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**TRANSLATING UNOCAL:
THE EXPANDING WEB OF LIABILITY FOR
BUSINESS ENTITIES IMPLICATED
IN INTERNATIONAL CRIMES**

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INTRODUCTION

In 1996, a group of villagers from Myanmar sued Unocal Corporation in the United States for alleged complicity in forced labor and other crimes against humanity committed in Burma/Myanmar by a military unit under contract to provide security during the construction of a gas pipeline. The *Unocal* litigation produced two milestone events in the development of human rights law: decisions by both a California federal district court¹ and a panel of the

[This Article contains numerous citations to “[name of country] Resp.,” “[name of country] Supp. Resp.,” and “[name of country] Section of Composite Supp. Resp.” For more information regarding these sources, see *infra* note 11.—Ed.]

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1. *Doe I v. Unocal Corp.*, 110 F. Supp. 2d 1294 (C.D. Cal. 2000) [hereinafter District Decision]. The plaintiffs were villagers from Myanmar who had been subjected to forced labor, rape, physical injuries, torture, and murder at the hands of the military unit that was under contract to a consortium of international energy companies. *See id.* at 1295. Lacking any means of redress in Myanmar, the surviving victims and the dependents of the decedent victims filed their complaint in a federal district court in California. *See id.* at 1294. Also implicated in the action along with Unocal were the military junta ruling Myanmar and Total S.A., a French company involved with the consortium that was constructing the pipeline. *Id.* at 1295-96. Total and Unocal were not accused of directly per-

Ninth Circuit² that ruled that a corporation could be held liable under the federal Alien Tort Claims Act (ATCA)³ for its complicity in a violation of international criminal law occurring outside the United States.

Since the decision in *Unocal*, every year litigants have filed increasing numbers of ATCA cases involving the complicity of corporations in human rights abuses outside the United States.⁴ These cases continually bring to the attention of multilateral agencies, businesses, lawyers, scholars, and human rights advocates that, in conditions of war or political repression, host countries (that is, the countries in which the activities in question occur) rarely provide forums in which the perpetrators of serious human rights abuses may be held accountable.⁵ Simply stated, host countries

petrating the crimes, but of complicity in those crimes because they had allegedly provided material support to the military security force and had done nothing to restrain the abuses. *See id.* at 1303. The claim against the ruling military junta in Myanmar was dismissed on sovereign immunity grounds. *See Doe I v. Unocal Corp.*, 963 F. Supp. 880, 886 (C.D. Cal. 1997). The claim against Total was dismissed for lack of personal jurisdiction. *See Doe I v. Unocal*, 27 F. Supp. 2d 1174, 1181 (C.D. Cal. 1998). As for *Unocal*, the district court held that a corporation could conceivably be liable for complicity in the crimes involved, but granted summary judgment for *Unocal* on the grounds that the applicable test under international law for complicity had not been met, because there was insufficient evidence in the record to demonstrate *Unocal's* "active participation in the unlawful conduct." District Decision at 1310.

2. *Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002). The panel decision reversed the summary judgment on the grounds that the District Decision had applied the wrong test for complicity. *See id.* at 947. The panel adopted the test used by the International Criminal Tribunals for the Former Yugoslavia and Rwanda—namely, providing substantial assistance with the knowledge that it would facilitate a crime. *See infra* notes 93-96 and accompanying text. After a hearing before the full bench of the Ninth Circuit, but before a decision, the parties settled. As a condition of the settlement, all prior decisions were vacated. *See Doe I v. Unocal*, 403 F.3d 708 (9th Cir. 2005).

3. The Alien Tort Claims Act, 28 U.S.C. § 1350 (2006) [hereinafter ATCA] provides "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." The statute allows foreign plaintiffs to seek civil redress in federal courts for certain violations of international law. A companion statute, the Torture Victims Protection Act, 28 U.S.C. § 1350 (2006) [hereinafter TVPA], was enacted in 1992. *See* Ralph G. Steinhardt, *International Humanitarian Law in the Courts of the United States: Yamashita, Filartiga, and 911*, 36 GEO. WASH. INT'L L. REV. 1, 21-27 (2004) (discussing the origins of ATCA, the TVPA and the principal court decisions interpreting those statutes). It allows suits by U.S. nationals as well as aliens for torture or extrajudicial killings that occur abroad. *Id.*

4. *See, e.g., Sarei v. Rio Tinto, PLC*, 487 F.3d 1193 (9th Cir. 2007); *Khulumani v. Barclay National Bank, Ltd.*, 504 F.3d 254 (2d Cir. 2007).

5. *See generally*, John Gerard Ruggie, *Business and Human Rights: The Evolving International Agenda*, 101 AM. J. INT'L L. 819 (2007) (discussing the human rights obligations of transnational corporations); Leiv Lunde & Mark Taylor, *Regulating Business in Conflict Zones: Challenges and Options, in PROFITING FROM PEACE, MANAGING THE RESOURCE DIMENSIONS OF CIVIL WAR* (Karen Ballentine and Heiko Nitzschke eds., 2005) (summarizing the dynamics involved in civil conflicts in which business entities are implicated); Olga Martin-

with informal economies and the *de facto* recession of the state generally exhibit a nearly total loss of regulatory effectiveness and thus are poor environments for regulating transnational economic entities.⁶ The widespread occurrence of these conditions around the world has been termed a global “governance gap” and a “permissive environment for wrongful acts by companies of all kinds.”⁷

The International Military Tribunal at Nuremberg (IMT) and the International Military Tribunal for the Far East in Tokyo (IMTFE) were the first judicial efforts to close the governance gap by trying and convicting a number of individual businessmen who, on behalf of their employers, had engaged in aiding and abetting forced labor and other international crimes during World War II.⁸ After nearly fifty years, *Unocal* and the suits following in its wake have revived those efforts by constructing a basis under U.S. law for victims of human rights abuses occurring abroad to bring civil actions against the offending companies themselves.⁹

Ortega, *Deadly Ventures? Multinational Corporations and Paramilitaries in Colombia*, 16 REVISTA ELECTRONICA DE ESTUDIOS INTERNACIONALES (2008) (describing relationships between transnational corporate business activities and the hostilities in Colombia); Robert Dufresne, *Reflections and Extrapolation on the ICJ's Approach to Illegal Resource Exploitation in the Armed Activities Case*, 40 N.Y.U. J. INT'L L. & POL. 171 (2008) (describing the conditions of widespread illicit exploitation of resources in the Democratic Republic of the Congo that became the subject of litigation before the International Court of Justice); Surya Deva, *Human Rights Violations By Multinational Corporations and International Law: Where from Here?*, 19 CONN. J. INT'L L. 1 (2003) (describing the role of multinational corporations in deprivations of basic human rights and the efforts of international and domestic authorities to regulate their activities).

6. See Lunde & Taylor, *supra*, note 5, at 328 (describing the ineffectiveness of legal regulators in conflict zones, as well as the frequent corruption of conflict-zone governments).

7. U.N. Human Rights Council, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, ¶ 3, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008) (prepared by John Ruggie), available at <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf>. See also HUMAN RIGHTS WATCH & CENTER FOR HUMAN RIGHTS AND GLOBAL JUSTICE, ON THE MARGINS OF PROFIT: RIGHTS AT RISK IN THE GLOBAL ECONOMY (2008), available at http://www.hrw.org/sites/default/files/reports/bhr0208_1.pdf (presenting a compendium of information regarding human rights violations by business companies that is drawn from numerous reports prepared by Human Rights Watch).

8. 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, 104-18 (2000) (discussing the prosecution of business representatives acting in concert with Axis armed forces in forced labor and other crimes against humanity committed in Europe and the Far East during World War II).

9. The panel decision relied on the landmark decision *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980), for the proposition that federal courts could hear allegations under the ATCA brought by aliens against those who commit human rights violations abroad. *Doe I v. Unocal Corp.*, 395 F.3d 932, 969 (9th Cir. 2002).

These cases raise two questions: (1) Is the United States the only country that provides judicial accountability for business entities involved in international crimes abroad? and (2) How are other countries “translating” the basic kinds of accountability that *Unocal* recognized into their own legal systems?¹⁰

This Article attempts to answer these questions by presenting the results of a comparative law survey (the Survey)¹¹ involving sixteen countries (the Surveyed Countries)¹² that invited lawyers and legal scholars to examine questions relating to the status of international criminal law (ICL)¹³ in each country. Their responses examine the

10. The need for accountability for business entities is part of a larger search for accountability for offenders generally. See Beth Stephens, *Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 *YALE J. INT'L L.* 1, 34 (2002) (arguing that accountability for human rights abuses, a concept native to most legal systems, “translates” differently in the legal traditions of different countries).

11. The Survey was conducted in 2005 and 2006 by Fafo with the financial support of the Ford Foundation and the governments of Canada, Norway, and Switzerland. The authors of this Article were the principle researchers. The results of the Survey were originally summarized in ANITA RAMASASTRY & ROBERT C. THOMPSON, FAFO, *COMMERCE, CRIME AND CONFLICT: LEGAL REMEDIES FOR PRIVATE SECTOR LIABILITY FOR GRAVE BREACHES OF INTERNATIONAL LAW* (2006), available at <http://www.fafo.no/pub/rapp/536/536.pdf>. The Survey questionnaire and all responses are available at http://www.fafo.no/liabilities/CCC_index.htm (last visited June 27, 2009). References in this Article to individual responses to the Survey appear in footnotes to this Article as: “[name of country] Resp.,” or, in cases where a supplemental response has been received, either as: “[name of country] Supp. Resp.” or “[name of country] Section of Composite Supp. Resp.” The authors of this Article owe a profound debt of gratitude to the extensive volunteer efforts of the respondents below and peer reviewers (whose names appear in parentheses): for Argentina, Tomás Ojea Quintana (Santiago Otamendi); for Australia, Richard Meeran (Jonathan Clough, Sarah Joseph, Bernadette McSherry, and Justine Nolan); for Belgium, Bruno Demeyere (Kristof Cox); for France, William Bourdon, Yann Queinnet, and Abigail Hansen; for Germany, Remo Klinger (Anthony Sebok); for India, Srinivasan Muralidhar (Surya Deva); for Indonesia, Harkristuti Harkrisnowo and David K. Linnan; for Japan, Human Rights Now, coordinated by Professor Yasunobu Sato and Shimpei Yamamoto; for the Netherlands, Nicola Jägers (Menno T. Kamminga); for Norway, Ingrid Hillblom (Asne Julsrud, Gro Nystuen, Christian H. Ruge, and Mark B. Taylor); for South Africa, Charles Abrahams (Max Du Plessis); for Spain, Ana Libertad Laliena (Olga Martín-Ortega); for Ukraine, Oksana Bilobran (Scott Horton); for the United Kingdom, Stephen Powles, Rosanna Mesquita, Jeremy Carver and Richard Hermer; and for the United States, Robert C. Thompson.

12. The sixteen countries are: Argentina, Australia, Belgium, Canada, France, Germany, India, Indonesia, Japan, Norway, the Netherlands, Spain, South Africa, Ukraine, the United Kingdom, and the United States. These countries were selected with the objective of maximizing the geographic distribution of the countries as well as the differences in their legal traditions.

13. As used in this Article, “international criminal law” (ICL) means the body of law containing offenses against universally recognized human rights and/or other universally protected international interests that are identified in the various international covenants discussed in this Article. Those covenants have required or otherwise led their parties to adopt domestic legislation penalizing such offenses, thereby incorporating ICL into their respective penal codes. ICL is a subset of a wider body of law referred to as “international

incorporation of ICL from the Rome Statute of the International Criminal Court (Rome Statute and ICC, respectively)¹⁴ and other international covenants into domestic penal codes, assess the extra-territorial application of those laws, describe applicable concepts of third-party liability, and evaluate the status of corporate liability under domestic penal codes. Their responses reveal other sources of criminal liability for illicit business conduct abroad, such as bribery of foreign officials, money laundering, and dealing in stolen property. Finally, they provide analyses of the laws and legal customs relating to the rights of victims to access civil courts in the Surveyed Countries (and the obstacles that impede such access) in search of compensation and other remedies under various concepts of tort, delict,¹⁵ and noncontractual responsibility.

This Article's summary analysis of the responses presents compelling evidence of the existence of what has been termed an emerging transnational "web of liability"¹⁶ for business entities implicated in international crimes. Since the Surveyed Countries represent both civil and common law traditions, parties as well as nonparties to the ICC, and a wide geographic spectrum, it is reasonable to assume that the conclusions reached in this Article may be extrapolated more broadly to cover a far wider set of countries.

A. *International Criminal Law Is Widely Incorporated into the Domestic Penal Codes of the Sixteen Countries*

A fundamental premise of ICL is that certain human rights are so widely recognized in international covenants and other authori-

humanitarian law." See Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 243 (2000) (discussing the evolutionary development out of the "laws of war" originally designed to codify the rules of "civilized" international warfare of a body of international law that aims to protect human rights during internal armed conflicts as well as non-international armed conflicts).

14. The International Criminal Court (ICC) was created by the Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]. There are 110 parties to the ICC, including twelve of the Surveyed Countries. See Rome Statute of the International Criminal Court, <http://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XVIII/XVIII-10.en.pdf> (last visited June 27, 2009).

15. A "delict" is the civil law equivalent of a tort. See Beth Van Schaack, *In Defense of Civil Redress: The Domestic Enforcement of Human Rights Norms in the Context of the Proposed Hague Judgments Convention*, 42 HARV. INT'L L.J. 141, 173 n.178, 177 (2001) (discussing rules applicable to torts/delicts under various European authorities). See also Belgium Resp., 44; Netherlands Resp., 23.

16. See RAMASASTRY & THOMPSON, *supra* note 11 at 27 ("web of liability"); U.N. Human Rights Council, *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, ¶ 22, UN.Doc. A/HRC/4/35 (Feb. 19, 2007) (prepared by John Ruggie) ("an expanding web of potential corporate liability for international crimes"); Ruggie, *supra*, note 5, at 831 ("this expanding jurisdictional web").

ties that violations should be punished wherever they occur. If a host country suffers from a governance gap, and fails for whatever reason to prosecute a violation of ICL, then that failure should be remedied by either an international tribunal or the domestic criminal courts of other countries. Domestic courts can enforce ICL only when it has been incorporated into their penal codes.¹⁷

After World War II, a series of widely ratified international covenants emerged that today define and proscribe the crimes found in ICL. The Genocide Convention (1948) defines and proscribes the crime of genocide.¹⁸ The four Geneva Conventions (1949)¹⁹ provide extensive definitions of war crimes pertaining to international conflicts and carve out a selection of particularly serious war crimes, called the “grave breaches,” which are required to be included in the penal codes of all parties.²⁰ These “grave breaches” include the killing or inhuman treatment of prisoners and the compulsion of a prisoner of war to serve in one’s own

17. See *infra* note 33.

18. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 [hereinafter Genocide Convention]. There are 141 parties to the Genocide Convention, including all of the Surveyed Countries except Indonesia and Japan. See Convention on the Prevention and Punishment of the Crime of Genocide, <http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-1.en.pdf> (last visited July 29, 2009) (listing parties to the Convention).

19. See Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Convention I]; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Convention II]; Convention relative to the Treatment of Prisoners of War, Aug. 2, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Convention III]; Convention relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Convention IV]. The 1949 Conventions each contain a list of certain crimes considered so important that the drafters decided to call them “grave breaches” and to require each of the parties to adopt criminal legislation that penalized them. See *infra* note 21. There are 194 parties to each Convention, including all of the Surveyed Countries. Int’l Comm. Red Cross, Geneva Conventions of 12 August 1949, International Humanitarian Law: State Parties / Signatories, <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=375&ps=P> (last visited July 27, 2009) (listing parties to the Conventions).

20. According to the International Committee of the Red Cross, “[t]he idea of including a definition of ‘grave breaches’ in the actual text of the Convention came from the experts called in by the International Committee of the Red Cross in 1948. It was thought necessary to establish what these grave breaches were, in order to be able to ensure universality of treatment in their repression. Violations of certain detailed provisions of the Geneva Conventions might quite obviously be no more than offences of a minor or purely disciplinary nature, and there could be no question of providing for universal measures of repression in their case.” See International Humanitarian Law – First 1949 Geneva Convention, <http://www.icrc.org/ihl.nsf/COM/365-570061?OpenDocument> (last visited July 28, 2009).

armed forces.²¹ Article 3 in each of the 1949 Conventions (Common Article 3) contains a brief description of war crimes that are applicable to noninternational conflicts.²² These resemble the grave breaches, but none is denominated a “grave breach” that parties to the 1949 Conventions are obligated to punish.

The Apartheid Convention (1973) defines and proscribes the practice of apartheid.²³ Additional Protocols I and II²⁴ to the 1949 Conventions (both 1977) contain additional war crimes, with Additional Protocol I adding to the list of war crimes, including several new grave breaches, such as launching attacks on civilians and perfidious use of the emblems of humanitarian agencies like the Red Cross.²⁵ Additional Protocol II adds extensively to the list of war

21. The four 1949 Conventions contain an aggregate total of nine “grave breaches.” See Convention I, *supra* note 19, art. 50 ((1) “wilful killing,” (2) “torture or inhuman treatment, including biological experiments,” (3) “wilfully causing great suffering or serious injury to body or health,” and (4) “extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.”); Convention II, *supra* note 19, art. 51 (same as Convention I); Convention III, *supra* note 19, art. 130 (same as Conventions I and II, except for the deletion of the last clause (4) regarding destruction and appropriation of property, plus, in addition: (5) “compelling a prisoner of war to serve in the forces of the hostile Power,” and (6) “wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention”); Convention IV, *supra* note 19, art. 147 (same as Conventions I and II, plus, in addition: (7) “unlawful deportation or transfer or unlawful confinement of a protected person,” (8) “wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention,” and (9) “taking of hostages”).

22. See Convention I, *supra* note 19, art. 3; Convention II, *supra* note 19, art. 3; Convention III, *supra* note 19, art. 3; Convention IV, *supra* note 19, art. 3.

23. See International Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 30, 1973, 1015 U.N.T.S. 243 [hereinafter Apartheid Convention]. There are 107 signatories, including three of the Surveyed Countries: Argentina, India and Ukraine. See International Convention on the Suppression and Punishment of the Crime of Apartheid, <http://treaties.un.org/doc/Publication/MTDGS/Volume%20I/Chapter%20IV/IV-7.en.pdf> (last visited June 27, 2009).

24. Protocol Additional to the Geneva Convention of August 12, 1949, and relating to the Protection of Victims of International Armed Conflicts, Dec. 12, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]; Protocol Additional to the Geneva Conventions of August 12, 1949 and relating to the Protection of Victims of Non-International Armed Conflicts, Dec. 12, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II].

25. There are 168 parties to Additional Protocol I, including all of the Surveyed Countries except India, Indonesia, and the United States. Int’l Comm. Red Cross, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, International Humanitarian Law: State Parties / Signatories, <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=470&ps=P> (last visited July 28, 2009) (listing parties to Additional Protocol I). Additional Protocol I expanded the list of war crimes applicable to international armed conflict. See Additional Protocol I, *supra* note 24, arts. 8-79. It also added thirteen new “grave breaches.” The new breaches dealt with: (1) medical experimentation, *id.* art. 11(4)(2), attacking individual civilians, *id.* art. 85(3)(3), indiscriminately attacking the civilian population or civilian property, *id.*, (4) attacking “works or installations containing

crimes applicable to noninternational conflicts, but it does not add to the list of grave breaches.²⁶ The Torture Convention (1987) defines and proscribes torture “by or at the instigation of a public official or other person acting in an official capacity.”²⁷ The Rome Statute (1998) codifies almost all of the crimes from these preceding conventions and adds additional crimes, particularly, for the first time, an extensive list of crimes against humanity.²⁸ Lastly, the

dangerous forces” (e.g., dams) knowing that civilians would be harmed, *id.*, (5) attacking nondefended and demilitarized zones, *id.*, (6) attacking persons who are *hors de combat*, *id.*, (7) perfidious use of the symbols of the Red Cross, Red Crescent, or Red Lion, *id.*, (8) transferring one’s own population into occupied territory, *id.* art. 85(4), (9) deportation of the population of an occupied territory, *id.*, (11) practices of apartheid and other practices based on racial discrimination, *id.*, (12) attacking historical monuments, works of art, or places of worship that are not in military use by the opposing forces, *id.*, and (13) depriving certain persons of the right to a fair trial. *Id.*

26. Additional Protocol II significantly expands the protections available in noninternational conflict. See Additional Protocol II, *supra* note 24, arts. 4-17. It created no new grave breaches, however, thus imposing no new incorporation obligations on its parties. There are 164 parties to this Protocol, including all of the Surveyed Countries except India, Indonesia, and the United States. A list of the parties is available at <http://treaties.un.org/doc/Publication/UNTS/Volume%201125/volume-1125-I-17513-English.pdf> (last visited July 28, 2009).

27. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 108 Stat. 382, 1465 U.N.T.S. 85 [hereinafter Torture Convention], available at <http://www.un.org/documents/ga/res/39/a39r046.htm>. There are 146 parties, including all of the Surveyed Countries except India. For a list of parties, see Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, <http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-9.en.pdf> (last visited June 27, 2009).

28. The list of “crimes against humanity” developed over time, beginning with the Charter of the International Military Tribunal, Nuremberg Rules in Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 82 U.N.T.S. 279 [hereinafter IMT Charter], which punished “murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal.” See IMT Charter art. 6(c). See also Theodor Meron, *Reflections on the Prosecution of War Crimes by International Tribunals*, 100 AM. J. INT’L L. 551, 564-65 (2006) (discussing the legal arguments used to justify the application of “customary international law” to provide authority to the IMT to penalize crimes against humanity).

The 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity art. 1(b), Nov. 26, 1968, 754 U.N.T.S. 73 [hereinafter Statutory Limitations Convention], available at <http://www.icrc.org/IHL.NSF/FULL/435?OpenDocument>, called upon its parties to eliminate statutes of limitations for violations of enumerated “crimes against humanity” that included the ones from the IMT Charter, plus (6) “eviction by armed attack or occupation or inhuman acts resulting from apartheid” and (7) “the crime of genocide [from the Apartheid Convention].” See Statutory Limitations Convention, art. 1(b). There are 53 state parties to the Statutory Limitations Convention, but including only three of the Surveyed Countries—Argentina, India and Ukraine. For a list of parties, see Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, <http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-6.en.pdf> (last visited Sept. 5, 2009).

Child Soldier Convention (2000) proscribes the use in combat of children under fifteen years of age.²⁹ With the exceptions of Additional Protocol II³⁰ and the Rome Statute,³¹ each of these covenants obligates its parties to adopt legislation that penalizes

The statutes of both the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda contain identical lists of crimes against humanity, drawn primarily from the IMT Charter, to which the Security Council resolutions establishing the new tribunals added imprisonment, torture, and rape. See Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, art. 5, May 25, 1993, 32 I.L.M. 1159 [hereinafter ICTY Statute]; Statute of the International Criminal Tribunal for Rwanda art. 3, Nov. 8, 1994, 33 I.L.M. 1598 [hereinafter ICTR Statute]. The crimes in the ICTY Statute are limited to those “committed in armed combat.” ICTY Statute art. 5. The crimes against humanity in the Statute of the ICTR are limited to those “committed as part of a widespread or systematic attack against any civilian population on national, ethnic, racial or political grounds.” ICTR Statute art. 3.

The list of crimes against humanity in Article 7(1) of the Rome Statute includes all of the above crimes, together with “[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.” Rome Statute, *supra* note 14, art. 7(1)(k). These are punishable only “when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.” *Id.* art. 7(1). The Statute defines “attack” in terms that could apply to acts committed either in wartime or peacetime, so long as the acts constitute “a course of conduct involving the multiple commission of acts.” *Id.* art. 7(2)(a). See generally Beth Van Schaack, *The Definition of Crimes Against Humanity: Resolving the Incoherence*, 37 COLUM. J. TRANSNAT’L. L. 787 (1999) (tracing the development of a standard for crimes against humanity that would justify international intervention in the affairs of sovereign states in a nonconflict situation, and explaining how that standard inspired the adoption of the “widespread and systematic” formula first appearing in Article 3 of the ICTR Statute and ultimately in Article 7(2)(a) of the Rome Statute).

29. Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, May 25, 2000, U.N. GAOR, U.N. Doc A/54/RES/263 (entered into force Feb. 12, 2002) [hereinafter Child Soldier Convention]. There are 128 parties, including all Surveyed Countries. See Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, <http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-11-b.en.pdf> (last visited July 29, 2009). The Child Soldier Convention proscribes the use of children younger than 18 years in armed hostilities. See Child Soldier Convention, *supra*, art. 1. Both Additional Protocol I and Additional Protocol II had imposed a ban on the use of children below the age of 15 in hostilities, but without requiring their parties to criminalize violations. See Additional Protocol I, *supra* note 24, art. 77(2); Additional Protocol II *supra* note 24, art. 4(3)(c)-(d). See also Rome Statute, *supra* note 14, art. 8(2)(b)(xxvi), 8(2)(e)(vii).

30. Several of the war crimes relating to noninternational conflicts in Additional Protocol II—for example, attacking the civilian population (Additional Protocol II, *supra* note 24, art. 13) and attacking historical monuments or places of worship (Additional Protocol II, *supra* note 24, art. 16)—have been included in the Rome Statute (see Rome Statute, arts. 8(e)(i), (iv)), thereby becoming subject to the incentive contained in the Rome Statute for countries to incorporate them into their penal laws, as discussed in the text corresponding to *infra* notes 34–39.

31. Parties to the Rome Statute are under no explicit obligation to incorporate the core crimes contained in the Rome Statute, although the preamble contains a clause reminding parties that they have obligations under existing international law to do so. See

violations of certain identified provisions.³² Once a country has adopted the necessary legislation, generally as part of the ratification process, these crimes become enforceable in the country's courts along with all other domestic crimes.³³

The Rome Statute offers its parties a strong incentive to incorporate the three core crimes³⁴ of genocide,³⁵ crimes against humanity, and war crimes.³⁶ The Rome Statute is founded on the

Rome Statute, *supra* note 24, pmbl. ("Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes . . .").

32. See Convention I, *supra* note 19, art. 49; Convention II, *supra* note 19, art. 50; Convention III, *supra* note 19, art. 129; Convention IV, *supra* note 19, art. 146.

33. None of the Surveyed Countries reported that a person may be prosecuted for conduct that is not proscribed in a penal code provision, although such a provision may simply incorporate by reference all of the crimes in the international covenants to which a country is a party. See Netherlands Section of Composite Supplementary Resp. Thus, the maxim *nulla crimen sine lege* ("no crime without a [written] law") seems to be widely observed at the domestic level. In contrast, international courts have applied "customary international law," (also referred to as "the customs and usages of war"), that is, those actions that have been so widely recognized as international crimes in writing by various authoritative sources ("opinio juris"), and so widely banned by international legal sources ("state practice"), that they should be recognized by an international tribunal as criminal even though they are not found in written legal instruments that specifically proscribe them in the jurisdictions where they are committed. See Theodor Meron, *The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 AM. J. INT'L L. 238 (1996) (discussing the evolution of customary international law and its application by the IMT and the ICTY).

34. The Rome Statute gives the ICC jurisdiction over the crime of aggression, but this jurisdiction will not take effect until further action by the Assembly of States Parties under Articles 121 and 123. See Rome Statute, *supra* note 14, art. 5(2).

35. Genocide is defined as:

any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction, in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

Genocide Convention, *supra* note 18, art. II; ICTY Statute, *supra* note 27, art. 4(2); Statute of the ICTR *supra* note 27, art. 3(2); Rome Statute, *supra* note 24, art. 6.

36. The Rome Statute contains thirty-eight war crimes applicable to international armed conflict and a further sixteen applicable to non-international conflicts. See Rome Statute, *supra* note 14, art. 8. These are drawn from multiple preexisting covenants, most notably the 1949 Geneva Conventions (*Id.* art. 8(2)(a)), Additional Protocol I (for example, prohibitions on attacks against civilians, *id.* art. (8)(2)(b)(i), Declaration III to the 1989 Hague Convention—on the Use of Bullets Which Expand or Flatten Easily in the Human Body (July 29, 1899) (*Id.* art. 8(2)(b)(xix) and the Hague Convention Respecting the Laws of War on Land (Hague IV); October 18, 1907 (for example, pillaging a town or place, even when taken by assault, *id.* art. 8(b)(2)(xvi)). Some prohibitions that neither the 1949 Geneva Conventions (like Common Article 3) nor Additional Protocol I gave "grave breach" status, as well as the prohibition on the conscription of children below the age of 15, are now criminally enforceable in the ICC and in the criminal courts of any

principles of complementarity, meaning that the enforcement of the core crimes is expressly the primary responsibility of the domestic courts of countries, irrespective of whether they are parties to the Statute.³⁷ Accordingly, the ICC may not investigate or prosecute an offender for any crime that a domestic court is willingly and adequately investigating or prosecuting.³⁸ It is therefore in the interests of all countries, parties and nonparties alike, to incorporate the core crimes because this is the only way they will have the necessary legal authority to prosecute their own nationals, thereby avoiding the embarrassment and potential political consequences of having any offenders among their own people brought before the ICC.³⁹

Given the obligations and incentives just mentioned, it is not surprising that the Survey found that ICL has been widely incorpo-

country that has incorporated the core crimes from the Rome Statute. *See, e.g.*, Rome Statute, *supra* note 14, art. 8. The two lists of war crimes are not exhaustive, as the Rome Statute gives the ICC general authority to punish “other serious violations of the laws and customs applicable in [“international conflicts” and “conflicts not of an international character”]. Rome Statute, *supra* note 14, arts. 8(2)(b), (e).

37. The ICC is complementary to national criminal jurisdiction in the sense that it is not the primary source of justice over international crimes. Its jurisdiction over crimes is effective only if a national court does not assert jurisdiction or if the national court is “unwilling or unable genuinely to carry out the investigation or prosecution.” Rome Statute, *supra* note 14, art. 17(1)(a).

38. A country seeking to defeat ICC jurisdiction may argue inadmissibility on three grounds. *See* Rome Statute, *supra* note 14, art. 17. All grounds require that the country, which does not have to be a state party, have authority to punish the core crimes. *See id.* The first ground applies if the country is investigating or prosecuting the person involved, “unless the State is unwilling or unable genuinely to carry out the investigation or prosecution.” *Id.* art. 17(1)(a). The second ground applies when a state has investigated the case and has decided not to prosecute, “unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute.” *Id.* art. 17(1)(b). The third ground applies when the person involved has already been convicted or acquitted by a state for the conduct that is the subject of the complaint by the ICC. Rome Statute, *supra* note 14, art. 20(3). The conviction or acquittal will bar an ICC trial unless the State’s proceedings: (a) “were for the purposes of shielding the person concerned from responsibility for crimes within the jurisdiction of the Court;” or (b) “otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.” *Id.* These provisions clearly authorize the ICC to look beneath the surface of a domestic court’s proceedings to ascertain whether they meet the test for adequacy.

39. A country that has adopted the core crimes of the Rome Statute may or may not also have authority to punish acts of torture by governmental officials that do not occur as “part of a widespread and systematic attack directed against a civilian population” or the use of child soldiers below the age of 18 or apartheid that occurs in a context other than a “widespread and systematic attack.” Rome Statute, *supra* note 14, art. 7. The country’s authority to punish these crimes would depend upon whether it had incorporated these crimes from other relevant international covenants.

rated by the sixteen Surveyed Countries. Twelve of the sixteen are parties to the Rome Statute,⁴⁰ and nine of these—Australia, Belgium, Canada, Germany, the Netherlands, Norway, South Africa, Spain, and the United Kingdom—have already incorporated the three core crimes.⁴¹ The penal codes of the remaining seven countries—Argentina,⁴² France,⁴³ India,⁴⁴ Indonesia,⁴⁵

40. The twelve Surveyed Countries that are parties to the Rome Statute are: Argentina, Australia, Belgium, Canada, France, Germany, Japan, the Netherlands, Norway, South Africa, Spain, and the United Kingdom. Ukraine is a signatory, but has not yet ratified the Statute. India, Indonesia, and the United States are not signatories. See Rome Statute, *supra* note 14.

41. See Australia Resp., at 7; Belgium Resp., at 21; Canada Resp., at 4; German Resp., at 12; Netherlands Resp., at 17; Norway Section of Composite Supp. Resp.; South Africa Resp., at 20; Spain Resp., at 10; and U.K. Resp., at 16.

42. Argentina is a party to the Genocide Convention, *supra* note 18, the 1949 Geneva Conventions, *supra* note 19, Additional Protocol I, *supra* note 24, Additional Protocol II, *supra* note 24, the Torture Convention, *supra* note 27, the Rome Statute, *supra* note 14, and the Child Soldier Convention, *supra* note 29. It has not adopted legislation to incorporate any of the international crimes into its penal code. See Argentina Resp., at 17. Accordingly, international crimes can only be prosecuted based on analogous crimes in the penal code. For example, “enforced disappearance of persons” would be punished as “illegal deprivation of liberty,” “genocide” as “murder,” and so forth. See *id.* at 17, 20. Argentina’s amnesty for crimes committed during the “dirty war” period from 1976 to 1983 was overturned in partial reliance on the Statutory Limitations Convention. See Luis Benavides, *Introductory Note to Supreme Court of Mexico: Decision on the Extradition of Ricardo Miguel Cavallo*, 42 INT’L. LEGAL MATERIALS 884, 886 (2003). Numerous prosecutions of offenders from the “dirty war” have resulted. See Alexei Barrionuevo, *Argentine Ex-Army Chief Gets Life Sentence in ‘Dirty War’ Crimes*, N.Y. TIMES, July 25, 2008, at A9; Alexei Barrionuevo, *Argentine Priest Receives Life Sentence in ‘Dirty War’ Crimes*, N.Y. TIMES, Oct. 10, 2007, at A7.

43. France is a party to the Genocide Convention, *supra* note 18, the 1949 Geneva Conventions, *supra* note 19, Additional Protocol I, *supra* note 24, Additional Protocol II, *supra* note 24, the Torture Convention, *supra* note 27, the Rome Statute, *supra* note 14, and the Child Soldier Convention, *supra* note 29. It has incorporated the crime of genocide from the Genocide Convention into its domestic law. See France Resp., at 15. It has a brief list of crimes derived from the Statute of the IMT that constitute both war crimes (when committed during wartime) and crimes against humanity (whenever occurring). See *id.* France has also incorporated the crime of torture from the Torture Convention. *Id.* at 7, 19.

44. India is a party to the Genocide Convention, *supra* note 18, the 1949 Geneva Conventions, *supra* note 19, and the Child Soldier Convention, *supra* note 29. It has no statute incorporating genocide. See India Resp., at 14. It has no crimes against humanity. See *id.* It has no torture statute applicable in peacetime. See *id.* India has signed the Torture Convention, but had not ratified it as of February 24, 2008. See *supra* note 27. India has enacted a statute, entitled the “Geneva Conventions Act of 1960,” which incorporates the grave breaches from each of the 1949 Geneva Conventions. India Resp., at 21. India does not expressly ban the use of child soldiers in its military, but its child labor laws (prohibiting the employment of children below the age of 14) may have some application. See India Resp., at 14; India Section of Composite Resp.

45. Indonesia is a party to the 1949 Geneva Conventions, *supra* note 19, the Torture Convention, *supra* note 27, and the Child Soldier Convention, *supra* note 29. Indonesia has no war crimes in its penal code. Indonesia Resp., at 8.

Japan,⁴⁶ Ukraine,⁴⁷ and the United States⁴⁸—contain many international crimes incorporated from the other covenants previously mentioned. None of the other covenants requires its parties to incorporate crimes against humanity or war crimes applicable to noninternational conflicts, and accordingly there are gaps in the penal codes of most of the remaining seven countries. It remains to be seen whether the countries with these gaps will be encouraged by the Rome Statute to update their penal codes as a matter of self-interest.

The pattern and pace of the process of incorporation indicated by the Survey suggests that ICL is already finding its way into many more domestic penal codes than the ones discussed here. In the meantime, acts that would be violations of ICL may be indirectly enforced under the penal code provisions of most countries that punish such crimes as the domestic crimes of murder, assault, child

The Indonesian parliament passed Law Number 26/2000 in November 2000. *See Indonesia Resp.*, at 8. It provides for the establishment of a new court system to try cases of gross human rights violations committed before the legislation was adopted, including crimes against humanity and genocide. *See* Law No. 26/2000, Nov. 6, 2000., art. 7 (Indon.). Since the Indonesian Constitution forbids the retroactive application of law, it is unclear whether this law will survive judicial scrutiny.

46. Japan is a party to the 1949 Geneva Conventions, *supra* note 19, Additional Protocol I, *supra* note 24, Additional Protocol II, *supra* note 24, the Torture Convention, *supra* note 27, the Rome Statute, *supra* note 14, and the Child Soldier Convention, *supra* note 29. Most ICL crimes have not been incorporated into the penal code and thus ICL violations would have to be punished as their domestic analogs, except for some crimes incorporated in 2004, such as destruction of historic monuments (art. 3), delay in the repatriation of prisoners of war (art. 4), transfer of its own civilian population into occupied territory (art. 5), and delay in the repatriation of civilians (art. 6). *See* Japan Resp., at 18, 21.

47. Ukraine is a party to the Genocide Convention, *supra* note 18, the 1949 Geneva Conventions, *supra* note 19, Additional Protocol I, *supra* note 24, Additional Protocol II, *supra* note 24, the Torture Convention, *supra* note 27, and the Child Soldier Convention, *supra* note 29. It is a signatory but not yet a party to the Rome Statute. *See* Rome Statute, *supra* note 14. Ukraine has incorporated the crimes of genocide and official torture from the respective conventions. Ukraine Resp., at 13, 15. It has no crimes against humanity on its books. *Id.*, at 14, 18; Ukraine Section of Composite Supp. Resp. Ukraine has a statute that incorporates all of the grave breaches identified in the 1949 Geneva Conventions and the two Additional Protocols. Ukraine Resp., at 20, Ukraine Section of Composite Supp. Resp. Whether the crimes would pertain to activities occurring in non-international conflicts has not yet been definitively established. Ukraine Section of Composite Supp. Resp.

48. The United States is a party to the Genocide Convention, *supra* note 18, the 1949 Geneva Conventions, *supra* note 19, the Torture Convention, *supra* note 27, and the Child Soldier Convention, *supra* note 29. It has incorporated the crime of genocide, the crime of official torture, all of the grave breaches from the 1949 Geneva Conventions and all of the provisions of Common Article 3. U.S. Resp., at 12 n.28, 13. It has no crimes against humanity on its statute books. *Id.* at 12. The United States adopted an amendment to its war crimes statute in 2006 that incorporates all of the provisions of Common Article 3. *See* 18 U.S.C. § 2441(d) (2006).

neglect, slavery, false imprisonment, persecution of minorities, and torture.

B. *The Extraterritorial Reach of Domestic Laws
Creates a Universal "Web of Liability"*

The ICC's core jurisdiction extends to offenses committed by the nationals of parties, offenses committed on the territory of parties, and offenses committed by the nationals of other countries that have accepted the ICC's jurisdiction—or on the territory of those countries.⁴⁹ The U.N. Security Council could expand this core jurisdiction by referring to the ICC a situation arising in any country, as it did in the case of Darfur.⁵⁰ Alternatively, it could create an ad hoc international tribunal, such as the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), under Chapter VII of the U.N. Charter.⁵¹ Or the Security Council could establish a special "mixed" international/domestic court, such as that created for Sierra Leone.⁵² These kinds of actions by the Security Council should be regarded as the exception rather than the rule, since there is a high potential for such actions to be blocked unless they serve the interests of all of the permanent members.

49. See Rome Statute, *supra* note 14, art. 12. ICC jurisdiction also extends to acts committed aboard ships and aircraft registered to its parties. See *id.* art. 12(2)(a).

50. Cases arising anywhere in the world may be referred to the ICC by the U.N. Security Council. See Rome Statute, *supra* note 14, art. 13(b). The Security Council referred the situation in Darfur to the ICC on March 31, 2005. S.C. Res. 1593, U.N. Doc. S/RES 1593 (March 31, 2005). That resolution referred to Chapter VII of the U.N. Charter as partial authority. See *id.*

51. Chapter VII of the U.N. Charter authorizes the Security Council to "determine the existence of any threat to the peace . . . and . . . decide what measures shall be taken . . . to maintain or restore international peace and security." U.N. Charter art. 39. This has been interpreted to include the establishment of ad hoc international criminal tribunals to punish war crimes occurring during specific conflict situations. Acting pursuant to Chapter VII, the Security Council has adopted Resolution 827 establishing the ICTY and Resolution 955 establishing the ICTR. See S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993); S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994).

52. The Special Court for Sierra Leone was created by an agreement between the Security Council and the government of Sierra Leone. See S.C. Res 1315, U.N. Doc. S/RES/1315 (Aug. 14, 2000) (authorizing the creation of the Special Court under Chapter VII). It is composed of a Trial Chamber consisting of one judge appointed by the government of Sierra Leone and two judges appointed by the Secretary-General of the United Nations and an Appeals Chamber consisting of two judges appointed by the government of Sierra Leone and three judges appointed by the Security Council. See *id.* art. 12(1).

As of January 1, 2009, there were 192 members of the United Nations,⁵³ of which 108 were parties to the Rome Statute.⁵⁴ These 108 countries contain approximately 28 percent of the world's population.⁵⁵ The remaining 84 U.N. members have yet to join, including seven of the world's ten most populous countries: China, India, the United States, Indonesia, Pakistan, Bangladesh, and the Russian Federation. Thus, over 70 percent of the world's population (and a correspondingly high percentage of its territory) is outside of the ICC's core jurisdiction. Also, as discussed below, the ICC has no jurisdiction over corporations and other legal persons.⁵⁶

Even where it has jurisdiction, the ICC, like other international tribunals, may be expected to focus its attention on the most egregious and high-level offenders,⁵⁷ leaving it to domestic courts to deal with other offenders.⁵⁸

53. United Nations Member States, <http://www.un.org/members/list.shtml> (last visited May 12, 2009).

54. See Rome Statute, *supra* note 14.

55. The population of the world in 2006 is estimated to have been approximately 6.5 billion. The 108 countries that are parties to the Rome Statute then had an estimated combined population of approximately 1.8 billion, or roughly 28 percent of the world population. See Countries of the World (By Largest Population), <http://www.worldatlas.com/aatlas/populations/ctypopls.htm> (last visited Sept. 7, 2009). Spreadsheet calculations and other sources of this information are on file at the office of the *George Washington International Law Review*.

56. See *infra* Part D.

57. The Rome Statute expressly limits the ICC's jurisdiction to "the most serious crimes of international concern." Rome Statute, *supra* note 14, art. 5. The policy of the ICTY is to do the same. See Carla Del Ponte, *Investigation and Prosecution of Large-scale Crimes at the International Level: The Experience of the ICTY*, 4 J. INT'L CRIM. JUST. 539, 542 (2006) (discussing the limitations placed on the Prosecutor of the ICTY by the terms of Resolution 1503 of the Security Council, and the selection factors that lead the ICTY to concentrate its efforts on the most egregious cases); Meron, *supra* note 28, at 563 (explaining how the lack of resources and political backing often requires ad hoc tribunals to prosecute only the highest level officials).

58. The IMT itself tried twenty-three high level individuals. See Major Michael A. Newton, *Continuum Crimes: Military Jurisdiction Over Foreign Nationals Who Commit International Crimes*, 153 MIL. L. REV. 1, 48 n.226 (1996). Military courts of the allies tried at least an additional 21,000 lesser offenders. See *id.* The IMTFE at Tokyo tried twenty-eight high level individuals. See *id.* Approximately 5,700 additional lesser offenders were tried in the military courts of the allies. See Steve Sheppard, *Propter Honoris Respectum: Passion and Nation: War, Crime, and Guilt in the Individual and the Collective*, 78 NOTRE DAME L. REV. 751, 785 n. 16 (2003). The ICTY has opened slightly fewer than 100 cases, some of which involve multiple defendants. See ICTY Indictments and Proceedings, <http://www.un.org/icty/cases-e/indictments-e.htm> (last visited May 12, 2009). To date, the ICTR has completed forty-three cases; it has twenty-six cases in progress and another five awaiting trial. See ICTR – Status of Cases, <http://69.94.11.53/ENGLISH/cases/status.htm> (last visited May 12, 2009).

The Survey found that domestic courts of the Surveyed Countries generally have the requisite extraterritorial jurisdiction to potentially fill the territorial and other gaps just mentioned—jurisdiction that extends to ICL offenses committed outside of their borders. Fourteen of the Surveyed Countries have universal jurisdiction over ICL violations globally and can thus apply all or a part of their ICL laws to violations irrespective of the places where they were committed or the nationalities of the perpetrators and the victims.⁵⁹ Having universal jurisdiction does not mean that a country may try a person *in absentia*, although some countries may provide for this under their domestic laws.⁶⁰ The statutes of many other countries that apply universal jurisdiction to ICL offenses do so subject to the offender being found in their jurisdictions.⁶¹

The Survey also found that all of the Surveyed Countries apply the “active personality” principle,⁶² meaning they apply their incor-

59. See Australia Resp., at 8; Belgium Resp., at 57; Canada Resp., at 6; France Resp., at 25; Germany Resp., at 19; India Resp., at 21; India Portion of Composite Supp. Resp.; Japan Resp., at 19 (universal jurisdiction applies only when so required by a international treaty to which Japan is a party); Netherlands Resp., at 21 (universal jurisdiction may be limited to those situations where there is a treaty in force with another state giving the Netherlands the right to prosecute); Norway Section of Composite Supp. Resp.; South Africa Section of Composite Supp. Resp.; Spain Section of Composite Supp. Resp.; Ukraine Resp., at 26 (penal code of Ukraine authorizes prosecution of acts committed abroad “in such cases as provided for by international treaties”); Ukraine Section of Composite Supp. Resp.; U.K. Resp., at 17, 19; U.S. Resp., at 12. Belgium’s universal jurisdiction statute was amended in 2003 to provide that, in lieu of the prior system whereby individuals could commence a *constitution de partie civile*, now only the federal prosecutor can investigate ICL violations committed abroad, thus limiting, although still preserving for some purposes, the universal jurisdiction of Belgium’s ICL laws. Belgium Resp., at 52.

60. A number of civil law countries authorize *in absentia* trials, but the practice is confined to a minority of jurisdictions, and is not allowed in common law countries. See Belgian Resp., at 61; Claus Kress, *Universal Jurisdiction over International Crimes and the Institut de Droit International*, 4 J. INT’L CRIM. JUST. 561, 577 (2006) (discussing the existence of rules allowing *in absentia* proceedings in Belgium, Germany, Israel, New Zealand, and Spain and concluding that it is allowed in a definite minority of states); Roger O’Keefe, *Universal Jurisdiction: Clarifying the Basic Concept*, 2 J. INT’L CRIM. JUST. 735 (2004) (discussing the varying notions of universal jurisdiction and the ways in which enforcement may occur, depending upon the presence of the offender in the prosecuting country’s territory, the willingness of another country to extradite, and the availability of *in absentia* authority in certain domestic laws); HUMAN RIGHTS WATCH, *UNIVERSAL JURISDICTION IN EUROPE: THE STATE OF THE ART 28* (2006), available at <http://www.hrw.org/sites/default/files/reports/ij0606web.pdf>.

61. See Canada Resp., at 5; Netherlands Section of Composite Supp. Resp.; Norway Section of Composite Supp. Resp.; South Africa Section of Composite Supp. Resp.; U.K. Resp., at 19 (as to war crimes); U.S. Resp. (18 U.S.C. § 2440A (2008) requires that the offender be present in the United States before he or she can be subject to the war crimes statute).

62. This principle is sometimes referred to as the “principle of active nationality.” Belgian Resp., at 56.

porated ICL to conduct of their nationals abroad.⁶³ Furthermore, all of the Surveyed Countries except for Argentina apply the “passive personality” or “protective principle,” hence all or a part of their incorporated ICL applies to crimes committed abroad against their own nationals or involving a national interest.⁶⁴

One who offends ICL could, in theory, simultaneously become liable to being prosecuted in the ICC or in any number of countries, with liability flowing from a variety of sources that take into account the nationality of the offender, the place of the crime, and where the offender is physically present during the course of a criminal investigation. Thus, there is literally no place in the world where someone can commit an international crime without incurring liability, whether under the Rome Statute or the laws of numerous countries. An offender for whom an arrest warrant has been issued by the ICC or one or more domestic courts faces a kind of containment—the offender will risk being apprehended in numerous countries and may have to live as a fugitive.⁶⁵ And even

63. See Argentina Resp., at 20 (Argentina’s criminal laws are applicable to conduct abroad by “agents or servants of Argentine authorities, in the function of their duties,” which presumably covers the Argentine military, diplomats, and so forth, but not private persons); Australia Resp., at 8; Belgian Resp., at 56; Canada Resp., at 4; France Resp., at 8; Germany Resp., at 18; India Resp., at 21 (India has a special statute that applies only to war crimes, which India can punish wherever occurring and by whomever perpetuated.); Indonesia Resp., at 14; Japan Resp., at 19, 21; Netherlands Resp., at 21; Norway Resp., at 22; South Africa Section of Composite Supp. Resp.; Spain Resp., at 13 (applicable to “crimes committed in the exercise of their functions by Spanish public servants residing abroad”); Ukraine Resp., at 25; U.K. Resp., at 17, 19; U.S. Resp., at 12.

64. See Argentina Resp., at 20 (Argentina allows prosecution when the “effects” of a crime are felt in Argentina.); Australia Resp., at 8; Belgium Resp., at 57 (requires double incrimination—the act in question must be a crime in the country in which it occurred); Belgian Section of Composite Supp. Resp.; Canada Resp., at 6; France Resp., at 8; Germany Resp., at 18; India Resp., at 21; Indonesia Resp., at 14; Japan Resp., at 15; Netherlands Resp., at 21; Norway Resp., at 22 (requires double criminalization); South Africa Section of Composite Supp. Resp.; Spain Resp., at 12 (requires double criminalization.); Ukraine Section of Composite Supp. Resp.; U.K. Resp., at 17-19; U.S. Resp., at 12 (genocide and war crimes only).

65. The Rome Statute encourages cooperation on extradition matters between the Prosecutor of the ICC and domestic prosecutors, and among domestic prosecutors themselves. See Rome Statute, *supra* note 14, arts. 34-52. Parties are obligated to arrest and surrender to the Court any person for whom a warrant has been issued by the Court. See *id.*, arts. 58, 89. Mutual assistance obligations, including the duty to extradite, are also found in all four of the 1949 Geneva Conventions, Additional Protocol I, the Genocide Convention, and the Torture Convention. See Convention I, *supra* note 19, art. 49; Convention II, *supra* note 19, art. 50; Convention III, *supra* note 19, art. 129; Convention IV, *supra* note 19, art. 146; Additional Protocol I, *supra* note 24, art. 88; Genocide Convention, *supra* note 18, art. 7; Torture Convention, *supra* note 27, art. 8. The Torture Convention provides the legal basis for extradition for the crime of torture, whether or not an extradition treaty is in force between a requesting party and the party on whose territory an offender

if the offender manages to find refuge in a country that is willing to grant asylum (thus deliberately flouting all extradition requests), there is never a secure existence—travel and immigration options will be severely limited, access to funds could be cut off, and, if the politics of the country granting asylum should change, the offender could be surrendered to an international court, extradited to another country to face prosecution,⁶⁶ or tried by the domestic courts of the country that formerly provided sanctuary.⁶⁷ If ultimately tried and convicted of an ICL violation, the offender may forfeit all ill-gotten gains through restitution mechanisms such as those included in the Statute of the ICTY,⁶⁸ the Rome Statute,⁶⁹ and the rules of the Special Court for Sierra Leone.⁷⁰

C. *Domestic Penal Codes Provide for Third-Party Liability in the Forms of Conspiracy, Aiding and Abetting, and Joint Criminal Enterprise / Common Purpose*

International courts have applied four principal modes of participation to punish offenders who were not the actual perpetrators of crimes but were indirectly involved:⁷¹ (1) conspiracy; (2) aiding and abetting (complicity); (3) joint criminal enterprise;⁷² and (4)

may be found. Torture Convention, *supra* note 27, art. 8. The conventions generally include the obligation to either extradite or try the offenders.

66. This has already occurred in the case of Charles Taylor, the former president of Liberia. See Marlise Simons, *Former Liberian President in the Hague for Trial*, N.Y. TIMES, June 21, 2006, at A6 (discussing the transfer of Charles Taylor to the Hague to stand trial in the Special Court for Sierra Leone).

67. This is potentially the situation for Hissene Habre, former president of Chad. See Lydia Polgreen, *African Union Tells Senegal to Try Ex-Dictator of Chad*, N.Y. TIMES, July 3, 2006, at A4.

68. See ICTY Statute, *supra* note 28, art. 24(3).

69. Rome Statute, *supra* note 14, art. 75.

70. Charles Taylor is a living example of someone who would face forfeiture of his illicitly obtained fortune if he is ultimately convicted. See Marlise Simons, *Gains Cited in Hunt for Liberia Ex-Warlord's Fortune*, N.Y. TIMES, March 9, 2008, at A4 (discussing the fact that the Special Court for Sierra Leone has engaged a London law firm to search through banking records, which could lead to funds being seized under an order of restitution and transferred to a special trust fund established to assist victims of the wars in Liberia and Sierra Leone, including those who were mutilated by machetes).

71. The term "corporate complicity" has been used by policymakers and scholars involved in the ongoing debate about business and human rights to cover all situations where businesses are implicated as accomplices in the human rights violations perpetrated by others. See Ramasastry, *supra* note 8, at 92 n.4. One of the earliest instances of its broad usage was in the U.N. Global Compact. See The Ten Principles of the UN Global Compact, <http://www.unglobalcompact.org/AbouttheGC/TheTENPrinciples/index.html> (last visited May 12, 2009). Principle Two of the Compact states that companies should "make sure they are not complicit in human rights abuses." *Id.*

72. Also referred to as "common purpose."

superior responsibility.⁷³ The Survey found that most of the domestic penal codes in the Surveyed Countries contain these modes of participation, resulting, not from the incorporation of international law, but from provisions in their preexisting penal codes.

Conspiracy in its classical formulation is a crime that occurs when two or more persons enter into an agreement to commit a crime.⁷⁴ Depending upon variations in domestic penal codes, it is often required that the conspirators thereafter take some concrete step to carry out that agreement.⁷⁵ Conspiracy was used in the IMT⁷⁶ and IMTFE⁷⁷ to punish leading civilian and military participants in the crime of planning and executing aggression. The statutes of the ICTY and ICTR both contain the crime of conspiracy to commit genocide.⁷⁸ The Rome Statute has no conspiracy provision, an omission that may be offset by the presence of other provisions for third-party liability, as discussed below. The Survey found that the penal codes of twelve Surveyed Countries contain conspiracy provisions.⁷⁹

Aiding and abetting (complicity) in its classical formulation allows a court to convict a person who facilitates the commission of a crime by providing assistance to the actual perpetrator of that crime (the “aiding” part of complicity) or who orders, urges, or instigates another to commit a crime (“abetting”).⁸⁰ Aiding and abetting was

73. Also referred to as “command responsibility.”

74. See generally Anne Langer and Jonathan Parnes, *Federal Criminal Conspiracy*, 45 AM. CRIM. L. REV. 449 (2008) (discussing the elements of the offense of conspiracy under U.S. law, including recent examples of criminal prosecutions for conspiracy).

75. See, e.g., U. S. Resp., at 9.

76. Article 5(a) of the IMT Charter, *supra* note 28, punishes “the planning, preparation, initiation or waging of war of aggression, or a war in violation of international law, treaties, agreements or assurances, or participation in a common plan or *conspiracy* for the accomplishment of any of the foregoing.” (emphasis added)

77. See Charter of the International Military Tribunal for the Far East art. 5(a), Apr. 26, 1946, T.I.A.S. No. 1587, available at <http://ibiblio.org/hyperwar/PTO/IMTFE/IMTFE-A5.html> [hereinafter IMTFE Charter].

78. See ICTY Statute, *supra* note 28, art. 4(3)(b); ICTR Statute, *supra* note, 28 art. 2(3)(b).

79. See Australia Resp., at 5; Belgium Resp., at 17; Belgium Supp. Resp., at 93; Canada Resp., at 3; France Resp., at 13; India Resp., at 13; India Section of Composite Supp. Resp.; Japan Resp., at 12, 14; Netherlands Resp., at 14; South Africa Resp., at 16; Spain Resp., at 9; Ukraine Resp., at 9-12, Ukraine Section of Composite Supp. Resp.; U.K. Resp., at 13 (“The agreement in question must involve either spoken or written words or be evidenced by a course of conduct.”); U.S. Resp., at 9 (“One or more persons [must] do any act to effect the object of the conspiracy.”).

80. See Ramasastry, *supra* note 8, at 141-43 (discussing the historical development of the concepts of aiding and abetting applied in international criminal tribunals).

used by the IMT.⁸¹ It is being used by the ICTY⁸² and ICTR.⁸³ It is also included in the Rome Statute.⁸⁴ In general, the elements of aiding and abetting are: (a) that a crime or attempted crime be committed; (b) that the accomplice provided assistance to the perpetrator (the *actus reus*); and (c) that the accomplice had the requisite mental state (*mens rea*).⁸⁵ The test for the *actus reus* applied by the ICTY and ICTR is that the assistance given by an accomplice must have a "substantial effect on the commission of the crime."⁸⁶

At the risk of oversimplification, there are three main tests used in criminal law to determine whether a party had the requisite *mens rea* to be convicted for aiding and abetting a crime. The "intent" test⁸⁷ is met where an accomplice desires the same outcome as a perpetrator (that is, that the crime be committed).⁸⁸ In other words, the accomplice must have possessed a willingness that the crime result. A lower threshold is found in the "knowledge" test,⁸⁹ which requires only that the accomplice knew or should have known (given all information available to him) that his actions could assist in the commission of a crime; the accomplice, however, does not need to have shared the intent or desired the outcome.⁹⁰ The knowledge test allows a court to convict a person even if he

81. See *The Zyklon B Case (Trial of Bruno Tesch and Two Others)*, 1 Law Reports of Trials of War Criminals 93, 93-102 (1997) (Brit. Mil. Ct. 1946). The owner of the firm that supplied Zyklon B gas to the SS for use in the extermination camps was convicted of complicity in war crimes and sentenced to death. See *United States v. Karl Krauch*, 8 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law 10 (1950). Officials in the I.G. Farben company were convicted of complicity in war crimes and crimes against humanity for their role in the construction of extermination camps. See generally *United States v. Flick*, 6 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law 10 (1949).

82. See ICTY Statute, *supra* note 28, art. 7(1).

83. See ICTR Statute, *supra* note 28, art. 6(1).

84. See Rome Statute, *supra* note 14, art. 25(a)(3).

85. See generally Ramasastry, *supra* note 8, at 143.

86. See, e.g., *Prosecutor v. Blaskic*, Case No. IT-95-14-A, Judgment, ¶ 48 (July 29, 2004) ("The Appeals Chamber reiterates that one of the requirements of the *actus reus* of aiding and abetting is that the support of the aider and abettor has a substantial effect upon the perpetration of the crime. In this regard, it agrees with the Trial Chamber that proof of a cause-effect relationship between the conduct of the aider and abettor and the commission of the crime, or proof that such conduct served as a condition precedent to the commission of the crime, is not required.").

87. Various referred to as the "specific intent" test or the "shared intent" test.

88. See U.S. Supp. Resp., at 2.

89. See *Prosecutor v. Vasiljevic*, Case No. IT-98-32, Judgment, ¶ 102(ii) (Feb. 25, 2004) ("In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of the specific crime of the principal.").

90. See *id.*; U.S. Supp. Resp., at 3.

actively wished that the crime not be committed.⁹¹ A third standard, referred to as the *dolus eventualis* test, relates to situations where an accomplice is aware of the risk that the perpetrator might commit a crime but nonetheless consciously decides to provide assistance.⁹²

For businesses, the issue of intent is critical because in many circumstances, the officers and managers of a company, either individually or collectively, may not share the same intent as the perpetrator of an ICL violation. It is more likely that they knew or had reason to know that their actions were facilitating the crime, or that they were aware of a serious risk of such a crime being committed.

The IMT, the ICTY, and the ICTR generally applied the knowledge test for *mens rea*.⁹³ However, there is now a potential divergence of approach between the ICC and its predecessor tribunals. Article 25(1)(c) of the Rome Statute provides that one is guilty of aiding and abetting a crime if “[f]or the purpose of facilitating the commission of such a crime, [one] aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission.”⁹⁴ The “for the purpose of facilitating” language has been interpreted in one of the few court decisions that have considered it as requiring not just knowledge, but the intent to commit a crime.⁹⁵ If the ICC ultimately adopts a

91. See Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 539 (Sept. 2, 1998) (“As a result, anyone who knowing of another’s criminal purpose voluntarily aids him or her in it, can be convicted of complicity even though he regretted the outcome of the offence.”).

92. See Andrew Clapham & Scott Jerbi, *Categories of Corporate Complicity in Human Rights Abuses*, 24 HASTINGS INT’L & COMP. L. REV. 339, 343, 346 (2001) (discussing the nature of *dolus eventualis* as applied in international law).

93. See Ramasastry, *supra* note 8, at 143.

94. Rome Statute, *supra* note 14, art. 25(1)(c).

95. See *Khulumani v. Barclay National Bank, Ltd.*, 504 F.3d 254 (2d Cir. 2007). Two judges in separate opinions stated that the appropriate formulation for aiding and abetting liability in an ATCA case is not the knowledge test applied by the pre-ICC tribunals, but the test in the Rome Statute, with its “for the purpose” language. See *id.* at 274-75 (Katzmann, J., concurring); *id.* at 332-33 (Korman, J., concurring in part and dissenting in part). Judge Korman stated: “This means more than the mere knowledge that the accomplice aids the commission of the offence, as would suffice for complicity according to the ICTR and ICTY Statutes, rather he must know as well as *wish* that his assistance shall facilitate the commission of the crime.” *Id.* at 332-33. (quoting Albin Eser, *Individual Criminal Responsibility*, in 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 767, 801 (Antonio Cassese et al., eds. 2002)) (emphasis added). The third judge, Judge Hall, would apply the knowledge standard found in the Restatement (Third) of Torts, for instance, the common law test for civil liability. See *id.* at 287-89 (Hall, J., concurring). It should be noted that the Panel Decision in *Unocal* did not discuss the Rome Statute’s definition of complicity. See *Doe I v. Unocal Corp.*, 110 F. Supp. 2d 1294, 1294 (C.D. Cal. 2000). A federal district

similar interpretation, it would represent a departure from the test used by the prior tribunals.⁹⁶

The Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes⁹⁷ has suggested that, at least in some cases, the question of whether the Rome Statute contains an “intent” test or a “knowledge” test may not make a practical difference.⁹⁸ The Commission reasons that if the Statute is interpreted to contain an “intent” test, the way in which an offender’s mental state is determined (that is, by examining all relevant circumstances) could lead a court to conclude that a person who has knowledge of the perpetrator’s criminal intent and yet proceeds to provide the assistance could be found to have acted with intent (that is, with the purpose of facilitating the crime).⁹⁹ It will, of course, be up to the ICC to interpret its own statute. Yet, irrespective of whether the Rome Statute complicity provision contains a test akin to the intent test or the knowledge test, there still will remain some inconsistency between the ICC and a number of domestic jurisdictions.

The Survey found that aiding and abetting concepts are present in the penal codes of all of the Surveyed Countries,¹⁰⁰ albeit with

court has recently ruled that the “intent” test implicit in the “for the purpose” clause contained in the Rome Statute may be satisfied by reference to Article 30(2) of the Statute, which defines “intent” to mean either actual intent or “[i]n relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.” In re S. African Apartheid Litig., 617 F. Supp. 2d 228, 262 (S.D.N.Y. 2009). This interpretation would seem to align the Rome Statute’s mens rea test with the “knowledge” test used by the ICTY and the ICTR. *See id.*

96. *See* Doug Cassell, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts*, 6 Nw. U. J. INT’L HUM. RTS. 304, 310-12 (2008) (discussing the drafting history of the Rome Statute leading to the inclusion of the “for the purpose” language, and also raising the question of whether the purpose in question need be a sole purpose, or whether a secondary purpose might suffice, for instance, to assist the perpetrator in continuing their criminal activities so as to secure an ongoing profitable business position).

97. The International Commission of Jurists (ICJ) is a nongovernmental organization with 85 national sections headquartered in Geneva. *See* 2 INT’L COMM’N OF JURISTS, REPORT OF THE INTERNATIONAL COMMISSION OF JURISTS EXPERT LEGAL PANEL ON CORPORATE COMPLICITY IN INTERNATIONAL CRIMES (2008) (third unnumbered page). Its mission is to promote the understanding of the rule of law and the protection of human rights around the world. *See id.* In March 2006 the ICJ asked eight expert jurists to serve on an Expert Legal Panel on Corporate Complicity in International Crimes, charged with exploring when business entities could become liable as accomplices in international crimes. *Id.* at vii. The final report in 2008 reflected consultations with a large number of concerned individuals and nongovernmental organizations. *See id.*

98. *Id.* at 22.

99. *Id.*

100. *See* Argentine Resp., at 5, 12; Australia Resp., at 5; Belgium Resp., at 16; Canada Resp., at 2, 3; France Resp., at 10, 11; Germany Resp., at 1; India Resp., at 7, 13; Indonesia Resp., at 6, 7; Japan Resp., at 11, 13; Netherlands Resp., at 12; Norway Resp., at 7; South

nuanced differences among them—as well as many similarities.¹⁰¹ There was agreement among the Surveyed Countries on a variety of issues. For example, the countries agree that assistance may be given either verbally or by concrete action.¹⁰² Additionally, they agree that assistance given after the commission is viewed as a separate crime, which includes covering up the crime or serving as an accessory after the fact.¹⁰³ Generally, the perpetrator need not be charged with or convicted of a crime in order for the court to try the accomplice.¹⁰⁴

There is some difference in approach toward an act of omission as the *actus reus*. Generally, the omission to perform a duty will suffice, such as the omission of a night watchman to lock up, thereby allowing his accomplice to enter the premises.¹⁰⁵ In France and Argentina, the breach of duty may consist of a failure to use reasonable means to prevent a crime.¹⁰⁶ A few countries require that the crime that was actually committed is the same one for which the accomplice rendered assistance; others require only that it must be of the same general type, that it was foreseeable, or that the perpetrator's intent was indefinite.¹⁰⁷

Africa Resp., at 15; Spain Resp., at 8; Ukraine Resp., at 9, 10; U.K. Resp., at 10, 19; U.S. Resp., at 7.

101. The reader who would like more detailed information regarding the various differences among the Surveyed Countries is invited to examine the individual Survey Responses, each of which deal with the subject of aiding and abetting in a discrete section.

102. See Argentina Supp. Resp., at 3; Germany Resp., at 2; Japan Supp. Resp., at 7; Netherlands Supp. Resp., at 3; Norway Resp., at 7; South Africa Supp. Resp., at 3; Spain Resp., at 9; U.S. Supp. Resp., at 7.

103. See Argentina Supp. Resp., at 1; Belgium Supp. Resp., at 88, 89; France Resp., at 12; Netherlands Resp., at 12; South Africa Supp. Resp., at 6; U.S. Supp. Resp., at 8.

104. See Argentina Supp. Resp., p. 4. Australia Resp., p. 5; Belgian Resp., p. 17; France Resp., pp. 11, 29 (explaining, however, that where the crime was committed abroad and acts of complicity occurred in France, a proceeding in a French court against an accomplice must present proof that the principal was convicted abroad); Germany Resp., p. 12; Netherlands Supp. Resp., p. 4; South Africa Resp., p. 15; Spain Resp., p. 8; U.S. Supp. Resp., at 8.

105. See Argentina Supp. Resp., at 3; Belgium Resp., at 18; France Resp., at 12; France Supp. Resp., at 5; Germany Supp. Resp., at 2; Japan Supp. Resp., at 6; Netherlands Supp. Resp., at 3; South Africa Supp. Resp., at 3; U.S. Supp. Resp., at 8.

106. See Argentina Supp. Resp., at 3; France Supp. Resp., at 5.

107. Although Germany requires that the offense that was completed must have been the one that the accomplice sought to assist, Germany Resp., at 12, most of the other countries require only that the offense that is ultimately attempted or completed be of the same kind, or the perpetrator's intention was indefinite as to the exact type of crime. See Belgium Suppl. Resp., at 100; France Supp. Resp., at 1; U.K. Resp., at 12; and U.S. Supp. Resp., at 8. In Japan, the principal must have committed the crime that the accomplice foresaw or a lesser crime of the same general nature (for example murder was foreseeable, but only bodily injury occurred, so the accomplice is charged with bodily injury). See Japan Supp. Resp., at 2.

The countries differ regarding other aspects of aiding and abetting. For example, some countries require that the *actus reus* be indispensable to the commission of the crime, whereas others require that it be "substantial."¹⁰⁸ Still others require that it merely contribute in some manner to the crime. Some countries require the crime to have been completed;¹⁰⁹ others require only an attempted crime.¹¹⁰ Some countries punish complicity the same as the underlying crime;¹¹¹ others reduce the penalty for accomplices.¹¹²

On the key issue of what constitutes the *mens rea* of aiding and abetting, the Survey found a lack of unanimity among the Surveyed Countries. Thirteen employ a test comparable to the "intent" test,¹¹³ with three of these countries (Germany, the Netherlands, and South Africa) also employing a version of the *dolus eventualis* test.¹¹⁴ Three Surveyed Countries (Argentina, Japan, and Norway) apply a "knowledge" test,¹¹⁵ and each also applies a version of the

108. The laws of Belgium require that the crime "could not have been committed without their assistance." Belgium Resp., at 17. Most of the other countries' penal codes, however, provide that the assistance must only make a contribution in some degree to the criminal act, without being a "substantial" contribution. See Argentina Supp. Resp., at 1 ("secondary complicity"); Australia Resp., at 5; France Resp., at 11 ("material participation"); Japan Supp. Resp., at 9 (mere "facilitation"); Netherlands Supp. Resp., at 3; Norway Section of Comp. Supp. Resp., at 10; South Africa Resp., at 4, South Africa Suppl. Resp., at 15 (explaining, however, that some courts seem to require a "substantial" or "causal" impact on the crime); Ukraine Resp., at 10 ("a causal connection"); U.S. Supp. Resp., at 1.

109. See Australia Resp., at 5; Belgium Resp., at 20; Germany Supp. Resp., at 2; South Africa Resp., at 15; U.K. Resp., at 12.

110. See Argentina Supp. Resp., at 3; Australia Resp., at 5; France Supp. Resp., at 7; Netherlands Resp., at 13; Norway Resp., at 7; South Africa Supp. Resp., at 6; U.S. Supp. Resp., at 6. India is reported to punish assistance, even though the perpetrator does not go so far as to be liable for an "attempted" crime. See India Resp., at 13. Germany would punish even an attempt to assist a perpetrator even if there is no ultimate unlawful act by the perpetrator. See Germany Supp. Resp., at 2.

111. See France Resp., at 10; Germany Supp. Resp., at 2.

112. See Argentina Resp., at 12 (one-third to one-half reduction for assistance that was not indispensable to the commission of the crime, for instance "secondary complicity"); Belgian Resp., at 17; Indonesia Resp., at 7 (one-third reduction of sentence); Japan Resp., at 13; Netherlands Resp., at 12 (one-third reduction); and Spain Resp., at 9 ("the accomplices to a consummated or intended crime shall be punished with penalty one degree lower than that established for the perpetrator of the same crime.").

113. See Australia Resp., at 5; Belgium Supp. Resp., at 85; Canada Resp., at 3; France Resp., at 12; Germany Resp., at 12; India Resp., at 13; Indonesia Resp., at 7; Netherlands Supp. Resp., at 1; South Africa Resp., at 16; Spain Section of Composite Supp. Resp.; Ukraine Resp., at 10; U.K. Resp., at 12; U.S. Supp. Resp., at 4.

114. See Germany Supp. Resp., at 1; Japan Supp. Resp., at 4; Netherlands Supp. Resp., at 1.

115. See Argentina Supp. Resp., at 2; Japan Supp. Resp., at 2; Norway Section of Composite Supp. Resp.

dolus eventualis test.¹¹⁶ In both common law and civil law jurisdictions, the state of mind of the accomplice may be inferred from the state of the defendant's knowledge and surrounding circumstances.¹¹⁷ Thus, it is not necessary for the prosecution to produce an admission or other direct evidence of the actual thoughts occurring inside the defendant's head.

There is an argument that the test for *mens rea* used to judge international crimes should be uniform, whether applied in international or domestic courts.¹¹⁸ After all, should not international crimes always be tried using the same substantive law, irrespective of the nature or location of the court involved? In recognition of this principle, the Dutch court in the *Van Anraat* matter¹¹⁹ (which could have selected either the "knowledge" test under international law or the *dolus eventualis* test available under Dutch law) ultimately decided to apply the international "knowledge" test.¹²⁰ Van Anraat was acquitted of complicity in Saddam Hussein's use of gas in his genocidal war against the Kurdish people because the prosecution failed to prove that he knew of Iraq's genocidal intentions.¹²¹ One writer has questioned the legal advisability of this

116. See Argentina Supp. Resp., at 2; Japan Supp. Resp., at 4; and Norway Section of Composite Supp. Resp.

117. See France Supp. Resp., at 1; U.S. Supp. Resp., at 3-6.)

118. Cf. Andre Nollkaemper, *Litigation Against MNCs: Public International Law in the Netherlands*, in LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW, 265, 280 (Menno T. Kamminga and Saman Zia-Zarifi eds., 2000) (discussing generally the application of public international law in transnational litigation); Nicola M.C.P. Jägers & Marie-José van der Heijden, *Corporate Human Rights Violations: The Feasibility of Civil Recourse in the Netherlands*, 33 BROOK. J. INT'L L. 833, 854 (2008) (discussing an argument advanced by Professor Nollkaemper to the effect that international standards, agreed to by all, would be more neutral and fair). This argument is strengthened by pointing out that a domestic jurisdiction is not fully complementary with the ICC unless it applies complicity as extensively as the Rome Statute.

119. Van Anraat, Rechtsbank [Rb.] Gravenhage [District Court of The Hague], ¶ 6.4, 23 december 2005, LJN AU8685 (Neth.).

120. See *id.*

121. See Harmen G. van der Wilt, *Genocide, Complicity in Genocide and International v. Domestic Jurisdiction: Reflections on the Van Anraat Case*, 4 J. INT'L CRIM. JUST. 239, 250 (2006) (discussing the choice that the District Court of the Hague had between the application of the international "knowledge" standard and the domestic *dolus eventualis* standard, and suggesting that "the outcome on the complicity to commit genocide count might have been different if the court had resorted to domestic criminal law"). The Court of Appeal evidently disagreed with the required use of the international "knowledge" test, but upheld the acquittal on the grounds that there was insufficient evidence to convict even if the *dolus eventualis* test were applied. See Harmen van der Wilt, *Genocide v. War Crimes in the Van Anraat Appeal*, 6 J. INT'L CRIM. JUST. 557 (2008). The Supreme Court of Holland affirmed van Anraat's conviction in 2009. See Int'l Justice Desk, Dutch Supreme Court upholds van Anraat judgment, June 30, 2009, <http://www.rnw.nl/int-justice/article/dutch-supreme-court-upholds-van-anraat-judgement>.

choice and suggested that had the court applied the *dolus eventualis* test, which only requires awareness of a risk, it could have convicted Van Anraat for complicity in genocide.¹²²

Those in favor of using the test that is generally applied in a domestic forum to try international crimes argue that international crimes that have been incorporated into domestic penal codes must thereafter be considered to be domestic crimes and thus judged using the standards prevailing in the forum.¹²³ This argument is particularly strong when a case involves related but purely domestic crimes as well as international crimes, as use of a single standard to judge both categories may simplify the proceedings.

Domestic courts and legislatures will eventually sort out the *mens rea* issue on a case-by-case basis. In the meantime, the business community may have justification to complain that there are no clear operational guidelines for them to follow in projecting whether a particular business arrangement in any given country amounts to criminal aiding and abetting.

Joint criminal enterprise (JCE) is the term applied to the mode of participation providing that individuals who associate themselves with others in a plan to commit crimes should be liable for all crimes committed by all of the other members of the group who act according to the common plan.¹²⁴ An early precedent is the case in the U.S. war crimes tribunal involving the leading German industrialist Friedrich Flick, who was convicted as an accessory to the crimes committed by the SS because of his financial contributions to that organization.¹²⁵ The court ruled that: "One who knowingly by his influence and money contributes to the support thereof must, under settled legal principals, be deemed to be, if not a principal, certainly an accessory to such crimes."¹²⁶ The ICTY, relying upon customary international law as found in the prior decisions of the IMT, has applied this principle to partici-

122. See Van der Wilt, *supra*, note 121.

123. See *id.*

124. See Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75, 103 (2005) (discussing the evolution of the concepts of JCE and superior responsibility within the ICTY and expressing concern that JCE in its latest formulation could amount to "guilt by association").

125. See *United States v. Flick*, 6 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law 10, 1217, 1220, 1222-23 (1949).

126. *Id.* at 1217.

pants in the crimes involved in ethnic cleansing cases such as *Tadic*¹²⁷ and *Brdanin*.¹²⁸

The *Brdanin* court articulated a three-tiered test for the *mens rea* for participating in a JCE. The defendant's mental state must meet any one of three tests. The first requires that "the accused must both intend the commission of the crime and intend to participate in a common plan aimed at its commission."¹²⁹ The second requires that "the accused must be shown to have personal knowledge of an organized criminal system and intend to further the criminal purpose of the system."¹³⁰ The third requires that "the accused can only be held responsible for a crime outside the common purpose if, under the circumstances of the case, it was *foreseeable* that such a crime might be perpetrated by one or other members of the group and the accused *willingly took that risk (dolus eventualis)*."¹³¹

Brdanin also ruled that the participants need not have agreed among themselves, so long as they acted according to the plan. Moreover, it ruled that all participants could be held liable not only for all crimes that they themselves committed pursuant to the JCE, but also for all crimes committed by those who were hired by other plan participants.¹³² These sweeping interpretations of JCE have been criticized in the academic press as offensive to the legality principle by coming close to "guilt by association."¹³³ The majority in *Brdanin* defended its formulation of JCE by emphasizing that a court could hold an individual liable only if that individual is found to have had criminal intent and is also found to have made a substantial contribution to the overall criminal plan.¹³⁴ The court observed that disparities among the degrees of contribu-

127. Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment (July 15, 1999).

128. Prosecutor v. Brdanin, Case No. IT-99-36-A, Judgment (Apr. 3, 2007). The *Brdanin* court's description of JCE was an advisory opinion, because Brdanin's crimes were not through participation in a JCE, but for aiding and abetting. See *id.* ¶¶ 503, 504. JCE has been applied in a number of other cases by the ICTY. One example is Prosecutor v. Radic, Case No. IT-98-30/1, Judgment (Feb. 28, 2005), in which the JCE involved was the infamous Omarska Camp, where inmates were subjected to horrendous living conditions and persecution. See HUMAN RIGHTS WATCH, GENOCIDE, WAR CRIMES, CRIMES AGAINST HUMANITY: A TOPICAL DIGEST OF THE CASE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 370 (2006) (providing a helpful compendium of the decisions of the ICTY through the end of 2005, including applications of JCE to obtain a conviction).

129. *Brdanin*, Case No. IT-99-36-A, Judgment, ¶ 365.

130. *Id.*

131. *Id.* (emphasis in original).

132. See *id.*

133. Danner & Martinez, *supra* note 124, at 124.

134. See *Brdanin*, Case No. IT-99-36-A, Judgment, ¶¶ 426-31.

tion to the overall criminal enterprise by individual actors could be addressed at the sentencing phase.¹³⁵

The Rome Statute has codified JCE as a mode of participation. Article 25(3)(d) makes an individual member liable for crimes committed “by a group of persons acting with a common purpose” when that individual’s “contribution shall be intentional” and is either “made with the aim of furthering the criminal activity or criminal purpose of the group” or “made in the knowledge of the intention of the group to commit the crime.”¹³⁶ This formulation seems to track two of the tests for the *mens rea* required for participation in a JCE found in *Brdanin*, but not the third (that is, the *dolus eventualis* test). The the drafting stage of the Rome Statute had concluded prior to the ICTY’s decisions in *Tadic* and *Brdanin*.¹³⁷ It remains to be seen whether the ICC may find a way to adopt the third category through an application of its inherent authority to apply customary international law. It is also possible that the Assembly of States Parties¹³⁸ will choose to include the *dolus eventualis* test by a future amendment to the Rome Statute.

Although not invited to address JCE specifically, respondents from five countries reported the presence of elements of this mode of participation. Australia, India, South Africa, Ukraine, and the United States all have laws that provide that persons who engage in group criminal activity become liable for all of the crimes of that group that are committed with their participation or are within the

135. See *id.* ¶ 432.

136. Rome Statute, *supra* note 14, art. 25(3)(d). Note that the ICC is currently relying on the theory of “co-perpetration,” based on Article 25(3)(a) of the Rome Statute (making an individual liable for crime committed “jointly with another or through another person”). See *id.* art. 25(3)(a); see also Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, (No.: ICC-01/04-01/07) Decision on the confirmation of charges, (Pre-Trial Chamber I), Sept. 30, 2008. The Prosecutor claimed in the *Katanga* matter that a defendant is guilty of an offense when he or she makes an “essential contribution” to the perpetration of that offense through his or her “joint control” over the individual or organization that actually commits the offense. *Katanga*, ¶ 473. The Pre-Trial Chamber stated: “Co-perpetration based on joint control over the crime involves the division of essential tasks between two or more persons, acting in a concerted manner, for the purposes of committing that crime.” *Id.* ¶ 521.

137. The Appeals Court issued the above-referenced *Tadic* decision in 1999, *supra* note 127, and its *Brdanin* decision in 2007, *supra* note 128. The Rome Statute was opened for signature on July 17, 1998. See Rome Statute, *supra* note 14.

138. Article 112 of the Rome Statute provides for an Assembly of States Parties, which is comprised of all states that have ratified the Rome Statute. See Rome Statute, *supra* note 14, art. 112. Article 121 of the Rome Statute provides that the Assembly of States Parties has authority to amend the Rome Statute by at least a two-thirds majority. See *id.* art. 121.

common design or purpose.¹³⁹ Additionally, three countries—Argentina, the Netherlands, and Spain—reported that association with a criminal organization is a separate crime.¹⁴⁰

For those multinational business corporations that engage in commercial activity involving a chain of commerce linked to a conflict or a repressive regime, the potential use of the knowledge test or the *dolus eventualis* test to judge either aiding and abetting or participation in a JCE has worrisome implications. A defense that could otherwise be used in a jurisdiction employing only the intent test for determining culpability—that the intent of the business was to make money, not to commit or facilitate crimes—would be far less likely to prevail.

It is likely that there will be cases arising in domestic courts that will provide further guidance on when business actors have crossed the line between innocent “just doing business” and criminal liability. But predicting precisely how a court will come out in any individual case is not a simple matter, which results in further uncertainty for business executives who are attempting to guide their corporations’ operations. The International Commission of Jurists has made an admirable contribution by providing both real and hypothetical examples to guide corporate executives,¹⁴¹ but the line, from the businessperson’s perspective, remains indistinct.

Superior responsibility is the fourth mode of participation mentioned at the outset of this section. It was first formulated in Article 85(4) of Additional Protocol I, which provides that a superior (military) officer may be held liable for war crimes committed by his subordinates if he knew or should have known that they had committed or were about to commit the crimes, yet the superior officer did nothing to punish or prevent the crimes.¹⁴² This formulation, changed so as to apply to both civilian and military hierarchies, has been carried forward into the Statutes of the ICTY and

139. See Australia Section of Composite Supp. Resp. (“In Australia, common purpose is found in s.11.2(3)(b) *Criminal Code Act 1995* (Cth). The defendant must have intended to aid, abet, counsel or procure the commission of an offence, and have been reckless as to the offence actually committed.”); India Section of Composite Supp. Resp.; South Africa Resp., at 17 (almost exclusively applied to the crime of murder); Ukraine Resp., at 11 (a crime committed by an organizer or a member of a “criminal organization” organized for the purpose of committing crimes shall be liable for all crimes committed with their participation); U.S. Supp. Resp., at 7-9.

140. See Argentina Resp., at 15. (“unlawful association for criminal purposes”); Netherlands Resp., at 13 (“participating in an organization that has the objective to commit crimes”); Spain Resp., at 6 (“illicit association”).

141. See generally INT’L COMM’N OF JURISTS, *supra* note 97.

142. See Additional Protocol I, *supra* note 24, art. 85(4).

the ICTR¹⁴³ as well as the Rome Statute.¹⁴⁴ Its presence in ICL has obvious implications for business executives in a chain of responsibility that reaches the activities of subordinates who are active in situations in which international crimes are occurring. Although the Survey did not specifically request information as to the presence of superior responsibility provisions in the laws of the Surveyed Countries, several peer reviewers provided information on their respective countries that indicated that the superior responsibility concept is applicable in Australia, Canada, Indonesia, Japan, Norway, and Ukraine.¹⁴⁵

It is important to note that a country whose laws do not provide for all three of the modes of participation contained in the Rome Statute could face the problem of seeing one of its nationals prosecuted in the ICC because it lacked the necessary authority to prosecute that person for the specific mode of activity that is connected to an ICL violation.

D. Domestic Laws Often Apply to Corporations and Other Legal Persons

All of the international criminal tribunals from the IMT to the ICC have had jurisdiction over crimes committed by individual offenders, but none has had jurisdiction to punish offenses committed by legal persons such as corporations.¹⁴⁶ Where companies were involved in ICL violations, the IMT and the IMTFE dealt with those crimes by prosecuting the responsible individual company representatives. For example, the IMT prosecuted Alfred Krupp and other executives of Friedrich Krupp A.G., the huge munitions company that engaged in forced labor and plunder of occupied countries during World War II.¹⁴⁷ The IMTFE prosecuted individ-

143. See ICTY Statute, *supra* note 28, art. 7(2); ICTR Statute, *supra* note 28, art. 6(3).

144. See Rome Statute, *supra* note 14, art. 28(b).

145. See Australia Section of Composite Supp. Resp.; Canada Section of Composite Supp. Resp.; Indonesia Section of Composite Supp. Resp.; Japan Section of Composite Supp. Resp.; Norway Section of Composite Supp. Resp.; Ukraine Section of Composite Supp. Resp.

146. See IMT Charter, *supra* note 28, art. 5 ("The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility."); IMTFE Charter, *supra* note 77, art. 5 (tracking the language of the IMT Charter); ICTY Statute, *supra* note 28, art. 6. ("The International Tribunal shall have jurisdiction over natural persons pursuant to the provisions of the present Statute."); ICTY Statute, *supra* note 28, art. 5 (tracking the language of the ICTY Statute); Rome Statute, *supra* note 14, art. 25(1) ("The Court shall have jurisdiction over natural persons pursuant to this Statute.").

147. See Ramasastry, *supra* note 8, at 108-12 (discussing the prosecution of corporate officials for forced labor and other international crimes committed during World War II).

ual Japanese businessmen for their roles in forced labor and other ICL violations.¹⁴⁸

During the drafting stage of the Rome Statute some of the parties to the negotiations attempted, unsuccessfully, to expand international criminal liability to legal persons, but the negotiations ran out of time before the negotiators could reach agreement on the issue.¹⁴⁹ The failure to include legal persons in the Rome Statute creates a major gap in the ICC's core jurisdiction.

The Prosecutor of the ICC has called attention to the role that business interests play in modern conflict situations. Luis Moreno-Ocampo, noting the serious ICL violations occurring in the conflict in the Democratic Republic of the Congo, stated:

According to information received, crimes reportedly committed in Ituri appear to be directly linked to the control of resource extraction sites. Those who direct mining operations, sell diamonds or gold extracted in these conditions, launder the dirty money or provide weapons could also be authors of the crimes, even if they are based in other countries.¹⁵⁰

This signals that the ICC may also pursue individual business representatives.

The Survey found that eight of the Surveyed Countries—Australia, Belgium, Canada, France, India, the Netherlands, Norway, and the United Kingdom—make it a general practice to recognize no distinction between natural and legal persons, thus giving ICL a wider reach at the domestic level.¹⁵¹ In general, criminal liability attaches when company representatives, that is, officers, directors, employees or agents, commit crimes while acting within the scope of their employment or in ways that permit the courts to attribute their activities to the company itself.

Although legal persons face no express liability for ICL violations in the remaining eight Surveyed Countries, three of those coun-

148. *See id.* at 113-17.

149. *See* Cassell, *supra* note 96, at 315-16. *See also* Andrew Clapham, *The Question of Jurisdiction Under International Criminal Law Over Legal Persons: Lessons from the Rome Conference on an International Criminal Court*, in *LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW* 139-95 (Menno T. Kamminga and Saman Zia-Zarifi eds., 2000).

150. LUIS MORENO-OCAMPO, SECOND ASSEMBLY OF STATES PARTIES TO THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, REPORT OF THE PROSECUTOR OF THE ICC 4 (2003), available at http://www.icc-cpi.int/NR/rdonlyres/C073586C-7D46-4CBE-B901-0672908E8639/143656/LMO_20030908_En.pdf.

151. *See* Australia Resp., at 3, 44; Belgium Resp., at 8, 13, 38; Canada Resp., at 2; Canada Section of Composite Supp. Resp. ("The Criminal Code defines 'person' to include legal persons, and the Canadian ICL statute adopts this definition by reference."); France Resp., at 4; India Resp., at 5, 9, 16; Netherlands Resp., at 10, 18; Norway Resp., at 3, 5; U.K. Resp., at 3, 7, 24.

tries—Japan, South Africa, and the United States—generally hold legal persons liable for crimes other than ICL violations, suggesting that legal persons may be made liable in the future.¹⁵² In two countries, Argentina¹⁵³ and Indonesia,¹⁵⁴ the prevailing legal theory holds that legal persons may not be criminally liable; in practice, however, the legislature in each country has enacted a number of criminal laws made expressly applicable to legal persons. These involve such crimes as violating pollution-control laws, banking laws, and antiterrorism laws.¹⁵⁵ Only three of the Surveyed Countries—Germany,¹⁵⁶ Spain,¹⁵⁷ and Ukraine¹⁵⁸—strictly adhere to the principle that legal persons cannot commit crimes. But even in Germany and Spain, the principle has eroded somewhat: Germany has a statute that provides for legal persons to be held financially liable for administrative fines imposed on their representatives;¹⁵⁹ and Spain has a statute that makes legal persons liable for criminal fines imposed upon their representatives.¹⁶⁰

Prosecutors in countries where legal persons are subject to ICL may name companies as defendants along with the responsible company representatives. This could lead to substantial fines for the companies, as well as long-term monitoring of their activities.¹⁶¹ Elsewhere, prosecution of responsible individual representatives may serve some, but not all, of the same deterrent purposes

152. See Japan Resp., at 6, 21; Japan Section of Composite Supp. Resp. (noting that in Japan the question of whether to include legal persons is a statute-by-statute matter, approximately two-thirds of the criminal statutes include provisions expressly applicable to legal persons, but ICL is not among them); South Africa Resp., at 11, 20 (noting that legal persons are ordinarily subject to criminal liability for crimes, but the ICL statute, which implements an international standard, applies only to natural persons); U.S. Resp., at 4, 13 (noting that most criminal statutes other than the ICL statutes apply to both natural and legal persons).

153. See Argentina Resp., at 3.

154. See Indonesia Resp., at 3.

155. See Argentina Resp., at 4; Indonesia Resp., at 4.

156. See Germany Resp., at 8.

157. See Spain Resp., at 4.

158. See Ukraine Resp., at 6.

159. Germany Resp., at 8.

160. See Spain Resp., at 5; Spain Section of Composite Supp. Resp. (observing that Spanish law makes corporations civilly liable for the crimes committed by their representatives).

161. In many circumstances, corporations can be put under monitoring as a condition of deferred or non-prosecution agreements with the U.S. government. On March 10, 2008, the U.S. Department of Justice released new internal guidelines governing the selection and use of monitors in deferred and non-prosecution agreements with corporations. See Memorandum from Craig S. Morford, Acting Deputy Attorney General, to Heads of Department Components and United States Attorneys (Mar. 7, 2008), available at <http://www.usdoj.gov/criminal/fraud//docs/dag-030708.pdf>. Initially used only in the context

as prosecutions of the corporations themselves. For example, many companies have indemnification agreements with their principal officers, which means that legal costs and some penalties incurred by individual defendants will ultimately be paid by the corporations involved.¹⁶² Additionally, a company that is associated with an egregious ICL violation may face being tried “in the court of public opinion.”¹⁶³ There can be a great deal of adverse publicity surrounding a criminal trial of a corporation’s employees that could result in substantial adverse effects on a corporation’s reputation and business.

E. *Reaching Parent and Subsidiary Corporations*

A key issue arising in the discussion of corporate complicity in international crimes relates to situations where the offending business entity in a foreign (host) country is only a subsidiary or affiliate, but its parent is a multinational enterprise domiciled or headquartered elsewhere (in a home country).¹⁶⁴ The subsidiary is a separate legal entity and may be subject to prosecution or a civil suit only in the host country.¹⁶⁵ The key problem, of course, is that the host state may be unwilling or unable to provide justice to victims or may itself be the perpetrator of the crime. In these circumstances, the focus shifts to the potential liability of the parent corporation in the courts of the home state.

The Survey sought information regarding the legal and practical problems associated with holding parent corporations accountable for the acts of their foreign subsidiaries. Laws that provide for “piercing the corporate veil,” so as to hold parents civilly or criminally accountable for the acts of a subsidiary, are found in multiple jurisdictions. Even so, there also appears to be a deeply rooted

of charges against an individual, prosecutors have increasingly relied upon such pre-trial diversion agreements to resolve corporate criminal investigations. *See id.*

162. *See* Bernard Black, Brian Cheffins, Martin Gelter, Hwa-Jin Kim, Richard Nolan & Mathias Siems, *Legal Liability of Directors and Company Officials Part 2: Court Procedures, Indemnification and Insurance, and Administrative and Criminal Liability (Report to the Russian Securities Agency)*, COLUM. BUS. L. REV. 1 (2008) (discussing indemnification laws of twelve countries with respect to the liability of corporate directors).

163. Ruggie, *supra* note 5, at 833.

164. *See* Jonathan Clough, *Punishing the Parent: Corporate Criminal Complicity in Human Rights Abuses*, 33 BROOK. J. INT’L L. 899 (2008) (discussing the current state of the law relative to parent/subsidiary liability issues).

165. For a recent example of how the use of multiple corporations can insulate a corporation in a home state, see *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633 (S.D.N.Y. 2006).

respect for corporate forms,¹⁶⁶ and courts apply the doctrine reluctantly.¹⁶⁷ Some countries do not even recognize the doctrine or apply the doctrine in cases of crimes or torts.¹⁶⁸ Where the doctrine applies, it generally requires that the parent must be proven to be the “effective manager” of the subsidiary,¹⁶⁹ or has “imposed its own decisions,”¹⁷⁰ that the corporate form is a “mere façade,”¹⁷¹ or that “the corporate identity was used to perpetrate a fraud.”¹⁷²

Independently of the “piercing” approach, a parent may in some instances be reached directly for actions it has taken in connection with the operations of the subsidiary, such as for conspiracy to commit a crime or for complicity in the crimes of the subsidiary.¹⁷³ This was done in the recent case involving Siemens Aktiengesellschaft, a company charged with violations of U.S. and foreign laws relating to bribery of foreign officials.¹⁷⁴ This approach has been referred to as “foreign direct liability.”¹⁷⁵ The concept of foreign direct liability has been applied in the context of civil lawsuits, where the parent itself, not the subsidiary, is alleged to have made decisions that have caused the harm. Jurisdictional problems also arise when attempting to reach a corporate subsidiary that is not domiciled or headquartered in the home country.¹⁷⁶ A doctrine

166. See *South Africa Resp.*, at 27.

167. See *Argentina Resp.*, at 23; *Australia Resp.*, at 11; *Belgium Resp.*, at 77; *India Resp.*, at 20; *Japan Resp.*, at 31; *Netherlands Resp.*, at 24; *Spain Resp.*, at 14, 15; and *Ukraine Resp.*, at 27.

168. See *Belgium Resp.*, at 77.

169. *Australia Resp.*, at 11.

170. *Belgium Resp.*, at 77.

171. See *Japan Resp.*, at 31; *Spain Resp.*, at 14.

172. *South Africa Resp.*, at 27.

173. See *France Resp.*, at 13, 22.

174. The German electronics firm Siemens Aktiengesellschaft (Siemens), along with three of its subsidiaries, pleaded guilty to charges related to the Foreign Corrupt Practices Act (FCPA), for a range of activities, including attempted bribery of government officials worldwide. See Siri Schubert and T. Christian Miller, *Where Bribery Was Just a Line Item*, N.Y. TIMES, Dec. 21 2008, at BU1. The Securities and Exchange Commission (SEC) filed a settled enforcement action on December 12, 2008 in the federal District Court for the District of Columbia charging Siemens with violations of the anti-bribery, books and records, and internal controls provisions of the FCPA. See *Sec. & Exch. Comm'n v. Siemens AG*, SEC Litigation Release No. 20,829 (Dec. 15, 2008), available at <http://www.sec.gov/litigation/litreleases/2008/lr20829.htm>. In the largest amount a company has ever paid to resolve corruption-related charges, Siemens offered to pay \$350 million in disgorgement to the SEC as well as a \$450 million criminal fine to the U. S. Department of Justice and a fine of €395 million (approximately \$569 million) to the Office of the Prosecutor General in Munich, Germany. Siemens previously paid a fine of €201 million (approximately \$285 million) to the Munich Prosecutor in October 2007. See *id.*

175. See *Australia Resp.*, at 11; *France Resp.*, at 5; *Netherlands Resp.*, at 25.

176. See *Argentina Resp.*, at 23, 23; *Australia Resp.*, at 11; *Belgium Resp.*, at 72; *Japan Resp.*, at 30; *Netherlands Resp.*, at 23; *South Africa Resp.*, at 27.

used in Japan could allow workers in a foreign subsidiary to sue a parent in Japanese courts for a breach of its “obligation of security,” that is, the duty to ensure the health of its workers, even foreign workers employed by a foreign subsidiary.¹⁷⁷

F. *Conventional Crimes Are Frequently Related to ICL Violations*

ICL violations generally occur in an atmosphere of lawlessness that encourages criminal elements to commit any number of other crimes as well.¹⁷⁸ These domestic crimes fall outside the jurisdiction of international tribunals, and thus they can be punished only in domestic courts. Host countries on whose territory these crimes occur have the primary enforcement responsibility, but that responsibility is abdicated where a governance gap exists and authorities are unwilling or unable to act. This is especially likely if the authorities themselves are complicit in the crimes. Offenders in countries where a governance gap exists need not fear prosecution because the court systems are either nonexistent or politically dependent.¹⁷⁹

Those countries with functioning court systems whose nationals commit conventional crimes in foreign jurisdictions may have extraterritorial jurisdiction to punish them. This is often true, for example, in cases of bribery of foreign officials, dealing in or importing stolen property, and money laundering. These crimes are seemingly endemic to the stream of commerce that supports all sides in a conflict situation and often arise in connection with repressive regimes.

Bribery of foreign officials. Not surprisingly, participants in an illicit chain of commerce often resort to bribery to secure a place in the chain.¹⁸⁰ Bribing a foreign official to obtain a business advantage

177. Japan Resp., at 32.

178. See OPEN SOCIETY JUSTICE INITIATIVE, LEGAL REMEDIES FOR THE RESOURCE CURSE 60 (2005), available at http://www.justiceinitiative.org/db/resource2/fs/?file_id=16376; LEIV LUNDE AND MARK TAYLOR, FAFO, COMMERCE OR CRIME 16 (2003), available at <http://www.faf.no/pub/rapp/424/424.pdf>; see generally THE POLITICAL ECONOMY OF ARMED CONFLICT: BEYOND GREED AND GRIEVANCE (Karen Ballentine and Jake Sherman eds., 2003).

179. See Terry Collingsworth, *The Key Human Rights Challenge: Developing Enforcement Mechanisms*, 15 HARV. HUM. RTS. J. 183, 196 (2002) (“American companies can participate in or aid human rights abuses in other countries confident that the host governments will not enforce local laws. Often, the host governments themselves are participants in the abuses. This frames the reality of the global economy.”).

180. See The Secretary-General, *Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth in the Democratic Republic of Congo*, ¶ 105, delivered to the Security Council, U.N. Doc. S/2002/1146 (Oct. 16, 2002) [hereinafter *U.N. Congo Report*].

has been a domestic crime in the United States since the enactment of the Foreign Corrupt Practices Act (FCPA)¹⁸¹ in 1977. The U.S. Securities and Exchange Commission (SEC) and the U.S. Department of Justice jointly enforce the FCPA. These agencies have obtained numerous settlements involving multinational corporations whose securities are registered with the SEC.¹⁸² Environmental and human rights advocates, governments, and the courts have increasingly scrutinized extractive industry practices, such as signature bonuses awarded to public officials.¹⁸³

The Organization for Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Bribery Convention)¹⁸⁴ has stimulated many other countries to enact similar legislation. There are today thirty-eight parties to the Bribery Convention, all of whom are reported by the OECD to have adopted legislation making bribery of foreign officials illegal for their nationals.¹⁸⁵ This includes thirteen of the Surveyed Countries, with India, Indonesia, and Ukraine being the only nonparties. South Africa, although not a party to the Bribery Convention, criminalizes bribery of foreign officials.¹⁸⁶ India and Indonesia (the latter already having some antibribery laws in place¹⁸⁷) are under consideration for membership in the OECD, which could lead them to adopt any necessary additional legislation. Domestic bribery statutes with extraterritorial application have great potential to

181. 15 U.S.C. § 78dd-1 (2006).

182. See Priya Cheria Huskins, *FCPA Prosecutions: Liability Trend to Watch*, 60 STAN. L. REV. 1447, 1449-50 (2008) (discussing recent proceedings against multinational corporations under the FCPA); SHEARMAN & STERLING LLP, RECENT TRENDS AND PATTERNS IN FCPA ENFORCEMENT 8 (2008), available at http://www.shearman.com/files/upload/LIT_FCPA_Trends_121208.pdf.

183. See, e.g., Jeff Gerth, *U.S. Businessman Is Accused Of Oil Bribes to Kazakhstan*, N.Y. TIMES, Apr. 1, 2003, at A10 (describing the prosecution of James Giffin under the Foreign Corrupt Practice Act, 15 U.S.C. § 78dd-1 (2006)).

184. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, 112 Stat. 3302, 37 I.L.M. 1 (1998).

185. See OECD Anti-Bribery Convention: National Implementing Legislation, http://www.oecd.org/document/30/0,3343,en_2649_37447_2027102_1_1_1_37447,00.html (last visited July 20, 2009) (describing of all of the implementing legislation adopted by parties to the Convention). See Ratification Status as of March 2009, available at <http://www.oecd.org/dataoecd/59/13/40272933.pdf> (last visited July 31, 2009).

186. See South Africa Resp., at 27.

187. See Indonesia Section of Composite Supp. Resp.

ensnare business actors that bribe their way into the channel of commerce in countries where ICL violations are occurring.¹⁸⁸

It remains to be seen what impact the 2005 U.N. Convention Against Corruption (UNCAC)¹⁸⁹ will have with respect to prosecution of bribery and related corruption offenses. UNCAC requires countries to establish criminal and other offenses to penalize a wide range of acts of corruption if these are not already crimes under domestic law.¹⁹⁰ UNCAC goes beyond previous instruments of this kind, criminalizing not only basic forms of corruption such as bribery¹⁹¹ and the embezzlement of public funds,¹⁹² but also trading in influence¹⁹³ and the concealment and laundering of the proceeds of corruption.¹⁹⁴ Offenses committed in support of corruption, including money laundering¹⁹⁵ and obstructing justice,¹⁹⁶ are to be penalized as well. UNCAC also deals with the problematic areas of private-sector corruption. Its parties are required to adopt legislation allowing private parties to bring legal proceedings against those responsible for their damages.¹⁹⁷

Dealing in or importing stolen property. In a conflict situation, both sides may finance their operations by seizing and selling whatever natural resources are available.¹⁹⁸ Timber illegally harvested in Cambodia and sold in Thailand provided the primary source of financing for the Khmer Rouge.¹⁹⁹ The trade in diamonds and timber sustained the horrendous wars in Liberia and Sierra

188. See Carter Dougherty, *Ex-Manager Tells of Bribery at Siemens*, N.Y. TIMES, May 27, 2008, at C4 (reporting on the case of the Siemens senior executives who were charged with the bribery of foreign officials in a number of countries).

189. United Nations Convention Against Corruption, Dec. 14, 2005, 2349 U.N.T.S. 145 [hereinafter UNCAC]. To date, there are 140 signatories and 135 parties to UNCAC. See United Nations Convention Against Corruption, <http://treaties.un.org/doc/Publication/MTDSC/VolumeII/ChapterXVIII/XVIII-14.en.pdf>. All of the Surveyed Countries are signatories and all but Germany, India, Japan, and Ukraine have ratified the UNCAC. See *id.*

190. See UNCAC, *supra* note 189, art. 13.

191. *Id.* art. 15.

192. *Id.* art. 17.

193. *Id.* art. 18.

194. *Id.* arts. 23-24.

195. *Id.* arts. 14, 23-24.

196. *Id.* art. 25.

197. *Id.* art. 35.

198. See *U.N. Congo Report*, *supra* note 180, ¶ 141.

199. See GLOBAL WITNESS & FAFO, THE LOGS OF WAR: THE TIMBER TRADE AND ARMED CONFLICT 55 (2002), available at <http://www.fafon.org/pub/rapp/379/379.pdf> (last visited June 30, 2009).

Leone.²⁰⁰ In these and many similar cases, lack of enforcement of existing statutes and regulations by the host countries or neighboring countries allowed the resources to cross international boundaries with impunity. Illegal resource exploitation during a conflict may involve an international crime. For example, the Rome Statute penalizes “seizing the property of an adversary unless such . . . seizure be imperatively demanded by the necessities of the conflict.”²⁰¹ But the same activities may involve domestic crimes, such as theft,²⁰² fraud, or violation of local resource management regulations.²⁰³ The illicit means used to acquire the natural resources may fall within an expansive definition of “stolen” found in domestic stolen property laws that prohibit the importation of “stolen property.”²⁰⁴ This allows a home country with a stolen-property statute to penalize those engaged in a chain of commerce that brings property acquired abroad by questionable means into its markets. Those who deal in natural resources, either as brokers, transporters, or importers, knowing of their illicit origin, could be guilty both of complicity in such international crimes and of directly perpetrating such domestic crimes.²⁰⁵ The Survey responses reported the existence of stolen-property laws in several countries.²⁰⁶ Since the protection of property is fundamental to any legal system, it would be a safe assumption that most other domestic penal codes criminalize dealing in stolen resources, including their importation.

200. See IAN SMILLIE, *DIRTY DIAMONDS: ARMED CONFLICT AND THE TRADE IN ROUGH DIAMONDS* 13, 17 (2002), available at <http://www.fao.no/pub/rapp/377/377.pdf> (last visited June 30, 2009).

201. Rome Statute, *supra* note 14, art. 8(e)(xii). See also Robert Dufresne, *Reflections and Extrapolation on the ICJ's Approach to Illegal Resource Exploitation in the Armed Activities Case*, 40 N.Y.U. J. INT'L L. & POL. 171 (2008) (discussing the interplay between “the phenomenon of the resource curse” and international law).

202. See *U.N. Congo Report*, *supra* note 180, ¶¶ 47-50.

203. See GLOBAL WITNESS & FAFO, *supra* note 199, at 14.

204. See, e.g., National Stolen Properties Act, 18 U.S.C. § 2314 (2006) (requiring a the payment of a fine from any individual who “transports, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of \$5,000 or more, knowing the same to have been stolen, converted or taken by fraud.”).

205. See, e.g., Belgian Resp., at 29 (any property obtained as the result of any crime fits the definition of “stolen,” including property resulting from crimes committed abroad); Netherlands Resp., at 14. The Netherlands imposes a “reasonable knowledge” test, which implies that anyone importing items such as diamonds from a war zone might reasonably conclude that they could be stolen property.

206. See Belgian Resp., at 29; France Resp., at 27; Netherlands Resp., at 14; U.S. Resp., at 13.

Money laundering. The proceeds of criminal activity abroad are often laundered through banks or legitimate businesses.²⁰⁷ Money-laundering statutes prohibit depositing the proceeds of criminal activity in a bank, investing in real estate, or otherwise introducing it into the commercial financial stream.²⁰⁸ They also require banks and other institutions that deal in money to inform themselves of the source of deposited funds and to send written notification to banking regulatory authorities whenever the bank has reason to suspect that such funds have been derived from an illegal activity.²⁰⁹ There is a high level of interest in money laundering in the international community, which has led to the creation of the Financial Action Task Force (FATF), established by the OECD. The FATF is today composed of thirty-eight countries and territories, including thirteen of the Surveyed Countries.²¹⁰ The FATF examines the legal authorities and operating programs involving money laundering in all countries of the world and places any country that does not meet strict standards on a list of Non-cooperating Countries and Territories (NCCT List). Of the forty-seven jurisdictions reviewed by the FATF since 1999 for deficiencies in their anti-money-laundering programs, none remains on the NCCT List.²¹¹ Thus, an offender who attempts to launder the proceeds of criminal activity abroad faces a worldwide array of modern anti-money-laundering programs that include stiff criminal penalties.²¹²

207. See *U.N. Congo Report*, *supra* note 180, ¶ 51.

208. See Caroline Bradley, *Private International Law-Making for the Financial Markets*, 29 *FORDHAM INT'L L.J.* 127 (2005) (discussing the structure and functioning of U.S. money laundering laws).

209. See, e.g., 12 C.F.R. § 21.11 (2009).

210. Only India, Indonesia, and Ukraine are non-members. See OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions: Ratification Status as of March 2009, <http://www.oecd.org/dataoecd/59/13/40272933.pdf> (last visited April 15, 2009). India has observer status. *Id.*

211. See Financial Action Task Force (FATF), http://www.fatf-gafi.org/pages/0,3417,en_32250379_32236992_1_1_1_1_1,00.html (last visited April 15, 2009).

212. See JONATHAN M. WINER, FAFO, *ILLCIT FINANCE AND GLOBAL CONFLICT* 7-8 (2002), available at <http://www.fafno.no/pub/rapp/380/380.pdf> (discussing the prevalence of illicit financial practices, including money laundering, in the chain of commerce associated with modern conflicts). One recent example of the application of anti-money laundering laws in action is the case of Riggs Bank in Washington, D.C., which was ultimately fined \$25 million by the U.S. Department of Justice for violations of U.S. anti-money-laundering laws arising out of its role in laundering funds for General Augusto Pinochet. See MINORITY STAFF OF S. PERMANENT SUBCOMM. ON INVESTIGATIONS, 108TH CONG., *MONEY LAUNDERING AND FOREIGN CORRUPTION: ENFORCEMENT AND EFFECTIVENESS OF THE PATRIOT ACT: CASE STUDY INVOLVING RIGGS BANK* 7, 17-37 (2004). Also, in February 2005, the bank agreed to pay \$8 million to Pinochet victims in connection with allegations that the bank had concealed and illegally facilitated the movement of Pinochet money out of Britain. See

The campaign against terrorism has generated domestic penal legislation in the United States and elsewhere that has broad extraterritorial reach.²¹³ The United States has exercised its extraterritorial authority to indict foreign arms dealers who allegedly conspired to sell arms to the Revolutionary Armed Forces of Colombia (FARC) in Colombia²¹⁴ and has fined a large multinational agricultural company for paying protection money to both sides in the Colombia civil conflict.²¹⁵ The United States has also been actively exercising its extraterritorial jurisdiction over members of foreign drug rings who bring illegal narcotics into the United States.²¹⁶

Numerous other crimes, running the gamut of criminality, have been reported by panels of experts appointed by the U.N. Security Council.²¹⁷ In one report alone, dealing with the Democratic Republic of the Congo, the experts pointed to instances of widespread smuggling of arms and other goods (especially natural resources), customs and tax evasion, foreign-exchange violations, counterfeiting, mass-scale looting by armed groups, monopolistic practices, price fixing, sanctions violations, embezzlement, and cor-

Anita Ramasastry, *Stopping Banks from Hiding Human Rights Abusers' Money: A Recent Settlement by Riggs Bank Highlights the Issue*, FINDLAW, Apr. 4, 2005, <http://writ.news.findlaw.com/ramasastry/20050404.html>. See also CLARIN – Información sobre el procesamiento de Augusto Pinochet Ugarte, <http://www.elclarin.cl/fpa/pinochet.html> (last visited Jan. 9, 2009) (providing documents relating to the Pinochet/Riggs investigation and prosecution, including the original and amended complaints).

213. See, e.g., 18 U.S.C. § 2332b(e) (2006) (granting extraterritorial authority over acts of terrorism). A LEXIS search for the word "terrorism" used in the U.S. Code Services produces 806 hits, including 176 hits under Title 18, the U.S. penal code (last searched Aug. 18, 2009).

214. See David Johnston & Seth Mydans, *Russian Held and Charged With Trying to Sell Arms*, N.Y. TIMES, Mar. 7, 2008, at A6 (discussing the arrest in Thailand of Viktor Bout, who was arrested in Thailand by Thai police after being indicted in the United States for an alleged conspiracy to sell arms to the Revolutionary Armed forces of Colombia a rebel force known as FARC); Benjamin Weiser, *2 Convicted of Scheme to Sell Arms to Terrorists*, N.Y. TIMES, Nov. 21, 2008, at A28 (discussing the conviction of Monzer al-Kassar, who was convicted of money laundering, and conspiring to provide material aid to terrorists [the FARC in Colombia] and to kill Americans).

215. See *Chiquita Settles Case on Payments to Rebel Groups*, N.Y. TIMES, Mar. 15, 2007, at C13.

216. See Simon Romero, *Colombia Extradites 14 Paramilitary Leaders to the United States*, N.Y. TIMES, May 14, 2008, at A6 (reporting on the extradition from Colombia to the United States of fourteen right-wing paramilitary leaders who were indicted in the United States on drug-trafficking charges, and noting that some of the extradited men were also accused of human rights violations in Colombia).

217. The Security Council has adopted the practice of appointing panels of experts to survey and report on various threats to international security. This is done by a formal resolution, such as S.C. Res. 1306, U.N. Doc. S/RES/1306 (July 5, 2000), which appointed a panel of experts concerning Sierra Leone.

ruption.²¹⁸ The Survey did not examine the extent to which these crimes, if committed overseas by a national of one of the Surveyed Countries, could be punished under the penal codes of the Surveyed Countries.

When an existing government is replaced, and the new government manages to overcome a preexisting governance gap, the authorities may decide to bring prior offenders to justice for crimes related to ICL violations. Such is the case in Chile, where the financial improprieties of the former Pinochet regime are being uncovered, leading to prosecution of crimes committed under that regime.²¹⁹

A domestic prosecutor who undertakes to prosecute crimes committed abroad may choose to pursue ICL violations alone or else join them with counts alleging conventional crimes as well. The latter course would lead to an increased likelihood of obtaining a conviction.

G. *Trends Are Emerging in the Domestic Prosecution of ICL Violations and Related Crimes*

Within the past few years, domestic prosecutors have undertaken some notable domestic prosecutions of violations of ICL and related laws. These include the cases of Hissène Habré, the former president of Chad,²²⁰ Augusto Pinochet, the late former president of Chile,²²¹ Alberto Fujimori, the former president of Peru,²²² and Saddam Hussein, the late former president of Iraq.²²³ Other noteworthy investigations and prosecutions have occurred in Argentina, Australia, Belgium, France, the Netherlands, Spain, and the United States.²²⁴ This small but growing collection of prosecutions indicates that the web of liability for international crimes is already effectively at work. These cases set important precedents and, as they are highly publicized, create a certain deterrent effect.

218. See generally *U.N. Congo Report*, *supra* note 180, ¶¶ 19, 21, 47-51.

219. See Pascale Bonnefoy & Alexei Barrionuevo, *Chilean Court Orders Arrests of Pinochet's Kin and Close Allies*, N.Y. TIMES, Oct. 5, 2008, at A5.

220. See *An African Pinochet*, N.Y. TIMES, Feb. 11, 2000, at A30; Marlise Simons, *Belgium Indicts Chad's Ex-Leader*, N.Y. TIMES, Sept. 30, 2005, at A8.

221. See *Pinochet Faces Torture and Murder Charges*, N.Y. TIMES, Sept. 9, 2006, at A7.

222. See Simon Romero, *Peru's Ex-President Convicted of Rights Abuses*, N.Y. TIMES, Apr. 8, 2009, at A6.

223. See Neil MacFarquhar, *Saddam Hussein, Defiant Dictator Who Ruled Iraq With Violence and Fear, Dies*, N.Y. TIMES, Dec. 30, 2006, at A10.

224. See *infra* Appendix B.

The Survey revealed that in eight of the Surveyed Countries, the decision to investigate and prosecute a crime is entirely in the hands of prosecutors who are given complete enforcement discretion, with little or no official participation by victims or their representatives. Australia, Belgium, Canada, France, India, Indonesia, South Africa, and the United States all employ such a system.²²⁵ On the other hand, the Survey also revealed that in six of the Surveyed Countries for which information was received, there are mechanisms for individuals or organizations to initiate and/or participate in criminal proceedings. In Argentina, the victim or the victim's representative, or even a nongovernmental organization (NGO), may participate in charging decisions, with the right to appeal a decision not to prosecute.²²⁶ In Germany, Spain, and Ukraine, the law requires prosecutors to investigate every complaint of a crime, and prosecutors may close an investigation only if they determine that there is no basis for a crime, although the victim or a representative may appeal a nonprosecution decision to a higher administrative level or to a court.²²⁷ In Germany, the attorney general may invoke a variety of grounds to justify nonprosecution of a foreign crime.²²⁸ In Japan, the prosecutor's decision not to prosecute is subject to the right of the victim or other complaining party to a "prosecution inquest committee" composed of eleven members selected by lot from among registered voters.²²⁹ In the Netherlands, an interested party may appeal the prosecutor's decision to a court.²³⁰ In addition, four of the Surveyed Countries—Argentina, Belgium, France, and Spain—allow private persons to initiate criminal proceedings through the *action civile* mechanism.²³¹ Under this mechanism, individual victims of crimes may initiate a criminal investigation by filing the appropriate docu-

225. See Australian Resp., at 13; Belgium Resp., at 86-93; Canada Section of Composite Supp. Resp.; France Resp., at 30; India Resp., at 23, 24; Indonesian Resp., at 16; Norway Section of Composite Supp. Resp.; South African Resp., at 37-39; U.S. Resp., at 32.

226. Argentina Resp., at 26.

227. See Germany Resp., at 27; Spain Resp., at 17; and Ukraine Resp., at 30.

228. Germany Resp., at 15 (discussing a lawsuit filed by German citizens against the U.S. Secretary of Defense, Donald Rumsfeld, and other high-ranking public officials for abuses in the Abu Ghraib prison, in which the German attorney general refused to initiate investigation proceedings, stating that the principle of non-interference in the internal affairs of another state took precedence over Germany's obligations to assist in international prosecution of ICL offenders).

229. Japan Resp., at 42.

230. Netherlands Resp., at 27.

231. See Argentina Resp., at 19; Belgium Resp., at 50; Belgium Section of Composite Supp. Resp.; France Resp., at 22; Spain Section of Composite Supp. Resp.; Stephens, *supra* note 10, at 19.

ments in court.²³² A judge must then conduct an investigation and order the prosecution of the offender if justified by the evidence.²³³ The victim may participate in the trial and may assert a claim for damages in the event of a conviction.²³⁴

A decision to undertake the prosecution of a crime committed in a foreign country, where all of the victims are foreigners, would undoubtedly present financial and other difficulties for many national prosecutors. Such a prosecution would almost always be far more resource-consuming and time-consuming than a purely domestic prosecution. In a case involving crimes committed abroad, one must gather evidence in a foreign country, obtain extradition of foreign fugitives, and ultimately try a case that involves foreign witnesses who speak languages that require in-court interpreters, documents in foreign languages that require translation, and complex and unfamiliar legal issues.²³⁵ For a prosecutor without sufficient resources even to prosecute all serious domestic crimes, having to deal with complex crimes involving events that occurred thousands of miles away, where all of the victims are foreigners, is unlikely to be a high priority. A domestic prosecutor may decline to undertake prosecution of an international crime out of fear that neglecting local crimes could subject the prosecutor to censure by superiors and/or adverse publicity. Further, even where a case involving foreign events is prosecuted, there is the overarching potential that a judge will invoke one of many grounds to dismiss the case, such as the principle of noninterference in the domestic affairs of a foreign state, the “political question” doctrine, lack of a “nexus” with the home country, and the like. Finally, if a prosecutor is pressured by whatever source to take on an ICL case involving foreign events, the prosecutor should first ensure that there are sufficient resources to handle the case to the prosecutor’s best level. Otherwise, a loss could set back not only the cause of human rights, but also the prosecutor’s career.

Nonetheless, the fact that a growing number of national prosecutors seem willing to undertake the burden of charging international crimes is evidence that there are instances when expending

232. See Stephens, *supra* note 10, at 19 (providing an excellent explanation of the *action civile* mechanism for those unfamiliar with civil law).

233. See *id.*

234. See *id.*

235. See generally HUMAN RIGHTS WATCH, *supra* note 60 (describing in detail the obstacles to justice that prevent the utilization of universal jurisdiction in many European countries).

precious extra resources is justified. Some of the factors taken into account are: How egregious was the offense? Is there public pressure to prosecute? Is the accused a national of the home country? Is the accused in the country or residing abroad? Is the accused a prominent figure? Will the prosecution aid a foreign policy goal of the home country? Is prosecution of the particular offense positively required by an international treaty?²³⁶ Will civil-society organizations materially support the prosecution by providing evidence and other assistance?

Human rights organizations in many countries have played an important role in working to bring about prosecutions of ICL violations through their own investigative work, their public campaigns for justice, and their effective demands that countries live up to their treaty obligations to prosecute crimes over which they have jurisdiction.²³⁷ The case for action becomes even more compelling when crimes impinge on other significant domestic interests, such as the need to impede drug trafficking and terrorist activities.

The existence of the ICC may make a difference in the willingness of domestic prosecutors to undertake prosecutions of ICL vio-

236. See Jagers & van der Heijden, *supra* note 118, at 865 (discussing how the presence of mandatory "prosecute or extradite" language in the Torture Convention may explain why prosecutions in Europe have focused on torture cases).

237. An excellent example is the success of Global Witness in spurring prosecutors and government authorities to pursue Charles Taylor and his business associate, Gus van Kouwenhoven. See GLOBAL WITNESS, TAYLOR MADE (2000), available at http://www.globalwitness.org/media_library_get.php/160/1242927741/taylormade2.pdf (depicting Taylor's use of profits from exploitative logging to fund Liberia's civil war and to instigate armed conflict in neighboring Sierra Leone). See GLOBAL WITNESS, A TIME FOR JUSTICE (2005), available at http://www.globalwitness.org/media_library_get.php/235/1242928125/A%20Time%20for%20Justice.pdf (2005) (explaining reasons for the international community to facilitate Taylor's extradition to the Special Court for Sierra Leone). See GLOBAL WITNESS, TIMBER, TAYLOR, SOLDIER, SPY (2005), available at http://www.globalwitness.org/media_library_get.php/237/1242928170/TimberTaylorSoldierSpy.pdf (detailing how Liberia's uncontrolled resource exploitation, Taylor's manipulation, and the re-recruitment of ex-combatants threatened regional peace). Taylor was arrested on March 29, 2006, and transferred to the Hague to stand trial before the Special Court for Sierra Leone on June 30, 2006. Prosecutor v. Charles Taylor, <http://www.sc-sl.org/CASES/ProsecutorvsCharlesTaylor/tabid/107/Default.aspx> (last visited Sept. 5, 2009). He faces an indictment containing eleven charges. See Amended Indictment, Prosecutor v. Charles Ghankay Taylor, Special Court for Sierra Leone, Case No. SCSL-2003-01-I, available at <http://www.sc-sl.org/LinkClick.aspx?fileticket=VifMuLYvYs4=&tabid=159>. Global Witness had documented van Kouwenhoven's role alongside that of Taylor in the Liberian conflict—exporting Liberian timber and bringing Taylor's despotic regime millions of dollars in profits. See Press Release, Special Court for Sierra Leone Office of the Prosecutor, Freetown, Prosecutor Welcomes New Global Witness Report: Charles Taylor Interference in Liberian Affairs Remains a Threat to Peace (June 17, 2005), available at <http://www.sc-sl.org/LinkClick.aspx?fileticket=tCmd7rhYamU%3d&tabid=196>; Marlise Simons, *The Dutch Try One of Their Own Over Links to Liberia*, N.Y. TIMES, May 3, 2006, at A3.

lations. As stated earlier, the imminent prospect of an ICC prosecution of a country's nationals could cause domestic authorities to undertake the prosecution in order to forestall the ICC's jurisdiction in the matter.²³⁸ In addition, the prosecutor of the ICC is engaged in cooperative working relationships with domestic investigators and prosecutors and with INTERPOL, exchanging experiences and practice.²³⁹ This should enhance domestic prosecutors' awareness of ICL violations and the techniques for enforcement. Additionally, the ICC prosecutor, in lieu of undertaking an ICC prosecution, has the option of providing evidence of crimes to domestic authorities for their follow-up action. The ICC has not yet developed an extensive track record, and thus it remains to be seen just how far the ICC's prosecutor needs go in order to make the threat of international prosecution seem credible to domestic authorities.²⁴⁰

H. *Civil Liability for ICL Violations Is Found in Domestic Jurisprudence*

Victims of international crimes have few avenues to obtain restitution for resulting injuries and loss of property. The ICC may order defendants to pay "fines and forfeitures"²⁴¹ into a trust fund for victims, "including restitution, rehabilitation and compensation."²⁴² The Sierra Leone Special Court has similar authority.²⁴³ At the domestic level, criminal courts in many countries may order criminal defendants to pay restitution to victims.²⁴⁴ The Survey

238. See *supra* note 38 and accompanying text.

239. See Press Release, International Criminal Court, Fifteenth Diplomatic Briefing of the International Criminal Court 9 (April 7, 2009), available at http://www.icc-cpi.int/NR/rdonlyres/1E5F488B-2FA9-40F4-9378-A386AF6CBA6E/280246/Compilation_of_State-ments_15_DS.pdf.

240. To date, the prosecutor of the ICC has investigated four situations: the Democratic Republic of the Congo, Uganda, the Central African Republic, and Darfur. See ICC – Office of the Prosecutor, <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor> (last visited July 30, 2009). The Prosecutor is also currently undertaking preliminary investigations in Chad, Kenya, Afghanistan, Georgia, Colombia, and Palestine. *Id.* As of this writing, approximately a dozen arrest warrants have been issued by the ICC in connection with those situations, and two cases are in the trial stage. For the complete docket of outstanding matters, see ICC – Presidency Decisions, <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Presidency/Decisions> (last visited July 30, 2009).

241. Rome Statute, *supra* note 14, art. 79.

242. Rome Statute, *supra* note 14, art. 75.

243. Statute of the Special Court for Sierra Leone art. 19, Jan. 16, 2002, 2178 U.N.T.S. 145.

244. See Julie Goldscheid, *Crime Victim Compensation in a Post-9/11 World*, 79 TUL. L. REV. 167 (2004) (discussing the functioning of programs for compensating victims of crime

found that Argentina, Belgium, France, Japan, the Netherlands, and Spain²⁴⁵ have the mixed civil/criminal mechanism of *action civile* that allows a crime victim or his representative to seek damages against a defendant in a criminal case.²⁴⁶ This mechanism, however, has drawbacks. The international courts, like domestic courts, are unlikely to deal with more than a few defendants. Additionally, one can expect only a very limited number of individual criminal defendants to have substantial personal assets available for restitution awards.²⁴⁷

The lack of jurisdiction in international courts and some national courts over deep-pocket corporate offenders compounds the problem. Domestic prosecution of ICL violations is a vital part of achieving justice and accountability. But the Survey results indicate that domestic prosecutors face many severe challenges. Thus, it is important to examine whether a role exists for civil courts in helping to close the accountability gap.

As noted above, official prosecutors and presiding judges may be reluctant to commence investigations into remote events. In a civil lawsuit, however, the victims themselves can take charge and commence the proceedings, provided that the courts will entertain such suits. The Survey sought information on whether civil torts actions (called "noncontractual liability" or "delicts" in civil law jurisdictions) have the potential to become a viable means for victims to seek redress.

An ICL violation that results in personal injury or loss of property is likely to be factually indistinguishable from an ordinary

used in courts in the United States); Susanne Walther, *Victims' Rights in the German Court System*, 19 FED. SENT'G. R. 113 (2006) (discussing how German criminal courts may order restitution not only for property loss but also for pain and suffering); Stephens, *supra* note 10, at 20 (discussing the low limits on compensation in criminal courts of the Netherlands).

245. See Argentina Resp., at 19; Belgium Resp., at 50; Belgium Section of Composite Supp. Resp.; France Resp., at 22; Japan Section of Composite Supp. Resp.; Spain Section of Composite Supp. Resp.; Stephens, *supra* note 10, at 19.

246. The *action civile* mechanism provides victims with an opportunity to piggyback onto the investigatory and prosecutorial work of official prosecutors. See Stephens, *supra* note 10, at 19. It can thus be a powerful tool, but only where a prosecutor is willing to pursue a case with diligence. *Id.* at 20. On the other hand, if the prosecutor fails to devote the necessary time and energy, a case is likely to fail or simply languish interminably, thus defeating the victim's purposes. *Id.* Further, *action civile* systems suffer from certain additional disadvantages, such as limitations on the amounts of awards, vagaries of judicial independence and the possibility, at least in France and Spain, that an unsuccessful *partie civile* must pay the defendant's defense costs. See Spain Section of Composite Supp. Resp.; Stephens, *supra* note 10, at 21.

247. Admittedly, the same could be said of criminal defendants generally.

intentional tort or delict.²⁴⁸ The plaintiff's burden in a civil matter is far easier to satisfy than the criminal "beyond a reasonable doubt" standard. Additionally, civil courts have jurisdiction over legal persons even in judicial systems in which they are exempt from criminal liability.²⁴⁹

The Survey found that all of the Surveyed Countries have civil tort systems whereby the victim of a wrong can sue for damages.²⁵⁰ Indonesia's tort system is the most limited, since it allows civil actions only for violations of environmental and consumer protection.²⁵¹

The Survey disclosed several ICL-based actions filed by victims or their representatives in the Surveyed Countries other than the United States (under the ATCA). Those reported were found in Argentina,²⁵² Australia,²⁵³ Belgium,²⁵⁴ France,²⁵⁵ and Germany.²⁵⁶ A few tort actions involving victims of environmental violations or

248. See generally TORTURE AS TORT: COMPARATIVE PERSPECTIVES ON THE DEVELOPMENT OF A TRANSNATIONAL HUMAN RIGHTS LITIGATION (Craig Scott ed., 2001). See also Jager & van der Heijden, *supra* note 118, at 857 (discussing the tort laws of the Netherlands that provide that breach of a statutory duty gives rise to a claim by the victim).

249. See, e.g., Argentina Resp., at 24.

250. See Argentina Resp., at 19, 21; Australia Resp., at 9; Belgian Resp., at 40, 41; Canada Resp., at 5; France Resp., at 22; Germany Resp., at 16, 18, 22; India Resp., at 17, 21; India Section of Composite Supp. Resp.; Indonesia Resp., at 10; Japan Resp., at 22, 23, 26; Netherlands Resp., at 19, 20, 22; Norway Resp., at 21, 22; South Africa Resp., at 20; Spain Resp., at 11, 14, 15; Ukraine Resp., at 22, 23, 26; U.K. Resp., at 8, 9, 25; U.S. Resp., at 13.

251. See Indonesia Resp., at 14.

252. See Argentina Resp., at 16, 22 (discussing a civil tort action that was in progress against employees of Ford Motor Argentina and Ford Motor Company for alleged complicity in crimes committed by state security forces in suppressing union activities at the company's car plants during the "dirty war" mentioned *supra* note 42). See also Business & Human Rights: Ford in Argentina, http://www.business-humanrights.org/Categories/Individualcompanies/F/Ford?&&&&batch_start=51 (last visited July 23, 2009).

253. See Australia Resp., at 8 (mentioning a potential negligence claim that may be filed against the Anvil Mining Company in connection with the events that are discussed *supra* note 42).

254. See Belgium Resp., at 38. Two such Belgian suits were *actions civiles* brought against the French oil company TotalFinaElf. *Id.* One was a suit by citizens of Myanmar arising out of the construction of the same Yadana pipeline involved in the Unocal litigation. See *id.* The other involved war crimes allegedly committed by the Congolese President Sassou Nguesso. See *id.*

255. See France Resp., at 19 (citizens of Myanmar brought an *action civile* before French courts against several high-ranking officials of TotalFinaElf S.A. and Total Myanmar Exploration Production for acts constituting the crime of illegal confinement arising out of the defendant's involvement in the same pipeline project as figured in Unocal).

256. See Germany Resp., at 15 (describing the attempt by the U.S.-based Center for Constitutional Rights to petition the attorney general to institute proceedings against Donald Rumsfeld, the Secretary of Defense of the United States, and other high-ranking public officials for their alleged involvement in the events at the Abu Ghraib prison; the attorney general ultimately refused to file the case on the grounds that the matter was already

violations of health and safety standards were reported in Australia,²⁵⁷ Canada,²⁵⁸ India,²⁵⁹ Japan,²⁶⁰ and the United Kingdom,²⁶¹ involving individual business representatives in some cases and corporate entities in others.

In contrast, plaintiffs have filed hundreds of tort actions—some based on ICL and others alleging other breaches of noncriminal aspects of international law—in the federal courts of the United States under the ATCA—some based on ICL and others alleging breaches of noncriminal aspects of international law—with the victims coming from over fifty foreign countries.²⁶² The U.S. federal judicial system undoubtedly provides a relatively favorable environment for hearing complaints against business entities for aiding and abetting grave human rights abuses, or, for that matter, for tort litigation in general.²⁶³

Beth Stephens, a law professor at Rutgers School of Law, has suggested that it is necessary to analyze the laws and customs of other countries in order to understand how the kinds of human rights accountability afforded by *Filartiga* “translate” in different jurisdictions.²⁶⁴ The Survey provides important insights in this regard. There are numerous advantages that tort plaintiffs in the United

involved in criminal proceeding in the United States and thus the principle of non-interference in the affairs of a sovereign state should prevail).

257. See *Australia Resp.*, at 9 (mentioning a suit by natives of Papua, New Guinea, against a mining company for environmental damages to their lands).

258. See *Canada Resp.*, at 5 (describing a suit by residents of Ghana against a Quebec company, dismissed on *forum non conveniens* grounds, which alleged environmental harms arising out of a mining operation in Ghana).

259. See *India Resp.*, at 27 (describing a major action filed by residents of Bhopal, India, against the Union Carbide Company for extensive injuries and loss of life arising from the release of toxic gases from a chemical plant).

260. See *Japan Resp.*, at 37 (describing an action wherein Indonesian plaintiffs sued a consortium of Japanese companies and the Japanese government for failure to adhere to international guidelines in planning and designing a large dam project in Sumatra that involved the forcible displacement of as many as 23,000 people).

261. See *U.K. Resp.*, at 27-28. One such case involved workers in the asbestos industry suing their employers in English High Court. See *id.* at 27. Another concerned injuries suffered in Namibian uranium mines. See *id.* A third was a negligence claim brought by over two hundred Kenyans either killed or injured by weapons discarded by British troops during military exercises in Kenya. See *id.*; see also Jagers & van der Heijden, *supra* note 118 (discussing a civil case filed in London involving a cargo ship that was chartered by a corporation domiciled in the Netherlands to haul hazardous waste and eventually allegedly ended up dumping in the streets of Abidjan, the capital of the Ivory Coast, killing an estimated 12 people and sickening over 9000).

262. Plaintiffs under ATCA have come from at least fifty-three countries. See *infra* Appendix A.

263. See Stephens, *supra* note 10, at 17.

264. *Id.* at 35.

States have over claimants elsewhere. The Survey sought to identify the obstacles that victims face in trying to find and access civil courts in other countries. The responses identified the following:

- (a) Absence of class action rules or severe limitations on class actions;²⁶⁵
- (b) Bans on contingency fees;²⁶⁶
- (c) “Loser pays” fee-shifting rules whereby the plaintiff runs the risk of having to pay a winning defendant’s legal fees;²⁶⁷
- (d) Inadequate discovery rules;²⁶⁸
- (e) Rules whereby the filing of a criminal complaint in a matter will prevent or suspend the filing of a concurrent civil action;²⁶⁹
- (f) High legal fees and costs, beyond the means of indigent victims;²⁷⁰
- (g) Limitations on legal aid for indigent foreign plaintiffs;²⁷¹
- (h) Lack of a culture encouraging *pro bono* services;²⁷²

265. Class actions are generally prohibited in Argentina and the Netherlands. See Argentina Resp., at 25; Jagers & van der Heijden, *supra* note 118, at 861 (discussing lack of class action rules under Dutch law). In Australia, class actions of the “opt out” variety are allowed only in federal and Victoria courts. Australia Resp., at 12. Class actions are provided for in the Spanish constitution, but courts are reluctant to apply the law. See Spain Section of Composite Supp. Resp. Belgium allows members of a victim class to join in a single action or to designate a representative to represent the class. Belgium Resp., at 81.

266. See Australia Resp., at 12; Belgium Resp., at 84; Jagers & van der Heijden, *supra* note 118, at 860 (discussing absence of contingency fee arrangements in the Netherlands); Spain Section of Composite Supp. Resp.

267. In Belgium, the United States, and Japan, parties generally bear their own costs and expenses. In Australia, Germany, Japan, the Netherlands, Spain, Ukraine, and many other countries, however, the loser pays all or a portion of the winner’s fees and costs. See Australia Resp., at 12; Belgium Resp., at 84; Germany Resp., at 25; Japan Resp., at 39 (in civil tort cases, approximately 10% is added to the judgment to pay for a winning plaintiff’s legal fees); Jagers & van der Heijden, *supra* note 118, at 861 (discussing the fee shifting laws of the Netherlands); Spain Section of Composite Supp. Resp.; Ukraine Resp., at 29.

268. See Belgium Resp., at 79 (judges have wide discretion to grant or withhold discovery of documents); Germany Resp., at 25 (plaintiffs have no rights to pre-trial discovery except where they already have possession of excerpts of a document, in which case they can demand to see the original.).

269. See Stephens, *supra* note 10, at 19.

270. See Argentina Resp., at 25; Australia Resp., at 12.

271. Some countries do not provide legal aid generally. See Australia Resp., at 12. Others do not provide legal aid to foreign plaintiffs. Belgium has a program that provides legal services for indigent citizens who seek to file civil suits and even *actions civiles*, and, in cases where a treaty obligates it to do so, foreign indigents. See Belgium Resp., at 83. Germany also has a legal aid program for indigent civil plaintiffs. Germany Resp., at 26. Japan allows for publicly funded legal aid, but not for foreign plaintiffs, with only a small number of exceptions. Japan Resp., at 39. Additionally, Japanese fee scales for legal-aid attorneys are quite low, not allowing sufficient funds for an expensive factual investigation, especially where the events in question occurred abroad. *Id.* Norway has a legal aid program for indigents that is available to foreign plaintiffs. Norway Resp., at 26.

272. Belgium allows for *pro bono* services. Belgium Resp., at 84. See Jagers & van der Heijden, *supra* note 118, at 860 (discussing how in the Netherlands, the legal culture does not promote the use of volunteer services to the same degree as in the United States).

- (i) Inability to recover for pain and suffering, other forms of consequential damages, or punitive damages;²⁷³
- (j) Inability to recover for wrongful death of a relative;²⁷⁴ and
- (k) Standing requirements that prohibit public interest lawsuits.²⁷⁵

The Survey indicated various other obstacles inhibiting victims' lawsuits, obstacles which are also present to some degree in the United States but have even greater negative impacts in other countries. These include:

- (l) Short statutes of limitations;²⁷⁶
- (m) High court fees payable in advance;²⁷⁷
- (n) High costs and other barriers associated with requirements to use only local languages;²⁷⁸
- (o) Extreme slowness of civil courts, especially involving civil appeal;²⁷⁹
- (p) Lack of court jurisdiction over governmental agencies, heads of state, and state-owned enterprises;²⁸⁰
- (q) Courts' lack of authority to entertain lawsuits over events occurring abroad;²⁸¹
- (r) Application of the doctrine of *forum non conveniens*;²⁸²

273. In Germany, damages for pain and suffering are far lower than in the United States. Germany Resp., at 26. The Netherlands does not allow courts to award punitive damages. Jagers & van der Heijden, *supra* note 118, at 861.

274. In Argentina, a dependant can sue in tort, but only if the victim dies after the suit was filed. Argentina Resp., at 25. In Germany, a dependant can recover for wrongful death only if the dependant also suffered damages. Germany Resp., at 26.

275. Argentina Resp., at 25; Belgium Resp., at 80. In Belgium, recent legislation was enacted that gave environmental groups the right to bring lawsuits on environmental issues in which they have an interest, thereby overcoming some standing issues. Belgium Resp., at 83; *cf.* Jager & van der Heijden, *supra* note 118, at 7 (discussing Dutch standing requirements that allow an NGO to bring a lawsuit where the harm occurs to a general interest it is promoting).

276. *See* Argentine Resp., at 24; Germany Resp., at 26 (an absolute limit of 30 years, without possibility of tolling); India Resp., at 22; U.K. Resp., at 31.

277. *See* Germany Resp., at 26; India Resp., at 22; Japan Resp., at 39 (although indigent plaintiffs can defer payment until after judgment); Norway Resp., at 26 (requirement for foreign plaintiffs only).

278. *See* Japan Resp., at 39.

279. *See* India Resp., at 23; Ukraine Resp., at 29.

280. *See* Argentina Resp., at 25; Belgium Resp., at 41.

281. *See* Belgium Resp., at 80; Germany Resp., at 23; India Resp., at 22. *But see* Australia Resp., at 10 (discussing a case in which an Australian court allowed a suit involving an automobile accident occurring in a foreign country on the grounds that the victim had sought medical care in Australia, thus stretching the "direct effect" rule).

282. *See* Argentina Resp., at 25; Canada Resp., at 5; India Resp., at 23; Indonesia Resp., at 15 (observing that the single Indonesian decision applying the doctrine has been "strongly criticized"); Japan Resp., at 28; U.K. Resp., at 32; U.S. Resp., at 18. The doctrine is not followed in many of the Surveyed Countries. *See* Australia Resp., at 12; Belgium Resp., at 85 (discussing a recent Belgian statute that authorizes judges to accept jurisdiction over tort actions arising in foreign countries where proceedings abroad would be

- (s) Lack of jurisdiction over foreign-based defendants, especially foreign subsidiaries of domestic corporations;²⁸³
- (t) Difficulty of collecting on judgments, including nonrecognition of judgments by foreign courts;²⁸⁴
- (u) Complex and unpredictable choice of laws rules;²⁸⁵
- (v) Lack of cooperation by foreign police forces;²⁸⁶ and
- (w) Inadequacy of witness protection programs and confidentiality of witnesses in civil tort trials.²⁸⁷

Experience under ATCA suggests rather convincingly that victims who are unable to find a forum in their home countries due to the presence of these obstacles are willing to travel great distances, at great risk and expense, in order to seek justice in the United States.²⁸⁸ Those who have endured great suffering are not principally motivated to sue only because they want compensation.²⁸⁹ They also have an understandable desire for retribution and a

impossible or where it would be unreasonable to request that the case be brought in a foreign court.); France Resp., at 29; Netherlands Resp., at 26; Spain Resp., at 15.

283. With few exceptions, plaintiffs/victims may only reach an ICL offender for conduct occurring abroad, whether individual or a corporation, in the country where the individual or corporation is a resident. *See, e.g.*, Argentina Resp., at 22; Australia Resp., at 10; Canada Resp., at 6 (must have a “real and substantial connection” with the subject of the litigation.); Belgium Resp., at 65; Japan Resp., at 27. In the case of a corporation, “residence” consists of having a headquarters office or a principal branch office. *See, e.g.*, Belgium Resp., at 65, Netherlands Resp., at 24. The difficulty of obtaining jurisdiction over a corporate defendant may be compounded by the corporate form of the defendant. Where the actual perpetrator is a different affiliated corporation, even a wholly-owned subsidiary, jurisdictional rules may preclude a suit against the parent or domestic affiliate even in the home country where the parent or domestic affiliate has its headquarters. *See, e.g.*, South Africa Resp., at 26. Some of the respondents to the Survey stated that it is sometimes possible to bring an action against a parent for its own conduct in causing the subsidiary to commit a violation. *See* Australia Resp., at 11; France Resp., at 6. Some countries reported that a corporation that commits a tort in their jurisdictions may by that very act subject itself to the civil jurisdiction of that country’s courts. *See* Argentina Resp., at 21; Germany Resp., at 23.

284. *See* Ukraine Resp., at 29.

285. *See* U.K. Resp., at 31.

286. *See* France Resp., at 29 (referring to the context of the *action civile*).

287. *See* Japan Resp., at 40 (a “certain measure of protection was established by a new act in 2007 and will enter into force during this year, though the effect and the practice of such protection remain to be seen”); Japan Section of Composite Supp. Resp.

288. Courts handling ATCA cases are frequently required to assess the likelihood of plaintiffs obtaining justice in their home countries when ruling on motions to dismiss on *forum non conveniens* grounds. *See, e.g.*, Presbyterian Church of Sudan v. Talisman, Inc., 244 F. Supp. 2d 289, 335 (S.D.N.Y. 2003) (providing a thoughtful description of the situation in Sudan at the time).

289. *See* Steinhardt, *supra* note 3, at 25 (“On the other hand, [ATCA/TVPA] plaintiffs are rarely if ever motivated by the prospect of making money out of their ordeals, finding vindication in the imposition of individual responsibility and the supremacy of principle over skepticism.”).

deeply held need to tell their story²⁹⁰ so as to expose their oppressors.²⁹¹ It is critically important to them to have a judge or some other public authority accept and announce the truth so that they can see that justice is done.²⁹² The record under ATCA shows an extremely low success rate of plaintiffs against corporate defendants, but, nonetheless, the stream of filings goes on. The ATCA experience teaches us that victims of horrendous international crimes will pursue justice even if their governments seem oblivious to their own responsibilities to do so.

Canadian Supreme Court Justice Ian Binnie acknowledged the need for foreign countries to open their courts to victims of international crimes when he told the Canadian Bar Association in 2008 that the Canadian legislature should consider adopting legislation that would allow foreign victims to sue corporations in Canadian courts for ICL violations committed abroad.²⁹³ He pointed out that Canada is among a large group of countries that are parties to international agreements that recognize human rights but have not yet provided accessible forums to hear the victims' complaints.²⁹⁴ Justice Binnie observed that "if [the ATCA] were replicated in more countries, there would be more avenues whereby companies could clear their names of allegations made against them, or complainants could obtain redress, depending on what the evidence shows."²⁹⁵

290. See Erin Stapp, *Third-Party Liability for Violations of the Law of Nations: Apply International Law, The Law of the Situs, or Domestic Standards?*, 49 SANTA CLARA L. REV. 495, 499 (2009) (discussing victims' needs "to create a judicial record of their suffering").

291. See Cherif Bassiouni, *The Role of Justice in Building Peace: Justice and Peace: The Importance Of Choosing Accountability Over Realpolitik*, 35 CASE W. RES. J. INT'L L. 191 (2003) (telling the story of a man in Bosnia who reported terrible savagery to the UN Commission of Experts to Investigate the War Crimes and Other Violations of International Humanitarian Law in the Former Yugoslavia, only to commit suicide that same evening, leaving the message: "I lived long enough to tell my story to someone in the hope that it will be told in the future.").

292. See Francisco Rivera, *Inter-American Justice: Now Available in a U.S. Federal Court Near You*, 45 SANTA CLARA L. REV. 889, 897 (2005) (relating how Dolly Filártiga, sister of the decedent in the *Filártiga* case, described her feelings about the outcome of the case, even though Peña-Irala, the defendant, had fled to avoid paying the \$10 million judgment: "With the help of American law I was able to fight back and win. Truth overcame terror. Respect for human rights triumphed over torture. What better purpose can be served by a system of justice?"). For a discussion of the importance of trials in situations of mass atrocity, see MARK OISEL, *Mass Atrocity, Collective Memory and the Law* (1999).

293. See Cristin Schmitz, *Binnie Calls for Corporate Accountability*, LAWYERS WKLY., Aug. 29, 2008, available at <http://www.lawyersweekly.ca/index.php?section=article&articleid=745>.

294. See *id.*

295. *Id.*

Those who wish to advance the cause of opening the civil courts to victims of ICL violations would do well to seek allies among advocates of tort reform on behalf of victims of other illicit practices. These could include victims of consumer fraud, environmental harms, product defects, medical malpractice, and food impurities. A recent example of the effort to open the courts to victims occurred in China, where the parents of children sickened or killed by tainted milk filed a class action against the twenty-two dairy companies that sold it.²⁹⁶ As the demands for corporate accountability for human rights and other abuses mount, countries are likely to face increasing pressure to open their courts.

The success of the international covenants discussed earlier in causing countries to incorporate international crimes suggests that policymakers might be led to consider undertaking multilateral, normative standard setting, such as in an international covenant. This could significantly add to the web of liability and thus ensure greater accountability. As mentioned earlier, a current example of a successful effort to use an international covenant to open up legal avenues for victims to recover damages is found in UNCAC, which requires all of its parties to provide legal means whereby victims of corruption can sue those responsible in domestic forums.²⁹⁷ The results of the Survey suggest that improved access to civil justice in domestic courts could ultimately provide the most effective means of redress for victims of ICL violations.

CONCLUSION

The Survey results show that the fundamental legal concept embraced by *Unocal*—corporate accountability for complicity in human rights abuses—is being “translated” into the legal traditions of many countries, thus forming a web of liability for businesses implicated in international crimes. The basic vehicle for the “translation” phenomenon has been widespread action by countries to bring their domestic legal regimes into line with their obligations under the Rome Statute and other international covenants.

When ICL is incorporated into a domestic legal system, it interacts with preexisting laws. In all of the Surveyed Countries, ICL assumes the extraterritorial jurisdiction of other domestic crimes, including universal jurisdiction that potentially applies to any ICL violation anyplace in the world. ICL also participates in the appli-

296. See Edward Wong, *Families File Suit in Chinese Tainted Milk Scandal*, N.Y. TIMES, Jan. 21, 2009, at A19.

297. UNCAC, *supra* note 189, art. 35.

cation of domestic third-party-liability concepts, and it becomes applicable to corporations in countries where other criminal statutes apply, thereby filling a gap in the ICC's core jurisdiction. In all countries, ICL provides a basis for potential civil liability for every offender, including legal persons.

The applicability of incorporated ICL to legal persons in an increasing number of domestic jurisdictions creates the need for transnational business corporations themselves to reckon with the expanding web of liability. In the particular legal tradition and culture of the United States, the need for accountability for ICL violations has translated primarily into civil litigation. In other countries, the need for accountability may translate into criminal prosecutions or administrative processes instead of civil litigation, or else into hybrid remedies, such as the *action civile*. Although ICL is largely untested in many domestic courts, it has the potential to ensnare corporations and their representatives who become involved in international crimes, whether deliberately or else inadvertently through what might otherwise appear to be normal business activities or relationships. This potential is exponentially higher when transnational corporations do business with authorities or nonstate groups in conflict zones and repressive regimes—situations where ICL violations are often widespread.

The web of liability will likely continue to expand as more countries join the ICC and complete the process of incorporating its core crimes. Undoubtedly, the meaning of concepts like the test for the *mens rea* of aiding and abetting an international crime and the reach of various aspects of the JCE concept will become clearer as, in the course of time, domestic courts are called upon to apply and interpret ICL in a domestic context. Meanwhile, many countries already have a body of other domestic crimes on their books. These are crimes outside the jurisdiction of the ICC, such as bribery of public officials, money laundering, and dealing in stolen property, which apply extraterritorially to the conduct of a country's nationals, including corporations, that do business abroad.

Although individual business representatives have been convicted of ICL violations, no business corporation has yet been convicted of a direct or indirect violation of ICL in a domestic criminal court. This may be due to the fact that prosecutors, despite their ample authority in many countries to charge domestic corporations with direct or indirect ICL violations committed abroad, have had difficulty overcoming some of the barriers discussed earlier in this Article. Prosecutorial exercise of universal jurisdiction is

almost unheard of outside of a few European countries, such as Belgium, France, and Spain.

The Survey identified a few legal mechanisms available to victims that allow them to intervene in prosecutorial decisions, thereby offsetting official reluctance to file these cases. But for the most part, prosecutorial discretion is the rule. In the few cases against individual business representatives that have moved forward, it has often been at the urging of national and international human rights organizations. This indicates that human rights organizations will need to continue to play a central role in informing domestic prosecutors of their authority, assisting in the gathering of evidence, and otherwise advocating for greater prosecution of international crimes.

Finally, the Survey found that all of the Surveyed Countries have civil delict or tort-like systems that would, at least in theory, provide victims of ICL violations with a cause of action against their abusers. The Survey, however, also identified numerous obstacles to such lawsuits. Courthouse doors are, for both legal and practical reasons, generally closed to victims, particularly those who live in poverty. This is due to factors such as restrictions on contingency fees, lack of class action rules, bans on the delivery of *pro bono* legal services, and the prevalence of a “loser pays” practice regarding legal fees and costs. Thus, civil lawsuits—even for the most heinous international crimes—are either simply unavailable or, if available, prohibitively expensive, financially risky, or both.

These obstacles remain in place owing to attitudes deeply rooted in the legal cultures of many countries. Yet nowhere does the law remain entirely static. For example, whereas criminal liability of legal persons was once generally held to be unacceptable in many countries, an increasing number of countries now fully accept it.²⁹⁸ Class actions are no longer an exclusively U.S. phenomenon.²⁹⁹ Courthouse doors are slowly opening throughout the world. Even in Indonesia, which does not generally recognize tort actions, the legislature has recently provided that individuals harmed by envi-

298. See Belgium Resp., at 6 (law creating corporate criminal liability was enacted in 1999); France Resp., at 4 (new Criminal Code provision applying criminal liability to legal persons was enacted in 2001).

299. Whether the class action against the dairy companies mentioned earlier will be allowed to stand remains to be seen. But other jurisdictions are opening to class actions. Some Australian jurisdictions allow class actions. Australia Resp., at 12. In France, the Sarkozy government is backing a proposed bill that would authorize class actions. See Vivian Grosswald Curran, *Globalization, Legal Transnationalization and Crimes Against Humanity: The Lipietz Case*, 56 AM. J. COMP. L. 363, 399 n.192 (2008).

ronmental violations or consumer safety violations can bring lawsuits for damages.³⁰⁰ These indications suggest that governments worldwide are susceptible to public pressure to remove those obstacles.

In the meantime, the list of grave obstacles to civil justice that emerges from the Survey suggests an urgent agenda for legal reform.³⁰¹ In the pursuit of the twin objectives of ending impunity and obtaining greater clarity in the regulation of business practices abroad, business groups and human rights organizations alike would do well to participate in this agenda as a critical part of the "translation" process.

300. Indonesia Resp., at 14.

301. See Collingworth, *supra* note 179, at 203 ("Until human rights are given the same priority as property rights, incidents of torture, murder, kidnapping and sexual assault will continue to be shocking, but routine, consequences of a lawless global economy.")

APPENDIX A

	COUNTRY	CASE
1	Afghanistan	<i>In re Iraq and Afghanistan Detainees Litig.</i> , 479 F. Supp. 2d 85 (D.D.C. 2007)
2	Algeria	<i>Doe v. Islamic Salvation Front</i> , 257 F. Supp. 2d 115 (D.D.C. 2003)
3	Argentina	<i>Siderman de Blake v. Republic of Argentina</i> , 965 F.2d 699 (9th Cir. 1992)
	Argentina	<i>Forti v. Suarez-Mason</i> , 672 F. Supp. 1531 (N.D. Cal. 1987)
	Argentina	<i>Bauman v. DaimlerChryslerAG</i> , 2007 U.S. Dist. LEXIS 13116 (N.D. Cal. Feb. 12, 2007)
4	Austria	<i>Anderman v. Fed. Republic of Austria</i> , 256 F. Supp. 2d 1098 (C.D. Cal. 2003)
5	Belgium	<i>Iwanowa v. Ford Motor Co.</i> , 67 F. Supp. 2d 424 (D.N.J. 1999)
6	Bosnia	<i>Kadic v. Karadzic</i> , 70 F.3d 232 (2d Cir. 1995)
	Bosnia	<i>Mehinovic v. Vuckovic</i> , 198 F. Supp. 2d 1322 (N.D. Ga. 2002)
7	Chile	<i>Gonzalez-Vera v. Kissinger</i> , 449 F.3d 1260 (D.C. Cir. 2006)
	Chile	<i>Schneider v. Kissinger</i> , 310 F. Supp. 2d 251 (D.D.C. 2004)
	Chile	<i>Estate of Cabello v. Fernandez-Larios</i> , 157 F. Supp. 2d 1345 (S.D. Fla. 2001)
	Chile	<i>Barrueto v. Larios</i> , 291 F. Supp. 2d 1360 (S.D. Fla. 2003)
	Chile	<i>Bauman v. DaimlerChryslerAG</i> , 2007 U.S. Dist. LEXIS 13116 (N.D. Cal. Feb. 12, 2007)
	Chile	<i>Denegri v. Republic of Chile</i> , 1992 U.S. Dist. LEXIS 4233 (D.D.C. Apr. 3, 1992)
8	China	<i>Ye v. Zemin</i> , 383 F.3d 620 (7th Cir. 2004)
	China	<i>Doe v. Liu Qi</i> , 349 F. Supp. 2d 1258 (N.D. Cal. 2004)
	China	<i>Bao Ge v. Li Peng</i> , 201 F. Supp. 2d 14 (D.D.C. 2000)
	China	<i>Deutsch v. Turner Corp.</i> , 317 F.3d 1005 (9th Cir. 2003)
	China	<i>Bao Ge v. Li Peng</i> , 1999 U.S. Dist. LEXIS 10834 (D.D.C. July 9, 1999)
9	Colombia	<i>Estate of Rodriguez v. Drummond Co.</i> , 256 F. Supp. 2d 1250 (N.D. Ala. 2003)
	Colombia	<i>In re Sinaltrainal Litig.</i> , 474 F. Supp. 2d 1273 (S.D. Fla. Miami Div. 2006)

Colombia	Mujica v. Occidental Petroleum Corp, 381 F. Supp. 2d 1164 (C.D. Cal. 2005)
10 Czechoslovakia	Burger-Fischer v. Degussa AG, 65 F. Supp. 2d 248 (D.N.J. 1999)
11 Ecuador	Jota v. Texaco Corp., 157 F.3d 153 (2d Cir. 1998)
Ecuador	Aguinda v. Texaco, Inc., 303 F.3d 470 (2d Cir. 2002)
12 Egypt	Bigio v. Coca-Cola Co., 239 F.3d 440 (2d Cir. 2000)
13 El Salvador	Arce v. Garcia, 434 F.3d 1254 (11th Cir. 2006)
El Salvador	Doe v. Rafael Saravia, 348 F. Supp. 2d 1112 (E.D. Cal. 2004)
El Salvador	Chavez v. Carranza, 2006 U.S. Dist. LEXIS 63257 (W.D. Tenn. Aug. 15, 2006)
14 Ethiopia	Abebe-Jira v. Negewo, 72 F.3d 844 (11th Cir. 1996)
15 France	Bodner v. Banque Paribas, 114 F. Supp. 2d 117 (E.D.N.Y. 2000)
France	Abrams v. Societe Nationale des Chemins de Fer Francais, 332 F.3d 173 (2d Cir. 2003)
16 Germany	Arndt v. UBS AG, 342 F. Supp. 2d 132 (E.D.N.Y. 2004)
Germany	Ungaro-Benages v. Dresdner Bank AG, 2003 U.S. Dist. LEXIS 27693 (S.D. Fla. Feb. 14, 2003)
17 Ghana	Cabiri v. Assasie-Gyimah, 921 F. Supp. 1189 (S.D.N.Y. 1996)
18 Guatamala	Aldana v. Del Monte Fresh Produce, N.A., Inc. 416 F.3d 1242 (11th Cir. 2005)
Guatamala	Xuncax v. Gramajo, 886 F. Supp. 162 (D. Mass. 1995)
19 Haiti	Jean v. Dorelien, 431 F.3d 776 (11th Cir. 2005)
Haiti	Lafontant v. Aristide, 844 F. Supp. 128 (E.D.N.Y. 1994)
Haiti	Paul v. Avril, 901 F. Supp. 330 (S.D. Fla. 1994)
20 Hungary	Deutsch v. Turner Corp., 324 F.3d 692 (9th Cir. 2003)
Hungary	Rosner v. United States, 231 F. Supp. 2d 1202 (S.D. Fla. 2002)
21 India	Bano v. Union Carbide Corp., 273 F.3d 120 (2d Cir. 2001)
22 Indonesia	Beanal v. Freeport-McMoRan, Inc., 969 F. Supp. 362 (E.D. La. 1997)
Indonesia	Doe v Exxon Mobil Corp., 393 F. Supp. 2d 20 (D.D.C. 2005)
Indonesia	Alomang v. Freeport-McMoRan, Inc., 1996 U.S. Dist. LEXIS 15908 (E.D. La. Oct. 17, 1996)

23	Iraq	Saleh v. Titan Corp., 436 F. Supp. 2d 55 (D.D.C. 2006)
	Iraq	Ibrahim v. Titan Corp., 391 F. Supp. 2d 10 (D.D.C. 2005)
24	Israel	Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984)
	Israel	Almog v. Arab Bank, PLC, 471 F. Supp. 2d 257 (E.D.N.Y. 2007)
	Israel	Saperstein v. Palestinian Auth., 2006 U.S. Dist. LEXIS 92778 (S.D. Fla. Dec. 22, 2006)
25	Kenya	Mwani v. Bin Ladin, 244 F.R.D. 20 (D.D.C. 2007)
	Kenya	Abur v. Republic of Sudan, 437 F. Supp. 2d 166 (D.D.C. 2005)
	Kenya	Mwani v. Bin Ladin, 2002 U.S. Dist. LEXIS 27826 (D.D.C. Sept. 30, 2002)
26	Lebanon	Belhas v. Ya'Alon, 466 F. Supp. 2d 127 (D.D.C. 2006)
27	Liberia	Roe v. Bridgestone Corp., 492 F. Supp. 2d 988 (S.D. Ind. 2007)
28	Libya	Saltany v. Reagan, 886 F.2d 438 (D.C. Cir. 1989)
29	Malaysia	Manliguez v. Joseph, 226 F. Supp. 2d 377 (E.D.N.Y. 2002)
30	Mexico	Sosa v. Alvarez-Machain, 542 U.S. 692 (2004)
31	Myanmar	Doe I v. Unocal Corp, 110 F. Supp. 2d 1294 (C.D. Cal. 2000)
32	New Guinea	Sarei v. Rio Tinto, PLC, 487 F.3d 1193 (9th Cir. 2007)
33	Nicaragua	Sanchez-Espinoza v. Reagan, 770 F.2d 202 (D.C. Cir. 1985)
	Nicaragua	Linder v. Calero Portocarrero, 747 F. Supp. 1452 (S.D. Fla. 1990)
34	Nigeria	Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88 (2d Cir. 2000)
	Nigeria	Kiobel v. Royal Dutch Petroleum Co., 456 F. Supp. 2d 457 (S.D.N.Y. 2006)
	Nigeria	Abiola v. Abubakar, 435 F. Supp. 2d 830 (N.D. Ill. 2006)
	Nigeria	Bowoto v. Chevron Corp., 2007 U.S. Dist. LEXIS 59374 (N.D. Cal. Aug. 13, 2007)
35	Palestine	Corrie v. Caterpillar, 503 F.3d 974 (9th Cir. 2007)
36	Panama	Industria Panificadora, S.A v. United States, 957 F.2d 886 (D.C. Cir. 1992)
	Panama	Goldstar (Panama) S.A. v. United States, 967 F.2d 965 (4th Cir. 1992)

37	Paraguay	Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980)
38	Peru	Flores v. S. Peru Copper Corp., 343 F.3d 140 (2d Cir. 2003)
39	Philippines	Hilao v. Estate of Marcos, 103 F.3d 767 (9th Cir. 1996)
	Philippines	In re World War II Era Japanese Forced Litig., 164 F.Supp. 2d 1153 (N.D. Cal. 2001)
40	Poland	Princz v. Fed. Republic of Germany, 26 F.3d 1166 (D.C. Cir. 1994)
	Poland	Sampson v. Fed. Republic of Germany, 250 F.3d 1145 (7th Cir. 2001)
41	Republic of Korea	Deutsch v. Turner Corp., 317 F.3d 1005 (9th Cir. 2003)
42	Rwanda	Ushikiwabo v. Barayagwiza, 1996 U.S. Dist. LEXIS 4409 (S.D.N.Y. Apr. 8, 1996)
43	South Africa	Khulumani v. Barclay Nat'l Bank, Ltd., 504 F.3d 254 (2d Cir. 2007)
44	Sudan	Presbyterian Church of Sudan v. Talisman Energy, Inc., 453 F. Supp. 2d 633 (S.D.N.Y. 2006)
45	Sweden	Von Dardel v. Union of Soviet Socialist Republics, 736 F. Supp. 1 (D.D.C. 1990)
46	Syria	Arar v. Ashcroft, 414 F. Supp. 2d 250 (E.D.N.Y. 2006)
47	The Russian Federation	Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424 (D.N.J. 1999)
48	Turkey	Deirmenjian v. Deutsche Bank, A.G., 526 F. Supp. 2d 1068 (C.D. Cal. 2007)
49	United Kingdom	Carmichael v. United Technologies Corp., 835 F.2d 109 (5th Cir. 1988)
50	Vietnam	Vietnam Ass'n for Victims of Agent Orange v. Dow Chemical Co., 517 F.3d 104 (2d Cir. 2008)
	Vietnam	Van Tu v. Koster, 364 F.3d 1196 (10th Cir. 2004)
	Vietnam	In re "Agent Orange" Prod. Liab. Litig., 373 F. Supp. 2d 7 (E.D.N.Y. 2005)
51	Yugoslavia	Alperin v. Vatican Bank, 410 F.3d 532 (9th Cir. 2005)
52	Zimbabwe	Tachiona v. Mugabe, 234 F. Supp. 2d 401 (S.D.N.Y. 2002)

APPENDIX B

Argentina	Following the rescission in 2003 of the blanket amnesty that was granted for all crimes committed during the “dirty war” period from 1976 to 1983 (see <i>supra</i> note 42), authorities took action against employees of Ford Motor Company for their complicity in the disappearance of labor activists working at a company plant. <i>Argentina Resp.</i> , at 15, 17.
Australia	The federal police are investigating whether Anvil Mining Ltd. is complicit in crimes against humanity committed in the Democratic Republic of the Congo. <i>Australia Resp.</i> , at 11.
Belgium	Authorities investigated a case involving crimes against humanity in 1998. Other criminal matters reported involved the use of the <i>action civile</i> mechanism: a case against TotalFinaElf S.A. for its alleged involvement in the same atrocities that figured in the Unocal litigation. In 2003, <i>action civile</i> complaints were lodged against high-profile political leaders in the United States and Israel, leading the legislature to make changes in the <i>action civile</i> statute that effectively placed control over suits against foreign defendants in the hands of the National Prosecutor. <i>Belgium Resp.</i> , at 34, 38, 55, 60.
Canada	In 2009, Désiréé Munyaneza, a Hutu, was convicted in a Montreal court of crimes, crimes against humanity and genocide relating to the 1994 Rwandan genocide. Ian Austen, <i>Rwandan Is Convicted in Genocide</i> , N.Y. TIMES, May 23, 2009, at A8.
France	Authorities brought charges of genocide and crimes against humanity arising out of events in Rwanda in 1994. <i>France Resp.</i> , at 19, 26. The <i>action civile</i> mechanism has been used by Myanmar citizens to bring charges against officials of TotalFinaElf S.A. in connection with events arising out of the pipeline project involved in the <i>Unocal</i> matter, as discussed in note 200. <i>France Resp.</i> , at 19.
The Netherlands	Frans van Anraat was convicted of complicity in war crimes and ultimately received a nineteen-year sentence. <i>Netherlands Resp.</i> , at 14. Van Anraat, Rechtsbank [Rb.] Gravenhage [District Court of The Hague], 23 December 2005, UN AU8685 (Neth.). See also Wilt, <i>supra</i> note 121. Guus Van Kouwenhoven was charged with complicity in war crimes in Liberia and Sierra Leone and also for violating a U.N.-imposed arms embargo for selling weapons to Charles Taylor. <i>Netherlands Resp.</i> , at 14. Although he was found guilty of violating the arms embargo, the guilty verdict was overturned on appeal. The attempted prosecution of

Desi Bourtese, the former head of Surinam, for torture and murder occurring in 1982 (prior to the adoption of ICL legislation in the Netherlands) failed when the court dismissed the prosecution on the grounds that ICL is not enforceable until it has been incorporated into the penal code. *Netherlands Resp.*, at 17.

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- Spain In 1998, Judge Baltazar Garc3n, who had initiated the original Spanish prosecution of former Chilean dictator Augusto Pinochet, investigated acts of genocide and terrorism in Argentina (concurrently with his investigation of similar matters in Chile). See Mar3a del Carmen M3rquez Carrasco & Joaqu3n Alcaide Fern3ndez, *In re Pinochet*, 93 AM. J. INT'L L. 690 (1999). In 2005, Judge Garc3n investigated instances of genocide in Guatemala. *Spain Resp.*, at 14. There is also an effort underway to assert Spanish universal jurisdiction over mass murders committed in El Salvador. See Victoria Burnett, *Jesuit Killings in El Salvador Could Reach Trial in Spain*, N.Y. TIMES, Nov. 14, 2008, at A10.
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- United States Charles "Chuckie" Taylor, Jr., the son of Charles Taylor, the former Liberian president, was sentenced to ninety-seven years in prison on January 9, 2009. *Son of Ex-President of Liberia Gets 97-Year Prison Sentence*, N.Y. TIMES, Jan. 10, 2009, at A14. Chuckie Taylor headed a paramilitary unit during his father's presidency. See also Elise Keppler, Shirley Jean & J. Paxton Marshall, *First Prosecution in the United States for Torture Committed Abroad: The Trial of Charles 'Chuckie' Taylor, Jr.*, 15 HUM. RTS. BRIEF 17 (2008).
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