

# The Limits of Offshoring—Why the United States Should Keep Enforcement of Human Rights Standards “In-House”

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## INTRODUCTION

As the world becomes more integrated, the recognition that globalization constitutes a force with growing influence over a host of transnational problems has gained increasing traction.<sup>1</sup> In response to these problems, many theorists have posited an emergent new world order as the construct most descriptive of how the world currently confronts all global problems or as prescriptive on how the world should confront these problems in the future.<sup>2</sup> These theories often expressly or implicitly suggest that all the global problems can be solved through a single new framework or reconfiguration of existing frameworks.<sup>3</sup>

While the search for a unified solution can play an integral role in policy development, this Note rejects the view that any single panacea will bring relief to the myriad afflictions influenced by globalization. Rather, each problem requires a solution tailored to its own unique characteristics, such that a proposed solution for human rights abuses by private actors may prove poorly suited to confront human rights abuses committed by state actors.

By examining the discrete global problem of corporations committing human rights abuses, Part I of this Note will first contend that no single strategy is currently being deployed on a global level to confront human rights abuses, corporate or otherwise. Next, Part II will argue that global economic and legal conditions foreshadow an increase in corporate human rights abuses because corporate actors can avoid liability under most existing legal theories while they simultaneously increase their operations across the globe. Finally, Part III will suggest that because globalization stands poised to exacerbate the abuse of human rights by private actors, Congress should modify existing legal theories and extend the jurisdiction of U.S. Courts as an effective and desirable method of stemming the proliferation of global misfeasance by private actors.

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1. See, e.g., Jost Delbrück, *Globalization of Law, Politics, and Markets—Implications for Domestic Law—A European Perspective*, 1 IND. J. OF GLOBAL LEGAL STUD. 9, 14–19 (1993).

2. See generally Michael Hardt & Antonio Negri, *Globalization as Empire*, in THE GLOBAL TRANSFORMATIONS READER 116, 117 (David Held & Anthony McGrew eds., 2000); Anthony McGrew, *Models of Transnational Democracy*, in THE GLOBAL TRANSFORMATIONS READER, 500, 500–05 (David Held & Anthony McGrew eds., 2000).

3. See, e.g., Anne-Marie Slaughter, *Governing the Global Economy Through Government Networks*, in THE GLOBAL TRANSFORMATION READER 189, 192–93 (David Held & Anthony McGrew eds., 2000).

## I. THE CURRENT GLOBAL RESPONSE TO HUMAN RIGHTS ABUSES

An assortment of initiatives launched by governments, international institutions, and transnational private actors has transformed human rights from a collection of lofty aspirations into actual benchmarks augmented by global awareness and methods of enforcement.<sup>4</sup> Although effective at promoting human rights as a precept of global values, the various institutions shepherding the human rights movement thus far have proven largely ineffective at coalescing around a single global vision of human rights.<sup>5</sup> Rather, different institutions often endorse different theories on how to define the precise contours of human rights and how exactly these rights should be vindicated once identified.<sup>6</sup>

Within this uneven theoretical landscape, legal claims tailored to confront the full range of possible human rights abuses have yet to find solid footing. Consequently, to understand the discrete global problem posed by private actors committing human rights abuses, the first step in analysis requires appraising the current state of human rights and identifying both the non-legal and legal components of their enforcement.

*A. The Non-Legal Measures Taken to Address Human Rights Abuses*

Although legal claims provide a familiar method for defining and enforcing fundamental rights, the theory that law alone can serve these functions misconstrues the growing advocacy role played by governments, international institutions, and transnational organizations.<sup>7</sup> In confronting human rights abuses, international and transnational institutions have helped define the normative foundations for human rights and instituted monitoring programs across the globe.<sup>8</sup> Further, governments and international institutions have crafted political responses to egregious human rights abuses through the use of sanctions, and even military intervention in extreme cases.<sup>9</sup> While these measures have certainly enhanced global awareness of human rights and possibly decreased the incidence of abuses, non-legal measures remain confined in their application within certain theoretical and practical limitations.

The United Nations Universal Declaration of Human Rights (“the Declaration”) ratified in 1948 provides a telling example of how international institutions can further the theory of human rights, and yet still face limitations in garnering global

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4. See, e.g., Human Rights Watch Who We Are, <http://www.hrw.org/about/whoweare.html>; Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg. at 71, U.N. Doc. A/810 (Dec. 12, 1948); Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (July 17, 1998), available at [http://www.icc-cpi.int/library/about/officialjournal/Rome\\_Statute\\_120704-EN.pdf](http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf).

5. Paul R. Dubinsky, *Human Rights Law Meets Private Law Harmonization*, 30 YALE J. INT'L L. 211, 253 (2005); Human Rights Watch Who We Are, *supra* note 4; G.A. Res. 217A, *supra* note 4.

6. See Human Rights Watch Frequently Asked Questions, <http://www.hrw.org/about/faq/>.

7. Jost Delbrück, *Structural Changes in the International System and its Legal Order: International Law in the Era of Globalization*, SWISS REV. INT'L & EUR. L., 1, 4 (2001).

8. See Human Rights Watch Who We Are, *supra* note 4.

9. Although many governmental and international responses that I have characterized as political involve a legal element, these interventions are in their character more political than legal insofar as adjudication and process remain the talisman of legal remedies.

acceptance.<sup>10</sup> Despite its capacious and seminal language, the Declaration still enjoys only partial recognition among U.N. member states if state compliance fairly approximates recognition.<sup>11</sup> Many states in the U.N. openly ignore select strictures of the Declaration, instead crafting their own roster of human rights that they feel deserve protection. As a result, any binding effect that the Declaration may impose on states applies to private actors only insofar as each member-state incorporates the Declaration's tenets as cultural or legal imperatives.

Attempts by non-governmental organizations (NGOs) to produce both credible human rights standards and meaningful enforcement regimes have likewise achieved mixed results. NGOs can operate with a flexibility largely inaccessible to staid international institutions such as the U.N. This advantage derives from the independence NGOs enjoy as transnational rather than international institutions. Whereas international institutions often rely on state participation and ratification for their legitimacy, transnational institutions instead function by developing expertise within a certain subject and then deploying that expertise on a global level.<sup>12</sup>

Independence from state actors certainly simplifies the process of achieving internal consensus on human rights standards. Nevertheless, whatever advantages NGOs may realize by foregoing cumbersome state ratification procedures comes at the cost of widening democracy deficits and growing dissonance between NGO policy makers and other stakeholders in the global human rights movement. However attenuated the democratic connections between the U.N. General Assembly and the people ultimately represented by the U.N., the ratification process of the General Assembly bears many hallmarks of democratic decision-making.<sup>13</sup> NGOs, in contrast, often reach their normative conclusions without the benefit of democratic processes and with an eye towards serving the organizational mission. One manifest result of these structural differences is the expansive human rights definition endorsed by some NGOs, which surpasses the scope of the Universal Declaration of Human Rights.<sup>14</sup>

Apart from definitional problems that have undermined global consensus on the limits of human rights, enforcement without resort to legal process poses significant obstacles. While the U.N. and government actors have recourse to political solutions such as sanctions, resolutions, official condemnation, and war, these choices in practice often produce a Hobson's choice between extreme enforcement and no enforcement at all.<sup>15</sup> Confronted with these stark alternatives, state governments and the U.N. usually opt for very mild enforcement strategies, which effectively supply

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10. G.A. Res. 217A, *supra* note 4.

11. See HUMAN RIGHTS WATCH, ANNUAL REPORT 19–35 (2005), <http://www.hrw.org/annual-report/2005.pdf>.

12. See Human Rights Watch, *Who We Are*, *supra* note 4.

13. See U.N. Charter art. 27, 28, *available at* <http://www.un.org/aboutun/charter/index.html>. *But see* Robert A. Dahl, *Can International Organizations be Democratic? A Skeptic's View*, in THE GLOBAL TRANSFORMATIONS READER 530, 538 (David Held & Anthony McGrew eds., 2000).

14. See HUMAN RIGHTS WATCH, ANNUAL REPORT, *supra* note 11, at 24–25 (describing “corruption” as human rights abuse).

15. See Michael A. Fletcher, *Bush Wins Only Mild Rebuke to North Korea*, WASH. POST, Nov. 19, 2006, *available at* 2006 WL 20087937.

almost no enforcement at all.<sup>16</sup> Further, most of these political measures are tailored to the problems of state actors leaving them largely inapposite as a remedy for corporate malfeasance.

For NGOs, enforcement measures include monitoring programs, public shaming, and global populism on the theory that by applying these tactics human rights abusers will feel real political and economic pressure to reform.<sup>17</sup> In addition, the cooperation of host states in accommodating the continued presence of NGOs proves a necessary prerequisite to the ongoing effectiveness of these monitoring strategies supplemented by subsequent action.<sup>18</sup> The non-legal enforcement measures of NGOs, therefore, have tended to stall in situations where 1) political and economic pressure has failed to materialize in the wake of damaging human rights revelations, 2) political and economic pressure has materialized, but remains insufficient to promote genuine reform, and 3) states have suspended their cooperation with NGOs upon the revelation of damaging information and forced them to leave the country. Thus, the non-legal enforcement methods practiced by NGOs can yield tangible results; however, these results depend on the particular circumstance of each case.

### *B. The Legal Measures Taken to Address Human Rights Abuses*

The creation of substantive human rights protected by international law has occurred predominately through a patchwork of national legal standards rather than a unified global vision supplemented by global institutions.<sup>19</sup> To date, the instances where international tribunals have adjudicated alleged human rights abuses remains the exception, not the rule. With no international judiciary available in many cases, national courts often provide the only legal recourse for enforcement of international human rights norms.<sup>20</sup> Relying on national forums to vindicate human rights victims, however, requires courts in each instance to determine under what circumstances they should exercise their jurisdiction and what substantive claims stand available once jurisdiction has been established.<sup>21</sup> With cultural biases entrenched in each legal system, consensus on these issues has proven elusive with the result that only a very small core of “crimes against humanity” survive as transnational legal theories available to human rights victims.<sup>22</sup>

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16. See, e.g., *id.*

17. See Human Rights Watch *Who We Are*, *supra* note 4.

18. See Amy Kazmin, *Burma Tells Red Cross to Halt Aid Projects*, FIN. TIMES ASIA, Nov. 29, 2006, at 6, *available*, at 2006 WL 20643383.

19. See Beth Stephens, *Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT'L LAW 1, 35 (2002); G.A. Res. 217A, *supra* note 4 (articulating an international consensus on human rights, but neglecting to propose any global institution that would vindicate such rights).

20. See Stephens, *supra* note 19.

21. Note, the courts must also determine which processes are available to these defendants, but these problems come after the determination that the forum has jurisdiction as well as what legal theory exists for this particular plaintiff. *Id.*

22. See Elements of the Crimes, 3d plen. mtg., U.N. Doc. ICC-ASP/1/3 (Sept. 9, 2002), *available* at [http://www.un.org/law/icc/asp/1stsession/report/english/part\\_ii\\_b\\_e.pdf](http://www.un.org/law/icc/asp/1stsession/report/english/part_ii_b_e.pdf); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004).

### 1. The Forums Available for Human Rights Claims

The jurisdictional riddles presented by human rights claims have caused many national courts to decline jurisdiction unless the individual cases fit snugly within comfortable parameters. National courts, however, constitute only one forum available in the adjudication of transnational claims. International forums also exist in certain circumstances while private, transnational arbitration procedures continue to develop as an alternative.<sup>23</sup> The central question with all possible forums remains whether and to what extent human rights claims fit within the purview of the forum's mandate.

Although national courts certainly exhibit various approaches to adjudicating human rights abuses, several recurrent distinctions have guided the inquiry as to whether jurisdiction applies. The first notable distinction involves determining where the human rights abuse allegedly occurred. Because national courts rely on sovereignty as crucial to establishing their own legitimacy,<sup>24</sup> human rights abuses that occur within boundaries of the court's national territory can progress with relatively few jurisdictional glitches.<sup>25</sup> Difficulties emerge, however, when courts are asked to extend both their jurisdictional reach and legal theories to situations unconnected to the forum state. The application of so-called universal jurisdiction to these situations constitutes "[a radical departure] from traditional bases of prescriptive jurisdiction."<sup>26</sup>

Invoking universal jurisdiction implicates the second distinction preeminent in analyzing whether a national court should hear cases unconnected to the forum state—the qualitative depravity of the offense charged. The theory for applying universal jurisdiction originates in the ancient legal recognition that some crimes are so inimical to human values that they have been declared crimes against all mankind.<sup>27</sup> Consequently, any court in any nation may hear claims originating from these crimes. However, much like the normative uncertainty concerning which rights deserve the designation of "human rights," the scope of offenses deserving the characterization of "crimes against all mankind" is not articulated with great legal clarity. Because national courts commonly construct international law by reference to international custom,<sup>28</sup> theoretical differences concerning the scope of human rights means that national courts usually decline to extend universal jurisdiction unless the claim alleges the most serious of human rights violations.<sup>29</sup>

Provided a national court finds that a claim alleges adequately contemptible conduct to satisfy the depravity element of universal jurisdiction, the national court may still decline application of universal jurisdiction if the perpetrator is not a government official. This final distinction exists because most national and international courts have held human rights law as regulating state actors.<sup>30</sup> As a consequence, national courts adhering to these theories have required a showing of governmental

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23. See Elements of the Crimes, *supra* note 22.

24. See Delbrück, *supra* note 7.

25. CHANDRA LEKHA SRIRAM, GLOBALIZING JUSTICE FOR MASS ATROCITIES 14 (2005).

26. K. Lee Boyd, *Universal Jurisdiction and Structural Reasonableness*, 40 TEX. INT'L L. J. 1, 8 (2004).

27. *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980).

28. See Delbrück, *supra* note 7, at 26.

29. See, e.g., *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 775, 776 (2d Cir. 1984).

30. See *id.* But see *Doe v. Unocal Corp.* 395 F.3d 932, 953 (9th Cir. 2005).

involvement before a defendant, public or private, will face liability for a violation of human rights law.<sup>31</sup>

With most national courts hoisting restrictive jurisdictional barriers, international tribunals have emerged as a theoretical model for extending jurisdictional reach to all corners of the globe.<sup>32</sup> Although this approach may theoretically improve the reach of global justice, these tribunals have historically rested their authority on very narrow mandates, such that the reach of human rights law is not significantly enhanced by their creation.<sup>33</sup> For instance, the International Criminal Court (ICC), whose creation supposedly heralded a new era in human rights enforcement, can only reach conduct perpetrated by nations consenting to its jurisdiction.<sup>34</sup> Further, the roster of offenses that may be tried in the ICC as circumscribed by its founding treaty includes only offenses that could fairly be understood as coextensive with those of the universal jurisdiction.<sup>35</sup>

Apart from permanently seated international tribunals, the international community has convened several ad-hoc tribunals in cases involving some of the most infamous examples of human rights abuse.<sup>36</sup> These courts, however, usually operate under constraints much more restrictive than those existent in permanently seated international courts. As a preliminary matter, the very existence of these courts requires an affirmative mandate every time international institutions determine that an occasion warrants international judicial intervention. The mandate itself usually confines the tribunal's reach to very narrow subject matter permitting jurisdiction over a specific class of human rights abuses and war crimes that originate within a specifically identified regional conflict.<sup>37</sup> Once the conflict ends, and the perpetrators have faced justice, the tribunal's mandate usually expires. Given the procedural obstacles hindering the creation of ad-hoc tribunals as well as their limited jurisdictional reach, these tribunals rarely provide a forum for human rights abuses.

As a final alternative, international arbitration procedures have recently emerged as a transnational private forum for adjudicating disputes between transnational actors. However, as noted transnational legal theorist Günther Teubner sets forth in his piece, *Global Private Regimes: Neo Spontaneous Law and Dual Constitution of Autonomous Sectors*, these forums generally pertain to private regulatory and contract arrangements wherein both parties agree beforehand to settle any disputes arising from the contract with a hearing before a neutral, international arbitrator.<sup>38</sup> Teubner has characterized

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31. See *Tel-Oren*, 726 F.2d at 776.

32. See Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (July 17, 1998), available at [http://www.icc-cpi.int/library/about/officialjournal/Rome\\_Statute\\_120704-EN.pdf](http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf).

33. See generally *id.*

34. *Id.* at 9.

35. See *id.*

36. Theodor Meron, *Reflections on the Prosecution of War Crimes by International Tribunals*, 100 AM. J. INT'L L. 551, 567-68 (2006). See, e.g., Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544.

37. *Id.*

38. Günther Teubner, *Global Private Regimes: Neo Spontaneous Law and Dual Constitution of Autonomous Sectors*, in PUBLIC GOVERNANCE IN THE AGE OF GLOBALIZATION 74 (Günther Teubner ed., 1997).

this development of transnational law whereby individuals contract around an uncertain legal environment as “spontaneous law.”<sup>39</sup>

Because arbitrators depend on the consent of adversarial parties to supply the arbitrators with jurisdiction over a claim, human rights abuses may appear totally incompatible with the transnational forum of arbitration. However, such a conclusion ignores at least one promising application for arbitration: collective bargaining. Insofar as unions can contract for higher human rights standards than those currently supplied by the national courts of their locus nation, international arbitrators could indeed play a vital role in civil enforcement of human rights claims.

A survey of the legal landscape for human rights forums therefore reveals a hodgepodge of national, international, and transnational forums providing different enforceable rights depending on the circumstances. This uneven approach produces a stratified human rights system with large gaps in enforcement. Within nations possessing independent courts and developed legal systems, human rights abuses will usually invoke a multitude of conventional criminal and civil legal theories to counter the abuse. However, in underdeveloped legal systems, the national courts may provide no recourse for the human rights abuse victim. In these instances, the claimant may press their charge in an international or in a foreign national forum only if their claim constitutes a crime against all mankind and the forum possesses personal jurisdiction over the defendant. In practical operation, this stratification permits human rights abuses to proliferate unrestrained by the intervention of legal process so long as the human rights abuse falls beneath the threshold of crimes against humanity, and it occurs within a nation without legal recourse for human rights abuses.

## 2. The Substantive Theories Available in Different Forums

Related to the jurisdictional questions arising from the legal enforcement of human rights is the question of which substantive legal theories apply within the various forums open to adjudicating human rights law claims. Provided that a court has taken jurisdiction over a claim, the first issue involves determining whether the available legal theories furnish criminal or civil penalties as the appropriate remedy for the abuse charged. Different forums favor different legal consequences, and while these biases may originate in cultural differences, they portend very different legal results for establishing accountability among different actors.<sup>40</sup>

The majority of national and international legal forums handle claims asserting human rights law theories as violations of national or international criminal law.<sup>41</sup> This tendency finds its roots in both cultural and structural realities that make civil liability in most forums either impossible or undesirable.<sup>42</sup> There is an exception for cases falling under the territorial jurisdiction of the forum state and thereby avoiding the jurisdictional problems presented by transnational human rights claims. When this exception applies, both criminal and civil theories may create legal liability. Nevertheless, civil claims may prove hazardous if asserted in a regime where the loser pays attorney’s costs to the winner.

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39. *Id.*

40. Stephens, *supra* note 19, at 5.

41. *Id.*

42. *Id.*

In cases not falling within traditional national law exceptions, the jurisdictional problems raised by asserting human rights claims circumscribe the available legal theories within a core of very serious human rights abuses.<sup>43</sup> Because these claims must allege the requisite severity to be actionable, national and international forums traditionally have favored attaching the most serious variant of legal liability to their commission: criminal liability.<sup>44</sup> International treaties that bind signatory states further illustrate the practice of punishing human rights abuses with criminal rather than civil liability by requiring or allowing domestic court martial or criminal trials for officials violating the terms of the treaties.<sup>45</sup>

Although applying criminal liability to human rights abuses may serve the principle of tailoring the punishment to fit the crime, this framework leaves a large gap in enforcement of human rights violations. Specifically, applying criminal liability to corporate and non-state actors remains difficult under the current framework.<sup>46</sup> Part of this difficulty stems from interpretations of substantive human rights law itself. However, even if the substantive human rights law were interpreted to include non-state actors within its ambit, much difficulty would still remain due to the practical shortcomings in the application of criminal sanctions to corporate actors.<sup>47</sup> Incarceration as a remedy simply proves inapplicable to corporate defendants, whereas criminal fines, from the defendant's perspective, achieve much the same effect as would civil remedies. On the other hand, the human rights victim would almost certainly favor a civil remedy because criminal prosecutions usually supply greater procedural protections for the alleged abuser, while providing no compensation to the victim if the prosecution prevails.

Civil liability for human rights abuses remains the anomalous result in most national and international forums.<sup>48</sup> However, the notable exception to this general proposition is the federal court system of the United States. Beginning in 1984 with the landmark case of *Filartiga v. Pena-Irala*, the United States has provided a forum for alien human rights abuse victims if the substance of the claim meets certain restrictive criteria.<sup>49</sup> To reach this conclusion, the United States Court of Appeals for the Second Circuit relied on an obscure statute passed in 1789 known as the Alien Torts Claim Act (ATCA).<sup>50</sup> The ATCA provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only committed in violation of the law of nations or a treaty of the United States."<sup>51</sup> From this concise directive, several federal courts have found the jurisdictional reach to hear cases brought by aliens against both U.S. citizens and other aliens.

Although the *Filartiga* case invited speculation that the ATCA would introduce an extra dimension to global accountability efforts, U.S. federal courts have ruled that

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43. SRIRAM, *supra* note 25, at 14.

44. *See* Stephens, *supra* note 19, at 12.

45. *See* SRIRAM, *supra* note 25, at 65.

46. *See* Tel-Oren v. Libyan Arab Republic, 726 F.2d 726, 775 (2d. Cir. 1984).

47. *See* Elizabeth K. Ainslie, *Indicting Corporations Revisited: Lessons of the Arthur Andersen Prosecution*, 43 AM. CRIM. L. REV. 107, 113 (2006).

48. *See* Stephens, *supra* note 19, at 2, 12.

49. *See* *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980).

50. 28 U.S.C. § 1350 (2002).

51. *Id.*



torts violating the law of nations essentially mirror those human rights violations which constitute crimes against all mankind.<sup>52</sup> In the recent ruling of *Sosa v. Alvarez-Machain*, for instance, the Supreme Court ruled that the unlawful kidnapping, deportation, and detention of a foreign national by a civilian bounty hunter working for the United States did not constitute a tort committed in violation of the law of nations under the ATCA.<sup>53</sup> Further, the broad dicta of *Sosa* provided federal courts some very detailed and restrictive guideposts on how to interpret the “law of nations” element of the ATCA.<sup>54</sup> Thus, it appears that ATCA doctrine simply provides human rights defendants one less nation of refuge for the most heinous human rights abuses, but falls short of adding substantive claims to the existing roster of actionable human rights laws.

Given the overlap between U.S. tort law constrained by ATCA doctrine and international human rights law constrained by universal jurisdiction theory, the current global response to human rights abuse presents another important limitation for the legal enforcement of human rights. This limitation involves presenting an effective legal framework for reaching perpetrators of human rights abuses who have minimal affiliations with any state actor. While the ATCA once held out promise as a theory capable of reaching transnational private actors who commit human rights abuses, the *Sosa* decision appears to have largely foreclosed this development for at least the time being.

## II. FILLING THE GAPS

Under the current legal regime, corporations will rarely face liability for a human rights violation unless the locus nation of the abuse enforces such legal liability.<sup>55</sup> This result derives from a confluence of factors, but one of these factors proves particularly significant: although corporations could theoretically commit crimes against all mankind and thereby face justice under universal jurisdiction or the ATCA, they will in fact usually commit abuses of lesser severity and thereby escape the purview of most existing international human rights law. While this zone of non-enforcement may have historically encompassed a marginal percentage of total human rights abuses, globalization has rapidly altered the landscape. Outsourcing by established corporations, government outsourcing of central governmental functions, and corporate expansion into lawless corners of the globe have made the conditions ripe for abuses falling beneath the universal jurisdiction standard to proliferate.

### *A. Defining the Zone of Non-Enforcement*

To understand the scale of the potential abuses that may become manifest as global interaction increases, one must first identify which human rights fall below the threshold required for the exercise of universal jurisdiction and the ATCA. Currently, human rights abuses meeting the standards of universal jurisdiction can find a forum for vindication. These include genocide, torture, war crimes violating the Geneva

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52. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004).

53. *Id.*

54. *Id.*

55. *See generally supra* Part I.

Conventions, slavery, and piracy.<sup>56</sup> Beyond this core, some forums recognize other human rights abuses, such as extra-judicial killing, extra-judicial arrest, prolonged arbitrary detention, acts of apartheid, and several others.<sup>57</sup> Notwithstanding this growing roster of violations that invoke universal jurisdiction, several human rights enumerated in the United Nations Universal Declaration of Human Rights (“the Declaration”) still receive only limited enforcement.<sup>58</sup> Determining which rights fall within this category of limited enforcement as well as the applicability of these rights to corporate actors constitutes the first step in appraising the shortcomings of the current regime.

### 1. The Human Rights Violations Likely to Occur

Among the rights in the Declaration outside the category protected by universal jurisdiction are many that might stand particularly vulnerable to abuse by corporate actors. These include Article Three, granting the right of security of person; Article Seventeen, granting the right for persons to own property; Article Twenty-Three, granting the right for persons to choose their place of employment; and Article Twenty-Nine, which limits the rights of each person to prevent one person from exercising their rights in interference with the rights of others.<sup>59</sup> While many of the most developed nations in the world fall short of vindicating each article of the Declaration, questions remain about which rights should have global reach and whether corporate actions fall under the rubric of human rights violations.<sup>60</sup>

The U.N. and several non-governmental organizations have attempted to supplement the original Declaration with subsequent measures aimed at clarifying the role of private actors within the human rights regime.<sup>61</sup> One of these documents, the United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (Norms), specifically addresses the role of corporations. Perhaps the most consistent point of emphasis contained within the Norms is the repeated call for transnational corporations and other entities to respect the security interests of their employees, customers, and fellow citizens by providing safe products, safe workplaces, and minimal environmental degradation.<sup>62</sup> Thus it would appear that a growing international consensus exists suggesting that security interests constitute a human rights value warranting increased protection.

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56. See SRIRAM, *supra* note 25, at 14; BETH STEPHENS & MICHAEL RATNER, INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 79–107 (1996).

57. See Amnesty International, Universal Jurisdiction: 14 Principles on the Effective Exercise of Universal Jurisdiction, <http://web.amnesty.org/library/index/engior530011999?OpenDocument>.

58. G.A. Res. 217A, *supra* note 4.

59. See *id.*

60. The United States, for instance, does not offer universal healthcare.

61. U.N. Econ. & Soc. Council [ECOSOC], Comm’n on Human Rights, Sub-Comm. on the Promotion and Protection of Human Rights, *United Nations Human Rights Norms for Corporations* (Aug. 26, 2003), available at <http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/64155e7e8141b38cc1256d63002c55e8?OpenDocument>.

62. *Id.* at ¶¶ 3, 4, 7, 13.

## 2. The Role Played by Corporations

The structure and language of the Declaration as well as the origins and circumstances surrounding the development of human rights suggest that human rights law began as a theory to counter atrocities committed by states.<sup>63</sup> As a consequence, many legal systems have opted against applying the strictures of human rights law to most actions of non-state actors.<sup>64</sup> Although this theory prevails for legal remedies, the position that corporations cannot commit human rights abuses as a factual matter constitutes a highly formalistic and increasingly disfavored perspective.<sup>65</sup>

A quick survey of the criminal offenses within the jurisdiction of the International Criminal Court (ICC) reveals that the differentiating feature distinguishing many human rights abuses from conventional offenses is the order of magnitude implicit in the human rights offense.<sup>66</sup> For instance, in order for murder to become a crime against humanity under ICC doctrine, the murder must take place “as part of a widespread or systematic attack directed against a civilian population.”<sup>67</sup> This element requiring a widespread or systematic attack simply forecloses most private actors from even wielding the ability to commit the offense. As corporations grow in scale, power, and influence, however, they constitute a growing exception to the general proposition that private actors remain too impotent to engage in conduct abusive to human rights.

Apart from identifying the increasing importance of security interests within the human rights framework, the U.N. Norms acknowledge the growing influence of corporate actors as potential abusers of human rights. With this acknowledgement, the conclusion follows that state and corporate actors no longer stand on distinctively different planes in the field of human rights standards. Rather, the analogy between states and transnational corporations appears too obvious for the U.N. to ignore.<sup>68</sup> Therefore, while corporations may prove incapable of violating human rights as a matter of international law in most cases, as a matter of fact, they remain quite capable of committing such violations and causing injury to the security interests of their employees, customers, and fellow citizens.

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63. See SRIRAM, *supra* note 25, at 65.

64. See *Tel-Oren v. Libyan Arab Rep.*, 726 F.2d 774, 776 (D.C. Cir. 1984). *But see Doe I v. Unocal Corp.*, 395 F.3d 932, 953 (9th Cir. 2002).

65. See generally *United Nations Human Rights Norms for Corporations*, *supra* note 61.

66. See Assembly of States Parties to the Rome Statute of the International Criminal Court, *Elements of the Crimes*, 1st Sess., 3d plen. mtg., U.N. Doc. ICC-ASP/1/3 (Sept. 9, 2002), available at [http://www.un.org/law/icc/asp/1stsession/report/english/part\\_ii\\_b\\_e.pdf](http://www.un.org/law/icc/asp/1stsession/report/english/part_ii_b_e.pdf).

67. *Id.* at art. 7(1)(a)(2).

68. In fact, many theorize that the real danger in the future is a general weakening of state laws and protections in favor of making conditions more accommodating to corporations. See Karl-Heinz Ladeur, *Globalization and the Conversion of Democracy to Polycentric Networks: Can Democracy Survive the End of the Nation State?*, in *PUBLIC GOVERNANCE IN THE AGE OF GLOBALIZATION* 89, 90 (Karl-Heinz Ladeur ed., 2004).

*B. The Impact of Globalization on Human Rights Abuses*

Within an environment of heightened awareness for corporate violations, the global scope of corporate conduct has dramatically increased over the last century.<sup>69</sup> This increase has come through both foreign direct investment of multi-national corporations and outsourcing of services and production to corporations headquartered abroad.<sup>70</sup> The effect of these initiatives is that today outsourcing has been estimated to account for twenty-five percent of international trade, and developing nations have increased their share of global manufactured exports from 6.6% to 24.7% between the 1960s and 1990s.<sup>71</sup> These statistics suggest that globalization has dramatically increased the economic contacts between developed and developing nations, with developing nations becoming central figures in the global supply chain.

Although transnational global organizations have shown great competence in effectuating the objectives of integrating the global economy,<sup>72</sup> analogous organizations committed to developing high human rights standards have yet to achieve the same successes. As a result, the legal enforcement of human rights norms that remain ineligible for enforcement under the universal jurisdiction theory has largely fallen to national courts who can assert traditional bases of jurisdiction.<sup>73</sup> In developed nations, there are usually a variety of forums and legal theories capable of reaching conduct within the human rights norms articulated by the U.N. These theories include basic negligence theories, intentional torts, and criminal sanctions in extreme cases. However, this same level of enforcement remains largely aspirational for much of the developing world.

When globalization increases the velocity of interactions between corporations and persons across the globe, and large swaths of the globe remain unprotected by developed legal systems, it should come as no surprise that alleged corporate human rights abuses tend to concentrate in those areas of weak legal enforcement.<sup>74</sup> In a recent report examining sixty-five alleged corporate human rights abuses spread across twenty-seven countries, twenty-five of the twenty-seven countries scored below average on the “rule of law” index developed by the World Bank.<sup>75</sup> Further, the report goes on to conclude that “there is clearly a negative symbiosis between the worst corporate-related human rights abuses and host countries that are characterized by a combination of relatively low national income, current or recent conflict exposure, and

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69. Nicholas Crafts, *Globalization and Growth in the Twentieth Century* 28, *Int'l Monetary Fund*, Working Paper No. WP/00/44 (2000), available at <http://www.imf.org/external/pubs/ft/wp/2000/wp0044.pdf>.

70. *Id.* at 27.

71. *See id.*

72. *See* Delbrück, *supra* note 1, at 14–19.

73. *See* SRIRAM, *supra* note 25, at 14.

74. Commission on Human Rights, *Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, 62d Sess., ¶ 27, U.N. Doc. E/CN.4/2006/97 (Feb. 22, 2006) (prepared by John Ruggie), available at <http://www.ksg.harvard.edu/m-rcbg/papers/JGR%20Interim%20Report%20to%20the%20UN.pdf>.

75. *Id.*

weak or corrupt governance.”<sup>76</sup> If this observation proves accurate, and the global economy continues to expand as it has over the last forty years,<sup>77</sup> the future promises an increase in the incidence of human rights abuses within those nations least prepared to confront them.

While global economic activity continues to expand into some of the more lawless corners of the globe, government outsourcing of core government functions reveals another method through which human rights abuses may flourish. In the United States, the recent movement towards privatization has seen governments privatize everything from management of prisons within the United States,<sup>78</sup> to training of troops within a war zone.<sup>79</sup> Inserting private contractors into hostile and dangerous environments, however, invites the possibility that the contractors may suffer or inflict human rights abuses.<sup>80</sup>

To witness the potential for human rights abuse that may occur by co-mingling private contractors and highly volatile situations, one need only look to the Abu Ghraib prison scandal in Iraq. During the Abu Ghraib scandal, private contractors engaged in intelligence gathering and took part in the abuse of Iraqi prisoners under the custodial care of the United States.<sup>81</sup> The abuses at Abu Ghraib included holding detainees on leashes, forcing detainees to crawl for four to six hours, attaching electronic cables to detainees and telling detainees they would be electrocuted if they fell off of a box, forcing detainees to masturbate, and other conduct committed by soldiers and contractors intended to inflict physical, psychological, or sexual harm on detainees.<sup>82</sup>

The Abu Ghraib scandal, however, only illustrates one dimension of abuse that may occur when contractors deploy in dangerous situations. While this scandal attracted much attention in the press,<sup>83</sup> the possibility that private contractors may become victims of human rights abuses also finds support in the experience of the Iraq War—over 650 private contractors have already died in that conflict.<sup>84</sup> Furthermore, while many nations have failed to embrace privatization with the same enthusiasm as the United States, the prospect of multinational corporations assuming the prison management and military campaigns of foreign governments presents human rights ramifications of potentially staggering proportions.

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76. *Id.* at ¶ 30. In addition to these general observations, anecdotal evidence and case law also corroborate the observation that most corporate human rights abuses occur in the developing world. *See, e.g.*, *Doe I v. Unocal Corp.*, 395 F.3d 932, 937–39 (9th Cir. 2002); Evan Clark, *Advocacy Group Finds Violations at Bangladesh Apparel Factory*, WOMEN’S WEAR DAILY, Oct. 26, 2006, at 14.

77. *See supra* text accompanying note 69.

78. *See* ALFRED C. AMAN JR., THE DEMOCRACY DEFICIT: TAMING GLOBALIZATION THROUGH LAW REFORM 102 (2004).

79. *See* Laura A. Dickinson, *Public Law Values in a Privatized World*, 31 YALE J. INT’L L. 383, 391 (2006).

80. *Id.*; Michael A. Cohen & Maria Figueroa, *Reining in Military Contractors*, WASH. POST, Dec. 7, 2006.

81. *See* Dickinson, *supra* note 79, at 391.

82. Douglas Jehl & Eric Schmitt, *The Struggle for Iraq: Abu Ghraib; Officer Says Army Tried to Curb Red Cross Visits to Prison in Iraq*, N.Y. TIMES, May 19, 2004, at A1.

83. *See, e.g., id.*

84. *See* Cohen & Figueroa, *supra* note 80.

## III. THE ROLE OF UNITED STATES CIVIL LAW IN FILLING THE GAP

With globalization trends falling ever further into legal limbo, corporate human rights abuses appear poised to increase in the coming years. Avoiding this outcome will require an adjustment to the current international legal regime to create a new paradigm that strengthens the legal systems within each territory, or increases the scope of transnational theories available in national and international forums. Several factors suggest that opening the United States court system would constitute a particularly effective and desirable forum for confronting human rights abuses committed by corporations.

The factors that support expanding transnational claims in the United States include the current state of the law in the United States, the bona fide United States's interest in confronting human rights abuses, and the likelihood that alternative measures would prove less effective at deterring corporate human rights abuse. Despite the many virtues that United States civil remedies may one day bring, the expansion of United States jurisdiction has prompted a variety of objections from both inside and outside the United States. These objections rest on the theory that, if the United States courts adopt a cavalier approach when applying transnational legal theories, this approach will undermine, rather than support, global stability.<sup>85</sup>

Given the international and domestic misgivings about universal jurisdiction, the mechanics for expanding any transnational claims should come through legislative, rather than judicial, methods.<sup>86</sup> With the need to confront human rights abuses, however, this appeal to legislative process should not become the basis for indefinite delay. Therefore, Congress should act with purpose to draft new transnational claims that may be brought in the United States under the jurisdiction of the Alien Torts Claim Act (ATCA) and that are tailored to the unique problem of corporate human rights abuses occurring in developing nations.

*A. Virtues of the United States Legal System*

The current state of law within the United States provides an excellent cultural and legal foundation for the expansion of human rights claims as applied to corporations.<sup>87</sup> This cultural and legal framework includes the establishment of personal jurisdiction on the basis of contacts,<sup>88</sup> the legal influence of the ATCA,<sup>89</sup> and the friendliness of the United States courts to lawsuits by impecunious plaintiffs.<sup>90</sup> When combined with the preference for civil relief as a remedy for addressing corporate malfeasance, the United States system offers a roster of advantages that is unparalleled in the international system.

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85. See Luisa Antonioli, *Taking Legal Pluralism Seriously: The Alien Tort Claims Act and the Role of International Law Before U.S. Federal Courts*, 12 IND. J. GLOBAL LEGAL STUD. 651, 659–660 (2005).

86. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004).

87. Stephens, *supra* note 19, at 6–12.

88. See *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945).

89. See *Sosa*, 542 U.S. at 724.

90. Stephens, *supra* note 19, at 14–17.

### 1. Jurisdiction in United States Court System

For United States federal courts to exert jurisdiction over a claim, the United States Constitution requires each court to possess jurisdiction over both the defendant and the subject matter of the controversy.<sup>91</sup> As the Supreme Court has re-calibrated the constitutional due process requirements, personal jurisdiction doctrine has evolved from a system once requiring actual service of process to the defendant's person into a system where service and minimum contacts will suffice.<sup>92</sup> As a result, a defendant need not actually reside in the territory where a complaint is filed, but rather may still be hailed into court provided he or she purposefully avails themselves to the forum state.<sup>93</sup> In this analysis, the federal courts of the United States deviate from the traditional bases of international jurisdiction: territorial (where the offense was committed or had its effects), passive personal (based on the nationality of the victim), protective (when a national interest is at stake), and national (based on the nationality of the offender).<sup>94</sup> Although not a traditional basis of jurisdiction, minimum contacts analysis, when combined with federal question jurisdiction, provides a valuable filtering mechanism to insure that only claims connected to the forum are heard.

The theory of minimum contacts, as applied to human rights abuses, both expands the reach of U.S. courts and also insures that the United States has a bona fide interest in the resolution of a particular controversy. In this sense, minimum contacts jurisdiction parallels the *effects theory*.<sup>95</sup> Using the effects theory, a forum nation may exercise jurisdiction when the effects of lawless activity outside its territory affect conditions within the forum nation.<sup>96</sup> The effects theory provides an imperfect analogue to minimum contacts doctrine because minimum contacts retains no absolute requirement that the individual case arise out of negative effects.<sup>97</sup> Still, the fact that a corporation avails itself of the United States provides both a legal foundation for the courts to assert personal jurisdiction as well as a normative foundation to assert United States interest and values. In the case of human rights abuses, the United States' interest in preventing the influx of goods and services produced in connection with human rights abuses is a bona fide, legitimate interest worthy of deference.

Apart from the doctrine and policy that render minimum contacts a sound proxy for United States personal jurisdiction, the Supreme Court in *Sosa v. Alvarez-Machain* recently interpreted the ATCA as a constitutionally legitimate grant of subject matter jurisdiction to the district courts.<sup>98</sup> While the Court affirmed the rationale of *Filartiga* in the *Sosa* case, it also cautioned the district courts against interpreting the ATCA too broadly.<sup>99</sup> Rather, the Court explicitly limited the range of torts that violate the law of

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91. See U.S. CONST. art. III, § 2; *Int'l Shoe*, 326 U.S. at 320.

92. See *Int'l Shoe*, 326 U.S. at 320.

93. *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957).

94. SRIRAM, *supra* note 25, at 14.

95. *Boyd*, *supra* note 26, at 7–8.

96. *Id.*

97. See *Int'l Shoe*, 326 U.S. at 320. Also, the effects theory is often used as a justification for the establishment of laws that expand beyond a forum nation to impose criminal and regulatory sanctions. See, e.g., 18 U.S.C. § 1201 (Supp. 2006); 18 U.S.C. § 1203 (2000).

98. 542 U.S. 692 (2004).

99. *Id.* at 725.

nations to a very narrow range of offenses and held that the ATCA is purely jurisdictional.<sup>100</sup> However, the dicta of *Sosa* suggests that the district courts may take cases under ATCA jurisdiction if Congress passes a law that invokes such jurisdiction and provides for a specific cause of action.<sup>101</sup> Thus, Congress effectively enjoys more power than the courts in crafting claims to fit within the ATCA.

## 2. Other Advantages of United States Courts

The jurisdictional doctrines of minimum contacts and the ATCA provide a favorable foundation for asserting a claim in a United States court. However, the jurisdictional doctrine only insures that a plaintiff *can* bring a claim. Jurisdiction alone fails to address whether a plaintiff would in fact bring a claim, assuming that he or she can bring it. In the corporate human rights context, willingness to bring a claim provides an important consideration because private actions against corporations function as a deterrent to abusive conduct. Further, many abuses brought under ATCA jurisdiction would likely take place far away from the United States, meaning that logistical hurdles would already create obstacles.<sup>102</sup> Such hurdles and the personal jurisdiction problems that they entail might ultimately dissuade an otherwise meritorious plaintiff from entering litigation.<sup>103</sup> Therefore, vindicating people who have suffered human rights abuses at the hands of corporations requires a civil system amenable to finding judgments for plaintiffs and reducing any potential litigation costs to a bare minimum.

The United States civil court system addresses these concerns with a legal culture and procedural framework that remains the most plaintiff-friendly in the world today.<sup>104</sup> Unlike most nations, the United States does not operate on a “loser pays” system that can severely deter meritorious litigation simply because the potential fees act as a compelling deterrent.<sup>105</sup> Instead, in the United States the payment of fees to an adverse party upon losing a case remains the exception, not the rule.<sup>106</sup> Further, other legal advantages exist in the United States, such as the contingency fee payment structure and the availability of punitive damages.<sup>107</sup> There is no requirement that civil and criminal trials concerning the same facts proceed at the same time, nor does the United States share the prevailing international sentiment against using litigation as means of policy reform.<sup>108</sup> As a result, the United States provides a forum of lower cost and higher possible payoff that could operate as an incentive to bring claims that might otherwise prove too onerous to litigate.

The arguments that show the United States as a superior venue for compensating victims likewise cut in favor of the United States as an enforcer capable of deterring bad conduct committed by corporations. This conclusion stems from the strong policy

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100. *Id.* at 714–15.

101. *Id.* at 726–28.

102. *See* SRIRAM, *supra* note 25, at 9.

103. *See* Stephens, *supra* note 19, at 12.

104. *Id.* at 16.

105. *Id.* at 14–15.

106. *Id.*

107. *Id.* at 15.

108. *Id.* at 12–14.



arguments in favor of civil, rather than criminal, penalties for corporate actors.<sup>109</sup> As a practical matter, the notion of criminal liability for corporate actors proves inapplicable in many contexts, because ascribing mental culpability to corporations is difficult and the criminal sanction of imprisonment remains unavailable.

*B. The Policy Considerations to Bear in Mind*

While the United States may offer a favorable venue for plaintiffs to litigate future human rights claims, many observers have expressed deep reservations about the extension of universal jurisdiction to cases so disconnected from the forum.<sup>110</sup> Some international observers fear that expanded jurisdiction will become a license for United States courts to exert hegemonic influence.<sup>111</sup> Domestic critics worry that expanded jurisdiction will upset the delicate balance of power between the branches of government.<sup>112</sup> Notwithstanding the force of these concerns, they tend to become less worrisome upon examination of the doctrines courts may use to decline jurisdiction and upon the realization that the legislature can effectively curtail most judicial indiscretion through properly crafting causes of action brought under ATCA jurisdiction.

To prevent the specter of every global negligence case finding its way into United States courts under a human rights theory, Congress and the courts have several options at their disposal. First, the courts have several doctrines available to decline jurisdiction, including: forum non-conveniens doctrine, political question doctrine, sovereign immunity doctrine, and international comity doctrine.<sup>113</sup> In the years preceding *Sosa*, these doctrines were applied with regularity to dispose of ATCA cases, such that only a handful of claims actually survived on appeal.<sup>114</sup> This history indicates that United States courts have and will exercise due caution when deciding cases that may upset international relations.

Additionally, Congress can quite effectively limit the scope of any civil claim. To prevent open-ended extensions of the law, Congress could draft civil claim statutes that parallel human rights criminal laws, such as those applied in the International Criminal Court (ICC). Further, Congress could graft an element of scale to statutes recognizing new civil claims.<sup>115</sup> Thus, in order for negligence to be a human rights abuse, Congress could add the requirement that human rights negligence must actually reach the level of gross negligence and emanate from a systematic practice that amounts to standard business operations. Through adding the elements of gross negligence and standard business operations, courts would arguably apply the law only to situations posing a genuine threat to human rights. This practice of tracking ICC drafting would also insert comparative law principles directly into the statutes and thereby allay some of the concerns posed by critics of hegemonic United States values. Also, by drafting

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109. See generally Ainslie, *supra* note 47; *supra* Part I.B.2.

110. See Antonioli, *supra* note 85; Boyd, *supra* note 26.

111. See Antonioli, *supra* note 85, at 664–65.

112. See Boyd, *supra* note 26, at 12–16.

113. *Id.* at 2.

114. *Id.* at 46–58. It is interesting to note that transnational corporations have greatly exaggerated the litigation threat posed by the ATCA. See SRIRAM, *supra* note 25, at 76.

115. See *supra* Part II.A.

individual causes of action, Congress could proceed bit-by-bit into different areas of potential abuse without fear that legal principles applying in one context would be transported by judges to another context. This method could allow for cautious expansion that would further allay hegemonic fears.

*C. The Effectiveness of Congressional Statutes Directed  
Against Corporate Human Rights Abuse*

Perhaps the most important feature supporting a congressional response creating actions against private actors for human rights abuses is the comparative effectiveness that such measures would hold over any alternatives. These alternatives include: non-legal responses of NGOs, a legal response applying criminal law to corporations in national or international forums, and a legal response applying civil law to corporations in national or international forums outside the United States. For each of these alternatives, the current state of law, the relative power of transnational corporations, or the current state of transnational organizations render the emergence of any countermeasures designed to thwart human rights abuses either unlikely or even counter-productive.

Recent history has demonstrated that actions by NGOs against alleged corporate abuses can produce unintended results,<sup>116</sup> whereas legal accountability in other forums tends to stall because many nations' domestic law does not reach corporate behavior,<sup>117</sup> or the national government where the abuse took place is unwilling or unable to confront the abusers.<sup>118</sup> For NGOs, the problem with confronting human rights abusers involves the limitations of public shaming as an agent of change. Public shaming can produce meaningful results, but it appears incapable of halting the abusive practices of stubborn laggards.<sup>119</sup> Further, at least in the sweatshop context, public shaming can actually produce more injury than the alleged abuse if a corporation leaves a region to avoid negative publicity.<sup>120</sup> Regarding holding corporations accountable for human rights violations, claimants tend consistently to butt against either legal limitations, in the form of limited law or unwilling forums,<sup>121</sup> or power limitations insofar as a national court lacks the necessary enforcement power to halt abuses within its national boundaries.<sup>122</sup>

Congressional creation of new human rights claims, however, suffers few of the shortfalls that hinder other attempts at stemming corporate human rights abuses. First, as the law would apply worldwide, the risk imposed by stubborn laggards and possible corporate defections would be greatly reduced. Whereas defections might save a

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116. Nicholas D. Kristof, Op-Ed., *In Praise of the Maligned Sweatshop*, N.Y. TIMES, June 6, 2006, at A21.

117. See *supra* Part II.B.

118. See Ladeur, *supra* note 68, at 90; *Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, *supra* note 74.

119. See Robin Broad, *A Better Mousetrap?*, in CAN WE PUT AN END TO SWEATSHOPS 43, 47 (Joshua Cohen & Joel Rogers eds., 2001).

120. See Kristof, *supra* note 116.

121. See *supra* Part I.B.

122. Ladeur, *supra* note 68, at 90.

corporation from bad publicity, they would not save a corporation from legal liability under a human rights statute. Further, the United States' legal and cultural framework comes equipped with doctrine that takes an expansive view of personal jurisdiction and encourages plaintiffs to seek redress.<sup>123</sup> Also, while the courts in the United States today exhibit much of the same reluctance as other national and international forums in adjudicating human rights claims, this reluctance would likely weaken if the courts could act under an affirmative congressional mandate.<sup>124</sup> Finally, the desirability of access to the United States markets gives U.S. courts ample power to enforce judgments and maintain their independence in adjudicating claims.

#### CONCLUSION

In the absence of congressional action on the issue of corporate human rights abuses, the United States could become the world's largest underwriter of private torturers and the world's largest consumer market for abusive producers. This regrettable conclusion would occur, despite its obvious repugnance to American and global values, because international and domestic law as currently interpreted offer little in the way of deterrence for non-state actors who are abusive of human rights.<sup>125</sup> With its decision in *Sosa*, the Supreme Court effectively cabined ATCA doctrine such that courts now have little maneuverability to hold private actors civilly liable under the ATCA without other enabling legislation.<sup>126</sup> Therefore, if a legal theory should exist to hold private actors accountable for human rights abuses, this theory must originate in another branch of government.

The Supreme Court grappled with legitimate concerns when it declined in *Sosa* to vest the judiciary with a blank canvas under the ATCA. These concerns have haunted the vast majority of ATCA cases, and they involve worries about affecting international relations with frivolous claims against foreign government officials or putting the courts in the awkward position of trying to interpret foreign laws.<sup>127</sup> Congress, however, can easily resolve such concerns with the statutes drafted to exclude government officials and clarify the offenses worthy of relief under the ATCA. The Court, constrained by the Constitution and its own precedent, cannot easily achieve these results.

The Court has recognized that Congress has the competence and authority to draft legislation that would deter private human rights abuses, but thus far Congress has shown little initiative to assert American values by giving abuse victims a forum in United States courts. This result has occurred even though any human rights litigation against foreign defendants must first meet the constitutional due process requirement of minimum contacts.<sup>128</sup> As Congress lies stagnant, however, a potential crisis looms with globalization encouraging interactions between corporate actors, volatile situations, unstable legal systems, and desperate individuals. As these interactions increase, human rights abuses will follow. Moreover, several of the perpetrators of

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123. *See supra* Part III.A.

124. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 728 (2004).

125. *See supra* Part I.B.1.

126. *See supra* Part III.A.1.

127. *Sosa*, 542 U.S. at 707–08, 727–28.

128. *See supra* Part III.

these abuses will have minimum contacts with the United States. Such a scenario produces the absurd result whereby America's economic markets would stand open for business to corporate abusers, but her court house doors would stand closed to the abuse victims' pleas.

Rather than perpetuate a system that provides an economic windfall to those abusing human rights in the developing world, Congress should assert its authority as the repository of American values and equip human rights victims with the world's most effective deterrent against corporate malfeasance: the United States civil court system. Statutes composed to supplement the subject matter jurisdiction granted under the ATCA enjoy the implicit legal endorsement of the Supreme Court,<sup>129</sup> as well as the moral endorsement of the world's human rights victims. All that is lacking is the endorsement of Congress.

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129. *See supra* Part III.