DETERRING "MILITARIZED COMMERCE": THE PROSPECT OF LIABILITY FOR "PRIVATIZED" HUMAN RIGHTS ABUSES

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A growing number of companies are retaining, or relying on, the services of local militaries to provide protection for their overseas operations. Alternatively, firms have developed relationships with what amount to private, incorporated armies. In some instances, these governmental and non-governmental units have notorious human rights records. Accordingly, the involvement of companies with rights-violating security forces prompts new and interesting questions concerning company liability for the actions of these troops. This article discusses whether Canadian companies engaging in this form of "militarized commerce" expose themselves to criminal prosecution or civil litigation in Canada for abuses committed by security forces overseas. The article concludes that while there are significant obstacles in the path of successful civil litigation and criminal prosecutions, such actions are entirely possible and that Canadian businesses operating internationally should not assume that their international activities are immune to legal scrutiny in this country.

Un nombre croissant de sociétés retiennent les services des militaires locaux ou s'en remettent à eux pour la protection de leurs opérations à l'étranger. Dans l'alternative, les firmes développent des liens avec ni plus ni moins des armées privées incorporées. Dans certains cas, ces entités gouvernementales et non gouvernementales sont notoires pour leurs infractions en matière des droits de la personne. Ce concours entre les sociétés et les forces de sécurité qui agissent en violation des droits de la personne soulève donc des questions nouvelles intéressantes concernant la responsabilité des sociétés pour l'action de ces troupes. Le présent article examine si les sociétés canadiennes qui participent à cette forme de « commerce militarisé » s'exposent à des poursuites pénales ou civiles au Canada pour les abus commis à l'étranger par les forces de sécurité. L'auteur arrive à la conclusion que s'il y a des obstacles importants à la réussite dans une action civile ou une poursuite pénale, ces procédures sont tout à fait possibles. Les entreprises canadiennes opérant à l'échelle internationale ne devraient donc pas présumer que leurs activités internationales sont à l'abri d'un examen judiciaire dans ce pays.

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I. INTRODUCTION

In March 1998, Alan Bell, a veteran of the British Special Forces and president of Globe Risk Holdings Inc., told members of the Prospectors and Developers Association of Canada that mining companies operating in the developing world should be concerned with security issues. Bell noted that kidnappings, civil unrest, conflict and violence directed at foreigners are commonplace in much of Latin America, Africa and Asia. He also observed that mining companies are increasingly turning to specialized international security firms to protect their investments and urged companies to perform "security audits" and develop comprehensive security contingency plans.[1]

As Bell suggests, and as recent attacks on Canadian mining company employees in Angola[2] and Colombia[3] show, operating a resource company today means working in some of the world's most dangerous hot spots. In many instances, the countries in which companies function are fissured by civil wars, with firms sometimes falling prey to one faction or another. In other instances, the company's operations themselves generate opposition, prompting unrest and, on occasion, violent resistance. Some companies have responded to these dangers not simply by performing "security audits" and developing contingency plans as Bell proposes, but by tapping directly into the military expertise and firepower of both state and private armies.

In this last regard, during recent years, a growing number of companies have retained, or relied on, the services of units of local militaries to provide protection for their operations. Alternatively, firms have developed relationships with what amount to private, incorporated armies. In some instances, these governmental and non-governmental units have notorious human rights records. Accordingly, the involvement of companies with rights-violating security forces prompts new and interesting questions concerning the degree to which companies are liable for the actions of these troops. Obviously, the extent of corporate liability in the very jurisdiction where abuses occur depends on both the law of that jurisdiction and the presence of a legal system capable of hearing such complaints. However, in many instances, there may be reason to believe that such a legal system does not exist. Accordingly, the more interesting question is whether, by engaging in this form of "militarized commerce", companies expose themselves to criminal prosecution or civil litigation in their home countries for abuses committed by security forces overseas. While this matter has been addressed, at least in part, in the U.S. literature,[4] it remains an open issue in Canada.

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[1] T. Richardson, "Mining and Exploration Security" *Canadian Mining Journal* 119:4 (August 1998) at 6-7.

[2] K. Damsell, "DiamondWorks Mine in Angola Attacked; 5 Dead" *National Post* (10 November 1998) C1.

[3] C. Cattaneo, "Soldiers Available in Colombia" *National Post* (3 June 1999) C5. See also Reuters-AP, "Several Canadians Among Kidnapped Oil Workers, Tourists" *Canadian Press Wire Service* (12 September 1999), online: QL (CPN), describing the kidnapping of Canadian oil workers in Ecuador, probably by Colombian rebels.

[4] See B. J. Kieserman, "Profits and Principles: Promoting Multinational Corporate Responsibility by Amending the Alien Tort Claims Act" (1999) 48 Cath. U. L. Rev. 881; D. Everett, "New Concern for Transnational Corporations: Potential Liability for Tortious Acts Committed By Foreign Partners" (1998) 35 San Diego L. Rev. 1123; K. L. Boyd, "The Inconvenience of Victims: Abolishing Forum Non Conveniens in U.S. Human Rights Litigation" (1998) 39 Va. J. Int'l L. 41; E. Rice, "Doe v. Unocal Corporation: Corporate Liability for

This article attempts to correct this imbalance by examining the question from a Canadian perspective. To this end, Part II describes the emergence of "militarized commerce" as a form of doing business by both Canadian and other Western businesses in the post-Cold War world. Part III focuses on whether Canadian companies engaging in militarized commerce can be held criminally liable in Canadian courts for the overseas wrongs committed by security forces. Part IV discusses the prospect of companies being sued for such involvement in civil court. The article concludes that while there are significant obstacles in the path of successful civil litigation and criminal prosecutions, such actions are entirely possible and that Canadian businesses operating internationally should not assume that their international activities are immune to legal scrutiny in this country.

II. THE NEW WORLD ORDER AND MILITARIZED COMMERCE

In June 1997, the Pentagon held a conference on the "privatization of security" in Sub-Saharan Africa. On display at the symposium were the members of a new growth industry, that of "private military companies" (PMCs). Also at the meeting were assorted non-governmental and inter-governmental agencies, the military attachés of Angola, Uganda, Guinea-Conakry and Zambia, and representatives of major oil firms, such as Texaco and Exxon, and mining companies, such as Sierra Rutile.[5]

The presence of resource companies at this meeting likely reflects new and emerging corporate concerns with security. In the 1990s, the collapse of the Eastern Bloc and the liberalization of investment rules in Eastern Europe and many nations in Africa have induced a veritable boom in overseas oil and mining exploration and production. For example, between 1992 and 1995, the number of foreign properties owned by Canadian mining firms grew by roughly 20% and by 1997, almost a third of exploration and production concessions held by Canadian companies were outside Canada.[6] While many of these operations are in relatively stable nations with a reliable political environment, "a growing number are in less stable regions where justice is dished out at the whim of dictators, corporate law is a work in progress and corruption is rampant."[7] Not surprisingly, "[c]ompanies operating in such locales can reduce the financial exposure by insuring their operations and hiring security firms to safeguard their property."[8] In fact, reliance on "well-armed" security firms may be a condition

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International Human Rights Violations" (1998) 33 U.S.F. L. Rev. 153; L. J. Dhooge, "A Close Shave in Burma: Unocal Corporation and Private Enterprise Liability for International Human Rights Violations" (1998) 24 N.C. J. Int'l L. & Com. Reg. 1; A. Khokhryakova, "*Beanal v. Freeport-Mcmoran, Inc.*: Liability of a Private Actor for an International Environmental Tort Under The Alien Tort Claims Act" (1998) 9 Colo. J. Int'l Envtl. L. & Pol'y 463.

[5] F. Misser & A. Versi, "Soldier of Fortune" *African Business* 227 (December 1997) 8.

[6] K. Howlett & M. Drohan, "Canadian Miners Living Dangerously" *The Globe and Mail* (26 July 1997) B1.

[7] *Ibid.*

[8] *Ibid.* See also discussion in M. Drohan & K. Howlett, "Vancouver Mining Firm Linked to Mercenaries" *Canadian Press Wire Service* (20 February 1997), online: QL (CPN). This new concern with security is also true for oil companies, see D. Knott, "BP Molds Security Strategy to Fit the Country" *Oil & Gas Journal* (9 June 1997) 31.

precedent to obtaining insurance for operations in dangerous countries.[9]

As a consequence, the 1997 Pentagon meeting reflects the emergence of a new phenomenon: that of "militarized commerce". For the purposes of this paper, "militarized commerce" is the acquisition by companies of military services from military or para-military forces as security for firm operations and includes assistance granted these troops in return for protection. In practice, these forces are drawn from two different sources: national militaries of the country in which the firm operates; or, incorporated mercenary armies or "private military companies" (PMCs) as they prefer to be known. As the case studies that follow suggest, in the last several years, there have been a number of notable examples of militarized commerce, many involving serious allegations of human rights violations.

A. *Oil in South America*

1. *Colombia*

Colombia has the worst human rights record in the Western hemisphere. Along with rebel guerilla groups and their paramilitary opponents, the Colombian military has been closely linked to serious human rights abuses. In its 1999 annual report, Human Rights Watch reported that

> [t]he Colombian army continued to commit serious violations with little apparent will to investigate or punish those responsible. As in the past, at the root of these abuses was the Colombian army's consistent and pervasive failure to enforce human rights standards and distinguish civilians from combatants. ...where paramilitary forces were weak, the army was directly implicated in the killing of civilians and prisoners taken hors de combat, as well as torture and death threats. [Conversely,] [i]n the rest of the country, where paramilitaries had developed a pronounced presence over the past decade, the army still failed to move against them and tolerated their activity, including egregious violations of international humanitarian law; provided some paramilitary groups with intelligence and logistical support to carry out operations; and actively promoted and coordinated joint maneuvers with them."[10]

For its part, Amnesty International indicated in its *1998 Annual Report* that in 1997, "[h]undreds of people were killed by the security forces and paramilitary groups operating with their support or acquiescence."[11]

Meanwhile, foreign resource companies have both invested in industries where trade union leaders have been massacred by paramilitary groups[12] and have themselves

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[9] J. Cotter, "Kidnap, Ransom Insurance Common for Canadian Businesses Abroad" *Canadian Press Wire Service* (13 January 1999), online: QL (CPN).

[10] Human Rights Watch, *World Report 1999*, online: Human Rights Watch <http://www.hrw.org/hrw/worldreport99/americas/colombia.html> (date accessed: 2 March 2000).

[11] Amnesty International, *Annual Report 1998*, online: Amnesty International <http://www.amnesty.org/ailib/aireport/ar98/amr23.htm> (date accessed: 2 March 2000).

[12] B. Cheadle, "Colombia Questioned as Place for Canadian Investors" *Canadian Press Wire Service* (21 October 1997), online: QL (CPN).

become a regular target of attack for left-wing guerilla groups.[13] In 1995, despite the Colombian army's long history of human rights abuses, oil giant British Petroleum (BP) concluded a US$5.4 million plus, 3-year agreement with the Colombian Defence Ministry to fashion a battalion of 150 officers and 500 soldiers to protect the company's operations.[14] Another major oil company, Occidental Petroleum, also concluded a similar agreement, involving a "one-year disbursal of in-kind and cash payments [to the military] totaling some $2 million. In-kind assistance included vehicles, health services and instruments, installations, troop transport, and helicopter flights. Cash payments are earmarked for security equipment, administration, communication, personal services, welfare upkeep, and a 'network of informants'."[15] Further, oil companies are required to pay the Colombian government a "war tax" of US $1.25 per barrel for protection.[16]

According to Human Rights Watch,

> [i]n Arauca, where Occidental Petroleum's Colombian subsidiary is based, the army unit that would become the company's partner in security already had a reputation for serious human rights abuses, including the massacre of ten civilians in Puerto Lleras in 1994. [Meanwhile,] [i]n Casanare, where British Petroleum operates, the army was alleged to have killed at least two and threatened and harassed others in the aftermath of protests against the company in 1995. [Despite this context,] neither company [had] added any component of their security agreements with the Defense Ministry, worth millions of dollars annually, insisting on compliance with human rights.[17]

Subsequently, in October 1996, Member of the European Parliament Richard Howitt released portions of a Colombian government study that reportedly connected BP with soldiers implicated in kidnappings, torture and murder.[18] Howitt indicated that "BP also passed video footage of protesters to the army. 'These people were then murdered, disappeared or were arrested'."[19] He also claimed that strikes against BP

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[13] Amnesty International, News Release AMR 23/44/97, "Colombia: British Petroleum Risks Fuelling Human Rights Crisis Through Military Training" (30 June 1997).

[14] D. J. Schemo, "Oil Companies Buying an Army to Ward Off Rebels in Colombia" *The New York Times* (22 August 1996) A1; "BP at War" *The Economist* 344:8026 (19 July 1997) 32. The precise figures involved appear to be at issue. See C. Godsmark, "BP Denies Human Rights Abuses" *The Independent* (6 November 1996) at 21: "BP pays $8.6m in taxes and lodging for military guards, who are intended to prevent attacks on its oil installations from left-wing guerrilla groups."

[15] Human Rights Watch, "Colombia: Human Rights Concerns Raised by the Security Arrangements of Transnational Oil Companies" (April 1998), online: Human Rights Watch <http://www.hrw.org/advocacy/corporations/colombia/Oilpat.htm> (date accessed: 2 March 2000).

[16] "BP at War", *supra* note 14.

[17] Human Rights Watch, *supra* note 15.

[18] See D. Harrison & M. Jones, "BP Accused of Funding Colombia Death Squads" *The Observer* (20 October 1996) O01; D. Harrison & M. Jones, "Europe Presses Colombia to Investigate BP" *The Observer* (27 October 1996)O20. See also "Colombian Government Report Accuses BP of Involvement in Environmental and Human Rights Abuses" *Drillbits & Tailings* (7 November 1996) at 4, online: Project Underground <http://www.moles.org/Project Underground/drillbits/1101/96110104.html> (last modified: 27 November 1997).

[19] H. Cranford, "BP Denies Claim of Rights Abuses" *The Daily Telegraph (London)* (25 October 1996) 18.

were broken up by Colombian soldiers.[20] While these allegations were denied by BP, they were sufficiently pressing to prompt the European Parliament to pass a resolution calling "on the Colombian President to publish in full his own Human Rights Commission report on the activities of British Petroleum in Casanare and calls on all European oil companies to observe the highest standards of respect for human rights and environmental protection, especially given the conditions of conflict in which they are working."[21]

Then, in June 1997, the UK television program *World in Action* reported that British Petroleum had concluded a contract with private military company Defence Systems Ltd. to provide counter-insurgency training to a Colombian police unit protecting BP's staff and installations in the Casanare region. In a press release dated June 30, 1997, Amnesty International declared that, given the context of human rights abuses in Colombia and the military and police record, "it would be extremely difficult to guarantee that any form of military, security and police training arranged by a private company to protect their own interests is not directly or indirectly contributing to further abuses against the local population."[22]

In April 1998, Human Rights Watch released two open letters to BP and Occidental Petroleum, calling upon the companies to prevent further human rights violations by military forces protecting their interests in Colombia. The group reported that in June 1998, BP restructured its security arrangements by suspending direct provision of funds to the military, instead relying on the state-owned company ECOPETROL as a conduit. Human rights clauses were also reportedly to be included in BP's new contracts.[23] Subsequently, in October 1998, new allegations were made that "DSC [Defence Systems Columbia] ... and a[n] Israeli private security firm, Silver Shadow, had contemplated providing arms and intelligence services for the Colombian military while they were security contractors for the Ocensa pipeline."[24] Denying these claims, BP suspended its security advisor and launched an internal inquiry.[25]

2) *Chile*

On the other side of the continent, in Chile, a consortium of companies led by Canada's Nova Corporation sparked intense controversy in 1996 when villagers protested a pipeline project that would pass through the small Andean town of San Alfonso. Concerned with the environmental impact of the project, villagers in San Alfonso, held a protest in June 1996 that was broken up by the Chilean Special Forces.

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[20] *Ibid.*

[21] EC, *Resolution on the Situation in Colombia* No.B4-1108/96, [1996] O.J.C. 347/1996, online: EUROPARL <http://www.europarl.eu.int/plenary/en/default.htm#adop> (date accessed: 6 March 2000).

[22] Amnesty International, *supra* note 13.

[23] Human Rights Watch, *World Report 1999*, online: Human Rights Watch <http://www.hrw.org/hrw/worldreport99/special/corporations.html> (date accessed: 2 March 2000).

[24] *Ibid.* For a different version of the story, see BBC, "BP Denies Arms Dealing" (17 October 1998), online: BBC <http://news2.thls.bbc.co.uk/hi/english/business/the%5Fcompany%5Ffile/newsid%5F195000/195574.stm> (date accessed: 3 March 2000).

[25] K. Marks, "BP Security Boss Suspended Over Arms Allegations" *The Independent* (17 October 1998) at 9.

According to press reports, "three people were seriously injured, including a teenage girl with head injuries and another with her teeth smashed; scores more were hurt and 17 people were arrested."[26] In the wake of the clash, Nova was accused by environmentalists, villagers and politicians of "sanctioning repression" by engaging in a course of action that led to reliance on "these special police who are trained to repress the population through brutality."[27] Opposition parliamentarians in Canada also suggested that the company was "associated" with the police action.[28] While the company denied that it had called upon the police, it relied on their assistance the following week to provide security for the company's return to the village.[29]

B. *Oil in Burma*

Like Colombia, Burma is a notorious human rights abuser. The country is ruled by a military dictatorship that continues to ignore the results of a democratic election held in 1990 and has committed persistent and egregious human rights abuses against its population. Yet, while Burma has become an international pariah state, it continues to benefit from foreign direct investment.

The most important project is the Yadana pipeline initiative, undertaken by oil companies Total and Unocal and the Burmese and Thai state oil parastatals. The pipeline, once in full operation, is expected to "provide Burma's dictatorship..., with up to US$400 million per year, making it the junta's single largest source of liquid funds."[30] Further, as the pipeline lies in a region of civil unrest and armed opposition to the dictatorship by ethnic groups, it has fuelled a notable increase in the presence of security forces providing protection to the pipeline.[31] In its *1999 World Report*, Human Rights Watch noted that "the Burmese forces providing security for the project [reportedly] continued to commit violations against villagers along the pipeline route, including killings, torture, rape, displacement of entire villages, and forced labor."[32] Meanwhile, the pleadings made in a lawsuit against Unocal brought in the United States allege that

> ...when Unocal and Total entered into the agreement by which SLORC [the name of the military dictatorship, as it was then known] undertook to clear the pipeline route and provide security for the pipeline, [the corporate] defendants knew or should have known that SLORC had a history of human rights abuses violative of customary international law, including the use of forced relocation and forced labor. ...In the course of its actions on behalf of the joint venture, plaintiffs allege SLORC carried out a program of violence

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[26] L. Diebel, "NOVA Accused of Backing Repression; Chilean Pipeline Clash Sparks Criticism" *The Edmonton Journal* (15 June 1996) at A6.

[27] *Ibid.*

[28] *House of Commons Debates* (18 June 1996) at 4026 (Bill Blaikie, NDP), online: <http://www.parl.gc.ca/english/hansard/064_96-06-18/064OQ1E.html> (date accessed: 3 March 2000).

[29] A. Boras, "Police Protect Pipeline Workers" *The Calgary Herald* (18 June 1996) C2.

[30] EarthRights International and Southeast Asian Information Network, "Total Denial: A Report on the Yadana Pipeline Project in Burma" (July 1996), online: Free Burma <http://metalab.unc.edu/freeburma/docs/totaldenial/chapter1.html> (date accessed: 3 March 2000).

[31] *Ibid.*

[32] Human Rights Watch, *supra* note 23.

> and intimidation against area villagers. SLORC soldiers forced farmers to relocate their villages, confiscated property and forced inhabitants to clear forest, level the pipeline route, build headquarters for pipeline employees, prepare military outposts and carry supplies and equipment. ...On information and belief, plaintiffs allege women and girls in the Tenasserim region have been targets of rape and other sexual abuse by SLORC officials, both when left behind after male family members have been taken away to perform forced labor and when they themselves have been subjected to forced labor. According to plaintiffs, there are also reports of rape and gang-rape by SLORC officials guarding women during periods of forced labor.[33]

Unocal and Total have repeatedly denied that human rights abuses have occurred in relation to the pipeline.[34]

C. *Oil in Africa*

1. *Sub-Saharan Africa*

Oil companies operating in Nigeria, particularly Royal Dutch Shell and Chevron, have been subjected to a barrage of criticism over their proximity to human rights abuses in that country. In a 1999 report of investigations undertaken in 1997, Human Rights Watch noted

> ...repeated incidents in which people are brutalized for attempting to raise grievances with the companies, in some cases security forces threatened, beat, and jailed members of community delegations even before they presented their cases. Such abuses often occurred on or adjacent to company property, or in the immediate aftermath of meetings between company officials and individual claimants or community representatives. ...There were also cases in which witnesses reported that company staff directly threatened, or were present when security force officers threatened communities with retaliation if there were disruption to oil production.[35]

The human rights organization reported recently that the Nigerian government has formed a number of "special task forces handling security in the oil producing areas", and, while the human rights situation in the country has improved in recent months,

> ...the response of the security forces to threats to oil production continues to be heavy handed, and in the oil regions human and environmental rights activists report little change. In virtually every community, there have been

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[33] *John Doe I* v. *Unocal Corp.*, 963 F. Supp. 880 at 885, online: <http://diana.law.yale.edu/diana/db/31198-1.html> (date accessed: 3 March 2000).

[34] See online: Unocal <http://www.unocal.com/responsibility/humanrights/hr5.htm> (date accessed: 3 March 2000); and, Total <http://www.total.com/us/cahier/timm.html> (date accessed: 3 March 2000).

[35] Human Rights Watch, "The Price Of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities" (23 February 1999), online: <http://www.hrw.org/hrw/reports/1999/nigeria/Nigew991-01.htm#P190_8265> (date accessed: 3 March 2000).

> occasions on which the paramilitary Mobile Police, the regular police, or the army, have beaten, detained, or even killed those involved in protests, peaceful or otherwise, or individuals who have called for compensation for oil damage, whether youths, women, children, or traditional leaders. In some cases, members of the community are beaten or detained indiscriminately, irrespective of their role in any protest.[36]

Human Rights Watch has documented several instances in which oil companies have called upon the assistance of Nigerian security forces to quell protests. Some of these units are well-known for their human rights-abusing propensities and, in several instances, people were killed by the Nigerian forces called to the scene. Companies are said to have done little or nothing to protest human rights abuses committed by security forces responding to company requests for assistance.[37] In February 1999, Human Rights Watch reported that in a "serious incident on January 4, soldiers using a Chevron helicopter and Chevron boats attacked villagers in two small communities in Delta State, Opia and Ikenyan, killing at least four people and burning most of the villages to the ground. More than fifty people are still missing."[38]

2. *North Africa*

On the other side of the continent, controversy has erupted over the operations of Canadian oil companies in Sudan. In March 1997, a small Canadian oil company concluded a $1 billion oil agreement with the government of Sudan, which is currently in the midst of a lengthy civil war with ethnic groups in the country's southern regions.[39] The oil concession is in an active conflict zone and has depended "for its security on the protective cordon of troops operating from a military base beside the oil camp."[40] A 1997 report in the *Toronto Star* indicated that "[t]he relationship between [the company] and its Sudanese hosts is self-evidently symbiotic. The oil camp opens its hospital doors to military men as well as nomads. [The company] services broken military trucks, provides electricity lines to their barracks and even pipes in water to the army camps."[41] This relationship has enraged rebel leaders who accuse the company and its successor in interest, Talisman Energy of Calgary, of complicity with the dictatorship.[42] A recent report from the UN Rapporteur on Sudan suggests that the Sudanese regime has used its military to "clear a 100-kilometre area around the oilfields operated by Talisman Energy Inc."[43] The chief executive officer of the company has repeatedly assured

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[36] *Ibid.*

[37] *Ibid.*

[38] Human Rights Watch, Press Release, "Oil Companies Complicit in Nigerian Abuses" (23 February 1999), online: <http://www.hrw.org/press/1999/feb/nig0223.htm> (date accessed: 3 March 2000).

[39] Reuter, "Arakis Oil Deal in Sudan Rapped" *The Toronto Star* (5 March 1997) C3.

[40] M. R. Cohn, "Oil Gushes Amid Slavery, Hunger" *The Toronto Star* (17 June 1998) A22 [hereinafter "Oil Gushes"].

[41] M. R. Cohn, "Oiling the Wheels of Revolution" *The Toronto Star* (20 April 1997) F5.

[42] "Oil Gushes", *supra* note 40. See also C. Cattaneo, "Talisman Drawn into Sudanese Conflict" *National Post* (5 May 1999) C1,C2.

[43] See discussion in S. Edwards, C. Cattaneo and S. Alberts, "Calgary Firm Tied to Sudan 'Atrocities'" *National Post* (17 November 1999) A1, A10.

shareholders that government revenues generated by the project will "be used for the benefit of the country's population, including building roads, schools and health facilities."[44] However, Sudanese government officials have been reported "as saying that the development of the oil fields is key to stepping up its program of forced Islamization of Christian and animist regions of Southern Sudan."[45] Further, a former employee of the Canadian company originally involved in the deal has "warned that when oil profits start flowing into government hands, Christians in the south of Sudan will be largely eliminated within two years."[46]

As this article went to press, the results of a Canadian government-sponsored mission to Sudan were released. Investigating Talisman Energy's role in the conflict, the "Harker Mission" concluded that "there has been, and probably still is, major displacement of civilian populations related to oil extraction. ...Sudan is a place of extraordinary suffering and continuing human rights violations, even though some forward progress can be recorded, and the oil operations in which a Canadian company is involved add more suffering."[47] Amongst other things, the Mission concluded that airfields and roads built, used and sometimes operated by the oil company have been employed by the Sudanese military in attacks against civilian populations. Security for the oil operation, meanwhile, is provided by "serving or former army, police, or security service officers [who] maintain the closest collaboration with the Sudanese Army garrison in Heglig, right next to which is a small compound described... as the base for the local detachment of Sudan Security."[48]

D. *Power in India*

In 1992, the US energy giant Enron, through its subsidiary the Dabhol Power Corporation (DPC), concluded the largest single foreign investment agreement in India. The project, an electricity-generating facility located in Maharashtra state, soon provoked opposition by local people, concerned principally with the project's environmental effects. The government's response has been to suppress dissent. Human Rights Watch reports that local leaders opposed to the controversial project "have been subjected to beatings and repeated short-term detention. ...[d]uring mass arrests at demonstrations in villages surrounding the project site, protesters have been beaten with canes (*lathis*) or otherwise assaulted by the police, in some cases sustaining severe injuries."[49]

Human Rights Watch accuses the Dabhol Power Corporation and Enron of complicity in these human rights violations. DPC "benefited directly from an official

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[44] Cattaneo, *supra* note 42.

[45] J. Ditchburn, "Codes of Conduct Needed in Deals With Sudan: Axworthy" *Canadian Press Wire Services* (17 March 1999), online: QL (CPN).

[46] L. Slobodian, "Oilfields or Killing Fields?" *British Columbia Report* (30 November 1998) at 49.

[47] Department of Foreign Affairs, "Human Security in Sudan: The Report of a Canadian Assessment Mission" at 15, online <http://www.dfait-maeci.gc.ca/foreignp/menu-e.asp> (date accessed: 3 March 2000).

[48] *Ibid* at 62.

[49] Human Rights Watch, *The Enron Corporation: Corporate Complicity in Human Rights Violations* (New York: Human Rights Watch, 1999) at 2, online: <http://www.hrw.org/hrw/reports/1999/enron/index.htm> (date accessed: 22 February 2000).

policy of suppressing dissent through misuse of the law, harassment of anti-Enron protest leaders and prominent environmental activists, and police practices ranging from arbitrary to brutal."[50] Further,

> [t]he company, under provisions of law, paid the abusive state forces for the security they provided to the company. These forces, located adjacent to the project site, were only stationed there to deal with protests. In addition, contractors (for DPC) engaged in a pattern of harassment, intimidation, and attacks on individuals opposed to the Dabhol Power project. When the victims of these acts attempted to file complaints with the police, they were met with official silence. Police refused to investigate complaints, and in several cases, arrested the victims for acts they did not commit.[51]

Enron has denied that human rights abuses remain an issue at the company's DPC operations in India.[52]

E. *Mining in Indonesia*

U.S. mining firm Freeport McMoRan runs one of the world's largest gold mines in Irian Jaya, Indonesia. The mine has been opposed by local indigenous groups since its opening in 1967 and anti-mine protests and violence have increased since 1977, resulting in crackdowns by the Indonesian military.[53] In April 1995, the Australian Council for Overseas Aid (ACFOA) released a report detailing significant human rights concerns tied to the mine. In particular, the report alleged that security services retained by Freeport, as well as Indonesian military personnel, "engaged in acts of intimidation, extracted forced confessions, shot 3 civilians, disappeared 5 Dani villagers, and arrested and tortured 13 people..."[54] ACFOA. later backtracked on its allegations of direct Freeport involvement in killings.[55] Subsequently, an investigation by the Catholic Church reported the murder of over a dozen civilians by the Indonesian military and multiple instances of torture, with at least four persons being killed by soldiers in Freeport facilities.[56] In September 1995, the Indonesian Human Rights Commission determined that human rights abuses in the mine region "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 the so-called

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[50] *Ibid* at 3.

[51] *Ibid* at 3.

[52] Human Rights Watch, Press Release, "Enron Defense of Human Rights Abuse Rejected" (28 January 1999), online: Human Rights Watch <http://www.hrw.org/hrw/press/1999/jan/enron0129.htm> (date accessed: 22 February 2000).

[53] Australian Council for Overseas Aid, "Trouble at Freeport" (April 1995), online: Project Underground <http://www.moles.org/ProjectUnderground/motherlode/freeport/acfoa.html> (last modified: 27 November 1997).

[54] *Ibid.*

[55] R. Bryce, "Spinning Gold" *Mother Jones* (Sept./Oct. 1996) 66, online: Mother Jones <http://www.motherjones.com/mother_jones/SO96/bryce.html> (date accessed: 22 February 2000).

[56] Catholic Church, "Violations of Human Rights in the Timika Area of Irian Jaya", online: Project Underground <http://www.moles.org/ProjectUnderground/motherlode/freeport/catholic.html#ReportIV> (last modified: 27 November 1997).

Free Papua Organization, and in the framework of safeguarding mining operations of PT Freeport Indonesia which the government has classified as a vital project."[57] In 1996, Amnesty International noted with concern that the Indonesian government had failed to "investigat[e]...the role of the mining company, Freeport McMoRan Copper and Gold Corporation, in the human rights violations."[58]

Freeport has persistently denied any involvement in human rights abuses, though it acknowledges that human rights abuses have been committed by "a few individuals in the Indonesian military" who have been "tried and punished under Indonesian law."[59]

F. *Mining in Africa*

A large number of mining companies, many of them Canadian, have operations in Africa. In a recent story on mining in Africa, the magazine *African Agenda* reported that some mining firms "incite hostility from surrounding communities by the militaristic manner in which their security personnel police concessions."[60] People said to be "encroaching" on mining concessions "are frequently treated with maximum cruelty. These intimidating acts sometimes succeed in deterring communities from investigating genuine suspicions of pollution spillovers and having their grievances addressed."[61] For example, in 1997, Amnesty International reported that "over 50 gold-miners were killed [in Tanzania] in what may have been extrajudicial executions during evictions from disputed land in an operation involving the police, regional authorities...and a Canadian mining company. The men were buried alive when the Canadian company, guarded by police, bulldozed small-scale mines..., despite on-the-spot appeals from distraught villagers, in advance of the company taking possession of the land for industrial mining."[62]

According to the human rights organization's 1999 report, Amnesty is continuing its investigation into these events.[63]

Other firms are also said to have developed close relations with state or rebel forces. Thus, another Canadian company is reported to have paid US$80 million in cash to Kabila's rebel forces in the civil war racking then-Zaire, in return for a mining

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[57] National Commission of Human Rights, Press Release, "Results of Monitoring and Investigation of Five Incidents at Timika and One Incident at Hoea, Irian Jaya, During October 1994 - June 1995" (September 1995), online: Project Underground <http://www.mcles.org/ProjectUnderground/motherlode/freeport/ighr.html> (last modified: 27 November 1997).

[58] Amnesty International, "INDONESIA: Full Justice? - Military Trials in Irian Jaya" ASA 21/47/95 (March 1996), online: Amnesty International <http://www.amnesty.org/ailib/aipub/1996/ASA/32101796.htm> (date accessed: 22 February 2000).

[59] See online: Freeport McMoRan <http://www.fcx.com/mr/issues&answers/ia-hra.html> (date accessed: 1 March 2000).

[60] C. Abugre & T. Akabzaa, "Mining Boom: Harnessing the gain of Africa" *African Agenda* 15 (1997) 7 at 9.

[61] *Ibid.*

[62] Amnesty International, *Annual Report 1997*, online: Amnesty International <http://www.amnesty.org/ailib/aireport/ar97/AFR56.htm> (date accessed: 29 February 2000).

[63] Amnesty International, *Annual Report 1999*, online: Amnesty International <http://www.amnesty.org/ailib/aireport/ar99/afr56.htm> (date accessed: 4 March 2000).

concession.[64] The loan by the company's major shareholder "of a Lear jet for Kabila's personal use during the [rebel] advance also may have helped cement the deal."[65] Since that time, reports have emerged of atrocities committed by Kabila and the rebel forces during the 1993-1997 civil war.[66]

Still other companies operating in sub-Saharan Africa have developed links with private military corporations. For example, in 1997, it was reported that a Canadian mining company had acquired the services of the South African PMC, Executive Outcomes, to provide security for its operations in war-ravaged Sierra Leone, possibly in exchange for certain indirect rights to diamond mining properties in that country.[67] The now defunct Executive Outcomes was described in 1997 as "a collection of former spies, assassins, and crack bush guerrillas, most of whom had served for fifteen to twenty years in South Africa's most notorious counterinsurgency units."[68] While Executive Outcomes is said to have "conducted itself professionally and compiled a respectable human rights record, especially relative to other African armies",[69] other reports suggest the company's soldiers may have been indiscriminate in their use of violence.[70]

G. *Conclusion*

In sum, these case studies show, first, that militarized commerce, while perhaps not commonplace, is certainly extant among resource companies operating in the developing world and, second, that security forces affiliated at some level with companies have been implicated in serious human rights abuses. Without commenting on their veracity, the case studies, when taken together, suggest that "militarized commerce" may entail either direct involvement in abuses by the firm's agents, or complicity with state human rights abuses. Involvement in human rights abuses by security services directly controlled by corporations seems rare, though the possibility of such involvement remains where companies retain disreputable private military corporations. Complicity, on the other hand, seems a more common complaint.

The *Concise Oxford Dictionary* defines complicity as "partnership in an evil action".[71] For its part, *Black's Law Dictionary* defines the term as meaning "[a] state of

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[64] C. J. L. Collins, "Reconstructing the Congo" *Review of African Political Economy* 24:74 (December 1997) 591.

[65] *Ibid.*

[66] Amnesty *1999 Report*, *supra* note 63.

[67] Howlett & Drohan, *supra* note 6 at B5.

[68] E. Rubin, "An Army of One's Own" *Harper's Magazine* 294:1761 (February 1997) 44 at 47.

[69] J. C. Zarate, "The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder" (1998) 34 Stan. J. Int'l L. 75 at 98. See also the discussion in J. Lee, "Give a Dog of War a Bad Name" *The [London] Times* (4 May 1998) 20, discussing the benefits stemming from PMC operations in Sierra Leone.

[70] Rubin, *supra* note 68 at 48: "When the [Executive Outcomes] pilots told the Sierra Leone military commander that they were having difficulty distinguishing between the rebels and civilians camped under the impenetrable canopy of vines and trees, the reply was, 'Kill everyone.' So they did." See also R. Moody, "Diamond Dogs of War" *New Internationalist* 299 (March 1998) 15.

[71] *The Concise Oxford Dictionary*, 5th ed., *s.v.* "complicity".

being an accomplice; participation in guilt".[72] The case studies discussed above suggest that "militarized commerce" involves several layers of possible "complicity" in human rights abuses. First, companies providing revenue to human rights abusing regimes or militaries can be accused of a form of "financial complicity." The payment of a "war tax" in Colombia, along with financial support for units of the Colombian military, represents a case in point. Second, companies providing material support to a regime or military that enhances its human rights-abusing capacity can be accused of a form of "material complicity". Examples include permitting the use by Indonesian or Nigerian troops of company infrastructure and equipment, or assisting in the procurement of equipment for these soldiers. Last, companies that call upon the services of human rights-abusing militaries for immediate security support, resulting in human rights abuses, can be accused of "incitement complicity". Examples include the reported behaviour of oil companies in Nigeria. Using this framework, in several of the instances described above, the company's alleged involvement with human rights abusing regimes involves two or more forms of complicity.

Complicity creates victims, many of whom will likely desire redress. Unfortunately, wrongs of the sort described in this section usually occur in countries unwilling or incapable of adjudicating claims for compensation or punishing transgressions of criminal law by powerful actors. In Burma, for example, through 1998

> the Government continued to rule by decree and was not bound by any constitutional provisions providing for fair public trials or any other rights. Although remnants of the British-era legal system were formally in place, the court system and its operation remained seriously flawed, particularly in the handling of political cases. Unprofessional behavior by some court officials, the misuse of overly broad laws, and the manipulation of the courts for political ends continued to deprive citizens of the right to a fair trial and the rule of law.[73]

In Indonesia, "[t]here were few signs of judicial independence. The court continued to be used to take action against, or deny legal remedy to, political activists and government critics."[74] In Nigeria, "[s]ome courts are understaffed. Judges frequently fail to show up for trials, often because they are pursuing other means of income. In addition court officials often lack the proper equipment, training, and motivation for the performance of their duties, again due in no small part to inadequate compensation."[75] In Sudan, "[t]he judiciary is not independent and is largely subservient

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[72] *Black's Law Dictionary*, 6th ed., *s.v.* "complicity".

[73] U.S. Department of State, Burma Country Report on Human Rights Practices for 1998, online: <http://www.state.gov/www/global/human_rights/1998_hrp_report/burma.html> (date accessed: 1 March, 2000).

[74] U.S. Department of State, Burma Country Report on Human Rights Practices for 1998, online: <http://www.state.gov/www/global/human_rights/1998_hrp_report/indonesi.html> (date accessed: 1 March, 2000).

[75] U.S. Department of State, Burma Country Report on Human Rights Practices for 1998, online: <http://www.state.gov/www/global/human_rights/1998_hrp_report/nigeria.html> (date accessed: 1 March, 2000).

to the Government."[76] Similar observations can be made of the court systems in many other countries implicated in militarized commerce.

Accordingly, the discussion in this section begs the question of whether militarized commerce exposes companies to legal liability, not overseas, but in their home countries. Part III of this article focuses on this issue by examining whether a Canadian corporation operating overseas in a fashion leading or contributing to human rights abuses commits a wrong recognizable in Canadian criminal law.

III. CORPORATE CRIMINAL LIABILITY FOR HUMAN RIGHTS ABUSES COMMITTED BY SECURITY FORCES

It is trite to say that to be liable in Canadian criminal law, a corporation must be found to have committed a criminal offence. However, in the particular instance of an alleged overseas wrongdoing by a corporation, this otherwise straightforward statement raises several issues. First, the infraction must be an offence that is "transnational" in scope, and not merely applied to events within Canada's borders. Second, given that in most instances of "militarized commerce" discussed above, the corporation and its personnel are not directly involved in the commission of human rights abuses, there must exist offences that fit the facts of "complicity". Last, violation of most criminal provisions requires a requisite mental state, or *mens rea*. Establishing a corporate *mens rea* remains an arduous task in Canadian criminal law. This section discusses each of these issues in turn.

A. *"Transnational" Jurisdiction*

Canadian criminal offences are almost exclusively territorial in scope. As Cory J. noted in *R. v. Finta*, "[t]he jurisdiction of Canadian courts is, in part, limited by the principle of territoriality. That is, Canadian courts, as a rule, may only prosecute those crimes which have been committed within Canadian territory."[77] In fact, subsection 6(2) of the *Criminal Code* reads "[s]ubject to this Act or any other Act of Parliament, no person shall be convicted or discharged under section 736 of an offence committed outside Canada." In *Finta*, Cory J. observed that this section "reflects the principle of sovereign integrity, which dictates that a state has exclusive sovereignty over all persons, citizens or aliens, and all property, real or personal, within its own territory."[78] At the same time, "there are exceptions to the principle of territoriality."[79]

1. *Crimes with a Real and Substantial Link*

First, it is possible for a "real and substantial link" to exist between Canada and a criminal offence occurring mostly overseas. In *R.* v. *Libman*,[80] a decision of the

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[76] U.S. Department of State, Burma Country Report on Human Rights Practices for 1998, online: <http://www.state.gov/www/global/human_rights/1998_hrp_report/sudan.html> (date accessed: 1 March, 2000).

[77] [1994] 1 S.C.R. 701 at 805-06, 112 D.L.R. (4th) 513 at 588 [hereinafter cited to S.C.R.].

[78] *Supra* note 77 at 806.

[79] *Ibid.*

[80] [1985] 2 S.C.R. 178, 21 D.L.R. (4th) 174 [hereinafter cited to S.C.R.].

Supreme Court of Canada, the accused ran a Toronto telephone sales solicitation room. Under his directions, telephone sales personnel contacted U.S. residents for the purpose of inducing them to purchase shares in two Central American mining companies. The salespeople made material misrepresentations with respect to the value of these shares. As a consequence, a large number of U.S. residents purchased securities that were virtually worthless. While most of their money was sent to Central America, the accused received a cut in Toronto.

The issue before the Supreme Court of Canada was whether the committal of the accused for trial on fraud charges should be quashed on the ground that the alleged offences occurred overseas. After reviewing the English and Canadian authorities on territoriality, La Forest J., for the Court, concluded that "... all that is necessary to make an offence subject to the jurisdiction of our courts is that a significant portion of the activities constituting that offence took place in Canada. As it is put by modern academics, it is sufficient that there be a 'real and substantial link' between an offence and this country, a test well known in public and private international law...".[81] La Forest J. then concluded, on the facts before him, that this test was met. As a consequence, he saw no need to determine "what may constitute a real and substantial link in a particular case".[82] However, he noted that "the outer limits of the test may...well be coterminous with the requirements of international comity."[83]

Since *Libman,* the courts have not spelled out these "outer limits" by defining precisely the requirements of international comity in criminal cases. "Comity", according to Estey J., concurring in *R.* v. *Spencer*,

> ...is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or of other persons who are under the protection of its laws.[84]

A more detailed distillation was seemingly provided by Bastarache J., concurring in *R* v. *Cook.*[85] Here, His Lordship cited with approval the reasoning of Lord Diplock in *R.* v. *Treacy* as follows: "...the rules of international comity, in my view, do not call for more than that each sovereign state should refrain from punishing persons for their conduct within the territory of another sovereign state where that conduct has had no harmful consequences within the territory of the state which imposes the punishment."[86]

This statement, along with several others made later in Bastarache J.'s reasons, suggest that a Canadian "effect" or "harmful consequence" stemming from the overseas wrongful act may be necessary as a matter of international comity. However, His Lordship, in an earlier passage, summarized the applicable legal standard as follows:

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[81] *Ibid.* at 212-13.

[82] *Ibid.* at 213.

[83] *Ibid.* at 213.

[84] [1985] 2 S.C.R. 278 at 283, 21 D.L.R. (4th) 756 at 759, citing *Hilton* v. *Guyot*, 159 U.S. 113 (1895) at 163-64 [hereinafter cited to S.C.R.].

[85] [1998] 2 S.C.R. 597, 164 D.L.R. (4th) 1 [hereinafter cited to S.C.R.].

[86] *Ibid.* at 669, citing *R* v. *Treacy*, [1971] A.C. 537 at 564.

"...it is permissible to assert criminal jurisdiction over acts taking place in another state *if they are connected to other acts that take place in the forum state which are in furtherance of criminal behaviour*, or if the acts in the other state have some pernicious consequence within the forum".[87] In addition, an insistence that Canadian adverse effects serve as the sole basis for Canadian court jurisdiction would be an approach largely inconsistent both with the wording in *Libman* and with the practice of lower courts.

In this first regard, La Forest J., in *Libman*, clearly indicated that Canadian courts may have jurisdiction where "a significant portion of the activities *constituting that offence* took place in Canada", not just where a significant portion of "effects" are felt in Canada. His Lordship went on to note that, with improvements in technology, "...the notion of comity, which means no more nor less than 'kindly and considerate behaviour towards others', has also evolved. How considerate is it of the interests of the United States in this case to permit criminals based in this country to prey on its citizens?".[88] On the facts in *Libman*, the victims of the fraud were clearly U.S. residents and, as such, the harmful effects of the accused actions were felt outside of Canada's borders. La Forest J. also cited, seemingly with approval, the following passage from Lord Diplock's speech in *R.* v. *Treacy*:

> There is no rule of comity to prevent Parliament from prohibiting under pain of punishment persons who are present in the United Kingdom, and so owe local obedience to our law, from doing physical acts in England, *notwithstanding that the consequences of those acts take effect outside the United Kingdom.* Indeed, where the prohibited acts are of a kind calculated to cause harm to private individuals it would savour of chauvinism rather than comity to treat them as excusable merely on the ground that the victim was not in the United Kingdom itself but in some other state.[89]

This focus on the elements of the offence, rather than simply the effects of the crime, appears also to have been followed by the lower courts. In *R.* v. *O.B.*[90], at issue was whether a Canadian accused could be tried in Canada for sexually assaulting his granddaughter in a car trip to the United States, and while the parties were in the United States. In concluding that there was no "real and substantial" connection to Canada within the meaning of *Libman*, the Ontario Court of Appeal held that, for Canadian courts to have jurisdiction, "there must be a significant link between Canada and *the formulation, initiation, or commission of the offence*".[91]

This case was relied upon in *Re Ouellette and The Queen*,[92] a recent decision of the Quebec Superior Court. In that case, the accused and the victim were both Canadian residents vacationing in the Bahamas. While in the Bahamas, the accused struck the victim, causing a fall. The victim later died in a Canadian hospital as a result of injuries sustained in the fall. Accordingly, the Court was required to determine whether it had criminal jurisdiction over the accused. Citing both *Libman* and *R.* v.

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[87] *Ibid.* at 667-68 (emphasis added).
[88] *Supra* note 80 at 214.
[89] *Ibid.* at 195-96 (emphasis added).
[90] (1997), 116 C.C.C. (3d) 189, 99 O.A.C. 313 (Ont.C.A.) [hereinafter cited to C.C.C.].
[91] *Ibid.* at 192 (emphasis added).
[92] (1998), 126 C.C.C. (3d) 219.

O.B., Béliveau J. concluded that there are

> ...two basic hypotheses in relation to the connection of an offence to Canada. First, the crime may have been committed in Canada but have effects outside of Canada or, second, it may have been committed outside of Canada and produce harmful consequences in Canada. ... *[I]t is clear that there is no principle concerning the matter which would be against Canadian courts taking jurisdiction in either situation.*[93]

The Court acknowledged that the outer limit of Canadian court jurisdiction was circumscribed by principles of international comity. However, it concluded on this issue that

> ...the international community could not complain that, in either [of the situations described above], Canada is interfering in another country's affairs. In addition, one must remember the principle that the international community has an interest in an offence not going unpunished...Every country therefore has an interest in seeing that crime is repressed and the rules of international law must facilitate this objective and not stand in its way.[94]

Accordingly, the Quebec Superior Court summarized the test to be applied as constituting a

> ...test of varying content which is assessed in relation to the circumstances and, in particular, the importance of the elements of the offence linked to Canada, the relevant facts which arose in Canada and the harmful consequences which were caused, or which could have been caused, in Canada. When weighing these factors, one must determine whether, by taking jurisdiction over the matter, the Canadian court offends international comity and one must take into account the universally recognized objective of not letting crime go unpunished.[95]

Confronted with an argument that the mere presence of the crime's effects in Canada could not ground jurisdiction, the Court referred to the language of "commission" contained in s. 6(2) of the *Criminal Code*. Béliveau J. held that this term has a technical meaning in criminal law, one not confined strictly to the effects of the crime. Accordingly, what was required to ground jurisdiction is a link between Canada and at least one essential element of the crime, whichever it may be.[96]

On the basis of these authorities, it would seem that the "real and substantial

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[93] *Ibid.* at 228-29 (emphasis added).

[94] *Ibid.* at 229.

[95] *Ibid.*

[96] This passage paraphrases Béliveau J.'s reasoning found in paragraph 96 of an earlier proceeding in the same case, reported at (1997), 121 C.R. (5th) 285. This same paragraph was quoted in verbatim format in *Ouellette, supra* note 92 at 230. However, in *Ouellette, ibid.*, an additional (and seemingly contradictory) sentence speaking of the need for "effects" was represented as having appeared in the original paragraph 96. This statement does not actually appear in the earlier proceeding as reported in the Criminal Reports or as reported in the version available on Quicklaw at [1997] A.Q. no 4076. Accordingly, the inclusion of this additional sentence in *Ouellette, supra,*note 92 would appear to have been an editing error.

link" test includes circumstances where at least some, but not necessarily all, of the elements of the offence occur in Canada. The location where the effect of the crime is felt is relevant, but is not dispositive of the issue. Instead, in evaluating whether a "real and substantial link" exists, at least some courts seem prepared to contemplate whether the formulation, initiation, or commission of the offence took place in Canada.

2. *Extraterritorial Crimes*

The second exception to the territoriality principle involves those "extraterritorial" crimes contained in the *Criminal Code*. As the Ontario Court of Appeal noted in *R.* v. *O.B.*, s. 7 of the Code "delineates some of the exceptions to this fundamental precept" of territoriality.[97] In particular, s.7(3.71) through to (3.77) dealing with war crimes and crimes against humanity "constitute an exception to the principle of territoriality found in s. 6(2) of the Code."[98]

The crime most relevant to this article is "crimes against humanity". Pursuant to s.7(3.71), every person "who...commits an act or omission outside Canada that constitutes ...a crime against humanity and that, if committed in Canada, would constitute an offence against the laws of Canada...shall be deemed to commit that act or omission in Canada at that time...". This provision is subject to the further requirements that the accused be, *inter alia*, a Canadian citizen or be employed by Canada in a civilian or military capacity. Alternatively, Canada must, under international law, be able "to exercise jurisdiction over the person with respect to the act or omission on the basis of the person's presence in Canada and, subsequent to the time of the act or omission, the person is present in Canada." A "crime against humanity" is defined in s.7(3.76) as

> murder, extermination, enslavement, deportation, persecution or any other inhumane act or omission that is committed against any civilian population or any identifiable group of persons, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission, and that, at that time and in that place, constitutes a contravention of customary international law or conventional international law or is criminal according to the general principles of law recognized by the community of nations.

Notably, s.7(3.77) indicates that, in the context of crimes against humanity, "act or omission" includes "attempting or conspiring to commit, counselling any person to commit, aiding or abetting any person in the commission of, or being an accessory after the fact in relation to, an act or omission."

In *R.* v. *Finta*, Cory J., writing for a majority of the Supreme Court of Canada, concluded that the war crimes/crimes against humanity provisions of the *Criminal Code* did not give Canadian courts jurisdiction to hear prosecutions of "an ordinary offence that has occurred in a foreign jurisdiction."[99] Instead, the courts only have jurisdiction where the unique elements involved in a crime against humanity were present.

For the applicable *actus reus* element to be met in a crime against humanity,

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[97] *R.* v. *O.B.*, *supra* note 90 at 191.
[98] *Finta, supra* note 77, *per* Cory J. at 807.
[99] *Ibid.* at 811.

it is not enough, according to Cory J., "simply to prove that the offence committed in Canada would constitute robbery, forcible confinement or manslaughter. An added element of inhumanity must be demonstrated to warrant conviction under the section."[100] "Inhumanity" is variously defined as cruel and barbarous, pitiless and unfeeling. A high level of stigma attaches to crimes against humanity, and offences reflect acts that "shock the conscience of all right-thinking people".[101] Moreover, Cory J. construed the definition of s.7(3.76) as requiring an inhumane act "based on discrimination against or the persecution of an identifiable group of people."[102] This interpretation would appear to have the affect of omitting instances where the inhumane acts are directed at "any civilian population", without targeting an identifiable group of persons. Such a conclusion seems difficult to justify on a plain reading of the provision. Nevertheless, this view is repeated later in Cory J.'s reasons, where he specified that "[w]hat distinguishes a crime against humanity from other offences under the *Criminal Code* is that the cruel and terrible actions which are essential elements of the offence were undertaken in pursuance of a policy of discrimination or persecution of an identifiable group or race."[103]

In terms of *mens rea*, Cory J. concluded that "the essential quality of a...crime against humanity is that the accused must be aware of or wilfully blind to the fact that he or she is inflicting untold misery on his victims."[104] The subsection is directed to those "who inflict immense suffering with foresight and calculated malevolence"[105] and "the mental elements of a crime against humanity must involve an awareness of the facts or circumstances which would bring the acts within the definition of a crime against humanity."[106] The accused need not know that her or his actions were inhumane. Rather, "the accused would have to be aware that the facts or circumstances of his or her actions were such that, viewed objectively, they would shock the conscience of all right-thinking people...Alternatively, the *mens rea* requirement....would be met if it were established that the accused was wilfully blind to the facts or circumstances that would bring his or her actions within the provisions of those offences."[107] Put another way, Cory J.'s reasons suggest that "the accused was aware of, or wilfully blind to, the facts or circumstances that made his offending acts more 'morally blameworthy', and that turn ordinary criminal offences into war crimes or crimes against humanity."[108]

As this article goes to press, the government has introduced a new bill that would change Canada's crime against humanity laws. Bill C-19, presently at First Reading, would repeal the *Criminal Code* provisions described above. Under the proposed new law, as under the old provisions, a person who commits genocide, war crimes or crimes against humanity overseas is subject to prosecution in Canada. However, the definition of "crime against humanity" is revised somewhat to remove the need for the crime to be directed against "any civilian population" or "any identifiable

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[100] *Ibid.* at 820.
[101] *Ibid.* at 812.
[102] *Ibid.* at 813.
[103] *Ibid.* at 814.
[104] *Ibid.* at 816.
[105] *Ibid.* at 817.
[106] *Ibid.* at 819.
[107] *Ibid.*
[108] I. Cotler, "War Crimes Law and the Finta Case," (1995) Supreme Court L.R. 577 at 627.

group of persons", thus eliminating an important stumbling block to convictions imposed by the Supreme Court of Canada in *R* v. *Finta*. It remains to be seen how the new definition, if enacted, will be interpreted by the courts.

B. *Criminal Code Offences for "Complicity" in Human Rights Abuses*

Clearly, the egregious human rights violations discussed in the context of "militarized commerce" translate fairly simply into *Criminal Code* offences. Assault and battery, murder, manslaughter, various threatening offences, forcible confinement and others, including crimes against humanity, are all likely candidates. Where the company or its agents are directly involved in human rights abuses, these crimes are applicable, assuming that the *Libman* test is met, or where the wrong is so egregious as to amount to a crime against humanity for which extraterritorial liability exists. On the other hand, as noted above, most human rights abuses occurring in the militarized commerce context appear to involve various levels of complicity, rather than direct involvement. Accordingly, it is submitted that the *Criminal Code* provisions most relevant to militarized commerce are those concerning aiding and abetting, counselling a crime that is committed, conspiracy and criminal negligence.

1. *Aiding and Abetting*

Subsection 21(1) provides that "every one is a party to an offence who...(b) does or omits to do anything for the purpose of aiding any person to commit it; or (c) abets any person in committing it." The *Concise Oxford Dictionary* defines "abets" as "encourage or assist" and "aids" as "help".[109] In *R.* v. *Salajko*[110], the Ontario Court of Appeal cited with approval a definition of abet as "to encourage or set on" and of an abettor as "an instigator or setter on, one who promotes or procures a crime to be committed". These definitions were supported by Cory J. in *R.* v. *Greyeyes,* where abets was defined as "encouraging, instigating, promoting or procuring the crime to be committed".[111] "Aiding" "means to assist or help the actor".[112] These views are consistent with the earlier case of *R.* v. *Dunlop*, where Dickson J., as he then was, writing for a majority of the Supreme Court of Canada, noted that, under s. 21,

> [m]ere presence at the scene of a crime is not sufficient to ground culpability. Something more is needed: encouragement of the principal offender; an act which facilitates the commission of the offence, such as keeping watch or enticing the victim away, or an act which tends to prevent or hinder interference with accomplishment of the criminal act, such as preventing the intended victim from escaping or being ready to assist the prime culprit.[113]

In *R.* v. *Thatcher*,[114] a majority of the Supreme Court of Canada affirmed a definition

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[109] *The Concise Oxford Dictionary*, 5th ed., *s.v.* "abets", "aids".

[110] [1970] 1 O.R. 824 at 826, 1 C.C.C. 352 at 353 (C.A.).

[111] [1997] 2 S.C.R. 825, *per* Cory J. at 837, 8 C.R. (5th) 308 at 318 [hereinafter cited to S.C.R.].

[112] *Ibid.* at 837.

[113] [1979] 2 S.C.R. 881 at 891, 47 C.C.C. (2d) 93 at 106.

[114] [1987] 1 S.C.R. 652, 32 C.C.C. (3d) 481.

of "aiding and abetting" as involving" intentional encouragement or assistance in the commission of the offence". Other similar definitions, cited with approval by the British Columbia Court of Appeal in *R.* v. *Vinette*[115], speak of aiding and abetting as "facilitating", "encouraging", "promoting" and "instigating".

At the level of *actus reus*, the forms of corporate complicity in human rights abuses discussed above seem to fall within the ambit of "aiding and abetting". "Incitement complicity", or calling upon the services of security forces, clearly amounts to encouraging or "setting on". Similarly, material complicity via the provision of material support in the form of equipment amounts to aiding, facilitating, assisting or helping. The provision of direct financial support in the form of a levy for security also seems to fall within the plain meaning of "facilitating", if not "encouraging". However, as shall be argued below, the extra-territorial nature of aiding and abetting in the context of militarized commerce introduces complications at the level of *actus reus*.

The *mens rea* element of the offence is, on its face, significantly more complex than the *actus reus* requirement. Paragraph 21(1)(c) has been interpreted by Cory J. in *R.* v. *Greyeyes* as requiring the Crown to prove "not only that the accused encouraged the principal with his or her words or acts, but also that the accused intended to do so".[116] Thus, to be guilty of abetting under paragraph 21(1)(c), the company in a militarized commerce context must have intended to encourage security forces to commit the acts that constitute the offences. It is notable, however, that a conviction remains possible where the principal is convicted of murder, but where the abettor, while lacking the intent required for murder, possesses the state of mind required for manslaughter. Thus, in *R.* v. *Davy,* McLachlin J., for a majority of the Supreme Court of Canada, held that "a person may be convicted of manslaughter who aids and abets another person in the offence of murder, where a reasonable person in all the circumstances would have appreciated that bodily harm was the foreseeable consequence of the dangerous act which was being undertaken."[117] In other words, a company that encourages a dangerous course of action by a security force in which death is a foreseeable risk -- for example, shooting into a crowd -- can be convicted of manslaughter, even where it did not intend to abet acts constituting murder.

With regard to paragraph 21(1)(b), in *R.* v. *Hibbert,*[118] the Supreme Court of Canada held that the language "for the purpose" found in that paragraph connotes a strong *mens rea* requirement, but "does not require that the accused actively view the commission of the offence he or she is aiding as desirable in and of itself."[119] On the facts in *Hibbert*, the accused was charged with aiding the murder of a victim, even though he assisted the murderer under duress. Lamer C.J., writing for the Court, concluded that this duress could not negate the accused's *mens rea*. The accused's desire and real wishes were irrelevant where the accused had the intention to assist the murderer. In *R. v. Greyeyes*, the Supreme Court of Canada summarized the appropriate standard as follows: "...the Crown is required to prove only that the accused intended the consequences that flowed from his or her aid to the principal offender, and need not

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[115] [1969] 3 C.C.C. 172 (B.C.C.A.).

[116] *Greyeyes*, *supra* note 111 at 842, *per* Cory J.(concurring).

[117] (1993), 86 C.C.C. (3d) 385 at 391, (*sub.nom. R.* v. *Jackson)* [1995] 4 S.C.R. 573 at 583, [hereinafter *Davy* cited C.C.C.].

[118] [1995] 2 S.C.R. 973, 99 C.C.C. (3d) 193 [hereinafter *Hibbert* cited to S.C.R.].

[119] *Ibid.* at 1004.

show that he or she desired or approved of the consequences."[120]

However, as this passage from *Greyeyes* implies, it is not enough that the assistance intentionally rendered by the accused has the effect of furthering the crime.[121] In other words, "[t]he mere fact that an action assists in the commission of the offence is not enough."[122] Instead, "...in order to convict an accused as a party for assisting the commission of an offence, it must first be shown that the accused had knowledge of the circumstances necessary to constitute that offence",[123] though not necessarily that these circumstances constitute an offence.[124] Put another way, it would seem that while the accused need not know that what is being done is an offence, he or she must be aware of the actual nature of activities being undertaken with their assistance. Thus, in *R.* v. *Adams,*[125] the accused was found not to be liable for attempted murder when he assisted a principal he knew had an intent to commit violence, but did not know had an intent to commit murder. This decision, however, must be read in light of the manslaughter exception set out in *Davy* and noted above.

On the basis of this discussion, it is clear that for a corporation to be convicted under s.21(1)(b) for abuses committed by security forces, the complicity of the corporation in the actions of the security forces must be such that the corporation intended, though perhaps did not desire, to assist the commission of the acts that constitute the offence. Further, the corporation would have to be aware of the very actions, or intended actions, facilitated by the assistance. However, where the security forces commit murder, the corporation may still be convicted of manslaughter where a reasonable person in all the circumstances would have appreciated that bodily harm was the foreseeable consequence of those security force acts intentionally aided by the company. Put more concretely, to be guilty of an offence by virtue of paragraph 21(1)(b), a company supplying helicopters to security forces must intend that the helicopters assist the security forces in committing offences and must be aware that those forces are committing, or intend to commit, these same acts. Alternatively, where the security force's acts constitute murder, the company's conviction for manslaughter may rest on its intentional assistance of the units via the supply of helicopters in circumstances where a reasonable person would know that murder was a foreseeable consequence. In either case, it is no defence if the company provides the helicopters under duress.

2. *Counselling an Offence that is Committed*

The definition of the counselling concept is set out in s. 22(1) of the *Criminal Code*. This provision provides that "[w]here a person counsels another person to be a party to an offence" and that person becomes a party, the counsellor is also considered a party, even if "the offence was committed in a way different from that which was

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[120] *Greyeyes, supra* note 111 at 842, *per* Cory J., concurring in the result, but with whom L'Heureux-Dubé J., writing for a majority, agreed on this issue at 832.

[121] *Ibid.* See *R.* v. *Morgan* (1993), 80 C.C.C. (3d) 16 (Ont. C.A.).

[122] *R.* v. *Lewin* (1998) 67 O.T.C. 113 at para. 20, [1998] O.J. No. 2929 at para. 20, online: QL (OJRE), (Ont. Ct. (Gen.Div.)).

[123] *Ibid.*, relying on *R.* v. *F.W. Woolworth Co. Ltd.* (1974), 18 C.C.C. (2d) 23 at 32, 46 D.L.R. (3d) 345 at 354 (Ont.C.A.)[hereinafter cited to C.C.C.].

[124] *Woolworth, ibid.* at 33-34.

[125] (1989), 49 C.C.C. (3d) 100, 33 O.A.C. 148 (Ont.C.A.).

counselled." However, pursuant to s. 22(2), the counsellor must know or ought to have known that the offence "was likely to be committed in consequence of the counselling." "Counsel" is defined in s. 22(3) as including "procure, solicit or incite". On this basis, the *actus reus* in s. 22 is simply to procure, solicit, incite or otherwise counsel an offence that occurs and which is of a sort that the person knew or ought to have known would occur in the wake of the counselling.[126] As with aiding and abetting, this straightforward *actus reus* is complicated by jurisdictional matters, as discussed below.

The *mens rea* for the offence is one of intentionally counselling the crime, coupled with the requirement that the counsellor know or ought to know the crime will result. This objective standard of "ought to know" is likely invalid where the prosecution is based on counselling a murder, a crime that, for constitutional reasons, requires subjective intent. However, the objective "ought to know" standard would apply for most other crimes.[127]

On this basis, a corporation engaged in militarized commerce may be made a party to the offences of security forces by virtue of s. 22 where it intentionally provokes these crimes and knew or, in most cases, ought to have known that the security forces would act in the way they did.

3. *Jurisdictional complications*

As noted above, on its face, the *actus reus* requirement of ss. 21 and 22 are fairly straightforward. However, neither section creates a crime of "aiding and abetting" or "counselling the commission of an offence". Rather they define instances where individuals who incite, induce or assist a third party to commit an offence are deemed parties to that offence. Both sections are therefore dependent on there being an underlying "offence". This fact, when combined with the extraterritorial nature of the militarized commerce, adds a layer of complication to prosecutions under ss.21 and 22. In particular, it raises the question of whether the underlying "offence" which is aided and abetted or counselled must be one that occurs in, or has a real and substantial link to, Canada.

An "offence" is nowhere defined in the *Criminal Code*. Accordingly, there is no explicit guidance as whether an act occurring entirely overseas can be an "offence". However, subsection 6(2), which precludes conviction "for an offence committed outside Canada", implies that an overseas act that would constitute an "offence" if it occurred in Canada remains an "offence", but one for which no Canadian conviction can be obtained. This interpretation is the one preferred by La Forest J., dissenting in *Finta*. There, His Lordship held that

> *s. 6(2) of the Code does not render Canadian territoriality a defining element of its offences. Rather, it merely precludes a person's conviction or discharge for an offence when committed outside Canada...The fact that an act or an omission may have taken place outside Canada's borders does not negate its quality as culpable conduct in the eyes of Canadians and the underlying values of Canadian criminal law*...The principle of territoriality simply responds to the structure of the international order; the prosecution of the perpetrator of a criminal act is normally entrusted to the state in which the

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[126] See K. Roach, *Criminal Law* (Concord: Irwin Law, 1996) at 79.
[127] *Ibid.*

act was committed.[128]

The *Finta* majority did not deal with this issue. Accordingly, there is some support for the argument - if only from a dissenting decision of the Supreme Court of Canada - that where one aids and abets or counsels an act that takes place entirely outside Canada and without a link to this country, but which constitutes a culpable wrong as defined by the *Criminal Code*, an underlying "offence" exists that might serve as the basis for a ss.21 or 22 conviction.

This assumes, of course, that there exists a sufficient jurisdictional link between the act of aiding, abetting or counselling and Canada. It is submitted that a conviction under ss. 21 or 22 for an act of militarized commerce is not impossible, given the right facts. In this last regard, two possibilities present themselves. First, the act of aiding and abetting or counselling may be found to have occurred in Canada. For example, where a company's managers supply a directive from the Canadian head office that amounts to an act of material, financial or incitement complicity and is issued for the purpose of suppressing opposition to the company's overseas operations through culpable acts by a third party, the *actus reus* and *mens rea* for aiding and abetting may have a full-fledged Canadian *situs*.

Alternatively, where not all the elements of aiding, abetting or counselling are situated in Canada, the head office might conduct itself in a fashion that satisfies the "real and substantial link" test. For example, the formulation or initiation of the behaviour said to constitute aiding, abetting or counselling may take place in Canada and culminate overseas. It should be noted, however, that thus far the "real and substantial link" test appears to have been applied only to "offences" under the *Criminal Code*, not to those provisions of the *Code* that render persons parties to the offence, such as aiding, abetting and counselling. It remains an open question, therefore, as to whether the "real and substantial link" test can be used to ground a Canadian prosecution under ss.21 and 22 for acts of aiding, abetting or counselling that take place only in part in Canada.

To circumvent the jurisdictional question entirely, the Crown might rely on the crimes against humanity provisions by bringing the act of aiding and abetting or counselling within the ambit of s.7 of the *Criminal Code*. As noted above, "aiding and abetting" and "counselling" are defined, in s.7(3.77) of the *Criminal Code*, as acts capable of constituting a crime against humanity. To meet the requirements of s.7, as set out in *Finta*, the aiding and abetting or counselling must relate to one of the acts that fall within the definition of a crime against humanity, be shocking to the conscience of "all right-thinking people" and undertaken with foresight of, or at least willful blindness to, their extreme gravity. They must also, it would seem, be directed against an identifiable group of people. In other words, if the corporation's acts of complicity are tied to a crime against humanity, are themselves shocking to the conscience and undertaken with foresight of, or willful blindness, to their pernicious nature, and are directed at an identifiable group – be it ethnic, religious or otherwise – the company is probably criminally liable for its overseas aiding, abetting or counselling, irrespective of whether any of its acts or decisions take place in Canada.

Notably, Bill C-19, if enacted, would repeal subsection 7(3.77) without introducing analogous language in the *Crimes Against Humanity Act*. It is submitted

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[128] *Finta*, *supra* note 77 at 747 (emphasis added).

that the absence of "aiding and abetting" or "counselling an offence" provisions in the new Act would greatly reduce the prospects of criminal convictions for those instances of militarized commerce that amount to complicity without themselves constituting actual commission of crimes against humanity.

4. *Conspiracy*

Conspiracy would also appear to be a logical charge to bring against a company engaged in an act of complicity. Paragraph 465(1)(a) of the *Criminal Code* makes it an offence to conspire "with anyone to commit murder or to cause another person to be murdered, whether in Canada or not...". Further, paragraph 465(1)(c) makes it an offence to conspire "with any one to commit an indictable offence". Of additional relevance is subsection 465(3), which provides that where one conspires in Canada to do an act described in subsection 465(1) outside of Canada that is an offence under the laws of the foreign place, the conspiracy is deemed to take place in Canada.

The core of conspiracy is an "agreement to perform an illegal act or to achieve a result by illegal means."[129] For the offence to be made out, "[t]here must be an intention to agree, the completion of an agreement, and a common design."[130] As Dickson J., as he then was, put it in *R.* v. *Papalia* "[t]he important inquiry is not as to the acts done in pursuance of the agreement, but whether there was, in fact, a common agreement to which the acts are referable and to which all of the alleged offenders were privy."[131] Thus, "[t]he Crown is simply required to prove a meeting of the minds with regard to a common design to do something unlawful."[132]

Accordingly, to obtain a Canadian conspiracy conviction for militarized commerce, the level of complicity by the company would have to extend to the formulation of an actual agreement to commit a wrongful act. Further, subsection 465(3) appears to establish a stricter jurisdictional standard than would be applied under the *Libman* test. More concretely, transnational jurisdiction over a conspiracy to commit a wrongful act other than murder requires both that the conspiracy take place in Canada and that the act which the conspirators seek to commit overseas be an offence under the laws of the foreign jurisdiction.

Thus, it would seem that the entire offence must occur in Canada, and not just its formulation or initiation. In addition, in contradistinction to the discussion above concerning aiding and abetting and counselling, the offence in question must be an "offence" as defined by the law of the *situs*, and not simply a culpable act as defined by the *Criminal Code*. In other words, were a state to allow security forces to use excessive force with impunity in their operations and were a company to conspire in Canada to deploy that force, no conviction for conspiracy in Canada would appear to be possible.

On the other hand, where the conspiracy relates to murder, paragraph 465(1)(a) would seem to greatly ease jurisdictional concerns. In this regard, La Forest, dissenting in *Finta*, held that paragraph 465(1)(a) "deals, *inter alia*, with conspiracy to murder abroad. The provision itself makes this extraterritorial act an offence and attaches a

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[129] *R.* v. *Douglas*, [1991] 1 S.C.R. 301 at 316, 3 C.R. (4th) 246 at 258.

[130] *United States of America* v. *Dynar*, [1997] 2 S.C.R. 462 at 500, (*sub nom. United States v. Dynar)* 115 C.C.C. (3d) 481 at 511 [hereinafter *Dynar* cited to S.C.R.].

[131] [1979] 2 S.C.R. 256 at 276-277, (1980) 11 C.R. (3d) 150 at 151.

[132] *Dynar, supra* note 130 at 501.

sanction to it."[133] The majority in *Finta* did not discuss this issue. In other words, there is Supreme Court authority, albeit from a dissenting judgment, implying that paragraph 465(1)(a) creates an extraterritorial offence of "conspiracy to murder abroad". This point is further reinforced by Laforest J.'s statement in *Finta* that paragraph 465(1)(a) and the piracy provisions in subsection 74(2) "reflect Parliament's intention to approach the relevant acts as domestic offences unto themselves".[134]

Consequently, a conspiracy to commit murder need neither occur nor have a real and substantial link to Canada, and murder need not be an offence in the overseas jurisdiction. Notably, "murder", as defined in s. 229 of the *Criminal Code*, includes intentionally causing the death of another person, as well as circumstances where the defendant "means to cause ... bodily harm that he knows is likely to cause ... death, and is reckless whether death ensues or not". Accordingly, were a company to form an agreement with security forces to cause bodily harm by firing into a crowd of massed protestors, that conspiracy might well be prosecutable under paragraph 465(1)(a) as an extraterritorial crime, even where the company did not necessarily intend to cause actual death, where all aspects of the conspiracy were situated in the overseas locale and where the use of such force by security personnel was licit under the laws of the foreign jurisdiction.

As with aiding and abetting and counselling an offence, a second means of circumventing jurisdictional concerns would be to characterize the conspiracy as a crime against humanity, something made possible by s. 7(3.77). Once again, to constitute such a crime, the conspiracy would have to be directed at the commission of one of the acts constituting a crime against humanity, be shocking to the conscience and the defendant would have to have foresight, or be willfully blind, to the gravity of its actions. The conspiracy would also have to be directed at an identifiable group. As with aiding and abetting and counselling an offence, the possibility of obtaining a crimes against humanity conviction for conspiracy will be removed if Bill C-19 is enacted in its present form.

5. *Criminal Negligence*

A prosecution for criminal negligence might also prove viable. Section 219 of the *Criminal Code* provides that "[e]very one is criminally negligent who (a) in doing anything...shows wanton or reckless disregard for the lives or safety of other persons." There are two criminal negligence offences: criminal negligence causing death, set out in s.220, and criminal negligence causing bodily harm, established by s.221.

While there may be some uncertainty in this area, the *actus reus* for criminal negligence causing both death and bodily harm requires an act that amounts "to a marked and significant departure from the standard which could be expected of a reasonably prudent person in the circumstances."[135] In terms of *mens rea*, the better

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[133] *Finta*, *supra* note 77 at 743.

[134] *Ibid* at 744.

[135] See *R.* v. *Tutton*, [1989] 1 S.C.R. 1392 at 1431, 13 M.V.R. (2d) 161 at 175, McIntyre J.; *R.* v. *Creighton*, [1993] 3 S.C.R. 3, 17 C.R.R. (2d) 1, McLachlin J. [hereinafter *Creighton* cited to S.C.R.]; *R.* v. *Barron* (1985), 23 C.C.C. (3d) 544, 48 C.R. (3d) 334 (Ont. C.A.). See also *R.* v. *Landreville* (1994), 91 C.C.C. (3d) 274, 4 M.V.R. (3d) 242 (Que. C.A.), Fish J.A. But see *R.* v. *Fortier* (1998), 127 C.C.C. (3d) 217 (Que. C.A.), suggesting that "reckless disregard" in criminal negligence requires a higher standard than mere marked deviation from the norm. See

view would appear to be that "objective *mens rea* is the fault standard for criminal negligence".[136] As McLachlin J. put it in *R.* v. *Creighton,* "...the *mens rea* for objective foresight of risking harm is normally inferred from the facts. The standard is that of the reasonable person in the circumstances of the accused. If a person has committed a manifestly dangerous act, it is reasonable, absent indications to the contrary, to infer that he or she failed to direct his or her mind to the risk and the need to take care."[137]

On the basis of this discussion, liability in criminal negligence for militarized commerce could arise where a company provides material or financial support or calls upon the services of security forces whose human rights record is so notorious that the corporation's act departs markedly from the standard of a reasonable person in the circumstances. However, the real and substantial link test would demand that there be a connection between the offence and Canada. Where the act of providing material or financial support or incitement commences or is initiated in Canada, this requirement might well be satisfied.

C. *Militarized Commerce and the Issue of Corporate Mens Rea*

Clearly, conviction on the basis of the offences outlined above requires proof beyond a reasonable doubt of both the relevant *actus reus* and *mens rea.* The *Criminal Code,* in s.1, defines "person" and "every one" as including "bodies corporate", "societies" and "companies". As a consequence, the provisions of the *Code* of interest to this paper apply as much to juristic persons as to physical persons. However, if a conviction were sought of a corporation for an act of militarized commerce, rather than of an individual, the *mens rea* requirement presents certain difficulties.

In Canada, "corporate criminal liability is essentially vicarious liability based upon the acts and omissions of individuals".[138] In other words, "[p]roof of the personal culpability of a person who constitutes the directing mind of a corporate accused may be essential in order to establish the guilt of the corporation." This is not to say, however, "that the individual who is that directing mind must be charged and convicted."[139]

The Supreme Court of Canada's present approach to corporate *mens rea* was developed in *Canadian Dredge & Dock Co.* v. *The Queen.*[140] The test there established, known as the identification theory, was summarized by Iacobucci J., writing for a majority of the Supreme Court of Canada in *Rhone (The)* v. *Peter A.B. Widener (The):*[141]

> ...the focus of inquiry must be whether the impugned individual has been delegated the "governing executive authority" of the company within the

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also *R.* v. *Anderson,* [1990] 1 S.C.R. 265 at 271, 53 C.C.C. (3d) 481 at 486-487, where the Court concluded that "[t]he conclusion that he [the accused] had a wanton or reckless disregard for the lives and safety of others must be drawn from the conduct which is alleged to be a marked departure from the norm."

[136] *R.* v. *Ubhi* (1994), 27 C.R. (4th) 332 at 334, 1 M.V.R. (3d) 161 at 162 (B.C.C.A.).

[137] *Creighton, supra* note 135 at 74.

[138] *R.* v. *CIP Inc.,* [1992] 1 S.C.R. 843 at 855, 71 C.C.C. (3d) 129 at 138.

[139] *R.* v. *Ontario Chrysler (1977) Ltd.* (1994), 69 O.A.C. 185 at 196, 2 M.V.R. (3d) 239 at 252.

[140] [1985] 1 S.C.R. 662, 45 C.R. (3d) 289 [hereinafter *Dredge*].

[141] [1993] 1 S.C.R. 497 at 520-526, 148 N.R. 349 at 372-380.

> scope of his or her authority. I interpret this to mean that one must determine whether the discretion conferred on an employee amounts to an express or implied delegation of executive authority to design and supervise the implementation of corporate policy rather than simply to carry out such policy. In other words, the courts must consider who has been left with the decision-making power in a relevant sphere of corporate activity.
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> ...
>
> The key factor which distinguishes directing minds from normal employees is the capacity to exercise decision-making authority on matters of corporate policy, rather than merely to give effect to such policy on an operational basis, whether at head office or across the sea.[142]

Put another way, "[a]n employee is considered to be the company's 'directing mind' when the corporation has given him the actual authority to decide matters related to a specific area."[143] This inquiry is said to be "...a fact-driven one which looks beyond titles and job descriptions to the reality of any given situation."[144] However, the identification theory will not operate where the employee's actions, even though within their sphere of responsibility, were totally in fraud of the corporation or were not, by design or result, partly for the benefit of the company.[145]

While the identification theory complicates corporate criminal prosecution, it would seem that in the context of militarized commerce, the transnational nature of the wrongful acts might reduce the relative importance of the "identification theory" as a bar to convictions. With the exception only of extraterritorial offences, the discussion above suggests that a Canadian conviction for an act of complicity requires either a Canadian *situs* or, at the very least, a real and substantial link. Either way, a conviction depends on a sufficient measure of participation by the company's Canadian head office. As the sections above propose, head office involvement is likely to be proven by a command-control paper trail from head office to the field. Notably, the existence of directives between field employees and supervisors in Canada would likely go a long way in revealing the existence, on the part of the supervisors, of "actual authority to decide matters related to a specific area". The obvious exception to this observation would be an employee in head office who acts outside of his or her authority in authorizing an act of militarized commerce. However, if this person were acting without authority, in many instances it seems likely that the overseas corporate employees empowered by the Canadian directive to engage in the act of complicity would seek clarification or fail to act.

In sum, the identification theory and the difficulties it presents to *mens rea* may, in practice, prove the least arduous aspect of a prosecution for militarized commerce, at least where the prosecution is dependent on there being some connection to Canada. It should be flagged, however, that if the prosecution were for an extraterritorial offence and no link existed to Canada, proof of corporate *mens rea* would likely be a more pressing issue.

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[142] *Ibid.*

[143] *Milliken & Co.* v. *Interface Flooring Systems (Canada) Inc.*, [1998] 3 F.C. 103 at 124, 143 F.T.R. 106 at 121.

[144] *R.* v. *Safety-Kleen Canada Inc.*, (1997) 32 O.R. (3d) 493 at 498, 98 O.A.C. 14 at 18 (Ont. C.A.).

[145] *Dredge, supra* note 140.

D. *Conclusion*

The discussion in this section suggests that Canadian criminal liability for corporate complicity in overseas human rights abuses by security forces is legally possible. More concretely, where a corporate manager is a "directing mind" and he or she assists, incites or conspires with a military or paramilitary unit that subsequently commits human rights abuses, the corporation could, where its complicity is cognizable as a *Criminal Code* offence, be prosecuted successfully in Canada.

This section suggests that there would be many hurdles to a successful prosecution, not least of which would be the question of Canadian court jurisdiction. However, the jurisdictional difficulty is not insurmountable. First, there is authority for the proposition that an act of aiding, abetting or counselling an offence need not be based on an offence that takes place in Canada. Thus, a corporation could conceivably be convicted in Canada as a party to an overseas culpable wrong it aids, abets or counsels in Canada. Second, the corporation's complicity with a culpable wrong committed by a third party may not need to have a full Canadian *situs*. Where a "real and substantial link" exists between the overseas wrong and Canada, courts may be seized of the matter. In practice, this would seem to require that the offence be formulated, initiated or committed in Canada. The language of "formulation" and "initiation", in particular, seems likely to permit prosecutions where a company's overseas operations are directed from a Canadian home office. In addition, where the overseas wrong constitutes an extraterritorial offence – such as a crime against humanity or, it would appear, conspiracy to commit murder – a conviction may be obtained in Canada, even in the absence of a real and substantial link. In other words, when companies operate internationally, they should not presume that they escape the long arm of Canadian criminal law.

IV. CIVIL LIABILITY

While criminal prosecutions have the advantage of including significant and defined penalties, realistically, a viable prosecution depends on the state deciding to pursue the matter. Civil law, while lacking the punitive authority of criminal sanctions, provides a more ready remedy for the actual victims of acts of militarized commerce. As with criminal law, pursuing a civil action in Canada for overseas wrongs committed by a Canadian corporation raises the procedural issue of jurisdiction, as well as substantive law concerns.

A. *"Transnational" Civil Jurisdiction*

While this area of the law remains confused, it would appear that there are at least two requirements to be met for a Canadian court to have civil jurisdiction over a transnational wrong. In the words of La Forest J., writing for a majority of the Supreme Court of Canada in *Tolofson* v. *Jensen*,[146]

> In Canada, a Court may exercise jurisdiction only if it has a "real and substantial connection" (a term not yet fully defined) with the subject of the

[146] [1994] 3 S.C.R. 1022 at 1049, 77 O.A.C. 81 at 108 [hereinafter cited to S.C.R.].

> litigation....This test has the effect of preventing a Court from unduly entering into matters in which the jurisdiction in which it is located has little interest. In addition, through the doctrine of *forum non conveniens* a Court may refuse to exercise jurisdiction where...there is a more convenient or appropriate forum elsewhere.

As La Forest J. suggests, the civil "real and substantial connection" test, also known as jurisdiction *simpliciter*,[147] remains ambiguous. While the language of "real and substantial" echoes that invoked in the criminal law context, the court approach to this issue in the civil context appears to be less well developed and arises as a concern most frequently where the defendant is served *ex juris*, or outside of the jurisdiction.[148] Where service is *in juris* to a defendant ordinarily resident in the province, it is unlikely a court would decline jurisdiction on the basis of the real and substantial connection test.

Authority for this proposition can be drawn from *Morguard Investments Ltd.* v. *De Savoye*,[149] a decision of the Supreme Court of Canada. Here, the Court was asked to grapple with the question of what, if any, recognition was to be given by the courts in one province to a judgment of another province's courts in a personal action against a defendant who did not live in the second province. In the course of answering this question, the Court indicated that no injustice would arise "in the case of judgments *in personam* where the defendant was within the jurisdiction at the time of the action or when he submitted to its judgment whether by agreement or attornment. In the first case, the court had jurisdiction over the person, and in the second case by virtue of the agreement."[150] This principle was put into practice in *Wong* v. *Wong*,[151] a decision of the British Columbia Supreme Court. In that case, the defendant was served in British Columbia. Accordingly, the Court concluded that it had jurisdiction simpliciter as "[h]istorically, that would be sufficient reason for this court to take jurisdiction over the parties and their world-wide property."[152] On this basis, where, at the very least, the defendant is regularly domiciled in a Canadian province, it seem likely that simple in-province service is enough to give rise to a real and substantial connection sufficient to meet the first test alluded to in *Tolofson*.

However, the jurisdictional question is complicated by the somewhat uncertain common law doctrine of *forum non conveniens*. By virtue of this principle, a court of

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[147] See *Cook* v. *Parcel, Mauro, Hultin & Spaanstra, P.C.* (1997), 143 D.L.R. (4th) 213 at 219, 31 B.C.L.R. (3d) 24 at 30 (B.C.C.A.): "...the test to be applied in determining whether the B.C. Supreme Court has jurisdiction over these proceedings is whether there is a real and substantial connection between the court and either the defendant (respondent firm) or the subject-matter of the litigation (occasionally referred to in the authorities as the "transaction" or the "cause of action"). Jurisdiction founded on this basis is referred to as 'jurisdiction *simpliciter*.'"

[148] .The most recent cases dealing with the "real and substantial connection" test have involved service *ex juris*. See, for example, *Oakley* v. *Barry* (1998), 158 D.L.R. (4th) 679, 166 N.S.R. 2(d) 282 (N.S.C.A.); *Craig Broadcast Systems Inc.* v. *Frank N. Magid Associates, Inc.* (1998), 155 D.L.R. (4th) 356, [1998] W.W.R. 17 (Man. C.A.); *Cook* v. *Parcel, Mauro, Hultin & Spaanstra, P.C.* (1997), 143 D.L.R. (4th) 213, 31 B.C.L.R. (3d) 24 (B.C.C.A.).

[149] [1990] 3 S.C.R. 1077, 46 C.P. (2d) 1. [hereinafter cited to S.C.R.]

[150] *Ibid.* at 1103-4.

[151] (1995), 8 B.C.L.R. (3d) 66, [1995] 8 W.W.R. 293 (B.C.S.C.)[hereinafter *Wong* cited to B.C.L.R.]. See also *Barclay's Bank PCL* v. *Inc. Incorporated* (1999), 242 A.R. 18, [1999] A.J. No. 145 (QL) (Alta. Q.B.).

[152] *Wong, ibid.* at 69-70.

a common law province, and now also in Quebec, may have the jurisdiction to adjudicate an action but may decline this jurisdiction. In deciding whether jurisdiction should be refused, the question asked by the Court is whether or not the forum chosen by the plaintiff is *forum non conveniens*. More concretely, the test to be applied has been summarized by the Supreme Court of Canada as follows:

> ... the court must determine whether there is another forum that is clearly more appropriate...[W]here there is no one forum that is the most appropriate, the domestic forum wins out by default and refuses a stay, provided it is an appropriate forum.[153]

In *Frymer* v. *Brettschneider*, Arbour J.A., as she then was, writing for the majority of the Ontario Court of Appeal, summarized this test as follows:

> In all cases, the test is whether there clearly is a more appropriate jurisdiction than the domestic forum chosen by the plaintiff in which the case should be tried. The choice of the appropriate forum is designed to ensure that the action is tried in the jurisdiction that has the closest connection with the action and the parties. All factors pertinent to making this determination must be considered.[154]

While it has been urged that the onus of proof is unlikely to be an important issue in a *forum non conveniens* analysis,[155] the allocation of this onus has arisen in several cases.[156] There is conflicting judicial opinion as to whether service *ex juris* imposes a burden on the plaintiff to justify its selection of forum.[157] However, there is apparent agreement that where the service is *in juris* and the relevant rules of civil procedure do not demand otherwise, "[t]he onus is on the moving party in a *forum non conveniens* application to satisfy the court that it is *not* a convenient forum. The only way to satisfy that onus is to satisfy the legal test that there is another forum *clearly* more appropriate for the hearing of the action".[158] Also of relevance is the statement made by Sopinka J. in *Amchem Products Inc.* v. *British Columbia*:

> While the standard of proof remains that applicable in civil cases, I agree with the English authorities that the existence of a more appropriate forum must be *clearly* established to displace the forum selected by the plaintiff.[159]

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[153] *Amchem Products Inc. v. British Columbia (W.C.B.),* [1993] 1 S.C.R. 897 at 931, 102 D.L.R. (4th) 96 at 119 [hereinafter cited to S.C.R.].

[154] (1994), 19 O.R. (3d) 60 at 79, 28 C.P.C (3d) 84 at 107 [hereinafter *Frymer* cited to O.R.].

[155] *Supra* note 153.

[156] See, for example, *Frymer*, *supra* note 154.

[157] See the position taken by the majority in *Frymer, ibid.* at 78-81 versus that taken by the Manitoba Court of Appeal in *Craig Broadcast Systems, Inc.* v. *Frank N. Magid Associates, Inc.* (1998), 155 D.L.R. (4th) 356, [1998] 4 W.W.R. 17 (Man. C.A.) [hereinafter *Craig Broadcasting Systems* cited to D.L.R.].

[158] *Craig Broadcasting Systems, ibid* at 367 (emphasis in original). See also *Frymer, supra* note 154 at 84, *per* Arbour J.A.: "I would conclude that when the plaintiff chooses a forum in which jurisdiction exists 'as of right', in the sense that the defendant is a resident of that jurisdiction, the defendant has the burden of showing that another forum is the convenient one."

[159] *Supra* note 153 at 921 (emphasis in original).

As the discussion above implies, in exercising their discretion under the *forum non conveniens* doctrine, Canadian courts may take into account a number of different variables. Generally, in assessing whether the forum is appropriate, the court will look at factors connecting the case to the court, including the residence of the parties and of witnesses, the language used during relevant events, the place of these events, the place where the parties conduct business, the location of relevant property, the choice of governing law, etc.[160] Notably, the Supreme Court of Canada, in *Amchem Products Inc.* v. *British Columbia* held that "the loss of juridical advantage" is also a factor that may be weighed "in identifying the appropriate forum."[161] However, Sopinka J. concluded for the Court that

> [t]he weight to be given to juridical advantage is very much a function of the parties' connection to the particular jurisdiction in question. If a party seeks out a jurisdiction simply to gain a juridical advantage rather than by reason of a real and substantial connection of the case to the jurisdiction, that is ordinarily condemned as "forum shopping". On the other hand, a party whose case has a real and substantial connection with a forum has a legitimate claim to the advantages that that forum provides. The legitimacy of this claim is based on a reasonable expectation that in the event of litigation arising out of the transaction in question, those advantages will be available.[162]

Critically, Canadian courts may also "weigh the relative advantages and obstacles to a fair trial".[163]

Few cases exist enunciating the approach of Canadian Courts to *forum non conveniens* where foreign plaintiffs sue a domestic corporation for non-contractual harm occurring overseas. Perhaps the most notable case with such facts is *Recherches Internationales Québec* v. *Cambior*,[164] a recent decision of the Quebec Superior Court. On the facts in *Recherches Internationales*, a Quebec-based mining firm, Cambior, was sued in Montreal for a toxic tailings spill in Guyana attributed to a Guyanese firm of which Cambior was the single largest shareholder. The plaintiffs in the case were a class of Guyanese said to have been affected by the spill. At issue early in the proceedings was the question as to whether Quebec was the appropriate forum for the trial.

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[160] P. Perrel, "A Litigator's New Primer on Conflict of Laws" 17 *Advocates' Quarterly* (1995) 300 at 306.

[161] *Supra* note 153 at 919.

[162] *Ibid.* at 920.

[163] J-G. Castel, *Canadian Conflict of Laws*, 4th Ed. (Butterworths, 1997) at 258. See *Burton* v. *Global Benefit Plan Consultants Inc.*, [1999] N.J. No. 64 (QL) (Nfld. S.C.); *Godin* v. *Richard* (1996), 155 N.S.R. (2d) 33, 457 A.P.R. 33 (N.S.S.C.); *Carroll* v. *Wag-Aero Inc.* (1994), 137 N.S.R. (2d) 295, 391 A.P.R. 295 (N.S.S.C).

[164] [1998] Q.J. No. 2554 (Que. S.C.), (QL), (14 August 1998), Montreal 500-06-000034-971 J.E.L./1998-0728 [hereinafter *Recherches Internationales* cited to QL]. The Court, in subsequent proceedings in that case noted that "[l]e recours collectif dirigé contre Cambior pour des dommages causés à l'étranger par une compagnie dont elle est actionnaire majoritaire était une première en droit québécois et même en droit canadien." [A class action brought against Cambior for damages caused overseas by a company in which it is a majority shareholder was the first in Quebec law and even in Canadian law.]

In ultimately concluding that Guyana was the most appropriate forum, the Court applied common law principles to conduct a *forum non conveniens* analysis. Maughan J. focused in particular on eight considerations: the place of residence of the parties and witnesses, the location of the evidence, the place where the fault occurred, the existence of court proceedings in another forum, the location of property owned by the defendant, the law applicable to the case, juridical advantage for the plaintiff in the chosen forum, and the interests of justice.

In discussing the matter of the residence of the parties, the Court noted that all of the plaintiffs were residents of Guyana. While Cambior was a Quebec corporation, the simple domicile of the defendant was not determinative. In fact, with respect to the issue of party residency, the Court was of the view that, on balance, Guyana, and not Quebec, was the appropriate forum for the litigation. Maughan J. determined that the inconvenience to the victims of having to litigate in Quebec far exceeded that of Cambior's board members and executive officers who would be required to testify in Guyana. Further, as many key witnesses were based in Guyana, the Court took the view that the location of witnesses favoured Guyana as the appropriate forum. The Court also noted that upwards of 900 victims had already filed claims in Guyanese courts against Omai, the Guyanese corporation which owned the mine. As a consequence, the courts of Guyana had already been seized of litigation surrounding the spill.

With respect to the location of the elements of proof, the Court concluded that most, if not all, of these elements were located in Guyana, including the rivers into which the toxic waste spilled, the medical records of victims and other key information. Similarly, in terms of where the fault occurred, while Cambior made a series of decisions concerning the design, construction, management and operation of the mine and tailings pond, the mine was built in Guyana and managed on a daily basis by its Guyanese subsidiary. Accordingly, "[a]ny act of negligence in the construction, management and operation of, the mine which Omai committed and for which Cambior, as principal, could be held liable would have occurred in Guyana."[165]

In terms of the location of the defendants' assets, Maughan J. found that Cambior has assets in both Quebec and Guyana. In fact, the worth of the company's Guyanese assets was sufficient to satisfy any adverse judgment against Cambior in Guyana. As a consequence, successful plaintiffs in either jurisdiction would have little difficulty in executing a judgment. More strongly favouring a Guyanese forum was the uncontested conclusion that it was the law of Guyana that would apply, a view arrived at with reference to the applicable provisions of Quebec's Civil Code.

With respect to juridical advantage, there were clear advantages for the plaintiffs to be had by suing in Quebec, including the availability of a class action procedure. However, this advantage alone could not decide the forum analysis. Maughan J. urged that "forum shopping is to be discouraged to avoid parties seeking out a jurisdiction simply to gain a juridical advantage when they have little or not connection with that jurisdiction." As the Guyanese plaintiffs lacked a real tie to Quebec and because the various considerations dealt with by the Court suggested Guyana as the most appropriate forum, the plaintiffs had "no legitimate claim to the advantages of the Quebec forum and its class action legislation."[166]

Turning finally to the issue of where the interests of justice would best be

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[165] *Ibid.* at para. 61.

[166] *Ibid.* at para. 79 (footnotes omitted).

served, the Court was confronted with the plaintiffs' argument that they would not receive a fair trial in Guyana. They presented evidence from a Montreal law professor about the inadequacies of the Guyanese justice system. Cambior responded with its own experts who urged that the Guyanese justice system was competent to deal with such a case. In weighing this battle of experts, Maughan J. concluded that:

> ...it is difficult, if not invidious, to make comparisons between two different systems of justice. At the same time, [the Court] acknowledges that, for the purposes of a *forum non conveniens* inquiry, this exercise is necessary to determine whether the remedy sought by the plaintiffs is available in the foreign jurisdiction. In the present case, RIQ has failed to bring forward any conclusive and objective evidence to substantiate its belief that Guyana is an inadequate forum due to the many deficiencies which plague its system of justice. On the contrary, the Court is satisfied that the remedy sought by the victims is available to them in Guyana and that the delays for having their case heard in Guyana are reasonable compared to the delays that exist in this jurisdiction.[167]

In the result, the Court concluded that "...the circumstances of the case are sufficiently unusual that it would be improper for it to remain seized of this litigation. Guyana is clearly the appropriate forum to decide the issues."[168] The case was dismissed. Yet, though the plaintiffs were ultimately unsuccessful, the outcome turned in large part on the Court's assessment of the facts, and in particular, on the likelihood of a fair trial in Guyana. Had the circumstances in Guyana been more egregious and the prospects of a fair trial more unlikely, the outcome of the decision may have differed. Accordingly, the Court's willingness to consider the likelihood of a fair trial in determining the proper forum has clear implications for civil suits brought in the context of militarized commerce. As the case studies above suggest, militarized commerce occurs often in countries with notorious human rights records and a corresponding, poor tradition of adherence to the rule of law. Cambior's case would undoubtedly have been much more difficult to make out if the waste spill had occurred in Burma or Sudan rather than Guyana. Similarly, common sense dictates that a company accused of complicity in human rights abuses by state actors will have a difficult time contesting a charge that the countries in which such events occur are unwilling or unable to provide a fair trial to the victims.

Thus, while the hurdles are not insubstantial, there is reason to conclude that foreign plaintiffs suing a Canadian corporation, served *in juris* in Canada for abuses stemming from overseas militarized commerce might well succeed in persuading a Canadian court that it has jurisdiction *simpliciter* and, owing to circumstances overseas inhospitable to a fair trial, that the *forum non conveniens* analysis favours Canada.

1. *Source of Liability*

Associated with the question of jurisdiction is the issue of which nation's law should be applied, were the case to proceed in Canada. The leading case on choice of law in multi-jurisdictional civil litigation is that of the Supreme Court of Canada in

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[167] *Ibid.* at para. 98.
[168] *Ibid.* at para. 99.

Tolofson v. *Jensen*.[169] The facts in *Tolofson*, and its accompanying case *Lucas (Litigation Guardian of)* v. *Gagnon*, were complicated. Put simply, both cases involved parties from two provinces suing in the courts of one province with regard to a tort that occurred within the territorial boundaries of another province. The issue before the Court was which province's law should apply to the proceedings.

La Forest J., writing for a majority of the Court, revisited the traditional common law rules for choice of law and reaffirmed the *lex loci delicti* as the applicable principle:

> From the general principle that a state has exclusive jurisdiction within its own territories and that other states must under principles of comity respect the exercise of its jurisdiction within its own territory, it seems axiomatic to me that, at least as a general rule, the law to be applied in torts is the law of the place where the activity occurred, i.e., the *lex loci delicti*.[170]

In the context of a tort claim, "the place where the activity occurred" is increasingly viewed as the place where the harm occurs.[171] In *Leonard* v. *Houle*,[172] the Ontario Court of Appeal was asked to determine whether a tort committed by Ottawa and Hull, Quebec police had occurred in Ontario or Quebec. In concluding that the tort occurred in Quebec, the Court held as follows:

> While there may be situations where the issue of where the tort takes place will raise "thorny issues", and perhaps also raise issues of public policy, this is not such a case. It seems clear to me that the wrong occurred in the Province of Quebec *because the injury occurred there*. The plaintiffs are not suing because the Ottawa police breached their duty when they commenced a chase while they were in the Province of Ontario, nor are they suing because the Ottawa police failed to adequately warn the Quebec police authorities of the ongoing chase. They are suing because Leonard was injured in the resulting car accident in the Province of Quebec. The activity which took place in the Province of Ontario, even if found to constitute a breach of duty on the part of the Ottawa police, does not amount to an actionable wrong. *There is no actionable wrong without the injury*. The place where "the activity took place" which gives rise to the action is in the Province of Quebec.[173]

On the basis of the discussion to this point, there is reason to conclude that a transnational tort action involving decisions made in Canada that cause harm overseas would be required to apply foreign law. However, the term "at least as a general rule" appearing in the *Tolfoson* passage cited above suggests that there are exceptions to the *lex loci delicti* rule.[174] In fact, in *Tolofson*, La Forest J. noted that

> I view the *lex loci delicti* rule as the governing law. However, because a rigid rule on the international level could give rise to injustice, in certain

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[169] *Supra* note 146.
[170] *Ibid.* at 1049-50.
[171] See discussion in Castel, *supra* note 163 at 692-3.
[172] (1997), 36 O.R. (3d) 357, 154 D.L.R. (4th) 640.
[173] *Ibid.* at 364-65. (emphasis added).
[174] See discussion in Castel, *supra* note 163 at 686-87.

> circumstances, I am not averse to retaining a discretion in the court to apply our own law to deal with such circumstances. I can, however, imagine few cases where this would be necessary.[175]

Despite La Forest J.'s view on the infrequency of exceptions, lower courts have relied on his reasoning to permit the application of Canadian law in certain circumstances. Thus, in *Hanlan et al.* v. *Sernesky*,[176] the Ontario Court of Appeal interpreted *Tolofson* as allowing "a discretion to apply the *lex fori* [law of the domestic forum] in circumstances where the *lex loci delicti* rule would work an injustice."

What exactly constitutes an "injustice" sufficient to overturn the presumption in favour of the *lex loci delicti* remains an open question. In *Hanlan*, the motions judge ruled that applying the foreign law, rather than Ontario law, would result in an injustice because, *inter alia*, the foreign law did not permit claims of the nature at issue. However, it is clear from comments made by La Forest J. in *Tolfoson* that a mere difference in the laws of the two jurisdictions does not constitute an "injustice".[177] On the other hand, the existence of a reprehensible or egregious legal regime may well justify an exception. In *Davidson Tisdale Ltd.* v. *Pendrick*,[178] the Ontario Divisional Court was asked to determine whether New York or Ontario law should apply in a lawsuit concerning misrepresentation in New York in the purchase of corporate shares. In concluding that it was the law of New York that should apply, the Court considered whether this was a case in which an exception should be made to the *lex loci delicti* rule. Ruling that it was not, the Court commented that "[w]e are not dealing here with conduct lawful by the laws of a state run by a despot, but unacceptable in a democratic society a matter that might require the application of Ontario law to prevent injustice."[179]

In sum, the caselaw to date suggests that even where a Canadian court has jurisdiction over a transnational tort, it will tend to apply the law of the place where the harm stemming from the tort occurs. There are, however, exceptions to this rule including, possibly, where the *lex loci* is the product of a despotic regime unacceptable to a democratic society.

2. *Nature of Liability*

Assuming success in overcoming the transnational hurdles to a civil action for

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[175] *Supra* note 146 at 1054. See also *George* v. *Gubernowicz*, [1999] O.J. No. 1677 (QL) (Ont. Ct. (Gen. Div.)); *Garger* v. *Days Inn of Toledo-Perrysburg* (1997), 47 O.T.C. 79 (Ont. Ct. (Gen. Div.)).

[176] (1998), 38 O.R. (3d) 479 at 479, 108 O.A.C. 261 at 262.

[177] *Supra* note 146 at 1058: " These "public policy" arguments [regarding "unfairness" in the foreign law] simply mean that the court does not approve of the law that the legislature having power to enact it within its territory has chosen to adopt. These laws are usually enacted on the basis of what are often perceived by those who make them as reasonable, though they may turn out to be unwise. The residents of the jurisdiction must put up with them until they are modified, and one does not ordinarily ignore the law of the land in favour of those who visit. True, it may be unfortunate for a plaintiff that he or she was the victim of a tort in one jurisdiction rather than another and so be unable to claim as much compensation as if it had occurred in another jurisdiction. But such differences are a concomitant of the territoriality principle."

[178] (1998), 116 O.A.C. 53., 31 C.P.C. (4th) 164 (Ont. Ct.(Gen. Div.)Div. Ct.) [hereinafter cited to O.A.C].

[179] *Ibid.* at 61.

militarized commerce, the next stage is to determine the Canadian substantive law basis for liability. Clearly, the wrongs identified in Part II as associated with militarized commerce are best characterized in the common law lexicon as torts. Further, in the absence of direct involvement by the company or its agents in human rights abuses, the most relevant tort is that of negligence. As a consequence, a company that engages in the sorts of complicity described in Part II and is unsuccessful in the *forum non conveniens* and *lex loci delicti* arguments will likely face a Canadian common law negligence action.

It is trite to say that a successful negligence action for an act of militarized commerce would depend on the company having a duty of care to the victims and that it breach this duty. Further, harm must ensue and this harm must be sufficiently proximate to, and caused-in-fact by, the company's actions. Suffice it to say that where militarized commerce of the sort described in Part II is at issue, the requirement of harm is not likely to be an issue. Human rights abuses of the sort described in Part II, including extra-judicial executions, forced labour, rape and other forms of brutality, are easily cognizable as "damage" in the law of negligence. Nor, in most instances, is there likely to be any issue that the company's incitement, material or financial complicity, if proven on a balance of probabilities, is at least a part cause-in-fact of the harm.

The duty and standard of care the Canadian company may owe victims of militarized commerce and the issue of proximate cause are slightly more complex. The *Anns* v. *Meton London Borough Council*[180] test, endorsed by the Supreme Court of Canada in *Kamloops* v. *Nielsen*,[181] anticipates a two-stage test for duty. First, the court must inquire as to whether there is "a sufficiently close relationship between the parties...so that, in the reasonable contemplation of the [defendant], carelessness on its part might cause damage to that person".[182] If this first test is met, the Court must ask whether there are any other considerations that might limit or negative this duty. The latter consideration is said to be one of "public policy which the courts in each jurisdiction will have to decide for themselves in the novel circumstances of the cases that come before them."[183] The application of the second test "may reflect the need to shield specific activities from judicial control, or the wish to prevent the 'floodgates of litigation' from opening into areas of potentially unlimited liability."[184] It may also reflect concerns of "efficiency and economic fairness".[185]

The next step is to determine whether the defendant's actions constitute a breach of the applicable standard of care. While "a discussion of duty centres around its existence,...the standard of care clarifies what the content of the duty is."[186] In the recent case of *Ryan* v. *Victoria (City)*, the Supreme Court of Canada summarized the principles applicable to the standard of care analysis as follows:

> Conduct is negligent if it creates an objectively unreasonable risk of harm. To avoid liability, a person must exercise the standard of care that would be

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[180] [1977] 2 W.L.R. 1024, [1977] 2 All E.R. 492.

[181] [1984] 2 S.C.R. 2, (1984), 10 D.L.R. (4th) 273. [hereinafter cited to S.C.R.]

[182] *Ibid.* at 10.

[183] A. Linden, *Canadian Tort Law*, 5th ed. (Toronto: Butterworths, 1994) at 260.

[184] *Ryan* v. *Victoria (City)*, [1999] 1 S.C.R. 201 at 220, (1999), 168 D.L.R. (4th) 513 at 525 [hereinafter *Ryan* cited to S.C.R.].

[185] *Ibid.* at 221.

[186] *Ibid.* at 219.

> expected of an ordinary, reasonable and prudent person in the same circumstances. The measure of what is reasonable depends on the facts of each case, including the likelihood of a known or foreseeable harm, the gravity of that harm, and the burden or cost which would be incurred to prevent the injury. In addition, one may look to external indicators of reasonable conduct, such as custom, industry practice, and statutory or regulatory standards.[187]

Finally, to be successful in a negligence action, the plaintiffs will have to show that the harm complained of is not so remote that the company cannot be considered the "proximate" cause of the wrong. While this is an area that remains somewhat unclear in Canadian law, the remoteness test is likely whether a reasonable observer would "foresee in a general way the class or character of injury which occurred," though not necessarily the "precise concatenation of events" leading to the injury.[188]

Accordingly, to be successful in a negligence action involving militarized commerce, the plaintiff must show that the company's conduct was such that it was foreseeable to a reasonable observer that its actions put the victims in the path of harm, that, in so acting, the company placed the plaintiffs at unreasonable risk, and that the harm that befell the victim was of the general sort foreseeable. In addition, there must be no policy reason prompting the court to negative the duty that otherwise arises by virtue of the foreseeable risk of harm.

Clearly, it goes beyond the scope of this paper to speculate on the array of facts that might arise to satisfy these requirements. That said, provisioning, retaining or calling upon security forces with notorious human rights records would likely place the ultimate victims of these forces at foreseeable risk, one that may well be unreasonable in the circumstances. If these forces commit atrocities in keeping with their reputation, company liability is likely to be established. Nor do there appear to be any evident policy reasons why, given such facts, a court might decline to find the company had a duty of care. In other words, there is no reason in principle why the sorts of acts described in Part II of this paper are not cognizable as tortious wrongs in Canadian tort law.

3. *Conclusion*

A foreign victim injured via an act of militarized commerce faces a number of hurdles in bringing a civil action in Canadian court. Nevertheless, these challenges are not insurmountable and there is every possibility that, on the right facts, militarized commerce would prove actionable in this country. Specifically, where the corporation is served with the complaint *in juris*, where the circumstances in the overseas jurisdiction are unlikely to favour a fair trial and where the foreign law is likely to work an injustice, the company could well face a viable common law tort action in Canadian court.

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[187] *Ibid.* at 222.

[188] *Ontario (Min. of Highways)* v. *Côté*, [1976] 1 S.C.R. 595 at 604, (1975), 51 D.L.R. (3d) 244 at 252 (S.C.C.).

V. CONCLUSION

In 1999, following the kidnapping of a Canadian oil executive, the Colombian mines and energy minister promised the support of Colombia's human rights-abusing army in protecting Canadian companies operating in that country.[189] This article suggests that companies may wish to pause and consider the legal implications of agreeing to this offer. It shows that companies, when they engage in "militarized commerce" by relying on, or assisting, human rights-abusing security forces, should not necessarily view human rights violations with indifference. Where a company is complicit in these abuses, either by providing material or financial support to security units or inciting the intervention of these forces, it may well be liable in both Canadian criminal and civil law. The article illustrates that a successful prosecution or civil action for "militarized commerce" would face significant obstacles, particularly in terms of court jurisdiction. The paper also suggests, however, that legal proceedings of these sorts are entirely possible. Accordingly, as Canadian companies globalize their activities, there is every possibility that the shadow of Canadian law will globalize with them, thereby holding companies accountable in Canada for their overseas wrongs.

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[189] Cattaneo, *supra* note 3.