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Ill-Gotten Gains: The Case for International Corporate Criminal Liability

*Jordan Sundell**

I. INTRODUCTION

Although many corporations act responsibly, economically fragile countries and war zones have proved fertile ground for a number of multinational corporations to commit a variety of serious international crimes. In such cases the offending corporation all too often goes under-punished or escapes punishment altogether. Take for example Nigeria. In 1995 the Nigerian government, in response to pressure from Royal Dutch Shell to repress environmental protestors, executed nine indigenous tribal leaders, including the well-known writer and human rights activist Ken Saro-Wiwa,¹ on suspect murder charges.² Royal Dutch Shell eventually settled the claim in U.S. federal court for \$15.5 million, less than two-tenths of one percent of the profits the company made from the region in the more than thirty years it operated there.³ Across the world, on

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1. See Ed Pilkington, *Shell Pays Out \$15.5m Over Saro-Wiwa Killing*, GUARDIAN, June 9, 2009, <http://www.guardian.co.uk/world/2009/jun/08/nigeria-usa>. For his work organizing indigenous peoples and minorities into a peaceful movement, Ken Saro-Wiwa was awarded the Goldman Environmental Prize as well as the Right Livelihood Award. See *Recipients by Year*, THE GOLDMAN ENVIRONMENTAL PRIZE, <http://www.goldmanprize.org/recipients/year> (last visited Sept. 4, 2010); *List of Right Livelihood Award Laureates*, THE RIGHT LIVELIHOOD AWARD, http://www.rightlivelihood.org/laureates.html?&no_cache=1 (last visited Sept. 4, 2010).

2. See Pilkington, *supra* note 1.

3. See JOHN MADELEY, *BIG BUSINESS, POOR PEOPLES: THE IMPACT OF TRANSNATIONAL CORPORATIONS ON THE WORLD'S POOR*, 123 (1999) (More than \$30 billion in oil was removed from Ogoniland between 1960 and 1994); *Ken Saro-Wiwa*, THE RIGHT LIVELIHOOD AWARD, <http://www.rightlivelihood.org/saro-wi>

the war-ridden streets of Iraq in September 2007, a Blackwater⁴ convoy fired on a group of civilians in Nisour Square, leaving seventeen dead.⁵ A trial failed to convict the guards as a result of evidentiary and immunity complications.⁶

Nor is corporate malfeasance a new phenomenon. In the 1950s the United Fruit Company, a U.S. corporation with a virtual monopoly in Guatemala, overthrew a democratically elected government there with the help of the CIA.⁷ Likewise, some of the earliest multinational corporations such as the British and Dutch East India Companies meddled with local governments and exploited human and natural resources.⁸

Herein resides the issue. Until recently, international criminal law has largely ignored the actions of corporations. At the same time, corporations have grown into organizations of herculean proportions with far flung subsidiaries and contacts that span the globe. In conjunction with that expansion, certain corporations have committed grave abuses in the developing world that would be impermissible in the developed world. Nor does this trend seem likely to recede absent changes in the

wa.html (Royal Dutch Shell enjoyed a 30% share of the oil profits made off the region). *See also* Press Release, Center for Constitutional Rights, Settlement Reached in Human Rights Cases Against Royal Dutch/Shell (June 8, 2009) <http://ccrjustice.org/newsroom/press-releases/settlement-reached-human-rights-cases-against-royal-dutch/shell> (last visited Nov. 14, 2010) (While the settlement only resolved the claims of the individual plaintiffs, a portion of the settlement will be dedicated to initiatives to support the Ogoni people).

4. Blackwater Worldwide, now called Xe Services, is a private security force that was used heavily by the United States in Iraq and Afghanistan before the massacre. *See Blackwater Worldwide*, N.Y. TIMES, Jan. 24, 2011, http://topics.nytimes.com/top/news/business/companies/blackwater_usa/index.html.

5. *See* James Risen, *Efforts to Prosecute Blackwater are Collapsing*, N.Y. TIMES, Oct. 21, 2010, at A1, available at http://www.nytimes.com/2010/10/21/world/21contractors.html?_r=2&hp.

6. *See id.* at A2 (explaining that there is uncertainty whether Blackwater, under a contract from the Department of State, is subject to the same criminal liability as Department of Defense contractors are and that following the shootings, government investigators gave the Blackwater personnel immunity in exchange for information).

7. *See generally* STEPHEN SCHLESINGER & STEPHEN KINZER, BITTER FRUIT: THE UNTOLD STORY OF THE AMERICAN COUP IN GUATEMALA 153, 159 (1982) (chronicling the role of United Fruit Company in the overthrow of the Guatemalan government).

8. *See* CLIVE DAY, A HISTORY OF COMMERCE 200 (1907). *See, e.g.*, Teemu Ruskola, *Conceptualizing Corporations and Kinship: Comparative Law and Development Theory in a Chinese Perspective*, 52 STAN. L. REV. 1599, 1677 (2000) (calling the British East India Company "one of the most notorious corporations of all time").

status quo.

Given multinational corporations' reach and ability to act irresponsibly in the developing world more or less with impunity, this Note proposes that the international community should either extend the jurisdiction of the International Criminal Court (ICC) to legal persons or adopt a specialized international tribunal empowered to try corporations for their role in egregious human rights abuse. Part I of this Note will review the history of corporate responsibility in international law, discuss the main approaches to handling corporate criminality, and address the relative strengths and weaknesses of domestic courts and international tribunals in the context of corporate criminal liability. Part II will respond to the main critiques of corporate criminal liability, evaluate the efficacy of domestic legal systems' reactions to corporate criminality, and suggest that domestic courts utilizing civil liability should adjudicate lesser offenses while international courts applying criminal sanctions should, subject to complementarity, resolve serious offenses.⁹ Finally, Part III concludes with suggestions on how to amend the ICC or fashion a special international tribunal to increase the international accountability of corporations.

II. BACKGROUND

A. A BRIEF TOUR OF THE POST-WORLD WAR II LANDSCAPE

Prior to World War II (WWII), international law, constrained states rather than individuals.¹⁰ The Nuremberg trials transformed this proposition by finding individuals accountable for violating human rights.¹¹ Subsequent trials,

9. The line demarking lesser offenses from serious offenses remains open to debate. A potential resolution may lie in utilizing the ICC's rubric of limiting serious offenses to war crimes, crimes against humanity, and genocide. An additional category of gross environmental violations might also be important to curbing the worst multinational actors.

10. See ALICE BULLARD, HUMAN RIGHTS IN CRISIS 39, 51 (2008). *Compare id.* ("World War II is recognized as the critical moment in global consciousness and consensus regarding the human cost of warfare. The conclusion of the war stimulated the growth of human rights law, and the emergence of a global human rights regime.") with Eric A. Posner, *Political Trials in Domestic and International Law*, 55 DUKE L.J. 75, 135 (2005) (writing that "the Nuremberg trial helped extend international law beyond its traditional application to states and into the realm of human rights.").

11. Kyle Rex Jacobson, *Doing Business with the Devil: The Challenges of Prosecuting Corporate Officials Whose Business Transactions Facilitate War*

referred to generally as the “industrialist cases,” found that German citizens, primarily wealthy industrialists, were guilty of committing war crimes.¹² One of these war crimes, termed “aggressive war,” is based on the theory that these individuals had encouraged Germany to make war in order to secure economic gain through military investments in industry.¹³ All those charged with this specific war crime were later acquitted on the belief that their actions were not covered by the Nuremberg Charter and that “active participation in the armament of Germany did not suffice to render an individual guilty of aggressive war.”¹⁴ Other businessmen were found guilty and were sentenced with prison—and death by hanging in some cases—for engaging in property crimes, slave labor, and as accessories to war crimes.¹⁵ Indeed, the tribunals explicitly rejected the argument that private individuals could not be charged with war crimes or crimes against humanity.¹⁶ In addition to directly prosecuting corporate leaders for crimes committed in an individual capacity, the Nuremberg trials also opened up another avenue for charging corporations with human rights violations: complicit liability such as aiding and abetting.¹⁷ Since the Nuremberg trials, the Genocide

Crimes and Crimes Against Humanity, 56 A.F.L. REV. 167, 170 (2005).

12. See Allison Marston Danner, *The Nuremberg Industrialist Prosecutions and Aggressive War*, 46 VA. J. INT'L L. 651, 653 (2006).

13. See *id.*

14. See *id.* at 657–58. See also *United States v. Flick (The Flick Case)*, in 6 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW 10, at 1192 (1952).

15. See, e.g., *Trial of Bruno Tesch and Two Others (The Zyklon B Case)*, 1 U.N. WAR CRIMES COMM'N, LAW REPORTS OF TRIALS OF WAR CRIMINALS 93, 101 (1947) (Brit. Mil. Ct. 1946) (convicting Bruno Tesch of distributing the poison gas, Zyklon B, to concentration camps knowing it would be used to kill civilians); *United States v. Flick (The Flick Case)*, in 6 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW 10, at 681, 852, 1186 (1952) (convicting Frederick Flick and other members of a mining conglomerate of contributing money to the Nazi government with full knowledge of their crimes); *United States v. Krauch (The I.G. Farben Case)*, in 7-8 *id.* at 309 (1942) (convicting thirteen executives of I.G. Farben, a chemical corporation, of unlawful deportation and the use of slave labor); *United States v. Krupp (The Krupp Case)*, in 9 *id.* at 467, 667 (convicting eleven defendants, executives of Krupp Industrial, of exploitation and slave labor offenses).

16. See Charter of the International Military Tribunal, art. 6, Aug. 8, 1945, 82 U.N.T.S. 286; see also *The I.G. Farben Case*, in 8 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW 10, at 1136 (1942) (“It can no longer be questioned that the criminal sanctions of international law are applicable to private individuals.”).

17. Richard Herz, *Text of Remarks: Corporate Alien Tort Liability and the*

Convention, the ad hoc international criminal tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) as well as the ICC have all recognized that along with individuals, non-state actors such as corporations could be held accountable for violations of international law.¹⁸

B. FORMS OF CORPORATE LIABILITY FOR INTERNATIONAL OFFENSES

Efforts to remedy corporate wrongdoing have largely followed three approaches: civil liability imposed by domestic courts, United Nations Security Council (UNSC) resolutions, and soft law.

i. Civil Liability

The most prominent codification of civil liability for international offenses is the US Alien Tort Claims Act (ATCA). Starting with the landmark case *Filartiga v. Pena-Irala* in 1980, human rights lawyers began to use the ATCA to bring a series of lawsuits against foreign human rights violators, including corporations, in U.S. federal courts.¹⁹ Liability under the ATCA attaches when a violation of either “the law of nations” or “a treaty of the United States” occurs.²⁰ The Supreme Court has interpreted these terms to extend only to offenses that would violate 1789-era international law such as piracy, infringement of ambassadorial rights, and violation of safe conduct,²¹ as well as violations of modern international norms of comparable definiteness and agreement among

Legacy of Nuremberg, 10 GONZ. J. INT'L L. 76, 77 (2006–2007). For example, in *Bodner v. Banque Paribas*, an action brought under the U.S. Alien Tort Statute whereby non-U.S. citizens can bring claims against one another for violations of the law of nations, the court expressly relied on the Nuremberg trials in finding that corporations could be found liable for their complicity in human rights violations. See *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117, 134 (E.D.N.Y. 2000).

18. See Gwynne Skinner, *Nuremberg's Legacy Continues: The Nuremberg Trials' Influence on Human Rights Litigation in U.S. Courts Under the Alien Tort Statute*, 71 Alb. L. Rev. 321, 340–41 (2008)

19. In *Filartiga*, two Paraguayan citizens employed a then-seldom-used 1789 statute, the ATCA, to sue a Paraguayan government official for an act of torture that took place in Paraguay. The litigation resulted in an award of \$10.3 million in damages. See *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

20. 28 U.S.C. § 1350 (2006).

21. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 714–15 (2004).

civilized nations as the 1789-era claims.²² Assuming a plaintiff can allege a valid claim, the ATCA covers general corporate activity²³ and also permits courts to find a parent corporation liable for the actions of its subsidiaries under certain circumstances.²⁴

Besides the vagueness of what torts come within the Act's ambit, commentators have highlighted three other drawbacks to the ATCA for plaintiffs. First, the majority of jurisdictions require a showing that the corporation either acted with state aid or in concert with a state actor.²⁵ This prong heightens the investigatory demands on plaintiffs and suggests that claims lacking a state component may not be justiciable under the ATCA. Second, U.S. courts tend not to exercise personal jurisdiction over defendants save when "sufficient connections" exist between the court and the defendant.²⁶ In the case of foreign state defendants, demonstrating sufficient connections can be a taxing bar for plaintiffs.²⁷ Third, even if a litigant surmounts the first two hurdles, *forum non conveniens* often prevents the claim.²⁸ In concert, these three features pose

22. *Id.* at 732.

23. *See Doe v. Unocal Corp.*, 963 F. Supp. 880, 891 (C.D. Cal. 1997) (concluding that international law may hold private actors like Unocal Corp. liable for major violations of international law); *Kadic v. Karadžić*, 70 F.3d 232, 239 (2d Cir. 1995) (finding that non-state actors can violate the law of nations including war crimes and other international criminal offenses).

24. *See In re South African Apartheid Litigation*, 617 F. Supp. 2d 228, 271 (S.D.N.Y. 2009) ("In some instances, the corporate relationship between a parent and its subsidiary [is] sufficiently close as to justify piercing the corporate veil and holding one corporation legally accountable for the actions of the other." (alternation in original) (internal quotations omitted) (quoting Thomson-CSF, S.A. v. American Arbitration Ass'n, 64 F.3d 773, 777 (2d Cir. 1995))).

25. *See, e.g., Kadic*, 70 F.3d at 239–40, 245; *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 104–05 (2d Cir. 2000). *But Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 791–95 (1984) (Edwards, J., concurring) (writing that for a handful of private acts, such as piracy and slave trading, the ATCA permitted individual liability absent state aid).

26. *See Developments in the Law—International Criminal Law: Corporate Liability for Violations of International Human Rights Law*, 114 HARV. L. REV. 2025, 2039–40 (2000–2001) [hereinafter *Corporate Liability*]; *Wiwa*, 226 F.3d 88 (noting the various standards to determine whether plaintiffs and defendants have sufficient contacts in a state to make them subject to the court's personal jurisdiction definition).

27. *See generally Corporate Liability* at 2040. *But see Wiwa*, 226 F.3d 88 (stating the Second Circuit's reversal of the judgment dismissing claims based on the absence of personal jurisdiction over two foreign corporations).

28. *See, e.g., Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534 (S.D.N.Y. 2001) (noting a dismissal of plaintiff's claims against a U.S. firm on grounds that the

considerable obstacles to plaintiffs seeking U.S. court jurisdiction, particularly low-income citizens of developing nations.

ii. United Nations Security Council

The United Nations (UN) Charter charges the UNSC with maintaining international order and security.²⁹ Where a threat to peace exists, the UNSC has the authority to adopt non-military measures such as “complete or partial interruption of economic relations”³⁰ These sanctions can target the business activities of States, individuals, and groups of individuals or legal persons.³¹ For example, in 1993 the UNSC placed an embargo on arms and oil in Angola to hinder an Angolan military group.³² Similarly, in 2000 it banned diamond exports in Sierra Leone.³³

However, UN sanctions suffer from a significant shortcoming: indirectness.³⁴ The UN cannot prosecute individuals, groups, or entities that violate a UN-imposed embargo.³⁵ As such, member states, rather than the UNSC, have the onus of ensuring legal violations do not go unpunished.³⁶ Even more important, the UNSC did not act in Angola or Sierra Leone to suppress corporate wrongdoing, but rather to pressure specific political regimes.³⁷ Given the UNSC’s silence in the face of the Rwandan genocide,³⁸ the

case should be adjudicated in Ecuador and Peru as more appropriate forums).

29. See U.N. Charter art. 39.

30. *Id.* art. 41.

31. Régis Bismuth, *Mapping a Responsibility of Corporations for Violations of International Humanitarian Law Sailing Between International and Domestic Legal Orders*, 38 DENV. J. INT'L L. & POL'Y 203, 210–11 (2010) (discussing the use of economic sanctions on states, individuals and groups of individuals or legal persons).

32. S.C. Res. 864, ¶ 19, U.N. Doc. S/RES/864 (Sept. 15, 1993).

33. Bismuth, *supra* note 31, at 210–11 (noting the use of sanctions in the diamond conflict in Sierra Leone).

34. *Id.* at 211 (discussing how the UN is unable to directly prosecute individuals, groups and persons violating its embargoes).

35. *Id.*

36. *Id.*

37. See S.C. Res. 1306, Preamble, U.N. Doc. S/RES/1306 (July 5, 2000) (noting that the purpose of the sanctions was to pressure the government of Sierra Leone to establish an effective Certificate of Origin regime in order to aid in establishing stability in the region).

38. See Michael N. Barnett, *The UN Security Council, Indifference, and Genocide in Rwanda*, 12 Cultural Anthropology 551, 561 (1997) (discussing the UNSC’s inaction in the face of suffering in Rwanda).

Burmese pipeline tragedy,³⁹ and a variety of other appalling behaviors,⁴⁰ relying on the UNSC may prove a recipe for impunity.

iii. Soft Law

A variety of organizations such as the UN and the Organization for Economic Co-operation and Development (OECD) have taken a different approach to corporate criminality. Rather than sanctioning activities after the fact, these organizations have fashioned a number of soft laws.⁴¹ Though not technically binding or backed by formal accountability mechanisms,⁴² the international standards championed by these soft laws aim to cultivate a body of norms that will shape future corporate behavior.⁴³ In 2003, for example, the UN Sub-Commission on the Promotion and Protection of Human Rights adopted an initiative entitled “Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights.”⁴⁴ The initiative reaffirmed and fleshed out

39. In Burma, civilians near a pipeline building project “have [allegedly] been subjected to forced labour, rape and even murder by army units working for the oil companies to protect the pipelines.” Shirin Wheeler, *EU probes Burma pipeline abuses*, BBC, Oct. 12, 2001, <http://news.bbc.co.uk/2/hi/europe/1596181.stm>. The United States has imposed sanctions, *id.*, but the UNSC has failed to act. *Crackdown in Burma: Targeted Sanctions Needed*, HUMAN RIGHTS WATCH, (Jan. 11, 2008), <http://www.hrw.org/en/news/2008/01/11/crackdown-burma-targeted-sanctions-needed>.

40. See Daniel Nasaw, *China and Russia Veto Zimbabwe Sanctions*, GUARDIAN, July 11, 2008, <http://www.guardian.co.uk/world/2008/jul/11/uk-nations.zimbabwe> (discussing China and Russia’s blocking of sanctions against Zimbabwe).

41. For the purposes of this Note, “soft law” means non-binding quasi-legal agreements such as UN resolutions and codes of conducts furnished by relevant international non-governmental organizations. For a fuller discussion of soft law see Gregory C. Shaffer and Mark A. Pollack, *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, 94 MINN. L. REV. 706 (2010). For more on soft law initiatives geared towards corporations see John Gerard Ruggie, *Business and Human Rights: The Evolving International Agenda*, 101 AM. J. INT’L L. 819, 819–20 (2007).

42. Barnali Choudhury, *Beyond the Alien Tort Claims Act: Alternative Approaches to Attributing Liability to Corporations for Extraterritorial Abuses*, 26 NW. J. INT’L L. & BUS. 43, 63–66 (2005–2006) (discussing the non-binding nature of the OECD Guidelines for Multinational Enterprises).

43. Bismuth, *supra* note 31, at 211–12 (discussing the OECD’s attempt at using soft law to shape corporate behavior).

44. U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm’n on the Promotion and Prot. of Human Rights, *Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, U.N. Doc.

corporations' responsibility to respect international commercial law, particularly in relation to the rights of workers and the security of people.⁴⁵

iv. A New Contender: Corporate Criminal Liability

a. The International Criminal Court

Another potential conduit for holding corporations liable is the ICC. However, in its current form the ICC does not have the authority to do so. Under Article 5 of the Rome Statute, the ICC has jurisdiction over natural, but not legal persons⁴⁶ committing the "most serious [international] crimes."⁴⁷ To date, this mandate encompasses genocide, crimes against humanity, and war crimes.⁴⁸

In order for the ICC to exercise jurisdiction one of four preconditions must be met: (1) the person accused of committing a crime is a national of a state party to the Rome Statute,⁴⁹ (2) the alleged crime was committed in the territory of a state party to the Rome Statute,⁵⁰ (3) the UNSC refers the case to the ICC,⁵¹ or (4) either the state where the accused is a national or the state where the crime was committed accepts the jurisdiction of the court.⁵² To exercise that jurisdiction the case must be referred to the Prosecutor by either a state party or the UNSC.⁵³ Alternatively, the Prosecutor may also decide to unilaterally initiate an investigation, but must go before a pre-trial chamber to get further authorization if his initial findings indicate a reasonable basis for continuing the investigation.⁵⁴

E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003). For more information on soft laws impact on international behavior see 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 (2003).

45. Weissbrodt & Kruger, *supra* note 44, at 911–12 (discussing the responsibilities corporations have over activities within their influence).

46. See Rome Statute of the International Criminal Court art. 25, July 17, 1998, 2187 U.N.T.S. 90, reprinted in 37 I.L.M. 1002 (1998), available at <http://untreaty.un.org/cod/icc/statute/romefra.htm> [hereinafter Rome Statute] (referencing natural persons, but not legal persons).

47. *Id.* art. 5(1).

48. *Id.* art. 5(1)(a–d).

49. *Id.* art. 12(2)(b).

50. *Id.* art. 12(2)(a).

51. *Id.* art. 13(b).

52. Rome Statute, *supra* note 46, art. 12(3).

53. *Id.* art. 13.

54. *Id.* art. 15.

In addition to limited territorial jurisdiction, ICC jurisdiction has another critical limitation known as complementarity, which recognizes the right of states to have the first opportunity to prosecute their own nationals.⁵⁵ Under the principle of complementarity, the ICC may act only if a state will not or cannot genuinely investigate or prosecute the crime at issue.⁵⁶ Furthermore, the ICC may only act if a crime is of sufficient gravity and if the individual has not already been tried for the same conduct in another court.⁵⁷

b. Domestic Approaches

While the ICC does not hold corporations criminally liable, a growing number of countries employ various forms of corporate criminal liability in their domestic law, such as The Netherlands, Denmark, Finland, Switzerland and France.⁵⁸ Some countries, for instance France, generally restrict liability to high ranking officials and their agents.⁵⁹ Others, like the United States, permit holding corporations criminally liable for the actions of each employee as well as the cumulative acts of its employees.⁶⁰ For example, a US federal prosecutor can charge a corporation with a crime if any employee, not just a high-ranking employee,⁶¹ commits an offense.⁶² Furthermore, if multiple individuals within the corporation possess the elements of criminal wrongdoing, a court may attribute their aggregate knowledge to the corporation.⁶³ Under the aggregate knowledge test, even if a court could not find any single employee liable, it could find the corporation liable. Importantly, the US criminal liability regime also allows a

55. Kari M. Fletcher, *Defining the Crime of Aggression: Is There an Answer to the International Criminal Court's Dilemma?*, 65 A.F.L. REV. 229, 246 (2010).

56. Rome Statute, *supra* note 46, art. 17(a–b).

57. *Id.* art. 17(1)(c–d).

58. Sara Sun Beale & Adam G. Safwat, *What Developments in Western Europe Tell Us About American Critiques of Corporate Criminal Liability*, 8 BUFF. CRIM. L. REV. 89, 110–15 (2004).

59. *Id.* at 117.

60. Being able to impute the cumulative acts of the corporation's employees is particularly important in cases where no one employee has done enough to incur liability.

61. *United States v. Twentieth Century Fox Film Corp.*, 882 F.2d 656, 660 (2d Cir. 1989).

62. *United States v. Sain*, 141 F.3d 463, 475–76 (3rd Cir. 1998).

63. *United States v. Bank of New England, N.A.*, 821 F.2d 844, 856 (1st Cir. 1987).

court to extend liability from the immediate corporation to controlling parent corporations⁶⁴ or de facto successor corporations if necessary.⁶⁵

In general, a corporation may be criminally responsible under US corporate criminal liability for the illegal acts of its employees provided that such acts are: (1) connected to and done within the course of employment, (2) for the benefit of the corporation, and (3) with the authorization or acquiescence of the corporation.⁶⁶ In assessing a corporation's culpability, a judge must consider four aggravating factors and two mitigating factors. The aggravating factors include (1) the involvement in or tolerance of criminal activity by "high level" or "substantial authority" personnel, (2) a recent history of similar misconduct on the organization's part, (3) a violation of a judicial order or condition of probation, and (4) whether the corporation tried to obstruct justice.⁶⁷ Mitigating factors include (1) the presence of "an effective program to prevent and detect violations of law" by corporate agents and (2) the extent of the corporation's cooperation with law enforcement officials.⁶⁸

At sentencing, a judge has a number of sanctions at his or her disposal. The most common penalty is fines.⁶⁹ However, judges can also deprive the corporation of the gains it received as a result of its illegal activities,⁷⁰ suspend the corporation's operations for a period of time, dissolve the corporation altogether (i.e., a corporate death sentence), or order the corporation to pay for negative publicity (e.g., tobacco companies in the United States have to pay for anti-smoking advertisements).⁷¹ Finally, a judge may try to rehabilitate the corporation.⁷² As a matter of practice, the main sanctions tend

64. *Massachusetts v. Beneficial Finance Co.*, 275 N.E.2d 33, 91–92 (Mass. 1971).

65. *United States v. Shields Rubber Corp.*, 732 F. Supp 569, 571–72 (W.D.Pa. 1989).

66. 10 WILLIAM MEADE FLETCHER ET AL., *FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS* § 4942 (perm. ed., rev. vol. 2009)..

67. Jennifer Moore, *Corporate Culpability under the Federal Sentencing Guidelines*, 34 ARIZ. L. REV. 743, 784 (1992).

68. *Id.*

69. ANCA IULIA POP, *CRIMINAL LIABILITY OF CORPORATIONS-COMPARATIVE JURISPRUDENCE* 39 (2006) *available at* http://www.law.msu.edu/king/2006/2006_Pop.pdf.

70. *Id.* at 40.

71. *Id.* at 4, 39.

72. Traditionally, this occurs through one of two forms: by placing the

to be fines, restitution, remedial orders, community service, and probation.⁷³

C. BODIES OF JUSTICE: PROS AND CONS OF DOMESTIC AND INTERNATIONAL COURTS

Assuming the international community prefers a legal solution over an ad hoc process involving the UNSC, two likely approaches exist for handling major human rights abuses: domestic proceedings (whether civil or administrative) and international tribunals.⁷⁴ Which forum handles a corporate abuse case can have profound implications for the corporation, the victims, and the local government.

i. Domestic Trials

Prosecuting corporate offenders in domestic courts has three primary benefits. First, domestic trials can burnish the political legitimacy of a regime, particularly a new regime, at the local, national, and international level.⁷⁵ For developing nations especially, prosecuting violations simultaneously demonstrates the regime's capacity and respect for human rights.⁷⁶ Greater capacity and respect for the rule of law can favorably demark a new government from an old regime.⁷⁷ Second, domestic prosecution builds up the local legal system by establishing local courts and police forces as fair and

corporation on probation or by ordering it to reorganize. *Id.* at 38–39.

73. *Id.* at 38–44.

74. See generally M. Cherif Bassiouni, *Searching for Peace and Achieving Justice: The Need for Accountability*, 59 LAW & CONTEMP. PROBS. 9 (1996) (arguing that the international community has a moral obligation to seek justice following human rights abuses, whether by international or domestic mechanisms); Christopher C. Joyner, *Redressing Impunity for Human Rights Violations: The Universal Declaration and the Search for Accountability*, 26 DENV. J. INT'L L. & POL'Y 591 (1998) (highlighting the importance of victim redress for human rights violations and deploring the prevalence of impunity for violators); Neil J. Kritz, *Coming To Terms with Atrocities: A Review of Accountability Mechanisms For Mass Violations of Human Rights*, 59 LAW & CONTEMP. PROBS. 127 (1996) (explaining that the appropriate response to human rights abuses will depend on the specific circumstances and should take into account the needs of the victims).

75. Kritz, *supra* note 74, at 132.

76. See *id.* at 132–33 (noting that trials demonstrate the new regimes determination to hold individuals accountable as well as the capacity to actually do so through a rebuilt legal system).

77. See *id.* (noting that trials of serious claims like war crimes garner considerable international attention and show the new government's resolve for holding perpetrators accountable).

effective.⁷⁸ Last, domestic prosecutions provide catharsis. That is, the prosecution acknowledges the wrongs of the past while promising hope for a better future, free of human rights violations.⁷⁹

At the same time, domestic trials, especially in the developing world, have several weaknesses. Procedural irregularities, political pressure, and lingering societal strife can color domestic adjudications.⁸⁰ This coloring can cut both ways. Inadequate procedural safeguards such as a lack of transparency provide an environment conducive to corruption.⁸¹ That kind of environment in turn provides corporations with numerous opportunities to influence the proceedings. On the other hand, local political sentiment may permit states to victimize corporations through unfair, politicized laws.⁸² Along with procedural and political problems, domestic courts also face major jurisdictional restraints.⁸³ In most cases, domestic courts can only impose jurisdiction when the person or the crime is linked to the state the court resides in.⁸⁴

ii. International Tribunals

Besides domestic proceedings, the other major method available for resolving international corporate human rights abuse is international tribunals. The international nature of these tribunals is their greatest advantage. The global backing inherent in an international forum “convey[s] a clear message that the international community will not tolerate such

78. See *id.* at 133 (noting that such trials “provide an important focus for rebuilding the domestic judiciary and criminal justice system” and establish “local courts as a credible forum for the redress of grievances in a nonviolent manner.”).

79. Milena Sterio, *Rethinking Amnesty*, 34 DENV. J. INT'L L. & POL'Y 373, 375 (2006).

80. See Kritz, *supra* note 74, at 136–39 (citing Bosnia as illustrative of the difficulties incumbent in politically and ethnically divided societies).

81. See Sterio, *supra* note 79, at 376 (noting that in this type of environment judges may be biased due to corruption).

82. For example, in August 1960, Cuba issued an executive resolution expropriating all property and enterprises wholly or principally owned by American nationals. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 403 (1964). More recently, Bolivia and Venezuela have nationalized much of their oil industries, expropriating the property of companies like ConocoPhillips, Chevron, Exxon Mobil, BP, and Total. *Venezuela Takes Over Refineries*, BBC NEWS (May 2, 2007), <http://news.bbc.co.uk/2/hi/business/6610333.stm>.

83. Sterio, *supra* note 79, at 376.

84. *Id.*

atrocities”⁸⁵ In addition to signaling the international community’s resolve, application of international law eliminates the potentially unfair use of politically-driven domestic laws while advancing the legitimacy of international human rights standards. Finally, an international body can often avoid procedural issues relating to jurisdiction and access to evidence that frequently hinder domestic courts.⁸⁶ Likewise, a tribunal’s global reputation might secure cooperation from third parties and theoretically “neutral” governments that a domestic tribunal would not receive.⁸⁷

For all of their benefits, international judicial bodies have some serious drawbacks. First, international judges and prosecutors may ignore, or, at least, undervalue a country’s political situation.⁸⁸ For example, during its first two years of operation in Rwanda the ICTR at times barred its staff from any contact with Rwandan authorities, even those who possessed useful information; did not make contact with victim’s groups, which could have provided a wealth of evidence and information; and generally kept itself at arm’s length from the country.⁸⁹ That distance left the impression that Rwanda’s wounds were “completely irrelevant to tribunal officials.”⁹⁰ Second, international prosecutions may only have a muted impact within the country of the human rights violation.⁹¹ The proceedings generally take place in a foreign tongue in a courtroom far from both the place of the crime and the people most directly affected by the prosecution.⁹² This often causes local populations to see the tribunal decisions as the product of “occidental bias and victor’s justice” rather than as a fair and

85. Kritz, *supra* note 74, at 129.

86. *See id.* at 129–30 (noting that personal jurisdiction and access to evidence issues are often more easily solved by an international court whose statute was specifically designed to deal with these kinds of situations).

87. *See id.* For example, often potential defendants are not accessible or have long since vacated the territory where the atrocities were committed; thus, “an international tribunal stands a greater chance than local courts of obtaining their physical custody and extradition.” *Id.* at 129.

88. *See id.* at 145–46 (highlighting the disconnect between the International Criminal Tribunal for Rwanda and the country of Rwanda itself).

89. *Id.* at 146.

90. *Id.*

91. *See id.* at 132–33.

92. *Id.* at 130–31 (explaining the reasons why the ICTY and ICTR did not sit within Yugoslavia and Rwanda respectively).

impartial determination.⁹³ Third, a number of hybrid international fora like the ICTY and ICTR do not possess automatic enforcement mechanisms.⁹⁴ As such, these bodies rely on state cooperation to give effect to their judgments.⁹⁵

In summary, three main potential mechanisms exist for combating international corporate human rights abuse: the UNSC and other state-to-state relations, domestic courts, and international tribunals. For the latter two options, two types of liability exist: criminal and civil. As discussed above, each of these approaches has pros and cons. In light of these strengths and weaknesses, this Note turns to a comparison of the options and makes some recommendations.

II. ANALYSIS

A. COMPARING THE CONTENDERS

i. UN Security Council and Soft Law are (Small) Parts of the Solution

Despite the inconsistent enforcement of UNSC resolutions, and the non-binding nature of soft laws, the two mechanisms nevertheless play a normative role in altering future behavior. According to Harold Hongju Koh, international human rights law develops through a process in which norms and rules are generated, internalized, and, ultimately, adopted as the new rules governing international conduct.⁹⁶ Following this line of reasoning, UNSC resolutions and soft laws, combined with efforts to reduce the immediate problem, provide norm-generating guidance for future actors. That is, they provide normative guidance about how actors ought to behave. Over time, these normative appeals seep into an international actor's decisions and eventually guide that actor's behavior, whether consciously or not.

However, norm generation does little in the present to hold corporations responsible or to provide victims a sense of justice. Take for example Burma. In order to clear land designated for

93. Sterio, *supra* note 79, at 378.

94. Kingsley Chiedu Moghalu, *Image and Reality of War Crimes Justice: External Perceptions of the International Criminal Tribunal for Rwanda*, 26 FLETCHER F. WORLD AFF. (FALL) 21, 23 (2002).

95. *Id.*

96. Harold Hongju Koh, *How is International Human Rights Law Enforced?*, 74 IND. L.J. 1397, 1407 (1998).

a pipeline, Burmese agents used rape, torture, and murder to relocate people that refused to leave their homes.⁹⁷ However, the country's leadership has thus far escaped formal approbation from the UNSC.⁹⁸ Indeed, China has taken a leading role in protecting Burma from repercussions.⁹⁹ Zimbabwe, too, has sidestepped sanctions despite its atrocious human rights record.¹⁰⁰ Something beyond waiting for norms to slowly coalesce should be done.

ii. Stacking Them Up: Civil Liability vs. Criminal Liability

Going beyond generating norms, civil liability offers victims concrete opportunities to redress the harm visited upon them by corporations violating human rights. However, although civil liability has some significant advantages, it also suffers from serious shortcomings that do not arise with criminal liability. These shortcomings suggest an opportunity for criminal liability to become an important arrow in the international system's quiver to combat corporate malfeasance.

Prime among civil liability's advantages is its ubiquity. Almost every jurisdiction (if not all) have laws imposing civil liability.¹⁰¹ As such, corporations theoretically face the risk of litigation throughout the globe. Similarly, civil liability covers more actors than criminal liability. That is, civil liability applies to both natural and legal persons, while criminal law tends to focus on natural persons and often limits the liability of legal persons.¹⁰² Likewise, civil liability generally requires a lower burden of proof than criminal liability.¹⁰³ For example, in the United States criminal liability requires proof beyond a reasonable doubt¹⁰⁴ whereas civil liability only necessitates a

97. *Doe I v. Unocal Corp.*, 395 F.3d 932, 936 (9th Cir. 2002), *reh'g en banc granted*, 395 F.3d 978 (9th Cir. 2003), *appeal dismissed and district court opinion vacated*, 403 F.3d 708 (9th Cir. 2005).

98. Edith M. Lederer, *China, Russia Veto Myanmar Resolution*, WASH. POST, Jan. 14, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/01/13/AR2007011300296.html>.

99. Colum Lynch, *U.S. Push for Burmese War Crimes Probe Hits Chinese Wall*, FOREIGN POL'Y BLOG (Oct. 24, 2010, 12:34 PM), http://turtlebay.foreignpolicy.com/posts/2010/10/24/us_push_for_burmese_war_crimes_probe_hits_chinese_wall.

100. Nasaw, *supra* note 40.

101. 3 INT'L COMM'N OF JURISTS, CORPORATE COMPLICITY & LEGAL ACCOUNTABILITY 10 (2008), *available at* http://icj.org/IMG/Volume_3.pdf.

102. *Id.* at 4–6.

103. *Id.*

104. *In re Winship*, 397 U.S. 358 (1970) (requiring the government to prove

preponderance of the evidence.¹⁰⁵ That lower burden theoretically makes it easier for plaintiffs to successfully prosecute their claim. Finally, civil liability provides an independent source of recompense that victims can pursue regardless of how the victim's government handles the situation.¹⁰⁶ Conversely, criminal proceedings depend on government action since the prosecutor typically has the last word on whether a prosecution will go forward.

Benefits aside, civil liability possesses some serious flaws. First, civil liability tends to be time restricted. Since victims of human rights violations often take a long time to organize and act against a violator, time is an integral component of holding human rights violators responsible.¹⁰⁷ Second, civil liability faces jurisdictional restraints. For instance, it can be difficult if not impossible to sue a corporation for an offense in State Y if the crime happened in State X against a person from State X.¹⁰⁸ At first glance it may seem right that if a corporation harms a citizen of one state in that citizen's state, civil suits should go forward in that state. However, this can raise problems, particularly in certain developing countries and quasi-states where legal mechanisms are non-existent, inadequate, or corrupt. Third, the elements of civil liability, principally negligence, intentionality, and causation, may not translate well to grave international crimes.¹⁰⁹ Fourth, civil liability makes for an unpredictable process due to the difficulty of calculating which set of laws applies in all but the most straightforward cases. Take for instance a case in which a crime occurred in State W against a person from State X by a citizen of State Z who was acting as an agent of a corporation based in State Y. Some states would apply the law of the country where the harm occurred while other states would use the law of the corporation's home country or the victim's home country for various other plausible reasons.¹¹⁰ This uncertainty

every essential element of a criminal offense beyond a reasonable doubt); *see, e.g.*, *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000).

105. *See, e.g.*, *Dunlop v. Daigle*, 444 A.2d 519, 520 (N.H. 1982) ("In a civil action the burden of proof is generally on the plaintiff to establish its case by a preponderance of the evidence.") (citing MCCORMICK ON EVIDENCE § 339 (E. Cleary ed., 2d ed. 1972)).

106. INT'L COMM'N OF JURISTS, *supra* note 101, at 4–6.

107. *See id.* at 44–45.

108. *See id.* at 49–51.

109. *Id.* at 13, 21.

110. *Id.* at 51–53; *see also* Eric Mongelard, *Corporate Civil Liability for*

raises litigation costs by guaranteeing a legal battle over which state's law to apply. Fifth, civil liability fails to adequately capture the gravity of war crimes, crimes against humanity, and genocide. No matter how high the monetary fine, to label a crime "non-criminal" lessens the stigma and seriousness of the crime.¹¹¹ Indeed, a financial judgment may suggest little more than that a corporation did something questionable and elected to pay to make the problem go away. Finally, the civil system is less well equipped than criminal systems to handle major international crimes perpetrated by corporations because of their ponderous mechanisms for investigation and evidence collection.¹¹²

An international criminal law approach, in contrast, would remedy the gaps in civil liability. War crimes, crimes against humanity, and genocide do not have a statute of limitations.¹¹³ An international approach would likely surmount at least some of the jurisdiction issues that any lone domestic legal system would face. A criminal law approach applying commonly-agreed upon laws would mitigate the choice of law challenges common to civil litigation. Moreover, labeling an activity as criminal rather than civil conveys the gravity of wrongdoing and heightens the stigma of the activity. Last, unlike a private civil attorney, a criminal prosecutor has significantly more tools and the backing of a state to aid him in investigating crime and collecting evidence. This would have a two-fold benefit. It would ameliorate at least some of the difficulties inherent in trying to uncover evidence that offenders can easily destroy or suppress in the kinds of places human rights violations abound. It would also put an attorney on more even footing with an offending corporation. That is, whereas civil attorneys take on multinational corporations with little more than the resources of his or her firm, a criminal prosecutor would have the authority and resources of his state.

In addition to the advantages highlighted above, corporate criminal liability has several other availing qualities. Criminal

Violations of International Humanitarian Law, 88 INT'L REV. RED CROSS 665, 687 (2006).

111. Mordechai Kremnitzer, *A Possible Case for Imposing Criminal Liability on Corporations in International Criminal Law*, 8 J. INT'L CRIM. JUST. 909, 915 (2010).

112. *Id.* at 916.

113. Rome Statute, *supra* note 46, art. 29. Still, even without a statute of limitations, in practice seeking a conviction for events in the distant past may be difficult.

proceedings carry a powerful educational message.¹¹⁴ They also provide a better guarantee for victims who often are poor, perhaps illiterate, and typically disenfranchised.¹¹⁵ These are the kind of people that may need outside help like a government prosecutor to get justice since they do not generally have the awareness or money to hire a civil attorney. Furthermore, criminal corporate liability creates strong incentives in favor of compliance. Linking corporate compliance with sensible guidelines results in corporations that exercise care to prevent and deter criminal conduct. They also promote an organizational culture that encourages ethical conduct and lawful behavior.¹¹⁶ Corporate criminality improves the chances of uncovering the guilty party (or parties). Frequently an outside investigator, whether due to the size of the corporation or efforts by the corporation to hide information, cannot find the responsible person(s) whereas the corporation can.¹¹⁷ Additionally, “[because] of the diffusion of responsibility in organizations and the ways in which individual decisions are channeled by corporate rules, policies and structures,” in rare circumstances no individual or group of individuals may in fact deserve blame for the crime.¹¹⁸ In such case, it makes sense to blame the corporation rather than its agents for the crime. Finally, corporate culture can cultivate the root cause of an employee’s criminal activity.¹¹⁹ For example, if the corporation provides large financial incentives for getting quick results and has a history of turning a blind eye to criminal indiscretions, then it arguably played a key role in encouraging illegal activity.

iii. Criticisms of Corporate Criminal Liability

As noted above, criminal liability possesses a number of benefits in the international corporate criminal context. However, not everyone supports corporate criminal liability (international or otherwise). These critics have raised a variety

114. Kremnitzer, *supra* note 111.

115. *See id.*

116. *Cf.* Rebecca Walker, *The Evolution of the Law of Corporate Compliance in the United States: A Brief Overview*, 1731 *PLI/CORP* 15, 24 (2009) (listing the existence and adequacy of a pre-existing compliance program as a possible consideration when prosecutors are determining when to charge a corporation with criminal misconduct).

117. Moore, *supra* note 67, at 754.

118. *Id.*

119. *Id.* at 753.

of objections to the practice ranging from philosophical to practical. As discussed below, however, the force behind these concerns is greatly diminished when considered within an international context.

The first objection comes from philosophical-minded detractors who argue that corporations cannot have the required mens rea for criminal liability. While individuals have the capacity to know right from wrong, corporations lack that capacity and therefore cannot be criminally liable.¹²⁰ On the other hand, proponents of holding corporations criminally liable would argue that the corporate structure resembles that of a human being. They have brains (the board of directors) as well as hands and feet (agents). Therefore, when corporations have the requisite criminal state of mind and act on it, corporations should suffer the fruit of its illegality. In essence, if corporations want to enjoy the benefits of legal personhood, they should incur the same consequences as natural persons.

Other critics contend that criminal liability would actually protect individuals within the corporation, making it harder to achieve convictions.¹²¹ They argue that prosecutors will focus on the big prize, the corporation rather than individuals,¹²² and that, in turn, a corporation may seek to protect a guilty employee in order to protect itself from criminal sanctions stemming from its agent's activities.¹²³ However, this already occurs within civil litigation. Civil attorneys focus on the deepest pockets connected to their litigation. Usually that will be the corporation. As such, at risk corporations already have significant incentives to protect the guilty party in order to minimize its own risks.¹²⁴ Likewise, a number of countries already possess domestic corporate criminal liability.¹²⁵ Imposing criminal liability at the international level would not result in increased impunity for guilty corporate officials.

120. H.J. Hirsch, *La Criminalisation Du Comportement Collectif- Allemagne*, in *LA CRIMINALISATION DU COMPORTEMENT COLLECTIF: CRIMINAL LIABILITY OF CORPORATIONS* 31, 39 (H. de Doelder & Klaus Tiedemann eds., Kluwer Int'l, 1996).

121. DiMento et al., *Corporate Criminal Liability: A Bibliography*, 28 W. ST. U. L. REV. 1, 3 (2000-01).

122. *Id.*

123. *Id.*

124. For example, under the doctrine of respondeat superior, a corporation may be held liable for the acts of its agents 10 WILLIAM MEADE FLETCHER ET AL., *FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS* § 4877 (perm. ed., rev. vol. 2009).

125. *See supra* Section I.B.4.b.

Indeed, it would lead to greater accountability since states would have greater incentive as well as political cover¹²⁶ to investigate and prosecute corporations and their officials than they do currently.

Another argument made by opponents of corporate criminal liability is that the primary gain of criminal liability, deterrence through the public condemnation and shaming of the guilty, does not apply to corporations since people, not corporations feel remorse.¹²⁷ Given this fact, it makes little sense to introduce the higher burden of proof and less flexible court proceedings that come with criminal liability. However, public shaming affects a corporation where it cares the most: its share price and bottom line.¹²⁸ A corporation that engaged in behavior that led to criminal sanctions and the resulting penalties and bad press would likely find its stock value reduced.¹²⁹ Since corporate board members are beholden to shareholders and often receive stock options as remuneration, they presumably have plenty of reasons to avoid criminal activities.¹³⁰

Critics also contend that imputing culpability would routinely fail to distinguish between official and unofficial acts.¹³¹ These critics worry about holding a corporation liable

126. That is, international law would give domestic actors a legitimate excuse to act on the grounds that if the state does not act the international tribunal will. In such a scenario, domestic leaders can reasonably argue that it is better for the state to investigate and pursue legitimate claims than to ignore the case and trust the international tribunal to handle the case.

127. V.S. Khanna, *Corporate Criminal Liability: What Purposes Does It Serve?* 109 HARV. L. REV. 1477, 1495.

128. Unethical behavior, if discovered, hurts a business' profitability in a number of ways. Unethical behavior may lead to fines and lawsuits as well as deterring consumers from patronizing the business. For instance, a 2001 survey found that seventy-six percent of Americans would boycott a company known to have "negative corporate citizen practices." Unethical behavior has other less obvious negative impacts on the bottom line as well. It can be harder to maintain and attract quality employees raising the cost of hiring and training new and potentially less qualified replacements. A company is also less likely to benefit from community goodwill which can translate into lost opportunities to gain "tax advantages, recruitment opportunities and strategic alliances." Amie J. Devero, *Corporate Values Aren't Just Wall Posters—They're Strategic Tools*, AM. MGMT. ASS'N., http://www.thelevergroup.com/graphics/articles/mworld%20edited_ama_%20logo.pdf.

129. Khanna, *supra* note 127, at 1495.

130. John T. Byam, Comment, *The Economic Inefficiency of Corporate Criminal Liability*, 73 J. CRIM. L. & CRIMINOLOGY 582, 586–87 (1982).

131. Moore, *supra* note 67, at 759.

for the acts of its agents even if the corporation did not know of, condone, or imply that the agent should commit the act. For these critics, aggregating a corporation's culpability would have to include carefully considering whether upper management knew or aided an agent's actions as a matter of corporate policy. Too often, these critics conclude, the acts of rogue employees acting contrary to corporate policy or where even careful oversight would not have detected the crime get unjustly imputed to the parent organization.¹³² This concern seems like a weak criticism in the case of major international violations. Major international criminal offenses like genocide, war crimes, and crimes against humanity generally depend on an extensive array of activities. In such cases, wary corporate leadership likely would know (or ought to know) about the agent's actions.

Another argument brought by critics of holding corporations criminally liable is that prosecutors would abuse their power.¹³³ Take, for example, the United States. Although prosecutors seldom indict corporations, critics proffer that in cases of corporate criminal allegations prosecutors regularly use their expansive powers to aggressively investigate the corporation and force it to make broad concessions. In exchange for the prosecutor deferring prosecutions, corporations regularly waive lawyer-client privilege,¹³⁴ force removal of senior management,¹³⁵ and stipulate to the facts as the

132. *Id.*

133. To demonstrate this criticism, consider Fischer Homes. In 2006 police conducted a large raid against Fischer Homes. The police seized thousands of pages of documents, made sure news cameras captured the entire sting operation, and eventually indicted seven employees on various criminal charges as well threatening Fischer Homes with a federal indictment for money laundering (a charge designed for use against organized crime, not a legitimate business). They gave the owner, Mr. Fischer two options. He could plead guilty and pay a \$1 million fine or he could risk a conviction. The government also pressured the seven indicted employees to lie (i.e. to commit perjury). The employees refused and the charges were eventually dropped three years after the initial raid and more than a \$1 million in legal fees later. In the end, it would have cost Fischer Homes less if it had simply acquiesced to the government's demand to wrongfully admit its guilt. Jon Entine, *A Parable of Politicized Prosecution*, WASH. POST, July 21, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/20/AR2009072002355.html?hpid=opinionsbox1>.

134. Mary Jo, White, *Corporate Criminal Liability: What Has Gone Wrong?*, 1517 PLI/CORP. 815, 820 (2005).

135. *Id.* at 821–22.

prosecutor sees them to be.¹³⁶ Conversely, proponents of U.S. corporate criminal liability counter accusations of prosecutorial abuse by noting that corporations that have a satisfactory compliance and ethics program are much less likely to be prosecuted for the crimes of its employees.¹³⁷ Furthermore, while a concern in the United States, the situation above seems unlikely at the international level since an international prosecutor is unlikely to wield the coercive power a federal prosecutor has within the United States.¹³⁸

In short, critics have raised a plethora of concerns over criminal liability. These concerns possess varying levels of persuasiveness within a domestic context. However, when viewed through an international lens these critiques lose much of their vitality.

B. A FORK IN THE ROAD: DOMESTIC TRIALS OR AN INTERNATIONAL TRIBUNAL

Thus far this Note has contemplated the various liability regimes the international community possesses to respond to international corporate criminality. It now turns to the mechanisms for carrying out those options. This section highlights the weaknesses of domestic courts and explains why the traditional limitations of international tribunals do not apply in the international corporate criminality context.

A patchwork network of domestic courts adjudicating corporate human rights offenses poses several problems. Chief among them, few states have both the clout and the proclivity

136. *Id.* at 824.

137. *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) (protecting corporations from liability for sexual harassment suits because they had programs in place that the offending employee failed to utilize); *see also Kolstad v. American Dental Ass'n*, 527 U.S. 526 (1999) (stating that corporations will not be liable for managers' discriminatory actions when they are contrary to the employer's "good faith efforts to comply with Title VII").

138. A careful reader might wonder why this point does not cut against the earlier argument in favor of criminal liability—i.e., that prosecutors will have the power of the state behind him. The key lies in balance. Many private attorneys in the developing world may not have the resources to face down a multinational corporation. On the other hand, some U.S. government attorneys have wielded corporate criminal liability like a bludgeon when a scalpel would do. In the middle, an international prosecutor would have greater resources than a developing world attorney, but less authority than a U.S. federal prosecutor.

to take up major corporate human rights offenses.¹³⁹ To illustrate the issue, consider Belgium. Around the millennium Belgian courts entertained a number of cases on the basis of a Belgium statute granting its courts universal jurisdiction.¹⁴⁰ However, in the face of repeated forceful warnings from the United States and Britain, Belgium quickly repealed its statute.¹⁴¹ Moreover, even if a domestic court has jurisdiction and renders a judgment, the court has no power to enforce its judgment abroad.¹⁴² An international approach to corporate human rights abuse, on the other hand, would remedy these concerns since any such court would likely have a provision providing for enforcement of its judgments in the courts of signatory states.

In contrast to domestic courts, the primary weaknesses attached to international human rights tribunals apply with less vigor within the context of multinational corporations. For instance, as noted above, international courts often fail to take sufficient account of local sentiment. For example, when South Africa conducted widespread truth and reconciliation commissions (TRC), having an international tribunal try key figures would have undermined the TRCs.¹⁴³ Such meddling would have ignored local wishes, re-opened national wounds, and made future leaders less likely to give up power voluntarily. But offenses by multinational corporations seem unlikely to engender similar problems because prosecutions would occur against a multinational entity, rather than locals. That lack of proximity and local indictments combined with

139. See *U.S. Reaction to Belgian Universal Jurisdiction Law*, 97 AM. J. INT'L L. 984, 986–87 (2003) (noting that Belgium repealed its law providing for universal jurisdiction after pressure from the United States).

140. *Id.*

141. *Id.*

142. This is particularly true for the courts of smaller countries because foreign judgments have no legal effect outside that jurisdiction. *Hilton v. Guyot*, 159 U.S. 113, 163 (1895). In order for a party to enforce the court's jurisdiction it must take that court's judgment to a court with jurisdiction over the losing party and get it formally recognized. Such recognition, however, is not automatic. The recognizing court will look into the jurisdiction of the court that made the judgment, the finality of the judgment, as well as the fairness of the process and whether the foreign judgment violates its public policy. Yaad Rotem, *International Law and the Economic Crisis: The Problem of Selective or Sporadic Recognition: A New Economic Rationale for the Law of Foreign Country Judgments*, 10 CHI. J. INT'L L. 505, 507 (2010).

143. This is not to say that TRCs can never try local figures, in fact they have successfully have, but rather that in some cases a local touch works better than outsiders.

attempts to remedy harms wrought on the local population by outsiders would minimize the negative emotions of the harmed community and may actually ameliorate them.

Likewise, local populations, if they notice the proceedings at all, often view international tribunals' brand of justice as distinctly Western.¹⁴⁴ In the case of corporate offenses, however, the target audience is not the local population, but rather multinational corporations. An international trial in such a situation would not go unnoticed by the relevant actors. Nor would it generally be perceived as Occidental bias or victor's justice since a large percentage of multinational corporations come from the developed world.

Finally, international tribunals may actually have less reach than domestic fora. As products of international cooperation and compromise, international tribunals represent the least common denominator of human rights norms. That is, they are typically limited to only those rights the majority of the world could reach a consensus on.¹⁴⁵ This limitation, if true, however, would not pose a problem for trying corporations engaged in war crimes, crimes against humanity, or genocide because either an amended ICC or a proposed special international tribunal would only pursue the most egregious violations by corporations.

As opposed to its inadequacies, which apply less forcefully in the corporate context, international tribunals' chief advantages remain potent. Such a tribunal's existence would demonstrate a broad-based resolve to clean up and deter major corporate malfeasance. And although the actual results of such a body probably would not live up to its mandate due to technical and political issues, its existence and efforts would accomplish its main objective, raising expectations of appropriate corporate behavior. Moreover, having an international tribunal oversee prosecutions would also mitigate the competency and corruption problems engendered in having developing world courts handle the case. When a local court could not handle a case for competency or political reasons, an international court could step in. Likewise, if a domestic court adjudicated the matter, but the trial was a show or a sham, the international court could again provide a backstop to prevent

144. Sterio, *supra* note 79, at 378.

145. See Joyner, *supra* note 74, at 609 (stating that international tribunals often are influenced by the political considerations of permanent members on the Security Council thereby undermining their effectiveness).

injustice. Finally, an international tribunal armed with a charter granting evidentiary powers and enforcement obligations for signatory state courts would have a greater chance of doing justice. In such cases, the international tribunal would more likely uncover critical evidence and have its judgments enforced in the relevant court than the typical developing world court.

C. SHARING THE LOAD: THE ICC FOR MAJOR VIOLATIONS,
DOMESTIC COURTS FOR THE REST

Domestic trials and international tribunals, as discussed in the previous section, have both strengths and weaknesses. Recognizing these competencies and limitations, the international community should develop a two-stream approach which parts based on the severity of the offense. For major offenses an international option should be on the table. However, for lesser conduct domestic proceedings are preferable.

Grave offenses such as war crimes, crimes against humanity, and genocide are less common and require a serious international response. Having the option—subject to complementarity—of conducting the trial before an international tribunal empowered to levy criminal sanctions makes more sense for several reasons. First, utilizing international tribunals would provide a clear statement that the international system has no tolerance for grave offenses. Second, given the politics involved when one nation or entity adjudicates the corporation of another country, an international tribunal is superior to a domestic court. For one, it is less likely to be swayed by the interests of powerful corporations or government interests. It might also act as a deterrent, encouraging states and courts to provide a reasonably fair domestic proceeding since a sham or show trial would not suffice to prevent an international tribunal such as the ICC from then hearing the case.¹⁴⁶ Finally, an international tribunal would ameliorate jurisdiction and enforcement of judgment issues. To bring this concern into focus, consider a hypothetical proceeding against a security firm, Black H20, in a

146. That is, where a domestic court tries, but fails to fairly or sincerely adjudicate the crime, an international tribunal like the ICC would provide a backstop to re-try the case in a fair, impartial proceeding. Anne-Marie Slaughter & William Burke-White, *The Future of International Law is Domestic (or, The European Way of Law)*, 47 HARV. INT'L. L.J. 327, 341 (2006).

Swaziland court. Assume that Black H2O committed widespread atrocities in Swaziland but currently does not have any offices, men, money, or equipment in Swaziland. In such a case, Swaziland would have a hard time haling Black H2O into court. And, even if it granted a default judgment, the plaintiff could not recover the judgment in Swaziland because Black H2O does not have anything of value in Swaziland. The plaintiff would have to take the Swaziland judgment to a state that can enforce the judgment. However, enforcement is hardly guaranteed.¹⁴⁷ An international tribunal with an enforcement provision, in contrast, would avoid these issues.

On the other hand, for lesser offenses, the potential scope of claims makes an international tribunal impractical.¹⁴⁸ Corporations conduct vast quantities of activities throughout the globe.¹⁴⁹ They want to keep costs low while many developing world governments want the foreign capital these corporations provide.¹⁵⁰ A few bad actors multiplied by millions of corporate activities would extrapolate into an avalanche of claims that could potentially overwhelm an international tribunal like the ICC. Furthermore, hearing minor claims at a centrally located international tribunal would do a disservice to plaintiffs. Victims are often poor and uneducated. Witnesses tend to be similarly situated in these kinds of cases. To ask them to travel long distances for small claims would be impractical.¹⁵¹ On the other hand, permitting them to file

147. See *supra* text accompanying note 138.

148. See Kritz, *supra* note 74, at 133 (explaining that despite the mountain of potential claims in places like the former Yugoslavia and Rwanda as a matter of practicality and policy, the ICTY and the ICTR had to limit their prosecutions to a select few).

149. For instance, of the largest one hundred economies in the world, fifty-one are corporations. Furthermore, the leading 500 multinational corporations conduct almost seventy percent of trade globally. World Trade Organization, Trade Liberalisation Statistics, http://www.gatt.org/trastat_e.html.

150. Manuel R. Agosin and Ricardo Mayer, *Foreign Investment in Developing Countries: Does It Crowd in Domestic Investment?*, UNCTAD 1 (Feb. 2000) http://www.unctad.org/en/docs/dp_146.en.pdf (noting that developing countries prize foreign direct investment for a variety of reasons).

151. When the author says long distance, he makes one of two assumptions. Either the ICC would not find the claim worth setting up a court abroad to hear or that should it set up a court abroad, that the court would still be far from the typical third world resident. That may be because the claimant lives in the country while the tribunal sits in a city. It might also be because the ICC would likely not set up a tribune short of the existence of numerous claims. In such a situation, it would make sense logistically to locate the tribune in a centralized location, but that might also translate into many claims being too inconvenient to pursue no matter how meritorious.

claims in a local court improves their chances of having their day in court.¹⁵² Additionally, trying lesser crimes at the international level might detract from the seriousness of war crimes, crimes against humanity, and genocide both by comparison and by clogging the litigation pipeline.

III. FROM THEORY TO PRACTICE: CREATING INTERNATIONAL JURISDICTION FOR CORPORATE ACTIVITY

For the reasons mentioned above, an international corporate criminal liability (ICCL) scheme should be extended to corporations. This proposition raises the question: how to incorporate ICCL into the tapestry of international legal mechanisms. Though a full treatment of this subject is beyond the scope of this Note, this section will provide a brief outline of the two most promising approaches: (1) amending the Rome Statute to permit the ICC to hear such cases and (2) creating a new, specialized tribunal.

A. AMENDING THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

Extending the ICC's jurisdiction to legal persons includes several major hurdles. The first and likely most important is that the United States is not a party to the Rome Statute. Given the sheer number of U.S. companies, this lacuna would significantly weaken any attempt to establish a single, international mechanism for handling international corporate human rights abuses. In addition, business entities would likely resist attempts to add legal persons under the ICC's umbrella. Last, ICC members, like any highly varied group, have wide ranging views on the ICC that have already yielded at least one failed try to include legal persons under the ICC's jurisdiction.¹⁵³

152. Of course, this is not a perfect solution. Plaintiffs may be unable to file a civil claim either due to lack of money, education, or desire. Big corporations may strong-arm the process to get a desired result. But for small claims it simply is impractical to have an international tribunal given the number of potential claims and the international community's likely reticence.

153. See Andrew Clapham, *The Question of Jurisdiction Under International Criminal Law Over Legal Persons: Lessons from the Rome Conference on an International Criminal Court*, in *LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW* 144–46 (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000) (discussing the French government's attempt to extend the ICC's jurisdiction to organizations during

While significant, these obstacles are not necessarily insurmountable. Although the Rome Statute does not cover corporations, this omission appears to have resulted from procedural and definitional issues, not out of philosophical or legal objections to the ICC applying to corporations.¹⁵⁴ The disagreements during the statute's drafting revolved around the intricacies involved in litigating legal persons via an international tribunal such as how to serve the indictment, who would represent the legal person, the level of intentionality the prosecutor must prove, and how to minimize a natural person's ability to hide behind group responsibility.¹⁵⁵ Moreover, what concern the delegates expressed about corporate criminal liability tended to focus on quasi-public corporate entities and non-governmental associations such as the Palestine Liberation Organization rather than the ramifications for private corporations.¹⁵⁶ In addition to relatively mild opposition at the ICC's drafting to include corporations under its jurisdiction, states have increasingly adopted the ICC and implemented its definitions. Indeed, a number of countries have gone so far as to permit charging corporations with international crimes.¹⁵⁷ Similarly, many states have adopted domestic corporate criminal liability schemes.¹⁵⁸ These trends combined with the importance of resolving major international abuses by corporations suggest the potential (albeit a small one) for collective action.

Assuming the international community manages to navigate these considerable political challenges, changes to the ICC's underlying treaty language would need to occur. As currently written, Article 25(1) of the Rome Statute of the International Criminal Court states that "the Court shall have jurisdiction over natural persons pursuant to this Statute."¹⁵⁹ It does not discuss legal persons. However, adding the three words "and legal persons" to Article 25(1) would bring

the negotiation stage of the Rome Statute).

154. *Id.* at 191.

155. *Id.*

156. *Id.*

157. For an in-depth survey of legal remedies in sixteen countries from a cross section of regions and legal systems, see Anita Ramasastry & Robert C. Thompson, *Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law--Executive Summary* (2006), available at <http://www.fao.no/pub/rapp/536/536.pdf>.

158. See *supra* Section I.B.4.b.

159. Rome Statute, *supra* note 46, art. 25(1) (emphasis added).

corporations within the ICC's ambit.¹⁶⁰

Along with amending Article 25(1) to include legal persons, the drafters would also have to include several other new provisions. For example, what actions could a court impute to the corporation? This Note proposes imposing corporate liability for an employee's illegal acts (1) related to and committed within the course of employment, (2) committed in furtherance of the business of the corporation, and (3) authorized or acquiesced in by the corporation.

Likewise, the ICC would have to establish a sentencing framework for determining the culpability of the corporation. At its most straightforward, the ICC could impose strict liability on the presumption that the corporation must have known of any offense grave enough to result in ICC adjudication. However, this Note proposes a more nuanced approach that considers three aggravating factors and two mitigating factors. Under this Note's tentative suggestion the ICC would look at: (1) the involvement in or tolerance of criminal activity by "high level" or "substantial authority" personnel, (2) a recent history of similar misconduct on the organization's part, and (3) whether the corporation tried to obstruct justice. Mitigating factors might include (1) the presence of an effective program to prevent and detect violations of law by corporate agents and (2) the extent of the corporation's cooperation with law enforcement officials.

In addition, the ICC would need to re-evaluate its penalties. Currently, the ICC has two choices: imprisonment and fines.¹⁶¹ Imprisonment may work if a corporate leader faces individual charges, but it does little to punish the actual corporation. Moreover, ICC reparations, while a promising penalty, would need reconsideration in light of corporations' significantly greater resources. For example, a \$2 million dollar judgment might harm an individual, but a multibillion dollar enterprise would barely notice. Consequently, penalties for legal persons should include the option of significantly stiffer monetary fines.

160. For example, it could read: the Court shall have jurisdiction over natural and legal persons pursuant to this Statute.

161. Rome Statute, *supra* note 46, art. 77.

B. A SPECIAL TRIBUNAL FOR INTERNATIONAL CORPORATE LIABILITY

If the signatories of the ICC cannot cooperate to amend the ICC, states could instead fashion a special tribunal. Past success at creating limited tribunals to adjudicate criminal prosecutions,¹⁶² human rights violations,¹⁶³ and international business complaints¹⁶⁴ suggests this as a potential solution. In order to develop a new tribunal for international human rights abuses by corporations, a coalition of states would need to write a charter document imposing the obligations and duties of multinational corporations. This Note suggests limiting the obligations to major offenses like war crimes, crimes against humanity, and genocide as well as perhaps gross environmental damage. The document would then need to establish what constitutes a breach of each of those obligations and duties and lay down penalties for breaches. Penalties could include fines, depriving the corporation of the gains it received as a result of its illegal activities, suspending the corporation's operations for a period of time, placing the corporation on probation, ordering the corporation to reorganize, or dissolving the corporation altogether. Following the creation of the substantive elements of the special tribunal, members would have to establish a procedural framework. Suggesting procedures goes beyond the conceit of this Note, but in determining the tribunal's procedural aspects, drafters should draw from experiences with the multiplicity of special tribunals in other areas of international law. Finally, the charter would have to include enforcement mechanisms that would require the domestic courts of signatories to recognize and enforce the international court's rulings.

IV. CONCLUSION

Corporations conduct business on every continent in virtually every way. They own satellites that photograph the planet below as well and bounce cell phone and Internet signals

162. See GEERT-JAN ALEXANDER KNOOPS, SURRENDERING TO INTERNATIONAL CRIMINAL COURTS: CONTEMPORARY PRACTICE AND PROCEDURES 1 (2002) (discussing the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for Yugoslavia).

163. For example, the European Court of Human Rights and Inter-American Court of Human Rights.

164. For example, the General Agreement on Tariffs (GATT) and the International Centre for Settlement of Investment Disputes (ICSID).

throughout the globe. They provide military resources via research and development, equipment, and manpower. They rummage throughout the planet acquiring oil, lumber, and a host of other natural resources. Most of these activities usually do not result in violations of human dignity, but where they do corporations should not escape liability simply because they are a legal person rather than a natural person or a nation-state.

Just as corporate activity comes in many shapes and sizes so too should the response to corporate abuses. For lesser offenses, States should handle the aftermath through their legal systems. In such situations, States are best positioned to weigh the costs and benefits of assessing corporate criminal responsibility. Moreover, practicality dictates this approach since the international community has little stomach to develop, empower, and pay for a legal system sufficiently large to handle the array of claims that might result from hearing cases arising from nearly two hundred nations.

In contrast, for larger offenses, particularly war crimes, crimes against humanity, and genocide, the international community should take a more active role. Large offenses call for a clear response from the world that the action is unacceptable and will not be tolerated. Given the necessity for an unambiguous response, the inadequacies of domestic legal systems and the advantages of an international tribunal, an international tribunal should oversee such adjudications.

The form of law applied should also be tailored to the type of offense. For lesser offenses, civil liability should be the general rule. Smaller offenses are less deserving of the heightened opprobrium attached to criminal sanctions. Similarly, because the offenses are smaller and therefore less noteworthy, a government sympathetic to foreign investment may be inclined to ignore the matter. Civil liability enables a victim to pursue their claim independent of the government's inclination. Furthermore, civil liability tends to impose a less strenuous burden of proof that aids victims in their quest for being made whole.

On the other hand, for grave offenses an international tribunal should apply criminal law. In contrast to lesser offenses, major offenses such as war crimes, crimes against humanity, and genocide are sobering accusations that require significant sanctions where appropriate. Criminal law best accomplishes these objectives by unambiguously expressing the gravity of the offense, demonstrating the international

community's resolve, and ensuring maximum due process protection for the accused. In this way—permitting domestic courts to continue handling smaller human rights offenses while permitting, subject to complementarity, the trial of major corporate human rights offenses in an international tribunal—the international system can accommodate recalcitrant states that do not support the ICC and other international adjudicatory bodies while better serving victims of gross corporate human rights abuse.