1999 DOROTHY SCHRAMM WORLD AFFAIRS STUDENT WRITING COMPETITION ESSAY

The Human Rights Injunction: Equitable Remedies Under the Alien Tort Claims Act

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I. PUTTING THE HUMAN RIGHTS INJUNCTION IN CONTEXT

A. Public Law Litigation and Analogies to the Transnational Context

One of the main goals of public law litigation is norm enunciation.[1] But an explicit concern with well-tailored remedies, crafted by courts to oversee the process of institutional reform, goes hand in hand with that goal.[2] In the 1960s era of public law litigation in the United States, the injunction was the central vehicle of reform:

> The centerpiece of the emerging public law model is the decree. . . . [It] seeks to adjust future behavior, not to compensate for past wrong. It is deliberately fashioned rather than logically deduced from the nature of the legal harm suffered. It provides for a complex, on-going regime of performance rather than a simple, one-shot, one-way transfer.

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1. This argument is supported by the work of Alexander Bickel, who asserts that a transformative decision like Brown v. Board of Education, 347 U.S. 483 (1954), which did not articulate a specific remedy, did more than "nothing." He writes: "Only as it may sometimes seem that nothing but power, purposefully applied, can affect reality, only thus could it be said that this first decision had no consequences. . . . In fact, announcement of the principle [that separate is not equal] was in itself an action of great moment . . . ." ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 245 (1962). For an in-depth discussion of public law litigation, see Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282-1305, 1308-09, 1313-16 (1976).

2. *See* OWEN FISS, THE CIVIL RIGHTS INJUNCTION (1978).

> Finally, it prolongs and deepens, rather than terminates, the court's involvement with the dispute.[3]

The "civil rights injunction" constituted both a declaration of rights, and an attempt at remedy.[4]

The desegregation of schools after *Brown v. Board of Education*[5] constituted the paradigm case for such ongoing structural change. District judges issued injunctions, monitored performance, and sought to redress not a single wrongful act, but to change a wrongful system on behalf of a social group.[6] These decrees did more than merely enunciate norms. They aimed to have practical effect.[7]

Transnational public law litigation, though new, is increasingly developing its own body of doctrine.[8] In this emerging area, exemplified by suits brought under the Alien Tort Claims Act[9] (ATCA), through which victims of human rights abuses and violations of the law of nations seek

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3. Chayes, *supra* note 1, at 1298.

4. *See* Owen Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979). Fiss articulates the following distinction:

> Rights operate in the realm of abstraction, remedies in the world of practical reality. A right is a particularized and authoritative declaration of meaning. . . . A remedy, on the other hand, is an effort of the court to give meaning to a public value in practice. . . . [I]t constitutes the actualization of the right.

Id. at 52. Chayes wrote of this era:

> Relief is not conceived as compensation for past wrong in a form logically derived from the substantive liability and confined in its impact to the immediate parties; instead, it is forward looking, fashioned ad hoc on flexible and broadly remedial lines, often having important consequences for many persons including absentees.

Chayes, *supra* note 1, at 1302.

5. 347 U.S. 483 (1954); 349 U.S. 294 (1955).

6. *See* FISS, *supra* note 2, at 11.

> The constitutional wrong is the structure itself; the reorganization is designed to bring the structure within constitutional bounds . . . . Moreover . . . a past wrong is required for the issuance of a structural injunction; the mere threat of a wrong in the future is not likely to be deemed sufficient to trigger the reform enterprise, even though such a threat is sufficient for the classic preventive injunction.

Id.

7. Of course, case law and history demonstrate that this practical effect was slow in coming, when it came at all. The main point is that the courts did not merely issue declaratory relief. They sought to affect the system through decrees with teeth.

8. *See* Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347 (1991).

9. 28 U.S.C. § 1350 (1994) (empowering federal district courts to hear "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").

redress in U.S. federal courts, one might expect that plaintiffs would seek traditional public law remedies, given district courts' experience and power.[10] Yet the ATCA context has not followed the same path: litigants have generally sought damage awards rather than injunctions. These suits have focused primarily on retrospective rather than prospective relief. Damages awards have gone largely uncollected,[11] and "norm declaration" has taken prominence over enforcement. This result has not troubled scholars who have argued that though remedies may not be enforceable in the international context, the judgments themselves stand as exemplars of norms to be followed for future conduct.[12] In the case of ongoing human rights violations, however, mere norm enunciation may not be enough to make plaintiffs whole. An injunction, with its direct, future orientation, may be a desirable vehicle for actual relief—that is, if it can be enforced.

Requests for injunctive relief are not without precedent. In the Alien Tort Claims context, several plaintiffs have requested equitable relief (injunctions and declaratory judgments) against both U.S. executive officers and corporate defendants. These requests were deemed either outside the courts' equitable discretion, problematic for their potential interference in political questions, or simply too broad in their scope for the courts to grant.[13]

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10. *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971) (holding that if school authorities fail to remedy discrimination in public schools, district courts may fashion equitable remedies: "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."). *See also* Hecht Co. v. Bowles, 321 U.S. 321, 329-30 (1944).

> The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.

Id.

11. *See* Richard B. Lillich, *Damages for Gross Violations of International Human Rights Awarded by U.S. Courts*, 15 HUM. RTS. Q. 207, 208 (1993); Edward A. Amley, Jr., Note, *Sue and Be Recognized: Collecting § 1350 Judgments Abroad*, 107 YALE L.J. 2177, 2208 (1998) (questioning "whether plaintiffs bring these claims only for the larger message that such actions convey.").

12. *See* Koh, *supra* note 8, at 2349.

> [A]lthough transnational public law plaintiffs routinely request retrospective damages or even prospective injunctive relief, their broader strategic goals are often served by a declaratory or default judgment announcing that a transnational norm has been violated. Even a judgment that the plaintiff cannot enforce against the defendant in the rendering forum empowers the plaintiff by creating a bargaining chip for use in other political fora.

Id.

13. *See* Sanchez-Espinoza v. Reagan, 770 F.2d 202, 207 (D.C. Cir. 1985) ("It would make a mockery of the doctrine of sovereign immunity if federal courts were authorized to sanction or enjoin, by judgments nominally against present or former Executive officers, actions that are, *concededly and as a jurisdictional necessity*, official actions of the United States."); Greenham

Numerous obstacles impede the issuance of injunctions—for example, the requirements of irreparable injury, the inadequacy of monetary damages,[14] and the desire to avoid ongoing monitoring of compliance by courts. These concerns increase multi-fold when an injunction may have extraterritorial effects beyond the issuing jurisdiction. Comity[15] and enforceability in the absence of transnational full faith and credit arise as potential obstacles. This article seeks to draw attention to the kind of cases in the human rights context where these obstacles can and should be surmounted—where monetary relief is inadequate, where a threat of irreparable injury exists and where violations are ongoing.

B. The Argument

This article argues that human rights injunctions with certain features and limitations may be used judiciously to promote human rights goals without sacrificing doctrinal legitimacy. In certain cases, injunctive relief represents a legally viable remedy. Section I of this article sets out the context and background of equitable remedies in U.S. domestic law. Section II defines the scope and nature of a human rights injunction. By examining three cases under the Alien Tort Claims Act in which courts have addressed

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Women Against Cruise Missiles v. Reagan, 755 F.2d 34, 37 (2d Cir. 1985) (holding that courts cannot enjoin the deployment of cruise missiles, as this is a political decision left to the coordinated branches of government); Ramirez de Arellano v. Weinberger, 788 F.2d 762, 764 (D.C. Cir. 1986) (holding that once all the offending conduct had ceased, and the actors had left Honduras, "the controversy has now become too attenuated to justify the extraordinary relief sought through equity's intervention"). *But see* Jota v. Texaco Inc., 157 F.3d 153 (2d Cir. 1998) *vacating sub nom*, Aquinda [sic] v. Texaco, Inc., 945 F. Supp. 625 (S.D.N.Y. 1996) (holding that in light of (1) the Government of Ecuador's changed position in support of litigation in the United States, (2) the possibility that some equitable relief could be granted without joining Ecuador as a party, and (3) the failure of the district court to secure Texaco's consent to jurisdiction in Ecuador, the district court should reconsider the possibility of granting equitable relief against Texaco, and vacating Aquinda, which had held that "[t]he extensive equitable relief sought by the plaintiffs—ranging from total environmental 'clean-up' of the affected lands in Ecuador to a major alteration of the consortium's Trans-Ecuador pipeline to the direct monitoring of the affected lands for years to come—cannot possibly be undertaken in the absence of Petroecuador [Texaco's state-owned joint venture partner] . . . ."); *In re* Estate of Ferdinand Marcos, Human Rights Litigation, 25 F.3d 1467, 1480 (9th Cir. 1994) (holding that in a suit for damages, where assets are at risk of being secreted away before a final judgment, a preliminary injunction freezing assets is within the power of the court).

14. Fiss refers to these limitations as part of a hierarchy of remedies, which subordinates equity to law. *See* FISS, *supra* note 2, at 38-45. However, some scholars have noted that these hierarchical considerations have been given less weight in recent decades as the concept of "property" has expanded. *See* Polly J. Price, *Full Faith and Credit and the Equity Conflict*, 84 VA. L. REV. 747, 815-17 (1998) (discussing the historical scope of the equity conflict and courts' willingness to issue injunctions governing conduct outside the forum state and noting that these factors are easily manipulated).

15. "Comity" has been defined by the Supreme Court as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." Hilton v. Guyot, 159 U.S. 113, 164 (1895).

the question of equitable relief, I suggest limiting principles to issuing human rights injunctions. These cases demonstrate that comity and enforceability raise the main obstacles and concerns for issuing such injunctions, especially with respect to foreign defendants. Section III argues that a human rights injunction is doctrinally sound, in particular against multinational enterprises, given the experience of transnational commercial litigation, especially in the antitrust and patent context. I suggest that these concerns may be overcome under certain circumstances to allow courts to issue human rights injunctions. I also argue that differences between the commercial and human rights contexts weigh in favor of issuing human rights injunctions. Finally, Section IV concludes by suggesting criteria that judges may use for evaluating whether injunctive relief should issue in particular cases.

II. THE HUMAN RIGHTS INJUNCTION

A. Fundamental Characteristics

A human rights injunction has several important characteristics.[16] First, it aims specifically at conduct, rather than indirectly at incentives and may more effectively influence behavior than damage awards. This is especially true when corporations engage in long-term projects. Damages cannot provide an adequate remedy at law if corporations are free simply to internalize and spread increased costs on to consumers, or have already factored potential losses from damage actions into their investment decisions. Corporations investing abroad may be able to factor large damage awards into a cost-benefit analysis if they see potential for future gains from tenacity in current business practices. Second, only injunctive relief can make the plaintiffs "whole" when violations are ongoing.[17] Third, the flexibility of a human rights injunction allows courts to tailor the relief more precisely to the facts at hand.[18] Fourth, injunctive relief allows courts to avoid putting

16. Owen Fiss argues that equitable relief is particularly well tailored to the civil rights context for reasons that fall into two categories—technocratic and normative. On the technocratic side, injunctions are adept at "technical tasks" of systemic reorganization, specifically tailored, and well-suited for preventive needs. On the normative side, an injunction allocates the power of initiation of the suit to private citizens, thus capturing American values of individualism. *See* FISS, *supra* note 2, at 86-89.

17. *See* BETH STEPHENS & MICHAEL RATNER, INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 216 (1996) (suggesting that injunctive relief may be especially appropriate in the case of ongoing violations).

18. The flexibility of human rights injunctions has been summarized as follows:

> The court need not decide the case entirely for the plaintiff or entirely for the defendant; within broad limits, it is free to accommodate the interests of the plaintiff, the defendant, and the public by devising an individually tailored remedy. . . . A court may reject entirely the specific relief requested by the plaintiff and substitute relief which, in its judgment, better reflects the parties' equities.

Development in the Law—Injunction, 78 HARV. L. REV. 994, 1063 (1965).

monetary values on personal injuries, especially when the monetary values for ongoing abuses are nearly impossible to ascertain. Fifth, a human rights injunction is limited in scope and nature.[19] It does not seek to invade the executive's prerogative in foreign affairs and diplomacy but rather aims to support that mission.[20] Sixth, the ideal defendant is a corporation in partnership with a government, thus surmounting the issues of foreign sovereign immunity through joint and several liability.[21] Finally, the court may enforce the injunction either through domestic contempt sanctions or through a web of cooperative injunctions issued by domestic courts of other nations with concurrent jurisdiction.

Human rights injunctions may be especially appropriate in the context of U.S. multinational enterprises (MNEs) investing abroad and engaging in public-private joint ventures with foreign governments. Though this might seem a narrow set of circumstances, multinational direct foreign investment in developing nations is both widespread and highly profitable. Recent studies show that such investment has increased multi-fold in the last decade.[22] Given the large number of U.S.-based MNEs investing abroad, it is

19. An example of an unrealistic or overbroad request is that a court enjoin an ongoing war. This realistically would exceed a court's power.

20. The human rights injunction need not always follow executive action—there is certainly room for judicial action to highlight problems that have not successfully been addressed by the political branches. While some scholars, such as Harold Koh, who focus less on the actual remedy, and more on the enunciation of norms, would advocate that courts should take an active role in pressing for "affirmative reform of United States foreign policy programs . . .", Koh, *supra* note 8, at 2368, that approach is not wholly consistent with a focus on actual remedies from a practical perspective. If the goal is to enforce a transnational injunction, then the judiciary will likely require assistance from the executive. But again, this does not mean that the judiciary should have no role whatsoever in defining the scope of the debate in cases where both human rights and foreign policy are at stake. Providing redress in actual cases, and engaging with the political branches in a dialogue about an individual's right not to be tortured is within the province of courts.

21. The challenge in the ATCA context is that there is a narrow gap between wholly private actors, who are generally not implicated in violations of the law of nations, and public actors such as foreign governments or their agencies or instrumentalities, which are often immune to suit under the Foreign Sovereign Immunity Act, 28 U.S.C. § 1604 (1994), unless they fall under one of the exceptions. The most important exception to the FSIA is the "commercial activity" exception under 28 U.S.C. § 1605(a)(2), which allows suit against a foreign sovereign or its agency or instrumentality engaging in activities of a commercial nature having direct effect in the United States. For a discussion of the commercial activities exception, see Republic of Argentina v. Weltover, Inc., 504 U.S. 607 (1992).

22. *See, e.g.*, Laura Bowersett, Casenote, Doe v. Unocal: *Torturous Decision for Multinationals Doing Business in Politically Unstable Environments*, 11 TRANSNAT'L LAW. 361, 362 n.3, 363 n.10 (1998) (noting that foreign investment in industrializing nations, particularly for the purpose of developing natural resources, often makes partners of multinational enterprises and sovereign states); George Thomas Ellinidis, *Foreign Direct Investment in Developing and Newly Liberalized Nations*, 4 D.C. L.J. INT'L L. & PRAC. 299, 300-01 (1995); *see also* David W. Leebron, *A Game Theoretic Approach to the Regulation of Foreign Direct Investment and the Multinational Corporation*, 60 U. CINN. L. REV. 305, 340-41 (1991) (noting that the host country may desire ongoing monitoring of the project, participation in decisions, access to the MNE skills, and the possibility of expropriation of the eventual project).

essential that investment decisions be shaped by more than mere market considerations.[23] MNE accountability in U.S. courts for conduct of foreign sovereign joint venture partners may have a greater effect on their decisions about where to invest and how to govern their subsidiaries than model codes of practice or international law norms lacking well-developed teeth. Norm enunciation is important, but the actual remedy matters.

Though this exploration began with a discussion of the civil rights injunction and domestic public law litigation, it is important to point out the main differences between a civil rights and a human rights injunction. The structural civil rights injunction was seen "as a means of initiating a relationship between a court and a social institution."[24] In contrast, the human rights injunction, especially one with extraterritorial effects, does not clearly aim to reform an *institution* or an *office*. It would be difficult to describe MNE investment in foreign countries as an institution or an office. Similarly, legal doctrine stands in the way of reforming foreign and domestic governmental officials directly through injunctions. Instead, the human rights injunction aims to reform a set of ongoing relationships between public and private actors, as well as a set of business practices and attitudes.

B. Three Cases Help to Define the Parameters of a Human Rights Injunction

In several cases decided under the Alien Tort Claims Act, courts have considered at some length the question of whether to issue injunctive relief. In *Sanchez-Espinoza v. Reagan*,[25] the D.C. Circuit denied the requests for injunctive relief. In *Jota v. Texaco* [26] the Second Circuit upheld the possibility of injunctive relief, given proper balancing of equities by the district court. Finally, in *John Doe I v. Unocal Corp.*,[27] the Central District of California upheld the possibility of injunctive relief in general under the Alien Tort Claims Act, but denied injunctive class certification under Federal Rule of Civil Procedure 23(b)(2) on the grounds that on the facts of this particular case, an injunction would not redress the harms. These three cases help to define some of the parameters of the realm in which human rights injunctions are most appropriate. In this subsection, I examine these cases and their reasoning. In the following subsection, I draw general lessons about the possible contours of a human rights injunction.

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23. Only an injunction can "purport to affect legal relationships abroad." Note, *Extraterritorial Application of the Antitrust Laws*, 69 HARV. L. REV. 1452, 1460 (1956).

24. FISS, *supra* note 2, at 36-37.

25. 770 F.2d 202 (D.C. Cir. 1985).

26. 157 F.3d 153 (2d Cir. 1998).

27. 963 F. Supp. 880 (C.D. Cal. 1997); *see also* Doe I v. Unocal Corp., 67 F. Supp. 2d 1140 (C.D. Cal. 1999) (denying motion for certification of injunctive class under FED. R. CIV. P. 23(b)(2) on the grounds that based upon the facts of this case, an injunction would not redress plaintiffs' injuries).

Sanchez-Espinoza v. Reagan provides the classic example of a hard conflict between the coordinated branches and court action, and provides a limiting case. In *Sanchez-Espinoza*, twelve Nicaraguan citizens sued members of the U.S. House of Representatives and two U.S. citizens for torts committed by the Contras.[28] Plaintiffs alleged that the defendants "authorized, financed, trained, directed and knowingly provided substantial assistance for the performance of activities which terrorize and otherwise injure the civilian population . . . ."[29] The court rejected plaintiffs' request for equitable relief as outside the discretion of the court, given the executive branch's support for the policies that caused the harm and potential far-reaching implications for foreign policy. The court reasoned, "[w]hether or not this is, as the district court thought, a matter so entirely committed to the care of the political branches as to preclude our considering the issue at all, we think it at least requires the withholding of discretionary [equitable] relief."[30] This case suggests that courts will not grant transnational equitable relief when the court's action would conflict with executive action.

In *Jota v. Texaco*, Ecuadorian plaintiffs sought equitable relief against Texaco, a U.S. oil company that had engaged in substantial environmental violations. [31] Although the district court initially dismissed the action on the grounds of *forum non conveniens*, comity, and failure to join PetroEcuador (the Ecuadorian state-owned joint-venture partner),[32] the Second Circuit reversed and remanded to the district court to balance on the merits whether Ecuadorian plaintiffs could be granted equitable relief.[33] The Second Circuit's opinion suggests parameters on the scope of equitable relief, and the importance of coordinated action with the political branches.

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28. *Id.* at 204-06.

29. *Id.* at 205.

30. *Id.* at 208. The court's logic is similar in Greenham Women Against Cruise Missiles v. Reagan, 755 F.2d 34 (2d Cir. 1985), where the Second Circuit held that courts could not enjoin the deployment of cruise missiles, as the Constitution left such a decision to the discretion of the political branches.

31. 157 F.3d 153, 155-56 (2d Cir. 1998), *vacating* Aquinda [sic] v. Texaco, 945 F. Supp. 625 (S.D.N.Y. 1996) (dismissing for failure to join indispensable parties, as well as on comity and *forum non conveniens* grounds) *and vacating and remanding* Aguinda v. Texaco, 175 F.R.D. 50 (S.D.N.Y. 1997) (denying plaintiff's renewed motion for reconsideration and the Republic of Ecuador's motion to intervene); see also the companion case to Aquinda, Ashanga v. Texaco, No. 94 Civ. 9266 (S.D.N.Y. 1994). Plaintiffs alleged that Texaco had polluted rain forests in Ecuador and had violated international law in causing physical injuries, including poisoning and increased cancer rates, through toxic dumping.

32. *See* Aquinda [sic] v. Texaco, 945 F. Supp. 625 (S.D.N.Y. 1996) (dismissing for failure to join indispensable parties, as well as on comity and forum non conveniens grounds) and Aguinda v. Texaco, 175 F.R.D. 50 (S.D.N.Y. 1997) (denying plaintiff's renewed motion for reconsideration and the Republic of Ecuador's motion to intervene).

33. *See* Jota, 157 F.3d at 155.

The Republic of Ecuador had initially objected to the litigation as an affront to its sovereignty.[34] After the initial district court decision, however, the Republic changed its position and moved to intervene in the case.[35] While this motion was denied, the Second Circuit made clear on the issue of equitable relief that because of the flexibility inherent in equity, the sovereign defendants were not indispensible parties required to be joined for litigation to proceed under Rule 19(b).[36] The court noted:

> [S]ince much of the relief sought could be fully provided by Texaco without any participation by Ecuador, dismissal of the entire complaint [was improper even despite the absence of the sovereign defendants]. . . . [A]n injunction might require Texaco to make good faith efforts to institute all, or at least portions, of the relief that the plaintiffs seek, an obligation the performance of which might not encounter any obstruction from Ecuador.[37]

The litigation against Texaco demonstrates in stark detail the political issues involved in cases where a human rights injunction may issue. Initially, Ecuador objected strenuously to the litigation as an affront to its sovereignty.[38] One might assume that this would require dismissal on comity grounds. However, the Second Circuit concluded that although the district court *could* dismiss on comity, dismissal was not *required.* A comity analysis would, like a *forum non conveniens* analysis, require consideration of two factors: "whether an adequate forum exists in the objecting nation and whether the defendant sought to be sued in the United States forum is subject to or has consented to the assertion of jurisdiction against it in the foreign forum."[39] The Second Circuit remanded to the district court to balance these factors with Ecuador's new approval of the litigation. Thus, while the litigation against Texaco suggests limitations for a human rights injunction, the Second Circuit's reasoning supports the notion that a court has the power to shape an appropriate equitable remedy, even if what the plaintiffs request cannot be fully achieved.

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34. *See id.* at 156.

35. *See id.* at 157; *see also* Aguinda v. Texaco, 175 F.R.D. 50 (S.D.N.Y. 1997).

36. *See* Jota, 157 F.3d at 161-62.

37. *Id.* at 162.

38. *See id.* at 156. In fact, the Ecuadorian ambassador (stating the official position of Ecuador) objected to the litigation. Yet Dr. Isauro Puente Davila, a "legislator who served as the President of the Special Permanent Commission on Environmental Defense, issued an 'official announcement'" supporting the litigation in the Southern District as it "will bring to those affected the possibility of finding just treatment and a solution to the serious situation that they are going through." *Id.* at 157.

39. *Id.* at 160.

While some might argue that allowing a court to respond to mercurial political attitudes toward litigation in this way would interfere with "the orderly conduct of litigation" and in "the finality of judgments,"[40] the Second Circuit took a more nuanced approach. The court stated that comity includes the idea that it is desirable for "the courts of one nation [to] accord deference to the official position of a foreign state, at least when that position is expressed on matters concerning actions of the foreign state taken within or with respect to its own territory."[41]

In *Doe I v. Unocal Corp.*,[42] plaintiffs asked the Central District of California to grant both equitable relief and damages against two oil companies for human rights violations.[43] These two oil companies, one American (Unocal), and one French (Total, S.A.), were engaged in a joint venture with the Burmese military regime (SLORC)[44] and a state-owned energy company (MOGE)[45] to build the Yadana gas pipeline.[46] Plaintiffs alleged that in constructing the pipeline, the SLORC forces "used and continue to use violence and intimidation to relocate whole villages, enslave farmers living in the area of the proposed pipeline, . . . [plaintiffs and their family members have suffered] death, . . . assault, rape and other torture, forced labor, and the loss of their homes and property . . . ."[47] They asserted these actions violate the law of nations.[48]

Although the district court dismissed the suit against SLORC and MOGE (the parties claimed to have actually committed the abuses) on the grounds of foreign sovereign immunity,[49] the court held that complete relief could be sustained against the remaining corporate defendants.[50] As alleged joint tort-feasors, the corporate defendants could be held liable for actions about which they knew or should have known, especially if the corporations treated

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40. Jota, 157 F.3d at 160.

41. *Id.* at 160. This does leave open the question of whether a court should act if a foreign nation has expressed its disapproval of the litigation.

42. 963 F. Supp. 880 (C.D. Cal 1997).

43. *See* Unocal, 963 F. Supp. at 883-84.

44. State Law and Order Restoration Council.

45. Myanmar Oil and Gas Enterprise.

46. Unocal, 963 F. Supp. at 884-85.

47. Unocal, 963 F. Supp. at 883.

48. *See id.*

49. The court reasoned that SLORC and MOGE's activities on the pipeline did not fall within the commercial activities exception to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)2 (1994) as the activity on the pipeline had no "direct effect" on U.S. commerce. *See* Unocal, 963 F. Supp. at 888.

50. *See id.* at 889. Though this was on a motion to dismiss, the decision has not been appealed to the Ninth Circuit.

SLORC as "an overseer, accepting the benefit of and approving the use of forced labor."[51]

Plaintiffs asked the court to enjoin the oil companies from paying their Burmese partners and from continuing activity on the pipeline until the related human rights abuses ceased. In a subsequent decision, the district court denied the plaintiffs' motion for injunctive class certification under Federal Rule 23(b)(2), on the grounds that an injunction would not redress the plaintiffs' harms.[52] Based upon further factual submissions, the court found that the pipeline was essentially complete, and that the share of the project owned by Unocal was sufficiently small that an injunction against Unocal, would not stop harms being committed by third parties not present before the court.[53] The court wrote:

> Because Unocal's share does not make up a substantial part of the funding and construction of the pipeline is complete, any equitable relief enjoining Unocal's participation would not be likely to affect the operation of the pipeline or more critically, the elimination of human rights violations in furtherance of the project. Instead, the cessation of these alleged illegal acts would depend on the independent actions of companies and governmental entities who are not parties to this lawsuit.[54]

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51. *Id.* at 892. The court found these allegations sufficient to defeat Unocal's motion to dismiss.

52. *See* Doe I v. Unocal Corp., 67 F. Supp. 2d 1140, 1144-46 (C.D. Cal. 1999).

53. *See id.*

54. *Id.* at 1147. The plaintiffs in *Unocal* had argued that because a number of firms had already left Burma of their own volition or because of sanctions, it followed that no other company would seek to take over Unocal's share in the project. *See id.* at 1146. The court found this argument to require too much speculation. *See id.*

A number of U.S. firms previously doing business in Burma left of their own accord, partly in response to public pressure from U.S. consumers. Levi Straus, Macy's, Liz Claiborne, Eddie Bauer, Texaco and Amoco "all pulled their operations out of the country." Debora L. Spar, *The Spotlight and the Bottom Line: How Multinationals Export Human Rights*, FOREIGN AFF., Mar./Apr. 1998, at 7, 10. This is despite the fact that the President of Amoco had "just six months earlier described Burma as one of his firm's most promising new regions for exploration." *Id.* For a discussion of individual corporate codes of conduct prohibiting investment in regimes such as Burma, see Barbara A. Frey, *The Legal and Ethical Responsibilities of Transnational Corporations in the Protection of International Human Rights*, 6 MINN. J. GLOBAL TRADE 153 (1997).

Unocal presented a case where the courts operated in a climate of executive and legislative agreement as to a course of action against the Burmese government. President Clinton's Exec. Order No. 13,047, 62 Fed. Reg. 28,301 (1997) prohibited new investment in Burma by United States persons. Under authority of the International Environmental Emergency Powers Act (IEEPA), 50 U.S.C. § 1701 (1994), the Foreign Operations Export Financing, and Related Programs Appropriations Act, Pub. L. No. 104-208, 110 Stat. 3009 (1996), the National Emergencies Act, 50 U.S.C. § 1601 (1994) and 3 U.S.C. §301 (1994), Clinton declared the situation in Burma a "national emergency" and prohibited new investment (except as permitted by license). In addition, the Order prohibits the "approval or facilitation by a United States person, wherever located, or a transaction by a foreign person where the transaction would

As in the Texaco litigation, once the Unocal pipeline project was complete, it no longer presents an ideal case for a human rights injunction. However, the opinion suggests that where a project is ongoing, and where the defendant's share is influential, an injunction could provide redress, and thus could issue.

These three cases, *Sanchez-Espinoza*, *Texaco* and *Unocal*, highlight a number of hurdles that courts face in granting human rights injunctions: whether courts should step in against the wishes of either the United States executive or a foreign sovereign in weighing political question or comity concerns; and whether courts have the power to enforce such injunctions. These problems have special meaning in the transnational context and should be analyzed under the rubric of "extraterritorial effects."

III. HURDLES IN THE EXTRATERRITORIAL CONTEXT

A. The Challenge of Extraterritorial Effects

The most controversial characteristic of a human rights injunction is the possibility of extraterritorial effects. Extraterritorial remedies raise questions of enforceability, comity, effectiveness, and ongoing monitoring of compliance.

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constitute a new investment in Burma prohibited by this order if engaged in by a United States person or within the United States." 62 Fed. Reg. 28,301, § 2(a). It is unclear how this provision would affect Unocal's statement that it would simply transfer its equity shares to another company.

The legislature also spoke on this issue. The Cohen-Feinstein Amendment, ("The U.S.-Burma Sanctions Amendment"), of the Omnibus Appropriations Act of 1997, Pub L. No. 104-208, § 570, 110 Stat. 3009-166 (1996) prohibits U.S. Government assistance to Burma; instructs U.S. representatives to international financial institutions such as the International Bank for Reconstruction and Development, the International Development Association, the International Finance Corporation, the Multilateral Guarantee Agency, the Asian Development Bank and the International Monetary Fund, to vote against loans for Burma; to limit granting of visas for Burmese officials only to those required by treaty obligations or "to staff the Burmese mission to the United States;" "until such time as the President determines and certifies to Congress that Burma has made measurable and substantial progress in improving human rights practices and implementing democratic government . . . ." § 570(a), 110 Stat. at 3009-166. "New investment" includes contracts for economic development or resource development, purchasing shares of ownership in development and entry into contracts for "royalties, earnings, or profits in that development" § 570(f)(2), 110 Stat. at 3009-167.

These sanctions have been driven by the repression of the democratic movement of Aung San Suu Kyi. Additional sanctions may be imposed if she or her movement for democracy are harmed. *See* § 570(c), 110 Stat. at 3009-166.

While the European Union imposed sanctions on Burma, these extraterritorial assertions of authority drew criticism from Burma's neighbors. The Philippine Foreign Minister, Domingo Siazon, rejected the sanction strategy in favor of "constructive engagement." In an interview with the Sydney Morning Herald, Siazon said, "By asking for foreign intervention, only the people and the poor will suffer, not SLORC. So why would you want to punish your own people?" Mark Baker, *US and Europe Accused Over Sanctions*, SYDNEY MORNING HERALD, May 2, 1997, at 11, *available in* 1997 WL 23337603. "Other key members of ASEAN—Indonesia, Malaysia, Thailand and Singapore—have also stated their opposition to sanctions and affirmed their support for Burma to be made a full member of the group this year." *Id.*

Extraterritorial action encompasses not only actions with an impact outside the United States, but also actions by state courts affecting the territory of another state—a context in which the Constitution guarantees "Full Faith and Credit."[55] Extraterritorial orders in the transnational context raise additional problems of enforcement in the absence of full faith and credit, as well as the potential for enactment of foreign statutes blocking their enforcement.

However, extraterritorial injunctions are not *per se* unissuable or unenforceable. The commercial context provides a body of doctrine governing such injunctions. In the transnational commercial context, courts have issued injunctions governing conduct outside the United States in connection with antitrust violations, tax collection, and patent and trademark infringement, overriding concerns about comity to redress violations of U.S. law. Though differences exist between the commercial context and the human rights context, many of the differences support granting human rights injunctions under the Alien Tort Claims Act.

B. Courts With Personal Jurisdiction May Issue Injunctions With Extraterritorial Effects

Courts possessing personal jurisdiction over a defendant may grant equitable relief over torts taking place wholly outside U.S. territory. In the leading case on extraterritorial injunctions, *Steele v. Bulova Watch Co.*,[56] the Supreme Court upheld relief enjoining a U.S. citizen residing in Texas from using the "Bulova" name on watches being manufactured in Mexico in violation of Bulova's trademark. The Court found that as long as the district court has personal jurisdiction, and there is no conflict with the law of the nation where the injunction must be obeyed, an injunction may issue.[57] The Court asserted:

> Where, as here, there can be no interference with the sovereignty of another nation, the District Court in exercising its equity powers may command persons properly before it to cease or perform acts outside its territorial jurisdiction.[58]

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55. U.S. CONST. art. IV, § 1. *See generally* Ernest J. Messner, *The Jurisdiction of a Court of Equity Over Persons to Compel the Doing of Acts Outside the Territorial Limits of the State*, 14 MINN. L. REV. 494 (1930). For an excellent and exhaustive examination of the history of extraterritorial equitable relief in the state-to-state context, see Price, *supra* note 14.

56. 344 U.S. 280 (1952).

57. The Court reasoned that there was no conflict with Mexican law. In fact, Mexican courts had "nullified the Mexican registration of 'Bulova' . . ." Bulova, 344 U.S. at 289. On the extraterritoriality question of "hard conflict" between U.S. orders and foreign orders, see Hartford Fire Insurance Co. v. California, 509 U.S. 764 (1993) and *infra* text accompanying notes 92-102.

58. Bulova, 344 U.S. at 289. This result has been reaffirmed more recently in Mannington Mills v. Congoleum Corp., 595 F.2d 1287, 1303 (3d Cir. 1979) (Adams, J., concurring).

The *Bulova* Court concluded that no conflict existed in that case to prevent the grant of injunctive relief.[59]

We may draw several lessons from *Bulova*. First, when the defendant is a multinational enterprise, and the suit is against the parent, the action potentially being enjoined may lie within the jurisdiction of the issuing court. For example, the suit in *Unocal* was against the California-based parent. Thus, the action potentially being enjoined lies within the Court's jurisdiction.[60] The more difficult case arises when the action to be enjoined is participation in a natural resource development project or some other action that takes place wholly outside the forum state. Even action wholly outside the forum state may fall within the *Bulova* rule that when there is personal jurisdiction over the defendant, an injunction compelling action (or here, inaction) outside the jurisdiction of the United States is an appropriate remedy as long as there is no conflict with the law of the country in which the action occurs.

One way to enjoin extraterritorial participation in human rights abuses could be for a court to enjoin the U.S. parent from paying its branch, or the foreign branch from paying its public partner. Even if such a "stop payment" request involves banks outside the United States a court may have equitable power to prevent future transactions for payment. In *United States v. First National City Bank*,[61] the U.S. government sought to freeze extraterritorial

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> Injunctive relief may also be utilized effectively if the district court deems such a remedy to be appropriate. Where, as here, the district court has personal jurisdiction over the defendant, there might well be no problem in ensuring compliance with its order, whether it prohibits Congoleum from prosecuting infringement suits or requires the licensing of competitors. Moreover, it is improbable that such an order would place Congoleum in the position of being forced to perform an act that is illegal in foreign countries, since patent rights primarily benefit the patent holder rather than the foreign government. . . . Thus, it is likely that the policies of most foreign nations will not be adversely affected by granting injunctive relief to Mannington. And if, for some reason, the patent laws and policies of one or two countries would be seriously affected—a proposition that incidentally is nowhere suggested in the record—the court can take these specific circumstances into account when fashioning its remedy, as other courts have done in the past.

Id.; *see also* United States v. National Lead Co., 332 U.S. 319, 351-52, 363 (1947) (upholding extensive equitable relief as within the discretion of the court to break up an international patent geographic division scheme); The Salton Sea Cases, 172 F. 792 (9th Cir. 1909); Massie v. Watts, 10 U.S. (6 Cranch) 148 (1810) (holding that a court may grant extraterritorial equitable relief *in personam* pertaining to lands not within the jurisdiction of the court). *See generally* Price, *supra* note 14.

59. *See* Bulova, 344 U.S. at 289.

60. This injunction would raise other issues with respect to piercing the corporate veil. The *Unocal* court was not willing to pierce the corporate veil in the case of Total, S.A. Plaintiffs' counsel argues that control of the joint venture activity lies squarely within the domain of the parent.

61. 379 U.S. 378 (1965).

assets as a pre-judgment security attachment for taxes owed. There, the Supreme Court upheld an injunction preventing Citibank from transferring property (funds) owned by an Uruguayan Corporation.[62] This included assets within Citibank's foreign branches, on the grounds that the branches were within the parent's practical control.[63] In the absence of a conflicting order or the risk of double liability, the Court asserted that it had the power to freeze assets. The Court collapsed the issue of remedy into personal jurisdiction alone, noting: "Once personal jurisdiction of a party is obtained, the District Court has authority to order [that party] to 'freeze' property under its control, whether the property be within or without the United States."[64] The Court did not explicitly analyze comity concerns. It merely noted that in the event of conflicting orders from Uruguay, the injunction would be modified.[65] In support of the injunction, the Court emphasized a strong public interest in collecting U.S. taxes. The Court reasoned: "Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved."[66]

Several strong public interests are at stake when a court assesses whether to issue a human rights injunction. The United States has a strong interest in restraining the behavior of its multinational enterprises, especially in cases where the executive and legislative branches have expressed their disapproval of investment in foreign regimes, such as in the case of the Sullivan or MacBride Principles,[67] or recent executive action in

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62. The Uruguayan Corporation had not yet been served with process according to FED. R. CIV. P. 4.

63. *See* First Nat'l City Bank, 379 U.S. at 384. The dissent took issue with this assertion of equitable control over the branch assets as improper. *See id.* at 387 (Harlan, J., dissenting). Though the dissent recognized the Court possessed jurisdiction, Harlan argued that jurisdiction alone was not sufficient and other "policy" concerns ought to limit the application of that jurisdiction. "[J]urisdiction is not synonymous with naked power. It is a combination of power and policy." *Id.* at 387-88 (Harlan, J., dissenting).

64. *Id.* at 384; *see also* New Jersey v. New York, 283 U.S. 473, 482 (1931) (upholding an injunction preventing New York from dumping its garbage into the sea off the coast of New Jersey). The Court recognized that foreign law may create conflict, but found no conflict in this case.

65. *See* First Nat'l City Bank, 379 U.S. at 379.

66. *Id.* at 383 (citation omitted); *see also* Hecht Co. v. Bowles, 321 US 321, 330 (1944) (noting that injunctions may issue at the discretion of the district court for violation of the administrative Emergency Price Control Act); United States v. Morgan, 307 U.S. 183, 194 (1939).

67. *See* LEON H. SULLIVAN, THE (SULLIVAN) STATEMENT OF PRINCIPLES (4th amplification 1984) (ennunciating six principles proposed by Leon H. Sullivan, Pastor of Zion Baptist Church in Philadelphia and a member of the Board of Directors of General Motors Corporation, in order to promote racial equality on the part of U.S. corporations doing business in South Africa); IRISH NATIONAL CAUCUS, THE MACBRIDE PRINCIPLES (1984) (setting forth nine principles, named after the late Sean McBride, drafted in order to end discrimination on the part of U.S. corporations against Catholics in Northern Ireland).

Burma.[68] The international community also has a strong public interest in discouraging investment that funds either a wholly private actor, or a private actor who, in concert with a public actor, engages in abuses of human rights. This is especially true when the abuses themselves may violate the law of nations.[69]

C. Comity Concerns May Limit Extraterritorial Injunctions

Precedent from the commercial context supports the argument that once a court has personal jurisdiction, it may enjoin actions taking place outside the forum state, when comity concerns can be overcome. Once a court determines that it has personal jurisdiction, it must balance several comity-related factors before issuing an injunction that will have extraterritorial effects.[70] An assessment of these factors demonstrates that in the human rights context, comity concerns should not always prevent a district court from issuing human rights injunctions.[71]

Two cases, *Timberlane Lumber Co. v. Bank of America*[72] and *Mannington Mills, Inc. v. Congoleum Corp.*[73] set forth a balancing test where an issuing court must weigh several factors: the degree of conflict with foreign law or policy; the nationality of the parties; the relative importance of the alleged violation of conduct here compared to that abroad; the availability of a remedy abroad and the pendency of litigation there; the possible effect on

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68. When the coordinate political branches have not yet spoken, a court may still exercise its discretion to highlight an area of potential concern, as long as the actor to be enjoined lies within the personal jurisdiction of the court. In the case of hard conflict, however, between the political branches' position and potential judicial action, courts should be wary of issuing human rights injunctions. The court may need to rely upon the executive for assistance in enforcing a cooperative web of injunctions, and the absence of such support could call into question the enforceability of a human rights injunction.

69. The district court in *Unocal* noted that, in that case, the forced labor allegations were sufficiently close to participation in the slave trade to violate the law of nations, regardless of whether accomplished by a public or a private actor. *See* Unocal, 963 F. Supp. at 891-92. Whether or not a human rights injunction should issue clearly depends upon the substantive question of whether a particular abuse violates the law of nations under the Alien Tort Claims Act. As a number of authors have addressed the substantive questions elsewhere, see for example, STEPHENS & RATNER, *supra* note 17, I will not address the substantive question here.

70. These factors derive from three sources: RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §403(2)(e)-(f) (1987) [hereinafter RESTATEMENTS], Mannington Mills, Inc., v. Congoleum Corp., 595 F.2d 1287, 1297 (3d Cir. 1979) and Timberlane Lumber Co. v. Bank of America, 549 F.2d 597, 614-15 (9th Cir. 1976).

71. Again, it is important to note that in certain circumstances, such as the district court case in Aquinda v. Texaco, 945 F. Supp. 625 (S.D.N.Y. 1996), where the Ecuadorian official position stated that it saw the litigation as an "affront" to its sovereignty, the court must take such factors into account. Yet this article seeks to demonstrate that in some extreme circumstances, where the conduct alleged is sufficiently egregious to violate the law of nations, these concerns may be overridden.

72. 549 F.2d 597 (9th Cir. 1976).

73. 595 F.2d 1287 (3d Cir. 1979).

foreign relations if the court exercises jurisdiction and grants relief; if relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries; whether the court can make its order effective; whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances; and whether a treaty with the affected nations has addressed the issue.[74] *The Restatement (Third) of Foreign Relations* directs that district judges considering actions with extraterritorial effects must look beyond individual country interests to incorporate "international system concerns" into the balancing.[75]

An analysis of the additional factors suggests that in the ATCA context, a court may issue an injunction with extraterritorial effect. The case is especially strong where the executive and legislative branches have expressed their position against new investment in a regime such as previously in South Africa or Northern Ireland, or currently in Burma or Cuba, thus obviating separation of powers concerns.[76] As for the international system interests, the international community has a strong interest in condemning actions such as forced labor and torture, especially when those actions have profound ethno-distributional effects, as in *Unocal*.[77] With

74. *See* Mannington Mills, Inc. v. Congoleum Corp. 595 F.2d 1287, 1297 (3d Cir. 1979) (holding the lower court's dismissal of suit improper without adequate factual record on the above listed factors); *see also* Timberlane Lumber Co. v. Bank of America, 549 F.2d 597, 614-615 (9th Cir. 1976). The RESTATEMENTS incorporate additional factors, including the effect of the order on the international system. *See* RESTATEMENTS § 403(2)(e)-(f). While these factors enter comity analysis at the level of jurisdiction to prescribe (that is, legislative jurisdiction), similar comity analysis ought to take place at the level of choosing remedies.

75. *See* RESTATEMENTS § 403(2)(e)-(f).

76. *See supra* note 54. In addition, this unity places such cases outside the reach of Baker v. Carr, 369 U.S. 186, 217 (1962), in which the Court cautioned that injunctions should not issue if they might create "multifarious pronouncements by various departments on one question." *Id.* *See also* Ramirez de Arellano v. Weinberger, 745 F.2d 1500, 1562 (1984) (Scalia, J., dissenting).

77. "Ethno-distributional" means affecting different ethnic groups unequally, both within Burma, and between Burma and the Western nations. Some critics might argue that "universal" concern for human rights standards, as articulated by U.S. courts, is by no means certain and that in certain contexts, particularly in the "Asian context" these values are far from universally held. This argument is not persuasive for several reasons. First, there is certainly conflict over the substantive norms encompassed in the idea of "the law of nations." Yet courts interpreting the Alien Tort Claims Act take an extremely cautious approach. For a tort to be cognizable under 28 U.S.C. § 1350, it cannot simply be listed in a treaty, or be part of U.S. public policy, but rather must have some kind of internationally agreed-upon content. For this reason, only torture, genocide, piracy and the slave trade/forced labor, have thus far been recognized as giving rise to a cause of action under the ATCA. Second, it is simply disingenuous to assert a cultural defense to an unnecessary torture of one nation's citizens. While U.S. courts should look critically at their own actions, given the legacy of Western cultural imperialism, they should also be skeptical of cultural defenses to flagrant and egregious abuses, especially where those abuses have profound effects on minority populations who may have less opportunity to shape the official state position on the matter. Economic development does not require torture or forced labor. Finally, it is important to keep in mind that the question of Western cultural imperialism is not unique to the debate over what constitutes the proper remedy. Primarily it reflects a substantive concern over the content, or even the idea, of the law of nations.

respect to concerns about enforceability, the potential effectiveness of any remedy depends upon international cooperation. Yet, unlike cooperation in antitrust, where different nations have different (and potentially conflicting) regulatory philosophies, it may be the case that the majority of nations with large fleets of multinational enterprises investing in questionable regimes would condemn the abuses taking place there.

As for the public interests of other states, there may be a conflict in the human rights context, but not one that deserves much weight. For example, in *Unocal*, Burma clearly had a strong government interest in keeping the pipeline project going. However, a successful pipeline project does not require the use of forced labor or torture. The government's interest in the pipeline could not be extended to an interest in the abusive practices surrounding its creation. As for the questions on conflicting orders, these can generally be addressed through a "savings clause" so that if the defendant is subject to a blocking statute, it will not be held in contempt.[78]

The "international system interests" suggested by the *Restatement* will weigh in favor of granting human rights injunctions in certain cases.[79] The international system's preoccupation with eradicating human rights violations is evidenced in numerous conventions, treaties, joint declarations and protocols put forth since World War II.[80] If a court is able to assert jurisdiction over an offender, the system as a whole has an interest in punishing the offender and cooperating with the punishment. That interest is especially strong in cases where the defendant is of the same nationality as the forum court, hence lessening potential inter-state conflicts. When the defendant is of a different nationality, however, comity concerns may pose a barrier to injunction.

D. Injunctions Against Foreign Defendants Raise Comity Concerns

Lower courts have limited the *Bulova* holding on comity grounds when U.S. courts have attempted to enjoin foreign defendants. For example, the Second Circuit in *Vanity Fair Mills, Inc. v. T. Eaton Co.*, [81] cautioned against extending the doctrine to foreign defendants.[82] The court counseled against

78. For a more in-depth discussion of blocking statutes, see *infra* text accompanying notes 75-86.

79. *See* RESTATEMENTS §403(2)(e)-(f).

80. *See, e.g.*, U. N. CHARTER; *Declaration on the Protection of All Persons from Being Subjected to Torture*, G.A. Res. 3452, 30 U.N. GAOR, Supp. No. 34 , U.N. Doc.A/1034 (1975); European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Nov. 26, 1987, ch. 1, art. 1, 27 I.L.M. 1152; American Convention on Human Rights, Nov. 22, 1969, 9 I.L.M. 673; Convention to Suppress the Slave Trade and Slavery, Sept. 25, 1926, 46 State. 2183, 60 L.N.T.S. 253; 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, Sept. 5, 1956, 18 U.S.T.S. 3201, 266 U.N.T.S. 3; International Labour Organisation Convention Concerning the Abolition of Forced Labour (No. 105), June 25, 1957, S. Exec. Rep. No. 102-7 (1993), 320 U.N.T.S. 291.

81. 234 F.2d 633 (2d Cir.), *cert. denied*, 352 U.S. 871 (1956).

82. *See id.* at 647.

injunctive relief where "discord and conflict with the authorities of another country" might result, and when "it will be difficult to secure compliance."[83] In *Unocal*, the district court dismissed the complaint against Total, S.A., the French oil company which participated in the pipeline project in Burma, not on comity grounds, but for lack of personal jurisdiction.[84] The court found that the parent company had insufficient contacts with the forum state, and that the parent's relationship with its subsidiaries in California did not warrant piercing the corporate veil.[85]

These limitations in suits against foreign defendants raise challenges under the Alien Tort Claims Act. A large number of the defendants in other cases have been foreign citizens or foreign government officials. District courts have extended jurisdiction over such defendants in other ATCA cases for damages if they acted under color of law or, if as private entities, they violated international norms against such acts as piracy or genocide.[86] Courts have awarded both compensatory and punitive damages—though as noted above, these awards have gone largely uncollected.[87]

Where courts' reluctance to grant injunctive relief is a matter of jurisdiction, then precedent under ATCA suggests that courts can assert jurisdiction over foreign defendants under certain circumstances, and the *Vanity Fair* limitation does not apply. If, however, the limitations on injunctive relief arise out of comity concerns, then the *Vanity Fair* limitation may seriously impede suits against foreign corporate defendants. First, however, we must decide first whether injunctions are actually more difficult to enforce than damage awards.

The standard method for enforcing an injunction involves collecting reports on compliance, issuing contempt sanctions against the defendant in the event of non-compliance, and potentially engaging a foreign court system to issue contemporaneous sanctions against its citizen corporations.[88] Where

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83. *Id.* at 647. "[T]he court refused to enjoin a Canadian corporation from using in Canada a trademark similar to that of an American manufacturer, because . . . the Lanham Act 'should not be given an extraterritorial application against foreign citizens . . . .'" *Development in the Law—Injunction*, *supra* note 18, at 1035 (quoting Vanity Fair, 234 F.2d at 643).

84. *See* Doe I v. Unocal Corp., 27 F. Supp. 2d 1174, 1189-90 (C.D. Cal. 1998).

85. *See id.*

86. *See, e.g.*, S. Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995) (upholding claim against Radovan Karadzic as acting under color of law in committing genocide); *In re* Estate of Ferdinand Marcos, Human Rights Litigation, 25 F.3d 1467 (9th Cir. 1994) (noting that the Marcos Estate is subject to preliminary injunction freezing assets to prevent their being secreted away).

87. *See, e.g.*, Xuncax v. Gramajo, 886 F. Supp. 162, 183 (D. Mass. 1995) (awarding punitive damages to highlight the "grave international law aspect of the tort"); Lillich, *supra* note 11, at 208 (noting that courts have awarded large damage awards despite the fact that "at present payment seems certain in only one instance").

88. Price notes that "the comity of nations does not require recognition of a foreign state's injunction." Price, *supra* note 14, at 783.

a U.S. court has personal jurisdiction over the defendant, the U.S. court can still issue contempt sanctions to enforce the decree. The court may also rely upon cooperation from courts in the second jurisdiction to enforce the injunction. This cooperation may be more difficult to obtain, but should not constitute a *per se* bar to enforceability.

The *Marcos Estate* litigation[89] provides one clue to resolving the question about remedies against foreign defendants. In that case, the Ninth Circuit upheld a preliminary injunction against a foreign defendant to freeze assets.[90] This case provides additional support for issuing a final injunction against a foreign defendant. Though *Marcos* involved a preliminary injunction, rather than a final injunction, one could argue that the final injunction should be easier to issue on the grounds that a court is deciding on the merits, rather than on the potential likelihood of success. In *Marcos*, the human rights violation was not ongoing. There was no need for compliance monitoring or the retaining of jurisdiction by the district court.

E. The Special Case of Blocking Statutes

Other nations have rejected U.S. judicial assertions of extraterritorial jurisdiction. Though the factor-balancing approach suggested above[91] does not always reach a clear conclusion, the Supreme Court has made clear that a court should *not* exercise jurisdiction when a foreign blocking statute or a conflicting court order creates a "hard conflict." [92] Hard conflict means that it would be impossible for the defendant to comply with both orders.

In the antitrust context, courts have granted broad injunctions against activities occurring abroad having "substantial effects" on U.S. commerce. [93] Yet a number of countries have enacted blocking statutes to create the sort of "hard conflict" envisioned in *Hartford Fire Insurance*.[94] In *United States v. Imperial Chemical Industries, Ltd.*,[95] a district judge issued injunctions with

89. *See In re* Estate of Ferdinand Marcos, Human Rights Litigation, 25 F.3d 1467 (9th Cir. 1994).

90. *See id.* at 1480 ("We join the majority of circuits in concluding that a district court has authority to issue a preliminary injunction where the plaintiffs can establish . . . impending insolvency of the defendant or that the defendant has engaged in a pattern of secreting or dissipating assets to avoid judgment.").

91. *See supra* Section III.C.

92. *See* Hartford Fire Ins. v. California, 509 U.S. 764 (1993).

93. *See, e.g.*, United States v. Aluminum Co. of Am., 148 F.2d 416, 443 (1945) ("[A]ny state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends."). *See also* Timken & Co. v. United States, 341 U.S. 593 (1951). The nature of ongoing relationships in antitrust makes the use of injunctions particularly apt.

94. *See, e.g.*, Protection of Trading Interests Act, 1980 (U.K.).

95. 105 F. Supp. 215 (S.D.N.Y. 1952) (holding equitable relief was appropriate to break up activities between ICI and DuPont in restraint of global trade in a nylon patent geographical division scheme).

profound extraterritorial consequences against both local and foreign defendants overriding any potential concerns about comity. The judge asserted ongoing jurisdiction over the case to monitor compliance for five years.[96] These orders raise similar, if not greater, concerns about ongoing monitoring, enforcement, and compliance to those at stake in the human rights context. Yet the court dismissed comity concerns as non-problematic:

> It does not seem presumptuous for this court to make a direction to a foreign defendant corporation over which it has jurisdiction to take steps and remedy and correct a situation, which is unlawful both here and in the foreign jurisdiction in which it is domiciled. . . . It is not an intrusion on the authority of a foreign sovereign for this court to direct that steps be taken to remove the harmful effects on the trade of the United States.[97]

The court acknowledged the possibility that English courts would not enforce the decree against Imperial Chemical Industries (ICI).[98] Yet the court issued the injunction nonetheless. As a blocking statute had not yet been enacted, British Nylon Spinners (BNS), a British corporation not party to the first action in the United States, brought suit in British court seeking specific performance of its licensing agreement.[99] BNS won in the British action, and ICI was, therefore, not compelled to comply with the injunction.[100]

Because the threat of blocking statutes or conflicting court orders limits the assertion of an injunction against a foreign defendant, courts must ask whether the defendant's home country would or has issued such a blocking statute. Second, a court should determine whether to give that statute any weight, given other circumstances, such as the U.S. coordinated branches' policy stance and the legitimacy of the foreign regime itself. It may be unlikely, given the nature of certain human rights violations and the

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96. *See id.* at 220. The court enjoined DuPont and ICI from asserting certain patent rights and from continuing their geographic division strategy found to be in restraint of trade, and from "reselling any product through [foreign-incorporated joint venture companies] or through any reorganized segment of them in which the other has an interest." *Id.* at 241. Though the court recognized that it did not have jurisdiction over the foreign companies themselves to enjoin their behavior directly, see *id.* at 241-42, the court was entirely willing to affect their behavior indirectly through the injunctions against DuPont.

97. *Id.* at 229.

98. *See Development in the Law—Injunction*, *supra* note 18, at 1034. Judge Ryan also inserted a "savings clause" so that any action compelled by English law contrary to his order was exempt from the decree.

99. *See* British Nylon Spinners Ltd. v. Imperial Chem. Indus. Ltd., [1954] 3 W.L.R. 505 (Ch.) (final appeal). The conflicting injunction created the sort of "hard conflict" that *Hartford Fire Ins.* requires courts to notice in comity balancing. *See* Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993).

100. *See* Note, *supra* note 23, at 1452-1453; *see also* British Nylon Spinners, [1954] 3 W.L.R. 505.

potential loss of political capital involved in such an order, that many states would enact such blocking statutes against a human rights injunction.

The court must also consider the jurisdictional basis under which an extraterritorial remedy would be asserted. The assertion of extraterritorial jurisdiction for antitrust injunctions is based on the "effects doctrine," which a number of commentators have found to be a questionable basis of jurisdiction.[101] A human rights injunction under the Alien Tort Claims Act rests upon different notions of jurisdiction. First, a court can rely upon the "nationality principle," namely that a court may govern the conduct of its nationals outside the forum state. Second, a more contested notion exists that there is universal jurisdiction over violations of the law of nations. Under international law, historically, there are certain crimes, such as piracy and slave trading, over which any country may assert jurisdiction.[102] The source of this jurisdiction is primarily an understanding that all countries have an interest in eradicating the behavior at issue and that the actors (such as pirates) are often of no clear nationality. A human rights injunction, as defined in this article, does not involve the extraterritorial application of U.S. law, as in an antitrust context. Rather, the purpose of an injunction under the ATCA is to craft an appropriate remedy for an ongoing violation of *the law of nations*. Arguably, the international community has a far stronger interest in preventing certain limited kinds of public harm than in enforcing and upholding one state's economic regulatory philosophy. A strong example of this is the *Texaco* case, where the government of Ecuador wished to force Texaco to clean up the mess it had left while engaged in resource-development in past decades.[103] The interests there not only encompassed abstract principles of human rights, but also the pressing need to make whole the citizens of nations who were exploited in extractive investment by multinational enterprises.

F. Enforcement Through Contempt Sanctions and Cooperative Webs of Injunctions

A human rights injunction may be enforced in one of two ways. The first stems from the source—the threat or implementation of contempt sanctions by the issuing court. The second operates by triggering patterns of international cooperation and corporate self-restraint, thus obviating any concerns about dictating policy to foreign governments. In concert, these two

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101. *See* LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 241 (1995) (noting the lack of universal acceptance of "effects" as basis for jurisdiction); *see also* RESTATEMENTS § 402 cmt. (d) ("[C]ontroversy has arisen as a result of economic regulation by the United States and others, particularly through competition laws, on the basis of economic effect in their territory, when the conduct was lawful where carried out.").

102. *See also* RESTATEMENTS § 404 reporter n. 1; HENKIN, *supra* note 101, at 240. An analogy may be drawn between pirates and multinational enterprises where the corporate nationality for purposes of litigation may be difficult to determine. *See supra* note 77.

103. *See* Jota v. Texaco, 157 F.3d 153 (2d Cir. 1998).

methods increase the likelihood that human rights injunctions will stop ongoing human rights violations.

The human rights injunction may raise questions about enforceability for historical reasons—district courts had to monitor compliance for many years in the era of civil rights injunctions. This concern should not raise any eyebrows, however, as monitoring compliance does not require engaging mechanisms outside the normal disposal of courts. In the case of *Ramirez de Arellano v. Weinberger*,[104] where an extraterritorial injunction was at issue, the court wrote:

> The suggestion that the enforcement of any equitable decree would present insurmountable problems of compliance rests entirely on wild speculation. . . . If a dispute arises over compliance with any remedial decree, the parties can introduce evidence in the district court to establish whether a violation in fact has occurred. This is the only method to determine a violation of a decree of which we are aware; it is a method universally used no matter where any acts occur or property is located. It is absurd to suggest on the basis of the plaintiffs' complaint that judicial monitoring of relief could be so problematic that adjudication of the plaintiffs' constitutional claims is barred.[105]

As in *Ramirez de Arellano*, the enforcement mechanisms of human rights injunctions under the ATCA do not present insurmountable problems. Normal proceedings can and should take place to insure that defendants are complying with injunctions.[106]

A harder case arises if a foreign defendant ignores an injunction, because the U.S. court would then have to rely on a foreign court to recognize and enforce the injunction. A human rights violation may provide stronger incentives for a foreign court to enforce an American order than the case of a violation of U.S. antitrust law. In the antitrust context, a foreign state may have a legitimate interest in blocking enforcement of an attempt by the United States to implement an economic philosophy that conflicts with its own. Yet in the case of a human rights injunction, there should rarely be such a countervailing interest to block recognition or enforcement. One possible conflict would be simply the desire for a country to bring its own tort-feasors

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104. 745 F.2d 1500 (1984), *vacated on other grounds*, Weinberger v. Ramirez de Arellano, 471 U.S. 1113 (1985) (noting that injunctive relief could issue against officials of the U.S. government for effective seizure and destruction of a U.S. citizen's cattle ranch in Honduras. This suit was not brought under the Alien Tort Claims Act, but did involve an injunction with extraterritorial effect).

105. Ramirez de Arellano, 745 F.2d at 1531-32.

106. *See* Baker v. General Motors Corp., 118 S. Ct. 657, 665 (1998) ("Sanctions for violations of an injunction . . . are generally administered by the court that issued the injunction.").

to justice rather than have its citizens tried in foreign courts. Yet in the civil, as opposed to the criminal context, where parties, rather than states, initiate suits, there is arguably a greater incentive for cooperation with the courts of the forum state where plaintiffs laid venue. In the case of the cooperative web of injunctions, the forum court can play a coordinating role as the "clearinghouse" to oversee the web. A second potential for conflict results from the desirability of economic development. Again, however, economic development should not rely upon human rights violations to accomplish its goals.

One final concern is that an injunction does not bind the successors in interest to the parties in a suit.[107] Indeed, the Central District of California relied upon this argument to reject injunctive class certification in *Unocal* on the grounds that if enjoined, Unocal would simply sell its stake in the joint venture.[108] This would make the injunction ultimately ineffective. This argument presents a different kind of dilemma—that of redressibility. If Unocal could sell its share of the project to a company that was in no way barred from investing in Burma, the project would continue, despite Unocal's absence and despite the injunction.[109] Though redressibility does limit the potential for human rights injunctions, it does not, in fact, render such injunctions ineffectual. Even if human rights injunctions only succeeded in barring U.S. multinational enterprises from participating in and financially benefiting from human rights violations abroad, this would still be a great stride in the alleviation of human rights abuses the world over.

G. Injunctions May Encourage American Corporate Norm Entrepreneurship

While these procedural and doctrinal hurdles demonstrate that human rights injunctions have limitations and may not bind all parties at all times, it is important to recognize that even injunctions enforceable solely against American corporations possess tremendous value. Such injunctions can create market disadvantages, which may spur multilateral enforcement

107. The Federal Rules of Civil Procedure state, "Every order granting an injunction . . . is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise." FED. R. CIV. P. 65(d). Though Fiss argues in *The Civil Rights Injunction* that the word "successors" was effectively read into this list of those bound, *see* FISS, *supra* note 2, at 15-17, the same may not be true in the case of transnational human rights injunctions. The contrast between these two types of injunctions is clear—in one, there is an "office" acting as defendant, while in the human rights context, the defendant is not an "office," but a corporation. The two systems are sufficiently different that successors cannot justifiably be bound by court order.

108. *See* Doe I v. Unocal, 67 F. Supp. 2d 1140, 1146 (C.D. Cal. 1999). The court's reasoning is open to question. When courts put criminals behind bars, frequently their associates take over the criminal activities. Yet this is not a reason to avoid sanctioning wrongdoers in the first place.

109. There is a question whether "new investment" includes investment by a new company in an ongoing project, or whether new investment simply refers to wholly new projects. Arguably, the first is included in the scope of the U.S. order. *See supra* note 54.

solutions. A sustained threat of human rights injunctions would place American corporations at an economic disadvantage *vis-à-vis* corporations not subject to such sanction.[110] But misery loves company, and companies hate the misery of competitive disadvantage. Thus, this economic disadvantage may prod U.S. companies to become "norm entrepreneurs," and encourage other countries to enforce similar human rights-encompassing restrictions against nationals investing abroad.[111] If U.S. corporations find themselves at a competitive disadvantage because of human rights injunctions under the ATCA, they may push for something akin to the Organisation for Economic Co-operation and Development (OECD) Bribery Convention[112] to prevent joint venture agreements with regimes engaging in human rights violations.[113] In this way, unilateral action by the United States may lead to

110. *See, e.g.*, Bowersett, *supra* note 22, at 376, 379-81 (arguing first, that expanded liability under ATCA "places U.S. multinational corporations at a distinct disadvantage" and second, that the *Unocal* court erred in exposing them to broader liability for their investment in developing regimes, as such investment is necessary to encourage democratic reforms). Such arguments rely upon indirect assumptions that increased economic development creates a propertied middle class that will demand greater democratic openness. Yet to rely upon such an argument to limit liability in effect turns logical reasoning on its head, especially where the alleged *direct* effect of a multinational corporation's investment is to fund a repressive regime's policy of abuses against its own citizens. From the perspective of protecting MNE investment this argument may be sound, but from the perspective of those who are forced into abusive labor arrangements to exploit natural resources, the argument that tort liability should be limited fails to persuade.

111. Harold Koh draws an analogy to the Foreign Corrupt Practices Act that may be useful to clarify this point. Harold Hongju Koh, International Business Transactions Course Lecture, Yale Law School (Apr. 1998). The FCPA was inserted into the Securities laws of the United States to prevent bribery of foreign officials by U.S. domestic concerns. *See* Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1, 78dd-2 (1994). This placed U.S. corporations at a competitive disadvantage with respect to foreign corporations still able to bribe foreign officials to encourage increased business. This led U.S. corporations to push for the creation of the OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions, Nov. 21, 1997, 37 I.L.M. 1 (entered into force Feb. 15, 1999), *available at* OECD Online, *Combating Bribery of Foreign Public Officials in International Business Transactions* (last modified Feb. 10, 2000) <http://www.oecd.org/daf/nocorruption/20nov1e.htm>.

112. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, *supra* note 111. The Convention includes the following language in Article 9:

> Each party shall, to the fullest extent possible under its laws and relevant treaties and arrangements, provide prompt and effective legal assistance to another Party for the purpose of criminal investigations and proceedings brought by a Party concerning offences within the scope of this Convention and for non-criminal proceedings within this scope of this Convention brought by a Party against a legal person.

Id. art. 9.

113. Past efforts at multilateral regulatory schemes for multinational enterprises have "been aimed at economic issues, including environmental exploitation, anti-trust issues and truth in business dealings." Frey, *supra* note 54, at 164-65. Corporate self-regulation has taken shape in the Sullivan and MacBride Principles, which governed investment in South Africa and Northern Ireland, respectively. *See supra* note 67; Frey, *supra* note 54, at 173-76. There is also a Draft U.N. Code of Conduct, Development and International Economic Co-operation: Transnational Corporations, U.N. ESCOR, 2d Sess., U.N. Doc E/1990/94 (1990) which governs both active and passive violations of human rights. *See* Frey, *supra* note 54, at 181-82.

multilateral cooperation. Human rights injunctions under the ATCA would help U.S. companies fight this battle with greater urgency.

IV. EVALUATING THE CASE FOR A HUMAN RIGHTS INJUNCTION: BALANCING CONCERNS IN INDIVIDUAL CASES

The above discussion suggests that there are no easy answers to the question of whether and when a human rights injunction should issue. It also suggests a number of criteria a court should use to evaluate the strength in a particular case.

A court should first identify the crucial elements permitting equitable relief, such as the inadequacy of monetary damages, the threat of irreparable harm, and the existence of an ongoing violation where the defendant is not immune from suit. Second, a court must determine that it has personal jurisdiction over the defendant. Third, a court should ask whether, for reasons of comity, it should refrain from issuing an injunction. The comity analysis should assess the *Timberlane, Mannington Mills* and *Restatement* factors.[114] These factors fall into three categories: (1) private interests of the parties, (2) public interests of each forum state, and (3) international system interests. In many cases of ongoing human rights violations, balancing these factors will weigh in favor of granting a human rights injunction. Multinational corporations, like pirates, have connections to many states. But when corporations engage either actively or passively in human rights violations, it may be difficult to bring them to justice unless many states agree to cooperate and enforce the court orders of those states in which plaintiffs choose to lay venue. The private interests of the plaintiffs in obtaining redress for harms suffered, as well as the ability of defendants to defend effectively, must be taken into account. MNEs have no legitimate interest in cutting investment costs by supporting inhumane labor practices. A claim of hardship to the corporation should carry no weight in a court's analysis. As for the public interest factors of each state, the conflicts present in the antitrust context, for which the balancing tests were created, may be largely absent in the human rights context when the harm involved is universally recognized as wrong. The balancing must take into account the idea that a foreign state does not have a legitimate interest in torturing its citizens, even, for example, to complete a much-needed gas pipeline project or to raise revenue.

International system concerns primarily encompass preserving peace and ensuring justice. A human rights injunction could be thought to intrude upon the sovereignty of other nations, thus threatening peace and stability. However, unlike in the antitrust context, in which one nation simply attempts to foist its own economic philosophy onto others, the human rights context is different. Multiple human rights treaties and conventions

114. *See supra* text accompanying notes 74-75.

demonstrate a widely held condemnation of certain acts, such as slave trading, torture or genocide. Therefore, the international system has a strong interest in fostering cooperation to adjudicate and enforce civil remedies against those who perpetrate those acts, especially when criminal sanctions are unavailable.

While not all cases may provide ideal conditions for human rights injunctions, this remedy can be both doctrinally sound and effective in practice. Given the experience and practice of courts in the commercial context, courts in the human rights context should not doubt their abilities to balance equities when human lives and human dignity are at stake.