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Rethinking Corporate Human Rights Accountability

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Rethinking Corporate Human Rights Accountability

Pammela Q. Saunders*

The standard account of corporate human rights accountability assumes that corporate entities, rather than individual corporate officers or employees, are the optimal targets of regulatory litigation. This assumption has led human rights advocates to despair over recent court decisions that make it increasingly difficult to bring suit against corporations for human rights violations. In light of these decisions (and similar barriers to suits against corporate entities in some other jurisdictions around the world), human rights advocates find themselves at a crossroads. Will litigants focus on new legal theories or on bringing their claims in new fora that offer better chances for prosecuting claims directly against corporate entities? Or, will they instead, or in addition, pursue claims against individual corporate agents?

While the standard account would suggest the former, that answer may be neither realistic nor correct. In fact, the arguments underlying the conclusion that institutional liability is essential were developed outside of the human rights context. To be sure, many of the same goals that underlie human rights litigation also underlie the traditional, domestic corporate litigation context in which these arguments originated. Yet, a more complex set of motivations are involved in the project of holding multinational corporations accountable for their complicity in human rights violations. Failing to consider the nontraditional goals that underlie human rights litigation leads to an incomplete account regarding the importance of different forms of liability in this context.

This Article develops a typology of goals underlying corporate human rights litigation and then "matches" these goals to the benefits and drawbacks of individual versus institutional liability. It concludes that there are significant benefits to naming individual corporate actors as defendants that have been largely overlooked. Far from being the disaster that it has been depicted to be, litigation targeting individual corporate actors has great potential to benefit victims and to serve as an important addition to the regulatory tool kit.

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I. INTRODUCTION

In the weeks leading up to a recent United States Supreme Court argument,[1] one provocative headline posed the question: "Should Corporations Have More Leeway To Kill than People Do?"[2] That *New York Times* op-ed, along with other high-profile coverage,[3] drew an explicit connection between the issue on which the Court had granted certiorari—whether corporations could be held accountable for their role in the commission of human rights violations to the same extent as individuals—and the Court's recent recognition of a corporation's status as a legal person with attendant constitutional rights in *Citizens United v. Federal Election Commission*.[4] The author concluded that a decision allowing the corporation to escape liability for its complicity in the commission of human rights violations[5] would create the most "startling paradox" by "treating corporations as people to let them make unlimited political contributions, even as it treats corporations as

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1. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013). The Court originally granted certiorari in 2011 on the question of "[w]hether corporations are immune from tort liability for violations of the law of nations . . . or . . . may be sued in the same manner as any other private party defendant under the ATS for such egregious violations," Petition for Writ of Certiorari at i, Kiobel v. Royal Dutch Petroleum Co., 132 S. Ct. 472 (2011) (mem.) (No. 10-1491), and heard oral argument on February 28, 2012. Less than a week later, the Court set the case for reargument on the question ultimately decided: "Whether and under what circumstances the Alien Tort Statute, 28 U.S.C. § 1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States." Kiobel v. Royal Dutch Petroleum Co., 132 S. Ct. 1738 (2012).

2. Peter Weiss, Op-Ed., *Should Corporations Have More Leeway To Kill than People Do?*, N.Y. TIMES (Feb. 24, 2012), http://www.nytimes.com/2012/02/25/opinion/should-corporations-have-more-leeway-to-kill-than-people-do.html?_r=0.

3. *See, e.g.*, Dahlia Lithwick, *Justice on the High Seas*, SLATE (Feb. 28, 2012, 7:25 PM), http://www.slate.com/articles/news_and_politics/supreme_court_dispatches/2012/02/the_supreme_court_considers_whether_royal_dutch_shell_is_immune_from_liability_for_human_rights_abuses_because_it_is_a_corporation_.html ("In brief, the looming question for the [C]ourt today is whether, after *Citizens United*, corporations enjoy not only free speech rights but also the right to say 'I'm immune from suit.'"); Katie Redford, Kiobel v. Shell *Tests Corporate Personhood*, HUFFINGTON POST (Feb. 28, 2012, 5:12 AM), http://www.huffingtonpost.com/katie-redford/kiobel-v-shell_b_1305805.html ("It would be profoundly ironic if the Supreme Court were to remove corporations from the threat of ATS lawsuits on grounds that they are not individuals when just two years ago, that same court ruled that corporations could enjoy free speech rights as persons in the *Citizens United* case."); Beth Stephens, *Response: A Federal Forum and* Citizens United, SCOTUSBLOG (July 19, 2012, 1:08 PM), http://www.scotusblog.com/2012/07/response-a-federal-forum-and-citizens-united/ (defending the legal proposition that the *Citizens United* decision requires a finding that the Alien Tort Statute permits suits against corporate entities).

4. 558 U.S. 310 (2010).

5. The case involved the Alien Tort Statute (ATS), which provides, "The 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." 28 U.S.C. § 1350 (2012).

if they are *not* people to immunize them from prosecution for the most grievous human rights violations."[6]

The position articulated in that op-ed reflects a widespread view among human rights advocates regarding the significance of recognizing corporate or organizational liability (as opposed to holding accountable only individual corporate actors).[7] The stakes feel very high indeed: those prosecuting claims want institutional liability to be allowed as desperately as the defendant corporations want it off the table.[8]

The arguments that have been advanced in favor of institutional liability for corporations are based on the proposition that individual-only liability is a far less desirable, if not wholly inadequate, way to put pressure on corporations to stop engaging in institutional misconduct.[9] The traditional economic view regarding the regulatory impact of tort liability suggests that it is clearly superior to impose liability directly on corporations for the malfeasance of their agents.[10] This view has attracted a good deal of scholarly attention focused on the benefits of holding institutions liable, both criminally and civilly, separate and apart from their individual agents.[11]

In making the claim that institutional liability for corporations is important, however, human rights advocates and scholars are relying

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6. Weiss, *supra* note 2.

7. Long before *Citizens United*, the notion of corporate personhood was argued to be morally and philosophically justified in situations where the corporate structures beget intentional actions on behalf of a corporation for which it should be held responsible as a collective entity distinct and independent from any of its individual employees and directors. *See* Peter A. French, *The Corporation as a Moral Person*, 16 AM. PHIL. Q. 207 (1979).

8. *See, e.g.*, Brief for Petitioners, Mohamad v. Palestinian Auth., 132 S. Ct. 1702 (2012) (No. 11-88); Brief of the American Federation of Labor & Congress of Industrial Organizations as *Amicus Curiae* in Support of Petitioners, Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013) (No. 10-1491); Brief for the United States as *Amicus Curiae* Supporting Petitioners, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491); Brief of the American Petroleum Institute et al. as *Amici Curiae* in Support of Neither Party, *Mohamad*, 132 S. Ct. 1702 (No. 11-88); Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443 (2001).

9. *See, e.g.*, Brief of American Federation of Labor & Congress of Industrial Organizations in Support of Petitioners, *supra* note 8; Brief for Petitioners, *supra* note 8. *But see* Ben Kerschberg, *Corporate Executives: Get Ready for a Billion Dollar Lawsuit*, HUFFINGTON POST, http://www.huffingtonpost.com/ben-kerschberg/corporate-executives-get-_b_791292.html (last updated May 25, 2011, 6:15 PM) (asserting that the United States Court of Appeals for the Second Circuit's decision in *Kiobel* is likely to "encourag[e] plaintiffs once again to target corporate directors and executives" and that suits against individual defendants are likely to "now become the norm among groups and plaintiffs' lawyers putatively advocating under the aegis of human rights").

10. *See infra* Part IV.A.1.

11. *See infra* Part IV.

on arguments that were developed outside of the human rights context.[12] To be sure, many of the same goals that underlie human rights litigation also underlie the traditional, domestic corporate litigation context in which these arguments originated. However, it is also true that a more complex set of motivations have been articulated in connection with the project of holding multinational corporations accountable for complicity in human rights violations.[13] Failing to consider the nontraditional goals that often underlie lawsuits brought by and on behalf of human rights victims[14] leads to an incomplete and somewhat inaccurate account of the importance of the availability of institutional liability.

To take but one example, proponents of institutional liability sometimes assert that this form of liability is superior based on research showing that businesses are more likely than individuals to be held liable by juries for the same underlying misconduct.[15] While the probabilistic nature of this outcome is true in the main, it does not appear to hold up in cases involving claims of human rights violations. Recent psychological research suggests that in cases involving egregious harms viewed as fundamentally "evil" (a category that would include most, if not all, human rights violations), juries are far more likely to hold individuals accountable than they are to impose liability on institutions.[16]

Certain other consequences of bringing lawsuits against individual corporate actors (what I will refer to as "individual liability threats") have been undertheorized or not taken into account at all in accounts comparing and contrasting institutional and individual

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12. *See, e.g.*, Brief for Petitioners, *supra* note 8; Ratner, *supra* note 8, at 461-75.

13. *See, e.g.*, Jill Greenfield, *The Future of Alien Tort Statute Litigation: A Talk by Paul Hoffman*, HARV. L. TODAY (Mar. 11, 2011), http://today.law.harvard.edu/the-future-of-alien-tort-statute-litigation-a-talk-by-paul-hoffman/?redirect=1. Jill Greenfield quotes Paul Hoffman, "a leading litigator of claims brought under the Alien Tort Statute," as saying that the "ultimate goal [of such litigation] is to inspire international regulation of corporate conduct in order to enforce good corporate behavior." *Id.*; *accord* Julian Ku, *Online* Kiobel *Symposium: The Alien Tort Statute as a Species of Extraterritorial U.S. Law*, SCOTUSBLOG (July 16, 2012, 1:50 PM), http://www.scotusblog.com/2012/07/online-kiobel-symposium-the-alien-tort-statute-as-a-species-of-extraterritorial-u-s-law/ (arguing that importing U.S. legal standards, such as veil piercing, into the ATS context means that the statute "is far more likely to survive as a meaningful tool for extraterritorial corporate regulation"); *see also* discussion *infra* Part III.B (typology).

14. These include, for example, promoting reconciliation, creating an official public record to document the human rights violation, uncovering unknown facts about what led to a victim's injury, and simply allowing the victim a chance to tell her story to the public. *See, e.g.*, *infra* Part V.B.

15. *See infra* notes 137-146 and accompanying text.

16. *See infra* Part IV.A.3.

liability. The traditional arguments fail to consider the many possible motivations underlying litigation against corporate defendants. Motivations that the literature has taken into account—such as maximizing compensation victims are likely to receive and incentivizing corporations to make internal policy changes to prevent similar misconduct and injuries in the future—are certainly present in many cases. Yet other goals—such as identifying all of the responsible parties, fully documenting the abuses, or creating an official public record—may also motivate the prosecution of human rights cases.[17] The best lineup of defendants to achieve the various litigation goals may be quite different depending on whether a plaintiff is thinking solely about monetary compensation for her injuries or is primarily interested in quickly obtaining access to discovery in order to understand the causes of the harm that she has suffered. The appropriate strategy for pleading and prosecuting such a case may be still different for a plaintiff (or an advocacy group representing the plaintiff) hoping the case may help encourage the creation, communication, and/or dramatization of new legal norms.

In addition, arguments regarding institutional liability for corporations in the human rights context (and elsewhere) generally fail to grapple with other, related questions of great practical significance. In particular, considering the advantages and disadvantages of institutional and individual liability threats in isolation can obscure the advantages and disadvantages that may appear when these different types of liability threats are "mixed" together by plaintiffs joining both types of claims.

The potential ramifications of prosecuting claims against both types of defendants have resonance with all forms of litigation to promote corporate accountability. At least in the criminal context, such litigation appears to be on the rise. Recently, for example, the United States Department of Justice (DOJ) shifted away from its practice of prosecuting only corporations for violations of the Foreign Corrupt Practices Act (FCPA). Instead, DOJ officials announced they were deliberately ramping up prosecutions against individual corporate employees as a more effective mechanism to promote deterrence.[18]

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17. *See infra* notes 90-96 and accompanying text.

18. At the same time, however, the DOJ was criticized for not taking its newly stated policy far enough. Despite having previously announced that it was going to pursue more individual prosecutions, DOJ officials initially prosecuted only Siemens AG (the corporate entity)—and not any individuals within the company—for significant FCPA violations. Congress responded by holding hearings to investigate prosecutorial practices under the FCPA generally and criticize the handling of the Siemens prosecution. *See* Joe Palazzolo,

This policy position originated just prior to the recent initiation of both public prosecutions and private suits targeting corporate misconduct across a number of corporate sectors through suits against both corporate entities and high-level corporate individuals—from the Wal-Mart bribery case in Mexico[19] to the financial industry mortgage crisis fallout[20] to the environmental disaster resulting from the DEEPWATER HORIZON oil spill.[21] In short, not only is there a need to consider the impact of mixing institutional and individual liability threats, but it is

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Specter Criticizes FCPA Enforcement at Senate Hearing, WALL ST. J. BLOG (Nov. 30, 2010, 1:00 PM), http://blogs.wsj.com/corruption-currents/2010/11/30/specter-criticizes-fcpa-enforcement-at-senate-hearing/ ("[A] multimillion dollar criminal fine against a corporation 'doesn't amount to a whole lot' without prison sentences for the corporate officials who committed the crime." (quoting Sen. Arlen Spector)). The DOJ subsequently charged eight individual Siemens officials for FCPA violations arising out of the same events that led to the corporate settlement. *See* Edward Wyatt, *Former Siemens Executives Are Charged with Bribery*, N.Y. TIMES (Dec. 13, 2011), http://www.nytimes.com/2011/12/14/business/global/former-siemens-executives-charged-with-bribery.html?_r=0.

19. *See, e.g.*, Mike Koehler, *Foreign Corrupt Practices Act Enforcement as Seen Through Wal-Mart's Potential Exposure*, BLOOMBERG BNA WHITE COLLAR CRIME REP., Sept. 21, 2012, at 1, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2145678.

20. *See, e.g.*, Matthew Goldstein, *Bank of America To Pay $131.8 Million Penalty in Mortgage Deals*, N.Y. TIMES (Dec. 12, 2013, 4:14 PM), http://dealbook.nytimes.com/2013/12/12/bank-of-america-to-pay-131-8-million-penalty-in-c-d-o-deals/?_php=true&_type=blogs&ref=litigation&_r=0 (reporting on litigation against Bank of America); Gretchen Morgenson, *$13 Billion, Yes, but What Took So Long?*, N.Y. TIMES (Nov. 23, 2013), http://www.nytimes.com/2013/11/24/business/13-billion-from-jpmorgan-chase-yes-but-what-took-so-long.html?ref=litigation (reporting on J.P. Morgan "mortgage meltdown" settlement); Gretchen Morgenson & Louise Story, *In Financial Crisis, No Prosecutions of Top Figures*, N.Y. TIMES (Apr. 14, 2011), http://www.nytimes.com/2011/04/14/business/14prosecute.html?ref=litigation ("It is a question asked repeatedly across America: why, in the aftermath of a financial mess that generated hundreds of billions in losses, have no high-profile participants in the disaster been prosecuted?").

21. *See, e.g.*, *Deepwater Horizon Oil Spill Litigation Database*, ENVTL. L. INST., http://www.eli.org/deepwater-horizon/litigation-database (last visited Jan. 20, 2015) ("The myriad consequences of the spill have already spurred an onslaught of litigation, with allegations ranging from personal injury and property damages to violations of RICO and securities law. As more damages are discovered, plaintiffs will likely continue filing new claims. This database attempts to track the ongoing litigation so people can see the types of cases that have been triggered, when and where the parties have filed, and what cases have been closed or consolidated."); *see also, e.g.*, Leo King, *BP £24bn Lawsuits Claim Contractors Failed To Use Modelling Software Properly*, COMPUTERWORLDUK (Apr. 21, 2011, 1:00 PM), http://www.computerworlduk.com/news/it-business/3275978/bp-24bn-lawsuits-claim-contractors-failed-to-use-modelling-software-properly (describing the BP lawsuit against contractor Halliburton related to the DEEPWATER HORIZON oil spill); John Schwartz, *Accord Reached Settling Lawsuit over BP Oil Spill*, N.Y. TIMES (Mar. 2, 2012), http://www.nytimes.com/2012/03/03/us/accord-reached-settling-lawsuit-over-bp-oil-spill.html (discussing settlement of some civil claims against BP).

of particular significance right now in the human rights arena and beyond.[22]

In reassessing the potential impacts of institutional and individual liability threats in the human rights context, this Article makes several related contributions. First, in laying out the potential benefits of both institutional and individual liability threats, it broadens the scope of the analysis to take into account several gaps that exist in the current approach to analyzing individual liability. Second, it demonstrates that focusing on holding corporations accountable to the victims of human rights abuses requires thinking not only about corporate law, but also about human rights law—and that different analyses may result when these disciplines intersect. Finally, the Article explains how the transnational context in which human rights claims arise—in which public regulation may be inconsistent or nonexistent across jurisdictions—also impacts the analysis. This last point is discussed in the particular context of human rights litigation but may well have significance in other corporate transnational litigation contexts as well.

At bottom, the Article demonstrates that an accurate and nuanced answer to the question of when and whether it is better to pursue institutional liability, individual liability—or a mix of the two—requires operating within a framework that takes into account the reality that not all litigants or claims are similarly situated and, at the same time, accepts that combining different liability threats may create unique consequences that are absent when each is considered in isolation. This Article creates such a framework, incorporating the standard arguments that have been made regarding the benefits and drawbacks of institutional and individual liability and developing a number of additional arguments that have not been previously addressed in the literature. The Article then applies the framework to analyze the likely consequences of prosecuting corporate human rights claims only against corporate-entity defendants, only against individual corporate actors, or against a mix of these types of defendants. Finally, the Article concludes that "second best"

22. Indeed, the analytical consequences of taking the benefits of individual officer accountability into account are not limited to the human rights context. They may also have particular resonance in many other cases that arise in a multinational context. For instance, litigation targeting high-level corporate officials may create a new market for insurance coverage that, in turn, might lead to private regulation and monitoring. *See infra* notes 195-205 and accompanying text. Private regulation may be a more effective mechanism for changing corporate practices than public regulation in the transnational context, where many countries in which multinational corporations do business have little or no corporate regulation—or even rule of law.

prosecutions by human rights victims against individual defendants only may be far more promising than the standard arguments would suggest. The Article proceeds as follows.

Part II begins by providing an overview of human rights litigation and the recent preoccupation with institutional liability. After briefly recounting the history of human rights litigation in the United States and elsewhere, along with arguments that have been advanced regarding the necessity of institutional liability, the Part ends by depicting the current crossroads at which corporate human rights advocates find themselves. At this crossroads, with at best an uncertain potential for continuing to litigate under the federal statutes that have been driving the vast majority of recent litigation, advocates are more likely than they have been in decades to consider anew in what forum and in what manner to raise such claims—with the defendant(s) to be named comprising a potentially significant part of the calculation.

Part III continues the description of corporate human rights litigation. This Part focuses on articulating the unique strategic motivations underlying human rights advocacy. The Part compares and contrasts litigation against corporations in the human rights context before developing a typology of goals that motivates corporate litigation generally and corporate human rights litigation specifically.

Part IV lays out the traditional arguments in favor of institutional liability and the corresponding negative arguments often made regarding permitting liability to attach to individual agents only. In addition to the impacts of institutional liability, the Part also describes the particular procedural advantages of bringing claims against individuals in the transnational/international context.

Part V reframes the conversation of the previous Part by examining the potential benefits that can accompany prosecuting claims against individuals—instead of or in addition to institutional defendants—along the entire timeline of a lawsuit (and beyond it). Advantages of individual liability that have been identified in other literatures are reviewed and additional benefits are mapped out.

Part VI then brings together the previous Parts to consider the benefits and drawbacks of utilizing institutional or individual liability threats—or a mix of the two—in the specific context of human rights litigation with its attendant goals. Ultimately, the Part demonstrates that while the potential shift to lawsuits against individuals only may generally be inferior to suits joining claims against both corporations and individual corporate actors, it is not nearly as clear-cut as many

have argued. Instead, individual threats in fact may have significant regulatory potential that can be harnessed.

II. CORPORATE HUMAN RIGHTS LITIGATION AND INSTITUTIONAL LIABILITY: A BRIEF OVERVIEW

While human rights litigation can be traced back to the 1940s and the very beginning of the modern human rights era,[23] attempts to hold corporations accountable for their role in such abuses originated much more recently. Until the 1990s, human rights litigation exclusively targeted public officials who had directly perpetrated human rights abuses. Following litigation against Unocal Corporation (Unocal), targeting that oil company for its alleged complicity with egregiously abusive practices perpetrated in connection with its pipeline project in Myanmar,[24] claims alleging corporate misconduct began to be filed in increasingly large numbers.[25]

The flood of claims against corporate defendants brought forth a corresponding deluge of corporate lawyers.[26] The lawyers began attacking the statutory footings on which these claims were alleged to stand.[27] Among other arguments,[28] defendants' lawyers took the position that the federal statutes permitted only individuals, not collective entities such as corporations, to be named as defendants.

The human rights advocates prosecuting these cases disputed this statutory interpretation. In so doing, plaintiffs' lawyers, along with many scholars, took the position that effectively holding corporations accountable required the availability of institutional liability.[29] The arguments reflected both traditional arguments regarding corporate liability and emerging theoretical accounts of the benefits of

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23. Paul Hoffman & Beth Stephens, *International Human Rights Cases Under State Law and in State Courts*, 3 U.C. IRVINE L. REV. 9, 13 (2013).

24. "The plaintiffs [in the Unocal case] were Burmese peasants who suffered a variety of egregious violations at the hands of Burmese army units that were securing the pipeline route. These abuses included forced relocation, forced labor, rape, torture, and murder." Doe v. Unocal *Case History*, EARTHRIGHTS INT'L, http://www.earthrights.org/legal/doe-v-unocal-case-history (last visited Jan. 21, 2015).

25. Ingrid Wuerth, Kiobel v. Royal Dutch Petroleum Co.*: The Supreme Court and the Alien Tort Statute*, 107 AM. J. INT'L L. 601, 604 (2013).

26. *See id.* ("Major law firms represented these deep-pocket defendants . . . .").

27. These statutes included both the ATS, 28 U.S.C. § 1350 (2012), and its supplement, the Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992).

28. Wuerth, *supra* note 25, at 605 (surveying the arguments resulting in dismissal).

29. *See, e.g.*, Brief for Petitioners, *supra* note 8.

recognizing the collective culpability that often underlies institutional wrongdoing.

It now looks increasingly likely that the federal statutes that have been driving corporate human rights litigation for almost twenty years are moribund. Even if there is some life left in them, lawsuits targeting transnational corporations face increasingly stringent jurisdictional hurdles.[30] While some litigation will no doubt continue to be brought against corporations in U.S. federal courts under both the Alien Tort Statute (ATS) and the Torture Victim Protection Act (TVPA), human rights advocates are increasingly likely to consider other legal bases for their claims, as well as other venues both within and outside the United States. This Part briefly canvasses the history of corporate human rights litigation, its preoccupation with institutional liability as essential to providing an adequate remedial scheme for victims of human rights violations, and the future of this brand of litigation.

A. The Rise of Corporate Human Rights Litigation

Over the past two decades, the ATS and its supplement, the TVPA,[31] have been the ubiquitous mechanisms for bringing claims of international human rights violations in U.S. courts. It is true, of course, as Paul Hoffman and Beth Stephens have recently pointed out, that human rights advocates began to bring claims in U.S. courts to advance arguments regarding international human rights norms "[i]n the 1940s, shortly after ratification of the United Nations Charter and adoption of the Universal Declaration of Human Rights."[32] But while some of these early cases advanced arguments about adopting into U.S. law human rights provisions found in the U.N. Charter, human rights advocates seemed to strike gold when they identified a statute that allowed them to directly advance arguments about international human rights in a legal system that generally prioritizes domestic legal principles over international ones.[33]

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30. *See* Daimler AG v. Bauman, 134 S. Ct. 746 (2014).

31. 28 U.S.C. § 1350.

32. Hoffman & Stephens, *supra* note 23, at 13.

33. *See* Ralph G. Steinhardt, *International Humanitarian Law in the Courts of the United States:* Yamashita, Filartíga *and 911*, 36 GEO. WASH. INT'L L. REV. 1, 36 (2004) ("A more systemic difficulty is a visceral unwillingness among domestic judges to take international law seriously. Litigators typically encounter what Paul Hoffman has called the 'blank stare phenomenon,' which occurs whenever a judge is predisposed to assume that international law is not really law at all and whose eyes glaze over when advocates advance international argumentation in court."); Hoffman & Stephens, *supra* note 23, at 13-14; *see also* Sampson v. Fed. Republic of Ger., 250 F.3d 1145, 1151-54 (7th Cir. 2001) (noting the "present uncertainty about the precise domestic role of customary international law" and

The approximately 200-year-old ATS[34] had previously been cited at most a handful of times in its history before it was invoked by plaintiffs in the seminal case of *Filartiga v. Pena-Irala*.[35] The United States Court of Appeals for the Second Circuit's decision in *Filartiga*, recognizing a cause of action for noncitizens harmed by a violation of international law, assured the continuing viability of some federal cause of action by non-U.S. citizens whose human rights are violated.[36] Yet, despite the *Filartiga* plaintiffs' success, prosecuting cases under this statute has never been easy. While the immediate reaction to *Filartiga* was the filing of dozens more lawsuits, most of these were quickly dismissed. In 1984, the United States Court of Appeals for the District of Columbia Circuit decided *Tel-Oren v. Libyan Arab*

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suggesting that the canon requiring that domestic law be interpreted not to violate international law should be used sparingly); Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599, 611-12 (2008) ("Under current doctrine, treaties and federal statutes are regarded as having equivalent stature, so that the last in time prevails in the event of a conflict."). Indeed, although the Oregon Supreme Court was sympathetic to the international human rights arguments advanced by the plaintiffs in *Namba v. McCourt*, 204 P.2d 569 (Or. 1949), the California Supreme Court in *Sei Fujii v. State*, 242 P.2d 617 (Cal. 1952), ultimately rejected lower California courts' reliance on international law in favor of a domestic constitutional rationale.

34. The ATS was enacted as part of the Judiciary Act of 1789. Thorough historical research by numerous scholars has turned up only a handful of citations prior to the plaintiff's reliance on it in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). *See, e.g.*, IIT v. Vencap, Ltd., 519 F.2d 1001 (2d Cir. 1975); Abdul-Rahman Omar Adra v. Clift, 195 F. Supp. 857 (D. Md. 1961); Bolchos v. Darrel, 3 F. Cas. 810 (D.S.C. 1795) (No. 1,607); *see also* Mexican Boundary-Diversion of the Rio Grande, 26 Op. Att'y Gen. 250 (1907); Breach of Neutrality, 1 Op. Att'y Gen. 57 (1795).

35. 630 F.2d at 880.

36. Though only a circuit-level decision, *Filartiga* has gained an outsized reputation as a precedent. The Supreme Court has been loath to adopt arguments inconsistent with it. *See, e.g.*, Sosa v. Alvarez-Machain, 542 U.S. 692, 731 (2004) (citing *Filartiga*, 630 F.2d 876); Benjamin Wittes, *Anton Metlitsky on the* Kiobel *Argument*, LAWFARE (Oct. 5, 2012, 6:51 AM), http://www.lawfareblog.com/2012/10/anton-metlitsky-on-the-kiobel-argument (reporting Anton Metlitsky's comments that oral argument in *Kiobel* revealed that it was "not only the 'liberal Justices' who believed the essential holding of *Filartiga* should be preserved," but also Justice Kennedy who "twice made clear during Kathleen Sullivan's argument for Shell that he was very interested in whether Shell's theory meant that *Filartiga* was wrongly decided"). That a cause of action should exist on the facts of the *Filartiga* case itself has also been effectively ratified by Congress, with the post-*Filartiga* enactment of the Torture Victims Protection Act capturing cases with similar fact patterns and ensuring they would continue to be actionable regardless of how the original ATS is interpreted. *See* H.R. REP. NO. 102-367, pt. 1, at 3 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 85; *see also* Emily M. Martin, Comment, *Torture, Inc.: Corporate Liability Under the Torture Victim Protection Act*, 31 N. ILL. U. L. REV. 175, 179 (2010) ("The parallels between the use of the [ATS] in *Filártiga* and the language of the TVPA demonstrate the interconnectedness of the two statutes and Congress's intent to make it easier for victims of torture to achieve civil redress by providing an unambiguous statutory remedy.").

Republic.[37] While unable to agree on a rationale, the panel concluded that the ATS could not be used to prosecute nonstate actors.[38]

These early setbacks did not stop plaintiffs. They continued to press claims against former officials, like those adjudicated in *Filartiga*—but also against private defendants without a direct governmental affiliation, as had been attempted in *Tel-Oren*.[39] These included claims not just against private individuals, but also claims against corporations and other organizations.[40] Indeed, following the Second Circuit's 1995 ruling in *Kadic v. Karadžić*—holding that private individuals not acting under the authority of a state could properly be subject to suit under the ATS[41]—and the contemporaneous filing of human rights litigation against Unocal,[42] ATS litigation began to be "focused increasingly on corporate defendants such as Chevron, Del Monte, Ford, IBM, Barclay National Bank, Talisman Energy, Unocal and Rio Tinto, all of whom allegedly aided and abetted foreign governments' human rights violations such as slave labor, extraordinary rendition, apartheid, war crimes and torture."[43] Less often, corporations were named as defendants on theories of primary responsibility for the underlying violation.[44]

The explosion of claims against corporate defendants changed the dynamics of these suits. While early cases were filed almost exclusively by public interest organizations, suits against deep-pocket corporate defendants were sometimes brought by private plaintiffs'

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37. 726 F.2d 774 (D.C. Cir. 1984).

38. *Id.* at 795.

39. Jean-Marie Simon, *The Alien Tort Claims Act: Justice or Show Trials?*, 11 B.U. INT'L L.J. 1, 24-27 (1993) (summarizing late-1980s suits).

40. *Tel-Oren*, 726 F.2d at 792.

41. 70 F.3d 232 (2d Cir. 1995).

42. *See, e.g.*, Sarah H. Cleveland, *The Alien Tort Statute, Civil Society, and Corporate Responsibility*, 56 RUTGERS L. REV. 971, 978 (2004) (identifying *Unocal* as a leading corporate ATS case); Cheryl Holzmeyer, *Human Rights in an Era of Neoliberal Globalization: The Alien Tort Claims Act and Grassroots Mobilization in* Doe v. Unocal, 43 LAW & SOC'Y REV. 271, 281-91 (2009) (discussing how the groundwork laid for corporate suits in cases like *Karadžić* led to the *Unocal* case, which "expanded the tactical repertoires of grassroots activists as well as those of litigators" and opened the floodgates on lawsuits against corporations).

43. Wuerth, *supra* note 25, at 604 (citing cases); *Settlement in Principle Reached in Unocal Case*, EARTHRIGHTS INT'L (Dec. 13, 2004), http://www.earthrights.org/legal/settlement-principle-reached-unocal-case; Peter Spiro, *Chevron Wins ATS Case. Will Corporations Fight, Not Settle?*, OPINIO JURIS (Dec. 2, 2008, 9:12 PM), http://opiniojuris.org/2008/12/02/chevron-wins-ats-case-will-corporations-fight-not-settle.

44. Wuerth, *supra* note 25, at 604 n.27 (citing Abdullahi v. Pfizer, Inc., 562 F.3d 163 (2d Cir. 2009)).

lawyers in contingency arrangements with their clients.[45] Major law firms represented the defendants and raised not only myriad and complex legal arguments before the courts in which the cases were pending, but also lobbied the United States Congress[46] and executive branch officials in the Justice and State Departments. This led to advocacy by the government of the corporate defendants' legal arguments.[47]

While the Supreme Court limited the scope of the ATS in 2004, it did not go as far as corporate defendants (or the executive branch at the time) had advocated. Rather, in *Sosa v. Alvarez-Machain*, the Supreme Court accepted a key contention of ATS plaintiffs: certain international law violations are actionable under the statute.[48] Of course, the Court also did not go nearly as far as plaintiffs would have liked. Limiting the claims that could be brought to those that rested "on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of [certain] 18th-century paradigms," the Court explicitly called upon courts to exercise "caution" in recognizing ATS causes of action.[49] The *Sosa* Court heeded its own warning, refusing to recognize the claims brought by the plaintiff and holding that those claims did not meet the

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45. *Id.* at 604.

46. The closest Congress came to taking action in response was in 2005, when Senator Dianne Feinstein introduced a bill amending the statute. *See* John B. Bellinger III, *Enforcing Human Rights in U.S. Courts and Abroad: The Alien Tort Statute and Other Approaches*, 42 VAND. J. TRANSNAT'L L. 1, 13 (2009). One scholar called the bill a "near-complete evisceration of the Alien Tort Statute as we (international lawyers) know it." Julian Ku, *Senate Considers Removing International Law from the Alien Tort Statute*, OPINIO JURIS (Oct. 19, 2005, 07:34 AM), http://lawofnations.blogspot.com/2005/10/senate-considers-removing.html. The sweeping proposed amendment was praised by the business community that had lobbied for it, but quickly withdrawn by its Democratic sponsor after it came under attack by labor and human rights groups. *See* Anthony J. Sebok, *Senator Feinstein's Now-Withdrawn Statute Limiting Non-Citizens' Tort Claims: How Would It Have Affected Abu-Ghraib-Related Civil Suits and Other Similar Civil Actions?*, FINDLAW (Oct. 31, 2005), http://writ.news.findlaw.com/sebok/20051031.html.

47. *See, e.g.*, Brief for the United States as Respondent Supporting Petitioner at 46-50, Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) (No. 03-339); Brief for the United States as Amicus Curiae at 5-12, Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244 (2d Cir. 2009) (No. 07-0016); Brief for the United States of America, as *Amicus Curiae* at 2-3, Khulumani v. Barclay Nat'l Bank, Ltd., 504 F.3d 254 (2d Cir. 2007) (Nos. 05-2141, 05-2326); Brief for the United States as *Amicus Curiae* at 4, Doe v. Unocal Corp., 403 F.3d 708 (9th Cir. 2005) (Nos. 00-56603, 00-56628); Beth Stephens, *Judicial Deference and the Unreasonable Views of the Bush Administration*, 33 BROOK. J. INT'L L. 773 (2008); Wuerth, *supra* note 25, at 604. *But see* Brief for the United States as Amicus Curiae Supporting Petitioners, *supra* note 8.

48. 542 U.S. 692, 694 (2004).

49. *Id.* at 725.

exacting test the Court had established for an actionable international legal norm. Furthermore, in a footnote, the Court expressly held open the question 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."[50]

Thus, it was only a matter of time until the Supreme Court ultimately granted certiorari to resolve the circuit split that had already arisen—and that it had explicitly noted—when *Sosa* was decided. The Court finally granted certiorari in *Kiobel v. Royal Dutch Petroleum Co.* in 2011,[51] after having lacked a quorum when the issue was presented in petitions filed between *Sosa* and *Kiobel*.[52] Furthermore, on the same day it certified the question in *Kiobel*, the Court also granted certiorari in *Mohamad v. Palestinian Authority* to resolve virtually the same question in the context of the TVPA and ordered that the cases be heard in tandem.[53]

B. Advocating for Institutional Liability

The arguments that ATS and TVPA advocates relied upon in support of the claim that the ATS and TVPA permit claims against organizational defendants explicitly and implicitly relied on the contention that institutional liability is essential to both the backward-looking goal of victim compensation and the forward-looking goal of deterring future corporate wrongdoing. Plaintiffs and their supporters argued that without institutional liability, victims would frequently lack an effective remedy and corporations would be inadequately deterred from engaging in wrongful behavior.

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50. *Id.* at 732 n.20 (contrasting the decisions in Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984), and Kadic v. Karadžić, 70 F.3d 232 (2d Cir. 1995)).

51. 132 S. Ct. 472 (2011) (mem.).

52. Linda Greenhouse, *Justices' Conflicts Halt Apartheid Appeal*, N.Y. TIMES (May 13, 2008), http://www.nytimes.com/2008/05/13/washington/13scotus.html.

53. Mohamad v. Rajoub, 132 S. Ct. 454 (2011) (mem.). While the issues were the same—whether the statutes permitted claims against organizational defendants as well as individuals—commentators from the start predicted the two cases might be decided differently because of differences between the two statutory provisions and their legislative histories. *See, e.g.*, Xander Meise, *U.S. Supreme Court Holds that the TVPA Does Not Apply to Organizations, but Corporate Officers Are Still Fair Game*, CORP. SOC. RESP. & L. (Apr. 23, 2012), http://www.csrandthelaw.com/2012/04/23/u-s-supreme-court-holds-that-the-tvpa-does-not-apply-to-organizations-but-corporate-officers-are-still-fair-game/ ("*Mohamad* does not provide much insight into how the Court might rule this fall in *Kiobel v. Royal Dutch Petroleum* . . . . *Mohamad* was argued the same day as *Kiobel* and the TVPA and the ATS have historical and legal links, but the Court mentioned *Kiobel* only once in *Mohamad*, and even then it did so only to contrast the language of the ATS with that of the TVPA.").

For instance, the *Mohamad* plaintiffs argued in their Supreme Court brief that an interpretation that failed to recognize institutional liability should be avoided because it would thwart the TVPA's "foremost aim": "to provide victims with remedies."[54] Specifically, they contended that "limiting liability under the TVPA to natural persons would preclude effective remedies for many victims."[55] The plaintiffs made several arguments in support of this contention. For example, they argued that a failure to allow claims against collective entities would limit the ability of victims to identify proper defendants because "while victims usually can identify organizations responsible for their abuse, they usually cannot pinpoint the particular people who committed torture or extrajudicial killing."[56] In addition, they argued that forcing victims to sue individuals would make it less likely that victims could recover damages because "natural persons . . . are likely to be judgment-proof" and not "subject to a U.S. court's enforcement power," while "organizations . . . often have assets that can provide victims with meaningful remedies."[57]

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54. Brief for Petitioners, *supra* note 8, at 38.

55. *Id.*

56. *Id.* ("Individual torturers and their superiors do not wear identity badges or hand out business cards. On the contrary, they generally use aliases or disguise themselves in the presence of their victims, making it unlikely that a victim or her survivors will be able to identify the specific human beings who perpetrated the torture or execution.").

57. *Id.* at 40. One of the amici curiae in the case, Professor Juan Méndez, the U.N. Special Rapporteur on Torture, made a similar argument:

> As a practical matter, it is unlikely that a victim of torture by a collective entity will be able to obtain the complete remedy required by the CAT if her civil action is only against the particular natural persons who physically committed the act of torture. . . . Absent corporate liability, an entity could shield the ill-gotten gains of torture from a civil remedy merely by pooling its assets and holding them collectively. While a human torturer may flee the jurisdiction to evade legal process, an entity with assets and operations in a given country is much less likely to be able to do so.

Brief of Amicus Curiae Professor Juan Méndez, U.N. Special Rapporteur on Torture, in Support of Petitioners at 35-36, Mohamad v. Palestinian Auth., 132 S. Ct. 1702 (2012) (No. 11-88).

Plaintiffs also argued that victims would be less likely to be able to obtain relief against individuals because, they claimed, limiting victims to suits against individuals would make it more difficult to obtain personal jurisdiction in U.S. courts: "It is much more plausible . . . that a torture victim will be able to secure general personal jurisdiction over a group through its contacts with the United States." Brief for Petitioners, *supra* note 8, at 39 (citing Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952)). In fact, it appears that this argument may not hold up in the wake of later decisions by the Court, which indicate that *Perkins v. Benguet Consolidated Mining Co.* is an exception to the general rule that a corporation must itself be incorporated or have its principal place of business in the state in which personal jurisdiction is invoked. *See* Daimler AG v. Bauman, 134 S. Ct. 746 (2014); Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846 (2011). In *Daimler AG v. Bauman*,

In addition to the contention that, overall, victims would be less likely to obtain financial compensation for injuries they suffered in the past, the plaintiffs in *Mohamad* also predicted that dire effects on collective entities' future behavior would be caused by the failure to recognize institutional liability. Specifically, the *Mohamad* plaintiffs argued that "the TVPA seeks 'to deter' torture and extrajudicial killing" and that this statutory goal would "be stymied if organizations were immunized from liability"[58] because in order to be deterred from committing these kinds of violations going forward,

> organizations need to face liability in a way that strikes directly at their organizational resources. Otherwise, organizations with patterns or programs of torturing or killing Americans could simply replace one torturer or killer with another, and then another, and another—each working as a cog in a machine that can act with impunity.[59]

Arguments found in both the party and amicus briefs in the ATS companion case, *Kiobel*, echo these themes. The *Kiobel* plaintiffs contended that the concept of imposing liability at a corporate or institutional level "is a function of loss allocation principles that have been a feature of all legal systems in the world for as long as corporations have existed."[60] Amici also pressed arguments, similar to those made by the *Mohamad* plaintiffs, that institutional liability under the ATS is a necessary precursor both to providing effective remedies

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the Court expressly rejected the contention that general jurisdiction could be established over a subsidiary based on the contacts of its parent corporation, *see Bauman*, 134 S. Ct. at 762, and indicated that *Perkins* was to be confined to its very unusual facts, in which the company had de facto relocated its "home" from the Philippines to Ohio during World War II, *see id.* at 756 & n.8.

58. Brief for Petitioners, *supra* note 8, at 41.

59. *Id.* at 41-42 (citing Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 150 (2d Cir. 2010) (Leval, J., concurring)). In addition to the arguments about the impact of not recognizing institutional liability, plaintiffs also argued, "It is hard to believe that groups [such as Hamas and al Qaeda] that use their status as organizations to take ownership over . . . heinous acts should simultaneously be able to rely on that status to evade accountability in U.S. courts." *Id.* at 41. Consistent with the facts of the case, the *Mohamad* plaintiffs focused on noncorporate organizations. In fact, corporate defendants have frequently been sued under the TVPA as well. As one amicus curiae noted, "[S]ome corporations have allegedly aided and abetted official torture as an illegitimate tool to advance their business interests, including Unocal Corp. in Myanmar, Royal Dutch Petroleum in Nigeria, [and] Talisman Energy in Sudan." Brief of Amicus Curiae Professor Juan Méndez, *supra* note 57, at 35 (citations omitted).

60. Brief for Petitioners at 8, Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013) (No. 10-1491). The *Kiobel* petitioners' brief is focused on history and the intent of the statute; it thus ties in many of its arguments about corporate tort liability to this overarching theme, for instance asserting that "[c]orporate tort liability was part of the legal inheritance our country received at its founding." *Id.* at 9.

for victims[61] and deterring corporate misconduct going forward.[62] The plaintiffs' articulated position is in line with scholarly arguments that have been advanced, which are discussed in detail in Part IV.[63]

C. The Future of Corporate Human Rights Litigation

Despite advocates' best efforts, it now seems unlikely that many institutional claims will continue to be viable against corporate entities under either of these two federal statutes, which have been the vehicles overwhelmingly utilized for the past few decades. In the TVPA context, at least, the issue is now completely settled. The Court ruled in *Mohamad* that only individuals may be sued for TVPA violations.[64] While *Kiobel* left open this question by deciding the case on an alternate ground, some circuits follow the rule that institutional corporate defendants are not permitted by the ATS, while others do not.[65] In any event, the *Kiobel* Court's adoption of a requirement that viable claims under the ATS include only those that "touch and

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61. *See, e.g.*, Brief for the United States as Amicus Curiae Supporting Petitioners, *supra* note 8, at 24 ("[T]here is also no good reason to conclude that the First Congress would have wanted to allow the suit to proceed only against the potentially judgment-proof individual actor, and to bar recovery against the company on whose behalf he was acting.").

62. Brief of the American Federation of Labor & Congress of Industrial Organizations as Amicus Curiae in Support of Petitioners, *supra* note 8, at 7 ("The underlying common-law rationales for corporate vicarious liability support [the] conclusion. The primary rationale for the common-law principle holding a corporation vicariously liable for the acts of its agents is 'the deterrent effect of the award of [] damages,' *i.e.*, to 'encourage employers to exercise closer control over their servants for the prevention of outrageous torts.'" (citing PROSSER AND KEETON ON THE LAW OF TORTS § 2 (W. Page Keeton et al. eds., 5th ed. 1984) (alterations in original))); *id.* ("[A] regime of purely personal liability will lead firms to take too little care and to initiate too much risky activity or misconduct. By contrast, principals who are vicariously liable and face the full expected cost of tort damages will seek to control their agents to ensure optimal precautionary measures." (quoting Reinier H. Kraakman, *Vicarious and Corporate Civil Liability*, *in* 2 ENCYCLOPEDIA OF LAW AND ECONOMICS 669, 670-71 (Boudewijn Bouckaert & Gerrit de Geest eds., 2000)) (internal quotation marks omitted)); *id.* ("[W]hen it is thoroughly understood [by corporations] that it is not profitable to employ careless and indifferent agents, or reckless and insolent servants, better men will take their places, and not before." (quoting Goddard v. Grand Trunk Ry. of Can., 57 Me. 202, 224 (1869)) (internal quotation marks omitted)).

63. *See, e.g.*, Mark A. Drumbl, *Collective Responsibility and Postconflict Justice*, *in* ACCOUNTABILITY FOR COLLECTIVE WRONGDOING 23, 28 (Tracy Isaacs & Richard Vernon eds., 2011); Brent Fisse & John Braithwaite, *The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability*, 11 SYDNEY L. REV. 468, 483-93 (1988); Ratner, *supra* note 8, at 474.

64. *See* Mohamad v. Palestinian Auth., 132 S. Ct. 1702 (2012) (No. 11-88).

65. *Compare, e.g.*, Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010) (determining that only claims against individual defendants, not institutional defendants, are actionable under the ATS), *with* Doe v. Exxon Mobil Corp., 654 F.3d 11 (D.C. Cir. 2011), *vacated*, 527 F. App'x 7 (D.C. Cir. 2013) (stating that claims against institutional defendants are actionable under the ATS).

concern" the United States is likely to bring about a substantial decline in the number of corporate human rights cases that can be successfully brought pursuant to the ATS.[66]

Thus, victims of human rights violations and their advocates find themselves at a crossroads. Such future litigation will likely take one or more forms. Those bringing such litigation may shift gears to embrace state common law claims that may be pleaded directly against corporate-entity defendants in U.S. courts. It is also possible that some victims may continue to pursue claims under the TVPA (or other legal theories) now by naming individuals as defendants rather than the corporate entities that employed them. Another possibility is that some advocates may choose to move to other jurisdictions that are more sympathetic to corporate human rights claims; some of these would allow corporate-entity liability while others would not.

Each of these possibilities is briefly discussed in turn, although it should be borne in mind that these possibilities are by no means mutually exclusive. It may turn out that advocates generally focus most of their efforts on one of these possibilities, *or* different advocates may decide to take different approaches and create a far greater diversity of corporate human rights litigation than has been the norm in the era when the ATS and TVPA still held great promise as viable vehicles for such claims. In addition, individual lawsuits may combine one or more of these approaches. For example, among many other options, a suit might be pursued in federal court that names an individual defendant under the TVPA and also joins related state common law claims against corporate entities.

1. State Common Law Claims

It has been suggested that corporate human rights litigation would likely shift toward causes of action arising under state law if the ATS were interpreted to make claims difficult to prosecute.[67] Indeed,

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66. *See, e.g.*, Roger Alford, Kiobel *Insta-Symposium: The Death of the ATS and the Rise of Transnational Tort Litigation*, OPINIO JURIS (Apr. 17, 2013, 5:48 PM), http://opiniojuris.org/2013/04/17/kiobel-instthe-death-of-the-ats-and-the-rise-of-transnational-tort-litigation. Alford concludes that "[t]he ATS as we know it is dead" and predicts that "the future of human rights in [U.S.] domestic courts is transnational tort litigation." *Id.* In addition, *Bauman*, decided even more recently, undermines personal jurisdiction in many cases where foreign corporate defendants have acceded to it based on ties to U.S. corporations. Daimler AG v. Bauman, 134 S. Ct. 746 (2014).

67. *See, e.g.*, Donald Earl Childress III, *The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation*, 100 GEO. L.J. 709 (2012); Hoffman & Stephens, *supra* note 23, at 15; Christopher A. Whytock, Donald Earl Childress III & Michael D. Ramsey, *Foreword: After* Kiobel*—International Human Rights Litigation in State Courts and Under*

state law causes of action were the earliest types of claims brought by human rights advocates.[68] So, too, did the *Unocal* plaintiffs bring and pursue the earliest corporate human rights litigation under state law theories as well as under the ATS.[69]

State common law causes of action hold much promise, it has been argued, because "[t]he same conduct that constitutes a violation of international human rights norms usually also violates the law of the place where it occurred and the law of the forum state."[70] What is more, plaintiffs are likely to avoid getting any serious challenge to the possibility of institutional liability if they plead their human rights claims as traditional domestic tort claims, i.e., as "assault and battery or intentional infliction of emotional harm rather than torture, or wrongful death instead of extrajudicial execution."[71]

2. Claims in Other Fora

Even if pleaded under state law, common law claims might continue to be brought in federal court (indeed, they have frequently been joined to ATS and TVPA federal law causes of action).[72] And, even if they are brought in state court, defendants may choose to

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State Law, 3 U.C. IRVINE L. REV. 1, 5 (2013). *But see* Austen L. Parrish, *State Court International Human Rights Litigation: A Concerning Trend?*, 3 U.C. IRVINE L. REV. 25 (2013) (expressing skepticism regarding the recent trend of human rights litigation moving to state courts).

68. Paul L. Hoffman, *The Application of International Human Rights Law in State Courts: A View from California*, 18 INT'L LAW. 61 (1984) (addressing the importance of human rights litigation); Hoffman & Stephens, *supra* note 23, at 13 ("Long before the Second Circuit decided the *Filártiga* case, human rights advocates looked to state courts to enforce international human rights norms.").

69. *See, e.g.*, Complaint, Roe v. Unocal Corp., No. BC237679 (Cal. Sup. Ct. L.A. Cnty. Sept. 29, 2000), *available at* http://upload.wikimedia.org/wikipedia/commons/b/b0/Doe_v_Unocal_Plaintiffs_Complaint_and_conformed_face_sheet.pdf (alleging fifteen separate state law counts).

70. BETH STEPHENS ET AL., INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 120 (2d ed. 2008); *see also* Whytock, Childress & Ramsey, *supra* note 67, at 6 (citing Childress, *supra* note 67, at 740) (arguing that plaintiffs can "avoid *Sosa*'s limitations on the types of international law violations over which the ATS provides jurisdiction by pleading their claims under state or foreign law").

71. Whytock, Childress & Ramsey, *supra* note 67, at 6; *see* Patrick J. Borchers, *Conflict-of-Laws Considerations in State Court Human Rights Actions*, 3 U.C. IRVINE L. REV. 45, 48-49 (2013); Hoffman & Stephens, *supra* note 23, at 18.

72. Complaint for Damages, Saldaña v. Occidental Petroleum Corp., No. CV11-8957 (C.D. Cal. Oct. 28, 2011) (alleging, in addition to ATS claims, common law claims arising under California law); Notice of Removal, Palacios v. Coca-Cola Co., 757 F. Supp. 2d 347 (S.D.N.Y. 2010) (No. 10-CV-3120) (alleging common law claims arising under New York and Guatemalan law).

remove them if there is a valid basis (diversity or otherwise) on which to do so.[73]

To the extent they can avoid removal, however, plaintiffs may decide to try to pursue claims in state courts.[74] Compared with federal courts, state courts may have some advantages.[75] They offer potentially less strict procedural rules and thereby enable plaintiffs to advance their claims further.[76] It is also conceivable that plaintiffs may identify state fora with more sympathetic judges.[77]

Tort litigation in common law jurisdictions outside the United States may also become more prevalent. While, to date, there have been few cases brought in many of these jurisdictions, one of the largest-ever settlements of a human rights claim against a corporation occurred in Australia, where a parent corporation agreed to a $350 million settlement based on activities undertaken by its subsidiary.[78] If it is truly becoming more difficult to proceed against corporate defendants in the United States, advocacy groups and plaintiffs' lawyers may decide to focus more attention on less hostile courts in Australia or other common law jurisdictions such as the United Kingdom and Canada.[79]

Bringing claims to prosecutors in civil law countries is also a possibility.[80] Indeed, as discussed in more detail below, one recent case was filed in Germany against a high-level executive of a corporation with a subsidiary in the Democratic Republic of the Congo (DRC).

3. Claims Against Individual Defendants

As noted in Subpart B above, while human rights advocates and scholars have strongly advocated in favor of institutional liability, advocates have not always chosen to bring claims exclusively against

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73. Whytock, Childress & Ramsey, *supra* note 67, at 5-7.
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. Michael D. Goldhaber, *Corporate Human Rights Litigation in Non-U.S. Courts: A Comparative Scorecard*, 3 U.C. IRVINE L. REV. 127, 135 (2013).
79. *See, e.g.*, *id.*
80. Sara Sun Beale, *A Response to the Critics of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1481, 1482 (2009). However, there are some downsides to such claims. Civil law jurisdictions generally require that claims be brought to public prosecutors. These public officials, rather than the victims, determine what claims to bring and whether to bring them. In addition, while this is changing, some civil law jurisdictions (including, e.g., Germany) retain an old civil law rule prohibiting institutional criminal liability, thereby permitting claims to be brought only against individual officers, directors, or employees. *Id.* at 1493-94.

corporate-entity defendants. Indeed, the *Unocal* litigation itself involved claims against the corporate entity, high-level officials, and anonymous corporate actors.[81] While there were a high percentage of claims naming only corporate defendants in the first few years following the *Unocal* filing, once it became clear that entity liability might not be possible (as was argued by Unocal itself), cases brought under the ATS and the TVPA were increasingly likely to name individual corporate officers, directors, and employees as defendants. While suits brought before 2003 almost never named individual corporate actors, most pending lawsuits today include both types of defendants.

Cases brought under the TVPA have typically been pleaded against both corporate entities and individual corporate defendants from the time the statute was first enacted. ATS claims, by contrast, were unlikely to include individual defendant claims until quite recently. This difference may reflect that the argument for institutional liability was perceived to be a far more difficult one in the TVPA context from the outset.[82]

Despite this reality, the existence of individual defendants has often been obscured. The *Mohamad* decision, for example, was argued as if there could be no possibility of claims being brought against individuals.[83] Yet, individuals within the organization were originally named as parties.[84]

The fact that claims have been lodged against individual corporate actors suggests it is possible that some plaintiffs may continue to pursue such claims (or advance new ones) under these statutes going forward. On the other hand, it is also possible that the

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81. Defendants other than Unocal included two top Unocal executives, John Imle and Roger Beach, as well as several anonymous "John Roe" defendants. *See, e.g.*, Answer of Unocal Corporation and Union Oil Company of California to Plaintiffs' Complaint at 1, Doe v. Unocal Corp., BC237679 (Cal. Sup. Ct. L.A. Cnty. Sept. 10, 2001).

82. From the beginning, most courts rejected the argument that the TVPA could be applied to organizational defendants because of legislative history favoring that interpretation. By contrast, courts were more divided over the issue with respect to the ATS and decisions opposing an interpretation that would allow prosecution of corporate entities were slower to emerge. Of course, the data does not directly reveal why pleading decisions were made, but the correlation with judicial reactions to claims against corporate or other organizational defendants in the context of these two types of claims is suggestive.

83. *See, e.g.*, Brief for Petitioners, *supra* note 8.

84. Before the Supreme Court took up the case, the plaintiffs voluntarily dismissed the individual defendants they had named. *See* Brief for Respondents at ii, Mohamad v. Palestinian Auth., 132 S. Ct. 1702 (2012) (No. 11-88) ("Jibril Rajoub, Amin Al-Hindi, and Tawfik Tirawi were named as defendants but were voluntarily dismissed and were not parties in the court of appeals.").

prospect of individual-only suits may be unappealing. While it is not possible to know for sure whether advocates believe their own rhetoric, they have certainly suggested that claims against individuals only are far less worthy of being pursued. The claims that have been lodged against individual corporate actors have, to date, all been joined to suits that also involve corporate-entity defendants. Going forward, even if plaintiffs choose to bring claims against individuals, it is possible they will join common law claims, like those discussed above, to ensure that they can also (or only) pursue claims against corporate entity defendants.

III. CORPORATE HUMAN RIGHTS LITIGATION: A TYPOLOGY OF ITS GOALS AND MOTIVATIONS

The arguments that have been made about institutional liability borrow and refer to arguments that have arisen in the corporate law context. Certainly some of the goals that animate corporate litigation generally are shared by human rights litigants in particular. But human rights litigation has a particular set of values that are often quite different from the typical tort suit.

This Part lays out a typology of litigation goals and actors that are actually involved in these different types of suits. Breaking down who brings different types of cases and what they hope to achieve is rarely included in discussions regarding the benefits and drawbacks of institutional liability. Even in the corporate human rights accounts, arguments often rely on generic and/or traditional assumptions. Yet, a fine-tuned analysis should ideally consider the range of goals that are actually in play. Focusing on the complete range of goals is, as I discuss in detail later, essential to drawing conclusions about the best form, or forms, of liability to pursue in corporate human rights litigation.

A. Corporate Litigation Goals: Traditional Versus Human Rights

As is true of all litigation, those who bring suits against corporations may do so for myriad reasons. Depending upon the type of claim prosecuted and the person prosecuting it, many different goals are likely to underlie litigation against corporations.

Perhaps the most commonly expressed goals of civil litigation generally are to *provide redress for injuries* and to *adjudicate*

culpability.[85] These goals may be seen as integrally related: redress may not only be in the form of financial *compensation* for injuries suffered by the victim, but may also be bolstered by the *recognition of wrongdoing* and *assignment of responsibility and blame* to the perpetrator(s).

Civil litigation may also be undertaken in order to *punish* wrongdoing.[86] Punishment may be a motivating factor of victims of corporate misconduct who feel they were wronged and want to exact retribution via legal proceedings and/or the consequences of such proceedings. Punishment of the wrongdoer is likely also to be one of the theoretical underpinnings of a criminal lawsuit brought against a corporation or its agents.[87]

Another commonly expressed goal of tort litigation is *deterrence of future misconduct* by the wrongdoer.[88] A deterrence rationale is related but distinct from the motive of obtaining *legal reform* of some sort, e.g., of an industry or a legal standard.[89]

The above are among the most often cited rationales and may be considered the traditional goals. In addition to these, however, a host of other, nontraditional objectives may motivate those who bring human rights lawsuits alleging corporate misconduct.[90]

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85. *See, e.g.*, Richard L. Abel, *A Critique of Torts*, 37 UCLA L. REV. 785, 791 (1990) ("The purposes of tort law are to pass moral judgment on what has happened, respond to the victim's need for compensation, and encourage future safety."); Edward A. Dauer & Leonard J. Marcus, *Adapting Mediation To Link Resolution of Medical Malpractice Disputes with Health Care Quality Improvement*, 60 LAW & CONTEMP. PROBS. 185, 185 (1997) ("According to conventional theory, the tort liability system serves two objectives: compensating injured persons, and causing other persons to internalize the costs of their errors and thus to guard against them in the future.").

86. Dauer & Marcus, *supra* note 85, at 194. Indeed, the availability of punitive damages in tort cases (as opposed to, for example, contract cases) is owed to the possibility of tort suits being used to punish wrongdoing.

87. Scott A. Schumacher, *Magnifying Deterrence by Prosecuting Professionals*, 89 IND. L.J. 511, 540 (2014) (describing "retribution and deterrence" as "the traditional bases for criminal liability").

88. *See, e.g.*, Abel, *supra* note 85, at 791, 806-07; Dauer & Marcus, *supra* note 85, at 194 ("Compensation of injured people is another [goal of the tort system], along with the articulation of social mores, the nonviolent resolution of disputes, even punishment where that seems appropriate. Deterrence, however, is undoubtedly one of the explicit objectives of the tort system.").

89. *See, e.g.*, Timothy D. Lytton, *Using Tort Litigation To Enhance Regulatory Policy Making: Evaluating Climate-Change Litigation in Light of Lessons from Gun-Industry and Clergy-Sexual-Abuse Lawsuits*, 86 TEX. L. REV. 1837, 1837 (2008) (describing efforts of tort litigants "to address a variety of social problems" in gun industries, tobacco industries, and fast food industries, among others).

90. Different categories of human rights claims may generally share or prioritize different goals. For example, plaintiffs alleging that a relative has been tortured or has disappeared may be more likely to have a goal of finding answers or publicizing facts, *see*

For example, human rights victims may use the litigation process in an attempt to achieve *reconciliation* between victim and wrongdoer.[91] The hope may be that the parties can use the case to find a way to move beyond the atrocity by reconciling and promoting harmonious and peaceful interactions going forward.[92]

Simply the chance to *have their day in court* or to have their side of the story heard and the wrong done to them publicly acknowledged may motivate some litigants to file suit.[93] Others may bring suit in order to *create an official record of events*.[94] For many victims, the process may allow them to *uncover the truth* in the form of factual information about the event that may be in the possession of the defendant or third parties.[95] Formal legal process, and the subpoena power that accompanies it, gives litigants the ability to force

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Raquel Aldana-Pindell, *In Vindication of Justiciable Victims' Rights to Truth and Justice for State-Sponsored Crimes*, 35 VAND. J. TRANSNAT'L L. 1399, 1439 (2002), while plaintiffs-employees who bring suit asserting serious labor violations, as in *Unocal*, may be more likely to be doing so as part of an effort to deter or eliminate similar practices going forward, *cf.* Anita Ramasastry, *Corporate Complicity: From Nuremberg to Rangoon—An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations*, 20 BERKELEY J. INT'L L. 91, 159 (2002) ("To the extent that corporate actors reflect on the potential for liability and the basis for such liability under established precepts of international law, then international law will have successfully achieved its goal of deterrence.").

91. Timothy William Waters, *Killing Globally, Punishing Locally?: The Still-Unmapped Ecology of Atrocity*, 55 BUFF. L. REV. 1331, 1351 (2008) (reviewing MARK A. DRUMBL, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW (2007)) ("The personalization of guilt is supposed to move societies subjected to atrocity beyond collective, ethnic formulations of conflict and make reconciliation possible.").

92. Scholars in multiple disciplines have argued that legal proceedings play a role in strengthening a shared understanding of the past, which in turn facilitates reconciliation and societal healing. MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 61 (1998).

93. *See, e.g.*, *id.* at 60 ("[M]any victims conceive of justice in terms of revalidating oneself, and of affirming the sense 'you are right, you were damaged, and it was wrong.'" (quoting Pumla Gobodo-Madikizela, a psychologist serving on the South African Truth and Reconciliation Commission)).

94. *Id.* at 60-61.

95. *See, e.g.*, Aldana-Pindell, *supra* note 90, at 1439 ("As a substantive matter, surviving human rights victims generally seek to learn three things: what happened, why the crime was committed, and who committed the crime. Learning what happened is most important when the direct victim of the violation does not survive. In such cases, the surviving human rights victims—the family members of the direct victim—consider the uncertainty of what may have happened to their loved ones as more painful than the truth itself, even when what they learn is gruesome.").

information to be turned over to them as part of the discovery process.[96]

Finally, in addition to seeking redress for individual wrongs suffered or legal reform, some litigants may use litigation to serve various *expressive and communicative goals*, such as conveying and/or dramatizing the facts surrounding the wrongful event, creating or communicating appropriate legal norms and standards, and/or inspiring or cross-fertilizing effective legal strategies to promote accountability.[97] Consciousness-raising through these and other aspects of bringing and pursuing a lawsuit creates a number of side effects for corporate defendants. For example, corporate defendants may be forced to answer to their shareholders or directly to the public for their wrongful behavior.[98]

B. Corporate Litigation Actors: Traditional Versus Human Rights

The various reasons or goals driving litigation may in turn be driving a variety of different actors—and may be different from person to person on a team working together to prosecute a single case. As with the goals, the actors range from those traditionally associated with the bringing of claims in court to those whose interests have not been traditionally taken into account, yet who may drive both the decision to file and the strategies employed in doing so.

With respect to civil litigation against corporations, traditional actors include the *plaintiffs* who bring claims. These are typically *third-party victims* of corporate misconduct with no connection to the corporation, other than through an injury that is traceable to the corporate defendant. Such claimants include, for example, victims of human rights violations suing large multinational corporations[99] or individuals bringing class actions against a corporation for a massive

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96. *See, e.g.*, Tony Mauro, *Justices Debate Alien Tort Law*, LEGAL TIMES, Apr. 5, 2004, at 8 (reporting, at the time *Sosa* was pending, that human rights plaintiffs-victims are drawn to U.S. courts because, inter alia, the United States has liberal discovery rules).

97. *See, e.g.*, Goldhaber, *supra* note 78, at 129; Hunjoon Kim & Kathryn Sikkink, *Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries*, 54 INT'L STUD. Q. 939, 940 (2010) ("It [can be] difficult to separate these normative and performative aspects of prosecution from its material punishment and enforcement effects.").

98. *See, e.g.*, Goldhaber, *supra* note 78, at 129; *see also* Special Representative of the Secretary-General, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, Human Rights Council, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) (by John Ruggie) [hereinafter Ruggie] (suggesting a requirement that businesses communicate regarding how they address human rights to shareholders and the public).

99. *See, e.g.*, Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013).

environmental tort.[100] The other typical plaintiffs in suits against corporations are *shareholders-plaintiffs* who initiate suits alleging corporate misconduct that has resulted in lower corporate share values. These claims may sometimes be connected to an event that also prompts litigation by plaintiffs-victims.[101] In other cases, it may be based on allegations of misconduct that injure the firm (and its shareholders) only.[102]

The *lawyers* bringing such suits have their own distinct interests.[103] Such interests may be financial in the case of private lawyers[104] or broadly reformatory in the case of public interest lawyers who are most frequently involved in human rights litigation. Human rights organizations, beyond the individual public interest lawyer, may have a stake in the outcome. In addition to potentially funding or helping to identify or litigate cases, these organizations may get involved in strategizing with the parties and lawyers involved in prosecuting cases. They may also file amicus briefs in support of particular positions when these cases are on appeal.

While frequently the interests of both lawyers and outside interest groups will align with the named litigants, it is not always the case. In addition to the financial stake that private lawyers may have in a case, both lawyers and others working for organizations may have goals that are distinct from those of the client on whose behalf they are advocating.[105] For example, human rights organizations may have

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100. *See, e.g.*, *In re* Deepwater Horizon, 739 F.3d 790 (5th Cir. 2014).

101. *See, e.g.*, Dan Levine, *BP Must Face Shareholder Suit over 2006 Alaska Oil Spill*, REUTERS (Feb. 13, 2014, 3:41 PM), http://www.reuters.com/article/2014/02/13/us-bp-spill-ruling-idUSBREA1C1RE20140213 (reporting on a shareholder suit related to the BP oil spill in Alaska in which "200,000 gallons of oil spilled from a BP pipeline onto the Alaskan tundra at Prudhoe Bay").

102. *See, e.g.*, Koehler, *supra* note 19, at 9 (reporting that allegations and investigation of FCPA violations by Wal-Mart have prompted the filing of shareholder derivative suits).

103. *See, e.g.*, Elizabeth Chamblee Burch, *Financiers as Monitors in Aggregate Litigation*, 87 N.Y.U. L. REV. 1273, 1275 (2012) (describing the distinct interests of class action plaintiffs' lawyers who serve as both "financier and agent" of their clients' cases).

104. *See, e.g.*, *id.* Even the goals matched with the financial interests of a private lawyer may vary depending on whether the lawyer is working on an hourly or a contingency basis. That is, contingency lawyers may seek a swift resolution or be focused on establishing liability and damages to ensure they will be paid, while hourly lawyers might be more focused on dragging out the process and far less interested in the ultimate outcome.

105. For instance, organizations may have commitments to principles that come into conflict with the best defense of an individual client's case. Individual lawyers may benefit from the reputational benefits that accrue from pursing a representation or strategy even if the client is better served by a different course. *See, e.g.*, Adam Liptak, *Specialists' Help at Court Can Come with a Catch*, N.Y. TIMES (Oct. 9, 2010), http://www.nytimes.com/2010/10/10/us/10lawyers.html?pagewanted=all (describing how "old guard" lawyers are "often wary of, if not hostile toward, the new breed of skilled and ambitious advocates, fearing that they are

broader goals focused on issues or groups that they are committed to, rather than the personal interests that may be motivating an individual client to bring suit.

Beyond the civil litigation context with which U.S. human rights litigation has typically been associated, corporations may also be prosecuted criminally for misconduct related to human rights violations. In such cases, *public prosecutors* are the most obvious drivers of litigation, although other public regulators—such as the Securities and Exchange Commission (SEC)—may also bring claims on behalf of the public.[106] In addition to these actors—and the generic public interest on whose behalf they are acting—other nontraditional actors may have a stake in the bringing of such suits. Victims, as well as their *communities or other interest groups* acting on their behalf, may put pressure on prosecutors and help shape how a suit is brought—or whether it is brought.[107]

Similar actors and motivations may be involved in human rights litigation in other countries. In civil law jurisdictions, criminal charges may be a necessary precursor to bringing civil claims.[108] In such jurisdictions, the victim may still have a stake in the litigation but may have lesser (or no) ultimate decision-making authority regarding whether an investigation will ultimately result in a claim being brought or how it is prosecuted.[109]

C. Different Actors, Different Goals: Traditional Versus Human Rights

The wide variety of individuals combined with the wide variety of goals means that a corporate human rights case may frequently look quite different than the prototypical or stereotypical case that involves only traditional actors and traditional goals. Identifying the range of interests and goals in such cases allows for a fine-tuned analysis of different forms of liability in corporate human rights litigation, taking

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more interested in the glory of a Supreme Court argument than in what is best for their clients and the development of the law").

106. *See, e.g.*, Sarah Marberg, Note, *Promises of Leniency: Whether Companies Should Self-Disclose Violations of the Foreign Corrupt Practices Act*, 45 VAND. J. TRANSNAT'L L. 557, 566 (2012) (describing the coauthority of the DOJ and SEC to enforce the FCPA).

107. *See, e.g.*, Rachel López, *The (Re)collection of Memory After Mass Atrocity and the Dilemma for Transitional Justice*, 47 N.Y.U. J. INT'L L. & POL. (forthcoming 2015).

108. *See* Beth Stephens, *Translating* Filártiga*: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT'L L. 1, 20 (2002).

109. *Id.* at 18-20.

into account the broader range of goals and interests that are typically involved in such litigation. The Tables below lay out the typology of corporate litigation goals and actors and break out the additional, nontraditional actors and goals that frequently drive corporate human rights litigation.

Table 1: Typology of Corporate Litigation Goals

Traditional Goals	Additional Human Rights Goals
Provide Redress	Promote Reconciliation
Determine Responsibility	Fact-Finding
Punish Wrongdoer	Access to Judicial Process
Deter Future Misconduct	Express and Promote Norms

Table 2: Typology of Corporate Litigation Actors

Traditional Actors	Additional Human Rights Actors
Plaintiffs-Victims of Harm	Public-Interest Lawyers
Plaintiffs-Shareholders	Human Rights Organizations
Private/For-Profit Lawyers	Communities
Criminal Prosecutors/Public	International Organizations

The typology helps isolate the most common of the myriad possible incentives driving litigation. The benefits and drawbacks of naming defendants will in fact depend in large part on the goals and actors involved. Linking the goals and actors to advantages and disadvantages that will be laid out in the next two Parts promotes a focus on the optimal approach to corporate accountability in the specific context of corporate human rights litigation.

IV. THEORETICAL ADVANTAGES OF INSTITUTIONAL LIABILITY

As discussed earlier, claims against individual corporate actors have increasingly been made a part of many cases targeting institutional behavior. In some cases—as with claims brought under the TVPA—claims against the individuals are the only permissible way to proceed. The regulatory impact of this development remains to be seen. This Part reviews the various arguments that have been proffered regarding the disadvantages of imposing liability only on individual corporate actors, rather than on the corporations themselves. It ends by noting that, in the context of claims brought against transnational corporations in particular, individual claims may be viewed as less desirable because jurisdictional rules may make them more difficult to prosecute in U.S. courts.

A. The Benefits of Institutional Liability

Theorists across a range of subject areas have identified a number of different advantages to bringing claims directly against the corporate entity, rather than against individuals acting on its behalf. Each of the potential advantages reflect regulatory goals that frequently accompany suits against corporations, i.e., corporate accountability for the misconduct that is the subject of litigation and the promotion of more socially responsible behavior going forward. However, they are a less ideal fit for other goals from the typology that may be prevalent in certain types of litigation.

I have loosely grouped the various arguments favoring corporate liability over individual liability into four broad categories: (1) the traditional economic view of corporate accountability, (2) philosophical and sociological justifications of corporate accountability, (3) insights on individual versus collective liability found in the psychological literature, and (4) collectivist arguments that have recently been made in the human rights literature. Each is discussed in turn, followed by a brief discussion of recent illustrative cases that reflect many of these theoretical arguments.

1. The Traditional Economic View of Corporate Accountability

Corporations are routinely sued by tort victims who typically view corporate entities, rather than the individuals they employ, as the preferred target for a variety of related reasons. To begin with, plaintiffs seeking large damages awards are far more likely to encounter judgment-proof defendants if they sue an individual tortfeasor rather than that person's corporate employer.[110] Thus, suing the corporation is strategic even when the corporation is responsible only based on an agency relationship to an individual who committed the tort while on duty as an employee—irrespective of whether the corporation had a policy or practice that required the employee to commit the tort. Because of their "deep pockets" and ability to pay judgments (directly or through insurance), corporations are the preferred target of plaintiffs even in a garden variety tort situation, such as an automobile accident in which a corporate vehicle negligently causes injury to another individual.[111]

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110. *See, e.g.*, Alan O. Sykes, *The Economics of Vicarious Liability*, 93 YALE L.J. 1231, 1242 (1984).

111. *See, e.g.*, Joseph H. King, Jr., *Limiting the Vicarious Liability of Franchisors for the Torts of Their Franchisees*, 62 WASH. & LEE L. REV. 417, 420 (2005) (noting that "it

Beyond the financial benefits accruing to plaintiffs and their attorneys, scholars[112] and courts[113] have identified significant regulatory benefits to imposing liability directly against corporations for the malfeasance of their agents. Economic arguments have long dominated the discourse regarding the regulatory impact of imposing tort liability directly on corporations.[114] Under this view, corporate liability has a more significant deterrent effect than would liability imposed directly on corporate agents. This is, in part, because the costs will be imposed on the actor that can bear them.[115] Mainly, however, the economic rationale relies on the notion that the threat of corporate or institutional liability will create financial incentives for shareholders and directors to invest in monitoring and other institutional controls that will lead to less tortious and unlawful behavior than would occur if liability only attached directly to individual actors.[116]

Criminal sanctions, too, are frequently pursued and levied against corporate entities, even though the criminal behavior is actually committed by an individual corporate agent.[117] "The standard economic approach to corporate criminal liability supports the view that imposing strict vicarious criminal liability on corporations invariably reduces corporate crime, with higher sanctions leading to

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should come as no surprise" that the perceived "deep[er] pocket" franchisors are "routinely joined as defendants in tort claims" for injuries allegedly caused by their franchisees).

112. *See, e.g.*, A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869 (1998).

113. *See, e.g.*, Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 14 (1991) ("Imposing exemplary damages on the corporation when its agent commits intentional fraud creates a strong incentive for vigilance by those in a position 'to guard substantially against the evil to be prevented.'" (quoting Louis Pizitz Dry Goods Co. v. Yeldell, 274 U.S. 112, 116 (1927)).

114. *See* Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961) (noting that "enterprise liability would enhance proper resource allocation" within corporations); William O. Douglas, *Vicarious Liability and Administration of Risk I*, 38 YALE L.J. 584 (1929); Lewis A. Kornhauser, *An Economic Analysis of the Choice Between Enterprise and Personal Liability for Accidents*, 70 CALIF. L. REV. 1345 (1982); Reinier H. Kraakman, *Corporate Liability Strategies and the Costs of Legal Controls*, 93 YALE L.J. 857 (1984); Christopher D. Stone, *The Place of Enterprise Liability in the Control of Corporate Conduct*, 90 YALE L.J. 1 (1980); Sykes, *supra* note 110, at 1231.

115. *See* Sykes, *supra* note 110, at 1236 ("[P]rincipals are often better suited than their agents to bear the risks of financial losses.").

116. *See id.* at 1236-39.

117. *See, e.g.*, John Collins Coffee, Jr., *Corporate Crime and Punishment: A Non-Chicago View of the Economics of Criminal Sanctions*, 17 AM. CRIM. L. REV. 419, 456-65 (1980). Of course, corporate criminal prosecutions frequently also involve charges against individual codefendants. *See infra* notes 187-188 and accompanying text (discussing the DOJ policy shift in prosecuting FCPA cases against individuals as well as corporations).

less crime."[118] Although this view has its critics (particularly as applied on the margins), it continues to dominate judicial opinions and discourse around policy making and also remains a perennial subject of scholarly debate. In short, "commentators broadly agree that [both civil and criminal] corporate liability usefully enlists the firm in interdicting or deterring its wayward agents and assures that it fully internalizes the costs arising from its activities."[119]

2. Philosophical and Sociological Justifications for Corporate Accountability

Often related to, but distinct from, the traditional economic rationale are philosophical arguments regarding whether and when a corporation can appropriately be held responsible. This literature both justifies the corporation as a separate "moral" agent on whom blame may be imposed and considers it to be an entity that, at least sometimes, may be considered separately and differently culpable from its constituent parts/agents.

For example, while some philosophers consider only individuals to be moral agents in possession of a "philosophical personality,"[120] others contend that collective entities, such as corporations, can have a separate moral personality under the right circumstances.[121] For individualists, group membership may be important to an individual's identity and individual action may be related to such group membership; yet, even so, the group as such is no more than a collection of individuals.[122] Collectivists, by contrast, assert the

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118. Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833, 834-35 (1994).

119. Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. Rev. 687, 689 (1997).

120. *See* Ratner, *supra* note 8, at 474 (quoting Fisse & Braithwaite, *supra* note 63, at 483-88); *see also, e.g.*, ALVIN I. GOLDMAN, A THEORY OF HUMAN ACTION (1970); J. Angelo Corlett, *Collective Moral Responsibility*, 32 J. SOC. PHIL. 573 (2001); Jan Narveson, *Collective Responsibility*, 6 J. ETHICS 179 (2002); Stephen Sverdlik, *Collective Responsibility*, 51 PHIL. STUD. 61 (1987). *See generally* H. D. Lewis, *Collective Responsibility*, 23 PHILOSOPHY 3 (1948) (insisting "that the belief in 'individual,' as against any form of 'collective,' responsibility is quite fundamental"); J.W.N. Watkins, *Historical Explanation in the Social Sciences*, 8 BRIT. J. FOR PHIL. SCI. 104 (1957).

121. *See, e.g.*, PETER A. FRENCH, COLLECTIVE AND CORPORATE RESPONSIBILITY 45-47 (1984).

122. Narveson, *supra* note 120, at 183. In short:

> [E]very group action involves the doing of various things by individuals who, however much they may be reacting to the behavior of others, decide to do what they do, and could in principle decide otherwise . . . . Group organisms are not

opposite. They perceive a separate "collective intentionality" that can exist apart from the individuals that comprise the collective.[123] On this view, organizations

> consist of sets of expectations [about] many past and present members of the organisation. But they are also a product of the *interplay* among individuals' expectations which distinguish shared meaning from individuals' views. The interaction between individual and shared expectations, on the one hand, and the organisation's environment, on the other, constantly reproduces shared expectations. . . . Indeed, the entire personnel of an organisation may change without reshaping the corporate culture; this may be so even if the new [personnel] have personalities quite different from those of the old.[124]

Related to this philosophical debate over individualism versus collectivism is the assertion that collective entities such as corporations can be considered to be distinct actors that are more than a mere sum of their individual members and employees. Peter French has offered an oft-cited formulation for identifying what he calls "conglomerate collectivities," i.e., groups who are "admitted to full-membership in the moral community."[125] According to French, such collectives are those that contain both an "identity" of their own, separate from those of its constituent members, and a central decision-making function.[126] Such

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> related to their constituent individual members in the way that mushrooms cells are to mushrooms . . . .

Id.

123. *See, e.g.*, MICHAEL E. BRATMAN, FACES OF INTENTION: SELECTED ESSAYS ON INTENTION AND AGENCY 116 n.17 (1999) (arguing that a "collective intention" requires multiple individuals); MARGARET GILBERT, SOCIALITY AND RESPONSIBILITY: NEW ESSAYS IN PLURAL SUBJECT THEORY (2000); Neta C. Crawford, *Individual and Collective Moral Responsibility for Systemic Military Atrocity*, 15 J. POL. PHIL. 187 (2007); Toni Erskine, *Kicking Bodies and Damning Souls: The Danger of Harming "Innocent" Individuals While Punishing "Delinquent" States*, *in* ACCOUNTABILITY FOR COLLECTIVE WRONGDOING, *supra* note 63, at 261, 262; Margaret Gilbert, *Group Wrongs and Guilt Feelings*, 1 J. ETHICS 65 (1997); Margaret Gilbert, *Who's To Blame? Collective Moral Responsibility and Its Implications for Group Members*, 30 MIDWEST STUD. PHIL. 94 (2006); Tracy Isaacs, *Collective Moral Responsibility and Collective Intention*, 30 MIDWEST STUD. PHIL. 59 (2006); Jens David Ohlin, *Joint Intentions To Commit International Crimes*, 11 CHI. J. INT'L L. 693 (2011); John R. Searle, *Collective Intentions and Actions*, *in* INTENTIONS IN COMMUNICATION 401 (Philip R. Cohen et al. eds., 1990); Marion Smiley, *From Moral Agency to Collective Wrongs: Re-Thinking Collective Moral Responsibility*, 19 J.L. & POL'Y 171 (2010).

124. Fisse & Braithwaite, *supra* note 63, at 479.

125. FRENCH, *supra* note 121, at x, 13; *see also* French, *supra* note 7, at 207 ("In short, corporations can be full-fledged moral persons . . . ."). Others have suggested additional elements. For example, Erskine suggests that the decision-making capacity would also require a linked "executive function" that allows it "effectively to translate [its] decisions into action." Erskine, *supra* note 123, at 266.

126. FRENCH, *supra* note 121, at 46.

an account of a discrete corporate identity and potential culpability also provides a rational account for when and why corporate and individual actors might *each* be independently or jointly responsible for the same underlying wrongful act.[127]

This philosophical account of corporate accountability is similar to normative accounts that favor corporate accountability based on the idea that corporations possess "autonomy of action."[128] That is, because "corporations act as organizations and are not simply the sum of individuals working for them; because they have . . . the capacity to change their policies, they can be held responsible for the outcomes resulting from these policies."[129] This normative framework is thus used to justify corporate, rather than individual, liability for events like the disaster at Bhopal, in which no single individual executive might be guilty of criminal behavior, but where "higher standards of care are expected of such a company [as Union Carbide] given its collective might and resources."[130]

3. Insights from the Psychological Literature

The theoretical idea that corporations should be held to a higher standard than individuals is supported by findings in the psychological literature analyzing the way that people actually assess corporate misconduct. Research indicates that people tend to assume that an individual's culpability corresponds to the individual's inherent "badness," rather than relating to a bad corporate culture in which he might have been a part. And, relatedly, identifying a culpable ("bad") individual allows organizations to scapegoat that person as a "bad apple" and disclaim any independent responsibility for the misconduct.[131] Yet, the same psychological factors also lead juries to

127. Of course, despite the tendency to rely on another's wrongdoing to disclaim one's own, both the corporation as a collective entity and one of its individual employees or directors as an individual actor may be culpable and blameworthy with respect to a particular harm. *Cf.* Erskine, *supra* note 123, at 268. Erskine makes this point in the context of collectives versus individuals within them: "[T]he assignment of duty or the apportioning of blame at the level of the [collective] state, for example, does not allow those multifarious [individual] agents within it (such as individual citizens [or] the state leader . . .) to evade either moral expectations or censure for those discrete actions that are ascribable separately to them. Rather, moral agents at all levels can be responsible for concurrent, complementary, or even coordinated acts and omissions." *Id.*

128. Ratner, *supra* note 8, at 474 (citing Fisse & Braithwaite, *supra* note 63, at 483-93).

129. *Id.*

130. Fisse & Braithwaite, *supra* note 63, at 486.

131. GRAHAME F. THOMPSON, THE CONSTITUTIONALIZATION OF THE GLOBAL CORPORATE SPHERE? 119 (2012). As Thompson explains:

hold corporations to a lower standard than individuals when faced with corporate defendants.[132]

In attempting to understand other people's behavior, people "rely heavily on personality-based attributions."[133] This frequently causes misapprehension—a phenomenon called "the fundamental attribution error"—resulting in a "tendency when judging the actions of a person to put too little weight upon the role of the situation relative to the weight that the situation actually has in causing the behavior."[134] People are inclined to believe that "bad acts are committed by bad people rather than" as a "result of bad situations."[135] Thus, in forming judgments of others, people "are easily convinced that behavior is a reflection of the target's character."[136]

By contrast, while people "work to form an integrated, global judgment about what [an individual] person is like" in order to determine whether that individual is "good" or "bad," people are typically "less motivated to form a global impression of [a] group."[137] Global impressions of groups prove challenging because people assume that a group's members will not necessarily behave in consistent ways (vis-à-vis one another) when acting on behalf of the group.[138] Because of the difficulty in forming a global impression of a

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> Calls for resignations when things go demonstrably wrong are the conventional response. But when resignations happen, that tends to be the end of the matter. The organizations—and those ultimately in control of its destiny—tend to heave a very loud sigh of relief and think the task is complete. The 'bad apple' has been removed from the barrel. Legitimacy has been restored. But things can just 'return to normal' as a result. Resignations by those held responsible can be a way of diverting or offsetting more serious attempts to govern organizations and businesses.

Id.; *see also* James Fanto, *Organizational Liability*, 19 J.L. & POL'Y 45, 49 (2010). Fanto argues that, in fact, organizational liability threats are used primarily to "identify individuals to be sacrificed as scapegoats for the benefit of the organization" and for

> [t]he organization [to] undertake reforms, even if they lack substance, and argue to the outside world that the problem has been addressed because the 'bad apples' have been expelled. The use of organizational liability thus reflects the belief that corruption in a firm is due to 'bad apples,' and not to a perverse firm culture or business practices that in fact transcend individuals.

Fanto, *supra*, at 49.

132. VALERIE P. HANS, BUSINESS ON TRIAL: THE CIVIL JURY AND CORPORATE RESPONSIBILITY 112-37 (2000).

133. Tom R. Tyler & Avital Mentovich, *Punishing Collective Entities*, 19 J.L. & POL'Y 203, 209 (2010).

134. *Id.* at 210.

135. *Id.*

136. *Id.*

137. HANS, *supra* note 132, at 85.

138. *Id.*

group or collective entity's inherent "goodness," jurors considering questions of corporate responsibility try to reimagine corporate entities as individual people and assign them a personality.[139] In doing so, they tend to imagine corporations are able to act more competently than individuals: "[A]lthough the actions of a person and a corporation are evaluated using much the same criteria, more is expected of a reasonable corporation than a reasonable person."[140] This translates into jurors' imposing higher standards on corporations than they impose on individual defendants.[141] Thus, not only is there a strong case that corporations *should* be held to a higher standard than their employees,[142] empirical studies also demonstrate that juries in fact hold corporate defendants accountable in situations where they would not do the same were the defendant an individual.[143]

On the other hand, however, because people are likely to equate culpability with innate "badness," it is easy for an individual to be turned into a scapegoat based on his having been identified as a culpable wrongdoer.[144] In contrast, if the institution or group on whose behalf an individual is acting is deemed responsible based on its structures or culture (or other "poisoned" environment), people tend to perceive the individual actor as not culpable—regardless of whether the individual in fact carried out an act.[145] In short, people tend to view an individual or his environment—but not both—as responsible for misconduct. If individuals are held accountable, the same instinct that equates their accountability with an inherent character defect means that the organization on whose behalf they were acting is perceived not to be the cause of their behavior.[146] Capitalizing on this tendency, organizations can sometimes convincingly disclaim responsibility for an individual's wrongful conduct and insist that the problem can be solved simply by replacing the individual wrongdoer with someone "better."

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139. NEIL VIDMAR & VALERIE P. HANS, AMERICAN JURIES: THE VERDICT 278 (2007).
140. *Id.*
141. HANS, *supra* note 132, at 112-37.
142. Fisse & Braithwaite, *supra* note 63, at 485.
143. HANS, *supra* note 132, at 117-19.
144. *See, e.g.*, THOMPSON, *supra* note 131, at 119.
145. *See, e.g.*, Rachel Abrams & Peter Lattman, *Ex-Credit Suisse Executive Sentenced in Mortgage Bond Case*, N.Y. TIMES (Nov. 22, 2013, 6:37 PM), http://dealbook.nytimes.com/2013/11/22/ex-credit-suisse-executive-sentenced-in-mortgage-case.
146. *See, e.g.*, *id.*

4. The International Collectivist View

Many of these same psychological phenomena may lie at the heart of certain liability preferences expressed by international law scholars and lawyers. While the traditional rule assumes that all international legal liability will be imposed at the level of the state, both the preference for individual criminal accountability in international criminal law, as well as counterarguments favoring recognition of accountability at a collective/institutional level, mirror the psychological arguments discussed above to some extent.

Debates over collective versus individual liability have arisen in the international law context generally, both in the context of collective corporate liability as well as in the context of other forms of collective liability (including, for example, when liability is appropriately imposed, not on an individual or individuals, but on the state itself or possibly on some group-level entity under the state umbrella).[147] Indeed, arguments regarding the propriety of holding responsible only individuals, rather than collective entities below the level of the state, are at least as old as modern human rights law.

The notion that international criminal liability should attach to individuals rather than be imposed collectively on entities, such as corporations, on whose behalf the individuals were acting, can be traced directly back to the sentiment in the Nuremberg trials that justice may be served "only by punishing individuals who commit such crimes" because crimes against humanity are committed by flesh-and-blood individual actors, not by abstract collective entities.[148] Personalizing the guilt and identifying evil individual Nazis allowed people to create a narrative about the worst atrocities that conformed to the above-discussed preference to think in such terms.[149] Thus, it is no coincidence that the recent U.S. judicial decisions discussed *supra* Part II, which take the position that international law recognizes only individual, rather than collective corporate liability, cite the Nuremberg trials for the proposition.[150]

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147. *See, e.g.*, Sara L. Seck, *Collective Responsibility and Transnational Corporate Conduct*, *in* ACCOUNTABILITY FOR COLLECTIVE WRONGDOING, *supra* note 63, at 140, 142.

148. PROCEEDINGS OF THE INTERNATIONAL MILITARY TRIBUNAL SITTING AT NUREMBERG, GERMANY pt. 22, at 466 (1950).

149. *See, e.g.*, Drumbl, *supra* note 63, at 23.

150. *See, e.g.*, Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 119 (2d Cir. 2010).

Yet, although this Nuremberg-era preference for individual, rather than collective, accountability for international criminal liability[151] has been reaffirmed at the international level quite recently—for example, in the establishment of the permanent International Criminal Court—the focus on individual culpability continues to be scrutinized by scholars, following Hannah Arendt's famous suggestion that individuals who are the agents of evil may in fact be ordinary people whose actions are a product of their circumstances and the culture or subculture in which they are embedded.[152] While some continue to insist that "accounts of group action are always reducible to descriptions of the actions of their individual human constituen[cies]" and must be punished accordingly, collectivists maintain that "formal organizations might also be blamed for wrongdoing, misjudgment, neglect, or harm that is not attributable on the same scale to particular individuals within the organization."[153]

Furthermore, as Mark Drumbl points out as part of his argument that recognizing collective responsibility will better achieve postconflict justice, "atrocity crimes are group crimes characterized more by collective obedience than by individual transgression."[154] Drumbl also identifies other downsides to individual prosecution in such cases, noting that "[t]he historical narrative [created as part of an international criminal trial of an individual perpetrator] can become crimped by prosecutorial strategizing and plea bargaining."[155] "Although due process may authenticate a historical record, it may also distort it."[156]

Collectivists are also skeptical of the theory that individual accountability can lead to reconciliation and note that it lacks

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151. Of course, I mean responsibility at the level of a collective entity below the level of the state. The state is the traditional repository for international responsibility; individual criminal responsibility is an exception (albeit, one of a growing number) to that formal rule.

152. Drumbl, *supra* note 63, at 29.

153. Erskine, *supra* note 123, at 265.

154. Drumbl, *supra* note 63, at 28. As Drumbl notes, "many distinguished scholars . . . have explored the systemic nature of widespread atrocity crimes" and

> [e]xperiments by Stanley Milgram and Jerry Burger examine the human penchant to commit harm while following orders; so, too, does a televised game show modeled on the Milgram experiment . . . in which 80 percent of participants, egged on by a sadistic hostess and a chanting audience, administered electric volts to a victim until he appeared to die.

Id. at 28-29 (footnotes omitted).

155. *Id.* at 35.

156. *Id.* (citing Mirjan Damaška, *What Is the Point of International Criminal Justice?*, 83 CHI.-KENT L. REV. 329, 336 (2008)).

empirical support. For example, one commentator notes that while the truth of the proposition that personalizing guilt will make reconciliation possible in the wake of ethnic conflict has been "largely unquestioned by mainstream [international criminal law] practitioners and scholars," there is "an almost total lack of evidence of this effect in the former Yugoslavia."[157]

5. Recent Illustrative Examples

Comments made by a sentencing judge in one recent criminal case, along with the corporate response to those comments, illustrate many of the above theoretical arguments. After a plea bargain agreement resulted in the conviction of a Credit Suisse executive accused of "inflating the value of mortgage bonds as the housing market collapsed," a federal judge imposed a sentence that was only half as long as the sentence recommended by the federal sentencing guidelines.[158] The defendant was specifically accused of "mask[ing] the true value of [the] assets" he was in charge of in order "to increase his [end-of-year] bonus."[159] In deciding to impose a much more lenient sentence for the conviction arising out of this conduct, the judge indicated that he was doing so based on his sense that the defendant was a "good person" who was influenced by the toxic culture in which he found himself.[160] The judge noted that the defendant "was in a place where there was a climate for him to do what he did," specifically, "an overall evil climate inside that bank."[161] The sentencing judge lamented, "This is a deepening mystery in my work . . . . Why do so many good people do bad things?"[162]

The bank objected to this characterization and argued that the opposite was true. Rather than being a "good person" in an "evil culture," the bank alleged that the defendant was a "bad apple" within an otherwise good organization. A bank spokesman pointed out: "[W]hen regulators decided [to charge the individual bank executive but] not to charge the bank in connection with [the executive's] actions, they highlighted the isolated nature of the wrongdoing, the bank's

157. Waters, *supra* note 91, at 1351-52.
158. Abrams & Lattman, *supra* note 145.
159. *Id.*
160. *Id.*
161. *Id.* (internal quotation marks omitted).
162. *Id.* (internal quotation marks omitted).

immediate self-reporting to the government and the prompt correction of its results."[163]

Likewise, in another recent case, a judge departed downwards from the sentence recommended by the sentencing guidelines in imposing a sentence on an individual Halliburton employee who wrongfully destroyed corporate documents following the DEEPWATER HORIZON oil spill disaster in the Gulf of Mexico.[164] In sentencing the former manager to community service and a $1,000 fine, the judge noted that he thought probation was "very reasonable in this case" because the manager was "a very honorable man" who had "no doubt . . . learned from [his] mistake."[165]

B. Difficulties of Bringing Claims Against Individuals

Beyond the question of whether they are better defendants for the reasons just discussed, individual corporate defendants may simply be more difficult to prosecute. Beyond the general difficulties described below, claims against individual defendants may be particularly difficult to prosecute when they arise out of alleged misconduct by multinational corporations that impacts victims outside of the United States.[166]

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163. *Id.*

164. Michael Kunzelman, *Halliburton Manager Gets Probation in Gulf Spill*, AP NEWS (Jan. 21, 2014, 1:50 PM), http://bigstory.ap.org/article/judge-sentence-halliburton-manager-oil-spill.

165. *Id.* The sentencing of the manager followed Halliburton's own guilty plea related to this employee's conduct. Halliburton had previously agreed to plead guilty to a misdemeanor charge and "pay a $200,000 fine and make a $55 million contribution to the National Fish and Wildlife Foundation." *Id.*

166. Beyond the above jurisdictional challenges, such claims are often brought under statutes that have been the subject of multiple legal challenges, including whether they permit claims against institutional defendants, *compare* Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010) (stating that only claims against individual defendants, not corporate defendants, are actionable under the ATS), *with* Doe v. Exxon Mobil Corp., 654 F.3d 11 (D.C. Cir. 2011), *vacated*, 527 F. App'x 7 (D.C. Cir. 2013) (finding that claims against institutional defendants are actionable under the ATS), *and* Mohamad v. Palestinian Auth., 132 S. Ct. 1702 (2012) (recognizing only claims against individual defendants under the TVPA); whether (in the case of the ATS) the statute creates jurisdiction but not a cause of action, *see, e.g.*, Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) (holding that the ATS permits claims arising under the "law of nations" (e.g., customary international law) only insofar as they "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms"); Abagninin v. AMVAC Chem. Corp., 545 F.3d 733 (9th Cir. 2008) (determining that pesticide spraying that caused sterilization does not state an ATS claim because the activity was not carried out in concert with a state actor and thus does not meet the statutory requirements for a violation of "law of nations"); and follow-on litigation regarding when alleged misconduct meets the *Sosa* requirements, *compare* Abdullahi v. Pfizer, Inc., 562 F.3d 163 (2d Cir. 2009) (finding that a

To begin with, identifying precisely which individual corporate actors are arguably responsible for human rights violations will be more difficult than alleging claims against corporate entities generally. Indeed, if the decision making behind the misconduct occurred behind closed doors—and possibly on another continent from the one where the victim is located—it may take discovery to ascertain the proper defendants.

Plaintiffs may attempt to overcome this latter difficulty by naming John Doe defendants.[167] How successful they will be remains unclear. In some cases, plaintiffs may have access to enough information to accuse an organization of misconduct without being able to properly allege actionable misconduct by any individual. Plaintiffs may risk dismissal based on a perception that individual malfeasance is less plausible than organizational malfeasance—especially in the wake of *Ashcroft v. Iqbal*.[168] In addition, a suit against a John Doe defendant is more likely to be dismissed on statute of limitations grounds than a suit against a named person. Most courts have held that Rule 15's "relation back" rule does not apply to John Doe defendants.[169]

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drug company's failure to obtain informed consent to testing of experimental drug meets the *Sosa* standard with citations to Nazi Germany medical testing), *with* Arias v. Dyncorp, 517 F. Supp. 2d 221 (D.D.C. 2007) (rejecting various motions to dismiss and for summary judgment by defendants in a case alleging harmful effects on local populations from herbicide spraying of cocaine fields in Colombia).

167. As noted above, there has been a rising incidence of claims brought against John Doe defendants, especially since the development of the yet-to-be-resolved circuit split regarding corporate entity liability under the ATS. Depending on how it is resolved, bringing claims against individuals may become the sole mechanism for alleging claims arising directly under the ATS. *Kiobel*, 621 F.3d at 111. *But see* Hoffman & Stephens, *supra* note 23, at 16 (discussing the possibility of state tort claims that will often be able to be brought in federal court on diversity grounds).

168. 556 U.S. 662 (2009).

169. Federal Rule of Civil Procedure 15(c)(1) provides:

> An amendment to a pleading relates back to the date of the original pleading when . . . the amendment changes the party or the naming of the party against whom a claim is asserted . . . and if . . . the party to be brought in by amendment . . . knew or should have known that the action would have been brought against it, *but for a mistake concerning the proper party's identity*.

FED. R. CIV. P. 15(c)(1) (emphasis added). The courts of appeals have mostly interpreted the "mistake" requirement to mean that a John Doe defendant does not qualify for "relation back" because using the John Doe name is not the result of a "mistake" about the person's identity but is owing to a lack of knowledge about the person's true identity. *E.g.*, Powers v. Graff, 148 F.3d 1223, 1226-27 (11th Cir. 1998); Jacobsen v. Osborne, 133 F.3d 315, 320 (5th Cir. 1998); Cox v. Treadway, 75 F.3d 230, 240 (6th Cir. 1996); Barrow v. Wethersfield Police Dep't, 66 F.3d 466, 469 (2d Cir. 1995); Wilson v. U.S. Gov't, 23 F.3d 559, 563 (1st Cir. 1994);

Personal jurisdiction is also less likely to be available over an individual defendant employed by a multinational corporation than over the corporation itself. A corporation that engages in global business and has offices or other facilities located in many different countries, including the United States, may be subject to personal jurisdiction in some court in the United States.[170] Individual defendants, by contrast, will frequently lack sufficient connection to a jurisdiction within the United States. Multinational corporations with operations in the United States may have individual officers, directors, and employees with domiciles across the globe. An individual's connection to corporate behavior that aids the commission of human rights violations may not create sufficient contacts with any particular state in the United States to subject the person to personal jurisdiction[171]—even when the corporate conduct in which he or she engaged was a crucial part of an overall corporate scheme or project that does give rise to personal jurisdiction over the corporate entity in the United States.

V. THEORETICAL ADVANTAGES OF IMPOSING LIABILITY ON INDIVIDUAL CORPORATE ACTORS

While the many drawbacks summarized in Part IV have dominated the strategies adopted by U.S. human rights plaintiffs to date, there is another side to the story. This Part considers the potential benefits of claims being brought against individual corporate actors, as opposed to their corporate employers.

To begin with, although identifying individual defendants may be more difficult and initially require plaintiffs to name John Doe defendants, there are some benefits to doing so, from the perspective of plaintiffs seeking additional ways to put pressure on corporations—especially if corporate parties are not able to be joined in the litigation. In addition, there are a number of potential benefits to suits against individuals, all of which have either been overlooked or dismissed too

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Worthington v. Wilson, 8 F.3d 1253, 1257 (7th Cir. 1993); W. Contracting Corp. v. Bechtel Corp., 885 F.2d 1196, 1201 (4th Cir. 1989).

170. *See, e.g.*, Daimler AG v. Bauman, 134 S. Ct. 746 (2014); *see also* Transcript of Oral Argument at 3, Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013) (No. 10-1491), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-1491rearg.pdf (addressing whether the personal jurisdiction challenge had been waived or remained an issue in the case).

171. *See* J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2798-804 (2011) (Ginsburg, J., dissenting).

quickly in the above theoretical accounts. Each of these benefits is discussed below.

A. Potential Strategic Advantages of Claims Against John Doe or Named Individuals

As discussed in Part IV.B, *supra*, individual claims may be harder to bring in part because the identities of the individual corporate agents responsible for human rights violations are not obvious to prospective plaintiffs. For the reasons discussed above, there are drawbacks to naming John Doe defendants—particularly in situations where there may not be enough information to make out a cause of action against an individual or individuals or where the statute of limitations may present an obstacle to proceeding if the true identity of a John Doe defendant is not discovered until after the limitations period has expired. Yet, there may also be some short-term strategic advantages to doing so when compared with suits against known entities.

Naming John Doe defendants might sometimes offer plaintiffs the ability to obtain discovery immediately.[172] Precisely because statutes of limitations are highly significant in the case of claims filed against John Doe defendants, a plaintiff may have a good argument that a court should first, even before considering any legal challenges that defendants may raise, issue an order allowing the plaintiff to obtain discovery to uncover the John Doe defendants' real identities and facilitate the plaintiff's ability to substitute their real identities before a looming statute of limitations would bar the plaintiff's claim(s).

In some cases—where numerous individuals are potential John Doe defendants—a plaintiff may have a compelling argument that the corporate entity or entities that employed the individual defendant(s) should turn over as much information as the plaintiff needs to be able to understand who was responsible for various decisions that were made in connection with the alleged human rights violations. This could result in plaintiffs being able to obtain tremendous amounts of information. Forcing corporations to turn over this information will simultaneously be a burden that many corporate defendants have heretofore avoided—and that they would likely prefer not to have to deal with—and would help plaintiffs to find answers they may be seeking to piece together the story behind their injuries.

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172. *See, e.g.*, Cahill v. John Doe—No. One, 879 A.2d 943 (Del. Super. Ct. 2005).

Furthermore, the pressure that this kind of discovery would put on corporate employers would not be limited to cases in which corporations are named as codefendants. Even in cases where courts have already ruled that individuals are the only appropriate defendants, their corporate employers may still be required to turn over relevant documents that are in their (rather than the individual defendants') possession.[173] Thus, even if corporate defendants are not able to be sued directly, naming individual corporate defendants provides a potential avenue for involving corporations in a judicial action and, in addition, obtaining discovery from them.[174]

B. Impacts of Individual Liability on Corporate Accountability

While U.S. litigation involving corporate malfeasance often focuses on claims against corporate or other organizational defendants, this is not the only model. Claims against individual corporate officers have long been the norm in other jurisdictions and occur with increasing regularity in other litigation contexts even within the United States. Although the traditional arguments in favor of corporate liability, summarized above, suggest that litigating directly against corporate entities has significant benefits, proceeding against individual corporate agents instead—or in addition—may have significant benefits as well. This Subpart reviews the arguments that have been made in favor of individual liability and suggests some additional arguments in favor of individual liability that have not been previously discussed in the context of corporate human rights litigation.

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173. Of course, this requires that the corporation be subject to the jurisdiction of a U.S. court's subpoena authority. *See* FED. R. CIV. P. 45 (authorizing federal courts to issue subpoenas upon, inter alia, third parties to a litigation that have relevant documents); Gonzalez v. Google, Inc., 234 F.R.D. 674 (N.D. Cal. 2006) (ordering Google to turn over documents). But, any case in which the corporation is not subject to the subpoena power of *any* court may be a case in which the corporation could not have been directly sued anyway because of a lack of personal jurisdiction or—in the ATS context—because of a failure to meet the "touch and concern" requirement. *See Kiobel*, 133 S. Ct. 1659.

174. This will obviously be much easier to accomplish in cases where the corporation is subject to the jurisdiction of a U.S. court. Most other jurisdictions do not grant plaintiffs the sweeping discovery rights they have in U.S. federal courts and many state courts are modeled after the federal system. But, if they are subject to jurisdiction, a court can compel discovery of both parties and nonparties, even where documents or witnesses are located in other countries. *See* Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for the S. Dist. of Iowa, 482 U.S. 522, 541 (1987) ("[T]he text of the Convention draws no distinction between evidence obtained from third parties and that obtained from the litigants themselves . . . ."); *In re* Vivendi Universal, S.A. Sec. Litig., No. 02CIV5571RJHHBP, 2006 WL 3378115, at *1 (S.D.N.Y. Nov. 16, 2006).

1. Arguments from Debates over Criminal Corporate Entity Liability

As discussed above, American law has traditionally looked favorably on the imposition of corporate liability as a regulatory device. Yet, although common law countries have long included criminal law sanctions as part of the corporate regulatory regime,[175] most civil law jurisdictions have refused to do so until very recently.[176] Even now, "Several civil law jurisdictions in continental Europe still make no provision for criminal liability of corporations (legal persons) in their penal codes . . . ."[177]

Reasons underlying this discomfort with corporate criminal liability are several. They include, for example, a perceived theoretical disconnect between the culpable mental state required for criminal law culpability, which does not map easily onto corporations which, as "mere legal fiction[s]," arguably possess no mental state.[178] In addition, some argue that "crime is necessarily an *ultra vires* act of a corporation; liability cannot be imputed to a corporation because a corporation cannot be legally formed for the purposes of committing a crime."[179] Finally, the traditional justifications for criminal punishment—deterrence, retribution, and rehabilitation—are considered to be unlikely to be met in the case of corporations because

175. Even in the United States and other common law jurisdictions, commentators have endorsed a system of individual, as opposed to corporate, accountability. *See, e.g.*, Fisse & Braithwaite, *supra* note 63, at 473 n.27 (collecting citations in support of this position). Vice President Joe Biden (whose position at the time of his statement as senator of the corporate-friendly state of Delaware might have influenced his views) has endorsed this approach, reportedly asserting, "Any system to control behavior must focus on personal accountability for wrongdoing." *Id.* at 473 n.32 (quoting Joseph Biden Jr., Chairman, Senate Judiciary Comm., The Challenge of Institutional Responsibility, Address Before New York Law School (Jan. 28, 1986), *in Biden 1986 Speech Indicates Strong Stance Against Corporate Crime*, CORP. CRIME REP., Sept. 21, 1987, at 1, 6); *accord* Michael W. Caroline, *Corporate Criminality and the Courts: Where Are They Going?*, 27 CRIM. L.Q. 237 (1985).

176. Seck, *supra* note 147, at 142; *see also* Beale, *supra* note 80, at 1482 ("[A] comparative review reveals something that may come as a surprise: in other countries, the focus in the past several decades has been on the creation of corporate criminal liability in jurisdictions in which it did not exist . . . ."). Brent Fisse and John Braithwaite characterize early Continental criminal theory as having a "preoccupation with individual criminal liability." Fisse & Braithwaite, *supra* note 63, at 475.

177. Seck, *supra* note 147, at 143 (citing CELIA WELLS, CORPORATIONS AND CRIMINAL RESPONSIBILITY (2d ed. 2001)).

178. *Id.* at 143-44; *see also* V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1479-80 (1996) (referring to corporations as "juristic fiction[s]").

179. Seck, *supra* note 147, at 143; *see also* Khanna, *supra* note 178, at 1480 (noting that under the "ultra vires doctrine . . . courts would not hold corporations accountable for acts, such as crimes, that were not provided for in their charters").

"[i]n practice, fines [levied as criminal punishment] are often too low to have any deterrent effect"[180] and "[f]ines do not promote the structural reforms and systemic change necessary for rehabilitation."[181] Furthermore, "Deterrence also presumes that a diligent principal can control the behavior of corporate agents, yet fear of individual criminal liability may do a better job."[182]

Those favoring individual officer liability point out that while corporations or other firms might have incentives to make structural changes to avoid civil or criminal liability going forward, there may be no incentive—or even a disincentive—for corporate employers to punish individual employees for wrongful acts that have already occurred.[183] Thus, if corporations are the only ones being sued, individual wrongdoers may not be sanctioned even if their employers are.[184] Even in cases where they are held liable themselves, "companies have strong incentives not to undertake extensive disciplinary action. In particular, a disciplinary program may be disruptive, embarrassing for those exercising managerial control, encouraging for whistle-blowers, or hazardous in the event of civil litigation . . . ."[185]

Arguments such as these have been relied upon to claim that entity liability by itself is insufficient to promote deterrence. This was the view adopted by the DOJ, for example, when it began in 2007 to initiate more individual prosecutions, rather than continuing to focus predominantly on charging corporate entities under the Foreign Corrupt Practices Act (FCPA).[186] The DOJ explicitly stated that this

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180. Seck, *supra* note 147, at 144.

181. *Id.* at 145.

182. *Id.* at 144; *see also* Howard E. O'Leary, Jr., *Corporate Criminal Liability: Sensible Jurisprudence or Kafkaesque Absurdity?*, CRIM. JUST., Winter 2008, at 24, 27 ("The goal of deterrence is obviously best served by prosecuting the individual criminal actors who can and do go to jail.").

183. Fisse & Braithwaite, *supra* note 63, at 472; Seck, *supra* note 147, at 147.

184. *See* Fisse & Braithwaite, *supra* note 63, at 469.

185. *Id.* at 472 (footnotes omitted) ("[T]he law has failed to provide adequate means for ensuring that corporate defendants are sentenced in a manner directly geared to achieving internal accountability.").

186. *Mendelsohn Says Criminal Bribery Prosecutions Doubled in 2007*, CORP. CRIME REP. (Sept. 16, 2008), http://www.corporatecrimereporter.com/mendelsohn091608.htm (noting the intentional decision to ramp up prosecutions of individuals in 2007); Roger M. Witten et al., *The Increased Prosecution of Individuals Under the FCPA: Trends and Implications*, WILMERHALE, http://www.wilmerhale.com/uploadedFiles/WilmerHale_Shared_Content/Files/Editorial/Publication/The%20Increased%20Prosecution%20of%20Individuals%20Under%20the%20FCPA_Bloomberg.pdf (last visited Jan. 22, 2015) ("In 2007 and 2008, the Department of Justice ('DOJ') and Securities and Exchange Commission ('SEC') brought cases against over 30 individuals, substantially more than in prior years. That trend

was an intentional departure from prior practice, reflecting its view that in order for the statute "to have a credible deterrent effect, people have to go to jail."[187]

2. Direct Regulatory Effects of Individual Liability Threats on Individual Decision Making

Part of the rationale underlying the view just described is the idea that direct liability threats may inspire individual, high-level corporate decision makers to make different decisions than they would if liability were perceived to be solely or primarily a threat to the corporation itself. Such individual liability threats may impact an individual's decision-making process, as well as change some of the variables that are part of the high-level official's decision-making calculus.

In general, an individual is likely to be more risk-averse when making decisions that impact him, rather than others or the group.[188]

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has continued in 2009."); *see also FCPA Update: Year End 2013*, MAYER BROWN 5 (Jan. 24, 2014), http://www.mayerbrown.com/files/Publication/5d5ded07-f423-4416-8be8-f4fb9fa60d5b/Presentation/PublicationAttachment/0d1466e7-26a7-4583-ab1c-f73762e2eba6/UPDATE_FCPA_Update_2013_End-of-Year.pdf (noting, in January 2014, the "long-standing trend . . . by the DOJ and SEC [to] hold[] individuals responsible for FCPA violations—not just their corporate employers").

187. *Mendelsohn Says Criminal Bribery Prosecutions Doubled in 2007*, *supra* note 186. The DOJ policy change was alleged not to go far enough when, after announcing its intention to prosecute more individuals, officials initially charged only Siemens AG, but not any individuals within the company, for significant FCPA violations. In the wake of the Siemens prosecution, Congress held hearings to investigate prosecutorial practices under the FCPA generally and to criticize the handling of the Siemens prosecution specifically. *See* Palazzolo, *supra* note 18 ("[A] multimillion dollar criminal fine against a corporation 'doesn't amount to a whole lot' without prison sentences for the corporate officials who committed the crime." (quoting Sen. Arlen Specter)). In fact, the DOJ subsequently charged eight individual Siemens officials for FCPA violations arising out of the same events that led to the corporate settlement. *See* Wyatt, *supra* note 18.

In a similar vein, the DOJ has recently begun "focusing its criminal resources on the professionals who advised and enabled their clients to evade or avoid taxes." Schumacher, *supra* note 87, at 512. As Scott Schumacher describes:

> [I]nstead of pursuing taxpayers who claimed hundreds of millions of dollars in phony losses, the government decided to go after the accounting firms, law firms, and professionals who advised these taxpayers. And these were not just any firms. The government proceeded criminally against professionals from some of the leading law and accounting firms, including KPMG, Ernst & Young, Brown & Wood, and Jenkens & Gilchrist. These cases garnered mixed results for the government, with the government getting some notable victories, but also some high-profile losses. In the process, however, the government effectively shut down the tax shelter industry and fundamentally changed tax practice.

Id. at 512-13 (footnotes omitted).

188. *See, e.g.*, Robert J. Rhee, *Tort Arbitrage*, 60 FLA. L. REV. 125, 152 (2008) ("It is true that the agents acting within a corporation may be risk averse, and this preference may

This is so even in situations where the decision about the risk to the group may be more accurate. In short, in some situations at least, an individual may be more likely to overestimate risks, and less apt to undertake them, when the risk is a personal one.

Psychologists have observed a related phenomenon as well. Group decision making is more likely to lead to decisions accepting hazardous risks that individual members would reject (even on behalf of the group) if making the same decision in isolation.[189] However, the one variable that apparently does reduce reckless "groupthink" is whether the group contains an influential member who is particularly risk-averse.[190] Thus, a real threat of individual liability—especially for upper-level employees—may increase the chance that an influential member of the decision-making group will be more risk-averse because of the potential personal impact on that individual.

In addition, beyond the risk of ultimate liability, individual decision makers may take into account the threat of suits being brought and the attendant consequences of defending them.[191] Responding to a lawsuit and potentially to discovery requests may take time and energy that cannot be off-loaded to lower-level employees who may ordinarily be assigned, for example, to research information needed to draft an answer to a complaint, to collect documents in response to discovery requests, or to be deposed as a corporate designate. While individual officials may be able to obtain assistance from their underlings with respect to some of these same tasks,[192] the ultimate onus will be on the higher-level officials to provide accurate responses. Any lawsuit filed directly against a high-ranking individual is likely to occupy a good deal more of his time and mental energy than one against the corporation for which he works. This will be even more likely to be the case where the individual corporate actor left the corporation

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manifest in corporate decisions. . . . To the extent that a decision personally affects the agent, such as promotion and salary or the opportunity to shirk, the stake may induce an agent to act according to her preference . . . ."); *see also* Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 504 n.15 (1991) (noting that individual officer defendants are more risk-averse than entity defendants in securities class actions).

189. *See, e.g.*, IRVING L. JANIS & LEON MANN, DECISION MAKING: A PSYCHOLOGICAL ANALYSIS OF CONFLICT, CHOICE, AND COMMITMENT 423 (1977).

190. *Id.*

191. *See, e.g.*, Rhee, *supra* note 188, at 152.

192. The ability of an individual to off-load these tasks does not extend, for example, to a deposition, should litigation reach that stage. While a corporation has the choice of who to designate (assuming the person to be qualified to speak on behalf of the corporation with respect to the subject matter of the deposition), an individual defendant will not have the same choice.

before it was sued. And if suits against individuals become more commonplace, the consequences of engaging in wrongful conduct will be perceived to be greater and thereby impact the decision-making calculus.[193]

3. Potential for Increased Private Regulation and Monitoring

An increased threat of individual liability may also have regulatory side effects. For instance, to the extent that an individual's liability risk is perceived to be real and substantial, individual corporate officers may demand that corporations either indemnify or provide insurance against that risk. In the former instance, the risk to the individual would simply become the corporation's, to the same extent as in a traditional suit targeting the corporate entity.[194] In the latter case, in theory, insurance companies could end up serving as regulators, imposing requirements and standards on corporate entities in exchange for lower premiums or as a contractual requirement of the policy.[195]

Insurance agreements commonly create incentives to develop standards for corporations to obey and incentivize compliance with those standards. Insurers often reduce premiums for those who can demonstrate they are in compliance with the regulations that are the subject of the policy.[196] Policies also sometimes create contractual

193. The doctrine of qualified immunity exists precisely because of the risk that liability threats will impact an individual official's decision making. *See, e.g.*, Triad Assocs., Inc. v. Robinson, 10 F.3d 492, 499 (7th Cir. 1993) (asserting that the benefits of providing officials with "breathing room" outweighs the price of "reduced accountability" for wrongful conduct in which they engage).

194. Corporations may have an easier time obtaining insurance for an individual than for the entire corporation. Indeed, insurance policies covering the risk of corporate liability may be difficult to obtain or be insufficient to cover the risk. In the case of Unocal, for example, claims against one of its subsidiaries were subject to a $20 million insurance policy. *See* Douglas M. Branson, *Holding Multinational Corporations Accountable? Achilles' Heels in Alien Tort Claims Act Litigation*, 9 SANTA CLARA J. INT'L L. 227, 240 (2011). But the policy, held by Myanmar Insurance, proved very difficult to reinsure in the London market: "No London syndicate would assume the risk unless [they] in turn could re-insure it"—which the syndicate was ultimately able to do only through a company, Pickwick Insurance, owned by Unocal. *Id.* at 240-41. "Unocal merely transferred the risk from the left to the right pocket." *Id.* at 241.

195. *Cf.* Neil Gunningham, *Environmental Management Systems and Community Participation: Rethinking Chemical Industry Regulation*, 16 UCLA J. ENVTL. L. & POL'Y 319, 436 (1998) ("Commercial third parties, such as insurance companies . . . , may also serve as surrogate regulators, enforcing their interests through withdrawal or denial of insurance . . . .").

196. *See* Bradley C. Karkkainen, *Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm?*, 89 GEO. L.J. 257, 324 (2001) ("[F]irms participating in Responsible Care saw their insurance premiums fall by ten percent

obligations to comply with public regulatory standards—or even impose more stringent standards.[197] In the context of environmental insurance policies, for example, such contractual duties create incentives for insureds "to engage in pre- and post-closing self-monitoring and implementation, and insurers . . . to conduct pre-closing monitoring and post-closing monitoring and enforcement."[198]

Clifford Holderness claims that insurance policies similarly have the potential to play an important "role in monitoring the board of directors and top managerial teams."[199] To begin with, he argues, when an insurance company is deciding whether or not to issue a policy, it can investigate "the firm's past actions, occasionally require[] changes in the board, and set[] conditions for directors and officers to observe."[200] If allegations of misconduct arise after a policy is in place, "the insurer through its defense efforts can serve as an independent external investigator of not only the accused official but the entire board and top managerial team"—as well as of the corporation itself.[201]

While insurance companies apparently do monitor insureds' behavior on an ongoing basis in at least some contexts,[202] this type of monitoring may in fact be unlikely to occur in the context of policies purchased to cover director & officer (D&O) liability. Tom Baker and Sean Griffith report findings of a quantitative empirical study of "over forty people in the D&O insurance industry—including underwriters, actuaries, claims managers, brokers, lawyers, and corporate risk

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on average, and in some cases as much as fifty percent."); *Responsible Care® Progress Report 2000*, GREENBIZ.COM 36, https://www.greenbiz.com/sites/default/files/document/O16F9640.pdf (last visited Jan. 22, 2015). The chemical industry's adoption of the Responsible Care environmental management program was motivated in part by the opportunity to obtain lower insurance premiums. *See* Gunningham, *supra* note 195, at 402-03.

197. Michael P. Vandenbergh, *The Private Life of Public Law*, 105 COLUM. L. REV. 2029, 2063 (2005).

198. *Id.* at 2063-64; *accord* Clifford G. Holderness, *Liability Insurers as Corporate Monitors*, 10 INT'L REV. L. & ECON. 115, 127 (1990).

199. Holderness, *supra* note 198, at 116.

200. *Id.*

201. *Id.*

202. Vandenbergh, *supra* note 197, at 2064 (citing NEIL GUNNINGHAM & PETER GRABOSKY, SMART REGULATION: DESIGNING ENVIRONMENTAL POLICY 118-20 (1998)) ("[C]oncerns among marine insurance underwriters about the adequacy of government inspections of vessels have led them to employ marine inspectors to survey ships that they are considering insuring."); *see also* Paul K. Freeman & Howard Kunreuther, *The Roles of Insurance and Well-Specified Standards in Dealing with Environmental Risks*, 17 MANAGERIAL & DECISION ECON. 517, 529 (1996) (noting that in the environmental context, insurers monitor their insureds' activity on an ongoing basis).

managers" from which they conclude that D&O insurers in fact do not monitor corporate governance.[203] Baker and Griffith posit:

> [T]he existing form of corporate D&O insurance both results from and contributes to the relatively weak constraints on corporate managers. Corporate managers buy this form of coverage for self-serving reasons, and the coverage itself, because it has almost no means of controlling . . . moral hazard, reduces the extent to which shareholder litigation aligns managers' and shareholders' incentives.[204]

4. Benefits of Personalizing the Narrative

The previous Part noted international collectivist arguments favoring corporate liability in the international criminal law context. Many of these arguments focus on the actual role played by corporations and the psychological misperception equating culpability for wrongful conduct with an individual's inherent "badness." Reflecting reality or not, however, this psychological perception is a documented human impulse. Moreover, it apparently prevents people from concluding that entities are accountable in situations in which harm appears to arise from evil intent, such as when a human rights atrocity has been committed.[205] Thus, personalizing the wrongdoer may be the best way of achieving accountability in many human rights cases; allowing plaintiffs to craft the personalization of the narrative may be empowering as well as beneficial.

As discussed above, psychologists have demonstrated the difficulties associated with perceiving organizational, rather than individual, misconduct.[206] In short, "[t]he human framework for understanding wrongdoing is tailored to evaluate the behavior of individuals."[207] As a consequence, "blaming a person is more psychologically fulfilling than blaming an impersonal set of organizational or situational forces."[208]

This is the flip side of the "bad apple" argument discussed in Part IV. That is, a corporation or other collective entity may be able to disclaim responsibility if an individual is held responsible. Yet, precisely because people *want* to find a "bad" person on whom to pin

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203. Tom Baker & Sean J. Griffith, *The Missing Monitor in Corporate Governance: The Directors' and Officers' Liability Insurer*, 95 GEO. L.J. 1795, 1798-99 (2007).

204. *Id.* at 1800.

205. Tyler & Mentovich, *supra* note 133, at 212-14.

206. *Id.* at 205.

207. *Id.*

208. *Id.* at 214.

blame,[209] an individual may in the most egregious cases be the only "acceptable" defendant from the perspective of a fact finder seeking the right actor on whom to place responsibility.[210] While corporations are more likely to be held responsible in cases involving negligence,[211] juries are actually *less* likely to hold them accountable in cases understood to require an inherently evil intent (as opposed to irresponsible or negligent conduct).[212]

In fact, it has been demonstrated that moral approbation is arguably greater when wrongful conduct can be attributed to a specific individual rather than to an organization. That is, personalizing the corporate policy and revealing the individual decision maker causes people—be they jurors, judges, or simply members of the public hearing about the human rights violation—to be both "more inclined and better able to morally evaluate [the] conduct" under consideration.[213] Thus, "promoting accountability for [organizational misconduct]" will be better achieved with "more transparen[cy] with respect to the people behind the decision making and the policies in the organizations instead of presenting people, insiders or outsiders, with abstract entities they cannot morally evaluate."[214]

In addition to increasing the chances of accountability, proponents of individual liability in the context of international criminal law embrace the idea that "[t]he personalization of guilt" will "move societies subjected to atrocity beyond collective, ethnic formulations of conflict and make reconciliation possible."[215] While the lack of empirical support for this proposition has been noted in at least some of the most significant contexts in which it has been invoked,[216] the possibility that reconciliation may be more likely to occur between those who live near corporations that have been responsible for or complicit in human rights violations to community members cannot be completely dismissed. The critique of reconciliation in cases of ethnic atrocities between groups with long-standing mutual hostilities may not apply in the same way to corporate

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209. NEAL FEIGENSON, LEGAL BLAME: HOW JURORS THINK AND TALK ABOUT ACCIDENTS 212-13 (2000).

210. Tyler & Mentovich, *supra* note 133, at 212-14.

211. HANS, *supra* note 132, at 114.

212. Tyler & Mentovich, *supra* note 133, at 212-14.

213. *Id.* at 229.

214. *Id.*

215. Waters, *supra* note 91, at 1351.

216. *Id.* at 1351-52 (expressing skepticism about reconciliation in the context of prosecutions before the International Criminal Tribunal for the Former Yugoslavia and noting a lack of empirical support that ethnic reconciliation has resulted).

culpability in the commission of human rights violations—at least not in every case.

Proceeding against individuals not only allows victims to access the potential benefits of a narrative that personalizes wrongdoing in the form of an individual or individuals, it also gives them the power to help create and shape the narrative. At least in common law jurisdictions, plaintiffs bringing civil litigation often have choices about who to name in the litigation and what theories to pursue. Naming individual defendants and creating a narrative about the personal role of individuals puts the narrative-making authority in the hands of the victims, rather than allowing it to be crafted solely by others.

In addition, naming individual defendants may also increase the likelihood that a public record will be created. In some contexts, at least, individuals are less likely than their corporate employers to settle.[217] A trial, rather than a confidential settlement, will not only lead to a public factual record, but to better development of legal standards by courts.[218]

5. Recent Illustrative Examples

While claims against corporate entities have occupied a great deal of attention in discussions of human rights litigation in the United States, it is not the only model for holding corporations accountable, as the above discussion illustrates. Recent cases in the United States, as well as in countries with a history of focusing on individual corporate agents, show that this model is feasible and, in some cases, may be the primary or only mechanism for holding corporations accountable.

For example, in *Does v. Chiquita Brands International, Inc.*,[219] plaintiffs brought suit not just against Chiquita and its Colombian

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217. Witten et al., *supra* note 186 ("[U]nlike companies, individuals are more likely not to settle and to go to trial, despite the fact that trials on FCPA charges are a daunting prospect . . . .").

218. *Cf. id.* ("Current FCPA 'law' comes largely from uncontested, settled proceedings. Because prosecuting more individuals will lead to more trials and more litigation, the government's theories of FCPA jurisdiction, culpability, and other issues will be subjected to judicial scrutiny and review. Undoubtedly, this will lead to more published FCPA cases and the body of FCPA law will grow and be refined.").

219. Complaint, Does v. Chiquita Brands Int'l, Inc., No. 9:11-cv-80405-KAM (S.D. Fla. Mar. 21, 2011), *available at* https://www.bloomberglaw.com (click "Dockets"; type "U.S. District Court for the Southern District of Florida" into the "Court" field; type "9:11-cv-80405" into the "Docket Number" field; run the search and select the only result; then select "3" under "Docket Proceedings").

subsidiary,[220] but also against fifteen "John Doe" defendants.[221] The Complaint goes on to detail corporate activities in furtherance of the alleged human rights violations and specifically mentions actions taken by some "top managers" who were based in the United States, as well as by local Colombian employees whose specific identities were not known.[222]

In Germany, a criminal complaint was filed against a senior manager of a Swiss/German manufacturer alleged to have aided and abetted grave human rights violations against local Congolese community members who lived near the corporation's operations in the DRC.[223] The alleged underlying human rights violations involved direct actions undertaken by Congolese police and military forces who reportedly "inflicted grave bodily harm, raped women and girls, arrested 16 people and destroyed property."[224]

The complaint against the manager stems from his alleged role in assisting the security forces who committed the violations in the form of "financial and logistical help," including transport and payment, from a Congolese subsidiary of the Swiss/German corporation, the Danzer Group. According to witnesses, the police and military personnel involved in the alleged violations "were transported to the village using [company] vehicles, . . . a [company] vehicle transported detained villagers to prison after the incident and . . . a local company manager paid the security personnel accompanying the detainees."[225] At the time the violations occurred, the corporate subsidiary "had been in a long-running dispute with the community over the company's repeated failure to fulfill the social commitments set out in a contract between the community and the company, as required by Congolese law."[226] Furthermore, while the Danzer Group has stated that "they would have refused to allow their vehicles to be used had they known their intended use or consequences,"[227] an attorney affiliated with one

220. *Id.* ¶¶ 268-269.

221. *Id.* ¶ 270 (alleging that the defendants were named under fictitious names because the plaintiffs were "ignorant of the true names and capacities of the Defendants" and planned to "amend this Complaint to allege the Does' true names and capacities when ascertained").

222. *See, e.g.*, *id.* ¶¶ 270, 297.

223. *Criminal Complaint Filed Accuses Senior Manager of Danzer Group of Responsibility over Human Rights Abuses Against Congolese Community*, EUR. CENTER FOR CONST. & HUM. RTS. (Apr. 25, 2013), http://www.ecchr.de/danzer-en.html.

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

of the NGOs that filed the complaint contends that the Congolese security forces' propensity to engage in human rights violations, especially involving sexual violence, was well known and therefore, "[t]he European parent companies of firms operating in such environments must adapt their risk management strategy accordingly and must ensure that they are neither directly nor indirectly involved in human rights violations."[228]

One commentator has noted the necessity of prosecuting the individual manager because German criminal law does not provide a mechanism for claims to be brought against corporate entities.[229] Instead, in order to pursue relief for victims of corporate decision making, prosecutors will have to rely on "[t]he concept of the liability of company executives (Geschäftsherrenhaftung) developed in German jurisprudence," which "provide[s] in principle for the liability of leading employees of a company."[230]

VI. MATCHING CORPORATE ACCOUNTABILITY TO HUMAN RIGHTS GOALS

Just as the plaintiffs argued to the Supreme Court in *Mohamad* and *Kiobel*, the Danzer Group litigation discussed above has been held up as an example of the shortcomings and failures inherent in relying on an individual-only liability model in the human rights context. In discussing the case, Anna von Gall, an attorney affiliated with one of the NGOs that initiated the complaint against the Danzer Group manager, has made many of the arguments discussed above. She argues, for instance, that "in cases where the legal responsibility for a company's internal risk management cannot be neatly attributed to an individual person, there lacks any basis for corporate liability."[231] Arguments like these have prompted changes in some civil law jurisdictions. Thus, at roughly the same time that U.S. courts have frequently concluded that individual accountability, rather than corporate accountability, is the only approach authorized by customary international law and the federal statutes that have been the vehicle for such claims, foreign jurisdictions are expanding their approach to

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228. Anna v. Gall, *Criminal Complaint Filed over German-Swiss Corporate Human Rights Abuses in Congo*, INTLAWGRRLS (June 3, 2013), http://ilg2.org/2013/06/03/criminal-complaint-filed-against-german-swiss-corporation-for-human-rights-abuses-in-congo/.

229. *Id.*

230. *Id.*

231. *Id.*

corporate liability[232] or are being called upon to do so by human rights advocates.[233]

As discussed in Part IV, there are many arguments in favor of institutional-level liability for corporations.[234] In general, allowing corporations to be sued and held responsible as separate entities allows recognition of the institutional factors that contribute to decision-making failures that may not be attributable to any one individual or even to specified individuals. Despite the psychological desire to attribute wrongdoing to an individual and associate evil results with nefarious motives and inherent character defects, there is a great deal of strong evidence supporting the contention that organizational factors, and group dynamics within them, in fact drive organizational decision making and consequent actions.

But the strength of these arguments in the specific context of corporate human rights litigation should be assessed not just with respect to arguments that have been propounded in reference to corporate litigation generally, but also with specific reference to the goals and context of this type of litigation in particular. Furthermore, as Part V reflects, the analysis should take into account not just the benefits of institutional liability, but also the unique regulatory benefits of individual-level liability threats. Such benefits ultimately compel the determination that it is worthwhile to bring claims against individuals, as well as corporate entities, when institutional liability is not available—and, perhaps even more significantly, that it is worthwhile to bring claims against individual corporate agents and invest resources and attention on such claims, even when institutional liability *is* available.

This Part reaches this conclusion by unpacking the implications of the previous Parts. It does this by first exploring the particular benefits and drawbacks of prosecuting claims not just against corporate entities or their individual agents, but also against both simultaneously. After doing so, the Part then demonstrates that although convincing courts to embrace corporate-level liability ultimately makes sense, the value of institutional, as opposed to individual, liability is far from clear-cut.[235] Instead, taking into account

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232. *See, e.g.*, Beale, *supra* note 80, at 1482 (noting that other jurisdictions have recently began to embrace and expand corporate criminal liability).

233. *See, e.g.*, Gall, *supra* note 228.

234. *See supra* Part IV (addressing arguments for institutional liability).

235. As discussed in more detail *infra* this Part, this point is focused mainly on the *regulatory* potential of institutional liability as well as its sometimes better "fit" with many of the goals of human rights litigation. In some cases, of course, especially in the United States,

the unique goals and context of corporate human rights litigation suggests that a mix of institutional and individual liability threats is optimal. Finally, the Part explores how litigants may optimize the potential impact of human rights litigation when combining claims against high-level corporate officials and lower-level actors in situations where individual liability is the only available option.

A. Combining Liability Threats

Much of the literature regarding individual versus corporate liability has focused on which of these mechanisms is *better*. Analyses often focus on individual versus institutional liability as a zero-sum game, with one correct choice. This is despite the fact that many jurisdictions that have adopted corporate criminal liability also still allow claims against individuals. Accordingly, as discussed earlier, in practice, criminal prosecutions that involve corporate malfeasance often combine claims against corporations with claims against individual employees or pursue them in seriatim. But theoretical discussions of corporate entity liability tend to be focused on justifying corporate entity liability and explaining why it is both necessary and superior to relying only on individual liability. Likewise, those advocating individual accountability frequently employ rhetoric suggesting that prosecuting individuals is the only effective threat.[236]

As a result, the potential benefits and downsides of mixing different types of threats are typically not considered despite the fact that bringing separate threats against different types of defendants may offer different—often complementary—regulatory benefits. Different types of claims may prompt a number of different types of regulatory impacts, as discussed in detail in Parts IV and V. In addition to regulatory benefits, there may also be procedural benefits to naming different types of defendants.[237]

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claims against individual defendants may not be procedurally viable because the individual defendant may not be subject to suit in a jurisdiction where the corporate employer is.

236. Even in shifting towards more individual prosecutions under the FCPA, the rhetoric employed by both the DOJ and Congress suggested that *only* individual threats would provide adequate deterrence. *See, e.g.*, *Mendelsohn Says Criminal Bribery Prosecutions Doubled in 2007*, *supra* note 186; Palazzolo, *supra* note 18. Relatedly, proponents of institutional corporate liability have often criticized the use of institutional criminal liability as a mechanism to "round up" the individual bad guys—and not to promote institutional reform. *See, e.g.*, Fanto, *supra* note 131, at 49.

237. As discussed *supra* Part IV.B, this may be particularly true in the case of transnational litigation because individual defendants may be less likely to be subject to personal jurisdiction or more likely to evade process by fleeing the jurisdiction even when they are subject to suit. To be sure, I do not mean to suggest that claims against defaulting

To be sure, these various benefits may be in some tension. Pursuing institutional liability in cases where institutional structures and cultures have arguably played a significant part, but the underlying wrongful act is considered to be particularly egregious or "evil," may make it difficult to create a "human" story that will easily allow jurors to assess and assign moral blame. As discussed above, research suggests that juries are more likely to hold corporate entities accountable for negligence and other less egregious harms, but, conversely, *less* likely to hold corporate entities responsible for intentional criminal acts and other egregious harms.[238] Pursuing claims against culpable individuals within an organization, as well as the corporate entity itself, may therefore increase the chances of prevailing against some defendant.

Yet, to the extent that a plaintiff decides to pursue a case against joint defendants who are to be tried together,[239] there are potential downsides to be navigated—at least by the time a case is tried, if not before. While it is theoretically possible for a plaintiff to argue that a corporation should be held liable for its unique role as an entity *and* that individuals should also be held separately responsible for their individual roles, cases like the recent prosecution and sentencing of the Credit Suisse executive illustrate how often the two theories are perceived to be incompatible.[240] Capitalizing on that tendency, corporate and individual defendants may be able to disclaim responsibility by focusing on the other's culpability.[241]

Similarly, those trying to prove claims brought exclusively against individual actors may find themselves in the unfortunate position of having to downplay the impact that internal corporate structures and/or a toxic business culture may have had on an individual employee defendant in order to avoid portraying the

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individual defendants are not worth pursuing. *See, e.g.*, Doe v. Rafael Saravia, 348 F. Supp. 2d 1112 (E.D. Cal. 2004). Indeed, as discussed *supra* Part IV.B, especially when plaintiffs are able to obtain information from the corporate employer of such an individual, such claims may be strategically valuable. Furthermore, these same benefits may well be captured in cases involving litigation against transnational corporations that do not involve claims of complicity in human rights violations.

238. *Compare* HANS, *supra* note 132, at 82-85, *with* Tyler & Mentovich, *supra* note 133, at 210-12.

239. In fact, they frequently need not be. For instance, there are mechanisms that allow separate trials "to avoid prejudice." *See* FED. R. CIV. P. 42(b). Criminal prosecutions may be initiated in seriatim, as occurred in the Siemens case. *See* Wyatt, *supra* note 18.

240. Abrams & Lattman, *supra* note 145.

241. This was true, for example, in the Credit Suisse prosecution discussed above. *See, e.g.*, *supra* notes 158-163 and accompanying text.

corporation as more culpable and blameworthy than the individual defendants on trial. In terms of accountability, plaintiffs may fear that they will be caught between a rock and a hard place: if they make strategic choices that bolster their chances of prevailing against individual corporate defendants, they may undermine or contradict arguments that demonstrate corporate culpability at an institutional level. Even if the prosecutions are split and individuals are prosecuted separately from their corporate employers, the narratives that are employed in each may necessarily be inconsistent, resulting in an overall incoherent record of the underlying incident.

Of course, whether plaintiffs pursue both types of defendants or not, a defendant will be able to press these same arguments.[242] The fact that a defendant relies on evidence that a plaintiff introduces into the record may simply make it easier, or more credible, for the defendant to do so. And, as discussed in more detail below, claims against each type of defendant may be utilized to achieve a variety of different goals that may be simultaneously driving the lawsuit, without requiring a plaintiff or her lawyer to choose among them at the time suit is initiated.

B. Engaging with Unique Human Rights Goals

Human rights advocates advancing legal and policy arguments in favor of institutional liability typically do not engage with the unique goals animating this genre of litigation. Instead, the arguments generally track those made about corporate liability more generally and engage only with traditional litigation goals, such as compensation and deterrence.[243] In fact, when both the victim-centered goals that are inherent to human rights remediation generally and the transnational context in which corporate human rights claims arise become part of the equation, the analysis looks very different.

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242. *See supra* notes 158-163 and accompanying text.

243. One notable exception may be in the brief filed by Professor Juan E. Méndez, U.N. Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, in which he notes specifically that "only a victim-centered perspective that allows for adequate and integrated compensation and rehabilitation for victims and their families can successfully fulfill international standards on redress and reparation." Brief of Amicus Curiae Professor Juan Méndez, *supra* note 57, at 32-33 (citing Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Report*, ¶¶ 47-49, Human Rights Council, U.N. Doc. A/HRC/16/52 (Feb. 3, 2011) (by Juan Méndez); Statement by Juan E. Méndez, Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Delivered to the United Nations Human Rights Council, U.N. HUM. RTS. (Mar. 7, 2011), http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11448&LangID=E.

To begin with, consider the drawbacks of mixed liability threats, discussed in the previous Subpart. As that discussion suggests, any litigant combining claims against a corporation and its agents may face difficult choices if these different claims are based on theories that come across as cognitively incompatible. But a plaintiff with a goal of creating a public narrative of the wrongful conduct may find it not just difficult but fundamentally incompatible with this goal.

For instance, in some cases, plaintiffs will need to plead, and ultimately introduce, evidence that focuses on the pieces of an overarching corporate scheme in which the named defendants, rather than other culpable individuals, were direct participants.[244] This could lead to a distorted factual record in cases where the overall corporate scheme was manifested at many levels by many different actors.

If a plaintiff's goal is compensation, the fact that the narrative created to win the case is inaccurate may seem like a trifling problem at best. But if a plaintiff is motivated to bring suit not only to obtain compensation, *but also to create an accurate narrative account of what led to the human rights violation*, narrative inaccuracies suddenly become significant problems.

Utilizing judicial processes at all may require accepting inherent limitations for victims attempting to accomplish the goal of creating "a coherent, if complex, narrative about the [underlying] trauma, and the multiple sources and expression[] of its violence."[245] While an official account and record of such a narrative may result, it will almost certainly come at the cost of "[v]ictims and other witnesses [having to] undergo the ordeals of testifying and cross-examination, usually without a simple opportunity to convey directly the narrative of their experiences."[246] This may undercut the victim's ability "to tell one's story and be heard without interruption or skepticism," which "is crucial to so many people, and nowhere more vital than for survivors of trauma."[247]

Yet, to the extent litigation is pursued despite these limitations, bringing claims against individuals may be instrumental in achieving many of these narrative goals to the extent possible. Personalizing the narrative may be essential to provide what Juan Méndez refers to as

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244. Even if other parts of the scheme may be necessary for background, proving the specific part played by the individual defendants will be critical and will likely take up the bulk of the facts introduced at every stage—from complaint to briefs defending against summary judgment motions to any trial that were to occur.

245. MINOW, *supra* note 92, at 58.

246. *Id.*

247. *Id.*

"the idea of integrated, victim-centered reparation and rehabilitation," which requires identifying all "of the responsible parties and a full truth-telling of the abuses as part of the victim's process of overcoming trauma and reintegrating into society."[248] Furthermore, in these types of cases, in which the plaintiffs-victims typically have suffered particularly serious harms that juries would tend to associate with an "evil" individual and not with an institution, the chances of prevailing and obtaining compensation would likely be greater if a jury were able to hold an individual responsible.

Beyond the increased probability of stating a claim that is likely to resonate with a fact finder, bringing claims against individuals could create additional opportunities for increased private regulation. As discussed in Part V.B.3, insurers have the capacity (and sometimes the incentive) to serve as private regulators when they are engaged to provide insurance coverage.[249] To date, corporations have not typically obtained insurance coverage of the risk of damages for human rights violations.[250] Yet, they might well purchase policies for high-level individuals if such suits become more commonplace. If they did so, the financial goal that typically drives tort litigation—often viewed as the main reason for suits against corporate entities—could be achieved in suits against individuals as well. If they did not do so, the threat of having to face litigation, and all its attendant costs, might impact individual behavior more than it is impacted as a result of the current state of affairs.

Even without the existence of clear, uniform standards for liability—something that has made it difficult for those attempting to come up with a list of best practices for multinational corporations—the involvement of insurance companies might lead to both the development of actuarial standards regarding what types of policies and behaviors are associated with a lower risk of litigation and the imposition of those standards. As it has in other contexts, this could

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248. Brief of Amicus Curiae Professor Juan Méndez, *supra* note 57, at 36.

249. Even if companies decide to self-insure, this increases the potential liability and the risk of some form of liability even if the plaintiff cannot prevail on the claim against the corporation itself.

250. The *Unocal* scenario—in which reputable English syndicates would not reinsure without themselves being able to obtain reinsurance, *see* Branson, *supra* note 194, at 240-41, suggests that the risk of corporate liability is simply too large and uncertain. It undoubtedly became even more difficult to obtain such insurance in the wake of the *Unocal* litigation. When the Unocal policy's reinsurance was being negotiated, corporate human rights claims had never even been attempted, while after the *Unocal* litigation and settlement, they began to be perceived as a more significant threat.

result in a level of what is considered "acceptable" corporate behavior established by courts or other public regulators.[251]

Such an outcome would be particularly noteworthy in the transnational context in which corporate human rights claims invariably arise. Any regulatory benefit will be more impactful given that it will be achieved in a setting where creating regulatory incentives has been a vexing problem.[252]

In short, including both individual and corporate defendants provides plaintiffs with the greatest chance of prevailing on some theory and allows the plaintiff to have the greatest flexibility in shaping the narrative. Even if plaintiffs ultimately conclude that they will be better served by pursuing one or more defendants more vigorously than others, or dropping one entirely from the case after the case has progressed, the inclusion of both corporate and individual defendants at the outset will create additional unique risks that corporations will have incentives to minimize going forward. Moreover, as noted above, increasing these risks, and including individual defendants in particular, may increase the possibility that insurers will become involved, providing additional regulatory incentives.

C. Capitalizing on Individual-Level Threats

Of course, those attempting to bring claims may not always have the choice of naming both corporate entities and individuals as defendants. Instead, proceeding against individual defendants may sometimes be the only option, as it is for with those bringing TVPA claims following *Mohamad* or litigating in jurisdictions like Germany where the claim against the Danzer Group executive has been lodged.

To be sure, for many human rights defendants, depending on their goals, such a scenario may be suboptimal. But being forced to proceed only against individuals, rather than against corporate or

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251. Vandenbergh, *supra* note 197, at 2063. Of course, private regulation of this sort is unlikely to "solve" the problems of international business regulation, but it may add something significant to the regulatory tool kit.

252. *See, e.g.*, Kenneth W. Abbot & Duncan Snidal, *Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit*, 42 VAND. J. TRANSNAT'L L. 501, 504-05 (2009) ("[T]he evolving structures of global production—multinational enterprises and global supply chains—pose major challenges for conventional 'regulation': action by the state or, at the international level, by groups of states, acting primarily through treaty-based intergovernmental organizations (IGOs) to control the conduct of economic actors through mandatory legal rules with monitoring and coercive enforcement." (footnote omitted)); Ruggie, *supra* note 98 (expressing the need for states to set clear expectations that businesses will respect human rights).

organizational entities, may achieve many of the goals that litigants in such cases are likely to have.

Many human rights plaintiffs and their advocates and supporters bring litigation as one way to put pressure on corporations to make changes, fully aware that such pressure does not always depend on there being a high risk of liability in any particular case (or even in general).[253] For example, while *Unocal* is one of the relatively few corporate rights cases that have resulted in financial compensation to the plaintiffs, its impact on the corporate defendant went well beyond the financial cost of the lawsuit.[254] Instead, the fact of the lawsuit itself, including its bringing to light facts about Unocal's practices, along with the reputational harm that it caused, had real consequences even before the settlement was reached. In 2003, for example, "Unocal reportedly devoted more than half of [the annual board] meeting to addressing" the investment that was involved in the ATS litigation then pending against it, despite the fact that this investment "comprised only a fraction of Unocal's total investments."[255] Unocal's "preoccupation with defending its Burmese investments to shareholders indicated the importance of negative publicity from the case," with one human rights activist opining: "I think they [Unocal] are very conscious of their image. The amount of money invested in the Burma project might be a miniscule amount but I think they are very, very afraid that their image will suffer."[256] Other similar cases that are "failures" in the sense that they resulted in no formal legal judgment against a corporate defendant are still part of the movement promoting corporate accountability.[257]

Thus, the potential financial impact on a corporation cannot be measured simply by calculating the risk that it will lose multiplied by the amount of damages that would be awarded. Instead, costs of

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253. Holzmeyer, *supra* note 42, at 291; *see also, e.g.*, Marcia Coyle, *Will Alien Tort Case Be Next* Citizens United*?*, NAT'L L.J. SUP. CT. INSIDER (Feb. 1, 2012) (asserting that Alien Tort Statute litigation has "never been about winning but about getting a lot of bad publicity about corporations and building sympathy for the cause plaintiffs are involved in"); *cf.* Simon, *supra* note 39, at 4-5 (noting that plaintiffs' attorneys use the ATS to pursue claims on "political and moral grounds alone").

254. Holzmeyer, *supra* note 42, at 290 (discussing how the *Unocal* litigation not only led to a blueprint for the filing of other human rights cases, but also led to the "formation of a unique human rights NGO").

255. *Id.* at 291.

256. *Id.* (alterations in original) (internal quotation marks omitted).

257. Goldhaber, *supra* note 78, at 129 (discussing how it is difficult to calculate the financial impact arising out of "the human rights consciousness raised by the alien tort cases" that have "inspired and cross-fertilized" a number of "[n]ew and perhaps more effective legal strategies to promote corporate accountability").

litigating and the attendant costs associated with the fact of that lawsuit (or the threat of other suits) are perhaps as significant, if not more so. Asserting claims against individual defendants has the potential to impact corporations in various ways, regardless of whether those impacts are likely to lead to eventual judgments. This is true whether or not the corporation itself is a party to the suit.

For example, if the corporate entity is subject to the jurisdiction of a U.S. court, any relevant information in its possession will be fair game in cases that get to discovery. As discussed above, in cases where plaintiffs need information to properly identify John Doe defendants, they may have strong arguments that they should be able to obtain this type of discovery immediately, thereby obtaining information far earlier than has been possible in most of these cases to date.

In addition, all of the other benefits associated with individual threats will be available. Thinking through how to best leverage these threats to impact corporate behavior going forward is a challenge that advocates would be well served to consider more deeply. Proceeding against high-level officials has the potential to put significant and unique pressure on key decision makers. This not only may change their decision-making calculus in significant ways—and potentially affect group decisions as well—but may put pressure on corporations to provide such high-ranking individuals with some sort of protection against the impact of such claims. Whether in the form of indemnification—which then preserves the impact of the litigation threat on the corporation—or obtaining insurance policies that may induce some additional private regulation, individual claims have a great deal of potential, even on their own, to inspire better corporate behavior going forward.

How much of an impact the ATS has had over the twenty years it has served as a direct threat to corporations is debatable. Thus far, the total dollar amounts recovered have been relatively paltry compared with the amounts sought and the net worth of the corporations sued. Recent estimates suggest that "about 180 alien tort disputes have been filed against business entities."[258] Of these, only fifteen have resulted in either a judgment or settlement and, extrapolating from the known sums recovered by plaintiffs in these suits, it appears that non-

258. *Id.* at 128.

Holocaust-related damages[259] have amounted to only about $80 million being levied against all corporate defendants.

Yet, the actual financial toll is certainly much higher. As Michael Goldhaber points out, it is "fair to estimate that the collective cost of alien tort defense has risen into the hundreds of millions of dollars," and, in addition, it is impossible to put a price "on the human rights consciousness raised by the alien tort cases."[260]

Whether corporations are ultimately named or not reflects only whether they are potentially subject to direct liability. But direct liability may be the least of a defendant's concerns if the costs it is most worried about relate to the fact of participating in litigation or the reputational costs that may be attendant to such litigation. Thus, strategies that lead to discovery against corporate entities may help plaintiffs achieve their goals, even if they ultimately fail to result in favorable final judgments. In fact, many of the complaint-stage defenses that have been raised by corporate defendants in human rights litigation have made things difficult for plaintiffs attempting to prosecute human rights claims, including with respect to their ability to advance to discovery quickly (or at all).[261] In short, regardless of the lack of traditional "success" of individual human rights cases brought to date, "[n]ew and perhaps more effective legal strategies to promote corporate accountability were inspired and cross-fertilized."[262] Ideally, advocates of all stripes bringing claims alleging corporate malfeasance will learn from this example and consider the variety of regulatory consequences that different litigation strategies may provoke, many of which go well beyond the traditional narrative.

VII. CONCLUSION

While human rights advocates have focused a great deal of energy on ensuring that human rights litigation can be prosecuted against corporations, in doing so they have neglected some of the unique goals that characterize this form of litigation. Going forward, pursuing the benefits of individual liability threats may better serve the goals animating the global human rights movement. Undertaken

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259. In reviewing the total amounts recovered in such litigation, Michael Goldhaber excludes Holocaust-related damages—which total in the billions of dollars—because unlike the typical ATS case, these cases "depended in significant part on diplomatic pressure and negotiation." *Id.* at 129 n.12.

260. *Id.* at 129.

261. *See id.* at 137-49.

262. *Id.* at 129; *see also* Ruggie, *supra* note 98.

thoughtfully and properly, such litigation has the potential to serve an important role in the regulation of transnational corporations.