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# Universally Liable - Corporate-Complicity Liability Under the Principle of Universal Jurisdiction

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# Note

# Universally Liable? Corporate-Complicity Liability Under the Principle of Universal Jurisdiction

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In recent years, courts have begun to rely on universal jurisdiction to expand traditional jurisdictional powers. Universal jurisdiction allows a state to prosecute an actor for an action that occurred outside of its territory, regardless of whether the actor or action is connected to the prosecuting state through territoriality or nationality.[1] Countries exercising universal jurisdiction have held individuals liable for primary and complicit criminal acts.[2] While criminal universal jurisdiction as applied to individuals is well-established, albeit

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1. *E.g.*, Donald Francis Donovan & Anthea Roberts, *The Emerging Recognition of Universal Civil Jurisdiction*, 100 AM. J. INT'L L. 142, 143 (2006) ("[B]y the principle of universal jurisdiction, international law has long recognized that a state may exercise jurisdiction over a limited category of conduct even without a connection by territory, nationality, or need for protection.").

2. *See, e.g.*, Naomi Roht-Arriaza, *The Pinochet Precedent and Universal Jurisdiction*, 35 NEW ENG. L. REV. 311, 311–13 (2001) (discussing the case against Chilean dictator Augusto Pinochet for his role in the murder and disappearance of thousands of people); Trial Watch, Frans Van Anraat, http://www.trial-ch.org/en/trial-watch/profile/db/facts/frans_van-anraat_286.html (last visited Mar. 8, 2009) (discussing the case against Dutch citizen Frans Van Anraat, who was convicted of complicity in war crimes for supplying Saddam Hussein's regime with chemical supplies used against the Kurds and Iran).

controversial,[3] it has not been applied to corporate actors.

This Note examines the development of the principle of universal jurisdiction and how it can be used to apply to corporations in order to hold them liable for complicity. Part I explains the concept of universal jurisdiction, examines relevant developments in international law, and examines the case history of some of the states utilizing the principle. It also gives a brief history of corporate complicity, both criminal and civil, in the international arena. Part II analyzes the trends emerging from the development of international law and offers a framework for when and why a corporation might be held liable under the theory of universal jurisdiction. This Note concludes that although state practice and customary international law do not clearly establish when a corporation will be held liable, the development of international law indicates that universal jurisdiction may be used to hold corporations liable for aiding and abetting human-rights violations as states adopt statutes in accordance with their obligations under the International Criminal Court (ICC).[4]

## I. BACKGROUND ON UNIVERSAL JURISDICTION AND CORPORATE COMPLICITY

### A. UNIVERSAL JURISDICTION

Universal jurisdiction is the notion that a state may prosecute individuals for certain crimes, regardless of where the perpetrator or victim resides or where the crimes were committed.[5] Historically, universal jurisdiction has been exercised over crimes, such as piracy, that occur beyond state borders and are difficult to prosecute under traditional notions of jurisdiction.[6] The modern rationale supporting universal jurisdiction is that some crimes are by their very nature so

3. *Cf.* Henry Kissinger, *The Pitfalls of Universal Jurisdiction: Risking Judicial Tyranny*, Foreign Affairs (Jul. 2001), *available at* http://www.globalpolicy.org/intljustice/general/2001/07kiss.htm. *But cf.* Kenneth Roth, *The Case for Universal Jurisdiction*, FOREIGN AFF. (Sept. 2001), *available at* http://www.foreignaffairs.org/20010901faresponse5577/kenneth-roth/the-case-for-universal-jurisdiction.html.

4. For a description of the ICC, see *infra* text surrounding footnote 35.

5. Donovan & Roberts, *supra* note 1, at 143. *See also* Mark L. Frankfurt, *German Prosecutor Asked to Investigate Rumsfeld*, N.Y. TIMES, Nov. 14, 2006, http://www.nytimes.com/2006/11/14/world/europe/14cnd-german.html.

6. *See* Donovan & Roberts, *supra* note 1, at 143.

heinous that every state has an interest in prosecuting them.[7] The scope of universal jurisdiction is limited to crimes such as genocide, crimes against humanity, war crimes, and torture.[8]

States exercise universal jurisdiction differently. Many states defer jurisdiction to the state where the crime occurred or whose nationals are involved, if that state has the means and desire to prosecute the crime, but will invoke the principle if it appears that an individual might escape liability.[9] Some states require an independent basis for personal jurisdiction, such as the physical presence of the accused for criminal prosecutions or minimum contacts for civil proceedings.[10] Other states exercise jurisdiction even if the perpetrator has no contacts with the state.[11] Universal jurisdiction has never been used to hold a corporation criminally liable, and historically it is exercised in criminal, not civil, proceedings.[12]

### *1. History and Development of International Law*

To understand the interplay of universal jurisdiction and corporate aiding-and-abetting liability, it is helpful to have a brief history of the development of international law after World War II (WWII). Before WWII, individuals were not subject to international law.[13] States were thought capable to deal with their citizens as they sought fit, and had rights and obligations

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7. *Id.*

8. Universal jurisdiction statutes have also included human and narcotics trafficking, and terrorism. IBA REPORT OF THE TASK FORCE ON EXTRATERRITORIAL JURISDICTION 154 [hereinafter IBA TASK FORCE] (on file with author), *available at* http://www.ibanet.org (search for "Extraterritorial Task Force Report"); *see also* Tom Ongena & Ignance Van Daele, *Universal Jurisdiction for International Core Crimes: Recent Developments in Belgium*, 15 LEIDEN J. INT'L L. 687, 687 (2002).

9. *See* Ongena & Van Daele, *supra* note 8, at 687.

10. Donovan & Roberts, *supra* note 1, at 144. Some states that require this independent jurisdictional basis are Belgium, the United Kingdom, the United States, and France. *See, e.g., id.* at 149.

11. This is often called "pure" universal jurisdiction. M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT'L L. 81, 137 (2001). *See generally* Christine A.E. Bakker, *Universal Jurisdiction of Spanish Courts Over Genocide in Tibet: Can it Work?*, 4 J. INT'L CRIM. JUST. 595 (2006).

12. Historically universal jurisdiction is exercised in criminal, not civil, proceedings. *See generally* Donovan & Roberts, *supra* note 1 (discussing the emergence of civil universal jurisdiction). *See also infra* note 230.

13. Anna Triponel, *Business and Human Rights Law: Diverging Trends in the United States and France*, 23 AM. U. INT'L L. REV. 855, 857–58 (2008).

only vis-à-vis other states.[14] As a result of the atrocities committed during WWII, it became clear that states had an interest in prosecuting actors and actions outside their traditional jurisdictions.[15] The Nuremberg Tribunals were thus created to determine the culpability of those thought responsible for WWII crimes,[16] establishing the first notion of universal jurisdiction: that states can prosecute certain grave crimes, regardless of where those crimes occur.[17] These atrocities were codified in international instruments after WWII. For example, the 1946 Genocide Convention confirmed genocide as a crime in international law,[18] obligating the parties to "prevent and punish" genocide, although only in the state where the genocide occurred.[19] The Convention did not, however, provide for universal jurisdiction or impose the duty to extradite or prosecute (known as "*aut dedere aut judicare*").[20]

Universal jurisdiction was subsequently codified in the 1949 Geneva Conventions.[21] The Geneva Conventions state that parties have the right and the duty to prosecute or extradite

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14. *Id.*; *see also* Evo Popoff, *Inconsistency and Impunity in International Human Rights Law: Can the International Criminal Court Solve the Problems Raised by the Rwanda and Augusto Pinochet Cases*, 33 GEO. WASH. INT'L L. REV. 363, 366 (2001) (discussing the problems the Allies encountered when trying to make the Tribunals legal because international law had never recognized crimes committed by a sovereign against its own subjects).

15. Gerrad J. Mekjian & Matthew C. Varughese, *Hearing the Victim's Voice: Analysis of Victims' Advocate Participation in the Trial Proceeding of the International Criminal Court*, 17 PACE INT'L L. REV. 1, 2–4 (2005).

16. *See id.* at 7–8. In addition, a tribunal was created to prosecute war crimes in Japan. See 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) for a discussion of a case against a Japanese mining company. *See also infra* note 118.

17. Mekjian & Varughese, supra note 15, at 8–9 (noting that "[t]he Nuremberg Principles . . . imposed individual criminal liability for grave international crimes and were later construed to require states to prosecute these crimes," and that Nuremberg's precedential effect is evinced by subsequent treaties imposing the duty to prosecute grave crimes regardless of territoriality).

18. LUC REYDAMS, UNIVERSAL JURISDICTION: INTERNATIONAL AND MUNICIPAL LEGAL PERSPECTIVES 48 (Oxford Univ. Press 2005).

19. Convention on the Prevention and Punishment of the Crime of Genocide art. I, Dec. 9, 1948, 78 U.N.T.S. 277, 280 ("[G]enocide, whether committed in time of peace or in time of war, is a crime under international law which [the Parties] undertake to prevent and to punish.").

20. Bruce Broomhall, *Towards the Development of an Effective System of Universal Jurisdiction for Crimes Under International Law*, 35 NEW ENG. L. REV. 399, 403 (2001).

21. *See* Laurie King-Irani, *Universal Jurisdiction: Still Trying to Try Sharon*, Middle East Report, July 30, 2002, http://www.merip.org/mero/mero073002.html.

individuals suspected of war crimes, crimes against humanity, and genocide.[22] Many states modeled their national legislation after the Conventions,[23] which apply only to individuals.[24]

The 1984 Torture Convention,[25] which confers an explicit duty to make torture an offense under national law,[26] has been described by influential scholars as the "high point" of the use of universal jurisdiction.[27] The Convention imposes on state parties the duty to prosecute or extradite a suspected violator, creating a form of universal jurisdiction between those states.[28]

Individual states had to take the initiative to prosecute the crimes codified under the Genocide, Geneva, and Torture

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22. Each of the four Conventions contains a common article obligating prosecution or extradition. *See* Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field art. 49, Aug. 12, 1949, 75 U.N.T.S. 31, 62; Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea art. 50, Aug. 12, 1949, 75 U.N.T.S. 85, 116; Convention Relative to the Treatment of Prisoners of War art. 129, Aug. 12, 1949, 75 U.N.T.S. 135, 236; Convention Relative to the Protection of Civilian Persons in Time of War art. 146, Aug. 12, 1949, 75 U.N.T.S. 287, 386. Collectively, these Conventions comprise the Geneva Conventions.

23. *See, e.g.*, Ongena & Van Daele, *supra* note 8, at 689–90 (noting that Belgium's legislature looks to the 1949 Geneva Conventions in addition to taking the definition of genocide directly from Article 2 of the Genocide Convention).

24. Most states are signatories to the Conventions, so the provision mandating obligatory extradition or prosecution of war crime suspects had potentially enormous impact. In addition, the Geneva Conventions are considered to be customary international law, thus binding even the few states that are not signatories. *Cf.* I.C.R.C. Geneva Conventions of 12 August 1949 and Additional Protocols of 8 June 1977: Signatures, Ratifications, Accessions and Successions as at 31 December 1993, 10 (1993). Some have argued that the Genocide and the Geneva Conventions apply to corporations. *See, e.g.*, Harold Hongju Koh, *Separating Myth from Reality About Corporate Responsibility Litigation*, 7 J. INT'L ECON. L. 263, 266 (2004) (asserting that a corporation can aid or abet in genocide under Article 4 of the Genocide Convention and that Article 3 of the Geneva Conventions binds all parties to an armed conflict, including non-state actors).

25. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Torture Convention].

26. *Id.* art. 4.

27. Conversation with Professor David Weissbrodt of the Univ. of Minn. Law School, Oct. 14, 2008.

28. Torture Convention, *supra* note 25, arts. 5 & 7(1). These articles are often cited as standing for the principle of universal jurisdiction. *See, e.g.*, REYDAMS, *supra* note 18, at 181 (discussing Senegalese proceedings against Chad's Habré and indicating that articles 5 and 7 of the UN Torture Convention require Senegal to repress torture). *But see* M. Cherif Bassioiuni, *The History of Universal Jurisdiction and Its Place in International Law*, *in* UNIVERSAL JURISDICTION 39, 55 (Stephen Macedo ed., 2006) (describing article 7(1) as more of a duty to "extradite or prosecute" than a notion of universal jurisdiction, and that the duty to prosecute in reliance on universal jurisdiction arises only if the person is not extradited).

Conventions because the relationship between the United States and the USSR deteriorated as the Cold War intensified.[29] International law remained relatively stagnant as the two countries jostled for power, preventing many developments by taking opposite stances on nearly every issue.[30] When the Cold War ended, the international community was able to resume the prosecution of violators of these grave crimes.

The first tribunals to punish violations of international human rights after Nuremberg were the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the Former Yugoslavia (ICTY).[31] The ICTR was created in response to genocide, and the ICTY was created in response to the dissolution of a state and the resulting ethnic violence.[32] Both imposed individual, criminal liability on a person who "aid[s] or abet[s] in the planning, preparation or execution" of genocide, crimes against humanity, or war crimes.[33]

The ICTY and the ICTR were followed by the creation of a permanent criminal court to prosecute serious violations of

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29. *See generally* Stephanie Carvin, Note, *Caught in the Cold: International Prisoners of War and Prisoners of War During the Cold War*, 11 J. CONFLICT & SECURITY L. 67 (2006) (discussing the Cold War and its effect on post-WWII relations and law).

30. *Id.* For example, the creation of a permanent, international criminal court with the jurisdiction to hear grave crimes was put on indefinite hold because of Cold War tensions. Popoff, *supra* note 14, at 367 (noting that the Cold War and the resulting "wars by proxy" made it impossible to create an international criminal court).

31. Phillipe Ferlet & Patrice Sartre, *The International Criminal Court in the Light of American and French Positions* 2, http://www.diplomatie.gouv.fr/fr/IMG/pdf/The_International_Cri_156AB.doc.pdf (last visited Mar. 8, 2009).

32. *See* Richard P. Barrett & Laura E. Little, *Lessons of Yugoslav Rape Trials: A Role for Conspiracy Law in International Tribunals*, 88 MINN. L. REV. 30, 30–32 (2003).

33. Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanities Law Committed in the Territory of the Former Yugoslavia since 1991, *adopted* May 25, 1993, *as amended by* S.C. Res. 1660, U.N. Doc. S/RES/1660 (Feb. 28, 2006), UN Doc. S/25705, art. 7.1; Statute of the International Criminal Tribunal for Rwanda, *adopted* Nov. 8, 1994, *as amended by* S.C. Res. 1431, U.N. Doc. S/RES/1431 (Aug. 14, 2002), UN Doc. S/RES/955, art. 61. The ICTR was groundbreaking for holding a radio station liable for inciting genocide, *see* Prosecutor v. Barayagwiza ICTR 99-52-T, Dec. 3, 2003 Trial Chamber I, and for extending the notion of command responsibility to a civilian corporate director. The defendant, a director of a tea factory, was found guilty of genocide and crimes against humanity (extermination and rape) for his role, *see* Musema v. Prosecutor, Case No. ICTR 96-13-A, Appeals Chamber, Nov. 16, 2001.

international law.[34] The ICC, created by the 1994 Rome Statute, has a unique type of mixed jurisdiction.[35] Preference to adjudicate is first given to a state with a traditional interest in prosecuting a crime, such as the state where the crime occurred or whose national perpetrated the crime.[36] If such a state proves unable or unwilling to prosecute the violator, then jurisdiction is conferred onto the ICC;[37] this is the notion of complementarity.[38]

The Rome Statute provides that it is a crime for an individual to aid or abet a war crime, a crime against humanity, or an act of genocide.[39] The Rome Statute's drafting history indicates that many states wanted to include criminal liability for corporations.[40] However, there was tension between civil- and common-law countries regarding the inclusion of such a provision.[41] Civil-law countries do not have mechanisms under their national systems to prosecute legal entities, effectively conferring automatic jurisdiction on the ICC in such proceedings.[42] Corporate liability was therefore excluded in the interest of completing the Rome Statute in a timely fashion.[43]

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34. *See* Doug Cassel, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts*, 6 NW. U.J. INT'L HUM. RTS. 304, 313 (2008) (noting that the purpose of the ICC is to ensure that "the most serious crimes of concern to the international community . . . not go unpunished").

35. *Cf.* Broomhall, *supra* note 20, at 399–400.

36. Rome Statute of the International Criminal Court, United Nations Diplomatic Conference on Plenipotentiaries on the Establishment of an International Criminal Court, *adopted* July 17, 1998, *entered into force*, July 1, 2002, U.N. Doc. A/CONF.183/9, 21, art. 17 [hereinafter Rome Statute].

37. *Id.*

38. *See* Cassel, *supra* note 34, at 316; *see also* Rome Statute, *supra* note 36, pmbl.

39. Rome Statute, *supra* note 36, art. 25(3)(c).

40. *See* United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, UN Doc. A/CONF.183/2/Add.1 at 49. art. 23 ¶ 5 ("The Court shall . . . have jurisdiction over legal persons, with the exception of States, when the crimes committed were committed on behalf of such legal persons or by their agencies or representatives.").

41. *See* Cassel, *supra* note 34, at 315. In many civil law countries, there is no concept of corporate criminally liability. *See id.* at 316.

42. *Id.* at 316.

43. *See id.* at 316 (noting that the time frame for completing the Statute was a mere five weeks); *see also* Andrew Clapman, *The Question of Jurisdiction Under International Criminal Law over Legal Persons*, *in* LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW 139, 146 (Menno T. Kamminga & S. Zia-Zarifi eds., Kluwer Law International 2000) (discussing the opposition to including corporate liability). However, negotiations leading up to the drafting period lasted much longer than five weeks; it is unlikely that more time during the drafting problem would have resolved such a fundamental systemic difference. *See* Cassel, *supra* note 34, at 315–16 (noting that fundamental policy differences among

However, many of the 108 signatories[44] have enacted, or will enact, domestic legislation to take advantage of the notion of complementarity provided for in the ICC.[45] This implementing legislation opens the door for corporate aiding-and-abetting liability at the national level, especially in countries that already recognize corporate criminal liability.

*2. Case History*

There are criminal and civil notions of universal jurisdiction. A few of the most influential and relevant cases are discussed below.

(i). Criminal Universal-Jurisdiction Proceedings

The first example of criminal universal jurisdiction[46] is widely regarded to be the trial of Adolf Eichmann.[47] Eichmann, a high-ranking Nazi official who escaped the Nuremberg trials by hiding in Argentina, was captured by Israeli agents and brought to Israel to stand trial for war crimes.[48] Israel based its jurisdiction on a statute that gave courts jurisdiction over

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the parties).

44. See International Criminal Court, Assembly of States Parties, http://www.icc-cpi.int/Menus/ASP/states+parties/The+States+Parties+to+the+Rome+Statute.htm [hereinafter ICC Assembly of States], for a list of state parties as of June 1, 2008.

45. An example of a state that enacted such legislation is Australia, discussed *infra* text accompanying note 61. Other nations that have implemented provisions establishing jurisdiction over genocide, war crimes, and crimes against humanity in accordance with their ICC obligations and who also recognize criminal corporate liability are Canada, the United Kingdom, and the Netherlands. Joanna Kyriakakis, Note, *Australian Prosecution of Corporations for International Crimes: The Potential of the Commonwealth Criminal Code*, 5 J. INT'L CRIM. JUST. 809, 819 (2007).

46. "[U]niversal jurisdiction is criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising . . . jurisdiction." PRINCETON UNIV. PROGRAM IN LAW & PUB. AFF., THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION 28 (Stephen Macedo ed., 2001).

47. IBA TASK FORCE, *supra* note 8. The Nuremberg Trials were created by a charter and thus are not equivalent to a state asserting jurisdiction based on domestic legislation. *See* Charter of the International Military Tribunal art.1, Aug. 8, 1945, 59 Stat. 1544, 1546.

48. *Id.* He was ultimately found guilty and hanged. BBC, *1961: Nazi War Crimes Trial Begins*, http://news.bbc.co.uk/onthisday/hi/dates/stories/april/11/newsid_2476000/2476225.stm (last visited Mar. 8, 2009).

"crimes against the Jewish people" regardless of territoriality or nationality.[49]

Since *Eichmann*, several states have utilized universal-jurisdiction statutes. Belgium has been one of the most active countries exercising universal jurisdiction. Noteworthy cases tried under Belgium's universal-jurisdiction statute include the *4 of Butare*,[50] the case against Ndombasi Yerodia, former Minister for Foreign Affairs of the Democratic Republic of the Congo (DRC),[51] and the case against Hissène Habré, former President of Chad.[52] The *Yerodia* case ultimately caused the Belgian legislature to amend its universal-jurisdiction law to include a jurisdictional hook.[53]

While Belgium narrowed its application of universal jurisdiction in response to international pressure,[54] other states maintained or increased the scope of their universal-jurisdiction jurisprudence. Spain has one of the broadest universal-jurisdiction statutes and instigated another famous universal-jurisdiction case—the trial of former Chilean dictator Augusto Pinochet.[55]

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49. The law was called the *Nazis and Nazi Collaborators (Punishment) Law* (1950). IBA TASK FORCE, *supra* note 8, at 13.

50. The *4 of Butare* involved four Rwandan civilians who were accused of committing war crimes. Ongena & Van Daele, *supra* note 8, at 687. The defendants were convicted or war crimes. *Id.* at 694. One defendant successfully removed his case to the ICTR, but the other three were unsuccessful on appeal and their convictions stood. *Id.* at 694.

51. In 1998 Congolese citizens filed an action in Belgian courts alleging that Yerodia had committed war crimes and crimes against humanity. *Id.* at 694–95.

52. *Id.* at 693. For a discussion of the Habré case, see generally Tanaz Moghadam, Note, *Revitalizing Universal Jurisdiction: Lessons from Hybrid Tribunals as Applied to the Case of Hissène Habré*, 39 COLUM. HUM. RTS. L. REV. 471 (2008).

53. As a result of the Yerodia litigation, the DRC filed a complaint against Belgium with the International Court of Justice (ICJ) in 2000. Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), 2002 I.C.J. 1, 6 (Feb. 14). The ICJ ruled that Belgium had violated the principle of diplomatic immunity for state officials. *Id.* at 33. Foreign pressure on Belgium to change its universal-jurisdiction legislation increased, and Belgium eventually modified its law in 2003 to require that the perpetrator to be of Belgian nationality or residence. HUMAN RIGHTS WATCH, *Belgium: Universal Jurisdiction Law Repealed*, Aug. 1, 2003, http://www.hrw.org/en/news/2003/07/31/belgium-universal-jurisdiction-law-repealed.

54. For example, then-U.S. Secretary of Defense Donald Rumsfeld threatened to revoke Belgium's status as host to NATO headquarters if it did not modify its law. *Id.* Ironically, Rumsfeld would be indicted by German courts under their universal jurisdiction statute after he resigned. *See* Frankfurt, *supra* note 5.

55. Mugambi Jouet, *Spain's Expanded Universal Jurisdiction to Prosecute Human-rights Abuses in Latin America, China, and Beyond*, 35 GA. J. INT'L & COMP. L. 495, 496–97 (2007).

In 1996, Spanish nationals filed a complaint against Pinochet under Spain's universal-jurisdiction statute.[56] While the suit was pending, Pinochet left Chile to receive medical attention in London, and the Spanish government successfully got British authorities to arrest Pinochet.[57] Britain ultimately concluded that it could extradite Pinochet to Spain because the United Kingdom had ratified and incorporated the Torture Convention into domestic law.[58] Although Spain was never able to prosecute Pinochet because he was declared mentally unfit to stand trial,[59] the case has been hailed as one of universal jurisdiction's greatest achievements.[60]

Spain and Belgium are among the states best known for exercising universal jurisdiction. Their famous cases involve individual prosecutions, generally against political actors during times of war or dictatorships. However, as states enact domestic ICC-implementing legislation, the likelihood that corporations will be subject to universal-jurisdiction proceedings is increasing. An example of such a state is Australia.[61] Australia introduced genocide, crimes against humanity, and war crimes into its criminal legislation in 1995 as part of its ratification of the Rome Statute.[62] Its ICC-implementing statute recognizes the principle of universal jurisdiction by establishing that anyone in any location, irrespective of citizenship or

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56. *Id.* (alleging "genocide, torture, and other atrocities"). A separate action was also brought by Chilean nationals, but the case involving Spanish citizens raised the issue of the exercise of universal jurisdiction without a traditional nexus of jurisdiction. *Id.* at 134–35.

57. *Id.* at 501.

58. *Id.* at 502. Therefore, they were obligated to extradite or prosecute him since he was accused of the crime of torture. *Id.*

59. *Id.*

60. *See* Moghadam, *supra* note 52, at 480 (noting it had the effect of establishing the notion that heads of state do not enjoy blanket immunity).

61. Australia has also attempted to impose aggressive statutory obligations on corporations operating overseas to abide by minimum standards of conduct. *See* Corporate Code of Conduct Bill, 2000 (Austl.). The United States has attempted to enact a similar bill, Corporate Code of Conduct Act, H.R. 2782, 107th Cong. (1st Sess. 2001), but both have met stiff opposition and neither has passed. *See* Library of Congress: THOMAS, H.R. 2783, http://thomas.loc.gov/bss/107search.html (Search "Corporate Code of Conduct") (noting that the last major action for the U.S. Bill was referred to subcommittee in 2001); Parliament of Australia, Corporate Code of Conduct Bill 2000 [2002], http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbills%2Fs259_first%2F0000%22 (noting the status of the bill as "not proceeding").

62. Kyriakakis, *supra* note 45, at 810.

residence, can be tried for crimes against humanity, genocide, or war crimes.[63] The Australian criminal code also explicitly states that for the purposes of its laws, "[a] [corporation] is no different than an individual, and a corporation may be found guilty of any offense, including one punishable by imprisonment."[64]

These laws make it possible for the Australian government to hold corporations liable for human-rights violations. The Australian government has already investigated the complicit actions of a corporation in the DRC in an event known as the "Kilwa Incident."[65] Anvil, an Australian mining company, allegedly aided and abetted the military suppression of a local uprising.[66] Anvil allegedly provided company vehicles and drivers to transport troops, and distributed food and payment to the soldiers who allegedly committed rape, murder, and enforced disappearance.[67] While the Australian government was investigating the incident, a Military Court in the DRC brought charges against three Anvil employees in their individual capacities.[68] The three employees were acquitted,[69] and shortly thereafter, Australian law-enforcement agencies closed the case without filing any charges.[70]

It is unlikely that the ICC will ever hear this case because the DRC is a Party to the Rome Statute.[71] Since the DRC conducted a trial, the ICC would have to conclude that that the

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63. *Id.* at 819.

64. *Id.* at 815 (citing Criminal Code Part 2.5, § 12.1 (Austl.)).

65. Adam McBeth, *Crushed by an Anvil: A Case Study on Responsibility for Human Rights in the Extractive Sector*, 11 YALE HUM. RTS. & DEV. L.J. 127, 147 (2008). For a detailed account of the events that occurred at Kilwa, see *id.* at 131–33 and Kyriakakis, *supra* note 45, at 811–14.

66. The uprising seems to have related to the rebels' unhappiness with what they perceived to be the government "pocketing money from the mines." McBeth, *supra* note 65, at 132. The rebels went to the mine owned by Anvil (the Dikulushi mine) to talk to the representatives, who refused to negotiate. *Id.* The rebels then stole fuel, trucks, and batteries belonging to Anvil. *Id.*; *see also* Kyriakakis, *supra* note 45, at 812.

67. *See* McBeth, *supra* note 65, at 133–34; Kyriakakis, *supra* note 45, at 812–13.

68. McBeth, *supra* note 65, at 143. Charges were also brought against members of the military. *Id.*

69. *Id.* at 144–45 ("The court further held that the Anvil employees had been coerced into handing over the vehicles and providing other support, and therefore were not liable for aiding and abetting any crimes that may have been perpetrated with that support.").

70. *Id.* at 151 ("Soon after the verdict . . . acquitting three Anvil employees . . . , the Australian Federal Police concluded its investigation without laying any charges.").

71. *See* ICC Assembly of States, *supra* note 44.

trial was a sham or that it was not independent, impartial, or sufficiently observant of due process.[72] While there have been several criticisms of the DRC proceeding,[73] it seems unlikely that the ICC is ready to question the validity of a Party's proceeding, absent clear and compelling evidence of some impropriety.[74]

(ii). Civil Universal-Jurisdiction Proceedings

The United States has one of oldest universal-jurisdiction statutes in the 1789 Alien Tort Statute (ATCA).[75] The ATCA gives U.S. federal courts jurisdiction over "any civil action by an alien for tort only, committed in violation of the law of nations or a treaty of the United States."[76] "The [ATCA] does not require the [violation] to be committed on U.S. territory or by a U.S. national, and the courts have not imposed any such requirements."[77] The court must, however, have personal jurisdiction over the defendant before it can hear an ATCA claim.[78]

The Supreme Court addressed the ATCA for the first time in *Sosa v. Alvarez-Machain*.[79] In *Sosa*, the Supreme Court held

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72. Rome Statute, *supra* note 36, arts. 17(1)(c), 20(3).

73. See generally McBeth, *supra* note 65, at 143–47, for different criticisms of the proceedings.

74. *Id.* at 158 (noting that "[t]he political difficulties for a young institution such as the ICC [to declare] a lack of confidence in the authorities of the [DRC] . . . ." make it unlikely that the incident will come before the ICC).

75. 28 U.S.C. § 1350 (2005). The Alien Tort Statute is also referred to as the Alien Tort Claims Act (ATCA). The United States has signed, but not ratified, the Rome Statute. ICC Assembly of States, *supra* note 44 (showing the list of parties to the Rome Statute among which the United States is not listed as having ratified); David J. Scheffer, *Staying the Course with the International Criminal Court*, 35 CORNELL INT'L L.J. 47, 63 (2002) (referring to President Clinton's decision on Dec. 31, 2000 to sign the Rome Statute). *See generally id.* at 63–66 (discussing the Clinton Administration's reservations with the Rome Statute).

76. 28 U.S.C. § 1350. The "law of nations" has been recognized by U.S. courts to refer to any "well-established, universally recognized" or "specific, universal, and obligatory" norm of international law. Donovan & Roberts, *supra* note 1, at 146 (citing Filartiga v. Peña-Irala, 630 F.2d 876, 888 (2nd Cir. 1980), and *In re* Estate of Marcos, Human Rights Litig., 25 F.3d 1467, 1475 (9th Cir. 1994)).

77. Donovan and Roberts, *supra* note 1, at 146.

78. Triponel, *supra* note 13, at 905. For a corporation, this means it must be headquartered or doing business in the United States. *Id.*

79. Sosa v. Alvarez-Machain, 542 U.S. 692 (2004). The first ATCA case was the 1980 case of *Filartiga v. Peña-Irala*, heard in the Second Circuit. *Filartiga*, 630 F.2d at 878 (describing the ATCA as a "rarely-invoked provision"). The plaintiffs, Paraguayan nationals, accused the defendant of torturing their son to death. *Id.* *Filartiga*'s lasting importance was that the court recognized that it had the

that the ATCA granted federal courts jurisdiction to hear cases on a limited number of international-law claims as they existed in 1789.[80] The claims include acts of piracy, the "infringement of rights of ambassadors," and slave trade.[81] The Court concluded that the "door [was] ajar" to other claims similar to those established in 1789, but that courts must exercise caution.[82] *Sosa* recognized torture as being a violation of customary international norms and as falling under the ATCA.[83] Although *Sosa* involved individual, not corporate, defendants, the Court mentioned corporations, addressing the possibility that the ATCA might apply to corporate defendants.[84]

### B. CORPORATE COMPLICITY

Criminal universal jurisdiction has thus far only been applied to individual actors, sometimes in their corporate capacity and sometimes for head-of-state activity. The United States has historically been one of the only states willing to hold corporations civilly liable for their complicit actions abroad.[85] Civil cases might help predict under what circumstances a corporation could risk criminal liability, especially as the likelihood of criminal-complicity liability increases as states begin enacting domestic legislation in compliance with the ICC.

The first notion of corporate complicity appeared during the Nuremberg Trials. Although the Nuremberg Tribunals only had the jurisdiction to try individuals,[86] the Tribunals' findings were

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jurisdiction to hear the claim, and that the plaintiffs had a cause of action under the ATCA. *See, e.g.*, Kristen Hutchens, Development, *International Law in the American Courts*—Khulumani v. Barclay National Bank Ltd.*: The Decision Heard 'Round the Corporate World*, 9 GERMAN L.J. 639, 639 (2008) (noting the holding of *Filartiga* and calling it a "landmark case"). *Sosa* involved a Mexican defendant accused of the wrongful torture and death of a DEA agent. *Sosa*, 542 U.S. at 697 (2004). Alvarez was abducted from Mexico to stand trial in the United States. *Id.* at 698.

80. *Sosa*, 542 U.S. at 712.

81. *Id.* at 720.

82. *Id.* at 729.

83. *Id.* at 732–33. The ATCA and some of its influential cases are discussed more thoroughly below. See *infra* Part B.

84. *Sosa*, 542 U.S. at 732 n.20.

85. It should be noted, however, that to date, no ATCA action against a corporation has proceeded to judgment on the merits. Jonathan Clough, *Punishing the Parent: Corporate Criminal Complicity in Human Rights Abuses*, 33 BROOK. J. INT'L L. 899, 902 (2008).

86. Ramasastry, *supra* note 16, at 106.

largely based on the corporations' liability.[87] One prominent case was the *Zyklon B Case*, where the defendant, the president of a gas-distribution company, was found liable for supplying poisonous gas to the Nazi gas chambers.[88] The defendant advised the Nazi government that the gas in question could be used against people.[89] The company thus knew of the intended purpose for the gas and continued to supply it to the government.[90]

Another notable case was the *Krupp* case.[91] In *Krupp*, twelve defendants were accused of war crimes and crimes against humanity for utilizing forced labor in various Krupp factories in Germany.[92] The court held the individuals liable but offered lengthy discussions of the Krupp entity as the prime actor and perpetrator of war crimes and crimes against humanity.[93]

More recently, the ATCA has been increasingly used to implicate and charge corporations with aiding and abetting violations of the human rights that fall under universal jurisdiction.[94] Since *Sosa*, two of the most influential cases in the realm of corporate complicity are *Doe v. Unocal*[95] and *Khulumani v. Barclay National Bank*.[96]

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87. *See* Cassel, *supra* note 34, at 315 (noting that the Tribunal was able to declare organizations criminal, but only at the trial of an individual); *see also* Ramasastry, *supra* note 16, at 106 (noting that much of the findings in the *Farben* case were based on the corporation's actions).

88. The Zyklon B Case, Trial of Bruno Tesch and Two Others, 1 Law Reports of Trials of War Criminals 93, 93 (Brit. Mil. Ct., Hamburg, 1946) (United Nations War Crimes Commission ed., London, His Majesty's Stationary Office, 1947) *available at* http://www.ess.uwe.ac.uk/WCC/zyklonb.htm [hereinafter The Zyklon B Case].

89. *Id.* at 95.

90. *Id.* The gas was intended for "the extermination of lice." *Id.* at 94.

91. United States v. Krupp, et al., The Krupp Trial, 8 LAW REPORTS OF TRIALS OF WAR CRIMINALS 69 (1949). See Ramasastry, *supra* note 16, at 106–08 n.50 for a discussion of two other cases, *I.G. Farben* and *Flick*, implicating corporate defendants where the tribunals spoke of corporate liability. United States v. Krauch, et al., The I.G. Farben Case, 10 LAW REPORTS OF THE TRIALS OF WAR CRIMINALS 1 (1952); United States v. Flick, Trial of Friedrich Flick and Five Others, 9 LAW REPORTS OF THE TRIALS OF WAR CRIMINALS 1 (1949).

92. *The Krupp Trial*, *supra* note 91.

93. *Id.* at 140, 168–69 ("We conclude that . . . illegal acts . . . were committed by, and on behalf of, the Krupp firm . . . .").

94. The Second and Ninth Circuits are the most active in holding corporations accountable as complicit actors for their actions abroad. *See, e.g.*, Doe v. Unocal Corp., 395 F.3d 932, 944 (9th Cir. 2002).

95. *Id.*

96. Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254 (2d Cir. 2007). There are many other important cases. *E.g.*, Sarei v. Rio Tinto, 550 F.3d 822 (9th Cir.

*Doe v. Unocal* held for the first time that the ATCA allows an action to lie against a private corporation.[97] The *Unocal* plaintiffs were citizens of Burma who had been raped, tortured, and forced to provide labor for Unocal's pipeline by the military.[98] The plaintiffs alleged that Unocal knew, or should have known, that the military, in providing security measures for the pipeline, would forcibly relocate citizens without compensation and compel labor on the pipeline.[99] After the court found that Unocal could be held liable for aiding and abetting, the parties settled, and the court vacated its holding as part of the settlement agreement.[100] However, the notion that U.S. courts were willing to hold corporations liable for complicity reverberated throughout the international corporate community, as many corporations were unsure of when they might face civil liability resulting from their foreign activities.[101]

The *Khulumani* plaintiffs were South African citizens who implicated a large number of multinational corporations in their ATCA claim for aiding and abetting apartheid.[102] The sheer number of defendants, and the substantial amount of compensation sought by the victims, made the case highly visible.[103] The U.S. Court of Appeals for the Second Circuit held

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2008); Bowoto v. Chevron, No. C 99-02506 SI, 2008 WL 4822251 (N.D. Cal. Nov. 5, 2008); Wiwa v. Royal Dutch Petroleum Co., 392 F.3d 812 (5th Cir. 2004).

97. Hutchens, *supra* note 79, at 640.

98. *Unocal*, 395 F.3d at 936. *See also* Richard L. Herz, *The Liberalizing Effects of Tort: How Corporate Complicity Liability Under the Alien Tort Statute Advances Constructive Engagement*, 21 HARV. HUM. RTS. J. 207, 211 (2008) (describing the circumstances of the case).

99. *Unocal*, 395 F.3d at 940 ("Unocal was made aware—by its own consultants and employees, its partners in the Project, and human-rights organizations—of allegations that the [government] was actually committing such violations in connection with the Project."). Unocal ostensibly hired the military to maintain security along the pipeline. *Id.* at 937–38.

100. *See* John Doe I v. Unocal Corp., 403 F.3d 708, 708 (9th Cir. 2005) (vacating its decision in Doe v. Unocal Corp., 395 F.3d 932, 944 (9th Cir. 2002)).

101. *Khulumani* had the potential to quiet these fears. Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254 (2d Cir. 2007). Instead, it "raised the eyebrows of corporations worldwide." Hutchens, *supra* note 79, at 658.

102. *Khulumani*, 504 F.3d at 258 (noting that there were approximately fifty corporate defendants whom the plaintiffs accused of "actively and willingly collaborat[ing] with the government of South Africa in maintaining . . . apartheid."). The defendants include Ford Motor Company, Shell Oil Company, ExxonMobil Corporation, General Electric Company, Xerox Corporation, The Coca-Cola Company, and Hewlett-Packard Company. Hutchens, *supra* note 79, at 644.

103. Hutchens, *supra* note 79, at 644 (noting that "the size of the relief sought [was] unprecedented," amounting to some $400 billion dollars and that the defendants were the "who's who of the world's largest banks and manufacturers").

that there is aiding-and-abetting liability under the ATCA.[104] However, the judges in the majority disagreed on the proper mens rea standard—"purpose" or "knowledge"—that the assistance would further a human-rights violation.[105]

The Supreme Court granted a writ of *certiorari* for *Khulumani*.[106] Four of the justices recused themselves, so the Court, for lack of a quorum, affirmed the judgment from the court below as if it had been an equally split court.[107] In effect, the Court did not rule on the merits[108] and the standard for corporate complicit liability under the ATCA remains undetermined.[109]

### C. SOFT-LAW INSTRUMENTS ADDRESSING CORPORATE HUMAN-RIGHTS OBLIGATIONS

The international community has acknowledged corporate liability, due in part to the expansion of liability under mechanisms such as the ATCA and the convergence of ICC implementing domestic legislation and existing domestic legislation.[110] A number of soft-law instruments attempt to define corporate obligations in regard to human rights. For example, the Universal Declaration of Human Rights (UDHR), established in 1948, provides that "every organ of society" has obligations to observe human rights.[111] The UDHR has been

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

105. *Id.* at 277 (Katzmann, J., concurring) (arguing that the mens rea standard should be "purpose" for a crime of assisting in a human-rights violation); *id.* at 288–89 (Hall, J., concurring) (finding "knowing practical assistance" sufficient to hold a corporation liable for aiding and abetting). *Cf. id.* at 292, 321–26, 332–33 (Korman, J., concurring in part and dissenting in part) (agreeing that a "purpose" test was required, but that it could apply only to individuals since corporations could not be held liable for aiding and abetting under international law).

106. Under the name *American Isuzu Motors v. Ntsebeza*, 128 S. Ct. 2424 (2008).

107. Am. Isuzu Motors, 128 S. Ct. at 2424 ("[T]he judgment is affirmed under 28 U.S.C. § 2109, which provides that under these circumstances the Court shall enter its order affirming the judgment of the court from which the case was brought for review with the same effect as upon affirmance by an equally divided Court.").

108. This type of affirmance is entitled to no precedential weight, and the judgment of the case below is considered to be the final disposition of the case. ROBERT L. STERN, ET AL., SUPREME COURT PRACTICE: FOR PRACTICE IN THE SUPREME COURT OF THE UNITED STATES 1149 (8th ed. 2002).

109. There are several cases coming through the courts that may eventually help clarify these uncertainties, including those listed, *supra* note 96.

110. This could lead to possible corporate criminal liability for universal-jurisdiction crimes, as demonstrated by Australia, discussed *supra* Part A.

111. Universal Declaration of Human Rights, G.A. Res. 217A (III), pmbl. U.N. Doc. A/810 at 71 (1948). *See* David Weissbrodt, *Keynote Address: International*

recognized to apply to businesses because businesses are thought to be included as part of "every organ of society."[112] In 1976, the Organization for Economic Co-operation and Development (OECD) established the Guidelines for Multinational Corporations, calling for the promotion of responsible business conduct.[113] The UN Global Compact, created in 1998, asked businesses to adopt a set of core principles addressing human-rights obligations.[114]

In 2003, the United Nations Sub-Commission on the Promotion and Protection of Human Rights released the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (UN Norms). These aim to distill corporations' human-rights responsibilities.[115] In June 2008, the UN Human Rights Council released the report of the Special Representative of the Secretary-General John Ruggie (*Ruggie Report*), containing his views and recommendations on the issue of human rights and transnational corporations, and the most current analysis of the state of international and domestic law with respect to the subject.[116] The *Ruggie Report* proposed a framework for approaching corporate liability in respect to human rights, and

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*Standard-Setting on the Human Rights Responsibilities of Business*, 26 BERKELEY J. INT'L L. 373, 377 (2008) [hereinafter Weissbrodt, *Standard-Setting*].

112. Weissbrodt, *Standard-Setting*, *supra* note 111, at 377. Many of the UDHR's provisions are now universally recognized as customary international law. *See generally* Louis B. Sohn, *The Human Rights Law of the Charter*, 12 TEX. INT'L L.J. 129, 133–34 (1977). Some have asserted that the UDHR *in toto* constitutes customary international law. *E.g.*, MYRES S. MCDOUGAL ET AL., HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY 274, 325–27 (1980).

113. Weissbrodt, *Standard-Setting*, *supra* note 111, at 378.

114. The Global Compact, The Ten Principles, Princ. 2, http://www.unglobal.compact.org/content/AboutTheGC/TheTenPrinciples.htm. The Global Compact states that corporations should ensure "they are not complicit in human rights abuses." *Id.*

115. The relevant section states, "[T]ransnational corporations and other business enterprises have the obligation to promote . . . and protect human rights recognized in international as well as national law . . . ." U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm'n on Prot. & Promotion of Human Rights, Working Group, *Norms on the Rights and Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, ¶ 1, U.N. Doc. E/EN.4/Sub.2/2003/12/Rev.2,(Aug. 26, 2003) [hereinafter UN Norms].

116. U.N. Hum. Rts. Council, Protect, Respect and Remedy: A Framework for Business and Human Rights, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, ¶ 8, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008) (*prepared by* John Ruggie) [hereinafter *Ruggie Report*].

suggested that states and corporations have affirmative duties to ensure that corporations are complying with human-rights norms. Furthermore, many corporations have developed voluntary methods of self-regulation and company policies to ensure compliance with human-rights obligations. These methods are discussed more thoroughly in Part II(A)(4)(ii).

## II. TRENDS FAVOR CORPORATE LIABILITY UNDER UNIVERSAL JURISDICTION

The uncertainty surrounding corporate-complicity liability in international law is unlikely to be resolved soon. Nevertheless, trends in international law demonstrate an ever-increasing scope of liability that has expanded to include corporations, and that domestic legislation will increasingly use concepts of universal jurisdiction to hold corporations liable for aiding and abetting human-rights violations as states enact ICC-implementing legislation. This Note analyzes these trends, and then discusses when and why corporations should be held liable under universal jurisdiction.

### A. THE TRENDS DEMONSTRATE A CONTINUALLY EXPANDING SCOPE OF LIABILITY

The development of international law since WWII evinces an expanding view toward holding parties responsible for egregious conduct. This is demonstrated by the contributions of different tribunals and instruments during the past seventy years that have increased the scope of liability for crimes and for different types of actors. The next logical step in this continuing evolution of international law will be states holding corporations liable for violating human rights under existing domestic universal-jurisdiction legislation, or by enforcing ICC obligations via domestic legislation.

#### *1. Post WWII: Individual Liability Relating to Corporate Activity*

The Nuremberg Tribunals expanded the scope of international criminal law by prosecuting individual actors.[117]

117. *See, e.g.*, Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 271–72 (2d Cir. 2007) (Katzmann, J., concurring) (noting that not only did Nuremberg extend individual liability, but also liability to accomplices of any crime triable by the Tribunal).

Nuremberg also advanced the notion of universal jurisdiction: states held foreign nationals liable for activities committed outside of their jurisdictions for the first time. Cases such as *Zyklon B* and *Krupp* illustrate that courts believed that corporations were capable of committing the heinous crimes tried at Nuremberg.[118] It can be inferred from the language of the decisions that if the Tribunals would have had jurisdiction over corporate entities, they would have been willing to hold them liable for committing these acts.[119] The court in each case discussed the wrongdoings committed by each corporation in great detail, and found the individuals guilty only after establishing that the actions of the corporation violated human rights, whether by selling poisonous gas to the government with the knowledge it would be used against humans,[120] or by using prisoners as forced labor for the company's profit.[121]

### *2. Cold War: Universal Jurisdiction Used as a Gap-filler*

The Cold War interrupted the development of additional opportunities for states to try violators of international human-rights norms in specific tribunals such as those used at Nuremberg. Universal jurisdiction became a "gap filler"; that is, it was used to catch and punish those who would otherwise slip through the cracks of the other jurisprudential mechanisms of international law. *Eichmann* and *Pinochet* are two instances where domestic criminal actions were brought against human-rights violators who might otherwise have avoided prosecution.[122]

The English court justified the *Pinochet* decision by

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118. There was also a tribunal held to try members of the Japanese coalition that examined issues of corporate liability. *See, e.g.*, Ramasastry *supra* note 16, at 113–17 (discussing the case against the Nippon Mining Company for utilizing forced labor during WWII). These cases, which were similar to Nuremberg in their treatment of corporate liability, are not discussed here. *See also* note 16.

119. For example, the Tribunal stated, "When private individuals, *including juristic persons*, proceed to exploit the military occupancy . . . such action . . . is in violation of international law." Clapman, *supra* note 43, at 167 (quoting 8 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS 1153) (emphasis in original). A corporation is an example of a juristic person. BLACK'S LAW DICTIONARY 365 (8th ed. 2004); *see also* Ramasastry, *supra* note 16, at 106–08 (discussing the possibility of the Tribunals holding the corporations liable).

120. The Zyklon B Case, *supra* text accompanying note 88. *See also* Cassel, *supra* note 34, at 312.

121. The Krupp Trial, *supra* text accompanying note 91.

122. *See* discussion *supra* text accompanying notes 47 and 55.

invoking the Torture Convention, and its willingness to do so reflected the emerging recognition and endorsement of the affirmative obligations to prosecute or extradite those responsible for committing torture, crimes against humanity, genocide, or war crimes under the notion of universal jurisdiction—each of those crimes being codified in the Geneva Conventions and the Torture Convention.[123] The court's invocation of the Torture Convention also demonstrated the growing trend of holding individuals accountable for human-rights violations despite the lack of an international forum in which to do so.

### *3. Post-Cold War: Aiding-and-Abetting Liability*

The ICTY and the ICTR were the first instances since WWII in which international tribunals were utilized to prosecute human-rights violations. Although the ICTY did not have jurisdiction over corporations,[124] it established an aiding-and-abetting standard[125] that U.S. courts have applied to corporations in ATCA proceedings.[126] In addition, the standard provides guidance to domestic criminal courts, such as Australia's, that allow for criminal prosecution of corporations.[127]

The ICTY standard for aiding and abetting requires an actus reus element and a mens rea element.[128] The actus reus

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123. See Triponel, *supra* note 13, for a discussion of how, during the Cold War, these obligations were largely ignored and many serious crimes went unpunished; *see also* Popoff, *supra* note 14, at 268 ("From 1948 to 1994, mass killings in Biafra, Bangladesh, Cambodia, and Somalia went unpunished despite the existence of the [Genocide] Convention.").

124. Barrett & Little, *supra* note 32, at 82.

125. Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 274 (2d Cir. 2007) (Katzmann, J., concurring) (noting that the inclusion of aiding-and-abetting liability in the ICTY statute was important because the ICTY was intended to codify existing customary international law).

126. *See, e.g.*, Doe v. Unocal Corp., 395 F.3d 932, 950 (9th Cir. 2002) (using the aiding-and-abetting standard adopted by the ICTY to ascertain international aiding-and-abetting liability for the ATCA).

127. U.N. Human Rights Council, Clarifying the Concepts of "Sphere of Influence" and "Complicity," *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises*, ¶ 34, U.N. Doc. A/HRC/8/16 (May 15, 2008) (*prepared by* John Ruggie) [hereinafter *Complicity Report*].

128. Angela A. Barkin, *Corporate America—Making a Killing: An Analysis of Why It is Appropriate to Hold American Corporations Who Fund Terrorist Organizations Liable for Aiding and Abetting Terrorism*, 40 CAL. W.L. REV. 169, 182 (2003).

element is satisfied if there is "practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime."[129] The mens rea element is met if the defendant had actual or constructive "knowledge that his actions will assist the perpetrator in the commission of a crime."[130] The accused does not have to share the intent of the perpetrator, or even know the crime the perpetrator intends to or does commit.[131] The defendant merely needs to know or have reason to know that a crime will probably be committed and if one is, he could be held liable for aiding and abetting.[132]

The ICTR uses a similar standard to the ICTY for aiding-and-abetting liability.[133] In addition, the ICTR extended command responsibility to a corporate actor in *Prosecutor v. Musema*.[134] Although the ICTR, like the ICTY, only had jurisdiction over natural persons, this case further demonstrates how the law is evolving to increase liability for corporate actors.

The ATCA expanded aiding-and-abetting liability further than the ICTY and the ICTR to apply to corporations in civil proceedings. In a thirty-year period, the ATCA went from two centuries of disuse to holding corporations liable for human-rights violations.[135] U.S. courts have determined that

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129. Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment, ¶ 235 (Dec. 10, 1998).

130. *Id.* ¶ 245.

131. *Id.*

132. *Id.*

133. Prosecutor v. Musema, Case No. ICTR-96-13-T, Judgment and Sentence, ¶ 126, 180–81 (Jan. 27, 2000) (describing the actus reus of aiding and abetting as "all acts of assistance in the form of either physical or moral support" that "substantially contribute to the commission of the crime" and the mens rea as existing if "at the moment he acted, the accomplice knew of the assistance he was providing in the commission of the principal offence."); Barkin, *supra* note 128, at 183 ("[T]he standards set forth . . . by the ICTY and the ICTR are similar in nature . . . .").

134. *Musema*, ICTR96-13-T, ¶ 895. The defendant, Musema, was found to have superior control over his employees at a tea plantation, and was therefore in a position to influence them to effectuate war crimes. *Id.* ¶ 894. The ICTR was only able to prosecute Musema in his individual capacity because of inconsistencies in witness reports. *Id.* ¶ 845.

135. The ATCA first permitted non-U.S. citizens to sue other foreign nationals for violations of international law, Filartiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980), then allowed an action against a non-state actor, Kadic v. Karadzic, 70 F.3d 232, 239, 244 (2d Cir. 1995) (holding that slave trade violates the law of nations when undertaken by private individuals as well as state actors, as well as finding genocide, war crimes, and crimes against humanity to be actionable under the ATCA), and ultimately was applied to a corporate actor, Doe v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002), *reh'g granted en banc*, 395 F.3d 978 (9th Cir. 2003), *vacated*, 403 F.3d 708 (9th Cir. 2005).

corporations can be liable for the crimes recognized under universal jurisdiction that are considered customary international law, such as torture, genocide, crimes against humanity, and war crimes.[136] The Supreme Court left the "door ajar" to the inclusion of other crimes, although it warned courts to use caution.[137]

Although the Supreme Court did not clarify the conflicting mens rea standards for corporate liability in *Khulumani*, the Second Circuit's willingness to hold the defendant liable in a proceeding implicating a large number of corporations indicates the growing scope of ATCA liability. As the international community recognizes the influence, resources, and power of multinational corporations, the ATCA will continue to be an important option for holding corporations liable for their actions.[138]

### *4. New Millennium, New Responsibilities: The ICC and Corporate Norms*

#### (i). The ICC

The ICC was a significant accomplishment in international law, since it was doubtful that countries with such divergent interests would reach a consensus and agree on a workable statute.[139] The variance between common-law and civil-law systems would have had international and domestic consequences for the Statute's parties had corporate aiding-and-abetting liability been included in the Rome Statute.[140] In addition to the absence of corporate criminal responsibility in civil-law countries and the resulting complementarity implications, the civil- and common-law countries disagreed over whether aiding-and-abetting liability should require a

136. *See, e.g.*, *Karadzic*, 70 F.3d at 239–40.

137. Sosa v. Alvarez-Machain, 542 U.S. 692, 728–29 (2005).

138. *See, e.g.*, *Complicity Report*, *supra* note 127, ¶ 29 (noting that there have been forty ATCA claims brought against companies since 1993, most alleging corporate complicity).

139. Christopher "Kip" Hale, *Does the Evolution of International Criminal Law End With the ICC? The "Roaming" ICC: A Model International Criminal Court for a State-Centric World of International Law*, 35 DENV. J. INT'L L. & POL'Y 429, 430 (2007) ("[T]he 1998 Rome Statute . . . must be viewed as a tireless, monumental success.").

140. See *supra* Part I(A)(1), and the discussion surrounding notes 40–45.

"knowledge" standard or an "intent" standard.[141] A compromise was reached: a "purpose" test was adopted for the crime of assisting a human-rights violation.[142]

The ICC has yet to construe this article and thus its meaning is undetermined.[143] However, under the notion of complementarity, signatory states benefit by enacting the language of the ICC into their domestic legislation. States could choose either to adopt the ICC's purpose test of or the actual or constructive knowledge standard of the ICTY (as the United States has in ATCA cases).[144] Signatories differ in how they have incorporated the language of the ICC, with some borrowing verbatim from the Rome Statute, and others creating broader or more restrictive definitions of its content.[145] Australia included parts of the Rome Statute in its implementing legislation,[146] and by investigating Anvil's actions in the DRC, it demonstrated its potential willingness to hold corporations liable under ICC obligations. The question remains, however: why have the states, whose domestic legislation permits corporations to be held criminally liable, not exercised the option to do so?

Although Anvil could have been liable for war crimes under Australia's criminal code,[147] the Australian government might have elected not to pursue this claim for several reasons. First, Australia has not yet applied the new legislation, and thus it is not entirely clear that Australia intended the legislation to apply to corporations.[148] Second, the facts of the Anvil case are

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141. Cassel, *supra* note 34, at 310–11.

142. Rome Statute, *supra* note 36, at art. 25(3)(c).

143. Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 275 (2d Cir. 2007) (Katzmann, J., concurring); *see also* Cassel, *supra* note 34, at 311–15 (discussing how the "knowledge" and "purpose" tests could be construed). *But see* K. Ambos, *General Principles of Criminal Law in the Rome Statute*, 10 CRIM. L.F. 1, 12–13 (1999) (denying that the purpose test requires anything less than purpose).

144. Doe v. Unocal Corp., 395 F.3d 932, 948–50 (9th Cir. 2002).

145. States can exceed the terms of the ICC by including crimes not listed in the ICC as those that are illegal. Julio Bacio Terracino, *National Implementation of ICC Crimes: Impact on National Jurisdictions and the ICC*, 5 J. INT'L CRIM. JUST. 421, 424 (2007).

146. Australia included articles 6, 7, and 8 of the ICC. International Criminal Court Act 2002, No. 41 (Austl.); ICC (Consequential Amendments) Act 2002, No. 42 (Austl.).

147. McBeth, *supra* note 65, at 149.

148. *See* Kyriakakais, *supra* note 45, at 815–16 (noting that it could be argued that the Australian Parliament did not mean the legislation enacted pursuant to its ICC obligations to apply to corporations since it never explicitly addressed the extension of criminal responsibility to corporations during the implementation process, but noting that they could have amended the Criminal Code at any time to

not the most favorable for trying to establish precedent-setting corporate liability under the new criminal code. Anvil claims that it only provided the assistance it did because it was ordered to by the DRC government.[149] Therefore, it is not as clear a case as *Unocal*, where the corporation either hired or requested the services of the military,[150] and as a result of this hiring, crimes were committed. Third, Australia probably contemplated the political ramifications of questioning the judgment of the DRC and may have decided those considerations trumped opening a case.[151] Finally, Australia may not have uncovered tangible facts establishing that Anvil was responsible for aiding and abetting the commission of a war crime.[152]

More broadly, criminal universal jurisdiction in the human-rights context is a nascent concept that has only been applied to foreign heads of state at this stage in its development. Applying the rationale and standards of individual aiding-and-abetting liability to corporate aiding-and-abetting liability is a logical step in the evolution of universal jurisdiction and international law, however, and the actions taken by the Australian government indicate the direction in which the law is headed. It seems likely that domestic legislation recognizing universal jurisdiction, either in the form of ICC-implementing legislation or otherwise, will be used to hold corporations liable under ICC-implementing legislation.

(ii). Corporate Law Development Indicates Growing Recognition of Human-Rights Obligations

As countries like Australia enact domestic legislation in accordance with their ICC obligations and the United States continues to allow corporations to be prosecuted under the ATCA, international lawmakers and corporations alike have recognized the need for clear standards of corporate obligations

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exempt corporations from liability under the new legislation).

149. McBeth, *supra* note 65, at 134–35.

150. However, Anvil reportedly indicated immediately after the violence that they were in "consultation with the Government of the DRC to provide additional security for the mine" so that if the incidents continued "the company would be able to continue its operations," indicating cooperation between Anvil and the government. Kyriakakis, *supra* note 45, at 813.

151. McBeth, *supra* note 65, at 152 ("[T]hat decision constitutes a triumph of political considerations over legal ones . . . .").

152. *See id.* at 151 (noting that there has been no public report on the outcome of Australia's investigation).

and responsibility to protect human rights.[153] Rapid globalization, especially since the 1990s, has resulted in a "governance gap" between the operational reality of transnational corporations and the ability of states to hold corporations liable for their actions.[154] Human-rights violations are most likely to occur in developing countries that are in need of investment and that are eager to ensure that corporations do not look elsewhere to invest.[155] These nations are unlikely to have the resources to enforce national laws and might feel constrained from doing so in order to ensure continued investment.[156] The governments of such nations might be more likely to engage in the types of practices that could expose a corporation to liability, as evinced by the conduct of Myanmar's government in *Unocal*. A number of different soft law mechanisms have attempted to address corporate responsibility in regard to human rights, but none have been particularly successful. Nonetheless, they indicate that corporations realize that corporate liability under national legislation is a business risk that needs to be assessed when considering a business venture.[157]

a. Soft-Law Mechanisms

The soft-law instruments examined here are the UDHR, the OECD Guidelines for Multinational Corporations, the Global Compact, and the UN Norms.[158] The development of these soft-law instruments demonstrates the recognition of

153. *Ruggie Report, supra* note 116, ¶ 8 ("Every stakeholder group, despite their other differences, has expressed the urgent need for a common conceptual and policy framework . . . .").

154. *Id.* ¶ 13 ("[The] legal framework regulating transnational corporations operates much as it did long before the recent wave of globalization.").

155. *Id.* ¶ 16.

156. *Id.* ¶ 14.

157. *See, e.g.*, Cynthia Williams & John M. Conley, *Is There an Emerging Fiduciary Duty to Consider Human Rights?*, 74 U. CIN. L. REV. 75, 83 (2005) (arguing that the modest success rate of plaintiffs surviving motions to dismiss in ATCA cases should not be seen as an indication that there is not a significant-enough risk of litigation for boards of directors to pay attention).

158. This list is by no means exhaustive. The 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*, ¶ 38, U.N. Doc. A/HRC/4/35 [hereinafter *Business and Human Rights Report*]. Other significant instruments include the International Labour Organization (ILO), one of the most cited treaties in corporate human-rights policies. *Id.* ¶ 47. The ILO states that all parties should respect the UDHR. *Id.*

corporate liability that has occurred in the past twenty years. While these instruments are not binding, they can become a factor during litigation.

For example, the UDHR did not specifically mention corporations, but it has been interpreted broadly to include them.[159] Almost all of its provisions have become customary international law,[160] and companies frequently invoke the UDHR when forming their own policies and maintain that they comply with the UDHR.[161] This indicates that some corporations see themselves as having an obligation to uphold human rights, which may eventually emerge as a customary corporate practice.

In addition, corporations that expressly state that they will respect human rights may have a difficult time defending themselves credibly in court, even if they voluntarily committed to respect human rights.[162] For example, Unocal's human-rights policy stated that "Unocal supports the Universal Declaration of Human Rights";[163] this policy "came back to haunt it" during the ATCA litigation.[164] Unocal subsequently removed its human-rights policy from its public Website after the litigation, arguably to avoid further impeachment.[165] Moreover, U.S. courts have turned to the UDHR when determining whether an alleged crime qualifies as a violation of the law of the nations in ATCA claims.[166]

The OECD Guidelines and the Global Compact, although not considered customary international law like the UDHR, specifically address corporate responsibility in regard to human-rights violations.[167] The Global Compact, in addition to

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159. See discussion *supra* Part I(C).

160. *Business and Human Rights Report*, *supra* note 158, ¶ 38. *See also* text of and text surrounding note 112.

161. *Business and Human Rights Report*, *supra* note 158, ¶ 37.

162. Eric Engle, *Corporate Social Responsibility (CSR): Market-Based Remedies for International Human Rights Violations?*, 40 WILLIAMETTE L. REV. 103, 112 (2004).

163. Unocal Corp., Human Rights and Unocal: A Discussion Paper, *portion reprinted in* Mark D. Kielsgard, *Unocal and the Demise of Corporate Neutrality*, 36 CAL. W. INT'L L.J. 185, 189 (2005).

164. Engle, *supra* note 162, at 112 n.66.

165. Kielsgard, *supra* note 162, at 188–89 nn.24–28 (2005).

166. *See, e.g.*, Doe v. Unocal Corp., 395 F.3d 932, 945 (2d Cir. 2002) (finding forced labor to violate the law of the nations based on the UDHR), *reh'g granted en banc*, 395 F.3d 978 (9th Cir. 2003), *vacated*, 403 F.3d 708 (9th Cir. 2005).

167. Triponel, *supra* note 13, at 895 ("The revision of the OECD Guidelines in 2000 demonstrates an evolution towards the view that corporations should respect

demonstrating how the international community views the responsibilities of transnational corporations and the influence transnational corporations have on the development of international law,[168] could have far-reaching implications if courts begin to look to it during proceedings as they have the UDHR. About 3,700 companies have joined the Global Compact.[169]

Finally, the UN Norms have been praised for being a "landmark step in holding businesses accountable for their human rights abuses . . . ."[170] The UN Norms are phrased in mandatory terms[171] and apply not only to transnational corporations, but also to "other business enterprises,"[172] as well as their subcontractors and suppliers. The UN Norms thus go many steps beyond previous guidelines, further evincing expanding notions of corporate liability.[173]

Like all of the instruments discussed above, the UN Norms are presented in the form of recommendations and guidelines that create no legally binding obligations.[174] Although the UN Norms may help establish customary law, provide guidance to

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human rights.").

168. Members of the business community were instrumental in developing these principles, and many have argued that the Global Compact reflects the increased influence of corporations in international lawmaking. Weissbrodt, *Standard-Setting*, *supra* note 111, at 379. Likewise, corporations also lobbied successfully during the drafting of the Rome Statute for the omission of "legal entities" from the Statute. Conversation with Professor Weissbrodt, *supra* note 27.

169. Weissbrodt, *Standard-Setting*, *supra* note 111, at 381 (but noting that another 67,000 transnational corporations have yet to join).

170. Kielsgard, *supra* note 163, at 199 (quoting David Weissbrodt & Muria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 AM. J. INT'L L. 901, 902 (2003)).

171. Weissbrodt, *Standard-Setting*, *supra* note 111, at 389 ("The Sub-Commission Norms apply to all businesses to the extent of their activities and influence, and since no opt-in is required, no one may opt out.").

172. UN Econ. & Soc. Council, Sub-Comm'n on the Promotion and Prot. of Human Rights, Economic, Social, and Cultural Rights: Norms on the Rights and Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, ¶ 16, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003), http://www.globalpolicy.org/socecon/tncs/2003/08ecosonorms.pdf. Other business enterprises are defined as "any business entity, regardless of the international or domestic nature of its activities, including a transnational corporation . . . or other legal form used to establish a business entity . . . ." *Id.* ¶ 21.

173. For example, the issue of subcontractors and suppliers was only mentioned in the OECD guidelines. Triponel, *supra* note 13, at 896.

174. That is, they are soft law instruments. *Business and Human Rights Report*, *supra* note 158, ¶ 45; Triponel, *supra* note 13, at 897.

courts trying to determine the extent of corporate norms, or serve as the basis for later treaties, they do not have the same effect that binding obligations have.[175] A binding consensus of corporate obligations has proven to be difficult, but the *Ruggie Report* provided a framework in an effort to facilitate that goal. Until universal mandatory corporate norms and enforcement mechanisms are established, however, national-court proceedings will continue to be the most effective and feasible method to hold corporations liable.

b. Corporate Self-Regulation

In addition to agreeing to soft-law regulations and guidelines, many corporations have acknowledged the importance of complying with international human-rights norms by enacting company policies that address their obligations.[176] The corporate social responsibility (CSR) movement, which began in the 1970's,[177] caused many corporations to impose voluntary standards on themselves and to self-regulate.[178] Corporations did so due to the realization that profits may result from complying with international human-rights norms,[179] and in recognition that the costs of noncompliance are increasing. Reputational costs to companies accused of human-rights violations can be quite high,[180] leading investors in some instances to forego investment, or even to divest their current holdings.[181] Some states have imposed a fiduciary duty on corporations to ensure they engage in due diligence to assure they are not violating human-rights standards.[182] The *Ruggie Report* calls for due diligence on the part of corporations to ensure the same.[183]

These internal human-rights policies—and the mechanisms

175. Triponel, *supra* note 13, at 897.
176. *Id.* at 887.
177. *Id.* at 875.
178. *Id.* at 887. American corporations were some of the first to do so, perhaps as a result of ATCA litigation. *Id.*
179. *Id.* at 886.
180. *See, e.g.*, JOHN DOORLEY & HELIO FRED GARCIA, REPUTATION MANAGEMENT 354–55 (discussing the fiscal and reputational damages Nike suffered because of reports of child-labor practices, poor working conditions, and physical and sexual assaults at its factories in Vietnam, Indonesia, and Pakistan, resulting in consumer protests and government legislation banning products made with child labor).
181. *Ruggie Report*, *supra* note 116, ¶ 75.
182. The United Kingdom is an example. *Id.* ¶ 30.
183. *Id.* ¶ 25.

to ensure they are followed—might become more important as some states, such as Australia, have begun to examine "corporate culture" when determining corporate criminal accountability. Australia examines company policies, rules, and practices to determine liability as opposed to focusing on the individual activity of individuals or employees.[184] CSR, like the UDHR, can thus affect a corporation in unforeseen ways and can create a standard to which corporations may be held.

As states like Australia enact national legislation incorporating the human-rights obligations established in the ICC, incentives for corporations to comply with these obligations will only increase as potential fora for litigation increase. States, in turn, have not only an interest but an affirmative duty to ensure that corporations comply with human-rights standards,[185] and likely will enact legislation enabling them to do so.[186] Finally, as states use domestic legislation conferring jurisdiction over corporations, other states might enact similar legislation to assure that their interests are being represented as opposed to allowing other states to create and enforce standards of corporate liability.

### B. FRAMEWORK FOR CORPORATE LIABILITY UNDER DOMESTIC STATUTES

That there is a trend toward using universal jurisdiction to impose criminal-complicity liability on corporations is not itself a reason for such use, unless the trend reflects the belief by states that corporate criminal-complicity liability is required by customary international law. In that case, the trend could be an emerging norm of customary international law. There is no evidence of this belief, however. The existence of the trend may nevertheless lead to additional states imposing criminal

184. *Id.* ¶ 31 (citing "Corporate Culture as a Basis for the Criminal Liability of Corporations," prepared for author by the law firm Allens Arthur Robinson, *available at* http://www.reports-and-materials.org/Allens-Arthur-Robinson-Corporate-Culture-paper-for-Ruggie-Feb-2008.pdf.) This, in turn, could affect when corporate liability will be triggered. *See* discussion surrounding note 200, *infra*, Part II(B)(1).

185. *Business and Human Rights Report*, *supra* note 158, ¶ 10 ("[I]nternational law firmly establishes that States have a duty to protect against nonstate human rights abuses within their jurisdiction, and that this duty extends to protection against abuses by business entities.").

186. *Cf.* Triponel, *supra* note 13, at 863 (discussing the affirmative duty of the United States and France to protect citizens from human-rights violations, indicating they have an interest in holding violators liable).

corporate-complicity liability because the existence of the trend tends to reduce concern that imposing such liability is in any way improper. This Note proposes a framework for when these states should hold corporations liable for complicit human-rights violations and explains why universal jurisdiction is the mechanism that is most likely to succeed in this respect, at least until the Rome Statute is revised.

*1. When Should Corporations be Held Liable?*

The three main types of aiding-and-abetting liability are direct, indirect, and silent.[187] Companies may be found directly liable when they "knowingly assist or encourage human rights abuses by others."[188] If Anvil had provided the vehicles and drivers to the DRC military without an element of coercion, it would have been an example of knowing assistance. Another example of direct aiding and abetting is *Unocal*. Unocal hired the military to protect its property interests along its pipeline. The mere hiring of the military to protect property interests might not be sufficient to establish direct aiding-and-abetting liability, but there is evidence that Unocal had knowledge that the Myanmar military systematically utilized forced labor and displaced locals,[189] and that Unocal nonetheless maintained and encouraged the military to protect the pipeline.[190]

If Unocal did not directly assist or encourage the military to commit human-rights abuses, however, it might be an example of indirect aiding and abetting. Indirect aiding and abetting is when a "company benefits from human-rights abuses committed by someone else, even if the company did not authorize, direct, or have prior knowledge of the activities."[191] Anvil's actions could also be seen as indirect aiding and abetting. Although

187. The Global Compact, *supra* note 114, at Princ. 2 (listing direct, beneficial, and silent complicity as the three types of complicity in a human-rights context); *Complicity Report*, *supra* note 127, ¶ 58 (defining beneficial complicity as a company benefiting directly from human-rights abuses committed by someone else).

188. Anthony P. Ewing, *Understanding the Global Compact Human Rights Principles*, *in* EMBEDDING HUMAN RIGHTS INTO BUSINESS PRACTICE 28, 39 (2003), *available at* http://www.unglobalcompact.org/docs/issues_doc/human_rights/Resources/embedding.pdf.

189. *See supra* note 99.

190. *See* Doe v. Unocal Corp., 395 F.3d 932, 941 (9th Cir. 2002) (quoting Unocal's President as saying "[i]f forced labor goes hand and glove with the military yes there will be more forced labor.").

191. Triponel, *supra* note 13, at 900.

Anvil did not instruct the DRC military to protect its property or give the military its equipment for the purpose of carrying out human-rights abuses, its mine was protected through the use of Anvil vehicles and drivers, and the military's actions were taken as a result of the rebels approaching Anvil's mine.[192] *Khulumani* also could be seen as example of indirect aiding and abetting since the companies were accused of financially benefiting from South Africa's national policy of apartheid.

It is more likely, however, that *Khulumani* is an example of silent aiding and abetting. Silent aiding and abetting occurs when a corporation knows that human-rights violations are occurring but does not do anything to rectify or stop the situation.[193] An example of silent complicity is paying taxes in a country where human-rights violations are occurring, mere presence in a country, or silence in the face of human-rights abuses.[194]

For the purposes of universal jurisdiction, corporations should be held liable, at a minimum, when they engage in direct aiding and abetting of human-rights violations. It might prove too difficult to hold corporations liable under a looser standard in an already controversial doctrine such as universal jurisdiction. Considerations such as these may have contributed to Australia's decision not to pursue the Anvil case.[195] Courts have been most willing to find that corporations violated human rights when there is evidence that the corporation solicited the service of the offender, as in *Unocal*, used prisoners for forced labor, such as *Krupp*, or supplied the offending materials to the perpetrator, such as in *Zyklon B*.

Universal jurisdiction should also be used in instances where corporations indirectly aid and abet human-rights violations. For example, if Unocal had been unaware that the military was committing human-rights violations, it would still be reasonable to find them liable if due diligence could have

192. *See* McBeth, *supra* note 65, at 136 n.41 (explaining that Anvil issued a press release in the days following the incident assuring investors that the DRC government promised Anvil the situation would be resolved); *id.* at 136 (explaining that there is no conclusive evidence Anvil was involved in the operation, but that Anvil did provide logistical support for the military and likely had prior knowledge of the operation).

193. Triponel, *supra* note 13, at 902.

194. *Ruggie Report*, *supra* note 116, ¶ 77.

195. The Anvil case is further complicated by Anvil's claim that the DRC military ordered it to turn over its vehicles in accordance with national law. *See* McBeth, *supra* note 65, at 134–35.

reasonably alerted them to the reality of the situation; that is, if they had "constructive knowledge."[196] The penalty for indirect corporate complicity could be less severe than that for an otherwise identical case of direct corporate complicity to reflect the different degree of culpability.

It might be risky to use a nascent doctrine such as universal jurisdiction in this context, however.[197] Although the Second Circuit was willing to find the defendants in *Khulumani* liable, it is unclear whether the Supreme Court would have reached the same conclusion. It might have concluded that the corporations were merely present in the country and silent in the face of human-rights abuses: according to the *Ruggie Report*, silent complicity will almost never give rise to liability.[198]

Corporations should not be held liable for silent complicity. To do so would expose each business in the offending state to liability, unless each somehow manifested its objection. This could have severe economic ramifications. Opponents of corporate aiding-and-abetting liability argue that corporate-complicity liability could have a chilling effect on foreign direct investment,[199] and the low threshold required for silent aiding and abetting increases the likelihood of such a chilling effect.

Holding corporations liable for direct aiding and abetting would comport with the standard of aiding and abetting set forth by the ICTY. It would fulfill the actus reus requirement of encouragement or practical assistance, and the "actual and constructive knowledge" mens rea requirement. Likewise, indirect aiding-and-abetting liability would fulfill the actus reus and mens rea requirements as well. Finding "encouragement or practical assistance" to fulfill the actus reus element might prove challenging, but encouragement might be found if the corporation knew that human-rights violations were occurring,

196. Furthermore, the human-rights abuses might not have occurred at all if it had not been for Unocal's request for military support.

197. *See Ruggie Report*, supra note 116, ¶ 78 (suggesting that only deriving benefits from a human-rights abuse is not likely to bring legal liability, but is likely to negatively affect public perception of the company).

198. *Id.* ¶ 77.

199. Jacqueline Duval-Major, Note, *One-Way Ticket Home: The Federal Doctrine of Forum Non Conveniens and the International Plaintiff*, 77 CORNELL L. REV. 650, 674–75 (1992) (noting that corporations often seek investment opportunities in developing states that do not significantly regulate business); *see also* Dominic Bencivenga, *Human Rights Abuses: Suits Attempt to Extend Liability to Corporations*, N.Y.L.J., Sept. 4, 1997, at 5 (reporting that Unocal's general counsel believes that the ATCA suit against Unocal could have a "chilling effect" on foreign direct investment because it would negate due diligence efforts).

or were likely to occur, on its behalf (e.g., the protection of its mine from a local uprising, as in Anvil), even absent an agreement between the corporation and the government to provide security measures. Since domestic courts such as those in the United States in ATCA actions look to the ICTY and the ICTR when establishing their own aiding-and-abetting standards, it would help establish a clear, uniform standard. Starting with a narrow application would help establish the viability of the concept and allow it to expand as it develops. It would not be contrary to the "purpose" standard in the Rome Statute, since the definition of "purpose" has not been established by the ICC.

Some states' domestic legislation might include crimes in addition those listed in the Rome Statute that could potentially be used to hold corporations liable.[200] Corporations should only be held liable for the gravest of crimes under state universal-jurisdiction statutes, such as piracy, genocide, crimes against humanity, war crimes, and torture. These crimes have been established to be those widely recognized in customary international law as the most egregious—the primary justification for universal jurisdiction. They have been recognized in instruments such as the Genocide Convention, Geneva Conventions, and Torture Convention. Exceeding these limited crimes would make justifying the use of universal jurisdiction more difficult.

Finally, a threshold problem is determining when corporate liability is triggered.[201] This implicates the doctrines of *respondeat superior*, parent–subsidiary liability, and "piercing the corporate veil," among others.[202] In the United States, for

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200. For example, Bosnia and Herzegovina's criminal code includes the devaluation of domestic currency, the unlawful issuance of money, and the forced conversion to another nationality in its definition of war crimes. Criminal Code of Bosnia and Herzegovina, art. 173(1)(d) and (f), *available at* http://www.iccnow.org/documents/criminal-code-of-bih.pdf. These are not present in Article 8 of the Rome Statute. *See* Rome Statute, *supra* note 36, art. 8.

201. A corporation is incapable of acting independently of individual, natural persons. Corporate criminality, therefore, requires the action of a corporate actor.

202. *See generally* Phillip I. Blumberg, *Asserting Human Rights Against Multinational Corporations Under United States Law: Conceptual and Procedural Problems*, 50 AM. J. COMP. L. SUPP. 493, 494 (2002) (discussing the application of limited liability and corporate responsibility as applied to parent-subsidiary relationships); David Aronofsky, *Piercing the Transnational Corporate Veil: Trends, Developments and the Need for Widespread Adoption of Enterprise Analysis*, 10 N.C.J. INT'L & COM. REG. 31, 41 (1985) (explaining that a parent company normally is not subject to liability unless in a way that makes the subsidiary and the parent

example, corporate liability can be triggered by the actions of any employee under the doctrine of *respondeat superior*.[203] In the United Kingdom, by contrast, the corporate actor must be shown to represent the "directing mind and will" of the company (also known as the "alter ego" approach").[204] These questions are beyond the scope of this Note, but, at a minimum, the actions and policies of head management should trigger corporate liability. For example, in *Zyklon B*, the president of the company was found to have committed war crimes.[205] Likewise, in *Unocal*, the corporation was charged along with its president and its CEO and chairman.[206] Courts have therefore been willing to find corporations liable for actions committed by their head management, and often impose stricter penalties for the actions of corporate management than for those of lower-ranking employees.[207] However, limiting corporate liability to the actions of only head management would allow many corporate human-rights violations to go unpunished.

### *2. Corporate Liability via Universal Jurisdiction*

Corporations should be held liable under universal jurisdiction because its use does not encounter many of the difficulties inherent in other bodies or methods of law, such as special tribunals, soft-law instruments, and CSR.

The ICTY and the ICTR special tribunals encountered myriad problems during the course of the trials. While many of these problems were found in both tribunals, the problems encountered by the ICTR are sufficient to demonstrate why

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one and the same).

203. *See* RESTATEMENT (THIRD) OF AGENCY § 2.04 (2000); Vikramaditya S. Khanna, *Should the Behavior of Top Management Matter?*, 91 GEO. L. REV. 1215, 1219–20 (2003).

204. *See, e.g.*, 11(1) HALSBURY'S LAWS OF ENGLAND, CRIMINAL LAW, EVIDENCE AND PROCEDURE, ¶ 38 (4th ed. 2006 Reissue) ("A corporation is vicariously liable for a crime committed by its servant or agent in the course of his employment or agency in the same circumstances as an employer or principal who is a natural person"); H.L. Bolton (Eng'g) Co. Ltd. v. T.J. Graham & Sons, 1 Q.B.D. 159, 172 (1957) ("[D]irectors and managers who represent the directing mind and will of the company . . . control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such."); *see* Khanna, *supra* note 203, at 1222(discussing the alter ego approach).

205. *See supra* text accompanying note 88.

206. The defendants were Robert C. Beach, Chairman and CEO, and John F. Imle, President. Doe v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002).

207. Khanna, *supra* note 203, at 1220.

special tribunals should not be the sole means of holding corporations liable.[208]

First, the ICTR did not have enough resources to adequately prosecute the number of people accused of committing war crimes.[209] The ICTR could only handle a fraction of the claims filed, and therefore was able to prosecute only the most notorious and high-ranking offenders.[210] In addition, the process was extremely time consuming and the financial cost per defendant was approximately $80 million.[211] The ICTR had a limited duration under its mandate, and the number of defendants awaiting trial far exceeded the ability of the tribunal to try them. At some point, issues of due process arise if detainees must wait years to be tried for their crimes.

These difficulties could be one reason that victims sought redress in other fora, such as in the *4 of Butare*, where the victims used the Belgian universal-jurisdiction statute to bring their claims.[212] This demonstrates how universal jurisdiction may be used to hold the violators of internationally recognized norms responsible for their actions when these violators might otherwise slip through the cracks. If Belgium had not prosecuted the *4 of Butare*, it is unlikely they would have been prosecuted by the ICTR.

The same rationale shows why universal jurisdiction is the best method for holding corporations liable. Since corporations are not subject to criminal proceedings in many states, they are able to slip through the "governance gap" in the justice system. Even under some far-reaching civil universal-jurisdiction statutes, such as the ATCA, courts need to establish personal jurisdiction over defendants before a case may be heard.[213] Therefore, universal jurisdiction without a jurisdictional requirement, such as that set forth in the ICC, provides the means to hold corporations accountable, while allowing states to prosecute offenders of grave crimes.

The ICC also reflects a similar governance gap. The

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208. Notwithstanding that the ICTY and the ICTR did not have jurisdiction over legal persons, these problems may arise in future tribunals.

209. *See generally* Mark A. Drumbl, *Law and Atrocity: Settling Accounts in Rwanda*, 31 OHIO N.U. L. REV. 41 (2005) (providing a detailed account of the problems the ICTR encountered).

210. *Id.* at 44–45.

211. *Id.* at 46.

212. *See supra* note 50 for background on the *4 of Butare*.

213. Triponel, *supra* note 13, at 905.

differences between the civil-law and common-law countries prevented corporations from being included in the statute. That the discussion was part of the Rome Statute's drafting process reflects the recognition that corporate liability for human-rights violations is becoming a reality. The *Ruggie Report*, specifically addressing the issue of corporate liability and human rights, calls for clearer standards. As states enact domestic legislation and investigate and possibly prosecute corporations for their complicit activities, corporate-complicity liability will undoubtedly be on the agenda when the ICC is up for revision in 2009.[214] The fundamental gap between common- and civil-law countries will likely remain, however, so the ICC might be forced to put the issue on hold yet again. Domestic litigation would be the gap-filler in the meantime.

In addition to filling the governance gap, universal jurisdiction is the method most likely to achieve corporate observation of human rights. Voluntary methods, such as soft-law instruments and CSR, are not adequate deterrents alone. The OECD Guidelines, Global Compact, and the UN Norms are all positive steps toward creating a global standard of corporate conduct in regard to human rights. However, all of these soft-law instruments have encountered functional difficulties and faced criticism.

The OECD Guidelines are the most widely applicable standards relating to corporate responsibilities and human-rights obligations.[215] Yet, they only mention human rights once throughout the entire instrument.[216] They have been criticized for lacking "specificity" and for falling behind the voluntary practices of many corporations, i.e., for being outdated.[217] Furthermore, the Guideline's regulatory mechanism, the National Contact Points (NCPs), is widely perceived to be ineffective.[218] NCPs have been criticized for having a bias toward companies, lacking transparency, efficiency, and the

214. *Complicity Report*, *supra* note 127, ¶ 34 n.17.

215. *Ruggie Report*, *supra* note 116, ¶ 46.

216. Organisation for Economic Co-Operation and Development [OECD], *The OECD Guidelines for Multinational Enterprises*, 19 (2000), *available at* http://www.oecd.org/dataoecd/56/36/1922428.pdf (Enterprises should "[r]espect the human rights of those affected by their activities . . . .").

217. *Ruggie Report*, *supra* note 116, ¶ 46 (encouraging revision to the OECD guidelines).

218. The OECD Guidelines required its signatories to establish an NCP to provide a forum for grievances. *Id.* ¶ 98.

resources to conduct investigations.[219]

The Global Compact, while a great achievement for getting 3,700 corporations to commit to its provisions, is not widely recognized by the business community the way the UDHR is. 67,000 transnational corporations have yet to commit. Furthermore, its scope is limited; it only contains ten principles that corporations voluntarily agree to follow. However, corporations "can affect virtually all internationally recognized rights."[220] While the Global Compact is a good start, it is not sufficient to ensure corporations' observation of human rights. Similarly, the UN Norms have faced criticism for essentially extending the duties of states to companies,[221] and for assigning human-rights responsibilities to companies in ways that are difficult to measure.[222]

Ultimately, soft-law recommendations, while an important step toward corporate human-rights responsibility, are not capable of adjudicating human-rights violations.[223] Until these instruments become widely embraced and enforceable,[224] they are not likely to produce the type of compliance that adjudication under state universal-jurisdiction statutes would achieve. This is not to suggest that universal jurisdiction is exempt from criticism and potential implementation problems, but rather that it is the method most likely to achieve corporate compliance with human-rights norms under the present circumstances.

The CSR movement, while indicating that corporations are increasingly aware of liability, risks such liability merely by conducting business, and will not by itself achieve corporate observation of human rights. Corporate self-monitoring suffers from inherent internal conflicts of interest. In addition, many

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219. *Id. But see id.* ¶ 99 (discussing innovative solutions to these problems that some NCP's have invented).

220. *Id.* ¶ 6.

221. *Id.* ¶ 51–53 (arguing that defining a limited list of rights linked to responsibilities is too imprecise and that the correct way to do it would be to define specific responsibilities of companies with regard to all rights, since there are "few if any internationally recognized rights business cannot impact").

222. For example, measurements based on "spheres of influence." *See Complicity Report, supra* note 127, ¶¶ 7–8 (defining spheres of influence); *Ruggie Report, supra* note 116, ¶¶ 51, 67–72 (criticizing the sphere of influence approach).

223. David Weissbrodt, *Business and Human Rights*, 74 U. CIN. L. REV. 55, 67 (2005) (noting that the UN Norms apply to all companies, but are not legally binding and only act as guidelines for interpreting existing law and summarizing international practice) [hereinafter Weissbrodt, *Business*].

224. *Id.*

corporate policies primarily address labor issues and barely mention human-rights commitments.[225] Many voluntary codes do not have mechanisms for ensuring compliance or even implementation.[226] Unocal exemplifies problems with self-regulation, since Unocal's human-rights policy stated that it observed the UDHR.[227] This case may be seen as a failure of corporate voluntarism based on self-imposed, non-binding norms.[228] Furthermore, since corporate human-rights obligations are relatively new, many corporations only recently have joined initiatives like the Global Compact and are only beginning to develop human-rights policies.[229] Universal jurisdiction provides a means to prevent corporations that have not adopted internal human-rights policies or agreed to any soft-law instruments to avoid human-rights obligations.

### *3. State Domestic Courts Exercising Universal Jurisdiction Provide the Best Forum*

Domestic court systems exercising universal jurisdiction pursuant to their ICC obligations that recognize corporate aiding-and-abetting liability would provide the best forum to prosecute corporations, mainly because many of them have the expertise and knowledge to deal with a complex and developing area of the law. Regardless of whether it is a civil system, such as the ATCA, or a criminal system, such as Australia's domestic legislation, domestic judiciaries are likely be the most experienced and best prepared to handle the cases. Ideally, the ICC will eventually include liability for corporations in its statute, but until civil-law and common-law countries resolve their differences, national court systems can fill the gap using domestic legislation, pursuant to their obligations to prevent grave human-rights violations.[230]

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225. *Id.* at 24.

226. *Id.*

227. *See* Engle, *supra* note 162, at 112.

228. Kielsgard, *supra* note 163, at 190; *see also id.* at 191 n.37 (listing other corporations that were implicated in the commission of human-rights violations abroad in apparent violation of their corporate human-rights policies).

229. *Cf. Business and Human Rights Report*, *supra* note 158, ¶ 17.

230. Even in countries that do not recognize corporate criminal liability, it would be appropriate to create punishments in civil proceedings for corporate defendants that are equivalent to criminal sanctions for criminal aiding and abetting. This approach has been taken in respect to corruption and bribery by legal entities. OECD, *Convention on Combating Bribery of Foreign Public Officials in International*

The experience of domestic courts will be instructive as to how to approach criminal liability at the international level. Thus, much like the U.S. Supreme Court often lets issues bounce around the circuit courts before hearing a case, the ICC can gain valuable information by examining the practice of state proceedings involving corporate liability under implementing legislation. There are practical and procedural problems with this, of course. Multiple states exercising universal jurisdiction to try grave crimes increases the likelihood of concurrent proceedings, inconsistent outcomes, and, for criminal proceedings, double jeopardy.[231] States may interpret the ICC in different ways, which could lead to competing definitions and applications. There could be corruption at the domestic level, thus making trials a sham. States could reduce the likelihood of these issues through the use of various legal doctrines such as international comity, forum non conveniens, collateral estoppel, or res judicata.[232]

The way domestic litigation provides a forum for trying corporations can be seen as the mirror image of the system of complementarity. In this instance, the ICC is unable to prosecute corporate violators of human rights, and so domestic forums are fulfilling their obligations as ICC signatories by

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*Business Transactions*, art. 3, DAFFE/IME/BR(97)20 (Apr. 8, 1998), *available at* http://www.oecd.org/dataoecd/418/38028044.pdf ("In the event that, under the legal system of a Party, criminal responsibility is not applicable to legal persons, that Party shall ensure that legal persons shall be subject to effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions . . . ."). Imposing similar punishments on corporate defendants in civil universal jurisdiction proceedings would increase deterrence, and perhaps obviate the need for states recognizing corporate criminal liability to exercise criminal universal jurisdiction, since one of the justifications for universal jurisdiction—slipping through the governance gap to avoid liability for a crime—would be diminished. Germany, for example, which does not recognize criminal liability for corporations, has enacted civil punishments for bribery that are similar to criminal sanctions. *See generally* OECD, *Germany: Phase 2, Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions*, at 26–29 (June 3, 2003), *available at* http://www.oecd.org/dataoecd/52/9/2958732.pdf.

231. *See generally* Terracino, *supra* note 145 (discussing the potential problems associated with ICC implementation legislation).

232. For a discussion of forum non conveniens, *see generally* Kathryn Lee Boyd, *The Inconvenience of Victims: Abolishing Forum Non Conveniens in U.S. Human Rights Litigation*, 39 VA. J. INT'L L. 41 (1998); Duval-Major, *supra* note 199; Robert C. Casad, *Issue Preclusion and Foreign Country Judgments: Whose Law?*, 70 IOWA L. REV 53 (1984). *Cf.* Duval-Major, *supra* note 199, at 650–51 (noting that the doctrine of *forum non conveniens* permits corporations to evade liability).

allowing prosecution of these crimes.

Universal jurisdiction covers a very limited range of crimes, those recognized by the international community to be the most egregious.[233] States have an interest in adjudicating them to assure that violators of these crimes are not able to slip through the governance gap while the international community establishes the best and most comprehensive set of standards governing corporate human-rights responsibilities.

## III. CONCLUSION

The development of international jurisprudence indicates that states are becoming increasingly willing to hold corporations accountable for their complicit actions abroad when their actions violate established human-rights standards, especially in instances of genocide, war crimes, torture, and crimes against humanity. International law has developed rapidly in the past seventy years, and each treaty, tribunal, and convention learns from and expands upon the previous one. Corporate criminal liability is the next logical step in the development of international law. Globalization has occurred at a rapid pace, and the institutions of the law are valiantly trying to adjust to and reflect new interactions between state and non-state actors. As states enact ICC-implementing domestic legislation, universal jurisdiction will enable states to hold corporations liable in ways that these treaties do not in their present form. Universal jurisdiction, although in its nascent stages, has enormous potential to shape and define the emerging recognition of corporate-complicity liability.

233. See note 8 *supra* for a list of crimes recognized under universal jurisdiction.