Berkeley Journal of International Law

Volume 20 | Issue 1 Article 4

2002

Corporate Complicity: From Nuremberg to Rangoon - An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations

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Corporate Complicity: From Nuremberg to Rangoon[1]

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By
Anita Ramasastry*

"Corporations have neither bodies to be punished, nor souls to be condemned. They therefore do as they like."

—Edward, 1st Baron Thurlow,
English Jurist and Lord Chancellor (1731-1806)

INTRODUCTION[2]

Can multinational corporations (MNCs) violate the law of nations? If so, how should nation-states deal with them when they are perpetrators?[3] In recent

1. Rangoon is the capital city of Burma. Myanmar is the name for Burma in the Burmese language. The country is currently ruled by the State Law and Order Restoration Council (SLORC), which took power in a 1988 coup, suspending the legislature and the judiciary. In 1989, the Burmese military government issued a decree that the country be known by the name of Myanmar. Since then, Burma has been referred to as Myanmar in Burmese government publications. The name Burma is still very much in use both unofficially and by other nations that do not recognize the present military government.

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2. Although this article includes many textual excerpts, such excerpts are important because they emphasize the focus that courts (both contemporary and historical) have focused on slave labor and its status as a violation of the law of nations and also on the role of corporate entities (referred to as legal persons) as participants in or beneficiaries of such crimes.

3. Multinational corporations, or MNCs, have been defined as corporations with affiliates or business establishments in more than one country. *See* W.H. Meyer, *Human Rights and MNCs: Theory v. Quantitative Analysis* 18 HUMAN RIGHTS Q. 369 (1996). Other terms that are often used

years, there has been increasing discussion of the problem of "corporate complicity"[4] with respect to MNC investment activity in countries with repressive regimes.[5] The investments may involve joint ventures or contractual partnerships with repressive host governments. MNCs may also have physical presences such as factories or mining operations in the host countries. The term complicity is used because MNCs are characterized as accomplices to serious human rights violations perpetrated by host governments. Victims in the host country typically are unable to seek redress in their own country. The courts are unable or ill equipped to handle their cases or the host government will not pursue enforcement against the perpetrators (e.g., security forces or the military).

There has been a particular focus on MNCs involved in extraction industries. In order to gain access to certain types of natural resources, such as oil and gas, copper, or diamonds, MNCs may have to partner with a repressive government.[6] MNCs entering into partnerships in so-called "conflict zones" have been subjected to increasing scrutiny. Some MNC partnerships allegedly have involved serious human rights violations such as forced labor, forced displacement of local communities, and torture and execution of citizens by government security forces retained to guard MNC project sites. In other instances, MNCs are alleged to have benefited from a repressive government's policies. For example, it has been alleged that MNCs have used prisoners as forced laborers to manufacture products in countries with poor human rights records.

In the United States, this heightened scrutiny has resulted in a wave of litigation against MNCs for violations of public international law under the federal Alien Tort Claims Act (ATCA). These lawsuits represent an effort of "home" states to assert jurisdiction over MNCs in an attempt to influence their behavior overseas and to provide compensation to victims. These lawsuits have twin compensatory and deterrent aims. Other nations, such as the United King-

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when referring to corporations or business entities that transact globally are transnational corporations and multinational enterprises. *See* P. MUCHLINSKI, MULTINATIONAL ENTERPRISES AND THE LAW 12-15 (1995). *See also*, Detlev F. Vagts, *The Multinational Enterprise: A New Challenge for Transnational Law*, 83 HARV. L. REV. 739 (1970).

4. One of the earliest groups to use the term "corporate complicity" in its publications was Human Rights Watch, a leading nongovernmental organization. Human Rights Watch has published two major reports that focus on investment activities of MNCs and their relationship to human rights violations. *See, e.g.*, HUMAN RIGHTS WATCH, THE ENRON CORPORATION: CORPORATE COMPLICITY IN HUMAN RIGHTS VIOLATIONS (1999), *available at* http://www.hrw.org/reports/1999/enron/ (last visited Feb. 7, 2002).

5. For a useful overview, *see* CHRISTOPHER AVERY, AMNESTY INT'L UK, BUSINESS AND HUMAN RIGHTS IN A TIME OF CHANGE (2000), *available at* http://www.business-humanrights.org/Avery-Report.htm (last visited Jan. 23, 2002).

6. *See* JULIETTE BENNETT, INT'L PEACE FORUM, BUSINESS IN ZONES OF CONFLICT—THE ROLE OF THE MULTINATIONAL IN PROMOTING REGIONAL STABILITY (2001), *available at* http://www.unglobalcompact.org/un/gc/unweb.nsf/content/Reg_Stability.htm (last visited Jan. 23, 2002). *See also*, THE ENRON CORPORATION, *supra* note 3; HUMAN RIGHTS WATCH, THE PRICE OF OIL: CORPORATE RESPONSIBILITY AND HUMAN RIGHTS VIOLATIONS IN NIGERIA'S OIL PRODUCING COMMUNITIES (1999), *available at* http://www.hrw.org/reports/1999/nigeria/ (last visited Jan. 23, 2002).

dom, have begun to allow suits against parent MNCs for actions of their subsidiaries located overseas.[7]

What is the legal responsibility of an MNC with operations in a country where human rights violations are widespread, or where its revenues provide support for a repressive regime? Should MNCs be liable if their actions assist or contribute to serious violations of international law by host governments? Furthermore, what type of MNC activity is sufficient to trigger aidor and abettor liability? The nature and degree of complicity that should give rise to liability will be a major theme of this article.

Advocates of greater corporate accountability for human rights violations argue that companies sometimes significantly contribute to a host government's ability to carry out systematic human rights abuses. MNCs may sometimes precipitate human rights violations by requesting or funding government activities that lead to such harm. One example is hiring government security forces to guard a project site. Corrupt governments may use force to subdue local citizens who object to investment activity. MNC investment may benefit government officials but worsen the economic situation for the local population. In other instances, an MNC may invest in a country and knowingly accept the inevitability or likelihood of governmental human rights abuses. Not all of these actions may trigger liability. Industry leaders, consequently, have raised concerns about the lack of clarity in the definition of corporate complicity.[8]

This article examines the historical origins of corporate complicity. In particular, it examines the impact of British and American war crimes tribunals after the Second World War, along with recent civil litigation by forced laborers seeking restitution from German and Japanese companies for their enslavement during the war. These cases are historical examples of MNC actions that rose to the level of egregious violations of international law. These cases also provide examples of how courts and legislators can develop and apply appropriate civil and criminal standards for MNC accomplice liability.

At the same time, cases involving corporate complicity during wartime are not directly analogous to MNC investment activities in modern conflict zones or in countries that have no internal conflict but that repress the rights of their citizens. During World War II, German and Japanese corporations directly utilized forced labor in their own factories and operations as part of a government-industry partnership. Their direct participation in certain war crimes and crimes against humanity led to the prosecution of their officers and employees. Today, MNCs may partner with repressive governments, like companies during World War II. They are not, however, alleged to be the principal perpetrators of criminal acts. Rather, certain MNCs allegedly have possessed knowledge of and con-

7. *See Lubbe v. Cape, Plc.*, 1 WLR 1545, 1566-67 (C.A. 2000), *available at* http://www.parliament.the-stationery-office.co.uk/pa/ld199900/ldjudgmt/jd000720/lubbe-1.htm (last visited Feb. 7, 2002) (landmark tort case brought by South African plaintiffs against British parent of South African asbestos company in which House of Lords refused to dismiss the case against the parent on grounds of forum non conveniens).

8. *See, e.g.*, Gregory Wallance, *Fallout from Slave-Labor Case is Troubling*, 150 N.J. L. J. 896, 24 (1997).

doned or been complicit in the criminal acts perpetrated by a host government and its security forces. The acts of the host government allegedly further an economic joint venture or project with tangible economic benefit flowing to the MNC.

This article focuses on the liability of MNCs with respect to the use of forced or slave labor. An analysis of forced labor cases allows us to examine corporate complicity in a historical as well as contemporary context. Enslavement or forced labor constitutes a violation of certain peremptory norms of international law such that states, individuals, and legal persons are prohibited from engaging in such conduct.[9] The International Labor Organization (ILO) recently published its first global report on forced and compulsory labor.[10] The report highlights the unfortunate reality that forced and compulsory labor is still a global problem. It further notes that while most leaders in the business and labor community state that they are committed to ending forced labor practices, much work remains to be done.[11]

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9. *See Kadic v. Karadzic*, 70 F.3d 232, 239 (2d Cir. 1995) where the Second Circuit held that participation in the slave trade violates the law of nations when undertaken by private individuals as well as state actors.

10. "The growth of forced labour worldwide is deeply disturbing," said ILO Director-General Juan Somavia in announcing the publication of the report in May. "The emerging picture is one where slavery, exploitation and oppression of society's most vulnerable members—especially women and children—have by no means been consigned to the past. Abusive control of one human being over another is the antithesis of decent work." *Forced Labour, Human Trafficking, Slavery Haunt Us Still*, 39 WORLD OF WORK (June 2001), *available at* http://www.ilo.org/public/english/bureau/inf/magazine/39/human.htm (last visited Oct. 8, 2001). *See also*, DIRECTOR GENERAL, INTERNATIONAL LABOUR ORGANIZATION, STOPPING FORCED LABOUR: GLOBAL REPORT UNDER THE FOLLOW-UP TO THE ILO DECLARATION ON FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK (89th Session of the International Labour Conference 2001), Report I(B), *available at* http://www.ilo.org/declaration (last visited Oct. 8, 2001). The Executive Summary reports that:

> Wordwide attention to forced labor has increased in recent years through the international appeals to one country in particular (Myanmar) to rectify that persistent problem. Trafficking of women and children—mainly for prostitution and domestic service but also sweatshop work—has also increased dramatically throughout the world in the last ten years. In North America, several high-profile cases in sweatshop industries have resulted in severe penalties and heightened public awareness.

Id. at vii.

11. The ILO Report states:

> While many policy statements endorsing the principle of the elimination of all forms of forced or compulsory labor have been issued by employers' and workers' organizations, the topic has not often been at center stage in their own activities. This may simply reflect the general lack of interest in forced labour problems within international and national economic forums as a whole, or a lower level of presence in the economic sectors or geographical areas where the phenomena are most often found . . . The subject matter itself may seem rather removed from the daily concern of organized employers. Nevertheless, there have been some recent developments on both the part of employers' and workers' organizations.

Id. at 86.

Certain industry groups are taking affirmative steps in acknowledging the problem and trying to eradicate it. *See, e.g.*, Sumana Chatterjee, *Chocolate Industry to Target Child Slavery on Cocoa Farms*, THE BOSTON GLOBE, Oct. 1, 2001, *available at* http://www.boston.co. . /chocolate_industry_to_target_child_slavery_on_cocoa_farmst.shtm (last visited Oct. 7, 2001). The chocolate industry announced that it accepted responsibility for labor practices on cocoa farms and will work with other stakeholders to eliminate child slavery. The industry plan includes the establishment of an indepen-

This article contends that MNCs should be held liable either civilly or criminally for their complicity in certain types of egregious human rights violations, including genocide, war crimes, crimes against humanity, and enslavement (often referred to as forced labor).[12] For purposes of this argument, complicity is defined as situations in which an MNC "aids and abets" a host government in carrying out serious human rights abuses. Additionally, this article advocates that an MNC's knowledge of ongoing human rights violations, combined with its acceptance of direct economic benefit arising from the violations, and continued partnership with a host government should give rise to accomplice liability.

This article also advocates treating corporate complicity as a universal problem deserving of attention in international criminal law and human rights law more broadly, rather than solely with respect to the ATCA. The ATCA is purely an American statute and as such should not be the sole determinant of how human rights are defined. Civil liability for MNCs that commit intentional torts would provide victims with compensation for their injuries.[13] Criminal sanctions against MNCs, however, may provide a stronger deterrent. Moreover, it appears, at least at present, that outside the United States, jurisdictional considerations favor prosecuting an MNC under international criminal law rather than civil law.

The heightened emphasis on MNCs does not mean that we should absolve host states of their responsibility to uphold and protect human rights. The duties imposed by international humanitarian law fall primarily to governments. Governments are required to act consistently with human rights principles and to ensure that private actors also comply. A government adhering to this duty will often enact and enforce laws that prohibit others from abridging the human rights of its citizens.

A government might set out laws, for example, prohibiting child labor as a way of protecting the rights of children from infringement by other private actors. Through such legislation, non-state actors, including businesses, become duty-holders. Corrupt governments, however, may fail to protect human rights and to ensure that other parties do not violate human rights. The absence of government action does not nullify the existence of human rights and the duties of non-state actors to respect such rights.

MNCs, like individuals, have an important role to play in protecting and promoting human rights. The preamble to the Universal Declaration of Human Rights states that, "every individual and every *organ of society*, keeping this

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dent monitoring system in the cocoa farms in the Ivory Coast to ensure that cocoa is not picked by child slaves.

12. As discussed below, there are situations in which an MNC might be liable for a second class of crimes in which the MNC acts "under color of law" such that it is deemed to be engaged in state action. Thus, in some circumstances, private actors, including MNCs, may be accountable when they are complicit with public (state) actors through the coercive use of state power. *See* Beth Stephens, *Corporate Accountability: International Human Rights Litigation Against Corporations in U.S. Courts*, *in* LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW 216 (Menno T. Kamminga and Saman Zia-Zarifi eds., 2000).

13. *See* William Schabas, *Enforcing International Humanitarian Law: Catching the Accomplices*, 83 INT'L REV. OF THE RED CROSS 439, 453 (2001).

Declaration in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance."[14]

To the extent that individuals have rights and duties under customary international law and international humanitarian law, MNCs as legal persons have the same set of rights and duties, and hence limited international legal personality.[15] This is not to say that we should focus exclusively on the actions of MNCs and forget about the role of states with respect to human rights. Rather, it is to say that as MNCs have an increased role in the global economy, so too do they have increasing rights and duties.[16] In order to deter MNCs from facilitating or participating in very serious human rights violations, we need to develop standards that will discourage them from doing so. At the same time, solutions should be circumscribed to deal with the most serious of harms.

Some commentators and critics may ask: Why penalize a corporate actor when nations and international tribunals have the ability to prosecute individual employees for wrongdoing? This debate is not new. Many nations have dealt with the issue of how to handle domestic corporate crime.[17] While individuals may be prosecuted and removed from a corporation, the corporate entity continues to exist and might continue its misconduct.[18] Prosecuting an individual may not deter the behavior of the corporation as a whole. Conversely, prosecuting an MNC may not deter an individual's criminal conduct.[19] A parallel approach to the problem of MNC complicity is therefore necessary.[20] In addition, sanctioning the MNC with fines, criminal prosecution, and even prohibiting future business operations may provide a greater deterrent for MNCs than the isolated prosecutions of individuals.[21]

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14. Universal Declaration of Human Rights, G.A. Res 217 (III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948); *see also,* BENJAMIN R. BARBER, JIHAD VS. MCWORLD 24-32 (Ballantine Books 1995).

15. *See* Andrew Clapham, *The Question of Jurisdiction Under International Criminal Law Over Legal Persons, in* LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW , *supra* note 12, at 189-90.

16. *See id.*

17. *See* CELIA WELLS, CORPORATIONS AND CRIMINAL RESPONSIBILITY (2001). Wells discusses corporations with respect to the commission of regulatory offenses and also conventional crime. Wells notes that the recognition of corporations as legal persons (as a capital pooling device) has afforded them certain protections without the imposition of corresponding obligations or responsibilities.

18. *See* BRENT FISSE AND JOHN BRAITHWAITE, CORPORATIONS, CRIME AND ACCOUNTABILITY 39 (1993).

19. *See id.* Fisse and Braithwaite discuss the problem of individuals being shielded from responsibility when the corporation takes the rap. *Id.* at 14.

20. *See id.* at 131-57.

21. This article does not address what type of sanction provides the greatest deterrence for corporate actors. There are a wide variety of financial and non-financial sanctions that can be imposed on a corporation, including monetary fines, equity fines, direct restitution to victims, corporate dissolution, adverse publicity, community service, and punitive injunctions. *See* WELLS, *supra* note 17, at 33-39. Wells notes that preventive and non-financial sanctions may have a greater deterrent effect than financial sanctions. Fisse and Braithwaite note that sanctions are appropriate, but only if the private justice system is not able to come up with its own plan for remedial action. *See* FISSE AND BRAITHWAITE, *supra* note 18, at 15.

Decision-making within a modern MNC may involve multiple persons whose activity leads collectively to human rights violations. The sum of the activity as a whole is egregious. It may be difficult to apportion individual responsibility.[22] The actions of an individual perpetrator or group of perpetrators, when facilitated through a large corporate enterprise, may also create greater harm than an individual acting alone. The public often blames a corporation for misconduct as opposed to focusing on an individual employee.[23] Finally, a collective or communitarian view of complicity would suggest that at some level, the effects of corporate wrongdoing should be borne by the corporate entity and hence, ultimately its shareholders.[24]

Other critics may ask whether the debate over corporate complicity is purely academic. First, new international guidelines and principles for MNCs that focus on human rights obligations are being developed by organizations such as the United Nations.[25] These guidelines refer to corporate complicity but do not adequately define the concept. To the extent that such guidelines may become binding, it is important to define the parameters of conduct that should be prohibited pursuant to such codes or principles.[26] Moreover, the increased focus on international criminal law and universal jurisdiction is recent and therefore, the status of legal persons within these spheres is even more recent in origin. While the debate over when and how to impose civil and criminal liabil-

22. *See id.* at 27. Fisse and Braithwaite also discuss the problems inherent in trying to aggregate the liability of individual actors.

23. *See id.* at 25. We do not, for example, state that Director "Y" of Company "X" was responsible for child labor problems or sweatshop conditions overseas. Rather, we tend to discuss the responsibility of Company "X" for the problem.

24. *See* CHRISTOPHER KUTZ, COMPLICITY: ETHICS AND LAW FOR A COLLECTIVE AGE 204-53 (2000).

25. The United Nations Subcommission for the Promotion and Protection of Human Rights is responsible for drafting the principles. Commentary to the draft principles discusses the issue of corporate complicity:

> Business enterprises shall inform themselves of the human rights impact of their principal activities and major proposed activities, so that they can avoid complicity in human rights abuses. Business enterprises shall have the responsibility to ensure that their business activities do not contribute directly or indirectly to human rights abuses, and that they do not knowingly benefit from these abuses. Businesses shall further refrain from activities that would undermine the rule of law as well as governmental and other efforts to promote and ensure respect for human rights, and shall use their influence in order to help promote and ensure respect for human rights. Governments may not use the Principles as an excuse for failing to take action to protect human rights, for example, through the enforcement of existing laws.

Draft Universal Human Rights Guidelines for Companies, Addendum 2, U.N. Doc. E/CN.4/Sub.2/2002/X/Add.1.E/CN.4/Sub2/2002/WG.2/WP.1/Add.1, *available at* http://www1.umn.edu/humanrts/links/principles11-18-2001.htm (last visited Jan. 1, 2002). *See also*, Principle 2 of the United Nations Global Compact, *available at* http://www.unglobalcompact.org/un/gc/unweb.nsf/content/prin2.htm (last visited Jan. 23, 2002) (noting that "the Secretary-General has asked world business to make sure their own corporations are not complicit in human rights abuses")

26. Margaret Jungk recommends that a company take action when a host government "is perpetrating planned, systematic, and continuous violations of fundamental human rights and the company maintains a direct connection to those violations." Margaret Jungk, *A Practical Guide to Addressing Human Rights Concerns for Companies Operating Abroad, in* HUMAN RIGHTS STANDARDS AND THE RESPONSE OF TRANSNATIONAL CORPORATIONS 171, 178 (Michael K. Addo ed., 1999).

ity on legal persons is new, there is still an emerging emphasis on creating standards for such determinations. The concept of complicity proposed in this article is meant to be narrowly tailored and relates only to serious violations of international law.

Still others may fear that advocating MNC liability will open the floodgates for litigation in the United States and perhaps criminal prosecution elsewhere. As noted above, corporate complicity, as discussed herein, relates only to the most egregious violations of international law. The Second World War gives us a framework from which to analyze what sort of actions give rise to culpability. The notion that an MNC might be sued or prosecuted does not mean that states will choose to do so with frequency.[27]

With respect to civil liability, plaintiffs still need to establish personal jurisdiction for a corporate defendant. In common law jurisdictions, the doctrine of forum non-conveniens also provides protection for corporate defendants.[28] Some advocates argue that in the United States, for example, forum non-conveniens has resulted in many lawsuits being dismissed, never to be brought in the host country jurisdiction where the MNC subsidiary is located.[29]

Part I of this article outlines various levels of corporate complicity as a way of understanding the spectrum of conduct for which MNCs have been criticized. This provides a necessary background for examining how courts have treated corporate actors with respect to their alleged involvement in war crimes and crimes against humanity. This also helps to delineate where on this continuum MNC conduct should give rise to accomplice liability.

Part II of this article examines the post-World War II trials of German and Japanese civilian businessmen for war crimes and crimes against humanity. The war crimes prosecutions provide an important starting point for developing a modern conception of corporate complicity. After the war, a group of major industrialists were prosecuted by the United States Military Tribunal (USMT) for their companies' use of slave labor. Similarly, a group of Japanese mining officials were also prosecuted by a British military court concerning forced labor activities in Formosa. These cases establish that there can be legal conse-

27. *See* Schabas, *supra* note 13, at 451.

28. Forum non-conveniens is a common law doctrine that allows a court to dismiss a civil lawsuit when there is proper personal jurisdiction, subject matter jurisdiction, and venue, and when dismissal would serve the convenience of the parties and the ends of justice. The doctrine has been significant in cases where the alternative forum is a foreign court as opposed to another court within the United States. Only defendants may invoke the doctrine. The Uniform Interstate and International Procedure Act states that "when the court finds that in the interest of substantial justice the action should be heard in another forum, the court may stay or dismiss the action in whole or in part on any condition that may be just." Uniform Interstate and International Procedural Act, 13 U.L.A. § 1.05 (2000).

29. *See* Kathryn Lee Boyd, *The Inconvenience of Victims: Abolishing Forum Non Conveniens in U.S. Human Rights Litigation*, 39 VA J. INT'L L. 41 (1998); David W. Robertson and Paula K. Speck, *Access to State Courts in Transnational Personal Injury Cases: Forum Non Conveniens and Antisuit Injunctions*, 68 TEX. L. REV. 937 (1990); Jacqueline Duval-Major, Note, *One-Way Ticket Home: The Federal Doctrine of Forum Non Conveniens and the International Plaintiff*, 77 CORNELL L. REV. 650 (1992).

quences to cooperation between economic actors and repressive governments, including prosecution for international crimes.

Part III focuses upon recent litigation brought by civilian victims interned in Nazi and Japanese concentration camps who were forced or slave laborers[30] in mines, factories, and plants owned by private German and Japanese corporations. This section considers the significance of those cases for the future of international humanitarian law, as well as for the ATCA in the United States.[31]

Part IV examines the issue of corporate complicity from a contemporary perspective. In particular, Part IV analyzes a recent case brought in a federal district court against Unocal Corporation for alleged use of forced labor as part of its pipeline project in Burma. The *Unocal* case relies heavily on the trials of the industrialists by the USMT, as well as the modern forced labor cases. The case is notable because of two seemingly conflicting opinions. The first judge who presided in the case issued an opinion that established that Unocal, as an MNC, could be sued for violations of international law—specifically, for knowing of the Burmese military's use of forced labor and for continuing to retain the military to provide security despite such knowledge. In a subsequent opinion, issued by a different judge, the case was dismissed.[32] The court found that Unocal's actions were not sufficient to create liability because Unocal had not affirmatively sought out forced labor for the pipeline. The two opinions provide conflicting accounts of what kind of MNC conduct is sufficient to trigger possible liability.

Part V provides a critique of the most recent *Unocal* decision. In particular, this section critiques the court's approach to defining corporate complicity and argues for a different standard for MNCs that operate outside of a wartime context.

Finally, Part VI argues that in light of recent litigation in the United States, there should be a further focus on criminal liability for MNCs in home states and also a renewed focus on how the International Criminal Court might deal with MNCs and legal persons. This section also notes that an expanded definition of

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30. The term slave labor has sometimes been used as well as forced labor. One of the American prosecutors at Nuremberg has noted that the term "slave" in the context of the Nazi slave labor program is inappropriate because:

> The Jewish concentration camp workers were less than slaves. Slavemasters care for their human property and try to preserve it; it was the Nazi plan and intention that the Jews would be used up and then burned. The term 'slave' is used in this [book] only because our vocabulary has no precise word to describe the lowly status of unpaid workers who are earmarked for destruction.

BENJAMIN FERENCZ, LESS THAN SLAVES: JEWISH FORCED LABOR AND THE QUEST FOR COMPENSATION, XVII (1979).

In the recent lawsuits against German corporations, plaintiffs' attorneys have distinguished between slave laborers and forced laborers. The former are concentration camp inmates earmarked for extermination and the latter are civilians and prisoners of war. The International Military Tribunal at Nuremberg never made a distinction and used the term slave labor. *See* The Nurnberg Tribunal, 6 F.R.D. 69, 123-26 (West 1948) (discussing slave labor policies of the Nazis).

31. *See* 28 U.S.C. § 1350 (2001). For a description of the ATCA, see note 112, *infra*, and accompanying text.

32. Judge Ronald Lew replaced Judge Richard Paez when the latter was elevated to the U.S. Court of Appeals for the Ninth Circuit.

corporate complicity should be included in international and national guidelines governing the conduct of MNCs as another way to deter MNCs from acting as accomplices.[33]

I.
THE SPECTRUM OF CORPORATE COMPLICITY

Before embarking on a historical analysis of corporate complicity, it is important to define the various ways in which an MNC can be described as complicit in the human rights violations of a host state. In this regard, the terms "complicity" and "accomplice" are used in a non-legal sense, to define possible ways in which a corporation may be implicated or linked to human rights abuses perpetrated by a host government.

A. International Law Violations for Which an MNC Might be Implicated

There are several ways in which an MNC might be implicated in violations of international law or the law of nations. For purposes of discussion, the term "law of nations" refers to international legal norms that are recognized as universal, obligatory, and definable.[34] An MNC might be liable: (1) directly for certain violations, (2) as an accomplice, or (3) as a joint actor who is complicit in state action that violates international law. Both the second and third types of liability link back to an analysis of whether the MNC has been an accomplice to the actions of a government in the context of foreign direct investment.

First, an MNC might be liable for its direct commission of a crime. Under international law, individuals (natural persons) have a duty not to violate a handful of fundamental or peremptory norms of international law, sometimes referred to as *jus cogens* norms.[35] An individual may be criminally liable for engaging in crimes such as piracy, aircraft hijacking, enslavement (including forced labor), genocide, war crimes, and crimes against humanity.[36] The Nuremberg and British war crimes trials are important benchmarks. These cases affirmed the notion that private individuals have certain non-derogable duties and responsibilities under international law and may be prosecuted for a limited class of international crimes.

At least in the United States, courts have begun to treat corporations (legal persons) in the same fashion as private individuals with respect to this class of

33. Corporations have been referred to as legal persons, legal entities, or juridical persons in many statutes and legal documents. Under the so-called "fiction," the law creates a legal entity known as a corporation and vests it with certain rights and duties.

34. *See Forti v. Suarez Mason*, 672 F. Supp. 1531, 1540 (N.D. Cal. 1987).

35. Jus cogen norms are defined in the Vienna Convention on the Law of Treaties and are often referred to as "peremptory norms" of international law. These norms are "'accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.'" *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714 (9th Cir. 1992) (quoting Vienna Convention on the Law of Treaties, Art. 53, May 23, 1969, 1155 U.N.T.S. 332, 8 I.L.M. 679).

36. *See* Restatement (Third) of Foreign Relations, § 404 (1986); *see also, Karadzic*, 70 F.3d at 239.

crimes. To the extent that an MNC is directly involved in forced labor, for example, the MNC, or its employees might be liable under international criminal law. Similarly, however, an MNC would be liable with respect to the category of offenses that apply to private individuals to the extent that it aids and abets the actions of a government. In other words, an MNC also might be liable for aiding and abetting a government's use of forced labor. In order for an MNC to be liable as an accomplice, however, the MNC would have to be prosecuted as an aidor and abettor under international criminal law.

A second set of international crimes is only actionable against states. Both customary international law as well as international treaties impose duties and obligations only on states for certain crimes. These crimes include, for example, torture, execution, rape, and forcible displacement.[37] In the United States, courts have been willing to exercise jurisdiction over individuals (and MNCs) when the private individuals act under color of law.

For purposes of making this determination, courts have applied jurisprudential standards developed when analyzing state action under American law.[38] Determining whether an MNC acted in concert with a state actor has involved inquiries into whether the MNC was a joint actor that conspired with the government to commit certain crimes in furtherance of the venture. At least one appeals court has noted that "the [ATCA] does confer subject matter jurisdiction over private parties who conspire in, or aid and abet, official acts of torture by one nation against the citizens of another nation."[39] Thus, notions of conspiracy and aidor and abettor liability exist even for crimes requiring state action.

This article focuses predominantly on how to determine accomplice liability with respect to an MNC's conduct in relation to forced labor, and by implication, violations of international law for which it can be implicated as a legal person. This analysis is relevant, however, to a general discussion of when an MNC acts "jointly" with a host government in violation of international law. In both of these contexts, the MNC is necessarily analyzed as an accomplice rather than as a principal for purposes of liability. Thus, some of the same facts and criteria that may trigger accomplice liability may also provide indicia of joint action between an MNC and a host government.

B. Typologies of Corporate Complicity

Recently, commentators have attempted to outline different categories of corporate complicity.[40] The three main categories of complicity are (1) direct complicity, (2) indirect complicity, and (3) mere presence in a country, coupled with complicity through silence or inaction.

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37. *See Karadzic*, 70 F.3d at 243.

38. There is a wide body of case law interpreting 42 U.S.C. § 1983, which defines when an individual has acted under color of state law.

39. *Carmichael v. United Technologies Corp.*, 835 F.2d 109, 113-14 (5th Cir. 1988).

40. *See* Andrew Clapham and Scott Jerbi, *Categories of Corporate Complicity in Human Rights Abuses* (2001), *available at* http://www.business-humanrights.org/Clapham-Jerbi-paper.htm (last visited Feb. 7, 2002). *See also*, Jungk, *supra* note 26, at 171-83.

1. Direct Corporate Complicity

The first category of complicity has been referred to as direct corporate complicity. This involves an MNC knowingly assisting a state in violating customary international law.[41] The MNC may be directly complicit where it "decides to participate through assistance in the commission of human rights abuses and that assistance contributes to the commission of the human rights abuses by another."[42] The MNC need not wish the criminal results but the corporation and its employees and agents must know of the "likely effects of their assistance."[43] Characterizations of direct complicity, however, are somewhat contingent on notions of accomplice liability since what constitutes direct participation still must be defined.

As discussed in Parts II, III, and IV, *infra*, German and Japanese corporations that used forced labor during World War II fall into the category of direct accomplices. In many instances, these companies sought out, or affirmatively utilized, forced laborers in their business operations and knew of the consequences of their actions.

2. Indirect Corporate Complicity

The broader and more difficult category to conceptualize is referred to as indirect complicity or "beneficiary" corporate complicity. In this category, the MNC is not itself the direct perpetrator of the crimes, but it benefits from human rights abuses committed by the host government. This category includes MNCs that have contractual partnerships or joint ventures with host governments and that stand to benefit from human rights violations committed in relation to the particular project. An oft-cited example is a situation in which security forces use repressive measures while guarding MNC facilities or to suppress peaceful protests.[44] As discussed in Part V, *infra*, Unocal's relationship with the government of Myanmar with respect to the building of an oil pipeline seems to be an example of indirect corporate complicity.[45]

The spectrum of what might constitute indirect complicity is broad indeed. On one end of the spectrum, a company may provide economic assistance to a repressive government in the form of revenues gained as part of a joint venture. The MNC may know that the host government is engaging in human rights violations but the links between its investment and the human rights violations may be more attenuated. Factors that are relevant to a determination of complicity include time or duration of the investment and partnership; the type of financing that is provided by the MNC to the government; the nature of the business relationship (e.g., highly integrated joint venture with the MNC having

41. *See* Clapham and Jerbi, *supra* note 40, at 3.
42. *Id.* at 5.
43. *Id.*
44. *See id.* at 6.
45. *See* THE DANISH HUMAN RIGHTS AND BUSINESS PROJECT, DEFINING THE SCOPE OF BUSINESS RESPONSIBILITY FOR HUMAN RIGHTS ABROAD (2001), *available at* www.humanrights.dk (last visited Feb. 7, 2002.

substantial control versus limited business dealings in the absence of a partnership) and whether the MNC continues to do business with the government once it knows that there may be human rights abuses associated with the investment.

MNC receipt of the economic benefits of human rights violations may rise to the level of direct complicity when (1) there is a strong and interdependent business relationship between the MNC and the host government (i.e., the MNC hires the security forces or contracts for their services); (2) the MNC is aware of the human rights violations; and (3) the MNC continues to provide financial support to the host state and continues to perform under contractual arrangements, particularly in furtherance of a collaborative project or endeavor.

When the above criteria are satisfied, acquiescence becomes action and encouragement. Therefore, indirect corporate complicity may be a misnomer and beneficiary complicity may be a better term, as the MNC is a beneficiary of profits or benefits generated in part through human rights violations.

As this article suggests, courts need to balance factors to determine whether beneficiary complicity has reached such a threshold that an MNC's continued presence and investment amounts to participation in a criminal enterprise. This second category of beneficiary complicity might trigger liability for international crimes applicable to private individuals, as well as those that require state action (to the extent that close collaboration in a business venture provides substantial support for a government's violation of human rights in furtherance of the business venture).

Human Rights Watch describes corporate complicity in a way that collapses the distinction between direct and indirect complicity, when it describes 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."[46]

3. *Silence or Inaction in the Face of a Host Government's Human Rights Violations*

While direct complicity is on one end of the spectrum, mere presence in a country with a repressive political history is another. Companies that had investment and operations in apartheid South Africa, for example, were often criticized for their presence in the country as perpetuating discrimination and racism. Simply by engaging in business activity in the host country, human rights activists' maintain that companies may unintentionally aggravate human rights violations.[47] A counter argument raised by MNCs, however, is that the presence of foreign companies improves the situation of employees who work for foreign subsidiaries, as well as for local stakeholders. MNCs also assert that they can constructively engage a repressive government through their presence and thereby bring about change in their human rights policies.

46. *See* THE ENRON CORPORATION, *supra* note 4.
47. *See* Jungk, *supra* note 26, at 171.

Human rights Non-Governmental Organizations (NGOs) assert that when MNCs become aware of systematic or continuous human rights abuses, they have an affirmative obligation to raise these issues with the government and to attempt to exert influence. Silence or inaction may amount to complicity in that it implies, at some level, tacit approval for a government's actions rather than mere neutrality. MNCs are exhorted to speak out in opposition to the human rights violations and to call for the host government to change its behavior and practices.[48]

This last category of complicity, relating to the duty to speak is the most difficult to link to accomplice liability under international law. This is the case because in this category, human rights violations are often unrelated to the MNC investment activity itself. Rather, the abuses are part of a more widespread phenomenon within a country. Thus, it is more difficult to maintain that the MNC is a criminal accomplice simply because its investment activity furthers the ability of the government to oppress its citizenry generally. MNCs may have a moral obligation to criticize the practices of the host state but are not directly liable for the human rights violations of the state.

II.
TRIALS OF THE INDUSTRIALISTS: THE FOUNDATIONS OF MNC LIABILITY

A. *The United States Military Tribunal and German Industry*

After the Second World War, the United States Military Tribunal (USMT) tried several German industrialists. The trials of Nazi era industrialists for using forced labor during the Holocaust and the prosecution of Japanese mining company officials provide support for the capacity of courts to adjudicate criminal and civil cases in which corporate officials are accused of committing human rights abuses. In addition, the World War II prosecutions provide useful text for understanding how a corporate entity also might be held legally responsible. Thus, there *is* case support for imposing liability on legal persons for violations of international humanitarian law despite the historic reluctance of some jurisdictions to do so.

Often, we instinctively think that it is inconceivable that an MNC would be capable of engaging in war crimes or crimes against humanity. Similarly, it is difficult to imagine penalizing an MNC for such conduct if it did occur. One important question to ask therefore, is if the actions of German or Japanese corporations during the Second World War occurred today, how would we respond? Moreover, to the extent that we would prosecute an individual for such crimes, why would we hesitate to similarly penalize the corporation for the same conduct? Starting with World War II as a baseline aids us in thinking about

48. *See* Clapham and Jerbi, *supra* note 40, at 7. *See also*, CHRIS AVERY, BUSINESS AND HUMAN RIGHTS IN A TIME OF CHANGE (1999), *available at* http://www.business-humanrights.org/Chapter1.htm (last visited Jan. 24, 2002).

what other factual situations might give rise to liability or public criticism and condemnation.

After Germany's defeat, the Allied powers formed a Control Council composed of four representatives of the victorious powers: The United States, Great Britain, France and the U.S.S.R. In order to provide a uniform basis for the trial of war criminals in the various occupied zones, the Control Council enacted Law No. 10, which designated international crimes that were prosecutable offenses. Pursuant to Control Council Law No. 10, the Americans established six military tribunals within the American Zone of Occupation and conducted twelve trials before American judges. Three of the trials involved the prosecution of German industrialists.

A parsing of the judgments rendered at Nuremberg by the International Military Tribunal (IMT) and the USMT involving industrialists and other commercial actors reveals an underlying implication that the corporations for which they worked had also committed international war crimes.[49] At Nuremberg, the IMT did not try any industrialists for their use of forced labor. Subsequently, however, the USMT did try executives from three German firms: I.G. Farben, Flick,[50] and Krupp.[51]

These decisions also discuss whether an affirmative defense of duress or necessity was applicable for defendants accused of engaging in forced labor.[52]

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49. *See* Anita Ramasastry, *Secrets and Lies? Swiss Banks and International Human Rights* 31 VAND. J. TRANSNAT'L L. 325, 423 (noting that the trial of corporate officers from the German company I.F. Farben by the USMT "bases much of its factual findings on the role of Farben as a corporate entity or corporate personality." *See also,* Clapham, *supra* note 15, at 166-71. For an historical account of I.G. Farben's wartime activities, *see* PETER HAYES, INDUSTRY AND IDEOLOGY: I.G. FARBEN IN THE NAZI ERA (1987).

50. Friedrich Flick was a leading German industrialist who owned steel plants in Germany. Flick was tried along with five members of the Flick concern for war crimes and crimes against humanity, including the enslavement and abuse of concentration camp inmates. Flick was convicted of using slave labor because of his knowledge and approval of certain activities of his deputy, Bernhard Weiss. Weiss "took an active and leading part in securing and allocating Russian prisoners of war for use in the work of manufacturing increased quotas" in one of Flick's plants. Flick has been described as someone who "at the height of his career . . . had voting control of a dozen companies, employing at least 120,000 persons engaged in mining coal and iron, making steel, and building machinery and other products which required steel as raw material." *The Flick Case*, VI TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS 1192 (1952). *See* Doe I v. Unocal, 110 F. Supp.2d 1294, 1309 (C.D. Cal. 2000). *See also,* L.M. Stallbaumer, *Frederick Flick's Opportunism and Expediency*, 13 DIMENSIONS: A JOURNAL OF HOLOCAUST STUDIES, *available at* http://www.adl.org/braun/dim_13_2_flick.html (last visited Oct. 9, 2001); FERENCZ, *supra* note 29, at 156-70.

51. *See* Matthew Lippman, *War Crimes Trials of German Industrialists: The "Other Schindlers,"* 9 TEMPLE INT'L & COMP. L. J. 173, 229-49 (1995).

52. I refer to the defense of "necessity" and "duress" interchangeably throughout this article. The terms "duress" and "necessity" have different meanings in the context of the common law. Necessity in common law is seen as a justification where a defendant is presented with a choice of two evils and must choose the lesser of two. Duress, by contrast, is referred to as an excuse. The defendant knows that the conduct in which he or she engaged was wrong but the defendant's own will or volition was overcome due to threats of death or serious bodily harm. *See* Joshua Dressler, *Exegesis of the Laws of Duress: Justifying the Excuse and Searching for its Proper Limits*, 62 S. CAL. L. REV. 1331, 1335-57 (1989); Claire O. Finkelstein, *Duress: A Philosophical Account of the Defense in Law*, 37 ARIZ. L. REV. 251, 254 (1995). German law, by contrast, refers to the defense of necessity, but defines necessity in relation to human coercion. *See* Herbert Schumann, *Criminal*

1. The Farben *Case—An Early Example of Corporate Complicity*

In 1947, twenty-three employees of I.G. Farben were indicted for plunder, slavery, and complicity in aggression and mass murder.[53] I.G. Farben was a major German chemical and pharmaceutical manufacturer. The defendants in the Farben case were prosecuted for "acting through the instrumentality of Farben" in the commission of their crimes.[54] Five of the Farben directors were held criminally liable for the use of slave labor.[55] This was the first time that a court attempted to impose liability on a group of persons who were collectively in charge of a company.[56]

The USMT based much of its findings on the role of Farben as a corporate entity.The Tribunal did not have jurisdiction over legal persons and therefore could not render a verdict against Farben itself. Nonetheless, the decisions focus quite clearly on the nature of the corporation and its role in perpetrating certain crimes. Farben is portrayed as the instrumentality through which individual actors were able to collectively engage in criminal acts. As the USMT noted:

> While the Farben organization, as a corporation, is not charged under the indictment with committing a crime and is not the subject of prosecution in this case, it is the theory of the prosecution that the defendants individually and collectively used the *Farben organization as an instrument* by and through which they committed the crimes enumerated in the indictment.[57]

The indictment charged that Farben, "through its foreign and economic policy, participated in weakening Germany's potential enemies and that Farben carried on propaganda, intelligence, and espionage activities for the benefit of the Reich."[58] The Tribunal noted, furthermore, that the action of private entities (including legal persons) had to be scrutinized under different rules. The Tribunal stated, "certainly where the action of private individuals, *including juristic persons*, is involved, the evidence must go further and establish that a transaction otherwise apparently legal in form is not voluntarily entered into because of the employment pressure."[59]

Law, in INTRODUCTION TO GERMAN LAW 383, 392-93 (Werner F. Ebke & Matthew W. Finkin, eds., Kluwer Law Int'l 1996). The International Military Tribunal and USMT both refer to the defense of necessity but appear to use it in a mixed fashion to refer both to duress and necessity. For example, in discussing the concept of necessity, the USMT states that necessity has also been referred to as compulsion, force and compulsion, and coercion and compulsory duress. *See United States v. Krupp*, IX TRIALS OF WAR CRIMINALS at 1436.

53. *See U.S. v. Krauch, et. al, The I.G. Farben Case*, VIII TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS, iii-iv (1952) [hereinafter *"The I.G. Farben Case"*].

54. *Id.* at 14.

55. *See id.* at 1081, 1205-09.

56. *See* Ramasastry, *supra* note 49, at 423 (1998).

57. *The I.G. Farben Case*, *supra* note 53, at 1108 (emphasis added).

58. *Id.* The Tribunal notes, at another point in the decision:

> Farben marched with the Wehrmacht and played a major role in Germany's program for acquisition by conquest. It used its expert technical knowledge and resources to plunder and exploit the chemical and related industries of Europe, to enrich itself from unlawful acquisitions, to strengthen the German war machine and to assure the subjugation of the conquered countries to the German economy.

Id. at 1128-29.

59. *Id.* at 1140. The Tribunal continued:

Other examples of how Farben was portrayed as a criminal actor relate to the company's seizure of property in enemy territory. The Tribunal stated:

> With reference to the charges in the present indictment concerning Farben's activities in Poland, Norway, Alsace Lorraine and France, *we find that the proof established beyond a reasonable doubt that offences against property as defined in Control Council Law No. 10 were committed by Farben,* and that these offences were connected with, and an inextricable part of the German policy for occupied countries as above described.[60]

Although limits on the USMT's jurisdiction precluded it from holding Farben liable for the use of slave labor, the USMT found that, as a corporate entity, Farben had violated Article 47 of the Hague Regulations on the Laws and Customs of War. Because of Farben's liability, individual directors could be convicted by virtue of their affiliation with Farben.[61] In the Tribunal's assessment:

> The result was the enrichment of Farben and the building of its greater chemical empire through the medium of occupancy at the expense of the former owners. *Such action on the part of Farben constituted a violation of rights of private property, protected by the Laws and Customs of War. And in the instance involving private property, the permanent acquisition was in violation of the Hague Regulations which limits the occupying power to a mere usufruct of real estate.* The forms of the transactions were varied and intricate, and were reflected in corporate agreements well calculated to create the illusion of legality. But the objective of pillage, plunder and spoliation stands out, and there can be no uncertainty as to the actual result.[62]

As part of its decision, the Tribunal also noted that Farben, as a corporate entity, had been directly involved in war crimes and crimes against humanity. For example, the Tribunal stated, "Auschwitz was financed and owned by Farben . . . The Auschwitz construction workers furnished by the concentration camp lived and labored under the shadow of extermination . . ."[63]

> In some instances, following confiscation by Reich authorities, Farben proceeded to acquire permanent title to the properties it has confiscated. In other instances involving "negotiations," with private owners, Farben proceeded permanently to acquire substantial or controlling interests in property contrary to the wishes of the owners, forceful seizure of property by the Reich, or other similar measures, such, for example, as withholding licenses, raw materials, the threat of uncertain drastic treatment in peace-treaty negotiations, or other effective means of bending the will of owners. The power of the military occupant was the ever-present threat in these transactions and was clearly an important, if not decisive, factor.

60. *Id.* at 1141.

61. *See* Hague Regulations Annexed to the 1907 Hague Convention on the Law and Customs of War on Land, Oct. 18, 1907, art. 47, 36 Stat. 2277, 1 Bevans 631. *See also*, Article 33 of the Geneva Convention of Aug. 12, 1949, Relative to the Protection of Civilian Persons in Time of War, 6 U.S.T. 3516, 3538.

62. *The I.G. Farben Case*, *supra* note 53, at 1140 (emphasis added).

63. *Id.* at 1183-84. It should also be noted, however, that the Tribunal focused on individual responsibility with respect to forced labor at Auschwitz:

> The defendants most closely connected with the Auschwitz construction project bear great responsibility with respect to the workers. They applied to the Reich Office for Labor . . . Responsibility for taking the initiative in the unlawful employment was theirs, and, to some extent at least, they must share the responsibility for mistreatment of the workers with the SS and the construction contractors . . . The use of concentra-

Perhaps the most definite expression of the Tribunal's focus on the actions of the corporate entity was the court's reference to legal persons:

> Where private individuals, including *juristic persons*, proceed to exploit the military occupancy by acquiring private property against the will and consent of the former owner, such action not being expressly justified by any applicable provision of the Hague Regulations, is in violation of international law. The payment of a price of other adequate consideration does not, under such circumstances, relieve the act of its unlawful character. Similarly, where a private individual or a *juristic person* becomes a party to unlawful confiscation of public or private property by planning and executing a well-defined design to acquire such property permanently, acquisition under such circumstances subsequent to the confiscation constitutes conduct in violation of the Hague Regulations.[64]

2. *The Krupp Firm*

In addition to the prosecution of Farben managers, the USMT prosecuted industrialists from the Krupp firm. The Krupp case involved the prosecution of twelve defendants for commission of war crimes and crimes against humanity with respect to plunder and spoliation of civilian property and factories in occupied territories, and also in the deportation of and use of prisoners of war and concentration camp inmates as forced laborers in various Krupp factories in Germany.[65] Eleven of the twelve defendants were convicted and sentenced by the USMT.

As with the Farben case, the Krupp decision is instructive concerning the possible attribution of criminal liability to MNCs. The decision discusses the actions of individuals but often only after a lengthy and detailed explication of the actions of the Krupp firm as the prime actor and perpetrator of the various war crimes and crimes against humanity.

The Krupp case underscores the possibility that in certain instances, it is the actions of the enterprise rather than individual defendants that appears criminal. For example, the Krupp firm, through multiple employees and officers, engaged in systematic plunder and spoliation through its acquisition and removal of prop-

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> tion camp labor . . . at Auschwitz with the initiative displayed by the officials of Farben in the procurement and utilization of such labor, is a crime against humanity.

Id. at 1185-87.

Farben was sued after the war but was initially unreceptive to a forced laborer's restitution claims. After the end of the war, a lawsuit brought by a Farben laborer at Auschwitz, Norbert Wollheim, in a German court, also highlighted the role of Farben as a corporate actor and its civil liability for unpaid wages. Farben argued that the SS, the Nazi Party, the German state, or subcontractors were responsible for the damages Wollheim sought. Farben also stated that had it not employed inmates, they would have been killed even sooner. The Frankfurt court concluded that Farben was liable for its negligence in failing to protect the life, body, and health of the plaintiff. Farben eventually settled with Wollheim and with the Conference on Jewish Material Claims Against Germany to compensate forced laborers who had been employed by Farben at Auschwitz. Farben agreed to pay no more than DM 30 million of which 10 percent would be reserved for non-Jewish claimants. *See* FERENCZ, *supra* note 30, at 34-38. (citing the Decision in *Wollheim v. I.G. Farben in Liquidation*, Frankfurt District Court, June 10, 1953, court file no. 2/3/0406/51. *Id.* At 37, n. 9).

64. *The I.G. Farben Case*, *supra* note 53, at 1132-33.

65. *The Krupp Case*, *supra* note 52.

erty in France, Alsace, and the Netherlands. The actions of the firm come to the fore as opposed to decisions or conduct of any individual worker.

According to the USMT, the Krupp concern originated with the business known as Fried. Krupp, founded in 1821.[66] The concern was converted into a German corporation in 1903 and became known as Fried. Krupp. A.G.[67] Krupp A.G. was a private, limited liability company.[68] Bertha Krupp, the mother of the defendant, Alfried Krupp, initially owned nearly all of the shares of this company.[69] In December 1943 Fried. Krupp. A.G. was dissolved and in accordance with the provisions of the "Lex Krupp," a special Hitler decree, the defendant Alfried Krupp became the sole owner.[70] After December 1943, the unincorporated privately owned concern, owned and controlled directly and through holding companies, mines, steel and armament plants, two subsidiary operating companies, shipyards, and a machinery factory.[71]

Under count two of the USMT's indictment, ten of the defendants were charged with plunder and spoliation amounting to war crimes and crimes against humanity.[72] The Krupp defendants were charged "in the plunder of public and private property, exploitation, spoliation, devastation, and other offenses against property and the civilian economies of the countries and territories which came under the belligerent occupation of Germany in the course of its invasions and wars."[73] Six of the defendants were found guilty under count two.[74] The Tribunal, in its judgment, described the actions of defendants as "[h]aving exploited, as principals or as accessories, in consequence of a deliberate design and policy, territories occupied by German armed forces in a ruthless way, far beyond the needs of the army of occupation and in disregard of the needs of the local economy."[75]

At the outset of its decision, the Tribunal discussed the Krupp firm's acquisition of property in France. The Krupp firm took over production at the Austin factory in Liancourt, France. This tractor factory was previously owned by Robert Rothschild, a Yugoslavian Jew, who had purchased the plant 1939. In 1940, the factory was confiscated by the German army after the German occupation.[76] The Krupp firm, in contravention of the Hague Regulations, purchased the Austin plant from the German administrator of Jewish properties, without compensation being made to the original owner.

66. *See id.* at 1332.
67. *See id.*
68. *See id.*
69. *See id.*
70. *See id.*
71. *See id.*
72. The relevant law relating to plunder and spoliation was contained in Articles 46-54 of the Hague Regulations of 1907 stating, for example, that "private property . . . must be respected," and cannot be confiscated" (Article 46); "pillage is formally forbidden" (Article 47). Hague Regulations, *supra* note 61.
73. *The Krupp Case*, *supra* note 52, at 467.
74. *See id.*
75. *Id.* at 1338.
76. *See id.* at 1349.

As with the Farben decision, the Tribunal states that the firm itself violated the Hague Regulations in its seizure and confiscation of property in occupied countries. In remarking on Krupp's actions in France, the Tribunal noted, " [t]he correspondence between the *Krupp firm* and the Paris office show the avidity of the firm to acquire the Austin factory and the Paris property."[77] The Tribunal stated:

> We conclude from the credible evidence before us that the confiscation of the Austin plant based upon German-inspired anti-Jewish laws and its subsequent detention by the *Krupp firm* constitute a violation of Article 48 of the Hague Regulations which requires that the laws in force in an occupied country be respected; that it was also a violation of Article 46 of the Hague Regulations which provides that private property must be respected; that the Krupp firm, through defendants Krupp, Loeser, Houdremeont Mueller, Janssen and Eberhardt, voluntarily and without duress participated in these violations . . . and that there was no justification for such action.[78]

The Krupp firm also leased an office in Paris as its French headquarters. Rather than leasing or purchasing property from a non-Jewish owner in Paris, the Krupp firm chose to profit form the anti-Jewish policy of the Nazi regime and leased a property on the Boulevard Haussmann that had been seized by the Commissioner for Jewish Affairs.[79] In describing this transaction, the USMT noted, "[t]his example of the Krupp firm's exploitation of the Nazi anti-Jewish policy is most objectionable because there was nothing to prevent the firm from honestly leasing or buying a building from a non-Jewish owner in Paris."[80]

Krupp also seized and plundered various plants and manufacturing facilities in order to provide its German facilities with adequate machinery and supplies. The USMT found that "the Krupp firm not only took over certain French industrial enterprises. It also considered occupied France as a hunting ground for additional equipment which was either shipped to the French enterprises operated by the Krupp firm or directly sent to Krupp establishments in Germany."[81]

In the Netherlands, the Krupp firm, through its Dutch subsidiaries, participated in a wholesale seizure and confiscation of materials that it had previously sold to municipal boards of work, gas works, municipalities, and private firms. Krupp participated in the confiscation and transport of seized goods and machinery. The third phase of the Dutch confiscation took place between November 1944 and May 1945 and was described as the "systematic plunder of public and private property."[82] Krupp took, from one factory alone, twenty-one freight

77. *Id.* at 1351 (emphasis added).

78. *Id.* at 1351-52. The Krupp firm also engaged in permanent acquisition of and then subsequent looting of a textile factory in Alsace. *See id.* at 1355. The USMT noted that "from a careful study of the credible evidence, we conclude that there was no justification under the Hague Regulations for the seizure of the [Alsatian] property and the removal of the machinery to Germany." Rather, the USMT concluded that, "this interference with the rights of private property was a violation of Article 46 of the Hague Regulations." *Id.* at 1357.

79. *See id.* at 1350.

80. *Id.* at 1351.

81. *Id.* at 1361.

82. *Id.* at 1365.

cars of machines and materials for its factories in Essen, Germany.[83] While ascribing liability, the USMT once again makes reference to the acts of the firm:

> We conclude that it has been clearly established by credible evidence that from 1942 onward illegal acts of spoliation and plunder were committed by, and on behalf of, the Krupp firm in the Netherlands on a large scale, and that particularly, between about September 1944 and the spring of 1945 certain industries of the Netherlands were exploited and plundered for the German war effort, in the most ruthless way, without consideration of the local economy, and in consequence of a deliberate design and policy.[84]

The USMT was of the opinion that the Krupp firm actively sought to engage in spoliation and plunder. In rendering its opinion, the Tribunal repeatedly refers to the collective intent of the firm, "[t]here are a number of other such examples, which make it clear to us that the initiative for the acquisition of properties, machines, and materials in the occupied countries was that of the Krupp firm and that it utilized Reich government and Reich agencies whenever necessary to accomplish its purposes. . . ."[85]

Count three of the indictment was entitled "Deportation, Exploitation and Abuse of Slave Labor."[86] All twelve defendants were charged under count three.[87] Eleven of the twelve defendants were convicted.[88] According to the USMT, the Krupp firm participated extensively in the Third Reich's compulsory labor program.[89] Krupp utilized the majority of its compulsory labor, which included prisoners of war, foreign civilians and concentration camp inmates at a constellation of 80-100 Krupp-owned factories in Essen Germany referred to collectively as the Cast Steel Factory.

Krupp was alleged to have treated Russian prisoners of war as well as eastern concentration camp inmates the worst of all of the groups. As for Russian prisoners of war, the Tribunal noted:

> [T]wo determinative factors which are established beyond doubt by contemporaneous documents taken from the Krupp files, some of which are quoted hereinabove. These are (1) that Russian prisoners of war were put to heavy work when, due to undernourishment, they were totally unfit physically, and (2) that not only

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83. *See id.*at 1367.

84. *Id.* at 1370 (quoting *Trial of Major War Criminals*, I TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS 239 (1950)).

85. *Id.* at 1372.

86. *Id.* at 667.

87. Count three of the indictment charged all of the defendants with violation of Article II of Control Council Law No. 10, paragraphs 1(b) and (c) for war crimes and crimes against humanity. Count three also charged the defendants with violations of the laws and customs of war. The relevant charge alleged that defendants participated:

> in atrocities and offenses against persons, including: murder, extermination, enslavement, deportation, torture, abuse and other inhumane acts committed against civilian populations of countries and territories under belligerent occupation of, or otherwise controlled by the Third Reich enslavement and deportation of foreign and German nationals, including, concentration camp inmates, employment of prisoners of war in war operations, and work having a direct relation to war operations.

Id.

88. *See id.*

89. *See id.* at 1374.

was there no official requirement that this be done but it was directly contrary to the orders of the competent officials.[90]

As for the eastern workers, the USMT found that they:

were beaten as part of their daily routine. The beatings took place in the Krupp plants and in the camps. The victims were beaten by the camp leaders . . . and by ordinary workers. Weapons with which they were beaten were supplied by the Krupp firm although all foreign workers were subjected to mistreatment, the most severe and inhumane was that suffered by the Russian prisoners of war and the eastern civilian labor.[91]

Furthermore, the Tribunal noted that there the Krupp firm had purposefully availed itself of slave labor. The USMT highlighted this decision of the firm when discussing liability. In 1944, the SS offered concentration camp inmates to the armaments industry. If armament firms wished to take advantage of this free labor, they submitted requests. As the USMT noted "[i]t was not a matter of refusing to accept an allocation. It was up to the enterprises to put in requests. Many armament firms refused. The Krupp firm sought concentration camp labor because of the scarcity of manpower then prevailing in Germany."[92]

The Tribunal rejected the defendants' defense of necessity and stated that "[t]he situation at the Berthawerk [one factory Krupp owned] again leads to the conclusion that the Krupp firm planned its own program upon its desire to use concentration camp labor.[93] Krupp and the other defendants argued that they would have lost their factories and properties had they refused to use slave labor. The Tribunal noted that fear of property loss was not sufficient grounds for invoking necessity. By contrast, the USMT did accept the defense of necessity for the majority of defendants who worked in the Flick concern (see Section V *infra*) because they had feared loss of life for refusing to accept forced labor in their factories.

The Krupp firm, the Tribunal concluded, had an "ardent desire" to employ forced labor. In using such a characterization, the Tribunal attributed intent to the corporate entity as well as the individual defendants. The notion that the Krupp firm *planned, desired, and sought* forced labor, or *engaged* in plunder and pillage, exemplifies the way in which (1) some criminal acts are the manifestation of planning and execution at the firm level, and (2) courts can attribute liability to the MNC as well as its employees.

3. Karl Rasche and the Role of the Financier

Another industrialist who was charged with engaging in slave labor was Karl Rasche, the Chairman of Dresdner Bank, a private commercial bank in

90. *Id.* at 1388. The fact that during a substantial part of the war years, Russian prisoners of war and Italian military internees were required to work in semi-starved conditions is conclusively demonstrated through documentary evidence taken from the Krupp files, which had been concealed. Because the evidence on the subject is voluminous, it cannot be discussed in detail, but it leaves no doubt as to the treatment of the war prisoners and internees.

91. *Id.* at 1409.

92. *Id.* at 1412.

93. *See id.* at 1423.

Germany that has been characterized as the bank of the Third Reich.[94] Rasche was the only private banker tried under the Nuremberg Charter.[95] He was charged with facilitating slave labor on the grounds that he made loans to entities using slave labor.[96] The USMT stated, "We cannot go so far as to enunciate the proposition that the official of a loaning bank is charged with the illegal operations alleged to have resulted from loans or which may have been contemplated by the borrowers."[97]

In the recent litigation brought by Holocaust survivors against Swiss banks, much was made by the defendant Swiss banks about the language of the *Rasche* decision. The banks cite *Rasche* to demonstrate that the mere act of providing money or credit to finance criminal activity does not constitute a violation of customary international law, even where the bank had knowledge of the purpose for such financing.[98]

When analyzing the spectrum of conduct that may give rise to complicity, one might analogize the *Rasche* case to a situation where an MNC may be present in a host country and where its limited investment activity might contribute to human rights violations. Passive investment or presence in a host county will not by itself trigger accomplice liability. On the other hand, one might argue that the *Rasche* decision itself needs to be tempered by examining the nature of the relationship between the financier and the criminal perpetrator. If the bank or banker provides continuous, ongoing and knowing financial support for criminal conduct in the form of loans, why should it not trigger accomplice liability? One can draw parallels from contemporary rules concerning the liability of individuals and legal persons for money laundering or for financing terrorist activity as situations in which the knowing provision of financial assistance contributes to criminal conduct and also triggers liability for the financial activity.

B. Trials of Other Industrialists: Japanese Mining Company Officials and the Kinkaseki Mine Prosecutions

Much of the current debate concerning corporate complicity and forced labor has focused on the USMT trials of the German industrialists. Legal commentators have overlooked the trial of employees of the Japanese Nippon Mining Company for their actions at the Kinkaseki Mine in Formosa during World War II.

The Kinkaseki Mine trial was held before the British War Crimes Court in Hong Kong.[99] The nine defendants were all civilian employees of the Nippon

94. *See United States v. Von Weizsaecker* (Ministries Case) XIV TRIALS OF WAR CRIMINALS BEFORE THE NUREMBURG MILITARY TRIBUNALS 621-22 (1952).

95. *See id.* For a more detailed account, *see* Ramasastry, *Secrets and Lies*, *supra* note 49, at 414.

96. *See Ministries Case*, *supra* note 94, at 852.

97. *Id.* at 854.

98. *See* Ramasastry, *supra* note 49, at 416.

99. The Court consisted of Lieutenant-Colonel R.C. Laming (Department of the JAG of India), Major R.S. Butterfield (Indian Grenadier), and Captain K.R. Busfield. The current POW litigation that was recently dismissed by a federal district court in California involved the activities of the

Mining Company who were accused of mistreating POWs forced to labor in the mines. Among them was the general manager of the mine, two production managers, a production supervisor, and five foremen. The trial took place in May 1947. The sentences ranged from one to ten years.

The *South China Morning Post*, a newspaper published in Hong Kong, provided detailed reports of the trials. According to the news reports, there were three main issues at trial: (1) whether the Army or the Nippon Mining Company was responsible for accidents to and mistreatment of POWs; (2) whether the working conditions in the mines were adequate; and (3) how the accused may have mistreated POWs. There may be court documents available in British government archives, but the author has only been able to locate these news reports, to date, providing an account of the proceedings.

The reports of the trials are instructive because they show that the war crimes tribunals in the Far East also grappled with the liability of economic actors. Moreover, the proceedings provide useful examples of the difficulty that tribunals face when apportioning liability to private actors and state actors.

As the discussion below illustrates, the British Military court focused a great deal of attention on whether care for the prisoners (and subsequent mistreatment) was the responsibility of the mining company or of the army. Similar to the German industrialists, the mining company officials invoked the defense of necessity. They asserted that in using POW labor in their mining operations, they were acting under orders from the Japanese Army. The court appeared to disregard this defense when imposing liability.

Newspaper accounts of the trial are not clear as to why the court reached the verdict that it did. However, it can be inferred that the court held the mining company legally responsible for deaths, injuries, and the suffering of the POWs. This is deduced from the fact that two of the defendants, Toda and Nakamura, a mining company manager and supervisor respectively, were found guilty, although they did not directly participate in the beatings or mistreatment of the prisoners. Thus, their guilt was predicated more upon their responsibility as members of the mining company than as private individuals engaged in human rights violations.

Nippon Mining Company at Kinkaseki. Nippon Mining Company, a subsidiary of Japan Energy Corporation, allegedly forced the British POWs to dig copper in Taiwan's Kinkaseki mine. The POW litigation was commenced in California on behalf of the POWs that were forced to work in the Kinkaseki mines. The case focused on Arthur Titherington, Henry Blackham, and Fergus McGhie, men currently in their late seventies or eighties who argue they were given poor food and no medical care by the company while working in the mine and were subjected to constant vicious beatings. According to news reports, there are more than five-hundred survivors who worked at Kinkaseki. *See Excavating Japan's Past*, ABC NEWS, Feb. 23, 2000, *available at* http://abcnews.go.com/sections/world/DailyNews/slavelabor000223.html (last visited Oct. 9, 2001). For further accounts of the experiences of British POWs at the Kinkaseki Mine, *see POWs Fight Japan in USA Courts*, BBC NEWS, Feb. 23, 2000, *available at* http://news.bbc.co.uk/hi/english/uk/newsid_652000/652633.htm (last visited Oct. 9, 2001). One of the plaintiffs in the POW litigation against the Japanese corporations is Arthur Titherington. He has written an account of his experiences. *See* ARTHUR TITHERINGTON AND ROBERT P. O'NEIL, KINKASEKI: ONE DAY AT A TIME (2001).

During the trials, the defendants and witnesses from the Japanese Army argued that when the POWs were working in the mine, the Army was not responsible for their welfare. Two Japanese Army officers on trial before another War Crimes Court, Colonel Nakano and Captain Imamura, were called as prosecution witnesses in the Kinkaseki Mine Trial. Both testified that the responsibility for the safety of POWs working in the mine lay with the members of the Nippon Mining Company and not with the staff of the POW camp. They alleged that the Company was also responsible for establishing the work quota and for supplying POW workers with the necessary equipment for working in the mine.[100]

Nakano, the Chief Commandant of all POW Camps in Formosa, declared that his guardianship of the POWs ended at the entrance of the mine and that the POWs came under the supervision of the Company once they entered the mine. According to relevant military regulations, the Camp Commandant appointed guards to escort the POWs to the mine. These guards took the POWs to the entrance of the mine, handed them over to the Company employees and remained on guard outside the mine. At the end of the day, the Army guards met the POWs at the entrance of the mine and escorted them back to camp.[101]

An affidavit from Colonel Yokoda Hiroshi, former Staff Officer to General Ando, a Taiwan Army Commander, corroborated Nakano's testimony by stating that the Company officials and their subordinates were directly responsible for the conditions in the mine. The Company was responsible for any deaths or injuries due to accidents or mishaps in the mine and the individual treatment of POWs by the mining Company's staff.

In his closing address, the prosecutor argued that there was ample evidence to prove that Company officials, including Toda Mitsugu and Nakamura Katsumi, were entirely responsible for the safety and welfare of the POW laborers at the mine. According to the prosecutor, the very fact that the defendants took such pains to explain the measures they implemented to improve the working conditions showed they felt some responsibility.

Defendant Toda Mitsugu, the manager of the Nippon Mining Company, claimed that the POWs were at all times under the orders and control of the POW Camp Commandant. Toda argued that when Japan went to war, the nation was instructed to obey the Army's leadership. He claimed that although he personally did not wish to employ POWs, he was not in a position to raise any objection, especially as his predecessor had reached an agreement with the Army.

Toda stated that during the war, the Company had sufficient laborers to meet the production demand and that POW labor was therefore superfluous. He claimed that it was not profitable to use POWs because they were inexperienced and had to be maintained at the Company's cost.[102] Toda alleged that the Army instructed the mining Company that it was responsible for the POWs' pay and

100. *See Copper Mine Trial*, SOUTH CHINA MORNING POST, May 13, 1947, at 4.
101. *See In a Copper Mine*, SOUTH CHINA MORNING POST, May 11, 1947, at 9.
102. *See Formosan Mine*, SOUTH CHINA MORNING POST, May 14, 1947, at 4.

other amenities, but that at all times the POWs would be under the orders and control of the Camp Commandant. Toda added that the mine staff was also told to report all irregularities to the Camp Commandant.[103] Both Toda and Mitsugu's arguments echo those of the German industrialists. They claimed to have accepted slave labor because they were not in a position to refuse the Japanese government's request.

According to Toda, Captain Imamura's predecessor told him that the POWs were not employed at the discretion of the Company as they were prisoners of the Japanese Army. The Camp Commandant organized the POWs into work parties. The Camp Commandant admonished the work parties that they were under the Army's control, but should regard the instructions of the Company leaders as coming from the Commandant himself.[104]

Toda also testified that, as he was not in a position to control the POWs directly, he did not care much about their safety. Toda maintained that, according to the regulation, the control and guarding of POW workers was the responsibility of the Japanese Army authorities, while the Company was responsible for teaching the POWS how to mine. He further supported his contentions by stating that the Camp Commandant and his staff regularly visited the mine and inspected POWs working there.[105]

Toda Mitsugu denied having knowledge of the "hanchos'" (foremen) beatings of POWs while he was manager. Toda disclaimed his responsibility for crimes committed by the hanchos. He testified that he visited the mines about three times a year and had never witnessed ill treatment. The Camp Commandant never reported any beatings to him and he had no direct contact with the POWs themselves. The hanchos did not report any beatings to him. Had he known of ill treatment of POWs, Toda said that he would have cautioned the leaders of the working parties and informed the Camp Commandant.[106]

A second accused Company official, Nakamura Katsumi, said in his statement that when he took over as production supervisor at the mine, he was informed by Captain Imamura, the POW Camp Commandant, that he was directly under Imamura's command and must obey his orders. Nakamura was also instructed to stop all beatings in the mine and to prevent the hanchos from punishing POWs, and to report all irregularities directly to the Commandant.[107]

Nakamura also testified that he understood the Japanese Army to be responsible for POW workers, as it had established a sentry box at the mine entrance. He

> testified that although he had heard that beatings and mistreatment of POWs had taken place prior to entering the mine, he did not know any details of those occurrences. He also stated that he had neither witnessed nor heard any case of beatings or mistreatment during his service in the mine.[108] During cross-examination

103. *See In a Copper Mine*, *supra* note 101, at 9.
104. *See Formosan Mine*, *supra* note 102.
105. *See Copper Mine Trial*, *supra* note 100.
106. *See Formosan Mine*, *supra* note 102.
107. *See In a Copper Mine*, *supra* note 101.
108. *See id.*

by the prosecution, Nakamura said that he did feel responsible for any lapse of safety, but that preventing misconduct on the part of the hanchos was not part of his duties.[109]

In his closing address, the defense counsel argued that neither Toda nor Nakamura could be held responsible for the safety and welfare of the POW laborers forced on them by the Army. Defense counsel also argued that the safety and welfare of the POWs during work hours remained the responsibility of the Camp Commandant. POWs were purportedly employed against the wishes and the advice of the mining company.[110]

On May 28, 1947, British War Crime Court Number Five found eight of the nine accused guilty, including Toda and Nakamura, although neither was found to have directly participated in the abuse of the POWs. Toda was sentenced to imprisonment for one year and Nakamura was sentenced to five years.[111]

C. Drawing the Line: Developing a Standard for Corporate Complicity Based on Previous War Crimes Prosecutions

The prosecution of both German and Japanese company officials establishes the proposition that active and willing participation in the use of forced labor constitutes violations of international humanitarian law. Based on these earlier cases, the prosecution of private economic actors for similar criminal acts should be actionable today. In other words, if an MNC actively sought forced labor from a host government or acquiesced to the use of forced labor in a factory or project, there is a good argument that the USMT and British Tribunal decisions would create some sort of liability. As discussed below, the venue for such a case might be either an international criminal tribunal or a domestic court.

The USMT cases and the British Tribunal cases provide us with differing assessments as to whether and when the defense of necessity should be applicable to economic actors (as contrasted with military personnel). The USMT accepted the defense of necessity proffered by several of the German defendants that they had no choice but to accept forced labor, although only when the defendants could demonstrate that they feared loss of life as opposed to property. By contrast, the British court appears to have rejected such a defense because it found the various mining officials guilty despite their arguments about military compulsion. Thus, under the British court's analysis, the fact that the use of forced labor occurred during wartime should not, by itself, provide a defense for corporate defendants.

Today, an MNC should not be absolved of liability simply because it claims that the host government required it to take certain actions. The defense of duress or necessity, moreover, is less relevant when assessing the decisions of MNCs to collaborate with repressive governments. Today, an MNC makes a

109. *See Copper Mine Trial*, SOUTH CHINA MORNING POST, May 16, 1947, at 4.
110. *See War Trial Ends*, SOUTH CHINA MORNING POST, May 29, 1947, at 1.
111. *See id.*

deliberate choice, outside of the context of war, to work with a repressive regime as a business partner.

The war crimes prosecutions also give rise to another open question: Should knowledge alone also give rise to liability? Assume an MNC has knowledge that forced labor is used by a host government in a way that benefits the MNC's investment activity, should this give rise to liability for the corporate entity or the individuals? Should liability only be imposed when the MNC affirmatively requested or compelled the use of forced labor? As discussed below, a federal district court recently concluded that knowingly accepting the benefits of forced labor is insufficient to create liability.

The Nippon Mining, Farben, Krupp, and Rasche prosecutions provide us with a spectrum upon which to assess culpability. On the one hand, active participation in the use of forced labor was deemed sufficient grounds for imposing criminal liability. On the other hand, the mere act of providing money that financed the construction of a concentration camp was not sufficient. Today, however, precedent established by the Yugoslav and Rwanda War Crimes Tribunals support the notion that knowingly engaging in a war crime or crime against humanity might well give rise to accomplice liability.

The gray area remains situations where an MNC might finance a project in conjunction with a host government. In this situation, the actions of the MNC arguably exceed the discrete activity of providing a commercial loan as was the case with Rasche. There is an ongoing business relationship where, (1) continued economic benefit may be derived as a result of human rights violations, and (2) repression is necessary to extract profits from the investment. In such a case, the *Rasche* holding, discussed in Part II.A.3 above, could be distinguished because there the profits were made on the loan rather than on the ongoing operation of the factories at Auschwitz. The *Rasche* decision, moreover, is outdated in the sense that international criminal law has evolved and the notion of accomplice liability has been developed more fully.

The issue of MNC culpability should be assessed in terms of the level, degree and duration of complicity, and the context in which that complicity occurs. A single loan, for example, might not trigger liability whereas a continuous business relationship might. In some ways, the USMT tried to grapple with the possible spectrum of culpability. It is significant to consider that the cases adjudicated by the USMT were borne of war. Because they are not operating against the backdrop of war, in which they may be commandeered by the State, MNCs that work with repressive regimes today arguably present a stronger case for the imposition of liability. Such MNCs are acting purely for profit rather than out of the national interest. At the same time, any guidelines for when liability should attach to an MNC must take into account the fact that MNCs may operate in countries with internal civil conflicts.

III.
CONTEMPORARY FORCED LABOR LITIGATION: REVISITING WORLD WAR II

A. Litigation Against German MNCs

The war crimes trials have established an important precedent for holding private civilians accountable for violations of international humanitarian law. They also help to establish parameters for when to attribute liability to legal persons and private actors with respect to egregious human rights violations such as enslavement. In both the German and Japanese prosecutions, however, the focus was on the criminal liability of individual defendants rather than the corporations.

Only in recent years has the federal Alien Tort Claims Act (ATCA) in the United States applied the doctrine from the USMT cases to MNCs directly. An analysis of the recent forced labor cases is important for several reasons. First, these cases help us to understand how courts have made the leap from the criminal prosecution of individual persons to the civil prosecution of MNCs. These cases bridge the historical gap. Second, the recent litigation is directly related to the use of forced labor by German enterprise during World War II. These cases do not provide clear definitions or answers to the question of when an MNC should be regarded as complicit. They do, however, help frame the pivotal questions by focusing on the conduct of MNCs engaged in violations of international law through economic cooperation with a state.

The ATCA provides domestic remedies for plaintiffs for egregious violations of international law.[112] The ATCA was first enacted in 1789, during the first session of the U.S. Congress. It authorized civil lawsuits in U.S. courts for damages by persons injured by violations of international law. The ATCA pro-

112. For a useful overview of the history of the ATCA, *see* INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS (Beth Stephens and Michael Ratner, eds., 1996). For a discussion of the ATCA and MNC liability, *see* Ralph G. Steinhardt, *Litigating Corporate Responsibility*, GLOBAL DIMENSIONS 1, 7, (June 1, 2001), *available at* http://www.globaldimensions.net/articles/cr/steinhardt.html (last visited Oct. 9, 2001). Steinhardt notes that "there can be no prophylactic rule against private obligations under international law, especially for well-defined, egregious violations of the law. There is, in short, no doctrinal firebreak that keeps private corporations from being liable for any violation of international law, ever." Later in the paper, Steinhardt also seems to imply that jurisdiction via the ATCA is akin to an exercise of universal jurisdiction. When discussing possible objections to the ATCA, he states, "the principle of universal jurisdiction expresses this sense that some international wrongs are sufficiently intolerable that every state has a legally-protectable interest in its suppression to apply its own law. From this perspective, the domestic courts are not acting unilaterally. They are acting as agents for the international legal order." *Id.* at 9. *See also, Corporate Liability for Violations of International Human Rights Law*, 14 HARV. L. REV. 2025 (2001) (advocating the development of a multilateral solution for MNC liability for human rights liability, rather than creation of ill-defined standards under the ATCA); Saman Zia-Zarifi, *Suing Multinational Corporations in the U.S. for Violating International Law*, 4 UCLA J. INT'L & FOREIGN AFF. 81 (1999); Ariadne K. Sacharoff, Note, *Multinationals in Host Countries: Can They Be Held Liable Under the Alien Tort Claims Act for Human Rights Violations?* 23 BROOK. J. INT'L L. 927 (1998); Brad J. Kieserman, Comment, *Profits and Principles: Promoting Multinational Corporate Responsibility by Amending the Alien Tort Claims Act*, 48 CATH. U. L. REV. 881 (1999).

vides federal court subject matter jurisdiction over suits by aliens (noncitizens of the U.S.) for a "tort . . . in violation of the law of nations."[113]

After lying dormant for nearly two centuries, the ATCA was revived in 1980 in a case brought by the family of a young man named Joel Filartiga, who was tortured to death in Paraguay.[114] Although the trial court initially rejected plaintiffs' claim, the U.S. Court of Appeals for the Second Circuit reinstated the case and noted that aliens could sue under the ATCA for violations of international law for which there was an international consensus. The court found that there was such a consensus concerning the prohibition of torture.[115]

The language of the ATCA states that courts may exercise jurisdiction over torts in violation of the "law of nations." U.S. courts have defined the law of nations to include international law norms that are universal and obligatory.[116] This standard has been applied in an evolving manner by U.S. courts, to encompass a broad range of international human rights violations. One of the most recent cases that has extended the scope of the ATCA was a lawsuit against Radovan Karadzic, the leader of the Bosnian Serbs during the war in the Balkans. In *Karadzic*, the Second Circuit found that genocide, war crimes, and crimes against humanity were proper predicates for ATCA jurisdiction.[117]

The *Karadzic* decision was also groundbreaking in that the court held that certain international human rights norms were applicable to private actors as well as public actors.[118] Accordingly, the court concluded that the ATCA applies to suits against private parties (as opposed to state actors) where, as in genocide, international law indicates that the prohibition binds private parties as well as state actors.[119]

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113. 28 U.S.C. §1350 (2001).

114. *See Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

115. The *Filartiga* court stated:

> In the modern age, humanitarian and practical considerations have combined to lead the nations of the world to recognize that respect for fundamental human rights is in their individual and collective interest . . . Indeed, for purposes of civil liability, the torturer has become like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind.

Id. at 890.

116. *See Forti v. Suarez Mason*, 694 F. Supp. 707, 709 (N.D. Cal. 1988) (on reconsideration).

117. *See Karadzic*, 70 F.3d at 244. Karadzic was the head of a *de facto* state based upon an illegal seizure of power. He was charged by plaintiffs with genocide, war crimes, crimes against humanity, summary execution, and torture (including rape).

118. *See id.* at 239-43.

119. For example, the Convention on the Prevention and Punishment of the Crime of Genocide of December 9, 1948, specifically prohibits genocide whether committed by a public or private actor. *See* Article 4 of the Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention]. The USMT stated quite succinctly that private individuals have duties under international law:

> It is argued that individuals holding no public offices and not representing the State, do not, and should not, come within the class of persons criminally responsible for a breach of international law. It is asserted that international law is a matter wholly outside the work, interest and knowledge of private individuals. The distinction is unsound. International law, as such, binds every citizen just as does ordinary municipal law. Acts judged criminal when done by an officer of the Government are criminal also when done by a private individual. The guilt differs only in magnitude, not

As discussed *infra*, U.S. courts extended the *Karadzic* decision one step further in 1997, when a federal district court concluded that it had subject matter jurisdiction over the Unocal corporation with respect to its pipeline operations in Burma. Unocal as a legal person was treated as analogous to a natural person with respect to allegations of forced labor. For other violations of international law such as the forcible displacement of Burmese civilians in order to build a pipeline, the court relied on U.S. constitutional doctrine concerning "joint actors" where private entities have acted in concert with the government.

The basis, at least in American law, for imputing liability to MNCs under the ATCA in the same fashion as natural persons is found in U.S. corporate and tort law. For example, rules of criminal responsibility hold corporations accountable for the illegal acts of their agents, if the agent was acting within the scope of his or her employment. In tort law, an agent's tortious acts can be attributed to the employer if the agent is acting pursuant to his or her employment.[120]

The recent World War II slave labor cases will have a longstanding impact on human rights litigation—firmly establishing, at least in American jurisprudence, the notion that a company can be sued civilly for certain direct participation in the use of forced labor. *The question is no longer whether an MNC can be sued but rather what factual circumstances will give rise to liability.*

In 1999, a host of cases was filed against German, Austrian, and American corporations alleging that these companies, or related subsidiaries, had used and benefited from slave labor during the Second World War. The suits were filed using the ATCA as the basis for subject matter jurisdiction. In a parallel and related effort, the German government and certain large German corporations agreed to create a fund of $5.2 billion (approximately DM 10 million) to settle slave labor claims.[121]

> in quality . . . There is no justification for a limitation of responsibility to public officials.

The Flick Case, supra note 50, at 1192.

120. *See* Stephens, *supra* note 12, at 219-20. ("The common acceptance in the United States of the concept of corporate crimes, however, undoubtedly contributes to the acceptance of the related concept that corporations can be held legally accountable for human rights violations.").

121. *See* John Hooper, *Nazis forced labourers to get payments*, THE GUARDIAN, May 31, 2001, *available at* http://www.guardian.co.uk/international/story/0,3604,498828,00.html (last visited Feb. 7, 2002). *See also* Interview with President William J. Clinton, 35 Wkly Compilation Presidential Documents 2610, in Orlando, FL (Dec. 20, 1999), *available at* 1999 WL 12655361.

The website of the German Economy Initiative Foundation, the nonprofit created to disburse the settlement funds, notes:

> Today, it cannot be a matter to give payments alone for the fact of forced labor. No legal basis exists for claims against German enterprises with regard to forced labor or to injuries consequential upon persecution during the Nazi era. The consequences of the fact that German enterprises were involved in Nazi wrongs cannot be settled by legal means. However, German enterprises recognize their moral responsibility, in particular where forced labor had to be performed under particularly harsh conditions and in cases where enterprises cooperated in discriminating against people who were persecuted on racial grounds during the Nazi regime.

See http://www.stiftungsinitiative.de/eindexr.html (last visited Feb. 7, 2002).

According to recent documentation, over 400 German companies used slave labor made available by the Nazis during the Second World War.[122] Slave laborers or forced laborers were not paid reparations by the German government. The German government took the position that private industry should pay any restitution, since it had benefited from the slave labor. Conversely, German corporations insisted that the government should be responsible for reparations since the postwar German government was a legal successor to the Third Reich. German companies also claimed that responsibility should not rest with them since they were forced to use slave labor by the German war effort.[123] The necessity and duress defenses were commonly raised in the trials of the industrialists, as well as in subsequent civil litigation in German courts.

The first slave labor action filed in the United States was against the American car manufacturer Ford Motor Company.[124] In 1998, a federal class action suit was filed in federal district court in Newark, New Jersey alleging that Ford

122. *See* Press Release, American Jewish Committee, American Jewish Committee Issues Second List of German Firms That Used Slave and Forced Labor During the Nazi Era (Jan. 27, 2000), *available at* http://www.ajc.org/pr/germany2ndlist.htm (last visited Oct. 9, 2001). Plaintiffs' lawyers commissioned a report that calculates the number of forced laborers under the Third Reich as well as the number of survivors and the economic value of the labor brought to the present day. In the summer of 1999, Cohen, Milstein, Hausfeld, and Toll asked Nathan Associates "to bring together in a consistent framework the various estimates of the total number of foreign forced laborers during World War II and of the number of survivors of this labor." *See* http://www.cmht.com/casewatch/slavelabor/cwslreport.htm (last visited Oct. 9, 2001).

123. *See, e.g.*, FERENCZ, *supra* note 30, at xviii. Ferencz, when referring to the industrialists tried from I.G. Farben, Krupp, and Flick, states, "[a]s far as they were concerned, the use of slaves was a patriotic duty which was both normal and proper under the circumstances." *See also, id.* at 188-89; Michael J. Bayzler, *Nuremberg in America*, 34 U. RICH. L. REV. 1, 194 n. 792. For an interesting article on the role of historians in documenting the role of German industry in World War II, *see* S. Jonathan Wiesen, *German Industry and the Third Reich: Fifty Years of Forgetting and Remembering*, 13 DIMENSIONS: A JOURNAL OF HOLOCAUST STUDIES, *available at* http://www.adl.org/braun/dim_13_2_forgetting.html (last visited Feb. 7, 2002).

124. *See* Ken Silverstein, *Ford and the Fuhrer: New Documents Reveal Close Ties Between Dearborn and the Nazis*, THE NATION, Jan. 24, 2000, *available at* http://past.thenation.com/issue/000124/0124silverstein.shtml (last visited Oct. 7, 2001); David Ensor, *G.M., Ford deny collaboration with Nazis during WWII*, CNN.COM, Nov. 30, 1998, *available at* http://www.cnn.com/US/9811/30/autos.holocaust (last visited Oct. 9, 2001). For a differing view, *see* Simon Reich, *The Ford Motor Company and the Third Reich*, 13 DIMENSIONS: A JOURNAL OF HOLOCAUST STUDIES, *available at* http://www.adl.org/braun/dim/_13_2_ford.html (last visited Oct. 9, 2001). Reich, a professor at the Graduate School of Public and International Affairs at the University of Pittsburgh is the author of *The Fruits of Fascism: Postwar Prosperity in Historical Perspective*, which documents the different degrees of success enjoyed by the Ford Motor Company in Germany and Great Britain in the 1930's and 1940's. Reich was retained as part of an investigative team commissioned by Ford in response to the forced labor lawsuit, to assess Ford's wartime activities. Reich states that, "I certainly found no evidence that American management ever sanctioned the use of slave labor or that it even knew of the use of slave labor." *See also,* Adam Lebor, *Slave Labour at Auschwitz Used by Ford*, INDEPENDENT, Aug. 20, 1999, at 8, *available at* 1999 WL 21262339.

On the subject of corporate payments to the victims of forced labor, the German Economy Foundation Initiative states:

> The absolutely necessary precondition for releasing the money is that all-embracing and enduring legal peace be created for the companies, i.e. that they be protected against all lawsuits and that there be a realistic prospect of protection against corresponding administrative and legislative measures against German companies.

German Economy Foundation Initiative, *Preamble*, *available at* http://www.stiftungsinitiative.de/eindexr.html (last visited Jan. 24, 2002).

had knowingly accepted economic benefits derived from the use of forced labor by its German subsidiary, Ford Werke A.G. in Nazi Germany.[125] Ford Werke also was joined as a defendant and the complaint alleged that the subsidiary had "knowingly earned enormous profits from the aggressive use of forced labor under inhuman conditions."[126]

The named plaintiff representing the class was Elsa Iwanowa, a Belgian citizen and resident, who alleged that she performed unpaid "forced labor under inhuman conditions for Ford Werke A.G." from 1942 to 1945 in its Cologne plant.[127] Iwanowa claimed that she was "abducted by Nazi troops and transported to Germany with approximately 2,000 other children by a representative of Ford Werke A.G." in order to work at the Cologne factory.[128] The class was comprised of all persons who were compelled to work for Ford Werke between 1941 and 1945.[129] Plaintiffs sought disgorgement of all profits and benefits that Ford earned through its subsidiary, as well as punitive damages "arising out of defendant's knowing use of forced labor under inhuman conditions."[130]

The complaint further alleged that Ford Werke AG, which had been doing business in Germany since 1925 and was headquartered in Cologne, aggressively requested the use of forced laborers.[131] The complaint states that in 1943, 25% of Ford Werke's workforce was unpaid forced labor. By 1944 the percentage of unpaid laborers had allegedly grown to 50%. It apparently remained constant until the end of the war.[132]

Ford moved to dismiss the Iwanowa case on three grounds: (1) lack of subject matter jurisdiction; (2) failure to state a claim; and (3) expiration of the statute of limitations.[133] While the motion to dismiss was pending before the court, new documents from Nazi archives were publicized revealing that Ford Werke A.G. was one of 51 German companies to use Auschwitz internees as slave laborers.[134] Ford's response was that the American parent did not control its German subsidiary's operations.[135]

Plaintiffs alleged that as a result of the use of unpaid forced labor, Ford Werke's annual profits had doubled by 1943.[136] The complaint also stated that unlike other subsidiaries of American-owned companies, Ford Werke had never

125. *See Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424 (D.N.J. 1999); *see also,* Class Action Complaint and Jury Demand, *Iwanowa v. Ford Motor Co.* (Civil Action No. 98-959).

126. *Iwanowa* complaint at ¶ 2.

127. *Id.* at ¶¶ 1-2 and 24-28.

128. *Id.* at ¶ 25.

129. *See id.* at ¶ 29.

130. *Id.* at ¶ 38.

131. *See id.* at ¶ 10.

132. *See id.*

133. *See* Ford Motor Company's Motion to Dismiss, *Iwanowa v. Ford Motor Co.* (Civil Action No. 98-959).

134. *See* Lebor, *supra* note 123, at 8.

135. *See* Douglas Davis, *Documents Reveal Ford was Part of the Auschwitz Industrial Complex*, GLOBAL JEWISH NEWS, Aug. 22, 2001, *available at* http://www.jta.org/story.asp?story=2020 (last visited Nov. 3, 2001).

136. *See Iwanowa* Complaint ¶ 12.

been nationalized by the Nazis and that the American parent retained a controlling interest throughout the war.[137]

In addition to the Ford case, dozens of other lawsuits were filed against different German and Austrian corporations for their use of slave labor during World War II.[138]

In September 1999,[139] Judge Joseph Greenaway, U.S. district court judge for the District of New Jersey, dismissed the lawsuit against Ford and its subsidiary Ford Werke A.G.[140] However, before dismissing the claim, the court found that it had subject matter jurisdiction over Iwanowa's slave labor claims under the ATCA.[141] The court found that Ford indeed had used "unpaid, forced labor during World War II" and that this "violated clearly established norms of customary international law."[142] The court further stated that Iwanowa's allegation that "she was literally purchased along with 38 other children . . . by a representative of [Ford Werke] . . .[is sufficient] to support an allegation that [Ford and Ford Werke] participated in slave trading."[143] Ford's alleged slave trading also was held to violate customary international law.[144]

The court further noted that although customary international law is sometimes referred to as the "law of nations," it nonetheless applies to private actors such as Ford in certain circumstances.[145] Slave trading, the court found "is included in that 'handful of crimes' to which the law of nations attributes individual responsibility."[146] The district court ruled that Ford could not use the non-state actor argument because it had worked with the Nazi government to procure slave laborers and therefore "acted as an agent of, or in concert with, the Ger-

137. *See id.* at ¶ 15.

138. *See* Joint Statement on occasion of the final plenary meeting concluding international talks on the preparation of the Federal Foundation "Remembrance, Responsibility, and the Future," July 17, 2000, Annex C, List of known World War II and National Socialist era cases against German companies pending in U.S. courts filed by plaintiffs' counsel participating in the negotiations. Lawsuits were filed against Agfa Gevaert, Alcatel, SEL, Albert Ackermann, Aktiengesellschaft, Audi, BASF, Beiersdorf, BMW, Bosch, Continental, (Tire), Daimler-Benz, Diehl Sifting & Co., Dunlop, drop Adler, Franz Haniel & Cie, Dyekerhoff Heinkel, Heiderlberger Zement, Hochtief, Hoescht, Phillip Holzman, Hugo Boss, Leica Camera, Leonhard-Moll Krupp, Lufthansa, MAN, Mannesmann, Messerschmitt-Boelkow-blohm, Miele & C., Pfaff Akteingesellschaft, Rheinmetall, Rodenstock, Siemens, Steyr-Daimler-Puch, Thyssen, VARTA, Voiest, Volkswagen, Wurttembergische, Metallwarenfabrik, and Zeppelin. American car manufacturers Ford and General Motors and their German subsidiaries, Ford Werke A.G., and Opel, were also sued. For further discussion of the slave labor litigation, *see* Bayzler, *supra* note 122, at 207, n. 843. *See also Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248, 281-82 (D.N.J. 1999).

139. Many of the slave labor cases were filed in federal court in New Jersey because the American subsidiaries of many German chemical and pharmaceutical companies are located in New Jersey.

140. *See Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 491 (D.N.J. 1999).

141. *See id.* at 438-46.

142. *Id.* at 440.

143. *Id.*

144. *See id.* at 439-41.

145. *Id.* at 443-45.

146. *Id.* at 445 (citing *Nat'l Coalition Gov't v. Unocal Corp.*, 176 F.R.D. 329, 348 (C.D. Cal. 1997).

man Reich."[147] Thus, the court treated Ford as if it was a natural person with respect to certain violations of international law.

Although the court concluded that Ford had violated international law, it ultimately dismissed *Iwanowa's* case. Dismissal was warranted, according to the Court, because relevant treaties between the Allied Powers and Germany required individual claims against corporations to be pursued exclusively through inter-governmental settlement.[148] Further, the court held that Iwanowa's claims against Ford and Ford Werke under the ATCA, American law,

147. *Id.* at 446 (referring to the Agreement on Reparations from Germany on the Establishment of an Inter-Allied Reparation Agency and on Restitution to Monetary Gold, Jan. 14, 1946, 3157 T.I.A.S. No. 1655).

148. *See id.* at 460. The court first looked at the treaties entered into between the Allied powers and the Federal Republic of Germany (F.R.G.) subsequent to the War. In January 1946, the United States and seventeen other nations met in Paris to sign the Paris Reparations Treaty obliging Germany to pay wartime reparations. *See id.* at 448-55. The Paris Reparations Treaty was never fully executed as the Cold War led to the division of Germany into two states, the Federal Republic of Germany (so called West Germany) and the German Democratic Republic (so called East Germany). *See* Convention Between the United Kingdom of Great Britain and Northern Ireland, France, the United States of America and the Federal Republic of Germany on the Settlement of Matters Arising out of War and the Occupation, May 26, 1952, 6 U.S.T. 4117, 331 U.N.T.S. 219 (as amended by Protocol on Termination of the Occupation Regime in the Federal Republic of Germany, Oct. 23, 1954, 6 U.S.T. 4117, 331 U.N.T.S. 219).

In 1952, the F.R.G. entered into a treaty known as the Transition Agreement with Western Nations that postponed its payment of reparations. In 1953, the Wartime powers and seventeen other nations entered into yet another treaty with the F.R.G. known as the London Debt Agreement. *See* Agreement on German External Debts, Feb. 27, 1953, 4 U.S.T. 443, 333, U.N.T.S. 3.

The London Debt Agreement deferred the collection of any reparations (as originally set forth in the Paris Reparations Treaty) until the F.R.G. had rebuilt its economy. In 1990, the F.R.G. and the German Democratic Republic both entered into a treaty with the United States, France, and the U.S.S.R. known as the Two-Plus-Four Treaty. *See* Treaty on the Final Settlement with Respect to Germany, Sept. 12, 1990, 29 I.L.M. 1186. The *Iwanowa* court treated the Two-Plus-Four Agreement as the treaty that settled the problem of wartime reparations because it stated that the Allied nations could demand no further reparations from a unified Germany. *See Iwanowa*, 6 F. Supp. 2d at 453. The court's analysis focused on article 5(2) of the London Debt Agreement:

> Consideration of claims arising out of the Second World War by countries which were at war with or were occupied by Germany during the war, and by nationals of such countries, against the Reich, or agencies of the Reich . . . shall be deferred until the final settlement of the problem of reparations.

Iwanowa, 67 F. Supp. 2d at 453 (quoting from the London Debt Agreement).

Since plaintiff Iwanowa had been a national of the U.S.S.R. during World War II, Article 2 covered her claims. Furthermore, although Iwanowa's claims were against Ford and Ford Werke, two private corporations, the court noted that previous interpretations of the London Debt Agreement provided the same deferral of reparations payments to private corporations. In 1963 and 1973, the German Supreme Court held that private German corporations that utilized unpaid slave labor were entitled to deferral of claims pursuant to the London Debt Agreement. *See id.* at 452-54 (discussing the German cases before the German Federal Supreme Court).

Commentators have critiqued the court's analysis of article 5(2) as being incorrect. For example, Bayzler remarks that,

> nothing in the Agreement makes such claims available only through government-to-government diplomacy. The court's analysis, in effect, interprets article 5(2) as not only deferring such claims, but forever extinguishing them. Moreover, the court's conclusion is contrary to the decisions reached by the German courts. Three German court decisions in 1997, in 1998, and in 1999 have allowed private claims for slave labor to go forward in German courts.

Bayzler, *supra* note 123, at 215.

and German law, were all time barred. Finally, the court ruled that the lawsuit should be dismissed on grounds of nonjusticiability and international comity.[149]

In September 1999, on the same day in which the action against Ford was dismissed, another federal district court (also in the federal district court for the District of New Jersey) dismissed four other slave labor cases involving German corporations Degussa and Siemens.[150] Degussa allegedly utilized slave laborers in various refining and manufacturing facilities[151] and Siemens purportedly used nearly 100,000 slave laborers in its electronic and communications equipment manufacturing facilities.[152]

Although Judge Dickensen Debevoise dismissed the lawsuits on grounds of nonjusticiability, the court also made certain factual and legal findings that serve as important precedents for future slave labor claims.[153] First, the court noted that the plaintiffs' claims comported with history concerning the involvement and knowledge of Degussa and Siemens with respect to their use of slave labor: "Plaintiffs factual allegations . . . are totally consistent with the history of the Nazi era and with the record developed during the post-war trials in Nuremberg."[154]

In the Court's opinion in *Burger-Fischer v. Degussa A.G.*, it stated that, "[t]he plaintiffs' accounts of the wrongs they suffered at the hands of the Nazi government and the defendants are deemed to be completely accurate. The historical events recited herein are established either by undisputed submissions in the record or are of common knowledge."[155]

The *Burger-Fischer* decision, similar to the *Iwanowa* decision, affirms the notion that the use of slave labor by private corporations is a violation of cus-

149. *See Iwanowa*, 67 F. Supp. 2d at 483-88 and 489-91. The discussion of justiciability suggests that the court dismissed the case under the political question doctrine.

150. *See Burger-Fischer*, 65 F. Supp. 2d at 248. The opinion dismissed the following actions: *Vogel v. Degussa AG*, Civil Action No. 98-5019 (D.N.J. filed Nov. 6, 1998); *Klein v. Siemens AG*, Civil Action No. 98-4468 (D.N.J. filed Sept. 24, 1998); *Licthman v. Siemens AG*, Civil Action No. 98-4252 (D.N.J. filed Sept. 9, 1998); *Burger-Fischer v. Degussa AG*, Civil Action No. 98-3958 (D.N.J. filed Aug. 21, 1998). All four cases involved Holocaust survivors who had worked as slave laborers for German companies.

151. *See id.*

152. *See id.* at 253.

153. *See id.* at 272-81.

154. *Id.* at 255. The court went on to state:

> In brief[,] Degussa and Siemens's executives were fully aware of the widespread use of slave labor and of the inhumane conditions in which the victims lived and worked. The two corporations were aware that this program was utilized not only to advance the German war effort, but also as part of the Nazi goal of exterminating the entire Jewish community in Germany, in the territories of its allies and in the conquered lands. Degussa was aware of the uses to which the Zyklon B it manufacturer would be used in concentration camps and was aware that the gold it refined was seized from the Jewish people at their places of residence, when they arrived at the concentration camps and from their bodies before and after they had been killed. Knowing this[,] Degussa and Siemens voluntarily participated and profited from the use of slave labor and[,] in the case of Degussa, in the manufacture and sale of Zyklon B and the refining of stolen gold.

Id. at 255.

155. *Id.* at 285.

tomary international law: "There can be little doubt that the acts in which the defendant corporations are alleged to have engaged were and are proscribed by customary international law . . . [and] defendants' alleged conduct violated German civil law in effect at the time they engaged in that conduct."[156]

To date, Ford and Ford Werke have not participated in any settlement fund or provided any reparations to laborers from the Werke plant. Degussa and Siemens, however, have pledged to participate in the German slave labor fund.[157] The dismissal of the various slave labor cases allows a company such as Ford, which regained ownership of the Werke plant at the end of World War II, to avoid liability for its violations of international law.

The lawsuits are important for publicizing the complicity of German and Austrian industry with the Nazis, as well as exerting pressure on German industry to participate in the slave labor fund. The cases also provide strong precedent for the fact that a corporation's active participation in the use of slave or forced labor is actionable under the ATCA.

Most importantly, the cases bridge the gap between World War II and modern MNC complicity. The *Iwanowa* and *Burger-Fischer* courts recognized that absent a treaty, plaintiffs would have a private right of action against the defendants for their violations of international law. In this respect, one can read the USMT decisions in tandem with the modern forced labor cases and develop a framework for holding MNCs accountable for direct complicity as outlined in Section I.

B. Litigation Against Japanese MNCs

While cases involving German corporations proceeded on the East Coast, litigation relating to the use of Korean and Chinese civilian slave labor and POW slave labor by the Japanese was commenced on the West Coast of the United States.

In September 2001, Judge Vaughn Walker, federal district court judge for the Northern District of California, dismissed a series of lawsuits brought by Chinese and Korean nationals against Japanese corporations. The plaintiffs sought compensation for forced labor activities during World War II.[158] The court previously had dismissed cases brought by American and Allied war veter-

156. *Id.*

157. *See* David Voraceos, *Ford Fights Lawsuit by Holocaust Survivors*, THE RECORD, Aug. 6, 1999, at A1, *available at* 1999 WL 7109695.

158. *See In re World War II Japanese Forced Litigation*, 164 F. Supp. 2d 1160 (N.D. Cal. 2001) (hereinafter *Japanese Forced Labor Litigation II*). The case dismisses the following actions: *Choe v. Nippon Steel Corp.*, *Kim v. Ishikawajima Harima Heavy Industries Co. Ltd.*, *O v. Mitsui Co., Ltd.*, *Sin v. Mitsui C. Ltd.*, *Su v. Mitsubishi Corp.*, *Sung et. al v. Mitsubishi Corp.*, and *Ma v. Kajima Corp.* For a brief account of the litigation, *see* David Caron and Adam Schneider, *U.S. Litigation Concerning Japanese Forced Labor in World War II*, ASIL INSIGHTS, Oct. 2000, *available at* http://www.asil.org/insights/insigh57.htm (last visited Oct. 9, 2001). For discussion of the claims of POWs, *see* LINDA GOETZ HOLMES, UNJUST ENRICHMENT: HOW JAPAN'S COMPANIES BUILT POSTWAR FORTUNES USING AMERICAN POWS (2001).

ans who had been Japanese POWs on the grounds that their claims were precluded by a peace treaty between the United States and Japan.[159]

The primary cause of action of the civilian plaintiffs was based on a special statute—Section 354.6—enacted by the California Legislature in 1999. The statute provides a cause of action for all individuals forced to labor without compensation "by the Nazi regime, its allies and sympathizers, or enterprises transacting business in any of the areas occupied by or under control of the [same regimes]."[160] The California statute also waived relevant statutes of limitations that might have otherwise barred claims. In addition to the state law

159. *See In re World War II Era Japanese Forced Labor Litigation*, 114 F. Supp. 2d 939 (N.D. Cal. 2001) (dismissing the cases because the 1951 Peace Treaty with Japan waived all claims) [hereinafter *Japanese Forced Labor Litigation* II]. Judge Walker, in his decision, focused on Article 14(b) of the Treaty of Peace with Japan, between Japan and 47 other Allied powers. The Article reads:

> Except as otherwise provided in the present Treaty, the Allied Powers waive all reparation claims of the Allied Powers, other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war, and claims of Allied Powers for direct military costs of occupation.

114 F. Supp. 2d at 945 (quoting the Mulilateral Treaty of Peace with Japan, Sept. 8, 1951, 3 U.S.T. 3169, TIAS No. 2490.

The United States Congress is currently considering federal legislation that would either preserve their causes of action in federal court or would authorize some sort of payment to U.S. war veterans who had been forced laborers for Japanese companies. *See* Steve La Rocque, *Two Bills Proposed to Help U.S. POWs Used as Forced Labor by Japan*, United States Embassy (Tokyo), *available at* http://www.usembassy.state.gov/tokyo/wwwhus0039.html (last visited Oct. 9, 2001). *See also*, *Senate Urges Government to Negotiate for World War II Prisoners*, ASSOCIATED PRESS, Nov. 1, 2000, *available at* http://www.207.25.71.29/2000/ALLPOLITICS/stories/11/01/powlaw suits.ap/ (last visited Oct. 9, 2001).

In August 2001, Senators Orrin G. Hatch and Dianne Feinstein introduced legislation to assist American POWs that were forced into slave labor by Japanese companies during World War II. According to Senator Dianne Feinstein,

> the POW Assistance Act of 2001 makes clear that any claims brought in state court, and subsequently removed to federal court, will still have the benefit of the extended statute of limitations enacted by the state legislatures. The statute of limitations should not be permitted to cut off these claims before they can be heard on the merits. Today's bill does nothing more than ensure that these POWs receive their fair day in court.

Press Release, Senator Dianne Feinstein, Hatch/Feinstein Introduce POW Assistance Act of 2001 to Assist American Soldiers Forced into Slave Labor by Japanese Companies During World War II (Aug. 1, 2001), *available at* http://www.senate.gov/~feinstein/releases01/R-POW.htm (last visited Jan. 24, 2002).

160. CAL. CODE OF CIV. PROC. §354.6(a). Section 354.6(a) states:

> Any Second World War slave labor victim, or heir of a Second World War slave labor victim, may bring an action to recover compensation for labor performed as a Second World War slave labor victim or Second World War forced labor victim from any entity or successor in interest thereof, for whom that labor was performed, either directly or through a subsidiary or affiliate.

Attorney General Bill Lockyer of California submitted an *amicus* brief supporting the constitutionality of the California statute. The Attorney General also submitted a similar *amicus* brief to the United States Court of Appeals for the Ninth Circuit supporting the constitutionality of California's Holocaust Victims Insurance Relief Act, which required that insurance companies seeking to do business in California provide information concerning insurance claims from the Holocaust Era. The Ninth Circuit determined in March 2001 that the California insurance statute did not interfere with U.S. foreign relations. *See* Press Release, Office of the Attorney General, Attorney General Lockyer Defends the Rights of Holocaust Victims and World War II Slave Laborers (Aug. 14,

claims, the plaintiffs sought compensation under the ATCA and under various state laws and customary international law. The court ultimately concluded that § 354.6 was unconstitutional because it infringes on the federal government's exclusive power of foreign affairs.[161] As with the German slave labor cases, the court found that the plaintiffs' claims were time barred.

Importantly, however, the court did find that a claim alleging that the Japanese corporations had used forced labor was actionable under the ATCA. The court's reasoning was based largely on the findings of the New Jersey district court in *Iwanowa v. Ford Motor Co.*: "[i]n this regard, a district court in New Jersey addressing forced labor claims under the ATCA against Ford Motor company recently concluded that '[t]he use of unpaid forced labor during World War II violated clearly established norms of international law.'"[162] The district court also cited with approval the fact that the *Iwanowa* court had based its findings on Nuremberg precedent.[163]

As with the German cases, the court was willing to state that "it seems beyond doubt that two forced labor practices of defendants during the Second World War violate traditional international law."[164] However, the court noted that as such conduct took place over 50 years ago, the claims were precluded by the controlling statute of limitations.[165]

2001), *available at* http://www.caag.state.ca.us/newsalerts/2001/01-079.htm (last visited Oct. 9, 2001).

161. *See Japanese Forced Labor Litigation II*, 164 F. Supp. 2d at 1164. The Japanese government had filed a submission with the court in which it stated that the California statute would have a deleterious effect on its relationship with the United States, as well as with China, and North and South Korea. *See id.* at 18-19. The U.S. State Department also concurred with this assessment. *See id.* at 19.

162. *Id.* at 1179 (citing *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 440 (D.N.J. 1999)).

163. The court stated:

> As [the *Iwanowa* court] reasoned, this conclusion is supported by the following: (1) the Nuremberg Tribunals held that enslavement and deportation of civilian populations during the war constituted a crime against humanity in violation of international law; (2) the Nuremberg Principle IV(b) provides that the "deportation to slave labor . . . of civilian populations of or in occupied territory constitutes both a 'war crime' and a 'crime against humanity'" (quoting Nuremberg Charter, Annexed to the London Agreement on War Criminals, Aug. 8, 1945, art. 6, 59 Stat. 1544, 82 UNTS 279); and (3) several American and German jurists have stated that the conduct related to slave labor violates international law.

Id. at 1179.

164. *Id.* at 1179. For further discussion of Japanese corporations and their involvement with wartime forced labor, *see* ILO Report of the Committee of Experts on the Application of Conventions and Recommendations, Forced Labour Convention, 1930 (No. 29) Observation, 2000 Japan (ratification 1932). In its annual report drawn up by a committee of legal experts, the ILO said Japan's mass relocation of workers from the Korean Peninsula and Japanese-occupied areas of China to work at mines, construction sites, and factories in Japan "violated ILO Convention No. 29 that banned forced labor." The unofficial version is available online at http://www.angelfire.com/ny2/village/ilo2000.html (last visited Oct. 9, 2001).

165. The court in *Japanese Era Forced Labor Litigation II* stated:

> None of the allegations in the Korean and Chinese plaintiffs' complaints suggest that they could not have attempted to bring those claims sooner. To be sure, the Ninth Circuit only formally recognized a right of action under the ATCA in 1994. But the statute has been in force since the 18th century and several courts found it to provide a cause of action much earlier than the Ninth Circuit. The Korean and Chinese plain-

In the end, the lawsuits brought against German and Japanese corporations may achieve some small amount of relief for the victim plaintiffs through settlements brokered as a result of political negotiations (in the case of the German lawsuits) or legislation (in the case of American POWs). Their greater significance, however, is in reinforcing the basis for holding a contemporary MNC liable for suit under the ATCA by reference to Nuremberg and USMT proceedings as precedent. The U.S. courts, through their own deliberations, have extended the possibility of liability to corporations in addition to private individuals. The trials of the industrialists did not make this link explicit.

The recent litigation brought by the forced labor victims of German and Japanese enterprise makes it clear that legal persons have the same obligations as natural persons when it comes to certain egregious violations of international law norms, at least for purposes of ATCA jurisdiction. Even more important is the fact that the courts have recognized that MNCs, even when collaborating with a government actor, may nonetheless bear responsibility. MNCs, therefore, may be directly complicit in crimes under international law. They are not excused solely because of the presence of the state.

It is ironic, however, that private violations of international law can be immunized by virtue of government settlements. If such collaboration can result in immunity, it should result in liability in situations where there is no settlement (i.e., in the non wartime context of MNC activity today). There is currently a debate within the human rights community as to whether a government can or should ever grant amnesty for gross human rights violations without itself breaching its own duties under treaties and customary international law. To do so, some commentators argue, would be incompatible with the duty of states to investigate such acts and to guarantee freedom from such acts within their jurisdiction. States cannot, it is argued, deprive individuals of their right to an effective remedy.

IV.
BENEFICIARY COMPLICITY[166]: THE *UNOCAL* CASE AND FORCED LABOR IN BURMA

The criminal prosecution of industrialists after World War II and the more recent forced labor cases are highly relevant to the development of a doctrine of corporate complicity for MNCs that collaborate with repressive governments today. The existence of recent civil litigation against a multinational oil company alleging that it knowingly permitted the use of forced labor is illustrative of

tiffs do not assert reasons why their claims could not have been brought under the ATCA within ten years of the war's end.

164 F. Supp. 2d at 1181.

166. The term beneficiary corporate complicity is a relatively new term. It has been used to refer to situations in which an MNC knowingly benefits from human rights violations committed by someone else (e.g., a host government). For a discussion of this concept, *see* Clapham and Jerbi, *supra* note 40.

the continuing probity of the criminal prosecutions of World War II era German and Japanese industrialists.[167]

Modern MNC complicity, however, may occur outside of the context of war. It is important, therefore, to appraise contemporary situations to determine when an MNC might be liable outside of war. As noted above, the larger question is whether an MNC could be liable as a result of its role as a beneficiary accomplice (also referred to as indirect complicity). As discussed in Part I, beneficiary complicity relates to situations in which an MNC has knowledge of ongoing human rights violations in a host country and engages in a business

167. For example, the Hererro community in Namibia has instituted a legal claim against German companies seeking reparations for the enslavement and destruction of their tribe. The lawsuit alleges that imperial Germany (which colonized Namibia in the early twentieth century) had formed a "brutal alliance" with German industry and engaged in enslavement, extermination, forced labor, medical experimentation, and other crimes in order to advance common financial interests. *See Hererros Sue German Firm for Reparations*, BUSINESS DAY, Sept. 6, 2001, *available at* http://allafrica.com/stories/200109060457/html (last visited Oct. 9, 2001). For a description of German colonization in Southwest Africa, *see A Bloody History: Namibia's Colonization*, BBC NEWS, Aug. 29, 2001, *available at* http://news.bbc.co.uk/hi/english/world/africa/newsid1514000/1514 856.stm (last visited Oct. 9, 2001).

The United Steel Workers Union and the International Labor Rights Fund have partnered with a Colombian trade union to file suit against Coca-Cola, its Latin American bottler, and two Florida investors who own a bottling company in Colombia. The lawsuit alleges that Coca-Cola's Colombian business partners maintain open relations with a Colombian death squad as part of a strategy to intimidate trade union leaders. The complaint states that five union members working in Coca-Cola bottling plants have been killed since 1994. *See Coke Abuse in Columbia*, MULTINATIONAL MONITOR (2001), *available at* http://www.essential.org/monitor/mm2001/01september/sep01front.html (last visited Jan. 24, 2002). *See also* Aram Rostoin, *It's The Real Thing: Murder*, THE NATION, Sept. 3, 2001, *available at* http://www.thenation.com/docmhtml?I=20010903&c=1&s=roston (last visited Oct. 9, 2001); Julian Borger, *Coca-Cola sued over bottling plant terror campaign*, THE GUARDIAN, July 21, 2001, *available at* http://www.guardian.co.uk/international/story/0,3604,525209,00.html (last visited Oct. 9, 2001). For a copy of the complaint, *see* http://www.laborrights.org/projects/coke/index.html (last visited Oct. 9, 2001).

The United Steelworkers and UNITE have also brought a case in federal district court in California against textile and garment manufacturers in which Nicaraguan garment workers allege that their employers have subjected them to cruel, inhuman, and degrading treatment in violation of the rights to life, liberty, and security of person and have prevented them from exercising their right to freedom of association in contravention of international law. Plaintiffs are bringing their suit under the ATCA. *See* Plaintiffs' Complaint in *Manzanerez v. C&Y Sportswear*, *available at* http://www.nlcnet.org/court_complaint.htm (last visited Oct. 9, 2001).

In June 2001, Exxon was sued by eleven villagers from Aceh, a territory in Indonesia. Plaintiffs allege that Exxon paid Indonesian security forces to guard its facilities and that the company had provided the military with buildings that were used to torture local residents who are part of the Free Aceh movement and excavators to dig mass graves for victims of military violence. The lawsuit further alleges that the company purchased military equipment for security forces assigned to the project and also paid mercenaries to provide training and intelligence to military in the project area. Exxon closed down its operations in March 2001 due to security concerns. *See* Audrey Gillan, *Exxon Accused of Rights Abuses*, THE GUARDIAN, June 22, 2001, *available at* http://www.guardian.co.uk/indonesia/Story/0,2763,510896,00.html (last visited Oct. 9, 2001); *Aceh: Lawsuit accuses Exxon Mobil of complicity in abuses*, DOWN TO EARTH, Aug. 2001, *available at* http://www.gn.apc.org/dte/50Ach.htm (last visited Oct. 9, 2001). For a copy of plaintiffs' complaint, *see* http://www.laborrights.org/projects/aceh/index.html (last visited Oct. 9, 2001).

Weir Group, a Scottish manufacturer of oil pumps used for oil pipelines has been criticized by human rights groups for its business activity in the war-torn Sudan. Weir allegedly has been complicit in the Khartoum government's campaign of violence against the population. *See* Saeed Shah, *Weir Group Stands Firm Over Sudan*, THE INDEPENDENT, Aug. 23, 2001, *available at* http://www.independent.co.uk/story.jsp?story=90140 (last visited Oct. 9, 2001).

relationship with a repressive host government. If the MNC, after learning of human rights violations linked to its investment, continues to do business with the host government, this should give rise to accomplice liability. An important caveat is that the MNC needs to benefit from the violations.

In the United States, one of the earliest cases in which a court held that a multinational corporation could be subject to a civil suit for alleged violations of international human rights law was *Doe v. Unocal.*[168] Unocal, a multinational oil company, undertook a joint venture with Total S.A, a French oil company, and the Myanmar government, to extract oil and build a pipeline in the Tennaserim region of Burma (Myanmar).[169] The case was filed in federal district court in California on behalf of Burmese citizens who allegedly suffered torture, assault, rape, loss of their homes and property, forced labor, and other human rights violations.[170] In addition to the corporation, the plaintiffs named the President and Chief Executive Officer of Unocal as defendants.

The *Unocal* case is significant because it was the first lawsuit in which a court acknowledged that an MNC could be liable for violations of international law. It is also important because of two conflicting district court decisions that have emerged. In 1997, a federal district court refused to dismiss the case for lack of subject matter jurisdiction. The court concluded that knowing acceptance of the benefits of forced labor was actionable as a violation of international law. By contrast, in August 2000, a different judge ruled that Unocal could not be held liable solely for knowing about the Burmese government's use of forced labor in relation to the pipeline project.

168. Other cases include *Wiwa v. Royal Dutch Petroleum*, 226 F.3d 88 (2d Cir. 2000). The *Wiwa* case charged that the defendants, Royal Dutch Petroleum and Shell Transport and Trading Company, were complicit in human rights violations perpetrated by Nigerian security forces, including the murder of prominent environmental activists. *Jota v. Texaco, Inc.* involves two consolidated claims, *Aguinda v. Texaco* (S.D.N.Y., Docket No. 93-7527) (on behalf of residents of the Oriente Region of Ecuador), and *Aguinda v. Texaco* (D.D., Docket No. 94 Civ. 9266) (residents of Peru). The complaints allege that Texaco polluted the rain forests and rivers of the two countries during oil exploration in Ecuador between 1964 and 1992. The case was originally dismissed on the ground of forum non-conveniens. In 1998, the U.S. Court of Appeals for the Second Circuit reversed the dismissal. The case was remanded for further consideration of whether it should be heard in Ecuador. A more recent case is *Bowato v. Chevron* (N.D. Cal. 1999, Docket No. C99-2506). This case charges that California-based Chevron was involved in a series of machine gun attacks upon unarmed protestors in Nigeria. The protestors were allegedly summarily executed during the attacks, burned in a fire set during the attack, or subsequently tortured by the police after the attack. For an analysis of the current status of these and other cases, *see* Jennifer Green and Paul Hoffman, *Litigation Update: A Recent Summary of Developments in the U.S. Cases Brought Under the Alien Tort Claims Act and Torture Victim Protection Act*, *in* THE AMERICAN CIVIL LIBERTIES UNION INTERNATIONAL CIVIL LIBERTIES REPORT (2001), *available at* http://www.aclu.org/library/iclr/2001/ (last visited Feb. 15, 2002).

169. For Unocal's description of its investment activity in Burma, *see* http://www.unocal.com/myanmar (last visited Oct. 1, 2001). For additional background that supported the plaintiffs' viewpoints, *see* EARTHRIGHTS INTERNATIONAL AND SOUTHEAST ASIAN INFORMATION NETWORK, TOTAL DENIAL: A REPORT ON THE YADANA PIPELINE PROJECT IN BURMA (1996) *available at* http://www.earthrights.org/pubs/td.html (last visited Oct. 11, 2001). For an update on the Yadana Pipeline Project, *see* EARTHRIGHTS INTERNATIONAL, TOTAL DENIAL CONTINUES (2000), *available at* http://www.earthrights.org/pubs/td2000.html (last visited Jan. 24, 2002); *see also* http://www.earthrights.org/burma.html (last visited Oct. 9, 2001).

170. *See Doe I v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997).

Burma has been under military control since 1958.[171] In 1988, Burma's military government suppressed pro-democracy movements and imposed martial law. A new military government, known as the State Law and Order Restoration Council (SLORC), took control and renamed the country Myanmar.[172]

The 1997 decision by Judge Paez of the Central District of California, ruled that Unocal could be held liable for human rights violations under public international law if the plaintiffs could prove that Unocal acted in concert with the Burmese military government in carrying out these abuses. The court further held that Unocal could be held independently liable for using forced labor.

The *Unocal* decision extended the scope of the ATCA[173] to private corporations. The Court noted that for certain violations of international law, private actors (such as Unocal) might be liable absent state action. Citing the *Karadzic* decision, the court observed that "[p]articipation in the slave trade "violates the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals."[174] For other types of violations of international law, the court held that if Unocal was a "joint actor" with SLORC (i.e., the Burmese government), "where there is a substantial degree of cooperative action between the state and private actors in effecting the deprivation of rights, state action is present."[175]

With respect to the plaintiffs' factual allegations, the court found that the allegations were sufficient to support a claim under the ATCA:

> The allegations of forced labor in this case are sufficient to constitute an allegation of participation in slave trading. Although there is no allegation that SLORC is physically selling Burmese citizens to the private defendants, plaintiffs allege that, despite their knowledge of SLORC's practice of forced labor, both in general and with respect to the pipeline project, *the private defendants have paid and continue to pay SLORC to provide labor and security for the pipeline, essentially treating SLORC as an overseer accepting the benefit of and approving the use of forced labor.* These allegations are sufficient to establish subject matter jurisdiction under the ATCA.[176]

When moving to dismiss the lawsuits, defendants asserted that Unocal had nothing more than a business relationship with SLORC and MOGE. The court rejected this argument and stated: "First, plaintiffs allege that Unocal and its officials knew or should have known about SLORC's practices of forced labor and relocation when they agreed to invest in the Yadana pipeline project, and that despite this knowledge, they agreed that SLORC would provide labor for the joint venture. . . ."[177]

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171. *See Doe I v. Unocal Corp.*, 110 F. Supp. 2d 1294, 1296 (C.D. Cal. 2000).

172. *See id.* More recently, SLORC has changed its name to the State Peace and Development Council.

173. *See* 28 U.S.C. §1350.

174. *Doe I*, 963 F. Supp. at 893 (citing *Kadic v. Karadzic*, 70 F.3d at 238).

175. *Id.* at 891. The court relied on precedent dealing with joint action between the state and private actors under U.S. positional law. This article does not explore the parameters of the joint action test because the prohibition against engaging in slave labor is one that the *Unocal* court found extended to private individuals even in the absence of state action.

176. *Id.* at 892 (emphasis added).

177. *Id.* at 896 (citing Unocal Complaint at ¶ 52).

The initial court decision focused on several key criteria for establishing the potential liability of Unocal with respect to the forced labor claims. The court rejected the defendants' motions to dismiss for failure to state a claim on the basis of three of the plaintiffs' allegations: (1) that Unocal financed SLORC's operations; (2) that Unocal knew about the use of forced labor; and (3) that Unocal accepted the benefits of forced labor. Thus, the plaintiffs maintained that Unocal went beyond the mere act of providing finance to a war criminal (e.g., as in the case of Karl Rasche).

After the defendants lost on their motions to dismiss for failure to state a claim, they proceeded against the plaintiffs with motions for summary judgment. On August 31, 2000, a different judge granted the defendants' motions on the ground that although there was evidence that Unocal knew about and benefited from forced labor on the Burma pipeline project, it was not involved directly in the alleged abuses. The court cited to decisions of the USMT involving the prosecution of German industrialists for their participation in the use of slave labor by the Third Reich. The summary judgment decision appears to be a complete reversal of the court's earlier findings regarding the legal standards governing the forced labor claim.

In its decision granting summary judgment, the court first described the history of Unocal's presence in Burma and its knowledge of the forced labor problem. Unocal began negotiating with SLORC in 1991.[178] In May 1992, Unocal retained a consulting company, Control Risk Group, to assess the risks associated with foreign investment in Burma. The report makes note of the fact that: "Throughout Burma the government habitually makes use of forced labor to construct roads."[179] In 1992, the Myanmar government established a state-owned company, the Myanmar Oil and Gas Enterprise (MOGE), as the holding company for the government's interest in energy resources.

Unocal bid on an oil product license but initially lost to the French Oil Company Total. Thereafter, MOGE entered into contractual agreements with Total.[180] In furtherance of the oil project, MOGE contracted to "assist and expedite [Total's] execution of the Work Programme by providing . . . security protection and rights of way and easements as may be requested by [Total]."[181] Unocal eventually acquired a 47.5 percent interest in Total's rights and interests in the various oil contracts.[182]

One part of the project involved the construction of a pipeline in Burma's Tennasarim region. As the court noted: "According to the deposition testimony of plaintiffs and witnesses, the military forced plaintiffs and others, under threat of violence, to work on these projects [building army barracks and helipads and clearing roads] and to serve as porters to the military for days at a time."[183] The

178. *See Doe I*, 110 F. Supp. 2d at 1296-97.
179. *Id.* at 1297 (citing Richardson Declaration, Ex. 476 at 33575).
180. *See id.*
181. *Id.*
182. *See id.*
183. *Id.* at 1298.

court also stated that the violence perpetrated against the plaintiffs "is well documented."[184]

In early 1995, human rights groups began corresponding and meeting with Unocal executives to inform them of the increased use of forced labor and of villager relocation by the Myanmar government.[185] Unocal took the position that SLORC was providing military protection for the pipeline as part of its contractual obligations.[186] Some correspondence between Unocal employees internally or with Total indicates that there was some deliberation over the nature of services provided by SLORC and also Unocal's relationship to SLORC in this regard.[187]

The court, in its reasoning, notes that slavery is a violation of *jus cogens* norms which were derived from values taken to be fundamental by the international community and which "enjoy the highest status within customary international law and are binding on all nations."[188] Thus, the court noted that individual liability under the ATCA could be established for acts amounting to slavery or slave trading.[189] The plaintiffs contended that forced labor is akin to "modern slavery," whereas Unocal characterized the Myanmar military's use of forced labor as a public service requirement.[190]

The court cited reports and conventions of the International Labor Organization (ILO) when discussing the issue of whether forced labor constitutes slavery. As the court noted, Burma is a signatory to twenty-one ILO conventions including Forced Labor Convention No. 29, which prohibits the use of forced labor and defines it as "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily."[191] The ILO has repeatedly condemned Burma and issued a report in 1998 concerning Burma's non-compliance with the forced labor convention. The report acknowledged that the definition of slavery now encompasses forced labor.[192]

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184. *Id.*

185. *See id.* at 1299.

186. *See id.* at 1300-01.

187. The court noted that on May 10, 1995:

> A Unocal employee, Joel Robinson, sent a letter informing Total of his general thoughts about his visit to the pipeline route . . . The letter stated that from Unocal's standpoint, probably the most sensitive issue is what is forced labor and how can you identify it. I am sure that you will be thinking about the demarcation between work done by the Project and work done on behalf of the Project. Where the responsibility of the Project ends is *very important*. *Id.* at 1301 (emphasis in the original, citations omitted).

See also letter from Total's Herve Chagnou to Unocal, dated Feb. 1, 1996, in which Chagnou states: "About forced labour used by the troops assigned to provide security on our pipeline project, let us admit between Unocal and Total that we might be in a gray zone." *Id.* at 1302.

188. *Id.* at 1304 (citing *Siderman de Blake v. Republic of Argentina*, 96 F.2d 699 (9th Cir. 1992).

189. *See id.* at 1307.

190. *Id.*

191. *Id.* at 1308 (citing Article 2 of ILO Convention No. 29 (1930)).

192. *See id.* (citing *Forced Labor in Myanmar (Burma): Report of the Commission of Inquiry Appointed Under Article 26 of the Constitution of the International Labour Organization to Examine*

The court rejected Unocal's public service argument and also noted that "the evidence does suggest that Unocal knew that forced labor was being utilized and that the Joint Venturers benefited from the practice."[193] Despite Unocal's knowledge, the court still dismissed the lawsuits. The court based its decision on a review of three decisions cited by plaintiffs "concerning the prosecution of German industrialists for their participation in the Third Reich's slave policies." According to the court, plaintiffs claimed that based on these cases, knowledge and approval of slave labor activity is sufficient for a finding of liability.[194]

Borrowing directly from the USMT proceedings, the court stated that during the Second World War, the Reich Labour office "implemented a massive slave-labor program utilizing foreign civilians, prisoners of war and concentration camp inmates. The German government compelled German factories to employ the slave laborers and severely punished industrialists for failing to meet production quotas."[195] The court appeared to cast the Nazi slave labor program as one that was imposed by the Nazi regime on private industry. Hence, the opinion suggests that many German industrialists accepted slave labor in their factories as a matter of necessity rather than as a deliberate criminal act. In other words, the *Unocal* court focused on the acceptance of forced labor as a result of necessity.

In *Unocal*, the court focused primarily on necessity as a defense to war crimes prosecutions. The *Unocal* court first analyzed the USMT prosecution of the Flick enterprise. The court emphasized that the USMT found that four of the six Flick defendants were entitled to the affirmative defense of necessity with respect to using slave labor.[196] The court pointed out that "in reaching its decision, the Tribunal acknowledged that the German slave labor program was created and supervised by the Nazi government, and that it would have been futile and dangerous for these defendants to have objected."[197] The *Unocal* court contrasted Flick's conviction on the grounds that he "took active steps to participate in the Reich's slave labor program ."[198]

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the Observance by Myanmar of the Forced Labor Convention, 1930 (No. 29), ILO Part IV.9.A § 198 (1998).

193. *Id.* at 1310.

194. *See id.* at 1309.

195. *Id. See generally*, YISREAL GUTMAN AND MICHAEL BERENBAUM, ANATOMY OF AN AUSCHWITZ DEATH CAMP (Indiana Univ. Press 1994) (discussing conditions of slave laborers forced to work for German industry).

196. *See Doe I*, 110 F. Supp. 2d at 1309.

197. *Id.* At Nuremberg, Flick's defense counsel argued that defendants had acted out of necessity with respect to their use of slave labor. According to an American prosecutor, defense counsel "pictured the deeds of the German industrialists as acts of military and economic necessity against the 'Red Flood.' The employment of forced labor was explained away as something beyond the defendant's control in a situation where production was ordered by the state and supervised by the SS." The prosecution, led by General Telford Taylor, rebutted the defense thesis by stating that the wholesale deportation of millions of civilians was not lawful under international law. Defense counsel also noted that the Hague Conventions were an anachronism that even the Allies had repudiated. *See The Flick Case*, *supra* note 50, at 1044-90, 1157, and 1172-85.

198. *Doe I*, 110 F. Supp. 2d at 1309.

The case of I.G. Farben was the second USMT prosecution consulted by the *Unocal* court. The court noted that "like the Flick defendants, the Farben defendants invoked the necessity defense and testified that they were under such oppressive coercion and compulsion that they could not be said to have acted with criminal intent."[199] Moreover, the court stated that five of the Farben defendants were found guilty, despite their proffered necessity defense, because "like Weiss and Flick, they were not moved by a lack of moral choice, but on the contrary, embraced the opportunity to take full advantage of the slave labor program. Indeed, it might have been said that they were, to a very substantial degree, responsible for broadening the scope of that reprehensible system."[200]

According to the *Unocal* court, the USMT noted that the Third Reich had not compelled Krupp to accept slave labor "but instead coincide[d] with the will of these from whom the alleged compulsion emanate[d].[201] Furthermore, the "Krupp firm had manifested not only its willingness but its ardent desire to employ forced labor."[202] The court's emphasis seems to focus more on the will of the German industrialists and whether they had acted out of free will or had been compelled to act. Although the court's analysis of the USMT precedent focuses on issues of will, its analysis of Unocal focuses more on direct versus indirect participation in the forced labor.

Based on a review of these decisions, the court held that in order to be liable, Unocal must have taken active steps in cooperating or participating in the forced labor activities. Mere knowledge that someone else might commit abuses was not sufficient.Unable to adduce the requisite affirmative conduct, the *Unocal* court ruled that the corporation could not be held liable under international law and therefore the claim under the ATCA failed.[203]

The court assessed Unocal's actions in relation to the Myanmar government in connection with plaintiffs' physical violence and forced relocation claims. These alleged human rights violations are ones that require state action (in order to be actionable). The court analyzed whether Unocal could be deemed to have "acted under color of law" by acting together with state officials or with significant state aid.[204]

In making this determination, the court analyzed whether Unocal was a "joint actor" with the Myanmar government with respect to the alleged human rights violations. Joint action has been found whether a private party is a "willful participant in joint action with the State or its agents." Some of the indicia of joint action, according to the court, include "a conspiracy between private and state actors" and "willful participat[ion] in joint action with the State or its

199. *Id.* at 1310 (citing to *Krauch*, *supra* note 53).

200. *Id.* (citing *Krauch*, *supra* note 53). The court also noted that Krauch was characterized as "a willing participant in the crime of enslavement."

201. *Id.* (citing *Krupp*, *supra* note 52, at 1439).

202. *Id.* (citing *Krupp*, *supra* note 52, at 1440).

203. *Id.* at 1310. *See also* William Branigin, *Claim against Unocal rejected: Judge cites evidence abuses in Burma but no jurisdiction,* WASH. POST, Sept. 8, 2000, at E10.

204. *Doe I*, 110 F. Supp. 2d at 1305.

agents."[205] The cooperation, furthermore, needs to be of a "substantial degree."[206]

In particular, the court focuses on a decision from the United States Court of Appeals for the Tenth Circuit, *Gallagher v. Neil Young Freedom Concert.*[207] In this case, the appeals court described joint action as follows:

> Some courts have adopted the requirements for establishing a conspiracy under Section 1983. These courts [require] that both public and private actors share a common, unconstitutional goal. Under this conspiracy approach, state action may be found if a state actor has participated in or influenced the challenged decision or action.[208]

In *Gallagher*, the University of Utah (a state university and state actor), had met with and retained private security for a rock concert. The security firm had engaged in a pat down search of concert-goers before allowing them to enter the concert venue. Plaintiff concert-goers sued the university and the firm for violations of their constitutional rights.[209]

The *Unocal* court noted that in *Gallagher*, a university and the state had shared a common goal of producing a profitable music concern but had not shared a common goal of violating the plaintiffs' constitutional rights. The *Gallagher* court concluded that the university's silence as to the kind of security provided or its acquiescence to the searches did not create state action.[210]

The *Unocal* plaintiffs alleged that Unocal's participation in a joint venture satisfied the requirements for state action under the joint action test. The court rejected this argument and concluded:

> as in *Gallagher*, Unocal and SLORC shared the goal of a profitable project. However, as the *Gallagher* court states, this shared goal does not establish joint action. Plaintiffs present no evidence that Unocal 'participated in or influenced' the military's unlawful conduct; nor do Plaintiffs present evidence that Unocal 'conspired' with the military to commit the challenged conduct.[211]

The court, in assessing whether Unocal's actions were the proximate cause of the human rights violations, concluded that "plaintiffs present no evidence Unocal 'controlled' the Myanmar military's decision to commit the alleged tortuous acts."[212]

As discussed below, there are alternative ways in which a court can and should analyze conduct in the context of an international joint venture to determine whether Unocal aided and abetted SLORC's human rights violations with respect to torture and forced relocation. The court based much of its analysis on one or two alternative tests developed under American law, rather than looking to international law for precedent. Furthermore, the Gallagher case involved a

205. *Id.* (citing *Dennis v. Sparks*, 449 U.S. 24, 27-28 (1980)).
206. *Id.* at 1306.
207. *See* 49 F.3d 1442 (10th Cir. 1995).
208. *Id.* at 1454 (quoting *Cunningham v. Southlake Ctr. For Mental Health, Inc.*, 924 F.2d 106, 107 (9th Cir. 1991)).
209. *See id.* at 1146.
210. *See id.* at 1456-57.
211. *Doe I*, 110 F. Supp. 2d at 1306.
212. *Id.* at 1307.

one-time relationship between the state and a private actor. Unocal was part of a long-term venture with SLORC that necessarily involved more collaboration between the parties and hence a different type of approach to the question of whether Unocal was acting under color of law.

V.
RETHINKING CORPORATE COMPLICITY AFTER THE SECOND WORLD WAR

Under certain circumstances, war may create an emergency situation that allows for derogation from certain principles of international law. This is evidenced by the USMT's findings in the trials of the industrialists. In the absence of war, should an MNC be allowed to continue to receive the economic benefit of illegal forced labor? Is there a point at which conscious acceptance of a benefit over an extended period of time constitutes active participation in the forced labor (i.e., does beneficiary complicity ever give rise to liability?)?

A. Unocal Summary Judgment Focuses Incorrectly on the Issue of Necessity

The *Unocal* summary judgment decision does not consider the temporal nature of Unocal's actions in Burma, which are potentially of indefinite duration. When the World War II industrialists were tried, the war had ended and the enslavement had ceased. The *Unocal* case is being litigated against a backdrop of ongoing human rights violations.

The largest problem, however, is the fact that the court makes no effort to distinguish between wartime and non-wartime violations of *jus cogens* norms. One major distinction between the trials of the German industrialists and the trial of Unocal relates to context. The German industrialists used forced labor during wartime; Unocal is alleged to have used or at least benefited from forced labor outside of the context of war.

There is a civil war in Burma but this war does not directly implicate Burma—other than to make MNCs' investment activity riskier. But this type of political risk is inherent in foreign investment decisions and cannot be equated with a wartime situation where a government may compel a company within its jurisdiction to engage in the use of slave labor. Security for a project may be necessary when internal conflict exists in a host country. Securing a site, however, does not mean that government security forces may engage in forcible conscription of citizens or other egregious violations of human rights.

Based on the categories of complicity outlined in Part I, litigation against Unocal should proceed. The Myanmar military was an agent of the Total-Unocal-SLORC joint venture and its activities were carried out in furtherance of the joint venture. The court, rather than focusing on whether Unocal had aided and abetted SLORC, analyzed whether Unocal had actively participated in enslavement or in some way had been compelled to do so under duress. In light of the historical differences, as well as the earlier Unocal ruling in 1997, it is puzzling why the district court focused much of its decision on language from the USMT

decisions discussing the fact that the defendants knew of and accepted the benefits of slave labor out of necessity.

In *Flick*, the USMT defined necessity as follows: "Necessity is a defense when it is shown that the act charged was done to avoid an evil both serious and irreparable; that there was no other adequate means of escape; and that the remedy was not disproportionate to the evil."[213] The defense of necessity, therefore, rests on the premise that there is no means of escaping the egregious wrong that one is forced to commit.

If one accepts the *Unocal* court's version of the *Flick* and *Farben* cases, the reason why more than acceptance of the forced labor was actionable is because there were grounds for defendants to plead an affirmative defense of necessity. The defendants in the Nuremberg cases would have been found liable for aiding and abetting the forced labor program if they did not have access to the necessity defense.[214] The *Krupp* defendants, in fact, were convicted of forced labor and their defense was summarily rejected. In *Flick*, the necessity defense was defeated by a showing that the defendant actively expanded its production efforts and increased the use of slave labor. The increase was not "necessary" for the *Flick* defendants to avoid retribution from the Nazis.

In the *Unocal* case, however, Unocal *had and has* a choice either to stop participating in forced labor programs by terminating its business relationship with the Myanmar government or to continue receiving the benefits of illegal slave labor. Unocal does not fear any retribution from Myanmar such as fear of death, as claimed by the German industrialists. The German defendants were exonerated when they could invoke the defense of necessity, not because knowledge was insufficient to trigger liability.

Moreover, decisions from the International War Crimes Tribunals for the former Yugoslavia and Rwanda have found that defendants who aid or abet human rights violations do not have the defense of duress or necessity available to them.[215] Necessity has been treated as relevant only as a mitigating factor at the sentencing phase.[216] The defense of duress is not condoned under contem-

213. *The Flick Case*, *supra* note 50, at 1200.

214. *See id.* (quoting Article II of Control Council Law No. 10, stating that "any person . . . is deemed to have committed a crime . . . if he was (a) a principal or (b) was an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part therein or (d) was connected with plans or enterprises involving its commission; *see also*, *The Krupp Case*, *supra* note 52, at 1433-34.

215. *See* AMNESTY INTERNATIONAL, UNIVERSAL JURISDICTION: 14 PRINCIPLES ON THE EFFECTIVE EXERCISE OF UNIVERSAL JURISDICTION, Principle 5 (1999), *available at* http://www.web.amnesty.org/web/web.nsf/pages/14_principles (last visited Feb. 15, 2002). Principle 5 states that the related defense of acting under the orders of a superior is prohibited as a defense with respect to grave crimes against international law. Amnesty International notes that Article 33 of the Rome Statute of the International Criminal Court, UN Doc A/CONF.183/9 (1998), provides that a superior order does not relieve a person of criminal responsibility for crimes against humanity or genocide. The statutes for the International Criminal Tribunals of Yugoslavia and Rwanda also exclude superior orders as a defense.

216. *See Prosecutor v. Drazen Erdemovic*, Case No. IT-96-22, Trial Judgment, Nov. 29, 1996, *available at* http://www.un.org/icty/erdemovic/trialc/judgement/erd-tsj961129e.htm (last visited Feb. 7, 2002).

porary humanitarian law for violations of *jus cogens* norms; therefore the court's emphasis is incorrect. Gross violations of human rights do not constitute "lawful" acts of state. Consequently, the defense of necessity or sovereign compulsion should not be available when the MNC assists a host government in violating *jus cogens* norms.

In addition to some of the excerpts that the court emphasized in its decision, there are some alternative pieces of text that suggest that the USMT's acquittal of some of the defendants on the grounds of necessity was not supported by all the American judges. For example, in the trial of the *Farben* defendants Judge Paul Herbert believed that his colleagues had been too lenient with the defendants:

> I conclude from the record that Farben accepted and frequently sought the forced workers . . . The important fact is that Farben's Versant [executive board of directors] willingly cooperated in utilizing forced labor. They were not forced to do so . . . The conditions at Auschwitz were so horrible that it is utterly incredible to conclude that they were unknown to defendants, the principle corporate directors, who were responsible for Farben's connection with the project . . . Each defendant who is a member of the Vorstand should be held guilty.[217]

The *Unocal* case is currently on appeal before the U.S. Court of Appeals for the Ninth Circuit. It is notable, however, that the principle that a private non-state actor can be sued before the U.S. courts for alleged violations of human rights was not challenged. The outcome of the *Unocal* case is crucial. The issue of whether beneficiary complicity is sufficient to create liability for an MNC is at stake.

B. Can Unocal Be Characterized as an Accomplice with Respect to the Forced Labor Claim?

The question of what constitutes "complicity" also remains unclear within the *Unocal* decisions. The original district court opinion held that Unocal merely accepted the benefits of the criminal acts, but did not directly participate in them as an accomplice. There is a plausible argument, however, that Unocal's alleged actions in financing SLORC, when coupled with the knowledge of SLORC's criminal purpose, triggers Unocal's liability for aiding and abetting SLORC in its enslavement of villagers.

To date, human rights literature has not provided clear parameters for what constitutes direct versus indirect corporate complicity in human rights abuses. Thus, the *Unocal* court was working with limited precedent when trying to create its own standards for corporate complicity.

Accomplice liability requires intentional participation, but not necessarily any intention to do harm. Rather, knowledge of foreseeable harmful effects should be sufficient. International criminal law has evolved since Nuremberg to explicitly include liability for aiding and abetting the commission of a crime. Thus, direct participation in the crime is not required in order to be found liable as an accomplice. As two commentators have noted:

217. FERENCZ, *supra* note 30, at 35.

> [A] corporation which knowingly assists a State in violating the customary international law principles contained in the Universal Declaration of Human Rights could be viewed as directly complicit in such a violation. For example, a company that promoted, or assisted with, the forced relocation of people in circumstances that would constitute a violation of international human rights could be considered directly complicit in the violation.[218]

Aiding and abetting constitutes a prosecutable offense and, in the words of the International Criminal Tribunal for the Former Yugoslavia, constitutes "beyond any doubt customary law."[219] Control Council Law No. 10, which governed the USMT proceedings, itself made reference to the notion of aiding and abetting.[220] More recently, the statutes governing the International Criminal Tribunals for the Former Yugoslavia and Rwanda ("Yugoslav Tribunal" and "Rwanda Tribunal") also impose criminal responsibility upon persons who have "planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution" of the various crimes set forth in the statute.[221] The Tribunals also criminalize the act of complicity in genocide.[222] Article 25 of the Rome Statute of the International Criminal Court imposes liability on a person who "aids, abets or otherwise assists in [the] commission or [the] attempted commission, including providing means for [the] commission" of specified offenses."[223]

The Rwanda Tribunal distinguishes between aiding and abetting, noting that aiding means giving assistance to a perpetrator whereas abetting involves facilitating commission of a crime by being sympathetic to the act.[224]

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218. CLAPHAM AND JERBI, *supra* note 40, at 3.

219. *See, e.g., Prosecutor v. Tadic*, Case No. IT 94-1 Trial Judgment, May 7, 1997, at ¶¶ 662, 669, *available at* http://www.un.org/icty/tadic/trialc2/judgement/index.htm (last visited Feb. 7, 2002).

220. Article II(2) of Control Council Law No. 10 provided that "a person is deemed to have committed a crime if he was (a) a principal or (b) was an accessory to the commission of any such crime or ordered and or abetted the same.

221. *See* STATUTE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, ART. 7, U.N.S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th meeting, at Article 5, U.N. Doc. S/Res/827 (1993) amended by U.N.S.C. Res. 1166, U.N. SCOR 53rd Sess., 3878th meeting, U.N. Doc. S/Res/1166 (1998); STATUTE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA, ARTICLE 6, U.N.S.C. Res. 955, U.N. SCOR, 49th Sess. 3453rd Meeting, at Article 3, Urn. Doc. S/RES/955 (1994). Accomplice or aidor and abettor liability has been recognized in a host of international treaties or conventions relating to slavery, genocide, torture, apartheid and inhuman treatment. *See, e.g.*, SUPPLEMENTARY CONVENTION ON THE ABOLITION OF SLAVERY, THE SLAVE TRADE AND INSTITUTIONS AND PRACTICES SIMILAR TO SLAVERY, Article 6, Sept. 7, 1956, 266 U.N.T.S. 3 (1956) (imposing criminal liability on persons who are accessories to enslavement); CONVENTION ON THE PREVENTION AND PUNISHMENT OF GENOCIDE, Article III(e), Dec. 9, 1948, 78 U.N.T.S. 277, entered into force on Jan. 12, 1951 (criminal liability may be imposed on persons who are complicit in genocide); INTERNATIONAL CONVENTION ON THE SUPPRESSION AND PUNISHMENT OF THE CRIME OF APARTHEID, Article III(b), G.A. Res. 3068, U.N. GAOR 28th Sess., Supp. No. 30, at Article 2, U.N. Doc A/9030 (1973) (imposing criminal liability on individual involved in directly abetting or encouraging commission of the crime of apartheid).

222. *See* ICTY Statute, Art. 4(3)(e); ICTR Statute, Art. 2(3)(e).

223. U.N. Doc A/CONF. 183/9 (1998), 37 I.L.M. 999, *available at* http://www/un/org/law/icc.statute/romefra.htm (last visited Feb. 7, 2002).

224. *See* Schabas, *supra* note 13, at 443 (citing *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Judgment, Sept. 2, 1998, *available at* http://www.ictr.org (last visited Feb. 7, 2002)).

There are perhaps three main requirements for the establishment of accomplice liability under international law. First, an international crime must have been committed. Second, the accomplice must have contributed in a material way to the crime through its action. Third, the accomplice must have intended that the crime be committed or have been reckless as to its commission.[225]

With regard to the concept of accomplice liability for someone who aids and abets an international crime, the "intentional participation test" articulated by the Yugoslav Tribunal in the *Tadic* case is instructive:

> The most relevant sources for such a determination are the Nürnberg war crimes trials, which resulted in several convictions for complicitous conduct. While the judgments generally failed to discuss in detail the criteria upon which guilt was determined, a clear pattern does emerge upon an examination of the relevant cases. First, there is a requirement of intent, which involves awareness of the act of participation coupled with a conscious decision to participate by planning, instigating, ordering, committing, or otherwise aiding and abetting in the commission of a crime. Second, the prosecution must prove that there was participation in that the conduct of the accused contributed to the commission of the illegal act.[226]

As to the first requirement, an accomplice can only be charged for aiding and abetting if someone else has perpetrated an international crime. However, this does not require the conviction of the perpetrator of the underlying crime. In criminal law an accomplice can usually be tried for complicity in a crime even where the principal perpetrator has not been identified or where guilt could not be proven against that principal. Moreover, the accomplice need not desire the commission of the offense.[227]

Even if the requirement of an underlying crime has been met, an accomplice must still have the requisite intent and actions. The requisite *mens rea* has been described as knowledge that the acts will assist the principal in the commission of a criminal act.[228] Unocal has admitted that it had knowledge of the military's actions. Thus, there is evidence to support the contention that Unocal knew that its investment activity, as well as its retention of government security forces for the pipeline project, could foreseeably contribute to violations of international law.

As for the required *actus reus*, the Rwanda and Yugoslav Tribunals have developed a broad understanding of what constitutes participation in the commission of a crime. According to the Yugoslav Tribunal, the *actus reus* required for aiding and abetting consists of "practical assistance, encouragement or moral support, which has a substantial effect on the perpetration of the crime."[229] As-

225. *See id.* at 446.

226. *Tadic*, *supra* note 219, at ¶ 674.

227. *See* Schabas, *supra* note 13, at 447 (citing *Prosecutor v. Akayesu*, Case No. IT-95-0-T, Trial Judgment, Dec. 2, 1999, at ¶ 530).

228. *See Prosecutor v. Delalic ("Celibici Case")*, Case No. IT-96-21, Trial Judgment, Nov. 1998, at ¶ 326, *available at* http://www.un.org/icty/celebici/appeal/judgement/index.htm (last visited Feb. 7, 2002).

229. *Prosecutor v. Furundzija*, Case No. IT-95-17/1, Trial Judgment, Dec. 10, 1998, at ¶ 249, *available at* http://www.un.org/icty/furundzija/trialc2/judgement/index.htm (last visited Feb. 7, 2002).

sistance of any kind, including providing moral or psychological support, may trigger culpable participation.[230]

In *Prosecutor v. Akayesu*, the Rwanda Tribunal convicted a village mayor as an accomplice relating to certain crimes of sexual violence because his encouragement of other such acts "sent a clear signal of official tolerance for sexual violence" that contributed to the offense.[231] Moral support and encouragement has also been found when a defendant has failed to act.[232]

The Yugoslav War Crimes Tribunal has also noted, in a case involving allegations of torture, that an accomplice's mere presence may constitute "participation" in certain circumstances. Presence may constitute complicity when it has a significant legitimizing effect on the perpetrator's conduct. The tribunal cited a decision of the German Supreme Court in which a high-ranking official of the Nazi Party was tried under Control Council Law No. 10. The defendant was convicted as an accomplice in the destruction of a synagogue due to his presence at the crime scene, his status within the Nazi party, and his knowledge of the criminal enterprise. The Yugoslav Tribunal stated:

> An additional requirement with respect to the predicate act for accomplice liability is that it must have a "direct and substantial effect" on the commission of the offense.[233] A "direct and substantial effect" has previously been found where a defendant could have pursued an alternative course of conduct that would have prevented or somehow mitigated the offense. The Yugoslav Tribunal has indicated that an accomplice's participation is substantial "if the criminal act most probably would not have occurred in the same way had not someone acted in the role that the accused in fact assumed."[234]

Assistance, however, need not constitute an "indispensable element" for the acts of the principal.[235] In the *Eintzgruppen* case, for example, the USMT convicted a military officer of aiding and abetting summary executions because he had the ability to object to the executions but "chose to let the injustice go uncorrected."[236]

Do Unocal's activities in Myanmar meet the threshold for application of accomplice liability under international law? Unocal is not alleged to have directly conscripted workers for the pipeline. Had Unocal done so, it may have been liable for directly violating international humanitarian law or for being "directly complicit" as outlined in the categories of complicity in Part I above.

Most recently, the court appears to have applied an incorrect standard when analyzing the conduct of Unocal with respect to forced labor. The court emphasized the issue of active participation in light of an implied defense of necessity.

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230. *See id.* at ¶¶ 199-204 (citing British Military Tribunal cases); *Prosecutor v. Musema*, Case No. ICTR-96-13, Trial Judgment, Jan. 27, 2000, at ¶ 126, *available at* http://www.ictr.org.

231. *Akayesu, supra* note 227, at ¶ 692-93.

232. *See Prosecutor v. Blaskic*, Case No. IT-95-14, Trial Judgment, March 3, 2000, at ¶ 284, *available at* http://www.un.org/icty/blaskic/trialc1/judgement/index.htm (last visited Feb. 7, 2002).

233. *Tadic, supra* note 219, at ¶ 692.

234. *Id.* at ¶ 688.

235. *Furundzija, supra* note 229, at ¶ 209.

236. *Trial of Otto Elmendorf and Others (Eitzgrippen Case)*, 4 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, 1, 572 (1949).

The correct inquiry, however, is whether Unocal's actions constitute aiding and abetting under international law. The court's earlier ruling, where it refused to dismiss the case for lack of subject matter jurisdiction applies a different standard that focused on Unocal's role as an accomplice. The earlier *Unocal* decision relating to subject matter jurisdiction applied the correct legal standard. The court, in its earlier decision, stated:

> Although there is no allegation that SLORC is physically selling Burmese citizens to the private defendants, plaintiffs allege that, despite their knowledge of SLORC's practice of forced labor, both in general and with respect to the pipeline project, the private defendants have paid for and continue to pay SLORC to provide labor and security for the pipeline, essentially treating SLORC as an overseer, accepting the benefit of and approving the use of forced labor. These allegations are sufficient to establish subject matter jurisdiction under the ATCA.[237]

The court recognized that the doctrine of "beneficiary" complicity (i.e. knowledge of the host government's criminal acts coupled with continued assistance that creates economic benefit for the MNC) is actionable.

Unocal knew that its actions would assist SLORC in the commission of crimes.[238] The district court found that Unocal knew that forced labor, imprisonment and executions occurred in the pipeline area.[239] It knew that the military's actions related to the pipeline project. Therefore, any continued support of the military in relation to the project, whether financial or otherwise, would appear to show that Unocal knew that its actions would further aid human rights violations. Alternatively, Unocal may have acted recklessly with respect to its agreements with the military.

The more difficult question is whether Unocal's actions are sufficient to create accomplice liability. Can Unocal be said to have provided practical assistance, support, or encouragement to SLORC through its actions that directly and substantially instigated the use of forced labor? More specifically, are the plaintiffs' factual allegations sufficient to support a claim of this nature?

First, it appears from the record that Unocal's alleged actions do constitute practical assistance, support, and encouragement of the military. Unocal provided practical assistance in the form of its financial support and agreements with the military. Unocal acknowledged that it "hired the Burmese military to provide security for the project and pay for these through the Myanmar Oil and Gas Enterprise" which is government-operated.[240] Three truckloads of soldiers accompanied project officials in their survey work and village visits.[241]

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237. *Doe I*, 963 F. Supp. at 892.

238. The requisite *mens rea* for aiding and abetting is knowledge that the act will assist the principal in the commission of the crime. *See Furundzija, supra* note 229, at ¶ 242. Knowledge has been found where there is "a conscious decision to assist" and where the accomplice acts "accept[ing] that such assistance would be a possible and foreseeable consequence of [the] conduct." *Id.* at ¶ 241; *Blaskic, supra* note 232, at ¶ 286.

239. *See Doe I*, 110 F. Supp. 2d at 1306, 1310.

240. *Id.* at 1301.

241. *See id.*

Unocal hired the Myanmar military to provide security for the pipeline and to build supporting roads and infrastructure for the project. Unocal continued to retain the military even after it became aware that it had committed offenses in furtherance of the pipeline project.[242] Due to the pipeline project, SLORC is alleged to have increased its activities in the pipeline area. The inference is that Unocal's investment increased military presence. Company employees have stated "[Unocal's] assertion that SLORC has not expanded and amplified its usual methods around the pipeline on our behalf may not withstand much scrutiny."[243]

In furtherance of the project, the military allegedly enslaved the local population, evacuated villages, executed some resistors and engaged in other criminal acts. Monetary support, coupled with the continued business relationship might well rise to the level of aiding and abetting SLORC's enslavement of its citizens. One could argue that if not for the pipeline and the income generated by Unocal, SLORC would not have engaged in forced labor to the extent that it did.

Alternatively, Unocal was (and is) a continued and influential spectator and knowing business partner to the Myanmar military. The company's presence and conduct at the project site through visits and the ongoing presence of officials may also create accomplice liability if it can be shown that the MNC's presence created a presumption that Unocal encouraged or approved of SLORC's actions. None of these considerations factored into the district court's reasoning.

C. The State Action Test and International Law

The main focus of this article is on situations in which an MNC may be held directly liable for its actions under international law. Where an MNC aids and abets a host government in violation of a *jus cogens* norm, it could potentially be held liable as a private actor. For certain types of human rights violations, however, the MNC must be deemed a state actor and therefore acting under color of law. This segment of the article briefly discusses the *Unocal* court's analysis of the state action requirement and suggests alternative approaches to this requirement. As noted above, the *Unocal* court also dismissed plaintiff's physical violence and forced relocation claims. It did so after finding that Unocal was not a joint actor as defined by U.S. precedent, including *Gallagher*. The following discussion briefly sets forth ideas that will be developed more fully in a future article.

The issue of whether an MNC (or an individual) has acted in collaboration with a state actor in commission of certain crimes such as torture, rape, and forced displacement should be decided based on principles of international law. In this sense, it would be more appropriate for U.S. courts to look to international precedent, rather than U.S. precedent with respect to state action.[244] In

242. *See id.* at 1306, 1310.

243. *Id.* at 1300.

244. *See* Craig Forcese, Note, *ATCA's Achilles Heel: Corporate Complicity, International Law and the Alien Tort Claims Act*, 26 YALE J. INT'L L. 487, 509-10 (2000).

due course, international tribunals, other national courts, and international and national lawmakers may also grapple with the problem of MNC complicity. Such groups will need to develop standards and tests based more on international experience. One of the main thrusts of this article is that American or ATCA jurisprudence alone should not be the basis for crafting theories of MNC responsibility or liability.

The *Unocal* court, relying on *Gallagher*, also seems to have devoted considerable attention to whether Unocal conspired with the military to engage in the unlawful acts of forcible displacement of villagers, and the violence that accommodated the displacement and forced conscription of the villagers for labor. In doing so, the court treats this as a situation like *Gallagher*, where the relationship between the state actor and the private actor is isolated, not continuous. There is no assessment of whether the joint action between Unocal and SLORC over a period of time caused the unlawful conduct to occur. The *Gallagher* test is not instructive when trying to understand the interrelationship between an MNC and a host government or its security forces. Such a relationship exists on a continuum and consists of multiple acts and omissions.[245]

The *Unocal* court also noted that, for liability to be imposed, Unocal's actions must have been proximately caused of the alleged human rights violations. In doing so, the court focused on whether Unocal had some control or power over SLORC that would have resulted in the harm.[246] An alternative reading of the proximate cause requirement would have focused on whether Unocal's actions could foreseeably have caused the human rights violations.[247]

Various U.S. cases examining the state action question have looked to see whether one party initiated a process or set in motion a series of acts that resulted in harmful conduct. The harmful or unlawful conduct, of course, was required to have been a reasonably foreseeable outcome of the original actions. Applying a test of reasonable forseeability, one can quite plausibly argue that Unocal should have foreseen that its hiring of the military to provide security and to assist in creating infrastructure for the pipeline would result in human rights violations.

More generally, the *Unocal* decision does not adequately address the issue of how to develop appropriate standards with respect to MNC liability or, in the absence of liability, at least responsibility for acts of violence committed by a

245. *See id.* at 513.

246. *See id.* at 506.

247. Alternative precedent suggests that an analysis of forseeability is appropriate when analyzing proximate cause in the context of state action under Section 1983. *See, e.g., Tidwell v. Schweiker*, 677 F.2d 560, 569 (7th Cir. 1982) (*cert. denied*, 61 U.S. 905 (1983)) (state did not have control over the procedures but it was sufficient that the state was responsible for initiating process that culminated in the harmful act; agency "set in motion a series of acts when the [agency] knew or should have known that a constitutional injury was the only reasonable outcome."); *Johnson v. Duffy*, 588 F.2d 740, 743-44 (9th Cir. 1978) (requisite causal connection can be established . . . also "by setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict this constitutional injury); *Tahoe Preservation Council v. Tahoe*, 216 F.3d 765 (9th Cir. 2000) (forseeability analysis an appropriate part of proximate cause determinations).

host government in furtherance of a joint venture. There are alternative sources of law for developing clearer standards.

First, alternative tests exist under international law. For example, under international law, a state is responsible for the actions of agents undertaken on the state's behalf. In the *Tadic* case, the Appeals Chamber of the Yugoslav Tribunal stated: "The requirement of international law for the attribution to states of facts performed by private individuals is that the State exercises control over the individuals."[248] The notion of state responsibility relates to when a state might be responsible for the actions of private actors. If such a doctrine is applied in the MNC context, it must be inverted so that an MNC is liable for the acts of the host state's military where the MNC exercised control over the military units that committed human rights violations.[249] Thus, one possible analysis is to ask to what extent a host government delegates to any MNC functions traditionally performed by the government. If the MNC stands in the shoes of the state, it could be deemed a state actor.

Second, plaintiffs alleged that Unocal satisfied the joint action test by virtue of its joint venture with SLORC. Merely alleging that a joint venture exists should not trigger state action in a case involving MNC-government partnership. However, the court could have examined the nature of the joint venture itself to determine whether Unocal had acted under color of law. If courts, as well as policymakers and activists, want to develop clearer guidelines for MNCs (whether binding or non-binding), they also need to examine the contractual structures that give rise to such partnerships.

Therefore, as an alternative to the "joint action" test, it may be appropriate to develop a "joint venture" test for purposes of evaluating whether an MNC has conspired or aided and abetted a host government. Questions or factors that are relevant to this inquiry include the structure of the business relationship or the joint venture, the level of control exercised by both parties (in terms of ownership in the joint venture and directors for the investment vehicle), the level of profit sharing from the activity, and the types of concessions granted to the MNC by the government as part of the investment process.

Third, an alternative to the U.S "joint action" text articulated in *Gallagher*, is a nexus/symbiotic relationship test. Under this test, plaintiffs must establish that "where there is a symbiotic relationship between the State and a privately owned enterprise, so that the State and a privately owned enterprise are [participants in a joint venture, the actions of the private enterprise may be attributable to the State."[250] The threshold for establishing a symbiotic relationship is high and courts have required that each party (the state and the private actor) benefit from the wrongful act itself.[251]

248. *Id.* at 508 (citing *Tadic*, *supra* note 219).

249. *See* Forcese, *supra* note 244, at 508 (citing *Tadic*, *supra* note 219).

250. *Id.* at 503 (citing *Rendell-Baker v. Kohn*, 457 U.S. 830, 847 (1982) (Marshall, J. dissenting), referring to doctrine outlined in *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961)).

251. *See id.* at 503.

Given that MNC-host government relationships are often long-term ventures, the nexus test may be more apt for analyzing whether state action is present. The nexus/symbiotic relationship test could itself serve as the basis for developing a joint venture test that permits an analysis of the underlying business relationship between the parties.

D. Extending Beneficiary Complicity Beyond Unocal

Can one extend a notion of beneficiary complicity to other situations? For certain violations of international humanitarian law, the publicity of certain war crimes and atrocities may be sufficient to establish *mens rea* of an MNC. As an example, one commentator has noted that the publicity of war crimes and atrocities in Sierra Leone, by the United Nations and other non-governmental organizations and the press, would permit a court to conclude that "diamond traders, airline pilots and executives, small arms suppliers and so on, have knowledge of their contribution to the conflict."[252]

However, the question remains, how far could one cast the accomplice's net? For example, could one prosecute the diamond vendor that trades with combatants in Angola or Sierra Leone? On the other hand, what about the bank that provides a loan to the diamond merchant who purchases the stones from the trader? This is where the court needs to examine the relationship between the MNC or business entity involved.

This article advocates extension of accomplice liability only when the MNC is actively investing in the host country and is providing assistance to the state through its investment activities.Both the intention and the action of an MNC must be viewed over time. The Second World War cases involved forced labor and other criminal activity that did stretch over several years. The end of the war, however, curtailed the duration.

Today, when assessing accomplice liability, it is important to assess the level of knowledge possessed by the MNC at the point of its entry into a host state. MNCs should be encouraged to engage in human rights risk assessment prior to investing in a country where there is corruption or repression emanating from the state. It is relevant to any inquiry about accomplice liability to determine what knowledge existed at the beginning of a business relationship and then, what knowledge was acquired by the MNC over time.[253]

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252. *See, e.g.*, Schabas, *supra* note 13, at 450-51 ("Given the intense publicity about war crimes and other atrocities in Sierra Leone, made known not only in specialized documents such as those issued by the United Nations and international non-governmental organizations, but also by the popular media, a court ought to have little difficulty in concluding that diamond traders, airline pilots and executives, small arms suppliers and so on, have knowledge of their contribution to the conflict and to the offences being committed.").

253. One proposal for the creation of a statutory cause of action for situations similar to Unocal suggests that MNCs should be penalized when they engage with a foreign affiliate (e.g., a foreign host government or its agents) in a business enterprise where the foreign affiliate "was predisposed to commit one or more human rights violations in furtherance of that enterprise when the agreement with it was reached." The same proposal defines "predisposed" as when the foreign affiliate has committed a human rights violation in the past and an MNC's "reasonable inquiry into the affiliate's past would have uncovered as much." The proposal, however, is limited to situations in which the

Let us assume that knowledge can be demonstrated, either through specific admissions or because (as in the case of Sierra Leone, for example) human rights abuses are publicly documented by reputable sources. A second question will remain as to how the MNC continues to act when it has acquired knowledge. Unocal is alleged to have known that SLORC had a history of human rights violations (amounting to violations of customary international law) when it entered into an agreement asking SLORC to clear the pipeline route. Despite this prior knowledge, Unocal is alleged to have provided financial assistance to SLORC and to have continued to contract with the military.[254]

Moreover, the definition of aiding and abetting under international law requires that the accomplice's act constitute "substantial assistance." "Substantial," at least with respect to an MNC, involves collaboration with the host government. Factors that are important in assessing whether the assistance is substantial include duration of the investment activity, duration of knowledge of the human rights violations, nature of the assistance to the host state (such as financial assistance), contractual agreements, and collaboration in a business venture. Substantial assistance should involve not only individual actions that are large in magnitude or scope, but continuous actions or presence that become substantial by virtue of their duration.

The substantial assistance requirement coupled with an examination of the relationship between an MNC and the host government suggests that courts must engage in some sort of proximate cause analysis. There needs to be a tangible nexus between the MNC conduct and the human rights violations.

This article advocates encompassing beneficiary complicity within the scope of accomplice liability for MNCs. This would mean that an MNC's knowledge of ongoing human rights violations, combined with its acceptance of direct economic benefit arising from the violations and continued partnership with a host government, could give rise to accomplice liability. As noted in Part I, however, there still remains a distinction between crimes for which an MNC might be liable as an accomplice and crimes for which the MNC must act in collaboration with the state to establish state action.

For war crimes, crimes against humanity, piracy, enslavement, and similar crimes, an MNC can be either directly liable or liable as an accomplice. For crimes such as torture, rape, and forcible displacement, the MNC must collaborate with the state under color of state law. To date, this concept is ambiguous and has been made perhaps more so by the application of American law.

For purposes of establishing liability, an MNC should be liable if the state has delegated its functions to the MNC such that the MNC acts as an agent of the government or performs governmental functions in its stead. As an alternative, a test as to whether a nexus or joint venture exists between the MNC and

MNC contracts with a non-subsidiary affiliate. This proposal may be limited in its utility but provides an example of how one might begin to think about the issue of knowledge in the context of accomplice liability. *See* David I. Beker, Note, *A Call for the Codification of the Unocal Doctrine*, 32 CORNELL INT'L L. J. 183, 202-05 (1998).

254. *See Unocal I*, 863 F. Supp. at 885.

the state may be appropriate. Such a joint venture test would examine the nature of the business relationship between the parties and also assesses the MNC's conduct with respect to whether it was reasonably foreseeable that the MNC's actions would lead to the relevant crimes.

Ultimately, it may prove more difficult to ascribe accomplice liability in situations where an MNC has acted in concert with the state in the commission of an offense. How does this affect the theory of beneficiary complicity? At a minimum, guidelines and codes of conduct dealing with MNC complicity should prohibit beneficiary complicity irrespective of the class of crime. An MNC should not aid a host state or its agents in violating international law—whether the crime is enslavement or torture and physical violence. Therefore, defining complicity to encompass direct as well as beneficiary complicity is important.

VI.

FUTURE CRIMINAL LIABILITY FOR MULTINATIONALS: EXTENDING THE PINOCHET PHENOMENON TO MNCS

If individuals are capable of engaging in certain egregious violations of international law, why does it surprise us to think that legal persons, such as MNCs, may likewise be implicated in such violations?[255] As discussed above,

255. While many countries are able to prosecute individuals for crimes committed abroad, governments have been reluctant, historically, to prosecute a corporation in a home jurisdiction (e.g., where the MNC is incorporated) for crimes committed overseas in a host state, but this is changing. See Theodore Meron, *Is International Law Moving Towards Criminalization?*, 9 EUR. J. INT'L L. 1 (1998), *available at* http://www.ejil.org/journal/Vol9/No1/art2.html#TopofPage (last visited Oct. 9, 2001).

With respect to the dichotomy between a state's prosecution of individuals versus corporations, one commentator has asked the question in this fashion:

> The more consensus there is of a common international interest in a specific form of legal sanction with respect to specific subject mater, the more this will count in favor of the acceptability of extraterritorial regulation. The point at which a consensus becomes so widespread and clear that states are no longer simply permitted to regulate a matter but required to do so is the point at which we move from the realm of state jurisdiction to state obligation—i.e., to state responsibility which is incurred when a state fails to provide for jurisdiction in its domestic law and to exercise it where the triggering facts are present. For example, normative discourse has progressed to the point with respect to the problem of child sex tourism that some states, such as Canada and Australia, have made it a criminal offence for their nationals to have "sex" with children anywhere in the world. Little, if any protest, from states afflicted by the sex-tourism trade, such as Thailand and Sri Lanka has occurred, and the debate has rapidly gone to another level. The real question now is not whether states are permitted to regulate their nationals' conduct but whether they have a duty to do so as an extension of their duty to ensure human rights . . . However, the truly interesting question . . . is whether two variants on the just-described sex-tourism regulations would meet with the same general acquiescance [sic]. The first variation would be to take the regulation out of the context of criminal law sanctions over individual tourists and extend the regulation to some form of regulation of corporate behavior (e.g., civil liability regime) with respect to those national travel agencies and national tour operators that deliberately facilitate such tours. The second variation would be to see if regulation, whether criminal or corporate, could be justified beyond a nationality basis for that jurisdiction. That is to say, if Australia began to allow civil suits against Japanese corporate sex-tour operators organizing

the USMT, after Nuremberg, did find that corporate entities had violated certain laws of war, although the statute of the Tribunal did not permit the prosecution of legal persons. Since Nuremberg, there has been an emerging practice among states to impute criminal responsibility to corporations—albeit in different manners, sometimes through regulatory statutes and at other times through the direct application of general penal laws. At the same time, certain international treaties, relating to issues such as bribery and corruption and hazardous wastes, create avenues for the prosecution of MNCs by domestic courts.

Corporations can commit international crimes and thus corporations can potentially be tried nationally. The U.S. slave labor cases brought under the ATCA, coupled with the renewed focus on the trials of the industrialists, provide us with a richer understanding of the prohibition on the use of slave labor as a peremptory norm of international law. Moreover, these cases highlight the possible role of the private corporation with respect to forced labor.

Nonetheless, there remains a question as to whether MNCs might be criminally accountable in national courts for such offenses.[256] Other nations do not have the benefit of a statute such as the ATCA.[257] This last section explores some of the reasoning behind the application of international criminal law to situations in which MNCs violate the law of nations by engaging in the knowing

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trips to Bangkok or Phuket, would Japan and Thailand accept this as a reasonable exercise of extraterroritorial jurisdiction?

Craig Scott, *Translating Torture into Transnational Tort: Conceptual Divides in the Debate on Corporate Accountability for Human Rights Harms*, *in* TORTURE AS TORT, 56 (Scott ed., 2000).

256. A few commentators have begun to discuss the applicability of universal jurisdiction or international criminal law to situations in which corporations commit crimes that constitute violations of the law of nations. *See, e.g.*, Andrew Clapham, *supra* note 14, at 141 ("[W]e can therefore consider that corporations commit international crimes, including war crimes and that these corporations may be tried, in some circumstances outside the jurisdiction where the crime took place. In other words, the 'Pinochet phenomenon' is applicable in the sphere of corporate international crimes.); Menno Kamminga and Saman Zia-Zarifi, *Introduction*, *in* LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW, *supra* note 12, at 8 (noting that "MNCs are prohibited from engaging directly or indirectly in violations of *jus cogens* principles (such as the prohibition of slavery and forced labour, genocide and torture, extrajudicial murder, piracy, crimes against humanity, and apartheid")); Muthucumaraswamy Sornarahaj, *Linking State Responsibility for Certain Harms Caused by Corporate Nationals Abroad to Civil Recourse in the Legal Systems of Home States*, *in* TORTURE AS TORT, *supra* note 255, at 492 ("It is equally clear that there is jurisdiction for any domestic court of any state to prosecute the multinational corporation if the allegation relates to a violation of a *jus cogens* norm like the prohibition of torture."); Schabas, *supra* note 13, at 454; Stephens, *supra* note 12, at 209. Stephens does not mention universal jurisdiction but states: "potential enforcement actions [against MNCs] include complaints to international agencies, as well as a range of civil and criminal proceedings in domestic courts, on behalf of both public and private plaintiffs." For a civil law perspective, *see* ATTAC, THE ACTIVITIES OF TRANSNATIONAL CORPORATIONS (SEMINAR CONCLUSIONS) (2001), *available at* http://www.attac.org/fra/toil/doc/cetim2en.htm (last visited Oct. 13, 2001). Among the seminar's conclusions was the statement that "national tribunals can receive claims and requests against Transnational Companies and their managers . . . Those making the claim have the option . . . to apply the increasingly widespread principle of universal jurisdiction."

257. For an argument regarding the extension of ATCA principles to other jurisdictions *see* John Terry, *Taking Filartiga on the Road: Why Courts Outside the United States Should Accept Jurisdiction Over Actions Involving Torture Committed Abroad*, *in* TORTURE AS TORT, *supra* note 255, at 109-33.

use of, for example, forced labor. To date, this argument has been purely academic, because such a prosecution has never occurred.

Criminal liability may be more feasible than civil litigation, given the need for a proper statute conferring jurisdiction in the civil context. Moreover, since criminal prosecution requires a much higher burden of proof than civil cases, states would have to satisfy a higher evidentiary threshold. Finally, criminal sanctions for egregious violations of international law may have a greater deterrent effect than civil lawsuits. Paying a civil fine is much less stigmatizing than a criminal conviction and penalty.

Under the universality principle, the jurisdiction of a national court does not depend on where an offense occurred, or on the nationality of the defendant. Jurisdiction is not limited by territorial boundaries where basic human rights are violated. Rather, the nature of the offense confers jurisdiction on all states. Offenses that have been described as giving rise to universal jurisdiction include piracy, slave trading, war crimes, crimes against humanity (that are part of systematic conduct), genocide, and torture.[258]

The most recent example of an exercise of universal jurisdiction relates to the decision of the United Kingdom (UK) authorities to arrest General Pinochet and to consider his extradition to Spain.[259] The UK's action generated criticism of the use of universal jurisdiction, but much of the adverse commentary may relate to the political consequences of a foreign court trying Pinochet, rather than the legality of a jurisdiction doing so.[260]

Some commentators have argued that a concept of universal civil jurisdiction might also be implied by virtue of the status of torture and slavery as *jus cogens* and *erga omnes* norms. Many treaties and standards of customary international law provide the basis for imposing liability on MNCs in national

258. *See* KENNETH C. RANDALL, FEDERAL COURTS AND THE INTERNATIONAL HUMAN RIGHTS PARADIGM, at 163 (Duke 1990). The basis for such a list of breaches of international law arise from documents such as the Nuremberg Principles as adopted by the United Nations General Assembly and multilateral treaties such as the Geneva Convention on the Laws of War. *See The Flick Case*, *supra* note 50; *The Krupp Case*, *supra* note 52; *The I.G. Farben Case*, *supra* note 53.

259. *See* Sonorajah, *supra* note 256, at 492 (citing the judgment of Lord Millet in the Pinochet case. Millet argued for universal jurisdiction in situations of torture, even absent any law incorporating norms prohibiting torture into domestic law); *see also*, A. Bianchi, *Immunity versus Human Rights: The Pinochet Case*, 10 EUR. J. INT. L. 2 (1999), *available at* http://www.ejil.org/journal/Vol10/No2/art1.html (last visited Feb. 7, 2002). These two executives are each alleged to have "participated in, directed and/or authorized the tortuous conduct resulting from the unlawful conspiracy between Unocal, Total, [Myanmar Oil and Gas Enterprise] (MOGE) and [Burmese State Law and Order Restoration Council] (SLORC) or . . . specifically knew or reasonably should have known that some hazardous conditions or activity under his control could injure plaintiffs and negligently failed to take or order appropriate action to avoid the harm . . . Plaintiffs Compl. For Damages and Injunctive Declaratory Relief, *Doe v. Unocal*, (C.D. Cal. 1996) (Civ. 96-6959), ¶¶ 15-16. A second suit was filed against Unocal in September 1996 by supporters of opposition leader and Nobel Peace Prize winner Aung San Suu Kyi, whose government was elected in 1992, but who was prevented from taking office by military rulers who had seized control of the country several years previously. *See Dissidents of Myanmar File Rights Suit Against Unocal Energy; They accused the firm of violations, money laundering through the pipeline project*, L.A. TIMES, Sept. 4, 1996, at D2.

260. *See. e.g.*, Scott, *Introduction*, *in* TORTURE AS TORT, *supra* note 255, at 5, n. 9.

courts.[261] For example, the USMT was able to use treaty language to determine that IG Farben had violated the laws of war.

Slavery constitutes a *jus cogens* and *erga omnes* norm in public international law. *Erga omnes* obligations refer to certain obligations that flow to all states from general principles of international law and international instruments of universal or quasi-universal characteristics.[262] *Jus cogens* norms are peremptory norms accepted and recognized by the international community as a whole. No derogation from *jus cogens* norms is permitted.[263]

Jus cogens norms are derived from basic concerns about human dignity and this includes the most fundamental human rights protections, such as protection from torture and slavery. According to some commentators, there is enough evidence in international law that shows that the prevention of slavery qualifies as a higher obligation that would trigger the principle of universal jurisdiction. The prevention of torture and slavery is the specific subject of multilateral treaties such as the Convention Against Torture.[264] The prohibition on slave trading and slavery is likewise found in multiple international treaties and instruments.[265]

More generally, there are examples in which national jurisdiction attaches to international crimes committed by MNCs.[266] In addition, states whose national criminal law permits prosecution of legal persons may be able to extend such jurisdiction to international crimes. Different jurisdictions have permitted

261. *See* Scott, *Translating Torture into Transnational Tort*, *in* TORTURE AS TORT, *supra* note 255, at 57 ("A central tension stems from the necessity to take seriously the following question: given the state of international law on the applicability of human rights norms to corporate actors, should judges assume the authority to develop such accountability without express or at least clear authorization from the relevant legislature? The question is bound up with the general question of justiciability and the associated debates on the relative competence and legitimacy of courts and legislatures in relation to law-creation activity.").

262. *See Barcelona Traction, Light and Power company, Ltd.*, (1970) I.C.J. Rep. at 3.

263. *See* Article 64 of the VIENNA CONVENTION ON THE LAW OF TREATIES, 23 May 1969 (entered into forced January 2, 1980) which states: "If a new peremptory norm of general international law emerges any existing treaty which is in conflict with that norm becomes void and terminates." All *jus cogens* norms are also *erga omnes* but *erga omnes* may include more than *jus cogens* norms.

264. *See* CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OF PUNISHMENT, adopted December 10, 1984, G.A. Res. 39/46 U.N. GAOR 9th Session, Supp. No. 51, U.N. Doc. A/39/51 (1985). Reprinted in (1984) 23 I.L.M. 1027.

265. *See* SLAVERY CONVENTION, September 25, 1926, 212 U.N.T.S. 17, INTERNATIONAL; LABOR ORGANIZATION CONVENTION (No. 29) CONCERNING FORCED OR COMPULSORY LABOR, June 28, 1930, 39 U.N.T.S. 55, SUPPLEMENTARY CONVENTION ON THE ABOLITION OF SLAVERY AND THE SLAVE TRADE AND INSTITUTIONS AND PRACTICES SIMILAR TO SLAVERY, September 7, '957, 266 U.N.T.S. 3; INTERNATIONAL LABOR ORGANIZATION CONVENTION (No. 105) CONCERNING THE ABOLITION OF FORCED LABOR, June 25, 1957; INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, adopted December 16, 1966, G.A. Res 2200 (XXI). U.N. GAOR 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force March 23, 1976).

266. THE BAMAKO CONVENTION ON THE BAN AND IMPORT INTO AFRICA AND THE CONTROL OF TRANSBOUNDARY WASTES WITHIN AFRICA has been cited often as an example of a treaty that demands that countries adopt legislation "for imposing criminal penalties on all persons who have planned, committed, or assisted in such illegal imports. Such penalties should be sufficiently high to both punish and deter such conduct." January 29, 1991 reprinted in 30 I.L.M. (1991) at 793. The Convention defines person as "any natural or legal person"; *see also* the BASEL CONVENTION ON THE CONTROL OF TRANSBOUNDARY MOVEMENT OF HAZARDOUS WASTES AND THEIR DISPOSAL, (1989) 28 I.L.M. 657.

legal persons to be tried for criminal offenses under varying standards, and have grappled with different tests for attributing actions of employees/agents to the corporate entity. The failure in some jurisdictions to proceed with prosecutions of corporate manslaughter or negligent homicide relate to prosecutorial restraint rather than a sense that it is not permissible.[267]

In 1948, the United Nations General Assembly asked the International Law Commission (ILC) to study the desirability of establishing a criminal chamber for the International Court of Justice. Neither this nor the international penal tribunal described in the 1948 Genocide Convention ever came to fruition. The project to establish an international criminal court was not reexamined until 1992 when the U.N. General Assembly directed the ILC to prepare a draft statute for an international criminal court. The ILC adopted a draft in 1994. Subsequently, the UN General Assembly set up an *ad hoc* committee to review the ILC draft. In 1996, a preparatory committee met. After five additional meetings, a draft statute was submitted to the United Nations Diplomatic Conference on the Establishment of an International Criminal Court (ICC) in Rome. The final text of the statute was adopted on July 17, 1998.[268]

At the Rome Conference, the draft statute under consideration included bracketed text that would give the ICC jurisdiction over natural and legal persons.[269] The French delegation was responsible for the proposal to include legal persons within the jurisdiction of the ICC. France is a jurisdiction that recog-

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267. *See* WELLS, *supra* note 17. For a discussion of the various theories with respect to attribution of liability for corporate crime see B. Fisse and J. Braithewaite, *The Allocation of Responsibility for Corporate Crimes*, 11 SYDNEY L. REV. 468 (1988).

There is no single accepted theory for attributing criminal liability to corporations. Some of the hurdles faced with respect to imputing liability to a legal person include the problem of imputing the acts of a natural person to a corporation. Common law systems have resolved this difficulty either by adopting vicarious liability or by identification of the acts of those representing the corporate "mind" or "will" as acts of the corporation (i.e., attribution). *See, e.g.,* L.H. LEIGH, THE CRIMINAL LIABILITY OF CORPORATIONS IN ENGLISH LAW 4-5 (1969); Civil law jurisdictions have responded by enacting legislation that provides for the application of specific penal laws to legal persons.

A second difficulty is when a crime includes specific intent in its definition. It is a conceptual impediment in any legal system to accept that a legal person can have *mens rea* for purposes of criminal prosecution. Some jurisdictions attribute the acts and *mens rea* of the employee to the corporation.

Under a related principle known as the identification principle, the liability of a corporation is limited to the actions of its policymaking officials. In the United Kingdom, this has been referred to as the directing mind doctrine. *See H.L. Bolton (Engineering) Co. Ltd. v. Graham & Sons Ltd.*, (1957) 1 Q.B. Other impediments have related to the doctrine of *ultra vires*, also referred to as the doctrine of declared aims. Under this doctrine, a corporation is formally limited to those acts that are expressly authorized in its corporate charter. Because corporate charters only permit companies to engage in lawful acts, the corporation lacks any power to commit unlawful acts. Thus, illegal acts committed by employees incur liability for the individual only.

268. The statute was adopted by a non-recorded vote with 120 votes in favor, 7 votes against, and 21 abstentions. See UN Press Release L/ROM 12 July 1998.

269. UN Doc. A/CONF.183/2/Add.1 at p. 49. Article 23 paras 5 and 6 read:

> The Court shall have jurisdiction over legal persons, with the exception of States, when the crimes committed were committed on behalf of such legal persons or by their agencies or representatives.
>
> The criminal responsibility of legal persons shall not exclude the criminal responsibility of natural persons who are perpetrators.

nizes legal responsibility for legal persons.[270] France further believed that criminal organizations such as those declared illegal at Nuremberg should likewise be outlawed by the ICC.[271]

Despite various attempts to create an acceptable formulation that would include legal persons within the ICC's jurisdiction, it proved impossible to reach a consensus within the short time of the Rome Conference and therefore the French withdrew the proposal.[272] The disagreements turned on issues such as devising rules of attribution (with respect to the knowledge and culpability of a legal person) and highlighted the importance of creating a way to deal with corporate war crimes.[273]

The ICC statute can be amended, at the earliest, seven years after it comes into force. According to Article 123, at that time, a review conference will be convened to consider amendments. Any amendments will require a consensus of the states that are parties to the statute, or a two-thirds majority if consensus is not possible.[274] While it seems that states can exercise criminal jurisdiction over MNCs either within a home or host state for violations of human rights, they often are not willing to do so. It is therefore increasingly important to develop mechanisms for encouraging them to do so. Amending the statute of the ICC to include legal persons is one way to accomplish what individual states are reluctant to do.[275] Nonetheless, this proposition is likely to face resistance from governments where large MNCs are domiciled. Attempts by some nation states to create a workable proposal suggests that the jurisdiction over legal persons is an issue deserving further consideration at the international level. If the ICC is not given general jurisdiction over legal persons, it may be more realistic for binding obligations to be created by virtue of treaties governing the conduct of MNCs.

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270. *See* Clapham, *supra* note 14, at 146.

271. *See id.*

272. *See id.* at 157.

273. *See id.* at 140. Clapham notes that in addition to discussions relating to the activities of corporations during the Second World War:

> [v]arious delegations pointed to the possible involvement of construction companies in covering up mass graves and several delegates referred to the role of the radio station that had urged the killing of Tutsis during the Rwanda genocide. The representative of Tanzania made a reference to coffee companies in Rwanda that had assisted in the genocide by storing arms and equipment. The involvement of multinational oil companies in population transfers and acts of violence in other countries were also sometimes considered.

Id. at 148.

274. *See id.* at 159.

275. *See* Francois Rigaux, *An International (Criminal) Court for Transnational Companies?* 2001 ATTAC SEMINAR ON THE ACTIVITIES OF TRANSNATIONAL CORPORATIONS, *available at* http://www.attac.org/fra/toil/doc/cetim7en.htm (last visited Feb. 7, 2002); *see also,* Amanda Macdonald, Hilke Molenaar, Peter Pennartz, Controlling CORPORATE WRONGS: THE LIABILITY OF MULTINATIONAL CORPORATIONS. LEGAL POSSIBILITIES, INITIATIVES AND STRATEGIES FOR CIVIL SOCIETY. (The IRENE Report of 2000) at 10 located at http://www.elj.warwick.ac.uk/global/ issue/2000-1/irene.html. This report summarized major findings from a seminar sponsored by the International Restructuring Education network at the University of Warwick in March 2000.

VII.
CONCLUSION

The *Farben* and *Nippon Mining* prosecutions provide a starting point for understanding the nature of individual responsibility, but also corporate responsibility, for grave breaches of international law. The effect of these cases, as well as of the recent World War II forced labor lawsuits, are that they have brought these issues to the attention of judges and jurists. Post-Nuremberg, the role of the industrialists was not the focus of many legal scholars' attention, especially in relation to the liability of legal persons.The renewed focus on restitution for World War II forced laborers, after more than fifty years, has caused scholars to reexamine these historically significant documents. Their relevance is clear as demonstrated by the *Unocal* decision. These cases have served to solidify the jurisdictional basis for suing MNCs in the United States and arguably could provide a similar foundation for establishing criminal (and perhaps even civil) jurisdiction in other countries.

At present, none of the recent MNC cases have been successful. The Holocaust related cases were dismissed on grounds of nonjusticiability, and also because the statute of limitations, according to the court, had expired. Very recently, civilian slave labor cases against Japanese MNCs were also dismissed because the applicable statutes of limitations were held to have run out. In both sets of litigation, the courts recognized, however, that plaintiffs had plausible causes of action against the MNCs for their use of slave labor during World War II. Thus, the procedural reasons for dismissal should not diminish the impact of the courts' findings in either case. Moreover, both the German and Korean cases can be construed as prompting settlement, thus opening possibilities for restitution to the victims.

With *Unocal,* the court held that mere knowledge of the use of slave labor by Unocal's business partner (the Myanmar military government) and acceptance of economic benefits were insufficient to give rise to a cause of action. The court, in rendering its decision, relied heavily on a brief reading of decisions of the USMT prosecution of several German industrialists with ties to the Third Reich. The court's analysis for many reasons, is flawed in that it ignores the distinction between wartime economic activity and foreign investment decisions made by MNCs today. The contradictory decisions with respect to the notions of beneficial complicity as well as aidor and abettor liability, also provide problematic guidance concerning the parameters of corporate complicity. The *Unocal* court at least implicitly recognized that forced labor claims against MNCs are possible.

The United Nations Subcomission on the Promotion and the Protection of Human Rights is drafting a comprehensive Human Rights Code for Companies. This is the only inter-governmental initiative, at present, that has the possibility of working its way through the United Nations bureaucracy to become either a binding convention ratified by states or a non-binding but legally authoritative document, which at least states clearly MNCs' human rights obligations. Such a code would be an explicit recognition of the obligations that exist implicitly in

many of the existing international conventions, documents, and judgments.[276] The guidelines, as well as any similar type of regional or multilateral initiative, should clearly state that beneficial corporate complicity is prohibited.

This evolution of criminal law coupled with the precedent delineating which precepts of international law apply to private actors means that states might well be more daring in their exercise of criminal jurisdiction over MNCs. The *Pinochet* case was a bold move with respect to the exercise of universal jurisdiction against a natural person. The extension of such jurisdiction to MNCs may seem far-fetched, but is arguably permissible under existing international law.[277]

Moreover, there may be other bases, including the ATCA and foreign direct liability under a tort theory of a parent corporation's breach of duty through its investments overseas that may also create civil liability in the United States and potentially other jurisdictions. Kent Greenfield has recently written an interesting article stating that American shareholders may be able to seek injunctive relief against American MNCs for violations of customary international law.[278] His argument is based on the principle that norms of customary international law apply equally to legal persons and natural persons, at least in the United States. In addition, the law of the United States historically has incorporated international law. Therefore, he argues, corporations should be held, as a matter of domestic company law, to a duty to uphold customary international law, including the prohibition on forced labor. Crucial to any of these possible causes of action is an understanding of what constitutes accomplice liability.

While MNCs are responsible for positive results such as foreign investment, capital flow, and job creation, they sometimes have been responsible for human rights abuses such as the use of child labor, failure to provide safe and healthy working environments, and repression of the formation of trade unions.[279] Although the problems of MNC violations of human rights should not be overstated, it is those exceptional cases implicating an MNC, in which the law should not remain silent.

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276. *See* David Weissbrodt, *UN guidelines for companies*, 2001 AMNESTY INTERNATIONAL HUMAN RIGHTS AND BUSINESS MATTERS, *available at* http://www.amnesty.org.uk/business/ newslet/ spring01/un.shtml (last visited Oct. 9, 2001). For the most recent version of the draft guidelines, *see* Draft Universal Human Rights Guidelines for Companies, Introduction, U.N. Doc. E/CN.4/Sub.2/ 2001/WG.2/WP.1 (2001), *available at* http://www1.umn.edu/humanrts/links/draftguidelines-intro.html (last visited Oct. 9, 2001).

277. There are many reasons why the criminal prosecution of an MNC may serve as a greater deterrent to MNC violations of human rights. The possibility of criminal prosecution and the accompanying sanctions may be a greater deterrent than civil fines or penalties. *See, e.g.*, 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 12, at 141.

278. *See* Kent Greenfield, *Ultra Vires Lives: A Stakeholder Analysis of Corporate Illegality (With Notes on How Corporate Law Could Reinforce International Law Norms)* 87 VA L. REV. 1279, 1369-77 (2002).

279. *See* D. Weissbrodt and M. Hoffman, *The Global Economy and Human Rights: A Selective Bibliography*, 6 MINN. J. GLOBAL TRADE 189 (1997).

This article has examined some of the original decisions that attributed criminal responsibility to private economic actors, and, by implication, to the corporate entities for which they worked. It is hard to imagine that the judges who comprised the various military tribunals after the Second World War would believe that their words and judgments would have so much relevance today, especially with respect to the liability and intent of economic actors. The rationale for prosecuting MNCs as accomplices may be more ambitious than states with large commercial and financial interests are willing to be. The focus on corporate complicity is a new phenomenon. To the extent that corporate actors reflect on the potential for liability and the basis for such liability under established precepts of international law, then international law will have successfully achieved its goal of deterrence.