Desislava Stoitchkova

Towards Corporate Liability in International Criminal Law

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SCHOOL OF HUMAN RIGHTS RESEARCH

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Desislava Stoitchkova
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Utrecht, January 2010 Desislava Stoitchkova

LIST OF ABBREVIATIONS

AC	Appeal Cases
A Crim R	Australian Criminal Reports
ATCA	Alien Tort Claims Act
CEO	Chief Executive Officer
Cir.	Circuit
CLR	Common Law Reports
Cr App R	Criminal Appeal Report
CSR	Corporate Social Responsibility
DRC	Democratic Republic of the Congo
EC	European Council
ECHR	European Court of Human Rights
ECJ	European Court of Justice
ESCOR	United Nations Economic and Social Council Official Records
EU	European Union
F 2d	Federal Reporter (Second Series)
F 3d	Federal Reporter (Third Series)
F Supp	Federal Supplement
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILM	International Legal Materials
ILO	International Labour Organisation
IMT	International Military Tribunal
JCE	Joint Criminal Enterprise
MNC	Multinational Corporation
NGO	Non-governmental Organisation
NW 2d	North-Western Reporter (Second Series)
OECD	Organisation for Economic Cooperation and Development
OTC	Oriental Timber Company
RS	Rome Statute
SATRC	South African Truth and Reconciliation Commission
SCR	Supreme Court Reports
TWC	Trials of War Criminals
UK	United Kingdom
UN	United Nations

UNITA	National Union for the Total Independence of Angola
UNWCC	United Nations War Crimes Commission
US	United States
USC	United States Code
USMT	United States Military Tribunal
VCLT	Vienna Convention on the Law of Treaties

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CHAPTER 1
INTRODUCTION

I CORPORATIONS, CONFLICTS AND HUMAN RIGHTS

With the advent of globalisation and the growing influence of multinational corporations (MNCs)[1] in recent decades, there have been mounting concerns about the implications of the corporate lack of accountability on human rights protection worldwide. Business enterprises, whose activities transcend state borders, wield tremendous financial and political power. Albeit instrumental in promoting socio-economic development worldwide, corporate might has a dark side as well. From oppressive working conditions[2] and environmental pollution[3] to intrusion in domestic political processes[4] and 'complicity' in egregious international crimes, MNCs can, and some reportedly do, encroach on human dignity and existence.

As their commercial activities expand in response to market demands, many corporations have come to operate in precariously volatile regions of the world. Even in circumstances of war or widespread violence against civilians, MNCs find it hard to resist opportunities for financial gain. Cognisant of existing regulatory deficiencies, enterprises increasingly venture into business which constitutes or borders on criminal behaviour. Some are known to have been directly involved in gross human rights violations, including forced labour, torture, killings and the displacement of

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1 The term 'multinational corporation' (and also 'multinational enterprise' and 'transnational corporation') is generally defined as 'an economic entity, which owns (in whole or in part), controls and manages income generating assets in more than one country' (P.T. Muchlinski, *Multinational Enterprises and the Law*, Oxford: Blackwell, 1995, p. 12). A similar definition has recently been embraced by the *UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises*, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003). Although a strict reading of the designations 'multinational', 'transnational', 'corporation' and 'enterprise' may warrant some differentiation in meaning, such terms will be used interchangeably throughout this study (for an overview of various definitions, see Muchlinski, *supra*, pp. 12-15).

2 Allegations of sweatshop production have been documented against companies operating in various industry sectors. See generally S. Prakash Sethi, *Setting Global Standards. Guidelines for Creating Codes of Conduct in Multinational Corporations*, New York: John Wiley & Sons Inc., 2003.

3 Frequently cited in this regard are the effects of Shell's oil extraction activities in the Nigerian Delta. Oil spills have caused extensive environmental damage, killing wildlife, ruining water supplies and destroying food sources. See e.g. J. Eaton, The Nigerian Tragedy, Environmental Regulation of Transnational Corporations, and the Human Right to a Healthy Environment, 15 *Boston University International Law Journal* 261 (1997) at 264-271.

4 For example, in 1970 ITT, an American MNC, allegedly engineered the attempted overthrow of the democratically elected government of Salvator Allende in Chile. See 53 UN ESCOR (1822nd meeting), pp. 19, 22, UN Doc. E/SR, 1822 (1972).

populations in Africa, Asia and South America.[5] Others help sustain – advertently or inadvertently – the infrastructure necessary for the commission of international crimes, being a source of arms, military equipment, raw products and money to violent governments and opposition rebel groups alike.[6]

The circumstances surrounding the exploitation of natural resources in conflict-ridden regions of the world are but an illustration of MNCs' involvement in serious human rights abuse and serve to highlight the pressing need for increased regulation and accountability.[7] The war in Sierra Leone, for instance, was to a large degree financed through the sale of diamonds. It is estimated that, for the duration of the conflict, and apart from the funds accumulated through sales effectuated by the government itself, the Revolutionary United Front rebels raised from $25 million to $125 million per year through the sale of diamonds.[8] The profits were mostly used for the purchase of arms and other military equipment. Throughout the conflict, rebel and army forces as well as different militia groups uniformly and indiscriminately killed, tortured and mutilated civilians. Tens of thousands were abducted and forced to slave in diamond mines. In 2000, the UN Security Council prohibited trade in Sierra Leone rough diamonds, concerned about the role played by diamonds in fuelling the civil war.[9] Despite the embargo, dealers and jewelers in Africa, Europe and the Middle East continued to buy Sierra Leone diamonds, while air and water cargo transportation companies ensured that diamond parcels reached their final destinations.[10]

Strategic control of diamond-rich areas has been a driving force in the ongoing conflict in the Democratic Republic of the Congo as well. In 2001, a panel of experts requested by the UN Security Council to report on the exploitation of natural resources in the DRC, uncovered that in an effort to secure the supply of weapons, the DRC government signed mining contracts with a number of foreign companies, worth

5 See hereunder and also section III.2 below.

6 *Ibidem.*

7 Although not the only avenue for MNCs' involvement in human rights abuse, documented allegations pertaining to corporate participation in violations amounting to international crimes have frequently revolved around MNCs' exploitation of natural resources. The term 'international crimes' in the present study is used to refer to the 'core crimes' currently punishable under international criminal law, namely genocide, war crimes and crimes against humanity. In order to make easier reading and unless explicitly specified otherwise, references to 'grave human rights violations' and 'serious human rights abuse' hereunder should be read to designate the international crimes that fall within the jurisdiction of the International Criminal Court. It must be noted here, however, that not all of the examples mentioned in this illustrative section relate to international crimes *per se*.

8 Report of the Panel of Experts appointed pursuant to Security Council Resolution 1306 (2000), paragraph 19, in relation to Sierra Leone, UN Doc. S/2000/1195, 20 December 2000, para. 78, at <www.un.org/Docs/sc/committees/SierraLeone/SLselectedEng.htm>.

9 UN Security Council Resolution 1306 on the situation in Sierra Leone, UN Doc. S/RES/1306, 5 July 2000, at <www.un.org/docs/scres/2000/sc2000.htm>.

10 UN Panel of Experts Report, *supra note 8.*

several million US dollars each.[11] Recently, in its decision confirming charges against Germain Katanga, the International Criminal Court also referred to the competition over control of Ituri's natural resources as a major reason for the continued conflict in the region.[12]

Angola's devastating civil war was also largely financed through the exploitation of the country's vast mineral reserves.[13] Investigation reports by non-governmental organisations have alleged that foreign oil corporations paid approximately $1 billion in signature bonuses to the Angolan government in order to obtain supplementary drilling licenses.[14] The Angolan government is also believed to have largely financed its military spending through mortgaging crude oil in order to secure credit lines with major international investment banks. Banks have, in turn, been accused of over-subscribing loans and thus effectively freeing up funds for the government to use against rebels threatening to disrupt mortgaged oil production.[15]

Oil extraction companies operating in Nigeria, Sudan and Colombia have also allegedly assisted the training and maintenance of military forces and private security companies charged with guarding oil pipes and terminals.[16] Some of these MNCs have been further linked with the import of high-tech weapons into Nigeria,[17] while others have been criticised for transporting soldiers with company helicopters to offshore drilling platforms where unarmed protestors have been subsequently killed.[18] Still others are reported to have supplied weapons and vehicles to the Myanmar military

11 Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, UN Doc. S/2002/1146, 16 October 2002, at <www.nisat.org/sanctions%20reports/DR%20Congo/UN%202002-10-16%20DR%20Congo.pdf>.

12 *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the confirmation of charges, ICC-01/04-01/07-717, 30 September 2008, para. 3, referring to UN Security Council Special Report on the Events in Ituri, January 2002 – December 2003, UN Doc. S/2004/573, 16 July 2004.

13 For an overview of corporate involvement in 'sanction-busting' for the benefit of UNITA, including the sale or delivery of arms, military equipment and petroleum as well as the purchasing of diamonds, see Final Report of the Panel of Experts established by the UN Security Council pursuant to Resolution 1237 (1999), UN Doc. S/2000/203, 10 March 2000, at <www.un.org/News/dh/latestangolareport_eng.htm>.

14 E.g. Human Rights Watch, *Some Transparency, No Accountability*, 12 January 2004, pp. 29-30, at <www.hrw.org/sites/default/files/reports/angola0104.pdf>; Global Witness, *A Crude Awakening: The Role of the Oil and Banking Industries in Angola's Civil War and the Plunder of State Assets*, 1 December 1999, p. 7, at <www.globalwitness.org/reports/show.php/en.00016.html>.

15 Global Witness Report, *supra note 14*, pp. 15-16.

16 See e.g. R. Dufresne, The Opacity of Oil: Oil Corporations, Internal Violence and International Law, 36 *New York University Journal of International Law and Politics* 331 (2004) at 337; C. Forcese, Deterring 'Militarised Commerce': The Prospect of Liability for 'Privatised' Human Rights Abuses, 31 *Ottawa Law Review* 171 (2000) at 173-177.

17 W. Reno, *Warlord Politics and African States*, London: Lynne Rienner Publishers Inc., 1998, p. 207.

18 A. Gedicks, *Resource Rebels: Native Challenges to Mining and Oil Corporations*, Cambridge: South End Press, 2001, pp. 49-50.

junta[19] or have been accused of complicity with the Indonesian army in massacres perpetrated during the Suharto regime.[20]

The trade in Cambodian timber, in violation of UN prohibitions on exports, enabled the Khmer Rouge regime to hold onto power and perpetuate for more than twenty years one of the most brutal civil wars in human history.[21] Timber played a role in the perpetuation of the conflict in Liberia too. Despite UN Security Council sanctions, imposed in 2002 and prohibiting the selling of arms to Liberia,[22] weapons continued to find their way into the country, mostly on the logging vessels of multinational timber companies with links to the black arms market. The Oriental Timber Company's security force, for instance, has also been accused of serious human rights violations including torture, forced labour, sexual abuse, looting and destruction of private property.[23]

The list of allegations against MNCs grows every year, although not all pertain to the commission of international crimes. The majority of business enterprises implicated for their participation in human rights abuse, and particularly in genocide, war crimes and crimes against humanity, have not however had their activities legally challenged. Attempts at prosecution have been sporadic and largely ineffective; corporations have been allowed to continue unabated on the quest for financial gain, perpetuating many a cycle of violence. This study, therefore, explores the desirability and feasibility of subjecting business enterprises *per se* to regulation through international criminal law as a means of narrowing the existing regulatory gap. It inquires into the permissibility and inherent challenges of extending criminal law provisions, and in particular the Rome Statute, beyond natural persons. Given the unique features of MNCs, it questions traditional models for constructing the criminal responsibility of economic entities. Furthermore, it discusses the appropriateness of extending liability beyond the

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19 Dufresne, *supra note 16*, at 337.

20 On 27 August 2008, the US District Court of Columbia found that a case against Exxon under the Alien Tort Claims Act should be submitted to a jury for trial. See <ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2001cv1357-365>. The plaintiffs allege that Exxon has been complicit in human rights violations committed by Indonesian security forces. For an outline of the Alien Tort Claims Act, see section III.2 below.

21 R.S. Salo, When the Logs Roll Over: The Need for an International Convention Criminalising Involvement in the Global Illegal Timber Trade, 16 *Georgetown International Environmental Law Review* 127 (2003) at 131-132.

22 UN Security Council Resolution 1408 on the situation in Liberia, UN Doc. S/RES/1408, 6 May 2002, at <www.un.org/Docs/scres/2002/sc2002.htm>.

23 In 2006, the Dutch District Court in The Hague convicted Guus Kouwenhoven, owner of the Royal Timber Corporation (and linked to the Oriental Timber Company), for selling arms to Liberia in violation of the UN embargo. Two years later the conviction was overturned on appeal due to lack of sufficient evidence. See LJN: BC7373, 10 March 2008 (at <www.rechtspraak.nl>). Although witness statements confirmed that the OTC security had been comprised and managed by (former) army members, the Appeals Court did not find conclusive evidence that the defendant himself had any control over the security staff. Accordingly, Kouwenhoven was acquitted of charges pertaining to war crimes too.

material perpetrators – not only to the organisation comprising the individuals who physically carry out the impugned conduct but also to parent corporations for their contribution to harm suffered in the course of their subsidiaries' activities.

II THE RISE OF CORPORATE SOCIAL RESPONSIBILITY

The debate about the responsibilities of business towards society is not a novel phenomenon. Agitation about the ethical implications of commercial activities predates the industrialisation era[24] but it was not until the mid-twentieth century that corporate social responsibility (CSR) began to truly gain momentum. As an organised movement, CSR was largely spurred by increased consumer activism and advances in communication technologies, which brought awareness of the broadening development divide in the modern world to the fore.[25] While campaigners were becoming increasingly vocal about the perceived failures of inter-governmental efforts to design and implement an adequate framework for the regulation of MNC activities,[26] the business community was growing acutely conscious of the importance of fostering a socially responsible image. It gradually came to be realised that a good social record is not only attractive to consumers but also furthers business sustainability in more general terms.[27] Corporate reputation was openly recognised as 'a fragile, intangible asset that complements – and sometimes surpasses – the value of more tangible material and financial' benefits.[28]

As pointed out by Zerk, the rise of the corporate social responsibility movement prompted the gradual displacement of the traditional 'state-centred' perspective on corporate regulation (focusing mainly on issues such as investor protection and taxation) by a more 'people-centred' approach to evaluating company performance.[29] CSR is nowadays generally understood as a need, as well as a duty, to integrate a wide range of social and environmental concerns in business strategy and operations. Although business groups tend to emphasize its voluntary character and equate it to corporate governance, definitions espoused via international forums regard the social responsibility of companies as an integral part of fulfilling legal expectations.[30] Apart from any binding or 'soft law' obligations in relation to reporting and transparency,

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24 J. Hood, *The Heroic Enterprise: Business and the Common Good*, New York: Free Press, 1996, p. xv.

25 J. Zerk, *Multinationals and Corporate Social Responsibility*, Cambridge: Cambridge University Press, 2006, p. 21.

26 *Ibidem*, p. 18.

27 C. Avery, Business and Human Rights in a Time of Change, in: M.T. Kamminga and S. Zia-Zarifi (eds.), *Liability of Multinational Corporations under International Law*, The Hague: Kluwer Law International, 2000, pp. 26-29, referring to studies indicating that a socially responsible image has the propensity to encourage productivity, boost workers' moral and attract qualified personnel.

28 C. Fombrun, *Reputation: Realising Value from the Corporate Image*, Cambridge: Harvard Business School Press, 1996, quoted in Avery, *supra note 27*, p. 25.

29 Zerk, *supra note 25*, p. 23.

30 *Ibidem*, pp. 29-32.

CSR thus implies responsibility to not only operate ethically in relation to the environment, society and human health but also in accordance with the law.[31]

Compliance with international human rights standards, espoused in treaty and customary law, has become widely accepted as falling within MNCs' sphere of responsibility.[32] The precise meaning and scope of the requisite compliance, however, remain contentious.[33] The primary duty to protect, respect and fulfill the enjoyment of human rights and ensure their horizontal application in relationships between individuals and business enterprises remains vested in nation states. Nonetheless, having gained (limited) international legal personality, corporations are now seen as direct addressees of human rights obligations too. Although not all of international law is extendable to MNCs, there is now a broad consensus that companies are bound by certain 'core' rules pertinent to all actors within the international domain.[34] Prominent among these generally applicable international principles is the prohibition to engage directly or indirectly in violations of *ius cogens* norms, including genocide, war crimes and crimes against humanity.[35]

Despite increased attention towards the human rights impact of corporate activities worldwide and the growing recognition of MNCs' responsibilities under international law, regulation – as will be seen below, remains piecemeal and largely deficient. While domestic jurisdictions have been reluctant to vigorously pursue mandatory enforcement despite the availability of avenues for regulatory supervision, the international system has not yet put in place any effective compliance mechanism directed at private enterprise delinquency. Flagging the legitimacy of business transactions and the self-proclaimed moral neutrality of their profit endeavours, corporations at the same time have been adamantly resistant to any attempts to regulate their conduct.

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31 *Idem*, p. 32.

32 In this regard, see also S. Joseph, *Corporations and Transnational Human Rights Litigation*, Oxford: Hart Publishing, 2004; N. Jägers, *Corporate Human Rights Obligations: In Search of Accountability*, Antwerp: Intersentia, 2002; A. Clapham, *Human Rights in the Private Sphere*, Oxford: Clarendon Press, 1993.

33 For an overview of substantive human rights norms deemed applicable to corporations through international instruments and in domestic systems, see e.g. P.T. Muchlinski, *Multinational Enterprises and the Law*, Oxford: Oxford University Press, 2007, pp. 507-536.

34 M.T. Kamminga and S. Zia-Zarifi, Liability of Multinational Corporations under International Law: An Introduction, in: M.T. Kamminga and S. Zia-Zarifi (eds.), *Liability of Multinational Corporations under International Law*, The Hague: Kluwer Law International, 2000, p. 8.

35 *Ius cogens* comprises non-derogable legal prohibitions of peremptory nature. The following international crimes have generally been accepted to comprise *ius cogens*: genocide, crimes against humanity, war crimes, piracy, slavery and torture. See in this regard M.C. Bassiouni, *Crimes against Humanity in International Criminal Law*, The Hague: Kluwer Law International, 1999, also discussing the contentious status that some legal scholars insist on according to crimes against humanity as *ius cogens* (p. 210 et seq.)

III REGULATION AT THE DOMESTIC LEVEL

Domestic enforcement methods aimed at ensuring corporate accountability for harm caused to others include a range of procedures and sanctions: criminal, civil and administrative. Such mechanisms may be invoked against MNCs in both host and home states and have come to increasingly target also parent companies for the injurious conduct of their foreign subsidiaries.

III.1 Criminal liability

The last century has witnessed a gradual but definite erosion of the traditional principle of *societas delinquere non potest*.[36] As a result, most national jurisdictions nowadays recognise legal persons, corporations in particular, as capable of incurring culpability in terms of criminal law.

Common law countries, such as England, the United States and Canada, were among the first to impose corporate criminal liability. Initially applied to regulatory offenses only, the concept was later extended to *mens rea* crimes.[37] By the 1970s, civil law traditions in continental Europe were beginning to follow suit. The Netherlands, Belgium, Switzerland, France, Denmark, Finland, Norway and Portugal are some of the states to have put in place domestic legislation prescribing the criminal responsibility of corporations in varying degrees of comprehensiveness.[38] Outside of Europe, the notion has been embraced by a variety of legal systems, including Australia, Japan, South Africa and India.[39]

There are a few countries, such as Germany, Italy and Argentina, which continue to resist the inclusion of corporate liability into their criminal codes on conceptual grounds, invoking concerns pertaining to the legal-philosophical underpinnings of subjective culpability.[40] However, even in those jurisdictions that have traditionally opposed the idea of corporate criminal responsibility, there has been a gradual shift of

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36 Literally 'corporations cannot commit crimes'. The essence of this principle postulates that moral and criminal responsibility cannot be vested with legal entities but fall upon the human beings who have agreed to perform the illegal action.

37 M. Wagner, *Corporate Criminal Liability: National and International Responses* (background paper for the Reform of Criminal Law 13th international conference 'Commercial and Financial Fraud: a Comparative Perspective', Malta, 8-12 July 1999), at <www.icclr.law.ubc.ca/publications/reports/corporatecriminal.pdf>.

38 See generally S. Sun Beale and A.G. Safwat, What Developments in Western Europe Tell Us About American Critiques of Corporate Criminal Liability, 8 *Buffalo Criminal Law Review* 89 (2002). Also FAFO Report, A. Ramasastry and R.C. Thompson, *Commerce, Crime and Conflict. Legal Remedies for Private Sector Liability for Grave Breaches of International Law. A Survey of Sixteen Countries*, 2006, at <www.fafo.no/pub/rapp/536/ 536.pdf>.

39 *Ibidem*.

40 The legal-philosophical debate surrounding the topic of corporate criminal responsibility, and in particular contentions in relation to the moral agency and moral responsibility of corporations, are further discussed in Chapter 2.

attention over the past decade to the question of how to construct the liability of 'fictitious' entities. Corporations in such states are being increasingly subjected to quasi-criminal sanctions.[41] Argentina has enacted a specific law establishing the liability of legal persons for certain categories of crimes,[42] while Germany imposes heavy administrative penalties subject to appeal in a criminal court. In many other legal systems, administrative penalties are increasingly being substituted for direct criminal provisions.[43]

National jurisdictions generally tend to criminalise serious human rights violations, including the egregious acts of genocide, war crimes and crimes against humanity. In many countries corporations can be held liable for breaches of such provisions not only when committed within the domestic legal system, but also when perpetrated abroad.[44] In some instances and on the basis of universal jurisdiction, a state may undertake the prosecution of international crimes committed anywhere in the world and irrespective of the nationality of the perpetrator or the victims.[45]

Despite the potential for domestic criminal prosecution of MNCs for human rights violations committed abroad, attempts at transnational human rights litigation by means of criminal law have been sporadic. Although corporations are prohibited under international law from engaging in, *inter alia,* genocide, crimes against humanity, forced labour, torture and extrajudicial murder, states have generally been averse to the strict regulation of MNCs' extraterritorial activities. On the one hand, the failure to prevent or punish corporate human rights transgressions does not give rise to state responsibility, although the duty to horizontally apply human rights has been affirmed in international jurisprudence.[46] On the other hand, fears of the adverse effects that over-regulation might have on competitiveness, innovation and productivity continue to fuel resistance to non-voluntary systems for appraising corporate conduct.[47]

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41 For an overview of the applicable regulatory regimes in a number of European countries, including Germany and Italy, see Sun Beale and Safwat, *supra note 38*.

42 FAFO Report, *supra note 38*.

43 C. Wells, *Corporations and Criminal Responsibility*, Oxford: Oxford University Press, 2001, p. 140.

44 On 2 April 2007, a Dutch Court of Appeal sentenced Frans van Anraat to 17 years imprisonment for his complicity in war crimes. Van Anraat's company, *FCA Contractor*, had commercially sold large quantities of Thiodyglicol (TDG) to the Iraqi regime of Saddam Hussein. At trial it was found that chemical weapons containing the TDG supplied by Van Anraat were subsequently deployed against the Kurdish population in Iraq and in the war against Iran. The Dutch Prosecution justified its choice to indict the individual businessman, not the company, by reference to the company's liquidation in 1992. See LJN: BA4676, 9 May 2005 (at <www.rechtspraak.nl>).

45 States, which have adopted universal jurisdiction with respect to breaches of international criminal law, include the United Kingdom, Canada, Australia and the Netherlands. Before amending its relevant law in 2003, Belgium sought the prosecution of the French energy company TotalFinaElf for its alleged complicity in forced labour in Myanmar. See S. Smis and K. van der Borght, Legislation, Belgium: Act Concerning the Punishment of Grave Breaches of International Humanitarian Law, 38 *International Legal Materials* 918 (1999).

46 Joseph, *supra note 32*, p. 9.

47 Zerk, *supra note 25*, p. 36-37.