

# JUDICIAL DEFERENCE AND THE UNREASONABLE VIEWS OF THE BUSH ADMINISTRATION

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## INTRODUCTION

U.S. courts have long held that executive branch views about a lawsuit's potential impact on foreign affairs are entitled to deference. Although the courts have emphasized that executive branch views are not binding, they rarely rejected them prior to the presidency of George W. Bush. This historically deferential approach took a dramatic turn during the Bush administration, when the executive branch informed the courts that a series of human rights cases against corporate defendants threatened U.S. foreign policy interests. Remarkably, the courts permitted most of the claims to proceed despite the administration's concerns.

These highly contested human rights cases were filed under the jurisdiction of the Alien Tort Statute ("ATS"),<sup>1</sup> which authorizes plaintiffs to seek civil remedies for egregious violations of international law.<sup>2</sup> The Bush administration adamantly opposed all ATS litigation as an interference in the foreign affairs powers of the executive branch. After losing a broad challenge to the interpretation of the ATS in the Supreme Court in 2004,<sup>3</sup> the administration filed repeated submissions in corporate-defendant ATS cases, arguing that judicial involvement interferes with foreign policy.

Approximately fifty ATS cases have been filed against corporate defendants since a key 1996 decision upheld the concept of ATS corporate liability.<sup>4</sup> The Bush administration filed letters or amicus briefs in ten of

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1. 28 U.S.C. § 1330 (2000).

2. For an overview of ATS litigation in general, see *infra* Part I.A and Appendix A.

3. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (holding that the ATS grants federal courts jurisdiction over claims for widely accepted, clearly defined violations of international law).

4. For a discussion of the first corporate-defendant decision, *Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997), see Part I.B. This total does not include cases alleging claims arising out of World War II. Over half of the post-*Unocal*, non-World War II corporate-defendant cases have been dismissed. Three settled, one ended with a jury verdict for the plaintiff, and one ended with a jury verdict for the defendant. Fifteen are currently pending in the district courts and another nine are pending on appeal. For a list of ATS corporate-defendant cases and their current status, see Appendix B.

those cases,<sup>5</sup> stating that the litigation could undermine important U.S. foreign policy interests, including national security. Prior to the Bush administration, courts dismissed most, if not all cases in which an administration filed a comparable objection. Of the eight ATS corporate-defendant cases in which the courts reached the issues raised by the Bush administration,<sup>6</sup> however, they accepted the administration's foreign policy concerns in only two, allowing five to proceed and dismissing one on other grounds after expressly rejecting the administration's arguments.<sup>7</sup> Moreover, one of the two cases in which the foreign policy concerns were accepted involved a contractor working with the U.S. government, a situation that is typically even more likely to trigger deference, and the other decision is still pending on appeal.<sup>8</sup> This remarkable record is even more striking given that all of these cases were decided during the era of heightened concern about national security that followed the attacks of September 11, 2001.

The traditional standard of judicial deference to executive branch foreign policy concerns varies according to the underlying issue.<sup>9</sup> The courts have held that some determinations are constitutionally committed

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5. For a detailed review of the ten submissions, see Appendix C. In an eleventh case, *Estate of Rodriguez v. Drummond Co., Inc.*, in response to a request from the district court, the State Department submitted a letter stating that it did not have an opinion at that time as to whether the litigation would have an adverse impact on U.S. foreign policy interests. Letter from John B. Bellinger, Legal Advisor, Dep't of State, at 2, *Romero v. Drummond*, No. 03-0575 (Aug. 2, 2006). In two additional cases, executive branch submissions stated that the "state secrets" doctrine barred litigation of claims that private corporations had participated in the government's abuse and/or illegal rendition of secret detainees. See *El-Masri v. United States*, 479 F.3d 296, 301 (4th Cir. 2007); Memorandum of the United States in Support of Motion to Dismiss, or, in the Alternative, for Summary Judgment by the United States, at 22–23, *Mohamed v. Jeppesen Dataplan Inc.*, No. 07-2798 (N.D. Cal. Oct. 19, 2007), 2007 WL 3223297.

6. In *Bowoto v. Chevron Texaco Corp.*, No. 03-417580 (Cal. Super. Ct. filed Feb. 20, 2003), filed in state court in California, the judge has not yet responded to the narrow issue raised by the executive branch submission. See *infra* note 118. In another case, *Doe v. Unocal*, 963 F. Supp. 880, the parties settled before the court resolved the issues raised by the executive branch. For an explanation of the complicated history of the *Unocal* litigation, see *infra* note 32.

7. *In re Agent Orange Prod. Liab. Litig.*, 373 F. Supp. 2d 7 (E.D.N.Y. 2005), *aff'd*, 517 F.3d 104 (2d Cir. 2008) (dismissing a suit by Vietnamese victims of herbicides used by the U.S. government during the Vietnam War after finding that the alleged actions did not violate international law norms recognized at that time). See discussion *infra* Part IV. B.

8. *Corrie v. Caterpillar, Inc.*, 503 F.3d 974 (9th Cir. 2007) (involving a U.S.-government-approved contract to sell bulldozers to Israel); *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164 (C.D. Cal 2005).

9. See *infra* Part II.

to the executive branch, including, for instance, whether a foreign government official is entitled to diplomatic immunity. On those issues, the courts follow the views of the executive branch with little or no scrutiny. In areas constitutionally assigned to the judiciary, however, such as statutory interpretation, courts do not defer.

Between these two extremes, difficult deference questions often arise when a court considers whether it should refrain from deciding a case otherwise properly within its jurisdiction because the executive branch claims that judicial resolution will interfere with foreign policy.<sup>10</sup> The courts often defer to such opinions, but stress that they are not bound to follow those views. The courts have not, however, clearly articulated a standard to guide their evaluation of the deference due to executive branch submissions.

In this Article, I derive a standard from the language of past decisions that explains, in part, the failings of the recent executive branch submissions. In order to merit deference, an administration submission must: (1) articulate the relevant policy interests; (2) explain how the litigation could harm those interests; (3) tie the anticipated harm to one of the recognized foreign policy justiciability doctrines; and finally, (4) offer explanations that are reasonable, drawing conclusions that are well-founded and supported by the facts. The Bush administration corporate-defendant submissions have failed to satisfy this basic test.

I begin in Part I with a history of the ATS and a review of the corporate-defendant ATS cases. In Part II, I discuss the precedents guiding deference to the foreign policy views of the executive branch and then articulate a standard that captures what the courts have held about foreign policy deference. Part III summarizes prior administration submissions in ATS suits, while Part IV offers a detailed analysis of Bush administration submissions in corporate-defendant ATS cases, along with the courts' responses to them. Part V analyzes flaws in the submissions, including both exaggerated claims that the cases could have catastrophic consequences and faulty economic arguments, that help explain the negative reception they have received.

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10. These cases are usually decided through application of the political question doctrine, the act of state doctrine, or comity. *See infra* Part II.A.

## I. THE ALIEN TORT STATUTE

### *A. From 1789 through Filártiga and the Post-Filártiga Individual Defendant Cases*

The ATS was enacted in 1789 as a section of the First Judiciary Act, the statute that established the judicial framework for the newly inaugurated federal government. The ATS reads in full: “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.”<sup>11</sup> Although there are no surviving records of the origins of the statute, modern historians have pieced together a likely explanation of its genesis.<sup>12</sup> In the period between independence and the drafting of the Constitution, the federal government faced several international crises in which foreign governments complained vehemently about violations of the law of nations, particularly attacks on diplomats. Under the Articles of Confederation, the federal government had no power to address these wrongs, although it bore full responsibility for managing the confrontations with the European powers that ensued. The Constitution strengthened the foreign affairs powers of the federal government. The ATS, enacted by the first Congress, was one of several efforts to codify federal supervision over issues impacting foreign relations.<sup>13</sup>

Largely overlooked in the nineteenth and early twentieth centuries, the statute regained prominence in 1980, when the Second Circuit relied on it in *Filártiga v. Peña-Irala*.<sup>14</sup> *Filártiga* was filed by the relatives of a young man tortured to death in Paraguay after they discovered his Paraguayan torturer living in New York City. Their civil lawsuit relied on the ATS, asserting that torture constituted a “tort . . . in violation of the law of nations.”<sup>15</sup> The administration of President Jimmy Carter strongly supported that view in a joint brief filed by the Departments of State and Justice.<sup>16</sup> The Second Circuit agreed, holding that “deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights” and therefore triggers federal court jurisdiction under the ATS.<sup>17</sup>

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11. 28 U.S.C. § 1330 (2000); *see also* Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73.

12. This history was summarized by the Supreme Court in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 716–20 (2004).

13. *Id.* at 715–17.

14. 630 F.2d 876 (2d Cir. 1980).

15. *Id.* at 880.

16. Memorandum for the United States as Amicus Curiae at 12–24, *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980) (No. 79-6090), 1980 WL 340146.

17. 630 F.2d at 878.

Although approximately 185 human rights lawsuits have been filed since *Filártiga*, the majority have been dismissed, most often for failure to allege a violation of an actionable international norm or because of the immunity of the defendants.<sup>18</sup> Most of the successful cases involve an egregious violation of international norms such as genocide, torture, summary execution, disappearance, war crimes, or crimes against humanity. Defendants have included those with command responsibility for abuses as well as direct perpetrators. For example, thousands of victims of Ferdinand Marcos' repressive regime in the Philippines won a judgment against Marcos' estate for torture, executions, and disappearances.<sup>19</sup> A group of indigenous Guatemalans won a judgment against General Hector Gramajo for torture and executions.<sup>20</sup> Survivors of abuses and relatives of deceased victims have filed lawsuits against the former military leaders of Argentina, El Salvador, Haiti, and Ethiopia, among others.<sup>21</sup>

In 2004, the Supreme Court upheld the application of the ATS to modern human rights litigation in *Sosa v. Alvarez-Machain*.<sup>22</sup> *Sosa* involved the kidnapping and detention of Humberto Alvarez-Machain, who was suspected (but later acquitted) of involvement in the murder of a U.S. drug enforcement agent.<sup>23</sup> Although the Court rejected Alvarez's claim of arbitrary detention, it upheld ATS jurisdiction over widely accepted, clearly defined violations of international law. The Court cited prior ATS decisions with approval, noting that their reasoning was "generally consistent" with the approach adopted by *Sosa*.<sup>24</sup>

#### B. Corporate Defendant ATS Cases

Until the mid-1990s, ATS cases generally targeted former officials of recognized governments who were acting under color of official author-

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18. See Appendix A. For a comprehensive analysis of modern human rights litigation; see also BETH STEPHENS ET AL., INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 12–25 (2d ed. 2008).

19. *Hilao v. Estate of Marcos*, 103 F.3d 789 (9th Cir. 1996).

20. *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995).

21. See, e.g., *Arce v. Garcia*, 434 F.3d 1254 (11th Cir. 2006) (upholding a jury verdict against two former military leaders of El Salvador); *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996) (upholding verdict against Ethiopian military official); *Paul v. Avril*, 901 F. Supp. 330 (S.D. Fla. 1994) (entering judgment against the former head of the military government of Haiti); *Forti v. Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987), *on reconsideration* 694 F. Supp. 707 (N.D. Cal. 1988) (denying motion to dismiss an ATS suit against a former Argentine general).

22. 542 U.S. 692 (2004).

23. *Id.* at 697–98.

24. *Id.* at 732.

ity when they committed human rights abuses. In *Kadic v. Karadzic*, filed in 1993, victims of genocidal ethnic cleansing in Bosnia-Herzegovina sued the leader of the unrecognized Bosnian-Serb regime for genocide, war crimes, crimes against humanity, torture, and summary execution.<sup>25</sup> The district court dismissed the complaint, holding that international law applied only to officials of recognized governments.<sup>26</sup> The Second Circuit reversed, stating that non-state actors could be held liable for human rights abuses in two circumstances.<sup>27</sup> First, the *Kadic* court recognized that some international law violations do not require state action.<sup>28</sup> The international law definitions of genocide and slavery, for example, apply to private actors as well as government officials.<sup>29</sup> Second, the court held that a private party can be held liable for a human rights violation that does require state action when it acts in concert with a state actor.<sup>30</sup> The court pointed to the extensive U.S. jurisprudence on “color of law” as a guide for determining when a private actor can be held to have acted in concert with a state actor.<sup>31</sup>

Although *Kadic* concerned an individual defendant, its holding applies equally to ATS claims against corporate defendants, either when a private corporation commits one of the abuses that does not require state action or when it acts in concert with government officials to commit a violation that does. *Doe v. Unocal* invoked this theory in its claims against a corporation involved in the construction of a gas pipeline across Burma.<sup>32</sup> Plaintiffs, Burmese villagers, had suffered executions, forced

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25. 70 F.3d 232 (2d Cir. 1995).

26. *Id.* at 237.

27. *Id.* at 236. The court also held in the alternative that Karadzic had acted under color of law of his de facto regime. *Id.* at 244–45.

28. *Id.* at 239–44.

29. *Id.* at 239, 241–42; Convention on the Prevention and Punishment of the Crime of Genocide art. IV, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951) (“Persons committing genocide . . . shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.”); Slavery Convention art. I(2), Sept. 25, 1926, 60 L.N.T.S. 253 (entered into force Mar. 9, 1927).

30. 70 F.3d at 245.

31. *Id.*

32. *Doe v. Unocal Corp.*, 963 F. Supp. 880, 891 (C.D. Cal. 1997). See also *Nat'l Coalition Gov't of Burma v. Unocal Corp.*, 176 F.R.D. 329 (C.D. Cal. 1997) (denying motion to dismiss); *Doe v. Unocal Corp.*, 110 F. Supp. 2d 1294 (C.D. Cal. 2000) (granting defendants' motion for summary judgment), *aff'd in part, rev'd in part*, 395 F.3d 932 (9th Cir. 2002) (reversing summary judgment and remanding for trial), *reh'g en banc granted*, 395 F.3d 978 (9th Cir. 2003). In December 2004, before a scheduled argument of the rehearing en banc, the parties announced a settlement and dismissed all claims. Neither side would disclose details of the settlement. *Unocal Settles Rights Suit in Myanmar*, N.Y. TIMES, Dec. 14, 2004, at C6. See also *Doe v. Unocal Corp.*, 403 F.3d 708 (9th Cir.

labor, and torture, including rape. They alleged that Unocal and its partners hired the Burmese military to provide security and other support, knowing that the military was likely to commit human rights abuses. The district court denied a motion to dismiss, holding that a corporation can be held liable for participating in a joint venture with a government that commits such abuses. Although the case was later dismissed on a motion for summary judgment,<sup>33</sup> a panel of the Ninth Circuit reversed, holding that a corporation could be held liable for aiding and abetting a human rights violation if it provided “knowing practical assistance or encouragement which has a substantial effect on the perpetration of the crime.”<sup>34</sup>

Later cases have consistently held that corporations can be held liable for human rights abuses through ATS litigation, although some of the cases have been dismissed on other grounds.<sup>35</sup> The circuit courts and most district courts have also agreed that corporations can be held liable for aiding and abetting human rights violations.<sup>36</sup> However, the courts have yet to agree on the proper standard for determining such liability. The *Unocal* panel decision relied on international law to hold that a corporate defendant could be held liable if it provided “knowing practical assistance or encouragement which has a substantial effect on the perpetration of the crime.”<sup>37</sup> In a concurring opinion, Judge Reinhardt rejected the use of international standards and urged that federal common law

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2005) (post-settlement order granting the parties’ stipulated motion to dismiss and vacating the district court decision on the motion for summary judgment).

33. Doe v. Unocal Corp., 395 F.3d 932, 942–45 (9th Cir. 2002).

34. *Id.* at 951, 947–53 (holding as well that the district court had applied an improperly high standard for corporate aiding and abetting liability).

35. See, e.g., Mujica v. Occidental Petroleum Corp., 381 F. Supp. 2d 1164 (C.D. Cal. 2005) (dismissed as a political question) (appeal pending); Presbyterian Church of Sudan v. Talisman Energy Inc., 453 F. Supp. 2d 633 (S.D.N.Y. 2006) (motion for summary judgment granted) (appeal pending); Bowoto v. Chevron Corp., No. 99-02506, slip op. (N.D. Cal. Aug 14, 2007) and Bowoto v. Chevron Texaco Corp., No. 03-417580 (Cal. Super. Ct. filed Feb. 20, 2003) (claims for events occurring in Nigeria pending in federal and state trial courts); Wiwa v. Royal Dutch Petroleum, 226 F.3d 88 (2d Cir. 2000) (claims for events in Nigeria pending in district court).

36. See Khulumani v. Barclay Nat. Bank Ltd., 504 F.3d 254 (2d Cir. 2007), *aff’d due to lack of a quorum sub nom.*, American Isuzu Motors, Inc. v. Ntsebeza, 2008 WL 117862, 76 U.S.L.W. 3405 (May 12, 2008) (No. 07-919); Sarei v. Rio Tinto, PLC, 487 F.3d 1193 (9th Cir. 2007), *reh’g granted*, 499 F.3d 923 (9th Cir. 2007); Aldana v. Del Monte Fresh Produce, N.A., Inc., 416 F.3d 1242, 1247–48 (11th Cir. 2005); Doe v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002), *reh’g en banc granted*, 395 F.3d 978 (9th Cir. 2003). For full history of the *Unocal* case, see *supra* note 32. But see Doe v. Exxon Mobil Corp., 393 F. Supp. 2d 20, 24 (D.D.C. 2005).

37. 395 F.3d at 951.

standards be applied, although he found that federal common law would arrive at a similar standard.<sup>38</sup>

More recently, the two judge majority in *Khulumani v. Barclay National Bank Ltd.* agreed that the ATS encompasses aiding and abetting claims, but disagreed on both the source and the substance of the standard.<sup>39</sup> Judge Katzmann found that the aiding and abetting standard was governed by international law, which he found required a showing that the defendant both “provides practical assistance to the principal which has a substantial effect on the perpetration of the crime” and “does so with the purpose of facilitating the commission of that crime.”<sup>40</sup> In contrast, Judge Hall concluded that the standard was governed by federal common law.<sup>41</sup> Looking at the *Restatement (Second) of Torts* for guidance, he found that the aiding and abetting standard required knowing, substantial assistance to the commission of a violation.<sup>42</sup> Thus, both the appropriate source of the aiding-and-abetting standard and its content remain unresolved.

The Bush administration submitted its views to the courts in many of the corporate-defendant human rights cases, arguing that each case raised significant foreign policy concerns. The degree of deference due to those views has been a key issue in the litigation.

## II. FOREIGN AFFAIRS DEFERENCE

### A. An Overview

Litigation that touches on foreign affairs raises difficult constitutional questions, shaped by two often-contradictory principles. At one extreme, as the Supreme Court stated emphatically in *Oetjen v. Central Leather Company*, “[t]he conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative—‘the political’— departments of the government.”<sup>43</sup> As a result, the courts are sensitive to the executive branch’s concerns about the foreign policy implications of pending cases.<sup>44</sup>

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38. *Id.* at 970 (Reinhardt, J., concurring).

39. 504 F.3d at 260.

40. *Id.* at 277 (Katzmann, J., concurring).

41. *Id.* at 284 (Hall, J., concurring).

42. *Id.* at 288. Judge Hall found that the standard should also include the additional *Restatement* bases for liability: encouraging, contracting, soliciting, or facilitating a violation. *Id.* at 288–89.

43. 246 U.S. 297, 302 (1918).

44. The Department of Justice is authorized by statute to submit the executive branch’s view of pending litigation to the courts. 28 U.S.C. § 517 (2008). Submissions

However, the Court has also repeatedly emphasized that the judiciary must exercise independent judgment in cases properly before the courts, even if the issues involve foreign affairs. Thus, the Court has stated that, “despite the broad statement in *Oejten* . . . it cannot of course be thought that ‘every case or controversy which touches foreign relations lies beyond judicial cognizance.’”<sup>45</sup> In the memorable words of Justice Douglas, unquestioning deference to executive branch views in a case implicating foreign affairs would render the court “a mere errand boy for the Executive Branch which may choose to pick some people’s chestnuts from the fire, but not others.”<sup>46</sup>

The degree of deference afforded to executive branch views depends on the subject at issue in the case, and, in particular, on whether that matter is clearly assigned by the Constitution to one of the branches of government. In a narrow set of cases involving recognition of diplomats, heads of states, and foreign governments, executive branch views are generally final.<sup>47</sup> Courts have found that such decisions require factual determinations that are delegated to the president as part of the executive branch’s power to “receive Ambassadors and other public Ministers.”<sup>48</sup>

At the other end of the deference spectrum, the Court has held that the Constitution assigns to the courts the interpretation of statutes. As the Court said in *Republic of Austria v. Altmann*, issues of statutory interpretation are “well within the province of the Judiciary”<sup>49</sup> and the views of the executive branch “merit no special deference.”<sup>50</sup> The Court declined to defer to the executive branch in that case, even though the statute at

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can be in the form of an amicus brief, a statement of interest, a letter, or a declaration. There is no public explanation for which format is used in particular cases. When the State Department writes a letter detailing its view of a case, it is often submitted to the court attached to a Statement of Interest filed by the Justice Department.

45. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964) (quoting *Baker v. Carr*, 369 U.S. 186, 211 (1962)).

46. *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 773 (1972) (Douglas, J., concurring).

47. See, e.g., *Ex parte Republic of Peru*, 318 U.S. 578, 588 (1943) (holding that if a suggestion of immunity is filed, it is the “court’s duty” to surrender jurisdiction); *Wei Ye v. Jiang Zemin*, 383 F.3d 620, 627 (7th Cir. 2004) (“[T]he immunity of foreign leaders remains the province of the Executive Branch.”).

48. U.S. CONST. art. II, § 3. LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 43 (2d ed. 1996) (“It is no longer questioned that the President does not merely perform the ceremony of receiving foreign ambassadors but also determines whether the United States should recognize or refuse to recognize a foreign government . . . .”).

49. 541 U.S. 677, 701 (2004) (quoting *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 448 (1987)).

50. *Id.*

issue, the Foreign Sovereign Immunities Act, concerned foreign affairs and diplomatic relations.<sup>51</sup>

The most difficult deference decisions arise in cases involving foreign policy concerns traditionally considered within the constitutional powers of the executive and legislative branches.

Three ill-defined and contentious doctrines—the political question doctrine, the act of state doctrine, and comity—determine whether a case otherwise properly within a court's jurisdiction should be dismissed because of the foreign affairs implications of the litigation.

The political question doctrine directs the courts to decline to decide a case otherwise properly presented for resolution because the dispute presents issues constitutionally assigned to the political branches of the government.<sup>52</sup> The Supreme Court in *Baker v. Carr* listed the six factors that may trigger the doctrine:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.<sup>53</sup>

The act of state doctrine instructs the courts to dismiss a case that intrudes on the legal authority of a foreign sovereign when the case requires the court to "declare invalid the official act of a foreign sovereign per-

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51. *Id.* at 700–02. As the Court emphasized in *Japan Whaling Ass'n v. American Cetacean Society*:

We are cognizant of the interplay between these [statutes] and the conduct of this Nation's foreign relations, and we recognize the premier role which both Congress and the Executive play in this field. But under the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones.

478 U.S. 221, 230 (1986).

52. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

53. *Id.*

formed within its own territory” in “the absence of a treaty or other unambiguous agreement regarding controlling legal principles.”<sup>54</sup>

Comity refers to a discretionary decision to defer to the rules of the foreign country in a case posing a conflict between U.S. law and foreign law.<sup>55</sup>

Recently, the Supreme Court muddied the analysis by referring, without explanation, to “a policy of case-specific deference to the political branches.”<sup>56</sup> The Court cited *Republic of Austria v. Altmann*, which stated that, in some circumstances, the State Department’s opinion on the implications of exercising jurisdiction over a particular case “might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy.”<sup>57</sup> Courts and commentators generally agree that “case-specific deference” must be an application of the political question, act of state, or comity doctrines, and not an offhanded creation of a new doctrine.<sup>58</sup>

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54. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401, 428 (1964) (dismissing a dispute that turned on the validity of the Cuban government’s expropriation of private property). *See also W.S. Kirkpatrick & Co. v. Envtl. Tectonics*, 493 U.S. 400 (1990) (rejecting a motion for dismissal of an action alleging that a company obtained contract from the Nigerian government through bribery of Nigerian officials, holding that the act of state doctrine does not require dismissal of claim that might “embarrass” foreign governments).

55. Analysis of comity is confused by the fact that several doctrines are often lumped together under that label. *See Michael D. Ramsey, Escaping “International Comity,”* 83 IOWA L. REV. 893, 897 (1998) (stating that “comity” is used to refer to at least four separate doctrines: “(1) recognition of foreign judgments; (2) interpretation of foreign law; (3) limits on extraterritorial reach of U.S. law; and (4) enforcement of foreign law”).

56. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004).

57. 541 U.S. 677, 702 (2004).

58. *See Khulumani v. Barclay Nat'l Bank, Ltd.*, 504 F.3d 254, 262 n.10 (2d Cir. 2007) (per curium), *aff'd due to lack of a quorum sub nom.*, *American Isuzu Motors, Inc. v. Ntsebeza*, 2008 WL 117862, 76 U.S.L.W. 3405 (May 12, 2008) (No. 07-919) (noting that “[t]he parties agree that *Sosa*’s reference to ‘case-specific deference’ implicates either the political question or international comity doctrine”); *Whiteman v. Dorotheum GmbH & Co.*, 431 F.3d 57, 69 (2d Cir. 2005) (stating that case-specific deference “has long been established under the prudential justiciability doctrine known as the ‘political question doctrine’”); *Joo v. Japan*, 413 F.3d 45, 49 (D.C. Cir. 2005) (interpreting “case-specific deference” as a lens through which to apply the political question doctrine); *Doe v. Liu Qi*, 349 F. Supp. 2d 1258, 1291 (N.D. Cal. 2004) (analyzing the Supreme Court’s reference to case-specific deference and concluding that “The act of state doctrine embodies these same concerns, and thus consideration may properly be given to it in the cases at bar”). *See also Separation of Powers—Foreign Sovereign Immunity—Second Circuit Uses Political Question Doctrine to Hold Claims Against Austria Nonjusticiable Under Foreign Sovereign Immunity Act—Whiteman v. Dorotheum GMBH & Co.*, 431 F.3d 57 (2d Cir. 2006), 119 HARV. L. REV. 2292, 2297 (2006) (rejecting the concept of “a new doctrine of deference” and concluding that the Supreme Court’s comments “are

The Court has emphasized that these doctrines must be applied with care to avoid the unconstitutional rejection of cases that are properly within the powers of the judicial branch. The Court warned that:

The doctrine of which we treat is one of “political questions,” not one of “political cases.” The courts cannot reject as “no law suit” a bona fide controversy as to whether some action denominated “political” exceeds constitutional authority. The cases we have reviewed show the necessity for discriminating inquiry into the precise facts and posture of the particular case, and the impossibility of resolution by any semantic cataloguing.<sup>59</sup>

Where the administration argues that a particular case could interfere with executive branch foreign policies, the courts must assess the claims in light of the specific requirements of the relevant foreign affairs doctrines.

In cases that potentially trigger one of these doctrines, the views of the executive branch receive respectful consideration but are not dispositive. In a case involving property expropriations in Cuba at the height of the Cold War, for example, the Supreme Court refused to follow the administration’s views as to the applicability of the act of state doctrine.<sup>60</sup> Justice Powell noted that separation of powers concerns limit the deference that the judiciary can constitutionally grant to administration views: “I would be uncomfortable with a doctrine which would require the judiciary to receive the Executive’s permission before invoking its jurisdiction. Such a notion, in the name of the doctrine of separation of powers, seems to me to conflict with that very doctrine.”<sup>61</sup> Justice Brennan also recognized that the executive branch has limited authority over the interpretation of the constitutionally assigned judicial power, observing that “[t]he Executive Branch . . . cannot by simple stipulation change a political question into a cognizable claim.”<sup>62</sup> Noting that six members of the Court shared his view on this point, Justice Brennan added, “the representations of the Department of State are entitled to weight for the light

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better understood as confirming that existing discretionary doctrines should be applied vigilantly to protect the Executive’s constitutional foreign affairs prerogative”); *The Supreme Court, 2003 Term—Leading Cases*, 118 HARV. L. REV. 466, 475 (2004) (describing the suggestion of case-by-case deference as “wholly unnecessary” in light of the availability of the political question and act of state doctrines).

59. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

60. *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972).

61. *Id.* at 773 (Powell, J., concurring).

62. *Id.* at 788–89 (Brennan, J., dissenting).

they shed on the permutation and combination of factors underlying the act of state doctrine. But they cannot be determinative.”<sup>63</sup>

In another case involving Cuba, *Regan v. Wald*, the Court deferred to the views of the administration, but only after considering the logical coherence of those views and the supporting evidence.<sup>64</sup> *Regan* challenged an executive order that prohibited U.S. citizens from spending money in Cuba; the executive branch maintained that rejecting the ban would undermine the U.S. foreign policy goal of denying Cuba access to foreign currency.<sup>65</sup> The Court concluded that the prohibition was justified by “the evidence presented to both the District Court and the Court of Appeals.”<sup>66</sup> Administration submissions may be entitled to less deference, however, if they are not consistent over time. In *Regan*, the Court noted that Presidents Kennedy, Carter, and Reagan had all agreed “that the continued exercise of [the currency restrictions] against Cuba is in the national interest.”<sup>67</sup> In a more recent decision, *American Insurance Ass’n v. Garamendi*, the Court also considered the logic underlying the administration’s claim that a state law would interfere with a national approach to insurance claims arising out of the Holocaust, concluding that “[t]he approach taken [by the executive branch] serves to resolve . . . several competing matters of national concern” at issue in the dispute.<sup>68</sup>

The lower courts have also rejected any implication that the courts are required to follow executive branch guidance in cases impacting foreign affairs. As the Second Circuit explained in *Allied Bank International v. Banco Credito Agricola de Cartago*, the applicability of the act of state doctrine “may be guided but not controlled by the position, if any, articulated by the executive as to the applicability *vel non* of the doctrine to a particular set of facts. Whether to invoke the act of state doctrine is ultimately and always a judicial question.”<sup>69</sup> The Third Circuit promulgated a similar standard in *Environmental Tectonics v. W.S. Kirkpatrick, Inc.*, holding that the State Department’s legal conclusions regarding the act of state doctrine were “not controlling on the courts,” but that its “factual assessment of whether fulfillment of its responsibilities will be prejudiced by the course of civil litigation is entitled to substantial respect.”<sup>70</sup>

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63. *Id.* at 790 (Brennan, J., dissenting).

64. 468 U.S. 222, 238–39 (1984).

65. *Id.* at 243.

66. *Id.*

67. *Id.*

68. 539 U.S. 396, 422 (2003).

69. 757 F.2d 516, 521 n.2 (2d Cir. 1985).

70. 847 F.2d 1052, 1062 (3d Cir. 1988), *aff’d*, 493 U.S. 400 (1990).

Similarly, an executive branch claim that a case presents a political question is not controlling. In *Alperin v. Vatican Bank*, for instance, the Ninth Circuit stated that if “the State Department express[es] a view [on whether a case presents a political question], that fact would certainly weigh” in the court’s determination.<sup>71</sup> In *Ungaro-Benages v. Dresdner Bank AG*, the Eleventh Circuit found an ATS suit justiciable over the objections of the executive branch, noting, “This statement of interest from the executive is entitled to deference . . . . A statement of national interest alone, however, does not take the present litigation outside of the competence of the judiciary.”<sup>72</sup> The Second Circuit in *Kadic v. Karadzic* stated that “an assertion of the political question doctrine by the Executive Branch, entitled to respectful consideration, would not necessarily preclude adjudication.”<sup>73</sup>

In *City of N.Y. v. Permanent Mission of India to the U.N.*, the court rejected the executive branch’s views as too vague and speculative: “[W]e find none of the cited issues, presented in a largely vague and speculative manner, potentially severe enough or raised with the level of specificity required to justify presently a dismissal on foreign policy grounds.”<sup>74</sup> Other cases have indicated that the court would reject arbitrary or unsupported executive branch views. In *National Petrochemical Co. of Iran v. M/T Stolt Sheaf*, for instance, the court found there was “no indication that [the executive branch submission] is an arbitrary or ad hoc directive.”<sup>75</sup> Similarly, the court in *Matimak Trading Co. v. Khalily* recognized that a “court might boggle at an ‘ad hoc, pro hac vice’ directive of the government.”<sup>76</sup>

More recently, the Supreme Court has emphasized the importance of considering executive branch views in the context of the particular facts and parties involved in a case. In a case involving foreign sovereign immunity, the Court stated that “should the State Department choose to express its opinion on the implications of exercising jurisdiction over par-

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71. *Alperin v. Vatican Bank*, 410 F.3d 532, 556, 562 (9th Cir. 2005) (dismissing, under the political question doctrine, claims regarding war crimes committed by an enemy of the United States during World War II).

72. 379 F.3d 1227, 1236 (11th Cir. 2004). The claims were ultimately dismissed on comity grounds. *Id.* at 1237–40. See also *In Re Nazi Era Cases Against German Defendants Litig.*, 129 F. Supp. 2d 370, 380 (D.N.J. 2001) (noting that a “Statement of Interest is non-binding on the Court”).

73. 70 F.3d 232, 250 (2d Cir. 1995).

74. 446 F.3d 365, 377 n.17 (2d Cir. 2006), *aff'd*, *Permanent Mission of India to the United Nations v. City of New York*, 127 S. Ct. 2352 (2007).

75. 860 F.2d 551, 556 (2d Cir. 1988).

76. 118 F.3d 76, 82 (2d Cir. 1997), *abrogated on other grounds*, *JPMorgan Chase Bank v. Traffic Stream*, 536 U.S. 88 (2002).

ticular petitioners in connection with *their* alleged conduct, that opinion might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy.”<sup>77</sup> Referring to the possibility of affording “case-specific deference to the political branches,” the Court in *Sosa* noted that in some cases “there is a strong argument that federal courts should give serious weight to the Executive Branch’s view of the case’s impact on foreign policy.”<sup>78</sup>

#### B. The Standard for Deference

It is difficult to glean from these cases a standard that articulates the deference due to an executive branch statement that a case will have a negative impact on U.S. foreign policy. At minimum, such statements are not definitive; the decisions state that much repeatedly. The cases discussed in the prior section state that the courts will be “guided but not controlled” by executive branch views<sup>79</sup> and reserve the right to reject views that are “vague” or “speculative.”<sup>80</sup> However, in appropriate cases, the courts give “serious weight,”<sup>81</sup> “substantial respect,”<sup>82</sup> and “respectful consideration”<sup>83</sup> to executive branch views. Capturing the inadequacy of these formulations, Justice Brennan stated that executive branch views are entitled to “weight for the light they shed”<sup>84</sup> — a circular statement indicating nothing about how a court will determine whether those views shed any light at all on the issues facing the court.

As these cases show, even when following the recommendations of the executive branch, the Supreme Court has reviewed the logic of those views and the supporting evidence, and has noted the importance of indications that the views are well-founded.<sup>85</sup> We can draw further guidance by focusing on courts’ analyses of two facets of administration submissions. First, the executive branch generally informs the court of the sub-

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77. Republic of Austria v. Altmann, 541 U.S. 677, 702 (2004) (citation omitted).

78. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004).

79. *Allied Bank Int’l v. Banco Credito Agricola de Cartago*, 757 F.2d 516, 521 n.2 (2d Cir. 1985).

80. *City of New York v. Permanent Mission of India to the United Nations*, 446 F.3d 365, 377 n.17 (2d Cir. 2006), *aff’d*, *Permanent Mission of India to the United Nations v. City of New York*, 127 S. Ct. 2352 (2007).

81. *Sosa*, 542 U.S. at 733 n.21.

82. *Env’tl. Tectonics v. W.S. Kirkpatrick, Inc.*, 847 F.2d 1052, 1062 (3d Cir. 1988), *aff’d*, 493 U.S. 400 (1990).

83. *Kadic v. Karadzic*, 70 F.3d 232, 250 (2d Cir. 1995).

84. *First Nat’l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 790 (1972) (Brennan, J., dissenting).

85. See discussion of *Regan v. Wald*, 468 U.S. 222 (1984), and *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003), *supra* text accompanying notes 64–68.

stance of the relevant foreign policy interests. On this, the courts are unlikely to raise any challenges; setting U.S. government foreign policy is clearly within the constitutional powers of the political branches. Second, the submission must explain how the litigation would harm those policy interests. Here, the courts are more likely to question administration assertions and to reject them if they do not appear logical or well-reasoned.<sup>86</sup> Executive branch views merit deference when they are logical and reasonable, that is, when their conclusions are well-founded and supported by the evidence provided.<sup>87</sup>

The requirement that views must be reasonable in order to merit deference seems relatively uncontroversial, even to those who favor heightened judicial deference. For example, in a recent article about deference and foreign relations law, Professors Posner and Sunstein argued that the courts should afford heightened deference to the executive branch when interpreting legislation that touches upon foreign affairs; they noted repeatedly that their approach would—“of course”—only apply to reasonable executive branch views.<sup>88</sup> Similarly, in a dissenting opinion that was sharply critical of a district court’s failure to defer to administration views, Judge Kavanaugh also recognized this requirement: “It is not enough . . . for the Executive Branch merely to assert harm; rather, the harm must be explained—and explained reasonably.”<sup>89</sup> Of course, as in any evaluation of reasonableness, there will inevitably be differences of opinion. As a case in point, Judge Kavanaugh finds reasonable an executive submission I find to be patently unreasonable,<sup>90</sup> as discussed in Part IV.

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86. For a similar effort to develop a standard to guide deference see Margarita S. Clarens, *Deference, Human Rights and the Federal Courts: The Role of the Executive in Alien Tort Statute Litigation*, 17 DUKE J. COMP. & INT’L L. 415, 431 (2007) (stating that a reasonable explanation should include “the specific and foreseeable” harms that the litigation will inflict).

87. The two halves of this approach could collapse into one: one definition of “reasonable” is “supported or justified by fact or circumstance.” Merriam-Webster’s Dictionary of Law, Reasonable, <http://dictionary.reference.com/browse/reasonable>.

88. Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170, 1198 (2007) (“If the executive’s interpretation is unreasonable, of course, it will be invalid . . .”). Further refining the rule, Professors Jinks and Katyal attempt to add some traction to the standard, focusing on whether the executive branch has engaged in a “deliberative process” producing “reasoned analysis.” Derek Jinks & Neal Kuma Katyal, *Disregarding Foreign Relations Law*, 116 YALE L.J. 1230, 1247–48 (2007).

89. Doe v. Exxon Mobil Corp., 473 F.3d 345, 362 (D.C. Cir. 2007) (Kavanaugh, J., dissenting).

90. *Id.*

These different factors combine to contribute to a proposed standard by which to evaluate administration views. In order to merit deference, an administration submission must (1) articulate the relevant policy interests; (2) explain how the litigation could harm those interests; (3) tie the anticipated harm to one of the recognized foreign policy justiciability doctrines; and finally, (4) the explanations offered must be reasonable, drawing conclusions that are well-founded and supported by the facts.

The reported cases indicate that, as of 2002, courts generally did defer to the executive branch's views that a case would have an impact on foreign policy. In 2002, a district court judge wrote: "[P]laintiffs have not cited, and the court has not found, a single case in which a court permitted a lawsuit to proceed in the face of an expression of concern such as that communicated by the State Department here."<sup>91</sup> There may be unpublished cases prior to that date in which the court disregarded the views of the State Department, or published cases in which the court reached its decision without mentioning that the State Department had filed an objection. Nevertheless, it seems safe to conclude that, prior to the administration of George W. Bush, the courts rarely rejected an executive branch recommendation that a case should be dismissed under one of the justiciability doctrines because of its foreign policy implications.

In contrast, as developed below, the Bush administration's submissions in corporate-defendant ATS cases were rejected by the courts more often than they were followed. Those submissions combined many of the administration's more extreme views of the role of the executive branch in litigation touching on foreign affairs. The submissions also included exaggerated claims that human rights litigation would have catastrophic results. The courts have been remarkably consistent in rebutting these concerns. After a review of prior executive branch submissions in ATS litigation in Part III, Part IV analyzes the courts' remarkably skeptical reception of Bush administration submissions stating that corporate-defendant litigation would harm U.S. foreign policy interests.

### III. EXECUTIVE SUBMISSIONS IN ATS CASES: THE FIRST TWENTY YEARS

Executive branch responses to litigation under the ATS from 1980 through 2000 varied from the strong support of the administrations of Presidents Jimmy Carter and Bill Clinton to the mixed views of the administrations of Presidents Ronald Reagan and George H.W. Bush.

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91. *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116, 1192 (C.D. Cal. 2002).

Before ruling on the *Filártiga* appeal, the Second Circuit asked the State Department for its views on the case.<sup>92</sup> In a joint submission on behalf of the Justice and State Departments, the Carter administration endorsed the plaintiffs' interpretation of the ATS, agreeing that the statute authorized the federal courts to assert jurisdiction over claims for violations of modern-day, evolving international law norms.<sup>93</sup> Far from raising concerns about potential interference with the executive branch's foreign affairs powers, the Carter administration concluded that ATS cases would strengthen U.S. foreign policy goals, even though "such suits unquestionably implicate foreign policy considerations."<sup>94</sup> The brief recognized that the judiciary plays an important role in many issues that affect foreign affairs: "[N]ot every case or controversy which touches foreign relations lies beyond judicial cognizance. Like many other areas affecting international relations, the protection of fundamental human rights is not committed exclusively to the political branches of government."<sup>95</sup> The administration concluded that if human rights litigation in U.S. courts were limited to cases in which "an individual has suffered a denial of rights guaranteed to him as an individual by customary international law," there would be "little danger that judicial enforcement will impair our foreign policy efforts."<sup>96</sup>

The next three administrations changed course several times. In *Trajano v. Marcos*, the Reagan administration filed a brief in support of the estate of Ferdinand Marcos, the former dictator of the Philippines, which argued that ATS jurisdiction included only those cases in which the U.S. government might in some way be held responsible for a violation of international law.<sup>97</sup> However, in a submission to the Supreme Court in *Tel-Oren v. Libyan Arab Republic*,<sup>98</sup> the Reagan administration expressed little concern about the *Filártiga* precedent and opposed Su-

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92. Memorandum for the United States as Amicus Curiae at 1, *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980) (No. 79-6090), 1980 WL 340146.

93. *Id.* at 4.

94. *Id.* at 22–23.

95. *Id.* at 22 (citations omitted).

96. *Id.*

97. The administration defined those as cases in which (1) the tortfeasor was subject to U.S. jurisdiction at the time the tort was committed; (2) the United States could be accountable for the action; (3) Congress had passed a criminal statute defining the conduct as an offense against the law of nations; and (4) the federal statute provided a private right of action. Brief for the United States as Amicus Curiae, *Trajano v. Marcos* at 9–10, 26–27, 878 F.2d 1439 (9th Cir. 1989) (table disposition) (Nos. 86-2448, 86-15039).

98. 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985).

preme Court review.<sup>99</sup> The administration argued that a grant of certiorari would be premature because of the divided opinions of the D.C. Circuit in that case and the possibility that the lower courts might clarify the “complex issues of federal jurisdiction, international law and statutory construction . . . without such review.”<sup>100</sup>

The administration of President George H.W. Bush expressed opposition to the *Filártiga* doctrine in testimony before Congress,<sup>101</sup> but did not file any submissions in ATS cases during its four years in office. The Torture Victim Protection Act (“TVPA”) was enacted during that administration.<sup>102</sup> The statute creates an explicit cause of action for torture and extrajudicial executions. Despite misgivings about the impact of human rights litigation, President George H.W. Bush signed the TVPA and offered strong support for the goals of the statute:

These potential dangers, however, do not concern the fundamental goals that this legislation seeks to advance. In this new era, in which countries throughout the world are turning to democratic institutions and the rule of law, we must maintain and strengthen our commitment to ensuring that human rights are respected everywhere.<sup>103</sup>

Under President Bill Clinton, the executive branch once again supported human rights litigation and the *Filártiga* interpretation of the ATS. In *Kadic v. Karadzic*, the Departments of State and Justice filed a joint Statement of Interest supporting federal jurisdiction over human rights claims and thereby rejecting the limitations proposed by the Reagan administration in *Marcos*.<sup>104</sup> In *Doe v. Unocal*, in response to a

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99. Brief for the United States as Amicus Curiae at 19, *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.D.C. 1984) (No. 83-2052).

100. *Id.* at 9.

101. During hearings on the Torture Victim Protection Act, administration representatives argued that the statute would improperly assert jurisdiction over actions which have no connection to the United States, risk provoking retaliatory lawsuits against U.S. officials, and involve individual litigants in foreign policy decisions. See *Torture Victim Protection Act of 1989: Hearing on S. 1629 and H.R. 1662 Before the Subcomm. on Immigration and Refugee Affairs of the S. Judiciary Comm.*, 101st Cong. 11–16 (1990) (statement of John O. McGinnis, Deputy Assistant Attorney General, Dep’t of Justice) & 22–29 (1990) (statement of David P. Stewart, Assistant Legal Advisor, Dep’t of State).

102. Torture Victim Protection Act of 1991, Pub. L. 102-256, 106 Stat. 73 (codified as a note to the Alien Tort Statute, 28 U.S.C. § 1330).

103. Statement on Signing the Torture Victim Protection Act of 1991, 28 WEEKLY COMP. PRES. DOC. 465, 466 (Mar. 12, 1992).

104. Statement of Interest of the United States at 1–2, *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) (Nos. 94-9035, 94-9069).

request from the district court, the Clinton administration stated that the litigation would not interfere with foreign affairs.<sup>105</sup>

#### IV. THE BUSH ADMINISTRATION'S EXECUTIVE SUBMISSIONS AND THE JUDICIAL RESPONSE

The administration of President George W. Bush has adamantly opposed ATS litigation and the *Filártiga* doctrine. In an amicus brief filed in the appeal of *Doe v. Unocal*, the Department of Justice urged the Ninth Circuit to overrule several prior decisions adopting the *Filártiga* doctrine and argued that ATS claims interfered with “important foreign policy interests.”<sup>106</sup> The administration submitted similar arguments in support of the petitioner in *Sosa v. Alvarez-Machain*, asserting that judicial consideration of any ATS human rights claim would be “incompatible” with the political branches’ constitutional foreign affairs powers and thus would violate the constitutional separation of powers.<sup>107</sup> In rejecting this argument, the *Sosa* Court declined to adopt the executive branch’s interpretation of the ATS without even referring to the sweeping constitutional claims in the administration’s brief.

After these unsuccessful efforts to convince the courts to reject ATS litigation in toto, the administration sought to significantly restrict its reach, particularly as applied to corporate defendants.

##### *A. The Bush Administration’s Opposition to Corporate Cases*

After the Supreme Court decision in *Sosa*, the Bush administration relied on several specific arguments aimed at blocking corporate-defendant cases. The administration argued that the courts should not permit claims by aliens for events that occur outside of the United States and should not recognize aiding and abetting liability under the ATS.<sup>108</sup> In addition,

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105. Statement of Interest of the United States, *Nat'l Coal. Gov't of the Union of Burma v. Unocal, Inc.*, 176 F.R.D. 329 (C.D. Cal. 1997) (No. 96-6112), reprinted as Exhibit A, *Nat'l Coal. Gov't*, 176 F.R.D. at 361–62.

106. Brief for the United States as Amicus Curiae at 4, *Doe v. Unocal Corp.*, 403 F.3d 708 (9th Cir. 2005) (Nos. 00-56603, 00-56628). See also Supplemental Brief for the United States as Amicus Curiae at 11, *Doe v. Unocal Corp.*, 403 F.3d 708 (9th Cir. 2005) (Nos. 00-56603, 00-56628). Submitted after the Supreme Court decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), the brief argued that imposing aiding and abetting liability “could interfere with the ability of the U.S. government to employ the full range of foreign policy options when interacting with regimes with oppressive human rights practices.”

107. Brief for the United States as Respondent Supporting Petitioner at 31–40, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (No. 03-339).

108. See, e.g., Brief for the United States as Amicus Curiae at 2–3, *Khulumani v. Barclay National Bank, Ltd.*, 504 F.3d 254 (2d Cir. 2007) (Nos. 05-2141, 05-2326).

the submissions asserted broadly that claims against corporations would deter investment and trade, triggering economic downturns that could have devastating consequences for the United States and its allies.<sup>109</sup>

In *Doe v. Exxon Mobil Corp.*, for example, plaintiffs alleged that Exxon paid and directed members of the Indonesian military to commit acts of torture and murder in the course of protecting natural gas facilities in Aceh, Indonesia.<sup>110</sup> The Department of State filed a letter stating that the lawsuit could endanger key U.S. interests, asserting that because Indonesia would perceive the lawsuit as “interference in its internal affairs,” it might decrease cooperation with the United States on a range of issues, including terrorism.<sup>111</sup> The letter claimed that the case would lead to decreased foreign investment in Indonesia and curtail investment opportunities for U.S. businesses.<sup>112</sup> The result would be to undermine Indonesia’s economic and political stability and the security of the entire region, thereby “risk[ing] a potentially serious adverse impact on significant interests of the United States, including interests related directly to the on-going struggle against international terrorism.”<sup>113</sup>

In a similar tone, the administration objected to *Mujica v. Occidental Petroleum Corp.*, a lawsuit seeking to hold the defendant liable for the bombing of a village by the Colombian military.<sup>114</sup> The administration expressed concern that such lawsuits could deter U.S. investment in Colombia, causing a downturn in Colombia’s economy and harming U.S. interests in Colombia and the region:

[S]uch downturns could damage the stability of Colombia, the Colombian government’s U.S.-supported campaigns against terrorists and narcotics traffickers, regional security, our efforts to reduce the amount of drugs that reach the streets of the United States, promotion of the rule of law and human rights in Colombia, and protection of U.S. persons, government facilities, and investments. Finally, reduced U.S. investment in Colombia’s oil industry may detract from the vital U.S.

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109. See, e.g., Letter from William H. Taft, Legal Advisor, Dep’t of State at 2, *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1134 (C.D. Cal. 2005) (No. 03-2860).

110. *Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 22 (D.D.C. 2005), *petition for cert. filed*, 76 U.S.L.W. 3050 (July 20, 2007) (No. 07-81).

111. Letter from William H. Taft, Legal Advisor, Dep’t of State at 3, *Doe v. Exxon Mobil*, 393 F. Supp. 2d 20 (D.D.C. 2005) (No. 01-1357).

112. *Id.* at 3–4.

113. *Id.* at 1.

114. *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1168–69 (C.D. Cal. 2005) (appeal pending).

policy goal of expanding and diversifying our sources of imported oil.<sup>115</sup>

Administration views are discussed in more detail in the following section, along with the judicial responses.

#### *B. Judicial Rejection of the Bush Administration Views*

The judiciary has been remarkably skeptical of the administration's views in corporate-defendant cases. Leaving aside cases arising out of World War II, the executive branch has submitted views in ten ATS corporate-defendant cases.<sup>116</sup> Although each of the cases involves distinguishable facts and slightly different U.S. government approaches, the scorecard is nevertheless striking: only two claims have been dismissed in response to the administration's foreign policy concerns, while one has been dismissed on other grounds, five have been permitted to proceed,<sup>117</sup> one is still pending,<sup>118</sup> and one settled before the court considered the administration's views.<sup>119</sup> Moreover, one of the two cases in which the claims were dismissed on foreign policy grounds involved a U.S. government contractor.<sup>120</sup> Cases involving the U.S. government are the most likely to trigger concerns about judicial interference with the

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115. Letter from William H. Taft, Legal Advisor, Dep't of State at 2, *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1134 (C.D. Cal. 2005) (No. 03-2860).

116. For a detailed description of the ten submissions, see Appendix C.

117. The administration fared slightly better in the district courts than in the circuit courts: In two cases, the district courts granted motions to dismiss, which were then overturned on appeal. *See Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116 (C.D. Cal. 2002), *rev'd by* 487 F.3d 1193 (9th Cir. 2007), *reh'g granted*, 499 F.3d 923 (9th Cir. 2007); *In re S. Afr. Apartheid Litig.*, 346 F. Supp. 2d 538 (S.D.N.Y. 2004), *rev'd*, *Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007), *aff'd due to lack of a quorum sub nom.*, *American Isuzu Motors, Inc. v. Ntsebeza*, 2008 WL 117862, 76 U.S.L.W. 3405 (May 12, 2008) (No. 07-919).

118. In the pending action, a state court case, *Bowoto v. Chevron Corp.*, the judge asked the State Department's views as to the impact of the case on U.S. foreign policy. Statement of Interest of the United States at 1, *Bowoto v. Chevron, Corp.*, No. 03-417580 (Super. Ct. Cal. May 29, 2007). The State Department submission addresses only a narrow issue, asking that the court refrain from granting injunctive relief that would require that the defendant comply with the voluntary corporate code of conduct developed by the executive branch. *Id.* at 2, 5-7. The court has not ruled on that issue. In a parallel federal court action, the judge declined defendant's request that the court seek the executive branch's views on the litigation. *Bowoto v. ChevronTexaco Corp.*, No. 99 Civ. 2506, at 3-5 (N.D. Cal. July 30, 2004) (Order Denying Motion for Court to Request Views).

119. For citations to the various decisions in *Doe v. Unocal* and the procedural history of the case, see *supra* note 32.

120. *Corrie v. Caterpillar, Inc.*, 503 F.3d 974 (9th Cir. 2007) (involving a U.S.-government-approved contract to sell bulldozers to Israel).

powers of the executive branch. In another government contractor case, *In re Agent Orange*, the district court rejected most of the administration's arguments and held that the claims were justiciable, but found that the acts alleged did not constitute a war crime at the time they occurred.<sup>121</sup> Thus, the courts have accepted the executive branch's views in only one of the corporate-defendant cases that did not involve a U.S. government contractor. That case, *Mujica v. Occidental*, is still pending on appeal to the Ninth Circuit.<sup>122</sup> This record is all the more remarkable considering that a district court judge in 2002 stated that she was unable to find a single case in which the courts had allowed a case to proceed in the face of a formal statement of concern from the State Department.<sup>123</sup>

The five cases in which the courts have permitted at least some claims to proceed over the objections of the administration are worth exploring in more detail.

#### 1. *Arias v. DynCorp*

In *Arias v. DynCorp*,<sup>124</sup> in which a claim was brought for injuries caused when pesticides sprayed in Colombia drifted across the border into Ecuador, the executive branch submitted a detailed, eleven-page declaration stating in strong terms that the litigation "pose[d] grave risks to U.S. national security interests, foreign policy objectives and diplomatic relations in the Andean Region."<sup>125</sup> The submission offers a stark warning about the dangers of the litigation:

The *Arias* plaintiffs challenge an aerial drug eradication program that has been repeatedly authorized by the executive and legislative branches after extensive deliberation as a key element in U.S. counter-narcotics strategy. Any disruption of this program would cripple United States efforts to stem the flow of narcotics into this country, provide a financial boon to international terrorist organizations that have targeted U.S. interests, and significantly undermine the prospects of strong and

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121. *In re Agent Orange Prod. Liab. Litig.*, 373 F. Supp. 2d 7 (E.D.N.Y. 2005), *aff'd*, 517 F.3d 104 (2d Cir. 2008) (dismissing a suit by Vietnamese victims of herbicides used by the U.S. government during the Vietnam War after finding that the alleged actions did not violate international law norms recognized at that time).

122. *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1194–95 (C.D. Cal. 2005).

123. *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116, 1192 (C.D. Cal. 2002).

124. 517 F. Supp. 2d 221 (D.D.C. 2007).

125. Declaration of Rand Beers, Assistant Secretary of State for the Bureau of International Narcotics and Law Enforcement Affairs Regarding Potential Impact of *Arias* Litigation on the United States National Security and Foreign Policy Interests at 10, *Arias v. DynCorp*, 517 F. Supp. 2d 221 (D.D.C. 2007) (No. 01-1980).

stable relations between the United States and Colombia and other Andean nations. The stakes are high.<sup>126</sup>

Nevertheless, the court refused to dismiss the case, holding that the claim did not challenge executive branch foreign policies or the implementation of those policies, because “the intended means of executing the policy in this case did not include the acts challenged here, which plaintiffs allege were specifically prohibited by the plan.”<sup>127</sup>

## 2. *Doe v. Exxon Mobil Corp.*

In *Doe v. Exxon Mobil Corp.*, Indonesian villagers sued for injuries inflicted by a company security force comprised of members of the Indonesian military.<sup>128</sup> The State Department stated that the lawsuit would lead Indonesia to decrease cooperation on counter-terrorism initiatives<sup>129</sup> and could undermine the country’s economic and political stability, affecting the security of the entire region and thereby “risk[ing] a potentially serious adverse impact on significant interests of the United States, including interests related directly to the on-going struggle against international terrorism.”<sup>130</sup> Although the district court dismissed the federal law claims, it refused to dismiss the state common law tort claims, holding that carefully controlled litigation and discovery would avoid interference with Indonesia’s sovereign interests.<sup>131</sup> Defendants sought a writ of mandamus from the D.C. Circuit, which the Circuit denied.<sup>132</sup>

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126. *Id.* at 10–11.

127. 517 F. Supp. 2d at 225. The court permitted the plaintiffs to depose the administration official who submitted the declaration. Deposition of Rand Beers, Arias v. DynCorp, 517 F. Supp. 2d 221 (D.D.C. 2007) (No. 01-1980).

128. *Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 22 (D.D.C. 2005).

129. Letter from William H. Taft, Legal Advisor, Dep’t of State at 3, *Doe v. Exxon Mobil*, 393 F. Supp. 2d 20 (D.D.C. 2005) (No. 01-1357).

130. *Id.* at 1. The letter observed, however, that “[its] assessment [was] ‘necessarily predictive and contingent on how the case’” proceeded, including the “intrusiveness of discovery” and the extent to which the case required “judicial pronouncements on the official actions of the [Government of Indonesia] with respect to the conduct of its military activities in Aceh.” *Id.* at 2 n.1.

131. 393 F. Supp. 2d at 28–29. The court accepted that adjudication of the international law claims of genocide and crimes against humanity would require an assessment of “whether the Indonesian military was engaged in a plan allegedly to eliminate segments of the population,” which “would be an impermissible intrusion in Indonesia’s internal affairs” and would “require[] the court to evaluate the policy or practice of the foreign state,” and dismissed those claims, while permitting the state law claims to proceed. *Id.* at 25, 28–29.

132. *Doe v. Exxon Mobil Corp.*, 473 F.3d 345, 354 (D.C. Cir. 2007), *petition for cert. filed*, 76 U.S.L.W. 3050 (July 20, 2007) (No. 07-81). Judge Kavanaugh, who served as a

*3. Khulumani v. Barclay National Bank, Ltd.*

In *Khulumani v. Barclay National Bank, Ltd.*, South Africans filed three lawsuits against dozens of corporations for damages stemming from the defendants' operations in South Africa during the Apartheid regime.<sup>133</sup> The executive branch filed a Statement of Interest in the district court, accompanied by a letter from the South African government asserting that adjudication of these cases would interfere with South Africa's reconciliation process.<sup>134</sup> The case was mentioned repeatedly in the Supreme Court briefing in the *Sosa* case, with the U.S. government, Sosa himself, and the amici writing in his support all portraying the case as an example of the foreign policy problems triggered by human rights litigation.<sup>135</sup> The *Sosa* decision included a footnote mentioning the possibility of applying "a policy of case-specific deference to the political branches" to the Apartheid cases:

The Government of South Africa has said that these cases interfere with the policy embodied by its Truth and Reconciliation Commission, which "deliberately avoided a 'victors' justice' approach to the crimes of apartheid and chose instead one based on confession and absolution, informed by the principles of reconciliation, reconstruction, reparation and goodwill." . . . The United States has agreed. . . . In such cases, there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy.<sup>136</sup>

The district court dismissed because it found that aiding and abetting liability was not actionable under the ATS.<sup>137</sup> On appeal, the administration submitted a brief urging that the Second Circuit affirm the lower court's rejection of aiding and abetting liability and arguing against recognition of extraterritorial claims under the ATS.<sup>138</sup> The Second Circuit reversed the dismissal, holding that aiding and abetting liability does trigger ATS jurisdiction, and remanded to the district court with instruc-

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legal advisor to President Bush before his appointment to the D.C. Circuit, filed a strongly worded dissent. *Id.* at 357 (Kavanaugh, J., dissenting).

133. 504 F.3d 254 (2d Cir. 2007), *aff'd due to lack of a quorum sub nom.*, American Isuzu Motors, Inc. v. Ntsebeza, 2008 WL 117862, 76 U.S.L.W. 3405 (May 12, 2008) (No. 07-919).

134. *Id.* at 298 (Korman, J., concurring in part and dissenting in part).

135. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004).

136. *Id.*

137. *Khulumani*, 504 F.3d at 260.

138. Brief of the United States as Amicus Curiae at 3–4, *Khulumani v. Barclay Nat'l Bank, Ltd.*, 504 F.3d 254 (2d Cir. 2007) (Nos. 05-2141, 05-2326).

tions to permit plaintiffs to file an amended complaint.<sup>139</sup> Given the likelihood of an amended complaint, the court refused to reach the political question issues, rejecting the argument that the Supreme Court's *Sosa* footnote required dismissal of the suit.<sup>140</sup> In their separate concurring opinions, neither of the two judges in the majority even discussed the executive branch's argument that recognition of aiding and abetting liability would constitute an unconstitutional interference with the foreign policy powers of the executive branch. The dissent argued that the panel should have dismissed the claim as a political question, based on the objections of the U.S. and South African governments and the concerns expressed by the Supreme Court.<sup>141</sup>

#### *4. Presbyterian Church of Sudan v. Talisman Energy, Inc.*

In *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, residents of southern Sudan sued a Canadian corporation, seeking compensation for genocide, crimes against humanity, and other violations of international law.<sup>142</sup> The State Department submitted a letter to the court that attached a diplomatic note from the Canadian government stating that the litigation infringed on the foreign relations of Canada.<sup>143</sup> The U.S. letter stated that the State Department shared the Canadian government's concerns and urged the court to take a narrow view of the ATS in order to avoid such conflicts.<sup>144</sup> The letter also stated the department's concerns about the dangers of taking an expansive interpretation of ATS jurisdiction.<sup>145</sup> The district court rejected the views of both the U.S. and Canadian governments, finding the Canadian government's expressed concerns unpersuasive because there was no showing that the pending litigation would interfere with Canada's foreign policy:

While this Court may not question either the accuracy of the description of Canada's foreign policy in its Letter, or the wisdom and effectiveness of that foreign policy, it remains appropriate to consider the degree to which that articulated foreign policy applies to this litigation.

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139. 504 F.3d at 261.

140. *Id.* at 262–63, 263 n.14.

141. 504 F.3d at 295–98 (Korman, J., concurring in part, dissenting in part) (discussing *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004)).

142. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633 (S.D.N.Y. 2006) (granting motion for summary judgment) (appeal pending).

143. Statement of Interest of the United States at 2, *Presbyterian Church of Sudan v. Talisman Energy Inc.*, 453 F. Supp. 2d 633 (S.D.N.Y. 2006) (No. 01-9882).

144. Letter from William H. Taft, Legal Advisor at 2–3, *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633 (S.D.N.Y. 2006) (No. 01-9882).

145. *Id.* at 3.

. . . While there is no requirement that a government's letter must support its position with detailed argument . . . dismissal is only warranted as a matter of international comity where the nexus between the lawsuit and that foreign policy is sufficiently apparent and the importance of the relevant foreign policy outweighs the public's interest in vindicating the values advanced by the lawsuit. Even giving substantial deference to the Canada Letter, Talisman has not shown that dismissal of this action is appropriate.<sup>146</sup>

The case was later dismissed on a motion for summary judgment; an appeal of that dismissal is currently pending.

#### 5. *Sarei v. Rio Tinto, PLC*

In *Sarei v. Rio Tinto, PLC*, residents of Papua New Guinea brought an ATS action against an international mining company alleging international law violations in connection with the operation of a copper mine.<sup>147</sup> The State Department filed a Statement of Interest ("SOI") stating that the litigation "would risk a potentially serious adverse impact on the peace process [in Papua New Guinea], and hence on the conduct of our foreign relations."<sup>148</sup> The submission attached a letter from the government of Papua New Guinea stating its objections to the litigation.<sup>149</sup> The district court dismissed the claim in deference to the views of the executive branch.<sup>150</sup> On appeal, the Ninth Circuit reversed.<sup>151</sup> The court noted that, although it would give the government's views "serious weight," those views would not be controlling: "Ultimately, it is our responsibility to determine whether a political question is present, rather than to dismiss on that ground simply because the Executive Branch expresses some hesitancy about a case proceeding."<sup>152</sup> The court concluded that the case did not trigger any of the factors requiring dismissal under the political question doctrine:

The State Department explicitly did *not* request that we dismiss this suit on political question grounds, and we are confident that proceeding does not express any disrespect for the executive, even if it would pre-

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146. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 2005 WL 2082846, at \*6–7 (S.D.N.Y. Aug. 30, 2005).

147. *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1198 (9th Cir. 2007), *reh'g granted*, 499 F.3d 923 (9th Cir. 2007).

148. Letter from William H. Taft, IV, Legal Advisor, Dep't of State at 2, *Sarei v. Rio Tinto*, 221 F. Supp. 2d 1116 (C.D. Cal. 2002) (No. 00-11695).

149. *Id.* at 2–3.

150. *Sarei*, 487 F.3d at 1199.

151. *Id.* at 1297.

152. *Id.* at 1224.

fer that the suit disappear. Nor do we see any “unusual need for unquestioning adherence” to the SOI’s nonspecific invocations of risks to the peace process. And finally, given the guarded nature of the SOI, we see no “embarrassment” that would follow from fulfilling our independent duty to determine whether the case should proceed. We are mindful of *Sosa*’s instruction to give “serious weight” to the views of the executive, but we cannot uphold the dismissal of this lawsuit solely on the basis of the SOI.<sup>153</sup>

### C. Judicial Scrutiny of Administration Claims in ATS Cases

Although each of these lawsuits raises distinct issues, it is striking that the court in each case ignored or rejected the argument that the very existence of the lawsuit interfered with foreign policy interests. The courts analyzed the administration’s submissions through the lens of one or more of the three doctrines governing decisions to dismiss based on foreign affairs concerns and applied the requirements of those doctrines with great care. The decisions confirm that administration concerns about the foreign policy implications of a lawsuit do not necessarily require dismissal. Moreover, in these cases, the courts chose to parse the logic of the administration’s claims, often concluding that the concerns that the executive branch expressed did not support the conclusion that the litigation would interfere with executive branch foreign affairs powers. Do these holdings comply with the Supreme Court’s guidance? Yes, in that the Court, in the cases discussed above, has stated that the courts must review the factual and logical underpinnings of the executive branch’s views. If not, the independence of the judicial branch would be undermined, with the courts relegated to the unconstitutional role of merely following the executive branch’s instructions in any case touching upon foreign affairs.

Are these holdings consistent with the standard I developed from past cases? Yes, in that the executive branch submissions fail the test on multiple grounds. The first prong of the test requires that the administration articulate the relevant policy interest. This prong is the least problematic: the courts have accepted the executive branch’s stated interest in fighting

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153. *Id.* at 1206–07. The Ninth Circuit granted a rehearing en banc, *id.* at 1196–97, but did not consider the issues raised in the State Department letter because the government of Papua New Guinea had reversed its position on the litigation and the executive branch had informed the court that the litigation no longer raised foreign policy concerns. See Brief for the United States as Amicus Curiae Supporting Panel Rehearing or Rehearing En Banc at 14 n.3, *cited in Sarei*, 487 F.3d at 1206 n.14 (“[A]fter noting that the SOI was based on concerns in 2001 ‘which are different from the interests and circumstances that exist today’ the government expressly declines to endorse a dismissal of this case based on the SOI.”).

terrorism and drug trafficking and promoting the stability of allied governments. The second prong, however, requires that the administration explain how the litigation could harm those interests, and the courts have repeatedly found that the corporate-defendant submissions fail this step. In *Arias v. DynCorp*, for example, the court concluded that that acts challenged in the lawsuit—spraying pesticides in the wrong country—would not contribute to the executive branch's stated foreign policy goals.<sup>154</sup> Similarly, the *Exxon Mobil* court found that the state claims could continue without threatening the policy interests asserted by the administration.<sup>155</sup> And in *Talisman*, the court stated explicitly that the Canadian government had not demonstrated a nexus between the lawsuit and that nation's foreign policy.<sup>156</sup>

The executive branch submissions analyzed here also fail the third prong in that they do not link the harms they discuss to the recognized justiciability doctrines. They repeatedly overstate those doctrines, claiming that lawsuits should be dismissed because of any foreign policy implications, rather than applying the strict standards set forth by the Supreme Court precedents.

Finally, the submissions fail the last prong, the requirement that the arguments must be reasonable and draw conclusions that are well-founded and supported by the facts. Although the courts do not explicitly label the executive branch submissions as unreasonable or not well-founded, they repeatedly criticize the failure to connect the reality of the litigation at issue with the dangers predicted by the administration. They find that the alleged consequences lack supporting evidence. Indeed, the conclusion seems inevitable: the courts do not defer to these administration views because they are only obligated to defer to the “reasonable” views of the executive branch—and the courts find the views of the Bush administration to be unreasonable.

#### V. THE LIMITS OF DEFERENCE: JUDICIAL REJECTION OF UNREASONABLE EXECUTIVE BRANCH VIEWS

This review of judicial responses to Bush administration views reveals that, in a remarkable reversal of past practice, the federal courts have permitted a string of lawsuits to proceed despite the Bush administration's assertions that the cases would interfere with U.S. foreign policy interests. The startling shift in the courts' responses to executive submis-

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154. *Arias v. DynCorp*, 517 F. Supp. 2d 221, 225–26 (D.D.C. 2007).

155. *Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 28–29 (D.D.C. 2005).

156. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633, 682–83 (S.D.N.Y. 2005).

sions indicates that the courts do not find the submissions convincing: the Bush administration has failed the reasonableness test. Several shortcomings in the Bush administration approach led the judiciary to refuse to defer to administration views: excessive claims for deference, exaggerated predictions of harm, ill-supported economic claims, and a perceived bias towards corporate interests.

#### *A. Excessive Claims for Deference*

The Bush administration overstated its powers, pushing for deference in areas traditionally viewed by the courts as within their purview. The Justice Department entered the ATS debate with a brief arguing that ATS litigation as a whole interfered with executive branch foreign affairs powers—and claiming that the courts should defer to this interpretation of the statute.<sup>157</sup> The administration also claimed the right to dictate to the courts the proper interpretation of the treaties and customary international law norms at issue in ATS cases.<sup>158</sup> In *Sosa*, the Supreme Court rejected the administration's views about the proper interpretation of the ATS and declined to defer to its views of the treaties and customary international law at issue, thus rejecting both the substance of the administration's arguments and its claim to deference on these issues.<sup>159</sup> The Supreme Court and the lower courts rejected similar deference claims in other high profile cases.<sup>160</sup> These excessive claims to deference have undermined the administration's credibility.

#### *B. Exaggerated Predictions of Harm*

The administration relied on arguments that were of questionable validity—or even patently absurd. In a globalized world in which litigants and courts have independent access to information about foreign governments and the role of the United States, the courts can more easily dismiss such arguments.

In corporate-defendant ATS cases, the administration claimed that the litigation could trigger instability that might impact a wide range of vital U.S. interests, including efforts to combat terrorism and the drug trade

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157. See Brief for the United States as Amicus Curiae at 19–20, Doe v. Unocal Corp., 403 F.3d 708 (9th Cir. 2005) (Nos. 00-56603, 00-56628).

158. *Id.*

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

160. See, e.g., *Republic of Austria v. Altmann*, 541 U.S. 677 (2004); *Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007), *aff'd due to lack of a quorum sub nom.*, *American Isuzu Motors, Inc. v. Ntsebeza*, 2008 WL 117862, 76 U.S.L.W. 3405 (May 12, 2008) (No. 07-919).

and to promote regional security around the world.<sup>161</sup> At a time when lawsuits are routinely filed against multinational corporations for many different claims, it seems preposterous to assert that a single lawsuit could trigger such exaggerated harms.

In *Doe v. Exxon Mobil*, for example, plaintiffs sought compensation for murder, torture, sexual assault, battery, false imprisonment, and other torts committed by the defendant's security forces.<sup>162</sup> The State Department submission starts with the reasonable assertion that Indonesia might view the lawsuit as an “‘interference’ in its internal affairs.”<sup>163</sup> It then suggests that Indonesia might respond by curtailing cooperation with the United States, thereby undermining U.S. counter-terrorism initiatives.<sup>164</sup> The letter also suggests that the litigation might worsen economic conditions in Indonesia, “breed[ing] instability” that could “create problems ranging from interruption in vital shipping lanes, to refugee outflows, to a new home for terrorists”<sup>165</sup> and could also “impact on the security” of Australia, Thailand, and other countries in the region.<sup>166</sup> An economic downturn in Indonesia might also make it difficult for the government to hire the professional personnel it needs to make progress in “promoting regional stability, countering ethnic and sectarian violence, [and] combating piracy, trafficking of persons, smuggling, narcotics trafficking, and environmentally unsustainable levels of fishing and logging.”<sup>167</sup>

Plaintiffs responded to this letter with an expert affidavit debunking the administration’s parade of horrors.<sup>168</sup> The affidavit noted that since Indonesia cooperates with the United States in fighting terrorism “because it is in its own national interest to do so,” it has continued to do so despite repeated U.S. criticism of its human rights record.<sup>169</sup>

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161. See *Doe v. Exxon Mobil*, 393 F. Supp. 2d 20, 22–23 (D.D.C. 2005).

162. *Id.* at 24.

163. Letter from William H. Taft, Legal Advisor, Dep’t of State, at 3, *Doe v. Exxon Mobil*, 393 F. Supp. 2d 20 (D.D.C. 2005) (No. 01-1357).

164. *Id.*

165. *Id.* at 4.

166. *Id.* at 5.

167. *Id.*

168. Affidavit of Harold Hongju Koh, *Doe v. Exxon Mobil*, 393 F. Supp. 2d 20 (D.D.C. 2005) (No. 01-1357).

169. Plaintiffs offered this alternative view through an affidavit from Harold Hongju Koh, the Assistant Secretary of State for Democracy, Human Rights, and Labor in the Clinton Administration. *Id.* at 5 (stating that both the executive branch and Congress have “consistently maintained that an honest and public scrutiny of Indonesia’s human rights record that truthfully chronicles military and police abuses does not inappropriately intrude into Indonesian sovereignty or interfere with United States foreign policy toward Indonesia”).

Similarly, *Mujica v. Occidental Petroleum Corp.* involved a raid on a village, during which cluster bombs were dropped on villagers resulting in the deaths of seventeen civilians, including children.<sup>170</sup> The Colombian government acknowledged that the bombing was unlawful and began a criminal investigation of those involved, and the U.S. government suspended economic assistance to the unit responsible for the bombing.<sup>171</sup> Plaintiffs alleged that the raid was carried out by both military and civilian security agents acting on behalf of the defendants.<sup>172</sup> The State Department letter in the case began with the reasonable suggestion that the courts of Colombia, if they could handle the case fairly, would be a preferable forum for a dispute about an atrocity that occurred in Colombia.<sup>173</sup> It also made the somewhat plausible assertion that the Colombian government would see parallel proceedings in the United States as “intrusive,” attaching a letter from the Colombian Ministry of Foreign Relations stating that “any decision in this case may affect the relations between Colombia and the [United States].”<sup>174</sup>

From this plausible beginning, the submission advanced a series of inflated claims. According to the executive branch, the economic repercussions of this single lawsuit seeking damages for an atrocity that had been condemned by both the U.S. and Colombian governments could be so grave that the lawsuit could undermine the stability of Colombia and of the region, weaken efforts to fight terrorists and drug traffickers, increase drug trafficking to the United States, endanger U.S. citizens in Colombia, and hinder the U.S. goal of achieving energy independence.<sup>175</sup>

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170. *Mujica v. Occidental Petroleum Corp.*, 382 F. Supp. 2d 1164 (C.D. Cal. 2005).

171. Letter from William H. Taft, Legal Advisor, Dep’t of State at 1–2, *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1134 (C.D. Cal. 2005) (No. 03-2860).

172. 382 F. Supp. 2d at 1168.

173. Letter from William H. Taft, Legal Advisor, Dep’t of State at 1, *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1134 (C.D. Cal. 2005) (No. 03-2860). The submission does not, however, explore the extensive evidence indicating that fair proceedings are not possible in Colombia.

174. *Id.* at 2. The letter did not address the likelihood that the Colombian government had little interest in actually investigating the incident or punishing those responsible.

175. *Id.* at 2. The district court dismissed the *Mujica* complaint in a decision that is pending on appeal to the Ninth Circuit. *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1168 (C.D. Cal. 2005), *appeal docketed*, No. 05-56056 (9th Cir. July 21, 2005). But in its decision, the lower court did not rely on the executive’s exaggerated claims that litigation of the case could endanger U.S. national security and the security of the entire Andean region. That is, the court implicitly rejected as unreasonable the executive branch’s broad claims. Instead, the court focused on the factors relevant to the political question doctrine and found one narrow conflict. The court noted that “the Executive has indicated that it wishes to pursue non-judicial methods of remedying the wrongs committed in Santo Domingo.” *Id.* at 1194 n.25. As a result, it concluded that “[f]urther

The cascading lists of catastrophic consequences in both the *Exxon Mobil* and *Mujica* letters are not just unreasonable. They are patently absurd. Given that litigants, experts, and the judges themselves have access today to a wide range of information about each of the topics mentioned in these letters, the courts may be more willing than previously to question the administration's unsupported conclusions.

The implausibility of these arguments is underscored by the fact that prior administrations did not suggest that human rights litigation in U.S. courts would pose a threat to U.S. national security. Furthermore, when the Bush administration has raised concerns about the economic impact of U.S. litigation in other areas, the tone of its submissions is measured and, therefore, more credible. In an amicus brief in a case concerning enforcement of antitrust measures, the Bush administration explained that U.S. allies viewed some civil antitrust litigation in U.S. courts as "inappropriate," leading to "tension with our trading partners."<sup>176</sup> These tensions, the amicus brief suggests, might "undermine the cooperative relationships that this Nation's antitrust agencies have forged with their foreign counterparts in recent years," leading to less effective international enforcement efforts.<sup>177</sup> The brief limits its rhetoric to the reasonable dangers to antitrust enforcement, with no allegation that tensions with our trading partners might lead to a cascading series of uncontrollable economic, political, and military harms.

### C. Ill-Supported Economic Claims

The executive branch submissions argue that civil lawsuits against corporations for abuses committed in foreign countries trigger severe economic consequences that undermine U.S. government policies.

#### 1. Deterrence of U.S. Foreign Investment

The administration's economic arguments rely on the unexplored assumption that ATS litigation will deter U.S.-based corporations from investing in countries with troubled human rights records. The argument assumes that diminished investment by U.S. business will then trigger several undesirable results: economic stagnation in the foreign country,

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adjudication of this case would constitute disagreement with this prior foreign policy decision." *Id.* If the Ninth Circuit follows the approach to executive branch submissions adopted by the *Sarei* panel, 487 F.3d 1193 (9th Cir. 2007), it is likely to reverse this dismissal.

176. Brief for the United States as Amicus Curiae Supporting Petitioners at 21–22, *F. Hoffmann-La Roche Ltd., v. Empagran, S.A.*, 542 U.S. 155 (2004) (No. 03-724).

177. *Id.* at 22.

reduced profits for U.S. companies, and replacement of U.S. corporations with investors from other countries who are both less economically efficient and more likely to abuse human rights.

Most ATS cases, however, involve the extractive industries. Corporations that are involved in extracting natural resources such as oil, gas, and minerals cannot choose where to invest.<sup>178</sup> Economic analysis of the impact of tort litigation on trade and investment often makes the mistake of assuming that corporations can freely enter and exit the relevant market, an assumption that does not apply to the extractive industries.<sup>179</sup> Corporations that have already made a significant investment in oil, gas, or mining operations in a foreign country are unlikely to abandon that investment in the face of liability suits. Nor are they likely to be replaced by corporations with lower costs: once they have begun their operations, they are likely to maintain a significant advantage over competitors that are not already heavily invested in the particular locale.<sup>180</sup>

It is also possible that corporations considering investments in foreign countries will adopt policies designed to deter complicity in gross human rights violations. When the issues are as stark as genocide and torture, non-economic factors may have some influence; basic decency suggests that some percentage of corporations would prefer to avoid providing knowing, substantial support of genocide and torture.<sup>181</sup> In any event, if

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178. In the memorable words of Vice President Dick Cheney, “The problem is that the good Lord didn’t see fit to always put oil and gas resources where there are democratic governments.” *Halliburton’s Cheney Sees Worldwide Opportunities, Blasts Sanctions*, PETROLEUM FINANCE WEEK (Apr. 1, 1996), quoted in Richard Herz, *The Liberalizing Effects of Tort: How Corporate Complicity Liability Under the Alien Tort Statute Advances Constructive Engagement*, 21 HARV. HUM. RTS. J. (forthcoming 2008) (manuscript at 1, on file with Author).

179. See, e.g., Alan O. Sykes, *Transnational Tort Litigation as a Trade and Investment Issue* (Stanford Law Sch. and Economics Olin Working Paper No. 331, 2007), available at <http://ssrn.com/abstract=956668>. Sykes concludes that imposing higher tort obligations on some, but not all, multinational corporations will increase the costs of the most efficient, lowest cost firms, and that they will be replaced by less efficient, higher cost companies that have lower tort standards. *Id.* at 27. He includes ATS claims in this analysis. *Id.* at 4. Sykes’ analysis, however, explicitly assumes free entry and exit into the market, *id.* at 16, despite the fact that almost all of his human rights examples concern the extractive industry. *Id.* at 29–31.

180. See *id.* at 23 n.20 (Sykes acknowledges that his conclusions may not apply if companies facing higher standards maintain their cost advantage even with the extra costs imposed by those standards.).

181. As Sykes notes, “competitors may gain little cost advantage if their own ethical principles lead them to refrain from similar behavior.” *Id.* at 31. Moreover, he concludes that egregious human rights abuses “may present instances in which a welfarist perspective is simply unpersuasive, involving alleged conduct that many observers believe should be sanctioned irrespective of the economic consequences.” *Id.* See also Jack L.

U.S. business executives see lucrative investment opportunities in countries governed by abusive regimes, they might first seek ways to avoid complicity in abuses, rather than forgoing profitable investments.

The executive branch assumes that the risk of human rights liability will lead U.S. corporations to divest because such liability will impose significant additional costs, putting U.S. business at a competitive disadvantage.<sup>182</sup> But the costs of ATS litigation are relatively minor compared to the profit potential in overseas markets. In addition, with increased international focus on human rights abuses and corporate responsibility, corporations might find that rights-protective policies provide a competitive edge. A special report in the *Economist* in early 2008 reached exactly this conclusion about corporate social responsibility programs: “[D]one badly, [corporate social responsibility] is often just a figleaf and can be positively harmful. Done well, though, it is not some separate activity that companies do on the side, a corner of corporate life reserved for virtue: it is just good business.”<sup>183</sup>

## 2. Undercutting U.S. Constructive Engagement

The administration also asserts that human rights lawsuits undermine the executive branch’s decision to use “constructive engagement” to promote reform. In an argument repeated in several corporate-defendant cases, the executive branch asserts that the “policy determination of whether to pursue a constructive engagement policy is precisely the type of foreign affairs question that is constitutionally vested in the Executive Branch and over which the courts lack institutional authority and ability to decide.”<sup>184</sup> This statement by itself is uncontroversial. The administration proceeds, however, to a less obvious assertion that ATS accountability undermines the policy of constructive engagement, defined as U.S. efforts “to promote active economic engagement as a method of encour-

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Goldsmith & Alan O. Sykes, *Lex Loci Delictus and Global Economic Welfare: Spinozzi v. ITT Sheraton Corp.*, 120 HARV. L. REV. 1137, 1146 (2007) (complaining that “ATS suits function in effect as a discriminatory tax on U.S. corporations that operate in foreign jurisdictions,” but recognizing that “[t]his burden may seem of little moment when claims of ethnic cleansing, genocide, torture, and the like are at stake”).

182. See Russell J. Weintraub, *International Litigation and Forum Non Conveniens*, 29 TEX. INT’L L.J. 321, 352 (1994) (stating that litigation against U.S. corporations for abuses committed in other countries “places our companies at a world-wide competitive disadvantage”).

183. Corporate Social Responsibility: Just Good Business, THE ECONOMIST, Jan. 17, 2008, [http://www.economist.com/business/displayStory.cfm?story\\_id=10491077](http://www.economist.com/business/displayStory.cfm?story_id=10491077).

184. Brief of the United States as Amicus Curiae at 14, *Khulumani v. Barclay National Bank, Ltd.*, 504 F.3d 254 (2d Cir. 2007) (Nos. 05-2141, 05-2326).

aging reform and gaining leverage.”<sup>185</sup> As explained at length in a forthcoming article, the administration does not support its far-from-obvious conclusion that litigation undermines constructive engagement.<sup>186</sup> To the contrary, litigation might well complement a constructive engagement approach. Constructive engagement is based on the assumption that U.S.-based corporate investors will promote human rights and democracy.<sup>187</sup> A corporation that is complicit in genocide, summary execution, or torture offers nothing to the pursuit of constructive engagement, because its “engagement” is not “constructive.”

The executive submissions assert that holding corporations accountable for human rights abuses will discourage companies committed to protecting human rights from investing in abusive regimes,<sup>188</sup> but it makes no effort to explain why this is true. Rather, such accountability levels the playing field for those who are truly committed to constructive engagement.

#### *D. A Perceived Bias Toward Corporate Interests*

Finally, the Bush administration was from the start viewed as closely allied with corporate interests. As a result, the courts may well have considered the (questionable) submissions in corporate-defendant cases with extra suspicion. The tone of those submissions only fuels the concern that they are an effort to protect the interests of the administration’s corporate allies, rather than a reflection of well-reasoned foreign policy concerns.

\* \* \* \*

In summary, the views that the Bush administration has offered in corporate-defendant human rights cases were not reasonable because their conclusions were not well-connected to the established doctrines, were not well-founded, and failed to provide supporting evidence. The result was not surprising: the courts refused to defer to their unreasonable concerns.

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185. *Id.* See also Brief for the United States as Amicus Curiae at 9, Doe v. Unocal Corp., 403 F.3d 708 (9th Cir. 2005) (Nos. 00-56603, 00-56628).

186. Herz, *supra* note 178 (manuscript at 3, on file with Author).

187. “Engagement theory assumes that companies will, through example and interaction, convey democratic values.” *Id.* at 1 (article abstract).

188. See *Khulumani v. Barclay National Bank, Ltd.*, 504 F.3d 254, 297 (2d Cir. 2007) (Korman, J., concurring in part and dissenting in part).

**CONCLUSION**

U.S. judges are keenly aware of their constitutional obligation to respect the foreign affairs powers of the executive branch. They are equally concerned with their constitutional obligation to exercise independent judgment when determining whether they should dismiss cases that are otherwise properly before them because of foreign affairs concerns raised by the executive branch. In a remarkable break from recent history, the courts have rejected a significant number of Bush administration suggestions that corporate-defendant ATS cases endanger U.S. foreign policy. A close look at those cases makes clear that the shift is not the result of a change in the way the courts have exercised their authority, but rather a judicious recognition that the Bush administration views are unreasonable, and therefore undeserving of deference.

## APPENDIX A

### OVERVIEW OF ALIEN TORT STATUTE CASES, 1789–PRESENT

Before the Second Circuit's decision in *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980), twenty-one reported cases alleged jurisdiction under the Alien Tort Statute ("ATS"), with only two upholding the claims.<sup>189</sup> Since *Filártiga*, approximately 185 cases have been litigated under the Alien Tort Statute ("ATS") or the closely related Torture Victim Protection Act ("TVPA"). A large majority of the post-*Filártiga* cases—about 123—have been finally dismissed, most often because of the immunity of the defendants or the failure to state an actionable violation of international law. Another nineteen have been dismissed but are currently on appeal. Approximately twenty-four have resulted in settlements or judgments for the plaintiffs and nineteen are currently pending.

These numbers are not exact because some cases may not appear on public databases and many cases assert claims on multiple grounds. The totals are also misleading in that they include all identifiable cases *asserting* an ATS claim, including many in which the claim is clearly unfounded. Several cases, for example, were filed under the ATS on behalf of a U.S. citizen, despite the statute's explicit limitation to claims by aliens. Others assert violations of domestic law that clearly do not satisfy the statute's requirement of a tort "committed in violation of the law of nations."

These totals do not include cases filed under the Foreign Sovereign Immunities Act of 1976 exception for claims against "state sponsors of terrorism,"<sup>190</sup> or the Anti-Terrorism and Effective Death Penalty Act of 1996,<sup>191</sup> although such cases often include ATS or TVPA claims. The tally also does not include cases arising out of injuries inflicted during World War II because they raise distinct issues.<sup>192</sup>

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189. For a list of the pre-*Filártiga* cases, see Kenneth C. Randall, *Federal Jurisdiction Over International Law Claims: Inquiries into the Alien Tort Claims Statute*, 18 N.Y.U.J. INT'L L. & POL. 1, 4–5 nn.15–17 (1985).

190. 28 U.S.C. § 1605A (2008) (formerly codified at 28 U.S.C. § 1605(a)(7)).

191. 18 U.S.C. §§ 2331–2339C (2008).

192. World War II cases arise out of wartime acts committed over sixty years ago; moreover, the U.S. government entered into peace agreements that are often interpreted as governing claims for compensation. As a result, issues concerning the statute of limitations, standing to sue, act of state, and political question are often quite different from those arising from more recent events. See generally STEPHENS, *supra* note 18, at 543–50 (discussing issues that arise in human rights litigation based upon historical injustices).

**Pre-*Filártiga* (1789–1980): 21 Cases**

From 1789, when the ATS was enacted, until the *Filártiga* decision in 1980, twenty-one cases asserted jurisdiction under the ATS, resulting in two judgments for plaintiffs.

**From *Filártiga* to *Sosa* (1980–2004): 81 Cases**

From 1980 to 2004, approximately eighty-one cases asserted jurisdiction under the ATS or the TVPA, resulting in one settlement, eleven judgments for plaintiffs, and sixty-nine dismissals.

**Post-*Sosa* (2004–2008): 104 Cases**

From the time of the 2004 *Sosa* decision until January 2008, the federal courts issued decisions in approximately 104 cases asserting jurisdiction under the ATS or the TVPA, with the following results:

Settlement	4	
Judgment For Plaintiff	8	
Dismissed	73	
Final	54	
On Appeal	19	
Pending in a District Court	19	
Survived Preliminary Motions	12	
No Decision Yet	7	

**Post-*Sosa* Cases by Defendants**

Approximately one third of the post-*Sosa* cases involve claims against the U.S. government, U.S. or local government officials, and/or U.S. government contractors. All of the ATS and TVPA cases against the U.S. government or its employees have been dismissed, although one pending case against a government contractor did survive a preliminary motion to dismiss.<sup>193</sup>

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193. Ibrahim v. Titan Corp., Nos. 04-1248, 05-1165, 2007 WL 3274784 (D.D.C. Nov. 6, 2007) (claim for mistreatment of prisoners held by the U.S. military). The decision addresses consolidated suits against two contractors—Titan Corporation and CACI Premier Technologies. *Id.* at 1. The district court dismissed the claim against Titan Corporation, which provided interpreters to the U.S. military, but denied the motion to dismiss the claims against CACI, which provided interrogators to the U.S. military. *Id.* at 1, 9. The court had earlier dismissed the international law claims against both defendants,

Approximately one third of the post-*Sosa* cases involve corporate defendants. Of the remaining post-*Sosa* cases, those against foreign governments have been dismissed on the basis of foreign sovereign immunity. Many cases have been dismissed for failure to allege an actionable violation of international law.

Only about ten percent of the post-*Sosa* cases—about a dozen—fall into the mold of the *Filártiga* case, in which an individual sues an individual defendant who is present in the United States alleging a human rights violation that occurred outside of the United States. All but one of the cases resulting in final judgments for plaintiffs were from this individual-defendant category.<sup>194</sup>

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permitting only state law tort claims to proceed. *Id.* In a handful of the cases included in these numbers, the courts have similarly dismissed the federal law claims but permitted the cases to proceed as diversity actions seeking state tort remedies. See, e.g., *Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 28–29 (D.D.C. 2005).

194. The exception is *Jama v. Esmor Corr. Serv.* (No. 97-03093), 2008 WL 724337 (D.N.J. Dec. 7, 2007), in which a jury returned a verdict for the plaintiff. *Id.* at 1. Several additional plaintiffs settled shortly before trial. *Id.*

**APPENDIX B**  
CORPORATE DEFENDANT HUMAN RIGHTS CASES

In 1997, *Doe v. Unocal Corp.* found that a corporation could be held liable under the ATS for certain claims, including those that do not require state action (e.g., genocide, slavery, and war crimes) and those in which the corporate defendant is complicit in violations committed by state actors.<sup>195</sup> All twenty-four corporate-defendant ATS cases decided prior to *Unocal* were dismissed. Post-*Unocal*, approximately fifty-two international human rights cases involving corporate defendants have been litigated (not including cases addressing abuses committed during World War II, which raise unique issues). Of the fifty-two, thirty-three have been dismissed (appeals of nine of the dismissals are still pending), fifteen are still pending in a federal trial court, three have settled, and in one, a jury returned a verdict for the plaintiff. Of the fifteen pending cases, nine have survived preliminary motions to dismiss, although in three of those, all of the international law claims have been dismissed (state law claims are still pending). One dismissal has been reversed and remanded to the district court. The remaining five cases were filed recently and await rulings on preliminary motions.

The table below provides data on the principle dispositions of ATS human rights cases with corporate defendants. A list of all of the cases, with citations, follows the table.

Note that cases with numerous defendants are included if one of the defendants is a corporation. Cases arising out of related events are counted as a single case, including, for instance, multiple cases arising out of the attacks of September 11, 2001, and multiple cases seeking damages from firms based on their involvement with the Apartheid regime in South Africa. The nine cases against corporations stemming from World War II are treated as a separate category because the issues they raise are so distinct. Keep in mind that any count is tentative, given that it may omit claims that are filed and dismissed without appearing on public databases. Many of the dismissed cases on this list failed because they were filed with no arguable international human rights violation.<sup>196</sup>

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195. *Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997).

196. See, e.g., *Ganguly v. Charles Schwab & Co., Inc.*, 2004 WL 213016, at \*6–7 (S.D.N.Y. Feb. 4, 2004), *aff'd*, 142 Fed. Appx. 498 (2d Cir. 2004) (foreign investor seeking to hold brokerage firm liable for losses failed to allege any violation of international law).

<b>Total Corporate Defendant Cases 1960 to Present (85)</b>			
<b>Pre-Unocal (pre-1996) (24)</b>			
Pre- <i>Filártiga</i> (pre-1980)	Dismissed	12	
Post- <i>Filártiga</i> and Pre-Unocal (1980–1996)	Dismissed	12	
<b>Post-Unocal (post-1996) (61)</b>			
World War II Claims		9	
Non–World War II Claims		52	
	Verdict for Plaintiff	1	
	Settled	3	
	Dismissed Total	33	
	On Appeal	9	
	Final	24	
	Pending	15	
	Survived Preliminary Motion	6	
	Federal Action Dismissed, State Law Claim Pending	3	
	Dismissal Reversed and Remanded	1	
	Decision Pending	5	

The following lists provide citations for each of the cases tabulated above. For cases with multiple decisions, citations are to the decision dismissing the case, the latest significant decision, or the latest decision from an appellate court. Cases are listed in chronological order within each category, starting with the earliest decisions.

#### **Pre-*Filártiga* (1960–1979)—All Dismissed (12)**

- Khedivial Line v. Seafarers' Int'l Union, 278 F.2d 49 (2d Cir. 1960)  
 Lopes v. Reederei Richard Schroder, 225 F. Supp. 292 (E.D. Pa. 1963)

- Upper Lakes Shipping Ltd. v. Int'l Longshoremen's Assn., 293 F. Supp. 207 (S.D.N.Y. 1963)
- Seth v. British Overseas Airways Corp., 329 F.2d 302 (1st Cir. 1964)
- Damaskinos v. Societa Navigacion InterAm., 255 F. Supp. 919 (S.D.N.Y. 1966)
- Valanga v. Metro. Life Ins. Co., 259 F. Supp. 324 (E.D. Pa. 1966)
- Abiodun v. Martin Oil Serv. Inc., 475 F.2d 142 (7th Cir. 1973)
- IIT v. Vencap, Ltd., 519 F.2d 1001 (2d Cir. 1975)
- Papageorgiou v. Lloyds of London, 436 F. Supp. 701 (E.D. Pa. 1977)
- Benjamins v. British European Airways, 572 F.2d 913 (2d Cir. 1978)
- Akbar v. New York Magazine Co., 490 F. Supp. 60 (D.D.C. 1980)
- Soultanoglou v. Liberty Trans. Co., No. 75-2259, 1980 U.S. Dist. LEXIS 9177 (S.D.N.Y.)

***Filártiga to Unocal (1980–1996)—All Dismissed (12)***

- Canadian Transport Co. v. United States, 663 F.2d 1081 (D.C. Cir. 1980)
- Trans-Continental Inv. Corp. v. Bank of Commonwealth, 500 F. Supp. 565 (C.D. Cal. 1980)
- B.T. Shanker Hedge v. British Airways, No. 82-1410, 1982 U.S. Dist. LEXIS 16469 (N.D. Ill.)
- De Wit v. KLM Royal Dutch Airlines, 570 F. Supp. 613 (S.D.N.Y. 1983)
- Canadian Overseas Ores Ltd. v. Compania de Acero, 727 F.2d 274 (2d Cir. 1984)
- Munusamy v. McClelland Eng'r, Inc., 579 F. Supp. 149 (E.D. Tex. 1984)
- Tamari v. Bache & Co., 730 F.2d 1103 (7th Cir. 1984)
- Jaffe v. Boyles, 616 F. Supp. 1371 (W.D.N.Y. 1985)
- Carmichael v. United Tech. Corp., 835 F.2d 109 (5th Cir. 1988)
- Jones v. Petty-Ray Geophysical Geosource, Inc., 722 F. Supp. 343 (S.D. Tex. 1989)
- Amlon Metals, Inc. v. FMC Corp., 775 F. Supp. 668 (S.D.N.Y. 1991)
- Hamid v. Price Waterhouse, 51 F.3d 1411 (9th Cir. 1995)

***Post-Unocal Cases (Post-1996)****World War II Cases (9)*

- Burger-Fischer v. DeGussa AG, 65 F. Supp. 2d 248 (D.N.J. 1999)
- Friedman v. Bayer Corp., No. 99-3675, 1999 WL 33457825 (E.D.N.Y. Dec. 15, 1999)
- Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424 (D.N.J. 1999)
- Bodner v. Banque Paribas, 114 F. Supp. 2d 117 (E.D.N.Y. 2000)
- Ungaro-Benages v. Dresdner Bank AG, 379 F.3d 1227 (11th Cir. 2004)

- Abrams v. Société Nationale des Chemins de Fer, 389 F.3d 61 (2d Cir. 2004)  
Alperin v. Vatican Bank, 410 F.3d 532 (9th Cir. 2005)  
Arndt v. UBS AG, 342 F. Supp. 2d 132 (E.D.N.Y. 2005)  
Deutsch v. Turner Corp., 324 F.3d 692 (9th Cir. 2003) (consolidated with  
*In Re WWII Era Japanese Forced Labor*, 114 F. Supp. 2d 939 (N.D. Cal. 2000))

*Non-World War II Cases Organized By Status (52)*

Jury Verdict for One Plaintiff/Other Plaintiffs Settled (1)

- Jama v. Esmor Corr. Serv., Civ. No. 97-03093, 2008 WL 724337 (D.N.J. Dec. 7, 2007)

Settled (3)

- Does v. The Gap, Inc., No. 01-0031, 2003 WL 22997250 (D. N.Mar. I. Sept. 11, 2003)  
Doe v. Unocal Corp., 403 F.3d 708 (9th Cir. 2005)  
Xiaoning v. Yahoo! Inc., Civ. No. 07-02151 (N.D. Cal. Nov. 9, 2007)

Pending in District Court, International Claims Survived Preliminary Motions (6)

- Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88 (2d Cir. 2000)  
*In Re Terrorist Attacks on Sept. 11, 2001*, 392 F. Supp. 2d 539 (S.D.N.Y. 2005)  
Bowoto v. Chevron Corp., No. 99-02506, 2007 WL 2349341 (N.D. Cal. Aug. 14, 2007)  
Arias v. DynCorp, 517 F. Supp. 2d 221 (D.D.C. 2007)  
Roe v. Bridgestone Corp., 492 F. Supp. 2d 988 (S.D. Ind. 2007)  
Almog v. Arab Bank, PLC, 471 F. Supp. 2d 257 (E.D.N.Y. 2007)

Pending in District Court, International Claims Dismissed but State Claims Pending (3)

- Bigio v. Coca-Cola Co., 448 F.3d 176 (2d Cir. 2006)  
Doe v. Exxon Mobil Corp., 473 F.3d 345 (D.C. Cir. 2007), *petition for cert. filed*, 76 U.S.L.W. 3050 (U.S. July 20, 2007) (No. 07-81)  
Ibrahim v. Titan Corp. & CACI, Nos. 04-1248, 05-1165, 2007 WL 3274784 (D.D.C. Nov. 6, 2007)

Pending in District Court (Dismissal Reversed on Appeal) (1)

Khulumani v. Barclay Nat. Bank Ltd. (*In re So. Afr. Apartheid Litig.*), 504 F.3d 254 (2d Cir. 2007), *aff'd due to lack of a quorum sub nom.*, American Isuzu Motors, Inc. v. Ntsebeza, 2008 WL 117862, 76 U.S.L.W. 3405 (May 12, 2008) (No. 07-919)

Pending in District Court, No Decision Yet (5)

Doe v. Nestle, Civ. No. 05-5133 (C.D. Cal., filed July 14, 2005)  
Shiguago et al. v. Occidental Petroleum Co., No. 06-4982 (C.D. Cal., filed Aug. 10, 2006)  
Carrizosa v. Chiquita Brands Intern., Inc., No. 07-60821, 2007 WL 3458987 (S.D. Fla. Nov. 14, 2007)  
*In re:* Chiquita Brands Int'l, Inc., 536 F. Supp. 2d 1371, (MDL 2008).  
Mohamed v. Jeppesen Dataplan Inc., No. 07-2798 (N.D. Cal. filed May 30, 2007).  
Estate of Atban v. Blackwater USA, No. 07-01831 (D.D.C. filed Oct. 11, 2007)

Dismissed, on Appeal (8)

Presbyterian Church of Sudan v. Talisman Energy, Inc., 374 F. Supp. 2d 331 (S.D.N.Y. 2005)  
Mujica v. Occidental Petroleum Corp., 381 F. Supp. 2d 1164 (C.D. Cal. 2005)  
Turedi v. Coca-Cola Co., 460 F. Supp. 2d 507 (S.D.N.Y. 2006)  
*In re Sinaltrainal Litig.*, 474 F. Supp. 2d 1273 (S.D. Fla. 2006)  
Doe v. Walmart Stores, Inc., Civ. No. 05-7307 (C.D. Cal. April 2, 2007)  
Bauman v. Daimlerchrysler AG, No. 04-00194, 2007 WL 486389 (N.D. Cal. Feb. 12, 2007)  
Sarei v. Rio Tinto, PLC, 487 F.3d 1193 (9th Cir. 2007) (rehearing en banc pending)  
Aldana v. Del Monte Fresh Produce, N.A., Inc., No. 01-3399, 2007 WL 3054986 (S.D. Fla. Oct. 16, 2007)

Lost After Jury Trial, on Appeal (1)

Estate of Rodriguez v. Drummond Co., No. 7:02-00665 (N.D. Ala. July 26, 2007)

Dismissed, Final (24)

*In Re Agent Orange Prod. Liab. Litig.*, 373 F. Supp. 2d 7 (E.D.N.Y. 2005), *aff'd on other grounds*, Vietnam Ass'n for Victims of Agent Orange v. Dow, 517 F.3d 104 (2d Cir. 2008)

- Jota v. Texaco, Inc., 157 F.3d 153 (2d Cir. 1998) (see also Aguinda v. Texaco, Inc., 303 F.3d 470 (2d Cir. 2002))
- Belgrade v. Sidex Int. Furniture Corp. 2 F. Supp. 2d 407 (S.D.N.Y. 1998)
- Beanal v. Freeport-McMoran, Inc., 197 F.3d 161 (5th Cir. 1999)
- Wong-Opasi v. Tenn. State Univ., 229 F.3d 1155 (Table) (6th Cir. 2000)
- Empagran S.A. v. F. Hoffman-La Roche, Ltd., No. 00-1686, 2001 WL 761360 (D.D.C. June 7, 2001)
- Kruman v. Christie's Int'l PLC, 129 F. Supp. 2d 620 (S.D.N.Y. 2001)
- Mendonca v. Tidewater, Inc., 159 F. Supp. 2d 299 (E.D. La. 2001)
- Robert v. Bell Helicopter Textron, Inc., No. 01-1576, 2002 WL 1268030 (N.D. Tex. May 31, 2002)
- Flores v. S. Peru Copper Corp., 343 F.3d 140 (2d Cir. 2003)
- United Bank for Africa PLC v. Coker, No. 94-0655, 2003 WL 22741575 (S.D.N.Y. Nov. 18, 2003)
- Herero People's Reparations Corp. v. Deutsche Bank, A.G., 370 F.3d 1192 (D.C. Cir. 2004)
- Hereros v. Deutsche Afrika-Linien Gmblt & Co., 232 Fed. Appx. 90 (3d Cir. 2007)
- Maugein v. Newmont Mining Corp., 298 F. Supp. 2d 1124 (D.Colo. 2004)
- Ganguly v. Charles Schwab & Co., Inc., No. 04-1742, 2005 WL 1772659 (2d Cir. July 25, 2005)
- Adamu v. Pfizer, Inc., 399 F. Supp. 2d 495 (S.D.N.Y. 2005)
- Abdullahi v. Pfizer, Inc., No. 01-8118, 2005 WL 1870811 (S.D.N.Y. Aug. 9, 2005)
- Brooks-McCollum *ex rel.* Emerald Ridge Serv. Corp. v. Emerald Ridge Serv. Corp. Bd. of Dir., 166 Fed. Appx. 618 (3d Cir. 2006)
- Frazer v. Chicago Bridge and Iron, 2006 WL 801208 (S.D. Tex. Mar. 27, 2006)
- Bano v. Union Carbide Corp., 198 Fed. Appx. 32 (2d Cir. 2006)
- Stutts v. De Dietrich Group, No. 03-4058, 2006 WL 1867060 (E.D.N.Y. June 30, 2006)
- Keating-Traynor v. Westside Crisis Ctr., No. 05-04475, 2006 WL 1699561 (N.D. Cal. June 16, 2007)
- Torrez v. Corr. Corp. of Am., No. 07-1551, 2007 WL 3046153 (D. Ariz. Oct. 16, 2007)
- Chen v. China Ctr. Television, No. 06-414, 2007 WL 2298360 (S.D.N.Y. Aug. 9, 2007)
- El-Masri v. United States, 479 F.3d 296 (4th Cir. 2007)
- Corrie v. Caterpillar, Inc., 503 F.3d 974 (9th Cir. 2007)

## APPENDIX C

### EXECUTIVE BRANCH SUBMISSIONS IN CORPORATE DEFENDANT CASES

This Appendix features non–World War II corporate-defendant ATS cases in which the U.S. government has submitted a letter, statement of interest, declaration, or amicus brief. The following provides a list of cases with citations and summaries.

#### 1. *Arias v. DynCorp*, 517 F. Supp. 2d 221 (D.D.C. 2007)

Plaintiffs sued DynCorp for physical harm and property damage caused when pesticides sprayed in Colombia, pursuant to a contract with the U.S. government to eradicate cocaine and heroine farms in Colombia, drifted across the border into Ecuador. The court dismissed the claim for torture but denied the motions to dismiss and for summary judgment on the additional international law claims.<sup>197</sup>

The administration submitted a declaration from the Assistant Secretary of State for the Bureau of International Narcotics and Law Enforcement Affairs that stated that the litigation posed a national security risk: “United States counter-narcotics policy in Columbia and the Andean Region is a product of a complicated U.S. national security and foreign policy objectives that cannot be addressed in any private litigation.”<sup>198</sup> A strongly worded, detailed, eleven-page declaration asserted that the litigation “poses grave risks to U.S. national security interests, foreign policy objectives and diplomatic relations in the Andean Region.”<sup>199</sup> The declaration stated that:

The *Arias* plaintiffs challenge an aerial drug eradication program that has been repeatedly authorized by the executive and legislative branches after extensive deliberation as a key element in U.S. counter-narcotics strategy. Any disruption of this program would cripple United States efforts to stem the flow of narcotics into this country, provide a financial boon to international terrorist organizations that have targeted U.S. interests, and significantly undermine the prospects of strong and stable relations between the United States and Colombia and other Andean nations. The stakes are high.<sup>200</sup>

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197. *Arias v. DynCorp*, 517 F. Supp. at 230–31.

198. Declaration of Rand Beers, Assistant Secretary of State for the Bureau of Int’l Narcotics and Law Enforcement Affairs Regarding Potential Impact of *Arias* Litigation on the United States Nat’l Sec. and Foreign Policy Interests at 1–2, *Arias v. DynCorp*, 517 F. Supp. 2d 221 (D.D.C. 2007) (No. 01-1980).

199. *Id.* at 10.

200. *Id.* at 10–11.

The court refused to dismiss the case, holding that the claim did not challenge the executive branch foreign policies or the implementation of those policies, because “the intended means of executing the policy in this case did not include the acts challenged here, which plaintiffs allege were specifically prohibited by the plan.”<sup>201</sup>

2. *Bowoto v. Chevron*, Civ. No. 03-417580 (Cal. Super. Ct. filed Feb. 20, 2003)

Nigerian plaintiffs filed both federal and state lawsuits seeking injunctive relief and damages for a series of military attacks on civilians in Nigeria, claiming that the defendant was liable for injuries inflicted by the government security forces. In the state court action, the judge requested the views of the State Department. But the federal court declined the defendant’s request that it seek the views of the executive branch.<sup>202</sup>

The administration filed a Statement of Interest<sup>203</sup> in the state case limited to one issue, stating that the court should not issue an injunction ordering the defendant to comply with the Voluntary Principles on Security and Human Rights because such an order “could have a chilling effect on the continued participation of corporate entities in this effort and, thus, would interfere with an important foreign policy initiative of the Federal Government.”<sup>204</sup>

The state court has not yet ruled on the issue raised by the submission.

3. *Corrie v. Caterpillar*, 503 F.3d 974 (9th Cir. 2007)

The family of a peace activist who was run over and killed by a military bulldozer in the Gaza Strip and a number of Palestinians who lived in the Gaza Strip and West Bank brought this action against the manufacturer of bulldozers used by Israeli Defense Forces to destroy homes of Palestinians. The district court granted a motion to dismiss, which was upheld by the Ninth Circuit on political question grounds.<sup>205</sup>

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201. *Arias*, 517 F. Supp. 2d at 225.

202. Letter of John B. Bellinger, Legal Advisor, Dep’t of State, attached to Statement of Interest of the United States at 1, *Bowoto v. Chevron Corp.*, No. 03-417580 (Super. Ct. Cal. May 29, 2007); *Bowoto v. Chevron Texaco Corp.*, No. 99 Civ. 2506, at 3–5 (N.D. Cal. July 30, 2004) (Order Denying Motion for Court to Request Views).

203. Statement of Interest of the United States, *Bowoto v. Chevron Corp.*, No. 03-417580 (Super. Ct. Cal. May 29, 2007).

204. *Id.* at 2.

205. *Corrie v. Caterpillar*, 503 F.3d 974, 997 (9th Cir. 2007).

The executive branch filed an amicus curiae brief in the appeal,<sup>206</sup> arguing against extraterritorial application of the ATS and against recognition of ATS aiding and abetting liability, and asserting that the claims in this case would interfere with executive branch foreign policies. The executive branch urged the courts to be “very hesitant” to recognize ATS claims by foreign citizens for abuses committed outside the United States.<sup>207</sup> It stated that:

The adoption of an aiding-and-abetting rule . . . would in numerous . . . circumstances . . . implicate and limit the United States’ foreign policy prerogatives. One important policy option for dealing with a foreign country is to promote active economic engagement in that country as a method of encouraging reform and gaining leverage with that country. The determination whether to pursue such a policy is the type of foreign affairs question constitutionally vested in the Executive Branch. . . . Judicial imposition of aiding-and-abetting liability under Section 1330 would undermine the Executive’s ability to employ economic engagement as an effective tool for foreign policy.<sup>208</sup>

Aiding and abetting liability, the executive branch argued, would “spur more lawsuits, resulting in greater diplomatic friction,” and “[s]erious diplomatic friction can lead to a lack of cooperation with the United States Government on important foreign policy objectives.”<sup>209</sup>

It also warned that “[p]ermitting this type of suit to proceed would directly challenge the national security determination of the political branches to fund” sales of defense articles to select countries and “necessarily implicate the foreign policy” decision to provide funding to Israel for these sales.<sup>210</sup>

The Ninth Circuit dismissed on the basis of the political question doctrine, but did not reach the other issues raised by the executive branch.

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4. *Doe v. Exxon Mobil Corp.*, 473 F.3d 345 (D.C. Cir. 2007), *petition for cert. filed*, 76 U.S.L.W. 3050 (Jul 20, 2007) (No. 07-81)

Indonesian villagers brought suit against Exxon for injuries caused by a company security force comprised of members of the Indonesian military.

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206. Brief of the United States as Amicus Curiae in support of Affirmance, *Corrie v. Caterpillar*, No. 05-036210 (9th Cir. Aug. 11, 2006).

207. *Id.* at 5.

208. *Id.* at 16–17 (citations omitted).

209. *Id.* at 18.

210. *Id.* at 27.

The State Department filed a letter<sup>211</sup> with the court stating that Indonesia would perceive the lawsuit as “interference” in its internal affairs, and it would therefore decrease cooperation with the United States on a range of issues, including counter-terrorism initiatives.<sup>212</sup> The letter suggested that the case would lead to decreased foreign investment in Indonesia, which could undermine the stability of the Indonesian government, and that an unstable Indonesia “could create problems ranging from interruption in vital shipping lanes, to refugee outflows, to a new home for terrorists.”<sup>213</sup> Specifically, the State Department predicted that if U.S. corporations pulled out in response to litigation, business competitors from other nations might take their place,<sup>214</sup> and that adjudication of the case could undermine Indonesia’s economic and political stability and the security of the entire region, thereby “risk[ing] a potentially serious adverse impact on significant interests of the United States, including interests related directly to the on-going struggle against international terrorism.”<sup>215</sup> However, the letter acknowledged that these views were speculative, based on problems that might develop during the course of the lawsuit: “Much of this assessment is necessarily predictive and contingent on how the case might unfold in the course of litigation,” including the “intrusiveness of discovery” and the extent to which the case required “judicial pronouncements on the official actions of the [Government of Indonesia] with respect to the conduct of its military activities in Aceh.”<sup>216</sup>

The district court dismissed the federal law claims, but refused to dismiss the state common law tort claims, although it imposed limits on discovery designed to avoid intrusion into Indonesian sovereignty.<sup>217</sup> Defendants sought a writ of mandamus from the D.C. Circuit; the circuit denied the request.<sup>218</sup> The court stated:

We disagree with Exxon’s contention that there is a conflict between the views of the State Department and those of the district court. . . . [T]he State Department [letter] noted that adjudication of the plaintiffs’ claims would “risk a potentially serious adverse impact on significant interests of the United States.” However, the letter also con-

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211. Letter from William H. Taft, Legal Advisor, Dep’t of State, Doe v. Exxon Mobil, 393 F. Supp. 2d 20 (D.D.C. 2005) (No. 01-1357).

212. *Id.* at 2–3.

213. *Id.* at 3–4.

214. *Id.* at 3.

215. *Id.* at 1.

216. *Id.* at 2 n.1.

217. Doe v. Exxon Mobil Corp., 393 F. Supp. 2d 20, 29–30 (D.D.C. 2005).

218. 473 F.3d 345, 354 (D.D.C. 2007).

tained several important qualifications. It noted that the effects of this suit on U.S. foreign policy interests “cannot be determined with certainty.” Moreover, the letter stated that its assessment of the litigation was “necessarily predictive and contingent on how the case might unfold in the course of litigation.” Most importantly, the State Department emphasized that whether this case would adversely affect U.S. foreign policy depends upon “the nature, extent, and intrusiveness of discovery.” We interpret the State Department’s letter not as an unqualified opinion that this suit must be dismissed, but rather as a word of caution to the district court alerting it to the State Department’s concerns. . . . Thus, we need not decide what level of deference would be owed to a letter from the State Department that *unambiguously* requests that the district court dismiss a case as a non-justiciable political question.<sup>219</sup>

Judge Kavanaugh, who served as a legal advisor to President Bush before being appointed to the D.C. Circuit, dissented.

5. *Doe v. Unocal*, 403 F.3d 708 (9th Cir. 2005)

Burmese citizens sued seeking damages for human rights violations committed by the Burmese military in furtherance of a joint natural gas pipeline project. A panel of the Ninth Circuit reversed the district court’s dismissal of the claims, holding that plaintiffs had sufficient evidence that the defendant bore legal responsibility for its involvement in the abuses.<sup>220</sup> The Ninth Circuit then agreed to a hearing en banc, but the parties settled and the case was dismissed.<sup>221</sup>

The U.S. government filed amicus briefs in May 2003 and August 2004,<sup>222</sup> arguing that ATS claims involved the judiciary in “matters that by their nature should be left to the political [b]ranches”<sup>223</sup> because foreign affairs “are of a kind for which the Judiciary has neither the apti-

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219. *Id.* at 354. Judge Kavanaugh rejected the majority’s reading of the State Department’s views as ambiguous, stating that “the State Department unambiguously stated to the District Court that, for multiple reasons, ‘adjudication of this lawsuit at this time would in fact risk a potentially serious adverse impact on significant interests of the United States, including interests related directly to the on-going struggle against international terrorism.’” *Id.* at 363 (Kavanaugh, J., dissenting).

220. *Doe v. Unocal Corp.*, 395 F. 3d 932 (9th Cir. 2002). For the full procedural history of the case, see *supra* note 32.

221. *Unocal*, 395 F.3d 978 (9th Cir. 2003); *Doe v. Unocal Corp.*, 403 F.3d 708 (9th Cir. 2005) (post-settlement order granting the parties’ stipulated motion to dismiss and vacating the district court decision on the motion for summary judgment).

222. Brief for the United States, *Doe v. Unocal Corp.*, 403 F.3d 708 (9th Cir. 2005) (Nos. 00-56603, 00-56628); Supplemental Brief for the United States as Amicus Curiae, *Doe v. Unocal Corp.*, 403 F.3d 708 (9th Cir. 2005) (Nos. 00-56603, 00-56628).

223. Brief for the United States as Amicus Curiae at 4, *Doe v. Unocal Corp.*, 403 F.3d 708 (9th Cir. 2005) (Nos. 00-56603, 00-56628).

tude, facilities nor responsibility.”<sup>224</sup> The government made the following statements in support of their position:

Wide-ranging claims the courts have entertained regarding the acts of aliens in foreign countries necessarily call upon our courts to render judgments over matters that implicate our Nation’s foreign affairs. In the view of the United States, the assumption of this role by the courts under the ATS not only has no historical basis, but, more important, raises significant potential for serious interference with the important foreign policy interests of the United States, and is contrary to our constitutional framework and democratic principles.<sup>225</sup>

....

[T]he types of claims being asserted today under the ATS are fraught with foreign policy implications . . . [which have] serious implications for our current war against terrorism, and permit[] ATS claims to be asserted against our allies in that war.<sup>226</sup> . . . [and against] the United States itself in connection with its efforts to combat terrorism.<sup>227</sup>

....

[T]he ATS thus places the courts in the wholly inappropriate role of arbiters of foreign conduct, including international law enforcement.<sup>228</sup>

The Supplemental Brief makes the additional argument that embracing “aiding and abetting” liability for ATS claims creates economic uncertainty that could hamper the government’s ability to “promote active economic engagement as a method of encouraging reform and gaining leverage,” deterring businesses from investments because of uncertainty concerning private liability and protracted litigation.<sup>229</sup> The Supplemental Brief also argued that there would be negative consequences for the executive branch’s ability to advance its diplomatic agenda:<sup>230</sup>

Adopting aiding and abetting liability under the ATS would, in essence, be depriving the Executive of an important tactic of diplomacy and available tools for the political branches in attempting to induce improvements in foreign human rights practices. The selection of the appropriate tools, and the proper balance between rewards and sanctions,

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224. *Id.* at 21.

225. *Id.* at 3–4.

226. *Id.* at 22.

227. *Id.* at 22.

228. *Id.* at 23.

229. Supplemental Brief for the United States as Amicus Curiae at 11, Doe v. Unocal Corp., 403 F.3d 708 (9th Cir. 2005) (Nos. 00-56603, 00-56628).

230. *Id.*

requires policymaking judgment properly left to the federal political branches.<sup>231</sup>

In addition, the government argued that ATS suits against corporate defendants based on aiding and abetting liability “would inevitably lead to greater diplomatic friction” and “trigger foreign government protests,”<sup>232</sup> and that “[t]his can and already has led to a lack of cooperation on important foreign policy objectives.”<sup>233</sup>

Finally, ATS aiding and abetting liability can deter “the free flow of trade and investment” in other countries and in the United States.<sup>234</sup>

The Ninth Circuit sitting en banc did not resolve these issues because the parties settled the cases.

6. In *Re Agent Orange Product Liability Litigation*, 373 F. Supp. 2d 7 (E.D.N.Y. 2005), *aff’d on other grounds*, *Vietnam Ass’n for Victims of Agent Orange v. Dow Chemical Co.*, 517 F.3d 104 (2d Cir. 2008)

Vietnamese citizens who were harmed by Agent Orange and similar herbicides manufactured by the defendants and used by the U.S. military during the Vietnam War sued for damages, alleging that the use of the toxic chemical constituted a war crime.

The extensive Statement of Interest filed in the district court argued that adjudication of the claims would intrude on the president’s constitutional power to conduct war, the use of Agent Orange did not violate international law norms at the time, and the defendants were protected by the government contractor defense.<sup>235</sup> The submission also argued that the courts should defer to the executive branch’s determination that the acts at issue did not violate international law.<sup>236</sup> These arguments were repeated in an amicus brief on appeal to the Second Circuit.<sup>237</sup>

The district court rejected the argument that the claim was nonjusticiable, but agreed that the use of Agent Orange in the 1960s did not violate a clearly established international law norm.<sup>238</sup> The Second Circuit affirmed the dismissal, agreeing that the plaintiffs had not established a

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231. *Id.* at 14–15.

232. *Id.* at 15–16.

233. *Id.* at 16.

234. *Id.*

235. Statement of Interest of the United States, *In re Agent Orange Prod. Liab. Litig.*, MDL 381, 373 F. Supp. 2d 7 (E.D.N.Y. 2005) (No. 04-400).

236. *In Re Agent Orange Product Liab. Litig.*, 373 F. Supp. 2d 7, 43–44 (E.D.N.Y. 2005).

237. Brief of the United States as Amicus Curiae at 16–22, *Vietnam Ass’n for Victims of Agent Orange v. Dow Chemical Co.*, 517 F.3d 104 (2d Cir. 2008) (No. 05-1953).

238. *In re Agent Orange*, 373 F. Supp. 2d at 105.

violation of the law at the relevant time; the appellate court did not reach other issues decided by the district court, including justiciability under the political question doctrine.

7. *Khulumani v. Barclay National Bank, Ltd.*, 504 F.3d 254 (2d Cir. 2007), *aff'd due to lack of a quorum sub nom.*, American Isuzu Motors, Inc. v. Ntsebeza, 2008 WL 117862, 76 U.S.L.W. 3405 (May 12, 2008) (No. 07-919)

South Africans brought three lawsuits against dozens of corporations for damages stemming from the defendants' operations in South Africa during the Apartheid regime.

The executive branch filed a letter in the district court<sup>239</sup> accompanied by a declaration from the South African government that asserted that adjudication of these cases would interfere with South Africa's chosen means to respond to past wrongs and would discourage needed investment.<sup>240</sup> The executive branch statement concurred in this assessment, asserting that the lawsuit would cause tension between the United States and South Africa and hamper the policy of encouraging positive change in developing countries through economic investment.<sup>241</sup>

The district court declined to reach the political question issues, dismissing the case instead because it found that aiding and abetting liability was not actionable under the ATS.<sup>242</sup> On appeal, the administration submitted a brief urging that the Second Circuit affirm the lower court's rejection of aiding and abetting liability as well as urging caution in recognizing extraterritorial claims under the ATS.<sup>243</sup> The brief argued that recognizing "aiding and abetting" liability would interfere with the executive branch's ability to employ policy options in repressive regimes, such as "active economic engagement as a method of encouraging re-

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239. Letter of William H. Taft IV, Legal Adviser, Dep't of State, *In re South African Apartheid Litigation*, MDL No. 1499 (Oct. 30, 2003), *cited in Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007), *aff'd due to lack of a quorum sub nom.*, American Isuzu Motors, Inc. v. Ntsebeza, 2008 WL 117862, 76 U.S.L.W. 3405 (May 12, 2008) (No. 07-919) (Korman, J., concurring in part and dissenting in part).

240. 504 F.3d at 300.

241. *Id.* at 297.

242. *In re S. Afr. Apartheid Litig.*, 346 F. Supp. 2d 538 (S.D.N.Y. 2004), *rev'd*, *Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007), *aff'd due to lack of a quorum sub nom.* American Isuzu Motors, Inc. v. Ntsebeza, 2008 WL 117862, 76 U.S.L.W. 3405 (May 12, 2008) (No. 07-919).

243. Brief of the United States as Amicus Curiae at 2, 27, *Khulumani v. Barclay National Bank, Ltd.*, 504 F.3d 254 (2d Cir. 2007) (Nos. 05-2141, 05-2326).

form and gaining leverage,”<sup>244</sup> which would constitute an unconstitutional interference in the powers of the executive branch:

The policy determination whether to pursue constructive engagement policy is precisely the type of foreign affairs question that is constitutionally vested in the Executive Branch and over which the courts lack institutional authority and ability to decide . . . . The selection of the appropriate tools, and the proper balance between rewards and sanctions, requires difficult policymaking judgments that can be rendered only by the political branches.<sup>245</sup>

The Second Circuit reversed, holding that aiding and abetting liability does trigger ATS jurisdiction, and remanded with instructions to permit plaintiffs to file an amended complaint. Given the likelihood of an amended complaint, the circuit refused to reach the political question issues. The Supreme Court affirmed the decisions for lack of a quorum, after four of the justices recused themselves.<sup>246</sup>

8. *Mujica v. Occidental*, 381 F. Supp. 2d 1164 (C.D. Cal. 2005) (appeal pending)

Colombian citizens brought an action against an oil company and private security firm to recover for their personal injuries and for the deaths of family members during a bombing of the village by the Colombian military.

The State Department submitted a letter<sup>247</sup> asserting that the litigation “will have an adverse impact on the foreign policy interests of the United States,” given that the legal proceedings against the Colombian government involving the underlying incidents were then-pending in the Colombian legal system.<sup>248</sup> The letter warned that “[d]uplicative proceedings in U.S. courts second-guessing [Colombia’s actions] may be seen as unwarranted and intrusive” by the Colombian government, and may have “negative consequences” for U.S. relations with Colombia.<sup>249</sup> In addition, lawsuits such as this one could deter U.S. investment in Colombia, which

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244. *Id.* at 13.

245. *Id.* at 14, 16–17.

246. *Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007), *aff’d due to lack of a quorum sub nom.*, *American Isuzu Motors, Inc. v. Ntsebeza*, 2008 WL 117862, 76 U.S.L.W. 3405 (May 12, 2008) (No. 07-919).

247. Letter from William H. Taft, Legal Advisor, Dep’t of State, *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164 (C.D. Cal. 2005) (No. 03-2860).

248. *Id.* at 1.

249. *Id.* at 2.

could harm Colombia's economy as well as negatively impact U.S. interests in Colombia and the region.<sup>250</sup>

[S]uch downturns could damage the stability of Colombia, the Colombian government's U.S.-supported campaigns against terrorists and narcotics traffickers, regional security, our efforts to reduce the amount of drugs that reach the streets of the United States, promotion of the rule of law and human rights in Colombia, and protection of U.S. persons, government facilities, and investments. Finally, reduced U.S. investment in Colombia's oil industry may detract from the vital U.S. policy goal of expanding and diversifying our sources of imported oil.<sup>251</sup>

The State Department letter attached a letter from the Colombian government stating that the case could affect relations between Colombia and the United States.<sup>252</sup>

The district court dismissed based on the political question doctrine, holding that permitting the case to go forward would express lack of respect for the executive branch's preferred approach to the underlying incident and relations with Colombia in general, and would contradict the executive branch's foreign policy decision to handle this matter through non-judicial means.<sup>253</sup> That decision is currently on appeal.

9. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633 (S.D.N.Y. 2006) (granting motion for summary judgment) (appeal pending)

Residents of southern Sudan sued a Canadian corporation seeking compensation for genocide, crimes against humanity, and other violations of international law.

The State Department sent a Statement of Interest to the court with a diplomatic letter from the Canadian government attached that stated that the litigation infringed on the foreign relations of Canada and would have a "chilling effect" on Canadian firms engaged in Sudan.<sup>254</sup> The U.S. Statement of Interest stated that it shared the Canadian government's concerns and urged the court to take a narrow view of the ATS in order

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250. *Id.*

251. *Id.*

252. *Id.*

253. *Mujica v. Occidental*, 381 F. Supp. 2d 1164, 1194 (C.D. Cal. 2005) (appeal pending).

254. Statement of Interest of the United States with attached Letter from Government of Canada at 4, *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633 (S.D.N.Y. 2006) (No. 01-9882).

to avoid such conflicts.<sup>255</sup> The letter also expressed the department's concerns about the dangers of taking an expansive interpretation of ATS jurisdiction and attached a copy of the Justice Department's brief in *Doe v. Unocal Corp.*<sup>256</sup>

The district court rejected the views of both the U.S. and Canadian governments, finding the Canadian government's expressed concerns unpersuasive because there was no showing that the pending litigation would interfere with Canada's foreign policy. The court opined that:

While this Court may not question either the accuracy of the description of Canada's foreign policy in its Letter, or the wisdom and effectiveness of that foreign policy, it remains appropriate to consider the degree to which that articulated foreign policy applies to this litigation.

. . . This lawsuit does not concern a Canadian company exporting to and engaged in trade with the Sudan, but a Canadian company operating in the Sudan as an oil exploration and extraction business. Moreover, the allegations in this lawsuit concern participation in genocide and crimes against humanity, not trading activity. While there is no requirement that a government's letter must support its position with detailed argument, where the contents of the letter suggest a lack of understanding about the nature of the claims in the ATS litigation, a court may take that into account in assessing the concerns expressed in the letter.

. . .

. . . [W]hile a court may decline to hear a lawsuit that may interfere with a State's foreign policy, particularly when that foreign policy is designed to promote peace and reduce suffering, dismissal is only warranted as a matter of international comity where the nexus between the lawsuit and that foreign policy is sufficiently apparent and the importance of the relevant foreign policy outweighs the public's interest in vindicating the values advanced by the lawsuit. Even giving substantial deference to the Canada Letter, Talisman has not shown that dismissal of this action is appropriate.<sup>257</sup>

The court concluded that there was no showing that the pending litigation would interfere with Canada's foreign policy.<sup>258</sup> The judge declined to defer to the position taken in the Statement of Interest and noted that the United States and other countries "retain a compelling interest in the

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255. *Id.* at 2.

256. *Id.* at 2–4.

257. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 2005 WL 2082846, at \*6–7 (S.D.N.Y. Aug. 30, 2005).

258. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633, 682–83 (S.D.N.Y. 2006).

application of the international law proscribing atrocities such as genocide and crimes against humanity.”<sup>259</sup>

The case was later dismissed on a motion for summary judgment; appeal of that dismissal is currently pending.

10. *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193 (9th Cir. 2007) (rehearing en banc granted)

Residents of Papua New Guinea (“PNG”) brought an ATS action against an international mining company, alleging that they and their family members were victims of international law violations in connection with operation of a copper mine in PNG.<sup>260</sup>

The State Department filed a letter that described the peace and reconciliation process in PNG and stated that the ongoing litigation “would risk a potentially serious adverse impact on the peace process and hence on the conduct of our foreign relations.”<sup>261</sup> The State Department letter cites an attached letter from the government of PNG stating its objections to the litigation.<sup>262</sup>

The district court dismissed the claim in deference to the views of the executive branch. On appeal, the Ninth Circuit reversed, noting that although the judiciary should give “serious weight” to the views of the executive branch, the court was not bound to dismiss a case in the face of the executive branch’s foreign policy concerns.<sup>263</sup> The court noted that the State Department had not specifically requested that the case be dismissed, and found the executive branch’s “guarded” comments an insufficient basis to do so.<sup>264</sup> “Ultimately, it is our responsibility to determine whether a political question is present, rather than to dismiss on that ground simply because the Executive Branch expresses some hesitancy about a case proceeding.”<sup>265</sup> The court stated that:

[T]his case presents claims that relate to a foreign conflict in which the United States had little involvement (so far as the record demonstrates), and therefore that merely “touch[ ] foreign relations.” . . . When we take the [Statement of Interest (“SOI”)] into consideration and give it “serious weight,” we still conclude that a political question is not presented. Even if the continued adjudication of this case does present

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259. *Talisman*, 2005 WL 2082846 at \*7.

260. *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193 (9th Cir. 2007).

261. Letter from William H. Taft, Legal Advisor, Dep’t of State at 2, *Sarei v. Rio Tinto, PLC*, 221 F. Supp. 2d 1116 (C.D. Cal. 2002) (No. 00-11695).

262. *Sarei*, 487 F.3d at 1199.

263. *Id.* at 1205–07.

264. *Id.* at 1206–07.

265. *Id.* at 1205.

some risk to the Bougainville peace process, that is not sufficient to implicate the . . . *Baker* factors . . . The State Department explicitly did *not* request that we dismiss this suit on political question grounds, and we are confident that proceeding does not express any disrespect for the executive, even if it would prefer that the suit disappear. Nor do we see any “unusual need for unquestioning adherence” to the SOI’s nonspecific invocations of risks to the peace process. And finally, given the guarded nature of the SOI, we see no “embarrassment” that would follow from fulfilling our independent duty to determine whether the case should proceed. We are mindful of *Sosa*’s instruction to give “serious weight” to the views of the executive, but we cannot uphold the dismissal of this lawsuit solely on the basis of the SOI.<sup>266</sup>

The Ninth Circuit granted a hearing en banc, but at that point the PNG government had reversed its position on the litigation and the State Department informed the court that it no longer sought dismissal based on the foreign policy concerns expressed in its earlier letter.<sup>267</sup>

11. *Estate of Rodriguez v. Drummond Co. Inc.*, 256 F. Supp. 2d 1250 (N.D. Ala. 2003)

In a case alleging that a U.S.-based company was legally liable for the murders of Colombian union members by Colombian paramilitary groups, the court asked the State Department whether the executive branch was aware of the pending litigation and whether it had made a decision not to intervene.<sup>268</sup> The Department of State replied that it was aware of the case, but “does not routinely involve itself in district court cases to which the United States is not a party,” so that “no inference should be drawn about the Department’s views regarding a particular case in which it has not participated, or as to questions which it has not addressed.”<sup>269</sup> The submission then states that the Department “does not have an opinion at this time as to whether continued adjudication of this matter will have an adverse impact on the foreign policy interest of the United States.”<sup>270</sup> The letter then notes its interpretation of the Supreme Court’s decision in *Sosa* that narrowed the applicability of the ATS in

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266. *Id.* at 1206–07.

267. See Brief for the United States as Amicus Curiae Supporting Panel Rehearing or Rehearing En Banc at 14 n.3, quoted in *Sarei*, 487 F.3d at 1206 n.14 (“[A]fter noting that the SOI was based on concerns in 2001 ‘which are different from the interests and circumstances that exist today’ the government expressly declines to endorse a dismissal of this case based on the SOI.”).

268. *Estate of Rodriguez v. Drummond Co.*, 256 F. Supp. 2d 1250 (N.D. Ala. 2003).

269. Letter from John B. Bellinger, Legal Advisor, Dep’t of State, at 2, *Romero v. Drummond*, No. 03-0575 (N.D. Ala. Aug. 2, 2006).

270. *Id.*

several cases; the letter was forwarded to the court by the Department of Justice, which reiterated those concerns and attached a copy of the brief the department filed in the *Khulumani* case.<sup>271</sup>

The court entered judgment for the defendants after a jury trial.<sup>272</sup> An appeal is pending.

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271. *Id.*; Statement of Interest of the United States, at 2, Romero v. Drummond, No. 03-0575 (N.D. Ala. Aug. 2, 2006).

272. Order Dismissing Case In Accordance with Jury Verdict, Rodriquez v. Drummond, No. 02-00665 (July 30, 2007).

# CORPORATE HUMAN RIGHTS VIOLATIONS: THE FEASIBILITY OF CIVIL RECOURSE IN THE NETHERLANDS

*Nicola M.C.P. Jägers & Marie-José van der Heijden\**

## INTRODUCTION

In August 2006, the oil and cargo ship Probo Koala set sail for the west coast of Africa. Its cargo consisted of, inter alia, a toxic brew of cleaning chemicals, gasoline, and crude oil slop. Under the cover of night on August 19, 2006, the deadly cargo of the Probo Koala was dispersed onto the streets of Abidjan, the capital of the Ivory Coast, in fourteen locations around the city—near vegetable fields, fisheries, and water reservoirs.<sup>1</sup> This resulted in a major environmental disaster and serious human suffering; it is estimated that a dozen people died and over 9000 fell ill.<sup>2</sup>

Before sailing to the Ivory Coast, the Proba Koala had called at ports in Europe, including the port of Amsterdam in the Netherlands. There, Dutch authorities halted the unloading of the waste and suggested that the waste be disposed of at special facilities in Rotterdam for approximately US\$250,000. For executives at Trafigura Beheer B.V. (“Trafigura”—a multinational oil trading company domiciled in the Netherlands with annual sales of US\$28 billion, which had chartered the Probo Koala—the disposal cost was too high.<sup>3</sup> They decided instead to send the ship on its way and to dump the waste elsewhere: Africa.

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1. The toxic sludge was removed from the ship and dumped by the Ivorian waste handler Société Tommy. Greenpeace News, Toxic Waste in Abidjan: Greenpeace Evaluation, Sept. 15, 2006, <http://www.greenpeace.org/international/news/ivory-coast-toxic-dumping/toxic-waste-in-abidjan-green> [hereinafter Greenpeace Evaluation].

2. Sebastian Knauer, Thilo Thielke & Gerald Traufetter, *Profits for Europe, Industrial Slop for Africa*, SPIEGEL ONLINE INT'L, Sept. 18, 2006, <http://www.spiegel.de/international/spiegel/0,1518,437842,00.html>. Victims have been treated for respiratory problems, nausea, dizziness, vomiting, and burns. Greenpeace Evaluation, *supra* note 1. The waste was eventually cleaned up by a French company. *Ivory Coast Begins Toxic Clean-up*, BBC NEWS, Sept. 17, 2006, <http://news.bbc.co.uk/2/hi/africa/5354530.stm>.

3. Trafigura is incorporated under Dutch law and is consequently domiciled in the Netherlands. Its headquarters are in Lucerne, Switzerland, while its operational center is

The case of the Probo Koala is sadly only part of a growing trend known as toxic waste colonialism, in which underdeveloped states are used as inexpensive disposal sites for waste turned away by developed states. The resulting harm frequently amounts to serious human rights violations. In the case of the Probo Koala, the right to health and the right to life were seriously threatened. As a result, Trafigura, the corporation that chartered the vessel, has been the subject of numerous investigations.<sup>4</sup> Currently, its British subsidiary, Trafigura Ltd., is facing charges of negligence before the High Court in London, where Trafigura's operational center is located.<sup>5</sup> However, beyond the case pending in London, Trafigura's incorporation in the Netherlands raises the interesting question of what possibilities Dutch law offers to address such extra-territorial human rights violations by a corporation. This Article will explore these possibilities from a civil law perspective.

The example of Trafigura illustrates one of many ways in which corporations can be either directly responsible for or contribute significantly to serious human rights violations. Increasingly, the impact (both negative and positive) that corporations have on human rights is being acknowledged. More importantly, the urge to hold corporations accountable for their grave human rights violations is strengthening.

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located in London, United Kingdom. See THE BERNE DECLARATION, NOMINATION FOR THE PUBLIC EYE GLOBAL AWARD 2007: TRAFIGURA BEHEER B.V. 1–2 (2007), [http://www.evb.ch/cm\\_data/Trafigura\\_e.pdf](http://www.evb.ch/cm_data/Trafigura_e.pdf) [hereinafter TRAFIGURA BACKGROUND].

4. The Dutch public prosecutor planned in February 2008 to file criminal charges against Trafigura and the Amsterdam City Council for their conduct in connection with the Probo Koala. Foo Yun Chee & Charles Dick, *Dutch Plan to Charge Trafigura Over Toxic Ship*, REUTERS, Feb. 19, 2008, <http://www.reuters.com/article/latestCrisis/idUSL19884993>. In the Ivory Coast, three Trafigura employees were arrested in connection with the incident. Toby Sterling, *Dutch Trafigura Settles Toxic Waste Case*, WASH. POST, Feb. 16, 2007, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/02/16/AR2007021600707.html>. In February 2007, Trafigura settled the case with the Ivory Coast by paying 152 million euros; however, an investigation conducted by the United Nations ("U.N.") Environmental Programme is still pending. *Trafigura Agrees Probo Koala Payout*, DUTCHNEWS.NL, Feb. 14, 2007, [http://www.dutchnews.nl/news/archives/2007/02/trafigura\\_agrees\\_probo\\_koala\\_p.php](http://www.dutchnews.nl/news/archives/2007/02/trafigura_agrees_probo_koala_p.php); Press Release, U.N. Environment Programme, Donor Assistance Critical to Cote D'Ivoire Clean-up Efforts (Dec. 20, 2006), <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=496&ArticleID=5456&l=en>.

5. Trafigura has faced serious allegations before. In May 2006, a Texas court ordered the company to pay penalties and repay profits of close to US\$20 million for violating U.S. laws and the embargo provisions of the "Oil for Food" program in Iraq. Knauer et al., *supra* note 2; Press Release, U.S. Attorney's Office, Southern District of Texas, Swiss Corporation Convicted in "Oil for Food" Case (May 25, 2006), available at <http://www.forensicrisk.com/060525-Trafigura.pdf>.

Traditionally, international law has exclusively addressed states. Nevertheless, it is increasingly recognized that non-state entities, such as individuals, also have rights and duties under international law. Holding corporations accountable for violations of international law, therefore, does not pose a problem conceptually. This can be deduced, *inter alia*, from the number of international conventions that explicitly create obligations for companies in specific areas.<sup>6</sup> Notwithstanding the growing awareness of corporate entities' major involvement in international human rights violations, there is no mechanism at the international level to hold such entities accountable.

As a result, the tendency has been to turn to domestic remedies.<sup>7</sup> This is not unusual since, generally, domestic legal systems are crucial to the enforcement of international human rights norms. In the burgeoning quest for international corporate accountability for violations of international human rights law, attention to the possibilities offered by domestic courts is rising as multinational corporations are confronted with liability claims in their home countries for violations committed abroad. From the perspective of the victims of such violations, the ability to bring a claim in their home countries offers the distinct advantage that they do not have

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6. See, e.g., International Convention on the Suppression and Punishment of the Crime of Apartheid art. I, Nov. 30, 1973, 1015 U.N.T.S. 243; Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, 28 I.L.M. 649 (1989); United Nations Convention Against Transnational Organized Crime art. 6(5), opened for signature Dec. 13, 2000, S. TREATY DOC. NO. 108-16 (2004), 2225 U.N.T.S. 275. Furthermore, there are numerous international instruments of a soft law character that address corporations directly. See, e.g., Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, para. 6, Int'l Labour Org., 204th Sess., Nov. 16, 1977, 17 I.L.M. 422 (1978); Organisation for Economic Co-operation and Development, Guidelines for Multinational Enterprises, June 21, 1976, 15 I.L.M. 969 (1976); Human Rights Council, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, U.N. Doc. A/HRC/4/35 (Feb. 19, 2007) (prepared by John Ruggie) (describing various soft law mechanisms). See also NICOLA M.C.P. JÄGERS, CORPORATE HUMAN RIGHTS OBLIGATIONS: IN SEARCH OF ACCOUNTABILITY (2002) (analyzing the accountability of corporations for violations of international human rights law from a conceptual point of view).

7. This is explicitly recognized by the U.N. Special Representative of the U.N. Secretary General on Business and Human Rights John Ruggie in his 2007 report to the U.N. Human Rights Council. Ruggie, *supra* note 6. This trend is also reflected in the survey conducted by the Norwegian research center Fafo, which maps the various ways of holding corporations accountable for international crimes in sixteen different jurisdictions. See ANITA RAMASASTRY & ROBERT C. THOMPSON, COMMERCE, CRIME AND CONFLICT: LEGAL REMEDIES FOR PRIVATE SECTOR LIABILITY FOR GRAVE BREACHES OF INTERNATIONAL LAW: A SURVEY OF SIXTEEN COUNTRIES (2006), available at <http://www.fafo.no/pub/rapp/536/536.pdf>.

to rely on the legal remedies available in the countries where the corporations operate—such remedies often being non-existent or difficult to acquire.

This Article focuses on tort law as an avenue to address corporate violations of international law. Tort law can be employed for several reasons. Tort law can serve a preventive function by discouraging certain unlawful behavior. In this sense, tort liability may act as a regulatory mechanism. Additionally, tort law offers redress for injuries suffered and therefore also serves a compensatory function. It is especially this latter characteristic of tort law that makes it an important tool of human rights enforcement from the perspective of victims of human rights violations.

Research in the area of tort law as a tool for enforcing human rights has so far concentrated mainly on the United States. This is hardly surprising given the eye-catching developments that have arisen under the Alien Tort Claims Act (“ATCA”).<sup>8</sup> Litigation under the ATCA is unique in the sense that it constitutes a category of truly international tort cases. In ATCA litigation, international law is incorporated to define the substance of the tort and to determine the actor who is liable to suit. Individuals and corporations, irrespective of their location, are being held responsible in the United States for violations of international law that occurred elsewhere.<sup>9</sup> However, as Professor Beth Stephens has commented, because of its unique character, the ATCA cannot easily be translated to other jurisdictions.<sup>10</sup> Moreover, outside the United States, domestic remedies for violations of international law are more often sought in the realm of criminal law rather than civil law.<sup>11</sup> Nevertheless, developments in civil litigation before other domestic courts reflect the same international law concerns as the human rights litigation in the United States. For example, a number of high-profile cases in which parent companies have been held responsible in the United Kingdom for

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8. Alien Tort Claims Act, 28 U.S.C. § 1330 (1994) (providing that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations”).

9. See, e.g., *Cabello v. Fernandez-Larios*, 402 F.3d 1148 (11th Cir. 2005); *Tachiona v. Mugabe*, 234 F. Supp. 2d 401 (S.D.N.Y. 2002); *In re Estate of Marcos Human Rights Litigation*, 910 F. Supp. 1460 (D. Haw. 1995).

10. Beth Stephens, *Translating Filártiga: A Comparative and International Law Analysis of Domestic Remedies For International Human Rights Violations*, 27 YALE J. INT'L L. 3, 17–18, 27–34 (2002) (providing an overview of the common procedures in different legal systems around the world that serve as obstacles to civil litigation for human rights abuses).

11. See *infra* Part IV for more on criminal law remedies.

bodily harm inflicted on third parties in host countries<sup>12</sup> have generated a fair amount of scholarly attention to civil law remedies in that jurisdiction.<sup>13</sup> This case law differs from the ATCA litigation insofar as it applies domestic liability standards to actors headquartered in the country, as opposed to the independent ATCA cases against non-resident defendants for international human rights violations committed outside the forum state.

This Article will not deal with the transnational human rights litigation in the United Kingdom, but will instead focus on the feasibility of such litigation in another European country: the Netherlands. Specifically of interest is the use of Dutch tort law as a remedy for corporate human rights abuses.<sup>14</sup>

In the Netherlands, as is the case with corporations in many other (home) countries, the activities of (Dutch) corporations abroad have been subject to increased political attention. Dutch political interest in multinational corporations' activities abroad is evidenced by the numerous questions regarding such activities submitted to the Dutch Parliament over the past few years. These questions have addressed, *inter alia*,

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12. See, e.g., Lubbe v. Cape PLC, [2000] 4 All E.R. 268 (Eng. H.L.); Sithole v. Thor Chem. Holdings Ltd., [1999] T.L.R. 110 (Eng. C.A.); Connelly v. RTZ Corp., [1997] 4 All E.R. 335 (Eng. H.L.); Ngcobo v. Thor Chem. Holdings Ltd., [1995] T.L.R. 10 (Eng. C.A.).

13. See generally Richard Meeran, *The Unveiling of Transnational Corporations: A Direct Approach*, in HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS 161–70 (Michael Addo ed., 1999); Richard Meeran, *Liability of Multinational Corporations: A Critical Stage in the UK*, in LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW 251 (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000).

14. The Dutch legal system may also provide avenues other than tort law, but given the limited space, these will not be discussed here. See, e.g., Marie-José van der Heijden & Katinka Jesse, *Corporate Environmental Accountability as a Means for Intragenerational Equity: 'Hidden' Environmental Impacts in the North-South Conflict*, in SUSTAINABLE DEVELOPMENT IN INTERNATIONAL AND NATIONAL LAW 348, 349–74 (Hans Christian Bugge & Christina Voigt eds., 2008). Van der Heijden and Jesse suggest that the so-called *enquête-recht* (right of investigation) of the *Ondernemingskamer* (Dutch Companies and Business Court) may be such an avenue. See generally *id.* This Dutch legal doctrine is comparable in some ways to the business judgment rule in U.S. corporate law. Shareholders and other stakeholders can file a complaint, after which the Dutch Companies and Business Court may decide to examine the corporate conduct, i.e., the management and its decisions. The *enquête-recht* can also be used as a disclosure mechanism. So far, no case on corporate violations of human rights abroad has been filed under this mechanism. The whole range of possible legal remedies will be extensively analyzed in van der Heijden's forthcoming dissertation.

Unilever's involvement in child labor practices in India<sup>15</sup> and Shell's activities in Nigeria.<sup>16</sup> The aforementioned incident involving Trafigura, and the illegal dumping of the waste carried by the Probo Koala in particular, led to political commotion during a special parliamentary debate in September 2006.<sup>17</sup> However, scholarly attention to the specific subject of corporate liability in the Netherlands for international human rights violations has remained relatively scarce.<sup>18</sup> One explanation might be that, to date, such claims have not been filed in the Dutch courts against (parent) companies. The Netherlands has no equivalent to the ATCA.

The question this Article seeks to answer is if and how Dutch tort law provides possibilities for transnational human rights litigation. By analyzing the Dutch legal system, this Article seeks to survey the possibilities this system might offer to human rights plaintiffs and litigators and to explore why claims of human rights violations under tort law still have not been brought before the Dutch courts. As part of this analysis, an examination of European law more generally is also required, since a survey of the Dutch legal system on its own is incomplete given the far-reaching harmonization of civil procedures at the European level.

This Article will demonstrate that in light of the increased attention to international civil liability claims and the characteristics of the Dutch civil system, a Dutch corporation will likely be faced with a claim concerning alleged human rights violations in the (near) future. In the 1990s, this seemed likely when Ken Saro-Wiwa and other leaders of the Ogoni

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15. Tweede Kamer der Staten-Generaal [TK] [Dutch House of Representatives] 2003–2004, Aanhangsel van de handelingen [Addendum to the Agenda: Questions Asked by Members of Parliament with Subsequent Answers by Members of the Cabinet], nos. 1453 & 1476, submitted 12 mei 2003.

16. TK 2003–2004, Aanhangsel van de handelingen [Addendum to the Agenda: Questions Asked by Members of Parliament with Subsequent Answers by Members of the Cabinet], no. 2237, submitted 17 juni 2004.

17. See TK 2006–2007, Brief van de Staatssecretaris van volkshuisvesting, ruimtelijke ordening en milieubeheer [Letter from the State Secretary on Environmental Management], no. 143, submitted 31 oktober 2006.

18. But see L. ENNEKING, CORPORATE SOCIAL RESPONSIBILITY: TOT AAN DE GRENSEN NIET VERDER? [CORPORATE SOCIAL RESPONSIBILITY: NOT BEYOND THE BORDER?] (2007); Gerrit Betlem, *Transnational Litigation Against Multinational Corporations Before Dutch Civil Courts*, in LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW 283–305 (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000); M.L. Lennarts, *Multinationals en Asbestclaims: Over Forum Non Conveniens, Zorgplichten, 'double standards' en 'soft law'* [Multinationals and Asbestos Claims: On Forum Non Conveniens, Caretaking, 'Double Standards' and 'Soft Law'], in LT VERZAMELDE 'GRONINGER' OPSTELLEN AANGEBODEN AAN VINO TIMMERMAN [LT COLLECTED 'GRONINGER' DRAFTING OFFERED TO VINO TIMMERMAN] 177–89 (E.E.G. Gepken-Jager & J.N. Schutte-Veenstra eds., 2003).

people challenged the business and environmental practices of various multinational corporations in Nigeria, particularly that of Shell Nigeria. These Ogoni leaders were eventually executed in 1995 by the Nigerian military government after a sham trial.<sup>19</sup> In 1996, the first of a series of cases was filed under the ATCA by the decedents' relatives against the Dutch/British parent company, The Royal Dutch/Shell, for its involvement in gross human rights abuses in Nigeria.<sup>20</sup> The plaintiffs alleged that Shell Nigeria was complicit in the execution of the Ogoni leaders. The Southern District Court of New York dismissed the case on *forum non conveniens* grounds, therefore raising the possibility that the case would be brought before a court in the parent company's home country—the Netherlands (its place of incorporation) or England (its corporate headquarters). The possibility of litigating in the Netherlands was, however, not fully explored, as the district court held that the case should be dismissed and tried in England. In 2000, the case was reversed on appeal and the U.S. Court of Appeals for the Second Circuit decided that "in balancing the interests, the district court did not accord proper significance to a choice of forum by lawful U.S. resident plaintiffs or to the policy interest implicit in our federal statutory law in providing a forum for adjudication of claims of violations of the law of nations."<sup>21</sup> The case therefore proceeded in the United States, foreclosing any need for an alternative forum, either in the United Kingdom or in the Netherlands.

This Article will show that as a result of certain features of Dutch tort law, the Dutch legal system is not as litigation-friendly as that of the United States. Nevertheless, there are several reasons why it is relevant to analyze the possibilities for civil litigation in the Netherlands. The Netherlands is the home country to a relatively large number of big multinational corporations such as Philips, Shell, and Heineken, to name a few. It is argued that the Netherlands offers an attractive environment to set up businesses, especially from a fiscal point of view, therefore drawing many to establish corporations in its jurisdiction.<sup>22</sup> This abundance of

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19. See *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 92–93 (2d Cir. 2000). For more background on the *Wiwa* case, see Sigrun I. Skogly, *Complexities in Human Rights Protection: Actors and Rights Involved in the Ogoni Conflict in Nigeria*, 15 NETH. Q. HUM. RTS. 47 (1997).

20. *Wiwa*, *supra* note 19, at 92.

21. *Id.* at 99–100. This reading of the *forum non conveniens* doctrine has been confirmed by the United States Supreme Court, which decided on March 26, 2001 to deny certiorari to an appeal by the defendants. *Id.*

22. See MICHAEL VAN DIJK ET AL., THE NETHERLANDS: A TAX HAVEN? 3 (2006), available at [http://www.somo.nl/html/paginas/pdf/netherlands\\_tax\\_haven\\_2006\\_NL.pdf](http://www.somo.nl/html/paginas/pdf/netherlands_tax_haven_2006_NL.pdf) (concluding that the Netherlands is attractive to businesses because it is perceived to be and functions as a tax haven).

well-known corporations and the favorable business climate in the Netherlands means that, should Dutch law provide an avenue for litigation, it would offer a plaintiff enforceable remedies.

In light of the above, it is important to analyze the possible remedies the Dutch legal system has to offer to victims of corporate human rights violations. This is done by addressing the following issues. First, in Part I, the consequences of the complex legal structures of multinational corporations will be addressed. In Part II, this Article will examine the procedural issues that arise when analyzing the feasibility of transnational human rights litigation. The first question one must ask is which court may, or sometimes must, hear such a claim (Part II.A). Part II.B will address the issue of the choice of law. Next, this Article will analyze substantive tort law in the Netherlands in an effort to address the general question of how a court will deal with violations of public law norms in the private sphere (Part II.C). The feasibility of transnational human rights litigation in the Netherlands will not only depend on the issues discussed in these sections but also on the general characteristics of Dutch private law and legal culture, which will be discussed in Part III. Given the general tendency towards using criminal prosecution in Europe as a remedy for international human rights violations, this avenue will be briefly explored in Part IV. The (dis)advantages of employing criminal or civil remedies will be discussed in Part V, followed by the conclusion.

Professor Stephens rightly states that “[a] full understanding of the varied options available in differing legal systems is an essential foundation for the worldwide drive for accountability and redress.”<sup>23</sup> It is hoped that this Article will contribute to that effort.

## I. THE LEGAL STRUCTURE OF MULTINATIONAL CORPORATIONS

A preliminary issue that must be addressed before determining whether a company can be sued under Dutch law for allegedly harmful activities abroad concerns the difficulties posed by the often complex legal structures of multinational corporations. The most straightforward case is the situation in which a multinational corporation becomes directly present in a host country by establishing a branch in that country. To litigate against that corporation will not present a problem, as the branch and the multinational corporation can be considered parts of one corporate group and a case can be brought under Dutch law against the parent company based on the principle of active nationality.<sup>24</sup>

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23. Stephens, *supra* note 10, at 57.

24. See *Burgerlijk Wetboek* [BW] [Civil Code] art. 1:5 (Neth.).

However, a more common situation is the one in which a corporation creates a separate legal entity that operates under the laws of the host country but is controlled by the parent company. The doctrine of limited liability, meant to encourage individual entrepreneurship, has resulted in corporations establishing complicated corporate structures consisting of numerous legal entities with multiple layers of limited liability. A parent company cannot simply be held liable for acts of legally separate subsidiaries.<sup>25</sup> A more complicated situation that further limits a corporation's liability results when a corporation enters into contractual relations with partners present in another country. Such a corporation cannot be liable for its foreign partners' acts.<sup>26</sup>

When discussing transnational human rights litigation, it is important to have a clear picture of which legal mechanism is being applied to overcome the potential obstacle of limited liability. Different mechanisms can be discerned, each of which has different consequences in the context of litigation.<sup>27</sup>

In the Netherlands, suits for human rights violations cannot be brought directly against a parent company's legally separate subsidiaries and partners operating abroad. Therefore, in order to bring a claim in the Netherlands, the parent of the foreign subsidiary must be identified and suit brought against this corporation either based on its direct participation in the alleged violations or based on a derivative responsibility for these acts. In principle, the parent company will, however, be shielded from accountability on the basis of the doctrine of limited liability.

Two legal mechanisms can be applied to overcome this hurdle. First, a litigant may try to "pierce the corporate veil" by demonstrating that the parent company should be liable for acts of the subsidiary because the legal separation is not in accordance with reality or because the corporate form has been abused by the parent company. To date, no claim has come before the Dutch courts seeking the accountability of a Dutch parent company for breaches of international human rights law in another country. It is therefore difficult to draw any conclusions as to whether the Dutch courts will pierce the corporate veil in such a case to find the parent company liable. To determine how a Dutch court would approach

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25. See BW art. 2:19 (Neth.).

26. See *id.* art. 2:20.

27. See OLIVIER DE SCHUTTER, EXTRATERRITORIAL JURISDICTION AS A TOOL FOR IMPROVING THE HUMAN RIGHTS ACCOUNTABILITY OF TRANSNATIONAL CORPORATIONS (2006), available at <http://www.reports-and-materials.org/Olivier-de-Schutter-report-for-SRSG-re-extraterritorial-jurisdiction-Dec-2006.pdf> (analyzing different situations in which extraterritorial jurisdiction is exercised to hold transnational corporations accountable for human rights violations).

piercing the corporate veil in tort cases, we need to turn to the case law concerning the accountability of a parent company for the debts of a subsidiary. The prevailing view is that the parent company can be held accountable for the debt of its subsidiary if: (1) the parent is the majority shareholder of the subsidiary; (2) the parent company knew or should have known that the creditors' rights would be infringed,<sup>28</sup> (3) the infringement is the result of an act of the parent company and/or it is a case of a special parent-subsidiary relationship;<sup>29</sup> and, finally, (4) if the parent company fails to take the creditors' interests into consideration.<sup>30</sup> From this case law, it can be concluded that profound (financial) involvement of the parent company and knowledge of the infringement of rights is required for the courts to allow the corporate veil to be pierced.

If and how these criteria will apply in the case of a claim concerning extraterritorial corporate human rights violations will depend on the specific circumstances and is difficult to predict. Nevertheless, one can conclude that providing the evidence needed for piercing the corporate veil will impose a considerable burden on the plaintiffs. Another consequence, from the litigant's perspective, is that the criteria for piercing the corporate veil are not very clear-cut, especially not when it concerns a case of human rights violations, which has not yet been brought before a Dutch court. It may prove very difficult to establish the factual relation required to pierce the corporate veil in such a case. Moreover, this mechanism may act as a disincentive for parent companies to control their subsidiaries as it is this factual relationship that can give rise to a piercing of the corporate veil. The less a parent company is involved in the politics and operations of its subsidiary, the less likely it is to be held liable for any misconduct.

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28. Such knowledge is presumed to be present if the financial policies are considerably interwoven, the infringement of creditors' rights can objectively be foreseen, and the financial position of the subsidiary is precarious. Knowledge of the infringement is also presumed if the parent company profits from this infringement while being closely involved in the activities of the subsidiary.

29. This refers to a "profound involvement" of the parent company in the policies of the subsidiary.

30. These criteria are drawn from the groundbreaking "piercing of the corporate veil" cases. See *Sobi/Hurks II*, Hoge Raad der Nederlanden [HR] [Supreme Court of the Netherlands], 21 december 2001, NJ 2005, 96 (Neth.); *Coral/Stalt*, Hoge Raad der Nederlanden [HR] [Supreme Court of the Netherlands], 12 juni 1998, NJ 1998, 727 (Neth.); *Nimox*, Hoge Raad der Nederlanden [HR] [Supreme Court of the Netherlands], 8 november 1991, NJ 1992, 174 (Neth.); *Albada Jelgerma II*, Hoge Raad der Nederlanden [HR] [Supreme Court of the Netherlands], 19 februari 1988, NJ 1988, 487 (Neth.); *Osby*, Hoge Raad der Nederlanden [HR] [Supreme Court of the Netherlands], 25 september 1981, NJ 1982, 443 (Neth.).

A second mechanism that plaintiffs in transnational human rights litigation may rely on is the direct liability of the parent for an act or omission by the *parent* in violation of its duty to exercise due diligence in the relationship towards the subsidiary. This approach was used in the previously mentioned transnational human rights cases decided by the British courts.<sup>31</sup> In this situation, acts or omissions of the parent company are considered to be in violation of a domestic liability standard. This mechanism has some advantages for transnational human rights litigation as it will encourage rather than discourage more active involvement by the parent company towards its subsidiaries. Subsequent sections of this Article will consider this last legal mechanism when discussing the possibilities offered by Dutch civil law in cases of corporate breaches of international law. This Article will introduce the general features of the Dutch system of liability law in order to analyze the possibilities it offers for plaintiffs to bring transnational human rights claims before the Dutch courts. This Article will focus more on legal mechanisms that can be used to hold corporations accountable for human rights violations and the resulting procedural issues, and less on the content of the norms and the extent of the obligations to which corporations should adhere.<sup>32</sup>

## II. LITIGATING AGAINST CORPORATIONS FOR VIOLATIONS OF INTERNATIONAL LAW IN THE DUTCH LEGAL SYSTEM

The transnational nature of human rights litigation under consideration in this Article raises jurisdictional questions that are dealt with under the rules of private international law. Before addressing the typical private international law issues concerning the proper legal forum and choice of law,<sup>33</sup> a preliminary remark is in order.

As will be demonstrated, the hard and fast rules of private international law pose a potential obstacle for victims of corporate human rights violations who want to bring suit against a corporation. One may question the appropriateness of a strict application of these rules of private international law in the face of the most serious violations of fundamental

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31. See *supra* note 12 and the authorities cited therein.

32. See JÄGERS, *supra* note 6 (analyzing the human rights obligations of corporations under international human rights law).

33. Private international law typically also addresses a third issue: the execution of judgments. In view of the fact that transnational human rights litigation remains relatively scarce and that such a case has never been brought in the Netherlands, this issue will not be addressed in this Article.

norms of international law.<sup>34</sup> The unification of private international law, necessary from the perspective of legal certainty, curbs judicial creativity and demands self-restraint of domestic legislators and courts when exercising their prescriptive and adjudicative powers. However, given the dependence on domestic courts as the first line of defense in the enforcement of international human rights law, human rights advocates claim that a certain flexibility for judicial activism is required to uphold universal substantive standards. It is beyond this Article's scope to discuss this tension between the distributive function of private international law and the human rights claim of universal application.<sup>35</sup> However, an argument can be made that some room should be allowed for national courts to deal with universally condemned human rights violations.

#### *A. Judicial Competence*

When exploring the issue of whether a Dutch court has jurisdiction, we cannot limit ourselves to Dutch law. A discussion of transnational tort litigation in the Netherlands is incomplete without examining the broader European perspective, given the partial harmonization of the requisites for judicial competence in the European Union ("EU"). The relevant European legislation harmonizing the rules on jurisdiction in the European Community so as to limit any potential conflict between national courts of the various Member States is EC Regulation 44/2001 of December 22, 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.<sup>36</sup> This regulation consolidates for most of the EU Member States the so-called Brussels Convention (1968).<sup>37</sup> In the Netherlands, EC Regulation 44/2001 was expressly

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34. See Upendra Baxi, *Geographies of Injustice: Human Rights at the Altar of Convenience*, in TORTURE AS TORT: COMPARATIVE PERSPECTIVES ON THE DEVELOPMENT OF TRANSNATIONAL HUMAN RIGHTS LITIGATION 197 (Craig Scott ed., 2001).

35. For more on this emerging conflict, see P.R. Dubinsky, *Human Rights Law Meets Private Law Harmonization: The Coming Conflict*, 30 YALE J. INT'L L. 211 (2005).

36. Council Regulation 44/2001, 2001 O.J. (L 12) 1 [hereinafter EC Regulation 44/2001].

37. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 1972 O.J. (L 299) 32 [hereinafter Brussels Convention]. The Brussels Convention (1968) applied to the members of the European Community. Six additional countries, then forming the European Free Trade Association, were added to the Brussels Convention vis-à-vis the Lugano Convention. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 1988 O.J. (L 319) 9. However, EC Regulation 44/2001 does not fully replace the Brussels Convention. The latter's provisions still remain in force in the relations between Denmark and the European Union ("EU") Member States bound by EC Regulation 44/2001. This is due to the EC Regulation's general opt-out for Denmark in relation to measures adopted under Title IV of the Treaty Establishing the European Community ("EC Treaty"). See EC Regula-

adopted as a guideline for the recent revision of the Dutch Code of Civil Procedure.

The jurisdictional rules under EC Regulation 44/2001 are mandatory and deprive national courts of any discretion to be more generous in providing a forum. A national court cannot take cognizance of a claim that falls within the reach of the regulation unless it can point to one of the jurisdictional grounds provided by the regulation conferring on the court the authority to do so.

At the time the Brussels Convention was drafted, the *forum rei* principle was recognized as the controlling jurisdictional principle in most European countries. It remains so today, as evidenced by its codification in EC Regulation 44/2001. Under article 2(1) of the regulation, “persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.”<sup>38</sup> What is to be understood as an individual’s domicile is provided for in article 60(1), which states that “a company or other legal person or association of natural or legal persons is domiciled at the place where it has its (a) statutory seat, or (b) central administration, or (c) principal place of business.”<sup>39</sup> This is a broad formulation that allows for multiple fora. Similarly, under Dutch law, domicile is interpreted as the place of incorporation (as opposed to the doctrine of the real seat).<sup>40</sup> In other words, regardless of the place of headquarters, if a corporation, pursuant to its articles of association, is incorporated under the laws of the Netherlands, it will be subject to the jurisdiction of Dutch courts. Despite such a broad formulation, a strict application of the doctrine of incorporation opens the door to abuse. Corporations may avoid Dutch jurisdiction by establishing the corporation in a

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tion 44/2001, *supra* note 36, art. 2(3) (“In this Regulation, the term ‘Member State’ shall mean Member States with the exception of Denmark.”); EC Treaty, *infra* note 51, art. 69 (“The application of this Title shall be subject to . . . the Protocol on the position of Denmark . . . ”). The Brussels Convention also continues to apply to the territories of the Member States that fall within the territorial scope of the Convention but are excluded from EC Regulation 44/2001 pursuant to article 299 of the EC Treaty. See EC Regulation 44/2001, *supra* note 36, pmlb. para. 23 & art. 68; EC Treaty, *infra* note 51, art. 299. Given the need for continuity, there are no textual dissimilarities between the Brussels Convention and EC Regulation 44/2001. Additionally, European Court of Justice case law remains relevant to the interpretation of EC Regulation 44/2001.

38. EC Regulation 44/2001, *supra* note 36, art. 2(1).

39. *Id.* art 60(1).

40. Wetboek van Strafvordering [Sv] [Code of Criminal Procedure] art. 2 (Neth.). The principle of incorporation is also applied in the United Kingdom, Ireland, and Denmark. Most European states—*inter alia*, Germany, France, Belgium, Spain, Greece, Portugal, and Luxembourg—acknowledge the doctrine of the real seat.

state with lenient rules while they in fact operate elsewhere. Therefore, certain modifications to the doctrine of incorporation have been made.<sup>41</sup>

Besides the *forum rei* principle, EC Regulation 44/2001 provides two additional grounds for jurisdiction (which should be considered as exceptions to the *forum rei* principle) that a plaintiff may wish to rely on in certain circumstances. First, under article 5(3), “in matters relating to tort, *delict* or *quasi-delict*” the plaintiff may sue “in the courts for the place where the harmful event occurred or may occur.”<sup>42</sup> In the case of corporate misconduct, it will not always be easy to establish the place where the harmful event occurred. A distinction will often be made between the place where the actual act occurs (*Handlungsort*) and the place where the harmful effect is felt (*Erfolgsort*). In cases of corporate misconduct, the place where the harmful effect is felt will usually be clear. However, establishing the *Handlungsort* can prove more difficult. It can be argued that the *Handlungsort* is the place where the parent company is seated, as this is where decisions were made that resulted in the harmful effect abroad.

In the aforementioned case of Trafigura it is clear that the Ivory Coast is the *Erfolgsort*, the place where the harm is felt. One could argue that the *Handlungsort* is in Europe as this is the place where the corporation Trafigura is incorporated and has its seat. Specifically, the United Kingdom would most likely be considered the *Handlungsort*, as London is Trafigura’s operational center.<sup>43</sup> The European Court of Justice (“ECJ”) has held that in such a situation, article 5(3) of EC Regulation 44/2001 must be understood to include both the place where the damage occurred and the place of the event giving rise to such damage, so that the defendant may be sued in the courts of either place at the option of the plain-

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41. In clear cases of abuse, the “public policy” doctrine has been applied. See, e.g., Engelse Ltd., Rechtsbank Amsterdam [Rb.] [District Court of Amsterdam], 6 april 1982, WPNR 1985, 5765 (Neth.). This can, however, only be relied on in cases where the foreign rules are in clear violation of fundamental norms and values of the Dutch legal order. Therefore, the public policy doctrine as a remedy against abuse of the doctrine of incorporation will only be relied on in exceptional circumstances. A compromise has been found in the Wet op de Formeel Buitenlandse Vennootschappen [Act on Formally Foreign Enterprises], 17 december 1997, Stb. 697 (entered into force Jan. 1, 1998). According to this law, if a corporation fits the definition of a “formally foreign enterprise” as articulated in article 1, certain Dutch provisions will be applicable regardless of the doctrine of incorporation. *Id.* The definition in article 1 refers to a corporation that although having been established in another state, operates almost exclusively in the Netherlands and therefore has no real connection to the country in which it was established. See generally P. VLAS, RECHTSPERSONEN [LEGAL ENTITIES] 5–44 (2002).

42. EC Regulation 44/2001, *supra* note 36, art. 5(3).

43. See TRAFIGURA BACKGROUND, *supra* note 3, at 2 (stating that London is Trafigura’s operational center).

tiff.<sup>44</sup> In some cases, a plaintiff might decide that it is more convenient to sue in the country where the decision was made. The place of harmful activity (*forum delicti*) can thus provide an additional jurisdictional option.

Second, article 5(5) of EC Regulation 44/2001 states that “a person domiciled in a Member State may, in another Member State, be sued . . . as regards a dispute arising out of the operations<sup>45</sup> of a branch, agency or other establishment, in the courts for the place in which the branch, agency or other establishment is situated.”<sup>46</sup> In other words, the legal entity constituting the corporation may be sued not only where its seat is located but also in the place where a branch is situated. This provision is only applicable to a branch of a corporation that is itself domiciled in the EU; it therefore cannot be used with respect to a branch of a non-European corporation. Article 5(5), however, does make available a second special ground for jurisdiction in the Netherlands over a corporation: tortious lack of supervision by a Dutch branch by a European parent corporation.

It has been contended that these two additional grounds for jurisdiction can, together, be seen as a European version of the ATCA.<sup>47</sup> According to this interpretation, Members States’ courts are competent to hear tort actions brought by victims, whatever their nationality, regarding the activities of a multinational corporation domiciled in a Member State or any of its branches. The action can be lodged either in the state where the parent company is domiciled or, where a branch was the base of the act that caused the damage, in the state where that branch is located. Such an interpretation of EC Regulation 44/2001 provides the possibility of opening European courts to lawsuits against corporations registered in the EU for harm occurring in any third country throughout the world.

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44. See, e.g., Case 21/76, Handelskwekerij Bier v. Mines de Potasse d’Alsace, 1976 E.C.R. I-1735; Case C-220/88, Dumez France v. Helaba, 1990 E.C.R. I-49; Case C-68/93, Shevill v. Presse Alliance SA, 1995 E.C.R. I-415, ¶ 19; Case C-364/93, Marinari v. Lloyds Bank PLC & Zubaidi Trading Co., 1995 E.C.R. I-2719, ¶ 10; Case C-51/97, Réunion Européenne SA v. Spliethoff’s Bevrachtingskantoor, 1998 E.C.R. I-6511.

45. The ECJ has interpreted “operations” as referring, inter alia, to activities in which the branch “has engaged at the place in which it is established on behalf of the parent body.” Case 33/78, Somafer v. Saar-Ferngas, 1978 E.C.R. I-2183, I-2194. The ECJ has further held that these “operations” need not be geographically limited to the State where the Branch is situated. See Case C-439/93, Lloyd’s Register of Shipping v. Société Campenon Bernard, 1995 E.C.R. I-961, ¶ 19.

46. EC Regulation 44/2001, *supra* note 36, art. 5(5).

47. See OLIVIER DE SCHUTTER, THE ACCOUNTABILITY OF MULTINATIONALS FOR HUMAN RIGHTS VIOLATIONS IN EUROPEAN LAW 33 (2004), available at <http://www.chrgj.org/publications/docs/wp/s04deschutter.pdf>.

At the EU level—which, relying heavily on the mechanisms of self-regulation,<sup>48</sup> has overall been reluctant to impose overly strict requirements on corporations—the European Parliament has proven to be a supporter of opening up the European courts in such a manner. In 1998, the European Parliament called for a study of the feasibility of adopting a “European ATCA.”<sup>49</sup> Prior to that, the European Parliament endorsed the interpretation of EC Regulation 44/2001 as a European ATCA when it adopted the resolution on “EU Standards for European Enterprises Operating in Developing Countries: Towards a European Code of Conduct” on January 15, 1999.<sup>50</sup>

In comparison to the ATCA, this interpretation of EC Regulation 44/2001 is wider in scope in the sense that the ATCA is only applicable to aliens. The scope of the jurisdiction conferred upon European courts by EC Regulation 44/2001 is not similarly limited. However, the EC Regulation is more limited than the ATCA in that it applies only to corporations registered or domiciled within the EU and it is purely adjudicative and not prescriptive in nature. It is questionable whether the EU has the authority to amend EC Regulation 44/2001 in order to make it truly a European ATCA, as that would seem to go beyond the objectives of the EU.<sup>51</sup>

In sum, in order for a Dutch court to be competent to hear a case against a corporation for human rights abuses committed abroad the defendant corporation must be incorporated in the Netherlands. The Dutch doctrine of incorporation provides a much stricter criterion than under

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48. See *id.* at 58.

49. European Parliament, Committee on Development and Cooperation, *Report on EU Standards for European Enterprises Operating in Developing Countries: Towards a European Code of Conduct*, at 16, A4-0508/98 (Dec. 17, 1998) (prepared by Richard Howitt) (“A study could also be undertaken on drawing up a European version of the American Tort Claims Act . . . .”).

50. Resolution on EU Standards for European Enterprises Operating in Developing Countries: Towards a European Code of Conduct, EUR. PARL. DOC. (A4-0508/98) (1999) (emphasizing the EU’s dedication to corporate enterprises playing a role in social development and human rights).

51. Article 65 of the EC Treaty provides that measures concerning cooperation in civil matters may be taken when necessary for the internal market. Consolidated Version of the Treaty Establishing the European Community art. 65, Dec. 24, 2002, 2002 O.J. (C 325) 33, 59 [hereinafter EC Treaty], available at [http://eur-lex.europa.eu/en/treaties/dat/12002E/pdf/12002E\\_EN.pdf](http://eur-lex.europa.eu/en/treaties/dat/12002E/pdf/12002E_EN.pdf). That condition would not seem to be met here. See JAN WOUTERS & LEEN DE SMET, CIVIELRECHTELijke SCHADECLAIMS TEGEN MULTINATIONALE ONDERNEMINGEN WEGENS MENSENRECHTENSCHENDINGEN ELDERS IN DE WERELD: LESSEN VAN DE ALIEN TORT CLAIMS ACT [CIVIL LIABILITY CLAIMS AGAINST MULTINATIONAL CORPORATIONS FOR HUMAN RIGHTS VIOLATIONS ELSEWHERE IN THE WORLD: LESSONS FROM THE ALIEN TORT CLAIMS ACT] (2003).

the ATCA where jurisdiction can be asserted over individuals temporarily present in the United States or over corporations doing business in the country. In addition, the special forms of jurisdiction under EC Regulation 44/2001 (*forum delicti* and the possibility to sue in the forum of a branch of a European corporation) provide a means to bring suit against a Dutch or otherwise European-based corporation for tortious lack of supervision.

The plaintiff's domicile in such a case is irrelevant. Victims of corporate misconduct will often be dependent on non-governmental organizations ("NGOs") to bring legal proceedings against the corporation because they lack the resources on their own to do so. Under current Dutch law, an NGO can bring a case where harm occurs to the general interest it is promoting as its objective, according to its articles of association.<sup>52</sup>

### 1. *Forum Non Conveniens*

An important legal hurdle to be overcome by plaintiffs in ATCA litigation is the doctrine of *forum non conveniens*, which generally provides that a case will be dismissed if a defendant can show that an adequate alternative forum exists.<sup>53</sup> Contrary to common law countries such as the United Kingdom<sup>54</sup> and the United States, the *forum non conveniens* doctrine is not applied in the Netherlands. In principle, therefore, the issue of a Dutch court's competence to hear the case will not present claimants with the same problems they face in common law countries. As discussed *supra*, the basic and primary rule of Dutch law is *forum rei*; in

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52. Burgerlijk Wetboek [BW] [Civil Code] art. 3:305a(1) (Neth.) (providing that an association or foundation with full legal capacity is entitled to an action for the purposes of protecting interests of a similar nature of other persons, to the extent it promoted those interests according to its articles of association). For more on the issue of *locus standi* for NGOs in public interest litigation, see Betlem, *supra* note 18, at 300–03. Betlem argues that foreign NGOs also have access to the courts in the Netherlands if the description of the purpose of the NGO matches the interest that has been harmed, and the NGO "can be regarded as an equivalent to 'an association or foundation with full legal capacity' within the meaning of article 3:305a [of the Dutch Civil Code]." *Id.* at 302.

53. After determining that an adequate alternative forum exists, the courts must "balance a series of factors involving the private interests of the parties in maintaining the litigation in the competing fora and any public interests at stake." *Wiwa*, 226 F. 3d 88, 100 (2d Cir. 2000) (citing *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981)).

54. Whether there is room for the doctrine of *forum non conveniens* under the Brussels Convention (now EC Regulation No. 44/2001) has been heavily debated. The High Court in England decided that the doctrine could not be applied in cases where the alternative court designated by the Brussels Convention is a court of an EU Member State. *Re Harrods (Buenos Aires) Ltd.*, [1991] 4 All E.R. 334 (Eng. C.A.). This implies, however, that there remains room for *forum non conveniens* arguments when third states are involved. See DE SCHUTTER, *supra* note 47, at 35–39.

other words, competent is the court of the place where the defendant is incorporated. Therefore, parent companies can be sued in the Dutch courts concerning activities abroad if the Netherlands is the country where the corporation has been established.

A few words need to be said on whether the European rules on jurisdiction, as laid down in EC Regulation 44/2001, leave any room for *forum non conveniens* considerations. The ECJ's judgment in *Group Josi Reinsurance Company* seems to imply that this is not the case.<sup>55</sup> In this case, the ECJ held that the general rule of jurisdiction being conferred on the courts of the domicile of the defendant may not be followed "only in exceptional cases where an express provision of the Convention provides that the application of the rule of jurisdiction which it sets out is dependent on the plaintiff's domicile being in a Contracting State."<sup>56</sup>

In other words, the ECJ seems to suggest that applying the *forum non conveniens* doctrine in cases where the national courts have jurisdiction based on the defendants' domicile in that state is incompatible with the requirements of the Brussels Convention—or today with those of EC Regulation 44/2001. The mandatory character of the *forum rei* principle was confirmed by the ECJ in 2005.<sup>57</sup> In other words, the courts of the defendant's domicile have no power to decline to exercise their jurisdiction.

#### B. Choice of Law

Having established the grounds on which a Dutch court would be considered the appropriate forum for transnational human rights litigation, we must now address the question of the applicable law. For tort law to be a useful regulatory system in this context, it is of course necessary that the law be applicable to actual tort claims filed against those multinational corporations. After all, if a country wishes to regulate certain transboundary activities of multinational corporations using its tort law, it can only do so if the judge deciding the suit applies that country's law.

EC Regulation 44/2001 is purely adjudicative and not prescriptive. It leaves open the question of which law will be applicable to a tort claim. This directly contrasts with the ATCA in the United States, which is both adjudicative and prescriptive. The question of prescriptive jurisdiction will be settled when the European Parliament and Council Regulation on the law applicable to non-contractual obligations ("Rome II") becomes

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55. See Case C-412/98, *Group Josi Reinsurance Co. v. Universal Gen. Ins. Co.*, 2000 E.C.R. I-05925, available at <http://curia.europa.eu/common/reddoc/convention/gemdoc/2000/html/c41298/41298-a-en.htm>.

56. *Id.* para. 61.

57. Case C-281/02, *Michael Owusu v. N.B. Jackson*, 2005 E.C.R. I-1383.

binding.<sup>58</sup> Because Rome II had not yet entered into force as this Article was being written,<sup>59</sup> this Article will first discuss prescriptive jurisdiction based solely on Dutch law. What, according to these rules, will a Dutch court decide is the applicable law if a parent company incorporated in the Netherlands is sued for the allegedly harmful activities of a subsidiary abroad?

First and foremost, it must be noted that under current Dutch private international law, parties are entitled to agree on the applicable law. Plaintiffs and defendant corporations can therefore come to an agreement stating that Dutch tort law is the law that will govern a transnational human rights case. The possibility of a choice of law is confirmed in the 2001 Bill on Conflicts of Law in Tort (*Wet Conflict enrecht Onrechtmatige Daad*) ("WCOD").<sup>60</sup> This choice of law rule supersedes the main rule regarding the selection of the law governing the dispute, *lex loci delicti*, which provides that the place where the harm occurred determines the applicable law.<sup>61</sup> As stated above, in cases of corporate misconduct, this *lex loci delicti* principle is not always dispositive as to which rules are applicable, for distinguishing between the place of the happening of the event (*Handlungsort*) and the place where the event results in damage (*Erfolgsort*) is not always easy.<sup>62</sup> In such a case, *Handlungsort* and *Erfolgsort* will point to two different locations and WCOD article 3(2) would apply. Article 3(2) provides that when the harmful effect of an act is felt in a place other than where the act takes place, the law of the country in which the effect is felt applies unless the corporation could not reasonably foresee this harmful effect.<sup>63</sup> Consequently, Dutch courts will have to apply foreign law. The purpose of WCOD article 3(2) is to ensure redress in accordance with the expectations of the society where the harm occurs. The result is that the preventive function of tort law is pushed to the background, especially in corporate cases where the laws of the host states are often less strict than the rules in the home state. For example, the law of the host state may have a high tolerance for gender discrimination or environmental harm. It has been ar-

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58. See *Commission of the European Communities, European Parliament and Council Regulation on the Law Applicable to Non-Contractual Obligations*, at 2, COM (2006) 83 final (Feb. 21, 2006).

59. The Rome II EC Regulation was adopted on July 11, 2007 and will enter into force on January 11, 2009. Council Regulation 864/2007, art. 32, 2007 O.J. (L 199) 40, 48 (EC) [hereinafter Rome II].

60. *Wet Conflict enrecht Onrechtmatige Daad* [WCOD] [Unlawful Act (Conflict of Laws) Act], art. 6(1), Stb. 2001, 190.

61. *Id.* art. 3(1).

62. See *supra* text accompanying notes 42–44.

63. WCOD, art. 3(2).

gued that in such cases, where foreign law does not comport with the rules of international law, the Dutch courts should not have the authority to apply these foreign rules.<sup>64</sup>

There are several exceptions to the principle of *lex loci delicti*. First, when the defendant and the plaintiff both have their primary residence in the country where the harm occurs the case will be governed by the law of that country.<sup>65</sup> Second, the so-called accessory obligation provides that when the wrongful act is closely connected to a contractual relation between the parties involved, the court may decide that the law that governs the case arising out of the wrongdoing will be the same law that governs the contractual obligation between the parties.<sup>66</sup>

One can therefore conclude that under current Dutch law on the conflicts of law in tort, Dutch courts will most likely apply foreign law in transnational human rights litigation that seeks to hold a parent company accountable for acts or omissions in violation of a duty of care by the parent company itself. Similarly, if the plaintiff seeks to pierce the corporate veil, the applicable law will be the law of the country where the subsidiary is incorporated because this will be considered the *lex societatis* of the subsidiary.<sup>67</sup>

As mentioned above, in the near future European law will settle the question of prescriptive jurisdiction. On June 25, 2007, an agreement was reached in Rome II applying to situations involving a conflict of laws and non-contractual obligations in civil and commercial matters.<sup>68</sup> Similar to the WCOD, Rome II's main rule is that parties are free to choose the applicable law.<sup>69</sup> The difference, however, is that under Rome II, where no choice is made, the principle of *lex loci damni* applies. In other words, "the law applicable to a non-contractual obligation shall be the law of the country in which the damage arises or is likely to arise, irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event arise."<sup>70</sup> Like the exceptions in Dutch law, Rome II provides that when both the plaintiff and the defendant

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64. See Andre Nollkaemper, *Litigation Against MNCs: Public International Law in the Netherlands*, in *LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW* 265, 280 (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000).

65. WCOD, art. 3(3).

66. *See id.* art. 5.

67. For more on piercing the corporate veil, see *supra* text accompanying notes 28–30. For more discussion on the duty of care, see *infra* text accompanying notes 92–98.

68. Rome II, *supra* note 59, art. 1.

69. *See id.* art. 14(1).

70. *Id.* art. 4(1).

have their primary residence in the same country, the law of that country will be applicable.<sup>71</sup>

In addition to establishing a conflict of law principle, Rome II resolves two other jurisdictional issues relevant to this Article's discussion. First, jurisdiction arising from an accessory obligation is mandatory. Article 4(3) of Rome II provides:

[w]here it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.<sup>72</sup>

Second, article 7 of Rome II incorporates a new "polluter pays" principle (concerning environmental damage) and reads:

The law applicable to a non-contractual obligation arising out of environmental damage or damage sustained by persons or property as a result of such damage shall be the law determined pursuant to Article 4(1), unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred.<sup>73</sup>

Consequently, when a case concerns damage to the environment, the plaintiff may choose between *lex loci damni* and *lex loci delicti*. The European Commission is of the opinion that this choice reflects "the polluter pays" principle. Applying this to the Trafigura case may result in either Dutch or English law being applicable if a plaintiff brought suit against Trafigura for the environmental damage caused in the Ivory Coast.

According to Dutch law, bringing suit against a Dutch parent company before a Dutch court for harmful activities abroad will not present major jurisdictional problems. However, at least in theory, a significant stumbling block will be that, generally, the Dutch court will have to apply the law of the host state unless the parties explicitly agree to have the law of the home country govern the dispute. An additional exception worth noting is that the law of the place where the damage occurs will be applied if the parties have chosen the law of the place where the damage occurs.

71. *Id.* art. 4(2). This provision, contrary to the provision in the WCOD, explicitly states that both parties must live in the same country *at the time the damage occurs* or is likely to occur in order for that country's law to govern the non-contractual obligation. *Id.* This suggests that plaintiffs who move to a particular country *after* they sustain damage will not necessarily enjoy the application of that country's law.

72. *Id.* art. 4(3).

73. *Id.* art. 7.

ing is the rarely invoked doctrine *forum necessitates*, which applies in situations in which no reasonably available alternative forum exists due to, for example, war or a natural disaster. However, practice in civil cases so far demonstrates that recourse is often taken to the *lex fori* for several reasons: a judge may be unfamiliar with foreign law or appropriate application of foreign law would be too time-consuming.<sup>74</sup> Moreover, with the entry into force of Rome II, the law of EU Member States may apply in cases concerning extraterritorial environmental damage caused by corporations incorporated in these states.

### C. Dutch Tort Law

Even if one concedes that Dutch tort law will rarely apply in transnational human rights litigation, it is relevant nonetheless to consider the potential value of Dutch substantive tort law in such cases. This is especially valuable as a source of comparative legal information for parties that agree to let Dutch law govern the dispute. Moreover, when Rome II ultimately enters into force in 2009, Dutch tort law will be applicable to cases involving environmental damage caused by a Dutch corporation. All of these reasons make it worthwhile to examine the legal techniques of Dutch law when dealing with such international disputes.

Under Dutch law, it is possible to file a legal claim against a corporation since corporations have legal personality under the Dutch Civil Code.<sup>75</sup> The focus of this Article is the civil liability of corporations for grave breaches of international law. It is important to note that in such cases national standards give effect to international standards when determining liability in specific cases. Professor Nollkaemper argues that instead of using national standards, it would be better to *directly* determine the legality of the contested activity on the basis of international law.<sup>76</sup> He argues that in cases of transnational litigation, public international law, having already been accepted by all or most states, would be perceived as more neutral and fair to the parties than would national standards. Moreover, he argues that such domestic rules, particularly in cases involving environmental standards, are not always easily applicable to a foreign situation and international law might therefore be the more appropriate law.<sup>77</sup> Nevertheless, as Professor Nollkaemper acknowledges, courts continue to turn to national law for the law that gov-

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74. See generally VOORKEUR VOOR DE *LEX FORI* [PREFERENCE FOR *LEX FORI*] (R. Kotting, J.A. Pontier & L. Strikwerda eds., 2004).

75. See Burgerlijk Wetboek [BW] [Civil Code] art. 2:3 (Neth.).

76. Nollkaemper, *supra* note 64, at 267.

77. *Id.* at 267–268.

erns such cases, while private international law determines which national standards are applicable.

If Dutch law is the applicable law, the relevant provision in Dutch tort law is article 6:162 of the Dutch Civil Code, which reads:

1. A person who commits an unlawful act towards another which can be imputed to him, must repair the damage which the other person suffers as a consequence thereof.
2. Except where there is a ground of justification, the following acts are deemed to be unlawful: the violation of a right, an act or omission violating a statutory duty or a rule of unwritten law pertaining to proper social conduct.
3. An unlawful act can be imputed to its author if it results from his fault or from a cause for which he is answerable according to law or common opinion.<sup>78</sup>

In other words, under Dutch tort law, a tort is committed when (1) an act or omission violates a statutory duty, (2) a right is violated, or (3) an act or omission violates a rule of unwritten duty of care. This differs, for example, from the English system of separate torts. In the Netherlands, the concept of tortious liability is a general principle that must be fleshed out by the courts. The Dutch courts have shown in a handful cases that they can enforce international law in civil litigation by reading it into the elements of a tort set out in the Dutch Civil Code.

Two situations need to be distinguished. In the first place, the activities of the corporation must directly violate an international legal right or duty to form the direct basis of a civil action. For direct application of international law in Dutch tort cases, two conditions need to be met: direct effect and horizontal effect. First, the international norm in question must have direct effect<sup>79</sup> or, in other words, be self-executing. An individual can only rely on an international norm before the Dutch courts if the relevant treaty provision (or a resolution by an international organization) is considered binding on all persons. This implies that the provision contains unequivocal norms that can be invoked before the courts without any further implementation. Whether a provision has direct effect is

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78. BW art. 6:162 (Neth.).

79. Article 93 of the Dutch Constitution reads: "Provisions of treaties and resolutions by international institutions, which may be binding on all persons by virtue of their contents, shall become binding after they have been published." GRONDWET VOOR HET KONINKRIJK DER NEDERLANDEN [Gw.] [CONSTITUTION OF THE KINGDOM OF THE NETHERLANDS] art. 93.

to be decided by the courts.<sup>80</sup> If an international treaty provision or decision of an international organization<sup>81</sup> has direct effect it will take precedence over conflicting national law. The direct effect of international norms has mostly been recognized by the Dutch courts regarding classic fundamental rights such as those laid down in the European Convention on Human Rights (“ECHR”) and the International Covenant on Civil and Political Rights (“ICCPR”).<sup>82</sup> Overall, social and economic rights as laid out in the European Social Charter (“ESC”) and the International Covenant on Economic, Social and Cultural Rights (“ICESCR”) are considered to lack direct effect.<sup>83</sup>

The direct effect of an international norm is the minimum requirement for the direct application of such a norm. The second requirement is that the norm must have a horizontal effect, meaning the norm must be capable of producing legal effect in the relations between two private parties. Dutch courts have been rather hesitant to recognize the horizontal effect of international norms.<sup>84</sup> However, to the extent that Dutch courts have recognized the horizontal effect of international norms, such recognition has, again, been mostly in relation to classic civil and political rights.<sup>85</sup>

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80. In determining whether a provision has direct effect, the courts will look to the wording and content of the provision; moreover, “the context, character and nature, goal and objective, intent of parties and the [*travaux préparatoires*]” are taken into account. Martijn van Empel & Marianne de Jong, *Constitution, International Treaties, Contracts and Torts*, in NETHERLANDS REPORTS TO THE 16TH INTERNATIONAL CONGRESS OF COMPARATIVE LAW 283, 295 (Ewoud Hondius & Carla Joustra eds., 2002), available at <http://www.ejcl.org/64/art64-17.pdf> (citing three cases from the Dutch Supreme Court and one case from the Dutch Special Court of Appeals). Beyond the scope of this Article and therefore not considered here is the direct effect of European Community Law in the Netherlands as a Member State. That body of law does not depend on the Dutch Constitution for its effect in the Dutch legal order. The ECJ has laid down the doctrines of autonomy and supremacy. See Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. I-1; Case 6/64, *Costa v. ENEL*, 1964 E.C.R. I-585.

81. The Dutch Supreme Court has decided that only treaties and decisions of international organizations can have direct effect in the Dutch legal order; customary law, principles of international law, and non-directly effective treaty provisions will not take precedence over national law. See *Nyugat*, Hoge Raad der Nederlanden [HR] [Supreme Court of the Netherlands], 6 maart 1959, NJ 1962, 2 (Neth.).

82. See generally L. Erades, *International Law and the Netherlands Legal Order*, in INTERNATIONAL LAW IN THE NETHERLANDS 375, 388–415 (H.F. van Panhuyst et al. eds., 1978).

83. See *id.*

84. See Nollkaemper, *supra* note 64; van Empel & de Jong, *supra* note 80, at 285.

85. The following provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”) have been acknowledged as having horizontal effect: the prohibition on slavery and forced labour (article 4); the right to liberty and security (article 5); the right to a fair trial (article 6); the right to respect for private and

Application of economic and social rights to horizontal relations is very rare.<sup>86</sup>

The Dutch Supreme Court has held that, under Dutch tort law, a breach of a statutory duty includes any breach of an act of parliament or of a norm provided in secondary legislation (either of a public or private nature), whether of Dutch or foreign origin. Therefore, where the defendant has acted contrary to the domestic law of a country other than the Netherlands, such an act will also be seen as a breach of a Dutch statutory duty.<sup>87</sup>

Besides the direct application of international norms described above, international law can be applicable to tort cases in an indirect manner. This can occur when the harmful activities violate a rule of unwritten duty of care as interpreted with reference to international law. This route is especially important for the applicability of international norms that lack direct effect. This also includes non-binding international norms, as was illustrated in the 1979 *BATCO* case.<sup>88</sup> The court found in this case that the corporation BATCO had acted wrongfully by closing its Amsterdam factory. Among the circumstances relied on by the court were the Organisation for Economic Cooperation and Development Guidelines for Multinational Enterprises (“OECD Guidelines”).<sup>89</sup> The OECD Guidelines provide:

Enterprises should . . . in the case of the closure of an entity involving collective lay-offs or dismissals, provide reasonable notice of such changes to representatives of their employees . . . and co-operate with the employee representatives . . . so as to mitigate to the maximum extent practicable adverse effects.<sup>90</sup>

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family life (article 8); the freedom of thought, conscience and religion (article 9); and the freedom of expression (article 10). Convention for the Protection of Human Rights and Fundamental Freedoms arts. 4–6, 8–10, Nov. 4, 1950, 213 U.N.T.S. 221. For an overview of these provisions, see van Empel & de Jong, *supra* note 80, at 288–90.

86. *But see* Hoge Raad der Nederlanden [HR] [Supreme Court of the Netherlands], 30 mei 1986, NJ 1986, 688 (Neth.) (discussing the right to strike under article 6(4) of the European Social Charter).

87. See Wet Conflictenrecht Onrechtmatige Daad [WCOD] [Unlawful Act (Conflict of Laws) Act], art. 8, Stb. 2001, 190; Betlem, *supra* note 18, at 292 (asserting that “where the defendant has acted contrary to an obligation of the domestic law of another country than the Netherlands, this is still a breach of a statutory duty”).

88. Ondernemingskamer [Dutch Companies and Business Court], 21 juni 1979, NJ 1980, 71 (Neth.).

89. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (2000), available at <http://www.oecd.org/dataoecd/56/36/1922428.pdf>.

90. *Id.* art. IV, para. 6.

The Chairman of BAT Industries, BATCO's parent company, had publicly accepted the OECD Guidelines as a guideline for BAT Industries' policy.<sup>91</sup> BATCO's public acceptance provided the basis for court's decision to use the OECD Guidelines to determine whether BATCO's activities could be characterized as mismanagement. The court stated that BATCO had seriously neglected its obligation to consult with employee representatives, concluded that BATCO's decision to close the factory was mismanagement, and therefore annulled the decision to close the factory. As Professor Nollkaemper has noted, the court's reliance on the OECD Guidelines in this case would seem to indicate that such international standards can also be used to determine the duty of care under Dutch tort law.<sup>92</sup> For corporations to be bound by such standards, international norms will have to be sufficiently evolved before they will be seen as publicly accepted legal standards.<sup>93</sup>

Because as yet no case has been brought against a parent company under Dutch tort law for its allegedly harmful activities abroad, it is difficult to predict how the duty of care will be determined in such cases. However, it seems that, given the accepted relevance of a non-binding international standard like the OECD Guidelines, international treaty norms will certainly be considered relevant to establishing that certain behavior violates the duty of care laid out in article 6:162 of the Dutch Civil Code.<sup>94</sup>

The Dutch Supreme Court has acknowledged that parent companies owe a duty of care to their "stakeholders," referring in these cases to creditors. A parent company must prevent a subsidiary from taking on new debt if it is clear that this debt will not be satisfied.<sup>95</sup> It has been ar-

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91. See van Empel & de Jong, *supra* note 80, at 291.

92. Nollkaemper, *supra* note 64, at 275.

93. See van der Heijden & Jesse, *supra* note 14. This can also be deduced, although it concerned financial reporting principles, from a more recent case where the Dutch Supreme Court ruled that non-binding guidelines on financial reporting had evolved into publicly accepted norms with which the company Koninklijke KPN had to comply. See Koninklijke KPN N.V./Stichting SOBI, Hoge Raad der Nederlanden [HR] [Supreme Court of the Netherlands], 10 februari 2006, LJN AU7473 (Neth.). The same reasoning was applied by the Court in the case against the company Versatel. Similar to BATCO, Versatel had subscribed to the non-binding Dutch Corporate Governance Code (known as the *Tabaksblat Code*), but did not inform a minority of the shareholders that it had amended its corporate governance policy; this conduct was complained of as mismanagement, and the Court decided to review the corporate decisions. Centaurus Capital Ltd. et al./Versatel Telecom International N.V., Hoge Raad der Nederlanden [HR] [Supreme Court of the Netherlands], 14 september 2007, NJ 2007, 611 (Neth.).

94. Burgerlijk Wetboek [BW] [Civil Code] art. 6:162 (Neth.).

95. See Albada Jelgerma II, Hoge Raad der Nederlanden [HR] [Supreme Court of the Netherlands], 19 februari 1988, NJ 1988, 487 (Neth.); Sobi/Hurks II, Hoge Raad der

gued that a broad reading of this rule means that a parent company has a duty of care to prevent foreseeable damage. For example, in terms of injury that may occur when working with hazardous materials, it has been argued that if workers fall ill as a result of working with such materials, this may give rise to direct liability for the parent company if the company had the opportunity to intervene in its subsidiary's activities.<sup>96</sup> In such cases, the first line of defense of the parent company will no doubt be that it ensured that the subsidiary's activities were in conformity with the local laws. The problem is, however, that local laws are often much less stringent than the law of the home state. It can be contended that under Dutch law a parent company cannot hide behind these double standards because Dutch law places high demands on corporations to assess and control risks and therefore they have a duty to intervene if they are aware of harmful activities. This interpretation of the duty of care also follows from the OECD Guidelines. A comment to the OECD Guidelines explains:

The reference to occupational health and safety implies that multinational corporations are expected to follow prevailing regulatory standards and industry norms to minimise the risk of accidents and injury to health arising out of, linked with, and occurring in, the course of employment. This encourages enterprises to work to raise the level of performance with respect to occupational health and safety in all parts of their operation, even where this may not be formally required by existing regulations in countries in which they operate.<sup>97</sup>

This clearly states that corporations have a duty beyond mere adherence to the national rules of the host state.<sup>98</sup> As discussed above, Dutch courts are prepared to consider the OECD Guidelines when determining the duty of care under Dutch tort law.

In sum, Dutch courts will refer both to binding and non-binding international standards to determine whether the unwritten duty of care has been violated. It may be argued that a failure to prevent foreseeable damage will give rise to tortious liability under Dutch law.

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Nederlanden [HR] [Supreme Court of the Netherlands], 21 december 2001, NJ 2005, 96 (Neth.).

96. Lennarts, *supra* note 18, at 184.

97. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, COMMENTARY ON THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (2000), para. 27, available at <http://www.oecd.org/dataoecd/56/36/1922428.pdf>.

98. Lennarts, *supra* note 18, at 187.

### III. THE LIKELIHOOD OF AN ACTIVIST APPROACH TO CIVIL LAW IN THE NETHERLANDS

From the previous discussion, it may be concluded that, despite potential stumbling blocks arising from the rules of private international law, transnational human rights cases are feasible before the courts in the Netherlands. In this Part, some other general procedural features of the Dutch legal system and Dutch legal culture will be discussed. These features may help explain why the use of civil lawsuits as a tool for social reform is not currently common in the Netherlands, and may reduce the attractiveness of the Netherlands as a forum for transnational human rights cases. Professor Stephens identifies certain procedural advantages in the United States that make it an attractive forum.<sup>99</sup> In this Part, some of these procedures will be compared with the procedures in the Netherlands.

First and foremost, there are several potential obstacles from an economic perspective. For one, a serious disincentive to litigate in the Netherlands is the “loser pays” principle. Unlike the “American rule,” in the Netherlands, the losing party can be required to pay the court fees and (part of) the legal fees of the victorious opponent.<sup>100</sup> This no doubt is an important reason why, so far, there has not been a case against a Dutch corporation for human rights violations abroad. In such a test case the chances that the plaintiff will face substantial legal fees and costs is a very real possibility. Moreover, unlike the rule in the United States and despite recent discussion to introduce the principle of “no cure, no pay,” the Netherlands still has not adopted this rule.<sup>101</sup> Substantial attorney fees can therefore pose a considerable disincentive for plaintiffs.<sup>102</sup> The absence of a contingency fees system that permits attorneys to collect fees as a percentage of a successful judgment makes it very unattractive for lawyers from a financial point of view to initiate a test case. Overall, Dutch lawyers will not take a proactive stance. Moreover, the Netherlands does not have a culture of volunteer work among lawyers to the

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99. The practices identified by Professor Stephens have been taken as a starting point for this survey of possible procedural obstacles to civil litigation for human rights violations. See Stephens, *supra* note 10, at 14–17, 27–34.

100. Wetboek van Strafvordering [SV] [Dutch Code of Criminal Procedure] arts. 237–45 (Neth.). However, according to article 242, the court has some room to moderate the potential penalty for the loser. *Id.* art 242.

101. The Dutch Bar Association tried to introduce the principle of “no harm, no pay” in bodily harm cases. This was, however, precluded by the Dutch Minister of Justice in March 2005. See A.W. Jongbloed, *Access to Justice, Costs and Legal Aid*, 11 ELEC. J. COMP. L. 1, 7–8 (2007), <http://www.ejcl.org/111/art111-14.pdf>.

102. Legal aid is provided in cases where the income of the plaintiff is not sufficient. See Wet op de Rechtsbijstand [Bill on Legal Aid] art. 34, Stb. 1993, 775.

same degree as in the United States.<sup>103</sup> A final major financial disincentive is that, unlike the United States, the Netherlands does not award punitive damages but permits only compensatory damages awards. In this sense, the prospect of civil litigation in the United States is a more effective deterrent to corporate malfeasance than is the case in the Netherlands.

In addition to economic obstacles, another factor that makes the Netherlands potentially less hospitable to transnational human rights claims is the manner in which the courts deal with cases involving a large number of victims, a common feature of transnational human rights litigation. Unlike in the United States, the right to bring a class action or a collective action for damages is not available under current Dutch law.<sup>104</sup> A group of claimants is not treated as an entity but as a sum of individuals, thus making legal procedures much more cumbersome. The only other procedure in Dutch law that facilitates civil litigation by large classes of similarly situated plaintiffs is a procedure created in 2005 under the Dutch Bill on the Settlement of Mass Damages (*Wet Collectieve Afwikkeling Massaschade*) ("WCAM").<sup>105</sup> Under the WCAM procedure, the court can issue a declaration of binding force for a settlement between plaintiffs and defendants. This procedure can be initiated independently from any civil suit. Aggrieved parties not in agreement with the settlement may opt out.<sup>106</sup> This procedure cannot, however, be compared to the class action.<sup>107</sup>

The general features of litigation procedures as outlined here help explain why an activist approach to private law is uncommon in the Netherlands. Private law is highly individualistic and neither judges (who tradi-

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103. See Stephens, *supra* note 10, at 30 (describing the development of U.S. civil litigation of human rights abuses abroad by U.S. public interest attorneys with additional pro bono support from law clinics and private law firms).

104. Article 305a of the Dutch Civil Code provides that an organization may bring a claim on behalf of people whose interests have allegedly been harmed, provided that the organization represents those interests. *Burgerlijk Wetboek* [BW] [Civil Code] art. 3:305a (Neth.). This article, however, does not address claims seeking monetary compensation. *Id.* para. 3.

105. *Wet Collectieve Afwikkeling Massaschade* [Dutch Bill on the Settlement of Mass Damages], *Stb.* 2005, 340; *Koninklijk Besluit* [Royal Decree], *Stb.* 2005, 380. The procedure introduced by this bill can be found in the Dutch Civil Code and the Dutch Code on Civil Procedure. BW arts. 7:907–10 (Neth.); *Wetboek van Burgerlijke Rechtsvordering* [Rv] [Code of Civil Procedure] arts. 14:1013–18 (Neth.).

106. See BW art. 7:908(2)–(3) (Neth.).

107. The WCAM procedure is a feature of contract law in which the participating victims are still seen as individuals and not as one collective. By contrast, a civil law claim based on tortious misconduct must be brought individually or by a group. In the latter case, however, the group is regarded as a number of individuals.

tionally play a more passive role in the Netherlands) nor lawyers (given the economic disincentives) take an active stance. Victims of human rights violations will therefore have a hard time finding a lawyer willing to take on their case, effectively blocking their access to the courts. This legal culture makes it unlikely that the Dutch legal system will be faced with many transnational human rights cases.

#### IV. CRIMINAL PROSECUTION

As mentioned in the Introduction to this Article, the dumping of toxic waste from the Probo Koala has given rise to various investigations and proceedings.<sup>108</sup> The victims have also turned to civil law remedies, albeit in the United Kingdom—not in the Netherlands. The previous Parts have mapped the feasibility of bringing such a case before the Dutch courts. It should be pointed out, however, that the role played by civil law as a remedy against corporate human rights violations in Europe as compared to the United States is limited. Recourse to civil action has so far been limited to a relatively small number of cases in the United Kingdom. In general, the principal remedy in Europe for extraterritorial human rights violations is criminal prosecution. This is underscored by several highly publicized cases in which individuals accused of committing grave human rights violations have been prosecuted. The case in the United Kingdom against General Augusto Pinochet, former dictator of Chile, serves as an example.<sup>109</sup> Similarly, individuals, both nationals and non-nationals, accused of extra-territorial human rights violations have been subjected to prosecution in the Netherlands. For example, in 2005 two former Afghan military leaders who had fled to the Netherlands were

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108. A similar case involving a ship and environmental damage is still pending in France. See Nick Champeaux, *Who Pays? Oil Spill Responsibility Before the Courts in France*, NETWORK EUROPE, Feb. 16, 2007, available at <http://www.networkeurope.org/Feature/who-pays-oil-spill-responsibility-before-the-courts-in-france> (discussing a criminal case brought before a French court with respect to a 1999 oil spill by the tanker Erika).

109. Pinochet was arrested in 1998 while visiting the United Kingdom. Spanish prosecutors had requested his extradition based on charges of murder, conspiracy to murder, and conspiracy to commit acts of torture during his time as the Chilean head of state. Ultimately, Pinochet was allowed to return to Chile on account of his failing health. See R v. Bartle and the Commissioner of Police for Metropolis and Others, *Ex Parte Pinochet*, [1999] UKHL 147, [2000] 1 A.C. 147 (Eng.). Other examples include the cases against Muammar Quaddafi of Libya and Ariel Sharon of Israel. Cour de cassation, Chambre criminelle [Cass. crim.] [French high court, criminal chamber] Paris, Mar. 13, 2001, Bull. crim., No. 64, at 218 (Fr.); Yaron, Amois et Autres v. Ariel Sharon, S.A., Cour de cassation [Belgian Supreme Court], No. P. 02.1139.F/1 (Feb. 12, 2003) (Belg.).

sentenced to prison for committing war crimes, notably torture, in Afghanistan.<sup>110</sup>

Perhaps even more relevant to this Article's discussion is the judgment in the case against the Dutch businessman Frans van Anraat.<sup>111</sup> In 2005, van Anraat was put on criminal trial in Dutch district court in The Hague for supplying raw materials for chemical weapons used by Iraq against Iran and Iraqi Kurds in the 1980–88 war.<sup>112</sup> According to the Dutch court, van Anraat was not aware of the genocidal intentions of the Iraqi regime when he sold the materials.<sup>113</sup> He was therefore not found guilty of genocide but was still sentenced to fifteen years' imprisonment for complicity in war crimes, since his deliveries facilitated the attacks.<sup>114</sup> This case concerned an individual who was prosecuted for business activities that were considered to be in violation of international law.<sup>115</sup> As yet, no criminal case has been brought against a *corporation* for grave extraterritorial breaches of international law.

The emphasis in Europe on criminal prosecution as a remedy for extraterritorial human rights violations warrants a brief discussion of the possibilities Dutch criminal law offers for prosecution of a corporation for human rights violations. The prevailing practice is to apply criminal liability to legal persons in the Netherlands.<sup>116</sup> No distinction is made be-

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110. See Rechtsbank [Rb.] Gravenhage [District Court of the Hague], 14 oktober 2205, LJN AU4347 & AU4373 (Neth.).

111. See generally Trial Watch: Frans van Anraat, [http://www.trial-ch.org/en/trial-watch/profile/db/legal-procedures/frans\\_van-anraat\\_286.html](http://www.trial-ch.org/en/trial-watch/profile/db/legal-procedures/frans_van-anraat_286.html) (last visited May 31, 2008).

112. *Id.*

113. Van Anraat, Rechtsbank [Rb.] Gravenhage [District Court of The Hague], 23 december 2005, LJN AU8685 (Neth.).

114. *Id.* This was the first case concerning genocide in the Netherlands; the judgment was confirmed in 2007 and two years were added to the sentence. See Trial Watch: Frans van Anraat, *supra* note 111.

115. Another Dutch businessman, Guus Kouwenhoven, has also been charged, convicted, and sentenced to eight years' imprisonment in relation to his company's business activities. The charges against him concerned complicity in war crimes in Liberia and violation of the U.N. weapons embargo by importing weapons for former Liberian president Charles Taylor during Liberia's civil war. Kouwenhoven was acquitted of the first charge, but was ultimately found liable for breaching the U.N. embargo. See Kouwenhoven, Rechtsbank [Rb.] Gravenhage [District Court of The Hague], 7 juni 2006, LJN AX7098 (Neth.). On appeal, Kouwenhoven was acquitted of all charges due to a lack of evidence. Kouwenhoven, Gerechtshof [Hof] Gravenhage [Appeals Court of The Hague], 10 maart 2008, LJN BC6068 (Neth.).

116. By 1951, the concept of holding legal persons liable for committing economic crimes had already been recognized by Danish courts and was formerly adopted by the so-called *Wet Economische Delicten* ("WED"). In 1976, this concept was also provided for in the Dutch Criminal Code. Today, the criminal cases brought against corporations frequently concern economic and environmental matters.

tween the criminal liability of individuals and legal persons, and corporations are frequently prosecuted for violating provisions in the Dutch Criminal Code.<sup>117</sup> Corporations can be held criminally accountable for the commission of a crime but also for being accomplices or for aiding and abetting the commission of a crime.<sup>118</sup> There is no specific type of sanction designed especially for corporations since no conceptual distinction is made between individuals and legal persons under Dutch criminal law.<sup>119</sup> The equal treatment of individuals and legal entities under Dutch criminal law makes criminal prosecution of corporations for human rights violations an interesting option, especially given the fact that the principal international crimes recognized under the Rome Statute of the International Criminal Court have been fully incorporated under Dutch law in the *Wet Internationale Misdrijven* (Dutch Bill on International Crimes).<sup>120</sup>

An advantage of civil redress for corporate human rights violations is the fact that victims can claim compensation for the harm suffered. In the criminal process, there has traditionally been a lack of attention to compensating the victim, due to the focus on the perpetrator. This was addressed in 1995 with the adoption of the *Wet Terwee* (Victim's Act), which made it possible, *inter alia*, for a claim for compensation to be filed adjunct to a criminal prosecution.<sup>121</sup> Since the adoption of the Act Terwee, there has been no fixed limit to the amount that may be awarded. Moreover, as is the case in the United States, a criminal prosecution does not bar civil action concerning the same conduct. In other words, criminal proceedings do not preclude the victim from also seeking a civil remedy.

The preceding brief sketch of the main features of Dutch criminal law shows that, from the perspective of holding corporations accountable for an extraterritorial violation of international law, this body of law offers an interesting avenue for victims of corporate misconduct. Nevertheless,

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117. The Dutch Criminal Code provides that criminal offenses can be committed by natural and legal persons, and that, in the case of the latter, prosecution may be brought against the legal person itself, the agent acting on its behalf who ordered or was instrumental in controlling or directing the commission of the offense, or both. See *Wetboek van Strafrecht* [SR] [Criminal Code] art. 5 (Neth.).

118. See SR arts. 47–54 (Neth.).

119. Not every penal sanction (e.g., imprisonment) is suitable for a legal person. Appropriate sanctions such as fines, denial or suspension of certain rights or privileges, or compensation to the victim are provided for in the Dutch Criminal Code. See SR arts. 9, 36a–f (Neth.).

120. *Wet Internationale Misdrijven* [WIM] [Bill on International Crimes], Stb. 2003, 270.

121. *Wet Terwee* [WT] [Victim's Act], Stb. 1993, 29.

to date, no corporation has been prosecuted for extraterritorial violations of international human rights law. It is possible that the complexities of holding multinational corporations accountable for extraterritorial violations of international law resulting, *inter alia*, from convoluted legal structures, pose such a major obstacle that the Dutch prosecutor has so far been unwilling to initiate criminal proceedings. The public prosecutor has the exclusive right to prosecute. His decision should be based on the likelihood of obtaining a sentence, and public interest should be taken into account.<sup>122</sup> The prosecutor, therefore, might be more inclined to prosecute the individual businessman,<sup>123</sup> as in the case of van Anraat.<sup>124</sup>

The transnational human rights cases in Europe have so far concentrated mainly on situations of torture. A possible explanation of the preference for criminal prosecution in these cases is the existence of an international document establishing the obligation to either extradite or prosecute in cases of torture. In a way, criminal prosecution has therefore proven less problematic in cases concerning torture because prosecution is “mandated” by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”).<sup>125</sup> The CAT’s inclusion of extraterritorial acts of torture is only made explicit with reference to criminal law enforcement. In other words, the CAT does not require state parties to provide civil law remedies for extraterritorial cases of torture. However, article 14 provides that each state party must “ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to a fair and adequate compensation, including the means for as full rehabilitation as possible.”<sup>126</sup> One could argue that a broad reading of this provision requires states to provide for civil redress in the case of torture. However, as Professor Byrnes has observed, although there is some support for this interpretation, the better

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122. See Wetboek van Strafvordering [Sv] [Code of Criminal Procedure] art. 167(2) (Neth.).

123. Article 12 of the Dutch Code of Criminal Procedure makes it possible for a concerned party, for example a foundation or a group of persons representing the interests affected by the decision not to prosecute, to request judicial review of the prosecutor’s decision not to initiate proceedings. See Sv art. 12 (Neth.).

124. The van Anraat case is discussed *supra* text accompanying notes 111–15.

125. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1988 U.S.T. 202, 1486 U.N.T.S. 85, available at <http://www2.ohchr.org/english/law/pdf/cat.pdf>. The convention requires, among other things, that state parties ensure all acts of torture are offenses under their criminal laws, extradite or prosecute alleged torturers found within their territory no matter where the alleged torture has occurred, and take necessary measures to ensure that they have jurisdiction to do so. See *id.* arts. 4(1), 5(2), 6–7.

126. *Id.* art. 14(1).

view is that the CAT does not require state parties to make resources available for civil actions concerning torture that occurred outside that state and for which it is not responsible.<sup>127</sup> The CAT's focus on criminal prosecution for extraterritorial acts of torture partly explains the focus on criminal remedies in the European cases. To date, there is no international treaty that clearly obliges courts to take jurisdiction over civil actions in respect to violations of international law committed abroad.<sup>128</sup>

#### V. WHICH AVENUE IS PREFERABLE?

The previous sections have outlined the legal avenues available in the Netherlands to hold multinational corporations accountable for extraterritorial violations of international law. The focus has been on civil remedies even though it has been acknowledged that the tendency will be to first turn to criminal law. In this Part, the advantages and disadvantages of choosing either a civil or criminal route will be briefly explored.

The avenue of civil liability offers a number of advantages. In general, it should not be forgotten that civil remedies in a number of countries may be the only option available to plaintiffs because criminal liability of legal persons and criminal prosecution of corporations for violations of international human rights law is not recognized.<sup>129</sup> This is not the case in the Netherlands, however, where criminal prosecution of legal entities

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127. Andrew Byrnes, *Civil Remedies for Torture Committed Abroad: An Obligation Under the Convention Against Torture?*, in TORTURE AS TORT: COMPARATIVE PERSPECTIVES ON THE DEVELOPMENT OF TRANSNATIONAL HUMAN RIGHTS LITIGATION 538, 539 (Craig Scott ed., 2001).

128. The failure of the Hague "Judgments Project" demonstrates the difficulties in coming to worldwide agreement on jurisdiction in civil matters. In 1996, negotiations started on a multilateral convention providing for uniform rules of jurisdiction and recognition in civil and commercial matters within the framework of the Hague Conference on Private International Law. Discussion of the Preliminary Draft Convention Text showed a lack of consensus among the parties. One of the issues was that the hard-and-fast rules of the proposed text would seriously curtail judicial activism in view of human rights, as is currently possible under the ATCA. It was eventually decided not to negotiate an all-encompassing convention, but to use a bottom-up approach beginning with the jurisdictional issues on which there was consensus. Whether the project will succeed is currently highly uncertain. See generally Knut Woesthoff, The Drafting Process for a Hague Convention on Jurisdiction and Judgments with Special Consideration of Intellectual Property and E-Commerce (2005) (unpublished L.L.M. thesis), available at [http://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1054&context=stu\\_llm](http://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1054&context=stu_llm).

129. The comparative survey conducted by the Norwegian institute Fafo shows that among the sixteen nations surveyed, the current jurisprudence of five of these countries, in principle, does not recognize criminal liability of legal persons. These countries are: Argentina, Germany, Indonesia, Spain, and the Ukraine. See RAMASASTRY & THOMPSON, *supra* note 7, at 13.

is fully accepted. But victims are dependent on governmental authorities to initiate the proceedings. The advantage of civil law is that victims can themselves set in motion a judicial proceeding. An additional advantage is that the civil route conserves the limited resources of the state's prosecutor. Moreover, the monetary damages that may be awarded in a civil suit are not always possible, or at least not to the same extent, in criminal proceedings. The importance of compensation for victims of human rights violations has been broadly acknowledged in international human rights law<sup>130</sup> and the opportunities offered by tort law in this respect are significant. Transnational tort litigation has, to date, already resulted in some impressive settlements. In several of the cases brought under the ATCA, defendant corporations have decided to settle, providing the victims with substantial financial compensation. At the same time, however, it should be acknowledged that even if a judgment is rendered, it can prove difficult to ensure that it is the victims who receive the bulk of the awarded sums. Nevertheless, the symbolic significance of being awarded compensation should not be underestimated. Professor Terry even goes so far as to state:

In truth . . . it is perhaps more accurate to describe the civil remedy not so much as a mechanism to fill a gap in "enforcement" under international law but as a means for providing a measure of self-respect, vindication and recognition for the victims of serious violations of international human rights.<sup>131</sup>

A substantial point of criticism regarding the use of civil remedies to address international human rights violations is the position that municipal tort law is an inadequate placeholder for the fundamental values under consideration. Dealing with grave violations such as genocide and torture by means of municipal tort invites the criticism that this trivializes such acts.<sup>132</sup> Some wrongful acts deserve not merely economic sanction but also deprivation of liberty. In criminal law cases, there is the penalty of imprisonment and the entire community may be understood to

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130. See Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law [Van Boven/Bassiouni Principles], G.A. Res. 60/147, para. 20, U.N. Doc. A/RES/60/147 (Dec. 16, 2005).

131. John Terry, *Taking Filártiga on the Road: Why Courts Outside the United States Should Accept Jurisdiction Over Actions Committed Abroad*, in TORTURE AS TORT: COMPARATIVE PERSPECTIVES ON THE DEVELOPMENT OF TRANSNATIONAL HUMAN RIGHTS LITIGATION, 109, 112 (Craig Scott ed., 2001).

132. See, e.g., DE SCHUTTER, *supra* note 47, at 47–48; LYAL S. SUNGA, INDIVIDUAL RESPONSIBILITY IN INTERNATIONAL LAW FOR SERIOUS HUMAN RIGHTS VIOLATIONS 111–26 (1992).

be represented by the government prosecutor. It may be argued that it is more appropriate to sentence those responsible for corporate decisions that result in grave violations of international law to jail than it is to impose mere economic sanctions on them. This argument holds true especially for the civil litigation discussed in this Article because in these cases, violations of international law are treated as a municipal tort, unlike in the ATCA litigation where the violations of international law give rise to a cause of action.<sup>133</sup>

However, in defense of civil recourse for violations of international law, it may be argued that transnational human rights litigation helps draw attention to human rights violations committed by corporations, thus creating a public record of the events. This type of litigation contributes to identifying corporations as violators of human rights. Such cases may, therefore, also serve to deter future abuses. Even when most corporations escape such litigation and those held accountable in fact do not pay out the required compensation, the negative publicity that these suits generate constitutes an important factor in preventing corporate human rights violations. In addition, private law is flexible, i.e., it is able to incorporate new international developments into corporate human rights obligations. As opposed to criminal law, which, according to the principle of legal certainty, must set forth clear-cut penalties in advance, civil law can take (more) particular circumstances into account, which may increase the amount of compensation significantly.

Moreover, it is important to emphasize that the question is not an “either/or” question. Both criminal and civil law have advantages and disadvantages as remedies and should operate as complements to each other. Finally, as persuasively argued by Professor Stephens, the divide between criminal prosecution and civil liability is not as sharp as is sometimes claimed.<sup>134</sup> For example, the consequences attached to either criminal or civil procedures differ significantly from one system to another. The objectives pursued also differ; in some countries civil law will, much like criminal law, act as a deterrent (one may think of the United States, given the vast financial implications attached to civil litigation there). In other words, in the different legal systems, “civil and criminal remedies intertwine and overlap in unfamiliar ways.”<sup>135</sup>

As long as the international community continues to shape the enforcement of international norms in terms of territorial jurisdiction, mul-

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133. See Anthony J. Sebok, *Taking Tort Law Seriously in the Alien Tort Statute*, 33 BROOK. J. INT'L L. 871, 889–96 (2008) (discussing “[w]hy the ‘tort’ in the Alien Tort Statute is not municipal tort law”).

134. Stephens, *supra* note 10, at 44–46.

135. *Id.* at 45.

tinational corporations will generally be able to avoid being held accountable for international human rights violations. Civil liability and criminal prosecution will only provide a partial answer to the problems posed by these elusive entities. The quest for accountability requires a multi-faceted approach consisting of national enforcement techniques, both of a civil and criminal nature as discussed in this Article, and mechanisms of self-regulation, but preferably also an international instrument aimed at holding corporate entities that violate international norms to account.

#### CONCLUSION

The Netherlands is home to a relatively large number of multinational corporations. A number of these corporations, such as Trafigura, have faced considerable criticism for extraterritorial misconduct. This Article aims to provide insight into the legal approach adopted in the Netherlands to assess the feasibility of transnational human rights litigation in this jurisdiction as a remedy for addressing corporate misbehavior. In line with other states in Europe, it would seem that the principal remedy for corporate human rights violations abroad is criminal prosecution. Civil action is, however, an important legal tool, especially considering the value (albeit sometimes symbolic) of awarding compensation to victims of human rights violations. Any opportunities offered by Dutch tort law should be utilized with civil law and criminal law playing complementary roles in preventing and remedying violations of human rights.

It has been demonstrated that Dutch civil law does not leave plaintiffs without remedies. Rules governing adjudicative jurisdiction will generally not pose a major obstacle to bringing transnational human rights cases before the Dutch courts. A significant advantage over common law countries is the fact that the doctrine of *forum non conveniens* will not be applied. However, it will not be easy to hold parent companies liable for harmful activities abroad. Notably, mandatory rules of private international law concerning choice of law may constitute potential stumbling blocks. A major procedural obstacle will be the fact that in most cases the applicable law will not be Dutch tort law, meaning that the Dutch judge will have to implement the foreign law of a host state. Parties may, however, choose to have Dutch law govern the dispute. Moreover, with the entry into force of Rome II, plaintiffs will be able to opt for Dutch law in cases of environmental harm emanating from the operations of a Dutch corporation. It remains to be seen precisely how a Dutch judge will determine whether certain contested corporate behavior indeed gives rise to tortious liability. International law can provide a cause of action directly or indirectly. In the latter situation, soft law instruments have

been applied as a standard to determine the duty of care and therefore it can be concluded that a violation of provisions laid out in international treaties will certainly be taken into consideration.

In sum, taking the procedural and substantive features of Dutch civil law into account, transnational human rights litigation in the Netherlands is certainly feasible. However, compared to the United States, other general features of the private law system in the Netherlands, such as the possible financial burden and the Dutch legal culture in general, make the Netherlands significantly less litigation friendly and may present considerable stumbling blocks for plaintiffs seeking civil recourse. This may explain why, to date, no transnational human rights case against a corporation has been brought before the Dutch courts. In fact, even the victims of the dumping of toxic waste carried by the Trafigura-chartered vessel the Probo Koala referred to in this Article, ultimately chose the English and not the Dutch courts to seek redress. Consequently, although transnational human rights litigation before the Dutch courts is feasible, significant hurdles continue to exist that impede the employment of Dutch civil law as a regulatory and preventive tool in the fight against undesirable corporate behavior.

# TAKING TORT LAW SERIOUSLY IN THE ALIEN TORT STATUTE

*Anthony J. Sebok\**

## INTRODUCTION: THE PROBLEM OF TOO MUCH LAW

Current legal argument over the application of the Alien Tort Statute (“ATS”) presents an interesting irony. While one might have thought that the problem with ATS litigation—especially in cutting-edge areas such as corporate liability for aiding and abetting—is that there is no law at all and that courts are “making things up” as they go along,<sup>1</sup> a moment’s reflection on the plaintiff’s arguments in *Corrie v. Caterpillar*, recently decided by the Ninth Circuit, illustrates that in fact, when it comes to aiding and abetting, there seems to be *too much law*.<sup>2</sup>

In *Corrie*, the plaintiff’s estate alleged that Caterpillar should be held liable under the ATS because Caterpillar violated the law of nations by selling modified bulldozers to the Israeli Defense Forces, who planned to use the bulldozers to violate certain rights protected by customary international law.<sup>3</sup> The specific claim against Caterpillar was that it was liable under the ATS because it had aided and abetted the Israeli Defense Forces.<sup>4</sup> The Ninth Circuit upheld the district court’s dismissal of the suit on political questions ground,<sup>5</sup> rendering the legal validity of the underly-

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1. This is my phrase, although I think it captures the spirit of the “conservative” critique of modern ATS adjudication. See Curtis Bradley & Jack Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 855 (1997) (noting that the customary international law by necessity has a “soft, indeterminate character,” and that “it makes no sense to say that judges ‘discover’ an objectively identifiable” law) (citations omitted). See also Julian Ku, *Keeping the Courthouse Door Open for International Law Claims Against Corporations: Rethinking Sosa*, 9 ENGAGE: J. FEDERALIST SOC’Y PRAC. GROUPS 81, 82 (2008) (agreeing with Justice Scalia’s prediction that judges would continue to engage in “unbridled federal court lawmaking”).

2. *Corrie v. Caterpillar, Inc.*, 503 F.3d 974 (9th Cir. 2007).

3. *Id.* at 977.

4. *Id.* at 979.

5. *Id.* at 984.

ing human rights claim moot, unless the Ninth Circuit takes up the question *en banc* or the case is appealed to the U.S. Supreme Court. For purposes of this Article, that question is likewise moot; I want to simply note that the plaintiff's argument about Caterpillar's aiding and abetting liability illustrates the too-much-law irony that is at the heart of contemporary ATS litigation against corporations.

Caterpillar argued two reasons why it could not be held liable for aiding and abetting under the ATS even if the Israeli Defense Forces had used Caterpillar's bulldozers to violate the law of nations. First, citing *United States v. Blankenship*,<sup>6</sup> Caterpillar argued that a mere seller of a product can never be held liable for the wrongs committed by the buyer under aiding and abetting liability.<sup>7</sup> Second, citing *Sosa v. Alvarez-Machain*,<sup>8</sup> Caterpillar argued that the specific action they allegedly and admittedly performed—selling a legal product to Israel—did not constitute a violation of a “specific, universal, and obligatory” proscription as required by the Supreme Court’s test for a cause of action under the ATS (even if Israel had used the product to violate international law).<sup>9</sup> The district court accepted these arguments and granted judgment in favor of Caterpillar.<sup>10</sup>

On appeal, the plaintiffs, not surprisingly, challenged these and other arguments made by Caterpillar. The plaintiff advanced a three-part argument that the aiding and abetting suit meets the *Sosa* test. First, the plaintiff argued that *Sosa* does not require that an allegation of aiding and abetting be rooted in a “specific, universal, and obligatory” norm in international law.<sup>11</sup> In other words, aiding and abetting liability is not a rule of international law, but a remedial rule based in federal common law. To satisfy the *Sosa* test, all that needs to be established is that a violation of the law of nations may have occurred.<sup>12</sup> Once the underlying violation is sufficiently alleged, derivative liability follows as a matter of domestic

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6. *United States v. Blankenship*, 970 F.2d 283 (7th Cir. 1992).

7. See *Corrie v. Caterpillar, Inc.*, 403 F. Supp. 2d 1019, 1027 (D. Wash. 2005), *vacated*, 503 F.3d 974 (9th Cir. 2007).

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

9. See Reply in Support of Motion to Dismiss by Defendant Caterpillar Inc. Pursuant to Fed. R. Civ. P. 12(b)(6) for Failure to State a Claim and Pursuant to the Political Question and Act of State Doctrines at 12–15, *Corrie v. Caterpillar, Inc.*, 403 F. Supp. 2d 1019 (D. Wash. 2005).

10. *Corrie v. Caterpillar, Inc.*, 403 F. Supp. 2d 1019, 1026–27 (D. Wash. 2005), *vacated*, 503 F.3d 974 (9th Cir. 2007).

11. Appellants’ Opening Brief, *Corrie v. Caterpillar, Inc.*, No. 05-36210, at 21–22 (9th Cir. Mar. 20, 2006).

12. *Sosa*, 542 U.S. at 698–99, 724.

tort law for anyone who aided and abetted that underlying violation.<sup>13</sup> Second, the plaintiff argued that even if the first argument fails, aiding and abetting is recognized under international law.<sup>14</sup> That is, selling industrial products<sup>15</sup> or providing a list of names to facilitate their sale<sup>16</sup> satisfies the *Sosa* test with regards to aiding and abetting the violations of international law alleged in the suit—war crimes, extrajudicial killing, and cruel, inhuman, and degrading treatment or punishment. Third, the plaintiff argued that the district court used an erroneous definition of aiding and abetting, and that the right definition would support the plaintiff's claim that a jury could find liability.<sup>17</sup> While the district court did not define aiding and abetting, it cited *Blankenship* for the proposition that, even assuming arguendo that the ATS provided for aiding and abetting liability at all, a mere seller could not be an aider and abettor under the ATS.<sup>18</sup> The plaintiffs argued instead that under either international law or domestic law, a seller could be held liable for aiding and abetting if it could be shown that, by selling a product, an actor provided “practical assistance that has substantial effect on the perpetuation of a crime” under international law, or “substantial assistance” under domestic law.<sup>19</sup>

This Article examines this irony of too much law in the imposition of aiding and abetting liability. Part I looks at aiding and abetting liability under both U.S. domestic law, illustrated in the *Restatement (Second) of Torts* and subsequent case law, and customary international law, derived from the Rome Statute of the International Criminal Court (“Rome Statute”) and decisions rendered by special international tribunals. Part II then explores how this proliferation of sources of law has given jurists a wide variety of law from which to choose. After reviewing the current case law, this Part examines paradigmatic examples of this irony of too much law. This Article concludes that the source of law should be *transnational* (as opposed to domestic) common law tort.

A review of recent case law underscores the irony of too much law even further. In 2002, the Ninth Circuit agreed in *Doe I v. Unocal*<sup>20</sup> that

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13. *Sosa*, 542 U.S. at 724–25.

14. Appellants' Opening Brief, *Corrie v. Caterpillar, Inc.*, *supra* note 11, at 23–25.

15. See, e.g., *In re Tesch* (Zyklon B Case), 13 I.L.R. 250 (Brit. Mil. Ct. 1946).

16. See, e.g., *United States v. Ohlendorf* (The Einsatzgruppen Case), in 4 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 3 (1950).

17. Appellants' Opening Brief, *Corrie v. Caterpillar, Inc.*, *supra* note 11, at 25–29.

18. *Corrie v. Caterpillar, Inc.*, 403 F. Supp. 2d 1019, 1027 (D. Wash. 2005), vacated, 503 F.3d 974 (9th Cir. 2007).

19. Appellants' Opening Brief, *Corrie v. Caterpillar, Inc.*, *supra* note 11, at 23–25.

20. *Doe I v. Unocal*, 395 F.3d 932 (9th Cir. 2002), vacated *en banc*, 395 F.3d 978 (9th Cir. 2003). Although the Ninth Circuit was vacated *en banc*, it led to an important

the plaintiff could bring an aiding and abetting claim but disagreed over the definition and source of the law of aiding and abetting.<sup>21</sup> Given that the decision was pre-*Sosa*, the first argument raised by the *Corrie* plaintiff—that the an allegation of aiding and abetting need not be rooted in a “specific, universal, and obligatory” norm in international law—was assumed and not argued. However, the second and third issues were raised, and the court’s answers did not follow in any predictable pattern. The majority, led by Judge Pregerson, found that the source of aiding and abetting law is international law, and that an actor is liable when he provides “knowing practical assistance” to a party who commits a crime in violation of international law.<sup>22</sup> The concurrence, written by Judge Reinhardt, located the exact same cause of action in domestic law.<sup>23</sup>

The friendly disagreement between these two nominally liberal judges went even further. Judge Pregerson took the position that, if domestic law provided the relevant test, it would be drawn from the doctrine of aiding and abetting as defined in the *Restatement (Second) of Torts* § 876.<sup>24</sup> In contrast, Judge Reinhardt took the view that a test based on domestic law should draw upon the doctrines of joint venture liability,<sup>25</sup> agency liability,<sup>26</sup> and reckless disregard<sup>27</sup>—three common law doctrines that are very different from the concept of aiding and abetting.

A similar dispute over the relevant sources of law arose between two judges who otherwise agreed with the basic proposition that aiding and abetting liability should be available under the ATS. In *Khulumani v.*

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settlement and remains one of the most learned discussions of aiding and abetting liability under the ATS.

21. *Id.* at 947–51.

22. *Id.* at 951.

23. *Id.* at 963–78 (Reinhardt, J., concurring). Reinhardt explained:

In my view, courts should not *substitute* international law principles for established federal common law or other domestic law principles, as the majority does here, unless a statute mandates that substitution, or other exceptional circumstances exist. . . . [T]he benefits of the vast experience embodied in federal common law as well as any useful international law principles are obtained when we employ the traditional common law approach ordinarily followed by federal courts. Those benefits are lost, however, when we substitute for the wide body of federal authority and reasoning, as the majority does here, an undeveloped principle of international law promulgated by a recently-constituted ad hoc international tribunal.

*Id.* at 966–67.

24. *Id.* at 951.

25. *Id.* at 970–72.

26. *Unocal*, 395 F.3d at 972–74.

27. *Id.* at 974–76.

*Barclay National Bank*,<sup>28</sup> the South African ATS case recently decided by the Second Circuit, the two-judge majority split along exactly the same lines as Judges Pregerson and Reinhardt in *Unocal*. Judge Katzmann took the position that the plaintiff's claim for aiding and abetting should adopt the test set out in international law—most significantly, the Rome Statute<sup>29</sup>—while Judge Hall took the position that the plaintiffs' case could go forward on the basis of domestic law—namely the *Restatement (Second) of Torts* § 876.<sup>30</sup>

As the third judge on the panel, Judge Korman, slyly noted in his dissent, if on remand the federal district court were to apply the Rome Statute, the plaintiffs would likely fail to meet its comparatively demanding standard.<sup>31</sup> None of the pleadings so far indicates that the defendants purposely facilitated the violation of human rights by promoting the apartheid system. Instead, the plaintiffs alleged that at most the corporate defendants were substantially certain that their efforts to sell products to the South African government would have the effect of enabling apartheid to survive.<sup>32</sup> However, substantial certainty, while meeting the *Restatement (Second) of Torts* test, is insufficient under the Rome Statute's test.

There is good reason to believe that the judges in *Khulumani* misunderstood the significance of the difference between international and domestic law tests for aiding and abetting. While Judge Katzmann stated that “those who assist in the commission of a crime with the purpose of facilitating that crime would be subject to aiding and abetting liability under the statutes governing the [International Criminal Tribunal for the Former Yugoslavia] and the [International Criminal Tribunal for Rwanda],”<sup>33</sup> this does not tell the whole story. As the next section will show, the applicability of the aiding and abetting doctrine to many corporate defendants in ATS litigation is *overdetermined*. That is, under either body of law, the corporate defendants could be found liable.

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28. *Khulumani v. Barclay Nat'l Bank*, 504 F.3d 254 (2d Cir. 2007) (per curium), *aff'd due to lack of a quorum sub nom.*, *American Isuzu Motors, Inc. v. Ntsebeza*, 2008 WL 117862, 76 U.S.L.W. 3405 (May 12, 2008) (No. 07-919).

29. *Id.* at 274–76.

30. *Id.* at 284–87.

31. *Id.* at 332–33.

32. Second Consolidated and Amended Complaint ¶¶ 4–6, *In re S. African Apartheid Litig.*, 346 F. Supp. 2d 538 (S.D.N.Y. 2004).

33. *Khulumani*, 504 F.3d at 276.

## I. THE INTERNATIONAL AND DOMESTIC CONTENT OF AIDING AND ABETTING LIABILITY

### A. *The Restatement (Second) of Torts and Halberstam: The Underpinnings of Domestic Law*

Although the concept of assigning liability to those who enable or encourage tortious conduct has existed within the common law for centuries,<sup>34</sup> claims specifically in aiding and abetting have become increasingly common over the last two decades. The *Restatement (Second) of Torts* § 876 was codified in 1979 and allowed for the imposition of liability on persons acting in concert.<sup>35</sup> Section 876 attaches liability to an actor who knows that another's conduct constitutes a breach of duty but nevertheless provides substantial assistance or encouragement to that party.<sup>36</sup>

The scope of this doctrine was discussed thoroughly by the D.C. Circuit in *Halberstam v. Welch*.<sup>37</sup> The court in *Halberstam* noted that relatively few claims had been adjudicated under the theory of aiding and abetting, and posited that this phenomenon resulted from confusion in applying the doctrine.<sup>38</sup> To address the issue, the court analyzed a variety of aiding and abetting cases, element by element, to illustrate how the tort was correctly applied.<sup>39</sup> In particular, the court determined what constituted "substantial assistance" by balancing the five factors recommended in the *Restatement (Second) of Torts* § 876: (1) the nature of the act encouraged; (2) the amount (and kind) of assistance given; (3) the defendant's absence or presence at the time of the tort; (4) the defendant's relation to the tortious actor; and (5) the defendant's state of mind.<sup>40</sup>

The court in *Halberstam* applied these factors to hold a woman liable for a murder her husband committed while burglarizing a home.<sup>41</sup> Specifically, the D.C. Circuit ruled that a defendant did not need to be present at the time of the tort in order for liability to attach and explained its

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34. See, e.g., *Talbot v. Janson*, 3 U.S. (3 Dall.) 133 (1795) (holding defendant liable for aiding and abetting in piracy because he knowingly supplied guns). See also *Hennifer's Case*, 11 F. Cas. 1099, 1103 (C.C.D. Pa. 1793) (court recognized liability for committing aiding or abetting hostilities in violation of the law of nations).

35. RESTATEMENT (SECOND) OF TORTS § 876 (1976).

36. *Id.*

37. *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983).

38. *Id.* at 478.

39. *Id.* at 478–86.

40. *Id.* at 478.

41. *Id.* at 488–89.

ruling through the existence of other relevant factors from section 876.<sup>42</sup> Namely, the district court had found that the defendant knew of her husband's occupation as a professional thief and was also aware of her own role in assisting their criminal enterprise.<sup>43</sup> Analogizing the case to an illustration in the comments to section 876,<sup>44</sup> the D.C. Circuit concluded that the plaintiff's death was a reasonably foreseeable consequence of continued personal property crime, and thus found the defendant liable for aiding and abetting the murder.<sup>45</sup>

Although *Halberstam* and section 876 have been widely followed,<sup>46</sup> some courts have hesitated to apply the doctrine in difficult cases, and others still have not accepted its formulation. For example, in *Rice v. Paladin Enterprises*,<sup>47</sup> an aiding and abetting action was brought against the publisher of a "hit man" manual after a professional killer relied on the book's approach to carry out a murder.<sup>48</sup> The publisher conceded that when marketing the book, he intended to help criminals commit crimes.<sup>49</sup> A Maryland district court in the Fourth Circuit acknowledged that state

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42. *Id.* at 486–88.

43. See *Halberstam*, 705 F.2d at 488. These findings were based upon circumstantial evidence, and took into account that the defendant acted as her husband's bookkeeper and secretary for many years and also helped launder the items he had stolen. *Id.*

44. See RESTATEMENT (SECOND) OF TORTS § 876 cmt. d, illus. 10 (1976). The illustration explains:

*A* and *B* conspire to burglarize *C*'s safe. *B*, who is the active burglar, after entering the house and without *A*'s knowledge of his intention to do so, burns the house in order to conceal the burglary. *A* is subject to liability to *C*, not only for the conversion of the contents of the safe, but also for the destruction of the house.

*Id.* See also *Am. Family Mut. Ins. Co. v. Grim*, 440 P.2d 621, 626 (Kan. 1968).

45. *Halberstam*, 705 F.2d at 483.

46. *Halberstam* has been followed in over 50 subsequent decisions and is accepted as good law in many federal circuits. See *Khulumani*, 504 F.3d at 288 ("In the almost quarter-century since *Halberstam* was decided, many state courts and Circuit Courts, including the Second Circuit, have adopted the *Restatement*'s aiding and abetting standard."). See also *Hurley v. Atlantic City Police Dep't*, 174 F.3d 95 (3d Cir. 1999) (*Halberstam* and the *Restatement* were followed in the Third Circuit); *Temporomandibular Joint (TMJ) Implant Recipients v. Dow Chem. Co.*, 113 F.3d 1484 (8th Cir. 1997) (followed by Eighth Circuit); *Kitson v. Bank of Edwardsville*, 240 F.R.D. 610 (S.D. Ill. 2006) (followed in Seventh Circuit); *Davis v. United States*, 340 F. Supp. 2d 79, 92 (D. Mass. 2004); *Crawford By & Through Crawford v. City of Kansas City*, 952 F. Supp. 1467, 1477 (D. Kan. 1997).

47. On appeal, the Fourth Circuit reversed the judgment. *Rice v. Paladin Enter.*, 128 F.3d 233 (4th Cir. 1997).

48. *Id.* at 239.

49. *Id.* at 241.

law recognized civil liability for aiding and abetting under section 876, but nonetheless declined to find the defendant liable.<sup>50</sup>

In the context of securities law, the Supreme Court cited *Halberstam* to suggest that aiding and abetting liability does not have a concrete basis at common law.<sup>51</sup> Its reliance on *Halberstam* for this proposition is surprising. Although the court in *Halberstam* conceded that many courts failed to apply the doctrine clearly, the court did not question its validity as a cause of action.<sup>52</sup> In fact, the court in *Halberstam* was optimistic about the extension of aiding and abetting and tort law generally to redress “newly emerging notions of economic justice.”<sup>53</sup>

The *Restatement (Second) of Torts* formulation of aiding and abetting has not been unequivocally adopted in some jurisdictions.<sup>54</sup> Still, it is often the case that the cause of action is available when applied to a straightforward set of facts. For example, aiding and abetting has been applied to litigation involving fraud,<sup>55</sup> products liability,<sup>56</sup> terrorism,<sup>57</sup> and libel.<sup>58</sup> But given the breadth and novelty of wrongs that aiding and

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50. Rice v. Paladin Enter., 940 F. Supp. 836, 842, 849 (D. Md. 1996), *rev'd*, 128 F.3d 233 (4th Cir. 1997).

51. Cent. Bank of Denver, N.A. v. First Interstate Bank, N.A., 511 U.S. 164, 181 (1994). The Court quoted *Halberstam*:

The doctrine has been at best uncertain in application, however. As the Court of Appeals for the District of Columbia Circuit noted in a comprehensive opinion on the subject, the leading cases applying this doctrine are statutory securities cases, with the common-law precedents “largely confined to isolated acts of adolescents in rural society.”

*Id.*

52. *Halberstam*, 705 F.2d at 478.

53. *Id.* at 489.

54. See, e.g., Fed. Deposit Ins. Corp. v. S. Prawer & Co., 829 F. Supp. 453, 457 (D. Me. 1993) (in Maine, “it is clear . . . that aiding and abetting liability did not exist under the common law, but was entirely a creature of statute”); *In re Asbestos Sch. Litig.*, No. 83-0268, 1991 U.S. Dist. LEXIS 10471, at \*34 (E.D. Pa. July 18, 1991) (cause of action under *Restatement* § 876 “has not yet been applied as a basis for liability” by Pennsylvania courts); Meadow Ltd. P’ship v. Heritage Sav. & Loan Ass’n, 639 F. Supp. 643, 653 (E.D. Va. 1986) (aiding and abetting tort based on *Restatement* § 876 “not expressly recognized by the state courts of the Commonwealth [of Virginia]”).

55. See, e.g., *In re Enron Corp. Sec., Derivative & “ERISA” Litig.*, 511 F. Supp. 2d 742 (S.D. Tex. 2005).

56. See, e.g., *In re Temporomandibular Joint (TMJ) Implants Prods. Liab. Litig.*, 113 F.3d 1484 (8th Cir. 1997).

57. See, e.g., *Tel-Oren v. Libyan Arab Rep.*, 726 F.2d 774, 801–08 (D.C. Cir. 1984). However, it is worth noting that the plaintiff brought an action in conspiracy, not aiding and abetting. *Id.* at 798.

58. See, e.g., *Russell v. Marlboro Books*, 18 Misc. 2d 166 (N.Y. Sup. Ct. 1959).

abetting has been applied to redress, it is not surprising that these actions have been met with resistance, particularly within these contexts.

### B. Customary International Law

Customary international law is a set of normative standards that have achieved a general degree of international consensus.<sup>59</sup> These standards are derived from international conventions, the judicial decisions from international tribunals, and general principles of law that are widely recognized within civilized nations.<sup>60</sup> Contemporary discussions on aiding and abetting law generally focus on interpretations of the Rome Statute of the International Criminal Court and the decisions rendered by special international tribunals involving Germany, Rwanda, and the former Yugoslavia. Generally, the divergence in opinion regarding these sources arises over what the sources stand for collectively, rather than what each says on its own. Still, interpretations do vary.<sup>61</sup>

Aiding and abetting was recognized as a basis for criminal liability by the Nürnberg Military Tribunal (“NMT”), an international court formed after World War II to punish violators of international law. Control Council Law No. 10, which established these courts, provided for the culpability of officers that did not directly carry out war crimes but were nonetheless responsible for assisting in their commission.<sup>62</sup> However,

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59. Customary international law is defined by the *Restatement (Third) of the Foreign Relations Law* as “law [that] results from a general and consistent practice of states followed by them from a sense of legal obligation.” RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987).

60. See Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 933. See also *Filártiga v. Peña-Irala*, 630 F.2d 876 (1980).

61. See, e.g., Philip A. Scarborough, Note, *Rules of Decisions for Issues Arising Under the Alien Tort Statute*, 107 COLUM. L. REV. 457, 479–85 (2007); Daniel Diskin, Note, *The Historical and Modern Foundations for Aiding and Abetting Liability Under the Alien Tort Statute*, 47 ARIZ. L. REV. 805 (2005); Chimène I. Keitner, Conceptualizing Complicity in Alien Tort Cases (Apr. 3, 2008) (unpublished manuscript on file with Author).

62. Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and Against Humanity, Jan. 20, 1946, 3 OFFICIAL GAZETTE OF THE CONTROL COUNCIL FOR GERMANY 50. Article 2(2) explains:

[A] person . . . is deemed to have committed a crime . . . if he was (a) a principal or (b) was an accessory to the commission of any such crime or *ordered or abetted* the same or (c) took a consenting part therein or (d) was connected with plans or enterprises involving its commission . . .

*Id.* art. 2(2) (emphasis added).

there has been judicial disagreement over the mental state required to find a defendant culpable.<sup>63</sup>

This difficulty arose in part from a mens rea threshold in one trial that diverged from the generally applied standard. In *The Ministries Case*, the court acquitted Karl Rasche,<sup>64</sup> a German industrialist accused of knowingly providing loans to businesses that relied on forced labor.<sup>65</sup> Despite evidence indicating that Rasche was substantially certain his funding would facilitate criminal activity, the NMT acquitted the chairman.<sup>66</sup> It stated: “We cannot go so far as to enunciate the proposition that the official of a loaning bank is chargeable with the illegal operations alleged to have resulted from loans or which may have been contemplated by the borrower.”<sup>67</sup> Thus, this case has been cited for the proposition that the NMT required a purposeful mens rea to convict a party accused of enabling human rights violations.<sup>68</sup> In other words, culpability attaches only where there is evidence that a third-party defendant assisted the direct wrongdoer and intended primarily to facilitate an international crime.

The standard applied during the trial of Karl Rasche can be distinguished and dismissed as an outlying case. Scholars have pointed to other trials conducted by the NMT in which culpability attached to defendants for knowingly—but not purposefully—contributing to the commission of an international crime.<sup>69</sup>

For example, in *United States v. Flick*, a German industrialist was convicted of international crimes based on his knowledge and approval of decisions made by his deputy, Bernard Weiss, to use Russian prisoners of war as slave labor.<sup>70</sup> The evidence presented at trial indicated that Weiss, who was also convicted, actively pursued increasing production

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63. See, e.g., *Khulumani*, 504 F.3d 254. See also *supra* notes 28–32 and accompanying text (detailing the disagreement between Judges Katzmann and Hall).

64. Karl Rasche was chairman of the Dresdner Bank. See *United States v. Von Weizsaecker (The Ministries Case)*, in 12–14 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 853 (1949).

65. *Id.* at 852.

66. *Id.* at 852–55.

67. See *id.* at 854.

68. *Khulumani*, 504 F.3d at 276.

69. See, e.g., Anita Ramasastry, *Corporate Complicity: From Nuremberg to Rangoon—An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations*, 20 BERKELEY J. INT'L L. 91, 113–17 (2002).

70. *United States v. Flick (The Flick Case)*, in 6 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 3 (1949). See generally Ramasastry, *supra* note 69.

in light of the decreased cost of forced labor.<sup>71</sup> However, there were no facts to indicate that Weiss sought primarily to enslave Russian prisoners of war. Rather, Weiss' purpose in utilizing slave labor was presumably to make money.<sup>72</sup> Thus, *Flick* is often cited for the proposition that defendant's knowledge that his actions will incidentally result in an international crime is sufficient to establish aiding and abetting liability.<sup>73</sup>

Similarly, in *United States v. Krupp*, knowledge appears to have satisfied the mens rea requirement necessary to convict eleven of twelve employees of the Krupp firm charged with deportation, exploitation, and abuse of slave labor.<sup>74</sup>

Another trial, *U.S. v. Krauch*,<sup>75</sup> is particularly noteworthy because the successful criminal charges against Farben were followed by a civil action brought by forced laborers seeking redress for unpaid wages. In the private action, a German court held Farben liable for negligently failing to protect the plaintiff's life, body, and health.<sup>76</sup>

A concept of aiding and abetting similar to one set forth in Control Council No. 10 was implicitly applied in Hong Kong during the

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71. *United States v. Flick (The Flick Case)*, in 6 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 3, 1198, 1202 (1949).

72. *Id.* at 1198.

73. See Edwin V. Woodsome, Jr. & T. Jason White, *Corporate Liability for Conduct of a Foreign Government: The Ninth Circuit Adopts a "Reason to Know" Standard for Aiding and Abetting Liability Under the Alien Tort Claims Act*, 26 LOY. L.A. INT'L & COMP. L. REV. 89, 108 (2003) (discussing *Unocal*, 110 F. Supp. 2d at 1310).

74. *United States v. Krupp (The Krupp Case)*, in 9 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 1448–49 (1950). See generally Matthew Lippman, *War Crimes Trials of German Industrialists: The "Other Schindlers,"* 9 TEMP. INT'L & COMP. L.J. 173, 229–49 (1995).

75. *United States v. Krauch (The Farben Case)*, 8 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 1132 (1952). The NMT stated:

Where private individuals, including juristic persons, proceed to exploit the military occupancy by acquiring private property against the will and consent of the former owner, such action, not being expressly justified by any applicable provision of the Hague Regulations, is in violation of international law. The payment of a price or other adequate consideration does not, under such circumstances, relieve the act of its unlawful character.

*Id.*

76. See Ramasastry, *supra* note 69, at 107–08 n.63 (citing the decision in *Wollheim v. I.G. Farben in Liquidation*, Frankfurt District Court, June 10, 1953, court file no. 2/3/040651). Farben and Wollheim eventually settled the claim.

*Kinkaseki Mine* trial.<sup>77</sup> Pursuant to that trial, a civil action was brought by prisoners of war against the Nippon Mining Company to obtain redress for their forced mine labor, during which the prisoners of war were allegedly given little food or medical care and were allegedly subjected to violence.<sup>78</sup>

Thus, although many of these tribunals did not explicitly set forth a standard for third-party liability, their conviction of those who indirectly perpetuated international crime suggests that purposeful intent was not a prerequisite to finding culpability. In *Zyklon B*,<sup>79</sup> however, a British military court offered more clarity regarding the mens rea standard it applied.<sup>80</sup> The defendants sold poison gas to the Nazi party knowing that it would be used to commit mass murder, but without any specific intent to harm those persons.<sup>81</sup> Nonetheless, the tribunal found the defendants culpable, explicitly holding that knowledge without purposeful intent was sufficient to create culpability in that situation.<sup>82</sup>

The *Einsatzgruppen* tribunal also presents a clear formulation on the mental state required in order to convict a third-party for assisting in the commission of a crime.<sup>83</sup> The NMT suggested that it would not exonerate a Nazi interpreter who turned over lists of Communist party members to his organization, knowing that the people listed would be executed when found.<sup>84</sup> The NMT held that in performing that function, the translator had “served as an accessory to the crime.”<sup>85</sup>

More recently, the International Criminal Tribunal for Rwanda (“ICTR”) and the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) have also recognized criminal liability under the theory

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77. See Ramasastry, *supra* note 69, at 113–18 (analyzing contemporaneous newspaper reports of the trial of employees of the Japanese Nippon Mining Company by the British War Crimes Court in Hong Kong in 1947). See also Paul L. Hoffman & Daniel A. Zaheer, *The Rules of the Road: Federal Common Law and Aiding and Abetting Under the Alien Tort Claims Act*, 26 LOY. L.A. INT'L & COMP. L. REV. 47, 71 (2003) (attributing conviction of corporate officers in the *Kinkaseki Mine* trial to language relating to aiding and abetting contained in the Charter of the International Military Tribunal for the Far East art. 5, Apr. 26, 1946, T.I.A.S. No. 1587).

78. For a discussion of this “overlooked” area of civil and criminal culpability for complicity and forced labor, see Ramasastry, *supra* note 69, at 113–17.

79. *In re Tesch* (Zyklon B Case), 13 I.L.R. 250 (Brit. Mil. Ct. 1946).

80. See Hoffman & Zaheer, *supra* note 77, at 75 (discussing *Zyklon B*).

81. See *In re Tesch* (Zyklon B Case), 13 I.L.R. 250.

82. See Hoffman & Zaheer, *supra* note 77, at 75.

83. United States v. Ohlendorf (The *Einsatzgruppen* Case), in 4 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 3, 569 (1950).

84. *Id.*

85. *Id.*

of aiding and abetting. These tribunals looked to the NMT to determine the international law standards for aiding and abetting. Incorporating these sources, the tribunal in *Prosecutor v. Furundzija*<sup>86</sup> determined that a defendant's culpability for aiding and abetting turned on whether "the defendant knew that his or her actions would aid the offense,"<sup>87</sup> but did not require that an accomplice share a common purpose with the actual perpetrators of the crime.<sup>88</sup>

While most agree on the standards generally applied by tribunals in Rwanda and the former Yugoslavia, a number of scholars and judges have questioned whether these courts should be relied upon as a meaningful source of international law. In particular, they point out that these tribunals were formed ad hoc to address isolated catastrophes and applied a jurisprudence that had not necessarily been accepted or verified by the international community.<sup>89</sup> These commentators instead look to international treaties, such as the Rome Statute, as a more effective barometer of international norms.<sup>90</sup>

### C. Why This is a False Conflict

Judge Katzmann relies on Article 25(3) of the Rome Statute, and correctly notes that it "makes clear that, other than assistance rendered to the commission of a crime by a group of persons acting with a common purpose, a defendant is guilty of aiding and abetting the commission of a crime only if he does so '[f]or the purpose of facilitating the commission of such a crime.'"<sup>91</sup> The Rome Statute established the ICC, a permanent international tribunal formed to punish those who committed serious international crimes.<sup>92</sup> Although the Rome Statute is arguably more ex-

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86. *Prosecutor v. Furundzija*, Case. No. IT-95-17/1-T, Judgment (Dec. 10, 1998).

87. Hoffman & Zaheer, *supra* note 77, at 74 ("A defendant's culpability for aiding and abetting an international law offense will attach only if the defendant knew that his or her actions would aid the offense. The accomplice does not need to share the mens rea of the principal.").

88. See *Prosecutor v. Furundzija*, Case. No. IT-95-17/1-T, Judgment, ¶¶ 236–48 (Dec. 10, 1998); *Prosecutor v. Musema*, Case No. ICTR-96-13-T, Judgment, ¶¶ 180–81 (Jan. 27, 2000).

89. See, e.g., Frank Christian Olah, *MNC Liability for International Human Rights Violations Under the Alien Tort Claims Act*, 25 QUINNIPAC L. REV. 751, 797 (2007).

90. But see David J. Scheffer, *Staying the Course with the International Criminal Court*, 35 CORNELL INT'L L.J. 47, 53 (2002) ("Narrow-minded analyses that only examine the ICC Treaty and ignore the supplemental documents can be greatly misleading and are simply erroneous.").

91. *Khulumani*, 504 F.3d at 275 (quoting article 25(3) of the Rome Statute).

92. Rome Statute of the International Criminal Court art. 25(3), July 17, 1997, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

plicit on aiding and abetting than either the Statute of the ICTY<sup>93</sup> or of the ICTR,<sup>94</sup> the Rome Statute is not a stable foundation for the interpretation of the ATS. Article 25(3) of the statute codifies aiding and abetting, but fails to incorporate any requirements for finding causation:

In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

. . .  
(c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;

(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

(ii) Be made in the knowledge of the intention of the group to commit the crime;<sup>95</sup>

Scholars disagree over the interpretation of “for the purpose of facilitating.” Some scholars believe that it imposes an intent requirement, while others believe that it leaves the traditional knowledge requirement intact. Some critics have posited that the statute is also unclear on mens rea,<sup>96</sup> while others accept that article 25(3) requires a purposeful state of mind but also argue that the burden of meeting this threshold is too re-

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93. Statute of the International Criminal Tribunal for the Former Yugoslavia art. 7(1), S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993) (“A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.”).

94. Statute of the International Criminal Tribunal for Rwanda art. 6(1), S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994) (“A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute, shall be individually responsible for the crime.”).

95. Rome Statute, *supra* note 92, art. 25(3)(c)–(d).

96. See, e.g., Marko Milanović, *State Responsibility for Genocide: A Follow-Up*, 18 EUR. J. INT'L L. 669, 671 (2007).

strictive to be effective.<sup>97</sup> It does not matter, however, which position is correct—as Robert Cryer has pointed out, article 25(3) neither reflects nor declares customary international law.<sup>98</sup>

By his own admission, Judge Katzmann in *Khulumani* was trying to determine what definition of aiding and abetting was so “well-established[] [and] universally recognized” to be considered customary international law for the purposes of the [ATS].<sup>99</sup> That definition is the one articulated in *Furundzija* and the other cases cited above, not the definition provided by article 25(3). The Rome Statute thus should not have played a role—at least not a determinative one—in Judge Katzmann’s analysis.<sup>100</sup> The test international law produces should look a lot like the test produced by domestic tort law.

## II. WHY THE CONFLICT MATTERS

### A. The Apparent Overinclusiveness of Tort Law in the ATS

The disagreement over the source of aiding and abetting liability for the purpose of ascertaining corporate susceptibility to suit for funding or supplying human rights violators under the ATS may be a false conflict,

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97. See, e.g., Elizabeth T. Reichard, *Catching the Money Train: Using the Alien Tort Claims Act to Hold Private Banks Liable for Human Rights Abuses*, 36 CASE W. RES. J. INT’L L. 255, 271 (2004).

98. ROBERT CRYER, PROSECUTING INTERNATIONAL CRIMES: SELECTIVITY AND THE INTERNATIONAL CRIMINAL LAW REGIME 315–16 (2005). Cryer explains:

[T]he Article also introduces a purposive, motive requirement that is not required by custom (under which knowledge suffices). The crime is thus not defined in accordance with customary international law, but in practice the addition of the purposive intent will render liability under the Rome Statute more narrowly than in custom . . . .

*Id.*

99. *Khulumani*, 504 F.3d at 277 (quoting *Kadic v. Karadzic*, 70 F.3d 232, 239 (2d Cir. 1995)).

100. Katzmann cited to cases that found aiding and abetting liability under the ATS but relied on sources of law other than the Rome Statute. *Khulumani*, 504 F.3d at 277. These included *Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257 (E.D.N.Y. 2007), *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633 (S.D.N.Y. 2006), *Bowoto v. Chevron Corp.*, No. C 99-02506 SI, 2006 U.S. Dist. LEXIS 63209, 2006 WL 2455752 (N.D. Cal. Aug. 22, 2006), and *In re “Agent Orange” Prod. Liab. Litig.*, 373 F. Supp. 2d 7 (E.D.N.Y. 2005). *Khulumani*, 504 F.3d at 277. In particular, Katzmann noted that *Presbyterian* had found that “[a]iding and abetting liability is a specifically defined norm of international character that is properly applied as the law of nations for purposes of the [ATS].” *Khulumani*, 504 F.3d at 277 (quoting *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633, 668 (S.D.N.Y. 2006)).

but what if it were not? To put it another way, when would a divergence between international law and domestic law affect the application of the ATS?

The truth is, this question has not been squarely addressed because of a very simple feature of the relationship between international law and domestic tort law: the latter is overinclusive of the former. This relationship between international law and domestic tort law was nicely illustrated in *Sosa*. The plaintiff, Alvarez, sued under the Federal Torts Claim Act and the ATS because he was kidnapped by bounty hunters hired by the U.S. government.<sup>101</sup> The surviving ATS claim was described by Justice Souter as a putative violation of the putative customary international law norm against arbitrary arrest.<sup>102</sup> Therefore, the ATS claim failed to meet the *Sosa* test for a violation of customary international law cognizable under the ATS. The Court found that the prohibition against arbitrary arrest was “a norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1330 [the ATS] was enacted”<sup>103</sup> because it was “a single illegal detention of less than one day.”<sup>104</sup> However, had the Court found that the detention violated customary international law, there would have been no shortage of legal support for the claim that the detention violated domestic tort law. Common law recognizes false imprisonment as a tort that can be claimed by persons who have been detained without privilege for periods of less than twenty-four hours.<sup>105</sup>

In fact, a moment’s reflection reveals that virtually every international law violation alleged under the ATS has a counterpart in American tort law. Genocide, torture, and rape are all incidents of battery, assault, intentional infliction of emotional distress, and where death results, wrongful death. Slave labor is a form of false imprisonment, as is excessive detention. Even in the earliest cases in which the Court found international law violations by relying on norms with “definite content and acceptance among civilized nations,” these violations could be easily recast as common law torts. The attack upon the French diplomat in the “Marbois incident” was a battery.<sup>106</sup> Piracy was, among other things, trespass

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101. *Sosa*, 542 U.S. at 697–98.

102. *Id.* at 736.

103. *Id.* at 732.

104. *Id.* at 738.

105. See, e.g., RESTATEMENT (SECOND) OF TORTS § 112 (1976); *Grant v. Stop-N-Go Market of Texas, Inc.*, 994 S.W.2d 867 (Tex. App. 1999).

106. *Respublica v. De Longchamps*, 1 U.S. (1 Dall.) 111 (1784), cited in *Sosa*, 542 U.S. at 716–17. According to a recent argument by Thomas H. Lee, the historical purpose of the ATS was originally limited to the protection of the international law right of “safe

to chattel.<sup>107</sup> The “plunder” of a British colony in Sierra Leone must have implicated the torts of trespass to land and chattel, if not battery, assault, and false imprisonment.<sup>108</sup>

It is not true as a matter of theory or practice that every violation of international law cognizable under the ATS must be a tort under the common law.<sup>109</sup> According to Judge Katzmann, 28 U.S.C. § 1330 “confers federal subject-matter jurisdiction when the following three conditions are satisfied: (1) an alien sues, (2) for a tort, (3) committed in violation of the law of nations.”<sup>110</sup> Logically speaking, an alien could sue for a tort cognizable under the common law that is based on a wrong that is not a wrong in international law. This is arguably what happened in *Adra v. Clift*.<sup>111</sup> There, the tort alleged was the taking of a minor child from the custodial parent and the international law violation alleged was the falsification of a passport.<sup>112</sup> While taking a child from a parent *may* be a

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conduct” for ambassadors. See Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830, 860–66 (2006). While I agree with G. Edward White that this is an extremely narrow reading of the original purpose of the statute, for purposes of this Article, I do not need to rely on historical intent. See G. Edward White, *A Customary International Law of Torts* 22–26 (U. Virginia Pub. Law & Legal Theory Working Paper Series, Paper No. 34, 2005), available at [http://law.bepress.com/uvalwps/uva\\_publiclaw/art34](http://law.bepress.com/uvalwps/uva_publiclaw/art34); Scarborough, *supra* note 61, at 467 (“[T]he historical evidence suggests that the ATS was originally enacted as a measure to provide a forum for aggrieved aliens who might face significant discrimination when seeking to enforce state-created rights in state courts.”).

107. *Bolchos v. Darrel*, 3 F. Cas 810 (D.S.C. 1795) (No. 1607), *cited in Sosa*, 542 U.S. at 720; *Moxon v. Fanny*, 17 F. Cas 942 (D. Pa. 1793) (No. 9895), *cited in Sosa*, 542 U.S. at 720.

108. 1 Op. Att'y Gen. 57 (1795), *cited in Sosa*, 542 U.S. at 720–21 (discussing Attorney William Bradford's views on the availability of civil redress for British victims of a French attack in Sierra Leone in United States federal court).

109. This is a logical claim, and not an empirical claim, although as my discussion of *Adra v. Clift, infra*, will show, this is one time when an examination of the exception might help prove the rule. Furthermore, I take my claim here to be nothing more than the converse of the claim that the original purpose of the ATS was to provide a cause of action for wrongs *qua* violations of the law of nations, and not their state common law analogs. See, e.g., William R. Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 490–91 (1986); Lee, *supra* note 106, at 888.

110. *Kuhlumani*, 504 F.3d at 267 (quoting *Kadic v. Karadic*, 70 F.3d 232, 238 (2d Cir. 1995)).

111. *Adra v. Clift*, 195 F. Supp. 857 (D. Md. 1961).

112. *Id.* at 864–65. In *Adra*:

[D]espite the fact that the child Najwa was a Lebanese national, not entitled to be admitted to the United States under an Iraqi passport, defendant concealed Najwa's name and nationality, caused her to be included in defendant's Iraqi

tort—although, as I will argue, this is not obvious—falsifying a passport is not a tort. Rather, it is a violation of the law of nations and a violation of the public laws of the United States.

*Adra* is doubly interesting because the tort alleged was not one, like battery or trespass to chattels, that could be located easily in the common law of every state. The tort of “the unlawful taking or withholding of a minor child from the custody of the parent or parents entitled to such custody”<sup>113</sup> is not universally recognized by the common law. The court cited to a comment in the *Restatement (Second) of Torts* to establish that there could be a claim for redress by one parent against another for the deprivation of a child’s companionship, but the tort alleged was by no means well established or deeply rooted in U.S. common law.<sup>114</sup>

*Adra*, which was decided in 1961 and is one of the modern pre-*Filártiga* cases, is a literal application of Judge Katzmann’s two-pronged jurisdictional test under the ATS.<sup>115</sup> Under this approach, the court first establishes jurisdiction and then identifies a tort that is causally related to the international law violation that created the jurisdiction. However, Judge Katzmann’s model, which parallels *Adra*, is not without precedent. Judge Harry Edwards argued explicitly for the adoption of the *Adra* approach in *Tel-Oren v. Libyan Arab Republic*, an important post-*Filártiga* case: “The *Adra* formulation adopts a two-step jurisdictional test, requir-

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passport, and succeeded in having her admitted to the United States thereby. *These were wrongful acts not only against the United States, but against the Lebanese Republic, which is entitled to control the issuance of passports to its nationals.*

*Id.* (citations omitted) (emphasis added).

113. *Id.* at 862.

114. *Id.* (citing WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 103 (2d ed. 1955) and RESTATEMENT OF TORTS § 700 cmt. c (1939)).

115. In a case with very similar facts, an ATS claim was rejected, in part because the court rejected *Adra*’s two-step approach:

Although Plaintiff characterizes *Adra v. Clift* as finding the mother’s alleged abduction of the child to be a violation of a law of nations, the case’s approach to 28 U.S.C. § 1330 was more complex. In *Adra*, the court found jurisdiction using a two-step process. First it identified a municipal tort: “the unlawful taking or withholding of a minor child from the custody of the parent or parents entitled to such custody.” Then, the court found the mother’s misuse of her passport constituted a violation of the law of nations, emphasizing that use of passports must be taken seriously. The *Adra* court’s two-step approach to § 1330 has not been widely adopted.

*See Taveras v. Taveras*, 397 F. Supp. 2d 908, 916 n.7 (D. Ohio 2005) (citations omitted).

ing what would appear to be a looser allegation of a law of nations offense, coupled with a municipal tort.”<sup>116</sup>

This two-step approach, however, is not the same as the two-step approach espoused by *Sosa*.<sup>117</sup> *Sosa* requires first that the court satisfy jurisdiction based on an alleged violation of a treaty or customary international law.<sup>118</sup> If jurisdiction is based on the latter, the court must satisfy itself that “the common law . . . provide[s] a cause of action for the modest number of international law violations thought to carry personal liability at the time . . .”<sup>119</sup> The Supreme Court did not adopt Judge Edwards’ test from *Tel-Oren* and, by extension, it did not adopt the analysis offered by the court in *Adra*. In *Sosa*, the Court identified violations of international law, if any, that provided the grounds for liability under the ATS. That holding does not address the analytically distinct question of whether a claim for redress under the ATS may be based on a wrong that is not also a jurisdiction-granting violation of international law (i.e., a tort grounded purely in common law). Consequently, it remains a logical possibility that the Court’s two-step approach in *Sosa* is compatible with the two-step approach in *Adra*. As I will argue in the next section, however, there are good reasons to believe that the ATS should be incompatible with the two-step test in *Adra*.

#### B. Why the “Tort” in the Alien Tort Statute is Not Municipal Tort Law

The temptation to look to domestic law—or “municipal law” in the parlance of some<sup>120</sup>—is easy to see. As Judge Edwards noted, the alternative view would impose on judges the “awesome duty . . . to derive from an amorphous entity—i.e., the ‘law of nations’—the standards of liability applicable in concrete situations.”<sup>121</sup> Even for a judge sympathetic to the cause of human rights, such as Judge Edwards, asking federal judges to discern concrete tort actions out of international law puts

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116. *Tel-Oren v. Libyan Arab Rep.*, 726 F.2d 774, 787 (D.C. Cir. 1984) (Edwards, J., concurring). A very good analysis of the approach endorsed by Judges Katzmann and Reinhardt can be found in Keitner, *supra* note 61, at 28–30. Keitner labels the municipal law—or “two-step” approach—as the “ancillary question” approach. *Id.* at 29–38.

117. See William S. Dodge, *Bridging Erie: Customary International Law in the U.S. Legal System After Sosa v. Alvarez-Machain*, 12 TULSA J. COMP. & INT'L L. 87, 97–100 (2004) (on *Sosa*'s “two step” test).

118. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 698–99 (2004).

119. *Id.* at 694.

120. See, e.g., Kenneth C. Randall, *Federal Jurisdiction Over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. INT'L L. & POL. 1, 32 (1985) (“[T]he [ATS] requires a municipal tort cognizable under American law *plus* a violation of the law of nations or a treaty.”).

121. *Tel-Oren*, 726 F.2d at 781 (Edwards, J., concurring).

the ATS in a precarious position. It makes too obvious what conservative critics of the ATS have been saying—that ATS litigation gives judges unbounded discretion to impose their own values on the disputes before them.<sup>122</sup>

The municipal law theory of the ATS can be seen as a preemptive strike on the argument that since the *Erie* revolution, there has been no federal common law of torts upon which to draw and therefore the ATS refers to an empty set of norms until Congress chooses to fill it with explicit rights of action.<sup>123</sup> This is the thrust of Justice Scalia's disagreement with Justice Souter in *Sosa*. Scalia concedes that at one time, it may have been possible for the ATS to direct the federal courts to a body of tort law from which to read off the causes of action triggered by a violation of international law or a treaty, but that was made impossible by the advent of *Erie v. Tompkins*.<sup>124</sup> *Erie* famously declared that there was no such thing as common law outside of the command of some sovereign, which means, argued Scalia, that absent a command of Congress, there could be no cause of action for a tort in violation of the law of nations.<sup>125</sup>

Scalia's point was about both content and authority. The authority point is simple: "Because post-*Erie* federal common law is made, not discovered, federal courts must possess some federal-common-law-making authority before undertaking to craft it."<sup>126</sup> The content point is less obvious, but it has to do with the fact that the federal courts have made common law absent express delegation in a variety of contexts, ranging from admiralty law to constitutional torts.<sup>127</sup> Scalia argues that these episodes are "exceptions,"<sup>128</sup> a point which, although controversial, is not crucial to my current argument. What is crucial to my argument is that the fields of common-law-making occupied by the federal courts can be said to possess a relatively rich and easily discernible body of substantive rules of liability and remedy. This is certainly true of admiralty law, a body of law that developed through centuries and possesses clear doctrinal rules and principles.

If, like Judge Edwards, one was concerned that the ATS, if it were to survive, had to be tethered to a body of law that offered judges clear

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122. See Robert H. Bork, *Judicial Imperialism: There's One Way in Which America is as Bad as Belgium*, WALL ST. J., June 22, 2003, available at <http://www.opinionjournal.com/extra/?id=110003659>.

123. See Bradley & Goldsmith, *supra* note 1, at 824, 827.

124. *Sosa*, 542 U.S. at 740 (quoting *Erie v. Tompkins*, 304 U.S. 64 (1938)).

125. *Id.* at 741.

126. *Id.*

127. *Id.* at 742.

128. *Id.*

rules and principles just like admiralty law, then it is easy to see why one would be tempted by the idea that the torts triggered by international law violations simply be read off the U.S. municipal tort law. Tort law, at least for anyone who does not actually teach it or practice it, might appear to be quite stable and easy to locate. After all, there is the *Restatement (Second) of Torts* and Prosser's *Handbook of the Law of Torts*—how hard could it be to figure out what constitutes a tort in the United States?

I will not respond to Scalia's point about the federal court's lack of authority to make tort law through common law methods of reasoning under the ATS. Many scholars have responded to the Bradley & Goldsmith argument upon which it is based,<sup>129</sup> and there may be no better refutation of the argument than Souter's in *Sosa* itself.<sup>130</sup> In this Part, I argue that those who wish to resist Scalia gain no advantage by adopting the position that the ATS merely requires a federal judge to apply municipal tort law to the case before her. If this is an effort to throw the Scalias of the world a bone, it is a bad idea for two reasons.

First, the defender of the ATS who hopes to hold off a critic like Scalia by explaining that the ATS simply asks federal courts to look to the well defined body of tort law of a domestic jurisdiction sacrifices much of the ATS's importance in a futile quest to buy peace with an implacable critic. As the court noted in *Xuncax v. Gramajo*,<sup>131</sup> even if it were more

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129. See, e.g., Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371 (1997); Ryan Goodman & Derek P. Jinks, *Filártiga's Firm Footing: International Human Rights and Federal Common Law*, 66 FORDHAM L. REV. 463 (1997).

130. *Sosa*, 542 U.S. at 729–730. Souter explained:

*Erie* did not in terms bar any judicial recognition of new substantive rules, no matter what the circumstances, and post-*Erie* understanding has identified limited enclaves in which federal courts may derive some substantive law in a common law way. For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations. . . . We think it would be unreasonable to assume that the First Congress would have expected federal courts to lose all capacity to recognize enforceable international norms simply because the common law might lose some metaphysical cachet on the road to modern realism.

*Id.* I would note that, despite being one of the authors approvingly cited by Bradley & Goldsmith, I have never maintained that, in American jurisprudence, legal positivism is the same as legal realism, or any theory of law that requires adjudication to be based on an interpretation of a human sovereign. In fact, I have labored in my writings to say exactly the opposite. *See generally* ANTHONY J. SEBOK, *LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE* (1998).

131. *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995).

convenient, from a practical point of view, to answer the question of what torts are authorized under the ATS by a violation of international law, the court would convert a claim under the ATS from a claim concerning the violation of human rights into one concerning the violation of local private rights. Judge Woodlock's own words are exactly right:

This . . . concerns the proper characterization of the *kind* of wrongs meant to be addressed under § 1330: those perpetrated by *hostis humani generis* ("enemies of all humankind") in contravention of *jus cogens* (peremptory norms of international law). In this light, municipal tort law is an inadequate placeholder for such values. . . . Given the seeming inadequacy of municipal law to address, meaningfully, such human rights violations as are at issue here—i.e., torture, summary execution, disappearances—there appears little warrant to look to municipal law exclusively for guidance in redressing these violations.<sup>132</sup>

Judge Woodlock's point is not that only international law can properly name the wrong for which plaintiffs have demanded redress under the ATS. He has no problem with, and in fact applies with gusto, plaintiffs' claims under the Torture Victim Protection Act of 1991 ("TVPA").<sup>133</sup> Conservative critics have never treated the TVPA with the same sort of skepticism that characterizes Scalia's reaction to the ATS in *Sosa* because the TVPA is a clear and unambiguous exercise of Congress's power. But that is not the only virtue of the TVPA; claims under the TVPA have the virtue of moral clarity and candor. As Judge Woodlock pointed out in a footnote, "I question the appropriateness of using a municipal wrongful death statute to address summary executions or 'disappearances.' Similarly, I doubt any municipal law is available to address the crime of genocide adequately."<sup>134</sup> The difference between a claim under the ATS for wrongful death versus genocide is the same as the difference between bringing a claim under the TVPA for battery or assault and torture.

Judge Woodlock's point goes to the very heart of why the ATS exists at all. As he noted, in *Adra* the legal wrong for which the plaintiff sought redress did not align with the "jurisdictional hook"—that is, the wrong in international law that brought the case within the ATS.<sup>135</sup> This alignment

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132. *Id.* at 183.

133. *Id.* at 176–78, citing Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992).

134. *Id.* at 183 n.24.

135. *Id.* at 183 ("[A] case like *Adra* begs the question of how closely allied the alleged violations of international and municipal law must be. Could they be wholly unrelated,

problem can be seen in a variety of contexts, although the best analog is a case in which the plaintiff tried to bootstrap its burden to prove breach of duty by alleging that the defendant violated a municipal law that was not designed to protect the interest that was in fact injured.<sup>136</sup> The classic case from first-year torts, *Palsgraf v. Long Island Railroad Co.*, involved a claim by a party who suffered a personal injury (Mrs. Palsgraf) that arose from the breach of a duty by the defendant railroad not to negligently injure the property of a third party (who, incidentally, did not sue the railroad).<sup>137</sup> Tort law offers other examples, such as the limitation that, in order for a plaintiff to benefit from the doctrine of *per se* negligence, the plaintiff must show that “[t]he hazard out of which the accident ensued must have been the particular hazard or class of hazards that the statutory safeguard in the thought and purpose of the Legislature was intended to correct.”<sup>138</sup> This problem is also illustrated in Holocaust litigation in which Jewish slave laborers worked to near death in German factories sued corporate defendants for unjust enrichment<sup>139</sup> based on a violation of their interest against racially- or religiously-motivated killing, e.g., genocide, and not a violation of their interest in being paid for their work or in receiving the full value of property that, from the perspective of the law of equity, had been placed in a constructive trust.<sup>140</sup>

Second, it simply is not true that recourse to municipal tort law makes the “awesome duty,” as Judge Edwards put it, any easier, or the product more palatable to a skeptic like Scalia.<sup>141</sup>

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different in kind as well as degree?”). In my discussion below, I use the word “align” as a synonym for “ally.”

136. See, e.g., *Victor v. Hedges*, 91 Cal. Rptr. 2d 466 (Cal. Ct. App. 1999) (violation of vehicular statute that prohibited parking on a sidewalk not *per se* negligence where plaintiff was struck by a third party who spun out of control as a result of regular negligence on the roadway).

137. *Palsgraf v. Long Island Railroad Co.*, 162 N.E. 99 (N.Y. 1928). See also JOHN C.P. GOLDBERG, ANTHONY J. SEBOK & BENJAMIN C. ZIPURSKY, *TORT LAW: RESPONSIBILITIES AND REDRESS* 312–13 (2d ed. 2008). (discussing the “alignment problem” and *Palsgraf*).

138. *De Haen v. Rockwood Sprinkler*, 179 N.E.2d 764 (N.Y. 1932).

139. See Anthony J. Sebok, *A Brief History of Mass Restitution Litigation in the United States*, in *CALLING POWER TO ACCOUNT* 341 (David Dyzenhaus & Mayo Moran eds., 2005).

140. Others have made the same argument, using different terminology. Keitner, for example, labels the approach endorsed by Judges Pregerson, Hall, and Woodlock the “conduct-regulating rules” approach. See Keitner, *supra* note 61, at 38–60. She identifies the central virtue of this approach as follows: “[U]nder the ATS, international law provides and defines the right . . . and domestic law provides and defines the remedy.” *Id.* at 40.

141. *Tel-Oren v. Libyan Arab Rep.*, 726 F.2d 774, 780 (D.C. Cir. 1984).

Municipal law will not provide federal judges with a body of law authorized with any specificity unless the municipal law is the law of a municipality. While very few interpreters of the ATS have advanced this argument, it seems to be exactly what the Ninth Circuit meant in *Marcos Estate I*.<sup>142</sup> There, the court argued that the adoption of Judge Edwards's position meant that the applicable municipal tort law was the law of the Philippines.<sup>143</sup> This result is precise, but bizarre; under this logic, the substantive tort law in each ATS case would depend on the choice of law analysis of the federal judge.<sup>144</sup> This would turn Judge Friendly's argument defending federal common law on its head. In his famous article, *In Praise of Erie—and of the New Federal Common Law*, Friendly argued that the federal common law that remained after *Erie* would be of great value to litigants in federal court because it would be more uniform and far more predictable than the much broader federal common law that existed under *Swift v. Tyson*.<sup>145</sup>

It is unlikely that courts really intend to refer to the municipal law of a jurisdiction when they use the expression “municipal law.” It is more likely that they intend to refer to federal common law in the spirit of the rule of substantive law that federal courts invoke when they interpret statutory torts created by Congress (such as the federal antitrust laws),<sup>146</sup> implied rights of action (such as rights under federal regulatory power<sup>147</sup> or constitutional torts),<sup>148</sup> or certain areas of law that have been explicitly reserved to the federal courts post-*Erie* (such as admiralty law).<sup>149</sup> But none of this law has a fixed meaning, as anyone who has written or practiced in this area understands. To take but one example, the U.S. Supreme Court did not simply read the law off of an existing municipal code when it considered whether to restrict the tort available to railway workers under the Federal Employer’s Liability Act to the “zone of dan-

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142. *In re Estate of Marcos Human Rights Litig.*, 978 F.2d 493 (9th Cir. 1992).

143. *Id.* at 503.

144. *Xuncax*, 886 F. Supp. at 182 n.22. As Judge Woodlock pointed out, it made little sense to say that the plaintiffs in *Xuncax*—Guatemalans who were tortured, killed, and raped in Guatemala—should be required to frame their claim for redress under the ATS according to the specific statutory and decisional law of Massachusetts’ law of intentional torts and survivorship. *Id.* For a sophisticated effort to deal with this problem, see Scarborough, *supra* note 61.

145. Henry J. Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 405 (1964).

146. See, e.g., *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981).

147. See, e.g., *Tex. & Pac. Ry. Co. v. Rigsby*, 241 U.S. 33 (1916).

148. See, e.g., *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

149. See, e.g., *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975).

ger rule" or to permit bystander liability for emotional distress.<sup>150</sup> Nor did the Court simply "make it up," as Scalia would characterize the process of post-*Erie* federal-common-law-making. Instead, the Court engaged in a searching review of the practices of the fifty states and the policies that lay behind them, and then made a choice between the two available rules.<sup>151</sup> One might disagree with the choice that was made, but that is not the point. The point is that common-law-making by federal courts is attractive not because of its predictability, but because of the quality of the reasoning that goes into the final result.

So far, nothing I have argued necessarily refutes the argument for using municipal law as the source of law for the "tort" in the "Alien Tort Act"—if municipal law includes "those sources properly used by federal courts to identify the plaintiffs' right to redress." There is an unspoken assumption that those sources are easy to identify—unspoken, I say, because, except for a handful of courts like *Marcos Estate I*, it is assumed that the sources are the same as those used by the federal courts when they interpret the tort law contained in a statute like the Federal Employer's Liability Act.<sup>152</sup>

But this assumption is false. The correct answer to the question, "What sources ought a federal court use to identify the plaintiff's right to redress?" depends on the allegedly violated interest. For example, when the plaintiff seeks redress for a violation of an interest protected by admiralty law, the sources of law are different than those that apply when the plaintiff seeks redress for a violation of an interest protected by federal regulations of the workplace or the U.S. Constitution.<sup>153</sup> In the admiralty case *Reliable Transfer Co.*, the question before the federal courts was whether to keep the archaic American rule of divided damages or to adopt the more modern rule of proportionate liability (or comparative fault).<sup>154</sup> The U.S. Supreme Court looked to a wide range of sources, including but not restricted to U.S. court decisions.<sup>155</sup> It also took note of the practices of

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150. See *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532 (1994).

151. *Id.* at 554–57 (choosing the zone of danger rule).

152. *In re Estate of Marcos Human Rights Litig.*, 978 F.2d 493 (9th Cir. 1992).

153. See White, *supra* note 106, at 42–44 (using admiralty law to make the same point).

154. *Reliable Transfer Co.*, 421 U.S. at 404.

155. *Id.* Here I part ways with White, with whom I am in agreement on almost all other points. Citing *Wells v. Liddy*, 186 F.3d 505 (4th Cir. 1999), he notes that when faced with the problem of adjudicating a tort issue in admiralty law, federal courts apply "general common law tort principles." White, *supra* note 106, at 66. *Wells* involved a defamation suit based on conduct that took place on a ship in international waters. *Wells*, 186 F.3d at 517. The Fifth Circuit correctly refused to apply the law of any American state, and noted: "[I]t appears that there is no well-developed body of general maritime law of

other nations and international compacts to which the United States was not a signatory, as well as theoretical concerns elucidated by scholars concerned with the question of which rule was best, all things considered.<sup>156</sup> This approach is not limited only to admiralty law. Judge Friendly, writing in defense of the “new” federal common law, noted that shortly after *Erie*, the Supreme Court decided that *Clearfield Trust Co. v. United States*, a case that involved an innocent error by a bank that deposited a check issued by the federal government, should be decided by the “federal law merchant.”<sup>157</sup>

What are the sources of law appropriate to answer the question: What is the plaintiff’s right to redress where there is an alleged violation of an interest not to be subjected to torture, slave labor, genocide, etc.? To quote *Sosa* in another context, it would be “passing strange”<sup>158</sup> if the appropriate sources of law would be exclusively the common law of the fifty states. This is for two reasons, both described in greater detail above. First, there is a lack of alignment between the interests protected by the rights to redress identified in the *Restatement (Second) of Torts*. Second, there is no more reason to restrict interpretation to purely domestic sources of law where the interests protected are grounded in the law of nations than there would be reason to restrict interpretation of admiralty law to purely domestic sources.

#### CONCLUSION

My argument ends at this point, although it obviously leaves important and urgent business unfinished. If we know that the sources of the law of redress under the ATS are not restricted by municipal or domestic law, how do we identify the proper set of sources? That obviously must be left for another day and another article. If my argument is correct, however, it should put federal courts and litigators on notice that there is no reason to assume that the law of torts in the ATS looks anything like the law of torts in the fifty states, or even in the federal common law of

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defamation. In such a situation, it is clear that the general maritime law may be supplemented by either state law or more general common law principles.” *Id.* at 42. My point is that, while there is a structural similarity to the analysis performed by the court in *Wells* and cases involving the ATS, the content or substance of the law that “supplements” the “general transnational” tort law will be different. Whereas the *Wells* court may have been justified in limiting itself to the law of the fifty states, the *Restatement (Second) of Torts*, and scholarship published in the United States, a court adjudicating the ATS would not be justified in staying within domestic boundaries.

156. *Id.* at 404–05.

157. *Clearfield Trust Co. v. United States*, 318 U.S. 316, 367 (1943).

158. See *Sosa*, 542 U.S. at 719.

statutory torts, implied rights of action, and constitutional torts. Take, for example, how the Supreme Court approached the correct damages rule in admiralty law. It adopted the foreign proportional damages rule over the American rule of divided damages. It is important to recall that the proportionate liability rule was adopted not because it was foreign, i.e., commanded by a sovereign who happened to be foreign, but because the Court felt that it was the best interpretation or expression of the global law of admiralty, taking into account the arguments for and against the rule preferred by American courts as well as foreign courts. The federal courts, by the same token, should be free to adopt “foreign” damages rules in the context of ATS litigation. For example, punitive damages are flatly prohibited in the tort law of all civil law nations and many common law nations.<sup>159</sup> Following the logic of this Article to its conclusion, one might wonder why every court that has adjudicated ATS claims has assumed that punitive damages ought to be available to a plaintiff who successfully pleads and proves a tort in violation of the law of nations under the ATS.<sup>160</sup> One might think, to the contrary, that the burden is on the judge who wishes to import a damages rule that is clearly disfavored among legal systems around the globe into the global law of redress that is authorized by the ATS once jurisdiction is satisfied.

Once one understands that tort law in the ATS is global tort law, not the municipal tort law of the United States, then it becomes clear that judges and scholars have a great deal of work to do. The structure of the law of redress for wrongs—something that all civil and common law legal systems possess—is diverse. The package of principles that has come to characterize the majority approach in the *Restatement (Second) of Torts* is clearly not the only logical or sensible way to organize a tort system. No one system should have a privileged position in the ATS. The principles adopted—whatever they are, and whomever they benefit—should be chosen by federal courts on the basis of how well those principles fit the goals of the ATS, and not on the basis of whether they fit the

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159. For a good review of the state of this doctrine globally, see John Y. Gotanda, *Punitive Damages: A Comparative Analysis*, 42 COLUM. J. TRANSNAT'L L. 391 (2004).

160. If punitive damages were transparently procedural, this question would make little sense. It may be necessary to remind American readers that, although punitive damages are viewed as part of the procedural rules of the forum jurisdiction, they are viewed as a matter of substantive law (and highly controversial substantive law) outside of the common law world. See Wolfgang Wurmnest, *Recognition and Enforcement of U.S. Money Judgments in Germany*, 23 BERKELEY J. INT'L L. 175, 195 (2005) (“Most judgments found to violate German public policy [e.g., punitive damages] are manifestly contrary to German substantive, as opposed to procedural, law.”).

goals of the American Law Institute or the judges and legislators of any particular set of states.

# PUNISHING THE PARENT: CORPORATE CRIMINAL COMPLICITY IN HUMAN RIGHTS ABUSES

*Jonathan Clough\**

*“We are seeking to prevent . . . the perpetuation of a double standard under which most foreign corporations, as well as their home governments, operate. There is one set of standards—legal and moral—in domestic operations; but a completely different and much lower set of standards when these same entities are operating abroad, particularly in much poorer countries. This dichotomy is wrong, and the governments in the industrialized world have the means of preventing it: by applying extraterritorially many of the domestic and international standards that are adopted and enforced at home.”\*\**

## INTRODUCTION

Ensuring the accountability of multinational corporations (“MNCs”)<sup>1</sup> for their conduct in the developing world is one of the great legal challenges of our time. From humble beginnings, the legal fiction that is “the corporation” has evolved into a behemoth, central to the functioning of the world economy.<sup>2</sup> It has been estimated that between twenty-nine<sup>3</sup> and fifty-one<sup>4</sup> of the one hundred largest economies are MNCs. In 2005, there were approximately 77,000 MNCs, with 770,000 foreign affiliates, generating an estimated \$4.5 trillion in value

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\*\* Mark Gibney & R. David Emerick, *The Extraterritorial Application of United States Law and the Protection of Human Rights: Holding Multinational Corporations to Domestic and International Standards*, 10 TEMP. INT’L & COMP. L.J. 123, 145 (1996) (emphasis removed).

1. Multinational corporations (“MNCs”) are corporations that are incorporated in one country but operate in one or more other countries. See PETER T. MUCHLINSKI, *MULTINATIONAL ENTERPRISES AND THE LAW* 5–8 (2d ed. 2007). Other terms found in the literature include “transnational corporations” and “multinational enterprises.” *Id.*

2. See PHILLIP I. BLUMBERG, *THE LAW OF CORPORATE GROUPS—SUBSTANTIVE LAW* 3–39, 55–62 (1987) (providing a history of the evolution of the corporate form, and in particular of corporate groups).

3. U.N. Conference on Trade and Development [UNCTAD], *World Investment Report 2002: Multinational Corporations and Export Competitiveness*, 90, UNCTAD/WIR/2002 (June 12, 2003), available at [http://www.unctad.org/en/docs//wir2002\\_en.pdf](http://www.unctad.org/en/docs//wir2002_en.pdf) (figure makes adjustments for the value-added nature of gross domestic product as opposed to sales).

4. Sarah Anderson & John Cavanagh, *Top 200: The Rise of Global Corporate Power*, at i, CORPORATE WATCH, Dec. 4, 2000, available at <http://s3.amazonaws.com/corpwatch.org/downloads/top200.pdf> (figure is based on a comparison of sales with Gross Domestic Product).

added, employing some 62 million workers and exporting goods and services valued at more than \$4 trillion.<sup>5</sup>

Crucial to the success of these enterprises is the ability to incorporate in one country while seeking out opportunities in one or more other countries. Increasingly, these opportunities may be found in the developing world where resources are plentiful, labor is cheap, and regulation weak or non-existent. Such countries are also often notorious for human rights abuses in which MNCs may become involved.

For example, a number of civil actions were brought against the giant U.S. energy company Unocal Corporation<sup>6</sup> that alleged knowing involvement in human rights abuses by the Burmese military.<sup>7</sup> The allegations arose from Unocal's involvement in the production, transportation, and sale of gas in Burma, the plaintiffs being villagers in the area through which the gas pipeline passed.<sup>8</sup> Security for the project was provided by the Burmese military and it was alleged that the plaintiffs were subjected to forced labor, as well as acts of murder, rape, and torture.<sup>9</sup> Although disputed by Unocal, the Ninth Circuit Court of Appeals found "evidence sufficient to raise a genuine issue of material fact" that Unocal was aware that the project had hired the Burmese military to provide these ser-

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5. UNCTAD, *World Investment Report 2006, FDI from Developing and Transition Economies: Implications for Development*, 5, UNCTAD/WIR/2006 (2006), available at [http://www.unctad.org/en/docs/wir2006overview\\_en.pdf](http://www.unctad.org/en/docs/wir2006overview_en.pdf).

6. CHEVRONTEXACO, ANNUAL REPORT 2004, available at <http://www.chevron.com/Investors/FinancialInformation/AnnualReports/2004/financials/>. Prior to its merger with ChevronTexaco (now Chevron), Unocal reported revenues of U.S.\$8.2 billion, net earnings of U.S.\$1.2 billion and total assets of U.S.\$13.1 billion. UNOCAL CORPORATION, ANNUAL REPORT 2004, available at <http://www.chevron.com/Documents/Pdf/Unocal2004AnnualReport.pdf>.

7. Doe v. Unocal Corp., 963 F. Supp. 880, 883 (C.D. Cal. 1997), *aff'd in part, rev'd in part, and remanded*, 395 F.3d 932, 936 (9th Cir. 2002), *reh'g en banc granted*, 395 F.3d 978, 979 (9th Cir. 2003); Nat'l Coalition Gov't of the Union of Burma v. Unocal Inc., 176 F.R.D. 329, 334 (C.D. Cal. 1997); Doe v. Unocal Corp., 110 F. Supp. 2d 1294, 1296 (C.D. Cal. 2000). The Union of Burma, otherwise known as Myanmar, will be referred to as Burma throughout this Article. See U.S. Dep't of State, Bureau of East Asian and Pacific Affairs, Background Note: Burma, <http://www.state.gov/r/pa/ei/bgn/35910.htm> (last visited June 6, 2008) (The United States does not recognize the name Myanmar, as the country is called by the ruling junta, although the United Nations does use Myanmar.).

8. Doe v. Unocal Corp. 963 F. Supp. 880, 883 (C.D. Cal. 1997), *aff'd in part, rev'd in part, and remanded*, 395 F.3d 932, 937-40 (9th Cir. 2002), *reh'g to en banc court granted*, 395 F.3d 978, 979 (9th Cir. 2003); Nat'l Coalition Gov't of the Union of Burma v. Unocal Inc., 176 F.R.D. 329, 335-37 (C.D. Cal 1997); Doe v. Unocal Corp., 110 F. Supp. 2d 1294, 1297-98 (C.D. Cal 2000).

9. *Unocal Corp.*, 395 F.3d at 939-40.

vices.<sup>10</sup> John Haseman, a former military attaché at the U.S. embassy in Rangoon and consultant to Unocal reported that “egregious human rights violations have occurred, and are occurring now, in southern Burma . . . . Unocal, by seeming to have accepted [the Burmese Military]’s version of events, appears at best naïve and at worst a willing partner in the situation.”<sup>11</sup> Although the District Court granted summary judgment in favor of Unocal, this was reversed by the Court of Appeals in respect of all but the torture claims.<sup>12</sup> That decision was appealed to an eleven judge *en banc* court within the Ninth Circuit<sup>13</sup> before the case was settled in December 2005.<sup>14</sup>

In another example, Canada’s largest energy company, Talisman Energy, Inc., was allegedly complicit in human rights abuses in the Sudan.<sup>15</sup> The plaintiffs claimed that “Talisman worked with the [Sudanese] [g]overnment to devise a plan of security for the oil fields and related facilities,”<sup>16</sup> “Talisman hired its own military advisors to coordinate military strategy with the [g]overnment,” and had “regular meetings with Sudan’s army intelligence unit and the Ministry of Energy and Mining . . . .”<sup>17</sup> It was alleged that Talisman was aware that the government’s “protection” of oil operations, based on the joint Talisman and Sudanese-government strategy, entailed ethnic cleansing or genocide, the murder or enslavement of substantial numbers of civilians (including women and children), and the destruction of villages.<sup>18</sup>

Such incidents have given rise to the term “corporate complicity,” which describes the alleged knowing involvement of corporations in human rights abuses committed by others. The key features that typically arise in such cases are:

1. The defendant is a large, well-resourced transnational corporation.

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10. *Id.* at 938.

11. *Id.* at 942.

12. *Id.* at 962.

13. *Unocal Corp.*, 395 F.3d at 979.

14. EarthRights International, *Final Settlement Reached in Doe v. Unocal*, Mar. 21, 2005, available at [http://www.earthrights.org/legalfeature/final\\_settlement\\_reached\\_in\\_doe\\_v.\\_unocal.html](http://www.earthrights.org/legalfeature/final_settlement_reached_in_doe_v._unocal.html).

15. Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 299–301 (S.D.N.Y. 2003).

16. *Id.* at 300.

17. *Id.*

18. *Id.*

2. The alleged human rights abuses occurred in a country (the ‘host jurisdiction’) other than the transnational corporation’s country of incorporation (the ‘home jurisdiction’).
3. The host jurisdiction is unable and / or unwilling to investigate and prosecute the alleged abuses.
4. The transnational corporation is alleged to be complicit in the human rights abuses either directly or, more commonly, indirectly through the interposition of subsidiaries or other intermediaries. . .<sup>19</sup>

To date, efforts to render MNCs accountable for such conduct have fallen into one of three main categories. First, voluntary instruments such as the United Nations *Global Compact*<sup>20</sup> and the Organization for Economic Cooperation and Development (“OECD”) *Guidelines for Multinational Enterprises*<sup>21</sup> have encouraged corporations to observe and protect human rights in the conduct of their business.<sup>22</sup> Second, civil actions have achieved limited success while also focusing attention on the issue.<sup>23</sup> They do, however, face considerable procedural obstacles and, to date, none have proceeded to judgment on the merits. Third, there have been some attempts to impose statutory obligations on corporations conducting overseas operations to abide by minimum standards of conduct. While bills have been introduced in both the United States<sup>24</sup> and Australia,<sup>25</sup> the political obstacles to securing the passage of such legislation are considerable and, to date, neither has been passed.<sup>26</sup>

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19. Jonathan Clough, *Not-So-Innocents Abroad: Corporate Criminal Liability for Human Rights Abuses*, 11(1) AUSTL. J. HUM. RTS. 1, 5 (2005).

20. United Nations, Global Compact—What is the UN Global Compact?, <http://www.unglobalcompact.org/AboutTheGC/index.html> (last visited June 2, 2008).

21. Organisation for Economic Co-operation and Development [OECD], *The OECD Guidelines for Multinational Enterprises*, OECD Doc. 80761 (rev. ed. 2000), available at <http://www.oecd.org/dataoecd/56/36/1922428.pdf>.

22. Erin Elizabeth Macek, *Scratching the Corporate Back: Why Corporations Have No Incentive to Define Human Rights* 11 MINN. J. GLOBAL TRADE 101, 108–23 (2002).

23. See generally SARAH JOSEPH, CORPORATIONS AND TRANSNATIONAL HUMAN RIGHTS LITIGATION (Colin Harvey ed., 2004); BETH STEPHENS ET. AL., INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 131–214 (2d ed. 2008); Michael Byers, *English Courts and Serious Human Rights Violations Abroad: A Preliminary Assessment*, in 7 LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW 241–49 (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000).

24. Corporate Code of Conduct Act, H.R. 2782, 107th Cong. (1st Sess. 2001).

25. Corporate Code of Conduct Bill, 2000 (Austl.).

26. The H.R. 2782 was referred to the House Subcommittee on International Monetary Policy and Trade on July 17, 2000. See WASHINGTON COLLEGE OF LAW, CENTER FOR HUMAN RIGHTS AND HUMANITARIAN LAW, HUMAN RIGHTS BRIEF (2000), <http://www.wcl.american.edu/hrbrief/08/lwatch.cfm>. The Australian bill was introduced

Until recently there has been relatively little discussion of the application of domestic criminal law in this context.<sup>27</sup> However, the nature of corporate involvement in human rights abuses, coupled with the difficulty of securing prosecutions in the host jurisdiction, has focused attention on the potential liability of the parent corporation under the domestic laws of the home jurisdiction. The issue was specifically raised in a recent survey of sixteen countries (“Surveyed Countries”) by the Fafo Institute for Applied Studies in Norway (“Fafo Institute Survey”).<sup>28</sup> The Surveyed Countries,<sup>29</sup> representing a broad spectrum of both common law and civil law traditions, were asked to provide information as to their domestic laws relating to the accountability of MNCs.<sup>30</sup> A specific recommendation arising out of the survey was that “consideration is required to explore how the components of complicity found in the different national legal systems surveyed might be applied to business entities.”<sup>31</sup> This Article attempts to address that question.

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after the Corporate Code of Conduct Bill 2000 was rejected by the Commonwealth Parliamentary Joint Statutory Committee on Corporations and Securities. See PARLIAMENTARY JOINT STATUTORY COMMITTEE ON CORPORATIONS AND SECURITIES, REPORT ON THE CORPORATE CODE OF CONDUCT BILL 2000, at 39 (2001), available at [http://www.aph.gov.au/senate/committee/corporations\\_ctte/completed\\_inquiries/1999-02/corp\\_code/report/report.pdf](http://www.aph.gov.au/senate/committee/corporations_ctte/completed_inquiries/1999-02/corp_code/report/report.pdf).

27. Clough, *supra* note 19, at 3. See also Beth Stephens, *The Amorality of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT'L L. 45, 67 (2002); Craig Forcese, *Deterring “Militarized Commerce”: The Prospect of Liability for “Privatized” Human Rights Abuses*, 31 OTTAWA L. REV. 171, 174–84 (2000) (discussing several examples of corporate responsibility for human rights violations going unchecked). See generally Diane Marie Amann, *Capital Punishment: Corporate Criminal Liability for Gross Violations of Human Rights*, 24 HASTINGS INT'L & COMP. L. REV. 327 (2001).

28. ANITA RAMASASTRY & ROBERT C. THOMPSON, COMMERCE, CRIME AND CONFLICT: LEGAL REMEDIES FOR PRIVATE SECTOR LIABILITY FOR GRAVE BREACHES OF INTERNATIONAL LAW—A SURVEY OF SIXTEEN COUNTRIES, Executive Summary (Fafo 2006), available at <http://www.fafo.no/pub/rapp/536/536.pdf> [hereinafter FAFO SURVEY]. This survey followed an earlier pilot study of five countries. FAFO & INTERNATIONAL PEACE ACADEMY, BUSINESS AND INTERNATIONAL CRIMES: ASSESSING THE LIABILITY OF BUSINESS ENTITIES FOR GRAVE VIOLATIONS OF INTERNATIONAL LAW (Fafo 2003), available at <http://www.fafo.no/liabilities/467.pdf>.

29. The Surveyed Countries in the 2006 Fafo Survey are Argentina, Australia, Belgium, Canada, France, Germany, India, Indonesia, Japan, the Netherlands, Norway, South Africa, Spain, the Ukraine, the United Kingdom, and the United States. FAFO SURVEY, *supra* note 28, at 13.

30. *Id.* at 9–12.

31. FAFO SURVEY, *supra* note 28, at 28.

Focusing on the common law jurisdictions of Australia,<sup>32</sup> Canada, the United Kingdom, and the United States,<sup>33</sup> this Article analyzes the application of domestic principles of complicity to extraterritorial conduct by corporations.<sup>34</sup> The analysis proceeds in four parts. Part I provides an overview of principles of complicity under the domestic law of these jurisdictions. Part II considers the legal bases by which criminal conduct can be attributed to a corporation, particularly where the defendant forms part of a corporate group. As the alleged abuses will have occurred outside the home jurisdiction, Part III discusses principles of extraterritorial criminal jurisdiction. Part IV provides two examples of how legislative provisions may be drafted in order to impose extraterritorial criminal liability on corporations. The Article concludes that while the imposition of such liability is theoretically possible, whether it is a practical option is questionable. Nonetheless, it is argued that the underlying rationales found in the criminal law provide ample justification for the enactment of specific criminal statutes targeting corporate complicity in terms that are appropriate for a corporate defendant. Models for such legislation already exist both in the United States and elsewhere, providing an appropriate and potentially more effective means of prosecuting the parent corporation for its complicity in human rights abuses by others.

Although the focus of this Article is on the liability of the parent corporation in the home jurisdiction, this is not to dismiss the importance of pursuing the perpetrators in the host country.<sup>35</sup> It simply recognizes that there are many practical difficulties in doing so. Given that the ultimate beneficiary of these enterprises is the parent, it is both logical and reasonable to seek means to render such corporations accountable for their conduct. This Article explores one way in which that may be achieved via criminal prosecution for complicity.

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32. With respect to Australia, the focus will be on the relevant federal law, the Criminal Code Act 1995 (Austl.).

33. With respect to the United States, references in this Article will be made to relevant federal provisions and also the American Law Institute's Model Penal Code.

34. See generally JENNIFER A. ZERK, MULTINATIONALS AND CORPORATE SOCIAL RESPONSIBILITY: LIMITATIONS AND OPPORTUNITIES IN INTERNATIONAL LAW (2006); JOSEPH, *supra* note 23. Because of its specific focus, this Article does not address broader questions relating to the accountability of MNCs.

35. See Damian Betz, *Holding Multinational Corporations Responsible for Human Rights Abuses Committed by Security Forces in Conflict-Ridden Nations: An Argument Against Exporting Federal Jurisdiction for the Purpose of Regulating Corporate Behavior Abroad*, 14 DEPAUL BUS. & COM. L.J. 163, 202–05 (2002).

### I. PRINCIPLES OF COMPLICITY

Allegations against corporations do not typically allege that the corporation committed the abuses in its own right. Rather, the corporation is said to have provided support to those who actually committed the abuses, either by encouraging them and/or by providing some form of assistance. Such conduct fits neatly within the general concept of criminal complicity, and this terminology has been regularly applied in this context.<sup>36</sup>

Complicity is a well-established basis for criminal liability, tracing its common law roots back to at least the fourteenth century,<sup>37</sup> with similar principles also evolving in civil law countries.<sup>38</sup> It is almost universally recognized as a legitimate basis for criminal liability, with all of the Surveyed Countries recognizing complicity as an offense under their domestic law.<sup>39</sup> Principles of complicity are also recognized in international law,<sup>40</sup> being found in article 25(3) of the Rome Statute<sup>41</sup> and accepted by the International Criminal Tribunals for Rwanda and the former Yugoslavia.<sup>42</sup>

The essence of complicity is easily stated; the accomplice is punished because of his or her knowing involvement in the crime of another. It is well established that these principles may also be applied to a corporation.<sup>43</sup> While easily stated, liability for complicity presents significant conceptual challenges even when applied domestically. Courts have struggled to appropriately define the scope of liability, resulting in an area of the law that “betrays the worst features of the common law: what

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36. See, e.g., Andrew Clapham & Scott Jerbi, *Categories of Corporate Complicity in Human Rights Abuses*, 24 HASTINGS INT'L & COMP. L. REV. 339 (2001). Although beyond the scope of this Article, the related principles of conspiracy and incitement may also be relevant in this context.

37. United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938).

38. Clapham & Jerbi, *supra* note 36, at 345.

39. FAFO SURVEY, *supra* note 28, at 16.

40. Although note conflicting U.S. authority as to whether aiding and abetting forms part of the “law of nations” for the purposes of the Alien Tort Claims Act. See *In re South African Apartheid Litigation*, 346 F. Supp. 2d 538, 549–50 (S.D.N.Y. 2004); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 320–24 (S.D.N.Y. 2003).

41. Rome Statute of the International Criminal Court art. 25(3), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

42. Prosecutor v. Jean-Paul Akayesu, Case No. ICTR 96-4-T, Judgment, ¶¶ 6.3.2, 7.8 (Sept. 2, 1998); Prosecutor v. Furundzija, Case No. IT 95-17/1-T, Judgment, ¶¶ 198, 207 (Dec. 10, 1998); FAFO SURVEY, *supra* note 28, at 20.

43. John Henshall (Quarries), Ltd. v. Harvey, [1965] 2 Q.B. 233, 241 (U.K.); Nat'l Coal Bd. v. Gamble, [1959] 1 Q.B. 11 (U.K.); R v. Robert Millar (Contractors), Ltd., [1970] 2 Q.B. 54 (U.K.).

some would regard as flexibility appears here as a succession of opportunistic decisions by the courts, often extending the law, and resulting in a body of jurisprudence that has little coherence.”<sup>44</sup> These complexities are magnified when different jurisdictions are considered, with each country adopting different approaches to the same challenges. Although a detailed analysis of principles of complicity is beyond the scope of this Article, it is possible to summarize the key features that, with some variation, are similar in each jurisdiction.

#### A. The Need for a Principal Offender

In contrast to inchoate offenses such as conspiracy and incitement, liability for complicity is derivative. That is, the liability of the accessory is predicated on the commission of an offense (the “principal offense”) by a “principal offender” or “principal.”<sup>45</sup> Therefore, being an “accessory” is not an offense in its own right; the accused is a party to the principal offense and is tried and sentenced as a principal offender. Consequently, if there is no principal offense, there can be no liability for complicity. The trier of fact must therefore be satisfied, on the criminal standard, that the principal offense has been committed.

It might seem that this requirement would present a significant obstacle, particularly if the principal offense is alleged to have occurred in another jurisdiction where there may be no prosecution of the principal offender. However, it is not necessary for the alleged principal offender to have been *convicted* of the principal offense. An accused may be guilty of complicity even where a principal offender has not been identified. So long as the trier of fact is satisfied that the principal offense was committed by some person, and is satisfied of the accused’s involvement in that offense, then he or she may be liable as an accessory.<sup>46</sup>

In some circumstances, there will be no principal offense because the principal offender is incapable of committing an offense. For example, he or she may be a child below the age of criminal responsibility or an adult who does not possess the necessary mens rea. Although a strict application of accessorial principles would deny liability as there is no

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44. ANDREW ASHWORTH, PRINCIPLES OF CRIMINAL LAW 440 (5th ed. 2006).

45. 18 U.S.C. § 2 (1951); Criminal Code Act, 1995, § 11.2(1) (2007) (Austl.); Criminal Code of Canada, R.S.C., ch. C-46, § 21(1)(a) (1985); Accessories and Abettors Act, 1861, 24 & 25 Vict., c. 94, § 8 (Eng.); 18 U.S.C. § 2 (1951); MODEL PENAL CODE § 2.06(1) (2001).

46. Criminal Code Act, 1995, § 11.2(5) (2007) (Austl.); King v. R (1986) 161 C.L.R. 423, 433–36 (Austl.); MODEL PENAL CODE § 2.06(7) (2001); WAYNE R. LAFAVE, CRIMINAL LAW 689 (4th ed. 2003).

principal offense, the defendant may be liable under the doctrine of innocent agency.<sup>47</sup>

Where an act, which would be a crime if done by *A*, is caused by *A* to be done by *B*, and *B* does not commit a crime by doing so, the law may regard *A* as having acted by an innocent agent and as being guilty of the crime as a principal offender.<sup>48</sup>

In such cases, the defendant is not actually liable as an accessory. Rather, he or she is regarded as having committed the principal offense through the agency of the innocent agent.

#### *B. The Actus Reus of Complicity*

For a relatively straightforward concept, the law of complicity has developed terminology of surprising complexity. At common law, an accessory was referred to either as a principal in the second degree or as an accessory before the fact, depending on whether or not the accused was present during the commission of the principal offense. The terminology used to describe the conduct of an accessory was equally varied: aiding, abetting, comforting, concurring, approbating, encouraging, consenting, assenting, countenancing, counseling or procuring.<sup>49</sup> Today, the most common formulation is to say that the accused will be liable as an accessory if he or she “aids, abets, counsels or procures” the commission of the principal offense.<sup>50</sup> Similar terminology has been adopted in all of the Surveyed Countries.<sup>51</sup>

Although these words have a specific meaning, but they are all “instances of one general idea, that the person charged . . . is in some way linked in purpose with the person actually committing the crime, and is by his words or conduct doing something to bring about, or rendering

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47. Osland v. R (1998) 197 C.L.R. 316, 347–48 (Austl.). A more correct term is “non-responsible” agent. *Id.*

48. See generally 18 U.S.C. § 2(b) (1951); Criminal Code Act, 1995, § 11.3 (2007) (Austl.); Criminal Code of Canada, R.S.C., ch. C-46, § 23.1 (1985); R v. Demirian [1989] V.R. 97 (Austl.); R v. Cogan, [1976] Q.B. 217 (U.K.); MODEL PENAL CODE § 2.06(2)(a) (2001).

49. R v. Russell [1959] V.R. 59, 66–67 (Austl.). See also LEFAVE, *supra* note 46, at 671.

50. See 18 U.S.C. § 2(a) (1951); Criminal Code Act, 1995, § 11.2(1) (2007) (Austl.); Accessories and Abettors Act, 1861, 24 & 25 Vict., c. 94, § 8 (Eng.). In Canada, “counsel” is defined to include “procure, solicit or incite.” Criminal Code of Canada, R.S.C., ch. C-46, § 22.3 (1985). The Model Penal Code refers only to “aids” and “solicits.” MODEL PENAL CODE § 2.06(3)(i)(ii) (2001). The equivalent terms in civil law countries are “l'aide et l'assistance, la fourniture des moyens.” Clapham & Jerbi, *supra* note 36, at 345.

51. FAFO SURVEY, *supra* note 28, at 18.

more likely, such commission.”<sup>52</sup> They are not, however, mutually exclusive because the conduct of the accused may fall within more than one category. For example, it has been suggested that an act of abetting will usually be implicit in, or associated with, an act of aiding.<sup>53</sup>

Traditionally, the phrase aiding and abetting was used when the accused was present at the commission of the principal offense, whereas “counseling and procuring” described those situations in which the accused was absent.<sup>54</sup> Corporate complicity would therefore typically involve counseling and procuring as assistance and/or encouragement is provided prior to the commission of the offense. In any event, the distinction has now been removed in most jurisdictions and even in England, where this distinction is retained, it appears to have little practical consequence.<sup>55</sup> The same is true of the conflict between Australian and U.K. authority on whether the words “aiding and abetting, counseling and procuring” should be given their ordinary<sup>56</sup> or their common law meaning.<sup>57</sup> In practical terms, even at common law the words are given what would generally be regarded as their ordinary meanings.

For example, aiding is given its natural meaning of “give support to, . . . help, assist.”<sup>58</sup> Typical acts of aiding include providing materials or other physical support, providing advice, or acting as a lookout. The essential feature of abetting is that the accused was present during the commission of the principal offense and encouraged the commission of that offense.<sup>59</sup> Encouragement may be express or implied, and in some cases the mere presence of the accused may provide encouragement to the principal offender.<sup>60</sup>

Similarly, counseling involves advice or encouragement prior to the commission of the offense, and has been interpreted as meaning “urged or advised,”<sup>61</sup> or to “advise” or “solicit.”<sup>62</sup> Typical examples of counseling include providing advice on the commission of the offense, for ex-

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52. R v. Russell [1933] V.R. 59, 67 (Austl.) (cited with approval in *Giorgianni v. R* (1985) 156 C.L.R. 473, 493).

53. ASHWORTH, *supra* note 44, at 414.

54. Ferguson v. Weaving, [1951] 1 K.B. 814, 818–19 (U.K.).

55. ASHWORTH, *supra* note 44, at 414.

56. Attorney-Gen.’s Reference (No. 1 of 1975), [1975] 1 Q.B. 773, 779 (U.K.).

57. Giorgianni v. R (1985) 156 C.L.R. 473, 492 (Austl.).

58. R v. Beck (1990) 43 A. Crim. R. 135, 143 (Austl.); R v. Greyeyes, [1997] 2 S.C.R. 825, 837 (Can.).

59. R v. Russell (1933) V.R. 59, 67 (Austl.); R v. Salajko, [1970] 1 O.R. 824, 826 (Can.); Wilcox v. Jeffery, [1951] 1 All E.R. 464, 467 (K.B.) (U.K.).

60. R v. Coney, [1882] 8 Q.B.D. 534, 534 (U.K.).

61. Stuart v. R (1974) 134 C.L.R. 426, 445 (Austl.).

62. R v. Calhaem, [1985] 1 Q.B. 808, 813 (U.K.).

ample by providing directions or inside knowledge, or simply by providing encouragement.

Procuring refers to conduct of the accused that goes beyond merely encouraging the commission of the principal offense and actually causes or brings about its commission.<sup>63</sup> An example of such conduct is when the accused offers money for the offense to be committed. “To procure means to produce by endeavour. You procure a thing by setting out to see that it happens and taking the appropriate steps to produce that happening.”<sup>64</sup> It is the only form of complicity that requires proof of a causal connection between the accessory’s conduct and the commission of the principal offense. In other cases, it is sufficient if the conduct of the accused can be described as assisting or encouraging the commission of that offense, even though it did not cause its commission, and even if ultimately it made no material difference to the outcome.<sup>65</sup>

In light of the above, and despite all the variation in terminology, complicity essentially consists of providing assistance and/or encouragement to the principal offender. Such terms are broad enough to encompass typical examples of what, in the corporate context, has been described as direct complicity; that is, when a company knowingly assists in a human rights violation.<sup>66</sup> Examples include knowingly assisting in the forced relocation of peoples in circumstances related to business activity<sup>67</sup> or providing financial or material support to security forces known to engage in human rights abuses.<sup>68</sup> Such conduct not only involves the provision of assistance to the principal offender, but may also constitute encouragement of the principal offense. In circumstances in which a corporation has employed security forces who then commit human rights abuses, it may even be said that the corporation has procured the commission of the principal offense by paying for and thereby causing its commission.

In other cases, the alleged complicity may be the failure of the accused to intervene and prevent the principal offense; that is, turning a blind eye. In the corporate context, the term silent complicity has been used to describe those situations in which the corporation assists or encourages the

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63. R v. Beck, [1985] 1 W.L.R. 22, 27–28 (U.K.).

64. Attorney-Gen.’s Reference (No. 1 of 1975), [1975] 1 Q.B. 773, 779 (U.K.). See also LAFAVE, *supra* note 46, at 674.

65. THE LAW COMMISSION, PARTICIPATING IN CRIME, Law Com No. 305, ¶¶ 2.32–2.33 (2007). See also Criminal Code Act, 1995, § 11.2(2)(a) (2007) (Austl.).

66. Clapham & Jerbi, *supra* note 36, 341–42.

67. *Id.* at 342.

68. Forcese, *supra* note 27, at 185 (discussing examples of “financial complicity” and “material complicity”).

human rights violation through its inaction.<sup>69</sup> An example of such silent complicity is when a corporation is aware of human rights abuses but fails to raise any objection. In general, mere acquiescence in or assent to the principal offense is not sufficient to constitute complicity unless it can be said to encourage or assist the principal offense.<sup>70</sup> However, silence or inaction may constitute complicity if, for example, that silence is taken by the principal offender to constitute tacit approval and the accused remains silent knowing this to be the case.<sup>71</sup> Consequently, silent complicity could arise when a parent corporation is aware of a violation by a subsidiary or an independent contractor, which in turn is aware of the parent's knowledge and is encouraged by the parent's inaction. It is also the case that when the defendant is under a legal duty to act, failure to discharge that duty may constitute complicity.<sup>72</sup> There is also some limited authority that the failure of an employer to prevent an employee from committing an offense may constitute complicity.<sup>73</sup>

Professor Clapham also refers to a third category of complicity, known as beneficial or indirect complicity, in which a corporation benefits directly from human rights abuses committed by someone else. For example, the company may benefit from the suppression of peaceful protest against its business activities or the use of repressive measures while guarding company facilities.<sup>74</sup> In the absence of conduct more akin to direct or silent complicity, the mere fact of benefiting from a human rights violation is unlikely to constitute complicity under domestic criminal law. Such circumstances are more commonly addressed by specific legislation that prevents a person benefiting from the proceeds of crime.

### C. The Mens Rea for Complicity

Although the range of conduct that may amount to complicity is broad, the mens rea element provides a significant limitation on its scope. Each jurisdiction requires that the accused intended to assist or encourage the

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69. Clapham & Jerbi, *supra* note 36, 341–42.

70. R v. Phan (2001) 53 N.S.W.L.R. 480, 487 (Austl.). See also Wilcox v. Jeffery, [1951] 1 All E.R. 464, 466 (K.B.) (U.K.); LAFAVE, *supra* note 46, at 672–73.

71. R v. Coney, [1882] 8 Q.B.D. 534, 540 (U.K.). For a discussion of similar concepts in international law, see Clapham & Jerbi, *supra* note 36, at 347–49.

72. THE LAW COMMISSION, *supra* note 65, ¶ 2.26.

73. See generally R v. Gaunt, [2004] 2 Crim. App. 194 (U.K.); R v J.F. Alford Transp. Ltd., [1997] 2 Crim. App. 326 (U.K.).

74. Clapham & Jerbi, *supra* note 36, at 347.

commission of the principal offense.<sup>75</sup> It is not enough that he or she did so recklessly or unwittingly. Some jurisdictions also require that the defendant must “know the essential matters which constitute the principal offense.”<sup>76</sup> This does not mean that the accused must have been aware that the conduct amounted to a criminal offense, as such an interpretation would allow an accused to argue ignorance of the law as a defense.<sup>77</sup> Nor is it necessary to prove that the defendant knew the precise details of the principal offense, such as time and place. It is sufficient that the accused had knowledge of the principal offender’s intention to commit a crime of the type that was in fact committed.<sup>78</sup>

The requirement of actual knowledge may be a significant impediment to prosecution for complicity in human rights abuses. For example, Dutch national Frans van Anraat was prosecuted for complicity in Saddam Hussein’s use of chemical weapons because he allegedly supplied the necessary chemicals during the 1980s.<sup>79</sup> He was acquitted of this charge on the basis that he did not know the use to which the chemicals would be put.<sup>80</sup> Similarly, Gus Van Kouwenhoven was charged with complicity in the war crimes of former Liberian President Charles Taylor.<sup>81</sup> Van Kouwenhoven operated a timber trading company in close association with the former president, but was acquitted of complicity charges due to lack of evidence that he had knowledge of the war crimes.<sup>82</sup>

Because of these difficulties, some jurisdictions adopt a lesser mens rea. For example, in Germany and the Netherlands, it is sufficient that the defendant was aware of the conduct and showed “indifference toward or acceptance of the chance that a proscribed result might occur.”<sup>83</sup> This

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75. *United States v. Reifler*, 446 F.3d 65, 96 (2d Cir. 2006); *Giorgianni v. R* (1985) 156 C.L.R. 473, 487–88 (Austl.); *R v. Greyeyes*, [1997] 2 S.C.R. 825, 842 (Can.). See also Baruch Weiss, *What Were They Thinking?: The Mental States of the Aider and Abettor and the Causer Under Federal Law*, 70 FORDHAM L. REV. 1341 (2002) (discussion of the mens rea requirement in the United States).

76. *Giorgianni*, 156 C.L.R. at 487–88; *Johnson v. Youden*, [1950] 1 K.B. 544, 546 (U.K.). See generally *United States v. Peoni*, 100 F. 2d 401 (2d Cir. 1938). See also Criminal Code Act, 1995, § 11.2(3)(a) (2007) (Austl.); MODEL PENAL CODE § 2.06(3)(a) (2001); LAFAVE, *supra* note 46, at 675–83. The requirement of knowledge has also been applied by the International Criminal Tribunals for Rwanda and the former Yugoslavia. FAFO SURVEY, *supra* note 28, at 20.

77. *Johnson*, 1 K.B. at 546.

78. See generally *R v. Bainbridge*, [1960] 1 Q.B. 129 (U.K.).

79. FAFO SURVEY, *supra* note 28, at 19 n.17.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 20.

is not generally the case in common law countries, although in the United Kingdom it has been said that there are four different interpretations of the mens rea for complicity that require less than actual knowledge.<sup>84</sup>

Some concern has also been expressed that there must be a “shared intention” between the accomplice and the principal offender, and that this may be difficult to apply in the context of corporate complicity as the two actors may have different motivations for the conduct.<sup>85</sup> Although in most cases the accessory will share the principal offender’s intention that the principal offense be committed, this is not, however, an essential requirement of secondary liability. That is, there is no need to show that the accessory and principal offender were in agreement or shared a common purpose.<sup>86</sup>

Further, it is important to remember the crucial distinction between intention and motive. Complicity requires that the accomplice intentionally assisted the commission of the principal offense. While the accomplice’s motive may be evidence of that intention, it is not an element of the offense. For example, security forces may commit murder because of government policy and/or racial hatred. A corporation that is complicit in such conduct is still liable as an accessory notwithstanding that it was motivated by business interests. Nor does it matter that the accomplice did not wish the principal offense to be committed. An accomplice will still be liable whether indifferent or horrified about what is to happen.<sup>87</sup>

One circumstance in which a lesser standard of mens rea is required is where two or more people act in concert pursuant to a common purpose or joint enterprise to commit an offense. Where the agreed offense is actually committed, each party to the joint criminal enterprise is liable as a principal offender, irrespective of the actual role they played in its commission. More significantly, where the offense committed is different from that intended by the group, each party will be liable if the offense actually committed was a foreseeable consequence of the common pur-

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84. THE LAW COMMISSION, *supra* note 65, ¶ 2.65. The tests are:

(1) belief that *P* might commit the conduct element; (2) foresight of the risk of a strong possibility that *P* will commit it; (3) contemplation of the risk of a real possibility that *P* will commit it; and (4) foresight that it is likely that *P* will commit it.

*Id.*

85. FAFO SURVEY, *supra* note 28, at 18–19.

86. Attorney-Gen.’s Reference (No. 1 of 1975), [1975] 1 Q.B. 773, 779 (U.K.).

87. Nat’l Coal Bd. v. Gamble, [1959] 1 Q.B. 11, 23 (U.K.) (cited with approval in Prosecutor v. Jean-Paul Akayesu, Case No. ICTR 96-4-T, Judgment, ¶ 539 (Sept. 2, 1998)); Dir. of Public Prosecutions for N. Ir. v. Lynch, [1975] 1 A.C. 653, 678 (H.L.).

pose. In some jurisdictions, the level of foresight required is low, requiring only that the defendant foresaw the offense actually committed was a *possible* consequence of the joint enterprise.<sup>88</sup> In others, such as the United States, the acts of the principal offender must have been a “natural and probable consequence” of the criminal scheme the accomplice encouraged or aided.<sup>89</sup> Although recognized in international law,<sup>90</sup> the doctrine is not universally adopted.

## II. PRINCIPLES OF CORPORATE CRIMINAL LIABILITY

Having considered the application of general principles of complicity in the context of human rights abuses, it is necessary to consider how those principles apply when the defendant is a corporation.<sup>91</sup> Corporate criminal liability is a relatively recent phenomenon, having evolved primarily in nineteenth century Anglo-American law as a response to the increasing role of corporations during the industrial revolution.<sup>92</sup> Although well established in many common law countries, civil law jurisdictions have generally been slower to recognize corporations as suitable subjects for criminal prosecution.<sup>93</sup> More commonly, these jurisdictions rely upon civil or administrative penalties, although in some cases such administrative penalties are much closer in form to criminal penalties.<sup>94</sup>

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88. Criminal Code Act, 1995, § 11.2(3)(b) (2007) (Austl.); Criminal Code of Canada, R.S.C., ch. C-46, §§ 21(2), 22(2) (1985); *McAuliffe & McAuliffe v. R* (1995) 183 C.L.R. 108, 113–14 (Austl.); *R v. Powell*, [1999] 1 A.C. 1, 6–7 (H.L.) (U.K.).

89. LAFAVE, *supra* note 46, at 687.

90. Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Law*, 93 CAL. L. REV. 75, 102–03 (2005).

91. The focus of this Article is on the liability of corporations as opposed to unincorporated entities which, in the absence of statutory provision to the contrary, are not subject to criminal liability in their own right. GLANVILLE WILLIAMS, TEXTBOOK OF CRIMINAL LAW 969 (2d ed. 1983). The Canadian Criminal Code defines “organization” extremely broadly, and unincorporated entities fall within this definition. Criminal Code of Canada, R.S.C., ch. C-46, § 2 (1985).

92. For a history of corporate criminal liability see L.H. LEIGH, THE CRIMINAL LIABILITY OF CORPORATIONS IN ENGLISH LAW, 15–42 (1969).

93. For a comparative perspective, see generally XIVTH INTERNATIONAL CONGRESS OF COMPARATIVE LAW, CRIMINAL LIABILITY OF CORPORATIONS (Hans de Doelder & Klauss Tiedemann eds., 1996).

94. THE LAW REFORM COMMISSION, CORPORATE KILLING 112–13 (2005) (Ir.); James Gobert & Emilia Mugnai, *Coping with Corporate Criminality—Some Lessons from Italy*, CRIM. L. REV. 619, 624 (2002).

Nonetheless, eleven of the sixteen Surveyed Countries apply criminal liability to legal persons, including corporations.<sup>95</sup> These countries represent a range of legal traditions, suggesting that there is indeed growing acceptance of corporate criminal liability. Although corporations are not within the jurisdiction of the International Criminal Court (“ICC”), this was apparently a result of procedural and definitional problems rather than a challenge to the “conceptual assumption that legal persons are bound by international criminal law.”<sup>96</sup>

While early authority suggested that a company could not be indicted for manslaughter or any offense of violence,<sup>97</sup> the weight of authority is now to the effect that a corporation can commit any offense except those which, by their nature, can only be committed by an individual.<sup>98</sup> However, the individualistic nature of the criminal law, with its emphasis on guilty acts and guilty minds, presents particular challenges for the imposition of corporate criminal liability. A corporation, as a legal fiction, cannot act in its own right; it can only act through human agents. Accordingly, each jurisdiction has developed ways to render corporations liable for the actions of individuals.

For example, U.S. federal courts apply principles of vicarious liability, including for those offenses that require proof of mens rea.<sup>99</sup> Other jurisdictions have adopted a modified form of vicarious liability whereby the corporation will only be liable when the relevant conduct was engaged in by a person within the company of sufficient seniority to be regarded as

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95. FAFO SURVEY, *supra* note 28, at 13. Among the countries surveyed, this includes: Australia, Belgium, Canada, France, India, Japan, the Netherlands, Norway, South Africa, the United Kingdom, and the United States. *Id.* The five countries that do not permit legal persons to be prosecuted for criminal offenses are: Argentina, Germany, Indonesia, Spain, and the Ukraine. *Id.*

96. Andrew Clapham, *The Question of Jurisdiction Under International Criminal Law over Legal Persons: Lessons from the Rome Conference on an International Criminal Court*, in LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW, *supra* note 23, at 139, 191.

97. *People v. Rochester Ry. & Light Co.*, 195 N.Y. 102, 106–09 (N.Y. 1909); *R v. Cory Bros. & Co. Ltd.*, [1927] 1 K.B. 810, 815–17 (U.K.); *R v. Great N. of Engl. Ry. Co.*, [1846] 9 Q.B. 315, 326, 115 Eng. Rep. 1294, 1298 (Q.B.). The question was left open by the Canadian Supreme Court in *Union Colliery Co. v. R.*, [1900] 31 S.C.R. 81, 88–90 (Can.).

98. THE LAW COMMISSION, CODIFICATION OF THE CRIMINAL LAW: GENERAL PRINCIPLES—CRIMINAL LIABILITY OF CORPORATIONS, Working Paper No. 44, 23 (1972).

99. See, e.g., *N.Y. Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481, 494–95 (1909); *Standard Oil Co. of Tex. v. United States*, 307 F.2d 120, 125 (5th Cir. 1962). See generally KATHLEEN BRICKEY, CORPORATE AND WHITE COLLAR CRIME 18–32 (4th ed. 2006).

the “directing mind and will” of the company.<sup>100</sup> Some jurisdictions, most notably Australia and Canada, have enacted comprehensive provisions specifically addressing the criminal liability of corporations.<sup>101</sup> Add to these general models of liability a raft of specific statutory provisions and the challenge is not so much devising a model of corporate criminal liability, but choosing the most appropriate one.

It is not proposed to discuss the merits of the various models of corporate criminal liability.<sup>102</sup> Less commonly analyzed, and representing a particular challenge in the context of MNCs, is the question of how to render a parent corporation liable for the conduct of its subsidiaries. The analysis has so far proceeded on the simple model of a corporation directly involved in the assistance or encouragement of the conduct in the host jurisdiction. In reality, this is rarely the case because the conduct of the parent is carried out through the intermediary of a subsidiary or subsidiaries. For example, Unocal conducted its operations in Burma through wholly owned subsidiaries,<sup>103</sup> while Talisman conducted its operations in the Sudan through a consortium of oil companies called the Greater Nile Petroleum Operating Company, Ltd. (“GNPOC”).<sup>104</sup>

The rationale for interposing subsidiaries is easily understood; it minimizes risk and insulates the parent. Because of the principle of separate corporate identity, the subsidiary or related company is treated as a separate legal entity.<sup>105</sup> Consequently, the parent will generally not be liable for the conduct of the subsidiary, despite the “commercial reality that every holding company has the potential and, more often than not, in fact does, exercise complete control over a subsidiary.”<sup>106</sup> Further insulation of the parent is provided by the principle of limited liability, whereby the

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100. *Tesco Supermarkets, Ltd. v. Nattrass*, [1972] A.C. 153, 171 (H.L.) (U.K.). See also *Hamilton v. Whitehead* (1988) 166 C.L.R. 121, 127 (Tesco as applied in Australia); *Can. Dredge & Dock Co. v. R.*, [1985] 1 S.C.R. 662, 691–96.

101. Criminal Code Act, 1995, pt. 2.5 (2007) (Austl.); Criminal Code of Canada, R.S.C., ch. C-46, §§ 22.1–22.2 (1985). See also MODEL PENAL CODE § 2.07 (2001).

102. See generally JONATHAN CLOUGH & CARMEL MULHERN, THE PROSECUTION OF CORPORATIONS 64–182 (2002); JAMES GOBERT & MAURICE PUNCH, RETHINKING CORPORATE CRIME 78–178 (2003).

103. *Doe v. Unocal Corp.*, 395 F.3d 932, 937 (9th Cir. 2002), *reh’g en banc granted*, 395 F.3d 978, 979 (9th Cir. 2003).

104. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 300 (S.D.N.Y. 2003).

105. *Adams v. Cape Indus., PLC*, (1991) Ch. 433, 536 (U.K.).

106. *Briggs v. James Hardie & Co.* (1989) 16 N.S.W.L.R. 549, 577 (Austl.). The situation is otherwise where the relevant conduct is carried out by an unincorporated division of an incorporated entity. *Poller v. Columbia Broad. Sys., Inc.*, 284 F.2d 599 (D.C. Cir. 1960).

liability of shareholders, including corporate shareholders, is limited to the unpaid amount of their investment. The extension of this principle, designed to protect investors in the enterprise, to the enterprise itself is one of the most significant factors in the success of MNCs because it allows risk to be transferred to the (often undercapitalized) subsidiary.<sup>107</sup>

Thus, in the multi-tiered corporate group, with its first-tier, second-tier, and even third-tier subsidiaries, traditional entity law provides multiple layers of limited liability, with each upper-tier company insulated from liability for its lower-tier subsidiaries. Four, or even five, layers of limited liability in complex multinational groups are not uncommon.<sup>108</sup>

While complex corporate structures and the use of subsidiaries is now standard practice in the corporate world, the challenges they present are not new. Nor are they limited to the sphere of human rights abuses. Particularly in the United States, ever since limited liability was extended to corporate groups, courts have struggled to articulate a principled basis on which to mitigate its more extreme consequences by rendering the parent liable for the conduct of the subsidiary.<sup>109</sup> This has involved courts applying principles of agency liability as well as so-called enterprise liability whereby the courts will pierce the corporate veil and impose liability on the parent for the conduct of the group.<sup>110</sup> “This theory recognizes that when a parent and its subsidiary are part of an economically integrated enterprise, there is, in effect, one corporate actor and consequently ‘all components comprising the integrated group should accordingly be liable.’”<sup>111</sup>

While extensive, this body of jurisprudence is of little assistance. First, even in the United States, there are “hundreds of decisions that are irreconcilable and not entirely comprehensible,”<sup>112</sup> with principles that have been described as a “legal quagmire.”<sup>113</sup> Second, there is limited authority for their application in the context of criminal liability, a rare example being the prosecution of Exxon Corporation for the grounding of the

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107. PHILLIP E. BLUMBERG, THE MULTINATIONAL CHALLENGE TO CORPORATION LAW 58–60 (Oxford Univ. Press 1993).

108. *Id.* at 59.

109. See generally BLUMBERG, *supra* note 2.

110. See BLUMBERG, *supra* note 2, at pp. 105–36.

111. Robert Iraola, *Criminal Liability of a Parent Company for the Conduct of its Subsidiary: The Spillover of the Exxon Valdez*, 31 CRIM. L. BULL. 3, 9 (1995) (citing PHILLIP I. BLUMBERG, THE LAW OF CORPORATE GROUPS: PROBLEMS OF PARENT AND SUBSIDIARY CORPORATIONS UNDER STATUTORY LAW OF GENERAL APPLICATION 967 (1983)).

112. BLUMBERG, *supra* note 107, at 86–87.

113. United States v. John-T Chemicals, Inc., 768 F.2d 686, 691 (5th Cir. 1985), *cert. denied*, 475 U.S. 1014 (1986).

Exxon Valdez oil tanker.<sup>114</sup> In denying Exxon's motion to dismiss, the District Court apparently accepted both agency and enterprise theory as grounds of Exxon Corporation's liability for the conduct of its subsidiary.<sup>115</sup> This decision is, however, of little precedential value as the corporations ultimately entered into a plea agreement for \$150 million, which was subsequently reduced to a \$25 million fine and \$100 million in restitution.<sup>116</sup> Third, outside the United States, courts are more inclined to adhere to the principle of separate corporate personality, with no clear principle indicating the circumstances in which a court will be prepared to lift the corporate veil in civil, let alone criminal, cases.<sup>117</sup>

Although of limited general application, such cases do serve to focus attention on the concept of control as a means of rendering the parent liable for the group.<sup>118</sup> Given the variety of corporate structures, whether a corporation controls another can be a complex question. Clearly there must be something beyond the level of control inherent in the parent-subsidiary relationship. But in what circumstances should a group of companies be regarded as an integrated entity rather than separate businesses? While the answer is obviously dependent on the circumstances, “[w]hat should be critical to the analysis should be the reality of the relationship between parent and subsidiary and not the technical legal form that it takes.”<sup>119</sup> Relevant factors include the level of control actually exercised by the parent over the subsidiary, the extent to which the companies are economically integrated, the level of financial and administrative interdependence, overlapping employment structures, and a common group persona.<sup>120</sup>

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114. Nat'l Dairy Prods. Corp. v. United States, 350 F.2d 321, 327 (8th Cir. 1965); United States v. Exxon Corp., No. A90-015 CR, 1990 U.S. Dist. LEXIS 1821 (D. Alaska 1990). See also United States v. Johns-Manville Corp., 231 F. Supp. 690, 698 (E.D. Pa. 1964).

115. Iraola, *supra* note 111, at 8. See also H. Lowell Brown, *Parent-Subsidiary Liability Under the Foreign Corrupt Practices Act*, 50 BAYLOR L. REV. 1, 35 (1998).

116. *In re Exxon Valdez*, 270 F.3d 1215, 1245–46 (9th Cir. 2005).

117. See, e.g., Adams v. Cape Indus., PLC, (1990) Ch. 433, 476. See generally Ian M. Ramsay & David B. Noakes, *Piercing the Corporate Veil in Australia*, 19 COMPANY & SEC. L. J. 250 (2001).

118. BLUMBERG, *supra* note 107, at 59–60. See also William J. Rands, *Domination of a Subsidiary by a Parent*, 32 IND. L. REV. 421, 433–46 (1999).

119. GOBERT & PUNCH, *supra* note 102, at 153. See also BLUMBERG, *supra* note 107, at 89–120.

120. BLUMBERG, *supra* note 107, at 94–95. See also United States v. John-T Chemicals, Inc., 768 F.2d 686, 691–92 (5th Cir. 1985), cert. denied, 475 U.S. 1014 (1986); GOBERT & PUNCH, *supra* note 102, at 152.

While the common law is reluctant to look behind notions of separate corporate identity and limited liability, it must be remembered that these are simply legal fictions and are subject to legislative intervention. One way in which this may be done is by imposing liability in functional terms. By imposing liability upon corporations that “control” other corporations, the controlling corporation may then be made liable for the conduct of the group.<sup>121</sup> For example, under the Age Discrimination in Employment Act of 1967,<sup>122</sup> when an employer controls a corporation incorporated in a foreign country, any prohibited practice by that corporation is presumed to be the conduct of the employer.<sup>123</sup> The determination of whether an employer controls a corporation is based upon four factors: “the interrelation of operations, common management, centralized control of labor relations, and common ownership or financial control, of the employer and the corporation.”<sup>124</sup>

Similarly, the Bank Holding Company Act of 1956 defines a “bank holding company” to mean “any company which has control over any bank or over any company that is or becomes a bank holding company by virtue” of this Act.<sup>125</sup> Under section 1841(a)(2), any company has control over a bank or company if:

- (A) the company directly or indirectly or acting through one or more other persons owns, controls, or has power to vote 25 per centum or more of any class of voting securities of the bank or company;
- (B) the company controls in any manner the election of a majority of the directors or trustees of the bank or company; or
- (C) the Board determines, after notice and opportunity for hearing, that the company directly or indirectly exercises a controlling influence over the management or policies of the bank or company.<sup>126</sup>

An alternative way of rendering the parent liable for the conduct of the group would be to impose an obligation on the parent corporation to ensure that it takes reasonable steps to ensure that neither it, nor any of its subsidiaries are engaged in specified offenses, irrespective of where they

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121. BLUMBERG, *supra* note 107, at 107–16. In some cases, courts have interpreted statutory provisions as imposing group liability in order to ensure that legislative intention was not frustrated. *United States v. Park*, 421 U.S. 658, 672 (1975) (discussing *United States v. Dotterweich*, 320 U.S. 277 (1943)).

122. Age Discrimination in Employment Act, 29 U.S.C. § 623(h) (2006).

123. *Id.* § 623(h)(1).

124. *Id.* § 623(h)(3).

125. Bank Holding Company Act, 12 U.S.C. § 1841(a)(1) (2006).

126. *Id.* § 1841(a)(2)(A)–(C).

occur.<sup>127</sup> The advantage of such an obligation is that it avoids the need for attribution and focuses on the failure of the corporation itself:

Where a statutory duty to do something is imposed on a particular person . . . and he does not do it, he commits the actus reus of an offence. . . . but this is not a case of vicarious liability. If the employer is held liable, it is because he personally has failed to do what the law requires him to do and he is personally not vicariously liable. There is no need to find someone—in the case of a company, the brains and not merely the hands—for whose act the person with the duty be held liable.<sup>128</sup>

Corporate liability for a failure to act is a well-established basis of liability, particularly in the area of workplace safety, where there is a duty to ensure a safe workplace. A similar concept is apparently found in Italy, where a corporation can be made liable for “structural negligence;” that is, failing to ensure that suitable systems were in place to prevent an the commission of an offense.<sup>129</sup> In the context of complicity, the Model Penal Code provides that a defendant will be liable as an accomplice if, “having a legal duty to prevent the commission of the offense, [he or she] fails to make proper effort so to do . . . with the purpose of promoting or facilitating the commission of the offense.”<sup>130</sup>

By focusing on what the corporation failed to do, liability for omissions allows a broad range of factors to be taken into account, allowing an assessment of the “culture” of the organization. Any danger that the provision is overbroad can be minimized by providing for an appropriate fault element, such as criminal negligence, or by allowing a due diligence defense. In the context of MNCs, liability for the failure resides with the parent itself, rather than in the complex web of its subsidiaries. However, even if corporate liability may be imposed in enterprise terms, rendering the company liable for the conduct of those entities that it controls, an additional challenge remains. In what circumstances can the criminal law apply extraterritorially?

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127. Olivier De Schutter, *Extraterritorial Jurisdiction as a Tool for Improving the Human Rights Accountability of Transnational Corporations* 44–45 (Catholic Law Sch. & Office of the U.N. High Comm’r for Human Rights, Background Paper, Nov. 3, 2006), available at <http://www.reports-and-materials.org/Olivier-de-Schutter-report-for-SRSG-re-extraterritorial-jurisdiction-Dec-2006.pdf>.

128. John Smith, Case Commentary, *Health and Safety at Work: R v. British Steel, PLC*, 1995 CRIM. L. REV. 655. See also LAW COMMISSION, CRIMINAL LAW: INVOLUNTARY MANSLAUGHTER, Consultation Paper No. 135, 129 (1994).

129. Gobert & Mugnai, *supra* note 94, at 626.

130. MODEL PENAL CODE § 2.06(3) (2001).

### III. PRINCIPLES OF EXTRATERRITORIAL CRIMINAL JURISDICTION

There is a general presumption that criminal laws are local in operation and apply only in the sovereign territory of the state that enacted the law.<sup>131</sup> This territorial principle is almost universally recognized and is the most common basis for the exercise of criminal jurisdiction.<sup>132</sup> Although intended to limit the reach of criminal laws, the principle of territoriality may nonetheless encompass extraterritorial conduct in some cases. In particular, the doctrine of ubiquity allows a state to exert jurisdiction over an offense when only part of the offense was committed within the jurisdiction.<sup>133</sup> This is particularly relevant in the context of complicity, where the act of complicity may occur in the home jurisdiction, even though the principal offense occurred in the host jurisdiction.

Although at common law the application of this doctrine in such cases was limited,<sup>134</sup> this position may of course be altered by clear legislative intention. For example, under section 20 of the Misuse of Drugs Act 1971, it is an offense for a person to assist in or induce the commission in any place outside the United Kingdom an offense punishable under the provisions of a corresponding law in force in that place.<sup>135</sup> It is therefore possible for an appropriately drafted statute to impose liability on a parent corporation for complicity with respect to conduct occurring within the home jurisdiction, even though the principal offense is intended to be committed in the host jurisdiction. This doctrine has particular significance in the context of corporate liability as corporate offenders, unlike individuals, can be in more than one place at one time. Unless the corporation's operations are completely restricted to the host jurisdiction, it is likely that at least some of the relevant conduct will have occurred in the home jurisdiction. For example, although the provision of assistance may have occurred primarily in the host jurisdiction, executive approval may have been given in the home jurisdiction. It may therefore be argued that

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131. Treacy v. Dir. of Pub. Prosecutions, [1971] A.C. 537, 561 (U.K.). See generally Equal Employment Opportunity Comm'n v. Arabian Am. Oil Co., 499 U.S. 244 (1991); R v. Finta, [1994] 1 S.C.R. 701, 805–12 (Can.).

132. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 cmt. c (1987); DAVID LANHAM, CROSS-BORDER CRIMINAL LAW 30 (1997); Council of Europe: European Committee on Crime Problems, *Extraterritorial Criminal Jurisdiction*, 3 CRIM. L.F. 441, 446 (1992) (hereinafter *Extraterritorial Criminal Jurisdiction*).

133. *Extraterritorial Criminal Jurisdiction*, *supra* note 132, at 446–47, 462.

134. MICHAEL HIRST, JURISDICTION AND THE AMBIT OF THE CRIMINAL LAW 129 (Andrew Ashworth ed., 2003).

135. Misuse of Drugs Act of 1971, 1971, § 20, sched. 1 (Eng.). See also Crimes Act 1958, § 181 (1958) (Vict.).

the home jurisdiction may assert jurisdiction as part of the offending conduct occurred within its jurisdiction.

In any event, the enactment of extraterritorial laws in this context is clearly justified on two bases. The first is the principle of universal jurisdiction, which recognizes the right of any country to exercise jurisdiction over a defendant with respect to “universal crimes” such as piracy, genocide, and war crimes.<sup>136</sup> Jurisdiction may be exercised irrespective of the nationality of the defendant or the locus of the offense, with such sweeping jurisdiction being justified by the egregious nature of the conduct and the need to limit the availability of safe havens for those accused of such crimes.<sup>137</sup> A number of the Surveyed Countries impose universal jurisdiction with respect to crimes under the Rome Statute.<sup>138</sup> However, given the need for the defendant to have some presence in the jurisdiction in order to be prosecuted, it is argued that the second basis of jurisdiction, the nationality or active personality, provides a more sound rationale for extraterritoriality in the context of corporate defendants.

This second principle recognizes that a state may extend the application of its criminal laws to its own nationals wherever they may be located. It is widely recognized as a basis of extraterritorial criminal laws and is adopted by a number of the Surveyed Countries with respect to Rome Statute crimes committed by their nationals.<sup>139</sup> For example, the International Criminal Court Act of 2001 (U.K.) imposes liability for genocide, crimes against humanity, and war crimes, and applies extraterritorially to acts committed outside the jurisdiction by U.K. nationals or residents.<sup>140</sup>

There are essentially two rationales for a country’s imposition of extraterritorial criminal liability on its own nationals. First, it is a means for

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136. *Extraterritorial Criminal Jurisdiction*, *supra* note 132, at 453. See also LANHAM, *supra* note 132, at 37–38.

137. *Extraterritorial Criminal Jurisdiction*, *supra* note 132, at 453.

138. FAFO SURVEY, *supra* note 28, at 16. Australia, Canada, the Netherlands, Spain and the United Kingdom are examples among the countries surveyed. *Id.* Under articles six through eight of the Rome Statute, these offenses are genocide, crimes against humanity and war crimes. Rome Statute, *supra* note 41, arts. 6–8.

139. FAFO SURVEY, *supra* note 28, at 16. Argentina, Australia, Belgium, Canada, Germany, Japan, Norway, South Africa, Ukraine, the United Kingdom and the United States are examples among the countries surveyed. *Id.* It is apparently recognized and applied in civil law countries more commonly than in common law countries; HIRST, *supra* note 134, at 46, 201.

140. International Criminal Court Act 2001, ch. 17, § 51 (2001) (U.K.). Liability also extends to ancillary conduct such as aiding and abetting. *See id.* at §§ 51, 55. See also Criminal Code Act, 1995, ch. 8 (2007) (Austl.); Crimes Against Humanity and War Crimes Act, S.C. 2000, ch. 24 § 8 (Can.).

states to subject “their own nationals to certain national norms and [to protect] fundamental interests from attacks by a state’s own nationals from abroad.”<sup>141</sup> This rationale is clearly applicable in the context of ensuring the observance of international human rights norms by MNCs. Second, it allows those countries that do not extradite their own nationals to ensure that offenses by those nationals do not go unprosecuted. This rationale assumes particular significance in the context of MNCs because a corporation cannot be extradited.

Extradition is a process whereby one state will surrender a person for prosecution in another state. The mechanism by which defendants are extradited has evolved in the context of the physical transfer of an individual and there is no precedent for the “extradition” of a corporation.<sup>142</sup> Although it has been suggested that “[a] corporation . . . may be made to answer through extradition proceedings, just as a natural person would be,”<sup>143</sup> it is difficult to see how this can in fact be achieved. While a corporation may commit a criminal offense in one jurisdiction even though it was incorporated in another,<sup>144</sup> a corporation cannot physically move from one jurisdiction to another. There is therefore no way in which a host jurisdiction may compel the “transfer” of a corporate defendant to face charges in that jurisdiction. Nor is there any power by which to extradite individual officers or employees of the organization unless they are charged in their own right. Even if personally charged, there is no compulsion on them to appear as the company unless directed to by the company itself.<sup>145</sup>

The host jurisdiction is therefore faced with two options. First, it may proceed in absentia. While ordinarily the trial of serious criminal offenses requires the personal presence of the defendant,<sup>146</sup> courts may proceed in absentia when, for example, the accused has absconded or is

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141. *Extraterritorial Criminal Jurisdiction*, *supra* note 132, at 448. See also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 (1987).

142. GOBERT & PUNCH, *supra* note 102, at 157. See also De Schutter, *supra* note 127, at 24.

143. ANITA RAMASAstry & ROBERT C. THOMPSON, COMMERCE, CRIME AND CONFLICT: LEGAL REMEDIES FOR PRIVATE SECTOR LIABILITY FOR GRAVE BREACHES OF INTERNATIONAL LAW—A SURVEY OF SIXTEEN COUNTRIES, SURVEY RESPONSE OF THE UNITED STATES OF AMERICA, at 19 (Fafo 2006).

144. McNabb v. T. Edmondson & Co. (1941) V.L.R. 193 (Austl.) (relying on an inference from Home Benefits Proprietary, Ltd. v. Crafter (1939) 61 C.L.R. 701, where the High Court upheld a conviction against a foreign company, the issue passing sub silentio).

145. GOBERT & PUNCH, *supra* note 102, at 157.

146. Of course, even where a corporation is present in the jurisdiction, it can only ever appear by representative.

otherwise absent.<sup>147</sup> In some jurisdictions, specific provision is made for proceedings in absentia when a corporate defendant does not appear.<sup>148</sup>

Alternatively, the corporation may submit to the jurisdiction. While initially it may seem unusual that a corporation would voluntarily submit to a criminal prosecution, it may ultimately be in the company's interest to do so. For example, the company may have significant business interests in the jurisdiction, which may be jeopardized if it does not cooperate. It is notable that all of the prosecutions of foreign corporations under the Foreign Corrupt Practices Act ("FCPA") appear to have been the result of guilty pleas.<sup>149</sup>

In either case, even if the host jurisdiction were to return a verdict against the defendant corporation in absentia, such a verdict would only be enforceable against those assets of the corporation that remained in the jurisdiction. The enforcement of a criminal judgment beyond those assets would be extremely problematic and would require the cooperation of the home jurisdiction. A verdict in absentia may also give rise to arguments of double jeopardy if another jurisdiction were to subsequently try the corporation. Given the practical difficulties surrounding extradition of corporate defendants, it is argued that the nationality principle provides a clear justification for the prosecution of corporations for extraterritorial conduct. The difficulty lies in determining the nationality of a corporation. There are a number of determinants that may be applied, including the "siège local" (principal place of management), the locality of the principal shareholder, the principal place of business, or the place of incorporation.<sup>150</sup> Of these, the most feasible determinants are principal place of business and place of incorporation.

Principal place of business as a jurisdictional basis is well known in civil proceedings, and requires that the entity do business "not occasionally or casually, but with a fair measure of permanence and continuity" in the jurisdiction.<sup>151</sup> The activities within the jurisdiction need not be conducted by the foreign corporation itself, but may be performed on its behalf by an agent.<sup>152</sup> It therefore allows the prosecution of a corporation

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147. R v. Jones (No. 2) (1972) 1 W.L.R. 887 (Austl.).

148. Crimes Act 1958, § 359(B) (1958) (Vict.).

149. Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1 to -3 (1998); Paul D. Carrington, *Law and Transnational Corruption: The Need for Lincoln's Law Abroad*, 70 LAW & CONTEMP. PROBS. 109, 116 (2007).

150. *Extraterritorial Criminal Jurisdiction*, *supra* note 132, at 466.

151. Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 329 (S.D.N.Y. 2003) (quoting Hoffritz for Cutlery, Inc. v. Amajac, Ltd., 763 F.2d 55, 58 (2d Cir. 1985)).

152. Ken Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 95 (2d Cir. 2000).

irrespective of where it is incorporated, so long as its principal place of business was in the prosecuting country.

While it would therefore seem to be an ideal jurisdictional basis for corporate prosecutions, and is used as such in the FCPA,<sup>153</sup> this strength is also its weakness. The possibility that a company may have more than one place of business raises one of the primary concerns in relation to the assertion of extraterritorial criminal jurisdiction, which is that it may give rise to competing jurisdictional claims.<sup>154</sup> Ordinarily such disputes in the criminal law would be resolved by the extradition process, as there is no criminal law equivalent of *forum non conveniens*. In essence, the jurisdiction that has the defendant is ultimately the one that has the ability to prosecute. However, this does not apply in the case of a corporate defendant which, as already discussed, cannot be extradited. Consequently, there is the possibility that a corporate defendant could be prosecuted in more than one jurisdiction.

Accordingly, for reasons of "certainty and convenience," it is submitted that place of incorporation is the most appropriate basis for determining nationality.<sup>155</sup> In contrast to the other determinants, the place of incorporation is easily established. It is also fixed as each corporate entity can have only one place of incorporation and hence one nationality. This helps to avoid competing jurisdictional claims and also provides a level of certainty, which is essential in the context of criminal liability. Defendants, whether corporate or individual, are entitled to be able to ascertain with some predictability their potential criminal liability.

In applying this principle to MNCs, it must be remembered that although often described as entities in their own right, MNCs are merely "a group of corporations, each established under the law of some state, linked by common managerial and financial control and pursuing integrated policies."<sup>156</sup> A company incorporated in another jurisdiction is a new and distinct entity. The nationality of each constituent corporation is therefore determined separately and not by reference to its parent or related corporations. For example, it has been alleged that an Australian company, Anvil Mining Ltd., was complicit in war crimes committed by soldiers in the Democratic Republic of Congo.<sup>157</sup> The crimes, which in-

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153. 15 U.S.C. § 78dd-2(h)(1)(B) (defining domestic concern).

154. *Extraterritorial Criminal Jurisdiction*, *supra* note 132, at 465.

155. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 213 cmt. c (1987). See, e.g., *Dempster v. Nat'l Companies & Sec. Comm'n* (1993) 9 W.A.R. 215 (Austl.) (application of the nationality principle in the context of a corporate criminal prosecution).

156. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 213 cmt. f (1987).

157. David Lewis, *Congo Court Urges Massacre Trial for Foreign Miners*, REUTERS, Oct. 16, 2006, available at <http://today.reuters.com/News/CrisesArticle.aspx?storyId>

cluded summary executions, rape, and looting, were alleged to have occurred near the town of Kilwa.<sup>158</sup> After the town was seized by rebels in October 2004, government soldiers counter-attacked, killing at least seventy three people according to a 2005 UN investigation.<sup>159</sup> Anvil's silver and copper mines are near the town, and the company's trucks and airplanes were used by the army during the operation.<sup>160</sup> It was alleged that in failing to withdraw the vehicles, the Anvil staff members "knowingly facilitated (the actions of) the accused . . . when they committed the war crimes."<sup>161</sup> Anvil claimed that the vehicles were requisitioned by the military and that it had no choice but to hand them over.<sup>162</sup>

In 2004, Anvil Mining underwent a corporate restructuring whereby the Australian company, Anvil Mining NL, was acquired by the Canadian company, Anvil Mining Ltd.<sup>163</sup> Anvil NL became a wholly owned subsidiary of Anvil Mining Ltd., and its shares of Anvil NL were delisted from the Australian and Berlin Stock Exchanges.<sup>164</sup> Anvil NL remains incorporated in Australia, but under the name Anvil Mining Management NL.<sup>165</sup>

Applying place of incorporation as the test of nationality, Canada would have jurisdiction to prosecute Anvil Mining, while Australia could prosecute Anvil Mining Management NL. Applying the place of business test, Australia would have jurisdiction over Anvil Mining *and* Anvil Mining NL since, although Anvil Mining is incorporated in Canada, its principal place of business is in Australia.<sup>166</sup> However, even if a case proceeded to judgment, the ability to enforce that judgment would be limited to the assets of the company within Australia.

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=L16676754. In another recent example, a civil action has been brought against the U.S. coal company Drummond alleging that the company offered money and cars to right-wing paramilitary gunmen to kill union leaders at one of its mines in Northern Columbia. Verna Gates, *Drummond's Colombia Rights Trial Begins in Alabama*, REUTERS, July 9, 2007, available at <http://www.reuters.com/article/domesticNews/idUSN7928491520070709>.

158. Lewis, *supra* note 157.

159. *Id.*

160. *Id.*

161. *Id.* (internal quotations omitted).

162. *Id.*

163. *Anvil Mining Limited*, CAN. STOCK REV., Mar. 3, 2006, available at [http://www.canstock.com/shownews.php?article\\_id=29](http://www.canstock.com/shownews.php?article_id=29).

164. *Id.*

165. Australian Securities and Investments Commission, <http://www.search.asic.gov.au> (follow "Company Search" hyperlink; then search by organization name for "Anvil Mining Management NL").

166. ANVIL MINING, 2006 ANNUAL REPORT 65, available at [http://www.anvilmining.com/files/Anvil\\_AR06\\_lo-res\\_March26.pdf](http://www.anvilmining.com/files/Anvil_AR06_lo-res_March26.pdf).

#### IV. LEGISLATIVE REFORM

The foregoing discussion has illustrated that in principle there is an underlying doctrinal framework that would allow for the prosecution of corporations for complicity in human rights abuses occurring outside the host jurisdiction. While the imposition of such liability is theoretically possible, it compounds complexity upon complexity, combining three areas of law that have evolved primarily with individuals in mind, and applying them to circumstances for which they are not ideally suited. Even if the political will could be found to bring such a prosecution, doctrinal difficulties would be exacerbated by problems of gathering evidence in foreign jurisdictions. Large corporations are likely to contest such charges vigorously. Is there any possibility of success?

It is suggested that the best chance of a successful prosecution is to enact specific provisions tailored to corporate defendants and imposing extraterritorial liability. A model of what may be achieved can be found in the FCPA, which imposes extraterritorial criminal liability with respect to certain practices involving the bribery of foreign officials. For the purposes of illustration, this Article focuses on section 78dd-2, which applies to domestic concerns, and section 78dd-3, which applies to domestic concerns and persons other than issuers.<sup>167</sup> Under section 78dd-2(a), it is an offense for any domestic concern “or for any officer, director, employee, or agent of such domestic concern or any stockholder thereof acting on behalf of such domestic concern, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of [certain prohibited transactions relating to foreign officials].”<sup>168</sup> It expressly applies to U.S. corporations, as well as organizations with their principal place of business in the United States.<sup>169</sup> Jurisdiction under the FCPA also extends to conduct of a “United States person” acting outside the United States, whether or not the person “makes use of the mails or any means or instrumentality of interstate commerce.”<sup>170</sup> Extraterritorial jurisdiction in such cases is based on the nationality principle because “United States person” is defined to include corporations organized under the laws of the United States.<sup>171</sup>

The extraterritorial reach of the FCPA is further extended by section 78dd-3(a), which makes it an offense for *any* person, “while in the territory of the United States, corruptly to make use of the mails or any

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167. Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1 (1994) (applies to issuers).

168. *Id.* § 78dd-2(a).

169. *Id.* § 78dd-2(h)(1)(B).

170. *Id.* § 78dd-2(i)(1).

171. *Id.* § 78dd-2(i)(2).

means or instrumentality of interstate commerce or to do any other act in furtherance of [a prohibited transaction].”<sup>172</sup> “Person” for these purposes is defined to include corporations organized under the law of a foreign nation.<sup>173</sup> Consequently, the United States may exercise criminal jurisdiction over a foreign corporation with respect to conduct occurring primarily outside the United States, so long as the corporation made use of the mails or the Internet in the United States.<sup>174</sup> It does not require that the corporation had its principal place of business in the United States, so long as it had some presence in the jurisdiction.<sup>175</sup>

Although this provision is not phrased in traditional complicity terms, the term “in furtherance” of is apt to encompass a broad range of conduct associated with the prohibited transactions. As a U.S. federal statute, principles of vicarious liability apply and the extraterritorial reach of the legislation is clear, relying expressly upon either objective territoriality or nationality. However, even the most well-drafted provision is meaningless without the political will to prosecute and it is in this respect that the FCPA is perhaps most notable.

Criminal prosecutions under the FCPA can only be brought by the U.S. Department of Justice<sup>176</sup> and a summary of prosecutions under the FCPA reveals that the Department has pursued such prosecutions with some vigor.<sup>177</sup> Prior to 1998, it appears that FCPA prosecutions primarily involved U.S. corporations operating directly in foreign countries.<sup>178</sup> However, the Act was amended in 1998 to expand its extraterritorial reach.<sup>179</sup> Since then, in addition to prosecutions against U.S. corporations,<sup>180</sup> there

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172. *Id.* § 78dd-3(a).

173. *Id.* § 78dd-3(f)(1).

174. 15 U.S.C. § 78dd-3(a) (1994).

175. *Id.*

176. See H.R. REP. NO. 95-640, at 9, 12 (1977) (stating that criminal prosecutions under the FCPA are brought by the Department of Justice). Civil enforcement actions may be brought by the Securities Exchange Commission.

177. See generally Danforth Newcomb & Philip Urofsky, *FCPA Digest of Cases and Review Releases Relating to Bribes to Foreign Officials Under the Foreign Corrupt Practices Act of 1977*, Feb. 13, 2008, available at [http://www.shearman.com/files/upload/FCPA\\_Digest.pdf](http://www.shearman.com/files/upload/FCPA_Digest.pdf).

178. *Id.* at 58–80.

179. International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (1998).

180. Newcomb & Urofsky, *supra* note 177, at 42 (discussing United States v. DPC (Tianjin) Co. No. CR 05-482 (C.D. Cal. 2005)). See also Deferred Prosecution Agreement, United States v. Monsanto Co., No. 1:05-CR-00008 (D.D.C. 2005), available at <http://corporatecrimereporter.com/documents/monsantoagreement.pdf>; Agreement between U.S. Dep’t of Justice and InVision Techs., Inc. (Dec. 3, 2004), available at <http://corporatecrimereporter.com/documents/invision1.pdf>; Agreement between Crimi-

have been prosecutions successfully targeting U.S. corporations operating through subsidiaries,<sup>181</sup> foreign corporations operating through subsidiaries,<sup>182</sup> and a foreign issuer listed on the New York Stock Exchange.<sup>183</sup> Of eight prosecutions brought against corporations since 1998, four were against foreign corporations.<sup>184</sup> Of the new investigations commenced between 2005 and 2007, nineteen of the twenty-four have been of U.S. corporations or a combination of U.S. and foreign corporations, with five directed solely at foreign corporations.<sup>185</sup>

In another example of corporate criminal liability for extraterritorial conduct, the U.S. multinational Chiquita Brands International, Inc., recently pleaded guilty to engaging in prohibited transactions with a designated terrorist organization.<sup>186</sup> Chiquita pleaded guilty to making payments via a Colombian subsidiary to the United Self-Defense Forces of Columbia (“AUC”).<sup>187</sup> The payments were made in response to threats of harm to the company’s personnel and property, and were approved by senior executives who were aware that the AUC was a terrorist organization.<sup>188</sup>

Another useful precedent may be found in division 270 of the Australian Criminal Code Act of 1995, which creates a number of offenses relating to slavery. Of particular relevance, section 270.3 provides that a person (including a corporation)<sup>189</sup> who, whether within or outside Australia, intentionally:

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nal Div., Fraud Section, U.S. Dep’t of Justice and Micrus Corp. (Feb. 28, 2005), *available at* <http://corporatecrimereporter.com/documents/micrus.pdf>.

181. Agreement between U.S. Dep’t of Justice and SSI Int’l Far East, Ltd., No. 3:06-CR-00398 (D. Or. 2006), *available at* <http://www.secinfo.com/d1znFa.v22t.d.htm>. See also Newcomb & Urofsky, *supra* note 177, at 47, 54 (discussing United States v. Titan Corp., No. CR-05-314 (S.D. Cal. 2005) and United States v. Syncor Taiwan, Inc., No. CR-02-1244 (C.D. Cal. 2002)).

182. Newcomb & Urofsky, *supra* note 177, at 31, 49–50 (discussing United States v. Vetco Gray Controls Inc., No. 07-CR-004 (S.D. Tex. 2007) and United States v. ABB Vetco Gray, Inc. (S.D. Tex. 2004)).

183. In the Matter of Statoil, ASA, Exchange Act Release No. 54,599, 89 SEC Docket 283, 286 (Oct. 13, 2006), *available at* <http://www.sec.gov/litigation/admin/2006/34-54599.pdf>.

184. Newcomb & Urofsky, *supra* note 178, at 4.

185. *Id.* at 2–3.

186. U.S. DEP’T OF JUSTICE, *Chiquita Brands International Pleads Guilty to Making Payments to a Designated Terrorist Organization and Agrees to Pay \$25 Million Fine*, Mar. 19, 2007, *available at* [http://www.usdoj.gov/opa/pr/2007/March/07\\_nsd\\_161.html](http://www.usdoj.gov/opa/pr/2007/March/07_nsd_161.html).

187. *Id.*

188. *Id.*

189. Criminal Code Act, 1995, § 12.1 (2007) (Austl.).

- (a) possesses a slave or exercises over a slave any of the other powers attaching to the right of ownership; or
- (b) engages in slave trading; or
- (c) enters into any commercial transaction involving a slave; or
- (d) exercises control or direction over, or provides finance for:
  - (i) any act of slave trading; or
  - (ii) any commercial transaction involving a slave;

is guilty of an offense.<sup>190</sup>

Again, it should be noted that this offense is couched in broad terms and is not limited in the same way as traditional concepts such as “aiding and abetting.” Phrases such as “exercises control or direction over” and “provides finance for” are apt to cover a broad range of circumstances, and are particularly appropriate for corporate involvement in such offenses. On the other hand, unlike complicity under the general criminal law, the defendant in this case is not tried as a principal offender, but is punished for this specific offense. The section includes language that is explicitly extraterritorial in operation, and principles of corporate criminal liability are found in part 2.5 of the Act.

These are just two examples of legislative provisions that have been drafted in order to impose extraterritorial criminal liability on corporations. More importantly, the number of prosecutions under the FCPA shows just what can be achieved when the political will to enforce such statutes exists.

#### CONCLUSION

[I]t is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes . . .<sup>191</sup>

This Article has sought to demonstrate that it is possible to impose domestic criminal liability upon MNC’s with respect to their involvement in human rights abuses outside their home jurisdiction. Such liability is justified not only because of the difficulty of pursuing offenders in the host jurisdiction, but because of the culpability of the parent corporation itself. Principles of separate corporate identity cannot be allowed to conceal the fact that these operations are ultimately controlled by, and for the benefit of, the parent corporation. Parent corporations should not be

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190. Criminal Code Act, 1995, § 270.3(1) (2007) (Austl.).

191. Rome Statute, *supra* note 41, pmb.

able to reap the benefits of distinct corporate identity yet disown their subsidiaries when issues of accountability arise.

It has been demonstrated that principles of complicity may be applied to such conduct, that models of corporate fault exist, and that extraterritoriality may be justified on the basis of corporate nationality. Although this places the responsibility on the home jurisdiction, the situation may be seen as analogous to those countries that refuse to extradite their own nationals. Given the absence of effective international regulation and the inability of other countries to prosecute, it is incumbent upon the home jurisdiction to control the conduct of those corporations that are incorporated under its laws.<sup>192</sup>

While such prosecutions are theoretically possible under existing criminal law principles, it is suggested that the complexities are such that the chances of a successful prosecution are slim. Far more appropriate is to use these underlying principles to inform the drafting of legislation specifically addressing corporate involvement in human rights abuses. Such an approach avoids the strict application of traditional accessorial principles in favor of provisions that reflect the reality of corporate complicity. It also allows the basis of corporate fault to be clearly articulated and the extraterritorial reach of the laws expressly stated. Drafting specific laws also facilitates international agreement by allowing jurisdictions to adapt the provisions to their own circumstances. In particular, some jurisdictions do not recognize corporate criminal liability at all, preferring instead to impose civil or administrative sanctions.<sup>193</sup>

The merits of such an approach can be seen in the FCPA. Since its passage in 1976—a response to widespread bribery of foreign officials by U.S. corporations<sup>194</sup>—the United States has been instrumental in lobbying for a range of international instruments prohibiting the practice.<sup>195</sup> Recent decades have seen a significant number of successful prosecutions against both U.S. and foreign corporations with respect to conduct occurring outside the United States.<sup>196</sup> While the FCPA is by no means

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192. Stephens, *supra* note 27, at 83.

193. Beth Stephens, *Translating Filártiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT'L L. 1, 44–46 (2002). See also United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25, Art. 10, U.N. Doc. A/RES/55/25 (Mar. 31, 2005).

194. See Logan Michael Breed, *Regulating Our 21st-Century Ambassadors: A New Approach to Corporate Liability for Human Rights Violations Abroad*, 42 V.A. J. INT'L L. 1005, 1028–29 (2002).

195. Phillip I. Blumberg, *Accountability of Multinational Corporations: The Barriers Presented by Concepts of the Corporate Juridical Entity*, 24 HASTINGS INT'L & COMP. L. REV. 297, 315 (2001).

196. See Stephens, *supra* note 193, at 2–3.

the only model, it disproves the suggestion that it is not possible to prosecute large corporations with respect to extraterritorial conduct. With appropriate legislation and political will it clearly can be done.

Criminal prosecution of corporations under domestic law will never be the complete answer. It should, however, be part of an international response. According to the *United Nations Norms on the Responsibilities of Multinational Corporations and Other Business Enterprises with Regard to Human Rights*, states have an obligation to ensure that MNCs and other business enterprises respect human rights.<sup>197</sup> While an integrated response should involve a range of accountability mechanisms, it is the state of incorporation that has the practical ability to impose criminal sanctions on the parent corporation. Such accountability is particularly important given that corporations are not subject to the jurisdiction of the ICC. The imposition of criminal sanctions, however, goes beyond the issue of accountability. It is also a mechanism through which society expresses its condemnation and represents an unequivocal rejection of that conduct. Complicity in egregious human rights abuses is not just a matter of doing business. The application of extraterritorial criminal laws is one mechanism whereby such conduct is condemned irrespective of where it occurs.

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197. U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on the Promotion & Prot. of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 13, 2003), available at <http://www1.umn.edu/humanrts/links/norms-Aug2003.html>.

# **SOFT LAW, HARD MARKETS: COMPETITIVE SELF-INTEREST AND THE EMERGENCE OF HUMAN RIGHTS RESPONSIBILITIES FOR MULTINATIONAL CORPORATIONS**

*Ralph G. Steinhardt\**

## INTRODUCTION

**D**o multinational corporations have enforceable obligations to protect international human rights? If they do, two principles lying at the foundations of two traditionally separate bodies of law—corporate law and international human rights law—must be reconceived and reconciled. In corporate law, the bedrock principle of shareholder primacy requires a corporation’s directors and officers to maximize the return on their shareholders’ investment.<sup>1</sup> One dominant critique of the corporate responsibility initiative suggests that it subverts shareholder primacy by requiring management to develop an expertise in human rights law and exercise *de facto* control over abuses generally committed by governments, raising costs without raising revenues.<sup>2</sup> In international human rights law, the bedrock principle of state responsibility traditionally places a comprehensive obligation on governments to protect human rights and either imposes no obligations on non-state actors like corporations or imposes obligations only in extraordinary circumstances defined by international agreement. From that perspective, the corporate human

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1. *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919) (“A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end.”). See also PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 2.01 rep. note 1 (Am. Law Inst. 1994) (“Some cases, mostly arising before the turn of the century, applied the concept reflected in *Dodge v. Ford*, a strict notion of *ultra vires*, or both, to strictly preclude the utilization of corporate resources, either by way of donation or otherwise, for humanitarian, educational, philanthropic, or public welfare activities.”).

2. See, e.g., Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, N.Y. TIMES, Sept. 13, 1970 (Magazine); MILTON FRIEDMAN, CAPITALISM AND FREEDOM 133 (Univ. of Chi. Press 1982) (1962) (“Few trends could so thoroughly undermine the very foundations of our free society as the acceptance by corporate officials of a social responsibility other than to make as much money for their stockholders as possible. This is a fundamentally subversive doctrine.”).

rights initiative dilutes the “state primacy” principle and poses a controversial distraction from the already daunting task of getting government actors to take human rights law seriously.

In contemporary corporate and international law, the doctrines of shareholder supremacy<sup>3</sup> and state responsibility<sup>4</sup> have lost their simple rigidity, but a puzzle persists: in what circumstances—if any—may civil or criminal liability be imposed on a company for violating human rights standards, and how—if at all—will those obligations be enforced?

I have previously argued that the emerging standards of corporate responsibility rest on four separate but compatible regimes of doctrine and practice, each with its own characteristic modes of enforcement:<sup>5</sup> (i) *a market-based regime*,<sup>6</sup> or “human rights entrepreneurialism,” under which corporations compete for consumers and investors by conforming to international human rights standards; (ii) *a regime of domestic regulation*,<sup>7</sup> exemplified by sanctions or boycott legislation, which channels

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3. The shareholder primacy principle, insofar as it reflected an assumption that corporate altruism is inherently unprofitable, has been qualified considerably:

- (a) . . . a corporation should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain.
- (b) Even if corporate profit and shareholder gain are not thereby enhanced, the corporation, in the conduct of its business: (1) is obliged, to the same extent as a natural person, to act within the boundaries set by law; (2) may take into account ethical considerations that are reasonably regarded as appropriate to the responsible conduct of business, and (3) may devote a reasonable amount of resources to public welfare, humanitarian, educational, and philanthropic purposes.

PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS, *supra* note 1, at 55. A contemporary, progressive stream of corporate law scholarship rests on the “concern about the harm to nonshareholders that can occur as a result of managerial adherence to the shareholder primacy principle. Efforts to maximize shareholder wealth are often costly to nonshareholders and often come at the expense of particular nonshareholder constituent groups.” David Millon, *Communitarianism in Corporate Law: Foundations and Law Reform Strategies*, in PROGRESSIVE CORPORATE LAW 1, 1 (Lawrence Mitchell ed., Westview Press 1995).

4. For at least twenty years, governments have had the obligation, especially under the regional human rights systems, to protect against human rights abuses by non-state actors. *See generally* ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS 347–436 (Oxford Univ. Press 2006).

5. Ralph G. Steinhardt, *Corporate Responsibility and the International Law of Human Rights: The New Lex Mercatoria*, in NON-STATE ACTORS AND HUMAN RIGHTS 177–226 (Philip Alston ed., Oxford Univ. Press 2005). Part III of this Article replicates this prior work.

6. *Id.* at 180.

7. *Id.* at 187.

corporate behavior to advance a rights-based foreign policy; (iii) *a regime of civil liability*,<sup>8</sup> enforced through private lawsuits in domestic courts and exemplified in the United States by actions under the Alien Tort Statute (“ATS”),<sup>9</sup> such as the Holocaust litigation<sup>10</sup> and the *Unocal* case;<sup>11</sup> and (iv) *a regime of international regulation and quasi-regulation*<sup>12</sup> by both intergovernmental organizations and non-governmental organizations, based on a variety of international instruments of varying formality and legal status, in order to minimize the role that multinational corporations play in the violation of human rights.

These four regimes do not preclude the evolution of other approaches to corporate responsibility,<sup>13</sup> nor do they operate independently of one another: developments in one regime have direct effects in another. Nor is there any argument that the law of corporate human rights responsibility is fully formed and operable in any of these four areas. But the coherence of these developments with one another suggests that contemporary analysts—whether corporate counsel or human rights advocates, not to

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8. *Id.* at 194.

9. Alien Tort Claims Act, 28 U.S.C. § 1330 (2006).

10. See, e.g., Bodner v. Banque Paribas, 114 F. Supp. 2d 117 (E.D.N.Y. 2000) (descendants of Jewish customers of French financial institutions sued for damages, alleging conspiracy to expropriate assets and failure to disgorge these assets to their rightful owners post-Holocaust); Burger-Fischer v. Degussa AG, 65 F. Supp. 2d 248 (D.N.J. 1999) (class action brought against German corporations, seeking damages for enforced labor during the Holocaust and for oppressive living and working conditions).

11. Doe v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002), *reh'g granted*, 395 F.3d 978 (9th Cir. 2003).

12. Steinhardt, *supra* note 5, at 202.

13. It is conceivable for example that a regime of corporate *criminal* responsibility is in prospect, as several papers in this Symposium suggest. Ronald C. Slye, *Corporations, Veils, and International Criminal Liability*, 33 BROOK. J. INT'L L. 955 (2008); Jonathan Clough, *Punishing the Parent: Corporate Criminal Complicity in Human Rights Abuses*, 33 BROOK. J. INT'L L. 899 (2008). See also Special Representative of the Secretary-General, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, ¶ 22, delivered to the General Assembly, U.N. Doc. A/HRC/4/035 (Feb. 9, 2007). In particular, the Special Representative noted the following:

[C]orporate responsibility is being shaped through the interplay of two developments: one is the expansion and refinement of individual responsibility by the international *ad hoc* criminal tribunals and the . . . Statute [of the International Criminal Court]; the other is the extension of responsibility for international crimes to corporations under domestic law. The complex interaction between the two is creating an expanding web of potential corporate liability for international crimes, imposed through national courts.

mention scholars of international law and corporate law—should not ignore or minimize this recent history.

Other participants in this Symposium have focused on the power and the limits of the three regimes that are in principle the most coercive: domestic regulation, civil liability, and international regulation.<sup>14</sup> In this Article, I argue that the *least* coercive regime—the free and competitive marketplace—also serves as a means of enforcing the emerging standards of corporate responsibility, although my conception of enforcement may initially appeal more to devotees of Adam Smith than to lawyers.<sup>15</sup> The argument is that the law protecting the freedom of competition allows companies to compete with one another by implementing human rights policies and by adopting industry-wide statements of best human rights practices. History suggests that these best practices, beginning perhaps as voluntary or aspirational guidelines, can assume a more authoritative cast over time and become the best available measure of a company's due diligence and fair dealing.<sup>16</sup> The evolution may be gradual and atomistic (e.g., through individual civil claims against non-complying companies for unfair business practices or false advertising), or it may be coordinated through legislation with general application (e.g., through “comply or explain” directives designed to increase market transparency by maximizing information to consumers, investors, and other businesses).<sup>17</sup>

The modes by which law emerges from the conduct of corporations in the marketplace may vary, the timing may not be linear or uniform, and progress—however defined—may not always be discernible. However, history offers a tolerable parallel in the medieval and renaissance *lex mercatoria*, the law merchant, which originated in the long-term, mutual, and sophisticated self-interest of the entrepreneurial class and which gradually became codified in the commercial law of states, ultimately emerging as a form of contemporary transnational law. As this Article

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14. Nicola M.C.P. Jägers & Marie-José van der Heijden, *Corporate Human Rights Violations: The Feasibility of Civil Recourse in the Netherlands*, 33 BROOK J. INT'L L. 833 (2008); Anthony J. Sebok, *Taking Tort Law Seriously in the Alien Tort Statute*, 33 BROOK J. INT'L L. 871 (2008).

15. See *infra* note 61.

16. See *infra* Part III.

17. The “comply or explain” principle has become a feature of Europe’s approach to corporate governance. The governance codes in the various member states articulate norms or recommendations that may not be mandatory, but companies must either comply with these norms or explain publicly why they are not complying with them. See Statement of the European Corporate Governance Forum on the Comply-or-Explain Principle (Feb. 22, 2006), available at [http://ec.europa.eu/internal\\_market/company/docs/ecforum/ecgf-comply-explain\\_en.pdf](http://ec.europa.eu/internal_market/company/docs/ecforum/ecgf-comply-explain_en.pdf) (last visited May 31, 2008).

will illustrate, commercial law has characteristically developed from the bottom up, following a distinctive normative trajectory, evolving from competitive practices into commercial customs and expectations, then transforming into the soft law netherworld of principles or model contracts, and finally taking shape as law. In short, norms that corporations themselves consider to be in their competitive self-interest may ratchet towards normativity and become more recognizably law-like.

The emerging norms of corporate responsibility in matters of human rights can and should be understood in light of this ancient dynamic: substantively and chronologically, the law merchant followed mercantile custom rather than creating, defining, coercing, displacing, or preempting it. From this perspective, the voluntary or aspirational undertakings of entrepreneurs are not only consistent with the emergence of legal obligations; they propel and refine them. In addition, appreciating this historical trajectory has certain practical consequences for the contemporary practice of law. Quite apart from understanding how legal obligations evolve from business cultures, the *lex mercatoria* paradigm of corporate human rights responsibility suggests that the distinctions that structure the current debate—between, for example, voluntary aspirations and mandatory obligations, between state and non-state actors, or between public international law and private international law—radically oversimplify the issues.

The argument proceeds in three stages. Part I advances a modest empirical claim that multinational corporations have increasingly declared their commitment to human rights standards (or some substantial subset of them) and that they increasingly compete for customers and investors in this mode. Part II makes a normative claim that the justifications for this “human rights entrepreneurialism” are multiple and mutually reinforcing. Part III advances the analytical claim that links the emerging rules of a corporation’s best human rights practice to the ancient *lex mercatoria*.

### I. THE EMPIRICAL CLAIM: HUMAN RIGHTS ENTREPRENEURIALISM

Many multinational corporations now voluntarily proclaim some commitment to human rights, even if the record of their compliance is mixed. These unilateral and voluntary commitments take various forms, including corporate codes of conduct, which articulate and standardize the company’s business practices. The codification initiative began in the anti-apartheid<sup>18</sup> and pro-environment<sup>19</sup> movements, but has grown to

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18. The Sullivan Principles, first articulated in 1977 and ultimately incorporated by President Reagan into Executive Order No. 12,532, 50 Fed. Reg. 36861 (Sept. 9, 1985),

address a variety of human rights concerns, like security operations, corruption, freedom of association, discrimination, child labor, and forced labor of any sort. A handful of firms—especially petroleum companies, the largest corporations in the world—have even pegged corporate policy to the Universal Declaration of Human Rights,<sup>20</sup> suggesting that the companies were aligning themselves with traditionally governmental obligations that go well beyond the rights of workers.<sup>21</sup>

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amounted to a voluntary code of conduct for companies doing business in South Africa during the *apartheid* regime. The principles required certain human rights practices, like integrated workplaces, fair employment, and affirmative action. They also gave companies an objective, common, and auditable standard under which their presence in South Africa might be defended in the competition for a good corporate image. In 1984, with some 125 signatories, the principles were expanded to require companies to take more aggressive action against *apartheid*, tantamount to corporate civil disobedience. The principles also provided a benchmark for the managers of municipal pension funds and university endowments, and served as the model for the MacBride Principles for companies doing business in Northern Ireland. By 1987, with only glacial change in South Africa, even the drafters of the Sullivan Principles considered them a failure and urged corporations to withdraw from South Africa altogether.

19. In 1989, the Coalition for Environmentally Responsible Economies (“CERES”) adopted the Valdez Principles, which required signatory companies to adopt a variety of green practices to protect the biosphere by using renewable resources, disposing of wastes properly, disclosing environmental risks, and submitting to an annual environmental audit. Coalition for Environmentally Responsible Economies [C.E.R.E.S.] Principles, <http://www.ceres.org/NETCOMMUNITY/Page.aspx?pid=416&srcid=811> (last visited May 18, 2008).

20. The Universal Declaration of Human Rights is an authoritative articulation of governments’ human rights responsibilities under the United Nations Charter. Universal Declaration of Human Rights, G.A. Res. 217A (III), at 71, U.N. Doc A/810 (Dec. 10, 1948). *See also* INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY AND PRACTICE 143–64 (Richard Lillich et al. eds., Aspen Publishers 2006).

21. *See, e.g.*, Amerada Hess Corporation, Corporate Responsibility Policy (2002), <http://www.hess.com/downloads/documents/pdf/csrpolicy.pdf>; Chevron Corporation, Human Rights Statement (2006), <http://www.chevron.com/documents/pdf/chevronhumanrightsstatement.pdf>. *See also* The Body Shop, Human Rights Principles (2006), <http://www.thebodyshopinternational.com/NR/rdonlyres/023A7009-1E1A-4305-9BA9-F1845F1EA038/0/Humanrightsprinciples.pdf>. This instrument states:

As a global business, we respect local, cultural and political differences, but will always insist that our business activities adhere to basic human rights, as enshrined in the Universal Declaration for Human Rights. We will assess all our business activities to determine where we have direct or indirect impacts, ensure compliance with human rights legislation and strive to have a positive impact on our stakeholders and on society at large. We will use objectively measurable standards that reflect internationally recognised human rights standards and conventions.

These voluntary, unilateral codes of conduct characteristically address the business-to-business relationships of a company with its suppliers and vendors. For example, Levis Strauss & Co. (“LS & Co.”), in its Global Sourcing and Operating Guidelines, declared that it “favor[s] business partners who share our commitment to contribute to improving community conditions” and it “require[s] that [contractors] implement a corrective action plan within a specified time period” if “a contractor is not complying with [LS & Co.’s Business Partner Terms of Engagement].”<sup>22</sup> Moreover, in its Country Assessment Guidelines, LS & Co. articulated the criteria it would apply to determine whether doing business in a particular country was harming its competitiveness and profitability, including whether the human rights environment would prevent the company from “conduct[ing] business activities in a manner that is consistent with [LS & Co.’s] Global Sourcing Guidelines and other company policies.”<sup>23</sup>

Equally prominent are rights-sensitive certification and branding initiatives in a variety of industries that purport to offer consumers some assurance that the products they buy were not produced in ways that violate the rights of workers or broader communities. When, for example, the World Diamond Council realized that the world market for diamonds was undermined by consumer fears of conflict diamonds, it developed the Kimberley Process Certification Scheme (“Kimberley Process”), a public-private partnership for developing an auditable certification protocol to assure buyers that profits from the sale of gems would not support governments or paramilitary groups that violate the human rights of civilians in conflict zones.<sup>24</sup> By design, the Kimberley Process served the specific commercial goal of “protect[ing] the legitimate diamond indus-

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22. Levi Strauss & Co., Global Sourcing and Operating Guidelines, <http://www.levistrauss.com/Downloads/GSOG.pdf> (last visited May 18, 2008).

23. *Id.*

24. World Diamond Council, Kimberley Process Certification Scheme, <http://www.worlddiamondcouncil.com> (follow “Resolutions” hyperlink; then follow “Kimberley Process Certification Scheme” hyperlink) (last visited May 18, 2008). The Kimberley Process Certification Scheme has been specifically approved by the United Nations in recognition that it:

[C]an help to ensure the effective implementation of relevant resolutions of the Security Council containing sanctions on the trade in conflict diamonds and act as a mechanism for the prevention of future conflicts, and calls for the full implementation of existing Council measures targeting the illicit trade in rough diamonds, particularly conflict diamonds which play a role in fuelling conflict.

G.A. Res. 62/11, ¶ 2, U.N. Doc. A/62/L.16 (Nov. 21, 2007).

try,”<sup>25</sup> and now covers the overwhelming bulk of the world’s trade in diamonds.<sup>26</sup> Similarly, coffee retailers, like Starbucks, routinely offer “fair trade” coffees through the Coffee and Farmer Equity Practices (“C.A.F.E.”) program, guaranteeing on every cup that the production and marketing of its products did not harm workers or the environment.<sup>27</sup> Like the Kimberley Process, the C.A.F.E program may target the retail consumer, but it also regulates business-to-business relationships in the supply chain. The apparel industry has also adopted various workplace codes of conduct and monitoring protocols to structure a business relationship in order to assure customers that sweatshop practices are reduced or stopped altogether.<sup>28</sup> Chiquita Brands International sought to market an “Ethical Banana” by adopting an auditable social and environmental standard for its farms in Latin America, under the Better Banana Project (“BBP”) of the Rainforest Alliance.<sup>29</sup> Similarly, in the extractive industry, where private security operations have frequently led to human rights violations, a unique partnership of government representatives, corporate officers, and human rights activists has developed a voluntary system to minimize the risk of violations.<sup>30</sup>

There have also been efforts to define a common measure of corporate compliance, to standardize the unilateral codes of conduct, and to offer the consumer a readily identifiable mark at the point of purchase. The

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25. *International Trade: Significant Challenges Remain in Deterring Trade in Conflict Diamonds, Testimony Before the Subcommittee on Oversight of Government Management, Restructuring and the District of Columbia, Committee on Governmental Affairs, U.S. Senate*, GAO-02-425T, at 6 (2002) (statement of Loren Yager, Director, International Affairs and Trade), available at <http://hsgac.senate.gov/021302yager.pdf>.

26. For more information on the ongoing successes of the Kimberley Process, see <http://www.kimberleyprocess.com> (last visited Apr. 16, 2008).

27. For more information about the C.A.F.E. practices, see SCS Collaboration with Starbucks Coffee to Create the C.A.F.E. Practices Program, <http://www.scscertified.com/csrpurchasing/starbucks.html> (last visited May 18, 2008).

28. See, e.g., The Fair Labor Ass’n, Workplace Code of Conduct, <http://www.fairlabor.org/var/uploads/File/The%20Fair%20Labor%20Association%20Workplace%20Code%20of%20Conduct.pdf> (last visited May 18, 2008); The Fair Labor Association, Principles of Monitoring, [http://www.fairlabor.org/docs/FLA\\_PRINCIPLES\\_OF\\_MONITORING.pdf](http://www.fairlabor.org/docs/FLA_PRINCIPLES_OF_MONITORING.pdf) (last visited May 18, 2008); The Clean Clothes Campaign, Code of Labour Practices for the Apparel Industry Including Sportswear, <http://www.cleanclothes.org/codes/index.htm> (last visited May 18, 2008).

29. Rainforest Alliance, *Profiles in Sustainable Agriculture: Chiquita Reaps a Better Banana* (2005), [http://www.rainforest-alliance.org/programs/profiles/documents/chiquita\\_profile.pdf](http://www.rainforest-alliance.org/programs/profiles/documents/chiquita_profile.pdf); Chiquita Banana, *Better Banana Project: Working for the Environment* (2007), <http://www.chiquita.com/discover/owbetter.asp>.

30. See Bennett Freeman, Maria B. Pica & Christopher N. Camponovo, *A New Approach to Corporate Responsibility: The Voluntary Principles on Security and Human Rights*, 24 HASTINGS INT’L & COMP. L. REV. 423 (2001).

most developed of these efforts is Social Accountability (“SA”) 8000 (“SA 8000”), a voluntary protocol under which independent auditors certify that a company complies with human rights standards derived from, *inter alia*, International Labour Organisation conventions, the Universal Declaration on Human Rights, and the U.N. Convention on the Rights of the Child.<sup>31</sup> Nine specific areas are identified in the SA 8000 standard: child labor, forced labor, health and safety, freedom of association, freedom from discrimination, disciplinary practices, work hours, compensation, and management systems to assure compliance.<sup>32</sup> Like other audit-able standards, including ISO 9000 on quality control and ISO 14001 on environmental management, SA 8000 and its cognates<sup>33</sup> allow certified companies to differentiate themselves from their uncertified competitors.<sup>34</sup> Since its introduction, SA 8000 has come to cover hundreds of thousands of workers and thousands of factories in scores of countries, altering the essential commercial relationship between a company and its suppliers.

Human rights concerns are also present in the investment market: over the last decade, individual and institutional investors have adopted social or ethical criteria to screen their initial investments and to guide their votes as stockholders once the investment is made. The typical target of shareholder activism has been sustainable business,<sup>35</sup> of which human rights responsibility is one component. The dominant investment houses have also marketed ethical-investment mutual funds, and the major stock markets have developed social indices to guide investors with human

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31. Social Accountability International, Overview of SA 8000, <http://www.sa-intl.org/index.cfm?fuseaction=Page.viewPage&pageID=473> (last visited June 1, 2008).

32. *Id.*

33. See, e.g., European Union [E.U.] Eco-Label Scheme, [http://ec.europa.eu/environment/ecolabel/whats\\_eco/ov\\_concept\\_en.htm](http://ec.europa.eu/environment/ecolabel/whats_eco/ov_concept_en.htm) (last visited May 18, 2008); Fairtrade Foundation, [http://www.fairtrade.org.uk/what\\_is\\_fairtrade/fairtrade.foundation.aspx](http://www.fairtrade.org.uk/what_is_fairtrade/fairtrade.foundation.aspx) (last visited May 18, 2008); G3 Sustainability Reporting Guidelines, [http://www.global-reporting.org/NR/rdonlyres/ED9E9B36-AB54-4DE1-BFF25F735235CA44/0/G3\\_Guide\\_linesENU.pdf](http://www.global-reporting.org/NR/rdonlyres/ED9E9B36-AB54-4DE1-BFF25F735235CA44/0/G3_Guide_linesENU.pdf) (last visited May 18, 2008).

34. Problems with implementing the SA 8000 persist, and the system may rest on the fiction of quantifying the unquantifiable (and auditing it) or finding a consumer with perfect information who is not driven exclusively by considerations of price. See generally Li-Wen Lin, *Corporate Social Accountability Standards in the Global Supply Chain: Resistance, Reconsideration, and Resolution in China*, 15 CARDOZO J. INT'L & COMP. L. 321 (2007).

35. Tim Dickson, *The Financial Case for Behaving Responsibly*, FIN. TIMES, Aug. 19, 2002, at 5 (defining sustainable business as behavior “that enhances long-term shareholder value by addressing the needs of all relevant stakeholders and adding economic, environmental, and social value through its core business functions”). See also Louisa Wah, *Treading the Sacred Ground*, 87 MGMT. REV. 18–22 (1998).

rights concerns.<sup>36</sup> An entire ethical consulting industry has also arisen in order to assist companies manage risk by adhering to the norms of corporate citizenship.

These examples could be multiplied, but even this overview suggests that companies routinely perceive a competitive advantage in offering rights-sensitive product lines and branding, even if limits on the effectiveness of these initiatives remain clear.<sup>37</sup> Indeed, the proliferation of these commitments can be traced to the competitive demands placed on a corporation, including the need to attract consumers and investors. However, it also rests on the company's need to develop sustainable business relationships in the marketplace. Business groups, like the Chamber of Commerce and the Business Leaders Initiative on Human Rights, regularly report on the best practices of their members across industrial sectors, in dozens of countries, implicating a broad range of human rights concerns.<sup>38</sup> The commercial advantages of human rights entrepreneurialism are clearly not lost on successful competitors.

## II. THE NORMATIVE CLAIM: TOWARDS A UNIFIED PRINCIPLE OF JUSTIFICATION

It is one thing to observe that multinational corporations have increasingly taken on some public commitment to the protection of human rights. It is quite another to argue that corporations *should* take these commitments on, especially when governments continue to bear primary responsibility at law for the protection of individuals' human rights. After all, the multinational corporation may be better conceived as a bearer of rights than as a bearer of obligations in this arena. In this Part, after identifying the three principal categories of justifications—consequentialist, deontological, and positivist—I argue that the theoreti-

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36. See, e.g., Dow Jones STOXX Sustainability Index, <http://www.sustainability-indexes.com> (last visited May 18, 2008); FTSE4Good Index, <http://www.ftse4good.com> (last visited May 18, 2008). These indices are only partial indicators of human rights practices because they include only particular areas of corporate responsibility, some of which have little to do with human rights.

37. See generally Robert J. Liubicic, *Corporate Codes of Conduct and Product Labeling Schemes: The Limits and Possibilities of Promoting International Labor Rights Standards Through Private Initiatives*, 30 LAW & POL'Y INT'L BUS. 111 (1998).

38. Examples of such reports produced by the U.S. Chamber of Commerce and the Business Leaders Initiative on Human Rights can be found on their respective Web sites. U.S. Chamber of Commerce: Reports and Studies, <http://www.uschamber.com/publications/reports/default> (last visited May 18, 2008); Business Leaders Initiative on Human Rights, Reports and Tools, <http://www.blihr.org/> (follow "Reports & Tools" hyperlink) (last visited May 18, 2008).

cal rationales for accepting these obligations (or having them imposed) are multiple and reinforcing.

*Consequentialism.* A purely consequentialist justification suggests that it is in the long-term self-interest of the corporation to bring its practices into conformity with at least some subset of human rights standards. The orthodox rationale for consequentialism is that a company suffers in capital markets if its shares lose value in an increasingly socially-conscious investment environment, and it suffers in the retail market via consumer choices at the point of purchase (including boycotts). With the rise of ATS litigation against corporate defendants, it may increasingly suffer in a courtroom. The dominant rationale offered by corporations that have voluntarily adopted human rights policies is the market reliability rationale: to the extent that respect for human rights correlates with a commitment to the rule of law, the corporation should choose the more ordered, and therefore more profitable, environment. The commercial case for corporate human rights responsibility compliance has been articulated by the U.N. High Commissioner for Human Rights:

- (1) [Ensuring] Compliance with both Local and International Laws . . . .
- (2) Satisfying Consumer Concerns . . . .
- (3) Promoting the Rule of Law . . . .
- (4) Building Community Goodwill . . . .
- (5) [Improving] Supply Chain Management . . . .
- (6) Enhancing Risk Management . . . .
- (7) Keeping Markets Open . . . .
- (8) Increasing Worker Productivity and Retention . . . .
- (9) Applying Corporate Values[] . . . in ways that . . . . [maintain] the faith of employees and external stakeholders in company integrity.<sup>39</sup>

Market players confirm this dynamic. For example, the former President of the American Chamber of Commerce in Hong Kong observed:

[W]hile it might not always be the case that trade and business are good for human rights, it most certainly is the case that a good human rights environment is always good for business. Businesses are acting in their

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39. U.N. High Commission for Human Rights' Presentation for the Annual Meeting of the World Economic Forum, Davos, Switz., Jan. 2000, *Business and Human Rights: A Progress Report*, Part I, available at <http://www.unhchr.ch/business.htm#I1>.

own self-interest when they actively promote respect for human rights in countries where they operate.<sup>40</sup>

*Deontological approaches.* A second principle of justification is classically deontological and grounded in the natural law conception of rights.<sup>41</sup> In this view, human beings have rights simply by virtue of being human, regardless of whether these rights have been articulated in positive law or not, and no one (natural or juridical) is immune from the obligation to respect and protect those rights. From that perspective, the burden of persuasion rests on those who would exclude corporations from the human rights initiative, rather than on those who would include them. The carve-out from human rights obligations for corporations becomes especially problematic as more government operations—like security, the conduct of armed conflict, and the running of prisons—are privatized. Governments cannot privatize their way out of international legal obligations to protect human rights. The delegation of public authority to a nominally private actor cannot relieve the government of its international legal obligations. Entities, both public and private, should be held accountable if human rights are abused in the exercise of government functions, regardless of who—or what—is performing them.

*Positivism.* A third rationale is essentially positivistic, as that term of art is understood in international law (referring to the practice of states, including the adoption of treaties).<sup>42</sup> International law has recognized

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40. John Kamm, *The Role of Businesses in Promoting Respect for Human Rights in China*, INT'L BUS. ETHICS REV., Nov. 1, 1997, available at <http://www.business-ethics.org/newsdetail.asp?newsid=30>. Experience over the past decade confirms that the market reliability rationale (and similarly consequentialist arguments) continues to be a dominant public justification for bringing human rights concerns into the corporate decision-making process. E.g., *Beyond the “Genocide Olympics”*, THE ECONOMIST, Apr. 24, 2008, available at [http://www.economist.com/business/PrinterFriendly.cfm?story\\_id=11090045](http://www.economist.com/business/PrinterFriendly.cfm?story_id=11090045) (last visited May 30, 2008) (“What is striking today is how often activists, big firms and governments are now in agreement about the importance of human rights, and are working together to advance them.”). See generally DAVID VOGEL, THE MARKET FOR VIRTUE: THE POTENTIAL AND LIMITS OF CORPORATE SOCIAL RESPONSIBILITY (Brookings Institution Press 2005).

41. See generally PATRICK HAYDEN, THE PHILOSOPHY OF HUMAN RIGHTS 3–10 (Paragon House 2001).

42. Since the time of Grotius, the traditional basis for international legal obligations has been the consent of states, expressed through treaties and custom. “Positivism” at international law refers to the process by which states generate international law in these forms, generally out of a sense of their national interest. FERNANDO R. TESON, A PHILOSOPHY OF INTERNATIONAL LAW 73 (Westview Press 1998) (“[P]ositivism rests on two pillars: national interest and state consent.”). For a general overview of traditional ethical approaches to decision-making by multinational corporations, see THOMAS DONALDSON, THE ETHICS OF INTERNATIONAL BUSINESS (Oxford Univ. Press 1989).

two separate circumstances under which a nominally private actor might nonetheless bear international responsibility: first, a narrow class of *per se* wrongs identified by treaty and custom that are unlawful even in the absence of state action, and second, a broader class of offensive conduct that is sufficiently infused with state action to engage international standards.

The wrongs in the first category are identified in treaty regimes that prohibit certain human rights violations and explicitly override the state action requirement. For example, the Genocide Convention requires that persons committing genocide be punished, “whether they are constitutionally responsible rulers, public officials or private individuals.”<sup>43</sup> Certain aspects of the war crimes regime of the Geneva Convention, especially common article 3, similarly bind non-state actors when they are parties to an international armed conflict.<sup>44</sup> The prohibition on slavery is quintessentially aimed at acts by individuals in a market setting and is unlawful whether there is state action or not.<sup>45</sup> The International Law Commission (“ILC”), which was directed by the United Nations General Assembly to codify the Nuremberg principles, has never required state action for wrongs in this category. Indeed, in 1985, the ILC rejected a draft that would have limited liability to “State authorities” in favor of a draft making all individuals who commit an “offence against the peace and security of mankind” liable.<sup>46</sup> Routine commercial activity by multi-national corporations does not typically fall into this class, of course, but there is no prophylactic rule that corporations are in principle immune from liability for acts that do come within these treaty regimes.

It is equally clear that multinational corporations cannot be immune from human rights obligations for their state-like or state-related activities. In other words, there may be corporate conduct that falls into the second category of non-state liability, namely conduct that becomes internationally wrongful by virtue of the actor’s relationship with a state. In this theory, a mere contractual relationship with a government that com-

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43. Convention on the Prevention and Punishment of the Crime of Genocide art. 4, Dec. 9, 1948, 78 U.N.T.S. 1021.

44. Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 75 U.N.T.S. 135.

45. See Kathleen Kim & Kusia Hreshchyshyn, *Human Trafficking Private Right of Action: Civil Rights for Trafficked Persons in the United States*, 16 HASTINGS WOMEN’S L.J. 1, 31–2 (2004) (discussing the *Unocal* case and how “the law of nations attributes individual liability [for engaging in forced labor, the ‘modern variant of slavery’] such that state action is not required”).

46. *Draft Code of Offences Against the Peace and Security of Mankind*, [1985] 2 Y.B. Int’l L. Comm’n 7, A/CN.4/SER.A/1985/Add.1 (Part 2), at 14, available at [http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes\(e\)/ILC\\_1985\\_v2\\_p2\\_e.pdf](http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1985_v2_p2_e.pdf).

mits human rights violations should be insufficient to trigger liability—moral agency theory does not revoke the law of proximate cause. However, a private actor that fulfills a government function or is in a business relationship with a government that requires human rights violations for profit should satisfy the standard. And both international and domestic law articulate aiding-and-abetting standards that cover both juristic and natural individuals.<sup>47</sup>

Positivism, like the deontological approach, shifts the burden of proof: because the law treats both human beings and corporations as individuals, the burden of justification falls to those who carve out an exception for companies. A related positivist rationale would not consider the practice of states internationally but rather the standard company law of most municipal legal systems, which provides a crucial *quid pro quo*: companies receive from the state the benefit of incorporation, meaning the right to exist and to limit the liability of stockholders to the extent of their investment, and, in exchange for that considerable and profitable right, they can be expected to serve the public interest and not abuse their privileges.<sup>48</sup>

The common principle in these positivist approaches is the understanding that international law is not different *in kind* from other sources of obligation for the modern corporation. It is well-established that a corporation might be liable in tort for damages caused by the negligence or intentional acts of its employees,<sup>49</sup> that a corporation can violate the property rights of others and be required to pay damages or to obey an injunction, and that a corporation can be guilty of criminal offenses including conspiracy and aiding and abetting.<sup>50</sup> The human rights norms

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47. The predictable variation at the margins of the international aiding-and-abetting standard—whether within international institutions or among the municipal legal systems around the world—does not undermine its core denotation. In *United States v. Smith*, 18 U.S. 153 (1820), the Supreme Court had to determine the international definition of piracy, and the Court discerned a lowest common denominator among the practice of states and the scholarly consensus. Specifically, the Court acknowledged controversy in some particulars but concluded that “whatever may be the diversity of definitions in other respects, all writers concur in holding that robbery or forcible depredations upon the sea, *animo furandi* [i.e., with the intention to steal] is piracy.” *Id.* at 161 (emphasis added).

48. See DAVID SCIULLI, CORPORATE POWER IN CIVIL SOCIETY 27–28 (N.Y.U. Press 2001) (arguing that U.S. state legislatures historically imputed a duty upon corporations to serve the public interest in every undertaking and in no way viewed them as merely vehicles of profit).

49. See FRANCIS M. BURDICK, THE LAW OF TORTS: A CONCISE TREATISE 145–47 (Charles K. Burdick ed., Banks & Co. 4th ed. 1926). See also RESTATEMENT (THIRD) OF AGENCY § 2.04 (2006).

50. See AMERICAN BAR ASS’N, THE CORPORATE LITIGATOR 643 (Francis J. Burke, Jr. & Michael Goldblatt eds., 1989).

imposed on, or undertaken by, the corporation are similarly compatible with their juristic status.

### III. THE ANALYTICAL CLAIM: THROUGH THE LENS OF *LEX MERCATORIA*

The history of the law merchant is that best commercial practices started as a form of spontaneous or voluntary order and, if they survived, gradually became codified in the commercial law of states,<sup>51</sup> evolving ultimately into international trade law and the U.N. Convention on Contracts for the International Sale of Goods.<sup>52</sup> Contemporary scholars have prolonged a hundred years war over whether the *lex mercatoria* existed independently of municipal law and what its substantive norms—if any—were.<sup>53</sup> There is, however, a wide consensus that the law in its positivist forms eventually replicated certain customary practices at the heart of an effective and ethical transnational business order.

In the sources and content of norms governing corporate responsibility, it is possible to see the emergence of a new *lex mercatoria*—a contemporary variant of the medieval and renaissance law merchant. The *lex mercatoria* was developed and enforced as a tool to promote better business practices through offers of security to consumers and other merchants. The *lex mercatoria* also served an interstitial role, filling the gaps of each jurisdiction's commercial law and harmonizing disparate approaches in

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51. Harold J. Berman & Colin Kaufman, *The Law of International Commercial Transactions* (Lex Mercatoria), 19 HARV. INT'L L.J. 221 (1978) (noting that certain widespread similarities in legal doctrines governing the allocation of risk of loss or damage to goods, standard clauses in bills of lading or letters of credit, and arbitration clauses are “due in part to common commercial needs shared by all who participate in international trade transactions”). See also WYNDHAM A. BEWES, THE ROMANCE OF THE LAW MERCHANT 28–62 (1923) (demonstrating that certain doctrines of contemporary commercial law can be traced through the law merchant and ultimately to medieval business customs, including the enforceability of informal agreements, the rights of a possessor of a bearer bill of exchange, the protection of the good faith purchaser of stolen goods even against the original owner when the goods were bought in the “open market,” the right of a seller to stop the transit of goods if the buyer defaults after shipment, and the right of partners to an accounting). Accord LEON E. TRAKMAN, THE LAW MERCHANT: THE EVOLUTION OF COMMERCIAL LAW 25–26, 33 (1983) (describing similarities between the ancient *lex mercatoria* and the modern Uniform Commercial Code in the United States).

52. Cf. John Honnold, *The Influence of the Law of International Trade on the Development and Character of English and American Commercial Law*, in THE SOURCES OF THE LAW OF INTERNATIONAL TRADE 70, 76 (Clive M. Schmitthoff ed., 1964).

53. See, e.g., Richard A. Epstein, *The Empirical and Theoretical Underpinnings of the Law Merchant: Reflections on the Historical Origins and Economic Structure of the Law Merchant*, 5 CHI. J. INT'L L. 1 (2004); Charles Donahue, Jr., *Medieval and Early Modern Lex Mercatoria: An Attempt at the Probatio Diabolica*, 5 CHI. J. INT'L L. 21 (2004).

different markets and nations. The law's genesis in the customs of the marketplace

was by far the most decisive factor in its development: it made the law eminently a practical law adapted to the requirements of commerce; and as trade expanded and new forms of commercial activity arose—negotiable paper, insurance, etc.—custom everywhere fashioned and framed the broad general principles of the new law. Custom is alike the ruling principle and the originating force of the Law Merchant.<sup>54</sup>

In this way, the *lex mercatoria* became one model for innovation in the introduction of new legal principles and doctrines, originating and evolving from the initiative of merchants who were motivated by a long-term, sophisticated, and mutual self-interest. As a result, key entrepreneurial concepts and practices found their way into the commercial law of states—and ultimately into contemporary international trade law and the U.N. Convention on Contracts for the International Sale of Goods. The international legal order thereby replicated and formalized the ethical business order, rather than displacing, coercing, or pre-empting it.<sup>55</sup>

But there were more than merely utilitarian reasons for the emergence and the stability of *lex mercatoria*: the influence of canon law tended to inject transnational standards of good faith and equity into commercial dealings as well:

Canon law, the body of universal law and procedure developed by the [Roman Catholic] Church for its own governance *and to regulate the rights and obligations of its communicants*, had from the beginning its own sphere of application and separate courts. . . . [But] there was a tendency towards overlapping jurisdiction, and before the Reformation it was common to find ecclesiastical courts exercising civil jurisdiction.<sup>56</sup>

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54. WILLIAM MITCHELL, AN ESSAY ON THE EARLY HISTORY OF THE LAW MERCHANT 12 (1904).

55. See, e.g., INTERNATIONAL CHAMBER OF COMMERCE, INCOTERMS (2000). *Incoterms* is a source of international uniform definitions for commercial delivery terms, which defines the obligations of sellers and buyers regarding shipment and receipt of goods. Because its publisher, the International Chamber of Commerce, is a non-governmental entity, *Incoterms* does not have the legally binding effect of an international treaty. But it does provide a written expression of custom and usage—or best practice—in the industry. Parties to international transactions often expressly incorporate *Incoterms* into their contracts, and even when they do not, courts will occasionally incorporate them. RALPH FOLSOM ET AL., INTERNATIONAL BUSINESS TRANSACTIONS 72 (West 2d ed. 2001).

56. J.F. O'CONNOR, GOOD FAITH IN INTERNATIONAL LAW 25–26 (1991) (emphasis added).

For that reason, it was perhaps inevitable that jurisprudence of the Church would converge with (and to some extent displace) the Roman civil law:<sup>57</sup> the pragmatic need for cooperation, combined with the “spiritual jurisprudence” then ascendant, assured that merchants would act with some sense of mutual restraint in their dealings with one another.<sup>58</sup> As a result, the merchant had to rely on standards of fairness, which changed in accordance with commercial practice. The influence of canon law is illustrated by the fact that by the sixteenth century, virtually every commercial nation in Europe had altered prior doctrine and, in response to the usages of the merchant class, recognized the enforceability of a *bona fide* purchaser’s rights, the validity of sales confirmed by the payment of earnest money, the validity and enforceability of formless contracts, the negotiability of bills of exchange, the obligations of partners and agents, and the necessity of swift justice *ex aequo et bono*.<sup>59</sup> In each of these respects, commercial habits and practices were transformed into legal institutions, doctrines, and codes, with the result that the law was increasingly uniform—even as it became increasingly cosmopolitan and equitable.

The *lex mercatoria* was also distinguished by the ways that its norms were enforced and commercial disputes were resolved. The dominant mode of enforcement was the internalization of norms by entrepreneurs themselves.<sup>60</sup> One determinant of a merchant’s sustained prosperity was his ability to conform to the expectations of the market, which were formalized only over time into law; there were concrete commercial consequences for any merchant insufficiently committed to the abstract standards of good faith that underlay the pragmatic doctrines in the law merchant. When internalization failed and disputes did arise, they were typically resolved by the merchants themselves through mercantile councils and guilds or through informal, expeditious forms of mediation and arbitration—not by professional judges in the formal setting of a courtroom. When a dispute became sufficiently serious or prolonged that the local courts became involved, the law that governed was—directly or indi-

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57. *Id.* at 26. See also 1 FREDERICK POLLOCK & FREDERIC MAITLAND, THE HISTORY OF THE ENGLISH LAW BEFORE THE TIME OF EDWARD I, at 190 (1970) (demonstrating that, in the early medieval period, a “new and Christian tinge” came to color contractual obligations and commercial law generally).

58. TRAKMAN, *supra* note 50, at 7.

59. MITCHELL, *supra* note 53, at 157–58.

60. Cf. Harold H. Koh, *The 1994 Roscoe Pound Lecture: Transnational Legal Process*, 75 NEB. L. REV. 181, 203–06 (1996).

rectly—what the merchants had themselves adopted to facilitate ethical and uniform trade practices.<sup>61</sup>

It will be noted that the *lex mercatoria*, in its original form, effectively blurred the received distinction between self-interest and altruism. Adam Smith fully understood the reinforcing dynamic between these two forces; Smith is commonly invoked by advocates of laissez-faire capitalism who stress those passages in the *Wealth of Nations* that find the “invisible hand” in rational economic actors pursuing their self-interest.<sup>62</sup> That emphasis however ignores the balance at work in Smith’s philosophy, especially in *The Theory of the Moral Sentiments*, which focuses on the innate sense of empathy with which human beings regulate their instinct for acquisitive self-interest.<sup>63</sup> It radically oversimplifies Smith’s theory of capitalism to suggest that individuals in natural or juristic form are exempt from the dictates of conscience or equity; indeed (and perhaps counter-intuitively), the distinction between altruism and self-interest cannot adequately account for the variance in commercial decision-making by individuals, by firms, and by nations. If it did, the ra-

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61. MITCHELL, *supra* note 53, at 156; BERMAN & KAUFMAN, *supra* note 50, at 226–27. For example:

Through the decisions of Lord Mansfield and his successors, there was created a body of judicially declared English commercial law which incorporated and refined rules developed in earlier times throughout Europe. The incorporation of the law merchant added a cosmopolitan dimension to the English common law, without which the common law courts could hardly have served the needs of British commerce.

*Id.* at 226–27.

62. 2 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 477 (Edwin Cannan ed., Univ. of Chicago Press 1976).

[The individual] generally, indeed, neither intends to promote the public interest, nor knows how much he is promoting it. . . . [He] intends only his own security; and by directing that industry in such a manner as its produce may be of the greatest value, he intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention.

*Id.* See also Alan B. Krueger, *Economic Scene: The Many Faces of Adam Smith: Rediscovering ‘The Wealth of Nations’*, N.Y. TIMES, Aug. 16, 2001, at C2 (discussing Emma Rothschild’s view that “Smith has been reinvented as a narrow, unyielding defender of unfettered free enterprise”).

63. ADAM SMITH, THE THEORY OF THE MORAL SENTIMENTS 11 (1759) (“How selfish soever man may be supposed, there are evidently some principles in his nature, which interest him in the fortune of others, and render their happiness necessary to him, though he derives nothing from it except the pleasure of seeing it.”).

tional breach of contracts would be nearly universal, and *pacta sunt servanda* would become the relic of a naïve age.

In sum, *lex mercatoria* comprised a body of authority that was (and remains to this day) transnational in scope, grounded in good faith, reflective of market practices, and codified in the commercial law of the various nations and in international law. Because these features reappear in some emerging forms of commercial law in the twentieth and twenty-first centuries, these new pockets of law have been described as “a” or “the” new *lex mercatoria*.<sup>64</sup> But with consequences not yet fully appreciated by either the corporate community or the human rights community—let alone the academic community—the corporate human rights standards described above offer fertile ground for the emergence of a similarly stable and significant body of commercial standards.

It is clear at the threshold that the market-based initiatives described in Part I reflect the apparent competitive advantages of establishing and projecting a reputation for equitable conduct and a measure of transparency in corporate decision-making. The Kimberley Plan governing the sale of conflict diamonds, the evolution of SA 8000, and the sale of rights-sensitive product lines, *inter alia*, suggest that the market ultimately gives new relevance to international human rights standards in the global economy. It would be neither unprecedented nor illegitimate if what began as the articulation and internalization of best business practices became enforceable legal standards over time, either through domestic regulation, international standard-setting, or, in extraordinary circumstances, the prospect of civil liability. There is, in short, a critical historical connection between best practices in the market and the rules of law: “In all great matters relating to commerce, the legislators have copied, not dictated.”<sup>65</sup>

## CONCLUSION

One critique of this analysis rests on the truth that human rights standards are not yet common business conventions, let alone universal norms. Nor are they conspicuously successful. Nor do they cement the

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64. Examples include, among others, the law of cyberspace. See, e.g., Aron Mefford, Note, Lex Informatica: *Foundations of Law on the Internet*, 5 IND. J. GLOBAL LEGAL STUD. 211 (1997); David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996). Examples also include the norms adopted in transnational arbitration panels. Harold J. Berman & Felix J. Dasser, *The “New” Law Merchant and the “Old”: Sources, Content, and Legitimacy*, in *LEX MERCATORIA AND ARBITRATION* 21 (Thomas E. Carboneau ed., 1990).

65. GOLDSCHMIDT, HANDBUCH DES HANDELSRECHTS 378–79 (1891), quoted in Trakman, *supra* note 50, at 10.

relationship among merchants through reciprocal assurances of commercial good faith. To the contrary, the principal beneficiary of these standards (and the “altruism” behind them) is not the mercantile community itself; it is a labor force, a society, or even an idea. But the genetic marker of the *lex mercatoria* was that seemingly soft notions like good faith evolved into widely accepted standards—standards that became some of the hardest commercial law there is and originated in the notion that a merchant’s self-interest depended on his or her respect for the interests of others. In other words, at the substantive core of this supposedly private law were public values, and at the procedural core of what became commercial law were voluntary undertakings of the merchant class.<sup>66</sup>

It is in addition ahistorical to require that so new a development be wholly formed before it can be taken seriously. In the synergistic dynamic that was the *lex mercatoria*, practices affected rules, which affected practices, which refined rules, and so on over the centuries. This dynamic allowed a communal sense of fairness or equity to emerge and get transformed into doctrinal form. That dynamic is again on display as the business and legal culture changes in response to the four regimes of principle and practice described above. It also suggests that the business community and the human rights community might assist one another in the articulation of a common sense of justice and the development of legal standards to maximize the benefits of compliance at decreasing marginal cost.

In short, human rights entrepreneurialism, the codes of conduct, the ATS litigation in *Unocal* and its progeny, the work of groups like the RiskMetrics Group,<sup>67</sup> and the adoption of domestic and international legal norms reflect a partial, but very real, development at the intersection of the law and the marketplace. Indeed, the corporate human rights initiative mirrors the two dominant faces of globalization: the expansion of international trade and commerce without regard to boundaries and the

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66. See *Bank of Conway v. Stary*, 200 N.W. 505, 508 (N.D. 1924). As stated by the court:

The law merchant is a system of law that [did] not rest exclusively on the institutions and local customs of any particular country, but consists of certain principles of equity and usages of trade which general convenience and a common sense of justice have established to regulate the dealings of merchants . . . in all the commercial countries of the civilized world.

*Id.* at 508.

67. The RiskMetrics Group is a signatory to the United Nations’ Principles for Responsible Investment (“UNPRI”). Principles for Responsible Investment, <http://www.unpri.org/principles/> (last visited June 1, 2008).

universalizing effects of the human rights movement—the only global ideology to survive the twentieth century. Without suggesting that the corporate culture is about to enter some millennial Age of Aquarius, we will see the continued development of broad-based organizations specifically devoted to bringing human rights issues into the corporate boardroom, the modest growth of a consumer- and investor-driven market dynamic that embraces human rights concerns, the imposition of civil and criminal liability in appropriate circumstances, and a continuing transformation in the work of human rights advocates, all of which reinforces the insight that we must not think too simply about corporate decision-making, about human rights law, or about the received distinction between so-called public and so-called private law.

# CORPORATIONS, VEILS, AND INTERNATIONAL CRIMINAL LIABILITY

Ronald C. Slye\*

## INTRODUCTION

When should a corporate entity *itself* be held criminally liable for violations of international law? It is well settled that corporate actions are, and should be, subject to international regulation and that international criminal law applies to individual corporate employees just as it applies to other private, non-state individuals. Still, the issue of corporate criminal liability for international law violations remains unresolved. Corporations are not presently subject to criminal liability under international law. Interestingly, business entities have been subject to *domestic* criminal prosecution for centuries in some states<sup>1</sup> and such liability is relatively uncontroversial. There is no reason that the same form of accountability at the international level should be viewed differently.<sup>2</sup> This Arti-

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1. In fact, corporate criminal liability is found as early as 1670 in France, though it was removed after the French revolution, only to be reimposed in the late nineteenth century with industrialization. For a brief summary of some of the history of corporate criminal liability in domestic legal systems, see Andrew Weissman & David Newman, *Rethinking Criminal Corporate Liability*, 82 IND. L.J. 411, 417–23 (2007) (focusing on history in common law countries).

2. Some argue against holding the corporate entity criminally liable under international law, using the same arguments that were offered at Nuremberg and Tokyo in favor of holding state officials, rather than the state itself, liable for aggression, crimes against humanity, and war crimes. See, e.g., Joseph F.C. DiMento & Gilbert Geis, *Corporate Criminal Liability in the United States*, in RESEARCH HANDBOOK ON CORPORATE LEGAL RESPONSIBILITY 159, 160–61 (Stephen Tully ed., 2007) (noting that individuals, not states, are held criminally liable for violations of international criminal law; also noting that heads of family are not held responsible for criminal acts of family members). Such arguments assume that if one holds the corporation criminally liable one cannot also hold individual corporate employees liable. As I note below, I argue that the one (holding the entity liable) does not preclude the other (holding individuals liable). Arguments for holding states liable for violations of international criminal law do not assume that individuals cannot still also be held criminally liable. Oppenheim, for example, notes that the responsibility of the state is different than the responsibility of the individual. The state's responsibility for the acts of one of its nationals is not "vicarious responsibility *stricto sensu*. The state is in international law not legally responsible for the act itself, but for its own failure to comply with obligations incumbent upon it in relation to the acts of the private person: those acts are the occasion for the state's responsibility for its own wrong-

cle draws upon two different strands of scholarship to illustrate this thesis: corporate accountability under international law<sup>3</sup> and corporate criminal liability in domestic legal systems.<sup>4</sup>

This Article briefly outlines below some general arguments concerning corporations as proper objects of international criminal law. Though this issue appears to have received little attention in international criminal law circles, it has been the subject of a rich and varied conversation in academia, the courts, and legislatures throughout the world. The central inquiry is: under what circumstances should criminal liability be imposed on a collective corporate entity, and what does it mean to hold an entity itself criminally liable? This Article does not tackle all aspects of these questions. Rather, it highlights what are arguably the most important issues raised by any proposal to hold a corporation criminally liable and draws analogies between efforts to hold corporate entities criminally liable for international law violations and recent international human rights and criminal law jurisprudence. International human rights and international criminal law have yet to address directly the question of corporate criminal liability. They have, however, developed some jurisprudence concerning the actions of collectives and groups that provides useful insights into how, and under what circumstances, it might be appropriate to hold a corporate entity criminally liable under international law.

This Article argues for a move to reassert the veil of organizational responsibility for international crimes—an effort that parallels arguments in favor of holding sovereign states criminally liable.<sup>5</sup> Historically, responsibility at the international level focused on the state rather than on individual state officials. Though not the first to break this mold, the

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ful acts, not the basis of its responsibility.” OPPENHEIM’S INTERNATIONAL LAW 501 n.13 (Sir Robert Jennings & Sir Arthur Watts, eds., 9th ed. 1997).

3. See, e.g., Beth Stephens, *The Amorality of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT’L L. 45 (2002) (discussing corporate accountability generally under international law, including civil and criminal liability).

4. See, e.g., CELIA WELLS, CORPORATIONS AND CRIMINAL RESPONSIBILITY (2d ed. 2001); *Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227 (1979) [hereinafter *Corporate Crime*].

5. This Article does not address the question of whether states should be held criminally liable for international law violations or the implications of such liability. Most academic discussion concerning whether to hold states liable for their actions focuses on civil liability. This is not surprising insofar as a number of courts have indeed held states civilly liable for their wrongful acts. Parallels between sovereign state accountability and corporate accountability are worthy of exploration, though this Article does not undertake that inquiry.

Nuremberg and Tokyo Tribunals irrevocably established the proposition that individuals can be held responsible for violating international law, even if their acts are committed on behalf of a state. In other words, German and Japanese officials who ordered and implemented an aggressive war and crimes against humanity could not hide behind the structure of the state, but could be held individually, and criminally, responsible for their official acts. The veil of sovereignty was thus pierced. In one of the most quoted phrases from its judgments, the Nuremberg Tribunal asserted the importance of prosecuting individuals: "Crimes against international law are committed by men, not abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."<sup>6</sup>

In domestic corporate law, it is generally accepted that individual corporate officials and employees may be held liable for wrongful acts committed in a corporate capacity. Like their counterparts in the public sector, individual corporate officials are not immunized behind the veil of their organization. Yet, there is support for the idea that the corporation itself should be held liable for certain actions—many domestic jurisdictions have imposed criminal liability on corporations for decades, and in some cases centuries. These prosecutions have all occurred under domestic law, and have involved violations of, *inter alia*, environmental, labor, tort, and anti-trust law.<sup>7</sup> However, international law has not been applied in similar circumstances to impose criminal liability. This Article will explore whether we should hold a corporate entity *criminally* liable for violations of *international* law, with particular attention to three questions. First, why should the corporate entity, as distinct from corporate officials and employees, be held criminally liable? Second, under what circumstances should criminal liability be imposed upon a corporate entity? Finally, what penalties are appropriate for a corporation criminally

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6. International Military Tribunal (Nuremberg), Judgment and Sentences (Oct. 1, 1946), reprinted in 41 AM. J. INT'L L. 172, 221 (1947).

7. See, e.g., United States v. Overholt, 307 F.3d 1231 (10th Cir. 2002) (conviction of corporation under the Safe Drinking Water Act and the Clean Water Act); People v. O'Neil, 550 N.E.2d 1090 (Ill. App. Ct. 1990) (corporation criminally convicted for death of its employee); United States v. Basic Constr. Co., 711 F.2d 570 (4th Cir. 1983) (holding that a corporation can be held criminally liable for employees' violations of antitrust laws). See also David N. Cassuto, *Crime, War and Romanticism: Arthur Anderson and the Nature of Entity Guilt*, 13 VA. J. SOC. POL'Y & L. 179, 228–29 (2006) (discussing unsuccessful prosecution of Ford Motor Company for reckless homicide on theory that Ford failed to warn consumers regarding fire risks related to the design of the vehicle). For additional discussion, see Judy K. Broussard, Note, *The Criminal Corporation: Is Ohio Prepared for Corporate Criminal Prosecutions for Workplace Fatalities?*, 45 CLEV. ST. L. REV. 135 (1997).

convicted of an international crime? Before turning to these questions, Part I briefly addresses whether corporations are subject to international criminal law at all.

#### I. BACKGROUND: RIGHTS AND DUTIES OF CORPORATIONS UNDER INTERNATIONAL LAW

While there is some debate concerning whether corporations are or should be subject to regulation under international law,<sup>8</sup> this Article proceeds as though they are and should be. There is no question that corporations enjoy rights under international law, including rights under international human rights treaties.<sup>9</sup> Two examples illustrate this point. Corporations have rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>10</sup> and have brought claims before the European Court of Human Rights (“ECHR”) alleging that these rights have been violated.<sup>11</sup> Corporations may also bring international claims against the United States, Mexico, and Canada under the North American Free Trade Agreement.<sup>12</sup>

Corporations are also subject to obligations under international law, both directly and indirectly. For example, liability was imposed directly on ship “owners”—usually corporations—as early as 1969 under the International Convention on Civil Liability for Oil Pollution Damage.<sup>13</sup> Indirect obligations are suggested by the broad language found in the

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8. For a brief introduction to some of the debate, and a criticism of the direct versus indirect distinction I adopt here, see Carlos M. Vazquez, *Direct vs. Indirect Obligations of Corporations Under International Law*, 43 COLUM. J. TRANSNAT'L L. 927 (2005).

9. Initially corporations were more likely to assert their rights—usually concerning property rights against foreign governments—before ad hoc claims commissions. Prior to the development of commissions before which corporations could appear, corporations, like other private individuals, relied upon states to espouse their claims. Charles M. Spofford, *Third Party Judgment and International Economic Transactions*, 3 RECUEIL DES COURS 116, 177–81 (1964) (giving examples of corporations using international arbitration mechanisms against other entities, including states).

10. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222.

11. See, e.g., Agrotexim and Others v. Greece, 330 Eur. Ct. H.R. 3 (ser. A) (1996) (holding that in fact the company, and not its shareholders, is the proper rights holder); The Sunday Times Case, 30 Eur. Ct. H.R. (ser. A) (1979).

12. North American Free Trade Agreement arts. 1115–1138, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993).

13. The Treaty has been amended numerous times, most thoroughly with a Protocol in 1992. See Protocol of 1992 to Amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, Nov. 27, 1992, 1953 U.N.T.S. 330. None of these amendments have changed the fact that owners of ships, who usually are corporations, are liable for damages arising from oil pollution.

preamble to the United Nations Universal Declaration of Human Rights, which states that “every *individual* and every *organ of society*” has an obligation to promote respect for the rights in the declaration.<sup>14</sup> International law also requires states to regulate their nationals, including corporations, thus imposing indirectly on corporations obligations rooted in international law.<sup>15</sup> Sometimes in fulfillment of these obligations, and sometimes on their own initiative, states impose liability on their corporate nationals for acts committed outside of their territory.<sup>16</sup>

Given that corporations clearly enjoy rights under international law, and insofar as corporations are already subject to liability under international law, either directly or indirectly, it follows that corporations should be subject to certain duties and obligations under international *criminal* law. It would be illogical to grant corporations rights under international law, including international human rights law, while simultaneously allowing them to avoid responsibility for the most egregious violations of that same body of law.<sup>17</sup>

## II. WHY HOLD THE CORPORATION LIABLE?

Individual corporate officials and other employees may be held civilly and criminally liable for violations of international law. As early as Nuremberg, corporate officials were prosecuted for their involvement in

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14. Universal Declaration of Human Rights, G.A. Res. 217A, pmb., U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948). The Universal Declaration of Human Rights of course is not itself a source of binding international law. While it is clear that a good deal of the Declaration now reflects customary international law, this is less clear with respect to organizational liability. For the purposes of this Article, I do not take a position on this question.

15. See, e.g., Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal art. 4, Mar. 22, 1989, 1673 U.N.T.S. 125; Convention on Combating Bribery of Foreign Officials in International Business Transactions, Dec. 17, 1997, S. TREATY DOC. NO. 105-43, 37 I.L.M. 1 (obligating state parties to exercise jurisdiction over extraterritorial conduct of their nationals).

16. Thus the United States imposes criminal liability for bribery committed by U.S. nationals (both natural and legal) anywhere in the world. Foreign Corrupt Practices Act of 1977 § 104, 15 U.S.C. § 78dd-1 (2008). The Australian Criminal Code Act of 1995 criminalizes slavery, including “any transaction involving a slave.” Criminal Code Act, 1995, § 270 (1995) (Austl.), available at [http://www.austlii.edu.au/au/legis/cth/consol\\_act/cca1995115/sch1.html](http://www.austlii.edu.au/au/legis/cth/consol_act/cca1995115/sch1.html).

17. For a good summary of some of the arguments concerning the wisdom of imposing liability on corporations under international law in both the civil and criminal context, see Stephens, *supra* note 3.

crimes against peace, war crimes, and crimes against humanity.<sup>18</sup> The issue there was not the application of international law to corporations; rather, it was the application of international law to private non-state actors. There is no question that private non-state actors can be held liable for violations of international criminal law.<sup>19</sup>

Given that individual employees of a corporation can be prosecuted for international criminal law violations (and, to paraphrase the Nuremberg judgment, it is people, not corporations, who commit crimes), what would be the benefit of prosecuting the corporate entity itself? Corporations, in addition to officials or other employees, should be held criminally liable for three reasons: (1) collective action is likely to result in greater harm than individual action; (2) the individual actions of each corporate employee may be insufficient to hold any one of them liable under international law, even though a wrong has clearly been committed; and (3) effective deterrence of collective actions requires systemic punishment.<sup>20</sup> As will be discussed in detail in the following discussion, these three arguments are not alternatives, but instead build upon each other sequentially. The first recognizes that individuals acting collectively can cause far more damage than any one individual acting alone. This observation is central to the definition of most international crimes, and is usually reflected in the chapeau element of each. The second focuses on a class of crimes that falls outside of the traditional international criminal law approach aimed at individual culpability. These are a subset of those crimes committed by collectives of individuals. The third posits that the primary way to address this subset of collective crimes is to hold the entity itself accountable, which will more effectively deter similar wrongdoing. Such organizational liability may decrease those collective crimes already captured by international criminal law.

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18. See, e.g., The Zyklon B Case (Trial of Bruno Tesch and Two Others), 1 Law Rep. of Trials of War Criminals 93 (Brit. Mil. Ct. 1946) (holding German industrialists liable for the provision of Zyklon B to Nazi concentration camps).

19. See, e.g., United Nations Convention on the Prevention and Punishment of the Crime of Genocide art. IV, Jan. 12, 1951, 78 U.N.T.S. 277 (private individuals may be liable for genocide).

20. Some might argue that if we hold the entity itself liable we should not also hold individual corporate employees liable. I do not adopt this position. There are important reasons for allowing prosecution of both the entity and individual employees, though in any one case a prosecutor may reasonably decide to only pursue one type of defendant. For my purposes here, however, I focus on the possibility of holding the entity liable independent of whether we also hold employees liable.

*A. Collective Action Compared to Individual Action*

Corporations wield enormous power; they can, and have, caused significant harms. In addition to wielding enormous economic power,<sup>21</sup> corporations increasingly engage in state-like activity as a result of the privatization of traditional state functions (e.g., the management of prisons, public welfare programs, public utilities, and wars) and the tendency of corporations to elect to operate in environments where state power is weak or non-existent.

The rise of the corporation is analogous to the rise of the modern nation-state—both unite individuals for a common purpose, and both result in entities with an enormous potential for good or ill. The modern human rights movement arose out of a desire to protect the individual from the misuse of power by the modern state, an entity that also provided, and continues to provide, enormous benefits to modern society. While there are significant differences between states and private business corporations, the concern for the protection of individual rights and well-being that arose in response to the concentration of power in the state similarly applies to the concentration of power in the corporation.

International criminal law recognizes the special nature of violations committed by organized groups. The four major international crimes—war crimes, crimes against humanity, genocide, and aggression—all require collective action.<sup>22</sup> The chapeau element of two of these four crimes incorporates a collective action requirement.<sup>23</sup> The third, genocide, does not expressly require collective action, though in practice genocide usually involves collective action.<sup>24</sup> The fourth, aggression,

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21. The annual revenues of the wealthiest corporations exceed the gross domestic product of all but the wealthiest countries. See Jonathan Clough, *Not-So-Innocents Abroad: Corporate Criminal Liability for Human Rights Abuses*, 2005 AUSTL. J. HUM. RTS. 1 (citing to studies showing that close to half of the largest economies in the world are those of multinational corporations).

22. The one major exception to this is torture, which can be committed by a lone state official. There is also some question whether genocide could be committed by one person. See, e.g., Prosecutor v. Akayesu, Case No. ICT-96-4-T, Judgment n.61 (Sept. 2, 1998) (“a person could be found guilty of genocide without necessarily having to establish that genocide had taken place throughout the country concerned”).

23. For example, International Criminal Court (“ICC”) Statute article 7 requires a “widespread or systematic attack directed against any civilian population” for crimes against humanity and article 8’s definition of war crimes requires a plan, policy, or large-scale commission of such crimes. See Rome Statute of the International Criminal Court arts. 7, 8, July 17, 1998, 2187 U.N.T.S. 90, available at <http://untreaty.un.org/cod/icc/statute/romefra.htm> [hereinafter Rome Statute].

24. *But see supra* note 23, raising the question of whether a person acting alone could commit genocide.

requires state involvement.<sup>25</sup> This recognition of the power of collectives has not, however, lead to the assertion of international criminal jurisdiction over entities, including corporations. Instead, the response has been to increase individual criminal liability for individuals who participate in such widespread or systemic crimes. We thus attribute to the individual the actions of other individuals that are part of the collective organization.<sup>26</sup> This Article does not argue against such a flow of responsibility, but instead maintains that responsibility should likewise flow in the other direction, from the individual to the organization.

#### *B. Individual Actions May Be Insufficient to Impose Liability*

While international criminal law has addressed the collective nature of these crimes by enhancing individual criminal liability, it fails to adequately capture all crimes committed by a group, especially formal organizations. For example, individuals may suffer a harm committed by a corporation, but no single person has acted with the requisite mens rea and actus reus to be held criminally liable. Even if there is no question that a harm has been committed by a collective, we can not hold any one individual criminally liable for that harm if the elements of the crime are not satisfied. In other words, individual actions may not trigger individual liability, but in the aggregate they may add up to a criminal act.

The notion that the whole may be greater than the sum of its parts with respect to liability is not new. Charles Abbott observed as long ago as 1936 that “a corporation has a personality of its own distinct from the personalities which compose it, a ‘group personality’ different from and greater than . . . the sum of its parts,”<sup>27</sup> and “[i]n the same way that a house is something more than a heap of lumber and an army something more than a mob . . . a corporate organization is something more than a number of persons.”<sup>28</sup>

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25. See generally U.N. G.A. Res. 3314 (XXIX), U.N. Doc. A/RES/3314 (Dec. 17, 1974). Article 5.1(d) of the Rome Statute places the crime of aggression within the jurisdiction of the ICC, however, parties have not yet agreed on an operative definition. Rome Statute, *supra* note 23, arts. 5.1–5.2.

26. This was in fact the general approach adopted in the negotiations for the Rome Treaty creating the ICC, which rejected a proposal to include juridical persons within the court’s jurisdiction. See Andrew Clapham, *The Question of Jurisdiction Under International Criminal Law over Legal Persons: Lessons from the Rome Conference on an International Criminal Court*, in *LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW* 139, 145 (M. Kamminga & S. Zia-Zarifi eds., 2000) (noting that the Rome Statute incorporates the idea of “criminalizing the individual participation in a crime committed by a collective entity”).

27. CHARLES ABBOTT, THE RISE OF THE BUSINESS CORPORATION 2 (1936).

28. *Id.* at 15.

Collective action and organization theory makes clear that organizational decisions do not necessarily reflect the preference of any individual within the organization. Instead, organizations often reach a decision through a process of bargaining and concessions among different interest groups.<sup>29</sup> Group decisions may be determined as much by the structure of the decision-making process as by the individual or collective preferences of individuals. Voting theorists have known this for a while—the structure of a voting process has a strong influence on the outcome of a particular vote, thus alterations in the voting process may lead to opposing decisions even though the preferences of individual voters remains the same.<sup>30</sup> This suggests something akin to a collective or institutional responsibility that is more than the aggregated responsibility of each individual who makes up the organization.

### C. Effective Deterrence Requires Systemic Punishment

Holding individual corporate officials and employees criminally liable may not adequately deter certain corporate wrongdoing and harms and there may not be sufficient individual culpability to successfully prosecute any one individual. If harms result from the collective action of individuals whose individual acts are not themselves blameworthy, how does one establish accountability for those harms? How does one express societal disapproval, deter future such harms, and rehabilitate the wrongdoer? When it comes to organizational actions that result in harm, sanctioning the entity itself will be more effective in influencing behavior than prosecuting isolated individuals. If the harm one seeks to deter is created by the aggregation of individual acts that are otherwise innocent (or at least not clearly culpable), or if the harm is created by a policy, system, or decision-making process, placing accountability on the aggregate actor rather than individual actors will create more effective deterrence. A focus on holding the corporation responsible is more likely to result in systemic reforms that may be necessary to prevent future harms than is a focus on individual criminal behavior.

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29. See, e.g., MEIR DAN-COHEN, RIGHTS, PERSONS, AND ORGANIZATIONS: A LEGAL THEORY FOR BUREAUCRATIC SOCIETY 33 (1986) (discussing and citing to some of the literature on organizational theory).

30. See, e.g., KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (Yale Univ. Press 1963) (1951) (one of the major contributors to a complex understanding of voting theory and how, among other things, voting systems influence outcomes). Compare to the school of interest group theory, which also attempts to explain collective preferences and outcomes, and is most often associated with George Stigler. See George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971).

### III. UNDER WHAT CIRCUMSTANCES SHOULD AN ENTITY BE HELD LIABLE?

When an act or result should be imputed to a corporation and trigger criminal liability is a question that many domestic jurisdictions have addressed. There are four general approaches to determine when an act should be attributed to a corporation for purposes of criminal liability. In the first approach, which derives from the doctrine of respondeat superior, the act of any employee is attributed to the corporation. This theory has been adopted in U.S. law, in which the Supreme Court has held that a corporation can be criminally liable when an employee commits a crime within the scope of her employment and, in some variations, with the intent to benefit the corporation.<sup>31</sup>

Typically, liability is imposed if the individual was acting within the scope of the authority of the corporation and consistent with the powers delegated to that specific individual. But, suppose an employee acts outside her authority or contrary to an internal policy. Under Canadian law, a corporation cannot cite to an internal rule that prohibits the act as a defense.<sup>32</sup> U.S. law is similar, finding corporate liability for the act of a corporate employee even if there is a specific internal rule prohibiting the act.<sup>33</sup> Not allowing the corporation to cite its internal rules as a defense creates a heightened incentive for the organization to ensure that its rules are enforced; it also precludes a company from avoiding liability when it prohibits certain activity on paper but allows it in practice.

Most jurisdictions preclude corporate liability for the acts of employees that were not intended to, or do not, benefit the organization, such as embezzlement.<sup>34</sup> In the human rights context, one might ask if a corporation should be held liable if an employee assists in, for example, a war crime and the corporation is harmed by that involvement through adverse publicity. On the one hand, it seems unfair to hold the corporation liable for an unsanctioned act that harms its public image. On the other hand, if the corporation does not have clear processes in place to prevent, or detect and punish, such activities, holding the corporation liable may create an incentive to implement such controls, thus furthering deterrence.

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31. In the United States, imputing the mental state of a corporate officer to the corporation was first established by statute (the Elkins Act), which was upheld by the Supreme Court. N.Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481 (1909). See also United States v. Ill. Cent. R.R., 303 U.S. 239 (1938); Standard Oil Co. v. United States, 307 F.2d 120, 125 (5th Cir. 1962).

32. See, e.g., *Dredge v. R.*, [1985] 1 S.C.R. 662 (Can.).

33. See *United States v. Beusch*, 596 F.2d 871, 878 (9th Cir 1979).

34. See, e.g., *Corporate Crime* *supra* note 4, 1250 n.34 (citing to U.S. cases requiring benefit to corporation).

In the second approach to corporate criminal liability, only acts of certain high level officers or managers are attributed to the corporation. The focus of this approach is on the acts of the “brains” of the organization—in other words, only those acts committed by employees with decision-making authority are attributed to the organization and may trigger organizational liability. The acts of low-level employees—the “hands” or “labor” of the organization—will not be attributed to the corporation.<sup>35</sup>

One of the foremost authorities on corporate criminal liability, Celia Wells, criticizes this approach. She warns that the distinction between brains and labor is a rhetorical device that “has been used to justify the class structure, educational inequalities, and the division of labour between manual and intellectual worker.”<sup>36</sup> However, the fact that some have used the distinction between intellectual and physical abilities to justify discriminatory treatment does not mean that such distinctions are either inaccurate as a descriptive matter or that they are not useful in some contexts. Within the context of corporate criminal liability, and certainly within the context of international criminal law, there is value in distinguishing between the brains of an operation and those who merely execute. In fact, international criminal law generally emphasizes a preference for prosecuting those at the highest level of responsibility rather than “foot soldiers.”<sup>37</sup>

Crucial to this second approach is the determination of what acts will in fact be attributed to the brains of a corporation. This question is not

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35. See, e.g., *id.* at 1242 (setting forth this theory in the context of U.S. jurisprudence). See also *Tesco Supermarkets Ltd. v. Nattrass*, [1972] A.C. 153 (H.L.) (United Kingdom adopting this approach).

36. WELLS, *supra* note 4, at 154.

37. See Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea art. 1, amended Oct. 27, 2004, Royal Decree No. NS/RKM/1004/006 (Cambodia), available at [http://www.eccc.gov.kh/english/cabinet/law/4/KR\\_Law\\_as\\_amended\\_27\\_Oct\\_2004\\_Eng.pdf](http://www.eccc.gov.kh/english/cabinet/law/4/KR_Law_as_amended_27_Oct_2004_Eng.pdf) (“The purpose of this law is to bring to trial senior leaders . . . and those who were most responsible . . .”). See International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 [ICTY], Rules of Procedure and Evidence, Rule 11bis, May 30, 2006, IT/32/Rev. 38 (encouraging referral to state courts of prosecutions of low-level defendants). The moral philosopher Agnes Heller adopted the distinction between “evil” and “bad” people. Evil people are those who have decision-making power—they have a choice and choose evil. Bad people are those who are subordinate to evil people—they commit wrongful acts, but have less choice. Agnes Heller, *The Natural Limits to Natural Law and the Paradox of Evil*, in *ON HUMAN RIGHTS* 149, 155–57 (S. Shute & S. Hurley eds., 1993). International criminal law has in fact adopted a similar distinction, emphasizing the importance of prosecuting leaders and architects over subordinates and “foot soldiers.”

unlike the question in international criminal law concerning the responsibility of superiors for the acts of their subordinates, and in fact domestic corporate criminal law adopts an approach similar to that adopted in international criminal law. The United States Supreme Court has stated that an individual corporate officer may be held liable if he occupied a position of “responsibility and authority” and had the power to prevent the wrong through the exercise of the “highest standard of foresight and vigilance.”<sup>38</sup> The Council of Europe adopted a similar position in a convention concerning corruption, which imposes criminal liability on the corporate entity itself when an employee was convicted of a crime if the natural person had a “*leading position* and had a power of *representation*, or *authority to take decisions*, or authority to exercise *control* or where there has been *lack of supervision* by this natural person.”<sup>39</sup> Under international criminal law, a similar standard exists with respect to military superiors. The Statute of the International Criminal Tribunal for Rwanda (“ICTR”) states that a superior is liable for the acts of his subordinate “if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.”<sup>40</sup> Military commanders thus can be held liable for the acts of their subordinates if they had actual knowledge or if they were negligent in not discovering such knowledge.<sup>41</sup>

The Statute of the International Criminal Court (“ICC”) adopts two different standards for military and civilian superiors with respect to responsibility for the acts of their subordinates. For military superiors the standard is the “knew or should have known” standard like that articulated in the ICTR Statute.<sup>42</sup> For civilians, the standard is that the superior either knew or “consciously disregarded information” that indicated the

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38. *United States v. Park*, 421 U.S. 658, 672–74 (1975).

39. See Clapham, *supra* note 26, at 153 n.26 (discussing the Council of Europe’s Criminal Convention on Corruption).

40. Statute of the International Criminal Tribunal for Rwanda [ICTR] art. 6(3), S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994).

41. Not all articulations of superior responsibility in the military context adopt this negligence standard. Protocol I to the 1949 Geneva Conventions, for example, states that a military superior is liable “if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.” Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 86(2), June 8, 1977, 1125 U.N.T.S. 3. The ICTR standard more accurately reflects current international law on the issue.

42. Rome Statute, *supra* note 23, art. 28(a).

subordinate was acting criminally.<sup>43</sup> This is a weaker standard than that adopted by the United States Supreme Court in the corporate criminal context, which is more like the test for military officers—it creates an incentive for the superior to search out information (compare “highest standards of foresight and vigilance” with “had reason to know”). In contrast, the ICC civilian standard does not create any such incentive because liability attaches if the superior *consciously* disregards available information.

The final two approaches to determining when an act should be attributed to a corporation for purposes of criminal liability take a more holistic approach to the corporate entity. A study of corporate criminal liability in the late 1970s noted the prevalence of jury cases in which a corporation was found criminally liable even though all of the individual corporate officers were acquitted.<sup>44</sup> Such verdicts suggest a theory of liability in which the whole is greater than the sum of its parts<sup>45</sup>—that in some cases, even though no one individual is clearly culpable for a criminal act (or juries feel uncomfortable holding them criminally responsible), someone, in this case the entity, should bear responsibility.

The third approach focuses on the procedures, policies, and culture of the corporation. This approach is the most collective, focusing on the corporation as an entity. It analogizes the internal mental processes of an individual with the internal organizational policies of a corporation. There are two variations of this approach. The first would require that one show that the procedures and practices of the corporation *created* the wrongful conduct—i.e., that there is a causal connection between corporate policies and the wrongful activity.<sup>46</sup> The second would require that one show how the procedures or policies did not and could not prevent such activity.<sup>47</sup> This second variation places a higher burden on the cor-

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43. *Id.* art. 28(b).

44. *Corporate Crime*, *supra* note 4, at 1248.

45. Of course an equally plausible, and in fact more likely, explanation is the desire of a jury to hold someone accountable for a wrong, but the reluctance to criminally punish any one individual. It could be that there is not enough evidence to attribute morally wrongful behavior to any one individual, but recognition that individual acts resulted in a harm that should be remedied.

46. This is the approach adopted by the United Kingdom in the recently enacted Corporate Manslaughter and Corporate Homicide Act, which provides that a corporate entity may be liable for manslaughter if “the way in which its activities are managed or organized by its senior management is a substantial element in the breach [of a relevant duty owed by the corporation].” Corporate Manslaughter and Corporate Homicide Act, 2007, c. 19, § 1(3) (U.K.).

47. For further articulation and examples of the two variations of this approach, see *Corporate Crime*, *supra* note 4, at 1243. The author articulates three different theories of

porate entity, increasing the collective responsibility of the corporation for the individual acts of its employees. This variation is similar to other areas of the law under which individuals may lose important interests if they do not take reasonable precautions, such as one finds in the doctrines of adverse possession with respect to real property and due diligence in the case of lost personal property.<sup>48</sup> Under U.S. securities laws, corporate officers can be held liable for “knowingly fail[ing] to implement a system of internal accounting controls” that meet a minimum set of standards for corporate accounting transparency and control.<sup>49</sup> Such a theory is not completely foreign to international human rights law. In *McCann v. United Kingdom*, a case brought against the United Kingdom for the killing of suspected IRA terrorists in Gibraltar, the ECHR concluded that the individuals who killed the suspects were not responsible for the deaths because they acted reasonably given what they were told by their superiors.<sup>50</sup> The court did, however, find that those who organized the operation were responsible for the deaths, and that the killings thus violated the right to life of the suspects because the design of the operation made it highly likely that the operatives in the field would shoot to kill in almost all circumstances.<sup>51</sup> In other words, it was the overall design of the operation that was found to have caused the deaths, rather than the individual actions of the persons pulling the trigger.

The fourth and last approach is similar to the third approach, but rather than looking at corporate systems, it aggregates the individual acts of various employees. Under this approach a corporation may be held liable for a crime even though the conduct of no one person satisfies all the elements of the crime. In other words, the actus reus and mens rea do not have to reside within the same person. Celia Wells offers an illustration of this approach: “[T]he question would not be whether employee *X*'s knowledge plus employee *Y*'s knowledge *added up to* recklessness . . . but whether, given the information held amongst a number of ‘responsible officers,’ it can be said that the corporation itself was reckless.”<sup>52</sup> Suppose, therefore, that employee *X* knows that a community of people

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corporate criminal liability. The third “proposes that a corporation is blameworthy only when its procedures and practices unreasonably fail to prevent corporate criminal violations,” and “a corporation is blameworthy when its practices and procedures are inadequate to protect the public from corporate crimes.” *Id.*

48. See 3 AM. JUR. 2d *Adverse Possession* § 43 (2008); 1 AM. JUR. 2d *Abandoned, Lost, and Unclaimed Property* § 32 (2008).

49. Securities Exchange Act of 1934 § 13, 15 U.S.C. § 78m(b)(5) (2008).

50. *McCann v. United Kingdom*, 324 Eur. Ct. H.R. (ser. A) ¶¶ 210–13 (1996).

51. *Id.* ¶ 211.

52. WELLS, *supra* note 4, at 156.

live near a dam. Employee *Y* enters into a contract with another company to destroy the dam, is under the impression that no individuals live near the dam, and informs the company of this fact. Under this approach the corporation of which *X* and *Y* are a part would be liable for the deaths caused by the destruction of the dam. (The company that actually destroyed the dam may of course also be liable.) Note also that a focus on the communication system of the corporation might lead to a similar finding of liability under the third approach. For example, a trucking company was found liable for violating a federal regulation that prohibited truckers from driving while ill. The driver had told the company's dispatcher that he could not drive, but then changed his mind when informed of the company's policy concerning absences. The court concluded that the corporate officers knew that the new policy they had implemented would encourage drivers to drive while ill and thus they were responsible for their employee's violation of that federal regulation.<sup>53</sup>

This fourth approach raises some other interesting questions. For example, could one aggregate across corporate entities? In other words, could one hold a collection of corporate entities (a joint venture for example) criminally liable for certain activities even if it was not possible to hold any one individual corporate entity responsible? With respect to individual criminal liability, the third approach may suggest imposing liability on the individual or individuals who designed the decision-making process or procedures of the organization, even if they were not directly involved in the actual decisions that resulted in the wrongful activity. Just as we hold individuals or companies liable for defective design in the U.S. tort system, so too should those who create defective decision-making systems be held liable.<sup>54</sup> As in the product liability context, one would want to show at least negligence, if not actual knowledge and foreseeability, of the consequences of a systemic design flaw in a corporate decision-making system.

#### IV. PENALTIES AND SANCTIONS

Thus far this Article has suggested reasons for holding a corporate entity criminally accountable for violations of international law and the circumstances under which we might want to do so. The next logical question is what does it mean to hold a corporation criminally liable? In other words, what penalty can be imposed on a corporate entity? Is the

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53. See *Corporate Crime*, *supra* note 4, at 1249 (citing United States v. T.I.M.E.-D.C., Inc., 381 F. Supp. 730 (W.D. Va. 1974)).

54. For an explanation of design defect liability, see TERRENCE F. KIELY & BRUCE L. OTTLEY, UNDERSTANDING PRODUCTS LIABILITY LAW 126 (2006).

penalty sufficiently different from non-criminal penalties (such as fines) to justify the higher burden of proof and additional procedural protections afforded to criminal defendants under both domestic and international law?

Penalties to consider are fines, restraints, structural injunctions, publicity, equity awards, and dissolution. Fines are the most common, but are also easily imposed through civil liability. One difference between criminal and civil fines is the criminal label attached to the former. This may result in increased deterrence, public shaming, and some satisfaction of a desire for retribution. There is some evidence that attaching the criminal label to a fine is viewed more seriously by the person being fined, and thus may have a greater deterrence value than civil fines.<sup>55</sup> Labeling a fine criminal and identifying an individual or entity as such publicly shames the individual or organization. This can be viewed as a weak form of punishment, a strong expression of public condemnation, or a weak form of retribution.

A fine's effectiveness is obviously dependent on its size. A small insignificant fine risks having little, if any, impact on a corporation—it runs the danger of being just one additional cost of doing business. A fine that is too large, however, risks weakening the corporation in a way that may be detrimental to its legitimate business activities, and thus socially wasteful. Of course, if the corporation's main business is illegal, then such concerns are lessened or non-existent. There are various solutions to the size problem. First, instead of setting a predetermined absolute amount for a fine, the amount could be calculated as a percentage of corporate income, assets, or some other measure of economic size. The disadvantage of this approach is that the amount of the fine for the same wrongful activity will vary depending on the corporation's size, which raises the problem of horizontal inequity. Second, the fine could be tied to the economic benefit the company derived from its illegal activity, such as the revenue or profits generated by the illegal activity. To emphasize its punitive nature, and to forestall the corporation from viewing the fine as an additional cost of doing business, the fine would have to be more than one hundred percent of the revenues or profits.<sup>56</sup>

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55. See V.S. Khanna, *Corporate Criminal Liability: What Purpose Does it Serve?* 109 HARV. L. REV. 1477, 1497–1512 (1996) (discussing the reputational effect of criminal and civil sanctions on individuals and corporations, though concluding that in most cases involving corporations the stigma associated with criminal sanctions is similar to that of civil sanctions). For a discussion more sympathetic to the power of the stigma of corporate criminal sanctions, see *Corporate Crime*, *supra* note 4, at 1365.

56. While conceptually these two approaches are appealing, one should not underestimate the practical issues concerning the measurement of revenues and profits—

Restraints, also sometimes referred to as incapacitation or probation, usually involve injunctions that prevent a corporation from engaging in a particular type of activity, either temporarily or permanently. A company could be prohibited from operating in a particular country or from engaging in a particular activity in a country or region. For example, if a corporation involved in the resource extraction industry (i.e., oil, mining) is found complicit in a crime against humanity, the company could be prohibited from operating in the country where the violations occurred. Alternatively, the corporation could be placed on “probation” during which its activities would be monitored by a court or other independent agency.<sup>57</sup> These probationary monitoring controls could be implemented and overseen by a domestic agency of the company’s place of incorporation (such as the U.S. Treasury Department or the Securities and Exchange Commission), an international organization (such as the United Nations High Commissioner for Human Rights or the International Labour Organization), non-governmental organizations (such as a consortium of human rights organizations), or some combination thereof.

A structural injunction may be used to restructure internal corporate systems and decision-making processes.<sup>58</sup> This penalty is most effective when the basis of liability is systemic—and thus would be most appropriately paired with the third approach to corporate criminal liability described above in Part III.<sup>59</sup>

Adverse publicity orders require that a corporation publicly acknowledge its wrongdoing.<sup>60</sup> This can take the form of a simple acknowledg-

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corporations have some discretion to inflate or deflate the reported measure of their economic activity. Thus, to be effective, fines should be determined using an independent accounting mechanism.

57. See, e.g., 3 AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE, standard 18-3.14 (3d ed. 1994), available at [http://www.abanet.org/crimjust/standards/sentencing\\_blk.html#2.6](http://www.abanet.org/crimjust/standards/sentencing_blk.html#2.6) (contemplating probationary oversight as a response to corporate criminal conduct, though suggesting that such monitoring should not extend to “the legitimate ‘business judgment’ decisions of the organization’s management or its stockholders or delay such decisions”).

58. For a brief discussion of such a punitive injunction, see Brent Fisse & John Braithwaite, *The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability*, 11 SYDNEY L. REV. 468, 501 (1988).

59. See *supra* notes 49–50 and accompanying text. Such restructuring is contemplated in the United Kingdom’s newly enacted Corporate Manslaughter and Corporate Homicide Act. Corporate Manslaughter and Corporate Homicide Act, 2007, c. 19, § 9 (U.K.).

60. See Patrick Hamilton, *Corporate Criminal Liability for Injuries and Death*, 40 U. KAN. L. REV. 1091, 1101 (1992) (discussing adverse publicity orders). See generally Brent Fisse, *The Use of Publicity as a Criminal Sanction Against Business Corporations*, 8 MELB. U. L. REV. 107 (1971) (discussing and supporting adverse publicity orders). The United Kingdom’s recently enacted Corporate Manslaughter and Corporate Homicide

ment of wrongdoing ("Corporation *X* admits to having aided crimes against humanity in country *Y*"), but could also include more detail about the nature of the offense, details about other sanctions that may have been imposed, and the steps the corporation has taken to prevent future similar occurrences. The more detail and information required by such orders, the more likely it is that such orders will be viewed as punitive (and thus satisfy retributivists) and the more likely it is that they may lead to corporate reforms and contribute to deterrence.

Equity awards consist of the issuance of new shares in the corporation to victims.<sup>61</sup> In other words, victims of a corporate crime are given an ownership interest in the company. Such a penalty has two clear effects. First, by diluting the investment of existing shareholders it imposes a cost on the corporation's owners. Second, it ties the economic well being of victims to the economic well being of the corporation. The first point I take to be uncontroversial. Imposing a cost on shareholders for corporate wrongdoing makes as much economic sense as allowing shareholders to benefit from a corporation's legal activities.<sup>62</sup> The second point highlights a potential drawback of this type of sanction. Some victims, and possibly many of them, would be offended by the idea of reaping an economic benefit from a corporation that engaged, for example, in a crime against humanity of which they were the victims.<sup>63</sup>

Dissolution is the corporate equivalent of capital punishment. It is a punishment usually reserved for those corporations whose primary purpose is illegal. The U.S. Sentencing Commission contemplates such a punishment in cases where the corporation is not engaged in any legiti-

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Act allows imposition of such adverse publicity orders. Corporate Manslaughter and Corporate Homicide Act, 2007, c. 19, § 10 (U.K.) (granting the court power to make a "publicity order").

61. See, e.g., New South Wales Law Reform Commission, Report 102 (2003), *Sentencing: Corporate Offenders* § 7 (discussing equity fines), available at <http://www.lawlink.nsw.gov.au/lrc.nsf/pages/r102chp07>. See also John C. Coffee, Jr., "*No Soul to Damn, No Body to Kick*": An Unscandalized Inquiry into the Problem of Corporate Punishment, 79 MICH. L. REV. 386, 413 (1980) (proposing and discussing equity fines).

62. Holding shareholders accountable in this way assumes either that shareholders may be able to influence management (to make sure that they do not engage in illegal activity) or that they may easily learn of such activity allowing them to exit by selling their interest. With the exception of closely held corporations or large institutional investors, neither of these assumptions is clearly warranted.

63. One victim in South Africa, for example, told an interviewer that she would not want money from the person who killed her husband. She explained that if she used that money to buy a house, for example, the house would always remind her of her loss and of the perpetrator. Interview with Anonymous Victim, in Cape Town, S. Afr. (Nov. 28, 2003).

mate business.<sup>64</sup> While dissolution may provide some satisfaction, without the imposition of criminal sanctions on individual officers or the inclusion of restraints on the future activity of the former officers, those same individuals could create a new corporation to engage in similar activity.

#### CONCLUSION

While corporate criminal liability is controversial in the context of international criminal law, it is widely accepted in many domestic legal systems. The purpose of this Article is to challenge this disconnect between domestic and international legal systems. In the course of this discussion, a number of issues have emerged that warrant further exploration. First, those interested in imposing criminal liability on corporations for international crimes would benefit from the findings of those who study organizational systems and behavior. Such literature could assist in determining what actions are rightly attributed to the organization as well as how best to create incentives to alter organizational structures in a way that minimizes involvement with violations of international criminal law. Second, proponents of corporate criminal liability may draw insight from those who argue for the imposition of criminal liability on states, as well as other entities such as political parties or guerilla movements. Third, as suggested above, there is a good deal to learn from those who have studied corporate criminal liability within domestic legal systems—this is a field with a long and rich history. Fourth, and finally, there are some interesting analogies, and even disconnects, between doctrines that have developed in international criminal law and those that have developed in domestic corporate criminal law.<sup>65</sup> An increased attention to them may benefit both domestic and international legal systems.

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64. U.S. Sentencing Guidelines Manual § 8C1.1 (2003).

65. For example, the fact noted above that in the United States corporate officials are subject to a higher duty of responsibility (a knew or should have known standard) than civilian superiors under the ICC (knew or conscious disregard standard). These may be appropriate differences, but it is possible that such differences are not well known, and the anomalies they create are probably unintended.

## NEITHER JUSTICE, NOR OASIS: ALGERIA'S AMNESTY LAW

### INTRODUCTION

The notion that justice shall be done, regardless of its looming real world effects, is not a recent phenomenon: It is ancient. As early as 43 B.C., the statesman Lucius Calpurnius Piso Caesoninus is attributed as having stated, *fiat justitia ruat cælum*—“let justice be done, though heaven should fall.”<sup>1</sup> Setting aside this maxim as outdated, the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) instead drew from Hegel’s maxim, *fiat justitia ne pereat mundus*—“let justice be done lest the world should perish.”<sup>2</sup> The critical responses to and tension between these two Latin phrases largely informs the debate this Note treats, namely, whether there can be amnesties for international crimes, and more particularly, whether Algeria’s 2006 amnesty law conflicts with a duty to prosecute such grave violations.

Humanitarian and human rights law is presently struggling through an enforcement crisis. After the Nuremberg Trials, the world witnessed a sprawling gap in accountability that has only more recently been broken with the landmark formation of the ICTY, International Criminal Tribunal for Rwanda (“ICTR”), Special Court for Sierra Leone (“SCSL”), and International Criminal Court (“ICC”), among other significant developments.<sup>3</sup> Nevertheless, amnesty laws<sup>4</sup> have been and

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1. “Let justice be done, though the world perish,” The Columbia World of Quotations, no. 21998, 1996, available at <http://www.bartleby.com/66/98/21998.html>. This maxim was later adopted as the motto of Ferdinand I (1558–1564) in the permutation, *fiat justitia et pereat mundus*, *id.*, and also invoked by Lord Mansfield in his historic 1772 judgment declaring the unlawfulness of slavery. STEVEN M. WISE, THOUGH THE HEAVENS MAY FALL: THE LANDMARK TRIAL THAT LED TO THE END OF HUMAN SLAVERY 173 (2005).

2. See Antonio Cassese, The Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, para. 18, Nov. 14, 1994, <http://www.un.org/icty/rapportan/first-94.htm>.

3. In addition, the Iraqi Higher Criminal Court is active. The Ad-Hoc Court for East Timor and Special Tribunal for Cambodia have also been set up. Although, the former has been highly criticized by human rights advocates as a diversionary front. Ad-Hoc Court for East Timor, Global Policy Forum, <http://www.globalpolicy.org/intljustice/eti/morindx.htm> (last visited Mar. 16, 2008). The latter body issued its first indictment in July 2007. Nic Dunlop, *Cambodia's Trial by Fire*, L.A. TIMES, Aug. 21, 2007. There have been serious issues with the tribunal, however, which has prompted the U.N. to threaten withdrawal of support. Guy De Launey, *UN Warning on Cambodia Tribunal*, BBC, Oct. 2, 2007, <http://news.bbc.co.uk/2/hi/asia-pacific/7023303.stm>.

4. BLACK’S LAW DICTIONARY 92–93 (8th ed. 2004). Generally defined, amnesty is a “forgetfulness, oblivion; an intentional overlooking” and is etymologically related to the

continue to be passed in countries with serious records of human rights crimes,<sup>5</sup> reducing or eliminating punishment for perpetrators of these abuses. Supporters of amnesty laws maintain that retributive justice may not be required because “the heavens” will otherwise fall even further: Such laws may be necessary to end recurrent violence within a state. Amnesties then function strategically to aide the state’s transition, theoretically to a more just and prosperous society. On the other hand, opponents argue that amnesties threaten “the world” to the extent that they spawn a widespread deficit of justice and undermine the essence of humanity.

From 1992 to 1998,<sup>6</sup> Algeria experienced a “dirty war”<sup>7</sup> that claimed the lives of between 100,000 to 200,000 people, and in which tens of thousands more were brutalized. In 2006, fourteen years after the initiation of the conflict, the controversial Charter for Peace and National Reconciliation (“the Charter”) was put into effect. Introduced by President Abdelaziz Bouteflika, the Charter granted broad amnesty for select universal crimes committed during the war.<sup>8</sup> A Draft Charter, released six months prior, explicitly justified this measure as vital, if not necessary to lead Algeria permanently out of chaos.<sup>9</sup>

The present Note seeks to address meaningfully whether this legislation is legally valid to the extent that it shields prosecutions.<sup>10</sup>

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Greek word for oblivion or not remembering. OXFORD ENGLISH DICTIONARY (2d ed. 1989). Contrastingly, a pardon is legally defined as “[t]he act or an instance of officially nullifying punishment or other legal consequences of a crime. A pardon is usu[ally] granted by the chief executive of a government.” BLACK’S LAW DICTIONARY 1144 (8th ed. 2004).

5. See *infra* Part III(f).

6. While these are the years that witnessed the worst of the violence, arguably Algeria’s conflict has not completely ceased. See *infra* Part IV and Conclusion.

7. “Dirty war” most accurately describes what the country underwent. This term has been defined as “an offensive conducted by secret police or the military of a regime against revolutionary and terrorist insurgents and marked by the use of kidnapping and torture and murder with civilians often being the victims.” The Free Online Dictionary, <http://www.thefreedictionary.com/dirty+war> (last visited Mar. 16, 2008). For an analysis concerning why Algeria’s conflict should not be considered a “civil war,” see HUGH ROBERTS, ALGERIA’S VEILED DRAMA, *reprinted in* THE BATTLEFIELD ALGERIA 1988–2002: STUDIES IN A BROKEN POLITY 250, 254–59 (Verso) (2003).

8. See *infra* notes 67–69 and accompanying text.

9. See *infra* note 59, pmb.

10. At least two scholars have concluded that the Charter should not be recognized, however they have done so after analysis based on non-legal criteria. See Valerie Arnould, *Amnesty, Peace and Reconciliation in Algeria*, 227 CONFLICT, SECURITY & DEV. 253 (2007); Charles P. Trumbull IV, *Giving Amnesties a Second Chance*, 25 BERKELEY J. INT’L L. 283 (2007).

Part I provides essential background on Algeria, its political and social history leading up to adoption of the Charter as well as the context and substance of the Charter itself. Focusing on the particular violations the Charter amnesties, Part II analyzes whether a duty to prosecute these crimes exists under the international and multilateral treaties to which Algeria is a party. After establishing the incompatibility of the Charter and these agreements, Part III then scrutinizes the present status of customary law to find that states have an obligation to prosecute the most serious war crimes as well as crimes against humanity. Addressing several of the most prevalent policy issues, this section also argues in favor of a broad customary duty to prosecute. Finally, Part IV begins with an analysis of whether the Charter can be considered to amnesty grave war crimes and crimes against humanity committed during the Dirty War, and concludes by suggesting that a duty to prosecute should be and is consistent with the wishes of many of Algeria's victims.

## I. ALGERIA: THROUGH TURMOIL TO THE PRESENT

### *A. Pre-Independence Algeria: A Brief Historical Account*

Algeria's struggle for independence has profoundly shaped Algerian politics and society. France occupied Algeria from 1830 until 1962 when it was forced to give up its departments after eight years of one of the bitterest conflicts within its formerly colonized lands.<sup>11</sup> Faced with a colonial regime that relegated Algerians to second-class status<sup>12</sup> and trampled over the native population's sense of culture and tradition, in late 1954, support for an independent Algerian state coalesced into active

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11. According to official Algerian estimates, the war resulted in 300,000 orphans, 400,000 refugees, 700,000 migrants, and 3 million displaced people. BENJAMIN STORA, ALGERIA 1830–2000: A SHORT HISTORY, 110–11 (Jane Marie Todd trans., Cornell U. Press 2001). Although the most reliable assessment of total casualties during the war, both French and Algerian, civil and military, is approximately 500,000, most of whom were Algerian, *id.*, the ruling party's figure of 1 million Algerian deaths became widely accepted. This figure became so central to the country's reputation, for example, that Algeria is commonly referred to in Arabic as *balad milyūn mujāhidīn*, “country of a million freedom fighters.”

12. “The colons enjoyed full rights; the colonized were ‘subjects’ not ‘citizens,’ liable to special provisions: tallage, corvée, and detention . . . without due process. In 1881, a Code de l’Indigénat (Native Code) was established, regularizing these repressive measures.” *Id.* at 6. By 1955, for example, and according to French statistics, only 8 out of the 2000 workers in the general state government were native Algerians. For every 15,342 indigenous Algerians, only 1 attended school, as opposed to 1 for every 227 Europeans living in the country. An Algerian made twenty-eight times less in gross income than a European resident. *Id.* at 39.

resistance, led by the *Front de Libération Nationale* (“FLN”).<sup>13</sup> The fight for independence eventually came to a close in a ceasefire in March 1962. This ceasefire was followed by a referendum on July 1, 1962, in which 6 million people voted in favor of Algeria becoming an independent state, with 16,534 objecting.<sup>14</sup> Soon after, a sequence of decrees was issued, amnestying grave offenses carried out by Algerian and French forces in Algeria.<sup>15</sup>

In keeping with popular revolutionary sentiment, though it was initially mobilized to overthrow French colonial rule, the Algerian army proved to endure in strength, dominating Algerian politics to date with a power difficult to underestimate. Similarly, the FLN emerged to become the sole ruling party in post-independence Algeria, building its legitimacy upon a constructed legacy that it exclusively liberated the Algerian people from colonial domination and founded the modern Algerian state.<sup>16</sup> This narrative long held immense appeal among not only Algerians outraged by pervasive economic, political, and cultural subjugation, but also other states of the global South, with which Algeria

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13. Insurrection began in November 1954 in a series of well-organized, concurrent attacks by the FLN. *Id.* at 35–36. Riots in over two-dozen villages and towns followed in August 1955. *Id.* at 43–44. France responded by sending in troops, strengthening its security forces, and in March 1956, voting into effect a law providing for “special powers,” which forebodingly set aside the majority of safeguards for individual liberties in Algeria. *Id.* at 44, 46. The FLN subsequently began a string of attacks in the capital, in what infamously became known as the Battle of Algiers. While the FLN engaged in guerilla warfare tactics, including bombings of European civilians, French paratroopers struggled to put down the insurgency, which it succeeded in doing by September 1957, however not without practicing routine torture and disappearing approximately 3000 people. *Id.* at 47, 49, 50–52. The French also placed tens of thousands of Algerians in detention camps without due process. *Id.* at 53. Violence continued to be exchanged not only between the French and Algerian forces, but also between Algerian political factions. *Id.* at 59. In August 1956, though, other active parties and groups were assimilated into the FLN, persuaded by the party that a single, greater unity was necessary if Algeria was to overcome the strength of the French forces. *Id.* at 60–61. A revamped armed branch of the FLN then spread throughout the country, fighting under daunting conditions. *Id.* at 61–62.

14. *Id.* at 97–98, 104.

15. *Id.* at 113. For translated text of some of the key decrees as well as an account of the strained evolution of French-Algerian relations vis-à-vis Algeria’s War of Independence, see Shiva Eftekhari, Note, *France and the Algerian War: From a Policy of “Forgetting” to a Framework for Accountability*, 34 COLUM. HUM. RTS. L. REV. 413, 424–26 (2003).

16. The accuracy of this nationalist “myth” put forth by the FLN is questionable, as other key players were also influential. ROBERT MALLEY, THE CALL FROM ALGERIA: THIRD WORLDISM, REVOLUTION AND THE TURN TO ISLAM, 34–35 (1996).

actively aligned itself.<sup>17</sup> Over time, however, the perpetual commemoration of and struggle for greater freedom from external oppression was unable to overcome hardships within the Algerian state.

### B. Algeria's Dirty War

In the mid-1980s the revolutionary socialist government began to face mounting discontent, brought about by a combination of economic troubles<sup>18</sup> and general estrangement from an ossified and corrupt regime.<sup>19</sup> In October 1988, this discontent erupted across the country in riots and demonstrations against state power. After nearly a week, the army was called in: More than 500 people, mostly youths, were killed.<sup>20</sup> The regime also retaliated by torturing people on a widespread basis, a fact the government itself later admitted.<sup>21</sup> President Chadli Benjedid's response astounded many. Benjedid introduced a series of reforms, the most notable of which was a new constitution in 1989 that secured essential freedoms and granted the right to form political associations.<sup>22</sup> Algeria then witnessed a swell of civil society participation that called into question post-independence power dynamics. Numerous political opposition parties, both secular and Islamist, were registered.<sup>23</sup>

In June 1990, free multiparty local elections took place for the first time in Algeria's history, elections in which the *Front Islamique du Salut* ("FIS"), a party with an Islamist platform, won a majority.<sup>24</sup> With

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17. *Id.* at 141–49, 210.

18. By 1986, oil prices had dropped dramatically, which, in a non-diversified economy, meant that the Algerian state could not continue its program of social welfare as it had in its prime. *Id.* at 208–09.

19. For example, in 1991, "the former prime minister, Abdelhamid Brahimi, claimed that government officials had siphoned off [twenty-six] billion dollars, [a sum] equivalent to the amount of Algeria's foreign debt." MARTIN STONE, THE AGONY OF ALGERIA, 108 (1997).

20. Human Rights in Algeria, Testimony by Tom Malinowski to the U.S. House of Representatives, Human Rights Watch, Mar. 4, 2005, <http://hrw.org/english/docs/2005/03/04/algeri10260.htm>.

21. Algeria: Human Rights Developments 1992, Human Rights Watch, [http://www.hrw.org/reports/1993/WR93/Mew-01.htm#P71\\_39546](http://www.hrw.org/reports/1993/WR93/Mew-01.htm#P71_39546) (last visited Mar. 12, 2008).

22. MICHAEL WILLIS, THE ISLAMIST CHALLENGE IN ALGERIA: A POLITICAL HISTORY, 111–12 (1996). This move should not necessarily be construed as the initiation of a genuine democratic transition. Instead, it was likely pushed by the army, which arguably viewed political reforms as a strategy to fragment dissent, thereby preserving its dominance. See, e.g., Rolf Schwarz, *Human Rights Discourse and Practice as Crisis Management: Insights from the Algerian Case*, 7 J. N. AFR. STUD. 57, 66–67 (2002).

23. STORA, *supra* note 11, at 198–99.

24. For a thorough history of the development of Islamist politics in Algeria, see WILLIS, *supra* note 22. While treatment of the FIS's popularity is beyond the scope of

parliamentary elections approaching, the FIS held demonstrations against the regime's manipulation of the process. This prompted the army to impose martial law and imprison FIS leadership in June 1991.<sup>25</sup> The first round of parliamentary elections was nevertheless held in December 1991 and the FIS secured a majority of seats. Justified on the basis of "saving" the country from Islamist politics,<sup>26</sup> the army generals staged a *coup d'état* the following month, marking the end of Algeria's democratic bout.<sup>27</sup> Benjedid was ousted and a provisional governing body was erected in lieu of a presidency, the *Haut Conseil d'Etat* ("HCE"), comprised of a quintet of men who were to rule the country until Bouteflika's election in 1999.<sup>28</sup> The FIS was banned and a state of emergency was declared.<sup>29</sup>

Algeria then experienced a gradual descent into chaos. One of the historic leaders of the FLN and the then chairman of the HCE, Mohammed Boudiaf, was shot dead by one of his bodyguards during a speech.<sup>30</sup> Armed Islamist factions drawing from the FIS's support base soon emerged and carried out guerilla attacks. The army, then, employing "torture, humiliations and deadly reprisals," not only sought to uproot the fighters, but also embarked on a "policy of terror against the people to dissuade them from supporting the armed struggle groups."<sup>31</sup> The actions of security forces provoked increasing anger

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this Note, it should be emphasized that there were various and complex factors, especially socio-economic, contributing to the party's success. For an account of the Dirty War and its roots, see LUIS MARTINEZ, THE ALGERIAN CIVIL WAR: 1990–1998 (Jonathan Derrick trans., Colum. U. Press 2000).

25. STORA, *supra* note 11, at 209.

26. See, e.g., *The Junta in Court*, Algeria-Watch, Sept. 2002, [http://www.aleria-watch.org/en/aw/junta\\_court.htm](http://www.aleria-watch.org/en/aw/junta_court.htm).

27. The legitimacy of the overthrow was and remains immensely controversial. Debate largely centers upon the relation "between" Islamist politics and democracy, and more particularly, the nature of the FIS. For a closer examination of these issues, see for example Peter A. Samuelson, *Pluralism Betrayed: The Battle Between Secularism and Islam in Algeria's Quest for Democracy*, 20 YALE J. INT'L L. 309 (1995) (arguing that the regime's coup was unjustified, the threat of the FIS overestimated, and the takeover worse than honoring the majority election results).

28. On the composition of the HCE, see for example WILLIS, *supra* note 22, at 250–52.

29. *Id.* at 256–57.

30. The circumstances surrounding his death are both suspicious and contested. It is probable that his reluctance to cooperate with the army generals caused his assassination by regime insiders. See, e.g., MARTIN EVANS & JOHN PHILLIPS, ALGERIA: ANGER OF THE DISPOSSESSED 177–80 (2007); WILLIS, *supra* note 22, at 263–66; *Operation Boudiaf*, Mouvement Algérien des Officiers Libres, <http://www.anp.org/affaireboudiaf/engaffboudiaf.html> (last visited Mar. 16, 2008).

31. MARTINEZ, *supra* note 24, at 21–22.

among certain FIS sympathizers, who until 1993 had remained passive.<sup>32</sup> While this rage spurred Islamist armed forces to mobilize against the security forces, it also led to attacks against civilians,<sup>33</sup> whom they perceived to be against them, as they were not actively championing their cause.<sup>34</sup>

This abbreviated narration of the opening events of the Dirty War illustrates the basic patterns of violence that were to continue at a heightened level until the late 1990s, when the scale of the conflict began to decrease. Numerous massacres took place.<sup>35</sup> Bomb attacks, often in public places, were frequent. In addition to security forces victimizing women, including by rape,<sup>36</sup> opposition groups raped and abducted women,<sup>37</sup> sometimes torturing them and sometimes murdering them.<sup>38</sup> Security forces joined by state-armed militias and Islamist groups killed each other and civilians alike.<sup>39</sup> It is estimated that tens of thousands of people were tortured at the hands of state security forces<sup>40</sup> after the practice became institutionalized in the early 1990s, mostly taking place

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32. *Id.* at 48, 60–61.

33. STORA, *supra* note 11, at 214.

34. MARTINEZ, *supra* note 24, at 72, 76–77.

35. There are serious concerns that the state security forces were behind the massacres. HABIB SOUĀDIA, LA SALE GUERRE: LE TÉMOIGNAGE D'UN ANCIEN OFFICIER DES FORCES DE L'ARMÉE ALGÉRIENNE 88–90 (Découverte 2001). See also, e.g., NESROULAH YOUS, QUI A TUÉ À BENTALHA?: CHRONIQUE D'UN MASSACRE ANNONCÉ (Découverte 2000). For an overview of both of these books as well as an appraisal of the credibility of their accounts, see HUGH ROBERTS, FRANCE AND THE LOST HONOUR OF ALGERIA'S ARMY, reprinted in THE BATTLEFIELD ALGERIA 1988–2002: STUDIES IN A BROKEN POLITY 305, 309–13 (Verso) (2003). See also, generally, AN INQUIRY INTO THE ALGERIAN MASSACRES (Yousef Bedjaoui, Abbas Aroua, & Meziane Aït-Larbi eds., Hoggar 1999), available at [http://www.hoggar.org/index.php?option=com\\_content&task=view&id=102&Itemid=3&limit=1&limitstart=2](http://www.hoggar.org/index.php?option=com_content&task=view&id=102&Itemid=3&limit=1&limitstart=2) (providing a history of and perspectives on the massacres).

36. E.g., Algeria: Human Rights Developments 1995, Human Rights Watch, [http://www.hrw.org/reports/1996/WR96/MIDEAST-01.htm#P137\\_26320](http://www.hrw.org/reports/1996/WR96/MIDEAST-01.htm#P137_26320) (last visited Mar. 12, 2008).

37. For an exploration of women and gender identity in Algerian history and society from pre-colonial times to the present, see generally MARNIA LAZREG, THE ELOQUENCE OF SILENCE: ALGERIAN WOMEN IN QUESTION (1994).

38. E.g., *Algeria: Fear and Silence: A Hidden Human Rights Crisis*, Amnesty International, Nov. 19, 1996, at 32, [http://asiapacific.amnesty.org/library/pdf/MDE280111996ENGLISH/\\$File/MDE2801196.pdf](http://asiapacific.amnesty.org/library/pdf/MDE280111996ENGLISH/$File/MDE2801196.pdf) [hereinafter *Fear and Silence*].

39. E.g., *Extrajudicial Killings*, Algeria-Watch, Apr. 1999, [http://www.algeria-watch.org/en/aw/extrajudicial\\_killings.htm](http://www.algeria-watch.org/en/aw/extrajudicial_killings.htm).

40. E.g., *January 1992–January 2007: Fifteen Years of Atrocities and Impunity in Algeria*, Algeria-Watch, Jan. 11, 2007, [http://www.algeria-watch.org/en/aw/15\\_years.htm](http://www.algeria-watch.org/en/aw/15_years.htm) [hereinafter *Fifteen Years of Atrocities*].

at secret detention sites.<sup>41</sup> Between 1992 and 1998 alone, state security forces disappeared approximately 7000 Algerians.<sup>42</sup>

### C. Attempts at National “Reconciliation”: 1999–2008

Efforts responding to the violence have not been limited to the Charter. In January 1995, under the auspices of the Sant’Edigio Community in Rome, six key opposition parties, including the FIS, signed the Platform for a Peaceful Resolution of Algeria’s Crisis, an agreement the Algerian government vehemently rejected.<sup>43</sup> In February 1995, however, the state adopted a clemency law, *Qānūn al-rahma*, “aimed at repentant terrorists.”<sup>44</sup> An estimated 250 to 300 militants took advantage.<sup>45</sup> The

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41. E.g., *Fear and Silence*, *supra* note 38, at 41. The most frequent torture techniques include:

[T]he ‘chiffon’ method (the detainee is tied in a horizontal position to a bench and cloth is inserted in his mouth, then his nose is held closed and a mixture of dirty water and chemicals is poured in his mouth in large quantities causing choking and swelling of the stomach); the ‘chalumeau’ (blowtorch, which is used to burn the face and parts of the detainee’s body); electric shocks applied to the ears, genitals, anus and other sensitive parts of the detainee’s body; tying a rope around the detainee’s penis and/or testicles causing swelling of the genitals; and beatings all over the body, especially on the sensitive parts. Others methods reported are burnings on the body with cigarettes; insertion of bottles, sticks and other objects, including firearms, in the anus; putting glue in the detainee’s anus; placing the detainee’s penis in open drawers and shutting the drawer; and suspending the detainee in contorted positions.

*Id.* at 44. Additional forms of torture involve castration, amputating fingers, and gauging out eyes with forks and knives. *La République Torture*, Movement Algérien des Officiers Libres, <http://www.anp.org/frenindex/torture.html> (last visited Mar. 16, 2008).

42. This is the highest number of known disappearances in any state during or subsequent to this timeframe, second only to Bosnia. *Time for Reckoning: Enforced Disappearances and Abductions in Algeria*, Human Rights Watch (2003) at 3, <http://www.hrw.org/reports/2003/algeria0203/algeria0203.pdf> [hereinafter *Time for Reckoning*]. Algeria-Watch puts forth the figure of 20,000 disappeared between January 1992 and January 2007. *Fifteen Years of Atrocities*, *supra* note 40.

43. HUGH ROBERTS, ALGERIA’S RUINOUS IMPASSE AND THE HONOURABLE WAY OUT, reprinted in THE BATTLEFIELD ALGERIA 1988–2002: STUDIES IN A BROKEN POLITY 160, 171–75 (Verso) (2003) (elaborating upon the significance of the agreement).

44. Among other measures, the law prohibited prosecution for individuals who belonged to certain groups and did not perpetrate offenses “leading to loss of human life, permanent disability, breach of the moral or physical integrity of citizens or destruction of public property.” U.N. Committee Against Torture, Second Periodic Reports of States Parties Due in 1994: Algeria, para. 33, U.N. Doc. CAT/C/25/Add.8 (May 30, 1996) [hereinafter CAT Report].

Ministry of the Interior declared in August 1998 that offices were being opened in each *wilāya*<sup>46</sup> to process complaints of disappearances,<sup>47</sup> which the National Human Rights Observatory, set up in February 1992,<sup>48</sup> oversaw. In March 2001, this body was replaced with the ad hoc National Consultative Commission for the Promotion and Protection of Human Rights,<sup>49</sup> charged with handling the issue of the disappeared.<sup>50</sup> Based on the commission's report completed four years later, though never released, the human rights commissioner admitted that state security forces disappeared 6146 people.<sup>51</sup> In July 1999, three months after becoming president, Bouteflika introduced the "Law of Civil Harmony."<sup>52</sup> After being passed by Parliament, this initiative allegedly received broad backing in a referendum,<sup>53</sup> but it was widely criticized in

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45. Tobias Schumacher, The EU and Algeria: A Forgotten Case?, EuroMeSCo Research Seminar "Democratization and Human Rights," July/Aug. 2006, at 3, [http://www.euromesco.net/images/enews\\_9\\_en.pdf](http://www.euromesco.net/images/enews_9_en.pdf).

46. *Wilāya* is the Algerian-Arabic word for "state," of which there are forty-eight in the country.

47. *Time for Reckoning*, *supra* note 42, at 40. "Questions were quickly raised about this initiative, first because these bureaus were part of the same ministry whose forces were suspected in many of the 'disappearances,' and second because their working methods and powers to collect information were never made public." *Id.*

48. CAT Report, *supra* at 44, para. 34.

49. Executive decree No. 03-299 (11 Sept. 2003) art. 3 (Alg.). "Décret présidentiel n° 03-299 du 14 Rajab 1424 correspondant au 11 septembre 2003 complétant le décret présidentiel n° 01-71 du 30 Dhoul El Hidja 1421 correspondant au 25 mars 2001 portant création de la commission nationale consultative de promotion et de protection des droits de l'Homme (CNCPDH)."

50. *Id.*

51. "Reconciliation" at the Price of Truth and Justice?, Algeria Watch, Aug. 26, 2005, [http://www.algeria-watch.org/en/aw/truth\\_justice.htm](http://www.algeria-watch.org/en/aw/truth_justice.htm). Associations for families of the disappeared, however, maintain that they have more than 8000 files documenting disappearances. *Chronology (Part Two)*, Algeria-Watch, Sept. 10, 2006, [http://www.algeria-watch.org/en/policy/chronology\\_2.htm](http://www.algeria-watch.org/en/policy/chronology_2.htm).

52. The stated purpose was "to se[t] up . . . particular measures aimed at offering suitable solutions for those persons involved in acts of terrorism and subversion." *Law of Civil Harmony*, Website of International Humanitarian Law, July 13, 1999, <http://www.wihl.nl/finals/Algeria/AL.LIM.LAW%20OF%20CIVIL%20HARMONY.1999.pdf>.

53. *Algeria: Attacks on Justice 2000*, International Commission of Jurists, Aug. 13, 2001, [http://www.icj.org/news.php3?id\\_article=2549&lang=en](http://www.icj.org/news.php3?id_article=2549&lang=en) [hereinafter *Attacks on Justice 2000*]. Reduced sentences were allowed for persons who did not commit massacres or bomb public places. Granting the option of creating special Probation Committees in each *wilāya* to decide applications for probation, the law permitted this relief to those who neither committed or participated in the aforementioned crimes, nor those "that have led to the death of people" or involved rape. Exoneration from prosecution was afforded to the same class of persons as probation, except the additional

public opinion, the press, as well as by secular political movements.<sup>54</sup> According to government figures, approximately 5500 persons surrendered.<sup>55</sup> And building upon the Law of Civil Harmony, in January 2000, Bouteflika extended a general amnesty<sup>56</sup> to members of two Islamist groups,<sup>57</sup> but its precise terms were not revealed.<sup>58</sup>

The Charter is thus the most recent in a series of attempts at securing lasting peace. Although a Draft Charter was revealed on August 15, 2005,<sup>59</sup> the actual Charter was not disclosed prior to its adoption.<sup>60</sup> The

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bar of “permanent disabling of a person” was included. This law did not apply to state security forces. *Law of Civil Harmony*, *supra* note 52, art. 1–3, 7, 11–17, 27.

54. These forces “led a campaign against this law arguing that it constituted an arbitrary impunity procedure for the abuses and crimes committed and a voluntary silence regarding the conditions in which terrorism and repression developed and ceased.” Hidouci, *infra* note 287, at 3. See also, e.g., EVANS & PHILLIPS, *supra* note 30, at 267 (“[Grassroots civilian pressure groups] wanted to express their pain and anger and believed that, in denying truth and justice, Bouteflika’s transition process was fundamentally flawed.”). A domestic opinion poll also suggested that less than half the population supported the law. *Id.* at 270.

55. *Algeria: Attacks on Justice 2002*, International Commission of Jurists, Aug. 26, 2002, <http://www.icj.org/news.php?i&article=2648&lang=en> [hereinafter *Attacks on Justice 2002*]. Even though the Law of Civil Harmony appeared specific enough to further reconciliation, there have been criticisms that it was applied arbitrarily and without meaningful investigation, thereby largely undermining its supposed value. See, e.g., *Attacks on Justice 2000*, *supra* note 53; *Truth and Justice on Hold: The New State Commission on ‘Disappearances’*, Human Rights Watch, Dec. 2003, at 8, <http://www.hrw.org/reports/2003/algeria1203/algeria1203.pdf>. More importantly, this amnesty violated international law for the same reasons that the Charter is legally invalid. See *infra* Part II, III. But see Nina H.B. Jørgensen, *The Scope and Effect of the Algerian Law Relating to the Reestablishment of Civil Concord*, 13 LEIDEN J. INT'L L. 681, 688 (2000). While violence by armed groups noticeably lowered in the beginning of 2000, it swelled at the year’s end, for example, leaving 250 dead in the month of October. EVANS & PHILLIPS, *supra* note 30, at 265.

56. Executive decree No. 2000-03 (10 Jan. 2000) art. 3 (Alg.). “Décret présidentiel n° 2000-03 du 4 Chaoual 1420 correspondant au 10 janvier 2000 portant grâce amnistiantie.”

57. *Algeria, New Amnesty Law Will Ensure Atrocities Go Unpunished: Muzzles Discussion of Civil Conflict: Joint Statement by Amnesty International, Human Rights Watch, the International Center for Transitional Justice, and the International Federation of Human Rights*, Human Rights Watch, Mar. 1, 2006, <http://hrw.org/english/docs/2006/03/01/algeri12743.htm> [hereinafter *Atrocities Go Unpunished*].

58. *Attacks on Justice 2000*, *supra* note 53. Killings by armed groups escalated by 20% in 2000 relative to the prior year. *Attacks on Justice 2002*, *supra* note 55.

59. Executive decree No. 05-278 (14 Aug. 2005) Annex (Alg.). “Décret présidentiel n° 05-278 du 9 Rajab 1426 correspondant au 14 août 2005 portant convocation du corps électoral pour le référendum du jeudi 29 septembre 2005 relatif à la réconciliation nationale.” For an English translation of the Draft Charter, see Ministry of Foreign Affairs, Embassy of Algeria, London, Charter for Peace and National Reconciliation,

former does not explicitly provide for the amnestying of security forces and does not mention the jail sentences and fines that are to be imposed for voicing criticism concerning the handling of the "National Tragedy."<sup>61</sup> Nevertheless, forty-five days later, Bouteflika's initiative was put to a referendum on September 29, 2005. According to official figures, 97.36% of the Algerian populace approved the Charter,<sup>62</sup> with an average voter turnout of 79.76%<sup>63</sup> among approximately 18.3 million registered voters.<sup>64</sup> There was no independent monitoring of the voting.<sup>65</sup> Algeria's full cabinet approved the final version on February 27, 2006, but Parliament was not in session and did not debate the Charter.<sup>66</sup>

Among its most important provisions, the Charter extends amnesty to persons who did not commit or participate in massacres, public bombings, and rape.<sup>67</sup> Those who have already been imprisoned and

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[http://www.algerianembassy.org.uk/charter\\_for\\_peace\\_and\\_national\\_r.htm](http://www.algerianembassy.org.uk/charter_for_peace_and_national_r.htm) (last visited Mar. 16, 2008) [hereinafter Draft Charter].

60. *Joint NGO Letter on the Occasion of the EU-Algeria Association Council on 20–21st March 2006: Human Rights Concerns at the EU-Algeria Association Council*, Human Rights Watch, Mar. 14, 2006, <http://hrw.org/english/docs/2006/03/14/algeri13024.htm>.

61. Compare Draft Charter, *supra* note 59, with *Charte pour la paix*, *infra* note 67, art. 45.

62. The deceptively simple question posed to voters was, "Do you agree with the Draft Charter for Peace and National Reconciliation, which is proposed to you?" Executive decree No. 05-278 (14 Aug. 2005) art. 2 (Alg.). "Décret présidentiel n° 05-278 du 9 Rajab 1426 correspondant au 14 août 2005 portant convocation du corps électoral pour le référendum du jeudi 29 septembre 2005 relatif à la réconciliation nationale." (author's translation).

63. Some areas called for a boycott of the referendum, and the reported voter turnout in the capital was 32% lower than its usual levels. See *Algerians Overwhelmingly OK National Peace Charter*, ARAB NEWS, Oct. 1, 2005, <http://www.arabnews.com>.

64. *Algeria Today: Algerians Voted Massively for a Peaceful Future*, Embassy of the People's Democratic Republic of Algeria, Washington, Sept. 30, 2005, at 1, [http://www.algeria-us.org/ALGERIA%20TODAY/ALGERIA\\_TODAY%20SEP%2032%202005.pdf](http://www.algeria-us.org/ALGERIA%20TODAY/ALGERIA_TODAY%20SEP%2032%202005.pdf) [hereinafter *Algeria Today*].

65. Michael Slackman, *Algerian Voters Said to Approve President's Postwar Plan*, N.Y. TIMES, Oct. 1, 2005.

66. *Atrocities Go Unpunished*, *supra* note 57.

67. Legislative decree No. 06-01 (27 Feb. 2006) art. 5–6, 10 (Alg.). "Ordonnance n° 06-01 du 28 Moharram 1427 correspondant au 27 février 2006 portant mise en œuvre de la Charte pour la paix et la réconciliation nationale" [hereinafter *Charte pour la paix*]. Given Algeria's history with prosecutions and its judiciary troubles, it is extremely unlikely the state will meaningfully prosecute these crimes in the near future. To date, Algeria has failed to offer substantial evidence of prosecutions for any gross human rights violations. See, e.g., HRC Observations finales, *infra* note 114, para 7.

sentenced and who did not engage in the aforementioned crimes are pardoned.<sup>68</sup> Articles 45 and 46 provide:

No legal proceedings may be initiated against an individual or a collective entity, belonging to any component whatsoever of the defense and security forces of the Republic, for actions conducted for the purpose of protecting persons and property, safeguarding the nation or preserving the institutions of the Democratic and Popular Republic of Algeria. The competent judicial authorities are to summarily dismiss all accusations or complaints.<sup>69</sup>

Anyone who, by speech, writing, or any other act, uses or exploits the wounds of the National Tragedy to harm the institutions of the Democratic and Popular Republic of Algeria, to weaken the state, or to undermine the good reputation of its agents who honorably served it, or to tarnish the image of Algeria internationally, shall be punished by three to five years in prison and a fine of 250,000 to 500,000 dinars.<sup>70</sup>

In two separate decrees published alongside the Charter, under specified measures, the Algerian State offers compensation to the “victims of the national tragedy,” including the families of those who

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68. Charte pour la paix, *supra* note 67, art. 8–10.

69. *Id.* art. 45. The translation of this article is from *Atrocities Go Unpunished*, *supra* note 57. Implicitly, this provision tracks the non-amnestied crimes for members of armed groups. It would be absurd to argue that massacres, public bombings, or rapes were committed for “the purpose of protecting persons or property, [or] safeguarding the nation.” (Although rape can be a form of torture, it is not “typically” justified on the basis of extracting information.) In contrast, according to warfare tactics, it is logically consistent, albeit unsound, to maintain that state forces tortured, disappeared, and murdered people in furtherance of this specified end. Apparently, the state carefully worded this article to allow room for such interpretation. The Human Rights Committee criticized this ambiguity when it considered the Charter and implored the state to amend it. See HRC Observations finales, *infra* note 114. See also CAT Observations finales, *infra* note 100.

70. Charte pour la paix, *supra* note note 67, art. 46. The translation used can be found at *Atrocities Go Unpunished*, *supra* note 57. This fine is approximately \$3812–\$7625 USD as of October 6, 2007. The 2007 Algerian per capita GDP was estimated to be \$8100. Algeria Country Profile, CIA World Fact Book, available at <https://www.cia.gov/library/publications/the-world-factbook/print/ag.html> (last visited Mar. 16, 2008) [hereinafter Algeria Country Profile]. The Human Rights Committee has called for the abrogation of this provision. HRC Observations finales, *infra* note 114, para. 8. See also CAT Observations finales, *infra* note 100, para. 17 (noting that the Algerian state “should amend” article 46 in order to ensure an “effective remedy”) (author’s translation).

have been disappeared,<sup>71</sup> as well as those who have participated in “terrorism.”<sup>72</sup>

## II. ALGERIA'S TREATY OBLIGATIONS

Given the history of the Dirty War, the systematic human rights violations that the amnesty law shields are torture, extrajudicial executions, and disappearances. Under humanitarian treaties, the Charter's amnestying of these crimes is not invalidated, as a perverse result of Algeria's conflict having been internal. On the other hand, each of the multilateral and regional human rights treaties Algeria has ratified<sup>73</sup> undermines the legal soundness of the Charter with regard to the duty to prosecute.

### A. The Geneva Conventions and Common Article 3

How Common Article 3 relates to “grave breaches” under the Geneva Conventions is crucial, as this article explicitly addresses internal armed conflicts.<sup>74</sup> The distinction between international and internal conflicts in

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71. Executive decree No. 06-93 (28 Feb. 2006) art. 1–2 (Alg.). “Décret présidentiel n° 06-93 du 29 Moharram 1427 correspondant au 28 février 2006 relatif à l’indemnisation des victimes de la tragédie nationale.” The Algerian state has conditioned this indemnification upon families declaring the death of their disappeared loved one. *Charte pour la paix*, *supra* note note 67, art. 30. Troubled by this requirement, the Human Rights Committee has recommended its abolishment. HRC Observations finales, *infra* note 114, para. 13. *See also* CAT Observations finales, *infra* note 100, para. 13 (calling for the removal of this stipulation and asserting that it constitutes “a form of inhumane and degrading treatment”) (author’s translation).

72. Executive decree No. 06-94 (28 Feb. 2006) (Alg.). “Décret présidentiel n° 06-94 du 29 Moharram 1427 correspondant au 28 février 2006 relatif à l’aide de l’Etat aux familles démunies éprouvées par l’implication d’un de leurs proches dans le terrorisme.”

73. Algeria entered a Euro-Mediterranean Agreement with the European Community, which went into force in September 2005. EUROPA, European Commission, External Relations, Treaties Office, Association Agreements, The Euro-Mediterranean Partnership, Algeria, <http://ec.europa.eu/world/agreements/prepareCreateTreatiesWorkspace/treatiesGeneralData.do?step=0&redirect=true&treatyId=821> (last visited Mar. 17, 2008). While this agreement contains a provision on human rights, it is very general and therefore does not warrant much discussion. *See* Euro-Mediterranean Agreement Establishing an Association between the European Community and its Member States, of the One Part, and the People’s Democratic Republic of Algeria, of the Other Part, art. 2, Oct. 10, 2005, O.J.E.U. L265/2 (2005).

74. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75

humanitarian law has serious repercussions, as the duties and rights following from each may not be equal.<sup>75</sup> Scholars have long been critical of this division, arguing that it has not only become unwieldy particularly for “internationalized” armed conflicts,<sup>76</sup> but also frustrated the very justice this body of law was meant to advance.<sup>77</sup> States have a duty to extradite or prosecute instances of grave breaches defined in the Geneva Conventions, however it is not expressly provided for in internal conflicts.

The prevailing opinion maintains that the *aut dedere aut judicare*<sup>78</sup> obligation for grave breaches only applies to international conflicts.<sup>79</sup> Nevertheless, at least one scholar has demonstrated how internal conflicts can be consistently subsumed within the grave breaches regime.<sup>80</sup> Even if this regime applies only to international conflicts, there

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U.N.T.S. 135 [hereinafter Geneva Convention III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

75. See, e.g., M. Cherif Bassiouni, *The Normative Framework of International Humanitarian Law: Overlaps, Gaps and Ambiguities*, 8 TRANSNAT'L L. & CONTEMP. PROBS. 199, 223–24 (1998).

76. See James G. Stewart, *Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict*, 85 INT'L REV. RED CROSS 313 (2003).

77. See Bassiouni, *supra* note 75, at 224.

78. Latin for “extradite or prosecute.”

79. ANDREAS O’SHEA, AMNESTY FOR CRIME IN INTERNATIONAL LAW AND PRACTICE 143–44 (2002). One key argument supporting this view relies upon common article 2 to the Geneva Conventions, which states: “[T]he present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties.” Geneva Convention I, *supra* note 74, art. 2; Geneva Convention II, *supra* note 74, art. 2; Geneva Convention III, *supra* note 74, art. 2; Geneva Convention IV, *supra* note 74, art. 2. As the extradite or prosecute duty belongs to the “present Convention[s],” article 2 limits this obligation to international conflicts, “between two or more High Contracting Parties.” See, e.g., Mary Ellen O’Connell, *New International Legal Process*, 93 AM. J. INT’L L. 334, 341 (1998). In addition, as neither common article 3 nor Protocol II mentions penal sanctions, it is maintained that their application to internal conflicts is excluded. O’SHEA, *supra* note 79, at 144–45 (summarizing the arguments typically given for the non-applicability of the grave breaches regime to internal conflicts).

80. In each of the Geneva Conventions, the provisions establishing the duty to extradite or prosecute refer to “any of the grave breaches of the present Convention.” Geneva Convention I, *supra* note 74, art. 49; Geneva Convention II, *supra* note 74, at art. 50; Geneva Convention III, *supra* note 74, art. 129; Geneva Convention IV, *supra* note 74, art. 146. The inclusion of the wording, “the present Convention,” suggests the *aut dedere aut judicare* provision applies to the entire treaty, which contains article 3 treating internal conflicts. The articles defining grave breaches that directly follow those establishing this duty verify that they are “defining the nature of breaches of the other

is a growing trend to blur the division between international and internal conflicts and apply certain rules of war to the latter.<sup>81</sup> In the meantime, the *aut dedere aut judicare* duty does not reach amnesty laws such as Algeria's. Like countless other states, if Algeria can be considered fortunate not to have had its war further complicated by outside state actors, it is tragically ironic that the consequences of this non-involvement under the Geneva Conventions means the difference between furthering accountability and allowing for impunity.

#### B. Protocol II

Protocol Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts ("Protocol II")<sup>82</sup> not only governs Algeria's Dirty War, but also directly addresses amnesties in article 6(5). Ostensibly, this provision seems troublesome for a duty to prosecute:

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articles . . . rather than giving a complete definition of the norms that might be breached." O'SHEA, *supra* note 79, at 146. They provide: "Grave breaches to which the preceding Article relates shall be those involving any of the following acts." Geneva Convention I, *supra* note 74, art. 50; Geneva Convention II, *supra* note 74, art. 51; Geneva Convention III, *supra* note 74, art. 130; Geneva Convention IV, *supra* note 74, art. 147. It is further argued that this reading is bolstered by the *travaux préparatoires* and succeeding practice, demonstrating a purpose not to exclude internal conflicts from the grave breaches regime. O'SHEA, *supra* note 79, at 147–51.

Given the general consensus supporting the former analysis, a reading to the contrary might seem superfluous at this point: Internal armed conflicts have "lost the battle" for inclusion in the grave breaches regime! Nonetheless, it is important to recall that the Trial and Appellate Chambers in *Tadic* differed when considering whether article 2 of the ICTY statute, which encompassed grave breaches under the Geneva Conventions, covered non-international conflicts. Compare *Prosecutor v. Tadic*, Case No. IT-94-1, Decision on the Defense Motion on Jurisdiction, para. 50 (Aug. 10, 1995), with *Prosecutor v. Tadic*, Case No. IT-94-1, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, para. 78 (Oct. 2, 1995) (noting, however, that "contrary to the drafters' apparent indifference to the nature of the underlying conflicts, such an interpretation would authorize the International Tribunal to prosecute and punish certain conduct in an international armed conflict, while turning a blind eye to the very same conduct in an internal armed conflict.") In a separate opinion, Judge Abi-Saab agreed with the Trial Chamber, finding no international conflict requirement to article 2 of the ICTY statute. See *Prosecutor v. Tadic*, Case No. IT-94-1, Separate Opinion of Judge Abi-Saab on the Defense Motion for Interlocutory Appeal on Jurisdiction, sec. 4 (Oct. 2, 1995).

81. See Bassiouni, *supra* note 75, at 224; Bruno Simma & Andreas L. Paulus, *The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View*, 93 AM. J. INT'L L. 302, 312–13 (1999); Stewart, *supra* note 76, at 344.

82. Algeria ratified this instrument in August 1989. Secretary General, Status of the Protocol Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, U.N. Doc. A/53/287 (Aug. 26, 1998).

At the end of hostilities, the authorities in power shall endeavor to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.<sup>83</sup>

While there have been a handful of decisions treating this article as sanctioning amnesty laws following a civil conflict,<sup>84</sup> this position is dubious. Structurally, the provision on amnesty is nestled at the bottom of a section devoted to penal prosecutions.<sup>85</sup> In keeping with this observation, the International Committee of the Red Cross offered:

The ‘travaux préparatoires’ of [article] 6(5) indicate that this provision aims at encouraging amnesty, i.e., a sort of release at the end of hostilities, for those detained or punished for the mere fact of having participated in hostilities. It does not aim at an amnesty for those having violated international humanitarian law.<sup>86</sup>

The sounder interpretation, therefore, is that Protocol II considers the permissibility of amnesty for general criminal sanctions after civil strife, not for serious violations of humanitarian law.<sup>87</sup>

### *C. Convention Against Torture*

There is a very strong basis for finding that the Charter breaches the Convention Against Torture and Other Cruel, Inhuman or Degrading

83. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, art. 6(5), S. Treaty Doc. No. 100–2, 1125 U.N.T.S. 609 [hereinafter Protocol II].

84. The most prominent example is the *AZAPO* case analyzing the validity of South Africa’s amnesty law. Azanian People’s Organization (*AZAPO*) v. President of the Republic of South Africa 1996 (4) SA 671 (CC) at para. 30 (S. Afr.). At least one commentator has argued that this interpretation is sound based on the plenary meeting notes for Protocol II. See Karen Gallagher, Note, *No Justice, No Peace: The Legalities and Realities of Amnesty in Sierra Leone*, 23 T. JEFFERSON L. REV. 149, 176–78 (2000).

85. This implies that “the drafters were primarily interested in reintegrating insurgents into national life.” Naomi Roht-Arriaza, *Combating Impunity: Some Thoughts on the Way Forward*, 59 LAW & CONTEMP. PROB. 93, 97 (1996).

86. Letter from Dr. Toni Pfanner, Head of the Legal Division, ICRC Geneva, to The Prosecutor of the International Criminal Tribunal for the Former Yugoslavia, Apr. 15, 1997, cited in Douglass Cassel, *Accountability for International Crime and Serious Violations of Fundamental Human Rights: Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities*, 59 LAW & CONTEMP. PROB. 197, 218 (1996).

87. See, e.g. Cassel, *supra* note 86.

Treatment or Punishment ("CAT")<sup>88</sup> to the extent that it precludes Algeria's obligation<sup>89</sup> to prosecute those among the security forces and state-militias who carried out acts of torture.<sup>90</sup> Article 7 sets forth that a state party "shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution."<sup>91</sup>

Some scholars have read this provision as "not explicitly requir[ing]" that a prosecution take place, let alone that punishment be imposed and served," article 7 only specifying that the state party must "submit the case."<sup>92</sup> This particular wording may have been chosen, though, in order to "respect the independence of national courts and the procedural rights of defendants by avoiding language that suggested that a particular outcome of prosecutions was required."<sup>93</sup> Similarly, it has further been noted that the *aut dedere aut judicare* obligation is also included in such fundamental conventions<sup>94</sup> as the Convention on the Prevention and

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88. Algerian ratified CAT on October 10, 1989. Office of the U.N. High Commissioner for Human Rights, Algeria's Homepage, Status of Ratifications, <http://www.unhchr.ch/tbs/doc.nsf/newhvstatusbycountry?OpenView&Start=1&Count=250&Expand=3#3> (last visited Mar. 16, 2008) [hereinafter UNHCHR Algeria].

89. For a well-informed overview of approaches under Islamic law to the (im)permissibility of torture, see Sadiq Reza, *Torture and Islamic Law*, 8 CHI. J. INT'L L. 21 (2007) (calling into doubt a relation between Islamic law and the practice of torture in "Muslim-majority countries").

90. CAT's definition of "torture" restricts the scope of the Convention's application to Algerian security forces and state-armed civil militias. *See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. Res. 39/46, art.1(1), U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (Dec. 10, 1984) [hereinafter CAT].

91. *Id.* art. 7.

92. Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2604 (1991). *See also* Leila Nadya Sadat, *Exile, Amnesty and International Law*, 81 NOTRE DAME L. REV. 955, 1020 (2006) (noting CAT is "unclear" regarding scope of duty to prosecute, "leav[ing] a certain degree of discretion to national legal systems in [its] implementation").

93. Orentlicher, *supra* note 92, at 2604, n.306. *See also* Michael Scharf, *Accountability for International Crime and Serious Violations of Fundamental Human Rights: The Letter of Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes*, 59 LAW & CONTEMP. PROB. 41, 46–47 (1997) (Such language was intended "to reflect the developments in international standards of due process that had occurred in the nearly forty years since the Genocide Convention was drafted in 1948.").

94. Naomi Roht-Arriaza, Comment, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 CAL. L. REV. 451, 463–66 (1990).

Punishment of the Crime of Genocide,<sup>95</sup> and the Geneva Conventions.<sup>96</sup> Seventeen additional international treaties feature this provision, many of which deal with terrorism.<sup>97</sup>

A recent Preliminary Report before the General Assembly offers a current interpretation of CAT's *aut dedere aut judicare* provision:

It seems that the existing treaty practice . . . has already created a sufficient basis for considering the extent to which the obligation to extradite or prosecute, so important as a matter of international criminal policy, has become a matter of concrete legal obligation . . . [S]everal treaties (for example, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment) compel [s]tates parties to introduce rules to enforce the *aut dedere aut judicare* principle, according to which the State which does not order extradition is obliged to prosecute . . . States will therefore have to set up appropriate mechanisms to ensure the effective enforcement of this principle.<sup>98</sup>

This statement suggests that whether or not a conviction and sentence is ultimately imposed, “submit[ting] the case to [a state party’s] competent authorities” in accordance with article 7 means that at minimum a prosecution must be brought. And fittingly, according to a general comment the Committee Against Torture recently issued: “[A]mnisties or other impediments which preclude or indicate unwillingness to provide prompt and fair prosecution and punishment of perpetrators of torture or ill-treatment violate the principle of non-derogability.”<sup>99</sup>

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95. Convention on the Prevention and Punishment of the Crime of Genocide art. 6, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277.

96. Geneva Convention I, *supra* note 74, art. 49; Geneva Convention II, *supra* note 74, art. 50; Geneva Convention III, *supra* note 74, art. 129; Geneva Convention IV, *supra* note 74, art. 146.

97. This has led one scholar to observe that “the purpose of the principle is to ensure that those who commit crimes under international law are not granted safe haven anywhere in the world.” Roht-Arriaza, *supra* note 94, at 463–66. For a complete list of these treaties, see *Universal Jurisdiction: The Duty to Enact and Enforce Jurisdiction*, Amnesty International, (2001) at 21, [http://web.amnesty.org/library/pdf/IOR530182001ENGLISH/\\$File/IOR5301801.pdf](http://web.amnesty.org/library/pdf/IOR530182001ENGLISH/$File/IOR5301801.pdf). A recent overview of the issues involved in the *aut dedere aut judicare* principle can be found at Report of the Int'l Law Commission, 394–99, U.N. GAOR, 61st Sess., Supp. No. 10, U.N. Doc. A/61/10 (2006).

98. Special Rapporteur, Int'l Law Commission, *Preliminary Report on the Obligation to Extradite or Prosecute (“Aut Dedere Aut Judicare”)*, para. 38–39, delivered to the General Assembly, U.N. Doc. A/CN.4/571 (June 7, 2006) (prepared by Zdzislaw Galicki) [hereinafter *Extradite or Prosecute Report*].

99. U.N. Comm. Against Torture, General Comment No. 2, Implementation of Article 2 by State Parties, para. 5, U.N. Doc. CAT/C/GC/2 (2008).

The committee invoked this declaration in its May 2008 concluding observations on Algeria's compliance with CAT.<sup>100</sup> Offering strong criticisms, the Committee Against Torture observed that the Charter's provisions amnestying armed groups and state forces "do not conform to the obligation of every state party . . . to pursue the authors of [torture] . . ."<sup>101</sup> After instructing the Algerian state to amend the Charter to clarify that it does not amnesty acts of torture,<sup>102</sup> the committee asserted: "The state party should take without delay all necessary measures to guarantee that . . . the authors of [torture, past or recent, including rape and forced disappearances] are pursued and punished in a manner proportionate to the gravity of acts committed . . ."<sup>103</sup> CAT therefore grounds a clear duty to prosecute perpetrators of torture, which amnesty laws like Algeria's transgress.

#### *D. International Covenant on Civil and Political Rights*

Under the International Covenant on Civil and Political Rights ("International Covenant"),<sup>104</sup> an effective remedy imposes duties upon the Algerian state that conflict with the Charter. This fundamental instrument establishes a states party's commitment to "respect" and "ensure" certain rights<sup>105</sup> as well as provide an "effective remedy" when these rights are violated, "notwithstanding that the violation has been committed by persons acting in an official capacity."<sup>106</sup> Emphasis has been placed on the drafting history, which has been argued to express the need for "ensuring accountability of government authorities for violations, especially by ruling out the defenses of sovereign immunity or following superior orders," a purpose explicitly shown, for example, in the above quoted clause.<sup>107</sup>

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100. U.N. Comm. Against Torture, Examen des Rapports Présentés par les États Parties en Application de l'Article 19 de la Convention, Observations finales du Comité contre la torture, Version Non Editee, para. 11, U.N. Doc. CAT/C/DZA/CO/3 (2008) [hereinafter CAT Observations finales].

101. *Id.* para. 11 (author's translation).

102. *Id.*

103. *Id.* (author's translation).

104. In December 1989, Algeria became a state party to the International Covenant as well as the Optional Protocol to the International Covenant on Civil and Political Rights. UNHCHR Algeria, *supra* note 88.

105. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI) art. 2(1), 21st Sess., U.N. GAOR, Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter International Covenant].

106. *Id.* art. 2(3)(a).

107. Roht-Arriaza, *supra* note 94, at 475–76.

Legal scholars have pointed to numerous decisions by the Human Rights Committee (“HRC”) interpreting the right to an effective remedy as requiring a state’s duty to investigate and prosecute breaches,<sup>108</sup> particularly those involving torture and disappearances.<sup>109</sup> Key decisions date back as early as the mid-1980s.<sup>110</sup> While it is accurate that in earlier communications the committee acted more to encourage than assert a duty to prosecute, leaving some discretion to the state,<sup>111</sup> the language it has employed has remarkably strengthened over the years to support an unambiguous obligation. For example, in the case of Algeria alone, the HRC has issued no fewer than six communications concerning torture and disappearances that expressly declare that the Algerian state has a duty to prosecute and punish perpetrators.<sup>112</sup>

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108. Although the International Covenant provides for derogation “in time of public emergency which threatens the life of the nation,” it is not permitted for “articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16, and 18.” International Covenant, *supra* note 105, art. 4(1)–(2). A state party may derogate from neither the prohibition on torture contained in article 7, nor articles 6 and 16, which respectively ground the right not to be disappeared or extrajudicially killed. *Id.* art. 6, 16. The derivative rights of nonderogable provisions that follow from article 2(3) are likewise nonderogable, even though this provision is not expressly mentioned in article 4. See U.N. Human Rights Comm., General Comment No. 29, State of Emergency (Article 4), para. 14, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001).

109. See, e.g., Orentlicher, *supra* note 92, at 2569–71; Roht-Arriaza, *supra* note 94, at 477–78.

110. See, e.g., U.N. Human Rights Comm., Quinteros v. Uruguay, Communication No. 107/1981, para. 15–16, U.N. Doc. CCPR/C/OP/2/107/1981 (1990); U.N. Human Rights Comm., Bleier v. Uruguay, Communication No. 30/1978, para. 13(3), 15, U.N. Doc. CCPR/C/OP/1/30/1978 (1985); U.N. Human Rights Comm., Muteba v. Zaire, Communication No. 124/1982, para. 13, U.N. Doc. A/39/40/124/1982 (1984). These communications did not involve discussion of amnesty laws. Nonetheless, in Rodriguez v. Uruguay, considering Uruguay’s amnesty law, the HRC stated that “amnesties for gross violations of human rights and legislation such as . . . [its] *Ley de Caducidad de la Pretension Punitiva del Estado* are incompatible with the obligations of the State party under the Covenant” and “urge[d]” Uruguay to investigate the allegations of torture and provide for civil redress as well as compensation. U.N. Human Rights Comm., Rodriguez v. Uruguay, Communications No. 322/1988, para. 12(4), 14 U.N. Doc. CCPR/2/3/A/322/1988 (1994).

111. See Scharf, *supra* note 93, at 48–52.

112. The following pronouncement is typical of that contained in each of these communications:

[T]he State party is *under an obligation* to provide the author with an effective remedy, including a thorough and effective investigation into the disappearance and fate of the author’s son, his immediate release if he is still alive, adequate information resulting from its investigation, and adequate compensation for the author and her family for the violations suffered by the author’s son. The State party

Consistent with these communications, the committee considered Algeria in October 2007<sup>113</sup> and picked apart the Charter, stating that the Algerian state should:

Take all appropriate measures to guarantee that grave human rights violations brought to its attention, such as massacres, torture, rape, and disappearances, are made the object of investigations, and that those responsible for such violations, including state agents and members of armed groups, are pursued and respond for their acts.<sup>114</sup>

Engage in a complete and independent investigation into every allegation of disappearance, and after identification, pursue and punish the guilty.<sup>115</sup>

Guarantee that all allegations of torture and cruel, inhumane and degrading treatment are made the object of investigations brought by an independent authority and that those responsible for such acts are pursued and punished in a consequential manner.<sup>116</sup>

In addition, in paragraph 7(a) of its concluding observations, the committee asserted: “[A]rticle 45 should be amended in order to clarify that crimes such as torture, murder, and abductions are exempt from [its]

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*is also under a duty to prosecute criminally, try and punish those held responsible for such violations. The State party is also under an obligation to take measures to prevent similar violations in the future.*

U.N. Human Rights Comm., Boucherf v. Algeria, Communication No. 1196/2003, para. 11, U.N. Doc. CCPR/C/86/D/1196/2003 (2006) (emphasis added). See also, U.N. Human Rights Comm., Aber v. Algeria, Communication No. 1439/2005, para. 9, U.N. Doc. CCPR/C/90/D/1439/2005 (2007); U.N. Human Rights Comm., Grioua v. Algeria, Communication No. 1327/2004, para. 9, U.N. Doc. CCPR/C/90/D/1327/2004 (2007); U.N. Human Rights Comm., Cheraitia v. Algeria, Communication No. 1328/2004, para. 9, U.N. Doc. CCPR/C/90/D/1328/2004 (2007); U.N. Human Rights Comm., Medjnouna v. Algeria, Communication No. 1297/2004, para. 10, U.N. Doc. CCPR/C/87/1297/2004 (2006); U.N. Human Rights Comm., Bousroual v. Algeria, Communication No. 992/2001, para. 11, U.N. Doc. CCPR/C/86/992/2001 (2006).

113. The committee probed the state with an extensive list of twenty-seven issues, five of which were directly related to the Charter. U.N. Human Rights Comm., List of Issues to be Taken up in Connection with the Consideration of the Third Periodic Report of Algeria, para. 3, 13, 22–23, 25, U.N. Doc. CCPR/C/DZA/Q/3 (2007).

114. U.N. Human Rights Comm., Examen des Rapports Présentés par les États Parties Conformément à l'Article 40 du Pacte, Observations finales du Comité des droits de l'Homme, Version Non Editee, para. 7(b), U.N. Doc. CCPR/C/DZA/CO/3/CRP.1 (2007) (author's translation) [hereinafter HRC Observations finales].

115. *Id.* para. 12(d) (author's translation).

116. *Id.* para. 15(a) (author's translation).

application.”<sup>117</sup> Although the HRC’s recommendations were not couched in mandatory language, this does not detract from their legal force, as the committee’s purpose is not to dictate, but rather to approach states in a non-combative manner. These statements concerning the Charter are remarkable in both number and degree of specificity. Given the Charter’s central purpose to extinguish criminal actions<sup>118</sup> as well as the HRC’s statement in paragraph 7(a), the above-quoted references to “pursue and respond” and “pursue and punish” indicate that perpetrators of gross human rights violations are to be held criminally responsible. Thus, in accordance with the International Covenant, Algeria, *inter alia*, must prosecute and punish for the crimes it amnesties, namely, torture, extrajudicial murders and disappearances.

#### E. African Charter on Human and Peoples’ Rights

Article 7(1) of the African Charter on Human and Peoples’ Rights (“African Charter”)<sup>119</sup> provides that “[e]very individual shall have the right to . . . an appeal to competent national organs against acts of violating his fundamental rights . . .”<sup>120</sup> Article 5 expressly prohibits torture, article 6 establishes a right to liberty and security, and article 26

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117. “Moreover, the State party should make sure to inform the public that article 45 does not apply to declarations or proceedings for torture, extrajudicial executions, and disappearances.” *Id.* para. 7(a) (author’s translation).

118. Within a paragraph on criminal punishments, the HRC noted: “[It] believes that [the Charter], which bans all proceedings against units of the defense and security forces, also appears to promote impunity and undermine the right to an effective remedy (articles 2, 6, 7, and 14 of the Covenant).” *Id.* para. 7 (author’s translation). At first glance, the word “appear” may seem at odds with the committee’s strong recommendations. However, the Algerian state vaguely referenced having criminally pursued and punished perpetrators of abuses. U.N. Human Rights Comm., Summary Record of the 2495th Meeting, para. 10, U.N. Doc. CCPR/C/SR.2495 (2007); U.N. Human Rights Comm., Replies of the Government of the Algerian Republic to the List of Issues to be Taken up in Connection with Consideration of the Third Periodic Report of Algeria, U.N. Doc. CCPR/C/DZA/Q/3/Add.1 (2007) (noting prosecutions and convictions for members of “legitimate defense groups,” but for “ordinary offenses”). Moreover, the right to an effective remedy also imposes upon states the duty to investigate and disclose pertinent information, which the Charter does not explicitly bar. If the committee used “appear” instead of simply declaring that the Charter spawns impunity and violates the right to an effective remedy, it was only giving the state the benefit of the doubt.

119. Algeria became a state party in March 1987. African Union, List of Countries Which Have Signed, Ratified / Acceded to the African Union Convention on African Charter on Human and Peoples’ Rights, [http://www.achpr.org/english/ratifications/ratification\\_charter\\_en.pdf](http://www.achpr.org/english/ratifications/ratification_charter_en.pdf) [hereinafter Parties to African Charter].

120. African Charter on Human and Peoples’ Rights art. 7(1), OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (June, 27, 1981) [hereinafter African Charter].

sets forth a state's "duty to guarantee the independence of the Courts . . . ."<sup>121</sup> With these particular articles in consideration, the African Commission on Human and Peoples' Rights ("African Commission") issued a set of Principles and Guidelines ("Guidelines"),<sup>122</sup> in which it set forth: "The granting of amnesty to absolve perpetrators of human rights violations from accountability violates the right of victims to an effective remedy."<sup>123</sup>

Prior to the Guidelines, the commission expressed this principle against such amnesties in consideration of communications submitted against Mauritania.<sup>124</sup> The communications involved claims of "grave or massive violations of human rights," including torture and disappearances.<sup>125</sup> In 1993, the Mauritanian parliament adopted an amnesty law covering these violations, a law that the African Commission noted: "[H]ad the effect of annulling the penal nature of the precise facts and violations . . . [and] leading to the foreclosure of any judicial actions . . . ."<sup>126</sup> The commission declared that the state "has the duty to adjust its legislation to harmonise it with its international obligations,"<sup>127</sup> which, read with the preceding observation, implies a duty to prosecute. Confirming this obligation, the commission instructed Mauritania to "identify and *bring to book* the authors of the violations . . . ."<sup>128</sup>

Given not only the Guidelines' pronouncement on the irreconcilability of general amnesty laws with the African Charter, but also the African Commission's identification of a duty for Mauritania to reframe its amnesty law, the African Charter prohibits amnesty laws for grave human rights violations. This forbiddance includes amnestying violations of torture and disappearances, as in the case of Mauritania, and

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121. *Id.* art. 5–6, 26.

122. Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, pmbl., OAU Doc. DOC/OS(XXX)247 (adopted 2001).

123. *Id.* para. C(d). An effective remedy entails "access to justice," "reparation for the harm suffered," and "access to the factual information concerning the violations." *Id.* para. C(b). Furthermore, "[e]very State has an obligation to ensure that . . . any persons whose rights have been violated, including by persons acting in an official capacity, has an effective remedy by a competent judicial body[,] and a claim to a right to a remedy must be "determined by competent judicial, administrative or legislative authorities." *Id.* para. C(c)(1)–(2).

124. 13<sup>th</sup> Annual Activity Report of the African Commission on Human and Peoples' Rights, 1999–2000, 150, OAU Doc. AHG/222(XXXVI).

125. *Id.* para. 115–14.

126. *Id.* para. 81–82.

127. *Id.* para. 84.

128. *Id.* at 161 (emphasis added).

extrajudicial killings,<sup>129</sup> all three of which the Charter shields from prosecution.

### III. CUSTOMARY INTERNATIONAL LAW

If the legal invalidity of the Charter is established under Algeria's treaty obligations, academic literature reveals that a duty to prosecute under customary international law is highly controversial, scholars remaining near evenly split.<sup>130</sup> Nevertheless, after examining a wide

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129. See African Charter, *supra*, note 120, art. 4–7.

130. There are those who adopt the position that there is some form of an obligation to prosecute under customary international law. See M. Cherif Bassiouni, *Accountability for International Crime and Serious Violations of Fundamental Human Rights: Searching for Peace and Achieving Justice: The Need for Accountability*, 59 LAW & CONTEMP. PROB. 9, 17–18 (1996) (asserting that the *aut dedere aut judicare* provision applies to crimes against humanity, genocide, war crimes, and torture); Sadat, *supra* note 92, at 1014–22 (suggesting that a custom against amnesties for *jus cogens* crimes may now have come to fruition); Carla Edelenbos, *Human Rights Violations: A Duty to Prosecute?* 5 LEIDEN J. INT'L L. 21, 13, 15–16 (1994) (pointing to an emerging norm to prosecute war crimes and crimes against humanity, and possibly disappearances and extrajudicial murders as well, despite “inconclusive” state practice); Orentlicher, *supra* note 92, at 2582–85 (maintaining that a custom requiring punishment of torture, extra-judicial killings, and disappearances exists or is budding); O’SHEA, *supra* note 79, at 228–65 (arguing that state practice and *opinio juris* support an obligation to prosecute extra-legal killings, genocide, torture, customary crimes, and those crimes under the jurisdiction of the ICC); Roht-Arriaza, *supra* note 94, at 489–505 (stating that there is a crystallizing duty to investigate and “take action against” grave human rights violations and advocating for an obligation to prosecute and investigate); Milena Sterio, *Rethinking Amnesty*, 34 DENV. J. INT'L L. & POL'Y 373, 391–94 (2006); William W. Burke-White, *Reframing Impunity: Applying Liberal International Law Theory to an Analysis of Amnesty Legislation*, 42 HARV. INT'L L.J. 467, 529–30 (2001) (noting that amnesty laws are legally invalid where they encompass war crimes, crimes against humanity, genocide, and torture).

Contrastingly, there is a sizeable group of scholars who maintain that a custom requiring prosecution is either lacking and / or too unclear. See Roman Boed, *The Effect of Domestic Amnesty on the Ability of Foreign States to Prosecute Alleged Perpetrators of Serious Human Rights Violations*, 33 CORNELL INT'L L.J. 297, 314–18 (2000) (concluding that although there is likely sufficient *opinio juris*, state practice prevents the assertion that there is a customary duty to prosecute crimes against humanity); Kristin Henrard, *The Viability of National Amnesties in View of the Increasing Recognition of Individual Criminal Responsibility at International Law*, 8 MSU-DCL J. INT'L L. 595, 626–28, 648 (1999) (acknowledging that while “international law does seem to be moving the direction of prohibiting the grant of amnesty for international crimes,” if certain measures are sufficiently provided for in the context of democratic transition, even amnesty provisions covering international crimes might be acceptable); Dwight G. Newman, *The Rome Statute, Some Reservations Concerning Amnesties, and a Distributive Problem*, 20 AM. U. INT'L L. REV. 293, 306–15 (2005) (holding that despite “some trends in the progress of duties to prosecute . . . sources do not support the

variety of sources, this section argues that such a duty does in fact exist for the gravest of war crimes as well as crimes against humanity.

#### A. International Tribunals

According to the ICTY in the *Furundzija* case, torture's *jus cogens*<sup>131</sup> status has certain consequences, namely, that interstate acknowledgment of national amnesty laws that protect perpetrators of torture "would not be accorded international legal recognition."<sup>132</sup> This non-recognition is based on the inconsistency of maintaining that "treaties or customary rules providing for torture would be null and void *ab initio*, and then be unmindful of a State say, taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law."<sup>133</sup>

In "The Lomé Amnesty Decision," the SCSL considered whether the broad amnesty in the Lomé Agreement barred its jurisdiction over international crimes.<sup>134</sup> The SCSL found that it did have universal jurisdiction based on the reasoning that "a state cannot sweep such crimes into oblivion and forgetfulness . . . [as] the obligation to protect human dignity is a peremptory norm and has assumed the nature of obligation *erga omnes*."<sup>135</sup> However, the SCSL noted that a custom prohibiting amnesty for international crimes "is developing," rather than

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incorporation of a generalized duty"); Steven R. Ratner, *New Democracies, Old Atrocities*, 87 GEO. L.J. 707, 726–29 (1999); Scharf, *supra* note 93, at 52–61 (arguing that there is no custom requiring states to refrain from granting amnesty for crimes against humanity); Ronald C. Slye, *The Legitimacy of Amnesties Under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible?*, 43 VA. J. INT'L L. 173, 191 (2002) (maintaining that "existing international law is vague about the specifics of a state's obligation to prosecute or punish," but some type of accountability is necessary for grave human rights violations); Trumbull, *supra* note 10, at 290–303 (finding no custom legally invalidating amnesty laws, and asserting that even though blanket amnesty laws might breach certain obligations, the scope of these obligations is uncertain).

131. *Jus cogens* is "[a] mandatory or peremptory norm of general international law accepted and recognized by the international community as a norm from which no derogation is permitted." BLACK'S LAW DICTIONARY 876 (8th ed. 2004)

132. Prosecutor v. Furundzija, Case No. IT-95-17/1, Judgment, para. 155 (Dec. 10, 1998).

133. *Id.*

134. Prosecutor v. Kallon, Case No. SCSL-2004-15-AR72(E), Case No. SCSL-2004-16-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, para 1, 65 (Mar. 13, 2004).

135. *Id.* para. 69, 71–72.

fully formed.<sup>136</sup> In the subsequent *Kondewa* case, contrastingly, Justice Robertson addressed the customary status of amnesties at length in a separate opinion, concluding that a rule does exist that “invalidates amnesties offered under any circumstances to persons most responsible for crimes against humanity (genocide and widespread torture) and the worst war crimes (namely those in Common Article 3 of the Geneva Conventions).”<sup>137</sup>

### B. Inter-American System

The Inter-American Court of Human Rights (“Inter-American Court”) has long been at the forefront in framing the duties of states vis-à-vis massive human rights violations. In its seminal case, *Valásquez Rodríguez*, the court interpreted in now famous dicta the “respect” and “ensure” language of the American Convention on Human Rights (“American Convention”)<sup>138</sup> to require states to “prevent, investigate and punish any violation of the rights recognized by the Convention.”<sup>139</sup>

With countless cases of human rights abuses brought before the Inter-American System, amnesty laws have also come into consideration. Not only the Inter-American Commission on Human Rights (“Inter-American Commission”), but also the Inter-American Court have consistently declared the incompatibility of amnesty laws with obligations under the American Convention. For example, in ruling on Peru’s grant of amnesty to security forces and civilians for human rights violations committed between 1980 and 1995, in the *Barrios Altos Case*, the Inter-American Court asserted the following:

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136. *Id.* para. 82. Duties *erga omnes* have been defined as “obligations of a State towards the international community as a whole. By their very nature [they] are the concern of all States. In view of the importance of the right involved, all States can be held to have a legal interest in their protection.” *Barcelona Traction, Light and Power Co., Ltd. (Belg. V. Spain)*, 46 I.L.R. 178, 206 (I.C.J. 1970).

137. *Prosecutor v. Kondewa*, Case No. SCSL-2004-14-AR72(E), Separate Opinion of Justice Robertson on the Decision on Lack of Jurisdiction / Abuse of Process: Amnesty Provided by the Lomé Accord, para. 51 (May 25, 2004). Referring to Protocol II, Justice Robertson reasoned, its amnesty provision “would apply to rank and file participants, but not to authors of [armed] conflicts.” *Id.* para. 32. Acknowledging the existence of state practice undermining a customary rule, Justice Robertson noted that this is at least partially offset by “a hand-wringing quality about the excuses for amnesty by states which grant them.” *Id.* para. 47.

138. American Convention on Human Rights art. 1, O.A.S. T.S. No. 36, 1144 U.N.T.S. 123 (Nov. 22, 1969) reprinted in OAS/Ser.L/V/4 rev.12.

139. *Velásquez Rodríguez Case*, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4, at para. 166 (July 29, 1988).

All amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance.<sup>140</sup>

Likewise, the Inter-American Commission found amnesty laws in Argentina, Chile, El Salvador as well as Uruguay to be in violation of the American Convention, and reiterated a state's duty to investigate, prosecute and punish.<sup>141</sup>

### C. National Courts

Granting amnesty for acts and omissions “associated with political objectives” provided that an applicant fully discloses relevant facts, South Africa’s Promotion of National Unity and Reconciliation Act 34 of 1995 was reviewed by the Constitutional Court of South Africa (“South

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140. Barrios Altos Case, 2001 Inter-Am. Ct. H.R. (ser. C) No. 75, at para. 41 (Mar. 14, 2001). At least one scholar has suggested that this case does not establish a duty to prosecute based on the Inter-American Court’s subsequent judgment in the case on reparations. See Trumbull, *supra* note 10, at 301, n.96. It is important to note that Peru stated in the initial decision before the Court that it would concede the violation of a right to fair trial and judicial guarantees in failing to punish the crimes in question as well as consider “the viability of criminal and administrative punishments.” Barrios Altos Case, 2001 Inter-Am. Ct. H.R. (ser. C) No. 75, at para. 35 (Mar. 14, 2001). Moreover, the Inter-American Commission recommended that Peru “punish those responsible for these grave crimes, through the corresponding criminal procedure.” *Id.* para. 17. The Court’s judgment on reparations actually does reference a duty to prosecute. With regard to non-monetary reparations, the Inter-American Court unanimously ordered the application of its judgment on the merits, which expressly set forth an obligation to “punish those responsible.” In addition, in its original judgment, the Court found that Peru violated the right to fair trial and judicial protection, “as a consequence of the enactment and enforcement of [its two amnesty laws].” Barrios Altos Case, Judgement of November 30, 2001 Inter-Am. Ct. H.R. (ser. C) No. 87, at para. 50(5)(a), 3(2)(c), 3(5) (Nov. 30, 2001). And, both amnesty laws were passed in the middle of criminal court proceedings against the perpetrators of the massacre in question. *Id.* para. 2(g)–(m).

141. E.g. Argentina, Cases 10.147, 10.181, 10.240, 10.262, 10.309 & 10.311, Inter-Am. C.H.R. Report No. 28/92, OEA/ser. L/V/II.82, doc. 24, para. 40–41 (1992); Espinoza v. Chile, Case 11.725, Inter-Am. C.H.R. Report No. 133/99, OEA/Ser.L/V/II.106, doc. 6 rev. para. 64-67 (1999); Las Hojas v. El Salvador, Case 10.287, 1993 Inter-Am. C.H.R. Report No. 26/92, OEA/Ser./L/V/II.83, doc. 14 (1992); Mendoza v. Uruguay, Cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374, & 10.375, Inter-Am. C.H.R. Report No. 29/92, OEA/Ser.L/V/II.83, doc. 14, para. 46, 50 (1992); Romero y Galdámez, Case 11.481, Inter-Am. C.H.R. Report No. 37/00, OEA/ser.L/V/II.106, doc. 3, rev. at 671, para. 4, 126, 129–31, 141, 158–59 (1999).

African Court") in the *AZAPO Case*.<sup>142</sup> This body considered international law only for the purposes of interpreting the South African Constitution, which contained the Act in question, and deemed "irrelevant" any duty to the contrary established by international law.<sup>143</sup> Turning to the Geneva Conventions, the court found that the duty to prosecute grave violations therein enshrined was inapplicable based on the distinction between international and internal conflicts, South Africa's case belonging to the latter type.<sup>144</sup> The court then bolstered this presumption by arguably misinterpreting Protocol II as encouraging national amnesties.<sup>145</sup> And thus, the right to criminal prosecutions was swiftly rejected.<sup>146</sup>

In contrast, in a 2004 decision, the supreme court of Chile denied the application of Chile's amnesty law to forced disappearances and affirmed prison sentences for defendants found guilty of disappearing persons in 1975.<sup>147</sup> The court relied on the Inter-American Convention of Forced Disappearances of Persons, even though this treaty was not ratified by the country's parliament, and unanimously declared that forced disappearances constitute a crime against humanity to which no statute of limitations applies.<sup>148</sup> As the crime of disappearing individuals is a continuing violation, the court found that the country's amnesty law shielding crimes perpetrated between 1973 and 1978 was inapplicable.<sup>149</sup> Significantly, what the court did find binding were principles established

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142. Azanian People's Organization (AZAPO) v. President of the Republic of South Africa 1996 (4) SA 671 (CC) (S. Afr.).

143. *Id.* para. 26.

144. *Id.* para. 29–30.

145. *Id.* para. 30–31. See *supra* Part II(b).

146. For criticism of South Africa's decision not to prosecute and its Truth and Reconciliation Commission, see for example Ziyad Motala, *The Use of the Truth Commission in South Africa as an Alternative Dispute Resolution Mechanism Versus the International Law Obligations*, 45 SANTA CLARA L. REV. 913 (2005). See also, e.g., Olivia Lin, *Demythologizing Restorative Justice: South Africa's Truth and Reconciliation Commission and Rwanda's Gacaca Courts in Context*, 12 ISLA J. INT'L & COMP L. 41 (2005) (questioning the uncompromising acceptance of restorative justice).

147. *Supreme Court of Chile: Case of Miguel Angel Sandoval Rodríguez* (November 17, 2004), American Society of International Law, International Law in Brief, Oct. 30, 2004, <http://www.asil.org/ilib/2004/11/ilib041119.htm#j2> [hereinafter *Rodríguez Case*].

148. *Id.* Chile is not a party to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity. Office of the U.N. High Commissioner for Human Rights, Ratifications and Reservations, <http://www.ohchr.org/english/bodies/ratification/6.htm> (last visited Mar. 16, 2008).

149. *Rodríguez Case*, *supra* note 147.

by the United Nations International Law Commission and given effect by the Nuremberg Tribunal as well as the ICTY.<sup>150</sup>

The supreme court of Argentina went even further in its 2005 landmark decision that struck down the country's two amnesty laws as unconstitutional.<sup>151</sup> The court deemed disappearances a crime against humanity with *jus cogens* status, thereby invalidating any statutory limitations.<sup>152</sup> Furthermore, even though Argentina ratified the American Convention after the amnesty laws, the court established that the amnesty laws prevented the state from satisfying its obligations under the treaty as well as under established principles of international law, as both the purpose and the effect of the amnesty laws were to bar prosecution.<sup>153</sup> In reaching this conclusion, the court closely drew from the jurisprudence of the Inter-American Court, particularly the *Barrios Altos Case*.<sup>154</sup>

#### D. Regional Agreements

The monitoring bodies of the African Charter and the American Convention have interpreted their instruments to establish a duty to prosecute human rights violations<sup>155</sup> and both are widely ratified.<sup>156</sup> In addi-

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150. *Id.* As of December 2006, Chile has found more than 100 people guilty of crimes including disappearances, murders, and torture, and 35 former generals are either sentenced or to stand trial. Larry Rohter, *Chile's Leader Attacks Amnesty Law*, N.Y. TIMES, Dec. 24, 2006.

151. *Supreme Court of Argentina: Case of Julio Héctor Simon (Decision declaring Argentina's Amnesty Laws Unconstitutional)* (June 14, 2005), American Society of International Law, International Law in Brief, June 28, 2005, available at <http://www.asil.org/ilib/2005/06/ilib050628.htm>.

152. *Id.*

153. *Id.*

154. *Id.* In June 2006, the first prosecution of a former official took place since the invalidation of the amnesty laws. Two months later, the first conviction was issued; a former police officer received twenty-five years for his participation in disappearing a couple and their infant daughter. Joe Shaulis, *Argentina Ex-President Testifies Now-Annulled 'Dirty War' Amnesty Laws Needed*, JURIST, Aug. 31, 2006, <http://jurist.law.pitt.edu/paperchase/2006/08/argentina-ex-president-testifies-now.php>.

155. See *supra* Part II(e), Part III(b).

156. All fifty-three members of the African Union have ratified the African Charter. Parties to African Charter, *supra* note 120. Twenty-five states are parties to the American Convention. Basic Documents Pertaining to Human Rights in the Inter-American System, American Convention, Signatures and Current Status of Ratifications, OAS/Ser.L/V/1.4 rev.12 (Jan. 31, 2007). Nine states have yet to ratify this instrument, including the United States, but, unlike international treaties, support for human rights principles at a regional level does not require near unanimity. See RESTATEMENT OF THE LAW (THIRD): FOREIGN RELATIONS LAW OF THE UNITED STATES § 702(c), cmt. 11 [hereinafter RESTATEMENT].

tion, while the European Court of Human Rights has read article 1<sup>157</sup> of the Convention for the Protection of Human Rights and Fundamental Freedoms<sup>158</sup> as grounding a duty to prevent or remedy transgressions of the treaty, the European Commission on Human Rights has construed it as an obligation to prosecute criminally where suitable.<sup>159</sup>

#### *E. U.N. Resolutions and Activities*

In a 1973 General Assembly resolution, the following principle was framed in obligatory language: "War crimes and crimes against humanity . . . shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty, to punishment."<sup>160</sup>

Resolutions on specific human rights crimes have also framed the duty to prosecute and punish in mandatory terms. Regarding extra-judicial killings, the Economic and Social Council passed a resolution in 1989 stating: "[I]n no circumstances, including a state of war, siege or other public emergency, shall blanket immunity from prosecution be granted to any person allegedly involved in extra-legal, arbitrary or summary executions."<sup>161</sup> According to the Declaration on the Protection of All Persons from Enforced Disappearances adopted by the General Assembly in 1992, alleged perpetrators of disappearances "shall not benefit from any special amnesty law or similar measures that might have the effect of exempting them from any criminal proceedings or sanction."<sup>162</sup> And concerning torture, in a 1999 resolution, the Commission on Human Rights declared: "[T]hose who encourage, order,

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157. Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, 213 U.N.T.S. 221 (Nov. 4, 1950).

158. There are forty-six parties to this instrument. European Court of Human Rights, Basic Texts, Dates of Ratification of the European Convention on Human Rights and Additional Protocols, <http://www.echr.coe.int> (last visited Oct. 18, 2007).

159. Yasmin Naqvi, *Amnesty for War Crimes: Defining the Limits of International Recognition*, 85 INT'L REV. RED CROSS 583, 607 (2003).

160. Principles of International Co-operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity, G.A. Res. 3074 (XXVIII), U.N. GAOR, 28th Sess., Supp. No. 30, at 78 para. 1, U.N. Doc. A/9030 (1973) (adopted with ninety-four in favor, none against, and twenty-nine abstentions) [hereinafter Principles of International Co-operation].

161. Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, U.N. Econ. & Soc. Council Res. 1989/65, para. 19, U.N. ESCOR Supp. No. 1 at 52, U.N. Doc. E/1989/89 (May 24, 1989).

162. Declaration on the Protection of All Persons from Enforced Disappearances, G.A. Res. 47/133, art. 18, U.N. GAOR, 47th Sess., Supp. No. 49, U.N. Doc A/47/49 (Dec. 18, 1992) (adopted without a vote).

tolerate or perpetrate [torture] must be held responsible and severely punished.”<sup>163</sup>

Furthermore, the 1997 final report prepared by the Special Rapporteur on Amnesty provided that “[e]ven when intended to establish conditions conducive to a peace agreement or to foster national reconciliation, amnesty and other measures of clemency shall be kept within the following bounds,” which provide, *inter alia*, “perpetrators of serious crimes under international law may not benefit from such measures until”<sup>164</sup> the state has “prosecuted, tried, and duly punished [them]”.<sup>165</sup> Over the past few decades, numerous other resolutions and statements have been made to the same effect.<sup>166</sup>

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163. Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment, Commission on Human Rights [CHR] Res. 1999/32, para. 4, CHR, 55th Sess., U.N. Doc. E/CN.4/RES/1999/32 (Apr. 23, 1999).

164. Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political): Revised Final Report Prepared by Mr. Joinet pursuant to Sub-Commission Decision 1996/119, CHR, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 49th Sess., princ. 25(a), U.N. Doc. E/CN.4/Sub.2/1997/20/Rev.1 (Oct. 2, 1997).

165. *Id.* princ. 18.

166. Question of the Punishment of War Criminals and of Persons Who Have Committed Crimes Against Humanity, G.A. Res. 2712 (XXV), U.N. GAOR, 25th Sess., Supp. No. at 78, para. 2, U.N. Doc. A/8028 (1970) (“[c]all[ing] upon all states to take measures . . . to arrest such persons and extradite them . . . so that they can be brought to trial and punished”) (adopted with fifty-five in favor, four against, and thirty-three abstentions); RESTATEMENT, § 702, cmt. b (asserting that a state violates customary international law “if [the enumerated *jus cogens* human rights violations], especially by its officials, have been repeated or notorious and no steps have been taken to prevent them or to punish the perpetrators”); S.C. Res. 827, para. 2, U.N. Doc. S/RES/827 (May 25, 1993) (unanimously founding the ICTY “for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law”); Vienna Declaration and Programme of Action, para. 60, 62, U.N. Doc. A/Conf.157/23 (July 12, 1993) (“States should abrogate legislation leading to impunity for those responsible for grave violations of human rights such as torture and prosecute such violations . . . [I]t is the duty of all States, under any circumstances . . . if allegations are confirmed [that an enforced disappearance has taken place], to prosecute its perpetrators.”); S.C. Res. 955, para 1, U.N. Doc. S/RES/955 (Nov. 8, 1994) (establishing the ICTR towards the same end as that of the ICTY); Rome Statute, *infra* note 204, at pmb. (“[R]ecalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes”); Impunity, U.N. Commission on Human Rights, Res. 2002/79, para. 11, U.N. CHR, 58th Sess., U.N. Doc. E/CN.4/RES/2002/79 (Apr. 25, 2002) (“urg[ing] all States to take effective measures to implement their obligations to prosecute or extradite perpetrators of [crimes such as genocide, crimes against humanity, war crimes and torture]”).

Recent statements by U.N. officials adopt the same position against such amnesties. In addition to truth and reconciliation commissions, according to the

While these positions against amnesties for war crimes and crimes against humanity are highly significant, the U.N. has at times either assisted in negotiating such amnesties or offered tacit approval. Examples of the former include peace agreements in Haiti (1993) and South Africa (1994), and an instance of the latter involves a response to El Salvador's amnesty law (1993).<sup>167</sup> It is important to note, however,

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Under-Secretary-General for Peacekeeping Operations: “[W]e must also ensure that any amnesty clauses in peace agreements exclude amnesties for war crimes, genocide, crimes against humanity and other serious violations of international human rights and humanitarian law.” Press Release, Working Justice Systems Vital for UN Peacekeeping Success, Security Council Told (Sept. 30, 2003). The Secretary-General also asserted that resolutions and mandates should “[r]eject any endorsement of amnesty for genocide, war crimes, or crimes against humanity.” The Secretary-General, *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, para. 64(c), delivered to the Security Council, U.N. Doc. S/2004/616 (Aug. 23, 2004). Addressing the Security Council, the U.N. Legal Counsel maintained: “Justice should never be sacrificed by granting amnesty in ending conflicts . . . [A]mnesty for international crimes [is] now considered unacceptable in international practice.” Press Release, Justice Must Not Be Sacrificed to End Conflicts, Security Council Told (June 22, 2006).

167. Trumbull, *supra* note 10, at 293–94. Although Trumbull also cites a U.N. implicit endorsement of Guatemala’s amnesty law, this case should be excluded from the above category, as Guatemala’s law was not designed to encompass war crimes, crimes against humanity, or torture. See Annual Report, Guatemala, Inter-Am. C.H.R., OEA/Ser.L/V/II.95, doc. 7 rev., para. 30 (1996).

The 1996 Abidjan Accord amnestied the acts of the Revolutionary United Front of Sierra Leone. Peace Agreement between the Government of the Republic of Sierra Leone and the Revolutionary United Front of Sierra Leone, art. 14 (Nov. 30, 1996). Nonetheless, the case of Sierra Leone ultimately warrants exclusion, as the Special Representative of the Secretary-General added a statement to his signature of the Lomé Accord, asserting “that the UN holds the understanding that the amnesty provisions of the Agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law.” S.C. Res. 1315, pmb., U.N. Doc. S/Res/1315 (Aug. 14, 2000) (affirming unanimously). The Security Council itself then “reaffirm[ed] further that persons who commit or authorize serious violations of international humanitarian law are individually responsible and accountable for those violations.” *Id.* Pursuant to this resolution, the amended Statute of the SCSL expressly provides: “[A]n amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in articles 2 to 4 of the present Statute shall not be a bar to prosecution.” Statute of the Special Court for Sierra Leone, art. 10, Jan. 16, 2002, 2178 U.N.T.S. 145.

Finally, U.N. involvement in Liberia should not be so easily construed in favor of amnesties. Signed by a U.N. representative, the 2003 Comprehensive Peace Agreement ending hostilities in Liberia included a vague provision leaving open the possibility of a general amnesty. Comprehensive Peace Agreement Between the Government of Liberia and the Liberians United for Reconciliation and Democracy (LURD) and the Movement for Democracy in Liberia (MODEL) and Political Parties, art. 34, signed Aug. 18, 2003,

that these U.N. endorsements took place over a decade ago, and more recent positions should also be considered, which suggest greater continuity between U.N. principles and practice regarding amnesties.<sup>168</sup> In March 2007, in a report delivered to the Security Council, the Secretary General reminded President Hamid Karzai that his Action Plan on Peace, Justice and Reconciliation must not bar from prosecution genocide, war crimes, crimes against humanity, or gross human rights violations.<sup>169</sup> Similarly, the High Commissioner for Human Rights, in May 2007, advised the Ugandan government and the Lord's Resistance Army to ground their peace agreement in international legal standards, relaying: “[T]here can be no amnesty for war crimes, crimes against humanity, genocide, and gross violations of human rights.”<sup>170</sup> And as recently as July 2007, the U.N. stated that it would boycott East Timor's Commission of Truth and Friendship if the body did not amend its terms of reference to exclude amnesty for genocide, war crimes, crimes against humanity, and gross human rights violations.<sup>171</sup>

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available at [http://www.usip.org/library/pa/liberia/liberia\\_08182003\\_cpa.html](http://www.usip.org/library/pa/liberia/liberia_08182003_cpa.html). Despite this, the United Nations Mission in Liberia (“UNMIL”) was subsequently established via a Security Council resolution, which “stresse[d] the need to bring to justice those responsible [for human rights violations and atrocities].” S.C. Res. 1509, para. 10, U.N. Doc. S/Res/1509 (Sept. 19, 2003) (adopted unanimously). In November 2005, the Security Council passed an additional resolution that, in the event of Charles Taylor’s return to Liberia, UNMIL was mandated to “transfer him or facilitate his transfer to Sierra Leone for prosecution.” S.C. Res. 1638, para. 1, U.N. Doc. S/Res/1638 (Nov. 11, 2005) (adopted unanimously).

168. See also Acte d’Engagement, *infra* note 192.

169. The Secretary-General, *Report of the Secretary-General on the Situation in Afghanistan and its Implications for International Peace and Security*, para. 79, delivered to the Security Counsel and the General Assembly, U.N. Doc. S/2007/152, A/61/799 (Mar. 15, 2007).

170. Press Release, UN Official Urges Ugandan Parties to Put Human Rights at Centre of Talks (May 11, 2007).

171. Press Release, Secretary-General, Secretary-General Says U.N. Officials Will Not Testify at Timor-Leste Commission, As Terms of Reference Include Possible Amnesty for Human Rights Violations, U.N. Doc. SG/SM/11101 (July 26, 2007).

Regarding Algeria specifically, the Special Rapporteur on Violence Against Women, Yakin Ertürk, issued a recent report on women in Algeria that recommended “adopt[ing] a zero tolerance policy towards all forms of violence against women and girls and diligently record, investigate and prosecute all cases.” *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences*, Yakin Ertürk, U.N. Human Rights Council, 70th Sess., Agenda Item 3, para. 104(a), U.N. Doc. A/HRC/7/6/Add.2 (2008). The report specified that “all identified perpetrators of sexual violence should be exempted from amnesty and brought to justice.” *Id.* para. 104(b).

*F. State Practice*

Against this abundance of judicial decisions, treaties, resolutions, and statements supporting a duty to prosecute war crimes, crimes against humanity, gross human rights violations, genocide and torture, in the past twenty-five years, numerous countries have issued amnesties for such crimes, including: Afghanistan,<sup>172</sup> Argentina,<sup>173</sup> Cambodia,<sup>174</sup> Chile,<sup>175</sup> Colombia,<sup>176</sup> El Salvador,<sup>177</sup> Haiti,<sup>178</sup> Honduras,<sup>179</sup> Lebanon,<sup>180</sup> Mauritania,<sup>181</sup> Peru,<sup>182</sup> Sierra Leone,<sup>183</sup> South Africa,<sup>184</sup> Uganda,<sup>185</sup> and Uruguay.<sup>186</sup> Some of the provisions of these laws, though, are more tailored in procedure and scope.<sup>187</sup> Nevertheless, what these cases share

172. Ron Synovitz, *Afghanistan: Amnesty Law Draws Criticism, Praise*, Eurasia Insight, Mar. 17, 2007, <http://www.eurasianet.org/departments/insight/articles/pp0317.7.shtml>.

173. *Supra* Part III(b)–(c).

174. Ronald C. Slye, *The Cambodian Amnesties: Beneficiaries and the Temporal Reach of Amnesties for Gross Violation of Human Rights*, 22 WIS. INT'L L.J. 99, 101–03 (2004).

175. *Supra* Part III(b)–(c).

176. Juan Forero, *New Colombia Law Grants Concession to Paramilitaries*, N.Y. TIMES, June 23, 2005.

177. *Supra* Part III(b).

178. *Haitians Vote Amnesty But Terms Are Vague*, N.Y. TIMES, Oct. 7, 1994.

179. Honduras: Continued Struggle Against Impunity, Amnesty International, Mar. 27, 1996, 4, [http://web.amnesty.org/library/pdf/AMR370011996ENGLISH/\\$File/AMR3700196.pdf](http://web.amnesty.org/library/pdf/AMR370011996ENGLISH/$File/AMR3700196.pdf) [hereinafter Struggle Against Impunity].

180. *Amnesty Ratified in Lebanon*, N.Y. TIMES, Aug. 27, 1991.

181. 13<sup>th</sup> Activity Report of the ACHPR, *supra* note 124.

182. *Supra* Part III(b).

183. *Supra* Part III(a).

184. *Supra* Part III(a).

185. The Amnesty Act, 2000, art. 3, Conciliation Resources, Our Work, Accord, Northern Uganda, Additional Keytexts, [www.c-r.org](http://www.c-r.org) (last visited Mar. 16, 2008). In February 2008, the Ugandan government and Lord's Resistance Army / Movement signed an annex agreement that provides for the creation of a special domestic court to prosecute “serious crimes” perpetrated during Uganda’s conflict. How this agreement will affect the Amnesty Act and the extent to which “traditional justice mechanisms” will influence or supplement the court’s proceedings remains to be seen. Annexure to the Agreement on Accountability and Reconciliation art. 7, 9–14, 23, Feb. 19, 2008, [http://mediacentre.go.ug/uploads/Signed%20Annexure%20to%20Agreement%20on%20Accountability%20and%20Reconciliation.19.02.08%20\\_1\\_.pdf](http://mediacentre.go.ug/uploads/Signed%20Annexure%20to%20Agreement%20on%20Accountability%20and%20Reconciliation.19.02.08%20_1_.pdf).

186. *Supra* Part III(b).

187. For example, the amnesty law adopted in February 2007 in Afghanistan bars the state from bringing prosecutions for war crimes on its own initiative, but acknowledges victims’ legal right to seek justice by allowing them to bring complaints against parties. Synovitz, *supra* note 172. The “Justice and Peace Law” in Colombia offers reduced sentences to crimes committed by armed groups, which encompass gross human rights

is a dearth of *opinio juris*, from which state practice must stem.<sup>188</sup> A key question is whether states adopting amnesty laws can be considered to have done so out of a sense of legal obligation when the driving force behind their passage is a fraught or forced attempt to secure public order.<sup>189</sup> These situations have been likened to duress, undermining the relative value of this practice as a manifestation of state-perceived rights and duties.<sup>190</sup> This observation holds true for most, if not all of these amnesty laws.<sup>191</sup>

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violations. Annual Report, Columbia, Inter-Am. C.H.R., OEA/Ser.L/V/II.127, doc. 4 rev. 1, para. 14 (2006); Annual Report, Colombia, Inter-Am. C.H.R., OEA/Ser.L/V/II.124, doc. 5, para. 14, 17 (2005).

188. *Opinio juris*, short for *opinio juris sive necessitates*, signifies “from a sense of legal obligations.” RESTATEMENT § 102, cmt. c.

189. Illustratively, in response to the HRC’s appraisal of the Charter, the Algerian government stated that the Charter “is a political text and should not, therefore, elicit comment from a legal body.” Characterizing the Charter as an expression of “the unanimous will of the Algerian people,” the government then asserted that the Charter and accompanying decrees do not “favour impunity or amnesty.” U.N. Human Rights Comm., Comments by the Government of the People’s Democratic Republic of Algeria to the Concluding Observations of the Human Rights Committee, para. 1, U.N. Doc. CCPR/C/DZA/CO/3/Add.1 (2007).

190. See, e.g., O’SHEA, *supra* note 79, at 262–63. For evidence that Uruguay, Chile, El Salvador, and the United States have acknowledged the importance of prosecuting human rights violations, see Roht-Arriaza, *supra* note 94, at 496–98. But see Scharf, *supra* note 93, at 58–59.

191. O’SHEA, *supra* note 79, at 262–63. States have diplomatically recognized other countries’ amnesty laws. For example, the United States, France and the European Union backed the Charter based ostensibly on its accompanying referendum. *Infra* note 268. However, one encounters the same problem in assessing whether this recognition follows from *opinio juris*, a problem that is especially attenuated given that policy considerations, not a legal understanding of humanitarian and human rights principles, may be the overriding factor in issuing approval. See, e.g., *id.* Guidelines for assessing customary human rights law serve to downplay the importance of this particular evidence of custom. According to the Restatement: “[O]ther states are only occasionally involved in monitoring [international human rights] law through ordinary diplomatic practice. Therefore, the practice of states that is accepted as building customary international law of human rights includes some forms of conduct different from those that build customary international law generally.” RESTATEMENT § 701, note 2. The Restatement then proceeds to elaborate upon forms of conduct specific to human rights law. Importantly, the consequence of diplomatic practice towards other states is limited to the following: “invocation of human rights principles in national policy, in diplomatic practice, in international organization activities and actions; and other diplomatic communications or action by states reflecting the view that certain practices violate international human rights law, including condemnation and other adverse state reactions to violations by other states.” *Id. Compare, id., with id.* § 102, cmt. b. In the case of Algeria, for example, neither of the above affirmations of the Charter holds weight, as they respectively invoked principles of democracy, not those of human rights, and affirmed rather than criticized the state’s practice.

Furthermore, two recent instances of state practice demonstrate a commitment to respecting a duty to prosecute when amnesty laws are negotiated and ratified. In January 2008, the Democratic Republic of Congo and several armed groups within the country signed a peace agreement that expressly excludes from a prospective amnesty law war crimes, crimes against humanity, and genocide committed from June 2003 to the present.<sup>192</sup> Additionally, Iraq's parliament passed a U.S.-backed amnesty law in February 2008 that precludes its application to persons convicted of crimes against humanity, war crimes, and genocide.<sup>193</sup>

There is also a closely related trend of amnesty laws functioning as stopgaps, where amnestied violations are prosecuted years later at less harrowing junctures. In 1996, the Special Prosecutor for Human Rights in Honduras indicted ten military officers for the 1982 attempted murder and unlawful detention of six students. The officers argued that they were immune from prosecution under the 1991 amnesty law, an argument the country's supreme court unanimously rejected.<sup>194</sup> Beginning in the late 1990s, courts in Chile exploited loopholes in the

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192. *Acte d'Engagement* art., 4(1), Jan. 23, 2008, [http://www.rfi.fr/radiofr/images/097/Actedengagement\\_Goma080123.pdf](http://www.rfi.fr/radiofr/images/097/Actedengagement_Goma080123.pdf). Significantly, this act was negotiated by the United Nations, International Conference on the Great Lakes Region, United States, African Union, and European Union, and all five parties emphasized article 4, which provides for the exclusion in question. *Id.* pml.

193. *Qānūn al-'afū al-'ām*, art. 2(a), Feb. 17, 2008, [http://parliament.iq/Iraqi\\_Council\\_of\\_Representatives.php?name=articles\\_ajsdyawqwqdjasdba46s7a98das6dasda7das4da6d8asdsawewqeqw465e4qweq4wq6e4qw8eqwe4qw6eqwe4sadkj&file=showdetails&sid=431](http://parliament.iq/Iraqi_Council_of_Representatives.php?name=articles_ajsdyawqwqdjasdba46s7a98das6dasda7das4da6d8asdsawewqeqw465e4qweq4wq6e4qw8eqwe4qw6eqwe4sadkj&file=showdetails&sid=431); Statute of the Iraqi Higher Criminal Court, art.1(2), Oct. 18, 2005. For an English translation of the "General Amnesty Law," see Travis Sharp, *Full Text of Iraq's Recently Passed Amnesty Law*, Iraq Insider, Mar. 7, 2008, <http://theiraqinsider.blogspot.com/2008/03/full-text-of-iraqs-recently-passed.html>.

Albeit more modest, regarding impunity more generally, another example of state practice indirectly supporting a duty to prosecute is President Jose Ramos Horta of Timor Leste's request that the East Timor Court of Appeals issue an opinion on whether a pardon passed by East Timor's parliament is constitutional and violates the state's international obligations. This law could shield perpetrators of a range of crimes, such as firearms offenses, crimes against security, and larceny, committed between April 2006 and April 2007. *Timor Crime Law Goes to Court*, THE AGE, July 4, 2007, <http://www.theage.com>; Anselmo Lee, *Open Letter to President Jose Ramos-Horta on Impunity and Rights Violations*, Action in Solidarity with Asia and the Pacific, June 21, 2007, [http://www.asia-pacific-action.org/statements/2007/forumasia\\_openletter\\_tojoseramos-horta\\_210607.htm](http://www.asia-pacific-action.org/statements/2007/forumasia_openletter_tojoseramos-horta_210607.htm).

194. Struggle Against Impunity, *supra* note 179, at 5–6. It appears, however, that subsequent threats from the military thwarted these efforts towards accountability. See SRIRAM, *infra* note 209, at 42.

state's amnesty law in order to prosecute disappearances.<sup>195</sup> Argentina has been fully active in its prosecutions since 2005.<sup>196</sup> In 2005, a Peruvian judge ordered the arrest of more than 100 military officers implicated in a 1988 massacre, and historically, in September 2007, Peru's ex-president Alberto Fujimori was transferred from Chile to Peru, where he will stand trial before the country's supreme court for authorizing murders.<sup>197</sup> Likewise, in late 2006, a Uruguayan court charged eight former police and military officers with kidnapping and conspiracy related to disappearances and overturned as unconstitutional pardons for two of the accused.<sup>198</sup>

#### *G. A Customary Duty to Prosecute*

To synthesize the evidence analyzed, robust *opinio juris* against amnesties for universal crimes is found in international, regional, national judicial decisions<sup>199</sup> as well as administrative opinions, with the

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195. Rohter, *supra* note 150.

196. Most recently, for example, the courts are poised to criminally try the country's ex-president for human rights violations during the Dirty War. James M. Yoch, Jr., *Argentina Ex-President to Face Trial for Alleged 'Dirty War' Rights Abuses*, JURIST, Mar. 22, 2007, <http://jurist.law.pitt.edu/paperchase/2007/03/argentina-ex-president-to-face-trial.php>.

197. Howard Kline, *Peru Ex-President Fujimori Facing Four Trials Starting in November*, JURIST, Oct. 6, 2007, <http://jurist.law.pitt.edu/paperchase/2007/10/peru-ex-president-fujimori-facing-four.php>.

198. Lisl Brunner, *Uruguay Indicts 8 for Operation Condor Disappearances*, JURIST, Sept. 12, 2006, <http://jurist.law.pitt.edu/paperchase/2006/09/uruguay-indicts-8-for-operation-condor.php>.

After or during periods of transition, within the last few decades, countries without amnesty laws have also prosecuted international crimes in their national courts. For example, in 1975, Greece commenced criminal trials against the junta, which overthrew the government in 1967 and carried out torture and arbitrary arrests. (Greece pronounced an "amnesty," however it covered political crimes and did not apply to crimes of the junta.) SRIRAM, *infra* note 209, at 49–50. After the Bolivian congress brought charges in 1986 against members of the security forces, military, and junta, as well as General Luis Garcia Meza, who ruled from 1980–1981, the supreme court ultimately convicted defendants of torture, arbitrary detention, and murder. Though the general became a fugitive, eleven of the guilty were imprisoned. *Id.* at 47. Border guards were convicted in the early nineties for shooting at East Germans who attempted to flee the country, and in 1997 several ex-officials were found guilty on similar charges. *Id.* at 55–56. Also, a number of convictions were issued against members of security forces in Sri Lanka for disappearances. *Id.* at 70.

199. "In determining whether a rule has become international law, substantial weight is accorded to: (a) judgments and opinions of international judicial and arbitral tribunals; (b) judgments and opinions of national judicial tribunals." RESTATEMENT § 103(2).

limited exception of the South African Court.<sup>200</sup> These are matched by widely supported General Assembly resolutions<sup>201</sup> and plentiful U.N. reports and official statements. With regard to state practice, numerous states have passed amnesty laws for serious international crimes, but this pattern is largely undercut by a lack of requisite *opinio juris*. And states have either repealed, in whole or in part, amnesty laws covering such breaches, and several have begun or attempted to prosecute amnestied crimes.

It is important to confront the bugaboo of this operation: State practice.<sup>202</sup> Based on its relative frailty, critics have often dismissed the argument that a duty to prosecute exists as merely aspirational. Nevertheless, these dismissals fail to take into account the very nature of public humanitarian law and human rights law, which have traditionally relied upon *opinio juris* in order to accommodate normative concerns unique to these bodies of law.<sup>203</sup> Even though a practice of prosecuting

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200. The Lomé Amnesty Decision is complex, as the SCSL generally rejected amnesties for international crimes, but maintained that the amnesty in question did not serve as a bar primarily based upon the jurisdiction expressly conferred upon it by statute, leaving it up to the national court to decide whether to accept the amnesty for jurisdictional purposes. Thus, when the SCSL noted that a customary norm against such amnesties was crystallizing, this should not be construed as *opinio juris* against these laws per se. Rather, it was more a reluctant declaration on the general status of custom. *See supra* Part III(a).

201. For example, General Assembly resolution 3074 was passed by a unanimous vote of ninety-four, with twenty-nine abstentions. Principles of International Co-operation, *supra* note 160. Those abstaining could have openly voted against the resolution, but chose not to, which suggests an extreme uneasiness towards not supporting an affirmative duty to prosecute and punish war crimes and crimes against humanity. Moreover, as backing for U.N. resolutions requires “general support,” RESTATEMENT § 701, note 2., this vote satisfies the threshold for inclusion as custom.

202. There has been significant tension between what has been identified as “modern” and “traditional” custom. If the former prioritizes *opinio juris*, thereby allowing custom to come into being more rapidly, the latter prioritizes state practice, thereby retarding the speed at which custom is realized. *See* Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757, 758–60 (2001). This Note relies upon the Restatement, which exhibits greater sensitivity to human rights and is widely supported in its more flexible approach. *See, e.g.*, Richard B. Lillich, *The Growing Importance of Customary International Human Rights Law*, 25 GA. J. INT'L & COMP. L. 1, 8–14, n.72 (1995).

203. *See, e.g.*, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); *Military and Paramilitary Activities (Nicar. v. U.S.)*, para. 183–209, 1986 I.C.J. 14 (June 27). *See, e.g.*, Frederic J. Kirgis, Jr., *Appraisals of the ICJ's Decision: Nicaragua v. United States (Merits)*, 81 AM. J. INT'L L. 146, 149 (1987) (maintaining that while a customary analysis favoring *opinio juris* might seem incoherent with the more traditional emphasis on state practice, this discrepancy can be explained by reference to a sliding scale, positing that the relative weight of either element is based upon “the activity in question and on the

international crimes is modest, it is nonetheless existent and the tendency of states to pass amnesty laws should not outweigh near unanimous *opinio juris*. It is therefore wholly appropriate to assert a duty to prosecute the most serious war crimes<sup>204</sup> and crimes against humanity, which represent the severest classes of violations.

Turning to policy issues, it has been argued that the sheer scale of potential prosecutions to be brought after armed conflicts makes any duty to prosecute unmanageable, especially given the limited strength and independence of the judiciaries in many if not most of the states experiencing such struggles.<sup>205</sup> This position, however, spawns an intolerable paradox: The more pervasive the atrocities, the less accountability may be demanded. If a state does not have sufficient capacity to handle prosecutions, it is all the more reason to support the development of appropriate mechanisms,<sup>206</sup> not to make concessions to a fundamentally deficient status quo. Likewise, allowing states to excuse

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reasonableness of the asserted customary rule"); Joshua Ratner, *Back to the Future: Why a Return to the Approach of the Filartiga Court is Essential to Preserve the Legitimacy and Potential of the Alien Tort Claims Act*, 35 COLUM. J.L. & SOC. PROBS. 83, 117-119 (supporting the *Filartiga* approach, and asserting that the decision "implied that, at least in terms of the [customary international law] of human rights, official state pronouncements were of greater evidentiary significance than reports of contrary state practice"); John Tasioulas, *In Defense of Normative Relativity: Communitarian Values and the Nicaragua Case*, 16 OXFORD J. OF LEGAL STUD. 85 (1996) (arguing in support of the *Nicaragua* approach and noting that "a clearly demonstrated *opinio juris* may establish a norm despite a lack of general state practice consistent with the putative norm"). But see Anthony D'Amato, *Trashing Customary International Law*, 81 AM. J. INT'L L. 101 (1987) (criticizing *Nicaragua*). See also, e.g., THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 113 (1991) ("The burden of proof to be discharged in establishing custom in the field of human or humanitarian rights is . . . less onerous than in other fields of international law.").

204. Namely, these are found in Common Article 3 of the Geneva Conventions. As accordingly set forth in the Rome Statute, such crimes include the following: "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture"; "committing outrages upon personal dignity, in particular humiliating and degrading treatment"; "taking of hostages"; "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable." Rome Statute of the International Criminal Court, art. 8(2)(c), U.N. Doc. A/CONF.83/9 (July 17, 1998) [hereinafter Rome Statute]. For concision, "war crimes" will hereinafter be used to refer to these violations only.

205. Ratner, *supra* note 130, at 719-20. To an extent, prosecutorial discretion will provide relief by limiting judicial scope. There is the danger that this discretion will be used to accomplish victors' justice, but this may be offset by the principle that those most responsible for the abuses should be prosecuted. See, e.g., Orentlicher, *supra* note 92, at 2601-03.

206. See *Extradite or Prosecute Report*, *supra* note 98.

themselves based on scarce state resources<sup>207</sup> and the expense of criminal trials is a failure to invest in the rule of law in cases where it matters most.

A duty to prosecute must also confront situations in which an amnesty law is considered the only viable way of ending violence.<sup>208</sup> Based on this dilemma, it has been proposed that in order to form a more nuanced customary rule towards amnesties, striking a balance “between” justice and peace,<sup>209</sup> recognition of an amnesty law should be partially determined by whether the legislation “is reasonably necessary to end the hostilities.”<sup>210</sup> This criterion is quite fair. If a general rule accommodated this factor, however, what will prevent states from timing the legislation of amnesty laws to coincide with what appear to be alleviating circumstances giving rise to an exception? Hopefully, there will also come a time when the state enjoys relative stability within the same generation. Is it then appropriate to maintain support for an active amnesty law when it is no longer justified on this initial prescribed basis?

This question closely relates to the further quandary that prosecutions will shatter a fragile peace, destabilizing a country, as those in power or those who have relinquished power but still exert extreme pressure on the government are more often than not implicated in the crimes to be

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207. See Azanian People’s Organization (AZAPO) v. President of the Republic of South Africa 1996 (4) SA 671 (CC) at para. 42–49 (S. Afr.) (including this argument in its section on civil remedies).

208. It is not wholly clear whether a general duty to prosecute is necessarily disadvantageous in this context. A state might be able to drive a hard bargaining line by offering insurgents a choice between a possible commuting of punishment and a maximum sentence, rather than between criminal impunity and continued battle. This would hinge on whether those fighting prefer the risk of maintaining the struggle to the near certainty of some criminal punishment. Also, there would then arise the issue of to what extent a state could commute a given sentence, as in principle punishment must appropriately reflect the gravity of the offense committed. While there are difficulties surrounding the compatibility of prosecutions and ending recurrent violence, there are also hurdles involved in brokering a peace deal that amnesties war crimes and crimes against humanity, as any peace process relies on the assumption that those involved favor peace to sustaining conflict. Favoring the latter is tragically all too easy; this choice follows from entrenched convictions rooted in the very causes giving rise to violence in the first place. See *infra* Conclusion.

209. See Bassiouni, *supra* note 130, at 11–13 (calling into question justice and peace being framed as a dichotomy). For a valuable case study that closely examines states in transition in order to analyze patterns affecting the capacity for accountability and that maintains peace and justice are not opposed, but rather exist along a continuum, see CHANDRA LEKHA SRIRAM, CONFRONTING PAST HUMAN RIGHTS VIOLATIONS: JUSTICE AND PEACE IN TIMES OF TRANSITION (2004).

210. See Trumbull, *supra* note 10, at 316–19, 325–27 (arguing for a three-part balancing test, involving process, substance and circumstances).

prosecuted. Considering the balance of power to assist in the determination of whether an amnesty law should be supported is reasonable,<sup>211</sup> but it is not unproblematic. Incorporation of this factor into a legal rule would persistently stamp out state practice.<sup>212</sup> Virtually all states that have amnestied war crimes or crimes against humanity have suffered from political and civil instability when these laws were passed. And again, must it be accepted that the right to demand accountability is forever denied because an amnesty law coincided with a transition towards general welfare, even if power has since shifted to offer the opportunity for fair prosecutions?

The two criteria referenced above—whether amnesty laws are reasonably required to stop conflicts, and whether state balance of power necessitates their adoption—are essentially dilutions of the necessity defense in international law.<sup>213</sup> Although such elements can certainly be incorporated into the content of the rule itself, this would thereby preclude the application of this tailored extraordinary defense,<sup>214</sup> which raises cause for concern. The purpose of the necessity defense's "strict limitations [is] to safeguard against possible abuse,"<sup>215</sup> which, it has been suggested, is precisely the danger these two propositions present.

If ending impunity is to be considered a fundamental universal interest worthy of being furthered, it is crucial to have a strong rule, rather than a

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211. See Arnould, *supra* note 10, at 230–31 (setting aside legal considerations to analyze whether the Charter is justified on the basis of two factors taken from Sriram's study). Sriram, however, identifies these factors to inform whether accountability can be achieved, not whether it should be sought. SRIRAM, *supra* note 209, at 20–33, 203.

212. While this might seem circular, skeptics of a general duty to prosecute do not generally base their objections on the normative desirability of such a rule, but rather on its practical ramifications for developing nations. See, e.g., Trumbull, *supra* note 10 (formulating criteria towards channeling possibly emergent state practice against amnesty laws).

213. To invoke a successful necessity defense in international law, a state must prove that the wrongful act "is the only way for the State to safeguard an essential interest against a grave and imminent peril" and "does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole." And necessity may not be invoked where the wrongful act violates a *jus cogens* norm, or where "the State has contributed to the situation of necessity." International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts With Commentaries, art. 25, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10 (2001) [hereinafter Draft Articles]. For a recent appraisal, see Sarah F. Hill, *The "Necessity Defense" and the Emerging Arbitral Conflict in its Application to the U.S.-Argentina Bilateral Investment Treaty*, 13 LAW & BUS. REV. AM. 547, 549–57 (2007) (supporting the Draft Articles while acknowledging criticisms).

214. The examples provided in the Draft Articles include humanitarian intervention and military necessity. See Draft Articles, *supra* note 213, art. 25, cmt. 20.

215. *Id.* art. 25, cmt. 2.

more specific norm that creates loopholes from its very inception. Where a state explicitly or tacitly uses criminal immunity as an indispensable political bargaining chip in negotiating peace agreements or beneficial transfers of power, a near inevitable reality, and then enshrines this immunity in an amnesty law covering war crimes or crimes against humanity, such law should be treated as a breach, not a customary exception based on expediency.<sup>216</sup> Otherwise, a legal basis for exerting pressure on states to prosecute and supporting those within a state who do seek justice will be continually lost,<sup>217</sup> which is especially troublesome when the arguable “costs” of justice no longer outweigh any “benefits” of peace. This rule is neither radical nor novel. It essentially parallels the approach of the CAT and HRC,<sup>218</sup> African Commission,<sup>219</sup> and Inter-American System.<sup>220</sup>

Although it could be maintained that the presence of a clear obligation will undermine any leverage criminal immunity may possess, this is an overstatement in the majority of cases. A general duty to prosecute is unlikely to pose much of a new threat to perpetrators. When national prosecutions for amnestied international crimes have actually taken place, it is only years later, and only after extremely persistent efforts are paired with opportune circumstances. Also, given the flexibility prosecutorial discretion provides a state, those who stand to lose might be correct in assessing the chances of a criminal suit being brought as slim. Lastly, even without an obligation to prosecute, there is always some menace of accountability. National amnesty laws in certain circumstances do not bar jurisdiction in foreign state courts over crimes against humanity, genocide, and torture,<sup>221</sup> and the ICC prosecutor may choose not to accept a state’s amnesty law.<sup>222</sup> More importantly, the fear among perpetrators that states might not forever abide by their amnesty laws may always remain to some degree, given the frequent unpopularity of these laws and their groundings on power balances, which are subject to shift.

The peace agreements in question, admittedly, present some further difficulty. If foreign states or the U.N. participate in negotiations leading to an amnesty for war crimes or crimes against humanity, there is the

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216. See M. Cherif Bassiouni, *Justice and Peace: The Importance of Choosing Accountability Over Realpolitik*, 35 CASE W. RES. J. INT'L L. 191 (2003).

217. See Orentlicher, *supra* note 92, at 2547–48.

218. See *supra* Part II(c)–(d).

219. See *supra* Part II(e).

220. See *supra* Part III(b).

221. Boed, *supra* note 130.

222. See Rome Statute, *supra* note 204, art. 17(1)(b), 17(2)(a).

danger of losing credibility. Parties to peace agreements may require arbiters to commit on paper to such legally compromising terms. One option is to concede the illegal provisions, when absolutely necessary, but append a disclaimer, as the U.N. official did in the case of the Lomé Accords. This might be considered a superficial response, but the danger of realpolitik is precisely why international law is formed not only by what states do and say, but also by *opinio juris*.

#### IV. ALGERIA AND THE DUTY TO PROSECUTE

Algeria is thus confronted with two sets of legal obligations. While the Charter breaches those established by treaty,<sup>223</sup> does it amnesty war crimes and crimes against humanity, thereby contravening the general duty to prosecute? This section suggests that the Charter extinguishes liability for both categories of crimes. Furthermore, prosecuting these violations would be in keeping with the desires of a considerable number of Algerians whose lives these violations have affected.

##### *A. The Charter: Amnesty War Crimes and Crimes Against Humanity*

The Charter unquestionably amnesties war crimes.<sup>224</sup> Encompassing disappearances, torture, and extrajudicial killings,<sup>225</sup> war crimes must

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223. In Algeria, international and regional agreements are accorded a higher status than domestic law: “Treaties ratified by the President of the Republic in accordance with the conditions provided for by the Constitution are superior to the law.” CONSTITUTION DE LA RÉPUBLIQUE ALGÉRIENNE DÉMOCRATIQUE ET POPULAIRE [Constitution] ch. 2, art. 132 (Alg.). The country’s Constitutional Council embraced this provision in a 1989 decision, which stated: “[A]fter its ratification and publication, every convention is integrated into national law and through application of article 123 [sic] of the constitution, acquires a superior authority to the law, allowing every Algerian citizen to claim it in front of the courts.” Décision n° 1-D-L-CC-89 of 20 août 1989 relative au code électoral, *available at* <http://www.conseil-constitutionnel.dz/indexFR.htm> (author’s translation).

224. War crimes and crimes against humanity may take place within an internal armed conflict, and thus non-state actors are responsible. William A. Schabas, *Theoretical and International Framework: Punishment of Non-State Actors in Non-International Armed Conflict*, 26 FORDHAM INT’L L.J. 907, 918–22 (2003). See also, Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, G.A. Res. 2391, art. 2, U.N. GAOR Supp. No. 18, 23d Sess., U.N. Doc. A/7218 (Nov. 26, 1968); Kadic v. Karadzic, 70 F.3d 232, 240 (1995) (setting forth that non-state actors may violate war crimes and genocide).

The armed groups in Algeria satisfy the non-state actor requirements of Protocol II, as “under responsible command, [they] exercise[d] such control over a part of [Algeria’s] territory as to enable them to carry out sustained and concerted military operations[.]” Protocol II, *supra* note 83, art. 1. They also fall under the less stringent

have been carried out against civilians.<sup>226</sup> In addition, they must have taken place within the context of an “armed conflict,” which has been defined by the ICTY in *Tadic* as “protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”<sup>227</sup> As violence by armed groups broke out in Algeria towards the end of 1992 and the regime was soon after unable to put a stop to their daily attacks,<sup>228</sup> by definition, armed conflict began at this juncture. The point of commencement appears clear enough, but has the armed conflict ended, and if so, when? Again, according to the ICTY: “[I]nternational humanitarian law . . . extends beyond the cessation of hostilities until . . . a peaceful settlement is achieved.”<sup>229</sup> While violence between the regime and insurgency noticeably declined by 1999<sup>230</sup> and many members of armed groups have laid down their weapons, it is quite difficult to conclude that a “peaceful settlement” has in fact occurred when fatal clashes and bomb attacks have persisted.<sup>231</sup> Thus, war crimes involve the period from late 1992 through the present. Post-1992, particular Islamist factions at different times abducted, tortured,<sup>232</sup> and murdered civilians.<sup>233</sup> And it has been extensively documented that state security forces committed all three of the above crimes against non-combatants.<sup>234</sup>

Considerably more complex by definition, crimes against humanity introduce a series of necessary elements, ensuring that their intended superlative severity is preserved.<sup>235</sup> This category of crimes has been

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definition of non-state actors in the Rome Statute. See Rome Statute, *supra* note 204, art. 8(2)(f).

225. See Rome Statute, *supra* note 204, art. 8(2)(c).

226. These are “persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted.” Protocol II, *supra* note 83, art. 4(1). The term “civilian” will hereinafter be referred to in this sense.

227. Prosecutor v. Tadic, Case No. IT-94-1, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, para. 70 (Oct. 2, 1995).

228. EVANS & PHILLIPS, *supra* note 30, at 186–88.

229. Prosecutor v. Tadic, Case No. IT-94-1, Defense Motion for Interlocutory Appeal on Jurisdiction, para. 70 (Oct. 2, 1995).

230. EVANS & PHILLIPS, *supra* note 30, at 261.

231. See *infra* notes 302–306 and accompanying text.

232. *Fear and Silence*, *supra* note 38, at 24; Smith, *infra* note 294.

233. See *infra* Part IV(a).

234. See *infra* Part IV(a).

235. This class of crimes appears in various permutations in the Nuremberg Charter as well as the Statutes of the ICTY, ICTR, ICC, SCSL, and Iraqi Higher Criminal Court (“IHCC”). Compare Agreement by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic and the Government of the Union of

most recently set forth in the Rome Statute,<sup>236</sup> and may include the acts amnestied by the Charter.<sup>237</sup> Crimes against humanity are defined in the Rome Statute as any of the enumerated acts when (1) “committed as part of a widespread or systematic,” (2) “attack directed against any civilian population,” (3) “with knowledge of the attack.”<sup>238</sup> The second factor further requires a state or organizational policy.<sup>239</sup>

Enforced disappearances are inherently such crimes when committed on a widespread or systematic basis.<sup>240</sup> As this requirement is framed in the disjunctive, “widespread” alone is sufficient<sup>241</sup> and has been defined as “massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of

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Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis, Charter of the International Military Tribunal, art. 6(c), Aug. 8, 1945, 82 U.N.T.S. 279; Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 5, S.C. Res. 827 (May 25, 1993); Statute of the International Criminal Tribunal For Rwanda, art. 3, S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994); Rome Statute, *supra* note 204, art. 7; Statute of the Special Court for Sierra Leone, art. 10, Jan. 16, 2002, 2178 U.N.T.S. 145; Statute of the Iraqi Higher Criminal Court, art. 12, Dec. 10, 2003. For exploration of the development of crimes against humanity, see Mohamed Elewa Badar, *From the Nuremberg Charter to the Rome Statute: Defining the Elements of Crimes Against Humanity*, 5 SAN DIEGO INT'L L.J. 73, 77–91 (2004); Simon Chesterman, *An Altogether Different Order: Defining the Elements of Crimes Against Humanity*, 10 DUKE J. COMP. & INT'L L. 307, 308–14 (2000); Phyllis Hwang, *Defining Crimes Against Humanity in the Rome Statute of the International Criminal Court*, 22 FORDHAM INT'L L.J. 457 (1998); Darryl Robinson, *Developments in International Criminal Law: Defining “Crimes Against Humanity” at the Rome Conference*, 93 AM. J. INT'L L. 43, 44–45 (1999).

236. The definition of crimes against humanity is near identical in the ICC and IHCC statutes. Compare Rome Statute, *supra* note 204, art. 7, with Statute of the Iraqi Higher Criminal Court, art. 12, Dec. 10, 2003.

237. Rome Statute, *supra* note 204, art. 7(1)(a), 7(1)(f), 7(1)(i) (murder, torture, and enforced disappearances, respectively).

238. *Id.* art. 7(1).

239. An “attack directed against any civilian population” is defined as a “course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.” Rome Statute, *supra* note 204, art. (7)(2)(a).

240. See International Convention for the Protection of All Persons from Enforced Disappearance art. 5, U.N. Doc. E/CN.4/2005/WG.22/WP.1/REV.4 (Sept. 23, 2005) [hereinafter Convention on Disappearance].

241. “Systematic basis” is presently harder to demonstrate in this case. It must be “pursuant to a preconceived plan or policy.” Draft Code of Crimes Against the Peace and Security of Mankind With Commentaries, art. 18, cmt. 3, in Report of the International Law Commission on the Work of Its Forty-Eight Session, U.N. GAOR, 51st Sess., Supp. No. 10, at 14, UN Doc. A/51/10 (1996).

victims.”<sup>242</sup> With no less than 6146 Algerians disappeared by the state,<sup>243</sup> the scale of the missing was one of the worst in the last decade of the twentieth century.<sup>244</sup> These acts were widespread, and therefore are crimes against humanity. Concerning armed groups, it is unlikely that the many abductions they carried out<sup>245</sup> fit the definition of “enforced disappearances”<sup>246</sup> because these groups were not “political organizations” in the usual sense of the term; rather, they were highly fractured entities composed of various informal cells that worked under distinct local leadership.<sup>247</sup> Quite probably, most victims who were abducted were shortly thereafter murdered. There were, however, cases of armed groups holding women captive in their camps and later releasing them, at least sometimes after raping them. While such instances could fit the definition of other enumerated crimes against humanity,<sup>248</sup> approximately how many women lived through this type of experience is unknown.<sup>249</sup>

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242. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, para. 580 (Sept. 2, 1999). See also Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgment, para. 649. (May 7, 1997); Prosecutor v. Mile Mksic, Miroslav Radic, and Veselin Sljivancanin, (Case No. IT-95-13-R 61) Review of the Indictment Pursuant to Rule 61 of the Rules and Procedure and Evidence, April 3, 1996, at para. 29, quoted in Tadic, Case No. IT-94-1-T, Opinion and Judgment, at para. 643 (May 7, 1997).

243. See *supra* note 51 and accompanying text.

244. *Time for Reckoning*, *supra* note 42.

245. Algeria: Human Rights Developments 1999, Human Rights Watch, <http://www.hrw.org/wr2k/Mena-01.htm> (last visited Mar. 16, 2008).

246. Rome Statute, *supra* note 204, art. 7(2)(i).

247. EVANS & PHILLIPS, *supra* note 30, at 183, 221, 231; Algeria: Human Rights Developments 1995, *supra* note 36. While the FIS was certainly a political organization, generally, it does not appear that those who committed violent acts against civilians were directly connected to the party. Algeria: Human Rights Developments 1993, Human Rights Watch, [http://www.hrw.org/reports/1994/WR94/Middle-01.htm#P63\\_37797](http://www.hrw.org/reports/1994/WR94/Middle-01.htm#P63_37797) (last visited Mar. 16, 2008); Algeria: Human Rights Developments 1996, Human Rights Watch, [http://www.hrw.org/reports/1997/WR97/ME-01.htm#P89\\_36462](http://www.hrw.org/reports/1997/WR97/ME-01.htm#P89_36462) (last visited Mar. 16, 2008). See also *supra* Part I(b). Moreover, despite some ambiguous statements made by the FIS early on in the conflict, representatives came to clearly condemn and disassociate the party from abuses on civilians. ROBERTS, *supra* note 43, at 172; Algeria: Human Rights Developments 1992, Human Rights Watch, [http://www.hrw.org/reports/1993/WR93/Mew-01.htm#P71\\_39546](http://www.hrw.org/reports/1993/WR93/Mew-01.htm#P71_39546) (last visited Mar. 16, 2008); Algeria: Human Rights Developments 1993, *supra* note 247; Algeria: Human Rights Developments 1994, Human Rights Watch, [http://www.hrw.org/reports/1995/WR95/MIDEAST-01.htm#P90\\_29860](http://www.hrw.org/reports/1995/WR95/MIDEAST-01.htm#P90_29860) (last visited Mar. 16, 2008); Algeria: Human Rights Developments 1995, *supra* note 36.

248. See Rome Statute, *supra* note 204, art. 7(1)(e), 7(1)(h).

249. EVANS & PHILLIPS, *supra* note 30, at 219–20.

Regarding torture, tens of thousands of Algerians have suffered this abuse.<sup>250</sup> In all likelihood, state forces were responsible for the vast majority of these violations,<sup>251</sup> thereby establishing a widespread practice. The second factor for crimes against humanity, “attack directed against any civilian population,” is also satisfied. State-led torture was directed against civilians, its victims having protected status whether or not they actively participated in the hostilities, as they were necessarily detained at the time they were tortured.<sup>252</sup> These well-orchestrated<sup>253</sup> acts of torture carried out at numerous secret detention facilities<sup>254</sup> fulfill the state policy requirement, which is informal and may be deduced from the acts in question.<sup>255</sup> The last requirement, “knowledge of the attack,” refers to the perpetrator “understand[ing] the overall context of his act,”<sup>256</sup> a relatively low threshold that is easily satisfied. Thus, state forces committed crimes against humanity when they tortured.

Lastly, extrajudicial killings perpetrated by both security forces and armed groups also constitute crimes against humanity. It is first

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250. See *supra* Part I(b). For testimonies of Algerians who were tortured, see *Algérie, La machine de mort: Témoignages de victimes de la torture*, Algeria-Watch (Oct. 2003), [http://www.algeria-watch.org/pdf/pdf\\_fr/machine\\_mort\\_temoignages.pdf](http://www.algeria-watch.org/pdf/pdf_fr/machine_mort_temoignages.pdf).

251. Based on information culled from a wide variety of sources, a detailed chart of 300 Algerians who were tortured can be found at *Algérie, La machine de mort: 300 cas de tortures*, Algeria-Watch (Oct. 2003), [http://www.algeria-watch.org/pdf/pdf\\_ma\\_chine\\_mort\\_300\\_cas.pdf](http://www.algeria-watch.org/pdf/pdf_ma_chine_mort_300_cas.pdf). 296 people were abducted by state agents and the remaining 4 were the victims of civil militias. *Id.* at 28, 42, 44–45.

One occasionally encounters reported instances of torture by armed guerillas. *Fear and Silence*, *supra* note 38, at 24; Smith, *infra* note 294. Although it is possible that this practice was frequent enough to be widespread, at present, the available evidence does not seem to suggest it.

252. Rome Statute, *supra* note 204, art. 7(2)(e); Protocol II, *supra* note 83, art. 4(1).

253. *Algérie, La Machine de mort: Un rapport sur la torture, les centres de détentions secrets et l'organisation de la machine de mort*, Algeria-Watch (Oct. 2003), [http://www.algeria-watch.org/pdf/pdf\\_fr/machine\\_mort\\_rapport.pdf](http://www.algeria-watch.org/pdf/pdf_fr/machine_mort_rapport.pdf).

254. *Fear and Silence*, *supra* note 38.

255. See *Prosecutor v. Tadic*, Case No. IT-94-1-T, Opinion and Judgment, para. 653 (May 7, 1997). As an illustration of just how commonplace torture was in Algeria, consider what one local policeman is reported to have told a mother seeking information about her disappeared son, “Of course we torture people: they always have something to confess. You’re all terrorists. You gave birth to terrorists. So everything that’s happening is normal.” Kristianasen, *infra* note 293.

256. *Prosecutor v. Kayishema*, Case No. ICTR-95-1, Judgment, para. 133 (May 21, 1999). See also *Prosecutor v. Tadic*, Case No. IT-94-1-T, Opinion and Judgment, para. 659 (May 7, 1997) (stating “the perpetrator must know that there is an attack on the civilian population, know that his act fits with the attack and the act must not be taken for purely personal reasons unrelated to the armed conflict,” where knowledge may be actual or constructive).

important to acknowledge that identifying which murders were directed against civilians is inherently fact specific.<sup>257</sup> Analysis is further complicated by the widely held suspicion that the regime infiltrated certain armed groups and incited or recruited members to perpetrate barbarous acts for the purpose of justifying the 1992 coup and shifting public opinion in its favor.<sup>258</sup> Similarly, the regime carried out indiscriminate attacks and then sought to attribute them to Islamist

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257. In deciding whether an attack was “directed against any civil population,” the ICTY set forth the following criteria:

*[I]nter alia, the means and method used in the course of the attack, the status of the victims, their number, the discriminatory nature of the attack, the nature of the crimes committed in its course, the resistance to the assailants at the time and the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirements of the laws of war.*

Prosecutor v. Kunarac, Case No. IT-96-23/1-A, Judgment, para. 91 (June 12, 2002) (stating that “the civilian population is the primary object of the attack.”). See also Prosecutor v. Musema, Case No. ICTR-96-13-A, para. 207 (Jan. 27, 2000) (“[T]he fact that there are certain individuals among the civilian population who are not civilians does not deprive the population of its civilian character.”).

258. See generally, e.g., MOHAMMED SAMRAOUI, CHRONIQUE DES ANNÉES DE SANG, ALGÉRIE: COMMENT LES SERVICES SECRETS ONT MANIPULÉ LES GROUPES ISLAMISTES (Denoel 2003). Such activities are infamously well known among scholars on Algeria:

[Senior military officers have] been linked to such high-profile incidents as kidnapping of three officials from the French embassy in Algiers in October 1993; the high-jacking of an Air France Airbus in 1994; bombings of France’s public transport system, including the Paris Metro, in 1995; the kidnapping and murder of the Tibhirine monks in 1996, and a number of other such incidents.

Jeremy Keenan, *Waging War on Terror: The Implications of America’s ‘New Imperialism’ for Saharan Peoples*, 10 J. N. AFR. STUD. 619, 625 (2005) (describing the regime’s alleged staging of “terrorist” activities in the Sahara-Sahel region beginning in 2002). Regarding the junta’s orchestration of the 1995 Paris bomb attacks, which were blamed on Algerian fanatics, one former Algerian secret police agent, for example, testified that he was instructed to bribe European officials, who were complicit, and personally delivered \$90,000 in hush money to a member of the French parliament. John Sweeney & Leonard Doyle, *Algeria Regime ‘Was Behind Paris Bombs,’* Manchester Guardian, Nov. 16, 1997, <http://desip.igc.org/Algerian.html>. See also, e.g., EVANS & PHILLIPS, *supra* note 30, at 221–24, 287–88; SOUAÏDIA, *supra* note 35, at 56–59; YOUS, *supra* note 35; *The Junta In Court*, *supra* note 26 (quoting testimony from the former Chief of Special Units, who relayed that a colonel, referring to a leader of an armed group known for slaughtering women and children, told him, “[H]e is our man, you will work together with him””).

factions.<sup>259</sup> These tactics ultimately led to a commonly asked question among Algerians, *qui tue qui*—“who’s killing whom”?

Notwithstanding these challenges, certain reasonable appraisals can be made. Extrajudicial killings by the regime were widespread. Based only on the most reliable and sufficiently specific estimates, hundreds of extrajudicial killings were committed by security forces in 1995, 1997, and 1998.<sup>260</sup> Such acts were also reported in 1994,<sup>261</sup> 1995, 1999, 2000, and 2002, although in lesser general numbers.<sup>262</sup> In December 2004, an investigator authorized by the government even confessed that security forces are thought to have killed a total of 5200 civilians in “illegal acts.”<sup>263</sup> State forces will again inevitably fall within the two additional requirements, organizational policy<sup>264</sup> and “knowledge of the attack.”

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259. For example, one family reported that after security forces killed five of their immediate male relatives in front of them in their home, the security forces asked them to sign a statement that “terrorists” committed the murders. Annual Report for Algeria 1997, Amnesty International, <http://www.amnestyusa.org/annualreport.php?id=C31D660257EB53E080256A0F005BEA9E&c=DZA> (last visited Mar. 16, 2008). See also, e.g., EVANS & PHILLIPS, *supra* note 30, at 194–98, 225, 229–31, 246, 249–50, 261–62, 287, 296.

260. Annual Report for Algeria 1995, Amnesty International, <http://www.amnestyusa.org/annualreport.php?id=DC29278C303A801680256A0F005BB4B1&c=DZA> (last visited Mar. 16, 2008); Annual Report for Algeria 1997, *supra* note 259; Annual Report for Algeria 1998, Amnesty International, <http://www.amnestyusa.org/annualreport.php?id=C91D0197E237ADDE80256A0F005C025D&c=DZA> (last visited Mar. 16, 2008).

261. For a list of over 100 reported instances of murder(s) carried out by state security forces, the majority of which occurred in 1994, see COMITÉ ALGÉRIEN DES MILITANTS LIBRES DE LA DIGNITÉ HUMAINE ET DES DROITS DE L'HOMME, LIVRE BLANC SUR LA RÉPRESSION EN ALGÉRIE (1991–1994) (OU L'HISTOIRE DE LA TRAGÉDIE D'UN PEUPLE) TOME I 63–77 (Hoggar 1995).

262. Algeria: Human Rights Developments 1995, *supra* note 36; Algeria: Human Rights Developments 1994, *supra* note 247; Annual Report for Algeria 1999, Amnesty International, <http://www.amnestyusa.org/annualreport.php?id=A0729B516A6823B080256A0F005C1B25&c=DZA> (last visited Mar. 16, 2008); Annual Report for Algeria 2000, Amnesty International, <http://www.amnestyusa.org/annualreport.php?id=CCCF26F04013D12802568E400729EC9&c=DZA> (last visited Mar. 16, 2008); Annual Report for Algeria 2002, Amnesty International, <http://www.amnestyusa.org/annualreport.php?id=2709795C610F55D980256BAE0056CA88&c=DZA> (last visited Mar. 16, 2008).

263. ROBERT FISK, THE GREAT WAR FOR CIVILIZATION: THE CONQUEST OF THE MIDDLE EAST 584 (2005).

264. As an illustration of this policy, consider what signs placed on the corpses in one city read: “[T]his is the fate reserved for those who encourage the terrorists.” Some of the murdered had shattered skulls. Some had had their organs removed. One man’s face was beyond recognition due to torture. Firemen told the Algerian Committee of Free Activists for Human Dignity and Human Rights that “they had received orders ‘from the top’ not to remove the cadavers before eight in the morning so that the population could see them in the meantime.” COMITÉ ALGÉRIEN DES MILITANTS LIBRES DE LA DIGNITÉ HUMAINE ET DES DROITS DE L'HOMME, *supra* note 261, at 75–76 (author’s translation).

Armed groups also murdered civilians. Scores of these deaths, frequently estimated to run into the hundreds, were reported each year between 1993 and 2004. Given the clandestine nature of the conflict, however, these approximate death tolls differentiate between neither causes of death—whether death was due to a massacre, bomb attack, or individual assault—nor groups of non-state actors.<sup>265</sup> Even if only a fraction of these deaths were due to murder and correctly attributed to a given faction, they would almost certainly satisfy the widespread requirement. Inferring the remaining two factors should prove unproblematic. Thus, murders by opposition forces amount to crimes against humanity, and each of the three amnesty abuses perpetrated by the regime likewise fit within this category.

#### *B. Legitimacy by “Democratic” Referendum?*

Under Algeria’s treaty obligations as well as the customary duty to prosecute, a referendum on the amnestying of grave human rights violations,<sup>266</sup> war crimes, or crimes against humanity is *ipso facto* void. Nevertheless, the legal unsoundness of the Charter established in Parts II and III of this Note may seem troubling, as the official vote tally for the

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265. Algeria: Human Rights Developments 1993, Human Rights Watch, [http://www.hrw.org/reports/1994/WR94/Middle-01.htm#P63\\_37797](http://www.hrw.org/reports/1994/WR94/Middle-01.htm#P63_37797) (last visited Mar. 17, 2008); Algeria: Human Rights Developments 1994, Human Rights Watch, [http://www.hrw.org/reports/1995/WR95/MIDEAST-01.htm#P90\\_29860](http://www.hrw.org/reports/1995/WR95/MIDEAST-01.htm#P90_29860) (last visited Mar. 17, 2008); Algeria: Human Rights Developments 1995, Human Rights Watch, [http://www.hrw.org/reports/1996/WR96/MIDEAST-01.htm#P137\\_26320](http://www.hrw.org/reports/1996/WR96/MIDEAST-01.htm#P137_26320) (last visited Mar. 17, 2008); Algeria: Human Rights Developments 1996, Human Rights Watch, [http://www.hrw.org/reports/1997/WR97/ME-01.htm#P89\\_36462](http://www.hrw.org/reports/1997/WR97/ME-01.htm#P89_36462) (last visited Mar. 17, 2008); Algeria: Human Rights Developments 1997, Human Rights Watch, [http://www.hrw.org/worldreport/Mideast-01.htm#P207\\_37583](http://www.hrw.org/worldreport/Mideast-01.htm#P207_37583) (last visited Mar. 17, 2008); Algeria: Human Rights Developments 1998, Human Rights Watch, <http://hrw.org/worldreport99/mideast/algeria.html> (last visited Mar. 17, 2008); Annual Report for Algeria 1997, *supra* note 259; Annual Report for Algeria 1998, *supra* note 260; Annual Report for Algeria 1999, *supra* note 262; Annual Report for Algeria 2000, *supra* note 262; Annual Report for Algeria 2001, Amnesty International, <http://www.amnestyusa.org/annualreport.php?id=426DF7C05D7F48A580256A16004BE7EE&c=DZA> (last visited Mar. 17, 2008); Annual Report for Algeria 2002, *supra* note 262; Annual Report for Algeria 2003, Amnesty International, <http://www.amnestyusa.org/annualreport.php?id=2A0BB2E9CC487AEC80256D24003790E9&c=DZA> (last visited Mar. 17, 2008); Annual Report for Algeria 2004, Amnesty International, <http://www.amnestyusa.org/annualreport.php?id=29F1B4B25091AC9980256E9E005A99AC&c=DZA> (last visited Mar. 17, 2008).

266. See, e.g., *Mendoza*, *supra* note 141, para. 32 (referring to Uruguay’s plebiscite on its amnesty law and stating that “[a] *fortiori*, a country cannot by internal legislation evade its international obligations”).

Charter referendum might suggest wide support.<sup>267</sup> On this assumption, representatives of the United States, France, and the European Union formally endorsed the Charter.<sup>268</sup> These officials were apparently undisturbed by the following question: Does democracy support the proposition that a majority vote can be taken on the *denial* of citizens' rights?<sup>269</sup> The paramount issue, though, is whether the referendum accurately reflects the wishes of the victims, which presents difficult and divisive issues. Virtually all of Algeria suffered, but are all Algerians victims, as the state maintains?<sup>270</sup> While the capacity for human compassion towards the pain of others should not be denied, is vicarious the same as personally endured suffering?

Even if one responds to this question in the affirmative—deeming the overwhelming majority of the Algerian people to be the victims—there is still good reason to be highly skeptical of the referendum as an expression of broad backing for the Charter. Unverified by any independent audit,<sup>271</sup> the plebiscite took place in a police state where

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267. See *Algeria Today*, *supra* note 64.

268. U.S. Respects Algeria Reconciliation Charter, State Welch Says, U.S. International Information Programs, Mar. 20, 2006, <http://usinfo.state.gov/xarchives/display.html?p=washfile-english&y=2006&m=March&x=20060320160211ndyblehs0.1067469>; Press Release, Ministry of Foreign Affairs Spokesperson, Paris, Algeria / Referendum (Sept. 30, 2005); Press Release, European Union, Declaration by the Presidency on Behalf of the European Union on Algeria's Referendum on a Charter for Peace and National Reconciliation (Oct. 10, 2005).

269. U.S. and French interests are not limited to significant investment ties with Algeria. Both American and French intelligence services have long been suspected of collaborating with Algerian secret services during the Dirty War and beyond. See, e.g., Keenan, *supra* note 258, at 628. For an in depth look at France's support for and complicity with Algeria's mafia-like insiders in their staging of violence and manipulations of public opinion, see generally LOUNIS AGGOUN & JEAN-BAPTISTE RIVOIRE, FRANÇALGÉRIE, CRIMES ET MENSONGES D'ETATS: HISTOIRE SECRÈTE, DE LA GUERRE D'INDÉPENDANCE À LA "TROISIÈME GUERRE" D'ALGÉRIE (Découverte 2004). An overview of this book in English can be found at *Françalgérie: On the Secret War in Algeria and French Machinations*, Algeria-Watch, July 2004, <http://www.algeria-watch.org/en/aw/francalgerie.htm>.

After September 11th, the United States closely allied itself with Algiers, President Bush offering unwavering approval of the regime's strategy in response to "terrorism." E.g. EVANS & PHILLIPS, *supra* note 30, at 278–79, 287–89, 292. In a display characteristic of the Bush administration's "dead on" understanding of the Middle East and North Africa, the Assistant Secretary of State for Near Eastern and North African Affairs told the *New York Times*: "'Washington has much to learn from Algeria on ways to fight terrorism.'" Steven R. Weisman, *U.S. to Sell Military Gear to Algeria to Help it Fight Militants*, N.Y. TIMES, Dec. 10, 2002.

270. See Draft Charter, *supra* note 59.

271. Slackman, *supra* note 65.

electoral deceit has been a recurrent allegation.<sup>272</sup> There were likewise serious charges of fraud surrounding the referendum in question.<sup>273</sup> Moreover, voters might not have fully appreciated the significance of the text they were actually given. Those who did vote had only forty-five days to consider the Draft Charter, which differed from the final legislation in key aspects.<sup>274</sup> Freedom of the press is quite poor in Algeria.<sup>275</sup> Journalists have often been harassed and sacked with heavy defamation charges under strict press laws.<sup>276</sup> State security forces, for example, “savagely attacked” one French journalist who attempted to cover the amnesty campaign in September 2005.<sup>277</sup> Radio and television, the two chief media outlets, are primarily government controlled.<sup>278</sup> No viewpoint critical of the amnesty was expressed on television.<sup>279</sup> Fittingly, it has been reported that there was little if any debate on the Charter leading up to the referendum,<sup>280</sup> critics of the law were swiftly

272. See *Observations du Collectif des Familles de Disparu(e)s en Algérie sur le respect par l'Algérie de ses obligations découlant du Pacte international relatif aux droits civils et politiques, Rapport alternatif à l'attention du Comité des droits de l'Homme, 90ème session du Comité de droits de l'Homme, Examen du rapport de l'Algérie le 23 juillet 2007*, at 8, 63–64, 74, [http://www.ohchr.org/english/bodies/hrc/docs/ngos/fidh\\_algeria.pdf](http://www.ohchr.org/english/bodies/hrc/docs/ngos/fidh_algeria.pdf) [hereinafter CFDA Rapport]. Even a top Algerian official in charge of voting has voiced concern. In a letter dated May 17, 2007 and addressed to Boutiflika, Saïd Bouachaïr, the Coordinator of the National Political Commission for the Monitoring of Legislative Elections, requested intervention after finding widespread fraud in the 2007 parliamentary and regional elections. According to Bouachaïr, non-FLN observers were not permitted to monitor polling stations. Voting boxes arrived at polling stations pre-filled with pro-FLN votes and some were even stolen after votes were cast. Similarly, lists of the candidates running were left incomplete. Letter from Saïd Bouachaïr, Al-Lajna al-Siyāsiyya al-Wataniyya li-Murāqabat al-Intikhābāt al-Tashrīyya, ‘udū al-Lajna, Al-munassiq, to Ra’īs al-Jumhūriyya (May 17, 2007), reproduced in *id.* at 77–78.

273. See CFDA Rapport, *supra* note 272, at 63–64.

274. See *supra* Part I(c).

275. Algeria was rated “not free” by the World Audit Organization, landing a score of 62 out of 100. World Audit Organization, Freedom of the Press Report, Algeria, <http://www.worldaudit.org/presstable.html> (last visited Nov. 8, 2007) [hereinafter World Audit Report]. Similarly, in the 2006 World Press Freedom Index, Algeria ranked 126 out of 168 countries. Reporters Without Borders For Press Freedom, World Press Freedom Index 2006, [http://www.rsf.org/article.php3?id\\_article=19385](http://www.rsf.org/article.php3?id_article=19385) (last visited Nov. 8, 2007).

276. In 2005, for example, there were 114 documented cases of press harassment. U.S. Dept. of State, Country Reports of Human Rights Practices, Algeria, Mar. 6, 2007, <http://www.state.gov/g/drl/rls/hrppt/2006/78849.htm>.

277. CFDA Rapport, *supra* note 272, at 49 (author’s translation).

278. World Audit Report, *supra* note 275.

279. CFDA Rapport, *supra* note 272, at 49.

280. Hidouci, *infra* note 287, at 4.

silenced, and “police arrested those who collected signatures” against it.<sup>281</sup> Those who disfavored the amnesty were harassed, threatened with death, and sometimes imprisoned.”<sup>282</sup> Freedom of association fairs no better.<sup>283</sup> No less than three demonstrations against the Charter held by families of the disappeared were aggressively dispersed.<sup>284</sup> Among numerous other restrictions and bans, the Algerian authorities would not locate a room for a public gathering to discuss the Charter, a meeting which resultantly could not take place.<sup>285</sup> Although one can find opinions from within Algeria both for and against the amnesty law,<sup>286</sup> at present, there is little reliable evidence that determines just how representative these opinions are<sup>287</sup> given the socio-political climate in Algeria as well as the specific context of the referendum.

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281. Al Karama for Human Rights and Algeria-Watch, *Observations on the Periodic Report to the Human Rights Committee*, Algeria-Watch, July 23, 2007, [http://en.al-karama.org/index.php?option=com\\_content&task=view&id=45&Itemid=37](http://en.al-karama.org/index.php?option=com_content&task=view&id=45&Itemid=37).

282. CFDA Rapport, *supra* note 272, at 6, 53.

283. For a recent analysis of the Algerian law on associations, see Chafika Kahina Bouagache, *The Algerian Law on Associations Within Its Historical Context*, The International Journal of Not-For-Profit Law, vol. 8, issue 2, Apr. 2007, [http://www.icnl.org/knowledge/ijnl/vol9iss2/special\\_3.htm#\\_edn1](http://www.icnl.org/knowledge/ijnl/vol9iss2/special_3.htm#_edn1).

284. Relatives were questioned and threatened. More ominously, after the authorities failed to investigate ten complaints filed by his family, one man whose father was disappeared was sued for defamation by the two alleged perpetrators after he made public accusations. Belkacem Rachedi was fined and sentenced as a result of at least one of the suits. Annual Report for Algeria 2006, Amnesty International, <http://www.amnestyusa.org/annualreport.php?id=ar&yr=2006&c=DZA> (last visited Mar. 12, 2008).

285. Al Karama, *supra* note 281.

286. See, e.g., Daho Djebal, *Algeria: Amnesty and Oligarchy*, Carnegie Endowment for International Peace, Arab Reform Bulletin: October 2005, vol. 3 issue 8, <http://www.carnegieendowment.org/files/Djebal.pdf>; Louisa Hanoune, *On the Eve of the September 29 Referendum*, Fraternité, The Newspaper of the Workers Party of Algeria, Sept. 11, 2005, <http://www.eit-ilc.org/us/articles.php?Ing=en&pg=455>. For a collection of articles addressing the “reconciliation” process, the majority of which were authored by Algerians, see QUELLE RÉCONCILIATION POUR ALGÉRIE (2005), available at <http://www.hoggar.org/books/Reconciliation/Reconciliation.pdf>. Twenty of the twenty-seven contributors signed an appended list of recommendations that, among other things, calls for “instructing and judging those most responsible for the most serious crimes (massacres, forced disappearances, rapes, and torture)” as well as “excluding serious crimes with respect to international law” from an amnesty. *Id.* at 228 (author’s translation).

287. Echoing the overall suspiciousness of the referendum, the former Algerian Minister of Economics and Finances (1989–1991), Ghazi Hidouci, has asserted that the government strategically employed voting in order to bypass public debate and use “the will of the people” as a buffer against conflicting international law. Ghazi Hidouci, “*Charter for Peace and National Reconciliation*” in *Algeria: Threatening Contradictions*, 9 Arab Reform Brief, Arab Reform Initiative,

On the other hand, if one considers the victims to be those who were massacred, killed in bomb attacks, executed, raped, tortured, and forcibly disappeared, as well as the families of these direct victims,<sup>288</sup> the legal obligations in question are all too appropriate.<sup>289</sup> There are victims who affirmatively reject the amnesty law.<sup>290</sup> As noted above, the families of the disappeared attempted to demonstrate against the Charter prior to the referendum.<sup>291</sup> On the day of the referendum, in one suburb of the capital victims and families who lost their loved ones buried their ballots at a

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July 15, 2006, [http://www.arab-reform.net/IMG/pdf/Papier\\_No9\\_Algerie\\_anglais\\_final\\_ghazi\\_hidouci.pdf](http://www.arab-reform.net/IMG/pdf/Papier_No9_Algerie_anglais_final_ghazi_hidouci.pdf).

288. The word, “victims,” henceforth will be used in this sense, unless otherwise indicated.

289. Even accepting the government’s figures, statistically, the referendum cannot be said to account for their wishes with any accuracy. The population of Algeria is currently estimated at 33.3 million. *Algeria Country Profile*, *supra* note 70. 18.3 million Algerians are registered to vote and purportedly the referendum had a 79.76% voter turnout, which calculates to approximately 14.6 million who “actually” voted. If 97.36% voted for the Charter, then roughly 14.2 million supported it. *See Algeria Today*, *supra* note 64. This last figure is about 42.6% of the entire population. Compare this with an estimate of the number of victims, for which purposes we will assume the worst likely figures. 200,000 Algerians lost their lives and 8000 were disappeared. *Chronology (Part Two)*, *supra* note 51. Women’s rights advocates estimate that approximately 5,000 women were raped. *Algeria: Human Rights Developments 2000*, Human Rights Watch, <http://www.hrw.org/wr2k1/mideast/algeria.html> (last viewed Mar. 12, 2008). The author has not encountered narrowly estimated figures for tortures. Let us consider that 50,000 citizens were tortured. The total number of direct victims then morbidly reaches 263,000. Concerning their immediate family members, choosing the year from which to pull the average household size in Algeria is problematic, as the ages of the victims vary widely. Some victims had families of their own, others were too young. Assuming the former, we will factor by not only the average family size from 1966, 5.9 members, but also the more recent demographic from 1987, 7 members. *Encyclopedia of Nations, Social and Humanitarian Assistance, The Family—Society’s Building Block*, <http://www.nationsencyclopedia.com/United-Nations/Social-and-Humanitarian-Assistance-THE-FAMILY-SOCIETY-S-BUILDING-BLOCK.html> (last visited Mar. 12, 2008). Thus, there are approximately 3.4 million victims, which constitute 10.1% of the Algerian populace.

290. Although reference to statistics has been made in order to disprove the contention that the referendum represents the wishes of the victims, this Note does *not* advocate their use in deciding whether justice should be pursued. In addition to violating established legal principles, deferring to majority opinion among victims would present deeply problematic moral dilemmas. For example, would a simple majority vote among the victims suffice, even if 60% favored amnesty and 40% rejected it, or 70% and 30%, respectively? There are victims who support the Charter. *See, e.g.*, Daikha Dridi, *Victims Groups Question Algeria Amnesty*, AL JAZEERA, Sept. 30, 2005, <http://english.aljazeera.net/English/archive/archive?ArchiveId=14563>. However, this should not be determinative.

291. Annual Report for Algeria 2006, *supra* note 284.

local cemetery in protest.<sup>292</sup> And three days after the Charter's passage six groups that support the victims held a shared press conference to denounce the amnesty.<sup>293</sup> Direct statements from victims and organizers of associations express a desire for truth and accountability.<sup>294</sup> Formal manifestations of dissent have also been articulated. In April 2007, four Algerian human rights groups that represent the victims were among the organizations that signed an open letter to the Council of the European Union, demanding the abrogation of the Charter, and asserting that the legislation constitutes a denial of truth and justice for victims of the amnestied crimes.<sup>295</sup> In addition, the *Collectif des Familles de Disparu(e)s en Algérie* submitted an extensive shadow report before the HRC, in which the group requested the body to instruct the Algerian government to rescind the Charter.<sup>296</sup> The report also asked for "a processing of the cases of the disappeared that allows for the effective exercise of the right of the families of the disappeared to truth and justice, the two existing as an integral part of their right to redress."<sup>297</sup>

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292. *Id.*

293. Wendy Kristianasen, *Algeria: The Women Speak*, LE MONDE DIPLOMATIQUE, Apr. 11, 2006, <http://mondediplo.com/2006/04/07algeria>.

294. For example, leader of the *Sumūd* Association of the Families of Victims Abducted by Islamist Armed Groups, Ali Merabet lost his two brothers, Aziz, twenty-eight years old, and Merzak, fourteen; an Islamist group kidnapped, murdered and buried them in a farmyard. While leaving open the possibility for genuine forgiveness among victims, Merabet stated: "'We are not against a national reconciliation, but we do say "no" to an amnesty decided in a hurry without going through a process that will recover truth and justice.'" Dridi, *supra* note 290. Similarly, founder of the *Collectif des Familles de Disparu(e)s en Algérie*, Nacéra Dutour, whose son, Amin, was forcibly disappeared, voiced her rejection of the Charter: "[It] ended the dreams of truth and justice for thousands of families of the disappeared." Kristianasen, *supra* note 293. Cherifa Kheddar witnessed armed militants haul away her brother and sister. After torturing her brother, they murdered both in the family's home in 1996. Kheddar protests every Sunday with other victims in front of the government palace. She reiterated her demands: "'[O]ur position has always been that justice must work first and that those found guilty can be pardoned later on . . . [b]ut the national reconciliation gives impunity even to those people who have killed hundreds of times.'" Craig S. Smith, *Many Algerians Are Not Reconciled by Amnesty Law*, N.Y. TIMES, June 28, 2006.

295. This statement was supported by the *Ligue Algérienne des Droits de l'Homme*, *Ligue Algérienne de Défense des Droits de l'Homme*, *SOS Disparu*, and *Collectif des Familles de Disparu(e)s en Algérie*. *Open Letter at the Occasion of the EU-Algeria Association Council*, Euro-Mediterranean Human Rights Network, Apr. 24, 2007, <http://www.euromedrights.net/pages/348/news/focus/28989>.

296. CFDA Rapport, *supra* note 272, at 15, 72, 74.

297. *Id.* at 15 (author's translation). In referencing the Charter's violation of the right to justice, the *Collectif des Familles de Disparu(e)s en Algérie* cited article 6 of the

Prior to the Charter, Algerians sought accountability in overseas courts.<sup>298</sup> And in lieu of access to courts, Algerian women staged mock trials against Islamist opposition groups and figures as well as former president Benjedid for crimes against humanity.<sup>299</sup>

Thus, the claim that the referendum widely represents the wishes of the “victims” is doubtful at best, whether the victims are understood to be the Algerian people or those who have suffered crimes and their families. The possible concern—or perhaps hypocritical assertion of cultural relativism—that a duty to prosecute is yet another patriarchal, colonial

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Convention on Disappearance, which requires a state party to hold perpetrators criminally responsible.” *Id.* at 14.

298. In April 2001, an Algerian family who lost their son to torture as well as two detainees subjected to this abuse filed civil complaints in France against General Khaled Nezzar. EVANS & PHILLIPS, *supra* note 30, at 280–81. Alleging liability for crimes committed under his direction, including deaths, acts of torture, internments, and disappearances, in July 2002, victims again lodged complaints against Nezzar in a Paris criminal court. Press Release, *Justitia Universalis, Algérie: Justitia Universalis dépose une plainte contre le général Khaled Nezzar* (July 1, 2002). And Abderrahmane El Mehdi Mosbah, an asylee from Algeria, brought a complaint in December 2003 with the Paris public prosecutor against General Larbi Belkheir for the acts of torture he endured for forty days in the winter of 2003, charging Belkheir’s responsibility in instigating and erecting a policy of torture. Press Release, *Justitia Universalis, Algérie: M. A. El Mehdi Mosbah et Justitia Universalis déposent plainte contre le général Larbi Belkheir* (*Communiqué de Maître Willian Bourdon, avocat à Paris*) (Dec. 10, 2003). See also, e.g., *Criminal Lawsuits Against Algeria’s Generals*, Algeria-Watch, Jan. 2004, [http://www.algeria-watch.org/en/aw/criminal\\_lawsuits.htm](http://www.algeria-watch.org/en/aw/criminal_lawsuits.htm).

A civil action in the United States was also brought. Algerian citizens and the *Rassemblement Algérien des Femmes Democrates* (“RAFD”) brought suit in federal district court under the Alien Tort Claims Act and Torture Victims Protection Act against the FIS and one of its members for war crimes, crimes against humanity, and additional breaches of international and domestic law. Plaintiffs included family members of the murdered. RAFD sued on behalf of those targeted by Islamist groups. *Doe v. Islamic Salvation Front*, 257 F. Supp. 115, 117–18 (D.C. 2003) (granting summary judgment for the defendant).

299. RANJANA KHANNA, ALGERIA CUTS: WOMEN & REPRESENTATION, 1830 TO THE PRESENT 68–70 (2008). For a theoretical reading of “virtual justice” within an Algerian context, see *id.* at 68–99.

imposition on Algeria is misplaced.<sup>300</sup> Many victims desire truth and justice,<sup>301</sup> and they believe the Charter extinguishes both.

#### CONCLUSION

Since the Algerian state passed the Charter in February 2006, the country's fourth grant of amnesty, has Algeria enjoyed peace? December 10, 2006: A bomb goes off on a bus with foreign oil workers, killing two people. February 13, 2007: Seven bombs explode, killing six people. April 10, 2007: Bombs explode in Algiers, killing thirty-three people. July 11, 2007: A suicide bomb blows up a vehicle close to an army barrack, killing eight people. September 6, 2007: A suicide bomb detonates before a presidential visit, killing twenty. September 8, 2007: A car bomb goes off at a coastguard barracks, killing thirty people.<sup>302</sup>

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300. While acknowledging that the universality of human rights norms can be challenged, for purposes of this Note, it is sufficient to point out that this particular issue does not seem to be a preoccupation for the majority of Algerians. For an interesting analysis of Islamic law's emphasis on duties and their relation to human rights, see Jason Morgan-Foster, Note, *Third Generation Rights: What Islamic Law Can Teach the International Human Rights Movement*, 8 YALE HUM. RTS. & DEV. L.J. 67 (2005).

301. At minimum, under the International Covenant, Algeria has a duty to investigate and reveal sufficient information to victims and their families. *Supra* note 105. A customary right to truth appears to be budding. See Yasmin Naqvi, *The Right to the Truth in International Law: Fact or Fiction?* 88 INT'L REV. RED CROSS 245, 254–67 (2006). For a sketching of the parameters of this right, see *id.* at 262–63.

The relation “between” truth and justice is hotly contested. *Id.* at 269–72. At least one scholar has suggested, for example, that the process of communally approaching “the truth” may be an adequate form of justice itself. See Slye, *supra* note 130, at 246–47. This is the often-touted model of “restorative justice,” which South Africa’s Truth and Reconciliation Commission is supposed to represent. Some have championed restorative justice to the exclusion of criminal accountability in transitional states emerging from turmoil, frequently engaging in an ironic tug of war over perceptions of victims’ needs, which they argue are better honored by the former of the two models. Aside from having a polarizing effect, choosing truth over justice or vice versa is unnecessary. A balanced approach is possible and should be supported. For a collection of works on the topic, see TRUTH COMMISSIONS AND COURTS: THE TENSION BETWEEN CRIMINAL JUSTICE AND THE SEARCH FOR TRUTH (William A. Schabas & Shane Darcy eds., 2004). A strong illustration of the two’s co-existence can be found in Sierra Leone’s experience. See William A. Shabas, *A Synergistic Relationship: The Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone*, in TRUTH COMMISSIONS AND COURTS: THE TENSION BETWEEN CRIMINAL JUSTICE AND THE SEARCH FOR TRUTH 3 (William A. Schabas & Shane Darcy eds., 2004) (“The real lesson of the Sierra Leone experiment is that truth commissions and courts can work productively together, even if they only work in parallel.”).

302. *Chronology—Armed Attacks and Bombings in Maghreb States*, Reuters, Jan. 29, 2008. The September 6th attack was carried out by a boy only fifteen years old. Salima Tlemçaci, *Attentat suicide contre la caserne de Dellys (Boumerdes)*, EL WATAN, Sept. 10,

December 11, 2007: Two bombs explode in the capital near the Constitutional Council and offices of the U.N., killing an estimated sixty.<sup>303</sup> Meanwhile, state security forces have continued to detain and torture people.<sup>304</sup> As a result of ongoing fighting, 400 people, including many civilians, were killed in 2006,<sup>305</sup> and the following year witnessed the deaths of 300 people, at least seventy of whom were civilians.<sup>306</sup> In assessing the causes of the recent bombings, analysts have drawn attention to poverty, pervasive unemployment, and broad alienation from politics in Algeria.<sup>307</sup> These deeper causes of violence serve as a reminder that amnesty is not the panacea for meaningful peace,<sup>308</sup> an observation at least some Algerians appear to support.<sup>309</sup>

A shrewd politician, Bouteflika has been mindful of the complex host of issues confronting Algeria, seeking to revamp the country politically and economically<sup>310</sup> and strengthening the presidency<sup>311</sup> at the expense of

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2007, <http://www.elwatan.com>. There is one main lingering group that is suspected to be responsible, the al-Qaeda Organization in the Islamic Maghreb, which changed its name from the *Groupe Salafiste pour la Prédication et le Combat* in early 2007.

303. "Dozens killed" in Algeria Blasts, BBC, Dec. 11, 2007, <http://news.bbc.co.uk/2/hi/africa/7137997.stm>.

304. Algeria: Briefing to the Human Rights Committee, Amnesty International, Sept. 2007, 1–2, <http://www.ohchr.org/english/bodies/hrc/docs/ngos/AI-Algeria.pdf>.

305. Annual Report for Algeria 2006, *supra* note 284.

306. Annual Report for Algeria 2007, Amnesty International, <http://www.amnestyusa.org/annualreport.php?id=ar&yr=2007&c=DZA> (last visited Mar. 12, 2008).

307. William McLean, *Algeria Rebel Attacks Test Government Security Policy*, Reuters, Sept. 23, 2007.

308. In keeping with this insight, a prominent scholar on Algeria stated:

Turning the page on this decade without seeking to understand the mechanisms which pushed the society of this young state into self-destruction would constitute a headlong rush toward unforeseeable political consequences. The mourning process of Algerian society can be brought to closure only by acknowledging the drama that has taken place, and by a political willingness to bring justice to all those who have been its victims.

Luis Martinez, *Why the Violence in Algeria?* J. N. AFR. STUD. 14, 26 (2004) (arguing that "the failure of democratic transition" is the central factor in explaining what gave rise to the violence).

309. Concerning Algerians' reactions to the bombings, a survey conducted by the independent daily newspaper, *El Khabar*, revealed that 76% of the 10,016 questioned "do [not] think that national reconciliation is sufficient to confront the recent terrorist outbreak." Djalel Bouâti, *La réconciliation ne peut pas, à elle seule, venir à bout du terrorisme*, AL KHABAR, Sept. 23, 2007, <http://www.elkhabar.com> (author's translation).

310. For a look at Bouteflika's efforts to improve Algeria's foreign relations and prospects for foreign investments, see Yahia H. Zoubir, *The Resurgence of Algeria's Foreign Policy in the Twenty-First Century* 9 J. N. AFR. STUD. 169 (2004).

the army. Engaging in a power struggle with this historically dominant faction,<sup>312</sup> Bouteflika was able to use the disclosures of its tactics during the Dirty War in order to leverage not only the army's retreat from politics and a rearrangement of its command, but also the retirement of the generals who waged the 1992 coup and subsequent campaign of terror.<sup>313</sup> However, this balance of power is precarious, as the generals have sought to develop their own influential networks, especially with those sympathetic to the "war on terror."<sup>314</sup> Efforts at overhauling a profoundly defective judiciary have also been initiated.<sup>315</sup> In January 2000, Bouteflika created the National Commission for Judicial Reform, which produced a report that included recommendations he vowed to follow. After its release, Bouteflika dismissed several judges on corruption charges and the majority of magistrates. The President identified three key relevant phases, improving prison conditions, the quality of magistrates, and the independence of the courts.<sup>316</sup>

While these initiatives are positive, Algeria undeniably has a long and daunting path ahead towards establishing truth as well as justice for the crimes committed during its conflict. Regardless of the barriers to be faced, however, international law, both in treaty and custom, requires that justice be served after certain occurrences. Algeria's treaty obligations establish the invalidity of the Charter, as perpetrators of gross violations of human rights must be prosecuted and punished under the Convention Against Torture, International Covenant, and African Charter. Similarly, grave war crimes and crimes against humanity may

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311. An early assessment, optimistic of Bouteflika's strengthening of the presidency can be located at Robert Mortimer, *Bouteflika and Algeria's Path from Revolt to Reconciliation* 99 CURRENT HIST. 10 (2000).

312. Ulla Holm, *Algeria: President Bouteflika's Second Presidential Term*, Dansk Institut for International Studier (November 2004).

313. After serving as Minister of Foreign Affairs during what most Algerians consider to have been the country's golden era, the Houari Boumedienne years (1965–1978), Bouteflika lived in exile from 1981 until 1987 and then ran as an independent candidate backed by the military in the 1999 presidential elections. Bouteflika's apparent lack of involvement in the regime's violence was partly perceived as a source of legitimacy. EVANS & PHILLIPS, *supra* note 30, at 255–56; STORA, *supra* note 11, at 145, 259–61.

314. Hugh Roberts, *Demilitarizing Algeria*, 12–18, Carnegie Papers No. 86, Middle East Program (May 2007).

315. For perspectives on the Algerian judiciary and the challenges it faces from two American judges who visited Algeria as part of independent reform efforts, see Hon. James G. Glazebrook, *Judicial Independence in the Democratic Republic of Algeria*, 43 No. 1 JUDGES' J. 44 (2004); Joseph P. Nadeau, *Algeria 2001: Quest for Democracy*, 40 No. 3 JUDGES' J. 38 (2004).

316. Youcef Bouandel, *Bouteflika's Reforms and the Question of Human Rights in Algeria*, 7 J. N. AFR. STUD. 23, 32–36 (2002).

not be amnestied under general international law. Concerns that the customary duty to prosecute will perpetuate conflict and destabilize societies should not dictate exceptions to the rule. Permitting legal concessions to political expediency fails to account for the slackening over the long-term of any apparent tensions between peace and justice, and the effects of this norm are far less drastic than are sometimes assumed.

In passing the Charter, Algeria breached the customary obligation to prosecute, as the crimes it amnestied were not only war crimes, but also crimes against humanity. Disappearances, torture, and extrajudicial killings committed by state forces, and murder perpetrated by armed groups are within this latter class of crimes. Concerning Algerians' response to the amnesty of these crimes, even if it were legal to hold a referendum on this issue—and it is not—the results of the plebiscite on the Charter are not genuinely representative of domestic opinion. More importantly, consideration should be given to the voices of those who have more directly suffered, Algerians who were tortured or raped, Algerians whose family members were disappeared, killed or massacred.

The Charter for Peace and National Reconciliation has brought neither peace, nor reconciliation. When will the Algerian state seek peace *with* its people? When will it reconcile *itself* with the law?

*Laura Scully\**

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\* B.A. New York University; J.D. Brooklyn Law School (expected 2009); Editor-in-Chief of the *Brooklyn Journal of International Law* (2008–2009). Pour “Qadour,” et pour tous ceux qui continuent à trouver leurs chemin à travers le désert / Li-“Qādūr” wa li-kul illī rāhūm mā zālū yaḥawsū ṭrīqhum fil-ṣahrā’.

# **BUCKING CONVENTIONAL WISDOM: RUSSIA’S UNILATERAL “SUSPENSION” OF THE CFE TREATY**

## **INTRODUCTION**

The Treaty on Conventional Armed Forces in Europe (“CFE Treaty”) is a seminal arms control agreement between the member states of the North Atlantic Treaty Organization (“NATO”) and the former Warsaw Pact.<sup>1</sup> Signed in Paris on November 19, 1990, and having entered into force on November 9, 1992, the Treaty established the reduction of troop and armament levels throughout Europe based on a system of parity.<sup>2</sup> Frequently described as “the cornerstone of European security,” the CFE Treaty facilitated the demobilization of “more than 60,000 battle tanks, armoured combat vehicles, artillery, combat aircraft and attack helicopters.”<sup>3</sup> On July 14, 2007, President Vladimir Putin announced that the Russian Federation was unilaterally “suspending” its

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1. See Treaty on Conventional Armed Forces in Europe, Nov. 19, 1990, 30 I.L.M. 6 (1991), available at [http://www.osce.org/documents/doclib/1990/11/13752\\_en.pdf](http://www.osce.org/documents/doclib/1990/11/13752_en.pdf) (last visited Apr. 17, 2008) [hereinafter CFE Treaty]. NATO, currently with twenty-six member states, is a collective security alliance that was established on April 4, 1949 with the signing of the North Atlantic Treaty. NATO Web site, Frequently Asked Questions, <http://www.nato.int/issues/faq/index.html#A1> (last visited Apr. 12, 2008). The States Parties to the CFE Treaty who are NATO members are: Belgium, Canada, Denmark, France, Germany, Greece, Iceland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Spain, Turkey, the United Kingdom, and the United States of America. See *supra* CFE Treaty at 1; NATO Web site, NATO Member Countries, <http://www.nato.int/structure/countries.htm> (last visited Apr. 12, 2008). The Warsaw Pact was a competing military alliance that formed on May 14, 1955, and was officially dissolved on July 1, 1991. See generally AN INSIDE HISTORY OF THE WARSAW PACT, 1955–1991: DOCUMENTARY COMPANION TO A CARDBOARD CASTLE? (Vojtech Mastny et al. eds., 2005), available at <http://www.php.isn.ethz.ch/collections/colltopic.cfm?lng=en&id=15697>. The former Warsaw Pact countries who are States Parties to the CFE Treaty were: Bulgaria, Czechoslovakia, Hungary, Poland, Romania, and the Union of Soviet Socialist Republics (“USSR”). See CFE Treaty *supra* at 1; Treaty of Friendship, Cooperation and Mutual Assistance, May 14, 1955, 219 U.N.T.S. 3, available at <http://www.yale.edu/lawweb/avalon/intdip/soviet/warsaw.htm>.

2. See U.S. Dep’t of State, Bureau of Arms Control, Fact Sheet: Conventional Armed Forces in Europe (CFE) Treaty (June 18, 2002), <http://www.state.gov/t/ac/rfs/fs/11243.htm>.

3. Extraordinary Conference of the States Parties to the CFE Treaty, Background, [http://www.osce.org/conferences/cfe\\_2007.html?page=24854](http://www.osce.org/conferences/cfe_2007.html?page=24854) (last visited Apr. 25, 2008) [hereinafter CFE Treaty Background].

participation in the CFE Treaty.<sup>4</sup> Russia's suspension officially went into effect on December 12, 2007.<sup>5</sup>

Russia's decision to suspend its implementation of the CFE Treaty came in the midst of a period of rising tensions in its relations with the West. Ahead of the G8 summit in June 2007, President Putin threatened to aim Russia's missiles at Europe if the United States proceeded with plans to install a missile defense shield in Poland and the Czech Republic.<sup>6</sup> In late July 2007, the United Kingdom expelled four Russian diplomats for Moscow's failure to cooperate in the investigation of the murder of former Russian spy Alexander Litvinenko; three days later, the Russian Foreign Ministry responded in kind, expelling four British diplomats.<sup>7</sup> In August 2007, Russian Air Force bombers resumed long-range sorties over the world's oceans, a Cold War-era practice that had been discontinued in the early 1990s.<sup>8</sup>

Russia's announcement of its "suspension" of CFE Treaty participation is reminiscent of the United States' notification of its withdrawal from the Anti-Ballistic Missile Treaty ("ABM Treaty") in December 2001.<sup>9</sup> The U.S. withdrawal from the ABM Treaty inspired much international legal scholarship.<sup>10</sup> Referring to the highly political—rather than legal—

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4. See President of Russia, Information on the Decree "On Suspending the Russian Federation's Participation in the Treaty on Conventional Armed Forces in Europe and Related International Agreements" (July 14, 2007), <http://kremlin.ru/eng/text/docs/2007/07/137839.shtml> [hereinafter Suspension Announcement].

5. See Statement by Russia's Ministry of Foreign Affairs Regarding Suspension by Russian Federation of Treaty on Conventional Armed Forces in Europe (CFE Treaty) (Dec. 12, 2007), [http://www.mid.ru/brp\\_4.nsf/e78a48070f128a7b43256999005bcbb3/10da6dd509e4d164c32573af004cc4be?OpenDocument](http://www.mid.ru/brp_4.nsf/e78a48070f128a7b43256999005bcbb3/10da6dd509e4d164c32573af004cc4be?OpenDocument) [hereinafter December Russian MFA Statement].

6. Luke Harding, *The New Cold War: Russia's Missiles to Target Europe*, THE GUARDIAN, June 4, 2007, at 1, available at <http://www.guardian.co.uk/russia/article/0,,2094839,00.html>.

7. Luke Harding, *Putin Hits Back at UK by Expelling Diplomats*, THE GUARDIAN, July 20, 2007, at 1, available at <http://www.guardian.co.uk/russia/article/0,,2130814,00.html>.

8. Andrew E. Kramer, *Recalling Cold War, Russia Resumes Long-Range Sorties*, N.Y. TIMES, Aug. 18, 2007, available at <http://www.nytimes.com/2007/08/18/world/europe/18russia.html>.

9. See U.S. Dep't of St., Off. of the Press Sec'y, Announcement of Withdrawal from the ABM Treaty (Dec. 13, 2001), <http://www.state.gov/t/ac/rls/fs/2001/6848.htm> [hereinafter ABM Withdrawal].

10. See, e.g., Rein Müllerson, *The ABM Treaty: Changed Circumstances, Extraordinary Events, Supreme Interests and International Law*, 50 INT'L & COMP. L.Q. 509 (2001); Emily K. Penney, Comment, *Is That Legal?: The United States' Withdrawal from the Anti-Ballistic Missile Treaty*, 51 CATH. U. L. REV. 1287 (2001–02); Patricia Hewitson,

justification for withdrawal provided by President Bush, one commentator mused that “it is possible that the stated grounds of the U.S. withdrawal [from the ABM Treaty] could be regarded as supplying a precedent for withdrawal by the United States or other countries from other arms control treaties containing similar withdrawal clauses.”<sup>11</sup> However, scant attention has been given to the legal implications of Russia’s “suspension.”<sup>12</sup> This is especially surprising given the fact that the CFE Treaty does not contain a “suspension” clause but only a “withdrawal” clause.<sup>13</sup> Russia’s unilateral “suspension” of its obligations under the CFE Treaty, and the validity of Russia’s justifications are legal issues that may be analyzed under the law of treaties.

Part I of this Note provides background on the adaptation of the CFE Treaty, a description of Russia’s “suspension” and a summary of the reactions of NATO members and other parties to the Treaty. Part II analyzes the differences between “withdrawal” and “suspension” in the law of treaties, and Part III closely examines the “Extraordinary Events” clause that appears in the CFE Treaty. Three customary international law grounds for treaty suspension are discussed in Part IV. Finally, Part V considers the legality of Russia’s unilateral “suspension” of its obligations under the CFE Treaty, determining that the act constitutes a material breach under customary international law.

## I. THE ADAPTED CFE TREATY, RUSSIA’S “SUSPENSION” AND REACTIONS

Following the dissolution of the Warsaw Pact and the enlargement of NATO,<sup>14</sup> the States Parties to the CFE Treaty met in Istanbul and, on November 19, 1999, signed the Agreement on the Adaptation of the CFE Treaty (“CFE Adaptation Agreement”), replacing the anachronistic bloc-based limits of the CFE Treaty with national and territorial ceilings,<sup>15</sup>

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*Nonproliferation and Reduction of Nuclear Weapons: Risks of Weakening the Multilateral Nuclear Nonproliferation Norm*, 21 BERKELEY J. INT’L L. 405 (2003).

11. Frederic L. Kirgis, *Proposed Missile Defenses and the ABM Treaty, Second Addendum*, ASIL INSIGHTS, Dec. 2001, available at <http://www.asil.org/insights/insigh70.htm#addendum> (emphasis added).

12. *But see* Duncan B. Hollis, *Russia Suspends CFE Treaty Participation*, ASIL INSIGHTS, July 23, 2007, <http://asil.org/insights/2007/07/insights070723.html>.

13. See CFE Treaty, *supra* note 1, art. XIX(2).

14. The Czech Republic, Hungary, and Poland—all former Warsaw Pact members—acceded to NATO on March 12, 1999. CNN.com, Poland, Hungary, Czech Republic Joining NATO Today (Mar. 12, 1999), <http://www.cnn.com/WORLD/europe/9903/12/big.nato.01/index.html>.

15. CFE Treaty Background, *supra* note 3. “National ceilings” refers to the maximum amount of defined armaments and equipment that a State Party is allowed to deploy any-

and extending it to former Soviet republics.<sup>16</sup> However, only four signatories have since ratified the CFE Adaptation Agreement: Russia, Ukraine, Belarus, and Kazakhstan.<sup>17</sup>

At the time that the CFE Adaptation Agreement was signed in Istanbul in 1999, the Russian Federation specifically committed to withdrawing its military forces from the Republic of Moldova by the end of 2002, disbanding two of its military bases in Georgia by July 1, 2001, and negotiating the duration of two other Russian bases in Georgia in the year 2000.<sup>18</sup> Russia has not completed the removal of its “peacekeepers” from the Moldovan break-away region of Transdniestria, nor from Russia’s military base at Gudauta, Georgia.<sup>19</sup> NATO states have conditioned ratification upon Russia’s promised but as-of-yet-incomplete withdrawal of ex-Soviet military bases from Georgia and Moldova.<sup>20</sup>

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where in the area of the CFE Treaty’s application; “territorial ceilings” means the total amount of equipment in each category limited by the CFE Treaty that is allowed on the territory of a State Party, including equipment owned by any other States Parties. *Id.*

16. Agreement on Adaptation of the Treaty on Conventional Armed Forces in Europe, Nov. 19, 1999, available at [http://www.osce.org/documents/doclib/1999/11/13760\\_en.pdf](http://www.osce.org/documents/doclib/1999/11/13760_en.pdf) [hereinafter CFE Adaptation Agreement]. The following former Soviet republics signed the CFE Adaptation Agreement: Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Moldova, Ukraine, and Russia. *Id.* at 1. The Czech Republic and the Slovak Republic (formally Czechoslovakia at the time the original CFE Treaty was signed) both signed the CFE Adaptation Agreement. *Id.*

17. Richard Weitz, *Extraordinary Conference Fails to Achieve Agreement on CFE Treaty Dispute*, WORLD POLITICS REVIEW, June 19, 2007, <http://www.worldpoliticsreview.com/article.aspx?id=861>.

18. Final Act of the Conference of the States Parties to the Treaty on Conventional Armed Forces in Europe, 12–13, Nov. 19, 1999, available at [http://www.osce.org/documents/doclib/1999/11/13761\\_en.pdf](http://www.osce.org/documents/doclib/1999/11/13761_en.pdf). The agreements with Moldova and Georgia are commonly referred to as the “Istanbul commitments.” See CFE Treaty Background, *supra* note 3 (referring to Moscow’s “obligations under the Adapted CFE Treaty and what have become known as the Istanbul commitments”).

19. See NATO, Questions and Answers on CFE, 2–3, 5, May 2007, available at [http://www.nato.int/issues/arms\\_control/cfe\\_qa\\_factsheet.pdf](http://www.nato.int/issues/arms_control/cfe_qa_factsheet.pdf).

20. See Richard Weitz, *Georgia and the CFE Saga*, CENTRAL ASIA-CAUCASUS ANALYST, June 27, 2007, available at <http://www.cacianalyst.org/?q=node/4643>. There had been particular controversy over a lingering Russian military presence at Gudauta, Georgia, which the Russian Federation insists fulfills merely support functions for its “peacekeeping force in Abkhazia.” *Id.* However, a North Atlantic Council statement released ahead of the NATO summit in Bucharest in April 2008 suggested that NATO states had softened their stance. See Press Release, NATO, NAC Statement on CFE (Mar. 28, 2008), available at <http://www.nato.int/docu/pr/2008/p08-047e.html> [hereinafter March 2008 NAC Statement] (pledging to “move forward on ratification of the Adapted CFE Treaty in parallel with implementation of specific, agreed steps by the Russian Federation to resolve outstanding issues related to Russian forces/facilities in the Republic of Moldova and Georgia”) (emphasis added). Russia, however, seems not to have viewed

In his annual address to the Russian Parliament on April 26, 2007, President Putin warned of “a moratorium on [Russia’s] observance of [the CFE] treaty until such time as all NATO members without exception ratify it and start strictly observing its provisions, as Russia has been doing so far on a unilateral basis.”<sup>21</sup> Approximately one month later, the Russian Federation formally requested the Depository of the CFE Treaty (the Netherlands) to convene an “Extraordinary Conference of the States Parties.”<sup>22</sup> Article XXI of the CFE Treaty provides that such a conference will be convened if a party “considers that exceptional circumstances relating to this Treaty have arisen[.]”<sup>23</sup> In a press release, the Russian Ministry of Foreign Affairs (“Russian MFA”) pointed to “the serious problems that have arisen with the NATO nations’ implementation of the Treaty as a result of its enlargement and NATO foot-dragging on ratification of the [CFE Adaptation Agreement], signed in 1999.”<sup>24</sup> A NATO document circulated in May 2007 asserted that “no provision in the Treaty . . . would allow for a unilateral moratorium on implementation of the Treaty” and that such a move “would constitute direct violation of the Treaty.”<sup>25</sup>

The Extraordinary Conference, held in Vienna on June 12–15, 2007, failed to produce any agreement on ratification: NATO members steadfastly declined to ratify the CFE Adaptation Agreement until Russia completed the withdrawal of its military forces from Moldova and Georgia (both of whom agreed with NATO), while Russia criticized the “artificial” linking of treaty ratification with Russia’s Istanbul commit-

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this softening of rhetoric as a genuine concession, describing NATO’s continued reference to ‘Russian forces/facilities in the Republic of Moldova and Georgia’ as positions “that actually hinder exit from the current situation surrounding CFE” because Russia has already implemented its Istanbul commitments. *See* Press Release, Russian MFA Information and Press Department Commentary on NATO’s Statement on Treaty on Conventional Armed Forces in Europe (CFE) (Apr. 1, 2008), available at [http://www.ln.mid.ru/brp\\_4.nsf/f68cd37b84711611c3256f6d00541094/7ab167be6f20e0cd325741f002dbe48?OpenDocument](http://www.ln.mid.ru/brp_4.nsf/f68cd37b84711611c3256f6d00541094/7ab167be6f20e0cd325741f002dbe48?OpenDocument).

21. Vladimir Putin, President of the Russian Federation, Annual Address to the Federal Assembly (Apr. 26, 2007), available at [http://www.kremlin.ru/eng/speeches/2007/04/26/1209\\_type70029type82912\\_125670.shtml](http://www.kremlin.ru/eng/speeches/2007/04/26/1209_type70029type82912_125670.shtml).

22. Press Release, Ministry of Foreign Affairs of the Russian Federation, Convening an Extraordinary Conference to Discuss CFE Treaty (May 28, 2007), available at [http://www.mid.ru/brp\\_4.nsf/e78a48070f128a7b43256999005bcbb3/2e0b88fe13533efbc32572ea00419155?OpenDocument](http://www.mid.ru/brp_4.nsf/e78a48070f128a7b43256999005bcbb3/2e0b88fe13533efbc32572ea00419155?OpenDocument) [hereinafter Russian MFA Extraordinary Conference Request].

23. CFE Treaty, *supra* note 1, art. XXI(2).

24. Russian MFA Extraordinary Conference Request, *supra* note 22.

25. Questions and Answers on CFE, *supra* note 19, at 3.

ments.<sup>26</sup> The head of the Russian delegation, Anatoly Antonov, said after the conference that his government “would ‘carefully analyze and ponder’ the stalemate[,] . . . warn[ing], however, that Russia might have to suspend its implementation if the CFE remained unaltered for another year.”<sup>27</sup>

Russia acted much more expeditiously. On July 14, 2007, President Putin issued an official decree declaring that “[e]xceptional circumstances surrounding the CFE Treaty have led the Russian Federation to consider suspending its participation in the Treaty until NATO members ratify the Adapted Treaty and begin to implement the document in good faith.”<sup>28</sup> Putin’s announcement did not formally invoke article XIX (the “Extraordinary Events” clause) of the CFE Treaty, but he did offer the following six “exceptional circumstances that affect the security of the Russian Federation” in support of Russia’s decision to “suspend” the CFE Treaty:

1. The failure of Bulgaria, Hungary, Poland, Romania, Slovakia and the Czech Republic to make the necessary changes in the composition of group of states party to the Treaty on the accession of these countries to NATO;
2. The excessive parties to the CFE Treaty that belong to NATO, and the exclusive group that formed among CFE Treaty members as a result of the widening of the alliance;
3. The negative impact of the planned deployment of America’s conventional forces in Bulgaria and Romania because of this exclusive group mentality;
4. The failure of a number of parties of the CFE Treaty to comply with the political obligations contained in the Istanbul Agreements relating to the early ratification of the Adapted Treaty;

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26. Weitz, *supra* note 17.

27. *Id.*

28. Suspension Announcement, *supra* note 4. The announcement stated that “[t]he operation of the [CFE] Treaty will be suspended in 150 days as of the date of Russia’s notifying the depositary and other member states of its decision.” *Id.* This notice period appears to derive from CFE Treaty article XIX(2), which requires that “[a] State Party intending to withdraw shall give notice of its decision to do so to the Depository and to all other States Parties [and that] [s]uch notice shall be given at least 150 days prior to the intended withdrawal from this Treaty.” CFE Treaty, *supra* note 1, art. XIX(2); *see also* Hollis, *supra* note 12 (pointing out that Russia’s “150 day notice period matches that required for withdrawal under CFE Article XIX(2)”).

5. The failure of Hungary, Poland, Slovakia and the Czech Republic to comply with commitments accepted in Istanbul to adjust their territorial ceilings;
6. Estonia, Latvia and Lithuania's failure to participate in the CFE Treaty has adverse effects on Russia's ability to implement its political commitments to military containment in the northwestern part of the Russian Federation. Estonia, Latvia and Lithuania's actions result in a territory in which there are no restrictions on the deployment of conventional forces, including other countries' forces.<sup>29</sup>

The statement indicated that the suspension is “in conformity with international law” and that “in case of necessity, immediate action to suspend the CFE Treaty can be taken by the President of the Russian Federation.”<sup>30</sup>

The Russian MFA released a statement elaborating on President Putin’s decree.<sup>31</sup> The MFA confirmed that it conveyed formal notification of Russia’s suspension to the “depositaries [sic] and other states parties to the CFE Treaty” on July 14, 2007.<sup>32</sup> The statement also intimated the practical effects of the suspension on the Russian Federation’s obligations under the CFE Treaty:

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29. Suspension Announcement, *supra* note 4. The CFE Treaty provides that the required notice “shall include a statement of the extraordinary events the State Party regards as having jeopardized its supreme interests.” CFE Treaty, *supra* note 1, art. XIX(2).

30. Suspension Announcement, *supra* note 4. Article 37(4) of the 1995 Federal Law of the Russian Federation on International Treaties of the Russian Federation provides:

The operation of an international treaty of the Russian Federation, the decision concerning consent to the bindingness of which for the Russian Federation was adopted in the form of a Federal Law, may be *suspended* by the President of the Russian Federation in instances requiring the taking of urgent measures, with the obligatory immediate informing of the Soviet of the Federation and the State Duma and the submission to the State Duma of a draft respective Federal Law.

WILLIAM E. BUTLER, THE LAW OF TREATIES IN RUSSIA AND THE COMMONWEALTH OF INDEPENDENT STATES 190 (2002) (emphasis added).

31. Press Release, Ministry of Foreign Affairs of the Russian Federation, Statement by the Ministry of Foreign Affairs of the Russian Federation (July 14, 2007) [http://www.mid.ru/brp\\_4.nsf/e78a48070f128a7b43256999005bcbb3/95413db612370d01c325731a0030e1b5?OpenDocument](http://www.mid.ru/brp_4.nsf/e78a48070f128a7b43256999005bcbb3/95413db612370d01c325731a0030e1b5?OpenDocument) [hereinafter July MFA Statement]. The July MFA Statement is dated July 14, 2007, but is filed on the MFA Web site under July 16, 2007. See Documents and Materials of the Russian MFA, [http://www.mid.ru/brp\\_4.nsf/english?OpenView&Start=2.404](http://www.mid.ru/brp_4.nsf/english?OpenView&Start=2.404) (last visited Apr. 25, 2008).

32. *Id.* The CFE Treaty designates “the Government of the Kingdom of Netherlands” as the Depository. CFE Treaty, *supra* note 1, art. XXII(1).

[I]n particular, providing information and receiving and conducting inspections will be temporarily suspended. Russia during the suspension will not be bound by any limits on conventional arms. But the real quantities of Russian military equipment will depend on the evolution of the military-political situation, particularly on the readiness of the other states parties to the CFE Treaty to show adequate restraint. . . . The Russian moratorium does not mean that we are shutting the door to further dialogue. In case of the solution of the questions raised by us it will be possible to quickly ensure the collective fulfillment of the Treaty's provisions.<sup>33</sup>

Notwithstanding the ostensibly equivocal language in Putin's decree that Russia was "considering" a suspension, NATO responded as follows in a statement on July 16, 2007:

The announcement by the Russian Federation issued on the 14th of July 2007 to suspend as of the 12th of December 2007 its participation in the work of this landmark Treaty, including its flank regime and associated documents is deeply disappointing. The Allies are very concerned by this unilateral decision.<sup>34</sup>

NATO Spokesman James Appathurai described Russia's move as "a step in the wrong direction."<sup>35</sup> The U.S. Department of State echoed these sentiments.<sup>36</sup> Even Ukraine, which has ratified the CFE Adaptation

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33. July MFA Statement, *supra* note 31. Two months after the suspension announcement, a Russian general informed the State Duma (the lower chamber of Russia's Parliament) that "Russia will not scale up armaments for the duration of a moratorium" on the CFE Treaty. *Russia Promises Not to Build Up Arms During CFE Moratorium*, RIA NOVOSTI, Sept. 19, 2007, available at <http://en.rian.ru/world/20070919/79524231.html>.

34. Press Release, NATO, NATO Response to Russian Announcement of Intent to Suspend Obligations Under the CFE Treaty (July 16, 2007), available at <http://www.nato.int/docu/pr/2007/p07-085e.html>. NATO's indication that Russia's "suspension" would go into effect on December 12, 2007 (a date that did not appear in President Putin's announcement) suggests that NATO regarded Putin's announcement as the official beginning of the 150-day notice period required in article XIX(2) of the CFE Treaty. See Hollis, *supra* note 12, at n.7.

35. Slobodan Lekic, *Suspension of CFE Treaty is a 'Step in the Wrong Direction,' NATO Says*, July 16, 2007, THE INDEPENDENT, available at <http://news.independent.co.uk/europe/article2773165.ece>.

36. See Press Release, U.S. Dep't of State, Russian Announcement of Intention to Suspend Implementation of Conventional Armed Forces in Europe Treaty (July 14, 2007), available at <http://www.state.gov/r/pa/prs/ps/2007/88417.htm> ("The United States is disappointed by the Russian announcement of its intention to suspend implementation of the Conventional Armed Forces in Europe (CFE) Treaty.").

Agreement, expressed alarm at Russia's suspension.<sup>37</sup> Although some have questioned the legal basis for Russia's "suspension,"<sup>38</sup> thus far no State Party to the CFE Treaty has challenged the legality of Russia's move.<sup>39</sup>

## II. WITHDRAWAL VS. SUSPENSION

Russia's pronouncements have consistently warned of a "suspension" or a "moratorium," but never of a "withdrawal." However, the CFE Treaty provides only for the latter.<sup>40</sup> These terms, and the mechanisms they represent, are not interchangeable.<sup>41</sup> The Vienna Convention on the

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37. Press Release, Statement of the Ministry of Foreign Affairs of Ukraine in Connection with Declaration of the Russian Federation of Implementation Suspension of the Conventional Armed Forces in Europe Treaty, July 19, 2007, available at <http://www.mfa.gov.ua/mfa/en/publication/content/12547.htm> [hereinafter Ukraine MFA Statement] ("Suspension of the CFE Treaty may be an impact for restoration of the atmosphere of distrust and have negative consequences for the European security system.").

38. See Hollis, *supra* note 12; Vladimir Socor, *Russia Would Re-Write or Kill CFE Treaty*, EURASIA DAILY MONITOR, July 18, 2007, [http://www.jamestown.org/edm/article.php?article\\_id=2372298](http://www.jamestown.org/edm/article.php?article_id=2372298) (asserting that "Russia is placing itself in violation of the treaty in a legal sense and would be violating it in practical terms as well if it proceeds with the unilateral moratorium on compliance with the treaty's terms"); see also Yuri Zakharovich, *Why Putin Pulled Out of a Key Treaty*, TIME.COM, July 14, 2007, <http://www.time.com/time/world/article/0,8599,1643566,00.html> ("[A]s no provision for a unilateral moratorium was built into the CFE treaty, Russia's action amounts to non-compliance, strictly speaking.").

39. Neither NATO nor its member states have assailed the legality of Russia's suspension, despite NATO's claim in a May 2007 report that "[s]uspension of implementation of [CFE] Treaty obligations would constitute a direct violation of the Treaty." Questions and Answers on CFE, *supra* note 19, at 3.

40. See CFE Treaty, *supra* note 1, art. XIX(2). This provision reads:

Each State Party shall, in exercising its national sovereignty, have the right to withdraw from this Treaty if it decides that extraordinary events related to the subject matter of this Treaty have jeopardized its supreme interests. A State Party intending to withdraw shall give notice of its decision to do so to the Depository and to all other States Parties. Such notice shall be given at least 150 days prior to the intended withdrawal from this Treaty. It shall include a statement of the extraordinary events the State Party regards as having jeopardized its supreme interests.

*Id.* (emphasis added).

41. See Hollis, *supra* note 12 ("[The Vienna Convention on the Law of Treaties] carefully separates the rights of suspension and termination, without any indication of interchangeability or hierarchy.").

Law of Treaties<sup>42</sup> ("VCLT"), which "codified . . . the customary rules on the law of treaties,"<sup>43</sup> provides for "[t]ermination of or withdrawal from a treaty" in article 54, a separate provision from the suspension provision found in article 57.<sup>44</sup> VCLT article 70(2) provides that a withdrawal "releases the [withdrawing party] from any obligation further to perform the treaty," while article 72(1)(a) provides that a suspension "releases the [suspending party] from the obligation to perform the treaty . . . *during the period of the suspension*."<sup>45</sup> Presumably, "the treaty cannot bind the withdrawing state again unless it goes through a new procedure to express its consent to be bound," whereas in a suspension "the treaty's operation can be resumed and the parties continue to have a treaty relationship during the *suspension period*."<sup>46</sup>

Because withdrawal is a more drastic and permanent method of exiting a treaty than is suspension, one construction regards suspension as a "lesser, included power within the power to . . . withdraw from a treaty."<sup>47</sup> It would seem that "if the law of treaties seeks to preserve the stability of international commitments, it makes sense to always allow suspension in lieu of withdrawal or termination since the former will cause less injury to a treaty's stability."<sup>48</sup> VCLT article 62(3) appears to support this view by providing that "[i]f . . . a party may invoke a fundamental change of circumstances as a ground for *terminating or withdrawing* from a treaty it may also invoke the change as a ground for *suspending* the operation of the treaty."<sup>49</sup> However, this is the only VCLT

42. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT]. The VCLT is widely considered to be the authoritative codification of the customary law of treaties, as well as a "progressive development" of it. See, e.g., IAN M. SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 26 (1973). The USSR, and by extension, the Russian Federation as the USSR's state successor, acceded to the VCLT on April 29, 1986. Multilateral Treaties Deposited with the Secretary-General, United Nations Treaty Collection: Vienna Convention on the Law of Treaties, available at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXXIII/englishinternetbible/partI/chapterXXIII/treaty1.asp> (last visited Apr. 25, 2008).

43. See J.F. O'CONNOR, GOOD FAITH IN INTERNATIONAL LAW 108 (1991).

44. VCLT, *supra* note 42, arts. 54, 57; see also Hollis, *supra* note 12 ("[T]he fact that these rights come in two separate provisions militates against reading the powers as interchangeable; i.e., an express right to terminate only authorizes termination, not suspension.").

45. VCLT, *supra* note 42, arts. 70(2), 72 (emphasis added).

46. Hollis, *supra* note 12 (emphasis added).

47. *Id.*

48. *Id.* (citing PAUL REUTER, INTRODUCTION TO THE LAW OF TREATIES ¶ 237–38 (J. Mico and P. Haggemann trans., 1989)).

49. VCLT, *supra* note 42, art. 62(3) (emphasis added). The validity of Russia's suspension under VCLT article 62 will be considered *infra* text accompanying notes 188–91.

provision that seems to treat suspension as a derivative right of the right of withdrawal. This is likely because article 62 represents an “extremely narrow and restrictive” codification of the doctrine of *rebus sic stantibus*, now called “fundamental change of circumstances,” which has proved daunting for any state to invoke successfully.<sup>50</sup> Thus, the VCLT’s general approach is to regard suspension as a distinct right under the law of treaties.<sup>51</sup>

International lawyers who negotiate treaties “use denunciation and withdrawal clauses to promote ratification and reduce uncertainty about the future.”<sup>52</sup> Withdrawal clauses are attractive to states considering ratification of a treaty because they allay a state’s fear that it will be indefinitely bound by a treaty at the expense of its national interests.<sup>53</sup> An empirical survey of treaty exit provisions identified six common variations of denunciation and withdrawal clauses, but did not indicate that any exit clauses provided for suspension in lieu of or in addition to withdrawal.<sup>54</sup> These findings suggest that treaty drafters over the years have not viewed a right to suspension as having the same risk-management appeal as does the right to unilateral withdrawal; otherwise, “suspension” clauses would be included in a substantial number of treaties. Moreover, nearly all Cold War arms control treaties have included the “Extraordinary Events” clause that provides for withdrawal,<sup>55</sup> but not for suspension.

Especially where the suspending party does not place temporal limits on the suspension period, or establish firm conditions under which it will resume compliance with the treaty, suspension may damage a treaty’s stability at least as much as, if not more than, withdrawal. When a state party formally withdraws from a treaty, other states parties can continue to implement the treaty with the knowledge that they no longer owe legal

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50. See Laurence R. Helfer, *Exiting Treaties*, 91 VA. L. REV. 1579, 1643 (2005); see also Hollis, *supra* note 12. For additional discussion of VCLT article 62, see *infra* text accompanying notes 108–18.

51. Article 59 is illustrative of the VCLT’s distinct treatment of suspension. Paragraph 1 of article 59 addresses termination of a treaty implied by conclusion of a later treaty, but paragraph 2 provides that “[t]he earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties.” VCLT, *supra* note 42, art. 59.

52. Helfer, *supra* note 50, at 1647.

53. See *id.* at 1633.

54. See *id.* at 1597.

55. See Cindy A. Cohn, Note, *Interpreting the Withdrawal Clause in Arms Control Treaties*, 10 MICH. J. INT’L L. 849, 851 (1989). The language of the prototypical “Extraordinary Events” clause is virtually identical to that in article XIX(2) of the CFE Treaty, which is reproduced *supra* note 40.

obligations under the treaty to the withdrawing state.<sup>56</sup> However, when a state unilaterally suspends a treaty, it is unclear to other state parties whether the suspending party will ultimately resume implementation of the treaty or maintain its suspension indefinitely.<sup>57</sup> Whereas the VCLT includes a separate article setting forth conditions under which a party can *withdraw* from a treaty that contains no provision for termination or withdrawal,<sup>58</sup> the VCLT does not provide for unilateral *suspension* unless it conforms with the treaty's provisions or is consented to by all the parties.<sup>59</sup> Thus, the VCLT implicitly acknowledges that unilateral suspension is potentially more volatile than unilateral withdrawal.

### III. THE “EXTRAORDINARY EVENTS” CLAUSE

Analytically distinct from the parsing of withdrawal and suspension rights under customary international law is the issue of justification: on what grounds may a state party withdraw from a treaty? Whereas most withdrawal clauses analyzed in three editions of a United Nations (“U.N.”) handbook “do not require a state to provide any justification for its decision to quit a treaty,” arms control treaties generally require a state to provide to the other states parties advance notice that includes an explanation of its reasons for withdrawal.<sup>60</sup> Even if a treaty does not contain a withdrawal clause, VCLT article 65 provides that “notification shall indicate the measure proposed to be taken [i.e., withdrawal or suspension] and the reasons therefore.”<sup>61</sup>

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56. See VCLT, *supra* note 42, art. 70. Withdrawal “releases the parties from any obligation further to perform the treaty.” *Id.* art. 70(a).

57. Cf. Craig Dunkerley, Address at the Carnegie Moscow Center, The Politics of CFE—One American Perspective, (Nov. 16, 2007), at 18, available at <http://www.carnegie.ru/en/pubs/media/1074411%202016%202007%20Dunkerley%20CFE%20Speaking%20Notes.pdf> (“I am not predicting that any particular set of hard and fast events would inevitably follow from a mid-December Russian suspension of their CFE compliance but precisely the contrary: greater uncertainty.”). The VCLT seeks to mitigate the uncertainty surrounding the suspending party’s ultimate intentions by providing that “the parties shall refrain from acts tending to obstruct the resumption of the operation of the treaty” during the suspension period. See VCLT, *supra* note 42, art. 72(2).

58. VCLT, *supra* note 42, art. 56 (providing for denunciation or withdrawal if “it is established that the parties intended to admit the possibility of denunciation or withdrawal” or if “a right of denunciation or withdrawal may be implied by the nature of the treaty” so long as a party “give[s] not less than twelve months’ notice of its intention to denounce or withdraw”).

59. See *id.* art. 57.

60. Helfer, *supra* note 50, at 1598.

61. VCLT, *supra* note 42, art. 65(1). It has been suggested that VCLT article 65 is not addressed to states parties withdrawing from or suspending compliance with a treaty that expressly provides for withdrawal or suspension. See Antonio F. Perez, *Survival of Rights*

Since 1963, “all bilateral arms agreements between the U.S. and the Soviet Union [footnote omitted] and almost all multilateral arms treaties” have included the “Extraordinary Events” clause.<sup>62</sup> The Clause<sup>63</sup> refers to the withdrawing state’s “national sovereignty” and “supreme interests,” but narrowly circumscribes the clause’s scope in that a state can only withdraw in response to “extraordinary events, related to the subject matter of this Treaty.”<sup>64</sup> No tribunal has formally defined or interpreted this clause under international law.<sup>65</sup> In fact, it has been fully exercised by a withdrawing state party on only two prior occasions: by North Korea when it announced its withdrawal from the Nuclear Non-Proliferation Treaty (“NPT”) in 2003<sup>66</sup> and by the United States when it gave notice of its withdrawal from the ABM Treaty in 2001.<sup>67</sup>

The clause first appeared in article IV of the 1963 Treaty Banning Nuclear Weapon Tests in the Atmosphere, Outer Space and Underwater<sup>68</sup> (also known as the “Partial Test Ban Treaty,” or “PTBT”). In negotiating the PTBT, the United States and the USSR contemplated three primary grounds justifying withdrawal under the “Extraordinary Events” clause: (1) breach of the treaty by a State Party, (2) nuclear tests by a state not party to the treaty that might jeopardize the national security of the withdrawing party, and (3) nuclear explosions conducted by an unknown actor that would have violated the treaty or jeopardized the withdrawing party’s national security were the actor to be identified as either a State Party or a state not party to the treaty.<sup>69</sup> Although the clause’s wording

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*Under the Nuclear Non-Proliferation Treaty: Withdrawal and the Continuing Right of International Atomic Energy Agency Safeguards*, 34 VA. J. INT’L. L. 749, 779 n.89 (1994) (asserting that “[t]he domain of article 65 must . . . be those treaties which are silent on the subject” of treaty exit).

62. Cohn, *supra* note 55, at 851.

63. The text of the “Extraordinary Events” clause in the CFE Treaty is reproduced *supra* note 40.

64. See Cohn, *supra* note 55, at 854.

65. See Penney, *supra* note 10, at 1301 (citing Cohn, *supra* note 55, at 855).

66. See *Statement of DPRK Government on its Withdrawal from NPT*, Korean Central News Agency of DPRK, Jan. 10, 2003, available at <http://www.kcna.co.jp/item/2003/200301/news01/11.htm> [hereinafter DPRK Statement].

67. See Kirgis, *supra* note 11.

68. Cohn, *supra* note 55, at 851.

69. 2 MOHAMED I. SHAKER, THE NUCLEAR NON-PROLIFERATION TREATY: ORIGIN AND IMPLEMENTATION 1959–1979, at 887–88 (1980). To the extent that analyses of the withdrawal clause in the NPT include a discussion of the negotiating history of the original “Extraordinary Events” clause in the PTBT, such background information is helpful in interpreting the scope of the same clause in the CFE Treaty. Cf. *id.* at 885 (“Since [the withdrawal] right has been previously affirmed in the Partial Test-Ban Treaty, it would be

seemed to leave “judgements on the existence of the extraordinary events completely to the discretion of the withdrawing state,”<sup>70</sup> in testimony before the Senate Foreign Relations Committee in 1963, then U.S. Secretary of State Dean Rusk expressed his view that “a country could not withdraw for simply frivolous or unrelated matters as a matter of whim and still pretend that it is legal within the treaty to do so.”<sup>71</sup> Although Rusk’s statement suggests that certain reasons for withdrawal are not covered under the “Extraordinary Events” clause, neither the PTBT nor the CFE Treaty includes a provision for resolving a dispute between States Parties about the validity of a withdrawal under the clause.<sup>72</sup>

The paragraph that follows the withdrawal clause in the CFE Treaty spells out one circumstance where the right to withdraw is guaranteed: if a State Party attempts to circumvent the treaty by amassing conventional weapons holdings beyond the treaty’s scope, thereby threatening the balance of forces.<sup>73</sup> A U.S. Department of Defense analysis explains that

quite relevant here [with regard to the NPT] to trace back its origins in the negotiating history of the latter.”)

70. JENNY NIELSEN & JOHN SIMPSON, MOUNTBATTEN CTR. FOR INT’L STUD., THE NPT WITHDRAWAL CLAUSE AND ITS NEGOTIATING HISTORY 4 (2004), [http://www.mcis.soton.ac.uk/Site\\_Files/pdf/withdrawal\\_clause\\_NPT\\_nielsen&simpson\\_2004.pdf](http://www.mcis.soton.ac.uk/Site_Files/pdf/withdrawal_clause_NPT_nielsen&simpson_2004.pdf).

71. Cohn, *supra* note 55, at 851–52 (quoting *Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Underwater: Hearings Before the S. Comm. on Foreign Relations*, 88th Cong. 50 (1963) (statement of Dean Rusk, U.S. Sec’y of State)).

72. A provision of the CFE Treaty does require the Depository to “convene a conference of the States Parties which shall open no later than 21 days after receipt of the notice of withdrawal in order to consider questions relating to the withdrawal from this Treaty.” CFE Treaty, *supra* note 1, art. XXI(4). However, such a conference cannot be regarded as an adjudicative mechanism; it is simply an opportunity for multilateral negotiations. Somewhat in contrast is the withdrawal clause in the NPT Treaty, which, while otherwise identical to that in the CFE Treaty (except for a three months’ notice period instead of 150 days), requires that the withdrawing party also provide notice to the United Nations (“U.N.”) Security Council. See Treaty on the Non-Proliferation of Nuclear Weapons, art. X(1), *opened for signature* July 1, 1968, 21 U.S.T. 483, 493, 721 U.N.T.S. 161, 175 (entered into force Mar. 5, 1970) [hereinafter NPT Treaty].

If the [Security] Council then found that the withdrawal might foreshadow [a ‘threat to the peace’ under UN Charter Articles 24, 39 and 41–42], it would have authority to take action to delay or prevent withdrawal, or to require other action by the withdrawing party to keep the peace before it would have permission to withdraw.

George Bunn & Roland Timerbaev, *The Right to Withdraw from the Nuclear Non-Proliferation Treaty (NPT): The Views of Two NPT Negotiators*, 10 YADERNY KONTROL [NUCLEAR CONTROL] DIGEST 20, 25 (2005), available at [http://iisdb.stanford.edu/pubs/21011/Bunn\\_Timerbaev.pdf](http://iisdb.stanford.edu/pubs/21011/Bunn_Timerbaev.pdf).

73. CFE Treaty, *supra* note 1, art. XIX(3). The paragraph provides:

this provision was included to deter the Soviet Union from stockpiling armaments and equipment just east of the Ural Mountains, which would be outside the CFE Treaty's area of application, and from building up conventional armaments not limited by the treaty, such as armored combat vehicles controlled by paramilitary groups.<sup>74</sup> This provision demonstrates that the phrase "subject matter of this Treaty" in article XIX(2)<sup>75</sup> is a relatively flexible concept that provides the right to withdraw even in the absence of a party's breach of its explicit treaty obligations.

The question of the scope of the CFE Treaty's withdrawal clause was broached several times during U.S. Senate ratification hearings in 1991. In response to a question by Senator Biden about whether the United States would withdraw in the event that the USSR breached a "political pledge" to neutralize equipment east of the Urals, then Secretary of State James Baker III replied that "we have withdrawal rights that are perhaps a bit broader than just for reasons of circumvention of the treaty" and affirmed that "[w]e would have the right [to withdraw] under our national security withdrawal rights."<sup>76</sup> In a written response to a similar line of questioning by Senator Lugar, Secretary Baker stated that "violation of the statement alone would give rise to a compliance issue in the Joint Consultative Group and it could, depending in [sic] its seriousness, create a right of withdrawal from the treaty under article XIX."<sup>77</sup> Another area

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Each State Party shall, in particular, in exercising its national sovereignty, have the right to withdraw from this Treaty if another State Party increases its holdings in battle tanks, armoured combat vehicles, artillery, combat aircraft or attack helicopters, as defined in Article II, which are outside the scope of the limitations of this Treaty, in such proportions as to pose an obvious threat to the balance of forces within the area of application.

*Id.*

74. U.S. Dep't of Defense., Off. of the Under Sec'y for Acquisition, Technology, and Logistics, Treaty Compliance, CFE Treaty: Article-by-Article Analysis—Article XIX, <http://www.dod.mil/acq/acic/treaties/cfe/artbyart/analysis19.htm> (last visited Apr. 26, 2008) [hereinafter DOD Analysis].

75. CFE Treaty, *supra* note 1, art. XIX(2).

76. *Treaty on Conventional Armed Forces in Europe: Hearing Before the Subcomm. on European Affairs of the S. Comm. on Foreign Relations*, 102nd Cong. 887 (1991) (statement of James Baker III, U.S. Sec'y of State), available at <http://www.dod.mil/acq/acic/treaties/cfe/congress/rattest2.htm> [hereinafter *Baker Testimony*].

77. *Id.* The Joint Consultative Group, established in article XVI of the CFE Treaty and governed by procedures set forth in the Protocol on the Joint Consultative Group, is charged with, inter alia, "address[ing] questions relating to compliance with or possible circumvention of the provisions of this Treaty" and "consider[ing] matters of dispute

of inquiry concerned the U.S. right to withdraw if Russia, Ukraine or Belarus gained independence and refused to join the CFE Treaty. Secretary Baker's written statement indicated that withdrawal would be a prerogative in this eventuality.<sup>78</sup> These flexible interpretations of the "Extraordinary Events" clause should be contextualized in a ratification process wherein the State Department endeavors to assuage Senators' concerns about U.S. obligations under the Treaty. Nevertheless, they reflect one State Party's understanding that withdrawal under article XIX(2) could be a legally sound response in various circumstances surrounding the CFE Treaty.

Thirty years after the original "Extraordinary Events" clause was born, a state invoked it for the first time. On March 12, 1993, the Democratic People's Republic of Korea ("DPRK") notified the U.N. Security Council of its intent to withdraw from the NPT<sup>79</sup> under article X(1), effective three months later.<sup>80</sup> This notice included two reasons for the DPRK's decision: (1) a 1993 joint military exercise between South Korea and the United States that the DPRK claimed threatened its security, and (2) the International Atomic Energy Association ("IAEA") inspectors' alleged lack of objectivity in carrying out a specially authorized inspection of sites in the vicinity of DPRK nuclear energy facilities.<sup>81</sup>

In the following months, the NPT's depositaries—the United States, the United Kingdom, and the Russian Federation—as well as the U.N. Security Council, prevailed upon the DPRK to reverse its planned withdrawal.<sup>82</sup> A joint statement by the depositaries "question[ed] whether the DPRK's stated reasons for withdrawing constitute[d] extraordinary

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arising out of the implementation of this Treaty." CFE Treaty, *supra* note 1, arts. XVI(2)(A), XVI (2)(I), (7).

78. *Baker Testimony*, *supra* note 76 ("The Treaty contains mechanisms for withdrawal should this be necessary."). The Senate Foreign Relations Committee, in collaboration with the Bush Sr. administration, developed a protocol for reacting to non-accession by militarily significant former Soviet republics; it gave the President the power to recommend withdrawal from the Treaty to the Senate following an unsuccessful "extraordinary conference" convened under article XXI. See CONG. REC. S18001, S18025 (daily ed. Nov. 25, 1991) (statement of Sen. Biden), available at <http://www.dod.mil/acq/acic/treaties/cfe/congress/rattest15.htm>.

79. NPT Treaty, *supra* note 72, art. X(1).

80. Perez, *supra* note 61, at 750. The NPT's requirement that a party withdrawing under the "Extraordinary Events" clause give notice of its intention to withdraw to the U.N. Security Council creates potential for third-party review of a withdrawal's validity. See Bunn & Timerbaev, *supra* note 72, at 22, 25.

81. Bunn & Timerbaev, *supra* note 72, at 20–21.

82. Perez, *supra* note 61, at 751.

events relating to the subject-matter of the Treaty.”<sup>83</sup> On June 11, 1993 just one day before its withdrawal was to become effective, the DPRK announced that it was “suspending” its withdrawal and “accept[ed] safeguards on all its nuclear material.”<sup>84</sup>

For nearly the next ten years, the DPRK remained a party to the NPT, until January 10, 2003, when it declared “an automatic and immediate effectuation of its withdrawal from the NPT, on which ‘it unilaterally announced a moratorium as long as it deemed necessary’ according to the June 11, 1993, DPRK-U.S. joint statement.”<sup>85</sup> The DPRK’s position was that it was reinstating its 1993 notice of withdrawal, under which remained all but one day before it was to become legally binding.<sup>86</sup> The States Parties to the NPT rejected this argument, regarding the DPRK’s declaration as a new notice of a withdrawal that would not become effective until April 10, 2003.<sup>87</sup> Neither the NPT nor the VCLT makes provision for the “suspension” of a notice of withdrawal.<sup>88</sup> The VCLT provides only that “[a] notification or instrument [of withdrawal] may be revoked at any time before it takes effect.”<sup>89</sup> The NPT parties’ apparent interpretation of the DPRK’s 1993 “moratorium” on its withdrawal as a full “revocation” under VCLT article 68 suggests that customary international law does not permit states to implement “suspension” where the VCLT provides only for a more stable measure like “revocation.”<sup>90</sup>

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83. NPT Co-Depositories Statement, *reprinted in* letter Dated 1 April 1993 from the Representatives of the Russian Federation, the United Kingdom of Great Britain and Northern Ireland, and the United States of America Addressed to the President of the Security Council, U.N. SCOR, 48th Sess., Annex, at 2, U.N. Doc. S/25515 (Apr. 2, 1993) [hereinafter NPT Co-Depositories Statement]. The statement of the depositaries also noted that “nuclear-related security assurances have been provided to the DPRK as a non-nuclear-weapon state party to the NPT.” *Id.* This fact ostensibly served to undermine the DPRK’s claims about any “extraordinary events” threatening its security. See Perez, *supra* note 61, at 774 (“[The relevant context for interpreting [NPT] article X(1) arguably includes the assurances given by the [Nuclear Weapon State parties] as an inducement for [Non Nuclear Weapon State] parties to adhere to the NPT[.]”).

84. Perez, *supra* note 61, at 751.

85. DPRK Statement, *supra* note 66.

86. See Bunn & Timerbaev, *supra* note 72, at 21.

87. See Jean du Preez & William Potter, James Martin Ctr. for Nonproliferation Stud., North Korea’s Withdrawal from the NPT: A Reality Check (Apr. 9, 2003), <http://cns.miis.edu/pubs/week/030409.htm> (“[T]he generally held view is that North Korea’s withdrawal [came] into effect on 10 April 2003 when its three-month notice of withdrawal expire[d].”).

88. See Perez, *supra* note 61, at 751 n.9.

89. VCLT, *supra* note 42, art. 68 (emphasis added).

90. The official commentary to the International Law Commission’s 1966 Draft Articles on the Law of Treaties, upon which the VCLT is based, affirmed the importance of a right of revocation during the notice period without mentioning the “suspension” of a

Moreover, although the DPRK claimed to act “under the grave situation where [its] supreme interests are most seriously threatened,”<sup>91</sup> its grounds for withdrawal in 2003 were no more valid under the “Extraordinary Events” clause than they were in 1993.<sup>92</sup> However, the U.N. Security Council did not invalidate the DPRK’s reasons for withdrawal and order the DPRK to remain within the NPT because China would have vetoed such a resolution.<sup>93</sup>

Perhaps the United States did not challenge the legality of the DPRK’s 2003 withdrawal from the NPT because the United States had, about one year earlier, itself unilaterally withdrawn from a landmark arms control treaty.<sup>94</sup> On December 13, 2001, the United States conveyed notice of its withdrawal from the ABM Treaty to Russia, Belarus, Kazakhstan and Ukraine.<sup>95</sup> The U.S. statement expressly invoked article XV(2) of the ABM Treaty, which is substantively identical to the CFE Treaty’s withdrawal clause.<sup>96</sup> After noting that the “strategic relationship with Russia . . . is cooperative rather than adversarial,” unlike when the Treaty was concluded in 1972, the United States described the development of long-

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withdrawal notice. See Int’l Law Comm’n, *Reports of the International Law Commission to the General Assembly*, at 38, U.N. Doc. A/6309/Rev. 1 (1966), reprinted in [1966] 2 Y.B. Int’l L. Comm’n 169, 264 U.N. Doc. A/CN.4/191 [hereinafter *ILC Draft Articles on the Law of Treaties with commentaries*] (“[T]he considerations militating in favour of encouraging the revocation of notices and instruments of denunciations, terminations, etc. are so strong that the general rule should admit a general freedom to do so prior to the taking effect of the notice or instrument.”).

91. *DPRK Statement*, *supra* note 66.

92. See Bunn & Timerbaev, *supra* note 72, at 22–23 (contending that the 2003 withdrawal notice must have relied upon the two reasons provided by the DPRK in its aborted 1993 withdrawal, both of which were inadequate because they did not “relate to the ‘subject matter’ of the NPT”).

93. See *id.* at 24. The Security Council only “call[ed] upon North Korea to permit IAEA [International Atomic Energy Agency] inspections.” *Id.* at 23.

94. See ABM Withdrawal, *supra* note 9 (indicating that the U.S. withdrawal would go into effect “six months from [December 13, 2001]”—on June 13, 2002).

95. Press Release, U.S. Dept. of St., Text of Diplomatic Notes Sent to Russia, Belarus, Kazakhstan and Ukraine (Dec. 14, 2001), available at <http://www.state.gov/r/pa/prs/ps/2001/6859.htm> [hereinafter ABM Withdrawal Diplomatic Notice]. Pursuant to a 1997 Memorandum of Understanding, these four post-Soviet states were deemed the official “successor states” to the USSR, as regards the ABM Treaty. See generally Linda McCarty, Note, *Succession of the ABM Treaty*, 9 NEW. ENG. J. INT’L & COMP. L. 603 (2003).

96. See ABM Withdrawal Diplomatic Notice, *supra* note 95. The only differences between the withdrawal clauses in the ABM and CFE Treaties is that the former requires a six-month notice period and does not require notice to any “depository.” See Treaty on the Limitation of Anti-Ballistic Missile Systems, U.S.-U.S.S.R., art. XV, May 26, 1972, 23 U.S.T. 3434.

range ballistic missiles by certain states and the active attempt to acquire “weapons of mass destruction” by “a number of state and non-state entities” as “pos[ing] a direct threat to the territory and security of the United States and jeopardiz[ing] its supreme interests.”<sup>97</sup> President Putin, in a televised response, declared that the U.S. decision was “mistaken” but that it did “not pose a threat to the national security of the Russian Federation.”<sup>98</sup> However, many other world leaders and U.S. senators expressed concern that the U.S. repudiation of the ABM Treaty could spur a new arms race in anti-ballistic missiles.<sup>99</sup>

Most legal analyses leading up to and in the wake of the U.S. withdrawal concluded that growing threats from “rogue states” and terrorists, especially after the attacks of September 11, 2001, constituted “extraordinary events” justifying unilateral withdrawal from the Treaty.<sup>100</sup> At the same time, commentators warned that negotiation and compromise with Russia to modify the ABM Treaty would have been a sounder policy for the U.S. given third-party states’ dependence on the security environment established by the Treaty.<sup>101</sup> More controversial was whether the U.S. withdrawal comported with the “fundamental change of circumstances” doctrine in VCLT article 62, which the White House seemed implicitly to invoke in its withdrawal statement.<sup>102</sup> Some suggested that

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97. ABM Withdrawal Diplomatic Notice, *supra* note 95.

98. U.S. Withdrawal from ABM Treaty: International Comment and Reaction, <http://www.acronym.org.uk/docs/0112/doc01.htm#int> (last visited Apr. 26, 2008).

99. *See id.* (citing U.N. Secretary-General Annan’s concern that “the annulation of the [ABM Treaty] may provoke an arms race, especially in the missile area, and further undermine disarmament and non-proliferation regimes”). U.S. Senate Majority Leader Thomas Daschle said that withdrawal from the ABM Treaty “presents some very serious questions with regard to future arms races involving other countries, and sends the wrong message to the world with regard to [the United States’] intent in abiding with treaties.” *Id.*

100. *See, e.g.*, Müllerson, *supra* note 10, at 531–35; Penney, *supra* note 10, at 1317 (“[T]he Bush administration could frame a valid, good faith argument for withdrawal on national security interests.”).

101. *See* Müllerson, *supra* note 10, at 536 (“The unilateral withdrawal of the U.S. from the ABM Treaty without seeking arrangements with Russia may undermine other arms-control agreements.”).

102. *Compare id.* at 539 (contending that “current changes are of such a magnitude and character that if *rebus sic stantibus* can ever be justifiably used this may be one of such cases”), and Frederic L. Kirgis, *Proposed Missile Defenses and the ABM Treaty*, ASIL INSIGHTS, May 2001, available at <http://www.asil.org/insights/insigh70.htm> (stating that “President Bush thus appears to have set the stage for a change-of-circumstances argument”), with MALGOSIA FITZMAURICE & OLUFEMI ELIAS, CONTEMPORARY ISSUES IN THE LAW OF TREATIES 195 (2005) (concluding that “there would seem to be sufficient reason to question the applicability of the doctrine of fundamental change of circumstances in the context of the termination of the ABM Treaty”).

the U.S. withdrawal from the ABM Treaty set a precedent for future withdrawal from arms control treaties.<sup>103</sup> However, the consensus was that the implications of the U.S. withdrawal, and any resolution to a treaty dispute with Russia, would likely be political rather than legal.<sup>104</sup>

#### IV. POSSIBLE GROUNDS FOR SUSPENSION UNDER CUSTOMARY INTERNATIONAL LAW

A U.S. Department of Defense analysis of the CFE Treaty states that the “right of withdrawal [under article XIX(2)] is in addition to any other rights a State Party has under customary international law regarding termination or suspension of the Treaty . . .”<sup>105</sup> Such additional rights under customary law are to be found exclusively in the provisions of the VCLT.<sup>106</sup> The three relevant VCLT provisions for unilateral treaty exit are article 62 (Fundamental Change of Circumstances), article 60 (Breach), and article 61 (Impossibility).<sup>107</sup>

The centuries-old customary doctrine of *rebus sic stantibus* was codified, amidst much debate, in what eventually became VCLT article 62.<sup>108</sup> At the 1968 Diplomatic Conference on the Law of Treaties there was, however, agreement “that it was essential to make this doctrine as restrictive as possible to safeguard against abuse and to emphasize that its application in practice should be exceptional, and that the stability of treaties should be maintained.”<sup>109</sup> Thus, paragraph 1 of article 62 in effect requires satisfaction of five conditions: (1) there must be a change of cir-

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103. See, e.g., Kirgis, *supra* note 11 (noting that “it is possible that the stated grounds of the U.S. withdrawal could be regarded as supplying a precedent for withdrawal by the United States or other countries from other arms control treaties containing similar withdrawal clauses”); Hewitson, *supra* note 10, at 434 (discussing “the precedential value of the U.S. ABM Treaty withdrawal” for the DPRK’s subsequent withdrawal from the NPT).

104. See David Sloss, *Proposed Missile Defenses and the ABM Treaty, Reply to Response*, ASIL INSIGHTS, Aug. 2001, <http://www.asil.org/insights/insigh70.htm#reply> (“[T]he issue must be resolved politically, not legally.”).

105. DOD Analysis, *supra* note 74.

106. VCLT, *supra* note 42, art. 42(2) (providing that termination, denunciation, withdrawal, or suspension of a treaty’s operation “may take place only as a result of the application of the provisions of the treaty or of the present Convention”).

107. See Hollis, *supra* note 12. VCLT article 56 also provides for unilateral denunciation or withdrawal from a treaty, but can only be invoked by a party seeking to leave a treaty that “does not provide for denunciation or withdrawal.” VCLT, *supra* note 42, art. 56. Insofar as the CFE Treaty includes a withdrawal clause, VCLT article 56 is inapplicable. CFE Treaty, *supra* note 1, art. XIX(2).

108. See generally ILC Draft Articles on the Law of Treaties with commentaries, *supra* note 90, at 257–60.

109. FITZMAURICE & ELIAS, *supra* note 102, at 176.

cumstances existing when the treaty was concluded, (2) the change must be “fundamental,” (3) the parties must not have foreseen the change, (4) the existence of those circumstances must have been an essential basis for the parties’ original consent to be bound by the treaty, and (5) the change must radically transform the “extent” of treaty obligations still to be performed.<sup>110</sup>

Article 62 of the VCLT does not define the terms “fundamental” or “extent of obligations still to be performed,”<sup>111</sup> nor, for that matter, delineate the scope of the term “circumstances.” Paragraph 2 expressly disqualifies invocation of the doctrine in two cases: if the treaty in question establishes a boundary, or if the invoking party’s own breach of any international obligation owed to a party to the treaty is the cause of the claimed “fundamental change.”<sup>112</sup> Finally, as discussed *supra* above in Part II, paragraph 3 of article 62 provides that a party invoking article 62 to *suspend* a treaty’s operation must satisfy the same conditions required for termination or withdrawal—the five-part test of paragraph 1.<sup>113</sup>

Traditionally, the outbreak of war between parties to a treaty or the creation of new states have both been accepted as grounds for application of the *rebus sic stantibus* doctrine, whereas internal political revolutions, policy shifts, or the partial loss of treaty goals have been rejected.<sup>114</sup> In the *Gabčíkovo-Nagymaros* case before the International Court of Justice (“ICJ”), Hungary claimed that its 1992 termination of a 1977 treaty with then Czechoslovakia was justified under VCLT article 62 because the policy of “socialist integration” had disappeared, market economies had emerged in both states, a “unilateral scheme” had replaced a “single and indivisible operational system,” and the treaty had become “a prescription for environmental disaster.”<sup>115</sup> The 1997 judgment of the ICJ determined that the collective effect of these changed circumstances would not “radically transform the extent of the obligations still to be performed.”<sup>116</sup> The court thus confirmed the exacting customary law standard required for invocation of article 62.<sup>117</sup> Moreover, since the “Ex-

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110. *Id.* at 177.

111. Kirgis, *supra* note 102. Thus, “[I]acking any common criteria of what is fundamental, decision makers attach significance to certain changes through the screen of their own pursued and perceived values.” ARI DAVID, THE STRATEGY OF TREATY TERMINATION: LAWFUL BREACHES AND RETALIATIONS 49 (1975).

112. VCLT, *supra* note 42, art. 62(2).

113. See *id.* art. 62(3). The five-part test is discussed *supra* note 110 and accompanying text.

114. See Cohn, *supra* note 55, at 858–63.

115. *Gabčíkovo-Nagymaros Project* (Hung. v. Slovk.), 1997 I.C.J. 7, 57 (Sept. 25).

116. *Id.* at 61.

117. See FITZMAURICE & ELIAS, *supra* note 102, at 361–62.

traordinary Events” clause is available to states parties to arms control treaties, the “fundamental change of circumstances” doctrine “at best . . . would operate as a secondary argument which has no immediate legal effect.”<sup>118</sup>

VCLT article 60 permits a party to suspend unilaterally a multilateral treaty as a response to a specific event: material breach of that treaty by one of the parties.<sup>119</sup> If a party is “specially affected by the breach,” then it can “suspend[] the operation of the treaty in whole or in part in the relations between itself and the defaulting State.”<sup>120</sup> Alternately, in a treaty “of such a character that a material breach of its provisions by one party radically changes the position of every party,” any party (besides the defaulting state) can suspend the treaty in whole or in part.<sup>121</sup> This latter provision was designed for disarmament or arms control treaties.<sup>122</sup> Paragraph 3 defines “material” breaches as either “a repudiation of the treaty not sanctioned by the present Convention” or “the violation of a provision essential to the accomplishment of the object or purpose of the treaty.”<sup>123</sup>

The ICJ also had occasion to interpret article 60 in the *Gabčíkovo-Nagymaros* case, insofar as Hungary claimed that Czechoslovakia materially breached a treaty in 1991 by launching a project known as “Variant C” to divert the Danube River.<sup>124</sup> The court, in rejecting Hungary’s contention, stressed the importance of procedural rules, and applied article 60 “in a very rigorous manner.”<sup>125</sup> Moreover, “if [a] breach is not material . . . any purported denunciation on the grounds of breach will be illegal and invalid . . . becom[ing] a breach in itself giving the other party a right to take countermeasures.”<sup>126</sup>

VCLT article 61 provides that an “impossibility of performing a treaty” may be invoked “as a ground for suspending the operation of the treaty” where the “impossibility results from the . . . [temporary] disappearance or destruction of an object indispensable for the execution of

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118. *Id.* at 193. But see Cohn, *supra* note 55, at 870 (applying the “Fundamental Change of Circumstances” analysis as an “analogy” to assess whether the United States could withdraw from the ABM Treaty in 1989 under the Treaty’s “Extraordinary Events” clause).

119. See VCLT, *supra* note 42, art. 60.

120. *Id.* art. 60(2)(b).

121. *Id.* art. 60(2)(c).

122. See MOHAMMED M. GOMAA, SUSPENSION OR TERMINATION OF TREATIES ON GROUNDS OF BREACH 104 (1996).

123. VCLT, *supra* note 42, art. 60(3).

124. *Gabčíkovo-Nagymaros Project* (Hung. v. Slovk.), 1997 I.C.J. 7, 63 (Sept. 25).

125. FITZMAURICE & ELIAS, *supra* note 102, at 365.

126. GOMAA, *supra* note 122, at 135–36.

the treaty.”<sup>127</sup> Paragraph 2 precludes the invocation of impossibility “if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.”<sup>128</sup> In *Gabčíkovo-Nagymaros*, the ICJ suggested a narrow interpretation of impossibility of performance based on the discussions at the 1968 Diplomatic Conference that adopted the VCLT.<sup>129</sup> While the court found it unnecessary “to determine whether the term ‘object’ in Article 61 can also be understood to embrace a legal régime”—as Hungary had argued it should—the court dutifully applied paragraph 2, finding that Hungary’s own breaches of the treaty brought about any “impossibility.”<sup>130</sup>

#### V. ASSESSING THE (IL)LEGALITY OF RUSSIA’S “SUSPENSION”

Russia’s unilateral “suspension” of the CFE Treaty has drawn a swarm of political and media attention,<sup>131</sup> but not much reaction from scholars of international law.<sup>132</sup> There may be a presumption that Russia’s move, following the treaty withdrawals of the DPRK and the United States earlier this decade, is legally unassailable because of the “Extraordinary Events” clause.<sup>133</sup> This view is misguided. Russia’s suspension has uncovered a novel question in the law of treaties, an exploration of which may not only facilitate resolution of the ongoing impasse over the CFE Treaty, but also help enhance the stability of arms control agreements in general.

Russia’s suspension of the CFE Treaty’s operation, in effect as of December 12, 2007,<sup>134</sup> amounts to breach of the treaty, embodying both

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127. VCLT, *supra* note 42, art. 61(1). This article first provides for termination or withdrawal based on “permanent” impossibility before stipulating that “[i]f the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.” *Id.*

128. *Id.* art. 61(2).

129. *Gabčíkovo-Nagymaros Project*, 1997 I.C.J. at 60.

130. *Id.* at 60–61.

131. See, e.g., Federico Bordonaro, *The Implications of Russia’s Moratorium of the C.F.E. Treaty*, POWER AND INTEREST NEWS REP., Nov. 14, 2007, [http://www.pinr.com/report.php?ac=view\\_report&report\\_id=721&language\\_id=1](http://www.pinr.com/report.php?ac=view_report&report_id=721&language_id=1); Richard Weitz, *Russia’s CFE Suspension Threatens European Arms Control*, WORLD POLITICS REVIEW, Dec. 19, 2007, <http://www.worldpoliticsreview.com/article.aspx?id=1448>.

132. But see Hollis, *supra* note 12. Professor Hollis’s timely article is, to the Author’s knowledge at the time of this Note’s publication, the only serious legal analysis of Russia’s “suspension” of the CFE Treaty besides this Note.

133. See Sloss, *supra* note 104 (“[T]he question whether a country’s ‘supreme interests’ have been jeopardized . . . is not a justiciable question.”).

134. December Russian MFA Statement, *supra* note 5.

forms of material breach delineated in VCLT article 60(3). First, the suspension is a material breach as “a repudiation of the treaty not sanctioned by [the VCLT].”<sup>135</sup> The VCLT allows for suspension that is either “in conformity with the provisions of the treaty” or has the “consent of all the parties after consultation with the other contracting States.”<sup>136</sup> Clearly, the parties to the CFE Treaty did not consent to the suspension: a NATO statement dated December 12, 2007 declared that “NATO Allies deeply regret” Russia’s decision.<sup>137</sup> Russia’s intended suspension was not a topic at the “Extraordinary Conference” in June 2007,<sup>138</sup> so there was effectively no formal “consultation with the other contracting states.”

Nor does Russia’s “suspension” conform to the provisions of the CFE Treaty. The Treaty, which is of “unlimited duration,” provides in article XIX(2) that “[e]ach State Party shall . . . have the right to *withdraw* from this Treaty . . . .”<sup>139</sup> Russian authorities have expressly distinguished Russia’s “suspension” from a withdrawal,<sup>140</sup> so there is no translation discrepancy. VCLT article 31(1) prescribes the general rule that “[a] treaty shall be interpreted in good faith *in accordance with the ordinary meaning* to be given to the terms of the treaty in their context and in light of its object and purpose.”<sup>141</sup> The ordinary meaning of the term “withdraw” may be ascertained from VCLT article 70, which provides that withdrawal “releases the [withdrawing party] from any obligation further

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135. VCLT, *supra* note 42, art. 60(3)(a).

136. *Id.* art. 57.

137. Press Release, NATO, Alliance’s Statement on the Russian Federation’s “Suspension” of its CFE Obligations (Dec. 12, 2007), available at <http://www.nato.int/docu/pr/2007/p07-139e.html>. NATO states reiterated their lack of consent to Russia’s “suspension” in a March 2008 statement. See March 2008 NAC Statement, *supra* note 20 (“Russia’s ‘suspension’ risks eroding the integrity of the CFE regime and undermines the cooperative approach to security which has been a core of the NATO-Russia relationship and European security for nearly two decades.”).

138. *Russia Will Not Talk CFE Treaty Withdrawal in Vienna*, RIA NOVOSTI, June 6, 2007, <http://en.rian.ru/russia/20070606/66759638.html>. The “emergency CFE conference” to which this article refers is the “Extraordinary Conference” discussed above. See *supra* text accompanying notes 23–27.

139. CFE Treaty, *supra* note 1, art. XIX(1), (2) (emphasis added).

140. See, e.g., *Russia’s Upper House Backs Suspension of CFE Treaty*, RADIO FREE EUROPE, Nov. 16, 2007, <http://www.rferl.org/featuresarticle/2007/11/E9FBE1AC-6A86-4DE1-8BE8-54DC8FBB10E8.html> (“[Russian Foreign Minister Sergei] Lavrov also made clear that the move should be considered a suspension, and not what he called the ‘extreme measure’ of withdrawal.”).

141. VCLT, *supra* note 42, art. 31(1) (emphasis added).

to perform the treaty.”<sup>142</sup> Thus, under an ordinary meaning interpretation of article XIX(2), Russia’s suspension is a clear violation.<sup>143</sup>

Yet Russia’s Foreign Minister has publicly placed Russia on the following legal footing:

From the legal point of view, the withdrawal provision in the CFE Treaty gives reason to assert that a member state has the right to suspend the Treaty on the same grounds on which it can withdraw from it. This conclusion arises from the general principle of law and the usual norm of international law, expressed by the formula ‘he who has greater leeway is also entitled to the smaller leeway contained in it.’ In the light of this legal principle repeatedly applied in international legal practice, withdrawal from the treaty is ‘greater leeway,’ and suspension ‘the smaller leeway’ therein contained.<sup>144</sup>

Here, then, lies the legal foundation of Russia’s “suspension”: a purported “general principle of law” used as a maxim of interpretation. The principle cited by Minister Lavrov, using his language, is not encountered in any authorities.<sup>145</sup> The closest Latin phrase is *major continet in se minus* (“the greater includes within itself the less.”).<sup>146</sup> However, neither this maxim, nor any application of it, is encountered in any international law materials. Even the English lay phrase “lesser, included power,”<sup>147</sup> which adequately captures the concept upon which Russia relies, is not found in any relevant authorities. Russia’s suggestion that the principle is frequently used in international law is thus unsupported.

In distinction is a competing Latin phrase: *expressio unius est exclusio alterius* (“to express or include one thing implies the exclusion of . . . the

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142. *Id.* art. 70(1)(a), 70(2).

143. The VCLT provides that “[a] special meaning shall be given to a term if it is established that the parties so intended.” *Id.* art. 31(4). This cannot be established for reasons discussed below. See *infra* text accompanying notes 148–58.

144. Ministry of Foreign Affairs of the Russian Federation, Replies by Russian Minister of Foreign Affairs Sergey Lavrov to Questions from the German Newspaper *Frankfurter Allgemeine Zeitung*, Dec. 3, 2007, [http://www.mid.ru;brp\\_4.nsf/e78a48070f128a7b43256999005bcbb3/7e227d8f37ec91b8c32573a70036fb3a?OpenDocument](http://www.mid.ru;brp_4.nsf/e78a48070f128a7b43256999005bcbb3/7e227d8f37ec91b8c32573a70036fb3a?OpenDocument).

145. Extensive text searches of Minister Lavrov’s term were performed in the Westlaw and Lexis-Nexis legal databases, as well in Google.

146. BALLENTINE’S LAW DICTIONARY 297 (1916); cf. STEWART RAPALJE & ROBERT L. LAWRENCE, A DICTIONARY OF AMERICAN AND ENGLISH LAW 899 (1997) (*Omne majus continet in se minus, minus in se complectitur*: “the greater contains or embraces the less.”).

147. See Hollis, *supra* note 12 (“[I]n order for Russia to sustain its reliance on the CFE Treaty, the law of treaties would need either to regard suspension and withdrawal as interchangeable, or view the suspension power as a lesser, included power within the power to terminate or withdraw from a treaty.”).

alternative.”).<sup>148</sup> This well-known canon of interpretation has been discussed and endorsed in numerous treatises on the law of treaties.<sup>149</sup> It supports the proposition that the drafters of the CFE Treaty intended “withdrawal” to be exclusive; that is, if the parties had intended to admit the right to *suspend* the CFE Treaty, they would have made specific provision for *suspension*.<sup>150</sup>

Since article XIX(2) in the CFE Treaty traces its origin to the PTBT,<sup>151</sup> states’ interpretation of the PTBT may be applied to the CFE Treaty. In fact, a U.S. State Department Legal Adviser involved in the negotiation of the original “Extraordinary Events” clause<sup>152</sup> subsequently wrote that a “decision to end [the PTBT or NPT] very probably would require a far-reaching realignment of the country’s foreign-policy stance.”<sup>153</sup> He used the terms “end” and “termination” interchangeably with “withdrawal,” but never once substituted the term “suspension.”<sup>154</sup> Indeed, “suspension”—a measure that bars the suspending party from “acts tending to obstruct the resumption of the operation of the treaty”<sup>155</sup>—appears plainly incompatible with a provision designed to safeguard a state’s “supreme interests” when they become “jeopardized” by the continued operation of the treaty in the face of “extraordinary events.”<sup>156</sup> Reflecting customary international law, the VCLT carefully divides suspension from other means of treaty exit, which further cautions against conflating “suspension” and “withdrawal” in interpreting the CFE Treaty.<sup>157</sup> To summarize, Russia’s “suspension” does not conform to the CFE Treaty’s provisions; nor is Russia’s “repudiation”<sup>158</sup> of it salvaged by provisions

148. BLACK’S LAW DICTIONARY 620 (8th ed. 2004).

149. See, e.g., ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 201 (2000); MARK E. VILLAGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES 160 (2d. ed. 1997); SAMUEL B. CRANDALL, TREATIES: THEIR MAKING AND ENFORCEMENT 400 (2d. ed. 1916).

150. The CFE Treaty, including all Annexes and Protocols, is 118 pages long, suggesting exhaustiveness in drafting. See CFE Treaty, *supra* note 1.

151. See discussion *supra* text accompanying notes 68–72.

152. See John Norton Moore, *Enhancing Compliance With International Law: A Neglected Remedy*, 39 VA. J. INT’L L. 881, 968 (1999) (discussing State Department Legal Adviser Abram Chayes’s “legal brief”).

153. Abram Chayes, *An Inquiry into the Workings of Arms Control Agreements*, 85 HARV. L. REV. 905, 963 (1972).

154. *Id.* at 962–65.

155. VCLT, *supra* note 42, art. 72(2).

156. See CFE Treaty, *supra* note 1, art. XIX(2).

157. See Hollis, *supra* note 12 (“[T]he fact that these rights come in two separate provisions militates against reading the powers as interchangeable[.]”); see also discussion *supra* Part II (analyzing distinction between suspension and withdrawal).

158. See VCLT, *supra* note 42, art. 60(3)(a).

of the VCLT. Therefore, Russia has worked a material breach of the CFE Treaty.

Russia may contend that its domestic law did not allow it to “withdraw” from the CFE Treaty, but only to “suspend” the Treaty’s operation.<sup>159</sup> Article 37(4) of the 1995 *Federal Law of the Russian Federation on International Treaties of the Russian Federation* provides:

The operation of an international treaty of the Russian Federation, the decision concerning consent to the bindingness of which for the Russian Federation was adopted in the form of a Federal Law, may be suspended by the President of the Russian Federation in instances requiring the taking of urgent measures.<sup>160</sup>

In other words, under Russian law, when urgent action is needed, “suspension” of ratified treaties is the only measure available to the Russian President.<sup>161</sup> However, article 27 of the VCLT holds that “[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”<sup>162</sup> Hence, Russia cannot get very far with an argument about domestic law restrictions.

Although effecting a “suspension” where only a “withdrawal” was allowed, Russia did comply with the notice requirements in article XIX(2) of the CFE Treaty: it gave 150 days advance notice, both to the Depository and to all other States Parties, of its decision to withdraw from the Treaty.<sup>163</sup> However, there may be a further basis for establishing that Russia has worked a “repudiation of the treaty not sanctioned by the [VCLT],”<sup>164</sup> involving an assessment of the (in)adequacy of Russia’s stated grounds under the “Extraordinary Events” clause. For this purpose, the clause may be divided into three elements: (1) the occurrence of “extraordinary events,” (2) the relation of those extraordinary events to “the subject matter of the treaty,” and (3) that the state’s “supreme national interests” have been “jeopardized.”<sup>165</sup>

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159. See Hollis, *supra* note 12 (“An alternative explanation . . . may lie in Russian domestic legal requirements.”).

160. BUTLER, *supra* note 30, at 190 (emphasis added). The law further calls for “the obligatory immediate informing of the Soviet of the Federation and the State Duma and the submission to the State Duma of a draft respective Federal Law.” *Id.*

161. See *id.* at 190, 194.

162. VCLT, *supra* note 42, art. 27 (emphasis added).

163. See Suspension Announcement, *supra* note 4.

164. VCLT, *supra* note 42, art. 60(3)(a).

165. See Perez, *supra* note 61, at 776–77 (describing similar elemental breakdown of NPT withdrawal clause).

Although the common understanding of the clause is that each of these three elements is subject only to self-judging by the withdrawing state,<sup>166</sup> there is one instance when a state's grounds under the clause were challenged: the United States, United Kingdom, and Russia "question[ed] whether the DPRK's stated reasons for withdrawing from the [NPT] Treaty constitute[d] extraordinary events relating to the subject-matter of the Treaty."<sup>167</sup> Notably, this challenge included the first two elements of the clause, but excluded the third element.<sup>168</sup> This suggests that only the third element regarding "supreme national interests" is steadfastly "self-judging."<sup>169</sup> The first two elements, being more objective, are thus amenable to third-party review.<sup>170</sup>

First, it should be pointed out that Russia technically never cited "extraordinary events;" rather, it enumerated six "*exceptional circumstances*" that affect the security of the Russian Federation."<sup>171</sup> The "exceptional circumstances" language comes from article XXI(2) of the CFE Treaty, providing procedures for convening an "extraordinary conference" in response to a State Party's concern about "exceptional circumstances relating to this Treaty."<sup>172</sup> In distinguishing between "extraordinary events" and "exceptional circumstances" under an ordinary meaning interpretation of the CFE Treaty, one must conclude that "circumstances" refers to a set of conditions that has developed over time, whereas the term "events" describes distinct, episodic occurrences.<sup>173</sup> In this regard, past withdrawal announcements under the clause may be instructive: in March 1993, the DPRK cited a U.S.-South Korean joint military exercise as an "extraordinary event."<sup>174</sup> In December 2001, the United States cited the September 11, 2001 attacks as an "extraordinary event."<sup>175</sup> Both of these are properly regarded as "events" rather than "circumstances." Did President Putin's announcement simply mislabel the "extraordinary

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166. See SHAKER, *supra* note 69, at 898.

167. NPT Co-Depositories Statement, *supra* note 83.

168. See Perez, *supra* note 61, at 777 n.77.

169. *But see id.* at 777 (positing that "only the first two elements could be considered legally 'self-judging'").

170. See Cédric van Assche, *Withdrawal from the ABM Treaty: A Reply*, ASIL INSIGHTS, Sept. 2001, <http://www.asil.org/insights/insight70.htm#vanassche> (asserting that "the occurrence of such extraordinary events is a matter for objective determination by a Court").

171. Suspension Announcement, *supra* note 4 (emphasis added).

172. CFE Treaty, *supra* note 1, art. XXI(2).

173. See AMERICAN HERITAGE DICTIONARY 338, 616 (4th ed. 2000).

174. See Bunn & Timerbaev, *supra* note 72, at 20.

175. See ABM Withdrawal, *supra* note 9.

events” as “exceptional circumstances,” or do Russia’s grounds for “suspension” bear substantive defects?

Russia’s first reason is cryptically translated and vague: it amounts to the failure of six new NATO members to make “necessary changes” in the “composition” of states party to the Treaty.<sup>176</sup> The statement does not elaborate on the “changes” desired. While it seems to relate to the “subject matter” of the CFE Treaty, it cannot properly be regarded as an “extraordinary event” since it appears to be an ongoing state of affairs. Russia’s second reason concerns the “excessive” and “exclusive” nature of the group of Treaty parties who are also NATO members.<sup>177</sup> This seems neither to be an “extraordinary event,” as it has existed for at least the past two years, nor to relate to the CFE Treaty’s “subject matter.” Therefore, the second ground is no “extraordinary event.” The third reason—the “planned deployment of America’s conventional forces in Bulgaria and Romania”<sup>178</sup>—is not quite an “event” since it has not yet occurred, nor does it really relate to the CFE Treaty, since the United States has secured the consent of the two states.<sup>179</sup>

The fourth reason provided in the Russian “suspension” announcement is the failure of many CFE Treaty parties to ratify the CFE Adaptation Agreement.<sup>180</sup> That agreement, however, was signed in December 1999; for nearly eight years, all but four countries have failed to ratify the CFE Adaptation Agreement. The status quo can hardly be an “extraordinary event.” The fifth reason given is the failure of four NATO members to “adjust their territorial ceilings” in compliance with their “commitments accepted in Istanbul.”<sup>181</sup> The same refutation given for the preceding reason applies here: although it “relates” to the CFE Treaty, it is not an “extraordinary event” because of its ongoing existence for this entire decade. Finally, Russia’s sixth reason is the Baltic countries’ (Estonia, Latvia, and Lithuania) non-participation in the CFE Treaty and the difficulty that presents to Russian security in its northwestern region.<sup>182</sup> In addition to being invalid for the reason that the state of affairs has remained static for years, it may be argued that this claim does not relate to the subject matter of the CFE Treaty, precisely because those states are not parties.

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176. Suspension Announcement, *supra* note 4.

177. *Id.*

178. *Id.*

179. See U.S. Embassy in Bulgaria, Frequently Asked Questions and Answers About Shared Military Facilities (Apr. 9, 2008), [http://sofia.usembassy.gov/shared\\_facilities\\_faq.html](http://sofia.usembassy.gov/shared_facilities_faq.html).

180. See Suspension Announcement, *supra* note 4.

181. *Id.*

182. *Id.*

The foregoing analysis, though quite informal, suggests that *all six* of Russia's grounds fail to constitute "extraordinary events" as that term's ordinary meaning is reasonably understood. Moreover, some of them do not "relate to the subject matter" of the CFE Treaty, or do so only marginally. It is important to note that a failure under either of the two elements analyzed invalidates that reason as a ground for lawful suspension. Not a single justification supplied by Russia emerges intact as "extraordinary events related to the subject matter" of the CFE Treaty. Hence, on a substantive level, Russia's purported invocation of article XIX(2) amounts to "a repudiation of the treaty not sanctioned by [the VCLT]."<sup>183</sup>

The principle of good faith is incorporated in the VCLT in article 26 (*Pacta sunt servanda*): "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith."<sup>184</sup> Since President Putin issued his statement about Russia's intention to "suspend" the CFE Treaty, Russia has often declared that its move was meant to "restore the viability" of the treaty, that it is still very much open to negotiation, and that Russia does not plan to escalate its military forces in the treaty zone.<sup>185</sup> Thus, Russia may wish to rely on this ostensibly treaty-respecting behavior as a measure of its "good faith" under article 26. However, the countervailing consideration is that Russia has used its "suspension"—which has already been shown above to have been an illegitimate repudiation of the treaty—as a "bargaining chip" to exploit in its multi-dimensional diplomatic bouts with the United States, over such issues as ABM in Eastern Europe and the independence of Kosovo. This would count as a distinct absence of "good faith."

Furthermore, as a result of Russia's suspension of the CFE Treaty, it refused to provide data on its military at "an annual information exchange meeting" on December 14, 2007.<sup>186</sup> This frustrates one of the principal objectives of the Treaty, the promotion of transparency and co-operation with respect to conventional weapons in Europe. Thus, Russia has materially breached the CFE Treaty based on the second prong of VCLT article 60(3): it has "violat[ed] . . . a provision essential to the accomplishment of the object or purpose of the treaty."<sup>187</sup>

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183. VCLT, *supra* note 42, art. 60(3)(a).

184. *Id.* art. 26.

185. See, e.g., December Russian MFA Statement, *supra* note 5; *CFE Moratorium Does Not Imply Military Buildup—Russia's Lavrov*, RIA Novosti, Dec. 18, 2007, available at <http://en.rian.ru/russia/20071218/92999608.html>.

186. *Russia Says No Info Exchange With NATO Under Arms Treaty Freeze*, RIA Novosti, Dec. 14, 2007, available at <http://en.rian.ru/russia/20071214/92428637.html>.

187. VCLT, *supra* note 42, art. 60(3)(b).

Russia may venture to ground its unilateral suspension in customary international law as codified in the VCLT.<sup>188</sup> First, it may claim that its “suspension” was justified as an invocation of the “fundamental change of circumstances” doctrine.<sup>189</sup> However, Russia would be unable to show, under the five-part test described above in Part IV, that the dissolution of the USSR and the Warsaw Pact alliance was either unforeseen in November 1990, or that the existence of the USSR and the Warsaw Pact was “an essential basis”<sup>190</sup> for the parties’ original consent to be bound<sup>191</sup> by the CFE Treaty.<sup>191</sup> Russia will also be unable to rely upon VCLT article 60 to show that the parties to the CFE Treaty committed a “material breach” that entitled Russia to suspend its implementation of the treaty.<sup>192</sup> None of the other States Parties had “repudiated” the CFE Treaty or had violated a provision “essential to the accomplishment of the object or purpose” of the treaty.<sup>193</sup> Finally, impossibility of performance, as embodied in VCLT article 61, is of no use to Russia, since the “permanent disappearance or destruction” of the Warsaw Pact does not make performance of the treaty impossible in any sense.<sup>194</sup>

#### CONCLUSION

Russia’s unilateral “suspension” of the CFE Treaty—a “cornerstone of European security”<sup>195</sup>—cannot be legitimized under the terms of the Treaty itself or under customary international law. Indeed, Russia’s “repudiation” of the CFE Treaty, and its violation of provisions essential to the treaty’s object and purpose, constitutes a material breach of the treaty. Russia has violated international law.

It is important that this extralegal step by Russia not be overlooked—and thus effectively ratified—by the international community. Russia’s move not only imperils the future of European arms control and security, but also damages the foundation of public international law: the binding nature of treaties. Russia cannot in good faith abandon fundamental obli-

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188. See SINCLAIR, *supra* note 42, at 26.

189. See VCLT, *supra* note 42, art. 62.

190. *Id.*

191. See FITZMAURICE & ELIAS, *supra* note 102, at 177 (setting forth five-part test). The signing of the CFE Adaptation Agreement in 1999 demonstrates that the USSR and the Warsaw Pact did not constitute “an essential basis” for the parties’ consent to be bound, given that these entities had been defunct for nearly a decade. See CFE Adaptation Agreement, *supra* note 16.

192. See VCLT, *supra* note 42, art. 60(2)–(3).

193. *Id.*

194. *Id.* art. 61(1).

195. CFE Treaty Background, *supra* note 3.

gations under the CFE Treaty through a “suspension” not contemplated either by the plain language of the treaty or by customary international law. Such conduct opens the way for other states to depart from binding treaties in a curious, ad hoc fashion. This development would undermine the potential stability of all treaties and make states less likely to depend on treaties at all on the presumption that any party was free to leave at any time, in any manner.

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\* B.A., *cum laude*, Columbia University (2004); J.D., Brooklyn Law School (expected 2009); Executive Articles Editor of the *Brooklyn Journal of International Law* (2008–2009). I am grateful to my parents and friends for their tolerance and even support of my career aspirations and scholarly pursuits. I am also indebted to Professor Duncan Hollis, whose short article inspired this Note, and whose comments enhanced it. I thank the 2007–2008 Executive Board and staff members of the *Brooklyn Journal of International Law* for their assistance in preparing this Note for publication. This Note is dedicated to my grandparents in the United States and in the former USSR.

# **OUT AT HOME: CHALLENGING THE UNITED STATES-JAPANESE PLAYER CONTRACT AGREEMENT UNDER JAPANESE LAW**

## **INTRODUCTION**

**A**lthough it is an inherently American game, thus dubbed the “American Pastime,”<sup>1</sup> baseball is no exception to globalization.<sup>2</sup> For years, Major League Baseball (“MLB”) scouts have traversed South America, Latin America and the Caribbean in search of outstanding talent.<sup>3</sup> Moreover, players from across Asia have excelled in MLB for more than a decade.<sup>4</sup> Indeed, the main reason that international players come to MLB is to prove their skills in the world’s premiere baseball forum.<sup>5</sup> In

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1. Casey Duncan, Note, *Stealing Signs: Is Professional Baseball’s United States-Japanese Player Contract Agreement Enough to Avoid Another “Baseball War”?*, 13 MINN. J. GLOBAL TRADE 87, 88 (2003).

2. William B. Gould IV, *Globalization in Collective Bargaining, Baseball, and Matsuzaka: Labor and Antitrust Law on the Diamond*, 28 COMP. LAB. L. & POL’Y J. 283, 289–90 (2007); Krikor Meshefjelian, *The Global Reach of America’s Pastime: Antitrust Implications of the US-Japanese Player Contract Agreement*, ILL. BUS. L.J., Oct. 5, 2005, [http://iblsjournal.typepad.com/illinois\\_business\\_law\\_soc/2005/10/the\\_love\\_of\\_the.html](http://iblsjournal.typepad.com/illinois_business_law_soc/2005/10/the_love_of_the.html).

3. On Opening Day of 2004, nearly half of all MLB players were born outside of the United States, and players from thirty-three foreign countries currently play for either MLB teams or their minor league affiliates. MLB’s globalization is largely due to the efforts of Major League Baseball International, the global arm of MLB, which was organized in 1989 to “focus[] on the worldwide growth of baseball” and has offices in Beijing, New York, London, Sydney and Tokyo. The Official Site of Major League Baseball: International, <http://mlb.mlb.com/mlb/international/index.jsp?feature=mlbi> (last visited Apr. 14, 2008).

4. In 1995, Pitcher Hideo Nomo became the first Japanese player since the signing of the 1967 United States-Japanese Working Agreement to play in MLB. Ichiro Suzuki followed Nomo in 2000, becoming the first Japanese player to utilize the current Posting System. ROBERT WHITING, THE MEANING OF ICHIRO: THE NEW WAVE FROM JAPAN AND THE TRANSFORMATION OF OUR NATIONAL PASTIME 97 (2004) [hereinafter WHITING, MEANING OF ICHIRO]. Currently, the New York Yankees’ roster includes pitcher Chien-Ming Wang of Taiwan, and the Seattle Mariners’ roster includes pitcher Cha Seung Baek of South Korea. The Official Site of The New York Yankees: Team: Active Roster, [http://newyork.yankees.mlb.com/team/player.jsp?player\\_id=425426](http://newyork.yankees.mlb.com/team/player.jsp?player_id=425426) (last visited Apr. 14, 2008); The Official Site of The Seattle Mariners: Team: Active Roster, [http://seattle.mariners.mlb.com/team/player.jsp?player\\_id=430657](http://seattle.mariners.mlb.com/team/player.jsp?player_id=430657) (last visited Apr. 14, 2008).

5. Gould, *supra* note 2, at 293–94; see Andrew F. Braver, Note, *Baseball or Beso-buro: The Implications of Antitrust Law on Baseball in America and Japan*, 16 N.Y.L. SCH. J. INT’L & COMP. L. 421, 446 (1996) (identifying the quality of baseball in the United States as superior to that of Japan). Hideki Matsui, former Japanese player and current outfielder for the New York Yankees, explained that many Japanese players come to MLB to “help Japanese baseball enhance its reputation” and that their success is “proof

ternational players are not selected in MLB's amateur draft, but are signed at a young age by MLB clubs and begin their careers in the minor league system.<sup>6</sup> For Japanese players, however, the process is unique.<sup>7</sup> While under contract in Japan, a player must be posted by his team and then bid on by interested MLB teams.<sup>8</sup> The result is a highly restrictive system which unjustly limits the posted player's mobility and market value.<sup>9</sup>

Most theories suggest that the United States-Japanese Player Contract Agreement ("Posting Agreement"),<sup>10</sup> used for Japanese player transfers to MLB, violates U.S. antitrust laws as codified in the Sherman Act.<sup>11</sup> Others posit that posting falls under the National Labor Relations Act<sup>12</sup> as a mandatory subject of collective bargaining.<sup>13</sup> However, the Posting Agreement's limitations on player mobility stem from the Nippon Professional Baseball ("NPB") league's desire to keep Japanese players in Japan.<sup>14</sup> Furthermore, the Posting Agreement would be largely unnecessary if NPB's free agency system was less restrictive.<sup>15</sup> Thus, the resolution to this problem rests not in the laws of the United States, but rather

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that the level of Japanese baseball is high." Japan Today—Matsui Weighs in on Turmoil Facing Japanese Baseball, <http://www.japantoday.com/jp/shukan/243> [hereinafter Matsui Interview] (last visited Apr. 14, 2008). Masanori Murakami, a former NPB and MLB player, stated that MLB "is the best league" and analogized a Japanese player's desire to come to MLB to that of "a musician going to Carnegie Hall." Jim Caple, *Dice-K 2.0*, <http://sports.espn.go.com/espn/eticket/story?page=darvish> [hereinafter Caple, *Dice-K*] (last visited May 21, 2008).

6. Posting of Michael McCann to Sports Law Blog, [http://sports-law.blogspot.com/2006\\_11\\_01\\_archive.html](http://sports-law.blogspot.com/2006_11_01_archive.html) (Nov. 27, 2006, 6:10pm).

7. *Id.*

8. United States-Japanese Player Contract Agreement, paras. 5–7, Dec. 15, 2000, available at [http://jpbpa.net/convention/2001\\_e.pdf](http://jpbpa.net/convention/2001_e.pdf) [hereinafter Posting Agreement] (last visited Apr. 14, 2008).

9. See discussion *infra* Part II.B.

10. Posting Agreement, *supra* note 8.

11. Sherman Act, 15 U.S.C.A. §§ 1–7 (2007); e.g., Gould, *supra* note 2, at 294–95 (noting possible antitrust violations).

12. National Labor Relations Act, 29 U.S.C.A. §§ 151–169 (2007); e.g., Gould, *supra* note 2, at 306 (noting possible labor law violations); Elliot Z. Stein, Note, *Coming to America: Protecting Japanese Baseball Players Who Want to Play in the Major Leagues*, 13 CARDOZO J. INT'L & COMP. L. 261, 267 (2005).

13. Gould, *supra* note 2, at 287; Stein *supra* note 12, at 267. Another theory examines the effect of contract enforcement on the Posting System. Duncan, *supra* note 1, at 87–88.

14. "The posting system was obviously designed to benefit the Japanese team owners; it allowed them to . . . control the flow of players to the U.S." WHITING, MEANING OF ICHIRO, *supra* note 4, at 146.

15. Duncan, *supra* note 1, at 97; Matsui Interview, *supra* note 5.

in those of Japan.<sup>16</sup> In addition, Japanese players cannot successfully challenge the limitations of the posting system<sup>17</sup> under the laws of the United States, therefore they must do so under either Japanese antimonopoly or labor laws.<sup>18</sup>

The purpose of this Note is to examine the Posting Agreement with respect to Japanese antimonopoly and labor laws and to ascertain whether the process violates the provisions of either body of law. Part I explains the history of baseball in both the United States and Japan, including the development of their respective players' unions. Part II sets forth the tensions underscoring baseball relations between the United States and Japan and discusses how they led to the implementation of the current posting system. Part III examines antitrust and labor issues with regards to U.S. laws and explains why a comparable analysis under Japanese laws is proper. Part IV uses Japanese antimonopoly and labor laws to analyze the Posting Agreement, and Part V proposes player-friendly modifications to the current system.

## I. THE HISTORY OF BASEBALL IN THE UNITED STATES AND JAPAN

### A. Major League Baseball in the United States

Although some controversy exists as to the true origins of baseball, the Mills Commission published a report in 1907 concluding that Abner Doubleday invented the game in Cooperstown, New York, in 1839.<sup>19</sup>

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16. In both cases, U.S. courts recognize exemptions that render such arguments ineffective in securing additional player rights for the Japanese players. Gould, *supra* note 2, at 285 (referencing the judicially-created baseball exemption from U.S. antitrust law); *id.* at 297 (referencing both the statutory and non-statutory labor exemptions from U.S. antitrust law). Furthermore, Japanese players lack standing as MLB players to bring an action under either law. See discussion *infra* Part III.

17. The process defined in the Posting Agreement is commonly referred to as the posting system, or posting. Geoffrey R. Smull, *International Player Trades and Japan's Anti-Monopoly Law: A Look at the Continued Viability of the United States-Japan Player Contract Agreement*, ASIA L. NEWS (Am. B. Ass'n, Wash., D.C.), Spring 2005, at 1, available at [http://www.abanet.org/intlaw/committees/africa\\_eurasia/asia\\_pacific/spring05newsletter.pdf](http://www.abanet.org/intlaw/committees/africa_eurasia/asia_pacific/spring05newsletter.pdf).

18. *Id.* at 5 (discussing possible labor and antimonopoly law violations in Japan); Braver, *supra* note 5, at 453–54 (discussing ripeness of posting system for challenge in Japanese courts under antimonopoly law).

19. The Mills Commission was a panel organized in 1905 by Albert G. Spalding, former pitcher and sporting goods entrepreneur, to end the speculation surrounding the origins of modern-day baseball. The report was published on December 30, 1907, and the panel consisted of former National League presidents Col. A.G. Mills, Nicholas E. Young, and the Hon. Morgan G. Bulkeley; the Hon. Arthur P. Gorman, a U.S. Senator and former president of National Baseball Club of Washington; George Wright and

The original National League (“NL”) formed in 1876 and the American League (“AL”) began operating in 1900.<sup>20</sup> MLB formed in 1903 when both leagues merged.<sup>21</sup> In an effort to prevent players from jumping to rival baseball leagues, the AL and NL placed renewal clauses in their standard player contracts.<sup>22</sup> Players signed one-year contracts giving individual teams the option to unilaterally renew those contracts at the end of the season for which they were signed.<sup>23</sup> The clause was generally applied to the entire contract, therefore perpetually binding the player until his team declined the option.<sup>24</sup> Although MLB was reluctant to grant free agency to its players, the result was inevitable as baseball players, like so many other employees in the United States, unionized.<sup>25</sup> The Major League Baseball Players Association (“MLBPA”) formed in 1954 and initially protested the inadequacies of MLB’s pension fund,<sup>26</sup> but later lobbied for collective bargaining and alleged antitrust violations pertaining to the reserve clause.<sup>27</sup> Through MLBPA’s efforts as well as legislation<sup>28</sup> and various lawsuits,<sup>29</sup> free agency was established.<sup>30</sup> When

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Alfred J. Reach, who were former players and prominent businessmen; and Amateur Athletic Union president, James E. Sullivan. National Baseball Hall of Fame and Museum: History, <http://web.baseballhalloffame.org/museum/history.jsp> (last visited May 13, 2008).

20. Jon S. Greenwood, Note, *What Major League Baseball Can Learn From Its International Counterparts: Building a Model Collective Bargaining Agreement for Major League Baseball*, 29 GEO. WASH. J. INT’L L. & ECON. 259, 260 (1995).

21. MLB operated as a single league format until 1969 when it divided into the AL and NL. *Id.*

22. See Duncan, *supra* note 1, at 103–09 (discussing contract jumping in baseball prior to free agency and later use of one-year contracts and renewable options). Additionally, Major League Rule 4-A(a) allowed each MLB club to submit a list of up to forty players to the Commissioner’s Office that they wished to “reserve” for the following season. This rule allowed teams to secure an interest in a player on the list without fear that another team would entice him to switch clubs. *Kansas City Royals Baseball Corp. v. Major League Baseball Players Ass’n*, 532 F.2d 615, 622 (8th Cir. 1976). Further, Rule 3(g) explicitly prohibited negotiations with players while they were under contract with another team and justified the measure as preserving MLB’s competitive balance. *Id.*

23. *Kansas City Royals Baseball*, 532 F.2d at 618.

24. *Id.* at 624.

25. Greenwood, *supra* note 20, at 272–73.

26. Gould, *supra* note 2, at 286.

27. *Id.* at 286–87. MLBPA negotiated the first collective bargaining agreement in professional baseball in 1968. Greenwood, *supra* note 20, at 272. For the current collective bargaining agreement between MLBPA and MLB, see 2007–2011 Basic Agreement, Dec. 20, 2006, available at [http://mlbplayers.mlb.com/pa/pdf/cba\\_english.pdf](http://mlbplayers.mlb.com/pa/pdf/cba_english.pdf) [hereinafter Basic Agreement] (last visited Apr. 14, 2008).

28. Curt Flood Act of 1998, 15 U.S.C. § 26b (2007).

players attain free-agent status, they enjoy the freedom of contract negotiations with any MLB team.<sup>31</sup> Per the collective bargaining agreement, even players yet to reach free agency may seek higher pay in salary arbitration proceedings.<sup>32</sup>

Today, MLB is considered the best baseball in the world<sup>33</sup> and operates two leagues, AL and NL, with each comprised of three divisions: East, Central, and West.<sup>34</sup> Each year, the divisional winners meet in the playoffs, ultimately resulting in the AL and NL champions playing the World Series to determine the MLB champion.<sup>35</sup> MLB's talent pool is incredibly diverse, with players hailing from the United States, South America, Latin America and the Caribbean as well as Canada, Taiwan, and Japan.<sup>36</sup> Recently, MLB extended its global interests into China, and India is slated for MLB International developmental programs.<sup>37</sup> The "Ameri-

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29. *E.g.*, *Flood v. Kuhn*, 407 U.S. 258 (1972) (upholding the baseball exemption, but finally conceding that baseball was interstate commerce and reiterating that only Congress could remove the exemption); *Kansas City Royals Baseball*, 532 F.2d 615 (affirming arbitrator's decision that when a team exercises the renewal option in a standard player contract, the contract is renewable for only one year, not perpetually).

30. Free agency allows MLB players to negotiate with any and all MLB teams, generally resulting in a better contract, including a higher salary, for the player. *See Greenwood, supra* note 20, at 273–74 (discussing the effects of free market competition on player salaries). *See also* Alex Belth: Landmark Moments in Free-Agent History, Dec. 2, 2005, <http://sportsillustrated.cnn.com/2005/baseball/mlb/12/02/landmark.freeagency/index.html> (briefly discussing the legal battles that helped shape free agency as well as memorable signing "firsts" in MLB).

31. The current Basic Agreement provides: "Following the completion of the term of his Uniform Player's Contract, any Player with 6 or more years of Major League service who has not executed a contract for the next succeeding season shall be eligible to become a free agent." Basic Agreement, *supra* note 27, art. XX(B)(1). "Players who . . . become free agents under this Agreement shall be eligible to negotiate and contract with any [MLB] Club *without restrictions or qualifications*." *Id.* art. XX(B)(2) (emphasis added).

32. Any player's salary may go to arbitration if both the player and his current team consent to it. However, if the player has accumulated at least three years of MLB service, but less than the six years required for free agency, his salary may be submitted to arbitration without the other party's consent. In either circumstance, arbitration is "final and binding." *Id.* art. VI(F)(1).

33. Braver, *supra* note 5, at 446.

34. Greenwood, *supra* note 20, at 260–61.

35. *Id.*

36. The Official Site of Major League Baseball: International, *supra* note 3.

37. Jim Caple, *Good Showing in '08 Olympics Will Spur Interest*, Mar. 1, 2007, <http://sports.espn.go.com/espn/print?id=2766716&type=story>.

can Pastime" has truly become an international phenomenon, and continues to expand.<sup>38</sup>

### B. Nippon Professional Baseball in Japan

Americans brought baseball to Japan in 1873,<sup>39</sup> and the sport quickly became not just a game, but a way of life.<sup>40</sup> Baseball grew in popularity and became an organized professional league in 1936.<sup>41</sup> NPB is made up of two leagues, the Central and the Pacific, and players develop in a minor league system.<sup>42</sup> Like its counterpart in the United States, the Japanese Professional Baseball Players Association ("JPBPA") represents NPB's players in labor and salary matters.<sup>43</sup> Whereas the certification of MLBPA revolutionized American baseball in the 1960s, Japan did not have an equivalent association concerned with players' rights until 1985.<sup>44</sup> When JPBPA first organized, there was little support for collective actions in Japan.<sup>45</sup> At the time, JPBPA had a minimal effect on the game in Japan, as it only mustered support for minor changes to NPB.<sup>46</sup> In stark contrast to MLBPA, JPBPA evinced an unwillingness to strike in

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38. See Jeff Passan, *Revenue Stream of Consciousness*, Dec. 16, 2006, <http://sports.yahoo.com/mlb/news?slug=jp-international121806&prov=yhoo&type=lgns> (discussing MLB's international expansion and revenues).

39. Stein, *supra* note 11, at 267; WHITING, MEANING OF ICHIRO, *supra* note 4, at 52–53. During the Meiji Reformation, the Japanese solicited help from various countries in establishing an army, a navy, and a solid infrastructure. American professors who were in Japan to help establish this infrastructure were the first to introduce baseball to the Japanese. *Id.*

40. In 1886, the First Higher School of Tokyo established a baseball team and infused it with disciplines typically taught in Japanese martial arts. *Id.* at 53. Even today, when Japanese players practice, they focus more on their "inner self" than on skills and frequently push themselves towards mental limitations rather than physical ones. *Id.* at 52.

41. Organized in 1936, the Japan Occupational Baseball League was the first professional league in Japan. In 1939, it became the Japanese Baseball League and was renamed Nippon Professional Baseball in 1950 after reorganization. See WHITING, MEANING OF ICHIRO, *supra* note 4, at 148–49 (discussing establishment of Japanese professional baseball); Rising Sun Baseball: A Nippon Baseball League Primer, <http://risingsunbaseball.com/> (last visited May 13, 2008).

42. NPB teams each have one minor league, or farm, team. Greenwood, *supra* note 20, at 261 (stating that each NPB team has one minor league club).

43. Stein, *supra* note 11, at 269; Smull, *supra* note 17, at 2.

44. Braver, *supra* note 5, at 451.

45. Members of the union showed little support for its initiatives after formation and, following comments by one owner, an entire team of players withdrew from the bargaining unit. The team eventually rejoined the players' association. Braver, *supra* note 5, at 451–52.

46. JPBPA negotiated a raise in the minimum league salary as well as pensions in 1988. Greenwood, *supra* note 20, at 278–79.

order to obtain better conditions, higher pay, or even a free agency system.<sup>47</sup>

Although Japanese baseball is considered inferior to MLB,<sup>48</sup> its players are brought up in the “besoburo”<sup>49</sup> way of life<sup>50</sup> and nonetheless become national heroes in NPB.<sup>51</sup> Japanese players aim to prove the adequacy of NPB baseball in the U.S. market, but they are also lured by the prospect of less restrictive free agency.<sup>52</sup> Additionally, corruption and harsh training conditions in NPB make MLB an attractive option.<sup>53</sup> Although there is documented history of players switching leagues,<sup>54</sup> most players “choosing” to leave MLB for Japan are at the end of their careers and have been released by their MLB teams.<sup>55</sup> The “desire” of MLB players

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47. Following unionization, one JPBPA representative assured the Japanese public that NPB players would not strike, stating that the Japanese players “would not act like Americans.” Braver, *supra* note 5, at 452.

48. Paul White, *Japan Frets Over Talent Exodus to North America*, USA TODAY, Mar. 28, 2007, [http://www.usatoday.com/sports/baseball/2007-03-28-japan-effect\\_N.htm](http://www.usatoday.com/sports/baseball/2007-03-28-japan-effect_N.htm). Americans are historically reluctant to accept Japanese baseball as exhibiting quality equivalent to that of MLB. Some, including current and former MLB managers, think of Japanese baseball as a “second-rate, Ping Pong type of game.” WHITING, MEANING OF ICHIRO, *supra* note 4, at 25. One reason for this belief is that Japanese players tend to be smaller in both stature and physical composition than MLB players. This was minimally acceptable for pitchers but not for position players like Ichiro Suzuki, an outfielder, who checked-in at a mere five feet, nine inches 156 pounds prior to entering MLB. *Id.*

49. “Besoburo” is the Japanese word for baseball. WHITING, MEANING OF ICHIRO, *supra* note 4, at 53.

50. “Japan has imbued [besoboru] with its own philosophy: a Zen samurai emphasis on discipline, spirit and selflessness.” Robert Whiting, *Batting Out of Their League*, TIME MAG., Apr. 30, 2001, at 24, available at [http://www.time.com/time/asia/features/japan\\_view/baseball.html](http://www.time.com/time/asia/features/japan_view/baseball.html) [hereinafter Whiting, *Batting Out of Their League*].

51. See Duncan, *supra* note 1, at 91 (indicating playing success of Ichiro Suzuki, Hideki Matsui, and Tsuyoshi Shinjo).

52. Matsui Interview, *supra* note 5.

53. When Japanese players are drafted by NPB, they nominate their preferred teams, which induces teams to secretly pay players to make specific choices. See *id.* Additionally, observers note that Japanese pre-season training camps are more like military academies in their strict rules and demanding workouts, which are usually all-day affairs in freezing conditions. Whiting, *Batting Out of Their League*, *supra* note 50.

54. Eight Japanese players have left NPB via the posting system: Ichiro Suzuki, Kazuhisa Ishii, Akinori Otsuka, Norihiro Nakamura, Shinji Mori, Daisuke Matsuzaka, Akinori Iwamura, and Kei Igawa. Posting System, [http://www.baseball-reference.com/bullpen/Posting\\_System](http://www.baseball-reference.com/bullpen/Posting_System) (last visited Apr. 14, 2008). Other players, such as Houston Astros’ second baseman Kazuo Matsui, have come to MLB via free agency following the completion of their NPB contracts. Stein, *supra* note 11, at 261–62.

55. WHITING, MEANING OF ICHIRO, *supra* note 4, at 73 (characterizing NPB as “a lucrative market for aging major leaguers”); Whiting, *Batting Out of Their League*, *supra*

to switch leagues notwithstanding, NPB imposes a limit of three foreign players per team.<sup>56</sup>

## II. THE UNITED STATES-JAPAN BASEBALL RELATIONSHIP

### A. History Between MLB and NPB

Prior to World War II, the United States and Japan had a working relationship that allowed MLB players to travel to Japan.<sup>57</sup> The United States sent envoys on barnstorming tours where they demonstrated the superiority of U.S. baseball and fostered amicable international relations.<sup>58</sup> This congenial relationship, however, was often marred by nationalist sentiments, as demonstrated by the case of Eiji Sawamura.<sup>59</sup> After compiling an impressive pitching performance against MLB opposition, Sawamura downplayed the pitching skill required to strike out the biggest names in U.S. baseball.<sup>60</sup> He reduced the matter to three words: “I hate America.”<sup>61</sup> Assuming Sawamura’s pitching prowess translated to MLB success,<sup>62</sup> it would be difficult to find a forgiving and embracing populace in

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note 50 (“American players have been part of the Japanese baseball equation for years but only in the form of minor leaguers, benchwarmers and aging stars.”).

56. NPB takes great pride in its Japanese players’ skills and the league’s overall level of play and therefore limits the amount of direct American influence in the sport. In 1999, one NPB team manager publicly stated a desire to have an all-Japanese team. Whiting, *Batting Out of Their League*, *supra* note 50. Similarly, Yu Darvish, a half-Iranian and half-Japanese pitcher, was only pursued during NPB’s amateur player draft by one team because his background did not fit within Japan’s “very homogenous society.” Caple, *Dice-K*, *supra* note 5.

57. Braver, *supra* note 5, at 445.

58. *Id.*

59. Tom Singer, *Matsuzaka Posting System’s Latest Gem*, Nov. 14, 2006, [http://mlb.mlb.com/content/printer\\_friendly/bos/y2006/m11/d14/c1740635.jsp](http://mlb.mlb.com/content/printer_friendly/bos/y2006/m11/d14/c1740635.jsp).

60. In 1935, at the age of seventeen, Sawamura pitched against a U.S. team during a barnstorming tour and struck out four consecutive batters representing the biggest names in U.S. baseball at that time: Charlie Gehringer, Babe Ruth, Lou Gehrig, and Jimmie Foxx. *Id.*

61. Following the strikeouts, Sawamura was quoted as saying, “My problem is I hate America, and I cannot make myself like Americans.” *Id.*

62. Many consider Japanese baseball to be inferior to the MLB product; the sentiment was much stronger prior to the recent era which has seen the successful transition of players such as Nomo, Ichiro, and Hideki Matsui. See Jim Albright, *Why Haven’t we Had More Japanese Players in the Majors*; <http://baseballguru.com/jalbright/analysis/jalbright15.html> [hereinafter Albright, *More Japanese Players*] (last visited Apr. 14, 2008) (discussing quality of Japanese baseball players and teams from the early twentieth century through the 1960s).

the United States to cheer for him following such a statement.<sup>63</sup> Unsurprisingly, player exchanges did not occur between the two leagues until three decades later.<sup>64</sup>

During the 1960s, Japanese teams sent their players to train in MLB's minor league system.<sup>65</sup> Masanori Murakami came to America in 1964 as part of a training expedition to the San Francisco Giants.<sup>66</sup> Prior to his arrival in San Francisco, his NPB club, the Nankai Hawks, agreed to an option clause granting the Giants the right to purchase Murakami's contract if he played with the parent club.<sup>67</sup> The Giants exercised this right after Murakami was called-up from the minor leagues, but the Hawks vehemently opposed it and pressured Murakami to return to Japan.<sup>68</sup> Following this announcement, MLB and NPB tensions escalated and both sides threatened lawsuits.<sup>69</sup> Eventually, the leagues reached a compromise and Murakami played in San Francisco for one year, and was then allowed to return to Japan without further challenge.<sup>70</sup> Following this incident, both sides signed the Working Agreement of 1967, mandating that each league respect the other's reserve system.<sup>71</sup> This agreement essentially created a "de facto ban" and nearly thirty years passed before another Japanese player emerged in MLB.<sup>72</sup>

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63. During the Tokyo Giants' United States tour in 1935, the Pittsburgh Pirates tried unsuccessfully to recruit Sawamura to play in MLB. Sawamura declined the offer, citing haughty women, bad rice, and an inability to speak English as a few of his reasons for not wanting to live in America. WHITING, MEANING OF ICHIRO, *supra* note 4, at 72.

64. Attitudes towards the United States slowly improved following the end of the U.S. occupation of Japan after World War II. Even so, "support networks" for Japanese players attempting to make the move did not exist at this time and it was therefore more difficult for a Japanese player to adapt to his new surroundings. Albright, More Japanese Players, *supra* note 62.

65. WHITING, MEANING OF ICHIRO, *supra* note 4, at 73–74.

66. Like other minor leaguers, Murakami and other Japanese players spent time playing in the minors to gain experience, but could be called up to the parent club. *Id.* at 73–74.

67. *Id.*

68. The Hawks went so far as to tell Murakami that if he chose to remain in the United States, he might never be able to return to NPB. *Id.* at 75–76.

69. *Id.* at 76–78. MLB alleged that Nankei's refusal to let Murakami play in MLB was a breach of their working agreement. Additionally, when San Francisco exercised its right to Murakami, he signed a standard player contract and became part of MLB. Therefore, he also became part of the reserve system under which he was perpetually bound to the Giants until (and if) they unilaterally decided not to renew his contract. *Id.*

70. *Id.* at 79–80.

71. *Id.* at 84.

72. *Id.* at 118.

Don Nomura, a Japanese agent, decided that 1995 was the optimal time for a Japanese superstar to enter MLB.<sup>73</sup> The image of MLB in the minds of its fans was tarnished due to the labor strike of 1994,<sup>74</sup> and Nomura knew of an unexploited loophole in the de facto baseball ban.<sup>75</sup> He contacted Hideo Nomo, a dominant Japanese pitcher, and explained his simple, yet undetected loophole.<sup>76</sup> Nomo could retire from Japanese baseball, forcing his NPB team to release him from his contract and allowing him to join MLB as a free agent.<sup>77</sup> Amid outrage from both Japanese fans and the league,<sup>78</sup> Nomo retired from NPB and moved to MLB's Los Angeles Dodgers.<sup>79</sup> After winning Rookie of the Year Honors in 1995,<sup>80</sup> Nomo was no longer considered a traitor, but rather a national star in his homeland and a testament to competitive Japanese baseball.<sup>81</sup>

The next NPB star to move to MLB was Hideki Irabu in 1997, when the San Diego Padres negotiated for his rights from the Chiba Lotte Marines.<sup>82</sup> Irabu, however, did not want to leave Japan and refused to play in San Diego, despite Chiba Lotte's repeated warnings that he did not have a choice.<sup>83</sup> The Padres, frustrated with Irabu's unwillingness to play in San Diego, finally transferred his rights to the New York Yankees.<sup>84</sup> Although MLBPA was against this move, MLB Commissioner Bud Selig allowed the transfer, but later prohibited any future purchase of

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73. *Id.* at 102–03.

74. The MLBPA and MLB ownership were unable to reach an agreement preventing a labor stoppage in 1994. Greenwood, *supra* note 20, at 273–74. While players were seeking more money, MLB ownership sought unilateral implementation of a salary cap to contain player salaries. *Id.* Because of the strike, the World Series was cancelled for the first time since championship play began. *Id.* at 260–61. In the hearts and minds of American fans, the game had lost its appeal. See Matsui Interview, *supra* note 5 (stating that following the strike, MLB “faced a significant decline in fans”).

75. WHITING, MEANING OF ICHIRO, *supra* note 4, at 103.

76. *Id.* at 102–04.

77. *Id.*

78. The Japanese media publicly assaulted Nomo, referring to him as both a “traitor” and a “troublemaker.” Stein, *supra* note 11, at 270–71.

79. WHITING, MEANING OF ICHIRO, *supra* note 4, at 107.

80. *Id.* at 112.

81. Whiting, *Batting Out of Their League*, *supra* note 50.

82. San Diego had a working agreement with Chiba Lotte, including “exclusive rights” to Irabu. Richard Sandomir, *Baseball: Irabu's Legacy is a High-Stakes Auction*, INT'L HERALD TRIB., Dec. 6, 2006, at 20.

83. Both Irabu and his agent opposed his going to the United States and likened the process by which San Diego obtained his rights to “indentured servitude.” *Id.*

84. Irabu asserted that if he had to play in MLB, he would only do so for the Yankees. *Id.*

player contracts.<sup>85</sup> Then in 1998, Nomura used the Nomo loophole again to bring Alfonso Soriano to the New York Yankees,<sup>86</sup> prompting MLB and NPB to discuss a mutually agreeable protocol for Japanese player transfers to MLB.<sup>87</sup>

### B. The Posting System

MLB and NPB signed the Posting Agreement on July 10, 2000, and established the posting system.<sup>88</sup> Posting allows Japanese players who have not yet attained the minimum eight years of service which triggers true free agency in NPB to come to MLB.<sup>89</sup> It also provides compensation to the posted player's NPB team for the loss of an elite athlete.<sup>90</sup> The "Initial Termination Date" of the Posting Agreement was December, 15, 2002, but it remains operative on a yearly basis so long as neither league notifies the other of its intention to terminate the agreement.<sup>91</sup>

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85. Chief Operating Officer of MLBPA Gene Orza referred to the working agreement between San Diego and Chiba Lotte as "trafficking in human flesh" and opposed it because it deprived Irabu of his freedom. *Id.* Although MLBPA was unsuccessful in its attempt to invalidate the working agreement, MLB later prohibited any agreement that assigned "exclusive rights" of players to any MLB team. *Id.*

86. Although not a Japanese native, Soriano was under contract with an NPB team and wanted to play in MLB. Following Nomo through the narrow loophole in the Japanese-American ban, Soriano eventually landed in New York and played second base for the Yankees. Even though Soriano was a "foreign player" by Japanese standards, he was still under contract with NPB and his "retirement" occurred at age twenty-one, enraging NPB officials. Additionally, NPB claimed that it had closed the loophole prior to Soriano leaving the league, which angered MLB officials as it signaled NPB's unilaterally amending the working agreement. WHITING, MEANING OF ICHIRO, *supra* note 4, at 141–45.

87. MLB and NPB began negotiating for a player transfer system in 1998 and officially entered into the Posting Agreement on July 10, 2000. Duncan, *supra* note 1, at 100–01.

88. *Id.* Although the agreement was signed in July 2000, it was not effective until December 15, 2000. Posting Agreement, *supra* note 8, para. 17.

89. Tim Kurkjian, *Posting Process Needs to be Altered*, Dec. 15, 2006, [http://sports.espn.go.com/mlb/columns/story?columnist=kurkjian\\_tim&id=2697354](http://sports.espn.go.com/mlb/columns/story?columnist=kurkjian_tim&id=2697354); see Posting Agreement, *supra* note 8, para 4 (requiring MLB teams to inquire with the NPB commissioner regarding players currently under contract in Japan).

90. Posting Agreement, *supra* note 8, para. 9. This provision was included to address NPB's concerns over the dilution of the league because of players leaving for MLB. Stein, *supra* note 11, at 272.

91. The original agreement "terminated" on December 15, 2002 (the "Initial Termination Date"), unless the Commissioner of either league notified the other "(180) days prior to the Initial Termination Date . . . of his intention to modify or terminate" the agreement. When neither side did so, the agreement became effective from year-to-year and remains so until either Commissioner gives notice otherwise "(180) days prior to any anniversary of the Initial Termination Date." Posting Agreement, *supra* note 8, para. 17.

Pursuant to the Posting Agreement, an MLB team may inquire as to an NPB player's status between November 1 and March 1 of any given year.<sup>92</sup> If the player's NPB team agrees to posting,<sup>93</sup> it notifies the NPB Commissioner's office who then notifies the MLB Commissioner's office.<sup>94</sup> The MLB Commissioner then informs all MLB teams and within four days of notification interested teams must submit a sealed bid to the MLB Commissioner.<sup>95</sup> At the conclusion of the bidding period, the MLB Commissioner notifies NPB of the highest bid without disclosing the name of the bidding team.<sup>96</sup> The NPB team then has an additional four days to either accept or reject the bid.<sup>97</sup> If accepted, the MLB team is disclosed and has thirty days to negotiate a contract with the posted player.<sup>98</sup> If successful, the player joins his new MLB team and the bid price is passed on as a transfer fee to his NPB team within five days.<sup>99</sup> However, if the negotiations fail, the player returns to Japan until the posting period of the following year and no money changes hands.<sup>100</sup> Teams are expected to negotiate in good faith and the MLB Commissioner oversees the process.<sup>101</sup>

The Posting Agreement satisfies MLB's interest in obtaining the best talent in the world and assuages NPB's fear that it is becoming nothing more than a farm team for MLB.<sup>102</sup> One integral group, however, is left

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92. *Id.* para. 9. An NPB team may also decide to post a player without prior MLB inquiry. *Id.* para. 8.

93. *Id.* para. 5.

94. *Id.* para. 9.

95. *Id.*

96. "At the conclusion of the bidding period, the U.S. Commissioner shall determine the highest bidder . . . [and] then shall notify the Japanese Commissioner of the *amount* of the bid submitted by the successful bidder." *Id.* para. 10 (emphasis added).

97. *Id.* Teams decide whether to accept or reject the MLB team's bid because they are the ones that will eventually get that money if the negotiations are successful, not the player. *Id.* paras. 9, 11.

98. *Id.* para. 11.

99. *Id.*

100. *Id.* para. 12. Some criticize this provision in the Posting Agreement because there is a real possibility that some teams may submit high bids, fully aware that they will not be able to sign the player within the thirty-day window, simply to block another team from doing so for at least another year. Gould, *supra* note 2, at 294.

101. The MLB Commissioner has "the authority to oversee the bidding procedures . . . to ensure that they [have] not been undermined in any manner." Furthermore, the MLB Commissioner has the power to revoke a team's exclusive rights, or to declare any contract between a Japanese player and the winning bidder void if he "deems [that the contract] was the result of conduct that was inconsistent with [the] Agreement or otherwise not in the best interests of professional baseball." Posting Agreement, *supra* note 8, para. 13.

102. Whiting, *Batting Out of Their League*, *supra* note 50.

out: the Japanese players.<sup>103</sup> Under the posting system, players have minimal involvement and their only decision is whether to accept the MLB team's offer.<sup>104</sup> Because only one MLB team may negotiate with the player, his market value, and thus his final contract value, is kept artificially low.<sup>105</sup> In addition, NPB teams generally post players because the prospect of extraordinary bid prices is attractive to their financially despondent organizations.<sup>106</sup> The notion of exorbitant bids somewhat counters an original selling point of the posting system, which was that blind bidding ensured that large-market teams would not be the only organizations capable of landing celebrated Japanese players.<sup>107</sup> The stark, unfair nature of the system as it relates to NPB players' rights was not thrust into the forefront until the 2006 off-season.<sup>108</sup>

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103. MLB teams usually end up with great players who make an immediate impact on their respective teams, while the NPB teams collect the multi-million dollar transfer fees, leaving the Japanese players with a chance to play in the United States for less money than they would be worth on the free agent market. Kurkjian, *supra* note 89.

104. The Posting Agreement specifically prohibits MLB teams from contacting Japanese players under contract with NPB without MLB's Commissioner asking permission of the NPB Commissioner. Posting Agreement, *supra* note 8, para. 4. Additionally, MLB must still seek NPB's approval and follow the posting rules. *Id.* para. 5. The player is only personally involved in the negotiation of his contract with a team that has "sole, exclusive, and non-assignable" rights to him. *Id.* para. 11.

105. Under posting, the player's "purchase price" is a combination of both the bid amount and the resulting contract terms. Since only one team may negotiate with him, the player has diminished leverage and is denied his "maximum earning potential." Kurkjian, *supra* note 89.

106. *Id.* At the time of writing, there was much speculation about when, or if, NPB's biggest young star, Yu Darvish, would be posted. Bobby Valentine, former MLB manager and current manager of the Chiba Lotte Marines, speculated that Darvish's possible move to MLB will depend on whether his team, the Nippon Ham Fighters, "[are] in a state where they need a lot of money." Caple, *Dice-K*, *supra* note 5.

107. Small-market teams favored blind bidding because they felt that it leveled the playing field for them against large-market clubs. Kurkjian, *supra* note 89. The Tampa Bay Devil Rays are the only small-market team to successfully bid and negotiate a contract with any NPB player. In 2005, the Devil Rays signed a two-year, \$1.3 million contract with Shinji Mori, formerly of the Seibu Lions. Most recently, during the 2006 off-season, the Devil Rays signed a three-year, \$7.7 million contract with third baseman Akinori Iwamura, formerly of the Yakult Swallows. Tampa Bay paid a total of \$5.5 million in transfer fees to the NPB teams for both players. Posting System, *supra* note 54. Daisuke Matsuzaka's posting in 2006 seemingly thwarted this reasoning. Kurkjian, *supra* note 89.

108. See Kurkjian, *supra* note 89 (discussing how the posting process deprived Daisuke Matsuzaka and his agent, Scott Boras, of leverage in the negotiating of Matsuzaka's contract with the Boston Red Sox).

*C. Daisuke Matsuzaka*

In 2000, the Seattle Mariners bid roughly \$13 million for Ichiro Suzuki, and later signed him to a three-year contract worth \$12 million.<sup>109</sup> The amount of money bid for Ichiro has not been questioned because he was expected to be a star, and his skills have successfully transferred to MLB.<sup>110</sup> Following Ichiro's signing, the posting system experienced modest success until 2006, when it was criticized for encouraging high bidding and unfair practices.<sup>111</sup> In November 2006, the Boston Red Sox submitted a sealed bid to the MLB Commissioner's office of \$51.1 million for the negotiating rights to Daisuke Matsuzaka.<sup>112</sup> The Red Sox later signed a six-year, \$52 million contract with the Japanese pitcher.<sup>113</sup> Prior to this astronomical bid, MLBPA opposed the posting system,<sup>114</sup> but did not challenge it and most MLB team executives kept their personal opinions about the system to themselves.<sup>115</sup> Following the bid, however, sports writers and team executives openly stated that MLB had to change the system.<sup>116</sup> One unidentified executive went so far as to refer to the posting system as "silly" and even "stupid."<sup>117</sup>

MLB free agents rely on competition among at least two teams in negotiating the best possible contract.<sup>118</sup> Here, NPB players are explicitly deprived of that right in that they may only negotiate with one MLB

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109. WHITING, MEANING OF ICHIRO, *supra* note 4, at 22–24.

110. Kurkjian, *supra* note 89. Others, like Hideki Irabu, were unable to translate their NPB success into MLB stardom. Many see Irabu as one of the Yankees' worst investments. Sandomir, *supra* note 81.

111. Sandomir, *supra* note 81; Gould, *supra* note 2, at 294.

112. Kurkjian, *supra* note 89.

113. The contract includes a \$2 million signing bonus and provides for a base salary of \$6 million in 2007, \$8 million in 2008–2010, and \$10 million in 2011 and 2012. Beginning in 2009, Matsuzaka's contract contains escalators for his performance in both Cy Young Award and Most Valuable Player voting. He also has a no-trade provision and various other benefits. Matsuzaka Contract Details, [http://www.boston.com/sports/baseball/redsox/articles/2006/12/15/matsuzaka\\_contract\\_details/](http://www.boston.com/sports/baseball/redsox/articles/2006/12/15/matsuzaka_contract_details/) (last visited Apr. 14, 2008).

114. Gene Orza, then counsel to MLBPA, questioned the legality of posting because it deprived the player of choice and "totally ignore[d] his rights," but later admitted that MLBPA was limited in its efforts to help the Japanese players by the fact that JPBPA would not act on behalf of its members. WHITING, MEANING OF ICHIRO, *supra* note 4, at 146–47.

115. Kurkjian, *supra* note 89.

116. *Id.*

117. *Id.* Given the trend in escalating posting prices, baseball insiders speculate that if Darvish Yu, a young and powerful pitcher, is posted within the next few years that he will garner up to a \$75 million bid from an eager MLB team. Caple, *Dice-K*, *supra* note 5.

118. Greenwood, *supra* note 20, at 273.

team.<sup>119</sup> By eliminating every other MLB team from negotiations, posting keeps a player's market value artificially low.<sup>120</sup> It is reasonable to apply at least part of the bid price to the final contract price in ascertaining a player's market value, as both amounts together represent what he is worth to the MLB team.<sup>121</sup> Arguably then, Matsuzaka's value was over \$100 million, while he personally realized just half of that amount and had little choice in doing so.<sup>122</sup> Not every Japanese player desires to become an MLB hero but, for those who do, the process is utterly anti-player.<sup>123</sup>

### III. U.S. ANTITRUST AND LABOR LAW

#### A. The MLB Antitrust Exemption

In 1922, the United States Supreme Court decided the landmark case of *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*.<sup>124</sup> Plaintiff, an organized professional baseball league, alleged that MLB's AL and NL purchased other Federal League clubs and "induc[ed] all those clubs . . . to leave [that] League" in violation of the Sherman Act.<sup>125</sup> While the trial court found for the plaintiffs, the Court of Appeals reversed, finding that the business of baseball did not fall within the scope of the Sherman Act, and the Supreme Court affirmed.<sup>126</sup> In the decision, Justice Oliver Wendell Holmes, Jr., concluded that the business of baseball was of "giving exhibitions of baseball, which [is] purely [a] state affair[]," thus rejecting plaintiff's claim that MLB's practices violated federal antitrust laws.<sup>127</sup> Furthermore, Justice

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119. Kurkjian, *supra* note 89.

120. See *supra* note 114.

121. See Kurkjian, *supra* note 89 (discussing debate over what constitutes "purchase price" for luxury tax purposes). In essence, MLB teams have to pay twice for a player, which is "an expensive restriction." WHITING, MEANING OF ICHIRO, *supra* note 4, at 146.

122. See *supra* note 121, and accompanying text.

123. Stein, *supra* note 11, at 266.

124. 259 U.S. 200 (1922).

125. The Federal Baseball Club of Baltimore was one of eight member teams of the Federal League of Professional Base Ball Clubs, which was one of various professional baseball leagues that attempted to compete with a fairly young, yet well-established, MLB for the professional baseball market. Plaintiffs alleged that MLB was trying to monopolize the U.S. baseball market and extinguish, through prohibited business practices, any leagues that attempted to compete with them. *Id.* at 207.

126. The trial court found a conspiracy to monopolize the baseball market in violation of the Sherman Act and awarded \$80,000 in treble damages for the antitrust violation. *Id.* at 208–09.

127. *Id.* at 208.

Holmes noted that while such exhibitions require players to cross state lines and are undoubtedly money-makers, “the transport is a mere incident, not the essential thing.”<sup>128</sup> Moreover, baseball could not be designated “interstate commerce” within the scope of the Sherman Act because its product was one of “personal effort,” which is not a component of commerce.<sup>129</sup> Thus, the Supreme Court created baseball’s antitrust exemption and placed the decision to remove it squarely in the hands of Congress.<sup>130</sup>

In 1952 Congress issued its “Celler Report”<sup>131</sup> on the study of monopoly power which, following hearings on the business of baseball, concluded that “[t]he evidence adduced . . . would clearly not justify the enactment of legislation flatly condemning the reserve clause.”<sup>132</sup> This Congressional inaction coupled with *Federal Baseball* led later courts to apply the exemption established therein to validate the reserve clause.<sup>133</sup>

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128. Justice Holmes stated that player transport was an incident to an “exhibition [of baseball that], although made for money would not be called trade or commerce in the commonly accepted use of those words” and “[t]hat which in its consummation is not commerce does not become commerce among the States because the transportation that we have mentioned takes place.” *Id.* at 209.

129. *Id.*

130. See *Toolson v. New York Yankees, Inc.*, 346 U.S. 356, 357 (1953) (holding that *Federal Baseball* concluded that Congress did not intend to include baseball within the scope of the Sherman Act and was effectively put on notice with the *Federal Baseball* decision that only it could amend the law through legislation specifically geared to bring baseball within the scope of antitrust laws, and yet did nothing to accomplish the task); see also *Flood v. Kuhn*, 407 U.S. 258, 285 (1972) (denying Curt Flood’s request for free agency). Although the *Flood* Court concluded that “[p]rofessional baseball is a business and it is engaged in interstate commerce,” it nonetheless upheld *Federal Baseball* because “what the Court said in *Federal Baseball* in 1922 and what it said in *Toolson* in 1953, we say again here in 1972: the remedy, if any is indicated, is for congressional, and not judicial, action.” *Id.* at 282–85 (emphasis added).

131. *Kansas City Royals Baseball Corp. v. Major League Baseball Players Ass’n*, 532 F.2d 615, 619 (8th Cir. 1976).

132. 1952 Report of the Subcommittee on Study of Monopoly Power of the House Committee on the Judiciary, H. R. Rep. No. 2002, 82d Cong., 2d Sess., 229 (quoted in *Flood*, 407 U.S. 258, 272–73).

133. E.g., *Toolson*, 346 U.S. at 356; and *Flood*, 407 U.S. at 282–84. As early as 1902, players challenged MLB’s reserve system, albeit unsuccessfully. Nap Lajoie challenged the reasonableness and equitability of the renewable provision in the standard player contract and the Supreme Court of Pennsylvania found that the contract was reasonable and the consideration adequate. The court further stated that “mutuality of remedy [does not] require[] that each party should have precisely the same remedy, either in form, effect, or extent.” *Philadelphia Ball Club v. Lajoie*, 202 Pa. 210, 220 (Pa. 1902). See also *American League Baseball Club of Chicago v. Chase*, 149 N.Y.S. 6, 16 (N.Y. 1914) (denying “the proposition that the business of baseball for profit is interstate trade or commerce” and finding baseball outside the scope of the Sherman Act). The *Chase* court

Indeed, it was this reasoning that prompted the Supreme Court to uphold the baseball exemption with specific regard to the reserve clause in 1972 with its decision in *Flood v. Kuhn*.<sup>134</sup> The exemption lasted for over seventy-five years before Congress finally removed it as it pertained to employment issues, with the Curt Flood Act of 1998 (“Flood Act”).<sup>135</sup> There are limitations to the Flood Act’s application, however, in that Congress tailored its provisions to only “major league baseball players [who] play baseball at the major league level.”<sup>136</sup> Furthermore, section 26b(c) states that “[o]nly a *major league* baseball player has standing to sue under this section,” and section 26b(c)(1) defines a major league player as “a per-

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further noted that “[b]aseball is an amusement, a sport, a game that comes clearly within the civil and the criminal law of the state, and it is not a commodity or an article of merchandise subject to the regulation of Congress on the theory that it is interstate commerce.” *Id.* at 17.

134. *Flood*, 407 U.S. at 282. The Court stated that the baseball exemption was “an aberration,” but that it was “loathe . . . to overturn [*Federal Baseball* and *Toolson*] judicially when Congress, by its positive inaction, ha[d] allowed those decisions to stand for so long and . . . ha[d] clearly evinced a desire not to disapprove them legislatively.” *Id.* at 282–84. Curt Flood’s claim nonetheless helped create free agency for all MLB players and just four years later, two MLB players challenged the system by filing a grievance with the league. Andy Messersmith of the Los Angeles Dodgers and Dave McNally of the Montreal Expos both played the 1975 MLB season under the Standard Uniform Player’s Contract because neither signed a new contract following the 1974 season. Section 10(c) of the contract allowed each player’s respective team to unilaterally renew their contract for another year. Following the 1975 season, both teams attempted, again, to renew the players’ contracts under the same terms and Messersmith and McNally filed grievances alleging that the provision only applied to one renewal year and that they were actually free agents under contract to no team. The League, on the other hand, argued for perpetual renewability, stating that the renewal provision applied to the entire contract, *including* the renewal provision. In Messersmith’s and McNally’s case, the arbitrator found that the League’s interpretation of the Uniform Player Contract was incorrect and that the renewal provision only allowed for a one-year renewal of all terms of the contract, excluding the renewal provision. Thus, both players were declared free agents and were free to negotiate with any team in MLB for a new player contract, despite the protests of MLB officials. *Kansas City Royals*, 532 F.2d at 617–20. Following the Messersmith and McNally grievances, the Basic Agreements between MLBPA and MLB provided that “Arbitration Panel[s] shall not have jurisdiction or authority to add to, detract from, or alter in any way the provisions of such agreements.” Basic Agreement, *supra* note 27, art. XI.

135. Curt Flood Act, 15 U.S.C.A. § 26b (2007). Section 26b(a) states: “the conduct, acts, practices or agreements of persons in the business of organized professional major league baseball directly relating to or affecting employment of major league baseball players to play baseball at the major league level are subject to the antitrust laws to the same extent . . . [as] in any other professional sports business affecting interstate commerce.” *Id.* § 26b(a).

136. *Id.*

son who is a party to a major league player's contract, or is playing baseball at the major league level.”<sup>137</sup> Therefore, not only are minor league ballplayers excluded from the Flood Act's provisions,<sup>138</sup> but it is impossible for Japanese players to assert that the Posting Agreement violates the Flood Act because, under the aforementioned provisions, a Japanese player can neither claim that he is a “major league baseball player” nor that he “plays baseball at the major league level.”<sup>139</sup>

#### B. Labor Law and the MLBPA-MLB Collective Bargaining Agreement

Under the National Labor Relations Act (“NLRA”),<sup>140</sup> MLB must negotiate with MLBPA regarding topics relating to “wages, hours, and other terms and conditions of employment.”<sup>141</sup> In *Silverman v. Major League Baseball Player Relations Committee*,<sup>142</sup> the Second Circuit concluded that anti-collusion, free agency and reserve issues were mandatory subjects of bargaining and that to hold otherwise “would ignore the reality of collective bargaining in sports.”<sup>143</sup> One theory suggests that the omission of the posting system from the current collective bargaining agreement (“Basic Agreement”)<sup>144</sup> is itself a violation because posting is

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137. *Id.* §§ 26b(c), 26b(c)(1) (emphasis added).

138. In addition to the Flood Act specifically identifying and defining “major league baseball player,” section 26b(b)(1) avers that it does not “create, permit or imply a cause of action by which to challenge under the antitrust laws, or otherwise apply the antitrust laws to . . . the minor league level, any organized professional baseball amateur first-year player draft, or any reserve clause as applied to minor league players.” *Id.* § 26b(b)(1).

139. See *id.* §§ 26b(c), 26b(c)(1) (defining players eligible to assert a claim under the Act). When Japanese players are posted, they are still under contract with their NPB team, hence the posting system provides the NPB team with compensation in the amount of the winning MLB team's bid. Further, these players have never played a single out in a major league game, and will not do so until, and unless, they reach an agreement to play for the winning MLB team. Therefore, they are not “major league players,” but rather are still NPB players, and lack the necessary standing to sue MLB for an antitrust violation pursuant to the Flood Act. See generally *Posting Agreement, supra* note 8 (Posting Agreement is required for Japanese players to transfer to MLB because they are still under contract with NPB).

140. 29 U.S.C.A. §§ 151–169 (2007).

141. Employers and employee representatives are obligated to negotiate in good faith, although neither side is required to accept the other's proposal or to make concessions. *Id.* § 158(d).

142. 67 F.3d 1054 (1995).

143. *Id.* at 1060–62. The *Silverman* court also analyzed salary arbitration and likened it to “interest arbitration,” whereby employers and unions settle disputes over certain issues by sending them to an arbitrator, rather than engaging in collective bargaining. *Id.* at 1062. Nonetheless, the court found that there was “reasonable cause to believe that [salary arbitration] is a mandatory subject of bargaining.” *Id.*

144. Basic Agreement, *supra* note 27.

a mandatory topic for collective bargaining, rather than a permissive one.<sup>145</sup> However, the problem with Japanese players alleging that the Posting Agreement is a violation of the Basic Agreement is two-fold. First, these players are not contemplated within the definition of “player” found in the Basic Agreement.<sup>146</sup> Second, posting is neither covered by the Basic Agreement nor is it a mandatory subject of bargaining.<sup>147</sup>

The Basic Agreement applies to “Major League Players, and individuals who may become Major League Players during the term of [the] Agreement, with regard to all terms and conditions of employment.”<sup>148</sup> Under this definition, Japanese players seem to fall within the purview of the Basic Agreement<sup>149</sup> and could, therefore, argue that the Posting Agreement falls within this rubric such that it is a “mandatory subject of bargaining.”<sup>150</sup> Although the Basic Agreement encompasses employment issues relating to “individuals who may become Major League Players,”<sup>151</sup> Japanese players do not fall under that determination. The only players included in this category are those that are drafted by MLB teams and who begin playing in the parent clubs’ minor league farm systems.<sup>152</sup> Thus, posting cannot be considered a mandatory subject of the MLBPA-MLB bargaining relationship.

Additionally, the Basic Agreement states that players “shall be entitled to negotiate in accordance with the *provisions set forth in this Agreement*.”<sup>153</sup> Posting is not specifically covered in the Basic Agreement, nor is it implied by its provisions.<sup>154</sup> The article dealing with “International Play”<sup>155</sup> only pertains to “any game or series of games played by a Club or Clubs” outside the continental borders of MLB, or in which a foreign

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145. Gould, *supra* note 2, at 306–07; Stein, *supra* note 11, at 287–89.

146. See Basic Agreement, *supra* note 27, art. II (defining “player”).

147. There is no section that either directly or indirectly refers to Japanese, or any foreign players for that matter, within the Basic Agreement, nor does it make any mention of the posting system. The only references to player signings are found within the Articles pertaining to Salaries, the Assignment of Player Contracts, and the Reserve System, none of which encompass posting. *Id.* arts. VI, XIX, XX, respectively; see also Gould, *supra* note 2, at 300 (citing the 2006 Basic Agreement, which is largely the same as the current Basic Agreement).

148. Basic Agreement, *supra* note 27, art. II.

149. See *id.* (referencing “players who *may become*” MLB players) (emphasis added).

150. Stein, *supra* note 11, at 285–87.

151. Basic Agreement, *supra* note 27, art. II.

152. Sections of the Basic Agreement refer to Minor League Players and MLB player assignments to the minor league clubs, as well as the allocation of draft picks to member clubs losing ranked players to the free agency system. *Id.* arts. XIX, XX.

153. *Id.* art. II (emphasis added).

154. Gould, *supra* note 2, at 300.

155. Basic Agreement, *supra* note 27, art. XV(J).

club is a participant.<sup>156</sup> The article also refers to “Joint Cooperation” among MLB clubs regarding international activities, but again there is no mention of international player acquisitions or the rights afforded to such players.<sup>157</sup> Rather, the provision attaches only to international competition and league-wide contracts.<sup>158</sup>

Japanese players could only oppose posting as a violation of the Basic Agreement if MLBPA decides to bring them within its definition.<sup>159</sup> MLBPA, however, has no incentive to include Japanese players as members of its bargaining unit.<sup>160</sup> Japanese players are under contract with other teams, in another league and have their own representation in the JPBPA.<sup>161</sup> If Japanese players want their playing conditions changed in NPB, *their* union approaches *their* teams and *their* respective league; they do not seek help from MLBPA.<sup>162</sup> The Basic Agreement does not reference posting and, since Japanese players are both under contract in NPB and members of JPBPA, they do not fall within the meaning of “Major League Player” and may not challenge posting as such.<sup>163</sup>

#### IV. JAPANESE ANTIMONOPOLY AND LABOR LAW

##### A. Japanese Antimonopoly Law

Japan did not adopt antitrust laws similar to the Sherman Act until the conclusion of World War II,<sup>164</sup> when it enacted the Act Concerning Pro-

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156. The Article specifically relates to games played “outside the United States and Canada; or within or without the United States and Canada against a foreign club or clubs.” The continental borders of MLB, as used above, pertain to the United States and Canada as there are currently no MLB clubs attributed to any cities or countries outside of the two aforementioned North American countries. *Id.*

157. *Id.* art. XV(J)(4).

158. The provision “includ[es] but [is] not limited to, international play, international events for which Player participation is sought by or on behalf of a Club or Clubs (such as clinics or skill competitions), [and] international competition among nations.” In addition to international competition on the field of play, the provision provides for “the exploitation of international rights, such as media and sponsorship contracts.” *Id.*

159. *But cf.* Stein, *supra* note 11, at 287–88 (recognizing that the Basic Agreement does not cover the Posting Agreement, but stating that this omission is itself a violation of MLB’s obligation to address mandatory subjects of collective bargaining).

160. *Id.* at 290–91.

161. Smull, *supra* note 17, at 2.

162. *Id.*

163. This is further evidenced, both that Japanese players are not covered by MLBPA and the lack of incentive to include them, by the fact that MLBPA offered to help JPBPA contest the validity of the Posting Agreement, either in the United States or Japan, and JPBPA refused the offer. WHITING, MEANING OF ICHIRO, *supra* note 4, at 147.

164. BASIC JAPANESE LAWS 393 (Hiroshi Oda ed., 1997).

hibition of Private Monopolization and Maintenance of Fair Trade (“Antimonopoly Act”).<sup>165</sup> The Antimonopoly Act was drafted during the post-war occupation and, therefore, resembles the Sherman Act in many ways.<sup>166</sup> Both the Sherman Act and the Antimonopoly Act are primarily concerned with prohibiting illegal restraints of trade, unfair business practices, and monopolization.<sup>167</sup> For the purposes of this Note, the most striking difference between Japanese and U.S. antitrust law is that Japan does not have a baseball exemption.<sup>168</sup> This fact alone makes the Japanese legal system a more attractive vehicle for challenging the Posting Agreement.<sup>169</sup> The baseball exemption notwithstanding, U.S. jurisprudence finds certain sports’ business practices violative of antitrust legislation as either unfair trade practices or illegal restraints of trade.<sup>170</sup> It

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165. Act Concerning Prohibition of Private Monopolization and Maintenance of Fair Trade, Law No. 54, (1947) (Jp.) [hereinafter Antimonopoly Act], *translated at* <http://www.jftc.go.jp/e-page/legislation/ama/ama.pdf> (last visited Apr. 14, 2008).

166. Following World War II, occupational forces in Japan assisted the Japanese government in the drafting and adoption of the Antimonopoly Act, the premise of which was largely against common economic practice in Japan at the time. Braver, *supra* note 5, at 436. Prior to World War II, the Japanese government routinely interfered in the affairs of private businesses and there was little in the way of wealth distribution, as most power was concentrated in a few companies. *Id.* The Antimonopoly Act was modeled after the Sherman Act and the Clayton Act, but was stricter. Enforcement of the Antimonopoly Act was lax, primarily because of Japan’s traditional allowance of cartels. Only after amendments to the act in 1974 was the law strengthened and cartel fines increased. Even then, however, the United States criticized Japan’s relaxed implementation, which led to further amendments throughout the 1990s. ODA, *supra* note 164, at 393. Much of the resistance to enforcement of the Antimonopoly Act stemmed from Japan’s contempt of the occupational forces because they represented both defeat and the imposition of Western laws and ideals. *Id.* at 439–40.

167. Sherman Act, 15 U.S.C.A. §§ 1–7 (2007); Antimonopoly Act §1.

168. Smull, *supra* note 17, at 3 (stating that Japanese antimonopoly law does not recognize a baseball exemption); see discussion *supra* Part III (referencing the baseball exemption).

169. Smull, *supra* note 17, at 3.

170. *Flood v. Kuhn*, 407 U.S. 258 (1972) (holding that the reserve system was a violation, but the exemption was entitled to stare decisis, and the Court left removal of the exemption to Congress); *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1189 (D.C. Cir. 1978) (holding that the NFL’s rookie player draft was a violation of § 1 of the Sherman Act because it had “severe anticompetitive effects and no demonstrated procompetitive virtues” and was therefore an unreasonable restraint of trade); *Mackey v. NFL*, 543 F.2d 606, 623 (8th Cir. 1976) (stating that NFL’s “Rozelle Rule,” which required compensation for a team losing a player to another NFL team via free agency, was an unreasonable restraint of trade because it promoted a highly restrictive system of free agency in which player mobility was deterred rather than encouraged).

follows, therefore, that these violations are the proper context under which to analyze the posting system with regards to Japanese law.<sup>171</sup>

The Antimonopoly Act defines an unfair trade practice as “[a]ny act . . . which tends to impede fair competition” within the scope of activities generally classified as unfair and designated an unfair trade practice by the Japanese Fair Trade Commission.<sup>172</sup> Of the six activities set forth in section 2, the current posting system fits squarely within both “[d]ealing with another party on such conditions as will unjustly restrict the business activities of the said party”<sup>173</sup> and “[d]ealing with another party by unjust use of one’s bargaining position.”<sup>174</sup> Furthermore, because the amount of the winning bid goes to the posted player’s NPB team, thereby depriving the player of his full market potential, the posting system could arguably be considered “[d]ealing at unjust prices.”<sup>175</sup>

By its nature, the posting system is an unjust restriction on NPB players’ business activities.<sup>176</sup> Initiating the process for a possible transfer to MLB relies not on the player’s approval, but ultimately on that of his NPB team.<sup>177</sup> Further, once the highest bid is determined, the winning team is awarded the “sole, exclusive, and non-assignable right to negotiate with and sign” the player.<sup>178</sup> Moreover, if the NPB club does not accept the bid, or if the MLB team fails to sign the player, “another request

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171. See Smull, *supra* note 17, at 5; and Braver, *supra* note 5, at 453–54 (both noting the availability of Japanese antitrust claims).

172. Antimonopoly Act § 2(9). Japan’s Fair Trade Commission is an independent five-person agency charged with enforcing the Antimonopoly Act, and is largely based on the U.S. Federal Trade Commission. Braver, *supra* note 5, at 438.

173. Antimonopoly Act § 2(9)(iv).

174. *Id.* § 2(9)(v).

175. *Id.* § 2(9)(ii); Smull, *supra* note 17, at 2.

176. See discussion *supra* Part II.B (detailing inequities of posting system); see Antimonopoly Act § 2(9)(iv) (prohibiting practices that unjustly restrict the another party’s business activities).

177. Posting Agreement, *supra* note 8, paras. 5, 6. Additionally, the Japanese club may make one of its players available for posting without any inquiry on the part of an MLB team. *Id.* paras. 7, 8. Either way, the player’s prerogative in the matter is never mentioned in any paragraph relating to the initial inquiry.

178. *Id.* para. 11. Buttressing this part of the problem is the fact that the MLB team that submits the winning bid does little more than quote a number. The bid price does not change hands unless the MLB team successfully negotiates a contract with the player and, in the event that no agreement is reached, there is no penalty on the team; the entire bid is then off the table and neither the player nor the NPB team sees any money. Once again, the Japanese player is subjected to this process and has no say in where he goes or with whom he may negotiate, further proving the “anti-player” nature of the posting system. Rehan Waheed, *The Posting System in Major League Baseball*, J. OF BUS. L. SOC’Y, Nov. 2, 2006, [http://iblsjournal.typepad.com/illinois\\_business\\_law\\_soc/2006/11/the\\_posting\\_sys.html](http://iblsjournal.typepad.com/illinois_business_law_soc/2006/11/the_posting_sys.html).

for posting with respect to that Japanese player shall be *prohibited* until the following November 1.”<sup>179</sup> The only time the posted player is personally involved in this process is when he negotiates with the winning MLB team.<sup>180</sup> Thus, posting unjustly restricts a player’s freedom of choice and his ability to “shop” his talents to an array of MLB teams and may, therefore, be a violation of the Antimonopoly Act.<sup>181</sup>

Additionally, the posting system may be actionable as an “undue use of one’s bargaining position.”<sup>182</sup> Here, NPB and MLB each have superior bargaining positions to the Japanese players.<sup>183</sup> While both organizations have power over the player, it is ultimately the NPB team that can unduly control the process since they must approve a player’s posting before further action is taken.<sup>184</sup> This skewed power is also visible where the NPB team has the sole right to reject the winning MLB bid, thereby ensuring that no team will have the opportunity to negotiate with the player until at least the following November.<sup>185</sup> MLB has superior bargaining power because by awarding “sole, exclusive, and non-assignable” rights to the player, only one team “competes” for his services and his contract value is kept artificially low.<sup>186</sup> Essentially, the player has no bargaining power and if he does not acquiesce to the bidding team’s final offer, or if his NPB team does not approve both the initial posting and the bid amount, he must return to Japan for at least another year.<sup>187</sup>

Alternatively, if either of the preceding analyses is insufficient to establish a violation, the combination of the two may be viewed as “[d]ealing at unjust prices.”<sup>188</sup> It is difficult to grasp the concept of a six-year contract worth \$52 million<sup>189</sup> as “unjust,” until the terms of Daisuke Matsuzaka’s player contract are compared with the \$51.1 million windfall for his former NPB team, the Seibu Lions.<sup>190</sup> In total, the Boston Red

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179. Posting Agreement, *supra* note 8, paras. 11, 12 (emphasis added).

180. *Id.*

181. Smull, *supra* note 17, at 5; Meshefesian, *supra* note 2.

182. Antimonopoly Act, Law No. 54, § 2(9)(v) (1947) (Jp.).

183. Smull, *supra* note 17, at 5.

184. Posting Agreement, *supra* note 8, paras. 6–8.

185. *Id.* para. 11.

186. *Id.* Thus restricting the number of teams involved in negotiations to one. Smull, *supra* note 17, at 5; *see discussion supra* Part II.C.

187. Posting Agreement, *supra* note 8, para. 12.

188. Antimonopoly Act, Law No. 54, § 2(9)(ii) (1947) (Jp.).

189. Matsuzaka Contract Details, *supra* note 113.

190. Boston bid \$51.1 million for the rights to negotiate with Matsuzaka, all of which was transferred to the Seibu Lions upon Matsuzaka’s agreement to Boston’s contract offer. Kurkjian, *supra* note 89; *see* Posting Agreement, *supra* note 8, para. 11 (detailing the procedure and timeframe for transfer of the bid amount to the NPB club).

Sox spent roughly \$100 million to acquire Matsuzaka,<sup>191</sup> and arguably his talent alone commanded such a price tag.<sup>192</sup> Furthermore, Matsuzaka has to earn his money over the course of the next five seasons<sup>193</sup> while Seibu received their transfer fee once the contract was signed.<sup>194</sup> Therefore, Matsuzaka received an “unjust price” for his services as his contract reflects only one-half of his potential value.<sup>195</sup>

One other possible violation of Japanese antitrust laws is that posting is established by an international agreement, and section 6 of the Antimonopoly Act prohibits parties from signing “an international agreement or international contract which contains such matters as constitute an unreasonable restraint of trade or unfair business practices.”<sup>196</sup> As established above, Japanese players have colorable claims against posting under either provision. Further, the Antimonopoly Act provides for private causes of action by “person[s] whose interests are infringed or likely to be infringed” by the illegal conduct.<sup>197</sup> Thus, if either the JPBPA or any individual posted player can show an undue restraint of trade or an unfair business practice associated with the Posting Agreement, they can bring a suit in Japan for either monetary damages or injunctive relief.<sup>198</sup> Furthermore, enforcement of the Antimonopoly Act favors the idea that any international agreement in violation of section 6 is unenforceable and

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191. Even before negotiations took place, Boston’s total package for Matsuzaka was expected to be between \$80 and \$100 million. Barry M. Bloom, *Red Sox Win Matsuzaka Bid*, MLB.com, Nov. 15, 2006, [http://mlb.mlb.com/content/printer\\_friendly/mlb/y2006/m11/d13/c1739983.jsp](http://mlb.mlb.com/content/printer_friendly/mlb/y2006/m11/d13/c1739983.jsp).

192. In an interview following MLB’s announcement regarding the Red Sox’s winning bid, Omar Minaya, General Manager of the New York Mets, said, “You’ve got to pay a pitcher like Matsuzaka when he’s already proven himself in the Olympics and in Japan and the [World Baseball] Classic. A lot of people respect this pitcher.” *Id.* (alteration in original).

193. At the time of writing, Matsuzaka had completed one full season with the Red Sox, a campaign that brought the World Series trophy back to Boston for the second time in the past four years. Nick Cafardo, *Well-earned Recognition*, BOSTON GLOBE, Nov. 4, 2007, at E19.

194. Paragraph 11 states that, “the U.S. Major League Club shall pay the Japanese Club the amount of its successful bid within five (5) business days of the confirmation of terms.” Posting Agreement, *supra* note 8, para. 11. It is also worth noting that Seibu agreed to post Matsuzaka following his Most Valuable Player performance in the 2006 World Baseball Classic in part due to the team’s financial troubles. Kurkjian, *supra* note 89. The team even marketed Matsuzaka throughout the posting process as “a national treasure.” Singer, *supra* note 59.

195. See *supra* notes 121 and 122, and accompanying text.

196. Antimonopoly Act, Law No. 54, § 6 (1947) (Jp.); see Smull, *supra* note 17, at 4 (explaining the possibility of a section 6 claim for JPBPA).

197. Antimonopoly Act § 24.

198. *Id.* §§ 24–26; Smull, *supra* note 17, at 4.

entirely null and void.<sup>199</sup> According to JPBPA, however, it is near futile to bring a lawsuit in the Japanese legal system because “trials last forever [in Japan].”<sup>200</sup> MLBPA even offered to assist its Japanese counterpart in pursuing the action, in either the United States or Japan, but the offer was rejected.<sup>201</sup> Thus, the Posting Agreement remains effective and will continue to limit Japanese players’ mobility and earning potential until action is taken to invalidate it.<sup>202</sup>

### B. Japanese Labor Law

In Japan, unions meeting certain criteria<sup>203</sup> are permitted to negotiate towards collective bargaining agreements with employers and are not liable for concerted activity, such as strikes.<sup>204</sup> Since formation in 1985, JPBPA has been a far weaker version of MLBPA,<sup>205</sup> and remains reluctant to strike because of “traditional Japanese cultural views of collective harmony, company loyalty, and a tendency to promote the benefit of the group over the individual.”<sup>206</sup> Nonetheless, JPBPA has successfully em-

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199. Smull, *supra* note 17, at 4.

200. Whiting, *Batting Out of Their League*, *supra* note 50.

201. Toru Matsubara, an official with JPBPA responded to MLBPA by saying that court proceedings in either country would be too lengthy and, therefore, that “the problem can’t be helped.” WHITING, MEANING OF ICHIRO, *supra* note 4, at 147.

202. *Id.* at 146–47.

203. Article 28 of Japan’s Constitution guarantees the right of collective action, which “inherited many of the effects of the guarantee of the dispute right in advanced capitalist countries.” KAZUO SUGENO, JAPANESE LABOR LAW 539–40, (Leo Kanowitz, trans.) (1992). To come within the purview of the Labor Union Act, a Japanese union must have “formed voluntarily . . . for the main purposes of maintaining and improving working conditions and raising the economic status of the workers.” Labor Union Act, Act No.174, art. 2(1) (1949) (Jp.), *translated at* <http://www.cas.go.jp/jp/seisaku/hourei/data/lua.pdf> (last visited Apr. 14, 2008). In addition, labor unions must be financially independent of their employer. *Id.* art. (2)(1)(ii).

204. Labor Union Act, arts. 1(1), 6; SUGENO, *supra* note 203, at 539–40 (discussing collective action by unions, including “dispute acts” such as strikes and boycotts). Furthermore, if an employer refuses to “bargain collectively with representatives of the workers employed by the employer without justifiable reasons,” it is considered an unfair labor practice. Labor Union Act, art. 7(ii). Justifiable collective actions are exempt from criminal liability. *Id.* art. 2. Also, employers cannot claim damages arising from strikes or other “acts of dispute.” *Id.* art. 8. Dispute acts are typically defined as those which “impair an employer’s normal operation of its business conducted in the course of a labor dispute” and include strikes and picketing. SUGENO, *supra* note 203, at 544. Justifiable dispute acts must be “aimed at achieving an object of collective bargaining.” *Id.* at 550.

205. Stein, *supra* note 11, at 269.

206. Duncan, *supra* note 1, at 93. For a general discussion of the evolution of Japanese cultural opinions towards labor, see ANTHONY WOODIWISS, LAW, LABOUR AND SOCIETY IN JAPAN: FROM REPRESSION TO RELUCTANT RECOGNITION (1992).

ployed both the collective bargaining and concerted activity mechanisms to effect changes within NPB.<sup>207</sup> Therefore, JPBPA could feasibly utilize either of these rights to achieve player-friendly changes to the posting system.<sup>208</sup>

Pursuant to Japanese labor law, JPBPA has a right to bargain collectively with NPB regarding payment and working terms and conditions.<sup>209</sup> Also, if JPBPA is established in its constitution as a democratic organization affording equal treatment to all of its members, it may claim administrative relief from unfair labor practices.<sup>210</sup> The union may demand collective negotiations regarding posting because it directly affects both players' salaries and working terms and conditions, and it is within NPB's power to change the system.<sup>211</sup> Furthermore, although posting affects the aforementioned player interests, JPBPA was neither consulted during the drafting of the Posting Agreement, nor did the union ratify it.<sup>212</sup> If JPBPA demands collective bargaining and NPB refuses to negotiate, it would constitute an unfair labor practice within the purview of

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207. In 1993, NPB instituted its first free agency system. NPB's system was fashioned after MLB's system, but remains a more restricted version of the free agent market. Braver, *supra* note 5, at 453. Some suggest that this Americanization was the product of former MLB stars playing in Japan and making more money than the native Japanese players and bringing their "pro-union" attitude with them. *Id.* at 446–48.

208. Smull, *supra* note 17, at 5.

209. Labor Union Act, arts. 1, 6.

210. Article 5(1) of the Labor Union Act states that any labor union meeting Article 5(2) constitutional requirements and complying with the Article 2 definition of a labor union may utilize administrative procedures and be awarded remedies pursuant to the provisions of the Act. *Id.* art. 5(1); SUGENO, *supra* note 203, at 423–31 (explaining qualifications of labor unions as a prerequisite for taking action pursuant to the Labor Union Act). If a union alleges unfair labor practices in violation of Article 7 of the Labor Union Act against the employer, the union may file, within one year of the act's commission, a motion with the Labor Relations Commission, which will then investigate the matter and determine whether it should proceed to a hearing. Labor Union Act, art. 27. If the matter goes to hearing, the Labor Relations Commission may award the relief sought by the movant or it may dismiss the motion. *Id.* art. 27-12(1).

211. Although there is no provision in the Labor Union Act that specifically addresses topics for collective bargaining, it is generally accepted that any issue which relates to employee interests for which the employer has the "discretion to respond" is appropriate. SUGENO, *supra* note 203, at 485–86. With regards to posting, NPB exerts power over the player both before he is posted and after MLB teams bid for his negotiating rights and therefore have the discretion to respond to player inquiries as well as the overall agreement with MLB. See *supra* Part IV.A (discussing NPB's superior bargaining power to that of its players).

212. WHITING, MEANING OF ICHIRO, *supra* note 4, at 147.

the Labor Union Act.<sup>213</sup> JPBPA could then submit the issue to the Labor Relations Commission or they could initiate a strike.<sup>214</sup>

At present, the posting system is a sensitive issue in Japan, with JPBPA likening the process to “human trafficking.”<sup>215</sup> Since 1985, JPBPA has only gone on strike once, but the attempt was successful.<sup>216</sup> Given that posting directly relates to players’ rights, it is reasonable to expect that JPBPA would be successful in at least making the process more player-friendly through either collective bargaining or concerted activity.<sup>217</sup> Thus, the issue is ripe for action by JPBPA without fear of criminal or civil liability.<sup>218</sup> If they remain hesitant to strike, JPBPA can either file a complaint seeking administrative relief with a district labor relations commission,<sup>219</sup> or they may file suit in the court system for

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213. In order for NPB to refuse collective bargaining, the league would have to provide a legitimate reason to do so. Labor Union Act, art. 7.

214. Employees may file motions with the Labor Relations Commission alleging unfair labor practices against an employer and requesting that the Commission investigate the matter. If the Commission finds sufficient bases for pursuing the matter, it will initiate a hearing to further explore the allegations. *Id.* art. 27(1). The Labor Relations Commission includes members representing employers, workers, and the public interest. *Id.* art. 19(1). The Commission has authority to investigate alleged unfair labor practices and to resolve labor disputes. *Id.* art. 20.

215. Smull, *supra* note 17, at 2.

216. In 2004, the JPBPA protested the possible merger of two NPB teams because it threatened both the stability of the dual-league format and the jobs of players and team personnel. JPBPA and NPB ownership signed an agreement, ending the action after two days and preventing a second strike, which provided that the merger would proceed as planned, but that NPB would initiate the process of finding corporate ownership for a new team to enter the league the following year in 2005. Additionally, the agreement abandoned the traditional exorbitant league entry fees charged to new corporate ownership while establishing an expansion draft-type system to ensure the new team’s competitiveness. *Id.*

217. Both public opinion and that of the legislature currently favors collective action by JPBPA. *Id.* at 3. Unions in Japan may decide to strike prior to reaching impasse in collective bargaining, but it is generally recognized that to strike over a term currently in negotiations is improper. Failure to give notice of a possible strike to an employer prior to the action is not dispositive of the legality of the concerted activity, but the propriety of such action is assessed based on whether it amounted to an intentional paralysis of the employer’s operations. SUGENO, *supra* note 203, at 553–54.

218. As previously discussed, labor unions meeting statutory criteria may participate in administrative procedures and demand relief from unfair labor practices. See *supra* note 210 and accompanying text. In addition, such qualified unions may exercise their statutory right to engage in collective action while enjoying exemption from both criminal and civil liability. SUGENO, *supra* note 203, at 424. Furthermore, if JPBPA does strike over the posting system and it is deemed a “justifiable act,” NPB would not be permitted to claim damages against the union for the disruption. Labor Union Act, art. 8.

219. Labor Union Act, art. 27.

monetary damages.<sup>220</sup> Once again, JPBPA must initiate the reform process, but is reluctant to do so both because of cultural barriers and the daunting length of Japanese trials.<sup>221</sup>

#### V. PROPOSAL FOR MODIFICATIONS TO THE POSTING SYSTEM

In the absence of JPBPA action invalidating the Posting Agreement, there are modifications that can make the system more amenable to Japanese players' rights.<sup>222</sup> First, the bidding process, which takes place entirely in the United States among MLB teams, can be altered so that sole negotiating rights to the posted players are not awarded to the highest bidder.<sup>223</sup> Instead, the rights to negotiate with the player could be given to multiple teams thereby creating a pseudo-market in which the player may "shop" his talents to the club offering the best overall package, including term of contract, compensation, and location.<sup>224</sup> If more teams are allowed to negotiate, the player can extract more value for his talents and is assured the opportunity to bargain for an amount closer to his market potential, rather than a low offer which he must accept if he does not wish to remain in Japan.<sup>225</sup>

Alternatively, the Posting Agreement can require MLB teams to pay NPB teams a percentage of the total package negotiated with the player, rather than having them place a bid beforehand.<sup>226</sup> This amount would be a percentage of the total package, but would not come out of the player's salary; it would be a separate payment to the NPB team, but would serve a similar purpose and be transferred comparably to the current bid

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220. SUGENO, *supra* note 203, at 627. If JPBPA seeks relief from the Labor Relations Commission, it will not be entitled to "consolation money" or "compensation for abstract losses," but if it seeks relief solely from the court system, they can only obtain remuneration for past wages and will not be able to affect the employer-employee relationship in the future. *Id.* at 691–92.

221. WHITING, MEANING OF ICHIRO, *supra* note 4, at 147.

222. See discussion *supra* Part II.B–C.

223. *Contra* Posting Agreement, *supra* note 8, para. 11 (stating that only the highest bidder gets negotiating rights to the posted player).

224. This system would resemble free agency in that teams would actually compete to sign the player, therefore encouraging better offers. See Greenwood, *supra* note 20, at 273 (stating that escalation of players' salaries is due to free market competition encouraged by free agency); Basic Agreement, *supra* note 27, art. XX(B)(2) (setting forth procedures for negotiating and signing free-agent contracts).

225. See Gould, *supra* note 2, at 292 (referencing the potential for higher salary through free agency); see *id.* at 294 (referencing potential for MLB teams to bid high while knowing they cannot sign the player); Posting Agreement, *supra* note 8, para.12 (stating that players return to Japan for another year if negotiations are unsuccessful).

226. *Contra* Posting Agreement, *supra* note 8, para. 11 (providing for bidding process which occurs prior to a player's posting).

price.<sup>227</sup> Since this alteration is analogous to the system in the Basic Agreement whereby MLB teams losing free agents to other teams are compensated with draft picks, it would encourage competitive negotiations with Japanese players.<sup>228</sup> Interested teams could submit skeletal contracts outlining some terms and conditions which they are prepared to offer, and then let the player choose the teams with whom he wants to negotiate based on his own criteria.<sup>229</sup> This process would afford the player a pro-active role in deciding where he will eventually play. Not only would he be given a chance to make an informed decision, but he would also have the leverage enjoyed by free agents to extract maximum value.<sup>230</sup>

#### CONCLUSION

The Posting Agreement is the product of decades of U.S.-Japanese baseball tensions resulting from NPB's animosity towards players desiring to prove their skills in MLB. The strictures placed on player mobility and bargaining power are the embodiment of NPB's desire to keep Japanese players in Japan, and to not become a farm system for MLB. Opponents to the system have suggested that its unfair labor practices violate both antitrust and labor law. However, for a Japanese player hoping to challenge the posting system in the United States, the baseball exemption from antitrust law and the lack of protection from MLBPA are near-insurmountable hurdles.

By instituting the proposed changes, MLB can still access Japanese talent while ensuring that NPB remains a competitive professional league and receives compensation for posted players. Furthermore, players will acquire bargaining power and freedom of choice, both of which the current Posting Agreement denies them. Nonetheless, the only way to truly combat this problem is for JPBPA to demand a better free agency system and collective negotiations specifically geared towards remedying the unfair labor practices that are encouraged by posting. They can also accomplish this task by invalidating the Posting Agreement under Japan's

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227. *See id.* (stating that in the event of successful contract negotiations, bid price goes to NPB team).

228. *See* Basic Agreement, *supra* note 27, art. XX(B)(4) (setting forth team compensation for loss of free agents).

229. Not only does this create a market for the player, but it re-establishes his freedom of choice. *See* WHITING, MEANING OF ICHIRO, *supra* note 4, at 146 (quoting MLBPA officials as questioning the legality of posting for depriving players of choice and rights).

230. *See* Kurkjian, *supra* note 89 (discussing how the posting process deprived Daisuke Matsuzaka and his agent, Scott Boras, of leverage in the negotiation of Matsuzaka's contract with the Boston Red Sox).

antimonopoly law. MLB cannot unilaterally fix a problem arising from NPB's feudalistic and out-dated policies, and they "can[no]t force the Japanese players to stand up for their interests."<sup>231</sup> If Japanese players will not assert their rights, the Posting Agreement will remain intact and will continue to restrict their mobility and market value indefinitely.

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231. WHITING, MEANING OF ICHIRO, *supra* note 4, at 147.

\* A.B., Princeton University (2001); J.D., Brooklyn Law School (expected 2009); Managing Editor of the *Brooklyn Journal of International Law* (2008–2009). I would like to thank my family, especially my parents, Michael and Marian, my sister, Christina, and my grandfather, Vincent J. Siesta, Sr., for their unwavering love and support. Thank you also to the 2007–2008 Executive Board and staff of the *Brooklyn Journal of International Law* for their help in preparing this Note for publication. All errors and omissions are my own.

# ARE WE THERE YET? TAKING “TRIPS” TO BRAZIL AND EXPANDING ACCESS TO HIV/AIDS MEDICATION

## INTRODUCTION

On May 4, 2007, President Luiz Inácio Lula da Silva of Brazil signed a decree to import a generic version of the Merck owned HIV/AIDS drug Efavirenez.<sup>1</sup> This unprecedented decree was issued after failed negotiations with Merck, during which Brazil’s health ministry rejected an offer by the company to lower the drug’s price by thirty percent.<sup>2</sup> Brazil cited the compulsory licensing provision in the Agreement on Trade Related Aspects of Intellectual Property Rights (“TRIPS”), claiming that this provision allows the government to override pharmaceutical patents in cases of national emergency or public interest.<sup>3</sup>

TRIPS is the international trade agreement that gives pharmaceutical companies patent rights in every member nation of the World Trade Organization (“WTO”).<sup>4</sup> Patent protection provides the patent owner a temporary monopoly to exclusively produce and sell a certain medication.<sup>5</sup> Patent rights are important because they allow pharmaceutical companies to recoup and make a profit on the high research and development costs invested in making a drug, thus incentivizing the creation of new medication.<sup>6</sup> However, due to the owner’s temporary monopoly power, patent rights allow the patent holder to charge prices for the drug that may be prohibitively high for some developing nations.<sup>7</sup> Acknowledging the

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1. *Compulsory License Issued for Merck’s Efavirenz*, 21 World Intell. Prop. Rep. (BNA) No. 6 (June 2007) [hereinafter BNA Report].

2. *Id.*

3. *Id.*

4. See WORLD TRADE ORGANIZATION, UNDERSTANDING THE WTO: THE AGREEMENTS 17 (2007), [http://www.wto.org/english/thewto\\_e/whatis\\_e/whatis\\_e.htm#understanding\\_chapter](http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm#understanding_chapter) (download Chapter 2: The Agreements for pdf version). [hereinafter UNDERSTANDING THE WTO: THE AGREEMENTS].

5. FREDERIC M. SCHERER, THE ECONOMIC EFFECTS OF COMPULSORY PATENT LICENSING 84–85 (1977).

6. *Id.* at 84.

7. See Mark C. Lang, *What a Long, Strange “TRIPS” It’s Been: Compulsory Licensing From the Adoption of TRIPS to the Agreement on Implementation of the Doha Declaration*, 3 J. MARSHALL REV. INTELL. PROP. L. 331, 331 (2004) (discussing how one of the main reasons for the high HIV/AIDS infection rate in developing countries is the high prices of pharmaceutical products produced by Western companies). But see Bryan Mercurio, *Resolving the Public Health Crisis in the Developing World: Problems and Barriers of Access to Essential Medicines*, 5 NW. J. INT’L HUM. RTS. 1, 1–5 (2006) (arguing that the focus on patent regulation is largely misguided because many factors, such as

prohibitive costs of essential medicines to developing countries due to patents, certain flexibilities and exceptions were written into the TRIPS agreement.<sup>8</sup>

One such flexibility is the compulsory licensing provision.<sup>9</sup> The compulsory licensing provision allows developing countries to produce or buy generic versions of the patented medication, thus reducing the cost of the medicine.<sup>10</sup> The compulsory licensing provision has been invoked more than a dozen times, including by economically deprived countries with very high rates of HIV infection.<sup>11</sup> However, middle-income countries like Brazil have frequently used the threat of the compulsory licensing provision in order to have stronger bargaining power in their negotiations with pharmaceutical companies.<sup>12</sup> Brazil's recent use of the provision to import generic HIV/AIDS medication has created heated controversy as to the meaning and intent of the provision. The pharmaceutical industry argues that as a middle-income country with a relatively low rate of HIV infection, Brazil's use of the provision is not necessary and sets dangerous precedent by encouraging overuse of the provision.<sup>13</sup>

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(lack of proper healthcare systems and corruption, are responsible for the ongoing health crisis in the developing world). See also Robert Weissman, *A Long Strange TRIPs: The Pharmaceutical Industry Drive to Harmonize Global Intellectual Property Rules, and the Remaining WTO Alternatives Available to Third World Countries*, 17 U. PA. J. INT'L ECON. L. 1069, 1116–17 (1996). The market does not provide a solution for optimal drug pricing in the context of developing countries. *Id.* Although pharmaceutical companies generally provide different pricing schemes to different countries (based on what “the market will bear”), this pricing scheme still creates prohibitively high drug prices for many developing countries. *Id.* at 1117. The problem is in defining what is optimal. Pharmaceutical companies want to maximize their wealth and the drug prices reflect this. However, the optimal goal of the law should be to minimize the cost of health care without ruining the pharmaceutical industry’s incentives to create more drugs. See ANTHONY OGUS, COSTS AND CAUTIONARY TALES: ECONOMIC INSIGHTS FOR THE LAW 30–31 (2006). This price will be different than the price that pharmaceutical companies want to sell at in order to maximize profits. *Id.*

8. UNDERSTANDING THE WTO: THE AGREEMENTS, *supra* note 4, at 42. Governments are allowed to reduce the short term costs of intellectual property protection, such as public health problems, through the various exceptions in the TRIPS agreement. *Id.*

9. *Id.*

10. *Id.*

11. Consumer Project on Technology, Examples of Health-Related Compulsory Licensing, <http://www.cptech.org/ip/health/cl/recent-examples.html> (last visited Oct. 26, 2007) [hereinafter Consumer Tech].

12. *Id.* Brazil, in its negotiations with various pharmaceutical companies, has threatened at least three times to issue a compulsory license for generic production of the drug before the parties reached an agreement. *Id.*

13. Press Release, Merck & Co., Inc., Statement on Brazilian Government’s Decision to Issue Compulsory License for STOCRIN (May 4, 2007), <http://www.merck.com/>

This Note will discuss Brazil's use of the compulsory licensing provision to import generic HIV/AIDS drugs and analyze whether Brazil's actions are consistent with the meaning and intention of the TRIPS agreement. Part I of this Note will present a brief overview of the TRIPS agreement. Part II will explain the compulsory licensing provision in the TRIPS agreement and discuss how the provision has been used in the context of producing generic HIV/AIDS drugs. Part III will discuss the recent controversy surrounding Brazil and Merck. Finally, Part IV will analyze the validity of Brazil's actions under the compulsory licensing provision and present policy arguments for and against Brazil's use of the provision. This Note argues that Brazil's recent use of compulsory licensing is valid under the TRIPS provision. It will be effective in strengthening Brazil's bargaining power with pharmaceutical companies and ensuring that Brazil continues to be able to provide HIV/AIDS treatment for its citizens.

However, the use of the compulsory licensing provision by other middle-income countries to import or produce generic HIV/AIDS medication demonstrates that the use of the provision should be evaluated on a case by case basis and may not set good policy in every circumstance. Thus, this Note concludes by arguing that the compulsory licensing provision does not provide an adequate remedy to the prohibitively high cost of medicines in developing countries. This Note adopts an additional remedy to the access problem in which the students and faculty of research universities play an important role in creating greater access to essential medicine in developing countries.

## I. THE TRIPS AGREEMENT

Intellectual property rights can be defined as "the rights given to people over the creations of their minds."<sup>14</sup> The protection of intellectual property rights has become an increasingly important concern in interna-

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newsroom/press\_releases/corporate/2007\_0504.html [hereinafter Merck Statement]; Press Release, PhRMA, Compulsory Licensing Trend Dangerous (May 14, 2007), [http://www.phrma.org/news\\_room/press\\_releases/phrma:\\_compulsory\\_licensing\\_trend\\_dangerous/](http://www.phrma.org/news_room/press_releases/phrma:_compulsory_licensing_trend_dangerous/) [hereinafter PhRMA Press Release].

14. WTO, Frequently Asked Questions about TRIPS, [http://www.wto.org/english/tratop\\_e/trips\\_e/tripfq\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/tripfq_e.htm) (last visited Sept. 21, 2007). Intellectual property rights are divided into two main categories: (1) copyrights: rights granted to authors of original artistic works; and (2) industrial property: this includes protection of distinctive signs such as trademarks and industrial property such as inventions (protected by patents), industrial designs, and trade secrets. *Id.*

tional trade.<sup>15</sup> The extent of protection afforded to intellectual property varies widely throughout the world and this can provide a source of tension in economic relations between countries.<sup>16</sup> As a response to the ever-growing concern over intellectual property protection, the nations of the WTO negotiated the TRIPS agreement.<sup>17</sup> The TRIPS agreement entered into force on January 1, 1995, and “is to date the most comprehensive multilateral agreement on intellectual property.”<sup>18</sup> The agreement is an attempt by the WTO to standardize the protection of intellectual property rights throughout the world by establishing minimum levels of protection that each WTO member country must provide for the intellectual property of other WTO members.<sup>19</sup> The preamble of TRIPS generally describes the objective of the agreement, which is to reduce the impediments to international trade while promoting the protection of intellectual property.<sup>20</sup>

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15. UNDERSTANDING THE WTO: THE AGREEMENTS, *supra* note 4, at 39. See also Weissman, *supra* note 7, at 1075–87 (discussing the role of the U.S. pharmaceutical industry in influencing the drafting of the TRIPS agreement and how intellectual property rights was framed as a trade issue).

16. UNDERSTANDING THE WTO: THE AGREEMENTS, *supra* note 4, at 39.

17. *Id.* The World Trade Organization (“WTO”) was created in 1995 as a successor to the General Agreement on Tariffs and Trade (“GATT”) established at the end of World War II. WTO, THE WORLD TRADE ORGANIZATION IN BRIEF 3 (2007), [http://www.wto.org/english/res\\_e/dolload\\_e/inbr\\_e.pdf](http://www.wto.org/english/res_e/dolload_e/inbr_e.pdf). The WTO’s objective is to help trade flow “smoothly, predictably, and freely.” *Id.* at 1. The WTO has 150 member countries, which accounts for approximately 97% of world trade. *Id.* at 7. The WTO typically makes decisions through a consensus of its members. *Id.* The WTO’s agreements are a result of negotiations between the member countries. *Id.* at 4. The 1986–94 Uruguay Round negotiations resulted in the current set of WTO agreements. *Id.* at 4. One of the agreements that was negotiated during the Uruguay Round was the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”). See UNDERSTANDING THE WTO: THE AGREEMENTS, *supra* note 4, at 39.

18. World Trade Organization, Overview: The TRIPS Agreement, [http://www.wto.org/english/tratop\\_e/trips\\_e/intel2\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/intel2_e.htm) (last visited Sept. 22, 2007) [hereinafter Overview of the TRIPS Agreement].

19. UNDERSTANDING THE WTO: THE AGREEMENTS, *supra* note 4, at 39.

20. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 81 (1994) [hereinafter TRIPS Agreement]. The preamble of the TRIPS agreement reads: “Desiring to reduce distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade.” *Id.* at 84.

The TRIPS agreement provides protection for inventions such as pharmaceutical patents.<sup>21</sup> The agreement gives the pharmaceutical patent owner exclusive rights for making, using, offering for sale, selling, and importing the drug in every member nation of the WTO.<sup>22</sup> By providing the patent holder exclusive rights to make and sell the drugs they have developed, TRIPS prevents the emergence of competition based on the reduction of production costs.<sup>23</sup> In this way, pharmaceutical companies hold a temporary monopoly power over the drug in all WTO member nations.

One of the main arguments for granting this monopoly power is that it provides an incentive for the future development of medicine.<sup>24</sup> By conferring a temporary monopoly over a certain drug, TRIPS allows pharmaceutical companies to recoup the research and development (“R&D”) costs of producing the drug.<sup>25</sup> If companies could not recover their R&D costs and make a profit on selling the drug, they would have less of an incentive to invest in producing the drug in the first place.<sup>26</sup> Thus universal patent protection provides a mechanism to encourage future R&D on new medicines.<sup>27</sup>

21. UNDERSTANDING THE WTO: THE AGREEMENTS, *supra* note 4, at 41. To qualify for patent protection under the TRIPS agreement, an invention has to be new, it must be an “inventive step”, and it must have “industrial applicability.” TRIPS Agreement, *supra* note 20, art. 27(1). Patent protection over pharmaceutical drugs lasts at least twenty years and must be available for both products and processes. UNDERSTANDING THE WTO: THE AGREEMENTS, *supra* note 4, at 41.

22. TRIPS Agreement, *supra* note 20, art. 28.

23. Fredrick M. Abbott, *Managing the Hydra: The Herculean Task of Ensuring Access to Essential Medicines*, in INTERNATIONAL PUBLIC GOODS AND TRANSFER OF TECHNOLOGY: UNDER A GLOBALIZED INTELLECTUAL PROPERTY REGIME 393, 408 (Keith E. Maskus & Jerome H. Reichman eds., 2005).

24. Henry Grabowski, *Increasing R&D Incentives for Neglected Diseases: Lessons from the Orphan Drug Act*, in INTERNATIONAL PUBLIC GOODS AND TRANSFER OF TECHNOLOGY: UNDER A GLOBALIZED INTELLECTUAL PROPERTY REGIME 457, 462 (Keith E. Maskus & Jerome H. Reichman eds., 2005). “Patents have been found to be critically important to pharmaceutical firms in appropriating the benefits from drug innovation.” *Id.* It takes millions of dollars to develop and get approval for a new medicine. *Id.* Absent market protection, other companies could imitate the drug and free-ride on the innovator’s work. *Id.* Because imitation costs in pharmaceuticals are extremely low relative to the innovator’s costs of developing the new medicine, some form of market exclusivity is required to allow innovators to appropriate enough of the benefits from the drug innovation to cover their large R&D costs and make a profit. *Id.*

25. CARLOS M. CORREA, TRADE RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS: A COMMENTARY ON THE TRIPS AGREEMENT 275 (2007).

26. *Id.*

27. *Id.*

However, the exclusive monopoly power that TRIPS confers to pharmaceutical companies is problematic. Approximately two thirds of the 150 WTO member nations are developing countries.<sup>28</sup> As a result, a major issue arising out of pharmaceutical patent protection under the TRIPS agreement is how to ensure that pharmaceutical patents do not prevent sick people in these developing nations from having access to medicines.<sup>29</sup>

## II. THE COMPULSORY LICENSING PROVISION

Acknowledging the difficulties that developing countries may have in conforming to the TRIPS agreement, certain flexibilities and exceptions were written into the agreement.<sup>30</sup> One such exception is compulsory licensing.<sup>31</sup>

Compulsory licensing allows another producer to make a patented drug without the consent of the patent owner.<sup>32</sup> Compulsory licensing helps ensure that developing countries have access to medicines while protect-

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28. WTO, UNDERSTANDING THE WTO—DEVELOPING COUNTRIES 93 (2007), [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/dev1\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/dev1_e.htm) [hereinafter UNDERSTANDING THE WTO: DEVELOPING COUNTRIES].

29. UNDERSTANDING THE WTO: THE AGREEMENTS, *supra* note 4, at 42.

30. UNDERSTANDING THE WTO: DEVELOPING COUNTRIES, *supra* note 28, at 93. Excluding compulsory licensing, the other three main exceptions to patent rights are: (1) article 27, permits exclusion from patentability where necessary to protect public health and the environment; (2) article 30, which permits member nations to provide limited exceptions to patent exclusivity contingent upon a showing that the interests of the patent owner are not unreasonably infringed upon; and (3) article 40, which allows a government to impose price controls or nondiscriminatory taxes. TRIPS Agreement, *supra* note 20, arts. 27(2), 30, 40(2). *See also* Weissman, *supra* note 7, at 1099. Exceptions to exclusive rights are permitted when needed to “protect public health and nutrition, and to promote the public interest in sectors of vital importance” to economic development; to prevent “abuse of intellectual property rights;” and to prevent unreasonable trade practices that “adversely affect the international transfer of technology.” TRIPS Agreement, *supra* note 20, arts. 8(1), 8(2). Flexibilities in the TRIPS agreement include extra time for lower developed and least developed countries (“LDCs”) to fulfill their commitments. *Id.* arts. 65.2, 66.

31. UNDERSTANDING THE WTO: THE AGREEMENTS, *supra* note 4, at 42.

32. WTO, TRIPS AND PHARMACEUTICAL PATENTS: FACT SHEET 4 (2006), [http://www.wto.org/english/tratop\\_e/trips\\_e/factsheet\\_pharm00\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/factsheet_pharm00_e.htm) [hereinafter TRIPS AND PHARMACEUTICAL PATENTS: FACT SHEET]. Article 31 of the TRIPS agreement, entitled “Other Use Without Authorization of the Right Holder” is the compulsory licensing provision of the TRIPS agreement. *Id.* It allows member nations to make “use of the subject matter of a patent without the authorization of the right holder, including use by the government of third parties authorized by the government.” TRIPS Agreement, *supra* note 20, art. 31.

ing the rights of the patent holder.<sup>33</sup> Article 31 of the TRIPS agreement, entitled “Other Use Without Authorization of the Right Holder,” is the compulsory licensing provision of the agreement.<sup>34</sup> In the context of public health, the compulsory licensing provision is intended to permit countries to produce or import generic drugs that are more affordable than patented medications.<sup>35</sup> Because the provision is an exception to the exclusive rights of the patent holder, the use of the provision is restricted by a number of conditions aimed at protecting the rights of the patent holder.<sup>36</sup>

The WTO has explicitly stated that each member nation has the freedom to determine the grounds upon which compulsory licenses may be granted.<sup>37</sup> Article 31 lists several non-exclusive grounds for granting a compulsory license: national emergency or extreme urgency; public non-commercial use;<sup>38</sup> and remedy to anti-competitive practices.<sup>39</sup> Although article 31 specifically mentions several grounds for issuing a license, it must be stressed that this list is not exclusive and it does not limit a member’s right to issue compulsory licenses based on other grounds.<sup>40</sup> However, the grant of a compulsory license on frivolous grounds, such as the individual interest of a competitor, is not a legitimate ground for granting a compulsory license because compulsory licenses are exceptions to patent rights and, as such, may only be used in exceptional circumstances.<sup>41</sup>

33. TRIPS AND PHARMACEUTICAL PATENTS: FACT SHEET, *supra* note 32, at 4.

34. *Id.*

35. CORREA, *supra* note 25, at 313–14.

36. TRIPS AND PHARMACEUTICAL PATENTS: FACT SHEET, *supra* note 32, at 4.

37. WTO, Ministerial Declaration of 14 November 2001, ¶ 5(b) WT/MIN(01)/DEC/2 [hereinafter Doha Declaration].

38. “Public non-commercial use,” otherwise known as “government use,” is an act by the government of a member nation to exploit by itself or through the use of a private contractor a patented invention without consent of the patent owner. CORREA, *supra* note 25, at 316.

39. See TRIPS Agreement, *supra* note 20, art. 31.

40. CARLOS M. CORREA, PATENT RIGHTS IN INTELLECTUAL PROPERTY AND INTERNATIONAL TRADE: THE TRIPS AGREEMENT 189, 210 (1998).

41. NUNO PIRES DE CARVALHO, THE TRIPS REGIME OF PATENT RIGHTS 232 (2002). The compulsory licensing provision should be read together with the related provisions of article 27(1) which requires member countries to make patents available for any inventions, including products or processes, and subject to the normal tests of novelty, inventiveness, and industrial applicability. See Overview of the TRIPS Agreement, *supra* note 18. Article 27(1) also requires that patents be enjoyed without discrimination as to the place where they were invented and whether the product is produced locally or imported. *Id.*

Although the TRIPS agreement is flexible regarding the grounds for issuing a compulsory license, the agreement subjects such licenses to a detailed list of conditions. Article 31(b) requires a country applying for a license to first attempt to negotiate a voluntary license from the patent holder under reasonable commercial terms and for a reasonable period of time.<sup>42</sup> However, in situations of national emergencies, other circumstances of extreme urgency, or in cases of public non-commercial use, there is no need to try to negotiate for a voluntary license.<sup>43</sup> Additionally, under the compulsory license, adequate remuneration must still be paid to the patent holder taking into account the economic value of the authorization in each case.<sup>44</sup> The scope and duration of the use of the compulsory license is “limited to the purpose for which it was authorized”<sup>45</sup> and authorization of such use can be terminated “if and when the circumstances which led to it cease to exist and are unlikely to recur.”<sup>46</sup> Furthermore, article 31(f) states that a compulsory license shall be authorized “predominately for the supply of the domestic market of the Member authorizing such use.”<sup>47</sup> This condition has the practical effect of preventing export of generic drugs to countries that do not have sufficient pharmaceutical industries to produce the drugs themselves.<sup>48</sup>

In November 2001, the WTO nations held the Doha Ministerial Conference (“Doha Declaration”) in order to clarify the terms and intention of the compulsory licensing provision.<sup>49</sup> This conference resulted in the Doha Declaration. The Doha Declaration stressed that the TRIPS agreement should be interpreted and implemented in such a manner so as to promote public health.<sup>50</sup> The Declaration affirmed the government’s right to use the agreement’s flexibilities, such as compulsory licensing, in order to protect public health and also clarified some of the grounds for granting a compulsory license.<sup>51</sup> It stated that each member has the right

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42. TRIPS Agreement, *supra* note 20, art. 31(b).

43. *Id.*

44. *Id.* art. 31(h).

45. *Id.* art. 31(c).

46. *Id.* art. 31(g).

47. *Id.* art. 31(f).

48. CORREA, *supra* note 25, at 321.

49. See generally Sara M. Ford, *Compulsory Licensing Provisions Under the TRIPS Agreement: Balancing Pills and Patents*, 15 AM. U. INT'L L. REV. 941, 964–66 (2000) (discussing the wide range of interpretations that developing and developed countries attach to the language in article 31).

50. Doha Declaration, *supra* note 37, ¶ 4.

51. See Divya Murthy, *The Future of Compulsory Licensing: Deciphering the Doha Declaration on the TRIPS Agreement and Public Health*, 17 AM. U. INT'L L. REV. 1299, 1305 (2002) (noting that the ministerial text of the Doha Declaration intended to address

to determine what constitutes a “national emergency” or “other circumstance of extreme urgency” and that public crisis such as HIV/AIDS, tuberculosis, malaria, and other epidemics, can present such circumstances.<sup>52</sup>

In addition, the Declaration recognized that some WTO members with insufficient manufacturing capacities were having difficulties making use of the compulsory licensing provision and instructed the Council for TRIPS to find an “expeditious solution to this problem.”<sup>53</sup> On August 30, 2003, in response to the Doha Declaration, WTO members adopted an amendment that solved the legal problem for exporting countries.<sup>54</sup> The August 30 Decision waived exporting countries’ obligations under article 31(f).<sup>55</sup> Under this waiver, any member country may export generic pharmaceuticals made under compulsory licenses to meet the needs of importing countries that lack manufacturing capacity to make the drug.<sup>56</sup>

For many years, compulsory licensing was typically used as a bargaining tool for developing countries in their negotiations with pharmaceutical companies.<sup>57</sup> However, after the Doha Declaration in 2002, develop-

two issues: the scope of the term “public health” and the ability of nations without adequate manufacturing capacities to seek the benefits of compulsory licensing).

52. Doha Declaration, *supra* note 37, ¶ 5(c). The declaration also clarified what the grounds are for granting a compulsory license by stating that “each Member has the right to determine what constitutes a national emergency or other circumstances of extreme urgency, it being understood that public health crises, including those related to HIV/AIDS, tuberculosis, malaria and other epidemics, can represent a national emergency or other circumstances of extreme urgency.” *Id.*

53. *Id.* ¶ 6.

54. TRIPS AND PHARMACEUTICAL PATENTS: FACT SHEET, *supra* note 32, at 6.

55. *Id.*

56. *Id.* This waiver is itself subject to several conditions. The importing member must notify the TRIPS Council of the type and quantity of licensed product, and, except in the case of a least developed country, the importing member must establish a lack of manufacturing capacity to produce the drug. WTO, Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health, Decision of 30 August 2003, ¶ 2(c), WT/L/540, <http://docs.wto.org/DDFDocuments/t/WT/L/540.doc> (Sept. 2, 2003) [hereinafter August 30 Decision]. It is unclear what a member must do in order to establish “lack of manufacturing capacity.” The Annex of the Decision sets out two alternatives: (1) the member has established that it has no manufacturing capacity in the pharmaceutical sector; or (2) the member has some manufacturing capacity in the pharmaceutical sector but it is currently insufficient to meet its needs. *Id.* In addition, in order to prevent the emergence of a black market through re-exportation of the generic drug, the Decision requires that the generic drug must be clearly distinguished through specific labeling, packaging, or product coloring. *Id.* ¶ 2. Finally, the responsibility of “adequate remuneration” to the patent holder is still applicable although it only extends to the exporting member. *Id.* ¶¶ 3–4.

57. Consumer Tech, *supra* note 11.

ing countries began utilizing the provision in order to obtain generic versions of HIV/AIDS medication.<sup>58</sup> In 2004, Malaysia and Indonesia became the first middle income countries to issue compulsory licenses for the importation of HIV/AIDS medications.<sup>59</sup> In 2006, amidst much controversy, Thailand issued a compulsory license for importation of the generic version of Efravinez, an HIV/AIDS medication.<sup>60</sup> In the beginning of 2007, Thailand announced that it would issue two more compulsory licenses for the HIV/AIDS drug Kaletra and the heart disease drug Plavix.<sup>61</sup> Then, on May 4, 2007, for the first time in Brazil's history, President Luiz Inácio Lula da Silva signed a decree issuing a compulsory license for the Merck owned HIV/AIDS drug Efavirenez.<sup>62</sup>

### III. THE RECENT CONTROVERSY SURROUNDING THE DISPUTE BETWEEN BRAZIL AND MERCK

#### A. About Brazil's HIV/AIDS Program

In order to better understand the recent controversy surrounding Brazil's actions, it is necessary to consider the factual background of the AIDS epidemic in Brazil. Acquired Immune Deficiency Syndrome ("AIDS") is caused by the Human Immunodeficiency Virus ("HIV").<sup>63</sup> First recognized in 1981, AIDS has since become a worldwide pandemic.<sup>64</sup> HIV kills or damages cells in the body's immune system caus-

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58. *Id.* After the Doha Declaration in 2002, Zimbabwe, Mozambique, and Zambia became the first developing nations to issue a compulsory license for the production of Antiretroviral drugs ("ARVs"). *Id.* In 2005, three more low income countries issued a compulsory license for the importations of generic ARVs (Cameroon, Eritrea, and Ghana). *Id.*

59. *Id.*

60. *Id.* On November 29, 2006, Thailand's Ministry of Health, without prior negotiations with Efavirenz's producer Merck, declared that it would issue a compulsory license for the importation of Efavirenz from India and pay Merck a royalty rate of 0.5%. Brook K. Baker, *Price Cut Hand-Cuffs: Thailand Must Stand Up to Merck*, IP-HEALTH, Dec. 3, 2006, <http://lists.essential.org/pipermail/ip-health/2006-December/010273.html>.

61. Consumer Tech, *supra* note 11. On January 25, 2007, Thailand announced that it would issue compulsory licenses for Kaletra and Plavix. *Id.* The royalty rate to the patent holder under both licenses was 0.5%. *Id.* In addition, the Plavix license does not have a specific expiration date and will last until the patent has expired or there is no essential need. *Id.*

62. BNA Report, *supra* note 1.

63. See Nat'l Inst. of Health, HIV Infection and AIDS: An Overview, <http://www.niaid.nih.gov/factsheets/hivinf.htm> (last visited Sept. 29, 2007) [hereinafter NIH Fact Sheet].

64. *Id.* In 2006, there were approximately 39.5 million people living with the HIV virus worldwide and approximately 4.3 million new infections. UNAIDS, AIDS

ing sickness and death from illnesses that normally do not make healthy people sick.<sup>65</sup> Antiretroviral drugs (“ARVs”) have been developed to disrupt the progress of HIV.<sup>66</sup> ARVs have been proven to be effective at combating the virus but they are not a cure.<sup>67</sup> A person taking ARVs must take them for life because if treatment is stopped, the virus will become active again.<sup>68</sup>

But the AIDS epidemic continues to devastate many developing countries.<sup>69</sup> Approximately 24.7 million people are infected with HIV in Sub-Saharan Africa, compared with 1.4 million people in North America.<sup>70</sup> So while the new drugs have lowered the rate of HIV infection in developed countries, the high cost of these drugs is not affordable for most people living with HIV/AIDS in developing countries.<sup>71</sup> The local production or importation of generic drugs could lower the price of essential medication, making the drugs affordable for people in developing nations.<sup>72</sup> A strong international patent system exacerbates the lack of access problem for developing nations by inhibiting developing nations

EPIDEMIC UPDATE 1, UNAIDS/06.29E (2006), available at [http://data.unaids.org/pub/EpiReport/2006/2006\\_EpiUpdate\\_en.pdf](http://data.unaids.org/pub/EpiReport/2006/2006_EpiUpdate_en.pdf) [hereinafter UNAIDS EPIDEMIC UPDATE].

65. NIH Fact Sheet, *supra* note 63.

66. UNAIDS: Policy and Practice—HIV Treatment, <http://www.unaids.org/en/PolicyAndPractice/HIVTreatment/default.asp> (last visited June 06, 2008).

67. *Id.*

68. *Id.*

69. UNAIDS, REPORT ON THE GLOBAL AIDS EPIDEMIC—EXECUTIVE SUMMARY 6, UNAIDS/06.20E (2006), available at [http://data.unaids.org/pub/GlobalReport/2006/2006\\_GR-ExecutiveSummary\\_en.pdf](http://data.unaids.org/pub/GlobalReport/2006/2006_GR-ExecutiveSummary_en.pdf). “Africa remains the global epicenter of the AIDS pandemic. South Africa’s AIDS epidemic—one of the worst in the world—shows no evidence of a decline.” *Id.*

70. UNAIDS EPIDEMIC UPDATE, *supra* note 64, at 65 (providing a global map of the number of people infected with HIV in different regions of the world).

71. WORLD HEALTH ORGANIZATION [WHO], PROGRESS REPORT: TOWARDS UNIVERSAL ACCESS—SCALING UP PRIORITY HIV/AIDS INTERVENTIONS IN THE HEALTH SECTOR 21 (2007), available at [http://data.unaids.org/pub/Report/2007/20070925\\_oms\\_progress\\_report\\_en.pdf](http://data.unaids.org/pub/Report/2007/20070925_oms_progress_report_en.pdf) [hereinafter WHO PROGRESS REPORT]. Between 2003 and 2005, the price of first-line ARVs has decreased between 37–53% in low and middle income countries. *Id.* at 6. Between 2005 and 2006, the price has decreased an additional 10–20%. *Id.* However, the average prices paid for second line regimens remain unaffordably high in low and middle income countries where few generic alternatives are available. *Id.* at 21. In 2006, the most commonly used second-line regimen cost \$1698 in low-income countries and \$4735 in middle-income countries. *Id.* at 22–23.

72. John A. Harrelson, *TRIPS, Pharmaceutical Patents, and the HIV/AIDS Crisis: Finding the Proper Balance Between Intellectual Property Rights and Compassion*, 7 WIDENER L. SYMP. J. 175, 177 (2001) (discussing the proper level of patent protection for pharmaceuticals in developing countries).

from buying the cheaper generic versions of the drug as a result of the patent owner's exclusive rights to make and sell the drug.<sup>73</sup>

Brazil is home to approximately one third of the total population of people infected with HIV/AIDS living in Latin America.<sup>74</sup> Started in 1997, Brazil's highly praised anti-AIDS program provides free treatment to approximately 180,000 HIV/AIDS patients and has been credited for keeping the HIV/AIDS epidemic in Latin America under control.<sup>75</sup> Brazil's provision of antiretroviral therapy is among the most comprehensive in the world and, according to the Joint United Nations Program on HIV/AIDS ("UNAIDS"), it has been yielding positive results.<sup>76</sup> Brazil's success in providing access to HIV/AIDS medication to its citizens has been attributed to "governmental commitment, the reduced cost of pharmaceuticals made possible by domestic manufacture of generic drugs, and negotiated price discounts for other drugs."<sup>77</sup>

In furthering its campaign to provide affordable HIV/AIDS treatment, Brazil has used the threat of issuing a compulsory license as a means of negotiating lower prices with drug companies.<sup>78</sup> In 2001, Merck responded to Brazil's recent threat to issue a compulsory license by reducing the price of Stocrin, an HIV/AIDS medication.<sup>79</sup> In August of the same year, Swiss pharmaceutical company Roche also agreed to lower the price of its AIDS-fighting drug Viracept by forty percent, in response

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73. *Id.* at 175–78.

74. UNAIDS EPIDEMIC UPDATE, *supra* note 64, at 48. In 2005, there was a total of 1.7 million people living with HIV in Latin America. *Id.* At the end of 2006, around 180,000 of the 210,000 people in need of ARVs in Brazil were receiving them. WHO PROGRESS REPORT, *supra* note 71, at 64.

75. BNA Report, *supra* note 1.

76. UNAIDS EPIDEMIC UPDATE, *supra* note 64, at 49. Mother-to-child transmission of HIV declined from 16% in 1997 to less than 4% in 2002. *Id.* Between 1996 and 2002, AIDS mortality rates decreased by 50%, and AIDS-related hospitalizations dropped by 80% during the same period. *Id.* UNAIDS has praised Brazil by stating that "Brazil's dual emphasis on prevention and treatment has helped to keep its HIV epidemic under control." *Id.*

77. Zita Lazzarini, *Making Access to Pharmaceuticals a Reality: Legal Options Under TRIPS and the Case of Brazil*, 6 YALE HUM. RTS. & DEV. L.J. 103, 129 (2003). For example, between 1997 and 2001, the estimated annual cost of HIV therapy in Brazil has fallen from \$7858 per person to \$4137 per person. *Id.* This is at least two times lower than the cost of HIV therapy in the United States, which costs between \$10,000 and \$15,000 per patient per year. *Id.*

78. Naomi A. Bass, *Implications of the TRIPS Agreement for Developing Countries Pharmaceutical Patent Laws in Brazil and South Africa in the 21st Century*, 34 GEO. WASH. INT'L L. REV. 191, 209–10 (2002).

79. *Id.* at 209. In March 2001, Merck agreed to lower the prices of Indinavir and Efavirenz by 65% and 59%. In return, Brazil cancelled its plan to authorize generic production of the drugs. See Consumer Tech, *supra* note 11.

to Brazil's threat to issue a compulsory license.<sup>80</sup> Similarly, in 2003, Merck agreed to lower the price of ARV Kaletra after Brazil's threat to issue a compulsory license for the drug.<sup>81</sup> This pattern of threats and negotiations clearly demonstrates that Brazil's threats to issue compulsory licenses for HIV/AIDS medications have resulted in lowering the costs of many essential drugs for the government's HIV/AIDS program.

#### *B. The Recent Controversy: Brazil and Merck*

Despite Brazil's previous success in negotiating with pharmaceutical companies, the cost of Brazil's HIV/AIDS program has almost doubled in the last several years,<sup>82</sup> partially due to the increased demand for second-line HIV/AIDS medication.<sup>83</sup> At current prices, the annual cost of Merck's Efavirenz for the Brazilian government was \$42 million, at \$1.59 per pill.<sup>84</sup> Brazil's health ministry claimed that they could import a generic version of the drug from India at a price of \$0.45 per pill.<sup>85</sup> Since 2006, Brazil's Ministry of Health has attempted to negotiate with Merck for a price reduction.<sup>86</sup> Brazil stated that it wanted to pay the price for the drug that Merck currently offered to countries in similar income levels as

80. Bass, *supra* note 78, at 209. After unsuccessful negotiations over the price of the ARV Nelfinavir (sold under the brand name Viracept by Roche), Brazil's Health Minister announced that his country will issue a compulsory license for the local production of the generic version of the drug. *See* Consumer Tech, *supra* note 11. Nine days later, Roche and Brazil reached an agreement for a 40% reduction in the price of the drug in exchange for Brazil not issuing the compulsory license. *Id.*

81. *Id.*

82. BNA Report, *supra* note 1. The cost of the program has increased from \$247.5 million to \$445.5 million during the last several years. *Id.*

83. Medecines Sans Frontieres, *The Second-line AIDS Crisis: Condemned to Repeat?*, MSF ARTICLE, Apr. 13, 2007, [http://www.msf.org/msfinternational/Invoke.cfm?component=article&objectid=65D58C38-15C5-F00A25DE21CB571D3E0E&method=full\\_html](http://www.msf.org/msfinternational/Invoke.cfm?component=article&objectid=65D58C38-15C5-F00A25DE21CB571D3E0E&method=full_html) [hereinafter MSF Article]. "While the needs for second-line regimens are likely to increase in the coming years, medicines used for second-line therapy are mostly unavailable or unaffordable in developing countries." *Id.*

84. BNA Report, *supra* note 1. According to the World Health Organization ("WHO"), Efavirenz is one of the drugs used in the newly-recommended first-line ARV regimen for adults and adolescents. WHO, *SOURCES AND PRICES OF SELECTED MEDICINES AND DIAGNOSTICS FOR PEOPLE LIVING WITH HIV/AIDS* 5, WHO/EDM/PAR/2004.4 (2004), available at [http://data.unaids.org/Publications/IRC-pub02/jc645-sources\\_prices\\_en.pdf](http://data.unaids.org/Publications/IRC-pub02/jc645-sources_prices_en.pdf). Currently, 38% of patients take the drug and it is estimated that by the end of 2007, 75,000 of the 200,000 patients currently on antiretroviral treatment in Brazil will be taking Efavirenz. Posting, *Brazilian Government Declares Efavirenz to be of Public Interest*, [gabriela@abiaids.org.br](mailto:gabriela@abiaids.org.br), to EssentialDrugs.org (Apr. 26, 2007) [hereinafter Essential Drugs].

85. BNA Report, *supra* note 1.

86. Essential Drugs, *supra* note 84.

Brazil.<sup>87</sup> On April 25, 2007, Brazil took the first step in the compulsory licensing process by declaring Efavirenz in “the public interest.”<sup>88</sup> After the Health Ministry rejected Merck’s offer of \$1.10 per pill, the Brazilian government took the final step in its compulsory licensing process by issuing a license to import the generic version of the drug from India while paying Merck royalties of 1.5%.<sup>89</sup> The government claimed that the generic drug would permit an annual savings of \$30 million on their anti-AIDS program.<sup>90</sup> In justifying this unprecedented action, Brazil’s president stated that he was not willing to sacrifice the health of his country’s citizens for the sake of world trade.<sup>91</sup>

#### IV. ANALYZING BRAZIL’S RESPONSE

##### *A. Brazil’s Actions are Valid Under the Compulsory Licensing Provision*

If Merck challenges the legal validity of Brazil’s actions under the compulsory licensing provision, the United States may take the dispute in front of the WTO’s international panel, the Dispute Settlement Body (“DSB”), which is responsible for settling disputes between Member nations.<sup>92</sup> In determining whether Brazil’s actions are valid under the com-

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87. Press Release, Brazil Ministry of Health, Efavirenz: Questions About Compulsory Licensing (Apr. 25, 2007), <http://www.aids.gov.br/data/Pages/LUMISE77B47C8ITE MID74BBB449C36442B9B92D6ACC1D9DFC21ENIE.htm> [hereinafter Brazil Health Web site—Efavirenz]. Brazil stated that the cost of the Merck’s Efavirenz is 136% higher in Brazil than in Thailand and that it would accept the same price offered to Thailand. *Id.*

88. Essential Drugs, *supra* note 83. Brazil’s compulsory licensing provision entails three steps: (1) declare in a decree that the product in question is “in the public interest”; (2) the government is required to negotiate with the company to see if a mutually acceptable price can be reached; (3) the government will issue another decree if the negotiations fail and it decides to issue a compulsory license. Posting of Tove Iren S. Gerhardsen, tgerhardsen@ip-watch.ch, to IP-Watch.org (May 4, 2007), available at <http://www.ip-watch.org/weblog/index.php?p=614&res=1280&print=0>.

89. BNA Report, *supra* note 1.

90. *Id.*

91. *Id.* “Between our trade and our health, we are going to take care of our health. It is not possible for someone to get rich from the misfortune of others.” *Id.*

92. WTO, UNDERSTANDING THE WTO—SETTLING DISPUTES 56 (2007), [http://www.wto.org/english/thewto\\_e/whatis\\_e/whatis\\_e.htm#understanding\\_chapter](http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm#understanding_chapter) (download Chapter 3: Settling Disputes for pdf version). Disputes arise under the TRIPS agreement when one country adopts a trade policy that another WTO Member believes to be violating the agreement. *Id.* at 55. The Dispute Settlement Body (“DSB”), composed of all WTO Members, is responsible for setting up panels to consider the case. *Id.* at 56. The decision of the panel is subject to review by a permanent appellate body. *Id.* Once a case has been decided, the losing “defendant” must conform its policy to the ruling of the panel. *Id.* at 58. If the losing party fails to conform to these rules, a suitable penalty, such as a sanction or tariff, may be imposed. *Id.* The DSB has never heard a case involving a

pulsory licensing provision of the TRIPS agreement, the DSB must first determine if Brazil has satisfied the conditions of the compulsory licensing provision which restrict its use.

The DSB will most likely find that Brazil's use of the compulsory licensing provision is valid for three main reasons. First, Brazil has sought prior negotiation with the patent holder Merck and thus satisfies the condition under article 31(b) requiring "reasonable" negotiation with the patent holder. Second, even if Brazil's negotiations with Merck are not considered reasonable, Brazil actions are valid under either the national emergency or the public non-commercial use exceptions of article 31(b), which waive the reasonable negotiating requirement. Finally, Brazil's use of the provision is valid because Brazil may import the generic Efavinez from India under the waiver of article 31(f) provided by the August 30 Decision.

#### (i) Prior Reasonable Negotiation Requirement Under Article 31(b)

The compulsory licensing provision is ambiguous about many of the conditions and grounds for issuing a license, thus leaving the provision open to different interpretations. First, article 31(b) states that unless the license is granted for a national emergency, other circumstance of extreme urgency, or a public non-commercial use, the member must have previously attempted to negotiate with the patent owner under reasonable commercial terms and that such efforts have not been successful within a reasonable period of time.<sup>93</sup> However, what is considered "reasonable" under this provision is not defined and has been left to national laws.<sup>94</sup> For example, a reasonable period of time has been considered anywhere between 90 days and 6 months.<sup>95</sup> Although the United States may argue that Brazil has not attempted to negotiate for a reasonable period of time, this argument is not likely to be successful because prior to issuing the license, Brazil had negotiated with Merck for two years over the price of Efavirenz.<sup>96</sup>

In arguing that Brazil did not negotiate under "reasonable commercial terms," the United States may point out that Brazil consistently refused Merck's offers which were based on fair terms.<sup>97</sup> However, Merck's of-

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challenge to a country's use of the compulsory licensing provision. Consumer Tech, *supra* note 11.

93. See TRIPS Agreement, *supra* note 20, art. 31(b).

94. CORREA, *supra* note 25, at 320.

95. CARVALHO, *supra* note 41, at 234.

96. See UNDERSTANDING THE WTO: THE AGREEMENTS, *supra* note 4.

97. Gerhardsen, *supra* note 88. On a practical level, Merck has argued that the price of Efavirenz in Brazil is fair. Merck Statement, *supra* note 13. Merck bases its HIV pric-

fers were not fair in this instance because its pricing scheme disregarded extremely relevant factors, such as the extent of the country's population needing treatment and the actual number of patients currently being treated with the drug.<sup>98</sup> For example, the cost of Efavirenz is 136% higher in Brazil than in Thailand, a country of comparable income level.<sup>99</sup> In addition, approximately 75,000 people are taking Efavirenz in Brazil, while in Thailand only 17,000 people are taking the drug.<sup>100</sup> During negotiations, Brazil informed Merck that it would accept a price the same price offered to Thailand, namely \$0.65 per tablet.<sup>101</sup> However, the lowest price Merck offered to Brazil was \$1.10 per tablet.<sup>102</sup> Thus, Merck's reduced price offers were not consistent with the international pricing scheme for the drug and cannot be considered fair.

In response, the United States may argue that Brazil's repeated use of the compulsory licensing provision as a bargaining tool does not qualify as negotiating under reasonable commercial terms.<sup>103</sup> It will argue that by threatening to issue a compulsory license during negotiations with pharmaceutical companies, Brazil was not bargaining under reasonable commercial terms. Brazil may respond by arguing that the threat of issuing a compulsory license has provided a tactical advantage in prior negotiations and did not prevent successful agreements with pharmaceutical companies.<sup>104</sup> Thus, Brazil will argue that threatening to issue a compulsory license during negotiations qualifies as negotiating under reasonable commercial terms. It is unclear whether the DSB will consider the threat of using the provision as bargaining under reasonable commercial terms. However, the DSB will find that under the national emergency or the public non-commercial use exception of 31(b), the requirement to bargain under reasonable commercial terms has been waived.

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ing policy on the comparable wealth and disease burden of the country. *Id.* Brazil is the world's twelfth largest economy and has a much lower rate of infection than many countries at its income level. *Id.* Thus Brazil has a greater capacity to pay for HIV/AIDS medicines than countries that are poorer or harder hit by the disease. *Id.*

98. Brazil Health Web site—Efavirenz, *supra* note 87.

99. *Id.*

100. *Id.*

101. *Id.*

102. BNA Report, *supra* note 1.

103. See Consumer Tech, *supra* note 11 (citing examples of Brazil's threats to issue a compulsory license that resulted in lower drug prices).

104. Consumer Tech, *supra* note 11. Until the current dispute with Merck, the pharmaceutical companies have reacted positively to Brazil's threats to issue a compulsory license by lowering prices and reaching an agreement with Brazil. *Id.*

(ii) The National Emergency and Public Non-Commercial Use Exceptions Under Article 31(b)

The requirement of reasonable prior negotiations with the patent holder under article 31(b)<sup>105</sup> is waived because Brazil's compulsory license falls under both the national emergency and public non-commercial use exceptions to article 31(b).

Brazil's compulsory license falls under the national emergency exception to article 31(b) and thus Brazil was not required to negotiate with Merck prior to issuing the license. Brazil's compulsory license was issued for an HIV/AIDS medication.<sup>106</sup> The WTO has explicitly stated that HIV/AIDS can qualify as a national emergency.<sup>107</sup> Thus, Brazil's use of the provision falls under the national emergency exception because Efavirenz will be used in the government's HIV/AIDS program.<sup>108</sup>

The United States may argue that although the WTO has stated that AIDS "can" constitute a national emergency or other circumstance of extreme urgency, this does not necessarily mean that Brazil's AIDS epidemic actually *does* constitute such circumstances. In fact, the United States will point out that Brazil's rate of infection is much lower than in many countries, thus bolstering its argument that Brazil's AIDS epidemic does not qualify as a national emergency.<sup>109</sup> However, an important reason for Brazil's low rate of infection is the country's ability to obtain affordable medicine, either through negotiations with pharmaceutical companies or through actual use of the compulsory licensing provision.<sup>110</sup> In addition, the WTO has avoided a clear declaration of what is considered a national emergency and has explicitly stated that each country must decide for itself the conditions of a national emergency.<sup>111</sup> This demonstrates that the DSB is unlikely to require that a country be

105. See TRIPS Agreement, *supra* note 20, art. 31(b).

106. See BNA Report, *supra* note 1.

107. See Doha Declaration, *supra* note 37, ¶ 5(c).

108. See BNA Report, *supra* note 1.

109. Ubiraja Regis Quintanilha Marques, Valesak Santos Guimaraes & Caitlin Sternberg, *Brazil's AIDS Controversy: Antiretroviral Drugs, Breaking Patents, and Compulsory Licensing*, 60 FOOD & DRUG L.J. 471, 471 (2005). As a result of Brazil's extensive anti-AIDS program, only about 600,000 Brazilians are infected with the disease. *Id.* This is less than one percent of the adult population. *Id.*

110. Lazzarini, *supra* note 77, at 129. Brazil's success in providing access to AIDS medication to its citizens has been attributed to "governmental commitment, the reduced cost of pharmaceuticals made possible by domestic manufacture of generic drugs, and negotiated price discounts for other drugs." *Id.*

111. See *supra* note 52 and accompanying text.

“steeped in disease”<sup>112</sup> before it can invoke the national emergency exception under article 31(b). Thus, under the national emergency exception, Brazil was not required to engage in reasonable negotiations with Merck prior to issuing the license.

Furthermore, Brazil was not required to negotiate with Merck before issuing the license because Brazil’s compulsory license falls under the public non-commercial use exception to 31(b).<sup>113</sup> Prior to issuing the license, Brazil’s government declared Efavirenz to be in the “public interest” in light of the need to ensure the viability of the government’s HIV/AIDS treatment program.<sup>114</sup> Thus, the license was granted for a public non-commercial use because Efavirenz is part of the Brazilian government’s HIV/AIDS program.<sup>115</sup> The United States will counter that Brazil’s use of the provision is not a public non-commercial use because the government is importing the generic drug from a private Indian manufacturer.<sup>116</sup> However, the non-commercial nature of the use does not prevent the government from hiring a commercial contractor to actually exploit the patents on behalf of the government.<sup>117</sup> Thus, Brazil’s actions are valid under the public non-commercial use exception in article 31(b).

### (iii) Conditions of Compulsory Licensing Under Article 31(f) and the August 30 Decision

The most contentious aspect of the validity of Brazil’s actions under article 31 is Brazil’s use of the compulsory licensing provision to import generic Efavirenz from India.<sup>118</sup> Although the August 30 Decision allows countries to import generic drugs by waiving article 31(f) of the compulsory licensing provision, the August 30 Decision requires that the importing country establish a lack of manufacturing capacity.<sup>119</sup> The United States will argue that Brazil cannot establish a lack of manufacturing capacity because the country is itself a major producer of generic drugs.<sup>120</sup>

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112. Jennifer Bjornberg, *Brazil’s Recent Threat on Abbott’s Patent: Resolution or Retaliation?*, 27 NW. J. INT’L L. & BUS. 199, 218 (2006).

113. See CORREA, *supra* note 25, at 316 (describing the public non-commercial use exception in article 31).

114. See Essential Drugs, *supra* note 84.

115. See Essential Drugs, *supra* note 84.

116. BNA Report, *supra* note 1.

117. CORREA, *supra* note 25, at 317.

118. See BNA Report, *supra* note 1.

119. See TRIPS AND PHARMACEUTICAL PATENTS: FACT SHEET, *supra* note 32, at 6.

120. MARQUES ET. AL., *supra* note 109, at 473. Eight of the sixteen ARVs used in the anti-AIDS cocktails provided by the Brazilian government are manufactured in Brazil. *Id.* Compulsory licenses are not needed for these drugs because Brazil began to manufacture

However, the August 30 Decision does not require a country to demonstrate that it has no manufacturing capacity in the pharmaceutical sector.<sup>121</sup> In fact, a lack of manufacturing capacity may also mean that a country has some manufacturing capacity in the pharmaceutical sector but that it is currently insufficient to meet its needs.<sup>122</sup> Thus Brazil may argue that it has established a lack of manufacturing capacity to produce generic Efavirenz because its pharmaceutical laboratories are currently unable to produce a safe generic version of the drug. In order to ensure the quality, safety, and effectiveness of the generic drug, Brazil will only use generics produced from laboratories that are pre-qualified by the World Health Organization (“WHO”).<sup>123</sup> Currently, all the laboratories producing generic Efavirenz that are WHO pre-qualified are located in India.<sup>124</sup> Thus, Brazil currently lacks manufacturing capacity to produce generic Efavirenz because its laboratories are not WHO pre-qualified to produce the drug.

#### (iv) Brazil’s Compulsory License for Efavirenz is Valid Under Article 31

As this dispute demonstrates, there are many undefined and ambiguous terms in the compulsory licensing provision, which leave it open to different interpretations. So far, only a handful of countries have utilized the provision in the context of pharmaceuticals<sup>125</sup> and the DSB has yet to resolve a dispute resulting from the use of article 31 to import or produce generic HIV/AIDS drugs.<sup>126</sup> If the United States challenges Brazil’s use

these drugs before Brazil was forced to recognize patents for pharmaceutical drugs under the TRIPS agreement. *Id.*

121. See TRIPS AND PHARMACEUTICAL PATENTS: FACT SHEET, *supra* note 32, at 6.

122. *Id.*

123. Press Release, Brazil Ministry of Health, Treatment of AIDS: Brazil Issues Compulsory License for Efavirenz (May 4, 2007) <http://www.aids.gov.br/data/Pages/LUMISCEBD192AENIE.htm> (click on “More National Programme News,” go to page 3) [hereinafter Brazil Health Web site—Treatment of AIDS]. The WHO’s pre-qualification program lists manufacturers and suppliers whose HIV-related medicines have been found acceptable for procurement by U.N. agencies. WHO, PRE-QUALIFICATION PROGRAMME: ANNUAL REPORT 2 (2007), available at <http://healthtech.who.int/pq/default.htm> (click on Annual Report 2007 under quick-links on the right side).

124. Brazil Health Web site—Treatment of AIDS, *supra* note 123. See also WHO, PRE-QUALIFICATION PROGRAMME: ACCESS TO HIV/AIDS DRUGS AND DIAGNOSTICS OF ACCEPTABLE QUALITY 3–4 (2007), available at <http://healthtech.who.int/pq/> (click on pdf).

125. See *supra* note 58 and accompanying text.

126. WTO, Dispute Settlement: Index of Dispute Issues, [http://www.wto.org/english/tradisp\\_e/dispu\\_e/dispu\\_subjects\\_index\\_e.htm#trips](http://www.wto.org/english/tradisp_e/dispu_e/dispu_subjects_index_e.htm#trips) (last visited Nov. 2, 2007). There have

of the compulsory licensing provision, the DSB will most likely find that Brazil's recent actions are valid under article 31. Ultimately though, how this dispute is resolved in front of the DSB will create important precedent by defining many of the ambiguities in the compulsory licensing provision. The resolution of the DSB will be an important factor in determining if and how this provision will be used in the future.

*B. Brazil's Actions Set Good Policy for the Future Use of the Compulsory Licensing Provision*

In justifying his country's unprecedented use of the compulsory licensing provision, Brazil's president stated that he was not willing to sacrifice the health of his country's citizens for the sake of world trade.<sup>127</sup> This statement reflects the concern of many developing nations that strong intellectual property rights over pharmaceuticals prevents impoverished people from having access to life-saving medication. By allowing generic manufacturers to override the patent holder's rights, compulsory licensing provides a flexible and direct means for the rapid development of generics.<sup>128</sup> The introduction of generics creates competition in the pharmaceutical market and has been proven to reduce the cost of medicine.<sup>129</sup> The effect of the compulsory licensing provision to lower drug prices is demonstrated in Brazil. By using the compulsory licensing provision to import generic Efavirenz from India, the Brazilian government is saving \$30 million annually on their anti-AIDS program.<sup>130</sup> Thus, by lowering drug prices, compulsory licenses allow countries to provide greater access to medicines for their citizens.

However, the pharmaceutical industry's response to Brazil's issuance of a compulsory license has been extremely negative. Merck has stated that it is "profoundly disappointed" by the decision of the Brazilian government to issue a compulsory license for Efavirenz<sup>131</sup> and considers the

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only been two complaints filed with the DSB relating to pharmaceuticals. *Id.* Neither of these complaints involve the use of compulsory licenses. *Id.*

127. BNA Report, *supra* note 1. "Between our trade and our health, we are going to take care of our health. It is not possible for someone to get rich from the misfortune of others." *Id.*

128. Weissman, *supra* note 7, at 1116–20.

129. *Id.* "The empirical evidence in support of the price-reducing effects of the introduction of generics is overwhelming." *Id.* at 117. Empirical studies reveal that patents are a major factor in sustaining high drug prices and the introduction of generics lowers drug prices to the production costs. *Id.*

130. BNA Report, *supra* note 1.

131. Merck Statement, *supra* note 13. The company says that it had attempted to negotiate in good faith with Brazil and remains flexible and committed to reaching a mutually acceptable agreement with the Brazilian government. *Id.*

recent actions of Brazil to be a “major step backward.”<sup>132</sup> Merck maintains that Brazil’s use of the compulsory licensing provision does not set good policy for two reasons. First, Merck argues that Brazil’s use of the provision sets bad precedent because it will encourage overuse of the provision, which will have a “chilling effect” on the R&D incentives of pharmaceutical companies. Second, Merck argues that Brazil’s use of the provision will discourage foreign investment and that it may deter pharmaceutical companies from introducing new life-saving drugs in Brazil.

Merck’s first argument is that by overriding the exclusive rights of the patent holder to produce and sell the drug, Brazil “sends a chilling signal” to pharmaceutical companies who develop life-saving drugs for diseases that afflict the developing world.<sup>133</sup> Research and development is a costly and risky process.<sup>134</sup> Pharmaceutical companies rely on patent protection in order to recoup a premium for the high research and development costs in creating a new drug.<sup>135</sup> By breaking patents where it is not absolutely necessary, developing countries may be discouraging pharmaceutical companies from creating new life-saving medications.

This argument is particularly relevant in the case of Brazil. Brazil is classified as an “upper-middle income country” and is the twelfth largest economy in the world.<sup>136</sup> In addition, Brazil has a very successful HIV/AIDS program and has been able to control the spread of the HIV/AIDS epidemic within its borders.<sup>137</sup> In this way, Brazil appears to

132. *Brazil Issues Compulsory License for AIDS Drug*, BRIDGES WEEKLY TRADE NEWS DIGEST, May 9, 2007, <http://www.ictsd.org/weekly/07-05-09/story4.htm>.

133. Merck Statement, *supra* note 13.

134. PhRMA Press Release, *supra* note 13. Last year alone, the U.S. pharmaceutical industry invested \$55 billion on research and development [“R&D”] of new medications. *Id.* Currently, there are seventy-seven medicines and vaccines being developed for HIV/AIDS. *Id.* See also Bruce Lehman & Michael Einhorn, *Intellectual Property and Compulsory Licensing: Pharmaceuticals and the Developing World* (on file with author). “The research process for new drugs is daunting.” *Id.* at 4. The development of new drugs averages 15 years. *Id.* There is a high risk of failure and “most efforts at innovation fail.” *Id.* at 5. The average new drug costs up to \$800 million to develop, while the generic version costs under two million. *Id.*

135. PhRMA press release, *supra* note 13. See also Lehman & Einhorn, *supra* note 134. Several studies have confirmed the correlation between patent protection and R&D. *Id.* at 5. In fact, one study concluded that 60 percent of drug inventions in a representative time period would not have been developed without patent protection. *Id.*

136. Central Intelligence Agency, The World Factbook, Rank Order—GDP, <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2001rank.html> (last visited May 30, 2008).

137. Central Intelligence Agency, The World Factbook, Rank Order—HIV/AIDS Adult Prevalence Rate, <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2155rank.html> (last visited Nov. 10, 2007). The rate of adult HIV/AIDS infec-

be in a much less desperate situation than many countries who suffer not only from high rates of HIV/AIDS infection, but also from floundering economies and infrastructure. Because Brazil is a relatively wealthy nation and has been successful in controlling the HIV/AIDS epidemic, it may be argued that Brazil's use of the compulsory licensing provision is not appropriate because it is not necessary. The use of the compulsory licensing provision where it is not absolutely necessary may lead countries down a slippery slope to overuse the provision, thereby discouraging R&D by pharmaceutical companies. Thus, Brazil sets a negative example for how the compulsory licensing provision should be used by encouraging overuse of the provision and thereby disincentivising the R&D of new life-saving medications.

However, although strong patent protection may impede R&D by pharmaceutical companies, this claim has been exaggerated, especially in the context of developing countries. Pharmaceutical companies, driven by profits, invest most of their money in researching drugs for diseases that afflict developed nations.<sup>138</sup> For example, twenty-one percent of the global disease burden<sup>139</sup> comes from malaria, pneumonia, diarrhea, and tuberculosis.<sup>140</sup> However, these diseases received less than one percent of all public and private investment in health research.<sup>141</sup> A recent report from the British Government's Commission on Intellectual Property

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tion in Brazil in 2003 was 0.70%, compared with the rate in the United States of 0.60%. *Id.*

138. Joseph Stiglitz, *Dying in the Name of Monopoly*, BUSINESS DAY, Mar. 9, 2007, available at <http://www.businessday.co.za/articles/topstories.aspx?ID=BD4A407148>. See also GLOBAL FORUM FOR HEALTH RESEARCH THE 10/90 REPORT ON HEALTH RESEARCH 2003–2004, at 122–23 (2004), [http://www.globalforumhealth.org/Site/002\\_What%20we%20do/005\\_Publications/001\\_10%2090%20reports.php](http://www.globalforumhealth.org/Site/002_What%20we%20do/005_Publications/001_10%2090%20reports.php) (click on chapter 5) [hereinafter THE 10/90 REPORT]. Data on the site shows that the most dangerous and widespread diseases receive the least percentage of total investment in health research. *Id.* The global disease burden combines death, morbidity, and disability in one figure to create an effective measuring tool for measuring conditions that are not on the priority list. Global Forum for Health Research, The 10/90 Gap: Themes—Burden of Disease, available at [http://www.globalforumhealth.org/Site/003\\_The%2010%2090%20gap/003\\_Themes/01\\_Burden%20of%20disease.php](http://www.globalforumhealth.org/Site/003_The%2010%2090%20gap/003_Themes/01_Burden%20of%20disease.php) [hereinafter Themes—Burden of Disease].

139. The global disease burden combines death, morbidity, and disability in one figure to create an effective measuring tool for measuring conditions that are not on the priority list. Global Forum for Health Research, The 10/90 Gap: Themes—Burden of Disease, available at [http://www.globalforumhealth.org/Site/003\\_The%2010%2090%20gap/003\\_Themes/001\\_Burden%20of%20disease.php](http://www.globalforumhealth.org/Site/003_The%2010%2090%20gap/003_Themes/001_Burden%20of%20disease.php) [hereinafter Themes—Burden of Disease].

140. THE 10/90 REPORT, *supra* note 138, at 122. These diseases have an overwhelming or exclusive incidence in poor countries. *Id.* at 123.

141. *Id.* at 122.

Rights found that “the IP system hardly plays any role in stimulating research on diseases particularly prevalent in developing countries, except for those diseases where there is also a substantial market in the developed world.”<sup>142</sup> This demonstrates that the patent protection provided in developing countries does not heavily contribute to the incentives of pharmaceutical companies for research and development because pharmaceutical companies are investing in drugs primarily for the benefit of developed countries.

Moreover, Brazil’s use of the compulsory licensing provision was appropriate because it is necessary for Brazil to use the compulsory licensing provision in order to maintain its successful HIV/AIDS program. The cost of Brazil’s HIV/AIDS program is rising, partially due to the high costs of second-line HIV/AIDS medication.<sup>143</sup> In addition, an important part of Brazil’s success in its HIV/AIDS program is due to Brazil’s ability to bargain for lower prices with pharmaceutical companies by threatening to issue a compulsory license.<sup>144</sup> By utilizing the compulsory licensing provision after repeated threats to do so, Brazil sends a clear message to pharmaceutical companies that it is serious about the health of its citizens.

Secondly, Merck argues that Brazil’s actions will have a negative impact on “Brazil’s reputation as an industrialized country” seeking to attract foreign investment.<sup>145</sup> This is because pharmaceutical companies may cease investing and introducing new drugs in countries where the compulsory licensing provision has been invoked and where the government of these countries does not provide sufficient protection of intellectual property rights. This argument is especially relevant in light of the recent dispute between Abbott Laboratories and Thailand. During the past year, Thailand issued compulsory licenses for the anti-retroviral drugs Efavirenz and Kaletra and for the heart disease medication Plavix.<sup>146</sup> The Thai government engaged in limited negotiations with pharmaceutical companies prior to issuing the licenses, claiming that prior negotiation with pharmaceutical companies is not an effective

142. COMMISSION ON INTELLECTUAL PROPERTY, INTEGRATING INTELLECTUAL PROPERTY RIGHTS AND DEVELOPMENTAL POLICY, EXECUTIVE SUMMARY 13 (2002), [http://www.iprcommission.org/papers/pdfs/final\\_report/CIPR\\_Exec\\_Sumfinal.pdf](http://www.iprcommission.org/papers/pdfs/final_report/CIPR_Exec_Sumfinal.pdf).

143. See *supra* notes 82–84 and accompanying text.

144. See *supra* notes 78–81 and accompanying text.

145. Merck Statement, *supra* note 13.

146. MINISTRY OF PUBLIC HEALTH AND NATIONAL HEALTH SECURITY OFFICE THAILAND, FACTS AND EVIDENCES ON THE 10 BURNING ISSUES RELATED TO THE GOVERNMENT USE OF PATENTS ON THREE PATENTED ESSENTIAL DRUGS IN THAILAND Preface (2007), available at [http://www.bilaterals.org/article.php3?id\\_article=7349](http://www.bilaterals.org/article.php3?id_article=7349) (link to pdf is in the middle of the page) [hereinafter Thailand White Paper].

means of getting a price reduction.<sup>147</sup> As a result of Thailand's decision to use the compulsory licensing provision, Abbott announced that it will not introduce new medicines into the country.<sup>148</sup> Abbott's reaction shocked the international community because Thailand's citizens will be deprived of several new essential drugs as a result of Abbott's withdrawal from the Thai market.<sup>149</sup>

Although Abbott's reaction may not be justified, it is a potential hazard for a country that plans to use the compulsory licensing provision. However, Brazil's use of the compulsory licensing provision remains good policy because it is readily distinguished from the situation in Thailand. Unlike Thailand's use of the compulsory licensing provision, Brazil only used the provision one time, it engaged in long negotiations with Merck prior to issuing the license, and it used the provision to import generic HIV/AIDS drugs.<sup>150</sup>

First, unlike Thailand, which issued three licenses within a three month period, Brazil has used the compulsory licensing provision only once in its entire history.<sup>151</sup> Although Brazil has made repeated threats to use the provision in its negotiations with pharmaceutical companies, this is different than actual use of the provision because there remains a possibility of negotiating an agreement between the parties. This is demonstrated by the successful negotiations of the Brazilian government, which has been able to use the threat of compulsory licensing in order to negotiate for lower drug prices without resorting to actual use of the provision.<sup>152</sup>

Second, Brazil's situation is different from Thailand because Brazil attempted to negotiate with Merck for two years prior to issuing the li-

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147. *Id.* at 6.

148. On March 16, 2007, Abbott Laboratories announced that it would no longer introduce new medicines in Thailand. *Abbott Says it Will Not Introduce New Drugs in Thailand*, 21 World Intell. Prop. Rep. (BNA) No. 04 (Apr. 2007) [hereinafter BNA Report Thailand]. The company was responding to Thailand's recent decisions to issue compulsory licenses on "essential" medications. *Id.* Abbott's spokeswoman justified her company' actions by explaining that Thailand chose to break numerous patents on medicines, ignoring the patent system and as a result, Abbott elected to not introduce new medicines into the country. *Id.*

149. *Id.* The international non-profit organization Doctors Without Borders has called this decision "appalling" and "a major betrayal to patients." *Id.* Among the drugs that will not be introduced in Thailand as a result of Abbott's withdrawal from the Thai market is the heat-stable version of the vital second-line anti-retroviral Lopinavir. MSF Article, *supra* note 83. This anti-retroviral is needed in HIV/AIDS programs and has several advantages, most importantly the fact that it does not need to be refrigerated. *Id.*

150. See *supra* notes 82–90 and accompanying text.

151. Consumer Tech, *supra* note 11.

152. *Id.*

cense.<sup>153</sup> Although prior negotiations may not have been necessary under the national emergency or non-commercial use exceptions of the compulsory licensing provision,<sup>154</sup> Brazil's willingness to negotiate an agreement with Merck prior to issuing the license sends a positive signal to pharmaceutical companies by demonstrating that Brazil is serious about patent protection.

Finally, Brazil's case is distinguishable from Thailand because Brazil did not use the provision to import a controversial drug. Thailand's use of the provision to produce Plavix, a heart disease medication,<sup>155</sup> is contentious because it demonstrates that Thailand is willing to invoke the provision for any drug available on the market, even for drugs that are primarily sold to developed countries.<sup>156</sup> Moreover, this is the first time the provision has been used to produce a chronic disease medication and it is unclear if such drugs are an acceptable use of the compulsory licensing provision.<sup>157</sup> By contrast, Brazil used the compulsory licensing provision to produce generic HIV/AIDS drugs.<sup>158</sup> The use of the compulsory licensing provision for HIV/AIDS medication is not controversial because HIV/AIDS is explicitly listed in the provision under the national emergency exception<sup>159</sup> and the provision has been used several times before to produce generic HIV/AIDS drugs.<sup>160</sup>

The differences between Brazil and Thailand's use of the compulsory licensing provision are further highlighted by Abbott's reaction to Brazil's compulsory license. In July of 2007, Abbott agreed to provide Brazil a 29.5% reduction on its HIV/AIDS drug Kaletra.<sup>161</sup> The disparate reactions of the pharmaceutical industry and the major differences between the countries' use of the compulsory licensing provision demonstrates that, unlike Thailand, Brazil's use of the provision sets a positive example for how the compulsory licensing provision should be used in the future.

153. See *EssentialDrugs*, *supra* note 84.

154. See TRIPS Agreement, *supra* note 20, art. 31(b).

155. BNA Report Thailand, *supra* note 148.

156. BNA Report Thailand, *supra* note 148. The pharmaceutical industry is concerned that Thailand's actions indicate that compulsory licensing will become a "routine occurrence in the operation of Thailand's public health system." *Id.*

157. For a discussion of the validity of Thailand's compulsory license for Plavix and its effect on international health and trade, see Brent Savoie, *Thailand's Test: Compulsory Licensing in an Era of Epidemiological Transition*, 48 VA. J. INT'L L. 211 (2007).

158. BNA Report, *supra* note 1.

159. Doha Declaration, *supra* note 37, ¶ 5(c).

160. Consumer Tech, *supra* note 11.

161. *Government Abbott Reach Agreement to Reduce Price of AIDS Drug Kaletra*, 21 World Intell. Prop. Rep. (BNA) No. 08 (Aug. 2007).

Although Brazil's use of the compulsory licensing provision sets good policy, a country seeking to invoke the compulsory licensing provision must exercise caution. The situation in Thailand demonstrates that use of the compulsory licensing provision is risky. This is because pharmaceutical companies may stop introducing drugs into a developing country if they believe that the country is not respectful of patent protection on pharmaceuticals. Thus the future of compulsory licensing remains uncertain and the use of the provision must be evaluated according to the circumstances in each case.

#### CONCLUSION

In the context of pharmaceuticals, the compulsory licensing provision in the TRIPS agreement has most often been used to provide generic HIV/AIDS drugs for least developed countries.<sup>162</sup> Brazil's recent use of compulsory licensing calls into question the scope and meaning of the provision by asking whether a large middle-income country like Brazil, with a relatively low rate of infection,<sup>163</sup> should be able to use the provision in order to import generic HIV/AIDS medication. The text of the compulsory licensing provision and the Doha Declaration support the legal validity of Brazil's actions. Likewise, in the context of HIV/AIDS, Brazil's actions create good policy for the future use of the provision by middle-income countries. However, as the recent dispute between Abbott and Thailand demonstrates, use of compulsory licensing is a risky endeavor and may not set good policy in every circumstance.

The goal of the TRIPS agreement is to balance the protection of intellectual property in order to incentivize future R&D while providing various exceptions, such as compulsory licensing, in order to reduce the short term costs of intellectual property protection. Although compulsory licensing provides a mechanism for increasing access to medicines in developing countries, this option is difficult and risky. Furthermore, in the context of pharmaceuticals, the protection of intellectual property raises an ethical dilemma. Questions of intellectual property in this context can be a life or death matter because residents of developing countries are dying of diseases such as AIDS because they cannot afford to buy essential medications.

There have been many proposed solutions that address the access to medicine gap between developed and developing countries.<sup>164</sup> One such

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162. See *supra* notes 57–60 and accompanying text.

163. See *supra* notes 136–137 and accompanying text.

164. For example, the economist Joseph Steiglitz proposes a system of financial government prizes to complement the current patent system. Joseph E. Steiglitz, Editorial,

solution addresses the role of research universities, who have a responsibility to ensure that their research reaches the people who need it most.<sup>165</sup> Universities are a major contributor to pharmaceutical patent innovation and they own patent rights to key HIV/AIDS drugs that are on the market.<sup>166</sup> Universities can manage their pharmaceutical patents to ensure that the HIV/AIDS medications that are a product of university research are sold at affordable prices in developing countries.<sup>167</sup> This means that universities can bargain for specific licensing terms in their agreements with pharmaceutical companies that will ensure low-cost access to pharmaceuticals in the developing world.<sup>168</sup> This approach requires that stu-

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*Scrooge and Intellectual Property Rights*, 333 BRIT. MED. J. 1279, 1279–80 (2006), available at <http://www.bmjjournals.org/cgi/reprint/333/7582/1279>. The prizes will encourage research on neglected diseases that mostly afflict developing countries, such as malaria and tuberculosis. *Id.* This medical prize fund would give large rewards for cures or vaccines for diseases like malaria, that affect millions, and smaller rewards for drugs that are minor variations on existing ones. *Id.* The prizes would be funded by governments in developed countries. *Id.*

Another solution to the current international patent system is proposed by Jean Lanjouw, a senior fellow at the Brookings Institute, who argues that setting minimum standards of patent protection in all countries is unfair. Jean O. Lanjouw, *Opening Doors to Research: A New Global Patent Regime for Pharmaceuticals*, 21 BROOKINGS REV. 13–17 (2003). Lanjouw argues that patent rights in developing countries make drugs such as ARVs unaffordable and do not encourage research on diseases that primarily affect developing countries. *Id.* Lanjouw suggests that in order for a system of intellectual property to be fair, it will need to recognize the differences in the development level of countries. *Id.* One solution is to establish a system where patent protection in poor countries differs across diseases depending on the importance of those countries' markets as a potential source of research incentives. *Id.* Thus, patent protection would be minimal in the poorest countries and would increase gradually to cover more diseases, starting with diseases like malaria that are particularly prevalent in developing countries. *Id.*

165. Dave A. Chokshi & Rahul Rajkumar, *Leveraging University Research to Advance Global Health*, 298 J. AM. MED. ASS'N 1934, 1934 (2007).

166. *Id.* In 2002, research universities in the U.S. were estimated to have contributed \$19.6 billion to “the drug development pipeline.” *Id.* University hold patents to one third of HIV drugs approved by the U.S. Food and Drug Administration between 1987 and 2007. *Id.*

167. *Id.* at 1935.

168. *Id.* at 1935. One such successful campaign took place at Yale University where a coalition of students and faculty requested that Yale, the patent holder to an important ARV, negotiate with Bristol-Meyers Squibb, the distributor of this ARV. Rahul Rajkumar, *The Role of Universities in Addressing the Access and Research Gaps*, Universities Allied for Essential Medicines National Conference 7–11 (Sept. 28, 2007), available at <http://www.essentialmedicine.org/wordpress/wp-content/uploads/2007/10/uuemconference2007-day-1-role-of-universities.pdf>. Yale successfully worked with Bristol-Meyers Squibb to ensure that its patents do not prevent inexpensive HIV/AIDS therapy in developing countries. *Id.*

dents organize local, campus-based campaigns in order to pressure universities to include access provisions in their licensing agreements with pharmaceutical companies.<sup>169</sup> Through local activism, the students and faculty of research universities can have a major impact on the high price of medication in developing countries.

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169. *Id.* at 43.

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