UKnowledge

Kentucky Law Journal

Volume 102 | Issue 3 Article 3

2014

Corporate Voluntarism and Liability for Human Rights in a Post-*Kiobel* World

Robert C. Bird
School of Business, University of Connecticut

Daniel R. Cahoy
Smeal College of Business, Pennsylvania State University

Lucien J. Dhooge
Scheller College of Business, Georgia Institute of Technology

Follow this and additional works at: https://uknowledge.uky.edu/klj

 Part of the Business Organizations Law Commons, and the Human Rights Law Commons

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation

Bird, Robert C.; Cahoy, Daniel R.; and Dhooge, Lucien J. (2014) "Corporate Voluntarism and Liability for Human Rights in a Post-*Kiobel* World," *Kentucky Law Journal*: Vol. 102 : Iss. 3 , Article 3.
Available at: https://uknowledge.uky.edu/klj/vol102/iss3/3

This Article is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.

Corporate Voluntarism and Liability for Human Rights in a Post–*Kiobel* World

Robert C. Bird,[1] *Daniel R. Cahoy,*[2] *and Lucien J. Dhooge*[3]

Introduction

IN the United States, human rights and the operations of transnational corporations intersect through litigation filed pursuant to the "Alien Tort Statute" (ATS). The ATS states that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[4] Largely dormant since its passage in 1789, the ATS proved contentious since its reinvigoration forty years ago as a tool by which alien plaintiffs sought to hold foreign government officials liable in the United States for human rights violations.[5] Its more recent utilization against transnational corporations for alleged complicity in human rights abuses associated with their foreign investment activities proved even more controversial.[6]

---

1 Associate Professor and Northeast Utilities Chair in Business Ethics, School of Business, University of Connecticut. The authors thank members of the Academy of Legal Studies in Business, the University of Connecticut Human Rights Institute and the Raoul Wallenberg Institute of Human Rights and Humanitarian Law at the University of Lund, Sweden for their insights in the preparation of this Article. Financial support from the University of Connecticut School of Business summer grant program is gratefully acknowledged.

2 Professor of Business Law and Dean's Faculty Fellow in Business Law, Smeal College of Business, Pennsylvania State University.

3 Sue and John Staton Professor of Law, Scheller College of Business, Georgia Institute of Technology.

4 28 U.S.C. § 1350 (2012).

5 *See, e.g.*, Abebe–Jira v. Negewo, 72 F.3d 844, 846–47 (11th Cir. 1996); Kadic v. Karadzic, 70 F.3d 232, 238 (2d Cir. 1995); Hilao v. Estate of Marcos (*In re* Estate of Ferdinand Marcos, Human Rights Litigation), 25 F.3d 1467, 1472–73 (9th Cir. 1994); Filartiga v. Peña–Irala, 630 F.2d 876, 878–80 (2d Cir. 1980); Xuncax v. Gramajo, 886 F. Supp. 162, 179 (D. Mass. 1995); Forti v. Suarez–Mason, 672 F. Supp. 1531, 1535 (N.D. Cal. 1987).

6 ATS litigation involving transnational corporations consisted of three distinct types of claims. These claims alleged violations of human rights relating to personal welfare, labor rights, and complicity in environmental degradation. For examples of ATS litigation alleging violations of human rights relating to personal welfare, see, e.g., Doe v. Exxon Mobil Corp., 654 F.3d 11, 14–15 (D.C. Cir. 2011) (claiming extrajudicial killing and torture arising from the utilization of the Indonesian military to provide security for a natural gas facility in Aceh); Bowoto v. Chevron Corp., 621 F.3d 1116, 1120–21 (9th Cir. 2010) (claiming collaboration with the Nigerian government in the commission of extrajudicial killing, crimes against humanity, torture, cruel, inhuman, and degrading treatment and violations of the rights to life, liberty, and security during attacks upon villages in the Ogoni region); Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1073, 1075 (9th Cir. 2010) (claiming forced disappearance and torture arising from alleged complicity in the Central Intelligence Agency's extraordinary rendition program); Presbyterian Church of Sudan v.

The issue of whether transnational corporations could be defendants in human rights litigation to the same degree as government officials and private individuals remained unresolved after the United States Supreme Court's first substantive opinion regarding the ATS in *Sosa v. Alvarez-Machain* in 2004.[7] After failing to gather the necessary quorum to consider the petition for certiorari in *Khulumani v. Barclay National Bank, Inc.*, the prospects for clarification of the ATS in regard to corporations seemed remote.[8]

However, a new line of cases originating in three different federal circuits reinvigorated the debate regarding the proper limits of the ATS.[9] The most important of these cases came from the Second Circuit in *Kiobel v. Royal Dutch Petroleum Company*.[10] In *Kiobel*, a divided panel held that the ATS does not grant jurisdiction for lawsuits against corporations.[11] While choosing not to address this argument, the Supreme Court held that the presumption against

Talisman Energy, Inc., 582 F.3d 244, 247 (2d Cir. 2009) (claiming current and former non-Muslim residents of southern Sudan collaborated with the Sudanese government in the commission of extrajudicial killings, forcible displacement, war crimes, confiscation, and destruction of property, kidnapping and rape); Abdullahi v. Pfizer, Inc., 562 F.3d 163, 168 (2d Cir. 2009) (claiming children suffered injuries as a result of negligence in the testing of the antibiotic Trovaflozacin Mesylate in Kano, Nigeria); Khulumani v. Barclay Nat'l Bank, Ltd., 504 F.3d 254, 258 (2d Cir. 2007) (claiming corporate complicity in supporting the policy of apartheid in South Africa). For examples of ATS litigation alleging violations of labor rights, see, e.g., Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013, 1015 (7th Cir. 2011) (claiming the use of child labor in the operation of a rubber plantation in Liberia); Baloco v. Drummond Co., 640 F.3d 1338, 1341 (11th Cir. 2011) (claiming extrajudicial killing by paramilitaries at a coal mine in Colombia as a result of the murder of union officials); Aldana v. Del Monte Fresh Produce N.A., Inc., 578 F.3d 1283, 1286 (11th Cir. 2009) (claiming torture arising from the abduction of union officials by paramilitaries at a banana plantation in Morales, Guatemala); Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1257 (11th Cir. 2009) (claiming war crimes and extrajudicial killing as a result of the murder of a union official by paramilitaries at a bottling facility in Carepa, Colombia); Romero v. Drummond Co., 552 F.3d 1303, 1309 (11th Cir. 2008) (claiming extrajudicial killing, torture, and denial of the right to associate in connection with the murder of union officials by paramilitaries at a coal mine in Colombia); Doe v. Nestle, S.A., 748 F. Supp. 2d 1057, 1062, 1064 (C.D. Cal. 2010) (claiming the utilization of forced labor, child labor, and torture in the cultivation of cocoa fields located in Cote d'Ivoire). For examples of ATS litigation alleging complicity in environmental degradation, see, e.g., Sarei v. Rio Tinto, PLC, 671 F.3d 736, 742, 743 (9th Cir. 2011) (claiming war crimes, genocide, racial discrimination, violations of the rights to life, health, and sustainable development and environmental degradation arising from the operation of a gold and copper mine on the island of Bougainville in Papua New Guinea); Arias v. Dyncorp, 738 F. Supp. 2d 46, 48–49 (D.C. 2010) (claiming physical harm and property damage to Ecuadorian citizens arising from Dyncorp's contract with the U.S. government to eradicate cocaine and heroin production facilities in Colombia through aerial spraying of pesticides); Flores v. S. Peru Copper Corp., 414 F.3d 233, 236–37 (2d Cir. 2003) (claiming violations of the rights to life, health, and sustainable development arising from the operation of a copper mine and refinery in Ilo, Peru).

7 Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

8 *See* Am. Isuzu Motors, Inc. v. Ntsebeza, 553 U.S. 1028, 1028 (2008) (indicating denial of petition for certiorari).

9 *See infra* note 38 and accompanying text.

10 Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010).

11 *Id.* at 149.

the extraterritorial application of U.S. law was applicable to the ATS, thereby prohibiting its use unless the claims at issue touched and concerned the United States with sufficient force.[12] *Kiobel* struck a blow to human rights jurisprudence, disabling one of the few viable remaining vehicles in the world for victims of human rights to seek redress through a national court.

As the U.S. legal door substantially closed on corporate liability, new non-compulsory opportunities emerged that may facilitate worldwide protection of human rights. One such promising opportunity is the "Protect, Respect, and Remedy" framework by Special Representative of the U.N. Secretary General (SRSG) John Ruggie.[13] This framework advocates three pillars upon which business respect for human rights should be based: (1) the state duty to protect human rights through appropriate policies and structures, (2) the corporate responsibility to respect human rights by acting with due diligence, and (3) greater access to effective judicial and non-judicial remedies for victims of human rights violations.[14] These principles, though backed by the United Nations and developed with consultation of a variety of corporate and activist interest groups, are not compulsory.[15] Yet such 'principled pragmatism' may be all that remains after the already narrowly-interpreted ATS is further neutered as an effective enforcement tool.

This Article is organized in four parts. Part I explores the development and the construction of the ATS. This Part shows that, while the ATS initially offered strong promise as a legal remedy, Supreme Court and lower court decisions have eroded its potential scope. Part I focuses more closely on *Kiobel* in order to understand the potential viability, if any, of ATS claims in a post-*Kiobel* world.

Part II shifts away from legal remedies and focuses on a series of reports written by the SRSG that develop voluntary and cooperative mechanisms for business and government to safeguard human rights. This Part introduces the Protect, Respect, and Remedy framework and the notion of due diligence as a human rights obligation for multinational corporations. Part III notes that, while the framework has much merit, it is still in need of substantial reform. This Part also focuses on how ambiguities can be resolved, particularly on the question of what constitutes sufficient due diligence to protect human rights under the framework. The goal of this Part is to augment the viability of the SRGS's framework for future revision, and position it as a well-accepted standard of

12 Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1669 (2013).

13 *See* Special Representative of the Secretary-General, Report of the Special Representative of the Secretary-General on the Issue of Hum. Rts. and Transnat'l Corps. and Other Bus. Enter., *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect, and Remedy" Framework*, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) (by John Ruggie) *available at* http://www.ohchr.org/documents/issues/business/A.HRC.17.31.pdf [hereinafter SRSG Final Rep. 2011].

14 *Id.* at Annex III.

15 *Id.* at ¶ 1.

conduct for businesses to ensure respect for human rights, particularly in light of the impending dilution of the ATS.

Part IV returns to a legal perspective. This Part briefly outlines a future potential cause of action that could create a remedy for human rights violations post-*Kiobel*. In short, when a corporation's actions differ from its public promises about respect for human rights, there may be a cause of action based on the falsehood. While far from a complete substitute for the ATS, this cause of action, based roughly on advertising liability prohibited by the Federal Trade Commission (FTC), may take companies to task that make domestic public statements directly contradicting their disrespect for human rights abroad. The Article concludes that regardless of the method, the need to protect human rights from corporate abuses remains as important as ever, and its placement in a more prominent position on the corporate agenda represents a worthwhile goal for all affected and interested parties.

I. The Alien Tort Statute and Transnational Corporations

A. Historical Background

Although a comprehensive history of the ATS is beyond the scope of this Article, a review of its historical background is necessary to place recent judicial decisions in proper perspective. Interpretation of the ATS has been complicated by the absence of legislative history. The ATS was not mentioned in the debates surrounding the adoption of the first Judiciary Act in 1789, and there is no evidence of what its drafters intended by its inclusion.[16] This lack of formal legislative history was a significant source of frustration for courts called upon to interpret its provisions in a contemporary context.[17]

An established body of judicial precedent is also unavailable for modern interpretations. The ATS was an infrequent subject of judicial opinions prior to the 1980s.[18] In addition to these judicial opinions, the ATS was the

16 *See, e.g.*, Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 812 (D.C. Cir. 1984) (Bork, J., concurring) (noting "[t]he debates over the Judiciary Act in the House—the Senate debates were not recorded—nowhere mention the provision, not even, so far as we are aware, indirectly").

17 *See, e.g.*, Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 104 n.10 (2d Cir. 2000) (noting "[t]he original purpose of the [ATS] remains the subject of some controversy . . . . [as] [t]he Act has no formal legislative history" and the intent of the drafters was "a matter forever hidden from our view by the scarcity of relevant evidence"); Trajano v. Marcos (*In re* Estate of Ferdinand E. Marcos, Human Rights Litigation), 978 F.2d 493, 498 (9th Cir. 1992) (noting "[t]he debates that led to the Act's passage contain no reference to the [ATS], and there is no direct evidence of what the First Congress intended it to accomplish"); Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 304 (S.D.N.Y. 2003) (noting "[d]espite the fact that the [ATS] has existed for over two hundred years, little is known of the framers' intentions in adopting it—the legislative history of the Judiciary Act does not refer to section 1350").

18 *See, e.g.*, O'Reilly de Camara v. Brooke, 209 U.S. 45, 51 (1908) (suggesting that the ATS may be applicable to a claim that a U.S. officer illegally seized alien property in a foreign state); Nguyen Da Yen v. Kissinger, 528 F.2d 1194, 1201–02 n.13 (9th Cir. 1975) (observing that injuries accruing as

subject matter of two opinions of the U.S. Attorney General dating from 1795 and 1907.[19] Other sources of interpretation were absent prior to the watershed opinions of the U.S. Court of Appeals for the Second Circuit in *Filartiga v. Peña-Irala*[20] and *Kadic v. Karadz Ić*.[21]

The Supreme Court finally addressed the ATS in substantive detail in 2004 in *Sosa v. Alvarez-Machain*.[22] In an opinion authored by Justice Souter, the Court concluded the ATS was a jurisdictional statute intended to address the power of federal courts to "entertain cases concerned with a certain topic."[23] This interpretation did not lead to the conclusion that the ATS was inoperative until such time as Congress created a list of actionable torts.[24] Instead, the Court endorsed the conclusion that federal courts were entitled to entertain claims for torts in violation of the law of nations as recognized by common law existing at the time of the adoption of the ATS.[25] These torts were limited to violations of safe conduct, infringement of the rights of ambassadors, and piracy.[26] These torts were within the "relatively modest set of actions alleging violations of the law of nations" over which the ATS conferred jurisdiction.[27]

However, the Court found no congressional developments in the intervening years to preclude courts from recognizing new claims under the

---

the result of the evacuation of children from Vietnam by the U.S. Immigration and Naturalization Service and private adoption agencies could be addressed pursuant to the ATS); Abdul-Rahman Omar Adra v. Clift, 195 F. Supp. 857, 863-64 (D. Md. 1961) (concluding wrongful withholding of custody of a child was an actionable tort and the misuse of a passport to gain entry into the United States was a violation of international law); Bolchos v. Darrel, 3 F. Cas. 810, 810 (C.C.D.S.C. 1795) (No. 1607) (concluding the ATS granted jurisdiction with respect to a dispute concerning title to slaves seized on a captured enemy vessel).

19 *See* Mexican Boundary - Diversion of the Rio Grande, 26 Op. Att'y Gen. 250, 252 (1907) (concluding the ATS "provide[s] a forum and a right of action" to Mexican nationals injured as a result of the diversion of the Rio Grande by a U.S. irrigation company if such act was deemed to be a tort in violation of the law of nations); Breach of Neutrality, 1 Op. Att'y Gen. 57, 59 (1795) (concluding the ATS provided a remedy for aliens injured as a result of the participation of U.S. citizens in the plundering of British property off the coast of Sierra Leone by French naval forces in violation of principles of neutrality).

20 Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980) (holding torture perpetrated by a Paraguayan police official upon a private citizen of Paraguay violated the law of nations and was actionable by the victim's survivors pursuant to the ATS).

21 Kadic v. Karadz Ić, 70 F.3d 232, 236, 248 (2d Cir. 1995) (holding genocide, war crimes, torture, and extrajudicial killing perpetrated by a private individual against other private individuals violated the law of nations, were actionable pursuant to the ATS and did not present nonjusticiable issues).

22 Sosa v. Alvarez-Machain, 542 U.S. 692, 697 (2004).

23 *Id.* at 714.

24 Early federal cases and opinions addressing the ATS gave no intimation that further implementing legislation was necessary. *See, e.g.*, Bolchos v. Darrel, 3 F. Cas. 810, 810 (C.C.D.S.C. 1795) (No. 1607); Breach of Neutrality, 1 Op. Att'y Gen. at 59.

25 *Sosa*, 542 U.S. at 714.

26 *Id.* at 715.

27 *Id.* at 720.

law of nations.[28] Justice Souter concluded "judicial power should be exercised on the understanding that the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today."[29] New claims based on international norms were not recognizable if they had "less definite content and acceptance among civilized nations than the historical paradigms familiar when [the ATS] was enacted."[30] The Court cited piracy and torture as two of "a handful of heinous actions" meeting this standard and thus actionable pursuant to the ATS.[31] Plaintiff Alvarez's claim of arbitrary arrest failed to meet this stringent standard and was subject to dismissal.[32]

Sosa left unresolved the question of private liability for violations of international law. Justice Souter's opinion expressly reserved the issue of "whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual."[33] Justice Souter did not elaborate upon this question other than to contrast the results in *Tel–Oren* and *Kadic* with respect to private liability for torture and genocide committed by private actors.[34]

B. Corporate Liability Under the ATS

Despite the absence of resolution in *Sosa*, it was widely assumed that international law in general, and international human rights law in particular, applied to transnational corporations.[35] This assumption led to the conclusion

28 *Id.* at 724–25.

29 *Id.* at 729.

30 *Id.* at 732.

31 *Id.* (citing United States v. Smith, 18 U.S. (5 Wheat.) 153, 163–80 (1820) (defining piracy); Tel–Oren v. Libyan Ara Repbulic, 726 F.2d 774, 781 (C.A.D.C. 1984) (equating the severity of torture with that of piracy).

32 *Id.* at 734–35. The Court dismissed the Universal Declaration of Human Rights as a basis for Alvarez's claim as it was a statement of aspirations only and did not impose binding obligations upon national governments. *Id.* The Court rejected utilization of the International Covenant on Civil and Political Rights as it was ratified by the United States on the express understanding that it was not self–executing. *Id.* at 735. In addition, Alvarez's claim lacked the necessary "state policy" and "prolonged" nature to qualify as an enforceable norm. *Id.* at 737 (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1986)). Although the exact meaning of these terms remained an open question, the Court held that they clearly required "a factual basis beyond relatively brief detention in excess of positive authority." *Id.* Even assuming Alvarez's detention was "prolonged" and the result of "state policy," it remained impossible to determine if and when such detention achieved the degree of certainty necessary to violate international law characteristic of the offenses of piracy, interference with ambassadors and violation of safe conduct. *Id.* The Court concluded the principle advanced by Alvarez remained, "in the present, imperfect world . . . an aspiration that exceeds any binding customary rule having the specificity [the Court] requires." *Id.* at 738.

33 *Id.* at 732 n.20.

34 *Id.*

35 *See, e.g.*, Sarei v. Rio Tinto, No. 02–56256, 2011 U.S. App. LEXIS 21515, at *744 (9th Cir. Oct. 25, 2011) (holding that the plaintiffs' claims of genocide and war crimes arising from the operation

that transnational corporations possess duties with respect to human rights, the violation of which may be subject to the initiation of litigation pursuant to the ATS.[36] Numerous commentators shared this assumption.[37] However, this assumption was questioned in a series of opinions dating from 2010.[38] The most

---

of a gold and copper mine on the island of Bougainville in Papua New Guinea were within the limited federal jurisdiction created by the ATS and that no principle of international or domestic law served to impose liability for violations of international norms on individuals while immunizing corporations); Doe v. Exxon Mobil Co., 654 F.3d 11, 57 (D.C. Cir. 2011) (in which the court stated "[t]he issue of corporate liability has remained in the background during the thirty years since the Second Circuit decided *Filartiga*, while numerous courts have considered cases against corporations . . . under the ATS without any indication that the issue was in controversy"); Baloco v. Drummond Co., 640 F.3d 1338, 1345 (11th Cir. 2011) (holding that children of murdered union leaders in Colombia had adequately pled a cause of action cognizable under the ATS without reference to whether the defendant was a state or private actor); Aldana v. Del Monte Fresh Produce, Inc., 416 F.3d 1242, 1256 (11th Cir. 2005) (holding that corporations may be liable for human rights violations without specifically addressing the applicability of the ATS); Beanal v. Freeport–McMoran, Inc., 197 F.3d 161, 163 (5th Cir. 1999) (dismissing plaintiffs' claims alleging complicity in environmental degradation without specifically addressing the applicability of the ATS to corporations); Roe v. Bridgestone Corp., 492 F. Supp.2d 988, 1010–24 (S.D. Ind. 2007) (holding that corporations may be liable for human rights violations without specifically addressing the applicability of the ATS).

36 *See, e.g.*, Romero v. Drummond Co., 552 F.3d 1303, 1315 (11th Cir. 2008) (expressly rejecting the argument that corporations are not subject to the ATS as there is no "express exception for corporations" nor was such an exception recognized within the circuit); *In re* XE Servs. Alien Tort Litigation, 665 F. Supp.2d 569, 588 (E.D. Va. 2009) (concluding that "[n]othing in the ATS or *Sosa* may plausibly be read to distinguish between private individuals and corporations").

37 *See, e.g.*, Anthony Clark Arend, Note, *Rebuttal: The Supreme Court Should Overturn* Kiobel, 160 U. PA. L. REV. PENNUMBRA 99, 106 (2011), *available at* http://www.pennlawreview.com/debates/index.php?id=44 (last visited Jan. 19, 2014) (contending that the question of whether corporations may be civilly accountable for violations of international law in domestic courts is for individual states to determine within their national legal systems); Jonathan A. Bush, *The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said,* 109 COLUM. L. REV. 1094, 1224 (2009) (indicating an instance where a corporation was not exempted from liability for violations of international law at Nuremberg given the presence of counsel throughout the proceedings and the argument given at the close of the proceedings); Susan Farbstein & Tyler Giannini, Note, *Closing Statement:* Kiobel *Ignores History in Creating a Corporate Carve–Out,* 160 U. PA. L. REV. PENNUMBRA 99, 110 (2011), *available at* http://www.pennlawreview.com/debates/index.php?id=44 (last visited Jan. 19, 2014) (citing opinions spanning thirteen years of ATS jurisprudence in which parties or courts assumed or specifically held that the ATS was applicable to corporations); Geoffrey Pariza, *Genocide, Inc.: Corporate Immunity to Violations of International Law After* Kiobel v. Royal Dutch Petroleum, 8 LOY. U. CHI. INT'L L. REV. 229, 250 (2011) (contending post–war practicalities rather than a desire to immunize corporations from liability for violations of international law led to the determination not to prosecute corporations at Nuremberg); Janine M. Stanisz, *The Expansion of Limited Liability Protection in the Corporate Form: The Aftermath of* Kiobel v. Royal Dutch Petroleum Co., 5 BROOK. J. CORP. FIN. & COM. L. 573, 593 (2011) (noting the Nuremburg Tribunal's discussion of corporate obligations and responsibilities pursuant to international law even in the absence of a named corporate defendant); Mara Theophilia, *"Moral Monsters" Under the Bed: Holding Corporations Accountable for Violations of the Alien Tort Statute After* Kiobel v. Royal Dutch Petroleum Co., 79 FORDHAM L. REV. 2859, 2907 (2011) (contending that the "specific, universal and obligatory norm" required by *Sosa* applied to the conduct at issue rather than the identity of the perpetrator).

38 *See, e.g.*, Doe v. Nestle, 748 F. Supp. 2d 1057, 1143–45 (C.D. Cal. 2010) (rejecting claims that

important of these opinions, *Kiobel v. Royal Dutch Petroleum Co.*, is discussed below.

1. Kiobel v. Royal Dutch Petroleum Co.—The most significant and comprehensive opinion rejecting the use of the ATS against transnational corporations was the Second Circuit's decision in *Kiobel v. Royal Dutch Petroleum Co.*[39] The plaintiffs in *Kiobel* were residents of Nigeria who claimed that Dutch, British, and Nigerian corporations aided and abetted the Nigerian government in human rights violations during the course of oil exploration and production operations in the Ogoni region.[40] The district court dismissed the plaintiffs' claims with the exception of those relating to arbitrary arrest and detention, crimes against humanity, and torture.[41]

The Second Circuit dismissed the remaining claims. The court initially determined that *Sosa* required the case be determined through the application of customary international law rather than the domestic law of the United States or any other country.[42] The fact that a particular legal norm, such as corporate tort liability, may be found in the legal systems of most or even all "civilized nations" does not give that norm status as customary international law.[43] It is only where nations demonstrate that a wrong is of "mutual, and not merely several, concern, by means of express international accords, that a wrong generally recognized becomes an international law violation within the meaning of the [ATS]."[44]

Applying such law, the court found no specific, universal, and obligatory norm holding transnational corporations responsible for human rights violations. This conclusion did not render the ATS ineffective. Rather, it was available against individual perpetrators such as "employees, managers, officers, and directors of a corporation—as well as anyone who purposefully aids and

---

the defendants aided and abetted violations of international norms prohibiting slavery, forced labor, child labor, torture and cruel, inhuman and degrading treatment arising from the operation of cocoa fields in Côte d'Ivoire on the basis that there was no specific, universal and obligatory norm supporting the application of international law in general, and human rights law in particular, to transnational corporations under either domestic law, customary international law or treaties and conventions); Flomo v. Firestone Natural Rubber Co., 744 F. Supp. 2d 810, 1024 (S.D. Ind. 2010) (rejecting claims arising from the alleged use of child labor on rubber plantations operated by the defendants in Liberia due to the absence of corporate liability pursuant to international criminal law and the Torture Victim Protection Act and the possibility of disparate treatment by extending the benefits of the ATS to aliens while denying the availability of ATS remedies to U.S. citizens).

39 Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 120 (2d Cir. 2010).

40 *Id.* at 117.

41 *Id.* at 118–19 (citing Kiobel v. Royal Dutch Petroleum Co., 56 F. Supp.2d 457, 465–67 (S.D.N.Y. 2006)).

42 *Id.* at 117–18. The court in particular noted that "[t]he history of corporate rights and obligations under domestic law is, however, entirely irrelevant to the issue before us—namely, the treatment of corporations as a matter of customary international law." *Id.* at 117 n.11.

43 *Id.* at 118.

44 *Id.* (quoting IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975)).

abets [such violations]."[45] Criminal, civil, and administrative remedies against corporations themselves were available as long as the source of such remedies was not customary international law.[46]

Therefore, *Sosa* mandated the application of customary international law in such cases.[47] This conclusion was reinforced in Justice Breyer's concurring opinion in which he stated that "[t]he norm must extend liability to the type of perpetrator (e.g. a private actor) the plaintiff seeks to sue."[48] The court noted that it had applied this standard consistently since *Filartiga*.[49] International law had guided the court in determining whether the state officials, private individuals, and aiders and abettors could be held liable under the ATS.[50] Given this history, there was no reason to consult a different set of rules with respect to corporate liability.[51]

Additional support for this conclusion was found in the history of international tribunals. No tribunal had ever held a corporation liable for a violation of international law. The London Charter granted the International Military Tribunal at Nuremberg jurisdiction solely over natural persons.[52] Although the Nuremberg Tribunals declared certain organizations associated with the Nazi war effort to be criminal, this was, according to the court, merely to facilitate prosecution of the individual members.[53] Thus, although I.G. Farben and its affiliated entities were dissolved as a result of their involvement with the operation of the Nazi death camp at Auschwitz, only their executives were charged, indicted, or prosecuted.[54] As noted in the Nuremberg judgment

45 *Id.* at 121–22.

46 *Id.*

47 *Id.* at 127 (citing Sosa v. Alvarez–Machain, 542 U.S. 692, 732 n.20 (2004)).

48 Sosa v. Alvarez–Machain, 542 U.S. 692, 760 (2004) (Breyer, J., concurring).

49 *Kiobel*, 621 F.3d at 132.

50 *See* Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 258–59 (2d Cir. 2009) (determining the status of aiders and abettors); Kadic v. Karadzic, 70 F.3d 232, 239–41 (2d Cir. 1995) (determining the status of private individuals); Filartiga v. Peña–Irala, 630 F.2d 876, 889–90 (2d Cir. 1980) (determining the status of state officials).

51 *Kiobel*, 621 F.3d at 130.

52 *Id.* at 133–34. (noting that the London Charter grants authority to "try and punish persons . . . whether as individuals or as members of organizations" (citing Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis art. 6, Aug. 8, 1945, 59 Stat. 1544, 1547, 82 U.N.T.S. 279)). The same limitation was included in the tribunal established with respect to the war in the Pacific theater and in Control Council Law No. 10. *See id.* at 134 (indicating that the Charter of the International Military Tribunal for the Far East grants jurisdiction over "war criminals who as individuals or as members of organizations are charged with offenses" (citing Charter of the International Military Tribunal for the Far East art. 5, Jan. 19, 1946, 4 BEVANS 20, 22)). *See also* Control Council Law No. 10, *Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, in* 1 ENACTMENTS AND APPROVED PAPERS OF THE CONTROL COUNCIL AND COORDINATING COMMITTEE 306, 309 (1945) (granting jurisdiction to the International Military Tribunal).

53 *Kiobel*, 621 F.3d at 134.

54 *Id.* at 135.

itself, "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[55]

International tribunals since Nuremberg also excluded corporations. For example, the charters establishing the criminal tribunals for Rwanda and the former Yugoslavia both excluded corporations from liability.[56] According to the court, these charters codified existing norms of customary international law limiting liability to natural persons.[57] The more recent failure of the states negotiating the Rome Statute of the International Criminal Court to include corporations within the court's jurisdiction after lengthy consideration was equally important.[58] History suggests that corporate liability was a concept that had yet to ripen into a universally accepted norm of international law.[59]

The court also concluded international treaties did not support the existence of a specific, universal, and obligatory norm by which to hold transnational corporations liable for human rights violations. Treaties only constituted sufficient proof of a norm of customary international law if an "overwhelming majority" of states had ratified and conducted themselves according to their terms.[60] The United States and an overwhelming majority of members of the international community had not ratified treaties that imposed corporate liability in other areas, such as environmental protection, and labor rights.[61]

55 The Nurnberg Trial (United States v. Goering), 6 F.R.D. 69, 110 (Int'l Military Trib. at Nuremberg 1946).

56 *See* Statute of the International Tribunal for Rwanda, art. 5, S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994) (restricting jurisdiction to "natural persons"). *See also* U.N. Secretary–General, *Report Pursuant to Paragraph 2 of Security Council Resolution 808*, ¶ 52, U.N. Doc. S/25704 (May 3, 1993) (restricting jurisdiction to "natural persons").

57 *Kiobel*, 621 F.3d at 136 (citing Khulumani v. Barclay Nat'l Bank, Ltd., 504 F.3d 254, 274 (2d Cir. 2007) (Katzmann, J., concurring)). The issue of corporate liability was expressly addressed and rejected with respect to the International Criminal Tribunal for the former Yugoslavia. *See Report Pursuant to Paragraph 2 of Security Council Resolution 808, supra* note 56, ¶ 50 (stating that "the ordinary meaning of the term 'persons responsible for serious violations of international humanitarian law' would be natural persons to the exclusion of juridical persons").

58 *See Kiobel*, 621 F.3d at 136–37. A proposal to include corporate liability for human rights violations within the Rome Statute was withdrawn after encountering opposition from twenty-five states, including Australia, China, Mexico, South Korea, and the United States. *See* Doe v. Nestle, 748 F. Supp. 2d 1057, 1140 (C.D. Cal. 2010) (discussing the negotiating history of the Rome Statute). As a result, the Rome Statute is solely applicable to "natural persons." The Rome Statute of the International Criminal Court, art. 25(1), July 17, 1998, 2187 U.N.T.S. 90, 105. For a complete discussion of the consideration and ultimate exclusion of corporations from the jurisdictional reach of the International Criminal Court, see Albin Eser, *Individual Criminal Responsibility*, *in* 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 767, 778 (Antonio Cassese et al., eds., 2002).

59 *Kiobel*, 621 F.3d at 137.

60 *Id.*

61 *See, e.g.*, Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration and Exploitation of Seabed Mineral Resources, Dec. 17, 1976, 16 I.L.M. 1450 (not ratified by the United States); Convention Relating to Civil Liability in the Field of Maritime Carriage of

These treaties also did not support the existence of a broad norm imposing liability for human rights violations upon corporations.[62] In fact, these treaties could not even be viewed as crystallizing an emerging norm with respect to corporate liability or described as having a "norm–creating" character.[63]

Finally, the court rejected the existence of a norm imposing corporate liability on three additional grounds. First, the court rejected the imposition of liability on "policy and reason" grounds because *Sosa* requires specific, universal, and obligatory norms rather than "abstract aspirations or even pragmatic concerns in place of specific international rules."[64] Second, despite trends to the contrary, the prevailing view among scholars is that international law primarily regulates states and not individuals and corporations.[65] The court concluded by distinguishing the attorney general's opinions in 1795 and 1907, which purportedly extended the ATS to corporate activities.[66]

C. Once More Into the Breach: The U.S. Supreme Court and Kiobel v. Royal Dutch Petroleum Co.

The one topic on which courts and commentators could agree was the need for further guidance from the U.S. Supreme Court. Such guidance appeared forthcoming in October 2011 when the Court granted certiorari to review the Second Circuit's holding regarding the application of human rights

---

Nuclear Material, Dec. 17, 1971, 974 U.N.T.S. 255 (not ratified by the United States, China, Russia, or the United Kingdom); Vienna Convention on Civil Liability for Nuclear Damage, May 21, 1963, 1063 U.N.T.S. 265 (not ratified by the United States, China, France, Germany, or the United Kingdom); Convention on Third Party Liability in the Field of Nuclear Energy, July 29, 1960, 956 U.N.T.S. 263 (not ratified by the United States, China, Russia, or Germany); Convention (No. 98) Concerning the Application of the Principles of the Right to Organize and to Bargain Collectively, July 1, 1949, 96 U.N.T.S. 257 (not ratified by the United States).

62 *Kiobel*, 621 F.3d at 138.

63 *Id.* at 139.

64 *Id.* at 140 & n.41. The court described "policy and reason" grounds as including the "logical expansion of existing norms," the absence of a policy reason for a corporate exemption from liability, the recognition of corporate liability under federal common law, and the imposition of duties upon corporations given that they are persons and rights–carrying entities. *Id.* For further discussion of "parity of reasoning," see Harold Hongju Koh, *Separating Myth from Reality About Corporate Responsibility Litigation*, 7 J. INT'L ECON. L. 263, 265 (2004).

65 *See, e.g.*, MICHAEL KOEBELE, CORPORATE RESPONSIBILITY UNDER THE ALIEN TORT STATUTE: ENFORCEMENT OF INTERNATIONAL LAW THROUGH US TORTS LAW 196 (2009) (concluding that, "despite trends to the contrary, the view that international law primarily regulates States and in limited instances such as international criminal law, individuals, but not [transnational corporations], is still the prevailing one among international law scholars").

66 *Kiobel*, 621 F.3d at 142 n.44 (dismissing these opinions as doing nothing more than "baldly declar[ing] that a corporation can sue under the ATS . . . or that a corporation can be sued under the ATS . . . [without describing] any basis for assumptions about customary international law"). The 1907 opinion was inconsistent with *Sosa* to the extent it concluded the ATS provided a forum and cause of action. *Id.* With respect to the 1795 opinion, it was unclear to the court whether the discussion regarding the "Sierra Leone Company" was applicable to "modern juridical entities." *Id.*

norms to corporations in *Kiobel*.[67] The parties presented oral arguments on February 28, 2012 on the issue of whether international human rights norms are applicable to corporations as to support the exercise of jurisdiction pursuant to the ATS. The differing viewpoints of the Justices were on full display in the course of the arguments. Several Justices expressed doubt about the existence of a specific, universal, and obligatory international norm providing for corporate liability for human rights violations.[68] Another concern was the appropriateness of the United States as a forum for claims made by non–citizens against other non–citizens arising from conduct that occurred entirely outside of the United States.[69] Other Justices focused on the narrower question of identifying appropriate defendants pursuant to the ATS,[70] the possible consequences of blanket immunity for corporations,[71] the meaning of and effect upon the ATS of the holdings of the Nuremberg Tribunal,[72] and alternatives to direct corporate liability such as through respondeat superior.[73]

The concerns regarding the extraterritorial reach of the ATS rose to the forefront five days after oral arguments when the Court issued an order restoring the case to the calendar for reargument.[74] The question for reargument was whether and under what circumstances the ATS allows for U.S. courts to recognize causes of action for violations of the law of nations occurring outside of U.S. territory. Oral arguments on this issue occurred on October 1, 2012.[75]

---

67 Kiobel v. Royal Dutch Petroleum Co., 132 S. Ct. 472, 472 (Oct. 17, 2011) (No. 10–1491) (order granting petition for writ of certiorari).

68 *See, e.g.*, Transcript of Oral Arguments at 3, l. 24 – p. 4, ll. 1–6, Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (Feb. 28, 2012) (No. 10–1491) (Justice Kennedy stating that "[n]o other nation in the world permits its court to exercise universal civil jurisdiction over alleged extraterritorial human rights abuses to which the nation has no connection" and requesting appellants' counsel to provide his "best authority to refute that proposition").

69 *Id.* at 7, ll. 7–9, p. 11, ll. 22–24 (Justice Alito noting that there is "no particular connection between the events here and the United States" which led him to ask "[w]hat business does a case like that have in the courts of the United States?"). *See also id.* at 41, ll. 22–25 (Justice Kennedy recognizing the position of the United Kingdom and the Netherlands that "corporations should not be liable for acts committed on foreign territories").

70 *Id.* at 13, ll. 14–16 (Justice Ginsburg stating "I thought what we were talking about today, the question was is it only individual defendants or are corporate defendants also liable?"). *See also id.* at 23, ll. 11–14 (Justice Breyer stating that "I would have thought the question in this case is, can a private actor be sued for certain violations of substantive criminal law?").

71 *Id.* at 25, ll. 16–23 (Justice Breyer asking whether an eighteenth century U.S. court would have excused piracy if it was conducted by "Pirates, Incorporated" rather than Blackbeard personally).

72 *Id.* at 35, ll. 19–21 (Justice Ginsburg noting that I.G. Farben was dissolved and its assets confiscated as a result of the Nuremberg proceedings).

73 *Id.* at 39, ll. 1–7 (Justice Kagan discussing the possibility of corporate liability for human rights violations committed by individual corporate actors through the doctrine of respondeat superior).

74 Kiobel v. Royal Dutch Petroleum Co., 132 S. Ct. 1738 (Mar. 5, 2012) (No. 10–1491) (order restoring case to calendar for reargument).

75 Transcript of Oral Argument at 1, l. 11, Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1669

The petitioners' and respondents' arguments with respect to this issue were relatively predictable. The petitioners (the Nigerian residents and original plaintiffs) contended that the exercise of universal jurisdiction in civil cases involving corporate violations of international human rights norms was a "trend in the world today" in which the United States was a standard bearer as evidenced by the ATS.[76] The respondents (the British, Dutch, and Nigerian corporations and original defendants) argued that extraterritorial reach of the ATS in this case was unjustified given that the case had "nothing to do with the United States . . . [i]t's Nigerian plaintiffs suing an English and Dutch company for activity alleged to have aided and abetted the Nigerian government for conduct taking place entirely within Nigeria."[77] By contrast, the United States shifted its support from the petitioners in the February 2012 oral arguments to the respondents in the October 2012 arguments. While disagreeing with the respondents in the February arguments on whether corporations were immune from ATS liability,[78] the United States expressed its support for the respondents' position on the ATS's extraterritorial reach in the October arguments with respect to claims against corporations for aiding and abetting human rights violations.[79] The Court remained divided on this issue as well.[80]

(Oct. 1, 2012) (No. 10–1491).

76 *See, e.g.*, *id.* at 55, ll. 12–18 (statement of petitioners' counsel Paul L. Hoffman).

77 *Id.* at 22, ll. 10–14 (quoting respondents' counsel Kathleen M. Sullivan).

78 *See* Transcript of Oral Argument at 15, ll. 18–22, p. 22, ll. 21–24, Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1669 (Feb. 28, 2012) (No. 10–1491) (Solicitor General stating "[t]he court of appeals erred in its categorical ruling that a corporation may never be held liable under the Alien Tort Statute regardless of the norm, the locus of the wrong, or the involvement of the state" and that "[t]he question of extraterritorial application is distinct from the question of whether a corporation can be held liable").

79 *See* Transcript of Oral Argument at 41, ll. 3–8, Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1669 (Oct. 1, 2012) (No. 10–1491) (Solicitor General stating "[t]he Alien Tort Statute should not afford a cause of action to address the extraterritorial conduct of a foreign corporation when the allegation is that the defendant aided and abetted a foreign sovereign. In this category of cases, there just isn't any meaningful connection to the United States.").

80 *See id.* at 4, ll. 9–12 (Justice Kennedy questioning the U.S. origin of effects occurring in Nigeria). *See also id.* at 24, ll. 20–22 (in which Justice Scalia restated his strong belief in the presumption against extraterritorial application of U.S. law). *But see id.* at 13, ll. 5–9 (Justice Sotomayor expressing support for a test that permitted ATS jurisdiction in cases where the defendant is a citizen of the country, the acts occurred within the country, or the alien has exhausted domestic and international avenues for relief). *See also id.* at 23, ll. 8–17, p. 36, ll. 6–13, p. 38, ll. 21–22, p. 40, ll. 2–13 (Justices Ginsburg, Sotomayor and Kagan characterizing the defendants' argument as inconsistent with the well–accepted interpretation of the ATS set forth in *Filartiga v. Peña–Irala*).

Given these considerations, it was far from certain that the ATS would survive the Court's decision in *Kiobel*. These concerns were confirmed by the announcement of the Court's opinion on April 17, 2013. In a unanimous decision, the Court affirmed the Second Circuit's dismissal of the petitioners' complaint.[81] However, the reasons for so doing were fractured into four separate opinions.

Authored by Chief Justice Roberts and joined by Justices Alito, Kennedy, Scalia, and Thomas, the majority dismissed the petitioners' complaint on the basis of the presumption against extraterritorial application of U.S. law.[82] The application of this presumption was appropriate in these circumstances given the absence of explicit congressional intent that the ATS have extraterritorial reach and the presumption that, while governing domestic affairs, U.S. law "does not rule the world."[83] The application of this presumption additionally served to "protect against unintended clashes between [U.S.] law and those of other nations which could result in international discord."[84]

This concern about unnecessary judicial intrusion into foreign affairs and the resultant potential for discord was particularly acute with respect to actions brought pursuant to the ATS. The Court specifically noted the repeated stress upon the exercise of judicial caution and awareness of foreign policy considerations in its previous ATS opinion in *Sosa v. Alvarez–Machain*.[85] Such caution and awareness were even more necessary when the purported cause of action concerned conduct occurring within the territory of a foreign sovereign.[86] These concerns and considerations led the Court to apply the presumption against extraterritoriality to the ATS despite the fact that it is a jurisdictional statute, and the presumption was traditionally reserved for merits questions.[87]

The majority opinion then turned to whether the petitioners effectively rebutted the presumption by demonstrating a "clear indication of extraterritoriality."[88] The majority of the Court concluded that the petitioners had failed to do so. Initially, the Court found that nothing in the text of the ATS itself suggested that it was intended to have extraterritorial reach. Extraterritorial reach could not be implied from the mere fact that the ATS

81 Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1669 (2013).

82 *Id.*

83 *Id.* at 1664 (citing Microsoft Corp. v. AT&T, 550 U.S. 437, 454 (2007)).

84 *Id.* (citing EEOC v. Arabian Amer. Oil Co., 499 U.S. 244, 248 (1991)).

85 *Id.* (citing Sosa v. Alvarez–Machain, 542 U.S. 692, 727–28 (2004), in which the Court noted that "the potential [foreign policy] implications . . . of recognizing . . . causes [under the ATS] should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs" and the need for "great caution" given that "many attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences").

86 *Id.* at 1665.

87 *Id.* at 1664 (citing *Arabian Amer. Oil Co.*, 499 at 246).

88 *Id.* at 1665 (citing Morrison v. Nat'l Australia Bank Ltd., 130 S. Ct. 2869, 2883 (2010)).

mentioned "aliens" and "the law of nations."[89] The use of the term "any civil action" was equally unconvincing as it was well established that generic terms such as "any" or "every" were insufficient to rebut the presumption.[90] Similarly, the inclusion of the term "tort" was not effective in rebutting the presumption as the transitory tort doctrine allowed recovery when a cause of action arose in the territory of another sovereign only when there was "a well founded belief that it was a cause of action in that place."[91] The issue was thus whether the ATS granted U.S. courts authority to recognize a cause of action under U.S. law to enforce norms of international law.[92] The answer to this question was in the negative—the use of the term "tort" did not necessarily mean that Congress intended for the ATS to reach conduct occurring in the territory of a foreign sovereign.[93]

Extraterritorial application was further unsupported by the ATS' historical background. Two of the three principal offenses against the law of nations for which the ATS was intended to provide relief—violation of safe conduct and infringement of the rights of ambassadors—had no "necessary extraterritorial application."[94] Instead, both of these offenses were committed against individuals who were within the boundaries of the sovereign recognizing the cause of action and allowing for the initiation of civil litigation.[95] The third offense, piracy, presented a more difficult question; the Court traditionally regarded the high seas upon which piracy occurs as the equivalent of foreign soil for purposes of the application of the presumption against extraterritoriality.[96] However, the Court concluded that the application of U.S. law to pirates did not "typically impose the sovereign will of the United States onto conduct occurring within the territorial jurisdiction of another sovereign" and thus carried "less direct foreign policy consequences."[97] This conclusion was based upon the extraordinary international status of pirates who were "fair game wherever found, by any nation, because they did not operate within any jurisdiction."[98] As a "category unto themselves," the application of national laws to this small group of individuals did not create significant foreign policy concerns.[99]

---

89 *Id.*

90 *Id.* (citing *Morrison*, 130 S. Ct. at 2881–82; Small v. United States, 544 U.S. 385, 388 (2005); *Arabian Amer. Oil Co.*, 499 U.S. at 248–50; Foley Bros., Inc. v. Filardo, 336 U.S. 281, 287 (1949)).

91 *Id.* at 1666 (citing Cuba R.R. Co. v. Crosby, 222 U.S. 473, 479 (1912)).

92 *Id.* at 1666.

93 *Id.*

94 *Id.*

95 *Id.* (citing 1 WILLIAM BLACKSTONE, COMMENTARIES 245–48, 251 (1765) (describing these offenses as being committed against persons "who are here").

96 *Id.* at 1667 (citing Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 173–74 (1993); Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 440 (1989)).

97 *Id.* at 1667.

98 *Id.*

99 *Id.* The Court specifically noted that "when a statute provides for some extraterritorial application, the presumption against extraterritoriality operates to limit that provision to its terms."

The Attorney–General's opinion of 1795, purporting to advocate the application of the ATS to events occurring outside of the territory of the United States, according to the majority defied "a definitive reading."[100] The Court was unwilling to attempt to interpret the opinion or determine its "precise meaning."[101] Whatever the opinion's intended meaning, the majority found it "hardly suffices to counter the weighty concerns underlying the presumption against extraterritoriality."[102]

Finally, the Court concluded there was no evidence that Congress adopted the ATS in order to make the United States "a uniquely hospitable forum for the enforcement of international norms."[103] To the contrary, the majority concluded it was implausible that Congress would have intended to embroil the struggling fledging republic in international controversy by requiring the extraterritorial application of its laws.[104] Such an interpretation would have generated diplomatic strife.[105] It also would create difficulties for U.S. citizens who could be haled into court anywhere in the world for alleged violations of the law of nations occurring in the United States or abroad.[106] Such serious foreign policy consequences mandated that any such decisions be relegated to the political braches rather than the judiciary.[107] As a result, the Court affirmed the dismissal of the appellants' claims as they did not touch and concern U.S. territory "with sufficient force to displace the presumption against extraterritorial application."[108]

Id. (quoting Microsoft Corp. v. AT&T, 550 U.S. 437, 455–56 (2007)).

100 *Id.* at 1668. *See also supra* note 19 and accompanying text.

101 *Kiobel*, 133 S. Ct. at 1668.

102 *Id.*

103 *Id.*

104 *Id.* The Court specifically noted that "the parties offer no evidence that any nation, meek or mighty, presumed to do such a thing." *Id.*

105 *Id.* at 1669 (citing Doe v. Exxon Mobil Corp., 654 F.3d 11, 77–78 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (listing recent objections to the extraterritorial application of the ATS by Canada, Germany, Indonesia, Papua New Guinea, South Africa, Switzerland, and the United Kingdom).

106 *Id.*

107 *Id.*

108 *Id.* The majority further noted that "mere corporate presence" within U.S. territory did not constitute sufficient force by which to displace application of the presumption. *Id.* In a separate concurring opinion, Justice Kennedy concluded that the majority's opinion left open a number of "significant questions regarding the reach and interpretation" of the ATS and that the Court might be required to elaborate on its holding in future cases outside the scope of the opinion. *Id.* (Kennedy, J., concurring). Justice Kennedy did not identify these unresolved questions or the type of cases that may be outside of the majority's opinion. Justice Alito, in a concurring opinion joined by Justice Thomas, concluded that an ATS claim could only be maintained for conduct occurring within the United States that violated a norm of international law satisfying *Sosa's* requirement of definiteness and acceptance among civilized nations. *Id.* at 1669–70 (Alito, J., concurring). Justice Breyer, in a concurring opinion joined by Justices Ginsburg, Kagan and Sotomayor, rejected the majority's invocation of the presumption against extraterritoriality on the bases that the ATS was enacted with foreign relations in mind through its use of terms such as "aliens," "treaties" and "the

II. PRINCIPLED PRAGMATISM AND THE PROTECT, RESPECT, AND REMEDY FRAMEWORK

The holding in *Kiobel* significantly diminished viable legal remedies for liability; therefore, the search continues for ways to encourage multinational corporations to respect human rights. One possibility is the utilization of legitimized and voluntary initiatives that establish standards and encourage change, but without the looming threat of judicial action. This Part focuses on one such promising possibility, the Protect, Respect, and Remedy framework developed by United Nations Special Representative of the Secretary–General John Ruggie.[109] Among other things, this framework exhorts corporations to respect human rights and "act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved."[110]

The purpose of this Part is to evaluate the framework, in particular the due diligence process, and offer recommendations for improvement. The Protect, Respect, and Remedy framework represents the most viable global tool that encourages multinational corporations to respect human rights. The framework has been widely well received by corporations, governments, and NGOs.[111] Thus, any advancement towards improving the widespread application of this framework represents an important step toward facilitating

law of nations." *Id.* at 1670–72 (Breyer, J., concurring). Additionally, the application of the ATS to piracy necessarily required the application of U.S. law to acts within the jurisdiction of foreign sovereigns as ships engaged in piracy are within the jurisdiction of the nation whose flag they fly. *Id.* at 1672. The majority's application of the presumption against extraterritoriality was further undermined by the rejection of such application by lower courts, the fact that many states permit foreign nationals to initiate litigation based upon unlawful conduct of their own nationals occurring abroad, and Congress' authorization of the punishment of foreign perpetrators of serious violations of international law against foreign persons through legislation as well as the absence of legislation restricting the jurisdictional reach of the ATS. *Id.* at 1675–77. Justice Breyer proposed an alternative in which jurisdiction existed under the ATS where (1) the alleged tort occurred on U.S. soil, (2) the defendant is a U.S. national or (3) the defendant's conduct "substantially and adversely affects and important American national interest" which includes the prevention of the United States from serving as a safe harbor free of civil and criminal liability for human rights violators. *Id.* at 1673–74. In applying this alternative approach, Justice Breyer concluded these elements were missing in *Kiobel* as the defendants were non–U.S. corporations whose sole presence in the United States were offices of separate but affiliated companies, the plaintiffs were not U.S. nationals, the conduct took place in Nigeria and the defendants did not directly engage in human rights violations but were alleged to have assisted other non–U.S. nationals to do so. *Id.* at 1677–78.

109 For a biography of Dr. John Ruggie, see JOHN RUGGIE, PROFILE, HARVARD KENNEDY SCHOOL, http://www.hks.harvard.edu/about/faculty–staff–directory/john–ruggie (last visited Jan. 19, 2014).

110 SRSG Final Rep. 2011, *supra* note 13, ¶ 6; *see also infra* Part II.A.

111 *E.g.*, Chris Jochnick & Nina Rabaeus, *Business and Human Rights Revitalized: A New UN Framework Meets Texaco in the Amazon*, 33 SUFFOLK TRANSNAT'L L. REV. 413, 421 (2010) (noting the framework's widespread acceptance); Adrienne Margolis, *Multinational Corporations Operate Seamlessly Across National Borders, But Insufficient Regulations Have Led to Disastrous Consequences for Human Life*, 64 INT'L B. NEWS 23, 25 (2010) (accepting the framework's application).

protection of human rights. Furthermore, with the apparent decline or even demise of the ATS as a future possibility for protection, enhancement of such a well-respected framework becomes an even more important and pressing task.

A. The History and Development of the Framework

An understanding of the framework today requires comprehension of the historical context in which it arose. For decades international organizations have been developing methods to concretize the obligations of multinational businesses to human rights. For example, the Code of Conduct for Transnational Corporations, drafted by the U.N. Commission on Transnational Corporations between 1977 and 1990, was motivated by similar concerns expressed by the U.N. Economic and Social Council (ECOSOC) to the Secretary-General in 1972.[112] ECOSOC cited "the emergence of the increasingly integrated global economy, the prominence of international trade and investment, the growth of information and communications technology . . . increasing privatization [and] concerns about the impact of globalization and trade on human rights" as grounds for the renewal of efforts to formulate a code of conduct for corporations.[113]

ECOSOC was also motivated to act as a result of increased stakeholder concerns about human rights manifested through enhanced consumer awareness, shareholder initiatives, and the proliferation of non-governmental organizations and voluntary codes of conduct.[114] Underlying all of these concerns was a continued recognition of the unprecedented power of corporations to shape economic and social outcomes.[115] These concerns ultimately resulted in the drafting of the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Respect to Human Rights in 2003 (Norms).[116] At least seventy non-governmental organizations (NGOs)

---

112 *See generally* Econ. and Soc. Council (ECOSOC), Comm'n on Transnat'l Corps., Rep. of the Secretariat on the Outstanding Issues in the Draft Code of Conduct on Transnat'l Corps., 23 I.L.M. 602, 626–40 (1984).

113 Human Rights Principles and Responsibilities for Transnat'l Corps. and Other Bus. Enters., *Introduction*, ¶ 4, U.N. Doc.E/CN.4/Sub.2/2002/WG.2/WP.1/Add.1 (Feb. 2002).

114 For a discussion on early voluntary codes of conduct, see Hans. W. Baade, *The Legal Effects of Codes of Conduct for Multinational Enterprises*, *in* 1 LEGAL PROBLEMS OF CODES OF CONDUCT FOR MULTINATIONAL ENTERPRISES 3, 4 (Norbert Horn ed., 1980).

115 *See* Larry Catá Backer, *Multinational Corporations, Transnational Law: The United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law*, 37 COLUM. HUM. RTS. L. REV. 287, 293 (2006); Troy Rule, *Using "Norms" to Change International Law: UN Human Rights Sneaking in Through the Back Door?*, 5 CHI. J. INT'L L. 325, 327 (2004).

116 Backer, *Multinational Corporations, Transnational Law*, *supra* note 115, at 330; Larry Catá Backer, *On the Evolution of the United Nations' "Protect-Respect-Remedy" Project: The State, the Corporation and Human Rights in a Global Governance Context*, 9 SANTA CLARA J. INT'L. L. 37, 45–46 (2011).

endorsed the Norms, including Oxfam, Amnesty International, and Human Rights Watch.[117]

Although widely endorsed by NGOs, the Norms encountered strong resistance from the very entities to which they would be applied—the multinational corporations tasked with respecting human rights.[118] The rules had the potential to bind corporations to a set of mandatory obligations,[119] a state of affairs, which many corporate leaders found untenable. A number of states also resisted the Norms, claiming that they threatened both state sovereignty and the integrity of international law.[120] The United Nations Sub-Commission on Human Rights eventually declared that the Norms had "no legal standing" and that the Human Rights Commission "should not perform any monitoring function in this regard."[121]

Although the Norms failed to generate widespread support for a variety of reasons, one important factor was that corporations perceived an unworkable amount of ambiguity in the human rights obligations that the Norms proposed.[122] Structurally, the Norms did not sufficiently differentiate between the responsibilities of states and corporations.[123] Furthermore, the Norms identified ideals of conduct rather than minimum standards. For example, Article 12 of the Norms required that corporations contribute to the realization of "the highest attainable standards of physical and mental health."[124] This exhortation was not only difficult to clearly define, but implied a corporate obligation to satisfy a wide range of social obligations that governments in

117 *See* David Weissbrodt & Muria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 AM. J. INT'L L. 901, 906 (2003).

118 *See e.g.*, Timothy E. Deal, Senior Vice President, U.S. Council for International Business, Address at the Frank Hawkins Kenan Institute of Private Enterprise Seminar: Are Human Rights the Business of Business? (Dec. 10, 2003) (transcript available at http://www.uscib.org/index.asp?documentID=2794); Adam Greene, *UN Steps Back From "Norms" on Business and Human Rights*, USCIB (July 13, 2004), *available at* http://www.uscib.org/index.asp?DocumentID=2936 ("Business believe[d] the proposed UN norms would shoulder companies with the primary responsibility for upholding human rights.").

119 *See* Weissbrodt & Kruger, *supra* note 117, at 913 (noting that "[t]he Norms as adopted are not a voluntary initiative of corporate social responsibility," but also stating that "[a]lthough not voluntary, the Norms are not a treaty, either.").

120 Backer, *On the Evolution of the United Nations' "Protect-Respect-Remedy" Project: The State, the Corporation and Human Rights in a Global Governance Context*, *supra* note 116, at 45-46.

121 U.N. Comm'n on Human Rights, Rep. to the Economic and Social Council, 60th Sess., ¶ 2004/116(c), U.N. Doc. E/CN.4/2004/L.11/Add.7 (Apr. 22, 2004).

122 *See* U.N. Econ. and Soc. Council, Sub-Comm'n on the Promotion and Prot. of Human Rights, Rep. of the U.N. High Commissioner on Human Rights and Responsibilities of Transnat'l Corps. and Related Bus. with Regards to Human Rights, 61st Sess., ¶ 20(d)-(e), (h), U.N. Doc. E/CN.4/2005/91 (Feb. 15, 2005).

123 *Id.*

124 U.N. Comm'n on Human Rights, Sub-Comm'n on Promotion and Prot. of Human Rights, Norms on the Responsibilities of Transnat'l Corps. and Other Bus. Enters. with Regard to Human Rights, 55th Sess., ¶ 12, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003).

the developed world have difficulty in delivering. Other obligations, such as the promotion of "mental health" and "education," were never sufficiently articulated. The Norms also incorporated vague obligations such as the adherence of standards of "bioethics" and "the precautionary principle."[125] The Norms were thus filled with "a complex, vague, and non-bounded set of norms" that would be extremely difficult to define, let alone satisfy, by multinational corporations expected to follow them.[126] It was upon this uncertain footing, in the wake of an unsuccessful regulatory effort that provoked the ire of many in both business and government, that a new framework was to be built for articulating the obligations of businesses toward human rights.

In 2005, then U.N. Secretary General Kofi Annan appointed John Ruggie as the SRSG in order to identify and clarify standards of corporate responsibility and elaborate on the state's role in the development of transnational regulation.[127] In his initial report in 2006, the SRSG boldly dismissed the Norms. He viewed them as an exercise "engulfed by its own doctrinal excesses . . . [resulting in] the highly contentious though largely symbolic proposal to monitor firms and provide reparation payments to victims."[128] The Norms were based upon "exaggerated legal claims and conceptual ambiguities [which] created confusion and doubt even among many mainstream international lawyers and other impartial observers."[129] As a result, the Norms suffered from a lack of precision in delineating state and corporate responsibilities and "obscure[d] rather than illuminate[d] promising areas of consensus and cooperation among business, civil society, governments and international institutions with respect to human rights."[130] The SRSG then conducted fourteen multi-stakeholder consultations on five continents, sanctioned more than two-dozen separate research projects, and received twenty submissions and one thousand pages of documents.[131] The subsequent reports were the result of these preliminary efforts.

---

125 *Id.* ¶ 13.

126 Denis Arnold, *Transnational Corporations and the Duty to Respect Basic Human Rights, Business Ethics Quarterly*, 20 BUS. ETHICS Q. 371, 375 (2010).

127 *See* U.N. Econ. and Soc. Council, Comm'n on Human Rights, Promotion and Protection of Human Rights, 61st Sess., ¶ 1(a)-(b), U.N. Doc. E/CN.4/2005/L.87 (Apr. 15, 2005). *See also* Office of the High Comm'r for Human Rights, Human Rights Comm'n Res. 2005/69, ¶ 1 U.N. Doc. E/CN.4/RES/2005/69 (Apr. 20, 2005) (stating that in 2005, the UN Commission on Human Rights adopted resolution E/CN.4/RES/2005/69 requesting the "Secretary-General to appoint a special representative on the issue of human rights and transnational corporations and other business enterprises").

128 Special Representative of the Secretary-General, *Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises*, ¶ 59, U.N. Doc. E/CN4/2006/97 (Feb. 22, 2006) (by John Ruggie) [hereinafter SRSG Rep. 2006].

129 *Id.*

130 *Id.* ¶ 69.

131 Special Representative of the Secretary-General, *Report of the Special Representative of the U.N. Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Protect, Respect and Remedy: A Framework for Business and Human Rights, delivered*

In April of 2008, the SRSG published a report entitled "Protect, Respect and Remedy: A Framework for Business and Human Rights."[132] This report concluded that the global marketplace as currently structured posed significant risks to society due to the enormous disparity between the marketplace's power and the reach of the institutions responsible for its regulation.[133] The SRSG characterized this disparity between global economic forces and the capacity of societal institutions to manage such forces through their national governments as "governance gaps."[134] These gaps were responsible for an increasing number of corporate-related human rights abuses.[135] The inability of many national governments, even those of the largest and most economically dominant states, to manage social impacts associated with globalization left the business and human rights discussion, in the words of the SRSG, without "an authoritative focal point."[136]

These governance gaps could be addressed through a framework comprising of three core pillars, specifically, "the State duty to protect against human rights abuses by third parties, including business; the corporate responsibility to respect human rights; and the need for more effective access to remedies."[137] The pillars were intended to form "a complementary whole in that each supports the others in achieving sustainable progress" on the issue of human rights and business.[138] The responsibility to respect human rights was "the baseline expectation for all companies in all situations."[139] Such responsibility could be discharged if corporate decision-making bodies engaged in due diligence "to become aware of, prevent and address adverse human rights impacts."[140] As a result, the SRSG concluded that the regulatory framework governing transnational corporations continued to operate in much the same manner as it did at an earlier time.[141]

The 2011 final report of the SRSG is titled "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' framework."[142] The SRSG's report is, in fact, comprised of guiding principles.[143] Their purpose is to establish "a common global platform for action,

---

to the Human Rights Council, ¶ 4, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008) (by John Ruggie) [hereinafter SRSG Rep. 2008].

132 *Id.*

133 *Id.* ¶ 14. *See* Jean-Philippe Robé, *Multinational Enterprises: The Constitution of a Pluralistic Legal Order*, *in* GLOBAL LAW WITHOUT A STATE 45, 52-56 (Gunther Teubner ed., 1997).

134 SRSG Rep. 2008, *supra* note 131, ¶ 3 (discussing the concept of "governance gaps").

135 *Id.* ¶ 3.

136 *Id.* ¶ 5.

137 *Id.* ¶ 9.

138 *Id.*

139 *Id.* ¶ 24.

140 *Id.* ¶ 56.

141 *Id.* ¶ 13.

142 SRSG Final Rep. 2011, *supra* note 13.

143 *Id.*

on which cumulative progress can be built, step–by–step, without foreclosing any other promising longer–term developments."[144] They are not intended to be new legal obligations, but rather to elaborate upon the implications of already existing standards and practices for states and businesses.[145] The principles unify these standards and practices under a single framework to be utilized by corporations and states. They do not compel mandatory conduct or reporting requirements backed by punitive measures. They also lack the threat of developing compulsive power, unlike the Norms, which envisioned measures that were not voluntary.

This does not mean, however, that the principles outlined in the 2011 report are merely ambiguous exhortations to good conduct, uniformly accepted but readily ignored. Rather, Ruggie describes his approach as "principled pragmatism: 'an unflinching commitment to the principle of strengthening the promotion and protection of human rights as it relates to business, coupled with a pragmatic attachment to what works best in creating change where it matters most—in the daily lives of people.'"[146] The principles articulate specific calls to action by multinational corporations. They present specific obligations, processes, and implementations that firms are expected to pursue in respecting human rights. Finally, they successfully combine the aspirational character of global documents and the realistic sensibility of a business plan. Principled pragmatism is indeed an apt term for Ruggie's approach.

B. The Ruggie Framework and Due Diligence

The pragmatic implementation of these principles is likely the component of the Protect, Respect, and Remedy framework that is of greatest interest to multinational corporations, and thus is our primary focus here. The cornerstone of this pragmatism is the corporation's obligation to act with due diligence to avoid infringing on the human rights of others. The notion of due diligence in international law and human rights is nothing new. The history of due diligence as a standard in international law can be traced back to Grotius and other seventeenth century writers who reference the concept.[147] Today, due diligence

144 *Id.* ¶ 13.

145 *Id.* ¶ 14.

146 Special Representative of the Secretary–General, *Report of the Special Representative of the Sec'y Gen. on the Issue of Human Rights and the Transnat'l Corp.s and Other Business Enterprises – Business and Human Rights: Further Steps Toward the Operationalization of the 'Protect, Respect and Remedy' Framework*, ¶ 4, U.N. Doc. A/HRC/14/27 (Apr. 9, 2010) (by John Ruggie) [hereinafter SRSG Rep. 2010] (citing SRSG Rep. 2006, *supra* note 128, ¶ 81).

147 *See* Joanna Bourke–Martignoni, *The History and Development of the Due Diligence Standard in International Law and its Role in the Protection of Women Against Violence*, *in* DUE DILIGENCE AND ITS APPLICATION TO PROTECT WOMEN FROM VIOLENCE 47, 48 (Carin Benninger–Budel ed., 2008) ("The writings of seventeenth–century jurists including Hugo Grotius, Richard Zouche, and Samuel Pufendorf made mention of the responsibility of the sovereign to prevent injuries to foreign nationals, to punish private persons who commit acts of violence against foreigners and to ensure

in human rights has been applied in a variety of situations, such as gender-based discrimination and violence, human trafficking, and freedom from torture.[148]

An advantage of using the due diligence concept is that it is a well-trodden doctrine in business and therefore readily recognizable by corporate interests. In corporate law, for example, the duties of ordinary care and good faith owed by directors include oversight obligations, which in turn require the collection and evaluation of information, "reasonable decision-making procedures, monitoring, reporting, and adjustments of corporate policy when and where necessary."[149] Due diligence in the securities industry involves investigation and independent verification by underwriters in order to prepare registration statements.[150] Materially foreseeable risks must be discovered and disclosed by publicly traded corporations in public filings and offering documents, and thus require adequate investigatory procedures to meet the due diligence standard.[151] A further source of understanding is the compliance and ethics program set forth in the U.S. Federal Sentencing Guidelines, which require the exercise of "due diligence to prevent and detect criminal conduct."[152] These due diligence requirements in business can provide a shield in some cases from liability if the required steps were properly performed.[153]

Therefore, the SRSG made a wise choice when including due diligence as a key concept in defining corporate human rights obligations. In 2008, the SRSG's report concluded that corporations could satisfy procedural aspects of due diligence by analyzing the country context in which their activities occurred and determining their human rights impacts and whether such activities might contribute to abuses.[154] Substantive guidance could be derived from the International Bill of Rights as well as the core conventions of the International Labor Organization.[155] The report required proactive due diligence by

---

reparations are made.").

148 *See, e.g.*, Viviana Waisman, *Human Trafficking: State Obligations to Protect Victims' Rights, The Current Framework and a New Due Diligence Standard*, 33 HASTINGS INT'L & COMP. L. REV. 385, 405–07 (2010).

149 *See* Lucien J. Dhooge, *Due Diligence as a Defense to Corporate Liability Pursuant to the Alien Tort Statute*, 22 EMORY INT'L L. REV. 455, 471 (2008).

150 *See* Joseph K. Leahy, *What Due Diligence Dilemma? Re-Envisioning Underwriters' Continuous Due Diligence After Worldcom*, 30 CARDOZO L. REV. 2001, 2013–14 (2009) (stating that in the securities industry "due diligence is an extensive investigation of the issuer" including "a thorough time-consuming review of the issuer's industry, its reputation and the reputation of its principal officers").

151 *See* Dhooge, *supra* note 149, at 471.

152 U.S. SENTENCING GUIDELINES MANUAL, § 8B2.1(a)(1) (2011), *available at* www.ussc.gov/Guidelines/2011_Guidelines/Manual_HTML/8b2_1.htm (last visited Jan. 19, 2014).

153 *See* Christian A. Young, Note, *Looking Back on WorldCom: Addressing Underwriters' Due Diligence in Shelf Registration Offerings and the Need for Reform*, 40 SUFFOLK U. L. REV. 521, 528–29 (2007) (explaining the "due diligence defense").

154 *See* SRSG Rep. 2008, *supra* note 131, ¶ 25.

155 *Id.* ¶ 58.

corporations in three specific areas. First, corporations must examine the context within which their activities take place in order to "highlight any specific human rights challenges they may pose."[156] Second, due diligence required assessment of the potential and actual human rights impacts of a proposed business activity given the context in which it occurs and the corporation's status as a producer, manufacturer, service provider, supplier, or employer.[157] Finally, due diligence required corporations to determine whether their relationships within a specific activity contribute to human rights abuses.[158]

Published in March 2011, the SRSG's fifth and final report (the 2011 report) has significant content relevant to due diligence.[159] The 2011 report further divided the due diligence process into four distinct components. Initially, corporations should "identify and assess any actual or potential adverse human rights impacts" caused by or deriving from their activities or relationships through utilization of internal and external human rights experts and "meaningful consultation with potentially affected groups and other relevant stakeholders."[160] The second element of an adequate due diligence process is "effective integration" and "appropriate action."[161] The third element of an effective due diligence program is tracking. In order to determine the effectiveness of responses to potential impacts, corporations are encouraged to track their effectiveness through utilization of "appropriate qualitative and quantitative indicators" and solicit feedback from internal and external sources, including affected stakeholders.[162] The final element of an effective due diligence program is communication of human rights policies and practices to affected stakeholders.[163]

For multinational corporations, this is where the rubber hits the proverbial road. The due diligence processes in the framework represent a method to help firms manage their responsibilities to impacted communities as well as their responsibilities to shareholders. As Ruggie states, conducting due diligence "protect[s] both values and value."[164]

156 *Id.* ¶ 57.

157 *Id.*

158 *Id.*

159 SRSG Final Rep. 2011, *supra* note 13, at Annex ¶¶ 17–21.

160 *Id.* Annex ¶ 18.

161 *Id.* Annex ¶ 19.

162 *Id.* Annex ¶ 20.

163 *Id.* Annex ¶ 21.

164 SRSG Rep. 2010, *supra* note 146, ¶ 79.

III. The Challenge of Due Diligence in the Protect, Respect, and Remedy Framework

As noted earlier, the SRSG has expressed four core elements of human rights due diligence under the Protect, Respect, and Remedy framework. First, firms should have an explicit and transparent human rights policy.[165] Second, there should be an assessment of human rights impacts on firm activities.[166] Third, the values underlying human rights should be disseminated and embedded throughout the organization's culture and systems.[167] Fourth, performance should be tracked and reported.[168]

The SRSG has stated that an ongoing process of due diligence is required for successful integration and implementation of human rights into corporate practice.[169] Due diligence expects that firms will make themselves aware of potential human rights issues, prevent these problems from happening, and mitigate adverse impacts that have already arisen.[170] This Part evaluates the four core elements of due diligence and offers recommendations to clarify and improve their effectiveness. While each discussion represents a material advancement in the framework, further understanding of these obligations can do much to increase compliance and strengthen future relationships between corporations and the human rights community.[171]

A. Reinforce the Business Benefits of Having a Broad Human Rights Policy

One of the core business goals of the framework is the development of a firm-wide human rights policy.[172] The SRSG's 2008 report briefly describes the scope of this policy as one that may use "broad aspirational language" to describe human rights, but should also offer "more detailed guidance" in areas where it is necessary to give commitments specific meaning.[173] The SRSG's 2011 report elaborates upon the specific requirements of this policy, including approval by senior level management; formulation in consultation with internal

165 *See also* SRSG Rep. 2008, *supra* note 131, ¶ 60 (discussing the scope of due diligence).

166 *Id.* ¶ 61.

167 *Id.* ¶ 62.

168 *See also* SRSG Final Rep. 2011, *supra* note 13, Annex ¶¶ 16–17 (indicating the operational principles used in tracking and reporting); Special Representative of the Secretary-General, *Promotion of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, ¶ 49, Human Rights Council, U.N. Doc. A/HRC/11/13 (Apr. 22, 2009) (by John Ruggie) [hereinafter SRSG Rep. 2009].

169 SRSG Rep. 2009, *supra* note 168.

170 *See* SRSG Rep. 2008, *supra* note 131, ¶ 56.

171 *Id.* ¶ 64 (explaining that as companies adopt and incorporate due diligence practices into their industries, they play a role in improving human rights impacts in their corporate community and developing countries).

172 SRSG Final Rep. 2011, *supra* note 13, ¶¶ 15–16; SRSG Rep. 2009, *supra* note 168, ¶ 49.

173 SRSG Rep. 2008, *supra* note 131, ¶ 60.

and external experts; broad coverage to include personnel, business partners, and other parties with direct links to the corporation's operations; public availability; and reflection on operational policies and procedures.[174]

Having a human rights policy is certainly an important first step in furthering the goals of human rights protection in a corporate enterprise. An overarching policy is necessary to give the firm some direction in terms of its goals, operationalization of those goals, expression of values, and responsibilities of key internal stakeholders of the organization. In addition, the SRSG rightly notes that there is a tension between having a freestanding human rights policy and one that is integrated within established due diligence processes.[175] The former risks not being integrated into the firm's operations, while the latter practice might dilute the unique attributes of human rights protection. The underlying thrust of this concern is expressed in the SRSG's 2010 report, which wisely instructs that human rights initiatives need to be addressed directly and in a systematic fashion.[176] A policy is the first expression of that initiative.

Future work by the SRSG's successors must account for the fact that, while such policies are important, standing alone they are no panacea for eliminating socially irresponsible behavior. Studies into corporate ethical codes, by analogy, report that the benefits from such expressions of values are far from uniform.[177] While some studies associate ethical codes with reduced unethical conduct,[178] others report no such benefit.[179] Indeed, a 2001 meta-analysis of the effectiveness of such codes found that only eight of nineteen studies showed a significant relationship between the existence of a corporate code and ethical behavior.[180]

Regrettably, the SRSG's reports did not discuss the embedded values of expressions of corporate human rights policy. These embedded values must not remain deemphasized in future implementation of the framework. One such value is the positive impact that communicated human rights policies may have upon shareholder confidence. Significant individual and institutional investors may be motivated to invest or increase their stake in firms with a human rights

174 SRSG Final Rep. 2011, *supra* note 13, Annex ¶ 16(a)–(e).

175 *See id.* Annex ¶ 17.

176 *See* SRSG Rep. 2010, *supra* note 146, ¶ 56.

177 *See, e.g.*, Patrick M. Erwin, *Corporate Codes of Conduct: The Effects of Code Content and Quality on Ethical Performance*, 99 J. BUS. ETHICS 535, 535 (2011).

178 Donald L. McCabe, et al., *The Influence of Collegiate and Corporate Codes of Conduct on Ethics-Related Behavior in the Workplace*, 6 BUS. ETHICS Q. 461, 471 (1996); *see also* Mark John Somers, *Ethical Codes of Conduct and Organizational Context: A Study of the Relationship Between Codes of Conduct, Employee Behavior and Organizational Values*, 30 J. BUS. ETHICS Q. 185, 185 (2001).

179 Lawrence B. Chonko & Shelby D. Hunt, *Ethics and Marketing Management: An Empirical Examination*, 13 J. BUS. RES. 339, 356 (1985); *see also* Margaret Anne Cleek & Sherry Lynn Leonard, *Can Corporate Codes of Ethics Influence Behavior?*, 17 J. BUS. ETHICS 619, 625 (1998).

180 Mark S. Schwartz, *The Nature of the Relationship between Corporate Codes of Ethics and Behaviour*, 32 J. BUS. ETHICS 247, 249 (2001).

policy.[181] Such policies are one indicator of management quality because they demonstrate risk awareness and mitigation and may prove crucial in meeting investor expectations by ensuring corporate access to business opportunities that require robust statements of human rights values. Examples in this regard may be found in financial organizations such as the World Bank, the International Finance Corporation, and regional institutions, all of which include statements of human rights values in their governance requirements.[182]

Perhaps more importantly, investors may be dissuaded from divesting as a result of such policies. Although divestment by individual investors may have no appreciable effect, such action by institutional investors could have a significant impact on many corporations.[183] An example in this regard is the California Public Employees Retirement System (CalPERS), the largest public pension fund in the United States, with assets in excess of $200 billion.[184] Although characterizing divestment as an ineffective strategy for achieving social and political goals and expressing a preference for constructive engagement, CalPERS' 2009 Statement of Investment Policy nevertheless permits divestment where the continuation of the investment is imprudent and inconsistent with fiduciary duties.[185] A comprehensive and implemented human rights policy could dissuade institutional investors like CalPERS from divestment in certain situations.

Corporate human rights policies will also motivate socially responsible investors to act. Socially responsible investing is a two trillion dollar industry.[186] Indeed, over half of Americans surveyed monitor a firm's social performance, ethics, and environmental behavior.[187] A corporation's robust statement of its human rights policy can send strong signals to various constituents that the organization is a worthy recipient of socially responsible investing. The

181 *See* John Gerard Ruggie, *Business and Human Rights: The Evolving International Agenda*, 101 AM. J. INT'L L. 819, 820 (2007).

182 *See Corporate Governance Development Framework*, DFI CORPORATE GOVERNANCE PORTAL, *available at* http://www.cgdevelopmentframework.com (follow the hyperlink then click on the "CG Dev. Framework" tab) (last visited Jan. 19, 2014); *see also The Newly Revised IFC Performance Standards – Guidance on Implementation by EP Association Members from 1 January 2012*, EQUATOR PRINCIPLES (Dec. 7, 2011), *available at* http://www.equator-principles.com/index.php/all-ep-association-news/254-revised-ps.

183 *See, e.g.*, Dhooge, *Due Diligence as a Defense to Corporate Liability Pursuant to the Alien Tort Statute*, *supra* note 149, 495 & n.243, 496 (discussing the Sudan Divestment Task Force).

184 *See generally Facts at a Glance: General*, CALPERS 1 (June 2012), *available at* http://www.calpers.ca.gov/eip-docs/about/facts/general.pdf.

185 *See Statement of Investment Policy: Regarding Divestment*, CALPERS ¶¶ 1, 4(a) (Feb. 17, 2009), *available at* http://www.calpers.ca.gov/eip-docs/investments/policies/invo-risk-mang/divestment.pdf.

186 Steve Schueth, *Socially Responsible Investing in the United States*, 43 J. BUS. ETHICS 189, 191 (2003) ("[N]early $2.2 trillion under professional management in the United States involved in one or more of the three primary social investment strategies.").

187 *Consumers Want Brands—and Social Responsibility*, 152 SALES & MARKETING MGMT., Jan. 2000, at 76.

investment decisions of hundreds of socially responsible investment mutual funds may be influenced by the expression of a human rights policy.[188]

Human rights values and practices can also be expressed as core components of a firm's social marketing campaign to ethically sensitive consumers and organizations. As standards for social and environmental corporate reporting coalesce,[189] a firm has the opportunity to showcase its human rights performance through explicit rankings and measures that demonstrate the firm's absolute performance and performance relative to competitors.[190] Furthermore, such policies enhance and safeguard corporate reputation and brand image. Reputation and image are crucial to attract a wide range of stakeholders, including consumers, employees, shareholders, suppliers, and business partners. To the extent that human rights violations, or the perception thereof, cause harm to a firm's reputation and image, all of these relationships are negatively impacted. The damage caused to reputation and current and future profitability as a result of this negative impact is often inestimable.[191] Human rights controversies can besmirch corporate reputations overnight, and the resultant damage can linger in the public's conscience for decades.[192] Rehabilitation of reputation and regaining public trust are expensive, time consuming, and difficult propositions. Well known global corporations such as Nestlé, Union Carbide, Exxon, and possibly BP may "remain inextricably linked to their misdeeds despite the passage of time."[193]

Enhancing trust and confidence among stakeholders is particularly crucial. Distrust and low confidence do not provide transnational corporations with significant margins for error with respect to human rights issues. Local stakeholders are much more likely to grant the benefit of the doubt and allow for remedial actions for human rights violations committed by firms with high levels of community trust. Allegations of corporate misdeeds may be addressed and remedied at their root by corporate human rights policies, rather than

188 *See* Joshua A. Newberg, *Corporate Codes of Ethics, Mandatory Disclosure, and the Market for Ethical Conduct*, 29 VT. L. REV. 253, 289 (2005).

189 *See* Ruggie, *Business and Human Rights: The Evolving International Agenda*, *supra* note 181.

190 *See* Cynthia A. Williams & John M. Conley, *Is There an Emerging Fiduciary Duty to Consider Human Rights?*, 74 U. CIN. L. REV. 75, 81 (2005) (noting that most global 500 companies "now have corporate social responsibility (CSR) officers and departments and ... as a response to changing market conditions, well-run companies are paying sharply increased attention to human rights and other social and environmental risks throughout their global value chain.").

191 *See, e.g.*, Sharon Beder, *Put the Boot In*, ECOLOGIST, Apr. 2002, at 24 (discussing the impact on Nike's brand after a decade of highly publicized allegations of human rights abuses.).

192 *See* Lauren A. Dellinger, *Corporate Social Responsibility: A Multifaceted Tool to Avoid Alien Tort Claims Act Litigation While Simultaneously Building a Better Business Reputation*, 40 CAL. W. INT'L L.J. 55, 85 (2009); *see also* Lucien J. Dhooge, *Beyond Voluntarism: Social Disclosure and France's Nouvelles Régulations Économiques*, 21 ARIZ. J. INT'L & COMP. L. 441, 460 (2004) (citing CHRISTOPHER L. AVERY, BUSINESS AND HUMAN RIGHTS: FIVE COMMON MISCONCEPTIONS (1997), *available at* http://198.170.85.29/Misconceptions.htm.

193 Dhooge, *Beyond Volunteerism*, *supra* note 192, at 460.

taking on a new life in the media, on the Internet, and through NGOs.[194] While transnational corporations will never perhaps achieve the same level of credibility and trust enjoyed by NGOs and individuals actively engaged at the grassroots level, that is not the ultimate objective of such policies. Rather, human rights policies present valuable opportunities to the extent they enhance trust and confidence in the communities in which corporations do business.

On a more abstract level, human rights policies have value because they strengthen corporate legitimacy. It has been correctly noted that "[c]orporate privilege can only be legitimate if the corporation serves the community from which the factors of production of its wealth are derived."[195] This license to operate requires broadly defining the constituencies to which the corporation has some degree of responsibility.[196] Human rights policies address this concern by acknowledging the duty to respect rights beyond traditional shareholder concerns in favor of a much larger pool of stakeholders.[197] A properly drafted and carefully implemented policy draws attention to all stakeholders, thereby increasing collaboration, further enhancing corporate legitimacy, and justifying a firm's license to operate within the community.[198]

B. Clarify the Necessary Assessment Standard of Human Rights Impacts on Company Activities

The framework also invites firms to "identify and assess any actual or potential adverse human rights impacts" that might arise from direct activities or as a result of relationships with other firms.[199] To achieve this goal, firms should rely on internal and/or independent human rights expertise and consultation with relevant stakeholders.[200] Such assessment is an important part of human rights compliance. The 2008 SRSG report emphasizes proactivity and forward thinking, noting that human rights problems arise for corporations because they fail to assess the human rights implications of decisions before those decisions

194 *See, e.g.*, Memorandum from Ira M. Millstein et al., Weil, Gotshal & Manges, LLP, Corporate Social Responsibility for Human Rights: Comments on the U.N. Special Representative's Report Entitled "Protect, Respect and Remedy: A Framework for Business and Human Rights" 5 (May 22, 2008), *available at* http://198.170.85.29/Weil-Gotshal-legal-commentary-on-Ruggie-report-22-May-2008.pdf [hereinafter Weil Memorandum] (discussing the business benefits of corporate policies that safeguard human rights).

195 Backer, *Multinational Corporations, Transnational Law*, *supra* note 115, at 301.

196 *Id.* at 301-02, 339-40 (arguing that a corporation's service to the community may include a "broadening of the constituencies to which [it] must be responsible.").

197 *Id.* at 339-40.

198 *Id.* at 340.

199 SRSG Final Rep. 2011, *supra* note 13, Annex ¶ 18; *see also* SRSG Rep. 2009, *supra* note 168, ¶¶ 49, 61.

200 SRSG Final Rep. 2011, *supra* note 13, Annex ¶ 18; *see also* SRSG Rep. 2009, *supra* note 168, ¶¶ 49, 61.

are undertaken.[201] These assessments can also be linked with other risk–based assessments in the organization, such as those relating to the environmental and social impact assessments.[202]

The SRSG ably explored other approaches to human rights assessments, and a growing body of research highlights their importance.[203] The framework is to be commended for defining the scope of the assessment, specifically, country and local contexts within which the business activity is to take place, the impact of the activity within these contexts, and whether and how relationships the company maintains or is contemplating may contribute to abuses.[204] These parameters dispel any notions that philanthropy, relief in times of emergency, and other desirable good deeds are sufficient to overcome human rights violations in a firm's operations.[205] As previously noted, it also dispels another widely–held belief that legal compliance is all that is required to obtain and sustain business' social license to operate.[206] This is a particularly difficult problem in states where national legal systems are weak or wholly absent, because such systems either do not offer the same level of protection as international human rights standards, or conflict with such standards.[207]

In defining the scope of the assessment, the SRSG notes that as international human rights instruments were written by and for states, their meaning for and application to business has not always been well understood.[208] While fluent in economics, transnational corporations do not generally "speak the language of human rights."[209] As a result, there is "little that count[s] as shared knowledge across different stakeholder groups in the business and human rights domain."[210] Given this disconnect, the SRSG correctly attempts to translate the language of human rights into the language of business using traditional concepts of corporate governance. The SRSG accomplishes this by drawing parallels between human rights impact assessments and impact assessments performed by corporations on a routine basis. This includes financial, environmental, and social impact assessments, and a "do no harm" standard familiar to businesses in

201 SRSG Rep. 2008, *supra* note 131, ¶ 61.

202 *Id.*

203 *See, e.g.*, Tarek F. Maassarani et al., *Extracting Corporate Responsibility: Towards a Human Rights Impact Assessment*, 40 CORNELL INT'L L.J. 135, 149, 152 (2007) (noting the impact of a research model created to explore corporate responsibility on human rights).

204 SRSG Rep. 2009, *supra* note 168, ¶ 50; *see also* SRSG Rep. 2008, *supra* note 131, ¶ 57.

205 *See* SRSG Final Rep. 2011, *supra* note 13, Annex ¶ 11; *see also* SRSG Rep. 2010, *supra* note 146, ¶¶ 63–65; SRSG Rep. 2009, *supra* note 168, ¶ 62; SRSG Rep. 2008, *supra* note 131, ¶ 55.

206 *See* SRSG Rep. 2010, *supra* note 146, ¶ 68; *see also* SRSG Rep. 2009, *supra* note 168, ¶¶ 46, 66.

207 *See* SRSG Rep. 2010, *supra* note 146, ¶ 68; *see also* SRSG Rep. 2009, *supra* note 168, ¶¶ 46, 66.

208 SRSG Rep. 2009, *supra* note 168, ¶ 57.

209 Backer, *supra* note 115, at 307.

210 SRSG Final Rep. 2011, *supra* note 13, ¶ 4.

managing other types of risk.[211] Corporate leadership clearly understands the concept of due diligence in these contexts.[212]

The SRSG's 2011 report goes further than any previous effort in defining the elements of due diligence.[213] However, despite this admirable attempt, there are several areas that require additional clarification. For example, there are some inconsistencies in the characterization of human rights assessments in the SRSG's reports over the last several years that merit attention. First, the SRSG describes human rights assessment with the same language devoted to risk assessment in other fields. Human rights impacts "merit a similar level of due diligence as any other risk."[214] Human rights assessment is described in corporate governance parlance as assessment, management, and disclosure of material risks in order to avoid liability.[215] Other risks to be avoided include delays in the planning, construction, and operation of foreign investment projects, difficulties in labor markets, increased costs associated with financing, insurance, and security, and reduced returns on investment.[216] The end result of failure to adequately safeguard against human rights violations is identical to the failure to adequately conduct a risk assessment in other fields, specifically, erosion of corporate value and the breach of disclosure requirements and directors' fiduciary duties.[217]

Yet the SRSG sows seeds of confusion to the extent he backs away from this comparison in other portions of his reports. Despite the previously referenced characterizations, the SRSG has also described due diligence associated with human rights assessment as being broader than traditional notions of due diligence, specifically, "a comprehensive, proactive attempt to uncover . . . risks, actual and potential, over the entire life cycle of a project or business activity. . . ."[218] In other words, this process must go beyond identification and management of risks to the company and address risks to affected individuals and communities

211 *See e.g.*, SRSG Rep. 2008, *supra* note 131, ¶¶ 24, 56; U.N. Special Representative of the Secretary-General, *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled "Human Rights Council,"* ¶¶ 3, 10, U.N. Doc. A/HRC/4/74 (Feb. 5, 2007) (by John Ruggie).

212 *See also* Williams & Conley, *supra* note 190, at 81 ("[A]s a response to changing market conditions, well-run companies are paying sharply increased attention to human rights and other social and environmental risks. . . .").

213 *See* SRSG Final Rep. 2011, *supra* note 13, Annex ¶¶ 17-21; *Business and Human Rights: Interview with John Ruggie*, BUSINESS ETHICS, (Oct. 30, 2011), http://business-ethics.com/2011/10/30/8127-un-principles-on-business-and-human-rights-interview-with-john-ruggie/ (discussing implications of the corporate responsibility).

214 SRSG Rep. 2009, *supra* note 168, ¶ 51.

215 *See id.* ¶ 81. *See also* Dhooge, *Due Diligence as a Defense to Corporate Liability Pursuant to the Alien Tort Statute*, *supra* note 149, at 470 ("While directors and executives may know little about the substance of human rights law, corporate leadership understands the concept of due diligence.").

216 *See also* SRSG Rep. 2010, *supra* note 146, ¶ 70.

217 *Id.* ¶ 73.

218 SRSG Rep. 2009, *supra* note 168, ¶ 71.

associated with specific activities and relationships.[219] This statement introduces yet another difference between traditional risk management and human rights assessment, that is, the involvement of rights holders. This involvement extends human rights risk assessment beyond merely calculating probabilities.[220] While human rights are undoubtedly indivisible from all aspects of human existence, including civil, cultural, economic, political, and social activities, the SRSG's description of due diligence in this context backs away from prior characterizations closely equating human rights due diligence to other readily understandable and business–friendly risk assessment frameworks. What the SRSG appears to offer transnational corporations in some sections of these reports seemingly disappears in other sections.

Two other unresolved issues merit further attention in the future. First, the preference for freestanding human rights assessment procedures, or the folding of such assessments into existing due diligence processes, must be clarified.[221] While the SRSG has accurately described the advantages and disadvantages of each approach,[222] the absence of a preference may leave some corporations uncertain as to the procedures most suitable for conducting thorough assessments set forth in the SRSG's reports.

Additional clarification is also necessary with respect to the consequences of a due diligence process that fails to accurately assess human rights impacts. Corporations that fail to conduct reasonable inquiries or disregard evidence of actual or potential impacts clearly should not receive the protection of the due diligence shield. But due diligence assessments may be thorough and reasonable and nevertheless be tainted by erroneous predictions, a board's well–reasoned decision not to follow every recommendation, or a company's prioritization of human rights challenges and corresponding project policies through its organization. The implications of such results must be addressed in future efforts.

There are several key questions that must be addressed in this regard. One example is whether boards of directors and other corporate decision makers must either adhere to every recommendation and avoid every risk to human rights no matter how remote, or retain a degree of independent business judgment. This is an important question as the SRSG has stated that corporations are liable for their own acts and omissions as well as those of companies with which they maintain a "business relationship."[223] The breadth of this potential liability is staggering because it includes acts and omissions by "business partners, entities in the value chain, and any other non–State or State entity directly linked to its business operations, products or services."[224] It is questionable whether boards

219 *See also* SRSG Rep. 2010, *supra* note 146, ¶ 81.

220 *Id.* ¶ 85.

221 *See also* SRSG Rep. 2009, *supra* note 168, ¶¶ 77–78.

222 *Id.*

223 SRSG Final Rep. 2011, *supra* note 13, Annex ¶ 13.

224 *Id.*

of directors and other corporate decision makers even possess sufficient data to make informed decisions, let alone whether their imperfect decisions may result in liability for the corporation. These decisions are also crucial because, according to the SRSG, directors, officers, and employees may be subjected to personal liability for adverse human rights impacts relating to the acts and omissions of their corporations, at least with respect to "gross human rights abuses," a term that remains undefined in the SRSG's reports.[225] This may prove to be a moving target as human rights laws evolves over time.[226] Additionally, the SRSG states that in situations where a corporation lacks "leverage" to prevent or mitigate adverse human rights impacts associated with its activities, it should consider ending the relationship.[227] What amount of "leverage" or lack thereof that constitutes the tipping point remains unclear. Equally unclear is the terminology regarding "ending the relationship."[228] In particular, questions may be raised whether this statement places a requirement upon corporations or merely a matter for consideration, and whether "ending the relationship" means or requires divestment. If the relationship is deemed "crucial," the corporation must consider the severity of the abuse and adopt measures designed to mitigate adverse impacts.[229] But if the primary purpose of all corporations is to maximize profits, are not all relationships crucial to maintaining and increasing profitability? A corporation that fails to "end the relationship" under such circumstances "should be prepared to accept any consequences—reputational, financial or legal—of the continuing connection."[230] This statement echoes standards for strict liability—a result that the SRSG could not possibly have intended, yet arguably seems to fall within such language. At the very least, this statement creates intended or unintended openings for future litigants seeking to question board of director decisions impacting human rights considerations.

The SRSG has understandably instructed corporations that his reports, and the due diligence framework set forth therein, are not intended to serve as a "plug in tool kit."[231] Nevertheless, to be truly effective, as undoubtedly intended by the SRSG, the due diligence framework must serve as somewhat of a tool kit and contain as much clarity and guidance as possible for the corporations to be judged by its standards.

Finally, there is more that can be developed in the creation and use of impact assessments. A human rights assessment practice generates value-capturing opportunities for the organizations that implement them. Most obvious is that such assessments help accurately predict the risks attendant to poor human rights conditions such as kidnapping of employees, sabotage, government

225 *Id.* ¶ 23.

226 *See id.*

227 *Id.* ¶ 19.

228 *Id.*

229 *Id.*

230 *Id.*

231 *Id.* ¶ 15.

expropriation, and corruption.[232] Firms can also assess the potential benefits of human rights practices such as increased local productivity, community support, and consumer demand.[233]

Future efforts should emphasize the positive spillover effect that human rights assessments may have on the functioning of the organization as a whole. The mere act of a company–wide assessment in a novel area such as human rights can improve organizational learning in the practice of self–assessments generally.[234] Assessments can also generate unexpected efficiency opportunities. For example, when the Sarbanes–Oxley Act (SOX) was passed in the United States, it required that each annual report include an assessment of internal controls.[235] While most firms perceived SOX as another cost, a minority of firms used this assessment requirement to eliminate redundant information systems, streamline financial controls, and consolidate financial processes.[236] Future efforts should illustrate that self–assessments are essential for implementing corporate change, a source of potential value, and embed skills that promote a more nimble organization.

Due diligence also improves risk assessment and management. Human rights due diligence can be integrated into existing management systems to the extent it resembles other forms of risk assessment.[237] This integration broadens and strengthens the information received by business, and consequently improves the risk assessment that emerges from the data collection and analysis processes.[238] The added value associated with human rights due diligence and enhanced risk assessment is also of significant benefit to managers on the ground. Furthermore, as risk assessment is well known to businesses, characterizing due diligence in a similar manner "has the best chance to resonate with company management and be absorbed into site specific practices."[239]

In addition to these considerations, it should come as no surprise that there is a link between respect for human rights and profitability.[240] Respect

232 *See also* Maassarani et al., *supra* note 203, at 159.

233 Principle One of the United Nations Global Impact has also pointed to these outcomes as beneficial. *See Global Compact Principle One*, UNITED NATIONS GLOBAL COMPACT, http://www.unglobalcompact.org/aboutthegc/thetenprinciples/principle1.html (last updated July 26, 2013).

234 *See* Mark B. Taylor et al., *Due Diligence for Human Rights: A Risk–Based Approach* 3, (Corp. Social Responsibility Initiative Working Paper No. 53, 2009), *available at* http://www.hks.harvard.edu/m–rcbg/CSRI/publications/workingpaper_53_taylor_etal.pdf.

235 Sarbanes Oxley Act of 2002, Pub. L. No. 107–204, 116 Stat. 745.

236 *See also* Robert C. Bird, *Pathways of Legal Strategy*, 14 STAN. J.L. BUS. & FIN., 1, 29–30 (2008). *See generally* Stephen Wagner & Lee Dittmar, *The Unexpected Benefits of Sarbanes–Oxley*, HARV. BUS. REV., Apr. 2006, at 133, 133–34 (discussing how some firms welcomed Sarbanes Oxley and made changes to their financial processes).

237 *See* Taylor et al., *supra* note 234, at 8.

238 *Id.* at 7–8.

239 *Id.* at 8.

240 *See also* Kimberly Gregalis Granatino, *Corporate Responsibility Now: Profit at the Expense of Human Rights with Exemption from Liability?*, 23 SUFFOLK TRANSNAT'L L. REV. 191, 210–11 n.122

for human rights promotes integrity in national fiscal and legal systems.[241] This increased integrity in turn creates a secure investment environment by discouraging arbitrary decisions, protecting intellectual property rights and other business assets, and ensuring economic stability, thereby fostering an atmosphere conducive to future growth. Characterizing respect for human rights and due diligence in this manner serves to transform the topic from one posing a potential threat to one of corporate opportunity.

The impact of such certainty cannot be overstated. Similarly, due diligence provides greater certainty to transnational corporations themselves. The occurrence of human rights violations and associated possibilities of litigation and harm to corporate image are material risks for transnational corporations.[242] These risks are exacerbated by the fact that human rights instruments are fraught with uncertainty, and the power to define their meaning is fragmented among numerous constituencies.[243] Boards of directors may be unwilling to undertake projects that present such risks, despite the fact that shareholders would otherwise approve of risk-taking in the interest of maximizing profit.[244] Conservative decision making overly focused on risk avoidance and liability concerns, rather than return on investment, is a disservice to shareholders who are thus denied the full measure of return on their investment.[245] Due diligence alleviates this risk to the extent it provides greater certainty to boards of directors that their decisions will be less likely to form the basis of litigation and cause harm to corporate reputation.[246] Boards of directors are thus freer

---

(1999); Anna Triponel, *Business & Human Rights Law: Diverging Trends in the United States and France*, 23 AM. U. J. INT'L L. REV. 855, 886 (2008) ("[T]he argument by economic analysts that adopting human rights standards is profitable for the corporation in the long run has gained credence.").

241 Dhooge, *Due Diligence as a Defense to Corporate Liability Pursuant to the Alien Tort Statute*, *supra* note 149, at 459.

242 *See, e.g.*, U.N. Special Representative of the Secretary-General, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, ¶ 145, U.N. Doc. A/HRC/17/31/Add.2 (May 23, 2011) (by John Ruggie); SRSG Rep. 2009, *supra* note 168, ¶ 81; Dhooge, *Due Diligence as a Defense to Corporate Liability Pursuant to the Alien Tort Statute*, *supra* note 149, at 485.

243 *See* Williams & Conley, *supra* note 190, at 101.

244 *See also* William T. Allen et al., *Realigning the Standard of Review of Director Due Care with Delaware Public Policy: A Critique of* Van Gorkom *and its Progeny as a Standard of Review Problem*, 96 Nw. U. L. REV. 449, 455 (2002) (contending that "[a] standard of review that imposes liability on a board of directors for making an 'unreasonable' (as opposed to 'irrational') decision could result in discouraging riskier yet socially desirable economic decisions."); Dhooge, *Due Diligence as a Defense to Corporate Liability Pursuant to the Alien Tort Statute*, *supra* note 149, at 486.

245 FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 93 (1991) (stating that "investors' wealth would be lower if managers' decisions were routinely subjected to strict judicial review").

246 *See* Dhooge, *Due Diligence as a Defense to Corporate Liability Pursuant to the Alien Tort Statute*, *supra* note 149, at 486.

to undertake projects with appropriate risks.[247] Increased certainty and risk minimization will also result in more efficient resource allocation.[248]

As noted by the SRSG, the primary means by which transnational corporations address human rights abuses are through litigation and countering negative publicity.[249] These costs may be direct in the form of legal representation, responding to discovery requests and appearing at judicial proceedings or indirect through the disruption of normal corporate functions, disclosure of sensitive information, and reputational harm.[250] Transnational corporations may also incur transition costs associated with adaptation to constantly changing human rights norms.[251] Additionally, transnational corporations would incur significantly smaller costs early in the foreign investment decision-making process associated with issues concerning location, timing, design, and personnel.[252] The above-listed factors will result in a competitive advantage for those firms that adopt a responsible approach to human rights. Greater certainty strengthens national legal, fiscal, and political systems, which in turn encourages foreign investment. This enhanced certainty encourages responsible risk-taking, improves assessment of such risks, streamlines management and resource allocation, and reduces negative costs associated with litigation and crisis management.[253] These benefits are in addition to those arising from brand and reputational enhancement and building consumer trust.[254] Such firms are attractive to a wide range of stakeholders and customers, including current and potential members of the supply chain, current and future business partners, and present and potential employees.[255]

247 *See also* David Rosenberg, *Galactic Stupidity and the Business Judgment Rule*, 32. J. CORP. L. 301, 302 (2007).

248 *See also* Dhooge, *Due Diligence as a Defense to Corporate Liability Pursuant to the Alien Tort Statute*, *supra* note 149, at 487.

249 SRSG Rep. 2008, *supra* note 131, ¶ 93.

250 *See also* ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 166–67 (2006).

251 *See also* Andrew S. Gold, *A Decision Theory Approach to the Business Judgment Rule: Reflections on* Disney, *Good Faith and Judicial Uncertainty*, 66 MD. L. REV. 398, 468 (2007); Weil Memorandum, *supra* note 194, at 2.

252 Special Representative of the Secretary-General on the Issue of Human Rights and Transnat'l Corps. and Other Bus. Enters., *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, Addendum, Summary Reports of Five Multi-Stakeholder Consultations*, ¶ 121, U.N. Doc. A/HRC/8/5/Add.1 (Apr. 23, 2008).

253 *See* Dhooge, *Due Diligence as a Defense to Corporate Liability Pursuant to the Alien Tort Statute*, *supra* note 149, at 485–88.

254 *See also* Peter Frankental & Frances House, *Human Rights: Is it Any of Your Business?*, AMNESTY INT'L & INT'L BUS. LEADERS F., Apr. 2000, at 25, *available at* http://198.170.85.29/Benefits-to-business-society.htm; Weil Memorandum, *supra* note 194, at 5.

255 Dhooge, *Due Diligence as a Defense to Corporate Liability Pursuant to the Alien Tort Statute*, *supra* note 149, at 482.

C. The Framework Should Better Clarify How Firms Should Integrate Human Rights Principles into the Organization

Another area where the framework and SRSG efforts remain insufficiently clear is how corporations should satisfactorily integrate human rights policies into their company structure.[256] As the SRSG's findings reflect, a commitment to human rights cannot simply exist in the exhortations of the responsible sub-entity in the firm or a few commitment-minded employees.[257] The concern for human rights must be organization wide.

Yet before opportunities for firm benefits are discussed, the meaning of this prong should be more precisely defined. The SRSG's reports are obviously only the first step, and ideas will evolve over time. However, the precise definition of this integration prong varies between documents. In 2009, the SRSG described this element as "integrating those values and findings into corporate cultures and management systems."[258] In 2010, the four elements of due diligence were described again, but this time the document explained this prong as "integrating these commitments and assessments into internal control and oversight systems."[259]

This may be unintentional, but the difference in language could be interpreted as meaningful. The language in the 2010 report has a focused approach, encouraging firms to implement commitments and information into formal control mechanisms and already existing management systems.[260] If firm-expressed commitments to human rights and findings of assessment are integrated into the key relevant processes of the organization, this appears to satisfy the due diligence requirement of integration.

The 2009 SRSG report summarizes more detailed language from the 2008 report. However, the 2009 report speaks to a substantially different set of foci and values.[261] The 2009 language is broader than the language used in 2008, implying that integration of human rights sources from both formal findings as well as informal values. The word 'values' invokes a moral and ethical component more strongly than its 2010 counterpart of 'commitments and assessments.'[262] The 2009 language also implies that due diligence implicates driving these

256 *See* SRSG Final Rep 2011, *supra* note 13, Annex ¶ 19.

257 *See generally* SRSG Rep. 2010, *supra* note 146, ¶¶ 89, 91 (noting that successful companies have mechanisms in place to deal with such grievances, but they are vastly underdeveloped); SRSG Rep. 2008, *supra* note 131, ¶ 60 (noting that companies need to adopt detailed guidance for human rights policy in specific function areas).

258 SRSG Rep. 2009, *supra* note 168, ¶ 49 (citation omitted).

259 SRSG Rep. 2010, *supra* note 146, ¶ 83.

260 *See id.*

261 *See* SRSG Rep. 2009, *supra* note 168, ¶ 49 (citation omitted).

262 *Compare* SRSG Rep. 2009, supra note 168, ¶ 49 ("values"), *with* SRSG Rep. 2010, *supra* note 146, ¶ 83 ("commitments and assessments").

values more deeply and broadly in the organization.[263] This earlier report uses the words 'cultures and management' rather than the more technical and narrow 'commitments and assessments'.[264] The 2009 language invokes ideals, while the 2010 language calls to mind processes and standardization.[265] The difference may be subtle, but the choice of language does matter. This lack of precision must be resolved going forward.

Operationalization of human rights principles through oversight systems can generate value for firms. These benefits appear to be largely similar to those expressed in the second prong on assessment. In a manner similar to assessment, spillover effects from operationalization can offer expected and unexpected learning opportunities and provide data that the firm may use to further its operations.

The 2009 language, however, appears more far-reaching and thus holds greater potential for participating firms. Corporate culture has emerged as a clear source of risk in corporate activity. Human rights policies become vitally important as nations begin to consider corporate culture when determining corporate criminal accountability. Australian law, for example, focuses on firm policies, rules, and practices to determine liability rather than the activities of individual employees.[266]

The focus by the SRSG appears to be that government authorities will be the leading forces for inculcating a corporate culture respectful of human rights.[267] As the 2008 report states, "[g]overnments are uniquely placed to foster corporate cultures in which respecting rights is an integral part of doing business."[268] Such efforts involve requiring sustainability reports and redefining fiduciary duties for organizations. The report focuses on state-owned enterprises where shifts in corporate culture may be easier to achieve.[269]

The SRSG reports, however, do not place sufficient emphasis on the most influential driver of changes in corporate culture—the companies themselves. While government encouragement is important, a renewed focus should be made to encourage private enterprises to change values through efforts of their choosing. Corporations may respond well to reporting mechanisms or changes in fiduciary reporting, and these practices certainly have their benefits.

263 SRSG Rep. 2009, *supra* note 168, ¶ 120.

264 *Compare id.* ¶ 49 ("cultures and management"), *with* SRSG Rep. 2010, *supra* note 146, ¶ 83 ("commitments and assessments").

265 *Compare* SRSG Rep. 2009, *supra* note 168, ¶¶ 49–55, *with* SRSG Rep. 2010, *supra* note 146, ¶¶ 79–86.

266 *See e.g.*, Kendra Magraw, Note, *Universally Liable? Corporate Complicity Liability under the Principle of Universal Jurisdiction*, 18 MINN. J. INT'L L. 458, 486 (2009); 'CORPORATE CULTURE' AS A BASIS FOR THE CRIMINAL LIABILITY OF CORPORATIONS, ALLENS ARTHUR ROBINSON 15–16 (2008), *available at* http://198.170.85.29/Allens-Arthur-Robinson-Corporate-Culture-paper-for-Ruggie-Feb-2008.pdf.

267 *See* SRSG Rep. 2008, *supra* note 131, ¶¶ 29–32.

268 *Id.* ¶ 29.

269 *Id.* ¶¶ 29–32.

However, if the emphasis is on cultural change, for some firms the key drivers for such change must come from inside the organization itself.

This means the emphasis of the SRSG and NGOs could be to interact with corporate leaders or other influential members of the organization to encourage them to embed human rights values into the organization as well as provide tools to facilitate such cultural change. Significant literature already exists in the management discipline on successful and empowering culture change.[270] With such an emphasis on value change originating from top management,[271] including the SRSG's own reports,[272] leadership engagement and persuasion might influence the most thorough culture change toward human rights responsibility.

The embedding of human rights values into the highest levels of organizations will have trickle down positive impacts on employees.[273] Such organizations should experience improved recruitment, retention, and motivation. In addition to the costs savings associated with such developments (such as those associated with protracted recruitment, absenteeism, and interruptions in production), a commitment to human rights practices through a robust due diligence process is a source of motivation to workers. Such a process is a strong signal to not only the marketplace and the current workforce, but also to the labor pool, individual members of which may be motivated to actively seek out such firms for employment.[274] Current employees are motivated to remain and devote maximum time and effort on behalf of an employer perceived to be a good corporate citizen by implementing sound management principles, providing guidance to employees working in difficult environments, and maintaining high ethical standards.[275] Profitability and productivity increase as workers who feel valued by their employer contribute to existing knowledge and skill bases and work to achieve the company's objectives.[276] Perhaps most importantly,

---

270 *See e.g.*, CHRISTOPHER S. DAWSON, LEADING CULTURE CHANGE: WHAT EVERY CEO NEEDS TO KNOW (2010) (providing insights on CEO leadership); Jane Bryson, *Dominant, Emergent, and Residual Culture: The Dynamics of Organizational Change*, 21 J. ORGANIZATIONAL CHANGE MGMT. 743, 743 (2008) (explaining the importance of organizational change within the organizational culture); Andrew Leigh, *Sustaining Culture Change*, 21 TRAINING & MGMT. DEV. METHODS 101, 101 (2007) (expressing how to understand and work towards cultural change).

271 *See* EDGAR H. SCHEIN, ORGANIZATIONAL CULTURE AND LEADERSHIP 225–27 (3d ed. 2007).

272 *See* SRSG Rep. 2008, *supra* note 131, ¶ 62.

273 *A Guide for Integrating Human Rights into Business Management*, BUSINESS LEADERS INITIATIVE ON HUMAN RIGHTS, UNITED NATIONS GLOBAL IMPACT & OFFICE OF THE HIGH COMMISSIONER 13, http://www.ohchr.org/Documents/Publications/GuideHRBusinessen.pdf (last visited Jan. 19, 2014).

274 *See* Lucy Amis et al., *Human Rights: It Is Your Business*, INTERNATIONAL BUSINESS LEADERS FORUM 5 (2005), *available at* http://commdev.org/files/1154_file_Human_Rights_It_Is_Your_Business.pdf.

275 *Id.*

276 *Id.*

such employees may serve as ambassadors for the business, thereby further enhancing corporate reputation, attracting new customers, and recruiting potential employees.[277]

D. Tracking and Reporting of Performance Metrics Need Better Standards

According to the framework, firms need to track the effectiveness of their responses to human rights problems and report that performance.[278] These reports need to be based on "appropriate qualitative and quantitative indicators."[279] Like other parts of the framework, this call for tracking requires clarification. One question that arises is what the preferred modes of tracking and reporting really are. The framework identifies numerous characteristics of a well–conceived human rights impact framework.[280] Many widely respected and influential frameworks share one or more of these characteristics. Examples in this regard include the Voluntary Principles on Security and Human Rights and the Business Leaders Initiative on Human Rights.[281] Nevertheless, the framework identifies several other assessment frameworks as equally meritorious.

The identification of numerous alternatives, the shared characteristics of these frameworks, and the absence of consensus, prevent mandated compliance with any specific tracking and reporting model. This conclusion merely recognizes the SRSG's own words that one size does not fit all and that due diligence processes, including tracking and recording, will differ by industry and operation.[282] Attempts to design and implement a specific tracking and reporting model across industries may exclude worthy initiatives, quash creativity in designing and implementing future guidelines, and reduce incentives to innovate to meet the ongoing and dynamic challenges presented by due diligence in the human rights context. Yet the SRSG is critical of the multitude of human rights initiatives as lacking scale to truly move markets and existing as separate fragments.[283] In their place, the SRSG would provide

277 *Id.*

278 SRSG Final Rep. 2011, *supra* note 13, Annex ¶ 20; SRSG Rep. 2009, *supra* note 168, ¶ 49.

279 *See* SRSG Final Rep. 2011, *supra* note 13, Annex ¶ 20.

280 *See* Special Representative of the Secretary–General on the Issue of Human Rights and Transnational Corps. and Other Bus. Enters., *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled "Human Rights Council"*, ¶¶ 10–21, U.N. Doc. A/HRC/4/74 (Feb. 5, 2007).

281 *See e.g.*, *Voluntary Principles on Security and Human Rights*, VOLUNTARY PRINCIPLES, http://www.voluntaryprinciples.org/files/voluntary_principles_english.pdf (last visited Jan. 19, 2014) (explaining the characteristics of the voluntary principles); *Report 3: Towards a 'Common Framework' on Business and Human Rights: Identifying Components*, BUS. LEADERS INITIATIVE ON HUM. RTS. 7, http://www.realizingrights.org/pdf/BLIHR3Report.pdf (last visited Jan. 19, 2014) (identifying the core concepts of business in human rights).

282 SRSG Final Rep. 2011, *supra* note 13, ¶ 15; SRSG Rep. 2010, *supra* note 146, ¶ 82; SRSG Rep. 2009, *supra* note 168, ¶ 73.

283 SRSG Final Rep. 2011, *supra* note 13, ¶ 5.

transnational corporations with "universally applicable guiding principles" for meeting their due diligence obligations.[284] The ability to accomplish this task given the diversity of initiatives and the desirability of a universal framework must be explored in future efforts.

One avenue that future efforts may explore is how to create baseline standards that would level competition between transnational corporations and across industries. This objective is accomplished, in part, through the application of the SRSG's framework to all companies operating in the global marketplace, regardless of how they are owned or their overall size and scale of global operations. Such a requirement promotes equity between competitors as well as between divergent industries. The SRSG conceded as much in his 2011 final report, in which he stated that his reports and the accompanying due diligence requirement were applicable to "all business enterprises . . . regardless of their size, sector, location, ownership and structure."[285] However, the SRSG seemingly backs off of this statement by noting that human rights obligations are proportional to the size of the business.[286] The questions of applicability and proportionality thus remain unresolved.

The framework also promotes equity across international boundaries as the responsibility to engage in due diligence and track and report the results applies to all companies, regardless of where they are headquartered. This result is particularly desirable for corporations based in states that impose reporting and disclosure requirements beyond those established by other legal systems. However, one potential source of confusion is the undefined requirement of "formal reporting" where there is a risk of "severe human rights impacts."[287] These requirements may speak the language of the human rights community but may sow considerable confusion in the business community regarding which impacts are severe enough to merit formal reporting and the intricacies of such reporting, should it be required. A greater challenge for those who continue the SRSG's efforts is to create baseline standards for all transnational corporations to follow while simultaneously retaining flexibility in the due diligence protocol by, for example allowing corporations and industries to select among a range of due diligence options in determining which human rights risks are material to their businesses.

284 SRSG Rep. 2010, *supra* note 146, ¶ 82.

285 SRSG Final Rep. 2011, *supra* note 13, Annex.

286 *Id.* Annex ¶ 14.

287 *Id.* Annex ¶ 21.

IV. False Reporting and the Continuing Role of Post-ATS Legal Liability

If firms engage in tracking and reporting of human rights compliance as recommended by the SRSG, it is reasonable to believe that there could be a positive economic impact. Investors and consumers will act on this information and likely reward ethical, compliant companies. One would expect that reported performance is of higher value (leading to greater economic reward) than the mere existence of a code of conduct because it demonstrates action. An example of the type of positive feedback that might be expected can be found in corporate environmental, social responsibility, or sustainability reporting.[288] Companies apparently believe that promotion of their social good makes a difference to at least a segment of the buying and investing public. And there is evidence that the words in and of themselves can have an impact.[289]

However, given the advantages of positive human rights reports, it is possible that some companies may try to color the truth. They may exaggerate performance, cover up failures, and generally mislead the public. In the context of environmental impacts, the practice of making false or misleading claims is known as "greenwashing."[290] It has been suggested that analogous claims to unrealized human rights compliance could be termed "bluewashing," to note a firm's attempt to cloak itself in the flag of United Nations' principles.[291] Left unaddressed, the marketplace could become polluted with obfuscation and half-truths, leaving consumers and investors with little ability to sort good companies from bad. Unfortunately, direct legal recourse may be lacking. The uncertain nature of corporate liability under the ATS means that the affected must pursue some alternate legal option for enforcing compliance with human rights norms.

There is at least one legal tack worth considering. The most viable route may be indirect compulsion based on a corporation's voluntary statements. In short, when a corporation's actions differ from its public promises about respect for human rights there may be a cause of action based on the falsehood.[292] A number of specific laws at the state and national level could provide relief for this general harm, depending on the context. But in general, it is true that

288 *See* John M. Conley & Cynthia A. Williams, *Engage, Embed, and Embellish: Theory Versus Practice in the Corporate Social Responsibility Movement*, 31 J. Corp. L. 1, 23–31 (2005) (describing the nature of corporate social responsibility reporting).

289 *See, e.g.*, Pratima Bansal & Iain Clelland, *Talking Trash: Legitimacy, Impression Management, and Unsystematic Risk in the Context of the Natural Environment*, 47 Acad. Mgmt. J. 93, 100–01 (2004) (finding that firms with low environmental legitimacy can decrease their unsystematic risk by expressing a commitment to the environment).

290 William S. Laufer, *Social Accountability and Corporate Greenwashing*, 43 J. Bus. Ethics 253, 255–58 (2003) (describing the nature of greenwashing).

291 Halina Ward, *The Interface Between Globalisation, Corporate Responsibility, and the Legal Profession*, 1 U. St. Thomas L.J. 813, 830 (2004) (referring to the use of the term "bluewash").

292 Ruggie, *Business and Human Rights*, *supra* note 181, at 835.

liability for false statements depends on establishing factual elements that are not necessary in an ATS claim, potentially limiting the usefulness. Even in the most egregious cases, alternate liability may simply not exist. An examination of the strengths and weaknesses of alternate liability is helpful in framing the need for affirming corporate liability under the ATS.

A. Perverting the Framework with Deception

The possibility that firms will attempt to mislead the public with positive statements related to human rights is an obvious obstacle to assessment of corporate performance under the SRSG framework. Some such behavior may be the result of a desire to deceive. However, the majority of false reports will likely result from an attempt to dilute or obscure negative information with a flood of positive. Regardless, the false information can detract significantly from the goals of SRSG and other reporting systems. The incentives to comply with human rights norms will be individually reduced. And more broadly, the information environment in the marketplace will be such that good companies cannot obtain an advantage from their behavior.

There have been many examples of broken information environments over time, with strongly deleterious effects. For example, one can look to the time of patent medicines to see a freewheeling world of mischaracterizations and outright lies that favored products that simply did not work.[293] More recently, firms peddling financial products have come under fire for failing to disclose all of the necessary information for consumers to make informed choices.[294] In general, firms tend to take advantage of the flexibilities that exist in the regulatory system. Ambiguity can easily give rise to information asymmetry.

With regard to social responsibility metrics, there is evidence that corporations have engaged in providing misleading information, and that such instances may be growing. David Hess reviewed research on increased corporate "dissembling"—actual falsehoods or obfuscating bad information with good—and stated that firms appear to engage in such acts in response to legitimacy-threatening effects.[295] In this context, the deception is a deliberate corporate strategy. In addition, evaluation of corporate social responsibility performance is often unhelpful because it is based on reports created by the

293 JAMES HARVEY YOUNG, THE TOADSTOOL MILLIONAIRES: A SOCIAL HISTORY OF PATENT MEDICINES IN AMERICA BEFORE FEDERAL REGULATION 44–57 (1962); Kara W. Swanson, *Food and Drug Law as Intellectual Property Law: Historical Reflections*, 2011 WIS. L. REV. 331, 341–42 (2011); *Balm of America: Patent Medicine Collection–History*, SMITHSONIAN NAT'L MUSEUM OF AMER. HIST., http://americanhistory.si.edu/collections/object-groups/balm-of-america-patent-medicine-collection?ogmt_page=balm-of-america-history (last visited Jan. 19, 2014).

294 Jean Eaglesham, *Weighing the SEC's Crackdown on Fraud*, WALL ST. J., Apr. 11, 2012, at C.1.

295 David Hess, *The Three Pillars of Corporate Social Reporting as New Governance Regulation: Disclosure, Dialogue, and Development*, 18 BUS. ETHICS Q. 447, 462–63 (2008); David Hess & Thomas W. Dunfee, *The Kasky–Nike Threat to Corporate Social Reporting: Implementing a Standard of Optimal Truthful Disclosure as a Solution*, 17 BUS. ETHICS Q. 5, 6–8 (2007).

firm itself, rather than actual evidence of firm behavior.[296] Companies have significant incentives to mislead without significant fear of being caught by neutral auditors.

The appropriate remedy for deception depends on a number of factors, such as the nature of the product and related harms, the enforcement environment, and the sophistication of the public. Moreover, a remedy can be ex ante regulatory—such as a regime of rules or certifications for statements, or ex post tort-based—with an accounting for the specific harm. In the context of human rights claims, the optimal system may not be fully clear until the future. However, options exist now that allow the environment to develop.

B. An Initial Question of Corporate Speech

Before jumping into the liability question, it is important to appreciate the strong protections corporations have for speech, particularly in the United States. Such protection may conflict with an attempt to regulate a statement that is arguably false or incomplete, but made in an attempt to engage in the public forum. Additionally, if a company forcefully promotes good behavior over failures, speech rights may tip the balance toward immunity.

In general, commercial speech has been viewed as subject to some regulation and deserving of more limited protection than social or political speech.[297] Prior to 1976, it was not even clear that the First Amendment protected commercial speech at all.[298] In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[299] the U.S. Supreme Court first recognized that commercial speech regulation must be squared with the First Amendment, though at a tier below non-commercial speech.[300] Regulation of commercial speech requires intermediate scrutiny and is most appropriate when false or misleading information is involved.[301]

However, not all corporate speech is commercial. Perhaps the most powerful and impactful pronouncement to that effect is the Supreme Court's recent decision in *Citizens United v. Federal Election Commission*.[302] In that case, the Court determined that a particular ban on electioneering communication was

296 Hess, *supra* note 295, at 463.

297 Robert Sprague & Mary Ellen Wells, *The Supreme Court as Prometheus: Breathing Life into the Corporate Supercitizen*, 49 AM. BUS. L.J. 507, 546–47 (2012) (detailing the U.S. Supreme Court's development of the corporate speech doctrine).

298 *See* Nancy J. Whitmore, *Facing the Fear: A Free Market Approach for Economic Expression*, 17 COMM. L. & POL'Y 21, 32–38 (2012) (discussing the evolution of the U.S. Supreme Court's jurisprudence regarding commercial speech).

299 Va. State Bd. of Pharmarcy v. Va. Citizens Consumer Council, 425 U.S. 748, 762 (1976).

300 *See* Recent Case, 126 Harv. L. Rev. 818 (2013), 821–24 (2013) (discussing the law regarding commercial speech in R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205).

301 Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 563 (1980) (noting the importance of informational accuracy in commercial speech limitations).

302 *See* Citizens United v. FEC, 558 U.S. 310, 354–55 (2010).

unconstitutional, and in doing so confirmed: "political speech does not lose First Amendment protection 'simply because its source is a corporation.'"[303] Corporations enjoy the same speech protections as individuals when the content is political or social.

The political/commercial divide is not necessarily easy to discern. A firm's statement about human rights compliance could have elements of social/political speech and commercial speech. Any distinction is likely to be very context-dependent and arguable. One could suggest that "commercial" should be the presumptive characteristic of corporate speech because firms make such statements for a financial purpose.[304] However, it may be that when the speech is blended, firms may enjoy greater constitutional protection as a result of the Court's broader protections: "It is possible that, post-*Citizens United*, any corporate speech . . . is an inextricably intertwined combination of commercial and political speech and therefore cannot be regulated."[305] Until the case law clarifies a more dependable formula, some ambiguity on the level of constitutional scrutiny will remain.

C. Advertising Liability as a Means of Redress for Human Rights Violations

At base, liability for misleading the public is grounded in a statement. Given the lack of required corporate social responsibility reporting, the statement must usually be voluntarily offered. There is often a strategic advantage for firms to claim adherence to human rights principles and social responsibility. In such cases, the firm defines the ethical playing field, and arguably retains the option of not playing at all. However, many firms do make substantial claims, such as in the context of corporate sustainability reporting.[306] Explicit, public firm statements related to human rights may be contained in product labeling, an advertisement, a web resource, or an annual report.

If the statements do not match reality, a variety of options exist to prevent a company from retaining the unjust benefit of a compliance veneer. Perhaps the most powerful is basic false advertising liability. In this context, a company that disseminates untrue statements regarding its products and services is liable if consumers are likely to be deceived and those consumers or competitors suffer

303 *Id.* at 342 (citing First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 784 (1978)).

304 David Hess & Thomas W. Dunfee, *The Kasky-Nike Threat to Corporate Social Reporting: Implementing a Standard of Optimal Truthful Disclosure as a Solution*, 17 BUS. ETHICS Q. 5, 14-16 (2007).

305 Sprague & Wells, *supra* note 297, at 550.

306 REPORTING ON HUMAN RIGHTS, GLOBAL REPORTING INITIATIVE (GRI), 8 (2008), *available at* https://www.globalreporting.org/resourcelibrary/Reporting-On-Human-Rights.pdf. *See also* Galit A. Sarfaty, *Regulating Through Numbers: A Case Study of Corporate Sustainability Reporting*, 53 VA. J. INT'L L. 575, 590-92 (2013) (describing the rise of the GRI as the leading standard in sustainability reporting).

harm as a result. The FTC, in particular, has been an increasingly powerful force for holding companies to their promises by using its powers under both the deceptive practices and unfair competition prongs of the FTC Act.[307] Competitors also have the ability to take action against false or misleading statements relating to a company's products, most prominently under the federal Lanham Act.[308] There are varying rights under state law as well. Reasonably, the issue of truth in the promotion of a product or service might turn on statements related to adherence to human rights norms. To the extent that consumers place value in corporate promises to respect human rights—for example by preferentially patronizing such companies—the law of unfair competition or deceptive advertising may create liability.[309]

The first hurdle to this form of advertising liability is the fact that false statements related to human rights are not always directed to consumers. Because consumer reliance is a key factor, it is important that one be able to prove not only a misleading statement, but also one that consumers would be aware of when making a purchase or using a service.[310] However, an actual advertised statement is not always necessary to find liability. It has been possible to predicate liability on a claim or promise that consumers only impliedly were aware of and upon which they relied. The FTC is a leader in this regard. The agency has consistently pursued companies for implying false facts that are material to consumers, without evidence of a specific purchasing connection. For example, in *The Matter of CVS Caremark Corp.*, the FTC filed a complaint against a pharmacy chain for improperly disposing of consumer information.[311] According to the FTC, CVS falsely "represented, expressly or by implication, that it implemented reasonable and appropriate measures to protect personal information against unauthorized access."[312] The case settled and CVS consented to extensive government monitoring.[313] More recently, the FTC filed a complaint against Internet giant Google for false statements about

307 Patricia E.M. Covington & Meghan S. Musselman, *Recent Privacy and Data Security Developments*, 65 BUS. LAW. 611, 613 (2010).

308 15 U.S.C. § 1125(a)(1)(b) (2012).

309 Su-Ping Lu, Note, *Corporate Codes of Conduct and the FTC: Advancing Human Rights Through Deceptive Advertising Law*, 38 COLUM. J. TRANSNAT'L L. 603, 619–24 (2000).

310 111 AM. JUR. TRIALS 303 § 18 (2009) (describing the federal requirement for reliance); 5 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 27:57 (4th ed. 2013) (explaining the extent of deception required under federal law); Victor E. Schwartz & Cary Silverman, *Common Sense Construction of Consumer Protection Acts*, 54 U. KAN. L. REV. 1, 18–19 (2005) (illustrating that State law is a bit muddled on the need to demonstrate actual consumer reliance, but acknowledging the apparent requirement of potential or capacity to mislead).

311 CVS Caremark Corp., F.T.C. No. 72-3119, 2009 WL 1892185, at *1–2 (June 18, 2009).

312 *Id.* at *2.

313 Press Release, Fed. Trade Comm'n, CVS Caremark Settles FTC Charges: Failed to Protect Med. and Fin. Privacy of Customers and Employees; CVS Pharmacy Also Pays $2.25 Million to Settle Allegations of HIPAA Violations (Feb. 18, 2009), *available at* http://www.ftc.gov/opa/2009/02/cvs.shtm.

its privacy practices related to Google Buzz.[314] Again, the agency agreed to settle in exchange for long–term monitoring and promises of additional privacy protections.[315] Notably, the FTC did not establish that consumers were aware of particular practices or procedures, but rather relied on a general understanding standard.[316] Moreover, it was irrelevant that the misrepresentations were not obviously designed by the firms to influence purchasing decisions; the fact that they were known and relied upon by consumers was enough. Subsequent consumer outrage established that consumer reliance was real. Extending this analysis, it seems that background knowledge of human rights claims should be sufficient as well.

Another potential obstacle for advertising liability is that a statement on human rights may not relate to the quality of a service or product, which is the traditional grounding for this type of claim. But this is also not insurmountable. Consumers routinely apply facts about production conditions and corporate social responsibility in making purchasing decisions, unrelated to whether the good or service functions as advertised. Designations like "dolphin–safe" tuna, "cruelty–free" cosmetics, and "fair trade" coffee have an impact.[317] One of the most famous cases involving such an alleged falsity occurred at the state level in *Nike v. Kasky*.[318] There, the plaintiff merely argued that defendant Nike made false public statements about its child labor practices. Such statements were not made in connection with an advertised product. The California Supreme Court found the statements to constitute commercial speech, rendering it subject to legal scrutiny.[319] Though California's false advertising statute was later limited by amendment,[320] it may be possible to field such claims in other states.

Importantly, the indirect nature of the harm involved can preclude liability in certain false advertising contexts. A civil claim under state law often requires that the plaintiff demonstrate some harm in addition to the deception.[321] That can be difficult to prove when the human rights violation at issue takes place far away, and the consumer is not monetarily impacted. While the Lanham Act may be more relaxed in this regard, courts have restricted the use of the statute to competitors.[322] Such a case is not impossible to imagine, but the

314 Complaint at *2, *4–5, *In re* Google, Inc., No. 102–3136, 2011 WL 1321658 (F.T.C. Mar. 30, 2011).

315 Agreement Containing Consent Order, Google Inc., F.T.C. No. 102–3136 (Oct. 24, 2011), *available at* http://www.ftc.gov/os/caselist/1023136/110330googlebuzzagreeorder.pdf.

316 *In re* Google, Inc., 2011 WL 1321658, at *5).

317 Rebecca Tushnet, *Fighting Freestyle: The First Amendment, Fairness, and Corporate Reputation*, 50 B.C. L. REV. 1457, 1462 (2009).

318 Kasky v. Nike, Inc., 45 P.3d 243, 247 (Cal. 2002).

319 *Id.* at 259.

320 CAL. BUS. & PROF. CODE §§ 17200–10 (Deering 2007).

321 Schwartz & Silverman, *supra* note 310, at 21.

322 Delcianna J. Winders, Note, *Combining Reflexive Law and False Advertising Law to Standardize "Cruelty–Free" Labeling of Cosmetics*, 81 N.Y.U. L. REV. 454, 469–70 (2006).

activist–company plaintiff would probably be significantly less common. Against this backdrop, the FTC has an advantage: as its authorizing legislation requires only likely deception, a mistaken purchasing decision may still fall within the ambit of enforcement.[323]

Given the advantages of the FTC's enforcement powers, it is heartening to see that liability for corporate social responsibility statements may have particular resonance at the agency. As evidence, one may look to new regulation on the advertising of "green" products. Often, companies will certify that their products are energy efficient or manufactured using green processes and source materials. This translates into increased sales, at least among a certain segment of the population. However, some manufacturers have allegedly been making empty claims.[324] The FTC has promulgated guidelines for the use of environmental marketing claims.[325] Recently, the agency has indicated that it will crack down on such false claims.[326] The FTC has proposed updates to its guidelines that would include false and misleading uses of certifications implying green practices.[327] It is not a great stretch to imagine the same principles and regulatory possibilities being directed to corporate claims of human rights compliance.

In addition to false advertising to consumers, it is possible to envision a closely aligned action based on investor fraud. Section 10(b),[328] and related Rule 10b–5,[329] can create liability for losses stemming from a material misstatement leading to a decision to purchase a security. It is reasonable that one could consider a misstatement about human rights to be the central source of fraud.[330] Courts have historically been a bit skeptical that such soft considerations are the motivating factor in a securities purchase, but the increasing prevalence of socially responsible investing makes such a case more viable now.[331] In fact, the recently enacted Dodd–Frank provisions require disclosures relating to

323 Andrew Serwin, *The Federal Trade Commission and Privacy: Defining Enforcement and Encouraging the Adoption of Best Practices*, 48 SAN DIEGO L. REV. 809, 823–26 (2011).

324 *See* Elizabeth K. Coppolecchia, Note, *The Greenwashing Deluge: Who Will Rise Above the Waters of Deceptive Advertising?*, 64 U. MIAMI L. REV. 1353, 1353–54 (2010) (discussing the scope of definitions of the term "greenwashing").

325 16 C.F.R. §§ 260.1, 260.2(a) (2013).

326 Gabriel Nelson & Amanda Peterka, *FTC Proposes Crackdown on "Greenwashing,"* N.Y. TIMES (Oct. 6, 2010), http://www.nytimes.com/gwire/2010/10/06/06greenwire–ftc–proposes–crackdown–on–greenwashing–42606.html.

327 Guides for the Use of Environmental Marketing Claims, 75 Fed. Reg. 63552 (proposed Oct. 15, 2010) (to be codified at 15 C.F.R. pt. 260).

328 Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78j(b) (2012).

329 17 C.F.R. § 240.10b–5(a) (2013).

330 *See* Janet E. Kerr, *The Creative Capitalism Spectrum: Evaluating Corporate Social Responsibility Through a Legal Lens*, 81 TEMPLE L. REV. 831, 839–42 (2008).

331 *See* David J. Scheffer & Caroline Kaeb, *The Five Levels of CSR Compliance: The Resiliency of Corporate Liability Under the Alien Tort Statute and the Case for a Counterattack Strategy in Compliance Theory*, 29 BERKELEY J. INT'L L. 336, 379 (2011).

payments to foreign governments, conflict materials and mining safety.[332] The more difficult factor, as with civil advertising fraud, may be demonstrating a loss stemming from the deception. This is not out of the question, though, as the increasingly connected world can spread word of a corporation's bad behavior quickly and widely, creating negative publicity and a corresponding stock decline.

In the current environment, advertisements, company statements in annual reports, and declarations in other public documents create some likelihood of consumer or investor reliance, and therefore liability. However, the variability in such reporting makes the nature of any such statement less concrete and weakens the consumer/investor connection.[333] Far more useful would be to predicate liability on a specific and universal certification.[334] This is where the United Nations' Global Compact can play an important role.[335] With its ten principles in the areas of human rights, labor, and the environment,[336] the Compact provides a structure for statements of human rights compliance. Companies voluntarily describe compliance in a periodic "communication on progress" (COP).[337] Moreover, the failure to submit a timely COP can result in a company being expelled, as over 4221 have been so far.[338] With a few changes, the Global Compact could be used in concert with unfair competition law to provide an enforcement mechanism.

Most importantly, it would need to be clear when a company has met a certain level of compliance under the Global Compact. The new Global Compliance Differentiation Programme is a step in this direction, permitting a company to classify itself as "GC Advanced" only if it adopts and reports on a

332 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 1502-04, 124 Stat. 1376, 2213-21 (2010); Faith Stevelman, *Global Finance, Multinationals and Human Rights: With Commentary on Backer's Critique of the 2008 Report by John Ruggie*, 9 SANTA CLARA J. INT'L L. 101, 137-39 (2011).

333 There is a variety of guidelines for corporate social responsibility, including the International Labour Organization's Tipartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, the Organization of Economic Co-Operation and Development Guidelines of Multinational Enterprises, and the International Standards Organization's ISO 26000. Kathy Robb & Steven Schell, *ISO'S Standards on Social Responsibility: ISO 26000 Takes Shape*, 37 No. 4 ABA TRENDS 1, 4 (2006).

334 *See* Miriam A. Cherry & Judd F. Sneirson, *Beyond Profit: Rethinking Corporate Social Responsibility and Greenwashing after the BP Oil Disaster*, 85 TUL. L. REV. 983, 1034-35 (2011) (analogizing a private certification model in CSR to that used in organic foods).

335 U.N. GLOBAL COMPACT, http://www.unglobalcompact.org/ (last visited Jan. 19, 2014).

336 *The Ten Principles*, U.N. GLOBAL COMPACT, http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html (last visited Jan. 19, 2014).

337 U.N. GLOBAL COMPACT, U.N. GLOBAL COMPACT POLICY ON COMMUNICATING PROGRESS 1 (Feb. 25, 2011), *available at* http://www.unglobalcompact.org/docs/communication_on_progress/COP_Policy_Febii.pdf.

338 *Id.* at 3; *Expelled Participants*, U.N. GLOBAL COMPACT, http://www.unglobalcompact.org/COP/analyzing_progress/expelled_participants.html (last visited Jan. 19, 2014).

broad range of best practices.[339] A second important revision involves the use of the Global Compact logo. Currently limited to use in connection with Global Compact communications,[340] if companies were instead permitted to use the logo to claim compliance, the false advertising regime could reasonably apply. A false certification of human rights compliance is likely to impact consumer decision–making, and is really no different than misrepresenting environmental, organic, or fair–trade production means.

D. Avoiding the Backlash of Reduced Information Production in Response to Liability

Before fully embracing a voluntary disclosure–liability scheme for human rights compliance, one must note the potential downside: companies may simply decide to promise and disclose less. In fact, a rational firm may decide that no disclosure is the best route.[341] With less information to create a hook for liability, the company is better insulated. Clearly, this would defeat the purpose of imposing liability in the first place.

Notably, the balance between liability and disclosure is nothing new; it has been a subject of concern in the product liability field for some time.[342] When the potential for firm losses due to a liability rule become too great, only consumer demand or regulation may tip the scales back. Such pressure is common when the information relates to safety such as medical products. Still, it is not unheard of in the context of broader social goals, as evidenced by the FTC guidelines on green advertising. Indeed, regulation may be the most powerful force in compelling full disclosure from companies.

Even without regulation, the ability of companies to choose silence over a positive public position may be declining. Companies are facing increasing pressure to engage in socially responsible business practices, and the refusal to take a position could have a significant market impact. Conversely, when one company makes a disclosure, competitors are pressured to provide information or be perceived as hiding negative information. Hess and Dunfee describe this phenomenon as the "unraveling process."[343] They suggest that it is a form of signaling that can have an effect even in the absence of regulation. However,

339 *Differentiation Programme*, U.N. GLOBAL COMPACT, http://www.unglobalcompact.org/COP/differentiation_programme.html (last visited Jan. 19, 2014).

340 *See Global Compact Logo*, U.N. GLOBAL COMPACT, http://www.unglobalcompact.org/AboutTheGC/Global_Compact_Logo/index.html (last visited Jan. 19, 2014).

341 Hess & Dunfee, *supra* note 295, at 23; *see also* Elizabeth Brown, *No Good Deed Goes Unpunished: Is There a Need for a Safe Harbor for Aspirational Corporate Codes of Conduct?*, 26 YALE L. & POL'Y REV. 367, 385–97 (2008) (describing various legal disincentives for adopting an aspirational code of conduct).

342 *See, e.g.*, Daniel R. Cahoy, *Medical Product Information Incentives and the Transparency Paradox*, 82 IND. L.J. 623, 643–49 (2007) (explaining how requiring more information disclosure can produce less information production when the latter is discretionary).

343 Hess & Dunfee, *supra note* 295, at 20.

they also identify barriers that exist to voluntary disclosure in the absence of a consistent system of evaluation, such as the high cost of reporting and loss of proprietary information.[344]

Barriers aside, it is worth noting that the potential for *decreased* public disclosure was raised after the *Kasky* decision. But all evidence is that companies did not decrease disclosure or compliance efforts. Rather, they increased them in view of the increased importance of good corporate citizenship.

CONCLUSION

The ATS has been one of the most controversial human rights laws in recent memory. Revived from two centuries of relative dormancy, the ATS appeared to serve as an avenue for assessing liability against corporations who violate human rights abroad. With the advent of more recent cases and the imminent decision of *Kiobel*, the impact of the ATS appears to be in its decline. New methods are needed to encourage compliance with human rights in global commerce.

One such solution is the promising Protect, Respect, and Remedy framework developed by SRSG John Ruggie. This framework, developed in consultation with businesses, the legal profession, human rights groups, and affected communities, represents the latest and most promising opportunity to reduce corporate human rights violations. While offering much to commend, the framework is in need of modest reforms that can amplify its effectiveness and provide specific guidance to corporations tasked with complying with its terms.

Finally, the emphasis on corporate voluntarism does not necessarily mean that legal liability should be shelved as an option. There are few avenues for such liability in the United States, but one potential option is making of false statements about corporate practices. Consumers often rely upon such statements, and the possibility exists for false advertising to become a source of human rights exposure.

The need to protect human rights from corporate abuses remains as important as ever in a globalized economy. As one opportunity for regulation steadily narrows in the ATS, another opportunity for voluntary compliance shows important promise. Regardless of method, placing human rights obligations in a more prominent position on the corporate agenda represents a worthwhile goal of both activist and scholarly pursuit. The reforms and discussions here hopefully modestly advance that important agenda.

344 *Id.* at 23–24.