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Emerging Issues of Human Rights Responsibility in the Extractive and Manufacturing Industries: Patterns and Liability Risks

Caroline Kaeb*

I. INTRODUCTION

¶1 Gross human rights violations -- such as forced displacement, forced labor, genocide and torture -- have long made international headlines and been on the political agenda of the international community. In a changing and globalized world, human rights violations are no longer associated solely with governments, but also with multinational corporations ("MNCs"). The Business and Human Rights Resource Center -- widely acknowledged as providing the broadest array of "balanced information of business and human rights"[1] -- has documented abuses ranging from health and safety violations in the workplace, to murder, torture, and forced displacement at the hands of military and security forces protecting company facilities. Indeed, attention to corporate human rights responsibility, the issue's significance for contemporary business practice, and the need for regulative outreach to non-state actors have increased tremendously.

¶2 Often the human rights performance of corporations and their host governments overseas are intertwined and complicate the allocation of responsibility. The latest case to feature extensively in international headlines,[2] that is emblematic of interdependencies between states and corporation, concerns the oil operations of the France-based Total S.A. ("Total") in Myanmar (formerly Burma). The activities of Total in conjunction with the U.S.-based Unocal Corp. ("Unocal") in Burma resulted in prominent litigation against the respective corporations in European and North-American jurisdictions. Major cases against MNCs[3] for human rights violations committed abroad have been brought in both U.S courts under the U.S. Alien Tort Statute[4] ("ATS") and European domestic courts.[5]

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[1] Business & Human Rights Resource Center, A Brief Description, http://www.business-humanrights.org/Aboutus/Briefdescription (last visited Apr. 13, 2008) (quoting Mary Robinson, Director of the Ethical Globalization Initiative, former United Nations High Commissioner for Human Rights and President of Ireland). The Center tracks the human rights performance of over 3000 corporations in over 180 countries.

[2] *See As Myanmar Cracks Down on Protesters, Oil Companies Keep up Controversial Ties*, INT'L HERALD TRIBUNE, Sept. 28, 2007, *available at* http://www.iht.com/articles/ap/2007/09/29/business/AS-FIN-Myanmar-Fueling-the-Junta.php; *Global Firms Provide Lifeline to Myanmar's Junta*, AGENCE FRANCE-PRESS (AFP), Sept. 29, 2007, *available at* http://afp.google.com/article/ALeqM5jono5w9ykIWMyXNPZgt4JiKLKDTg.

[3] MNC for the purpose of this article is defined as the parent holding company as distinct from the local subsidiary operating in the host state.

[4] The ATS, passed by the Congress in 1789, confers on the district courts "original jurisdiction of any civil action by an alien for a tort only committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. For a discussion on legal pluralism with regard to ATS litigation, see Luisa Antoniolli, *Taking Legal Pluralism Seriously: The Alien Tort Claims Act and the Role of International Law*

Like its joint venture partner Unocal, Total was alleged to have used forced labor provided by the Burmese government to build a pipeline. The case against Total on charges of complicity in crimes against humanity has just been reopened in Belgian courts, after cases against Unocal in U.S. courts and against Total in French courts had been settled on similar charges.[6] The case of Total shows that out-of-court settlements will not protect MNCs in the long-run from liability; rather, corporations themselves, NGOs with human rights agendas, academics, and policymakers must recognize and address the significance of corporate human rights issues.

¶3 This article presents a case study on corporate human rights performance in the extractive and manufacturing industries in various country contexts. The analysis evolves around two main studies on Royal Dutch/Shell and Nike which shed light on the dynamics underlying contemporary business practices in host countries and the sector-specific patterns of human rights problems. In particular, the studies explore human rights violations related to business activities in terms of the local political situation and corporate structures of the parent-subsidiary relationship. Additional examples from the respective industrial sector further illustrate: first, the various kinds of alleged human rights violations; second, the corporation's potential involvement in the abuses in the context of the legal standards at stake; and finally, the implications of public scrutiny and litigation for corporate policies. Thus, the article intends to give an account of liability risks[7] for both the extractive and manufacturing sectors that is closely related to policy parameters.

¶4 One reason for focusing on alleged abuses in the extractive and manufacturing sectors is that these sectors have been the subject of intense public scrutiny and criticism for their human rights performance abroad. Also, these industrial sectors illustrate challenges of corporate human rights responsibility and implications for corporate policies that are common and applicable to most other sectors. The analysis will show

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before U.S. Federal Courts, 12 IND J. OF GLOBAL LEGAL STUD. 651 (2005).

[5] European jurisdictions provide for criminal prosecution rather than civil damages in order to redress international human rights violations. Many European legal systems, however, do not allow for criminal liability of legal entities, since it goes to the very heart of the controversy surrounding collective moral responsibility. *See* Kai Ambos, *Art. 25: Individual Criminal Responsibility, in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 475, 477-78 ¶ 4 (Otto Triffterer ed. 1999). It is argued that a corporation, as any collective, has "no soul to damn" and "no body to kick," and thus can be subject neither to moral blame nor criminal liability. John Coffee, *"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386 (1981). This leads to a situation where corporations cannot be held criminally liable in domestic courts. However, there are some exceptions. France and Belgium, for example, provide for corporate criminal responsibility and thus allow the indictment and prosecution of legal persons and corporations in particular. *See* BRUNO DEMEYERE, FAFO AIS, SURVEY RESPONSE, LAWS OF BELGIUM, 'COMMERCE, CRIME AND CONFLICT: A SURVEY OF SIXTEEN JURISDICTIONS' 38 (Sept. 6, 2006), *available at* www.fafo.no/liabilities/CCCSurveyBelgium06Sep2006.pdf; ABIGAIL HANSEN & WILLIAM BOURDON, FAFO AIS, SURVEY RESPONSE, LAWS OF FRANCE, 'COMMERCE, CRIME AND CONFLICT: A SURVEY OF SIXTEEN JURISDICTIONS' 4-7 (Sept. 6, 2006), *available at* http://www.fafo.no/liabilities/CCCSurveyFrance06Sep2006.pdf.

[6] *Belgium Reopens Myanmar Humanity Crimes Probe Against Oil Giant Total*, AGENCE FRANCE-PRESS (AFP), Oct. 2, 2007 [hereinafter *Belgium Reopens*], *available at* http://afp.google.com/article/ALeqM5g84fzhRA8Y6IvW-gmt7YmonfEBKg

[7] This essay is confined to the analysis of the risk for MNCs to be held liable in courts of their home state, i.e. where they are incorporated, under active nationality jurisdiction or in courts of a third state under universal jurisdiction. It does not address the adjudication of abuses in courts of the host state, i.e. where an MNC operates through its local subsidiaries.

that corporations tend to shift from formally denying to acknowledging and assuming responsibility for their impact on society.

II. HUMAN RIGHTS IN A BUSINESS CONTEXT: THE EXTRACTIVE INDUSTRIES

¶5 This section analyzes human rights violations in the extractive sector by focusing on the activities of Royal Dutch/Shell[8] and its Nigerian subsidiary ("Shell")[9], the biggest oil producer in Nigeria with a longstanding history of oil extraction in the Niger delta. The main reason for focusing on Shell is that many of its oil facilities are close to local communities that have continuously and increasingly protested the exploitation of their land over the last decade.[10] In the face of protests, Shell has become more vulnerable to accusations of complicity in human rights violations committed by government security forces. Furthermore, the case of Shell in Nigeria shows a pattern of human rights problems that is intrinsic to most oil and mining corporations.

¶6 The following sections describe human rights violations that occur in the midst of business operations in the host country[11] and elaborate on the common parameters of liability risks in the extractive industries.

A. Complicity Charges: the Case of Shell in Nigeria

¶7 Shell is peculiar compared to other oil corporations: rather than relying on support from its home government, it cooperates closely with host governments to initiate and maintain its oil operations abroad.[12] Given these close relationships, Shell was particularly vulnerable to charges of complicity in state human rights abuses against local communities in the oil areas -- especially against the Ogoni people.

1. Corporate Structures in the Local Political Context

¶8 When facing allegations of human rights violations, Shell, like many other oil companies, often points to the difficult political and social environment in which it conducts its oil operations.[13] In 1999, Shell -- while acknowledging that human rights problems surrounded its oil operations in Nigeria -- stressed that "major human rights violations do not generally exist in a vacuum, but within a nexus of corruption, poverty, poor public services and infrastructure, governmental instability and other factors which make it difficult for business to operate."[14] Thus, the boundaries between the local

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[8] Royal Dutch Petroleum Company and Shell Transport and Trading Company.
[9] Unless specified otherwise, Royal Dutch/Shell and its Nigerian Subsidiary are henceforth referred to as "Shell."
[10] *See* HUM. RTS. WATCH, THE PRICE OF OIL: CORPORATE RESPONSIBILITY AND HUMAN RIGHTS VIOLATIONS IN NIGERIA'S OIL PRODUCING COMMUNITIES 12 (1999) [hereinafter THE PRICE OF OIL], *available at* http://www.hrw.org/reports/1999/nigeria/nigeria0199.pdf.
[11] Evidence is established through corporate statements regarding human rights-related incidents, substantial claims from non-governmental organizations, civil society and the international press, as well as findings in related court proceedings primarily brought before U.S. courts.
[12] *See* J. George Frynas, *Global Monitor: Royal Dutch/Shell*, 8 NEW POL. ECON. 275, 279-80 (2003).
[13] *See* Richard Boele et al., *Shell, Nigeria and the Ogoni. A Study in Unsustainable Development: I. The Story of Shell, Nigeria and the Ogoni People - Environment, Economy, Relationships: Conflict and Prospects for Resolution*, 9 SUSTAINABLE DEV. 74, 82 (2001).
[14] Boele, *supra* note 13, at 82 (quoting SHELL INTERNATIONAL, MANAGEMENT PRIMER ON HUMAN RIGHTS

political context in which human rights violations occur and a corporation's intrinsic sphere of influence and responsibility are often blurred.

¶9 Indeed, the environment in which MNCs operate is often characterized by deep frictions among opposing local factions, usually the official government and local communities.[15] Such tense situations in the host country make it difficult to draw the line between governmental and corporate responsibility for human rights violations.[16]

¶10 A closer look at the corporate structures of oil companies and their relationship with host governments is necessary to define the scope of corporate human rights responsibility. In many oil extracting countries, the oil industry is nationalized; as a result, oil corporations often operate in a joint venture with the host government. For example, Royal Dutch/Shell's Nigerian subsidiary, the Shell Petroleum Development Company (SPDC), is a minority shareholder in a joint venture with the Nigerian National Petroleum Company; Shell serves as the operating partner in the joint venture making all operational decisions.[17] Thus, corporate and governmental interests in the protection of oil facilities and oil production are largely intertwined. This interdependence provides the basis for complicity charges against MNCs, as well as calls by communities and NGOs for oil corporations to use their joint venture influence to promote greater respect for human rights in governmental policies.[18]

2. Setting the Scene: Security on the Ground

¶11 Complicity charges against MNCs must be evaluated in light of the security risks in the host country. Security issues are one of the most urgent problems facing oil corporations in many of their operating countries. According to Human Rights Watch ("HRW"), sabotage of pipeline projects, intimidation of company and contractor staff, and hostage-taking do occur, even though companies and local communities dispute the prevalence of these incidents, particularly sabotage.[19]

¶12 These security risks are rooted in protests against corporate policies that often have detrimental effects on local communities. In Nigeria, for instance, the Ogoni people allege that Shell Nigeria coercively appropriated land for oil production without adequate compensation and caused environmental degradation.[20] The unequal distribution of gains for Shell and losses for local communities has sparked protests that result in security risks to the oil corporation.

¶13 In order to protect their staff and facilities, oil corporations hire so-called "supernumerary police," trained and recruited by the Nigerian police. Additionally, corporations may enlist Nigerian government security forces, such as the Mobile Police.[21]

(1999)).

[15] *See* THE PRICE OF OIL, *supra* note 10, at 68-71.

[16] *See* Watts, *supra* note 22, at 390.

[17] *See* Boele, *supra* note 13, at 75; J. Paul Martin, *Royal Dutch Shell: How Deep the Changes, in* NON-STATE ACTORS IN THE HUMAN RIGHTS UNIVERSE, 93, 95 (George Andreopoulos et al. eds., 2006).

[18] *See* THE PRICE OF OIL, *supra* note 10, at 3-6.

[19] *Id.* at 3, 10.

[20] *See* Wiwa v. Royal Dutch Petroleum Co., 96 Civ. 8386, 2002 U.S. Dist. LEXIS 3293 at *4 (S.D.N.Y. Feb. 22, 2002); Brief of Wiwa Plaintiffs as Amici Curiae in Support of Appellants and Urging Reversal at 6, Kiobel v. Royal Dutch Petroleum Co., 456 F. Supp. 2d 457 (S.D.N.Y. Sept. 29, 2006), *leave for interlocutory appeal granted*, Nos. 06-4800 & -4876 (2d Cir. Dec. 27, 2006).

[21] *See* THE PRICE OF OIL, *supra* note 10, at 10, 14.

Furthermore, the Nigerian government has set up special Task Forces to handle security issues in the oil production areas, such as the Rivers State Internal Security Task Force that was created to respond to the Ogoni crisis. Because these multiple relationships create several lines along which human rights abuses can occur, each incident needs to be examined individually in order to allocate responsibility for the abuses.

3. The Range of Liability Risks

¶14 Human rights violations are most commonly committed by government security forces in response to protests against oil operations.[22] Major MNCs, such as Shell and Chevron Corporation ("Chevron"), have been accused of complicity in crimes against humanity, summary execution, extrajudicial killings, arbitrary detention, torture, cruel, inhumane or degrading treatment, and other violations of international law, such as infringements on the right to life, liberty and security of the person, and the right to peaceful assembly and association.[23]

¶15 Complicity charges were brought against Royal Dutch/Shell and its Nigerian subsidiary SPDC in U.S. courts under the ATS and the Torture Victim Protection Act (TVPA) in *Wiwa v. Royal Dutch Petroleum*[24] and *Kiobel v. Royal Dutch Petroleum*.[25] Like the *Wiwa* plaintiffs, the *Kiobel* plaintiffs claimed that they and their kin were subjected to human rights violations by the Nigerian government, violations in which the corporate defendants were complicit.[26] The allegations against Royal Dutch/Shell and its Nigerian subsidiary are substantially similar in both cases and hinge upon two sets of incidents.[27] The first set involved violations against local residents by Nigerian military police/security forces allegedly requested by Shell Nigeria in order to protect company facilities and contain protests. Specifically, *Wiwa* and *Kiobel* plaintiffs claimed that the security forces beat and shot locals protesting the destruction of their property for pipeline construction purposes in April 1993, and shot three people, killing one of them, in October 1993 near a Shell flow station at Korokoro, Rivers State, Nigeria.[28] The plaintiffs alleged that the military police used vehicles supplied by Royal Dutch/Shell and that corporate staff were present during the assaults.[29]

¶16 The second set of incidents involved the arbitrary detention, trial and ultimate execution in 1995 of the "Ogoni 9," including Ken Saro-Wiwa and Barinem Kiobel, all leaders of the Movement for the Survival of the Ogoni People (MSOP).[30] After eight

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[22] *See* Michael J. Watts, *Righteous Oil? Human Rights, The Oil Complex, and Corporate Social Responsibility*, 30 ANN. REV. OF ENV'T AND RESOURCES 373, 390-91 (2005).
[23] *See* Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 93-94 (2d Cir. 2000); Eighth Amended Complaint for Damages and Equitable Relief at 26-42, Bowoto v. Chevron Corp., No. C 99-02506 SI, 1999 U.S. Dist. Ct. Pleadings 5760 (N.D. Cal. Sept. 21, 2006).
[24] *Wiwa*, 2002 U.S. Dist. LEXIS 3293.
[25] Kiobel v. Royal Dutch Petroleum, 456 F. Supp. 2d 457 (S.D.N.Y. Sep. 29, 2006), *leave for interlocutory appeal granted*, Nos. 06-4800 & -4876 (2d Cir. Dec. 27, 2006).
[26] *Wiwa*, 226 F.3d at 92; Brief of Wiwa Plaintiffs, *supra* note 20, at 1.
[27] *See id.* at 1-2; Kiobel v. Royal Dutch Petroleum Co., No. 02 Civ. 7618, 2006 U.S. Dist. LEXIS 71421, at *2 (S.D.N.Y. Sept. 29, 2006).
[28] Brief of Wiwa Plaintiffs, *supra* note 20, at 6-7; Wiwa v. Royal Dutch Petroleum Co., Nos. 96 Civ. 8386 & 01 Civ. 1909, 2006 U.S. Dist. LEXIS 65601, at*3 (S.D.N.Y. Sept. 12, 2006).
[29] *See* Brief of Wiwa Plaintiffs, *supra* note 20, at 6-7; *Wiwa*, 2002 U.S. Dist. LEXIS 3293, at *5.
[30] MOSOP is the representative organization of the Ogoni people and forms an opposition against Shell's operations in the region. *See Wiwa*, 2002 U.S. Dist. LEXIS 3293, at **4-5; Brief of Wiwa Plaintiffs, *supra*

months of detention without being charged, Ken Saro-Wiwa (president of the MSOP) and other leaders of the protest movement were put on trial before a special court under "formal" charges of murder.[31] Owens Wiwa -- son of Ken Saro-Wiwa -- was subject to multiple unlawful detentions from December 1993 until April 1994, and was allegedly assaulted and tortured repeatedly during his detentions.[32]

¶17 The plaintiffs in *Wiwa* and *Kiobel* alleged that Royal Dutch/Shell -- operating directly and through its Nigerian subsidiary -- cooperated and even conspired with Nigerian authorities in order to contain the protest movement and secure its oil operations in the Niger Delta.[33] The plaintiffs claimed that the trial failed to satisfy international standards of due process because there was no possibility for appeal and witnesses were bribed by the defendants to give false testimony.[34] The plaintiffs further alleged that the defendants offered Ken Saro-Wiwa his freedom in exchange for an end to the MSOP's international protests against Shell.[35]

¶18 On February 22, 2002, the U.S. District Court for the Southern District of New York in *Wiwa* denied most of the defendant's motions to dismiss and held that the plaintiffs were entitled to file their actions under the ATS and the TVPA.[36] In September 2006, the court in *Kiobel* granted the motions to dismiss with regard to extrajudicial killings, forced exile, destruction of property, and right to life, liberty and personal assembly.[37] However, the court preserved the general claim of aiding and abetting under the ATS and the particular claims concerning crimes against humanity and torture, as well as arbitrary arrest and detention.[38] The court certified all issues for interlocutory appeal.[39]

¶19 The claims against Royal Dutch/Shell reveal a broad range of human rights problems facing MNCs. Whereas the first set of incidents involves abuses committed by security forces that are either contracted, requested by, or otherwise acting with the awareness of the corporation, the second set of cases pertains to more general allegations of corporate support of repressive policies in the host country.

¶20 The distinction between these types of human rights problems correspond to the categories of beneficial and so-called silent complicity. The Global Compact identifies three categories of corporate complicity -- direct complicity, beneficial complicity and silent complicity.[40] On one end of the spectrum is direct complicity, and on the other is silent complicity, mere presence in a country with repressive policies. Beneficial complicity lies somewhere in between.[41]

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note 20, at 7-8.
[31] *Wiwa*, 226 F.3d 88 at 92; Brief of Wiwa Plaintiffs, *supra* note 20, at 7.
[32] *Id*. at 9.
[33] *Wiwa*, 2002 U.S. Dist. LEXIS 3293 at *5; *Kiobel*, 2006 U.S. Dist. LEXIS 71421 at *2.
[34] Brief of Wiwa Plaintiffs, *supra* note 20, at 8.
[35] *Wiwa*, 2002 U.S. Dist. LEXIS 3293, at *5.
[36] *Id*. at *2.
[37] *Kiobel*, 456 F. Supp. 2d 457, 468. (S.D.N.Y. Sep. 29, 2006), *leave for interlocutory appeal granted*, Nos. 06-4800 & -4876 (2d Cir. Dec. 27, 2006).
[38] *Id*. at 463-67.
[39] *See id.* at 467-68.
[40] Celia Wells & Juanita Elias, *Catching the Conscience of the King: Corporate Players on the International Stage, in* NON-STATE ACTORS AND HUMAN RIGHTS 141, 163 (Philip Alston ed. 2005).
[41] *See* Anita Ramasastry, *Corporate Complicity: From Nuremberg to Rangoon: An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations*, 20 BERKELEY J. INT'L L. 91,

¶21 Direct complicity exists where a corporation knowingly assists violations of international law committed by a state; to date, direct complicity has only been found in a limited number of cases.[42] So-called "silent complicity" refers to non-action, for example, the silence of a corporation in the face of systematic or continuous human rights violations by host country authorities. Under this concept, silence is deemed not to be neutral;[43] rather, the company is expected to "raise systematic and continuous human rights abuses with the appropriate authorities."[44] For example, corporations were accused of "silent complicity" for investing and operating in apartheid South Africa, since their business activities arguably helped to perpetuate a regime of discrimination and racism.[45] Thus, a multitude of corporations were sued under the ATS in U.S Courts.[46] The plaintiffs claimed that the corporation's mere business activity in apartheid South Africa constituted a violation of the law of nations and thus created a cause of action under the ATS.[47] The District Court for the Southern District of New York held that it "must be extremely cautious in permitting suits here based upon a corporation's doing business in countries with less than stellar human rights records"[48] and thus decided that a corporation's business activities alone are not sufficient to provide a basis for ATS jurisdiction.[49] In October 2007, the Second Circuit Court of Appeals vacated the District Court's dismissal of the plaintiffs' ATS claims and remanded for further proceedings.[50]

¶22 Beneficial complicity, also referred to as indirect complicity,[51] is more difficult to conceptualize since it lies at the edge of accountability and liability.[52] It pertains to situations where there is no direct corporate involvement in the execution of human rights violations by a third party, but the violations occur in the context of business activities and the corporation benefits from the violations.[53] The most common example of beneficial complicity is the situation where security forces use repressive measures when protecting company facilities or containing peaceful protests.[54] The major lawsuit against

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103 (2002).

[42] Examples of direct complicity are German corporations, in particular I. G. Farben, Flick and Krupp, that used forced labor during World War II. *See* Ramasastry, *supra* note 40, at 102. Inés Tófalo applies a different metric in these cases of direct complicity by showing that the human rights violations are "symbiotic joint actions, where the state and the TNC [transnational corporation] act in concert." Inés Tófalo, *Overt and Hidden Accomplices: Transnational Corporations' Range of Complicity for Human Rights Violations, in* TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS, 335, 339 (Olivier de Schutter ed. 2006).

[43] Wells, *supra* note 39, at 173; Klaus Leisinger, *Business and Human Rights, in* EMBEDDING HUMAN RIGHTS IN BUSINESS PRACTICE 50, 56 (UN Global Compact Office ed. 2004).

[44] ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS 221 (2006) (quoting *Report of the United Nations High Commissioner for Human Rights to the 56th Session of the General Assembly*, at ¶ 111, U.N. Doc. A/56/36/2001 (2001)).

[45] Ramasastry, *supra* note 40, at 103.

[46] *See* Khulumani v. Barclay National Bank Ltd., 504 F.3d 254 (2d Cir. 2007).

[47] *See* Khulumani v. Barclay National Bank Ltd., 346 F. Supp. 2d 538, 548, 551 (S.D.N.Y. 2004).

[48] *Id*. at 554.

[49] *Id*. at 557.

[50] *See Khulumani*, 504 F.3d at 264. The Court of Appeals vacated the District Court's dismissal of the ATS claims holding that the District Court erred when it held that the ATS does not allow for claims of aiding and abetting liability. *See id*. at 260.

[51] *See* Ramasastry, *supra* note 40, at 102.

[52] *See* Tófalo, *supra* note 41, at 340-44, 350-51; Ramasastry, *supra* note 40, at 102.

[53] *See* Ramasastry, *supra* note 40, at 102-03.

[54] *See* United Nations Global Compact, The Ten Principles: Principle Two, *available at* http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/Principle2.html.

Unocal in U.S. courts involves allegations of beneficial complicity in the human rights violations committed by the government in the furtherance of an oil pipeline project.[55]

4. Complicity Standards under the Ninth Circuit Ruling

¶23 Complicity standards were first defined with respect to corporate liability under the ATS by the U.S. Court of Appeals for the Ninth Circuit in *Doe v. Unocal*.[56] Relying heavily on standards developed by the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), the court held that complicity requires "knowing practical assistance or encouragement that has a substantial effect on the perpetration of the crime"[57]; under this reasonable knowledge test, a plaintiff must show that the corporation "knew or had reason to know" that its actions assisted the crime.[58] This *mens rea* requirement creates an important nexus between the action of the direct perpetrator and the corporation.

¶24 A broad array of indicators may establish this nexus, including the fact that a corporation derives economic benefits from the violations; in such cases, the complicity is often referred to as "beneficial/beneficiary complicity."[59] Other indicators may include the nature of the business relation, i.e. the level of corporate control in a private-public joint venture, the continuation of corporate assistance despite awareness of the violations, and the presence of a common goal.[60] Neither scholars nor courts have settled yet which indicators establish the required nexus.[61] Ralph Steinhardt, a prominent scholar in the field, points to the difficulty to "handle the intermediate case where a corporation simply benefits [from abuses], without contractual nexus," i.e. the corporation is not connected with the government by contract regarding joint venture projects or provision of security services.[62]

¶25 The *Unocal* court also had to define the *actus reus* requirement to establish complicity. Granting Unocal's motion for summary judgment in 2000, the U.S. District Court for the Central District of California argued that Unocal's conduct did not satisfy the standard of "active participation" in using forced labor, as the corporation merely knowingly accepted the benefits of forced labor utilized in furtherance of a joint pipeline project with the government.[63] Following the jurisprudence of the ICTY, the Court of

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[55] *See* Ramasastry, *supra* note 40, at 102. The categorization of the different complicity cases is often difficult and differs among academic scholars. Thus, for example, Tófalo considers the state commission of abuses in furtherance of a joint venture as a case of direct, rather than indirect complicity. Tófalo, *supra* note 41, at 340-41.

[56] Even though the Ninth Circuit Court of Appeals decided to rehear the case en banc, the case was finally vacated due to an out-of-court settlement by the parties. Thus, the ruling does not stand any longer; however, the court's elaborations with regard to the requirements of corporate complicity are often referred to. *See* CLAPHAM, *supra* note 43, at 255.

[57] Doe v. Unocal Corp., 395 F.3d 932, 948, 951 (9th Cir. 2002).

[58] *Id.* at 951 (quoting Prosecutor v. Musema, Case No. ICTR 96-13-T, Judgment & Sentence, ¶ 180 (Jan. 27, 2000)).

[59] *See* Ramasastry, *supra* note 40, at 102, 145; *see also* CLAPHAM, *supra* note 43, at 221-22, 257.

[60] *See* Ramasastry, *supra* note 40, at 102-03; Ralph G. Steinhardt, *Corporate Responsibility and the International Law of Human Rights: The New Lex Mercatoria, in* NON-STATE ACTORS AND HUMAN RIGHTS 177, 199-200.

[61] *See id.* at 198-202; Ramasastry, *supra* note 40, at 102-03.

[62] Steinhardt, *supra* note 59, at 200.

[63] *See Unocal*, 395 F.3d at 947-48; Doe v. Unocal Corp., 110 F. Supp. 2d 1294, 1310 (C.D. Cal. 2000). *See also* Andrew Clapham, *The Complexity of International Criminal Law: Looking Beyond Individual*

Appeals rejected this view and held that the act of assistance does not have to actually cause the violations of the principal, here the host government.[64] Rather, the court deemed it sufficient that the acts of the accomplice have a "[substantial] effect on the commission of the crime," such that the abuses would "most probably" not have occurred "in the same way" without the participation of the corporation.[65]

5. Agency and Joint Action Liability

¶26 To establish third-party liability for corporate human rights abuses under the ATS, U.S. courts have preferred the theory of aiding and abetting under international law, as seen in the court's decision in *Unocal*.[66]

¶27 However, imputation may also be established under federal common law rules, such as joint venture liability, agency liability and reckless disregard.[67] In *Wiwa*, the court agreed with the plaintiffs that Royal Dutch/Shell "dominated and controlled" Shell Nigeria and thus principles of agency liability applied.[68] Under agency law, the corporation, as the principal, is liable for the acts of the agent and cannot put forward as a defense that the agent was merely authorized to perform lawful, non-tortious acts.[69] Accordingly, the plaintiffs claimed that the existence of an agency relationship between Royal Dutch/Shell and its Nigerian subsidiary rendered Shell responsible for the "willful participa[tion]" of its Nigerian subsidiary in "joint action" with Nigerian government that violated the plaintiffs' rights.[70] However, the court found that there was no need to employ this theory of imputation since the plaintiffs presented sufficient facts to support an immediate "significant cooperative action" between Royal Dutch/Shell and the Nigerian government in committing the abuses at issue.[71]

Responsibility to the Responsibility of Organizations, Corporations and States, *in* FROM SOVEREIGN IMPUNITY TO INTERNATIONAL ACCOUNTABILITY: THE SEARCH FOR JUSTICE IN A WORLD OF STATES 233, 242 (Ramesh Thakur & Peter Malcontent eds., 2004).

[64] *See* Tófalo, *supra* note 41, at 343-44; CLAPHAM, *supra* note 43, at 257.

[65] *Unocal*, 395 F.3d at 950 (quoting Prosecutor v. Tadi, Case No. IT-94-1-T, Opinion & Judgment ¶ 688 (May 7, 1997)).

[66] *See* Tarekt F. Maassarani, *Four Counts of Corporate Complicity: Alternative Forms of Accomplice Liability under the Alien Tort Claims Act*, 38 N.Y.U. J. INT'L L. & POL. 39, 39 (2005); *Unocal*, 395 F.3d at 946-51.

[67] Reference to these principles for third-party liability is made particularly when federal common law rather than international law is deemed the appropriate source of law in these cases. *See id*. at 964-69. However, as Judge Reinhardt in his concurring opinion in *Unocal* points out, joint liability and agency principles are well established under international law as well. *Id*. at 972-73.

[68] *Wiwa*, 2002 U.S. Dist. LEXIS 3293, at *41 n.14.

[69] Tófalo, *supra* note 41, at 342.

[70] *Wiwa*, 2002 U.S. Dist. LEXIS 3293, at **40-41. Corporate human rights liability generally requires a sufficient nexus to state action (Exceptions were recognized by U.S. courts for slave trading, genocide, war crimes, and forced labor. *See* CLAPHAM, *supra* note 43, at 255). In *Wiwa*, the plaintiffs employed the "joint action" test to establish Shell Nigeria's involvement in the government abuses. *Wiwa*, 2002 U.S. Dist. LEXIS 3293, at *40. Under the "joint action" test, private actors are considered state actors provided that they are "willful participant[s] in joint action with the State or its agents." *Id*.

[71] *Id.* at **41-43. The court stressed that it is merely deciding upon a motion to dismiss; thus, the evidence presented by the plaintiffs is not analyzed with the same rigor as with regard to a motion for summary judgment. *Id*. at **45-46.

6. The Corporate *Actus Reus*

¶28 Corporate acts that consitute an *actus reus* and trigger complicity liability may take on various forms. Often human rights violations are preceded by a corporation's request for security protection by government forces. In *Wiwa,* for example, the plaintiffs claimed that Royal Dutch/Shell directly, or through its local subsidiary, "recruited the Nigerian police and military to suppress MSOP" and ensure that oil "development activities could proceed 'as usual.'"[72] The plaintiffs further alleged that Royal Dutch/Shell made payments to the military, provided logistical support (such as transportation and weapons),[73] and participated in the overall planning and coordination of the "security operations" by attending regular meetings with the security forces.[74]

¶29 *Wiwa* is not the only case concerning abuses by security forces. In an incident at Umuechem in 1990, Shell was also accused of being complicit in the "killing of eighty unarmed civilians and the destruction of hundreds of homes" by security forces whose protection Shell had explicitly requested.[75]

¶30 Corporations often contest their alleged connection to public security forces[76] which is difficult to reconstruct since the criminal acts do not occur in a corporation's inner "sphere of influence."[77] Shell acknowledged direct payment to Nigerian security forces on at least one occasion.[78] However, it strongly denied inferences that a security arrangement involving possible payment to the Special Task Force in the Ogoni region existed, even though the *Guardian* reported in 1995 about a Nigerian government document implying an arrangement of such kind.[79] While Royal Dutch/Shell increasingly acknowledges its responsibility for human rights violations by security forces,[80] its local subsidiaries have been more reluctant to accept such responsibility.[81]

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[72] *Id*. at *5.
[73] *Id.*
[74] Brief of Wiwa Plaintiffs, *supra* note 20, at 9-10.
[75] THE PRICE OF OIL, *supra* note 10, at 14.
[76] *See* Frynas, *supra* note 12, at 282.
[77] Principle One of the Global Compact states that "businesses should support and respect the protection of international human rights within their sphere of influence." United Nations Global Compact, The Ten Principles: Principle One [hereinafter Principle One], *available at* http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/principle1.html. The Global Compact principles do not elaborate in more detail what is considered to be the corporate "sphere of influence." *Id.* However on its official webpage the Global Compact provides indications on how the sphere of influence should be mapped. Precisely, the "sphere of influence" involves the inner sphere of corporate human rights compliance "in the workplace" and the outer sphere of human rights commitment "in the community." *Id*. Furthermore, the corporate "sphere of influence" extends to the situation when corporations rely on security forces for the protection of their company facilities and these security forces violate international standards for the use of force. *Id*. When moving from a corporation's inner to its outer sphere of influence a decrease in legal density of corporate human rights duties can be observed. *See* CLAPHAM, *supra* note 43, at 220. Accordingly, this gradual conception of the sphere of corporate influence can be aligned to the three dimensions of human rights obligations, namely the obligation to respect human rights (in the workplace), the duty to protect human rights (for example by preventing the use of force by external security forces), the duty to promote human rights (by contributing to the human rights debate in the wider community). *Id.*
[78] THE PRICE OF OIL, *supra* note 10, at 13.
[79] *See* Boele, *supra* note 13, at 80.
[80] This is reflected for example in the endorsement of the Voluntary Principles on Security and Human Rights by many major corporations from the extractive sector, where the latter subscribe themselves to best practices regarding their relationship with private and public security forces. *See* Int'l Bus. Leaders Forum & Bus. Soc. Responsibility, Voluntary Principles on Security and Human Rights, http://www.voluntaryprinciples.org/ (last visited Apr. 13, 2008).

Still, even Shell Nigeria admits to "the gap between its intentions and its current performance."[82] Though quite tentative, this statement reflects rising awareness of the human rights problems.

¶31 Cases in which subcontracted security forces commit excessive acts may involve indirect corporate complicity. However, where corporate staff are present when military forces commit abuses -- as was alleged of Shell -- and take no steps to prevent the abuses from occurring, the nexus between corporate acts and human rights abuses is even closer and implicates direct complicity.[83]

¶32 In this context, legal responsibilities are difficult to allocate because the effects of the corporate acts are often not immediate, but rather intermediated by political dynamics in the host country. For instance, Shell once called for the intervention of the naval forces, whose subsequent deployment of the Mobile Police led to the assault of numerous local community members.[84] In such instances, corporations often defend themselves by referring to their mere legal obligation to inform Nigerian authorities when a threat to oil production exists.[85]

¶33 Furthermore, determining either the nature or degree of private-public involvement and cooperation is not an easy task; defining in clear terms the realm of corporate responsibilities stemming from this relationship is even more complex. Certainly, oil corporations tend to operate in difficult political and social environments. Nonetheless, the economic interest in oil production -- on the part of both corporations and host governments -- has exacerbated frictions with local communities in the oil producing areas, deepened discontent in the delta, and might have often lead to repressive government responses.[86] This undeniable link should be taken into consideration when determining the responsibility of MNCs for human rights abuses.

7. The Extraterritorial Reach of Jurisdiction

¶34 *Wiwa* holds MNCs liable for human rights abuses occurring in the context of their business activities abroad. The liability risk for MNCs is particularly significant since U.S. courts assert personal jurisdiction over business entities incorporated under the sitting jurisdiction, as well as over non-resident units of MNCs where an affiliate is present in U.S. jurisdiction and has a "sufficient" relationship with the non-resident unit.[87] Precisely, the relationship must be of such a nature that "two [entities] can be regarded as a single unit for the service or process."[88] To determine whether a sufficient relationship exists, courts consider various factors, including ownership, control, and the (even temporary) presence of corporate officials of the non-resident entity on U.S. territory.[89]

¶35 Under these standards, the Second Circuit Court of Appeals asserted personal jurisdiction over the two holding companies: Royal Dutch Petroleum Company

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[81] Frynas, *supra* note 12, at 282.
[82] Boele, *supra* note 13, at 84 (referencing SPDC (Shell Nigeria) as of 1998).
[83] *See* THE PRICE OF OIL, *supra* note 10, at 14; Ramasastry, *supra* note 40, at 102.
[84] *See* THE PRICE OF OIL, *supra* note 10, at 15.
[85] *See id*. at 4, 152.
[86] *See* THE PRICE OF OIL, *supra* note 10, at 17.
[87] PETER T. MUCHLINSKI, MULTINATIONAL ENTERPRISES AND THE LAW 141 (2007).
[88] *Id*.
[89] *Id*. at 148-49.

(incorporated in the Netherlands) and Shell Transport and Trading Co. (incorporated in the UK).[90] The court found that an Investor Relations Office in New York was "facilitating the relations of the parent holding companies with the investment community."[91] Thus, a sufficient relationship between the affiliate and non-resident units was established even though the Investors Relations Office was "nominally part of Shell Oil Company" -- whose shares are all held by the independent U.S subsidiary[92] -- and not of the parent holdings.[93]

8. Shell's Response: A Changed Human Rights Approach

¶36 In the face of public scrutiny of its operations, particularly in Nigeria, Shell adopted a stakeholder-sensitive corporate policy that holds itself responsible for an inner sphere of employee rights and an outer sphere of community rights and security policies.[94] Thus, Shell incorporated a model of corporate human rights responsibilities in its management agenda that follows the policy guidelines of the Global Compact.[95] Generally, corporations in the extractive and energy sector have become increasingly aware of the human rights problems surrounding security arrangements. Thus, many corporations which were subject to public scrutiny, including Shell, Chevron, Rio Tinto and AngloGold Ashanti, participated in a multi-stakeholder dialogue with various governments and NGOs that resulted in the adoption of the Voluntary Principles on Security and Human Rights.[96] These Principles set out best practices for extractive corporations in forming their relationships with public and private security forces.[97]

¶37 But the difficulty in assigning "relevant performance measures (metrics) that can be verified," as pointed out by Shell, accentuates the practical problems that MNCs face in carrying out their responsibilities outside the workplace, and needs further analysis as well as better legal standards and guidelines.[98]

B. Human Rights Problems in the Extractive Industries: A Widespread and Multi-faceted Issue

¶38 Human rights problems are not peculiar to Shell in Nigeria. A multitude of corporations in the extractive industries face similar problems in various country contexts. In order to illustrate the patterns elaborated above, the following section outlines further human rights abuses that have occurred in the context of extractive operations and have drawn public scrutiny.

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[90] Wiwa, 226 F.3d at 94-95. The two holding companies "jointly control and operate the Royal Dutch/Shell Group, a vast, international, . . . network of affiliated but formally independent oil and gas companies." *Id*. at 92.
[91] *Id*. at 93.
[92] All shares of the Shell Oil Company are held by Shell Petroleum Inc., the U.S. subsidiary company of the parent holding companies. *Id*. at 93.
[93] *Id*. at 93, 96-98.
[94] SHELL INTERNATIONAL LIMITED (SI), THE SHELL REPORT : PEOPLE, PLANET AND PROFITS: AN ACT OF COMMITMENT 29 (1999).
[95] Principle One, *supra* note 76.
[96] *See* Voluntary Principles on Security and Human Rights, *supra* note 79.
[97] *See* Martin, *supra* note 16, at 105.
[98] SHELL INTERNATIONAL LIMITED (SI), *supra* note 93, at 29. *See also* Martin, *supra* note 16, at 107-09 (expressing criticism about Shell's human rights agenda).

1. Killings, Arbitrary Detention, Torture in Nigeria

¶39 Claims were brought against the U.S.-based ChevronTexaco Corporation[99] ("Chevron") in *Bowoto v. Chevron Texaco Corp.*, alleging liability for "their own acts and the acts of CNL" (Chevron Nigeria Limited) in two incidents that occurred in the Nigerian Delta region.[100] The first took place in May 1998 and resulted in the shooting of protesters at Chevron's Parabe offshore platform and the subsequent detention and torture of the protest leader.[101] The protesters were residents of the Niger Delta demanding a larger contribution from Chevron toward the development of the oil extracting area.[102] The plaintiffs claimed that CNL acted "in concert with" Chevron when it recruited Nigerian government forces to intervene and transported their soldiers in CNL-leased helicopters.[103] Furthermore, the plaintiffs claimed that CNL personnel were on board the helicopters.[104] CNL confirmed that a CNL employee was in one helicopter for observatory purposes, but lacked control over the Nigerian military action.[105] The second incident, as described by the plaintiffs, occurred in January 1999; soldiers in a CNL-leased helicopter opened fire on two villages, Opia and Ikenyan, injuring and killing several people.[106] The soldiers were allegedly paid by CNL the day after the attacks.[107] Chevron's spokesman Charles Stewart acknowledged the payment to the soldiers, but stressed that the money was merely part of regular payments to Nigerian soldiers for protecting its facilities.[108]

¶40 On March 22, 2004, the District Court for the Northern District of California denied Chevron's motion for summary judgment because the plaintiffs presented evidence of an "extraordinarily close relationship between the parents and subsidiaries prior to, during and after the attacks."[109] Moreover, the court found that the relationship could be sufficient for a reasonable jury to qualify the local subsidiary as an agent of Chevron, for whose actions the latter can be held liable.[110] Factors supporting an agency relationship included the high volume of communications between the defendant and its

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[99] The corporation operated under the name "ChevronTexaco" since its merger with Texaco in 2001 until 2005 when it changed its name back to "Chevron."

[100] Bowoto v. Chevron Texaco Corp., 312 F. Supp. 2d 1229, 1233 (N.D. Cal. 2004). From 2000 until late 2006, Chevron filed a series of motions to dismiss and motions for summary judgment directed both at the entire case and at specific claims.

[101] *See id*.

[102] *See* THE PRICE OF OIL, *supra* note 10, at 3,11.

[103] *Bowoto*, 312 F. Supp. 2d at 1233; *see also* Bowoto v. Chevron Texaco Corp., No. C 99-02506 SI, 2007 U.S. Dist. LEXIS 59374, at **4-5 (N.D. Cal. 2007).

[104] Bowoto v. Chevron Corp., Order re: Defs.' Mot. Summ. J. Pls.' Claims 10 Through 17, No. C 99-02506 SI, slip op. at 10 (N.D. Cal. August 14, 2007).

[105] *See id.*

[106] *Bowoto*, 312 F. Supp. 2d at 1233.

[107] *See* Marcos Simmons, *Chevron to Stand Trial for Human Rights Abuses in Nigeria: Federal Judge Finds Evidence that Chevron was Complicit in Murder of Nigerian Villagers*, EARTHRIGHTS INTERNATIONAL, Aug. 15, 2007, *available at* http://www.earthrights.org/legalfeature/chevron_to_stand_trial_for_human_rights_abuses_in_nigeria.html.

[108] David R. Baker, *Chevron Paid Nigerian Troops after Alleged Killings: Villagers in Lawsuit Say 4 People Died - Oil Company Questions If Attacks Took Place*, S.F. CHRON., Aug. 4, 2005, *available at* http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2005/08/04/MNGAJE2I2K1.DTL.

[109] *Bowoto*, 312 F. Supp. 2d at 1243.

[110] *Id*. at 1246.

local subsidiary on the days of the security incidents, close parent-subsidiary monitoring, integral company policies, and overlap in management staff.[111]

¶41 Finally on August 14, 2007, the court issued a series of orders denying other motions by Chevron for summary judgment.[112] Accordingly, since the plaintiffs had established enough evidence that "CNL personnel were directly involved in the attacks, that CNL had paid and transported the GSF [Nigerian government security forces], and that CNL knew that GSF were prone to use excessive force,"[113] the case went to trial.

2. Murder, Rape and Torture in Furtherance of Forced Labor in Burma

¶42 One of the most prominent corporate human rights cases to-date was settled in California state and federal courts. The case concerned charges against Unocal[114] for complicity in human rights violations in relation to the Yadana pipeline project in Burma (today Myanmar) in the 1990s. The pipeline project was a joint-venture between the U.S.-based Unocal, the state-run Myanmar Oil and Gas Enterprise, Thailand's major oil exploration firm PTTEP, and the French corporation Total.[115] Unocal was allegedly complicit in the murder, rape, and torture of local residents by the Burmese Military, which Unocal had contracted to provide security services to the pipeline project. The plaintiffs claimed that the abuses were committed in furtherance of forced labor for the construction of the pipeline.[116]

¶43 Though ultimately vacated and settled out-of-court,[117] the Ninth Circuit Court of Appeals, in reversing the District Court's summary judgment on the major ATS claims,[118] held that "the evidence . . . supports the conclusion that Unocal gave practical assistance to the Burmese Military in subjecting Plaintiffs to forced labor."[119] According to the court, the practical assistance "took the form of hiring the Burmese Military to provide security and build infrastructure along the pipeline route" and giving logistical information to the military about where to provide security in daily meetings.[120] Given the District Court's finding that Unocal knew that forced labor was used,[121] the Ninth Circuit further held that a reasonable factfinder could conclude that Unocal "knew or should reasonably have known" that its payment and provision of logistical information would "assist or encourage the Myanmar Military to subject Plaintiffs to forced labour."[122] In response to allegations of complicity in forced labor, a Unocal spokesman said that the company acknowledged that human rights abuses may have taken place in

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[111] *See id.* at 1241-46.
[112] The motion regarding plaintiffs' claims under the ATS was granted merely as to the charges of crimes against humanity. Bowoto v. Chevron Texaco Corp., No. C 99-02506 SI, 2007 U.S. Dist. LEXIS 59374 (N.D. Cal. 2007).
[113] Simmons, *supra* note 107.
[114] Unocal was acquired by Chevron in 2005.
[115] *Global Firms Provide Lifeline to Myanmar's Junta*, *supra* note 2.
[116] Doe v. Unocal Corp., 395 F.3d 932, 936 (9th Cir. 2002).
[117] CLAPHAM, *supra* note 43, at 255.
[118] *Unocal*, 395 F.3d at 937; Doe v. Unocal Corp., 110 F. Supp. 2d 1294 (C.D. Cal. 2000); Doe v. Unocal Corp., 27 F. Supp. 2d 1174 (C.D. Cal. 1998).
[119] *Unocal*, 395 F.3d at 952.
[120] *Id*.
[121] *Unocal*, 110 F. Supp. 2d at 1310.
[122] *Unocal*, 395 F.3d at 953.

Burma, but that Unocal operated under high ethical standards and rejected allegations of complicity with the military as unsubstantiated.[123]

¶44 Similar charges against another partner in the Yadana joint venture pipeline project, the French corporation Total, were filed in French and Belgian courts.[124] The victims claimed that Total also provided logistical and financial support to the military, which had coerced locals into labor for the construction of the pipeline.[125]

¶45 Although French courts only exercise home state jurisdiction,[126] Belgian courts, like those of the U.S., exercise extraterritorial jurisdiction over suspects of foreign nationality for international crimes committed abroad.[127] The French Total case was ultimately settled,[128] but in Belgium, criminal proceedings initiated in 2002 by four Myanmar refugees[129] have just been reopened after the Belgian Constitutional Court held that a person recognized as a refugee in Belgium enjoys the same rights as a Belgian citizen.[130] Thus, the provisions of the Belgian Criminal Code prescribing criminal jurisdiction over crimes -- especially international crimes[131] -- committed abroad allowed further investigation and prosecution of the case against Total.[132]

¶46 According to the leading/largest French news agency, Total's only comment regarding the reopening of the Belgian case has been that the corporation has "taken note" of it.[133] In general, Total recognizes the controversy surrounding its presence abroad, particularly in Myanmar, while stressing the difficult political context in which oil corporations usually operate. On its corporate webpage, Total states: "Unfortunately,

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[123] Marianne Lavelle, *The Court of Foreign Affairs: U.S. Corporations Face a Slew of Lawsuits Alleging Human-Rights Abuses*, U.S.NEWS, June 15, 2003, *available at* http://www.usnews.com/usnews/biztech/articles/030623/23suits.htm.

[124] DEMEYERE, *supra* note 5, at 38, 78; HANSEN, *supra* note 5, at 19-20.

[125] *Belgium Reopens*, *supra* note 6.

[126] Precisely, French courts exercised jurisdiction under the principle of active nationality (i.e. the perpetrator is a national of the adjudicating state). *See* ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 277 (2003).

[127] Belgian law, however, puts an additional restriction on the exercise of extraterritorial jurisdiction. Relying on jurisdictional prescriptions under the principle of "passive nationality," Belgian law requires the victim of the abuses either to be a Belgian national, have an effective, usual, and legal residential status in Belgium for at least three years, or, since May 2006, have a recognized refugee status in Belgium. DEMEYERE, *supra* note 5, at 57-58.

[128] *Belgium Reopens*, *supra* note 6.

[129] At the time when the case was lodged, private individuals could initiate criminal proceedings through the mechanism of "constitution de partie civile." DEMEYERE, *supra* note 5, at 38.

[130] *Belgium Reopens*, *supra* note 6.

[131] In 2003, the Belgian universal jurisdiction statute of 1993, and amended in 1999, was repealed and most of the law's substantial provisions were integrated into the Belgian Criminal Code. Thus, new arts. 136*bis*–136*octies* were introduced in the Belgian Criminal Code incorporating genocide, crimes against humanity and war crimes into the substantial scope of actionable crimes under Belgian law. *See* DEMEYERE, *supra* note 5, at 21-24.

[132] In 1999, a new art. 5 was introduced in the Belgian Criminal Code providing for criminal liability of legal persons. *See* DEMEYERE, *supra* note 5, at 12-13. Belgian Criminal Code, art. 5, does not contain any restrictions as to the crimes covered by its scope of application. Therefore, it is widely agreed that Belgian Criminal Code, art. 5, also regulates criminal liability of legal persons, in particular corporations, for international crimes committed abroad. *Id.* at 37-38. Of particular relevance with respect to criminal liability of corporations is Belgian Criminal Code, art. 136*ter* point 3, which incriminates slavery as a crime against humanity in accordance with Rome Statute, art. 7, ¶ 1(c). *Id.* at 22, 28.

[133] *Belgium Reopens*, *supra* note 6.

the world's oil and gas reserves are not necessarily located in democracies, as a glance at a map shows."[134]

¶47 In the face of public critique of their relations with repressive governments, Total has made human rights performance an integral part of its Corporate Social Responsibility ("CSR") policies, describing its effort to address the "critical issue of human rights" in its business operations abroad as an effort to "reconcil[e] security [for its employees and assets] and human rights"[135] as well as to spur community development.[136] Total has subscribed to the Voluntary Principles on Security and Human Rights and implemented a two-pronged policy to (1) conduct human rights training sessions for its security staff, and to (2) "[f]ormaliz[e] relations between Total subsidiaries and governments on security issues."[137] The difficult standing that oil corporations have when operating in countries with repressive regimes has become patent in the recent debate over political sanctions against the military regime in Myanmar. In this context, home governments have urged MNCs -- and especially Total -- to freeze their investments in Myanmar.[138] Total continues to operate in Myanmar arguing that "[f]ar from solving Myanmar's problems, a forced withdrawal would only lead to our replacement by other operators probably less committed to the ethical principles guiding all our initiatives."[139]

3. Forced Displacement in Sudan

¶48 In 1998, Canadian oil corporation Talisman Energy Inc. ("Talisman") acquired a stake in a major oil project in Sudan.[140] On November 8, 2001, Talisman was charged with complicity in crimes against humanity, war crimes, and genocide committed by government forces contracted to secure local oil projects.[141] The plaintiffs claimed that Talisman aided and abetted the forced displacement of non-Muslim Sudanese from its oil extraction area in South Sudan, as well as the resultant extrajudicial killings, torture, rape, and physical destruction of civilian homes.[142]

¶49 In its defense, Talisman claimed that its management was unaware of the forced displacement conducted in and close to their oil concession areas.[143] The District Court for the Southern District of New York found that "the government was [in fact] heavily engaged in providing security for the GNPOC [Greater Nile Petroleum Operating Company Limited as the entity conducting operations on behalf of the Consortium

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[134] TOTAL S.A., TOTAL IN BURMA: THE YADANA PIPELINE PROJECT , *available at* http://burma.total.com/.
[135] TOTAL S.A., SHARING OUR ENERGIES 2006: CORPORATE SOCIAL RESPONSIBILITY REPORT 15 (2006), *available at* http://www.total.com/static/en/medias/topic1606/Total_2006_CSR_en.pdf.
[136] *Id*. at 24.
[137] *Id*. at 15.
[138] *French Fm Kouchner: Oil Giant Total Would Not Be Spared from Possible Sanctions vs Myanmar,* HERALD TRIB. EUR., Oct. 2, 2007, *available at* http://www.iht.com/articles/ap/2007/10/02/europe/EU-GEN-France-Total-Myanmar.php.
[139] *As Myanmar Cracks Down on Protesters, Oil Companies Keep up Controversial Ties*, *supra* note 2 (quoting Jean-Francois Lassalle, vice-president of public affairs for Total Exploration & Production).
[140] *See* Reg Manhas, *Talisman in Sudan: Impacts of Divestment*, GLOBAL COMPACT Q. (2007), *available at* http://www.enewsbuilder.net/globalcompact/e_article000775162.cfm?x=b11.
[141] *See* Presbyterian Church of Sudan v. Talisman Energy Inc., 453 F. Supp. 2d 633, 639-40 (S.D.N.Y Sept. 12, 2006).
[142] *See id*. at 665-66.
[143] *See* HUM. RTS. WATCH, SUDAN, OIL, AND HUMAN RIGHTS 36-38 (2003).

members under their agreements with the government] concession."[144] In particular, the court substantiated that Talisman worked on drafting guidelines for the Consortium's interaction with the military in terms of providing logistical support.[145] Even though the court held that there was evidence "that Talisman was informed that Government forces forcibly displaced civilian populations to create a buffer zone around oil development sites,"[146] the court granted the defendants' motion for summary judgment on September 12, 2006, since the plaintiffs failed to provide sufficient evidence that Talisman "performed any act that assisted the Government in its violations of international law."[147]

¶50 With regard to Talisman's decision to withstand public pressure to close its operations in Sudan for a long time, a Senior Manager at Talisman explained that as an indirect investor in the pipeline project, the corporation was able to continue its "advocacy with the Government of Sudan for tolerance and the protection of human rights" and be actively engaged in community development programs in the oil concession areas.[148] Elaborating on the developments surrounding Talisman's withdrawal from Sudan, he recalls that public pressure peaked in 2001, when the U.S. House of Representatives passed a version of the Sudan Peace Act that would have led to the delisting of Talisman shares from the New York Stock Exchange. The final bill adopted by Congress did not contain these sanctions; still, it provided the backdrop against which Talisman announced in October 2002 the sale of its interest in the project.[149]

4. Alleged Human Rights Violations in the Mining Industries

¶51 Companies in the mining sector have also frequently been accused of complicity in human rights violations against local communities committed by private or public security forces. For example, such accusations have been brought against Barrick Gold in Papua New Guinea[150] and AngloGold Ashanti in the Democratic Republic of Congo.[151]

¶52 Rio Tinto also faced intense public and judicial scrutiny for human rights violations that occurred in connection with security operations surrounding its mine on the island of Bougainville in Papua New Guinea.[152] Rio Tinto allegedly requested government support to suppress the uprising of local residents protesting against environmental damage caused by Rio Tinto's mining operations, as well as against its racially discriminatory hiring practices.[153] The military intervention, the plaintiffs claimed, unleashed secessionist efforts, an ensuing civil war and finally a military

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[144] Presbyterian Church, 453 F. Supp. 2d at 649. In its examination of the facts, the court stressed that the admissibility of the evidence presented by the plaintiffs had not yet been evaluated and witnesses had not yet been brought forward by plaintiffs. *Id*. at 642.
[145] The guidelines stipulated that communication facilities of the Consortium should be made available to the military, and accommodation and medical care should be provided. *Id*. at 649-50.
[146] *Id*. at 670-71.
[147] *Id*. at 679.
[148] Manhas, *supra* note 140.
[149] *See id*.
[150] DAVID MARTINEZ, CORPWATCH, BARRICK'S DIRTY SECRET: MINING IN PAPUA NEW GUINEA (2006).
[151] *See* HUM. RTS. WATCH, THE CURSE OF GOLD: DEMOCRATIC REPUBLIC OF CONGO (2005).
[152] *See* CORPWATCH, ASSOCIATING WITH THE WRONG COMPANY: RIO TINTO'S RECORD AND THE GLOBAL COMPACT , July 13, 2001, *available at* http://www.corpwatch.org/article.php?id=623; *see also* Sarei v. Rio Tinto Plc., 221 F. Supp. 2d 1116 (C.D. Cal. 2002).
[153] *See id*. at 1121-26.

blockade that lasted for several years and cut island inhabitants off from medical and other supplies from the mainland.[154] A lawsuit was filed in U.S. courts against Rio Tinto Limited, an Australian corporation, and Rio Tinto Plc., a company incorporated under the laws of England and Wales, for crimes against humanity and war crimes.[155] In 2002, the District Court for the Central District of California confirmed U.S. courts as the legal forum of the dispute,[156] but dismissed all claims against Rio Tinto on the basis of the political question doctrine.[157] In 2007, the Ninth Circuit Court of Appeals reversed the ruling since the District Court erred in holding that the claims raised non-justiciable political questions.[158]

¶53 The case of Rio Tinto shows a mutual interdependence, with MNCs relying on the government's support to launch and maintain their business operations, and the government relying on MNCs for the profit. Such intertwined private-public interests entangle MNCs in highly complex political situations that may give rise to corporate liability, liability that used to apply primarily to state actors.

III. HUMAN RIGHTS IN A BUSINESS CONTEXT: THE MANUFACTURING INDUSTRIES

¶54 Human rights problems faced by manufacturing industries differ significantly from those faced by the extractive industries. Whereas human rights violations in the extractive sector stem primarily from excessive acts under corporate security arrangements, those in the manufacturing sector occur mainly within the supply chain and infringe labor standards in the workplace. Accordingly, this section argues that the corporate structures of MNCs in the manufacturing industries, particularly the textile sector, are decisive in determining whether MNCs may be held responsible and liable for human rights violations of their supplier factories.

¶55 The following section will briefly unfold patterns of human rights abuses in supplier facilities, and discuss the liability risks that MNCs might encounter for these violations. For this purpose, this section will first focus on the case study of Nike and then proceed to illustrate the findings in other manufacturing sector cases.

A. Corporate Structures

¶56 Many companies in the manufacturing sector are called upon to take responsibility for sweatshop working conditions in their subcontracted supplier factories, especially in

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[154] *Id*. at 1124-27.
[155] *Id*. at 1120.
[156] The defendants filed a motion to dismiss the action on *forum non conveniens* grounds in favor of an Australian forum. *See id*. at 1175. In order for a dismissal to be granted, defendants must show that (1) there exists an adequate alternative forum, where they are amenable to process and the subject matter of the suit is cognizable, and that (2) private and public interests favor trial in the alternative forum. *Id*. at 1164-65. The court dismissed the defendants' motion holding that the "plaintiffs' claims are not cognizable in Australia. *Id*. at 1177-78.
[157] *Id*. at 1198. According to the political question doctrine, a claim that presents a political question is not justiciable. The doctrine has its roots in the principle of separation of powers and intends to ensure that the judiciary is not interfering with decisions constitutionally committed to one of the other branches of government. *See id*. at 1193-95. In *Baker*, the U.S. Supreme Court defined the factors that a court has to consider in order to determine whether a claim involves a political question. Baker v. Carr, 369 U.S. 186 (1962).
[158] Sarei v. Rio Tinto, Plc., 487 F.3d 1193, 1197 (9th Cir. 2007).

the sports apparel and footwear industries. These industries rely heavily on a so-called "triangle" manufacturing system, which entails the outsourcing of labor-intensive products to subcontracted companies in newly industrialized, low-wage countries.[159] Inherent in this business strategy is a formal detachment of the parent companies from their subcontractors, which are incorporated as independent legal entities; this formal detachment served as the basis of the positions adopted by many MNCs in the early 1990s vis-à-vis charges of human rights violations in subcontracted factories and enabled MNCs -- particularly in the textile sector -- to displace blame onto its subcontractors who were mainly located in Asia and Central America.[160]

¶57 In response to alleged poor working conditions Nike took this "detachment defense" when it declared: "We don't make shoes."[161] This position was technically true, as Nike had adopted the widely used outsourcing strategy, and the violations were committed by legally independent subcontracted companies, not by the corporation's own managers or their plants.[162]

¶58 An anti-sweatshop movement has sharply criticized the working conditions in subcontracted companies overseas. The movement's principal target has been Nike, being the largest company in the global sports shoe and apparel industry.[163] However, Nike's major competitors, Reebok and Adidas-Salomons, have also faced similar criticism for production practices in supplier factories.[164]

B. The Case of Nike

¶59 The allegation that conditions in Nike's supplier factories violate core labor standards and human rights has become emblematic of the problems facing the manufacturing, and especially the textile, industries overall. Therefore, this section explores patterns of human rights abuses in supplier facilities and potential liability risks by analyzing primarily, but not exclusively, the case of Nike.

1. An Account of Sweatshop Working Conditions

¶60 NGOs and other stakeholder groups have vigorously criticized Nike for the sweatshop working conditions in its subcontracted supplier factories, particularly in Indonesia, but also in Thailand, Vietnam, Pakistan and other countries. These groups allege that workers in supplier factories are paid legal minimum levels that are below living wage levels and thus do not provide for the basic needs of the workers and their families.[165] NGOs also claim that overtime work -- though voluntary according to contract provisions -- has coercive features in the daily practice of these companies; refusal to work overtime is often followed by intimidation, harassment or threat of

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[159] Graham Knight & Josh Greenberg, *Promotionalism and Subpolitics*, 15 MGMT. COMM. Q. 541, 543 (2002).
[160] *See id*. at 558.
[161] *See* Richard McIntyre, *Are Workers Rights Human Rights and Would It Matter If They Were?* 6 HUM. RTS. & HUM. WELFARE 1, 1 (2006).
[162] *See* Knight, *supra* note 159, at 558.
[163] *See* TIM CONNOR, GLOBAL EXCHANGE: STILL WAITING FOR NIKE TO DO IT (2001).
[164] Knight, *supra* note 159, at 543.
[165] CONNOR, *supra* note 163, at 4, 52.

dismissal.[166] Moreover, non-compliance with national and international health and safety standards in the contracting factories threaten the health and life of workers (e.g. inadequate workers' protective equipment in production lines, or high level exposure to toxic chemical vapors and substances).[167] It is also claimed that worker intimidation and harassment were common practices in contracted factories, and intended to interfere with workers' freedom of association, in particular their union involvement and strike participation.[168] Nike recognized most of these deficiencies in its first Corporate Responsibility ("CR") Report published in 2001.[169]

2. The Range of Liability Risks

¶61 Even though infringements of workers' rights clearly touch on human rights related issues, whether and to what extent workers' rights can be classified as human rights is debatable and not yet settled.[170] Regardless of such classification, the U.S. Supreme Court in *Sosa v. Alvarez-Machain* held that violations of a "narrow class of international norms" are actionable under the ATS.[171] In contrast, European jurisdictions apply mostly international criminal law categories of war crimes, crimes against humanity, and genocide in human rights litigation in their domestic courts.[172] Therefore, in both instances, the liability risks of MNCs before domestic courts are restricted to a narrow set of gross violations of international law.

¶62 Thus, leaving aside the discussion of whether workers' rights are human rights, courts are most likely to consider violations of core labor standards,[173] particularly the use of child labor and forced labor, as falling into a narrow realm of these statutes.[174] In fact, a lawsuit was brought before the U.S. District Court for the Central District of California against Nestlé, Cargill, Archer Daniels Midland Company (ADM) for aiding and abetting liability under the ATS and the TVPA. The plaintiffs claimed that the defendants were liable for abuses by their agents, employees, partners, and otherwise contracted farms.[175] In particular, the three native Malian plaintiffs claimed that they were trafficked and

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[166] TIMOTHY CONNOR, WE ARE NOT MACHINES: INDONESIAN NIKE AND ADIDAS WORKERS 19 (Clean Clothes Campaign et al. eds., 2002).
[167] CONNOR, *supra* note 163, at 4; CONNOR, *supra* note 166, at 24.
[168] *Id*. at 11.
[169] NIKE INC., FY01 CORPORATE RESPONSIBILITY REPORT (2001), *available at* http://www.nikeresponsibility.com/#crreport/fy01_cr_report.
[170] *See* McIntyre, *supra* note 161, at 9; Marisa Anne Pagnattaro, *Enforcing International Labor Standards: The Potential of the Alien Tort Claims Act*, 37 VAND. J. TRANSNAT'L L. 203, 231-32 (2004).
[171] *See* Maassarani, *supra* note 65, at 46; Sosa v. Alvarez-Machain, 542 U.S. 692, 729 (2004).
[172] DEMEYERE, *supra* note 5, at 21-24.
[173] The ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up adopted in 1998 (henceforth: 1998 Declaration) incorporates the core labor conventions which are considered to be obligatory for all ILO members. As enumerated by the 1998 Declaration, the fundamental rights enshrined in the core labor conventions include: freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labor; the effective abolition of child labor; and the elimination of discrimination in respect of employment and occupation. *Declaration on Fundamental Principles and Rights at Work*, ILO, 86th Sess. (1998), *available at* http://www.ilo.org/dyn/declaris/DECLARATIONWEB.static_jump?var_language=EN&var_pagename=DECLARATIONTEXT.
[174] *See* Pagnattaro, *supra* note 170, at 211.
[175] *See* Class Action Complaint for Injunctive Relief and Damages, Doe v. Nestle S.A., No. 05-5133, slip op. at 8 (C.D. Cal. July 14, 2005).

forced to labor in Cote d'Ivoire cocoa plantations; furthermore they claimed that they were subjected to torture while working on the cocoa plantations.[176] However, to date, no court has ruled on forced child labor as a cause of action under the ATS.

¶63 Even though some authors claim that all core labor standards can be enforced under the ATS,[177] courts have only scarcely regarded the freedom of association and the right to collective bargaining, as well as the elimination of discrimination, as a cause of action under the ATS. Marisa Anne Pagnattaro, a prominent scholar in the field, refers to one case where the court considered the rights to associate and organize as actionable under the ATS inasmuch as the rights "are generally recognized as principles of international law."[178]

¶64 Apart from child labor and forced labor, other gross human rights violations that occur in the sphere of the workplace of supplier facilities -- such as human trafficking, torture, and cruel, inhuman or degrading treatment -- may be considered to fall in the narrow realm of "violations of the law of nations," as defined in *Sosa* and the international crime categories under European jurisdiction statutes. Thus, a lawsuit filed before the U.S. District Court for the Southern District of Florida against Nestlé for alleged complicity in the murder of a trade union leader by the Columbian paramilitary forces could hold promise in the future.[179] However, the substantial scope under these statutes needs yet to be defined further by domestic courts.

3. Allegations of Child Labor

¶65 The most severe allegation that Nike has faced since the mid-1990s concerns the employment of children by its contracting companies. In 1996, Life magazine first reported that children as young as ten years old were manufacturing Nike products in Pakistan.[180] In fact, in its 2001 CR report, Nike itself acknowledged that the "worst experience and biggest mistake was in Pakistan, where we blew it" and that "[o]f all the issues facing Nike in workplace standards, child labor is the most vexing."[181] Nike further recalled the revelations documented in the 1996 Life magazine article, which branded Nike as a "child labor company." According to its 2001 CR report, Nike had ordered hand-stitched soccer balls from the city of Sialkot and realized soon thereafter that production was to be carried out through village contractors that employed children.[182]

¶66 Subsequently, Nike "reversed course" and subcontracted its production to a single company that guaranteed minimum age standards for employment.[183] However, Nike has

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[176] *Id.* at 1.
[177] *See, e.g.,* Pagnattaro, *supra* note 170, at 231.
[178] Rodriguez v. Estate of Drummond, 256 F.3d 1250 (N.D. Ala. 2003); Pagnattaro, *supra* note 170, at 243-44.
[179] *See* INTERNATIONAL LABOR RIGHTS FORUM, ILRF SUES NESTLÉ FOR COMPLICITY IN COLUMBIAN UNION MURDER, October 26, 2006, http://www.laborrights.org/end-violence-against-trade-unions/colombia/968.
[180] *See* Steve Boggan, *'We Blew It': Nike Admits to Mistakes over Child Labor*, THE INDEPENDENT, Oct. 20, 2001, *available at* http://www.commondreams.org/headlines01/1020-01.htm; Sydney H. Schanberg, *On the Playgrounds of America, Every Kid's Goal is to Score: In Pakistan, Where Children Stitch Soccer Balls for Six Cents an Hours, the Goal is to Survive*, LIFE MAG. 38-48 (June 1996).
[181] *See* NIKE, *supra* note 169, at 29.
[182] *Id.*
[183] *Id.*

faced practical problems in implementing Nike's prescribed minimum age standards of eighteen years old for footwear manufacturing and sixteen years old for apparel and equipment; for example, verifying the real age of applicants due to the lack of reliable birth records has been particularly difficult in Pakistan and Cambodia.[184] Despite these difficulties, Nike holds itself accountable for compliance with minimum age standards and devotes itself to guarantee improved compliance with minimum standards.[185]

¶67 Particularly public scrutiny of the incidents in Pakistan changed Nike's approach from avoidance and denial towards acknowledgement of and engagement with the problem. On May 12, 1998, Philip Knight, CEO and Founder of Nike Inc., appeared at the National Press Club in Washington, DC, where he laid out six commitments to improving working conditions in Nike's supplier factories.[186] Subsequently, Nike initiated steps to ensure an independent monitoring system of its contractors. Along with other corporations, Nike joined the Fair Labor Association ("FLA"), incorporated by President Clinton in 1999 as a cooperation of apparel and footwear companies and NGOs. FLA aims to create a monitory system that ensures corporate compliance with its labor standards.[187] But Nike's most significant reform -- which has had a tremendous impact on other companies in the textile sector -- was its disclosure of its subcontracted factories (nearly 800 in number).[188] As the first major apparel manufacturer that voluntarily opened its entire supply-chain to independent monitoring and external assessment, Nike has thus set an important precedent for the entire apparel and footwear industry.

4. The Role of Public Security Forces

¶68 Local supplier companies often request and employ government forces in order to provide security for factories, especially during times of unrest. Even though physical violence is only occasionally reported, these security forces still serve to intimidate and deter workers from exercising their freedom of association.[189]

¶69 The employment of government forces is not the only consequence of the interdependence between the state and corporations. Representatives of trade unions have also been arrested and detained by government forces, often under vague charges.[190] In such cases, corporations may be charged with beneficial complicity based on a blurred private-public divide and the mutual interest in profit that complicates the attribution of responsibility for human rights violations.

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[184] *Id*.
[185] Richard M. Locke, a prominent scholar in the field, argues that the Nike case "symbolizes both the benefits and the risks inherent in globalization" and illustrates Nike's development towards becoming a Corporate Global Citizen. Richard M. Locke, *The Promise and Perils of Globalization: The Case of Nike, in* MANAGEMENT: INVENTING AND DELIVERING IT'S FUTURE, 39, 39 (Richard Schmalensee & Thomas A. Kochan eds., 2003).
[186] *See* CONNOR, *supra* note 163, at 1-2.
[187] *See* NIKE, *supra* note 169, at 54-55; Fair Labor Ass'n, FLA History, http://www.fairlabor.org/about/history (last visited Apr. 13, 2008).
[188] *See* McIntyre, *supra* note 161, at 2.
[189] *See* CONNOR, *supra* note 166, at 27.
[190] *See id*. at 13.

C. Beyond Nike: MNCs' Responsibility for Human Rights Performance of Supplier Factories

¶70 While receiving the most public attention, Nike is not the only case of human rights violations in the supplier facilities of MNCs. Several MNCs have been charged with a variety of human rights violations associated with their manufacturing supply-chains.

1. Health and Safety in the Workplace

¶71 MNCs have been scrutinized for low health and safety standards in overseas supplier factories that jeopardize the health and lives of workers. For example, a major fire that broke out on May 10, 1993 in the four-story factory complex of the Kader Industrial Toy Company near Bangkok illustrates the magnitude of the problem. The Kader Industrial Toy Company was a supplier to major corporations such as J.C. Penney and Fisher-Price.[191] With 188 workers killed and 469 seriously injured, the fire was referred to as the "worst industrial fire in history" to date.[192] The safety precautions were wholly insufficient as there were no fire extinguishers, alarms, or emergency exits, and external exits were blocked. With flammable fabrics everywhere, the fire spread quickly.[193]

2. Human Trafficking

¶72 One of the largest human trafficking cases in the recent past involved the Daewoosa apparel factory in American Samoa, which had entered into a contract with an intermediate supplier to J.C. Penney, a U.S. department store. U.S. Attorney General John Ashcroft described the working conditions in the Daewoosa factory as "modern day slavery."[194] Instead of hiring locals, the owner of the factory imported workers from Vietnam and China. Upon arrival in American Samoa, it was reported that Daewoosa paid only a fraction of what was promised while charging excessive fees for room and board. Payment was suspended if the factory ran out of orders, but charges for accommodation and board continued to be deducted from the workers' salaries. An investigation by the U.S. Occupational Safety and Health Administration found "inhuman living conditions," including deprivation of food, high temperatures in the factory, and overcrowded dorms.[195] Allegedly, food was withheld as a form of punishment.[196]

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[191] Dep't of Commc'n & Pub. Info., ILO, *Business with a Conscience: Why Best Practice Is Good Practice*, 57 WORLD OF WORK MAG. (2006), *available at* http://www.ilo.org/wow/Articles/lang--en/WCMS_081378/index.htm; Bob Herbert, *In America; The Sweatshop Lives*, N.Y. TIMES, Dec. 28, 1994, *available at* http://query.nytimes.com/gst/fullpage.html?res=980DE2DE153BF93BA15751C1A962958260.

[192] Bob Herbert, *In America; Terror in Toyland*, N.Y. TIMES, Dec. 21, 1994, *available at* http://query.nytimes.com/gst/fullpage.html?res=9903E0D61038F932A15751C1A962958260.

[193] *See* Jill Murray, ILO, Corporate Codes of Conduct and Labour Standards, http://www.itcilo.it/actrav/actrav-english/telearn/global/ilo/guide/jill.htm (last visited Apr. 13, 2007); Dep't of Commc'n & Pub. Info., ILO, *supra* note 191.

[194] John Gittelsohn, *U.S. Sends Strong Message to Those Who Traffic in Human Lives*, 8 GLOBAL ISSUES, 14, 14 (2003), *available at* http://usinfo.state.gov/journals/itgic/0603/ijge/ijge0603.pdf.

[195] *Id*. at 15.

[196] Steven Greenhouse, *Beatings and Other Abuses Cited at Samoan Apparel Plant That Supplied U.S. Retailers*, N.Y. TIMES, Feb. 6, 2001, *available at* http://query.nytimes.com/gst/fullpage.html?res=9A03E3D6113EF935A35751C0A9679C8B63&n=Top/Ne

Furthermore, it was reported that the workers' passports were confiscated to prevent them from fleeing the factory.

¶73 Eventually, the U.S. Justice Department stepped in and the factory owner was put on trial before a federal court in Honolulu. In 2002, he was convicted of holding the workers in "involuntary servitude."[197] J.C. Penney reacted promptly after it had taken notice of the conditions in the Daewoosa factory. According to Tim Lyons, a spokesman for J.C. Penney, the company stopped selling apparel produced in the Daewoosa factory and suspended its contracts with the supplier that was receiving its goods from there. Furthermore, J.C. Penney claimed it was unaware that its supplier obtained products from the Daewoosa factory.[198]

3. Forced Child Labor

¶74 The chocolate industry has long been subject to public scrutiny for allegations of forced child labor on their suppliers' cocoa farms in West Africa, especially in the Ivory Coast. A 2001 BBC article brought the issue to public attention, reporting that many parents sold their children to work in the cocoa plantations where they "have to work so hard they get sick and some even die."[199] Subsequently, the International Labour Office ("ILO") investigated 1500 farms across West Africa and found children working twelve hours per day and using machetes that exposed them to a high risk of injuries. According to the ILO, two-thirds of the children were under fourteen years old and most did not attend school.[200]

¶75 Nestlé and other chocolate corporations have faced increased criticism for buying cocoa from plantations that allegedly employ forced child labor. As a result, on its corporate webpage, Nestlé makes clear that it "does not own cocoa farms or plantations in West Africa, nor [does it] employ workers on farms" but that it is nevertheless committed to ensuring that child labor is not used on cocoa plantations.[201]

¶76 Nestlé's approach marks a potential new corporate human rights policy that steers away from denying responsibility on formal grounds (along the lines of Nike's former "detachment defense") and moves towards acknowledging and assuming responsibility for actions of business partners. In fact, the problem of child labor in cocoa cultivation has received great attention by the chocolate and cocoa industry. In a joint statement with various stakeholder groups, the global cocoa and chocolate industry restated the urgent need to put an end to "the worst forms of child labor [1] and forced labour [2] in

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ws/U.S./U.S.%20States,%20Territories%20and%20Possessions/American%20Samoa.

[197] Gittelsohn, *supra* note 194, at 16.

[198] *U.S. Firms Linked to Samoan 'Sweatshop' in Labor Report*, CNN, Feb. 7, 2001, *available at* http://archives.cnn.com/2001/fyi/news/02/07/samoan.sweatshops/index.html.

[199] Humphrey Hawksley, *Mali's Children in Chocolate Slavery*, BBC, Apr. 12, 2001, *available at* http://news.bbc.co.uk/1/hi/world/africa/1272522.stm.

[200] *See* Amnesty International UK, *West Africa: Chocolate - Amnesty International Expresses Alarm at Continuing Child Labour in Cocoa Industry*, Apr. 4, 2007, *available at* http://www.amnesty.org.uk/news_details.asp?NewsID=17323. These findings were confirmed by a recent BBC article, as well as by Amnesty International. Humphrey Hawksley, *Child Cocoa Workers Still 'Exploited'*, BBC, News April 2, 2007, http://news.bbc.co.uk/1/hi/world/africa/6517695.stm (last visited January 18, 2008).

[201] Nestlé UK Ltd., *Cocoa Working Practices*, http://www.nestle.co.uk/OurResponsibility/DevelopingWorldIssues/Cocoa+Working+Practices.htm (last visited Jan. 28, 2008).

cocoa cultivation and processing in West Africa" and reaffirmed its commitment to this end.[202] In 2002, the global cocoa and chocolate industry established the International Cocoa Initiative, a multi-stakeholder foundation "working towards responsible labor standards for cocoa growing."[203]

IV. CONCLUSIONS

¶77 This analysis of human rights abuses for which MNCs are being scrutinized for responsibility reveals eight discernable tendencies. First, there is increasing sensitivity to human rights issues on the part of MNCs. This is reflected in the various multi-stakeholder initiatives to which MNCs have subscribed in the last several decades, such as the Voluntary Principles on Security and Human Rights and the International Cocoa Initiative. However, even though many MNCs have created social and economic development programs, they continue to distance themselves from responsibility for the concrete human rights abuses at issue, as evidenced by the various suits against MNCs for human rights violations in numerous jurisdictions around the world.

¶78 Second, most cases demonstrate MNCs' tendency to shift from formalistic denial to acknowledgment of their responsibility for abuses committed by government forces and subcontracted factories. Thus, rather than rebuffing calls for responsibility and arguing that subcontracted supplier factories are not legally owned or operated by Nike, for example, MNCs have begun to accept responsibility for labor and human rights violations in these factories.[204] This trend shows that MNCs are prepared to enter into a dialogue with the various stakeholder groups and discuss possibilities to prevent future human rights abuses in relation with their business operations.

¶79 Third, it is difficult to allocate responsibility for human rights abuses since the abuses are often linked both to business operations and the political and economic situation in the host country. The situation becomes more complex where corporate and governmental interests are closely intertwined, as is the case in oil extracting countries where the industry is often nationalized and conducted as private-public joint ventures.[205] Thus, the distinction between governmental and corporate responsibilities becomes blurred.

¶80 Fourth, extractive industries show the following pattern with regard to human right problems: human rights abuses are often committed by government security forces or government authorities of the host country, leaving the corporation to face complicity charges for gross violations of human rights that qualify as international crimes.[206] Thus,

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[202] Nestlé UK Ltd., *International Alliance Joins Forces to Address Child Labour Abuse in the West African Cocoa Sector*, Dec. 2001, http://www.nestle.co.uk/OurResponsibility/DevelopingWorldIssues/International+Alliance+on+Cocoa.htm.

[203] Nestlé UK Ltd., International Cocoa Initiative, July 2002, http://www.nestle.co.uk/OurResponsibility/DevelopingWorldIssues/International+Cocoa+Initiative.htm.

[204] *See* Debora L. Spar, *Spotlight and the Bottom Line: How Multinationals Export Human Rights*, 77 FOREIGN AFF. 7, 7 (1998).

[205] *See* Boele, *supra* note 13, at 75.

[206] Potentially, abuses could also concern infringements of core labor standards as highlighted in Shell's training material, *Human Rights Dilemmas*, where a purchasing manager for "Shell Select Shops" might face the problem of child labor when contracted coffee suppliers cannot assure that no child labor was used on their supplier cocoa plantations. *See* CLAPHAM, *supra* note 43, at 223-24. Another example of labor-

the responsibility of oil and mining corporations for human rights abuses is closely related to the political context in the host country and depends primarily on the relation with the host government as regards the business and security operations.

¶81 Fifth, the human rights problems within manufacturing industries abroad mostly involve allegations of abuse within the corporate production and supply chain, and mostly pertain to the situation in the workplace. In many cases, abuses amount to infringements of International Labor Standards. Also, as in the extractive industries, manufacturing industries face complicity charges in abuses by government forces or paramilitary groups; however in the manufacturing context, abuses usually occur as infringements of the freedom of association and collective bargaining.

¶82 Sixth, the analysis has shown that the number of cases in domestic courts charging MNCs for human rights violations in relation to business ventures has increased significantly since the 1990s. However, most cases pending before domestic courts involve gross violations of human rights, such as crimes against humanity, forced displacement, summary execution, extrajudicial killing and torture, whereas infringements of core labor standards have been primarily subject to corporate self-regulation[207] rather than litigation. If brought before courts, labor-related ATS claims, including infringements of core labor standards such as forced labor, child slavery and abuse of trade unionists by security forces, could be found to constitute gross human rights violations that satisfy the narrow category of "violations of the law of nations" that are actionable under the ATS, as well as the specific set of international crimes that are actionable under European universal jurisdiction statutes.

¶83 Seventh, the sector-specific patterns of human rights problems might translate into a sectoral divide with regard to the extraterritorial adjudication of the abuses in domestic courts. The divide might come to depend on the civil or criminal nature of the domestic liability systems. Civil human rights litigation is a phenomenon peculiar to the U.S.[208] European jurisdictions, on the other hand, provide for criminal prosecution for direct redress of international human rights violations. Thus, there is a divergence in civil and criminal remedies for violations of international human rights norms.[209] This divergence in remedies also implicates the causes that are actionable under the respective domestic system. Whereas the ATS is quite vague and open in providing remedies for a "violation of the law of nations" (28 U.S.C. § 1350), European statutes prescribe remedies for human rights violations along the lines of the international law categories of crimes against humanity, war crimes and genocide. The reason for the divergence is that many

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related human rights problems in the extractive industries is the claim against Rio Tinto for racial discrimination. The U.S. Court of Appeals for the Ninth Circuit reversed the District Court's dismissal of the discrimination claim on act of state grounds. *See* Sarei v. Rio Tinto Plc., 487 F.3d 1193, 1224 (9th Cir. 2007).

[207] Corporate self-regulation is at the core of Corporate Social Responsibility ("CSR"); CSR can be defined as "an extended form of [corporate] governance" under which a firm's fiduciary duties are extended to all stakeholders. Lorenzo Sacconi, *Corporate Social Responsibility (CSR) as a Model of "Extended" Corporate Governance: An Explanation Based on the Economic Theories of Social Contract, Reputation and Reciprocal Conformism*, 142 LIUC PAPERS IN ETHICS, LAW, AND ECON. 7-8 (2004).

[208] *See* SARAH JOSEPH, CORPORATIONS AND TRANSNATIONAL HUMAN RIGHTS LITIGATION 14-16 (2004). Even though other jurisdictions, such as France and Belgium allow civil claims as adjunct to criminal proceedings, they usually do not adjudicate a unique civil cause of action for human rights violations. *See* DEMEYERE, *supra* note 5, at 49-50; HANSEN, *supra* note 5, at 22, 30.

[209] *See* Olivier de Schutter, *The Accountability of Multinationals for Human Rights Violations in European Law*, *in* NON-STATE ACTORS AND HUMAN RIGHTS 288; JOSEPH, *supra* note 207, at 13-14.

of these European provisions were introduced in national codes as an implementation of international treaties and conventions, in particular the Geneva Conventions and its Additional Protocols.[210] Thus, redress is confined to abuses that qualify as international crimes -- a risk to which the extractive industries are especially prone; whereas redress for environmental damages and infringements of labor rights -- a risk to which the manufacturing industries are prone -- are more difficult to prosecute under these legal systems.[211] Despite the restrictive interpretation by the U.S. Supreme Court, the ATS still provides enough flexibility in its terms to potentially accommodate the latter cases in the future. Thus, this civil/criminal divergence may translate in the future into a divide among different industrial sectors with regard to liability risks, depending on the respective legal system that can assert jurisdiction over MNCs.

¶84 Lastly, even though major human rights litigation against corporations has been brought primarily under the U.S. ATS, European legal systems, like that of Belgium, are well-equipped to hold corporations extraterritorially liable for violations of international humanitarian law, and are thereby able to exercise jurisdiction over crimes that were committed abroad by non-Belgians as well. However, liability litigation in this context is confined to the category of international crimes provided by the Rome Statute.

¶85 In sum, despite the increased scrutiny of corporate practices, MNCs continue to face liability risks in numerous sectors. As legal systems continue to evolve to accommodate claims against MNCs for human rights violations, identifying common problems and risk areas in major industries should serve to facilitate increased corporate human rights compliance and responsible global corporate citizenship.

[210] *See* Naomi Roht-Arriaza, *Universal Jurisdiction: Steps Forward, Steps Back*, 17 LEIDEN J. INT'L L. 375, 383 (2004).

[211] This does not apply in cases in which infringement of labor rights do also qualify as international crimes.