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# Punishing the Parent: Corporate Criminal Complicity in Human Rights Abuses

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# PUNISHING THE PARENT: CORPORATE CRIMINAL COMPLICITY IN HUMAN RIGHTS ABUSES

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> *"We are seeking to prevent . . . the perpetuation of a double standard under which most foreign corporations, as well as their home governments, operate. There is one set of standards—legal and moral—in domestic operations; but a completely different and much lower set of standards when these same entities are operating abroad, particularly in much poorer countries. This dichotomy is wrong, and the governments in the industrialized world have the means of preventing it: by applying extraterritorially many of the domestic and international standards that are adopted and enforced at home."*[**]

## INTRODUCTION

Ensuring the accountability of multinational corporations ("MNCs")[1] for their conduct in the developing world is one of the great legal challenges of our time. From humble beginnings, the legal fiction that is "the corporation" has evolved into a behemoth, central to the functioning of the world economy.[2] It has been estimated that between twenty-nine[3] and fifty-one[4] of the one hundred largest economies are MNCs. In 2005, there were approximately 77,000 MNCs, with 770,000 foreign affiliates, generating an estimated $4.5 trillion in value

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** Mark Gibney & R. David Emerick, The Extraterritorial Application of United States Law and the Protection of Human Rights: Holding Multinational Corporations to Domestic and International Standards, 10 TEMP. INT'L & COMP. L.J. 123, 145 (1996) (emphasis removed).

1. Multinational corporations ("MNCs") are corporations that are incorporated in one country but operate in one or more other countries. *See* PETER T. MUCHLINSKI, MULTINATIONAL ENTERPRISES AND THE LAW 5–8 (2d ed. 2007). Other terms found in the literature include "transnational corporations" and "multinational enterprises." *Id.*

2. *See* PHILLIP I. BLUMBERG, THE LAW OF CORPORATE GROUPS—SUBSTANTIVE LAW 3–39, 55–62 (1987) (providing a history of the evolution of the corporate form, and in particular of corporate groups).

3. U.N. Conference on Trade and Development [UNCTAD], *World Investment Report 2002: Multinational Corporations and Export Competitiveness*, 90, UNCTAD/WIR/2002 (June 12, 2003), *available at* http://www.unctad.org/en/docs//wir2002_en.pdf (figure makes adjustments for the value-added nature of gross domestic product as opposed to sales).

4. Sarah Anderson & John Cavanagh, *Top 200: The Rise of Global Corporate Power*, at i, CORPORATE WATCH, Dec. 4, 2000, *available at* http://s3.amazonaws.com/corpwatch.org/downloads/top200.pdf (figure is based on a comparison of sales with Gross Domestic Product).

added, employing some 62 million workers and exporting goods and services valued at more than $4 trillion.[5]

Crucial to the success of these enterprises is the ability to incorporate in one country while seeking out opportunities in one or more other countries. Increasingly, these opportunities may be found in the developing world where resources are plentiful, labor is cheap, and regulation weak or non-existent. Such countries are also often notorious for human rights abuses in which MNCs may become involved.

For example, a number of civil actions were brought against the giant U.S. energy company Unocol Corporation[6] that alleged knowing involvement in human rights abuses by the Burmese military.[7] The allegations arose from Unocal's involvement in the production, transportation, and sale of gas in Burma, the plaintiffs being villagers in the area through which the gas pipeline passed.[8] Security for the project was provided by the Burmese military and it was alleged that the plaintiffs were subjected to forced labor, as well as acts of murder, rape, and torture.[9] Although disputed by Unocal, the Ninth Circuit Court of Appeals found "evidence sufficient to raise a genuine issue of material fact" that Unocal was aware that the project had hired the Burmese military to provide these ser-

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5. UNCTAD, *World Investment Report 2006*, *FDI from Developing and Transition Economies: Implications for Development*, 5, UNCTAD/WIR/2006 (2006), *available at* http://www.unctad.org/en/docs/wir2006overview_en.pdf.

6. CHEVRONTEXACO, ANNUAL REPORT 2004, *available at* http://www.chevron.com/Investors/FinancialInformation/AnnualReports/2004/financials/. Prior to its merger with ChevronTexaco (now Chevron), Unocal reported revenues of U.S.$8.2 billion, net earnings of U.S.$1.2 billion and total assets of U.S.$13.1 billion. UNOCAL CORPORATION, ANNUAL REPORT 2004, *available at* http://www.chevron.com/Documents/Pdf/Unocal2004AnnualReport.pdf.

7. Doe v. Unocal Corp., 963 F. Supp. 880, 883 (C.D. Cal. 1997), *aff'd in part*, *rev'd in part*, *and remanded*, 395 F.3d 932, 936 (9th Cir. 2002), *reh'g en banc granted*, 395 F.3d 978, 979 (9th Cir. 2003); Nat'l Coalition Gov't of the Union of Burma v. Unocal Inc., 176 F.R.D. 329, 334 (C.D. Cal. 1997); Doe v. Unocal Corp., 110 F. Supp. 2d 1294, 1296 (C.D. Cal. 2000). The Union of Burma, otherwise known as Myanmar, will be referred to as Burma throughout this Article. *See* U.S. Dep't of State, Bureau of East Asian and Pacific Affairs, Background Note: Burma, http://www.state.gov/r/pa/ei/bgn/35910.htm (last visited June 6, 2008) (The United States does not recognize the name Myanmar, as the country is called by the ruling junta, although the United Nations does use Myanmar.).

8. Doe v. Unocal Corp. 963 F. Supp. 880, 883 (C.D. Cal. 1997), *aff'd in part*, *rev'd in part*, *and remanded*, 395 F.3d 932, 937–40 (9th Cir. 2002), *reh'g to en banc court granted*, 395 F.3d 978, 979 (9th Cir. 2003); Nat'l Coalition Gov't of the Union of Burma v. Unocal Inc., 176 F.R.D. 329, 335–37 (C.D. Cal 1997); Doe v. Unocal Corp., 110 F. Supp. 2d 1294, 1297–98 (C.D. Cal 2000).

9. *Unocal Corp.*, 395 F.3d at 939–40.

vices.[10] John Haseman, a former military attaché at the U.S. embassy in Rangoon and consultant to Unocal reported that "egregious human rights violations have occurred, and are occurring now, in southern Burma . . . . Unocal, by seeming to have accepted [the Burmese Military]'s version of events, appears at best naïve and at worst a willing partner in the situation."[11] Although the District Court granted summary judgment in favor of Unocal, this was reversed by the Court of Appeals in respect of all but the torture claims.[12] That decision was appealed to an eleven judge *en banc* court within the Ninth Circuit[13] before the case was settled in December 2005.[14]

In another example, Canada's largest energy company, Talisman Energy, Inc., was allegedly complicit in human rights abuses in the Sudan.[15] The plaintiffs claimed that "Talisman worked with the [Sudanese] [g]overnment to devise a plan of security for the oil fields and related facilities,"[16] "Talisman hired its own military advisors to coordinate military strategy with the [g]overnment," and had "regular meetings with Sudan's army intelligence unit and the Ministry of Energy and Mining . . . ."[17] It was alleged that Talisman was aware that the government's "protection" of oil operations, based on the joint Talisman and Sudanese-government strategy, entailed ethnic cleansing or genocide, the murder or enslavement of substantial numbers of civilians (including women and children), and the destruction of villages.[18]

Such incidents have given rise to the term "corporate complicity," which describes the alleged knowing involvement of corporations in human rights abuses committed by others. The key features that typically arise in such cases are:

1. The defendant is a large, well-resourced transnational corporation.

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10. *Id.* at 938.

11. *Id.* at 942.

12. *Id.* at 962.

13. *Unocal Corp.*, 395 F.3d at 979.

14. EarthRights International, *Final Settlement Reached in* Doe v. Unocal, Mar. 21, 2005, *available at* http://www.earthrights.org/legalfeature/final_settlement_reached_in_doe_v._unocal.html.

15. Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 299–301 (S.D.N.Y. 2003).

16. *Id.* at 300.

17. *Id.*

18. *Id.*

> 2. The alleged human rights abuses occurred in a country (the 'host jurisdiction') other than the transnational corporation's country of incorporation (the 'home jurisdiction').
>
> 3. The host jurisdiction is unable and / or unwilling to investigate and prosecute the alleged abuses.
>
> 4. The transnational corporation is alleged to be complicit in the human rights abuses either directly or, more commonly, indirectly through the interposition of subsidiaries or other intermediaries. . .[19]

To date, efforts to render MNCs accountable for such conduct have fallen into one of three main categories. First, voluntary instruments such as the United Nations *Global Compact*[20] and the Organization for Economic Cooperation and Development ("OECD") *Guidelines for Multinational Enterprises*[21] have encouraged corporations to observe and protect human rights in the conduct of their business.[22] Second, civil actions have achieved limited success while also focusing attention on the issue.[23] They do, however, face considerable procedural obstacles and, to date, none have proceeded to judgment on the merits. Third, there have been some attempts to impose statutory obligations on corporations conducting overseas operations to abide by minimum standards of conduct. While bills have been introduced in both the United States[24] and Australia,[25] the political obstacles to securing the passage of such legislation are considerable and, to date, neither has been passed.[26]

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19. Jonathan Clough, *Not-So-Innocents Abroad: Corporate Criminal Liability for Human Rights Abuses*, 11(1) AUSTL. J. HUM. RTS. 1, 5 (2005).

20. United Nations, Global Compact—What is the UN Global Compact?, http://www.unglobalcompact.org/AboutTheGC/index.html (last visited June 2, 2008).

21. Organisation for Economic Co-operation and Development [OECD], *The OECD Guidelines for Multinational Enterprises*, OECD Doc. 80761 (rev. ed. 2000), *available at* http://www.oecd.org/dataoecd/56/36/1922428.pdf.

22. Erin Elizabeth Macek, *Scratching the Corporate Back: Why Corporations Have No Incentive to Define Human Rights* 11 MINN. J. GLOBAL TRADE 101, 108–23 (2002).

23. *See generally* SARAH JOSEPH, CORPORATIONS AND TRANSNATIONAL HUMAN RIGHTS LITIGATION (Colin Harvey ed., 2004); BETH STEPHENS ET. AL., INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 131–214 (2d ed. 2008); Michael Byers, *English Courts and Serious Human Rights Violations Abroad: A Preliminary Assessment*, *in* 7 LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW 241–49 (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000).

24. Corporate Code of Conduct Act, H.R. 2782, 107th Cong. (1st Sess. 2001).

25. Corporate Code of Conduct Bill, 2000 (Austl.).

26. The H.R. 2782 was referred to the House Subcommittee on International Monetary Policy and Trade on July 17, 2000. *See* WASHINGTON COLLEGE OF LAW, CENTER FOR HUMAN RIGHTS AND HUMANITARIAN LAW, HUMAN RIGHTS BRIEF (2000), http://www.wcl.american.edu/hrbrief/08/1watch.cfm. The Australian bill was introduced

Until recently there has been relatively little discussion of the application of domestic criminal law in this context.[27] However, the nature of corporate involvement in human rights abuses, coupled with the difficulty of securing prosecutions in the host jurisdiction, has focused attention on the potential liability of the parent corporation under the domestic laws of the home jurisdiction. The issue was specifically raised in a recent survey of sixteen countries ("Surveyed Countries") by the Fafo Institute for Applied Studies in Norway ("Fafo Institute Survey").[28] The Surveyed Countries,[29] representing a broad spectrum of both common law and civil law traditions, were asked to provide information as to their domestic laws relating to the accountability of MNCs.[30] A specific recommendation arising out of the survey was that "consideration is required to explore how the components of complicity found in the different national legal systems surveyed might be applied to business entities."[31] This Article attempts to address that question.

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after the Corporate Code of Conduct Bill 2000 was rejected by the Commonwealth Parliamentary Joint Statutory Committee on Corporations and Securities. *See* PARLIAMENTARY JOINT STATUTORY COMMITTEE ON CORPORATIONS AND SECURITIES, REPORT ON THE CORPORATE CODE OF CONDUCT BILL 2000, at 39 (2001), *available at* http://www.aph.gov.au/senate/committee/corporations_ctte/completed_inquiries/1999-02/corp_code/report/report.pdf.

27. Clough, *supra* note 19, at 3. *See also* Beth Stephens, *The Amorality of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT'L L. 45, 67 (2002); Craig Forcese, *Deterring "Militarized Commerce": The Prospect of Liability for "Privatized" Human Rights Abuses*, 31 OTTAWA L. REV. 171, 174–84 (2000) (discussing several examples of corporate responsibility for human rights violations going unchecked). *See generally* Diane Marie Amann, *Capital Punishment: Corporate Criminal Liability for Gross Violations of Human Rights*, 24 HASTINGS INT'L & COMP. L. REV. 327 (2001).

28. ANITA RAMASASTRY & ROBERT C. THOMPSON, COMMERCE, CRIME AND CONFLICT: LEGAL REMEDIES FOR PRIVATE SECTOR LIABILITY FOR GRAVE BREACHES OF INTERNATIONAL LAW—A SURVEY OF SIXTEEN COUNTRIES, Executive Summary (Fafo 2006), *available at* http://www.fafo.no/pub/rapp/536/536.pdf [hereinafter FAFO SURVEY]. This survey followed an earlier pilot study of five countries. FAFO & INTERNATIONAL PEACE ACADEMY, BUSINESS AND INTERNATIONAL CRIMES: ASSESSING THE LIABILITY OF BUSINESS ENTITIES FOR GRAVE VIOLATIONS OF INTERNATIONAL LAW (Fafo 2003), *available at* http://www.fafo.no/liabilities/467.pdf.

29. The Surveyed Countries in the 2006 Fafo Survey are Argentina, Australia, Belgium, Canada, France, Germany, India, Indonesia, Japan, the Netherlands, Norway, South Africa, Spain, the Ukraine, the United Kingdom, and the United States. FAFO SURVEY, *supra* note 28, at 13.

30. *Id.* at 9–12.

31. FAFO SURVEY, *supra* note 28, at 28.

Focusing on the common law jurisdictions of Australia,[32] Canada, the United Kingdom, and the United States,[33] this Article analyzes the application of domestic principles of complicity to extraterritorial conduct by corporations.[34] The analysis proceeds in four parts. Part I provides an overview of principles of complicity under the domestic law of these jurisdictions. Part II considers the legal bases by which criminal conduct can be attributed to a corporation, particularly where the defendant forms part of a corporate group. As the alleged abuses will have occurred outside the home jurisdiction, Part III discusses principles of extraterritorial criminal jurisdiction. Part IV provides two examples of how legislative provisions may be drafted in order to impose extraterritorial criminal liability on corporations. The Article concludes that while the imposition of such liability is theoretically possible, whether it is a practical option is questionable. Nonetheless, it is argued that the underlying rationales found in the criminal law provide ample justification for the enactment of specific criminal statutes targeting corporate complicity in terms that are appropriate for a corporate defendant. Models for such legislation already exist both in the United States and elsewhere, providing an appropriate and potentially more effective means of prosecuting the parent corporation for its complicity in human rights abuses by others.

Although the focus of this Article is on the liability of the parent corporation in the home jurisdiction, this is not to dismiss the importance of pursuing the perpetrators in the host country.[35] It simply recognizes that there are many practical difficulties in doing so. Given that the ultimate beneficiary of these enterprises is the parent, it is both logical and reasonable to seek means to render such corporations accountable for their conduct. This Article explores one way in which that may be achieved via criminal prosecution for complicity.

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32. With respect to Australia, the focus will be on the relevant federal law, the Criminal Code Act 1995 (Austl.).

33. With respect to the United States, references in this Article will be made to relevant federal provisions and also the American Law Institute's Model Penal Code.

34. *See generally* JENNIFER A. ZERK, MULTINATIONALS AND CORPORATE SOCIAL RESPONSIBILITY: LIMITATIONS AND OPPORTUNITIES IN INTERNATIONAL LAW (2006); JOSEPH, *supra* note 23. Because of its specific focus, this Article does not address broader questions relating to the accountability of MNCs.

35. *See* Damian Betz, *Holding Multinational Corporations Responsible for Human Rights Abuses Committed by Security Forces in Conflict-Ridden Nations: An Argument Against Exporting Federal Jurisdiction for the Purpose of Regulating Corporate Behavior Abroad*, 14 DEPAUL BUS. & COM. L.J. 163, 202–05 (2002).

## I. PRINCIPLES OF COMPLICITY

Allegations against corporations do not typically allege that the corporation committed the abuses in its own right. Rather, the corporation is said to have provided support to those who actually committed the abuses, either by encouraging them and/or by providing some form of assistance. Such conduct fits neatly within the general concept of criminal complicity, and this terminology has been regularly applied in this context.[36]

Complicity is a well-established basis for criminal liability, tracing its common law roots back to at least the fourteenth century,[37] with similar principles also evolving in civil law countries.[38] It is almost universally recognized as a legitimate basis for criminal liability, with all of the Surveyed Countries recognizing complicity as an offense under their domestic law.[39] Principles of complicity are also recognized in international law,[40] being found in article 25(3) of the Rome Statute[41] and accepted by the International Criminal Tribunals for Rwanda and the former Yugoslavia.[42]

The essence of complicity is easily stated; the accomplice is punished because of his or her knowing involvement in the crime of another. It is well established that these principles may also be applied to a corporation.[43] While easily stated, liability for complicity presents significant conceptual challenges even when applied domestically. Courts have struggled to appropriately define the scope of liability, resulting in an area of the law that "betrays the worst features of the common law: what

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36. *See, e.g.*, Andrew Clapham & Scott Jerbi, *Categories of Corporate Complicity in Human Rights Abuses*, 24 HASTINGS INT'L & COMP. L. REV. 339 (2001). Although beyond the scope of this Article, the related principles of conspiracy and incitement may also be relevant in this context.

37. United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938).

38. Clapham & Jerbi, *supra* note 36, at 345.

39. FAFO SURVEY, *supra* note 28, at 16.

40. Although note conflicting U.S. authority as to whether aiding and abetting forms part of the "law of nations" for the purposes of the Alien Tort Claims Act. *See In re* South African Apartheid Litigation, 346 F. Supp. 2d 538, 549–50 (S.D.N.Y. 2004); Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 320–24 (S.D.N.Y. 2003).

41. Rome Statute of the International Criminal Court art. 25(3), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

42. Prosecutor v. Jean-Paul Akayesu, Case No. ICTR 96-4-T, Judgment, ¶¶ 6.3.2, 7.8 (Sept. 2, 1998); Prosecutor v. Furundzija, Case No. IT 95-17/1-T, Judgment, ¶¶ 198, 207 (Dec. 10, 1998); FAFO SURVEY, *supra* note 28, at 20.

43. John Henshall (Quarries), Ltd. v. Harvey, [1965] 2 Q.B. 233, 241 (U.K.); Nat'l Coal Bd. v. Gamble, [1959] 1 Q.B. 11 (U.K.); R v. Robert Millar (Contractors), Ltd., [1970] 2 Q.B. 54 (U.K.).

some would regard as flexibility appears here as a succession of opportunistic decisions by the courts, often extending the law, and resulting in a body of jurisprudence that has little coherence."[44] These complexities are magnified when different jurisdictions are considered, with each country adopting different approaches to the same challenges. Although a detailed analysis of principles of complicity is beyond the scope of this Article, it is possible to summarize the key features that, with some variation, are similar in each jurisdiction.

*A. The Need for a Principal Offender*

In contrast to inchoate offenses such as conspiracy and incitement, liability for complicity is derivative. That is, the liability of the accessory is predicated on the commission of an offense (the "principal offense") by a "principal offender" or "principal."[45] Therefore, being an "accessory" is not an offense in its own right; the accused is a party to the principal offense and is tried and sentenced as a principal offender. Consequently, if there is no principal offense, there can be no liability for complicity. The trier of fact must therefore be satisfied, on the criminal standard, that the principal offense has been committed.

It might seem that this requirement would present a significant obstacle, particularly if the principal offense is alleged to have occurred in another jurisdiction where there may be no prosecution of the principal offender. However, it is not necessary for the alleged principal offender to have been *convicted* of the principal offense. An accused may be guilty of complicity even where a principal offender has not been identified. So long as the trier of fact is satisfied that the principal offense was committed by some person, and is satisfied of the accused's involvement in that offense, then he or she may be liable as an accessory.[46]

In some circumstances, there will be no principal offense because the principal offender is incapable of committing an offense. For example, he or she may be a child below the age of criminal responsibility or an adult who does not possess the necessary mens rea. Although a strict application of accessorial principles would deny liability as there is no

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44. ANDREW ASHWORTH, PRINCIPLES OF CRIMINAL LAW 440 (5th ed. 2006).

45. 18 U.S.C. § 2 (1951); Criminal Code Act, 1995, § 11.2(1) (2007) (Austl.); Criminal Code of Canada, R.S.C., ch. C-46, § 21(1)(a) (1985); Accessories and Abettors Act, 1861, 24 & 25 Vict., c. 94, § 8 (Eng.); 18 U.S.C. § 2 (1951); MODEL PENAL CODE § 2.06(1) (2001).

46. Criminal Code Act, 1995, § 11.2(5) (2007) (Austl.); King v. R (1986) 161 C.L.R. 423, 433–36 (Austl.); MODEL PENAL CODE § 2.06(7) (2001); WAYNE R. LAFAVE, CRIMINAL LAW 689 (4th ed. 2003).

principal offense, the defendant may be liable under the doctrine of innocent agency.[47]

Where an act, which would be a crime if done by *A*, is caused by *A* to be done by *B*, and *B* does not commit a crime by doing so, the law may regard *A* as having acted by an innocent agent and as being guilty of the crime as a principal offender.[48]

In such cases, the defendant is not actually liable as an accessory. Rather, he or she is regarded as having committed the principal offense through the agency of the innocent agent.

### *B. The Actus Reus of Complicity*

For a relatively straightforward concept, the law of complicity has developed terminology of surprising complexity. At common law, an accessory was referred to either as a principal in the second degree or as an accessory before the fact, depending on whether or not the accused was present during the commission of the principal offense. The terminology used to describe the conduct of an accessory was equally varied: aiding, abetting, comforting, concurring, approbating, encouraging, consenting, assenting, countenancing, counseling or procuring.[49] Today, the most common formulation is to say that the accused will be liable as an accessory if he or she "aids, abets, counsels or procures" the commission of the principal offense.[50] Similar terminology has been adopted in all of the Surveyed Countries.[51]

Although these words have a specific meaning, but they are all "instances of one general idea, that the person charged . . . is in some way linked in purpose with the person actually committing the crime, and is by his words or conduct doing something to bring about, or rendering

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47. Osland v. R (1998) 197 C.L.R. 316, 347–48 (Austl.). A more correct term is "non-responsible" agent. *Id.*

48. *See generally* 18 U.S.C. § 2(b) (1951); Criminal Code Act, 1995, § 11.3 (2007) (Austl.); Criminal Code of Canada, R.S.C., ch. C-46, § 23.1 (1985); R v. Demirian [1989] V.R. 97 (Austl.); R v. Cogan, [1976] Q.B. 217 (U.K.); MODEL PENAL CODE § 2.06(2)(a) (2001).

49. R v. Russell [1959] V.R. 59, 66–67 (Austl.). *See also* LEFAVE, *supra* note 46, at 671.

50. *See* 18 U.S.C. § 2(a) (1951); Criminal Code Act, 1995, § 11.2(1) (2007) (Austl.); Accessories and Abettors Act, 1861, 24 & 25 Vict., c. 94, § 8 (Eng.). In Canada, "counsel" is defined to include "procure, solicit or incite." Criminal Code of Canada, R.S.C., ch. C-46, § 22.3 (1985). The Model Penal Code refers only to "aids" and "solicits." MODEL PENAL CODE § 2.06(3)(i)(ii) (2001). The equivalent terms in civil law countries are "l'aide et l'assistance, la fourniture des moyens." Clapham & Jerbi, *supra* note 36, at 345.

51. FAFO SURVEY, *supra* note 28, at 18.

more likely, such commission."[52] They are not, however, mutually exclusive because the conduct of the accused may fall within more than one category. For example, it has been suggested that an act of abetting will usually be implicit in, or associated with, an act of aiding.[53]

Traditionally, the phrase aiding and abetting was used when the accused was present at the commission of the principal offense, whereas "counselling and procuring" described those situations in which the accused was absent.[54] Corporate complicity would therefore typically involve counseling and procuring as assistance and/or encouragement is provided prior to the commission of the offense. In any event, the distinction has now been removed in most jurisdictions and even in England, where this distinction is retained, it appears to have little practical consequence.[55] The same is true of the conflict between Australian and U.K. authority on whether the words "aiding and abetting, counseling and procuring" should be given their ordinary[56] or their common law meaning.[57] In practical terms, even at common law the words are given what would generally be regarded as their ordinary meanings.

For example, aiding is given its natural meaning of "give support to, . . . help, assist."[58] Typical acts of aiding include providing materials or other physical support, providing advice, or acting as a lookout. The essential feature of abetting is that the accused was present during the commission of the principal offense and encouraged the commission of that offense.[59] Encouragement may be express or implied, and in some cases the mere presence of the accused may provide encouragement to the principal offender.[60]

Similarly, counseling involves advice or encouragement prior to the commission of the offense, and has been interpreted as meaning "urged or advised,"[61] or to "advise" or "solicit."[62] Typical examples of counseling include providing advice on the commission of the offense, for ex-

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52. R v. Russell [1933] V.R. 59, 67 (Austl.) (cited with approval in *Giorgianni v. R* (1985) 156 C.L.R. 473, 493).

53. ASHWORTH, *supra* note 44, at 414.

54. Ferguson v. Weaving, [1951] 1 K.B. 814, 818–19 (U.K.).

55. ASHWORTH, *supra* note 44, at 414.

56. Attorney-Gen.'s Reference (No. 1 of 1975), [1975] 1 Q.B. 773, 779 (U.K.).

57. Giorgianni v. R (1985) 156 C.L.R. 473, 492 (Austl.).

58. R v. Beck (1990) 43 A. Crim. R. 135, 143 (Austl.); R v. Greyeyes, [1997] 2 S.C.R. 825, 837 (Can.).

59. R v. Russell (1933) V.R. 59, 67 (Austl.); R v. Salajko, [1970] 1 O.R. 824, 826 (Can.); Wilcox v. Jeffery, [1951] 1 All E.R. 464, 467 (K.B.) (U.K.).

60. R v. Coney, [1882] 8 Q.B.D. 534, 534 (U.K.).

61. Stuart v. R (1974) 134 C.L.R. 426, 445 (Austl.).

62. R v. Calhaem, [1985] 1 Q.B. 808, 813 (U.K.).

ample by providing directions or inside knowledge, or simply by providing encouragement.

Procuring refers to conduct of the accused that goes beyond merely encouraging the commission of the principal offense and actually causes or brings about its commission.[63] An example of such conduct is when the accused offers money for the offense to be committed. "To procure means to produce by endeavour. You procure a thing by setting out to see that it happens and taking the appropriate steps to produce that happening."[64] It is the only form of complicity that requires proof of a causal connection between the accessory's conduct and the commission of the principal offense. In other cases, it is sufficient if the conduct of the accused can be described as assisting or encouraging the commission of that offense, even though it did not cause its commission, and even if ultimately it made no material difference to the outcome.[65]

In light of the above, and despite all the variation in terminology, complicity essentially consists of providing assistance and/or encouragement to the principal offender. Such terms are broad enough to encompass typical examples of what, in the corporate context, has been described as direct complicity; that is, when a company knowingly assists in a human rights violation.[66] Examples include knowingly assisting in the forced relocation of peoples in circumstances related to business activity[67] or providing financial or material support to security forces known to engage in human rights abuses.[68] Such conduct not only involves the provision of assistance to the principal offender, but may also constitute encouragement of the principal offense. In circumstances in which a corporation has employed security forces who then commit human rights abuses, it may even be said that the corporation has procured the commission of the principal offense by paying for and thereby causing its commission.

In other cases, the alleged complicity may be the failure of the accused to intervene and prevent the principal offense; that is, turning a blind eye. In the corporate context, the term silent complicity has been used to describe those situations in which the corporation assists or encourages the

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63. R v. Beck, [1985] 1 W.L.R. 22, 27–28 (U.K.).

64. Attorney-Gen.'s Reference (No. 1 of 1975), [1975] 1 Q.B. 773, 779 (U.K.). *See also* LAFAVE, *supra* note 46, at 674.

65. THE LAW COMMISSION, PARTICIPATING IN CRIME, Law Com No. 305, ¶¶ 2.32–2.33 (2007). *See also* Criminal Code Act, 1995, § 11.2(2)(a) (2007) (Austl.).

66. Clapham & Jerbi, *supra* note 36, 341–42.

67. *Id.* at 342.

68. Forcese, *supra* note 27, at 185 (discussing examples of "financial complicity" and "material complicity").

human rights violation through its inaction.[69] An example of such silent complicity is when a corporation is aware of human rights abuses but fails to raise any objection. In general, mere acquiescence in or assent to the principal offense is not sufficient to constitute complicity unless it can be said to encourage or assist the principal offense.[70] However, silence or inaction may constitute complicity if, for example, that silence is taken by the principal offender to constitute tacit approval and the accused remains silent knowing this to be the case.[71] Consequently, silent complicity could arise when a parent corporation is aware of a violation by a subsidiary or an independent contractor, which in turn is aware of the parent's knowledge and is encouraged by the parent's inaction. It is also the case that when the defendant is under a legal duty to act, failure to discharge that duty may constitute complicity.[72] There is also some limited authority that the failure of an employer to prevent an employee from committing an offense may constitute complicity.[73]

Professor Clapham also refers to a third category of complicity, known as beneficial or indirect complicity, in which a corporation benefits directly from human rights abuses committed by someone else. For example, the company may benefit from the suppression of peaceful protest against its business activities or the use of repressive measures while guarding company facilities.[74] In the absence of conduct more akin to direct or silent complicity, the mere fact of benefiting from a human rights violation is unlikely to constitute complicity under domestic criminal law. Such circumstances are more commonly addressed by specific legislation that prevents a person benefiting from the proceeds of crime.

### *C. The Mens Rea for Complicity*

Although the range of conduct that may amount to complicity is broad, the mens rea element provides a significant limitation on its scope. Each jurisdiction requires that the accused intended to assist or encourage the

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69. Clapham & Jerbi, *supra* note 36, 341–42.

70. R v. Phan (2001) 53 N.S.W.L.R. 480, 487 (Austl.). *See also* Wilcox v. Jeffery, [1951] 1 All E.R. 464, 466 (K.B.) (U.K.); LAFAVE, *supra* note 46, at 672–73.

71. R v. Coney, [1882] 8 Q.B.D. 534, 540 (U.K.). For a discussion of similar concepts in international law, see Clapham & Jerbi, *supra* note 36, at 347–49.

72. THE LAW COMMISSION, *supra* note 65, ¶ 2.26.

73. *See generally* R v. Gaunt, [2004] 2 Crim. App. 194 (U.K.); R v J.F. Alford Transp. Ltd., [1997] 2 Crim. App. 326 (U.K.).

74. Clapham & Jerbi, *supra* note 36, at 347.

commission of the principal offense.[75] It is not enough that he or she did so recklessly or unwittingly. Some jurisdictions also require that the defendant must "know the essential matters which constitute the principal offense."[76] This does not mean that the accused must have been aware that the conduct amounted to a criminal offense, as such an interpretation would allow an accused to argue ignorance of the law as a defense.[77] Nor is it necessary to prove that the defendant knew the precise details of the principal offense, such as time and place. It is sufficient that the accused had knowledge of the principal offender's intention to commit a crime of the type that was in fact committed.[78]

The requirement of actual knowledge may be a significant impediment to prosecution for complicity in human rights abuses. For example, Dutch national Frans van Anraat was prosecuted for complicity in Saddam Hussein's use of chemical weapons because he allegedly supplied the necessary chemicals during the 1980s.[79] He was acquitted of this charge on the basis that he did not know the use to which the chemicals would be put.[80] Similarly, Gus Van Kouwenhoven was charged with complicity in the war crimes of former Liberian President Charles Taylor.[81] Van Kouwenhoven operated a timber trading company in close association with the former president, but was acquitted of complicity charges due to lack of evidence that he had knowledge of the war crimes.[82]

Because of these difficulties, some jurisdictions adopt a lesser mens rea. For example, in Germany and the Netherlands, it is sufficient that the defendant was aware of the conduct and showed "indifference toward or acceptance of the chance that a proscribed result might occur."[83] This

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75. United States v. Reifler, 446 F.3d 65, 96 (2d Cir. 2006); Giorgianni v. R (1985) 156 C.L.R. 473, 487–88 (Austl.); R v. Greyeyes, [1997] 2 S.C.R. 825, 842 (Can.). *See also* 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 (2002) (discussion of the mens rea requirement in the United States).

76. *Giorgianni*, 156 C.L.R. at 487–88; Johnson v. Youden, [1950] 1 K.B. 544, 546 (U.K.). *See generally* United States v. Peoni, 100 F. 2d 401 (2d Cir. 1938). *See also* Criminal Code Act, 1995, § 11.2(3)(a) (2007) (Austl.); MODEL PENAL CODE § 2.06(3)(a) (2001); LAFAVE, *supra* note 46, at 675–83. The requirement of knowledge has also been applied by the International Criminal Tribunals for Rwanda and the former Yugoslavia. FAFO SURVEY, *supra* note 28, at 20.

77. *Johnson*, 1 K.B. at 546.

78. *See generally* R v. Bainbridge, [1960] 1 Q.B. 129 (U.K.).

79. FAFO SURVEY, *supra* note 28, at 19 n.17.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 20.

is not generally the case in common law countries, although in the United Kingdom it has been said that there are four different interpretations of the mens rea for complicity that require less than actual knowledge.[84]

Some concern has also been expressed that there must be a "shared intention" between the accomplice and the principal offender, and that this may be difficult to apply in the context of corporate complicity as the two actors may have different motivations for the conduct.[85] Although in most cases the accessory will share the principal offender's intention that the principal offense be committed, this is not, however, an essential requirement of secondary liability. That is, there is no need to show that the accessory and principal offender were in agreement or shared a common purpose.[86]

Further, it is important to remember the crucial distinction between intention and motive. Complicity requires that the accomplice intentionally assisted the commission of the principal offense. While the accomplice's motive may be evidence of that intention, it is not an element of the offense. For example, security forces may commit murder because of government policy and/or racial hatred. A corporation that is complicit in such conduct is still liable as an accessory notwithstanding that it was motivated by business interests. Nor does it matter that the accomplice did not wish the principal offense to be committed. An accomplice will still be liable whether indifferent or horrified about what is to happen.[87]

One circumstance in which a lesser standard of mens rea is required is where two or more people act in concert pursuant to a common purpose or joint enterprise to commit an offense. Where the agreed offense is actually committed, each party to the joint criminal enterprise is liable as a principal offender, irrespective of the actual role they played in its commission. More significantly, where the offense committed is different from that intended by the group, each party will be liable if the offense actually committed was a foreseeable consequence of the common pur-

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84. THE LAW COMMISSION, *supra* note 65, ¶ 2.65. The tests are:

> (1) belief that *P* might commit the conduct element; (2) foresight of the risk of a strong possibility that *P* will commit it; (3) contemplation of the risk of a real possibility that *P* will commit it; and (4) foresight that it is likely that *P* will commit it.

*Id.*

85. FAFO SURVEY, *supra* note 28, at 18–19.

86. Attorney-Gen.'s Reference (No. 1 of 1975), [1975] 1 Q.B. 773, 779 (U.K.).

87. Nat'l Coal Bd. v. Gamble, [1959] 1 Q.B. 11, 23 (U.K.) (cited with approval in Prosecutor v. Jean-Paul Akayesu, Case No. ICTR 96-4-T, Judgment, ¶ 539 (Sept. 2, 1998)); Dir. of Public Prosecutions for N. Ir. v. Lynch, [1975] 1 A.C. 653, 678 (H.L.).

pose. In some jurisdictions, the level of foresight required is low, requiring only that the defendant foresaw the offense actually committed was a *possible* consequence of the joint enterprise.[88] In others, such as the United States, the acts of the principal offender must have been a "natural and probable consequence" of the criminal scheme the accomplice encouraged or aided.[89] Although recognized in international law,[90] the doctrine is not universally adopted.

## II. PRINCIPLES OF CORPORATE CRIMINAL LIABILITY

Having considered the application of general principles of complicity in the context of human rights abuses, it is necessary to consider how those principles apply when the defendant is a corporation.[91] Corporate criminal liability is a relatively recent phenomenon, having evolved primarily in nineteenth century Anglo-American law as a response to the increasing role of corporations during the industrial revolution.[92] Although well established in many common law countries, civil law jurisdictions have generally been slower to recognize corporations as suitable subjects for criminal prosecution.[93] More commonly, these jurisdictions rely upon civil or administrative penalties, although in some cases such administrative penalties are much closer in form to criminal penalties.[94]

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88. Criminal Code Act, 1995, § 11.2(3)(b) (2007) (Austl.); Criminal Code of Canada, R.S.C., ch. C-46, §§ 21(2), 22(2) (1985); McAuliffe & McAuliffe v. R (1995) 183 C.L.R. 108, 113–14 (Austl.); R v. Powell, [1999] 1 A.C. 1, 6–7 (H.L.) (U.K.).

89. LAFAVE, *supra* note 46, at 687.

90. Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Law*, 93 CAL. L. REV. 75, 102–03 (2005).

91. The focus of this Article is on the liability of corporations as opposed to unincorporated entities which, in the absence of statutory provision to the contrary, are not subject to criminal liability in their own right. GLANVILLE WILLIAMS, TEXTBOOK OF CRIMINAL LAW 969 (2d ed. 1983). The Canadian Criminal Code defines "organization" extremely broadly, and unincorporated entities fall within this definition. Criminal Code of Canada, R.S.C., ch. C-46, § 2 (1985).

92. For a history of corporate criminal liability see L.H. LEIGH, THE CRIMINAL LIABILITY OF CORPORATIONS IN ENGLISH LAW, 15–42 (1969).

93. For a comparative perspective, see generally XIVTH INTERNATIONAL CONGRESS OF COMPARATIVE LAW, CRIMINAL LIABILITY OF CORPORATIONS (Hans de Doelder & Klauss Tiedemann eds., 1996).

94. THE LAW REFORM COMMISSION, CORPORATE KILLING 112–13 (2005) (Ir.); James Gobert & Emilia Mugnai, *Coping with Corporate Criminality—Some Lessons from Italy*, CRIM. L. REV. 619, 624 (2002).

Nonetheless, eleven of the sixteen Surveyed Countries apply criminal liability to legal persons, including corporations.[95] These countries represent a range of legal traditions, suggesting that there is indeed growing acceptance of corporate criminal liability. Although corporations are not within the jurisdiction of the International Criminal Court ("ICC"), this was apparently a result of procedural and definitional problems rather than a challenge to the "conceptual assumption that legal persons are bound by international criminal law."[96]

While early authority suggested that a company could not be indicted for manslaughter or any offense of violence,[97] the weight of authority is now to the effect that a corporation can commit any offense except those which, by their nature, can only be committed by an individual.[98] However, the individualistic nature of the criminal law, with its emphasis on guilty acts and guilty minds, presents particular challenges for the imposition of corporate criminal liability. A corporation, as a legal fiction, cannot act in its own right; it can only act through human agents. Accordingly, each jurisdiction has developed ways to render corporations liable for the actions of individuals.

For example, U.S. federal courts apply principles of vicarious liability, including for those offenses that require proof of mens rea.[99] Other jurisdictions have adopted a modified form of vicarious liability whereby the corporation will only be liable when the relevant conduct was engaged in by a person within the company of sufficient seniority to be regarded as

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95. FAFO SURVEY, *supra* note 28, at 13. Among the countries surveyed, this includes: Australia, Belgium, Canada, France, India, Japan, the Netherlands, Norway, South Africa, the United Kingdom, and the United States. *Id.* The five countries that do not permit legal persons to be prosecuted for criminal offenses are: Argentina, Germany, Indonesia, Spain, and the Ukraine. *Id.*

96. Andrew Clapham, *The Question of Jurisdiction Under International Criminal Law over Legal Persons: Lessons from the Rome Conference on an International Criminal Court*, *in* LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW, *supra* note 23, at 139, 191.

97. People v. Rochester Ry. & Light Co., 195 N.Y. 102, 106–09 (N.Y. 1909); R v. Cory Bros. & Co. Ltd., [1927] 1 K.B. 810, 815–17 (U.K.); R v. Great N. of Engl. Ry. Co., [1846] 9 Q.B. 315, 326, 115 Eng. Rep. 1294, 1298 (Q.B.). The question was left open by the Canadian Supreme Court in *Union Colliery Co. v. R*, [1900] 31 S.C.R. 81, 88–90 (Can.).

98. THE LAW COMMISSION, CODIFICATION OF THE CRIMINAL LAW: GENERAL PRINCIPLES—CRIMINAL LIABILITY OF CORPORATIONS, Working Paper No. 44, 23 (1972).

99. *See, e.g.*, N.Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481, 494–95 (1909); Standard Oil Co. of Tex. v. United States, 307 F.2d 120, 125 (5th Cir. 1962). *See generally* KATHLEEN BRICKEY, CORPORATE AND WHITE COLLAR CRIME 18–32 (4th ed. 2006).

the "directing mind and will" of the company.[100] Some jurisdictions, most notably Australia and Canada, have enacted comprehensive provisions specifically addressing the criminal liability of corporations.[101] Add to these general models of liability a raft of specific statutory provisions and the challenge is not so much devising a model of corporate criminal liability, but choosing the most appropriate one.

It is not proposed to discuss the merits of the various models of corporate criminal liability.[102] Less commonly analyzed, and representing a particular challenge in the context of MNCs, is the question of how to render a parent corporation liable for the conduct of its subsidiaries. The analysis has so far proceeded on the simple model of a corporation directly involved in the assistance or encouragement of the conduct in the host jurisdiction. In reality, this is rarely the case because the conduct of the parent is carried out through the intermediary of a subsidiary or subsidiaries. For example, Unocal conducted its operations in Burma through wholly owned subsidiaries,[103] while Talisman conducted its operations in the Sudan through a consortium of oil companies called the Greater Nile Petroleum Operating Company, Ltd. ("GNPOC").[104]

The rationale for interposing subsidiaries is easily understood; it minimizes risk and insulates the parent. Because of the principle of separate corporate identity, the subsidiary or related company is treated as a separate legal entity.[105] Consequently, the parent will generally not be liable for the conduct of the subsidiary, despite the "commercial reality that every holding company has the potential and, more often than not, in fact does, exercise complete control over a subsidiary."[106] Further insulation of the parent is provided by the principle of limited liability, whereby the

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100. Tesco Supermarkets, Ltd. v. Nattrass, [1972] A.C. 153, 171 (H.L.) (U.K.). *See also* Hamilton v. Whitehead (1988) 166 C.L.R. 121, 127 (Tesco as applied in Australia); Can. Dredge & Dock Co. v. R, [1985] 1 S.C.R. 662, 691–96.

101. Criminal Code Act, 1995, pt. 2.5 (2007) (Austl.); Criminal Code of Canada, R.S.C., ch. C-46, §§ 22.1–22.2 (1985). *See also* MODEL PENAL CODE § 2.07 (2001).

102. *See generally* JONATHAN CLOUGH & CARMEL MULHERN, THE PROSECUTION OF CORPORATIONS 64–182 (2002); JAMES GOBERT & MAURICE PUNCH, RETHINKING CORPORATE CRIME 78–178 (2003).

103. Doe v. Unocal Corp., 395 F.3d 932, 937 (9th Cir. 2002), *reh'g en banc granted*, 395 F.3d 978, 979 (9th Cir. 2003).

104. Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 300 (S.D.N.Y. 2003).

105. Adams v. Cape Indus., PLC, (1991) Ch. 433, 536 (U.K.).

106. Briggs v. James Hardie & Co. (1989) 16 N.S.W.L.R. 549, 577 (Austl.). The situation is otherwise where the relevant conduct is carried out by an unincorporated division of an incorporated entity. Poller v. Columbia Broad. Sys., Inc., 284 F.2d 599 (D.C. Cir. 1960).

liability of shareholders, including corporate shareholders, is limited to the unpaid amount of their investment. The extension of this principle, designed to protect investors in the enterprise, to the enterprise itself is one of the most significant factors in the success of MNCs because it allows risk to be transferred to the (often undercapitalized) subsidiary.[107]

Thus, in the multi-tiered corporate group, with its first-tier, second-tier, and even third-tier subsidiaries, traditional entity law provides multiple layers of limited liability, with each upper-tier company insulated from liability for its lower-tier subsidiaries. Four, or even five, layers of limited liability in complex multinational groups are not uncommon.[108]

While complex corporate structures and the use of subsidiaries is now standard practice in the corporate world, the challenges they present are not new. Nor are they limited to the sphere of human rights abuses. Particularly in the United States, ever since limited liability was extended to corporate groups, courts have struggled to articulate a principled basis on which to mitigate its more extreme consequences by rendering the parent liable for the conduct of the subsidiary.[109] This has involved courts applying principles of agency liability as well as so-called enterprise liability whereby the courts will pierce the corporate veil and impose liability on the parent for the conduct of the group.[110] "This theory recognizes that when a parent and its subsidiary are part of an economically integrated enterprise, there is, in effect, one corporate actor and consequently 'all components comprising the integrated group should accordingly be liable.'"[111]

While extensive, this body of jurisprudence is of little assistance. First, even in the United States, there are "hundreds of decisions that are irreconcilable and not entirely comprehensible,"[112] with principles that have been described as a "legal quagmire."[113] Second, there is limited authority for their application in the context of criminal liability, a rare example being the prosecution of Exxon Corporation for the grounding of the

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107. PHILLIP E. BLUMBERG, THE MULTINATIONAL CHALLENGE TO CORPORATION LAW 58–60 (Oxford Univ. Press 1993).

108. *Id.* at 59.

109. *See generally* BLUMBERG, *supra* note 2.

110. *See* BLUMBERG, *supra* note 2, at pp. 105–36.

111. Robert Iraola, *Criminal Liability of a Parent Company for the Conduct of its Subsidiary: The Spillover of the Exxon Valdez*, 31 CRIM. L. BULL. 3, 9 (1995) (citing PHILLIP I. BLUMBERG, THE LAW OF CORPORATE GROUPS: PROBLEMS OF PARENT AND SUBSIDIARY CORPORATIONS UNDER STATUTORY LAW OF GENERAL APPLICATION 967 (1983)).

112. BLUMBERG, *supra* note 107, at 86–87.

113. United States v. John-T Chemicals, Inc., 768 F.2d 686, 691 (5th Cir. 1985), *cert. denied*, 475 U.S. 1014 (1986).

Exxon Valdez oil tanker.[114] In denying Exxon's motion to dismiss, the District Court apparently accepted both agency and enterprise theory as grounds of Exxon Corporation's liability for the conduct of its subsidiary.[115] This decision is, however, of little precedential value as the corporations ultimately entered into a plea agreement for $150 million, which was subsequently reduced to a $25 million fine and $100 million in restitution.[116] Third, outside the United States, courts are more inclined to adhere to the principle of separate corporate personality, with no clear principle indicating the circumstances in which a court will be prepared to lift the corporate veil in civil, let alone criminal, cases.[117]

Although of limited general application, such cases do serve to focus attention on the concept of control as a means of rendering the parent liable for the group.[118] Given the variety of corporate structures, whether a corporation controls another can be a complex question. Clearly there must be something beyond the level of control inherent in the parent-subsidiary relationship. But in what circumstances should a group of companies be regarded as an integrated entity rather than separate businesses? While the answer is obviously dependent on the circumstances, "[w]hat should be critical to the analysis should be the reality of the relationship between parent and subsidiary and not the technical legal form that it takes."[119] Relevant factors include the level of control actually exercised by the parent over the subsidiary, the extent to which the companies are economically integrated, the level of financial and administrative interdependence, overlapping employment structures, and a common group persona.[120]

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114. Nat'l Dairy Prods. Corp. v. United States, 350 F.2d 321, 327 (8th Cir. 1965); United States v. Exxon Corp., No. A90-015 CR, 1990 U.S. Dist. LEXIS 1821 (D. Alaska 1990). *See also* United States v. Johns-Manville Corp., 231 F. Supp. 690, 698 (E.D. Pa. 1964).

115. Iraola, *supra* note 111, at 8. *See also* H. Lowell Brown, *Parent-Subsidiary Liability Under the Foreign Corrupt Practices Act*, 50 BAYLOR L. REV. 1, 35 (1998).

116. *In re* Exxon Valdez, 270 F.3d 1215, 1245–46 (9th Cir. 2005).

117. *See, e.g.*, Adams v. Cape Indus., PLC, (1990) Ch. 433, 476. *See generally* Ian M. Ramsay & David B. Noakes, *Piercing the Corporate Veil in Australia*, 19 COMPANY & SEC. L. J. 250 (2001).

118. BLUMBERG, *supra* note 107, at 59–60. *See also* William J. Rands, *Domination of a Subsidiary by a Parent*, 32 IND. L. REV. 421, 433–46 (1999).

119. GOBERT & PUNCH, *supra* note 102, at 153. *See also* BLUMBERG, *supra* note 107, at 89–120.

120. BLUMBERG, *supra* note 107, at 94–95. *See also* United States v. John-T Chemicals, Inc., 768 F.2d 686, 691–92 (5th Cir. 1985), *cert. denied*, 475 U.S. 1014 (1986); GOBERT & PUNCH, *supra* note 102, at 152.

While the common law is reluctant to look behind notions of separate corporate identity and limited liability, it must be remembered that these are simply legal fictions and are subject to legislative intervention. One way in which this may be done is by imposing liability in functional terms. By imposing liability upon corporations that "control" other corporations, the controlling corporation may then be made liable for the conduct of the group.[121] For example, under the Age Discrimination in Employment Act of 1967,[122] when an employer controls a corporation incorporated in a foreign country, any prohibited practice by that corporation is presumed to be the conduct of the employer.[123] The determination of whether an employer controls a corporation is based upon four factors: "the interrelation of operations, common management, centralized control of labor relations, and common ownership or financial control, of the employer and the corporation."[124]

Similarly, the Bank Holding Company Act of 1956 defines a "bank holding company" to mean "any company which has control over any bank or over any company that is or becomes a bank holding company by virtue" of this Act.[125] Under section 1841(a)(2), any company has control over a bank or company if:

> (A) the company directly or indirectly or acting through one or more other persons owns, controls, or has power to vote 25 per centum or more of any class of voting securities of the bank or company;
>
> (B) the company controls in any manner the election of a majority of the directors or trustees of the bank or company; or
>
> (C) the Board determines, after notice and opportunity for hearing, that the company directly or indirectly exercises a controlling influence over the management or policies of the bank or company.[126]

An alternative way of rendering the parent liable for the conduct of the group would be to impose an obligation on the parent corporation to ensure that it takes reasonable steps to ensure that neither it, nor any of its subsidiaries are engaged in specified offenses, irrespective of where they

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121. BLUMBERG, *supra* note 107, at 107–16. In some cases, courts have interpreted statutory provisions as imposing group liability in order to ensure that legislative intention was not frustrated. United States v. Park, 421 U.S. 658, 672 (1975) (discussing United States v. Dotterweich, 320 U.S. 277 (1943)).

122. Age Discrimination in Employment Act, 29 U.S.C. § 623(h) (2006).

123. *Id.* § 623(h)(1).

124. *Id.* § 623(h)(3).

125. Bank Holding Company Act, 12 U.S.C. § 1841(a)(1) (2006).

126. *Id.* §1841(a)(2)(A)–(C).

occur.[127] The advantage of such an obligation is that it avoids the need for attribution and focuses on the failure of the corporation itself:

> Where a statutory duty to do something is imposed on a particular person . . . and he does not do it, he commits the actus reus of an offence. . . . but this is not a case of vicarious liability. If the employer is held liable, it is because he personally has failed to do what the law requires him to do and he is personally not vicariously liable. There is no need to find someone—in the case of a company, the brains and not merely the hands—for whose act the person with the duty be held liable.[128]

Corporate liability for a failure to act is a well-established basis of liability, particularly in the area of workplace safety, where there is a duty to ensure a safe workplace. A similar concept is apparently found in Italy, where a corporation can be made liable for "structural negligence;" that is, failing to ensure that suitable systems were in place to prevent an the commission of an offense.[129] In the context of complicity, the Model Penal Code provides that a defendant will be liable as an accomplice if, "having a legal duty to prevent the commission of the offense, [he or she] fails to make proper effort so to do . . . with the purpose of promoting or facilitating the commission of the offense."[130]

By focusing on what the corporation failed to do, liability for omissions allows a broad range of factors to be taken into account, allowing an assessment of the "culture" of the organization. Any danger that the provision is overbroad can be minimized by providing for an appropriate fault element, such as criminal negligence, or by allowing a due diligence defense. In the context of MNCs, liability for the failure resides with the parent itself, rather than in the complex web of its subsidiaries. However, even if corporate liability may be imposed in enterprise terms, rendering the company liable for the conduct of those entities that it controls, an additional challenge remains. In what circumstances can the criminal law apply extraterritorially?

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127. Olivier De Schutter, *Extraterritorial Jurisdiction as a Tool for Improving the Human Rights Accountability of Transnational Corporations* 44–45 (Catholic Law Sch. & Office of the U.N. High Comm'r for Human Rights, Background Paper, Nov. 3, 2006), *available at* http://www.reports-and-materials.org/Olivier-de-Schutter-report-for-SRSG-re-extraterritorial-jurisdiction-Dec-2006.pdf.

128. John Smith, Case Commentary, *Health and Safety at Work:* R v. British Steel, PLC, 1995 CRIM. L. REV. 655. *See also* LAW COMMISSION, CRIMINAL LAW: INVOLUNTARY MANSLAUGHTER, Consultation Paper No. 135, 129 (1994).

129. Gobert & Mugnai, *supra* note 94, at 626.

130. MODEL PENAL CODE § 2.06(3) (2001).

## III. PRINCIPLES OF EXTRATERRITORIAL CRIMINAL JURISDICTION

There is a general presumption that criminal laws are local in operation and apply only in the sovereign territory of the state that enacted the law.[131] This territorial principle is almost universally recognized and is the most common basis for the exercise of criminal jurisdiction.[132] Although intended to limit the reach of criminal laws, the principle of territoriality may nonetheless encompass extraterritorial conduct in some cases. In particular, the doctrine of ubiquity allows a state to exert jurisdiction over an offense when only part of the offense was committed within the jurisdiction.[133] This is particularly relevant in the context of complicity, where the act of complicity may occur in the home jurisdiction, even though the principal offense occurred in the host jurisdiction.

Although at common law the application of this doctrine in such cases was limited,[134] this position may of course be altered by clear legislative intention. For example, under section 20 of the Misuse of Drugs Act 1971, it is an offense for a person to assist in or induce the commission in any place outside the United Kingdom an offense punishable under the provisions of a corresponding law in force in that place.[135] It is therefore possible for an appropriately drafted statute to impose liability on a parent corporation for complicity with respect to conduct occurring within the home jurisdiction, even though the principal offense is intended to be committed in the host jurisdiction. This doctrine has particular significance in the context of corporate liability as corporate offenders, unlike individuals, can be in more than one place at one time. Unless the corporation's operations are completely restricted to the host jurisdiction, it is likely that at least some of the relevant conduct will have occurred in the home jurisdiction. For example, although the provision of assistance may have occurred primarily in the host jurisdiction, executive approval may have been given in the home jurisdiction. It may therefore be argued that

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131. Treacy v. Dir. of Pub. Prosecutions, [1971] A.C. 537, 561 (U.K.). *See generally* Equal Employment Opportunity Comm'n v. Arabian Am. Oil Co., 499 U.S. 244 (1991); R v. Finta, [1994] 1 S.C.R. 701, 805–12 (Can.).

132. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 cmt. c (1987); DAVID LANHAM, CROSS-BORDER CRIMINAL LAW 30 (1997); Council of Europe: European Committee on Crime Problems, *Extraterritorial Criminal Jurisdiction*, 3 CRIM. L.F. 441, 446 (1992) (hereinafter *Extraterritorial Criminal Jurisdiction*).

133. *Extraterritorial Criminal Jurisdiction*, *supra* note 132, at 446–47, 462.

134. MICHAEL HIRST, JURISDICTION AND THE AMBIT OF THE CRIMINAL LAW 129 (Andrew Ashworth ed., 2003).

135. Misuse of Drugs Act of 1971, 1971, § 20, sched. 1 (Eng.). *See also* Crimes Act 1958, § 181 (1958) (Vict.).

the home jurisdiction may assert jurisdiction as part of the offending conduct occurred within its jurisdiction.

In any event, the enactment of extraterritorial laws in this context is clearly justified on two bases. The first is the principle of universal jurisdiction, which recognizes the right of any country to exercise jurisdiction over a defendant with respect to "universal crimes" such as piracy, genocide, and war crimes.[136] Jurisdiction may be exercised irrespective of the nationality of the defendant or the locus of the offense, with such sweeping jurisdiction being justified by the egregious nature of the conduct and the need to limit the availability of safe havens for those accused of such crimes.[137] A number of the Surveyed Countries impose universal jurisdiction with respect to crimes under the Rome Statute.[138] However, given the need for the defendant to have some presence in the jurisdiction in order to be prosecuted, it is argued that the second basis of jurisdiction, the nationality or active personality, provides a more sound rationale for extraterritoriality in the context of corporate defendants.

This second principle recognizes that a state may extend the application of its criminal laws to its own nationals wherever they may be located. It is widely recognized as a basis of extraterritorial criminal laws and is adopted by a number of the Surveyed Countries with respect to Rome Statute crimes committed by their nationals.[139] For example, the International Criminal Court Act of 2001 (U.K.) imposes liability for genocide, crimes against humanity, and war crimes, and applies extraterritorially to acts committed outside the jurisdiction by U.K. nationals or residents.[140]

There are essentially two rationales for a country's imposition of extraterritorial criminal liability on its own nationals. First, it is a means for

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136. *Extraterritorial Criminal Jurisdiction*, *supra* note 132, at 453. *See also* LANHAM, *supra* note 132, at 37–38.

137. *Extraterritorial Criminal Jurisdiction*, *supra* note 132, at 453.

138. FAFO SURVEY, *supra* note 28, at 16. Australia, Canada, the Netherlands, Spain and the United Kingdom are examples among the countries surveyed. *Id.* Under articles six through eight of the Rome Statute, these offenses are genocide, crimes against humanity and war crimes. Rome Statute, *supra* note 41, arts. 6–8.

139. FAFO SURVEY, *supra* note 28, at 16. Argentina, Australia, Belgium, Canada, Germany, Japan, Norway, South Africa, Ukraine, the United Kingdom and the United States are examples among the countries surveyed. *Id.* It is apparently recognized and applied in civil law countries more commonly than in common law countries; HIRST, *supra* note 134, at 46, 201.

140. International Criminal Court Act 2001, ch. 17, § 51 (2001) (U.K.). Liability also extends to ancillary conduct such as aiding and abetting. *See id.* at §§ 51, 55. *See also* Criminal Code Act, 1995, ch. 8 (2007) (Austl.); Crimes Against Humanity and War Crimes Act, S.C. 2000, ch. 24 § 8 (Can.).

states to subject "their own nationals to certain national norms and [to protect] fundamental interests from attacks by a state's own nationals from abroad."[141] This rationale is clearly applicable in the context of ensuring the observance of international human rights norms by MNCs. Second, it allows those countries that do not extradite their own nationals to ensure that offenses by those nationals do not go unprosecuted. This rationale assumes particular significance in the context of MNCs because a corporation cannot be extradited.

Extradition is a process whereby one state will surrender a person for prosecution in another state. The mechanism by which defendants are extradited has evolved in the context of the physical transfer of an individual and there is no precedent for the "extradition" of a corporation.[142] Although it has been suggested that "[a] corporation . . . may be made to answer through extradition proceedings, just as a natural person would be,"[143] it is difficult to see how this can in fact be achieved. While a corporation may commit a criminal offense in one jurisdiction even though it was incorporated in another,[144] a corporation cannot physically move from one jurisdiction to another. There is therefore no way in which a host jurisdiction may compel the "transfer" of a corporate defendant to face charges in that jurisdiction. Nor is there any power by which to extradite individual officers or employees of the organization unless they are charged in their own right. Even if personally charged, there is no compulsion on them to appear as the company unless directed to by the company itself.[145]

The host jurisdiction is therefore faced with two options. First, it may proceed in absentia. While ordinarily the trial of serious criminal offenses requires the personal presence of the defendant,[146] courts may proceed in absentia when, for example, the accused has absconded or is

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141. *Extraterritorial Criminal Jurisdiction*, *supra* note 132, at 448. *See also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 (1987).

142. GOBERT & PUNCH, *supra* note 102, at 157. *See also* De Schutter, *supra* note 127, at 24.

143. ANITA RAMASASTRY & ROBERT C. THOMPSON, COMMERCE, CRIME AND CONFLICT: LEGAL REMEDIES FOR PRIVATE SECTOR LIABILITY FOR GRAVE BREACHES OF INTERNATIONAL LAW—A SURVEY OF SIXTEEN COUNTRIES, SURVEY RESPONSE OF THE UNITED STATES OF AMERICA, at 19 (Fafo 2006).

144. McNabb v. T. Edmondson & Co. (1941) V.L.R. 193 (Austl.) (relying on an inference from Home Benefits Proprietary, Ltd. v. Crafter (1939) 61 C.L.R. 701, where the High Court upheld a conviction against a foreign company, the issue passing sub silentio).

145. GOBERT & PUNCH, *supra* note 102, at 157.

146. Of course, even where a corporation is present in the jurisdiction, it can only ever appear by representative.

otherwise absent.[147] In some jurisdictions, specific provision is made for proceedings in absentia when a corporate defendant does not appear.[148]

Alternatively, the corporation may submit to the jurisdiction. While initially it may seem unusual that a corporation would voluntarily submit to a criminal prosecution, it may ultimately be in the company's interest to do so. For example, the company may have significant business interests in the jurisdiction, which may be jeopardized if it does not cooperate. It is notable that all of the prosecutions of foreign corporations under the Foreign Corrupt Practices Act ("FCPA") appear to have been the result of guilty pleas.[149]

In either case, even if the host jurisdiction were to return a verdict against the defendant corporation in absentia, such a verdict would only be enforceable against those assets of the corporation that remained in the jurisdiction. The enforcement of a criminal judgment beyond those assets would be extremely problematic and would require the cooperation of the home jurisdiction. A verdict in absentia may also give rise to arguments of double jeopardy if another jurisdiction were to subsequently try the corporation. Given the practical difficulties surrounding extradition of corporate defendants, it is argued that the nationality principle provides a clear justification for the prosecution of corporations for extraterritorial conduct. The difficulty lies in determining the nationality of a corporation. There are a number of determinants that may be applied, including the "siége local" (principal place of management), the locality of the principal shareholder, the principal place of business, or the place of incorporation.[150] Of these, the most feasible determinants are principal place of business and place of incorporation.

Principal place of business as a jurisdictional basis is well known in civil proceedings, and requires that the entity do business "not occasionally or casually, but with a fair measure of permanence and continuity" in the jurisdiction.[151] The activities within the jurisdiction need not be conducted by the foreign corporation itself, but may be performed on its behalf by an agent.[152] It therefore allows the prosecution of a corporation

147. R v. Jones (No. 2) (1972) 1 W.L.R. 887 (Austl.).

148. Crimes Act 1958, § 359(B) (1958) (Vict.).

149. Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1 to -3 (1998); Paul D. Carrington, *Law and Transnational Corruption: The Need for Lincoln's Law Abroad*, 70 LAW & CONTEMP. PROBS. 109, 116 (2007).

150. *Extraterritorial Criminal Jurisdiction*, *supra* note 132, at 466.

151. Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 329 (S.D.N.Y. 2003) (quoting Hoffritz for Cutlery, Inc. v. Amajac, Ltd., 763 F.2d 55, 58 (2d Cir. 1985)).

152. Ken Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 95 (2d Cir. 2000).

irrespective of where it is incorporated, so long as its principal place of business was in the prosecuting country.

While it would therefore seem to be an ideal jurisdictional basis for corporate prosecutions, and is used as such in the FCPA,[153] this strength is also its weakness. The possibility that a company may have more than one place of business raises one of the primary concerns in relation to the assertion of extraterritorial criminal jurisdiction, which is that it may give rise to competing jurisdictional claims.[154] Ordinarily such disputes in the criminal law would be resolved by the extradition process, as there is no criminal law equivalent of forum non conveniens. In essence, the jurisdiction that has the defendant is ultimately the one that has the ability to prosecute. However, this does not apply in the case of a corporate defendant which, as already discussed, cannot be extradited. Consequently, there is the possibility that a corporate defendant could be prosecuted in more than one jurisdiction.

Accordingly, for reasons of "certainty and convenience," it is submitted that place of incorporation is the most appropriate basis for determining nationality.[155] In contrast to the other determinants, the place of incorporation is easily established. It is also fixed as each corporate entity can have only one place of incorporation and hence one nationality. This helps to avoid competing jurisdictional claims and also provides a level of certainty, which is essential in the context of criminal liability. Defendants, whether corporate or individual, are entitled to be able to ascertain with some predictability their potential criminal liability.

In applying this principle to MNCs, it must be remembered that although often described as entities in their own right, MNCs are merely "a group of corporations, each established under the law of some state, linked by common managerial and financial control and pursuing integrated policies."[156] A company incorporated in another jurisdiction is a new and distinct entity. The nationality of each constituent corporation is therefore determined separately and not by reference to its parent or related corporations. For example, it has been alleged that an Australian company, Anvil Mining Ltd., was complicit in war crimes committed by soldiers in the Democratic Republic of Congo.[157] The crimes, which in-

153. 15 U.S.C. § 78dd-2(h)(1)(B) (defining domestic concern).

154. *Extraterritorial Criminal Jurisdiction*, *supra* note 132, at 465.

155. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 213 cmt. c (1987). *See, e.g.*, Dempster v. Nat'l Companies & Sec. Comm'n (1993) 9 W.A.R. 215 (Austl.) (application of the nationality principle in the context of a corporate criminal prosecution).

156. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 213 cmt. f (1987).

157. David Lewis, *Congo Court Urges Massacre Trial for Foreign Miners*, REUTERS, Oct. 16, 2006, *available at* http://today.reuters.com/News/CrisesArticle.aspx?storyId

cluded summary executions, rape, and looting, were alleged to have occurred near the town of Kilwa.[158] After the town was seized by rebels in October 2004, government soldiers counter-attacked, killing at least seventy three people according to a 2005 UN investigation.[159] Anvil's silver and copper mines are near the town, and the company's trucks and airplanes were used by the army during the operation.[160] It was alleged that in failing to withdraw the vehicles, the Anvil staff members "knowingly facilitated (the actions of) the accused . . . when they committed the war crimes."[161] Anvil claimed that the vehicles were requisitioned by the military and that it had no choice but to hand them over.[162]

In 2004, Anvil Mining underwent a corporate restructuring whereby the Australian company, Anvil Mining NL, was acquired by the Canadian company, Anvil Mining Ltd.[163] Anvil NL became a wholly owned subsidiary of Anvil Mining Ltd., and its shares of Anvil NL were delisted from the Australian and Berlin Stock Exchanges.[164] Anvil NL remains incorporated in Australia, but under the name Anvil Mining Management NL.[165]

Applying place of incorporation as the test of nationality, Canada would have jurisdiction to prosecute Anvil Mining, while Australia could prosecute Anvil Mining Management NL. Applying the place of business test, Australia would have jurisdiction over Anvil Mining *and* Anvil Mining NL since, although Anvil Mining is incorporated in Canada, its principal place of business is in Australia.[166] However, even if a case proceeded to judgment, the ability to enforce that judgment would be limited to the assets of the company within Australia.

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=L16676754. In another recent example, a civil action has been brought against the U.S. coal company Drummond alleging that the company offered money and cars to right-wing paramilitary gunmen to kill union leaders at one of its mines in Northern Columbia. Verna Gates, *Drummond's Colombia Rights Trial Begins in Alabama*, REUTURS, July 9, 2007, *available at* http://www.reuters.com/article/domesticNews/idUSN7928491520070709.

158. Lewis, *supra* note 157.

159. *Id.*

160. *Id.*

161. *Id.* (internal quotations omitted).

162. *Id.*

163. *Anvil Mining Limited*, CAN. STOCK REV., Mar. 3, 2006, *available at* http://www.canstock.com/shownews.php?article_id=29.

164. *Id*.

165. Australian Securities and Investments Commission, http://www.search.asic.gov.au (follow "Company Search" hyperlink; then search by organization name for "Anvil Mining Management NL").

166. ANVIL MINING, 2006 ANNUAL REPORT 65, *available at* http://www.anvilmining.com/files/Anvil_AR06_lo-res_March26.pdf.

## IV. LEGISLATIVE REFORM

The foregoing discussion has illustrated that in principle there is an underlying doctrinal framework that would allow for the prosecution of corporations for complicity in human rights abuses occurring outside the host jurisdiction. While the imposition of such liability is theoretically possible, it compounds complexity upon complexity, combining three areas of law that have evolved primarily with individuals in mind, and applying them to circumstances for which they are not ideally suited. Even if the political will could be found to bring such a prosecution, doctrinal difficulties would be exacerbated by problems of gathering evidence in foreign jurisdictions. Large corporations are likely to contest such charges vigorously. Is there any possibility of success?

It is suggested that the best chance of a successful prosecution is to enact specific provisions tailored to corporate defendants and imposing extraterritorial liability. A model of what may be achieved can be found in the FCPA, which imposes extraterritorial criminal liability with respect to certain practices involving the bribery of foreign officials. For the purposes of illustration, this Article focuses on section 78dd-2, which applies to domestic concerns, and section 78dd-3, which applies to domestic concerns and persons other than issuers.[167] Under section 78dd-2(a), it is an offense for any domestic concern "or for any officer, director, employee, or agent of such domestic concern or any stockholder thereof acting on behalf of such domestic concern, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of [certain prohibited transactions relating to foreign officials]."[168] It expressly applies to U.S. corporations, as well as organizations with their principal place of business in the United States.[169] Jurisdiction under the FCPA also extends to conduct of a "United States person" acting outside the United States, whether or not the person "makes use of the mails or any means or instrumentality of interstate commerce."[170] Extraterritorial jurisdiction in such cases is based on the nationality principle because "United States person" is defined to include corporations organized under the laws of the United States.[171]

The extraterritorial reach of the FCPA is further extended by section 78dd-3(a), which makes it an offense for *any* person, "while in the territory of the United States, corruptly to make use of the mails or any

167. Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1 (1994) (applies to issuers).
168. *Id.* § 78dd-2(a).
169. *Id.* § 78dd-2(h)(1)(B).
170. *Id.* § 78dd-2(i)(1).
171. *Id.* § 78dd-2(i)(2).

means or instrumentality of interstate commerce or to do any other act in furtherance of [a prohibited transaction]."[172] "Person" for these purposes is defined to include corporations organized under the law of a foreign nation.[173] Consequently, the United States may exercise criminal jurisdiction over a foreign corporation with respect to conduct occurring primarily outside the United States, so long as the corporation made use of the mails or the Internet in the United States.[174] It does not require that the corporation had its principal place of business in the United States, so long as it had some presence in the jurisdiction.[175]

Although this provision is not phrased in traditional complicity terms, the term "in furtherance" of is apt to encompass a broad range of conduct associated with the prohibited transactions. As a U.S. federal statute, principles of vicarious liability apply and the extraterritorial reach of the legislation is clear, relying expressly upon either objective territoriality or nationality. However, even the most well-drafted provision is meaningless without the political will to prosecute and it is in this respect that the FCPA is perhaps most notable.

Criminal prosecutions under the FCPA can only be brought by the U.S. Department of Justice[176] and a summary of prosecutions under the FCPA reveals that the Department has pursued such prosecutions with some vigor.[177] Prior to 1998, it appears that FCPA prosecutions primarily involved U.S. corporations operating directly in foreign countries.[178] However, the Act was amended in 1998 to expand its extraterritorial reach.[179] Since then, in addition to prosecutions against U.S. corporations,[180] there

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172. *Id.* § 78dd-3(a).

173. *Id.* § 78dd-3(f)(1).

174. 15 U.S.C. § 78dd-3(a) (1994).

175. *Id.*

176. *See* H.R. REP. NO. 95-640, at 9, 12 (1977) (stating that criminal prosecutions under the FCPA are brought by the Department of Justice). Civil enforcement actions may be brought by the Securities Exchange Commission.

177. *See generally* Danforth Newcomb & Philip Urofsky, *FCPA Digest of Cases and Review Releases Relating to Bribes to Foreign Officials Under the Foreign Corrupt Practices Act of 1977*, Feb. 13, 2008, *available at* http://www.shearman.com/files/upload/FCPA_Digest.pdf.

178. *Id.* at 58–80.

179. International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (1998).

180. Newcomb & Urofsky, *supra* note 177, at 42 (discussing United States v. DPC (Tianjin) Co. No. CR 05-482 (C.D. Cal. 2005)). *See also* Deferred Prosecution Agreement, United States v. Monsanto Co., No. 1:05-CR-00008 (D.D.C. 2005), *available at* http://corporatecrimereporter.com/documents/monsantoagreement.pdf; Agreement between U.S. Dep't of Justice and InVision Techs., Inc. (Dec. 3, 2004), *available at* http://corporatecrimereporter.com/documents/invision1.pdf; Agreement between Crimi-

have been prosecutions successfully targeting U.S. corporations operating through subsidiaries,[181] foreign corporations operating through subsidiaries,[182] and a foreign issuer listed on the New York Stock Exchange.[183] Of eight prosecutions brought against corporations since 1998, four were against foreign corporations.[184] Of the new investigations commenced between 2005 and 2007, nineteen of the twenty-four have been of U.S. corporations or a combination of U.S. and foreign corporations, with five directed solely at foreign corporations.[185]

In another example of corporate criminal liability for extraterritorial conduct, the U.S. multinational Chiquita Brands International, Inc., recently pleaded guilty to engaging in prohibited transactions with a designated terrorist organization.[186] Chiquita pleaded guilty to making payments via a Colombian subsidiary to the United Self-Defense Forces of Columbia ("AUC").[187] The payments were made in response to threats of harm to the company's personnel and property, and were approved by senior executives who were aware that the AUC was a terrorist organization.[188]

Another useful precedent may be found in division 270 of the Australian Criminal Code Act of 1995, which creates a number of offenses relating to slavery. Of particular relevance, section 270.3 provides that a person (including a corporation)[189] who, whether within or outside Australia, intentionally:

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nal Div., Fraud Section, U.S. Dep't of Justice and Micrus Corp. (Feb. 28, 2005), *available at* http://corporatecrimereporter.com/documents/micrus.pdf.

181. Agreement between U.S. Dep't of Justice and SSI Int'l Far East, Ltd., No. 3:06-CR-00398 (D. Or. 2006), *available at* http://www.secinfo.com/d1znFa.v22t.d.htm. *See also* Newcomb & Urofsky, *supra* note 177, at 47, 54 (discussing United States v. Titan Corp., No. CR-05-314 (S.D. Cal. 2005) and United States v. Syncor Taiwan, Inc., No. CR-02-1244 (C.D. Cal. 2002)).

182. Newcomb & Urofsky, *supra* note 177, at 31, 49–50 (discussing United States v. Vetco Gray Controls Inc., No. 07-CR-004 (S.D. Tex. 2007) and United States v. ABB Vetco Gray, Inc. (S.D. Tex. 2004)).

183. In the Matter of Statoil, ASA, Exchange Act Release No. 54,599, 89 SEC Docket 283, 286 (Oct. 13, 2006), *available at* http://www.sec.gov/litigation/admin/2006/34-54599.pdf.

184. Newcomb & Urofsky, *supra* note 178, at 4.

185. *Id.* at 2–3.

186. U.S. DEP'T OF JUSTICE, *Chiquita Brands International Pleads Guilty to Making Payments to a Designated Terrorist Organization and Agrees to Pay $25 Million Fine*, Mar. 19, 2007, *available at* http://www.usdoj.gov/opa/pr/2007/March/07_nsd_161.html.

187. *Id.*

188. *Id.*

189. Criminal Code Act, 1995, § 12.1 (2007) (Austl.).

> (a) possesses a slave or exercises over a slave any of the other powers attaching to the right of ownership; or
>
> (b) engages in slave trading; or
>
> (c) enters into any commercial transaction involving a slave; or
>
> (d) exercises control or direction over, or provides finance for:
>
> (i) any act of slave trading; or
>
> (ii) any commercial transaction involving a slave;
>
> is guilty of an offense.[190]

Again, it should be noted that this offense is couched in broad terms and is not limited in the same way as traditional concepts such as "aiding and abetting." Phrases such as "exercises control or direction over" and "provides finance for" are apt to cover a broad range of circumstances, and are particularly appropriate for corporate involvement in such offenses. On the other hand, unlike complicity under the general criminal law, the defendant in this case is not tried as a principal offender, but is punished for this specific offense. The section includes language that is explicitly extraterritorial in operation, and principles of corporate criminal liability are found in part 2.5 of the Act.

These are just two examples of legislative provisions that have been drafted in order to impose extraterritorial criminal liability on corporations. More importantly, the number of prosecutions under the FCPA shows just what can be achieved when the political will to enforce such statutes exists.

## CONCLUSION

> [I]t is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes . . .[191]

This Article has sought to demonstrate that it is possible to impose domestic criminal liability upon MNC's with respect to their involvement in human rights abuses outside their home jurisdiction. Such liability is justified not only because of the difficulty of pursuing offenders in the host jurisdiction, but because of the culpability of the parent corporation itself. Principles of separate corporate identity cannot be allowed to conceal the fact that these operations are ultimately controlled by, and for the benefit of, the parent corporation. Parent corporations should not be

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190. Criminal Code Act, 1995, § 270.3(1) (2007) (Austl.).

191. Rome Statute, *supra* note 41, pmbl.

able to reap the benefits of distinct corporate identity yet disown their subsidiaries when issues of accountability arise.

It has been demonstrated that principles of complicity may be applied to such conduct, that models of corporate fault exist, and that extraterritoriality may be justified on the basis of corporate nationality. Although this places the responsibility on the home jurisdiction, the situation may be seen as analogous to those countries that refuse to extradite their own nationals. Given the absence of effective international regulation and the inability of other countries to prosecute, it is incumbent upon the home jurisdiction to control the conduct of those corporations that are incorporated under its laws.[192]

While such prosecutions are theoretically possible under existing criminal law principles, it is suggested that the complexities are such that the chances of a successful prosecution are slim. Far more appropriate is to use these underlying principles to inform the drafting of legislation specifically addressing corporate involvement in human rights abuses. Such an approach avoids the strict application of traditional accessorial principles in favor of provisions that reflect the reality of corporate complicity. It also allows the basis of corporate fault to be clearly articulated and the extraterritorial reach of the laws expressly stated. Drafting specific laws also facilitates international agreement by allowing jurisdictions to adapt the provisions to their own circumstances. In particular, some jurisdictions do not recognize corporate criminal liability at all, preferring instead to impose civil or administrative sanctions.[193]

The merits of such an approach can be seen in the FCPA. Since its passage in 1976—a response to widespread bribery of foreign officials by U.S. corporations[194]—the United States has been instrumental in lobbying for a range of international instruments prohibiting the practice.[195] Recent decades have seen a significant number of successful prosecutions against both U.S. and foreign corporations with respect to conduct occurring outside the United States.[196] While the FCPA is by no means

192. Stephens, *supra* note 27, at 83.

193. Beth Stephens, *Translating Filártiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT'L L. 1, 44–46 (2002). *See also* United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25, Art. 10, U.N. Doc. A/RES/55/25 (Mar. 31, 2005).

194. *See* Logan Michael Breed, *Regulating Our 21st-Century Ambassadors: A New Approach to Corporate Liability for Human Rights Violations Abroad*, 42 VA. J. INT'L L. 1005, 1028–29 (2002).

195. Phillip I. Blumberg, *Accountability of Multinational Corporations: The Barriers Presented by Concepts of the Corporate Juridical Entity*, 24 HASTINGS INT'L & COMP. L. REV. 297, 315 (2001).

196. *See* Stephens, *supra* note 193, at 2–3.

the only model, it disproves the suggestion that it is not possible to prosecute large corporations with respect to extraterritorial conduct. With appropriate legislation and political will it clearly can be done.

Criminal prosecution of corporations under domestic law will never be the complete answer. It should, however, be part of an international response. According to the *United Nations Norms on the Responsibilities of Multinational Corporations and Other Business Enterprises with Regard to Human Rights*, states have an obligation to ensure that MNCs and other business enterprises respect human rights.[197] While an integrated response should involve a range of accountability mechanisms, it is the state of incorporation that has the practical ability to impose criminal sanctions on the parent corporation. Such accountability is particularly important given that corporations are not subject to the jurisdiction of the ICC. The imposition of criminal sanctions, however, goes beyond the issue of accountability. It is also a mechanism through which society expresses its condemnation and represents an unequivocal rejection of that conduct. Complicity in egregious human rights abuses is not just a matter of doing business. The application of extraterritorial criminal laws is one mechanism whereby such conduct is condemned irrespective of where it occurs.

197. U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on the Promotion & Prot. of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 13, 2003), *available at* http://www1.umn.edu/humanrts/links/norms-Aug2003.html.