INTERNATIONAL HUMAN RIGHTS AND MULTINATIONAL CORPORATIONS: AN FCPA APPROACH

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ABSTRACT

Recent Supreme Court decisions have severely curtailed the reach of the Alien Tort Statute ("ATS"), making it nearly impossible to hold multinational corporations accountable in the United States for grave human rights violations overseas. In this Article, we propose a new strategy that borrows from the U.S. antibribery regime under the Foreign Corrupt Practices Act of 1977 ("FCPA"). We demonstrate that the fundamental aspects of this regime can be adapted to cover corporate involvement in human rights violations while remedying many of the serious shortcomings that compromised the effectiveness of civil litigation. An FCPA-based regime would clearly define the prohibited conduct by reference to existing U.S. statutes that criminalize grave human rights violations. It would delineate a clear jurisdictional scope centered around U.S. corporations and foreign corporations that choose to access U.S. securities markets, and provide clear rules for holding corporations accountable for complicity in human rights violations committed by others. By placing enforcement decisions in the hands of federal prosecutors rather than private plaintiffs, it would avoid the separation of powers concerns that played a central role in the ATS's demise. Like the FCPA has done for foreign bribery, this model would not only give multinational corporations a powerful incentive to avoid involvement in grave human rights violations but also give the United States a tool for inducing other states to pressure companies under their influence to do the same.

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INTRODUCTION

Thanks to recent Supreme Court decisions, the United States' role in enforcing international human rights law now faces a crisis. After *Kiobel v. Royal Dutch Petroleum Co.*,[1] *Jesner v. Arab Bank, PLC*,[2] and *Nestlé US, Inc. v. Doe*,[3] which severely curtailed the reach of the Alien Tort Statute ("ATS"),[4] it now seems impossible to hold multinational corporations accountable in U.S. courts for their complicity in atrocities from which they profit. Rather than bemoan this state of affairs, we propose a new strategy that may lead to greater and more effective enforcement. The United States already has a powerful regulatory scheme, the Foreign Corrupt Practices Act of 1977 ("FCPA"),[5] to rein in the abuses of international business. In that field—antibribery law—the United States staked out a leading international position, eventually inducing other important home states of multinational corporations to join it in suppressing corruption of foreign officials. In this Article, we argue that the United States should build on this success and adapt the FCPA as a model for corporate accountability for grave violations of human rights.

This Article starts from the widely shared premise that multinational corporations have an obligation to respect the interests protected by international human rights law.[6] The hard questions are not the existence or desirability of this obligation but its scope and the means of its enforcement. In the United

[1] 569 U.S. 108, 124 (2013) (finding presumption against extraterritoriality applicable to causes of action under ATS).

[2] 138 S. Ct. 1386, 1407 (2018) (holding that "foreign corporations may not be defendants in suits brought under the ATS").

[3] 141 S. Ct. 1931, 1937 (2021) (holding that "allegations of general corporate activity—like decision making—cannot alone establish domestic application of the ATS").

[4] 28 U.S.C. § 1350 (granting jurisdiction to federal district courts over "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").

[5] Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, tit. I, 91 Stat. 1494, 1494-98 (codified as amended at 15 U.S.C. §§ 78dd-1 to -3) (prohibiting bribery of foreign government officials).

[6] *See, e.g.*, Off. of the High Comm'r for Hum. Rts., Rep. on the Guiding Principles on Business and Human Rights, U.N. Doc. A/HRC/17/31, at 1 (2011) [hereinafter UNGP] ("These Guiding Principles are grounded in recognition of . . . [t]he role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights . . . ."). *See generally* Joel R. Paul, *Holding Multinational Corporations Responsible Under International Law*, 24 HASTINGS INT'L & COMPAR. L. REV. 285 (2001) (discussing scholarship analyzing contemporary efforts to hold corporations accountable for human rights violations under international law); Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443 (2001) (proposing system of corporate responsibility for human rights violations derived from specific human right at issue, corporation's structure, connections with government, and "nexus to affected populations"); Beth Stephens, *The Amorality of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT'L L. 45, 48, 68-81 (2002) (arguing that under international law "core human rights norms apply to corporations as well as to states and individuals").

States, the last quarter century has witnessed a fruitless effort to enforce human rights against firms through private tort suits. That effort failed because it lacked a proper legislative base reflecting the support of the political branches, required federal courts to divine private causes of action in contested and ambiguous customary international law, and threatened to embroil the country in disputes with some of its closest allies and partners. Faced with this predicament, judicial efforts to sustain the litigation ground to a halt. In the present moment, those seeking to hold multinational corporations accountable under international law should not lament the caution of the courts but instead seize the opportunity to design a proposal that the political branches will find feasible and attractive.

In a nutshell, we propose to borrow from the most successful U.S. innovation in the regulation of multinational corporations in the last fifty years, namely the international antibribery regime codified as the FCPA. We demonstrate that the fundamental aspects of this regime can be adapted to cover corporate involvement in human rights violations. The FCPA approach to human rights enforcement would provide clear answers to the complex legal questions that have stymied ATS litigation. It would clearly define the prohibited conduct by reference to existing U.S. statutes that criminalize grave human rights violations such as genocide, torture, war crimes, and human trafficking. It would delineate a clear jurisdictional scope, centered around U.S. corporations and foreign corporations who choose to access U.S. securities markets. It would provide clear rules for holding corporations accountable for complicity in human rights violations committed by others, such as foreign governments or rebel groups. By placing enforcement decisions in the hands of federal prosecutors rather than private plaintiffs, the model would avoid the separation of powers concerns that played a central role in the demise of ATS litigation.

Once in place, the FCPA model would give multinational corporations a powerful incentive to avoid such involvement. The United States has proven that it knows how to prosecute multinational corporations. No other country matches the scope and severity of U.S. prosecutions of these businesses, which have been fined tens of billions of dollars in the past two decades alone.[7] In addition to large fines, U.S. prosecutors have imposed extensive reforms on multinational firms, requiring them to exit risky countries and lines of businesses, adopt and enforce strict internal policies, and spend billions of dollars on new compliance personnel and systems.[8] Confronting these legal risks, many multinational firms have invested in expensive compliance programs to ward off government investigations, making the regulatory regime largely self-enforcing.[9] The FCPA

[7] *See* BRANDON L. GARRETT, TOO BIG TO JAIL 149 (2014) (counting 2,262 corporate prosecutions between 2001 and 2012); PIERRE-HUGUES VERDIER, GLOBAL BANKS ON TRIAL 7 (2020) (counting over $34 billion in fines and penalties from U.S. criminal settlements and regulatory actions against large international banks between 2008 and 2016 for "benchmark manipulation, tax evasion, and sanctions violations").

[8] *See* Pierre-Hugues Verdier, *The New Financial Extraterritoriality*, 87 GEO. WASH. L. REV. 239, 255-64 (2019).

[9] *See* U.S. DOJ & U.S. SEC, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES

model would also give the United States a tool for inducing other states to pressure companies under their influence to do the same. It could even catalyze the adoption of a multilateral agreement under which major home states take responsibility for disciplining their firms, as happened in the antibribery field.[10] In sum, taking an FCPA approach to human rights enforcement gives us the best chance of stopping the most influential actors in the global economy from tolerating or supporting human rights abuses.

To our knowledge, only a handful of commentators have considered the relevance of U.S. anticorruption law, embodied in the FCPA, to human rights enforcement.[11] None has focused on substituting FCPA-type criminal liability for private tort suits. Because this literature did not appreciate the downside of civil litigation in this area and predated the downfall of ATS litigation in the courts, it does not consider how this model of criminal liability can do much more than civil suits ever could while avoiding their pitfalls. We make that case here.

Our argument proceeds as follows. Part I describes the role of states in ensuring human rights accountability by multinational corporations, the rise of private lawsuits under the ATS as the United States' primary tool to that effect, and how and why that experiment failed. In Part II, we consider the resources currently available under federal criminal law to attack corporate complicity in human rights abuses. The possibility of such prosecutions exists, but under present law they would present serious legal and practical difficulties that make them an unlikely avenue to ensure accountability. Part III then describes our proposal, explaining why the FCPA provides the right model and how it overcomes the shortcomings of both the old civil litigation model and current criminal law. We conclude in Part IV with an account of how this approach can both provide more effective deterrence of human rights violations by multinational corporations and enable the United States to push the international community towards stronger enforcement, just as the FCPA evolved into a broader international anticorruption regime.

ACT 53-54 (2d ed. 2020) [hereinafter FCPA RESOURCE GUIDE], https://www.justice.gov/criminal-fraud/file/1306671/download [https://perma.cc/3JMY-4KU4] (identifying existence and effectiveness of a company's compliance program as factor justifying nonprosecution).

[10] *See* Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, 2802 U.N.T.S. 225 (entered into force Feb. 15, 1999) [hereinafter OECD Convention].

[11] *See* Logan Michael Breed, Note, *Regulating Our 21st-Century Ambassadors: A New Approach to Corporate Liability for Human Rights Violations Abroad*, 42 VA. J. INT'L L. 1005, 1028-35 (2002) (contending that adoption of FCPA-modeled federal statute would deter potential corporate human rights violations and remove procedural hurdles to ATS litigation); Jonathan Clough, *Punishing the Parent: Corporate Criminal Complicity in Human Rights Abuses*, 33 BROOK. J. INT'L L. 899, 926-28 (2008) (discussing FCPA briefly as potential model for extraterritorial criminal liability).

I. THE RISE AND FALL OF CIVIL LITIGATION AS A MEANS OF CORPORATE HUMAN RIGHTS ENFORCEMENT

During the 1990s, U.S. civil litigation became the front line in the battle to hold multinational corporations accountable for human rights abuses. For roughly twenty years, victims were able to sue corporations in tort for their complicity in human rights violations. But the Supreme Court first signaled concerns about, then full-blown opposition to, these suits. Although resistance continues in the lower levels of the judiciary, it seems that U.S. courts are no longer open to tort claims against corporations based on international human rights law.

This Section traces the rise and fall of this civil litigation experiment. It first outlines the problem of participation by multinational corporations in grave violations of international human rights and the role of home states in promoting accountability for these actions. It then explains why, in the United States, civil litigation under the ATS first seemed an attractive mechanism for promoting accountability but then withered away. Ultimately, the legal foundations of the litigation were too contingent, and support for the policy too limited, to sustain the strategy.

A. *Corporate Human Rights Accountability*

Positive legal authority—international treaties and customary international law—directly imposing duties on multinational corporations was and remains scant.[12] At the same time, international law recognizes that its prohibitions of some grave human rights abuses—genocide, certain war crimes, and slavery, for example—apply to private persons, not just state actors.[13] International law also understands that private actors can become so entangled in state-based international crimes—such as torture and extrajudicial killing—as to share responsibility with the state actors who carried out these outrages.[14]

A particularly significant document that combines these strands into an aspirational program is the United Nations' *Guiding Principles on Business and Human Rights* ("UN Guiding Principles"),[15] which lays out a framework for

[12] *See, e.g.*, Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1401 (2018) (plurality opinion) ("The international community's conscious decision to limit the authority of [existing] international [criminal] tribunals to natural persons counsels against a broad holding that there is a specific, universal, and obligatory norm of corporate liability under currently prevailing international law.").

[13] *See, e.g.*, Kadic v. Karadžić, 70 F.3d 232, 239-43 (2d Cir. 1995) (concluding that leader of unrecognized state could be held liable for acts of genocide, crimes against humanity, and war crimes committed in his private capacity).

[14] All of the U.S. criminal statutes implementing human rights treaties on the basis of universal jurisdiction take this approach. *See infra* note 88.

[15] *See* UNGP, *supra* note 6, at 1 (declaring guidelines aimed at "enhancing standards and practices with regard to business and human rights so as to achieve tangible results for affected individuals and communities, and thereby also contributing to a socially sustainable globalization").

defining the obligations of multinational corporations.[16] It strongly endorses the principle that, whether existing positive law imposes formal legal duties on private companies or not, all important actors in global relations should bear a responsibility to respect human rights and face accountability for their failures to do so.[17]

In a perfect world, states that host the operations of multinational corporations would police actions on their territory to ensure human rights compliance. In reality, host states are often part of the problem. Multinational corporations, especially those in extractive industries, have found themselves operating in the midst of civil unrest where host states inflict atrocities on the surrounding populations. Even where host governments themselves do not orchestrate human rights abuses, weak prosecutorial and judicial institutions may make accountability unlikely. In the face of these circumstances, the United Nations has called on home states to take the lead in human rights enforcement. Thus, the UN Guiding Principles declare: "States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations."[18] Even if international law does not require states that provide legal form and headquarters to multinational corporations to impose human rights responsibilities on corporate nationals, there is a growing expectation that they should.

States have several tools at their disposal to carry out this function. The core human rights obligations—the bans on genocide, torture, grave war crimes, and slavery—rest on treaties and customary international law that obligate states to either prosecute or extradite all persons found within their territory that have committed these atrocities.[19] Because many states in the civil law tradition do

[16] *Id.* at 13-26.

[17] *Id.* at 13 ("Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved."). In some circumstances, multinational corporations may have sufficient incentives to fulfill this responsibility without state-imposed sanctions; they may even contribute to enforcing human rights norms against states and other actors. *See generally* Jay Butler, *The Corporate Keepers of International Law*, 114 AM. J. INT'L L. 189 (2020) (analyzing "corporate keepers phenomenon" whereby corporations decide to comply with international law without state directive to do so). Our proposal targets cases where these incentives have proved insufficient to deter violations.

[18] UNGP, *supra* note 6, at 3.

[19] Several treaties that the United States has joined expressly obligate a party either to prosecute any offender found on its territory, no matter where the offense occurred, or to extradite the offender to a country that will prosecute. *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 5(2), *adopted* Dec. 10, 1984, 1465 U.N.T.S. 85, 114 [hereinafter Convention Against Torture] (directing party states to establish jurisdiction over torture offenses when offender or victim is national of state or when offense is committed in territory under state's jurisdiction or on ship or aircraft registered to state), *implemented by* Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. No. 103-236, § 506, 108 Stat. 382, 463-64 (codified as amended at 18 U.S.C. § 2340A); *see also* Geneva Convention for the Amelioration of the Condition of the

not impose criminal sanctions on legal, as opposed to natural, persons, the treaties do not extend the prosecute-or-extradite obligation to corporations, which in any event cannot be extradited as such.[20] But even these states may use their criminal law to punish corporate officers caught up in the covered offenses, and states that do extend criminal law to corporations might extend these laws accordingly. Alternatively, states might force corporations within their jurisdictions to disgorge any gains obtained in the course of human rights violations and otherwise provide restitution to their victims.

As we discuss below, the United States from 1980 until very recently mostly took the route of civil litigation. Indeed, as will be seen in Part III, all the U.S. criminal statutes that invoke universal jurisdiction to punish grave human rights violations were enacted only in the last twenty-five years, and prosecutions under them have been rare. The ATS provided a unique mechanism under which U.S. courts heard civil claims for human rights violations worldwide by both

Wounded and Sick in Armed Forces in the Field art. 49, Aug. 12, 1949, 6 U.S.T. 3114, 3146; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 50, Aug. 12, 1949, 6 U.S.T. 3217, 3251; Geneva Convention Relative to the Treatment of Prisoners of War art. 129, Aug. 12, 1949, 6 U.S.T. 3316, 3419; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 146, Aug. 12, 1949, 6 U.S.T. 3516, 3616 [hereinafter, together, the Geneva Conventions], *all implemented by* War Crimes Act of 1996, Pub. L. No. 104-192, § 2, 110 Stat. 2104, 2104 (codified as amended at 18 U.S.C. § 2441). Other treaties that the United States has joined do not by their terms contain this obligation, but a strong case can be made that customary international law has evolved to impose a duty to prosecute or extradite. In these instances, the United States has adopted legislation asserting universal jurisdiction to criminalize the proscribed conduct. *See, e.g.*, Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, May 25, 2000, 2173 U.N.T.S. 222, 237-41 [hereinafter Child Soldiers Protocol] (recognizing special protections needed to safeguard children from use in armed conflicts), *implemented by* Child Soldiers Accountability Act of 2008, Pub. L. No. 110-340, § 2(a), 122 Stat. 3735, 3735-37 (codified at 18 U.S.C. § 2442(c)) (criminalizing recruitment and use of child soldiers where accused is American national, person "lawfully admitted for permanent residence in the United States," stateless individual with habitual residence in United States, or person present in United States regardless of nationality or where offense occurs in United States); Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, Nov. 15, 2000, 2237 U.N.T.S. 319, 343 [hereinafter Human Trafficking Protocol] ("[E]ffective action to prevent and combat trafficking in persons . . . requires a comprehensive international approach in the countries of origin, transit and destination that includes measures to prevent such trafficking, to punish the traffickers and to protect the victims of such trafficking, including by protecting their internationally recognized human rights . . . ."), *implemented by* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 223(a), 122 Stat. 5044, 5071-72 (codified at 18 U.S.C. § 1596); Convention on the Prevention and Punishment of the Crime of Genocide art. 7, Dec. 9, 1948, 78 U.N.T.S. 277, 282 [hereinafter Genocide Convention] (asserting agreement to "grant extradition" for acts of genocide), *implemented by* Human Rights Enforcement Act of 2009, Pub. L. No. 111-122, § 3(a), 123 Stat. 3480, 3481 (codified at 18 U.S.C. § 1091(e)(2)(D)).

[20] *See supra* note 19 (limiting jurisdictional reach to accused natural persons).

American and foreign multinational corporations. Yet, civil litigation to enforce such claims faces growing and perhaps insurmountable obstacles.

B. *The Rise of Corporate Human Rights Litigation*

The origins of the corporate torts suits go back to the 1970s, when human rights advocates first sought to enforce international law through private litigation.[21] Human rights litigators unearthed the ATS—an obscure statute embedded in the part of the U.S. Code that deals with federal court jurisdiction and procedure. This provision, adopted in 1789 as part of the first federal law on the judiciary, gives federal courts subject matter jurisdiction over "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."[22]

Although long-standing, the statute had been an enigmatic relic of no practical significance. This all changed when, in 1980, the Second Circuit decided *Filártiga v. Peña-Irala*.[23] At the urging of the Carter Administration's State Department, the court ruled that the statute establishes federal court subject-matter jurisdiction over tort claims brought by aliens based on violations of the customary international law of human rights.[24]

Filártiga involved claims by private persons against a government official for acts that could violate international law only if they involved an exercise of official authority.[25] Congress ratified its holding in 1992 through the Torture Victim Protection Act ("TVPA").[26] This provision allows victims of torture or extrajudicial killing to bring a civil action in federal court against "[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation" perpetrated the proscribed acts.[27] Although the statute resolved

[21] *See, e.g.*, Filártiga v. Peña-Irala, 630 F.2d 876, 878 (2d Cir. 1980).

[22] Act of Sept. 24, 1789, Pub. L. No. 1-20, § 9, 1 Stat. 73, 76-77 (codified at 28 U.S.C. § 1350).

[23] 630 F.2d at 876.

[24] *Id.* at 878.

[25] *Id.* at 878-90.

[26] Torture Victim Protection Act of 1991, Pub. L. No. 102-256, § 2, 106 Stat. 73, 73 (codified at 28 U.S.C. § 1350). This statute resolved a circuit split, as no other federal court of appeals had embraced *Filártiga*, and the District of Columbia and Seventh Circuits had cast doubt on that case. *See* Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 374 n.6 (7th Cir. 1985) (per curiam) (dictum) (distinguishing plaintiff's argument from that accepted by court in *Filártiga*); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 775 (D.C. Cir. 1984) (per curiam) (affirming dismissal for lack of subject matter jurisdiction of Israeli citizens' claims against government officials arising from armed attack of civilian bus).

[27] Torture Victim Protection Act § 2(a). Unlike the ATS, the TVPA expressly created a cause of action, thus resolving any doubts about the source of substantive law or federal court subject matter jurisdiction, and included U.S. nationals among the potential plaintiff class. *See id.* Its limitation to "individuals," however, seemed to exclude suits against legal persons, including corporations. *See id.* The Supreme Court so held two decades later. *See* Mohamad v. Palestinian Auth., 566 U.S. 449, 451-52 (2012) ("We hold that the term 'individual' as used in the [TVPA] encompasses only natural persons. Consequently, the [TVPA] does not impose

uncertainty over the validity of *Filártiga*'s holding, its enactment indicated nothing about the proper meaning of the ATS.

Only in 1995 did a federal court, acting at the urging of the Clinton administration, apply the ATS to claims against an individual not cloaked with state authority, namely the supposed president of the unrecognized state of Srpska.[28] Once that threshold had been crossed, it proved relatively easy to take the next logical step. Plaintiffs began to argue, and courts to hold, that private legal persons such as corporations also had the capacity to violate international law and thus to be held accountable through tort suits.[29] Soon a surge of litigation in U.S. courts sought tort compensation from private corporations for violations of international human rights law.[30]

The Supreme Court got its first chance to interpret the ATS in *Sosa v. Alvarez-Machain*,[31] which, like *Filártiga*, involved a tort suit by a foreign national against a foreign government official, but for arbitrary detention rather than torture or extrajudicial killing.[32] The Court determined that the ATS provides only subject matter jurisdiction over certain torts, and not a corresponding cause of action.[33] The Court further held, however, that federal courts could imply the necessary cause of action from the statute's grant of jurisdiction.[34]

liability against organizations.").

[28] *See* Kadic v. Karadžić, 70 F.3d 232, 239-43 (2d Cir. 1995) (considering congressional intent behind ATS and TVPA).

[29] The earliest case that we have uncovered upholding federal court jurisdiction over a tort claim against a corporation based on international law is *Doe v. Unocal Corp.*, 963 F. Supp. 880, 890 (C.D. Cal. 1997), *aff'd in part, rev'd in part*, 395 F.3d 932 (9th Cir. 2002), *reh'g granted en banc*, 395 F.3d 978 (9th Cir. 2003), *appeal dismissed*, 403 F.3d 708 (9th Cir. 2005).

[30] Between 1997 and the Supreme Court's decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), at least four federal cases upheld ATS claims against corporations. *See, e.g.*, Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 296 (S.D.N.Y. 2003) (denying corporate defendant's motion to dismiss ATS claim); Sarei v. Rio Tinto PLC, 221 F. Supp. 2d 1116, 1208 (C.D. Cal. 2002) (holding plaintiff sufficiently alleged violation of law of war under ATS), *aff'd*, 456 F.3d 1069 (9th Cir. 2006), *aff'd in part, vacated in part, rev'd in part*, 487 F.3d 1193 (9th Cir. 2007); Bodner v. Banque Paribas, 114 F. Supp. 2d 117, 128 (E.D.N.Y. 2000) ("If plaintiffs are able to substantiate these claims [against banking institutions] . . . plaintiffs clearly will have demonstrated violations of contemporary international law and ample basis for federal subject matter jurisdiction pursuant to the [ATS]."); *Unocal*, 963 F. Supp. at 889 (upholding jurisdiction over American corporation for human rights claims under ATS). None considered at any length whether customary international law might apply differently to private legal persons.

[31] 542 U.S. 692 (2004)

[32] *Id.* at 712-38 (reversing grant of summary judgment to plaintiff on ATS claim).

[33] *Id.* at 712-14.

[34] *Id.* at 724. Three Justices rejected this part of the opinion, arguing that no such inference could be made. *Id.* at 739 (Scalia, J., concurring in the judgment, joined by Rehnquist, C.J., and Thomas, J.) ("There is . . . one thing that I would subtract [from the Court's opinion]: its reservation of a discretionary power in the Federal Judiciary to create causes of action for the enforcement of international-law-based norms."); *see also* Paul B. Stephan, *Inferences of*

Because the Court over the previous decade had come to disapprove of the practice of implying causes of action from legislation having different purposes, the *Sosa* majority tried to confine the consequences of this last conclusion. It proclaimed that not all possible torts based on international law violations could find vindication in the cause of action implied from the ATS.[35] It posited that Congress, when it adopted the ancestor of the ATS in 1789, had recognized an obligation on the part of the United States to provide remedies for breaches of specific duties with respect to "safe conducts or passports," "the immunities of ambassadors and other public ministers" from interference or harm, and the punishment of piracy.[36] It would not extend liability under the statute beyond modern conduct that matched these traditional offenses: "Accordingly, we think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized."[37] It concluded that no such consensus existed about a customary international legal right to be free from the sort of arbitrary detention suffered by Alvarez-Machain.[38]

Sosa proved one of the more quixotic of the Court's modern decisions. On the one hand, the Court clearly feared that civil human rights claims would proliferate, and its limiting language put the burden on plaintiffs to demonstrate that the international legal norm on which they based their claim was widely embraced by states and well-defined. On the other hand, litigants responded to the challenge with enthusiasm and confidence, bolstered by several lower courts.

Human rights claims against private corporations survived motions to dismiss more frequently than they had before *Sosa*.[39] Some plaintiffs asserted that a

Judicial Lawmaking Power and the Law of Nations, 106 GEO. L.J. 1793, 1800-04 (2018) (tracing judicial practice of prescriptive inferences from jurisdictional grants).

[35] *Sosa*, 542 U.S. at 724.

[36] *Id.* at 716-20 (quoting 21 LIBR. OF CONG., JOURNALS OF THE CONTINENTAL CONGRESS 1136 (G. Hunt ed., 1912) (citing An Act for the Punishment of Certain Crimes Against the United States, ch. 9, § 8, 1 Stat. 112, 113-114 (1790))).

[37] *Id.* at 725.

[38] *Id.* at 731-38.

[39] *See* Sarei v. Rio Tinto, PLC, 671 F.3d 736, 744 (9th Cir. 2011) (en banc) (plurality opinion) (finding claims of genocide and war crimes within court's jurisdiction under ATS), *vacated*, 569 U.S. 945 (2013); Flomo v. Firestone Nat. Rubber Co., 643 F.3d 1013, 1024-25 (7th Cir. 2011) (finding insufficient basis for determining child labor was violation of customary international law but noting extension of ATS to corporations); Doe v. Exxon Mobil Corp., 654 F.3d 11, 15 (D.C. Cir. 2011) (upholding aiding and abetting in murder, torture, sexual battery, and false imprisonment claims and considering whether ATS extends to corporations); Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 247-48, 251 (2d Cir. 2009) (noting that ATS covered aiding and abetting in human rights abuses by corporation but concluding standard for aiding and abetting liability was not met); Abdullahi v. Pfizer, Inc., 562 F.3d 163, 168-69 (2d Cir. 2009) (reversing grant of motion to dismiss claim alleging nonconsensual medical experimentation with state action); Romero v. Drummond Co., 552 F.3d 1303, 1315 (11th Cir. 2008) (considering allegations of recruitment

corporation had directly violated rules that international law applies to private persons, such as the prohibitions of genocide and slavery. Others asserted that the defendant was complicit in state misconduct, including acts such as extrajudicial killings and torture that violate international law only when they entail state action, and thus bore aiding-and-abetting liability.[40] The exposure of corporations, both foreign and domestic, to U.S. litigation risk grew rapidly.

C. *The Fall of Corporate Human Rights Litigation*

By requiring that the international law on which an ATS claim rests be widely accepted and well-defined, *Sosa* invited new arguments by defendants. One was the assertion that this limitation on actionable customary international law applies not just to rules regulating conduct but also to rules about the scope of a prohibition. An order issued in December 2009 by a Second Circuit panel considering the South African apartheid litigation put this question front and center, when the court asked interested persons to brief the issue whether the ATS ever permitted suits against corporations.[41]

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of paramilitaries to murder and torture and discussing applicability of ATS to corporations); Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 260 (2d Cir. 2007) (per curiam) ("We hold that . . . a plaintiff may plead a theory of aiding and abetting liability under the [ATS]."), *aff'd by an equally divided court*, 553 U.S. 1028 (2008); Aldana v. Del Monte Fresh Produce, N.A., Inc., 416 F.3d 1242, 1253 (11th Cir. 2005) (per curiam) (upholding torture claim under ATS but affirming dismissal of nontorture claims); *In re* Chiquita Brands Int'l, Inc., 792 F. Supp. 2d 1301, 1330, 1333-34 (S.D. Fla. 2011) (concluding plaintiffs sufficiently pled claims of torture, extrajudicial killings, and war crimes against banana producer), *rev'd sub nom.* Cardona v. Chiquita Brands Int'l, Inc., 760 F.3d 1185 (11th Cir. 2014); Al-Quraishi v. Nakhla, 728 F. Supp. 2d 702, 753 (D. Md. 2010) (considering war crimes allegations under ATS and noting that "[t]here is no basis for differentiating between private individuals and corporations"); Licea v. Curaçao Drydock Co., 584 F. Supp. 2d 1355, 1366 (S.D. Fla. 2008) (awarding damages to plaintiffs alleging forced labor and human trafficking); Bowoto v. Chevron Corp., 557 F. Supp. 2d 1080, 1092 (N.D. Cal. 2008) (finding plaintiffs' torture claims actionable under ATS), *aff'd*, 621 F.3d 1116 (9th Cir. 2010); Arias v. Dyncorp, 517 F. Supp. 2d 221, 227 (D.D.C. 2007) ("[T]he [ATS] may be used against corporations acting under 'color of [state] law,' or for a handful of private acts, such as piracy and slave trading." (second alteration in original) (citing Aldana v. Fresh Del Monte Produce, Inc., 305 F. Supp. 2d 1285, 1301 (S.D. Fla. 2003), *aff'd in part, vacated in part, rev'd in part*, *Aldana*, 416 F.3d at 1242)); Almog v. Arab Bank, PLC, 471 F. Supp. 2d 257, 276, 285 (E.D.N.Y. 2007) (denying motion to dismiss with respect to claims of aiding and abetting genocide and crimes against humanity under ATS); *In re* Agent Orange, 373 F. Supp. 2d 7, 52-59 (E.D.N.Y. 2005) (holding that use of defoliant did not violate international law but indicating that corporate liability may exist under ATS).

[40] *Compare* Doe v. Nestle US, Inc., 766 F.3d 1013, 1024 (9th Cir. 2014) (permitting plaintiffs' complaint based on prohibition against slavery that applies to private persons), *with Khulumani*, 504 F.3d at 260 (permitting plaintiffs to plead "theory of aiding and abetting liability" for allegations of torture and extrajudicial killing that require state action to constitute international law violations).

[41] *See, e.g.*, Balintulo v. Daimler AG, No. 09-cv-02778, 2009 U.S. App. LEXIS 29244, at *15-18 (2d Cir. 2009) (expressing intent to consider extent of corporate liability under ATS).

Amici gave different answers. The panel ultimately dismissed the appeal on procedural grounds,[42] but at least one of its members seemed to find the argument against corporate liability convincing. That person, Judge Cabranes, wrote the majority opinion in *Kiobel*, which was pending at the time of the order in the apartheid case.[43] His opinion held that customary international law did not recognize corporate responsibility for international crimes, and hence the ATS did not support a cause of action for suits against corporations.[44]

The Supreme Court granted certiorari in *Kiobel* on the issue of corporate liability under the ATS.[45] After oral argument, however, the Court ordered further briefing and another argument on the question of whether the ATS recognized a cause of action for violations of the law of nations occurring on the territory of another sovereign.[46] Perhaps predictably, the Court then resolved the second question and avoided the first. It relied on the presumption against extraterritoriality in prescriptive jurisdiction, an interpretive rule that had surfaced two years earlier as a central part of its emerging jurisprudence.[47] It unanimously upheld dismissal of the plaintiff's claim, with a five-Justice majority ruling that the causes of action implied from the ATS's grant of subject matter jurisdiction are subject to the presumption against extraterritoriality.[48] This means, the Court explained, that "even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application [of U.S. law]."[49]

The *Kiobel* decision proved a significant setback to human rights tort suits against corporations. The ATS applies only to noncitizen plaintiffs, and *Kiobel*'s

[42] Balintulo v. Daimler AG, 727 F.3d 174, 182 (2d Cir. 2013).

[43] *See* Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 115 (2d Cir. 2010). Of the three members of the Second Circuit on the *Balintulo* panel, only Judge Cabranes was a member of the *Kiobel* court. He wrote the majority opinion, with Judge Leval concurring in the judgment but rejecting the majority's analysis of corporate nonliability under the ATS. *Id.* at 149-50 (Leval, J., concurring) (contending that majority's finding of absence of corporate liability under ATS is without support in international law's precedents and scholarship). A careful reading of the *Kiobel* majority opinion might suggest a substantial debt to the briefing in *Balintulo*. *See generally* Letter Brief of Amicus Curiae National Foreign Trade Council Addressing Questions Regarding Non-Existence of Corporate Liability Under Customary International Law, Balintulo v. Daimler AG, No. 09-2778-cv (2d Cir. Dec. 22, 2009), 2009 WL 7768621 (contending that customary international law does not acknowledge rule imposing corporate liability for noncriminal acts nor extension of criminal liability to corporations). One of the authors of this Article (Stephan) was counsel of record on that brief.

[44] *Kiobel*, 621 F.3d at 149.

[45] Kiobel v. Royal Dutch Petroleum Co., 565 U.S. 961, 961-62 (2011).

[46] Kiobel v. Royal Dutch Petroleum Co., 565 U.S. 1244, 1244 (2012).

[47] *See* Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 264-65 (2010) (articulating and explaining presumption). *See generally* RESTATEMENT (FOURTH) OF THE FOREIGN RELS. L. OF THE U.S. § 404 (AM. L. INST. 2018) (providing background and application of the presumption).

[48] Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 114-17, 124 (2013).

[49] *Id.* at 124-25.

territoriality restriction largely limits claims to harms suffered by aliens within the United States. Almost all the suits brought under the ATS had involved abuses suffered in other countries.[50]

Contemporaneous Supreme Court decisions imposed significant additional barriers to human rights cases against corporations. A year before *Kiobel*, the Court in *Mohamad v. Palestinian Authority*[51] had held that the TVPA's limitation on its cause of action to claims against "individuals" precluded suits against legal persons, including corporations.[52] A year after *Kiobel*, the Court in *Daimler AG v. Bauman*[53] ruled that a plaintiff could not obtain *in personam* jurisdiction over a foreign corporation simply by suing its U.S. subsidiary.[54] As a result, a victim of human rights abuses in Argentina could not bring suit in the United States to hold a German company responsible for acts attributable to its Argentinian subsidiary.[55] This transsubstantive interpretation of the Due Process Clause of the Fourteenth Amendment had the practical effect of barring most suits against foreign corporations for claims that did not involve harm occurring in the United States, except in the rare case when a U.S. subsidiary was implicated in the harm.[56]

Another blow came in *Jesner*.[57] The defendant, a foreign bank, was sued for processing funds through U.S. channels as part of a general campaign of financing violent acts in violation of international law.[58] A majority of the Court held that the ATS could not support any claim grounded in customary international law against a foreign corporation.[59] A plurality embraced the position of the Second Circuit in *Kiobel* that the ATS could not support claims against any corporation.[60]

Most recently, the Court in *Nestlé* tightened the limits on what claims touch and concern the territory of the United States under *Kiobel*. While assuming

[50] *See, e.g.*, Doe v. Drummond Co., 782 F.3d 576, 598-99 (11th Cir. 2015) (holding allegation that corporate officers acted in United States to provide support to Colombian paramilitaries that carried out atrocities in Colombia insufficient to overcome presumption against extraterritoriality).

[51] 566 U.S. 449 (2012).

[52] *Id.* at 451-52.

[53] 571 U.S. 117 (2014).

[54] *Id.* at 139.

[55] *Id.* at 120-21.

[56] Another setback for persons seeking civil redress for systematic violations of U.S. law abroad was *RJR Nabisco, Inc. v. Eur. Cmty.*, 136 S. Ct. 2090 (2016). The Court ruled that federal prosecutors could charge companies engaged in extraterritorial patterns of racketeering, but that the civil provisions of the Racketeering Influenced and Corrupt Organizations Act ("RICO") did not apply to such activity. *Id.* at 2108-10 (citing 18 U.S.C. §§ 1961-1968).

[57] Jesner v. Arab Bank, PLC, 138 S. Ct. 1386 (2018).

[58] *Id.* at 1393.

[59] *Id.* at 1400.

[60] *Id.* at 1406-07.

without deciding that aiding and abetting forced labor might give rise to a claim under the ATS, it ruled that because "making 'operational decisions' is an activity common to most corporations, generic allegations of this sort do not draw a sufficient connection between the cause of action respondents seek—aiding and abetting forced labor overseas—and domestic conduct."[61] A majority of the justices in *Nestlé* did take the position that the ATS covers claims against domestic corporations to the same extent as against natural persons.[62] Three justices, however, would have held that the ATS generally admits no international-law claims beyond violation of safe conducts, infringement of the rights of ambassadors, and piracy, and three others did not indicate that they disagreed.[63]

In six cases over fourteen years, the Supreme Court consistently has rejected federal tort claims based on international human rights law, in four of those instances where the defendant was a private corporation and the fifth where the defendant was a legal person not recognized as a foreign state. It does not seem

[61] Nestlé US, Inc. v. Doe, 141 S. Ct. 1931, 1937 (2021). Eight justices joined this holding. Justice Alito, writing only for himself, would have resolved the question of whether the ATS extends to claims against domestic corporations and not addressed any other issue in the case. *Id.* at 1950-51 (Alito, J., dissenting).

[62] *Id.* at 1941 (Gorsuch, J., concurring, joined in relevant part by Alito, J.) ("Nothing in the ATS supplies corporations with special protections against suit."); *id.* at 1947 n.4 (Sotomayor, J., concurring in part and concurring in the judgment, joined by Breyer, J., and Kagan, J.) ("[T]here is no reason to insulate domestic corporations from liability for law-of-nations violations simply because they are legal rather than natural persons."). Previously in *Jesner*, Justice Alito suggested that barring ATS suits against domestic corporations would accomplish nothing, as suits by aliens against these defendants generally would fit the requirements of federal diversity jurisdiction under 28 U.S.C. § 1332(a)(2). 138 S. Ct. at 1410 n.* ("Because this case involves a foreign corporation, we have no need to reach the question whether an alien may sue a United States corporation under the ATS.").

[63] *Nestlé*, 141 S. Ct. at 1939 (plurality opinion of Thomas, J.) ("[F]ederal courts should not recognize private rights of action for violations of international law beyond the three historical torts identified in *Sosa*."). Three members of the court rejected this position. *Id.* at 1944 (Sotomayor, J., concurring in part and concurring in the judgment) ("[The plurality's] reading contravenes both this Court's express holding in *Sosa* and the text and history of the ATS."). Chief Justice Roberts and Justices Alito and Barrett did not join the part of Thomas's opinion that discussed whether the ATS created a cause of action beyond the three torts identified in *Sosa*. Nor did they join Justice Sotomayor's opinion. Previously in *Jesner*, Justices Thomas and Gorsuch championed a narrow reading of *Sosa*, and Justice Alito seemed to signal his agreement with them. 138 S. Ct. 1386, 1409 (2018) (Alito, J., concurring in part and concurring in the judgment) ("For the reasons articulated by Justice Scalia in *Sosa* and by Justice Gorsuch today, I am not certain that *Sosa* was correctly decided."); *id.* at 1412 (Gorsuch, J., concurring in part and concurring in the judgment) (contending that role of establishing new causes of actions "belongs to the political branches"); *id.* at 1408 (Thomas, J., concurring) (agreeing with Justice Gorsuch that "[c]ourts should not be in the business of creating new causes of action under the [ATS]"). Justices Kavanaugh and Barrett joined the court after *Jesner*.

premature to declare that the enforcement of international human rights law against corporations through U.S. tort litigation has come to an end.[64]

D. *The Problems with Private Litigation*

One might depict the closing down of human rights suits against corporations as yet another regrettable episode in the Supreme Court's rightward drift. Yet, whatever one might think in general about the evident tendency of the Court to limit civil litigation targeted at business interests, its stance in the international law cases is defensible. The ATS litigation strategy was innovative, but that does not mean that it was good.

To be sure, civil litigation has its virtues. It puts control over the vindication of individual rights in the hands of the victims, or more precisely their lawyers, rather than trusting the government to suppress harmful behavior. It gives the judiciary, undoubtedly the most trusted branch of the federal government, the ability to investigate and resolve doubts, rather than leaving questions of fundamental justice to the rough-and-tumble political process. It can draw on private information unavailable to public officials, and the promise of contingent fees mobilizes private funding, thus placing little demand on limited public resources. It comes mostly free to the taxpayer, at least with respect to direct costs.[65]

The case against civil litigation based on customary international law, however, remains powerful. First and most obvious, the legal basis for these suits has been wafer-thin. The best reading of the original legislation from which the ATS is derived indicates that Congress never intended to do more than provide a forum for claims for which the United States had a clear obligation to provide satisfaction, most typically when U.S. nationals committed international

[64] The "touch and concern" test might still provide an opening for alien victims were they able to show substantial and specific tortious conduct by a U.S. corporation in the United States. Moreover, under diversity jurisdiction U.S. corporations remain subject to tort litigation based on state or foreign law in instances where a U.S. court has *in personam* jurisdiction over the defendant and, in federal courts, where the plaintiffs are aliens. In addition, a handful of federal statutes provide expressly for corporate civil liability with respect to particular offenses such as slavery or human trafficking. *E.g.*, William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 223(a), 122 Stat. 5044, 5071-72 (codified at 18 U.S.C. § 1596) (extending jurisdiction to extraterritorial acts); Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, § 4(a)(4)(A), 117 Stat. 2875, 2878-79 (codified as amended at 18 U.S.C. § 1595) (authorizing civil suit). The *Nestlé* plurality noted this statutory remedy and offered it as an example of the capacity of Congress to authorize civil suits to enforce international human rights. 141 S. Ct. at 1939-40.

[65] *See generally* Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193 (1982) (advocating judicial authority to order civil remedies). *See also* Hannah L. Buxbaum, *Transnational Regulatory Litigation*, 46 VA. J. INT'L L. 251, 271-72 (2006); Paul B. Stephan, *The Political Economy of Choice of Law*, 90 GEO. L.J. 957, 968 (2002) ("Depending on the procedural rules in effect, plaintiffs may bear little of the costs generated by their suits and anticipate great rewards for success.").

wrongs.[66] However much international law has changed since the eighteenth century, it has not yet embraced the principle that a state has a general obligation to provide access to justice for claims in which that state is in no way implicated. Moreover, support in customary international law for treating private legal persons as subjects with direct and distinct international legal obligations (as opposed to rights) is also scant.[67] The legal basis for the corporate ATS suits, while they lasted, was a mix of creativity on the part of plaintiffs' attorneys and indulgence by a handful of sympathetic courts.

Second, customary international law, by its nature, does not provide a good source of primary rules to govern private behavior. By definition, it is uncodified and immanent. Its fluidity, a byproduct of the lack of concentrated lawmaking power in any well-defined set of institutions, makes it especially difficult to determine whether specific acts, however widely condemned by domestic laws, also violate international law.[68] In deciding ATS cases, U.S. courts found themselves parsing through multiple, sometimes contradictory treaties, international court decisions, and national materials to try to divine the existence and content of the norms proscribing certain conduct, whom these norms applied to, and the theories under which responsibility could be attributed to indirect participants. Customary international law's flexibility facilitates its adoption, but at the price of precision and clarity. Its fluidity may facilitate state-to-state cooperation, but it provides little help to private actors seeking to manage legal risk.

Third, exactly because customary international law invites debates and interpretive disputes, its application to foreigners by domestic courts heightens international tensions. What to the domestic court might look like disinterested application of compelling, if unwritten, rules may look to the defendant's home country like weaponized litigation designed to discriminate against outsiders. In essence, extraterritorial human rights claims "impose the sovereign will of the United States onto conduct occurring within the territorial jurisdiction of another

[66] The literature is vast, but for useful historical investigations of the assumptions underlying the 1789 legislation, see Anthony J. Bellia Jr. & Bradford R. Clark, *The Original Source of the Cause of Action in Federal Courts: The Example of the Alien Tort Statute*, 101 VA. L. REV. 609 (2015); Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587 (2002); and Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830 (2006).

[67] The customary international law of investment protection may bestow rights on private legal persons. *See* Anthea Roberts, *Triangular Treaties: The Extent and Limits of Investment Treaty Rights*, 56 HARV. INT'L L.J. 353, 363 (2015) (describing investor rights under customary international law). This law does not, however, impose any corresponding obligations on the protected investors.

[68] *See* Paul B. Stephan, *Privatizing International Law*, 97 VA. L. REV. 1573, 1630-32 (2011) (describing rule-of-law difficulties presented by uncertain boundaries of international law); *see also* Pierre-Hugues Verdier & Erik Voeten, *Precedent, Compliance, and Change in Customary International Law: An Explanatory Theory*, 108 AM. J. INT'L L. 389, 412 (2014) (describing how existence and content of customary international law rules are constantly contested).

sovereign."[69] Such claims also often target multinational firms vital to their home country's economy and which those countries claim primary authority to regulate. Perhaps for these reasons, the U.S. experiment with corporate ATS litigation generated substantial objections from foreign governments, especially in the form of amicus briefs in the cases.[70]

The failure of the political branches to enact any laws authorizing human rights suits against corporations meant that the U.S. judiciary had neither guidance nor political protection. The courts were making internationally consequential, and often controversial, decisions without any participation by the departments of government primarily responsible for the conduct of foreign affairs.[71] At worst, their actions could invite political retaliation and call for a response by the U.S. government. As such, they risked "impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs."[72]

Fourth, suits against multinational corporations engage shortcomings specific to the U.S. civil litigation system. The United States uses a unique mix of procedural rules that effectively subsidize civil suits independent of their merits. These features include broad pretrial discovery, jury trials, class actions, punitive damages, contingent-fee arrangements, and a general rule of not taxing the losing side with the winner's attorneys' fees.[73] These features lack counterparts elsewhere in the world and strike many foreign actors as not merely strange but aberrant and threatening.[74] They also introduce significant financial risk based on legal uncertainty that can disrupt otherwise desirable trade and

[69] Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 121 (2013).

[70] Looking only at the Supreme Court merits stage of U.S. litigation, at least seven briefs were submitted by six foreign states and the European Union expressing concerns. *See, e.g.*, Brief of the Governments of the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland as Amici Curiae in Support of Neither Party at 2, *Kiobel*, 569 U.S. 108 (No. 10-1491) (asserting opposition "to broad assertions of extraterritorial jurisdiction over alien persons arising out of foreign disputes with little, or no, connection to the United States").

[71] The statement in the text does not apply to litigation authorized by the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, which, read together with the Trafficking Victims Protection Reauthorization Act of 2003, allows a civil suit for victims of extraterritorial human trafficking. *See supra* note 64 and accompanying text (collecting statutes providing corporate civil liability with respect to human trafficking offenses). This statute reflects the considered opinion of the political branches to authorize civil litigation with respect to direct involvement in one particular human rights violation.

[72] Sosa v. Alvarez-Machain, 542 U.S. 692, 727 (2004).

[73] *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 252 (1981) (explaining why "American courts . . . are . . . extremely attractive to foreign plaintiffs" and expressing concerns that "[t]he flow of litigation into the United States would increase and further congest already crowded courts").

[74] *See* Alan O. Sykes, *Transnational Forum Shopping as a Trade and Investment Issue*, 37 J. Legal Stud. 339, 341-42 (2008).

investment.[75] In the case of deep pocket defendants, exemplified by multinational corporations, these rules imbue claims with substantial settlement value even when not meritorious.

These same procedures can, of course, make civil litigation a powerful weapon for vindicating important societal interests. When Congress chooses to aim this weapon at a particular target, the duty of the courts is clear. But when courts choose the target on their own, the instrumental effects of U.S. civil litigation are less clear and harder to justify.[76] Over the last several decades, the Supreme Court has come round to the position that the availability of this weapon should rest on choices made by the political branches, rather than on the judiciary's discretion.[77]

Fifth and last, the prospects of the political branches acting to enable civil litigation against corporations based on international human rights law seem poor. Serious questions about the viability of the ATS as a basis for such claims have existed at least since *Sosa*. After the Supreme Court's decision in that case, only one bill has been introduced in Congress proposing to confirm corporate liability. The "Alien Tort Statute Reform Act," introduced by Senator Diane Feinstein, would have permitted suits based on claims "of torture, extrajudicial killing, genocide, piracy, slavery, or slave trading if a defendant is a direct participant acting with specific intent to commit the alleged tort."[78] The proposed Act expressly extended liability to both domestic and foreign corporations, but it contained several restrictions, including a bar to liability in instances where a foreign state was responsible for committing the tort within its own territory and imposing an exhaustion requirement where "adequate and available remedies" existed in the place where the tort occurred.[79] That bill went nowhere, and nothing of its sort has come along since.[80]

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[75] Alan O. Sykes, *Corporate Liability for Extraterritorial Torts Under the Alien Tort Statute and Beyond: An Economic Analysis*, 100 GEO. L.J. 2161, 2193-97 (2012).

[76] *See, e.g.*, Gonzaga Univ. v. Doe, 536 U.S. 273, 283 (2002) (rejecting "the notion that our cases permit anything short of an unambiguously conferred right to support a cause of action"); Alexander v. Sandoval, 532 U.S 275, 286 (2001) ("Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress."). For interesting but, we believe, ultimately unpersuasive political-economy arguments in favor of judicial targeting, see Saul Levmore, *Changes, Anticipations, and Reparations*, 99 COLUM. L. REV. 1657, 1661-86 (1999); and Stewart & Sunstein, *supra* note 65, at 1289-1316.

[77] *See* Paul B. Stephan, Bond v. United States *and Information-Forcing Defaults: The Work That Presumptions Do*, 90 NOTRE DAME L. REV. 1465, 1474-76 (2015).

[78] Alien Tort Statute Reform Act, S. 1874, 109th Cong. § 2(a) (2005).

[79] *Id.* § 2(d).

[80] Again, the only exception to the statement in text is the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, along with the Trafficking Victims Protection Reauthorization Act of 2003. A question currently under litigation is whether this statute, like Senator Feinstein's proposal, is limited to direct participation in human trafficking or also extends to downstream consumers of products made using human trafficking. *See* Doe v. Apple Inc., No. 1:19-cv-03737 (D.D.C. filed Dec. 15, 2019) (Bloomberg Law).

It seems clear that persons harmed by human rights violations will not have access to federal courts to seek compensation from corporations any time soon.[81] The question thus arises of what tools the United States might employ to hold multinational corporations to human rights standards. This question, we maintain, is not an international law issue: we do not argue that the United States bears an international legal obligation to take measures. Instead, we consider this a matter of desirable policy backed up by reasonable expectations of the international community, and ask how the United States should pursue the goal of deterring legal persons subject to its jurisdiction from participating in grave violations of international human rights law.

II. THE LIMITS OF CRIMINAL PROSECUTIONS UNDER CURRENT LAW

In searching for a public alternative to private human rights litigation in U.S. courts, a natural first step is to consider the options available under existing law. The most salient option would be for U.S. prosecutors to pursue criminal charges against corporations that engage in or facilitate human rights violations overseas. This approach would avoid many of the problems associated with ATS litigation. As will be seen, federal law criminalizes grave human rights violations, providing precise definitions that avoid the need for courts to scrutinize ambiguous evidence of customary international law. The relevant statutes also expressly provide for extraterritorial application, and criminal prosecutions are initiated by executive branch officials, thus avoiding the separation-of-powers concerns raised by ATS cases. Finally, because these statutes require that defendants have substantial connections with the United States, the risk of jurisdictional clashes with foreign sovereigns would be reduced.

The United Nations, NGOs, and scholars have advocated national criminal prosecutions as a means of holding multinational corporations accountable for grave human rights violations. The UN Guiding Principles provide that one of the ways for states to implement the expectation that their enterprises respect human rights worldwide is through "criminal regimes that allow for prosecutions based on the nationality of the perpetrator no matter where the offence occurs."[82] An independent commission of experts recommends that "law enforcement in home States should, as a matter of principle, exercise jurisdiction over all cross-

[81] Access to state courts raises other issues not discussed here, including constitutional limits on the extraterritorial prescriptive jurisdiction of states and possible preemption arguments. For a valuable overview of these questions, see John C. Harrison, *International Law in U.S. Courts Within the Limits of the Constitution*, *in* THE RESTATEMENT AND BEYOND: THE PAST, PRESENT, AND FUTURE OF U.S. FOREIGN RELATIONS LAW 275 (Paul B. Stephan & Sarah H. Cleveland eds., 2020). *See generally* Symposium, *Human Rights Litigation in State Courts and Under State Law*, 3 U.C. IRVINE L. REV. 1 (2013) (extolling virtues of state law and state courts). The drawbacks of civil litigation as a means of enforcing international human rights exist whether in federal or state courts.

[82] UNGP, *supra* note 6, at 4.

border corporate crimes cases that come to their attention."[83] U.S. and foreign legal scholars have likewise pointed to home-state criminal prosecutions as a remedy for corporate human rights violations.[84]

The attractiveness of this alternative is further enhanced by the fact that, in the past two decades, criminal prosecutions have become one of the U.S. government's most important tools for corporate accountability. The DOJ brought at least 2,262 federal corporate prosecutions between 2001 and 2012, across many industries and for a range of crimes including environmental, fraud, antitrust, foreign bribery, and immigration violations.[85] Corporations paid tens of billions of dollars in fines, including more than $34 billion from the world's largest banks.[86] The DOJ has used criminal prosecutions to impose extensive reforms on multinational corporations, requiring them to hire compliance officers, change their business practices, and abandon risky clients and activities worldwide.[87] If these tools were used against human rights violations, they could provide strong incentives for corporations to improve their record. Why not turn the DOJ's formidable enforcement resources towards that goal?

This Section undertakes a close examination of the U.S. legal framework that would apply to corporate criminal prosecutions for human rights violations overseas. In doing so, it focuses on the most severe human rights violations criminalized by U.S. law, namely genocide, torture, grave war crimes, use of child soldiers, and human trafficking. It examines in what circumstances these statutes would apply extraterritorially to multinational corporations and the standards under which human rights violations committed by other actors could be attributed to them. Finally, it examines some of the practical challenges that would arise. Ultimately, while corporate criminal prosecutions under current law are a theoretical possibility, the legal and practical difficulties are so serious that they cannot be considered a viable strategy.

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[83] JUSTICE IAN BINNIE, ANITA RAMASASTRY, WILLIAM BOURDON, SIRI FRIGAARD, NUHU RIBADU, JAMES G. STEWART, MARK TAYLOR, ALEX WHITING & MARTIN WITTEVEEN, THE CORPORATE CRIMES PRINCIPLES: ADVANCING INVESTIGATIONS AND PROSECUTIONS IN HUMAN RIGHTS CASES 10 (2016).

[84] *See* James G. Stewart, *The Turn to Corporate Criminal Liability for International Crimes: Transcending the Alien Tort Statute*, 47 N.Y.U. J. INT'L L. & POL. 121, 133 (2014) ("Like the ATS, corporate criminal liability developed in the United States in order to avoid egregious gaps in accountability."); *see also* Clough, *supra* note 11, at 904 (presenting model legislative provisions "to impose extraterritorial criminal liability on corporations"); Ratner, *supra* note 6, at 533-36 (assessing criminal and other domestic liability regimes as options for corporate human rights accountability); John Gerard Ruggie, *Business and Human Rights: The Evolving International Agenda*, 101 AM. J. INT'L L. 819, 830 (2007) (calling the possibility of holding multinational corporations liable domestically for international crimes "[b]y far the most consequential legal development" in business and human rights).

[85] GARRETT, *supra* note 7, at 301.

[86] VERDIER, *supra* note 7, at 7 tbl.2.

[87] *See* Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 938-57 (2007).

A. *Extraterritorial Human Rights Crimes*

In the past thirty years, Congress has adopted several statutes to criminalize grave human rights violations.[88] The relevant statutes expressly state that they apply outside the territorial limits of the United States. For example, the genocide statute applies "regardless of where the offense is committed," as long as the offender is a U.S. national or is "present in the United States."[89] Likewise, the torture, human trafficking, and child soldiers statutes cover relevant acts committed outside the United States if the offender is a U.S. national or present there,[90] and the war crimes statute applies "whether inside or outside the United States" if the offender is a U.S. national or a member of the country's armed forces.[91]

Could U.S. prosecutors use these statutes to bring criminal charges against U.S. corporations for human rights violations abroad? As a rule, U.S. federal crimes can be committed by corporations and other legal entities as well as by individuals.[92] The scope of corporate criminal liability under U.S. law is extremely broad: a corporation is responsible for all crimes committed by its employees within the scope of their employment and with the intent to benefit the corporation.[93] Thus, in theory, a corporation could be charged for acts that constitute genocide, torture, or war crimes committed abroad by one of its employees or agents.

Nevertheless, corporate prosecutions based on these statutes would face serious legal and practical challenges. "The scope of an extraterritorial statute . . . turns on the limits Congress has (or has not) imposed on the statute's

[88] *See* 18 U.S.C. §§ 1091 (criminalizing genocide), 1596 (criminalizing slavery, human trafficking and related offenses), 2340A (criminalizing torture), 2441 (criminalizing war crimes), 2442 (criminalizing recruitment and use of child soldiers). This article will focus on these statutes, which U.S. officials usually refer to as the core extraterritorial human rights crimes recognized by U.S. law and that fall within the mandate of specialized units of the DOJ and FBI. However, other U.S. federal crimes with extraterritorial application may also be relevant to human rights prosecutions. *See, e.g.*, *id.* §§ 175 (prohibiting biological weapons), 229 (prohibiting chemical weapons), 956 (criminalizing conspiracy to kill, kidnap, maim, or injure persons or damage property in a foreign country), 1203 (criminalizing hostage taking), 2332a (criminalizing use of weapons of mass destruction), 2332f(b)(2) (criminalizing bombing of public places). The United States has not federally criminalized crimes against humanity so far, although legislation to that effect has been proposed. *See, e.g.*, Crimes Against Humanity Act of 2010, S. 1346, 111th Cong. § 2 (2010).

[89] 18 U.S.C. § 1091(e)(2).

[90] *Id.* §§ 1596, 2340A, 2442.

[91] *Id.* § 2441.

[92] The Dictionary Act, 1 U.S.C. § 1 (providing that "the words 'person' and 'whoever'"—which are typically used in criminal statutes—"include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals . . . ."); *see* Stewart, *supra* note 84, at 165-66.

[93] *See* Daniel Richman, *Political Control of Federal Prosecutions: Looking Back and Looking Forward*, 58 DUKE L.J. 2087, 2109 (2009).

foreign application . . . ."[94] For a case to proceed, prosecutors would need to show that it falls within one of the statutory grounds of jurisdiction. All five statutes apply where the alleged offender is a U.S. national. Except for the war crimes statute, they also apply where the alleged offender is found or present in the United States. Thus, prosecutors would have to argue that a corporate defendant is properly characterized as a U.S. national, or that it is present or found in the United States.

As a matter of international law, a corporate entity can clearly be a national of a state. Under the traditional rule, "a corporation has the nationality of the state under the laws of which the corporation is organized."[95] Likewise, "[t]he general assumption in United States legislation is that a corporation's nationality is that of its place of incorporation."[96] The precise language used in the relevant statutes, however, raises complications. The genocide, war crimes, human trafficking, and child soldiers statutes all cross-reference the definition of a "national of the United States" in section 101 of the Immigration and Nationality Act ("INA").[97] As a general matter, the INA is concerned with the immigration status of individuals rather than with the nationality of corporate entities. Does its definition of U.S. nationals encompass U.S.-based corporations?

Under section 101, a "national of the United States" is "(A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States."[98] The INA does not define a "citizen of the United States," but instead lists categories of persons who become nationals and citizens at birth and provides procedures for naturalization, all of which apply solely to individuals.[99] Thus, although in some contexts federal law considers corporations to be "citizens of the United States," the first prong of the INA's definition does not appear to contemplate them.[100] The second prong,

[94] RJR Nabisco, Inc. v. Eur. Cmty., 136 S. Ct. 2090, 2101 (2016).

[95] RESTATEMENT (THIRD) OF THE FOREIGN RELS. L. OF THE U.S. § 213 (AM. L. INST. 1987).

[96] *Id.* § 213 reporters' note 5; *see also* Detlev F. Vagts, *The Corporate Alien: Definitional Questions in Federal Restraints on Foreign Enterprise*, 74 HARV. L. REV. 1489, 1526 (1961) ("When a statute or other provision is concerned with differentiating between citizens and noncitizens, but is silent as to the standards to be used with respect to corporations, the courts tend to look to the place of incorporation.").

[97] 8 U.S.C. § 1101. For the cross-references, see 18 U.S.C. §§ 1091(e)(2)(A), 1596(a)(1), 2441(b), 2442(c)(1). The torture statute, 18 U.S.C. § 2340A(b)(1), simply refers to a "national of the United States" without a cross-reference to the INA or any other definition.

[98] 8 U.S.C. § 1101(a)(22).

[99] *See id.* §§ 1401-1459.

[100] Some federal statutes contemplate that corporations and other legal entities may be "citizens," but these are specific, localized definitions. *See, e.g.*, 19 U.S.C. § 2601(11) (defining any corporation "organized or existing under the laws of the United States" as a "United States citizen" under the convention on cultural property); 46 U.S.C. § 50501 (setting out parameters for citizenship of corporations operating vessels in the "coastwise trade"). U.S. law also "assigns corporations a 'citizenship' for [diversity jurisdiction purposes], but they are not citizens for purposes of the Privileges and Immunities clause of Article IV, Section 2, of the Constitution . . . or of the Privileges and [sic] Immunities clause of the Fourteenth

however, could encompass corporate entities. Section 101 defines a "person" as "an individual or an organization," and the latter term clearly includes corporations.[101] Thus, a corporation would be considered a U.S. national if it "owes permanent allegiance to the United States."[102]

Although there is substantial case law on the notion of "permanent allegiance," all of it arises in the context of determining whether an individual is a U.S. national.[103] We found no cases considering whether a legal person can owe "permanent allegiance" to the United States. However, holding that a corporation organized in the United States owes it "permanent allegiance" would be consistent with the normal rule of corporate nationality.[104] It would also be consistent with the Supreme Court's recent holding in *Daimler* that a corporation whose place of incorporation and principal place of business are in the United States is "at home" in the United States and can be sued there with respect to its worldwide activities.[105] International law recognizes that, under the nationality principle, the state of incorporation may legitimately regulate the worldwide activities of a corporation. Recognizing U.S. corporations as "nationals" would

Amendment." RESTATEMENT (THIRD) OF THE FOREIGN RELS. L. OF THE U.S. § 213, reporters' note 5 (AM. L. INST. 1987) (citations omitted).

[101] 8 U.S.C. § 1101(b)(3). The latter term includes a "corporation, company, partnership, association, trust, foundation or fund . . . ." *Id.* § 1101(a)(28).

[102] *See id.* § 1101(a)(22).

[103] *See, e.g.*, Fernandez v. Keisler, 502 F.3d 337, 339 (4th Cir. 2007) (deferring to Board of Immigration Appeals' interpretation that "national of the United States" does not include naturalization applicants); Perdomo-Padilla v. Ashcroft, 333 F.3d 964, 965 (9th Cir. 2003) (holding that permanent resident alien who has filed application for naturalization does not yet owe "permanent allegiance" to United States); Hughes v. Ashcroft, 255 F.3d 752, 756 (9th Cir. 2001) (rejecting argument that alien can acquire U.S. nationality through lengthy U.S. residency).

[104] *See* Paul W. Ferrell, *The Corporate Alien and Treaty Visa Nationality*, 7 GEO. IMMIGR. L.J. 283, 287 (1993) ("Since a corporate 'person' owes its existence to national or state law, it is reasonable to attribute its allegiance to the nation or state which sanctioned its creation."). In other contexts, Congress has provided definitions of "U.S. national" that encompass corporations organized in the United States. *See, e.g.*, 22 U.S.C. §§ 1641(2), 1642(1), 1643a(1), 1644a(1)(b), 1645a(1)(B) (describing settlement of international claims by U.S. nationals against various foreign countries); 50 U.S.C. § 4131(c) (settling post-World War II claims). In addition, numerous statutory and regulatory provisions, as well as U.S. treaties, define a "U.S. person" to encompass U.S.-based corporations for various purposes. *See, e.g.*, 17 C.F.R. § 230.902(k)(1) (2021) (including "any partnership or corporation organized or incorporated" under U.S. laws within definition of a U.S. person for securities regulation purposes).

[105] Daimler AG v. Bauman, 571 U.S. 117, 137 (2014). The INA does not define "allegiance," but it defines "permanent" as "a relationship of continuing or lasting nature, as distinguished from temporary." 18 U.S.C. § 1101(a)(31). Although it may be possible to reincorporate a U.S.-organized corporation overseas, this is a complex and demanding process that is rarely used in practice. *See also* Vagts, *supra* note 96, at 1526 ("When a statute or other provision is concerned with differentiating between citizens and noncitizens, but is silent as to the standards to be used with respect to corporations, the courts tend to look to the place of incorporation.").

also be consistent with the general rule that organizations are criminally liable to the same extent as individuals.

Nevertheless, there are several arguments corporate defendants could raise to contest application of the human rights statutes to their activities. While the statutes' legislative histories contain no direct indications that Congress meant to exclude corporate liability, they abundantly reflect congressional intent to implement U.S. obligations under treaties.[106] These treaties do not provide for corporate criminal liability, and the Court held in *Jesner* that the international community had not developed "specific, universal, and obligatory" norms of corporate criminal liability sufficient to allow private lawsuits to proceed under the ATS.[107] In our view, these arguments need not prevail in the criminal context, where Congress has incorporated the relevant offenses through specific statutory provisions in a system that recognizes corporate criminal responsibility.[108] However, they could complicate prosecutions.

In addition to situations where the alleged offender is a U.S. national, the genocide, torture, and human trafficking statutes also apply to conduct overseas where the offender is "present in the United States."[109] While this prong appears primarily meant to cover an individual foreign national who commits a crime abroad then seeks refuge in the United States, it may cover corporations with a sufficient U.S. presence. At least one court expressly rejected the argument that a terrorist-financing statute with similar language only applied to natural persons because such a limitation would mean that "individuals could evade . . . criminal . . . liability . . . through the simple act of incorporation."[110] Nevertheless, defendants could argue that this prong was intended solely to

[106] *See* Human Trafficking Protocol, *supra* note 19, at 319, 343-51; Child Soldiers Protocol, *supra* note 19, at 236-41; Convention Against Torture, *supra* note 19, at 85, 113-22; The Geneva Conventions, *supra* note 19, at 31, 85, 135, 287 (1949); Genocide Convention, *supra* note 19, at 278; *see also* 18 U.S.C. §§ 1596 (implementing Human Trafficking Protocol), 2442 (implementing Child Soldiers Protocol), 2340A (implementing Convention Against Torture), 2441 (implementing grave breaches provisions of the Geneva Conventions), 1091(e)(2)(D) (implementing Genocide Convention).

[107] Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1399, 1401 (2018) (stating that demonstration of "a norm that is specific, universal, and obligatory" is threshold question in common law ATS actions (quoting Sosa v. Alvarez-Machain, 542 U.S. 692, 732 (2004))). Defendants could also argue that the "permanent allegiance" prong in section 101's definition of a "U.S. national" was meant only to reflect the special situation of noncitizen nationals of the United States, e.g., people who live in U.S. outlying possessions. *See, e.g.*, *Fernandez*, 502 F.3d at 349-50 (stating that noncitizens who become nationals at birth are described as owing permanent allegiance to the United States).

[108] It is also well established that, under the Define and Punish Clause, Congress can criminalize conduct beyond that which the treaty or customary international law strictly requires. U.S. CONST. art. I, § 8, cl. 10 ("The Congress shall have Power . . . To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations . . . .").

[109] 18 U.S.C. §§ 1091(e)(2)(D), 1596(a)(2), 2340A(b)(2), 2442(c)(3).

[110] Goldberg v. UBS AG, 660 F. Supp. 2d 410, 431-32 (E.D.N.Y. 2009).

implement the United States' obligation to prosecute or extradite individuals and should not apply to corporate defendants.[111]

B. *Modes of Corporate Criminal Liability*

Another point that an opponent would make is that corporations usually are not alleged to have committed human rights violations directly through their employees or agents. The typical claim is that the corporation contributed in some way to violations committed by a local actor, such as the host state's police or armed forces, paramilitary groups, or insurgents.[112] In these scenarios, corporate criminal liability would have to be established through theories such as aiding and abetting or conspiracy. In addition, U.S.-based corporations often operate abroad through subsidiaries, which may be organized in the host country or in a third country. As a result, several corporate layers may separate the U.S. parent from the individuals involved.

The simplest theory under which the crimes of local actors could be attributed to the corporation is aiding and abetting. Anyone who "aids, abets, counsels, commands, induces or procures" the commission of a federal offense is liable as a principal for that offense.[113] A defendant is liable under that section "if (and only if) he (1) takes an affirmative act in furtherance of that offense, (2) with the intent of facilitating the offense's commission."[114] The first prong would capture many situations in which corporations are alleged to have assisted human rights violations overseas. It encompasses not only material aid, such as providing weapons, vehicles, or facilities to the primary offender, but also encouragement, such as soliciting assistance in ensuring a facility's security, repelling insurgents, or making land, labor or other resources available.[115] If such acts are established, the corporation's culpability would turn on its intent.

The nature of the criminal intent required on the defendant's part is likely to prove critical. The typical allegation is that the defendant provided assistance to the primary offender, hoping to achieve a noncriminal result. For example, a defendant faced with attacks by local insurgent groups may have allowed

[111] In addition, while U.S. corporations are "at home" in the United States and the exercise of criminal jurisdiction over them even for offenses committed abroad is unlikely to raise constitutional issues, foreign corporations might argue that U.S. courts lack personal jurisdiction over them for such acts. The Supreme Court has not decided whether the limits on personal jurisdiction over foreign corporate entities imposed on the states by the Fourteenth Amendment also apply to federal criminal proceedings in U.S. courts and, if so, what connections are required. *See* Verdier, *supra* note 8, at 276-82.

[112] *See* Clough, *supra* note 11, at 905 ("[T]he corporation is said to have provided support to those who actually committed the abuses, either by encouraging them and/or by providing some form of assistance.").

[113] 18 U.S.C. § 2(a).

[114] Rosemond v. United States, 572 U.S. 65, 71 (2014); *see also* WAYNE R. LAFAVE, CRIMINAL LAW 887 (6th ed. 2017); DANIEL C. RICHMAN, KATE STITH & WILLIAM J. STUNTZ, DEFINING FEDERAL CRIMES 467 (2014).

[115] *See* Clough, *supra* note 11, at 909.

government planes to use its airstrip and provided them with fuel to conduct surveillance flights. In such a case, the defendant may not have intended to facilitate the government's commission of war crimes by bombing local villages. It may have known, however, that such acts were likely. To be liable as an aider or abettor, is it sufficient that the defendant knew that the primary offender was likely to commit the crime? Or must it share the primary offender's criminal intent?

This question has been a source of lengthy debate in civil suits under the ATS, leading to a circuit split.[116] Because these cases were concerned with civil liability, their analyses relied primarily on international law and federal common law tort principles. What standard would apply under federal criminal law? According to the Supreme Court, criminal aiding and abetting requires "a state of mind extending to the entire crime. . . . [T]he canonical formulation . . . is Judge Learned Hand's: . . . a defendant must not just 'in some sort associate himself with the venture,' but also 'participate in it as in something that he wishes to bring about' and 'seek by his action to make it succeed.'"[117] On its face, this standard suggests that "[a]n act of facilitation with mere knowledge that the act will assist the principal is not sufficient."[118]

In the context of human rights offenses, this is very high standard. Prosecutors would have to establish that the corporation shared the perpetrator's specific intent, for example to commit genocide, and provided assistance with the purpose to aid or encourage the crime. This would likely prove difficult if not

[116] In a case brought against hundreds of corporations accused of aiding and abetting South Africa's apartheid regime, the Second Circuit held that a defendant could be held liable in an ATS suit for aiding and abetting international law violations. Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 260 (2d Cir. 2007) (per curiam). Judge Katzmann held that courts should look to international law for the aiding and abetting standard and concluded that it required that the defendant act with the purpose of facilitating the crime's commission. *Id.* at 275 (Katzmann, J., concurring). Judge Hall held that courts should look to federal common law and concluded that, under tort principles, the standard was knowledge. *Id.* at 289-91 (Hall, J., concurring). *See also* Doe v. Nestle US, Inc., 766 F.3d 1013, 1024 (9th Cir. 2014) (declining to decide whether purpose or knowledge standard applies); Aziz v. Alcolac, Inc., 658 F.3d 388, 394 (4th Cir. 2011) (adopting purpose standard); Doe v. Exxon Mobil Corp., 654 F.3d 11, 39 (D.C. Cir. 2011) (adopting knowledge standard); Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 258-59 (2d Cir. 2009) (adopting Judge Katzmann's purpose standard). The United States argued in *Nestlé* against the use of aiding and abetting liability in ATS litigation, but the Court declined to decide the question. 141 S. Ct. 1931, 1937-38 (2021).

[117] *Rosemond*, 572 U.S. at 76 (quoting Nye & Nissen v. United States, 336 U.S. 613, 619 (1949) (quoting United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938))).

[118] Baruch Weiss, *What Were They Thinking?: The Mental States of the Aider and Abettor and the Causer Under Federal Law*, 70 FORDHAM L. REV. 1341, 1349 (2002); *see also* United States v. Bryant, 461 F.2d 912, 920 (6th Cir. 1972) ("The defendant must act or fail to act with the specific intent to facilitate the commission of a crime by another . . . . '[b]ut knowledge that a crime is being committed, even when coupled with presence at the scene, is generally not enough to constitute aiding and abetting.'" (citations omitted) (quoting United States v. Garguilo, 310 F.2d 249, 253 (2d Cir. 1962))).

impossible for most alleged corporate human rights violations. While some cases have suggested that knowledge may be sufficient, Hand explicitly rejected this suggestion, noting that definitions of aiding and abetting "have nothing whatever to do with the probability that the forbidden result would follow upon the accessory's conduct" and that "[a]ll the words used . . . carry an implication of purposive attitude towards it."[119] Most federal courts have adopted Hand's reasoning.[120]

Even if the appropriate mental state could be attributed to the defendant, another complex issue would arise. In most cases, the primary violator, not being a U.S. national or present in the United States, will be beyond the reach of the relevant criminal statute. Would this bar prosecution of a U.S. corporation for aiding and abetting? To convict an accomplice, "it is of course . . . necessary for the prosecution to show . . . that the crime was committed . . . . If the acts of the principal in the first degree are found not to be criminal, then the accomplice may not be convicted."[121] If the principal's conduct overseas is not covered by the statute, the defendant would argue that it is not a crime as far as U.S. law is concerned and that an accomplice cannot be convicted.[122]

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[119] *Peoni*, 100 F.2d at 402.

[120] *See* Wilson-Bey v. United States, 903 A.2d 818, 831 (D.C. Cir. 2006) ("Although *Peoni* was decided sixty-eight years ago, it remains the prevailing authority defining accomplice liability."); U.S. DOJ, Crim. Res. Manual § 2474 (2020) ("The elements necessary to convict under aiding and abetting theory are [inter alia] 1. [t]hat the accused had specific intent to facilitate the commission of a crime by another; 2. [t]hat the accused had the requisite intent of the underlying substantive offense . . . ."); MODEL PENAL CODE § 2.06(3)(a) (AM. L. INST. 1985) (requiring "the purpose of promoting or facilitating the commission of the offense"); LAFAVE, *supra* note 114, at 900; G. Robert Blakey & Kevin P. Roddy, *Reflections on* Reves v. Ernst & Young*: Its Meaning and Impact on Substantive, Accessory, Aiding Abetting and Conspiracy Liability Under RICO*, 33 AM. CRIM. L. REV. 1345, 1389-90 (1996) ("The federal courts of appeals now uniformly use 'intent' as the necessary state of mind for accomplice liability . . . ."). *But see* Weiss, *supra* note 118, at 1344 (arguing that while the *Peoni* standard is widely accepted, in practice "there is no clear answer to the 'knowledge versus purposeful intent' question"). In *Rosemond*, the Supreme Court's most recent substantial statement on aiding and abetting, the majority restated the *Peoni* standard and stated that conviction requires "a state of mind extending to the entire crime" and that the accomplice must "intend[] to facilitate that offense's commission." *Rosemond*, 572 U.S. at 76. Other passages, however, seem to allude to knowledge as the relevant standard, which according to Justice Alito's dissent "leaves our case law in the same, somewhat conflicted state that previously existed." *Id.* at 1253 (Alito, J., concurring in part and dissenting in part).

[121] LAFAVE, *supra* note 114, at 885, 915 ("[T]he guilt of the principal must be established at the trial of the accomplice as part of the proof on the charge against the accomplice."); *see also* RICHMAN ET AL., *supra* note 114, at 468 ("[A]ccomplice liability is contingent upon the actual occurrence of an offense."); Clough, *supra* note 11, at 906 ("[I]f there is no principal offense, there can be no liability for complicity.").

[122] According to the Supreme Court, language that governs the territorial scope of a federal offense is part of the offense's substantive definition, not purely jurisdictional. Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 253-54 (2010).

Another mode of criminal liability that could be used to prosecute corporate human rights violations is conspiracy. In general, a criminal conspiracy consists of an agreement between two or more persons with intent to commit an unlawful act.[123] Under federal law, a conspiracy is both a crime and a mode of liability, allowing each conspirator to be charged with crimes committed by others in furtherance of the conspiracy.[124] The notoriously broad conspiracy statute is a workhorse of federal prosecutors, who use it frequently in corporate cases. There is abundant case law extending it to extraterritorial offenses, and several of the criminal statutes prohibiting human rights violations specifically encompass conspiracy.[125] Thus, if employees were parties to a conspiracy with local actors to commit these crimes, the corporation could in principle be held criminally liable both for conspiracy and for the underlying offense.[126]

However, using conspiracy in this manner would raise some of the same thorny questions discussed above. First, to be liable for conspiracy, a defendant seemingly must have "joined in the illegal agreement with the intent of helping it succeed in its criminal purpose."[127] If this is correct, then a corporation could not be held liable for genocide, war crimes or torture abroad unless it possessed the criminal intent required for these crimes. Second, while—unlike for aiding and abetting—the planned offense need not be completed, the object of the conspiracy must be to commit a federal offense. If the co-conspirator who engages in the prohibited conduct abroad is not covered by the relevant federal criminal statute, can it be said that the corporation conspired to commit a U.S.

[123] *See* LAFAVE, *supra* note 114, at 823.

[124] 18 U.S.C. § 371; Pinkerton v. United States, 328 U.S. 640, 643 (1946). "[The *Pinkerton* doctrine] provides that a person can commit an offense not only by engaging in the forbidden conduct himself but also by participating in a conspiracy that leads a confederate to engage in that conduct." United States v. Ashley, 606 F.3d 135, 143 (4th Cir. 2010).

[125] *See* Verdier, *supra* note 8, at 274 (summarizing case law in lower courts: "[I]f the underlying offense applies extraterritorially, conspiracy to commit that offense also does, regardless of whether the overt act . . . occurs within the United States."); *see also id.* at 274 n.206. The genocide, torture, child soldiers, and human trafficking statutes specifically encompass conspiracies to commit these crimes. 18 U.S.C. §§ 1091(d), 1596, 2340A(c), 2442(b). The war crimes statute does not explicitly encompass all conspiracies to commit war crimes, but defines several specific war crimes to include conspiracies to commit them. *Id.* § 2441(d)(1)(A)-(H). The general conspiracy statute, 18 U.S.C. § 371, should apply to other war crimes, although courts may condition its application on establishing that the exercise of U.S. jurisdiction is consistent with international law. *Cf.* United States v. Ali, 718 F.3d 929, 941-42 (D.C. Cir. 2013) (dismissing charge of conspiracy to commit piracy as inconsistent with international law).

[126] The statute also requires that an overt act be committed in furtherance of the conspiracy. 18 U.S.C. § 371. The overt act need not itself be committed by the corporation and may be very minimal, so this requirement would not likely be a significant obstacle to prosecution.

[127] United States v. Svoboda, 347 F.3d 471, 479 (2d Cir. 2003); *see also* United States v. Falcone, 109 F.2d 579, 581 (2d Cir. 1940), *aff'd* 311 U.S. 205 (1940) (noting that conspirator "must in some sense promote the[] venture himself, make it his own, have a stake in its outcome"); LAFAVE, *supra* note 114, at 837 ("[I]t is intent rather than knowledge which is usually required . . . .").

federal crime?[128] This problem might be circumvented by using conspiracy as an attribution rule: if each conspirator is treated as if he had committed the crime himself, then the corporation could be held liable if it is itself caught by the statute, regardless of whether its co-conspirators are. Nevertheless, conspiracy, like aiding and abetting, would raise complex legal questions that could impede prosecutions.

Finally, in order to attribute criminal responsibility to a U.S. corporation, prosecutors would often need to overcome corporate separateness. Multinational corporations typically do not conduct business in foreign countries directly but rather through subsidiaries organized in the host state or in third countries.[129] This structure allows the corporation to achieve legitimate business objectives, such as risk management, tax planning, and securing benefits under trade and investment treaties. It also means, however, that the employees involved in human rights violations will not work directly for the U.S. corporation. Under the *respondeat superior* doctrine, their actions can be attributed to the relevant subsidiary, but that subsidiary may not be covered by the relevant statute—not being itself a U.S. national or present in the United States—or subject to the jurisdiction of U.S. courts.

Under what circumstances can the parent be held criminally liable for the conduct of its subsidiaries? In the few decided cases on this question, courts have held that even where the parent owns all of the subsidiary's shares and appoints all of its directors, the subsidiary's separate legal personality must prima facie be respected.[130] The parent may be responsible for its subsidiary's conduct under either of two theories: alter ego or agency. The alter ego theory applies in cases where "a parent company totally dominates and controls its subsidiary"[131] and runs it "in accordance with [the parent]'s policies and objectives, and with independent existence in form only."[132] In applying it, courts look at all relevant facts and circumstances, including whether the parent and subsidiary have common stock ownership, directors, officers, and departments; whether they file consolidated financial statements and tax returns; whether the parent incorporated the subsidiary, finances it, pays its expenses, sends it business, or uses its property as its own; and whether the subsidiary observes corporate formalities and keeps its operations separate.[133]

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[128] *See* LAFAVE, *supra* note 114, at 861 (discussing purported "pure legal impossibility" defense to conspiracy, which "only means . . . that the requisite conspiratorial objective is lacking"); *see also In re* Sealed Case, 223 F.3d 775, 779 (D.C. Cir. 2000) ("[A] hunter cannot be convicted of attempting to shoot a deer if the law does not prohibit shooting deer in the first place . . . . Obviously a charge of conspiracy to shoot a deer would be equally untenable.").

[129] *See* Clough, *supra* note 11, at 915 ("The rationale for interposing subsidiaries is easily understood; it minimizes risk and insulates the parent.").

[130] United States v. Jon-T Chems., Inc., 768 F.2d 686, 691 (5th Cir. 1985).

[131] *Id.*

[132] Nat'l Dairy Prods. Corp. v. United States, 350 F.2d 321, 327 (8th Cir. 1965).

[133] *Jon-T Chems., Inc.*, 768 F.2d at 691-92.

Under the second theory, the parent may be held liable where "[t]he subsidiaries were agents of the parent, and the employees of the subsidiaries acted as sub-agents of the parent corporation."[134] Its main advantage for prosecutors is that it does not require that the subsidiary be the parent's alter ego for all purposes. It is sufficient that the subsidiary "act on the principal's behalf and subject to the principal's control" in connection with the transaction or conduct at issue.[135] In 1989, the U.S. government successfully argued that the corporate parent could be held liable under this theory while pursuing criminal corporate liability against Exxon Corporation for the grounding of their tanker, the *Exxon Valdez*, by their subsidiary, Exxon Shipping Company.[136] In practice, however, it is unclear whether agency would be easier to establish than the alter ego theory. Courts have made it clear that mere ownership of a subsidiary through which the parent does business does not amount to an agency relationship, and have looked to factors indicating that the parent exercised more control than simply voting its stock or appointing board members.[137]

Both theories would require a complex, highly fact-sensitive inquiry into the relationship between the companies. In general, courts have applied the alter ego theory only where the parent and subsidiary were highly enmeshed, to the point of total dominance and control of the subsidiary by the parent. If most multinationals take care—as their attorneys advise them—to conduct their overseas operations through subsidiaries that observe corporate formalities, have their own directors and employees, and act with some degree of genuine independence, attributing criminal responsibility to the parent likely will prove difficult. The agency theory provides a possible alternative, but it remains largely untested in the criminal context and appears to require substantial control by the parent over the criminal conduct.

C. *Practical Challenges*

Beyond these difficult legal questions, attempts to prosecute U.S. corporations for human rights violations overseas would also raise substantial practical challenges. The United States' meager record of individual

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[134] United States v. Johns-Manville Corp., 231 F. Supp. 690, 698 (E.D. Pa. 1964).

[135] RESTATEMENT (THIRD) OF THE L. OF AGENCY § 1 (AM. L. INST. 2006). The agency theory simply consists of applying to subsidiaries the same *respondeat superior* rule under which the conduct of individual employees or agents is imputed to a corporation. *See* Stephen Raucher, Comment, *Raising the Stakes for Environmental Polluters: The* Exxon Valdez *Criminal Prosecution*, 19 ECOLOGY L.Q. 147, 152 (1992).

[136] *See* Roberto Iraola, *Criminal Liability of a Parent Company for the Conduct of Its Subsidiary: The Spillover of the* Exxon Valdez, 31 CRIM. L. BULL. 3, 7-9 (1995) (discussing theories of liability presented by government in its prosecution of Exxon Corporation).

[137] *See* RESTATEMENT (THIRD) OF THE L. OF AGENCY § 1 reporter's note f(2) (AM. L. INST. 2006); Raucher, *supra* note 135, at 153-56 ("The level or form of control necessary to create an agency relationship between a parent corporation and its wholly owned subsidiary has not been well articulated by the courts. However, the mere existence of a parent-subsidiary connection does not demonstrate agency.").

prosecutions under the relevant statutes illustrates some of these obstacles. Under an executive order issued in 1998, all U.S. departments and agencies must "maintain a current awareness of United States international human rights obligations that are relevant to their functions and . . . perform such functions so as to respect and implement those obligations fully."[138] Federal law enforcement agencies have implemented this requirement by establishing special units to investigate and prosecute international human rights violations. In congressional testimony in 2009, Lanny Breuer, then head of the DOJ's Criminal Division, outlined the Department's "very robust enforcement program" and its commitment to "seek justice for victims of human rights violations and war crimes" through "the use of all of our available tools to see that justice is done."[139]

On closer examination, the government's enforcement program is less ambitious than these units' mission statements suggest. In practice, it consists primarily of identifying and prosecuting individual human rights offenders who have immigrated to or are otherwise present in the United States. Once these individuals are identified, they are almost never prosecuted under the statutes described above. Instead, the government indicts violators for failing to disclose their participation in overseas atrocities on immigration forms and seeks to extradite or deport them. ICE boasts that its Human Rights Violations and War Crimes Unit has arrested over 460 individuals since 2003 in connection with human rights violations and removed or obtained the departure of more than 1,000 "known or suspected human rights violators."[140]

In sharp contrast, only a handful of individuals have been prosecuted for human rights violations. To our knowledge, no one has ever been prosecuted under the genocide or child soldiers statutes, and war crimes prosecutions have been limited to members of the U.S. armed forces and U.S. contractors.[141] Only one individual has ever been indicted and tried under the torture statute. Chuckie Taylor, son of Liberian dictator Charles Taylor, was tried and convicted in

[138] Exec. Order No. 13,107, 3 C.F.R. § 234 (1999).

[139] *No Safe Haven: Accountability for Human Rights Violators, Part II: Hearing Before the Subcomm. on Hum. Rts. & the L. of the S. Comm. on the Judiciary*, 111th Cong. 74, 75-76 (2009) [hereinafter *No Safe Haven*] (statement of Lanny A. Breuer, Assistant Att'y Gen., U.S. DOJ).

[140] *Human Rights Violations and War Crimes*, U.S. ICE, https://www.ice.gov/investigations/human-rights-violations-war-crimes [https://perma.cc/8GNE-F7R8] (last updated Mar. 10, 2021). *See generally* Chimène I. Keitner, *Prosecute, Sue, or Deport? Transnational Accountability in International Law*, 164 U. PA. L. REV. ONLINE 1 (2015) (discussing deportations of human rights violators by U.S. government).

[141] There have been many prosecutions under the human trafficking statutes, but they relate primarily to smuggling of persons into the United States. *See, e.g.*, United States v. Maka, 237 F. App'x 225, 227 (9th Cir. 2007) (holding that human trafficking claims are not duplicative of human smuggling claims).

October 2008 and is serving a ninety-seven-year sentence.[142] His well-publicized trial illustrates the difficulties faced by prosecutors. After his arrest in 2006, Taylor raised numerous legal objections, including constitutional issues that took years to resolve.[143] The trial lasted six weeks and "the trial team faced enormous logistical challenges in transporting, lodging, and then preparing witnesses from several African and European countries."[144] Although DOJ and FBI officials touted the case as a major accomplishment, it has not been repeated.[145]

Many factors make prosecutions uniquely challenging. Although the relevant criminal statutes now have lengthy or no statutes of limitations and broad extraterritorial application, they do not cover violations that occurred before the statutes were adopted or expanded. Even in cases where the statutes might apply, identifying and investigating targets is difficult because "the majority of these abuses occur in foreign countries where access to witnesses and evidence is often limited" and "the violator is often protected by a regime that is sympathetic . . . or politically embarrassed by the allegations of human rights abuses."[146] Often, evidence collection is impaired by burdensome and lengthy procedures under formal international arrangements such as Multilateral Legal Assistance Treaties.[147] Even where the host state is willing to cooperate, it may "lack[] the law, equipment, material or skills necessary to obtain evidence."[148]

In the corporate context, some of these difficulties may be even more serious. Victims, witnesses, informants, and whistleblowers "may be subject to social pressures from their community, the corporate entity or co-workers to remain silent or may be subject to significant personal risks such as harassment, intimidation and threats of violence."[149] They may require protective measures or resettlement.[150] Prosecutions require special expertise in collecting and analyzing evidence, including "an understanding of corporate and management structures or recovering and analysing large amounts of financial, commercial,

[142] Press Release, U.S. DOJ, Roy Belfast Jr., A/K/A Chuckie Taylor, Sentenced on Torture Charges (Jan. 9, 2009), https://www.justice.gov/opa/pr/roy-belfast-jr-aka-chuckie-taylor-sentenced-torture-charges [https://perma.cc/7CSR-7YK2].

[143] *See* United States v. Belfast, 611 F.3d 783, 803-06, 809 (11th Cir. 2010) (detailing Taylor's numerous challenges to his prosecution, including allegations that Torture Act was unconstitutional and his trial was fundamentally unfair).

[144] *No Safe Haven*, *supra* note 139, at 77.

[145] In June 2020, the DOJ arrested and indicted Michael Sang Correa, a Gambian national, on torture and related charges. *See* Press Release, U.S. DOJ, Gambian Man Indicted on Torture Charges (June 11, 2020), https://www.justice.gov/opa/pr/gambian-man-indicted-torture-charges [https://perma.cc/Q5FH-3NVZ].

[146] *No Safe Haven*, *supra* note 139, at 89 (statement of Arthur M. Cummings, Exec. Assistant Dir., FBI).

[147] BINNIE ET AL., *supra* note 83, at 34.

[148] *Id.* at 34.

[149] *Id.* at 64.

[150] *Id.* at 66-67.

electronic, telecommunications and digital data" especially when "some of that evidence may be under the control of the relevant corporate actor."[151] Corporate defendants "may also have greater financial, legal and technical resources to fight a case than other investigative targets."[152] These factors, in addition to the complex legal questions that would arise, likely explain why federal prosecutors have so far shown little interest in pursuing such cases.

Proponents of corporate human rights prosecutions might argue that these considerations should not matter. After all, only a handful of corporate criminal prosecutions of any sort have ever gone to trial. Defendants usually refrain from raising even plausible legal arguments, preferring to settle charges through non-prosecution agreements ("NPAs"), deferred prosecution agreements ("DPAs"), or plea agreements.[153] Their decisions appear to arise from widespread fear—after the government's prosecution of accounting firm Arthur Andersen led to its collapse—that a criminal trial and conviction would amount to a death sentence.[154] Thus, some critics allege, the DOJ can effectively hold firms to ransom, forcing them to pay enormous fines to settle weak cases.[155] Other critics, on the contrary, allege that DOJ prosecutors lack the capacity and will to bring large corporations and their senior officials to trial, instead settling for large, headline-grabbing fines and internal compliance programs.[156]

Either argument would suggest that the challenges described above might not be real obstacles to corporate human rights prosecutions and settlements based on the standard DOJ modus operandi. There is reason to doubt, however, that this strategy would be successful for human rights prosecutions. Even though corporations almost always settle criminal cases, they do so in the shadow of a credible threat of prosecution. The challenges of prosecuting overseas human rights violations are so severe as to undermine the credibility of the government's threat. The stigma of admitting to major human rights violations would likely be much more serious than for run-of-the-mill fraud, immigration

[151] *Id.* at 2.

[152] *Id.*

[153] Brandon L. Garrett, *The Changing Face of Corporate Prosecutions*, 40 CHAMPION 48, 49 (2016) (noting that public corporations receive deferred or non-prosecution agreements in more than half of criminal corporate liability cases).

[154] *See* Julia Schiller, Note, *Deterring Obstruction of Justice Efficiently: The Impact of* Arthur Andersen *and the Sarbanes-Oxley Act*, 63 N.Y.U. ANN. SURV. AM. L. 267, 300-02 (2007).

[155] *See, e.g.*, Richard A. Epstein, Opinion, *The Deferred Prosecution Racket*, WALL ST. J., Nov. 28, 2006, at A3.

[156] *See, e.g.*, JESSE EISINGER, THE CHICKENSHIT CLUB: WHY THE JUSTICE DEPARTMENT FAILS TO PROSECUTE EXECUTIVES (2017) (arguing that DOJ prosecutors struggle to hold both individual executives and "too big to fail" corporations accountable for criminal corporate actions); Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, N.Y. REV. (Jan. 9, 2014), https://www.nybooks.com/articles/2014/01/09/financial-crisis-why-no-executive-prosecutions/ (criticizing DOJ prosecutors for failing to prosecute executives after 2008 financial crisis).

or environmental violations, making corporate defendants more reluctant to settle a weak prosecution case.

In sum, even though existing federal criminal statutes provide a theoretical basis for prosecuting U.S. corporations for participating in grave human rights violations overseas, such prosecutions would raise severe legal and practical challenges. Prosecutors have so far brought no such cases, and the chances of their successfully doing so in the near future appear slim.

III. ADAPTING THE FCPA MODEL TO PROTECT HUMAN RIGHTS

To this point we have established that the United States does not have adequate legal tools to hold corporations accountable for human rights abuses. The ATS project has foundered and political support for refloating it seems absent. The criminal arsenal available to federal prosecutors has substantial shortcomings. If the United States is to address the problem of corporate complicity in human rights violations, new legislation is needed. In this Section, we describe the steps that would fill this gap and have a realistic chance of becoming law.

We envision the adoption of a statute modeled on the criminal provisions of the FCPA that would proscribe involvement in human rights violations. We argue that the process of adopting this legislation would lead to clear rules and avoid excessive delegation of policymaking to the judiciary. It would put control over human rights policy in the hands of career federal prosecutors, rather than in a decentralized mix of civil society activists, plaintiffs' attorneys, and assorted interest groups. It also would give the United States a tool with which to goad other states to cooperate in human rights enforcement.

A. *The FCPA Model and Corporate Human Rights Compliance*

The regulation of corporate bribery of foreign officials has exploded in the twenty-first century. A U.S. program established administratively in 1974 and ratified by Congress in 1977 grew exponentially in the new century.[157] An international treaty, the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, formalized the recognition of other rich states that the U.S. program had created a new norm for transnational regulation.[158] Throughout the new century the rate and significance of U.S. prosecutions grew, with several important states developing similar programs and no states actively resisting U.S. investigations and prosecutions. Anticorruption law went from a tertiary regulatory concern to the heart of compliance activity of multinational companies.[159]

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[157] *See* Rachel Brewster, *Enforcing the FCPA: International Resonance and Domestic Strategy*, 103 VA. L. REV. 1611, 1646-56 (2017) (summarizing data on FCPA prosecutions and fines).

[158] OECD Convention, *supra* note 10.

[159] *See* Mike Koehler, *A Foreign Corrupt Practices Act Narrative*, 22 MICH. ST. INT'L L. REV. 961, 1016-20 (2014); Rebecca L. Perlman & Alan O. Sykes, *The Political Economy of*

Four aspects of the FCPA make up what we call the FCPA model. First, it rests on a statute that defines with some clarity the elements of the offense as well as particular defenses.[160] Second, it imposes criminal liability on corporations as well as their officers, employees, shareholders, and agents.[161] Third, it leaves the issue of victim compensation to the sentencing phase, rather than providing victims with a direct action to sue independently of any prosecution.[162] Fourth, it links jurisdiction principally to access to U.S. capital markets, although it also relies on corporate and individual nationality.[163] The FCPA does other things, but these features point us in the direction of better human rights enforcement. Reviewing the origins of the FCPA, how its impact has changed, and how U.S. exceptionalism in transnational anticorruption law morphed into U.S. leadership offers lessons for the design and implementation of human rights legislation.

Congress adopted the legislation on a bipartisan basis principally to ratify a claim by the Securities and Exchange Commission ("SEC") about its existing authority to deal with a scandal that threatened U.S. geopolitical interests as much as economic interests. An SEC investigation into illegal corporate donations during the 1972 presidential election turned up evidence of widespread bribery of foreign officials by major U.S. international businesses.[164] The SEC in response asserted that, as to firms over which it had jurisdiction (persons defined as "issuers" under U.S. securities law), it had the authority to treat bribes to obtain or retain business as a form of fraud on investors.[165] After a short period of administrative enforcement of this standard, Congress enacted a law that both endorsed the theory and established bribery of foreign public officials as a criminal offense.[166]

The FCPA extends criminal liability not just to issuers and their officers, shareholders, employees, and agents, but also to nonissuers with U.S. nationality and to non-U.S. persons (in both cases expressly encompassing legal entities) who carry out significant acts on U.S. territory as part of a bribery scheme. This exercise of prescriptive jurisdiction thus rests on fairly traditional international

the Foreign Corrupt Practices Act: An Exploratory Analysis, 9 J. LEGAL ANALYSIS 153, 173-74 (2017).

[160] 15 U.S.C. §§ 78dd-1 to -3.

[161] *Id.*

[162] *Id.*

[163] *Id.*

[164] U.S. SEC, 94TH CONG., REP. ON QUESTIONABLE & ILLEGAL CORPORATE PAYMENTS & PRACTICES 3 (Comm. Print 1976).

[165] *See* Securities Act Release No. 5466, 39 Fed. Reg. 10,237, 10,237 (Mar. 19, 1974) (announcing that conviction for foreign bribery is material fact that must be disclosed to investors); U.S. SEC, 94TH CONG., REP. ON QUESTIONABLE & ILLEGAL CORPORATE PAYMENTS & PRACTICES (Comm. Print 1976). *See generally* Note, *Disclosure of Payments to Foreign Government Officials Under the Securities Acts*, 89 HARV. L. REV. 1848 (1976) (discussing multiple bases for requiring disclosure of payments to foreign officials).

[166] 15 U.S.C. §§ 78dd-1 to -3.

law conceptions of regulatory authority (power over territory and nationals) plus a pragmatic recognition that access to U.S. capital markets could be made conditional on acceptance of a particular regulatory regime.[167]

For more than two decades, prosecutors did very little with this new criminal jurisdiction. A handful of corporate officers went to jail for condoning bribes and the SEC occasionally flexed its muscles to impose administrative sanctions, but criminal prosecutions against large multinational corporations were rare. The reason is a matter for debate, and no single explanation will suffice. But an important factor was the unique position of U.S. law relative to the rest of the rich world: the United States criminalized conduct that other countries supported with tax subsidies. U.S. firms complained that this environment placed them at a competitive disadvantage when doing business in the expanding global economy after 1980. Although Congress did not cut these firms any slack, prosecutors also did not seek to test the limits of their powers against large multinational corporations.[168]

At the end of the 1990s, however, the United States increased the pressure on other rich nations to take steps to suppress corporate bribery, with the implicit threat of stronger unilateral action if they did not.[169] The OECD Convention resulted. This multilateral instrument requires state parties to criminalize and prosecute corporate bribery of the sort regulated by the FCPA.[170] It relies on peer review and informal consultations for enforcement rather than any formal governance.[171] Whether because of, or in spite of, its weak institutional structure, national behavior changed quickly. The United States significantly increased both the number and impact of its criminal prosecutions, and several other states responded with enforcement of the legislation that the Convention had obligated them to adopt. Nor does it appear that prosecutors held back when cases raised foreign policy concerns, as shown by the cases brought against significant state-owned foreign firms.[172] These steps created a virtuous circle of stepped-up self-enforcement by subject corporations, driving others to take similar measures so

[167] Issuers do face a separate legal obligation that does not apply to other persons covered by the FCPA, namely a duty to maintain accurate books and records as well as internal controls to ensure accurate records. *Id.* § 78m(b)(2)(A). These provisions are subject to both criminal sanctions enforced by the DOJ and administrative sanctions applied by the SEC. To the extent a multinational firm uses a consolidated accounting method to keep its books, this provision also has the effect of piercing the corporate veil within a corporate group as to any violations of these provisions.

[168] *See* Brewster, *supra* note 157, at 1646-47 (noting that although capacity of FCPA enforcement agencies grew in the 1990s, number of resulting actions increased more slowly).

[169] *See* Daniel K. Tarullo, *The Limits of Institutional Design: Implementing the OECD Anti-Bribery Convention*, 44 VA. J. INT'L L. 665, 668-80 (2004).

[170] *See* OECD Convention, *supra* note 10.

[171] *Id.*

[172] *See, e.g.*, Deferred Prosecution Agreement at 1, United States v. Statoil, ASA, No. 06-cr-960 (S.D.N.Y. Oct. 11, 2006), https://www.justice.gov/criminal-fraud/case/united-states-v-statoil-asa-court-docket-number-06-cr-960 [https://perma.cc/UUX2-XS8F].

as not to be isolated as indifferent to corruption risk.[173] Today large multinational corporations devote significant resources to both prevention and investigation of corrupt payments to foreign officials, whether made directly out of corporate resources or through independent middlemen such as distributors.[174]

Notably, these developments have taken place without bringing private civil suits into the enforcement mix. The FCPA does not provide for private suits, and an earlier effort to use civil RICO suits as an indirect means of FCPA enforcement produced few suits and in any event is no longer tenable in light of the Supreme Court's more recent jurisprudence.[175] Rather, the contemporary international regime of anticorruption enforcement, a significant regulatory success, emerged through state agencies (prosecutors and diplomats) acting on their own, without any competitive pressure from parallel decentralized enforcement by private actors.

B. *Legislation and Legal Clarity*

First and foremost, our proposal requires Congress to adopt, and the President to sign, new legislation imposing criminal liability for corporate participation in human rights abuses. This legislation should address several legal problems inherent in any legislation criminalizing transnational corporate conduct. It should specify the jurisdictional scope of the legislation, an obligation implicit in the Supreme Court's evolving jurisprudence on the presumption against extraterritoriality. It should define the proscribed conduct with precision, ideally through cross-references to preexisting criminal statutes. It should address the mens rea issue in a manner that accounts for the specific issues raised when assigning culpability to an entity comprising many actors subject to incomplete control and supervision. And finally, it should resolve issues of criminal agency presented by corporate structure.

1. Scope of Jurisdiction

The FCPA applies its proscriptions to three classes of defendants. The first and least controversial class comprises "any domestic concern, . . . or . . . any officer, director, employee, or agent of such domestic concern or any

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[173] FCPA RESOURCE GUIDE, *supra* note 9, at 52-53, 56-58.

[174] *See* Mike Koehler, *Foreign Corrupt Practices Act Ripples*, 3 AM. U. BUS. L. REV. 391, 395-402 (2014) ("[P]re-enforcement action professional fees and expenses are typically the greatest financial consequence to a company resolving an FCPA enforcement action.").

[175] *See* Env't Tectonics v. W.S. Kirkpatrick, Inc., 847 F.2d 1052, 1061 (3d Cir. 1988) (upholding RICO civil suit based on facts arising out of FCPA prosecution), *aff'd on other grounds*, 493 U.S. 400, 407-08 (1990) (act of state doctrine does not apply to claim). *But see* RJR Nabisco, Inc. v. Eur. Cmty., 136 S. Ct. 2090, 2106 (2016) (limiting civil suits under RICO to violations producing domestic injury to persons or property). One would suppose that injuries resulting from bribery of foreign officials would occur in places where foreign officials exercised authority, which would not be the United States.

stockholder thereof acting on behalf of such domestic concern."[176] A domestic concern is then defined as "any individual who is a citizen, national, or resident of the United States" and any legal person that either "has its principal place of business in the United States" or is organized under U.S. law.[177] Extending criminal liability for human rights violations to this class of persons accords with fundamental principles of international law. A state has the clear right to regulate its subjects, both natural and legal, wherever they might be found.[178] Moreover, states arguably have an obligation under international law to deter their subjects from committing grave violations of human rights law.

The second class comprises "any issuer which has a class of securities registered pursuant to [federal securities law] or which is required to file reports under [federal securities law]," as well as "any officer, director, employee, or agent of such issuer."[179] In effect this applies the FCPA to any entity that seeks access to U.S. capital on any significant scale. It embraces the theory on which the SEC originally extended its jurisdiction to foreign bribes: persons who participate in U.S. capital markets need to know whether business activity in which they are solicited to invest rests on a sound basis or hidden corruption, and knowledge of corruption thus is per se material information to investors.

We consider imposing criminal liability for human rights violations on the same class of actors covered by the FCPA to be defensible as well as desirable. It is defensible because its rationale—protecting the integrity of financial markets located on national territory—satisfies the requirement of international law that an assertion of prescriptive jurisdiction have a reasonable nexus or genuine connection with the legitimate interests of a sovereign.[180] In addition, foreign firms who list their stock on U.S. exchanges or otherwise access U.S. public securities markets have made an affirmative choice to submit to U.S. jurisdiction and are already subject to demanding U.S. regulatory regimes, including the FCPA and most requirements under the Sarbanes-Oxley Act. As a result, neither the firms nor their home countries could credibly object to the exercise of U.S. jurisdiction that our proposal represents.

Extending liability to all firms that access U.S. public securities markets is also desirable because investors reasonably might expect that businesses reliant on active collaboration with violent, abusive regimes incur substantial reputational and legal risk and do not offer good long-term prospects for success. Again, the argument is that information about complicity in human rights violations is per se material to investors. Just as hiding bribery from investors

[176] 15 U.S.C. § 78dd-2(a). This provision excludes issuers covered under the second category below.

[177] *Id.* § 78dd-2(h)(1).

[178] RESTATEMENT (FOURTH) OF THE FOREIGN RELS. L. OF THE U.S. § 410 (AM. L. INST. 2018).

[179] 15 U.S.C. § 78dd-1(a).

[180] *See* RESTATEMENT (FOURTH) OF THE FOREIGN RELS. L. OF THE U.S. § 407 (AM. L. INST. 2018).

denies them the information they need to allocate capital properly, covering up the extent to which foreign operations depend on collaboration with human rights abusers also cheats investors of material information they need. Moreover, sanctioning such complicity increases the likelihood that companies seeking U.S. capital will not engage in this particular form of self-harm, and therefore protects investors.

A pragmatic argument further supports extending the jurisdiction of our proposed criminal statute to all issuers regardless of nationality. Our experience with the FCPA shows that large foreign multinationals desire access to U.S. capital markets. Using capital-market access to bring foreign firms that compete with U.S. firms within the U.S. regulatory regime has two benefits. This move makes it easier for U.S. firms to tolerate the regime, rather than lobbying for relief from Congress and the executive. In addition, as will be discussed below, the existence of U.S. regulatory authority can induce other countries to develop their own programs that can complement and even bolster the U.S. regime.[181]

Finally, the FCPA also applies to any person who is not an issuer or a U.S. national, but who, "while in the territory of the United States, corruptly . . . make[s] use of the mails or any means or instrumentality of interstate commerce or . . . do[es] any other act in furtherance" of a violation of its proscriptions.[182] This provision rests on the fundamental principle of territorial jurisdiction, a well-established and uncontroversial basis for assertion of prescriptive jurisdiction.[183] Again, we can conceive of no reason why the United States would want foreign actors operating on U.S. territory to be free from proscriptions of human rights violations that would apply to U.S. nationals.

Establishing this head of jurisdiction does not do away with all problematic issues. In particular, the term "acts in furtherance" will require some definition to account for questions of causation and complicity, as discussed below. Our point here is that whatever acts count as establishing complicity in a human rights obligation, occurrence of those acts on U.S. territory provides a sufficient basis for U.S. jurisdiction.

2. Definition of Proscribed Conduct

In addition to pinning down the jurisdictional basis for regulation, legislation also can define with some clarity and stability the behavior subject to proscription. Definition provides both ex ante and ex post benefits. Ex ante, a clear legislative statement of what counts as a human rights violation, compared to the common law process that unfolded under the ATS, provides firms with a more focused incentive to develop compliance programs and otherwise avoid such abuses. Ex post, a clear definition satisfies both the private interests of potential defendants by giving them an opportunity to conform their behavior to

[181] *See infra* Section V.B.

[182] 15 U.S.C. § 78dd-3(a).

[183] RESTATEMENT (FOURTH) OF THE FOREIGN RELS. L. OF THE U.S. § 408 (AM. L. INST. 2018).

the requirements of the law and the public interest in limiting prosecutorial discretion.[184]

We expect the legislation we propose to follow the example of the FCPA not only in defining the proscribed conduct, but in limiting official discretion to pick and choose what behavior will satisfy the definition of a crime.[185] A ready solution to the definition of proscribed conduct is to reference definitions of proscribed conduct found in existing criminal statutes. The United States has already criminalized acts of genocide, torture, grave war crimes, recruitment and use of child soldiers, and human trafficking.[186] Our proposal would involve an explicit extension of these statutes to corporations otherwise satisfying the jurisdictional requirements we propose.

Some might see the inflexibility inherent in criminal statutes as a drawback. Linking corporate liability to particular statutes would mean that emergence of a new international consensus about the impermissibility of particular kinds of corporate behavior would not have any domestic consequences until the adoption of a new enactment. But the unreliability of claims about the coalescing of new norms of international law proved to be one of the drawbacks of the ATS approach. In spite of the limitations of the legislative process, we think Congress remains the best instrument for translating emerging norms of international law governing multinational corporations into positive U.S. law. Legislative extension of existing laws to corporations, imposing domestic criminality for international crimes, constitutes the best program.

3. Mens Rea and Secondary Liability

Because a corporation is a legal fiction, any imposition of legal accountability on it depends on attribution rules linking the behavior of real people to the corporation. Attribution comes in two forms. First, when will the acts of persons not associated with the corporation result in liability? We will call this question external complicity. Second, when will acts of persons (physical or legal) associated with a corporation lead to corporate liability? We will call this internal complicity. The FCPA addresses these issues in a manner that easily can be adapted to corporate human rights violations. We discuss external complicity in this subsection, and internal complicity in the next.

First, the FCPA criminalizes the "knowing" providing of a "thing of value" to a third party for the purpose of influencing official decisions in violation of

[184] *See* John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 212-19 (1985) (describing concern about abuse of discretion as basis for principle of legality).

[185] This, at least, has been the focus of the Supreme Court, and we anticipate (perhaps optimistically) that Congress will get the message. *See, e.g.*, United States v. Davis, 139 S. Ct. 2319, 2324 (2019) (finding definition of violent felony for purposes of enhanced sentencing unconstitutionally vague); McDonnell v. United States, 136 S. Ct. 2355, 2373 (2016) (narrowing construction of "official act" under federal bribery statute).

[186] *See supra* notes 88-90 and accompanying text.

the statute.[187] It further defines "knowing" as having a "firm belief" that the intended result "is substantially certain to occur."[188] Courts have added as a gloss that a person who is willfully blind to the substantial certainty of an unlawful payment will be treated as possessing knowledge.[189] In effect, the provision of any material benefit in the knowledge that a third party is substantially certain to use that benefit for the purpose of a proscribed bribe counts as complicity.

We believe that the "knowing" standard used in the FCPA, and not a "purpose" standard sometimes used by international institutions to assign state responsibility for the conduct of nonstate actors, should apply to criminalize corporate involvement in human rights violations. We believe that the relevant question is whether the provider of assistance knew of the substantial certainty that the assistance would contribute to a proscribed human rights violation, and not whether the provider had the purpose of bringing about that violation. Our proposal not only hews to the FCPA template but also to the concededly thin precedent under international criminal law.[190]

The argument for the "knowing" standard, as opposed to the more demanding "purpose" standard, rests on a "bitter with the sweet" argument. It maintains that a corporation choosing to enter into a relationship with a third party, such as a host country's military or security forces, to obtain a benefit from that relationship should be held accountable for actions that it expected the third party to undertake, even if it would have preferred to obtain the benefits from the relationship without inflicting any human rights violations. It is the entry into the relationship and the acceptance of the corresponding benefits that create a basis for culpability.

Not only is the knowledge standard morally defensible, but it has pragmatic value as well. As noted above, determining corporate purpose presents serious problems of proof, given the distributed nature of corporate decision-making. In ATS litigation, limiting liability to instances where the corporation aided and abetted third-party conduct for the purpose of bringing about human rights violations typically led to dismissal of the suit.[191] One would expect that criminal

[187] 15 U.S.C. §§ 78dd-1(a)(3), -2(a)(3), -3(a)(3).

[188] *Id.* §§ 78dd-1(f)(2), -2(h)(3),-3(f)(3).

[189] *See, e.g.*, United States v. Kozeny, 643 F. Supp. 2d 415, 418 (S.D.N.Y. 2009) (denying defendant's motion to preclude evidence because there was substantial certainty that defendant knew of ongoing bribery).

[190] UNGP, *supra* note 6, at 19 ("The weight of international criminal law jurisprudence indicates that the relevant standard for aiding and abetting is knowingly providing practical assistance or encouragement that has a substantial effect on the commission of a crime.").

[191] *See, e.g.*, Aziz v. Alcolac, Inc., 658 F.3d 388, 398-99 (4th Cir. 2011) (granting motion to dismiss after applying purpose standard to aiding and abetting liability); Doe v. Exxon Mobil Corp., 654 F.3d 11, 32-39 (D.C. Cir. 2011) (denying motion to dismiss after applying knowledge standard); Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 257-60 (2d Cir. 2009) (granting motion to dismiss because mens rea required for aiding and abetting is purpose standard). *But see* Doe v. Nestle US, Inc., 766 F.3d 1013, 1024-25 (9th Cir. 2014) (denying motion to dismiss after inferring purpose to violate child slavery

cases, where the prosecution faces a substantially greater burden of proof than does a plaintiff in a civil suit, would skew this outcome even more.

Given the evidentiary burden that the prosecution carries in criminal cases and the challenges of assigning a mens rea to a corporate actor, we believe that the FCPA approach represents the best solution to the question of culpable corporate complicity in a criminal human rights violation. Our experience with the FCPA has not turned up significant shortcomings. Indeed, one can argue that the results produced by this regime—significant investments in compliance, rather than in after-the-fact disputation—support the case that the FCPA serves as a general model for corporate criminal liability.

Criminal law also generally addresses grading issues—that is, distinguishing the severity and consequences of criminal conduct depending on judgments about seriousness, dangerousness, and the like. In the case of the FCPA, the legislation does not make grading choices. It treats as equivalent for culpability purposes direct bribery through corporate agents and the receipt of benefits known to be generated by bribes paid by independent actors.[192]

Without deprecating the significance of corruption as a blight on human life, most people are unlikely to consider bribing government officials as serious or dangerous as torture, genocide, grave war crimes, or human trafficking. Thus, the law criminalizing human rights violations should distinguish, as a grading factor, the direct commission of a proscribed offense from the rendering of material assistance with the object of obtaining a benefit. Although complicity in human rights violations is and should be subject to criminal penalties, it should not be treated as identical to the primary crime.

First, the sanctions applied by current U.S. criminal law to international crimes focus mostly on punishments that can apply only to physical persons, namely imprisonment.[193] Concededly, they also provide for financial penalties, which can apply to corporations, but those are secondary.[194] Current law also does not specifically address nonimprisonment penalties that could apply to corporations, especially debarment from government contracting. As a result, treating corporate involvement in human rights violations as exactly the same as individual conduct misses the chance to tailor the sanctioning rules to the distinctive qualities of corporate acts.

Second, we think that as a general matter the criminal law should distinguish firms that directly organize and conduct criminal activity from firms that knowingly benefit from the criminal conduct of others. Both should be

prohibition from retention of benefits generated by child slavery).

[192] 15 U.S.C. §§ 78dd-1(a)(1), (3), -2(a)(1), (3), -3(a)(1), (3). To be sure, the legislation leaves prosecutors considerable discretion to take various factors into account, even if it does not grade offenses in terms of direct versus indirect participation. The DOJ's current guidance focuses on the extent of a firm's compliance efforts before the offense, including with respect to those actors with whom it does business. FCPA RESOURCE GUIDE, *supra* note 9, at 52-53, 56-58.

[193] *See, e.g.*, 18 U.S.C. § 2441.

[194] *See id.*

sanctioned, but firms in the first category seem more reprehensible and dangerous. We appreciate that in the case of white-collar crimes such as FCPA violations that focus fundamentally on wrongful material benefits, the distinction may not matter: it is the receipt of benefits that is the purpose of the wrongful behavior. But criminal violations of human rights law involve harms that go far beyond economic losses. We think it is defensible to distinguish between those that directly inflict such harms and those that accept benefits that grow out of harmful conduct, even though both deserve, and indeed demand, criminal sanctions.

Accordingly, our proposal would deviate from the FCPA template in one respect. We believe that the legislation we hope to see enacted should treat as a separate offense the provision of assistance to activity known to satisfy the elements of an international crime as defined under U.S. law.[195] We expect the distinction to having grading consequences, but not to go to the question of criminality as such. We also expect that, in making grading distinctions, the legislation will take account of the particular nature of corporate criminal sanctions, including financial penalties, debarment, and restitution.

4. Agency Liability Across Corporate Forms and Actors

A complicity question specific to legal persons such as corporations is the circumstances under which the acts of other persons should be attributed to a corporation. Given that a legal person can act only through others, some attribution is essential for any criminal liability. How sweeping a rule to use, however, may be debatable. Conventional practice, including in the FCPA, is to use a rule of *respondeat superior*.[196] This results in automatic attribution to a corporation of any conduct (including the mens rea accompanying that conduct) by a person acting in the course of their service to the corporation. Thus the FCPA holds corporations accountable for the actions of their officers, directors, employees, stockholders, and agents, the last including other corporate members of a single corporate family, when taken on behalf of the primary corporation.[197]

Some commentators have argued for amelioration of *respondeat superior*. One proposal would provide corporations with a due diligence affirmative defense.[198] If a corporation could prove that it had implemented and maintained

[195] We use the formula "known to satisfy the elements" to indicate that the prosecution would not have to prove that the defendant knew that the assisted activity violated international law. Knowledge would apply to the acts constituting the offense, not to the legal status of those acts.

[196] *See, e.g.*, Stichting Ter Behartiging van de Belangen van Oudaandeelhouders in het Kapitaal van Saybolt International B.V. v. Schreiber, 327 F.3d 173, 186 (2d Cir. 2003) (describing imposition of corporate liability for FCPA violation based on respondeat superior principle).

[197] 15 U.S.C. §§ 78dd-1(a), -2(a), -3(a).

[198] *See* Bribery Act, (2010) § 7(2) CURRENT LAW 23 (UK) (establishing defense for relevant commercial organization that proves that it "had in place adequate procedures designed to prevent persons associated with [that organization] from undertaking such

a comprehensive compliance program designed to deter as well as ferret out misconduct, it would not have to suffer for the acts of rogue employees or agents. Under the FCPA, however, the DOJ regards due diligence and compliance efforts as factors affecting its exercise of prosecutorial discretion, including the mitigation of penalties, but not as an affirmative defense.[199]

We see nothing wrong in principle with creating an affirmative defense, especially if it clearly assigns the evidentiary burden of persuasion to the defendant. We note, however, that *pro forma* compliance programs designed to ward off liability without materially altering corporate behavior are not unknown in the anticorruption world. A landmark case, *United States v. Siemens Aktiengesellschaft*,[200] exposed a pattern of directives from corporate headquarters admonishing employees not to bribe coupled with the continued maintenance of practices designed to support corrupt payments. Especially notable in that case was a refusal of the company's leadership to close down off-the-books accounts containing large sums that in the past were used to pay bribes and from which employees remained free to make withdrawals without accounting for the destination of the withdrawn funds.[201] We worry that creation of an affirmative defense might induce firms to create similar Potemkin compliance programs in hopes that the façade will not be breached. We appreciate, however, arguments that the U.S. approach leaves prosecutors with too much discretion and thus opens the system to abuse.

On balance, we believe that the United States should amend its human rights legislation to follow the FCPA approach to *respondeat superior*. Corporations would face criminal liability if persons acting within the scope of their corporate responsibilities violated the statutory proscription. Under the same rule, acts of corporate subsidiaries would be attributed to the parent without the fact-intensive inquiries required by the alter ego and agency theories described above.[202] Prosecutors and courts could take account of corporate due diligence in charging and sentencing. However, the existence of due diligence would not be a question addressed by the trier of fact in a criminal proceeding.

5. Accounting and Administrative Liability

Under the FCPA, issuers must not only stay away from corruption, but they must maintain accounting systems that prevent the accumulation of off-the-

conduct").

[199] FCPA RESOURCE Guide, *supra* note 9, at 51-55.

[200] No. 1:08-cr-00367 (D.D.C. 2008).

[201] Statement of Offense at ¶¶ 35, 87, United States v. Siemens Aktiengesellschaft, No. 1:08-cr-00367 (D.D.C. Dec. 15, 2008).

[202] This rule would help address concerns that multinational enterprises may avoid liability for human rights abuses by operating abroad through undercapitalized subsidiaries. *See* Nick Friedman, *Corporate Liability Design for Human Rights Abuses: Individual and Entity Liability for Due Diligence*, 41 OXFORD J. LEGAL STUD. 289, 313 (2021).

books resources that can be converted into bribes.[203] These rules would continue to apply under our proposal, although they might not play the same role of making it easier to prosecute offenses. Unlike bribery offenses, which at their core consist of payments that all parties involved strive to keep secret and for which little evidence may exist other than falsified records, grave human rights violations typically generate victims, witnesses, and other evidence. Still, to the extent an issuer misrecords a payment, for example to military forces hired to provide security, to hide the anticipated abuses that such security may entail, liability under the regular books-and-records rules would exist.

If the United States were to treat an issuer carrying out or providing assistance to human rights violations as equivalent to corrupt payments covered by the FCPA, does it follow that the SEC also should have jurisdiction over this activity? As noted above, assertion of jurisdiction over issuers rests on the argument that knowledge of the regulated transaction is material information that must be disclosed to investors. If this premise justifies criminal jurisdiction over issuers, does it apply equally to administrative regulation?

In principle, we see no reason not to treat nondisclosure of involvement in human rights violations as a category of issuer behavior that comes within SEC jurisdiction. If one regards this information as material to investors, then there is no good reason to exclude the SEC from carrying out its normal regulatory responsibilities. At the same time, we do not envision any special set of rules bolstering SEC jurisdiction in human rights cases. We expect that the primary responsibility for enforcement of legislation regulating corporate involvement in human rights violations will belong to the DOJ, in particular its Criminal Division.

C. *The FCPA Approach and Foreign Relations*

As we describe throughout this article, our proposal has substantial advantages over the ATS model. One of the most salient is that it brings the enforcement of U.S. human rights policy within the institutional arrangements normally used to develop and apply U.S. foreign relations, namely executive implementation of legislative mandates. Thus, it protects the judiciary from entanglement in policy disputes that it lacks the competence to resolve and that can harm public trust in its wisdom, while also protecting U.S. foreign policy from misinformed judicial interventions that may damage the national interest. We believe these benefits more than compensate for any costs tied to the abandonment of a private cause of action.

[203] The FCPA's accounting provision, 14 U.S.C. § 78m(b)(2), which requires SEC-registered issuers to accurately record transactions and maintain an adequate system of internal accounting controls, is often the basis of enforcement actions in cases where it may be difficult for prosecutors or the SEC to prove a violation of the antibribery provisions. *See* KEVIN E. DAVIS, BETWEEN IMPUNITY AND IMPERIALISM: THE REGULATION OF TRANSNATIONAL BRIBERY 123 (2019).

The linchpin to this argument is the observation that human rights enforcement does not stand apart from foreign relations. Concrete steps to hold human rights violators accountable for their actions necessarily affect the interests of the states on whose behalf the violators act or whose complicity they implicate. People debate vigorously how much weight to assign the interest in vindicating human rights in relation to others, such as security or economic goals.[204] One cannot, however, maintain that human rights exist in a foreign relations vacuum.

It follows from this premise that the conventional process for shaping foreign relations on the basis of ideals, interests, and expertise should apply to human rights enforcement. The conventional process involves cooperation and contestation between the two democratically accountable branches of government, each seeking ratification through electoral success for their choices and goals. The courts have a limited role to the extent that the Constitution or duly enacted legislation imposes judicially enforceable constraints on executive action. But most of the balancing and decision-making in the face of conflicting interests and ideals takes place outside the courtroom.[205]

The case for situating the formation and implementation of foreign policy in the political branches and not in the judiciary is well-known and straightforward. First, only the actors in the political branches have to face electorates, a process that produces at least some alignment between policy choices and democratic preferences. Second, actors in the political branch have the capacity to negotiate and engage reciprocally with their foreign counterparts. Judges by design lack both these qualities. By avoiding political accountability they gain judicial independence, but at the price of losing any significant external discipline. By working in isolation from other policymakers, they keep their independence, but at the price of both knowledge and instrumental capacity. They can engage with ideas, but cannot conduct transactions. Yet foreign relations, while not devoid of ideas, are fundamentally transactional.[206]

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[204] *See* William W. Burke-White, *Human Rights and National Security: The Strategic Correlation*, 17 HARV. HUM. RTS. J. 249, 249-53 (2004) (discussing the tension between national security and human rights in U.S. foreign policy); Jenia Iontcheva Turner, *Policing International Prosecutors*, 45 N.Y.U. J. INT'L L. & POL. 175, 204-09 (2012) (discussing competing goals of international justice).

[205] *See, e.g.*, Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1403 (2018) ("The political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns.").

[206] We are aware of the judicial network literature that seeks to complicate the points made in text. *See, e.g.*, Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191, 202-04 (2003) (claiming connectedness of courts around the world); Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103, 1104 (2000) (describing five different categories of international judicial interaction and its impact on global legal community). However, more recent research has demonstrated the aspirational, rather than descriptive, nature of this work. *See, e.g.*, Paul B. Stephan, *Courts on Courts: Contracting for Engagement and Indifference in International Judicial Encounters*, 100 VA. L. REV. 17, 78-82, 85-87 (2014) (documenting the widespread indifference of U.S. courts to foreign judicial

Our proposal looks to Congress to adopt legislation specifying the standards of human rights compliance to apply and to determine the jurisdictional scope of these rules. It gives enforcement power to federal prosecutors, rather than private plaintiffs' attorneys. It looks to the judiciary to apply enacted rules, rather than generate the rules themselves.

A specific virtue of our proposal is its reliance on jurisdictional rules that have widespread acceptance within the international community. Before the Supreme Court's intervention in *Kiobel*, ATS suits relied on judge-made rules for subject matter jurisdiction, principally the controversial concept of universal jurisdiction over private civil suits.[207] It was this jurisdictional assertion, rather than the substantive rules applied, that provoked the ire of U.S. allies. Our proposal, in contrast, would allow the U.S. to apply its law to a significant portion of multinational corporations without pushing against any international norms. In addition, as we describe below, the regime we propose can increase deterrence of human rights violations, provide restitution and some reparation for the injuries suffered by victims, and encourage other home states to adopt similar regimes to repress corporate human rights violations.

Against the clear advantages of our proposal over the ATS strategy stands only one countervailing argument. Private litigation is independent of government. It can challenge the status quo and the apathy and indifference that sustain it. It also can overcome the barriers that interest groups erect to frustrate democratic preferences.[208]

We appreciate these arguments and believe that in the domestic context they have considerable weight. But when the object is to affect the behavior of foreign government officials and others acting outside the United States, the argument for independence from U.S. political authority misses the point. Attempting to shape the foreign relations of the United States without the participation of the national government is likely to be feckless when not futile. As the Supreme Court has observed, the capacity of U.S. private litigation to influence the acts of foreign governments is at best fortuitous, while its ability to disrupt negotiations between the U.S. government and foreign states is considerable.[209]

activity); Pierre-Hugues Verdier, *Transnational Regulatory Networks and Their Limits*, 34 YALE J. INT'L L. 113, 122-30 (2009) (discussing limitations of informal international cooperation among national regulatory agencies).

[207] Several human rights treaties have established universal jurisdiction as the basis of criminal responsibility for specified violations, but the principle of universal jurisdiction with respect to civil claims is contested. *See* RESTATEMENT (FOURTH) OF THE FOREIGN RELS. L. OF THE U.S. § 413 reporters' note 4 (AM. L. INST. 2018) ("Some cases brought in the United States under the Alien Tort Statute . . . have been viewed as examples of universal civil jurisdiction and have been controversial.").

[208] *See* Levmore, *supra* note 76, at 1672-73 (analyzing legal change using interest group analysis).

[209] *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 432 (1964) ("Piecemeal dispositions . . . involving the probability of affront to another state could seriously interfere with negotiations being carried on by the Executive Branch and might prevent or render less favorable the terms of an agreement that could otherwise be reached.").

In the resolution of domestic rights and duties, judicial independence is significant. When attempting to reorient the country's foreign relations, it is a major shortcoming.

IV. THE FCPA APPROACH CAN IMPROVE HUMAN RIGHTS PERFORMANCE

As seen above, our proposed model would provide a more predictable legal framework for corporate human rights accountability, while avoiding the significant separation of powers concerns raised by ATS litigation. It also has two substantial, additional advantages relative to the ATS. First, it would harness a range of criminal investigation and enforcement tools unavailable in civil litigation. These would both increase deterrence and incentivize businesses to improve their internal compliance controls, investigate and report violations, and cooperate with law enforcement, all leading to greater self-enforcement of the prohibition of human rights violations. Second, it would encourage other states to adopt and enforce similar laws to police the conduct of their multinationals abroad. These benefits are no mere speculation: both materialized for foreign bribery following the United States' adoption and enforcement of the FCPA. We contend that U.S. adoption of our model could trigger the same dynamics.

A. *Benefits of Public Enforcement*

Our model would restore the two main benefits of ATS litigation: deterring grave human rights violations overseas through financial penalties and providing compensation to victims. As was the case in ATS litigation, covered companies under our model would face the threat of large financial penalties. Because corporations and other organizations cannot be imprisoned, the main criminal sanctions they face are financial: fines, restitution, and disgorgement of profits. Until the 1990s, U.S. corporate criminal prosecutions were rare, but since then they have increased dramatically.[210] The same is true of the penalties imposed by U.S. prosecutors: large firms, both domestic and foreign, have paid billions of dollars to the DOJ and U.S. regulatory agencies to settle criminal cases. [211]

One of the most active areas of enforcement has been foreign bribery. According to a leading empirical study, between 1977 and 2017 the DOJ and SEC brought 337 successful FCPA prosecutions against domestic and international firms.[212] While roughly two-thirds of these firms were based in the

[210] Gabriel Markoff, *Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century*, 15 U. PA. J. BUS. L. 797, 803 (2013) ("[U]ntil the 1990s, corporate prosecutions were a minor part of American law . . . . [a]rmed with the power to seek larger, more punitive fines, the DOJ began to ramp up corporate prosecutions during the 1990s.").

[211] *See* VERDIER, *supra* note 7, at 9.

[212] Hans B. Christensen, Mark Maffett & Thomas Rauter, Policeman for the World: The Impact of Extraterritorial FCPA Enforcement on Foreign Investment and Internal Controls 46 tbl.1 (Sept. 2, 2020) (unpublished manuscript) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3349272 [https://perma.cc/8ZLN-

United States, the others were based in twenty-one different foreign countries.[213] Nor were the penalties insignificant: another study by Professor Rachel Brewster found that the top ten FCPA fines levied between 1997 and 2016 totaled $4.8 billion, $3.5 billion of which was paid by foreign firms.[214] While one can debate the deterrent effect of criminal fines, it bears noting that these penalties far exceed any actual judgments and settlements paid as a result of ATS litigation.

A possible concern about relying on criminal fines is that, unlike civil damages, they do not compensate victims. However, U.S. criminal penalties against corporations are not limited to fines; as part of a sentence, a court may order that a defendant "make restitution to any victim of such offense, or if the victim is deceased, to the victim's estate."[215] As part of a plea agreement, a criminal defendant may also be required to make restitution to others, which allows such agreements to impose broader restorative measures.[216] Even where corporations resolve potential criminal charges through NPAs or DPAs, these agreements often provide for restitution and remediation.[217] Thus, although under our model cases would be initiated by prosecutors rather than private plaintiffs, this would not prevent securing substantial compensation for victims.[218]

Our model has substantial additional benefits over private litigation. First, the stigma and nonmonetary penalties associated with criminal prosecutions would further strengthen deterrence. After the U.S. government prosecuted accounting firm Arthur Andersen for its involvement in the Enron scandal and the firm's subsequent collapse, many saw criminal indictment or conviction as a virtual death sentence for corporations.[219] That is no longer the case—in recent years several multinationals, including some of the world's largest banks, have pleaded guilty to U.S. criminal charges without collapsing.[220] Nevertheless, corporate criminal charges remain exceptional, and bring greater publicity and

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[213] *Id.* at 47 tbl.2.

[214] Brewster, *supra* note 157, at 1651.

[215] 18 U.S.C. § 3663(a)(1)(A).

[216] *Id.*

[217] *See* Garrett, *supra* note 87, at 908.

[218] To be sure, resolution of FCPA corporate charges do not often include restitution because of the difficulty of identifying particular victims. Gideon Mark, *Private FCPA Enforcement*, 49 AM. BUS. L.J. 419, 488 (2012) ("In most FCPA cases, there is more than one victim. The pool typically includes competitors, shareholders, and government agencies or instrumentalities. While bribery is not a victimless crime, victims of FCPA violations receive no compensation."). Competitors who lose government contracts face a difficult causation problem because it may be impossible to prove that any contracts would have been tendered but for the prospect of a bribe. The direct victims of official malfeasance—the general public who suffer from government underperformance—normally cannot be disaggregated into identifiable victims. But in human rights cases, identifiable victims typically exist and can be compensated as part of the resolution of criminal charges.

[219] *See* Markoff, *supra* note 210, at 800.

[220] Verdier, *supra* note 8, at 263.

stigma than civil matters, which large firms routinely settle with little fanfare. In addition, criminal charges often trigger a threat of debarment from government contracts, revocation of vital business licenses, and other regulatory consequences.[221] Prosecutors can choose to bring criminal charges against individual officers or employees, an option unavailable in private litigation, which would further provide a strong deterrent.[222] From an expressive standpoint, our proposal would treat grave human rights violations as what they are: crimes, not torts.

The involvement of prosecutors and law enforcement agencies would also bring more robust investigatory capabilities to bear on human rights violations. The FBI and other federal law enforcement agencies have access to tools that private plaintiffs lack: they "can develop informants, go undercover, interview willing witnesses, conduct full-blown searches upon consent or where warrants are not required, make 'investigative stops,' or conduct sustained physical surveillance."[223] They can also use grand jury subpoenas to obtain documents, request wiretaps,[224] and solicit and provide legal protection to whistleblowers.[225] These tools may be particularly important in uncovering human rights violations perpetrated within large, complex organizations by actors who have every incentive to act covertly. To be sure, some of the practical difficulties described above would persist, but the cases' greater U.S. nexuses and the existence of corporate records would facilitate investigation.

However, the most important benefit of the criminal regime relative to private litigation is the creation of incentives for firms to adopt compliance programs, investigate potential violations, discipline the individuals involved, and report violations to prosecutors. In the past two decades, this has been an explicit and central goal of U.S. corporate criminal enforcement policy. The U.S. Criminal Sentencing Guidelines state that corporate criminal sanctions must "provide just punishment, adequate deterrence, and incentives for organizations to maintain internal mechanisms for preventing, detecting, and reporting criminal conduct."[226] Accordingly, the Guidelines and related DOJ enforcement policies

[221] These are often waived, but agencies are becoming stricter. *See* VERDIER, *supra* note 7, at 182 ("In response to criticism, regulatory agencies are reexamining their policies on granting waivers to banks from collateral consequences of conviction and warning banks not to expect automatic waivers.").

[222] *Id.* ("Prosecutors no longer automatically grant NPAs and DPAs but insist that the worst offenders plead guilty to felony charges. As a result, several of the world's largest banks are now convicted felons subject to probation, a fate more comparable to that of ordinary criminal defendants.").

[223] Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 778 (2003) (footnote omitted).

[224] *Id.* at 780.

[225] Amy Deen Westbrook, *Cash for Your Conscience: Do Whistleblower Incentives Improve Enforcement of the Foreign Corrupt Practices Act?*, 75 WASH. & LEE L. REV. 1097, 1100 (2018).

[226] U.S. SENT'G GUIDELINES MANUAL ch. 8, introductory cmt. (U.S. SENT'G COMM'N

"offer incentives to organizations to reduce and ultimately eliminate criminal conduct by providing a structural foundation from which an organization may self-police its own conduct."[227] In other words, the U.S. criminal justice system explicitly aims to incentivize firms to create a culture of compliance and leverage their resources to prevent and remedy violations.

To achieve this aim, the system uses several tools. First, for firms to secure a more favorable sentence, the relevant guidelines require them to "establish effective internal compliance procedures and controls, investigate potential misconduct, and report it promptly to U.S. authorities."[228] An effective compliance program "must include procedures to prevent and detect criminal conduct, effective oversight and training, internal audits, whistleblowing procedures, and effective responses to criminal conduct."[229] Second, when firms settle charges, the agreements often impose detailed compliance reforms to prevent future violations, an approach that has been described as "structural reform prosecution."[230] These reforms can include costly measures such as terminating activities in risky countries, firing employees responsible for violations, establishing new compliance programs, and hiring new personnel.[231] They sometimes impose external oversight by independent monitors who report to the DOJ.[232]

These tools have been deployed in the FCPA context. German engineering firm Siemens agreed to pay $800 million in fines and disgorgement of profits to the DOJ and SEC for engaging in a systematic program of bribery to officials in Iraq, Argentina, Venezuela, and Bangladesh.[233] Siemens itself cooperated extensively with U.S. authorities by initiating its own internal FCPA investigation, sharing its results with the DOJ on a continuous basis, disciplining the individuals involved (including senior management), and implementing reforms "including the complete restructuring of Siemens AG and the implementation of a sophisticated compliance program and organization."[234] As part of its plea agreement, it agreed to install an independent compliance monitor

2016).

[227] *Id.*; *see also* U.S. DOJ, Just. Manual § 9-28.300 (2020).

[228] Verdier, *supra* note 8, at 256.

[229] *Id.*

[230] Garrett, *supra* note 87, at 855.

[231] *Id.* at 863-64.

[232] *See* GARRETT, *supra* note 7, at 172-95 (describing use of monitors, process by which they are picked, and how to improve their effectiveness); Vikramaditya Khanna & Timothy L. Dickinson, *The Corporate Monitor: The New Corporate Czar?*, 105 MICH. L. REV. 1713, 1716 (2007) (proposing historical and normative analysis of use of corporate monitors by U.S. enforcement agencies).

[233] Press Release, U.S. DOJ, Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay $450 Million in Combined Criminal Fines (Dec. 15, 2008), https://www.justice.gov/archive/opa/pr/2008/December/08-crm-1105.html [https://perma.cc/MR43-S9X6].

[234] *Id.*

for four years.[235] Since then, the DOJ and SEC have entered into many similar settlements with firms across industries historically rife with bribery, such as infrastructure, energy, transportation, and telecommunications.[236]

The impact of prosecutions is not limited to the firms they directly target. Because fines and other penalties depend on the adequacy of preexisting compliance programs and cooperation, active enforcement incentivizes other firms to invest in compliance and to investigate and report violations. The programs approved by prosecutors also set a benchmark for other firms to follow. Since the rise of robust FCPA enforcement, firms have devoted extensive resources to compliance. "Companies in a wide swath of industries have added compliance committees to corporate boards, created compliance and ethics departments headed by former government officials and, in some instances, added costly processes to daily operations to make sure money isn't changing hands improperly overseas."[237]

Our proposal would create similar incentives for multinational firms to prevent, investigate, and report human rights violations in their overseas operations. The same criminal enforcement and sentencing policies as in the FCPA field would apply, encouraging firms to implement effective compliance programs. Like foreign bribery, many instances of corporate participation in grave human rights violations could be prevented or deterred by internal controls, investigation and reporting. Indeed, that is the central premise of existing efforts to improve human rights compliance by multinationals. The UN Guiding Principles prescribe that firms adopt "[a] human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights."[238] That process "should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed."[239] Other groups have made similar recommendations, and firms and third-party providers have been filling in the details.[240] At present, however, these recommendations have not borne much fruit, the efforts of a few companies aside. Several studies

[235] *Id.*

[236] *SEC Enforcement Actions: FCPA Cases*, U.S. SEC, https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml [https://perma.cc/T7P7-34JN] (last updated July 8, 2021).

[237] Ashby Jones, *FCPA: Company Costs Mount for Fighting Corruption*, WALL ST. J. (Oct. 2, 2012), https://www.wsj.com/articles/SB10000872396390444752504578024893988048764; *see also* N.Y.C. BAR, THE FCPA AND ITS IMPACT ON INTERNATIONAL BUSINESS TRANSACTIONS 7 (2011) ("Companies subject to the FCPA generally dedicate substantial financial and other resources to implementing internal controls and conducting internal investigations to prevent and identify instances of potential misconduct.").

[238] UNGP, *supra* note 6, at 16.

[239] *Id.* at 17.

[240] *See, e.g.*, ORG. FOR ECON. COOP. & DEV., DUE DILIGENCE GUIDANCE FOR RESPONSIBLE BUSINESS CONDUCT (2018) (listing recommendations for responsible business conduct regarding human rights).

indicate that on-the-ground implementation remains poor.[241] U.S. enforcement would provide the stick to encourage firms to implement compliance programs effectively.

The considerations above demonstrate how public enforcement under our model could have a greater impact than private litigation. The threat of large civil damages can deter violations and incentivize corporations to implement policies to prevent them. But civil litigation provides no incentives for firms to detect, investigate, and report those violations that do occur. Unlike in the criminal context, investigation and reporting is unlikely to mitigate penalties. On the contrary, they may make the firm more likely to be sued. This problem is compounded by the difficulty for private plaintiffs in collecting admissible evidence of human rights violations and evidence of firms' responsibility for those violations. True, the civil discovery process allows access to many relevant documents, but in cases where parties have incentives to act covertly, the availability of criminal investigation tools may considerably increase the likelihood of success.

On an ex post basis, while civil settlements could in theory include reform obligations, plaintiffs will often lack incentives to demand such commitments if they would come at the price of a smaller financial settlement. Firms themselves likely will be highly reluctant to undertake long-term obligations that involve external monitoring on behalf of the plaintiffs and could lead to reopening the settlement. By contrast, when the government establishes a policy of requiring such reforms as a condition to a criminal settlement, it becomes much harder for the defendant firms to avoid. Thus, public enforcement would not only advance the deterrence and compensation goals associated with ATS litigation, but also provide greater incentives for entire industries to improve their compliance with international norms and to investigate and report violations.

B. *U.S. Enforcement as a Global Catalyst*

Although we propose that the United States adopt our model on its own, we expect that, far from casting the country as an outlier, it would encourage other states to adopt and enforce similar laws. Here again, the FCPA provides a compelling precedent. In the years following its adoption, U.S. companies roundly criticized the statute for putting them at a competitive disadvantage.[242] By preventing them from paying bribes in global industries rife with corruption,

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[241] *See* EUR. PARLIAMENTARY RSCH. SERV., TOWARDS A MANDATORY EU SYSTEM OF DUE DILIGENCE FOR SUPPLY CHAINS 6 (2020) ("Academic research has shown that voluntary corporate tools that implement due diligence have not been sufficiently effective at securing respect for rights."); *see also* Jonathan Bonnitcha & Robert McCorquodale, *The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights*, 28 EUR. J. INT'L L. 899, 910 (2017) (describing "concerns that an exclusive focus on due diligence processes that are not tethered to the foundational responsibility to respect human rights may encourage 'tick-box' exercises that allow businesses to claim that they are compliant with the Guiding Principles.").

[242] VERDIER, *supra* note 7, at 36.

they alleged, the FCPA would cause them to lose contracts to firms whose home states had no such laws.[243] Thus, they predicted, it would harm U.S. businesses while failing to alleviate bribery.[244] The same "level playing field" argument has been made against national laws such as the ATS that hold firms accountable for human rights violations abroad. According to Professor Alan Sykes, "nothing will be gained if aiders and abettors are held liable for providing 'assistance' to primary wrongdoers who can readily obtain such assistance elsewhere, at a more or less equivalent 'price,' from individuals who are not subject to aiding and abetting liability."[245]

While we agree that civil litigation under the ATS suffers from significant problems, the experience of the FCPA shows that unilateral enforcement by the United States need not create a competitive disadvantage for its firms. A growing body of evidence shows that the surge in FCPA enforcement in the past twenty years has not had this effect.[246] The U.S. government has enforced the FCPA not only against U.S. firms but also against many of their foreign competitors, thus leveling the playing field.[247] These actions also have incentivized other jurisdictions to adopt their own antibribery regimes and enforce them against their firms.[248] This phenomenon has been encouraged and facilitated by the creation of a multilateral antibribery treaty that has now been ratified by virtually all major home states of multinational corporations.[249]

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[243] *Id.*

[244] *See id.* ("In many countries and industries, they argued, bribery was a fact of life. If they stopped paying bribes, purchasers would simply turn to their foreign competitors, who would be happy to keep the money flowing. The FCPA, they argued, would harm U.S. business while doing little do decrease bribery overseas."); Brewster, *supra* note 157, at 1628 ("The FCPA remained controversial after its passage. Business groups bitterly and continuously complained that it would put American industry at a disadvantage with foreign competitors."); Sarah C. Kaczmarek & Abraham L. Newman, *The Long Arm of the Law: Extraterritoriality and the National Implementation of Foreign Bribery Legislation*, 65 INT'L ORG. 745, 751 (2011) ("U.S. firms complained that they were disadvantaged when competing against foreign corporations not subject to similar laws. Between April 1994 and May 1995 alone, U.S. firms allegedly lost contracts 80 percent of the time to firms willing to pay bribes. The U.S. government documented almost 100 cases in which American firms lost contracts valued at a total of $4.5 billion to foreign companies that paid bribes." (footnotes omitted)).

[245] Sykes, *supra* note 75, at 2189. As a result of such laws, U.S. corporations and other firms subject to U.S. law "may be displaced by higher cost competitors that have no incentive to respect the rules of customary international law." *Id.* at 2194.

[246] Brewster, *supra* note 157, at 1650 ("First, penalties are notably higher in the present era (1997-2016). Second, the majority of the top penalties were assessed against foreign corporations in the present era.").

[247] *See* Paul B. Stephan, *Regulatory Competition and Anticorruption Law*, 53 VA. J. INT'L L. 53, 62-65 (2012) (elaborating on regulatory competition dynamics with respect to anticorruption policy).

[248] Brewster, *supra* note 157, at 1662.

[249] *See Ratification Status as of May 2018*, ORG. FOR ECON. COOP. & DEV., http://www.oecd.org/daf/anti-bribery/WGBRatificationStatus.pdf [https://perma.cc/3ARF-L6UM].

As noted earlier, a key feature of the FCPA is that it does not apply only to U.S. firms. Foreign firms that have securities listed on a U.S. exchange or have substantial U.S. establishments may be prosecuted for FCPA violations in their worldwide activities. Even foreign firms with little or no U.S. contacts can be prosecuted where the bribery scheme uses U.S. means of interstate or international commerce.[250] As a result, foreign firms are frequently prosecuted for FCPA violations, as was the case with Siemens. This exposure to FCPA enforcement imposes on major foreign firms that engage in bribery costs comparable to those U.S. firms must contend with. That exposure has also led these foreign firms to make substantial investments in FCPA compliance and investigations, striving towards a standard comparable to that adopted by U.S. firms.[251]

FCPA enforcement has also had a dramatic impact on the willingness of other home states to adopt and enforce their own foreign bribery laws. In a 2011 study, political scientists Sarah Kaczmarek and Abraham Newman found that countries whose firms were targeted by FCPA enforcement were twenty times more likely to enforce their own antibribery laws.[252] They attributed this effect to several mechanisms that promote the adoption and enforcement of home state laws in response to FCPA enforcement. Because a lenient or nonexistent home state bribery regime exposes them to U.S. prosecution, firms face greater costs to maintaining such a regime.[253] At the same time, domestic advocates for antibribery legislation gain legitimacy and public attention, and U.S. enforcement "raises the salience of the issue and has the potential to inject it into electoral competition."[254] In short, "[e]xtraterritorial interventions offer political resources to domestic actors hoping to step up enforcement and undermine the political legitimacy of those advocating a weak implementation regime."[255]

Indeed, several high-profile U.S. prosecutions of foreign firms directly led their home states to strengthen their antibribery regimes. After the British government suspended its Serious Fraud Office's ("SFO") investigation of BAE Systems, an arms manufacturer involved in corrupt payments to Saudi officials, the DOJ initiated its own case.[256] BAE Systems eventually paid $400 million in

[250] Brewster, *supra* note 157, at 1627.

[251] Indeed, it may be that the absence of U.S. extraterritorial enforcement actually tilts the playing field against U.S. companies. An event study of the *Kiobel* decision, which largely foreclosed ATS litigation for human rights violations that occur outside the United States, found that extractive industry firms headquartered abroad, especially those with subsidiaries in countries with the worst human rights records, benefited most from the decision. Darin Christensen & David K. Hausman, *Measuring the Economic Effect of Alien Tort Statute Liability*, 32 J.L. ECON. & ORG. 794, 795-96 (2016). By contrast, U.S.-based firms derived no statistically significant benefit. *Id.* at 795.

[252] Kaczmarek & Newman, *supra* note 244, at 747.

[253] *Id.* at 750.

[254] *Id.*

[255] *Id.*

[256] *Id.* at 754.

U.S. fines.[257] An embarrassed British government "promised tough new anticorruption legislation and significantly expanded the SFO's budget."[258] Likewise, the DOJ's case against Daimler AG embarrassed the German government, which dramatically increased the resources devoted to antibribery enforcement.[259] Germany became the second most active antibribery enforcer after the United States.[260] Because our proposal, like the FCPA, would cover foreign firms listed or active in the United States, it could provide their home countries with similar incentives to create or strengthen their own regimes to prevent and punish human rights violations abroad.[261]

One might worry that coverage would not be universal. Some countries may adopt laws but fail to enforce them. Firms from countries that do not enforce human rights standards at all and are not within U.S. jurisdiction—e.g., state-owned firms from China or Russia—might simply replace compliant firms. Once again, recent evidence on the FCPA's impact shows that this concern may be exaggerated. A study by economists Hans Christensen, Mark Maffett, and Thomas Rauter finds that, after the United States ramped up FCPA enforcement, direct investment by state parties to the OECD Convention into high corruption countries declined significantly.[262] This was true even for firms from member countries that did not actively enforce their own antibribery laws, suggesting that U.S. enforcement against these firms prevented them from gaining a competitive advantage.[263] Among foreign firms, the decline was greater for those more likely to be subject to U.S. jurisdiction because they were listed on a U.S. exchange or had significant U.S. establishments.[264] These firms were also more likely to conduct longer due diligence and to hire reputable accounting advisers when investing in high corruption countries.[265]

Thus, the study suggests the FCPA had an impact even on firms from treaty members with no enforcement.[266] There was also no evidence of a corresponding increase in investment into high corruption countries by firms from

[257] *Id.*

[258] *Id.*

[259] *Id.* at 755.

[260] *Id.*

[261] *See* Sean J. Griffith & Thomas H. Lee, *Toward an Interest Group Theory of Foreign Anti-Corruption Laws*, 2019 U. ILL. L. REV. 1227, 1257-66 (providing several examples of countries that began enforcing anticorruption laws following U.S. enforcement actions). The development of effective regimes in other prominent home states would also create opportunities for cooperative enforcement, enhancing the overall effectiveness of the system and alleviating complaints of U.S. unilateralism. In other areas of criminal corporate enforcement, U.S. prosecutors and regulatory agencies regularly cooperate with foreign authorities. *See* VERDIER, *supra* note 7, at 38.

[262] Christensen et al., *supra* note 212, at 33-34.

[263] *Id.*

[264] *Id.* at 15.

[265] *Id.* at 33.

[266] *Id.* at 21.

nonmembers, such as China or Russia.[267] Overall, the authors concluded that, "[i]nconsistent with the argument that stricter enforcement disproportionately harms the competitiveness of US firms relative to firms from other developed countries, [our] results suggest that the US has successfully extended the extraterritorial reach of the FCPA to non-US firms headquartered in OECD countries."[268] On this point, it is worth noting that the DOJ and SEC actively enforce the FCPA against foreign firms, even those from non-OECD countries, and such enforcement has increased in recent years.[269]

Another potential concern is that the FCPA enforcement model might not succeed in encouraging enforcement by foreign states without a multilateral treaty like the Anti-Bribery Convention, which embodies a common commitment by the relevant states to eradicate bribery. Thus, according to Brewster, in order to enforce the FCPA against foreign firms, "the U.S. government needed an international agreement that established a strong foreign anti-bribery principle in other major exporting states."[270] Likewise, Christensen and his coauthors emphasize the impact of U.S. enforcement on firms from other OECD Convention member states who share a commitment to prohibiting bribery even if they do not actively enforce their own laws.[271] Their apparent concern is that without such a common commitment, U.S. enforcement against foreign firms would be seen as illegitimate and their home states would resist it.

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[267] *Id.* at 4.

[268] *Id.* at 24. *But see* Nathan M. Jensen & Edmund J. Malesky, *Nonstate Actors and Compliance with International Agreements: An Empirical Analysis of the OECD Anti-Bribery Convention*, 72 INT'L ORG. 33, 43-47 (2018) (finding evidence that while firms from Anti-Bribery Convention ("ABC") countries reduced corrupt payments in Vietnam after ABC Phase 3 implementation began, corrupt payments from non-ABC countries increased.).

[269] In November 2018, the DOJ announced a "China Initiative," one of whose components is to "[i]dentify Foreign Corrupt Practices Act (FCPA) cases involving Chinese companies that compete with American businesses." U.S. DOJ, ATTORNEY GENERAL JEFF SESSION'S [SIC] CHINA INITIATIVE FACT SHEET (Nov. 1, 2018), https://www.justice.gov/opa/speech/file/1107256/download [https://perma.cc/FM69-S7YL]. Hundreds of Chinese companies are listed on U.S. securities exchanges, bringing them within the scope of the FCPA and of our proposed statute. Jodi Wu, Cori A. Lable & Gerald Lam, *Insight: A Shift in U.S. FCPA Policy—Should Chinese Companies Be Worried?*, BLOOMBERG L. (June 10, 2019, 4:01 AM), https://news.bloomberglaw.com/white-collar-and-criminal-law/insight-a-shift-in-u-s-fcpa-policy-should-chinese-companies-be-worried-4. In 2017, media reports revealed that the DOJ was investigating state-owned oil company Sinopec for FCPA violations in Nigeria. *Id.* More than fifteen Chinese nationals—including Patrick Ho, Hong Kong's former home secretary—have been investigated or prosecuted for FCPA violations. Helen Chan, *China's "Belt and Road" Projects Under Growing FCPA Scrutiny*, THOMSON REUTERS BLOG (July 24, 2019), https://www.jdsupra.com/legalnews/china-s-belt-and-road-projects-under-42482/ [https://perma.cc/U6MW-PJMG].

[270] Brewster, *supra* note 157, at 1615-16.

[271] Christensen et al., *supra* note 212, at 4 ("FDI flows decrease by a similar magnitude whether or not a country actively enforces its own foreign corruption regulation, which corroborates the importance of extraterritorial US FCPA enforcement in explaining the decline in investment.").

There is little reason to believe that the absence of such a regime would pose a significant obstacle to the United States' ability to pursue a FCPA-like enforcement strategy for human rights. The reason the OECD Convention was pivotal in legitimizing U.S. enforcement was that, before its adoption, states fundamentally disagreed about antibribery policy.[272] In many countries, bribes to foreign officials were openly tolerated or even encouraged and made tax-deductible as business expenses.[273] By contrast, virtually all states recognize prohibitions on core human rights violations like genocide, torture, war crimes, and human trafficking as universal norms.[274] All major home states are parties to treaties that prohibit and criminalize them.[275] Though these treaties may not expressly provide for home state enforcement against corporations, they leave little disagreement about the underlying prohibitions and would make it difficult for foreign governments to complain.

In addition, U.S. enforcement of human rights norms against multinationals could catalyze multilateral cooperation. While major initiatives like the UN Guiding Principles,[276] the OECD Guidelines for Multinational Corporations,[277] and the Independent Commission's report[278] all emphasize the role of home states in enforcing human rights obligations, there is currently no treaty to that effect.[279] Here again, the FCPA provides an encouraging precedent. Its adoption prompted powerful U.S. multinational firms like GE, Boeing, and Merck, which were most exposed to liability, to lobby the U.S. government not only to enforce the FCPA against their foreign competitors, but also to sponsor an international

[272] Brewster, *supra* note 157, at 1640.

[273] *Id.*

[274] *See Status of Ratification Interactive Dashboard*, U.N. HUM. RTS. OFF. OF THE HIGH COMM'R, https://indicators.ohchr.org/ [https://perma.cc/G8HX-VG7L] (last visited Sept. 18, 2021) (providing details regarding international adoption of human rights treaties).

[275] *Id.* These include the treaties cited *supra* note 19 and, in the case of several prominent home states, the Rome Statute of the International Criminal Court, *opened for signature* July 17, 1998, 2187 U.N.T.S. 3 (entered into force July 1, 2002).

[276] UNGP, *supra* note 6.

[277] ORG. FOR ECON. COOP. & DEV., OECD GUIDELINES FOR MULTINATIONAL CORPORATIONS 31 (2011).

[278] BINNIE ET AL., *supra* note 83, at 1.

[279] The UN Human Rights Council's Open-Ended Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises has produced several drafts of a proposed "legally binding instrument" that encompasses, among many other proposals, mandatory due diligence and home state civil and criminal enforcement. *See* UN Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises (Aug. 6, 2020) (second revised draft) (available at https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf [https://perma.cc/XR8Y-L393]). Its final content and prospects for adoption and ratification remain highly uncertain. *Id.*

treaty to level the playing field.[280] These efforts led directly to the adoption of the OECD Convention, which according to Brewster, "almost certainly would not currently exist but for the United States' passage of the FCPA."[281] The Convention, in turn, bound other home states to adopt antibribery laws and legitimized robust FCPA enforcement against foreign firms, encouraging others to ramp up their own enforcement.[282] Adoption of our model could lead to a similar virtuous cycle.

CONCLUSION

The U.S. retreat from civil litigation as a means of enforcing human rights has frustrated and angered many in the legal academy and civil society. If the status quo holds, their reaction is justified. But what has been missing from the conversation is critical analysis leading to realistic reform. The present moment provides an opportunity to enact modest changes to U.S. criminal law that will have a profound effect on human rights compliance by multinational corporations. The resolution of the present crisis in human rights law, we believe, has been in front of us the entire time. The FCPA regime pioneered by the United States represents a powerful and effective means of reining in transnational abuses of corporate power.

To be sure, the model we propose will not address all human rights concerns associated with the activities of multinational corporations. It focuses on the gravest human rights violations universally recognized as crimes, rather than on compliance with other important norms such as labor or environmental standards. Because it is premised on criminal liability, it cannot easily encompass the activities of contractors and other supply chain actors over which a corporation has limited control. Thus, it does not preclude other efforts aimed at promoting human rights compliance throughout the activities of multinational corporations.[283] What it can do is provide a viable alternative to the ATS in

[280] Brewster, *supra* note 157, at 1658.

[281] *Id.* at 1619.

[282] *Id.* at 1660-69.

[283] In recent years, these efforts include multiple voluntary initiatives and, increasingly, national laws mandating human rights due diligence (or at least disclosure). *See, e.g.*, *Modern Slavery Act 2018* (Austl.); Loi 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre [Law 2017-399 of March 27, 2017 on the Duty of Vigilance of Parent Companies and Ordering Companies], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 28, 2017, No. 74; Modern Slavery Act, (2015) CURRENT LAW c. 30 (UK); Council Regulation 2017/821 of 17 May 2017 Laying Down Supply Chain Due Diligence Obligations for Union Importers of Tin, Tantalum, and Tungsten, Their Ores, and Gold Originating from Conflict-Affected and High-Risk Areas, 2017 O.J. (L 130) 1. A literature discusses issues raised by supply chain compliance. *See* Adam S. Chilton & Galit A. Sarfaty, *The Limitations of Supply Chain Disclosure Regimes*, 53 STAN. J. INT'L L. 1, 7-25 (2017) (discussing the lack of pertinent information provided by supply chain disclosures); Kishanthi Parella, *Improving Human Rights Compliance in Supply Chains*, 95 NOTRE DAME L. REV. 727, 738-42 (2019) (exploring risks inherent in governance gaps in global supply chains); Galit A. Sarfaty, *Shining Light on*

providing effective deterrence of corporate complicity in atrocities. As it did in anticorruption, the United States can lead the way.

Global Supply Chains, 56 HARV. INT'L L.J. 419, 431-34 (2015). The United States has also used trade remedies to exclude goods made with forced labor. *See* CHRISTOPHER A. CASEY, CATHLEEN D. CIMINO-ISAACS, KATARINA C. O'REGAN, CONG. RSCH. SERV., SECTION 307 AND IMPORTS PRODUCED BY FORCED LABOR 1 (2020).