



## UNITED STATES OF AMERICA

### SURVEY QUESTIONS & RESPONSES<sup>1</sup>

Survey conducted as part of *Commerce, Crime, and Conflict: A Comparative Survey of Legal Remedies for Private Sector Liability for Grave Breaches of International Law And Related Illicit Economic Activities*.

#### **I. Disclosure requirements for business entities**

**1. What sort of material information are business entities required to provide to their shareholders and/or public under your jurisdiction's company law or securities laws that may be relevant to potential litigants? For example, are such entities required to provide information about:**

- **material civil litigation?**
- **risk factors that would impact a shareholder's investment in the company?**
- **any reported violations of law or pending proceedings arising from such violations?**
- **revenues received from, or amounts paid to or on account of, a government or its officials or agents?**

Public disclosure of material information relating to the current business condition and future business prospects of corporations with securities registered with the Securities and Exchange Commission (SEC) is the hallmark of the U.S. securities laws. Prior to

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<sup>1</sup> The initial responses to this survey of US law were provided by Robert C. Thompson, Attorney-at-law, New York City. The contents of this survey response are intended for research purposes only and continue to be revised in light of peer review. The contents of this survey response are in no way intended as comment on specific cases or judgements, nor are they intended as legal advice on any of the issues covered. Due to constraints of space, many responses in this text provide only a basic introduction to the issue and the complexities of specific cases or provisions may not be fully explicated. Readers seeking practical legal advice should consult a lawyer in the relevant jurisdiction. Citations and references to this survey response should adhere to the following format: "Survey Response, Laws of the United States of America (Robert C. Thompson), 'Commerce, Crime and Conflict: A Survey of Sixteen Jurisdictions' Fafo AIS, [date accessed] 2006". The contents of this survey response are published by Fafo AIS under a Creative Commons Attribution-Share Alike 2.5 License.

offering a security for sale to the public, an issuer must offer each prospective purchaser a prospectus and file a registration statement under the Securities Act of 1933.<sup>2</sup> The prospectus is actually a part of the registration statement. These documents must set forth all material information relating to the business of the issuer, its properties, its financial condition, officers and directors, pending litigation, risks faced by the issuer, etc. The registration statement must contain as exhibits all material documents, such as major contracts for purchase or supply of raw materials, terms of financial obligations outstanding, etc. The prospectus and registration statement must be accompanied by financial statements, including a balance sheet, an income statement and a statement of source and application of funds (cash flow statement), all certified by an independent public accountant. All financial statements must be prepared according to Generally Acceptable Accounting Principles (GAAP). Registration statements, plus all exhibits, are on file with the SEC and are available for public inspection and copying and are also available online.

In addition, an issuer with securities registered with the SEC is required to file periodic reports with the SEC under requirements set forth in the Securities and Exchange Act of 1934<sup>3</sup> and implementing SEC regulations. An official report, called a Form 10-K, is due following the close of a registrant's fiscal year. An separate annual report to shareholders must also be sent to the shareholders of a registrant, although its content differs from that of Form 10-K. Form 10-K must be prepared according to lengthy and detailed requirements set forth in SEC regulations. It must contain a "management analysis" describing the current business of the registrant and an analysis of the risks that the registrant faces. Form 10-K must describe any pending or threatened litigation of a material nature. It must be accompanied by certified financial statements showing the condition of the registrant as of the end of its fiscal year (plus any materially changed information arising between the end of the fiscal year and the date of the Form 10-K), together with an income statement and a cash flow statement. The financial statements must include consolidated information for all controlled subsidiaries. Should any information arise during the year that is material to the condition and/or prospects of a registrant, the registrant must provide interim reports, either on a quarterly basis (using Form 10-Q) or monthly basis (using a Form 8-K). Owing to the recent scandals involving purported lapses in corporate governance, the filing requirements have been significantly tightened by the SEC. For example, under the Sarbanes-Oxley Act of 2002, the chief executive officer must certify in writing that there are no materially misleading statements in the annual report or in the financial statements. Severe penalties accrue for a false certification.

The original registration and annual filing requirements are designed to provide the public with all material information relative to the condition and prospects of a registrant. "Materiality" is generally judged by the standard of whether the information, if known to a purchaser or seller of the securities of the registrant, would affect the decision of that person buying or selling the security. All documents are filed under

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<sup>2</sup> 15 U.S.C. § 77a *et seq.*

<sup>3</sup> 15 U.S.C. § 78a *et seq.*

severe criminal and civil penalties for providing false or misleading information. Further, the registrant/issuer, its management, its accountants who certified the financial statements, and, in some cases, its attorneys are potentially liable in a civil action to any person who is harmed by false and misleading information of a material nature.

Registrants are required to disclose information relative to their holdings of natural resources. Registrants with oil and gas holdings are required to report such holdings on a regional, not a country-specific basis, a requirement that hinders analysis of a registrant's business and financial dealings in any particular country.

U.S. laws dealing with the extraction of oil, gas and other minerals from federal or tribal lands require the holder of an operating lease to file periodic reports on the amounts of such minerals extracted for each lease, along with the amounts due to the federal government or to the affected tribal person. These reports are composited by a bureau within the U.S. Department of Interior on a state-by-state basis and are posted on the internet, so as to inform the public as to the revenue streams from public and tribal lands.

One should also mention that rules governing civil and criminal litigation require the parties to disclose information pertinent to the issues at stake in the litigation. Some information may be withheld if it would lead to the loss of governmental secrets. In some cases, the court may order a party to produce documents "in camera," i.e. to the judge, who will determine whether it should be withheld, disclosed, or disclosed under a protective order that guards its confidentiality.

## **2. Is there a right to know statute enabling one to obtain information from your government?**

Yes. A federal statute called the Freedom of Information Act (FOIA)<sup>4</sup> requires each federal agency to provide paper and other forms of documents held by it to any requesting person. The information covered by FOIA includes all nonexempt information that is generated by the agency, along with any information furnished to it by outside parties. This includes all correspondence, permit applications, reports and memoranda, decision documents, rulings, etc. FOIA provides that a request must be made in writing. A request need not specify a particular document or piece of information, but may ask for information fitting a description, e.g. "all documents related to the operations of the Department of X that are related to the operations of Y Company in the country of Z." The federal agency that is in possession of the document must make a copy of such document available with ten days of receipt of the request (subject to reasonable extensions if the number of documents is voluminous or the search for the documents justifies additional time). If a document contains confidential business information (CBI), the agency is required to protect the information. Information is termed CBI if it has been furnished by a person under a claim of confidentiality, it related to the business or property of such person, and the information is of a nature that is ordinarily kept confidential by that person. The FOIA regulations promulgated by most

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<sup>4</sup> 5 U.S.C. § 552.

federal agencies require the agency to inform the person that originally furnished the CBI of the request for such information and allow such person to make a written submission that states the reasons why the information should be withheld from disclosure. An agency that withholds the information may be sued in federal court by the requesting party. In addition to the CBI exception, FOIA contains exemptions for documents relating to the inner policy deliberations of the agency, to pending litigation, and to law enforcement.

Most, if not all, U.S. states have laws pertaining to access to public information that govern documents and other information in the possession of state agencies. Such state laws operate on essentially the same basis as the U.S. FOIA.

In addition to information available under FOIA, the federal Administrative Procedure Act requires each federal agency that proposes to promulgate a rule or regulation to publish a statement in the Federal Register that accompanies the promulgation, setting forth the scientific, technical, legal and practical basis for the proposed promulgation, and to provide the public a period of time (which must generally be at least 30 days) for the public to comment on such proposal. The agency must respond in writing to the comments received at the time it promulgates a final regulation. An agency must build an administrative record for each promulgation, i.e. a collection of documents and other information that it relies upon in making its final decision. A person that challenges the agency in court, i.e. seeks judicial review of the promulgation, is entitled to obtain a copy of the administrative record. Often, private litigants utilize FOIA to force pre- and post-promulgation disclosure of relevant information.

Most, if not all, states in the U.S. have state statutes containing procedural and substantive requirements similar to those set forth in the federal Administrative Procedure Act.

## **II. Status of business entities under criminal law in ARGENTINA**

### **3. Does your penal code (or judicial interpretations thereof) provide that business entities may be prosecuted criminally for violations of such code?**

Yes, if the specific penal statute so provides. Corporate responsibility for criminal conduct is well established under both federal and State laws. "A corporation may be criminally liable for almost any crime except acts manifestly requiring commission by natural persons, such as rape and murder."<sup>5</sup> Corporations and other forms

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<sup>5</sup> V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve*, 109 Harv. L. Rev. 1477, 1488 (1996) [hereinafter Khanna]. See, Harvey L. Pitt & Karl A. Groskaufmanis, *Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct*, 78 Geo. L.J. 1559, 1563, 1570, 1573-74 (1990) (noting the growth in criminal prosecutions of and sanctions against corporations as well as the growth in corporate criminal liability). See, Beth Stephens, *STEFAN A. RIESENFELD SYMPOSIUM 2001: The Amoral of Profit: Transnational Corporations and Human Rights*, 20 Berkeley J. Int'l L. 45

of business entities are treated the same as individuals for purposes of most criminal statutes in the U.S., both federal and State. Under federal law, many criminal statutes state explicitly define “person” to include corporations and other forms of liability on corporations was affirmed by the Supreme Court in 1909.<sup>6</sup>

The general approach of State penal codes is reflected in the position taken by the American Law Institute in its Model Penal Code. In 1976 the American Law Institute’s Model Penal Code adopted Sections 2.07 and 2.97. Section 2.07 states that “a corporation may be held criminally liable for penal offenses committed by its agents on its behalf if the legislative purpose plainly appears to impose such liability.” Section 2.97 provides that an omission to discharge a specific duty imposed on a corporation may be criminally punished.

#### **4. What type sanctions are applied to business entities, as opposed to natural person**

The statutory penalties applicable to business entities are generally monetary fines or civil penalties. Imprisonment of a business entity is, of course, impossible. Some statutes impose a higher maximum monetary fine when the perpetrator is a corporation than when it is a natural person. One example is 15 USCS § 78ff, pertaining to bribery of foreign officials under the Federal Corrupt Practices Act. Section 78ff imposes a maximum fine of \$5,000,000 on a natural person and a maximum fine of \$25,000,000 when the defendant is a corporation. In some cases, e.g. environmental infractions, an entity that does business with the federal government may be debarred from dealing with the government by being placed on a list of violating facilities.

Federal courts may fashion suitable remedies for criminal violations, including debarring corporations from participating in various business practices or even areas of business.

#### **5. What are the standards applied in your jurisdiction for attributing liability to a business entity for the actions of individual servants? For example:**

- a. What must one demonstrate in order to convince the court that the actions of the servants of the business entity may be attributed to the business entity to establish the guilt of the business?**

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(2002). See, Gilbert Geis and Joseph F.C. DiMento, *Empirical Evidence and the Legal Doctrine of Corporate Criminal Liability*, 29 Am. J. Crim. L. 341 (2002) [hereinafter Geis and DiMento].

<sup>6</sup> *New York Central and Hudson River Railroad Company v. U.S.*, 212 U.S. 481 (1909) (“It is true that there are some crimes, which in their nature cannot be committed by corporations. But there is a large class of offenses, of which rebating under the Federal statutes is one, wherein the crime consists in purposely doing the things prohibited by statute. In that class of crimes we see no good reason why corporations may not be held responsible for and charged with the knowledge and purposes of their agents, acting within the authority conferred upon them.”)

- b. If, in order to find a business entity guilty of a crime, the court must find that the business entity intended to carry out an activity that is a crime, how must the prosecution demonstrate that such intent (mens rea) was present? ; and**
- c. What are the standards applicable in your jurisdiction for attributing the criminal liability of a business entity to the servants of the business entity?**

The standards for imputing criminal activity of an employee or agent to a corporation are succinctly summarized in the following excerpt from a recent law review article:

A corporation can be held criminally liable for the acts, omissions, or failures of an agent acting within the scope of his employment. Because corporations are incorporeal legal entities, courts look to employees of the corporation as a means of imputing intent, or *mens rea*, as well as the guilty act, or *actus reus*, to the corporation. Courts use a three-prong inquiry to determine whether a corporation will be held vicariously liable for the acts of its employees. First, the individual must be acting within the scope and nature of his employment. Second, the individual must be acting, at least in part, to benefit the corporation. Finally, the employee's act and intent must be imputed to the corporation.<sup>7</sup>

Although U.S. courts initially resisted holding corporations liable for crimes on the theory that a corporate entity is not capable of forming the requisite criminal intent, such a theory has not been a bar to the application of criminal statutes to corporations since the Supreme Court ruled on the matter in 1909.<sup>8</sup> To the extent that any requirement for proving a *mens rea* was present, the mental state of the corporation's servants, acting in their corporate capacity, will suffice.

A servant of a business entity may be held liable for the crime or administrative violation of the entity in cases where the statute so provides. For example, the chief executive officer of a corporation that has filed a false or misleading report under the securities laws may be charged with that violation if he or she participated in the preparation of the report knowing that the information was false. In some cases, e.g. the filing of reports on the environmental condition of a business entity, the business entity that is required to file information with the government must designate a person who is responsible for the truth and accuracy of the information, and require such person to sign the report under an affirmation of its truthfulness and accuracy. Generally, there must be a rational connection between the crime committed by the business entity and the action or participation of the individual person who is charged.

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<sup>7</sup> Annie Geraghty, *Corporate Criminal Liability*, 39 Am. Crim. L. Rev. 327, 328 (2002).

<sup>8</sup> *New York Central*, 12 U.S. 481. See Geis and DiMento, *supra*. See Khanna, *supra*.

**6. Under your criminal law (penal code) what is the legal standard for convicting someone of being an accomplice to or aiding and abetting the commission of a crime by another (complicity)? What is the legal standard for convicting someone of plotting with another to commit a crime (criminal conspiracy)?**

**A. Aiding and Abetting.**

The U.S. criminal code makes aiding and abetting an integral part of a federal crime:

§ 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.<sup>9</sup>

Section 2 applies to the entire criminal code.<sup>10</sup> Thus, unless there is an express statutory provision to the contrary, a person may be convicted of aiding and abetting any act made criminal under the code.

The elements of aiding and abetting are, generally: (1) guilty knowledge on the part of the accused (*mens rea*); (2) the commission of an offense by someone; and (3) the defendant assisted or participated in the commission of the offense (*actus reus*).<sup>11</sup>

Aiding and abetting liability under 18 U.S.C. § 2 requires proof that defendants in some way associated themselves with venture, that they participated in venture as something that they wished to bring about, and that they sought by their actions to make venture succeed.<sup>12</sup>

State law is generally consistent with federal law on this matter. The American Law Institute's Model Penal Code provides that:

a person is an accomplice of another person in the commission of an offense if:  
(a) with the purpose of promoting or facilitating the commission of the offense, he, (i) solicits the other person to commit it, or (ii) aids or agrees or attempts to

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<sup>9</sup> 18 U.S.C. § 2 (2000).

<sup>10</sup> See, Baruch Weiss, *What Were They Thinking?: The Mental States of the Aider and Abettor and the Causer Under Federal Law*, 70 Fordham L.Rev. 1341, 1345 (2002).

<sup>11</sup> *U.S. v. Staten*, 581 F2d 878, 886 (D.C. Cir. 1978); *U.S. v. Raper*, 676 F2d 841, 849 (D.C. Cir. 1982).

<sup>12</sup> *Central Bank, N. A. v First Interstate Bank, N. A.*, 128 L Ed 2d 119, 114 S Ct 1439 (1994).

aid such other person in planning or committing it, or (iii) having a legal duty to prevent the commission of the offense fails to make proper effort to prevent [it].<sup>13</sup>

U.S. court decisions applying international law in the context of suits under ATCA have in the past acknowledged that aiding and abetting is an element of the “laws of nations,” beginning with the Nuremberg tribunal and continuing through the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda.<sup>14</sup> The principal U.S. court decisions in which aiding and abetting is held to apply to ATCA include *Karadzic*,<sup>15</sup> *Wiwa*,<sup>16</sup> *Talisman*<sup>17</sup> and the *Unocal* series of decisions.<sup>18</sup> The *Unocal* litigation, which ended in a settlement agreement, produced a decision by a panel of the Court of Appeals for the Ninth Circuit which addressed the complicity issue. The panel decision held that the test for complicity used in ATCA cases should be derived from the decisions of the international tribunals. The full panel of the Ninth Circuit agreed to a rehearing of the panel decision and vacated the panel decision. Thus, the panel decision, although interesting for its scholarly content, is not a precedent to be cited in future court decisions.

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<sup>13</sup> American Law Institute, *Model Penal Code* § 2.06(3).

<sup>14</sup> *United States v. Alstotter*, 6 L. Rep. Tr. War Crim. 1, 62 (1948) (“This is but an application of general concepts of criminal law. The person who persuades another to commit murder, the person who furnishes the lethal weapon for the purpose of its commission, and the person who pulls the trigger are all principals or accessories to the crime.”); *Prosecutor v. Tadic (Case No. IT-94-I-T), Opinion and Judgment, May 7, 1997, at PP 678, 691.*; *Prosecutor v. Musema*, ICTR-96-13-T (Jan. 27, 2000), <http://www.ictj.org/>.

<sup>15</sup> *Karadzic*, 70 F.3d 232.

<sup>16</sup> *Wiwa v. Royal Dutch Shell Petroleum Company*, 2002 U.S. LEXIS 3293, at court opinion 49 (S.D.N.Y. 2002) [hereinafter *Wiwa III*]. (“The TVPA provides for liability for an individual who ‘subjects’ another to torture or extrajudicial killing. See 28 U.S.C. § 1350, note, § § 2(a) & (b). While the language of the TVPA could be more precise, the definition of the verb ‘subject’ suggests, as plaintiffs argue, that the use of that word expands rather than narrows the reach of the statute. ‘Subject’ means to cause someone “to undergo the action of something specified; to expose ... to make liable or vulnerable.’ Random House Webster’s College Dictionary (1999). Using this definition, individuals who ‘cause someone to undergo’ torture or extrajudicial killing, as well as those who actually carry out the deed, could be held liable under the TVPA.”).

<sup>17</sup> *Talisman*, 2003 U.S. LEXIS 4085, at court opinion 90. (“The Amended Complaint properly alleges that Talisman aided and abetted or conspired with Sudan to commit various violations of the law of nations. As noted *supra*, the Amended Complaint includes allegations that Talisman worked with Sudan to carry out acts of ‘ethnic cleansing’; that Talisman encouraged Sudan to do so; and that Talisman provided material support to Sudan, knowing that such support would be used in carrying out such unlawful acts. Moreover, the allegations set forth that Talisman’s acts were substantial as that term is understood in international law.”)

<sup>18</sup> The principal court decisions to date in the *Unocal* litigation are: *Nat’l Coalition Gov’t of the Union of Burma v. Unocal, Inc.*, 176 F.R.D. 329, 334 (C.D. Cal. 1997) [hereinafter *National Coalition*’]; *Doe v. Unocal Corp.*, 963 F.Supp. 880 (C.D. Cal. 1997) [hereinafter *Paez*]; *Doe v. Unocal Corp.*, 27 F.Supp. 2d 1174 (C.D. Cal. 1998) [hereinafter *Total Dismissal*], *Doe v. Unocal Corp.*, 67 F.Supp. 2d 1140 (C.D. Cal. 1999) [hereinafter *Class Certification*]; *Doe v. Unocal*, 110 F.Supp. 2d 1294 (C.D. Cal. 2000) [hereinafter *Lew Opinion*], *Doe v. Unocal*, 395 F.3d 932 (9<sup>th</sup> Cir. 2002)[hereinafter *Ninth Circuit Panel Opinion*].”; *Doe I v. Unocal*, 395 F.3d 978 (9<sup>th</sup> Cir. 2003) [granting motion for rehearing and vacating *Ninth Circuit Panel Decision*]; *Doe I v. Unocal*, 403 F.3d 708 (9<sup>th</sup> Cir. 2005) [dismissing and vacating prior decisions].

The question of whether a civil cause of action exists under ATCA has arisen in the litigation over the participation of a number of U.S. multinational corporations that did business in South Africa during apartheid. A number of South African citizens filed claims that were eventually consolidated in the federal district court for the Southern District of New York, referred to as the *Kulumani* case.<sup>19</sup> Prior to the decision in *Kulumani* matter, the U.S. Supreme Court issued its decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). The *Sosa* decision, although allowing that ATCA was a statute whose reach could expand with changing notions of the “laws of nations,” strongly cautioned federal courts against expanding the reach of ATCA without a substantial basis for creating common law remedies, including unambiguous guidance from Congress. Following *Sosa*, the court in *Kulumani* held (*In re South African Apartheid Litigation*, 346 F.Supp.2d (S.D.N.Y. 2004)) that U.S. law does not provide for a civil cause of action under ATCA, citing an earlier Supreme Court decision (*Central Bank of Denver v. First Interstate Bank of Denver*, 114 S.Ct. 1439 (1994)) that held that the federally-created civil cause of action does not include accomplices to a breach of the statute without an express grant in the language of the statute creating the right. The *Kulumani* decision was appealed to the Court of Appeals for the Second Circuit. A hearing before a panel of that Court was held in early 2006. One of the panelists raised the issue of whether the lack of congressional authority for a civil cause of action for complicity under ATCA was dispositive of the issue. A decision on that case is expected shortly.

A future version of this response will explore the various tests applied in federal and state courts to assess the state of mind (intent), or *mens rea*, need to be proved in order to establish accomplice liability, particularly as the tests are applied to legal persons engaged in business activities linked to the criminal activity of others.

### **Conspiracy.**

The U.S. criminal code makes conspiracy a separate federal offense:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.<sup>20</sup>

There are four elements of criminal conspiracy, each of which the prosecution must prove beyond a reasonable doubt. Circumstantial evidence alone is a sufficient basis for a conspiracy conviction. A conspiracy exists where there is: (1) an agreement

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<sup>19</sup> *In re South African Apartheid Litigation*, 346 F.Supp.2d (S.D.N.Y. 2004).

<sup>20</sup> 18 U.S.C. § 371 (1994).

between at least two parties, (2) to achieve an illegal goal, (3) where the parties possess knowledge of the conspiracy and with actual participation in the conspiracy, and (4) where at least one conspirator committed an overt act in furtherance of the conspiracy.<sup>21</sup>

“A conspiracy is distinct from the substantive crime contemplated by the conspiracy and is charged as a separate offense.”<sup>22</sup> Acquittal on a conspiracy charge does not bar prosecution based on the substantive offense. Likewise, acquittal of the substantive offense does not necessarily bar conviction on the conspiracy count; however, if the government's theory of illegal conspiracy depends upon the defendant's knowledge of and assistance with the substantive count, acquittal on the substantive count mandates acquittal on the conspiracy count.<sup>23</sup>

The concept of conspiracy has been found to exist in international law and as such is carried into federal common law. In *Talisman*, the court stated:

The concept of complicit liability for conspiracy or aiding and abetting is well-developed in international law, especially in the specific context of genocide, war crimes, and the like. The Statute of the International Military Tribunal, the body that tried Nazi war criminals, stated that ‘leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such a plan.’ Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal, art. 6, 82 U.N.T.S. 279. Allied Control Council Law No. 10, used to prosecute German war criminals domestically, created criminal liability not only for principals who committed acts of genocide or war crimes but also for those who were connected with any plans or enterprises involving the commission of such crimes. See William A. Schabas, *Enforcing International Humanitarian Law: Catching the Accomplices*, 83 INT'L REV. RED CROSS 439, 442 (June 2001). Such complicity could include corporate liability.<sup>24</sup>

Whether the holding in *Talisman* will endure following the Supreme Court's decision in *Sosa* remains to be seen.

**7. Are there any other practical considerations or factors that must be present when the defendant in a criminal proceeding is a business entity rather than a natural person?**

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<sup>21</sup> Raphael Prober and Jill Randall (2002) *Federal Criminal Conspiracy*, 39 Am. Crim. L. Rev. 571.

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

<sup>23</sup> *Id.*

<sup>24</sup> *Talisman*, 2003 U.S. LEXIS 4085, at court opinion 322.

As stated earlier in answer to Question Three, corporations may be prosecuted for any crime which it is capable of committing, even aiding and abetting rape or murder. There are no insurmountable hurdles or extra burdens (such as additional filing fees, bonds, consent requirements or the like) which make prosecution of a corporation inherently more difficult than prosecution of an individual.

The principal issues that a corporate prosecution involves which are not found in the prosecution of natural persons are:

1. **The decision to charge the corporation.** Prosecutors have the discretion of whether to name a corporation or other legal entity in connection with crimes committed by individuals who are officers, directors, employees or agents of the entity. A memorandum prepared within the U.S. Department of Justice names the “Thompson Memorandum” (no relation) sets out a variety of factors to be taken into consideration by federal prosecutors in deciding whether to add the corporation to an indictment. These factors include: whether the corporation authorized the criminal activity, either directly or by tolerating a “corporate culture” that encouraged its servants to skirt the law; whether the corporation was cooperative with the authorities during their investigation of the criminal activities; and whether the corporation has taken immediate and effective steps to prevent criminal behavior in the future.

2. **Naming the proper corporate entity.** Because business enterprises often have multiple corporate entities, the pleading should be carefully drawn to identify the correct corporate entity.

3. **Piercing the corporate veil.** Where the actions of a subsidiary corporation are involved, and the prosecution wishes to implicate the parent U.S. corporation, the pleading should fully and carefully set forth the basis for piercing the corporate veil.<sup>25</sup> Where numerous corporations have similar-sounding names, or have identical names, but are incorporated in different jurisdictions, the pleadings should avoid mistakenly naming the wrong entity.

4. **Imputing actions of servants to the corporation.** The corporation can be expected to raise the defense that the real criminals were acting ultra vires, i.e. without corporate authority. Accordingly, the pleadings should fully and carefully state the basis for imputing the actions of the individuals to the corporation. If the criminal behavior occurred at a very senior level, and numerous individuals were involved, this requirement should be easily met. The ordinary principles of agency law apply with respect to non-employee contractors, agents, and the like.

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<sup>25</sup> *Wiwa III*, 2002 U.S. LEXIS 3293, at court opinion 41. The court found that Royal Dutch/Shell controlled Shell’s Nigerian subsidiary, and thus the activities of the subsidiary can be imputed to the parent company. Similarly, in *Talisman*, 2003 U.S. LEXIS 4085, at court opinion 105, the court had little difficulty piercing the corporate veil and attributing the presence of a subsidiary to the parent where it appeared that the parent and subsidiary had the same officers and directors, the subsidiary did all of its business by or for the parent, and the subsidiary had no financial standing other than that of the parent.

5. **Immunity of State-Owned Entities.** As discussed below, corporations and other business entities which are majority owned by foreign states or subdivisions thereof are immune from suit in the U.S. federal and state courts.

### **III. Status of International Law/International Humanitarian Law in your Country's Legal Framework**

**8. Which international crimes have been incorporated into your domestic criminal law? Please include any crimes enumerated in the Rome Statute of the International Criminal Court such as genocide, war crimes, crimes against humanity, and other relevant instruments.**

Congressional legislation is needed in order for a violation of international law to be prosecuted in a U.S. federal court.<sup>26</sup> Congress has adopted legislation incorporating the crimes of: genocide;<sup>27</sup> war crimes;<sup>28</sup> torture;<sup>29</sup> piracy;<sup>30</sup> slavery;<sup>31</sup> and trafficking in women<sup>32</sup> and children<sup>33</sup>—all activities proscribed under international agreements. The U.S. is not a signatory to the Rome Statute of the International Criminal Court, and thus no implementing legislation has been enacted.

**9. Do your country's laws modify the provisions of the ICC Statute, such as concepts of aiding and abetting and conspiracy or liability of business entities rather than only natural persons?**

Statutes covering genocide, torture and war crimes are based on the same texts as the Statute of Rome, i.e. the genocide statute reflects the Convention for the Prevention

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<sup>26</sup> Lee A. Steven, *Genocide and the Duty to Extradite or Prosecute: Why the United States is in Breach of Its International Obligations*, 39 Va. J. Int'l L. 425, 450-461 (1999).

<sup>27</sup> 18 U.S.C. § 1091. The genocide statute applies only to acts committed by nationals of the U.S. or to acts committed within the territory of the U.S. 18 U.S.C. § 1091(d).

<sup>28</sup> 18 U.S.C. § 2441. The war crimes statute applies only to acts where the either the perpetrator or the victim is a member of the U.S. armed forces or a national of the U.S. §2441(b). It defines war crimes as acts prohibited under: (1) the 1949 Geneva Conventions and any additional protocol to which the U.S. is a party; (2) the 1907 Hague Conventions; and (3) common article III of the 1949 Geneva Convention.

<sup>29</sup> 18 U.S.C. § 2340A. The torture statute applies only to acts committed outside of the United States. It states that the U.S. courts have extraterritorial jurisdiction to try the offender if the offender is either a U.S. national or is found in the U.S. 18 U.S.C. § 2340A(b). The statute also makes conspiracy to commit torture a crime. 18 U.S.C. § 2340A(c).

<sup>30</sup> 18 U.S.C. § 1651.

<sup>31</sup> 18 U.S.C. §§ 1583, 1589 (the latter section covering “forced labor”), U.S. Const. 18<sup>th</sup> Amend.

<sup>32</sup> 18 U.S.C. § 1441. See also the Victims of Trafficking and Violence Protection Act of 2000, PL 105-386, which contains 22 U.S.C. § 7101, et seq., relating to the international trafficking of women and girls.

<sup>33</sup> 18 U.S.C. § 1591.

and Punishment of the Crime of Genocide,<sup>34</sup> the torture statute is based on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,<sup>35</sup> and the war crimes statute is based on the Hague Convention and the Geneva Conventions.<sup>36</sup>

**10. Do your criminal courts have jurisdiction over those international crimes that have not been incorporated into your domestic law?**

No. Unless Congress has incorporated an international crime into federal criminal law, there is no enforceable crime in the U.S.

**11. May a business entity be prosecuted for international crimes in the courts of your country, whether under domestic law or with reference to international law? If yes, under what circumstances?**

There are federal criminal statutes covering genocide (18 U.S.C. § 1091), war crimes (18 U.S.C. § 2441), torture (18 U.S.C. § 2340A), piracy (18 U.S.C. § 1651), and slavery and forced labor (18 U.S.C. §§ 1583, 1589). The genocide statute applies only to “nationals” of the U.S., i.e. natural persons. The war crimes statute applies only to natural persons who are “nationals” of the U.S. and to “whoever” commits a war crime against a U.S. national. Query whether the term “whoever” in this context includes legal persons has not been interpreted by a court. The Torture Victims Protection Act applies only to “individuals.”

**IV. Alternative Mechanisms**

**12. Can you think of any bases in your country’s tort law (civil law) for suing individuals and /or business entities for violations of international criminal law, IHL, (whether or not incorporated into domestic law)?**

The U.S. has a robust tort system, both at the state and federal levels, and victims of torts connected with violations of international criminal law or international humanitarian law may sue for damages and other relief, either individually or as part of a class action suit. The U.S. laws provide for contingency fees for lawyers and for class actions, which make it possible for low-income victims to sue or to be joined with the suits of others. Also, punitive (exemplary) damages and damages for pain and suffering are allowed, leading to large recoveries.

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<sup>34</sup> 18 U.S.C. § 1091(a).

<sup>35</sup> 18 U.S.C. § 2340.

<sup>36</sup> 18 U.S.C. § 2441(c).

State courts have on rare occasions allowed tort claims brought by victims of certain human rights violations. For example, a state court in Hawaii allowed claims brought by the estate of a Philippine man against former Philippine president Ferdinand Marcos for false imprisonment, torture and conversion of property.<sup>37</sup> California courts allowed claims for forced labor and personal injuries brought by a Korean national against a cement company which had employed him as a slave laborer.<sup>38</sup> A Louisiana court allowed claims by citizens of Indonesia that they were injured by security forces employed by a subsidiary of a U.S. corporation<sup>39</sup> (although the court, in a later proceeding, dismissed the claims for insufficient pleadings).<sup>40</sup> Prior to the settlement in 2005 that brought the Unocal litigation to a close, there were claims pending before the California Superior Court for Los Angeles County brought by Burmese villagers involving claims for forced labor, rape and murder, essentially the same claims involved in the federal *Unocal* case then pending before the federal courts. In addition, state law claims may be included in a federal complaint and decided by a federal court exercising supplemental jurisdiction under 28 U.S.C. § 1367(c).<sup>41</sup>

Although state courts are open to victims of human rights abuses occurring abroad, the federal courts are a preferred forum. This is due in large part to the favorable procedures contained in the Federal Rules of Civil Procedure, including liberal discovery rules. A defendant facing federal claims in state courts has the right to remove the case to federal court under 28 U.S.C. § 1441. Accordingly, most plaintiffs see little to gain by initiating litigation in a state court.

A 1980 decision by the Second Circuit in *Filartiga*,<sup>42</sup> launched the federal courts into an expansive interpretation of the Alien Tort Claims Act (“ATCA”)<sup>43</sup> so as to allow numerous tort claims brought in federal court for a tort committed in breach of the “law of nations.” A corporation may be sued civilly for torts, including a violation of international law under ATCA.<sup>44</sup>

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<sup>37</sup> *Roxas v. Marcos*, 89 Haw. 91 (1998).

<sup>38</sup> *Taheiyo Cement Corp. v. Superior Court*, 105 Cal.App.4<sup>th</sup> 399 (2003). This decision was subsequently overturned on constitutional grounds by the federal Circuit Court of Appeals for the 9<sup>th</sup> Circuit because the California statute allowing the case to be brought had impermissibly interfered with the foreign policy of the U.S. *Deutsch v. Turner Corp.*, 317 F.3d 1005 (9<sup>th</sup> Cir. 2003).

<sup>39</sup> *Alomang v. Freeport-McMoRan, Inc.*, 718 So.2d 971 (La. 1998).

<sup>40</sup> *Alomang v. Freeport-McMoRan, Inc.*, 811 So.2d 98 (La. 2002).

<sup>41</sup> See, for example, *Estate of Rodriguez v. Drummond*, 256 F.Supp.2d 1250 (N.D.Ala. 2003). State law claims for wrongful death and aiding and abetting were included in the federal complaint.

<sup>42</sup> *Filartiga v. Pena-Irala*, 630 F. 2d 876 (2d Cir. 1980) [hereinafter *Filartiga*].

<sup>43</sup> 28 U.S.C. § 1350. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78. The text of the statute is:

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.

<sup>44</sup> *Wiwa v. Texaco*, 2002 U.S. Dist. LEXIS 3293 (S.D.N.Y. 2002)[hereinafter *Wiwa III*]; *Presbyterian Church of Sudan v. Talisman Energy*, 244 F.Supp.2d 289 (S.D.N.Y. 2003)[hereinafter *Talisman*]; *SINALTRAINAL v. The Coca Cola Co.*, 256 F. Supp. 2d 1345, 2003 U.S. Dist. LEXIS 7145, No. 01-3208 (S.D. Fla. March 31, 2003); *Estate of Rodriguez v. Drummond Co.*, 256 F.Supp.2d 1250, 1267 (N.D.Ala. 2003) [hereinafter *Drummond*]; but see *Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362, 382 (E.D. La. 1997) where the district court held that the TVPA, in referring to an “individual,” did not express a

Defendants in many ATCA cases over the years have argued that the ATCA statute was only intended to allow the federal courts to take jurisdiction over tort claims arising under international law as it existed in 1789, eg. slave trading, piracy, violation of safe conduct and infringement of the rights of ambassadors. ATCA decisions over the past two decades have given the statute more than a mere jurisdictional interpretation; they have recognized a substantive private right of action which is coextensive with international law as it has developed since the statute was originally enacted in 1789. As discussed below, the U.S. Supreme Court has recently ruled that ATCA is a jurisdictional statute which allows the federal courts to enforce, as part of federal law, those provisions of international law that are clearly recognized and accepted among civilized nations.<sup>45</sup>

A separate private right of action in federal courts for torture committed “under color of law” and “extrajudicial killing” was created by Congress in 1991, when it adopted the Torture Victims Protection Act (“TVPA”).<sup>46</sup> The TVPA is codified as a note to the ATCA in 28 U.S.C. § 1350.<sup>47</sup>

An ATCA analysis must examine whether the underlying claim is based on the “law of nations.” Most judicial decisions acknowledge that “international law” is an amorphous body of authority, including treaties, decisions of international courts, widely-observed customs and the writings of international legal experts.<sup>48</sup> Generally, “[A]ctionable violations of international law must be of a norm that is specific, universal and obligatory.”<sup>49</sup> As mentioned above, the U.S. Supreme Court has recently stated that: “federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted.”<sup>50</sup> A breach of international law for which a private party may bring an action must be one which is intended to protect private individuals, which distinguishes it from those laws intended to protect the sovereignty of a state.

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Congressional intent to include corporations. See further discussion of the Alien Tort Claims Act under Section 7, *infra*.

<sup>45</sup> *Sosa v. Alvarez-Machain*, 542 U.S.692, 753; 59 L. Ed. 2d. 718, 753; 124 S. Ct. 2739, 2765 (2004).

<sup>46</sup> Torture Victim Protection Act of 1991. Act March 12, 1992, P.L. 102-256, 106 Stat. 73. Codified as a note to 28 U.S.C. § 1350.

<sup>47</sup> See note 1, above, containing an excerpt from *Karadzic*, in which Judge Newman of the Second Circuit pointed to the legislative history of the TVPA as authority for Congressional approval of ATCA’s broad reach.

<sup>48</sup> *Filartiga*, 630 F.2d 876, at 880. (“The Supreme Court has enumerated the appropriate sources of international law. The law of nations ‘may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law.’ *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61, 5 L. Ed. 57 (1820); *Lopes v. Reederei Richard Schroder*, 225 F. Supp. 292, 295 (E.D.Pa.1963)”)

<sup>49</sup> *Hilao v. Estate of Marcos (In re Estate of Ferdinand Marcos, Human Rights Litig.)*, 25 F3d 1467, 1475 (9<sup>th</sup> Cir. 1994).

<sup>50</sup> *Sosa*, *op. cit.*

Although claims for piracy, slavery and genocide may be actionable without state authorization of the participation of a state actor, international law generally applies only to states, and thus there must be “state action” involved in order to constitute a breach of such law. In those cases, an individual may not violate an international legal norm unless he is acting under color of a state’s law.<sup>51</sup> The “under color of law” test may be met by a showing that a private person was acting together (i.e. aiding and abetting or in complicity) with governmental authorities.<sup>52</sup> Often, courts confronting this issue draw parallels from cases involving the federal civil rights statutes, where “state action” must be found.<sup>53</sup>

ATCA and TVPA are not a panacea for victims of human rights abuses committed abroad. The plaintiffs must first obtain personal service upon the perpetrators, and most potential defendants are foreigners not found in the U.S. An individual may be served with process if he visits the U.S., even briefly, using so-called “tag” service. Federal courts also have personal jurisdiction over corporations that are “doing business” in the U.S. Absent such personal jurisdiction, ACTA and TVPA provide no means for judicial relief for a human rights victim.

Even where personal jurisdiction is established, ACTA/TVPA claims are also limited by the various doctrines applicable to all federal court cases that are discussed elsewhere in this section, such as sovereign immunity, *forum non conveniens*, head of state, political question, and others. Finally, even where a final judgment is rendered, enforcement of that judgment against an absent defendant with no discoverable asset in the U.S. is usually impossible. Because of this, many ATCA/TVPA defendants choose not even to appear in court to defend themselves. Many huge default judgments, often including millions of dollars in punitive damages, have been rendered.<sup>54</sup> Few, if any, plaintiffs have obtained any substantial monetary relief.

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<sup>51</sup> *Estate of Rodriguez v. Drummond Co.*, 256 F.Supp.2d 1250 (N.D.Ala. 2003).

<sup>52</sup> *Id.*

<sup>53</sup> See, *Beanal v. Freeport-McMoran Inc.*, 969 F. Supp. 362, at 374-376 (E.D.La. 1997).

<sup>54</sup> *Teresa Xuncax, et al. v. Hector Gramajo*, 886 F. Supp. 162, 200 (D.Mass. 1995). {“n45 See, e.g., Ortiz Ex. E, documenting the following cases: *Filartiga v. Pena-Irala*, 577 F. Supp. 860 (E.D.N.Y. 1984) (for torture to death: \$ 175,000 to sister, \$ 200,000 to father in compensation, \$ 5,000,000 to each as punitive damages); *Martinez-Baca v. Suarez-Mason*, No. 87-2057 SC (N.D. Cal., Apr. 22, 1988) (for systematic arbitrary detention and torture: \$ 11,170,699 in compensation (including lost earnings), \$ 10,000,000 in punitive to victim; *Forti v. Suarez*, No. 87-2058-DLJ (N.D. Cal. Apr. 25, 1990) (for first plaintiff, for arbitrary detention, torture, and witnessed abuse and execution of brother: \$ 3,000,000 compensatory, \$ 3,000,000 in punitive; for second plaintiff, for arbitrary detention, abuse and “disappeared” mother: \$ 2,000,000 in compensation, \$ 1,000,000 punitive); *Trajano v. Marcos*, No. 86-0207, (D. Hawaii, May 19, 1991) (for torture and summary execution: \$ 236,000 in lost earnings, \$ 175,000 moral damages, \$ 1,250,000 exemplary damages to victim's estate; \$ 1,250,000 in compensation, \$ 1,250,000 exemplary to victim's mother; *Siderman v. Argentina*, No. CV-82-1772-RMT (MCx) (C.D. Cal. Sep. 28, 1984) (for torture: compensatory damages totalling \$ 2,607,575.63 to victim), vacated on other grounds, No. CV-82-1772-RMT (MCx) (C.D. Cal. Mar. 7 1985), rev'd and remanded, 965 F.2d 699 (9th Cir. 1992); *Quiros de Rapaport, et al. v. Suarez-Mason*, No. C87-2266 JPV (N.D. Cal. Apr. 11, 1989) (for torture and murder of one victim, disappearance of another: \$ 10,000,000 in compensation, \$ 10,000,000 punitive to victims' widows, \$ 5,000,000 in compensation, \$ 5,000,000 punitive to victims' mother and sister, respectively). See also *Todd v. Panjaitan*, No. CV-92-12255-PBS (D. Mass. Oct. 26, 1994) (awarding \$ 2,000,000 in

A major motivating factor in many ATCA/TVPA cases is a desire on the part of the injured victim to tell his or her story and obtain a judicial acknowledgment of the mental and physical injuries he or she has suffered at the hands of the defendant.

## V. Jurisdiction and related issues

### 13. On what bases do the courts of your country assert personal jurisdiction over criminal and civil defendants?

U.S. courts<sup>55</sup> have personal (*in personam*) jurisdiction over a natural person if: (1) the defendant is resident in or domiciled in a jurisdiction; (2) the defendant is physically present in the jurisdiction; (3) the defendant has consented to be sued; or (4) the defendant appears in court to defend the action, without stating that the appearance is for the purposes of contesting jurisdiction (“special appearance”).

U.S. courts have personal jurisdiction over a corporation if: (1) the corporation is organized in a jurisdiction; (2) the corporation is doing business in the jurisdiction;<sup>56</sup> (3) the corporation has consented to be sued; or (4) the corporation appears in court to defend the action without specifying that the purpose of the appearance is a special appearance.

*In personam* jurisdiction over an individual or a corporation may be “general,” i.e. a suit may be brought for any cause of action over which the forum court has subject matter jurisdiction and there is proper venue; or, “specific,” i.e. the suit may be brought only with regard to those activities which gave rise to the cause of action.<sup>57</sup>

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compensation to mother as administratrix of son's estate, \$ 2,000,000 in compensation to mother, and \$ 10,000,000 in punitive damages); Paul v. Avril, No. 91-399-CIV (S.D. Fla. July 1, 1994) (awarding six victims of torture and arbitrary detention between \$ 2,500,000 and \$ 3,500,000 in compensatory damages each together with \$ 4,000,000 each in punitive damages).”)

<sup>55</sup> Under the Federal Rules of Civil Procedure, federal district courts apply the procedural rules on jurisdiction which are applicable to the state jurisdiction in which they are sitting. F.R.C.P. 4(k)(1)(A).

<sup>56</sup> See *Talisman*, 2003 U.S. LEXIS 4085, at court opinion 329. (“[A] corporation is ‘doing business’ and is therefore ‘present’ in New York and subject to personal jurisdiction with respect to any cause of action, related or unrelated to the New York contacts, if it does business in New York ‘not occasionally or casually, but with a fair measure of permanence and continuity.’ (quoting *Hoffritz for Cutlery, Inc. v. Amajac, Ltd.*, 763 F.2d 55, 58 (2d Cir. 1985)). In order to meet this standard, a plaintiff must show that a defendant engaged in ‘continuous, permanent, and substantial activity in New York.’ *Wiwa*, 226 F.3d at 95.

“The continuous presence and substantial activities need not be conducted by the foreign corporation itself. Indeed, personal jurisdiction may be based upon activities performed on behalf of a foreign corporation by an agent:

Under well-established New York law, a court of New York may assert jurisdiction over a foreign corporation when it affiliates itself with a New York representative entity and that New York representative renders services on behalf of the foreign corporation that go beyond mere solicitation and are sufficiently important to the foreign entity that the corporation itself would perform equivalent services if no agent were available.” *Wiwa*, 226 F.3d at 95.)

<sup>57</sup> See *International Shoe Co v Washington*, 326 US 310, 318 (1945). The decision notes that in some prior cases, the defendant's "continuous corporate operations within a state were thought so substantial and of

In a criminal matter, if a criminal act is commenced in one state, but the defendant is in another state, the first state may ask the authorities to arrest the defendant and extradite him to the requesting state to stand trial. If the defendant has fled to a foreign country, a treaty of extradition is in effect between the foreign country and the U.S., the U.S. may formally request that the foreign country arrest and extradite the defendant to stand trial in the original court in which the criminal complaint was filed.

There are certain circumstances in which a court may obtain jurisdiction over property located within the jurisdiction, so-called *in rem* jurisdiction. There are other circumstances, such as in proceedings for the dissolution of marriage, in which the court may determine the marital status of a petitioner even though the spouse is not within the jurisdiction. This is done through publication or by mailing a copy of the petition to the last and usual place of abode of the absent spouse.

The term “physically present” is generally interpreted not to require presence for any period of time longer than necessary to serve the defendant with court papers.<sup>58</sup> This so-called “transient” or “tag” jurisdiction has allowed courts in the U.S. to obtain jurisdiction over persons who are merely visiting the U.S. temporarily.<sup>59</sup> Among the defendants who have been “tagged” in recent years are: Pena-Irala (served while in the U.S. on an expired visitor’s visa), Hector Gramajo, former Defense Minister of Guatemala, who was served while attending the Harvard Kennedy School, Karadzic (served when entering his hotel in New York City during a trip to New York during which he addressed the U.N.), Assasie-Gyimah (Ghanian military officials temporarily in the United States)<sup>60</sup>; and Li Peng (former Chinese Premier, served while visiting the U.S. in connection with the Tiananmen Square massacre).

A corporation is “doing business” in a jurisdiction if it is conducting its affairs in some fashion that appears to be “continuous and systematic”.<sup>61</sup> The court must review the facts in each case to ensure that certain “minimal contacts” have occurred in order to

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such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities”). See also Arthur T. von Mehren and Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv L Rev 1121, 1148-53 (1966). (The article introduces the “general” and “specific” terminology.)

<sup>58</sup> See *Burnham v Superior Court of California*, 495 U.S. 604 (1990)(Defendant served with divorce papers while on a visit to California.) “Tag” jurisdiction and “doing business” jurisdiction, are referred to as “exorbitant” forms of jurisdiction. See Beth Van Schaack, *In Defense of Civil Redress: The Domestic Enforcement of Human Rights Norms in the Context of the Proposed Hague Judgments Convention*, 42 Harv. Int’l L. J. 141 (2001) (Quoting John Fitzpatrick, *The Lugano Convention and Western European Integration: A Comparative Analysis of Jurisdiction and Judgments in Europe and the United States*, 8 CONN. J. INT’L L. 695, 703 n.34 (1993). “Exorbitant jurisdiction can be defined as those assertions of jurisdiction that are not generally recognized by accepted principles of international law.”)

<sup>59</sup> A person may be prosecuted for a crime committed outside of the territory of the U.S. and found guilty even if he is kidnapped and forcibly brought to the U.S. See *U.S. v. Yunis*, 924 F. 2d 1086 (D.C. Cir. 1991).

<sup>60</sup> *Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189, 1193 (S.D.N.Y. 1996).

<sup>61</sup> See *International Shoe Machinery Co. v. Washington*, 326 U.S. 310, at 318, 320.

meet constitutional standards for due process. In such a case, the corporation may be served with process on any claim which a plaintiff may have against it. This is referred to as “general” jurisdiction. In many jurisdictions a corporation which has been formed outside of a state (a “foreign corporation”) must register with the state authorities in order to be allowed to do business within the state. Nonregistration carries with it certain penalties, among them the denial of the right to sue on contracts entered into in the state. Most, if not all, jurisdictions requiring the registration of foreign corporations also require the foreign corporation to designate an agent within the state for service of process (usually the state secretary). If a corporation is doing business, but has failed to register with the authorities, a plaintiff may nonetheless commence an action against the corporation and may make use of statutory authority to serve the corporation in its home jurisdiction. The statute is referred to as a “long-arm” statute.

A corporation which commits a crime in a jurisdiction may be made to answer through extradition proceedings, just as a natural person would be. Additionally, if a corporation is not regularly doing business in a jurisdiction, yet commits a tort in that jurisdiction, an injured plaintiff may also make use of the “long-arm” statute to make service upon the corporation in its home jurisdiction, but only for the purposes associated with the particular tort involved.<sup>62</sup> The legal fiction involved here is that the corporation, by sending a product into, or taking some other action in, a state, has impliedly consented to be sued in connection therewith.

Because personal jurisdiction based on “doing business” requires very little more than certain “minimum contacts” with a jurisdiction, it enables plaintiffs to sue multinational corporations, even through their corporate headquarters and all other corporate offices may be outside of the jurisdiction or even the U.S. In *Wiwa II*, the court determined that merely maintaining a shareholder relations office in New York was sufficient to subject Shell to the jurisdiction of the federal court. Conversely, the district court in the *Unocal* case dismissed an action against Total S.A. on the grounds that the defendant did not have even minimal contacts with California.<sup>63</sup>

Finally, it should be noted that a foreign government which maintains a diplomatic legation in the U.S. is always “present” in the U.S., and it, or any of its sub-entities, may be sued in federal courts, subject to the Foreign Sovereign Immunities Act. Service of process though diplomatic channels is provided for under that Act.<sup>64</sup>

**14. When parent and subsidiary entities are involved in a multinational setting, how does a court assert personal jurisdiction over parents or subsidiaries located out of country? What are the standards for overcoming**

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<sup>62</sup> A general discussion of the American systems of jurisdiction as compared with European systems can be found in Friedrich K. Juenger, *American Jurisdiction: A Story of Comparative Neglect*, 65 U. Colo. L. Rev. 1 (1993).

<sup>63</sup> *Total Dismissal*, 27 F. Supp. 2d 1174.

<sup>64</sup> 28 USC § 1608. See Working Group of the American Bar Association, *Reforming the Foreign Sovereign Immunities Act*, 40 Colum. J. Transnat'l L. 489, at 503 (2002).

**limitations on jurisdictions over business entities within a multinational corporation?**

A future version of this response will provide an answer to this question.

**15. How may a court attribute the actions of a subsidiary to a parent business entity, i.e. “pierce the corporate veil”?**

A future version of this response will provide an answer to this question.

**16. What types of actions (civil and criminal) might be asserted against a business entity with respect to activities taking place outside of your jurisdiction by a business entity over which your courts have jurisdiction?**

Numerous federal laws apply “extraterritorially,” i.e. they make conduct outside of the U.S. a criminal offense punishable in the U.S. Leading examples of this are: bribery of foreign officials to obtain business advantages,<sup>65</sup> money laundering,<sup>66</sup> importation of stolen property,<sup>67</sup> and conspiracy to export drugs to the U.S.,<sup>68</sup>

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<sup>65</sup> The Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1 *et seq.*; 15 U.S.C. § 78mm.

<sup>66</sup> 18 U.S.C. § 1956, 31 U.S.C. § § 5311 *et seq.*

<sup>67</sup> The National Stolen Properties Act, or “NSPA,” 18 U.S.C. § 2315. The NSPA reads in part:

Whoever receives, possesses, conceals, stores, barter, sells, or disposes of any goods, wares, or merchandise, securities, or money of the value of \$ 5,000 or more <ellipsis> of the value of \$ 500 or more, which have crossed a State or United States boundary after being **stolen, unlawfully converted, or taken**, knowing the same to have been stolen, unlawfully converted, or taken <ellipsis> [s]hall be fined under this title or imprisoned not more than ten years, or both. (emphasis added)

The NSPA makes it a federal felony offense to import property into the U.S. which has been “stolen, unlawfully converted or taken.” The term “stolen” has been consistently interpreted by the courts to include not only property acquired by outright theft, but property wrongfully taken from its rightful owner, with intent to deprive him of possession.<sup>67</sup> In several reported cases, the NSPS has been applied to art antiquities taken from foreign countries and imported in to the U.S.<sup>67</sup> These cases involved foreign patrimony laws (i.e. art antiquities made public property by law); accordingly, public property taken by force during a conflict may be considered “stolen” within the meaning of the NSPA. Thus, the NSPA interpretation could be applied to natural resources, acquired through outright theft, fraudulent acquisition, or plunder/pillage abroad, and imported into the U.S.

A significant volume of natural resources flowing from conflict areas (eg. diamonds) are likely to end up in U.S. markets. Clearly, if a means could be found to identify given resource streams as “stolen,” and it could be shown that the buyers were aware that they were “stolen,” then the domestic NSPA could become a formidable weapon for interdicting the illicit resource streams, resulting in both accountability for past crimes, but also presenting a dampening effect on future violations. Hopefully, the combined effect would result in a lessening of conflict.

It could be difficult in some cases to prove that a particular shipment of natural resources was “stolen” and that the purchasers were aware of that fact. However, with modern investigative techniques, including the aid of undercover agents and informers, it should be well within the capabilities of the Federal Bureau of Investigation, aided by police officials in foreign countries through Interpol, to establish that a particular stream of natural resources stemmed from illicit sources and that the U.S. purchasers knew it.

<sup>68</sup> 18 U.S.C. §963—importation and distribution of cocaine)

racketeering,<sup>69</sup> counterfeiting,<sup>70</sup> and support of or conspiracy to commit terrorism.<sup>71</sup> When these offenses are connected to instances where grave breaches of international

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<sup>69</sup> The Racketeering Influenced Corrupt Organizations Act, or “RICO,” 18 U.S.C. § 1961 *et seq.*

RICO has been summarized as follows:

RICO prohibits the following activities: (1) acquiring an interest in an enterprise by using or investing income either directly or indirectly derived from a pattern of racketeering activity, (2) acquiring or maintaining either directly or indirectly an interest in an enterprise through a pattern of racketeering activity, (3) conducting or participating directly or indirectly in the affairs of an enterprise through a pattern of racketeering activity, and (4) conspiring to violate any of the above-listed provisions. The “pattern” of acts referred to in RICO consists of acts somehow “related” to one another by a common plan or scheme. The statute provides criminal and civil remedies for violations. Civil actions promise a plaintiff treble damages, costs of the suit, and attorneys’ fees. On the criminal side, an individual convicted under RICO may be fined, imprisoned for up to twenty years, or both, and will be required to forfeit any proceeds derived from the prohibited activity. Lea Brilmayer and Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 Harv. L. Rev. 1217, 1246 (1992).

RICO provides a civil cause of action for “any person injured in his business or property by reason of a violation of section 1962.” 18 U.S.C. § 1964(c). Thus, a person injured abroad by an “Unacceptable Activity” may find relief under RICO. RICO Section 1962(c) provides that:

It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity.

Section 1962(d) makes it “unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c)” of Section 1962.

The term “pattern of racketeering activity” is defined as follows: “‘pattern of racketeering activity’ requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity.” 18 U.S.C. § 1961(1)

“Racketeering activity” includes (a) “any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act [21 U.S.C. § 802]), which is chargeable under State law and punishable by imprisonment for more than one year, and (b) any violation of a lengthy list of specific federal criminal statutes, including, *inter alia*, the NSPA, and statutes pertaining to counterfeiting, fraud relating to identification documents, mail fraud, financial institution fraud, unlawful procurement of citizenship and naturalization, witness tampering, misstatements in an application for a passport, visa or permit, peonage and slavery, laundering of monetary instruments, sexual exploitation of children, trafficking in counterfeit goods, and white slavery.” 18 U.S.C. § 1961(5)

The U.S. prosecutors have a powerful tool when using RICO to prosecute a conspiracy charge. A RICO prosecution (or civil lawsuit) need not allege that the conspiracy took place on U.S. territory, only that it could have an effect within the U.S. See *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1364 (9th Cir. 1988) (en banc), cert. denied, 490 U.S. 1035 (1989) [hereinafter *Republic of the Philippines*]. See also Brilmayer and Norchi, 105 Harv. L. Rev. 1217, at 1257 (“In finding jurisdiction [in the Noreiga case], the court noted that, even if extraterritorial conduct produces no effect in the United States, a defendant can still be reached if he intended to produce an effect in the United States or is part of a conspiracy in which some co-conspirator’s activities occurred in American territory.”)

The importance of RICO in connection with an effort to combat the “Unacceptable Activities” lies principally in its potential application to those perpetrators who engage in

criminal law occur in foreign countries, such as when stolen or fraudulently obtained natural resources are marketed in the U.S., the U.S. statutes may be invoked to hold the

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domestic or foreign commerce of the U.S. “though a pattern of racketeering activity,” or invest in a U.S. business or acquire U.S. real estate using the proceeds of their illicit activities. If they do so, or conspire to do so, they may face not only the potential for criminal prosecution, but lawsuits by the victims of their activities. A person who, on the requisite number of occasions and the requisite number of times, commits any of the acts listed under (a) or (b) in the preceding paragraph and thereafter uses the proceeds of such conduct in the U.S. may face a RICO charge. If the “racketeering activity” is itself a crime under U.S. law, e.g., importing “stolen” property, the person may face not only an NSPA charge, but a RICO charge as well. And even if the “racketeering activity” is not itself punishable in the U.S., for example, it is an act “chargeable under State law and punishable by imprisonment of more than one year,” a RICO charge may be brought in the U.S. federal courts. The term “chargeable under State law” has been interpreted to mean that the act taking place abroad need only be one which, if committed in the U.S., would be an offense punishable under State law. *Wiwa III*, 2002 U.S. LEXIS 3293, at court opinion 80.

Courts have sustained RICO counts in a number of ATCA cases: *Marcos*<sup>69</sup> and *Wiwa III* are leading examples. In the *Marcos* case, the Ninth Circuit held that the conduct of former President Marcos in the Philippines constituted “racketeering,” inasmuch as it involved fraudulent or otherwise illegal misappropriation of property. When the Marcoses brought millions of dollars of jewelry into the U.S. when they fled the Philippines, this constituted transportation of stolen property, a RICO predicate offense. The Marcoses also purchased real property in the U.S., which constituted a violation of RICO. The Ninth Circuit affirmed the granting of an injunction prohibiting the Marcoses from disposing of any of their assets worldwide. *Id.*, at 1358. (“Here there is alleged to be a group of individuals associated in fact for the purpose of illegally investing the fruits of fraud and illegally using the mails and wire and illegally transporting in interstate commerce the fruits of the fraud.

The effect on the commerce of the United States of engaging in mail or wire fraud or bringing stolen property into the country is palpable. The Marcoses are mistaken in arguing that such criminal acts have no consequences for commerce to or in this country. The criminal enterprise which they are charged with conducting consisted in operations taking place within the United States. These operations had multiple effects on the domestic and foreign commerce of this country. If the operations were criminal, the operators incurred criminal liability under our law. RICO provides a civil cause of action for ‘any person injured in his business or property by reason of a violation of section 1962.’ 18 U.S.C. § 1964(c). Plaintiffs allege violations of two subsections found in section 1962: section 1962(c) and section 1962(d). Title 18 U.S.C. § 1962(c) provides that:

It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity.

Section 1962(d) makes it “unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c)” of Section 1962.”)

In *Wiwa III*, the court held that alleged bribery, extortion, murder and arson, even though they occurred in Nigeria, nonetheless constitute “racketeering” within the meaning of RICO. *Wiwa III*, 2002 U.S. LEXIS 3293, at court opinion 83.

<sup>70</sup> 18 U.S.C. § 470.

<sup>71</sup> 18 U.S.C. § 2333(a): “Any national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefor in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney’s fees.”

perpetrator accountable in a U.S. court. The federal complicity and conspiracy statutes make foreign accomplices and conspirators criminally liable as well.

Enforcement of criminal statutes on an extraterritorial basis requires that the U.S. obtain jurisdiction over the perpetrator; thus the perpetrator must be present in the U.S.<sup>72</sup> If the perpetrator is a corporation, the usual rules involving jurisdiction over corporations would pertain. If the perpetrator is an individual, physical presence in the U.S. is required for a court to assert jurisdiction. The U.S. courts do not try defendants “in absentia.” Where an extradition treaty is in force between the U.S. and a foreign country in which an individual defendant is located, the government of that country may be persuaded to provide mutual assistance to U.S. authorities, leading to the arrest of the individual and his extradition to the U.S. to stand trial.<sup>73</sup>

In a few exceptional and notable cases, the individuals have been essentially kidnapped by U.S. law enforcement authorities or captured on the battlefield or in occupied territory by military authorities. The courts have not closely examined the circumstances leading to an individual’s being “present” in the U.S.<sup>74</sup> The Supreme Court has refused to allow the dismissal of indictments where a defendant has been the subject of a transborder abduction.<sup>75</sup> Because the abduction of a foreign citizen without the consent of the government involved is a breach of international law, and is likely to lead to a diplomatic *contretemps*, the practice is used sparingly, and only by authorization at the highest levels of the Department of Justice.<sup>76</sup> In the few cases involved, the federal authorities have generally exhausted diplomatic channels and have been prompted by motivations strong enough to overcome concerns about diplomatic niceties.

A decision to prosecute an individual or a corporation for a breach of federal law is subject to the doctrine of “enforcement discretion.” Federal prosecutors are not required to prosecute every violation of U.S. criminal law, nor could they, given the finite resources at their disposal. A federal prosecution which involves a complex fact

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<sup>72</sup> The well-known cases of John Walker and Yaser Esam Hamdi are examples of the use of battlefield seizure to bring a defendant to justice in the U.S.

<sup>73</sup> *U.S. v. Alvarez-Machain*, 504 U.S. 655 (1992).

<sup>74</sup> See *Kasi v. Ageelone*, 300 F3d 487 (4<sup>th</sup> Cir. 2002). In that case, the murderer of two CIA agents carried out in Virginia fled to Pakistan and was later abducted by FBI agents in Pakistan. See *Ker v. Illinois*, 119 U.S. 436 (1886). In 1960, the U.N. Security Council determined that Israel’s abduction of Adolph Eichmann from Argentina violated the sovereignty of that nation. *Alvarez*, at p. 159.

<sup>75</sup> *U.S. v. Alvarez-Machain*, 504 U.S. 655, at 670 (1992).

<sup>76</sup> Department of Justice, United States Attorneys’ Manual, § 9-15.610. (“Due to the sensitivity of abducting defendants from a foreign country, prosecutors may not take steps to secure custody over persons outside the United States (by government agents or the use of private persons, like bounty hunters or private investigators) by means of *Alvarez-Machain* type renditions without advance approval by the Department of Justice. Prosecutors must notify the Office of International Affairs before they undertake any such operation. If a prosecutor anticipates the return of a defendant, with the cooperation of the sending State and by a means other than an *Alvarez-Machain* type rendition, and that the defendant may claim that his return was illegal, the prosecutor should consult with the OIA before such return.”)

situation, international actors and events, the need to develop evidence that will withstand challenge in court, and the potential for significant foreign policy implications will not be undertaken lightly.

In allocating investigative and legal resources, federal prosecutors have considerable latitude in making decisions as to which laws to enforce, the extent of the enforcement effort, the selection of defendants, the resources devoted to particular cases, appellate strategy, and a myriad of other aspects of law enforcement. These decisions may be influenced purely by resource considerations, or they may be influenced by policy direction from the U.S. Department of Justice. In turn, the Justice Department must take into account the varying policy and political considerations, often from inconsistent perspectives, that abound in a law enforcement agency.

Thus, the presence in the criminal laws of a statute that proscribes a given activity does not necessarily mean that any particular violation of that statute will lead to a federal prosecution. Given the vicissitudes of policy, a decision not to prosecute a given violation at one point in time could be followed at another point in time by a full-fledged prosecution of that same violation. This analysis focuses primarily on whether there is a *potential* for U.S. law to be applied in prosecuting an “Unacceptable Activity,” not on whether the political and policy will is present on the kind of scale that would be necessary for a successful prosecution to be conducted.

Other federal statutes that are potentially applicable to activities conducted in the U.S. or at its borders cover a wide range of activities which, in turn, may implicate those linked to grave breaches of international criminal law abroad. U.S. customs and immigration regulations, for example, can be used to intercept goods and people involved in criminal activities. If plundered goods are moved into the U.S. accompanied by fraudulent customs documents, those responsible for the false documents are punishable in U.S. courts. Persons traveling into or out of the U.S. for the purposes of conducting criminal activities may use forged or altered passports. Traffickers may move their victims into the U.S. with forged travel documents.

Congress has also enacted numerous criminal statutes that apply to activities carried out entirely in the U.S. that may play an important role in an overall scheme to either violate international law or, if not prohibited under international law, nonetheless are considered to be unacceptable.

Other statutes that apply extraterritorially which affect U.S. interests may be made criminal, and statutes which have reached beyond U.S. borders have survived constitutional challenges on a regular basis. Leading examples of this are: (1) 18 U.S.C. §§ 1114(1) and 1201(a)(5), making it a federal crime to kidnap and murder a U.S. federal agent; (2) 18 U.S.C.S § 1959, applied to the murder in Mexico of an American national mistakenly identified as a U.S. federal drug agent. Similarly, the extraterritorial

enforcement of U.S. drug laws, as exemplified by the famous Noriega case,<sup>77</sup> rests on a theory of prevention of harm in the U.S.<sup>78</sup>

**17. If plaintiffs wanted to sue a business entity in your jurisdiction, what are some of the jurisdictional and procedural obstacles that they (and their lawyers) might face?**

1. **Cost.** The costs involved in federal court litigation can be prohibitive even when legal services are furnished pro bono. A human rights suit against a multinational corporation will inevitably be defended by one or more top law firms, each thoroughly familiar with the myriad ways in which a plaintiff can be worn down by costly and time-consuming legal maneuvers. A plaintiff can expect to see one or more motions to dismiss, which, if any is denied, will result in one or more appeals. In the meantime, there will be extensive discovery--depositions, interrogatories, requests for admission, and document requests. There will likely be numerous status conferences and incidental court appearances. If the motion to dismiss is unsuccessful, the defendants will file motions for summary judgment, resulting in further court appearances, briefs, and court conferences. If the plaintiff is seeking to certify a class under F.R.C.P. Rule 23, the defendant will likely oppose the

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<sup>77</sup> See *U.S. v. Noriega*, 117 F.3d 1205 (11<sup>th</sup> Cir. 1997).

<sup>78</sup> See Brilmeyer and Norchi, 105 Harv. L. Rev. 1217, at 1257: ("A jurisdictional issue also arose in the celebrated case of *United States v. Noriega*. The facts underlying the case are well known. In February, 1988, a federal grand jury in Miami indicted General Manuel Noriega for conspiracy to transport cocaine into and out of the United States. General Noriega (along with Lieutenant Colonel Luis Del Cid) was charged with a pattern of racketeering activity in violation of the RICO statutes as well as various violations of the drug law. General Noriega was charged as a "principal" for violating the Travel Act, participating in a racketeering enterprise, and conspiring to import, distribute, and/or manufacture cocaine for sale in the United States.

On December 20, 1989, President Bush ordered United States combat troops into Panama City on a mission with the goal, inter alia, of seizing General Noriega to face the indictment in the United States. Not long after the invasion, Lieutenant Colonel Del Cid, the commander of two thousand Panamanian troops, surrendered to American forces. The apprehension of General Noriega took longer, but after eleven days in the Papal Nunciature in Panama City, General Noriega surrendered as well.

Supporting its conclusion, the Court cited Justice Holmes's opinion in *Strassheim v. Daily* for the proposition that '[a]cts done outside a jurisdiction, but intended to produce or producing effects within it, justify a State in punishing the cause of the harm as if [the accused] had been present at the effect, if the State should succeed in getting him within its power.' The impact territoriality theory of jurisdiction expounded by Justice Holmes indeed supports the Noriega court's result. Importation of drugs has a direct and deliberate effect in the United States, which is enough under *Strassheim* to support application of American law. As Justice Holmes suggested, however, the impact theory limits itself to situations in which the consequences for the forum were intended or purposeful.

A quite different question would arise if the sole basis for obtaining jurisdiction over Noriega consisted of his alleged role in a conspiracy. Under a conspiracy theory of extraterritoriality, Noriega could be held to American law by virtue of his co-conspirators' acts in the United States. This theory has been used in establishing personal jurisdiction over absent defendants, and, in the context of venue, the conspiracy theory has been justified by recourse to the defendant's 'constructive presence.'")

certification, resulting in additional briefing, court appearances and appeals. Even a dedicated pro bono legal office can have its resources stretched thin by all of these proceedings. If the plaintiffs lose, they face the potential for an assessment of court costs, which could be significant.

2. **U.S. Government and “Act of State” Issues.** Even if jurisdiction and venue are proper, a federal court has discretionary authority to dismiss the suit under the act of state doctrine<sup>79</sup> or one of its related doctrines, such as “comity” or “political question” (see discussion under Question No. 12 below). The U.S. Department of Justice may file an amicus brief to represent the interests of the U.S. government. Or, the State Department and/or the Department of Justice may inform the court, via a “Statement of Interest,” that the suit should be dismissed. It is also common for a foreign government to file a statement asking the court to employ the doctrines of comity<sup>80</sup> or *forum non conveniens*.

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<sup>79</sup> See further discussion of “act of state doctrine” below.

<sup>80</sup> See *Gabriel Ashtanga Jota v. Texaco Corporation*, 157 F.3d 153, at 160 (2d Cir. 1998) {hereinafter *Jota*}. (“When a court dismisses on the ground of comity, it should normally consider whether an adequate forum exists in the objecting nation and whether the defendant sought to be sued in the United States forum is subject to or has consented to the assertion of jurisdiction against it in the foreign forum. That is the approach usually taken with a dismissal on the ground of *forum non conveniens*, as we noted in Part 1, and it is equally pertinent to dismissal on the ground of comity.”) See *Sarei v. Rio Tinto, op cit. at 1200*: {“ In deciding whether to invoke international comity, courts frequently look to the standard set forth in section 403 of the Restatement, which provides that ‘a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.’ RESTATEMENT, § 403(1). See also *Marsoner v. United States*, 40 F.3d 959, 965 (9th Cir. 1994) (‘Under the revised Restatement, reasonableness is ‘an essential element in determining whether, as a matter of international law, the state may exercise jurisdiction to prescribe’); *Sequihua, supra*, 847 F. Supp. at 63. The Restatement identifies a number of factors that courts should consider in assessing whether the exercise of jurisdiction would be unreasonable:

(a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory; (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect; (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted; (d) the existence of justified expectations that might be protected or hurt by the regulation; (e) the importance of the regulation to the international political, legal, or economic system; (f) the extent to which the regulation is consistent with the traditions of the international system; (g) the extent to which another state may have an interest in regulating the activity; and (h) the likelihood of conflict with regulation by another state.’ RESTATEMENT, § 403(2).”)

See *Talisman*, 2003 U.S. LEXIS 4085, at court opinion 147: (“Normally, comity entails a domestic court honoring a foreign court’s judgment or dismissing a case in favor of a pending proceeding. See, e.g., *Cunard S. S. Co. v. Salen Reefer Servs.* AB, 773 F.2d 452 (2d Cir.1985) (affirming the grant of comity to a Swedish court decision staying creditor actions); *Allstate Life Ins. Co. v. Linter Group, Ltd.* 994 F.2d 996 (2d. Cir. 1993) (affirming dismissal in favor of a pending proceeding in Australia).”)

3. **Legal Objections.** A multinational corporation can be expected to raise every defense or objection to the lawsuit that can be advanced without embarrassing the presenting attorney. Among the myriad legal objections raised in previous ATCA cases are: the statute of limitations;<sup>81</sup> lack of standing, insufficient basis for certification of a class (including lack of common injuries or other factual or legal issues and failure of the plaintiffs to represent the class)<sup>82</sup>; various formal deficiencies in pleadings;<sup>83</sup> lack of personal jurisdiction (including lack of jurisdiction over a parent corporation when the entity having contacts with the jurisdiction is a subsidiary); lack of subject matter jurisdiction (both statutory and constitutional objections having been presented); improper service of process; sovereign immunity; head of state immunity, *forum non conveniens*, the act of state doctrine,<sup>84</sup> justiciability (political question),<sup>85</sup> comity,<sup>86</sup> local action,<sup>87</sup> absence of state involvement (in

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<sup>81</sup> ATCA has no statute of limitations. In the absence of a specified time period, one court decision has applied the ten-year statute limitations found in the TVPA. See *Ivanova v. Ford Motor Company*, 67 F.Supp. 424, at 462 (D.N.J. 1999). Other cases have employed analogous state statutes of limitations. See *Alfredo Forti et al. v. Guillermo Suarez-Mason*, 672 F.Supp. 1531, at 1549 (N.D.Ca. 1988) (Applying the one-year statute of limitations for personal injuries under California law.)

<sup>82</sup> *Class Certification*, 167 Fed. Supp. 2d 1140, 1141. (“First, the plaintiff must have suffered an injury in fact -- an invasion of a legally-protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of -- the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.”)

<sup>83</sup> See *Beanal v. Freeport-McMoran*, 1998 U.S. Dist LEXIS 2522 (E.D.LA 1998). The court dismissed the complaint for failure to state a claim (insufficient facts to support standing) after giving plaintiff leave to amend in a prior ruling.

<sup>84</sup> The act of state doctrine stems from the judicial recognition that “Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment of the government of another, done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.” *Underhill v. Hernandez*, 169 U.S. 250, 252 (1897).

Related to the act of state doctrine is the justiciability or political question doctrine. The Second Circuit, writing in *Karadzic*, described the elements of this doctrine:

“A nonjusticiable political question would ordinarily involve one or more of the following factors: [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question. *Baker v. Carr*, 369 U.S. at 217; see also *Can v. United States*, 14 F.3d 160, 163 (2d Cir. 1994).” *Karadzic*, 70 F.3d 232, 249.

“The Second Circuit commented that: “it would be a rare case in which the act of state doctrine precluded suit under [the ATCA].” *Id.*, at 250.

<sup>85</sup> See *Baker v. Carr*, 369 U.S. 186 (1962).

<sup>86</sup> The doctrine of comity is related to both the act of state doctrine and the doctrine of *forum non conveniens*, inasmuch as each doctrine requires the forum court to examine whether the courts of the state in which the acts occurred has an interest in the matter.

an attempt to defeat an ATCA claim invoking the “law of nations”); absence of state involvement in torture (to meet the TVPA requirement that torture be carried out “under color of law”); failure to join an indispensable party (usually a governmental entity which is immune from suit and cannot be joined or a foreign party over which the court has no personal jurisdiction); and failure to exhaust local remedies (under the TVPA).<sup>88</sup>

**18. Do the civil courts of your country sometimes decline to exercise jurisdiction over matters where the events occurred in another country and/or the majority of witnesses and the bulk of other evidence is outside of your country, thereby making it more convenient for the parties to litigate in the courts of another jurisdiction (sometimes referred to as the doctrine of *forum non conveniens*)?**

U.S. federal courts and the overwhelming majority of State courts recognize the doctrine of *forum non conveniens* (FNC).<sup>89</sup> The Supreme Court described the doctrine in *Gulf Oil v. Gilbert*<sup>90</sup> and *Piper Aircraft Co. v. Reyno*.<sup>91</sup> The doctrine applies. The decision as to whether to apply the doctrine lies within the discretion of the trial court, and such discretion may be exercised even though jurisdiction and venue are proper in the selected forum.<sup>92</sup> Ordinarily, the appellate court will not disturb a trial court’s decision unless it is clear that the trial court failed to apply the correct rule of law, e.g. to consider all relevant factors when making its determination.<sup>93</sup> The defendant has the burden of proof with respect to all elements of the doctrine.<sup>94</sup> The plaintiff’s choice in selecting the forum must be given great weight.<sup>95</sup>

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<sup>87</sup> See *Bigio v. Coca-Cola*, op cit. at 451: (“Under the local action doctrine, courts may not exercise jurisdiction over any ‘local’ action involving real property unless the property at issue is found within the territorial boundaries of the state where the court is sitting. [citations omitted].”)

<sup>88</sup> In *Wiwa II*, 226 F.3d, at 56, the court found that exhaustion for TVPA purposes had occurred when the defendant did not show that it would be amenable to suit in Nigeria. (“Nigerian courts remain an uncertain forum for justice.”) The court also referred to the U.S. State Department Country Report for Nigeria, which stated: “The judiciary is subject to political influence, and is hampered by corruption and inefficiency. The judicial system was incapable of providing citizens with the right to a speedy trial.” Available at: <http://www.state.gov/g/drl/rls/hrrpt/2000/at/700.htm>.

<sup>89</sup> See Phillip J. Blumberg, *American Law in a Time of Global Interdependence: U.S. National Reports to the XVIth International Congress of Comparative Law: Section IV Asserting Human Rights Against Multinational Corporations Under United States Law: Conceptual and Procedural Problems*, 50 Am. J. Comp. L. 493, 524 (2002).

<sup>90</sup> *Gulf Oil v. Gilbert*, 330 U.S. 501 (1947).

<sup>91</sup> *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981) [hereinafter *Piper*].

<sup>92</sup> *Wiwa v. Royal Dutch Petroleum Company*, 226 F.3d 88, at 100 (2d Cir. 2000) [hereinafter *Wiwa II*].

<sup>93</sup> *Id.*, at 107.

<sup>94</sup> See Blumberg, 50 Am. J. Comp. L. 493, at 506.

<sup>95</sup> *Wiwa II*, 226 F.3d, at 107.

The classic FNC analysis begins with the determination as to whether an alternative forum exists.<sup>96</sup> Although a court may require that there be more than the mere existence of a judicial system and the legal right to file suit, there is a split of authority as to whether certain systemic problems, such as the absence of a right to a jury trial, endemic judicial corruption, or the unavailability of legal aid area sufficient to preclude granting a motion to dismiss on *forum non conveniens* grounds.<sup>97</sup> If the defendant is not subject to service in the alternate forum, the court may condition its dismissal on FNC grounds upon the defendant's agreement to consent to jurisdiction.<sup>98</sup>

In *Piper*, the Supreme Court ruled that the likelihood that the law of the alternate forum may be less favorable to the plaintiff is irrelevant in determining whether an adequate forum exists.<sup>99</sup> However, the Court also noted: "In rare circumstances, however, where the remedy offered by the other forum is clearly unsatisfactory, the other forum may not be an adequate alternative, and the initial requirement may not be satisfied. Thus, for example, dismissal would not be appropriate where the alternative forum does not permit litigation of the subject matter of the dispute."<sup>100</sup> Despite this pronouncement, courts have in the past rarely refused to dismiss on the grounds that there were deficiencies in the alternative court that would affect the realistic availability of a judicial remedy.<sup>101</sup> However, the tide appears to be turning in favor of finding that an alternate forum is inadequate if the court system is corrupt or incompetent and the likelihood of a just result is remote.<sup>102</sup>

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<sup>96</sup> See *Talisman*, 2003 U.S. LEXIS 4085, at court opinion 124. ("In assessing whether or not to grant a dismissal based on the doctrine of *forum non conveniens*, a two step analysis is required. First, the court must determine whether an adequate alternative forum exists. Second, if such a forum exists, the court must undertake a balancing test and weigh several factors involving the private interests of the parties and the public interests at stake.")

<sup>97</sup> See Blumberg, 50 Am. J. Comp. L. 493, at 507. The article lists twelve factors commonly considered by courts in assessing the convenience of a foreign forum, and notes that courts have sometimes used one or more of these systemic deficiencies as grounds for the exercise of discretion to deny a motion to dismiss.

<sup>98</sup> *Id.*, at 523. See *Republic of the Philippines*, 862 F.2d. ("We hold that dismissal on the ground of *forum non conveniens* was erroneous in the absence of a condition requiring Texaco to submit to jurisdiction in Ecuador . . .")

<sup>99</sup> *Piper*, 454 U.S. 235 at 247.

<sup>100</sup> *Id.*, at 255.

<sup>101</sup> Blumberg, 50 Am. J. Comp. L. 493, at 507. See also *Karadzic*, 70 F.3d 232, at 249. ("Finally, we note that at this stage of the litigation no party has identified a more suitable forum, and we are aware of none. Though the Statement of the United States suggests the general importance of considering the doctrine of *forum non conveniens*, it seems evident that the courts of the former Yugoslavia, either in Serbia or war-torn Bosnia, are not now available to entertain plaintiffs' claims, even if circumstances concerning the location of witnesses and documents were presented that were sufficient to overcome the plaintiffs' preference for a United States forum.")

<sup>102</sup> The "clearly unsatisfactory" exception in *Piper* has been aptly applied in human rights cases. Recent cases have declined to dismiss on FNC grounds, relying in part on reports that the proposed alternate forum was unlikely to provide a favorable result even if the case could be brought from an institutional or procedural standpoint. See *Talisman*, 2003 U.S. LEXIS 4085, at court opinion 127-128. Court decisions on the exhaustion of remedies provision in the TVPA could lead to further expansion of the "clearly unsatisfactory" doctrine. See *Wiwa II*, 226 F.3d, at 57, where the courts of Nigeria were viewed as potentially corrupt, making it unlikely that the plaintiff could obtain a suitable remedy.

Having found that an adequate alternate forum is available, the court must next consider both the private and public interests affected and weigh them together to determine where the balance of interests lies. In human rights cases seeking a U.S. trial of events occurring in a foreign jurisdiction, the balancing process can become complex. Private factors to be considered involve the question of whether a serious hardship or inconvenience would be avoided by dismissal. The private interest factors to be weighed include: the availability of witnesses and the cost of bringing them or their testimony to the forum,<sup>103</sup> the location of the parties, the location of documents and the costs of production, and the availability of suitable counsel.<sup>104</sup> The costs inconvenience involved on the defendant's side must be weighed against the costs and inconvenience involved on the plaintiff's side.<sup>105</sup>

The public interest equation seems to give the courts the greatest difficulty. One principal factor considered by the courts is the interest of the forum state in providing a judicial forum for its citizens and residents.<sup>106</sup> The converse consideration applies when

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<sup>103</sup> *Talisman*, 2003 U.S. LEXIS 4085, at court opinion 141. (“Second, large corporations like *Talisman* routinely litigate cases outside of their home jurisdiction. Third, as plaintiffs point out, ‘the need to photocopy and ship documents is hardly unprecedented in American litigation.’ *DiRienzo v. Philip Servs. Corp.*, 232 F.3d 49, 66 (2d Cir. 2000).”)

<sup>104</sup> See *Wiwa II*, 226 F.3d, at 107. (“The record, however, contains substantial evidence that trial in New York will be less expensive and burdensome for the plaintiffs. The plaintiffs have already obtained excellent pro bono counsel to litigate this matter in the courts of the United States; there is no guarantee that they will be able to obtain equivalent representation in England without incurring substantial expenses. Two of the plaintiffs lived in the United States when the action was brought. The cost and difficulties of relocating themselves to England for the duration of the litigation is likely to be onerous. Finally, the plaintiffs and their attorneys have already made substantial investments of time, money, and energy in pursuing this litigation in the U.S. courts. Requiring the plaintiffs to replicate them in the British courts would substantially increase their burden.”)

<sup>105</sup> See *Wiwa II*, 226 F.3d, at 103. (“In arguing that England is a more appropriate forum, defendants rely upon arguments such as the inconvenience of shipping documents from England to the United States and the additional cost for a Nigerian witness of flying to New York rather than London. These considerations are indeed a legitimate part of the *forum non conveniens* analysis, but (a) the defendants have not demonstrated that these costs are excessively burdensome, especially in view of the defendants' vast resources, cf. *Calavo Growers of California v. Generali Belgium*, 632 F.2d 963, 969 (2d Cir. 1980) (Newman, J., concurring) (‘It will often be quicker and less expensive to transfer a witness or a document than to transfer a lawsuit.’), and (b) the additional cost and inconvenience to the defendants of litigating in New York is fully counterbalanced by the cost and inconvenience to the plaintiffs of requiring them to reinstitute the litigation in England--especially given the plaintiffs' minimal resources in comparison to the vast resources of the defendants. These considerations cannot justify overriding the plaintiffs' choice of forum.”) See *Talisman*, 2003 U.S. LEXIS 4085, at court opinion 143. (“In this case, defendants clearly have the upper hand when it comes to resources. The relative poverty of plaintiffs is a factor the Court may consider.”)

<sup>106</sup> See *Wiwa II*, 226 F.3d, at 106. (“The new formulations of the Torture Victim Protection Act convey the message that torture committed under color of law of a foreign nation in violation of international law is ‘our business,’ as such conduct not only violates the standards of international law but also as a consequence violates our domestic law. In the legislative history of the TVPA, Congress noted that universal condemnation of human rights abuses ‘provides scant comfort’ to the numerous victims of gross violations if they are without a forum to remedy the wrong. House Report at 3, 1992 U.S.C.C.A.N. at 85. This passage supports plaintiffs' contention that in passing the Torture Victim Prevention Act, Congress has expressed a policy of U.S. law favoring the adjudication of such suits in U.S. courts. If in cases of torture in

the parties are all or partly from the alternate forum state. Another principal factor is the potential burden on the selected court (i.e. court congestion), which raises the issue of whether the burden should best be borne by the foreign forum, which may have the greatest interest in the outcome. The extra burden of trying a “foreign” case includes: the need to consider conflict of laws issues and, where necessary to apply foreign substantive law; the need to make special provisions for translation and interpretation in a variety of foreign languages; and the need to consider matters of sovereign immunity and matters of state. Complex multi-party litigation can thus add an overwhelming burden to an already crowded court docket, and an overworked federal judge’s temptation to find that another forum is more convenient is surely great.

Lawsuits against business entities on account of their involvement in regional conflicts will generally involve events which occur far from the U.S. and almost entirely foreign parties. The defendants are likely to raise the FNC issue at the outset and to press it aggressively. As in any litigation situation, the decision to dismiss on FNC grounds a claim involving foreign parties and foreign events arising from a conflict situation is a complex process which only requires the judge to “consider” all relevant factors and to “balance” them before reaching a result. Thus, it may be difficult to predict the outcome of a motion to dismiss on FNC grounds, and it is also difficult to obtain a reversal of a decision which is left to the discretion of the trial judge.

The courts appear to be recognizing the diminishing disparity in costs and inconvenience between litigating in one location as opposed to another. Fax machines, e:mail, video conferencing, jet travel and video depositions all contribute towards reducing that disparity.

**Some recent cases where the doctrine of *forum non conveniens* was litigated:**

*Aguinda v. Texaco Co.*, 303 F.3d 470 (2d Cir. 2002), affg. *Aguinda v. Texaco. Co.*, 945 F.Supp. 625 (S.D.N.Y. 1996).<sup>107</sup>

*Cabiri v. Assasie-Gyimah*, 921 F.Supp. 1189 (S.D.N.Y. 1996).<sup>108</sup>

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violation of international law our courts exercise their jurisdiction conferred by the 1789 Act only for as long as it takes to dismiss the case for *forum non conveniens*, we will have done little to enforce the standards of the law of nations.”)

<sup>107</sup> Suit dismissed: all plaintiffs and all members of the putative class were living in Ecuador or Peru.

<sup>108</sup> Dismissal denied. The court stated (at 1199: “In the instant action, the access to sources of proof and the availability of witnesses are, as plaintiff points out, in defendant’s control. Since this action is brought pursuant to United States case law and statutes, namely the Alien Tort Claims Act and the Torture Act, this Court has an interest in having the issues of law presented decided by a United States court.

Moreover, the Court is unconvinced that the courts of Ghana provide an adequate alternative forum for this action. Presuming Cabiri’s allegations to be true, he would be putting himself in grave danger were he to return to Ghana to prosecute this action. As the court in *Rasoulzadeh v. Associated Press*, 574 F. Supp. 854 (S.D.N.Y. 1983), aff’d, 767 F.2d 908 (2d Cir. 1985), stated:

if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all, the district court may conclude that dismissal would not be in the interests of justice. A motion to relegate a plaintiff to a foreign forum will be denied if

*Eastman Kodak Co. v. Kavlin*, 978 F.Supp. 1078 (S.D.Fla. 1997)

*Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995)<sup>109</sup>

*The Presbyterian Church of Sudan v. Talisman Energy*, 2003 U.S. Dist. LEXIS 4085 (SDNY 2003)<sup>110</sup>

*Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 99 (2d Cir. 2000) (*Wiwa II*)<sup>111</sup>

**19. Are there any checks and balances on prosecutorial discretion or decision making (e.g. when a prosecutor declines to prosecute a case, are there any measures in place to review his or her decision or an appeals mechanism?)**

Prosecutors at both the state and federal level generally have unfettered discretion to decide whether or not to investigate and prosecute. At the municipal level, a victim of

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the plaintiff shows that foreign law is inadequate, or that conditions in the foreign forum plainly demonstrate that the plaintiffs are highly unlikely to obtain basic justice therein.

*Id. at 861* (internal quotations and citations omitted). In that case, Judge Haight determined that the plaintiffs, citizens of Iran who had applied for political asylum in the United States, would be unable to obtain justice in the courts of Iran, and that if the plaintiffs were to return to Iran to prosecute their claims, as the defendant suggested, they would likely be killed. Under those circumstances, the court held that the defendant's motion to dismiss based upon *forum non conveniens* had 'no substance.' *Id.* Likewise in the instant action, the Court finds that plaintiff is highly unlikely to obtain justice in the Ghanaian courts, and that to force plaintiff to bring this action in Ghana would unnecessarily put him in harm's way, or, also unacceptable, would mean an end to the action altogether. [citation omitted]"

<sup>109</sup> The Second Circuit (at 250) dismissed the FNC claim as follows: "Finally, we note that at this stage of the litigation no party has identified a more suitable forum, and we are aware of none. Though the Statement of the United States suggests the general importance of considering the doctrine of *forum non conveniens*, it seems evident that the courts of the former Yugoslavia, either in Serbia or war-torn Bosnia, are not now available to entertain plaintiffs' claims, even if circumstances concerning the location of witnesses and documents were presented that were sufficient to overcome the plaintiffs' preference for a United States forum."

<sup>110</sup> The court observed (at court opinion 126): "It would be rather surprising if the government of Sudan conducted a war of 'ethnic cleansing' against plaintiffs and at the same time granted them a fair judicial process to remedy those injuries. In addition, it would be perverse, to say the least, to require plaintiffs to bring this suit in the courts of the very nation that has allegedly been conducting genocidal activities to try to eliminate them."

<sup>111</sup> The Second Circuit (at 109) summarized its analysis of FNC as applied in this case as follows: "In order to be granted dismissal based on *forum non conveniens*, the defendants bear the burden of establishing that the Gilbert factors 'tilt[] strongly in favor of trial in the foreign forum.' *R. Maganlal & Co.*, 942 F.2d at 167. We believe they have failed as a matter of law to meet this burden. The factors weighing against dismissal include (1) the substantial deference courts are required to give to the plaintiff's choice of forum, (2) the enormous burden, expense, and difficulty the plaintiffs would suffer if required to begin the litigation anew in England, (3) the policy favoring our court's retention of such suits brought by plaintiffs who are residents of the United States, and (4) the policy expressed in the TVPA favoring adjudication of claims of violations of international prohibitions on torture. These factors are more than sufficient to overcome the defendants' weak claim for dismissal based on *forum non conveniens*."

a crime may file a criminal complaint, thereby starting the investigative procedure. Although there is no mechanism for appealing a decision not to pursue a criminal matter, there are numerous checks and balances in the system. The U.S. has a very active free press that is not reluctant to criticize both the police and the prosecutors. In many cases, the press publicizes the details of reported crimes from the victims' perspective, which adds to the pressure on the prosecutors to investigate and apprehend the perpetrators and bring them to trial.

At the state and local levels, attorneys general, district attorneys and city attorneys are elected officials who are ultimately accountable to the public for their decisions.

Tort remedies are available for victims of crime, and juries may award not only actual damages but punitive damages (sometimes called "exemplary damages") in cases involving particularly offensive behavior. Such damages are considered the civil equivalent of criminal fines, and are imposed in order to discourage future tortuous behavior by others.