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The Five Levels of CSR Compliance: The Resiliency of Corporate Liability under the Alien Tort Statute and the Case for a Counterattack Strategy in Compliance Theory

By
David Scheffer and Caroline Kaeb*

INTRODUCTION

Multinational corporations confront a brave new world of compliance that extends far beyond a company's commercial goals and onto terrain that can deeply impact its survival and prosperity. The rules of the game have changed over the last two decades as the primary elements of corporate social responsibility (CSR) – human rights, environment, labor, and anti-corruption priorities – advanced in the halls of government, in the rule-making of international institutions, in courtrooms, and in a growing number of board rooms. We argue in this article that the stakes are simply too high for any corporate manager or director to deny or seek to evade CSR and this new regime of compliance. The business case for CSR will become increasingly dependent upon a sophisticated, multi-layered regime of compliance. The ultimate goal should be to make social and human rights issues an integral part of a

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corporation's business strategy in order to benefit the company and its stakeholders.¹ Corporate officers who retrench into conventional practices would ignore the new reality and place at risk the sustainability of the corporation's core operations and – possibly within hours – the worth of its stock. The rules of the game have already changed and it has become essential not only to understand the varied character of compliance methodology today but also to look forward and comprehend what the boldest form of corporate compliance with CSR principles will look like in the near future.

Law and practice have evolved rapidly in recent years, particularly in the field of human rights, and multinational corporations remain at risk of liability suits in U.S. courts for their human rights performance abroad. Legal liability has altered the costs of international operations to an extent that goes beyond the risk of mere money damages resulting from lawsuits. Despite recent decisions in the United States Court of Appeals for the Second Circuit (the Second Circuit)² that might ultimately result in limiting corporate liability under the Alien Tort Statute (ATS),³ the profusion of ATS litigation against multinational corporations in the United States means that human rights compliance has become firmly entrenched as an issue of law in addition to moral responsibility.

One might contend that defaulting on CSR elements still has competitive advantages that can dictate short-term corporate decision-making.⁴ However, the context has changed significantly, and today a corporation, whatever its competitive drive, risks defaulting on legal standards and not solely moral imperatives. The shift towards legal liability over the long term should enhance the incentive for corporations not to default. Furthermore, the non-legal risks of loss of reputation, denial of access to foreign markets, and shareholder dissent (not to mention plunging stock values) assume higher visibility as CSR issues take hold in the courts and beyond.

This article describes five stages of corporate compliance that should be factored into minimizing corporate liability risks. The fifth stage is the most challenging. It entails innovation and what we describe as a “counter-attack” by corporate officers who understand the modern dynamics of enlightened compliance theory and practice, and the value of *advancing* CSR objectives,

1. See Terry O'Collaghan, *Disciplining Multinational Enterprises: The Regulatory Power of Reputation Risk*, 21 GLOBAL SOC'Y 100-14 (2007); DAVID VOGEL, THE MARKET FOR VIRTUE: THE POTENTIAL AND LIMITS OF CORPORATE SOCIAL RESPONSIBILITY 16-45 (2005). For an excellent study of current theories and practice about corporate social responsibility, see MICHAEL KERR, RICHARD JANDA AND CHIP PITTS, CORPORATE SOCIAL RESPONSIBILITY: A LEGAL ANALYSIS (Chip Pitts ed., 2009).

2. *Infra* Part III.

3. 28 U.S.C. § 1330 (2010) (“The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”).

4. See Aneel Karnani, *The Case Against Corporate Social Responsibility*, WALL ST. J., Aug. 23, 2010, at R1.

particularly in the realm of human rights. This entails a level of compliance that inspires innovation and a growing recognition of the importance of social values in order to create and capture business value for the long-run. The prize is both long-term business growth and meaningful social impact. The end objective of the fifth level of compliance is that the corporate sector can “right the system,” namely by challenging and attempting to correct the governmental or societal challenges to international law principles, and thus enhancing the social environment for future business growth.

I.

LEVEL ONE: RHETORICAL DEFERENCE TO CSR COMPLIANCE

The first level of corporate compliance to CSR has been of a largely rhetorical character as demonstrated in the public relations and investor relations sectors of corporate operations. Policy formulation centers on how to communicate the right message to the public. Corporate management must build upon this foundation and follow through on all levels of compliance. Since the late 1990s, the annual reports and additional sustainability reports of scores of major multinational corporations engaged in the extractive and manufacturing industries, garment production, pharmaceuticals, and internet communications (to name only a few) have reported varying degrees of commitment to and performance under CSR objectives. This has been a natural development from the beginning as the news of good intentions becomes the act of rhetorical compliance, sometimes long before there is tangible evidence of follow-through by the corporation to walk the talk. The intentional character of annual report language and the representations of actual performance to advance CSR objectives have demonstrated at least a nominal recognition of the importance of the CSR endeavor for public affairs departments and eventually corporate managers and directors in their communications with shareholders, investors, and other stakeholders. As a result, such attention to CSR raises expectations of compliance. Such expectations should be met in order to sustain credibility and establish a self-proclaimed record of performance against which the corporation can be held accountable.

Some of the best examples of the first level of compliance originally emerged from the public affairs offices of multinational corporations as opposed to specially mandated compliance divisions, although the latter soon appeared with greater frequency and importance in corporate structures.⁵ The favored tool of the public affairs divisions has been the responsibility/sustainability report,

5. Daimler began the corporate compliance department in 2006 with a centralized organization, which then integrated with the Legal Department in 2008 to form a Legal & Compliance unit. In 2009, Daimler established a Group Compliance Board to oversee compliance at all business units and report to the Board of Management. See DAIMLER AG, COMPLIANCE, <http://www.daimler.com/dccom/0-5-992580-1-998634-1-0-0-1032095-0-0-135-7145-0-0-0-0-0-0.html> (last visited Oct. 11, 2010).

which can offer splashy, reasoned, and even lengthy treatments of the subject, often posted on the corporation's web site.⁶

The rhetorical deference to human rights and other CSR elements can achieve some short-term goals for the multinational corporation, including strengthening its public commitment to CSR and perhaps blunting litigation threats from victims if they see good faith efforts being transparently undertaken to address their needs. Overall, however, this first level of compliance either reflects authentic adherence to CSR principles or stands as mere window-dressing for the corporation's shallow efforts to address human rights, labor, environmental, or anti-corruption issues impacted by its operations. No one should be surprised if civil society stands watch on the annual reports and press releases to ensure follow-through on corporate representations of past, current, or future compliance.

In general, the first level of compliance is essential as a demonstration of corporate commitment and for the public's understanding of corporate performance. However, public relations tactics alone can be shallow and deceptive means of addressing the real grievances and concerns of those at risk in the corporate operations. An office or division of the corporation dedicated to CSR compliance objectives, with sufficient personnel and financial resources, should strengthen the credibility not only of the first level of compliance but the four other levels discussed below. The first level of compliance is hence only the beginning of the story.

II.

LEVEL TWO: SELF-REGULATORY COMPLIANCE WITH INDUSTRY STANDARDS

The second level of corporate compliance – voluntary standards and codes of conduct – originates either from within the corporation, similar to the first level, or draws upon institutional guidelines. Voluntary standards of human rights and other CSR compliance grounded in codes of conduct have been widely introduced into the operational framework of major multinational corporations. The standards and codes either follow institutional guidelines that have been developed by leading international organizations⁷ or multi-

6. DAIMLER AG, SUSTAINABILITY REPORT 2009, 13-16; TOTAL S.A., ENVIRONMENT AND SOCIETY 2008: OUR CORPORATE SOCIAL RESPONSIBILITIES 12-14, 16-19, 24, http://www.total.com/MEDIAS/MEDIAS_INFOS/1044/EN/Total-csr-en-2008.pdf; NIKE INC., FY01 CORPORATE RESPONSIBILITY REPORT 26-31, 53-54 (2001), http://www.nikeresponsibility.com/#crreport/fy01_cr_report; STARBUCKS CORPORATION, ETHICAL SOURCING, <http://www.starbucks.com/SHAREDPLANET/ethicalInternal.aspx?story=sspPrinciples> (last visited Oct. 11, 2010); STARBUCKS CORPORATION, HUMAN RIGHTS PERFORMANCE INDICATORS, <http://www.starbucks.com/SHAREDPLANET/ourResponsibilityInternal.aspx?story=globalReporting> (last visited Oct. 11, 2010); SHELL INTERNATIONAL LIMITED (SI), RESPONSIBLE ENERGY, THE SHELL SUSTAINABILITY REPORT 32-40 (2007).

7. U.N. Human Rights Council, *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts: Report of the Special*

stakeholder initiatives,⁸ or they are created by in-house counsel, often in collaboration with outside counsel, and are tailored to the corporation's unique operations.⁹

The existence of voluntary guidelines or codes of conduct endorsed and incorporated by the corporation in its management and operational strategies represents an explicit validation of "soft" enforcement of CSR objectives. By "soft," we mean that while the guidelines and codes are designed to influence corporate behavior, non-compliance does not necessarily result in, and usually escapes, any real enforcement consequences. These are not legally enforceable documents and they do not give rise to any discernible cause of action if they are "violated" by the corporation or any corporate officials. Enforcement is left up to the corporation itself and to needling stakeholders, including shareholders and civil society groups, seeking to steer a company towards compliance with its own guidelines.¹⁰

In a perfect world, at least for CSR objectives, voluntary guidelines and codes of conduct linked to tangible industry performance would accomplish the mission and prevent litigants from knocking on the corporate door. That world does not yet exist. In Part IV we examine the need for tougher compliance divisions within multinational corporations and for improved regulatory performance by governments. At this point, however, we turn to years of U.S. jurisprudence explicating the ATS to remind corporate managers and directors that there are "hard" enforcement tools wielding the threat of civil monetary penalties – particularly for violations of fundamental human rights principles or atrocity crimes (genocide, crimes against humanity, and war crimes)¹¹ – that

Representative of the Secretary-General (SRSG) on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, 14-23, U.N. Doc. A/HRC/4/035 (2007); UN GLOBAL COMPACT OFFICE, GLOBAL COMPACT ANNUAL REVIEW 25-27 (2007); MCKINSEY & COMPANY, ASSESSING THE GLOBAL COMPACT'S IMPACT 1-14 (2004), available at <http://www.unglobalcompact.org/>; COUNCIL OF EUROPE, GUIDELINES FOR THE COOPERATION BETWEEN LAW ENFORCEMENT AND INTERNET PROVIDERS AGAINST CYBERCRIME (2008); GLOBAL NETWORK INITIATIVE, PRINCIPLES, <http://www.globalnetworkinitiative.org/> (last visited Oct. 11, 2010); *Voluntary Principles on Security and Human Rights*, <http://www.voluntaryprinciples.org/principles/index.php> (last visited Oct. 11, 2010).

8. See Voluntary Principles for Security and Human Rights, <http://www.voluntaryprinciples.org/> (last visited Oct. 11, 2010); Global Network Initiative, <http://www.globalnetworkinitiative.org/> (last visited Oct. 11, 2010).

9. GAP INC. CODE OF VENDOR CONDUCT, http://www.gapinc.com/public/documents/code_vendor_conduct.pdf; STARBUCKS SUPPLIER CODE OF CONDUCT, <http://assets.starbucks.com/assets/supplier-code-of-conduct.pdf>; MATTEL, INC., GLOBAL MANUFACTURING PRINCIPLES, <http://corporate.mattel.com/pdfs/GMPoverview.pdf>.

10. Pfizer enforces its Global Standards of Business Conduct through a Corporate Compliance Division headed by a Compliance Officer. The Corporate Compliance Division performs internal auditing and monitoring. See PFIZER INC., CORPORATE COMPLIANCE PROGRAM, http://www.pfizer.com/about/corporate_compliance/corporate_compliance.jsp (last visited Nov. 18, 2010).

11. The term "atrocity crimes" describes the international crimes that have been and are being prosecuted before the international and hybrid criminal tribunals and include genocide, crimes

must be reckoned with in managing any multinational operations.

III.

LEVEL THREE: ALIEN TORT STATUTE COMPLIANCE AND THE EUROPEAN DIMENSION

Following a quarter century of ATS litigation in the federal courts, the risks of lawsuits against multinational corporations are now well established. There are victim groups and non-governmental organizations, not to mention an entire academy of law professors and litigators, well prepared to create causes of action for corporate complicity in massive violations of human rights, in particular. In fact, there are currently about two-dozen pending ATS cases against U.S. and foreign corporations for allegedly having aided and abetted serious human rights violations overseas.¹² In the past, corporate defendants have escaped judicial enforcement on procedural grounds, on the merits, or by settlement. The latest most prominent example involves Royal Dutch Petroleum in the *Kiobel* case.¹³ While corporations have fared relatively well during the end stages of the ATS litigation, they have been battered during the years of litigation with occasional victories by the plaintiffs on important points of evidence and of law, while also enduring relentlessly bad press that can directly impact corporate profitability and sustainability in the global marketplace.

One response to the risk of ATS litigation is to change the law, or repeal it entirely. That has not occurred in the U.S. Congress, and any such strategy remains improbable as a means of countering the risk of ATS litigation. We do not advocate any particular revision of the ATS or its repeal. The real battleground remains in the courts.

We examine ATS litigation risks under four categories of study. First, it is critically important to understand the nature and limits of the substantive torts covered by the ATS in the aftermath of the U.S. Supreme Court's judgment in *Sosa v. Alvarez-Machain*.¹⁴ This has been a moving target for quite some time, and even after *Sosa* one needs to be cognizant of how the federal courts have been interpreting that decision with respect to the violations at issue. Second,

against humanity, and serious war crimes. One of its benefits is to succinctly describe these crimes in two words rather than having to recite all of the categories of crimes falling within the subject matter jurisdiction of the tribunals. See David Scheffer, *Genocide and Atrocity Crimes*, 1 GENOCIDE STUDIES AND PREVENTION 3, 229-50 (2006); David Scheffer, *A Symposium on David Scheffer's "Genocide and Atrocity Crimes,"* 2 GENOCIDE STUDIES AND PREVENTION 1, 31-96 (2007).

12. Pending cases in which aiding and abetting liability remains at issue include *Balintulo v. Daimler AG*, No. 09-2778-CV (2d Cir. argued Jan. 11, 2010) (pertained to South Africa); *Mujica v. Occidental Petroleum, Inc.*, 564 F.3d 1190 (9th Cir. 2009) (appeal pending) (pertained to Colombia); *Doe v. Exxon*, 658 F. Supp. 2d 131 (D.D.C. 2009), appeal docketed, No. 09-7125 (D.C. Cir. Oct. 29, 2009) (pertaining to Indonesia).

13. *Kiobel v. Royal Dutch Petroleum*, Nos. 06-4800-cv, 06-4876-cv (2d Cir. Sept. 17, 2010).

14. 542 U.S. 692 (2004).

complicity principles have been severely challenged in the Second Circuit. We will examine that issue in depth. Third, the Second Circuit also examined whether corporations are even subject to lawsuits under the ATS. The judgment rendered in *Kiobel* on September 19, 2010, dealt a severe blow to sustaining corporate liability under the ATS. But there was a vigorous dissent on the three-judge panel and that particular decision, discussed herein, may be challenged before an *en banc* panel of the Second Circuit or eventually before the Supreme Court.

Fourth, even if ATS liability recedes as a viable risk or is avoided in any particular case, no multinational corporation should assume it can avoid compliance challenges with respect to human rights norms. There remains significant foreign interest, particularly within European courts, in extending the reach of human rights norms to govern corporate behavior, including the enforcement of criminal sanctions. While Europe's litigation heritage on corporate liability for ATS-like torts is minuscule compared to that of the United States, it would be folly to assume that the reach of the law is not expanding elsewhere. Canada is now considering legislation that would impose corporate liability for a long list of crimes and human rights abuses.¹⁵ In effect, whatever gap may arise in ATS liability could be ephemeral within a short number of years for multinational corporations that will remain exposed to European or other foreign litigation. In fact, the Union Oil Company of California (UNOCAL), which merged with the Chevron Corporation on August 10, 2005, and thereafter operated as a wholly-owned subsidiary of Chevron, experienced this reality in France and Belgium following its ATS settlement in the United States, which we discuss later in this article.

A. The Scope of Substantive Torts under the ATS

The Supreme Court constricted the range of substantive torts that are subject to ATS litigation in *Sosa v. Alvarez-Machain*. [Sosa v. Alvarez-Machain, 542 U.S. 692, 732]. This case was not an obvious one to bring under the ATS, and one can only wonder whether the counsels for the plaintiff were rolling the dice against themselves. It is not surprising that all nine justices found that an arbitrary detention of less than 24 hours simply did not rise to the level of massive criminal or tortious conduct that one would identify with arbitrary detentions of significantly greater length. The complaint compelled the Supreme Court to examine the precise contours of the ATS and whether it can be stretched to accommodate a relatively minor infraction of international law, however frightful the arbitrary detention presumably was for Dr. Alvarez-

15. Bill C-354 (An Act to amend the Federal Courts Act (international promotion and protection of human rights)), House of Commons of Canada, Second Session, Fortieth Parliament 57-58 Elizabeth II (First reading, Apr. 1, 2009), available at <http://www2.parl.gc.ca/HousePublications/Publication.aspx?Docid=4329781&file=4>.

Machain.¹⁶

The Supreme Court's analysis described the ATS in the context of what violations of international law, or the "law of nations," would have qualified for ATS litigation in 1789. Using this standard, the Court further determined what comparable contemporary violations international law would invoke ATS jurisdiction. Suddenly, the American legal community was reminded of three sure-fire violations reaching all the way back to 1789 that could be litigated. However, these violations were not relevant to corporations. The Supreme Court identified violation of safe conducts, infringement of the rights of ambassadors, and piracy as the three blockbuster "offenses against the law of nations" that everyone could feel comfortable adjudicating in federal courts.¹⁷ While useful as historical insight into the drafting of the 1789 statute, this list of violations belied the magnitude and character of the many torts and atrocity crimes in the modern era. The ATS either slammed the door shut 215 years before *Sosa*, permitting only these three international law violations of certain validity, or it left the door ajar for additional violations that the courts can identify as meeting the high standards established by the Supreme Court.

In fact, the majority of Supreme Court justices concluded that the ATS door indeed was left ajar to include additional violations of international law that met the same high bar of universal application as the three violations of 1789. The standard for determining whether other torts or crimes qualify under the ATS is drawn from the 1789 template of the statute: "...[F]ederal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when [the ATS] was enacted."¹⁸ This is a very high bar for new causes of action to surmount. Nevertheless, the hard message for corporations is that an increasing number of atrocity crimes, in particular, and other massive torts may be able to leap over that bar now.

A few examples of ATS causes of action against multinational corporations in federal courts are summarized in a leading casebook:

... Caterpillar Corporation was sued for selling bulldozers to the Israeli military that were used to demolish Palestinian homes; the Canadian company Talisman was sued for aiding and abetting genocide in Sudan; U.S. chemical companies were sued for providing Agent Orange as a defoliant to the U.S. military in the Vietnam War; Royal Dutch Shell was sued for complicity in the execution of Ogoniland environmental activists in the Niger Delta; Yahoo! was sued for aiding and abetting torture by providing the Chinese government access to a human rights activist's electronic records; Drummond Coal was sued for assisting

16. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 738 (2004) ("It is enough to hold that a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy.").

17. *Id.*, at 724.

18. *Id.* at 732.

paramilitary forces in the murder of labor activists in Colombia; and Bridgestone/Firestone was sued for supporting forced child labor in the rubber industry. . . . ATS claims against banks, insurance companies, and other corporations enriched by human rights violations under the Nazi regime ultimately resulted in a global settlement of claims and produced substantial recoveries.¹⁹

This is not an insubstantial record of alleged mega-torts.

The list is potentially endless if one focuses on torts that arise from corporate negligence rather than criminal intent. This article does not focus on the former, but it should be appreciated that there are innumerable instances of negligence from which ATS liability, resulting in massive torts found to violate international law, may arise. Multinational corporations are capable of violating international law even if their senior officers escape criminal prosecution for such violations.²⁰ For the time being, much of ATS litigation is focused on those established violations of international law that provide the kind of universal acceptance that can be readily translated into civil liability under the ATS. It may seem awkward at times, for purposes of ATS liability, to examine actions and modes of participation that have become well adjudicated and codified in international criminal law. This, however, is the nature of the beast and federal courts have become very comfortable with looking at this field of law in order to establish the parameters of tort liability under the ATS. Nevertheless, negligence standards may provide far broader opportunities in the future as customary international law matures, particularly in environmental law.²¹

The interesting feature of the *Sosa* test for tortious liability is that a widening ambit of atrocity crimes, which is not a static field at all, has been easily captured within the parameters of *Sosa* liability. It would be difficult to identify an atrocity crime, in which a corporation may be found to be either complicit or directly perpetrating, that is also free of ATS liability. Certainly,

19. LOUIS HENKIN, SARAH H. CLEVELAND, LAURENCE R. HELFER, GERALD L. NEUMAN, & DIANE F. ORENTLICHER, *HUMAN RIGHTS* 1137 (2d ed., Foundation Press 2009).

20. See generally Kathleen Morris, *The Emergence of Customary International Law Recognizing Corporate Liability for Violations of International Human Rights and Environmental Law*, GONZAGA J. INT'L L. (2007-2008); Steven Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility* 111 YALE L.J. 443, 446-48 (2001).

21. See, e.g., Michael Barsa and David Dana, Three Obstacles to the Promotion of Corporate Social Responsibility by Means of the Alien Tort Claims Act: The *Sosa* Court's Incoherent Conception of the Law of Nations, the "Purposive" Action Requirement for Aiding and Abetting, and the State Action Requirement for Primary Liability, Public Policy Roundtable: The Alien Tort Statute and U.S. Enforcement of Foreign Judgments, Searle Center on Law, Regulation and Economic Growth, Northwestern University School of Law, Apr. 29-30, 2010, at http://www.law.northwestern.edu/searlecenter/papers/Dana_Barsa_ATCAFfinal.pdf; James Harrison, The Gulf of Mexico Oil Spell and International Law, International Law Observer, May 31, 2010, at <http://internationallawobserver.eu/2010/05/31/the-gulf-of-mexico-oil-spill-and-international-law/>; Stephen L. Kass, *International Liability for the BP Oil Plume*, New York Law Journal, Aug. 26, 2010, at <http://www.clm.com/publication.cfm/ID/299>.

federal courts would not ponder too long the ATS's applicability to the atrocity crimes of genocide, any of the wide range of crimes against humanity, or any of the many war crimes universally found enforceable under international law.

The statutes of the war crimes tribunals as well as their respective jurisprudence have established substantiality thresholds for charges of atrocity crimes. This means that once a particular crime is charged and prosecuted before any one of the tribunals, it will almost certainly enter the realm of ATS liability. The ICC has a long future ahead, and accordingly, the determination of what level and character of criminal conduct falls within the jurisdiction will continue to evolve each year. A federal judge twenty years from now will have a rich body of jurisprudence, built upon that already generated by the tribunals, to ascertain what does or does not constitute an atrocity crime. He or she will be able to use this knowledge to establish the parameters of ATS liability.

Recent amendments to the Rome Statute of the International Criminal Court (ICC) activated the crime of aggression, albeit with a trigger date no earlier than January 1, 2017.²² Such codification of the individual's criminality, from his or her leadership responsibilities in waging a war of aggression or engaging in isolated acts of aggression, could have profound impact on corporate officers in terms of criminal prosecution. It could also expose corporations engaged in war-related enterprises, such as arms manufacturing and military contracting, to ATS liability. A ruling by the ICC invoking its jurisdiction over the crime of aggression could be easily interpreted by a federal court as establishing the basis for ATS liability over an atrocity crime, as similar rulings by the war crimes tribunals since 1995 have deeply influenced the range of torts, or atrocity crimes, that fall within the violations of the law of nations established by the ATS.

There exists the possibility that within a number of years other categories of international crimes will be considered as within the ICC's subject matter jurisdiction. These crimes potentially include drug trafficking and international terrorism.²³ The possibility that multinational corporations could be involved or complicit in such international crimes is not insubstantial. Of course, it is entirely possible that a federal court will view drug trafficking or international terrorism as being so universally outlawed as to leave no question that the crime is part of ATS liability as a violation of the laws of nations. The judicial task will be made much easier if either drug trafficking or international terrorism

22. The Crime of Aggression, RC/Res.6 (June 28, 2010); David Scheffer, *The Complex Crime of Aggression under the Rome Statute*, 23 LEIDEN J. INT'L L. 897 (2010); David Scheffer, *Aggression is Now a Crime*, INT'L HERALD TRIB., July 1, 2010, at 8; David Scheffer, *States Parties Approve New Crimes for International Criminal Court*, 14 ASIL Insight, issue 16 (June 22, 2010), available at <http://www.asil.org/insights100622.cfm>; Roger S. Clark, *Amendments to the Rome Statute of the International Criminal Court Considered at the first Review Conference on the Court, Kampala, 31 May-11 June 2010*, GOETTINGEN J. INT'L L. 2, 689 (2010).

23. See Annex II, *Report of the Working Group on the Review Conference*, ICC-ASP/8/20 (2009), available at http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/WGRC-ENG.pdf.

becomes part of the jurisdiction of the ICC, for this will create an opportunity for federal courts to view such crimes as having achieved actionable status under the ATS by meeting certain magnitude tests under the amended Rome Statute.

Therefore, while the *Sosa* judgment confirmed a narrow ambit for ATS liability, the *Sosa* test is actually being met on a daily basis in the war crimes tribunals,²⁴ whose judicial decisions are migrating to federal courts through their examination of similar criminal conduct. Multinational corporations will need to keep a sharp eye on the ever-evolving jurisprudence of the war crimes tribunals because it directly affects the scope of ATS liability. The evolution of the law itself is important, perhaps more so than whether corporations are specifically subject to the ICC's jurisdiction. The law that flows from the ICC, just as the law that other war crimes tribunals have developed, will continue to influence federal courts in ATS litigation.

B. Complicity Principles and the Talisman Test of Aiding and Abetting²⁵

Despite the widening ambit of atrocity crimes falling within the jurisdiction of the ATS, there is a countervailing wind in the Second Circuit that may hold great promise for shutting the door on ATS claims against multinational corporations, both in terms of a high standard of proof for aiding and abetting liability and for any corporate liability whatsoever under the ATS. Multinational corporations typically attract liability claims for acting in complicity, rather than for directly perpetrating or being part of a conspiracy or joint criminal enterprise, in the commission of ATS crimes. Before addressing whether corporations can be liable at all, under any theory of complicity, for ATS violations, we focus on the complicity issue.

A Second Circuit panel upheld the district court's dismissal of the victim plaintiffs' claims in *Presbyterian Church of Sudan v. Talisman Energy, Inc.* on the grounds that the plaintiffs had failed to show that Talisman Energy, a multinational oil and gas corporation headquartered in Calgary, Alberta, Canada, with substantial business in the United States and in New York State, aided and abetted the commission of the alleged crimes in Sudan.²⁶ On October 4, 2010, the Supreme Court denied a *writ of certiorari* that had been filed by the plaintiffs challenging the Second Circuit's standard for aiding and abetting liability, and thus the Second Circuit's "purpose" criterion for aiding and

24. The war crimes tribunals include the International Criminal Court, the International Tribunals for the former Yugoslavia and Rwanda, the Special Court for Sierra Leone, and the Extraordinary Chambers in the Courts of Cambodia.

25. Some of the text of this section is drawn from Scheffer's amicus curiae brief to the Supreme Court in connection with the *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, litigation. See Brief of David J. Scheffer, Director of the Center for International Human Rights, as Amicus Curiae in Support of the Issuance of a Writ of Certiorari, *The Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 2010 U.S. LEXIS 7652 (May 19, 2010) (No. 09-1262).

26. 582 F.3d 244 (2d Cir. 2009).

abetting (explained below) remains enforceable in that particular federal circuit.²⁷

Earlier, the Second Circuit, relying heavily upon Judge Katzmann's concurring opinion in *Khulumani v. Barclay National Bank Ltd.*,²⁸ used a standard of liability for aiding and abetting which conflicted with the concurring opinions of Judges Peter Hall and Edward Korman in the judgment. The court also misinterpreted a long line of precedents as well as the ICC's Rome Statute, which it misread to require a shared or common purpose *mens rea* standard, similar to specific intent, for aiding and abetting. The court further misread the relevant article of the Rome Statute as a statement of customary international law applicable to accessory liability.²⁹ This also stands at odds with the Second Circuit district court ruling in *In Re South African Apartheid Litigation* on April 8, 2009,³⁰ and is inconsistent with the *Sosa* requirement that civil claims under the ATS be based on federal common law, which applies a knowledge standard for aiding and abetting.³¹ We suspect that the court's ruling has given great hope to corporate officers and counsel that the ATS burden may be lifting with respect to the most common form of accessory liability: aiding and abetting.

A knowledge standard for corporate aiding and abetting liability has been confirmed by the United States Court of Appeals for the Eleventh Circuit,³² by two district courts in the United States Court of Appeals for the Ninth Circuit,³³ and by several district courts in the Second Circuit.³⁴ Judge Shira Scheindlin wrote in *In Re South African Apartheid Litigation* in 2009:

[T]here are no applicable international legal materials requiring a finding of specific intent before imposing liability for aiding and abetting a violation of customary international law. As a result, I conclude that customary international

27. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 2010 U.S. LEXIS 7652 (Oct. 4, 2010).

28. 504 F.3d 254, 277 (2d Cir. 2007).

29. *Presbyterian Church of Sudan*, 582 F.3d at 257-59.

30. 617 F. Supp. 2d 228 (2009).

31. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724, 732 (2004); see also Petition for Writ of Certiorari, *The Presbyterian Church of Sudan v. Talisman Energy* (Apr. 15, 2010) (No. 09-1262) ("The history this [Supreme] Court relied on in *Sosa* further suggests that the Founders expected that common law principles would supply the rules by which ATS cases would be litigated. This approach would have been essential to implement the ATS, because international law did not supply the rules and standards by which tort litigation was conducted in 1789. This remains true today.") (citing *Sosa*, 542 U.S. at 719-20, 724).

32. See *Cabello v. Fernandez-Larios*, 402 F.3d 1148 (11th Cir. 2005); *Romero v. Drummond Co.*, 552 F.3d 1303 (11th Cir. 2008); *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242 (11th Cir. 2005); see also *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252 (11th Cir. 2009).

33. *Bowoto v. Chevron Corp.* No. C99-02506 SI, 2006 U.S. Dist. LEXIS 63209, at 17-19 (N.D. Cal. Aug. 21, 2006); *Doe v. Saravia*, 348 F. Supp. 2d 1112, 1148-48 (E.D. Cal. 2004).

34. *Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257, 288-294 (E.D.N.Y. 2007); *In re Agent Orange Prod. Liab. Litig.*, 373 F. Supp. 2d 7, 91 (E.D.N.Y. 2005); *In re Terrorist Attacks on Sept. 11, 2001*, 392 F. Supp. 2d 539, 554 (S.D.N.Y. 2005); *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117, 134 (E.D.N.Y. 2000).

law requires that an aider and abettor know that its actions will substantially assist the perpetrator in the commission of a crime or tort in violation of the laws of nations.³⁵

Judge Scheindlin is correct. This standard has a long line of international precedents, drawing upon the jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, in which the knowledge standard has been applied to individuals prosecuted for aiding and abetting the commission of atrocity crimes.³⁶ It also draws upon the standard for aiding and abetting established during the trials of the Nuremberg and Tokyo International Military Tribunals following World War II.³⁷

All of this jurisprudence through June, 1998, was familiar to the negotiators of the Rome Statute, which included Professor Scheffer. Under this standard, a corporation that, for example, assists a government's armed forces or paramilitary in the perpetration of atrocity crimes by contracting for the exploration of oil and paying for security for construction projects, knows that it is financing and perhaps providing some logistical support to the military's actions to deal with the civilian population affected by the oil exploration and transport. However, the corporation does not share the government's specific criminal intent in using its military forces to assault the civilian population. Rather, the corporation simply has the knowledge that its financial payments and logistical support, probably provided as part of a joint venture with the government, are being used by the military and paramilitary to commit atrocity crimes. If, however, the military or paramilitary could achieve the same results

35. *In re South African Apartheid Litigation*, 617 F. Supp. 2d 228, 262 (2d Cir. 2009).

36. See *Prosecutor v. Ntakirutimana*, Case Nos. ICTR 96-10-A & ICTR-96-17-A, Judgment, ¶ 501 (Dec. 13, 2004); *Prosecutor v. Delalic*, Case No. IT-96-21-T, Judgment, ¶¶ 321, 326-29 (Nov. 16, 1998); *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgment, ¶ 229 (Jul. 15, 1999); *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, ¶ 245 (Dec. 10, 1998) (finding that "the clear requirement in the vast majority of the [Nuremberg-era] cases is for the accomplice to have knowledge that his actions will assist the perpetrator in the commission of the crime."); see also ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 211, 214-18 (Oxford Univ. Press ed., 2d ed. 2008); WILLIAM A. SCHABAS, THE UN INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA AND SIERRA LEONE 302-09 (2006).

37. See Petition for Writ of Certiorari, *supra* note 31, at 28-30 ("The overwhelming weight of authority from the International Military Tribunal ('IMT') at Nuremberg, and subsequent zonal trials held by the United States and its allies under Control Council Law No. 10, establishes that knowledge, not purpose, is the *mens rea* standard for criminal aiding and abetting liability under international law. For example, two top officials of the firm that supplied the poison Zyklon-B gas for Nazi gas chambers *knowing* it would be used to kill concentration camp prisoners were convicted for their assistance using the Nuremberg principles established by the IMT."); *In re Tesch*, 13 INT'L L. REP. 250 (1947) ("Zyklon B case") (confirmed aiding and abetting liability standard following the major Nuremberg trials and is recognized as setting one of the major precedents for determining aiding and abetting liability of corporate officers. There, two top officials of the company manufacturing and selling Zyklon B gas for use in the Nazi gas chambers did so as business men for profit, but they also knew that the intent of the Nazi officials was to murder the concentration camp prisoners with the gas. They were convicted of aiding and abetting strictly on a knowledge standard and not a shared intent standard with the Nazi perpetrators.).

without committing atrocity crimes or human rights violations, the corporation would be equally if not more satisfied.³⁸ Thus, the corporate intent is not to commit the human rights violations or atrocity crimes, but the knowledge that others will commit them does not deter the corporation from making its payments and providing logistical support. It is as if the corporation sighs, “Whatever . . . just get the job done so we can explore for oil and make a profit from our foreign operations.”

The sources for what is considered to be a growing body of precedential jurisprudence and customary international law from the war crimes tribunals were upended when the Second Circuit looked to the Rome Statute of the ICC, to which the United States and at least 80 other nations are not state parties, for guidance on the proper standard of liability for aiding and abetting.³⁹ In their petition for *writ of certiorari* before the Supreme Court, the plaintiffs in *Talisman* pointed out that “*Sosa* clearly identified customary international law as the source of law to define primary violations actionable under the ATS, but it is federal common law itself that provides the liability standards for those complicit in such violations.”⁴⁰ As discussed above, the *primary* violations are growing as the international criminal tribunals further develop the law relating to atrocity crimes. Federal courts should be examining violations of the “laws of nations” in the context of the modern laboratory of jurisprudence when it comes to the violations found in the tribunals. That inquiry, however, is very different from a legal determination of accessory liability for the commission of the primary violations.

The mode of liability analysis should rest strictly within federal common law. Again, the plaintiffs in *Talisman* stated it correctly in their petition to the Supreme Court:

The question of whether a defendant is liable for participating in such a violation is ancillary to the question of whether there has been a violation of an international norm; it does not affect the determination of whether the plaintiff's rights have been violated. While the *right* comes from international law, Congress has provided for tort remedies in the ATS, and the scope of this *remedy* is a question of federal common law Accessorial rules such as aiding and abetting . . . are not part of a distinct ‘norm or violations of the laws of nations.’⁴¹

The Second Circuit essentially threw out federal common law and relied exclusively on its erroneous reading of international law to find the standard for

38. The corporate defendants in the *Zyklon-B case* in Germany after World War II would have been pleased, no doubt, to make the same profit selling the poisonous gas to the Nazi's for the slaughter of infected animals. Their intent was to make a profit, not pass judgment on the morals of the Nazi regime. But they knew the intent of others was to use the gas to kill humans.

39. Presbyterian Church of Sudan v. Talisman Energy, 582 F.3d 244, 259 (2d Cir. 2009).

40. Petition for Writ of Certiorari, *supra* note 31, at 19-20.

41. Petition for Writ of Certiorari, *supra* note 31, at 23; see *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 280-81 (2d Cir. 2007) (Katzmann, J., concurring) (explaining that “aiding and abetting is a theory of liability for acts committed by a third party,” not “an offense in itself.”).

accessorial liability. Even if the Second Circuit was correct in using international law for the standard of corporate aiding and abetting, its misreading of the Rome Statute means that its dismissal of the aiding and abetting claim in *Talisman* constitutes error.

The wording of the Rome Statute's aiding and abetting provision, Article 25(3)(c), reads: ". . . [A] person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person . . . (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission."⁴² This provision frames the aiding and abetting complicity standard under individual criminal responsibility principles in the Rome Statute. Aiding and abetting is not a substantive crime; rather, it is a mode of liability that describes, in part, how a substantive crime (genocide, crimes against humanity, war crimes) can be charged against an individual person. Several issues arise in the Second Circuit decision regarding the aiding and abetting provision of the Rome Statute.

First, the court assumed that Article 25(3)(c) reflects customary international law.⁴³ Chief Judge Dennis Jacobs, writing for a three-judge panel that included Judges Leval and Cabranes, committed the fatal error of searching for the customary international law on corporate aiding and abetting liability in the Rome Statute. Like Judge Katzmann in the *Khulumani* judgment,⁴⁴ whose writing Chief Judge Jacobs hails, Chief Judge Jacobs searched for *Sosa*'s required norm of universal acceptance and thought he discovered it in Article 25(3)(c) of the Rome Statute.

The Rome Statute is a negotiated treaty of considerable complexity designed to govern only the ICC. The Rome Statute in its entirety was never intended to reflect customary international law. Relatively few of the provisions of the Rome Statute merit that rigorous categorization and they do not include Article 25(3)(c). Nonetheless, the Second Circuit leaps to the conclusion that Article 25(3)(c) embodies customary international law.

Article 25(3)(c) was a negotiated compromise among primarily common law and civil law governments after years of talks leading to the Rome Statute and was not finalized to express a rule of customary law. There is no international consensus reflected in Article 25(3)(c), which in any event must be read in conjunction with the *mens rea* provision of the Rome Statute, which is Article 30.

The Second Circuit ruled, "Thus, applying international law, we hold that the *mens rea* standard for aiding and abetting liability in ATS actions is purpose

42. Rome Statute of the International Criminal Court, art. 25(c)(3), July 1, 2002, 37 I.L.M. 1002 (1998) [hereinafter *Rome Statute*].

43. *Presbyterian Church of Sudan*, 582 F.3d at 258-59.

44. *Khulumani*, 504 F.3d at 268-77 (Katzmann, J., concurring).

rather than knowledge alone.”⁴⁵ However, the great weight of international precedent has identified aiding and abetting with a knowledge standard,⁴⁶ and it would be erroneous to identify the Rome Statute as somehow confirming one theory over another. The Second Circuit interprets the provision as if one side had won the argument over the other side in the negotiations. That emphatically was not the case. There were too many voices objecting to a shared intention standard for aiding and abetting liability to conclude that somehow Article 25(3)(c) obliterates all those arguments and installs intention – indeed specific intent – as the requirement. If that had been the aim in the negotiations, negotiators would have recast aiding and abetting more coherently as a co-perpetrator mode of liability.⁴⁷

The provisions of the Rome Statute that the drafters understood were being negotiated to record customary international law were the substantive crimes identified and defined in Articles 5, 6, 7, and 8 of the treaty – the very provisions federal courts should be looking to for guidance about the *primary* violations of international law at stake in ATS litigation.⁴⁸ For years the drafters examined and debated the development of international humanitarian law and international criminal law to arrive at a consensus as to what constituted customary international law for the substantive crimes. Thus, if one applies the *Sosa*⁴⁹ standard to the Rome Statute, one can confidently identify the international crimes defined therein as representing the types of crimes (or torts) that have universal character and are of such a magnitude that they fall within the jurisdictional scope of the ATS. However, that sharp focus on customary international law was never the aim of the negotiations regarding *other* provisions of the Rome Statute, including negotiations on accessory liability. Therefore, in the end while some other articles of the Rome Statute did reflect customary international law,⁵⁰ Article 25(3)(c) was *not* one of them.

45. *Presbyterian Church of Sudan*, 582 F.3d at 259.

46. ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 211, 214-218 (2d ed. 2008).

47. Elevating an aider and abettor to co-perpetrator status (and thus removing his accessory liability and replacing it with direct perpetration liability) logically occurs when the aider and abettor graduates to sharing the intention of the perpetrator to commit the underlying crime. Professor William Schabas posits:

Some judgments have attempted to explain the distinction [between aiding and abetting and perpetration] in another way, stating that when the accomplice ‘shares’ the intent of the principal perpetrator, he or she becomes a ‘co-perpetrator.’ But this does not assist in establishing the criminal liability of someone who has not actually perpetrated a criminal act. The ‘accomplice’ who actually commits a criminal act has graduated to the category of ‘co-perpetrator,’ but has not done so before.

WILLIAM A. SCHABAS, THE U.N. INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA AND SIERRA LEONE 307-08 (Cambridge Univ. Press 2006).

48. WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 103 (3d ed. 2007).

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

50. See, e.g., *Rome Statute*, *supra* note 42, arts. 22, 23, 24, 25(3)(e), 32 and 67.

The general principles of criminal law set forth in Articles 22-33 of the Rome Statute were negotiated between common law and civil (Romano-Germanic) law countries in particular, with active intervention of delegations schooled in *Sharia* law or other major legal systems. In some instances, the end product of this process of negotiation was a provision that mirrored customary international law. For example, the provisions of the Rome Statute that doubtless fall within this category include Articles 22 (*nullum crimen sine lege*), 23 (*nulla poena sine lege*), 24 (*non-retroactivity ratione personae*), 25(3)(e) (incitement to commit genocide), 32 (mistake of fact or mistake of law), and 67 (rights of the accused).

It would be erroneous to claim, after the deals struck and compromises arrived at during years of talks, that all of the provisions on general principles of law, rules of evidence and procedure, penalties, and sentencing were reflections of customary international law – many were not. Negotiators labored to create the ICC's *subject matter jurisdiction* for crimes of customary international law. However, the Rome Statute never would have been created if the standard of universal acceptance had been required for other provisions, including all of the general principles of law.

For example, Article 33, which deals with superior orders and prescription of law, was heavily negotiated.⁵¹ The negotiations resulted in compromise language that did not mirror comparable provisions in the charters of the Nuremberg and Tokyo International Military Tribunals or the statutes of the other international or hybrid criminal tribunals of recent years. Indeed, the end result in Rome reflected more what was acceptable to North Atlantic Treaty Organization (NATO) military commanders than what was desired by many other governments. The former President of the International Criminal Tribunal for the Former Yugoslavia, Professor Antonio Cassese, wrote, “[Article 33] is at odds with customary international law, for it does not include *war crimes* in the category of offences with regard to which superior order [sic] enjoining their commission are always manifestly unlawful.”⁵² Beyond the general principles of law, another example of negotiated compromise arises with Article 77, which establishes a maximum sentence of life imprisonment “when justified by the extreme gravity of the crime and the individual circumstances of the convicted person,”⁵³ reflecting the maximum degree of punishment permitted under customary international law. Arab and Caribbean delegations strongly objected to the absence of the death penalty in the Rome Statute and would never concede that Article 77 reflects the maximum degree of punishment permitted

51. See Per Saland, *International Criminal Law Principles*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE STATUTE 189, 210-212 (Roy S. Lee ed., 1999).

52. ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 279 (Oxford Univ. Press ed., 2d ed. 2008).

53. *Rome Statute*, *supra* note 42, art. 77.

under customary international law.⁵⁴ Indeed, the U.S. government would not concede that point.

Similarly, Article 25(3)(c) of the Rome Statute was negotiated not to codify customary international law but to accommodate the numerous views of common law and civil law experts about how to describe the action of an aider or abettor. Per Saland, the Swedish Chairman of the Working Group on the General Principles of Criminal Law both prior to and throughout the Rome Conference, wrote that Article 25:

[P]osed great difficulties to negotiate in a number of ways. One problem was that experts from different legal systems took strongly held positions, based on their national laws, as to the exact content of the various concepts involved. They seemed to find it hard to understand that another legal system might approach the issue in another way: e.g., have a different concept, or give the same name to a concept but with a slightly different content The text was also burdened with references to the mental element (e.g., intent and knowledge) because agreement had not yet been reached as to the text of a separate article dealing with the mental element in general terms.⁵⁵

As the lead U.S. negotiator, Professor Scheffer⁵⁶ does not recall hearing directly or being advised by his United States Justice Department team of negotiators of a single discussion prior to or during the Rome negotiations in which the text of what laboriously became Article 25(3)(c) on aiding and abetting as a mode of participation was being settled as a matter of customary international law. It was a very contentious provision, with some delegations seeking explicit reference to intention, notwithstanding the important complication that the word “intention” has different meanings in different legal systems.⁵⁷ In some countries, for example, passive intention is inferred from an actor’s engagement in conduct with knowledge of some likely consequence of that conduct.⁵⁸ Other delegations were wedded to the term “knowledge,” believing that it better reflected the standard that was employed in their national practice and that had been endorsed in the jurisprudence of the Nuremberg and Tokyo International Military Tribunals and of the International Criminal

54. WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 316, n.17 (Cambridge Univ. Press ed., 3d ed. 2007).

55. Per Saland, *International Criminal Law Principles*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 189, 198 (Roy Lee ed., 1999).

56. Scheffer was deputy head of the U.S. delegation to the U.N. talks on the International Criminal Court from 1995 to 1997, and thereafter headed the U.S. delegation until January 20, 2001.

57. WILLIAM A. SCHABAS, THE U.N. INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA AND SIERRA LEONE 293 (Cambridge Univ. Press 2006). In reference to the difficulties in navigating the 27 European Union member states’ national private law systems, Osnabrück University professor Christian von Bar wrote, “Currently, words like ‘intention’ or ‘damage’ can have extremely different meanings in different member states’ legal systems.” Mark Beunderman, *Academic handbook could form basis for EU civil code*, EUobserver, Oct. 22, 2007, <http://euobserver.com/9/24979?print=1>.

58. ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 61-63 (2d ed., Oxford Univ. Press. 2008).

Tribunals for the Former Yugoslavia and Rwanda.⁵⁹

Negotiators struggled to find compromise within the wording of the article. Ultimately, they settled on using “purpose” rather than “intent” or “knowledge.” Reaching this compromise became easier with the resolution of the final language of Article 30, an article that deals expressly with the issue of the mental element of crimes. Finalizing the language of Article 30 enabled negotiators to look to Article 30 for intent and knowledge standards while seeking an accommodation for Article 25(3)(c) to describe the character of aiding and abetting. However, if anyone had claimed that the negotiators were writing *customary international law* on aiding and abetting liability in Article 25(3)(c), they would have been laughed out of the room.

Thus, the wording of Article 25(3)(c) was uniquely crafted for the ICC, and when read in conjunction with the *mens rea* standards set forth in Article 30 of the Rome Statute, it leaves the judges of the ICC the task of determining precisely the proper criteria for accessory liability. Nothing discourages or prevents them from looking to the growing jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, to state practice, and to scholarly texts for guidance on this issue.

Article 25(3)(c) is not a statement of customary international law. Since the ICC has yet to interpret the provision’s meaning and application with respect to accessory liability for aiding and abetting, national courts can only speculate as to its scope and meaning. That speculation should be fully informed by the history of negotiations that produced that article. One pillar of certainty in that history is that Article 25(3)(c) has no standing as customary international law.

In the years following the Rome Statute negotiations, scholars have debated what Article 25(3)(c) of the Rome Statute achieves – whether the provision creates a shared intent requirement for aiding and abetting or whether, when joined with the mental element provision of Article 30, it builds upon longstanding and growing precedents from international and hybrid criminal tribunals that sustain the knowledge standard for aiding and abetting.⁶⁰ Such

59. See *id.* at 63-64, 114-15, 215, 217-18.

60. See *id.* at 74, 214-29 (2d ed. 2008); See also Roger S. Clark, *The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offences*, 2 CRIM. L.F. 291, 301-03 (2001); Donald K. Piragoff & Darryl Robinson, *Article 30: Mental Element*, in *COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* 849, 854-55 (Otto Triffterer ed., 2d ed. 2008); Kai Ambos, *Article 25: Individual Criminal Responsibility*, in *COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* 743, 759-60 (Otto Triffterer ed., 2d ed. 2008); WILLIAM A. SCHABAS, *AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT* 213 (3d ed. 2007); WILLIAM A. SCHABAS, *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 435-46 (2010); Albin Eser, *Individual Criminal Responsibility*, in *1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 767, 798-801, 900-02 (Antonio Cassese, et al. eds., 2002); Douglass Cassel, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Court*, 6 NW. U. J. INT’L HUM. RTS. 304 (2008).

debate demonstrates that there are reasonable interpretations, including the application of the knowledge standard. However, until the judges of the ICC rule on the *mens rea* requirement for aiding and abetting under the Rome Statute, no national court can dictate that one standard (such as purpose or shared intention) negates a second standard (such as knowledge) in the ICC's constitutional framework or in its practice, and no national court can accurately establish that the particular formulation found in the Rome Statute, however interpreted, represents an intent on the part of the negotiators to record a principle of customary international law.

The drafting experience of the Rome Statute only confirmed the reality of 1789 when the ATS was adopted, namely that “[t]here were no universally accepted international standards for aiding and abetting piracy in the 18th century.”⁶¹ Now, as then, U.S. courts need to look to federal common law to ascertain aiding and abetting liability. However, even if the Second Circuit’s abandonment of that source were to be affirmatively upheld by the Supreme Court some day, the preponderance of relevant practice in the field of atrocity crimes and international criminal law points to the knowledge standard and *not* an intent standard to determine aiding and abetting liability.

The great weight of international precedent has identified aiding and abetting with a knowledge standard.⁶² The Second Circuit nevertheless reached a contrary conclusion: “Thus, applying international law, we hold that the mens rea standard for aiding and abetting liability in ATS actions is purpose rather than knowledge alone.”⁶³

Among the problems with this conclusion is that it obliterates the distinction between aiders and abettors, on the one hand, and perpetrators of atrocity crimes on the other hand. The character of atrocity crimes, which are massive assaults on civilian populations or egregious violations of the laws of war, means that: 1) the intention of the perpetrator can often be inferred more readily; and 2) the many additional participants in the vast criminal enterprise necessarily act with a multiplicity of intentions among them, but the aiders and abettors do so only knowing that their participation facilitates the intentional commission of the principal crime while they act upon their separate individual intentions, such as the pursuit of profit, survival, status, or even discrimination against the victims.

Professor William Schabas explained, “Some judgments [of the war crimes

61. Petition for Writ of Certiorari, *supra* note 31, at 21.

62. See, e.g., ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 211, 214-18 (2d ed. 2008); Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment, ¶¶ 236-45 (Dec. 10, 1998); Brief for International Law Scholars William Aceves et al. as Amici Curiae Supporting Petitioners at 12-15, The Presbyterian Church of Sudan v. Talisman Energy, Inc., 2010 U.S. LEXIS 7652 (2d Cir. Apr. 30, 2010) (No. 09-1262).

63. The Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 259 (2d Cir. 2009).

tribunals] have attempted to explain the distinction [between aiding and abetting and perpetration] in another way, stating that when the accomplice ‘shares’ the intent of the principal perpetrator, he or she becomes a ‘co-perpetrator.’”⁶⁴ Had the drafters of the Rome Statute meant to require an intent standard for aiding and abetting, they would have agreed to recast aiding and abetting more coherently as a co-perpetrator mode of liability. They did not. Consequently, a national court would be mistaken to identify the Rome Statute as somehow confirming a shared intention standard and denying the knowledge standard. The final wording of Article 25(3)(c) negated neither the large body of precedents for a knowledge standard in aiding and abetting liability nor the common sense reality of how atrocity crimes are committed.

Negotiators repeatedly stumbled over what eventually was consolidated in Article 30 of the Rome Statute regarding the required mental element for all of the atrocity crimes, including the mental element for accessory liability for such crimes. There remained a lingering and significant problem prior to Rome among largely common law and civil law delegations about precisely how the *mens rea* for aiding and abetting should be worded. The Preparatory Committee draft in spring 1998, which was the initial working draft in Rome, reflected this continued indecision with its draft language for the aiding and abetting provision: “[With [intent][knowledge] to facilitate the commission of such a crime,] aids, abets or otherwise assists”⁶⁵

It was only after negotiators reached Rome in the summer of 1998 that they finally arrived at compromise language. They knew that Article 30 of the Rome Statute, which deals with the required mental element, would be the agreed formula for how both intent and knowledge would be described and applied as the mental element for criminal acts, “[u]nless otherwise provided.”⁶⁶ The latter proviso relates to explicit formulations of intent and knowledge for some of the atrocity crimes defined in Articles 6, 7, and 8, for command responsibility under Article 28, and for participants in a “common purpose” under Article 25(3)(d)(ii).⁶⁷ But the proviso’s relevance, if any, to Article 25(3)(c) is far from clear and was never confirmed in the negotiations.

The final text of Article 30(2)(b) easily captures the *mens rea* requirement for aiding and abetting, namely, “[i]n relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary

64. WILLIAM A. SCHABAS, THE U.N. INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA AND SIERRA LEONE 307-08 (2006).

65. United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June-17 July 1998, *Official Records*, Vol. 2, *Summary records of the plenary meetings and of the meetings of the Committee of the Whole*, 275 no. 10, U.N. Doc. A/CONF.183/13 (Vol. II) (2002).

66. *Rome Statute*, *supra* note 42, art. 30(1).

67. WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 224-25 (3d ed. 2007).

course of events.”⁶⁸ During the Rome Statute negotiations, drafters did not relegate aiding and abetting to the first prong of this formulation – “means to cause that consequence” – that would have injected a shared intention standard into aiding and abetting. Rather, in the language of Article 30(2)(b) of the Rome Statute, the intent of the aider or abettor is logically discovered within the awareness of the “consequence,” namely that he or she who aids or abets is someone who “is aware that [the consequence] will occur in the ordinary course of events.”⁶⁹

Article 25(3)(c)’s opening phrase, “For the purpose of facilitating the commission of such a crime,” was agreed to in Rome during the final negotiations as an acceptable compromise phrase to resolve the inconclusive talks over whether to use the word “intent” or the word “knowledge” for this particular mode of participation.⁷⁰ The “purpose” language stated the de minimus and obvious point, namely, that an aider or abettor purposely acts in a manner that has the consequence of facilitating the commission of a crime, but one must look to Article 30(2)(b) for guidance on how to frame the intent of the aider or abettor with respect to that consequence.

Donald Piragoff, lead Canadian government negotiator on general principles of law throughout the years of negotiations culminating in Rome, wrote about the relationship between aiding and abetting liability under Article 25(3)(c) and mental element requirements of Article 30(2):

A question arises as to whether the conjunctive formulation [intent and knowledge] changes existing international jurisprudence that an accomplice (such as an aider or abettor) need not share the same *mens rea* of the principal, and that a knowing participation in the commission of an offence or awareness of the act of participation coupled with a conscious decision to participate is sufficient mental culpability for an accomplice. It is submitted that the conjunctive formulation has not altered this jurisprudence, but merely reflects the fact that aiding and abetting by an accused requires both knowledge of the crime being committed by the principal and some intentional conduct by the accused that constitutes the participation . . . Article 30 para. 2(b) makes it clear that “intent” may be satisfied by an awareness that a consequence will occur in the ordinary course of events. This same type of awareness can also satisfy the mental element of “knowledge,” as defined in article 30, para. 3. Therefore, if both “intent” and “knowledge” are required on the part of an accomplice, these mental elements can be satisfied by such awareness.⁷¹

Professor Roger Clark, a principal negotiator advising Samoa before and during the Rome conference, wrote:

There was considerable debate throughout the process about the conjunctive

68. *Rome Statute*, *supra* note 42, art. 30(2)(b) (emphasis added).

69. *Id.*

70. *Id.* at art. 25(3)(c).

71. Donald K. Piragoff & Darryl Robinson, *Article 30: Mental Element*, in *COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* 849, 855 (Otto Triffterer ed., 2d ed. 2008).

"and" between intent and knowledge [in Article 30]. Some delegations, the French in particular, insisted that both were necessary. Others of us, especially from common law jurisdictions, believed that the appropriate mental element for each separate material element had to be considered on its own merits. Particularly for circumstance elements, as the term "circumstance" is used in article 30(3) (and some consequence ones), knowledge (in the sense of awareness) might well be enough, although intent might be required as to other relevant elements. The debate shed more heat than light. In part, the differences of perspective coincided with the ease with which some of us are prepared to see several different material elements combining with appropriate mental *elements* (plural) to form "the offence," where others tend to see *the* material element, a global "thing," and a single intent/knowledge mental element which gets attached to that thing.⁷²

There has been no ruling by the judges of the ICC on whether the "purpose" language in Article 25(3)(c) constitutes a form of specific intent, whereby evidence of a particular intention must be demonstrated and the mental element of Article 30(2)(a) or the first prong of Article 30(2)(b) ("that person means to cause that consequence") *must* be applied. For the present, the compromise struck in Article 25(3)(c) reflects the ambiguity that uniquely characterizes the Rome Statute on aiding and abetting liability.

Nonetheless, the Second Circuit equates the "purpose to facilitate" requirement in Article 25(3)(c) with the perpetrator's intent to commit the crime, thus marrying the perpetrator's intent with that of the aider or abettor as a virtual co-perpetrator.⁷³ That is a mistaken reading of the provision. Professor William Schabas wrote, "The purpose requirement was added during the Rome Conference, but nothing in the official records provides any clarification for the purposes of interpretation."⁷⁴ When the intention of the principal perpetrator is known to the aider or abettor, who nonetheless proceeds to assist such perpetrator in the commission of the principal crime, then aiding and abetting liability logically arises. This is so even though the aider or abettor acts with a different intention, which may be an intent that on its face is perfectly legal (such as seeking to profit from a business enterprise).

The most generous interpretation one can afford Article 25(3)(c) is that it connotes an inferred intent from the act of providing assistance that one knows is facilitating the commission of a crime. That one can infer intent from knowledge is well established. For example, in the context of the ATS, while making a profit may be a corporation's primary objective, a secondary objective can arise in the realization that one's actions facilitate the commission of the crime and such knowledge can give rise to an inferred intent to join in the criminal conduct because it is profitable. In some (probably) rare cases, a

72. Roger S. Clark, *The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offences*, 2 CRIM. L.F. 291, 302-303 (2001).

73. *Rome Statute*, *supra* note 42, at art. 25(3)(c).

74. WILLIAM SCHABAS, THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 435-46 (2010).

corporation may actually come to embrace not only its primary objective of making a profit, but also the criminal purpose of the perpetrator. However, when that additional objective is fully embraced, it transforms the criminal character of the corporation from that of an aider or abettor into that of a full co-perpetrator of the crime.

A small group of European scholars – with whom the Second Circuit seemingly aligns itself – seeks to impose a far-reaching and provocative interpretation on Article 25(3)(c), setting aside precedent and favoring a narrow interpretation that attaches to the defendant aider or abettor an intention to join the perpetrator in the commission of the underlying crime.⁷⁵ Such a view, at the heart of the debate in Rome, would lead one to believe that the Rome Statute definitively establishes a whole new playing field for aiding and abetting that, at a minimum, would have to be uniquely tailored for the ICC and far removed from any claim of customary international law.

The Second Circuit succumbs to the notion that insertion of the word “purpose” in Article 25(3)(c) must really mean a purpose or shared intent standard for aiding and abetting. But the phrase “purpose to facilitate” demonstrates the absence of any agreement on precisely the issue of shared intent. In Rome there was no agreement to so limit aiding and abetting to such a narrow range of liability requiring the finding of a shared intent to commit the underlying crime. That theory may exist in the aspirations of certain academics determined to declare victory *ex post facto* at Rome, but it has no reality in either the Rome Statute or the ATS. Only the judges of the ICC will sort this out when faced with a real case.

However, when Article 25(3)(c) is interpreted by the judges of the ICC, they are more likely to discover the standard for aiding and abetting as it has developed in the jurisprudence of the international military tribunals at Nuremberg and Tokyo and the international and hybrid criminal tribunals in recent years, in state practice, and in the writings of leading scholars: a knowledge standard of substantial assistance and an intent standard arising from awareness that the criminal consequence will occur in the ordinary course of events. A fair reading of Articles 25(3)(c), 30(2)(b), and 30(3) of the Rome Statute achieves such a standard.

C. Can Corporations be Sued under the Alien Tort Statute?

A three-judge panel of the Second Circuit Court of Appeals recently ruled in *Kiobel v. Royal Dutch Petroleum*, by approval of two judges and one

75. See Albin Eser, *Individual Criminal Responsibility*, in 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY, 767, 798-801 (Antonio Cassese, et al. eds., 2002); see also Albin Eser, *Mental Elements—Mistake of Fact and Mistake of Law*, in 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY, 889, 900-02 (Antonio Cassese, et al. eds., 2002).

dissenting judge, that no civil action can be lodged against corporations under the ATS.⁷⁶ Shortly prior to that ruling, U.S. District Judge Stephen Wilson in the Ninth Circuit held that there is no corporate liability under the ATS.⁷⁷ Further, on the strength of *Kiobel*, U.S. District Court Judge Jane Magnus-Stinson in the Seventh Circuit ruled on October 5, 2010, that there is no corporate liability under the ATS.⁷⁸ These are profoundly important developments in ATS litigation and challenge at least two decades of federal court precedents confirming the theory and reality of corporate liability under the ATS. Despite the dramatic sequence of these judgments in September and October 2010, corporate liability under the ATS remains alive in other Courts of Appeals and even in the Seventh and Ninth circuits. As of the date of this writing, only these two district court judges have joined the *Kiobel* majority view. So a long struggle in the federal courts is likely for the foreseeable future and may not be resolved until the Supreme Court reviews the issue.

The *Kiobel* judgment, which we examine shortly, followed a request by the Second Circuit Court of Appeals in December 2009, in which a three judge panel asked for views on (1) whether the violations of customary international law for which the ATS provides jurisdiction can encompass non-criminal conduct, and (2) what sources of international law evince with respect to whether customary international law recognizes corporate criminal liability.⁷⁹

We first note that, as reflected in an *amicus* brief Professor Scheffer co-authored as a response to the Second Circuit's inquiry on corporate liability, the scope of ATS liability surely includes criminal actions, such as atrocity crimes, but the torts at issue may not attract criminal liability with respect to corporations.⁸⁰ Hence, corporate behavior should be scrutinized whether or not one concludes that corporations are subject to criminal sanction in the ATS context.

As long as the plaintiff is not a citizen of the United States, the [ATS] statute is satisfied if the underlying wrong takes tortious form and is in violation of international law. There is no additional requirement that the underlying conduct be criminal. Although it is true that courts have found tortious forms of criminal conduct actionable under the ATS, elevating that into a pleading requirement would convert a sufficient condition into a necessary one, and that amounts to a

76. *Kiobel v. Royal Dutch Petroleum*, Nos. 06-4800-cv, 06-4876-cv (2d Cir. Sept. 17, 2010); See Chimène I. Keitner, *Kiobel v. Royal Dutch Petroleum: Another Round in the Fight over Corporate Liability Under the Alien Tort Statute*, 14 ASIL Insight, Issue 30 (Sept. 30, 2010), available at <http://www.asil.org/insights100930.cfm>.

77. *John Doe v. Nestle, S.A.*, No. CV 05-5133-SVW-JTL (C.D. Cal. Sept. 8, 2010).

78. *Flomo v. Firestone Natural Rubber Company*, No. 1:06-cv-00627-JMS-TAB (S.D. Ind. Oct. 5, 2010).

79. Letter issued by the United States Court of Appeals for the Second Circuit, *In re South African Apartheid Litigation* (Dec. 4, 2009) (on file with authors and with the *Berkeley Journal of International Law*).

80. Brief of International Law Scholars as Amici Curiae Supporting Plaintiff-Appellees at 2, *Balintulo v. Daimler AG*, No. 09-2778-CV (2d Cir. 2009).

judicial rewriting of the statute.⁸¹

Furthermore, despite the *Kiobel* majority ruling negating corporate liability under the ATS, there are well-established precedents and authorities confirming that customary international law, treaties, and general principles of law clearly recognize liability for corporations, including criminal liability, which translates into ATS liability. The fact that corporations are omitted from the jurisdiction of contemporary international criminal tribunals, including the ICC, neither undermines this basic principle nor precludes corporate liability under the ATS. The *amicus* brief which Professor Scheffer co-authored states in pertinent part:

The International Criminal Tribunals for the former Yugoslavia and for Rwanda, like the International Criminal Court, were established to prosecute natural individuals for the most serious violations of international law. That their jurisdiction did not extend to corporations no more implies that corporations are not subject to potential liability for international law violations than the omission of torture as a separate offense implies that torture is not a violation of international law. These tribunals were simply not set up to address corporate liability.

By its terms, the Rome Statute did not even purport to alter the established international standards for liability, corporate or otherwise. Article 10 of the Statute provides explicitly that '[n]othing in this Part [addressing jurisdiction inter alia] shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.'

The diplomatic negotiations leading up to the adoption of the Rome Statute reflected differences in the domestic treatment of corporate liability, but 'no delegation challenged the conceptual assumption that legal persons are bound by international criminal law.' Delegations recognized that the various differences in the criminal liability of corporations would prevent the complementarity principle under the Rome Statute from functioning efficiently. Specifically, deferring to national courts (which the complementarity principle encourages) requires corresponding criminal codes at the national level. The structural differences among national systems and between the International Criminal Court and certain national legal systems, combined with the varying character of the penalties for legal persons, proved too complex to resolve prior to the end of the diplomatic conference that finalized the text of the Rome Statute on July 17, 1998. But the entire discussion by delegations never centered on, or challenged, whether legal persons were bound by international criminal law. To the contrary, delegations agreed to keep the focus on the responsibility of natural persons because that was every delegation's original objective, and it was achievable in the negotiations. There was no suggestion that a corporate official, for example, could not be investigated and prosecuted by the International Criminal Court for his or her role in a corporation's criminal conduct, as had been undertaken at Nuremberg.⁸²

The Second Circuit focused on whether, because of the Rome Statute's sole focus on natural persons and its exclusion of legal or juridical persons (like multinational corporations) from its jurisdiction, such exclusion means that as a principle of international law multinational corporations can incur no criminal or tort liability for their overseas conduct. There was significant discussion during

81. *Id.* at 9-10.

82. *Id.* at 9-10 (citations omitted).

the Rome Diplomatic Conference about a proposal to include legal entities, such as corporations, in the personal jurisdiction of the International Criminal Court. However, as the chairman of the working group on the subject concluded by July 8, 1998, “Regarding . . . the criminal responsibility of juridical persons, all delegations had recognized the great merits of the relevant proposal [to cover corporate liability], but some had felt that it would perhaps be premature to introduce that notion. Consequently, the deletion of those paragraphs was noted.”⁸³ In a later publication, Chairman Per Saland explained further:

One [further difficult issue of substance] which followed us to the very end of the Conference was whether to include criminal responsibility of legal entities alongside that of individuals or natural persons. This matter deeply divided the delegations. . . . [The French and Solomon Islands’ Delegates] came up with a series of proposals that, more and more, linked the criminal responsibility of legal entities to that of an individual. The inclusion gradually became acceptable to a wider group of countries, probably a relatively broad majority. . . . Time was running out, and the inclusion of the criminal responsibility of legal entities would have had repercussions in the part on penalties as well as on procedural issues, which had to be settled so as to enable work to be finished. Eventually, it was recognized that the issue could not be settled by consensus in Rome.⁸⁴

Thus, no conclusion should be drawn regarding the exclusion of corporations from the jurisdiction of the Rome Statute other than that no political consensus could be reached to use the particular treaty-based court governed by the Rome Statute to prosecute corporations under international criminal law for atrocity crimes. The Rome Statute left other avenues for holding corporations accountable for criminal conduct wide open. Any interpretation of the Rome Statute, including that found in *Kiobel*, concluding that the treaty purposely meant to express a principle of law precluding national courts of law – either civil or criminal – from proceeding against corporations for the commission of atrocity crimes or, for that matter, other violations of international law, is in error and grossly distorts what transpired during the negotiations leading to the Rome Statute. The Rome negotiations operated on the basis of consensus, which meant that political compromises dictated the outcome of many disputes among delegations.⁸⁵ In this case, the omission of certain criminal liability (for corporations) does not mean that corporations enjoy virtual immunity under international law from such liability; it simply means that the particular court – the ICC – was established without corporations as legal entities being subject to its jurisdiction. Nonetheless, corporate officers

83. United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June-17 July 1998, *Official Records*. Vol. 2, *Summary records of the plenary meetings and of the meetings of the Committee of the Whole*, 275 no. 10, U.N. Doc. A/CONF.183/13 (Vol. II) (2002).

84. Per Saland, *International Criminal Law Principles*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 189, 199 (Roy S. Lee ed., Kluwer Law International, 1999).

85. WILLIAM SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 15-21 (3d ed. 2007).

can be investigated and prosecuted before the Court for perpetration of or complicity in the commission of atrocity crimes.⁸⁶

In any event, ATS litigation should take into account the recent judgment of the U.S. Supreme Court in *Citizens United v. Federal Election Commission*,⁸⁷ in which the Supreme Court strengthened, with particular ferocity and against a scathing dissent by four justices, the longstanding legal precept that corporations are “persons” under the Constitution. As one legal commentator wrote, “If anything, the decision in *Citizens United v. Federal Election Commission* conferred new dignity on corporate ‘persons,’ treating them – under the First Amendment free-speech clause – as the equal of human beings.”⁸⁸ If corporations can exercise free speech with equal standing as natural persons in the United States, then it would be implausible to argue that under the ATS somehow corporations are *not* “persons” that can commit torts “in violation of the law of nations or a treaty of the United States.”⁸⁹ Indeed, corporations are fully capable of committing or being complicit in atrocity crimes with equal personality and commitment as they have to exercise free speech rights in American society and perhaps elsewhere as well.

To argue that a corporation is not a “person” when it is engaged in the violation of human rights or in atrocity crimes, but is surely a “person” that is entitled to engage in political advocacy during an election campaign in the United States is a distinction without any persuasive rationale. The *right* of the corporation, as a person, to engage in political speech during electoral campaigns has to stand on an equal level with the *responsibility* of the corporation, as a person, not to commit or be complicit in the perpetration of human rights violations or their worst manifestations in atrocity crimes. The loud applause we hear from the corporate sector over *Citizens United* may fade as plaintiffs in ATS cases embrace the personhood of the corporate defendants as legitimate targets for accountability for massive human rights violations. The *Kiobel* majority turned its back on the Supreme Court majority judgment in *Citizens United* and locked the door on ATS litigation for the benefit of corporations that presumably are not the same persons the Supreme Court invested with such extraordinary rights in *Citizens United* in early 2010.

The *Kiobel* majority dismissed all the claims of representatives of the

86. James Podgers, *Corporations in Line of Fire*, ABA JOURNAL, Jan. 2004, available at http://www.abajournal.com/magazine/article/corporations_in_line_of_fire/89887/ (“Meeting with a select group of reporters in September [2004] during the annual meeting of the International Bar Association in San Francisco, [ICC Prosecutor Luis Moreno-] Ocampo noted that businesspeople could be involved in many criminal activities that fall under the ICC’s jurisdiction. Corporate officials who participate in those activities may be subject to prosecution by the court, said Ocampo, an Argentinian lawyer who took office in June.” *Id.*).

87. 558 U.S. 50 (2010).

88. Posting of Lyle Denniston to SCOTUSblog, <http://www.scotusblog.com/2010/01/analysis-the-personhood-of-corporations/> (Jan. 21, 2010, 18:45 EST).

89. 28 U.S.C. § 1330.

Ogoni people in Nigeria against Royal Dutch Petroleum Corporation, Shell Transport and Trading Company PLC, and Shell Petroleum Development Company of Nigeria, LTD., for aiding and abetting the Nigerian government in committing human rights abuses directed at the plaintiffs, including extrajudicial killing, crimes against humanity, torture and cruel, inhuman, and degrading treatment, arbitrary arrest and detention, forced exile, and property destruction.⁹⁰ Judge Leval concurred only in the judgment of the Court dismissing the complaint on its aiding and abetting analysis and filed a separate opinion strongly disagreeing with the majority regarding its rejection of corporate liability *per se* under the ATS.⁹¹

From our perspective, the *Kiobel* majority view regarding corporate liability under the ATS fails on several levels of analysis, some of which Judge Leval explains in his dissent to the majority's ruling on this aspect of the case. First, the *Kiobel* majority misinterprets the famous statement in the *Nuremberg* judgment that, "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."⁹² The Nuremberg judges were focusing on how to create a new precedent in international law for prosecuting individuals for violations of international law rather than rely only on the prior practice in international law of holding *nations* responsible for such violations. Indeed, the judges note that this statement of principle reflects a rejection of "the argument that only states could be held liable under international law."⁹³ The only way to effectively punish the atrocity crimes at issue at Nuremberg, and to do so within the jurisdiction of the London Charter of the tribunal,⁹⁴ was to prosecute natural persons for criminal conduct. The judges had to stress that natural persons indeed are responsible under criminal law principles for such crimes because the Nuremberg Tribunal was on the cutting edge of international law development at the time; there was no certainty of such individual liability in 1945 and 1946.⁹⁵ There is nothing in the Nuremberg judgment to suggest that

90. *Kiobel v. Royal Dutch Petroleum*, Nos. 06-4800-cv, 06-4876-cv (2d Cir. Sept. 19, 2010).

91. *Id.* (Leval, J., concurring only in the judgment).

92. *Id.* at 7 (quoting *The United States of America, et al., v. Hermann Wilhelm Goering, et al. Opinion and Judgment*, 6 F.R.D. 69, 110 (Int'l Military Trib. at Nuremberg, 1946)).

93. *Id.*

94. Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis [London Charter], Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279, reprinted in 39 AM. J. INT'L L. 259 (Supp. 1945).

95. Excellent essays on how the Nuremberg trials entered new terrain for international law include Richard Overy, *The Nuremberg trials: international law in the making*, and Andrew Clapham, *Issues of complexity, complicity and complementarity: from the Nuremberg trials to the dawn of the new International Criminal Court*, in *FROM NUREMBERG TO THE HAGUE: THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE* 1-67 (Cambridge Univ. Press 2003). Justice Robert Jackson, the American prosecutor at Nuremberg, advised President Harry Truman that, "International Law is more than a scholarly collection of abstract and immutable principles. It is an outgrowth of treaties or agreements between nations and of accepted customs. But every custom has its origin in some

the Nuremberg judges made this statement to the exclusion of either nations or corporations for purposes of *civil liability* for such criminal conduct in violation of international law. They were battling the demon of impunity for political and military officials of the Nazi regime and rightly emphasized that the officials themselves must be held liable as criminals and punished, not with civil remedies, but with criminal punishments including the death penalty.

Furthermore, the only way that the Nuremberg prosecutors made their cases against the corporate executives of Farben and Krupps was to establish that these corporations had violated international law. In fact, Nuremberg prosecutors examined the prospect of corporate liability as part of the tribunal's jurisdiction and steered away from it only for tactical reasons. Historian Elizabeth Borgwardt wrote:

Corporate criminal liability – ultimately abandoned at Nuremberg in favor of individual liability for owners and directors – was seriously explored by the prosecution staff, and “never rejected as legally unsound,” as legal scholar Jonathan Bush explains, elaborating that “these theories of liability were not adopted, but not because of any legal determination that they were impermissible under international law.” Instead, prosecutors in the subsequent proceedings made a tactical decision to follow the lead of the main IMT tribunal and proceed with trials against individuals.⁹⁶

Although the Nuremberg Tribunal had no personal jurisdiction over juridical persons, the prosecution of natural persons who led corporations rested to a significant degree upon the illegality of the corporation's conduct.⁹⁷ The *Kiobel* majority's contention that corporations cannot violate international law thus flies in the face of common sense, logic, and the reality of the evidence presented at Nuremberg. The issue is how a corporation is held responsible for such violations, not whether a corporation itself can violate international law. Judge Weinstein in the *Agent Orange* judgment left no doubt as to the civil liability of corporations for torts under the ATS, “at least in cases of *jus cogens* violations . . .”⁹⁸

single act, and every agreement has to be initiated by the action of some state. Unless we are prepared to abandon every principle of growth for International Law, we cannot deny that our own day has its right to institute customs and to conclude agreements that will themselves become sources of a newer and strengthened International Law. International Law is not capable of development by legislation, for there is no continuously sitting international legislature. Innovations and revisions in International Law are brought about by the action of governments designed to meet a change in circumstances. It grows, as did the Common-law, through decisions reached from time to time in adapting settled principles to new situations. Hence I am not disturbed by the lack of precedent for the inquiry we propose to conduct.” International Conference on Military Trials: London, 1945, *Report to the President by Mr. Justice Jackson* (June 6, 1945), available at <http://avalon.law.yale.edu/imt/jack08.asp>.

96. Elizabeth Borgwardt, Bernath Lecture: Commerce and Complicity: Corporate Responsibility for Human Rights Abuses as a Legacy of Nuremberg, 34 *Diplomatic History* 4, 627, 632 (Sept. 2010) (citations omitted).

97. *Id.* at 630-31.

98. *In re Agent Orange*, 373 F. Supp. 2d at 58-59. Judge Stephen Wilson in *Nestle* used the same erroneous interpretation of footnote 20 in *Sosa* as did the *Kiobel* majority to debunk Judge

The *Kiobel* majority also misinterpreted the now famous footnote 20 of the Supreme Court's judgment in *Sosa v. Alvarez-Machain*.⁹⁹ The Supreme Court instructed the lower courts to consider when ruling on ATS claims "whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or an individual."¹⁰⁰ The *Kiobel* majority extrapolate from this dicta footnote an overarching principle that the tortfeasor must also be identified as such as a matter of customary international law – that the commission of the narrow band of torts or crimes qualifying for subject matter jurisdiction under the ATS must be shown under international law to be committed by certain categories of tortfeasors – those identified as such under principles of customary international law – in order to attract ATS jurisdiction. Judge Leval attacks the majority's "strange view of international law"¹⁰¹ broadside.

Leval dismantles footnote 20 of *Sosa* to demonstrate how the majority takes it out of context and then misinterprets it. The distinction being drawn at that point in the *Sosa* judgment was how the courts had arrived at a determination that not only States, but also private actors, could be held liable for violations of international law. There was no distinction drawn between individuals (natural persons) and corporations. Both are private actors. So the question was whether international law imposes liability on private actors. To answer that question, the *Kiobel* majority would require a determination of "whether well established norms of international law impose liability on such a perpetrator – and the answer may be different depending on whether the actor is a natural person or a corporation."¹⁰²

But Judge Leval contends that if read in context, the passage evokes a contrary interpretation. All of the Supreme Court justices agreed that Dr. Alvarez-Machain's claims under the ATS should be dismissed because the particular conduct – arbitrary detention of relatively short duration – did not violate the law of nations. What divided the justices was whether damages may ever be awarded in a suit under the ATS. The minority believed that since there was no implementing statute for the ATS, there was no private cause of action. The majority ruled that there is no need for a further statute making the law of nations enforceable in U.S. courts. They approved of a private cause of action under the ATS.

Justice Souter, who authored the majority judgment in *Sosa*, distinguished

Weinstein's commonsensical interpretation of why corporations can incur civil liability just as can individuals, whether under U.S. domestic law or international law. *Nestle*, No. CV 05-5133-SVW-JTL at 133.

99. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732, n.20 (2004).

100. *Id.*

101. *Kiobel*, Nos. 06-4800-cv, 06-4876-cv at 59 (Leval, J., concurring only in the judgment).

102. *Id.* at 27.

between the two relevant lower court cases of *Tel-Oren*¹⁰³ and *Kadic*.¹⁰⁴ The former held that torture practiced by a private actor was not a violation of international law and that it had to be practiced by an official on behalf of the State to constitute torture. In *Kadic*, the Second Circuit ruled that genocide could be committed by either a State or by a private actor. Leval wrote:

Nothing in the *Tel-Oren* or *Kadic* opinions suggested in any way that the law of nations might distinguish between conduct of a natural person and of a corporation. They distinguish only between private and State action. The *Sosa* footnote refers to the concern of *Tel-Oren* and *Kadic* – that some forms of noxious conduct are violations of the law of nations when done by or on behalf of a State, but not when done by a private actor independently of a State, while other noxious conduct violates the law of nations regardless of whether done by a State or a private actor. Expressly referring to these discussions in *Tel-Oren* and *Kadic*, *Sosa*'s footnote 20 notes the pertinence of the consideration whether international law extends the scope of liability [to private actors]. . . . Far from implying that natural persons and corporations are treated *differently* for purposes of civil liability under ATS, the intended inference of the footnote is that they are treated *identically*. If the violated norm is one that international law applies only against States, then “*a private actor, such as a corporation or an individual*,” who acts independently of a State, can have no liability for violation of the law of nations because there has been no violation of the law of nations. On the other hand, if the conduct is of the type classified as a violation of the norms of international law regardless of whether done by a State or a private actor, then “*a private actor such as a corporation or an individual*,” has violated the law of nations and is subject to liability in a suit under the ATS. The majority's partial quotation out of context, interpreting the Supreme Court as distinguishing between individuals and corporations, misunderstands the meaning of the passage.¹⁰⁵

This clarification is vital to an understanding of the fundamental analytical error in the *Kiobel* majority decision and in the *Nestle*¹⁰⁶ and *Firestone*¹⁰⁷ judgments of recent date. If federal courts misinterpret footnote 20 of *Sosa*, that misinterpretation radically transforms their analysis of corporate liability under the ATS. Furthermore, the European Commission, in its *amicus curiae* brief in *Sosa*, pointed to the fact that non-state actors, like corporations, can violate a subset of norms of international law – genocide, war crimes and piracy – and be liable for them, while certain other violations of the law of nations – such as summary execution, prolonged arbitrary detention, and torture – may only trigger liability for state officials acting under color of law.¹⁰⁸ That is a logic that fortifies Leval's own reading of footnote 20 of *Sosa*.

Several other dissenting views expressed by Judge Leval in his concurring

103. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984).

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

105. *Kiobel*, Nos. 06-4800-cv, 06-4876-cv at 30-31 (Leval, J., concurring only in the judgment) (emphasis added).

106. *John Doe v. Nestle, S.A.*, No. CV 05-5133-SVW-JTL (C.D. Cal. Sept. 8, 2010).

107. *Flomo v. Firestone Natural Rubber Company*, No. 1:06-cv-00627-JMS-TAB (S.D. Ind. Oct. 5, 2010).

108. *Kiobel*, Nos. 06-4800-cv, 06-4876-cv at 29 (Leval, J., concurring only in the judgment).

opinion in *Kiobel* merit emphasis because they may prevail in other circuits and ultimately before the Supreme Court:

- (i) No individual civil liability has ever been proven in international law for the commission of atrocity crimes, just as no corporate civil liability has ever been so proven. So both types of private actors have avoided civil liability under international law. As Judge Leval notes, “If the absence of widespread agreement in the world as to civil liability bars imposing liability on corporations, it bars imposing liability on natural persons as well.”¹⁰⁹ Yet the majority assumes that individuals can be held liable under the ATS but not corporations. That view confuses criminal law and civil law remedies. If one follows the logic of the majority, there should be no civil liability for individuals under ATS as such civil liability (as opposed to criminal liability) has never been established under international law.¹¹⁰
- (ii) International law leaves to individual States the remedy for a violation of international law; in the United States, one of those remedies is the ATS. The ATS makes no distinction among tortfeasors. Judge Weinstein of the Second Circuit pointed out in a significant corporate liability case, *Agent Orange*, that “an ATS claim is a federal common law claim and it is a bedrock tenet of American law that corporations can be held liable for their torts.”¹¹¹ Thus, in the absence of an international rule, one looks to the United States and its federal common law to determine how it will carry out its international obligations for the enforcement of international law.¹¹² The conservative or nativist doctrinaire surely would

109. *Id.* at 51.

110. *Id.* at 38-39.

111. *Id.* at 38, n.41.

112. Judge Leval’s analysis is instructive and entirely consistent with the analysis herein:

“[W]hen one looks to international law to learn whether it imposes civil compensatory liability on those who violate its norms and whether it distinguishes between natural and juridical persons, the answer international law furnishes is that it takes no position on the question. What international law does is it prescribes norms of conduct. It identifies acts (genocide, slavery, war crimes, piracy, etc.) that it prohibits. At times, it calls for the imposition of criminal liability for violation of the law, whether by vesting a tribunal such as the ICC with jurisdiction to prosecute such crimes or by imposing on States a duty to make the crimes punishable under national law. . . . Yes, the question whether acts of any type violate the law of nations and give rise to civil damages is referable to the law of nations. And if the law of nations spoke on the question, providing that acts of corporations are not covered by the law of nations, I would agree that such limitation would preclude suits under the ATS to impose liability on corporations.

look to national law to determine the pathway for remedies for violations of international law rather than blindly look to a doctrine of international law – crafted by foreign nations – or even to a sadly distorted interpretation of the Rome Statute of the International Criminal Court (presumably to the horror of conservatives deeply opposed to the ICC) to dictate how U.S. courts must enforce the law.

- (iii) Nothing in *Sosa* infers that natural person tortfeasors are the only candidates for liability under the ATS, or that when a corporation is responsible for the commission of genocide, and profits from it, that it is not liable at least with respect to civil remedies. Indeed, the number of cases against corporate tortfeasors has been impressive through the years.¹¹³

Judge Leval's opinion in *Kiobel* challenges the majority in so many ways that a separate article would be required to explain them. In our view the majority failed to make a persuasive set of arguments that would deny corporate liability under the ATS. When a majority opinion attracts such a strong, well documented, eloquent, and lengthy dissent as that delivered by Judge Leval in *Kiobel*, one supported by years of precedents in the federal courts, a second

But international law does not provide that juridical entities are exempt. And as for civil liability of both natural and juridical persons, the answer given by the law of nations... is that each State is free to decide that question for itself. While most nations of the world have not empowered their courts to impose civil liability for violations of the law of nations, the United States, by enacting the ATS, has authorized civil suits for violation of the law of nations. . . .

Civil liability *under* the ATS for violation of the law of nations is not awarded because of a perception that international law commands civil liability throughout the world. It is awarded in U.S. courts because the law of nations has outlawed certain conduct, leaving it to each State to resolve questions of civil liability, and the United States has chosen through the ATS to impose civil liability. The majority's ruling defeats the objective of international law to allow each nation to formulate its own approach to the enforcement of international law. . . .

The claim that a tort has been committed is premised on a violation of the law of nations. This follows a determination that an actor has done what international law prohibits. But international law leaves the manner of remedy to the independent determination of each State. . . . The fact that other nations have not chosen to exercise the discretion left to them by international law in favor of civil liability does not change the fact that international law has left the choice as to civil liability with each individual nation."

Kiobel, Nos. 06-4800-cv, 06-4876-cv at 47-50 (Leval, J., concurring only in the judgment) (internal citations omitted).

113. Judge Leval wrote, "No court has ever dismissed a civil suit against a corporation, which alleged a violation of the laws of nations, on the ground that juridical entities have no legal responsibility or liability under that law. No court has ever discussed such a rule with even vaguely implied approval. Quite to the contrary, on many occasions courts have ruled in cases involving corporate defendants in a manner that assumed without discussion that corporations could be held liable." *Id.* at 22. This passage is footnoted with a recitation of ten federal court cases under ATS involving corporate defendants. *Id.* at 22-23, n.12; *see also id.* at 54-55, n34; *Nestle*, at 127-31.

reckoning on the primary issue of corporate liability under ATS is certain to follow in the near future.

The *Kiobel* majority's misreading of footnote 20 in *Sosa* further infects the analysis of Ninth Circuit Judge Stephen Wilson in *John Doe v. Nestle*. Judge Wilson rests practically his entire analysis on what he perceives to be *Sosa*'s directive that corporate liability for atrocity crimes must be universally adopted as a matter of customary international law. His entire analysis of the Rome Statute is intended to validate this misreading, only to succumb to the same misunderstanding of the negotiating history of the Rome Statute as held by the *Kiobel* majority before that particular international court of criminal jurisdiction only.

The issue before the negotiators of the Rome Statute was whether corporations should be held criminally liable for the same crimes (genocide, crimes against humanity, and war crimes) that individuals would be prosecuted for before the Court. The fact that negotiators ultimately rejected corporate liability under the Rome Statute had nothing to do with rules of customary international law and everything to do with whether national legal systems already held corporations *criminally* liable or would be likely to under the principle of complementarity of the Rome Statute.¹¹⁴ The issue of civil liability for corporations was not on the table because the ICC had no basis for adjudicating civil liability. It was a disconnect between the criminal jurisdiction of the Court and the reality of how corporations should be held liable (in other words, to achieve civil remedies) that cratered the proposal for corporate liability.

But both the *Kiobel* majority and the district court judges in *Nestle* and *Firestone* overlooked all of those realities to assume, erroneously, that the negotiators of the Rome Statute rejected corporate liability because of their failure to discover a rule of customary international law. If the issue had simply been one of civil remedies, the outcome might have been very different and the proposal for corporate liability might have survived in some fashion. But holding corporations *criminally* responsible for atrocity crimes under the Rome Statute indeed was a bridge too far in 1998 for purposes of the ICC. That decision had nothing to do with customary international law or with the free choice of nations to hold corporations as tortfeasors liable for civil remedies.

Neither the Second Circuit's ruling on corporate liability in *Kiobel* nor the

114. WILLIAM SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 211 (3d ed. 2010) ("Proposals that the Court also exercise jurisdiction over corporate bodies in addition to individuals were seriously considered at the Rome Conference. While all national legal systems provide for individual criminal responsibility, their approaches to corporate criminal liability vary considerably. With a Court predicated on the principle of complementarity, it would have been unfair to establish a form of jurisdiction that would in effect be inapplicable to those States that do not punish corporate bodies under criminal law. During negotiations, attempts at encompassing some form of corporate liability made considerable progress. But time was simply too short for the delegates to reach a consensus and ultimately the concept had to be abandoned.") (citations omitted).

Supreme Court's denial of certiorari in *Talisman* on aiding and abetting standards for corporate complicity are the end of the story. When both issues are examined in other federal circuits and by other courts of appeals and federal district court judges, and ultimately on the merits by the Supreme Court, we are confident that corporate social responsibility will reflect both a knowledge standard for aiding and abetting liability and a reaffirmation of the long line of precedents that confirm the risk of corporate civil liability under the ATS. In any event, *Kiobel* in particular invites the ATS bar to give much more serious consideration to civil actions against corporate officers and their often considerable personal assets for such individuals' critical roles in guiding corporate conduct leading to atrocity crimes and other human rights abuses.¹¹⁵ Also, if corporate civil liability ultimately is denied under the ATS by the Supreme Court, then criminal prosecution of top corporate executives implicated in their companies' involvement with atrocity crimes may become much more likely on the docket of the ICC as plaintiffs look to that court to shut down the corporation's criminal behavior.

D. The European Dimension of Corporate Liability

That the ATS prescribes civil damages for violations of the law of nations that includes atrocity crimes is unprecedented in its conceptual nature.¹¹⁶ There is no direct counterpart of the ATS in Europe. However, there is something that potentially comes close: The 1968 Brussels Convention (now Brussels I Regulation)¹¹⁷ confers on the courts of European Union (EU) Member States the competence to adjudicate civil proceedings against corporations domiciled in the EU even if the damage is sustained in third countries and even if the victim is not domiciled in the EU.¹¹⁸ The Brussels I Regulation is merely a jurisdictional prescription and does not *per se* determine the law applicable in the respective national jurisdiction. Rather, the conflict of law principle of *lex loci delicti* applies, determining that the law of the jurisdiction is applicable where the harm took place, namely, the forum state where the parent company,

115. See, e.g., *Kiobel*, Nos. 06-4800-cv, 06-4876-cv at 11 ("We note only that nothing in this opinion limits or forecloses suits under the ATS against the individual perpetrators of violations of customary international law—including the employees, managers, officers, and directors of a corporation—as well as anyone who purposefully aids and abets a violations of customary international law.").

116. Beth Stephens, *Corporate Liability: Enforcing Human Rights Through Domestic Litigation*, 24 HASTINGS INT'L & COMP. L. REV. 401, 409 (2001).

117. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 1262 U.N.T.S. 153 [hereinafter Brussels Convention]; replaced by Council Regulation No. 44/2001, Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 12) 1 [hereinafter Brussels I].

118. Jan Wouters & Lee Chanet, *Corporate Human Rights Responsibility: A European Perspective*, 6 NW. U.J. INT'L HUM. RTS. 262, 295 (2008).

alleged to have committed the violations, is domiciled.¹¹⁹ The underlying rationale is that although the damage occurred abroad, the violation of duty was effected in the forum state.¹²⁰

Some European jurisdictions have now implemented international crimes (in particular atrocity crimes) into national legislations and statutes and thus provided the substantive legal grounds for such claims under the Brussels I Regulation. However, no major cases have been brought against corporations under this procedure. Jan Wouters, a prominent scholar with regard to human rights redress against corporations in Europe, wonders why there have not been more cases despite the real potential of civil claims against European corporations for human rights abuses. He postulates that one reason might be that the procedural laws in Europe are less favorable for the victims than in the United States, where the possibility of contingency fees and class action suits are available.¹²¹

Furthermore, there is a different legal culture when it comes to providing redress for human rights violations, particularly with respect to international crimes, in Europe as opposed to the United States.¹²² As Professor Beth Stephens wrote, Europeans would feel that “tort remedies [do not] fit the crime.”¹²³ Rather, European jurisdictions provide for criminal prosecution in such cases. Since the mid 1990s, an increasing number of European countries have incorporated atrocity crimes, as defined under the Rome Statute for the ICC, into their domestic criminal codes. This has occurred mostly in the course of national implementation legislation in signatory states to the Rome Statute.

Aside from these revisions of their domestic criminal codes, an increasing number of states, including Belgium and France, have also included provisions allowing for criminal liability of legal persons, including corporations in particular. France has always been a strong advocate for corporate criminal liability. It introduced the concept in 1994 by imposing a wide range of criminal sanctions and fines against corporations, as well as various forms of deprivation of a corporation’s rights, such as dissolution of the corporation, judicial surveillance of up to five years, closure of the firm’s establishments used for the offense, confiscation of corporate assets, and public display of the court’s sentence.¹²⁴ Often times, civil damages can be attached to criminal proceedings

119. Olivier De Schutter, *The Accountability of Multinationals for Human Rights Violations in European Law*, in *NON-STATE ACTORS AND HUMAN RIGHTS* 227, 274 (Philip Alston ed., 2005).

120. *Id.* at 275.

121. See Wouters & Chanet, *supra* note 118, at 299.

122. Beth Stephens, *Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies For International Human Rights Violations*, 27 YALE J. OF INT'L. L. 24-26 (2002).

123. See Beth Stephens, *Conceptualizing Violence Under International Law: Do Tort Remedies Fit the Crime?*, 60 ALB. L. REV. 579 (1997).

124. Andrew Kirsch, *Criminal Liability for Corporate Bodies in French Law*, 9 EUR. BUS. LAW REV. 41 (1998).

such as under the concept of *constitution de partie civile* under French and Belgian law.¹²⁵ France, Belgium, Germany, the Netherlands, Italy, and Spain provide criminal liability of corporations or “quasi-criminal and/or administrative penalties that accompany criminal actions and effectively serve as punitive sanctions.”¹²⁶ Since numerous European systems have far reaching extraterritorial jurisdiction prescriptions that can extend liability to American corporations for human rights abuses before European courts, it is a risk that cannot be ignored by multinational corporations with a European presence. Even American corporations tied to European companies through joint ventures, agency relationships, licensing agreements, and other contractual ties can be deeply impacted by the fate of the European partner before its national courts.

The case of complicity in human rights abuses in the context of UNOCAL’s joint venture operations in Burma vividly illustrates the complex diversity of legal standards and fora that multinational corporations and their partners might confront after settling the case under the ATS in the United States. Total S.A., UNOCAL’s French-based joint venture partner, faced a lawsuit on similar charges in French courts. After yet another out-of-court settlement in France, the case against Total was reopened in Belgian courts in October 2007.¹²⁷ This merry-go-round of interconnected litigation against Total S.A. in three different jurisdictions demonstrated that the multinational character of a corporation’s operations can lead to a multiplicity of risks regarding human rights abuses, perhaps leading to many financial settlements. Winning or settling in one jurisdiction will not necessarily stem the tide of litigation and further protracted negotiations aimed at settlements.

Considering the diversity in legal standards, the wide jurisdictional reach, and Europe’s commitment to establishing an effective corporate social responsibility framework at the EU level (as reflected in the most recent European Commission Green Paper¹²⁸), multinational corporate liability is alive and well in Europe. Even if the risk of being held liable for human rights abuses has not yet materialized on a large scale for corporations in Europe, the risk exists and may grow in the years ahead. While the European Commission favors self-regulation of multinationals with a European presence, the European

125. ABIGAIL HANSEN & WILLIAM BOURDON, FAFO AIS, SURVEY RESPONSE, LAWS OF FRANCE, ‘COMMERCE, CRIME AND CONFLICT: A SURVEY OF SIXTEEN JURISDICTIONS’ at 30 (Sept. 6, 2006), available at <http://www.fafo.no/liabilities/CCCSurveyFrance06Sep2006.pdf>; BRUNO DEMEYERE, FAFO AIS, SURVEY RESPONSE, LAWS OF BELGIUM, ‘COMMERCE, CRIME AND CONFLICT: A SURVEY OF SIXTEEN JURISDICTIONS’ at 38 (Sept. 6, 2006), available at www.fafo.no/liabilities/CCCSurveyBelgium06Sep2006.pdf.

126. See Brief of International Law Scholars as Amici Curiae Supporting Plaintiff-Appellees at 19-23, Balintulo v. Daimler AG, No. 09-2778-CV (2d Cir. 2009).

127. *Belgium Reopens Myanmar Humanity Crimes Probe Against Oil Giant Total*, AGENCIE FRANCE-PRESS (AFP) (Oct. 2, 2007), <http://afp.google.com/article/ALeqM5g84fzhRA8Y6IvW-gmt7YmonfEBKg> (dismissed on procedural grounds).

128. EUROPEAN COMMISSION, *GREEN PAPER – PROMOTING A EUROPEAN FRAMEWORK FOR CORPORATE SOCIAL RESPONSIBILITY*, COM (2001) 366 FINAL (July 18, 2001).

Parliament continues to press for effective enforcement against corporations. Multinational corporations with a European presence should not ignore these transforming realities and the dynamic developments awaiting corporate liability in Europe.

As noted earlier, an initiative is afoot in Canada to legislate a modern-day ATS in that country.¹²⁹ The Canadian bill is much more comprehensive and specific in terms of the torts, including those of a criminal character, which can be claimed by foreigners against Canadian-based multinational corporations. The torts include not only atrocity crimes but also wanton destruction of the environment, trans-boundary pollution, and a violation of any of the fundamental conventions of the International Labour Organization.¹³⁰ The bill is not expected to be voted on by the Canadian Parliament until perhaps 2012.¹³¹ But if it is adopted and becomes law, Canada may surpass the United States as the riskiest venue for CSR litigation against multinational corporations, at least those linked to Canadian jurisdiction.

IV.

LEVEL FOUR: COMPLIANCE STRATEGIES TO MANAGE AND MINIMIZE RISKS

A. Reputational and Settlement Risks

The ATS presents a formidable challenge in risk assessments because the liability that arises under ATS litigation, whether or not the plaintiffs are successful, can be significant financially and otherwise. There is an imperative need to manage and minimize the risks of litigation and economic injury from violations of international human rights law or from other violations of international law, including the commission of atrocity crimes in the course of multinational operations. Corporations remain exposed to the risks of diminished reputation and to the costs of legal settlements that offer attractive alternatives to prolonged litigation under the ATS, depending on its current fate before the federal courts.

Risk assessment entails the study of both legal/liability risks and non-actionable risks, such as those relating to reputation. We saw in the previous section the knife-edge of liability risks that corporations now stand upon under

129. Bill C-354 (An Act to amend the Federal Courts Act (international promotion and protection of human rights)), House of Commons of Canada, Second Session, Fortieth Parliament 57-58 Elizabeth II (First reading, Apr. 1, 2009), available at <http://www2.parl.gc.ca/HousePublications/Publication.aspx?Docid=4329781&file=4>.

130. *Ibid.* Sec. 25.1(2).

131. Matthew Hill, *Son of dead anti-mining activist in Canada lobbying for tougher laws*, MINING WEEKLY Oct. 1, 2010, at <http://www.miningweekly.com/article/son-of-murdered-anti-mining-activist-in-canada-lobbying-for-tougher-laws-2010-10-01>; Cyril Mychalejko, *Canada's Long Road to Mining Reform*, TOWARD FREEDOM Jan. 21, 2010, <http://towardfreedom.com/home/content/view/1832/1/>.

the ATS and the divided federal circuits. However, reputational risks, which can arise from poorly managed operations overseas and ultimately from the litigation that results from corporate violations of international law, can do far more to damage corporate profitability and the long-term credibility of the “brand name” than most court cases could impose upon a corporate defendant.

For example, the classic business school case study in the realm of reputational risks is that of Nike, which involved the violation of the human rights of laborers in Nike shoe manufacturing facilities overseas.¹³² The sad, outrageous reality that Nike used child labor and refused to provide benefits to its labor force, pointed to poor management decisions that reverberate to the current day. Studies have shown that Nike’s brand image has yet to recover from the beating it took over the child labor fiasco, even though it remains a highly profitable enterprise.¹³³

Another example is Wal-Mart, which prevents its U.S. labor force from unionizing. In a 210-page report, Human Rights Watch stated “the retail giant stands out for the sheer magnitude and aggressiveness of its anti-union apparatus.”¹³⁴ Further, Wal-Mart was accused of using suppliers that operated on sweatshop conditions where workers were not paid minimum wage and worked far longer hours than legally allowed.¹³⁵ Sam Walton, the founder and former Chairman of Wal-Mart, once said, “the secret of successful retailing is to give your customers what they want. And really, if you think about it from your point of view as a customer, you want everything: a wide assortment of good-quality merchandise; the lowest possible prices.”¹³⁶ That philosophy was implemented on a vast scale in the United States and several foreign countries. Ultimately, violations of the basic labor rights of its employees and human rights of those working for Wal-Mart’s overseas vendors became the cause célèbre of human rights activists at home and abroad.¹³⁷ Indeed, Wal-Mart suffered a historic drop in sales, saw its name dragged through virtual mud in the media for many months, and had to radically change its managerial approach to labor in order to begin to reverse the tide and restore its much tattered

132. DEBORAH L. SPAR ET AL., HITTING THE WALL: NIKE AND INTERNATIONAL LABOUR PRACTICES, NO. 9-700-047 (Harvard Business School 2000).

133. Simon Zadek, *The Path to Corporate Social Responsibility*, HARVARD BUSINESS REVIEW, at 7 (2004).

134. Pallavi Gogoi, *Wal-Mart’s Record on Human Rights*, BUSINESSWEEK, May 01, 2007, available at http://www.businessweek.com/bwdaily/dnflash/content/apr2007/db20070430_084675.htm.

135. *Wal-Mart hit by ‘sweatshop’ claim*, BBC NEWS, Sept. 13, 2005, <http://news.bbc.co.uk/2/hi/business/4243676.stm>.

136. *An Introduction to Walmart.com*, WALMART, <http://www.walmart.com/cp/An-Introduction-to-Walmart.com/542413> (last visited Nov. 14, 2010).

137. See e.g., WAL-MART WATCH, <http://walmartwatch.com/> (last visited Nov. 14, 2010); CAROL PIER, HUMAN RIGHTS WATCH, DISCOUNTING RIGHTS: WAL-MART’S VIOLATION OF WORKERS’ RIGHT TO FREEDOM OF ASSOCIATION (2007).

reputation.¹³⁸

Starbucks provides a third example where it appears as if reputational risk is the primary risk assessment driving management to embrace eco-friendly and labor-friendly policies and practices. It was not the risk of litigation that propelled the complex of CSR policies at Starbucks. Rather, it was a market strategy that recognized, publicized, and implemented policies as a pathway to greater market share and profitability by tapping into the political and sociological sentiments of its higher income and educated customer base.¹³⁹

This risk assessment focuses on the risks that corporate investors would be most concerned about for the future viability of the corporation's operations. However, the catastrophic BP oil gusher in the waters of the Gulf of Mexico during the spring and summer of 2010 signals the need for a new era of risk assessments. Such upgraded reports should focus on worst-case scenarios and the potential harm that a corporation's operations may present to society as a whole. In other words, CSR should compel corporate managers to think out-of-the-box and realistically about risks to the ecosystem, to populations and to labor exposed to corporate accidents and malfeasance (including bad luck, incompetence, poor management, or corruption) that can quickly thrust the corporation into hell's kitchen. Planning for this type of risk reaches far beyond reputational risks to issues of common survival. Multinational corporations, particularly in the extractive and chemical and power industries, need to anticipate worst-case scenarios and plan for them.

A second strategy to manage and minimize risks is to maneuver within lawsuits against the multinational corporation so as to reach a settlement with the plaintiffs. The most prominent examples are *UNOCAL* (Burma),¹⁴⁰ *Wiwa/Shell* (Nigeria),¹⁴¹ *Yahoo!* (China),¹⁴² and *Pfizer* (Nigeria).¹⁴³ In each case, the corporation avoided the risk of an unfavorable precedent in either federal courts or, in the matter of *Pfizer*, Nigerian courts. Within several months after the *Sosa* judgment, UNOCAL settled with the Burmese plaintiffs. Even though the Supreme Court did not determine any ATS liability in *Sosa*, the Court confirmed that the door remains open for additional torts or crimes, and

138. Ann Zimmerman, *Wal-Mart Taps Insider for U.S. Retail Operations*, WALL ST. J., Apr. 28, 2003, at B6.

139. David Baron & Daniel Diermeier, *Strategic Activism and Non-Market Strategy*, 16 J. ECONOMICS & MANAGEMENT STRATEGY 599, 620 (2007).

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

141. Settlement Agreement and Mutual Release, *Wiwa v. Shell Petroleum*, 96 Civ. 8386, 01 Civ. 1909, 04 Civ. 2665 (2d Cir. June 8, 2009), available at http://wiwavshell.org/documents/Wiwa_v_Shell_SETTLEMENT AGREEMENT.Signed.pdf.

142. Brian Todd et al., *Yahoo settles dissidents suit*, CNN.COM, Nov. 13, 2007, <http://edition.cnn.com/2007/WORLD/asiapcf/11/13/yahoo.china/index.html>.

143. Joe Stephens, *Pfizer to Pay \$75 Million to Settle Trovan-Testing Suit*, WASH. POST, July 31, 2009, at A15, available at <http://www.washingtonpost.com/wpdyn/content/article/2009/07/30/AR2009073001847.html>.

the kind at issue in the *UNOCAL* case presented a good opportunity for a finding of ATS liability. By settling, UNOCAL avoided precedents on aiding and abetting and other legal issues that could have constrained its foreign operations as well as those of many other corporations.

The corporate defendant in each of these massive ATS cases, with hundreds of millions of dollars probably at stake in potentially adverse judgments against each of them, found merit in arriving at relatively cheap settlements with small victim groups without any admission of guilt. To the corporate headquarters, this is a satisfactory and perhaps attractive outcome. The plaintiff group is compensated, the plaintiff lawyers depart, the corporate treasury is deprived of a few moments of profits, and the company's reputation stops sliding. But is that the reality?

The small victim group bought off by the settlement typically is only one component of a much larger victim pool. How many other victims will launch litigation, particularly if they sense the possibility of financial settlements that will enrich them beyond their wildest expectations? Pfizer settled in Nigeria, but remains at risk in federal courts over the same conduct.¹⁴⁴ The settlement is a narrowly constructed means of minimizing corporate risk in a small corner of the corporate field of operations, but the settlement invites a longer-term risk of not addressing the core issues that continue to impact the larger victim population. The risk remains, indeed may grow, that the corporation will not satisfy the demands of civil society and of the public itself to rectify the human rights or other international law violations. Whether the settlement is a private one, as in the cases of *UNOCAL*, *Yahoo!*, and *Pfizer*, or a public one, as in the case of *Wiwa/Shell*, the corporation still risks not restoring its brand name or reputation in the eyes of the public.

The secret content of UNOCAL's settlement left the impression that UNOCAL had cut a deal to silence the victim group rather than remedy the larger complex of grievances and injuries arising from the overall operations in Burma, even though the monetary value of the settlement probably addressed the immediate needs of particular members of the relatively small plaintiff group. The settlement simply gave rise to public skepticism and cynicism over the corporation's general intentions, and the public then infers an admission of guilt by the corporation without the legal accountability that compels much grander corrective action to remedy the larger violations of human rights occurring in the territory of operations. The overriding question still remains:

144. See *Abdullahi v. Pfizer, Inc.*, Nos. 05-4863, 05-6768, 2009 U.S. App. LEXIS 1768 (2d Cir. Jan. 30, 2009) (In January 2009, the US court of appeals reversed the lower courts' dismissal of the case. The two lawsuits have been consolidated. A divided court found that the prohibition of non-consensual medical experimentation on humans is binding under customary international law. In July 2009, Pfizer petitioned the US Supreme Court asking it to hear an appeal of the Court of Appeals' January 2009 ruling. In November 2009 the Supreme Court asked the US Solicitor General to submit a brief to the Court in this case. In May 2010 the Solicitor General submitted this brief to the Court urging the Court to deny Pfizer's petition).

what was UNOCAL trying to hide with its secret settlement? That question alone eviscerates a good deal of the public relations value of the publicly announced but entirely undisclosed settlement. UNOCAL may achieve a short-term gain at the expense of a long-term loss in its credibility and reputation – as the company too scared to speak the truth openly.

The public settlement, which transparently reveals the financial payments and other corrective measures of the settlement between the parties, also puts a price tag (and a low one at that) on human rights (or labor rights or medical rights or environmental security), and it does so only for the component of the victim population that is party to the settlement. Such pricing of fundamental human rights can appear callous and may even pull the corporation deeper into the risk pit as the public recoils from the deal-making. It is as if the human rights crisis can be bought off with just enough cash. When Shell reached a publicly-disclosed settlement in the *Wiwa/Shell* case, it staged a one day webchat on July 23, 2009, on its web site to discuss, “Doing business in Nigeria: challenges and questions.” While this was a feel-good effort for the corporation, it veered more towards a public relations stunt than an authentic effort to address the underlying problems. Shell also had previously publicized its human rights efforts at length in its sustainability reports.¹⁴⁵ In its recent sustainability report, Shell took a different approach, however, stating that, “We believe that the decision not to include a dedicated human rights section in the Report is appropriate in light of developments in 2008.”¹⁴⁶ How this apparently new approach by Shell with regard to human rights further unfolds, particularly in light of the recent settlement, remains to be seen. Furthermore, Shell had previously publicized its CSR efforts grandly in its annual reports.¹⁴⁷

From the perspective of civil society and the public at large, it will remain questionable whether a settlement – public or private – will achieve the long-term goals these groups want to achieve. They are seeking systemic, society-wide change in the relationship between the corporation and its host government, and no narrowly conceived settlement will satisfy that demand. The settlement may appear as simply a *de facto* (though not publicly explicit) admission of guilt by the corporation dressed up with some cash, a self-

145. PETER KNIGHT, SHELL INT'L LTD., THE SHELL REPORT, (1998).

146. ROYAL DUTCH SHELL PLC, RESPONSIBLE ENERGY SUSTAINABILITY REPORT 39 (2008), available at http://www.shell.com/home/content/investor/financial_information/annual_reports/dir_reports_archive.html.

147. See ROYAL DUTCH SHELL PLC, ROYAL DUTCH SHELL PLC ANNUAL REPORT AND FORM 20-F FOR THE YEAR ENDED DECEMBER 31, 2009 50 (2010), available at http://www.annualreportandform20f.shell.com/2009/servicepages/downloads/files/all_shell_20f_09.pdf; ROYAL DUTCH SHELL PLC, ROYAL DUTCH SHELL PLC ANNUAL REPORT AND FORM 20-F FOR THE YEAR ENDED DECEMBER 31, 2008, 64 (2009), available at http://www.annualreportandform20f.shell.com/2008/servicepages/downloads/files/entire_shell_20f_08.pdf; Royal Dutch Shell PLC, *Royal Dutch Shell PLC Annual Report and Form 20-F for the year ended December 31, 2008*, 68, available at http://www-static.shell.com/static/investor/downloads/financial_information/reports/2007/2007_annual_report.pdf.

congratulatory press release, and a glossy page of smiling faces in the annual report. (This is what the fifth level of compliance discussed below counters. It aims for the corporation to have an impact on society so that both societal and business values are enhanced.)

So what does the corporation want out of the settlement? Is it to save the money damages of a possible (perhaps probable?) adverse judgment in the courts? Is it to prevent a damaging legal precedent that would raise the risks, not only for the defendant corporation but for other corporate investors as well? Or is it to manage reputational risk, or a combination of all three? Whatever its motive for a settlement, the corporate defendant may not restore its reputation to the high level of credibility and trust it earlier enjoyed.

B. Additional Risks

Despite the Supreme Court's denial of *certiorari* on the Second Circuit's narrow reading of secondary liability under the ATS in the *Talisman* case, multinational corporations remain subject to a host of various risks. Washington lawyer Jonathan Drimmer pointed out some of these risks in a paper for the Washington Legal Foundation on February 12, 2010, and they merit emphasis here.

First, as discussed above, other Courts of Appeals have viewed secondary liability under the ATS differently than the Second Circuit and, more recently, one federal district court in the Central District of California.¹⁴⁸ Aside from the *Nestle* order, the Ninth and Eleventh Circuits, where many corporate ATS cases are filed, have confirmed at either the district court or court of appeals level the knowledge standard for corporate aiding and abetting, and thus they stand in direct opposition to the Second Circuit on the issue. But while several federal courts have denied any aiding and abetting liability for corporations unless Congress explicitly authorizes such liability, others have looked to domestic rather than international standards, and some have left that issue undefined.¹⁴⁹ Thus, risk assessments need to factor in the corporation's exposure in different federal circuits unless and until the Supreme Court intervenes to resolve the disparate rulings.

Second, aiding and abetting is not the only mode of liability that can ensnare corporate conduct overseas. As Drimmer points out, plaintiffs can rely on such other theories of liability as alter ego, agency, ratification, joint venture, or *respondeat superior*.¹⁵⁰ And under these theories, a "purpose" test or finding of criminal intention is not as apparent. The current status of the *Talisman*

148. John Doe v. Nestle, S.A., No. CV 05-5133-SVW-JTL (C.D. Cal. Sept. 8, 2010).

149. Jonathan C. Drimmer, *Is Second Circuit Ruling A "Talisman" Against Alien Tort Statute Suits?*, WASH. LEGAL FOUND. LEGAL BACKGROUNDER, Feb. 2010, at 1, 3, available at http://www.wlf.org/publishing/publication_detail.asp?id=2138.

150. *Id.* at 4.

litigation will be of little relevance in these evaluations of corporate liability under the ATS by the federal courts.

Third, there is a pragmatic reality about corporate actions that may point to the purpose/knowledge distinction for aiding and abetting as a distinction without a difference. Does “purpose,” particularly in Article 25(3)(c) of the Rome Statute, which the Second Circuit relies upon so heavily, restrict corporate liability to aiding and abetting that has the “sole purpose” or the “primary purpose” of committing the underlying crime, or can it extend to “purpose as inferred from knowledge of likely consequences” from the act of aiding or abetting? We raised this issue above when discussing the insertion of “purpose” in Article 25(3)(c). If such inferred intent is a legally acceptable reading of “purpose” by the federal courts, particularly in the absence of any guidance yet from the ICC on aiding and abetting liability, then providing assistance despite the knowledge of likely consequences can easily encompass inferred intent to facilitate the commission of the crime. As Drimmer cautions, “[I]f plaintiffs have sufficient evidence to permit a jury to infer a *mens rea* of knowledge, they may have sufficient evidence to satisfy the purpose test.”¹⁵¹ Even the Second Circuit in its *Talisman* judgment noted that, “intent must often be demonstrated by the circumstances, and there may well be an [ATS] case in which a genuine issue of fact as to a defendant’s intent to aid and abet the principal could be inferred”¹⁵² A heavy reliance on a purpose standard as a prerequisite to corporate aiding and abetting liability nonetheless may prove ephemeral if *inferred intent* is logically and easily derived from the knowledge of likely consequences arising from a corporation’s aiding and abetting of an ATS crime.

C. What Can be Done to Minimize Risks of Non-Compliance

The fourth stage of compliance requires strategies that have become standard fare in legal advice to corporate clients and do not require much attention here, but we thought it would be useful to set them forth briefly before we discuss the fifth stage of compliance that moves well beyond these particular strategies. We have already emphasized the importance of corporate codes of conduct in the overall building of a compliance strategy in our examination of the second level of compliance above. Other strategies, however, are critical to a proper foundation of business and legal advice to corporate officers about how to manage and then minimize the risks of non-compliance.

Human Rights Auditing of Corporate Performance. The conventional indicia of auditing functions (financial performance, labor relations, compensation, taxes, foreign corrupt practices) should include, for all intents and purposes, the additional factors associated with compliance with human rights standards. This includes audits associated with mergers and acquisitions.

151. *Id.*

152. *Presbyterian Church of Sudan*, 582 F.3d 244, 264 (2d Cir. 2009).

Securities and Exchange Commission Filings. There has been a recent development towards including environmental, social, and governance (ESG) factors in disclosure statements for Securities and Exchange Commission (SEC) filings. The SEC recently released the “Commission Guidance Regarding Disclosure Related to Climate Change,” and thus established an important precedent for the environmental pillar of the ESG factors.¹⁵³ However, investors have been advocating strongly to also include social and governance risk factors in disclosure proceedings. The latest effort to include ESG factors in SEC filings has been organized through the “21st Century Disclosure Initiative” established by Christopher Cox, former chairman of the SEC. Under the ambit of the initiative, 14 institutional investors called on the SEC to include environmental, social, and governance risk factors as part of disclosure.¹⁵⁴ Such transparency, particularly with regard to human rights risks and related strategies to minimize such risks, can be treacherous terrain for the corporation as it broadcasts to the world the human rights issues that may be confronting the corporation and for which it may not have adequate strategies developed to counter a record of non-compliance.

International Finance Corporation Loans. The International Finance Corporation (IFC) works with private companies to provide loans, equity financing, advice, and technical services. Its primary purpose is to promote private sector investment in developing countries by financing risks that other institutions will not underwrite. The IFC’s contracts, however, do not provide any conditionality regarding human rights, international law, or CSR in general. The IFC is cognizant of at least some aspects of these gaps and has acknowledged that its “Performance Standards” need to be updated to reflect at least human rights concerns.¹⁵⁵ For example, the standard Credit Line Agreement negotiated by the IFC with private investors could incorporate any number of CSR objectives to ensure that investments, including joint ventures, in developing countries have some CSR compliance built into the loan’s conditionality.¹⁵⁶

Contractual Commitments to Compliance. Perhaps one of the most potent strategies of compliance would be wider use and implementation of CSR clauses

153. SustainGenuity, *SEC to bring ESG into Regulation?*, Mar. 8, 2010, available at <http://brownflynn.wordpress.com/2010/03/08/sec-to-bring-esg-into-regulation/>.

154. See 21st Century Disclosure Initiative, <http://www.sec.gov/disclosureinitiative> (last visited Nov. 14, 2010).

155. The IFC’s web page reflects the review of Performance Standards, at [http://www.ifc.org/ifcext/policyreview.nsf/AttachmentsByTitle/Phase1_Progress_Report1-11-10.pdf/\\$FILE/Phase1_Progress_Report1-11-10.pdf](http://www.ifc.org/ifcext/policyreview.nsf/AttachmentsByTitle/Phase1_Progress_Report1-11-10.pdf/$FILE/Phase1_Progress_Report1-11-10.pdf), 3 and 12 (last visited Nov. 20, 2010).

156. A comprehensive analysis of what the IFC’s Credit Line Agreement could stipulate to cover CSR, particularly human rights, principles is found in Ana Tenreiro Goncalves, *The Role of the International Finance Corporation on Preventing Human Rights Violations: How to Use Contracts to Prevent (or Discourage) Human Rights Violations*, paper submitted for the Seminar on Corporate Human Rights Responsibility, Spring 2010, Northwestern University School of Law (on file with the authors).

in the contracts negotiated for joint ventures and other corporate relationships. Such clauses can be written in many ways and a contract's author needs to be careful that the social priorities of CSR are not buried through contractual gamesmanship. For example, a corporation can minimize its risks by insisting on a waiver of immunity for CSR violations in its contractual arrangement with a foreign partner, and vice versa. The clause may also state that the corporation has no intention of violating international law in its operations, thereby blunting claims of intentional non-compliance with international legal standards underpinning CSR. That may achieve the corporation's objective to avoid legal liability but it may actually increase the likelihood of CSR violations in the consequence.

In the alternative, we would encourage contractual commitments between multinational corporations and their local partners that enhance compliance with CSR objectives and establish some level of agreed accountability for non-compliance. At a minimum, the parties should agree to arbitration to iron out differences of opinion about compliance performance and to resolve disputes before third parties are incentivized to initiate litigation. Waivers of immunity in such contracts may insulate one of the parties to some extent, but we doubt that once stakeholders and victims initiate legal claims on CSR violations that the courts will sympathetically read such waivers, particularly when catastrophic events like crimes against humanity or massive pollution form the basis of third-party claims.

Compliance Divisions. While many corporations have created compliance units of one kind or another to implement CSR principles, the initiative remains relatively small. We believe that the best procedure by which multinational corporations can ensure their compliance with CSR, assuming that is their purpose, would be to ensure that some significant category of companies, particularly in the extractive, energy, chemicals, and internet communications, have highly professional compliance divisions focusing on CSR alongside compliance with national laws and regulations. The aim would be to pull CSR out of the public affairs divisions, which must still address the issue, of course, and ensure that CSR is being undertaken by experts and individuals well versed in the larger issues of the societal consequences of corporate operations. Some, in other words, should form the worst-case scenario team.

We are skeptical that corporations voluntarily will create tough compliance divisions on CSR without some prodding by government. The United States Congress and the European Parliament, for starters, should examine the feasibility of mandating relevant categories of multinational corporations in their respective jurisdictions to create highly professional compliance divisions reporting directly to senior management and the board of directors on CSR compliance. These divisions also should file annual sustainability reports with ramped up federal regulatory bodies or the European Commission, as relevant,

to demonstrate good faith efforts to comply with and implement CSR objectives in corporate operations.¹⁵⁷ Corporate interests doubtless will resist any governmental mandate to create such compliance divisions, but the best way to counter such a development would be to voluntarily create such divisions and show that self-regulation actually works.

Compliance divisions should act with the independent authority that the internal affairs divisions of police departments exercise, ensuring that corporate officials and personnel perform in accordance with the corporation's upgraded internal mandates for CSR. This may appear as a harsh antidote to corporate malfeasance or avoidance of CSR principles, but the world has changed. BP's conversion of the Gulf of Mexico into a virtual sludge pit has been a wake up call to take CSR compliance seriously. Either corporations will solve the compliance imperative voluntarily and quickly, or government will need to step in with a cattle prod and compel corporations to step up to the plate of CSR compliance. This is no longer a public affairs responsibility alone; indeed, CSR is becoming a core value to corporate performance and demands the most professional and focused attention by corporate management.

Public Relations Response Mechanism. Notwithstanding our criticism of the unhealthy focus on addressing CSR through the prism of public relations, we believe public relations has a critical role to play once CSR non-compliance occurs or the worst case scenario has unfolded. The first level of compliance discussed above identifies public relations on the front end of compliance, namely, how to put out the good story of corporate compliance. But there is also the back end of the public relations role, specifically, how to respond to an alleged act of non-compliance. Given the power of the Internet and twenty-four-hour news cycle, rapid responses are critical. One should expect factually-accurate explanations that address the concerns and questions of as many constituents and stakeholders in the corporation as possible. BP's public relations performance in the Gulf of Mexico catastrophe failed on many counts and should be an instructive case study in the future to show the perils of poor public relations and communications strategies that can drive the corporation even deeper into the proverbial ditch.¹⁵⁸

157. See David Scheffer, *BP shows need for rethink of regulation*, FINANCIAL TIMES, May 28, 2010, at 11.

158. See Christopher Beam, *Oil Slick: How BP is Handling Its P.R. Disaster*, Slate Magazine, May 5, 2010, 1-3, at <http://www.slate.com/id/2253099>; Mark Sappenfield, *A Yachting Trip? The 10 Worst BP Gaffes in Gulf Oil Spill*, The Christian Science Monitor, June 20, 2010, available at <http://www.csmonitor.com/USA/2010/0620/A-yachting-trip-The-10-worst-BP-gaffes-in-Gulf-oil-spill>; Vivienne Walt, *Can BP Ever Rebuild Its Reputation?* TIME Magazine, July 19, 2010, 1-3, available at <http://www.time.com/time/business/article/0,8599,2004701.00.html>.

V.

LEVEL FIVE: COUNTERATTACK: ENTERING A NEW PHASE OF COMPLIANCE

A. The Case of Google in China

The headline in *The New York Times* on January 13, 2010, blared: “Google, Citing Cyber Attack, Threatens to Exit China.”¹⁵⁹ Several months later, after futile negotiations with the Chinese government, Google shut down its China site on March 22, 2010.¹⁶⁰ Google claimed that government attempts to control the content on the web had not only occurred in China, even though China is certainly the most polarizing example; rather, Google products had been blocked in 25 of the 100 countries where Google is operating, including countries in Europe. Thus, Google felt the need to re-formulate its policies by explicitly endorsing Article 19 of the Universal Declaration of Human Rights and clearly state: “We don’t want to engage in political censorship. This is especially true in countries like China and Vietnam that do not have democratic processes through which citizens can challenge censorship mandates.”¹⁶¹ The question remains: What motivated Google to pull out of one of the largest future markets with a prospect of more than 800 million internet users over the next 10 years?

The case of Google is emblematic of a new phase of corporate compliance. It signifies more than mere compliance with legal standards and social norms. Google seized the values of human rights and leveraged its corporate power to function as an advocate for human rights and ultimately for social change. We refer to this phenomenon as “counterattack” against governmental authority in countries of operations; other scholars refer to less provocative variations on this theme as “social innovation”¹⁶² or “human rights entrepreneurialism.”¹⁶³ Even though we recognize that the phenomenon is closely related to engines for social change, we choose to frame the concept as a matter of reinforcement of human rights at the corporate level.

The concept of counterattack indicates a proactive approach as distinguished from a merely reactive approach to compliance challenges. The

159. Andrew Jacobs et al., *Google, Citing Cyber Attack, Threatens to Exit China*, N.Y. TIMES, Jan. 13, 2010, at A1, available at <http://www.nytimes.com/2010/01/13/world/asia/13beijing.html?pagewanted=2>.

160. Miguel Helft et al., *Google Shuts China Site in Dispute Over Censorship*, N.Y. TIMES, Mar. 22, 2010, at A1, available at <http://www.nytimes.com/2010/03/23/technology/23google.html>.

161. Rachel Whetstone, The Official Google Blog, *Controversial content and free expression on the web: a refresher*, Apr. 19, 2010, <http://googleblog.blogspot.com/2010/04/controversial-content-and-free.html>.

162. JASON SAUL, SOCIAL INNOVATION INC.: 5 STRATEGIES FOR DRIVING BUSINESS GROWTH THROUGH SOCIAL CHANGE (2010).

163. RALPH G. STEINHARDT, *Corporate Responsibility and the International Law of Human Rights: The New Lex Mercatoria*, in NON-STATE ACTORS AND HUMAN RIGHTS 180 (Philip Alston ed., 2005).

underlying premise of corporate action is not only to refrain from doing any harm by complying with a minimum standard, but rather to “do good” as an integral part of a corporate business strategy. We do not claim that corporations are or should be philanthropic, non-profit organizations. Rather, we acknowledge the corporate objective of a publicly held company to maximize shareholder value. We argue, however, that, as the case of Google in China demonstrates, compliance with human rights can be an integral part of a business strategy and thus be a market incentive, rather than a non-market add-on as is usually claimed in the scholarship.¹⁶⁴

The notion that compliance is beneficial to the profitability and thus the bottom-line of a corporation is hardly new. Scholars long have argued the “business case for CSR,” namely, to make socially responsible business practices fall within Milton Friedman’s definition of a corporation’s social responsibility.¹⁶⁵ Reputational risk is mostly the angle from which the long-term profitability of socially responsible business practices is derived. Another factor is liability and legal risk, as discussed earlier in this article. For example, the situation Yahoo! confronted in 2005 fell within this category. The company struggled with difficult issues of legal compliance regarding a “hard” conflict of laws that resulted in a lawsuit under the ATS. The conflict arose between Chinese laws obliging Yahoo! to disclose user information for purposes of governmental investigation and international legal standards enshrining the right to privacy.¹⁶⁶ Adding to Yahoo!’s problems was the fact that its server hosting the user-information requested by the Chinese government was located on Chinese territory, thus making it vulnerable to governmental pressure. This included government requests to disclose personal user information at the discretion of the government and in a manner that might fall short of international human rights standards.¹⁶⁷

In contrast, Google, in order to avoid such legal obstacles, stored personal user information on servers outside of mainland China.¹⁶⁸ Even though this was an effective measure to minimize risk, Google did not rely merely upon the tactic to meet its compliance standards in countries of operation with difficult political cultures. Rather, Google extended itself beyond its corporate motto of “Do no evil” by integrating a human rights strategy into its business model, business strategy, and management decision making, particularly in emerging

164. DAVID BARON, *BUSINESS AND ITS ENVIRONMENT* 11-12, 13, 754 (Stephanie Johnson ed., Prentice Hall 2010).

165. Milton Friedman, *The Social Responsibility of Business to Increase its Profits*, N.Y. TIMES MAGAZINE, Sept. 13, 1970, available at <http://www.colorado.edu/studentgroups/libertarians/issues/friedman-soc-resp-business.html>.

166. Xiaoning et al v. Yahoo! Inc., et al., Case No. CO7-02151CW (N.D. Cal 2007).

167. Sky Canaves, *Clearing Up Confusion on Google and China*, WALL ST. J.: CHINA REALTIME REPORT BLOG, Jan. 15, 2010, <http://blogs.wsj.com/chinarealtime/2010/01/15/clearing-up-confusion-on-google-and-china/>.

168. *Id.*

markets.¹⁶⁹

B. Google Takes a Stance for Human Rights

Google announced on its corporate blog on January 12, 2010, that it is “no longer willing to continue censoring our results on Google.cn, and so over the next few weeks we will be discussing with the Chinese government the basis on which we could operate an unfiltered search engine within the law, if at all.”¹⁷⁰ David Drummond, Chief Legal Officer at Google, wrote in that blog, “We recognize that this may well mean having to shut down Google.cn, and potentially our offices in China.”¹⁷¹ Google’s “new approach to China” had been prompted by highly sophisticated cyber attacks that originated in China and targeted Google’s computer system as well as the systems of at least 20 other companies across a broad range of industry sectors, including internet, finance, technology, medical, and chemical.¹⁷² Evidence suggested that the main goal of the attacks was accessing the Gmail account of Chinese human rights activists. Google stated that investigations showed that third parties had regularly accessed accounts of American, Chinese, and European-based Gmail users who were advocating human rights in China.¹⁷³

After more than two months of unfruitful negotiations with the Chinese government that, according to Drummond, “has been crystal clear [. . .] that self-censorship is a non-negotiable legal requirement,”¹⁷⁴ Google announced on its corporate blog on March 22, 2010, that it stopped censoring its search services on its China web site Google.cn and redirected all China users to Google’s Hong Kong server, through which they can access an uncensored search in simplified Chinese.¹⁷⁵ Drummond expressed his “hope that the Chinese government respects our decision, though we are well aware that it could at any time block access to our services.”¹⁷⁶ In fact, this is what has happened; while Google’s service was temporarily interrupted when searching for sensitive information, home grown services, such as those offered by Baidu, worked just fine.¹⁷⁷ An expert on Chinese independent media confirmed, “Even

169. Google Code of Conduct, available at <http://investor.google.com/corporate/code-of-conduct.html> (last visited Nov. 14, 2010).

170. David Drummond, *A New Approach to China*, THE OFFICIAL GOOGLE BLOG, Jan. 12, 2010, <http://googleblog.blogspot.com/2010/01/new-approach-to-china.html>.

171. *Id.*

172. *Id.*

173. *Id.*

174. David Drummond, *A New Approach to China: An Update*, THE OFFICIAL GOOGLE BLOG, Mar. 22, 2010, <http://googleblog.blogspot.com/2010/03/new-approach-to-china-update.html>.

175. *Id.*

176. *Id.*

177. Kathrin Hille, *Google’s Business in China Starts to Unravel*, THE FINANCIAL TIMES, Mar. 31, 2010.

though Google has stopped censoring, people cannot get access to sensitive news” without software to “scale” the “Great Firewall,” the existence of which has never been admitted by the Chinese government but is confirmed by experts in the field.¹⁷⁸

Faced with the threat of the Chinese government not to renew Google’s license to operate in China if Google continued its current practice, Google stopped redirecting its Chinese users automatically to its Hong Kong site; rather, Google’s Chinese site, Google.cn, now requires users to click on a tab that says in Chinese, “We have moved to google.com.hk.” Users will be redirected to the Hong Kong site for web searches.¹⁷⁹ China finally renewed Google’s license after the latter stopped redirecting its users automatically to google.com.hk.¹⁸⁰ This is certainly the beginning of a protracted struggle between China and Google on the censorship issue. It remains to be seen how Google and other Internet giants such as Microsoft and Yahoo! will adapt their strategies towards China, particularly since their long-proclaimed aspirations of cooperation with the Chinese government have not been met. The Chinese government renewed Google’s license after it had been challenged openly on its censorship policy by the internet company. Whether this marks the beginning of cooperation on the part of the Chinese government remains unclear. Experts nonetheless see a shift from diplomatic efforts to a technology-focused approach that aims at finding software engineering weapons to ‘scale’ China’s ‘Great Firewall.’¹⁸¹

Many human rights advocates have praised Google for having delivered on its strong and distinctive corporate values, especially its central tenet of “don’t be evil” that is enshrined in the company’s statement of philosophy and its rules for its top management. The concept of “don’t be evil,” which the company essentially restates as not doing evil, reflects Google’s refusal to compromise the integrity of its search results. In its statement of philosophy, the company claims, “We never manipulate ranking to put our [advertising] partners higher in our search results and no one can buy better PageRank.” Google has made it clear that short-term gain would never justify breaching its users’ trust in the objectivity of its search results.¹⁸²

Google’s corporate culture and management approach has been strongly influenced and coined by its two co-founders, Sergey Brin and Larry Page. When the company went public in 2004, Google’s Initial Public Offer (IPO)

178. Jonathan Stray, *After Google’s Move, A Shift in Search Terms*, N.Y. TIMES, Mar. 28, 2010, at B9, available at <http://www.nytimes.com/2010/03/29/technology/29googletrends.html>.

179. Loretta Chao & Amir Efrati, *China Renews Google’s License*, WALL STREET JOURNAL, July 11, 2010, available at <http://online.wsj.com/article/SB10001424052748704075604575356552939507706.html>.

180. *Id.*

181. Brad Stone, *Scaling the Digital Wall in China*, N.Y. TIMES, Jan. 16, 2010, at B1, available at <http://www.nytimes.com/2010/01/16/technology/internet/16evade.html>.

182. BENJAMIN EDELMAN & THOMAS R. EISENMANN, GOOGLE INC. 17, 19 (Harvard Business Publishing 2010).

prospectus announced a dual-class equity structure that ensured “Google’s top management trio” – Brin, Page, and Schmidt – would own approximately one third of the shares but control over 80 percent of the votes. This structure protected them from replacement by investors questioning the company’s strategy.¹⁸³ The IPO prospectus included an unusual letter by Page and Brin, opening with this fuselage: “Google is not a conventional company. We do not intend to become one.”¹⁸⁴ In their letter, Page and Brin reaffirm the long-term focus of their business approach, stating, “*As a private company, we have concentrated on the long term, and this has served us well. As a public company, we will do the same.* . . . If opportunities arise that might cause us to sacrifice short-term results but are in the best long term interest of our shareholders, *we will take those opportunities.* . . . We would request that our shareholders take the long-term view.”

In their letter to shareholders, Brin and Page also made clear that Google followed the premises of “Don’t be evil[:] We believe strongly that in the long term, we will be better served – as shareholders and in all other ways – by a company that does good things for the world” and “Making the world a better place[:] We aspire to make Google an institution that makes the world a better place.”¹⁸⁵ Google’s decision to shut its China server comes as no surprise considering its corporate values and unconventional management approaches. The evidence strongly suggests that Google’s decision regarding the censorship issue in China traces back to its founders, particularly Brin, who is sensitive to political and social issues in oppressive regimes as he and his family personally experienced repressive policies under the communist regime in the former Soviet Union.¹⁸⁶

However, China is not the only situation where Google registered criticism against stifling political dissent with cyber attacks. Following Google’s public dispute with China over Internet censorship, Google’s security team pointed to Vietnam on March 30, 2010, accusing the country of using malicious software for political ends. After investigating the attacks, the computer security firm McAfee confirmed that the perpetrators may have political motivations and may have some allegiance to the government of the Socialist Republic of Vietnam.¹⁸⁷ On its corporate blog, Google stood by its corporate values, once again stating: “We believe that malware is a general threat to the Internet, but it

183. *Id.* at 5.

184. Larry Page and Sergey Brin, *Letter from the Founders: ‘An Owner’s Manual’ for Google Shareholders*, GOOGLE INC., FORM S-1 REGISTRATION, Apr. 29, 2004.

185. *Id.*

186. Jessica E. Vascellaro, *Brin Drove Google to Pull Back in China*, WALL ST. J., Mar. 25, 2010, at A1, available at <http://online.wsj.com/article/SB10001424052748704266504575141064259998090.html>.

187. George Kurtz, *Vietnamese Speakers Targeted in Cyberattack*, MCAFEE SECURITY INSIGHTS BLOG, Mar. 30, 2010, <http://siblog.mcafee.com/cto/vietnamese-speakers-targeted-in-cyberattack/>.

is especially harmful when it is used to suppress opinions of dissent.”¹⁸⁸ The respective malware targeted tens of thousands of Vietnamese computer users all around the world who downloaded Vietnamese keyboard language software. Even though, according to Google’s security team, this attack was less sophisticated than the ones recently carried out in China, the “infected machines have been used both to spy on their owners as well as participate in distributed denial of service . . . attacks against blogs containing messages of political dissent.”¹⁸⁹

Specifically, the attacks targeted activists engaged in opposition to mining and extractive industries in Vietnam. Such economic activity raises fears among the local Vietnamese public of major environmental damage and, since the project would be carried out in cooperation with a Chinese state-run company, the public also fears that Chinese workers would flood into sensitive regions of Vietnam. Unlike the situation in China, the incidents related to Vietnam have not been addressed by Google’s top management; rather, the company’s online security team has addressed them. Regardless of where the action is in Google management, the corporation has begun to demonstrate a systemic pattern of resistance against governments impeding freedom of speech, thus delivering on its promise to “take cyber security seriously and help keep free opinion flowing.”¹⁹⁰

C. The Stakes are High for Google

So what was at stake for Google when it contemplated leaving the Chinese market with its search engine? Even though Google does not publicly break down its revenues by country, estimates suggest that Google’s China revenue last year was about \$300 million, admittedly a tiny fraction of about \$22 billion worldwide revenue in 2008.¹⁹¹ With its market share of thirty-three percent in Internet searches, Google trails its main homegrown Chinese competitor Baidu, which holds sixty-three percent of the market share.¹⁹² In light of these numbers, some financial experts rebut praise by human rights advocates for Google’s move to defy Chinese censorship; they claim that Google in fact failed in China and did not have much to lose with regard to revenues.

These statements, however, run the risk of being considered shortsighted with regard to the potential market-share growth in China. This is especially true for the Internet service sector since China already has more internet users than

188. Google Inc., *The Chilling Effects of Malware*, GOOGLE ONLINE SECURITY BLOG, Mar. 30, 2010, <http://googleonlinesecurity.blogspot.com/2010/03/chilling-effects-of-malware.html>.

189. *Id.*

190. *Id.*

191. Miguel Helft, *For Google, A Threat to China With Little Revenue at Stake*, N.Y. TIMES, Jan. 15, 2010, at A10, available at <http://www.nytimes.com/2010/01/15/world/asia/15google.html>.

192. David Barboza, *China, Where U.S. Internet Companies Often Fail*, N.Y. TIMES, Jan. 16, 2010, at B1, available at <http://www.nytimes.com/2010/01/16/technology/16failure.html>.

any other country, respectively 384 million according to the latest statistics, with the potential to grow to 840 million, or 61 percent of the country's population, by 2013.¹⁹³ By potentially sacrificing the largest internet market in the world with potential of further growth, Google's management decision in China might seem surprising from a purely financial point of view. However, the decision is aligned with Google's core value of "don't be evil," to confront the manipulation of its search results and interference with the free flow of information. Management must have concluded that this approach will serve its shareholders best in the long run.

Moreover, Google has not abandoned all of its business ventures in China. According to Google's Corporate Blog on March 22, 2010, the corporation's China office is still operating (with a research, development, and sales presence).¹⁹⁴ Eric Schmidt emphasized at the World Economic Forum in Davos, Switzerland, last January, "We like what China is doing in terms of growth. . . . We just don't like censorship."¹⁹⁵ Google's decision on China may well have been driven by its long-term vision with an eye on other key markets, particularly Europe, where Google's operations are of much larger scale according to market share and revenue. In Britain alone, Google has about ten times the advertising sales as it does in China. If Google had continued to self-censor its search results in China, that business practice likely would have set a bad precedent that might have increased public and legal scrutiny in Europe. By defying China with regard to the censorship issue, Google has had an opportunity to show its goodwill to its customers, civil society, and governments that it is not intending to abuse its dominant market position in any way. Certainly, Google's policies in China do not have any discernible legal impact on issues that the company is facing in Europe,¹⁹⁶ but it has an enormous impact on the public perception of its operations and brand name by people (the primary users) and by their governments.

D. The Strategic Importance of the 'Google Case'

1. Deriving Business Value through Knowledge Flow

Google's stated core business mission is to "organize the world's

193. See Canaves, *supra* note 162; Michael Forsythe, *Google Searches for Tiananmen, Hu's Son Still Blocked*, BLOOMBERG BUSINESS WEEK, March 23, 2010, <http://www.businessweek.com/news/2010-03-23/google-searches-for-tiananmen-hu-s-son-still-blocked-in-china.html>.

194. See Drummond, *supra* note 170.

195. Rebecca Blumenstein & Alan Murray, *Google's Eric Schmidt: 'We'd Very Much Like to Stay in China'*, WALL ST. J., Jan. 29, 2010, available at <http://blogs.wsj.com/davos/2010/01/29/googles-eric-schmidt-comments-on-china/tab/article/>.

196. For example, there is the risk of antitrust actions and law suits for intermediary liability as a media company that is 'editing' information and not simply functioning as a conduit anymore.

information”¹⁹⁷ and to “facilitate access to information for the entire world.”¹⁹⁸ This motivated Google’s management to enter the Chinese market in 2006 and pull out of it in March 2010. As Drummond reflected, “[W]e launched Google.cn . . . in the belief that the benefits of increased access to information for people in China and a more open Internet outweighed our discomfort in agreeing to censor some results.”¹⁹⁹ Freedom of expression is central to Google’s business model and its economic success; rather than being an externality or a non-market issue, freedom of expression as a human rights issue is at the heart of the business of Google and other companies in the information and communications sector. As Clay Shirky, an expert on the Internet’s social effects, puts it: “Google [isn’t] exporting . . . a product or a service, it’s [exporting] a freedom.”²⁰⁰ The continuous infringements of freedom of expression through the Chinese government’s insistence on self-censorship of politically-sensitive information not only exposed Google to the scrutiny of human rights advocates and civil society, but also put the company at odds with its core business mission to provide wide access to information and enhance information flows.

Granted, Google may seem peculiar with regard to its governance structure, its corporate values, and its “unconventional approaches for managing innovation.”²⁰¹ However, it is also emblematic for a new business approach which lives up to the demands of a modern global economy that is well-connected through various channels of communication and where the creation of business value and strategic advantage lies in the “effective participation in knowledge flows” rather than extracting and protecting “knowledge stocks.”²⁰² It is not only crucial for companies from the information and communication sector to seek to protect freedom of expression on a global scale; this is true for companies in all other industry sectors as well. The free flow of information has become essential to creating and capturing business value across the spectrum of commerce in the 21st century. Anne-Marie Slaughter correctly argues that “the [new] measure of power is connectedness” in diplomacy, business, and society as a whole.²⁰³

2. The Centrality of Privacy

Another human rights-related issue is pivotal to Google’s business, namely,

197. See Edelman, *supra* note 182, at 13.

198. *Id.*

199. See Drummond, *supra* note 164.

200. Mark Landler, *Google Searches for a Foreign Policy*, N.Y. TIMES, Mar. 26, 2010, at 4..

201. See Edelman, *supra* note 182, at 6.

202. John Hagel III et al., *Measuring the Forces of Long-Term Change: The 2009 Shift Index*, Deloitte Center for the Edge 9 (2009).

203. Anne-Marie Slaughter, *America’s Edge: Power in the Networked Century*, 88 FOREIGN AFFAIRS 94 (2009).

the protection of the privacy of its users. Google's business is based on "open networks, free information flows, and the company's perceived right to manage those flows. That right in turn is a function of Google's credibility and trustworthiness."²⁰⁴ Trustworthiness and the protection of user privacy are closely tied to Google's brand image and thus its business success. This is particularly true considering that Google collects details of user searches and in many instances the search results that users clicked for an indefinite period of time.²⁰⁵ Asked in an interview with CNBC's Mario Bartiromo whether people should "treat . . . Google like their most trusted friend," Eric Schmidt, CEO of Google, replied that, "If you don't want anybody to know about it, you should perhaps not do it in the first place."²⁰⁶ Whether putting responsibility primarily on its customers to protect their own interest in and right to privacy will be sufficient for Google and other service providers to gain and maintain the trust of their customer base, is questionable.

The challenge for Google will be to prove to its users that they can trust Google now and, considering the unlimited storage of user search history, for the indefinite future. This is a high bar and requires an extraordinary form of almost super-compliance fortified by a proactive policy of "counter-attack." Against this backdrop, it might have been a greater risk for Google's business on a global scale *not* to exit China earlier this year. Arthur Kroeber, an expert on the Chinese economy and its impact on regional and global markets, reaffirmed this thesis, concluding, "If Google loses its customer's trust, it has no business – anywhere."²⁰⁷

The impact of these risks related to infringements of internet privacy will be even more exacerbated by the latest developments on cloud computing – a form of external storage of user-sensitive data that is being promoted by Microsoft but being considered at Google as well.²⁰⁸ Following through on this model of external data storage requires a solid basis of trust between service providers such as Google and its users in order to persuade the latter to store sensitive personal data in the "cloud" as opposed to one's personal hard drive; the risks of privacy violations are exponential for users. Thus, extraordinary measures are required for companies such as Google to gain the level of trust with customers in order to rely upon their business as the company enters these

204. Arthur Kroeber, *Why Google risks more by not exiting china*, THE FINANCIAL TIMES, Jan. 19, 2010.

205. See Edelman, *supra* note 182, at 7-8. Google keeps full search logs for 18 months and anonymizes logs after that, i.e. search histories cannot be traced back anymore to specific IP-addresses.

206. *Google CEO on Privacy (VIDEO): 'If You Have Something You Don't Want Anyone To Know, Maybe You Shouldn't Be Doing It.'* HUFFINGTON POST, Dec. 7, 2009, http://www.huffingtonpost.com/2009/12/07/google-ceo-on-privacy-if_n_383105.html.

207. Canaves, *supra* note 167.

208. Mike Harvey, *Microsoft moves into 'cloud' computing*. TIMESONLINE, May 12, 2010, http://business.timesonline.co.uk/tol/business/industry_sectors/technology/article7124530.ece.

new markets. Pulling out of China in the wake of persistent violations of its users' privacy can strengthen those bonds of trust.

3. Cyberspace as the "Railroads" of the 21st Century

Google's experience in China has wider impact for the information security of companies from all industry sectors. As mentioned above, in addition to Google, at least twenty companies across various industry sectors, including finance, technology, medical and chemical, have been targeted by Chinese cyber attacks.²⁰⁹ Invoking John Hagel's "big shift"²¹⁰ towards knowledge flows as the key strategic advantage of modern day business, we would emphasize that the centrality of cyberspace for all multinational corporations as users of software, services, and platforms is a modern reality. While privacy protection of its customers is pivotal for Google to perform its business mission of organizing and managing information flows, secure channels of information are no less important for all companies to achieve their core business missions. Freedom of expression is a foundational concept in deriving business value and it is applicable beyond the information and communication sector to a broad range of other industries.

There are numerous industries that thrive with the free-flow of information, even though information does not pertain to their core business mission, as is the case for information and communications companies. One example is the financial sector, where the free flow of information is crucial in order to ensure efficient markets, gain transparency in pricing of financial products, and buy and sell with low transaction costs. Once service providers such as Google, Microsoft, or Yahoo! come under attack, the fall-out can reverberate though the entire corporate landscape. Peter Navarro, author of *The Coming China Wars*,²¹¹ observes that "this is not only a Google story. It is a story about industrial espionage, coming from China, attacking American business and our economy."²¹² In his view, the target of the cyber attacks were industry secrets including corporate intellectual property that would give Chinese enterprises a competitive advantage over their American counterparts.²¹³

If industrial espionage was the main motive, then the centrality of privacy for all corporate sectors is underscored. First, privacy plays an integral role in the relationship among industrial players. Lack of privacy protections in the form of intellectual property rights or trade secrets for corporations portends the

209. See Drummond, *supra* note 164.

210. See Hagel, *supra* note 202, at 2-3.

211. PETER NAVARRO, THE COMING CHINA WARS, WHERE THEY WILL BE FOUGHT AND HOW THEY CAN BE WON (2007).

212. *Google Not Only Target of China Hackers*, CBS NEWS, Jan. 24, 2010, <http://www.cbsnews.com/stories/2010/01/24/eveningnews/main6137395.shtml> (citing Peter Navarro).

213. *Id.*

risk of significant destruction of corporate value. Second, the centrality of privacy is implicated in the interaction between various industries and their consumers. As more personal data is moved into the “cloud,” all industries will utilize cyberspace in some manner to interact with their customers. For example, medical records of the future in the “cloud” could beneficially serve as a single source of health information but that will require a counterattack effort much more proactive than the effort used to engender enough trust to record one’s searches and clicks.

We would liken the internet servers as the railroads of the 21st century, similar in importance as the laying of railroad track across the United States in the 19th Century, an endeavor that vastly expanded the American economy and its population’s social mobility. An attack on Google would rip apart this generation’s modern railroads; attack Google, Microsoft, and Yahoo! and the impact on commerce generally would be enormous, if not catastrophic. The challenge is how to prevent the virtual dismantlement of these “railroads” of the 21st century. A proactive counterattack may become increasingly necessary to protect freedom of expression and privacy.

This fifth level of compliance is different from the reactionary compliance levels of Levels One through Four. We conclude that a counterattack is not only necessary to protect human rights but also to protect a corporation’s ability to perform its core business mission and ensure long term profitability of the industry and business in general. As Secretary of State Hillary Clinton pronounced in the wake of Google’s recent struggle with China, networks and a free flow of information are just too important, and the U.S. “stand[s] for a single internet where all of humanity has equal access to knowledge and ideas.”²¹⁴ The counterattack theory is also a useful theory with regard to other enterprises, and not only those in the information and communications industry. The objective underpinning the fifth level of corporate compliance is to prevent foreign governments from using their own violations of international law – particularly regarding human rights – to obstruct global commerce. There might be other ways to construct a counterattack strategy, but the case of Google illustrates a bold, forward-thinking way to conduct global business.

4. Conflicting Views on Privacy and a Convergence of Markets

An examination of the European experience reaffirms the value of the counterattack strategy. *The New York Times* reported on February 1, 2010, that Google might have a problem in China, “but it may have bigger headaches in Europe.”²¹⁵ Google dominates the European market in web searches with 80

214. Hillary Rodham Clinton, US Secretary of State, U.S. Dep’t of State, Remarks on Internet Freedom, Jan. 21, 2010, available at <http://www.state.gov/secretary/rm/2010/01/135519.htm>.

215. Eric Pfanner, *In Europe, Challenges for Google*, N. Y. TIMES, Feb. 1, 2010, at B1, available at <http://www.nytimes.com/2010/02/02/technology/companies/02google.html>.

percent of the market share.²¹⁶ Google's scale of operations raises serious concerns with some European politicians, in particular in Germany and Italy. Sabine Leutheusser-Schnarrenberger, the German Minister of Justice, said in an interview with the magazine *Der Spiegel*, "On the whole, I see a giant monopoly developing, largely unnoticed, similar to Microsoft."²¹⁷ A statement such as this might heighten fears in American boardrooms, since it reflects upon the antitrust cases against Microsoft in Europe in recent years that resulted in unprecedented monetary fines and significant changes in Microsoft's business strategy, as imposed by the European Commission's Director General for Competition and Antitrust.²¹⁸

However, under Article 102 of the Treaty on the Functioning of the European Union, a dominant market share is not a sufficient cause for an antitrust action by the European Commission; rather, it must be shown that a company is abusing its dominant market position with the aim to eliminate competitors. In this context, it might have been a bigger risk for Google not to exit China and publicly show its commitment to privacy and freedom of expression. Public perception can be as important as legal analysis. Google seized the opportunity to deliver on its core corporate value of doing no evil. The company reinforced the trustworthiness of its customers and potentially the support of politicians, some of whom are concerned that Google might abuse its dominant position while others are sincerely committed to the protection of human rights and freedom of expression.

The most immediate challenge Google has faced in Italy occurred when four of Google's executives were sentenced by a court in Milan, Italy, for privacy violations in a case involving a video that was posted by a third party on one of Google's websites.²¹⁹ The film showed the bullying of a boy with autism. The case struck at the heart of Google's identity and corresponding responsibility. Google insists that it is not a media company and is not interested in owning or creating content; rather, it claims to be merely organizing and managing information and making it accessible to the public. It thus claims no editorial control over the content posted on its sites and platforms and thus no legal responsibility for such content.²²⁰

216. *See id.* Although Yahoo and Bing offer modest competition for Google in the United States, both are almost nonexistent in Europe, with less than 2 % market share each.

217. *See id.* Google's stake in the European market is tremendous; thus, for example German newspaper and magazine publishers generate about 100 million Euros a year from advertising, while Google earns an estimated 1.2 billion Euros from search advertising only in Germany.

218. *Id.; see also Antitrust: Commission imposes € 899 million penalty on Microsoft for non-compliance with March 2004 Decision*, IP/08/318, Feb. 27, 2008.

219. Karin Retzer and Teresa Basile, *Morrison & Foerster LLP, Practice Note: Milan Court Finds Google Executives Criminally Liable: Why the Ruling is Controversial*, May 14, 2010 (on file with authors).

220. David Carr, *Not Creating Content. Just Protecting it*, N.Y. TIMES, Mar. 28, 2010, at B1, available at <http://www.nytimes.com/2010/03/29/business/media/29carr.html>.

The Italian court disagreed both on factual grounds and on the merits. It held that Google could not be considered merely a conduit for other people's information, particularly given the more active stance that Google increasingly has taken in disseminating information. Thus, the court held that since Google monitors and censors its search results in China, it should be expected to comply with legal standards in Italy.²²¹ This vividly illustrates how in times of globalized business operations, a company's business strategy in one market might affect the standard against which the company is measured in other markets and jurisdictions.

Moreover, Google is engaged in more than mere search operations. Its search results are organized based on fine-tuned search algorithms that support a highly lucrative advertising model through paid listings on search result pages.²²² Whereas in the past, advertisers competed vigorously for high positions on search-result pages, spurring high payments to service providers, Google took a more constructive and active approach by increasing bids "by the ratio of an ad's *actual* click-through rate (CTR) to its *expected* CTR (based on Google's predictions)."²²³ Andrew Lih, an expert on the news media, noted that, "When Google indexes the Web and returns content in the context of who they rank first, their claims aside, they inherently become a media company."²²⁴

Even though Google's core business is web search and paid listings, it also has been expanding its product line beyond mere web searches. In one of its latest projects called "StreetView," Google takes pictures of storefronts and homes and organizes them in a new mapping service.²²⁵ Projects of such character where Google gathers and disseminates information clearly point towards Google becoming a full-fledged media company rather than a mere conduit of information. Considering the nature of its core services and especially the expansion into these new domains, it will be difficult for Google to claim credibly that it is not a media company with all the responsibilities of monitoring that professional media coverage entails.

Underlying this conflict of Google with the European law of privacy are colliding American and European views on privacy rights. James Whiteman, an authority of the development of legal traditions, captures this tension stating that there are "two western cultures of privacy: dignity versus liberty."²²⁶ Whereas privacy is framed as a human-dignity right in Europe, it is enforced as a

221. *Id.*

222. See Edelman, *supra* note 182, at 2-3.

223. *Id.* at 3.

224. See Carr, *supra* note 220.

225. Adam Liptak, *When American and European Ideas of Privacy Collide*, N.Y. TIMES, Feb. 26, 2010, at WK1, available at <http://www.nytimes.com/2010/02/28/weekinreview/28liptak.html>.

226. James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151 (2004).

consumer-protection right in the United States.²²⁷ When balancing privacy against freedom of speech, Italian courts confirmed that privacy comes first in Europe. Thus, the European commitment to privacy challenges the American notion of free expression and the free flow of information. Privacy in American jurisprudence is an aspect of liberty and protection against government interference into a person's personal sphere, particularly the home.

The continental notion of privacy protection focuses on protecting people from having their lives exposed to the public eye, particularly in the mass media. It is a matter of different prioritization that rests in different historical backgrounds; the privacy protection in modern European law stems from the experiences of the public who were exposed to surveillance and blackmail by the secret police in totalitarian regimes.²²⁸ In contrast, for Americans the prominence of freedom of speech goes back to revolutionary times and the founding of the republic after the British government censored and controlled the press in the colonies.²²⁹ Certainly, both freedom of speech and respect for privacy are an integral part of both European and American legal culture. But the respective limits of these rights are construed differently.

In sum, the legal scope even of fundamental principles can diverge significantly between European countries and the United States, not to mention with regard to emerging markets such as China or Bangladesh. This legal uncertainty makes it a complex and perhaps impossible undertaking for multinational corporations to ensure that their business decisions are in compliance with all legal standards in all countries of operations. Rather, the field of compliance has become infiltrated with strategic management strategies that might require a multinational corporation to trade some key markets in order to ensure compliance in another key market. As the case of Google demonstrates, the nature of corporations as global entities with global brand images to cultivate might require such trade-offs in order to preserve the long-term success of the corporate brand.

VI. CONCLUSION

The five levels of corporate compliance with CSR principles co-exist with each other in a commercial environment that can be merciless to multinational corporations refusing to embrace the ever-changing demands of modern society. Ideally, a corporation's rhetorical deference to CSR joins hands with self-regulation to create a shield against the risk of litigation. In the event litigation ensues, there are compliance strategies to manage and minimize reputational and

227. See Liptak, *supra* note 225.

228. *Id.* Examples would include the Gestapo in Nazi Germany and the Stasi in the Democratic Republic of Germany.

229. *Id.*

settlement risks. The doctrine of corporate liability under the ATS has been severely and, in 2009 and 2010, successfully challenged in some federal courts. Novel interpretations of aiding and abetting and of the range of tortfeasors under the ATS essentially remove corporations from the net of ATS liability. Our lengthy treatment of ATS risks under the third level of compliance arises from our deep concern that the Second Circuit, in particular, has fundamentally misunderstood what constitutes customary international law under, and misinterpreted Articles 25 and 30 of, the Rome Statute of the ICC, as well as confused what law to apply to tortfeasors under the ATS. The Second Circuit has undermined the long-developed line of precedents that holds corporations accountable to human rights principles under the ATS.

Nevertheless, additional risks arise regardless of the success or failure of ATS litigation, including the discovery of inferred intent in the act of aiding and abetting, perhaps in such a manner as to transform the corporation's role from an act of complicity to more direct participation in the commission of the atrocity crime. There are also growing incentives to sue or prosecute top executives for corporate conduct leading to atrocity crimes if the ATS is no longer available for civil actions against corporations.

We also developed the fifth level of compliance as a major focus of our analysis. The "counterattack" doctrine of the fifth level is admittedly provocative and open to deep skepticism. We anticipate "realists" and free market advocates to weigh in with cynical comments about the overly optimistic character of the fifth level's focus on protection of human rights. So we wish to make the following points as a means of challenging the cynics.

We have tried to demonstrate that multinational corporations have an incentive to make human rights and other CSR compliance issues an integral part of the business strategy because in our view, the human rights agenda will become a core function of corporations in the 21st Century. Taking compliance initiatives on CSR, and particularly human rights, over the years will benefit shareholders and commerce in general. The modern corporation will find reason to act both in its own self-interest and in the best interests of society.

The classic business case for CSR focuses on reputational risk and marketing the corporate engagement on CSR into a brand name. The fifth level of compliance has a different goal. The example of Google is one where a powerful corporation's CEO and board of directors sought to advance human rights protections as a cause of independent merit. The Google experience suggests a new paradigm for the business case for CSR. The corporation becomes not simply an advocate for human rights but also the operative champion for the cause that steers the corporation deeply into the realm of human rights and social rights. The traditional business case for CSR thus is transformed and strengthened because the new paradigm reinforces the corporation's self-interest in human rights protection as a core function of a successful global strategy and ultimately of global business generally.

In the fifth level of compliance, the corporation embraces and implements a

stakeholder-sensitive strategy as an indispensable part of the corporation's objectives and hence constructs a corresponding business model for the future. We believe the recent Google experience in China and Vietnam offers significant clues as to what that brave new world will look like in the months and years ahead – a proactive engagement by corporations in the toughest human rights issues of our time because it is good business to defend those rights.

