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Evasion of Liability: Recociling for Corporations' Multinational Character with National & International Law

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EVASION OF LIABILITY: RECOCILING CORPORATIONS' MULTINATIONAL CHARACTER WITH NATIONAL & INTERNATIONAL LAW

I. INTRODUCTION

In 1992, Unocal Corporation and its subsidiary, Union Oil Company of California, acquired an interest in a French project to produce, transport, and sell natural gas from deposits off the coast of Myanmar.[1] Unocal was allegedly aware that Myanmar's military was to protect the pipeline and the survey teams involved in this project, although this fact was disputed.[2] Raising a claim under the Alien Tort Statute, Plaintiffs alleged that the Myanmar Military subjected them to acts of murder, rape, and torture, acts that successive military governments in Burma and Myanmar had been known to impose on their citizens.[3] The Ninth Circuit recognized that the Alien Tort Claims Act provided a cause of action as long as "plaintiffs ... allege a violation of 'specific, universal, and obligatory' international norms as part of [their] ATCA claim."[4] The Court then considered the threshold question of "whether the alleged tort [was] a violation of the law of nations," finding that torture, slavery, and murder were *jus cogens* violations and, thus, violations of the law of nations, ultimately holding that the Plaintiffs sufficiently alleged violations of the law of nations under the Alien Tort Claims Act.[5]

Following in the promising direction of the Ninth Circuit, a group of Nigerian residents filed a class action suit in the Second Circuit alleging that Royal Dutch Shell Petroleum Company and Shell Transport and Trading Company, through their joint subsidiary Shell Petroleum Development Company of Nigeria, Ltd. (SPDC), armed, financed, and conspired with Nigerian

[1] Doe I v. Unocal, 395 F.3d 932, 937 (9th Cir. 2002).
[2] *Id.* at 938.
[3] *Id.* at 939-40.
[4] *Id.* at 944.
[5] *Id.* at 945.

military forces to suppress protests.[6] These plaintiffs had been engaged in peaceful protests against the damaging environmental effects of SPDC's oil exploration and production practices in Ogoniland when, according to the petitioners' complaint, respondents enlisted the Nigerian military and policy to suppress the demonstrations, which the Nigerian forces accomplished by attacking villages, by beating, raping, killing, and arresting residents, and by destroying and looting property.[7] The petitioners, who had been granted political asylum in the United States, sought to hold the corporations civilly liable for their role in the violence, alleging that the corporations aided and abetted the atrocities, under the Alien Tort Statute, likely anticipating similar treatment in the Second Circuit as had been handed down in the Ninth Circuit in the *Doe I v. Unocal* decision.[8] However, both the Second Circuit, and later the Supreme Court, held that U.S. courts lacked jurisdiction over the petitioners' claim.[9] The Court, going one step beyond the Second Circuit's decision, ruled that the Alien Tort Statute did not provide a cause of action for conduct committed in the territory of a foreign sovereign, reinforcing a presumption of extraterritoriality even in cases alleging violations under the law of nations.[10]

Extraterritoriality poses a harrowing obstacle to the domestic adjudication of multinational corporations' misconduct, as the legal frameworks for which to reconcile demands for civil and criminal liability remain unclear and, at times, at odds.[11] While corporations, since their inception, have been governed by domestic law, legal framers could not have foreseen that individual corporations would develop a structure so complex as to transcend both national borders and

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[6] *See generally* Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 111 (2013).
[7] *Id.* at 113.
[8] *Id.*
[9] *Id.* at 117.
[10] *Id.*
[11] *See* Beth Stephens, *The Amorality of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT'L L. 45, 54 (2002).

domestic legal infrastructures.[12] The ability of a multinational enterprise to structure itself in such a way that its directors have the ability to create and select legal personalities, locations, and, consequentially, what laws will govern it have often made these corporations, in practice, beyond the reach of domestic legal systems.[13] While, for many corporations, the gaping holes in the legal infrastructure with respect to corporate accountability have enabled harmless cost-saving schemes,[14] some corporations have gone even further, aiding, abetting, and taking advantage of the commission of human rights violations in the name of profit-seeking.[15] The supranational character of multinational enterprises has created a regulatory problem that enables impunity for acts of civil wrongdoing and for acts in violation of national and international criminal laws, and the only viable solution is for states to pursue a national and international approach to addressing this impunity. This paper will lay forth an argument asserting the need for both the development of domestic legal frameworks that will overcome the novel jurisdictional issues for multinational corporations and the formulation of an international treaty to codify the rights and obligations of multinational corporations and the duties of states to enforce those obligations.

Section II of this paper will provide an in-depth analysis of the regulatory challenge of enforcing and adjudicating the liability of multinational enterprises. This section will provide a

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[12] Phillip I. Blumberg, *The Corporate Entity in an Era of Multinational Corporations*, 15 DEL. J. CORP. L. 283, 288-89 (1990) ("American common law, too, is beginning to recognize the inadequacy of entity law in dealing with the special problems presented by complex multi-tiered corporate structures. In cases involving the construction of statutes not expressly extending their reach to all affiliated companies of a group, courts have construed the statutes, particularly remedial statutes, liberally to do so. In in the process of construing the statutes, a special variant of 'piercing the veil jurisprudence' has emerged applying the doctrine free of some of the significant restrictions applicable to some common law controversies.").

[13] Jonathan Turley, *"When in Rome": Multinational Misconduct and the Presumption Against Extraterritoriality,* 84 NW. U. L. REV. 598 (1990) (discussing how existing legal frameworks and statutory constructions effectively insulate multinational enterprises from liability and serve as "judicially maintained barrier[s]" to accountability).

[14] *See e.g.,* Robin F. Hansen, *Multinational Enterprise Pursuit of Minimized Liability: Law, International Business Theory and the* Prestige *Oil Spill*, 26 BERKELEY J. INT'L L. 410, 425-26 (2008) (discussing how multinational corporations will select jurisdictions for incorporation in order to take advantage of tax and secrecy havens).

[15] *See, e.g.*, Stephens, *supra* note 11 (discussing instances of corporate complicity in human rights abuses from slave labor and enrichment during the Holocaust to labor violations and exploitation of child labor by Disney, Nike, and Levi Strauss).

primer on the legal character of multinational enterprises, a discussion of the regulatory challenges owed to the peculiar legal character, and a discussion of the jurisdictional principles and challenges relevant to the adjudication of multinational corporate conduct. Section III will provide a brief literature review, providing insight into American and international courts treatment of extraterritorial corporate wrongdoing and scholars' suggested approaches to the regulatory problem. Section IV will lay out a proposed framework for addressing the problem, using the United States as the model for domestic regulatory reform and imagining an effective treaty-building process for the solution of the corporate impunity.

II. THE CORPORATE REGULATORY PROBLEM

Jurisdictional principles developed long before corporate entities began to utilize disconnected domestic regulatory regimes to evade liability for their conduct in one jurisdiction by subjecting itself to the laws of another jurisdiction.[16] Lawmakers and courts could not have anticipated a corporation's ability to change the laws that govern it, nor could they have foreseen that the veil of corporate privilege would one day become a mechanism for evading liability for complicity in tortious and criminal acts. Against the backdrop of antiquated and static legal frameworks, state courts are generally unable to reconcile their domestic laws with the multinational and evolving character of the corporate enterprises that they are responsible for regulating.[17] Fears of imposing one country's will onto another sovereign create a hesitancy for courts to extend their reach beyond their own borders,[18] and in the absence of an adequate international framework specifically addressing the conduct of multinational corporate actors, these corporations are left effectively unregulated. But how can states, as individual sovereigns and as members of the international

[16] BETH VAN SCHAACK & RONALD SLYE, INTERNATIONAL CRIMINAL LAW AND ITS ENFORCEMENT CASES AND MATERIALS 81 (4th Ed. 2019).
[17] Blumberg, *supra* note 12.
[18] Kiobel, *supra* note 6, at 109.

community, advance legal frameworks sufficient to close the loopholes in corporate accountability?

Using the United States as the model for proposing an improved regulatory legal framework, this paper contends that a cooperative domestic and international scheme is necessary to begin to hold multinational corporations civilly and criminally responsible for unlawful conduct. Domestically, states will need to create or amend statutes applicable to corporate conduct to empower courts to adjudicate claims of unlawful corporate conduct. Internationally, states will need to form a consensus on how corporate crimes and torts will be adjudicated, codifying an international treaty as to the rights and obligations of multinational corporations under international law. in addition to providing guidelines as to the responsibility of states to enforce the law. After all, as Justice Scalia stated in his concurrence in *Sosa v. Alvarez-Machain*, federal causes of action *must* be created by statute, Constitution, or international treaty, and not just general claims under the common law.[19] While legal scholars have demonstrated support for either the domestic or international remedies to this corporate accountability problem, few, if any, have proposed the need to pursue both together.[20] A successful international legal regime will depend on the willingness of state governments to engage in a cooperative treaty-drafting process with other states to hold corporate actors accountable, a process that would theoretically resonate in that state's domestic legal regime. Creating both domestic and international laws to hold corporations accountable diminishes the possibility of corporations continuing to evade liability by simply

[19] 542 U.S. 692, 740-41.

[20] *Compare to* Larry Cata Backer, *Shaping the Global Law for Business Enterprises: Framing Principles and the Promise of a Comprehensive Treaty on Business and Human Rights*, N.C. J. INT'L L. 417, 429 (discussing the futility of pursuing any international treaty for human rights and the responsibilities business enterprises unless states agree on the treaty's fundamental principles and core objectives and demonstrate willingness to compromise where "treaty writing may produce a challenge to conventional norms and the ideologies of domestic and international law systems that may require pragmatic compromise in treaty drafting").

relocating, as the cooperative regulatory network would drastically minimize the numbers of states *where* the corporations would be beyond reach.

A. MULTINATIONAL ENTERPRISES: A PRIMER

The phenomenon of corporate legal personalities has undergone various transformations since the recognition centuries ago that a corporate entity retains a legal personality separate from that of its directors and officers.[21] Since the inception of the "corporate legal personality," the very nature of corporate structures has evolved from a simple corporate entity to increasingly complex multinational enterprises, an evolution that has outpaced the development of the law with respect to corporate conduct and liability.[22] The increasing complexity of corporate structures and the inability of the law to keep up with that evolution has created the vast loopholes through which corporations and their directors and officers evade liability for outright criminal and tortious conduct, and for complicity in the egregious conduct of other state and/or organizational actors.[23] Indeed, while American courts have offered limited recourse from these corporate liability loopholes through the application of "piercing the veil jurisprudence" in exceptional cases, the limited body of law has not sufficiently developed in order to address its application to the full spectrum of corporate liability questions relating to every corporation, from the entity to the multinational enterprise.[24] Effectively, the problem that arises with the structural complexity of modern multinational corporations is two-fold: first, where the corporation itself is regulated by

[21] Blumberg, *supra* note 12, at 292.
[22] *Id.* at 288-89 ("American common law, too, is beginning to recognize the inadequacy of entity law in dealing with the special problems presented by complex multi-tiered corporate structures. In cases involving the construction of statutes not expressly extending their reach to all affiliated companies of a group, courts have construed the statutes, particularly remedial statutes, liberally to do so. In in the process of construing the statutes, a special variant of 'piercing the veil jurisprudence' has emerged applying the doctrine free of some of the significant restrictions applicable to some common law controversies.").
[23] *See, e.g.,* Hansen, *supra* note 14, at 425-25 (discussing how "renegade regime regulation" allows multinational enterprises to avoid liability in one jurisdiction by claiming that it is subject to regulation in another jurisdiction, creating loopholes where the preferred jurisdiction lacks relevant legal frameworks or enforcement capabilities);
[24] Blumberg, *supra* note 12, at 291.

domestic laws, the multinational corporation, with multitiered and cross-border division of labor, makes the vast structure a regulatory challenge; and, second, the economic and political capital held by large and economically significant multinational corporations will undoubtedly impact domestic will to enforce criminal and civil liability against corporations.[25]

B. THE EVOLUTION OF THE CORPORATE STRUCTURE

In corporate law, the traditional Angle-American rule was that a corporation would adopt the nationality of the jurisdiction in which it was chartered, while other countries would look to the jurisdiction where the corporation maintained its principle offices.[26] While most countries have since abandoned more stringent standards for determining a corporation's "nationality," many now look to the corporation's stock ownership, management, and control to determine such.[27] Thus, when, towards the end of the nineteenth century, the New Jersey state legislature passed a statute permitting businesses incorporated in New Jersey to own stock in other corporations, the relaxation of regulations that limited how corporations could structure overseas enterprises presented a turning point in American business practices.[28] This development created the opportunity for an organizational shift for American multinational enterprises operating abroad. Where those businesses were previously characterized as foreign corporations operating within the bounds of those other countries, the ability to own stock in other corporations allowed business owners to restructure their foreign operations as subsidiary corporations, each organized and maintaining the nationality of the country where it would operate.[29]

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[25] Stephens, *supra* note 11, at 54.
[26] Detlev Vagts, *The Multinational Enterprise: A New Challenge for Transnational Law*, 83 HARV. L. REV. 739, 741 (1970).
[27] *Id*. at 742.
[28] Stephens, *supra* note 11, at 55-56.
[29] *See* Vagts, *supra* note 30, at 742.

The significance of this development is underscored by two related principles that guide the relationship between the corporate entity and the law. First, the territorial principal, a recurring theme throughout the research of multinational corporate liability, "is predicated on the idea that economic entities are wholly regulated within a single territory."[30] Second, the "principle of hierarchy of regulatory authority" posits that "every political community has regulatory power independent of and superior to the power of the entity regulated or the individuals who have aggregated resources."[31] Backer suggests that these two principles form a model for enterprise law whereby "political states form closed regulatory systems subject to an exclusive regulation by a set of singular political institutions superior in power to and separable from the people and things these political institutions regulate," limiting the ways in which people, capital, shareholders, and the enterprise itself relate to and are affected by the law.[32] Corporations are subject to regulation by the domestic law, a legal framework separate and apart from that of any other state. Where a corporation chartered within one country is operating within the bounds of a foreign country, the corporation is effectively subject to the regulation of two states—the state of incorporation and the state of territoriality.[33]

Thus, the development in New Jersey of a state law allowing corporations to own shares in other companies provided an escape from the double-regulatory scheme that multinational corporations were subject to.[34] As the New Jersey policy became the norm, American multinational corporations began deviating from operating in other countries as "foreign corporations" and, instead, would opt to operate through subsidiary corporations organized in the

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[30] Larry Cata Backer, *The Autonomous Global Corporation: On the Role of Organizational Law Beyond Asset Partitioning and Legal Perspective*, 41 TULSA L. REV. 541, 543 (2006).
[31] *Id*.
[32] *Id*.
[33] Vagts, *supra* note 30, at 741-42.
[34] Stephens, *supra* note 11, at 55-56.

country in which it intended to operate.[35] While, in theory, this novel parent-subsidiary structure affords a favorable degree of independence to the subsidiary and choice in the applicable regulatory scheme by way of place of operations, conflicts in governing subsidiaries continue to arise for the states charged with regulating these corporations.[36] Whether and in what situations the nationalities of the parent or the subsidiary govern, with issues of foreign interference in domestic corporate regulation often dictating a country's treatment of a multinational corporation. As Vagts notes:

> "While the [multinational enterprise] chain, thus articulated, does represent a tidy system—each corporate unit operating as a native within the country of its corporation—tensions between that legal theory and the economic interdependence of the [multinational enterprise] keep developing. The home country (in particular the United States) finds it hard to resist the temptation to extend its authority over the foreign subsidiaries and to treat them as mere extensions of the parents. On the other hand, host countries find it hard to ignore the foreign control over their corporations and to treat them on a parity with locally owned enterprises. . . . They may insist that the subsidiary's management operate in pursuit of the best interests of the subsidiary, even where that plan of operation conflicts with the parent's plan that the subsidiary be operated in the in the interests of the overall enterprise. Finally, host countries are often tempted to use their grasp upon the subsidiary to assert regulatory authority over the operations system as whole."[37]

Indeed, these conflicts in law underscore the effect of the absence of an international regulatory scheme for corporations operating across borders. Multinational enterprises implicate, albeit indirectly, the sovereignty of both home and host states.[38] While the absence of international regulation demands regulation by individual countries, the challenge will lie in how a home country enforces their laws against a subsidiary without interfering with the legal integrity of the foreign country, taking into account the country's national interests, and demonstrating a regard

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[35] Vagts, *supra* note 30, at 742.
[36] *Id*. at 743.
[37] *Id*.
[38] *Id*. at 786.

for that country's sovereignty.[39] Even until today, this conflict has created a vacuum in the enforcement of the law in response to the tortious and criminal conduct of multinational corporations, where the mandate of any country to pursue legal action is unclear or the relative economic and political power combined with the extraterritoriality of the multinational enterprise's subsidiaries impairs the country's ability to do so.

C. THE JURISDICTIONAL CHALLENGE TO CORPORATE POLICING

As the previous section highlighted, it is widely accepted that multinational enterprises have outgrown the domestic legal regimes designed to regulate national corporations.[40] The evolution of the corporate structure and the failure of the governing statutory frameworks to keep up have enabled multinational enterprises to minimize their liability by taking advantage of the jurisdictional conflicts and ambiguities related to nationality and legal personality.[41] In particular, multinational corporations three strategies to evade the enforcement of liability for acts that are, for all intents and purposes, attributable to the parent corporation: outsourcing; "renegade regime regulation"; and reliance on the corporate veil.[42]

Outsourcing provides an alternative means to further complicate and alienate a corporation from the conduct of an independent entity operating within its chain of production.[43] Unlike the formation of subsidiary corporations that can be under the effective control of the parent, outsourcing entails contracting out the corporation's operations to unaffiliated entities that do not share ownership with the enterprise.[44] Instead, the corporation outsourcing its operations binds

[39] *Id*. at 739, 786-87.
[40] *See, e.g., Id*.; Backer, *supra* note 30; Jodie Kirshner, *Why Is the U.S. Abdicating the Policing of Multinational Corporations to Europe?: Extraterritoriality, Sovereignty, and the Alien Tort Statute*, 30 BERKELEY J. INT'L L. 259, 259 (2012); Stephens, *supra* note 11.
[41] Hansen, supra note 14, at 418.
[42] *Id*. at 418-19.
[43] *Id*. at 420.
[44] *Id*.

itself to the hired entity solely by way of a contractual relationship, giving the outsourcing corporation significant power over how to define and reduce its exposure to liability.[45] Importantly, because that hired entity remains separately owned and operated, the multinational corporation cannot be held vicariously liable for the wrongful conduct of employees of that entity committed in the course of employment.[46]

Second, corporations employ a strategy coined by Robin Hansen as "renegade regime regulation," where a [multinational enterprise] avoids liability in State A by claiming that it is regulated by State B."[47] Multinational enterprises take advantage of the varied legal infrastructures from country to country in a number of ways, such as by incorporating subsidiaries in secrecy havens to hide certain information or the identities shareholders and officers.[48]

Lastly, corporations capitalize on the distinct legal personalities afforded to corporate entities and shield themselves behind the corporate veil.[49] "First, the corporate veil discourages courts from assuming jurisdiction over [multinational enterprise] components which are deemed foreign nationals. . . . Second, the corporate veil makes it difficult to plead a sufficient cause of action regarding the activities of a [multinational enterprise] component that is not locally incorporated."[50] Although the corporate veil is not impenetrable, instances of actual piercing of

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[45] *Id*. at 420-21. Although contractual terms con significantly limit the risk of liability to the outsourcing corporation, many jurisdictions, including the United States, have statutes in place providing that a contract cannot shield one contracting party from *all* liability. *Id.* However, the ability to reduce exposure to such liability is, nonetheless, a significant advantage of outsourcing operations to unrelated, third-party entities.
[46] *Id*. at 421.
[47] *Id*. at 424.
[48] *Id*. at 425-27. Hansen states, "Use of secrecy havens in [multinational enterprise] corporate structuring further complicates lawsuits that already face the difficult challenge of determining an appropriate judicial forum for activities that span multiple jurisdictions." *Id.* At 427. Similar to the abuse of tax havens to minimize a corporation's tax liabilities to its home government, secrecy havens are characterized by statutory regulations that permit corporations to withhold certain information that would otherwise affect its liability and culpability in litigation.
[49] *Id*. at 432 ("The separate legal personality of [multinational enterprise] corporate components, along with the doctrine of limited liability for shareholders means that, as a rule, parent companies are not liable for the actions of their subsidiaries. This separation of liability is referred by some as the "entity law approach to [multinational enterprise] liability.").
[50] *Id*.

the veil are limited.[51] Indeed, the inconsistent treatment of multinational enterprises based on their chosen jurisdiction for operations creates a meticulously crafted corporate structure, constructed around loopholes catering to the corporation's objectives.

These strategies ultimately rely on the jurisdictional principle of territoriality in order to insulate corporations from the reach of inconvenient legal systems. Territoriality is one of five jurisdictional principles long recognized as allowing a state to assert jurisdictional authority over a legal person.[52] "The classical view of domestic jurisdiction under international law is based upon a robust defense of national sovereignty and the close to unrestricted power of a state to regulate activities of its nationals or criminal conduct undertaken within, or directed toward, its territory."[53] In one of the most cited iterations of domestic jurisdiction, the *Lotus Case* established a broad construction of domestic jurisdiction, reasoning:

> "International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities. . . . Restrictions upon the independence of States cannot therefore be presumed. . . . [A]ll that can be required is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty."[54]

Some scholars have interpreted this to mean that the *Lotus Case* supports a jurisdictional construction wherein "states retain residual freedom to act in situations in which international law does not prescribe a contrary rule."[55]

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[51] *Id*. at 434 (discussing four narrow circumstances under which a jurisdiction may pierce the corporate veil: (1) statutory intervention; (2) invocation of an applicable legal doctrine; (3) application of a veil-piercing doctrine; and (4) a direct cause of action against a parent company).
[52] VAN SCHAACK & SLYE, *supra* note 16, at 82.
[53] *Id*. at 81.
[54] Permanent Court of Int'l Justice, P.C.I.J. (ser. A) No. 10 (1927).
[55] VAN SCHAACK & SLYE, *supra* note 16, at 82.

However, under U.S. law, the principle of territoriality has developed a corollary, the presumption against extraterritoriality.[56] The presumption holds that "unless there is the affirmative intention of Congress clearly expressed to give a statute extraterritorial effect, we must presume it is primarily concerned with domestic conditions."[57] Unlike the aforementioned interpretation of the *Lotus Case*, the presumption against territoriality assumes that the absence of a contrary rule of jurisdictional construction, jurisdiction cannot be extended extraterritorially, even if not in contravention of international law.[58] The Supreme Court has adopted this "canon of construction" in avoidance of potential political problems that could arise over contests for jurisdiction and questions of interference with other States' sovereignty.[59]

This narrow interpretation of jurisdictional reach has created gaping legal loopholes through which multinational corporations can evade liability by using any number of strategies to put itself beyond the reach of the national courts. Because domestic laws vary from country to country, the lack of consistency or conflicts in law create ample opportunities for corporations to choose the State law most favorable to its objectives. Further, the absence of an international regulatory scheme reinforces the disconnect across legal systems that encourages corporate impunity. What is required, then, is a cooperative legal regime that reconciles the vast variation in enforcement of corporate liability, particularly with respect to more egregious corporate conduct, by both encouraging domestic legal reforms to address the substantive and jurisdictional challenges to regulation and by establishing an international framework codifying the rights and obligations of States and corporate entities.

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[56] *See* Morrison v. National Australian Bank Ltd., 561 U.S. 247, 255 (2010).
[57] *Id*. (internal quotations omitted).
[58] *See generally* Kiobel, *supra* note 6.
[59] Morrison, *supra* note 56, at 255; Kiobel, *supra* note 6, at116.

III. ACADEMIC REVIEW: CASE LAW AND SCHOLARSHIP

The variation in domestic legal treatment of corporate liability, and the absence of positive international law and established norms, have resulted in the inconsistent legal treatment of questions pertaining to corporate accountability for unlawful conduct. Focusing on corporate acts in violation of international criminal law and human rights violations, this section will look at how the United States and the international community have interpreted the concepts of corporate liability and extraterritoriality and the directions in which adjudication appears to be headed.

A. UNITED STATES AND THE DOMESTIC LEGAL FRAMEWORK

The United States had long upheld a narrow interpretation of jurisdiction over acts committed in foreign territory, delineating specific exceptions to the presumption against extraterritoriality.[60] The Alien Tort Statute appeared to fall well within that category of exceptions, granting jurisdiction to district courts over "any civil action by an alien for a tort only committed in violation of the law of nations or a treaty of the United States."[61] The Alien Tort Statute provided a forum for adjudication of acts of wrongdoing, but the confines and the outer limits of the statute's applicability were not apparently clear from the statutory language itself, except that claims arising under this law would be civil.[62] Although enacted in 1789 as part of the Judiciary Act, the Alien Tort Statute was rarely visited until 1980, when Paraguayan citizens brought an action against

[60] Kiobel, *supra* note 6, at 122 (citing a 1795 opinion authored by Attorney General William Bradford: "So far ... as the transactions complained of originated or took place in a foreign country, they are not within the cognizance of our courts; nor can the actors be legally prosecuted or punished for them by the United States. But crimes committed on the high seas are within the jurisdiction of the ... courts of the United States; and, so far as the offence was committed thereon, I am inclined to think that it may be legally prosecuted in ... those courts.... But some doubt rests on this point, in consequence of the terms in which the [applicable criminal law] is expressed. But there can be no doubt that the company or individuals who have been injured by these acts of hostility have a remedy by a civil suit in the courts of the United States; jurisdiction being expressly given to these courts in all cases where an alien sues for a tort only, in violation of the laws of nations, or a treaty of the United States...").

[61] 28 U.S.C. § 1359

[62] *Id.*

another Paraguayan citizen for causing the death of the son and brother, Joelito, by torture.[63] The plaintiffs, Joel and Dolly Filartiga, alleged that Pena-Irala had kidnapped Joelito in retaliation for his opposition to the Paraguayan government and tortured him to death.[64] Plaintiffs further alleged that the Alien Tort Statute gave U.S. courts jurisdiction over the lawsuit, despite the fact that none of the parties to the action were American citizens.[65] Finding that torture was a violation of customary international law, the Second Circuit concluded that there was "no distinction between treatment of aliens and citizens."[66] Indeed, the Court asserted that "[t]he constitutional basis for the Alien Tort Statute is the law of nations, which has always been part of the federal common law."[67] The *Filartiga* decision opened the door for a slew of cases in over the following two decades where victims of human rights violations that occurred overseas would come to seek civil redress of those crimes in U.S. courts.[68]

However, the U.S. courts have increasingly shied away from welcoming extraterritorial suits into U.S. forums for adjudication and began to limit the kinds of claims that could be brought under the Alien Tort Statute. In *Sosa v. Alvarez-Machain*, the Court held that the Alien Tort Statute merely granted the federal courts jurisdiction over claims, and the Statute itself did not provide a cause of action for claimants.[69] While still reserving discretion for the courts to extend the federal courts' common law jurisdiction to a limited number of claims arising under the law of nations,

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[63] Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).
[64] *Id*.
[65] *Id*.
[66] *Id*. at 884.
[67] *Id*. at 885.
[68] *See, e.g.,* Abebe–Jira v. Negewo, 72 F.3d 844 (11th Cir.1996) (alleging torture of Ethiopian prisoners); Kadic v. Karadzic, 70 F.3d 232 (2d Cir.1995)(alleging torture, rape, and other abuses orchestrated by Serbian military leader); In re Estate of Ferdinand Marcos, 25 F.3d 1467 (9th Cir.1994) (alleging torture and other abuses by former President of Phillippines); Tel–Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C.Cir.1984) (alleging claims against Libya based on armed attack upon civilian bus in Israel); Xuncax v. Gramajo, 886 F.Supp. 162 (D.Mass.1995) (alleging abuses by Guatemalan military forces).
[69] 542 U.S. 692, 724-25 (2004).

the Court displayed a reluctance to do so, pointing out that "[w]hile the absence of congressional action addressing private rights of action under an international norm is more equivocal than its failure to provide such a right when it creates a statute, the possible collateral consequences of making international rules privately actionable argue for judicial caution."[70] The Court articulated a two-step framework for permitting a private cause of action under the Alien Tort Statute without further congressional action: first, a court must determine whether the particular international norm alleged to have been violated is accepted and defined with specificity, and second, if step one is satisfied, a court should consider whether allowing the cause of action would be an appropriate exercise of judicial discretion.[71]

This trend away from reliance on the Alien Tort Statute has continued, with the Court's decisions in *Kiobel v. Royal Dutch Petroleum*[72] and *Jesner v. Arab Bank*[73] dimming the prospects of future utility of the Alien Tort Statute for the redress of crimes committed abroad. *Kiobel*, while extending the presumption against territoriality to claims arising under the Alien Tort Statute and precluding claims where all the relevant conduct occurred outside of the United States, left open the question of whether the Statute could be applied to multinational corporations at all.[74] The *Kiobel* Court closed its majority opinion by stating: "And even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against territorial application. Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices."[75]

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[70] *Id*. at 727.
[71] Jesner v. Arab Bank, PLC, 138 S.Ct. 1386, 1419-20 (2018) (J. Sotomayor, dissent) (explaining the framework established by the Court in *Sosa v. Alvarez-Machain*, *supra* note 69).
[72] Kiobel, *supra* note 6.
[73] Jesner, *supra* note 71.
[74] Kiobel, *supra* note 6, at 124-25.
[75] *Id*.

Jesner v. Arab Bank, however, resolved the question left unanswered in *Kiobel*, holding that the Alien Tort Statute could not apply to foreign corporations.[76] Petitioners alleged that Respondent, Arab Bank, caused or facilitated terrorist acts committed abroad by using its New York branch to clear dollar-denominated transactions that benefitted terrorists.[77] Relying on the political implications of adjudicating claims involving foreign corporations by reference to *Kiobel* and to the foreign policy concerns arising out of *Jesner* itself, the Court held that "judicial deference requires that any imposition of corporate liability on foreign corporations for violations of international law must be determined in the first instance by the political branches of the Government."[78] "As demonstrated by this litigation, foreign corporate defendants create unique problems. And courts are not well suited to make the required policy judgments that are implicated by corporate liability in cases like this one."[79]

In dismantling Alien Tort Statute precedent, the Court effectively rendered moot much of the scholarly argument in favor of using domestic statutory schemes to hold corporate entities criminally liable.[80] In her dissent, Justice Sotomayor critiques the plurality's decision for foreclosing foreign corporate liability under the Alien Tort Statute in its entirety.[81] Justice Sotomayor contends that the plurality misapplied the standard articulated in *Sosa*, which instructed the courts to consider "whether there was 'sufficient consensus' that, with respect to particular conduct prohibited under a 'given norm,' the type of defendant being sued can be alleged to have

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[76] Jesner, *supra* note 71.
[77] Id. at 1388.
[78] *Id.* at 1408.
[79] *Id.* at 1407.
[80] *See generally* Eric Engle, Extraterritorial Corporate Criminal Liability: A Remedy for Human Rights Violations?, 20 ST. JOHN'S J. LEGAL COMMENT. 287, 288 (2006) (arguing that Racketeering Influenced and Corrupt Organization Act (RICO), the Foreign Corrupt Practices Act (FCPA), as well as Security and Exchange Commission (SEC) regulations and law have extraterritorial effect on corporate persons and the corporate entity itself). *Cf.* Julian Simcock, Recalibrating After Kiobel: Evaluating the Utility of the Racketeer Influenced and Corrupt Organizations Act ("RICO) in Litigating International Corporate Abuse, 15 CUNY L. REV. 443 (2012).
[81] Jesner, *supra* note 71, at 1419 (2018) (J. Sotomayor, dissent).

violated that specific norm."[82] She explains that step one of the *Sosa*-inquiry could be resolved by considering "whether the given international-law norm binds only state actors or state and nonstate actors alike, because there does not appear to be an international-law norm that contemplates a finer distinction between types of private actors."[83] Indeed, under most international laws, corporate entities do not appear to be exempt from liability.[84]

Arguably the last test for the viability of the Alien Tort Statute as a potential tool for victims will by the Court's review of the Ninth Circuit's decision in *Doe I v. Nestle*.[85] In a claim against Nestle for aiding and abetting child slavery in the harvest of cocoa in the Ivory Coast, the Ninth Circuit held that allegations that Nestle funded child slave labor practices from the United States were relevant to the claim under the Alien Tort Statute.[86] Distinguishing its holding from that of the Court in *Jesner*, the Ninth Circuit emphasized that *Jesner* only derailed the claims against Nestle insofar as the law applies to conduct committed by foreign corporations.[87] However, the Court's trend away from liability under the Alien Tort Statute does not bode well for the outcome of *Nestle*, and if the Supreme Court's series of decisions is indicative of anything, it is that domestic corporate accountability will require legislative remedies within the United States.

B. THE INTERNATIONAL COMMUNITY'S TRIALS AND LESSONS LEARNED

On the international level, the first successful invocations of corporate criminal liability arose out of the Nuremberg Trials.[88] The Nuremberg trials demonstrated that corporate actors could be

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[82] *Id*. at 1422.
[83] *Id*.
[84] *Id*.
[85] 906 F.3d 1120 (9th Cir. 2018).
[86] *Id.*
[87] *Id*. at 1124.
[88] *See, e.g*., U.S.A. v. Von Weizsaecker (Ministries Trial), 14 Trials of War Criminals before the Nuremberg Military Tribunals, 314, 740-41 (1949) (convicting Paul Plaiger of pillaging coal from mines in Poland during the war while manager of Miling and Steel Works East Inc.); International Military Tribunal (Nuremberg) Judgment (1946), 1 Trial of the Major War Criminals before the International Military Tribunal (1945), 228 (convicting Walther Funk for his role in managing a commercial enterprise that exploited crude oil throughout Europe with the German army).

held liable for their conduct in contravention of the laws and customs of war for conduct which included the employment of slave labor, the aiding and abetting of criminal conduct by Nazis, and by reaping financial gain from the appropriated property and assets of victims of the Nazi regime.[89] However, these trials also importantly demonstrated the ability of the global community to agree on the need for redress of egregious criminal conduct. These cases often implicated corporate actors who had been found guilty of "pillaging" in the context of an armed conflict, defined by the International Criminal Tribunal for the Former Yugoslavia as "embrac[ing] all forms of unlawful appropriation of property in armed conflict for which individual criminal responsibility attaches under international law."[90] The criminal tribunals following the Second World War demonstrated a willingness to prosecute the bad acts of corporations and their agents in the context of conflict to reap gain.[91] Indeed, the IG Farben Judgment's position that "one may not utilize the corporate structure to achieve an immunity from criminal responsibility for illegal acts which he directs, counsels, aids, orders, or abets" captured the moral impetus to hold criminal conduct attributable to the individual, even acting in a corporate capacity.[92]

One can reasonably infer that the post-World War II plan for prosecuting commercial actors "involve[d] dispensing with the corporate entity and assessing whether individual business representatives satisfy requirements for regular modes of liability such as aiding and abetting, instigating, or direct perpetration."[93] The plan has not been realized universally, as the corporate entity has remained intact, but some states have demonstrated a willingness to reach parent

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[89] *Id.*; *see also* Stephens, *supra* note 11, at 54.
[90] *Prosecutor v. Zdravko Mucic aka "Pavo", Hazim Delic, Esad Landzo aka "Zenga", Zejnil Delalic (Trial Judgement)*, IT-96-21-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 16 November 1998
[91] James Stewart, *The Turn to Corporate Criminal Liability for International Crimes: Transcending the Alien Tort Statute*, 47 N.Y.U. J. INT'L L. & POL. 121, 125 (2014).
[92] JAMES STEWART, CORPORATE WAR CRIMES: PROSECUTING PILLAGE OF NATURAL RESOURCES 19-23, 77 (2010) (citing *United States v. Krauch et al., (IG Farben),* 8 Trials of War Criminals 1081).
[93] *Id.*

corporations for the conduct of their subsidiaries.[94] A number of cases arising out of European countries have adopted an enterprise theory of liability, in which parent corporations are deemed to effectively control the conduct of all subsidiary entities within the enterprise.[95] The approach taken by the English courts, in particular, have circumvented the challenges raised by the U.S. courts related to extraterritoriality and the challenges that could arise from recognizing an enterprise as having numerous legal personalities.[96] Foreign courts have found jurisdiction over the mercury poisoning of employees in a mining subsidiary where the parent corporation had an obligation to prevent it[97] and over the assault and detention of protesters by police at the site of a mining subsidiary for the parent corporation's failure to prevent the harm,[98] for example.

Unlike the United States with the Alien Tort Statute, many European Union member states have bypassed the requirement of a separate cause of action, some automatically permitting international law claims to be stated in national courts and others drafting additional laws to create domestic avenues for redress of corporate liability.[99] Interestingly, the European Union itself has attempted to enact rules that would enable European courts to access corporate liability for conduct committed abroad and "has called upon the European Commission to develop a mandatory

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[94] Jodie A. Kirshner, *supra* note 40, at 279 ("While the [Alien Tort Statute] provided causes of action in international law and extraterritorial jurisdiction, the courts of some member states, and particularly the United Kingdom, are circumventing the need for both by emphasizing contributing infringements of their domestic tort laws by domestic parent corporations.).

[95] *See, e.g.,* Sithole and Ors v. Thor Chemicals Holdings Ltd and Desmond John Cowley [1999] EWCA Civ 706; Guerrero v. Monterrico Metals PLC, [2009] EWHC 2475 (QB); Trafigura Beheer v. Golden Stavraetos Maritime Inc. [2003] 4 All ER 746. *See generally* Kirshner, *supra* note 40.

[96] Kirshner, *supra* note 40, at 279-80.

[97] Sithole and Ors, *supra* note 95.

[98] Guerrero v. Monterrico Metals PLC, *supra* note 95.

[99] Kirshner, *supra* note 40, at 282-83 ("Where considerations of justice support doing so, Austria, Belgium, Estonia, the Netherlands, Portugal, Romania, France, Germany, Luxembourg, and Poland allow jurisdiction over claims that do not fall within any domestic cause of action. Belgium and the Netherlands have viewed the jurisdiction as necessary for compliance with the European Convention on Human Rights, which guarantees the right to a fair trial. Several European countries have drafted new criminal laws for corporations, creating additional avenues for human rights claims against them.").

'European multilateral framework governing companies' operations worldwide.'"[100] The European Parliament also unsuccessfully proposed the "[standardization] corporate liability and the law of corporate groups,| which would have had the effect of broadly regulating the conduct of foreign subsidiaries.[101] The European Court of Justice has consistently ruled that corporations bear legal responsibilities to comply with and prevent the violation of human rights laws.[102] Thus, while the United States has demonstrated a clear reluctance to pursue both corporate civil and criminal liability, European countries, among others, have begun to move in the opposite direction.[103]

Despite the growing impetus to hold multinational corporations accountable from a number of European countries and the European Union, the broader international community has been unable to make progress on formulating a cohesive regulatory framework, largely due to countries' unwillingness to compromise on the parameters and conditions of a collaborative project.[104] In 2014, the United Nations Human Rights Council established an intergovernmental working group specifically intended to address the absence of an international regulatory framework pertaining to the regulation of multinational corporations and other corporate enterprises.[105] The working group sought to resolve concerns arising out of the 2011 United Nations Guiding Principles on Business and Human Rights, wherein predominantly civil society actors and scholars criticized the

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[100] Kirshner, *supra* note 40, at 287.
[101] *Id.*
[102] *Id*. (discussing the implications of the following cases: Case 36/74, Walrave & Koch v. Assoc. Union Cycliste Int'l, 1974 E.C.R. 1405 (corporations obliged not to discriminate); Case 43/75, Defrenne v. Sabena, 1976 E.C.R. 455 (corporations bear human rights responsibilities); Guerra and Others v. Italy, App. No. 14967/89, 7 Eur. Ct. H.R. (1998) (finding Italy liable for failing to inform local population about potential accidents at a chemical factory); Lopez Ostra v. Spain, App. No. 16798/90, 303-C Eur. Ct. H.R. (ser. A) (1994) (Spain liable for failing to protect residents from environmental problems at nearby waste treatment facility)).
[103] *E.g.,* Human Rights Council Res. 26/9, U.N. Doc. A/HRC/26/L.22/Rev. 1, ¶ 1 (June 26, 2014); Amnesty International, *Malabo Protocol: Legal And Institutional Implications Of The Merged And Expanded African Court*, 22 January 2016, available at: https://www.refworld.org/docid/56a9ddcf4.html (focusing on Article 46C: Corporate Criminal Liability).
[104] Backer, *supra* note 20, at 423-34.
[105] Human Rights Council Res. 26/9, U.N. Doc. A/HRC/26/L.22/Rev. 1, ¶ 1 (June 26, 2014).

Guiding Principles for requiring little affirmative action on the part of corporate actors to comply.[106] While the working group arose out of Guiding Principles, the projects are essentially two sides of the same coin, one providing a theoretical basis for a comprehensive regulatory framework and the other creating a practicable enforcement mechanism by which to enforce the theories and principles.[107]

The Guiding Principles are premised on three foundational priorities: "States' existing obligations to respect, protect, and fulfill human rights and fundamental freedoms; the role of business enterprises as specialized organis of society performing specialized functions, required to comply with all applicable laws and to respect human rights; [and] the needs for rights and obligations to be matched to appropriate and effective remedies when breached."[108] Indeed, the Resolution itself iterated "the importance of building the capacity of all actors to better manage challenges in the area of business and human rights", emphasized "that transnational corporations and other business enterprises have a responsibility to respect human rights," and recognized "that proper regulation, including through national legislation, of transnational corporations and other business enterprises and their responsible operation can contribute to the promotion, protection and fulfillment of and respect for human rights and assist in channeling the benefits of business towards contributing to the enjoyment of human rights and fundamental freedoms."[109] Meanwhile, the working group proceeded with the mandate of deliberating on "the content, scope, nature and form of the future international instrument" that would codify the principles into positive law.[110]

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[106] Backer, *supra* note 20, at 421.
[107] *Id*. at 424-25.
[108] Shift Project, *UN Guiding Principles on Business and Human Rights*, June 2011, available at: https://shiftproject.org/resource/un-guiding-principles-on-business-and-human-rights/intro/.
[109] Human Rights Council Res. 26/9, U.N. Doc. A/HRC/26/L.22/Rev. 1, ¶ 1 (June 26, 2014);
[110] Human Rights Council, Rep. on the First Session of the Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, with the Mandate of Elaborating an International Legally Binding Instrument, U.N. Doc. A/HRC/31/50, ¶ 1 (Feb. 5, 2016).

The latter project proved to be challenging, where member states could not agree on the specifics of the concepts that would comprise the content of the regulatory instrument: a renewed commitment by States to regulation; shared principles; concepts and legal nature of transnational corporations; extent of human rights to be covered; the enforcement obligations of States; scope of the interests to be protected; enhanced duties of corporations; the legal liability of corporations; and international remediation mechanisms.[111]

While the international efforts to create a universal regulatory framework have, to date, not borne much fruit, and States have demonstrated an inability to reach a consensus on the fundamental tenets, the United Nations Guiding Principles and the intergovernmental working group have shown, at minimum, that States are willing to engage in discourse recognizing the absence of and the need for regulation of multinational corporate entities. While suffering from their own flaws, the two projects symbolize the first steps in the development of a regulatory scheme.[112] As such, the United Nations' endeavors serve to provide hope that there does exist a possibility for an international collaborative effort among states to create and enforce a framework and legal scheme for the regulation of corporate conduct across national borders.

IV. CONCLUSION: A RECOMMENDATION FOR THE REDRESS OF CORPORATE IMPUNITY

Up until now, domestic regulatory schemes have governed the conduct of multinational corporations. However, as globalization increasingly defines the nature of economic relationships internationally, and as the profit-seeking motives of multinational enterprises guide the decision-making of parent corporations and their subsidiaries, the need for a regulatory scheme that

[111] Backer, *supra* note 20, at 425-26.
[112] *Id*. At 478-79 (discussing obstacles to the construction of a treaty where there exist the inherent limitations on the scope of possible regulated conduct, challenges to state sovereignty, and tensions between established international norms and principles that do not have the effect of law).

transcends borders continues to become more pressing. While some states have demonstrated that they have the legal infrastructure to prosecute and hold corporations civilly accountable, there has been no uniformity in enforcement around the world. In fact, as a number of Alien Tort Statute cases in the United States have demonstrated, corporations have largely been able to evade accountability for their conduct based on jurisdictional obstacles that are, by definition, characteristic of the structure of a multinational corporation.[113] The demise of the Alien Tort Statute as a mechanism for redress of harms committed outside of the United States, and the particular rejection of liability for corporate actors, demonstrates that domestic schemes will not be enough to regulate multinational corporations, even where some States do seem to be headed in a more favorable direction. An international consensus is necessary.

However, while many United Nations member states have displayed a willingness to cooperate in the development of shared principles of corporate responsibility and in the drafting of a legal instrument, those watching the progress of the Guiding Principles and the working group should remain, at best, cautiously optimistic. In the drafting of the Statute of the International Criminal Court, the States rejected the idea of including corporate criminal responsibility within the jurisdiction of the International Criminal Court, leaving the prosecution of corporate entities for international criminal conduct to the discretion of and subject to the laws of the states themselves.[114] In response, some countries, like Canada and the United Kingdom, have authorized their courts to exercise jurisdiction over war crimes and, specifically, pillaging through interpretive acts, while other countries, like Australia, have explicitly included corporate criminal liability within their legal code.[115] However, while the efforts of these States to codify a principle of

[113] See, e.g., Kiobel, *supra* note 6; Unocal, *supra* note 1.
[114] STEWART, *supra* note 92, at 79.
[115] *Id*. at 80.

corporate liability, absent a supranational obligation, the uniformity of corporate accountability remains a distant goal.

The fact that individual States have undertaken efforts to incorporate new statutes or amend old statutes to create causes of action for corporate wrongdoing, unfortunately, has no influence on other states' obligations to conform their domestical legal frameworks to those of the international community.[116] As *Kiobel* demonstrated, the United States Court of Appeals was reluctant to extend liability to a corporation under the Alien Tort Statute for "violations of the law of nations" because "the concept of corporate liability for violations of customary international law has not achieved universal recognition or acceptance as a norm in the relations of States with each other."[117] Indeed, how will customary international law develop if individual states are unwilling to follow suit in upholding newer legal norms of international law precisely because those norms have not risen to the level of qualifying as "customary"? Thus, the guarantee of corporate liability for extraterritorial conduct is doubly dependent on the initiatives of individual states to, first, recognize and codify corporate liability for criminal conduct and, second, extend their reach to the strategically-structured corporate entities, so long as that exercise of jurisdiction does not violate international law. Moreover, the enforcement of the *states'* responsibility to contribute to the creation of cohesive domestic laws, to the development of a strong international framework, and to the cooperation of the international community as a whole to address the concerns over corporate impunity require that regulation occur on the international level as well.

International regulation will eventually need to take the form of an enforceable agreement, such as a treaty prescribing affirmative duties to enforce corporate liability. However, as the

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[116] *Id.*
[117] *Id*. (citing Kiobel v. Royal Dutch Petroleum, No. 06-4800-cv, 06-4876-cv, 2010 WL 3611392 (2d Cir. September 17, 2010)).

Guiding Principles and working group have demonstrated, the formulation of international consensus is a complex and difficult feat. In the short-term, international agreements to continue to cooperate in the formulation of principles for corporate liability and in the enforcement of such acts would demonstrate a good-faith intent to address and resolve the deeply troubling concerns over corporate impunity, particular for human rights violations and other egregious criminal acts.

In sum, the complexity of multinational corporate structures has empowered multinational corporations to capitalize in legal vacuums, wherein corporations evade liability for their tortious and criminal conduct. Redress of this problem requires an international collaborate efforts. States will need to reform domestic statutory schemes, avoiding statutory failures like that of the Alien Tort Statute where the where the nuanced legal characters of multinational enterprises can evade accountability. States must also be willing to subject itself to a broader international regulatory framework, creating rights and obligations for both the states and the corporations. A supranational scheme is the only legal mechanism that can both ensure states' enforcement of corporate liability and corporations' compliance with international laws. However, that international instrument will require consent and collaboration, two factors that have proven challenging in past efforts to regulate at the international level.