Negotiating the Terms of Corporate Human Rights Liability Under Federal Law

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I. INTRODUCTION

Human rights law presents a number of difficulties that seem to be largely doctrinal in nature.[1] Individuals naturally seek the best answers to these difficulties. This Article documents some of these difficulties, and suggests not so much answers, but what one might call a negotiational

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1. *See* discussion *infra* Sections II–IV (considering the largely doctrinal nature of the approaches cited throughout this Article).

approach to their resolution.[2] The Article addresses the role of corporate liability, an increasingly important area of the law, particularly under the federal Alien Tort Statute,[3] for major violations of the most fundamental human rights.[4] Often, such cases involve a theory of corporate aiding and abetting liability in connection with an underlying substantive human rights violation.[5]

A large number of contestable issues arise in such contexts. Here is the most typical approach: Assuming some theory of the nature of ordinary and corporate persons, the aims of tort and criminal law, and the idea of fairness, one could seek to discover the doctrinally most appropriate particular sets of legal requirements for a given kind of human rights case. Recognizing the complexity of this inquiry, one could apply some version of what are technically called coherentist, holistic-molecular, or reflective equilibrium approaches.[6] One could thus tinker with the various judicial requirements in human rights cases, until some optimum is reached, in the sense that any further improvement in the overall judicial approach to the tort or crime under consideration would have to come at a supposedly excessive cost in some other aspect. Thus, the goal would be to discover the supposed morally or legally best approach to each aspect of the case.

The approach to corporate human rights recommended below seeks no such theoretical correctness or pragmatically appealing outcomes, but a hypothetically or actually negotiated accommodation in light of established and sensible priorities against broad background moral constraints. Thus, the aim is not to discover right or true answers to these various judicial questions, nor to discover whether one legal requirement would be better or fairer than some alternative requirement. Instead, within broad moral limits, the emphasis is on outlining a casual, informal simulation of negotiating or bargaining among parties affected by or interested in any possible form of corporate liability for human rights abuses.

No such simulated negotiation results in a uniquely unassailable outcome or conclusion. But proposing human rights liability rules to accommodate realistic and reasonable interests and priorities of affected and interested parties, including conscientious consumers, while avoiding outcomes may

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2. *See id*.; *see also* HOWARD RAIFFA, THE ART AND SCIENCE OF NEGOTIATION 66–77 (1982) (explaining a classic account of relevant problems and possibilities in such negotiations).

3. 28 U.S.C. § 1350 (2012). This statute dates from 1789. *See* Judiciary Act of 1789, ch. 20 § 9 (b), 1 Stat. 73, 77; *see also* discussion *infra* Sections III–VI.

4. *See* discussion *infra* Section III.

5. *See* discussion *infra* Section V.

6. *See infra* notes 37–41 and accompanying text.

involve a moral and jurisprudential travesty.[7] Currently, binding human rights law can make no such guarantees.

The key recommendation, based on a thought-experiment negotiation process, is for human rights advocates to seriously consider bargaining away their preferred legal positions—on corporate *mens rea* in tort cases, punitive damages recovery, standards of proof, the legal relevance of remedial measures, statutes of limitation, corporate criminal liability, and other matters—to obtain broad corporate acquiescence in realistically enforceable corporate tort liability, particularly on an aiding and abetting theory, for at least the most egregious underlying human rights violations.

Ideally, the concessions suggested above will someday no longer be necessary. Presently, such concessions, along with the various non-compulsory means encouraging corporate human rights compliance, might persuade major corporate enterprises that limited and genuine exposure to human rights-oriented tort law is in the overall long-term corporate interest. Such a strategy might, thus, increase the overall meaningfulness and impact of human rights law.

In developing these themes, this Article first addresses, by way of example, questions of *mens rea*, or required mental states, through the basic purposes and relevant assumptions underlying general tort and criminal law.[8] Whichever approach the law adopts, with or without negotiation, toward corporate aiding and abetting liability in human-rights-oriented torts cases should at least be generally compatible with these basic purposes and assumptions. Next, this Article addresses several possible approaches to the *mens rea* issues before adopting a model of negotiation or bargaining bounded by general moral constraints.[9]

Secondly, this Article discusses a number of issues associated with the Alien Tort Statute—ATS[10]—in case context.[11] From the perspective of this statute and case law, the Article briefly considers issues of *mens rea* in general and in context;[12] criminal and tort intention, knowledge, and

7. *See infra* Sections IV–VI.
8. *See infra* Section II.
9. *See infra* Sections III–IV. For our purposes, a hypothetical or real negotiating process could involve a focus on statutory enactments and amendments, including possible amendments to the Alien Tort Statute. *See id.*; 28 U.S.C. § 1350 (2012).
10. *See* 28 U.S.C. § 1350.
11. *See* discussion *infra* Section III.A (discussing the eight judge dissent in *Doe v. Nestle, USA, Inc.*, 788 F.3d 946, 946–956 (9th Cir. 2015) (Bea, J., dissenting), *reh'g denied*).
12. *See infra* Sections III–IV.

foresight;[13] multinational corporate, subsidiary, or contractual partner liability;[14] various forms of aiding and abetting or accessory liability;[15] and the scope of extraterritorial or distinctly foreign applicability of the ATS in egregious human rights cases.[16] These considerations are then synthesized in a brief concluding section.[17]

II. SOME BASIC PURPOSES AND OTHER ASSUMPTIONS OF TORT AND CRIMINAL LAW

Negotiating the various aspects of potential corporate human rights liability unavoidably takes place within certain general bounds. In particular, such negotiating will likely reflect, at least generally, some reasonably widely accepted version of the purposes and other basic assumptions underlying tort and criminal liability. Such underlying assumptions may structure, facilitate, and help legitimize the results of a hypothetical or actual bargaining process.

Versions of retributive theory and of utilitarianism provide the most prominent accounts of criminal law in general,[18] and of criminal *mens rea* requirements in particular.[19] Scholars combine backward-looking retributive theories and forward-looking utilitarian theories.[20] Most notably, John Rawls recommended a utilitarian approach at the broadest levels of criminal law theory, but a retributive approach to applying criminal law in particular cases.[21]

Other writers seek to add distinct alternatives to the basic categories of retribution and utilitarianism. Thus, some think of criminal law as communicative, expressive, or vindictive of community norms, values,

13. *See infra* Section IV.
14. *See infra* Section V.A.
15. *See infra* Section V.B.
16. *See infra* Section V.C.
17. *See infra* Section VI.
18. *See, e.g.*, Martin R. Gardner, *The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present*, 1993 UTAH L. REV. 635, 639–40.
19. *See id.* Retributive theories consider criminal punishment as logically fitting or as called for and deserved, whereas utilitarian views tend to think in terms of maximizing overall utility or welfare across some population and time frame, with the punishment itself considered as a loss of welfare. Utilitarian theories of punishment are forms of the broader category of consequentialism. *See* Hugo Adam Bedau & Erin Kelly, *Punishment*, STAN. ENCYCLOPEDIA OF PHIL., http://plato.stanford.edu/entries/punishment/ [https://perma.cc/4P6N-X727] (last updated July 31, 2015).
20. *See* Bedau & Kelly, *supra* note 19.
21. *See* John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 5 (1955).

and sentiments.[22] Others voice concern for offender incapacitation,[23] rehabilitation,[24] and moral education.[25] Yet others refer to the value of societal preservation,[26] or, more parochially, to the expiation of sin.[27] The Supreme Court suggested that a *mens rea* requirement in a statute, apart from any appropriate strict liability cases, "alleviate[s] vagueness concerns," "narrow[s] the scope of [its] prohibition[,] and limit[s] prosecutorial discretion."[28]

The purposes of the criminal law in general, and criminal *mens rea* requirements in particular, suggest that *mens rea* requirements should somehow serve the public and its values, without unfairly sacrificing the criminal defendant on the altar of possible utility gains. Thus, the question of whether a defendant deserves some level of punishment, or any punishment at all, should not be casually set aside.[29] This will remain as long as we distinguish different degrees of culpability among, for example, involuntary acts, innocent and eminently defensible choices, momentarily careless choices, knowledgeable choices, and strategically calculated deliberation, even if each choice results in the same harmful outcome.[30]

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22. *See, e.g.*, Antony Duff, *Legal Punishment*, STAN. ENCYCLOPEDIA OF PHIL., http://plato.stanford.edu/entries/legal-punishment/ [https://perma.cc/68T3-2T68] (last updated May 13, 2013). It seems evident that tort law can involve communicative or socially expressive elements as well.

23. *See* Albert W. Alschuler, *The Changing Purposes of Criminal Punishment*, 70 U. CHI. L. REV. 1, 1, 11 (2003) (discussing early U.S. crime control's emphasis on incapacitation and deterrence).

24. *See id.* at 1–21 (discussing rehabilitation efforts to provide prisoners with the ability to contribute to society).

25. *See id.* at 1 n.1.

26. *See* Gary V. Dubin, *Mens Rea Reconsidered: A Plea for a Due Process Concept of Criminal Responsibility*, 18 STAN. L. REV. 322, 364 (1966).

27. *See id.*

28. McFadden v. United States, 135 S. Ct. 2298, 2307 (2015) (alteration in original) (quoting Gonzales v. Carhart, 550 U.S. 124, 149, 150 (2007)).

29. *See, e.g.*, Winnie Chan & A.P. Simester, *Four Functions of Mens Rea*, 70 CAMBRIDGE L.J. 381, 384 (2011) ("[*Mens rea*] helps to establish the moral innocence or guilt of the defendant's conduct . . . .").

30. For a discussion of knowing versus intent *mens rea*, see Elonis v. United States, 135 S. Ct. 2001, 2010 (2015) ("When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute 'only that mens rea which is necessary to separate wrongful conduct from "otherwise innocent conduct."'" (quoting Carter v. United States, 530 U.S. 255, 269 (2000))). For a classic treatment of statutory criminal *mens rea* cases, see generally J. LL. J. EDWARDS, 8 MENS REA IN STATUTORY OFFENCES (L. Radzinowicz ed., 1955). For a broad American, and in particular a Uniform Penal Code focus, see WAYNE R. LAFAVE ET AL., CRIMINAL LAW 252–318 (5th ed. 2010). For stimulating theoretical discussion of criminal *mens rea* issues, see LEO KATZ, BAD ACTS

Similar constraints on state of mind requirements arise in the context of civil tort liability. These similarities arise, however, despite more demanding *mens rea* requirements in criminal cases, as opposed to lower levels of blame, fault, culpability, responsibility, and stigma involved in civil tort cases.[31] Thus, contemporary tort law hosts partially competing theories of its purposes, including compensation, enterprise liability, economic deterrence and wealth maximization, social justice, and individual justice.[32]

One could further multiply the possible legitimizing and constraining purposes of tort law.[33] On any reasonable such listing, however, a sense of meaningful justice and of vindication for innocent victims of severe harms would play a significant role.[34] This value is obviously relevant in contexts of basic human rights violations.

AND GUILTY MINDS: CONUNDRUMS OF THE CRIMINAL LAW 165–209 (1987); Larry Alexander, *Insufficient Concern: A Unified Conception of Criminal Culpability*, 88 CAL. L. REV. 931, 931 (2000) (explaining purpose and knowledge *mens rea* as reducible to a recklessness *mens rea* in the sense of a contextually insufficient concern for the interests of other persons); Joshua Dressler, *Does One Mens Rea Fit All?: Thoughts on Alexander's Unified Conception of Criminal Culpability*, 88 CAL. L. REV. 955, 955–56 (2000) (responding to and critiquing Alexander, *supra*); Stephen J. Morse, *Inevitable Mens Rea*, 27 HARV. J.L. & PUB. POL'Y 51, 51 (2003) (discussing the *mens rea* requirements as indispensable as long as criminal defendants are thought of as rational actors rather than as mechanical objects); Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 1020 (1932) ("It is hopeless to find any general universal concept of *mens rea* applicable to all . . . crimes alike."); Kenneth W. Simons, *Rethinking Mental States*, 72 B.U. L. REV. 463, 464 (1992) (distinguishing the *mens rea* significance of culpable belief states of mind and of culpable desire states of mind, as well as culpably negligent conduct); *see generally* Findlay Stark, *It's Only Words: On Meaning and Mens Rea*, 72 CAMBRIDGE L.J. 155 (2013) (arguing for the communicative value and the judicial discretion-reducing value of uniform definitions of *mens rea* terms).

31. *See* Peter Cane, *Mens Rea in Tort Law*, 20 OXFORD J. LEGAL STUD. 533, 533 (2000) (explaining that while an actor's intent is often crucial in personal responsibility-focused criminal cases, tort law often focuses on negligence or strict liability, given the special tort law concern for injured victims, actual and prospective); Edward Sankowski, *Two Forms of Moral Responsibility*, 18 PHIL. TOPICS 123, 124 (1990) (suggesting strict tort liability as responsibility without blameworthiness, fault, or culpability). *See also* John C.P. Goldberg & Benjamin C. Zipursky, *Tort Law and Responsibility*, *in* PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS 18 (John Oberdiek ed., 2014) (explaining tort law as involving "civil recourse" and a concern for "victims' demands for responsive action" in tort law cases).

32. *See* John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 514 (2003). For a similar inventory of purposes or justifications of tort law, see Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449, 449 (1992) (noting the possibility of combined theories).

33. *See, e.g.*, George L. Priest, *Satisfying the Multiple Goals of Tort Law*, 22 VAL. U. L. REV. 643, 645 n.23 (1988) (summarizing the ten goals of tort law listed in Robert F. Blomquist, *Goals, Means, and Problems for Modern Tort Law: A Reply to Professor Priest*, 22 VAL. U. L. REV. 621, 629–34 & 634 n.50 (1988)).

34. *See* sources cited *supra* notes 31–33.

For those interested in increasing the efficacy of human rights law over time, it seems relevant to consider the process values associated with well-functioning tort law regimes. In this respect, tort law systems should offer genuine effectiveness, routine compliance, and the enforceability of sensible procedural requirements as well as fair substantive judicial outcomes.[35] Similar compliance and enforceability issues are a matter of vital concern in the context of human rights law.[36]

In particular, any approach to the various contestable issues in human rights-oriented tort contexts would presumably draw upon at least one, if not several, of basic aims and constraints of tort law. Ultimately, one might choose to seek some genuinely right overall theory of each of the contestable issues in human rights contexts. The various answers to each question would, in theory, fit together in such a way as to jointly contribute to the sense that the other answers are also right.

As a loose analogy, consider a crossword puzzle.[37] A solver's confidence in the correctness of the completed grid reflects several considerations, as well as their holistic interaction. A particular answer must be neither a letter too long nor a letter too short. Answers must in some sense cohere with one another. By themselves, and even jointly, though, these considerations cannot maximize confidence in the correctness of one's pattern of grid entries. Instead, one could start from the clues provided, seeking, without regard to the grid, what seemed a correct or crossword-sound answer, in response to the clue. Confidence reaches its maximum only when the grid-based tests yield outcomes that cohere well with the clue-based tests.

One could, in principle, pursue correct answers to human rights torts problems through vaguely similar methods. In several areas of philosophical inquiry, such an inquiry is known as coherentism.[38] One might construe

35. *See* sources cited *supra* note 33.

36. *See* ERIC A. POSNER, THE TWILIGHT OF HUMAN RIGHTS LAW 69–70 (2014) (explaining the skepticism, or realism, manifested by scholars regarding compliance with international human rights treaties).

37. *See* SUSAN HAACK, EVIDENCE AND INQUIRY: TOWARDS RECONSTRUCTION IN EPISTEMOLOGY 81–82 (1993). Professor Haack, admittedly, does not intend this example to suggest a pure coherentism. *See id.*

38. Coherentism is the name given to several philosophical theories within modern epistemology, or the study of knowledge. For more detailed discussions of coherentism, see Robert Audi, *Foundationalism, Coherentism, and Epistemological Dogmatism*, 2 PHIL. PERSPECTIVES 407, 407–08 (1988); Laurence Bonjour, *The Coherence Theory of Empirical Knowledge*, 30 PHIL. STUD. 281, 281–82 (1976); Keith Lehrer, *Coherence, Justification, and Chisholm*, 2 PHIL. PERSPECTIVES 125 (1988); Nicholas Rescher, *Foundationalism, Coherentism, and the Idea of Cognitive Systematization*, 71 J. PHIL. 695, 695, 703 (1974).

coherentism as a form of a broader class of approaches under the rubric of holism,[39] or, in our case, more precisely, molecularism.[40] One of the best known variants thereof is the "[wide] reflective equilibrium" technique endorsed by John Rawls.[41]

Borrowing some of the most basic techniques associated with these schools, this Article aspires not to perpetually debate moral or legal correctness, but to advance plausible and defensible accommodations for enforceable human rights. The goal is to arrive at several meaningful concessions to multinational corporate actors that might purchase greater corporate acquiescence in an enforceable regime of corporate tort liability for at least egregious human rights violations under typical circumstances.

Concessions could be made, in the course of broad hypothetical bargaining, in exchange for a jurisprudential regime that respects the basic rights of such corporate defendants, while reducing, in several respects, the risk of human rights travesties. The idea of a human rights travesty refers to the most egregious human rights violations, with some degree of direct or indirect corporate involvement, where those violations are, in practice, left unremedied in any forum. The necessary concessions, along with other important considerations—including increasing multinational corporate sensitivity to public perceptions of corporate complicity in human rights violations—are intended to open the door to meaningful, if in some respects limited, corporate human rights tort liability. Such a development would

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39. "Holism" takes on a variety of meanings in different contexts. *See, e.g.*, Ned Block, *An Argument for Holism*, 95 PROCEEDINGS ARISTOTELIAN SOC'Y 151, 151 (1995) (discussing differing definitions of meaning holism); Kimberly Kessler Ferzan, *Holistic Culpability*, 28 CARDOZO L. REV. 2523, 2523–24 (2007) (explaining individual mental state concepts versus overall blameworthiness within the criminal law context). For an example of holism about units of meaning, see James O. Young, *Holism and Meaning*, 37 ERKENNTNIS 309, 309–11 (1992). For an example of holism and the locus of value, see Campbell Brown, *Two Kinds of Holism About Values*, 57 PHIL. Q. 456, 456–59 (2007). For important historical forms and debates, see A.W. Price, *Aristotle's Ethical Holism*, 89 MIND 338 (1980); Timothy Shiel, *On Marx's Holism*, 4 HIST. PHIL. Q. 235 (1987).

40. *See* Henry Jackman, *Meaning Holism*, STAN. ENCYCLOPEDIA OF PHIL., http://plato.stanford.edu/entries/meaning-holism/ [https://perma.cc/F5SB-VQ37] (last updated Sept. 15, 2014) (explaining the meaning of a word is inescapably linked to the meanings of a very limited number of other, related words). To pursue the physics analogy, though, holism is often contrasted with atomism. *See id.*; Brown, *supra* note 39, at 456; Michael Esfeld, *Holism and Analytic Philosophy*, 107 MIND 365, 365 (1998).

41. *See* JOHN RAWLS, A THEORY OF JUSTICE 20–21, 48–50 (1971). For commentary, see Jon Mikhail, *Rawls' Concept of Reflective Equilibrium and its Original Function in* A Theory of Justice, 3 WASH. U. JURIS. REV. 1, 5–26 (2010). For a somewhat broader focus, see Norman Daniels, *Reflective Equilibrium*, STAN. ENCYCLOPEDIA OF PHIL., http://plato.stanford.edu/entries/reflective-equilibrium/ [https://perma.cc/BJ48-YFB6] (last updated Jan. 12, 2011) (explaining reflective equilibrium as a matter of seeking coherence among our beliefs); *see also* R.B. Brandt, *The Science of Man and Wide Reflective Equilibrium*, 100 ETHICS 259, 260–78 (1990).

promote, generally, the practical meaningfulness of the evolving system of international human rights law.

III. THE ALIEN TORT STATUTE AND THE *MENS REA* PROBLEM

The curious history and continuing complications of the Alien Tort Statute have been widely documented.[42] The Alien Tort Statute, enacted as part of the Judiciary Act of 1789,[43] declares with deceptive simplicity that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[44] This Article leaves a number of issues to judicial resolution or to statutory amendment, including who counts as an alien, the law of nations, separation of powers issues, which *mens rea* or mental states required, comity and the division of responsibility between domestic and international law, the range of possible defendants, corporate and accomplice liability, the scope of geographical application of the statute, the relevance of other laws and fora, the nature and limits of recoveries available for successful plaintiffs, and possible exhaustion requirements.[45]

In the course of his academic discussion of the subject, Justice Stephen Breyer refers to the ATS as "a statute that helps to protect basic human rights."[46] As to the broader project of protecting such rights, Justice Breyer declared: "The citizens of most nations believe that goal to be important. They also believe that the rule of law is necessary to achieve

42. *See* 28 U.S.C. § 1350 (2012). For valuable complementary discussions, see, for example, STEPHEN BREYER, THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES 134–64 (2015); GEORGE P. FLETCHER, TORT LIABILITY FOR HUMAN RIGHTS ABUSES 17–26 (2008); Beth Stephens, *The Curious History of the Alien Tort Statute*, 89 NOTRE DAME L. REV. 1467 (2014) (highlighting *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), and *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013)).

43. *See* 28 U.S.C. § 1350.

44. *Id.*

45. A number of these issues and related uncertainties are touched upon in BREYER, *supra* note 42, at 134–64. A reasonably instructive analogy might be drawn, in this respect, between the ATS and the similarly terse formulation of broad civil rights liability under 42 U.S.C. § 1983, under which a number of evidently basic issues must be judicially addressed. 42 U.S.C. § 1983 (2012); *see, e.g.*, Anderson v. Creighton, 483 U.S. 635 (1987) (holding that an officer is entitled to qualified immunity if he or she can establish as a matter of law that a reasonable officer under the same circumstances could believe the search complied with the Fourth Amendment).

46. BREYER, *supra* note 42, at 134.

it."[47] In this sense, broad public expectations regarding key legal instruments such as the Alien Tort Statute seem high.

The idea of a hypothetical negotiating process in the context of implementing, interpreting, and reforming the ATS can be introduced through, merely for example, the recent case of *Doe v. Nestle USA, Inc.* (*Nestle II*).[48] In *Nestle II*, the Ninth Circuit addressed several issues, including those of corporate *mens rea* in the context of alleged tortious aiding and abetting of underlying basic human rights violations, allegedly perpetrated directly by parties with whom the ATS defendants had contractual relationships.[49]

The plaintiffs in *Nestle II* were "alleged former child slaves of Malian descent, dragooned from their homes and forced to work as slaves on cocoa plantations in the Ivory Coast."[50] The corporate tort defendants were not themselves accused of the underlying enslavement, human trafficking, or child slave labor practices, but of accessory liability thereto.[51] The Ninth Circuit did not address in *Nestle* whether pursuing any tort or criminal action against any of those accused of enslavement, human trafficking, or child slave labor would have been futile.[52]

One question in *Nestle II* was whether aiding and abetting tort liability requires a showing of Nestle's purpose or intent to further or facilitate the underlying human rights violations, or a showing of Nestle's knowledge, at some relevant time, of such violations.[53] If the Ninth Circuit determined that accessory liability under the ATS requires purpose or intent rather than mere knowledge, the court would reach the question of what sorts of corporate activities, beliefs, desires, values, or dispositions suffice to show the relevant purpose or intent.[54]

In *Nestle II*, the appellate majority recognized that two other federal circuits have adopted a purpose or intent rather than a knowledge *mens*

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47. *Id.*

48. 788 F.3d 946 (9th Cir. 2015) (*Nestle II*) (Bea, J., dissenting) (rejecting the majority's denial of rehearing en banc, as joined by seven other Ninth Circuit judges). The denial leaves intact the panel opinion in *Doe v. Nestle USA, Inc.*, 766 F.3d 1013 (9th Cir. 2014) (*Nestle I*). The corporate defendants in this case, beyond Nestle at the level indicated, also included fellow multinationals Archer Daniels Midland, Cargill, Inc., and Cargill Cocoa. *Nestle II*, 766 F.3d at 946 [hereinafter the multinational corporate defendants in this and similar cases will be referred to below as Nestle].

49. *See Nestle II*, 788 F.3d at 948 (Bea, J., dissenting from denial of rehearing en banc).

50. *Id.* at 947.

51. *See id.*

52. *See id.*

53. *See id.* at 948–49 (Bea, J., dissenting).

54. *See id.* at 949.

rea requirement.[55] However, the panel majority determined that it need not decide between these two *mens rea* requirements under the circumstances,[56] as "the plaintiffs' allegations satisfy the more stringent purpose standard,[57] and therefore state a claim for aiding and abetting slavery."[58]

The dissenters in *Nestle II* rejected the applicability of a knowledge *mens rea* requirement,[59] as well as the panel holding that the plaintiffs had alleged facts legally sufficient to establish purpose or intent on the part of the defendants.[60] According to the dissenters, the assertion that the defendants sought or intended to increase their profits through a production process involving child slavery, among other actions, did not amount to a sufficient allegation of the defendant's intent.[61]

The dissenters further observed that beyond asserting the defendants' quest for greater rather than lesser profits, "the plaintiffs . . . do not even allege that the defendants could not have procured similar prices from the Ivorian plantations absent their use of slave labor—by technological innovations or the exercise of monopsony power, for instance."[62] It is unclear whether the dissenters would, in such contexts, impose a pleading and production burden showing that a profit-motivated corporation obtained greater overall profits, over some time frame, through contractual relationships fulfilled by child slave labor rather than through other legally permissible and practical alternative production process. Any such inquiry would of course be highly speculative, if not arbitrary.[63]

By contrast, the majority focused less on cost comparisons, or on any likelihood of greater profits or reduced costs through alternative approaches to cocoa production. The majority conceded the lack of any intent on the part of the defendants to harm children as an intent or purpose for its own

55. *Nestle I*, 766 F.3d 1013, 1023–24 (9th Cir. 2014) (first citing Aziz v. Alcolac, Inc., 658 F.3d 388, 399–400 (4th Cir. 2011); and then Presbyterian Church of Sudan v. Talisman Energy, Inc., 583 F.3d 244, 259 (2d Cir. 2009)).

56. *Id.* at 1024.

57. We here ignore the interesting possibility that in some circumstances, a knowledge *mens rea* requirement might actually be more rigorous, or more genuinely inculpatory and indicative of more serious responsibility, than a purpose or intent *mens rea* requirement.

58. *Nestle I*, 766 F.3d at 1024.

59. *Nestle II*, 788 F.3d at 951 (Bea, J., dissenting).

60. *See id.* at 951.

61. *See id.* at 950.

62. *See id.* at 950–51, 950 n.11.

63. It seems possible, for example, that requiring greater mechanization of the cocoa production process could be prohibitively costly over the short term, gradually more competitive over some longer time frame, and profit-enhancing over some yet longer period.

sake.[64] The majority then conceded that an ordinary intentional business relationship does not meet the aiding and abetting intent *mens rea* requirement,[65] as presumably in the case of a lessor's profitably renting a car that is later used in a bank holdup.[66] Thus,

> Doing business with child slave owners, however morally reprehensible that may be, does not by itself demonstrate a purpose to support child slavery. Here, however, the defendants allegedly intended to support the use of child slavery *as a means* of reducing their production costs. In doing so, the defendants sought a legitimate goal, profit, through illegitimate *means*, support of child slavery.[67]

The majority, thus, emphasized the distinction between seeking or intending some state of affairs as an end in itself, or for its own sake, and intending a state of affairs largely, or indeed entirely, as a means[68]—perhaps sincerely regretted—to some desired goal.[69]

More broadly, the *Nestle II* case raises a number of contentious issues. These include, among others, the question of private corporate aiding and abetting tort liability under the ATS;[70] related issues of the level of descriptive generality to be employed in determining whether corporate behavior violates specific consensual international legal prohibitions;[71] and further related questions as to the possible extraterritorial reach, in these and other contexts, of the Alien Tort Statute.[72]

From our perspective, though, it is important not to lose focus on the nature and moral gravity of the phenomenon of child slavery, as well as

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64. *Nestle I*, 766 F.3d at 1025.
65. *See id.*
66. *See* discussion *infra* Section V.B.
67. *Nestle I*, 766 F.3d at 1025–26 (emphasis added).
68. *See* discussion *infra* Section IV.
69. *See Nestle I*, 766 F.3d at 1025–26.
70. *See Nestle II*, 788 F.3d at 954 (Bea, J., dissenting); *see also* Amanda Humphreville, Comment, *If the Question Is Chocolate-Related, the Answer Is Always Yes: Why* Doe v. Nestle *Reopens the Door for Corporate Liability of U.S. Corporations Under the Alien Tort Statute*, 65 AM. U. L. REV. 191 (2015); *see also* discussion *infra* Section V.
71. *See Nestle II*, 788 F.3d at 951 (Bea, J., dissenting). For background on issues of the appropriate level of generality at which rules, rights, and other phenomena should be described, see Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1057–1108 (1990). *See also* Michael H. v. Gerald D., 491 U.S. 110, 129 n.7 (1991) (discussing the dispute over relatively narrow and broad descriptions of rights between Justices Scalia and Brennan); John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003 (2009).
72. *See Nestle II*, 788 F.3d at 952 (Bea, J., dissenting). The key questions in this respect focus on the proper interpretation of *Kiobel v. Royal Dutch Petroleum*, 133 S. Ct. 1659, 1669 (2013), which raised the possibility of rebutting a presumption against extraterritorial application of the ATS by showing that the claim touches and concerns the territory and interests of the United States with sufficient force, as well as *Kiobel*'s relationship to *Morrison v. National Australia Bank*, 561 U.S. 247, 264–73 (2010).

the currently limited number, availability, and scope of genuinely effective judicial mechanisms for redressing such depredations.[73] It might be said that all recognized human rights count as, in some sense, fundamental. But it is also difficult to believe that ratifiers of human rights treaties would be indifferent as among the violation of any two of their many enumerated human rights.[74] Child slavery is morally distinctive. Allowing proper scope for cultural and historical relativism still leaves us with the distinctive egregiousness of contemporary child slavery, however common such practices may be.[75]

Nor should the Alien Tort Statute hamstring courts into applying complex and largely unresolvable inquiries into whether child slavery is, under a given set of circumstances, genuinely profitable, or more profitable than some alternative production process. The debates over the economics of nineteenth century chattel slavery continue today,[76] but such debates are irrelevant to this Article's concerns. Differences in largely hypothetical productivity levels do not mitigate an abomination.

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73. For example, the United Kingdom enacted criminal penalties to persons who engage in slavery, servitude, forced or compulsory labor, and human trafficking under the British Modern Slavery Act of 2015. British Modern Slavery Act 2015, 63 Eliz. 2, http://www.legislation.gov.uk/ukpga/2015/30/contents/enacted/data.htm [https://perma.cc/2UBN-4XBQ] (last visited Aug. 2, 2016).

74. For a sophisticated discussion of lists of human rights, see JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE (Cornell Univ. Press, 3d ed. 2013).

75. *See Child Slavery*, ANTI-SLAVERY, http://www.antislavery.org/english/slavery_today/child_slavery/default.aspx [https://perma.cc/4BA7-GTEH] (last visited Aug. 2, 2016); *Stories of Child Slavery*, ANTI-SLAVERY, http://www.antislavery.org/english/slavery_today/child_slavery/stories_of_child_slavery.aspx [https://perma.cc/JJA7-CXJ4] (last visited Aug. 2, 2016) (describing anecdotal accounts of contemporary child slavery). For a sense of the complications and variations of the institution of slavery in international commodity production supply chains, see *Slavery in the Global Supply Chain*, ANTI-SLAVERY, http://www.antislavery.org/english/slavery_today/slavery_and_what_we_buy/default.aspx [https://perma.cc/37JS-6TV5] (last visited Aug. 2, 2016). For controversial background allegations on some selected participants in and narrow segments of the cocoa and chocolate production sector in particular, see *Child Labor and Slavery in the Chocolate Industry*, FOOD EMPOWERMENT PROJECT, www.foodispower.org/slavery-chocolate [https://perma.cc/ K2HN-NNNC] (last visited Aug. 2, 2016).

76. *See* ROBERT WILLIAM FOGEL & STANLEY L. ENGERMAN, TIME ON THE CROSS 4–5 (1989 ed.) (1974) (explaining traditional interpretation of slavery economics is contradicted by advances in economics, math, and statistics); HERBERT G. GUTMAN, SLAVERY AND THE NUMBERS GAME: A CRITIQUE OF TIME ON THE CROSS 84–85 (1975) (rejecting a number of the Fogel & Engerman arguments). *See, e.g.*, C.W. & A.J.K.D., *Did Slavery Make Economic Sense?*, ECONOMIST (Sept. 27, 2013, 3:37 PM) http://www.economist.com/node/21586949 [https://perma.cc/YMQ8-JKJR] (explaining several conflicting theories either supporting or critiquing the ideas of Fogel & Engerman).

Thus, even if a court, for corporate *mens rea* purposes, took a position on the genuine profitability over some time frame of child slavery, such a determination might not meaningfully bear on the relevant issues. The court and the corporate defendant may have different time frames in mind. For example, a corporate defendant might predict that child slavery is the most profitable option, but is mistaken in that regard, if only because of adverse publicity or an ATS lawsuit. The meaningful risk of ATS aiding and abetting liability might also inspire a corporation to explore non-child slavery options, including the training of some number of workers to operate and maintain agricultural machinery.

Differences in the costs of various cocoa and other commodity production methods may, in some cases, be minimal by comparison with other components of the cost of finished retail products, especially given the price elasticity of the demand for chocolate,[77] and the potential effects of adverse publicity on corporate image.[78] Especially in such cases, the risk of meaningful ATS litigation might well encourage a corporate defendant to insist on non-slavery practices by those with whom it directly or indirectly contracts.

Ultimately, though, human rights advocates should be willing to accept, in negotiations, a *mens rea* requirement of intent, in exchange for corporate concessions that should be of greater concern to the human rights community. Listed below are some justifications for this recommendation through exploring relationships between intending some outcome as an end or as a means, and desiring, foreseeing, or knowing of that outcome.

IV. SOME RELATIONSHIPS AMONG INTENTION, DESIRE, FORESIGHT, AND KNOWLEDGE

When choosing to solve issues of *mens rea* on the merits, or to somehow bargain or negotiate, as this Article recommends—one needs some sense of the meaning and scope of intention and related concepts. Particularly for those seeking right answers on the merits, the problems are daunting:

> Controversy persists concerning the relationship between intention, desire and foresight of consequences; between intending something, wanting it and realizing that my action will or might bring it about: does intention involve a 'desire' for

77. *See, e.g.*, *Price Elasticity of Demand*, ECON. ONLINE, www.economicsonline.co.uk/Competitive_markets/price_elasticity_of_demand/ [https://perma.cc/WVF6-G5G8] (last visited Aug. 2, 2016).

78. Note the arguably significant and perhaps increasing concern on the part of some multinational corporations for their public image as socially responsible global actors. *See* discussion *infra* Section VI.

> that which is intended; does an agent intend what she foresees as the certain, probable or likely consequences of her actions?[79]

Some of the important issues can be raised hypothetically. Professor Ferzan asked: "The sniper who shoots at a soldier, thereby heating the barrel of his gun—does he intend to alert the enemy of his presence? When an actor knows the result is certain does the actor also intend that result?"[80] Should the answer always turn on whether the result is motivationally significant for the actor?[81]

While the ordinary scope of the idea of intention may not always correspond with tort or criminal law usages, claims as to ordinary contexts may be provocative. Anthony Kenny, for example, suggested: "Feeling miserable, I may deliberately get drunk. In doing so, I foresee that I will have a hangover; but I do not get drunk in order to have a hangover or with the intention of bringing on a hangover."[82] In a more positive mood, and with somewhat different aims, a person might "imbibe a good deal of wine with the intention of enjoying a pleasant evening with a friend; he foresees he will get drunk and intends enjoying the evening and getting drunk."[83] Or, to elaborate upon Professor Ferzan's hypothetical above,[84] consider an assassin who "intends to kill the Prime Minister by shooting her with a rifle from ambush."[85] Such an assassin:

> [F]oresees that this will make a loud noise, heat the barrel of the rifle, and cause the Prime Minister to fall out of her seat. We would normally suppose the assassin intends pulling the trigger, and the shooting and killing of the Prime Minister, without necessarily intending the loud noise, the heating of the barrel of the gun, or the Prime Minister's fall from her seat.[86]

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79. R.A. DUFF, INTENTION, AGENCY, AND CRIMINAL LIABILITY: PHILOSOPHY OF ACTION AND THE CRIMINAL LAW 15 (1990) (focusing on criminal as distinct from civil tort liability).

80. Kimberly Kessler Ferzan, *Beyond Intention*, 29 CARDOZO L. REV. 1147, 1149–50 (2008).

81. *See id*. at 1150. Alternatively, one might ask whether a particular consequence was or was not part of an actor's "chain of reasons for acting." MICHAEL S. MOORE, PLACING BLAME 450–51 (1997).

82. Anthony Kenny, *Intention and Purpose*, 63 J. PHIL. 642, 644 (1966).

83. Joseph M. Boyne & Thomas D. Sullivan, *The Diffusiveness of Intention Principle: A Counter-Example*, 31 PHIL. STUD. 357, 357 (1976).

84. *See* Ferzan, *supra* note 80, at 1149–50.

85. Gilbert Harman, *Rational Action and the Extent of Intentions*, 9 SOC. THEORY & PRAC. 123, 123 (1983).

86. *Id.*

The scope of one's intentions, or of intended outcomes, is often expanded, however, beyond these limits. Professor Duff, for example, recognized "a broader notion of intention which includes foresight of morally certain—and perhaps even of probable—consequences,"[87] with unclear application to the criminal law.[88] Professor Duff sought to distinguish between "intending an effect"[89] and "bringing [that effect] about intentionally."[90]

Such a distinction draws upon Jeremy Bentham's classic notion of an oblique intention,[91] under which at least some foreseen and probable consequences can count as intended even under the criminal law.[92] The philosopher Henry Sidgwick later took up this understanding of intention.[93] Professor Sidgwick argued in this fashion:

> Suppose a nihilist blows up a railway train containing an emperor and other persons: it will no doubt be held correct to say simply that his intention was to kill the emperor; but it would be thought absurd to say that he 'did not intend' to kill the other persons, though he may have had no desire to kill them and may have regarded their death as a lamentable incident in the execution of his revolutionary plans.[94]

On such a view, a criminal defendant is taken to have intended all of the consequences of the defendant's acts that the defendant foresaw and believed to be "certain or probable."[95]

This broader understanding of the scope of intended consequences may result from what might be thought of as a "working backwards." Often, determining whether a tort or criminal defendant at least partly intended a particular result dictates how legally or morally responsible that defendant was for that result. Professor Sidgwick may, in contrast, begin at the other end, with the conclusion that the defendant was legally or morally responsible for the result. Assuming the defendant's responsibility for that result, and their inability to "evade responsibility," we can perhaps then infer, for

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87. DUFF, *supra* note 79, at 89.

88. *See id.*

89. R.A. Duff, *Intentions Legal and Philosophical*, 9 OXFORD J. LEGAL STUD. 76, 78 (1989).

90. *Id.*

91. *See* JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION ch. VIII, at 86 (Hafner ed., 1970) (1789).

92. *See id.* One would imagine that whatever might count as an intention for criminal law purposes would count at least as clearly as an intention for most civil tort law purposes. On the other hand, distinctive stigma or disgrace may attach to a tortious human rights violation, even though aiding and abetting.

93. HENRY SIDGWICK, THE METHODS OF ETHICS 202 (Hackett 1981) (1874).

94. *Id.* at 202 n.1.

95. *Id.* at 202. *But see* Rollin M. Perkins, *A Rationale of Mens Rea*, 52 HARV. L. REV. 905, 911 (1939) ("As far as actual intention is concerned, more is required than an expectation that the consequence is likely to result from the act"). However, a "desire" is not always required for intention. *Id.* at 911.

pragmatic and moral reasons, that the defendant can be held to have intended the result.[96] Very roughly, one might infer the defendant's intent from a sense of the defendant's responsibility. Other theorists have discussed this broader sense of intention.[97]

A somewhat different perspective suggests that the main reason the law focuses on intention or lack of intention is because frequently unlawful results that are intended are more likely to occur than unlawful results that are unintended.[98] If harm is more likely to occur if it is intended, then the law has a reason to specially sanction the intent to bring about such a result.[99] But if a result of an action is certain to occur whether that result is intended or not, we have, at least in this respect, no practical reason to choose one theory of intention over another.[100]

Again, the real strength of any or all of these arguments is something that, for our purposes, we can afford to bypass in the process of a negotiated agreement on even the strongest intent-based *mens rea* requirement or other concessions to potential defendants, in exchange for corporate human rights law concessions on what human rights advocates might consider more practically important and fundamental matters. In exchange for legitimizing the availability of a limited multinational corporate aiding and abetting liability for grave human rights violations wherever the corporate influence extends, concessions on *mens rea* and other matters are worth making.

Part of the motivation for a human rights advocate's willingness to endorse a strong *mens rea* requirement reflects the above contesting views as to how to define intention or how to distinguish intention from mere knowledge.[101] There is also the murkiness and unpredictability of applying such distinctions in practice. Thus, the practical difference between *mens rea* standards may not be consistently large.

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96. *See* SIDGWICK, *supra* note 93, at 202.

97. *See, e.g.*, Glanville Williams, *Oblique Intention*, 46 CAMBRIDGE L.J. 417, 419 (1987) ("A result that is either witnessed or foreseen as certain is almost always regarded as sharing the intentional nature of the act where it is either the contemporaneous [concurrent] result or the immediate consequence of the act."). This holds whether one desired, regretted, or regarded with indifference the result in question, as in the case of a defendant who quite sincerely cared only about getting paid. *See id.* at 438.

98. *See* Kenny, *supra* note 82, at 650. Professor Kenny recognizes the basic legal presumption "that a man intends the natural consequences of his acts," and that one can intend both ends and means, thus "[a] man intends the ends he sets himself and the means he adopts to those ends." *Id.* at 642, 648.

99. *See id.* at 650.

100. *See id.* at 651.

101. *See* discussion *supra* notes 79–89 and accompanying text.

Consider, for example, the application of the sophisticated approach by Professor John Finnis. Finnis concluded that: "What one intends is what one chooses, whether as end or as means. Included in one's intention is everything which is part of one's plan [proposal], whether as purpose or as way of effecting one's purpose[s]—everything which is part of one's reason for behaving as one does."[102] Let us simply take the idea of intending something as a means to another goal, as opposed to seeking something for its own sake, or as an end in itself. Even so, many of us do not believe that invariably, our conscious choices reflect a reasonably clear plan or proposal. We may not know our own actual motives especially well. Nor may all of our arguably relevant reasons for acting be clear and uncontestable, even in retrospect.

More broadly, all parties should recognize that no negotiated legal gain or loss on issues of intent and *mens rea* can be invariably and entirely secure. At the most basic level, there are "different ways of describing what somebody does: in killing X, for example, I may also be shooting X, pulling a trigger, and moving my finger."[103] The most morally or legally appropriate descriptions may in some cases be contestable. And while it may be that "every action is intentional under some description,"[104] multiple descriptions may in some cases be in play, and an actor may be aware of arguably relevant circumstances on some descriptions but not others.[105] Consider the simple case of what one expects to be a painful, indeed dreadful, experience at the dentist: as one intentionally walks into the office, and intentionally keeps the appointment, what other events or experiences are within the scope of one's intentions—or plans, proposals, or reasons?[106]

Additionally, the Knobe Effect, a psychological or otherwise empirical generalization holding that "a person's intuitions as to whether or not a given side-effect was produced 'intentionally' can be influenced by that person's attitude toward the specific side-effect in question," must be accounted for.[107] The persons thus influenced by their own attitudes in judging matters

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102. John Finnis, *Intention in Tort Law*, *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW 229 (David G. Owen ed., 1997).

103. A.P. Simester, *Paradigm Intention*, 11 L. & PHIL. 235, 236 (1992).

104. Ferzan, *supra* note 80, at 1149.

105. *See id*; *see also* RICHARD R. NISBETT, MINDWARE: TOOLS FOR SMART THINKING 4 (2015); THOMAS GILOVICH & LEE ROSS, THE WISEST ONE IN THE ROOM 43 (2015).

106. *See* Arthur R. Miller, *Wanting, Intending and Knowing What One Is Doing*, 40 PHIL. & PHENOMENOLOGICAL RES. 334, 338 n.7 (1980). At the potentially quite misleading level of wants or desires, many such patients may report that all they wanted, desired, or cared about was the prompt alleviation of pre-existing, or other pain. *See id.*

107. Joshua Knobe, *Intentional Action and Side Effects in Ordinary Language*, 63 ANALYSIS 190, 191 (2003).

of intentionality may presumably include, to one degree or another, judges and jurors in some corporate human rights tort cases.

One final complication in the realm of the intentional is contributed by any relevant lack of clarity and predictability in the application of what is called the Principle of Double Effect.[108] The Principle of Double Effect holds that "sometimes it is permissible to cause a harm as a ['proportionate' and unintended] side effect . . . of bringing about a good result even though it would not be permissible to [presumably intentionally] cause such a harm as a means to bringing about the same good end."[109] The literature and the relevant complications that follow are substantial.[110] One related problem, further diluting the human rights costs of any concession in the area of a required *mens rea*, involves "the difficulty of distinguishing between grave harms that are regretfully intended as part of the agent's means and grave harms that are regretfully foreseen as side effects of the agent's means."[111]

In the general human rights context, no major contemporary multinational corporation desires the practice of slave or child labor for its own sake, by its own agents, its subsidiaries and suppliers, or by any entity with which it maintains direct or indirect contractual relations. But wanting or not wanting something for its own sake, whatever that murky idea may include, hardly exhausts the realm of intention. Leading corporate actors, or the corporation itself, may demonstrably prefer one level of costs, or one level of

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108. Alison McIntyre, *Doctrine of Double Effect*, STAN. ENCYCLOPEDIA OF PHIL., http://plato.stanford.edu/entries/double-effect [https://perma.cc/N9R9-45PR] (last updated Sept. 23, 2014).

109. *Id.*

110. For a mere fragment of the double effect literature, focusing in large part on issues of intention and foresight, *see* T.A. CAVANAUGH, DOUBLE-EFFECT REASONING: DOING GOOD AND AVOIDING EVIL (2006); ALAN DONAGAN, THE THEORY OF MORALITY 157–64 (1977); JONATHAN GLOVER, CAUSING DEATH AND SAVING LIVES 88, 90 (1977) (noting in particular "the difficulty of deciding where to draw the line between an act and its consequences."); THE DOCTRINE OF DOUBLE EFFECT: PHILOSOPHERS DEBATE A CONTROVERSIAL MORAL PRINCIPLE (P.A. Woodward ed., 2001) (see in particular the respective contributions of Professors Anscombe, Bennett, Boyle and Nagel); SUZANE UNIACKE, THE DOCTRINE OF DOUBLE EFFECT IN PRINCIPLES OF HEALTH CARE ETHICS 263 (R.E. Ashcroft et al., eds., 2007); Antony Duff, *Intention, Responsibility and Double Effect*, 32 PHIL. Q. 1, 5 (1982) ("The criteria of intentional agency and responsibility for an effect involve the agent's knowledge of and control over that effect, but also its significance as providing a reason for or against his action . . . .").

111. McIntyre, *supra* note 108; *see also* Megha Bahree, *Child Labor*, FORBES (Feb. 29, 2008, 3:20 PM), http://www.forbes.com/global/2008/0310/062.html [https://perma.cc/4XD8-FPHH] (explaining that the race to the bottom is forcing farmers and manufacturers to rely upon child labor).

profitability, over another. And, in rare cases, evidence may demonstrate, however tentatively, that corporate actors believed slavery or child labor to be, at some point in the production process, a likely means to more desirable cost or profit levels.

It might well be, in some cases, that a corporate actor feels vaguely forced to adopt such a means of production in the context of a cost-cutting "race to the bottom" among competitors.[112] However self-defeating and undesired such a race to the bottom may be, it may still involve intentional actions.[113] The best solution to the race to the bottom problem may be some form of credible, uniformly threatened legal or judicial sanctions.[114]

In general, even if the legal *mens rea* standard requires a showing of intent, the judicial inquiry into intent may overlap substantially with an inquiry into what the corporation or its directing agents believed, foresaw, or actually knew, as production processes evolved over time. The differences, in such contexts, between an intentional and a less-than-intentional *mens rea* may often be modest, if not debatable or illusory, and readily negotiated away by human rights advocates.

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112. For a brief definition of the race to the bottom, see *Race to the Bottom*, FIN. TIMES, http://lexicon.ft.com/Term?term=race-to-the-bottom [https://perma.cc/2KYU-6TUT] (last visited Aug. 2, 2016).

113. For an interesting illustration at the level of competing states, rather than corporate actors, see the insightful majority opinion by Justice Cardozo in the state and federal unemployment compensation case of *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937). For discussion at the level of enforced labor standards in globalized production markets, see, for example, R.A., *Racing to the Bottom*, ECONOMIST: FREE EXCHANGE (Nov. 27, 2013 5:12 PM), www.economist.com/blogs/freeexchange/2013/11/1abour-standards [https://perma.cc/JWL5-W4RD] (scroll to bottom of page; then go to page 2 to find this posting). *See also* RICHARD M. LOCKE, THE PROMISE AND LIMITS OF PRIVATE POWER: PROMOTING LABOR STANDARDS IN A GLOBAL ECONOMY 12 (2014) (noting collective action problems even among reputation- or image-conscious brands).

114. The basic logic of a credible and broadly imposed, or at least broadly threatened, regime of legal sanctions in such "collective action" dilemma situations was classically suggested by THOMAS HOBBES, LEVIATHAN chs. 13–18 (Richard Tuck, ed.) (rev. ed., 1996) (1651). A narrower gauge solution to such collective action problems is endorsed by Justice Cardozo. *Steward Machine Co.*, 301 U.S. at 596–97; *see also* RUSSELL L. HARDIN, COLLECTIVE ACTION (1982) (discussing the ways in which people act together when confronted with actual collective action problems and analyzing the ways in which their actions do not conform with various theories about how people would act in these situations).

V. THE IMPORTANCE OF A REALISTIC POSSIBILITY OF MEANINGFUL CORPORATE LIABILITY FOR SEVERE HUMAN RIGHTS VIOLATIONS

A. Corporate Human Rights Liability

There appears to be some possibility, whatever the current or future setbacks and reverses, of meaningful corporate business liability in otherwise appropriate cases under the Alien Tort Statute or some alternative vehicle. Whatever the human rights liability of state actors,[115] or authorized individual persons acting on behalf of a corporation,[116] the availability of corporate

115. For a sense of the current binding international law's emphasis on state liability, as distinguished from corporate business liability, see, for example, John Ruggie (Special Representative), *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, ¶ 6, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011); Draft Resolution, Human Rights Council, U.N. Doc. A/HRC/26/L.1 (June 23, 2014) (elaborating on the state versus corporation division regarding legal liability). *See also* John Gerard Ruggie, JUST BUSINESS: MULTINATIONAL CORPORATIONS AND HUMAN RIGHTS (2013); John G. Ruggie, Closing Plenary Remarks, UN Forum on Business & Human Rights Issues 12 (Jan. 27, 2015). For additional valuable perspectives, see Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443 (2001); Gwynne Skinner, *Parent Company Liability: Ensuring Justice for Human Rights Violations*, INT'L CORP. ACCOUNTABILITY ROUNDTABLE (Sept. 2015), http://icar.ngo/wp-content/uploads/2015/06/ICAR-Parent-Company-Accountability-Project-Report.pdf [https://perma.cc/SH3M-MRW8]; Gwynne Skinner, Robert McCorquodale & Olivier De Schutter, *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business*, INT'L CORP. ACCOUNTABILITY ROUNDTABLE 12 (Dec. 2013), http://icar.ngo/wp-content/uploads/2013/02/The-Third-Pillar-Access-to-Judicial-Remedies-for-Human-Rights-Violation-by-Transnational-Business.pdf [https://perma.cc/7ACV-VT7V]; John Tasioulas, *Human Rights, No Dogmas: The UN Guiding Principles on Business and Human Rights*, JAMES G. STEWART (Jan. 30, 2015) http://jamesgstewart.com/human-rights-no-dogmas-the-un-guiding-principles-on-business-and-human-rights/ [https://perma.cc/627T-UDH3].

In some human rights cases, the boundaries as to moral and causal responsibility between government and corporate actors may be far from clear. Historically, see ADAM HOCHSCHILD, KING LEOPOLD'S GHOST (1999); *I.G. Farben*, HOLOCAUST EDUC. & ARCHIVE RESEARCH TEAM, http://www.holocaustresearchproject.org/economics/igfarben.html [https://perma.cc/BK5P-ZME4] (last visited Aug. 4, 2016), and the commentary in Gwynne Skinner, *Nuremberg's Legacy Continues: The Nuremberg Trials' Influence on Human Rights Litigation in U.S. Courts Under the Alien Tort Statute*, 70 ALBANY L. REV. 327 (2008). *See also* Edmund F. Byrne, *In Lieu of a Sovereignty Shield, Multinational Corporations Should Be Responsible for the Harm They Cause*, 124 J. BUS. ETHICS 609, 609 (2014).

116. For some advantages of pursuing individual liability of persons acting on behalf of a corporation, as distinct from corporate institutional liability, see Pammela Q. Saunders, *Rethinking Corporate Human Rights Accountability*, 89 TUL. L. REV. 603 (2015).

tort liability under the ATS, in some cases, remains an important priority, rather than a negotiating point conceded by human rights advocates.

This Article assumes that there is some minimum colorable argument for possible institutional or corporate liability under at least a revised version of the ATS.[117] Despite some judicial intimations to the contrary,[118] it has been argued that "[c]ustomary, as opposed to treaty-based, international law has never recognized the imposition of direct duties on private corporations."[119] There will often be an additional dimension of doubt as to the existence of a custom and the scope of customary law, whether international or not.

For example, there will be cases in which observers can reasonably differ as to whether enough persons have walked a diagonal across the lawn to create a path. Thus, one or two cases of walking ordinarily do not establish a path; more generally, one cannot specify any determinate number of cases that would suffice to establish a path, or by analogy for a custom, but one fewer than which would not.[120]

There is also a level-of-generality problem in describing the relevant customary international law. The more specificity used to describe the vital relevant circumstances, the less likely one finds any number of cases of judicial recognition thereof. A specific characterization of any set of circumstances may distinguish certain features, while others may not have struck equally reasonable judges as particularly relevant.

In the present context, we would have to decide whether the most relevant question is: at one extreme, whether somehow sufficiently well-established customary international law condemns slavery or child slavery, or another extreme, whether such well-established customary international law condemns child slavery by corporate entities or by a defendant's corporate subsidiaries in particular relationships of extraterritoriality. Some independent theory must be adopted in order to justify choosing one broad or narrow description over another.[121] In at least some human rights cases, avoiding what we might call a serious moral travesty would seem to be one useful and attractive option.

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117. *See, e.g.*, Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013, 1017–19 (7th Cir. 2011) (Posner, J.) (citing a number of cases, many of which assume, rather than explicitly hold for, possible corporate liability under the ATS); *see also In re* South African Apartheid Litig., 15 F. Supp. 3d 454 (S.D.N.Y. 2014). *But see* Julian S. Ku, *The Curious Case of Corporate Liability Under the Alien Tort Statute: A Flawed System of Judicial Lawmaking*, 51 VA. J. INT'L L. 353, 355 (2011) ("[T]he view that corporations can be liable for violations of customary international law under the ATS is wrong.").

118. See the cases cited in *Flomo*, 643 F.3d at 1017–19.

119. Ku, *supra* note 117, at 355.

120. For a technical discussion of problems of this general form, see Dominic Hyde, *Sorites Paradox*, STAN. ENCYCLOPEDIA OF PHIL., http://plato.stanford.edu/entries/sorites-paradox [https://perma.cc/MGP2-BR7M] (last updated Dec. 6, 2011).

121. *See id.*

Particularly under United States law, the rights and liabilities of corporate persons and of human persons crucially overlap.[122] As well, in matters such as slavery and involuntary servitude, the availability of a remedy does not depend on a showing of state action or action under color of state law.[123] More generally, corporations can have a relevant *mens rea*.[124] Corporations can, for example, intend to speak; know what they are saying; and even speak recklessly or negligently, as in the case of a hasty corporate website posting.[125]

Thus, one might well wonder whether human rights advocates should continue to rely exclusively on non-binding corporate social responsibility rather than on a combination of such techniques with some form of binding tort or criminal law.[126] Some multinational corporations may be sensitive to image-damaging publicity, perhaps involving their subsidiaries and suppliers, in the press and via social media. But not all multinationals currently have even internal policies regarding human rights.[127] Well-intended corporations, or their subsidiaries and suppliers, may be drawn into a human-rights-damaging race to the bottom with regard to labor practices.[128] Local or host country judicial accountability, in practice, for

122. See, for example, the controversial case of *Citizens United v. FEC*, 558 U.S. 310 (2010).

123. *See, e.g.*, United States v. Kozminski, 487 U.S. 931, 943 (1988); *see also* Akhil Reed Amar & Daniel Wildavsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to* Deshaney, 105 HARV. L. REV. 1359, 1368 (1992); George Rutherglen, *State Action, Private Action, and the Thirteenth Amendment*, 94 VA. L. REV. 1367, 1371, 1391 (2008).

124. *See, e.g.*, V.S. Khana, *Is the Notion of Corporate Fault a Faulty Notion?: The Case of Corporate Mens Rea*, 79 B.U. L. REV. 355, 357–58 (1999).

125. *See id.* at 357–58 in the context of corporate political speech, as in *Citizens United*, 558 U.S. 310 (2010).

126. For discussion on corporate responsibility, see Anita Ramasastry, *Corporate Social Responsibility Versus Business and Human Rights: Bridging the Gap Between Responsibility and Accountability*, 14 J. HUM. RTS. 237 (2015). Note in particular that even the classic argument of Milton Friedman requires corporate compliance with the binding legal rules against force and fraud. *See* Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG. (Sept. 13, 1970), http://umich.edu/~thecore/doc/Friedman.pdf [https://perma.cc/KP4R-EJD4] ("[A] corporate executive . . . has [a] responsibility to his employers . . . to make as much money as possible while conforming to the basic rules of the society, both those embodied in law and those embodied in ethical custom.").

127. *See* Susan Ariel Aaronson & Ian Higham, *"Re-Righting Business": John Ruggie and the Struggle to Develop International Human Rights Standards for Transnational Firms*, 16 HUM. RTS. Q. 333, 360 (2013).

128. *See supra* notes 112–14 and accompanying text; *see also* Elisa Giuliani & Chiara Macchi, *Multinational Corporations' Economic and Human Rights Impacts On Developing*

even basic human rights violations may be limited, especially in areas in transition toward a general rule of law, thereby unfortunately reducing the local costs of non-compliance.[129]

Additionally, there may actually be genuine legal risks, at this point, in a corporation's adoption of any internal corporate policies regarding human rights. Such policies may have genuine public relations or image-enhancement value. But especially in an evolving legal environment, courts might use such well-intended policies against the adopting corporation as some evidence of its awareness of a problem, of its realistic ability to address such problems, or of its acknowledgement of a duty to prevent or minimize serious harms.[130] In the Alien Tort Statute context, human rights advocates could endorse a clarification of the law in this regard, and could at this juncture reasonably make concessions in this area, in exchange for a more clearly binding general corporate legal obligation.

B. Corporate Aiding and Abetting Liability

In many, if not most, potential corporate human rights violation cases under the ATS, the corporate liability alleged may take some form of complicity, accomplice, accessory, or aiding and abetting liability. The sheer number of foreign affiliates, subsidiaries, and contracting parties associated with multinational corporations suggests the significance of some form of aiding and abetting liability.[131]

Given the numbers, and the significance of various sorts of corporate affiliates, the human rights advocate's negotiations should prioritize the realistic availability of aiding and abetting liability, in appropriate cases,

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Countries: A Review and Research Agenda, 38 CAMBRIDGE J. ECON. 479, 500 (2014) (noting the possibility of "searching for efficiency gains [in some sense] by abusing human rights").

129. *See* Giuliani & Macchi, *supra* note 128, at 500. *See also* POSNER, *supra* note 36, at 42–43.

130. *See, e.g.*, Rupert v. Clayton Brokerage, 737 P.2d 1106, 1110 & n.3 (Colo. 1987) (en banc) ("Although evidence of a broker's violation of a custom or internal rule adopted for the protection of its customers does not automatically establish liability, a court may consider the custom or rule in a case-by-case determination of whether the broker breached a fiduciary duty to the customer." (citing authority, including WILLIAM PROSSER, PROSSER & KEETON ON TORTS § 33, at 196 (5th ed. 1984))). *But see, e.g.*, Young v. Forgas, 720 N.E.2d 360, 369 (Ill. App. Ct. 1999) (an agency's own "[i]nternal rules and procedures . . . do not impose a legal duty upon municipal entities and their employees." (citations omitted)). Negotiations could also involve the inadmissibility of post-incident corporate actions taken to reduce the risk of future incidents.

131. It is reported that as of 2009, 82,000 transnational corporations had 810,000 foreign affiliates, with exports by those affiliates purportedly accounting for a third of all goods and services exports world-wide. *See* Danielle Olson, *Corporate Complicity in Human Rights Violations Under International Criminal Law*, 1 DEPAUL INT'L HUM. RTS. L.J. 1, 1 (2015).

within ATS tort law contexts.[132] One may reasonably assume that whatever problems of fairness, stigma, and utility may typically arise by imposing criminal liability on aiding and abetting conduct, such problems are at least no worse under arguably less severe ATS and other civil tort law rules.

In hypothetical or actual negotiations, human rights advocates are currently on defensible ground in requiring a meaningful realm of tortious aiding and abetting liability. The recent ATS cases are often in some measure accommodating of at least some minimal, narrow, restrictive form and degree of corporate aiding and abetting liability.[133]

Under criminal law, it has long been held that a defendant who aids and abets an underlying criminal act is, or may be held, responsible for the crime as the underlying perpetrator.[134] The main problem in such criminal law cases is setting an appropriate *mens rea* requirement in aiding and abetting cases, and criminal law has tended to splinter over such questions. Thus, some criminal law courts require a showing of the defendant's purpose or intention to facilitate the underlying offense in order for aiding and abetting liability to attach.[135]

An immediate problem, however, is addressing the complexity of the idea of intention in such cases. One could have an intention to aid the principal, but, as noted above, at any level of generality. Or one could intend to aid the principal in the principal's acting, or in acting as the principal chose or might have chosen to act. Or most narrowly and rigorously, one might intend to aid the principal precisely in the principal's violation of the law. But what difference in *mens rea* exists between intending to aid

132. Aiding and abetting liability is often discussed in criminal, as opposed to civil tort law, contexts.

133. *See, e.g.*, Balintulo v. Ford Motor Co., 796 F.3d 160, 170 (2d Cir. 2015); Aziz v. Alcolac, Inc., 658 F.3d 388, 390–91 (4th Cir. 2011); Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 247–48 (2d Cir. 2009); Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1258 n.5 (11th Cir. 2009).

134. *See, e.g.*, Pereira v. United States, 347 U.S. 1, 9–11 (1954); Nye & Nissen v. United States, 336 U.S. 613, 618–19 (1949); Bozza v. United States, 330 U.S. 160, 164 (1947). *See also* HERBERT MORRIS, ON GUILT AND INNOCENCE: ESSAYS IN LEGAL PHILOSOPHY AND MORAL PSYCHOLOGY 129 (1976) (discussing the abandonment of distinct criminal culpability levels for principals and accessories).

135. *See Balintulo*, 796 F.3d at 170 (for an example in the ATS civil tort context); Mastafa v. Chevron Corp., 770 F.3d 170, 192–94 (2d Cir. 2014); *Talisman*, 582 F.3d at 247–48; Michael S. Moore, *Causing, Aiding and the Superfluity of Accomplice Liability*, 156 U. PA. L. REV. 395, 396 (2007); Paul H. Robinson & Jane A. Grail, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 738–39 (1983).

a violation of law, and continuing to aid what one consciously knows to be an ongoing violation of law?[136]

Beyond these considerations, some criminal courts have predictably further confused matters by allowing liability based upon a showing of the aider's pecuniary interest;[137] inference of intent under particular specified circumstances;[138] mere, but relevant, knowledge;[139] a doctrinal slide from a knowledge standard into one of mere recklessness;[140] or, as currently recommended by some for the human rights context, aiding and abetting liability based on mere negligence.[141] Finally, we could also allow the *mens rea* for aiding and abetting in the human rights context to track the *mens rea* requirements for one or more, if not all, of the elements of the underlying human rights offense of which the principal actor is, or might be, accused.[142]

At this point, we might conceivably choose to strike off in search of some technically correct or best solution to the various problems of *mens rea* in corporate aiding and abetting cases under the ATS, or in search of some less purely theoretical but more pragmatically attractive approach.[143] Such a theory may focus on corporate condonation,[144] accountability,[145] or a corporation's somehow identifying itself with the underlying action.[146] This theory should seek to correctly classify corporations that were only

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136. *See, e.g.*, Rosemond v. United States, 134 S. Ct. 1240, 1248–49 (2014) ("[A] person aids and abets a crime when . . . he intends to facilitate that offense's commission . . . . We have . . . previously found that intent requirement satisfied when a person actively participates in a criminal venture with full knowledge of the circumstances[.]"). For a discussion of this uncertainty, see Kit Kinports, Rosemond, *Mens Rea, and the Elements of Complicity*, 52 SAN DIEGO L. REV. 133, 170 (2015); *see also* United States v. Robinson, 799 F.3d 196, 200–01 (2d Cir. 2015).

137. *See, e.g.*, Louis Westerfield, *The Mens Rea Requirement of Accomplice Liability in American Criminal Law–Knowledge or Intent*, 51 MISS. L.J. 155, 161 (1980).

138. *See id.*

139. *See id.*; James G. Stewart, *Complicity*, *in* OXFORD HANDBOOK OF CRIMINAL LAW 534, 551 (Markus D. Dubber & Tatjana Homle eds., 2014).

140. *See* Stewart, *supra* note 139, at 557.

141. *See* James G. Stewart, Assoc. Professor, Univ. B.C. Peter A. Allard Sch. of Law, Address at the American Society of International Law Annual Conference, Complicity in Business and Human Rights (Apr. 9, 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2676192 [https://perma.cc/HPE6-2EFG]; *see also* James Stewart, *What Is the ICC's Standard for Complicity Really?*, JAMES G. STEWART (Dec. 4, 2014), http://jamesgstewart.com/what-is-the-iccs-standard-for-aiding-and-abetting-really/ [https:// perma.cc/92SA-BJYF].

142. *See, e.g.*, Stewart, *supra* note 139, at 550.

143. *See* MARION SMILEY, MORAL RESPONSIBILITY AND THE BOUNDARIES OF COMMUNITY: POWER AND ACCOUNTABILITY FROM A PRAGMATIC POINT OF VIEW 255 (1992).

144. *See* Alexander F. Sarch, *Condoning the Crime: The Elusive Mens Rea for Complicity*, 47 LOY. U. CHI. L.J. 131, 136 (2015).

145. *See* Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CAL. L. REV. 323, 355 (1985).

146. *See id.*

in it for the money, and neither knew nor cared about anything else as distinct from mercenary cases.[147]

Taking this path would involve confronting the more or less insoluble doctrinal problems bypassed in connection with accomplice *mens rea*, and *mens rea* in criminal and tort contexts generally.[148] There is no reason to reinstate these perpetual doctrinal difficulties in the context of corporate aiding and abetting liability in the ATS cases. Given the various doctrinal slides and overlaps between intent and knowledge in one context or another,[149] such as the related issues of the availability of punitive damages,[150] or perhaps even of individual personal actor liability,[151] human rights activists should make sensible concessions. At least over the short term, activists should genuinely legitimize the idea and the institution of corporate human rights liability in tort, and establish the principle of corporate aiding and abetting liability under some version of the ATS.

C. Extraterritoriality Concerns

Finally, there may at some point be room for meaningful negotiation among interested parties on the proper extraterritorial scope and application of the ATS.[152] Extraterritoriality under the ATS is motivated primarily by realistic concerns that some of the most grievous human rights violations might otherwise have no forum for meaningful redress.[153] But limitations

147. Presumably, neither all taxi drivers nor all Uber drivers would also be classified as, in the traditional argot, "wheel men."

148. For a survey of the more or less doctrinally unresolvable issues, see *supra* Section IV.

149. *See supra* Section IV.

150. *See, e.g.*, Flomo v. Firestone Nat. Rubber Co., 744 F. Supp. 2d 810, 816–17 (S.D. Ind. 2010), *aff'd on other grounds*, 643 F.3d 1013 (7th Cir. 2011); GEORGE P. FLETCHER, TORT LIABILITY FOR HUMAN RIGHTS ABUSES 58–65 (2008).

151. *See, e.g.*, *Flomo*, 744 F. Supp. 2d at 817 (noting a possible tradeoff between maximizing the incentives of individual actors to avoid violations and the presumably crucial availability of far more substantial corporate assets—including corporate reputation—where the corporation is a possible defendant).

152. This negotiation's results could again be conceivably reflected in statutory amendments.

153. *See* Ingrid Wuerth, Kiobel *&* Royal Dutch Petroleum Co.*: On the Supreme Court and the Alien Tort Statute*, 107 AM. J. INT'L L. 601, 620 (2013). *See also* Ernest A. Young, *Universal Jurisdiction, the Alien Tort Statute, and Transnational Public-Law Litigation After* Kiobel, 64 DUKE L.J. 1023, 1125 (2015) (quoting Wuerth, *supra*, at 620). For the realistic irrelevance of some national legal systems, see Jernej Letnar Cermic, *Corporate Accountability for Human Rights: From a Top-Down to a Bottom-Up Approach, in*

on the extraterritorial scope of the ATS reflect, most fundamentally, a sense of possible unfairness, imprudence, and inefficacy in adjudicating matters with little direct connection to American parties and interests.[154]

At least for the moment, the extraterritorial application of the ATS is limited, pursuant to the case of *Kiobel v. Royal Dutch Petroleum Co*.[155] Taken as a whole, *Kiobel* can be interpreted to hold that while there is a presumption against extraterritorial application of the ATS where the parties and actions are largely foreign,[156] there is a possibility that such a presumption can be overcome when, in the classic language of property covenant law, "the claims touch and concern the territory of the United States . . . with sufficient force to displace the presumption."[157]

It remains to be seen or bargained over, whether the notoriety, scale, gravity, and otherwise unredressable nature of a human rights violation arguably traceable in part to action by a United States corporation could sufficiently touch and concern the territory, the global public image, and the diplomatic and foreign policy interests of the United States to justify extraterritorial application of the ATS.[158] Any legal test involving this obviously complex and abstract sufficiency must be largely indeterminate

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THE BUSINESS AND HUMAN RIGHTS LANDSCAPE: MOVING FORWARD, LOOKING BACK 193, 215 (Jena Martin & Karen E. Bravo eds., 2016). At a minimum, corporate mobility can make host country civil or criminal liability difficult to impose. *See, e.g.*, Beth Stephens, *The Curious History of the Alien Tort Statute*, 89 NOTRE DAME L. REV. 1467, 1521 (2014).

154. *See* Wuerth, *supra* note 153, at 620; Young, *supra* note 153, at 1125.

155. 133 S. Ct. 1659 (2013).

156. *See id.* at 1669.

157. *Id.*

158. For judicial interpretation of *Kiobel*, see Daimler AG v. Bauman, 134 S. Ct. 746, 762–63 (2014); Doe v. Drummond Co., 782 F.3d 576 (11th Cir. 2015); Ellul v. Congregation of Christian Bros., 774 F.3d 791, 796–97 (2d Cir. 2014); Adhikari v. Daoud & Partners, 95 F. Supp. 3d 1013, 1017–20 (S.D. Tex. 2015); Doe v. Cisco Sys., Inc., 66 F. Supp. 3d 1239, 1244–46 (N.D. Cal. 2014).

Among the commentaries, the most authoritative is STEPHEN BREYER, *Opening the Courthouse Door: The Alien Tort Statute and Human Rights*, *in* THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES 134 (2015), followed by influential Second Circuit Judge Pierre N. Leval, *Beyond* Kiobel: *The Future of Human Rights Litigation in US Courts*, 19 UCLA J. INT'L L. & FOR. AFF. 1 (2015). *See also* Doug Cassel, *Suing Americans for Human Rights Torts Overseas: The Supreme Court Leaves the Door Open*, 89 NOTRE DAME L. REV. 1773 (2014); Ursula Tracy Doyle, *The Evidence of Things Not Seen: Divining Balancing Factors From* Kiobel's *"Touch and Concern" Test*, 66 HASTINGS L.J. 443 (2015); Anna Grear & Burns H. Weston, *The Betrayal of Human Rights and the Urgency of Universal Corporate Accountability: Reflections on a Post-*Kiobel *Landscape*, 15 HUM. RTS. L. REV. 21 (2015); Robert McCorquodale, *Waving Not Drowning:* Kiobel *Outside the United States*, 107 AM. J. INT'L L. 846 (2013); Ralph G. Steinhardt, Kiobel *and the Weakening of Precedent: A Long Walk for A Short Drink*, 107 AM. J. INT'L L. 841 (2013); Fernando R. Tesón, *The* Kiobel *Decision: The End of an Era*, 8 N.Y.U. J.L. & LIBERTY 161 (2013); Peter Weiss, *ATS Lives:* Al Shimari *Survives* Kiobel, 19 UCLA J. INT'L L. & FOR. AFF. 19 (2015).

until authoritatively clarified. One alternative way to clarify the scope of *Kiobel* extraterritoriality is through actual or hypothetical negotiation by representatives of affected parties. Human rights advocates should be willing to consider trading off the ideal breadth of extraterritoriality, at least over the short term, if necessary to extend ATS coverage to American corporate involvement in the most egregious, notorious, and horrific abuses of well-established human rights. Perhaps the broadest possible scope for extraterritoriality should, where realistically necessary, be traded off unless and until the results from that concession involve what human rights advocates and others consider a sheer travesty, whatever the negotiated compensations in other respects.

VI. CONCLUSION

This Article raised, and roughly prioritized from a human rights advocate's standpoint, a number of contentious and perhaps theoretically unresolvable issues. Assuming actual or hypothetical negotiation involving such issues, this Article seeks to identify where concessions can best be made for the sake of more crucial human rights priorities, with an eye toward avoiding what some have called moral or jurisprudential travesty, including broad and conspicuous corporate impunity in the most grievous and otherwise vital cases.

Human rights advocates themselves, as well as corporate decisionmakers, victims, experts, officials, consumers, trade groups, and others can of course differ as to their own sets of priorities and tradeoff rates. The broader goal herein is to encourage hypothetical, and eventually some forms of actual, negotiation over such judicial matters. Enhancing the current momentum toward some more genuinely meaningful human rights law regime is at this point a worthy aspiration.

Momentum in this respect cannot be taken for granted. Consider, for example, even a tempered version of Professor Eric Posner's recent treaty-focused assessment: "Human rights law has failed to accomplish its objectives. More precisely, there is little evidence that human rights treaties, on the whole, have improved the well-being of people, or even resulted in respect for the rights in those treaties."[159] There is, however, no reason to

159. ERIC A. POSNER, THE TWILIGHT OF HUMAN RIGHTS LAW 7 (2014). Professor Posner goes on to note problems of blatant, generalized, routine non-compliance and the inefficacy of legal institutions and infrastructure. *See id.* at 71–72. For a recent loosely parallel example involving the purportedly binding and unappealable ruling of the

assume that meaningful progress cannot be made on the treaty, customary, and statutory law fronts if circumstances are properly analyzed and appropriate corporate behaviors are incentivized. Certainly there is no reason in particular to assume that major transnational corporate actors must be indifferent to their global human rights image, or that they cannot realistically be induced to be more sensitive in this respect.[160]

International Court of Justice, see Bruno Waterfield, *UN Orders Japan to Halt Whaling in the Arctic*, TELEGRAPH (Mar. 31, 2014, 12:47 PM), http://www.telegraph.co.uk/news/worldnews/asia/japan/10734305/UN-orders-Japan-to-halt-whaling-in-the-Antarctic.html; *see also*, Reuters, *Japan to Resume Antarctic Whale Hunt Despite ICJ Ruling*, TELEGRAPH (Nov. 28, 2015, 9:52 AM), http://www.telegraph.co.uk/news/worldnews/asia/japan/12022369/Japan-to-resume-Antarctic-whale-hunt-despite-ICJ-ruling.html.

160. For a brief account of a portion of the distinctive Benetton corporate social marketing story, see Edward Boches, *Three Ways to Look at Benetton: The Cause, The Creative, The Controversy*, CREATIVITY UNBOUND (Nov. 22, 2011), http://edwardboches.com/three-ways-to-look-at-benetton-the-cause-the-creative-the-controversy [https://perma.cc/JL7M-M9S7], along with Tanya Talaga, *Benetton to Pay $1.1 Million to Survivors of Bangladeshi Factory Collapse*, STAR (Apr. 17, 2015), http://www.thestar.com/news/world/2015/04/17/benetton-to-pay-11-million-to-survivors-of-bangladeshi-factory-collapse.html [https://perma.cc/RC5V-MTK2] (referring to Benetton's survivors' fund contribution regarding the Rana Plaza garment factory collapse on April 24, 2013, in which 1,129 people typically earning perhaps a dollar a day were killed). In another multinational corporate image context, see the summary of developments involving the Nike Corporation in Max Nisen, *How Nike Solved Its Sweatshop Problem*, BUS. INSIDER (May 9, 2013, 10:00 PM), http://www.businessinsider.com/how-nike-solved-its-sweatshop-problem-2013-5 [https://perma.cc/V83Y-BYRU] (noting Nike's outsourcing-based and thereby production cost-cutting business plan).