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Restoring Liberalism to Transnational Corporate Accountability: From Universal Jurisdiction's Ashes to an Afterlife of Multilateral Avenues

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RESTORING LIBERALISM TO TRANSNATIONAL CORPORATE ACCOUNTABILITY: FROM UNIVERSAL JURISDICTION'S ASHES TO AN AFTERLIFE OF MULTILATERAL AVENUES

Steven S. Nam*

ABSTRACT

This Article engages in the recurrent debate over effective transnational corporate accountability and offers the first liberalist defense of universal jurisdiction's marginalization in the U.S. court system. Per the U.S. Supreme Court, foreign tortfeasors including corporate human rights violators may no longer be sued in U.S. courts by their foreign victims via the Alien Tort Statute (ATS) without a sufficient nexus to U.S. territory. Insofar as one motivation of ATS defenders was to expand a global human rights regime internalizing liberal values, this Article contends that pursuing transnational corporate accountability unilaterally through the U.S. judiciary is inconsistent with a core tenet of liberalism itself—a state and its constituents should not be subject to the external authority of other states. Liberal states duly have protested universal jurisdiction over their business enterprises, as well as the indefinite long-term “intervention” it poses.

This Article recommends further development of two alternative avenues that encourage multilateral cooperation on transnational corporate accountability. The first is inclusive public-private diplomacy convening all stakeholders, including non-state actors such as victims' legal advocates and culpable companies. Exemplary were wartime forced labor negotiations led by, but hardly restricted to, the American and German governments in 1999, which produced a landmark compensation fund for Nazi-era victims despite the earlier dismissal of related U.S. class action lawsuits. The second avenue

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consists of the widely welcomed U.N. Guiding Principles on Business and Human Rights and their use by a polycentric constellation of corporate accountability NGOs, governments, and business enterprises. The Guiding Principles' legacy remains incomplete, however, as many victims of corporate human rights abuses struggle to access concrete remedy; the Accountability and Remedy Project under Office of the United Nations High Commissioner for Human Rights stewardship is intended to address this gap. Ongoing development and implementation of these above alternatives presage the continuing march towards a coherent global corporate accountability regime reliant on cooperation and coordination between stakeholders, rather than on extraterritorial unilateralism.

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INTRODUCTION

The modern chronicle of transnational corporate accountability begins in the courtrooms of Nuremberg following the international military tribunal of 1946. There, from 1947 to 1948, the United States tried before its military courts dozens of industrialists from the prominent German companies IG Farben, Flick, and Krupp,¹ effectively becoming corporate accountability's postwar progenitor. The historic import of these industrialist trials seemingly has faded to "a footnote or a passing reminder" that the American purge of the Nazi elite went beyond government and military leadership.² At the time, British fears that the industrialist trials would become an ideological boon for Communism,³ coupled with an outpouring of criticism from German society at the resulting convictions,⁴ necessitated a strong sense of direction from Washington.

Despite the political need for German industry's cooperation in reconstruction and for its support against the Soviet Union, American authorities refused to soften their punitive stance⁵ as they strived towards a liberal postwar international order. Liberalism is the influential political philosophy marked by a commitment to the juridical equality and civic rights held by citizens, recognition of private property rights, economic decisions predominantly shaped by market forces against a backdrop of multilateral institutions, and a representative government which derives its authority from a consenting electorate.⁶ It follows that, under liberalism, a state and its constituents are subject neither to the external authority of other states nor to the internal authority of special prerogatives, such as those held by military

¹ The charges largely stemmed from the companies' heavy use of slave labor and plundering of businesses in German-occupied territories. *See generally* TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL IN NUREMBERG (1947). The convictions from a fourth trial before a French military tribunal, that of Saar magnate Hermann Roechling and several associates, were reversed on appeal in 1949. Grietje Baars, *Capitalism's Victor's Justice? The Hidden Stories Behind the Prosecution of Industrialists Post-WWII*, in *THE HIDDEN HISTORIES OF WAR CRIMES TRIALS* 163, 188 (Kevin Jon Heller & Gerry Simpson eds., 2013).

² S. JONATHAN WIESEN, *WEST GERMAN INDUSTRY AND THE CHALLENGE OF THE NAZI PAST* 68 (2001).

³ TOM BOWER, *THE PLEDGE BETRAYED: AMERICA AND BRITAIN AND THE DENAZIFICATION OF POSTWAR GERMANY* 287–354 (1982).

⁴ WIESEN, *supra* note 2, at 97.

⁵ *Id.* at 69, 97.

⁶ Michael W. Doyle, *Liberalism and Foreign Policy*, in *FOREIGN POLICY: THEORIES, ACTORS, CASES* 54, 55–56 (Steve Smith et. al. eds., 2012).

castes.⁷ If “the tight network of factories and industries” in the Ruhr Valley managed by iron and steel magnates could be broken up, “then Germany, it was argued, would be prevented from unleashing another war of aggression.”⁸ Accountability and liberalism were found to be intrinsically linked—the notion that “failure of accountability signified the failure of liberalization”⁹ in the First World War’s aftermath guarded against U.S. complacency following its sequel.

More than seventy years after World War II’s end, the existence today of over one hundred liberal states worldwide¹⁰ is a testament to the longstanding influence of the United States and its liberal allies. But gone are the days when unipolar American dominance could foster liberalization with antithetically minimal regard for the liberal guarantee of respect between states. Chief Justice Roberts’ majority opinion in *Kiobel v. Royal Dutch Petroleum* captured this contemporary reality, referencing “recent objections to extraterritorial applications of the ATS [Alien Tort Statute] by Canada, Germany, Indonesia, Papua New Guinea, South Africa, Switzerland, and the United Kingdom” along with “diplomatic strife” precipitated by excessive jurisdiction.¹¹ Justice Ginsburg, in the opinion for *Daimler AG v. Bauman*, which was joined by seven other justices, furthermore stressed “risks to international comity” through the “expansive view of general jurisdiction posed. Other nations do not share the uninhibited approach to personal jurisdiction advanced by the Court of Appeals in this case.”¹² At first glance, it would appear that realist critics of the ATS had been validated in their criticisms of universal jurisdiction over corporations for being welfare-negative to the United States politically and economically, endangering its foreign relations as well as trade and investment.¹³ Yet scholarship even through realist lenses has pointed out a

⁷ *Id.*

⁸ WIESEN, *supra* note 2, at 54.

⁹ Ruti Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106 YALE L.J. 2009, 2039 (1997).

¹⁰ Doyle, *supra* note 6, at 56.

¹¹ *Kiobel v. Royal Dutch Petro. Co.*, 133 S. Ct. 1659, 1669 (2013). Per *Kiobel*, foreign tortfeasors including corporate human rights violators may no longer be sued in U.S. courts by their foreign victims via the ATS without a sufficient nexus to U.S. territory. *Id.* The ATS is a provision of the 1789 Judiciary Act that enables federal courts jurisdiction over civil actions for torts committed in violation of “the law of nations.” 28 U.S.C. § 1350 (2012).

¹² *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014).

¹³ *See, e.g.*, GARY CLYDE HUFBAUER & NICHOLAS K. MITROKOSTAS, AWAKENING MONSTER: THE ALIEN TORT STATUTE OF 1789, 14 (2003); Daniel Abebe, *Not Just Doctrine: The True Motivation for Federal Incorporation and International Human Rights Litigation*, 29 MICH. J. INT’L L. 1 (2007); Theresa Adamski,

dearth of empirical evidence behind the realist approach.¹⁴ All the same, ATS supporters who sought extraterritorial legal enforcement of human rights norms were set back by the preponderance of Supreme Court justices across the ideological spectrum weighing against ATS litigation's judicial overreach.¹⁵

Insofar as one motivation of ATS defenders was to expand a global human rights regime internalizing liberal values,¹⁶ this Article contends that pursuing transnational corporate accountability unilaterally through the U.S. judiciary is inconsistent with a core tenet of liberalism itself—a state and its constituents should not be subject to the external authority of other states.¹⁷ In an era in which both liberal and illiberal states navigate roads of intertwining trade and institutions, transnational companies often function as representative vehicles of their respective home countries and of economic interdependence. Even the most liberal of states (including stalwart U.S. allies) have duly protested the external authority of universal jurisdiction over their business enterprises¹⁸ and the indefinite long-term “intervention” it poses.

This Article identifies and recommends the further development of two alternative avenues that encourage multilateral cooperation on transnational corporate accountability. The first is inclusive public-private diplomacy open to all stakeholders, including culpable companies and legal representatives of the victims themselves. Wartime forced labor negotiations led by the U.S. and German governments in 1999 were exemplary and produced a landmark compensation fund for foreign victims after U.S. district courts had dismissed as non-justiciable a pair of related class action lawsuits.¹⁹ The second avenue

The Alien Tort Claims Act and Corporate Liability: A Threat to the United States' International Relations, 34 *FORDHAM INT'L L.J.* 1502, 1540 (2011); Julian Ku & John Yoo, *Beyond Formalism in Foreign Affairs: A Functional Approach to the Alien Tort Statute*, 2004 *SUP. CT. REV.* 153, 154–55 (2004).

¹⁴ See Robert Knowles, *A Realist Defense of the Alien Tort Statute*, 88 *WASH. U. L. REV.* 1117, 1173 (2011).

¹⁵ See, e.g., Sarah H. Cleveland, *The Alien Tort Statute, Civil Society, and Corporate Responsibility*, 56 *RUTGERS L. REV.* 971 (2004); Harold Hongju Koh, *The 1994 Roscoe Pound Lecture: Transnational Legal Process*, 75 *NEB. L. REV.* 181 (1996); Christiana Ochoa, *Towards a Cosmopolitan Vision of International Law: Identifying and Defining CIL Post Sosa v. Alvarez-Machain*, 74 *U. CIN. L. REV.* 105 (2005).

¹⁶ Knowles, *supra* note 14, at 1137.

¹⁷ See Doyle, *supra* note 6, at 55–56.

¹⁸ See, e.g., STEPHEN BREYER, *THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES* 163 (2015); 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, 8–9 (2009).

¹⁹ MICHAEL J. BAZYLER, *HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICA'S COURTS* 72–83 (2003).

consists of the widely-welcomed U.N. Guiding Principles on Business and Human Rights (U.N. Guiding Principles or UNGPs)²⁰ and their use by a polycentric constellation of corporate accountability NGOs, governments, and business enterprises.²¹ The Guiding Principles' legacy remains incomplete, however, as many victims of corporate human rights abuses struggle to access concrete remedies due to practical and legal barriers.²² The Accountability and Remedy Project under the stewardship of the Office of the U.N. High Commissioner for Human Rights was established to address this gap.²³ Further development and implementation of these above alternatives presage the continuing march towards a coherent global corporate accountability regime reliant on cooperation and coordination between stakeholders, rather than on extraterritorial unilateralism.

I. LIBERALISM'S DISHARMONY WITH UNIVERSAL JURISDICTION OVER FOREIGN BUSINESS ENTERPRISES

A. *Judicial Unilateralism in an Interdependent Economic Community*

Portrayals of critics and proponents of ATS litigation typically have assumed a simple binary—on the one hand, realist cost-benefit analysts who criticize the universal jurisdiction of the ATS for endangerment of U.S. foreign policy,²⁴ and on the other, advocates drawing from liberalism who conflate its use with U.S. leadership in the development of a global human rights regime.²⁵

²⁰ Office of the High Commissioner of the U.N. Human Rights Council (OHCHR), *Guiding Principles on Business and Human Rights*, U.N. Doc. HR/PUB/11/04 (2011) [hereinafter *Guiding Principles*].

²¹ *Applications of the U.N. "Prospect, Respect and Remedy" Framework*, Special Representative of the United Nations Secretary-General for business and human rights (June 30, 2011), <https://business-humanrights.org/sites/default/files/media/documents/applications-of-framework-jun-2011.pdf>.

²² See, e.g., Katerina Yiannibas, *The Removal of Barriers to Access to Remedy for Corporate Related Human Rights Abuses in the European Union*, BUS. & HUM. RTS. RESOURCE CTR., <https://www.business-humanrights.org/en/the-removal-of-barriers-to-access-to-remedy-for-corporate-related-human-rights-abuses-in-the-european-union> (last visited Jan. 21, 2017).

²³ U.N. High Commissioner for Human Rights, *Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse: Explanatory Notes for Guidance*, ¶ 3, U.N. Doc. A/HRC/32/19/Add.1 (May 12, 2016) [hereinafter *Improving Accountability and Access to Remedy: Explanatory Notes*].

²⁴ See *supra* note 13 and accompanying text.

²⁵ See Cleveland, *supra* note 15, at 971–84; Koh, *supra* note 15, at 197; Ochoa, *supra* note 15. For a discussion of ATS legislation's facilitation of "norms entrepreneurs," or progressive domestic constituencies, NGOs, and international institutions that push heightened standards for customary international law, see Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 Hous. L. Rev. 623, 647 (1998).

Scholarship empirically assessing the extent to which ATS legislation against foreign corporations caused interstate friction has shown that actual U.S. foreign policy implications were limited and short-lived.²⁶ Moreover, a relatively brief historical record²⁷ does not give credence to the most dire realist projections of economic downturns and exacerbated national security threats. Nevertheless, the game-changing *Kiobel* and *Bauman* decisions precluded definitive answers as to whether those realist predictions would have materialized over time, or if hindrances to U.S. foreign policy would have proven superficial relative to the expected benefits of a strengthened global human rights regime. In the wake of *Kiobel*'s majority opinion, claims against foreign business enterprises must "touch and concern the territory of the United States," and "do so with sufficient force to displace the presumption against extraterritorial application."²⁸ The *Bauman* majority opinion was backed by eight justices and further entrenched *Kiobel*, asserting that it "rendered plaintiffs' ATS . . . claims infirm."²⁹

In the buildup to *Kiobel*, the Special Representative of the U.N. Secretary-General on Business and Human Rights feared a looming existential threat to ATS litigation, "an entire juridical edifice for redressing gross violations of human rights."³⁰ But the decisiveness of what ensued—a categorical rollback of the ATS including extraterritorial corporate liability ordered by blunt

²⁶ See Knowles, *supra* note 14, at 1173–75.

²⁷ The first ATS litigation against a multinational corporation for aiding and abetting human rights violations was filed in 1996 by Burmese citizens and human rights groups against the U.S. oil company. Unocal. *Doe v. Unocal Corp.*, 963 F. Supp. 880, 883–84 (C.D. Cal. 1997). ATS lawsuits targeting foreign corporations began arising shortly thereafter. See, e.g., *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386 (KMW)(HBP), 1998 U.S. Dist. LEXIS 23064 (S.D.N.Y. Sept. 25, 1998); *Sarei v. Rio Tinto Plc.*, 221 F. Supp. 2d 1116 (C.D. Cal. 2002); *In re S. African Apartheid Litig.*, 346 F. Supp. 2d 538 (S.D.N.Y. 2004).

²⁸ *Kiobel v. Royal Dutch Petro. Co.*, 133 S. Ct. 1659, 1669 (2013).

²⁹ *Daimler AG v. Bauman*, 134 S. Ct. 746, 763 (2014). Whereas *Kiobel* limited subject matter jurisdiction in transnational human rights cases using the ATS, *Bauman* limited the ability of courts to assert personal general jurisdiction over foreign corporations in transnational cases. *Id.*

³⁰ JOHN RUGGIE, HARVARD KENNEDY SCH., *KIOBEL AND CORPORATE SOCIAL RESPONSIBILITY* 6 (2012). *Kiobel* did not apply to every statute authorizing federal human rights litigation. See, e.g., Beth Stephens, *State Law Claims: The Next Phase of Human Rights Litigation*, 108 AM. SOC'Y INT'L L. PROC. 442 (2014) ("Although the Second Circuit recently applied *Kiobel* to reverse a jury verdict on an ATS claim arising in Bangladesh, it affirmed the TVPA [Torture Victim Protection Act] judgment based on the same facts. Similarly, federal claims under the Anti-Terrorism Act, the Trafficking Victims Protection Act, and the 'state sponsors of terrorism' exception to the Foreign Sovereign Immunities Act will all continue.").

judicial language, which resurfaced in *Bauman*³¹—has raised two questions that the conventional realist-versus-liberalist discourse is unable to adequately address. Why were liberal stalwarts such as the United Kingdom, the Netherlands, and Germany, close U.S. allies that would seem to favor an expansive global human rights regime over realist concerns, among the most strident critics of universal jurisdiction over their culpable companies?³² Furthermore, what compelled seven justices across the ideological spectrum to join Justice Ginsburg’s *Bauman* opinion in rejecting the cosmopolitan argument that U.S. federal courts have a “strong interest in adjudicating and redressing international human rights abuses,”³³ without so much as a mention of its potential benefits? The denied argument, after all, aligns with the liberal state’s fundamental “freedom of the individual . . . the right to be treated and a duty to treat others as ethical subjects,”³⁴ a worthy balance for “considerations of international rapport” per *Bauman*.³⁵

Effective accountability and liberalization are interwoven,³⁶ and gradual expansion of the international liberal community is regarded as a preferable outcome for liberal states and peoples.³⁷ But to that end, universal jurisdiction over foreign business enterprises harbors an inherent paradox. Meant to be liberalizing in its aims, as a means it is inconsistent with what liberal “democratic peace” theorist Michael W. Doyle deemed “the basic postulate of liberal international theory . . . that states have the right to be free from foreign intervention.”³⁸ This precept is enshrined in the ideals of the U.N. Charter³⁹

³¹ See *Daimler AG v. Bauman*, 134 S. Ct. 746, 763 (2014) (“The Ninth Circuit, moreover, paid little heed to the risks to international comity its expansive view of general jurisdiction posed. Other nations do not share the uninhibited approach to personal jurisdiction advanced by the Court of Appeals in this case.”).

³² See Brief for the Governments of the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland as Amici Curiae in Support of Neither Party, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491); Brief for the Federal Republic of Germany as Amicus Curiae Supporting Respondents, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491).

³³ *Daimler*, 134 S. Ct. at 763. See BREYER, *supra* note 18, at 163 (“[M]any nations have accepted what foreign relations law calls ‘universal jurisdiction,’ . . . This jurisdictional principle, however, most commonly applies to criminal prosecutions, not necessarily to civil actions for damages or to instances in which the defendant is a corporation.”).

³⁴ Doyle, *supra* note 6, at 55.

³⁵ *Bauman*, 134 S. Ct. at 763.

³⁶ See *supra* note 9 and accompanying text.

³⁷ JOHN RAWLS, *THE LAW OF PEOPLES* 82 (1999).

³⁸ Michael W. Doyle, *Kant, Liberal Legacies, and Foreign Affairs*, 12 PHIL. & PUB. AFF. 205, 213 (1983) [hereinafter Doyle, *Kant, Liberal Legacies, and Foreign Affairs*]. See G.A. Res. 2625 (XXV), Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance

and has become a postwar truism despite often being problematic in practice; in correlation with citizens' rights to liberty, the states that democratically represent them are entitled to political independence, and "[m]utual respect for these rights then becomes the touchstone of international liberal theory."⁴⁰ This enables the economic strand of liberalism that incentivizes economically interdependent states to resolve conflicts peacefully.⁴¹ Universal jurisdiction's judicial fiat over foreign companies runs contrary to a multilateral liberal framework under which "individuals are free to establish private international ties without state interference. Profitable exchanges between merchants . . . create a web of mutual advantages and commitments that bolsters sentiments of public respect."⁴² At the state level, this interdependence of commerce shapes "crosscutting transnational ties that serve as lobbies of mutual accommodation." These forums for interactions "ensure by their variety that no single conflict sours an entire relationship"⁴³ and buttress a global trade network that has encompassed liberal as well as illiberal states.

There is discordance to universal jurisdiction's unilateralism with the multilateral conduits through which many business enterprises operate. A web of cross-border contact has helped sustain the contemporary liberal order.⁴⁴ The interdependent benefits of trade are protected by stable expectations, in turn.⁴⁵ Institutions developed to reinforce concepts of expected peacefulness, and notwithstanding regular disputes, such as "the European Union, the North

with the Charter of the United Nations (Oct. 24, 1970) ("No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other state.").

³⁹ U.N. Charter art. 2, ¶ 1.

⁴⁰ Doyle, *Kant, Liberal Legacies, and Foreign Affairs*, *supra* note 38, at 213. For a leading neoliberal authority's perspective on nonintervention, see JOSEPH S. NYE, JR. & DAVID A. WELCH, UNDERSTANDING GLOBAL CONFLICT AND COOPERATION 209 (9th ed. 2013).

Nonintervention in the internal affairs of sovereign states is a basic norm of international law. Nonintervention is a powerful norm because it affects both order and justice. Order sets a limit on chaos. International anarchy—the absence of a higher government—is not the same as chaos if basic principles are observed. Sovereignty and nonintervention are two principles that provide order in an anarchic world system. At the same time, nonintervention affects justice. States are communities of people who deserve the right to develop a common life within their own boundaries. Outsiders should respect their sovereignty and territorial integrity.

⁴¹ NYE & WELCH, *supra* note 40, at 64–65.

⁴² Doyle, *Kant, Liberal Legacies, and Foreign Affairs*, *supra* note 38, at 213.

⁴³ *Id.* at 231–32.

⁴⁴ Michael W. Doyle, *Liberalism and World Politics*, 80 AM. POL. SCI. REV. 1151, 1163 (1986) [hereinafter Doyle, *Liberalism and World Politics*].

⁴⁵ NYE & WELCH, *supra* note 40, at 67.

American Free Trade Agreement (NAFTA), and the Organization of American States . . . create a culture in which peace is expected and provide forums for negotiation.”⁴⁶ Universal jurisdiction over foreign business enterprises disables transnational consultations between state actors, which have increasingly welcomed non-state actor involvement, and bypasses intermediary multilateral institutions.⁴⁷ In its extraterritorial push for greater accountability and liberalization, it ironically disregards the channels and tools offered by the international liberal community, the use of which had become customary. This divergence forms the crux of universal jurisdiction’s mismatch with transnational corporate accountability and its rejection by many liberal states.

B. Judicial Unilateralism as a Mode of Intervention

Where transnational corporations abuse economic interdependence, strict adherence to nonintervention despite calamitous failings of oversight by the corporations’ home countries can become formalistic to a fault, both ethically and pragmatically. The preeminent political philosopher John Rawls asserted that “condemnation by the world society” is merited when “domestic institutions violate human rights . . . [a] people’s right to independence and self-determination is no shield from that condemnation nor even from coercive intervention by other peoples in grave cases.”⁴⁸ But determining when and how to engage in an intervention is a challenging task for states, given the tension between justice and order⁴⁹ as well as the array of options available, including military force.⁵⁰ A proportionate response is key to obtaining international

⁴⁶ *Id.*

⁴⁷ *See infra* Part III.

⁴⁸ RAWLS, *supra* note 37, at 38.

⁴⁹ NYE & WELCH, *supra* note 40, at 209.

⁵⁰ For the position of the United Nations on military intervention, see A More Secure World: Our Shared Responsibility, Rep. of the High, transmitted by Letter Dated 1 December 2004 from the Chair of the High-level Panel on Threats, Challenges and Change Addressed to the Secretary-General, ¶ 203, U.N. Doc. A/59/565 (Dec. 1, 2004). In the letter, the Chair endorses:

the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent.

Id.

backing. Certainly, disparate categories of human rights violators can warrant different types of intervention.⁵¹

Intervention's acceptance as a contingency tool within the liberal paradigm has corresponded with its application in acute human rights crises; Rawls noted that the duty of nonintervention would "have to be qualified in the general case of . . . grave violations of human rights."⁵² Since the 1990s, humanitarian interventions of limited duration have been ordered in countries such as Bosnia, Haiti, Kosovo, Liberia, Somalia, and Sudan⁵³ with widespread approval from the international liberal community. In contrast, the practice of reaching corporate human rights violators via universal jurisdiction and punishing them through civil lawsuits has drawn the kind of condemnation referenced in *Kiobel*.⁵⁴ Realist institutional competence arguments criticizing the interference of inexpert and insulated courts on issues with foreign policy implications rely heavily on intuition.⁵⁵ Furthermore, these arguments do not adequately account for the instances in which universal jurisdiction was employed successfully for non-corporate human rights violators.⁵⁶

Universal jurisdiction delegates to a unilateral decision-making judiciary without conventional jurisdiction (e.g., U.S. courts) and non-state actors of immediate interest (corporate human rights violators, foreign victims, and their

⁵¹ See, e.g., NYE & WELCH, *supra* note 40, at 211 ("The broad definition of intervention therefore includes the whole range of behavior, from not very coercive to highly coercive. The degree of coercion involved in intervention is important because it relates to the degree of choice that the local people have, and thus the degree of outside curtailment of local autonomy.").

⁵² RAWLS, *supra* note 37, at 37.

⁵³ NYE & WELCH, *supra* note 40, at 211–12.

⁵⁴ See *supra* note 11. Here, we should distinguish the reactions of liberal state actors from those of the greater liberal community (including scholars and human rights advocates). The latter of the two groups has seen significant support for universal jurisdiction in general. See, e.g., Ochoa, *supra* note 15. Yet state actors have retained primacy in the liberal framework in theory and in practice, as exhibited by states' protestations that influenced *Kiobel*. See *supra* note 10. See also Peter J. Spiro, *Disaggregating U.S. Interests in International Law*, 67 L. & CONTEMP. PROBS. 195, 199 (2004) ("Liberal theorists . . . understand that 'individuals and private groups are political actors of consequence to the development and effectiveness of international regimes, but . . . [a]s much as Realism, Liberal IR reifies the territorial state and hews to the primacy of states on the international scene.'").

⁵⁵ See, e.g., Knowles, *supra* note 14, at 1140. The author cautions that "realism-based institutional competence assumptions are intuitively very persuasive. That is why they are often simply stated as 'traditional . . . understandings' and persist in court decisions. But they are surprisingly brittle." *Id.*

⁵⁶ See generally UNIVERSAL JURISDICTION (Stephen Macedo ed., 2006). Note that special tribunals have prosecuted criminal cases against individuals for business activities that abetted war crimes. See, e.g., Baars, *supra* note 1. See also *Prosecutor v. Nahimana*, Case No. ICTR-99-52-T, Judgment and Sentence (Int'l Crim. Trib. for Rwanda Dec. 3, 2003).

advocates).⁵⁷ This latter approach often offers compelling justifications including limited capacity and/or capability in the courts of the victims' home states, or their questionable impartiality in the face of strong government support for foreign investment. But universal jurisdiction over transnational business enterprises would require U.S. courts to dictate unilaterally what claims should be recognized by foreign states against their own companies.⁵⁸ Contrary to its cosmopolitan intent, it could produce new strains of international law informed by U.S. domestic legal understandings⁵⁹ yet dressed in universality. As a form of intervention, it would encroach upon foreign liberal and illiberal state regimes alike—while giving rise to, in the words of Justice Stephen Breyer, “fear of American international law ‘hegemony,’”⁶⁰—for an indefinite open-ended duration that has little in the way of recent precedent.

A lack of available standards further complicates relief via U.S. courts, bereft of “information and a framework that shapes expectations . . . a sense of continuity” built internationally through cooperative liberal institutions.⁶¹ While dismissing four civil lawsuits filed in New Jersey against German companies culpable of wartime forced labor, Judge Dickinson Debevoise lamented the dearth of comparable domestic case law to guide a judicial ruling, although he did write that “[e]very human instinct yearns to remediate in some way the immeasurable wrongs inflicted . . . in which corporate Germany unquestionably participated.”⁶² He raised the concern that were his court to design “appropriate reparations for the plaintiffs in the present case, it would lack any standards to apply. . . . Wrongs were suffered not only by the classes of persons represented . . . but also by many other classes of persons in many lands.”⁶³

Shortcomings in the actual execution of universal jurisdiction over foreign business enterprises stem from its difficult autonomy, obfuscated by cosmopolitan intentions and presentation. For instance, Judge Debevoise

⁵⁷ M. Cherif Bassiouni, *The History of Universal Jurisdiction and Its Place in International Law*, in *UNIVERSAL JURISDICTION* 39 (Stephen Macedo, ed. 2006).

⁵⁸ See Karen Knop, *Here and There: International Law in Domestic Courts*, 32 N.Y.U. J. INT'L L. & POL. 501 (2000).

⁵⁹ *Id.* at 505–06.

⁶⁰ BREYER, *supra* note 18, at 148.

⁶¹ NYE & WELCH, *supra* note 40, at 66.

⁶² *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d. 248, 285 (D.N.J. 1999).

⁶³ *Id.* at 284.

asked, “what conceivable standard could a single court arrive at a fair allocation of resources among all the deserving groups? By what practical means could a single court acquire the information needed to fashion such a standard?”⁶⁴ He ultimately referenced the importance of multilateral fora in redressing wartime forced labor by German companies, as it “was a task which the nations involved sought to perform as they negotiated the Potsdam Agreement, the Paris Agreement, the Transition Agreement and the 2 + 4 Treaty. It would be presumptuous for this court to attempt to do a better job.”⁶⁵ His insight was substantiated when the selfsame German wartime forced labor issue found resolution away from U.S. courts through decentralized public-private diplomacy, which is the first of two alternative avenues presented by this Article for transnational corporate accountability that reflect liberal principles in their means as well as aims.

II. INCLUSIVE PUBLIC-PRIVATE DIPLOMACY IN TRANSNATIONAL CORPORATE ACCOUNTABILITY

A. *The Settlement Process for Nazi-Era Wartime Forced Labor as a Model*

The politically negotiated settlement agreement redressing the use of forced labor by German companies under the Third Reich⁶⁶ was a watershed for transnational corporate accountability. It amounted to ten billion marks, or approximately \$5.2 billion in December 1999,⁶⁷ dwarfing later ATS lawsuit judgments and settlements.⁶⁸ The successful negotiations proved instructive in

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ United States-Germany Agreement Concerning the Foundation “Remembrance, Responsibility and the Future,” U.S.-F.R.G., July 17, 2000, 39 I.L.M. 1298. For a first-hand account of the German forced labor settlement talks in 1999, see STUART E. EIZENSTAT, *IMPERFECT JUSTICE: LOOTED ASSETS, SLAVE LABOR, AND THE UNFINISHED BUSINESS OF WORLD WAR II* (2004). Eizenstat was U.S. Undersecretary of State at the time and a chief negotiator. *Id.* at 2.

⁶⁷ Carol J. Williams, *Germany Pledges \$5.2 Billion for Slave Laborers*, L.A. TIMES (Dec. 18, 1999), <http://articles.latimes.com/1999/dec/18/news/mn-45028>.

⁶⁸ See, e.g., *Chowdhury v. Worldtel Bangladesh Holding Ltd.*, 588 F. Supp. 2d 375 (E.D.N.Y. 2008) (entering a \$1.5 million ATS jury verdict against defendant holding company for torture); *Licea v. Curacao Drydock Co.*, 584 F. Supp. 2d 1355, 1366 (S.D. Fla. 2008) (entering an \$80 million ATS judgment against defendant corporation for human trafficking and forced labor); Press Release, Ctr. for Constitutional Rights, *Wiwa et al v. Royal Dutch Petroleum et al.*, <http://www.ccrjustice.org/home/what-we-do/our-cases/wiwa-et-al-v-royal-dutch-petroleum-et-al> (last modified Feb. 21, 2012) (announcing defendant corporation accused of complicity in human rights abuses including summary execution and torture settled out of court for \$15.5 million).

their contrasts with extraterritorial human rights litigation for the following reasons. First, on the heels of a multidimensional process wherein all relevant stakeholders had direct representation at the table, each party accepted the final settlement and lodged no subsequent challenges against its validity (although post-settlement disputes arose over peripheral issues such as accrued interest).⁶⁹ Second, the courts allocated the claims money to forced laborers of the German companies who were sued in U.S. courts as well as to surviving victims of defunct German firms;⁷⁰ forced laborers not a party to the independently dismissed district court civil lawsuits also received compensation.⁷¹ The fruits of this public-private approach⁷² arguably transcended what was possible with even the most favorable ATS lawsuit outcomes against foreign business enterprises.

Directly influential to the Berlin settlement talks was the rise of “a new, decentralized diplomacy” in the two-plus decades since the end of the Cold War involving “institutions as varied as businesses, charities . . . advocacy organizations, consulting firms, and philanthropic foundations.”⁷³ Such non-traditional political actors can address governance gaps between potent economic forces, actors, and the capacity of societies to hold them

⁶⁹ See EIZENSTAT, *supra* note 66, at 217 (“[I]n a negotiation, a lasting result is more likely to emerge by including everyone with a stake in the outcome rather than by freezing out people who may be left resentful. It is a way of neutralizing adversaries.”). For a discussion regarding the post-settlement disputes that largely were resolved in the forced laborers’ favor, see BAZYLER, *supra* note 19, at 96–99.

⁷⁰ EIZENSTAT, *supra* note 66, at 212. Approximately 1.25 million victims received funds from the settlement. Michael J. Bazylar, *The Holocaust Restitution Movement in Comparative Perspective*, 20 BERKELEY J. INT’L L. 11, 24–25 (2002).

⁷¹ *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248 (D.N.J. 1999); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424 (D.N.J. 1999). See Detlev Vagts & Peter Murray, *Litigating The Nazi Labor Claims: The Path Not Taken*, 43 HARV. INT’L L.J. 503 (2002); BAZYLAR, *supra* note 19, at 78 (“[T]he German government and representatives of German industries did not walk away from the bargaining table upon obtaining their legal victory. Even if they were now less fearful of American litigation, practical considerations led the Germans to press for a global settlement.”).

⁷² See Radu Mares, *Decentering Human Rights from the International Order of States: The Alignment and Interaction of Transnational Policy Channels*, 23 IND. J. GLOBAL LEGAL STUD. 171, 195 (2006) (“Conceptual treatments of human rights in a less state-centered global order do not seek mistakenly to reinforce distinctions such as those between hard and soft law, between legal and nonlegal, private and public, territorial and extraterritorial, but to transcend such distinctions with . . . a search for new regulatory arrangements to tackle them.”).

⁷³ Cameron Munter, *Diplomacy Disrupted: Foreign Policy in a Decentralized World*, FOREIGN AFF. (Mar./Apr. 2016), <https://www.foreignaffairs.com/reviews/review-essay/2016-02-15/diplomacy-disrupted>.

accountable.⁷⁴ Their emergence coincided with the reality that international law's structure typically imposes human rights duties on states that ratify treaties rather than on private companies.⁷⁵ Interests of disaggregated governmental and private entities more than ever clash in transnational rather than purely domestic political spaces. Without the full participation of businesses as well as civil society, a nuanced cross-border matter may never wholly be laid to rest. While the Berlin talks' non-traditional political actors nonetheless worked alongside chief negotiators dispatched by the intermediary U.S. and German governments, they added multidimensional layers of feedback and calibration unavailable to the aborted judicial route.⁷⁶ For this reason, the U.S. camp regarded these actors' overt participation as critical.⁷⁷

Inclusive public-private diplomacy's "more creative, flexible, and democratic" style continues to adapt to the expanding influence of private organizations and civil society groups on interstate relations, accommodating both advocates and increasingly powerful multinational businesses.⁷⁸ Its process does not depend on the legal protection of human rights in relationships between private actors, a tenuous shield only indirectly guaranteed through positive state obligations given "liberal concerns with preventing public state power from encroaching upon the private sphere of individual freedom."⁷⁹ Instead, direct negotiations between the concerned parties themselves are supported by both state and non-state actors that help impose an even playing field.⁸⁰ In the case of the Berlin talks, state efforts to convene the entire range of forced labor victim representatives and the culpable companies culminated in a compromise specifically tailored to their

⁷⁴ John Ruggie (Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises), *Protect, Respect and Remedy: A Framework for Business and Human Rights*, ¶ 3, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008).

⁷⁵ JOHN G. RUGGIE, *JUST BUSINESS: MULTINATIONAL CORPORATIONS AND HUMAN RIGHTS* 47 (2013) [hereinafter RUGGIE, *JUST BUSINESS*].

⁷⁶ EIZENSTAT, *supra* note 66, at 217–18.

⁷⁷ *Id.* Eizenstat describes how the German side was persuaded:

that to have an enduring agreement all stakeholders needed to be included—the class-action lawyers, Eastern European countries whose forced workers had never been paid, the state of Israel, and the [Holocaust] Claims Conference, which represented the interests of the Jewish slave laborers. This made for a messy and more complex negotiation. . . . But in the end I knew it would lead to a more satisfying result.

⁷⁸ Munter, *supra* note 73.

⁷⁹ Daniel Augenstein & Hans Lindahl, *Global Human Rights Law and the Boundaries of Statehood*, 23 *IND. J. GLOBAL LEGAL STUD.* 1, 2 (2006).

⁸⁰ *See id.*

circumstances, which both sides could accept with finality, without relying on unilateral judicial dicta.⁸¹

Taking into account the considerable resources allocated by the United States and other countries to their international development and trade institutions,⁸² decentralization and inclusiveness have further relevant applications. Many multilateral development banks and other state-based international financial institutions already feature or are developing independent accountability mechanisms (IAMs), these IAMs include multidimensional inclusive processes to resolve grievances lodged by communities and individuals that have suffered harm from institution-financed projects.⁸³ The Organization for Economic Co-operation and Development (OECD) followed suit starting in 2000, when the newly established National Contact Points of its member states began accepting complaints over companies' non-compliance with the OECD Guidelines for Multinational Enterprises.⁸⁴ In turn, civil society input has recommended that the OECD "strengthen state commitments to improving availability of remedies for victims of corporate abuses rather than merely rely on National Contact Point outlets, signifying a continual multi-pronged push towards greater public-private engagement."⁸⁵

⁸¹ See generally EIZENSTAT, *supra* note 66.

⁸² Such institutions include the Export-Import Bank of the United States, the Inter-American Foundation, the Millennium Challenge Corporation, and the Overseas Private Investment Corporation (OPIC). For data on aid distributed through them, see *Foreign Aid Dashboard*, USAID, <https://explorer.usaid.gov/aid-dashboard.html#2015> (last visited Jan. 21, 2017).

⁸³ See, e.g., MARK THORUM, OFFICE OF THE INSPECTOR GENERAL, EXPORT-IMPORT BANK OF THE U.S., OIG-INS-15-02, REPORT ON THE PROJECT FINANCING OF SASAN POWER LIMITED, 40–44, 53–54 (2015). See also Mares, *supra* note 72, at 195–96. Mares describes types of "opportunities on which the emerging regulatory regime of business and human rights is being built: first, the opening up of state economic channels to human rights aspects. . . [and] opportunities to enhance leverage through alignment, complementarity, and interaction of policy channels (policy coherence and 'smart' policy mixes)."

⁸⁴ *List of National Contact Points*, OECD, <http://mneguidelines.oecd.org/ncps/> (last visited Jan. 21, 2017).

⁸⁵ See Caitlin Daniel et al., *Remedy Remains Rare: An Analysis of 15 Years of NCP Cases and Their Contribution to Improve Access to Remedy for Victims of Corporate Misconduct*, ACCOUNTABILITY COUNSEL 7 (June 2015), http://www.accountabilitycounsel.org/wp-content/uploads/2012/05/OECDWATCH_RR_04.pdf. See also *Improving Accountability and Access to Remedy: Explanatory Notes*, *supra* note 23. ("Furthermore, there will be cases, especially where the human rights impacts are severe, where reference to non-judicial remedial mechanisms may not be appropriate or in keeping with State duties to protect against business-related human rights abuses.").

B. *Restorative Benefits and Caveats Distinct to the New Diplomacy*

While a main objective of inclusive public-private diplomacy in transnational corporate accountability is a negotiated settlement whereby corporate transgressors provide relief, the “lobbies for mutual accommodation”⁸⁶ that underpin it also offer restorative advantages for both sides. A culpable business enterprise is afforded the opportunity to proactively improve its reputation, in contrast to scenarios where it must defend against a lawsuit or settle out of court pre-judgment for purposes of damage control.⁸⁷ In the years since the breakthrough 1999 settlement, German companies that collaborated with the Nazi regime have seen their images markedly restored through their perceived willingness to acknowledge and make amends for forced labor.⁸⁸ Meanwhile, their Japanese counterparts continued to suffer negative headlines in the absence of a settlement for wartime transgressions, along with lingering spillover effects on their products.⁸⁹ Per the chief U.S. negotiator to the Berlin talks, the German companies “had never given much credence to the legal case against them. What they really wanted was to remove the threat of economic sanctions, boycotts, and other recriminations . . . that would haunt them even if they were victorious in court.”⁹⁰ Moreover, the aegis of “legal peace”—dismissal by plaintiffs of any pending Holocaust-era lawsuits against German corporate defendants—along with the promise of U.S. government Statements of Interest to discourage future litigation, was prerequisite for the German side and accepted by all parties to the negotiations.⁹¹ Incorporating legal peace into a conclusive restitution scheme closes the door to the never-ending potential for new litigation, as seen in

⁸⁶ See Doyle, *Liberalism and World Politics*, *supra* note 44.

⁸⁷ See *id.* at 230–31.

⁸⁸ See, e.g., Timothy Webster, *Sisyphus in a Coal Mine: Responses to Slave Labor in Japan and the United States*, 91 CORNELL L. REV. 733, 758 (2006).

⁸⁹ Steven S. Nam, *From Individual to Collective Restitution: Recasting Corporate Accountability for Korean Forced Labor in the Second World War*, 22 U.C. DAVIS J. INT’L L. & POL’Y 1, 14 (2015).

⁹⁰ EIZENSTAT, *supra* note 66, at 246.

⁹¹ BAZYLER, *supra* note 19, at 83–84. Regarding the Statement of Interest,

in any future Holocaust-related litigation against German defendants [it] would (1) inform the court handling the litigation that the foreign policy interests of the United States called for the recognition of the German Foundation as the exclusive forum for the resolution of disputes over the Holocaust-era conduct of German industry and (2) urge the dismissal of the lawsuit ‘on any legal ground.’

Id. at 84.

repetitious post-*Kiobel* iterations of lawsuits against Royal Dutch Shell across different fora that continue to this day.⁹²

Victims of corporate human rights violations and their advocates also obtain advantages through inclusive public-private diplomacy unavailable in extraterritorial human rights litigation. The Berlin settlement's transnational coverage of wartime forced laborers reached victims across geographic borders and provided them a uniform resolution, which separate domestic plaintiff classes would have been hard-pressed to achieve.⁹³ Furthermore, such a settlement can be structured so that it does not fixate solely on monetary compensation for each harmed individual, but rather takes "due account of the harm inflicted on groups of people, ethnic groups, and communities[,] . . . and incorporates a collective dimension"⁹⁴ for posterity. Appropriately, the German law that created the foundation for distributing settlement compensation began with a preamble acknowledging responsibility for corporate abuses under the Third Reich and pledging to sustain the memory of the injustices inflicted.⁹⁵ In contrast, corporations entangled in litigation generally are loath to admit any sort of responsibility for fear that admission will be used against them in future lawsuits.⁹⁶ A decentralized and inclusive settlement process also precludes the possibility of appeals from would-be corporate defendants, avoiding the risk of higher courts reversing plaintiff victories and denying redress.

⁹² See *Shell Faces Fresh Nigeria Pollution Claims in London*, VANGUARD (Mar. 2, 2016), <http://www.vanguardngr.com/2016/03/shell-faces-fresh-nigeria-pollution-claims-in-london/>.

Oil giant Royal Dutch Shell came under renewed scrutiny on Wednesday over its environmental record in Nigeria after lawyers brought fresh claims of damage caused by spills to a London court. . . . Shell agreed in January 2015 to pay more than \$80 million to the Nigerian fishing community of Bodo for two serious oil spills in 2008, following a three-year legal battle. . . . A Dutch court also ruled in December that four Nigerian farmers demanding compensation and a clean-up in four heavily-polluted Niger Delta villages can bring a case against the energy giant in the Netherlands.

Id.

⁹³ See Munter, *supra* note 73.

⁹⁴ Clara Sandoval & Gill Surfleet, *Corporations and Redress in Transitional Justice Processes*, in CORPORATE ACCOUNTABILITY IN THE CONTEXT OF TRANSITIONAL JUSTICE 93, 106 (Sabine Michalowski ed., 2013).

⁹⁵ BAZYLER, *supra* note 19, at 350–51 n.75.

⁹⁶ See, e.g., *Shell Settles One Lawsuit But Faces Another*, RADIO NETHERLANDS WORLDWIDE, <https://www.mw.org/archive/shell-settles-one-lawsuit-faces-another> (last visited Jan. 21, 2017) (Anne van Schaik of *Friends of the Earth* said the settlement is a sign that large oil companies will start to take responsibility for the actions of their subsidiaries . . . Shell maintains the allegations are false. The settlement is a "humanitarian gesture," said Shell executive Malcolm Brinded in a press statement).

It follows that speedy compensation for victims can be another advantage to circumventing judicial proceedings for public-private diplomacy in the quest for restitution. While proponents of a binding international treaty or of going through Congress to modernize and better delineate domestic laws on transnational corporate accountability⁹⁷ also merit consideration, such developments would require extensive deliberations without any guarantee of a realizable product. Former U.N. High Commissioner for Human Rights Louise Arbour has noted that dependence on future binding norms “would be frankly very ambitious . . . considering how long this would take and how much damage could be done in the meantime.”⁹⁸ The German settlement, for its part, resulted in payouts that went out after a shorter period of time than is possible under U.S. class action litigation rules.⁹⁹

Inclusive public-private diplomacy for transnational corporate accountability can even improve relations between participant states by proxy of big business. In July 2015, Mitsubishi Materials Corporation issued a formal apology at the Simon Wiesenthal Center’s Museum of Tolerance for the nearly nine hundred U.S. prisoners of war who had been used as slave laborers by its predecessor company Mitsubishi Mining Corporation.¹⁰⁰ Welcomed by the few remaining survivors and victims’ families, the apology was said to have strengthened Japan’s alliance with the United States;¹⁰¹ a former advisor to Japanese Prime Minister Shinzō Abe in attendance “expressed regret that it had taken so long” to deliver.¹⁰² In June 2016, Mitsubishi Materials announced an initial settlement for thousands of Chinese forced laborers including a formal apology and compensation that could total up to fifty-six million dollars depending on the number of victims who come forward.¹⁰³ Described as a

⁹⁷ See, e.g., BREYER, *supra* note 18, at 163–64; Anupam Chander, *Unshackling Foreign Corporations: Kiobel’s Unexpected Legacy*, 107 AM. J. INT’L L. 829, 829 (2013).

⁹⁸ *Interview Transcript: Louise Arbour*, FIN. TIMES (Jan. 8, 2008, 7:28 PM), <https://www.ft.com/content/720d1cc2-b6f3-11dc-aa38-0000779fd2ac>.

⁹⁹ BAZYLER, *supra* note 19, at 100–01.

¹⁰⁰ Mariko Lochridge, *Mitsubishi Materials Apologizes for Using U.S. POWs as Slave Labor*, REUTERS (July 20, 2015, 3:12 AM), <http://www.reuters.com/article/us-usa-mitsubishimaterials-apology-idUSKCN0P U02620150720>.

¹⁰¹ *Japanese Firms and their Wartime Crimes: Mitsubishi Shows Some Remorse*, ECONOMIST (July 20, 2015), <http://www.economist.com/news/asia/21659467-former-american-prisoners-war-receive-apology-mitsubishi-mitsubishi-shows-wartime-remorse>.

¹⁰² *Id.*

¹⁰³ *Mitsubishi Materials, Chinese WWII Slave Workers Reach Deal*, CHICAGO TRIBUNE (June 1, 2016, 9:43 AM), <http://www.chicagotribune.com/business/ct-mitsubishi-chinese-wwii-slave-workers-settlement-20160601-story.html>.

catalyst for improved ties between Beijing and Tokyo, it is seen to have increased the likelihood of a bilateral summit in the near future.¹⁰⁴

Inclusive public-private diplomacy is not without its limitations. States with poor relations and/or on opposite sides of the liberal-illiberal divide may be unwilling to meet at the table over corporate accountability,¹⁰⁵ much less with their relevant non-state stakeholders in tow. Corporate human rights violations can fail to garner the buy-in of influential intermediary administrations, which can be seen in the experience of South African Apartheid victims adversely impacted by foreign companies' conduct¹⁰⁶ as well as that of Korean wartime forced laborers,¹⁰⁷ whom the calculus of U.S. government interests did not favor. Human rights harms occurring on a smaller scale might escape governments' notice altogether. States also can hinder their own image-conscious corporations from moving for reconciliation and redress if doing so would clash with their political aims. For instance, the Japanese government allegedly opposed Mitsubishi's desired settlement talks with Korean wartime forced laborers on the one hand while sanctioning the company's Chinese forced labor settlement on the other.¹⁰⁸ With respect to governance gaps in transnational corporate accountability that states refuse to fill, the significance of non-state stakeholder contributions is magnified.

¹⁰⁴ *Mitsubishi to Compensate Chinese Wartime Laborers, Ignores Korean Victims*, DONG-A ILBO (July 25, 2015), <http://english.donga.com/List/3/all/26/411144/1>.

¹⁰⁵ See Andrew Moravcsik, *Taking Preference Seriously: A Liberal Theory of International Politics*, 51 INT'L ORG. 513, 513 (1997) (noting that liberal states tend to have less conflict with each other and enter into and comply with legal agreements more often).

¹⁰⁶ *Khulumani v. Barclay National Bank, Ltd.*, 504 F.3d 254, 259 (2d Cir. 2007) (per curiam). South Africa's government requested the dismissal of a representative ATS lawsuit for "interfering 'with a foreign sovereign's efforts to address matters in which it has predominant interest,'" while the U.S. government asserted that continuing the case would "risk potentially serious adverse consequences for significant interests of the United States." *Id.*

¹⁰⁷ John Haberstroh, Note, *In re World War II Era Japanese Forced Labor Litigation and Obstacles to International Human Rights Claims in U.S. Courts*, 10 ASIAN L.J. 253 (2003). Lack of U.S. support was cited as a key chilling factor leading to the 2000 and 2001 dismissals of *In Re World War II Era Japanese Forced Labor Litigation* by the Northern District Court of California and the Ninth Circuit Court of Appeals, wherein wartime forced labor claims were brought by allied POWs, U.S. civilians, and Korean, Chinese, and Filipino plaintiffs. *Id.*

¹⁰⁸ Moravcsik, *supra* note 105.

III. POLYCENTRIC APPROACHES TO TRANSNATIONAL CORPORATE ACCOUNTABILITY

A. *Proliferation of the U.N. Guiding Principles on Business & Human Rights*

Within delineated limits in certain policy domains, extraterritorial jurisdiction has proven effectual and expedient. For example, the Foreign Trade Antitrust Improvements Act of 1982 states that the Sherman Act does apply to conduct involving foreign trade or commerce when such conduct has a direct and reasonably foreseeable effect on domestic or import commerce.¹⁰⁹ A comprehensive study on varied uses of extraterritorial jurisdiction,¹¹⁰ commissioned by John Ruggie before the drafting of his brainchild, the U.N. Guiding Principles on Business & Human Rights, concluded that “multilateral measures are likely to be seen as more acceptable than unilateral measures; principles-based approaches are less problematic than prescriptive rules-based approaches.”¹¹¹ Unsurprisingly, Ruggie’s U.N. Guiding Principles thrive on multilateral, principles-based guidance to transnational corporate accountability while eschewing universal jurisdiction’s comparative quagmire.¹¹² Their introductory General Principles read as follows:

These Guiding Principles are grounded in recognition of: (a) States’ existing obligations to respect, protect and fulfill human rights and fundamental freedoms; (b) The role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights; (c) The need for rights and obligations to be matched to appropriate and effective remedies when breached. These Guiding Principles apply to all States and to all business enterprises, both transnational and others. . . . [They] should be understood as a coherent whole and should be read, individually and collectively, in terms of their objective of enhancing standards and practices . . . and thereby also contributing to a socially sustainable globalization. Nothing in these Guiding Principles should be read as creating new

¹⁰⁹ 15 U.S.C. § 6(a) (1982).

¹¹⁰ Jennifer A. Zerk, *Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas* (Harv. Kennedy Sch. of Gov’t, Working Paper No. 59, 2010), https://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_59_zerk.pdf [hereinafter Zerk, *Extraterritorial Jurisdiction*].

¹¹¹ RUGGIE, JUST BUSINESS, *supra* note 75, at 141.

¹¹² *See id.* at 63 (“[A]s a general solution to the overall human rights challenges posed by multinational corporations, extraterritorial jurisdiction remains unacceptable to governments.”).

international law obligations, or as limiting or undermining any legal obligations a State may have undertaken or be subject to under international law with regard to human rights.¹¹³

The UNGPs are a rare example of an impactful international “soft law” instrument that was not negotiated by national governments themselves.¹¹⁴ Nonetheless, the U.N. Guiding Principles have gained widespread acceptance as a normative reference point for public actors such as states, state-created institutions, and the United Nations in addition to private actors such as corporations and NGOs.¹¹⁵ Departing from conventional perceptions of adversarial relationships between states, businesses, and civil society, the UNGPs herald a “polycentric governance” for corporate accountability that depends on the coordinated efforts of all three groups to prevent, navigate, and redress corporate human rights violations.¹¹⁶ Even as they become increasingly accepted by the global liberal community for their emphasis on improving multilateral grievance mechanisms and *voluntary* initiatives (unlike the ATS lawsuits that threatened universal jurisdiction over corporations),¹¹⁷ the UNGPs and their promise are predicated on a continuing transnational evolution of the traditional liberal framework. Conventional liberalism views non-state actors as influential yet functional at the international level only through the state agents allocated to them, an arrangement manifest in

¹¹³ *Guiding Principles*, *supra* note 20, at 1.

¹¹⁴ John Ruggie, Professor, Harvard Kennedy School, Address at the Raymond and Beverly Sackler Distinguished Lecture: Just Business: Multinational Corporations and Human Rights (Feb. 28, 2013) [hereinafter Ruggie, Address].

¹¹⁵ *Id.* (“The Guiding Principles’ core features have been incorporated by numerous other international and national standard setting bodies. International business associations and labor federations have issued user’s guides to the Guiding Principles, and civil society groups invoke them in their work. The number of companies developing human rights-related policies and practices is increasing impressively.”).

¹¹⁶ *Id.*

For states, the focus is on the legal obligations they have under the international human rights regime to protect human rights abuses by third parties, including business, as well as policy rationales that are consistent with, and supportive of, meeting those obligations. For businesses, beyond compliance with legal obligations that may vary across countries . . . the Guiding Principles focus on the need to manage the risk of involvement in human rights abuses, which requires acting with due diligence to avoid infringing on the rights of others, and to address harm where it does occur. For affected individuals and communities, the Guiding Principles provide a basis for the further realization of their right to remedy, both judicial and non-judicial.

Id.

¹¹⁷ *See* Knowles, *supra* note 14, at 1176 (“[I]s the ATS nonetheless a counterproductive means of achieving cooperation regarding human rights because it interferes with efforts by international legal institutions to develop human rights law?”).

inclusive public-private diplomacy; the prospect of non-state actors' own transnational agency is left unconsidered.¹¹⁸ Peter Spiro helpfully characterizes this shift with respect to the United States as follows:

Existing models of international law and international relations are ill-equipped to project the more complete assimilation of the United States into international norm regimes. On the one hand, norm-driven theories fail to explain how international actors will overcome entrenched U.S. resistance to international lawmaking On the other hand, rationalist theories systematically underestimate the incentives that the United States may have for buying into international regimes. By segregating interests and actors along national lines, these models miss transnational accelerants of international norms Transnationality affords non-domestic actors enhanced leverage in pressing U.S. participation in international regimes.¹¹⁹

In practice, corporate accountability NGOs have regularly pierced the veil of statehood. Unconstrained by a state-hegemonic concept of international human rights law¹²⁰ and with their newfound tool of UNGP standards, NGOs pressure transnational business enterprises to improve self-enforcement mechanisms for human rights due diligence.¹²¹ NGOs can skirt the respect for sovereignty that binds the global liberal community when pressing for changes to domestic and foreign state institutions' accountability policies, often with reference to the UNGPs—which provide a needed “authoritative focal point around which the expectations and behavior of the relevant actors can converge.”¹²² In a recent joint letter to the Chairman and President of the Export-Import Bank of the United States both praising and offering

¹¹⁸ Spiro, *supra* note 54, at 199.

¹¹⁹ *Id.* at 218.

¹²⁰ See Mares, *supra* note 72, at 197 (“[T]he possibility for law to reassert itself globally through the intrafirm channel, allowing endless combinations of public regulation, private regulation, standardization and capacity-building measures involving a multitude of policy channels.”).

¹²¹ See, e.g., TIM STEINWEG ET AL., CTR. FOR RES ON MULTINATIONAL CORP., CUT AND RUN: UPDATE ON THE IMPACT OF BUCHANAN RENEWABLES' OPERATIONS AND VATTENFALL'S DIVESTMENT 61 (2013), <https://www.somo.nl/wp-content/uploads/2013/03/Cut-and-Run.pdf> (“[I]nternationally accepted standards such as the OECD Guidelines or the U.N. Guiding Principles also insist on proper human rights due diligence.”).

¹²² RUGGIE, JUST BUSINESS, *supra* note 75, at 78 (“One reason that existing initiatives, public and private, do not add up to a more coherent system capable of truly moving markets is the lack of an authoritative focal point around which the expectations and behavior of the relevant actors can converge. Thus, my immediate objective was to develop and obtain agreement on a normative framework and corresponding policy guidance for the business and human rights domain, establishing both its parameters and its perimeters.”).

recommendations for its grievance mechanism development, forty-one leading domestic and international NGOs and advocates highlighted the UNGPs' non-judicial mechanism effectiveness criteria.¹²³ In so doing, the letter detailed the ways to measure a mechanism's efficacy including legitimacy, accessibility, predictability, equitability, and transparency, among others.¹²⁴ The Export-Import Bank's grievance mechanism is intended to handle claims from individuals and communities harmed by overseas Bank-funded corporate projects;¹²⁵ hence in polycentric fashion, civil society input for domestic institutions as informed by the UNGPs can reach transnational corporate activity and heighten accountability standards without disrupting state sovereignty.

States also benefit from the permeation of UNGPs in the governance structures of representative global institutions, especially with respect to the UNGPs' universality and clarity. Many of the multilateral, principles-based concepts have been integrated into a panoply of institutional language, from the human rights chapter of the OECD Guidelines for Multinational Enterprises, to provisions in the new funding standards for the International Finance Corporation, to the social responsibility standard issued by the International Standards Organization.¹²⁶ By conditioning project approval and/or funding on compliance with the UNGPs, states and their institutions are better able to avoid situations where they become implicated in overseas corporate abuse resulting from their financial and/or promotional support of culpable firms. A liberal home state's call for adherence to UNGP guidance among its business enterprises also can translate into "much-needed support to host states that lack the capacity to implement fully and effectively regulatory environments on their own."¹²⁷ In the long-term, an increasingly uniform regulatory playing field worldwide should reduce costs for states and their transnational businesses, which have been navigating disparate patchworks of regulatory regimes across different host governments.

¹²³ Letter from Accountability Counsel et al. to Fred Hochberg, Chairman and President, Exp.-Imp. Bank of the U.S. (Jan. 4, 2016), <http://www.accountabilitycounsel.org/wp-content/uploads/2016/02/1.4.15-Ex-Im-Grievance-Mechanism-Sign-on-Letter.pdf>.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ Ruggie, Address, *supra* note 114, at 8–9.

¹²⁷ RUGGIE, JUST BUSINESS, *supra* note 75, at 85.

In the view of the UNGPs, business enterprises too are crucial proactive actors, rather than mere recipients, of the carrot and stick approach. For instance, their participation is key to multi-stakeholder initiatives (MSIs), or industry-wide initiatives designed by a polycentric and transnational array of government, corporate, and civil stakeholders to encourage voluntary standards and verification schemes.¹²⁸ The UNGPs note that in complex operating contexts, business enterprises would do well not only to engage with “expertise and cross-functional consultation within the enterprise, but also to consult externally with credible, independent experts, including . . . multi-stakeholder initiatives”¹²⁹ found in their respective industries. The Extractive Industries Transparency Initiative (EITI)¹³⁰ is a prominent example of a functioning MSI that, while subject to ongoing constructive criticism from civil society,¹³¹ has seen its global membership and credibility grow among liberal states.¹³² EITI invites greater scrutiny and concurrent accountability into the once largely opaque extractive industries sector. Overseen by a polycentric and international board on which sit individuals from the corporate and civil society spheres as well as government representatives,¹³³ EITI is one among a

¹²⁸ *Guiding Principles*, *supra* note 20, at 31.

¹²⁹ *Id.* at 26. See Peter Utting, *Regulating Business Via Multistakeholder Initiatives: A Preliminary Assessment*, in VOLUNTARY APPROACHES TO CORPORATE RESPONSIBILITY: READINGS AND A RESOURCE GUIDE (2002).

¹³⁰ See *Who We Are*, EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, <https://eiti.org/about/who-we-are> (last visited Jan. 21, 2017) (describing EITI as “a global Standard to promote open and accountable management of natural resources In each of the implementing countries, the EITI is supported by a coalition of governments, companies and civil society.”); *EITI Fact Sheet*, EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, https://eiti.org/sites/default/files/documents/eiti_factsheet_en.pdf (last visited Jan. 21, 2017) (“Countries implementing the EITI disclose information on tax payments, licenses, contracts, production and other key elements around resource extraction A country’s EITI Report informs the public of what happens with its natural resources”) One of the requirements of the EITI Reports is that they “are comprehensible, actively promoted, publicly accessibly, and contribute to public debate.” *Id.*

¹³¹ See, e.g., MSI INTEGRITY, PROTECTING THE CORNERSTONE: ASSESSING THE GOVERNANCE OF EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE MULTI-STAKEHOLDER GROUPS (2015), <http://www.msi-integrity.org/wp-content/uploads/2015/02/MSI-Integrity-Protecting-The-Cornerstone-Report.pdf>.

¹³² See *Frequently Asked Questions*, EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE, <https://eiti.org/FAQ> (last visited Jan. 21, 2017) (“An increasing number of OECD countries have begun implementing the EITI. When the EITI was launched in 2002, the objective was to tackle the ‘resource curse.’ The global transparency movement has come a long way since then, and so have the perceived benefits. . . . Norway decided to implement because it sees the EITI as part and parcel of its broader commitment to transparent public finances. The United States committed to implement the EITI to ‘help guarantee the taxpayer a full and fair return from their resources.’ Australia and Germany are piloting the EITI and UK and France have also committed”).

¹³³ See *The EITI Board*, EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE, <https://eiti.org/about/board> (last visited Jan. 21, 2017).

growing number of MSIs, each adapted to the distinct particulars and circumstances of a given industry. These MSIs share the common objective of incentivizing every stakeholder to cooperate for their respective economic, reputational, ethical, and moral interests. To the extent a MSI's legitimacy is strengthened via polycentric feedback and checks, it can counteract adversarial zero-sum attitudes over transnational corporate accountability within its pertinent industry.

B. Joint Development and Implementation of the Accountability and Remedy Project

Notwithstanding the liberal community's expanding reliance on the U.N. Guiding Principles, there are still no widespread and effective state-based judicial mechanisms that ensure access to remedy for transnational corporate human rights abuses, a main pillar of the UNGPs. Under a mandate from the Human Rights Council, the Office of the United Nations High Commissioner for Human Rights launched the Accountability and Remedy Project (the Project) in November 2014,¹³⁴ requesting and receiving input from a wide range of state, corporate, and NGO stakeholder groups. The Project commissioned an independent study and received feedback in the form of submissions from a wide variety of state and private actors.¹³⁵ The Project accorded the submissions balanced consideration, finding that better enabling access to remedy in practice will require "concerted and multifaceted efforts from all states. . . and closer international cooperation,"¹³⁶ especially with respect to challenges "exacerbated in cross-border cases."¹³⁷

Improved state-based judicial mechanisms for victims in transnational cases would address two problem areas. First, awareness and effective use of *non-judicial* grievance mechanisms at the disposal of workers and affected

¹³⁴ Improving Accountability and Access to Remedy: Explanatory Notes, *supra* note 23.

¹³⁵ JENNIFER ZERK, OHCHR, BUSINESS AND HUMAN RIGHTS: ENHANCING ACCOUNTABILITY AND ACCESS TO REMEDY 2–3 (2014), <http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/RemedyProject1.pdf>. Submissions came from States, the United States, the European Union, the International Organisation of Employers, leading corporate accountability NGOs such as the Centre for Research on Multinational Corporations (SOMO) and the International Corporate Accountability Roundtable (ICAR), attorneys and law firms, academia, and NPOs working in the field of business and human rights.

¹³⁶ Improving Accountability and Access to Remedy: Explanatory Notes, *supra* note 23, at ¶ 7.

¹³⁷ *Id.* at ¶ 5. A "cross-border" case is defined as "one where the relevant facts have taken place in, the relevant actors are located in order the evidence needed to prove a case is located in more than one State." *Id.* at Box 3.

communities continue to lag despite the assistance of NGOs worldwide;¹³⁸ many fear that such mechanisms “reflect the power imbalance between companies and rights-holders and . . . might become substitutes for judicial processes.”¹³⁹ Second, existing domestic legal regimes tend to focus on business activities and impacts within their own territories, leaving their systems undeveloped for redressing transnational corporate human rights abuses.¹⁴⁰ Domestic pathways whereby states could “strengthen judicial capacity to hear complaints and enforce remedies against all corporations operating or based in their territory, while also protecting against frivolous claims,”¹⁴¹ was suggested years before the UNGPs’ advent, yet can hardly be implemented in a unilateral vacuum with respect to cross-border cases. The impediments to extraterritorial jurisdiction over business enterprises assessed in this Article, coupled with its perennial and troublesome requirement of “reasonableness,”¹⁴² have necessitated greater coordination between countries for transnational judicial mechanisms that are complementary to the extent possible.

Bolstered by polycentric input and its accompanying legitimacy, the Accountability and Remedy Project has provided guidance for “cross-border cooperation between relevant State agencies and judicial bodies, tailored to the contexts of both public law enforcement and private law claims.”¹⁴³ Realistic in scope, it takes care to note the following granular and constructivist considerations:

¹³⁸ See, e.g., COLLEEN FREEMAN & ESTHER DE HAAN, CENTRE FOR RESEARCH ON MULTINATIONAL CORPORATIONS, USING GRIEVANCE MECHANISMS: ACCESSIBILITY, PREDICTABILITY, LEGITIMACY AND WORKERS’ COMPLAINT EXPERIENCES IN THE ELECTRONICS SECTOR 4–5 (Mar. 2014), <https://www.somo.nl/wp-content/uploads/2014/03/Using-Grievance-Mechanisms.pdf>; GWYNNE SKINNER ET AL., CORE, THE THIRD PILLAR: ACCESS TO JUDICIAL REMEDIES FOR HUMAN RIGHTS VIOLATIONS BY TRANSNATIONAL BUSINESS 60–61 (Dec. 2013), <http://icar.ngo/wp-content/uploads/2013/02/The-Third-Pillar.pdf>.

¹³⁹ RUGGIE, JUST BUSINESS, *supra* note 75, at 121.

¹⁴⁰ Improving Accountability and Access to Remedy: Explanatory Notes, *supra* note 23, ¶ 5.

¹⁴¹ John Ruggie (Special Representative on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises), *Protect, Respect and Remedy: A Framework for Business and Human Rights* ¶ 91, U.N. Doc A/HRC/8/5 (Apr. 7, 2008).

¹⁴² Zerk, *Extraterritorial Jurisdiction*, *supra* note 110, at 10 (“International law places limits on the use of direct extraterritorial jurisdiction. As well as having to rely on one or more established jurisdictional principles (i.e. relevant territorial connections, nationality connections, or the more controversial passive personality, protective or universality principles), it is generally agreed that the use of direct extraterritorial jurisdiction is subject to an overarching ‘reasonableness’ requirement. This requirement is only vaguely defined in international legal discourse.”).

¹⁴³ Improving Accountability and Access to Remedy: Explanatory Notes, *supra* note 23, ¶ 28.

There are many differences between jurisdictions in terms of legal structures, cultures, traditions, resources and stages of development, all of which have implications for the issues covered by the guidance. For instance, some legal systems are highly codified, whereas others place more reliance on legal development through judicial decisions and precedent. Some domestic legal systems are adversarial, whereas others are inquisitorial, and some contain elements of both. Some legal systems are federal, or devolved in nature, whereas others are unitary. Some legal systems provide for corporate criminal liability, and some do not. The guidance is therefore necessarily flexible and anticipates the need for adaptation to local needs and contexts. Identifying areas where improvement is needed in domestic legal regimes may be a complex task, and in some jurisdictions a formal legal review may be necessary.¹⁴⁴

The Project's recommendations include: (1) facilitating "detection, investigation, prosecution, and enforcement of cross-border cases concerning business involvement in severe human rights abuses," (2) using new normative frameworks in which requests for interstate legal assistance and collaboration are recognized under "appropriate bilateral and multilateral arrangements," and (3) carrying out transnational investigations by using joint investigation teams.¹⁴⁵ Whereas universal jurisdiction threatened to force unilateral judgments upon the business enterprises of ill-disposed states, the Project envisions mutually negotiated agreements and initiatives banding together states' domestic judicial mechanisms for rapid responses.¹⁴⁶ It also admonishes negotiating states to recognize "patterns of inward and outward foreign direct investment,"¹⁴⁷ so as to avoid self-interested biases and favoritism, and for judicial bodies to impose appropriate restitution upon companies that take into account their human rights due diligence¹⁴⁸ (reflecting the input from businesses that went into the Project's development). Further recommendations range from accessible information repositories for points of contact and outstanding requests, to the involvement of judicial and enforcement agency personnel in multilateral networks for exchange of know-how.¹⁴⁹ International

¹⁴⁴ *Id.* ¶ 5.

¹⁴⁵ *Id.* ¶¶ 9, 9.2–9.3.

¹⁴⁶ *See id.*

¹⁴⁷ *Id.* ¶ 9.7.

¹⁴⁸ *Id.* ¶ 11.2.

¹⁴⁹ *Id.* ¶¶ 9.5–9.6.

arrangements in law enforcement already incorporate many such collaborative elements, but their extension to relevant judicial bodies has little precedent.¹⁵⁰

More radical concepts for judicial mechanisms involving binding legal instruments, e.g., the creation of a new jurisdiction over business enterprises, are generally prone to a lack of self-agency and/or assured high-level representation for participant state and non-state stakeholders, rendering them impractical for purposes of adoption. Additional ideas discussed at the 2016 American Society of International Law Roundtable on Business & Human Rights included: (1) national mechanisms overseen by regional human rights commissioners (appointed by the U.N. Human Rights Commission or regional human rights courts where applicable), (2) specialized permanent tribunals at a regional level with harmonization across tribunals and judges from existing regional human rights courts, (3) extending the Rome Statute in the International Criminal Court to apply to corporate, as well as natural persons, or (4) a corporate human rights chamber based at the International Court of Justice in the Hague. The greater the degree of polycentric elements introduced into the development and implementation of these proposals, the greater will be their chances for coming to fruition someday.

Tapping into the liberal internationalism characteristic of the synergistic UNGPs, the Accountability and Remedy Project calls for state-based judicial mechanisms to transcend together the conventional bounds of comity with respect to transnational corporate abuses. Its proactive cross-border coordination is intended to shape mutually acceptable resolutions ending in concrete remedy. Whether the Project can gain the kind of polycentric traction enjoyed by the UNGPs remains to be seen. Its success would represent the latest contribution to a nascent and coherent global corporate accountability regime driven by stakeholder cooperation, as opposed to extraterritorial unilateralism.

CONCLUSION

Inasmuch as this Article has traced the evolving relationship between liberalism and transnational corporate accountability, the place of illiberal regimes within a broader discourse cannot be discounted. Most developing economies are rarely in a position to turn away, for ideological reasons alone,

¹⁵⁰ See *id.* ¶ 7.

investment by foreign business enterprises that hail from states with autocratic governments. Illiberal China is not only a significant driver of the global economy, but has also founded the Asian Infrastructure Investment Bank (AIIB)—an international financial institution joined by numerous liberal and illiberal states alike.¹⁵¹ Indeed, the United States and Japan have been roundly criticized for refusing to follow China's lead and rejecting membership in the AIIB,¹⁵² thereby losing the opportunity to exercise a liberalizing influence from the inside. Going forward, should we expect transnational business enterprises from illiberal states to respect human rights abroad despite tenuous government regard for human rights at home?

There is cause for optimism in free-market capitalism's invisible hand, the ubiquitous workings of which semi-planned economies such as China's cannot avoid while targeting continued expansion. Ruggie has noted that Chinese companies operating within the Global South recently "have begun to encounter resistance from local communities and other stakeholders that are empowered and mobilized by the very social norms that have built up around their European and North American counterparts."¹⁵³ In effect, if gradually higher standards are demanded by host communities as well as host states, respect for higher corporate accountability benchmarks becomes less of a prerogative and more of a competitive necessity for illiberal states and their businesses. While rule of law with regards to transnational corporate accountability remains a patchwork across liberal and illiberal states, the emergence of a "rule of norms" certainly appears underway.

Immanuel Kant, a forefather of liberalism and visionary of a cosmopolitan and just "universal civil society," envisioned it combining "the greatest freedom, and thus thoroughgoing antagonism among its members, with a precise determination and protection of the boundaries of this freedom, so that

¹⁵¹ See, e.g., Andrea Thomas & Charles Hutzler, *Germany, France, Italy to Join China-Backed Development Bank*, WALL STREET J. (Mar. 17, 2015), <http://www.wsj.com/articles/germany-france-italy-to-join-china-backed-development-bank-1426597078>; *Egypt, Norway, Russia Approved as AIIB founders*, CHINA DAILY, http://www.chinadaily.com.cn/business/2015-04/15/content_20437814.htm (last updated Apr. 15, 2015); *Iran Joins China-Led Asian Bank*, FARS NEWS AGENCY (Apr. 7, 2015), <http://en.farsnews.com/newstext.aspx?nn=13940118001336>.

¹⁵² See, e.g., Gerald L. Curtis, Keynote Speech at Columbia Business School's Center on Japanese Economy and Business 30th Anniversary Conference: The United States and Japan in a Turbulent Asia (May 13, 2016), <http://www8.gsb.columbia.edu/cjeb/sites/cjeb/files/Gerald%20L.%20Curtis%E2%80%99s%20Keynote%20Speech%20%E2%80%9CThe%20US%20and%20Japan%20in%20a%20Turbulent%20Asia%E2%80%9D.pdf>.

¹⁵³ RUGGIE, JUST BUSINESS, *supra* note 75, at 94.

it can coexist with the freedom of others.”¹⁵⁴ Healthy internal debate and frictions would be considered only natural given humanity’s proclivity towards unrestricted freedom. However, mutual respect for each other’s boundaries in the vein of liberalism would help form a greater whole and reduce distractions from “the highest attainable development of mankind’s capacities.”¹⁵⁵ The lack of this reciprocal respect doomed universal jurisdiction over foreign business enterprises, which despite noble intentions was an exercise in forcing cosmopolitanism before its time. When transnational corporate accountability is left to the unilateral and extraterritorial fiat of courts, the end result for stakeholders is not unlike Kant’s figurative lone trees “that grow in freedom and separate from one another . . . and are stunted, bent, and twisted.”¹⁵⁶ When accountability instead is ceded in polycentric fashion to governments, civil society, and business enterprises, their resemblance to Kant’s “trees in a forest”—“which need each other, for in seeking to take the air and sunlight from the others, each obtains a beautiful, straight shape”¹⁵⁷—grows inexorably.

¹⁵⁴ IMMANUEL KANT, PERPETUAL PEACE AND OTHER ESSAYS 33 (Ted Humphrey trans., Hackett Publ’g Co. 1983) (1784).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*