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## Transnational Corporations & International Human Rights Disputes: Alternatives to Litigation

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**TRANSNATIONAL CORPORATIONS &  
INTERNATIONAL HUMAN RIGHTS DISPUTES:  
ALTERNATIVES TO LITIGATION**

*Jacquelyn Silva\**

*Individuals working for transnational corporations face immense challenges in securing their fundamental rights and receiving remedy for corporate abuses. Inversely, transnational corporations face various risks against their social responsibility when they prioritize their operations and profits. Current international law efforts have been assessing ways in which to impose human rights obligations on companies more directly. Any such imposition of human rights protections advances the necessity of considering the mechanisms available to resolve such disputes, especially given that litigation in international “courts” is not available for this purpose. Until an international forum is established, challenges remain in confronting human rights disputes against transnational corporations, including jurisdictional constraints and methods of enforcement. This Article will assess the existing landscape of dispute resolution and enforcement as concerning transnational entities and will highlight arbitration and mediation as alternate approaches for achieving structured respect and authority for international human rights.*

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## TABLE OF CONTENTS

I. Introduction .....	869
II. Historical Overview: The Development of International Human Rights Law and its Applicability to Transnational Corporations .....	871
A. The Universal Declaration of Human Rights.....	871
B. The UN Global Compact .....	873
C. The Guiding Principles on Business and Human Rights .....	874
D. Proposed Binding Treaty on Business and Human Rights .....	877
III. A Legal Overview: The Legal Constraints of Corporate Accountability and Transnational Enforcement Mechanisms.....	878
A. Domestic Litigation: International Human Rights Claims Against Corporations in U.S. Courts.....	880
1. General Jurisdiction in U.S. State Courts .....	882
2. Specific Jurisdiction in U.S. State Courts .....	882
B. International Dispute Resolution Mechanisms .....	883
IV. The Avenues of Alternative Dispute Resolution: How ADR Mechanisms can be Used to Hold Transnational Corporations Accountable for Human Rights Violations .....	885
A. Arbitration.....	886
1. ICC International Court of Arbitration .....	888
2. The Hague Rules on Business and Human Rights Arbitration.....	890
3. Investor State Arbitration.....	892
B. Mediation .....	894
V. Why Alternative Dispute Resolution Mechanisms May Best Serve International Human Rights Claimants.....	895
VI. Standardizing Alternative Dispute Resolution for Cases of International Human Rights Law .....	897
VII. Conclusion.....	900

## I. INTRODUCTION

Every person is fundamentally entitled to basic human rights.<sup>1</sup> Under international human rights law, codified in state constitutions and international treaties,<sup>2</sup> states are obligated to protect individuals from having these rights infringed upon. However, there exists a lack of enforcement at the corporate level for adherence in abiding by these protections. These gaps, as they pertain to corporate social responsibility, remain a central focus of international human rights activism. While many international organizations are dedicated to promoting and upholding human rights,<sup>3</sup> legal challenges remain in achieving justice and redress for violations committed by transnational corporations. Despite being considered ‘legal persons,’<sup>4</sup> corporations pose problems for parties seeking to litigate, including jurisdictional constraints and the absence of binding authority. In this regard, alternative dispute resolution (ADR) mechanisms may prove more accessible and responsive to human rights victims bringing claims against such entities.

While participation in the international market presents appealing opportunities for corporate expansion, such transnational development implicates both social and legal risks and calls for an increased understanding of different environments, cultures, and trade practices. Accordingly, human rights obligations in the business sector have increasingly gained attention by international law efforts.<sup>5</sup> Leading companies are working to better understand integration abroad in order to account for coordination problems and address their systemic

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1. *What are human rights?*, UNITED NATIONS HUM. RTS. OFF. HIGH COMMISSIONER, <https://www.ohchr.org/en/issues/pages/whatarehumanrights.aspx> (last visited Feb. 7, 2021) (“These universal rights are inherent to us all, regardless of nationality, sex, national or ethnic origin, color, religion, language, or any other status.”).

2. *See, e.g.*, U.S. BILL OF RIGHTS (1791); *see also The Core International Human Rights Instruments and their monitoring bodies*, UNITED NATIONS HUM. RTS. OFF. HIGH COMMISSIONER, <https://www.ohchr.org/en/professionalinterest/pages/coreinstruments.aspx> (last visited Apr. 14, 2021).

3. *See Human Rights Organizations*, GEO. L. LIBR. (2020), <https://www.law.georgetown.edu/human-rights-institute/human-rights-on-campus/internships-and-career-planning/human-rights-organizations/>.

4. *See Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010); *see also* José E. Alvarez, *Are Corporations “Subjects” of International Law?*, 9 SANTA CLARA J. INT’L L. 1, 9-16 (2011) (stating that the international investment regime has reasoned that corporations and other investors are international legal persons or subjects of international law).

5. *See generally Protect Human Rights*, UNITED NATIONS, <https://www.un.org/en/our-work/protect-human-rights> (last visited Apr. 19, 2021); *Corporations*, AMNESTY INT’L, <https://www.amnesty.org/en/what-we-do/corporate-accountability/> (last visited Apr. 19, 2021).

impacts.<sup>6</sup> Therefore, it is essential for transnational corporations to closely consider the local laws and policies of their foreign subsidiaries and to make strong contracting decisions in anticipation of disputes.<sup>7</sup> At the same time, corporations, too, find themselves benefiting from ADR alternatives.

Current globalization trends reveal that roughly “one fourth of total global production is exported.”<sup>8</sup> Such trade patterns naturally impose stress on corporate decision making, an impact that strains the attention of corporate efforts to consistently meet demand shifts for maximum profit gain.<sup>9</sup> Accordingly, foreign investments arising out of the Global North are known to target opportunities in the Global South,<sup>10</sup> based on the latter having a weak rule of law and operating below international standards.<sup>11</sup> In such an environment, a great deal of human rights violations are underreported or overlooked, presenting a system that Northern investors can exploit, and in turn, avoid the costs of socially responsible operations.<sup>12</sup>

Currently, only non-binding standards outline the values and procedures for businesses to follow, including requirements to abide by international law and respect human rights.<sup>13</sup> In the absence of binding legal authority, as well as the complexities involved in litigating international human rights claims, it is essential to consider how ADR

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6. Julie Davoren, *Transnational Organization Structure*, HOUS. CHRON., <https://smallbusiness.chron.com/transnational-organization-structure-60691.html> (last visited Apr. 19, 2021) (emphasizing the importance of business structure and coordination in global integration and local responsiveness).

7. See generally Sean D. Murphy, *Taking Multinational Corporate Codes of Conduct to the Next Level*, 43 COLUM. J. TRANSNAT'L L. 389 (2005); see also DETLEV F. VAGTS ET AL., *TRANSNATIONAL BUSINESS PROBLEMS* 127 (6th ed. 2019) (“[Transnational corporations] enjoy a greater flexibility in organization. They may organize their managerial structure . . . to achieve the proper balance of global efficiency and local sensitivity.”).

8. See Esteban Ortiz-Ospina & Diana Beltekian, *Trade and Globalization*, OUR WORLD DATA (2014), <https://ourworldindata.org/trade-and-globalization>.

9. *Id.*

10. See Lucia Gómez, Ronald Wall & Päivi Oinas, *Foreign Investments in the Peripheral Global South*, in *THE STATE OF AFRICAN CITIES 2018: THE GEOGRAPHY OF AFRICAN INVESTMENT* 320 (2018); see also Kathryn L. Boyd, *Collective Rights Adjudication in U.S. Courts: Enforcing Human Rights at the Corporate Level*, 1999 BYU L. REV. 1139, 1142 (stating that corporations operating in less developed regions are known for “pursuing profit at the expense of the weakest individuals”).

11. *Rule of Law and Development*, UNITED NATIONS & RULE L., <https://www.un.org/ruleoflaw/rule-of-law-and-development/> (last visited Feb. 7, 2021).

12. *Corporations*, *supra* note 5 (“Companies are taking advantage of weak regulatory systems, especially in developing countries, and it is often the poorest people who are most at risk of exploitation.”).

13. See generally UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, *GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS* (2011), [https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf).

mechanisms like arbitration and mediation may remedy gaps in corporate accountability and succeed in correcting corporate human rights abuses.<sup>14</sup> Part II begins by outlining the historical developments of international human rights law and its applicability to transnational corporations. Part III addresses the legal problems associated with international corporate accountability. Finally, Part IV considers the use of alternative dispute resolution mechanisms, like arbitration and mediation, and addresses how they may be considered in the context of enforcing human rights in international business practices.

## II. HISTORICAL OVERVIEW: THE DEVELOPMENT OF INTERNATIONAL HUMAN RIGHTS LAW AND ITS APPLICABILITY TO TRANSNATIONAL CORPORATIONS

The development of human rights policies over time reveals the increasing significance of this area and mounting support on behalf of international actors. Beginning with the development of the United Nations (UN), and fast-forward to current international treaties, the human rights regime has continued its momentum of international human rights enforcement. Through this evolution, international law has maneuvered the imposition of human rights obligations on the business sector. While the corporate structure has long been perceived as having evaded such social responsibilities, current efforts have worked to close the gaps to allow means for holding transnational corporations accountable.

### A. *The Universal Declaration of Human Rights*

Following the catastrophic world events of the Holocaust and World War II, the UN was developed in 1945 to foster international peace and prevent future conflicts.<sup>15</sup> These tragic events revealed the human catastrophes resulting from nonintervention and urged the creation of a collaborative international body to promote and protect human rights.<sup>16</sup> The UN, operating under the UN Charter, has since aimed to safeguard global fundamental human rights “for all without distinction as to race, sex, language or religion”<sup>17</sup>—encompassing

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14. See Todd B. Carver & Albert A. Vondra, *Alternative Dispute Resolution: Why It Doesn't Work and Why It Does*, HARV. BUS. REV. (1994), <https://hbr.org/1994/05/alternative-dispute-resolution-why-it-doesnt-work-and-why-it-does>.

15. *What is the Universal Declaration of Human Rights*, AMNESTY INT'L UK (Oct. 21, 2017, 12:44 AM), <https://www.amnesty.org.uk/universal-declaration-human-rights-UDHR>.

16. *Protect Human Rights*, *supra* note 5 (citing to the UN Charter, “[m]aking the promotion and protection of human rights a key purpose and guiding principle of the Organization.”).

17. LOUIS HENKIN ET AL., HUMAN RIGHTS 214 (2nd ed. 2009).

“every individual and every organ of society.”<sup>18</sup> Through this mechanism, human rights became a collective concern of the international community.<sup>19</sup> Today, 193 sovereign states are official members of the UN, with the latest member, South Sudan, being admitted in July 2011.<sup>20</sup> Only two non-member states remain, although both have received standing invitations to participate as observers.<sup>21</sup>

In December 1948, three years after the UN was established, the Universal Declaration of Human Rights (UDHR) was proclaimed by the General Assembly.<sup>22</sup> The UDHR officially recognized and delineated thirty “fundamental human rights [and freedoms] to be universally protected” by all UN member states.<sup>23</sup> Since its publication, the UDHR has inspired the creation of over eighty human rights instruments and continues to “form the basis for all international human rights law.”<sup>24</sup>

In 1966, two international human rights treaties, the International Covenant on Civil and Political Rights (ICCPR)<sup>25</sup> and the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>26</sup> were created to implement the codified rights of the UDHR as binding on all ratifying states.<sup>27</sup> Together, these three documents make up what is

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18. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 318 (S.D.N.Y. 2003) (citing Louis Henkin, *The Universal Declaration at 50 and the Challenge of Global Markets*, 25 BROOK. J. INT'L L. 17, 25 (1999)).

19. See HENKIN ET AL., *supra* note 17, at 215.

20. *Growth in the United Nations Membership*, UNITED NATIONS, <https://www.un.org/en/about-us/growth-in-un-membership> (last visited Apr. 19, 2021); see also *South Sudan*, UNITED NATIONS, <https://www.un.org/en/about-us/member-states/south-sudan> (last visited Apr. 19, 2021) (“The Republic of South Sudan formally seceded from Sudan on 9 July 2011 as a result of an internationally monitored referendum held in January 2011, and was admitted as a new Member State by the United Nations General Assembly on 14 July 2011.”).

21. *Non-member States*, UNITED NATIONS, <https://www.un.org/en/about-us/non-member-states> (last visited Apr. 19, 2021) (“Non-member States, [State of Palestine and Holy See], having received a standing invitation to participate as observers in the sessions and the work of the General Assembly and maintaining permanent observer missions at Headquarters.”).

22. G.A. Res. 217 A, Universal Declaration of Human Rights (Dec. 10, 1948), <https://www.un.org/en/universal-declaration-human-rights/index.html>.

23. *Id.*

24. Universal Declaration of Human Rights, *supra* note 22; *What is the Universal Declaration of Human Rights*, *supra* note 15.

25. International Covenant on Civil and Political Rights, Dec. 16, 1966, 6 I.L.M. 368 999 U.N.T.S. 171.

26. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 6 I.L.M. 360, 993 U.N.T.S. 3.

27. See UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, FACT SHEET NO. 2 (REV.1), THE INTERNATIONAL BILL OF RIGHTS, <https://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf> (last visited Apr. 19, 2021).

known as the International Bill of Human Rights.<sup>28</sup> The United States became a signatory of both binding instruments in 1977, but has only ratified the ICCPR.<sup>29</sup> In total, twenty-six sovereign nations have not yet ratified the ICESCR, and twenty-four have not yet ratified the ICCPR,<sup>30</sup> this reveals the enduring gaps in the incorporation of binding human rights laws for which such claims can be brought.<sup>31</sup>

Moreover, existing human rights treaties do not generally impose legal obligations on states to regulate business entities.<sup>32</sup> Without the full implementation of the International Bill of Human Rights, along with the general problems associated with upholding international laws in national jurisprudence, great barriers remain for litigating human rights claims against corporate actors. Still, these instruments barely scrape the surface when addressing the problems associated with corporate liability in international law for human rights.<sup>33</sup>

### *B. The UN Global Compact*

The complexities involved in the growth of the corporate sector have continued to create newfound economic pressures and demands, encouraging the evasion of social responsibility. The 1990s marked a significant period of technological growth and connectivity, the effects of which led to the anti-globalization movement.<sup>34</sup> In response, the UN Global Compact was organized and implemented in July 2000 to address the widespread concerns on the negative impacts of corporate business practices on human rights and the environment.<sup>35</sup>

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28. HENKIN ET AL., *supra* note 17, at 215; *see generally* UNITED NATIONS HUM. RTS. OFF. HIGH COMMISSIONER, THE INTERNATIONAL BILL OF HUMAN RIGHTS (1948), <https://www.ohchr.org/documents/publications/compilation1.1en.pdf>.

29. *Status of Ratification Interactive Dashboard*, UNITED NATIONS HUM. RTS. OFF. HIGH COMMISSIONER, <https://indicators.ohchr.org> (last visited Apr. 19, 2021).

30. *Id.*

31. *See id.*

32. *The UN Guiding Principles on Business and Human Rights*, UN GUIDING PRINCIPLES REPORTING FRAMEWORK (Sept. 2017), <https://www.ungpreporting.org/resources/the-ungps/> [hereinafter *Guiding Principles*].

33. *Globalisation and Human Rights*, INT'L FED'N FOR HUM. RTS., <https://www.fidh.org/en/issues/globalisation-human-rights/> (last visited Apr. 19, 2021).

34. *See* Christian Fuchs, *Antiglobalization*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/event/antiglobalization> (last visited Apr. 19, 2021) (“[The Antiglobalization Movement was a] social movement that emerged at the turn of the 21st century against . . . a model of globalization based on the promotion of unfettered markets and free trade.”).

35. Rorden Wilkinson, *Global Compact*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/Global-Compact> (last updated May 17, 2016).

The Compact aims to encourage good business practices through corporate commitments to support UN goals.<sup>36</sup> Through its voluntary framework, the Compact relies on CEO pledges to implement universal sustainability principles and general member adherence to ten non-binding principles of business.<sup>37</sup> These principles are derived from major international instruments, including the UDHR.<sup>38</sup> Due to the Compact's voluntary nature, enforcement of the business principles "relies on public accountability, transparency, and enlightened self-interest."<sup>39</sup>

The Compact has attracted the participation of over 13,000 entities pledging a commitment to protecting human rights and social sustainability.<sup>40</sup> However, many transnational corporations are suspected of participating in the Compact only to provide reputational protections for conducting business in places having a weak rule of law.<sup>41</sup> Such unregulated environments are associated with having high levels of poverty and inequality and are, therefore, more likely to allow human rights abuses.<sup>42</sup> Thus, participation in the Compact may give the impression that an entity is committed to good business practices, although this commitment is without enforcement.

### *C. The Guiding Principles on Business and Human Rights*

In 2005, the UN Secretary General appointed John G. Ruggie to serve as the Special Representative for Business and Human Rights.<sup>43</sup> Ruggie, a Harvard professor specializing in human rights and international affairs, had previously assisted the Secretary General in establishing and overseeing the UN Global Compact.<sup>44</sup> Ruggie's appointment included a fact-finding mandate to identify and clarify the standards of corporate responsibility with regard to human rights in order

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36. *About the UN Global Compact*, UNITED NATIONS GLOBAL COMPACT, <https://www.unglobalcompact.org/about> (last visited Apr. 19, 2021).

37. *Id.*

38. Wilkinson, *supra* note 35.

39. *Id.*

40. *Our Participants*, UNITED NATIONS GLOBAL COMPACT, <https://www.unglobalcompact.org/what-is-gc/participants> (last visited Apr. 19, 2021).

41. Will Kenton, *United Nations Global Compact*, INVESTOPEDIA, <https://www.investopedia.com/terms/u/un-global-compact.asp> (last updated Apr. 20, 2020).

42. *See Rule of Law and Development*, *supra* note 11.

43. *John Ruggie*, HARV. KENNEDY SCH., <https://www.hks.harvard.edu/faculty/john-ruggie> (last visited Apr. 19, 2021); *see also* Press Release, United Nations, Secretary-General Appoints John Ruggie of United States Special Representative on Issue of Human Rights, Transnational Corporations, Other Business Enterprises, U.N. Press Release SG/A/934 (July 28, 2005), <https://www.un.org/press/en/2005/sga934.doc.htm> [hereinafter Secretary-General Appoints John Ruggie].

44. Secretary-General Appoints John Ruggie, *supra* note 43.

to “strengthen the human rights performance of the business sector around the world.”<sup>45</sup> In March 2011, after six years of conducting extensive research and consultations, Ruggie issued the Guiding Principles on Business and Human Rights (UNGPs).<sup>46</sup>

Ruggie described the UNGPs as the “end of the beginning,” intending the instrument to serve as an initial guide, giving future business and human rights efforts something to build off of.<sup>47</sup> The UNGPs ultimately “provide an authoritative global standard for preventing and addressing the risk of adverse impacts on human rights linked to business activity.”<sup>48</sup> Only one month after being published, the UN Human Rights Counsel unanimously endorsed the UNGPs.<sup>49</sup> This was significant in endorsing business adherence to the principles by all entities operating within the territory or jurisdiction of UN member states.<sup>50</sup>

The UNGPs are premised on a non-binding, three-pillar framework: protect, respect and remedy.<sup>51</sup> The first pillar pertains to the state’s “duty to protect against human rights abuses by third parties, including businesses[;]” the second calls on “corporate responsibility to respect human rights[;]” and the third validates “greater access by victims to effective remedy, both judicial and non-judicial.”<sup>52</sup> This three-part model is “grounded in social expectations and thus not based on or meant to create new legal norms.”<sup>53</sup> Notably, the UN High

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45. John G. Ruggie: *Berthold Beitz Research Professor in Human Rights and International Affairs*, HARV. KENNEDY SCH. CARR CTR. FOR HUM. RTS. POL’Y, <https://carcenter.hks.harvard.edu/people/john-ruggie> (last visited May 2, 2021).

46. Secretary-General Appoints John Ruggie, *supra* note 43.

47. Shane Darcy, *Key Issues in the Debate on a Binding Business and Human Rights Instrument*, BUS. & HUM. RTS. IR. (Apr. 13, 2015), <https://businesshumanrightsireland.wordpress.com/2015/04/13/key-issues-in-the-debate-on-a-binding-business-and-human-rights-instrument/>.

48. UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: RELATIONSHIP TO UN GLOBAL COMPACT COMMITMENTS (2014), <https://www.business-humanrights.org/en/latest-news/pdf-the-un-guiding-principles-on-business-and-human-rights-relationship-to-un-global-compact-commitments/>.

49. THE UN WORKING GROUP ON BUSINESS AND HUMAN RIGHTS, THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: AN INTRODUCTION 2, [https://www.ohchr.org/Documents/Issues/Business/Intro\\_Guiding\\_PrinciplesBusinessHR.pdf](https://www.ohchr.org/Documents/Issues/Business/Intro_Guiding_PrinciplesBusinessHR.pdf) (last visited May 10, 2021).

50. *See id.*

51. UN “Protect, Respect, and Remedy” Framework and Guiding Principles, BUS. & HUM. RTS. RESOURCE CTR., <https://www.business-humanrights.org/en/un-secretary-generals-special-representative-on-business-human-rights/un-protect-respect-and-remedy-framework-and-guiding-principles> (last visited Apr. 19, 2021).

52. *Id.*

53. BUSINESS, PEACEBUILDING AND SUSTAINABLE DEVELOPMENT 29 (Jason Miklian, Rina M. Alluri & John E. Katsos eds., 2019).

Commissioner promoted the UNGPs as a “global authoritative standard, providing a blueprint for the steps all states and businesses should take to uphold human rights.”<sup>54</sup>

Ruggie recognized the international treaty making process to be slow and faced with “monumental challenges.”<sup>55</sup> The extensive process required in finalizing a binding instrument, coupled with the timeline for getting enough ratifying states for it to become enforceable, would have allowed for several corporate human rights violations to occur unaffected by a lack of international standards.<sup>56</sup> This concern motivated the issuance of a non-binding instrument to avoid prolonging the publication of international business standards, which he considered essential to the human rights landscape.<sup>57</sup> In this way, the UNGPs were introduced to serve as a guideline for incorporation by both business and state practices.

Ultimately, the UNGPs are commitment free, meaning any efforts to incorporate them into business practices are legally unenforceable.<sup>58</sup> Without binding authority, victims of human rights abuses have limited means of achieving legal recourse, and businesses are not being held accountable.<sup>59</sup> Additionally, national courts have shied away from hearing international human rights claims involving foreign parties and corporations.<sup>60</sup> Having recognized this downfall, in June 2014, the UN Human Rights Council voted by a majority to begin developing a binding instrument inspired by the UNGPs to establish corporate liability and correct human rights violations by business entities.<sup>61</sup>

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54. John Gerard Ruggie, *The Social Construction of the UN Guiding Principles on Business & Human Rights* (John F. Kennedy Sch. of Gov't, Harvard Univ., Working Paper No. 67, 2017), <https://www.hks.harvard.edu/publications/social-construction-un-guiding-principles-business-human-rights>.

55. Darcy, *supra* note 47.

56. *See id.*

57. *Id.*

58. *See Binding Treaty*, BUS. & HUM. RTS. RESOURCE CTR., <https://www.business-humanrights.org/en/big-issues/binding-treaty/> (last visited Feb. 7, 2021).

59. *See id.*

60. *See* Pierre N. Leval, *The Long Arm of International Law*, FOREIGN AFF. (Mar./Apr. 2013), <https://www.foreignaffairs.com/articles/united-states/2013-02-05/long-arm-international-law>.

61. John Ruggie, *The Past as Prologue? A Moment of Truth for UN Business and Human Rights Treaty*, INST. FOR HUM. RTS. & BUS. (July 8, 2014), <https://www.ihrb.org/other/treaty-on-business-human-rights/the-past-as-prologue-a-moment-of-truth-for-un-business-and-human-rights-tre/>; *see also* Nadia Bernaz, Opinion, *The Draft UN Treaty on Business and Human Rights: the Triumph of Realism over Idealism*, BUS. & HUM. RTS. CTR. (Aug. 21, 2018), <https://www.business-humanrights.org/en/the-draft-un-treaty-on-business-and-human-rights-the-triumph-of-realism-over-idealism>.

*D. Proposed Binding Treaty on Business and Human Rights*

Since the anti-globalization movement of the 1990s, government failures to prevent human rights atrocities have flooded news headlines, and called on the attention from the international community to close these gaps.<sup>62</sup> In 2013, business and human rights issues returned to the UN agenda after the Human Rights Council expressed “the necessity of moving forward toward a legally binding framework to regulate the work of transnational corporations and to provide appropriate protection, justice and remedy to the victims of human rights abuses.”<sup>63</sup> In June 2014, a UN Intergovernmental Working Group (IGWG) was formed to begin developing a binding instrument modeled after the UNGPs.<sup>64</sup>

In July 2018, the IGWG released the first draft of the Treaty on Business and Human Rights, termed the “Zero Draft.”<sup>65</sup> This was the first international effort to create an “overarching international legal framework . . . governing business conduct in relation to human rights.”<sup>66</sup> However, this treaty draft was problematic because it focused solely on businesses of “transnational character.”<sup>67</sup> This led to legal uncertainty and provided businesses with the capacity to exploit and avoid liability through reclassification.<sup>68</sup> By October 2018, ninety-four states and four hundred civil society organizations participated in the fourth session of the IGWG—displaying an increase of interest and support for the Treaty’s development.<sup>69</sup> Treaty negotiations remain ongoing, with its latest revision having been published in August 2020, and the sixth session of the IGWG held in October 2020.<sup>70</sup> Of course, future negotiations will be essential to human rights by ensuring access to justice and remedies for populations affected by transnational corporate actors.

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62. See generally Adam Warden, *A Brief History of the Anti-Globalization Movement*, 12 U. MIAMI INT’L & COMP. L. REV. 237 (2004), <https://repository.law.miami.edu/cgi/viewcontent.cgi?article=1082&context=umicl>.

63. Olga F. Sixto, *Business and Human Rights: A Study on the Implications of the Proposed Binding Treaty 3* (Oct. 2015) (unpublished LLM manuscript) (on file with author).

64. Ruggie, *supra* note 61.

65. *Binding Treaty*, *supra* note 58.

66. Ruggie, *supra* note 61.

67. See John G. Ruggie, Opinion, *Comments on the “Zero Draft” Treaty on Business & Human Rights*, BUS. & HUM. RTS. RESOURCE CTR. (Aug. 20, 2018), <https://www.business-humanrights.org/en/blog/comments-on-the-zero-draft-treaty-on-business-human-rights/> [hereinafter *Comments on the “Zero Draft” Treaty*].

68. See *id.*

69. Antonella Angelini, *The Way Ahead for a UN Treaty on Business and Human Rights*, FAIR OBSERVER (Feb. 28, 2019), <https://www.fairobserver.com/world-news/un-treaty-business-human-rights-brumadino-dam-collapse-news-15215/>.

70. *Binding Treaty*, *supra* note 58.

The intended purpose of the Treaty will be to close the accountability gaps for human rights violations committed by business entities,<sup>71</sup> while also imposing legally binding obligations on states to provide victims with a remedy for violations of their rights.<sup>72</sup> The Treaty rules are intended to be enforced through domestic state efforts and to further promote the strengthening of international cooperation in the domains of business and human rights.<sup>73</sup> Although enforcement mechanisms remain problematic for international treaties, developing hard law accountability in this area is a step in the right direction.

### III. A LEGAL OVERVIEW: THE LEGAL CONSTRAINTS OF CORPORATE ACCOUNTABILITY AND TRANSNATIONAL ENFORCEMENT MECHANISMS

Despite the work of the UN and the existence of various human rights instruments,<sup>74</sup> international treaties do not yet impose direct legal obligations on business entities, thus leaving this area of enforcement largely to the states.<sup>75</sup> While ratifying governments are expected to implement international human rights law into their domestic systems, there remain obstacles in domestic enforcement of such claims.<sup>76</sup> The treaty ratification process requires national governments to “put into place domestic measures and legislation compatible with their treaty obligations.”<sup>77</sup> However, within the implementation process, the strength of international treaties are not conveyed in national courts. In many states, difficulties remain regarding the general recognition of all fundamental human rights as well as their legal enforcement.<sup>78</sup>

For instance, federal courts in the U.S. began to avoid hearing such cases, which are perceived to implicate separation-of-powers and

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71. See OEIGWG CHAIRMANSHIP REVISED DRAFT 16.7.2019, at art. 2, [https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG\\_RevisedDraft\\_LBI.pdf](https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf) (last visited Apr. 19, 2021).

72. *Id.*

73. *See id.*

74. See *The Core International Human Rights Instruments and their monitoring bodies*, UNITED NATIONS HUM. RTS. OFF. HIGH COMMISSIONER, <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx> (last visited Apr. 19, 2021).

75. *Guiding Principles*, *supra* note 32.

76. *Id.*

77. *International Human Rights Law*, DIAKONIA INT’L HUMANITARIAN L. CTR., <https://www.diakonia.se/en/IHL/The-Law/International-Law1/International-Human-Rights-Law/> (last visited Feb. 7, 2021).

78. See Rosa Freedman, *The Lack of Basic Human Rights Around the World: A Harrowing Reality*, INDEP. (Dec. 10, 2014, 12:33 PM), <https://www.independent.co.uk/life-style/health-and-families/features/the-lack-of-basic-human-rights-around-the-world-a-harrowing-reality-9913644.html>.

foreign policy concerns.<sup>79</sup> In 1980, *Filartiga*<sup>80</sup> emerged as a landmark case for human rights litigation in the U.S.<sup>81</sup> This decision established that victims of human rights abuses, including those committed abroad, could use the Alien Tort Statute (ATS)<sup>82</sup> to sue perpetrators in U.S. courts.<sup>83</sup> To pursue this course of action, plaintiffs would first need to meet the strict burden of establishing jurisdiction over the defendant.<sup>84</sup> Here, the *Filartiga* Court determined that “a state . . . has a legitimate interest in the orderly resolution of disputes among those within its borders.”<sup>85</sup> Despite this effort to provide a national forum for foreign litigants, the U.S. received political backlash from nations reinforcing their boundaries of nonintervention.<sup>86</sup> In response, U.S. federal courts began avoiding ATS claims and eventually restricting the legal reach of the statute altogether.<sup>87</sup> The U.S. poses as a great example of the difficulties in cross-border litigation, even without taking into account the additional challenge posed in hailing a corporate entity into court.

In considering work arounds to this issue, U.S. state courts and international mechanisms remain seen as viable forums for human rights cases. If able to navigate the substantive and jurisdictional constraints,<sup>88</sup> private parties may be able to bring their human rights claims under state law in domestic U.S. courts. Under proper circumstances, this process does not require corporate consent to initiate,<sup>89</sup> since a court having jurisdiction may, in theory, hail the defendant into court. Thus, the avenue of litigation may circumvent the difficulties posed in alternative mechanisms requiring voluntary participation such as arbitration and mediation.<sup>90</sup> Without any incentive, such partaking on behalf of

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79. See, e.g., *Daimler AG v. Bauman*, 571 U.S. 117 (2014). The Court determined that the transnational context of the dispute implicated risks to international comity. *Id.*

80. *Filartiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980).

81. *Id.*

82. 28 U.S.C. § 1350 (1948) (“The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”).

83. See *Filartiga*, 630 F.2d at 887 (allowing victims of serious human rights abuses abroad to sue under federal common law in federal court).

84. See *id.* at 887-88.

85. *Id.* at 885.

86. Roger Alford, *The Diplomatic Friction of ATS Litigation*, OPINIOJURIS (May 29, 2009), <http://opiniojuris.org/2009/05/29/the-diplomatic-friction-of-ats-litigation/>.

87. See *id.*

88. See Christopher A. Whytock, *Transnational Judicial Governance*, 2 ST. JOHN’S J. INT’L & COMP. L. 55, 56-60 (2012) [hereinafter Whytock, *Transnational*]; see also *Globalisation and Human Rights*, *supra* note 33.

89. See, e.g., *Romero v. Drumond Co.*, 552 F.3d 1303 (11th Cir. 2008) (exercising jurisdiction over Colombian subsidiary defendant under the Alien Tort Statute).

90. See Jack J. Coe et al., *Arbitration and Mediation in Cross Border Disputes: Possibilities and Limitations*, 19 PEPP. DISP. RESOL. L.J. 231, 237-49 (2019) (discussing the

corporate defendants is not likely to be acquired.<sup>91</sup> Alternatively, the favorable biases of domestic courts towards host state actors are likely to impact foreign parties from procuring a favorable judgment.<sup>92</sup> Despite this risk, parties may prefer the public nature of the litigation process, allowing them to call attention to corporate abuses and access to obtain reparations through legally binding judgments. Similarly, an international court could intend this judicial impact, while serving as a more neutral forum for foreign litigants. Despite this, international mechanisms are lacking in communitarian, transnational support,<sup>93</sup> leaving national options more accessible to private parties.

*A. Domestic Litigation: International Human Rights Claims Against Corporations in U.S. Courts*

A recognized leader of largescale judicial governance, U.S. courts have been known to be “among the most influential” in handling transnational disputes.<sup>94</sup> However, in the effort to maintain diplomacy and respect of territoriality, U.S. federal courts became reluctant to entertain claims involving foreign parties. Accordingly, several recent and notable Supreme Court rulings have largely restricted federal jurisdiction over international human rights claims in the U.S.<sup>95</sup>

In the 2013 Supreme Court case, *Kiobel v. Royal Dutch Petroleum Co.*,<sup>96</sup> the federal court system constricted the reach of the ATS and its ability to hear cases of international human rights against corporate actors.<sup>97</sup> The Supreme Court granted certiorari in *Kiobel* after the Second Circuit held that corporations are not subject to suit under the ATS because “corporate liability ha[d] not been established specifically

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voluntary nature of alternate dispute mechanisms, including the voluntary nature of consent-based arbitration and voluntary convening for mediation).

91. There are apparent difficulties in relying on voluntary methods when corporations are unlikely to consent to being sued nor voluntarily appear to defend themselves against claims of human rights abuses. Thus, instigating corporate incentives to maintain business relations or consumer interests may be considered among the possible incentives for ADR.

92. See generally Ronán Feehily, *Neutrality, Independence and Impartiality in International Commercial Arbitration, A Fine Balance in the Quest for Arbitral Justice*, 7 PENN ST. J.L. & INT’L AFF. 88 (2019).

93. See generally Kamil Omoteso & Hakeem Yusuf, *Accountability of Transnational Corporations in the Developing World*, 13 EMERALD PUBLISHING LIMITED 54 (May 26, 2016).

94. Whytock, *Transnational*, *supra* note 88, at 64.

95. See *Jesner v. Arab Bank*, 138 S. Ct. 1386 (2018); see also *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013). *Jesner* and *Kiobel* cases placed strict judicial limitations on Alien Tort Statute litigation against corporate defendants.

96. *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013).

97. See *id.* at 124-25.

as part of international law.”<sup>98</sup> The Supreme Court ultimately held that the case was barred under the presumption against extraterritoriality, leaving unresolved the question of whether the ATS applied to suits against foreign corporations.<sup>99</sup> Similarly, the 2018 Supreme Court decision in *Jesner v. Arab Bank*,<sup>100</sup> established that “absent further action from Congress it would be inappropriate for courts to extend ATS liability to foreign corporations.”<sup>101</sup> This decision further restricted federal jurisdiction and limited the legal recourse available to victims of corporate human rights abuses.

These cases reveal the evolution of human rights claims in the U.S. following *Filartiga* and the challenges of establishing personal jurisdiction over corporations for human rights violations. The holdings, made in an effort to curtail foreign policy implications, have left human rights victims with limited options to obtain legal recourse under the ATS.<sup>102</sup> Similarly, petitioners have narrow alternatives to litigate in federal court since few express private causes of action exist for international human rights.<sup>103</sup> Nevertheless, petitioners whose human rights claims cannot be litigated in federal courts may still bring their claims in state courts by establishing personal jurisdiction over a corporate defendant.<sup>104</sup> A court obtains official power to make such legal decisions and judgments by a showing of either general or specific jurisdiction over the defendant.<sup>105</sup> Accordingly, the following sections will outline both courses of jurisdiction.

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98. Christopher A. Whytock, Donald E. Childress III & Michael D. Ramsey, *Foreword: After Kiobel – International Human Rights Litigation in State Courts and Under State Law*, 3 U.C. IRVINE L. REV. 1, 3-4 (2013) [hereinafter Whytock, *After Kiobel*] (following the Second Circuit opinion, in which the majority held that corporations were not subject to international law, the Supreme Court granted certiorari to consider this question under customary international law).

99. *See Kiobel*, 569 U.S. at 125 (noting that nothing in the opinion limited Congress from amending the ATS in order to bring corporate defendants within the courts’ jurisdiction).

100. *Jesner v. Arab Bank*, 138 S. Ct. 1386 (2018).

101. *See id.* at 1403.

102. *Id.* at 1408 (“[A]ny imposition of corporate liability on foreign corporations for violations of international law must be determined in the first instance by the political branches of the Government.”).

103. Whytock, *After Kiobel*, *supra* note 98, at 4 (noting the Torture Victim Protection Act and Foreign Sovereign Immunities Act as express causes of action for international human rights under U.S. federal law).

104. *See id.* at 6; *see also* VAGTS ET AL., *supra* note 7, at 141 (“Another method of holding corporations accountable for the social . . . impacts of their activity is ordinary civil litigation in domestic courts . . . The claims may allege violation of domestic tort or statutory law, or of international law.”); *id.* at 142 (“There are many barriers to such claims, including limitations on personal jurisdiction over non-resident defendants.”).

105. *See* Craig Sanders, *Of Carrots and Sticks: General Jurisdiction and Genuine Consent*, 111 NW. U. L. REV. 1323, 1326 (2017) (“A state’s jurisdictional power over

### 1. General Jurisdiction in U.S. State Courts

A human rights victim may bring a claim in state court for conduct occurring overseas by invoking general jurisdiction over a domestic corporation. In *Goodyear*,<sup>106</sup> the Supreme Court held that a corporation is subject to the general jurisdiction of a state in which its contacts are so “continuous and systematic” as to render a corporation “essentially at home.”<sup>107</sup> Following this outcome, the court in *Daimler*<sup>108</sup> relied on *Goodyear* to clarify that a corporation’s state of incorporation or principal place of business renders it “at home” in the respective state and therefore subject to its jurisdiction.<sup>109</sup> In contrast, the *BNSF*<sup>110</sup> Court held that unrelated “in-state business . . . does not suffice to permit the assertion of general jurisdiction” over a defendant corporation.<sup>111</sup> Thus, a human rights victim may bring a claim against a domestic corporation for conduct occurring overseas in state court of the state only where the corporation is considered “at home.”<sup>112</sup>

### 2. Specific Jurisdiction in U.S. State Courts

Another avenue for achieving personal jurisdiction over a corporation is through specific jurisdiction. Specific jurisdiction is derived from a showing of “related contacts [that] took place in the forum [state],” thus establishing “an affiliation between the forum and the underlying controversy.”<sup>113</sup> In *McIntyre*,<sup>114</sup> the Court held that asserting jurisdiction is lawful when the defendant “purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.”<sup>115</sup> Six years later, in *Bristol-Myers*,<sup>116</sup> the Court held that a “corporation’s ‘continuous activity of some sorts within a state . . . is not enough to support the demand that the corporation be amendable to suits unrelated to that

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defendants is couched in either specific ‘conduct- linked’ jurisdiction or general ‘all-purpose’ jurisdiction.”).

106. *Goodyear v. Brown*, 564 U.S. 915 (2011).

107. *Id.* at 919.

108. *Daimler AG v. Bauman*, 571 U.S. 117 (2014).

109. *See id.* at 137 (citing *Goodyear*, 563 U.S. at 924).

110. *BNSF Railway Co. v. Tyrrell*, 137 S. Ct. 1549 (2017).

111. *Id.* at 1559.

112. *Id.*

113. *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1780 (2017); Patrick J. Borchers, *Conflict-of-Laws Considerations in State Court Human Rights Actions*, 3 U.C. IRVINE L. REV. 45, 57 (2013).

114. *McIntyre Machinery, LTD. v. Nicastro*, 564 U.S. 873 (2011).

115. *Id.* at 877.

116. *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017).

activity.’”<sup>117</sup> Therefore, under specific jurisdiction, a plaintiff may bring a claim against a foreign corporate defendant where there is a strong finding of “the defendant’s relationship to the forum State” and where “the defendant’s activities manifest an intention to submit to the power of a sovereign.”<sup>118</sup>

Despite the barriers in the U.S. for litigating international human rights claims in federal courts, state courts may provide a viable means of remedy under private civil tort law. Still, other procedural and substantive obstacles remain which may prevent victims from receiving recourse through this avenue.<sup>119</sup> For this reason, among others, it is important to consider the use of neutral forums available to remedy and prevent continuing corporate abuses. Accordingly, international dispute resolution mechanisms present great potential to serve as neutral judicial forums for this purpose.<sup>120</sup>

### *B. International Dispute Resolution Mechanisms*

When domestic laws fail to remedy human rights violations, “injured parties may . . . resort to international mechanisms for remedy.”<sup>121</sup> However, the current international system is not yet equipped to handle such cases involving corporate actors.<sup>122</sup> While human rights have been codified in international law,<sup>123</sup> an international court having jurisdiction over private party claims for corporate human rights abuses is yet to be established. Without such means, the enforcement mechanisms available for the protection of human rights at the transnational level have proven inadequate. The International Court of Justice and International Criminal Court are among the two most recognized international tribunals still in existence; however, both have restrictions that make them unavailable for this purpose.

The International Court of Justice (ICJ) was established in 1945 to settle legal disputes and provide advisory opinions for UN member states.<sup>124</sup> The ICJ, considered the principal judicial organ of the UN,

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117. *Id.* at 1781.

118. *Bristol-Myers*, 137 S. Ct. at 1779; *McIntyre Machinery, LTD.*, 131 S. Ct. at 873.

119. Paul Hoffman & Beth Stephens, *International Human Rights Cases Under State Law and in State Courts*, 3 U.C. IRVINE L. REV. 9, 17-20 (2013).

120. *See id.*

121. *International Human Rights Law*, *supra* note 77.

122. *See generally* David Scheffer, *Corporate Liability under the Rome Statute*, 57 HARV. INT’L L. J. 35 (2016).

123. *See International Law and Justice*, UNITED NATIONS, <https://www.un.org/en/global-issues/international-law-and-justice> (last visited Feb. 7, 2021) (outlining the development of a body of international law and judicial organs).

124. *The Court*, INT’L CT. JUST., <https://www.icj-cij.org/en/court> (last visited Feb. 7, 2021).

only hears contentious cases between member states or states who have otherwise accepted the jurisdiction of the Court.<sup>125</sup> Thus, private parties have no right of access to obtain recourse for human rights abuses under this mechanism.

The International Criminal Court (ICC) has jurisdiction to prosecute individuals for the crime of genocide, crimes against humanity, war crimes, and crimes of aggression.<sup>126</sup> In addition to the limited scope of claims for which the ICC has jurisdiction over, the parties must also be citizens of state parties to the Rome Statute who assent to the Court's jurisdiction.<sup>127</sup> Like the ICJ, the ICC remains unavailable for the purposes of human rights judicial resolution against corporate actors.

It is unlikely that a global forum for this purpose will be established until there is further global participation in the enforcement of international law for human rights. Without adequate international support, social enforcement on corporations to abide by the UNHR and respective human rights treaties may persist as the only multinational scrutiny accessible to individuals—a social adjudication per se. As long as corporations remain focused on generating profit for their shareholders, they will remain responsive to the interests of their consumer base and motivated to preserve their image and reputation in competitive markets. In this way, the people's collective voice may serve best to demand change in the face of corporate neglect, especially where the host state is not proactively protecting its citizens or corporate settlements act to quiet any commotion.<sup>128</sup> Meanwhile, the transition to

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125. See John R. Crook, *The International Court of Justice and Human Rights*, 1 NW. J. HUM. RTS. 1, 1 (2004); see also *How the Court Works*, INT'L CT. JUST., <https://www.icj-cij.org/en/how-the-court-works> (last visited Feb. 5, 2021) (explaining that the International Court of Justice is competent to hear legal disputes between States who are members of the United Nations).

126. *International Law and Justice*, *supra* note 123 (explaining that jurisdiction for crimes of aggression is contingent upon an agreement as to the definition of such a crime).

127. *How the Court Works*, INT'L CRIM. CT., <https://www.icc-cpi.int/about/how-the-court-works/Pages/default.aspx#legalProcess> (last visited Feb. 5, 2021) (explaining that the ICC has jurisdiction over four main crimes: genocide, crimes against humanity, war crimes, and crimes of aggression).

128. See, e.g., Apoorva Mandavilli, *The World's Worst Industrial Disaster Is Still Unfolding*, ATLANTIC (July 10, 2018), <https://www.theatlantic.com/science/archive/2018/07/the-worlds-worst-industrial-disaster-is-still-unfolding/560726/> (reporting that after a massive industrial gas leak in Bhopal, India, American company, Union Carbide Corporation, continues to deny liability, leaving the Indian Government to answer to the demands of human rights activists in the region); see also Larisa Epatko, *5 years after the world's largest garment factory collapse, is safety in Bangladesh any better?*, PBS (Apr. 6, 2018, 3:30 PM), <https://www.pbs.org/newshour/world/5-years-after-the-worlds-largest-garment-factory-collapse-is-safety-in-bangladesh-any-better> (reporting that in response to the globally

considering more serious reliance on alternative dispute resolution mechanisms is essential until states submit to international adjudication for human rights.

#### IV. THE AVENUES OF ALTERNATIVE DISPUTE RESOLUTION: HOW ADR MECHANISMS CAN BE USED TO HOLD TRANSNATIONAL CORPORATIONS ACCOUNTABLE FOR HUMAN RIGHTS VIOLATIONS

Without an established international venue to litigate claims against transnational entities,<sup>129</sup> and in the absence of binding international business standards,<sup>130</sup> petitioners and activists are left to consider alternative avenues to obtain legal recourse and reparations for human rights violations. Considering that ADR mechanisms require voluntary participation, petitioners must face the initial hurdle of navigating corporate cooperation. This poses further difficulties when parent corporations do not claim liability for the acts of their subsidiaries. In this way, corporate accountability requires transparency regarding the ownership and control of entities abroad.<sup>131</sup> Such transparency is often lacking in conflict environments, where parent companies may be less accessible and are only responsible for answering on behalf of their subsidiaries when a petitioner successfully pierces the corporate veil.<sup>132</sup>

After establishing liability, a corporation is still unlikely to avail itself to ADR without incentive. The human rights regime may be most successful in incentivizing such cooperation by targeting the reputation of corporate entities and harnessing the support of the transnational consumer base. Technological connectivity allows for immediate communications and broadcasts aimed at protecting the dignity of human rights against corporate abuses. In response, corporate actors are likely to abide by resolution efforts to appeal to their consumer base and retain shareholder profits.

Efforts to improve the administration of corporate social responsibility continue to be of the utmost importance in the fight for international human rights. Until there is a direct means of subjecting

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recognized catastrophe of the Rana Plaza collapse in Bangladesh, corporate entities looking to salvage their reputation formed alliances to ensure the safety of the factories that supplied them).

129. See *International Law and Justice*, *supra* note 123.

130. See *Comments on the "Zero Draft" Treaty*, *supra* note 67.

131. See VAGTS ET AL., *supra* note 7, at 129.

132. Péter D. Szigeti, *Territorial Bias in International Law: Attribution in State and Corporate Responsibility*, 19 J. TRANSNAT'L L. & POL'Y 311, 350 (2010) ("The required test for a successful piercing of the corporate veil is that the subsidiary be a mere 'instrumentality' or an 'alter ego' of the mother corporation, where the subsidiary's every action is decided in fact by the owner.").

corporations to legal enforcement and repercussions, an increased understanding for ADR alternatives in the international context is crucial. As a strong alternative to litigation in resolving disputes,<sup>133</sup> ADR mechanisms have long been relied upon by corporate entities in countries like the United States.<sup>134</sup> To this effect, the American Bar Association formed the ABA Section of Dispute Resolution in 1993, to promote widespread educational efforts in ADR.<sup>135</sup>

These alternative resolution processes have proven to be flexible, are voluntary, and provide parties with greater control over both the resolution method and outcome.<sup>136</sup> Ultimately aiming to a “achieve peaceful resolution of disputes,”<sup>137</sup> such mechanisms may appeal to the needs of human rights claimants who otherwise face challenges accessing recourse through litigation. Accordingly, developments in ADR practice areas may further improve the cooperation and receptiveness of transnational corporations who wish to avoid the costs and publicity involved in litigation. Thus, it is in the global community’s interests to explore these alternatives in the effort to close the loopholes of corporate social responsibility as pertaining to the international human rights regime. The following sections will discuss the benefits that ADR alternatives present while focusing on arbitration and mediation as reliable means for upholding the protections of the UN Guiding Principles.

#### A. Arbitration

Arbitration is a neutral and private process in which disputing parties “agree that one or several [arbitrators] can make a decision about the dispute after receiving evidence and hearing arguments.”<sup>138</sup> Arbitral proceedings have gained attention and momentum as an efficient and

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133. See Tala Esmaili & Krystyna Gilkis, *Alternative Dispute Resolution*, CORNELL L. SCH., [https://www.law.cornell.edu/wex/alternative\\_dispute\\_resolution](https://www.law.cornell.edu/wex/alternative_dispute_resolution) (last updated June 2017).

134. See Darryl Geddes, *U.S. corporations now widely use Alternative Dispute Resolution over litigation to solve disputes, national survey shows*, CORNELL CHRON. (May 21, 1997), <https://news.cornell.edu/stories/1997/05/survey-also-finds-lack-confidence-qualifications-arbitrators>; see also Michael McManus & Brianna Silverstein, *Brief History of Alternative Dispute Resolution in the United States*, 1 CADMUS J. 100 (2011).

135. Anna Spain, *Using International Dispute Resolution to Address the Compliance Question in International Law*, 40 GEO. J. INT’L L. 807, 821 (2009) (stating that ABA efforts include, but are not limited to, hosting conferences and endorsing publications in areas of arbitration, mediation, negotiation, and conciliation).

136. Esmaili & Gilkis, *supra* note 133.

137. Spain, *supra* note 135, at 810.

138. *Dispute Resolution Processes: Arbitration*, A.B.A., [https://www.americanbar.org/groups/dispute\\_resolution/resources/DisputeResolutionProcesses/arbitration/](https://www.americanbar.org/groups/dispute_resolution/resources/DisputeResolutionProcesses/arbitration/) (last visited Feb. 7, 2021).

effective form of international dispute resolution. Largely motivated by the globalization trends of the twentieth century, arbitration emerged as a substitute for litigation in the effort to depoliticize the settlement of disputes between multi-national parties.<sup>139</sup> A mechanism providing parties with control to establish the terms of resolving any potential disputes, arbitration has become acknowledged for producing fair and just outcomes in international commercial arbitration.<sup>140</sup> The impartial nature of arbitral proceedings presents an appealing alternative to litigation, allowing parties to evade the local biases of a host country's foreign courts and laws.<sup>141</sup> Arbitration is regarded as a less formal process, "rarely impos[ing] specific qualifications in order to act as an arbitrator."<sup>142</sup> Accordingly, it is not required that arbitrators be lawyers; instead, arbitrators may be neutral experts in the relevant field of dispute, such as scholars and professors or former judges.<sup>143</sup> In addition, parties to arbitration maintain a high degree of control over the organization and outcome of the legal proceedings;<sup>144</sup> they must agree on an appropriate venue and select one or more unbiased arbitrators to hear both sides of the case before issuing a final, binding decision.<sup>145</sup> Petitioners may also prefer the flexibility of arbitral proceedings and the potential to obtain fast and affordable relief.<sup>146</sup> Inversely, corporations may prefer the less formal and more efficient process of arbitration, including the level of confidentiality, and cooperation aiding the preservation of on-going business relationships.<sup>147</sup>

The discretion and control which parties maintain under arbitration eliminate many of the risks perceived of litigation while maintaining a structured process and ensuring a binding award. An arbitral decision usually cannot be appealed, contributing to faster procurement of potential remedy.<sup>148</sup> The 1958 New York Convention,<sup>149</sup> ratified by a

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139. Michael Faure & Wanli Ma, *Investor-State Arbitration: Economic and Empirical Perspectives*, 41 MICH. J. INT'L L. 1, 1 n.1 (2020).

140. Feehily, *supra* note 92, at 89.

141. *See id.* at 91.

142. *Id.* at 108.

143. *See* Esmaili & Gilkis, *supra* note 133.

144. *See* Aceris Law LLC, *What is International Arbitration?*, INT'L ARB., <https://www.international-arbitration-attorney.com/what-is-international-arbitration/> (last visited Apr. 20, 2021).

145. *See id.* While having one arbitrator is less costly, parties may feel more comfortable with each having at least one member of the tribunal that they know will be sympathetic.

146. *Dispute Resolution Processes: Arbitration*, *supra* note 138.

147. *See id.*

148. *Id.* ("When arbitration is binding, the decision is final, can be enforced by a court, and can only be appealed on very narrow grounds.")

149. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Oct. 6, 1958, 330 U.N.T.S. 3,

majority of countries,<sup>150</sup> applies to provide a secured legal system and enforce foreign arbitral awards for cross-border disputes.<sup>151</sup> These awards are considered final and are recognized and enforced by all ratifying member states and tribunals.<sup>152</sup> Arbitral tribunals are neutral forums known for providing foreign parties a fair and efficient procedural framework, free of local biases.<sup>153</sup> The following sections will discuss the International Chamber of Commerce (ICC) Court of Arbitration and The Hague Rules on Business and Human Rights Arbitration, as two exemplary mechanisms of the interest to pursue arbitral justice.

### *I. ICC International Court of Arbitration*

The ICC International Court of Arbitration<sup>154</sup> is considered one of “the world’s leading institution[s] for providing international arbitration services.”<sup>155</sup> The ICC framework outlines the arbitral procedures to be followed by parties to cross-border disputes,<sup>156</sup> providing guidance towards resolution and an essential structure for enforcing accountability for corporate human rights obligations. The ICC arbitration rules provide entities and private parties with flexible and efficient services to resolve disputes and enforce their outcomes.<sup>157</sup> A 2018 statistical report revealed that the ICC has managed over 23,300 cases since its creation in 1923.<sup>158</sup>

Although the ICC is considered a ‘court,’ it does not make formal judgements and instead exercises judicial supervision of arbitration proceedings to ensure proper application of the ICC rules.<sup>159</sup> The arbitral

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[https://uncitral.un.org/en/texts/arbitration/conventions/foreign\\_arbitral\\_awards](https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards) [hereinafter N.Y. Convention].

150. Feehily, *supra* note 92, at 89 (reporting that over 150 states had subscribed to the New York Convention by 2019).

151. *See generally* N.Y. Convention, *supra* note 149.

152. *See id.*

153. Susan L. Karamanian, *The Role of International Human Rights Law in Re-Shaping Investor-State Arbitration*, 45 INT’L J. LEGAL INFO 34, 34 (2017) [hereinafter Karamanian I].

154. *ICC International Court of Arbitration*, INT’L CHAMBER COM., <https://iccwbo.org/dispute-resolution-services/icc-international-court-arbitration/> (last visited Apr. 20, 2021).

155. Press Release, Dr. K. Chrysostomides & Co LLC, Dr. Kypros Chrysostomides Appointed as a Member of the ICC International Court of Arbitration (July 26, 2012), <https://chrysostomides.mywebreview.com/index.php?pageid=28&pageaction=chr&modid=101&newid=130>.

156. N.Y. Convention, *supra* note 149.

157. *See* INT’L CHAMBER OF COMMERCE, 2017 ICC DISPUTE RESOLUTION STATISTICS 51 (2018), <https://cdn.iccwbo.org/content/uploads/sites/3/2018/07/2017-icc-dispute-resolution-statistics.pdf>.

158. *Id.* at 52.

159. *ICC International Court of Arbitration*, *supra* note 154.

awards are considered binding, final, and enforceable in courts throughout the world.<sup>160</sup> Generally, ICC arbitration ensures fewer obstacles for international enforcement than decisions derived from national courts; this is primarily because it is not unusual for national courts to refuse recognition or enforcement of a judgment derived from another sovereign state.<sup>161</sup> Thus, arbitral awards prove more readily accessible and contractual.

Arbitration is mostly a confidential process, meaning the general public cannot attend the proceedings or view its record.<sup>162</sup> Despite this, the court may establish allowances for persons to attend the proceedings or have access to materials of a case based on necessity.<sup>163</sup> While some records are accessible through the ICC's website, these publications usually omit items of party identification, trade secrets, and any other sensitive information.<sup>164</sup> In turn, arbitration is a great alternative for a business entity wishing to maintain a reasonable degree of privacy over a case and to avoid any exposure that could otherwise be injurious to their reputation. Recent developments in ICC arbitration have allowed for the limited publication of arbitration awards.<sup>165</sup>

In January 2019, the ICC published a notice indicating the implementation of new policies to promote transparency and increase efficiency in international arbitration.<sup>166</sup> This transition is supported on grounds to make the decision-making process accessible, to improve the arbitral process generally, and to promote global trade.<sup>167</sup> Still, award publications are subject to party consent, therefore, parties may object to any publication or may opt to have awards "anonymised or pseudonymised."<sup>168</sup> This feature may be encouraging to corporate defendants who may prefer arbitration for its confidentiality aspect.

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160. *2021 Arbitration Rules*, INT'L CHAMBER COM., <https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/> (last visited Apr. 18, 2021).

161. See Yuliya Zeynalova, *The Law on Recognition and Enforcement of Foreign Judgments*, 31 BERKELEY J. INT'L L. 150, 150-51 (2013) ("Transnational litigants are . . . more likely to encounter difficulties enforcing their foreign court awards than parties seeking to enforce their foreign arbitral awards.").

162. *2021 Arbitration Rules*, INT'L CHAMBER COM. art. 8 (Jan. 1, 2021), [https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/#article\\_8](https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/#article_8).

163. See *id.*

164. See *id.* at art. 22.

165. *Publication of ICC Arbitration Awards: 2019 Advancements in Transparency of ICC Arbitration*, ACERIS L. LLC. (Mar. 26, 2019), <https://www.acerislaw.com/publication-of-icc-arbitration-awards-2019-advancements-in-transparency-of-icc-arbitration/>.

166. *Id.*

167. *Id.*

168. *Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration Under the ICC Rules of Arbitration*, INT'L CHAMBER COM. 8 (Jan. 1, 2019), <https://cdn.iccwbo.org/content/uploads/sites/3/2017/03/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration.pdf>.

Alternatively, human rights claimants will likely favor greater transparency in holding corporations accountable for international law violations. Although awards are non-binding on preceding cases, such publications may provide integral information for cases having similar facts.<sup>169</sup> Thus, the transition is likely to promote efficiency in the determination and consistency of outcomes while maintaining its appeal to private parties and business entities.

## 2. *The Hague Rules on Business and Human Rights Arbitration*

The Hague Rules on Business and Human Rights Arbitration were established to “provide a set of rules for the arbitration of business and human rights disputes.”<sup>170</sup> In 2019, working sessions were held by the Business and Human Rights Arbitration Working Group, a representative group of over two hundred individuals, which recognized arbitration as a mechanism having “great promise . . . to resolve human rights disputes involving business.”<sup>171</sup> Accordingly, the Drafting Team set out to develop standards inspired by the Arbitration Rules of the United Nations Commission International Trade Law (UNCITRAL).<sup>172</sup>

The Drafting Team acknowledged that disputes of international human rights related to transnational corporations were being held in national courts, which were subject to corruption and political influence, or were generally unqualified to handle such disputes.<sup>173</sup> In contrast, arbitration offers “unique attributes that could serve . . . parties well even where fair and competent courts are available.”<sup>174</sup> After devoting five years consulting with stakeholders and drafting text, the Drafting Team officially launched the Hague Rules on December 12, 2019.<sup>175</sup> The intent behind this project was to close the remedy gap of the UNGPs by establishing an “international private judicial dispute resolution avenue available to parties involved in business and human rights issues.”<sup>176</sup> In this way, the Hague Rules are directly challenging the legal obstacles

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169. See Karamanian I, *supra* note 153, at 38-39.

170. See CTR. FOR INT’L LEGAL COOPERATION, THE HAGUE RULES ON BUSINESS AND HUMAN RIGHTS ARBITRATION 1 (2019), [https://www.cilc.nl/cms/wp-content/uploads/2019/12/The-Hague-Rules-on-Business-and-Human-Rights-Arbitration\\_CILC-digital-version.pdf](https://www.cilc.nl/cms/wp-content/uploads/2019/12/The-Hague-Rules-on-Business-and-Human-Rights-Arbitration_CILC-digital-version.pdf) [hereinafter CTR. FOR INT’L LEGAL COOPERATION].

171. *Id.* at 1; *The Hague Rules on Business and Human Rights Arbitration*, CTR. FOR INT’L LEGAL COOPERATION (2019), <https://www.cilc.nl/project/the-hague-rules-on-business-and-human-rights-arbitration/> (last visited Apr. 18, 2021) [hereinafter *The Hague Rules*].

172. CTR. FOR INT’L LEGAL COOPERATION, *supra* note 170, at 3.

173. *The Hague Rules*, *supra* note 171.

174. *Id.*

175. *Id.*

176. *Id.*

faced by victims of business-related abuses while also working towards ascertaining transparency in proceedings and awards.<sup>177</sup>

Skepticism emerged from both business groups and civil society towards a private adjudicative remedy for the resolution of human rights claims and the challenge to arrive at rules that would appeal to multiple stakeholders.<sup>178</sup> However, the party discretion endorsed in arbitral proceedings can be used by transnational corporations “to prevent abuse from occurring in their supply chains and development projects.”<sup>179</sup> This, in turn, may prevent future cases from arising and contributes to the overarching goal of minimizing international law violations.<sup>180</sup>

The Hague Rules outline mechanisms that are consistent with the UNGP pillars, addressing adverse human rights impacts under the respect pillar and grievances consistent with the remedy pillar.<sup>181</sup> The Hague Rules principally follow the UNCITRAL rules, “with modifications needed to address certain issues likely to arise in the context of business and human rights disputes.”<sup>182</sup> Arbitral institutions, including the ICC, may serve as “an administrating or an appointing authority under the UNCITRAL Arbitration Rules.”<sup>183</sup> With similarities to the ICC rules of arbitration, the UNCITRAL rules provide a neutral forum, maintain party confidentiality, and issue awards which “may be made public in limited circumstances.”<sup>184</sup> Additionally, in the promotion of increased accessibility, the Rules are not limited by the type of claimants, respondents, or subject-matter of the dispute.<sup>185</sup> Despite the newfound potential for arbitral success in this area, the Rules encourage the settlement of disputes by collaborative settlement mechanisms such as mediation.<sup>186</sup>

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177. *See id.*

178. *See* Diane Desierto, *Why Arbitrate Business and Human Rights Disputes? Public Consultation Period Open for the Draft Hague Rules on Business and Human Rights Arbitration*, EJIL:TALK! (July 12, 2019), <https://www.ejiltalk.org/public-consultation-period-until-august-25-for-the-draft-hague-rules-on-business-and-human-rights-arbitration/>.

179. *The Hauge Rules*, *supra* note 171.

180. *See id.*

181. *See* CTR. FOR INT’L LEGAL COOPERATION, *supra* note 170, at 13.

182. *Id.* at 3.

183. LATHAM & WATKINS’ INT’L ARBITRATION PRACTICE, GUIDE TO INTERNATIONAL ARBITRATION 18 (2019), <https://www.lw.com/thoughtleadership/guide-to-international-arbitration-2017> [hereinafter LATHAM & WATKINS].

184. BAKER & MCKENZIE LLP, COMPARATIVE CHART OF INTERNATIONAL ARBITRATION RULES (Apr. 19, 2016), [https://www.bakermckenzie.com/-/media/files/insight/publications/2016/04/comparative-chart-of-international-arbitration/mm\\_london\\_comparativechart\\_apr16\\_updated.pdf?la=en](https://www.bakermckenzie.com/-/media/files/insight/publications/2016/04/comparative-chart-of-international-arbitration/mm_london_comparativechart_apr16_updated.pdf?la=en).

185. *See* LATHAM & WATKINS, *supra* note 183, at 12.

186. *See* CTR. FOR INT’L LEGAL COOPERATION, *supra* note 170, at 3 (provisions on facilitating settlement and mediation).

### 3. Investor State Arbitration

Investor-State Arbitration (ISA), also known as Investor-State Dispute Settlement (ISDS), was initiated as an “unbiased arbitration mechanism to resolve conflicts between states and foreign investors.”<sup>187</sup> ISA has become an increasingly relied upon practice of dispute resolution, proving protections that are imperative to entities seeking to do business in foreign territory.<sup>188</sup> Under this mechanism, private investors enter into either bilateral or multilateral agreements with sovereign states to conduct business in their territory under agreed upon terms, including governing dispute arrangements.<sup>189</sup> Through international investor agreements (IIAs) parties are considered as having provided advance consent to arbitrate.<sup>190</sup> The execution of IIAs constitutes a promise on behalf of the State to “treat foreign investment and investors in a certain, fundamentally fair, way.”<sup>191</sup> This includes the right not to have investor property expropriated without compensation—a major concern of foreign entities and a primary incentive to enter into such agreements.<sup>192</sup>

The investor-state arbitration process, established largely to protect foreign investors’ interests against local power, provides a safeguard against States who breach international standards.<sup>193</sup> States must therefore balance the protection of investor interests with their international obligations under international human instruments. Despite this, ISA is a “largely private system” which has been criticized as “incapable of addressing matters of public concern such as human rights.”<sup>194</sup> Disputes arising out of IIAs are brought only on behalf of the

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187. Emily Palombo, *Evaluating a Permanent Court Solution for International Investment Disputes*, 532 U. RICHMOND L. REV. 799, 809 n.58 (2018) (instilling confidence in access to recourse for potential disputes by “assur[ing] investors’ rights in countries with poorly performing institutions, weak rule of law and high levels of corruption.”).

188. Karamanian I, *supra* note 153, at 34-36 (stating that since 1967, roughly 2,500 investor state agreements have been executed); see *International Investment Agreements Navigator*, UNITED NATIONS CONF. TRADE & DEV., <https://investmentpolicy.unctad.org/international-investment-agreements> (last visited Feb. 7, 2021); see also Palombo, *supra* note 187, at 800 (“Currently, different forms of ISDS are included in over 3000 international agreements, and the number of cases referred to international investment tribunals has increased.”).

189. See Karamanian I, *supra* note 153, at 36-37.

190. *Id.* at 34.

191. *Id.*

192. *Id.* at 37.

193. See generally *id.* at 34 (referring to the emergence of the investor-state arbitration process which is “considered free of any local biases” and has “dominated how States treat foreign investment and the consequences to States for breaching international standards”).

194. Susan L. Karamanian, *The Place of Human Rights in Investor-State Arbitration*, 17 LEWIS & CLARK L. REV. 423, 424 (2013) [hereinafter Karamanian II].

investor corporations and not by state governments.<sup>195</sup> This places the state in a defensive position and limits its ability to hold corporations accountable for human rights abuses without inciting an action against themselves. However, this approach may serve as a viable strategy for states to uphold the human rights of their citizens to shed light on, and ultimately uphold, such international standards.

In this way, a state would have to break the terms of their IIA to retaliate for corporate abuses taking place in their territory. A corporate investor may then bring a claim to be adjudicated under ISA against the government under the terms of their bilateral agreement. In response, the state may use the international law human rights standards to defend its actions and uphold the fundamental rights of its people. Although viable, this may not be effective considering how many underdeveloped state governments “curtail human rights for the sake of economic development.”<sup>196</sup>

There are other general concerns on behalf of state parties, which perceive ISA as favorably biased towards investors.<sup>197</sup> In addition, the human rights regime raises concerns over the lack of public access to the arbitral process, given that such cases constitute matters of public concern.<sup>198</sup> Criticism in this regard has considered this privatized effect as “render[ing] the arbitration process incompatible with human rights.”<sup>199</sup> To combat this, recent agreements are recognized for “includ[ing] specific provisions requiring arbitral proceedings to be open to the public.”<sup>200</sup> Accordingly, the International Centre for Settlement of Investment Disputes (ICSID) has begun to provide limited access to published decisions.<sup>201</sup> While not usually parties, citizens can be beneficiaries of an arbitral award, allowing for the possibility for victims to be heard in the proceedings.

Another challenge facing investor-state arbitration is the lower predictability of outcomes given that “each arbitral tribunal may decide a case . . . without regard to previous awards.”<sup>202</sup> Both international

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195. Karamanian I, *supra* note 153, at 38.

196. Boyd, *supra* note 10, at 1143.

197. See Faure & Ma, *supra* note 139, at 2-3 (“Developing countries, in particular, accuse the ICSID-governed ISA system of being biased toward investors . . . . In response, the European Union has proposed to replace ISA with a multilateral investment court, and this idea has received support in academia.”).

198. Karamanian II, *supra* note 194, at 427.

199. *Id.*

200. Karamanian I, *supra* note 153, at 38-39.

201. *Id.* at 39.

202. *Id.* at 38-39 (“[T]ribunals are not bound to follow decisions of other tribunals; nevertheless, tribunals cite to precedent and distinguish cases when not applying them as precedent.”).

human rights law and investment law are grounded in public international law, derived from treaties and customary law.<sup>203</sup> Ensuring that arbitrators are well versed in international human rights law is one method in which to close the gaps of this nature. Using investor-state arbitration, private parties may direct their enforcement efforts to their own governments to develop greater access to a viable platform to bring their human rights claims against corporate entities.

### *B. Mediation*

Another ADR mechanism, mediation, is a third-party negotiation process held in a neutral forum where parties may “discuss and try to resolve [their] dispute” prior to deferring to more formal processes.<sup>204</sup> Through mediation, a settlement may be facilitated through negotiations that take place with parties either together or separately.<sup>205</sup> While a mediator may conduct information gathering and suggest solutions, a mediator “does not have the power to make a decision for the parties,” as only the parties themselves may agree to a resolution.<sup>206</sup> The mediator, chosen by the parties, maintains a neutral role and does not have a stake in the outcome of the dispute.<sup>207</sup> Typically, a mediator is a trained professional with relevant qualifications who helps parties find common ground and assists in drafting a resolution which the parties agree to; they do not have decision-making authority.<sup>208</sup> The degree of control which parties maintain in mediation contributes to the appeal of this mechanism, providing parties with the confidence to secure a resolution with which they are most comfortable.

Business leaders have been known to prefer mediation to resolve commercial transaction disagreements in order to preserve relationships, as well as to save time and money.<sup>209</sup> The process provides parties an opportunity to resolve their case by “understanding and evaluat[ing] . . . each [party’s] position based on what that [party] has to say.”<sup>210</sup> In this

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203. *Id.* at 35.

204. *Dispute Resolution Processes: Mediation*, A.B.A., [https://www.americanbar.org/groups/dispute\\_resolution/resources/DisputeResolutionProcesses/mediation/](https://www.americanbar.org/groups/dispute_resolution/resources/DisputeResolutionProcesses/mediation/) (last visited Feb. 7, 2021).

205. Steven C. Bennett, *Court-Ordered ADR: Promises and Pitfalls*, 71 PA. B. ASS’N Q. 23 (2000).

206. *Dispute Resolution Processes: Mediation*, *supra* note 204.

207. *Id.*

208. *See id.*; *see also About Us*, NAT’L ASS’N CERTIFIED MEDIATORS, <https://www.mediatorcertification.org> (last visited Apr. 18, 2021).

209. *See, e.g.*, Emily Doskow, *Mediation for Small Businesses*, NOLO, <https://www.nolo.com/legal-encyclopedia/mediation-small-businesses-29590.html> (last visited Apr. 18, 2021).

210. Myles P. Hassett, *Mediation is the New Trial*, 54 ARIZ. ATT’Y, Nov. 2017, at 38, 40.

way, mediation can be considered a more personable dispute resolution process, in which it is perceived as “possible to have a ‘win-win outcome.’”<sup>211</sup>

With similarities to other ADR methods, mediation is especially recognized for facilitating open communication and understanding between parties.<sup>212</sup> The process is voluntary, and the outcome is nonbinding<sup>213</sup>—the biggest distinction from arbitration. Because the outcome does not bind parties, they may ignore the result altogether or seek a more favorable and binding outcome through an alternative mechanism such as arbitration or litigation. While the confidence in enforcement of mediation outcomes is not strong, it may pose a favorable means to meet both parties’ needs, especially where a quick resolve may allow for continued operations.

#### V. WHY ALTERNATIVE DISPUTE RESOLUTION MECHANISMS MAY BEST SERVE INTERNATIONAL HUMAN RIGHTS CLAIMANTS

International human rights claims brought against corporate defendants are generally comprised of complex issues involving various applicable laws, language barriers, and cultural differences. Litigation has traditionally been relied on as the primary judicial means of human rights dispute resolution, thought to ensure a consistent procedural and legal structure with outcomes governed by established rules.<sup>214</sup> Additionally, parties who do not agree with a court’s decision may appeal to a higher court, ensuring the prerogative of justice.<sup>215</sup> However, in considering all international coordination challenges, litigation may ultimately prove unfavorable to both petitioning and defending parties to a corporate human rights cause of action.

In comparison to alternative dispute mechanisms, litigation is generally a longer process, requiring more financing and resources to be carried out.<sup>216</sup> Accordingly, a human rights petitioner will likely be disadvantaged in bringing a claim against a corporate defendant that may

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211. *Id.*

212. *Id.*

213. *Dispute Resolution Processes: Mediation*, *supra* note 204.

214. Nicholas Hammond, *The Difference Between Arbitration and Litigation*, LEXOLOGY (June 3, 2019), <https://www.lexology.com/library/detail.aspx?g=a947e053-535b-417c-8498-2e8cc9c6cd13> (“The court has a definite and formal procedure for settling the conflict between the parties concerned”).

215. *Id.*

216. Barbara Kate Repa, *Arbitration Pros and Cons*, NOLO, <https://www.nolo.com/legal-encyclopedia/arbitration-pros-cons-29807.html> (last visited May 5, 2021) (“According to a recent study by the Federal Mediation and Conciliation Services, the average time from filing to decision was about 475 days in an arbitrated case, while a similar case took from 18 months to three years to wend its way through the courts.”).

be more able to afford the associated time and costs of litigation.<sup>217</sup> Additionally, trial proceedings are public; while a human rights claimant may prefer this level of exposure, the publicity of court cases may negatively affect the market dynamics of business entities. Thus, a corporate defendant wishing to evade public access to sensitive information or reputational harm may instead settle to avoid defending the case on the merits. This potential outcome of litigation may prevent a petitioner from having their day in court and being able to share their story. Moreover, there are various procedural and substantive obstacles involved in requiring a corporate defendant to appear in court,<sup>218</sup> as well as the potential difficulties faced in having judgment upheld which may have been rendered in another state or under foreign laws.

Apart from domestic courts, there are few international tribunals that hear human rights claims.<sup>219</sup> From these, problems exist for acquiring jurisdiction over claims against corporate defendants. The UN Security Council established both the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda in 1993 and 1994 respectively.<sup>220</sup> These tribunals provided an international forum for humanitarian law, bringing justice to victims of international crimes.<sup>221</sup> These courts demonstrated how the procurement of international justice was essential, leading to the creation of the world's first permanent International Criminal Court in 2002.<sup>222</sup> The

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217. See *id.* (“[R]esolving a case through arbitration is usually far less costly than proceeding through litigation because the process is quicker and generally less complicated than a court proceeding.”).

218. See generally Hoffman & Stephens, *supra* note 119.

219. See *UN Documentation: International Law*, DAG HAMMARSKJÖLD LIBR., <https://research.un.org/en/docs/law/courts> (last updated Jan. 26, 2021, 4:34 PM).

220. See *The ICTR in Brief*, UNITED NATIONS INT’L RESIDUAL MECHANISM FOR CRIM. TRIBUNALS, <https://unictr.irmct.org/en/tribunal> (last visited Feb. 7, 2021) [hereinafter ICTR] (“The United Nations Security Council established the International Criminal Tribunal for Rwanda to ‘prosecute persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and neighboring States, between 1 January 1994 and 31 December 1994.’”); see also *United Nations International Criminal Tribunal for the Former Yugoslavia*, UNITED NATIONS INT’L RESIDUAL MECHANISM FOR CRIM. TRIBUNALS, <https://www.icty.org> (last visited Apr. 20, 2021) [hereinafter ICTY] (“The International Criminal Tribunal for the former Yugoslavia (ICTY) was a United Nations court of law that dealt with war crimes that took place during the conflicts in the Balkans in the 1990s.”).

221. See ICTR, *supra* note 220; see also ICTY, *supra* note 220.

222. See ICTR, *supra* note 220 (“[T]he ICTR has played a pioneering role in the establishment of a credible international criminal justice system.”); ICTY *supra* note 220 (establishing how the ICTY laid a foundation for international justice, providing victims with a voice and instilling accountability by perpetrators of humanitarian law); see also *About, INT’L CRIM. CT.*, <https://www.icc-cpi.int/about> (last visited Feb. 7, 2021); see also *INT’L CRIMINAL COURT, ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 2* (2011), <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf>.

ICC, like the preceding ad hoc tribunals, only hears cases brought against ‘natural persons’ and therefore is not an available venue for transnational business disputes.<sup>223</sup> Generally, corporate criminal liability has not been recognized under international law, although many states have made efforts to extend their national jurisdiction to include corporate defendants.<sup>224</sup> Despite the changes in the international climate, motivating efforts to recognize corporate liability, the absence of a legally binding international treaty or further legal authorizations has left corporate litigation to occur mostly domestically.<sup>225</sup>

The challenges involved in multi-national corporate litigation have encouraged the transitioning of legal efforts toward alternative dispute resolution. ADR mechanisms are ways of settling disputes with the help of a neutral third party. When used effectively, ADR may lower costs, produce quicker resolutions, and preserve or improve relationships among parties.<sup>226</sup> The common forms of ADR include arbitration, conciliation, negotiation, mediation, and collaborative law.<sup>227</sup> By utilizing ADR mechanisms, combined with the current status of international human rights law, disputes against transnational corporations may be resolved more effectively and efficiently.

Using this ADR mechanism, both petitioners and defendants maintain a high degree of self-sufficiency, allowing parties to feel ‘in control’ of their situation, process, and outcome. Finding a way to complement this principle with stronger enforcement of international human rights law is essential to the elimination of corporate abuses.

## VI. STANDARDIZING ALTERNATIVE DISPUTE RESOLUTION FOR CASES OF INTERNATIONAL HUMAN RIGHTS LAW

Given the challenges facing human rights enforcement under traditional dispute resolution mechanisms, it is advisable that states from the Global South consider feasible means by which to protect their citizens and uphold basic human rights norms. A region known for

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223. Scheffer, *supra* note 122, at 35.

224. Alessandra De Tommaso, *Guest blog: Corporate criminal liability under international law*, KINGSLEY & NAPLEY (Mar. 5, 2018), <https://www.kingsleynapley.co.uk/insights/blogs/criminal-law-blog/guest-blog-corporate-criminal-liability-under-international-law> (stating that in 2014, member states of the African Union adopted the Malabo Protocol to amend the Statute of the African Court of Justice and Human Rights to extend jurisdiction to international and transnational crimes and include corporations as possible defendants).

225. *Id.*

226. Carver & Vondra, *supra* note 14.

227. *Alternative Dispute Resolution*, LAW. & JURISTS (2017), <https://www.lawyersjurists.com/article/alternative-dispute-resolution-2/> (last visited Apr. 18, 2021).

having a weaker rule of law, corporations from the Global North are able to exploit resources and labor for their financial benefit with little to no consideration of their social responsibility.<sup>228</sup> Naming and shaming methods are not good enough as corporations have been known to make short-term adjustments only until their name is out of the media spotlight.<sup>229</sup>

Despite existing cross-border coordination challenges, there are alternative avenues that governments in the Global South could utilize to vindicate human rights claims against corporations, including domestic litigation, investor-state arbitration, and mediation. Using these mechanisms, developing countries may increase their bargaining power by contracting with corporate investors and requiring a committal to ADR.<sup>230</sup>

Enforcement of international law presents various challenges, particularly when handling cases involving actors belonging to states that have not implemented international treaties. While ongoing efforts are yet to solve these problems, the international human rights regime cannot afford to be patient. History pertaining to this area has shown that UN member states are committed to preventing fundamental human rights violations.<sup>231</sup> However, this commitment has been challenged by corporate activity which has introduced new obstacles associated with the enforcement of these rights.<sup>232</sup> Litigation of claims can be costly and time-consuming.<sup>233</sup> Accordingly, it is important to develop a better understanding of ADR mechanisms to target ways in which to best address corporate accountability for international human rights.

Although the UNGPs inspired business entities to incorporate socially responsible frameworks into their business models, there is no

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228. *Corporations*, *supra* note 5; see *WJP Rule of Law Index*, WORLD JUST. PROJECT (2019), <https://worldjusticeproject.org/rule-of-law-index/>; *Weak rule of law and lack of good governance a major threat to development, says UNODC executive director*, UNITED NATIONS (Nov. 15, 2013), <https://www.unodc.org/unodc/en/frontpage/2013/November/weak-rule-of-law-and-lack-of-good-governance-a-major-threat-to-development-says-unodc-executive-director.html>.

229. See, e.g., Scott W. Berg, *The human cost of an iPhone*, WASH. POST (Mar. 2, 2018, 10:10 AM), [https://www.washingtonpost.com/outlook/the-human-cost-of-an-iphone/2018/03/02/5d76555e-0b7e-11e8-8890-372e2047c935\\_story.html](https://www.washingtonpost.com/outlook/the-human-cost-of-an-iphone/2018/03/02/5d76555e-0b7e-11e8-8890-372e2047c935_story.html).

230. See VAGTS ET AL., *supra* note 7, at 127-28 (citing UNCTAD, WORLD INVESTMENT REP. 2002, at 90 (2002)). It has been acknowledged that corporations of the Global North “are bigger than many countries by comparing their sales to national GDPs.” *Id.* The United Nations Conference on Trade and Development found that “ExxonMobil was slightly larger than the economy of Pakistan and that General Motors was slightly larger than the economy of Peru.” *Id.*

231. See generally HENKIN ET AL., *supra* note 17.

232. See generally Scheffer, *supra* note 122.

233. See Repa, *supra* note 216.

legally binding obligation under international law to uphold them.<sup>234</sup> Any corrective action taken in this context can be largely attributed to motivations of receiving favorable media coverage, appeasing social movements, and catering to market forces and domestic laws.<sup>235</sup> Instances of continued human rights abuses reveal the necessity for holding corporations accountable for their violations.

By using the aspects of more than one ADR mechanism, the international community may begin to reveal the avenues most effective to obtain recourse for victims. One possibility would be to establish a collective process involving mediation and arbitration to find a middle ground solution. This would begin with a form of mediation to foster a private and collaborative environment for negotiation,<sup>236</sup> and would provide the opportunity to reach a settlement agreement before moving forward to a process of arbitration. Having an arbitral hearing consistent with the procedures set forth in ‘The Hague Rules on Business and Human Rights Arbitration’ will provide the necessary structure to the enforcement of human rights.<sup>237</sup>

Socialization of human rights may prove effective to pressure corporate entities into proactive compliance with the codified international standards. When the masses develop a voice in support of good behavioral patterns, transnational entities will respond to remain competitive and profitable. Such a combination of process would encourage transnational corporations to settle claims to avoid moving forward with a lengthy resolution process in which they must surrender more of their control.<sup>238</sup> Additionally, the incentive to settle may cater to victims having more equal bargaining power than they would otherwise. A human rights victim may be motivated to proceed to arbitration for having a binding arbitral award be published, and exposing the wrongdoer in a more officiated manner. Thus, by wanting to avoid arbitration, a corporate defendant may be more willing to reach a resolve which favors the interests of the victim. Maneuvering among

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234. See *Binding Treaty*, *supra* note 58.

235. See Berg, *supra* note 229 (reporting that in response to the news of ‘troubling’ factory conditions, Apple headquarters released public statements expressing their concern for the situation and urgency to correct the problems, and that these supposed efforts were futile, and only two years later, repeated incidents and protests erupted aimed at the continued “substandard wage structure and work environment”); see also Steven F. Cahan et al., *Corporate Social Responsibility and Media Coverage*, 59 J. BANKING & FIN. 409-22 (2015).

236. See Bennett, *supra* note 205, at 23, 25 (describing increased reliance on ADR mechanisms to reduce litigation associated delays and costs, while recognizing that ADR is not a “cure-all for the ills of modern litigation.”).

237. See generally CTR. FOR INT’L LEGAL COOPERATION, *supra* note 170.

238. See *Dispute Resolution Processes: Arbitration*, *supra* note 138.

ADR alternatives, petitioners may find a pattern of success in this area of enforcement.

## VII. CONCLUSION

The complexities of transnational corporate entities pose significant challenges to regulatory mechanisms.<sup>239</sup> Due to the obstacles involved in enforcement by traditional legal dispute resolution, ADR alternatives such as arbitration and mediation may prove a more reliable means of upholding the protections of the UNGPs. With the expansion of globalization, putting pressure on the corporate sector, there is an increased necessity for effective dispute resolution among the intricate relationships of transnational corporations, investors, and states. ADR may provide remedy for international human rights violations in places where judicial proceedings are not available or effective. These mechanisms have developed to allow parties from different legal, linguistic, and cultural backgrounds to resolve their disputes in neutral and fair settings.

While economic incentives in the global market continue to counter corporate efforts to prioritize human rights,<sup>240</sup> human rights victims depend on the efforts of the international legal community to ensure that these impacts are corrected. Although instruments such as the Draft Treaty on Business and Human Rights and the Hague Rules on Business and Human Rights Arbitration have only recently been made available for reference, they provide great potential in the efforts to give “teeth” to the UNGPs.<sup>241</sup> Arbitral proceedings provide parties with the flexibility to select procedures most appropriate for resolving international human rights claims, while mediation provides a collaborative operation to bring adverse parties together to remedy human rights abuses committed by transnational corporations. Additionally, transnational business entities may hold their subsidiary partners accountable to meet their business responsibilities under the UNGPs.<sup>242</sup>

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239. See VAGTS ET AL., *supra* note 7, at 126. OECD Guidelines for Multinational Enterprises outline that such entities are “established in more than one country . . . [and are not single entities], but rather a structure made up of many entities, each organized under the laws of some nation and tied together by links of stock ownership or other contractual agreements.” *Id.*

240. Monika Zalnieriute, *Technology, Private Companies and Human Rights: Why The Current International Legal Framework Isn't Enough*, OXFORD L. (Nov. 19, 2019), <https://www.law.ox.ac.uk/business-law-blog/blog/2019/11/technology-private-companies-and-human-rights-why-current>.

241. See generally CTR. FOR INT'L LEGAL COOPERATION, *supra* note 170.

242. Kenton, *supra* note 41.

Thus, under current circumstances, the human rights regime may rely on ADR alternatives as a modern approach to best overcome the challenges involved in transnational corporate adjudication. This avenue, providing neutral grounds for parties from different legal systems and of mixed nationalities, may resolve claims against transnational entities without fear of subjectivity by forum state courts in the effort to preserve humanitarian interests and promote healthy corporate relations.