FREEPORT IN WEST PAPUA: BRINGING CORPORATIONS TO ACCOUNT FOR INTERNATIONAL HUMAN RIGHTS ABUSES UNDER AUSTRALIAN CRIMINAL AND TORT LAW

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I INTRODUCTION

American company Freeport McMoRan Copper and Gold Inc ('Freeport') has been accused of participating in serious human rights abuses through the activities of its subsidiary, PT Freeport Indonesia, in gold and copper mining operations in West Papua (formerly known as Irian Jaya),[1] Indonesia. Persistent allegations surround the operations involving violence committed by military and private security forces in the mining region against Indigenous and local groups.[2] Freeport has disclosed that it provides financial and material resources to those forces, in return for obtaining security in the region. Australian company Rio Tinto was a 13% shareholder in Freeport over the period from mid-1995 to March 2004, as well as being (and remaining) a joint venture partner in the 1997 Grasberg mine extensions.[3] The commencement of the association between Rio Tinto and Freeport came at about the time of the release of a series of independent reports by human rights organisations regarding human rights abuses by security forces within the mining concession area,[4] and has continued during a period tainted by further like allegations.

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1 The name of the province is controversial and has undergone a number of changes during the region's colonial history. The Indonesian's named the territory West Irian or Irian Barat when they gained control from the Dutch government, from 1967-73, Irian being the Indonesian term for the island of New Guinea. It was then officially renamed Irian Jaya (meaning victorious Irian) by Suharto, and in 2001 the official name again changed to Papua. The name West Papua is preferred by nationalists who hope to secure independence from Indonesia; however it is also commonly used to differentiate Papua from the eastern aspect of the island, Papua New Guinea: Wikipedia, *Papua (Indonesian province)* <www.answers.com/topic/papua?method=5> at 2 June 2005.

2 See, eg, Abigail Abrash, Report commissioned by the Robert F Kennedy Memorial Centre for Human Rights, *Development Aggression: Observations on Human Rights Conditions in the PT Freeport Indonesia Contract of Work Areas, With Recommendations* (July 2002) 13-23; Catholic Church of Jayapura, *Violations of Human Rights in the Timika Area of Irian Jaya, Indonesia* (August 1995).

3 Jeff Atkinson, Oxfam Community Aid Abroad, *Undermined: The Impact of Australian Mining Companies in Developing Countries* (1998) 46; Shawn Donnan, 'Rio Tinto Plans to Sell Back its 12% Freeport McMoRan Stake: US$1-billion Stock Deal', *Financial Post (National Post)* (Canada), 24 March 2004. There are varying reports of Rio Tinto shareholding in Freeport of between 12% and 16%.

4 Australian Council for Overseas Aid ('ACFOA'), *Trouble at Freeport* (April 1995); Catholic Church of Jayapura, above n 2; National Human Rights Commission, Press Release, *Report of the Human Rights Commission*, Jakarta, (22 September 1995) Project Underground <http://www.moles.org/ProjectUnderground/motherload/freeport/ighr.html> at 12 November 2005. Editors' Note: the Project Underground website is no longer accessible. The author has in her possession hard copies of those parts of the website referenced in this article and should be contacted for further information.

Forcese has described arrangements where corporations support military-like security as 'militarized commerce'.[5] In his view, this represents a growing trend that frequently takes place in resource rich developing countries where commercial resource exploitation is often taking place in dangerous or politically sensitive regions, for example those afflicted by civil war, ethnic and political tensions, or corrupt or weak governments.[6] With increasing public records of alleged corporate human rights abuses involving the most serious of international offences,[7] scrutiny as to the various means to bring corporations to account is warranted.

The main aim of this article is to assess the potential to bring actions against corporations for transnational human rights abuses by security personnel under Australian criminal and civil laws, using Freeport as an example. Part II will briefly outline the factual background to the operations of Freeport in Indonesia, including a description of some of the allegations of human rights abuses by security forces operating in the concession area. The status of such allegations under international human rights law will be considered, and the need for home state (usually defined as the state of incorporation - see comments under Part II(D)) regulation argued, in light of the existing limits in holding corporations accountable in international law and in host states (the state in which the company is conducting its operations - see comments under Part II (D)). Part III focuses upon whether and how transnational corporations (corporations operating multinationally or 'TNCs') could be prosecuted for such abuses using the new 'international offences' contained in Division 268 of the *Criminal Code Act 1995* (Cth), and will consider whether such legislation is desirable. Part IV will consider the potential for TNCs to be sued under Australian tort law, and will assess the principles of Australian tort law compared to similar US, UK and Canadian civil laws. The conclusion considers that the case of Freeport is but one among many cases where TNCs have allegedly been involved in serious human rights abuses, and it is submitted that there is a pressing need for stronger regulation and accountability of TNCs.

5 Craig Forcese, 'Deterring "Militarized Commerce": The Prospect of Liability for "Privatized" Human Rights Abuses' (2000) 31 *Ottawa Law Review* 171, 174-5.

6 Ibid 173-4.

7 For example, as a reference of cases regarding ongoing concerns of corporate complicity in the most serious of international offences, including crimes against humanity, genocide and war crimes, see the report recently released by the International Peace Academy and Fafo AIS, *Business and International Crimes: Assessing the Liability of Business Entities for Grave Violations of International Law* (2004).

8 Indonesian sovereignty was secured in controversial circumstances. Indonesia had gained effective control over West Papua through military means by 1969, however, it was only following the conduct of a referendum pursuant to the Indonesian 'Act of Free Choice' of 1969 that the UN formally recognised Indonesian sovereignty over the region. Indonesia claimed the referendum evidenced the self-determination of the West Papuan people to remain part of Indonesia. However, there are serious concerns about the fairness of the referendum, with allegations of structural deficiencies and significant Indonesian coercion and intimidation affecting the process. See, eg, Abrash, above n 2, 8-10.

II FREEPORT IN WEST PAPUA

A *Mining Giant in Indonesia*

West Papua became a territory of Indonesia in 1969 following its independence from Dutch colonial rule.[8] Freeport has a long-standing involvement in the region, having commenced resource exploration and exploitation of the substantial gold and copper reserves in 1967. Its project is authorised pursuant to a Contract of Work ('COW') agreement drafted by Freeport and entered into with Indonesia's New Order Government, at the time headed by Army General Suharto (later to become President). This agreement was drawn at a time of significant strife, whilst diplomatic, political and military struggles over the region were taking place. Indonesia had yet to secure recognised sovereignty over the territory. The COW, amongst other things, gave Freeport exclusive rights of use and control over 2.6 million hectares of land for a period of thirty years, an agreement reached without consultation with traditional owners, and largely devoid of environmental, health and compensatory obligations.[9] Freeport's concession area has since been expanded as the reserves in the original mine site, the Ertzberg Copper deposit, were nearly exhausted to encompass the Grasberg ore body nearby.[10] The first COW was terminated prematurely, and replaced by a second, signed in 1991, allowing the expanded works.[11] The site is today home to the second largest open pit mine in the world.[12] Total mining in the region includes a production capacity of more than 200,000 tonnes of ore per day,[13] which forms the principle source of Freeport's annual revenue, reported in 2003 to total about US$2.2billion.[14]

PT Freeport Indonesia (the subsidiary) is owned and operated by Freeport Copper & Gold Ltd (81.28% shareholder), while the Indonesian government owns a further 9.36%, and PT Indocopper Investama Corp, which also has associations with former President Suharto, owns the remaining 9.36%.[15] In addition to its interest in the mines as a minority shareholder, the Indonesian government also relies heavily upon the taxation received from Freeport, with Freeport reported to be Indonesia's biggest tax contributor.[16]

9 The information regarding the terms of the COW and commencement of Freeport activity in West Papua is drawn from Denise Leith, *The Power of Politics: Freeport in Suharto's Indonesia* (2003) 61; Abrash, above n 2, 10-1; Institute for Human Rights Study and Advocacy, *What's Wrong With Freeport's Security Policy? Summary Report: Results of Investigation into the Attack on Freeport Employees in Timika, Papua, Finds Corporation Allows Impunity of Criminal Acts by Indonesian Armed Force* (2002) Institute For Human Rights Study and Advocacy <http://www.infid.be/freeport_report.html> at 17 November 2004.

10 Atkinson, above n 3, 46.

11 Both COWs are controversial and have been criticised by civil society groups. For Freeport's comments on the contracts see <www.fcx.com/articles/cow.htm> at 2 June 2005.

12 John Wright, 'Ex-West Irian Worker Tells of 'Mass Deaths', *Courier Mail* (Queensland), 6 January 1996.

13 Mining Week, 'Official Approval for Further Increase at Grasberg', *The Mining Journal*, 16 May 1997, 390.

14 Freeport-McMoRan Copper & Gold Inc., *The Strength Of Our Metals: 2003 Annual Report* (2003) FXC Freeport-McMoRan Copper & Gold Inc <http://www.fcx.com/inrl/annlrpt/2003/coverbody.htm> at 27 November 2004.

15 Mining Week, above n 13.

16 Institute for Human Rights Study and Advocacy, above n 9.

Australia is also a significant actor and beneficiary in the mining operations. Aside from its minority shareholding in the parent company, Australian mining company Rio Tinto also acquired a 40% interest in any increased production via the Grasberg extension after contributing about US$75million for mine development, and US$100 million for exploration in that area.[17] In 2003, Rio Tinto's interest in the Grasberg venture contributed A$104million to the group's earnings.[18] In addition, Atkinson reports that Australia has a strong connection with the Freeport mine operations through the group's significant commercial relationship with Cairns businesses, where the company has a base,[19] and through profits enjoyed by Australian businesses in light of that relationship.[20] Despite being a joint venturer in the expanded works, Rio Tinto reports that its American partner is responsible for all management,[21] which would suggest that any responsibility that might be attributable to the company (if at all) is deemed by Rio Tinto to lie with its partner. Atkinson, on the other hand considers that in light of its relationship, 'Rio Tinto now has at least partial responsibility for what happens at Freeport, particularly for any increase in environmental damage or human rights abuses which are connected to the expansion of mining operations which it funded'.[22]

Aside from its receipt of financial benefit, there is little information available regarding the particular allocation of management as between Freeport and Rio Tinto regarding the Grasberg mines. Local NGOs target their complaints against both Freeport and Rio Tinto, suggesting an expectation that both have the capacity to effect the proper management of the mines. Certainly, as a 40% shareholder and joint venturer, Rio Tinto arguably has the authority to intervene where they become aware of human rights abuses, and a failure to do so would give rise to legitimate calls for accountability. West Papua is notoriously difficult to access for the purpose of fact finding,[23] and this is likely to contribute to the lack of current information regarding the allocation of roles. It has not helped Rio Tinto that it has a poor history regarding environmental and human rights.[24] Aside from Freeport's disclosure of military funding (see comments under Part II(C)), it is unclear to what extent Rio Tinto's revenue, if at all, is injected into the military presence surrounding the mines.

For the greater part, this article considers a series of particularly well-documented

17 Atkinson, above n 3, 46.

18 Northern Territory Regional, 'Rio Tinto to Keep Stake in Grasberg Mine in Papua, Indonesia' *Asia Pulse*, 24 March 2004.

19 ACFOA, above n 4.

20 For example, Atkinson reports that Cairns provides the operations main supply base. Freeport has priority use of Cairns cargo wharves, and the subsidiary is reported to have spent, in 1994 alone, A$235million in Australia, of which A$90million was in Cairns. See Atkinson, above n 3, 46-47.

21 Donnan, above n 3; Sian Powell, 'W Papua mine paid $18.5m to Military', *The Weekend Australian* (Sydney), 15 March 2003, 19.

22 Atkinson, above n 3, 46.

23 See, eg, Abrash, above n 2, 11-2 ff.

24 See, eg, CorpWatch, *Associating with Wrong Company: Rio Tinto's Record and the Global Compact* (2001), Mines and Communities Website, <http://www.minesand communities.org/Company/rio8.htm> at 2 June 2005.

human rights violations during the period of 1994-1995, prior to Rio Tinto involvement in the mine, and hence it is addressed particularly to Freeport.

B *Human Rights Abuses in the Concession Area*

There have been numerous allegations of human rights abuses by security and military operating in the region throughout Freeport's 30-year history, however, none are better documented than those which occurred over a six month period of violence in 1994-1995.

In a 1995 study, the ACFOA reported that over the period of June 1994-February 1995, Indonesian armed forces and Freeport security 'engaged in acts of intimidation, extracted forced confessions, shot 3 civilians, disappeared 5 Dani villagers, and arrested and tortured 13 people'.[25] These appear to have been prompted as a violent response to independence flag raising ceremonies in the concession area. The incidents described include Indonesian military officers and Freeport security guards shooting into a crowd of peaceful protestors. In addition, 200-250 people were driven into the bush to escape the violence, and remained there for six months without receiving assistance.[26] Taking up the information contained in the ACFOA report, the Catholic Church of Jayapura further interviewed surviving victims and witnesses. The church report provided further information of a direct link between some of the abuses and Freeport by finding that torture was in a number of instances conducted in Freeport security posts and Freeport shipping containers, including the detention in a Freeport container, and torture, of four civilians from 6 October until 15 November 1994, after which time they were not seen again.[27]

In its own investigation of the same incidents, the National Human Rights Commission of Indonesia confirmed the human rights violations and held that the incidents:

> ... are directly related to activities of the armed forces and military operations carried out in connection with efforts to overcome the problem of peace disturbing elements and the presence of so-called Free Papua Organization, and in the framework of safeguarding mining operations PT Freeport Indonesia which the government has classified as a vital project.[28]

The National Human Rights Commission of Indonesia called for transparency regarding the 'operational activities' between the provincial government, armed forces and PT Freeport Indonesia, in order to assess the legal responsibility of respective parties.[29] No further action has been taken by the Commission, and to

25 ACFOA, above n 4.
26 Ibid.
27 Catholic Church of Jayapura, above n 2. See also, Elizabeth Brundige et al, *Indonesian Human Rights Abuses in West Papua: Application of the Law of Genocide to the History of Indonesian Control* (2004) [39-40] <http://www.law.yale.edu/outside/html/Public_Affairs/426/westpapuahrights.pdf> at 4 July 2005.
28 National Human Rights Commission, above n 4.
29 Ibid.

date only four soldiers have been convicted by local courts for their part in abuses resulting in the deaths of three people in the Freeport concession area.[30] Notwithstanding that the report acknowledged a link between Freeport and the abuses, the Amungme people (the principal Indigenous group of the region) responded to the report by criticising its failure to highlight what they deem the 'root cause of the human rights violations': Freeport.[31]

The earliest allegations of large scale human rights abuses in the concession area date back to 1977, when the military bombed and strafed villages surrounding the Freeport mine and resettled communities to the coast. The attacks were in retaliation after a group of Amungme people blew up a Freeport slurry pipeline (slurry pipelines are used to transport materials such as coal, copper and iron concentrates, by embedding them in a fluid, usually water) in protest at the company's activities,[32] but incidentally also cleared a part of the concession area for further development. In December 1995, violence in the region prompted a massive border crossing into Papua New Guinea. Over the previous 20 year period, up to 43,000 tribal people have been killed as a result of such violence.[33]

C *Freeport and Security Forces: An Unhappy Marriage*

The World Bank Extractive Industries Group has acknowledged that the practice of human rights violations by military, police or commercial mercenaries securing company control over a given territory and protecting their operations is not uncommon.[34] Ross, of Oxfam America, has reported that mineral wealth in a region can heighten the risk of civil war by involving the large-scale expropriation of land, potentially devastating environmental damage and human rights abuses that lead to rebellion by local groups.[35] Subversive acts in the Freeport concession area have commonly been attributed by NGOs to protests against the mining operations and their effects.

The Freeport concession area is the most militarised area in all of Indonesia.[36] The reasons include the characterisation of the mining operations by the Indonesian government as a 'vital project',[37] the direct economic interest of the Indonesian government in the project, the strategic value of the region in suppressing independence movements and the financial and material support provided by the company for a military presence there.

30 Atkinson, above n 3, 52.
31 *Amungme People's Response to National Commission of Human Rights Findings Announced on 22 September 1995*, Project Underground, <http://www.moles.org/ProjectUnderground/motherlode/freeport/hramung.html> at 12 November 2004.
32 ACFOA, above n 4.
33 Wright, above n 12.
34 World Bank Extractive Industries Review, *Striking a Better Balance: The World Bank Group and Extractive Industries* (2003) vol 3, 60, 83.
35 Ibid 83.
36 Danny Kennedy, Risky Business: *The Grasberg Gold Mine. An Independent Annual Report on P.T. Freeport Indonesia, 1998* (May 1998), 3.
37 National Human Rights Commission, above n 4 [4].

In an unprecedented act following a request by a shareholder, Freeport in 2003 disclosed to the US Security Exchange Commission that it paid US$5.6million of a total US$7million paid to Indonesian military to provide security at its Grasberg facilities in 2002, and US$4.7million in 2001, which was used to pay for housing and feeding troops, fuelling and maintaining military vehicles and allowances for incidental and administrative costs.[38] The company also spent US$9.6million on private security.[39] In addition, following a shut down of operations in 1996 due to civil disturbance in the region, Freeport spent US$35million to build, at its own expense, a military base for the Indonesian military in the concession area.[40] Ironically, there are now reports that the military in the concession area may be responsible for orchestrating violence so as to remind Freeport that its services are essential and must continue to be supported.[41]

D *Corporate Responsibility Under International Law*

States are the primary duty-bearers within international human rights law, and so at present there are only very limited circumstances in which it might be argued that corporations have direct legal responsibilities in international law for their conduct. Pursuant to the principle of horizontality,[42] corporations are, however, *indirectly* responsible for human rights violations in international law. This is on the basis that States 'hosting' TNCs have an obligation to protect and ensure the enjoyment of human rights in their territory. In order to do so, they must regulate the conduct of private and legal individuals where such conduct may infringe upon the human rights of others within the territory of that State.[43] Joseph considers it unlikely that this principle extends to obligate home States to regulate the extra-territorial activities of their nationals.[44] This limitation is a result of the State-centeredness of international law and the concern by States to protect their territorial sovereignty. Problematically, it appears that the principle of horizontality is generally under-utilised in bringing to account host States that fail in their human rights duties by failing to regulate foreign businesses.[45]

Joseph argues that there are a number of reasons why limiting the obligation to regulate TNCs to host States is likely to be insufficient. One such reason is the

38 Shawn Donnan, 'US Mining Group Funded Indonesian Military', *Financial Times* (London), 15 March 2003, 9.

39 Ibid.

40 Dan Murphy, World, 'Violence, a US Mining Giant, and Papua Politics', *Christian Science Monitor* (Boston), 3 September 2002, 1; Donnan, above n 38; Powell, above n 21.

41 Murphy, above n 40; Donnan, above n 38; Shawn Donnan and Tom McCawley, 'Army's Role Queried in Gold Mine Killings', *Financial Times* (London) 6 September 2002, 9; Institute for Human Rights Study and Advocacy, above n 9.

42 Traditionally human rights obligations are understood to apply as between the State and individuals. The concept of horizontality refers to the idea that human rights also apply horizontally, in terms of affecting relations between private individuals, on the basis that by requiring States to protect the human rights of individuals in their territory, States are also obliged to regulate the behaviour of third parties that might affect those rights.

43 Sarah Joseph, 'An Overview of the Human Rights Accountability of Multinational Enterprises' in Menno T Kamminga and Saman Zia-Zarifi (eds), *Liability of Multinational Corporations Under International Law* (2000) 75, 77.

44 Ibid 80.

45 Ibid 78.

potential power imbalance between a developing country and a TNC, with developing countries becoming more reliant on foreign direct investment to support their economies, and TNCs having the power to withdraw, or threaten to withdraw, such investment should regulations be strengthened.[46] Oxfam America recently reported that:

> Foreign direct investment (FDI) ... has become such an important part of global development strategies that it has replaced foreign aid as the main source of external capital for many developing countries. Today, FDI amounts to about 60 percent of the international capital flowing into developing countries each year and is nearly ten times larger than official development assistance. In contrast, in the late 1980s, the amounts of annual aid and FDI in developing countries were roughly the same.[47]

Conditions 'favourable' to foreign investors and companies conducting mining operations in Indonesia, such as the former Suharto's strongman-like hold on local communities and minimal regulatory oversight, led one corporate executive to reportedly state 'thank God it's a Dictatorship', and another analyst to claim 'Indonesia has one of the best mining laws in the world'.[48] Considering the Indonesian Government's economic interests in the Freeport mine in West Papua, it is conceivable that the risk of its loss would be a significant political and economic concern. In an incident in 1988, it is reported that upon the threat by Freeport that it would withdraw from the contract if something were not done about small-scale miners operating in the Freeport concession area, the State authorities arrested 51 miners and destroyed their operations. The miners claimed a traditional right to mine in the region.[49]

The economic clout of TNCs translating into de facto political clout can also be seen in contractual conditions favourable to the company. The Freeport-Indonesia 1991 Contract of Work explicitly provides for the flexible application of local laws to the Freeport mine operations on the basis that the Government acknowledges the 'added burdens and expenses to be borne by the Company and the additional service to be performed by the Company as a result of the location of its activities in a difficult environment ...'[50]

Some commentators claim that globalisation creates a 'race to the bottom' where, in order to attract foreign investment, developing nations increasingly reduce labour, environmental and other regulations that might restrict the operations of foreign investors and deter them from investing. The Australian Department of Foreign Affairs and Trade disputes that globalisation has such an effect. It reports that labour conditions improve in the short and long term, and that environmental

46 Ibid.

47 Oxfam America, *Investing in Destruction: The Impact of a WTO Investment Agreement on Extractive Industries in Developing Countries* (2003) 6.

48 Thomas Walkom, News, 'Bottom Line on Indonesia is the Bottom Line', *The Toronto Star* (Canada), 12 May 1998, A2.

49 Atkinson, above n 3, 39.

50 Contract of Work Between the Government of the Republik of Indonesia and P T Freeport Indonesia Company (1991), Article 18, para 8, extract taken from Abrash, above n 2, 11.

conditions improve at least in the long term, due to globalising economies.[51] This is at odds with the Freeport experience. In that case, disposal of tailings (a poisonous residue from the mineral extraction process) continue to be dumped at dangerously high levels into the Agua River, which local peoples depend upon, some 30 years after the first development of the site. Further, to date, very few Freeport employees are local people.[52]

Another source that potentially binds corporations under international law is customary international law. Customary international law refers to a body of laws that apply universally irrespective of whether States have formally acceded to the same, provided there is a regular and widespread State practice of conformity to those laws, coupled with express or inferred acknowledgement of their binding nature.[53] There is an exception for the 'conscientious objector' whereby those States that consistently object to a rule will not be bound regardless of it otherwise being deemed part of custom.[54] However there is a smaller group of customary international laws known as *jus cogens* that are non-derogable in any circumstance.[55]

For a number of reasons, customary international law alone is unlikely, at least currently, to provide a means of bringing corporations to account for their conduct. First, those human rights prohibitions likely to be considered as a rule of custom are uncertain and relatively small. Secondly, a smaller proportion of those laws are likely to extend to bind private individuals, and hence corporations, as opposed to applying only to States. Finally, there is no existing court or tribunal with jurisdiction over corporations for breaches of international law, with corporations being deliberately excluded, after debate on the issue, from the jurisdiction of the International Criminal Court (ICC).[56]

While there are various voluntary codes of ethical conduct and other 'soft law' mechanisms developing in an attempt to regulate foreign corporate behaviour in developing countries,[57] an obvious limitation of such measures is that they are not binding. The International Council on Human Rights Policy argues that such approaches alone are not adequate. It reports that to date, the implementation of voluntary approaches has not shown evidence of diminishing instances of human rights abuses by corporations.[58]

51 Department of Foreign Affairs and Trade, *Globalisation: Keeping the Gains* (2003) 11, 13-4.
52 Atkinson, above n 3, 47, 49.
53 Michael Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (1999) 3.
54 Ibid 180.
55 Ibid 183-95.
56 On the drafting process see Andrew Clapham, 'The Question of Jurisdiction Under International Criminal Law Over Legal Persons: Lessons from the Rome Conference on an International Criminal Court' in Kamminga and Zia-Zarifi (eds), above n 43, 141-160.
57 See, eg, OECD, *Guidelines for Multinational Enterprises,* 21 June 1976, 15 ILM 969 (1976) or the *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN Doc E/CN 4/Sub.2/2003/12/Rev 2 (2003).
58 International Council on Human Rights Policy, *Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies* (February 2002) 7, available online at <http://www.cleanclothes.org/ftp/beyond_voluntarism.pdf> at 4 July 2005.

Given the current state of international law, a means achievable in the short term for regulating corporate behaviour is, by extraterritorial regulation, emanating from the home State. Home States are predominately developed countries and are more likely to have relative power in parity with corporations,[59] as well as competent existing legal systems to enforce those laws. As beneficiaries (economically) of the spoils of extra territorial corporate activity, home States arguably also have a moral responsibility to regulate corporate behaviour. Thus, domestic Australian law may be a mechanism for bringing to account TNCs such as Rio Tinto and Freeport for their part in gross human rights violations in West Papua, where they have to date benefited from effective immunity under Indonesian domestic law and are not currently threatened by enforcement of international law.

III CORPORATE CRIMINAL LIABILITY PURSUANT TO THE COMMONWEALTH CRIMINAL CODE

A *Unintended Outcomes? The Enactment of International Offences in Australian Law*

It is arguable that, very likely without intention, Australia has created a basis to prosecute companies for certain serious international offences committed in other countries. Division 268 of the *Criminal Code Act 1995 (Cth)* ('Criminal Code') enacts within domestic legislation the crimes of genocide, crimes against humanity, and war crimes. These offences were inserted by the *International Criminal Court (Consequential Amendments) Act 2002* (Cth) as part of the ratification of the *Rome Statute of the International Criminal Court*[60] ('Rome Statute'). The legislation was moved through Parliament with considerable speed. The *International Criminal Court (Consequential Amendments) Bill 2002* (Cth) (No 42 of 2002) was introduced to the House of Representatives on 25 June 2002, to the Senate on 26 June 2002 and passed on 27 June 2002. The opposition claimed it had only received a copy of the Bill minutes prior to the House of Representatives sitting.[61] Similar complaints regarding a lack of adequate time to consider the lengthy legislation were made in the Senate. The haste was a result of the government delaying in introducing the Bill, despite its having been drafted some time in advance.[62] In order for Australia to be able to join other State parties in the inaugural Assembly of State parties and hence be empowered to nominate judges and prosecutors for the ICC, Australia was obliged to ratify the Rome Statute by 1 July 2002 following its enactment in domestic legislation,[63] and it

59 Joseph, above n 43, 84.

60 *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90, (entered into force 1 July 2002).

61 Commonwealth, *Parliamentary Debates*, House of Representatives, 25 June 2002, 4324 (Mr Swan) and 4334 (Mr Rudd).

62 Commonwealth, *Parliamentary Debates*, House of Representatives, 25 June 2002, 4325 (Attorney-General Williams).

63 Gillian Triggs, 'Implementation of the Rome Statute for the International Criminal Court: A Quiet Revolution in Australian Law' (2003) 25 *Sydney Law Review* 507, 509.

appears the final decision to do so came at the 11th hour.[64]

The Division 268 offences were not subjected to the usual consultative process that previous provisions of the Criminal Code have been subject to.[65] In the rush to introduce the legislation, McSherry theorises that little regard was had for how, and if, the new offences (in particular certain terrorism offences) would cohere with other parts of the Criminal Code, and in that sense the Criminal Code was 'treated as a mere vehicle for the inclusion of the new ... offences'.[66]

In relation to the division 268 crimes, the Government stated that '[w]hile these crimes cover the same acts as the International Criminal Court statute, they are part of Australia's criminal law and they have been defined according to the same principles, and with the same precision, as other Commonwealth criminal laws'.[67]

Australia was in fact at pains to reinforce that the crimes of genocide, war crimes, and crimes against humanity would be interpreted according to Australian domestic law.[68] Read in conjunction with Part 2.5 of the Criminal Code, which extends liability for all offences within the Criminal Code to corporate bodies, it appears that in enacting the offences within the Criminal Code, Parliament has extended liability for such crimes to corporate bodies, a step that has not occurred at an international level. As the issue was never discussed during Parliamentary debates, we can only assume such an extension was either considered wholly uncontroversial or was not foreseen, perhaps as a result of the speed with which the legislation was passed and a lack of scrutiny, from a domestic criminal law perspective, of its content. Another possible reason as to why the federal government did not seem to show any concern at the possible extension of these offences to corporations may be the limitations imposed on the commencement of prosecutions under Division 268 that decrease the likelihood of its being applied in relation to extraterritorial corporate harms (see comments regarding jurisdiction under Part III(C) below). Of course, extension of the offences to encompass the corporate actor is neither clear nor obvious, as the offences at an international level are specifically drafted with natural persons in mind.

64 For a discussion of the political process surrounding the introduction of the Bill, see Alex J Bellany and Marianne Hanson, 'Justice Beyond Borders? Australia and the International Criminal Court' (2002) 56(3) *Australian Journal of International Affairs* 417.

65 Development and amendments of the Criminal Code were being considered and drafted systematically via a consultative process headed by the principal drafting body, the Criminal Law Officers Committee, later to be known as the Model Criminal Code Officers Committee. The Criminal Code is being developed as a model for the States and Territories. See Bernadette McSherry, 'Terrorism Offences in the Criminal Code: Broadening the Boundaries of Australian Criminal Laws' (2004) 27(2) *University of New South Wales Law Journal* 354, 354-7, 371-2.

66 Ibid 357.

67 Commonwealth, *Parliamentary Debates*, House of Representatives, 25 June 2002, 4326 (Attorney-General Williams).

68 A declaration was included in the legislation confirming this intent. See Bellany and Hanson, above n 64, 423.

B *Corporate Criminal Responsibility under International Criminal Law*

Before considering the provisions of the Criminal Code and the new offences created, it is worth a cursory mention of the status of corporate criminal liability under international criminal law. While, as mentioned earlier, it is possible that under some customary international law corporations may be responsible for their conduct, a fundamental limitation has been, and continues to be, the lack of international tribunals and courts competent to try corporations for breaches, and hence an absence of international jurisprudence on the subject. Engstrom does, however, note a precedent for corporate criminal responsibility under international law in the *I G Farben Trial*,[69] in which the US Military Tribunal at Nuremberg treated a corporate defendant as capable of violating the laws of war.[70]

Recently, the Rome Conference of the International Criminal Court debated whether to extend the Court's jurisdiction to include corporations. Ultimately this proposal, put forth by the French delegate, was not accepted on the basis of disagreements regarding the service of indictments, difficulties in evidence, the concern that such liability would detract from the court's focus upon personal responsibility, and concern that there was no recognised uniform standards for corporate liability at an international level, with many major law systems not yet recognising such liability.[71] Ambos argues that given the lack of corporate criminal liability in many countries, the principle of complementarity would be unworkable were criminal responsibility enacted in the ICC jurisdiction.[72] The important principle of complementarity refers to the tenet, ratified in Article 17 of the Rome Statute, that the jurisdiction of the ICC will only be invoked where States are unable or unwilling to prosecute offenders domestically.[73]

While problems surrounding the inclusion of corporations in the jurisdiction of an international criminal court may exist in light of the different approaches of States to the issue, this is a moot point in relation to Australian criminal law. Corporate criminal liability is not new in Australia, though the provisions of the Criminal Code are wider than existing common law.[74] Australian States and Territories, too, are indicating a willingness to expand corporate criminal responsibility,[75] suggesting a growing consensus in Australia that corporations can

69 *US v Krauch (I G Farben Trial)*, US Military Tribunal sitting at Nuremberg, Judgment of 29 July 1948, *Trials of War Criminals Before Nuremberg Military Tribunals*, vol VIII, 1081-1210.

70 Viljam Engstrom, Institute for Human Rights, *Who is Responsible For Corporate Human Rights Violations* (January 2002) 28; Clapham, above n 56, 166-171.

71 UN Doc A/CONF 183/C1/L.3, reprinted in *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, 15 June-17 July 1998, Official Records, vol 2, 133-6.

72 Kai Ambos, 'Article 25: Individual Criminal Responsibility' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observer's Notes, Article by Article* (1999) 475, 478.

73 *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90, (entered into force 1 July 2002), art 17.

74 See, eg, Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (2001) 159-60.

75 For example, a number of States and Territories have proposed the introduction of the offence of corporate criminal manslaughter: see Rick Sarre and Jenny Richards, 'Criminal Manslaughter in the Workplace: What Options for Legislators?' (2004) 78 *Law Institute Journal* 59, 60-61.

commit criminal offences and that criminal sanction is an appropriate and necessary response.

C *Corporate Criminal Responsibility within the Criminal Code*

1 Extension of Offences to Corporate Offenders

Part 2.5, section 12.1 of the Criminal Code states:

> (1) This code applies to bodies corporate in the same way as it applies to individuals. It so applies with such modifications as are set out in this Part, and with such other modifications as are made necessary by the fact that criminal liability is being imposed on bodies corporate rather than individuals.
>
> (2) A body corporate may be found guilty of any offence, including one punishable by imprisonment.

The dictionary contained in the Criminal Code confirms that any reference to the term 'persons' in the Criminal Code is to be read to include a reference to bodies corporate.[76] Part 2.5 goes on to set out some of the modifications to be applied by courts when altering offences developed with natural persons in mind in order to apply those to corporations. The legislation also foresees that other modifications will need to be developed by the Courts as this area of law develops.[77]

In a note immediately proceeding section 12.1 of the Criminal Code, the legislation provides for the imposition of a fine where the only punishment specified for an offence is a term of imprisonment. This fine may be imposed either in addition to, or instead of, a term of imprisonment. Section 4B of the Crimes Act 1914 (Cth) sets out the formula as:

For natural persons:

Maximum term of imprisonment (in months) x 5 = Penalty Units

For bodies corporate:

Penalty Units for natural persons convicted of the same offence x 5 = Penalty Units

where 1 Penalty unit = $110.

[76] *Person* includes a Commonwealth authority that is not a body corporate, and *another* has a corresponding meaning. Note: this definition supplements paragraph 22(1)(a) of the *Acts Interpretation Act 1901* (Cth). That paragraph provides that person includes a body politic or corporate as well as an individual: *Criminal Code Act 1995* (Cth) s 4 and Schedule. Section 4B of the *Crimes Act 1914* (Cth) also confirms the application of all laws of the Commonwealth relating to an indictable or summary offence to bodies corporate as well as natural persons unless a contrary intention appears.

[77] Criminal Law Officers Committee, Parliament of Australia, *Model Criminal Code Chapters 1 and 2: General Principles of Criminal Responsibility Final Report* (1992) 111; Ian Leader-Elliot, *The Commonwealth Criminal Code: A Guide For Practitioners* (2002) 297.

So, for example, in the case of an offence punishable by a maximum term of 25 years imprisonment, the maximum fine for a body corporate amounts to A$825,000. In the case of an offence punishable only by life imprisonment, the Court may impose upon a corporation a pecuniary penalty of not more than 10,000 penalty units.[78] This amounts, in real terms, to a fine of up to A$1,100,000.

2 Jurisdiction

Traditionally, Australian criminal courts have had jurisdiction to try only such persons who have committed an offence within Australia.[79] This has in recent times been extended in some instances to empower courts to try Australian citizens for certain offences committed overseas, for example, the child sex tourism laws.[80] However, the jurisdiction in relation to the new genocide, crimes against humanity, and war crimes offences goes even further. For these offences, s 268.117(a) of the Criminal Code provides that anyone, anywhere, regardless of citizenship or residence, can be tried for an offence committed anywhere in the world. In addition, there is no foreign law defence, in other words the conduct will be an offence against Australian law regardless of whether the conduct was lawful in the place where it was commissioned. As the Division 268 offences are of the gravest nature, it is likely that such conduct would be criminalised in most, if not all, domestic legal systems. Nevertheless, the lack of a foreign law defence may overcome categories of impunity that exist under some foreign domestic laws.

The jurisdictional scope of the Division 268 offences means that a prosecution could (theoretically) be brought under Australian domestic criminal law against anyone in the world for genocide, crimes against humanity, or war crimes committed anywhere in the world. It is more likely, however, that there would need to be some Australian interest for such a prosecution to be commenced. McSherry suggests that it is foreseeable that Courts will interpret the exercise of jurisdiction as conditional upon the apprehension of the defendant in Australia.[81] It would in fact seem extremely unlikely for the Director of Public Prosecutions to commence a prosecution unless the defendant was in custody.

In cases of egregious human rights abuses by corporate bodies overseas, it is therefore possible that any corporation, regardless of whether it operates a base in Australia or is otherwise connected to Australian interests, may be tried in Australia for those offences. In reality, it is highly unlikely that such a prosecution would ever be commenced. A prosecution against a TNC, incorporated in Australia or otherwise, for extraterritorial harms may impact in any number of ways upon international relations and business investment, which are likely to deter political will to prosecute. Prosecution for division 268 offences can only be commenced with the written consent of the Attorney-

78 *Crimes Act 1914* (Cth) s 4B(3).
79 McSherry, above n 65, 367.
80 *Crimes Act 1914* (Cth) ss 50AA-50GA.
81 McSherry, above n 65, 368.

General.[82] A decision by the Attorney-General to consent, or to refuse, to prosecute, or to impose conditions upon such consent, is final and cannot be subject to any legal challenge.[83] Further, division 268 offences can only be prosecuted in the name of the Attorney-General.[84] In the absence of political will, prosecution is hence impossible. However, with companies in which Australia has a majority ownership or some sufficient and significant connection, NGO and public pressure could be applied to have a prosecution brought. It is conceivable that a tragedy arising from TNC extraterritorial conduct involving sufficient Australian interest may create the public attention necessary to sway political will. Hence the political aspect of the operation of Division 268 offences may also be a means of pursuing its application to corporations.

3 The Physical Element

Pursuant to traditional criminal law principles, every criminal offence is comprised of a physical element (actus reus) and mental, or fault, element (mens rea). The physical element refers to the act(s) or omission(s) forming the basis of the offence. Section 12.2 of the Criminal Code provides that the physical element of an offence will be attributed to a corporation where the act or omission is committed by 'an employee [including a servant], agent or officer of [the] body corporate acting within the actual or apparent scope of his or her employment, or within his or her apparent authority'.

In the context of militarised commerce, a pertinent question will be whether the conduct of private security forces or State military forces, paid for by a company for the purpose of some outcome sought on their behalf, can be attributed to the company as an act or omission of an agent, employee or officer. The Criminal Code does not provide further guidance as to who will be deemed an agent, officer or employee, and so the common law may be instructive. For example, under labour law principles, the degree of control, including financial control, exercised by one party over another is one of the indices of an employment relationship.[85] Human rights reports in the Freeport example provide specific details of human rights abuses by Freeport employees. It is less likely that members of a State military could be characterised in this way as, prima facie, they are employees and agents of the State, unless it could be shown that in practice the relationship between the company and the military personnel was characterised by a sufficient number of employment relationship indices, such as power of control.

In the event that a corporation could not be shown to have the requisite relationship with the agents of harm for those agents to be characterised as employees, agents or officers of the company, there is still the potential for criminal responsibility to be attributed to the company under the principles of

82 *Criminal Code Act 1995* (Cth) s 268.121(1).
83 *Criminal Code Act 1995* (Cth) s 268.122.
84 *Criminal Code Act 1995* (Cth) s 268.121(2).
85 *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16.

complicity.[86] The potential scope for corporate liability as an accomplice is wide, noting for example that in Australian law liability may be attached to an actor engaging in a common purpose (participant in a joint criminal plan, with liability extended to foreseeable crimes),[87] as an aider (one who helps, supports or assists the principle) or abettor (one who incites or encourages the principle).[88] In international criminal law, in order to be guilty as an aider or abettor to a crime, the accomplice must provide 'practical assistance, encouragement or moral support which has a substantial effect on the perpetration of the crime'.[89]

4 The Fault Element

The fault element of a criminal offence relates to the requisite 'state of mind' of the offender. There are three traditional categories of fault: intention, knowledge or recklessness. In addition, some offences can be proven when they have come about as a result of negligence. The leading case on criminal negligence is that of *Nydam v The Queen*,[90] in which the Supreme Court of Victoria held that for criminal negligence (in that case resulting in death) to be made out, the accused's behaviour must have involved 'such a great falling short of the standard of care which a reasonable [person] would have exercised and which involves such a high degree of risk that death or grievous bodily harm would follow the doing of the act [that it merits] criminal punishment'.[91] Section 5.5 of the Criminal Code emulates this definition.

One of the more notorious recent Australian examples of serious corporate negligence, notorious largely due to the extent of litigation and financial loss suffered by the offending company as a result, was the Esso Longford Gas Plant affair. On 25 September 1998, a gas leak and subsequent explosion and inferno at Esso Australia Pty Ltd owned and operated Longford gas plant caused the death of two of the company's employees and injured, in some cases by causing severe scarification, a further eight. In addition, gas supplies to most of Victoria were cut off causing substantial business losses. At the time (and to date) there was no corporate manslaughter offences in Victorian criminal law under which the company could be prosecuted,[92] and instead they were found guilty by the Supreme Court of Victoria of 11 criminal breaches of the *Occupational Health and Safety Act 1985* (Vic), as well as being deemed solely responsible for the event pursuant to a Royal Commission and coronial inquiry.[93] Esso's

86 *Criminal Code Act 1995* (Cth) s 11.2.
87 Bronitt and McSherry, above n 74, 412.
88 Ibid 378.
89 *Prosecutor v Furundzija*, Case No IT-95-17/1-T, Judgement 10 December 1998 (ICTY) [249], extract taken from Andrew Clapham and Scott Jerbi, *Categories of Corporate Complicity in Human Rights Abuses* Background Paper (2001) <http://209.238.219.111/Clapham-Jerbi-paper.htm> at 24 November 2004.
90 [1977] VR 430.
91 *Nydam v The Queen* [1977] VR 430 at 445, cited in Bronitt and McSherry, above n 74, 185.
92 The Bracks government in Victoria did subsequently introduce the *Crimes (Workplace Deaths and Serious Injuries) Bill 2001* (Vic) to the Victorian Parliament in November 2001. The Bill created new offences of corporate manslaughter and negligently causing serious injury by a body corporate, but was rejected in the Upper House in May 2002.
93 Katie Lapthorne, 'Esso at Fault over Fatal Blast', *Herald Sun* (Melbourne), 16 November 2002, 6; *DPP v Esso Australia Pty Ltd* (2001) 124 A Crim R 200.

responsibility was held to lie in its failure to adequately train staff in safety procedures and to conduct hazard audits that would have averted the risk. In sentencing the company, Cummins J stated that the cause and consequences of the explosion were 'grievous, foreseeable and avoidable'.[94]

Sub-section 12.3(1) of the Criminal Code provides that 'if intention, knowledge or recklessness is a fault element to an offence, that fault element must be attributed to the body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence'. Sub-section 12.3(2) then goes on to set out the means by which such authority or permission can be established, which are:

- The conduct was performed or tolerated (authorised or permitted) by the board of directors;
- The conduct was performed or tolerated (authorised or permitted) by a high managerial agent, although it is a defence when the body corporate proves that it exercised due diligence to prevent such conduct, authorisation or permission;
- A corporate culture (defined as an attitude, policy, rule, course of conduct or practice existing within all or the relevant part of the body corporate) existed that directed, encouraged, tolerated or led to non-compliance; or
- The body corporate failed to create and maintain a corporate culture that required compliance.

Section 12.4 of the Criminal Code sets out how a body corporate can be shown to be negligent, for such offences where negligence is a sufficient fault element.

Certainly, the most remarkable element of Part 2.5 is the concept of criminal liability based upon a corporate culture. In cases of militarised commerce, where it may be difficult to identify or evidence a decision of the parent company's board of directors giving rise to the abuses, evidence of a pervasive corporate culture tolerating or encouraging such conduct will be sufficient. For example, in the Freeport case, the company's act of building barracks for the military immediately following criminal violence being used against local peoples may be evidence of a corporate culture implicitly promoting or encouraging such abuses. This conduct might also be evidence of complicity.

D The Offences

1 Genocide

Sections 268.3 to 268.7 of the Criminal Code create five offences of genocide: genocide by killing; by causing serious bodily or mental harm; by deliberately inflicting conditions of life calculated to bring about physical destruction; by

94 *DPP v Esso Australia Pty Ltd* (2001) 124 A Crim R 200.

imposing measures intended to prevent births; and by forcibly transferring children. Elements common to all five offences are that the offences must be committed against a 'person or persons belong[ing] to a particular national, ethnical, racial or religious group' and the perpetrator must intend 'to destroy, in whole or in part, that national, ethnical, racial or religious group as such'. This definition largely reflects the definition of 'Genocide' found in Article 6 of the Rome Statute. The punishment for each of the offences is imprisonment for life.

To make out genocide, the intention to destroy the group in whole or part must have been formed before the alleged genocidal acts occurred.[95] The offence is against that group as a whole, not the individual.[96] Notwithstanding the intended extent and severity of the harm which is necessary for an act or omission[97] to be characterised as genocide, it is not inconceivable that companies might be responsible for, or complicit in, the conduct of such an offence. In the Freeport example, Amungme leader Tom Beanal brought an action against Freeport under United States legislation, the *Alien Tort Claims Act 1789*[98] ('ATCA'), alleging that the company committed cultural genocide by egregious human rights violations and eco-terrorism that 'destroyed the rights and culture of the Amungme and other Indigenous tribal people'.[99] This included their forced displacement and relocation to areas away from the lands associated with their cultural heritage. The US Court of Appeal ultimately did not recognise cultural genocide as an offence for which ATCA liability lies.[100] Likewise, it is unlikely that this would come within the Australian offences of genocide that, like their international counterparts, requires an intention to bring about the 'destruction' of part or whole of a group. In the case of genocide by the infliction of certain conditions of life, the 'physical destruction' of part or whole of the group must have been intended.[101]

Another example are allegations against Canadian company Talisman Energy that it assisted in the Sudanese government's military assaults against non-Muslim minorities in southern Sudan in order to help the Government clear the land for oil exploration, acts conducted with genocidal intent.[102] In a civil action being taken by community representatives in the US, it is being claimed that the company collaborated with the State 'in "ethnically cleansing" civilian

95 Kriangsak Kittichaisaree, *International Criminal Law* (2001) 73.
96 Ibid 69.
97 The actus reus of genocide can be an omission, see ibid 71.
98 28 USC § 1350.
99 Project UnderGround, *Lawsuit In New Orleans: Beanal v Freeport-McMoran, Inc and Freeport-McMoran Copper and Gold Inc Pleadings* <http://www.moles.org/ProjectUnderground/motherlode/freeport/lawsuit.html> at 12 November 2004.
100 *Beanal v Freeport-McMoran, Inc*, 197 F 3d 161, 168 (5th Cir, 1999); See also Antonio Cassese, *International Criminal Law* (2003) 96-7, who notes that cultural genocide (the destruction of the language and culture of a group) was specifically excluded from the definition of genocide contained in the Genocide Convention, and was likewise reflected in the Rome Statute and Criminal Code.
101 *Criminal Code Act 1995* (Cth) s 268.8(1)(d).
102 EarthRight International, *Court Proceeds with Talisman Suit: Court Refuses to Dismiss Suit Alleging Talisman Oil Aided Genocide in Sudan*, EarthRights International (24 March 2003) <http://www.earthrights.org/news/talismanmarch2003.html> at 30 November 2004.

populations surrounding oil concessions located in southern Sudan in order to facilitate oil exploration and extraction activities'.[103] Particularly, it is claimed that this has been directed against non-Muslim, African residents in southern Sudan and has 'entailed extrajudicial killings, forced displacement, military attacks on civilian targets, confiscation and destruction of property, kidnappings, rape, and the enslavement of civilians'.[104] As in the Freeport scenario, the community claims that the violence in the region is intricately connected with battles to control the oil resource and with the militarisation of security over the resources, and involves the cooperation of the company.[105]

2 Crimes Against Humanity

Sections 268.8 to 268.23 create 16 'crimes against humanity' offences, including murder, deportation or forcible transfer of population, imprisonment or other severe deprivation of physical liberty, torture, and enforced disappearances of persons. Common to all of these offences is they must have been committed 'intentionally or knowingly as part of a widespread or systematic attack directed against a civilian population'. An attack against a civilian population is in turn defined as 'a course of conduct involving the multiple commission of any one or more proscribed inhumane acts against any civilian population pursuant to, or in furtherance of, a state or organisational policy to engage in that course of action'.[106] Accordingly, an isolated act will not amount to a crime against humanity; there must be a link between the acts of the perpetrator and a State or organisational policy to commit the widespread or systematic attack on civilians, and the perpetrator must have intended for his or her acts to contribute to such attack.[107] At an international level, an attack must be widespread and systematic in the sense that it is not just a random act of violence.[108]

Recalling again the propensity for TNCs to find themselves operating in regions subject to internal strife or civil war, and relying, in a symbiotic fashion, upon the military forces of a government to maintain security and control over the region, the potential for TNCs to be embroiled in multiple human rights violations in a context involving a widespread or systematic attack on civilians is apparent. Again, considering the Freeport example, both private and State security forces have been documented as committing torture, deprivation of liberty, enforced disappearances and summary executions. The evidence arising from the independent human rights reports suggests that these have been conducted in a co-ordinated fashion against family members and potential civilian supporters of pro-Papuan independence leaders, as well as local members of particular tribal groups. If it could be shown that the acts were committed pursuant to a policy to discipline and suppress pro-independence supporters, or even to suppress civil

103 *Presbyterian Church of Sudan v Talisman Energy Inc* 244 F Supp 2d 289, 296 (NY, 2003).
104 Ibid.
105 Ibid.
106 *Criminal Code Act 1995* (Cth) s 4 and Schedule. This definition reflects the definition of 'crimes against humanity' found in Article 7 of the Rome Statute.
107 Triggs, above n 63, 523.
108 Kittichaisaree, above n 95, 96.

disobedience that might threaten Freeport security, then the requisite context to transform those acts into crimes against humanity might exist.

3 War Crimes

Sections 268.24 to 268.101 create more than 70 war crimes offences that apply variably to international and internal armed conflicts. These definitions broadly reflect the definitions of 'war crimes' found in Article 8 of the Rome Statute. It is beyond the scope of this paper to review the details of those crimes, due to the differences between those offences. Suffice it to say that given the offences proscribe war crimes conducted during internal armed conflict, the possibility of corporations being implicated is increased, noting again the example of Talisman in the current conflict in southern Sudan.

E Desirability of Domestic Criminal Laws

The Australian genocide, crimes against humanity and war crimes offences depart in some important respects from their international counterparts.[109] This applies not least in the extension of the offences to include corporate offenders. Triggs considers that to avoid difficulties that might arise where Australian jurisprudence differs from international rules and norms, it is to be expected that Australia will try to harmonise its approach with international jurisprudence where possible.[110] However, it may be necessary for Australian courts to enter into uncharted waters, where limited international jurisprudence exists to provide guidance. In the case of extending these offences to apply to corporations, the Courts have available to them US ATCA jurisprudence involving the application of the laws of nations (equivalent to customary international law)[111] to corporations. The degree to which this jurisprudence would be instructive is limited given these are decisions applying civil, and not criminal, principles. Australia is accordingly in a unique position to take a leading role in developing jurisprudence. Whether we will do so depends upon political will regarding the decision to prosecute.

The benefit of criminal prosecution for gross breaches of human rights includes the stigma attaching to a finding of criminal guilt. The standard of proof for criminal offences is beyond reasonable doubt, which is a significantly higher burden than required at civil law (the balance of probabilities). This makes criminal prosecution more difficult, however, criminal sanctions are widely considered to reflect more adequately the severity of the crime. At this stage only the most severe human rights abuses come within the scope of the division 268 offences.

109 For example, Triggs points out that the *Criminal Code* genocide offences depart in important respects from the offences as they will be applied by the ICC. While the *Rome Statute* simply lists the offences, the *Elements of Crimes* is a complementary text that sets out the elements of those offences. The *Elements of Crimes* has been adopted by the requisite two-thirds majority of members of the Assembly of States Parties. In particular, Article 6 of the *Elements of Crimes* provides that for an act or omission to constitute genocide, the conduct must have taken place in the context of a 'manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction'. This requirement is omitted from the *Criminal Code* definition, which is likely to make satisfaction of these offences easier under Australian law: Triggs, above n 63, 522-3.

110 Ibid 516.

111 Sarah Joseph, *Corporations and Transnational Human Rights Litigation* (2004) 22-5.

IV CIVIL LIABILITY

Human rights abuses can also be ordinary torts. A tort is a civil wrong that involves a breach of a duty of care imposed by the common law upon one party in relation to another.[112] Tort law is common to all common law jurisdictions such as Australia, the UK, US and Canada. However, the general principles vary between those jurisdictions. Ordinary tort law has been used with some regularity in transnational human rights litigation against corporations in the US and, to a lesser extent in the UK and Canada. Australia, comparatively, has not seen much litigation of this kind. An exception to this was an action in tort brought in Victoria against Australian company BHP for environmental damage in Papua New Guinea, allegedly caused by the company's mining operations (the 'Ok Tedi litigation').[113]

A *Jurisdiction*

There are a number of ways in which an Australian court may have jurisdiction over a company for wrongs committed outside Australia. These revolve around evidence of a nexus between the wrong and the jurisdiction. One means of establishing a sufficient nexus is where a plaintiff suffered some of the damage arising as a result of the wrong in Australia. In the case of *Regie Nationale des Usines Renault SA v Zhang*,[114] notwithstanding that the defendant company was incorporated in France and had no significant connection with Australia, it was sufficient that the plaintiff had incurred medical costs in New South Wales in order to invoke New South Wales Supreme Court jurisdiction.[115]

Another means of establishing nexus is where a corporation conducts business in the jurisdiction.[116] Clearly, a TNC incorporated in Australia would meet this requirement, however it has been held that a sufficient nexus is shown where agents act on behalf of the company within Australian territory. In the case of Freeport, the existence of a company base in the Northern Territory would therefore be sufficient to bring the company within that Territory's common law jurisdiction. Rules of court also allow for a writ or claim to be served outside the jurisdiction if required.

B Forum Non Conveniens

Australian courts have the inherent power to control their own proceedings, which includes the discretion to order a stay of proceedings in certain circumstances.[119] Most pertinent in cases of transnational human rights litigation is the doctrine of *forum non conveniens*, which under Australian law provides that

112 Peter E Nygh and Peter Butt (eds), *Butterworths Guides: Legal Terms* (1998) 104.
113 *Dagi v BHP* [1995] 1 VR 428. The matter settled.
114 (2002) 210 CLR 491 ('*Renault*').
115 Joseph, above n 111, 123.
116 Ibid.
117 *BHP v Oil Basins Ltd* [1985] VR 725.
118 Joseph, above n 111, 123.
119 Peter Tillman and John B Dorter, *Laws of Australia Online* 13.7, Ch 3, Pt C, Div 5, 40.

a claim can be dismissed if the relevant Australian jurisdiction is a 'clearly inappropriate forum' to hear the dispute. This is the settled test in Australia enunciated in the High Court decision *Oceanic Sun Line v Fay*[120] and confirmed in *Voth v Manildra Flour Mills*.[121]

The modern doctrine of *forum non conveniens* grew out of a traditional rule that provided that a court could not refuse jurisdiction unless to do so would cause an injustice either because it would be oppressive, vexatious or an abuse of process in some way.[122] In line with this traditional rule, the most recent restatement of the test was given by the majority in the High Court decision of *Renault*[123], which stated that *forum non conveniens* would only be granted where a trial would 'be productive of injustice, ... would be oppressive in the sense of seriously and unfairly burdensome, prejudicial or damaging, or vexatious, in the sense of productive of serious and unjustified trouble and harassment'.[124]

The Australian test of *forum non conveniens* makes it more difficult for corporations to avoid the Australian jurisdiction than its counterparts in other common law jurisdictions. Unlike the Australian approach, in the US, UK and Canada the inquiry is framed in terms of whether there is available to the plaintiff a more appropriate alternative forum where the matter should be heard.[125] This test is more easily satisfied by the defendant than its Australian counterpart. However, recent jurisprudence in the UK and Canada indicate that courts are increasingly willing to consider questions of substantive justice in deciding the issue of forum.[126]

However, the UK position has been significantly altered by the recent decision of the European Court of Justice ('ECJ') in *Owusu v Jackson*,[127] the effect of which will largely render *forum non conveniens* inapplicable in international tort matters in UK courts. That decision was concerned with the Brussels Convention[128] to which the UK is a party. Article 2 of the Brussels Convention provides that persons domiciled in a contracting State shall be sued in the courts of that State. What this means is that defendants shall be sued in their home State. This is a

120 (1988) 165 CLR 197.
121 (1990) 171 CLR 538.
122 Peter Prince, 'Bhopal, Bougainville and OK Tedi: Why Australia's *Forum Non Conveniens* Approach is Better' (1998) 47 *International and Comparative Law Quarterly* 573, 574.
123 (2002) 210 CLR 491.
124 (2002) 210 CLR 491, 521 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).
125 *Piper Aircraft Co v Reyno* 454 US 235 (1981); *Spiliada Maritime Corp v Cansulex* [1987] AC 46; *Amchem Products Inc v British Colombia* (Worker's Compensation Board), (1993) 102 DLR (4th) 96.
126 For the UK see *Lubbe v Cape* [2000] 4 All ER 268; for Canada see, eg, *Recherches Wilson v Servier Canada* (2000) 50 OR (3d) 219.
127 (C-281/02) (Unreported, Grand Chamber, Jann AP, Timmermans, Rosas, Gulmann, Puissochet, Schintgen, Colneric, von Bahr and Cunha Rodrigues JJ, 1 March 2005).
128 *Convention for the Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*, 27 September 1968, OJ 1978 L304, 36, as amended by the *Convention for the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland*, 9 October 1978, OJ 1978 L 304, 1 (amended version, 77); by the Convention for the Accession of the Hellenic Republic, 25 October 1982 OJ 1982 L 388, 1; and by the *Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic*, 26 May 1989, OJ 1989 L285, 1 ('Brussels Convention').

mandatory, non-derogable principle.[129] In this case, the Court was concerned with an action by an English national against one English defendant and a number of Jamaican defendants for a tort that occurred in Jamaica. Jamaica is not a contracting party to the Brussels Convention and so the defendants sought to argue that the Brussels Convention did not apply and hence *forum non conveniens* was available. The ECJ held that Article 2 of the Brussels Convention applies regardless of whether or not a case involves or has connecting factors with another contracting State and 'precludes a court of a Contracting State from declining the jurisdiction conferred on it by Article 2 of that convention on the ground that a court of a non-Contracting State would be a more appropriate forum for the trial of the action'.[130]

C *Choice of Law*

Once jurisdiction has been confirmed, an equally vexed question is which law applies as the basis against which the tortious conduct is measured, that of the forum hearing the action, or that where the tort occurred. After a period of uncertainty as to the appropriate choice of law principle in cases where a tort was committed outside of Australia, the matter was settled in the case of *Renault*.[131] In that case, the High Court brought the common law position on the question of choice of law in international tort cases into conformity with its position on interstate tort matters (ie torts committed in one Australian state and heard in another).[132] The result in *Renault* is that the applicable substantive law for international torts is the law of the place where the tort was committed (the *lex loci delicti* rule).[133] For this reason, if a tort occurred in a province of Indonesia, Indonesian substantive law would be applied in deciding the claim, and possibly also in awarding damages, although the issue of the applicable law in terms of damages was not resolved in *Renault*.[134]

Prior to the judgment in *Renault*, there had been some expectation or possibility that a 'flexible exception' may be available in some instances. The flexible exception is an expression that contemplated situations where in the interest of justice the rule on choice of law may be relaxed where a claim could not satisfy the *lex loci delicti* rule.[135] This possibility was explicitly ruled out by the Court in *Renault*.[136]

129 See, eg, *Owusu v Jackson* (C-281/02) (Unreported, Grand Chamber, Jann AP, Timmermans, Rosas, Gulmann, Puissochet, Schintgen, Colneric, von Bahr and Cunha Rodrigues JJ, 1 March 2005 [37]).

130 Ibid [46].

131 (2002) 210 CLR 491.

132 For a discussion of the case, see, eg, Ross Anderson, 'International Torts in the High Court of Australia' (2002) 10 *Torts Law Journal* 132; Matthew Duckworth, 'Regie Nationale des Usines Renault SA v Zhang: Certainty or Justice? Bringing Australian Choice of Law Rules for International Torts into the Modern Era (2002) 24 *Sydney Law Review* 569-83; Stephen Bouwhuis, 'Zhang: Suing Foreign Defendants for Acts Committed in Foreign Countries' (2002) 27(5) *Alternative Law Journal* 247-8.

133 *Renault* (2002) 210 CLR 491, 520 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ), 534-5 (Kirby J).

134 Ibid.

135 Anderson, above n 132, 2.

136 *Renault* (2002) 210 CLR 491, 520 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ), 534-5 (Kirby J). Kirby J did note some reservation in reaching that conclusion.

In contrast to Australia's (relatively) plaintiff friendly *forum non conveniens* approach, the inflexibility of the Australian position on choice of law can be considered against the Canadian common law approach, the current UK statutory position, and the approach in most US jurisdictions on the issue of choice of law. All largely favour the *lex loci delicti* rule but allow a degree of flexibility where (in Canada and the US) the application of that rule would cause injustice or (in the UK) where it is 'substantially more appropriate' for the law of another forum to be applied.[137] Notwithstanding, in cases where the wrongs are egregious, as is too often the case when we are considering conduct taking place in the context of militarised commerce, it seems less likely that the issue of choice of law will bar a claim on the basis that it is not a wrong in the place where it occurred. Given the severity of such direct human rights violations as murder, forcible disappearances and torture, it is likely for the conduct to be universally condemned, and a breach of local law, even if not enforced.

D *Conclusions On Civil Liability*

A common complaint against victims bringing actions against TNCs in their home State as opposed to the host State where the tort physically occurred is that it is somehow morally and legally repugnant to allow a plaintiff to forum-shop. However, the 'clearly inconvenient forum' test is sufficient to weed out actions without sufficient link to the Australian jurisdiction. Otherwise, it seems wholly reasonable that a victim would choose the jurisdiction most favourable to present her claim.[138] It certainly seems to tip the scales in favour of defendant corporations to deny plaintiffs such a right, given that largely TNCs enjoy the practical capacity to 'forum-shop' such countries as best suit them for their operations. This is certainly the case where the resource exploited in the host country is, for example, labour. In the extractive industries, TNCs are practically limited in terms of the location of their operations by the geographic location of the resources. However, the potential influence of TNCs in domestic policy (see comments under Part II(D)) provides further compelling argument from the perspective of justice for flexibility in terms of forum.

Notwithstanding that Australian tort law is more liberal in the important respect of *forum non conveniens* than its US, UK and Canadian counterparts, it is relatively underutilised as a means of transnational corporate litigation. Lack of litigation is therefore puzzling, but this may be related to the cost risks associated with litigation in Australia, the smaller compensatory outcomes relative to the US, the lack of suitable contingency fee arrangements in Australia compared to the US, and a general lack of litigious zeal and culture among Australian lawyers.

137 For a summary of the position in the UK, Canada and US regarding choice of law in international tort cases, see Duckworth, above n 132, 580-2.

138 For a discussion, see Prince, above n 122, 581-4.

V CONCLUSION

Parent company Freeport Mc-Moran, through its decisions guiding the operations of its subsidiary PT Freeport Indonesia, supports and depends upon State military, police and private mercenaries to maintain security in its concession area. The result has been the excessive policing of an otherwise remote and regional part of Indonesia. Putting aside concerns regarding the company's appropriation of the lands and means of subsistence of the Indigenous communities, and the serious environmental damage allegedly being caused by the company, throughout the history of Freeport's operations in the region there have been many allegations of serious human rights abuses by those security personnel. These allegations border on crimes against humanity and genocide, such is their context and severity. The Freeport example is unfortunately not unique, as there are ever growing reports surfacing of like human rights violations arising from circumstances of militarised commerce.

Rio Tinto, with a 13% interest in Freeport and a 40% interest in the Grasberg extension, has likewise benefited, supported and relied upon the heavy military presence in the mine concession region and the resultant suppression of protest that this has brought. Largely, the arguments against Rio Tinto are the same as those against its partner, particularly in relation to the Grasberg mines where its legal and financial interest, and hence authority, is most significant. In the case of Grasberg, actual knowledge of human rights violations and a failure to intervene may be sufficient to ground liability against Rio Tinto, notwithstanding the company's apparent hands off approach to its management.

In terms of the protection of human rights against corporate abuses, it is the author's view that it is desirable that means of enforcing the rights of victims be strengthened in any respect possible. There continue to be significant obstacles for nationals of developing countries to obtain redress in their own countries for wrongs inflicted against them by TNCs, particularly in cases of militarised commerce. In addition, many commentators argue that it is the pressure of international finance and trade agencies that bring about deregulation of economies prior to foreign investment or, whose activities inflame conflict. As both a cause of circumstances giving rise to human rights abuses overseas and a beneficiary of their activities, there is surely a moral, if not legal, imperative on the part of the home State to regulate the actions of their nationals and promote human rights universally.

This article has addressed some of the means of bringing corporations to account for their conduct in countries other than their place of incorporation under Australian law. The utilisation of such means would contribute to bringing relief to victims of serious harms and recognising the criminality of such conduct, as opposed to allowing effective impunity to corporations where their conduct occurs in weak, corrupt or failed States. Impunity suggests that corporate human rights abuses are tolerable provided the victims are not 'us'. A failure to increase and utilise 'hard law' measures to bring corporations to account belies the moral obligation incumbent upon developed nations to do so.