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Expanded Application of the FCPA's Anti-Bribery Provisions:
The Agents of Covered Parties

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I. Introduction

Congress enacted the Foreign Corrupt Practices Act (the "FCPA") in 1977 and, in so doing, created criminal and civil liability for offering and making corrupt payments to non-U.S. government officials ("foreign officials").¹ Most companies covered by the FCPA and conducting business internationally recognize that the FCPA's anti-bribery provisions apply to issuers,² domestic concerns,³ other entities and individuals whose prohibited conduct takes place in the territory of the U.S.,⁴ and U.S. persons whose prohibited conduct takes place outside the U.S. (collectively "covered parties"). Most of these companies may also know that the anti-bribery provisions can apply directly to the agents of covered parties.⁵ Recent prosecutions by the U.S. Department of Justice (the "DOJ"), however, suggest an expansive theory of liability that even those with a thorough understanding of the FCPA would likely find surprising. The

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¹ The FCPA's "anti-bribery provisions" are codified at 15 U.S.C. §§ 78dd-1, 78dd-2, and 78dd-3. The FCPA's "accounting provisions" also require issuers to maintain books and records that accurately reflect the disposition of company assets and to institute proper internal controls concerning the authorization of transactions. 15 U.S.C. §§ 78ff, 78m(b), (d)(1), (g)-(h).

² Issuers are companies that have securities registered with the Securities Exchange Commission under § 12 of the 1934 Securities Exchange Act or companies that must file reports under § 15(d) of the 1934 Securities Exchange Act. 15 U.S.C. § 78dd-1(a).

³ Domestic concerns are business entities organized under U.S. law or with their principal place of business in the U.S., as well as citizens, nationals or residents of the U.S. 15 U.S.C. § 78dd-2(h)(1).

⁴ 15 U.S.C. § 78dd-3(a).

⁵ 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), and 78dd-3(a).

government has indicated that it will pursue charges against foreign agents of covered parties on the basis of their status as agents, rather than under the separate FCPA that covers parties other than issuers and domestic concerns. The government's expansive theory of liability has little support in the statutory text or history, and could be subject to challenge.

II. A Potential New Theory of FCPA Prosecution

The DOJ has signaled its willingness to pursue charges against covered parties' foreign agents in at least two relatively recent FCPA dispositions. First, in the March 2005 criminal information filed against DPC Tianjin, a Chinese subsidiary of U.S. issuer Diagnostic Products Corp., the government alleged a violation of the anti-bribery provisions as they relate to issuers.⁶ The government stated that DPC Tianjin "acted as the agent" of Diagnostic Products Corp, its issuer parent.⁷ Similarly, in the October 2006 criminal information filed against SSI International Far East, Ltd. ("SSI Korea"), a Korean subsidiary of U.S. issuer Schnitzer Steel Industries, Inc., the government alleged that SSI Korea "acted as Schnitzer Steel's agent in South Korea and China" and that SSI Korea violated the anti-bribery provisions by engaging in prohibited conduct while in U.S. territory.⁸ While neither DPC Tianjin nor SSI Korea was alleged to have violated the anti-bribery provisions exclusively through their conduct as the agents of covered parties, reference to their agency status is potentially significant.

Prior to 1998, the FCPA was generally understood not to apply to foreign individuals or entities (other than foreign entities that are issuers⁹ or domestic concerns).¹⁰ The 1998 amendments to the statute, however, added the "other persons" provision,¹¹ which was enacted specifically to extend FCPA jurisdiction, in a limited way, to foreign individuals and entities. After the amendments, such individuals and entities may be criminally liable where they undertake an act in furtherance of making or offering a payment "while in the territory of the United States."¹² In light of the statute's history, the "other persons" provision might be thought to be the only means by which the FCPA could reach a foreign individual or entity that was not itself an issuer or domestic concern. The government's prosecution of foreign agents of issuers or domestic concerns directly challenges that assumption.

Application of the anti-bribery provisions to the agents of covered parties is potentially significant for several reasons. Continued application of the theory would expand the number of entities and individuals subject to criminal prosecution by U.S. enforcement authorities for

⁶ United States v. DPC (Tianjin) Co. Ltd., No. CR 05-462 (C.D. Cal. 2005) ("DPC Tianjin Information") (alleging that DPC Tianjin made corrupt payments to foreign officials in violation of § 78dd-1).

⁷ DPC Tianjin Information at 2.

⁸ United States v. SSI International Far East, Ltd., No. CR 06-398 (D. Or. 2006) ("SSI Korea Information") (alleging that, among other things, SSI Korea made corrupt payments in violation of § 78dd-3).

⁹ U.S. issuers are issuers "organized under the laws of the United States, or a State, territory, possession, or commonwealth of the United States or a political subdivision thereof." 15 U.S.C. § 78dd-1(g)(1).

¹⁰ See, e.g., H. Lowell Brown, Extraterritorial Jurisdiction Under the 1998 Amendments to the Foreign Corrupt Practices Act: Does the Government's Reach Now Exceed Its Grasp?, 26 N.C. J. Int'l L. & Comm. Reg. 239, 291-92 (noting that "[a]t the time of both the original enactment of the FCPA and the amendments in 1988, Congress refrained from asserting jurisdiction over non-U.S. individuals and entities").

¹¹ See 15 U.S.C. § 78dd-3.

¹² See id. § 78dd-3(a). In light of this language in § 78dd-3(a), an agent of a "person other than an issuer or domestic concern" could be liable under the FCPA only if the agent acted in the territorial United States.

offering or making corrupt payments to foreign officials. Plainly, a foreign entity that undertakes an act in furtherance of a prohibited offer or payment while in the territory of the U. S. may be charged with violation of the FCPA under the “other persons” provision. Under the theory suggested in the charging documents referenced above, a foreign subsidiary-agent of a U.S. issuer could also violate the anti-bribery provisions by using the mails or any means or instrumentality of interstate commerce corruptly in furtherance of a prohibited offer or payment, regardless of whether the act occurred in the territorial U. S. or not.¹³ Prosecutors could select either theory (or both) rather than having to prove the latter.

Charging foreign entities with FCPA violations as the agents of covered parties is not, however, without potential legal hurdles for the government. Perhaps most significantly, the “other persons” provision is arguably the exclusive means by which foreign entities that are not issuers may be charged with an FCPA violation. It is difficult to square the agency theory in the charging documents referenced above with the commonly accepted understanding of the FCPA, particularly the 1998 amendments to the law.¹⁴ Further, other evidence in the text of the statute suggests that the anti-bribery provisions are not intended to apply to covered parties’ agents where the agents are entities rather than natural persons. The statutory section dealing with domestic concerns, for example, sets forth penalties for a violation by “[a]ny natural person” that is an agent of a domestic concern, but does not provide a penalty for an agent that is not a natural person.¹⁵ The absence of a penalty provision covering entity-agents suggests that a charge against such an entity is beyond the intended scope of the statute. Either of these points could provide grounds to challenge such a charge in court.¹⁶

III. Advice for Companies Seeking to Manage Risk of a Violation

For companies seeking to remain in compliance with the FCPA, the potential application of the anti-bribery provisions directly to the agents of covered parties suggests that it would be prudent to monitor the conduct of, and periodically to test compliance to: non-U.S. subsidiaries. Such monitoring and testing is well-advised because non-U.S. subsidiaries have pled guilty for acts taken as agents of covered U.S. parents outside of the U.S., without reference to the covered parents’ conduct. Accordingly, parent corporations covered by the anti-bribery provisions cannot assume that what they don’t know about their foreign agents won’t hurt them.

While determinations of agency are inherently fact-driven, at least one court has found that, in the context of a criminal indictment, a subsidiary is a parent’s agent where the subsidiary

¹³ See 15 U.S.C. § 78dd-1(g)(1) (providing for anti-bribery jurisdiction irrespective of any “use of the mails or any means or instrumentality of interstate commerce in furtherance” of the corrupt conduct).

¹⁴ See, e.g., H. Lowell Brown, Extraterritorial Jurisdiction Under the 1998 Amendments to the Foreign Corrupt Practices Act: Does the Government’s Reach Now Exceed Its Grasp?, 26 N.C. J. Int’l L. & Comm. Reg. 239, 291-92 (noting that “[a]t the time of both the original enactment of the FCPA and the amendments in 1988, Congress refrained from asserting jurisdiction over non-U.S. individuals and entities”; *id.* at 295-96 (noting that the 1998 amendments, in response to the OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions, expanded the law’s jurisdiction to reach non-U.S. nationals if any act in furtherance of a violation is undertaken by the national while in the territory of the United States).

¹⁵ See 15 U.S.C. § 78dd-2(g)(A).

¹⁶ The “other persons” provision, 15 U.S.C. § 78dd-3, contains its own penalty provisions, which provide penalties for violations by both “juridical persons” and “natural persons.” *Id.* § 78dd-3(e).

is wholly owned and the parent controls the subsidiary's operations by appointing its directors and managers.¹⁷ Therefore, at least in the context of improper payments made by a foreign subsidiary, a determination by investigating counsel that no violation of the anti-bribery provisions has occurred should go beyond finding that the covered parent did not authorize, direct, control, or know about the conduct at issue. Counsel should also engage in the fact-gathering and analysis necessary to make determinations regarding agency status.

We are in a period of increased FCPA enforcement. U.S. authorities can be expected to push for expansive application of the FCPA's provisions, such as the direct application of the anti-bribery provisions to agents of covered parties, including non-U.S. subsidiaries of U.S. issuers. Such a development affects how companies and their counsel approach FCPA compliance.

New Executive Order Targets Beneficiaries of Public Corruption in Syria

Robert Bittman and Nathaniel Stewart

On February 13, 2008, President Bush issued Executive Order 13,460 expanding U. S. economic sanctions against Syria. The Executive Order "blocks" any U.S. assets of persons who are designated under the Order as having engaged in or benefited from public corruption in Syria and could represent a significant expansion in U.S. economic sanctions measures against countries deemed to support terrorism or engage in other behavior contrary to U.S. interests. "Blocked" property or assets "may not be transferred, paid, exported, withdrawn, or otherwise dealt in."¹⁸ The Order's broad language provides an additional weapon against sanctioned countries for combating corruption in foreign countries, making similar Executive Orders aimed at other corrupt regimes an attractive possibility.

Since 2004, the U.S. has prohibited the exportation of goods to Syria without express permission from the Commerce Department. For national security reasons, the President issued Executive Order 13,338 on May 11, 2004 prohibiting virtually all exports of U.S. made goods to Syria in response to Syria's continued support of terrorism, its occupation of Lebanon, and its effort to disrupt Iraq's stability. Executive Order 13,338 blocked "all property and interests in property" of persons who the U. S. determines to be significantly involved in Syria's provision of safe haven for terrorist organizations, its military presence in Lebanon, its pursuit of weapons of mass destruction, or its interference with Iraq's on-going reconstruction.¹⁹ The Order allows

¹⁷ See e.g., *United States v. Exxon Corp. & Exxon Shipping Co.*, No. A90-015-1CR, at 2-8 (D. Alaska Oct. 29, 1990) (order denying motions to dismiss).

¹⁸ Exec. Order No. 13,460 (Feb. 13, 2008).

¹⁹ Exec. Order No. 13,338 (May 11, 2004) states: "Except to the extent provided in regulations, orders, directives, or licenses that may be issued pursuant to the provisions of this order in a manner consistent with the SAA, and notwithstanding any license, permit, or authorization granted prior to the effective date of this order, (i) the Secretary of Commerce shall not permit the exportation or reexportation to Syria of any item on the Commerce Control List (15 C.F.R. part 774); and (ii) with the exception of food and medicine, the Secretary of Commerce shall

the Commerce Department to issue export licenses and trading permits in limited circumstances, but the Order generally bars U.S. trade with Syria and effectively seizes the property of persons believed to be at odds with U.S. foreign policy and international efforts.

The new Order also metes out economic sanctions against participants in and beneficiaries of Syria's public corruption. The Order explains that Syria's misuse of public assets and authority enriches the regime and enables it to fund terrorism, foment unrest in Lebanon and Iraq, and carry out other objectionable conduct. Order 13,460 blocks all property within U.S. jurisdiction belonging to "persons determined by the Secretary of Treasury, after consultation with the Secretary of State, to be responsible for, to have engaged in, to have facilitated, or to have secured improper advantage as a result of, public corruption by senior officials within the Government of Syria."²⁰

The Bush Administration targeted Syria for its "corrupt business environment, which denies the Syrian people economic prosperity and other freedoms."²¹ The Department of Treasury noted that "[t]he considerable role the Asad [*sic*] family, their inner circle, and the Syrian security forces exert over the economy, coupled with the absence of a free judicial system and the lack of transparency, concentrates wealth in the hands of certain classes and individuals. In turn, these classes and individuals depend upon this corrupt system for their success and fortune."²² The Department further explained that it was "targeting activities that entrench and enrich the Syrian regime and its cohorts thereby enabling the regime to continue to engage in threatening behavior."²³ Undersecretary for Terrorism and Financial Intelligence, Stuart Levey, stated that "[t]he Assad regime's cronyism and corruption has a corrosive effect, disadvantaging innocent Syrian businessmen and entrenching a regime that pursues oppressive and destabilizing politics, including beyond Syria's borders, in Iraq, Lebanon and the Palestinian territories."²⁴

It seems that the U. S. may have had at least one Syrian in mind when it enacted Order 13,460. Within eight days of issuing the Executive Order, the Treasury Department froze the U.S. assets of Syrian businessman Rami Makhluf, a cousin of Syrian President Bashar al-Assad and the brother of Syrian General Intelligence Directorate official Hafiz Makhluf. Mr. Makhluf is "a powerful Syrian businessman and regime insider whom improperly benefits from and aids

not permit the exportation or reexportation to Syria of any product of the United States not included in section 1(b)(i) of this order. . . . [A]nd notwithstanding any contract entered into or any license or permit granted prior to the effective date of this order, all property and interests in property of the following persons, that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of United States persons, . . . are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in: persons who are determined by the Secretary of Treasury, in consultation with the Secretary of State, (i) to be or to have been directing or otherwise significantly contributing to the Government of Syria's provision of safe haven to or other support for any person whose property or interests in property are blocked under United States law for terrorism-related reasons"

²⁰ Exec. Order No. 13,460 (Feb. 13, 2008).

²¹ Press Release, Dep't of Treasury, Rami Makhluf Designated for Benefiting from Syrian Corruption (Feb. 21, 2008).

²² Id.

²³ Id.

²⁴ Robin Wright, Sanctions on Businessman Target Syria's Inner Sanctum, WASH. POST, Feb. 22, 2008, at A18.

the public corruption of Syrian regime officials.”²⁵ According to Mr. Levey, “Makhluf has used intimidation and his close ties to the Assad regime to obtain improper business advantages at the expense of ordinary Syrians.”²⁶ Analyzing Mr. Makhluf’s designation, Joshua Landis, an expert on Middle East politics explained that “[a] lot of people think of Makhluf as a highway robber, and in some ways he is. But he is also one of the few people who can work through the system to get things done. All kinds of banks and people and foreign investors who want to join in Syria’s development are going to think twice and think ‘What’s going to happen to me?’”²⁷

“What’s going to happen to me?” is precisely the question that all companies with even indirect ties to the U. S. should now be asking. The Order’s broad language allows the U.S. to block all property within its jurisdiction controlled by individuals or entities found “to be responsible for, to have engaged in, to have facilitated, or to have secured improper advantage as a result of, public corruption” within Syria. In accordance with guidance issued by the Office of Foreign Assets Control (“OFAC”) on February 14, 2008, blocking measures such as those imposed by Executive Order 13460 apply both to individuals and entities explicitly designated by OFAC, such as Mr. Rami Makhluf, and to entities in which designated parties own directly or indirectly a 50 percent or greater interest. This means that U.S. companies, for example, are now prohibited from dealing with any company in which a blocked individual, like Mr. Makhluf, holds a 50 percent interest. The U.S. also may claim that a parent company with U.S. assets may have “secured an improper advantage” when one of its foreign subsidiaries benefits from Syria’s public corruption and is designated under the Order. If the proceeds and profits gained by the foreign subsidiary contribute to the parent company’s success and advantage, the government may successfully argue that the parent company secured an improper advantage as a result of public corruption and also should be designated. Under this scenario, the government could freeze the U.S. assets of both the parent and subsidiary companies. The Bush Administration may not intend the Order to reach corporate conduct in this way, but the Order is broad enough to support such an action and U.S. companies must now be aware of the ownership interests of blocked individuals in order to avoid dealing with prohibited parties.

The President’s new Order is even broader than other recent Orders blocking property tied to corruption in Burma and Belarus. In 2006, the President issued Executive Order 13,405 blocking the property of senior officials and those “closely linked” to such officials who are “responsible for or [have] engaged in public corruption related to Belarus.”²⁸ Similarly, in an October 2007 Executive Order, the President blocked the property of persons engaged “in activities facilitating public corruption by senior officials of the Government of Burma.”²⁹ These Orders, however, do not extend to persons found to have *benefited* from public corruption in these countries. Whereas the Burma and Belarus Orders are limited to government officials and those engaged in or facilitating the corruption, Executive Order 13,460 reaches persons and corporations who have “secured an improper advantage” as a result of Syria’s corrupt regime. This approach casts a significantly broader net.

²⁵ Press Release, Dep’t of Treasury, Rami Makhluf Designated for Benefiting from Syrian Corruption (Feb. 21, 2008).

²⁶ Robin Wright, Sanctions on Businessman Target Syria’s Inner Sanctum, WASH. POST, Feb. 22, 2008, at A18.

²⁷ Id.

²⁸ Exec. Order No. 13,405 (June 19, 2006).

²⁹ Exec. Order No. 13,448 (Oct. 19, 2007).

If proven effective, the new Order could be used as a template for future Executive Orders aimed at other corrupt and hostile regimes. It is unclear whether any similar Order will be issued with respect to North Korea, Iran, or even China, for example, but this new Order lays the ground work for similar Orders targeting additional countries that present a threat to national security. Any expanded use of such Executive Orders could continue to complicate due diligence in international dealings, investments, and trade as more countries are designated and more parties are potential beneficiaries of public corruption.

Finally, at least part of the new Order's rationale could be applied to legitimate business dealings that nevertheless have the effect of "entrench[ing] and enrich[ing] the Government of Syria," or any other subsequently designated regime, "and thereby enable[ing] the Government of Syria to continue to engage in certain conduct" hostile to the national security interests of the U.S.³⁰ Political safeguards may currently limit the U.S. to blocking only assets that are used in or gained through public corruption, but the underlying rationale of the Order would seem to support blocking *any* property that "enriches or entrenches" a hostile regime, regardless of any nexus to public corruption. The Bush Administration has not yet taken such an expansive approach, but Executive Order 13,460 provides a significant first step in that direction.

DOJ Issues Opinion Release Regarding FCPA Due Diligence

Elizabeth Bingold

I. Introduction

With increasing regularity, U.S. enforcement authorities continue to clarify their expectation that corporations engaging in acquisitions of foreign targets will conduct vigorous Foreign Corrupt Practices Act ("FCPA") due diligence. Most recently, Mark Mendelsohn, Deputy Chief, Fraud Section, Criminal Division, expressly identified two trends in FCPA enforcement: (1) increased public attention given to anti-corruption compliance, particularly in Europe; and (2) the prominent importance of FCPA due diligence.³¹ As to the latter, Mr. Mendelsohn emphasized that "check-the-box" efforts are "woefully inadequate."³² According to Mr. Mendelsohn, the question is not if you should conduct due diligence, but to what extent should you engage in due diligence, both before and post-closing.³³

Without any hard and fast rules defining sufficient due diligence efforts, the DOJ's FCPA opinion procedure releases are useful "official" resources, even though they are formally binding only on the parties to the particular request.³⁴ For example, the DOJ recently issued an opinion

³⁰ Exec. Order No. 13,460 (Feb. 13, 2008).

³¹ Remarks at the American Conference Institute (ACI) National FCPA Conference, March 26, 2008, New York City.

³² Id.

³³ Id.

³⁴ See 28 C.F.R. §80 (1999), available at <http://www.usdoj.gov/criminal/fraud/fcpa/opinion/frgncrpt.html>. The purpose of the FCPA opinion is to enable issuers and domestic concerns to obtain an opinion as to "whether certain specified, prospective – not hypothetical – conduct conforms with the Department's present enforcement policy regarding the antibribery provisions of the [FCPA]." 28 C.F.R. § 80.1 (1999). Requests are to be submitted in

approving a company's proposed purchase of a majority stake in a target company which has significant potential FCPA risks. The due diligence approach endorsed under the circumstances in this opinion may be of interest generally and underscores the lengths to which compliance-minded companies are taking to identify potential FCPA risks in international mergers and acquisition transactions.

II. Initial Due Diligence

The party requesting the opinion ("requestor") was in the process of purchasing a foreign government's interest in a state-owned public service provider. Prior to approaching the DOJ to seek an opinion on the acquisition's prospects under the FCPA, the requestor had undertaken the following due diligence efforts: retained outside accounting and legal professionals to advise on, execute, and report results of due diligence procedures in the foreign country; utilized U.S. resources such as the Department of Commerce's U.S. Commercial Service and the local embassy or consulate to obtain information on the target company, related entities, and all parties to the transaction; and hired a second law firm to review the due diligence undertaken.

III. Initial Result and Response

The requestor identified two FCPA risks that needed to be addressed before the transaction could be concluded. First, of particular concern to the requestor was the fact that their partner in the investment is currently the General Manager of the target company and, therefore, the requestor treated him as a "foreign official" for purposes of the FCPA. The requestor believed that local laws required disclosure of the potential business partner's interest in the target company, despite the fact that notification was not legally required or customary in the foreign country.³⁵ Secondly, the requestor was concerned that their partner may have been depriving the foreign government of a business opportunity that should have accrued to the foreign government itself.

After the partner refused to make any disclosure regarding the value of his expected premium in the transaction to the foreign government, the requestor was prepared to walk away from the deal. In response, the partner obtained the opinion of the foreign government that the local laws at issue did not apply to the partner. The requestor confirmed this status by meeting with the proper government officials.

IV. DOJ Opinion

writing and sent to the Assistant Attorney General in charge of the Criminal Division. See 28 C.F.R. § 80.2 (1999). A response to the request will be made within 30 days, by issuing an opinion that states whether the prospective conduct would violate the FCPA. The opinion will not bind or obligate, however, any agency other than the DOJ and only represents the DOJ's current enforcement policy. See 28 C.F.R. § 80.8, 11, 13 (1999).

³⁵ The partner and the foreign government contended that because the partner does not receive a salary or other compensation from the foreign government, and has no other affiliation with the foreign government, this classification was not necessary.

The DOJ determined that the proposed transaction did not violate the FCPA because of the requesting party's "unrelenting" due diligence, despite numerous obstacles and resistance – even at the risk of offending the partner and spoiling the deal. The DOJ also noted that its approval was influenced by the transparency of the transaction—including the requestor's documentation of the due diligence and retention of these documents in the U.S.; the justified commercial valuation of the bid; the fact that partner's status as a "foreign official" would soon cease; and the terms and conditions of the joint venture, which allowed the requesting party to unilaterally terminate the joint venture if, among other things, the business partner violated anti-corruption laws.

While this opinion does not detail all of the required actions expected of a company conducting FCPA due diligence, it is a useful guide to the type of proactive due diligence the DOJ expects from corporations engaging in acquisitions abroad.

A full copy of the DOJ opinion procedure release can be found at the following website: <http://www.usdoj.gov/criminal/fraud/fcpa/opinion/2008/0801.pdf>.

Choosing Appropriate Fora for Trying Crimes Against Humanity

Lucy Betteridge

In February 2008, the Spanish High Court issued arrest warrants for forty Rwandan army officials because of their alleged involvement in mass killings in the early 1990s. The officials are accused of killing nine Spanish citizens, including six missionaries based in Rwanda.³⁶ Although the offenses took place in Rwanda, the Spanish courts have been authorized to prosecute crimes against humanity under their domestic law even if the offenses took place outside of Spain. The Rwandan Foreign Ministry rejected the issuance of these Spanish warrants, and urged Interpol and other foreign governments to discard their application. The controversy has shed light on the ongoing debate about the appropriate fora for trying crimes against humanity.³⁷ This debate continues in the aftermath of Cyclone Nargis, which has some members of the international community calling for the prosecution of Myanmar officials who have blocked or significantly delayed the distribution of foreign aid to its displaced and injured citizens³⁸

To adjudicate crimes against humanity, international criminal law has produced two methods, each with its own set of controversies.³⁹ The first method, called universal jurisdiction, involves a nation's courts unilaterally assuming jurisdiction over a crime against humanity.

³⁶ Rwanda's Fury at Spanish Warrants, BBC News Africa, available at <http://news.bbc.co.uk/2/hi/africa/7238646.stm>.

³⁷ See, e.g., Posting of Jaya Ramji-Nogales to IntLawGrrls, <http://intlwgrrls.blogspot.com/2008/02/perils-of-universal-jurisdiction.html> (Feb. 14, 2008).

³⁸ See, e.g., Phillip Sherwell, Myanmar Cyclone: Burma Junta may be Prosecuted over Aid Block, TELEGRAPH, May 17, 2008, available at <http://www.telegraph.co.uk/news/worldnews/asia/burmamyanmar/1975851/Myanmar-cyclone-Gordon-Brown-says-Burma-is-guilty-of-inhuman-action.html>.

³⁹ ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 5 (2003).

Spain used this method in the Rwandan case. The second method involves the establishment of international criminal tribunals, such as those created by the United Nations to prosecute crimes against humanity, genocide, war crimes, and aggression.⁴⁰ Because crimes against humanity involve sensitive and troubling issues, the legitimacy of the method chosen to adjudicate them is especially important, as justice must be done in fact but also must be seen to be done by the interested nations and the broader international community. International criminal tribunals have an advantage in perceived legitimacy and are the method of choice when prosecuting crimes against humanity.

The statutory provision that Spain cites as providing jurisdiction for its prosecution of crimes against humanity is Article 607 of the Spanish Criminal Code, which has incorporated the Rome Statute of the International Criminal Court into domestic law.⁴¹ This law was tested in the November 2007 trial of former Argentine naval officer Adolfo Scilingo, whose conviction for crimes committed in Argentina was upheld by the Spanish High Court.⁴² In its decision, the Spanish Court stated that Spain's universal jurisdiction statute made the jurisdiction legitimate because the case had some connection to Spain's national interest.⁴³ In the case of Scilingo, crimes against humanity were not explicitly mentioned in the statute; the Spanish Supreme Court inferred its presence from the statutory language, "other [crimes] which, according to international treaties or convention, should be pursued in Spain."⁴⁴ In this application, the Spanish Court inferred that Spain could exercise jurisdiction in any case where its national interest was affected, as well as in any case where the crime alleged involved a violation of any treaty or convention to which Spain is a party. Such an interpretation provides the Spanish courts with broad jurisdiction. Taken to an extreme, the large number of cases in which Spain could intervene might cause others in the international community to question Spain's assertion of jurisdiction in matters that may affect the interests of another nation more directly. This type of questioning causes diminished legitimacy of Spain's judgment, or other countries taking a similar position.

In November 1994, the United Nations Security Council formed an ad hoc tribunal, the International Criminal Tribunal for Rwanda (ICTR) to investigate and prosecute crimes against humanity that were committed in Rwanda in the early 1990s. The statute, which established the ICTR, grants the tribunal concurrent jurisdiction over crimes committed in the territory of Rwanda, or crimes committed by Rwandan citizens in neighbouring states between January 1, 1994 and December 31, 1994.⁴⁵ Although concurrent jurisdiction does not preclude other national courts from prosecuting the same defendants, the ICTR does maintain precedence over national courts.⁴⁶ The crimes in question must be a violation of Article 3 of the Geneva

⁴⁰ Id. at 6-11.

⁴¹ Richard J. Wilson, Spanish Supreme Court Affirms Conviction of Former Argentine Naval Officer for Crimes Against Humanity, ASIL INSIGHTS (Am. Soc'y Int'l Law), Jan. 30, 2008, available at <http://www.asil.org/insights/2008/01/insights080130.html>.

⁴² Id.

⁴³ Id.

⁴⁴ Id.

⁴⁵ S.C. Res. 955, U.N. Doc. S/RES/508 (Nov. 8, 1994), available at <http://www.un.org/ict/english/Resolutions/955e.htm>.

⁴⁶ Id.

Conventions of 1949 and the Geneva Convention Additional Protocol II of 1977.⁴⁷ This jurisdiction is narrower than the universal jurisdiction of the Spanish national court. Other international criminal tribunals, such as the International Criminal Court (ICC), limit their jurisdiction.⁴⁸ By adopting concurrent jurisdiction and imposing jurisdictional limits, international criminal tribunals have gained the approval and support from a broad cross-section of the international community, which legitimates the work of these tribunals.

In reviewing the two approaches to prosecute crimes against humanity, the question of proper jurisdiction is inextricably tied to legitimacy. Proponents of universal jurisdiction see it as a method for punishing heinous crimes that might otherwise go unpunished, and as way for a country to protect its national interests. It also assists international tribunals by incorporating their statutes into domestic law, and contributing to the proliferation of those statutes into customary international law. Yet, universal jurisdiction can give states authority over proceedings to which they may have only a tenuous connection. The fact that a state *can* exercise jurisdiction over a matter does not mean that it *should*. Further, under the universal jurisdiction approach, a defendant may be prosecuted in a non-transparent manner by the domestic courts of one state, while other interested states are prevented from intervening. International tribunals solve this problem because several countries can participate in a single proceeding. Preserving legitimacy and fairness when trying crimes against humanity will both reduce future national resentments and provide momentum for further prosecution of crimes against humanity.

MONTHLY COMMITTEE CALLS

The International Criminal Law Committee will continue holding monthly telephone conference calls with committee members on the last Tuesday of each month (unless otherwise noted). Calls will occur at 6:00 PM EST. The schedule for 2008 is as follows: June 24, 2008; July 29, 2008; August 26, 2008; September 30, 2008; October 28, 2008; November 25, 2008; and December 30, 2008

The teleconference dial-in information is:

US/CANADA Toll-Free Voice Dial-in information:

Ready-Access Number: 1-800-504-8071; 7-Digit Access Code: 6621672

International Voice Dial-in information:

International Ready-Access Number: +1 3032480281; 7-Digit Access Code: 6621672

⁴⁷ Id.

⁴⁸ David Wippman, Exaggerating the ICC, BRINGING POWER TO JUSTICE? THE PROSPECTS OF THE INTERNATIONAL CRIMINAL COURT 99, 102 (Joann Harrington et al. ed., 2006).

ABA INTERNATIONAL LAW SECTION SPRING 2008 CONFERENCE

From April 1- April 5, 2008, the ABA International Law Section held their Spring Conference at the Grand Hyatt Hotel in New York City. The International Criminal Law Committee sponsored a subcommittee breakfast on April 3, 2008, as well as panel discussions entitled, “The Globalization of Corporate Compliance Standards – Is Globalization Driving Convergence?” and “The Increasing Reach of U.S. International Criminal Enforcement Efforts: UK and US Perspectives.”

ABA INTERNATIONAL LAW SECTION FALL 2008 CONFERENCE

The next ABA International Law Section Conference will be held in the fall, from September 23 – September 27, 2008, at the Brussels Hilton, in Brussels, Belgium. Participants can register on-line, through the ABA International Law Section website at: <http://www.abanet.org/intlaw/fall08/home.html>. The International Criminal Law Section will be sponsoring two programs: “Bringing War Criminals to Justice: The International Tribunals in the Hague,” on Wednesday, September 24th, from 2:30-4:00 PM; and “Conducting Effective Internal Investigations: A Proactive Response to Increased International Enforcement,” on Thursday, September 25th from 9:00-10:30 AM.

ABA INTERNATIONAL CRIMINAL LAW COMMITTEE YEAR –IN-REVIEW

The ABA International Law Committee is now accepting submissions for the annual Year-in-Review publication. Submissions should be forwarded by November 1, 2008 to the Committee's editor, Donald Shaver at donald.shaver@stanct.org.

ABA INTERNATIONAL CRIMINAL LAW COMMITTEE EVENT CALENDAR OF EVENTS

Section of International Law Leadership Retreat

August 6, 2008- August 7, 2008

Location: Bally's Atlantic City; Atlantic City, New Jersey

Format: Live/In-Person

Additional Information: http://www.abanet.org/intlaw/annual08/retreat_home.html

American Bar Association Annual Meeting

August 7, 2008 – August 12, 2008

Location: The Waldorf Astoria, New York City

Format: Live/In-Person

Additional Information: http://www.abanet.org/intlaw/annual08/annual_home.html

Section of International Law 2008 Fall Meeting

September 23, 2008 – September 27, 2008

Location: Hilton Brussels; Brussels, Belgium

Format: Live/In-Person

Additional Information: <http://www.abanet.org/intlaw/fall08/home.html>

Section of International Law 2009 Spring Meeting

April 14, 2009 – April 18, 2009

Location: The Fairmont Hotel, Washington, DC

Format: Live/In-Person