

Discussion Paper:

Holding Multinational Corporations Accountable for Breaches of Human Rights *

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Can a corporation commit a crime? Can a corporation violate human rights? It is hard enough to conceptualize the 'corporation' for the purposes of developing legal and moral accountability at the best of times. The fate of some of the world's largest corporations underlined that difficulty in a stark way. In what senses did Enron and WorldCom exist? One day (one year) Enron was the subject of the biggest investigation undertaken by Human Rights Watch,¹ the next it had 'disappeared' in a cloud of debts.

These corporate scandals highlight two important distinctions: that between corporate and white collar crime, and that between corporate and directorial responsibility. As to the first, the Enron and other scandals disclose some white collar (that is offending *against the company itself*) as well as corporate crime (that is crime affecting consumers, employees and others). The second distinction subdivides the field of corporate crime into the accountability of the *corporate entity* and the accountability of individual directors and officers for that crime.

Many corporations, like states, have the resources and power both to perpetrate and to escape responsibility for abuse. While most of us would like to sign up to reduce human rights violations, the means of achieving that reduction remain elusive.

Three core questions emerge in relation to multinational corporations: what legal avenues are possible? what principles of accountability can be used? and what models of complicity can be applied?

1. Context: Corporate Regulation in an Era of Globalization

Many people believe it is necessary to bring multinational corporations under the authority of international human rights frameworks. Traditionally international law conforms to a state-centric view of world politics. States are viewed as the primary actors in the international system, with international law acting to regulate relations between states.² Challenges to the role and primacy of the state in world politics has, however, fundamentally altered the role and function of international law. International law has expanded, but is increasingly focused, through concerns about human rights, with the individual.

This strengthening international legal commitments to human rights can be seen as another aspect of the multi-faceted nature of globalization.³ States have lost authority to supranational bodies at the same time as they have privatized many of their domestic functions.⁴ But it is economic globalization that is generally presented as the major challenge to state sovereignty. The challenge comes in particular from financial speculation in deregulated currency markets and the growing economic power of multinational corporations. States are more likely to attempt to attract international capital rather than to try to regulate it.⁵ In a

globalized economy, firms (especially those in manufacturing) can move easily across borders and evade boycotts and sanctions.⁶ The diminishing centrality of the state in world politics is accompanied by the rise of Multinationals as rival sources of power and influence in the world.

We cannot take the term 'MNC' as legally uncontested or unproblematic.

The OECD Guidelines for Multinational Enterprises use the following definition :

...companies or other entities established in more than one country and so linked that they may co-ordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another. Ownership may be private, state or mixed.⁷

This reflects the more fluid organization and structure of many modern companies with strategic alliances with other producers, seeking economies of scale in manufacturing.

With intergovernmental aid now largely overtaken by foreign direct investment, the temptation for host countries to attract investors with minimal human rights standards is often difficult to resist.⁸ Human rights abuses can occur whether the outsourcing takes place via wholly or partly owned subsidiary or through use of supply contracts. It is the ability of MNCs to operate across national borders and outside the effective supervision of domestic and international law that makes them important actors ripe for greater investigation under international laws. MNCs often act in concert with host states, in suppressing local populations, forcibly moving them, or forcibly requiring their labor- this is known as 'militarized commerce'.

2. Holding corporations to account:

First it is useful to look at the framework of legal possibilities. While the most direct legal response to such violations would be through a criminal or civil action in the host country, it does not take much insight to see that it is unlikely that a state that itself abuses human rights would prosecute such cases or be receptive to civil litigation. This has led to the pursuit of legal redress in the home country of the multinational complicit in the host state's human rights abuses. For example, the litigation arising from the activities of Cape plc and Thor Chemical Holdings, both companies domiciled in the UK but operating in South Africa, and ATCA (Alien Tort Claims Act) cases in US.

While the UK cases focused on procedural questions, ATCA has provoked debate of substantive issues. ATCA cases are pursued under customary international law. Under customary international law, natural persons (individuals) have a duty not to violate

fundamental or peremptory norms (including piracy, aircraft hijacking, forced labour, genocide, war crimes and crimes against humanity). This has led some to conclude that:

‘To the extent that individuals have rights and duties under customary international law and international humanitarian law, multinational corporations as legal persons have the same set of rights and duties.’⁹

ATCA is an example of a national jurisdiction treating corporations in the same way as natural persons with regard to international customary law.¹⁰ This is less surprising in the USA where corporate liability for criminal offences is well established.

The federal Alien Tort Claims Act 1789 gave to US district courts

‘original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.’

It converts a violation of the international law of nations into a domestic tort actionable in federal courts. In its modern incarnation, ATCA has been held to apply to private actors in relation to international crimes of genocide, war crimes, and crimes against humanity.¹¹ In 1992 Congress endorsed the use of US civil law (including ATCA) against those who use torture and extra-judicial killing.¹²

Increasingly ATCA is being used to pursue corporations rather than individuals. Cases are brought on behalf of non-US citizens; one filed recently is a huge class action on behalf of all those alive during and affected by the apartheid regime in South Africa between 1948-1993. But it is the Unocal litigation, launched in 1996, that is likely to determine the liability principles. Unocal, in a joint venture with Total S.A, and the Myanmar (Burmese) government, undertook to extract oil and build a pipeline. The case against UNOCAL is brought on behalf of Burmese citizens who allegedly suffered torture, assault, rape, loss of their homes and property, forced labor, and other human rights violations at the hands of the military.¹³ In a landmark decision in 1997, a U.S. federal district court in Los Angeles concluded that corporations and their executive officers can be held legally responsible under the Alien Tort Claims Act for violations of international human rights norms in foreign countries, and that U.S. courts have the authority to adjudicate such claims. A federal appeals court panel ruled in September 2002 that the case could proceed to trial because evidence was presented that Unocal provided substantial assistance to the military.¹⁴ At issue is how much assistance is required to trigger a corporation’s liability for abuses perpetrated by another, in this case by the Burmese military. Is it sufficient to prove that Unocal knowingly assisted or does there have to be proved some element of control by Unocal over the host state’s actors? The case is now (March 2003) being heard in a full appeals court.

ATCA cases being litigated in other states include one against Exxon,¹⁵ and the one we have already mentioned on behalf of South Africans seeking \$50billion from Citigroup, UBS and Credit Suisse for the 'blood and misery' the companies allegedly caused by doing business with SA's apartheid regime. The companies are said to have profited from loans to Pretoria between 1985 and 1993 while the UN embargo on trade was in force.¹⁶

The point here is that ATCA is a threat - a smoking gun- which could explode in the face of an MNC at some point.¹⁷ While these cases show that breaches of human rights obligations do not necessarily have to be characterised as crimes, the normative nature of the standards makes crime the closest analogy. A number of points can be made about using tort, civil claims. ATCA is there, and this makes it a useful strategic option but is it the optimal mechanism? Significant problems in translating ATCA jurisprudence to national or international for a include: different regimes for civil damages (punitive damages in the US blur the crime/tort distinction); corporate liability for crime is problematic in many jurisdictions; and reliance on US domestic legislation is inappropriate as an international response.

Deploying criminal law against multinationals for their activities abroad is also fraught with difficulties. This is the background to the many calls for a formal international framework to deal with MNC complicity, such as this from Andrew Clapham.

A legally binding convention that is enforceable in practice needs to be formulated to ensure proper multinational accountability, capturing the supply-chain, not just subsidiaries. This convention must be applied internationally and, in a development of international law, apply to corporations as well as states.¹⁸

Two elements that would need to be addressed in such a convention are corporate liability principles and complicity principles. The notion of corporate responsibility for crime is far from universally accepted.¹⁹ Even in jurisdictions where it exists, its theoretical and doctrinal development is immature and quite varied. Applying these developments to multinationals will present further difficulties of course, even if the question were their direct responsibility for offences committed by their subsidiaries or contractors further down increasingly diffuse supply chains. Those arguing for a more developed doctrine of complicity often fail to consider this problematic foundation.

Principles of complicity are drawn mostly from criminal law and, are generally based on proof of knowledge, something that has proved difficult in the development of corporate liability. We are going to use the example of the international Criminal Court, although it does not yet have jurisdiction over legal persons/corporations, only natural persons. The ICC is concerned with the most egregious of wrongful conduct, genocide, crimes against humanity, war crimes, and aggression.²⁰ It does not take too big a leap of imagination to extend international criminal law

to multi nationals. Corporate liability for crime has increasingly appeared on the agenda in many jurisdictions over the last 10 years. Additionally, it is not so difficult to conceive a corporation as the subject of international law. While the mind-set of the criminal lawyer is to think about individuals, that of the international lawyer was for a long time to think about states/a group entity, albeit of a special kind. But the ICC and other War Crimes Tribunals specifically address the crimes of individual human agents. Thus it might be said that national law is going corporate and international law is going individual. Indeed the Rome Statute contained in its *draft* form a clause extending jurisdiction over legal persons.

But there are still many problems. Those who advocate the accountability of MNCs in international law tend to be much stronger in their arguments of why this would be a good thing than in their arguments of how this can be achieved. In particular they tend to skate over the problems of attributing mental elements to corporations. Models of corporate accountability range from the broad agency principle (applied in the US federal courts) under which the corporation is responsible for anything any of its employees does, to the very narrow identification doctrine that applies in the UK for mens rea offences- where liability arises only through the culpability of an individual director. There are also some developing third way models using corporate culture as the route to accountability.

Bearing those in mind, we want now to look at some complicity schemes that might be used in this field. We are thinking of liability of the corporate entity but there may be individuals within the corporate structure who act unlawfully and, while the Rome Statute does not address corporations as such, it can of course be applied to individual directors.²¹ It is more likely that the violations result from a corporate policy or decision, rather than being attributable to any one individual's conduct. An example would be where a company enters into a contract with a state to build a pipeline, or a dam, and negotiates the suspension of human rights laws as part of its terms (as appears to have occurred with the consortium constructing the Baku-Tblisi-Ceyahn pipeline and the Turkish government).²² It is this type of corporate participation that may prove the harder to capture.

Commonly a taxonomy of three types of involvement is used to describe corporate complicity with abusive states: direct, indirect and beneficiary complicity.²³ *Direct* complicity would include cases of joint participation, for example if Unocal had supplied personnel to work with the Burmese military. *Indirect* complicity comprises those situations where the multinational corporation's activities help to maintain a regime's financial and commercial infrastructure. Beneficiary or third- order involvement describes the way that businesses silently exploit the regime, benefiting from lower wage costs because of poor conditions or discriminatory practices, for example. Human Rights Watch suggests that corporate complicity covers:

Situations in which "[a] corporation facilitates or participates in government human rights violations. Facilitation includes the company's provision of material or financial

support for states' security forces which then commit human rights violations that benefit the company.¹²⁴

One writer describes this as 'collapsing' the distinction between direct and indirect complicity.²⁵

The South African Truth and Reconciliation Commission uses a similar but not entirely congruent scheme of first-, second- and third-order involvement in sustaining apartheid policies.²⁶ First-order complicity covers the specific case of those who assist in the design or implementation of human-rights-violating policies. A question might arise as to the role of lawyers whose clients participate in such negotiations.²⁷ Second-order complicity appears to encompass those who knew that their products would be used to assist in repression, such as the manufacture of torture instruments.

What is needed is a model of complicity that is not so restrictive as to be ineffective except against the most egregiously bad multinational corporations but neither so inclusive that it will be politically unacceptable except to the most ethically compliant states. This is the threshold question- what is the minimum level of involvement and or knowledge before liability is triggered?

The Rome Statute (setting up the International Criminal Court) is a useful starting point since its principles have been accepted by the international community. Article 25 more or less adopts the common law. The three routes to liability under the general principles of Article 25 roughly cover instigation, assistance and joint enterprise. It relies on knowledge, purpose and aim - all of which are difficult to apply to a corporation. Much would depend on the attribution principle to be adopted. While civil law and common law jurisdictions have similar principles in relation to complicity this, as we have already said, is not so in relation to corporate attribution. In coming closer we doubt rather that they will come to a consensus that takes the broadest model possible. If the Corpus Iuris draft is anything to go by this is likely to be some version between agency and identification. (Corpus Iuris is the attempt by EU to establish a common framework for dealing with financial crime etc in member states). Draft Article 13 states that offences can be committed by corporations 'provided the offence is committed for the benefit of the organisation by some organ or representative of the organisation, or any person acting in its name and having power, whether by law or merely in fact, to make decisions.'

In the context of this paper, commander or superior liability also provides a significant line of *analogous* argument. Under the Rome Statute the rules are slightly different for civilian than for military commanders but in both cases they are wider than the general complicity principles in Article 25 because they include liability for failure to act. Common elements are:

- (i) the crimes concerned activities that were within the effective responsibility and control of the superior; and

- (ii) the superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

In the case of civilians this failure to exercise control leads to liability only where:

- (iii) the superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

But for military commanders the provision does not require proof of knowledge or wilful blindness, it is enough that the defendant 'knew or, *owing to the circumstances at the time, should have known* that the forces were committing or about to commit such crimes...' [Art 28].

Perhaps some version of this could be adapted for corporations?

To conclude:

Our task in this paper was to explore ways in which multinational corporations could be brought to account for human rights violations in which they are complicit. It is worth re-stating the obvious point that corporations owe their status in law *to law*. From this it follows that they should be challengeable in law. The cultural, social, and political changes associated with the development of highly interdependent global economies helps to explain the rise in debate about corporate liability.

International law can effect change through demands on states to regulate corporations. Some of the problems in asking states to control multinational corporations include: the reluctance of host states to cut off the hand that feeds them, problems of jurisdiction in home state litigation, and more generally the difficulty in pinning down the legal personality of a multinational corporation.

Establishing the complicity threshold- problematised in ATCA cases - is perhaps less of an issue than finding agreement on corporate attribution. We need in effect both: complicity and attribution principles that reflect the reality of state and corporate structures of decision-making. Before an effective regime can be developed it will be necessary to drive through a company culture or organizational principle of attribution.

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- ¹ Human Rights Watch The Enron Corporation: Complicity: The Dabhol Power Corporation (January 1999) www.hrw.org/reports/1999/enron/
- ² A. Cassese, *International Law* (2001), at 3.
- ³ David Held, *Violence, Law and Justice in a Global Age* (2001), Social Science Research Council Essays on Globalization after September 11, Nov 5th, p 1.
- ⁴ International Council on Human Rights Policy (ICHRP) *Beyond Voluntarism: Human Rights and the Developing Legal Obligations of Companies* (2002), at 10. See also Kamminga and Zia-Zarifi 'Liability of Multinational Corporations under international law: an introduction' in Kamminga M and Zia-Zarifi S. (eds) *Liability for Multinational Corporations under International Law* (2000), 5.
- ⁵ For example, S. Strange, *States and Markets* (1988), P. Cerny, *The Changing Architecture of Politics: Structure, Agency and the Future of the State* (1990), p. 237. R. Roscrance, 'The Rise of the Virtual State', *Foreign Affairs*, July/Aug 1996
- ⁶ Willets, 'Transnational Actors and International Organizations in World Politics', in J. Baylis and S. Smith (eds), *The Globalization of World Politics: An Introduction to International Relations* (2001), at 364.
- ⁷ As amended in 2000, www.oecd.org/daf/investment/guidelines/mnetext.htm.
- ⁸ Kamminga and Zia-Zarifi, *above* at 2.
- ⁹ Ramasastry 'Corporate Complicity: From Nuremberg to Rangoon, An examination of Forced Labour Cases and their Impact on the Liability of Multinational Corporations 20 *Berkeley Jnl of Int Law* (2002) 91, 96
- ¹⁰ Ramasastry p.101
- ¹¹ *Filartiga v Pena-Irala* 630 F. 2d 876 (2d Cir. 1980); *Kadic v Karadzic*, 70 F.3d at 244 (2d Cir. 1995).
- ¹² Torture Victims Protection Act 1992.
- ¹³ *Doe I v Unocal Corp* 963 F.Supp 880 (C.D. Cal 1997); 110 F.Supp. 2d 1294, 1296 (C.D.Cal. 2000); *John Doe v. Unocal corp.* Nos. 00-56603, 00-57197, 00-56628, 00-57195, 2002 WL 31063976 (9TH CIR. Sept 18, 2002).
- ¹⁵ *Doe v Exxon Mobil Corporation*, FEDERAL District Court for District of Columbia, 01-1257, claim filed by International Labor Rights Fund, 11 June 2001, alleging human rights abuses in Aceh, Indonesia, www.laborrights.org/projects/corporate/exxon last accessed 9 August 2002.
- ¹⁶ Time 1 July 2002, p 16
- ¹⁷ MNCs are already campaigning to have ATCA repealed.
- ¹⁸ Mail & Guardian [South Africa], 19 April 2002.
- ¹⁹ Stephens, notes that the extension of ATCA jurisdiction to corporations is undoubtedly a reflection of the 'common acceptance of the concept of corporate crime [in the US], at 220.
- ²⁰ Rome Statute Art 5
- ²¹ Schabas *Enforcing humanitarian law, supra* note 00, at 439.
- ²² See discussion above, text accompanying note 14?
- ²³ Danish Human Rights and Business Project, *Defining the Scope of Business Responsibility for Human Rights Abroad* (2001) www.humanrights.dk.
- ²⁴ In the Enron report, *supra*.
- ²⁵ Ramasastry, *supra*.
- ²⁶ South African Truth and Reconciliation Commission Report, Volume Four, Chapter Two, Business and Labour 1998.
- ²⁷ Kamminga and Zia-Zarifi wryly comment that they could attract no lawyers representing major MNCs to participate in the Colloquium on which their book is based, *supra* note 25, at 15.