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### The Turn to Corporate Criminal Liability for International Crimes: Transcending the Alien Tort Statute

James G. Stewart

*Allard School of Law at the University of British Columbia*, [stewart@allard.ubc.ca](mailto:stewart@allard.ubc.ca)

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# THE TURN TO CORPORATE CRIMINAL LIABILITY FOR INTERNATIONAL CRIMES: TRANSCENDING THE ALIEN TORT STATUTE

James G. Stewart\*

## ABSTRACT

*In November 2013, Swiss authorities announced a criminal investigation into one of the world's largest gold refineries on the basis that the company committed a war crime. The Swiss investigation comes a matter of months after the US Supreme Court decided in *Kiobel v. Royal Dutch Petroleum Co.* that allegations like these could not give rise to civil liability under the aegis of the Alien Tort Statute (“ATS”). Intriguingly, however, the Swiss case is founded on a much earlier American precedent. In 1909, the U.S. Supreme Court approved the novel practice of prosecuting companies. Unlike the Court's position in *Kiobel* a century later, the arguments that ultimately led to the open-armed embrace of corporate criminal liability were unambiguously concerned with impunity. For the U.S. Supreme Court, doing without corporate criminal responsibility would create a significant and highly undesirable regulatory gap. Since then, the American fiction that corporations are people for the purposes of criminal law has taken hold, such that the concept is now relatively ubiquitous globally. Even jurisdictions that bravely held out for decades on philosophical grounds have recently adopted corporate criminal liability. Switzerland is one such case.*

*In this paper, I argue that coupling corporate criminal liability with international crimes in national systems, as in this new Swiss case, is the next obvious “discovery” in corporate responsibility. In addition, at least*

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\* Assistant Professor, Faculty of Law, University of British Columbia. My kind thanks to José Alvarez, Nehal Bhuta, Roger Clark, Robert Cryer, Kevin Heller, Larissa van den Herik, Joanna Kyriakakis, Jens Ohlin, John Ruggie, and David Scheffer for criticizing an earlier draft. Special thanks to Derek Gregory and the Academic Mentoring Program at the Peter Wall Institute for Advanced Studies for intellectual encouragement and financial support over the course of this project. This project benefitted enormously from a fellowship from the Open Society Foundations.

*one international court has now adopted corporate criminal liability for international crimes. These developments promise to transcend several of the doctrinal and conceptual problems that plagued the ATS. First, this reframing will move this field beyond polarized debates about the scope of complicity within ATS litigation, which did not fully capture the nuanced meaning of accomplice liability in the criminal law. Second, it will bypass the cumbersome debate about corporate responsibility for international crimes as a matter of international law, which would not arise in criminal trials. Third, while trading the private right to sue under the ATS for prosecutorial discretion in a criminal context is certainly a massive loss, prosecutorial discretion also has its upsides, which we should now explore in greater depth. Finally, reframing ATS cases in international criminal law (principally enforced in national courts) offers corporate guilt and retribution as a justification for accountability, thereby answering many of the criticisms scholars leveled against the ATS process.*

*Corporate criminal liability (in conjunction with individual criminal responsibility of corporate officers for international crimes) always had certain competitive advantages over the ATS, that the Swiss investigation confirms as legally plausible. So, regardless of whether this particular investigation ever results in a trial or conviction, it announces an uncharted set of relationships between commerce, atrocity and international criminal law waiting to be mapped. As I show, by simultaneously mimicking and transcending the ATS, corporate criminal liability for international crimes offers human rights advocates a fresh platform for justice, while also contributing very new perspectives to scholarly debates about the propriety and efficacy of ATS litigation. All in all, the rise of corporate criminal liability for international crimes offers new ideas about the importance of corporate accountability globally, which understandably, never figured within the relatively narrow framing required for the ATS or business and human rights more generally.*

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*“There is always a first time for litigation to enforce a norm;  
there has to be.”*

Judge Richard Posner<sup>1</sup>

## I. INTRODUCTION: THE NEXT LEGAL “DISCOVERY”

In November 2013, Swiss prosecutors announced an investigation into a corporate war crime. According to the formal complaint that initiated the investigation, the giant Swiss gold refining company, Argor-Heraeus, was responsible for pillaging Congolese gold.<sup>2</sup> Pillage means theft during war.<sup>3</sup> After the Second World War (“WWII”), Allied courts prosecuted

<sup>1</sup> *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013, 1017 (7<sup>th</sup> Cir. 2011).

<sup>2</sup> See *Swiss Gold Refiner Accused Of Abetting Congo War Via Money Laundering*, FORBES, Nov. 4, 2013 <http://www.forbes.com/sites/kerryadolan/2013/11/04/swiss-gold-refinery-accused-of-abetting-congo-war-via-money-laundering/> (last visited Jan 21, 2014); *Swiss refiner “laundered DRC gold,”* BBC, Nov. 4, 2013, <http://www.bbc.co.uk/news/world-europe-24811420> (last visited Jan 21, 2014); Angélique Mounier-Kuhn, *Le raffineur d’or tessinois Argor visé par une enquête pénale*, LE TEMPS, Nov. 4, 2014. For an outline of the allegations against Argor-Heraeus, see KATHI LYNN AUSTEN, *THE PILLAGE OF EASTERN CONGO GOLD: A CASE FOR THE PROSECUTION OF WAR CRIMES* (2013), <http://www.stop-pillage.org/media-kit/>. For my own commentary on the development, see James G. Stewart, *Punish Companies That Pillage*, N. Y. TIMES, Nov. 14, 2013, <http://www.nytimes.com/2013/11/15/opinion/punish-companies-that-pillage.html> (last visited Jan 21, 2014). The case results from the hard work of a number of people, including Kathi Austen at the Conflict Awareness Project and Philip Grant at TRIAL, but Ken Hurwitz at the Open Society was the driving force behind it.

<sup>3</sup> According to the International Criminal Tribunal for the former Yugoslavia, pillage “is committed when private or public property is appropriated intentionally and unlawfully.” *Prosecutor v. Kordić & Čerkez*, Case No. IT-95-14/2-A, Judgement, ¶ 82. (Dec. 17, 2004). Traditionally, various rights to seize property during war contained in the Hague Regulations of 1907 colored this definition of pillage. See *Prosecutor v. Hadžihasanović et al.* Case No. IT-01-47-T, Judgement, ¶ 51 (Mar. 15, 2006) (“In the context of international armed conflicts, the taking of war booty and the requisition of property for military use may constitute limitations to that principle.”); *Prosecutor v. Martić*, Case No. IT-95-11-T, Judgement, ¶ 102 (June 10, 2007) (“[a] party to the conflict is also allowed to seize enemy military equipment captured or found on the battlefield as war booty, with the exception that the personal belongings of the prisoners of war may not be taken away. According to the Hague Regulations, forcible contribution of money, requisition for the needs of the occupying army, and seizure of material obviously related to the conduct of military operations, though restricted, are lawful in principle.”) Unfortunately, the ICC Elements of Crimes attempted to circumvent these complicated standards by demanding

various businessmen for pillaging natural resources from throughout Occupied Europe—including coal, iron ore, and oil—all of which bankrolled Hitler’s war machine.<sup>4</sup> In the modern era, too, individuals have faced charges for pillaging property of various sorts from conflict zones,<sup>5</sup> but curiously, the crime’s application to commercial actors in the extractive industry has remained a forgotten relic of post-war legal experimentalism. The failure to enforce the war crime in commercial contexts before now was profoundly unresponsive to the dynamics of

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that “[t]he perpetrator intended to deprive the owner of the property and to appropriate it for private or personal use”. International Criminal Court, Elements of Crimes, ICC-ASP/1/3, at 138-139 and 150. I have argued at length that, while probably not significant in the corporate context, the inclusion of the element of “private and personal use” is neither consistent with the laws of armed conflict nor any other definition of pillage in international criminal law. JAMES G. STEWART, CORPORATE WAR CRIMES: PROSECUTING PILLAGE OF NATURAL RESOURCES 19–23 (2010), <http://ssrn.com/abstract=1875053> (providing a full doctrinal history of the meaning of pillage). I therefore agree with the Special Court for Sierra Leone that “the requirement of ‘private or personal use’ is unduly restrictive and ought not to be an element of the crime of pillage.” See Prosecutor v. Brima et al. Case No. SCSL-04-16-T, Judgment, ¶ 754 (June 20, 2007); Prosecutor v. Fofana et al. Case No. SCSL-04-14-T, Judgement, ¶ 160 (Aug. 2, 2007). All this to say, treating pillage as theft in war is safe, provided one understands that certain exceptions exist in the laws of armed conflict.

<sup>4</sup> See e.g. U.S.A. v. Von Weizsaecker et al. (Ministries Case), 14 Trials of War Criminals 314, p. 741 (1949) (convicting Paul Pleiger, the manager of Mining and Steel Works East Inc., for pillaging at least 50,000 tons of coal from mines located in Poland during the war.) France v. Roechling, 14 Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, app. B, (1949), pp. 1112–1113 (finding Hermann Roechling for pillaging over 100 million tons of iron ore from the Société Lorraine Minière et Métallurgique in Moselle, France.); International Military Tribunal (Nuremberg) Judgment (1946), 1 Trial of the Major War Criminals before the International Military Tribunal (1945), p. 228 (convicting Walther Funk for his role in the management of a commercial enterprise named the Continental Oil Company, which exploited crude oil throughout occupied Europe in conjunction with the German army.) For a table of all known pillage cases, involving theft of natural resources as well as other forms of property, see JAMES G. STEWART, CORPORATE WAR CRIMES: PROSECUTING PILLAGE OF NATURAL RESOURCES 95–124 (2010), <http://ssrn.com/abstract=1875053>.

<sup>5</sup> In an earlier project, I established that modern international courts and tribunals have considered at least 69 allegations of pillage in modern conflicts, in addition to the numerous cases that arose after WWII. For a table of these cases, see *Id.* at 96–124. The most notable modern examples of pillage cases occur before the International Criminal Court, where former Vice-President of the Democratic Republic of Congo and the sitting President of Sudan are indicted for pillaging property other than natural resources. See Prosecutor v. Al Bashir, Warrant of Arrest for Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09, 4 March 2009, at 7 (confirming pillage charges against Al Bashir); Prosecutor v Bemba, Warrant of Arrest for Jean - Pierre Bemba Gombo Replacing The Warrant Of Arrest Issued on 23 May 2008, ICC - 01/05 - 01/08, 10 June 2008, at 9 (also confirming the charge of pillage against Bemba).

modern warfare; since the end of the Cold War at least, pillage of natural resources has substituted for Superpower sponsorship as a predominant means of conflict financing.<sup>6</sup>

Thus, it is hard to resist seeing the Swiss investigation in historic terms, regardless of whether it ever blossoms into a conviction. Locally, the case marks an unmistakable shift away from the history of Swiss dealings in pillaged gold during and after WWII.<sup>7</sup> On a more global level, the Argor-Heraeus case is one of the first criminal cases involving corporate responsibility for international crimes,<sup>8</sup> and the first time that a company

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<sup>6</sup> See generally, PHILIPPE LE BILLON, *WARS OF PLUNDER: CONFLICTS, PROFITS AND THE POLITICS OF RESOURCES* (2012) I. Bannon and P. Collier, “Natural Resources and Conflict: What Can We Do?” in I. Bannon and P. Collier (eds), *Natural Resources and Violent Conflict: Options and Actions* 1-16 (Washington: The World Bank, 2003); M. Ross, “The Natural Resource Curse: How Wealth Can Make You Poor in Natural Resources and Violent Conflict”, in Bannon and Collier (eds), *ibid.*, 17-42, at 30; D. Keen, *The Economic Functions of Violence in Civil Wars* (London: International Institute of Strategic Studies, 1998). For a remarkable anthropological study of how this correlation plays out in practice, see CAROLYN NORDSTROM, *SHADOWS OF WAR: VIOLENCE, POWER, AND INTERNATIONAL PROFITEERING IN THE TWENTY-FIRST CENTURY* (2004).

<sup>7</sup> For two examples from a voluminous literature, see IAN SAYER & DOUGLAS BOTTING, *NAZI GOLD: THE STORY OF THE WORLD’S GREATEST ROBBERY - AND ITS AFTERMATH* (1984); ISABEL VINCENT, *HITLER’S SILENT PARTNERS: SWISS BANKS, NAZI GOLD, AND THE PURSUIT OF JUSTICE* (1997).

<sup>8</sup> In 2009 and 2010, the NGO Al-Haq filed criminal complaints against Lima Holding B.V. and its managing directors for complicity in war crimes associated with the construction of the Wall in Israel and Palestine. Although the prosecution opened an investigation, it ultimately decided not to proceed. Dutch prosecutors cited several factors for reaching their decision, the most important of which was that the company’s contribution was minor. In this sense, it did not constitute complicity at all. In many respects, I view this case as a paradigm of causal contributions that fall below the “substantial” contribution threshold. For further details, see <http://www.om.nl/onderwerpen/internationale/map/concerning/>. More broadly, international criminal courts have continually flirted with corporate criminal liability. See, in this regard, J. A. Bush, *The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said*, 109 COLUM. L. REV. 1094–2081 (2009). In fact, the trial of various businesspeople was nearly staged as a second major trial at Nuremberg itself, before these cases were relegated to zonal trials. On this history, see DONALD BLOXHAM, *GENOCIDE ON TRIAL: WAR CRIMES TRIALS AND THE FORMATION OF HOLOCAUST HISTORY AND MEMORY* 28–32 (2003) (Bloxham’s chapter is entitled “‘The Trial that Never Was’: The Aborted Second Major Trial of Major War Criminals”). For discussion of the political agendas that played out in the trial of “industrialists” that did occur, see Grietje Baars, *Capitalism’s Victor’s Justice? The Hidden Stories Behind the Prosecution of Industrialists Post-WWII*, in *THE HIDDEN HISTORIES OF WAR CRIMES TRIALS* 163–192 (Kevin Jon Heller & Gerry Simpson eds., 2013) As an aside, I place the word “industrialists” in inverted commas because I suspect

has ever faced criminal scrutiny for pillaging natural resources from war zones.<sup>9</sup> So, beyond the significance of pillage for the extractive industry, there is a sense that Argor-Heraeus opens Pandora's box—a set of undiscovered relationships between commerce, atrocity, corporate criminal liability and international criminal law waiting to be mapped. No matter how this particular investigation plays out, the very fact of a formal investigation confirms the plausibility of these cases, sounding the beginnings of a brave new turn in thinking about global corporate accountability.

By chance, the rise of this new form of accountability coincides with the contraction, if not demise, of the far more popular avenue for hearing these types of cases. In 1980, human rights advocates stumbled upon an unused provision within the Judiciary Act of 1789, which they quickly harnessed to litigate “foreign cubed” human rights cases.<sup>10</sup> This provision mandates that US federal courts enjoy jurisdiction over “civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”<sup>11</sup> After some terminological inconsistency, the provision came to be known as the Alien Tort Statute (“ATS”).<sup>12</sup> At

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that, whether deliberately or not, the archaic language distances these precedents from modern commercial practices.

<sup>9</sup> There were, of course, a large number of business people prosecuted and convicted of pillaging natural resources after WWII. For a detailed analysis, see JAMES G. STEWART, *CORPORATE WAR CRIMES: PROSECUTING PILLAGE OF NATURAL RESOURCES* (2010). See also, Larissa van den Herik & Daniëlla Dam-De Jong, *Revitalizing the Antique War Crime of Pillage: The Potential and Pitfalls of Using International Criminal Law to Address Illegal Resource Exploitation during Armed Conflict*, 22 *Crim. L. Forum* 237–273 (2011).

<sup>10</sup> The term “foreign cubed” is used to describe cases in which foreign defendants are sued by foreign plaintiffs for torts committed on foreign soil. The phrase has become common in this literature. See Vivian Grosswald Curran & David J Sloss, *Reviving Human Rights Litigation After Kiobel*, 107 *AM. J. INT'L L.* 858–863, 858 (employing this term); Thomas H. Lee, *The Three Lives of the Alien Tort Statute: The Evolving Role of the Judiciary in U.S. Foreign Relations*, 84 *NOTRE DAME L. REV.* 1645–1670, 1647 (2014) (also referring to “foreign-cubed” cases); Ralph G. Steinhardt, *Kiobel and the Multiple Futures of Corporate Liability for Human Rights Violations*, 28 *MD. J. INT'L L.* 1–27, 2 (2013) (same). At times, the power is reduced from three to two. See e.g. Oona Hathaway, *The Door Remains Open to “Foreign Squared” Cases*, SCOTUSBLOG, <http://www.scotusblog.com/2013/04/kiobel-commentary-the-door-remainsopen-to-foreign-squared-cases/>.

<sup>11</sup> 28 U.S.C. § 1350.

<sup>12</sup> As Tom Lee has explained, courts initially called the provision the Alien Tort Act and the Alien Tort Claims Act (ATCA), before the Supreme Court adopted Alien Tort Statute (ATS) as its preferred descriptor. Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 *COLUM. L. REV.* 832, 3 (2006) (“The provision has also been called the Alien Tort Act, *Kadić v. Karadžić*, 70 F.3d 232, 236 (2d Cir. 1995); Alien Tort Claims



first, litigants employed the ATS to pursue individuals that they claimed were responsible for egregious human rights violations from Bosnia to the Philippines, using the law of nations as a jurisdictional hook on which to hang their human rights suits.<sup>13</sup> At a later stage, the promise of greater compensation to victims, the obvious financial incentives for lawyers and no shortage of corporate offending saw a turn to the commercial side of global repression.

For most of the past several decades, this civil option peculiar to the United States was uncontestedly “the main engine for transnational human rights litigation.”<sup>14</sup> Amongst human rights scholars, enthusiasm for the ATS litigation became immense, presumably because of the dearth of other options for redress. At its zenith, the ATS appeared to offer litigants a raft of comparative advantages over and above legal arrangements for corporate accountability on offer elsewhere. These advantages (perceived or real) included universal civil jurisdiction over “foreign cubed” cases, access to resources on the New York Stock Exchange worth contesting, and a bundle of procedural privileges without equivalent elsewhere.<sup>15</sup> In April 2013, however, the US Supreme Court’s decision in *Kiobel v. Royal*

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statute, *Republic of the Philippines v. Marcos*, 806 F.2d 344, 354 (2d Cir. 1986); and Alien Tort Claims Act, *Flores v. S. Peru Copper Corp.*, 253 F. Supp. 2d 510, 512-13 (S.D.N.Y. 2002). The use of Alien Tort Statute in this Article conforms to Supreme Court nomenclature. See, e.g., *Sosa v. Alvarez-Machain*, 542 U.S. 692, 697 (2004); *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 436 (1989).”

<sup>13</sup> See e.g., *Kadić v. Karadžić*, 70 F.3d 232 (2d Cir. 1995) (involving genocide allegations against a private individual for the first time within ATS litigation); *In re Estate of Ferdinand Marcos, Human Rights Litigation*, 25 F.3d 1467 (9<sup>th</sup> Cir. 1994) (involving proceedings against the estate of former Philippine President Ferdinand Marcos). Apparently, as many as one hundred cases were filed against dictators and military officials when their regimes fell, suggesting that ATS litigation was initially very much part and parcel of the transitional justice movement. According to David Weissbrodt, these cases were largely symbolic, seldom resulting in awards for damages. See DAVID WEISSBRODT ET AL, *INTERNATIONAL HUMAN RIGHTS: LAW, POLICY AND PROCESS* 816-17 (2009)

<sup>14</sup> Ingrid Wuerth, *The Supreme Court and the Alien Tort Statute*, 107 AM. J. INT’L L. 601, 601 (2013).

<sup>15</sup> On procedural advantages available in the United States that made ATS so popular, see Beth Stephens, *Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT’L L. 1, 28-33 (2002) (discussing the potential for U.S. procedure to overcome the difficulties with pre-paid legal fees, loser pays rules, the absence of contingency fees, high legal fees, the absence of punitive damages, limited discovery and difficulties with the uptake of international law, all of which create important barriers outside the United States). For a helpful comparative overview of some of these procedural arrangements, see Deborah R. Hensler, *The Globalization of Class Actions: An Overview*, 622 ANNALS AM. ACAD. POL. & SOC. SCI. 7 (2009).

*Dutch Petroleum Co.*<sup>16</sup> brought an abrupt end to the exuberance, sparking a clamor for alternative forms of corporate accountability in a world where justice for corporate wrongdoing is very much the exception not the rule. In this spirit, some have asserted that tort litigation in U.S. state courts could fill the ATS's shoes,<sup>17</sup> others reasonably look to Europe for alternative civil opportunities,<sup>18</sup> while still others have lauded the demise of the ATS's very unilateral assumption of responsibility for global corporate offending, calling for more multilateral responses to the sorts of difficulties that animated the ATS.<sup>19</sup>

But what role for the ATS's brother-in-arms, international criminal law? Perhaps, through a process of mimicry and transcendence, the Argor-Heraeus case gestures at this powerful but still ill-considered option. Although it is still far too early to say, there are good reasons to think that this particular successor could outperform its predecessor.

Certainly, there are many points of commonality between international criminal law and the ATS, even before the latter's recent fall. Historically speaking, the genesis of the ATS is the subject of very different readings,<sup>20</sup> but the statute's initial application several centuries ago bears an eerie resemblance to the facts in Argor-Heraeus. On 6 July 1795, the then U.S. Attorney General William Bradford authored an opinion

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<sup>16</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013).

<sup>17</sup> Christopher A. Whytock, Donald Earl III Childress & Michael D. Ramsey, *After Kiobel - International Human Rights Litigation in State Courts and under State Law*, 3 UC IRVINE L. REV. 1 (2013); Austen L. Parrish, *State Court International Human Rights Litigation: A Concerning Trend*, 3 UC IRVINE L. REV. 25 (2013); Paul L. Hoffman & Beth Stephens, *International Human Rights Cases Under State Law and in State Courts*, 3 UC IRVINE L. REV. 9 (2013).

<sup>18</sup> Robert McCorquodale, *Waving Not Drowning: Kiobel Outside the United States*, 107 AM. J. INT'L L. 846-851; GWYNNE SKINNER ET AL., *THE THIRD PILLAR: ACCESS TO JUDICIAL REMEDIES FOR HUMAN RIGHTS VIOLATIONS BY TRANSNATIONAL BUSINESS* (2013), <http://accountabilityroundtable.org/analysis/the-third-pillar-access-to-judicial-remedies-for-human-rights-violations-by-transnational-business/>; Caroline Kaeb & David J Scheffer, *The Paradox of Kiobel in Europe*, 107 AM. J. INT'L L. 852-857.

<sup>19</sup> Austen L. Parrish, *Kiobel, Unilateralism, and the Retreat from Extraterritoriality*, 28 MD. J. INT'L L. 208 (2013).

<sup>20</sup> This historical literature is rich and diverse. See e.g., Anne-Marie Burley (now Slaughter), *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461, 464 (1989) (arguing that the ATS was passed to allow the U.S. to fulfill its "duty", to conduct itself in a manner "befitting a civilized nation", with "honor and virtue."); For alternative readings of this history, see Lee, *supra* note 12 (suggesting that ATS was intended to ensure safe-conduct of foreign actors, especially where the U.S. government shared responsibility for the wrong in question); Joseph Modeste Sweeney, *A Tort Only in Violation of the Law of Nations*, 18 HASTINGS INT'L & COMP. L. REV. 445 (1994) (arguing, based on a detailed historical review, that the ATS was intended to only govern a class of prize cases involving seized vessels).

advising that the provision in the Judiciary Act of 1789 could supply a remedy to British merchants for acts of “plundering” carried out in Sierra Leone.<sup>21</sup> Legally speaking, plunder is a synonym for pillage.<sup>22</sup> Coincidentally, then, pillage, transnational commerce, and warfare in Africa mark the beginnings of the ATS and, quite possibly now, corporate criminal liability for international crimes.

The ATS and international criminal law (“ICL”) also overlap substantively. After Bradford’s opinion, this mysterious provision in the Judiciary Act all but disappeared. In 1980, almost two centuries later, courts unearthed, dusted off and redeployed the lost ATS provision, relying on Bradford’s now famous argument as precedent. Logically, litigants spent much of the ensuing years contesting the scope of this far-reaching new basis for civil liability, but after much dispute, consensus emerged that the ATS at least covered international crimes like war crimes, crimes against humanity and genocide.<sup>23</sup> In other words, Argor-

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<sup>21</sup> Breach of Neutrality, 1 Op. Att’y Gen. 57 (1795). Curtis Bradley has offered an informative presentation of the context surrounding Bradford’s opinion. See Curtis A. Bradley, *Attorney General Bradford’s Opinion and the Alien Tort Statute*, 106 AM. J. INT’L L. 22 (2012).

<sup>22</sup> See, for example, the Special Court for Sierra Leone’s conclusion that that “the prohibition of the unlawful appropriation of public and private property in armed conflict [...] has been variously referred to as ‘pillage’, ‘plunder’ and ‘looting.’” *Prosecutor v. Brima et al.*, Case No. SCSL-04-16-T, Judgment, para. 751 (June 20, 2007). Unhelpfully, post-WWII trials used the term spoliation as a further synonym, but when it came to defining the term legally, courts found that “spoliation is synonymous with the word ‘plunder’ as employed in Control Council Law No. 10, and that it embraces offenses against property in violation of the laws and customs of war of the general type charged in the indictment.” *United States v. Krauch et al.*, (IG Farben), 8 Trials of War Criminals 1081, p. 1133. For a more complete discussion of this unnecessarily confusing terminological equivalence, see STEWART, *supra* note 3, at 15–18.

<sup>23</sup> Although there is some controversy surrounding the types of “violations of the law of nations” that will give rise to actionable ATS claims, courts have consistently found international crimes can ground an ATS suit. As a general matter, courts initially required that an international law norm had to be “specific, universal and definable” to be actionable. See e.g. *Doe v Saravia* 348 F. Supp. 2d 1112, 1153-57 (E.D. Cal. 2004). In 2004, the Supreme Court’s decision in *Sosa* agreed that the ATS only extended to a “narrow class” or violations of international law, which include norms “of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18<sup>th</sup>-century paradigms” that originally inspired the ATS. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). While some decisions have excluded commercial fraud, misrepresentation and unjust enrichment from the scope of ATS suits, others have consistently found that genocide, crimes against humanity and war crimes are actionable. See e.g., *Kadić v Karadžić*, 70 F3d 232, 242 (2d Cir. 1995) (finding that that the District Court has jurisdiction over genocide), *Sarei v Rio Tinto*, 221 F. Supp 2d 1116, 1149 (C.D. Cal 2002) (finding that medical blockade constituted genocide, because “deliberately calculated to destroy plaintiffs and their way of life.”), *Mehinović v.*

Heraeus is not just factually similar to the context in which the ATS was first applied; both systems of accountability appeal to the same branch of international law. Stated differently, both are based on a latent legal “hook” that lay fallow for decades, before it was uncovered to allow domestic courts to read international crimes into the local legal system.

The Argor-Heraeus case is thus a reenactment of the legal “discovery” that brought about ATS litigation in the modern era. According to one of the pioneers of ATS litigation, the Statute was first applied to corporations in the 1980’s after a perplexed Burmese activist approached a student at Georgetown Law School. During that discussion, the Burmese activist apparently confessed his profound confusion that the U.S. legal system allowed a couple to recover when their dog died by over-anesthesia at the hands of a veterinarian, whereas massive social upheaval caused by an American company in Burma went completely unaddressed.<sup>24</sup> The student adroitly pointed to the ATS, proposed the obvious (but then novel) application to corporations, and a major movement was born. Although the “discovery” motif has obvious limitations, once again, its resonance with the rise of corporate criminal liability for international crimes in the Argor-Heraeus case is striking.<sup>25</sup>

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Vucković 198 F. Supp. 2d 1322 (N.D. Ga. 2002) (holding that acts of torture, degrading treatment and illegal imprisonment as part of a campaign of ethnic cleansing constituted crimes against humanity, which were actionable pursuant to the ATS); *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1158 (11<sup>th</sup> Cir. 2005) (finding that an individual killed by Augusto Pinochet’s regime in 1973 was a victim of a crime against humanity, and therefore enjoyed a right to sue pursuant to the ATS).

<sup>24</sup> Terry Collingsworth, *The Key Human Rights Challenge: Developing Enforcement Mechanisms*, 15 HARV. HUM. RTS. J. 183, 187 (2002). Interestingly, these types of moral contradictions have proved powerful in generating international criminal institutions, too. A favorite, I call the Geneva Absurdity, was instrumental in the “fight against impunity,” which played such an important role in the rise of modern international criminal justice. My telling of the *Geneva Absurdity* goes: if you kill a single person, you go to prison; if you kill ten people, you go to prison for the rest of your life, and in some places you are subject to the death penalty; but if you murder 10,000 innocent people, you are invited to Geneva for peace talks.

<sup>25</sup> Aside from seeming overly grandiose, some might argue that the discovery metaphor arrogates to so-called “norm entrepreneurs” an influence they do not deserve, and begs the question whether this is the best way of regulating global corporate malfeasance. See e.g., Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT’L ORG. 887–917 (1998) (offering an assessment of the role of norm entrepreneurs in international relations); JOHN BRAITHWAITE & PETER DRAHOS, *GLOBAL BUSINESS REGULATION* (2000) (developing a theory of global business regulation to respond to globalization, drawing on case studies from a wide variety of sectors); Nonetheless, on balance, I’m comfortable with including the metaphor here, since: (a) as an empirical observation, these fields do appear to emerge as a result of “discoveries” that produce Kuhnian paradigm shifts. See THOMAS KUHN, *THE STRUCTURE OF*

Strangely, this “discovery” metaphor runs deeper still; corporate responsibility for international crimes also depends on an American legal innovation of a different sort. By 1909, the industrial revolution had produced a swathe of new businesses, massive urbanization, and new means of producing harm within and beyond the workplace. How would systems of justice adjust to the rise of big business when extant laws seemed ill equipped to deal with the might of oil barons, automotive giants, and railroad companies at a time before the emergence of regulatory agencies?<sup>26</sup> In another mirroring of the ATS process and the

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SCIENTIFIC REVOLUTIONS (2nd edition ed. 1970); (b) international criminal justice as a field has often involved these types of discoveries in far more problematic settings (think war crimes in non-international armed conflicts). On this topic, see Allison Marston Danner, *When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War*, 59 VAND. L. REV. 1 (2006) (discussing judicial creativity in international criminal justice, with surprisingly little mention of the problem of retroactive criminal liability.) The “discovery” of corporate criminal liability for international crimes in national courts does not suffer from this problem; (c) In many parts of the world, theorists of national criminal law also celebrate “discoveries”. See e.g., Markus D. Dubber, *The Promise of German Criminal Law: A Science of Crime and Punishment*, 6 GERMAN L. J. 1049–1071, 1061 (2005) (“[d]octrines of criminal law [...] are not simply developed, or refined, or adapted, they are ‘discovered.’ The history of German criminal law theory is a history of these discoveries.”); (d) it was certainly not I who made the initial “discovery” about corporate criminal responsibility for international crimes in national law, so my ability to trumpet the find is nil. To the best of my knowledge, Diane Amann was among the first to discuss this possibility, but without doubt, it was Anita Ramasastry, Robert Thompson and Mark Taylor who’s ground-breaking comparative work revealed the full extent of the opportunity. See Diane Marie Amann, *Capital Punishment: Corporate Criminal Liability for Gross Violations of Human Rights*, 24 HASTINGS INT’L & COMP. L. REV. 327 (2000); RAMASASTRY, ANITA & THOMPSON, ROBERT C, COMMERCE, CRIME AND CONFLICT: LEGAL REMEDIES FOR PRIVATE SECTOR LIABILITY FOR GRAVE BREACHES OF INTERNATIONAL LAW (2006), [www.fao.no/pub/rapp/536/536.pdf](http://www.fao.no/pub/rapp/536/536.pdf) (surveying 16 legal systems to confirm that corporate criminal responsibility for international crimes is available in many); See also, Robert C Thompson, Anita Ramasastry & Mark B Taylor, *Translating UNOCAL: The Expanding Web of Liability for Business Entities Implicated in International Crimes*, 40 GEO. WASH. INT’L L. REV. 841 (2008). Of course, identifying the framework and employing it are two very different things. But for the ability of Jim Goldston at the Open Society Justice Initiative to recognize the significance of the “discovery” and Ken Hurwitz to tirelessly make this happen, these insights would remain purely academic; (e) the discovery is very helpful in moving this discourse away from the unhealthy fixation on the failure to include corporate criminal liability in the ICC Statute, which produced overly pessimistic visions of avenues for accountability already on offer; and (f) as a normative matter, the purpose of this piece (and my other work on this topic) is very much to engage with the conceptual merits of this “discovery”, which I do not take for granted.

<sup>26</sup> V. S Khanna, *Corporate Criminal Liability: What Purpose Does it Serve*, 109 HARV. L. REV. 1477 (1995). For a history of corporate criminal liability in the United States, see Kathleen F. Brickey, *Corporate Criminal Accountability: A Brief History and an*

turn to corporate *criminal* liability for international crimes today, the American answer at the turn of the 20<sup>th</sup> century was innovative, pragmatic, and more than slightly bizarre—prosecutors began charging companies with crimes. Thus, in a further act of historical parallelism with the contemporary, Celia Wells explains that corporate criminal liability was initially “discovered.”<sup>27</sup> And yet, in sharp contrast with *Kiobel* more than a hundred years later, when the curious practice of charging corporations with crimes reached the steps of the U.S. Supreme Court, the Justices unanimously endorsed it.<sup>28</sup>

Like the ATS, corporate criminal liability developed in the United States in order to avoid egregious gaps in accountability. As Vikramaditya Khanna has convincingly observed, it was the perception that corporate criminal liability was “the only available option”<sup>29</sup> that led to a gradual acceptance of the novel practice. In the words of the U.S. Supreme Court itself, annulling the then growing incidence of corporate prosecutions “would virtually take away the only means of effectually . . . correcting the abuses aimed at.”<sup>30</sup> Looking back at this historical “discovery” after *Kiobel*, one is struck by a sense of bittersweet irony—the same blend of legal entrepreneurialism and aversion to corporate impunity that carried the day in the Supreme Court a century ago fell on deaf ears in *Kiobel*. So the question immediately poses itself: could coupling their earlier

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*Observation*, 60 WASH. U. L. Q. 393 (1982). On the theoretical history of corporate accountability, see MICHAEL BLOWFIELD & ALAN MURRAY, CORPORATE RESPONSIBILITY: A CRITICAL INTRODUCTION 40–70 (2008).

<sup>27</sup> CELIA WELLS, CORPORATIONS AND CRIMINAL RESPONSIBILITY 25 (2001) (in discussing corporate criminal liability, Wells draws on Edwin Sutherland’s groundbreaking work in white-collar crime, to poignantly observe that “[t]he fact that white-collar crime had to be ‘discovered’ is sufficient to remind us that our notions of crime and criminals derive not from definitions but from constructions of everyday behaviour.”) Of course, there are ways of recasting this development in more pejorative terms. Gerhard Mueller, for instance, famously compared corporate criminal liability to a weed: “[n]obody bred it, nobody cultivated it, nobody planted it. It just grew.” Gerhard O.W. Mueller, *Mens Rea and the Corporation: A Study of the Model Penal Code Position on Corporate Liability*, 19 U. PITT. L. REV. 21, 21 (1957). Still, in this respect too, the comparisons with ATS litigation and the rise of corporate criminal liability for international crimes are striking.

<sup>28</sup> *New York Central & Hudson River Railroad Co. v. United States* 212 U.S. 481, 29 S.Ct 304, 53 L.Ed. 613 (1909). The issue is still the subject of considerable debate in the United States. See John Hasnas, *The Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1329 (2009). For a critique of all sides of this debate for failing to take into account the realities of corporate responsibility for international crimes, see James G. Stewart, *A Pragmatic Critique of Corporate Criminal Theory*, 16 NEW CRIM. L. REV. 261 (2013).

<sup>29</sup> Khanna, *supra* note 26, at 1486.

<sup>30</sup> *New York Central*, *supra* note 28, at 496.

enthusiasm for corporate *criminal* liability with the international law governing international crimes à la Argor-Heraeus succeed where the ATS did not?

At first blush, one is tempted to answer in the affirmative by stepping away from the points of commonality between the two systems; despite the great overlap, dissimilarities are important, and tend to account for many of the core difficulties that plagued the ATS process. For one reason, many more states are able to hear criminal cases against corporations and their representatives for violations of ICL. Over the past two decades, the originally American notion that corporate entities are people for the purposes of criminal law has spread like contagion across much of the planet,<sup>31</sup> for reasons that are largely indistinguishable from those that first inspired the practice at home—impunity is inimical to basic intuitions about justice. In 1988, for example, the Council of Europe called on member states to embrace corporate criminal responsibility on the grounds that individual criminal liability of corporate officers left a regulatory gap that corporate criminal responsibility could fill.<sup>32</sup> The Swiss law on corporate criminal liability that forms the basis of the case against Argor-Heraeus is, to bask in the irony a while longer, a direct product of that call for Continental systems to (effectively) Americanize this aspect of their criminal codes.<sup>33</sup>

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<sup>31</sup> WENDY DE BONDT, GERT VERMEULEN & CHARLOTTE RYCKMAN, LIABILITY OF LEGAL PERSONS FOR OFFENCES IN THE EU 22–23 (2012) (stating that corporate criminal liability did not come to European countries until 1976 in the Netherlands. Most countries adopted in in the early 1990’s, but many like Spain and the Czech Republic have only passed legislation codifying corporate criminal liability in the past year or so). *See also*, JAMES GOBERT & ANA-MARIA PASCAL, EUROPEAN DEVELOPMENTS IN CORPORATE CRIMINAL LIABILITY (2011) (setting out country reports on corporate criminal liability in sixteen European jurisdictions). For a slightly dated survey of corporate criminal liability within and beyond Europe, see HANS DE DOELDER & KLAUS TIEDEMANN, CRIMINAL LIABILITY OF CORPORATIONS (1996).

<sup>32</sup> See Council of Europe, Recommendation no. R (88) 18 of the Committee of Ministers to Member States Concerning Liability of Enterprises Having Legal Personality for Offences Committed in the Exercise of Their Activities (adopted by the Committee of Ministers on 20 October 1988 at the 420th meeting of the Ministers’ Deputies). According to Beth Stephens, the Inter-American Juridical Committee has issued a similar call. Stephens, Beth, *The Amoralty of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT’L. L. 45–90, 107 (2002) (citing Inter-American Juridical Committee, Inter-American Model Legislation on Illicit Enrichment and Transnational Bribery, OENSer.Q CJI/doc.70/98 rev. 2, adopted Aug. 22, 1998).

<sup>33</sup> It was not until 2003 that the Swiss finally succumbed to the trend the US Supreme Court played a crucial role in beginning almost a century earlier. *See* Bertrand Perrin, *La responsabilité pénale de l’entreprise en droit Suisse*, in CORPORATE CRIMINAL LIABILITY: EMERGENCE, CONVERGENCE, AND RISK 193, 198 (2011) (“[J]us’qu’à l’entrée en vigueur, le 1er octobre 2003, de l’article 100quater CPS, prédécesseur de l’actuel article

Little wonder, then, that John Ruggie, the former Special Representative of the UN Secretary-General on Human Rights and Transnational Corporations, has described international criminal law as “[b]y far the most consequential legal development” in the field of business and human rights.<sup>34</sup> In what follows, I substantiate this contention by arguing that, despite its own set of shortcomings, ICL enjoys distinct competitive advantages over its civil counterpart in core areas.

In particular, I argue that reframing ATS cases as instances of international crimes may overcome many of the principal challenges the ATS process faced, even at its height. Some of these hurdles were about doctrinal fit (viz. the extent to which the ATS “hook” successfully allowed for corporate liability for violations of international law and what the concept of complicity would entail once transposed into ATS cases), whereas others entailed normative criticisms of the efficacy, utility or propriety of allowing ATS suits against corporations to proceed in the world as we find it. On both levels, I contend that the more recent “discovery” of a role for international criminal law offers a smoother way through. At the conceptual level, my ambition is to plot some of the constitutive relations involved in marrying corporate criminal liability and international law, inviting fresh scholarly treatment of the strengths and weaknesses of this newly betrothed couple; debate that is not colored by expectations specific to the ATS or the scholarly fields that traditionally housed it.

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102 CPS, l'ordre juridique suisse considérait que les personnes morale n'avaient pas la capacité d'agir de manière coupable et devaient par conséquent échapper aux sanctions pénales ('societas delinquere non potest'). For one of the leading commentaries, see MICHEL DUPUIS, BERNARD GELLER & GILLES MONNIER, CP: CODE PÉNAL: PETIT COMMENTAIRE 561 (2012).

<sup>34</sup> John Gerard Ruggie, *Business and Human Rights: The Evolving International Agenda*, 101 AM. J. INT'L L. 819, 830 (2007); There is also a burgeoning literature exploring this field, which emanates from scholars throughout the world. See Joanna Kyriakakis, *Corporate Criminal Liability and the ICC Statute: The Comparative Law Challenge*, 56 NETHERLANDS INTERNATIONAL LAW REVIEW 333–366 (2009); DESISLAVA STOITCHKOVA, TOWARDS CORPORATE LIABILITY IN INTERNATIONAL CRIMINAL LAW (2010); Harmen van der Wilt, *Corporate Criminal Responsibility for International Crimes: Exploring the Possibilities*, 12 CHINESE J. INT'L L. 43–77 (2013); Andrew Clapham, *Extending International Criminal Law beyond the Individual to Corporations and Armed Opposition Groups*, 6 J. Int'l Crim. Just. 899–926 (2008); Michael J. Kelly, *Grafting the Command Responsibility Doctrine onto Corporate Criminal Liability for Atrocities*, 24 EMORY INT'L L. REV. 671 (2010); Grietje Baars, LAW(YERS) CONGEALING CAPITALISM: ON THE (IM)POSSIBILITY OF RESTRAINING BUSINESS IN CONFLICT THROUGH INTERNATIONAL CRIMINAL LAW (2012), <http://discovery.ucl.ac.uk/1348306/1/1348306.pdf> (last visited Jul 12, 2014).



In Part I, I address complicity. I start by showing how this doctrine unduly eclipsed alternative “modes of liability,” many of which implicate corporate malfeasance in broader terms. Even with respect to complicity, I show how both sides to the protracted debate about this doctrine within the ATS process missed important nuances in the criminal law, which were more permissive of these claims than either side presumed. Specifically, scholars and advocates focused on whether the mental element for complicity was “knowledge” or “purpose,” appealing to different sources of law to ground their preference one way or the other. While that debate made sense if one took some of the language of international courts and tribunals at face value, a closer holistic inspection of these standards as applied within criminal trials reveals that both sides to the ATS debate were overly circumspect. More broadly, the debate about the scope of complicity in ATS suits often sought to assign complicity a single status in international law, overlooking the fact that many national courts (including those in Switzerland) apply an entirely different standard to that applicable in ATS litigation. Given this doctrinal pluralism, these new criminal trials demand a normative critique of complicity as a matter of moral philosophy, which was seldom forthcoming within debates about the economic or political desirability of the ATS.

In Part II, I show how corporations can be prosecuted for international crimes in domestic courts in ways that transcend major stumbling blocks that impeded ATS litigation. As I will document, the question of corporate responsibility under the ATS regime was initially assumed. When it later became highly contested, the question was frequently pitched at the level of public international law—can corporations commit international crimes as a matter of the laws of nations?<sup>35</sup> While a certain cohort of ATS advocates always doubted the necessity of that inquiry, the answer to it is made clear by legislation in the adjacent criminal context. In what follows, I confirm how the case against Argor-Heraeus (and the many other companies that could be tried similarly) is grounded in what Harold Koh calls transnational law,<sup>36</sup> bypassing the rarefied debate about corporate personality in public international law generally and customary international law in particular. In essence, international law governing international crimes is “downloaded” into national criminal law, then partners with domestic notions of corporate criminal liability. This, again,

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<sup>35</sup> See *infra* notes 61–64.

<sup>36</sup> Harold Hongju Koh, *Why Transnational Law Matters*, 24 PENN ST. INT’L L. REV., 745 (2006).

is quite different from the methodologies that came before within the ATS, when the issue polarized courts and scholars alike.

In Part III, I explore the upsides of handing these cases to state prosecutors instead of relying on the private right to sue. The ability of global citizenry to initiate proceedings against powerful multinational enterprises before US courts was a key advantage of the ATS as initially conceived. Without doubt, the loss of this right to sue is a tremendous blow, especially in a world where corporate accountability for violations of international law is exceptionally rare. At the same time, there are conceptual, legal and pragmatic reasons why framing these sorts of allegations within corporate criminal liability might at least mitigate *Kiobel's* impact, and in a best case scenario, improve the likelihood of meaningful accountability. In this Part, I point to a range of these upsides, starting with the idea that criminal responsibility may better respond to crimes of this magnitude, culminating in the recognition that it is highly improbable that Argor-Heraeus could be heard within the ATS framework. I argue that a criminal framing has its advantages relative to the civil alternative, which we should now explore with greater scholarly zeal.

Finally, in Part IV, I point to the rationales for punishing corporations and their representatives for violating the strictures of international criminal law, which transcend the compliance narrative that presently pervades the business and human rights discourse in which the ATS frequently appeared. Debates about the propriety of the ATS process were extensive and important, but they tended to take place within the fields of international law and relations exclusively. Quite understandably, that disciplinarian perspective made corporate “compliance” with human rights the metric by which all initiatives would be judged.<sup>37</sup> Here, I argue that while very helpful, that discourse has also left out something an approach grounded in criminal law will insist upon, namely, guilt. In that vein, I show how many of the intuitions around the need for accountability within the business and human rights movement probably constitute what one leading criminal theorist calls “closet retributivism.”<sup>38</sup> When reconsidered in a retributive light, criminal trials not only offer vehicles for vindicating these desires, they also provide convincing normative responses to criticisms leveled at the ATS process.

Let me qualify the foregoing, to avoid misunderstandings from the outset. This turn to criminal responsibility does not mean that all other regulatory options are off the table; it just adds a new point to debates that

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<sup>37</sup> See *infra* notes 111-112.

<sup>38</sup> Michael S. Moore, *Closet Retributivism*, in *PLACING BLAME* 83–103 (2010).

are likely to continue in perpetuity. Like others, I am sensitive to the need for initiatives that address corporate responsibility for human rights violations at a number of intervals, including voluntary projects like the Kimberley Process, financial regulation as in the Dodd-Frank Act, and processes bent on acculturation, of which the UN Global Compact is a prime exemplar.<sup>39</sup> In the same breath, the retributive intuition helps ensure that for all its obvious benefits, Corporate Social Responsibility (“CSR”) does not inhibit more principled forms of accountability. All of these points, which passed underneath the radar during the primacy of ATS litigation, are brought front and center by the “discovery” of a new criminal phase in corporate accountability for violations of international law.

There are several ways to construct my critical comparison between ATS litigation and the new role assigned international criminal law, some more provocative than others. Drawing on David Kennedy, we might inquire whether the ATS might “on balance, and acknowledging its enormous achievement, be more part of the problem in today’s world than part of the solution.”<sup>40</sup> Put differently, if activists, human rights groups

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<sup>39</sup> There is much positive to be said about each of these regulatory initiatives. See FRANZISKA BIERI, *FROM BLOOD DIAMONDS TO THE KIMBERLEY PROCESS* (2010) (arguing that the Kimberley Process has reduced trade in conflict diamonds from 15% during the 1990s to just 1% today); More generally, see Paul Collier, *Laws and Codes for the Resource Curse*, 11 *YALE HUM. RTS. & DEV. L.J.* 9, 22–24 (2008) (assessing the extent to which voluntary codes like the Kimberley Process can be useful in conveying information and realigning incentives within the natural resource sector); On the Dodd-Franks Act, see Galit A. Sarfaty, *Human Rights Meets Securities Regulation*, 54 *VA. J. INT’L L.* 97, 101–102 (2013) (arguing that securities law is an innovative strategy that can promote corporate accountability, if framed appropriately); Georg Kell & John Gerard Ruggie, *Global Markets and Social Legitimacy: The Case of the “Global Compact,”* 8 *TRANSNATIONAL CORPORATIONS* 101–120 (1999) (offering arguments for the UN Global Compact that ultimately carried the day). Of course, whether these initiatives are optimal as a global regulatory scheme for the protection of human rights is debatable. On this score, see Surya Deva’s powerful criticism in Chapter 4 *Existing Regulatory Initiatives: An evaluation of (In)adequacy* in SURYA DEVA, *REGULATING CORPORATE HUMAN RIGHTS VIOLATIONS: HUMANIZING BUSINESS* 65–118 (2012).

<sup>40</sup> David Kennedy, *International Human Rights Movement: Part of the Problem?*, 15 *HARV. HUM. RTS. J.* 101, 101 (2002). Samuel Moyn tacitly suggests that this criticism is true of the ATS, when he laments how it “marginalized other options.” Samuel Moyn, *Why the Court Was Right About the Alien Tort Statute*, *FOREIGN AFFAIRS*, May 2, 2013, <http://www.foreignaffairs.com/articles/139359/samuel-moyn/why-the-court-was-right-about-the-alien-tort-statute> (last visited Jun 15, 2013). I am sympathetic to the intuition, although moving it from rhetorical conjecture to demonstrable truth strikes me as quite challenging. Also, as I mention further below, I see no reason why accountability need *necessarily* crowd out distributive justice projects (even if it has in the past), and therefore disagree with Moyn that we should *only* become “less centered on courts, less

and philanthropic organizations have to choose a single strategy in which to spend limited resources, energy and attention combatting corporate violations of international law globally, we might ask whether they would be wise to invest in corporate criminal liability ahead of ATS litigation. But why insist on just a single strategy? Personally, I do not think the ATS and ICL are necessarily mutually exclusive, that they inexorably crowd out attempts at addressing root causes of egregious human rights violations or unavoidably marginalize wider distributive justice initiatives some, like Samuel Moyn, appear to prioritize.<sup>41</sup> With care, consciousness

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rushed for a quick fix, less concerned with spectacular wrongs to individuals and more with structural evils, and less disconnected from social movements abroad.” *Id.* Finally, I fear that placing the emphasis on “social movements abroad” could inappropriately water down moral responsibilities. To overly-embellish somewhat, Peter Singer uses a person walking past a baby drowning in a puddle as a metaphor for assessing our *moral* responsibilities to the global poor, but Thomas Pogge chastises him for setting the problem up as one of omission—in truth, we are actively participating in the deaths of very many poor people through policies developed and implemented by our institutions. See THOMAS W. POGGE, *WORLD POVERTY AND HUMAN RIGHTS* 123 (2008). If this is true, placing too much of the onus on “social movements abroad” risks asking foreign victims to find solutions for our moral transgressions; taken to an extreme, it asks the baby to find its own authentic/indigenous way out of the puddle we have placed her in.

<sup>41</sup> To my mind, there is something of a tradition among some of the most gifted scholars to claim mutual exclusivity between accountability and distributive justice, without adequately establishing why the characteristics of one have a causal effect that precludes the other. For examples from two of the most brilliant scholars, see SAMUEL MOYN, *HUMAN RIGHTS AND THE USES OF HISTORY* [kindle location 1028] (2014) (arguing that the rise of international criminal justice came at the expense of arguments for greater distributive justice globally). More intensely, see also Baars, *supra* note 34 (effectively arguing that Marxism and ICL are mutually exclusive). Both arguments are exceptionally eloquent, but I suspect that much more would be required as proof to substantiate the mutual exclusivity claimed. Analytically, if Phenomenon A exists and Phenomenon B does not, it does not necessarily follow that Phenomena A and B are mutually exclusive; there could be myriad causal explanations, other than the existence of Phenomenon A, for the failure of Phenomenon B to materialize. In terms of the responsibility of ICL lawyers in particular, if there is a causal relationship between the corporate accountability agenda for violations of ICL and the global polity’s failure to enact a Marxist world government, that contribution is surely causally miniscule next to the innumerable other more potent influences. Thus, I worry that entertaining a theory of complicity of this breadth (in essence, lawyers calling for accountability for violations of ICL by corporations are complicit in capitalist imperialism) would make us all responsible for everything. Exorbitant visions of responsibility like this are often attractive when faced with the daunting extent of global injustice, but they dilute moral responsibility to vanishing point, meaning that perversely, no one is really responsible for anything. All this said, these criticisms are enormously helpful in pointing to the dangers of a blinkered approach bent on accountability *à tout prix*, and exemplars of the intellectual debate I hope these developments spark.

and a modicum of co-ordination, it is at least conceivable that these things might peaceably co-exist or even operate synergistically.

Consequently, in what follows, I prefer to isolate the upsides of corporate criminal liability for international crimes relative to ATS litigation, in the hope of identifying a form of accountability that will operate in a more cohesive and principled fashion with the ATS and other mechanisms moving forward. This, in other words, is a comparison not critique of the ATS, which I view as hugely important. By plotting the normative contours of the new global transnational regime the Argor-Heraeus case arises within, I invite fresh interdisciplinary scholarship, both supportive and critical, about this emergent new alternative paradigm.

Of necessity, I leave much out. I set aside, for instance, that international crimes generally enjoy extraterritorial application,<sup>42</sup> thereby solving the problem that ultimately proved ATS's undoing in *Kiobel*. Likewise, I will not discuss how (like the ATS) international criminal law provides a binding legal framework that contrasts with the many voluntary initiatives predicated on corporations magnanimously professing allegiance to basic international standards.<sup>43</sup> Finally, I do not repeat my earlier work offering a qualified defense of corporate criminal liability in abstract terms,<sup>44</sup> except to reiterate that I view it as defensible under certain conditions and that it is formally intended to go hand in hand with individual criminal liability of corporate officers (instead of shielding

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<sup>42</sup> ANITA RAMASAstry & ROBERT C. THOMPSON, COMMERCE, CRIME AND CONFLICT: LEGAL REMEDIES FOR PRIVATE SECTOR LIABILITY FOR GRAVE BREACHES OF INTERNATIONAL LAW - A SURVEY OF SIXTEEN COUNTRIES (2006) (finding that 11 of 16 states surveyed have jurisdiction over international crimes perpetrated by their nationals extraterritorially); Robert C Thompson, Anita Ramasastry & Mark B Taylor, *Translating UNOCAL: The Expanding Web of Liability for Business Entities Implicated in International Crimes*, 40 GEO. WASH. INT'L L. REV. 841, 854–858 (2008) (discussing extraterritorial jurisdiction for international crimes in a number of countries under the heading “The Extraterritorial Reach of Domestic Laws Creates a Universal Web of Liability”).

<sup>43</sup> JOHN GERARD RUGGIE, JUST BUSINESS: MULTINATIONAL CORPORATIONS AND HUMAN RIGHTS (AMNESTY INTERNATIONAL GLOBAL ETHICS SERIES) 68–78 (2013) (outlining and assessing the value of extant voluntary initiatives). See also Scott Pegg, *An Emerging Market for the New Millenium: Transnational Corporations and Human Rights*, in TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS 21–25 (Jedrzej George Frynas & Scott Pegg eds., 2003) (discussing voluntary approaches and self regulation as bases for corporate compliance with human rights).

<sup>44</sup> See Stewart, *supra* note 28, at 276–281. For an important recent philosophical defense of corporate moral agency, see also, CHRISTIAN LIST & PHILIP PETTIT, GROUP AGENCY: THE POSSIBILITY, DESIGN, AND STATUS OF CORPORATE AGENTS 155–163 (2011).

businesspeople from individual accountability).<sup>45</sup> In fact, with respect to the relationship with businesspeople as individuals, some jurisdictions only allow corporate criminal liability when cases against corporate officers cannot be mounted, reaffirming that like the ATS, this legal device is sometimes built as a kind of safety net to ensure that impunity does not prevail. Ironically again, this is the position in Switzerland, where Argor-Heraeus is seated.<sup>46</sup>

With these caveats in mind, we move to the first area where ICL proper opens up new channels through topics that slowed the ATS's passage.

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<sup>45</sup> Treating individual and corporate criminal liability as mutually exclusive (rather than operating hand in hand) is conceptually dangerous. Only prosecuting business representatives as individuals provides corporations with incentives to scapegoat their employees, whereas a unique focus on the corporation allows individuals to avoid their own moral responsibilities by pointing to the surrounding corporate structure. See, in this regard, BRENT FISSE AND JOHN BRAITHWAITE, *CORPORATIONS, CRIME AND ACCOUNTABILITY*, 36 (Cambridge University Press, 1993), CELIA WELLS, *CORPORATIONS AND CRIMINAL RESPONSIBILITY*, 52 (Oxford, 2<sup>nd</sup> ed., 2001). Out of a concern for this danger, a number of criminal codes emphasize that one form of responsibility should not defeat the other. See generally, *Recommendation, Council of Europe Committee of Ministers to Member States Concerning Liability of Enterprises Having Legal Personality for Offences Committed in Exercise of the Activities*, ¶ 5 (“[t]he imposition of liability on the enterprise should not exonerate from liability a natural person implicated in the offence.”) For specific examples of criminal legislation reflecting this principle, see Austria, *Verbandsverantwortlichkeitsgesetz*, § 3(4) (stating that both a natural person and the legal person may be held responsible for the same offense); Code Pénal Français (stating that the criminal responsibility of the corporate entity does not exclude that of natural persons who are perpetrators or accomplices to the same act.); Gérard Couturier, *Répartition des responsabilités entre personnes morales et personnes physiques*, 111 *REVUE DES SOCIÉTÉS* 307 (Daloz, April 1993). Even the draft ICC Statute, which contemplated a notion of corporate criminal liability for international crimes that was not retained in the final version of the Statute contained text indicating that “[t]he criminal responsibility of legal persons shall not exclude the criminal responsibility of natural persons who are perpetrators or accomplices in the same crimes.” See Article 17(6) of the Draft Statute contained within Preparatory Committee on the Establishment of an International Criminal Court 16 March-3 April 1998, Report of the Inter-Sessional Meeting From 19 to 30 January 1998 in Zutphen, The Netherlands, A/AC.249/1998/L.13, 4 February 1998, at 53.

<sup>46</sup> In Switzerland, corporate criminal liability only arises where a crime or misdemeanor perpetrated during commercial activities cannot be imputed to a particular business representative. Article 102(1) of the Swiss Penal Code states that “[a] crime or a misdemeanor that is committed in a corporation in the exercise of commercial activities confirming to its objects is imputed to the corporation if it cannot be imputed to an identified physical person by reason of the lack of organization of the corporation...” Article 121-3. This approach to corporate criminal liability highlights the doctrine's role as a backstop that prevents against impunity. This position undermines the thesis that corporate criminal liability exists as a means of shielding individuals within businesses; on the contrary, it assumes they have well shielded themselves.

## II. BEYOND THE ATS'S COMPLICITY DEBATE

Complicity, or aiding and abetting, is responsibility for helping.<sup>47</sup> The concept was a favorite device for attributing responsibility to corporations under the ATS scheme. From *Talisman* to *Khulumani*, a range of cases alleged that corporations were complicit in the violations of the laws of nations that security forces, governmental agents or armed factions carried out.<sup>48</sup> Intriguingly, Appellate courts split as to whether a “purpose” standard similar to that contained in the International Criminal Court (“ICC”) Statute, or a “knowledge” standard applied by other international courts and tribunals appropriately reflected the international law ATS cases were compelled to apply.<sup>49</sup> Scholars either sided with the knowledge camp,<sup>50</sup> or lamented the apparently insurmountable methodological

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<sup>47</sup> Out of frustration with the imprecise, archaic and duplicative terms complicity, aiding and abetting, accomplice liability, and accessorial liability, at least one leading criminal theorist has argued that we should simply describe this form of liability as “helping”. See Daniel Yeager, *Helping, Doing, and the Grammar of Complicity*, 15 CRIM. JUST. ETHICS 25, 9 (1996) (arguing that “[t]he one who pulls the trigger kills; the supplier of the weapon helps.”); As far as technical descriptions of accomplice liability go, in my opinion, Alan Sykes has offered the most concise when he states that “[a]n aider and abettor commits an act that contributes in some way to an ultimate harm but is not, by itself, sufficient to cause the harm.” Alan O. Sykes, *Corporate Liability for Extraterritorial Torts under the Alien Tort Statute and beyond: An Economic Analysis*, 100 GEO. L.J. 2161, 2188 (2011). Some would say that this definition is deficient since it fails to demarcate complicity from co-perpetration. On that distinction, see GEORGE FLETCHER, *RETHINKING CRIMINAL LAW* 638–39 and 659–69 (1978). For myself, I view the distinction as normatively unimportant as a matter of substantive criminal law. See James G. Stewart, *The End of “Modes of Liability” for International Crimes*, 25 LEIDEN. J. INT’L L. 165–219, 206–207 (2012) Therefore, I view Syke’s definition as complete.

<sup>48</sup> For helpful compilations of this case-law, see BETH STEPHENS, *INTERNATIONAL HUMAN RIGHTS LITIGATION IN UNITED STATES COURTS* 264–274 (2008); MICHAEL KOEBELE, *CORPORATE RESPONSIBILITY UNDER THE ALIEN TORT STATUTE* 259–275 (2009).

<sup>49</sup> *Presbyterian Church of Sudan v. Talisman Energy*, 582 F.3d 244 (2<sup>nd</sup> Cir. 2009) (finding that purposes and not knowledge is required for aiding and abetting with the ATS context, and interpreting purpose as going to the consummated offence). For cases applying a “knowledge” standard, see *In Re South African Apartheid Litigation* 617 F. Supp. 2d 288 (2009); *Romero v. Drummond Co.*, 552 F.3d 1303 (11<sup>th</sup> Cir. 2008); *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252 (11<sup>th</sup> Cir. 2009).

<sup>50</sup> Chimène I. Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 HASTINGS L.J. 61 (2008); Doug Cassel, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts*, 6 NW. UNIV. J. INT’L HUM. RTS. 304 (2007); David Scheffer & Caroline Kaeb, *Five Levels of CSR Compliance: The Resiliency of Corporate Liability*

ambiguity the whole exercise entailed.<sup>51</sup> For understandable reasons, these debates about the reach of civil liability did not engage with adjacent questions in the criminal law, including: (a) complicity's relationship with other forms of blame attribution; (b) its meaning in comparative criminal law;<sup>52</sup> or (c) broader normative debates about the shape it should take as a moral principle.<sup>53</sup> In what follows, I suggest that Argor-Heraeus is a key moment for the notion of corporate complicity, precisely because it lifts these new questions to the surface.

### A. On Complicity's Eclipsing Effect

Before we begin discussing complicity, it is worth emphasizing that aiding and abetting is not the sole basis for attributing criminal

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*under the Alien Tort Statute and the Case for a Counterattack Strategy in Compliance Theory*, 29 BERKELEY J. INT'L L. 334, 334–357 (2011).

<sup>51</sup> Ingrid Wuerth, *Alien Tort Statute and Federal Common Law: A New Approach*, 85 NOTRE DAME L. REV. 1931, 1945 (2009) (“Standing alone, neither domestic nor international law is a satisfactory source for aiding and abetting norms; it is little wonder that courts devoted substantial resources in trying to answer this question, only to generate a variety of opinions, none of them fully convincing.”).

<sup>52</sup> For my own overview of the various competing theories of complicity from the perspective of comparative criminal theory not international criminal law, see James G. Stewart, *Complicity*, in OXFORD CRIMINAL LAW HANDBOOK (forthcoming 2014) (Markus Dubber & Tatjana Hörnle eds.).

<sup>53</sup> I should disclose, at the outset, that I have defended a unitary theory of perpetration as a global theory of accomplice liability for international crimes, regardless of whether these cases are brought in international or domestic courts. See Stewart, *supra* note 48. For informative criticisms of this theory and my responses to them, see Darryl Robinson, *LJIL Symposium: Darryl Robinson Comments On James Stewart's "End Of Modes Of Liability"*, OPINIO JURIS (Mar. 21, 2012), <http://opiniojuris.org/2012/03/21/ljil-robinson-comments-on-stewart/> (last visited Aug 14, 2014); James G. Stewart, *LJIL Symposium: James Stewart responds to Darryl Robinson*, OPINIO JURIS (Mar. 21, 2012), <http://opiniojuris.org/2012/03/21/ljil-stewart-responds-to-robinson/> (last visited Aug 14, 2014); Jens Ohlin, *LJIL Symposium: Names, Labels, and Roses*, OPINIO JURIS (Mar. 21, 2012), <http://opiniojuris.org/2012/03/23/ljil-names-labels-and-roses/> (last visited Aug 14, 2014); James G. Stewart, *LJIL Symposium: James Stewart Responds to Jens Ohlin*, OPINIO JURIS (Mar. 23, 2012), <http://opiniojuris.org/2012/03/23/ljil-stewart-responds-to-ohlin/> (last visited Aug 14, 2014); Thomas Weigend, *LJIL Symposium: Thomas Weigend comments on James Stewart's "The End of 'Modes of Liability' for International Crimes"*, OPINIO JURIS (Mar. 23, 2012), <http://opiniojuris.org/2012/03/22/ljil-weigend-comments/> (last visited Aug 14, 2014); James G. Stewart, *LJIL Symposium: James Stewart Responds to Thomas Weigend*, OPINIO JURIS (Mar. 23, 2012), <http://opiniojuris.org/2012/03/22/ljil-stewart-responds-to-weigend/> (last visited Aug 14, 2014).



responsibility to commercial actors in war. While complicity is far and away the dominant point of focus in the ATS discourse, as well as in the field of business and human rights writ large,<sup>54</sup> limiting this debate to complicity inappropriately sells the reach of international criminal law short.

In truth, international criminal law has a long history of struggling with a full array of “modes of liability,” from superior responsibility to joint criminal enterprise and far beyond.<sup>55</sup> Although there was some uptake of these different forms of liability in ATS litigation,<sup>56</sup> numerically speaking, these instances were dwarfed by the much larger presence of aiding and abetting liability in corporate cases. Similarly, while scholars sometimes gestured towards these wider doctrinal possibilities,<sup>57</sup> their sage advice often did not receive the attention it deserved, drowned out as it were by the vociferous interest in complicity as a basis for assigning responsibility to corporate actors.<sup>58</sup> By contrast, considering the responsibility of commercial actors (corporations and their officers) in ICL will require a far more involved understanding of the full spectrum of standards on offer, instead of overemphasizing just one limited piece of the far larger puzzle.

In some commercial sectors, this need to bring in other forms of responsibility from ICL is already acknowledged in international law

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<sup>54</sup> See International Commission of Jurists, *CORPORATE COMPLICITY & LEGAL ACCOUNTABILITY*, (2008) Vols I, II and III. Available online at: <http://goo.gl/8UtbD>.

<sup>55</sup> The literature treating the subject is extensive, complex and sophisticated. See, in particular, ELIES VAN SLIEDREGT, *INDIVIDUAL CRIMINAL RESPONSIBILITY IN INTERNATIONAL LAW* (2012); MARK OSIEL, *MAKING SENSE OF MASS ATROCITY* (2009); NEHA JAIN, *PERPETRATORS AND ACCESSORIES IN INTERNATIONAL CRIMINAL LAW: INDIVIDUAL MODES OF RESPONSIBILITY FOR COLLECTIVE CRIMES* (2014); Jens David Ohlin, *Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise*, 5 J. INT'L CRIM. JUST. 69–90 (2007); Amy J. Sepinwall, *Failures to Punish: Command Responsibility in Domestic and International Law*, 30 MICH. J. INT'L L. 251 (2008); Mirjan Damaška, *The Shadow Side of Command Responsibility*, 49 AM. J. COMP. L. 455–496 (2001).

<sup>56</sup> For helpful summaries of the handful of ATS cases that have considered command responsibility (a.k.a. superior responsibility), conspiracy and joint criminal enterprise, see PETER HENNER, *HUMAN RIGHTS AND THE ALIEN TORT STATUTE* 210–225 (2009); BETH STEPHENS, *INTERNATIONAL HUMAN RIGHTS LITIGATION IN UNITED STATES COURTS* 257–264 and 274–276 (2008).

<sup>57</sup> Tarek F. Maassarani, *Four Counts of Corporate Complicity: Alternative Forms of Accomplice Liability under the Alien Tort Claims Act*, 38 N.Y.U. J. INT'L L. & POL. 39 (2005) (discussing four alternative forms of accountability, but not superior responsibility).

<sup>58</sup> In recent years, this doctrinal heterogeneity has only increased through the mass invocation of German notions of responsibility at the ICC, such as co-perpetration and commission through an organization.

circles, even if the relationship is yet to be tested in practice. In September 2008, a group of seventeen States (including the United States, the United Kingdom, China, and South Africa) formally agreed that the ICL concept of *superior responsibility* has a potential role in assigning responsibility for international crimes to company directors and those contracting private military companies.<sup>59</sup> Again, somewhat ironically, this aspect of the turn to ICL is also counterfactually dependent on the U.S. Supreme Court's concern for impunity—it was not until it approved of superior responsibility in the trial of the Japanese General Yamashita after WWII<sup>60</sup> that the doctrine began its rise to prominence within international criminal justice.<sup>61</sup> History aside, the potential significance of superior responsibility for the market in military services reveals just one example of the dangers of treating corporate responsibility as coterminous with complicity; systemically speaking, the fallacy exonerates commercial actors of what normally constitutes egregious wrongdoing.

Moreover, beyond just forms of participation, what about the definition of international crimes themselves? These questions also seem to have escaped close scrutiny in constellating the relationship between commerce, atrocity and ICL. For instance, a number of excellent scholars have argued that “corporations might in theory *commit* war crimes or crimes against humanity, but as a practical matter, history does not

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<sup>59</sup> According to the Montreux Document organized by the ICRC and Swiss government, then signed by 17 other nations, “Superiors of PMSC personnel, such as: a) governmental officials, whether they are military commanders or civilian superiors, or b) directors or managers of PMSCs, may be liable for crimes under international law committed by PMSC personnel under their effective authority and control, as a result of their failure to properly exercise control over them, in accordance with the rules of international law. Superior responsibility is not engaged solely by virtue of a contract.” See *The Montreux Document on Private Military and Security Companies*, 17 September 2008, available online at <http://www.eda.admin.ch/eda/en/home/topics/intla/humlaw/pse/psechi.html> (visited 3 January 2010). Since the date of signing a total of 50 states have endorsed the document.

See <http://www.eda.admin.ch/eda/en/home/topics/intla/humlaw/pse/parsta.html> (visited May 22 2014).

<sup>60</sup> In *Re: Yamashita* 327 U.S. 1, 15 (1946). Richard Lael has written an excellent history of the controversial case, see RICHARD L. LAEL, *THE YAMASHITA PRECEDENT: WAR CRIMES AND COMMAND RESPONSIBILITY IN NUREMBERG MILITARY TRIBUNALS AND THE ORIGINS OF INTERNATIONAL CRIMINAL LAW* (1982).

<sup>61</sup> As Kevin Heller has noted, courts convened after WWII “simply cited Yamashita, decided by the U.S. Supreme Court in 1949, for the existence of the mode of participation.” KEVIN JON HELLER, *THE NUREMBERG MILITARY TRIBUNALS AND THE ORIGINS OF INTERNATIONAL CRIMINAL LAW* 262–263 (2011).

suggest this is a prevalent practice.”<sup>62</sup> This claim is probably a fair empirical observation for many international crimes, but it is not an invariable truth. In fact, a clearer understanding of the precise meaning of some international offenses points to the diametrically opposite conclusion—many corporate actors *commit* the war crime of pillage in modern resource wars,<sup>63</sup> and they frequently do so as direct perpetrators not accomplices. A fulsome analysis of the doctrine governing pillage indicates the term “appropriate” in the definition of the crime incorporates those who harvest resources directly from the ground and those who acquire them from an intermediary.<sup>64</sup> As such, the war crime encapsulates an entire supply chain, without resort to complicity. On both scores, these findings reinforce the idea that complicity is merely one part of a larger story about ICL in corporate contexts that is yet to be fully told.

### B. Doctrinal Infidelity

With the caveat that complicity does not exhaust the full extent of corporate exposure to liability for international crimes, let us consider how debates about complicity in ATS litigation squared with doctrinal understandings of the same concept in ICL. As I suggest at the outset, courts and scholars were divided between *purpose* and *knowledge* as requisite mental elements for accomplice liability throughout much of the ATS’s history; indeed, the debate was a core point of contention constituting the field.<sup>65</sup> Once considered as a matter of ICL pure, however, neither set of arguments appear entirely faithful to the true applied

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<sup>62</sup> Steven Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 495 (2001) (emphasis added). See also William Schabas, *War Economies, Economic Acts, and International Criminal Law*, in PROFITING FROM PEACE: MANAGING THE RESOURCE DIMENSIONS OF CIVIL WAR 60 (Ballenstine et al., eds., 2005) [hereinafter *PROFITING FROM PEACE*] (arguing that “[g]enerally, though, the role of economic actors is more indirect. For example, while it is widely agreed that trade in diamonds helped to fuel conflict in places like Sierra Leone, unless it can be established that diamond traders were actually accomplices in the atrocities committed against civilians, there is little that existing law can contribute.”)

<sup>63</sup> PHILIPPE LE BILLON, *WARS OF PLUNDER: CONFLICTS, PROFITS AND THE POLITICS OF RESOURCES* (2012); MICHAEL KLARE, *RESOURCE WARS: THE NEW LANDSCAPE OF GLOBAL CONFLICT* (2002).

<sup>64</sup> STEWART, *supra* note 3, at 35–37 (showing how at least twenty-six WWII cases involved received stolen property as a basis for pillage, and how the assimilation of theft and receiving is not conceptually problematic, since the receiver also acquires property without the consent of the true owner).

<sup>65</sup> See *infra* notes 49 and 50.

meaning of complicity internationally. In actual fact, both complicity standards were more permissive of these suits against commercial actors than most assumed, and third types exist that leave the door even further ajar. An unintended consequence of the turn to criminal cases is that it may provide an opportunity to refashion accomplice liability in ways that are more faithful to its criminological meaning.

I begin with “purpose.” Within ATS litigation, this elevated standard was often interpreted as demanding a volitional disposition by Talisman, say, towards the violations of international law carried out by the Sudanese armed forces alleged to have used their fuel, roads, and airstrips to attack civilians.<sup>66</sup> Before considering this position as a matter of doctrine, note first how the purpose standard is something of an outlier in comparative criminal terms: to the best of my knowledge, only the U.S., Canada, Israel and the ICC mention “purpose” in their complicity standards.<sup>67</sup> This is highly significant if the interface between ICL and commerce will take place in national criminal courts, which are free to apply their own notions of aiding and abetting rather than those defined in customary international law, which ATS litigation was frequently at pains to decipher. For criminal liability, therefore, the *purpose* debate in ATS caselaw and scholarship was always somewhat *hors-sujet*; the test exists in a miniscule number of jurisdictions that could try these sorts of cases.

Nonetheless, even assuming that international standards of accomplice liability apply, a closer reading of criminal law suggests a significantly broader interpretation of the purpose standard than that adopted by most participants in the ATS process.<sup>68</sup> True, the U.S. Model Penal Code (from whence the international purpose standard originates), states that “[a] person is an accomplice . . . if with the *purpose* of facilitating the

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<sup>66</sup> *Presbyterian Church of Sudan v. Talisman Energy*, 582 F.3d 244 (2d Cir. 2009).

<sup>67</sup> See *infra* notes 58-70. Immediately before this Article went to press, I realized that my own country of citizenship, New Zealand, also stipulates that “[e]very one is a part to and guilt of an offence who . . . (b) does or omits an act *for the purpose* of aiding any person to commit the offence” Crimes Act 1961, § 66(1) (emphasis added). Nonetheless, like Canada, this language is interpreted as requiring only knowledge. See *Mahana Makarini Edmonds v. R.* [2011] NZSC 159, para. 25 (“A party will be liable as an aider and abettor only if he or she had *knowledge* of the essential matters constituting the offence.”) (emphasis added).

<sup>68</sup> Most assumed that “purpose” entailed a volitional commitment to the consummated crime, but David Scheffer and others made astute arguments based on the negotiating history of the ICC to suggest that purpose was really meant to be synonymous with intention. Scheffer and Kaeb, *supra* note 50, at 351–353. In effect, this advocates for interpreting purpose in the same fashions as New Zealand, Canada, Israel and the version of the Model Penal Code discussed below.

commission of the offence . . .”<sup>69</sup> And yet, it goes on to insist in the very next paragraph that “[w]hen causing a particular result is an element of an offense, an accomplice in the conduct causing such result is an accomplice in the commission of that offense if he acts with the kind of culpability, if any, with respect to that result *that is sufficient for the commission of the offense.*”<sup>70</sup> Although this subsequent paragraph changes the meaning of the purpose test entirely, it does not seem to have featured anywhere in the ATS debates. Nonetheless, the missing provision’s impact is likely to be significant, especially in the corporate world.

On the basis of this second overlooked component of the rule, leading American scholars and the vast majority of state jurisdictions in America consider that the purpose requirement goes only to the provision of the assistance (Talisman must have *wanted* to provide armed groups with access to its airfields), leaving the mental element in the crime with which the accomplice is charged to determine the culpability requisite for the attendant consequences (if recklessness suffices for crimes against humanity, Talisman must only be reckless that offering the airfields will lead to crimes against humanity).<sup>71</sup> Leading scholars not only explain that this meaning was intended during the negotiation of the MPC,<sup>72</sup> a comprehensive survey of American state jurisdictions confirms that 47 of 50 states either give “purpose” this meaning or abandon the term entirely.<sup>73</sup> In keeping with this trend, the U.S. Supreme Court recently

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<sup>69</sup> Model Penal Code Commentaries (Philadelphia: American Law Institute, 1985), § 2.06(3)(a), at 296.

<sup>70</sup> *Id.* § 2.06(4) (emphasis added).

<sup>71</sup> I am grateful to participants at the San Diego workshop on the criminal theory of complicity for pointing this out to me, especially Michael Moore and Mitchell Berman.

<sup>72</sup> Robert Weisberg, *Reappraising Complicity*, 4 BUFF. CRIM. L. R. 217, n.51 (2000) (“Arguably, section 2.06(4) [requires] that an accomplice purposefully assist or encourage the principal’s act, while having whatever culpable mental state with respect to the result that is required for liability as a principal”); Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, n.266 (1983) (discussing the negotiating history of the MPC that supports this interpretation); Grace E. Mueller, *The Mens Rea of Accomplice Liability*, 61 S. CAL. L. REV. 2169, 2178–2180 (1987).

<sup>73</sup> John F. Decker, *The Mental State Requirement for Accomplice Liability in American Criminal Law*, 60 S. C. L. REV. 237 (2008) (categorizing aiding and abetting standards in the US into three broad categories, which include (a) specific intent standards, which equate to a strong purpose standard; (b) “statutorily prescribed mental states”, which uses the missing section 2.06(4) language to require whatever mental state is announced in the crime charged to define the mental element required for accomplice liability; and (c) “natural and probable consequences.” Most states fall within category (c), but only three come with (a). The remainder are either category (b), or some variant that fall outside the taxonomy).

stipulated that “for purposes of aiding and abetting law, a person who actively participates in a criminal scheme *knowing* its extent and character intends that scheme’s commission.”<sup>73a</sup>

Foreign understandings of the “purpose” standard for complicity only confirm that indeed, we all misread the term. Canadian criminal law insists that “purpose...is essentially synonymous with ‘intention’ and does not mean desire.”<sup>74</sup> Likewise, Israel adopts precisely the alternative interpretation of purpose that always escaped advocates in the ATS context—like the MPC and the vast majority of states in America, Israeli criminal law interprets its purpose standard as only going to the actus reus of the assistance.<sup>75</sup> There is, as a result, next to no example of complicity in national criminal law that adopted a “purpose” standard like that endorsed in some leading ATS cases. As such, the turn to corporate criminal liability may offer the small number of jurisdictions that apply purpose standards a chance to clarify the international confusion brought about in their names.

Of course, this leaves the ICC Statute. Article 25(3)(c) of the ICC Statute stipulates that “a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that

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<sup>73a</sup> *Rosemond v. United States*, 134 S. Ct. 1240, 1243 (2014). In the same vein, the majority later reports that “The law does not, nor should it, care whether he participates with a happy heart or a sense of foreboding.” Admittedly, the reasoning required to achieve this outcome is less than convincing. As Justice Alito observed in dissent, having reviewed the history of the knowledge and purpose debates up until then, the majority opinion confounds these two standards. Nonetheless, it is tremendously significant that, in practice if not rhetoric, the resulting standard for complicity is knowledge.

<sup>74</sup> The leading case on the proposition is *R v. Hibbert* [1995] 2 S.C.R. 973 (“Parliament’s use of the term ‘purpose’ in s. 21(1)(b) should not be seen as incorporating the notion of ‘desire’ into the mental state for party liability, and that the word should instead be understood as being essentially synonymous with ‘intention’”). For a summary of further cases affirming that purpose does not equal desire in the law governing aiding and abetting in Canada, see DON STUART, *CANADIAN CRIMINAL LAW: A TREATISE* 664 (2011). If reducing purpose to intention seems strange, see Finnis’s explanation of how most English jurisdictions extent intention downwards, whereas “Canadians select ‘purposely’ as the term to be artificially extended.” JOHN FINNIS, *INTENTION AND IDENTITY: COLLECTED ESSAYS* 86 (2011).

<sup>75</sup> Israel, for example, is one of the very few states that use purpose as a mental element for complicity. Nonetheless, like the MPC and the vast majority of states in America, it interprets it far more restrictively than those within the ATS process understood. See Itzhak Kugler, *Israel*, in *THE HANDBOOK OF COMPARATIVE CRIMINAL LAW* 352, 370 (Kevin Jon Heller & Markus Dubber eds.) (citing the Israeli Supreme Court case of CA. 320/99 Plonit v. State of Israel 55(3) PD 22 [1999] for the conclusion that “where the aider only foresees the possibility of the commission of the principal offense, the aider may be convicted if it is his or her desire that should the offense actually be committed, his or her act will facilitate its commission.”).

person: . . . [f]or the *purpose* of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission.”<sup>76</sup> Here, the nuanced additional element of the MPC is sadly missing, and it is less clear that the precision of national understandings of purpose will or should influence the international hermeneutics. Admittedly, we international scholars have always misread the MPC on complicity too,<sup>77</sup> but the future of corporate responsibility for international crimes may quickly correct this. All of the leading commentators on the ICC Statute readily acknowledge that the ICC standard just copied from the MPC.<sup>78</sup> It follows that because the ICC “purpose” standard is “borrowed from the US Model Penal Code, the Code’s test should be adopted.”<sup>79</sup>

Strangely, from the perspective of the criminal law, the competing “knowledge” standard for complicity was probably undersold in ATS litigation, too.<sup>80</sup> Although most ad hoc ICL tribunals claim to be applying knowledge as a mental element for complicity, it frequently dilutes into recklessness in application. This is evident, for instance, from the habitual inclusion within most international criminal judgments of the refrain that “[i]f he is aware that one of a number of crimes will *probably* be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and an abettor.”<sup>81</sup> Clearly, awareness of a *probability* is constitutive of culpable risk-taking, not knowledge. As I have argued at length elsewhere, the numerous applications of this standard in practice corroborate the thesis

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<sup>76</sup> ICC Statute, Article 25(3)(c).

<sup>77</sup> As I say, I am among those guilty of this misreading. See Stewart, *supra* note 48, at 196–199.

<sup>78</sup> KAI AMBOS, TREATISE ON INTERNATIONAL CRIMINAL LAW: VOLUME 1: FOUNDATIONS AND GENERAL PART 165–166 (2013) (acknowledging that the ICC’s use of the term purpose “is borrowed from the Model Penal Code,” then interpreting this standard as requiring “a volitional dimension, beyond mere knowledge.”); ELIES VAN SLIEDREGT, INDIVIDUAL CRIMINAL RESPONSIBILITY IN INTERNATIONAL LAW 128 (2012) (describing the ICC’s “purpose” standard as “akin to a purpose approach of mens reas and reminiscent of the MPC standard and the approach in US federal law to complicity liability”). She concludes that purpose derives from knowledge, is stricter than that adopted in a number of national jurisdictions, and inconsistent with customary international law).

<sup>79</sup> SARAH FINNIN, ELEMENTS OF ACCESSORIAL MODES OF LIABILITY: ARTICLE 25(3)(B) AND (C) OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 201 (2012).

<sup>80</sup> For a more elaborate version of this argument, see Stewart, *supra* note 48, at 192–193.

<sup>81</sup> Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment, ¶ 246 (Int’l Crim. Trib. For the Former Yugoslavia Dec. 10, 1998) (emphasis added). For references to other case-law that also adopts this position, see *Id.* at 137.

that recklessness is the most common test for complicity internationally.<sup>82</sup> In this light, the knowledge camp in ATS litigation was also too circumspect.

Finally, to complete this light speed survey of complicity's likely incongruent application outside the ATS, third standards may very well apply in cases involving corporate responsibility for international crimes if Argor-Heraeus begins a trend. Take the Dutch case *Van Anraat*, where a Dutch businessman was successfully prosecuted as an accomplice to international crimes for selling chemical pre-cursors that Saddam Hussein used to asphyxiate Iraqi Kurds.<sup>83</sup> When faced with the question of whether to defer to the purpose/knowledge debate that captivated ATS litigation or simply to apply Dutch standards, courts in The Netherlands opted for the latter course. In effect, this stance meant that the court applied what continental lawyers call *dolus eventualis*, requiring simply that the accomplice perceived the occurrence of the criminal result as a possible consequence of their assistance and made peace with that possibility.<sup>84</sup> If ATS cases are transplanted into the many civil law jurisdictions that entertain this concept (as corporate criminal responsibility will often

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<sup>82</sup> *Id.* at 192–193. The doublespeak (claiming knowledge but really requiring recklessness) is certainly troubling, but recall that this interpretation is inspired by national jurisdictions that do exactly the same. WAYNE R. LAFAYE, *PRINCIPLES OF CRIMINAL LAW* 725–727 (2nd ed. 2010) (discussing the “natural and probable consequence” rule in various American jurisdictions, which is very similar to that adopted in international criminal justice); JACQUES-HENRI ROBERT, *DROIT PÉNAL GÉNÉRAL* 350 (6e éd. 2005) (setting out how an accomplice's acts are unlawful if the crime actually committed injures the same *legal interest* as that the accomplice considered); Ashworth, *supra* note 99, at 415–420 (discussing English jurisprudence that makes it adequate that the accomplice knows of the “type” of crime the perpetrator will commit, concluding that this “introduces reckless knowledge as sufficient.”).

<sup>83</sup> *Prosecutor v. Van Anraat*, May 9, 2007, LJN: BA6734, *Gerechtshof 's-Gravenhage*, 2200050906-2, (Neth.). For leading commentary on this and other related Dutch cases, see Harmen G. van der Wilt, *Genocide, Complicity in Genocide and International v. Domestic Jurisdiction: Reflections on the van Anraat Case*, 4 *J. INT'L CRIM. JUST.* 239 (2006); Wim Huisman & Elies Van Sliedregt, *Rogue Traders Dutch Businessmen, International Crimes and Corporate Complicity*, 8 *J. INT'L CRIM. JUST.* 803 (2010); Larissa van den Herik, *The Difficulties of Exercising Extraterritorial Criminal Jurisdiction: The Acquittal of a Dutch Businessman for Crimes Committed in Liberia*, 9 *INT'L CRIM. L. REV.* 211 (2009).

<sup>84</sup> George Fletcher provides a typically clear English-language explanation of *dolus eventualis*. See GEORGE FLETCHER, *RETHINKING CRIMINAL LAW* 445–448 (1978); To see a summary of jurisdictions that allow for *dolus eventualis*, see JEAN PRADEL, *DROIT PÉNAL COMPARÉ* 38 (3rd ed. 2008). On a conceptual plane, Greg Taylor has offered an outstanding criticism of the assimilation of *dolus eventualis* to intention, even in German criminal theory. See Greg Taylor, *Concepts of Intention in German Criminal Law*, 24 *OXFORD J. LEGAL STUDIES* 99 (2004).



permit), the results will likely be quite different to those that materialized in ATS litigation.<sup>85</sup>

Overall, the plurality of complicity standards leading ATS scholars found so ill suited to calculating a single test in customary international law<sup>86</sup> is less of a problem if these cases are heard in national criminal courts. In such instances, these national criminal courts will apply the standard of accomplice liability that is native to that forum, preferring a single local standard over a rule artificially distilled from the catalogue on offer globally. As a matter of doctrine, then, a turn to international criminal justice offers both nuance and a greater degree of precision than was evident within ATS litigation. This is not to say that a plurality of standards of accomplice liability is easy to work with, will be understood by relevant audiences in far-away places, will prevent against corporate races to the bottom, or will ensure the much coveted “level playing field” globally. In fact, in a forthcoming piece, I argue that these and a range of other attendant difficulties militate in favor of adopting a single global standard for complicity.<sup>87</sup> The only question is, what should that standard be?

### C. *Towards a Moral Theory of Accomplice Liability*

During the course of the ATS’s lifespan, there was a real paucity of normative engagement with the theory of accomplice liability.<sup>88</sup> The turn

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<sup>85</sup> That eventuality may also be close at hand—*dolus eventualis* is sufficient for complicity in Switzerland. DUPUIS, GELLER, AND MONNIER, *supra* note 33 at 191 (“Le complice doit avoir l’intention de favoriser la commission de l’infraction, mais le dol éventuel suffit.”).

<sup>86</sup> Wuerth, *supra* note 51, at 1945 (arguing that complicity debates in ATS litigation were plagued by ambiguity because of different national and international notions of the concept).

<sup>87</sup> James G. Stewart, *Ten Reasons for Adopting a Universal Concept of Participation in Atrocity*, in PLURALISM IN INTERNATIONAL CRIMINAL LAW (Elies Van Sliedregt & Vasiliev eds., 2014), <http://ssrn.com/abstract=2343392> (arguing for a universal standard of blame attribution, including complicity, for the following ten reasons: to ensure a level playing field; to restrain illiberal excess, to prevent arbitrary choices of law, to establish clear standards, to ensure that standards are neutral between traditions, that they are not imposed through force, to abandon custom as a basis for determining these standards, to overcome the Western technocratic legalese that unnecessarily pervades much of this criminal doctrine, to perform a didactic function for Western states instead of just for others, to simplify practice, and to save costs).

<sup>88</sup> Alan Sykes’ thoughtful article is one of the few exceptions. According to Sykes, we should abandon both the knowledge and purpose standards for accomplice liability in favor of a test that turns on whether the company had substantial leverage over the

to ICL, however, presents an opportunity to rectify this relative silence by drawing on the relationship between moral philosophy and the theory of criminal law to ensure that international notions of accomplice liability are assigned meanings that are politically representative, but neither illiberal nor unjustifiably permissive. As things transpire, there is much debate about what standard of accomplice liability is normatively preferable within these fields, which will become suddenly relevant once these cases become more about moral blame than civil recovery. Christopher Kutz, for example, argues that international criminal courts have extended aiding and abetting too far,<sup>89</sup> whereas Michael Moore and innumerable

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violation in question. Alan O. Sykes, *Corporate Liability for Extraterritorial Torts under the Alien Tort Statute and beyond: An Economic Analysis*, 100 GEO. L.J. 2161 (2011) (“the standards for corporate liability might usefully evolve to target liability toward scenarios in which the corporation plausibly has substantial leverage over the conduct of the host state as well as cases in which the involvement of the host state is peripheral and the primary misconduct is attributable to corporate agents.”). I agree with Sykes that we should abandon both the purpose and knowledge tests as static standards, but I later disagree with him that the substantial leverage standard he argues for makes any sense in the criminal law. For my normative critique of both knowledge and purpose standards of complicity, see Stewart, *supra* note 48, 195–199. I suspect, however, that there is no necessary disagreement between us on this score, since I agree with his insightful observation that “It is not obvious that the international standards for criminal aiding and abetting, which afford a basis for criminal sanctions against individuals such as imprisonment, are the appropriate standards in relation to civil liability.” *Id.* As an aside, I agree with that proposition, but think that negligence should be the appropriate standard for corporate complicity in a civil context in order to tie complicity to due diligence requirements. That position is tangential to this project, however, so I do not defend it here.

<sup>89</sup> Christopher Kutz, *The Philosophical Foundations of Complicity Law*, in THE OXFORD HANDBOOK OF PHILOSOPHY OF CRIMINAL LAW 22 (John Deigh & David Dolinko eds., 2011) (“The weaker criterion in international criminal law, which requires only recklessness on the secondary party’s part as to the principal’s commission of the crime, represents a substantial, even dangerous, weakening of the standard, and so confuses complicity law”). For skepticism about Kutz’s misgivings about reckless complicity, see Sanford H Kadish, *Reckless Complicity*, 87 J. CRIM. L. & CRIMINOLOGY 369, 386 (1996) (arguing that reckless complicity need not raise objections that are not already applicable to reckless perpetration). Andrew Simester, *The Mental Element in Complicity*, 122 L. Q. REV. 578–601 (2006) (expressing concern about mental elements for complicity lower than “purpose”, concluding that “[t]he better starting point is to distinguish culpability from responsibility, and to focus on the latter.”); Simon Bronitt, *Defending Giorgianni - Part One: The Fault Required for Complicity*, 17 CRIMINAL LAW JOURNAL 242 (1993); Simon Bronitt, *Defending Giorgianni - Part Two: New Solutions for Old Problems in Complicity*, 17 CRIMINAL LAW JOURNAL 305–318 (1993) (defending an elevated mental element for accomplice liability in Australia); Glanville Williams, *Complicity, Purpose and the Draft Code - 1*, CRIMINAL LAW REVIEW 4 (1990); Glanville Williams, *Complicity, Purpose and the Draft Code - 2*, CRIMINAL LAW REVIEW 98 (1990) (raising a series of perverse scenarios that would arise if accomplice liability is assigned a lower

others stand opposed to a strong purpose standard for accomplice liability across all crimes.<sup>90</sup> The point is that regardless of how complicity is defined as a matter of doctrine, or who prevails in the contest between “knowledge” and “purpose” if this binary is the universe of available options, the rise of corporate responsibility will place new emphasis on normative debates about the shape accomplice liability should take globally.<sup>91</sup>

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mental element, including, most memorably, the responsibility of the author Agatha Christie for copycat crimes her imaginative novels inspire). In a forthcoming piece, I respond to Glanville Williams’ *reductio ad absurdum* and other misgivings mentioned here. See James G. Stewart, *The Accomplice Liability of Arms Vendors: A Conceptual Defense*, forthcoming.

<sup>90</sup> Michael S Moore, *Causing, Aiding, and the Superfluity of Accomplice Liability*, 156 U. PA. L. REV. 395 (2007) (arguing that because all forms of complicity share the same causal structure as perpetration, there are no metaphysical bases for granting complicity its own separate ontology); I take Gideon Yaffe to be against a strong purpose standard too, when he argues that an intention to contribute to the crime is sufficient, and that “an intention can commit one to an event’s occurrence without committing one to promoting the event, or making it more likely to take place.” See Gideon Yaffe, *Intending to Aid*, 33 LAW & PHIL. 1–40, 1 (2014); Sanford H Kadish, *Reckless Complicity*, 87 J. CRIM. L. & CRIMINOLOGY 369 (1996) (arguing that recklessness should suffice for complicity when it is sufficient for perpetration of the crime in question, which by definition, means purpose should not apply as a mental element for complicity across the board); LARRY ALEXANDER & KIMBERLY KESSLER FERZAN, *CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW* 7-10 (1 ed. 2009) (arguing that insufficient concern is the baseline for all forms of criminal responsibility, although controversially, they would carve out a safe-habor for commerce). Based on empirical studies of expectations in the community, Paul Robinson and John Darley also found “stark disagreement” with the purpose standard for complicity. See PAUL ROBINSON & JOHN M DARLEY, *JUSTICE, LIABILITY AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW* 103 (1996) (concluding that “[f]rom the point of view of our respondents, the culpability requirement as to result should not be elevated to purposeful... instead, the offense should be graded according to the degree of culpability that the accomplice shows.”). Foreign theorists are seemingly unanimous in their disagreement with the purpose standard. See e.g., Claus Roxin, *Strafrecht, Allgemeiner Teil. Bd. 2: Besondere Erscheinungsformen der Straftat* (1. A. ed. 2003), 231 ff. (defending *dolus eventualis* as the lower limit of accomplice liability); ENRIQUE GIMBERNAT ORDEIG, *AUTOR Y CÓMPLICE EN DERECHO PENAL X* (2006) (same); DIETHELM KIENAPFEL, *DER EINHEITSTÄTER IM STRAFRECHT* (1971) (arguing against an elevated mental element for complicity in favor of a dynamic standard that correlates with that announced in the particular crime a defendant is charged with); THOMAS ROTSCH, “EINHEITSTÄTERSCHAFT” STATT TÄTHERRSCHAFT: ZUR ABKEHR VON EINEM DIFFERENZIERENDEN BETEILIGUNGSFORMENSYSTEM IN EINER NORMATIV-FUNKTIONALEN STRAFTATLEHRE (2009) (same). Again, for my own (neutral) synthesis of these competing theories of accomplice liability, see James G. Stewart, *Complicity*, in OXFORD CRIMINAL LAW HANDBOOK (forthcoming 2014) (Markus Dubber & Tatjana Hörnle eds.)

<sup>91</sup> As I mention earlier, I have argued that ICL should adopt what continental lawyers call a unitary theory of perpetration, where complicity shares the same elements as

This is especially true if there is ever some political appetite to consider promulgating a universal standard, but these questions will inevitably resurface regardless. Take the recent “specific direction” affair. Earlier this year, the ICTY Appeals Chamber rendered a judgment in the case of Momčilo Perišić declaring that the actus reus of complicity must be “specifically directed” towards the consummated crime in order to constitute complicity,<sup>92</sup> but the Special Court for Sierra Leone disagreed in the Charles Taylor appeal some months later,<sup>93</sup> and the ICTY Appeals Chamber ultimately reversed itself in a subsequent proceeding. Although I certainly accept that specificity is a recurrent issue in the theory of aiding and abetting, I have written at length criticizing “specific direction” as constructed in ICL, arguing that this new standard is inconsistent with customary international law, without precedence in doctrinal understandings of complicity anywhere, and at odds with theoretical accounts of accomplice liability.<sup>94</sup> Intriguingly, however, ATS litigation was struggling with this confused concept well before it attracted any attention internationally.

In expressing apprehension about the curious idea of “specific direction” as a form of actus reus, one appellate judge in the *Khulumani* litigation pointed out that:

I note a possible tension in the tribunals’ definition aiding and abetting under which the necessary mens rea is knowing assistance..., yet requires that the act of assistance be ‘specifically directed to assist the perpetration of a specific

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perpetration, and therefore disappears into a more capacious single notion of criminal responsibility. I argue that this should be the case whenever international crimes are charged, whether before international criminal courts and tribunals or national courts. See Stewart, *supra* note 48. For the beginnings of a debate that I hope continues with corporations (and other actors) in mind, see Darryl Robinson, Jens Ohlin and Thomas Weigend’s criticisms of my earlier argument and my responses to them. *Infra* note 53.

<sup>92</sup> Prosecutor v. Perišić, Case No. IT-04-81-A, Judgment, (Int’l Crim. Trib. Yugo., Feb. 28, 2013).

<sup>93</sup> Prosecutor v. Charles Ghankay Taylor, Case No.SCSL-03-01-A-1389, Appeal Judgment, 5–30 (SCSL Sept. 26 2013).

<sup>94</sup> James G. Stewart, THE ICTY LOSES ITS WAY ON COMPLICITY – PART 1 OPINIO JURIS, <http://opiniojuris.org/2013/04/03/guest-post-the-icty-loses-its-way-on-complicity-part-1/> (last visited Feb 13, 2014); James G. Stewart, THE ICTY LOSES ITS WAY ON COMPLICITY – PART 2 OPINIO JURIS, <http://opiniojuris.org/2013/04/03/guest-post-the-icty-loses-its-way-on-complicity-part-2/> (last visited Feb 13, 2014); James G. Stewart, “SPECIFIC DIRECTION” IS UNPRECEDENTED: RESULTS FROM TWO EMPIRICAL STUDIES EJIL: TALK!, <http://www.ejiltalk.org/specific-direction-is-unprecedented-results-from-two-empirical-studies/> (last visited Feb 13, 2014). For a summary of my writings on “specific direction,” see <http://www.law.ubc.ca/faculty/stewart/direction.html>.

crime.’ I express no view on how, if at all, this possible tension might be resolved.<sup>95</sup>

The inclusion of “if at all” was prescient, since the possible tension the judge pointed to was in fact an important contradiction soon to be overturned.<sup>96</sup> The implications of this single anecdote are, nonetheless, significant: first, ATS cases can also have a didactic role for the turn to corporate criminal liability for international crimes (underscoring the possibility of synergies I mentioned by way of introduction); second, these sorts of questions can only be adequately resolved within a philosophical robust vision of accomplice liability; and finally, more and more human rights advocates will probably see themselves weighing in on essentially philosophical debates with increasing frequency. Human Rights Watch, for instance, publicly opposed “specific direction” on principled grounds.<sup>97</sup>

There may be more of this to come if ICL assumes some of the load the ATS was traditionally asked to carry. A leading ATS advocate, for instance, has argued that “business as usual or not, if corporations are complicit in human rights violations, the victims of the abuses have a legal right to compensation from those corporations.”<sup>98</sup> And yet, criminal theorists beg to differ. In the Anglo-American world, intellectual leaders like George Fletcher, Andrew Ashworth and Anthony Duff oppose the application of complicity to “normal” business transactions,<sup>99</sup> and an

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<sup>95</sup> *Khulumani v. Barclay National Bank Ltd*, 504 F.3d 254 (2d Cir. 2007); *Ntsebeza v. Daimler Chrysler Corp*, 504 F.3d 254 (2d Cir 2007), n.15.

<sup>96</sup> The ICTY recently overturned its own previous caselaw that had upheld the “specific direction” standard. See *Prosecutor v. Šainović et al*, Case No. IT-05-87-A, Judgment, (2014). I should be clear, however, that while I view “specific direction” as a contradiction when treated as part of the actus reus, I have pointed to the need to consider these types of considerations as justifications in international criminal law. For theoretical literature discuss the relationship between complicity and justifications in the criminal law, see Douglas Husak, *Justifications and the Criminal Liability of Accessories*, 80 J. CRIM. L. & CRIMINOLOGY 491 (1989); Hans-Ludwig Schreiber, *Problems of Justification and Excuse in the Setting of Accessorial Conduct*, 1986 BYU L. REV. 611 (1986).

<sup>97</sup> Kenneth Roth, *A Tribunal’s Legal Stumble*, N. Y. TIMES, July 9, 2013, <http://www.nytimes.com/2013/07/10/opinion/global/a-tribunals-legal-stumble.html> (last visited Feb 13, 2014). I advised Human Rights Watch’s lawyers about “specific direction” prior to the Op-ed’s publication, although I never saw a written draft.

<sup>98</sup> Beth Stevens, *The Amoralty of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT’L L. 45, 46 (2002).

<sup>99</sup> The tendency among theorists of criminal law is to treat the shopkeeper’s complicity as omission liability, thereby absolving the shopkeeper of the responsibility to refuse the sale. See GEORGE FLETCHER, *RETHINKING CRIMINAL LAW* 420–421 (1978) (“The

extensive literature in German criminal theory questions the propriety of punishing “neutral acts,” viz. practices that further crimes but that remain “neutral” insofar as they arise through and are typical for an individual’s profession.<sup>100</sup> Although, personally, I am not convinced by these arguments,<sup>101</sup> they do highlight a fresh set of conceptual problems that did not register within debates about the ATS. With any luck, considering these issues now in the context of corporate criminal liability for international crimes will bring us closer to a justifiable moral account of this form of accountability.

At the risk of laboring the point, let me again insist how significant this shift in perspective will be for scholarly treatment of these problems. In an thoughtful recent article, Daniel Abebe argues that the emphasis on doctrine within ATS litigation and scholarship “masks underlying international relations theory assumptions that are the true motivations of the federal incorporation of CIL and international human rights litigation under the ATS.”<sup>102</sup> While that may well be true, the foregoing shows how both doctrine *and* international relations theory mask the deeper questions of moral responsibility that arise from these cases and how reframing these allegations in ICL brings these moral problems into sharper relief. Put differently, insisting on a criminal approach to the accountability of commercial actors for atrocity recalibrates the analysis by rebalancing the undervalued moral beneath with the widely disputed political above.<sup>103</sup>

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supplier knowingly contributes to the crime, but the question is whether he must deviate from the ordinary course of commercial life in order to hinder his customer’s criminal plan.”); R A Duff, “*Can I Help You?*” *Accessory Liability and the Intention to Assist*, 10 LEGAL STUDIES 165–181, 178–180 (1990) (“If it is not our responsibility, in law, to go out of our way to prevent the occurrence of harms or crimes which we did not ourselves originate, why should the shopkeeper have a legal responsibility to go out of her normal way to prevent her customers taking criminal advantage of her services?”); ANDREW ASHWORTH, *PRINCIPLES OF CRIMINAL LAW* 412 (6 ed. 2009) (“the shopkeeper is simply selling goods in the normal course of business, and the borrower is merely fulfilling a duty to restore the goods to their owner. If the law were to regard either of these acts as ‘aiding’ it would be requiring the defendants to do something abnormal in the circumstances and - in effect - punishing them for the omission to do the abnormal thing.”)

<sup>100</sup> See, e.g., PETER RACKOW, *NEUTRALE HANDLUNGEN ALS PROBLEM DES STRAFRECHTS* (2007); HANS KUDLICH, *DIE UNTERSTÜTZUNG FREMDER STRAFTATEN DURCH BERUFSBEDINGTES VERHALTEN* (2004).

<sup>101</sup> See James G. Stewart, *The Accomplice Liability of Arms Vendors: A Conceptual Defense* (forthcoming, 2015).

<sup>102</sup> Daniel Abebe, *Not Just Doctrine: The True Motivation for Federal Incorporation and International Human Rights Litigation*, 29 MICH. J. INT’L L. 1, 1 (2007).

<sup>103</sup> Ideally, of course, the moral theory would intersect with the political as is the case, for instance, in Thomas Pogge’s exceptional treatment of moral responsibility for global

This recalibration emerges as a recurrent theme—as we will observe later, complicity is just one site where this reorientation will have significant implications if cases like Argor-Heraeus materialize (and perhaps, among scholars, even if they do not).

### III. TRANSCENDING THE ATS'S IMPASSE ON CORPORATE LIABILITY

Whether corporations can be held liable for international crimes was another perennial point of contestation in ATS litigation.<sup>104</sup> Initially, ATS cases targeted only individuals, but as I mentioned earlier, the attraction of larger awards and the sheer extent of corporate malfeasance in global markets soon saw a shift to commercial cases.<sup>105</sup> As a matter of history, courts began by simply assuming that corporations could be sued under the rubric of the ATS and this practice caught on as one court uncritically cited another, but the apparently settled practice was interrupted by a sudden *prise de conscience*—the assumption might be false.<sup>106</sup> Initially, *Kiobel* was pegged to address the question of corporate responsibility for international crimes based on the laws of nations, until a second surprise in the form of a re-argument order pre-empted the question. Ultimately,

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poverty. See Pogge, *supra* note 40. In fact, Pogge's project is remarkably similar to my own, in that we both deny state sovereignty the ability to impede the reach of basic moral responsibilities. We deny, therefore, Thomas Nagel's (and others) view that moral responsibilities (of businesspeople and their corporations) are particular to nation states. See Thomas Nagel, *The Problem of Global Justice*, 33 PHIL. & PUB. AFF. 113–147 (2005); In any event, Grietje Baars' excellent Marxist criticism of this discourse as normalizing the excesses of capitalism seems dangerous in prioritizing the political exclusively, without adequate regard to the moral. A Marxist system of government way well diminish the frequency of resource wars, but will it also eviscerate basic moral principles like complicity? Baars, *supra* note 34. Again, I believe the moral and political come apart, are not necessarily antagonistic, and require reconciliation.

<sup>104</sup> Prior to the *Kiobel* decision, the Second Circuit had itself rendered contradictory decisions on the matter, as had a range of other appellate courts. For a full history, see Wuerth, *supra* note 14, at 605.

<sup>105</sup> Julian G. Ku, *The Curious Case of Corporate Liability Under the Alien Tort Statute: A Flawed System of Judicial Lawmaking*, 51 VIRGINIA J. INT'L L. 353, 357–363 (2010).

<sup>106</sup> *Id.*; For Eugene Kontorovich, the decision took practitioners and academics by surprise. Eugene Kontorovich, *Kiobel Surprise: Unexpected by Scholars but Consistent With International Trends*, 89 NOTRE DAME L. REV. 21 (2014) (stating that the only treatment of the question of extraterritoriality came in 2003, within a student note, and the issue was not raised by scholars or anyone else); There were, however, early calls for jurisdictional limitations on the scope of the ATS. See John M. Rogers, *The Alien Tort Statute and How Individuals Violate International Law*, 21 VAND. J. TRANSNAT'L L. 60 (1988) (concluding the article by pointing out that “[a] meaningful jurisdictional interpretation of the Alien Tort Statute is the logical alternative.”).

extraterritorial jurisdiction proved ATS's downfall for "foreign cubed" cases, leaving the corporate issue hanging. In what follows, I argue that ICL offers a decidedly less thorny path through these problems to the desired destination.

### A. *From Custom to Legislation*

The debate about corporate liability under the ATS frequently focused on the status of corporations in customary international law—eminent international jurists were commissioned to write expert briefs in *Talisman* declaring that custom knew of no such thing as a corporate international crime,<sup>107</sup> and in typically erudite form, José Alvarez cautioned against bequeathing international personality on corporations so quickly if our concern was human dignity.<sup>108</sup> In response, human rights advocates wisely beat retreat to general principles of law,<sup>109</sup> in order to showcase how corporate responsibility for serious torts was a hallmark of legal systems everywhere, even if state practice of this type of case is hard to come by.<sup>110</sup> In a third strategy, many appealed to federal common law as a source for corporate responsibility,<sup>111</sup> rightly pointing out that "in legal

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<sup>107</sup> See the Briefs of Professors Crawford, Greenwood, and Shaw in *Presbyterian Church of Sudan v Talisman Energy, Inc.* 582 F.3d 244 (2d Cir. 2009) and 131 S.Ct 79 (2010) (No. 09-1262).

<sup>108</sup> José Alvarez, *Are Corporations "Subjects" of International Law?*, 9 SANTA CLARA J. INT'L L. (2011).

<sup>109</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013) *Brief of Amici Curiae Center For Constitutional Rights, International Human Rights Organizations and International Law Experts In Support of Petitioners*, No. 10-1491, (filed July 13, 2011).

<sup>110</sup> By chance, Philip Alston and Bruno Simma had argued for a very similar approach in the field of international human rights generally, several decades beforehand. See Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AUST. YBIL 82 (1988) (arguing that an over-reliance on customary international law was often unconvincing whether there was little state practice to support the contention, instead preferencing general principles of law as an alternative basis for producing international human rights norms).

<sup>111</sup> Wuerth, *supra* note 51, at 1933 ("applying international law as part of a federal common law that governs all aspects of ATS may change the outcome of cases that turn on issues like secondary and corporate liability.") At least two courts followed this approach, and it is evident in Judge Leval's separate opinion in *Kiobel*. See *In re Agent Orange Product Liability Litigation*, 373 F. Supp. 2d 7, 59 (E.D.N.Y. 2005); *In re South Africa Apartheid Litigation*, 346 F. Supp. 2d 538, 546 (S.D.N.Y. 2004); *Kiobel v. Royal Dutch Petroleum*, Nos. 06-4800-cv, 2010 WL 3611392, (2d Cir. Sept. 17, 2010) (Leval, J., concurring). Julian Ku, however, criticizes this reasoning for failing to take into



parlance one does not refer to the tort of ‘corporate battery’ as a cause of action.”<sup>112</sup> Part of the attraction of ICL pure, however, is that it need not rely on customary international law or common law at all.

Legislation enables corporate criminal liability for international crimes in many national systems, through a quintessentially transnational legal process. To borrow from Harold Koh’s computing metaphor, transnational law is a kind of domestic/international hybrid that, in this instance at least, takes the form of a “download” from international to domestic.<sup>113</sup> International law defines the international crimes, then these offenses are incorporated into national criminal law through cross-reference or (to mix the metaphor slightly) a copy and paste. Once within the national sphere, the international-crimes-made-national partner with whatever domestic standards of blame attribution come with the system. There are three dominant methodologies by which corporate criminal liability for international crimes is achieved through this process, but each of them depends on legislative provisions that make this coupling between corporate criminal liability and international crimes *explicit* to varying degrees, and each dispenses with customary international law or common law entirely.

First, a large number of states that adopt a comprehensive criminal code dedicate a specific provision within these codes to corporate criminal liability, before going on to prohibit international crimes in subsequent sections. In Australia, for example, the Commonwealth Criminal Code of 1995 first states that “[t]his Code applies to bodies corporate in the same way as it applies to individuals,” then explicitly lists the full panoply of modern international crimes barring only aggression.<sup>114</sup> In Europe, half of

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account the Supreme Court’s language in *Sosa*, which emphasized that international law governs forms of responsibility within ATS suits. See *Ku*, *supra* note 105, at 392–394.

<sup>112</sup> *Doe v. Exxon Mobil Corp.*, 654 F.3d 11 (D.C. Cir. 2011), at 54.

<sup>113</sup> Koh, *supra* note 36, at 745.

<sup>114</sup> See § 12.1(1), Commonwealth Criminal Code Act 1995 (“This Code applies to bodies corporate in the same way as it applies to individuals.”). For an analysis of the potentiality of these provisions, see Joanna Kyriakakis, *Australian Prosecution of Corporations for International Crimes*, 5 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 809 (2007). For comparable provisions, see § 48(a), Norwegian General Civil Penal Code; Section 5, Belgian Criminal Code (“[t]oute personne morale est pénalement responsable des infractions qui sont intrinsèquement liées à la réalisation de son objet ou à la défense de ses intérêts, ou de celles dont les faits concrets démontrent qu’elles ont été commises pour son compte.”); Likewise, Art. 121 of the French Penal Code is translated into English as “Legal persons, with the exception of the State, are criminally liable for the offenses committed on their account by their organs or representatives.” Francophone scholars show renewed interest in corporate criminal liability within Europe, including its intersection with international crimes. See e.g., LA RESPONSABILITÉ PÉNALE DES

the national legal systems allow corporations to be convicted of all crimes announced in the criminal code, because these states deliberately decided to construct a concept of corporate criminal liability that applied to *all* criminal offences.<sup>115</sup> By this legislative method, much of the doctrinal debate about corporate liability in ATS litigation and scholarship falls away.

Second, a range of states create corporate criminal liability within their criminal codes, then specify a limited subset of criminal offenses that corporations can commit. Sometimes, this subset includes international offenses. To stay with Europe momentarily, nine states designate a circumscribed class of criminal offenses that corporate actors can commit,<sup>116</sup> three of which explicitly extend corporate criminal liability to “crimes within the jurisdiction of the International Criminal Court.”<sup>117</sup> By this method, too, corporations can be held criminally responsible for international crimes without engaging in the contested methodologies that hampered the ATS. Admittedly, these examples represent just a small fraction of the world’s legal systems, but the explanation demonstrates the method by which certain criminal jurisdictions construct corporate responsibility for international crimes through legislation. On this reading, corporate responsibility for international crimes is the latent legal possibility the ATS once was, just in considerably more places.

Third, in a slightly more circuitous route, another group of jurisdictions have promulgated separate legislation mandating that the term “person” (or its equivalent) be read as including both natural and legal persons in all other legislative enactments. In the United States, for instance, the War Crimes Act stipulates that “whoever” commits a war crime is subject to criminal punishment including fine, imprisonment and death.<sup>118</sup> The Dictionary Act of 2000 states that “[i]n determining the meaning of any Act of Congress... the words ‘person’ and ‘whoever’ include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.”<sup>119</sup> One should, of course,

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PERSONNES MORALES: PERSPECTIVES EUROPÉENNES ET INTERNATIONALES, 30 (Geneviève Giudicelli-Delage & Stefano Manacorda eds.).

<sup>115</sup> BONDY, VERMEULEN, AND RYCKMAN, *supra* note 31, at 80–84.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> 18 U.S.C. § 2441(a) (2006).

<sup>119</sup> Dictionary Act, 1 U.S.C. § 1 (2000). For similar results in Canada, see the combined effect of section 35 of the Interpretation Act, R.S. 1985, c. I-21 and the Canadian Crimes Against Humanity and War Crimes Act (S.C. 2000, c. 24). Section 6(1) of the Canadian Crimes Against Humanity and War Crimes Act states that: “Every person who, either before or after the coming into force of this section, commits outside Canada

(a) genocide,

guard against the expectation that this type of reading will always pay dividends—the U.S. Supreme Court has already rejected an analogous argument in a cognate context.<sup>120</sup> Still, the damage caused by this precedent (if it does migrate beyond the Torture Victims Protection Act) is contained in the field of corporate criminal liability for international crimes. How so? Well, because most legal systems have absorbed the century-old U.S. precedent accepting corporate criminal liability,<sup>121</sup> its potential coupling with international crimes cannot be shut down by any single judicial finding.

Fourth, in at least two international courts, corporate criminal liability for international crimes is either a newly minted phenomenon created within a regional treaty, or far more controversially, an inherent power in contempt proceedings before an ad hoc international criminal tribunal. As for the former, in June 2014, members of the African Union (AU) approved a protocol that gave to the newly reconstituted African Court of Justice and Human Rights the ability to try corporations for international crimes.<sup>122</sup> The AU's resolution attracted considerable global interest,

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(b) a crime against humanity, or

(c) a war crime,

is guilty of an indictable offence and may be prosecuted for that offence in accordance with section 8. Section 35 of the Interpretation Act stipulates that “[i]n every enactment ... person, or any word or expression descriptive of a person, includes a corporation.” In England and Wales, the International Criminal Court Act 2001 confers British courts with jurisdiction over international crimes carried out “outside the United Kingdom by a United Kingdom national, a United Kingdom resident or a person subject to UK service jurisdiction.” Section 5 of the Interpretations Act 1978 states that “[i]n any Act, unless the contrary intention appears, words and expressions listed in Schedule 1 to this Act are to be construed according to that Schedule.” The Schedule states that “[p]erson’ includes a body of persons corporate or unincorporate.”

<sup>120</sup> See *Mohamad v. Palestinian Authority*, 132 S.Ct. 1702, (2012).

<sup>121</sup> In this respect, corporate criminal liability represents an exception to the fact that the US normally imports substantive criminal law, while exporting criminal procedure. Elisabetta Grande, *Comparative Criminal Justice*, in *THE CAMBRIDGE COMPANION TO COMPARATIVE LAW* 191, 204 (Mauro Bussani & Ugo Mattei eds., 2012). On legal transplants generally, see ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (1974).

<sup>122</sup> See Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, May 15, 2014, STC/Legal/Min/7(I) Rev. 1, Art. 46C. The provision was adopted by the Assembly of the African Union in its Twenty-Third Ordinary Session between 26-27 June 2014 in Malabo, Equatorial Guinea. See Decision on the Draft Legal Instruments, Doc. Assembly/AU/8(XXIII), at 1 in African Union, *Decisions, Declarations And Resolutions*, Assembly/AU/Dec.517-545(XXIII) <http://summits.au.int/en/23rdsummit/documents/decisions-declarations-and-resolution-assembly-union-twenty-third-ordinary-sess> (“The Assembly... 2. ADOPTS the legal instruments as follows:... (e) Protocol on Amendments to the Protocol on the Statute of

primarily because it also caved to political pressure to offer sitting heads of state immunity from prosecution—a position many viewed as reprehensible backsliding.<sup>123</sup> At the same time, the protocol was progressive with respect to another set of actors who have enjoyed de facto immunity everywhere for all time. Under the heading “Corporate Criminal Liability”, the newly adopted protocol insists that “[f]or the purpose of this Statute, the Court shall have jurisdiction over legal persons, with the exception of States.”<sup>124</sup> It then goes on to detail various rules by which this form of responsibility will be judged.

Once again, this legislative grounding dispenses with the need for discussing customary international law’s treatment of the issue, as was a frequent prerequisite within ATS litigation. There is little doubt that a regional treaty can promulgate standards that extend beyond the scope of

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the African Court of Justice and Human Rights’). I am grateful to Tara O’Leary at Redress, Nicole Fritz at the Southern Africa Litigation Centre and Professor Charles Jalloh for help accessing this information, and for insights into the negotiating process that led to this provision.

<sup>123</sup> Article 46A *bis* of the adopted Protocol states “No charges shall be commenced or continued before the Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.” *Id.* For the extensive discussion of this provision on immunity, see Adam Nossiter & Marlise Simons, *African Leaders Grant Themselves Immunity in Proposed Court*, THE NEW YORK TIMES, July 2, 2014, <http://www.nytimes.com/2014/07/03/world/africa/african-leaders-grant-themselves-immunity-in-proposed-court.html> (last visited Aug 21, 2014); Monica Mark, *African Leaders Vote Themselves Immunity from New Human Rights Court*, THE GUARDIAN, July 3, 2014, <http://www.theguardian.com/global-development/2014/jul/03/african-leaders-vote-immunity-human-rights-court> (last visited Aug 21, 2014); Beth Van Schaack, *Immunity Before the African Court of Justice & Human & Peoples Rights—The Potential Outlier Just Security*, <http://justsecurity.org/12732/immunity-african-court-justice-human-peoples-rights-the-potential-outlier/> (last visited Aug 21, 2014). To the best of my knowledge, commentary on the sudden internationalization of corporate criminal liability for international crimes is nil, meaning that ironically (once more), the latent, unnoticed phenomenon had to be “discovered” by surprise. As for the term “backsliding,” I borrow it from Andrew Guzman and Katarina Linos’ recent work discussing human rights backsliding, although the analogy does not work at all neatly with their argument, since they are concerned with instances where human rights “undermine efforts to adopt or maintain high levels of protection in countries that would otherwise offer protections above the international norm.” African backtracking on immunity in international criminal courts does not fit that bill, although I wonder if Kiobel’s severe contraction of the ATS does. See Andrew T. Guzman & Katerina Linos, *Human Rights Backsliding*, 102 CAL. L. REV. 603–654, 605 (2014).

<sup>124</sup> See Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, *supra* note 122, Art. 46C.

customary international law,<sup>125</sup> as part of what many have championed as a divergent regionalism in international criminal justice.<sup>126</sup> In this light, the AU protocol is for the African Court what legislation adopting corporate criminal liability is to national legal systems—a step beyond the protracted disputes about customary international law or general principles of law in public international law onto a more solid positivist footing. In this sense, corporate criminal liability is undeniably on safer ground than the recent decision of the Special Tribunal for Lebanon (STL) to indict a media company for contempt,<sup>127</sup> although even there the “discovery” of corporate criminal liability is a lesser leap of faith than it was for the US Supreme Court in 1909, when it initially signed off on the concept.

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<sup>125</sup> In fact, the African Union has some considerable experience doing just this in other contexts. Article 4(j) of the Protocol establishing the AU’s Peace and Security Council famously insisted on “the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity, in accordance with Article 4(h) of the Constitutive Act.” See African Union, *Protocol Relating to the Establishment of the Peace and Security Council of the African Union*, Art. 4(j), July 9, 2002, available online at [www.au.int/en/sites/default/files/Protocol\\_peace\\_and\\_security.pdf](http://www.au.int/en/sites/default/files/Protocol_peace_and_security.pdf). The problem with this treaty provision was never that it cut across customary norms on the use of force; it was that it appeared inconsistent with Article 53 of the UN Charter, which requires that “no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council”. See in this regard, Thomas M. Franck, *The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium*, 100 AM. J. INT’L L. 88, 100 (2006) (discussing this provision in the context of Art 53 of the UN Charter, without raising objections about the provision’s novelty relative to contrary customary norms).

<sup>126</sup> William W. Burke-White, *Regionalization of International Criminal Law Enforcement: A Preliminary Exploration*, 38 TEX. INT’L L.J. 729 (2003) (offering various rationale for the regionalization of ICL).

<sup>127</sup> In January 2014, a Judge at the Special Tribunal for Lebanon found that a Lebanese media company named Akhbar Beirut S.A.L could be tried for contempt for disclosing the identities of protected witnesses. See *In the Case Against Akhbar Beirut S.A.L and Ibrahim Mohamed Al Amin*, STL-14-06/I/CJ/, *Redacted Version of Decision in Proceedings for Contempt with Orders in Lieu of an Indictment*, Jan 31, 2014. In a way, the decision has only tangential value for this paper, since Judge Baragwanath found that the STL does not have jurisdiction over corporations for garden-variety international crimes, but that “the logic demanding this conclusion does not call for such limitation in the case of contempt.” *Id.*, ¶ 21. Intriguingly, however, a separate judge appointed to try the very same reached the opposite view, even with respect to contempt, concluding that he did not have jurisdiction over the company. For the decision on the challenge to jurisdiction, see *In the Case Against New TV S.A.L and Karma Mohamed Tahsin Al Khayat*, STL-14-05/PT/CJ, *Decision on Motion Challenging Jurisdiction and on Request for Leave to Amend Order in Lieu of an Indictment*, Jul. 24, 2014. The issue is now pending before the STL’s Appeals Chamber. Note that all of this discussion is specific to the STL, and therefore has little bearing on the bases for corporate criminal liability for international crimes I mention here.

I offer no opinion about the merit of the judicial “discovery” of corporate criminal liability at the STL, except to observe how familiar that argumentative strategy for it will be to ATS litigants—corporate criminal liability is: not expressly excluded, ubiquitous elsewhere, important for reasons of justice and enabled by associated rules.<sup>128</sup> On their face, these arguments strike me as perfectly plausible given the history of corporate criminal liability, but nowhere near as convincing as the express legislative bases for corporate criminal liability for international crimes I point to. These stronger legislative foundations have sweeping implications—they immediately move us beyond the pervasive but overly restrictive understanding that “[c]orporations are not presently subject to criminal liability under international law.”<sup>129</sup> At least for Africa, that view is now outdated, but more significantly, it always had the unfortunate (unintended) effect of obscuring the many opportunities for corporate criminal liability for international crimes within national legal systems throughout the world, which some see as both the history and future of ICL.

So, migrating these cases into corporate criminal liability (and liability of corporate officers) will not magically solve the political and economic considerations these cases arguably engendered in the ATS or prevent powerful economic actors from politically out-maneuvering prosecutors in

<sup>128</sup> Judge Baragwanath’s reasoning makes each of these points in the STL decision that allowed for corporate criminal liability: (a) *Not expressly excluded* - “On its face, [the rule prohibiting contempt] neither embraces nor rejects such liability in the contempt context.” and “no other provision... limits the Rule’s application to natural persons.” *Id.*, ¶ 19; (b) *Ubiquity* - “Criminal liability for legal persons, such as corporations, is a familiar and increasingly pervasive legal construct in national systems based on the premise that the criminal conduct of certain natural persons done in their official capacity should be attributed under criminal law to the legal entity on whose behalf they acted.” *Id.*, ¶ 18; (c) *Importance for reasons of justice* - “To limit criminal liability for contempt to individual natural persons risks undermining the justice process; for the actual and most powerful culprits of any proved interference with justice would go untried.” *Id.*, ¶ 28; and (d) *Enabled by associated rules* - “most notably for our purposes, Lebanon has embraced and codified corporate criminal liability.” *Id.*, ¶ 26.

<sup>129</sup> Ronald C Slye, *Corporations, Veils, and International Criminal Liability*, 33 BROOK. J. INT’L L. 955, 955 (2007); See also, NICOLA JÄGERS, CORPORATE HUMAN RIGHTS OBLIGATIONS: IN SEARCH OF ACCOUNTABILITY 232 (2002) (“The existing mechanisms created for prosecuting violators of international criminal law currently offer no possibilities for the prosecution of corporations”). *Developments in the Law-Corporate Liability for Violations of International Human Rights Law*, 114 HARV. L. REV. 2025, 2030-2031 (2001) (arguing that “international law views corporations as possessing certain human rights, but it generally does not recognize corporations as bearers of legal obligations under international criminal law.”) (emphasis in original); ILIAS BANTEKAS, INTERNATIONAL CRIMINAL LAW 76 (4 edition ed. 2010) (“There is no doubt that general corporate criminal liability does not exist in international law.”).

certain real instances of alleged corporate offending (as may well take place in the Argor-Hereaus case). Still, the migration to ICL will provide a legislative platform for corporate responsibility for international crimes that is widely dispersed across numerous jurisdictions, and therefore, far more difficult to dislodge.

### B. Overcoming the ATS Debate

The move to a legislative grounding for corporate responsibility for international crimes overcomes much of the doctrinal and conceptual furor in ATS litigation. In terms of doctrine, the majority in the U.S. Second Circuit Court of Appeals stated in *Kiobel* (having just declared that corporations could not be held responsible for international crimes in public international law), “[nothing] in this opinion limit[s] or foreclose[s] *criminal*, administrative, or civil actions against *any* corporation under a body of law *other than customary international law—for example the domestic laws of any State.*”<sup>130</sup> A state can define its criminal law governing corporations in terms that extend beyond the scope of customary international law, and as we have seen, many do.<sup>131</sup> States, in other words, are perfectly free to do internally that which the African Union has achieved regionally. As such, from a doctrinal vantage point, reprocessing ATS cases as allegations of corporate responsibility for international crimes has potentially distinct advantages, which spoil many of the normative objections offered up against the ATS.

At the level of theory, the various methods of incorporation set out above undercut one of the principal criticisms of the ATS. Throughout its existence, leading scholars protested the “democratic cost” involved in allowing customary international law such power.<sup>132</sup> As Curtis Bradley has ably argued, “[b]y its very nature customary international law involves

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<sup>130</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010) (emphasis added).

<sup>131</sup> For an excellent survey of examples, see WARD FERDINANDUSSE, *DIRECT APPLICATION OF INTERNATIONAL CRIMINAL LAW IN NATIONAL COURTS* 23–29 (2006).

<sup>132</sup> Curtis A. Bradley & Jack L. III Goldsmith, *The Current Illegitimacy of International Human Rights Litigation*, 66 *FORDHAM L. REV.* 319, 345–348 (1997) (insisting that “judicial federalization of CIL without political branch authorization is inconsistent with American constitutional democracy on two grounds.”); John B. III Bellinger, *Enforcing Human Rights in U.S. Courts and Abroad: The Alien Tort Statute and Other Approaches*, 42 *VAND. J. TRANSNAT’L L.* 1, 10 (2009) (“In addition to causing diplomatic friction, ATS litigation also exacts “costs“ through the lack of democratic checks and accountability.”). See also, Curtis A. Bradley, *The Costs of International Human Rights Litigation*, 2 *CHI. J. INT’L L.* 457 (2001).

less US democratic inputs than other forms of law applied by US courts.”<sup>133</sup> According to this critique, the ATS created “democratic costs” because (a) the legislature enjoys much less ability to scrutinize customary international law norms (upon which ATS litigation was based); (b) custom is frequently seriously ambiguous; and (c) conferring unelected judges with the power to base important transnational judgments on this source hands lawmaking capacity to the branch of government with the weakest democratic credentials.<sup>134</sup> If one adds the common criticism that universal jurisdiction violates state sovereignty,<sup>135</sup> ATS litigation seemingly undermines democracy, at home and abroad.

Yet, ICL largely sidesteps all sides of the dispute by washing its hands of customary international law altogether. As we have just witnessed, corporate criminal liability for international crimes is available in many jurisdictions without recourse to customary international law; in the majority of European states and the African Court of Justice and Human Rights, there is an unequivocal legislative mandate for corporate criminal liability for international crimes. Elsewhere, the legislature may never have contemplated corporate criminal liability of international crimes specifically, but there is still a legislative (not customary) basis for

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<sup>133</sup> Bradley, *supra* note 132, at 465. In fairness, other arguments about the ATS’s “democratic deficiency” point to the absence of procedural checks and balances on decisions to bring these sorts of cases. See for example, Bellinger, *supra* note 132, at 10. Robert Knowles, however, has offered a sophisticated response to these objections, also from a realist perspective. See Robert Knowles, *Realist Defense of the Alien Tort Statute*, 88 WASH. U. L. REV. 1117, 1124 (2010) (arguing that there are good reasons for engagement in ATS litigation, in part, because handing the executive all power in dealing with these issues may prove politically disadvantageous).

<sup>134</sup> Bradley, *supra* note 132, at 465–467.

<sup>135</sup> Jack Goldsmith & Stephen D. Krasner, *The Limits of Idealism*, 132 DAEDALUS 47–63 (2003) (expressing pessimism about universal jurisdiction and other interventionist strategies as a trump on sovereignty). In truth, there is considerable debate about the validity of the intuition that universal jurisdiction so clearly violates sovereignty. Larry May argues that “sovereignty should count as a strong presumption that must be rebutted if international law, especially international criminal law, is to make any sense.” LARRY MAY, *CRIMES AGAINST HUMANITY: A NORMATIVE ACCOUNT* 8 (2004); Andrew Altman and Christopher Wellman, however, reject appeals to “international community” or “gravity” as a grounding for universal jurisdiction’s incursion into state sovereignty, but argue instead that widespread or systematic violations of basic human rights in a state suffice. Andrew Altman & Christopher Heath Wellman, *A Defense of International Criminal Law*, 115 ETHICS 35–67 (2004); For myself, I doubt that a single definitive answer to the question of universal jurisdiction vs. state sovereignty can be established without regard to case-by-case variations. After all, as Alejandro Chehtman has convincingly shown, the rationale for universal jurisdiction are diverse. See ALEJANDRO CHEHTMAN, *THE PHILOSOPHICAL FOUNDATIONS OF EXTRATERRITORIAL PUNISHMENT* 122–128 (2010).



arriving at that conclusion. Consequently, a good portion of the heated debate within the ATS litigation does not cross over the firebreak to corporate criminal liability for international crimes. True, cases like *Argor-Heraeus* still entail extraterritorial application of the criminal law, but as Austen Parrish has observed, in democratic terms, the extraterritorial application of law to a State's own nationals is an "innocuous form" of this notion.<sup>136</sup> So, perhaps the coming of corporate liability for international crimes addresses what many scholars saw as an important democratic failing of its civil predecessor.

If, on the other hand, corporations suddenly find themselves prosecuted for international crimes on the basis of universal jurisdiction, this will only add a new layer to pre-existing debates that Henry Kissinger, the Law Lords in *Pinochet*, members of civil society, legal scholars and philosophers have already rehearsed when considering universal jurisdiction for other types of actors.<sup>137</sup> We should certainly hold out the possibility that the application of universal jurisdiction to commercial actors will come with its own set of normative peculiarities, which make up part of the new unexplored terrain *Argor-Heraeus* (or a subsequent case) initiates. At first glance, though, these cases do not seem to give rise to democratic considerations that go beyond those international criminal justice already faces in other scenarios. This arguably holds true

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<sup>136</sup> Austen L. Parrish, *Kiobel, Unilateralism, and the Retreat from Extraterritoriality*, 28 MD. J. INT'L L. 208, 213 (2013) ("While extraterritorial jurisdiction has innocuous forms (for example, jurisdiction over one's own nationals or jurisdiction to punish offenses directed at state security), it becomes contentious when one state purports to tell foreigners what they can or cannot do on foreign soil."). This is not to say that it will be practically easy. See also, Austen L. Parrish, *Domestic Responses to Transnational Crime: The Limits of National Law*, 23 CRIM LAW FORUM 275–293 (2012) (arguing that extraterritorial exercises of criminal law are highly problematic in practice, and should not undermine multilateral attempts at regulating global criminal offending).

<sup>137</sup> A wide variety of commentators have addressed universal jurisdiction, but its possible application to corporations and/or their officers awaits more detailed treatment. For a sense of this variety, see e.g., Henry A Kissinger, *The Pitfalls of Universal Jurisdiction*, 80 FOREIGN AFF. 86 (2001); Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet, 38 I.L.M. 581, 591–594 (1999); AMNESTY INTERNATIONAL, UNIVERSAL JURISDICTION: A PRELIMINARY SURVEY OF LEGISLATION AROUND THE WORLD - 2012 UPDATE (2012), <http://bit.ly/WNhYst>; Human Rights Watch, UNIVERSAL JURISDICTION IN EUROPE: THE STATE OF THE ART, <http://www.hrw.org/node/11298> (last visited Jul 30, 2014); Máximo Langer, *The Archipelago and the Wheel: Universal Jurisdiction Domestic Prosecutions and the International Criminal Court*, in THE FIRST GLOBAL PROSECUTOR: CONSTRAINTS AND PROMISE (Alex Whiting, Martha Minow, & True-Frost eds., 2015); LUC REYDAMS, UNIVERSAL JURISDICTION: INTERNATIONAL AND MUNICIPAL LEGAL PERSPECTIVES (2004); MAY, *supra* note 135, at 3–19; CHEHTMAN, *supra* note 135, at 114–139.

regardless of whether one subscribes to Madeline Morris' view of the ICC's "democracy deficit,"<sup>138</sup> believe Aaron Fichtelberg's liberal response to her emphasizing fair trials,<sup>139</sup> or see universal jurisdiction in more cosmopolitan terms.<sup>140</sup>

If this reasoning is sound, it certainly does not suggest that the turn to ICL will suddenly produce an immaculate system of corporate accountability that is beyond all reproach, that this new framing is categorically the preferable response to corporate implication in atrocity, or that substantial, perhaps even definitive, criticisms might not undermine the propriety of cases like Aegor-Heraeus in concrete circumstances moving forward.<sup>141</sup> The point is just that ICL not only enjoys both doctrinal advantages over the earlier regulatory "discoveries" in corporate accountability, it also has far greater experience addressing the core conceptual concerns about the role accountability should play globally. At the very least, therefore, corporate responsibility for ICL warrants new scholarly attention that bridges multiple intellectual traditions. After all, the turn moves away from the earlier debates into new uncharted waters.

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<sup>138</sup> Madeline Morris, *The Democratic Dilemma of the International Criminal Court*, 5 BUFF. CRIM. L. REV. 591 (2001); See also, Madeline H. Morris, *Democracy, Global Governance and the International Criminal Court*, in FROM SOVEREIGN IMPUNITY TO INTERNATIONAL ACCOUNTABILITY 187–193 (Ramesh Chandra Thakur & Peter Malcontent eds., 2004); Although Morris' views tend to target the ICC specifically, she is equally skeptical about universal jurisdiction. On that topic, see Madeline H. Morris, *Universal Jurisdiction in a Divided World: Conference Remarks*, 35 NEW ENG. L. REV. 337 (2000).

<sup>139</sup> Aaron Fichtelberg, *Democratic Legitimacy and the International Criminal Court A Liberal Defence*, 4 J. INT'L CRIM. JUST. 765–785, 776 (2006) (criticizing Morris for adopting a republican view of democracy, then offering various arguments why a liberal alternative that prioritizes fair trials might make more sense in the context of modern ICL).

<sup>140</sup> Langer, *supra* note 137, at 6–14 (discussing the legitimacy of the ICC as compared with the exercise of universal jurisdiction by states based on cosmopolitan democracy, cosmopolitan constitutionalism, global administrative law, and state consent legitimacy).

<sup>141</sup> To date, the practical difficulties involved in bringing these sorts of cases have proved significant. See e.g., GWYNNE SKINNER ET AL., *THE THIRD PILLAR: ACCESS TO JUDICIAL REMEDIES FOR HUMAN RIGHTS VIOLATIONS BY TRANSNATIONAL BUSINESS* 81–99 (2013), <http://accountabilityroundtable.org/analysis/the-third-pillar-access-to-judicial-remedies-for-human-rights-violations-by-transnational-business/> (detailing thwarted attempts at generating corporate accountability in six different cases that were pursued in various jurisdictions). There is also outstanding criticism of this entire movement, which demands careful consideration. See Baars, *supra* note 34 (arguing that lawyers calling for corporate accountability for international crimes are congealing capitalism by paving the way for imperialist corporate expansionism).

### C. *New Standards for Corporate Attribution*

In what follows, I provide one limited illustration of new substantive questions generated by the turn to corporate criminal liability for international crimes. Specifically, the shift will entail a new variety of standards for attributing criminal wrongdoing to the corporation, many of which will be quite alien to ATS litigants and scholars. The ATS was always predicated on the quintessentially American notion of *respondeat superior*, which makes the company vicariously liable for crimes as soon as *any* employee is deemed guilty of them.<sup>142</sup> As a consequence, the task was always to pin the violation of international law on *any* employee. For some, however, *respondeat superior* is conceptually objectionable—scholars like Richard Epstein regret its ability to create vicarious corporate liability, which is fundamentally illiberal in structure and unfair as a distributive principle.<sup>143</sup> Normative questions of this sort, that seek to determine under what conditions corporations becomes responsible for criminal offending of its individual members, are very much part of the new terrain Argor-Hereaus lifts to the surface of international criminal law and the numerous fields that connect to it, more or less directly.

Even leaving these sorts of normative questions to the side momentarily, *respondeat superior* is decidedly rarer as a matter of doctrine outside the United States—other countries have adopted alternative

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<sup>142</sup> I am grateful to Robert Cryer for pointing out the need to emphasize that *respondeat superior* in corporate criminal law is not the same as superior responsibility in ICL. Their conceptual overlap is an intriguing point of debate I do not address here, although from memory, I recall that war crimes prosecutors are sometimes tempted to appeal to the former to defend the latter. For the definitive doctrinal treatment of *respondeat superior* in US federal criminal law, see RICHARD S. GRUNER, *CORPORATE CRIMINAL LIABILITY AND PREVENTION* 3–11 to 3–22 (2004). On the historical development of the concept, see Kathleen F. Brickey, *Corporate Criminal Accountability: A Brief History and an Observation*, 60 WASH. U. L. Q. 393–423 (1982).

<sup>143</sup> According to Epstein, *respondeat superior* may be a very sharp instrument, but it fails to calibrate punishment with responsibility, and is therefore harsh as a distributive principle. As he says, “potency is not enough; specificity and overkill matter as well.” Richard A. Epstein, *Deferred Prosecution Agreements on Trial: Lessons from the Law of Unconstitutional Conditions*, in *PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT* 38, 44–45 (2011). In fairness, he also criticizes corporate criminal liability for its anthropomorphic character and its tendency to punish innocent shareholders and employees. The concept is the subject of other criticisms too. See e.g., Alan O. Sykes, *The Economics of Vicarious Liability*, 93 THE YALE LAW JOURNAL 1231–1280, 1260 (1984). In the context of criminal law, see Bucy, Pamela H., *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINNESOTA LAW REVIEW 1095–1184 (1991) (arguing that *respondeat superior* is objectionable, primarily because it fails to take corporate intentions seriously)

models of blame attribution that attempt to capture “genuine corporate culpability,”<sup>144</sup> without depending so heavily on the complicity of company representatives. Building on the groundbreaking scholarly work of John Braithwaite and Brent Fisse,<sup>145</sup> Australian criminal law mandates that criminal courts can convict companies of offenses for a body corporate’s failure “to create and maintain a corporate culture that required compliance with the relevant provision.”<sup>146</sup> To return to Argor-Heraeus and the African Court of Justice and human rights, both involve precisely this type of “corporate culture” based standard for corporate criminal liability.<sup>147</sup> Space does not permit elaboration on this or other alternative models for allocating criminal blame to corporations,<sup>148</sup> but merely pointing to these alternatives highlights the availability of a whole host of options, which presently go unaddressed within the comparatively narrow framing required for ATS cases.

Clearly, employing transnational law to construct corporate responsibility for international crimes ushers in a whole set of new and intriguing questions, which we must now turn to in an attempt to foster accountability that is principled, fair, and functional. In this regard, an appreciation of the relative strengths and weaknesses of accountability models like ICL and ATS will be essential in ascertaining the optimal division of labor between them. This new understanding may also assist in identifying the added value of other regulatory models or, as Samuel Moyn and others would have it, broader structural rearrangements that would better respond to underlying causes of these crimes. At a higher level of abstraction, hopefully this preliminary sketch of the normative

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<sup>144</sup> William S. Laufer, *Corporate Bodies and Guilty Minds*, 43 EMORY L.J. 664 (1994) (discussing four models of corporate culpability that he considers capture genuine corporate culpability).

<sup>145</sup> BRENT FISSE & JOHN BRAITHWAITE, *CORPORATIONS, CRIME, AND ACCOUNTABILITY* (1993). Braithwaite is also responsible for thinking about corporate responsibility globally, which has a real relevance for international criminal law (even if he does not broach the subject). See JOHN BRAITHWAITE & PETER DRAHOS, *GLOBAL BUSINESS REGULATION* (2000).

<sup>146</sup> Section 12.3(2)(d) Commonwealth Criminal Code Act of 1995, Australia.

<sup>147</sup> See Article 102(2), Code Pénal Suisse (stipulating that companies are responsible for criminal offences “if the corporation can be said to have not taken all reasonable and necessary organizational measures to prevent such a breach.”). As for the African Court of Justice and Human Rights, the basis for responsibility is not quite as intense as in Australia and Switzerland, but it still stipulates that “[c]orporate intention to commit an offence may be established by proof that it was the policy of the corporation to do the act which constituted the offence.” See

<sup>148</sup> For a detailed overview of these standards in all European countries, highlighting that most adopt mixed standards of attribution, see BONDY, VERMEULEN, AND RYCKMAN, *supra* note 31, at 50–72.

terrain will pave the way for critical scholarly engagement with the ambitious idea that ICL can, at least partially, regulate global commerce. Clearly, that proposition will be highly contested, but whatever debate does arise, it will pay to ensure that these disputes are not unduly influenced by intuitions that turn out to be particular to the ATS experience.

Most significantly, the refrain that “[t]he existing mechanisms created for prosecuting violators of international criminal law currently offer no possibilities for the prosecution of corporations”<sup>149</sup> is true of the most prominent international institutions, but that reality in no way overshadows the availability of domestic courts to do that work. Moreover, it is precisely these courts that enjoy the place of prominence in the new architecture of international criminal justice, best reflected in the veritable deluge of domestic prosecutions for international offenses over the past two decades within national systems, in what Kathryn Sikkink so memorably describes as a “justice cascade.”<sup>150</sup> Turning this lens onto corporations operating in conflict zones is a natural next step in what has proved to be, for better or worse, international criminal justice’s light speed ascendance in the modern era.<sup>151</sup> Going forward, part of the role for both scholars and practitioners, is to determine whether this is a bridge too far for ICL, or a crucial next step if the field is to avoid the charge of out and out bias.

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<sup>149</sup> NICOLA JÄGERS, CORPORATE HUMAN RIGHTS OBLIGATIONS: IN SEARCH OF ACCOUNTABILITY 232 (2002). For a series of similar statements by other excellent authors, see *infra* note 129. As I mentioned earlier, many of these views were probably technically correct as a matter of customary international law, but in my view, their implicit focus on customary international law alone cloaked an extensive array of legislative opportunities for corporate criminal liability for international crimes at the national level, which somewhat ironically, bypass the difficulties ATS litigants always faced.

<sup>150</sup> KATHRYN SIKKINK, THE JUSTICE CASCADE: HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING WORLD POLITICS (2011).

<sup>151</sup> This view is predictive, but it need not assume a teleological view of the discipline, which Samuel Moyn and others are so critical of in international human rights. See SAMUEL MOYN, THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY (2010). In keeping with Kenneth Anderson’s metaphor, I also suspect that this eventuality may be an unintended consequence of international criminal law in the modern era. See Kenneth Anderson, *The Rise of International Criminal Law: Intended and Unintended Consequences*, 20 EUR. J. INT’L L. 331–358 (2009). Consequently, corporate responsibility for international crimes vindicates Koskenniemi’s contention that although ICL was a Western construct, Western states “lost full control of where it might lead.” Koskenniemi was referring to specific trials though, rather than the direction of the field itself. Martti Koskenniemi, *Between Impunity and Show Trials*, 6 MAX PLANCK Y.B. U.N. LAW, 19 (2002).

## IV. THE UPSIDES OF PROSECUTORIAL POWERS

Without doubt, the private right to sue is one of the key advantages of the ATS system. Victims of international crimes no longer had to plead with reluctant state officials to mount prosecutions against those responsible for their suffering (who were often themselves state officials). Instead, the ATS promised global citizens their day in court, a run-around past the usual prosecutorial politics (be they local or international), and the ability to seek compensation from companies with assets on the New York stock exchange worth contesting. The decline of this aspect of the ATS is certainly a major loss in a world where access to justice is so acutely underdeveloped, but reprocessing these cases as international crimes also has a silver lining, which also demands sober contemplation in the impoverished world of corporate accountability *Kiobel* has left us to. In this Part, I explore some of these upsides, which are now brought into sharp relief by the possibility of charges in the Argor-Heraeus case and the realization that, regardless of whether or not this particular allegation moves forward, it is just the tip of a much larger potentiality that lies in waiting. As I will show here, these upsides are conceptual, substantive and pragmatic.

A. *Is Civil Liability Sufficient for Atrocities?*

To my mind, euphoria that the ATS provided just some hope for corporate accountability may have forestalled a series of critical questions about its adequacy.<sup>152</sup> In particular, for all its procedural advantages, is civil liability a sufficient response to corporate participation in “unimaginable atrocities that deeply shock the conscience of humanity.”?<sup>153</sup> Compensation may be necessary, but can what Raphael

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<sup>152</sup> In an intriguing exception several years ago, Beth Stephens accepts that “[p]rivate litigation, unlike criminal prosecution, does not offer the full force of society’s condemnation of human rights abuses.” Beth Stephens, *Conceptualizing Violence under International Law: Do Tort Remedies Fit the Crime*, 60 ALB. L. REV. 580 (1996).

<sup>153</sup> ICC Statute, supra note 76, Preamble. This lofty language is easy pickings for critics; it fails to take seriously our pluralistic political aspirations for the world, gives to humanity more commonality of value than it demonstrates, and the absence of meaningful reaction (in many instances) suggests that if there is a “shock” it can hardly be particularly intense. On the first of these, see Brad R. Roth, *Coming to Terms with Ruthlessness: Sovereign Equality, Global Pluralism, and the Limits of International Criminal Justice*, 8 SANTA CLARA J. INT’L L. 231, 284 (2010) (“Where individuals commit ruthless acts on behalf of political causes to which one is unsympathetic or

Lemkin calls “barbarous practices reminiscent of the darkest pages of history”<sup>154</sup> really be redressed in *purely* monetary terms? Particularly in commercial contexts, the commodification of accountability risks allowing companies to absorb the cost of responsibility for international crimes, then pass this expense on to consumers, who pay incrementally more for weaponry, game consoles, cellphones and engagement rings. The inescapable threat, however, is that limiting accountability to civil recovery might allow corporations to purchase massive human rights violations.

There is much interesting literature contesting the opaque dividing line between tort and crime, but at least conceptually, if we should have criminal law at all, it is probably to express moral condemnation in ways that judicially-imposed redistributions of wealth alone cannot. In 1985, Richard Posner penned an important article arguing the contrary, based on his conviction that law and economics had much to offer the crafting of criminal law doctrine.<sup>155</sup> In a direct reaction to Posner’s argument, Doug Husak has reasserted the autonomous value of criminal responsibility outside its intersection with tort liability by arguing that the criminal law “has an expressive function.”<sup>156</sup> How, he asks, “could mere compensation possibly convey the stigma inherent in criminal punishment? If the state has a substantial interest in expressing condemnation, it is hard to see how a non-punitive response to core criminality could be adequate.”<sup>157</sup> Similarly minded, George Fletcher argues that “economic analysis

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indifferent, the acts “shock the conscience.” Where the acts are thought to be necessary expedients in the service of a compelling societal end, they turn out not to be so shocking, after all.” (footnotes omitted). While I share these grounds for skepticism to some extent, I do believe that atrocity is a major shock in the moral education of much of humanity. In addition, while we should certainly resist its potential to overwhelm all moral nuance or to “cheat” in Schmittian terms, I also believe that carefully assessing the role of corporations in this framing is long overdue.

<sup>154</sup> RAPHAEL LEMKIN, *AXIS RULE IN OCCUPIED EUROPE* 90 (2008).

<sup>155</sup> Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193 (1985).

<sup>156</sup> DOUGLAS N. HUSAK, *OVER CRIMINALIZATION* 186 (2008). For the seminal article in the English language on expressive theories of punishment, see Joel Feinberg, *The Expressive Function of Punishment*, in *PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT* (Gertrude Ezorsky ed., 1973). The expressive theory of punishment enjoys considerable support in ICL too. See Robert D. Sloane, *The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law*, 43 STAN. J. INT’L L. 39–94 (2007); MARK DRUMBL, *ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW* 173–180 (2007). For a criticism of the expressive theory, see Nathan Hanna, *Say What?: A Critique of Expressive Retributivism*, 27 LAW & PHIL. 123–150.

<sup>157</sup> HUSAK, *supra* note 156, at 186.

misleads us by reducing punishment to the prices that actors pay for engaging in their preferred conduct.”<sup>158</sup> So, in a corporate context, “substituting civil liability for criminal might be expressively irrational.”<sup>159</sup>

Consequently, one can appreciate how ATS advocates preferred civil liability for international crimes when the alternative was absolute impunity, but all things being equal, leading theorists believe that the stigma of criminal offending cannot be adequately conveyed through civil liability alone. Otherwise, a blanket preference for civil liability risks doing violence to the expressive aspirations of criminal punishment, which many view as the *raison d’être* of criminal responsibility across all types of defendants. In other words, if civil liability is both a necessary and sufficient response to atrocity, surely international criminal courts and tribunals should immediately dispense with the barbarity of punishment, since it is categorical excess next to civil remedies that neatly do away with the specious practice of moral blaming. If they do not, the idea that German, Serb, Rwandan and Congolese military and political leaders deserve criminal punishment, whereas cash payments will suffice as restitution from business representatives and their corporations (who participate in the same German, Serb, Rwandan and Congolese crimes), risks obvious internal contradiction.

Leading corporate theorists agree with this result, although they tend to reach the conclusion through a very different line of reasoning. Jack Coffee, for example, has argued that we should demarcate corporate criminal and civil liability along essentially moral lines: corporate actions that society wants to prohibit outright should be criminalized, whereas practices it wants to price should attract civil penalties companies can pass on to consumers, who will then use their pocketbooks to punish corporate offending less directly.<sup>160</sup> Immediately, this account raises important

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<sup>158</sup> GEORGE FLETCHER, *THE GRAMMAR OF CRIMINAL LAW* 61 (2007).

<sup>159</sup> Dan M Kahan, *Social Meaning and the Economic Analysis of Crime*, 27 J. LEGAL STUD. 609, 619 (1998) (criticizing economic analyses of corporate criminal liability as inappropriately leaving out the social meaning of punishment).

<sup>160</sup> Coffee, John C., Jr, *Does “Unlawful” Mean “Criminal”?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B. U. L. REV. 193–246, 230 (1991). Gerard Lynch, now a Second Circuit judge, ultimately agrees with Coffee, although like me, he views the prohibit/price dichotomy as boiling down to a purely moral question. Gerard E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, 60 LAW AND CONTEMP. PROBS. 23 (“the distinction between prohibition and pricing is, as Professor Coffee recognizes, ultimately a moral rather than economic distinction, made for moral rather than economic reasons.”). Like Coffee and Kahan, Lynch views corporate criminal liability as important above and beyond civil compensation. *Id.* at 52. (“Civil sanctions, however, do not serve the unique functions of



concerns about the sufficiency of ATS litigation, at least when corporate responsibility for heinous crimes is in question. Would civil liability, for instance, be an adequate sanction for the South African businessman who allegedly sold 50,000 machetes to the Hutu extremist Théoneste Bagasora at the zenith of the Rwandan genocide?<sup>161</sup> If we think this type of conduct (in these frightening circumstances) should be absolutely prohibited, the answer is no—here, civil liability falls short. To be clear, nothing here is an attack on the ATS as such—I view it as an important form of accountability—I merely join others in positing that it frequently needs supplementing with something stronger.

It is also true that by the same token, a purely criminal approach may have any number of pernicious effects of its own. These might include (a) providing symbolic punishment that does too little to improve the lot of victims on the ground;<sup>162</sup> (b) over-detering businesses from operating in coping economies that desperately need foreign investment to recover

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the criminal process in educating the public about basic standards of behavior, stigmatizing violators, and reinforcing the security, sense of justice, and automatic compliance of the law-abiding nearly as powerfully as criminal punishment.”). Kahan’s congruous argument for corporate criminal liability is also grounded in the social meaning of punishment, which he argues is left out in purely economic analyses of the problem. Kahan, *supra* note 159, at 618–622.

<sup>161</sup> Kathi Austin, *Illicit Arms Brokers: Aiding and Abetting Atrocities*, 9 BROWN J. WORLD AFF. 203 (2002).

<sup>162</sup> In the context of corporate responsibility for pillaging conflict commodities, for example, there is a concern that enforcing title in natural resources will amount to a pure formalism, depriving local traders of basic sustenance in a survival economy. This, according, to some commentators will produce a motivation for a return to war, not the reverse. See DOMINIC JOHNSON & ALOYS TEGERA, DIGGING DEEPER: HOW THE DR CONGO’S MINING POLICY IS FAILING THE COUNTRY 8 (2005). A similar, but not identical criticism is made of the Dodd-Franks Act, which sought to use regulatory reporting to address conflict minerals. See David Aronson, *How Congress Devastated Congo*, THE NEW YORK TIMES, August 7, 2011, <http://www.nytimes.com/2011/08/08/opinion/how-congress-devastated-congo.html> (last visited Aug 9, 2011); For responses from various actors, see A Conflict Over “Conflict Minerals” in Congo, THE NEW YORK TIMES, August 15, 2011, <http://www.nytimes.com/2011/08/16/opinion/a-conflict-over-conflict-minerals-in-congo.html> (last visited Feb 28, 2013). To my mind, saying that resource ownership is a pure fiction means Congolese resources are *res nullius*, replicating colonialism. More broadly, I believe that those who argue for a fictitious treatment of property rights have a heavy burden to show that this fiction (and the 4 million dead since 1998, the highest rates of displacement in recorded history, and the astronomical incidence of systemic sexual violence it enables) are in the net best interest of the Congolese people. Finally, I am concerned that these skepticisms seem to evacuate the concept of title in property from the entire country, instead of taking cases one by one, as criminal prosecutions would.

from the aftermath of violent upheaval;<sup>163</sup> or (c) failing to get to the heart of problems that require more elaborate regulatory, structural, or political reform.<sup>164</sup> In my view, it is highly unlikely that any absolute “one size fits all” answer exists for these sorts of questions, such that we can definitively declare that: civil liability is per se preferable; criminal prosecution is invariably ideal; both are necessary in concert; or, alternative regulatory arrangements are categorically superior to any forms of judicially imposed accountability.<sup>165</sup> Still, in order to even begin assessing these questions in real-world situations, we first require a topography of what corporate criminal liability for international crimes means across different sectors and an awareness of the ways in which weaker forms of accountability can act as shields against redress that is more conceptually fitting.<sup>166</sup>

### B. *Avoiding Legal Hurdles, Gaining Legal Tools*

The advantages of corporate criminal liability (and individual criminal liability of corporate officers) are not just conceptual preferences—corporate criminal liability compensates for the loss of the private right to sue by offering a series of important substantive benefits the ATS could not match.

First, processing allegations of human rights violations against corporations within the ATS often required plaintiffs to overcome a set of domestic legal concepts that are very alien to the criminal law. In particular, these include *forum non conveniens*, act of state and political

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<sup>163</sup> I address the arguments that ATS litigation over-deterred commerce below. See *infra*, section V.B.

<sup>164</sup> See, in particular, Moyn *supra* note 40.

<sup>165</sup> In a separate piece, I critique theorists of corporate criminal liability for too quickly assuming that there are stable answers to these questions that are not sensitive to context. See Stewart, *supra* note 28, at 261–299.

<sup>166</sup> Harry Ball and Lawrence Friedman, for example, argue that corporate criminal liability is useful insofar as it allows prosecutors to threaten “the full treatment.” By this, they imply that corporate transgression might attract all heads of accountability for the single crime: civil, criminal and regulatory. Harry V. Ball & Lawrence M. Friedman, *The Use of Criminal Sanctions in the Enforcement of Economic Legislation: A Sociological View*, 17 STAN. L. REV. 197, 215 (1965). This promise of synergy is conspicuously unrealized, however, in ATS suits against corporations. To the best of my knowledge, for all the cases filed against corporations, no parallel prosecutions (of the corporations or their representatives) have ever materialized.

question doctrines.<sup>167</sup> Each of these doctrine erected barriers that proved insurmountable for civil litigants in concrete ATS cases. But by contrast, repositioning these allegations in ICL (enforced primarily through national courts) allows prosecutors to bypass these legal impediments entirely. Without doubt, the loss of the ability for individual victims to sue and the higher burdens of proof in criminal trials are no triviality, but civil remedies always came with a series of downsides that should better factor in our assessment of feasible responses to corporate implication in atrocity.

Second, to these substantive advantages add a system of legal opportunities to influence prosecutorial discretion, which may at least partially soften the blow *Kiobel* has inflicted on the private right to sue. These opportunities can be generic or case-specific. Taking the generic type first, recall that international criminal law comes replete with broad obligations to prosecute international crimes. Conscious of the types of political influences that so frequently impede accountability for mass violence, the states that first negotiated the Geneva Conventions enacted provisions requiring universal jurisdiction, stipulated a duty to investigate and punish war crimes, and insisted that there is no statute of limitations for international crimes.<sup>168</sup> From a scholarly standpoint, greater intellectual engagement with each of these areas may well produce strange new fruit. Some of these devices have apparently distinct implications for corporate criminal liability, although this point too marks an area deserving of scholarly attention—the non-applicability of statutes of limitations has a finite application in its individualistic orientation: all people die. Corporations, however, can live forever.

In terms of case-specific opportunities to affect prosecutorial discretion, a range of legal mechanisms allow victims and others to either subtly force the issue or, more powerfully, to stand in for reluctant state prosecutors. For example, many civil law countries entertain concepts like *partie civile*;<sup>169</sup> Germany and other countries have compulsory

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<sup>167</sup> STEPHENS, *supra* note 48, at 335–365 (discussing case law governing forum non conveniens, act of state and political question doctrine in the context of ATS cases). For another helpful overview, see KOEBELE, *supra* note 48, at 323–355; K. Gallagher, *Civil Litigation and Transnational Business: An Alien Tort Statute Primer*, J. INT'L CRIM. JUST. (2010).

<sup>168</sup> For excellent discussions of these features of international criminal law, see YASMIN NAQVI, IMPEDIMENTS TO EXERCISING JURISDICTION OVER INTERNATIONAL CRIMES (2010); RUTH A KOK, STATUTORY LIMITATIONS IN INTERNATIONAL CRIMINAL LAW (2007).

<sup>169</sup> On *partie civile* in Belgium and France, see MIREILLE DELMAS-MARTY & JOHN R. SPENCER, EUROPEAN CRIMINAL PROCEDURES 94 (2002). With respect to the relation

prosecution principles (called *Legalitätsprinzip*);<sup>170</sup> and the notion of private prosecutions remains in various common law systems.<sup>171</sup> Albeit very imperfectly, these legal advantages may go some distance to at least minimize the loss of the ATS's most attractive characteristic—the independent right to sue. This is especially true if, as others have observed, these legal mechanisms “can be considered as a comparable vehicle for ATS-like claims.”<sup>172</sup> After all, the Argor-Heraeus case was initiated by a “denunciation” by a civil society organization within Switzerland.

To suggest this as a model is not a hopelessly rosy exhortation about the likelihood of corporate prosecutions; it is a call for deep engagement in legal questions that, for the ATS at least, remained peripheral. Thus, the simultaneous contraction of the ATS and rise of corporate responsibility for international crimes is an invitation to develop a rigorous, systematized, and comparative understanding of the sorts of devices that influence prosecutorial discretion, a normative theory delimiting their

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between partie civil and international crimes in Europe, *see* Kaeb & Scheffer, *supra* note 18, at 859.

<sup>170</sup> *See* MARKUS DIRK DUBBER & MARK KELMAN, *AMERICAN CRIMINAL LAW: CASES, STATUTES, AND COMMENTS* 101–105 (2005) (providing an English-language discussion of this concept, its conceptual grounding and exceptions to it). *See also* Markus Dubber, *Comparative Criminal Law*, in *THE OXFORD HANDBOOK OF COMPARATIVE LAW* (OXFORD HANDBOOKS) 1314 (Mathias Reimann & Reinhard Zimmermann eds., 2008); Rodolphe Juy-Birmann, *The German System*, in *EUROPEAN CRIMINAL PROCEDURES* 292, 338–339 (Mireille Delmas-Marty & John R Spencer eds., 2005).

<sup>171</sup> As David Garland has explained, the institution of private prosecutions in England has “gradually diminished in strength and importance.” DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 32 (2002); Nonetheless, private prosecutions still appear available for certain crimes. DAVID C. ORMEROD, J. JOHN CYRIL SMITH & BRIAN HOGAN, *SMITH & HOGAN CRIMINAL LAW* 12E PB 22, 829 and 1026 (2008); Apparently, this may also be true in South Africa. *See* JONATHAN M. BURCHELL & JOHN MILTON, *PRINCIPLES OF CRIMINAL LAW* 609 (3rd ed. 2005). Although I do little more than gesture towards these possibilities here, a more far-reaching comparative analysis of avenues for private prosecutions globally is precisely the type of research I hope this move towards corporate responsibility for international crimes will engender. For illustrations of this type of research, *see* PHILIP L. REICHEL, *COMPARATIVE CRIMINAL JUSTICE SYSTEMS: A TOPICAL APPROACH* 240 (1999) (discussing private prosecutions in various jurisdictions). After all, private prosecutions have played a significant but under-investigated and under-theorized role in the history in ICL. *See e.g.*, KATHRYN SIKKINK, *THE JUSTICE CASCADE: HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING WORLD POLITICS* (1 ed. 2011) (discussing how “Greek law permits private prosecution in criminal cases; that is, private citizens are entitled to file criminal cases.”); Jose Alvarez, *Crimes of States / Crimes of Hate: Lessons from Rwanda*, 24 *YALE JOURNAL OF INTERNATIONAL LAW* 365–483, 404 (1999) (asserting that private prosecutions were also available in Rwanda).

<sup>172</sup> Kaeb and Scheffer, *supra* note 18, at 856.

optimal design, and empirical programs to test their efficacy. Whether or not projects of this sort are ever realized, the loss of the private right to sue does not justify human rights advocates, scholars, states people, or citizens giving in to a kind of learned helplessness about corporate responsibility or their role in instigating it post-*Kiobel*; that type of defeatism overlooks the “discovery” and rise of a new set of opportunities, which still remain very poorly explored.

### C. Practical Advantages

We move, then, to the practical. On the one hand, more demanding rules of evidence and higher standards of proof in criminal trials unequivocally militate in favor of civil suits. Other strategic factors cut the other way. Take pillage, the very crime alleged in the Argor-Heraeus case. From a practical perspective, states frequently (but not invariably) own natural resources that are pillaged in modern war zones.<sup>173</sup> As a result, for a pillage case to function within an ATS framework to address these atrocity-enabling dynamics, foreign states would often have to act as plaintiffs. But is this thinkable? Not only is it unclear whether states ever had standing to bring a claim under the rubric of the ATS, the economic dependence of developing nations on corporate multinationals for direct foreign investment will often impede them exercising that possibility,<sup>174</sup>

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<sup>173</sup> STEWART, *supra* note 3, at 39–52 (discussing ownership of national resources in national law, the notion of permanent sovereignty over natural resources, indigenous ownership of natural resources, a rebel group’s ownership of natural resources under its control, and the relationship between recognition and ownership, concluding that in many instances, States own natural resources). Nonetheless, it is important to highlight how natural resources are sometimes owned by private entities, including companies. As such, pillage is both a sword and shield for corporate interests.

<sup>174</sup> Olivier de Schutter makes this point succinctly in a connected context. Olivier De Schutter, *The Accountability of Multinationals for Human Rights Violations in European Law*, in NON-STATE ACTORS AND HUMAN RIGHTS, 239–240 (2005) (arguing that “even when international law imposes on the State hosting the investment to protect its population from human rights violations, and thus to oblige all actors operating within its national territory to respect these rights, the host State will typically lack the incentive or the resources to adopt effective measures in that respect.”). See also, Larissa van den Herik & Jernej Letnar Čerňič, *Regulating Corporations under International Law: From Human Rights to International Criminal Law and Back Again*, 8 J. Int’l Crim. Just. 725–743, 728 (2010). (“In situations where a multinational corporation outweighs a developing host state in terms of economic power, that state may not be inclined to

especially after mass violence. Because criminal law does not depend on the foreign state's initiative or acquiescence, it may appropriately correct for this power imbalance.

Relatedly, a criminal prosecution may be the only feasible mechanism for accountability where power politics make the corporation "judgment-proof" in the civil realm.<sup>175</sup> To draw a vague parallel I have explored elsewhere, U.S. prosecutors recently indicted the British weapons giant BAE Systems for violating the U.S. Arms Export Control Act and making false statements concerning its compliance with the Foreign Corrupt Practices Act,<sup>176</sup> when the company's tremendous political power in Britain effectively rendered it judgment-proof there for allegedly paying billion-dollar kick-backs to the Saudi government over a lucrative weapons deal.<sup>177</sup> The point to be taken from this case is that prosecutors might sometimes have opportunities to charge corporations that have no equivalent in a civil context, for all sorts of profoundly political reasons ICL lawyers know too well. Greater attention to corporate responsibility for international crimes would better showcase these latent possibilities, such that the relative strengths and weaknesses of the criminal angle are clear as it moves forward with ATS litigation (and other forms of accountability) into the future.

For now, the broad lesson is that throwing ones hands up in lament that *Kiobel* largely destroys the right to sue corporations for violations of international law is to miss a potent practical alternative waiting in the wings.

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regulate a corporation too stringently. The investment and economic activity coming from the multinational may be more appealing to the developing state than the need to protect its citizens from violations committed by the multinational.")

<sup>175</sup> Khanna rightly argues that "judgment-proof" corporations were one of the core motivations for corporate criminal liability. We disagree that the opportunities for corporations to render themselves "judgment-proof" have changed appreciably throughout the world since the inception of regulatory bodies in the United States, although in fairness, his argument does not explicitly purport to extend beyond US borders. Khanna, *supra* note 26, at 1504. For my own misgivings about this approach, see Stewart, *supra* note 28, at 281-282.

<sup>176</sup> For helpful summary, see Brandon L. Garrett, *Globalized Corporate Prosecutions*, 97 VA. L. REV. 1775, 1842 (2011). See also, *Section III: Business as Usual*, in ANDREW FEINSTEIN, *THE SHADOW WORLD: INSIDE THE GLOBAL ARMS TRADE* (2011) (providing full background to the case against BAE Systems, including its evasion of accountability within the United Kingdom).

<sup>177</sup> *Id.*

## V. CORPORATE GUILT AS A NEW RATIONALE FOR ACCOUNTABILITY

Debates about the ATS were many and important, but they understandably left out a core idea that the criminal law will provide—guilt. For obvious reasons, this concept never featured within visions of ATS litigation that were bound up in tort law, international relations or a business and human rights agenda. As things transpire, however, many of those who call for stronger forms of corporate accountability for human rights abuses are probably fairly described as “closet retributivists.”<sup>178</sup> Significantly, recasting human rights cases that rise to the level of international crimes as corporate *crimes* allows us to make these retributive aspirations explicit, as a new possibility for justifying this form of corporate accountability.<sup>178a</sup> In this Part, I point to these underlying retributive intuitions, show how retribution is not necessarily the inhumane cry for revenge that many suppose, and demonstrate how the criminal law provides an appropriate vehicle in whose name “closet retributivists” can safely “come out.” In fact, as we will see momentarily, a deontological vision of responsibility cuts through much of the criticism that tied ATS cases down.

## A. “Closet Retributivism” in Business and Human Rights

By and large, arguments for and against the ATS were fought on consequentialist turf. In April 2013, for example, Judge Pierre Leval set out what were, in his estimation, the true purposes of ATS litigation. According to the judge, universal civil jurisdiction of this sort is helpful because

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<sup>178</sup> Michael Moore, one of the leading modern theorists of criminal law, uses this term to describe unresolved intuitions about responsibility and punishment. Moore, *supra* note 38.

<sup>178a</sup> I accept, of course, that corporations can violate all sorts of human rights short of perpetrating international crimes, meaning that international criminal justice offers only a partial solution to the wider problem of corporate accountability. For helpful commentary to this effect, see van den Herik & Černič, *supra* note 173, at 741 (“corporate responsibility under international criminal law could never subsume the human rights concept which has much broader implications.”) Necessarily, this is only part of a response to the problem of accountability within the business and human rights context, but it is arguably a solution that goes to the most egregious violations. Recall, also, that the ATS was always limited to “widely accepted, clearly defined violations” of international law, which also excluded some human rights norms.

keeping courts open to civil suits about human rights can bring solace and compensation to victims. More important, these suits draw global attention to atrocities, and in so doing perhaps deter would-be abusers. And they give substance to a body of law that is crucial to a civilized world yet so under-enforced that it amounts to little more than a pious sham.<sup>179</sup>

While this inventory of benefits is undeniably compelling, critics point to a range of countervailing costs associated with ATS litigation, usually of an economic and political type.<sup>180</sup> Nonetheless, both sets of arguments were always intensely utilitarian in form, overlooking the rationale most criminal theorists would offer for prosecuting criminals—wrongdoers deserve punishment because they are guilty. Thus, by focusing on retribution, I play down debates about the legitimacy and efficacy of the ATS scheme, although admittedly, my approach echoes Sarah Cleveland’s observation within these discussions, that “corporations that wish the ATS would go away are simply ignoring the availability of other legal mechanisms to reach this type of conduct.”<sup>181</sup>

To begin, note how many in this field harbor retributive intuitions, without ever claiming them as such. In 2011, Professor John Ruggie, the then United Nations Secretary General’s Special Representative for

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<sup>179</sup> Pierre N. Leval, *The Long Arm of International Law*, FOREIGN AFFAIRS, April, 2013, <http://www.foreignaffairs.com/articles/138810/pierre-n-leval/the-long-arm-of-international-law> (last visited Jan 22, 2014).

<sup>180</sup> GARY CLYDE HUFBAUER & NICHOLAS K. MITROKOSTAS, AWAKENING MONSTER: THE ALIEN TORT STATUTE OF 1789 38 (2003) (predicting grave financial implications for the US and global economies if ATS suits continued unchecked); Bradley and Goldsmith, *supra* note 132; Julian Ku & John Yoo, *Beyond Formalism in Foreign Affairs: A Functional Approach to the Alien Tort Statute*, 2004 SUP. CT. REV. 153 (2004) (arguing that for functional, policy or pragmatic reasons, the Executive is far better placed to deal with the concerns that animate the ATS than courts); Abebe, *supra* note 102 (employing political realism to argue that ATS suits would “complicate the achievement of the United States’ normative and strategic foreign policy goals.”); Sykes, *supra* note 88 (using economics to suggest that the ATS could lead to a net diminution of respect for human rights); Bradley, *supra* note 132 (carefully pointing to democratic and political costs that derive from ATS litigation); Bellinger, *supra* note 132 (same); For skillful responses to these criticisms, see Richard L. Herz, *The Liberalizing Effects of Tort: How Corporate Complicity Liability under the Alien Tort Statute Advances Constructive Engagement*, 21 HARV. HUM. RTS. J. 208 (2008) (criticizing many of the assumptions about the impact of ATS litigation); Knowles, *supra* note 133 (employing realism to problematize whether ATS cases really undermine US interests); Sarah H. Cleveland, *The Alien Tort Statute, Civil Society, and Corporate Responsibility*, 56 RUTGERS L. REV. 971 (2003) (arguing that ATS litigation does not harm US interests nearly as much as others pretend, or that it is exceptional relative to other available schemes).

<sup>181</sup> *Id.*, at 982.



Business and Human Rights, presented his final report on business and human rights. In response, Human Rights Watch, Amnesty International and a host of other civil society organizations issued a joint statement objecting that Ruggie's approach to issues of accountability was insufficiently progressive.<sup>182</sup> For this consortium of critics, one of the main perceived shortcomings included the need to place greater emphasis on the obligation for States to "prevent, investigate, *punish* and redress business-related human rights abuse".<sup>183</sup> This insistence on punishment could be read as retributive, especially if punishment exists independently of the need for redress or wider aspirations for compliance with human rights precepts.

In another example, retribution features less as a grounds for accountability, and more as a basis for calculating the type and quantum of a judicial response. In 2008, a British National Contact Point for the OECD Guidelines on Multinational Enterprises heard a case against a company named Afrimex.<sup>184</sup> In that case, Afrimex was alleged to have

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<sup>182</sup> See Human Rights Watch et al., *Joint Civil Society Statement on the draft Guiding Principles on Business and Human Rights* (2011), <http://www.business-humanrights.org/Links/Repository/1003963/jump>. The essence of the dispute seems to revolve around the need for a new treaty governing human rights rather than misgivings about accountability as such. For instance, Principle 25 of the Ruggie Principles mandated that "[a]s part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy." U.N. Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, Human Rights Council, A/HRC/17/31 (Mar. 21, 2011) (by John Ruggie). Ruggie also concluded his six-year mandate by calling for greater attention to corporate responsibility for international crimes. See JOHN GERARD RUGGIE, JUST BUSINESS: MULTINATIONAL CORPORATIONS AND HUMAN RIGHTS (AMNESTY INTERNATIONAL GLOBAL ETHICS SERIES) 200 (2013) ("[n]ational jurisdictions have divergent interpretations of the applicability to business enterprises of international standards prohibiting gross human rights abuses, potentially amounting to international crimes. Such abuses occur most frequently in situations where the human rights regime cannot be expected to function as intended, such as armed conflict. Greater legal clarity is needed for victims and business enterprises alike.")

<sup>183</sup> *Id.*, at 2 (emphasis added). Elsewhere, the Statement also includes the following argument: "States should adopt and implement effective regulatory measures to prevent, put an end to and punish business abuses of human rights at home and in other countries". I am also inclined to read this reference to punishment as suggesting retribution, particularly when it follows immediately on from regulatory measures to prevent and put an end to corporate human rights abuses.

<sup>184</sup> Final Statement by the UK National Contact Point for the OECD Guidelines For Multinational Enterprises: *Afrimex (Uk) Ltd*, URN 08/1209, 28 August 2008. In the

illegally exploited natural resources from the Democratic Republic of Congo (“DRC”) during a resource war Madeline Albright once dubbed “Africa’s First World War.”<sup>185</sup> Perplexingly, however, having found that Afrimex was responsible for violating the OECD Guidelines, the U.K. National Contact Point merely thanked the company for offering to formulate a corporate responsibility policy document “to shape its actions going forward.”<sup>186</sup> Aside from the public shaming, this was the only penalty visited upon the company. For many, this sanction will seem patently inadequate, especially if the underlying conduct also constituted the war crime of pillage.

At the end of WWII, a German businessman Pleiger received a prison sentence of 15 years for his prodigious pillage of Polish coal over the course of the conflict. By sharp contrast, an English company that appears to have engaged in legally comparable conduct in modern Africa escaped serious consequences with a direction to Ruggie’s influential work and some polite pressure to develop a strategy that conforms with the insightful principles he has espoused.<sup>187</sup> Thus, even though the NCP process is a valuable “calling to account,”<sup>188</sup> it seems inadequate on its face—the “verdict” produces a sharp sense of injustice, since the sanction inflicted on the company is woefully incommensurate with its wrongdoing. Here once more, the retributive intuition repeats;

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United Kingdom, this National Contact Point is housed within the Department for Business, Innovation and Skills. Very recently, it was conferred the power to hear arguments from civil society and issue public opinions, which makes it the most progressive of its type.

<sup>185</sup> Secretary of State Madeleine K. Albright, WELCOMING REMARKS AT THE UN SECURITY COUNCIL SESSION ON THE DEMOCRATIC REPUBLIC OF THE CONGO 1 (2000), <http://1997-2001.state.gov/www/statements/2000/000124.html> (“Because of that nation’s location and size, and because of the number of countries involved, the conflict there could be described as Africa’s first world war.”). Gérard Prunier, arguably the leading historian of the region, has also employed the metaphor. See GERARD PRUNIER, AFRICA’S WORLD WAR: CONGO, THE RWANDAN GENOCIDE, AND THE MAKING OF A CONTINENTAL CATASTROPHE (2009).

<sup>186</sup> Afrimex Case, *supra* note 184.

<sup>187</sup> The UK National Contact Point’s concluding “recommendation” starts as follows: “Afrimex offered to formulate a corporate responsibility policy document to shape its actions going forward. The NCP thanks Afrimex for this suggestion and understand that the work is underway on this document. In creating this corporate responsibility document, the NCP draws Afrimex’s attention to the US Special Representative on the issue of Human Rights’ recent report: ‘Protect, Respect and Remedy: A Framework for Business and Human Rights’”. *Id.*, at 14.

<sup>188</sup> “Calling to account” is a key element of Antony Duff’s explanation of the criminal trial. To my mind, the Afrimex case suggests that calling to account is necessary but insufficient for criminal justice. ANTONY DUFF, ANSWERING FOR CRIME: RESPONSIBILITY AND LIABILITY IN THE CRIMINAL LAW (2007).

proportionality in punishment is a fundamental tenet of retributive thinking.<sup>189</sup> So, when considering either the rationale for accountability or the sentence meted out, retribution does important but unacknowledged work.

Perhaps retribution was overlooked precisely because the ATS originated amongst human rights lawyers. One could certainly understand why a method inspired by human rights might take a purely consequentialist view of criminal trials; over the past decades much human rights literature has used “compliance” as the overarching objective.<sup>190</sup> Indeed, a set of prominent human rights scholars have developed sophisticated models for measuring human rights compliance by states, offering compelling arguments for prioritizing acculturation, coercion, and persuasion in different contexts.<sup>191</sup> By extrapolation to the corporation in war zones, applying this method to the problem of global corporate governance involves identifying projects and initiatives that will improve companies’ respect for human rights norms into the future. For the criminal theorist, however, this approach leaves something important out.

What do we do about corporate guilt for past offending? If a company does ten unspeakably evil things in, say, Angola, which amount to clear instances of international crimes, then through a perfect process of human rights acculturation comes to mend their wicked ways thereafter, do we just forget about the ten atrocities they participated in? A former serial murderer cannot avoid responsibility by claiming that she has discontinued her earlier criminal campaign (i.e. is now “compliant”), so offering that possibility to corporate war criminals seems incongruous to

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<sup>189</sup> Proportionality is a core element of retributive notions of punishment, perhaps best reflected in the Hegelian view that “[t]he cancellation of crime is retribution in so far as the latter, by its concept, is an infringement of an infringement, and in so far as crime, by its existence, has a determinative qualitative and quantitative magnitude, so that its negation, as existent, also has a determinate magnitude.” MICHAEL TONRY, *WHY PUNISH? HOW MUCH?: A READER ON PUNISHMENT* 46 (2010) citing G.W.F. Hegel, *Wrong [Das Unrecht]*. See also, Andrew Von Hirsch, *Proportionality in the Philosophy of Punishment*, *CRIME AND JUSTICE* 55–98 (1992).

<sup>190</sup> RYAN GOODMAN & THOMAS INNES PEGRAM, *HUMAN RIGHTS, STATE COMPLIANCE, AND SOCIAL CHANGE: ASSESSING NATIONAL HUMAN RIGHTS INSTITUTIONS* (2012); Oona Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 *YALE L. J.* 1870 (2002) (assessing literature on “compliance” with treaty law generally, then developing tests for “compliance” specific to human rights treaties); Harold Hongju Koh, *How is International Human Rights Law Enforced?*, 74 *IND. L.J.* 1397 (1999) (containing a section heading entitled “From Compliance to Obedience”).

<sup>191</sup> See, in particular, the helpful table summarizing these core arguments in Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 *DUKE L.J.* 621 (2004).

the point of objection. In other words, basic notions of (retributive) justice dictate that the CSR or Business and Human Rights movements cannot expunge past wrongdoing out of a laudable commitment to future compliance. Joining the UN Global Compact, establishing a human rights award or initiating the Kimberley Process are all praiseworthy initiatives, but they do not wipe the slate of history clean or act as a shield against law enforcement—justice still matters in concrete cases, above and beyond systemic questions of compliance.<sup>192</sup>

Again, these intuitions are fundamentally retributive. In a famous passage in his defense of retribution, Immanuel Kant argues that if a community on an island decided to dissolve itself, the last prisoner on the island should be executed beforehand, “so that everyone will duly receive what his actions are worth and so that the bloodguilt thereof will not be fixed on the people because they failed to insist on carrying out the punishment.”<sup>193</sup> If this reference to execution makes modern human rights lawyers cringe, Kant’s underlying argument does offer a hidden justification for stronger notions of corporate accountability for its own sake—sometimes corporations and/or their representatives *deserve* to be punished. From this perspective, international criminal law (predominantly enforced in national courts) might offer an apparatus for insisting on accountability that better squares with popular visions of justice.

None of this is to say that corporate criminal cases of this sort will be a walk in the park, that I have come close to defending retribution or that ATS litigation offered no retributive value; it is merely to make conscious the retributive ideation beneath the surface. Once exposed, this ideation should stimulate new debate, especially when the reorientation of ATS

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<sup>192</sup> Interestingly, the example Ruti Teitel and Rob Howse offer for the need to think beyond the compliance narrative is diametrically opposite to those operative in this field, but I suspect that they would welcome my scenario as bolstering their thesis too. Robert Howse & Ruti Teitel, *Beyond Compliance: Rethinking Why International Law Really Matters*, 1 GLOB. POLICY 127–136, 131 (2010) (“The broad political and economic considerations that might be served by integrating Serbia into the European Union have been almost entirely overshadowed by the concern that Serbia has failed adequately to cooperate with the ICTY prosecution of war criminals. Indeed, compliance has become the central issue with respect to Serbian accession to the EU, where ‘compliance’ with international law is viewed as a surrogate for or symbol of political ‘cooperation’”). In my instance, economic and political considerations have crowded out international criminal responsibility, but as I say, I suspect both examples evidence the shortcomings of compliance as the be-all and end-all of international law.

<sup>193</sup> IMMANUEL KANT, METAPHYSICAL ELEMENTS OF JUSTICE: PART I OF THE METAPHYSICS OF MORALS 140 (1999).

suits towards the criminal law produces marked departures from earlier thinking.

*B. A Deontological Response to ATS Critics*

In all likelihood, a deontological perspective grounded in moral responsibility (as distinct from a consequentialist vision set in economics or international relations), will offer different answers to core criticisms of ATS suits.

First, consider over-deterrence. During the South African Apartheid litigation brought under the ATS, the Bush administration argued that aiding and abetting liability “would surely deter many businesses from such economic engagement.”<sup>194</sup> Likewise, Alan Sykes has argued that liability schemes walk a thin line between understating harm (thereby failing to force business to internalize the full cost of doing business) and overstating harm (thus creating costs to the business that are excessive, especially when it must take burdensome precautions to avoid that harm).<sup>195</sup> In Professor Sykes view, ATS litigation fell on the wrong side of this balance; it imposed significant avoidance costs without making a difference as to whether atrocities took place or not. Chinese companies, which are practically immune from the discriminatory ATS regime, will (and do) assist brutal regimes when Western businesses withdraw from volatile countries to avoid these suits.<sup>196</sup> Thus, ATS liability is “undesirable because [it] will induce employers to take measures to avert liability that are socially wasteful.”<sup>197</sup>

For the retributivist, however, this reasoning is unconvincing as an argument against accountability. For one reason, it runs counter to Kant’s imperative that no one should be treated as a means for some wider sociological project. As Richard Herz has eloquently argued, the foregoing seems to place formally immutable human rights on the same

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<sup>194</sup> Brief for the United States of America as Amicus Curiae Supporting Respondents at 13, *Khulumani v. Barclay National Bank*, 509 F.3d 148 (2d Cir. 2007) (Nos. 05-2141-CV, 05-2336-CV).

<sup>195</sup> Sykes, *supra* note 88, at 2186-2187.

<sup>196</sup> To substantiate, I think very fairly, the point about other corporate actors moving in where Western companies are forced to withdraw for fear of liability, Sykes cites the *Talisman* case in Sudan. He points out how, “[f]ollowing *Talisman*’s departure, Chinese companies moved in and dominated the market.” *Id.* at 2195. (Parentheses omitted).

<sup>197</sup> *Id.* at 2188.

scales as economic interests.<sup>198</sup> But can these things be weighed against each other? If we give individuals rights, it seems difficult to understand how one could demand that any victim sacrifice herself in the name of improving economic efficiency, even if the number of victims was minute and the efficiency dividends marked. In other words, the utilitarianism inherent in economic argument sits uncomfortably with a deontological notion of rights, which retributive accounts of criminal responsibility take seriously. On this alternative framing, the task is to construct a morally defensible notion of international blame attribution (including complicity), then let responsibility attach where it may. If, as a result, companies balk at the prospect of working in South Africa or Sudan, this is less of a priority for the retributivist than holding the guilty to account.

Second, the argument that ATS litigation seldom makes a concrete difference to human rights compliance on the ground seems to miss a major moral problem at the heart of atrocity. To stay with Professor Sykes, he argues that “the implicit premise is that when such assistance [from a business to a human rights violator] is withheld, the likelihood or seriousness of the harmful act will be diminished.”<sup>199</sup> This premise, he says, is false. “Nothing will be gained” he argues, “if aiders and abettors are held liable for helping wrongdoers who could have obtained the same help elsewhere”.<sup>200</sup> Indeed, by deterring actors from Western democracies, this type of responsibility may just tie brutal regimes to companies from China and elsewhere, leading to a net diminution of human rights compliance on the ground. In this light, Sykes claims that the corporations that are technically complicit in human rights violations “do not ‘cause’ the repressive acts.”<sup>201</sup>

Yet, this reasoning is not consistent of the causal principles criminal courts will apply in these types of cases, which defer to moral principle over net outcomes. As I have argued elsewhere in far greater depth, most atrocities are causally overdetermined in the same sense Sykes cites; there are usually multiple sufficient causes for any given atrocity.<sup>202</sup>

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<sup>198</sup> Herz, *supra* note 180, at 226 (arguing, also, that even if societal interests could trump human rights, that social benefit would not only have to be “large and unequivocal”, some legitimate authority (rather than the corporation concerned) should make the decision.).

<sup>199</sup> *Id.* at 2188.

<sup>200</sup> *Id.* at 2189.

<sup>201</sup> *Id.* at 2203.

<sup>202</sup> James G. Stewart, *Overdetermined Atrocities*, 10 J. INT’L CRIM. JUST. 1189–1218 (2012). In that Article, I use several examples from the commercial sector to illustrate these causal problems in action, including the responsibility of corporations in Apartheid South Africa and the responsibility of the notorious arms vendor Viktor Bout, who responded to the complaint that his weapons sales had helped kill the better part of a

Perpetrators of mass violence often make sufficient but unnecessary contributions to unspeakable violence, mainly because brutal political or military groups furnish willing substitutes if any particular member defects, thus guaranteeing the commission of the crime. In fact, in my earlier study of causal overdetermination as applied to international criminal justice, I surmised that at least part of what Hannah Arendt famously calls “the banality of evil” is that terrible violence often involves playing a consequentially benign part in a wider horror that would take place regardless of one’s participation,<sup>203</sup> what makes radical evil so banal is that the most terrible individual actions frequently make no discernable difference.

I resist the temptation to expand terribly much on causal overdetermination here, except to insist that philosophers unanimously agree that a causally overdetermined contribution to a crime is a perfectly sufficient basis for holding one responsible for that offense.<sup>204</sup> Justifying quite why this is the case has given rise to a range of explanations (some

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million Angolans, by remarking that “If I didn’t do it, someone else would.” N. Schmidle, ‘Disarming Viktor Bout’, *The New Yorker* (5 March 2012), available at [http://www.newyorker.com/reporting/2012/03/05/120305fa\\_fact\\_schmidle](http://www.newyorker.com/reporting/2012/03/05/120305fa_fact_schmidle) (last visited 4 June, 2012).

<sup>203</sup> HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* (1992). My projection onto the phrase “banality of evil” is not so far from the meaning David Luban ascribes to the term. See David Luban, *State Criminality and the Ambition of the International Court of Justice*, in ACCOUNTABILITY FOR COLLECTIVE WRONGDOING 61–91, 61 (Tracy Isaacs & Richard Vernon eds., 2011) (citing Arendt’s responsibility and Judgement in Jerome Kohn (ed) (New York: Schocken Books, 2003), at 159 for the following meaning: “the phenomenon of evil deeds, committed on a gigantic scale, which could not be traced to any particularity of wickedness, pathology, or ideological conviction in the doer.”).

<sup>204</sup> After reviewing the philosophical literature addressing causal overdetermination, Michael Moore concludes that, while a justification for this sufficient understanding of causation is no mean feat, “[t]o my knowledge, no one denies these causal conclusions.” MICHAEL S. MOORE, *CAUSATION AND RESPONSIBILITY: AN ESSAY IN LAW, MORALS, AND METAPHYSICS* kindle 6052 (2009). The recurrent theme in these discussions is Aleksandr Solzhenitsyn exclamation “the simple step of a simple courageous man is not to take part in the lie, not to support deceit. Let the lie come into the world, even dominate the world, but not through me.” See Jonathan Glover & M. J. Scott-Taggart, *It Makes no Difference Whether or Not I Do It*, 49 P. ARISTOTELIAN SOC. 171–209 (1975) (discussing what he calls “The Solzhenitsyn Principle”); CHRISTOPHER KUTZ, *COMPLICITY: ETHICS AND LAW FOR A COLLECTIVE AGE* 128, 190–191 (2000) (discussing the Solzhenitsyn Principle, in the context of the accomplice liability of arms vendors); John Gardner, *Complicity and Causality*, 1 CRIM. LAW AND PHILOS. 127–141, 127 (2007) (using Solzhenitsyn’s quote as an epigraph for his treatment of causation in complicity).

more controversial than others).<sup>205</sup> I here offer only one, since it succinctly reveals how criminal law is likely to produce a very different result to that Professor Sykes reasonably endorses in a civil context.

Using an arms dealer who is fungible for numerous willing substitutes in a vibrant international market as his example, John Gardner explains that

we should not allow the arms dealer to get away with the idea that, by dealing arms, he made no difference to the overall incidence of the wrongdoing. In the relevant sense of “overall difference”, he did make an overall difference. He added his own arms dealings. True, he also subtracted like arms dealing by others, by competitors of his who would have filled the space in the arms market if he had moved into another line of work. But he cannot be allowed simply to treat the subtraction as cancelling out the addition, as yielding a zero sum. That is an abdication of responsibility. It is an abdication of responsibility because it is a refusal to accept that the relationship he has to his own wrongs is different from the relationship that he has to his competitors’ wrongs.<sup>206</sup>

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<sup>205</sup> In particular, causal overdetermination was a principal factor in Richard Wright’s championing of the so-called Necessary Element of a Sufficient Set (NESS) theory of causation. See Richard Wright, *Causation in Tort Law*, 73 CALIFORNIA LAW REVIEW 1735 (1985); Richard W. Wright, *Once More into the Bramble Bush: Duty, Causal Contribution, and the Extent of Legal Responsibility*, 54 VAND. L. REV. 1071 (2001). The German orthodoxy, however, approaches these questions from a quite different perspective, although it arrives at similar conclusions. See Friedrich Toepel, *Causal Overdetermination*, in CRITICAL ESSAYS ON “CAUSATION AND RESPONSIBILITY” 111–132 (Benedikt Kahmen & Markus Stepanians eds., 2013), <http://www.degruyter.com/view/product/186402> (last visited Aug 4, 2014); Professor Wright has also defended his account of causation against these criticisms. See Richard Wright, *The NESS Account of Natural Causation: A Response to Criticisms*, in CRITICAL ESSAYS ON “CAUSATION AND RESPONSIBILITY” 13–66 (Benedikt Kahmen & Markus Stepanians eds., 2013), <http://www.degruyter.com/view/product/186402> (last visited Aug 4, 2014). To my mind, Derek Parfit offers the most brilliant explanation for why overdetermined contributions are still blameworthy, but his conclusion casts a very wide net. See Derek Parfit, *Five Problems of Moral Mathematics*, in REASONS AND PERSONS (New York: Oxford University Press, 2003), pp 67 – 87 (inviting us to accept that those who make imperceptibly small contributions to joint harm are still responsible for that harm when operating in collective constructs).

<sup>206</sup> John Gardner, *Complicity and Causality*, 1 CRIM. LAW AND PHILOS. 127–141, 139 (2007).



On the back of this sort of reasoning, the doctrinal question for ICL is not so much whether the business (or its representatives) made a difference to an atrocity in a counterfactual sense, as is the common critique of ATS litigation; it is whether the business or its representatives participated in one.<sup>207</sup> Unfortunately, because the answer to that question is frequently affirmative, guilt often attaches to the company, its representatives, or both.<sup>208</sup>

Three words to qualify the foregoing. First, the preceding argument is not a criticism of Professor Sykes position, since his excellent piece is very sensitive to differences between civil accountability and other branches of law in precisely the sorts of ways I recommend here. In one such instance, for example, he asserts that “[e]conomic considerations may not be the only relevant policy considerations, but it would be exceedingly peculiar to suggest that the economic costs and benefits of liability under the ATS are wholly irrelevant to the wisdom of liability as a policy matter.”<sup>209</sup> I agree with both aspects of this proposition—moral

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<sup>207</sup> International criminal courts and tribunals apply this logic in practice. *See e.g.*, Prosecutor v. Charles Ghankay Taylor, Case No.SCSL-03-01-A, Judgment, ¶ 522 (“it is well-settled that a ‘substantial effect’ is not a ‘but for’ cause or a ‘condition precedent.’”); Ntawukulilyayo v. The Prosecutor, Case No. ICTR-05-82-A, Judgement, 2011 (“Whether a particular contribution qualifies as ‘substantial’ is a ‘fact-based inquiry’, and need not ‘serve as condition precedent for the commission of the crime’”); Prosecutor v. Blagojević and Jokić, Case No. IT-02-60-A, Judgment, ¶ 134 (2007) (“The Appeals Chamber, however, has already held that it is not required that the act of assistance serve as a condition precedent for the commission of the crime”). In many national systems, a separate less culpable notion of complicity exists for non-essential complicitous contributions, but it still holds those responsible for these non-essential crimes responsible for one and the same consummated offence. For thirteen examples from South America, for instance, see JUAN BUSTOS RAMIREZ & MANUEL VALENZUELA BEJAS, *LE SYSTEME PENAL DES PAYS DE L’AMERIQUE LATINE: AVEC REFERENCE AU CODE PENAL TYPE LATINO-AMERICAIN* 128–130 (1983) (setting out examples of complicity rules that formally distinguish essential from non-essential forms of assistance).

<sup>208</sup> I am attracted to James Gobert’s argument that if a corporation is an entity that can support moral responsibility, it is frequently a co-perpetrator or accomplice of international crimes along with its employees. *See* James Gobert, *Squaring the Circle: The Relationship between Individual and Organisational Liability*, in *EUROPEAN DEVELOPMENTS IN CORPORATE CRIMINAL LIABILITY* 139–157, 146 (2011) (arguing that the corporation and its employees are frequently complicit in one another’s crimes.) The addition of co-perpetration is my own, since one must assume that in many instances, the two actors share full responsibility for the consummated crime, especially where they are both implicated in planning and execution phases of the commission. On the theory of co-perpetration (far more than complicity) see MICHAEL BRATMAN, *SHARED AGENCY: A PLANNING THEORY OF ACTING TOGETHER* (2014).

<sup>209</sup> Sykes, *supra* note 88, at 2164.

responsibility provides another set of relevant considerations, and economic implications of any corporate accountability scheme are tremendously important. The great difficulty, however, is that before now, the moral implications of corporate offending have not featured in the debate at all, effectively foreclosing the opportunity to decide how intense our retributive brand of justice should be. Somewhat surprisingly, the weight to place on corporate guilt for atrocity is a debate that we are yet to have.

Second, retribution does not preclude simultaneously pointing to the positive consequentialist outcomes that trials will generate. With respect to deterrence, for example, leading experts of corporate criminal liability argue that whereas criminal law as applied to individuals frequently exacerbates the social dislocation that leads to crime in the first place, “corporations are more likely to react positively to criminal stigma by attempting to repair their images and regain public confidence.”<sup>210</sup> As a result, corporations may be more deterrable than individuals in some circumstances.<sup>211</sup> As such, corporate criminal liability offers very new opportunities for deterring atrocity,<sup>212</sup> which tend to remain seriously under-appreciated in the literature on international criminal justice, which is almost exclusively oriented towards individuals and individuals alone.<sup>213</sup> Retribution does not discount these important consequences, it just makes them secondary to a strict calculation of what the corporation and its representatives deserve.

Third, criminal trials can certainly coexist with civil litigation, claims for restitution, CSR initiatives of all stripes, regulatory responses like the Dodd-Frank Act, and broad-based programs that seek to infuse human

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<sup>210</sup> Brent Fisse, *Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions*, 56 S. CAL. L. REV. 1141, 1153–1154 (1983). In the same vein, Walsh & Pyrich note that corporate criminal convictions can strongly impact consumer purchasing decisions, and that criminal conviction may have other effects such as barring a corporation from certain kinds of business activity. Charles J. Walsh & Alissa Pyrich, *Corporate Compliance Programs as a Defense to Criminal Liability: Can a Corporation Save Its Soul?*, 47 RUTGERS L. REV. 605, 635 (1995).

<sup>211</sup> SALLY S. SIMPSON, CORPORATE CRIME, LAW, AND SOCIAL CONTROL 36 (2002).

<sup>212</sup> In fairness, not everyone shares this view. For example, though Eli Lederman is open to considering “self-identity” models of corporate criminal liability, he views individual liability as a more compelling and efficient deterrent. Eli Lederman, *Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity*, 4 BUFF. CRIM. L. REV. 641, 702 (2000).

<sup>213</sup> Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?* 95 AM. J. INT’L L. 7, 10 (2001); David Wippman, *Atrocities, Deterrence, and the Limits of International Justice*, 23 FORDHAM INT’L L.J. 473, 474 (1999); Julian Ku & Jide Nzelibe, *Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?*, 84 WASH. U. L. REV. 777, 832 (2006).

rights into corporate cultures. Insisting that the guilty be held accountable does not necessarily crowd out alternatives that could also deal with the problem. Nevertheless, if human rights advocates (and citizens at large) desire more proportionate forms of corporate accountability for human rights violations, international criminal justice not only offers a platform to satisfy those desires, it also supplies an obvious but unexplored rationale for exercising that power. Needless to say, none of the forgoing justifies retribution or solves Samuel Moyn's concern that sensationalized accountability will overwhelm wiser attempts at addressing root causes of human rights offending.<sup>214</sup> However, to return to one of my central themes, merely pointing to retribution inserts an overlooked argument for corporate accountability, which has important but under-appreciated normative implications. At the same time, retribution claims supremacy over the consequentialist rationale that always dominated discussions of the ATS scheme.

### C. *Retribution and Human Rights*

There is much to be said for and against retribution, including in ICL.<sup>215</sup> I largely set that debate aside here, in favor of a brief attempt at showcasing the plausibility of retribution for human rights advocates. I do this since I suspect that, in the minds of many, the two are not comfortable bedfellows.

In fact, some prominent authors argue that only retribution adequately respects the human dignity human rights conventions sanctify. In a typically elegant essay written in 1949, the novelist C.S. Lewis chastised the so-called "humanitarian" notion of punishment (*viz.* the idea that

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<sup>214</sup> See *infra* notes 40 and 41.

<sup>215</sup> MARK DRUMBL, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW 150–168 (2007); Robert D. Sloane, *The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law*, 43 STAN. J. INT'L L. 39, 70–74 (2007) (both expressing skepticism about retribution as a basis for punishment). Both of these accounts seem to focus exclusively on the justification of punishment by international institutions. It is unclear whether the analysis would change if national courts are punishing their own nationals for international crimes perpetrated abroad, or if corporate defendants were substituted for individuals. Both authors also disfavor retribution because of the selectivity inherent in international criminal prosecutions. I confess that I have never found that reasoning altogether convincing. I am grateful to Victor Tadros on this score who, articulating my misgivings better than I could, asked: "if three people rob a bank and for various political and circumstantial reasons, you can only apprehend one, is retribution no longer a sound rationale for punishing that one defendant because the two others escaped?"

criminal punishment should be used as an instrument for moral education or psychic treatment) as both inherently demeaning and politically dangerous.<sup>216</sup> For Lewis, “the concept of Desert is the only connecting link between punishment and justice,”<sup>217</sup> and dispensing with this linkage, especially in the name of mercy and humanitarianism, “means that each one of us, from the moment he breaks the law, is deprived of the rights of a human being.”<sup>218</sup>

True, retribution fell out of favor in the post-war period, where leading authors dismissed the philosophy as either “primitive” or “infantile.”<sup>219</sup> But very soon thereafter, alternative models of punishment that viewed criminal justice as a gateway to treatment, rehabilitation or moral education fell from grace, sparking a resurgence of the retributive ideal.<sup>220</sup> Thus, in discussing corporate accountability on an international stage, we must also recognize that retribution is presently the dominant rationale for punishment globally.<sup>221</sup> Therefore, reprocessing ATS-type cases against

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<sup>216</sup> C.S. Lewis, *The Humanitarian Theory of Punishment*, 3 THE TWENTIETH CENTURY: AN AUSTRALIAN QUARTERLY REVIEW 5–12 (1949).

<sup>217</sup> *Id.* at 148.

<sup>218</sup> *Id.*

<sup>219</sup> During that period, scholars argued that “official social institutions should not be predicated upon the destructive emotion of vengeance, which is not only the expression of an infantile way of solving a problem, but unjust and destructive of the purpose of protecting society.” LIVINGSTON HALL & SHELDON GLUECK, *CASES AND MATERIALS ON CRIMINAL LAW* 20 (1940). For other views of retribution as childish during this period, see JOHN BARKER WAITE, *THE CRIMINAL LAW AND ITS ENFORCEMENT* 3–4 (1947) (describing retribution as a “vindictive philosophy, consistent with the biblical eye for an eye and tooth for a tooth, paraphrased by the childish, ‘Tit for tat: kill my dog. I’ll kill your cat.’”).

<sup>220</sup> On the collapse of the welfare model of criminal justice, see DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* (2002).

<sup>221</sup> Writing as recently as 1981, for instance, Denis Galligan pointed out that “[i]n more recent years an usual combination of academic writers and practical reformers has produced cogent and persuasive arguments for the pre-eminence of retribution in criminal justice.” D. J. Galligan, *The Return to Retribution in Penal Theory*, in *CRIME, PROOF AND PUNISHMENT: ESSAYS IN MEMORY OF SIR RUPERT CROSS* 144–171, 144 (Colin Tapper ed., 1981); These views were also the norm across the Atlantic. See e.g., Sanford H. Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87 CAL L. REV. 978, 979 (1999) (“Beginning in the early 1970s, a widespread disaffection with rehabilitation as a theory and in practice took hold, which revolutionized sentencing laws in this country. The individualization of punishment had run its course, yielding to the sentiment that those who commit crime should be punished because they deserve it”); David Dolinko, *Three Mistakes of Retributivism*, 39 UCLA L. REV. 1623, 1623 (1991) (“It is widely acknowledged that retributivism, once treated as an irrational vestige of benighted times, has enjoyed in recent years so vigorous a revival”); R. A. Duff, *In Defence of One Type of Retributivism: A Reply to Bagaric and Amarasekara*, 24 MELB.

commercial actors within a retributive vision of ICL offers a better vehicle for realizing modern justifications for criminal justice, which may simultaneously resonate with foundational ideas in the theory of human rights.

Admittedly, isolating the precise rationale for privileging human beings as a species is a challenge for philosophers of human rights: a coherent answer to that question has to exclude animals and include “tiny babies, humans who suffer from profound disabilities, the very old and the demented who have lost any capacity for reasoned thought or the ability to understand the living of their lives.”<sup>222</sup> Unsurprisingly, there are a number of competing solutions to this riddle. Some, for instance, argue that human rights are God-given natural rights;<sup>223</sup> others view them as a byproduct of humans’ superior cognitive capacities; whereas others still, suggest that the search for firm conceptual ground in human rights is hopeless, to the point that it merely distracts us from the sentimentalism (or politics more broadly) that really work in affecting social change.<sup>224</sup> At least since Kant, though, *moral agency* has served as a serious contender among these theories of human rights.<sup>225</sup> So, according to this theory at least, the moral

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U. L. REV. 411, 411 (2000) (“A striking feature of penal philosophising during the last thirty years has been the revival of retributivism.”).

<sup>222</sup> To substantiate, I think very fairly, the point about other corporate actors moving in where Western companies are forced to withdraw for fear of liability, Sykes cites the Talisman case in Sudan. He points out how, “[f]ollowing Talisman’s departure, Chinese companies moved in and dominated the market.” *Id.* at 2195. (Parentheses omitted).

<sup>223</sup> CHARLES R. BEITZ, *THE IDEA OF HUMAN RIGHTS* 49–73 (2011) (discussing naturalistic theories of human rights).

<sup>224</sup> Richard Rorty, *Human Rights, Rationality, and Sentimentality*, in *THE RORTY READER* 351–365 (Christopher J. Voparil & Richard J. Bernstein eds., 1 ed. 2010). I place Michael Ignatieff in this same anti-foundationalist category, although he would undoubtedly want to preference a broader notion of politics over Rorty’s narrower sentimentalism. MICHAEL IGNATIEFF, *HUMAN RIGHTS AS POLITICS AND IDOLATRY* 54 (2011) (“Some people will have no difficulty thinking human beings are sacred, because they happen to believe in the existence of a God who created Mankind in His likeness. People who do not believe in God must either reject that human beings are sacred or believe they are sacred on the basis of a secular use of religious metaphor that a religious person will find unconvincing. Foundational claims of this sort divide, and these divisions cannot be resolved in the way humans usually resolve their arguments, by means of discussion and compromise. Far better, I would argue, to forgo these kinds of foundational arguments altogether and seek to build support for human rights on the basis of what such rights actually do for human beings.”)

<sup>225</sup> In modern times, Alan Gewirth is arguably the most prominent exponent of this view. Drawing on Kant, Gewirth argues that moral agency serves as the conceptual essence human rights should protect. Alan Gewirth, *The Epistemology of Human Rights*, 1 *SOC. PHIL & POLICY* (1984). For compelling criticisms of Gewirth, although not criticisms that go to moral agency directly, see Joseph Raz, *Human Rights Without Foundations*, SSRN

agency retributivists view as cardinal to criminal punishment may very well turn out to be the characteristic of human beings we create international human rights law to protect.

My purpose here is to raise rather than defend this possibility of direct correspondence between retribution and human rights.<sup>226</sup> In part, I am motivated to (partially) sooth any cognitive dissonance the idea of retribution might produce for human rights advocates, but significantly more importantly, to highlight the need for a new dialogue that takes retribution seriously as a justification of corporate criminal liability in ICL.<sup>227</sup> If a robust debate of this sort ensues, corporate responsibility for international crimes may help human rights advocates, scholars and critics forge a clearer understanding about the need for corporate accountability in a global context, and by implication, their own roles agitating for (or against) it. In all these respects, a shift to the type of retributive thinking only a criminal system can fully deliver has important implications that cry out for more of the attention the ATS traditionally enjoyed—from scholars, members of civil society, businesspeople, and citizens.

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ELIBRARY, 4 (2007), <http://ssrn.com/abstract=999874> (last visited Sep 9, 2011). Instead, Raz defends Rawls political view of human rights as “rights which set limits to the sovereignty of states, in that their actual or anticipated violation is a (defeasible) reason for taking action against the violator in the international arena.” *Id.*, at 9.

<sup>226</sup> Although I do not defend any foundational theory of human rights (let alone attempt to map it onto a defensible theory of retributivism), I note that, with important exceptions, theories of human rights steeped in political theory seldom draw on these discussions. For some of the best illustrations, see Martti Koskenniemi, *Human Rights, Politics and Love*, in *THE POLITICS OF INTERNATIONAL LAW* 153–167 (2011) (observing that human rights are necessary but impossible from the perspective of global society); Amartya Sen, *Elements of a Theory of Human Rights*, 32 *PHILOSOPHY & PUBLIC AFFAIRS* 315–356 (2004) (outlining the points of interface between his “capabilities” theory of justice and human rights). As I mention earlier, I view Thomas Pogge’s work as a remarkable attempt to synthesize the moral philosophy of accountability with political philosophy (although I am not convinced by the execution in places). Pogge, *supra* note 40. I view greater conceptual integration between moral and political like this as vital in the realm of global corporate accountability.

<sup>227</sup> As for retribution in ICL, see Alexander Greenawalt’s excellent new article, which lamentably, I only came to after completing this piece. Alexander Greenawalt, *International Criminal Law for Retributivists* forthcoming 35 *U. PENN. J. INT’L L.* (2014). Hopefully, this type of rigorous scholarship will provoke further debate about whether corporations should be treated differently, but at first blush, I see no reasons why this might be the case if one accepts Christian List and Philip Pettit’s advice that corporations often enjoy sufficient moral agency to support blame. See List and Pettit, *supra* note 44.

## VI. CONCLUSION: THE PATH AHEAD

In 1909, the U.S. Supreme Court endorsed the then heterodox practice of trying corporations for crimes. Since that time, the strange practice of employing criminal law to punish corporations has caught on throughout most of the world, as states attempt to reign in the ever increasing might of corporate actors. Chronologically speaking, the profusion of corporate criminal liability across most of the globe coincided with the rise of the Alien Tort Statute, and both trends were born of a common anxiety—corporate impunity. With the relative demise of the latter, the former grows in stature, especially when the underappreciated criminal angle always enjoyed certain competitive advantages over its more popular civil sibling. Viewed from the ATS’s perspective, the rise of corporate criminal liability will simultaneously appear as an exercise in mimicry and transcendence. Aside from the commonalities between the two systems we have witnessed here, marrying corporate criminal liability and international crimes also offers new responses to old criticisms of the ATS process. Overall, the understandable tendency to anticipate the consequences of these trials economically or geopolitically is tempered by the aspiration that the guilty should be held accountable. This is not to say that corporate criminal responsibility is anywhere near a panacea for all the woes of corporate misconduct internationally; on the contrary, it is a call for greater intellectual engagement with ICL alongside a wider set of regulatory initiatives and political programs. If the facts support the allegations leveled against Argor-Heraeus, that particular investigation may help break new ground in this regard. If it does not, others will certainly follow. Whatever happens, the very fact of a formal investigation has confirmed the plausibility of the project, and consequently, the birth of a fledgling field.