NOTE

Bridging the Void in Transnational Corporate Accountability: *Jesner v. Arab Bank* as a Call to Action

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The Supreme Court's 2018 decision in Jesner v. Arab Bank, PLC *likely signals the end of transnational corporate (TNC) human rights litigation under the Alien Tort Statute (ATS). More significantly, however, the ATS was never enough. The pace of globalization has left corporate governance in the dust decades ago and existing "solutions" are anything but. While TNC impunity is very much a global problem, the high cost of building international consensus has stalled and softened the international accountability agenda. The United States' vast market power makes it an essential component to progress in the business and human rights (BHR) movement. This Note illustrates the moral, social, and economic imperative of TNC accountability, explains the inadequacy of current liability mechanisms, and maps a realistic path toward a more fitting TNC accountability regime in the United States. While other articles critique the Supreme Court's dismemberment of the ATS, argue the normative merits of existing avenues of corporate accountability, or assess the progress and future of the BHR movement, this Note contributes to the conversation by laying the groundwork for a concrete path forward. Regardless of the legal or moral qualms with the outcome in* Jesner*, the Supreme Court's decision to strip human rights victims and advocates of one of the only existing legal avenues for TNC accountability should serve as a call to action.*

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I. INTRODUCTION

Spring of 2018 signaled a turning point for transnational corporate (TNC)[1] accountability under U.S. law: The U.S. Supreme Court finally beheaded the internationally renowned Alien Tort Statute (ATS).

The ATS grants federal district courts original 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."[2] Enacted in 1789 by the First Congress of the United States, the ATS serves to "promote harmony in international relations by ensuring foreign plaintiffs a remedy for international law violations in circumstances where the absence of a remedy might provoke foreign nations to hold the United States accountable."[3] Though essentially dormant for two hundred years,[4] the Second Circuit's 1980 decision in *Filartiga v. Peña-Irala*[5] mobilized the ATS as a tool for international human rights advocacy. Shortly thereafter, in *Doe v. Unocal Corp.*, the ATS opened U.S. federal courthouse doors to foreign plaintiffs seeking to hold corporations accountable for egregious human rights violations abroad.[6] Resurrected from obscurity, this 33-word statute has become internationally recognized as a singular avenue for TNC accountability.

Since *Unocal*, foreign plaintiffs have brought over one hundred and fifty ATS cases against corporations in U.S. federal courts, arising out of conduct in over sixty countries and two dozen industries.[7] Simultaneously, however, the U.S. Supreme Court has steadily chipped away at the scope of this

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1. The Conference of United Nations Organization on Trade and Development (UNCTAD) defines transnational corporations as "legal entities or entities without legal personality . . . that control[] assets of other entities in countries other than the mother [or "home"] country, usually by owning a capital stake." Marcel Kordos & Sergej Vojtovic, *Transnational Corporations in the Global World Economic Environment*, 230 PROCEDIA – SOC. & BEHAV. SCI. 150, 151 (2016) (citation omitted); *see also* UNCTAD, WORLD INVESTMENT REPORT 2016: METHODOLOGICAL NOTE 3 ("Multinational enterprises . . . are incorporated or unincorporated enterprises comprising parent enterprises . . . . A parent enterprise is defined as an enterprise that controls assets of other entities in countries other than its home country, usually by owning a certain equity capital stake.").

2. 28 U.S.C. § 1350 (2018).

3. Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1405 (2018).

4. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 720-21 (2004) (describing the few matters which raised the issue of ATS jurisdiction during the late 18th century, including two cases regarding privateers on the high seas and one Attorney General's opinion). According to Blackstone's contemporaneous commentaries, the law of nations referred to specific offenses under the criminal law of England in the late 18th century: "violation of safe conducts, infringement of the rights of ambassadors, and piracy." *Id.* at 715.

5. 630 F.2d 876 (2d Cir. 1980).

6. 963 F. Supp. 880 (C.D. Cal. 1997).

7. Amy Howe, *An Introduction to the Alien Tort Statute and Corporate Liability: In Plain English*, SCOTUS BLOG (July 24, 2017, 10:57 AM), https://www.scotusblog.com/2017/07/introduction-alien-tort-statute-corporate-liability-plain-english/; *see also* Donald Earl Childress III, *The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation*, 100 GEO. L.J. 709, 713 (2012) (stating that in 2012, six to ten corporate-related ATS cases were filed annually).

textually sweeping statute. First, in *Sosa v. Alvarez-Machain* in 2004, the Court held that only those claims which rest on a specific "norm of international character accepted by the civilized world" are actionable under the ATS.[8] This "restrained conception" of viable claims was recognized by the Court as a "high bar,"[9] and significantly narrowed the statute's scope. The Court also emphasized that in realms such as this, which implicate the foreign relations of the United States, the Court generally looks toward Congress for guidance.[10]

Nine years later, the majority opinion in *Kiobel v. Royal Dutch Petroleum Co.* further stunted the statute by holding that the presumption against extraterritorial jurisdiction applies to the ATS and can only be displaced when claims "touch and concern the territory of the United States . . . with sufficient force."[11] This significantly narrowed the list of eligible defendants. While the Court failed to establish a clear jurisdictional threshold, it held that "mere corporate presence" in the United States was insufficient.[12] Through these two decisions, made less than fifteen years after corporations were first held to account under the ATS, the U.S. Supreme Court emaciated the subject matter, territorial, and personal jurisdictional grant of the statute. Given the aggressive trend of the Court's ATS jurisprudence, the holding in *Jesner v. Arab Bank, PLC* was, arguably, an inevitability.

In essence, the majority opinion in *Jesner* held that because the charters of international criminal tribunals generally do not provide for jurisdiction over corporations, no international consensus exists as to whether corporations can be held liable for acts in violation of the law of nations.[13] Thus, per *Sosa*, the foreign corporate defendant, Arab Bank PLC, categorically could not be held liable under the ATS.[14] The majority further reasoned that, were the Court to rule in the reverse, it "could subject American corporations to an immediate, constant risk" of similar claims, "thereby hindering global investment in developing economies, where it is most needed."[15] Finally, the Court found that, counter to the original intent

8. *Sosa*, 542 U.S. at 725.

9. *Id.* at 725, 727.

10. *Id.* at 726 (explaining that it would be "remarkable to take a more aggressive role in exercising a jurisdiction that remained largely in shadow for much of the prior two centuries").

11. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124-25 (2013).

12. *Id.* at 125.

13. Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1400 (2018) (explaining that, despite global recognition of the importance of human rights, "[i]t does not follow, however, that current principles of international law extend liability—civil or criminal—for human rights violations to corporations or other artificial entities. This is confirmed by the fact that the charters of respective international criminal tribunals often exclude corporations from their jurisdictional reach.").

14. *Id.* at 1402 (explaining that, while the American legal system does provide for "corporate liability for the conduct of their human employees, . . . the international community has not yet taken that step, at least in the specific universal, and obligatory manner required by *Sosa*").

15. *Id.* at 1405.

of the statute, foreign corporate liability would exacerbate, rather than alleviate, diplomatic tensions.[16] While the foreign nature of the defendant in *Jesner* restricted the holding to foreign corporations, the same reasoning could logically be extended to the context of domestic corporations as well.[17]

With this holding, the Court put an end to, or at least significantly chilled, corporate litigation under the ATS. Over the past twenty years, plaintiffs from some of the world's most vulnerable regions leveraged the ATS against some of the world's most powerful corporate giants – including Chiquita Brands International,[18] Exxon Mobil,[19] and Cisco Systems Inc.,[20] amongst many others – for committing or facilitating the worst forms of human rights abuse, such as extrajudicial killing, war crimes, and torture. Ironically, while advocates, litigators, scholars, business leaders, and Supreme Court justices extensively researched and debated the merits and future of the ATS, for plaintiffs, the statute produced little litigation success and even fewer enforceable judgements.[21] That said, regardless of the legal or normative critiques of the outcome in *Jesner*[22] or the dearth of fruitful outcomes under the ATS, the Supreme Court's decision to strip human rights victims and advocates of one of the only existing legal avenues for TNC accountability[23] should serve as a call to action.

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16. *Id.* at 1406-07.

17. In addition to the logical incoherency in applying the *Jesner* analysis to U.S. corporations, it would make little sense for the Supreme Court to place U.S. entities at a disadvantage vis-à-vis their foreign counterparts.

18. *In re* Chiquita Brands Int'l, Inc., 190 F. Supp. 3d 1100 (S.D. Fla. 2016) (involving claims against Chiquita Brands International, Inc. for its alleged support of a violent right-wing paramilitary group in Colombia, which was responsible for the kidnapping, torture and extrajudicial killing of Plaintiffs' family members between the years of 1995 and 2004). The ATS claims were ultimately dismissed for lack of subject matter jurisdiction. *Id.* at 1112.

19. Doe v. Exxon Mobil Corp., 654 F.3d 11 (D.C. Cir. 2011) (involving claims against Exxon Mobil for hiring security forces which allegedly murdered, tortured, sexually assaulted, battered, and falsely imprisoned Indonesian villagers who lived in the vicinity of the company's large natural gas extraction and processing facility). The ATS claims were subsequently dismissed as moot after the Court's intervening opinion in *Kiobel*. Doe v. Exxon Mobil Corp., 527 F. App'x 7, 7 (D.C. Cir. 2013).

20. Doe I v. Cisco Sys., Inc., 66 F. Supp. 3d 1239 (N.D. Cal. 2014) (involving claims against Cisco Systems, Inc. for knowingly assisting in the false imprisonment, torture, assault, and battery of the plaintiffs, Chinese citizens of the Folun Gong religious practice, by Chinese actors in China). The ATS claims were ultimately dismissed for lacking sufficient nexus with the United States as required by *Kiobel*. *Id.* at 1247.

21. Beth Stephens, *The Curious History of the Alien Tort Statute*, 89 NOTRE DAME L. REV. 1467, 1467-68 (2014).

22. *See, e.g.*, Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1419-37 (2018) (Sotomayor, J., dissenting); Beth Stephens, *Five Things I Don't Like About the Jesner Opinion*, L. PROFESSOR BLOG NETWORK: HUM. RTS. AT HOME BLOG (Apr. 29, 2018), https://lawprofessors.typepad.com/human_rights/2018/04/five-things-i-dont-like-about-the-jesner-decision.html.

23. JOHN GERARD RUGGIE, JUST BUSINESS: MULTINATIONAL CORPORATIONS AND HUMAN RIGHTS xxxii (2013) [hereinafter JUST BUSINESS] (referring to the ATS as the most prominent avenue for raising claims of TNC-related human rights abuse, amongst a very limited universe of options).

We cannot look backward for a solution to a problem that essentially did not exist until the late twentieth century.[24] Rapid economic globalization over the past few decades has outpaced the development of global institutional capacity, largely to the detriment of vulnerable populations in states with weak rule of law.[25] While TNCs seamlessly cross borders, our regulatory system remains practically locked in the traditional Westphalian system of sovereign states.[26] Simultaneously, the world order has developed a catalogue of proscribed human rights abuses that it overwhelmingly refuses to apply to many of the worst offenders.[27] We continue to venerate the principles of state equality, autonomy, and non-interference at great cost to corporate accountability and humanity.[28] The Court's opinion in *Jesner* highlights the fact that the ATS was always an imperfect remedy stretched to cover the ever-growing governance gap surrounding TNC human rights abuse.

If we accept that *Jesner* signaled the end of corporate ATS litigation, we must embrace the need to tailor a fitting solution to this lethal symptom of today's globalized economy. The United States' vast market power makes it an essential component to this solution. National and transnational corporations alike pose similar risks, but the governance challenges are heightened in the transnational context due to the general absence of relevant laws with international or extraterritorial effect. A company may be based in country A, but cause or take part in abuses restricted to country B, and at present, virtually no laws can bridge the jurisdictional divide between

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24. *See id.* at 2. ("In 1970, there were approximately 7,000 transnational corporations in the world; that number grew to 30,000 by 1990, to 63,000 by 2000, and to 82,000 by 2009. Today, there are more than 100,000 multinational corporations with over 900,000 foreign affiliates."); Gwynne L. Skinner, *Expanding General Personal Jurisdiction Over Transnational Corporations for Federal Causes of Action*, 121 PENN ST. L. REV. 617, 663 (2017). This is not to say that TNCs, along with their externalities, are an entirely new phenomenon. From the great European trading companies of the 17th century, which predated the modern corporate form, to the emergence of industrial exploitation in the 19th and 20th centuries, corporations have long been accused of abusing labor and local populations. M.J. Peterson, *Multinational Corporations in Transnational Accountability*, INT'L DIMENSIONS ETHICS EDUC. SCI. & ENGINEERING (2008). However, the self-propelled and exponential proliferation of the modern-day TNC differentiates this phase of corporate abuse in at least two significant ways: (1) In the past, TNCs were subject to tighter regulation by the home state, as part of a more explicit (or even literal) colonial relationship; and (2) technological advancements have upscaled industrial power and potential for harm as never before. H.W. Singer, *The New International Economic Order: An Overview*, 16 J. MOD. AFR. STUD. 539, 543 (1978). Many scholars peg the start of this phase in TNC influence at the Bhopal spill in 1984, discussed below. *See infra* Part II.

25. JUST BUSINESS, *supra* note 23, at 2, 35 ("[T]he incidence of reported corporate-related human rights abuses is significantly higher in countries with weak governance where local laws do not exist or where laws are not enforced.").

26. LIESBETH FRANCISCA HUBERTINA ENNEKING, FOREIGN DIRECT LIABILITY AND BEYOND: EXPLORING THE ROLE OF TORT LAW IN PROMOTING INTERNATIONAL CORPORATE SOCIAL RESPONSIBILITY AND ACCOUNTABILITY 11-12 (2012).

27. JUST BUSINESS, *supra* note 23, at 19 (citing 350 distinct cases of TNC-related human rights abuse between February 2005 and December 2007).

28. ENNEKING, *supra* note 26, at 12.

the act and those ultimately responsible. The problems magnify as value chains increase – which financially, though rarely legally, connect parent companies to the abuses of partner corporations, subsidiaries, and contractors around the globe.[29] This paper focuses on the governance gap and the egregious human rights abuses attributed specifically to TNCs.[30] However, many of the policy proposals may equally apply to domestic companies.

This paper begins by describing the high cost of TNC impunity in today's globalized economy – the human cost, the corporate waste, and the broader threat to global security. Part II then defines the meaning of corporate accountability as used in this note and Part III outlines the existing mechanisms, or lack thereof, for human rights-related accountability in the TNC context. I address both non-binding and binding avenues for TNC liability, including civil society and consumer activism, as well as litigation strategies under federal, state, and foreign law. I also highlight the prominent procedural and substantive hurdles which often stand between plaintiffs and their quest for justice. Finally, Part IV proposes various strategies for mobilizing a business and human rights (BHR) framework under U.S. law. The proposals embrace existing U.S. legal tools that shape corporate incentives and adapt them in ways that have already been tested through voluntary private sector initiatives or in parallel regulatory contexts. My proposals touch on securities law, corporate law, and anti-corruption law. While a more detailed statutory framework is outside the scope of this paper, I hope to lay the foundation for a few compelling paths forward and to highlight essential factors that legislators and advocates should consider in the development of a new, or updated, legal instrument.[31]

TNC impunity is a global problem, but the high cost of building international consensus has stalled the accountability agenda for decades. In the meantime, globalization has vastly outpaced governance capacity, leaving a gaping regulatory void and allowing atrocities to occur in the name of profit. If the United States values human dignity, sustainable growth, and a stable global order, it must become a more central player in the business and human rights movement.

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29. JUST BUSINESS, *supra* note 23, at 2.

30. John Ruggie has referred to the disconnect between corporate abuse and corporate responsibility as "the biggest gap of all between globalization and governance." *Id.* at 33; *see also id.* at xxxii-iii (describing the challenges of applying human rights law to corporations more generally).

31. *See also* Gwynne L. Skinner, *Beyond* Kiobel*: Providing Access to Judicial Remedies for Violations of International Human Rights Norms by Transnational Business in a New (Post-*Kiobel*) World*, 46 COLUM. HUM. RTS. L. REV. 158 (2014) (describing the ATS landscape post-*Kiobel*). Skinner proposes amending the ATS so as to expressly extend the statute's jurisdiction over extraterritorial conduct or better define the sorts of activities that "touch and concern" the United States. *Id.* at 249-51.

II. THE COST OF CORPORATE IMPUNITY IN THE TWENTY-FIRST CENTURY

Individuals interact constantly with corporations – as consumers, service providers, employees, employers, and, more generally, as living creatures absorbing and reacting to corporate externalities. While a single TNC generally possesses far more power than a single human being, these constant, necessary, and mutually reinforcing interactions between humans and corporations create a system in which humans have the potential to massively impact the corporate condition, just as corporations massively impact the human condition. Consequently, from individual lives lost, to enormous corporate waste, to systemic socio-economic instability, corporate impunity for human rights abuses comes at a high cost for all stakeholders.

The Human Cost: Corporations can adversely affect the full range of human rights as defined by the International Bill of Rights[32] and the International Labor Organization's (ILO) Declaration on Fundamental Principles and Rights at Work.[33] For the purposes of this paper, however, when I refer to "human rights abuses," I include only those abuses which are commonly described as "gross" violations, though I use the term "egregious."[34] My goal is not to create a hierarchy of human rights, but

32. The International Bill of Rights consists of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights. Office of the U.N. High Comm'r for Human Right, Fact Sheet No. 2 (Rev.1), The International Bill of Human Rights (June 1996), https://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf.

33. Int'l Labour Org. [ILO], *Declaration on Fundamental Principles and Rights at Work and its Follow-up* (June 18, 1998). While individual countries may identify different, additional, or fewer rights as "human rights," there exists general consensus amongst major transnational corporations and business and human rights experts that the international Bill of Rights and the ILO's core declarations serve as guideposts in the business and human rights context. *See, e.g.*, JUST BUSINESS, *supra* note 23, at 72 (explaining that amongst the 102 Fortune Global 500 firms that reported having human rights-related corporate policies, nearly all of them drew their standards from the International Bill of Rights and the ILO Declaration, as opposed to other sources of international norms); *see also* John Ruggie (Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises), *Corporations and Human Rights: A Survey of the Scope and Patterns of Alleged Corporate-Related Human Rights Abuse*, at 2, U.N. Doc. A/HRC/8/5/Add.2 (May 23, 2008) [hereinafter *Scope and Pattern of Corporate Abuse*] (citing the International Bill of Rights and the ILO Declaration as the basis for U.N. Special Representative Ruggie's assessment of business-related human rights violations worldwide).

34. The United Nations General Assembly and the International Commission of Jurists have established a subcategory of harms considered to be "gross" violations of international human rights. *See* G.A. Res. 60/147, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Mar. 21, 2006); INT'L COMM'N JURISTS, THE RIGHT TO A REMEDY AND REPARATION FOR GROSS HUMAN RIGHTS VIOLATIONS: A PRACTITIONERS' GUIDE (rev. ed. 2018), https://www.icj.org/wp-content/uploads/2018/11/Universal-Right-to-a-Remedy-Publications-Reports-Practitioners-Guides-2018-ENG.pdf. While there is no clear-cut definition of what this term means, it factors in "the type of the violated rights and the character of the violation, the quantity of

rather to build the U.S. BHR legal framework upon a foundation of generally embraced legal principles – a status which many supposed "international human rights" do not enjoy in practice. For example, despite the fact that the United States is often viewed as a leader in the arena of civil and political rights, it is far less receptive toward economic, social, or cultural rights, like the right to fair wages or the right to decent living conditions.[35] Cultural and political sensitivities toward the recognition of certain human rights are exacerbated when one country exports its human rights standards abroad – as I propose is necessary to effectively regulate TNC abuse. Thus, this paper focuses on acts which are uniformly recognized – in the United States and beyond – as violations of fundamental human rights, such as crimes against humanity, torture, genocide, and extrajudicial killings. [36]

While this narrow focus excludes a variety of significant human rights violations, it still provides ample material to work with. Numerous allegations connect corporations with the most egregious forms of human rights abuse.[37] One of the earliest and most infamous incidents[38] was the 1984 methyl isocyanate gas leak at Union Carbide India Limited's (UCIL) pesticide plant in Bhopal, India, which, at the time, was majority owned by the U.S.-based Union Carbide Corporation.[39] While no consolidated record exists of the human toll in Bhopal, some estimates place the casualties as high as 30,000, with approximately 570,000 people exposed to the gas leak.[40]

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victims, the repeated occurrence of the violation and its planning, and the failure of the government to take appropriate measures relating to the violation in question." Roger-Claude Liwanga, *The Meaning of "Gross Violation" of Human Rights: A Focus on International Tribunals' Decisions over the DRC Conflicts*, 44 DENV. J. INT'L L. & POL'Y 67, 68 (2015).

35. For example, the United States has yet to ratify the ICESCR. *See International Covenant on Economic, Social and Cultural Rights*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-3.en.pdf (last visited May 20, 2020) (registering 170 state parties to the ICESCR, not one of which is the United States). Furthermore, few such rights are enshrined in the U.S. Constitution, which fails to guarantee the right of men and women to be treated equally, the right to education, the right to work, or the right to an adequate standard of living, amongst others. *See* U.S. CONST. amends. I-X (also known as the U.S. "Bill of Rights").

36. To be clear, in no way do I believe that the BHR movement should exclusively address these most egregious violations. I hope for this discussion to provide the foundation for future efforts that raise and adapt BHR standards to cover the full range of human and labor rights at stake.

37. In fact, U.N. Special Representative John Ruggie found that amongst the 320 cases examined, 44 percent affected the right to life, liberty and security of the person and 57 percent affected freedom from torture or cruel, inhuman or degrading treatment, which are included amongst the most egregious human rights abuses. *Scope and Pattern of Corporate Abuse*, *supra* note 33, at 14.

38. JUST BUSINESS, *supra* note 23, at 6; John Elliott, *India: After 30 Years, Bhopal is Still Simmering*, NEWSWEEK (Dec. 1, 2014, 11:23 AM), https://www.newsweek.com/india-after-30-years-bhopal-still-simmering-288144.

39. *History of Union Carbide India Limited*, BHOPAL.COM, http://www.bhopal.com/History-of-UC-India-Limited (last visited Apr. 4, 2020).

40. Elliott, *supra* note 38.

Authorities attribute the incident to negligent oversight and dramatically substandard safety conditions.[41]

Though people generally regard Bhopal as the world's worst industrial disaster,[42] the human cost of the global corporate agenda has only increased in the intervening years. In addition to allegations of fatal workplace conditions, many of the more recent cases involve the hiring of private or governmental security forces[43] which kill workers, community members, and human rights defenders.[44]

The Corporate Cost: Often in an attempt to promote private sector BHR initiatives, advocates have begun to focus on the "business case" for corporate human rights accountability.[45] When community or labor conflicts arise due to corporate abuse, the corporations themselves can face significant costs from a variety of sources – lost productivity, lost assets, lost financing, lost sales, personnel reallocation and retention, project modification, reputational degradation, and security expenditures.[46]

A 2014 report on company-community conflict in the extractive sector presents powerful data on these corporate costs.[47] Based on dozens of confidential interviews with industry experts and financial data analysis, the authors found that lost productivity due to delays in operations was the most frequently cited cost associated with corporate-related human rights abuse.[48] For example, a major mining project with capital expenditures between US$3-5 billion reported losing approximately US$20 million per week of delayed production, in net present value terms.[49] Another repeatedly cited cost of corporate-related human rights abuse are personnel costs,

41. *See Bhopal Trial: Eight Convicted over India Gas Disaster*, BBC NEWS (June 7, 2010), http://news.bbc.co.uk/2/hi/south_asia/8725140.stm.

42. JUST BUSINESS, *supra* note 23, at 6.

43. *See, e.g.*, Duncan Campbell, *Burmese Sue US Oil Company*, GUARDIAN (July 27, 2003), https://www.theguardian.com/world/2003/jul/28/burma.oil; Ed Clowes, *ExxonMobil Accused of Human Rights Abuse in Kurdistan Region*, TELEGRAPH (Jan. 18, 2020); *Tanzanian Victims Commence Legal Action in UK against Barrick*, RAID (Feb. 10, 2020), https://www.raid-uk.org/blog/tanzanian-victims-commence-legal-action-uk-against-barrick.

44. The nonprofit organization, Global Witness, found that in 2017 alone, just over two-hundred land and environmental defenders were killed globally – the highest total death count the organization has ever recorded during its six years of reporting on this issue. The organization also notes that their death toll is likely an underestimation, since many deaths go unreported and undocumented. GLOB. WITNESS, AT WHAT COST? IRRESPONSIBLE BUSINESS AND THE MURDER OF LAND AND ENVIRONMENTAL DEFENDERS IN 2017, at 7-8 (2018).

45. *See, e.g.*, Bennett Freeman et al., *Why Businesses are Nothing Without Strong Human Rights*, WORLD ECON. F. (Jan. 16, 2020), https://www.weforum.org/agenda/2019/01/5-ways-businesses-can-back-up-human-rights-defenders/.

46. RACHEL DAVIS & DANIEL FRANKS, COSTS OF COMPANY-COMMUNITY CONFLICT IN THE EXTRACTIVE SECTOR 15-16 (2014); STEVEN HERZ ET AL., DEVELOPMENT WITHOUT CONFLICT: THE BUSINESS CASE FOR COMMUNITY CONSENT 13-14 (2007).

47. DAVIS & FRANKS, *supra* note 46, at 15-18.

48. *Id.* at 19.

49. *Id.*

particularly at the senior management level.[50] A former senior manager estimated spending only one-third of his time on "actually doing my job," with the rest spent managing the fallout, internally and externally, arising from community conflict.[51] The time and financial demands of human rights-related troubleshooting also result in significant opportunity cost, preventing companies from pursing new markets and other business opportunities.[52]

The Security Cost: Beyond the cost to the individuals and corporations directly involved in instances of corporate human rights abuse, the pervasive culture of TNC impunity produces significant security costs at the national and global levels.

First, as demonstrated by the Bhopal disaster, corporate human rights abuse and environmental violations are frequently intertwined. U.N.S Special Representative John Ruggie found numerous cases where corporate-caused environmental damage threatened surrounding communities' rights to health, life, and adequate food and housing. [53] Furthermore, recent reports on the use of lethal violence against human rights defenders attributes the majority of such instances to situations where individuals are standing up for their land and environmental rights against the intrusion of private sector mega projects.[54] To the extent that the environmental externalities of TNCs accelerate the pace of climate change, they may increasingly represent an existential global security threat.[55]

Second, official corruption is regularly tied to corporate human rights abuse. The worst industrial accident since Bhopal illustrates the phenomenon well. The Bangladeshi Rana Plaza garment factory, a supplier for various TNCs, collapsed in April 2013, killing over 1,100 workers and

50. *Id.* at 20.

51. *Id.*

52. *Id.*

53. *Scope and Pattern of Corporate Abuse*, *supra* note 33, at 13-14 (finding that one-third of BHR cases also raise serious environmental concerns, including pollution, contamination, and degradation, to such an extent that it threatened surrounding communities' right to health, right to life, and rights to adequate food and housing, among others).

54. HRD MEMORIAL NETWORK, STOP THE KILLINGS 5 (Front Line Defs. ed., 2018), https://www.frontlinedefenders.org/sites/default/files/stk_-_full_report.pdf (reporting the killing of 312 human rights defenders in 2017, 67 percent of which involved individuals defending land, environmental, and indigenous peoples' rights and "nearly always in the context of mega projects linked to extractive industries and big business"); *see also Berta Cáceres: 2015 Goldman Prize Recipient South and Central America*, GOLDMAN ENVTL. PRIZE, https://www.goldmanprize.org/recipient/berta-caceres/ (last visited May 20, 2020) (describing the high-profile murder of a Honduran indigenous woman who took a vocal stand against the development of a dam, which would cut off the supply of water, food, and medicine for hundreds of indigenous peoples).

55. *See, e.g.*, LAURIE LAYBOURN-LANGTON ET AL., INST. FOR PUB. POLICY RESEARCH, THIS IS A CRISIS: FACING UP TO THE AGE OF ENVIRONMENTAL BREAKDOWN 16-20 (2019), https://www.ippr.org/files/2019-11/this-is-a-crisis-feb19.pdf (describing the local and global security consequences of climate change and environmental degradation).

severely injuring 2,500 others.[56] Though such allegations are officially unconfirmed, corruption likely played a significant role in this disaster.[57] The factory building, which was designed for retail and office space, was made of substandard materials and exceeded height restrictions by several stories, all of which was approved by the local government.[58] Similarly, in September 2012, a fire broke out in a textile factory in Pakistan, killing almost 300 workers.[59] Reports cite weak regulation, lax governmental oversight, and official corruption as the root causes of the disaster.[60]

Third, corporate-related human rights abuse frequently restricts civic space,[61] and, passively or actively, perpetuates violent regimes. Companies have been found to persuade governments to limit the scope of civil society organizations, encourage or approve the use of force by security services to break up demonstrations, fabricate allegations against human rights defenders, and harass advocates through baseless law suits and strategic litigation against public participation.[62] U.N. Special Representative John Ruggie found that in ninety percent of all instances of indirect corporate

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56. Jonathan Jacoby, *What's Changed (and What Hasn't) Since the Rana Plaza Nightmare*, OPEN SOC'Y FOUND. (Apr. 24, 2018), https://www.opensocietyfoundations.org/voices/what-s-changed-and-what-hasn-t-rana-plaza-nightmare.

57. *See id.* Notably, the factory was one of thousands of buildings in Bangladesh that had been converted into a multi-purpose industrial building, indicating that officials regularly turned a blind eye toward unsafe factory conditions. *Id.*

58. Julfikar Ali Manik & Jim Yardley, *Building Collapse in Bangladesh Leaves Scores Dead*, N.Y. TIMES (Apr. 24, 2013), https://www.nytimes.com/2013/04/25/world/asia/bangladesh-building-collapse.html. For a more comprehensive understanding of the role corruption plays in the readymade garment industry in Bangladesh, see SADID AHMED NUR-E MAULA ET AL., TRANSPARENCY INT'L BANGL., READYMADE GARMENT SECTOR: PROBLEMS OF GOOD GOVERNANCE AND WAY FORWARD (Oct. 31, 2013), https://blog.transparency.org/wp-content/uploads/2014/04/2013_TIB_GarmentSector_EN.pdf. The authors note the prevalence corruption and bribe payments throughout the industry, including factory owners who pay off police to suppress labor movements and payments to the Office of the Chief Inspector of Factories and Establishment to obtain approval of substandard facilities. *Id.* at 15, 23.

59. Zia ur-Rehman et al., *More than 300 Killed in Pakistani Factory Fires*, N.Y. TIMES (Sept. 12, 2012), https://www.nytimes.com/2012/09/13/world/asia/hundreds-die-in-factory-fires-in-pakistan.html.

60. *Id.*

61. CIVICUS, PEOPLE POWER UNDER ATTACK: A GLOBAL ANALYSIS OF THREATS TO FUNDAMENTAL FREEDOMS 4 (2018), https://www.civicus.org/documents/PeoplePowerUnderAttack.Report.27November.pdf (reporting on the increasing fragility and scarcity of civic space worldwide "[a]s societies fracture under the weight of rising social and economic inequalities and the increasing dominance of political leaders seeking to exploit societal divisions for their gain"). CIVICUS, a global alliance dedicated to strengthening citizen participation, defines "civic space" as "open space for civil society." *Id.*

62. BENNETT FREEMAN ET AL., BUS. & HUMAN RIGHTS RES. CTR. & INT'L SERV. FOR HUMAN RIGHTS, SHARED SPACE UNDER PRESSURE: BUSINESS SUPPORT FOR CIVIC FREEDOMS AND HUMAN RIGHTS DEFENDERS 20 (2018), https://www.business-humanrights.org/sites/default/files/documents/Shared%20Space%20Under%20Pressure%20-%20Business%20Support%20for%20Civic%20Freedoms%20and%20Human%20Rights%20Defenders_0.pdf; *What is a SLAPP?*, PUB. PARTICIPATION PROJECT, https://anti-slapp.org/what-is-a-slapp (last visited Apr. 5, 2019) ("[SLAPP] suits "chill free speech and healthy debate by targeting those who communicate with their government or speak out on issues of public interest.").

abuse – acts committed by a third party yet benefitting, or promoted by, a corporation – the actor directly committing the abuse was the state.[63] This finding is supported by the fact that many of the most well-known corporate-related ATS cases originate in some of the world's most notoriously violent and oppressive states[64] – *Doe v. Unocal Corp.* in Myanmar,[65] *Presbyterian Church of Sudan v. Talisman Energy, Inc.* in Sudan,[66] *Sarei v. Rio Tinto PLC* in Papua New Guinea,[67] and *Wiwa v. Royal Dutch Petroleum Co.* in Nigeria.[68] While it is difficult to draw a causal relationship between corporate and state human rights abuse, the tight correlation is striking.

The human, corporate, and broader security costs associated with egregious TNC abuse inextricably link corporate accountability with the sustainability of globalization[69] – the globalization of stable businesses, thriving economies, civil society, democracy, and rule of law.

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63. *Scope and Pattern of Corporate Abuse*, *supra* note 33, at 26. Indirect corporate harm includes cases where a company either is perceived to contribute to, or benefit from, abuse conducted by third parties, or cases where abuse is identified in a corporation's supply chain. *Id.* at 4. Ruggie defines "direct" corporate harm as instances where the company, through its employees or agents, was generally alleged to have committed the abuse, with minimal or no separation between the company and the abuse. *Id.*

64. FREEDOM HOUSE, DEMOCRACY IN RETREAT: FREEDOM IN THE WORLD 2019, at 16 (2019), https://freedomhouse.org/sites/default/files/Feb2019_FH_FITW_2019_Report_ForWeb-compressed.pdf (presenting Freedom Scores, as defined by political rights and civil liberties, for each country around the world – the four countries implicated in the subsequently enumerated cases, Myanmar, Sudan, Papua New Guinea, and Nigeria, all fall well within the bottom fifty percent of states); *see also* JUST BUSINESS, *supra* note 23, at 29 ("[A] negative symbiosis exists between the worst corporate-related human rights abuses and host countries that are characterized by combinations of relatively low national income, current or recent conflict exposure, and weak or corrupt governance.").

65. 963 F. Supp. 880 (C.D. Cal. 1997) (involving claims brought by residents of Myanmar against U.S., French, and Burmese oil companies seeking relief for alleged forced relocations, enslavement, extra judicial killings, rape, assault, torture, and other abuse in connection with their offshore drilling stations).

66. 582 F.3d 244 (2d Cir. 2009) (involving claims brought by current and former residents of Sudan against Talisman Energy, Inc., a Canadian corporation, for aiding and abetting, or conspiring with, the Sudanese government in forced relocations and assaults conducted to protect the company's oil facilities).

67. 221 F. Supp. 2d 1116 (C.D. Cal. 2002) (involving claims brought by current and former residents of Papua New Guinea against Rio Tinto plc and Rio Tinto Limited for allegedly destroying the island's environment and displacing and imprisoning residents in furtherance of the companies' mining project).

68. No. 96 Civ. 8386(KMW), 2002 U.S. Dist. LEXIS 3293 (S.D.N.Y. Feb. 22, 2002) (involving claims brought by citizens of Nigeria and Great Britain against Royal Dutch Petroleum Company and Shell Transport and Trading Company, incorporated and headquartered in the Netherlands and the United Kingdom, respectively, for allegedly facilitating violent attacks against local villagers who were protesting the companies' land appropriation and oil-excavation activities).

69. John Ruggie (Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises), *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, at 25, U.N. Doc. A/HRC/4/035 (Feb. 9, 2007).

III. DEFINING CORPORATE ACCOUNTABILITY

Various policies and laws in the United States have begun to acknowledge the negative human rights-related externalities of global corporations. Within these tools, ranging from self-imposed corporate pledges, to the emergence of "Benefit-Corporations," to criminal sanctions, this paper only focuses on existing mechanisms that provide for true corporate accountability – a concept that merits a more precise definition.

By "corporate" accountability, I mean to draw the distinction between liability for the corporate entity itself and the liability of individual corporate agents, which remains a litigation strategy under the ATS even after *Jesner*.[70] While individuals are inevitably the direct source of corporate-related abuse, corporations are the systemic source. Especially in the context of large TNCs, a company's incentive structure and corporate culture significantly influence its agents, either enabling or inhibiting actions that lead to human rights abuse.[71]

The rationale for imposing corporate liability in the human rights context closely mirrors the rationale for corporate liability in the criminal context. First, the Model Penal Code states that fining a corporation encourages managers to supervise corporate personnel.[72] Not only do fines erode a company's bottom line, but they also open the possibility of derivative suits by shareholders, which would impose costs on corporate managers – the actors with the greatest capacity to change corporate priorities and practices.[73] Second, punishing the company directly prevents unjust enrichment from the abuse.[74] Third, and particularly true in the transnational context, modern day corporations are vast and decentralized. It is often difficult to identify and convict the culpable agents, even when it is clear that the corporation was involved in the abuse.[75] Finally, despite the Supreme Court's majority opinion in *Jesner*, the Court has long acknowledged the value of corporate liability in regulatory and social welfare

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70. The holding in *Jesner* focused on the fact that the international community was not in agreement as to whether corporate entities themselves could commit acts in violation of the law of nations. Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1402 (2018).

71. *See also* RICK RELINGER, EMBEDDING THE CORPORATE RESPONSIBILITY TO RESPECT HUMAN RIGHTS WITHIN COMPANY CULTURE (2014) (discussing methods of embedding respect for human rights into corporate culture). *See generally* Marc Kaplan et al., *Shape Culture: Drive Strategy*, DELOITTE INSIGHTS (Feb. 29, 2016), https://www2.deloitte.com/insights/us/en/focus/human-capital-trends/2016/impact-of-culture-on-business-strategy.html (discussing the impact of corporate culture on corporations' actions).

72. MODEL PENAL CODE § 2.07, cmt. at 154 (AM. LAW INST., Tentative Draft No. 4, 1955).

73. Bruce Coleman, *Is Corporate Criminal Liability Really Necessary?*, 29 SW. L.J. 908, 921 (1975). For example, fines would provide the basis for a shareholder to bring suit against the directors for failing their fiduciary duty to act in the corporation's best interest.

74. *Id.*

75. *Id.* at 922.

contexts.[76] In 1909, the Court held that to give corporations "immunity from all punishment because of the old and exploded doctrine that a corporation cannot commit a crime would virtually take away the only means of effectually controlling the subject-matter and correcting the abuses aimed at."[77] By punishing the corporate entity, we align corporate incentives with the societal agenda to minimize harm.[78]

By "accountability," I mean the potential for a third party to impose consequences on an actor deemed to have fallen short of a stated or imposed commitment.[79] This focus on accountability distinguishes the BHR agenda from the more prevalent concept of Corporate Social Responsibility (CSR).[80] As an industry-led initiative, CSR focuses on self-guided, voluntary measures which incorporate social and environmental concerns into the corporate business model in order to reduce risk, save money, enhance customer relations, and better manage employees.[81] Beyond some incorporation of anti-discrimination and labor rights, human rights "have not come to play a pivotal role for the general conceptualization of CSR."[82]

The push for a BHR watchdog requirement is, at least partially, a response to the perceived failure of CSR to actually curb corporate misconduct.[83] A major pillar of the CSR industry, multi-stakeholder initiatives (MSIs), such as Social Accountability International and the Fair Labor Association, combine the efforts of businesses, civil society, and other stakeholders to make business processes more socially and environmentally sustainable through social audits and certification processes.[84] Arguably amongst the most robust CSR movements, MSIs emerged out of a lack of trust in strictly internal codes of conduct and audits.[85] However, much like the internal commitments, MSIs provide virtually no oversight and no accountability – the worst case scenario for a company is that it is forced to withdraw from the organization, or have its

76. *Id.* at 923.

77. N.Y. Cent. & Hudson R.R. Co. v. United States, 212 U.S. 481, 496 (1909); *see also* W.T. Grant Co. v. Superior Court, 100 Cal. Rptr. 179, 180 (Cal. Ct. App. 1972) ("[I]t [is] no longer open to serious doubt that a corporation may commit a crime which requires specific intent.").

78. Coleman, *supra* note 73, at 923-24.

79. *Accountability*, BLACK'S L. DICTIONARY, https://thelawdictionary.org/accountability/ (last visited May 20, 2020) ("When one party must report its activities and take responsibility for them. It is done to keep them honest and responsible.").

80. Anita Ramasastry, *Corporate Social Responsibility Versus Business and Human Rights: Bridging the Gap Between Responsibility and Accountability*, 14 J. HUM. RTS. 237, 237-38 (2015).

81. *Id.* at 237, 239.

82. *Id.*

83. *Id.* at 238, 250.

84. BRIAN FINNEGAN, AM. FED'N OF LABOR-CONG. INDUS. ORGS., RESPONSIBILITY OUTSOURCED: SOCIAL AUDITS, WORKPLACE CERTIFICATION AND TWENTY YEARS OF FAILURE TO PROTECT WORKER RIGHTS 13, 17 (2014).

85. *Id.* at 17.

certification revoked.[86] While MSI membership has grown over the past twenty years, there is little to show for it.[87] For example, just three weeks before the aforementioned fatal fire in Pakistan, Social Accountability International – recognized by many as providing the "gold standard of workplace certifications"[88] – had certified the factory as compliant with health and safety standards.[89] These voluntary initiatives provide an artificial gloss of social awareness, which arguably serves corporate more than human interests and undermines much needed governmental action.[90]

IV. EXISTING AVENUES FOR TRANSNATIONAL CORPORATE ACCOUNTABILITY

Prior to *Jesner*, the ATS was the most prominent domestic avenue for holding corporations accountable for human rights abuse.[91] On its own, international human rights law does not directly apply to corporations.[92] Thus, on the assumption that the ATS door is all but closed, victims, advocates, and regulators must turn to other avenues within domestic law to find a remedy for corporate-related human rights abuse.

Both host states (those in which a business is operating) and home states (those in which a business is headquartered or incorporated) presently possess varying degrees of jurisdiction over the actions of TNCs. However, victims of corporate human rights abuse in host states often face insurmountable obstacles in their pursuit of justice within the jurisdiction of the incident. First, host countries may simply have no mechanism for victims to bring a claim or seek redress.[93] Second, even when there is a right to a remedy, host countries often have ineffective and corrupt judicial systems.[94] Third, the separate legal identity of parent companies and their foreign subsidiaries may block even a successful victim from collecting on a positive verdict in the host state – for instance, due to a subsidiary's bankruptcy or lack of funds.[95] Fourth, victims may possess legitimate fears of retaliation by the company, the government, or other local stakeholders

86. *See, e.g.*, *id.* at 20.

87. *Id.* at 4.

88. *Id.* at 7.

89. Declan Walsh & Steven Greenhouse, *Inspectors Certified Pakistani Factory as Safe Before Disaster*, N.Y. TIMES (Sept. 19, 2012), https://www.nytimes.com/2012/09/20/world/asia/pakistan-factory-passed-inspection-before-fire.html.

90. Richard M. Locke, *Can Global Brands Create Just Supply Chains?*, BOS. REV. (May 21, 2013), http://bostonreview.net/forum/can-global-brands-create-just-supply-chains-richard-locke (quoting Former United States Secretary of Labor Robert Reich).

91. JUST BUSINESS, *supra* note 23, at xxxii.

92. *Id.*

93. Skinner, *supra* note 24, at 659-60.

94. *Id.* at 659.

95. *Id.* at 660; *see also infra* Section IV(B)(iv)(a).

in the host state.[96] Finally, with many countries operating under a "loser pays rule," litigation is often too costly.[97]

Conversely, the legal infrastructure in home states provides a more promising foundation for corporate accountability. Home states – generally among the wealthiest and most stable global economies – possess stronger rule of law, more resources dedicated to enforcement, and, especially with regards to the United States, a wider net of potentially eligible corporate defendants.[98] The United States serves as headquarters for the greatest number of Fortune 500 companies in the world,[99] and TNCs with foreign headquarters more commonly conduct business in the United States than in any other country in the world.[100] Collectively, these factors make the United States uniquely suited to lead or stall the BHR movement internationally.

At present, despite the dominance of the United States in the TNC market, nothing within U.S. law effectively addresses the problem of U.S.-based TNC human rights abuse when it occurs on foreign soil. The following discussion outlines the accountability avenues which do exist and describes their respective shortcomings.

A. Civil Society: Naming, Shaming, and Consumer Activism

Civil society has long been the most effective source of TNC accountability. Various initiatives by non-governmental organizations (NGOs) and journalists have shed light on corporate abuses and thus helped to change corporate behavior – either as a result of subsequent U.S. government action, consumer activism, or pure shame.

For example, in 2015 a small team of journalists with the Associated Press (AP) reported abusive practices within the Thai seafood industry. Laborers who had been essentially enslaved reported being "kicked, whipped with toxic stingray tails or otherwise beaten if they complained or

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96. *Id.* at 660.

97. *Id.*

98. *See generally* U.N. Conference on Trade & Development, UNCTAD Investment Brief No. 4 (Nov. 11, 2005), https://unctad.org/en/Docs/webiteiia200511_en.pdf (listing Finland, France, Germany, the Netherlands, Sweden, Switzerland, the United Kingdom, and the United States as the home states of the 25 largest TNCs, in terms of number of foreign subsidiaries); David Francis, *The Top 25 Corporate Nations*, FOREIGN POL'Y (2016), https://foreignpolicy.com/2016/03/15/these-25-companies-are-more-powerful-than-many-countries-multinational-corporate-wealth-power/ (listing Belgium, China, Denmark, England, Ireland, the Netherlands, South Korea, Switzerland, the United Arab Emirates, and the United States as the home states of the top 25 wealthiest TNCs in the world – with the United States as home to twelve of them); Alex Gray, *These are the World's 10 Biggest Corporate Giants*, WORLD ECON. F. (Jan. 16, 2017), https://www.weforum.org/agenda/2017/01/worlds-biggest-corporate-giants/ (listing the United States as the home country for the top nine largest companies in the world).

99. OXFORD PRO BONO PUBLICO, OBSTACLES TO JUSTICE AND REDRESS FOR VICTIMS OF CORPORATE HUMAN RIGHTS ABUSE 305 (2008).

100. Skinner, *supra* note 24, at 667.

tried to rest . . . . In the worst cases, numerous men reported maimings or even deaths on their [fishing] boats."[101] These news reports caught the world's attention and the United States was no exception, particularly given the well-known food suppliers exposed for selling this tainted seafood: Kroger, Albertsons, Safeway, Walmart, and Sysco.[102] Not long after the reports broke headlines, the Obama Administration enacted measures to tighten U.S. prohibitions on the importation of slavery-infected goods, some of which specifically targeted the seafood industry.[103]

Recent high-profile NGO campaigns have used similar "naming and shaming" tactics to incentivize socially productive competition between peer corporations – a "race to the top" approach. These NGOs incentivize companies to improve their practices through a scoring system which rewards demonstrated respect for human rights. For instance, Human Rights Watch released its "Behind the Bling" campaign in 2018, which calls on jewelry and watch companies to enhance human rights due diligence in their supply chains. This effort includes various investigative pieces on industry-specific corporate human rights abuse,[104] informative videos,[105] social media campaigns, and a scoreboard exposing differing degrees of supply-chain due diligence amongst industry leaders, including Tiffany & Co., Cartier, and Pandora.[106]

Even in the absence of governmental reactions, negative attention from high profile NGOs alone may prevent corporate human rights abuse. For

101. Robin McDowell et al., *AP Investigation: Slaves May Have Caught the Fish You Bought*, ASSOCIATED PRESS (Mar. 25, 2015), https://www.ap.org/explore/seafood-from-slaves/ap-investigation-slaves-may-have-caught-the-fish-you-bought.html.

102. *Id.*

103. Martha Mendoza, *Obama Bans US Imports of Slave-Produced Goods*, ASSOCIATED PRESS (Feb. 25, 2016), https://www.ap.org/explore/seafood-from-slaves/Obama-bans-US-imports-of-slave-produced-goods.html (announcing the Obama administration's decision to close the "consumptive demand" loophole within the Tariff Act of 1930, which previously provided an often exploited exception to the prohibition against the importation of slavery-tainted goods); *Obama Bans U.S. Imports of Slave Produced Goods*, CHI. TRIB. (Feb. 25, 2016), https://www.chicagotribune.com/nation-world/ct-slave-produced-goods-20160225-story.html (citing the Obama administration's pledge to close existing legal loopholes one month after they were flagged by AP reporters); Ian Urbina, *U.S. Closing a Loophole on Products Tied to Slaves*, N.Y. TIMES (Feb. 15, 2016), https://www.nytimes.com/2016/02/16/us/politics/us-closing-a-loophole-on-products-tied-to-slaves.html (discussing the Obama administration's decision to ratify the Port State Measures Agreement, which specifically targets illegal fishing and the National Oceanic and Atmospheric Administration's announcement to improve the tracking of seafood from catch to market).

104. *Behind the Shine: A Call to Action for the Jewelry Industry*, HUM. RTS. WATCH (Feb. 8, 2018), https://www.hrw.org/news/2018/02/08/behind-shine-call-action-jewelry-industry; Juliane Kippenberg, *Jewelers, Take Responsibility!*, HUM. RTS. WATCH (Mar. 21, 2018), https://www.hrw.org/news/2018/03/21/jewelers-take-responsibility.

105. Human Rights Watch, *The Hidden Cost of Jewelry*, YOUTUBE (Feb. 8, 2018), https://www.youtube.com/watch?v=Bo1BUmJx_OY.

106. *#BehindTheBling: Jewelers Should Come Clean*, HUM. RTS. WATCH, https://www.hrw.org/behindthebling (last visited Apr. 4, 2019); *see also Behind the Brands*, OXFAM, https://www.behindthebrands.org/about/ (last visited Apr. 4, 2019) (creating a similar race-to-the-top incentive structure for the world's ten largest beverage companies).

example, the faceoff between U.S. mining giant Newmont Mining Corporation and Máxima Acuña – a subsistence farmer turned activist – went global once NGOs like Amnesty International began publishing information about the company's alleged harassment campaign against the Peruvian human rights defender.[107] A situation which could have resulted in Máxima's death instead won her the world's highest prize for grassroots environmental heroes,[108] saw her case picked up by a top U.S.-based nonprofit legal advocacy organization, EarthRights International,[109] and brought Newmont's project to a halt.[110]

Consumers can also play a role in this type of extra-legal corporate accountability. Most notably, in 1991, reports on abusive labor practices in Nike's South Asian factories resulted in a global boycott that crippled Nike's sales, stock prices, and reputation.[111] In response, the company improved factory conditions, reformed its labor polices, and enhanced corporate transparency – internally mandating a policy of independent monitoring by the Fair Labor Association.[112] Nike is now lauded as a world leader in BHR, though its practices are far from perfect.[113]

Significantly, one of the primary catalysts for consumer activism against Nike was the ubiquity of the brand – at the time, Nike was the world's best-selling shoe company.[114] To be effective, all iterations of "naming and shaming" campaigns require well-known consumer-facing brands. If a company's name is not known or its reputation is relatively immaterial, the

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107. Because Máxima refused to relocate to accommodate an expansion of the existing mine, the mine's security forces allegedly threatened the Acuña family, stole and destroyed their crops, killed their livestock, harassed them with drones and photographers, beat Máxima and her daughter unconscious, and filed baseless criminal charges against Máxima in provincial court. Complaint for Damages and Equitable Relief at 10, 115, 125, 367, Acuña-Atalaya v. Newmont Mining Corp., 765 Fed. App'x 811 (3d. Cir. 2019) (No. 18-2042); *see also Case History: Máxima Acuña de Chaupe*, FRONTLINE DEFENDERS, https://www.frontlinedefenders.org/en/case/case-history-maxima-acuna-de-chaupe (last visited Mar. 4, 2020) (presenting a timeline of the events and legal actions).

108. *Máxima Acuña: 2016 Goldman Prize Recipient South and Central America*, GOLDMAN ENVTL. PRIZE, https://www.goldmanprize.org/recipient/maxima-acuna/ (last visited Apr. 4, 2019) [hereinafter *Máxima Acuña*].

109. *Maxima Acuña-Atalaya v. Newmont Mining Corp.*, EARTHRIGHTS INT'L, https://earthrights.org/case/maxima-acuna-atalaya-v-newmont-mining-corp/ (last visited Apr. 4, 2019).

110. *Máxima Acuña*, *supra* note 108.

111. Simon Birch, *How Activism Forced Nike to Change its Ethical Game*, GUARDIAN (July 6, 2012), https://www.theguardian.com/environment/green-living-blog/2012/jul/06/activism-nike; E.J. Dionne Jr., *Bad for Business*, WASH. POST (May 15, 1998), https://www.washingtonpost.com/archive/opinions/1998/05/15/bad-for-business/112d99ce-a98c-479a-8b4e-9c371c786f36/.

112. Birch, *supra* note 111.

113. David Teather, *Nike Lists Abuses at Asian Factories*, GUARDIAN (Apr. 14, 2005), https://www.theguardian.com/business/2005/apr/14/ethicalbusiness.money; *see also* Sarah Spellings, *This Could Be the Next Step for the New, Socially Conscious Nike*, CUT (Sept. 6, 2018), https://www.thecut.com/2018/09/nikes-colin-kaepernick-ad-raises-issues-of-workers-rights.html (discussing Nike's celebrated progress toward adequate human rights practices and highlighting its persistent areas for improvement, including living wage, transparency, and unionization).

114. Birch, *supra* note 111.

singular tool in the civil society toolbox becomes blunt. Furthermore, this avenue of corporate accountability provides no remedy for victims. Consequently, even the most effective civil society campaigns generally involve legal action as well – in the Thai case, the Obama Administration amended The Tariff Act of 1930, in the Peruvian case, EarthRights brought ATS and tort charges against Newmont in U.S. federal court, and, in the case of Nike, plaintiffs brought suit on misrepresentation grounds in the state of California. Civil society and consumer activism are powerful and necessary forces in the fight toward corporate accountability, but their inherent limitations require an emphasis on legal remedy.

B. Binding Statutes

1. Federal Law Claims: ATS, RICO, and TVPA

While corporate liability under the ATS generally stands on shaky ground after *Jesner*, it does, hypothetically, remain a possibility against U.S.-based corporations.[115] According to the Court, the First Congress enacted the ATS so as to "avoid foreign entanglements by ensuring the availability of a federal forum where the failure to provide one might cause another nation to hold the United States responsible for an injury to a foreign citizen."[116] Where a TNC with sufficient ties to the United States is alleged to have committed egregious human rights abuses in a foreign jurisdiction,[117] the risk of retaliation against the United States remains a concern.

However, the holding in *Jesner* rests on the all-encompassing principle that there is insufficient global consensus to conclude that the law of nations applies to corporations.[118] In his majority opinion, Justice Kennedy explicitly suggests that corporations are thus categorically excluded from jurisdiction under the ATS.[119] Additionally, from an economic perspective, it makes little sense for the United States to contort the modern application of the ATS in way that places U.S.-based corporations at a unique disadvantage. Consequently, from both a legal and practical perspective, corporate litigation under the ATS may be a dead end.

The remaining avenues for corporate accountability under U.S. federal law only apply to a subset of the most egregious human rights violations.

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115. *See, e.g.*, Doe v. Nestle, S.A., 906 F.3d 1120, 1124 (9th Cir. 2018) ("[T]he Supreme Court in *Jesner* held that foreign corporations cannot be sued under the ATS . . . [b]ut *Jesner* did not eliminate all corporate liability under the ATS . . . .").

116. Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1397 (2018).

117. *See* Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124-25 (2013) (expressing concern that foreign nations could retaliate by allowing legal action against U.S. citizens for crimes occurring in the U.S. or anywhere else in the world).

118. *Jesner*, 138 S. Ct. at 1400.

119. *Id.* at 1400-01.

First, the Racketeer Influenced and Corrupt Organizations (RICO) Act was designed to protect U.S. economic interests against the negative effects of racketeering at home or abroad. It extends the civil and criminal jurisdiction of federal courts over both people and corporations.[120] Within the definition of the statute, a "pattern of racketeering activity"[121] includes certain acts frequently implicated in corporate human rights abuse, such as murder, peonage, slavery, trafficking in persons, and interference with commerce through acts of violence.[122] Those found guilty under criminal RICO could face up to life imprisonment and may have to forfeit property, depending on the underlying conduct.[123] Under civil RICO, violators must pay successful plaintiffs treble damages and the cost of the suit.[124] Victims bringing a claim under civil RICO must prove a direct link between the pattern of racketeering and some injury to their business or property, which can include allegations of forced labor.[125]

However, the extraterritorial reach of RICO is quite limited, and particularly so in the context of transnational human rights abuse. Both civil and criminal RICO claims are based on predicate acts – the acts comprising the pattern of racketeering activity – which are enumerated within the RICO statute.[126] In 2016, the Supreme Court held that criminal RICO applies extraterritorially "only to the extent that the predicates alleged in a particular case themselves apply extraterritorially."[127] While some potentially relevant predicate acts do meet this criterion, including assassinating government officials[128] and killing a U.S. national outside of the United States,[129] the Court's holding made clear that the majority of predicate acts defined in the RICO statute do not extend beyond U.S. borders.[130]

Furthermore, the Court held that private parties may not seek relief under civil RICO for injuries sustained outside of the United States.[131] Nonetheless, given its goal of protecting the U.S. economy, RICO's

120. "'Person' includes any individual or entity capable of holding a legal or beneficial interest in property." 18 U.S.C. § 1961(3) (2018).

121. 18 U.S.C. § 1962(b) (2018). "'Pattern of racketeering activity' requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity." 18 U.S.C. § 1961(5) (2018).

122. 18 U.S.C. § 1961(1)(A), (B) (2018); *cf.* 18 U.S.C. § 1951 (2018).

123. 18 U.S.C. § 1963(a) (2018).

124. 18 U.S.C. § 1964(c) (2018).

125. *Id.*; Doe I v. Unocal Corp., 395 F.3d 932, 961 (9th Cir. 2002) ("The right to make personal and business decisions about one's own labor . . . fits . . . [the] definition of 'property' [included in 18 U.S.C. § 1951].").

126. RJR Nabisco, Inc. v. Eur. Cmty., 136 S. Ct. 2090, 2101-02 (2016).

127. *Id.*

128. 18 U.S.C. § 1751(k) (2018).

129. 18 U.S.C. § 2332(a) (2018).

130. *RJR Nabisco*, 136 S. Ct. at 2101-02.

131. *Id.* at 2107.

jurisdictional reach may extend beyond U.S. soil if the acts in question pass the "domestic effects test."[132] To bring a claim under RICO, a plaintiff must prove that the conduct in question produces, or has produced, "substantial effects within the United States," which are the direct and foreseeable result of the conduct, notwithstanding the fact that it was committed abroad.[133]

Combined, RICO's requisite factors impose a virtually impossible burden of proof on victims of TNC abuse. Despite numerous attempts to bring RICO claims against TNCs for alleged human rights violations,[134] there is only one notable success story: *Wiwa v. Royal Dutch Petroleum Co.*[135] In *Wiwa*, Nigerian citizens and residents brought claims against two European oil companies who allegedly facilitated violent government attacks against villagers in order to stifle local opposition to the companies' activities in the area. The District Court found that the claims passed the "effects" test because the actions in question lowered production costs for the two defendants, which, in turn, substantially affected the U.S. oil market by placing the European companies at an unfair advantage.[136] To illustrate the rarity of this favorable finding, the U. S. District Court for the Northern District of California turned away a subsequent RICO claim with nearly identical facts because the plaintiffs could not prove that the defendant financially benefited from the acts in question.[137]

The Trafficking Victims Protection Act (TVPA) covers an even smaller subset of corporate-related egregious human rights violations because it restricts potential plaintiffs to employees who suffered abuses as a result of forced labor. In addition to sex trafficking, the TVPA defines "severe forms of trafficking in persons" as "the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purposes of subjection to involuntary servitude, peonage, debt bondage, or slavery."[138] Trafficking victims may bring suit against those who commit the acts in question and those who knowingly benefit from the trafficking.[139] The 2008 amendments to the TVPA made clear that the Act applies extraterritorially, allowing for civil

132. Doe I v. Unocal Corp., 395 F.3d 932, 961 (9th Cir. 2002) (citing Consol. Gold Fields PLC v. Minorco, S.A., 871 F.2d 252, 261-62 (2d Cir. 1989)); *see also RJR Nabisco*, 136 S. Ct. at 2111.

133. *Unocal*, 395 F.3d at 961 (citing *Consol. Gold Fields*, 871 F.2d at 261-62).

134. *See, e.g.*, Doe I v. Israel, 400 F. Supp. 2d 86 (D.D.C. 2005); Jose v. M/V Fir Grove, 801 F. Supp. 349 (D. Or. 1991); *Unocal*, 395 F.3d at 961.

135. No. 96 Civ. 8386(KMW), 2002 U.S. Dist. LEXIS 3293 (S.D.N.Y. Feb. 22, 2002).

136. *Id.* at 70-71.

137. Bowoto v. Chevron Corp., 481 F. Supp. 2d 1010, 1015 (N.D. Cal. 2007).

138. 22 U.S.C. § 7102(11)(B) (2000).

139. Spring Miller & Stacie Jonas, *Using Anti-Trafficking Laws to Advance Workers' Rights*, 2015 CLEARINGHOUSE REV. 1, 2.

and criminal corporate liability for incidents that occur entirely on foreign soil so long as the defendant is based in the United States.[140]

Since this modification to the Act, only one notable case has resulted in corporate liability for acts which occurred abroad. *Adhikari v. Daoud & Partners*[141] involved civil TVPA claims against two corporate defense contractors, Daoud & Partners and Kellogg Brown & Root, Inc., Jordanian and American companies, respectively. The defendants recruited over a dozen Nepali workers through deceit and misrepresentation – promising well-paid hospitality jobs, but instead forcing the men to work at Al Asad air base in Iraq.[142] Just over a week after the thirteen recruits arrived in Iraq, insurgents killed twelve of them.[143] At the time of the acts in question, the TVPA did not expressly provide for extraterritorial jurisdiction, but the District Court held that the 2008 amendment blatantly covered the conduct of the defendants and could apply retroactively.[144] While the extraterritoriality of the TVPA remains otherwise untested, it does provide a potential avenue for TNC accountability, albeit for a narrow slice of corporate-related human rights abuse.

2. State Law Claims: Tort and Misrepresentation

Despite the international nature of TNC human rights abuse, claims under U.S. state law have become a common litigation strategy.[145] Particularly with the ATS's ever-narrowing jurisdiction, advocates overwhelmingly include state tort claims alongside ATS claims in cases related to TNC human rights violations, partially as a safety net in case the ATS claims are dismissed. Victims can bring tort claims against the primary perpetrator of, or those who contributed to, the harm in question.[146] Furthermore, common law tort claims are not limited by the presumption against extraterritoriality, which limits the geographic reach of statutory law, and they cover a broad range of prevalent corporate-related human rights

140. 18 U.S.C. § 1596(a) (2018). The relevant portion of the amendment extends TVPA jurisdiction if "(1) an alleged offender is a national of the United Sates or an alien lawfully admitted for permanent residence . . . ; or (2) an alleged offender is present in the United States, irrespective of the nationality of the alleged offender." *Id.*

141. 697 F. Supp. 2d 674 (S.D. Tex. 2009).

142. *Id.* at 679-80.

143. *Id.* at 680.

144. *Id.* at 683.

145. These claims can either be argued in state court or federal court, based on diversity jurisdiction. 28 U.S.C. § 1441(a) (2012) ("Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.").

146. ENNEKING, *supra* note 26, at 130.

abuses.[147] As one scholar points out: "Torture is assault and battery. Terrorism is wrongful death. Slavery is false imprisonment."[148]

Some scholars argue that state tort law paves the path forward for BHR litigation.[149] However, the dominant view remains that the foreign relations implications of ATS-type claims should not be left in the hands of the many state courts.[150] Additionally, civil tort claims possess many of the same procedural and doctrinal barriers as the ATS, discussed in detail below.[151] Rather than bridging the governance gap, pivoting to civil tort claims would just renew the same debate in a marginally different context.

Outside of tort claims, state law provides few avenues for TNC accountability. One notable example, however, is the previously mentioned case against Nike. The plaintiff in *Kasky v. Nike* challenged the company's alleged labor abuses using California state prohibitions against unfair competition and false advertising.[152] The claims asserted that Nike made various false statements regarding its labor practices and working conditions.[153] The Supreme Court of California found that these statements constituted "commercial" speech, and thus benefited from less constitutional protection than "noncommercial" speech.[154] The court held that "when a business enterprise, to promote and defend its sales and profits, makes factual representations about its own products or its own operations, it must speak truthfully."[155]

However, *Kasky* was essentially the last case of its kind. After the California Supreme Court found the speech in question to be "commercial," the U.S. Supreme Court agreed to review the decision. Though the Court ultimately dismissed the case on jurisdictional technicalities, analysts speculate that Kasky would not have fared well.[156] The case sparked intense debate amongst advocates and consumers, but particularly caught the attention of business leaders – Nike supporters accounted for twenty-two

147. Jeffrey A. Meyer, *Extraterritorial Common Law: Does the Common Law Apply Abroad?*, 102 GEO. L.J. 301, 304 (2014) (noting that common law is not subject to the "presumption against extraterritoriality," which limits the application of statutes).

148. Roger P. Alford, *Human Rights After* Kiobel*: Choice of Law and the Rise of Transnational Tort Litigation*, 63 EMORY L.J. 1089, 1091 (2014).

149. *Id.*; Seth Davis & Christopher A. Whytock, *State Remedies for Human Rights*, 98 B.U. L. REV. 397 (2018). Notably, these scholars couch their pro-state-tort-claims arguments in the assumption that the universe of TNC accountability mechanisms will remain static. Conversely, I argue that it cannot.

150. Davis & Whytock, *supra* note 149, at 398.

151. *See infra* Section IV(B)(iv).

152. Kasky v. Nike, Inc., 45 P.3d 243, 247-48 (Cal. 2002); *see* CAL. BUS. & PROF. CODE §§ 17200-17210 (concerning unfair competition), 17500-17594 (prosecuting false advertising) (West 2000).

153. *Kasky*, 45 P.3d at 247-48. Unlike "noncommercial" speech, governments in the United States may "entirely prohibit commercial speech that is false or misleading." *Id.* at 247.

154. *Id.* at 247.

155. *Id.*

156. David C. Vladeck, *Lessons from a Story Untold:* Nike v. Kasky *Reconsidered*, 54 CASE WESTERN RES. L. REV. 1049, 1050 (2004).

out of the thirty-one amicus briefs filed, many of which urged the Court to narrow or even eliminate the commercial-noncommercial speech delineation.[157] The demonstrated interest from the Court and industry leaders has all but closed this avenue for corporate accountability – no advocate wants to provide the Court with the platform to reconsider the commercial speech doctrine, and more recent Supreme Court decisions, such as *Citizens United*, validate these concerns.[158]

3. Foreign Law Claims: Foreign Direct Liability

Finally, human rights advocates often bring claims in U.S. courts under the tort laws of the country in which the corporate-related human rights violation occurred – commonly referred to as "foreign direct liability."[159] Like state tort law claims, this practice grew out of the wave of human rights litigation under the ATS and has increased in recent years.[160] Though foreign tort claims generally mirror those of state tort claims, they may provide victims an additional cause of action, notwithstanding the aforementioned challenges of bringing such claims in the forum of the incident.

Foreign direct liability also allows for a shield when "choice of law" issues arise. Choosing the law which should apply to a transnational case is a complex determination, the outcome of which may depend on the priorities of the jurisdiction in which the case is being heard. Most jurisdictions prioritize the law of the land with the strongest ties to the events and parties at issue, while others make the choice of law determination according to the *lex loci delcti* – "the law of the country where the injurious act occurred."[161] A few jurisdictions focus on government or forum interests, and even fewer apply the law which produces the best outcome.[162] To account for the complexity and uncertainty in choice of law determinations, in a single TNC-related human rights case advocates will often bring claims under a relevant federal statute, state tort law, and foreign tort law in an attempt to minimize the risk of case dismissal.[163] Given choice

157. *Id.* at 1051. Some of Nike's supporters included the Chamber of Commerce of the United States, Exxon Mobil, Microsoft, Pfizer, Fox, The New York Times, The Washington Post, and many others. *Id.*; *see also* Linda Greenhouse, *The Supreme Court: Advertising; Nike Free Speech Case is Unexpectedly Returned to California*, N.Y. TIMES (June 27, 2003), https://www.nytimes.com/2003/06/27/us/supreme-court-advertising-nike-free-speech-case-unexpectedly-returned-california.html.

158. Citizens United v. FEC, 558 U.S. 310, 329, 340 (2010) (holding that corporate "political speech" is protected by the First Amendment of the U.S. Constitution).

159. ENNEKING, *supra* note 26, at x.

160. *Id.* at 11-12, 45.

161. Alford, *supra* note 148, at 1101.

162. *Id.* at 1100-01.

163. *See, e.g.*, Julin v. Chiquita Brands Int'l, Inc. (*In re* Chiquita Brands Intl., Inc.), 690 F. Supp. 2d 1296, 1308-17 (S.D. Fla. 2010). Notably, the federal law claims in *Chiquita* fell under the Anti-Terrorism Act (ATA), which read, in relevant part: "Any national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or

of law considerations and the tortious nature of human rights violations, these types of state and foreign-law tort claims will likely remain a part of BHR litigation, regardless of the future framework for TNC accountability.

4. Barriers to Obtaining Justice

Though there is some initial promise in TNC human rights litigation under tort, RICO, and TVPA law, significant obstacles more often than not block ultimate recovery in U.S. courts.

i. General Personal Jurisdiction and Separate Legal Personality of Subsidiaries

First, establishing general personal jurisdiction[164] over a foreign subsidiary of a U.S.-based TNC can prove to be a crippling barrier in transnational human rights litigation, particularly as the bar for personal jurisdiction grows increasingly higher. In *Goodyear Dunlop Tires Operation v. Brown* and *Daimler AG v. Bauman* the Supreme Court held that in order for a court to exercise personal jurisdiction over a defendant corporation, its affiliations with the United States must be "so continuous and systematic as to render it essentially at home in the forum State."[165] In practice, this generally means that a corporation must be headquartered or incorporated in the United States for it to fall within the reach of U.S. courts.[166] Yet, in many transnational human rights cases, the connection between the acts in question and the United States do not meet this threshold – instead implicating either a subsidiary of a U.S.-based company or a parent of a U.S. subsidiary.

In such scenarios, the "separate legal identity" of subsidiaries and parent companies frequently prevents victims from establishing jurisdiction over

heirs, may sue therefor in any appropriate district court of the United States . . . ." 18 U.S.C. § 2333(a) (2018). In this case, Chiquita admitted to funding group which was at the time officially designated as a Foreign Terrorist Organization (FTO) by the United States Secretary of State. Given the far narrower scope of the ATA, I did not include it in my analysis above, but it does remain a possible tool in cases of corporate-related human rights abuse.

164. FED. R. CIV. P. 4(k).

165. Daimler AG v. Bauman, 571 U.S. 117, 127 (2014) (quoting Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011)) (quotations and brackets removed from the original). Prior to *Daimler* and *Goodyear*, courts could exercise personal jurisdiction over a foreign corporate defendant if it engaged in sufficiently "substantial," as opposed to merely "casual," activity in the United States. Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945). Whereas before *Daimler*, foreign corporations (located in a different state or abroad) rarely challenged a court's assertion of general personal jurisdiction, since *Daimler*, courts have dismissed increasing numbers of human rights cases against TNCs on personal jurisdiction grounds. Skinner, *supra* note 24, at 637-38, 651-52; *see, e.g.*, Krishanti v. Rajaratnam, No. No. 2:09–cv–05395 (JLL)(JAD), 2014 WL 1669873, at *7 (D.N.J. Apr. 28, 2014) (finding that, despite frequent contacts with the United States, there was no general jurisdiction over the NGO for the purposes of ATS and other claims for aiding and abetting a foreign terrorist organization, because the defendant was not "at home" in the forum state).

166. Skinner, *supra* note 24, at 619. The Court in *Daimler* does, however, leave open the possibility of the "exceptional case." *Daimler*, 571 U.S. at 139 n.19.

the U.S. entity.[167] Unless the plaintiffs can establish vicarious liability of the U.S.-based company under a theory of enterprise liability, such as veil-piercing[168] or agency law,[169] they must prove that the U.S. entity actually participated in the alleged acts.[170] While the Supreme Court has yet to address this matter specifically, many speculate that the holding in *Daimler* and *Goodyear* – requiring continuous and systematic U.S.-affiliation – could prevent corporations from being held accountable on agency grounds as well.[171] The combined effect of the personal jurisdiction and separate legal identity doctrines makes holding TNCs accountable in U.S. courts for acts committed in foreign jurisdictions nearly impossible.

ii. Forum non Conveniens

Even where a corporate defendant clearly falls within a court's personal jurisdiction, the company may still contend that another forum is more appropriate under the doctrine of *forum non conveniens*.[172] Given that most TNC-related human rights abuse occurs in foreign countries, is perpetrated by the hands of foreign actors, harms foreign victims, and overwhelmingly involves overseas evidence, defendants frequently invoke the doctrine of *forum non conveniens* in these cases.[173] For example, in *Sequihua v. Texaco, Inc.*, Ecuadoran residents and natives filed suit in U.S. District Court against Texaco Inc. and various affiliates for allegedly contaminating the air, ground, and water in Ecuador.[174] The court ultimately dismissed the case on *forum non conveniens* grounds, viewing Ecuador as the more appropriate forum.[175] In doing so, the court cited numerous factors in Ecuador's favor, including access to evidence and witnesses, the possibility of viewing the site of the alleged incident, cost of travel between the United States and Ecuador, the

167. Under the principle of "separate legal identity," shareholders and corporations benefit from limited liability – shareholders generally cannot be held responsible for the actions of the company and companies generally cannot be held responsible for the actions of other corporations, "even those in which they hold the entire equity interest." David W. Leebron, *Limited Liability, Tort Victims, and Creditors*, 91 COLUM. L. REV. 1565, 1612 (1991).

168. "Piercing the corporate veil" refers to a judicially created exception to the limited liability of corporations, "by which courts disregard the separateness of the corporation." Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036, 1036 (1991).

169. Most notably, the principle of *respondeat superior*, which is Latin for "Let the chief answer." "A superior is responsible for any acts of omission or commission by a person of less responsibility to him." *Respondeat Superior*, BLACK'S L. DICTIONARY, https://thelawdictionary.org/respondent-superior/ (last visited May 20, 2020). The doctrine attributes responsibility to a corporation for an employee's illegal actions when the employee acted within the scope of his duties and for the benefit of the corporation.

170. OXFORD PRO BONO PUBLICO, *supra* note 99, at 324. General allegations of participation or control are insufficient. *Id.*

171. Daimler AG v. Bauman, 571 U.S. 117, 135 (2014).

172. OXFORD PRO BONO PUBLICO, *supra* note 99, at 324.

173. *Id.*

174. 847 F. Supp. 61, 62 (S.D. Tex. 1994).

175. *Id.* at 64.

adequacy of the Ecuadoran judicial system, and the potential inability for U.S. courts to enforce a judgement in Ecuador.[176] The court also noted that, while a plaintiff's forum selection is generally granted deference, foreign plaintiffs who select a U.S. forum benefit from a significantly lower degree of deference.[177]

However, *forum non conveniens* is a totality-of-the-circumstances assessment, which lends itself to exceptions, even in cases where all of the alleged acts occurred abroad. If plaintiffs can prove that the host state's judicial system is either inadequate or inappropriate, such that there is "no remedy at all" or the plaintiff "will be . . . treated unfairly,"[178] they can overcome attempts to thwart a case on *forum non conveniens* grounds.[179] For example, in Máxima Acuña's case against Newmont,[180] the Third Circuit vacated the District Court of Delaware's attempt to push the case to Peruvian courts.[181] Despite voiced concerns about the integrity of the Peruvian judiciary, the District Court initially upheld the defendant's invocation of *forum non conveniens*, explaining that the alleged concerns dated back to a period of infamous corruption in Peru which had long since come to a close.[182] However, in light of an intervening series of corruption allegations "among the judicial system's top ranks and two resulting state-of-emergency declarations" that post-dated the District Court's decision, the Third Circuit remanded the case for a fresh assessment of corruption and impartiality within the Peruvian judiciary.[183] Thus, while *forum non conveniens* creates a presumption against litigating these TNC claims in U.S. courts, the suit can survive given the right set of facts.

iii. Aiding and Abetting Liability

Corporate-related human rights abuse is often indirectly, rather than directly, attributable to the corporation.[184] For example, third party actors,

176. *Id.*

177. *Id.* (citing Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254-55 (1981)).

178. *Piper Aircraft*, 454 U.S. at 255. Though, "dismissal on grounds of *forum non conveniens* may be granted even though the law applicable in the alternative forum is less favorable to the plaintiff's chance of recovery." *Id.* at 250.

179. *See generally Questions as to Convenience and Justice of Transfer Under Forum Non Conveniens Provision of Judicial Code (28 U.S.C.A. § 1404(a))*, 1 A.L.R. FED. 15. (1969) (describing the doctrine of *forum non conveniens*).

180. *See supra* Section IV(A).

181. Acuña-Atayala v. Newmont Mining Corp., No. 18-2042, 2019 U.S. App. LEXIS 8414, at *4-7 (3d Cir. Mar. 20, 2019); *see also Peruvian Farming Family Wins Important Appeal in Case to Hold Mining Giant Accountable for Abuse*, EARTHRIGHTS INT'L (Mar. 21, 2019), https://earthrights.org/media/peruvian-farming-family-wins-important-appeal-in-case-to-hold-mining-giant-accountable-for-abuse/ (discussing the Third Circuit's revival of Máxima Acuña's case against Newmont).

182. *Acuña-Atayala*, 2019 U.S. App. LEXIS 8414, at *4-5.

183. *Id.* at *5-6.

184. *Scope and Pattern of Corporate Abuse*, *supra* note 33, at 16-17. Indirect corporate harm includes cases where a company either is perceived to contribute to, or benefit from, abuse conducted by third parties, or cases where abuse is identified in a corporation's supply chain. Ruggie defines "direct"

such as armed forces, private security guards, guerillas, or government entities, perpetrated virtually all TNC-related murders of human rights defenders in 2017.[185] To bring a case against the relevant corporation under such circumstances, plaintiffs must prove that the corporation "aided and abetted" the third party in addition to meeting the elements of the underlying offense. This requires proving that the corporation provided "knowing practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime."[186] Though corporations frequently contribute to and benefit from third-party abuse,[187] any degree of disconnect between the TNC and the act itself further pads TNC impunity.

iv. Substantive Hurdles: Acts of State, Political Questions, and International Comity

Finally, pursuant to the act of state, political question, and international comity doctrines, U.S. courts may refuse to rule on cases where TNC-abuse is tied to the acts of a host state. These substantive hurdles aim to reduce judicial invasion into political territory and to ensure respect for the sovereignty of foreign states.[188]

The exemplary case of *Sarei v. Rio Tinto PLC* shows how these doctrines pose an additional barrier to TNC accountability.[189] In 1972, an international mining consortium built one of the world's largest copper mines in Papua New Guinea and, in the process, purportedly displaced and imprisoned local residents and destroyed the surrounding rainforest. Project-related waste and destruction resulted in many deaths, and numerous others suffered from disease. The company allegedly paid the government of Papua New Guinea 19.1 percent of the mine's profits as incentive to turn a blind eye to the corporate abuse.[190]

The U.S. District Court that heard the case explained that "courts find that a claim is barred by the act of state doctrine only if it involves (1) an official act of a foreign sovereign, (2) performed within its own territory, and (3) seeks relief that would require the court to declare the foreign

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corporate harm as instances where the company, through its employees or agents, was generally alleged to have committed the abuse, with minimal or no separation between the company and the abuse. *Id.*

185. GLOB. WITNESS, *supra* note 44.

186. Doe I v. Unocal Corp., 395 F.3d 932, 951 (9th Cir. 2002). Specifically, the requisite *actus reas* consists of acts which make a significant difference, though need not be an indispensable element for the acts of the principal. *Id.* at 950. The requisite *mens rea* is actual or constructive (i.e. "reasonable") knowledge that the accomplice's actions will assist the principal in the commission of a crime. *Id.*

187. U.N. Special Representative John Ruggie found an almost even split between direct (59%) and indirect (41%) corporate harm. *Scope and Pattern of Corporate Abuse*, *supra* note 33, at 16-17.

188. William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071, 2072 (2015).

189. 221 F. Supp. 2d 1116 (C.D. Cal. 2002).

190. *Id.* at 1121-24.

sovereign's act invalid."[191] In order to determine the implications of ruling on the issue, the court looked to the degree of consensus on the relevant area of international law, the implications for U.S. foreign relations, and whether the government that committed the acts in question remained in power.[192]

Similarly, the political question doctrine arises when claims implicate the role of the executive in policy matters and foreign relations. Courts apply a six-part test to determine whether a claim is barred by the political question doctrine. The court must take into consideration:

> (1) the existence of any textually demonstrable constitutional commitment of the issue to a coordinate political department; . . . (2) a lack of judicially discoverable and manageable standards for resolving the claims; . . . (3) the impossibility of deciding without an initial, nonjudicial, policy determination; . . . (4) the impossibility of a court's undertaking independent resolution without expressing the lack of respect for the coordinate branches of government; . . . (5) an unusual need for unquestioning adherence to a political decision already made; [and] (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[193]

Finally, the doctrine of international comity may be triggered on a discretionary basis in cases involving the recognition of legislative, executive, or judicial acts of another nation.[194] Out of respect for national sovereignty, courts may decline to hear cases they otherwise could.[195] The Restatement (Third) of Foreign Relations Law of the United States advises that "a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable."[196] To determine "reasonableness" in this context, the Restatement recommends that courts consider various factors, including the character of the activity being regulated, the importance of the regulation to, and the consensus within, the international community, and whether there is a conflict of laws between the interested states.[197] In *Sarei v. Rio Tinto*, the District Court ultimately found that the act of state, political question, and international comity doctrines all barred the court from hearing plaintiffs' claims.

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191. *Id.* at 1184.

192. *Id.* at 1189 (citing Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964)).

193. *Id.* at 1194-95 (citing Baker v. Carr, 369 U.S. 186, 217 (1962)).

194. *Id.* at 1199 (citing Hilton v. Guyot, 159 U.S. 113, 164 (1985)).

195. *Id.*

196. *Id.* (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(1) (AM. LAW INST. 1987)).

197. *Id.* at 1199-1200.

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Between the limited avenues within U.S. law and the various procedural and substantive obstacles to seeking remedy in U.S. courts, TNCs are largely insulated from legal accountability in the U.S. for their abuses abroad. For such massive actors, in terms of size, wealth, and social and economic impact, it is shocking how easily TNC accountability can fall through the cracks of the U.S. legal system at present.

V. IN SEARCH OF A BETTER SYSTEM

Arguably, to most effectively mitigate corporate harm around the globe, BHR standards and penalties should be internationalized. Efforts to this end have existed for the past fifteen years, beginning with the "Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights"[198] (the Norms) in 2003, and most recently producing the U.N. Guiding Principles on Business and Human Rights (UNGP) in 2011.[199]

Had the Norms come to fruition, they would have placed binding obligations upon TNCs to respect a sweeping array of human rights.[200] However, the Norms did too much and had too little support. For example, they purported to impose upon corporations the obligation to fulfill certain rights that had yet to be recognized at the global level, such as a "living wage" and consumer protection.[201] The antagonistic response from both the business community and nation states caused the U.N. Commission on Human Rights to ultimately abandon the Norms.[202]

The UNGP, incorporating the lessons learned from the failure of the Norms, subsequently established a framework with three pillars – protect, respect, and remedy.[203] The first pillar reiterates state obligations under existing international human rights law, the second obliges companies to "do no harm," and the final pillar recommends that both states and

198. Subcomm'n on Promotion and Prot. of Human Rights, Economic, Social, and Cultural Rights: Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E.CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003).

199. John Ruggie (Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises), *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) [hereinafter *UNGP*].

200. JUST BUSINESS, *supra* note 23, at 48-49.

201. *Id.*

202. Erika Gonzalez et al., *Business and Human Rights: The Failure of Self-Regulation*, TRANSNAT'L INST. (Oct. 13, 2016), https://www.tni.org/en/article/business-and-human-rights-the-failure-of-self-regulation.

203. *UNGP*, *supra* note 199, at 1.

companies provide remedies to victims (or potential victims) of corporate-related human rights abuse.[204]

While vastly more favored than the Norms, the UNGP are not binding, but merely "guiding principles" (which likely explains the warm welcome).[205] However, by establishing a framework with wide appeal, the UNGP substantially progressed the conversation around business and human rights. Furthermore, the precise language of the UNGP has been incorporated into various other formats, including the OECD Guidelines for Multinational Enterprises, the investment requirements of various lending institutions, and national action plans.[206] At the same time, many human rights advocates view the UNGP as a step backward – an act of United Nations "blue washing," which states can reference without actually having to force TNCs to reform their harmful practices.[207]

Partially in response to the UNGP's lack of teeth, efforts are underway to establish an actual treaty on BHR. The United Nations released the "zero draft" of the BHR treaty in July of 2018,[208] and a lot of questions remain unanswered. While a binding treaty could potentially provide more specific guidance to state parties, it is difficult to say whether this treaty could concretely contribute a means for redress.[209] With the enforceability of treaties largely depending on ratification and implementation by state parties, the high cost of negotiating a treaty may lead only to marginal benefits, particularly in the likely scenario that many powerful states, including the United States, refuse to get on board.[210]

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204. *Id.*

205. John Gerard Ruggie, *The Social Construction of the UN Guiding Principles on Business and Human Rights* 17 (Harvard Kennedy School Corporate Responsibility Initiative, Working Paper No. 67, 2017), https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/cri/files/workingpaper_67_0.pdf.

206. DIRECTORATE-GEN. FOR EXTERNAL POLICIES, EUR. PARLIAMENT, IMPLEMENTATION OF THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS 14 (2017), https://www.europarl.europa.eu/RegData/etudes/STUD/2017/578031/EXPO_STU(2017)578031_EN.pdf.

207. Benny Santoso, *"Just Business" – Is the Current Regulatory Framework an Adequate Solution to Human Rights Abuses by Transnational Corporations?*, 18 GER. L.J. 533, 538-39 (2017).

208. U.N. Human Rights Office of the High Comm'r, Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, Zero Draft (July 16, 2018), https://www.ohchr.org/documents/hrbodies/hrcouncil/wgtranscorp/session3/draftlbi.pdf.

209. *See* Anita Ramasastry, *Closing the Governance Gap in the Business and Human Rights Arena: Lessons from the Anti Corruption Movement*, *in* HUMAN RIGHTS OBLIGATIONS OF BUSINESS: BEYOND THE CORPORATE RESPONSIBILITY TO RESPECT? 162, 178 (Surya Deva & David Bilchitz eds., 2013) [hereinafter *Ramasastry II*]; *see also* Luis F. Yanes, *A Business and Human Rights Treaty: The Risks of Human Rights Counter-Diplomacy*, OPINIO JURIS (Sept. 8, 2018), http://opiniojuris.org/2018/08/09/a-business-and-human-rights-treaty-the-risks-of-human-rights-counter-diplomacy/ (discussing the various risks and shortcomings of relying on an international treaty for human rights enforcement, including non-compliance, lackluster implementation, corrosive treaty reservations, or low ratification rate).

210. The United States rarely ratifies human rights-related treaties. *United States Ratification of International Human Rights Treaties*, HUM. RTS. WATCH (July 24, 2009), https://www.hrw.org/news/2009/07/24/united-states-ratification-international-human-rights-treaties.

As a complement or alternative to the unenforceable UNGP, countries can turn inward to determine a BHR framework that works within their specific national context. Other countries have already begun this process – such as the recently passed Modern Slavery Acts in the United Kingdom[211] and Australia[212] and the Vigilance Law in France.[213] In stark contrast, the United States has pivoted sharply in the opposite direction – granting more and more rights to corporations[214] and back-peddling on proposed accountability measures.[215]

In this section, I propose various ways in which the United States could begin to enhance a BHR framework. None of the proposals are to be viewed as mutually exclusive alternatives – in fact, some would be most effective if implemented in tandem. While certain proposals would move the needle more than others, each proposal attempts to address a realistic area of opportunity for increased TNC legal accountability under U.S. law.

The proposals below touch on securities law, corporate law, and anti-corruption law. I provide a general explanation of each and outline the apparent benefits and weaknesses. My assessment focuses on three primary factors: (1) scope, (2) enforcers, and (3) enforcement. By "scope," I refer to the variety of peoples, places, and actions that fall within the regulatory power of the proposal. While each proposal requires a nexus with the United States, the inclusivity of the nexus varies. "Enforcers" refers to those who have the ability to bring suit – the U.S. government, foreign states, corporate actors, or victims of abuse – and whether their incentives generally align with the accountability agenda. Under "enforcement," I evaluate the practical enforceability of the proposals – the degree of discretion or deference provided those tasked with interpretation. In addition to these three criteria, two other elements, emphasized throughout this paper, are essential to a successful BHR framework: corporate liability and extraterritorial effect. The two latter factors should be read into each of the proposals below. While I only scratch the surface of what these amendments

211. Modern Slavery Act 2015, c. 30 (UK), http://www.legislation.gov.uk/ukpga/2015/30/contents/enacted (requiring certain UK corporations to report annually on the risks of modern slavery in their operations and supply chains and consolidating existing slavery and trafficking offenses into a single statute, amongst other provisions).

212. *Modern Slavery Act 2018* (Cth) (Austl.) (requiring certain Australian corporations to report annually on the risks of modern slavery in their operations and supply chains).

213. Stéphane Brabant & Elsa Savourey, *All Eyes on France – French Vigilance Law First Enforcement Cases (1/2): Current Cases and Trends*, CAMBRIDGE CORE BLOG (Jan. 24, 2020), https://www.cambridge.org/core/blog/2020/01/24/all-eyes-on-france-french-vigilance-law-first-enforcement-cases-1-2-current-cases-and-trends/#_edn13 (describing the goals and operation of the 2019 law, which provides remediation mechanisms for victims of corporate harm and enforcement mechanisms to ensure corporate compliance with the enumerated duties).

214. *See, e.g.*, Citizens United v. FEC, 558 U.S. 310 (2010).

215. *See, e.g.*, Nicholas Grabar & Sandra L. Flow, *Congress Rolls Back SEC Resource Extraction Payments Rule*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 16, 2017), https://corpgov.law.harvard.edu/2017/02/16/congress-rolls-back-sec-resource-extraction-payments-rule/.

and legal innovations could look like, I hope this paper will serve as a foundation for future research to further flesh out these, and alternative, avenues toward TNC accountability.

A. Securities Law

The recent attempt and subsequent failure to secure heightened reporting requirements for the extractive industry under the Dodd Frank Act bodes poorly for human rights related reporting requirements in the United States, but many other countries are embracing this approach.[216] For example, the European Union passed a 2014 directive calling for the disclosure of non-financial and diversity information by large corporations.[217] This law, which applies to companies with five hundred employees or more[218] obliges corporate management to report on the policies, outcomes and risks related to "environmental matters, social and employee-related matters, respect for human rights, anti-corruption and bribery matters."[219] Similarly, the aforementioned Modern Slavery Acts in Australia and the United Kingdom require corporations to annually report on the risks of forced labor in their operations and supply chains.[220]

Alternatively, rather than enact a new statute, the U.S. Securities and Exchange Commission (SEC) could deem risks related to egregious human rights violations "material" and thereby force companies to disclose BHR risks to investors. In the United States, companies must annually disclose any material risks they face, including ongoing or potential litigation. Courts generally consider a risk "material" if "there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote" or if it "would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."[221] Consequently, to the extent that human rights-related risks affect stock prices or market prices, they could be seamlessly wrapped into this pre-existing reporting requirement.[222]

In terms of enforcers, human rights-related SEC reporting requirements would subject corporations to SEC civil or administrative sanctions for

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216. *See generally* John Ruggie (Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises), *Human Rights and Corporate Law: Trends and Observations from a Cross-National Study Conducted by the Special Representative*, at 29, U.N. Doc. A/HRC/17/31/ADD.2 (May 23, 2011) [hereinafter *Corporate Law Trends*].

217. Council Directive 2014/95/EU, 2014 O.J. (L 330/1).

218. *Id.* at 3.

219. *Id.* at 1.

220. *Modern Slavery Act 2018* (Cth) (Austl.); Modern Slavery Act 2015, c. 30 (UK).

221. TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976).

222. For example, the SEC has provided clarification on the materiality of climate risks. U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-188, CLIMATE-RELATED RISKS: SEC HAS TAKEN STEPS TO CLARIFY DISCLOSURE REQUIREMENTS (2018).

failing to report or misrepresenting relevant human rights risks.[223] Given the heightened exposure to legal liability and the public's access to corporate annual reports, such reporting requirements would ideally incentivize directors to monitor and mitigate risks before they became material.

However, the SEC's reliance on self-disclosure reduces the ability to effectively enforce these proposals. First, it is difficult to objectively ascertain the materiality of human rights risks, even if the SEC produces clarifying guidance.[224] Such determinations require a careful balancing of factors and probabilities, which necessarily entails significant deference to corporate directors.[225] Notably, however, the materiality of these risks would objectively increase if either of my below proposals were to complement a SEC reporting requirement – the greater the likelihood of successful human rights litigation, the greater the materiality of these risks.

Finally, in terms of scope, the securities law approach would cover all "issuers" – companies that have securities traded in the United States or otherwise have SEC reporting requirements.[226] Though this means regulation would be restricted to larger, publicly traded companies, it would capture both foreign and domestic corporations.[227]

B. Corporate Law

Historically, actors in the United States considered the corporate form and its benefits, such as separate legal identity, an earned privilege. In order to be granted a corporate charter, companies had to prove they would provide a public service to the state.[228] While this public-interest obligation is long-lost,[229] the "B-corp," or benefit-corporation trend has gained momentum since the mid-2000s.[230] B-corp status requires companies to

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223. *How Investigations Work*, SEC (last modified Jan. 27, 2017), https://www.sec.gov/enforce/how-investigations-work.html.

224. *Corporate Law Trends*, *supra* note 216, at 31.

225. Basic Inc. v. Levinson, 485 U.S. 224, 238 (1988) (quoting SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 849 (1968)) ("[M]ateriality 'will depend at any given time upon a balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event in light of the totality of the company activity.'"); *see also* David Hess, *The Transparency Trap: Non-Financial Disclosure and the Responsibility of Business to Respect Human Rights*, 56 AM. BUS. L.J. 5 (2019) (providing additional insights on the hurdles presented by non-financial disclosure requirements).

226. 17 C.F.R. § 240.12g-1 (2016).

227. *Id.*; *see also* 15 U.S.C. § 77b(a)(4) (2012) (defining "issuer" within the context of SEC regulation, as capturing "every [legal] person who issues or proposes to issue any security" (brackets not in original)).

228. Justin Fox, *What the Founding Fathers Really Thought About Corporations*, HARV. BUS. REV. (Apr. 1, 2010), https://hbr.org/2010/04/what-the-founding-fathers-real.html; *Corporate Law Trends*, *supra* note 216, at 10.

229. Charlie Cray & Lee Drutman, *Corporations and the Public Purpose: Restoring the Balance*, 4 SEATTLE J. SOC. JUST. 305, 307 (2005).

230. *See, e.g.*, Joanne Bauer & Elizabeth Umlas, *Do Benefit Corporations Respect Human Rights?*, 2017 STAN. SOC. INNOVATION REV. 27, 29, 31.

"create a material positive impact on society and the environment,"[231] but the BHR agenda need not go quite so far. Rather, states could amend their laws of incorporation to require companies to include a "do no harm" principle in their articles of incorporation, akin to that outlined in the UNGP.[232] Such a clause could even set the bar of "harm" quite high (i.e. "egregious human rights abuses"), which would likely prove more palatable to both states and the business community.

In terms of scope, this proposal would only cover U.S.-based corporations. As to "enforcers," it would provide shareholders the ability to file derivative lawsuits against corporate directors whose business decisions result in societal harm. Though shareholders are not particularly incentivized to file suit against their own corporate directors, the threat of liability would at least reframe corporate incentives, making societal harm a higher priority.

Enforcement under this proposal is fairly limited. First, even if laws of incorporation clearly delineate the concept of "harm," courts analyze board decisions with great deference, in accord with the "business judgement rule." Under this rule, courts "refuse to second-guess a director's decisions unless the directors are interested or lack independence, . . . do not act in good faith, act in a manner that cannot be attributed to a rational business purpose or reach their decision by a grossly negligent process."[233] In effect, courts cannot touch a significant percentage of director decisions. Second, the extraterritorial effect of this proposal would frequently depend on a plaintiff's ability to "pierce the corporate veil" – connect the acts of the foreign subsidiary to the parent. There are ways to impute liability to a parent for its subsidiary's actions, though the exact evidentiary requirements are unclear and highly fact dependent. Courts require substantial proof that the parent and subsidiary were acting together to such an extent that one served as an "instrumentality," "alter ego," or "dummy" to the other.[234] Consequently, while not impenetrable, the corporate veil and the business judgement rule would pose substantial hurdles for prospective litigants.

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231. *Id.*

232. *UNGP*, *supra* note 199. Given that incorporation laws are state-based, just obtaining amendments to the laws of incorporation in California, Delaware, and New York would cover the overwhelming majority of companies incorporated in the United States.

233. Andrew S. Gold, *A Decision Theory Approach to the Business Judgement Rule: Reflections on Disney, Good Faith, and Judicial Uncertainty*, 66 MD. L. REV. 398, 399 (2007) (citing Brehm v. Eisner, 746 A.2d 244, 266 n.66 (Del. 2000) (internal quotes removed)).

234. Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036, 1063 (1991); *see, e.g.*, Doe v. Exxon Mobil Corp., 393 F. Supp. 2d 20, 29 (D.D.C. 2005) (explaining that plaintiffs provided sufficient facts that "would support jurisdiction over Exxon Indonesia as an alter ego of Exxon Mobil").

C. Anti-Corruption Law

My final proposal translates best practices from global anti-corruption law into the human rights arena. At its onset, the anti-corruption movement faced similar resistance to the BHR movement – tension between diplomacy and extraterritoriality, varying conceptions of not-so-universal norms, the challenges of corporate liability, and the struggles of tackling a global phenomenon via domestic law.[235] While corruption and egregious human rights abuse pose distinct challenges, both in terms of harm and regulation, the parallels and great success of the global anti-corruption movement provide an obvious foundation from which to build a similar framework for corporate human rights abuse.[236]

The passage of the U.S. Foreign Corrupt Practices Act (FCPA) in 1977 largely catalyzed the global anti-corruption agenda.[237] The FCPA criminalizes the payment of bribes to government officials, in the United States or abroad, in furtherance of business interests.[238] Amongst its other provisions, the FCPA subjects all U.S. persons (including corporations) and all U.S. issuers to fines and prison time if they are found to have acted in violation of the FCPA.[239] Furthermore, FCPA prosecutors regularly attribute the acts of subsidiaries to parent companies,[240] extending the reach of the statute's regulatory power all the more. Various countries around the

235. *Ramasastry II*, *supra* note 209, at 178.

236. *See generally* Pierre-Hugues Verdier & Paul Stephan, *After ATS Litigation: A FCPA for Human Rights?*, LAWFARE (May 7, 2018, 7:00 AM), https://www.lawfareblog.com/after-ats-litigation-fcpa-human-rights.

237. *See generally* Rachel Brewster, *Enforcing the FCPA: International Resonance and Domestic Strategy*, 103 VA. L. REV. 1611 (2017).

238. CRIMINAL DIV., U.S. DEP'T OF JUSTICE & ENF'T DIV., SEC, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 12-13 (2012) [hereinafter *FCPA Guide*].

239. 15 U.S.C. § 78dd-1, 2 (2018); *FCPA Guide*, *supra* note 238, at 68-69; *see also Ramasastry II*, *supra* note 209, at 176 (describing the broad reach of the FCPA). Notably, the FCPA also enables the SEC to file civil suit for misrepresentations or failure to disclose relevant bribes. However, as mentioned above, human rights risks are generally not reported to the SEC at present. 15 U.S.C. § 78m(b)(2)(A) (2018).

240. *See, e.g.*, Schnitzer Steel Indus., Inc., Exchange Act Release No. 54606, 2006 WL 2987067 (Oct. 16, 2006); U.S. DEP'T OF JUSTICE, DEFERRED PROSECUTION AGREEMENT BETWEEN SCHNITZER STEEL INDUSTRIES, INC. AND THE U.S. DEPARTMENT OF JUSTICE, CRIMINAL DIVISION, FRAUD SECTION (2006) (Schnitzer Steel consented to the entry of a cease-and-desist order and agreed to pay a $7.7 million civil penalty relating to corrupt payments made by its Korean subsidiary); Diagnostics Products Corp., Exchange Act Release No. 51724, 2005 WL 1211548 (May 20, 2005) (finding DPC in violation of FCPA for improper payments made by Chinese subsidiary); Syncor Int'l, Corp., Exchange Act Release No. 46979, 2002 WL 31757634 (Dec. 10, 2002) (assigning liability to Syncor International for payments that Syncor Taiwan made to physicians employed by hospitals owned by the legal authorities in Taiwan in exchange for their referrals of patients to medical imaging centers owned and operated by the defendant).

world have since enacted similar laws, including all OECD countries, as expressly required by the OECD Anti-Bribery Convention.[241]

In addition to its scope, a parallel BHR statute should embrace the FCPA's focus on specific prohibitions, rather than broad and amorphous corporate duties.[242] While the anti-bribery provisions of the FCPA may seem obvious today, corruption is almost as amorphous as human rights abuse. Through its narrow focus, the FCPA turned a nebulous harm into a discrete, more easily regulated act. In the BHR context, this exercise would necessarily entail arbitrary delineation amongst often equally horrendous human rights abuses, but if the FCPA serves as an accurate predictor, in terms of proliferation and behavioral change, it could drastically improve BHR awareness and corporate incentives.

The enforcers under a FCPA-esque model would be limited to U.S. government agencies, which alone, especially if pursued with the same rigor as the FCPA, could immensely improve TNC accountability for human rights violations. However, the very essence of egregious human rights abuse cries out for an avenue through which victims could pursue justice.[243] For instance, the "FCPA for human rights" could provide a civil prong that embraces the ATS's jurisdictional grant over claims of foreign plaintiffs,[244] or it could include a mechanism for victim compensation. Such an approach would preserve the modern-day core function of the ATS by allowing foreign plaintiffs an avenue for redress, while providing more guidance to TNCs that wish to avoid becoming future defendants.

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These proposals provide various examples of areas of opportunity for enhanced TNC accountability under U.S. law. While each possesses different regulatory scope, distinct enforcer motives, and a variety of enforcement challenges, they would all constitute material improvement from the status quo. Furthermore, each of these proposals has already been mobilized in some form – in foreign countries, through voluntary private sector initiatives, or in parallel regulatory contexts – and thus provide a realistic next step toward human rights enforcement in the United States.

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241. Organization for Economic Co-operation and Development, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, T.I.A.S. No. 99-215, 37 I.L.M. 1.

242. *Ramasastry II*, *supra* note 209, at 180.

243. While I do not believe in the common trope, that "corruption is a victimless crime," the FCPA specifically prohibits the payment of bribes to foreign officials, which does not lend itself well to victim-initiated lawsuits.

244. 28 U.S.C. § 1350 (1948).

VI. CONCLUSION

The Supreme Court's decision in *Jesner* should serve as a call to action. Though the ATS has promised the possibility of TNC accountability for the past twenty years, the high costs of corporate impunity demand a more adequate and tailored regulatory framework. It is no mystery why the world has failed to address this problem to date – corporate capture is a powerful force in host states and home states alike. Among the one hundred largest economic entities world-wide (including countries), sixty-nine are corporations.[245] A desire to harness this wealth largely eliminates states' motivation to impose strict regulatory measures on corporations. While host governments hope to attract foreign direct investment to spur economic development, U.S. policy-makers are implicitly beholden to corporate campaign contributions.

Critics of the codification of the BHR movement argue that extraterritorial regulation will result in more harm than good. They predict mass withdrawal of TNCs from high risk countries[246] and diplomatic rifts and retribution.[247] However, U.S. courts have regulated TNCs and foreign corporations for decades without serious diplomatic repercussions.[248] The success of the extraterritorial anti-corruption movement alone should serve as a strong counterargument against doomsayers. Furthermore, the implementation of strategic measures, such as safe harbors or good faith defenses, could alleviate the pressure on TNCs operating in challenging environments.[249]

Like all human rights movements, the exportation of U.S. or "western" norms into foreign markets is potentially problematic. By focusing on the most egregious human rights abuses, which benefit from the greatest international consensus, I attempted to avoid this clash of cultures. Nonetheless, the transnational BHR movement will ideally continue to seep into areas of greater contention, such as labor rights and anti-discrimination. In the meantime, this paper hopes to pave a potential step toward a more humane future.

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245. Joe Myers, *How Do the World's Biggest Companies Compare to the Biggest Economies?*, WORLD ECON. F. (Oct. 19 2016), https://www.weforum.org/agenda/2016/10/corporations-not-countries-dominate-the-list-of-the-world-s-biggest-economic-entities/.

246. Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1405-06 (2018); Leebron, *supra* note 167, at 1615.

247. *Jesner*, 138 S. Ct. at 1406.

248. Skinner, *supra* note 24, at 680.

249. *See generally* John F. Sherman III & Amy K. Lehr, *Human Rights Due Diligence: Is it Too Risky?*, 2010 CSR J. 6 (discussing the pros, cons, and risk-reduction potential of a human rights due diligence requirement for corporations); Benjamin Fox, *Companies Will Support EU Law on Due Diligence, but Need Assurances on Liability*, EURACTIV (Mar. 19, 2019), https://www.euractiv.com/section/economy-jobs/interview/companies-will-support-eu-law-on-due-diligence-but-need-assurances-on-liability/ (addressing the importance of including safe harbors within codified human rights corporate due diligence laws).

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