

---

---

## ORGANIZATIONAL IRRATIONALITY AND CORPORATE HUMAN RIGHTS VIOLATIONS

The problem of how to bring transnational corporations within the reach of international law has grown increasingly urgent for human rights scholars and activists. Today, individual corporations can wield as much power and influence as entire nations.<sup>1</sup> Unfortunately, that influence is not necessarily wielded for good, as corporations have been implicated in a broad range of human rights abuses. Companies that engage in the extraction of natural resources, such as the Shell Group and Unocal, have been accused of supporting abuses such as torture, rape, and forced labor, and pollution resulting from their activities has threatened the health and livelihood of local communities.<sup>2</sup> Labor practices of transnational corporations have also been a central human rights concern, with evidence of unsafe working conditions and physical abuses emerging from major clothing and toy companies.<sup>3</sup>

Because international law has traditionally been limited to state actors, the literature on business and human rights largely focuses on whether transnational corporations can be held responsible under international law.<sup>4</sup> Less attention is paid to the question of what leads corporations to violate human rights in the first place. When they do address that question, most writers assume that violations occur because corporations make rational decisions to pursue profits without regard to potential victims.<sup>5</sup>

This Note aims to provide a more nuanced account of the reason for corporate human rights violations, drawing from social science re-

---

<sup>1</sup> Cf. HENRY J. STEINER ET AL., *INTERNATIONAL HUMAN RIGHTS IN CONTEXT* 1388 (3d ed. 2008) (“[Wal-Mart’s] 2003 sales of \$256 billion made it larger than the economies of all but the world’s 30 richest nations.”).

<sup>2</sup> Radu Mares, *Introduction* to *BUSINESS AND HUMAN RIGHTS* xv, xv (Radu Mares ed., 2004).

<sup>3</sup> *Id.* at xvi.

<sup>4</sup> See, e.g., Surya Deva, *Human Rights Violations by Multinational Corporations and International Law: Where from Here?*, 19 *CONN. J. INT’L L.* 1 (2003); Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 *YALE L.J.* 443 (2001). Under the Universal Declaration of Human Rights, corporations can be held accountable for direct violations of human rights that take place “within their area of control and sphere of influence.” Irene Kahn, Sec’y Gen., Amnesty Int’l, *Understanding Corporate Complicity: Extending the Notion Beyond Existing Laws*, Speech at the Business Human Rights Seminar (Dec. 8, 2005), in STEINER ET AL., *supra* note 1, at 1389, 1390; see also Universal Declaration of Human Rights, G.A. Res. 217A, at 71–72, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948). The difficulty arises in attempts to hold corporations accountable when their complicity is more indirect.

<sup>5</sup> See, e.g., Beth Stephens, *Corporate Liability: Enforcing Human Rights Through Domestic Litigation*, 24 *HASTINGS INT’L & COMP. L. REV.* 401, 401 (2001) (“There is tremendous profit to be made from abusive behavior, and in the absence of effective regulation, corporations often seek to maximize profit at the expense of basic rights.”).

search on organizational irrationality. It may well be possible to explain many human rights violations as rational profit-maximizing behavior: if detection is unlikely and enforcement is weak, then a company may perceive a violation to be in its self-interest. However, the literature on organizational irrationality suggests that violations that are against a company's self-interest may also take place. If corporations do not always act rationally, then current efforts to change the self-interest calculation by increasing sanctions or inculcating norms will not suffice to achieve full compliance. Thus, a comprehensive human rights agenda should include assistance to corporations in overcoming irrational tendencies.

Part I of this Note provides an introduction to and an initial critique of the rational choice model as applied to business and human rights. Part II explores how concepts from the study of organizational behavior can shed light on the problem of human rights violations by transnational corporations. Part III uses this nuanced understanding of irrational organizational decisionmaking to evaluate existing compliance mechanisms and to suggest ways in which they might be improved.

### I. THE RATIONAL CHOICE MODEL

The standard rational choice account for corporate misconduct is that companies facing competitive pressures "will violate the law to attain desired organizational goals unless the anticipated legal penalties . . . exceed additional benefits the firm could gain by violation."<sup>6</sup> To the extent that this model explains some proportion of human rights violations, the natural response is to seek increased deterrence by improving monitoring and strengthening sanctions.<sup>7</sup>

Yet scholars have criticized the rational choice model on various levels and across domains. In corporate law, one complexity to consider is that an organization comprises diverse actors with distinct interests, making the ideas of a unified purpose and monolithic decisionmaking seem implausible.<sup>8</sup> Similarly, scholars discuss the role that social norms play in individual and group decisionmaking, suggesting that corporations may act against their narrow, profit-minded interest and in accordance with other values.<sup>9</sup> Finally, even if a corporation has a

---

<sup>6</sup> Diane Vaughan, *Rational Choice, Situated Action, and the Social Control of Organizations*, 32 *LAW & SOC'Y REV.* 23, 23 (1998).

<sup>7</sup> See *id.* at 24.

<sup>8</sup> See Michael B. Metzger, *Corporate Criminal Liability for Defective Products: Policies, Problems, and Prospects*, 73 *GEO. L.J.* 1, 16 (1984).

<sup>9</sup> See IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION* 22 (1992); David A. Skeel, Jr., *Shaming in Corporate Law*, 149 *U. PA. L. REV.* 1811, 1811-12 (2001).

unified purpose, it, like individuals, can fail to pursue that end in a fully rational manner.<sup>10</sup> It is the last of these issues, irrational organizational decisionmaking, on which this Note focuses.

The practical significance of irrationality depends, of course, on the extent to which corporations would rationally choose to comply with human rights norms. But this Note's argument does not depend on a particular theory of compliance. It is possible that strong incentives to comply currently exist because corporations have internalized human rights norms into their utility function.<sup>11</sup> Alternatively, compliance with human rights norms could be profit-maximizing behavior, even under a narrow definition of self-interest. Corporations themselves have indicated that they consider ethical behavior to be good for business,<sup>12</sup> and human rights violations trigger both significant reputational costs and potential litigation expenses.<sup>13</sup>

One useful piece of evidence that irrational decisionmaking causes human rights violations that might not occur otherwise is the existence of violations by companies that are widely regarded to have made good-faith commitments to the human rights cause. Two prominent examples include Levi Strauss & Co. and Reebok, both of which have been at the forefront of developing human rights codes of conduct but continue to struggle with violations.<sup>14</sup>

Moreover, to understand how decisions can go wrong, it is important to keep in mind that human rights violations do not necessarily involve binary choices to commit or not to commit. Rather, the choice may be about what sorts of precautions to take.<sup>15</sup> For example, Unocal likely could have avoided the harms it ultimately caused in Burma by taking precautions such as alternative security arrangements.<sup>16</sup> Undertaking an objective impact assessment "would have demonstrated to Unocal that the cost of importing or training security paled in comparison to the liability incurred from human rights violations."<sup>17</sup>

---

<sup>10</sup> See Metzger, *supra* note 8, at 16–23.

<sup>11</sup> For an attempt to develop a rational choice model for corporations that incorporates environmental norms, see Michael P. Vandenberg, *Beyond Elegance: A Testable Typology of Social Norms in Corporate Environmental Compliance*, 22 STAN. ENVTL. L.J. 55 (2003).

<sup>12</sup> See U.N. GLOBAL COMPACT & OFFICE OF THE U.N. HIGH COMM'R OF HUMAN RIGHTS, EMBEDDING HUMAN RIGHTS INTO BUSINESS PRACTICE 31 (2004), available at [http://www.unglobalcompact.org/docs/issues\\_doc/human\\_rights/Resources/embedding.pdf](http://www.unglobalcompact.org/docs/issues_doc/human_rights/Resources/embedding.pdf) (quoting statements by business leaders).

<sup>13</sup> See Tarek F. Maassarani et al., *Extracting Corporate Responsibility: Towards a Human Rights Impact Assessment*, 40 CORNELL INT'L L.J. 135, 159 (2007).

<sup>14</sup> See Lance Compa & Tashia Hinchliffe-Darricarrère, *Enforcing International Labor Rights Through Corporate Codes of Conduct*, 33 COLUM. J. TRANSNAT'L L. 663, 686 (1995).

<sup>15</sup> Even where there is more direct involvement, such as when a manager orders a particular action, the decision could still be irrational if the manager miscalculates the corporation's interest.

<sup>16</sup> See Maassarani et al., *supra* note 13, at 163–64.

<sup>17</sup> *Id.* at 164.

---

---

Of course, such steps were not guaranteed to be effective at prevention, and identifying a given choice as irrational requires a determination of the ex ante probabilities, which are difficult to assign. Nevertheless, the Unocal example illustrates how an apparently irrational choice not to take precautionary steps could lead to complicity in costly and unintended human rights violations.

Of course, isolated instances where violations proved costly do not mean that the general incentives for compliance are sufficient. Existing compliance mechanisms still lack enforcement measures, and even reputational costs and the threat of lawsuits are circumscribed by the human rights community's limited monitoring capacities and litigation resources. An analysis of what the socially optimal level of deterrence is, and whether it has been achieved, lies beyond the scope of this Note. Most of the reforms proposed below are intended to be consistent with continued efforts to strengthen deterrence. The idea driving these proposals is twofold. First, even when the optimal level of deterrence has been established, organizational irrationality is an obstacle that must be overcome along the way to full compliance. Second, most of the suggested reforms involve less intrusive, more feasible interventions that could have immediate payoffs to the extent that corporations already view compliance as within their self-interest.

## II. ORGANIZATIONAL IRRATIONALITY

In an attempt to deepen our understanding of how irrationality leads corporations to violate human rights, this Part explores three strands of research from the study of organizations. The first strand builds off of research on individual cognition to explain how biases at that level might either persist or be aggravated in the organizational structure, leading to irrational decisionmaking. The second strand looks at the effect that an organization's environment has on decisionmaking, and the third focuses on the structure and processes of the organization.<sup>18</sup>

### A. Cognitive Biases

Through empirical testing, social scientists have uncovered a broad range of cognitive limitations that undermine the rational choice model. These findings have led legal scholars to reconsider principles and

---

<sup>18</sup> This three-part framework tracks the one used by sociologist Diane Vaughan in her study of organizational misconduct. See Diane Vaughan, *The Dark Side of Organizations: Mistake, Misconduct, and Disaster*, 25 ANN. REV. SOC. 271, 274 (1999). However, the discussion within each of the strands draws on a variety of sources and fields.

doctrines that were rooted in that flawed model.<sup>19</sup> Research relating to cognitive biases in the organizational context suggests that the application of the rational choice model to corporate human rights violations should similarly be reconsidered. Professor Donald Langevoort has identified four biases that are relevant for the present discussion.<sup>20</sup>

First, “cognitive conservatism” leads people to interpret information in a manner that is consistent with previously held attitudes.<sup>21</sup> When individuals have to work together on teams, the challenges of cooperation require further simplification of information.<sup>22</sup> Second, the optimism bias leads people to overestimate their abilities, and studies suggest that organizations can exacerbate this tendency,<sup>23</sup> because they reward optimism in the hiring and promotion processes.<sup>24</sup> Third, the commitment bias leads people who have committed to a given path to interpret subsequently obtained information in a way that reinforces their original reasoning.<sup>25</sup> Such tendencies are even stronger in an organizational context, first because individuals become more invested in positions they have to pitch to others in the organization, and then, after a position has been adopted, because “costly implementation procedures [have been] put in motion.”<sup>26</sup> Fourth, the self-serving bias leads employees to interpret information in a manner that furthers their personal interests.<sup>27</sup> The organization suffers either because no one catches their flawed inferences or because other employees bring their own self-serving perspectives to complicate or aggravate the mistakes.<sup>28</sup>

With these four biases on the table, it is possible to develop a story for how a corporation can become complicit in a human rights violation that is not in its rational self-interest. Consider the paradigmatic case of an oil company employing private security forces in a developing country. The cognitive conservatism bias might lead individual

---

<sup>19</sup> See, e.g., Ward Edwards & Detlof von Winterfeldt, *Cognitive Illusions and Their Implications for the Law*, 59 S. CAL. L. REV. 225 (1986); Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1477–79 (1998).

<sup>20</sup> Donald C. Langevoort, *Organized Illusions: A Behavioral Theory of Why Corporations Mislead Stock Market Investors (And Cause Other Social Harms)*, 146 U. PA. L. REV. 101 (1997).

<sup>21</sup> *Id.* at 135 (internal quotation marks omitted).

<sup>22</sup> *Id.* at 137.

<sup>23</sup> *Id.* at 139–40. *But see* Jolls et al., *supra* note 19, at 1525 (suggesting that overoptimism is likely to have a smaller effect on firms than on individuals, because “firms that make systematic errors in judgment will be at a competitive disadvantage”).

<sup>24</sup> Langevoort, *supra* note 20, at 140.

<sup>25</sup> *Id.* at 142.

<sup>26</sup> John M. Darley, *How Organizations Socialize Individuals into Evildoing*, in CODES OF CONDUCT: BEHAVIORAL RESEARCH INTO BUSINESS ETHICS 13, 21 (David M. Messick & Ann E. Tenbrunsel eds., 1996).

<sup>27</sup> Langevoort, *supra* note 20, at 144.

<sup>28</sup> See *id.* at 145.

employees to underestimate the risk of conflict with the local population, perhaps because they are aware of a past operation of a similar nature that was successful. The optimism bias might lead the same group to overestimate the company's ability to deal with the risk that it had already downplayed, despite knowledge that other companies in similar circumstances had been implicated in human rights atrocities. Once the team has committed to a course of action on such flawed grounds, there could be increasing momentum to resist more negative information as it is subsequently attained. Finally, the self-serving bias might color inferences drawn at all three of these levels: the initial assessment of risk, the initial evaluation of capabilities, and the continuing reconsideration of both in light of new information. This story demonstrates that corporations can violate human rights without ever making a self-interested decision to do so. That is, organizations can stumble into irrational violations even when they think they are avoiding them.

### B. Organizational Environment

The environment of an organization shapes decisionmaking in at least two important ways. First, the organizational culture influences an individual's understanding of the available information and choices. Sociologist Diane Vaughan explains how, as a result of this "largely unconscious cultural knowledge, individuals . . . formulat[e] a definition of the situation that makes sense of it in cultural terms, so that in their view their action is acceptable and nondeviant."<sup>29</sup> The effect of culture is related to, and interacts with, the cognitive biases described in the previous section. Both ultimately operate on the level of individual decisionmakers; the distinction lies in their origin.

A second way in which the organizational environment contributes to irrationality focuses on group decisionmaking as such. Psychologist Irving Janis coined the term "groupthink" to describe the "mode of thinking that people engage in when they are deeply involved in a cohesive in-group, when the members' strivings for unanimity override their motivation to realistically appraise alternative courses of action."<sup>30</sup> Professor Ronald Sims, in elaborating on Janis's work, identifies factors contributing to groupthink that will often apply in corporate boardrooms, including "high cohesion, insulation from experts, limited methodological search and appraisal procedures, directive leadership, and high stress."<sup>31</sup>

---

<sup>29</sup> Vaughan, *supra* note 18, at 280–81.

<sup>30</sup> IRVING L. JANIS, *GROUPTHINK* 9 (2d ed. 1982).

<sup>31</sup> RONALD R. SIMS, *ETHICS AND ORGANIZATIONAL DECISION MAKING* 62 (1994).

As with organizational culture, the problem of groupthink interacts with the effects of individual cognitive biases. Even when individual group members hold reasonable views, group dynamics that suppress dissent will lead to less than fully reasoned decisions. And when members bring to the table views that have been distorted by individual biases, the groupthink theory suggests that the group will fail to engage competing interpretations effectively to remove these biases and reach the optimal decision. Even worse, research on group polarization suggests that group discussion in the absence of sufficient viewpoint diversity will exacerbate errors in reasoning, leading to more extreme views.<sup>32</sup>

The oil company paradigm developed in the previous section can be illustrative here as well. As members of the decisionmaking group view information through the lens of their organizational culture, their individual biases get filtered through an additional layer of excessive confidence in the company's capacities and deeply held commitment to (their perception of) the company's ends. For example, an organizational culture emphasizing competitive advantage can convince individual employees that the company is well equipped to overcome risks of complicity in human rights violations, while a culture valuing growth and opportunity can lead them to be biased in favor of undertaking a new project. The problem of groupthink prevents effective consideration of alternative ideas or dissenting views and potentially results in the group feeling even more confident in its plans — and thus less focused on shoring up its risk strategy.

### C. Organizational Structure and Processes

Both the cognitive bias and organizational environment explanations for irrationality ultimately point to a discrete decisionmaker making an identifiable error. This third section considers structural deficiencies that prevent organizations from ever putting the necessary pieces together. Just as an individual's reliance on heuristics could be rational "in a global sense,"<sup>33</sup> these organizational deficiencies may arise from the very structures that make a firm efficient in a macro sense.<sup>34</sup>

A first structural difficulty identified by the social psychologist John Darley is the diffusion of information within an organization.

---

<sup>32</sup> Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 74 (2000).

<sup>33</sup> Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1085 (2000).

<sup>34</sup> Kenneth A. Bamberger, *Regulation as Delegation: Private Firms, Decisionmaking, and Accountability in the Administrative State*, 56 DUKE L.J. 377, 417 (2006).

Using the example of a harmful product, he explains that an organization could have collected all the information it would have needed to recognize a risk without any one individual or team putting the pieces together.<sup>35</sup> The fragmentation of responsibility poses a similar challenge. Mistakes could be the product of minor lapses or oversights that combine into a major harm that cannot clearly be attributed to any one individual or unit.<sup>36</sup>

A second set of structural difficulties involves upward and downward communication. As Professor Kenneth Bamberger explains, an efficient firm will have information asymmetries whereby high-level managers possess more information about the company's broad goals, while lower-level employees possess more detailed knowledge of the issues concerning their subdivisions.<sup>37</sup> When it comes to communication between the two, concerns about information overload might "preclude[] charging lower level workers with concern for such low-frequency but potentially high-risk matters."<sup>38</sup> On the other side, information working its way upward could be distorted by intermediary managers influenced either by unconscious bias or conscious self-interest.<sup>39</sup>

Together, the problems of diffuse information and responsibility and incomplete communication create what Vaughan calls "[s]tructural secrecy."<sup>40</sup> Structural secrecy is the idea that in an organization, "(a) information and knowledge will always be partial and incomplete, (b) the potential for things to go wrong increases when tasks or information cross internal boundaries, and (c) segregated knowledge minimizes the ability to detect and stave off activities that deviate from normative standards and expectations."<sup>41</sup>

To see how these structural deficiencies could apply in the human rights context, consider the paradigmatic case of environmental practices that threaten a local community's health or cause permanent damage to the residents' livelihood. Within the offending corporation, information about and responsibility for the environmental practices may be diffuse. Moreover, both upward and downward communication systems are vulnerable to important failures. Risk assessments and early warning signs considered by lower-level managers might be skewed or never make their way to the final decisionmakers. At the same time, goals and priorities established by high-level management

---

<sup>35</sup> Darley, *supra* note 26, at 17-18.

<sup>36</sup> *See id.* at 18.

<sup>37</sup> Bamberger, *supra* note 34, at 418.

<sup>38</sup> *Id.* at 419.

<sup>39</sup> Langevoort, *supra* note 20, at 120.

<sup>40</sup> Vaughan, *supra* note 18, at 277.

<sup>41</sup> *Id.*



---

---

might not trickle down effectively to the teams that would actually need to implement them. Thus, environmental human rights abuses can take place without any actor within the responsible organization ever sitting down to calculate a decision with all the necessary information in front of her. Instead, the problem of structural secrecy can lead to an institutional decision, including one against the corporation's self-interest, that results in unintended human rights violations.

#### *D. Evidence*

To see how these irrational tendencies have operated in a real situation, consider the parallel issues leading up to the *Challenger* space shuttle launch. Like a corporation, the National Aeronautics and Space Administration (NASA) faced significant pressures to perform, making a rational choice explanation of the safety failures appear plausible. Vaughan explains this conventional historical account:

Underfunded by Congress, the Space Shuttle program depended on income from commercial satellite companies: the greater the number of flights per year, the greater the number of commercial payloads, the greater the income. Realizing the importance of schedule (the historically accepted explanation went), the managers who were immediately responsible for the decision responded to these pressures by disregarding the advice of their own engineers, knowingly violating rules about passing safety concerns up the hierarchy in the process.<sup>42</sup>

That the launch was approved despite significant evidence of risk could mean the relevant actors made a self-interested calculation that the probable gains outweighed the probable losses — an analogous tradeoff to the one corporations face when measuring potential profits against human rights risks. But Vaughan's in-depth investigation of the decisionmaking process shows that the risks were not properly evaluated as a result of the irrational tendencies described in the preceding sections.

Just as a corporation's employees develop certain cultural understandings that influence their information processing, so too did NASA employees interpret the level of acceptable risk through their cultural lenses.<sup>43</sup> In particular, Vaughan notes how "the original technical culture of excellence" was affected by "production and cost concerns" and "attention to rules and procedures."<sup>44</sup> Despite concerns about data

---

<sup>42</sup> Vaughan, *supra* note 6, at 36; *see also id.* at 40 ("Reduced funding had converted the R&D space agency into one that operated like a business, complete with production cycles and concerns about cost and efficiency.").

<sup>43</sup> Vaughan does not discuss individual cognitive biases separately, but one can readily imagine that they were operating in conjunction with the culturally induced distortions that she does emphasize.

<sup>44</sup> Vaughan, *supra* note 6, at 39.

from test missions, the engineers' attention to cost and scheduling prevented them from ordering additional tests.<sup>45</sup> At the same time, the engineers made sure to conform to all the relevant procedures, which provided psychological reassurance that their risk assessments were accurate.<sup>46</sup> While these errors were being made on the micro-level, a culture of groupthink prevented dissenters from speaking out: "Some people were silent who had information that might have altered the outcome. Some deferred to authority; others, concluding that they had not worked on the booster problems recently enough or were insufficiently informed for other reasons, kept their insights to themselves . . ." <sup>47</sup>

Structural secrecy also played a role. Early indications of problems, for example, were not passed up to the top NASA administrators.<sup>48</sup> These administrators also lacked the necessary expertise and context to evaluate the information that did make it to them.<sup>49</sup> Ironically, NASA had in place a decisionmaking process, Flight Readiness Review (FRR), intended to bring "all parts of the organization together for risk assessments prior to a launch" and to "uncover flaws in the analyses" done by isolated work groups.<sup>50</sup> Overwhelmed with information about the "60 million component parts," the FRR members could not meaningfully challenge the conclusions that were presented to them, and the risk assessment of the problematic component was "affirmed up the hierarchy."<sup>51</sup>

In addition to providing real-world evidence by analogy, the *Challenger* example illustrates the sort of case study that would help confirm the role played by irrational decisionmaking in corporate human rights violations. Interviews with the relevant actors, combined with documents from the original point of profit and risk assessment, could establish whether a corporation was complicit in a human rights violation against its self-interest. The same information could help determine what roles were played by individual cognitive biases, organizational culture, and deficient structures and processes. Moreover, broader surveys are necessary to determine the extent of the problem. One small study of noncompliance with environmental regulations, for example, confirmed that communications difficulties between employ-

---

<sup>45</sup> *Id.* at 41.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 45.

<sup>48</sup> Diane Vaughan, *Regulating Risk: Implications of the Challenger Accident*, in ORGANIZATIONS, UNCERTAINTIES, AND RISK 235, 240 (James F. Short, Jr. & Lee Clarke eds., 1992).

<sup>49</sup> *Id.*

<sup>50</sup> Vaughan, *supra* note 6, at 42.

<sup>51</sup> *Id.* at 43.

ees were one root cause of noncompliance.<sup>52</sup> A much more systematic study tailored to the causes of organizational irrationality would be a worthwhile next step.

### III. EVALUATING THE EXISTING MECHANISMS FOR COMPLIANCE

Influenced either directly or indirectly by the rational choice model, evaluations of the existing efforts to promote corporate human rights compliance focus on enforcement mechanisms. Enhancing enforcement procedures, such as reporting obligations and sanctions, is no doubt an essential part of increasing the weight given to compliance in a corporation's self-interest calculation. But developing these procedures for optimal effectiveness requires attention to the features of organizational irrationality discussed in Part II. Moreover, an examination of organizational irrationality reveals that other steps may be just as important.

This Part will analyze the implications of organizational irrationality for soft law and civil litigation. A lack of empirical validation should not preclude consideration of at least some of the more modest reforms this Note will propose. Because many of the suggested interventions are less intrusive than what human rights advocates are currently seeking, they should be more palatable to the business community, and because most can be undertaken without interfering with efforts to strengthen deterrence through enforcement, the cost of experimenting with them is low.<sup>53</sup>

#### A. *Soft Law*

1. *Overview.* — Soft law is generally understood to encompass nonbinding norms that govern behavior.<sup>54</sup> International soft law instruments can take a number of forms: resolutions and other pronouncements by international bodies, joint statements of intent issued by states, codes of conduct developed by an industry, guidelines drafted by expert groups, and more.<sup>55</sup> Even if not legally binding, soft

---

<sup>52</sup> EPA & CHEM. MFRS. ASS'N, DOC. NO. EPA-305-R-99-001, EPA/CMA ROOT CAUSE ANALYSIS PILOT PROJECT 24 (1999), available at <http://www.epa.gov/compliance/resources/publications/assistance/sectors/rootcauseanalysis.pdf>.

<sup>53</sup> It is conceivable that some of the irrationality mechanisms could operate in the other direction — for example, overoptimism about the reputational gains that follow from human rights compliance efforts. The proposals here could presumably be tailored to avoid interfering with any such pro-human rights tendencies. A separate project might consider ways to harness those tendencies to achieve additional human rights gains.

<sup>54</sup> See JEFFREY L. DUNOFF ET AL., INTERNATIONAL LAW: NORMS, ACTORS, PROCESS 93 (2d ed. 2006).

<sup>55</sup> See *id.* at 94.

law is “routinely invoked . . . to challenge nonconforming behavior.”<sup>56</sup> The discussion here will focus on three categories of soft law that could be used to regulate corporate conduct in the context of human rights: standards set by intergovernmental organizations, principles developed through multistakeholder initiatives, and codes of conduct. The examples provided are far from exhaustive, but they illustrate the relevant challenges and opportunities.

(a) *Intergovernmental Organizations.* — The Organisation for Economic Co-operation and Development (OECD) provided an early attempt to regulate corporate human rights behavior, among other practices, when it adopted the Guidelines for Multinational Enterprises in 1976.<sup>57</sup> Amended in 2000, the OECD Guidelines provide “non-binding recommendations by governments to multinational enterprises operating in or from the 33 adhering countries.”<sup>58</sup> The Guidelines begin by enumerating fundamental principles. Enterprises are expected to “[r]espect the human rights of those affected by their activities consistent with the host government’s international obligations and commitments.”<sup>59</sup> Within the specific subject areas, the Guidelines provide both benchmarks<sup>60</sup> and detailed procedural principles.<sup>61</sup> As often happens with soft law instruments, enforcement mechanisms have started to emerge based on the standards enunciated in the Guidelines. For example, complaints can now be brought against firms operating within the Guidelines’ jurisdiction for nonjudicial review by a National Contact Point.<sup>62</sup>

The more recent U.N. Global Compact represents an effort to involve more companies by offering vaguer principles. The Global Compact is a voluntary initiative that focuses on “norm diffusion and the dissemination of practical know-how and tools”<sup>63</sup> without developing new law per se.<sup>64</sup> It includes just two principles under the human rights heading: “[1] Businesses should support and respect the protection of internationally proclaimed human rights; and [2] make sure

<sup>56</sup> *Id.* at 93.

<sup>57</sup> See John Gerard Ruggie, *Business and Human Rights: The Evolving International Agenda*, 101 AM. J. INT’L L. 819, 819 (2007).

<sup>58</sup> ORG. FOR ECON. CO-OPERATION & DEV., THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 2 (2001), available at [http://www.oilis.oecd.org/olis/2000doc.nsf/LinkTo/NT00002F06/\\$FILE/JT00115758.PDF](http://www.oilis.oecd.org/olis/2000doc.nsf/LinkTo/NT00002F06/$FILE/JT00115758.PDF).

<sup>59</sup> *Id.* at 11.

<sup>60</sup> See, e.g., *id.* at 18 (“Enterprises should . . . [o]bserve standards of employment and industrial relations not less favourable than those observed by comparable employers in the host country.”).

<sup>61</sup> For example, the environmental recommendations include the “[a]doption of technologies and operating procedures in all parts of the enterprise that reflect standards concerning environmental performance in the best performing part of the enterprise.” *Id.* at 29.

<sup>62</sup> Ruggie, *supra* note 57, at 834.

<sup>63</sup> *Id.* at 820.

<sup>64</sup> *Id.* at 819–20.

that they are not complicit in human rights abuses.”<sup>65</sup> But it also goes on to enumerate environmental principles and labor goals, such as the elimination of child labor and employment discrimination.<sup>66</sup>

The Global Compact was designed to create a framework for “leadership, dialogue, learning, partnership projects, and network/out-reach.”<sup>67</sup> As with the OECD Guidelines, a complaint mechanism has recently been introduced.<sup>68</sup> The Global Compact Office (GCO) forwards registered complaints to a corporation accused of wrongdoing, and although the GCO takes no position on the merits, it reserves the right to remove the corporation from a public list of participants for failures to engage in a dialogue on the complaint.<sup>69</sup> This mechanism represents a first step in the direction of placing pressures on participants, but critics continue calling for, at the least, “a minimum social compliance threshold for participation.”<sup>70</sup>

(b) *Multistakeholder Initiatives.* — Efforts in this category involve cooperation among corporations, states, and civil society organizations.<sup>71</sup> They are often centered on a particular industry, facilitating the development of more detailed sets of principles. In that sense, these initiatives constitute an improvement on the approaches taken by intergovernmental organizations, which succeeded mainly in setting out more abstract ideals.

The Voluntary Principles on Security and Human Rights (the Principles) address the specific problems that corporations in the extractive sector have had with human rights violations by their security forces. The Principles first provide a series of factors that companies should consider in assessing risk, ranging from the human rights records of the prospective security forces to patterns of conflict within the local communities.<sup>72</sup> Next, the Principles cover issues pertaining to companies’ relationships with public security forces. Emphasis is placed on communication, training, and transparency, as well as on reporting human rights violations and proactively monitoring their investigations.<sup>73</sup> For private security forces, the Principles require greater over-

---

<sup>65</sup> U.N. Global Compact, The Ten Principles, <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html> (last visited Apr. 4, 2009).

<sup>66</sup> See *id.*

<sup>67</sup> Evaristus Oshionebo, *The U.N. Global Compact and Accountability of Transnational Corporations: Separating Myth from Realities*, 19 FLA. J. INT’L L. 1, 14 (2007).

<sup>68</sup> See GLOBAL COMPACT: NOTE ON INTEGRITY MEASURES 2–4, [http://www.unglobalcompact.org/AboutTheGC/gc\\_integrity\\_mesures.pdf](http://www.unglobalcompact.org/AboutTheGC/gc_integrity_mesures.pdf) (last visited Apr. 4, 2009).

<sup>69</sup> See *id.* at 3–4.

<sup>70</sup> Oshionebo, *supra* note 67, at 38.

<sup>71</sup> See Ruggie, *supra* note 57, at 835–37.

<sup>72</sup> THE VOLUNTARY PRINCIPLES ON SECURITY AND HUMAN RIGHTS 2–3, [http://www.voluntaryprinciples.org/files/voluntary\\_principles.pdf](http://www.voluntaryprinciples.org/files/voluntary_principles.pdf) (last visited Apr. 4, 2009).

<sup>73</sup> *Id.* at 3–5.

sight on the use of force. They include a proportionality requirement and draw a distinction between preventative and defensive force on the one hand and offensive force on the other.<sup>74</sup> The Principles even cover terms of the contract, suggesting that termination be permitted upon discovery of unlawful behavior<sup>75</sup> and that the security providers be “representative of the local population.”<sup>76</sup>

The Voluntary Principles have been adopted by many of the major players in the extractive sector,<sup>77</sup> and many NGOs signed on to show their support.<sup>78</sup> In addition to the significant level of detail, the Principles are distinctive for their emphasis on providing how-to guidelines rather than taking a more aspirational approach.<sup>79</sup> Such guidelines enable participating companies to operationalize their commitments more readily.<sup>80</sup> Early evidence suggests that corporations are at least taking the Principles into account.<sup>81</sup> Nevertheless, as with all voluntary initiatives, lack of enforcement remains the primary concern.

(c) *Codes of Conduct.* — Codes of conduct can be developed by industries, NGOs, and individual companies. The number of company codes has been estimated at around a thousand,<sup>82</sup> and industry associations ranging from toy manufacturers<sup>83</sup> to chemical producers<sup>84</sup> have developed instruments as well. NGOs such as Amnesty International have developed suggested guidelines<sup>85</sup> that companies can either adopt wholesale or use as the starting point for their own codes.

As compared with other forms of soft law, codes of conduct may be especially attractive to companies because of their even greater flexibility. Conversely, compliance may be especially difficult to enforce by external monitors, raising the concern that corporations reap reputa-

<sup>74</sup> *Id.* at 6.

<sup>75</sup> *Id.* at 6–7.

<sup>76</sup> *Id.* at 7.

<sup>77</sup> See Voluntary Principles on Security and Human Rights, Participants + Companies, <http://www.voluntaryprinciples.org/participants/companies.php> (last visited Apr. 4, 2009).

<sup>78</sup> See Voluntary Principles on Security and Human Rights, Participants + Non-Governmental Organizations, <http://www.voluntaryprinciples.org/participants/ngo.php> (last visited Apr. 4, 2009).

<sup>79</sup> Bennett Freeman et al., *A New Approach to Corporate Responsibility: The Voluntary Principles on Security and Human Rights*, 24 HASTINGS INT'L & COMP. L. REV. 423, 438 (2001).

<sup>80</sup> See *id.* at 439.

<sup>81</sup> See Sean D. Murphy, *Taking Multinational Corporate Codes of Conduct to the Next Level*, 43 COLUM. J. TRANSNAT'L L. 389, 419–20 (2005).

<sup>82</sup> Fiona McLeay, *Corporate Codes of Conduct and the Human Rights Accountability of Transnational Corporations: A Small Piece of a Larger Puzzle*, in TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS 219, 221 (Olivier De Schutter ed., 2006).

<sup>83</sup> Int'l Council of Toy Indus., Code of Business Practices, in BUSINESS AND HUMAN RIGHTS, *supra* note 2, at 321.

<sup>84</sup> Int'l Council of Chem. Ass'ns, Statement on Responsible Care, in BUSINESS AND HUMAN RIGHTS, *supra* note 2, at 324.

<sup>85</sup> Amnesty Int'l, Human Rights Guidelines for Companies, in BUSINESS AND HUMAN RIGHTS, *supra* note 2, at 154.

tional benefits from the promulgation of their codes and are left with minimal incentives to comply.<sup>86</sup> In practice, codes of conduct developed by individual companies run the full gamut as far as specificity and accountability are concerned. Professor Joshua Newberg distinguishes between “values statement[s]” at one end of the spectrum and compliance-driven codes at the other, while recognizing that many codes are hybrids that incorporate elements of both.<sup>87</sup> Codes of conduct often contain voluntary reporting elements, which constitute one step in the direction of greater accountability.<sup>88</sup>

2. *Analysis.* — When organizational irrationality is factored in, soft law takes on greater significance in the effort to reduce corporate human rights violations. Most would likely agree that attracting greater participation through flexibility is desirable, because participation forces corporations to think seriously about human rights and fosters dialogue among the various stakeholders. But those who stress the push toward greater enforcement and hard law status might overlook the important role that soft law can play in counteracting groupthink and cognitive biases. By bringing human rights concerns to the forefront, soft law should make corporate decisionmakers more attentive to competing considerations and thus more likely to make rights-protective choices. The push for compliance need not detract from this role played by soft law, but it can — if overly adversarial tactics disrupt the ongoing dialogue. For example, Professor Steven Ratner has noted the concern that NGOs can “fall prey to a visceral anti-[transnational enterprise] bias” that can obstruct cooperation.<sup>89</sup> Human rights advocates should, at the least, be aware of this tradeoff. It may not be worth pursuing enforcement at the cost of losing both cooperation and the irrationality-correcting functions of soft law.

In addition to its general debiasing effect, soft law could further the human rights cause through three particular strategies proposed below. Each is driven both by attention to organizational irrationality and a pragmatic awareness of the interests of the corporations’ side.

(a) *Operational Guidelines vs. Value Statements or Benchmarks.* — It is perhaps intuitive that how-to guidelines would enhance compliance better than abstract value statements would. But the discussion in Part II demonstrates why the need for the former is particularly acute. The kinds of vague principles contained in instruments such as the Global Compact need at some point to be translated into

---

<sup>86</sup> See Amiram Gill, *Corporate Governance As Social Responsibility: A Research Agenda*, 26 BERKELEY J. INT’L L. 452, 462 (2008).

<sup>87</sup> Joshua A. Newberg, *Corporate Codes of Ethics, Mandatory Disclosure, and the Market for Ethical Conduct*, 29 VT. L. REV. 253, 257 (2005) (internal quotation marks omitted).

<sup>88</sup> Gill, *supra* note 86, at 467–68.

<sup>89</sup> Ratner, *supra* note 4, at 533.

concrete instructions. If that translation takes place from within the organization, the irrational tendencies discussed earlier are liable to hinder effective action. Thus, human rights advocates should help establish how-to guidelines that are as specific as possible. The Voluntary Principles offer one of the best illustrations of this approach.

Some advocates would prefer to concentrate efforts on promoting accountability through benchmarks and minimum compliance standards.<sup>90</sup> Both approaches are worth pursuing; the major question is which to prioritize. Because corporations are more likely to resist benchmarks than operational guidelines, the human rights community might do well to make immediate inroads on the latter while continuing to negotiate the former.

(b) *Reporting/Monitoring vs. Impact Assessments.* — One of the most basic steps that a corporation can take toward better compliance is to agree to self-reporting. Commentators have pressed for this strategy as a way to strengthen codes of conduct.<sup>91</sup> The obvious concern about self-reporting is that corporations can consciously skew their information. Fear of reputational harms and lawsuits might make such attempts quite rational, particularly if there is no obligation to report accurately. The less obvious concern is that there may also be unintentional distortion. Each of the four cognitive biases discussed in this Note makes individual employees vulnerable to misinterpretation of information. So too might structural secrecy interfere with the accurate assembling of that information.

Monitoring by an external party would constitute an improvement over self-reporting, but corporations are even less inclined to agree to it.<sup>92</sup> Moreover, there is something of a dilemma in deciding how best to situate the monitoring party. On the one hand, if the monitoring group is too far removed, its effectiveness is limited by the accuracy of the information it gets. On the other hand, if the monitoring group becomes too closely involved with the people or entities being monitored, then it is liable to begin seeing information through the same biased lens.<sup>93</sup>

One way to avoid this dilemma is to have an external monitor intervene earlier. The underlying strategy is the same one involved in shifting toward operational guidelines: to help an organization reason clearly before the various biases can cloud a final determination. In-

---

<sup>90</sup> See, e.g., Oshionebo, *supra* note 67, at 38.

<sup>91</sup> See, e.g., Gill, *supra* note 86, at 467–68.

<sup>92</sup> Alex Wawryk, *Regulating Transnational Corporations Through Corporate Codes of Conduct*, in *TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS* 53, 62 (Jedrzej George Frynas & Scott Pegg eds., 2003).

<sup>93</sup> See David B. Kahn & Gary S. Lawson, *Who's the Boss?: Controlling Auditor Incentives Through Random Selection*, 53 *EMORY L.J.* 391, 404–05 (2004).



stead of demanding greater reporting obligations, human rights advocates should ask corporations to commit to developing action plans and risk assessments before they begin new projects. The very act of developing such plans for an external audience might have a debiasing effect by forcing the company to step outside its groupthink tendencies and uncover any information hidden by structural secrecy. Moreover, human rights advocates can help to recognize and correct for any biased inferences drawn by members of the organization. Commentators have used similar justifications in support of environmental impact assessments,<sup>94</sup> and others have used the relative success of this approach in the environmental context to argue for the potential value of human rights impact assessments.<sup>95</sup>

Finally, a practical advantage of emphasizing earlier intervention is that corporations may be more likely to cooperate. The cost of doing such assessments may be significant, but should not be prohibitive.<sup>96</sup> And whereas committing to reporting or monitoring makes corporations uneasy about prospective liability or reputational harms, releasing information and accepting feedback prior to the beginning of a project should seem much less risky. Of course, corporations may still be reluctant to subject their plans to scrutiny of any sort, and it is unclear how open they will be to implementing suggestions. Nevertheless, these are challenges that effective cooperation over time can help to overcome.

(c) *Counteracting Optimism.* — While the preceding subsections have considered ways to optimize the conditions for more rational decisionmaking, one can also imagine counteracting one set of biases by drawing on another set of cognitive tendencies. Soft law approaches to reducing corporate human rights violations might benefit from two more proactive interventions to offset the optimism bias.<sup>97</sup> The first involves the availability heuristic, which refers to the tendency people have to over- or underestimate probabilities based on examples that

---

<sup>94</sup> See, e.g., Neil Craik, *Deliberation and Legitimacy in Transnational Governance: The Case of Environmental Impact Assessments*, 38 VICTORIA U. WELLINGTON L. REV. 381, 383 (2007).

<sup>95</sup> See Maassarani et al., *supra* note 13, at 149. The Danish Institute for Human Rights has taken the lead in developing tools of this sort. For a case study describing the experience of Shell International with the Danish Institute's Human Rights Compliance Assessment tools, see Esther Schouten, *Road-testing the Human Rights Compliance Assessment Tools*, in U.N. GLOBAL COMPACT & THE OFFICE OF THE U.N. HIGH COMM'R OF HUMAN RIGHTS, EMBEDDING HUMAN RIGHTS INTO BUSINESS PRACTICE II 64 (2007), available at [http://www.unglobalcompact.org/docs/news\\_events/8.1/EHRBPII\\_Final.pdf](http://www.unglobalcompact.org/docs/news_events/8.1/EHRBPII_Final.pdf).

<sup>96</sup> See Maassarani et al., *supra* note 13, at 167 (noting that both the "extra investment and preparation time" should seem reasonable in light of what already goes into major projects like a "\$1 billion pipeline").

<sup>97</sup> See Christine Jolls & Cass R. Sunstein, *Debiasing Through Law*, 35 J. LEGAL STUD. 199, 200 (2006).

stick out in their minds.<sup>98</sup> Bringing the realities of human rights violations to the attention of corporate decisionmakers, and thus making them more “available,” might be one way to overcome the optimism bias that might otherwise skew their reasoning. Human rights advocates should spend more time bringing these stories to life, through film, photography, and personal testimony,<sup>99</sup> and should find ways to bring this evidence directly into the consciousness of their business counterparts. Even as human rights advocates push for stronger monitoring and tougher penalties, they should not overlook the potential significance of less intrusive interventions. They might request, for example, that business leaders commit to basic employee training that includes a component that dramatically showcases past human rights failures.

Another way to counteract the optimism bias is the strategic use of “framing” effects, which describe how people respond differently depending on how information is presented.<sup>100</sup> One example is loss aversion, which is the idea that “people tend to weigh losses more heavily than gains in evaluating potential outcomes.”<sup>101</sup> In light of that fact, advocates seeking to make the “business case” for human rights may want to emphasize potential harms rather than potential gains. This could mean helping to calculate the costs of litigation for sued corporations or performing the more difficult task of helping to translate reputational harms into concrete dollar figures. By sharpening the prospects for loss and putting them at the forefront of corporate decisionmakers’ attention, advocates could help those decisionmakers factor in human rights concerns at something closer to the objectively accurate level. Continuing to tout the reputational gains that come with good corporate citizenship might be valuable over the long term in inculcating norms, but capitalizing on loss aversion appears to be an underutilized strategy. This missed opportunity is all the more significant because it means that while human rights advocates seek stronger deterrence measures, they are failing to make the most of the potential for existing incentive structures to foster compliance through the mechanism of framing.<sup>102</sup>

---

<sup>98</sup> *Id.* at 209–10.

<sup>99</sup> *Cf.* Andrew K. Woods, *The YouTube Defense: Human Rights Go Viral*, SLATE, Mar. 28, 2007, <http://www.slate.com/id/2162780> (explaining the impact that such media can have for the human rights cause more generally).

<sup>100</sup> Jolls & Sunstein, *supra* note 97, at 205–06.

<sup>101</sup> *Id.* at 210; *see also* Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 *ECONOMETRICA* 263, 279 (1979).

<sup>102</sup> At first glance, this emphasis on loss may seem to contradict the earlier discussion of cooperative versus adversarial approaches. But it is possible for human rights advocates to spread this information in a spirit of cooperation, so long as both sides see improved compliance as the common goal.

### B. Civil Litigation

1. *Overview.* — As countries ratify the Rome Statute of the International Criminal Court<sup>103</sup> and incorporate its provisions into domestic law, the number of available jurisdictions for charging transnational corporations with international crimes is on the rise.<sup>104</sup> In the United States, the Alien Tort Statute<sup>105</sup> (ATS) has provided a vehicle for international human rights claims. Since *Doe I v. Unocal Corp.*,<sup>106</sup> corporations have been vulnerable to civil suits for complicity in human rights violations. The Supreme Court in *Sosa v. Alvarez-Machain*<sup>107</sup> left this door open without actually deciding the question of whether private defendants can be sued under the ATS.<sup>108</sup>

Neither business nor human rights advocates are completely satisfied with the ATS. Business groups, of course, oppose its very existence because it creates a risk of liability they otherwise would not face.<sup>109</sup> They argue that unpredictable liability will deter them from investing in foreign countries.<sup>110</sup> Human rights groups, for their part, encounter a number of obstacles in their attempts to sue corporations under the statute. Courts have frequently dismissed such claims on act of state, comity, or political question grounds, thus never reaching the merits of the cases.<sup>111</sup>

Moreover, both sides have reason to be concerned about two ambiguities that *Sosa* left unresolved. First, although *Sosa* provided guidance on the type of violation that would create a cause of action under the ATS,<sup>112</sup> the standard was open-ended enough that lower courts have not applied it in a predictable fashion.<sup>113</sup> Second, *Sosa* did not

<sup>103</sup> July 17, 1998, 2187 U.N.T.S. 90.

<sup>104</sup> Ruggie, *supra* note 57, at 831.

<sup>105</sup> 28 U.S.C. § 1350 (2006).

<sup>106</sup> 395 F.3d 932 (9th Cir. 2002).

<sup>107</sup> 542 U.S. 692 (2004).

<sup>108</sup> The Court alluded ambiguously to this issue in a footnote, stating that “whether a norm is sufficiently definite to support a cause of action,” *id.* at 732, is related to “whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual,” *id.* at 732 n.20.

<sup>109</sup> John E. Howard, Op-Ed., *The Alien Tort Claims Act: Is Our Litigation-Run-Amok Going Global?*, U.S. CHAMBER OF COMMERCE, Oct. 2002, <http://www.uschamber.com/press/opeds/0210howardlitigation.htm>.

<sup>110</sup> *See id.*

<sup>111</sup> *See* Logan Michael Breed, Note, *Regulating Our 21st-Century Ambassadors: A New Approach to Corporate Liability for Human Rights Violations Abroad*, 42 VA. J. INT’L L. 1005, 1022–23 (2002).

<sup>112</sup> The Court said that it would “require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.” *Sosa*, 542 U.S. at 725.

<sup>113</sup> *Compare* *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1247 (11th Cir. 2005) (finding that a “claim for cruel, inhuman, degrading treatment or punishment” falling short

involve “aiding and abetting” liability and thus provided no relevant guidance. Lower courts have therefore continued to struggle with basic questions, such as whether international law or federal common law supplies the standard, and what level of involvement is required under each.<sup>114</sup> Until these issues are clarified, corporations might be deterred from socially desirable investments for fear of being held liable for far-removed harms.<sup>115</sup> At the same time, human rights advocates will have a difficult time planning an efficient allocation of their scarce resources in the face of inconsistent judicial rulings.<sup>116</sup>

2. *Analysis.* — From the human rights perspective, one general concern about litigation as a strategy is that it could undermine the cooperative relationship that the analysis in the previous section prioritized. Of course, it does not follow that litigation should be discarded as a component of the broader strategy. Indeed, the threat of such private litigation is an important deterrent that must remain available in the absence of, for example, a full-fledged international criminal law regime. But the human rights community should recognize that litigation is not only an incomplete tool,<sup>117</sup> but also one that can undermine other efforts.

An analysis that incorporates organizational irrationality might also point toward a more surprising proposition — that narrowing the scope of the ATS may be in the interests of human rights advocates. In calculating the potential costs of human rights violations, corporations might not only misinterpret information about their likely complicity, but also underestimate the risk of enforcement against them. The self-serving bias, for example, may lead corporations to underestimate the likelihood of detection. Structural secrecy may prevent lawyers, who are in the best position to assess the litigation risk, from effectively preparing the organization to avoid hazards and from receiving warning signals from the frontlines.

---

of torture did not meet the *Sosa* standard), *with Doe v. Qi*, 349 F. Supp. 2d 1258, 1322 (N.D. Cal. 2004) (holding, “consistent with *Sosa*,” that if “the specific conduct at issue . . . is universally condemned as cruel, inhuman, or degrading,” it does not matter whether the general prohibition on such conduct is sufficiently precise).

<sup>114</sup> See Teddy Nemeroff, Note, *Untying the Khulumani Knot: Corporate Aiding and Abetting Liability Under the Alien Tort Claims Act After Sosa*, 40 COLUM. HUM. RTS. L. REV. 231, 232–33 (2008) (illustrating these layers of confusion through the disagreement of three judges in a single case, *Khulumani v. Barclay National Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007) (per curiam), the first post-*Sosa* appellate decision on the matter).

<sup>115</sup> See Brad J. Kieserman, Comment, *Profits and Principles: Promoting Multinational Corporate Responsibility by Amending the Alien Tort Claims Act*, 48 CATH. U. L. REV. 881, 933–34 (1999).

<sup>116</sup> See *id.* at 934.

<sup>117</sup> See Harold Hongju Koh, *Separating Myth from Reality About Corporate Responsibility Litigation*, 7 J. INT’L ECON. L. 263, 272–73 (2004) (calling for a treaty approach).

Uncertainty in the law makes even a fully rational calculation imprecise, but it also seems likely to feed into and exacerbate the problems created by the self-serving bias<sup>118</sup> and structural secrecy,<sup>119</sup> potentially obstructing efforts within an organization to further the cause of compliance. Thus, if the ultimate goal is to prevent human rights abuses, then helping corporations better predict their risk of liability should be a positive step.<sup>120</sup> Instead of categorically rejecting calls to amend the ATS,<sup>121</sup> or resting their hopes on the development of accommodating case law, human rights advocates should consider ways in which statutory reforms could further their purposes and should work with the business community to seek common ground.

This Note is not the place for a full-fledged proposal for reform of the ATS, but one particular goal must be emphasized. To fulfill the need for clarity, a new statute should specify standards for aiding and abetting liability and the particular violations that federal courts can adjudicate. Both of these issues will be extremely controversial, but settling them should be in the interests of both the human rights and business communities. Settlement enables better planning by both sides,<sup>122</sup> first of all, but more relevant to the problem of irrationality, settlement in these two most uncertain areas can also help prevent the set of human rights violations that corporations would have unwittingly committed against their self-interest.

Because reforming the ATS, unlike the proposals outlined earlier, raises significant potential costs, more empirical assessment is required before any steps should be taken. It will be important to estimate what proportion of violations occurs because of uncertainty in the law, whether exacerbated by one of the mechanisms of irrationality or not. The gains from increased compliance and other potentially beneficial reforms<sup>123</sup> must then be weighed against any increase in violations be-

---

<sup>118</sup> See Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23, 46 (2000).

<sup>119</sup> Cf. Joseph Sanders, *Firm Risk Management in the Face of Product Liability Rules*, in ORGANIZATIONS, UNCERTAINTIES, AND RISK, *supra* note 48, at 57, 79 (noting that “increasing rule uncertainty” leads to a bifurcation between the management of product design and the management of liability).

<sup>120</sup> A possible alternative view would be that uncertain liability will maximize precaution by forcing corporations to err on the safe side. This has some intuitive plausibility, but one should also recall that the mechanisms of organizational irrationality would cut against it.

<sup>121</sup> See, e.g., Koh, *supra* note 117, at 270.

<sup>122</sup> See Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1371 (1997).

<sup>123</sup> For example, an updated statute would provide a clearer authorization for U.S. courts to hear such suits and thus would weaken arguments for dismissal on political question grounds. Cf. Rachael E. Schwartz, “*And Tomorrow?*” *The Torture Victim Protection Act*, 11 ARIZ. J. INT’L & COMP. L. 271, 311 (1994) (arguing that the passage of the Torture Victim Protection Act indicates the political branches’ understanding that “such cases are suitable for judicial decision”).

---

---

cause of changes to the statute's deterrent effect. On balance, the costs might outweigh the benefits depending on the precise changes proposed, but that assessment cannot be made unless both sides engage and see what compromises can be reached.

The irrationality analysis itself points toward one possible compromise. To find aiding and abetting liability, courts have generally required corporations to have acted with knowledge or purpose.<sup>124</sup> Yet both standards may lead to only limited deterrence if cognitive bias and structural secrecy prevent the proper evaluation of risk. Thus, human rights advocates should urge a negligence theory of liability to incentivize corporations to take steps to counteract irrationality.<sup>125</sup> In return, corporations might demand the inclusion of a safe harbor provision that applies when they take certain steps, such as engaging in an impact assessment before beginning a project and following through on the assessment's recommendations. Such a compromise has the potential to be a win for both sides if it results both in a reduced number of human rights violations and in improved predictability for corporations.

#### CONCLUSION

The first goal of this Note is to identify concerns about organizational irrationality as an obstacle to improving corporate human rights compliance. The prevalence of these irrational tendencies may be presently unclear, but addressing them will only become increasingly important as other efforts to develop the rational and normative cases for compliance succeed. Although further empirical research into the extent of these problems will be necessary to guide the appropriate response, this Note also lays out some possible reforms to begin the conversation. At least some of the proposed interventions warrant immediate consideration because of their relatively low cost. But all of the suggestions are motivated by a common spirit of pragmatism that recognizes where second-best solutions are worth adopting and compromises are worth pursuing.

---

<sup>124</sup> Nemeroff, *supra* note 114, at 255.

<sup>125</sup> *Cf.* Langevoort, *supra* note 20, at 158 (making a similar argument for securities regulation).