

The background of the entire page is a photograph of a yellow excavator with a hydraulic breaker attachment demolishing a multi-story concrete building. The scene is filled with dust and debris, suggesting a recent or ongoing demolition. The excavator's arm is the central focus, reaching up into the structure of the building. The sky is a pale, hazy blue.

# **Principles and Mechanisms to Hold Business Accountable for Human Rights Abuses**

**Potential Avenues to Challenge  
Corporate Involvement in Israel's  
Oppression of the Palestinian People**

**Working Paper No. 11**  
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**by Yasmine Gado**  
Attorney



BADIL Resource Center  
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### **Yasmine Gado**

Principles and Mechanisms to Hold Business Accountable for Human Rights Abuses. Potential Avenues to Challenge Corporate Involvement In Israel's Oppression of the Palestinian People

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**Yasmine Gado:** Yasmine practiced corporate law in the New York office of Latham & Watkins and the Washington, D.C. office of Fried Frank. She also served as in-house counsel for the Export-Import Bank of the United States. She received her law degree with honors from George Washington University Law School and her undergraduate degree from Washington University. She currently lives in Amman where she is devoting her time to researching and writing on issues related to Palestine and human rights, including consultancy for human rights organizations such as Badil.

### **Credits & Notations**

This paper was prepared as a resource for the Palestinian civil society-led Campaign for Boycotts, Divestment and Sanctions (BDS) against Israel until it abides by its obligations under international law and all those engaged in efforts to end impunity for egregious human rights abuses.

BADIL working papers provide a means for BADIL staff, partners, experts, practitioners and interns to publish research relevant to durable solutions and reparations for Palestinian refugees and IDPs as part of a just and permanent solution of the Palestinian/Arab-Israeli conflict. Working papers do not necessarily reflect the views of BADIL.

**Cover photo:** Caterpillar and Volvo machines used in carrying out an Israeli demolition of a Palestinian home in Sur Baher, Jerusalem - 2007. Photo courtesy of ActiveStills

BADIL Resource Center  
for Palestinian Residency and Refugee Rights

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P.O.Box: 728, Bethlehem, Palestine  
Tel: 970-2-277-7086  
Fax: 970-2-274-7346  
E-mail: [info@badil.org](mailto:info@badil.org)  
Website: [www.badil.org](http://www.badil.org)

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# Introduction

One of the most important legal challenges today is the battle to hold transnational corporations (TNCs) accountable for their involvement in human rights violations.<sup>1</sup> Efforts are currently being made by a variety of actors in what is referred to as the corporate social responsibility (CSR) movement. At the national level, governments are increasingly including social considerations in their regulation of corporations and lawyers are using civil litigation to seek redress for victims of corporate-related human rights abuses. At the international level, corporate officials (and potentially corporations) may be held liable for complicity in international crimes, and the United Nations Human Rights Council is leading the development of a set of non-binding guiding principles for companies to ensure respect for human rights.

Activists are using a range of tactics to advance corporate accountability, including media campaigns, local campaigns to organize workers and consumers, lobbying for legislative reform and shareholder activism.<sup>2</sup> Socially responsible institutional investors also are exerting pressure through the adoption of ethical guidelines that exclude investment in corporations that fail to respect human rights. Workers and unions can potentially be a particularly potent force by virtue of their central role in the physical aspects of commerce, including the production and transport of goods. While the resources of these companies are vast and they are largely immune to democratic processes, gains are being made as corporate management responds to the cumulative impact of these efforts.

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- 1 Transnational corporations, also known as multinational corporations or MNCs, are companies that are incorporated in one state and operate in one or more others. This paper uses the terms TNC, company and business interchangeably to describe these corporations. The terms "human rights violations" and "human rights abuses" include but are not limited to acts by governmental or private actors of crimes against humanity and war crimes, including genocide, arbitrary arrest and detention, slavery, torture, cruel inhuman and degrading treatment, rape and extrajudicial execution, among others.
  - 2 See Jennifer Green and Beth Stephens, *Commentary: Human Rights Litigation and the Corporate Accountability Movement* 1 (Sep. 2008), available at <http://198.170.85.29/Jennifer-Green-and-Beth-Stephens-commentary.pdf>.

The mechanisms available within the existing legal and economic framework to advance corporate accountability for human rights abuses, and for their conduct in other areas of social concern, generally fall into three categories: (1) *domestic law*: regulation and litigation under state domestic legal systems; (2) *international law*: binding international law governing corporate complicity in international crimes and non-binding international norms on the issue of business and human rights; and (3) *market forces*: socially responsible investment funds, shareholder activism, consumer boycotts, etc. This article summarizes the latest developments in each of these areas. The discussion on domestic law will cover U.S. law; however, several recent surveys compare the laws of different domestic legal systems in the area of corporate accountability for human rights violations.<sup>3</sup>

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3 The International Commission of Jurists convened an expert legal panel which issued a report in September 2008 in three volumes: *Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes* (hereafter, "ICJ Report"), with Volume 3 devoted to the comparative law of domestic civil liability and the ways in which civil liability may arise in various jurisdictions for companies and/or their officials when they are complicit in gross human rights abuses, *available at* [http://icj.org/IMG/Volume\\_3.pdf](http://icj.org/IMG/Volume_3.pdf). In addition, a research team at Oxford University prepared a comprehensive survey of the laws of 13 jurisdictions summarizing obstacles to corporate accountability under various domestic legal systems, *Obstacles to Justice and Redress for Victims of Corporate Human Rights Abuse*, Oxford Pro Bono Publico (Nov. 3, 2008) (hereafter, "*Obstacles to Justice*"), *available at* <http://www.reports-and-materials.org/Oxford-Pro-Bono-Publico-submission-to-Ruggie-3-Nov-08.pdf>. An earlier study is the 2006 report *Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law – A Survey of Sixteen Countries* (hereafter, "*Commerce, Crime and Conflict*") by Anita Ramasastry and Robert C. Thompson, published by the FAFO Institute of Applied International Studies, Oslo, *available at* <http://www.fafon.no/pub/rapp/536/536.pdf>.

# I. Domestic Law: Regulation of Corporations under U.S. Law

Transnational corporations arguably account for one-fourth of the U.S. economy.<sup>4</sup> The U.S. serves as the headquarters for the greatest number of Fortune Global 500 companies in the world including 28 of the top 100.<sup>5</sup> Thus, the U.S. is a highly relevant jurisdiction for a discussion of corporate accountability.

In the United States, corporations are incorporated under state law and subject to state corporate governance rules. In addition, corporations are regulated under federal statutes that, among other things, impose disclosure requirements, allow for (limited) shareholder input into the formulation of corporate policy and impose criminal liability for certain proscribed acts. Civil tort liability may arise where a corporation's actions result in harm for which state or federal law provides a remedy. The relevance of these laws and regulations to corporate actions that affect human rights is discussed below.

## 1. Corporate Governance Rules

In the United States, the principles of corporate governance and duties of management is the province of state law, and were traditionally designed to provide accountability to shareholders and only shareholders.<sup>6</sup> However,

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4 As of March, 2009, U.S. parent companies of multinationals account for nearly 25 percent of all private-sector output (measured in terms of gross domestic product), or more than \$2.5 trillion. Matthew J. Slaughter, *How Mult-nationals Strengthen the US Economy* (Spring 2009).

5 Measured as of July 2009. <http://money.cnn.com/magazines/fortune/global500/2009/countries/US.html>

6 See Williams and Conley, *Is There An Emerging Fiduciary Duty to Consider Human Rights?*, 74 U. Cinn. L. Rev. 75 (2005) (hereafter, "*An Emerging Fiduciary Duty?*"), available at <http://www.law.uc.edu/current/experiences/publications/docs/0075williamsconley.pdf>. In *Dodge v. Ford Motor Co.*, 204 Mich. 459 (Mi 1919), the court held that Ford's withholding of dividends in order to enact socially beneficial policies was a breach of fiduciary duty. However, directors' freedom to act for the public welfare later expanded provided the ultimate goal of the contribution was to benefit the corporation and make a profit.

corporate management has always by necessity taken into consideration the needs of other stakeholders, such as employees, consumers, communities, etc. It has been argued that over the last decade there has evolved a duty on the part of officers and directors of U.S. corporations to consider the effects of their decisions on human rights as part of their duties to *shareholders*, due mainly to the risks of litigation under the Alien Tort Claims Act (discussed in Section 5.1 below), negative publicity, consumer boycotts, and divestment by institutional investors (discussed in Part III), and a growing importance of international norms, or “soft law,” in setting standards for corporate behavior (discussed in Part II).<sup>7</sup> The risk of international criminal liability for corporate officials and the corporate entity is another consideration, although corporate lawyers currently do not give it much weight in comparison to civil liability.<sup>8</sup>

## 1.1 Fiduciary Duties of Management

Under U.S. state law, corporate directors owe the corporation and its shareholders “fiduciary duties,” – that is, duties of trust, loyalty, care and good faith. The duty of care requires generally that before making a decision directors inform themselves of all material facts and give the matter due deliberation, that they perform their functions in good faith in the manner they believe is in the best interests of the corporation, with the care an ordinarily prudent person would be expected to exercise in a similar situation.<sup>9</sup> The duty of loyalty requires that directors act in the best interest of the corporation and its shareholders and refrain from using their positions to further personal gain.<sup>10</sup> Under the “business judgment rule,” courts presume that business judgments are made in an informed and prudent manner and give them great deference, unless the duties of care or loyalty are breached.<sup>11</sup> In effect, directors risk personal liability for breach of fiduciary duty if they act in bad faith or are grossly negligent, via shareholder derivative suits (a suit brought by a shareholder on behalf of the corporation in which any recovery goes to the corporation) or direct lawsuits by shareholders.

To fulfill the duties of care and good faith, corporate directors must not condone or approve illegal activity and must exercise oversight in areas that potentially

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7 *Id.* at 77; but see Fried Frank, *Trends in the Use of Corporate Law and Shareholder Activism to Increase Corporate Responsibility and Accountability for Human Rights* 1 (2007) (“Currently ... state law fiduciary duty standards do not compel corporate Boards of Directors to act in furtherance of international human rights”).

8 ICJ Report, Vol. 3 at 5.

9 *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985).

10 *Guth v. Loft*, 23 Del. Ch. 255, 5 A.2d 503, 510 (Del. 1939).

11 *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1983).



expose the corporation to liability to ensure violations do not occur.<sup>12</sup> Liability risks must be monitored via “a reasonable information and reporting system” designed to detect illegal behavior, and policies must be established to ensure legal compliance.<sup>13</sup> Because of the increasing risks arising from involvement in human rights abuses and other social risks, most large corporations now have CSR officers and departments that provide oversight on liability risks arising from human rights abuses and other social impacts, that report on and assess such risks, and establish policies to prevent conditions in which they are likely to arise.<sup>14</sup>

If a fiduciary duty to consider human rights has in effect been established through the risk of litigation and pressure by market participants over corporate human rights abuses, the risk of personal liability for breach of fiduciary duty, while relatively low,<sup>15</sup> still creates incentives for management to take human rights seriously.

## 2. Shareholder Proposals under Federal Securities Law

Apart from litigation, eligible<sup>16</sup> shareholders of public companies may also influence management’s decisions by submitting shareholder proposals in the form of resolutions for consideration at the corporation’s annual meeting, either individually or with a group of other shareholders. Management is required to include the shareholder proposal in its proxy materials (documents used to solicit shareholder votes on corporate actions) unless the corporation receives authorization from the U.S. Securities and Exchange Commission (SEC) to omit it.

Management is permitted to exclude a shareholder proposal for several reasons, including if the proposal is inconsistent with centralized management, i.e. interferes

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12 *In re Caremark Derivative Litig.*, 698 A. 2d 959, 971 (Del. 1996) (“a sustained or systematic failure of the board to exercise oversight – such as an utter failure to attempt to assure a reasonable information and reporting system exists – will establish the lack of good faith that is a necessary precondition to liability”).

13 *Id.*

14 See *An Emerging Fiduciary Duty?*, *supra* note 6, at 81.

15 See *id.* at 89-90 (noting the combination of indemnification of directors, insurance for directors and officers, and the business judgment rule makes the risk of personal liability negligible assuming decisions are made *in good faith*).

16 Under federal regulations applicable to public companies, a shareholder who has owned at least \$2,000 worth of stock or 1% of a company’s outstanding shares for at least a year is eligible to submit a proposal, limited to 500 words. SEC Rule 14a-8.

with the traditional structure of corporate governance.<sup>17</sup> Thus, shareholders cannot force a change in corporate policy, but at a minimum may recommend one. Management also may exclude a proposal if it involves an “ordinary business” matter; however, the SEC will not apply this exclusion if the proposal raises a significant social policy issue.<sup>18</sup> The SEC has been consistent in ruling that shareholder proposals relating to human rights issues raise such significant social policy considerations that the ordinary business exception does not apply.

Activist investors have made use of shareholder proposals in their attempts to influence corporate policy regarding Palestine. Shareholders<sup>19</sup> of Caterpillar Inc. submitted a proposal at the company’s 2005 annual meeting that would have directed management to investigate whether the use of its bulldozers by the Israeli military to demolish Palestinian homes, commercial buildings and agricultural land was consistent with the company’s code of conduct.<sup>20</sup> Caterpillar’s Board urged defeat of the resolution, saying the company had “neither the legal right nor the means to police individual use” of its equipment,<sup>21</sup> and the resolution was defeated 97 per cent to three per cent.

At first glance, the effectiveness of shareholder proposals as a mechanism to mandate a change in corporate policy may appear limited. Management’s recommendations have great weight, social-issue proposals rarely win a majority vote and the vast majority of proposals in the U.S. are non-binding.<sup>22</sup> However, proposals may be resubmitted if they meet certain voting thresholds, allowing support to build over time, and binding proposals are permitted although rare.<sup>23</sup> Further, even if the proposals do not win a majority vote, they provide shareholders with leverage to open dialogue with management, who sometimes

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17 Management also has the right to exclude a proposal under Rule 14a-8 if it: (a) does not relate significantly to the corporation’s business, (b) requests a specific amount in dividends, (c) would cause the company to take illegal action if implemented, (d) directly conflicts with a proposal of management, (e) requires action the corporation is not authorized to take, (f) involves a personal grievance not shared by other shareholders (g) contains false or misleading statements, or (h) repeats prior proposals not eligible for resubmission.

18 Exchange Act Release No. 40018 (1998).

19 The shareholders consisted of four Roman Catholic orders of nuns and Jewish Voice for Peace. Associated Press, *Caterpillar Won’t Probe Bulldozers’ Use* (Apr. 13, 2005). Further information about the Caterpillar initiative available at <http://www.jewishvoiceforpeace.org/>.

20 Caterpillar Inc. 2005 Proxy Statement, Proposal 4, 28.

21 Associated Press, *supra* note 19.

22 Adam M. Kanzer, *Putting Human Rights on the Agenda: The Use of Shareholder Proposals to Address Corporate Human Rights Performance* 4 Finance For a Better World, Ch. 5 (2009), available at [http://www.domini.com/common/pdf/Finance\\_for\\_a\\_Better\\_World\\_Kanzer.pdf](http://www.domini.com/common/pdf/Finance_for_a_Better_World_Kanzer.pdf).

23 Shareholder proposals must receive at least a 3% vote the first year, a 6% vote the second year, and a 10% vote in each subsequent year to be resubmitted.

respond to proposals that did not receive a majority vote.<sup>24</sup> Often the proposals are withdrawn before the annual meeting because an agreement with management was reached.<sup>25</sup>

There have been many successful shareholder proposals on a range of human rights issues.<sup>26</sup> In 1998, Investors Against Genocide filed a shareholder proposal with 28 mutual funds of Fidelity Investments relating to investments in corporations doing business in Sudan, requesting that Fidelity screen out investments in companies that substantially contribute to genocide, egregious violations of human rights, or crimes against humanity; they received between 21% and 29% of the vote at six funds.<sup>27</sup>

The most dramatic illustration of the power of shareholder proposals are those passed amid agitation for divestment from apartheid South Africa. Two shareholder proposals at General Motors brought to the board Reverend Leon Sullivan, who developed the Global Sullivan Principles of Corporate Social Responsibility.<sup>28</sup> This led to the adoption of shareholder proposals at many other companies, persuading management to adopt the Principles, report on their activities and ultimately to divest from South Africa. Thus, the shareholder proposal mechanism is capable of enormous influence when the public is engaged on a particular issue (and when large institutional investors become involved, as discussed in Part III).

It should be noted, though, that not all TNCs are public companies, and those that are always have the option of buying back their publicly-held securities. Currently, there is a strong “going-private” trend, which many expect to negatively affect the interests of non-shareholder stakeholders.<sup>29</sup> Some take an opposing view, however, that insulating companies from the short-term pressures of the capital markets would improve protection of those interests.<sup>30</sup>

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24 Kanzer, *supra* note 22, at 5. The majority of human rights proposals over the past 36 years have been filed by members and affiliates of the Interfaith Center on Corporate Responsibility (ICCR); their approach is to use the “threat” of a shareholder proposal as leverage to begin talks with management. See *id.* at 8.

25 *Id.*

26 See generally *id.* at 9-11 (listing achievements in the areas of labor conditions, non-discrimination in the workplace, corporate disclosure of human rights performance, community impact of mining operations and corporate political accountability).

27 See *id.* at 7.

28 See *id.* at 8.

29 See Kent Greenfield, *The Impact of “Going Private” on Corporate Stakeholders*, Boston College Law School Faculty Papers 2 (2008), available at [http://lsr.nellco.org/cgi/viewcontent.cgi?article=1236&context=bc\\_isfp](http://lsr.nellco.org/cgi/viewcontent.cgi?article=1236&context=bc_isfp).

30 See *id.* at 4-7 (citing examples).

### 3. Disclosure Requirements under Federal Securities Law

In addition to fiduciary duties and the requirement to consider shareholder proposals, federal securities laws require directors to report material risks to the corporation. Although these regulations do not expressly refer to human rights, over the past two decades, there has been a dramatic rise in the number of global companies that discuss social issues in their annual reports.<sup>31</sup> The CSR movement is actively promoting disclosure of social and environmental information in the expectation that shareholders will eventually use the information to force socially desirable changes.

### 4. Federal Criminal Liability

#### 4.1 International Crimes in U.S. Courts

A corporation is considered a “person” under U.S. domestic law. As such, corporations in theory may be prosecuted for violating international criminal laws that have been incorporated into U.S. law, because there is no legal distinction between natural persons and legal persons. Genocide, war crimes, and torture are some of the international crimes that have been incorporated by federal statutes into U.S. domestic law to meet its obligations under international treaties.<sup>32</sup> Aiding and abetting such crimes is also criminalized under U.S. law, as in most jurisdictions.<sup>33</sup>

While no prosecutor has actually initiated such a prosecution, it is possible, not only in the U.S. but in other jurisdictions as well.<sup>34</sup> For victims of human rights abuses, criminal prosecutions are not as advantageous as civil litigation because in many jurisdictions (including the U.S.) they cannot initiate a prosecution or receive reparations. In addition, the standard of proof (reasonable doubt) is higher than in a civil case (preponderance of the evidence).

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31 Williams and Conley, *An Emerging Third Way? The Erosion of the Anglo-American Shareholder Value Construct*, 38 *Cornell Int'l L.J.* 493, 496 (2005), available at <https://cdn.law.ucla.edu/SiteCollectionDocuments/uclasloan%20foundation%20conference/williams.pdf>.

32 Those treaties are the Genocide Convention, the Geneva Conventions, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

33 See *Commerce, Crime and Conflict* at 17.

34 See generally *id.* at 13-22.

One issue invoked by a case where the crimes in question occurred outside the U.S. is that of extraterritorial jurisdiction – i.e. the domestic court would be required to exercise jurisdiction over parties or activities abroad. Courts are often reluctant to do so out of fear of interfering in the affairs of another state or with U.S. foreign policy. However, even if many of these crimes occur outside the U.S., extraterritorial corporate abuses that are directed or planned from an office within the U.S. would likely fall within the jurisdiction of U.S. courts. Moreover, U.S. war crimes statutes approve the exercise of extraterritorial jurisdiction to prosecute grave breaches of international criminal law by and against U.S. nationals.<sup>35</sup> U.S. law also applies extraterritorial jurisdiction in cases under the Foreign Corrupt Practices Act, which imposes criminal liability on companies (and those acting on its behalf) for acts of bribery of foreign officials for the purpose of obtaining business.<sup>36</sup>

## 5. Civil Litigation

The most important legal mechanism available under U.S. law to hold corporations accountable for their involvement in human rights violations is the right of foreign victims of such violations to sue the company for damages under the Alien Tort Claims Act. The ATCA is unique among national jurisdictions in establishing universal jurisdiction over claims for torts committed in violation of international law.<sup>37</sup> Less important are the Torture Victim Protection Act (which most courts view as inapplicable to corporations), the Racketeer Influenced and Corrupt Organizations Act and state law tort claims. These claims and applicable defenses are summarized below.

### 5.1 Alien Tort Claims Act

The ATCA, enacted in 1789, allows aliens (plaintiffs who are not U.S. citizens) to sue in U.S. federal courts for damages for violations of the “law of nations” or a U.S. treaty.<sup>38</sup> The law does not require that the defendant’s actions take place in the U.S., or that the defendant be a U.S. citizen, but there must be some basis for the court to assert personal jurisdiction over the defendant (as discussed in Section 5.5).

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35 18 U.S.C. § 118.

36 15 USC §§ 78dd-1–78dd-3.

37 See *supra*, note 33, at 24. In an *action civile*, a mechanism available in civil law jurisdictions, victims must petition the public prosecutor to begin a case against the corporation; they cannot sue the company directly as under the ATCA.

38 28 U.S.C. § 1350. The statute provides: “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.”

The 1980 landmark case of *Filartiga v. Pena-Irala*<sup>39</sup> was the first successful use of the ATCA to enable victims of international human rights violations to sue in U.S. courts. In 2004, the U.S. Supreme Court affirmed the use of the ATCA for this purpose in the case *Sosa v. Alvarez-Machain*,<sup>40</sup> holding that the statute provides U.S. federal courts with jurisdiction over claims based on international law norms that are clearly defined, widely accepted and obligatory.<sup>41</sup> While there is some disagreement as to which norms are included, it is settled that claims alleging torture, extrajudicial killing, war crimes and genocide are actionable under the ATCA, with some courts also allowing claims based on crimes against humanity, cruel inhuman and degrading treatment, and arbitrary arrest and detention.<sup>42</sup> Most claims are based on norms that require that the corporation act in concert with a state actor or with state assistance; however, genocide, war crimes and slavery do not require state action.

Chevron was the first corporation to be sued under the ATCA over its oil production activities in Nigeria.<sup>43</sup> Since then, dozens of such cases have been filed against corporations in U.S. federal courts,<sup>44</sup> although the Supreme Court did not clarify in *Sosa*<sup>45</sup> that corporations may be sued under the ATCA. The vast majority of these cases have been dismissed, either because the underlying cause of action was not based on universal and clearly defined international norms or on the grounds of *forum non conveniens* (discussed below). The Chevron case and another case against Drummond, two out of three such cases to make it to trial, resulted in verdicts for defendants.<sup>46</sup> Moreover, as discussed below, in some U.S. courts corporations must share the intent of the perpetrators to be deemed complicit in human rights abuses by others, a stringent test that is difficult for plaintiffs to meet.

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39 630 F.2d 876 (2d Cir. 1980). *Filartiga* applied the ATCA to a claim by a Paraguayan family against a Paraguayan police officer who tortured their son to death.

40 542 U.S. 692 (2004).

41 See *id.* at 731.

42 See Ingrid Wuerth, *Wiwa v. Shell: The \$15.5 Million Settlement*, ASIL Insights, Vol. 13, Sec. 14 (Sep. 9, 2009) (citing cases).

43 *Bowoto v. Chevron Corp.*, No. C 99-02506 SI (N.D. Cal. 2008).

44 They include claims against Pfizer, Unocal, Wal-Mart, ExxonMobil, Shell, Coca-Cola, Southern Peru Copper, Ford, Del Monte, Chiquita, Firestone, Union Carbide, Gap, Nike, Citigroup, IBM, Drummond, General Motors among others; non-US companies Rio Tinto, Talisman Energy, and Barclays Bank have also been sued in US courts for the same reasons.

45 The Supreme Court stated in a footnote that "[a] related consideration is 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 individual." *Sosa*, 542 U.S. at 732 n.20. The Court offered no further comment.

46 *Chevron Corp.* (N.D. Cal., jury verdict on Dec. 1, 2008); *Romero et al v. Drummond et al* (N.D. Ala., jury verdict on June 26, 2007), *aff'd* 552 F.3d 1303 (11th Cir. 2008).

These setbacks and obstacles for plaintiffs have led some to question the strength of the ATCA in deterring corporate misconduct and providing a mechanism for victims to redress their injuries.<sup>47</sup> However, cases against Unocal Corporation and Royal Dutch Shell resulted in multi-million dollar settlements between the parties, both significant victories.<sup>48</sup> In addition, the reputational cost to corporations from credible allegations of human rights abuse provides strong incentive for management to respect human rights even if such cases are unlikely to go to trial or result in jury awards for plaintiffs.

### **a) Secondary Liability under the ATCA**

While some of these claims have involved allegations of direct violations<sup>49</sup> by the corporation of international law norms that are not limited by state action requirements, most involve allegations of corporate complicity in human rights abuses committed by others – typically, foreign governments with which they worked or supported.<sup>50</sup> TNCs may become complicit through the actions of employees or third parties which are *de jure* or *de facto* under the control of the parent corporation (and/or its affiliates and subsidiaries). Because the local government is usually unable and/or unwilling to investigate and prosecute the alleged abuses, the litigation usually focuses on holding the parent corporation liable in the jurisdiction where it is incorporated or in a jurisdiction convenient and favorable to the claimants.

#### ***Aiding and Abetting Theory***

Most U.S. courts have found aiding and abetting to be a viable theory for ATCA liability. It is settled that merely doing business in a state where human rights

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47 See Wuerth, *supra*, note 42.

48 The first jury verdict for plaintiffs in an ATCA case against a corporation was decided in August 2009 in *Worldtel Bangladesh Holding, Ltd.*, 588 F. Supp.2d 375 (E.D.N.Y. 2008) (jury verdict on Aug. 2009). In this case the plaintiff, a citizen of Bangladesh, had been tortured as the result of a business dispute. The defendants offered to stop the torture if the plaintiff would agree to leave Bangladesh and give up control of the telephone company he operated. The jury returned a \$1.5 million verdict against defendants, Amjad Khan and WorldTel Bangladesh Holding, Ltd. for torture in violation of the ATCA and TVPA. This is the only ATCA recovery by a plaintiff through trial. An appeal is planned.

49 See, e.g., *Sarei v. Rio Tinto PLC*, 550 F.3d 822 (9th Cir. 2008) and *Khulumani v. Barclay Nat'l Bank*, 504 F.3d 254 (2d Cir. 2007).

50 Defendants alleged to be complicit in actions by others have included: Chevron (for conduct related to protests in the Niger Delta), Rio Tinto (for slave labor and other claims related to copper mines in Papua New Guinea), Unocal (for the Yodana pipeline in Burma), a Boeing subsidiary (for claims related to extraordinary rendition), Pfizer (for nonconsensual medical experimentation in Nigeria), major banking, automobile and computer companies (for claims related to apartheid in South Africa), a variety of companies for atrocities committed during World War II, and others.

violations take place or benefiting from such violations is insufficient to establish liability.<sup>51</sup> Beyond that, there is disagreement as to the precise standard to determine what kinds of corporate actions constitute aiding and abetting. U.S. judges have approved three standards – two derived from international criminal law and one from domestic tort law.

The Ninth Circuit in the *Unocal* case applied a “knowledge standard” derived from international criminal tribunals which requires the plaintiff to show the corporation provided “*knowing practical assistance or encouragement that has a substantial effect on the perpetration of the crime.*”<sup>52</sup> (The state of mind of a corporation is represented by its employees, directors and management).

In a recent Second Circuit decision in *The Presbyterian Church of Sudan v. Talisman Energy*, the court applied a more rigorous “purpose standard” derived from the Rome Statute of the International Criminal Court which requires that the corporation *share the purpose or intent of the perpetrators.*<sup>53</sup> The court also applied the purpose standard to plaintiff’s conspiracy claim.

Another standard judges have approved<sup>54</sup> is a knowledge standard derived from domestic tort law principles, which provides that one is subject to liability for harm to a third person from the tortious act of another if he or she *knows the other’s conduct is a breach of duty and gives substantial assistance or encouragement to the other.*<sup>55</sup>

The U.S. Supreme Court is expected to take a case to elucidate the appropriate standard by which to prove aiding and abetting in ATCA cases. It has been argued (in an international criminal law context) that the two standards would not be much different in practical effect because once it is proven that a corporate

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51 See Green and Stephens, *supra* note 2, at 3.

52 *Doe I v. Unocal Corp.*, 395 F.3d 932, 937 (9th Cir. 2002), *vacated & reh’g granted*, 395 F.3d 978 (9th Cir. 2003), *and dismissed*, 403 F.3d 708 (9th Cir. 2005) (en banc). This decision was reheard and vacated *en banc* after the case was settled between the parties in December 2004.

53 In that case, plaintiffs alleged Talisman Energy aided and abetted and conspired with the Sudanese government to commit genocide, war crimes and crimes against humanity. They claimed the Canadian oil company helped the Sudanese government forcibly displace civilians and create buffer zones around oil facilities by building roads and upgrading airfields used to launch attacks on civilians. The court affirmed the dismissal of the case on the grounds that while the company knew the infrastructure might be used for attacks on civilians, there were benign purposes for the construction and no evidence was shown indicating they acted for an improper purpose. No. 07-0016 (2<sup>nd</sup> Cir. Oct. 2, 2009).

54 See, e.g., Khulumani, 504 F.3d at 287-89; *Doe I v. Unocal Corp.*, 395 F.3d at 967 (Reinhardt, J., concurring).

55 RESTATEMENT (SECOND) OF TORTS 876(b) (1979).



official had knowledge and failed to act, a purpose to profit may be inferred.<sup>56</sup> However, this was not the outcome in *Talisman Energy*, where the plaintiffs lost despite showing the company knew it was substantially assisting human rights violations because they could not prove the company intended to assist them.<sup>57</sup>

### ***Conspiracy Theory***

Plaintiffs have alleged that corporations conspired with governments as another form of secondary liability. A conspiracy between two parties is established in two situations: (a) by agreement (express or implied) and an act in furtherance of the conspiracy, whether or not an actual crime was completed, and (b) by being an accessory to a crime actually completed. In the *Shell* case, for example, the plaintiffs claimed the company conspired with the Nigerian government to violently suppress demonstrations and protests over the environmental devastation caused by the oil company's activities. The Second Circuit held that plaintiffs had alleged the second version of conspiracy involving a completed crime and approved their use of a conspiracy theory. As noted above, in *Talisman Energy*, the Second Circuit applied the purpose standard to the plaintiffs' conspiracy claim.

### ***Joint Venture Theory***

Judges have acknowledged that joint venture, agency, or reckless disregard might be appropriate theories in an ATCA complicity case.<sup>58</sup> Under a joint venture theory, a plaintiff argues that the company is responsible for human rights abuses because it entered into a contractual business relationship – namely, a joint venture – with the direct perpetrator. A company may be strictly liable (i.e. liable without fault) for harm caused by a business partner if the partners intend to form a partnership, they share an interest and have joint control over the project, profits and losses are shared, and the harmful conduct is related to the activities of the joint venture or partnership.

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56 See *infra* note 136 and accompanying text.

57 The UN Special Representative to the Secretary General on Business and Human Rights (SRSG) has called the standard and the outcome in the *Talisman* case “absurd” in that “as long as an IG Farben [the company that manufactured Zyklon B gas used by Nazis to kill Jews] intended only to make money, not to exterminate Jews, [the purpose standard] would make it permissible for such a company to keep supplying a government with massive amounts of Zyklon B poison gas knowing precisely what it is used for.” Remarks by Professor John Ruggie, SRSG, for ICJ Access to Justice Workshop, Johannesburg, South Africa, Oct. 29-30, 2009. See also *Commerce, Crime and Conflict* at 19 (“It is likely that the ‘shared intent’ standard presents too high a threshold for ‘corporate complicity’ because it requires that it be shown that actions were taken out of a common ‘state of mind’ when in fact corporate complicity in the criminal acts of others appears to be more often based on actions motivated by mutual or common interests.”)

58 See, e.g., *Unocal Corp.*, 395 F.3d at 967, 971, 973 (Reinhardt, J., concurring).

Several ATCA cases including *Unocal*, *Shell*, *Chevron* and *Talisman Energy* have involved allegations of corporate complicity in abuses committed by security providers, which are often hired when companies operate in dangerous areas. If a business partnership between the company and the security provider is proven, strict liability would apply and the company would be vicariously liable for any harm caused by the security provider. Even in the absence of a formal agreement or exchange of payment between a company and security providers (whether private companies, government military, or members of an armed group), if those providers are *de facto* providing security protection for the company, in the context of which gross human rights abuses have occurred, the company could be liable under a joint venture theory.<sup>59</sup>

### *Agency Theory*

Under an agency theory, an employer is liable for the wrongful acts of its agents (including employees) if the agent acted “within the scope of its authority” – i.e. in the course of performing its duties. If the agent or the employer benefited from the agent’s wrongful acts, it is presumed that the agent was acting within the scope of its authority and the employer would have the burden of proving the agent was acting outside the scope of its authority. If only the agent benefited from its wrongful acts, then the presumption would not apply and the plaintiffs would have the burden of proving the agent acted within the scope of its authority.

To establish the existence of an agency relationship, a plaintiff must show (a) a manifestation by the principal (i.e. the employer) showing he intended the agent to act for him, (b) that the agent accepted the undertaking and (c) that it was understood by the parties that the principal would be in control of the undertaking. The relationship may be express or implied; like a joint venture relationship, a formal contractual relationship is not necessary.<sup>60</sup>

The element of subordination is more difficult for a plaintiff to prove for an

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<sup>59</sup> Factors include: “whether the security forces were allowed access to the company’s operations site, whether they were present at or near to the company’s site on a regular basis, and whether the company provided weapons, material and other logistical support. Another important issue will be whether there is some continuity in the security services provided. A combination of some or all of these elements may be deemed to constitute a *de facto* security arrangement,” in which case the law may require that, if the company knew or should have known of the risk of gross human rights abuses being perpetrated by the security services, the company should have taken certain precautionary steps. ICJ Report, Vol. 3, at 41.

<sup>60</sup> See 3 AM. JUR. 2 D AGENCY § 21 (1986) (“The manner in which the parties designate the relationship is not controlling, and if an act done by one person in behalf of another is in its essential nature one of agency, the one is the agent of such other notwithstanding he is not so called”).

independent third party than for an employee. However, even if an independent subcontractor is not subordinate, the company would be liable for torts committed by the independent subcontractor if it was hired to perform inherently dangerous activities.

In *Bowoto v. Chevron*, the court allowed the plaintiffs to go to trial on an agency theory.<sup>61</sup> In that case, the plaintiffs alleged that Nigerian government security forces violated international law by torturing them or their relatives and submitting them to cruel, inhuman or degrading treatment. They alleged further that the Chevron parent (and relevant subsidiaries) was vicariously liable under joint venture and agency theories by equipping, paying and controlling the Nigerian security forces and directly participating with them in the attacks. The court held that sufficient evidence existed that the Chevron parent (and relevant subsidiaries) had “a right of control” over the security forces they hired and upheld the plaintiffs’ use of an agency theory. In a jury instruction the court also clarified that disobedience by an agent does not necessarily absolve the principal of responsibility. Thus, the Nigerian government could have acted within the scope of its authority even if its conduct was *unauthorized* by Chevron so long as the conduct was reasonably related to the kinds of tasks Chevron had asked the government to perform or was reasonably foreseeable based on a general history of excessive force.

## **b) The Unocal, Shell and Yahoo! Settlements**

The three ATCA cases against corporations in which plaintiffs were able to recover damages involved settlements by Unocal, Shell and Yahoo!.<sup>62</sup> In June 2009, Shell agreed to pay \$15.5 million to the families of members of the Ogoni people in Nigeria to settle a lawsuit<sup>63</sup> in the United States against it for complicity in torture, abduction, summary execution, crimes against humanity, wrongful death, assault and battery, infliction of emotional distress and negligence. In that case, the Nigerian government had falsely accused Ogoni human rights and environmental activists of murder and tried them in front of a special military tribunal. After trials that were internationally condemned and rigged to ensure

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61 312 F. Supp. 2d 1229, 1247 (N.D. Cal. 2004). The court also allowed plaintiffs’ aiding and abetting and conspiracy claims to go to the jury, which ultimately held Chevron was not liable.

62 Pfizer settled a case brought against it by the state of Kano in a Nigerian court for \$75 million; the government used \$35 million to compensate victims of its illegal drug trials. The settlement followed an earlier dismissal of ATCA claims brought in the US by the victims themselves. This dismissal was recently reversed by the appellate court; revival of the suit may lead to another large settlement.

63 *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 100 (2d Cir. 2000), *cert. denied*, 532 U.S. 941 (2001). Further information and court documents are available at <http://ccrjustice.org/ourcases/current-cases/wiwa-v.-royal-dutch-petroleum>.

a conviction, the activists were executed. The plaintiffs sued the ultimate parent companies, Royal Dutch Petroleum Company and Shell Transport and Trading, their Nigerian subsidiary and a company official, alleging that they acted in concert with the Nigerian government and actively participated in some of their attacks. On the eve of trial after the Second Circuit issued an order on jurisdiction favorable to plaintiffs, the defendants settled.

The case against Unocal was settled for an undisclosed sum (reported to be in the range of \$30 million) and involved allegations that the corporation was complicit in forced labor, rape and other torture committed by the Burmese military during the construction of a natural gas pipeline. There was evidence that Unocal had actual knowledge before it began the project of the military's history of committing gross human rights abuses, including forced labor, and that during construction of the pipeline Unocal was made aware that forced labor was being used by the military to build infrastructure for the pipeline. Unocal continued to supply the military with financial, logistical and technical support knowing the abuses were taking place. After the Ninth Circuit ruled the plaintiffs had alleged sufficient facts to go to a jury on their ATCA claim, Unocal settled.

In November 2007, Yahoo! settled for an undisclosed amount an ATCA suit filed against it<sup>64</sup> only seven months earlier by two Chinese dissidents. The company had given the plaintiffs' email records to Chinese officials, leading to their arrest and sentencing to 10-year prison terms for incitement to subvert state power and illegally providing state secrets to foreign entities. The lawsuit alleged that Yahoo! had knowingly and willfully aided and abetted the commission of torture and other human rights abuses that caused the plaintiffs severe physical and mental pain and suffering. In late February 2008 a new lawsuit was filed against Yahoo! by other Chinese dissidents based on similar allegations.

Shell, Unocal and Yahoo! did not admit wrongdoing. However, the fact and amount of the Unocal and Shell settlements indicates that corporations are keen to avoid human rights-related liability or to allow precedents to be established that could be cited in future cases.

### **c) Corrie et al v. Caterpillar Inc.**

The only ATCA case involving a corporation's activities in the occupied Palestinian territories (OPT) is *Corrie v. Caterpillar*, in which the plaintiffs alleged Caterpillar aided and abetted the Israeli government in committing war crimes,

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64 Further information and links to court filings are available at <http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/YahoolawsuiteChina>.

extrajudicial killing and cruel, inhuman, or degrading treatment or punishment. The plaintiffs also claimed violations of the Torture Victim Protection Act and RICO statute (discussed below) and included state law claims of wrongful death, public nuisance, and negligence.

Rachel Corrie, an American activist, was deliberately crushed to death by an IDF officer using a U.S.-manufactured Caterpillar bulldozer when she was attempting to prevent the army's demolition of a Palestinian home in Gaza. The Corrie family and a number of Palestinians living in the Gaza Strip and the West Bank sued Caterpillar, seeking compensation for death, injury, and property damage resulting from illegal demolitions by the IDF using Caterpillar bulldozers. Plaintiffs alleged that Caterpillar sold the bulldozers directly to Israel and the IDF knowing they would be used for illegal purposes (such as depopulating areas for settlements and bypass roads, collective punishment, and clearing paths for attacks on civilian neighborhoods), adapted them for military use and provided technical assistance and training. All of the plaintiffs' claims were dismissed on the ground that the case presented a political question (discussed below).

## **5.2 Torture Victim Protection Act**

The Torture Victim Protection Act (TVPA) grants both aliens and U.S. citizens the right to sue individuals for damages for acts of torture and extrajudicial execution committed anywhere in the world “under actual or apparent authority, or color of law, of any foreign nation.”<sup>65</sup> Courts have applied the TVPA to direct perpetrators, persons who ordered, abetted or assisted in the violation, and higher-ups who authorized, tolerated or knowingly ignored violations.<sup>66</sup>

Unlike the ATCA, the TVPA requires that plaintiffs first exhaust any (adequate) remedies available under the domestic law of the nation where the alleged violations occurred, and authorizes a much narrower set of potential claims than the ATCA – for torture and extrajudicial execution only. For this reason, TVPA claims are typically brought in conjunction with claims under the much broader ATCA.

It is currently unsettled whether corporations may be sued under the TVPA or only individual company officers or employees. The statutory language of the TVPA provides that an “individual” may be held liable for torture and extra-judicial

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65 28 U.S.C. § 1350.

66 Beth Stephens et al, *International Human Rights Litigation in U.S. Courts* (2008), Ch. 4, 86-87 (citing S. Rep. No. 102-249, at 8-9 (1991)).

killings, but is silent on the question whether the law applies only to natural persons, or legal persons as well. The courts are split on this issue.<sup>67</sup> Individual officials of corporations may be sued under the TVPA so long as they acted under “color of law.”

### **5.3 Racketeer Influenced and Corrupt Organizations Act**

Plaintiffs may also bring claims alleging corporate complicity in human rights violations under the Racketeer Influenced and Corrupt Organizations Act (RICO), as they did in *Caterpillar*, *Unocal* and *Shell*. The RICO statute,<sup>68</sup> which was passed to target organized crime (defined as an “illegal enterprise”) renders it unlawful to collect an unlawful debt (extortion) or engage in “racketeering activity,” including murder, kidnapping, gambling, arson, robbery, bribery, dealing in obscene matter, or dealing in a controlled substance or listed chemical, where the defendant’s act is chargeable under state law. Violations of this quasi-criminal statute are punishable by imprisonment, and victims have the right to recover damages for loss of or damage to their business or property.

Corporate defendants in these cases have argued for dismissal of RICO claims on the grounds that the statute does not extend to conduct committed outside the U.S. The statute itself is silent as to its extraterritorial application. In *Unocal*, the court dismissed the RICO claim on the grounds that the human rights abuses were committed outside the U.S. and (a) plaintiffs did not show sufficient facts to indicate that the abuses caused loss or injury within the U.S. (through an unfair competitive advantage as they had alleged) and (b) Unocal’s domestic conduct (transferring financial and technical support) did not directly cause the plaintiffs’ injuries in Burma.<sup>69</sup>

In the *Shell* case, however, the court did not dismiss the RICO claims, finding that the alleged actions, if proven, would have had a substantial effect on the U.S. economy since 40 percent of Nigeria’s oil production is exported to the United States, and its conduct, if proven, would have lowered its production costs and given them an unfair advantage in the U.S. oil market.

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67 See *Obstacles to Justice*, *supra* note 3, at 314 (citing cases).

68 18 U.S.C. § 1961 *et seq.*

69 In a recent case, a RICO claim against Blackwater for its shootings of Iraqi civilians in Iraq was also dismissed on the issue of extraterritoriality. In re: XE Services Alien Tort Litigation (Oct. 2009 E.D.Va). For further information and court documents, see <http://ccrjustice.org/ourcases/current-cases/estate-ali-hussamaldeen-albazzaz-v.-blackwater-worldwide%2C-et-al>.

In *Caterpillar*, the appellate court dismissed the case on political question grounds, but the lower court decided the RICO claim. Plaintiffs alleged that Caterpillar and the IDF formed a RICO enterprise engaged in a pattern of racketeering activity including murder, robbery, extortion, and physical violence because of Caterpillar's manufacture, design, financing, sales, servicing and training of the IDF with respect to its bulldozers. In its motion to dismiss, Caterpillar argued that its strictly commercial relationship with the IDF did not constitute a "RICO enterprise" but was lawful business activity; that the destruction and killings occurred outside the U.S. and RICO did not extend extraterritorially; that RICO does not cover personal injuries; that there was no direct causal relationship between Caterpillar's manufacture and sales and the harm done to the plaintiffs because the IDF could have obtained the bulldozers from another supplier; that the IDF's independent, intervening conduct was the proximate cause of the plaintiffs' injuries; and that no RICO conspiracy existed because there was no RICO claim.

The plaintiffs responded that a RICO enterprise existed because, knowing its bulldozers would be used to commit violations of international law, Caterpillar collaborated and shared technology with the IDF relating to the bulldozers, transported the bulldozers, parts and related technology to the IDF, worked with the IDF to arrange financing, provided post-sale technical support, and trained the IDF on the operation and maintenance of the bulldozers. The plaintiffs argued further that the unlawful acts of the enterprise were home demolitions and attacks on plaintiffs and decedents, willful killing, torture or inhumane treatment, willfully causing great suffering or serious injury to body or health, extensive destruction and appropriation of property carried out unlawfully and wantonly, all violations of the Geneva Conventions which resulted from Caterpillar's coordination with the IDF and all of which were foreseeable by Caterpillar. Plaintiffs also contended that RICO applies extraterritorially because Caterpillar's conduct in the U.S. significantly and materially furthered the unlawful scheme and a conspiracy existed because Caterpillar made its sales knowing its bulldozers were being used by the IDF to commit crimes while continuing to supply them and train IDF soldiers to use them.

The district court agreed with Caterpillar that plaintiffs had failed to state a RICO claim. The court declared "it was too great a leap" to conclude that the commercial relationship between Caterpillar and the Israeli government created an illegal enterprise. The court also held that under RICO the racketeering activity must occur inside the U.S. and that Caterpillar's "preparatory" acts in Washington of design, manufacture and export were not sufficient to meet jurisdictional requirements because it was not the conduct that caused the harm

to the plaintiffs. The court dismissed the plaintiffs' claim that the IDF illegally acquired property because while plaintiffs were deprived of their property, the IDF did not "acquire it" by destroying it to create buffer zones. The court also agreed with Caterpillar's arguments regarding causation – that the IDF soldiers caused the harm, not Caterpillar sales activity and dismissed the conspiracy claim since there was no RICO violation.

## **5.4 State Law Tort Claims**

Plaintiffs usually include state law tort claims in ATCA human rights litigation, as they did in *Caterpillar*, *Unocal* and *Shell*. Tort law imposes liability where an actor causes harm to a person through negligent, reckless or intentional conduct and sometimes imposes strict (no fault) liability, such as the vicarious liability of an employer for damage caused by his employee to a third party. Because tort law provides victims a remedy for injury to life, liberty, dignity, physical and mental integrity and property, gross human rights abuses will always encompass one or more of these injuries, giving rise to a potential tort claim.

### **a) Negligence**

A company can be liable if it negligently inflicts harm on a person to whom the company owes a "duty of care" – such as employees, consumers or those close to its operations. The company must take reasonable precautions to avoid harm that is reasonably foreseeable and if it fails to perceive a foreseeable risk, or fails to take adequate precautions it will be liable for any resulting harm, with some exceptions. For instance, a court may find that another actor's conduct broke the chain of causation between the company's act and the harm, known as an "intervening act." This would be very unlikely, however, if the company had a relationship with the third party and its conduct was foreseeable. In corporate complicity cases, victims may allege that the company negligently disregarded the risk that the direct perpetrator of the abuses would harm them because the abuses were foreseeable – for example, where the company hired security forces with a known history of excessive violence (as in *Unocal* and *Shell*).

### **b) Reckless Disregard or Recklessness**

Recklessness occurs when a party is or should be aware of an unreasonable risk, yet disregards it, leading to harm to another. There are two theories of recklessness: (a) *objective recklessness*, where a person acts (or if the person



has a duty to act, but fails to act) in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known and (b) *subjective recklessness*, also referred to as “*willful recklessness*” where a person has actual knowledge of a substantial risk and subsequently disregards it. Where a company hires or continues to use a security provider knowing that it has engaged and is engaging in widespread human rights abuses in its service for the company, a plaintiff may allege the company acted recklessly and should thus be liable for the plaintiff’s harm.

### **c) Intentional Torts: Assault, Battery, and Infliction of Emotional Distress**

Plaintiffs in ATCA cases have included claims for intentional torts. A company may be liable for an intentional tort if it voluntarily took action knowing it would cause harm, *or that harm was substantially certain* to result. A company that knowingly and deliberately assists a third party, such as a foreign government, to commit human rights abuses or hires a third party where it is substantially certain that harm to the victims would result, could be liable for intentional torts such as assault, battery, and infliction of emotional distress.

### **d) Seller of Goods Used to Commit Human Rights Abuses**

Where a company sells goods which are then used by the buyer to perpetrate human rights abuses, generally the more a product or service is apt to be used to infringe upon human rights, the more suspicious a provider will need to be to meet its duty of care and avoid liability. Multi-purpose generic products or services are less likely to result in liability than tailor-made or inherently dangerous goods or services or where the company actually knew or easily could have known the risk of harm due to a past history of abuse.

An important factor in these cases is the relationship between the company and the victim or perpetrator. Employees, consumers or those living close to where the goods are used are more likely to be successful in a suit against the company than other victims because it is more likely the risk would be considered foreseeable, that more proactive precautionary measures would be required, and that the harm suffered would be considered less remote from the company’s sale.

In *Corrie v. Caterpillar*, where the company sold bulldozers which were then used by the buyer to commit human rights abuses, plaintiffs brought several

state law tort claims based on negligence,<sup>70</sup> all of which were dismissed on the grounds that the case presented a political question not appropriate for the court to decide.

### **e) Supply Chain Relationships: Sourcing Goods from Jewish Settlements in the OPT**

A company may be liable (on theories of negligence, recklessness or intentional torts) for complicity in human rights abuses committed by providers in its supply chain. Clothing manufacturers and computer companies have faced such allegations where child labor or forced labor was used by its suppliers. Liability depends on (a) whether the abuses were reasonably foreseeable due to the perpetrator's past behavior or were easily discoverable by an investigation, (b) how close in the supply chain the perpetrator is from the company sued, and (c) whether the company is the single buyer and could dictate worker conditions.

An argument could be made that if a company purchases goods, labor or resources originating in Jewish settlements in the OPT, it would be complicit in human rights violations because the settlements violate the Geneva Conventions' prohibition on transfer of civilians into occupied territory, and are part of a system of apartheid, a crime against humanity. Theories of aiding and abetting, conspiracy, joint venture, negligence and reckless disregard could be argued. Relevant factors to determine liability might include how much the purchaser knew about the source of the goods, and how far down the supply chain the purchasing company is from the supplier, among others.

The U.S. allows retailers to import goods produced in Jewish settlements despite their illegality. Thus, the supplier could argue that under the political question doctrine (discussed below), the court should not adjudicate the case because it would interfere with decisions on import controls made by another branch of government.

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<sup>70</sup> Plaintiffs alleged claims of (1) wrongful death, asserting that Caterpillar owed a duty to the deceased because they were foreseeable victims of the IDF's illegal use of the bulldozers of which Caterpillar was aware, (2) public nuisance, arguing that Caterpillar interfered with the rights of civilians in the OPT to health, public safety, peace, comfort and convenience by supplying bulldozers used to destroy homes, (3) negligence, asserting that Caterpillar owed a duty to plaintiffs and the deceased because they were foreseeable victims of the IDF's illegal use of the bulldozers and Caterpillar breached that duty by supplying bulldozers used to destroy homes, and (4) negligent entrustment, sale and distribution, asserting that manufacturers owe a duty of care to persons injured by a third party's foreseeable illegal use of those products, and that the IDF's use of the bulldozers was foreseeable.

## 5.5 Defenses and Obstacles to Recovery

As discussed below, there are major obstacles plaintiffs face in suing TNCs in U.S. courts. In addition to these barriers, it should be noted that judicial bias in the U.S. creates a greater burden for Palestinian plaintiffs in particular.<sup>71</sup>

### a) Personal Jurisdiction

The most formidable legal obstacles in human rights litigation against TNCs arise from their multiple nationality. Many companies create complex structures with multiple tiers of subsidiaries, relying on the corporate shield between parent and subsidiary to insulate themselves from liability, minimizing their “presence” in any one jurisdiction (to avoid personal jurisdiction) and raising a defense of *forum non conveniens* (that the forum is inconvenient). TNCs often undercapitalize the offshore subsidiary so that it may be unable to pay a court judgment in favor of victims of human rights violations. It is also more difficult for a plaintiff to enforce a favorable judgment on a foreign subsidiary.

#### i. Presence

Personal jurisdiction in federal courts follows the state law where the court is located, and persons are subject to jurisdiction where they are domiciled (i.e. where they reside), where the act(s) complained of occurred, or where they are physically present. As a legal person, a corporation may be sued (a) where it is domiciled, which means its place of incorporation/organization, (b) where the act(s) complained of occurred, and (c) where the corporation has a “presence” which typically means where the corporation does “continuous and systematic business.” A foreign corporation is subject to personal jurisdiction in a federal court if it is present by “doing business” in the state where the court sits, as determined by the continuous and systematic business test.<sup>72</sup> If a court finds the defendant is sufficiently present, it will assert jurisdiction over the defendant if it is “fair” and “reasonable” to do so.<sup>73</sup>

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71 See generally Susan M. Akram and Yasmine Gado, *Legal Strategies Towards Accountability under International Law: Civil Tort Claims and Related Mechanisms in US Courts*, Al Majdal (Aug. 2009) (describing barriers to recovery by Palestinian and Arab plaintiffs in ATCA cases for reasons that did not mandate dismissal of similar suits against Arab or Palestinian plaintiffs).

72 The traditional indicia of presence for a company are whether it has an office, a phone listing, bank accounts or other property in the state, whether it does public relations work there, and whether it has individuals permanently located in the state to promote its interests.

73 Fairness is determined by several factors, including the nationality of the defendant, the burden and inconvenience to the defendant to litigate in the forum, the location where the events in question occurred, and others.

## *ii. The Responsibility of Parent Companies*

Because remedies usually are not available in the country where the wrongful act(s) occurred, plaintiffs attempt to go beyond the local subsidiary that caused the harm and sue the parent corporation (as well as the subsidiary). The law of corporations makes this difficult. A subsidiary is considered to have a “separate personality” so that its acts normally are not attributable to the parent. However, there are narrow exceptions to this rule where (a) the two entities are deemed to be *alter egos* or (b) where the subsidiary is deemed to be an agent of the parent.

### *Alter Ego Exception – “Piercing the Corporate Veil”*

Normally the corporate shield protects a parent from liability for a subsidiary’s wrongful conduct because the parent is a shareholder of the subsidiary, and the corporate form provides limited liability for shareholders for the acts of the corporation in which they invest. In rare circumstances, a court will “pierce the corporate veil” and hold the parent vicariously liable for the subsidiary’s actions if it concludes the subsidiary was an *alter ego* of the parent. The two entities will be deemed *alter egos* if (a) the parent controls the subsidiary to such a degree as to render the latter the mere instrumentality of the former – i.e. there is such unity of interest and ownership that the separate personalities no longer exist *and* (b) if failure to disregard their separate identities would result in fraud or injustice, such as where the subsidiary is undercapitalized and unable to pay a judgment. Direct involvement by the parent’s officers and employees in the subsidiary’s business, shared directors and commingling of funds are additional factors.<sup>74</sup>

### *Agency Jurisdiction*

A court may assert personal jurisdiction over a parent corporation if the parent has an employee or subsidiary that acts as an agent located within the court’s jurisdiction. This was the case in *Shell*. The Second Circuit’s test for an agency relationship *for purposes of jurisdiction* (not liability) is that the agent performs services sufficiently important to the parent that it would itself perform equivalent services if no agent were available.<sup>75</sup>

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<sup>74</sup> See *Enterprise Liability: Reviewing and Revitalizing Liability for Corporate Groups*, 97 Cal. L. Rev. 195, 197 (2009) (hereafter, “*Enterprise Liability*”).

<sup>75</sup> While the Ninth Circuit in *Unocal* described its agency jurisdiction test the same way, *Unocal Corp.*, 248 F.3d at 928-31, in a recent case it added a new requirement that the parent have exercised pervasive control over the subsidiary. The higher burden resulted in dismissal even though the defendant earned half its annual profits in the US market. *Bauman v. DaimlerChrysler AG* (9<sup>th</sup> Cir. Aug. 2009). A dissenting judge complained that the more stringent test would “shield foreign corporations from actions in American courts—although they have structured their affairs so as to reap vast profits from American markets—and deprive plaintiffs, including those who allege grave human rights abuses, of access to justice.”

To establish agency for jurisdictional purposes, a formal agency agreement is not required; the defendant need not have exercised direct control over its agent, but the agent must be primarily employed by the defendant and not engaged in similar services for other clients.

In *Shell*, the plaintiffs sued the foreign parents of the Nigerian subsidiary that caused their harm, as well as the Nigerian subsidiary. The parents (corporations based in England and the Netherlands) had to be “present” in New York for the court to assert jurisdiction over them. The court held that the parents had a sufficient presence to be sued in New York because they maintained an investor relations office that performed services sufficiently important to the foreign parents to render the New York representative their agent.<sup>76</sup>

In the last court ruling before *Shell* settled, the Second Circuit overturned the district court’s dismissal of claims against *Shell*’s Nigerian subsidiary.<sup>77</sup> The district court had dismissed the case against *Shell* Nigeria on the grounds that it did not have sufficient business in the U.S. to be tried in U.S. courts.<sup>78</sup> The Second Circuit decision would have permitted the plaintiffs to seek further information to establish *Shell* Nigeria’s connections to the United States. Five days after the ruling *Shell* settled.

These are key decisions because they established (for the Second Circuit at least) that companies doing significant business in the U.S. may be tried for human rights violations in U.S. courts, despite the fact that a remote subsidiary engaged in the activities that caused the plaintiffs’ harm.

### ***Unified Economic Scheme***

The law of corporations thus presents a major potential obstacle in ATCA cases against TNCs because the alleged wrongful conduct is usually performed by a subsidiary formed and located outside the U.S. and the parent may also be a foreign corporation. A lawyer for the plaintiffs in *Unocal* commented:

[N]otions of corporate separateness were developed at a time when the issue

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76 See *Wiwa* 226 F3d 88 (2<sup>nd</sup> Cir. 2000).

77 No. 08-1803-cv (2<sup>nd</sup> Cir. Jun. 2009).

78 *Kiobel v. Royal Dutch Petroleum Co.*, 02 Civ. 7618, 04 Civ. 2665, 2 3008 WL 591869 (S.D.N.Y. March 4, 2008). The plaintiffs had argued the court had jurisdiction over *Shell* Nigeria because half of its oil production was exported to the US, it had an importing agent in the US, it marketed its oil in the US, recruited and held training seminars for employees in the US through another *Shell* entity, contracted for construction of a barge in New Orleans among other service contracts, and partnered in projects with USAID.

was entirely one of domestic jurisdiction—e.g., concerns about holding a parent company liable in California were ameliorated by the fact that a New York subsidiary was adequately capitalized. However, in dealing with offshore companies set up to avoid, rather than shift, liability, a different analysis should be applied. Parent companies should be liable based on factors showing that decisions to invest were made by the parent, initial capital was provided by the parent, and profits would be returned to the parent. If the parent company’s lawyers are then able to create the illusion of separateness to offer plausible deniability to the parent, this should not cut off liability.<sup>79</sup>

Some lawyers and academics have proposed “enterprise liability,”<sup>80</sup> a theory in which a parent company and its web of subsidiaries are all part of a unified economic scheme so that the entire enterprise should be held liable for the human rights violations of one entity. The plaintiffs made this argument in the state court proceedings in the *Unocal* case, but were not successful; in the court’s view there was no “unity of interest” between the corporate entities to render them functionally the same entity. The enterprise liability concept has not been generally accepted.<sup>81</sup>

#### **b) *Forum Non Conveniens***

Several corporations have been successful in obtaining dismissal of ATCA claims on the grounds of *forum non conveniens* (FNC),<sup>82</sup> a discretionary doctrine permitting a court in rare instances to dismiss a claim over which it has proper jurisdiction where the case would greatly inconvenience the defendant, the judicial system, or both.<sup>83</sup> Federal courts must apply a two-part test to determine whether dismissal is proper under FNC, first, inquiring into the existence of an “adequate alternative forum” and second, weighing various private and public interest factors.<sup>84</sup>

An alternative forum – i.e. a court other than the court the plaintiff chose – is considered adequate if it offers a remedy and will treat the plaintiff with fairness.<sup>85</sup>

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79 Terry Collingsworth, *The Key Human Rights Challenge: Developing Enforcement Mechanisms*, 15 Harv. Hum. Rts. J. 183 (Spring 2002).

80 See, e.g., *Enterprise Liability*, *supra* note 74, at 197 (containing a discussion of enterprise liability under US law and in the context of human rights litigation and the *Unocal* case).

81 See *id.* at 200 (“Despite receiving a modicum of support from legal academia, pure ‘you profit, you pay’ enterprise liability for corporate torts has not, at least facially, been generally accepted.”)

82 See, e.g., *Turedi v. Coca Cola Co.*, 460 F. Supp. 2d 507 (S.D.N.Y. 2006); *Aguinda v. Texaco*, 142 F. Supp. 2d 534 (S.D.N.Y. 2001), *aff’d as modified*, 303 F.3d 470 (2d Cir. 2002); *Flores v. Southern Peru Copper Corp.*, 253 F. Supp. 2d 510 (S.D.N.Y. 2002).

83 See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947).

84 See, e.g., *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d at 100.

85 See *Piper Aircraft*, 454 U.S. 235, 254-55 (1981).

The court's determination will depend on whether the foreign forum involves substantive law that is highly unfavorable to the plaintiff, bias, lack of access by plaintiff due to cost, visa restrictions and other practical obstacles, or lack of jurisdiction over the defendant.<sup>86</sup> The defendant bears the burden of establishing that an adequate forum exists.

If an adequate alternative forum exists, the court must next perform a balancing test that weighs the private interests of the parties and the public interests of the competing forum.<sup>87</sup>

The private interests of the parties include: (1) the accessibility of evidence, (2) the availability of compulsory process for attendance of unwilling witnesses, (3) the cost of obtaining the attendance of willing witnesses, (4) the ease of viewing evidence if appropriate to the action, (5) whether the judgment will be enforceable in the alternative forum, and (6) any other considerations affecting the ease, cost, and fairness of the trial. The public interest factors include: (1) whether the court has a heavy case load (2) whether the burden of jury duty should be imposed on the community, (3) whether the court will face difficult problems dealing with conflict of law or foreign law, and (4) the local interest in having the controversy decided at home. [ ] To warrant dismissal on the grounds of *forum non conveniens*, the balance of the private and public interest factors must weigh strongly in favor of the alternative forum because "the plaintiff's choice of forum should rarely be disturbed."<sup>88</sup>

In addition to the above test, the Supreme Court has held that a plaintiff's choice of forum is entitled to greater deference when the plaintiff has chosen the home forum while a foreign plaintiff's choice of forum deserves less deference because it is "much less reasonable" to assume that a foreign plaintiff chose the forum for reasons of convenience.<sup>89</sup> In the Court's view, foreign plaintiffs are likely to be choosing U.S. courts not out of convenience but to take advantage of favorable law.<sup>90</sup> Thus, there is a "tension" between the ATCA and the doctrine of FNC in that the entire purpose of the ATCA is to provide a forum for foreign plaintiffs to hear claims of violations of international law even where the defendant is not a U.S. citizen.<sup>91</sup>

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86 Gary Born, *International Civil Litigation in United States Courts: Commentary and Materials*, 3d Ed., 1996, 351-53.

87 See *Gulf Oil Corp.* at 508-09.

88 *Id.* at 508-09.

89 See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255 (1981).

90 *Id.*

91 Jeffrey E. Baldwin, *International Human Rights Plaintiffs and the Doctrine of Forum Non Conveniens*, 40 Cornell Int'l L.J.749 (2007), available at <http://organizations.lawschool.cornell.edu/ilj/issues/40.3/CIN305.pdf>.

In the *Shell* case, the Second Circuit addressed this tension, declining to dismiss the case on FNC grounds because the plaintiff was a U.S. resident *and* because of the “public policy interest implicit in the ATCA’s provision of a forum for adjudication of claims of violations of the law of nations” and the interest of the United States, as expressed in the TVPA, in providing a forum for the adjudication of claims of torture in violation of the standards of international law.<sup>92</sup> Although the *Shell* holding does not guarantee international human rights plaintiffs a U.S. forum, it does make it easier for such plaintiffs to have their claims heard in U.S. federal courts in the Second Circuit.<sup>93</sup>

Although this section is limited to U.S. law, it is worth noting that a Canadian court dismissed on FNC grounds a case charging two Canadian corporations, Green Park International and Green Mount International, with aiding and abetting the colonization of the OPT by building settlements in the village of Bil’in on the West Bank. In *Bil’in v. Green Park*,<sup>94</sup> the Canadian court held that the Israeli High Court of Justice was the more appropriate forum because of its stronger connection to the case based on: the residence of the parties and witnesses and location of evidence, that relevant documents were likely to be in Hebrew or Arabic, that the injuries were suffered in the West Bank and the injurious act was committed there, the location of defendants’ assets and the need to enforce the judgment abroad, that the applicable law was not Canadian law but the law applicable in the West Bank, and practicality. The court found that the Israeli court was sufficiently impartial to provide a fair judgment.

### **c) Practical Hurdles: Cost and Logistics**

Lawyers for the plaintiffs in the *Shell* case have observed that plaintiffs often face “logistical, practical and even emotional hurdles. They usually live in a foreign country, often in a rural area that is difficult to reach and often in an ongoing situation of war and other security problems. As a result, the logistics of travel, communication and translation can be very difficult. Moreover, plaintiffs who have survived human rights abuses or lost relatives to such abuses are often traumatized and may require ongoing emotional support. They must be prepared to stay with litigation that may drag on for years.”<sup>95</sup> In the case against Shell, the litigation lasted over a decade before it was settled in June 2009.

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92 *Wiwa*, 226 F.3d at 101, 106.

93 *But see Baldwin*, *supra* note 91, arguing that subsequent district court decisions applying the approach in *Shell* limited the Second Circuit holding.

94 Further information and court documents available at <http://www.haguejusticeportal.net/eCache/DEF/9/488.html>.

95 Green and Stephens, *Commentary*, *supra* note 2, at 3.



#### **d) Political Question Doctrine**

Under the political question doctrine, claims in U.S. courts may be dismissed if they are determined to present a “non-justiciable” political question. Stated generally, a political question is one that is not appropriate for a court to decide, but rather should be decided by the political branches of government – the executive or legislature. There are six factors courts weigh to determine whether such a question is at issue in a case:

- (i) whether the U.S. Constitution committed the issue to one of the political branches; (ii) whether the court would be able to define standards to resolve the issue; (iii) whether deciding the issue required a policy determination of the type courts clearly did not decide; (iv) whether deciding the issue would show a lack of respect to the other branches of government; (v) whether there was an unusual unquestionable need to adhere to a political decision already made; and (vi) whether the court’s decision would cause embarrassment to the other branches by a conflicting decision on the same issue.<sup>96</sup>

Although the fact that a case arises in a politically charged context does not necessarily mean a nonjusticiable political question is present, this doctrine has proven to be a major obstacle in cases involving Israel’s actions in Palestine (and Lebanon). Because decisions by the executive and certainly by the U.S. Congress almost always favor Israel, application of the doctrine – i.e. deferring to the other branches – will favor defendants. In the *Caterpillar* case, the Ninth Circuit made a factual finding that the U.S. government pays for every bulldozer the IDF purchases from Caterpillar, and then dismissed the case on the grounds that it could not impose liability on Caterpillar without interfering with the foreign policy decision of the executive to pay for the bulldozers. Because the executive branch is heavily involved in mediating the Israeli-Palestinian conflict, because Congress appropriates billions in arms sales to Israel, and because Israel is considered a staunch ally, defendants are likely to prevail in the argument that these cases interfere in foreign policy decisions already made by the political branches of the U.S. government.

#### **e) Act of State Doctrine**

U.S. courts will dismiss a case that involves questioning a sovereign act of a foreign state. While the act of state doctrine applies to acts by sovereign States, corporations may raise the defense if the case involves a question as to legality

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<sup>96</sup> Baker v. Carr, 369 U.S. 186 (1962).

of acts of a foreign government.<sup>97</sup> The requirements of this doctrine are (a) an official public act of a state (b) in its territory (c) where barring adjudication of the case would be appropriate. Like the political question doctrine, this doctrine “reflects the prudential concern that the courts, if they question the validity of sovereign acts taken by foreign states, may be interfering with the conduct of American foreign policy by the Executive and Congress.”<sup>98</sup>

The factors courts consider in determining whether the doctrine mandates dismissal are: (a) the degree of codification or consensus concerning a particular area of international law; (b) whether the government which perpetrated the challenged act of state is no longer in existence; (c) the importance of the implications of the issue for foreign relations, and (d) whether the case involves aspects of international law that touch sharply on national nerves.<sup>99</sup> The first two factors weigh in favor of deciding the case, the latter two in favor of dismissal. U.S. courts often consult the views of the U.S. Department of State in deciding whether the doctrine should be applied.

In *Caterpillar*, the lower court held the doctrine required dismissal, although the Ninth Circuit affirmed the dismissal on other grounds. The act of state defense is not particularly strong in ATCA cases generally.<sup>100</sup> With respect to private actions in or relating to the OPT, the doctrine also is unlikely to be applied because the U.S. (like most states) views the OPT as outside Israel’s sovereign territory and because derogations from fundamental principles of international law are not permitted. Other factors also weigh in favor of plaintiffs, such as the high degree of consensus among nations concerning the international norms the State of Israel violates, and the fact that the U.S. government sometimes condemns acts by Israel (like the assassination of Salah Shehadah, a subject of an ATCA claim in *Matar et al v. Dichter*<sup>101</sup>) so there is no risk of interference with the executive’s conduct of foreign relations.

## **f) Palestinian Statelessness**

One court has held that Palestinians’ refugee status bars them from access to U.S. federal courts to enforce U.S. law where they attempt to rely on “diversity jurisdiction” – that is, jurisdiction based on the diverse citizenship of the parties.

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97 See, e.g., *Sarei v. Rio Tinto PLC*, 550 F.3d 822 (9<sup>th</sup> Cir. 2008).

98 *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 717 (9<sup>th</sup> Cir. 1992).

99 See *Banco Nacional de Cuba v. Sabbatino*, 376 US 398, 428 (1964).

100 See *Kadic v. Karadzic*, 70 F.3d 232, 250 (2<sup>d</sup> Cir. 1995) (“it would be a rare case in which the act of state doctrine precluded suit under [the ATCA].”).

101 563 F.3d 9 (2<sup>d</sup> Cir. 2009).

A U.S. federal court has jurisdiction over a civil case if, among other things, the case is between citizens of a U.S. State and “*citizens or subjects of a foreign state.*” The foreign state must be recognized – *de jure* or *de facto* - by the executive branch of the US government at the time the complaint is filed.

In a case brought during the first intifada in the 1980’s, *Abu-Zeineh v. Federal Laboratories, Inc. and Transtechnology Corporation*,<sup>102</sup> Palestinians sued U.S. manufacturers of CS gas, a chemical agent, alleging the companies manufactured defective CS gas and negligently sold the gas to the Israeli government. They sought damages for the deaths of their relatives exposed to the gas by IDF attacks in the occupied Palestinian territories and around Jerusalem. Three of the plaintiffs were citizens of Palestine, and the remaining six alleged they were citizens of both Palestine and Jordan. The *Abu-Zeineh* case did not involve a claim under the ATCA for violations of international law so the plaintiffs could not rely on its jurisdictional provision. Instead, the plaintiffs alleged that diversity jurisdiction gave them access to U.S. federal court to enforce U.S. domestic law.

The court dismissed the case on the grounds that it did not have diversity jurisdiction because the plaintiffs were not citizens of any state. The claims by Palestinian plaintiffs were dismissed because there is no *de jure* recognition of Palestine as a state, and according to the U.S. State Department, no *de facto* recognition either. The claims brought by six West Bank residents who argued they were both Palestinian and Jordanian citizens also were dismissed on the basis of defendant’s expert witness testimony (because the State Department did not offer an opinion on this question) that statements by Jordanian government officials immediately after Jordan severed its ties with the West Bank proved that the West Bank plaintiffs were not Jordanian citizens.

### **g) Political Influence**

The filing of Statements of Interest by the U.S. State Department has had significant influence in the outcome of ATCA human rights litigation. In a case against various companies that had profited from business with the South African apartheid regime,<sup>103</sup> the State Department filed a Statement of Interest claiming the litigation interfered with the U.S.’ relationship with the new South African government which was involved in its own process to redress injuries from apartheid.<sup>104</sup> In cases against the mining company Rio Tinto and oil company

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102 975 F.Supp. 774 (W.D. Pa. 1994).

103 *Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007).

104 In September 2009, the South African government reversed its position, now supporting the lawsuit.

Talisman Energy the State Department filed statements claiming that adjudicating the case would risk potentially serious adverse impact on its conduct of foreign relations. In the *Caterpillar* case, the State Department filed an amicus brief with the appellate court claiming that the case interfered with U.S. foreign policy regarding arms sales to Israel. All these cases were dismissed (although in *Talisman* the court claimed it was not because of the State Department objection). By contrast, in the *Shell* case, no Statement of Interest was filed, and in the *Unocal* case, the State Department filed a statement that *supported* adjudicating the case, stating it “would not prejudice or impede the conduct of U.S. foreign relations with the current government of Burma.”<sup>105</sup>

## **h) Statutes of Limitation**

A legal claim will be barred if a certain amount of time determined by statute has passed since the harm occurred or when the plaintiff learned of it. This may prevent accountability for gross human rights abuses because delays may result where a government in power is involved in the abuses, armed groups involved threaten those who speak out, or if the legal system in question is not functioning effectively for other reasons. Victims also may be too traumatized in the short-term to initiate litigation.

To summarize, the effectiveness of the ATCA in providing redress for victims and deterring corporate human rights abuse is still unclear. Aside from the *Shell*, *Unocal* and *Yahoo!* settlements, most cases against corporations have been dismissed. Only three ATCA cases have made it to trial, two major cases against *Chevron* and *Drummond*, where both corporations were victorious, and one minor case against *WorldTel* where the jury awarded the plaintiff only \$1.5 million in damages. The continued viability of the statute will depend on, among other things, the standard the U.S. Supreme Court ultimately applies – the stringent purpose standard (which would lessen the statute’s efficacy) or the knowledge standard. The numerous obstacles discussed above inhibit recovery by victims, and Congress may succumb to the ongoing pressure of business lobbies and amend the statute so as to lessen the threat to companies of human rights litigation in U.S. courts. Additional legal mechanisms to advance corporate accountability are emerging, however, namely international criminal law and non-binding international norms, discussed below.

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<sup>105</sup> Letter from Michael J. Matheson, Acting Legal Adviser, US State Department, Statement of Interest, *National Coalition Gov’t of Burma v. Unocal, Inc.* 176 F.R.D. 329, Exhibit A (C.D. Cal. 1999).

## II. International Laws and Norms

Corporations are regulated at the international level through binding international criminal law applicable to individuals acting on the company's behalf (and potentially the corporate entity itself), and non-binding international norms established via international governmental organizations. While corporate lawyers currently do not place much weight on the risk of international criminal liability for business executives due to the scarcity of precedent, experts believe international criminal law is becoming more relevant because companies are extending their operations into new contexts, such as operating amidst armed conflict, and further into countries notorious for governmental human rights abuse.<sup>106</sup> The increased relevance of international law is also evidenced by efforts to establish non-binding international norms for TNCs, led by the UN Human Rights Council. A general overview of these laws and emerging norms is provided below.

### 1. International Criminal Law Under the ICC and Tribunals

Six decades ago, at the Nuremberg trials following the Second World War, a number of business representatives were tried and some convicted for their involvement in Nazi crimes. In 2004, a Dutch businessman was tried and convicted in the Dutch district court in the Hague for his role in exporting substances to Iraq used to create mustard gas, used by Saddam Hussein on Iraq's Kurdish population.<sup>107</sup> Thus, it is settled that corporate executives may face direct and secondary personal liability under international criminal law.

This section provides a summary of principles of international criminal law outlined in a 2008 report issued by a panel convened by the International Commission

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<sup>106</sup> ICJ Report, *supra* note 3, Vol. 2 at 5.

<sup>107</sup> *Id.* at 9. Frans van Anraat is currently serving a 17-year prison term.

of Jurists<sup>108</sup> which provides an up-to-date analysis of circumstances in which business executives may face liability for complicity in human rights abuses committed by others. The Report is based on law contained in the Rome Statute of the International Criminal Court (ICC Statute), the views of the International Law Commission (ILC Code), and precedents established by international criminal tribunals, primarily those in Nuremberg, the Former Yugoslavia and Rwanda.

## 1.1 International Crimes Defined

The international crimes relevant to this discussion are crimes against humanity, war crimes and other gross human rights abuses that constitute crimes under international law.<sup>109</sup> All crimes against humanity are punishable when they are committed by anyone, including company officials, and both in times of peace or armed conflict.<sup>110</sup> War crimes are serious violations of the laws and customs of war and international humanitarian law applicable in armed conflicts (internal and international)<sup>111</sup> and may be committed by private parties, including individuals representing companies. The act need not be part of a plan or policy or large in scope – a single act will suffice.<sup>112</sup> Gross human rights abuses that constitute international crimes are genocide, slavery, torture, extrajudicial execution and enforced disappearance. States are required under certain international treaties to prevent and penalize all these acts in their criminal law.<sup>113</sup>

## 1.2 Enforcement of International Criminal Law

Currently there is no international forum available to try a corporate entity for international crimes. After intensive negotiations over the ICC Statute on this issue, State parties decided not to give it the power to prosecute legal entities such as corporations.<sup>114</sup>

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108 See ICJ Report, Vol. 2.

109 Crimes against humanity include widespread or systematic murder, extermination, enslavement, deportation or forcible transfer, imprisonment, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, forced sterilization or any other form of sexual violence, enforced disappearances, arbitrary detention, apartheid and other inhumane acts and persecutory acts which are committed on political, racial, national, ethnic, cultural, religious or gender grounds. See *id.* at 3-4.

110 See *id.* at 4.

111 War crimes include willful killing, torture, inhuman treatment, willfully causing great suffering or serious injury, extensive destruction or appropriation of property not justified by military necessity, unlawful deportation or transfer or displacement of the civilian population and intentionally directing attacks against civilian populations. They also include property offenses such as pillage and unlawfully destroying or seizing property. See *id.*

112 See *id.*

113 *Id.*

114 *Id.* at 8.

As noted above, however, it has been established since the Nuremberg trials that corporate *officials* may be prosecuted in international tribunals for international crimes. The ICC's jurisdiction over genocide, crimes against humanity and war crimes applies to individuals, including corporate officials, who are direct perpetrators of these crimes or are implicated in them.<sup>115</sup> The ICC does not have universal jurisdiction; it may exercise jurisdiction only if (a) the accused is a national of a State Party; (b) the crime took place on the territory of a State Party; or (c) the UN Security Council has referred the situation to the Prosecutor, irrespective of the nationality of the accused or the location of the crime.<sup>116</sup> Further, the Court will not investigate or prosecute a case if a state with jurisdiction is willing and able to do so in an impartial manner.<sup>117</sup>

In addition to the ICC, as discussed in Section I.4.1 above, many national jurisdictions including the U.S. have incorporated prohibitions of crimes under international law into their national criminal laws, so that domestic courts in these jurisdictions may try corporate officials and in some states, the corporate entity itself.<sup>118</sup> Jurisdictional barriers may exist in some jurisdictions,<sup>119</sup> but many states now apply universal jurisdiction principles for certain international crimes such as crimes against humanity, and international treaties impose on states a requirement of *aut dedere aut judicare* meaning "extradite or prosecute."<sup>120</sup>

While criminal law traditionally aims to punish and deter, more recently remedies and reparation (monetary or non-monetary) for victims are being included in international criminal law. For instance, the ICC Statute allows victims to present their views and concerns and to seek reparations, and the Court can order that fines and penalties be paid into a trust fund for victims and their families.<sup>121</sup>

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115 *Id.* at 55.

116 *Id.*

117 *Id.*

118 *Id.* at 52.

119 States typically exercise national criminal jurisdiction over crimes which are committed on their territory, regardless of the nationality of the accused or of the victim (territorial jurisdiction), and under international law, a state can exercise jurisdiction over crimes committed outside its territory by its nationals (extra-territorial jurisdiction on active personality grounds). There is also evidence of a new willingness on the part of some states to exercise jurisdiction when crimes are committed against its nationals (extra-territorial jurisdiction on passive personality grounds); or crimes are committed against or threaten its national interests (extra-territorial jurisdiction on protective grounds). *Id.* at 52-53.

120 *Id.*

121 *Id.* at 53 (citing Chapters 4 (Section 3) and 5 of the Regulations of the ICC and Article 79 of the ICC Statute).

## 1.3 Accomplice Liability under International Law

The ICC Statute, the most significant source of the current state of international criminal law has incorporated the concept of accomplice liability, criminalizing “committing, planning, ordering, or instigating” or “aiding and abetting” a crime.<sup>122</sup> Additional acts of complicity that give rise to liability under international criminal law are rendering assistance after a crime is committed, or failing as a superior to prevent or punish the commission of a crime by a subordinate under the superior’s power or control.<sup>123</sup> Regarding business executives, the Nuremberg tribunal held a bank executive criminally liable as an accomplice for taking deposits from the SS of property confiscated from concentration camp victims because he either *knew or was willfully blind* to the facts surrounding the source of the deposits.<sup>124</sup> Some of these forms of complicity are governed by their own legal rules, as discussed below.

### a) Aiding and Abetting

Aiding and abetting under international criminal law occurs when a person knowingly helps another to commit a crime. The person’s knowledge that his or her assistance, encouragement or moral support will contribute to the crime may be inferred from all relevant circumstances by direct or circumstantial evidence.<sup>125</sup>

#### *Act or Omission (Actus Reus)*

The crime of aiding and abetting thus consists of certain acts accompanied by a particular mental state. The assistance must have a “substantial effect” on the commission of the crime; it need not have *caused* the crime or made it worse but must have changed in some respect the way the crime was committed or accomplished.<sup>126</sup> The assistance can occur before, during or after the crime has occurred.<sup>127</sup> Examples of acts constituting aiding and abetting include: the provision of information, personnel, and logistical assistance to commit crimes; the procurement and use of products or resources (including labor) with knowledge

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122 *Id.* at 11 (citing ICC Statute and ad hoc tribunals in Yugoslavia and Rwanda).

123 *Id.* at 18. The Nuremberg Charter established accomplice liability for “leaders, organisers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit” the crimes in the Charter, who were “responsible for all acts performed by any persons in execution of such plan.” *Id.* at 13 n.31.

124 *Id.* at 14.

125 *Id.* at 17.

126 *Id.*

127 *Id.*



that the supply of these resources involves the commission of crimes; or the provision of banking facilities so that the proceeds of crimes can be deposited.<sup>128</sup>

A failure to act can be considered aiding and abetting if a person does nothing when they have the power to prevent or mitigate the crime, or where the silence “significantly legitimizes or encourages or provides moral support to the crime.”<sup>129</sup> The ICJ Report specified when a business executive’s failure to act could result in accomplice liability, focusing on the level of influence or control of the executive over the principal perpetrator and whether crimes are common in the country in which the business operates:

Although as yet untested in court, the Panel considers that there could be situations in which a company official exercises such influence, weight and authority over the principal perpetrators of a crime that his or her silent presence could be taken by the principals to communicate approval and moral encouragement to commit the crime. Further, if these company officials actually have the authority to prevent, stop or mitigate a crime and do not do so, they may be considered as aiding and abetting it. The greater the political and economic influence wielded by the company, or the personal or professional influence yielded by the company official, the more likely that company executives could find themselves exposed to accomplice liability. This is particularly so if they operate in countries where serious crimes are known to be committed.<sup>130</sup>

### ***Mental State (Mens Rea) – Knowledge or Purpose***

In addition to an act or omission, as for most crimes a particular mental state is required for aiding and abetting. The ICC Statute departs from the ILC Code and ad hoc tribunal precedents by requiring that a person provide assistance “for the purpose of facilitating” the commission of a crime.<sup>131</sup> This phrase “introduces a mental element that goes beyond the ordinary *mens rea* requirement of intent and knowledge required for other crimes under the ICC Statute.”<sup>132</sup> The ILC Code and ad hoc criminal tribunals use the less stringent knowledge standard for all forms of accomplice liability including aiding and abetting – namely, that the acts of assistance are performed with the *knowledge* that they will assist the commission of the specific crime of the principal perpetrator.<sup>133</sup>

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128 *Id.* at 19.

129 *Id.* at 20.

130 *Id.*

131 *Id.* at 22.

132 *Id.*

133 *Id.* at 21.

While the aider and abettor must be aware of the elements of the crime ultimately committed, if he is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he may be deemed to have intended to facilitate the commission of that crime.<sup>134</sup> According to the ICJ Report, in the context of corporate liability this means that:

a company representative who knows that the equipment the business is selling is likely to be used by a buyer for one of a number of crimes would not escape liability because there is uncertainty as to the exact crime intended. [ ] If the [corporate officials] have the necessary knowledge as to the impact of their actions, it is irrelevant that they only intended to carry out normal business activities. For example, vendors who sell goods or materials such as chemicals, computers, bulldozers or digging equipment can be responsible as accomplices if they have knowledge, judged objectively, that the purchaser would use them to commit crimes under international law.<sup>135</sup>

The ICJ Report authors questioned whether the difference in the knowledge and purpose standards would have any practical effect, however, because “if it is established that a corporate official had knowledge that an act would facilitate the commission of a crime, and yet proceeded to act, then the purpose to facilitate could be found to exist. The fact that the official knowingly aided a crime in order to make a profit does not diminish his assistance; indeed it could be interpreted as providing a further incentive to facilitate the crime ‘on purpose.’”<sup>136</sup>

### ***Proving Mental State***

The determination that a person acted with the requisite mental state for aiding and abetting is conducted on the basis of all relevant circumstances, established through direct and indirect or circumstantial evidence.<sup>137</sup> Therefore, objective facts can be used to infer the subjective mental state of the defendant – in short, knowledge may be inferred from the circumstances.

The mere presence of a company in an area where the crime is carried out or the fact that it is making a profit from the criminal activity will not in and of itself be enough to show that the company’s officials know that their goods or services are

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<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 21-22.

<sup>136</sup> *Id.* at 22.

<sup>137</sup> *Id.* at 22.

being used in criminal activity.<sup>138</sup> The kinds of evidence relevant to state of mind would include, for example, information available to the company representative at the time the company provided the assistance, such as (a) records of meetings between the perpetrator and company officials revealing the criminal intent of the perpetrator, or (b) reports by reputable sources (such as international organizations, business people, governments or reliable NGOs) that the company's products or services are being used to commit crimes.<sup>139</sup>

## **b) Common Purpose Liability**

In international criminal law, an individual can be held criminally liable if he or she is part of a group of several people "who share a common purpose and then embark on criminal activity in execution of it. Whoever contributes to the commission of crimes by the group or some of its members may be liable."<sup>140</sup>

Under the ICC Statute, a person is liable as a *principal* perpetrator if he commits a crime jointly with another or through another – a form of "co-perpetration."<sup>141</sup> He or she must "knowingly and intentionally provide a co-ordinated and *essential* contribution to a common plan which involves an element of criminality."<sup>142</sup> A person is liable as an *accessory* if he "intentionally contributes to the commission of a crime by a group of persons acting with a common purpose, with the aim of furthering the crime or the criminal purpose, or knowing that the group intends to commit the crime"<sup>143</sup> – intended to be a less stringent standard of contribution.

The ad hoc tribunals have established three forms of a joint criminal enterprise (JCE). The first is a "basic" form where all perpetrators act pursuant to a common purpose, and possess the same criminal intention – such as a group planning a murder in which each plays a role. The second is a "systemic" form of JCE where the defendant is aware of, and actively participates in enforcing, an organized system of ill-treatment, intending to further its illegal purpose. The "extended" category of JCE imposes liability for crimes committed by other participants in the JCE, even though those crimes were outside the common purpose of the enterprise, if it was foreseeable that such a crime might be perpetrated by one or other members of the group and the accused willingly took that risk.<sup>144</sup> An

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138 *Id.* at 23.

139 *Id.*

140 *Id.* at 27.

141 *Id.* at 29.

142 *Id.* (emphasis in original).

143 *Id.*

144 *Id.* at 28.

example is a common purpose to effect ethnic cleansing, for which murder would be a foreseeable crime, although technically not necessary to effect the common purpose.

### c) Superior Responsibility

In a corporate context, superior responsibility is a form of accomplice liability whereby a company official may be held responsible for an international crime perpetrated by a subordinate if the superior (a) knew or had reason to know that the crime was about to be, was being, or had been, committed; and (b) failed to take necessary and reasonable measures to prevent the crime, or to stop the crime or punish the perpetrator.<sup>145</sup>

The critical element of the superior-subordinate relationship is the ability of the superior to exercise power or control over the subordinate – *de jure* or *de facto*.<sup>146</sup> Control is defined as “the material ability to prevent or punish the commission of the offence.”<sup>147</sup> Civilian superiors may be found to have effective control over their subordinates if it is shown that, through their position in a hierarchy, they have the duty to report whenever crimes are committed and that in light of their position, those reports will likely trigger an investigation or initiate disciplinary or criminal measures.<sup>148</sup>

Regarding mental state, the superior must have either actual knowledge (established through direct or circumstantial evidence) that subordinates were about to commit or had committed crimes, or had constructive or imputed knowledge arising from information in the superior’s possession that would indicate at least the risk of offences being committed.<sup>149</sup> “Knowledge may be presumed if a superior had the means to obtain the relevant information regarding a crime and deliberately refrained from doing so or if the superior was so negligent about obtaining relevant information that malicious intent can be inferred from the failure to do so.”<sup>150</sup> (This language essentially refers to willful blindness). Finally, the superior must have failed to take necessary and reasonable measures to prevent or punish the crimes of his or her subordinates.

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145 *Id.* at 33. This liability is not “vicarious” – that is, superiors are not charged with the crimes of their subordinates, but with their failure to carry out their duty as superiors to prevent or punish the criminal conduct of their subordinates or persons under their control.

146 *Id.*

147 *Id.*

148 *Id.* at 34.

149 *Id.* at 33.

150 *Id.*

Superior responsibility is not limited to crimes physically committed by subordinates in person but may encompass any mode of individual criminal responsibility including aiding and abetting. Thus, if a company hires an agent to work in a country where the government is committing international crimes, and the agent is implicated in those crimes, the company executives may be at risk of superior liability if the elements of control, knowledge and failure to act are met. The ICJ Report cautioned that companies operating “in countries in conflict, or where gross human rights violations or abuses are widespread or systematic should be especially vigilant to exercise due diligence and put into place policies and procedures of management oversight to ensure that superiors take necessary and reasonable measures to prevent or punish acts committed by subordinates that could amount to crimes.”<sup>151</sup>

## 1.4 Companies Operating in the OPT: Supply of Goods; Plunder

As discussed earlier, companies doing business with Israel or in the OPT are often suppliers of goods. It is not likely corporate officials would be held criminally responsible for selling “legitimate and generic goods” to a government that then used the goods to commit a crime.<sup>152</sup> However, liability could result if the company provided more direct assistance, such as specifically tailoring its products to assist the perpetrators of the crime.<sup>153</sup> This has relevance for directors and officers of companies that supply the IDF with equipment; if it is used to commit international crimes the executives may be in danger of being held criminally liable as aiders and abettors.<sup>154</sup>

Aside from supplying goods, company officials risk criminal accusations of plunder or theft if their business cooperates with governments or other groups that illegally and forcibly remove people from their land.<sup>155</sup> This is relevant to companies facilitating construction of the wall, settlements and associated infrastructure on the West Bank.

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151 *Id.* at 35.

152 *Id.* at 37.

153 *Id.*

154 Consider by analogy the case of Frans van Anraat. During the trial it was shown that van Anraat knew he was exporting a substance to Iraq that could be used to produce poison gas and was aware that there was a reasonable chance it would be used for chemical attacks as Iraq had done during the Iran-Iraq war. The Court found that Anraat, “consciously and solely acting in pursuit of gain, has made an essential contribution to the chemical warfare program of Iraq...which enabled, or at least facilitated, a great number of attacks with mustard gas on defenceless civilians.” *Id.* at 9.

155 *Id.* at 41-42.

Given that the application of international criminal law to corporate actors is still largely untested (apart from Nuremberg and a single case in the Hague), its effectiveness as a mechanism to advance corporate accountability remains to be seen. Non-binding international norms relating to human rights and business have been applied to TNCs for decades, however, and these instruments ultimately may be more effective in raising standards of corporate behavior if they are “enforced” in the marketplace and political sphere.

## 2. Non-Binding International Norms and Guiding Principles

### 2.1 History of International Regulation

International regulation of TNCs began in the 1970s with the non-binding OECD Guidelines for Multinational Enterprises, the International Labor Organization Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy and the European Economic Communities’ Code of Conduct for Companies operating in South Africa.<sup>156</sup> All three involve voluntary participation by companies.

At the UN, the Commission on Transnational Corporations and the Centre for Transnational Corporations were established in 1974 to develop a code of conduct for TNCs, to monitor their social and environmental impacts and draft normative frameworks to govern them.<sup>157</sup> During the 1980s, these two organizations were combined into the UN Conference on Trade and Development and the proposed model code of conduct was abandoned. Also during this period, the scrutiny of major corporations increased dramatically through global media coverage and civil society activism focused largely on labor standards and environmental issues. Revelations of labor abuses and environmental devastation led to a renewed public interest in regulation of TNCs. Companies responded by developing voluntary codes of conduct and promoting environmentally sustainable products and better working conditions. At the same time, socially responsible investment funds began to “flourish”.<sup>158</sup> In 2000, the Global Compact between the UN and the corporate sector was established and currently over 4000 companies have

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<sup>156</sup> The Code of Conduct relating to South Africa appears to have been the first intergovernmental document addressing human rights responsibilities of companies. Scott Jerbi, *Business and Human Rights at the UN: What Might Happen Next?*, 31 Hum. Rts. Q., 299, 301-02 (2009), available at [http://www.realizingrights.org/pdf/Jerbi\\_Scott\\_Human\\_Rights\\_Quarterly\\_May09.pdf](http://www.realizingrights.org/pdf/Jerbi_Scott_Human_Rights_Quarterly_May09.pdf).

<sup>157</sup> *Id.* at 302.

<sup>158</sup> *Id.* at 304.

joined, committing themselves to help achieve UN goals and uphold ten principles covering human rights, labor, the environment and anti-corruption.<sup>159</sup> The EU is also addressing the issue of corporate human rights responsibilities as part of its CSR policy developed over the last decade, favoring a purely voluntary approach over binding regulations.<sup>160</sup>

In August 2003, the UN Sub-Commission on the Promotion and Protection of Human Rights, a body reporting to the UN Commission on Human Rights (replaced in 2006 by the UN Human Rights Council (HRC)) adopted “*Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*” which covered labor issues and effects on indigenous peoples by the operation of TNCs. The *Norms* were not adopted by the Commission, however, in part due to strong opposition of business.<sup>161</sup> In 2005, at the Commission’s request the UN Secretary General appointed a Special Representative on “the issue of human rights and transnational corporations and other business enterprises,” Professor John Ruggie (SRSR). The HRC has asked the SRSR to develop a set of guiding principles on corporate responsibility and accountability measures. These will almost certainly be non-binding.<sup>162</sup> Set forth below is a summary of the principles and proposals he has articulated to date in his periodic reports to the HRC.

## 2.2 Current Efforts by the UN Human Rights Council

The SRSR has proposed a policy framework to establish corporate responsibility for human rights violations known as “protect, respect, and remedy”:<sup>163</sup>

The framework rests on three pillars: the State duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication; the corporate responsibility to respect human rights, which in essence means to act with due diligence to avoid infringing on the rights of others; and greater access by victims to effective

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159 United Nations Global Compact, available at <http://www.unglobalcompact.org>.

160 See generally Jan Wouters & Leen Chanet, *Corporate Human Rights Responsibility: A European Perspective*, 6 N.W. U. J. of Int'l Hum. Rts., 262 (Spring 2008), available at <http://www.law.northwestern.edu/journals/jjhr/v6/n2/3/Wouters.pdf>.

161 Jerbi, *supra* note 156, at 306.

162 *Id.* at 316.

163 *Business and human rights: Towards operationalizing the “protect, respect and remedy” framework*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. A/HRC/11/13, 22 April 2009, ¶ 2 (hereafter, “Special Representative Report”), available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.13.pdf>.

remedy, judicial and non-judicial. The three pillars are complementary in that each supports the others.

At the HRC's request, the SRSG is currently "operationalizing" the framework.<sup>164</sup> There is more in the way of findings and summaries of existing law in the report, indicating the SRSG is still in the early stages of developing the guidelines.

### *State Duty to Protect*

The SRSG reported that a growing number of States are adopting CSR policies which "encourage responsible business practices, including fostering business understanding of and respect for human rights," and some restrict access to state assistance, such as export credit or investment insurance, to companies "having a CSR policy, participating in the United Nations Global Compact, or confirming their awareness of the OECD Guidelines."<sup>165</sup> He also reported a new trend in domestic corporate law whereby States are introducing public interest considerations into corporate laws and regulations, citing legislation and regulation in Europe and ATCA litigation in the U.S.<sup>166</sup>

The SRSG surveyed international investment and trade agreements which have been subject to controversy because they constrain States' compliance with international human rights obligations by exempting foreign investors from new laws and regulations, or compensating them for the cost of compliance.<sup>167</sup> He noted a disparity between agreements by OECD and non-OECD governments in terms of ensuring the State's ability to protect public interests.<sup>168</sup> He recommended that arbitration proceedings to enforce these agreements be made public and committed to developing guidance on "responsible contracting" by governments in relation to human rights.<sup>169</sup>

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<sup>164</sup> The HRC asked him to provide views and recommendations on strengthening the fulfillment of the State duty to protect against corporate-related human rights abuse, including through international cooperation, to elaborate further on the scope and content of the corporate responsibility to respect human rights and provide concrete guidance to business and other stakeholders, and to explore national, regional and international options for enhancing access to effective remedies for those whose human rights are impacted by corporate activities. In response the SRSG submitted his latest report in April, 2009, the Special Representative Report.

<sup>165</sup> *Id.* ¶ 21 at 8.

<sup>166</sup> *Id.* ¶¶ 24-27 at 9-10.

<sup>167</sup> *Id.* ¶ 30 at 10.

<sup>168</sup> OECD countries did *not* offer foreign investors exemptions from new laws, and contained provisions designed to preserve public interest considerations, while in non-OECD countries a majority of agreements did insulate investors from compliance with new environmental and social laws or required compensation for their compliance. *Id.* ¶ 32 at 11.

<sup>169</sup> *Id.* ¶¶ 34, 36 at 11-12.



The SRSR reported that currently there is little in the way of international cooperation; he proposed a working group to focus on corporate-related human rights abuses in conflict situations, where typically the most egregious abuses occur and where cooperation is “desperately needed”.<sup>170</sup>

### ***Corporate Responsibility to Respect***

The SRSR suggested companies should conduct ongoing human rights due diligence to ensure compliance with all internationally recognized human rights. The company should: (a) have a human rights policy, (b) assess human rights impacts of company activities, (c) integrate those values and findings into corporate cultures and management systems, and (d) track as well as report performance.<sup>171</sup> Among the various factors corporations should consider are whether and how the company might contribute to human rights abuse through the relationships connected to its activities, such as with business partners, entities in its supply chain, other non-State actors, and State agents.<sup>172</sup> The SRSR pledged to provide “a principled elaboration of human rights due diligence applicable to all businesses.”<sup>173</sup>

In “conflict-affected areas” he asserted that corporations should take into account international humanitarian law and policies; and in projects affecting indigenous peoples, should set standards specific to those communities.<sup>174</sup> The SRSR suggested the OHCHR publication, *Human Rights Translated*,<sup>175</sup> as a guide for companies on what human rights treaty language means in a business context.<sup>176</sup> He is also developing guidance for corporations regarding situations where national law conflicts with international standards.<sup>177</sup>

### ***Access to Remedy***

The SRSR notes that significant barriers to obtaining an effective judicial remedy persist in States’ domestic criminal and civil law systems. In civil claims, a plaintiff

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170 *Id.* ¶ 43 at 13.

171 *Id.* ¶ 49 at 14.

172 *Id.* ¶ 50 at 14.

173 *Id.* ¶ 76 at 19.

174 *Id.* ¶ 54 at 15.

175 Human Rights Translated, A Business Reference Guide, Monash University Castan Centre for Human Rights Law, International Business Leaders Forum, OHCHR, and Global Compact Office, available at [http://human-rights.unglobalcompact.org/doc/human\\_rights\\_translated.pdf](http://human-rights.unglobalcompact.org/doc/human_rights_translated.pdf).

176 Special Representative Report, *supra* note 163, ¶ 57 at 15.

177 *Id.* ¶ 69 at 18.

may be denied a remedy by the absence of a cause of action, cost, courts' inability to handle complex claims, or because corporate defendants have insufficient assets to pay a successful judgment.<sup>178</sup> Where the company is a subsidiary of an overseas parent, the powerful parent company may exercise leverage with government officials, and suing the parent (for its own or its subsidiary's actions or omissions) in its home State may raise jurisdictional issues about whether it is the appropriate forum. In addition, standards for parent companies regarding actions by its subsidiaries "may be unclear or untested in national law and such transnational claims also raise their own evidentiary, representational, and financial difficulties."<sup>179</sup> In criminal cases, States may be unwilling to devote the resources necessary to investigate and pursue allegations of corporate wrongdoing and vulnerable groups, such as women, children and indigenous peoples, may face additional barriers to obtaining a judicial remedy. The SRSB is studying options to address these barriers.<sup>180</sup>

The SRSB suggests that non-judicial grievance mechanisms should exist at the company, national and international levels and should provide legitimacy, accessibility, predictability, equitability, rights-compatibility and transparency.<sup>181</sup> Currently, these mechanisms are sparse, but an increasing number of companies, business associations and business-related organizations are developing them.<sup>182</sup> At the international level, the SRSB suggests mediation by an existing human rights body as a potential non-judicial grievance mechanism, and/or an arbitration system established by companies to handle disputes.<sup>183</sup>

### 3. Regional Instruments: European Union

In addition to international criminal law and international norms, obligations under regional legal instruments such as EU Directives and the European Convention on Human Rights could be enforced in domestic courts of EU states or the European

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178 *Id.* ¶ 94 at 23.

179 *Id.* ¶ 95 at 23.

180 *Id.* ¶¶ 96-98 at 23.

181 *Id.* ¶ 99 at 23. The World Bank Inspection Panel is an example of an international non-judicial grievance mechanism. The three-member body provides accountability for violations of the Bank's social and environmental policies by providing a forum to raise grievances for people who believe they have been or are likely to be adversely affected by a Bank project. The panel has been followed up by similar mechanisms at other multilateral development banks. Further information available at

<http://web.worldbank.org/WBSITE/EXTERNAL/EXTINSPECTIONPANEL/0,,contentMDK:20173267~menuPK:64129479~pagePK:64129751~piPK:64128378~theSitePK:380794,00.html>.

182 *Id.* ¶ 101 at 24.

183 *Id.* ¶ 112-13 at 26.

Court of Human Rights, respectively.<sup>184</sup> The OECD Guidelines for Multinational Enterprises, although not legally enforceable, also provide national forums to raise grievances. Human rights provisions in the EU Association Agreement with Israel (governing trade relations) arguably require suspension or termination of that agreement in light of Israel's human rights abuses.

### 3.1 EU Directives

An EU Directive is a legislative act that directs EU members to achieve a particular result while leaving the means of implementation to each individual state. U.K.-based Lawyers for Palestinian Human Rights<sup>185</sup> are attempting to enforce an EU Directive against the French companies Alstom and Veolia because of their involvement in the Jerusalem light railway.<sup>186</sup> The Directive establishes procedures for the award of public contracts, and is incorporated into British law through public procurement regulations that require, among other things, exclusion for "grave professional misconduct."

The lawyers asked a local London council to exclude Veolia from public contracts on the ground that its assistance to Israel to build and operate the tramway serving the settlements constitutes grave professional misconduct. They argued that Veolia's participation in the project violated (a) numerous UN resolutions, (b) the ICJ Advisory Opinion that the wall in the occupied West Bank is illegal, and (c) the prohibitions in the Geneva Conventions on transfer by an occupier of its civilian population into occupied territory.

The London council responded that a 1988 U.K. law prevented it from making an adverse decision regarding a company based on where it operates. The lawyers argue that "this is not an attempt to enforce a public sector boycott of all companies that trade with Israel. It is restricted to excluding from public contracts companies

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184 A comprehensive discussion of regional human rights instruments (such as those establishing the African Court on Human and People's Rights and the Inter-American Court of Human Rights) is beyond the scope of this paper.

185 Lawyers for Palestinian Human Rights is an organization of U.K.-based lawyers and law students who work on legal issues focused on protecting and promoting Palestinian human rights through litigation, advocacy, education and awareness raising, dissemination of information and lobbying. Further information is available at <http://www.lphr.org.uk/>.

186 Veolia and Alstom also are being sued in a French domestic court by the PLO with the assistance of Association France Palestine Solidarite (AFPS). The PLO is seeking annulment of the contracts to build and operate the light railway under a provision of French civil law allowing the discharge of any agreement that violates public order or good morals. Further information on AFPS available at <http://www.france-palestine.org/>.

that demonstrably break international law or help Israel to do so.”<sup>187</sup> The lawyers are considering suing the companies in a U.K. domestic court to clarify whether it was lawful to exclude or consider excluding Veolia from public contracts.

### 3.2 European Court of Human Rights

An individual may take a case alleging human rights abuses directly to the European Court of Human Rights. Its decisions are not automatically binding but it does have the power to award damages.<sup>188</sup> The Convention has to some extent imposed on its State parties an obligation to prevent human rights violations committed by private parties. However, it is unclear whether the court has jurisdiction over corporations’ overseas activities even if they are incorporated in a member state.<sup>189</sup>

### 3.3 OECD Guidelines on Multinational Enterprises

The OECD Guidelines on Multinational Enterprises are non-binding recommendations addressed by OECD governments to transnational corporations. They provide, among other things, that companies should “respect the human rights of those affected by their activities consistent with the host government’s<sup>190</sup> international obligations and commitments” regarding human rights.<sup>191</sup> Each adhering country has a “National Contact Point” (NCP), a forum where private parties can raise concerns about a company’s activities.<sup>192</sup> The NCP is required to attempt to resolve the issue and if it cannot, it must make a public statement containing recommendations regarding implementation of the Guidelines.

Under the Guidelines a company need not go beyond the standards of the host

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187 Adri Nieuwhof and Daniel Machover, *Time to Hold Veolia to Account*, *The Electronic Intifada* (Feb. 10, 2009).

188 Articles 34, 41 and 45(2) of the Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11 Rome, 4.XI.1950. Under 45(2), a judgment is “transmitted to the Committee of Ministers, which shall supervise its execution.”

189 See Olivier de Schutter, *The Accountability of Multinationals for Human Rights Violations in European Law*, Center for Human Rights and Global Justice Working Paper Num. 1, 17-21 (2004) (concluding the court does not have such jurisdiction), available at <http://www.chrgj.org/publications/docs/wp/s04deschutter.pdf>.

190 The term host government refers to the government of the country where the company is selling goods or conducting operations as distinguished from the “home country” where the company is incorporated.

191 OECD Guidelines for Multinational Enterprises 12, 14 (OECD 2008).

192 The National Contact Point may be a single government official or a co-operative body made up of representatives of government agencies, business and employee organizations and other interested parties *Id.* at 33.

government,<sup>193</sup> even if they fall short of the protections in the Guidelines. Thus, a company doing business with the Israeli government would be in compliance with the Guidelines if it met Israeli human rights standards.

The activist group Ireland Palestine Solidarity Campaign plans to raise with the Ireland NCP the issue of involvement of an Irish construction company, CRH, in the construction of the wall and Jewish settlements in the West Bank.<sup>194</sup> Despite the NCP's lack of enforcement power, this mechanism exposes companies' activities in the OPT and forces the NCP to articulate in public statements how the companies' operations can be reconciled with the human rights provisions in the Guidelines.

### 3.4 EU-Israel Association Agreement

The EU-Israel Association Agreement establishes a trade association between Israel and the European Community. The Agreement states that respect for human rights constitutes an "essential element" of the Agreement<sup>195</sup> and that the parties are required to take measures to fulfill their obligations under the Agreement and see that their objectives are attained.<sup>196</sup> In September 2009, lawyers representing two British MPs wrote to the EU Council arguing that based on these provisions, the EU was required to suspend or terminate the Agreement in light of Israel's human rights violations in the OPT.<sup>197</sup> The letter asserts that legal action may be appropriate if the Council refuses to take action.

Activists also have raised with individual companies the human rights provisions of the Association Agreement to explain that if they trade in goods originating in Israeli settlements they will be engaged in business that violates regional (as well as international) standards. They also have asked EU states whether they have issued Directives to that effect and have encouraged them to do so.

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193 *Id.* at 41.

194 IPSC is also considering a challenge to CRH's activities in a civil suit in Irish domestic courts as well as before the Irish Human Rights Council. They plan as well to lobby the Irish government to exclude CRH from the National Pension Reserve Fund for ethical reasons. For further information, see <http://bdsmovement.net/?q=node/595> and <http://www.ipsc.ie/>.

195 Article 2 of the Agreement provides that relations between the Parties and all provisions of the Agreement "shall be based on respect for human rights and democratic principles, which guides their internal and international policy and constitutes an essential element of this Agreement." EU-Israel Association Agreement, signed in Brussels, 20 November 1995, entered into force 1 June 2000, available at [http://www.delisr.ec.europa.eu/english/content/eu\\_and\\_country/asso\\_agree\\_en.pdf](http://www.delisr.ec.europa.eu/english/content/eu_and_country/asso_agree_en.pdf)

196 *Id.* Art. 79(1).

197 Letter to Javier Solana, Secretary General of the Council of the European Union, Sep. 1, 2009, available at [http://www.savegaza.eu/images/stories/letter\\_to\\_council\\_of\\_ministers.pdf](http://www.savegaza.eu/images/stories/letter_to_council_of_ministers.pdf)



### **III. Market Forces: Investor, Consumer and Public Pressure**

Given the non-binding nature of some international legal instruments, and the obstacles to obtain redress for victims under domestic law, it is unclear whether legal mechanisms are the most vital ones to further corporate accountability (although generally they are necessary for victims to recover damages). As far as deterrent effects on corporate management, there may be as much impact from pressures emanating from the marketplace.

The CSR movement has its origins in the U.S. during the 1970s with shareholder and public pressure on companies to divest from apartheid South Africa. Private organizations and individuals continue to play a pivotal role in advancing corporate accountability today where they are able to circumvent national governments that often protect business interests at the expense of the interests of victims in obtaining redress for corporate-related human rights abuse. Socially responsible institutional investors have substantial power over corporate management due to their large equity holdings, which if sold, could cause a stock price to plummet. Consumers exert influence through boycotts, and activists and NGOs through media campaigns that tarnish the corporate “brand.” Each of these mechanisms is discussed below, followed by examples from the BDS campaign.

While this paper does not discuss the potential impact of workers and unions to advance corporate accountability, its absence is not intended to minimize the unique and potent weapon workers hold through their ability to halt the physical machinery of commerce – such as the production and transport of goods. Details about union organizing, the state of unions, their willingness to struggle and adopt the Palestinian cause is beyond the scope of this paper. However, it is important to recognize that the ultimate power of the BDS movement arguably resides with labor.

# 1. Socially Responsible Investor Pressure

Socially responsible investors (SRIs) are individuals or institutional investors (such as pension funds and mutual funds) that choose financial investments on the basis of both profitability and impacts on society. This discussion focuses on institutional investors because of their influential role in the marketplace. There is an ongoing debate in the U.S. as to whether managers of investment funds are legally permitted to take into account social issues in their investment decisions. The general rule is that they may, within the context of a proper investment strategy, as long they do not adversely affect the financial performance of the entire portfolio.<sup>198</sup>

Institutional investors are required to vote on proposals raised at the annual meetings of companies in their portfolio. It has been argued that the fiduciary duty of institutional investors to vote on these proposals in a way that serves the best interests of their clients or beneficiaries requires them to consider human rights issues presented to them to avoid the financial risk associated with complicity in human rights abuses.<sup>199</sup>

In the human rights area, SRIs choose companies that have adopted human rights policies, consider human rights risks in their decision-making, choose business partners that respect human rights, provide robust reporting on corporate-related human rights issues, candidly acknowledge human rights risks and have remediation and grievance mechanisms, among other criteria.<sup>200</sup> They conduct research and analysis based on company documents, direct dialogue with management, reports or interviews with NGOs, unions, government officials, academic experts and other stakeholders, press coverage and site visits. They then establish internal guidelines and ratings frameworks that incorporate the results of this research into asset selection.<sup>201</sup> SRIs report that they are limited by what they view as a lack of consistent and high-quality disclosure by corporations of their human rights

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198 Freshfields, Bruckhaus Deringer, *A Legal Framework for the Integration of Environmental, Social and Governance Issues into Institutional Investment* 109 (2005) ("*Freshfields Paper*"), available at [http://www.unepfi.org/fileadmin/documents/freshfields\\_legal\\_resp\\_20051123.pdf](http://www.unepfi.org/fileadmin/documents/freshfields_legal_resp_20051123.pdf)

199 *Id.* at 116; see also Kanzer, *supra* note 22, at 3 ("... as a result of SEC rules, fiduciaries are now required to look at publicly traded corporations in all their aspects, not just their financials, when voting proxies.")

200 Elizabeth Umlas, *Human Rights and SRI in North America: An Overview*, paper to inform the mandate of the Special Representative of the United Nations Secretary-General on business and human rights, 6 (January 2009), available at <http://www.reports-and-materials.org/Umlas-Human-Rights-and-SRI-Jan-2009.pdf>.

201 *Id.*



risks, monitoring systems and performance.<sup>202</sup> They have been pressing for greater company disclosure on environmental and social issues, shareholder proposals and the voting results on management and shareholder proposals.<sup>203</sup>

SRI also use their voting rights assertively because it is difficult, if not impossible, for them to sell their large positions in a company if they disagree with the company's policies.<sup>204</sup> In addition, in 2003 the SEC established rules requiring mutual funds and investment advisers to disclose the policies and procedures they use to determine how to vote on proposals raised by management and shareholders of the companies in their portfolios and to disclose how they actually voted on these proposals. The purpose of the new requirements is to allow shareholders to monitor their fund's voting record, placing greater pressure on fund managers to consider social impacts of companies in their portfolios. The combination of large equity holdings and voting rights means that mutual funds and other institutional investors have a great deal of power over corporations.

SRI funds are growing rapidly.<sup>205</sup> The most influential SRI in the U.S. today are the California Public Employees Retirement System (CalPERS) and New York City Employee Retirement System (NYCERS). CalPERS currently votes shares in keeping with the Global Sullivan Principles of Corporate Social Responsibility. In addition to the SRI firms, SRI research providers and coordinating bodies for social investors, such as the Interfaith Center on Corporate Responsibility and Investors Against Genocide, are also active.

## 2. Consumer Pressure, Negative Publicity

Research has shown that consumers claim to take a corporation's human rights record into account and that consumers are willing to pay more for ethically produced goods.<sup>206</sup> Whether these claims are actually put into practice is unclear. Some studies suggest that only a small minority of consumers consider social impacts in their shopping choices, possibly due to inadequate information; however, the number of socially conscious consumers is growing.<sup>207</sup>

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202 *Id.* at 15.

203 *Id.* at 15-16.

204 *Freshfields Paper* at 115.

205 "From 2005-2007 alone, SRI assets increased more than 18 percent while the broader universe of professionally managed assets increased less than 3 percent." Social Investment Forum's biennial 2007 Report on Socially Responsible Investing Trends in the United States ii, *available at* [http://www.socialinvest.org/pdf/SRI\\_Trends\\_ExecSummary\\_2007.pdf](http://www.socialinvest.org/pdf/SRI_Trends_ExecSummary_2007.pdf).

206 See Wouters & Chanet, *supra* note 160, at 267-68 (Spring 2008) (citing examples).

207 *Id.* at 268.

Negative publicity does appear to impact corporate behavior. For example, a recent study found that 28% of all TNCs, and nearly half of the largest, have labor and human rights policies applicable to companies in their global supply chains. The industries with the highest prevalence of corporate human rights policies are those that experienced relatively greater negative publicity regarding human rights issues due to companies in their supply chains.<sup>208</sup>

Skeptics justifiably question the sincerity of corporate codes of conduct, human rights policies or other voluntary standards in light of management's fierce opposition to any type of hard regulation, as well as their continued involvement in human rights abuses despite officially adhering to such standards. Caterpillar, for instance, is a member of the UN Global Compact. Veolia is also a member and yet is set to operate the Jerusalem light railway for five years (although it has sold half of its investment in the project with the remaining half to be sold to the same buyer in five years).

However, corporations have withdrawn from investments targeted by activists, socially responsible investors, boycotts and negative publicity once these pressures reach a level of magnitude sufficient to convince management that the investment is or will become a liability. Examples of companies already being targeted for their involvement in Israeli human rights violations are set forth below.

### **3. Effects on Companies Doing Business in the OPT**

There are too many examples to list all of the divestments and boycotts regarding companies doing business with the Israeli government and/or enabling and profiting from its illegal occupation of the OPT. Some of the more significant ones are listed below.

It should be noted that the prospects for a broader boycott in the U.K. of goods produced in Jewish settlements has been increased by newly issued U.K. government guidance to local supermarkets on how they may distinguish between foods from settlements and Palestinian-manufactured goods in their labeling. Until now, food has been labeled "Produce of the West Bank." The new voluntary

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208 Aaron Bernstein and Christopher Greenwald, *Benchmarking Corporate Policies on Labor and Human Rights In Global Supply Chains* published in Capital Matters Occasional Paper Series, 4 (November 2009), available at <http://www.law.harvard.edu/programs/lwp/pensions/publications/occpapers/occasionalpapers5.pdf>.

guidance (not a legal requirement) issued by the Department for the Environment, Food and Rural Affairs (Defra) clarifies how to specify origin precisely, by using labels such as “Israeli settlement produce” or “Palestinian produce”.<sup>209</sup> EU law already requires merchants to distinguish between goods originating in Israel and those from the OPT, and Defra also clarified that it is illegal to label produce from the OPT as “Produce of Israel”.

### ***Norwegian Government Pension Fund Divestment from Elbit***

In September 2009, Norway’s Government Global Pension Fund announced its divestment from the Israeli firm Elbit Systems, because the firm provides surveillance equipment for the wall in the occupied West Bank as well as unmanned aerial vehicles used by the Israeli military. The highly-publicized decision was based on the Fund’s internal ethical guidelines. Minister of Finance Kristin Halvorsen said “We do not wish to fund companies that so directly contribute to violations of international humanitarian law.”<sup>210</sup>

### ***Dutch ASN Bank Divestment from Veolia***

In 2006, ASN, a Dutch bank divested from Veolia due to its involvement in the construction of a light railway connecting illegal settlements in East Jerusalem to Israel. ASN Bank also divested from other companies benefiting from the occupation, including Alstom, a French company and partner of Veolia in the Jerusalem light rail project.<sup>211</sup>

### ***Swedish National Pension Fund Divestment from Alstom***

In March 2009, the Swedish national pension fund, AP7, decided to exclude Alstom from its investment portfolio.<sup>212</sup> AP7 manages around \$15 billion in pension savings. Activists are now seeking to force Alstom’s withdrawal from a

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209 The Guardian, *U.K. issues new guidance on labelling of food from illegal West Bank settlements* (Dec. 10, 2009).

210 Press Release, Ministry of Finance, Norway (3 September 2009). Further information is available at [http://www.regjeringen.no/pages/2236685/Elbit\\_engelsk.pdf](http://www.regjeringen.no/pages/2236685/Elbit_engelsk.pdf) and at <http://www.bdsmovement.net/?q=node/533>

211 See Adri Nieuwhof, *Divestment Campaign Gains Momentum in Europe*, The Electronic Intifada (Mar. 24, 2009); Adri Nieuwhof, *Principled Dutch ASN Bank Ends Relations with Veolia*, The Electronic Intifada (Nov. 26, 2006). Groups that lobbied for the divestment included Interchurch Organisation for Development Co-operation (ICCO), A Different Jewish Voice (EAJG) and United Civilians for Peace. For information about ICCO, see <http://www.icco.nl/delivery/icco/en/>; for EAJG see <http://www.eajg.nl/> and for United Civilians for Peace, see <http://www.unitedcivilians.nl/nl/>.

212 *Divestment Campaign Gains Momentum*, *supra* note 210. Further information available at <http://bdsmovement.net/?q=node/461> and <http://www.bdsmovement.net/?q=node/431>.

consortium which was awarded a \$1.8 billion contract in Saudi Arabia to build the Haramain Express between Mecca and Medina.

### ***Veolia Divestment from Jerusalem Light Railway Project***

Veolia unexpectedly sold to an Israeli company (the Dan Bus Company) 49% of its shares in City Pass, the French-Israeli joint venture company that holds the construction contract with the State of Israel for the light rail project. After five years, the Israeli company will purchase the remaining 51% share.<sup>213</sup> Veolia's sale was attributed by Palestinian officials and activists to their boycott and lobbying efforts. Veolia is still set to operate the tramway once it is built. As noted earlier, Veolia is a member of the UN Global Compact, and had tried to justify the project at the Global Compact Forum.

### ***Divestments and Media Campaign Targeting Lev Leviev***

The media campaign which exposed Lev Leviev's enormous investments in illegal settlements has led to many divestments including those by the British government, Oxfam, Unicef, Swedish pension fund AP1, and most recently Black Rock Investments, one of the world's largest investment management firms.<sup>214</sup> In May 2009, eleven activist organizations called on the Norwegian government pension fund to divest from one of Lev Leviev's companies involved in settlement construction, in which the Norwegian fund is reportedly the fifth-largest shareholder.

### ***Dexia Bank Divestment from Israeli Settlements***

The Belgian-French financial group Dexia announced in June 2009 that it will no longer extend financing to Israeli settlements in the OPT through its Israeli branch, Dexia Israel, stating it would stop giving loans for this activity because it opposed the bank's code of ethics. The bank is still financing settlements in Jerusalem, however, which it considers "contested."<sup>215</sup>

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213 Adri Nieuwhof, *Veolia and Alstom Continue to Abet Israel's Rights Violations*, The Electronic Intifada (Nov. 24, 2009).

214 Open letter, Popular Committee Against the Wall and Settlements - Bilin Village, 14 September 2009; Press release, Adalah-NY, 25 August 2009; Press release, Adalah-NY, 4 March 2009. Further information available at <http://adalahny.org/>.

215 Press release, Campaign "Israel Colonizes, Dexia Finances," 15 June 2009. Further information available at <http://www.bdsmovement.net/?q=node/442>.

### ***Veolia Subsidiary Connex Dropped as Train Operator in Melbourne, Stockholm and Galway, Ireland***

In June 2009, after a four month letter campaign, the Victoria State Government in Australia dropped Connex as its train system operator over its agreement to operate the Jerusalem light rail system.<sup>216</sup> In April 2009, the Galway, Ireland City Council voted not to renew Veolia's contract to operate the city's underground transport system.<sup>217</sup> In January 2009, the Stockholm Community Council announced that Veolia, after operating the subway for the past 10 years, had lost the contract (worth \$4.5 billion). This decision followed protests organized by Diakonia calling on the council to exclude Veolia from bidding for the subway contract, during which thousands of signatories demanded that the council refuse to renew Veolia's contract.<sup>218</sup>

### ***Motorola***

In April 2009, Motorola sold its unit that produced bomb fuses and other equipment for the Israeli military, ridding itself of some activities that made it a target of boycotts worldwide.<sup>219</sup> Motorola still provides surveillance systems to Israeli settlements, phone services to Israeli soldiers and settlers in the West Bank, and communication systems to the IDF.

### ***British Trade Unions Boycott***

A coalition of 60 British trade unions (the Trades Union Congress – TUC) representing the vast majority of organized British workers recently joined the union movement of South Africa and Ireland in voting to build a mass boycott movement, divestment and sanctions on Israel to force it to comply with international law. The TUC represents 6.5 million workers across the U.K., who voted overwhelmingly for the resolution. The boycott will focus in particular on agricultural products produced in illegal settlements.<sup>220</sup>

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216 Press release, Australians for Peace, 28 June 2009. Further information available at <http://australiansforpalestine.com/>.

217 Press release, Ireland Palestine Solidarity Campaign, 21 April 2009. Further information available at <http://www.ipsc.ie/> and <http://www.bdsmovement.net/?q=node/375>.

218 Press release, Diakonia, 20 January 2009; Nieuwhof and Machover, *supra* note 187. Further information available at <http://www.diakonia.se/sa/node.asp?node=2807>.

219 Press release, The New York Campaign for the Boycott of Israel, 5 April 2009. Further information available at <http://boycottisraelnyc.org/>.

220 Press release, Palestine Solidarity Campaign, 17 September 2009. Further information available at <http://www.palestinecampaign.org/index2b.asp>.

### ***University of Sussex Students Boycott***

Two months after the trade unions' vote, students at the University of Sussex, England voted to boycott Israeli goods in a campus-wide referendum. Fifty-six percent of students voted in favour of the boycott. Goods from Israel will no longer be stocked in shops on the university campus.<sup>221</sup>

### ***Boycott of Ahava Dead Sea Products***

In the "Stolen Beauty" campaign, activists are campaigning against the sale of Ahava products. The products are manufactured in the illegal Mitzpe Shalem settlement in the West Bank, using mud from the Dead Sea shore in occupied territory. The products are labeled as originating from "The Dead Sea, Israel." Protests in the Netherlands led the government to initiate an investigation into whether the goods are illegally mislabeled.<sup>222</sup>

### ***Carmel – Agrexco Boycott***

Carmel-Agrexco is the Israeli national exporter of fruit and vegetables and exports large quantities of goods from illegal Jewish settlements to the U.K. In November 2004, seven campaigners blockaded the company's depot, using metal fencing, for over eleven hours. Prosecution of the blockaders was dropped after they argued Agrexco was violating international criminal law. Since then, blockades have continued regularly, and the company has taken no action, in order to avoid having to reveal its business practices in court.<sup>223</sup>

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221 Press release, University of Sussex Students' Union, 6 November 2009. Further information available at <http://www.ussu.info/>.

222 Adri Nieuwhof, *Boycott of Ahava Dead Sea Products Makes an Impact*, The Electronic Intifada (Dec. 2, 2009). Further information available at <http://www.bdsmovement.net/?q=node/599>.

223 International Call for Action Against Carmel-Agrexco, StopTheWall (Apr. 1, 2009). Further information available at <http://www.bdsmovement.net/?q=node/240>.

## IV. Conclusion

While the CSR movement has been gaining ground over the last decade, it still faces enormous challenges. As far as U.S. legal mechanisms, the viability of the ATCA is still unclear. Business will lobby hard to persuade Congress to narrow the statute and much depends on the aiding and abetting standard the U.S. Supreme Court ultimately adopts for ATCA cases. Adoption by U.S. courts of enterprise liability for TNCs would help address their evasion of liability through corporate structures, yet currently this appears unlikely. It is uncertain whether prosecutions of companies for international crimes in domestic courts will be pursued and how stringent the standards would be in the various jurisdictions if they were. Regarding international legal mechanisms, the ICC Statute does not apply to corporations and its adoption of a purpose standard (requiring proof that a defendant provided assistance “for the purpose of facilitating” commission of a crime) to accomplice liability might in any event make it difficult to punish corporate complicity.

State governments can be an obstacle to achieving corporate accountability. Many do not respect the human rights of their citizens, or fear the loss of foreign investment by TNCs if they did attempt to introduce social considerations in their dealings with them. Further, TNCs unduly influence the political process in wealthy states, including the U.S., where the political system often favors special interests.

On the other hand, while non-binding international norms are still the focus of current efforts at the UN, and binding norms appear to be completely off the agenda at least for the near future, “enforcement” of such norms may be achievable in the marketplace. Divestment by large institutional shareholders can cause a stock price to plummet and while socially responsible investment is in its early stages in some markets, it is clearly growing. With respect to public companies, corporate democracy mechanisms such as shareholder proposals can have tremendous

influence when the public is moved by a particular issue, as witnessed during the apartheid era. Consumers and NGOs also have influence through boycotts and threats to reputation. As noted earlier, workers wield enormous power through their ability to virtually halt the very machinery of commerce.

Ultimately the success of the CSR movement may depend on a united struggle by consumers, investors, workers and activists to force TNCs to respect human rights, and force state governments to fulfill their responsibilities under international treaties to protect the human rights of their citizens from encroachment by business.





**The mechanisms available within the existing legal and economic framework to advance corporate accountability for human rights abuses, and for their conduct in other areas of social concern, generally fall into three categories: (1) domestic law: regulation and litigation under state domestic legal systems; (2) international law: binding international law governing corporate complicity in international crimes and non-binding international norms on the issue of business and human rights; and (3) market forces: socially responsible investment funds, shareholder activism, consumer boycotts, etc. This article summarizes the latest developments in each of these areas.**

