

# BRIEF ON CORPORATIONS AND HUMAN RIGHTS IN THE ASIA-PACIFIC REGION

**Prepared for Professor John Ruggie  
United Nations Special Representative of the  
Secretary General for Business and Human  
Rights**

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## TABLE OF CONTENTS

<b>A.</b>	<b>Executive Summary</b>	<b>8</b>
A.1	Structure of Main Findings	8
A.2	Overview	8
A.3	Identifying and Clarifying Legal Standards of Corporate Responsibility and Accountability with Regard to Human Rights	8
(a)	Constitutional Human Rights	9
(b)	Human Rights Standards in Other Domestic Law	9
(c)	International Human Rights Law	10
A.4	The Role of States in Relation to Corporations and Human Rights	11
(a)	Overview	11
(b)	The Role of Parliament and the Executive	11
(c)	Role of the Judiciary	12
(d)	The role of the Police and Prosecuting Agencies	12
(e)	Role of Other Institutions	12
A.5	Implications for Corporations of the Concepts of 'Complicity' and 'Sphere of Influence'	12
(a)	Criminal Liability and Complicity	12
(b)	Criminal Provisions with Extraterritorial Reach	13
(c)	Civil Liability and Sphere of Influence	13
(d)	Sphere of Influence and Extraterritoriality	14
(e)	Published Business Practice Standards	14
<b>B.</b>	<b>BACKGROUND</b>	<b>15</b>
<b>C.</b>	<b>KEY AREAS OF BRIEF – OVERVIEW</b>	<b>16</b>
C.1	Introduction	16
C.2	Overview of Legal System of Jurisdiction	16
C.3	Human Rights Law Obligations of Corporations in Jurisdiction Reviewed	16
C.4	Criminal Liability of Corporations in Each Jurisdiction Reviewed	17
C.5	Civil liability of Corporations in Each Jurisdiction Reviewed	17
C.6	Relevant Findings/Decisions of Judiciary in Connection with Corporate Activity	17
(a)	Relevant Findings/Decisions of Judiciary	17
(b)	Corporate Human Rights Principles Established by Domestic Courts	17
C.7	Human Rights Related Investigations/Prosecutions of Corporations	18
C.8	If and How "Complicity" and "Sphere of Influence" are Understood in Each Jurisdiction	18
(a)	Complicity	18
(b)	Sphere of Influence	18
C.9	Extraterritorial Application of Domestic Laws to TNCs	19
C.10	Financial Incentives for Corporate Human Rights Compliance	19
C.11	Legal Liability Arising from Published Business Practice Standards	20
C.12	Domestic Jurisdiction by Foreign Courts	20
C.13	Other Key Areas Identified During Research and Drafting of the Brief	20
<b>D.</b>	<b>JURISDICTIONS IN THE ASIA-PACIFIC REGION REVIEWED</b>	<b>20</b>

<b>E.</b>	<b>AUSTRALIA</b>	<b>22</b>
E.1	Executive Summary	22
E.2	Overview of the Legal System of Australia	22
	(a) Australia – Background	22
	(b) Law of Australia	23
	(c) Judiciary	23
E.3	Human Rights Law Obligations of Corporations in Australia	24
	(a) Human Rights in the Constitution and Statutory Bills of Rights at State/Territory Level	24
	(b) Human Rights in Other Domestic Law	25
E.4	Criminal Liability of Corporations in Australia	28
	(a) Application of Australia's <i>Criminal Code</i> to Corporations	28
	(b) The Potential Extension of Liability for Genocide, War Crimes and Crimes Against Humanity to Corporations	29
	(c) Corporate Criminal Liability Outside the <i>Criminal Code</i>	29
E.5	Civil Liability of Corporations in Australia	30
E.6	Relevant Findings/Decisions of Judiciary in Connection with Corporate Activity	31
	(a) TNCs in Australia	31
	(b) Overview of Litigation and Judicial Decisions	31
E.7	Human Rights Related Investigations of Corporations in Australia	35
E.8	If and how 'Complicity' and 'Sphere of Influence' are Understood in Domestic Courts	36
	(a) Sphere of Influence	36
	(b) Complicity	36
E.9	Extraterritorial Application of Domestic Laws to TNCs	37
	(a) Legal Limits on the Application of Human Rights Standards/Laws to Corporations	37
	(b) <i>Corporate Code of Conduct Bill</i> (2000) (Cth)	38
	(c) The TPA	38
	(d) Bribery of Foreign Public Officials	39
	(e) Slavery	40
E.10	Potential Financial Incentives for Corporate Human Rights Compliance	40
E.11	Legal Liability Arising from Published Business Practice Standards	41
E.12	Consideration of Australian Jurisdiction by Other Relevant Jurisdictions	42
<b>F.</b>	<b>INDIA</b>	<b>43</b>
F.1	Executive Summary	43
F.2	Overview of the Legal System of India	43
	(a) India – Background	43
	(b) Law of India	44
	(c) The Judiciary	45
F.3	Human Rights Law Obligations of Corporations in India	46
	(a) Human Rights in the Constitution	46
	(b) Human Rights in Other Domestic Law	51
	(c) Constitutional and Legislative Rights in the Context of Corporate Activity	54
	(d) International Human Rights Law	54
F.4	Criminal Liability of Corporations in India	56
	(a) Application of <i>Penal Code</i> to corporations	56

	(b) Other Forms of Corporate Criminal Liability	57
F.5	Civil Liability of Corporations in India	59
F.6	Judicial Findings in Connection with Corporate Activity	60
	(a) Overview of Judicial Decisions	60
F.7	Decisions in Relation to Pollution of the Environment	63
	(a) "Polluter Pays" Principle	63
	(b) "Precautionary" Principle	64
	(c) Orders Against Corporations	64
	(d) Principles to be Derived From the Litigation	66
F.8	Human Rights Related Investigations/Prosecutions of Corporations	67
F.9	If and How 'Complicity' and 'Sphere of Influence' Are Understood in Domestic Courts	69
	(a) Complicity	69
	(b) Sphere of influence	69
F.10	Extraterritorial Application of Relevant Domestic Laws to TNCs	69
F.11	Potential Financial Incentives for Corporate Human Rights Compliance	69
F.12	Published Business Practice Standards	70
F.13	Consideration of Indian Jurisdiction by Other Relevant Jurisdictions	70
<b>G.</b>	<b>INDONESIA</b>	<b>72</b>
G.1	Executive Summary	72
G.2	Overview of Legal System of Indonesia	72
	(a) Indonesia – Background	72
	(b) Law of Indonesia	72
	(c) The Judiciary	74
	(d) The Human Rights Court	75
G.3	Human Rights Law Obligations of Corporations in Indonesia	76
	(a) Human Rights in the Constitution	76
	(b) Human Rights in Other Domestic Law	78
	(c) Impact of International Human Rights Law in Indonesia	81
G.4	Criminal Liability of Corporations in Indonesia	82
G.5	Civil Liability of Corporations in Indonesia	82
G.6	Human Rights Findings of Domestic Courts with Regard to TNCs	83
	(a) TNCs in Indonesia	83
	(b) Judicial Consideration of Constitutional Human Rights, the Human Rights Law, and International Human Rights Law in Connection with Corporate Activity	83
G.7	Human Rights Related Investigations and Prosecutions in Indonesia	83
	(a) Newmont	83
	(b) Monsanto	84
G.8	If and How "Complicity" and "Sphere of Influence" Are Understood in Domestic Courts	85
	(a) Complicity	85
	(b) Sphere of influence	86
G.9	Extraterritorial Application of Domestic Laws to TNCs	87
G.10	Potential Financial Incentives for Corporate Human Rights Compliance	87
G.11	Legal Liability Arising from Published Business Practice Standards	87
G.12	Consideration of the Indonesian Jurisdiction by Other Relevant Jurisdictions	88

	(a) Freeport	88
	(b) Exxon	89
<b>H.</b>	<b>MYANMAR</b>	<b>91</b>
H.1	Executive Summary	91
H.2	Overview of Legal system of Myanmar	91
	(a) Myanmar- Background	91
	(b) Law of Myanmar	93
	(c) Judiciary	94
H.3	Human Rights Law Obligations of Corporations in Myanmar	95
	(a) Human Rights in the Constitution	95
	(b) International Human Rights Law in Myanmar	96
	(c) Human Rights in Other Domestic law	97
H.4	Criminal Liability of Corporations in Myanmar	99
	(a) Application of Myanmar's <i>Penal Code</i> to corporations	99
	(b) Corporate Criminal Liability outside the <i>Penal Code</i>	100
H.5	Civil Liability of Corporations in Myanmar	100
H.6	Relevant Findings/Decisions of Judiciary in Connection with Corporate Activity	100
	(a) Overview of Litigation and Judicial Decisions	100
	(b) Principles that May be Derived from that Litigation	100
H.7	Human Rights Related Investigations/Prosecutions of Corporations in Myanmar	100
H.8	If and How "Complicity" and "Sphere of Influence" are Understood in Domestic Courts	101
	(a) Complicity	101
	(b) Sphere of Influence	101
H.9	Extraterritorial Application of Relevant Domestic Laws to TNCs	101
H.10	Potential Financial Incentives for Corporate Human Rights Compliance	102
H.11	Legal Liability Arising from Published Business Standards	102
H.12	Consideration of Myanmar's jurisdiction by other relevant jurisdictions	102
<b>I.</b>	<b>NEW ZEALAND</b>	<b>104</b>
I.1	Executive Summary	104
I.2	Overview of legal system of New Zealand	104
	(a) New Zealand – Background	104
	(b) Law of New Zealand	105
	(c) Judiciary	105
I.3	Human Rights Law Obligations of Corporations in New Zealand	106
	(a) Human Rights in the Constitution and Statutory Bills of Rights	106
	(b) Human Rights in Other Domestic Law	108
	(c) International Human Rights Law	111
I.4	Criminal Liability of Corporations in New Zealand	114
	(a) Application of New Zealand's <i>Crimes Act</i> to corporations	114
	(b) Corporate Criminal Liability Outside the <i>Crimes Act</i>	114
I.5	Civil Liability of Corporations in New Zealand	117
	(a) Vicarious Liability	118
I.6	Relevant Findings/Decisions of Judiciary in Connection with Corporate Activity	119
	(a) Overview of Litigation and Judicial Decisions	119
	(b) Principles That May Be Derived From That Litigation	119

I.7	Human Rights Related Investigations/Prosecutions of Corporations in New Zealand	120
I.8	If and How 'Complicity' and 'Sphere of Influence' Are Understood in Domestic Courts	121
	(a) Complicity	121
	(b) Sphere of Influence	121
I.9	Extraterritorial Application of Domestic Laws to TNCs	122
	(a) <i>Crimes Act</i>	122
	(b) Bribery of Foreign Public Officials	122
	(c) <i>Commerce Act and Fair Trading Act</i>	122
I.10	Potential Financial Incentives for Corporate Human Rights Compliance	122
I.11	Legal Liability Arising from Published Business Practice Standards	123
I.12	Consideration of New Zealand Jurisdiction by Other Relevant Jurisdictions	124
<b>J.</b>	<b>PAPUA NEW GUINEA</b>	<b>125</b>
J.1	Executive Summary	125
J.2	Overview of Legal system of PNG	126
	(a) PNG - Background	126
	(b) Law of PNG	126
	(c) The Judiciary	126
	(d) Transnational Corporations in PNG	127
J.3	Human Rights Law Obligations of Corporations in PNG	127
	(a) History of Human Rights and Corporations in PNG	127
	(b) Human Rights in the Constitution	127
	(c) Human Rights in Other Domestic Law	129
	(d) Common Law and Custom	129
	(e) International Human Rights Law in PNG	129
J.4	Criminal Liability of corporations in PNG	130
	(a) PNG's <i>Criminal Code</i> - Application to Corporations	130
	(b) Other Forms of Corporate Criminal Liability	131
J.5	Civil Liability of Corporations in PNG	131
J.6	Relevant Findings/Decisions of Judiciary in Connection with Corporate Activity	131
	(a) Judicial Consideration of Constitutional Human Rights in Connection with Corporate Activity	131
	(b) Judicial Consideration of International Human Rights Law in the Context of Corporate Activity	134
	(c) Principles That May Be Derived From Litigation in PNG	135
J.7	Human Rights Related Investigations/Prosecutions of Corporations in PNG	135
J.8	If and How "Complicity" and "Sphere of Influence" are Understood in Domestic Courts	135
	(a) Complicity	135
	(b) Sphere of Influence	136
J.9	Extraterritorial Application of Domestic Laws to TNCs	136
J.10	Potential Financial Incentives for Corporate Human Rights Compliance	137
J.11	Legal Liability Arising From Published Business Practice Standards	137
J.12	Consideration of the PNG Jurisdiction by Other Relevant Jurisdictions	137

<b>K.</b>	<b>THE PEOPLE'S REPUBLIC OF CHINA</b>	<b>139</b>
K.1	Executive Summary	139
K.2	Overview of Legal System of the PRC	140
	(a) The PRC - Background	140
	(b) Law of the PRC	141
	(c) Judiciary	142
K.3	Human Rights Law Obligations of Corporations in the PRC	143
	(a) Human Rights in the Constitution	143
	(b) Human Rights in Other Domestic Law	145
	(c) International Human Rights Law in the PRC	146
K.4	Criminal Liability of Corporations in the PRC	147
	(a) Application of the PRC's <i>Criminal Law</i> to Corporations	147
	(b) Corporate Criminal Liability Outside the <i>Criminal Law</i>	147
K.5	Civil Liability of Corporations in the PRC	147
K.6	Relevant Findings/Decisions of Judiciary in Connection with Corporate Activity	150
	(a) Overview of Litigation and Judicial Decisions	150
	(b) Principles That May be Derived from that Litigation	153
K.7	Human Rights Related Investigations/Prosecutions of Corporations in the PRC	153
K.8	If and How "Complicity" and "Sphere of Influence" Are Understood in Domestic Courts	155
	(a) Complicity	155
	(b) Sphere of Influence	155
K.9	Extraterritorial Application of Domestic Laws to TNCs	155
K.10	Potential Financial Incentives for Corporate Human Rights Compliance	155
K.11	Legal Liability Arising in the PRC from Published Business Practice Standards	156
K.12	Consideration of the PRC Jurisdiction by Other Relevant Jurisdictions	157
<b>L.</b>	<b>Conclusion</b>	<b>159</b>

## A. Executive Summary

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### A.1 Structure of Main Findings

1. The main findings of this brief are broadly structured in accordance with the first three components of the United Nations Special Representative of the Secretary General on Business and Human Rights' (**UNSRSG**) mandate as they pertain to the Asia Pacific region, namely:
  - identifying and clarifying standards of corporate responsibility and accountability for transnational corporations (**TNCs**) and other business enterprises with regard to human rights across the Asia Pacific region;
  - the role of the State in various Asia Pacific countries in effectively regulating and adjudicating the role of TNCs and other business enterprises with regard to human rights; and
  - the implications for TNCs and other business enterprises of the concepts of 'complicity' and 'sphere of influence'.
2. The main findings have taken into consideration the findings of the UNSRSG's interim report and other public statements that have been made by the UNSRSG that are of relevance to the brief.

### A.2 Overview

3. The Asia-Pacific Region is diverse in every respect. The countries reviewed in this brief represent a cross section of this diversity with regard to geographic position, political structure, economic profile and regional and global influence. The majority of these countries are liberal democracies – Australia, the Republic of India (**India**), the Republic of Indonesia (**Indonesia**), New Zealand and Papua New Guinea (**PNG**). Each of these countries, aside from Indonesia, are part of the Commonwealth. The Peoples Republic of China (**PRC**) and Myanmar stand apart as one party political systems of government.
4. The countries that are the subject of the brief also represent a mix of developed and developing countries in which a variety of TNC activity is undertaken.
5. The legal systems and judiciaries of these countries also vary. For instance, as a result of colonisation by England, Australia, India, New Zealand and PNG have independent judiciaries with an effective tradition of common law. In the PRC and Indonesia, however, a system of civil law is followed, with judicial precedent not comprising an official source of law.
6. Apart from Myanmar, all countries reviewed have a form of constitution that functions as the supreme source of law in the jurisdiction.

### A.3 Identifying and Clarifying Legal Standards of Corporate Responsibility and Accountability with Regard to Human Rights

7. The human rights laws that apply to corporations vary significantly across the jurisdictions in the Asia-Pacific region reviewed. The findings are presented below as follows:



- Constitutional human rights as they apply to corporations;
- Human rights standards contained in other domestic law as they apply to corporations; and
- International human rights law as it has been incorporated into or otherwise applied in the domestic jurisdictions reviewed.

**(a) Constitutional Human Rights**

8. As stated above, all of the countries reviewed, except Myanmar, have a form of constitution, being the fundamental and overriding source of law in each of these jurisdictions.
9. The constitutions of the PRC, India, Indonesia, New Zealand and PNG entrench a fairly extensive array of human rights.
10. In each of these jurisdictions, the issue of whether constitutional human rights may be enforced against corporations is one of debate. In the PRC, for instance, there is no express provision that applies constitutional provisions to corporations. The constitution does, however, make reference to state enterprises, economic corporations and companies. This may imply that such corporations are at least intended to be able to rely on, and perhaps be subject to, the terms of the constitution. However, there are few reports of enforcement of rights granted by the constitution, either by the National People's Congress (**NPC**) Standing Committee or by the PRC judiciary, which would assist in clarifying this issue.
11. In PNG, the constitution states that its section on fundamental and qualified rights applies 'to and in relation to corporations and associations in the same way as it applies to in relation to individuals'. However, to date there are few instances of individuals or groups enforcing their constitutional rights against corporations.
12. The Indonesian and Indian constitutions contain no express provisions to the effect that constitutional rights can be enforced against corporations. In India, however, the Supreme Court considered whether corporations could be liable for breaches of constitutional rights as far back as in 1979 by seeking to define 'the State' as including corporations that are either public enterprises or corporations that carry out public functions. This has seen state-owned or controlled enterprises likely to have the constitutional obligations of the State, including an obligation to uphold Fundamental Rights. Whether private corporations are subject to the same obligations is less clear.
13. Thus, the application of constitutional human rights to corporations is not uniform within the Asia Pacific region.

**(b) Human Rights Standards in Other Domestic Law**

14. India, Indonesia and New Zealand each have dedicated human rights acts. In Australia, the Australian Capital Territory and the State of Victoria have dedicated human rights legislation, although no such legislation exists at the federal level.

15. In addition, all of the jurisdictions reviewed have a range of human rights standards provided for in various statutes. Australia, New Zealand, India, Indonesia and PNG also recognise, to various extents, indigenous land ownership rights.
16. India's *Protection of Human Rights Act 1993* seeks to protect those human rights embodied in the Constitution and at international law. While the statute does not state whether these rights may be enforced against corporations, the National Human Rights Commission, also established by the *Protection of Human Rights Act 1993*, has undertaken numerous investigations of corporate violations of human rights and issued directives to central and state governments to address these violations.
17. In Indonesia it is not clear whether human rights obligations apply directly to corporations, although its definition of 'human rights violations' would clearly apply to individuals acting in their capacity as officers of corporations.
18. New Zealand's *Human Rights Act* does not apply to corporations. Australia's Australian Capital Territory *Human Rights Act*, rather than vesting individuals with causes of action under the Act, requires, among other things, the Attorney General of the Australian Capital Territory to issue a statement setting out whether any bill introduced into parliament is consistent with the human rights enunciated in the *Human Rights Act*. The *Victorian Charter of Human Rights and Responsibilities Act 2006* (Vic) makes it unlawful for a 'public authority' to act in a way that is inconsistent with the human rights set out in the Act. 'Public authority' is broadly defined, and can include corporations who are established by a statutory provision and have functions of a public nature.
19. Thus, all statutes dealing specifically with human rights in the jurisdictions reviewed, save for the Victorian legislation, are either silent or ambiguous on the issue of whether they apply to corporate activity. We are also not aware of any case law in any of these jurisdictions where the provisions of these statutes have been extended to corporate activity.
20. In all of the jurisdictions reviewed, save Myanmar, statutory labour and environmental standards apply directly to corporations and their officers.
21. Myanmar's legislation appears to contain minimal human rights standards, with only one or two references contained in its *Penal Code* and environmental law.
22. Apart from statutory instruments containing human rights standards, each of Australia, New Zealand, PNG and India are common law countries and, as a consequence, individuals are able to assert common law rights against other individuals, corporations and the State in order to protect some of their human rights.

**(c) International Human Rights Law**

23. All jurisdictions reviewed, aside from Myanmar, have either signed or ratified a significant number of international human rights law instruments.
24. Indonesia has not signed or ratified the *International Covenant on Civil and Political Rights (ICCPR)*, the *International Covenant on Economic, Social and Cultural Rights (ICESCR)* or the *Rome Statute of the International Criminal Court* (the **Rome Statute**), though it has committed, by Presidential decree, to do so. The PRC has signed or ratified all key

international human rights laws and has also approved 13 international environmental conventions.

25. There is significant variation in the role of international law across jurisdictions in the Asia Pacific Region.
26. In the PRC, for instance, international treaties acceded to by the Standing Committees of the NPC and the State Council take effect without the need for implementing legislation and will override contrary provisions of domestic legislation where that legislation so provides. International law occupies a similar position in Indonesia, where international instruments ratified by the Government automatically form part of its domestic law. It is less clear whether accession to an instrument of international human rights law without the approval of the House of Representatives (*DPR*) (necessary for 'ratification' under Indonesian law) would have the same effect.
27. In those jurisdictions reviewed that practice a common law tradition, namely Australia, India, New Zealand and PNG, international law must be incorporated into domestic law before it is legally binding in that jurisdiction. India, Australia and New Zealand have been proactive in incorporating their international law obligations in this regard. In each of these jurisdictions, international law may also be drawn on to assist with interpretation of domestic law and, in the event that domestic law does not cover the field with respect to an issue that comes before the courts.

#### **A.4 The Role of States in Relation to Corporations and Human Rights**

##### **(a) Overview**

28. These sections of the brief provide an overview of the enforcement of law generally in each jurisdiction reviewed. The brief outlines the role of various arms of the State in regulating and adjudicating human rights compliance of corporations. This includes the role of:
  - parliament and the executive;
  - the judiciary; and
  - other institutions such as national human rights commissions.
29. The effectiveness of States in regulating and adjudicating the role of corporations with regard to human rights varies significantly across the Asia Pacific region. Much of the variation may be attributed to governance standards within each State and the functionality of the rule of law.

##### **(b) The Role of Parliament and the Executive**

30. Aside from Myanmar, all countries reviewed have evinced a willingness, to varying degrees, to politically respond to alleged violations of human rights by corporations. The Indian Government has perhaps demonstrated the greatest activism in this regard, particularly with its legal response to the Bhopal incident which included enactment of legislation specifically dealing with the protection of rights of victims and processing of victims' compensation by the State.

**(c) Role of the Judiciary**

31. The role of the judiciary across the Asia Pacific region with regard to enforcing human rights standards in the context of corporate activity is significantly determined by the functional role of the judiciary within the State in question.
32. It can be concluded that the judiciaries operating in the jurisdictions reviewed demonstrate an increasing willingness to adjudicate alleged human rights violations by corporations. The exceptions to this finding are Myanmar, where there is effectively no independent judiciary, and perhaps the PRC, where claims brought to the courts may not be heard for lengthy periods, if at all.

**(d) The role of the Police and Prosecuting Agencies**

33. The role of police and prosecuting agencies in enforcing human rights standards with respect to corporate activity varies significantly across the Asia Pacific region.
34. Correlations in effectiveness of these institutions can be drawn between those countries reviewed that have been categorised as weak governance zones, with this often impacting on the effectiveness of these institutions, particularly in relation to state security forces. A number of jurisdictions reviewed demonstrate either a lack of willingness by police or reports of discouragement by police in this area. Prosecuting agencies have often been more effective than have police in weak governance zones.

**(e) Role of Other Institutions**

35. In all jurisdictions reviewed apart from Myanmar and the PRC, independent bodies responsible for investigation and enforcement of human rights standards and laws exist and either claim to have jurisdiction over corporations or in fact exercise such jurisdiction.
36. The powers and procedures of the human rights monitoring enforcement bodies are fairly similar across the region.

**A.5 Implications for Corporations of the Concepts of 'Complicity' and 'Sphere of Influence'**

**(a) Criminal Liability and Complicity**

37. Whether there is an avenue for a corporation to be found complicit in human rights violations of the state or another party, primarily depends on whether a corporation can be subject to criminal liability. In all jurisdictions reviewed, aside from PNG, corporations and their officers in an individual capacity are expressly subject to criminal liability and can be found complicit in breaches of the criminal law.
38. In all jurisdictions reviewed, aside from PNG, key legislation governing criminal law expressly applies to corporations. In PNG, the criminal liability of corporations remains a subject of debate.
39. Those statutes that extend criminal liability to corporations also include criminal liability for officers acting on behalf of a corporation, as these officers are natural persons for the purposes of the criminal law.

40. In a number of jurisdictions reviewed, criminal liability of corporations also derives from provisions in statutes outside the principal criminal law statute, for instance, in the *Company Law of the PRC*; in the *Corporations Act* and the *Trade Practices Act* of Australia; and in the *Environment (Protection) Act* of India. Indonesia's *Environmental Management Law* contains express provisions under which companies can be found criminally liable for various environmental crimes committed by employees or associates in the name of the company.
41. A number of jurisdictions reviewed have specifically extended, either by statute or jurisdiction, criminal liability to foreign corporations.

**(b) Criminal Provisions with Extraterritorial Reach**

42. A number of jurisdictions have statutes that extend criminal liability to corporations operating outside of their home jurisdiction.
43. For example, Australia has legislated to make bribery of foreign public officials a crime, a crime which by its nature applies to acts committed outside of Australia. This offence provision, contained in the Commonwealth *Criminal Code*, extends to corporations in the event that it can be shown that the firm's 'corporate culture' encouraged, tolerated or failed to discourage bribery of foreign public officials.
44. Other jurisdictions in the Asia Pacific region that extend criminal liability beyond their borders include the PRC, with its criminal law applying to foreigners who, outside the PRC territory, commit crimes against the PRC State or against its citizens where that crime has a minimum sentence of more than 3 years imprisonment.
45. India's *Foreign Contribution Act* also applies to bodies corporate outside of India and prohibits the making of certain payments to candidates or political organisations. Foreign contributions are not to be accepted by employees of Government companies and the statute applies to the whole of India and also to associates, branches or subsidiaries outside India, of companies and bodies corporate registered or incorporated in India.
46. Article 5 of the *Human Rights Court Law* of Indonesia provides that the Human Rights Court has the authority to hear and rule on cases of gross violations by Indonesian citizens outside the territorial boundaries of Indonesia. It is unclear, however, whether this applies to corporations. It would, however, apply to individual officers of a corporation who are Indonesian citizens taking action extraterritorially.

**(c) Civil Liability and Sphere of Influence**

47. With the exception of Indonesia, there is no direct legal reference to a concept of 'sphere of influence' with respect to the activities of a corporation. Indonesia's *Environmental Management Law* determines the criminal complicity of company officials by reference to whether the criminal acts were committed by persons who act in the 'sphere' of the company.
48. On the basis of our research, it appears that the legal doctrines that are most analogous to the concept of sphere of influence are found in the realm of corporate civil liability and, in particular, in the tortious doctrine of duty of care which defines the extent of interests that are protected when negligence occurs.

- 49. In all the jurisdictions reviewed, a corporation enjoys civil rights and assumes civil obligations in accordance with the law.
- 50. In all jurisdictions reviewed, save for Myanmar, corporations can be held vicariously liable for the wrongful acts or omissions of their employees or agents.

**(d) Sphere of Influence and Extraterritoriality**

- 51. There are a number of examples that can be drawn from the Asia Pacific region where a company's sphere of influence has been legally considered to extend beyond the jurisdiction within which it is incorporated or registered. In Australia, the Ok Tedi case showed that where an Australian parent company has sufficient control, knowledge and involvement in its subsidiary's business, it may have a duty of care to those affected by the subsidiary's operations.
- 52. In Indonesia, Article 5 of the *Human Rights Court Law* provides that the Human Rights Court has the authority to hear and rule on cases of gross violations by Indonesian citizens outside the territorial boundaries of Indonesia, but it is unclear whether this applies to corporations.
- 53. PNG has enacted the *Compensation (Prohibition of Foreign Legal Proceedings) Act 1995* pursuant to provisions in the Constitution that regulate or restrict rights contained in the constitution. The Act restricts the taking or pursuing of legal proceedings in foreign courts in relation to compensation claims arising from mining projects.
- 54. In Australia, statutory obligations regarding false and misleading statements and unconscionable conduct by companies also apply extraterritorially.

**(e) Published Business Practice Standards**

- 55. In many jurisdictions across the Asia-Pacific region, legal avenues exist for holding corporations to account for any false or misleading statements regarding business standards applied to their operations.

## **B. BACKGROUND**

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56. In November 2005, Craig Phillips and Rachel Nicolson of Allens Arthur Robinson (**AAR**) spoke with the UNSRSG, Professor John Ruggie, regarding AAR's potential provision of advice on a pro bono basis.
57. AAR's interest in providing advice to the UNSRSG derives from its work for numerous resource, finance and other transnational corporations (*TNCs*) that operate within the Asia-Pacific region. This work has increasingly included human rights-related advice.
58. Following discussion with Professor Ruggie, it was agreed that AAR would provide the UNSRSG with a brief on corporate legal obligations that may arise as a result of domestic and international human rights standards that have been, or may be, judicially applied to business activity in the Asia-Pacific region.
59. The areas to be the focus of the brief were determined by email correspondence in the week of 28 November 2005 and during a teleconference on 1 December 2005. The key areas agreed were as follows:
  - (a) the findings of courts in the Asia-Pacific region regarding international human rights standards in the context of business activity;
  - (b) relevant principles established by courts in the Asia-Pacific region that have considered corporate human rights obligations under domestic legislation;
  - (c) if and how the concepts of "complicity" and "sphere of influence" have been or are likely to be interpreted by courts in the Asia-Pacific region;
  - (d) the potential for extraterritorial application of domestic laws to the external operations of those TNCs that are based in the Asia-Pacific;
  - (e) the potential for use of financial incentives to encourage or require corporate compliance with human rights standards;
  - (f) the potential for legal liability arising from business practice standards publicly subscribed to by TNCs based or operating in the Asia-Pacific region; and
  - (g) any other areas identified as relevant during the course of development of the brief.
60. The countries in the Asia-Pacific region that are the main focus of the brief are: Australia, India, Indonesia, Myanmar, New Zealand, PNG and the PRC.
61. As agreed, this brief was to be provided by the end of the second quarter of 2006 in order that its findings could be incorporated into the UNSRSG's report, due at the end of 2006.
62. This brief has been reviewed by Charles Scerri QC of the Victorian Bar.

## **C. KEY AREAS OF BRIEF – OVERVIEW**

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### **C.1 Introduction**

- 63. The brief considers each jurisdiction in the Asia-Pacific region selected for review in turn.
- 64. Each of the key legal areas summarised below is covered within the review of each jurisdiction. This commences at Part D - *Jurisdictions in the Asia-Pacific Region Reviewed*. An Executive Summary of each jurisdiction is provided at the beginning of the discussion of each jurisdiction.

### **C.2 Overview of Legal System of Jurisdiction**

- 65. The review of each jurisdiction begins with a basic overview of the legal system of the country in question. The overview includes a general historical background to the country and an outline of the country's political system.
- 66. The laws of that jurisdiction, including the types of law in operation in that jurisdiction and any relevant hierarchy of laws are also discussed.
- 67. An overview of the workings of the judiciary, including the hierarchy of Courts and their respective jurisdictions is then provided, which includes an analysis of the position of the judiciary in relation to the structures of government. Where relevant, a discussion of the role of precedent is provided.
- 68. In some instances, commentary on the efficacy of the judiciary in that jurisdiction is provided.

### **C.3 Human Rights Law Obligations of Corporations in Jurisdiction Reviewed**

- 69. In this key area we set out any express and implied human rights law obligations of corporations in each jurisdiction. This includes an assessment of whether the constitution (if any) of the jurisdiction either expressly or impliedly makes provision for human rights and, if so, whether corporations are obliged to observe these constitutionally-embedded human rights.
- 70. We also include a review of any legislation that expressly provides for human rights law obligations, with respect to whether these express human rights law obligations apply to corporations.
- 71. Examples are then provided of other laws in operation in that jurisdiction which contain implied human rights standards, for instance laws relating to labour, the environment and the use of security forces. Again, their actual or potential application to corporations is discussed.
- 72. In the event that human rights law obligations are expressly or impliedly contained in the common law or traditional or customary law, this is also identified.
- 73. Finally, we outline how international human rights obligations are incorporated into the law of each jurisdiction and which key international human rights instruments have been signed and ratified by each jurisdiction. An analysis of the application of international human rights law to corporations is then provided.



#### **C.4 Criminal Liability of Corporations in Each Jurisdiction Reviewed**

- 74. In this area we analyse the extent to which corporations face any criminal liability. This includes an analysis of whether the primary criminal code of the jurisdiction expressly or impliedly applies to corporations.
- 75. Where relevant, the liability of a corporation for the actions of its employees is raised, as well as whether the directors or the corporation itself may be liable.
- 76. We also analyse whether a corporation is subject to any criminal liability outside of the terms of the primary criminal code.

#### **C.5 Civil liability of Corporations in Each Jurisdiction Reviewed**

- 77. In this area we review whether, and how, a corporation may be subject to civil liability. A discussion, where relevant, of the vicarious liability of a corporation for the wrongful acts or omissions of its employees or agents is included.
- 78. Civil liability is particularly relevant as it is a means by which corporations may be held accountable in the absence of express human rights law obligations. In particular, tort law, in which a corporation can be held responsible for an act which causes harm to another person, whether intentionally or not, has been used as a vehicle for obtaining relief from corporations in circumstances where human rights have allegedly been violated. This has been particularly relevant in the context of the US *Alien Tort Claims Act* 1789 (the **ATCA**).

#### **C.6 Relevant Findings/Decisions of Judiciary in Connection with Corporate Activity**

##### **(a) Relevant Findings/Decisions of Judiciary**

- 79. In this section we review judicial decisions made or opinions given in each jurisdiction regarding human rights in the context of corporate or business activity. A review is provided of judicial decisions that discuss any human rights embedded in the constitution or other domestic legislation as they relate to corporate or business activity.
- 80. A review is also provided of judicial decisions or judicial discussion of international human rights law in the context of corporate activity, with particular focus on cases where the courts have been prepared to imply human rights standards in the context of considering the criminal or civil liability of corporations.
- 81. A general assessment of the attitude of courts in each jurisdiction to human rights findings regarding TNCs is also provided.

##### **(b) Corporate Human Rights Principles Established by Domestic Courts**

- 82. The review also comments upon, on the basis of judicial decisions, whether any clear judicial principles or precedents have been established regarding corporate human rights obligations.
- 83. Where such human rights principles have been established, comment is provided on their likely scope of application in the future.

## **C.7 Human Rights Related Investigations/Prosecutions of Corporations**

84. To the extent that we have been able to do so, the review also notes investigations or prosecutions of corporations with respect to human rights, and identifies whether such investigations or prosecutions have been conducted by an arm of the government or by an independent authority.
85. This area is included because the concept of human rights law obligations of corporations is still developing across the Asia Pacific region. As a result, in a number of the jurisdictions that are reviewed, investigating action may have been taken with respect to human rights standards, however, particular cases may not have progressed to the stage of judicial determination or consideration. In these jurisdictions, investigations or prosecutions are important indicators of the status of corporate human rights obligations.
86. This key area is also relevant in those jurisdictions where judicial precedent does not play a significant role in establishing or developing the law.
87. It is also relevant in the context of criminal prosecutions of corporate officers and investigations of corporations by national human rights bodies.

## **C.8 If and How "Complicity" and "Sphere of Influence" are Understood in Each Jurisdiction**

88. The mandate of the UNSRSG includes research into and clarification of the implications of the concepts of 'complicity' and 'sphere of influence' as they relate to TNCs and other business enterprises.

### **(a) Complicity**

89. When preparing this brief, AAR was cognisant of the role of complicity in the context of corporate liability for impact on human rights, given that the potential liability of a TNC may be considered in the context of human rights violations by governments or non-state actors.
90. The concept of corporate complicity continues to be of relevance in cases tried under the ATCA. As noted during the UNSRSG's 8 December 2005 address to the Business and Human Rights Seminar, perhaps the clearest judicial definition of the ambit of corporate complicity for the purposes of ATCA was founded by the US Court of Appeals for the Ninth Circuit in the *Unocal*<sup>1</sup> case.
91. AAR has included in this brief any relevant law that explains or comments on the context of corporate complicity in human rights cases, as well as any related definitions of complicity drawn from other areas of law, such as aiding and abetting in the criminal law.

### **(b) Sphere of Influence**

92. 'Sphere of influence' is fast gaining currency in the context of corporate obligations regarding human rights. However, the concept of 'sphere of influence' remains essentially undeveloped in the domestic jurisprudence in the jurisdictions we examined and in

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<sup>1</sup> *DOE 1 v Unocal Corp*; 2002 US App lexis 19263 (9<sup>TH</sup> CIR 2002)

international jurisprudence. This is a result of a number of factors, including that "sphere of influence" is a politically rather than legally derived concept and that many jurisdictions remain undecided on the proper ambit of corporate responsibility with respect to human rights.

93. As a result, this brief examines legal concepts and principles, in the jurisdictions of each State considered, that may be analogous to the concept of 'sphere of influence' (eg. the common law duty of care) as a means of assessing the potential extent of a corporation's *legal* "sphere of influence" in a human rights context.

#### **C.9 Extraterritorial Application of Domestic Laws to TNCs**

94. In this section we examine whether each of the domestic jurisdictions reviewed has made laws that purport to regulate the activity of corporations outside the jurisdiction. Currently, the ATCA is the most utilised and well known domestic law which provides 'long arm' jurisdiction for US courts to consider human rights cases involving TNCs in respect of their activities undertaken in countries outside the US.
95. Historically, States have been relatively unwilling to legislate in a way that regulates corporate activity that occurs within another State's jurisdiction. With the rise of TNCs, however, there has been an increasing tendency to regulate trade across borders. The growing international regulation of trade has also seen an increase in the regulation of the impact of that trade, increasingly in the areas of human rights and the environment.
96. Given the emerging nature of the extraterritorial application of domestic laws to corporations operating outside their home jurisdiction, this key area examines whether there are any judicial decisions seeking to regulate extraterritorial corporate activity, whether any laws exist in the home jurisdiction that seek to do so (regardless of whether they have been tried in the courts), and whether any other legal mechanisms exist which would allow for regulation of extraterritorial corporate activity in the human rights or any other context.

#### **C.10 Financial Incentives for Corporate Human Rights Compliance**

97. In this section we examine whether the relevant jurisdictions provide any financial incentive regimes that either encourage or require corporations to comply with identified human rights standards.
98. These financial incentives may be company-specific, for instance export credits or company tax concessions for demonstrating general compliance with human rights. Incentives may also exist at the company project level, for instance the incorporation of human rights impact assessments and human rights management plans as prerequisites for the granting of project licences, leases or project finance.
99. Given that corporate compliance with human rights standards is still an emerging area, research into the existence of such financial incentives includes investigation of financial incentives for compliance in the areas of sustainable development, social impact assessment and other similar areas in which human rights standards may be incorporated.
100. Research was limited in this key area to those financial incentives that are legally regulated.

### **C.11 Legal Liability Arising from Published Business Practice Standards**

101. In this section we examine judicial decisions or legislation that may be relevant to a corporation's published business practice standards regarding human rights. More specifically, we note jurisdictions where there are legal grounds for liability to arise as a result of any discrepancy between public statements or commitments made by the TNC and its actual practices. Such liability for disparity between published standards and actual practice may arise in the form of claims based on misrepresentation or the deceptive, false or misleading nature of published statements. The potential for such a claim has received some international recognition as a result of the *Nike v Kasky*<sup>2</sup> case that was brought in California under that state's consumer protection laws.

### **C.12 Domestic Jurisdiction by Foreign Courts**

102. In this brief we make reference to circumstances in which courts of one country have made findings concerning the legal capacity of any of the countries that are the subject of this brief. This may arise in circumstances where the Courts in the jurisdiction in which the TNC is based are required to undertake an assessment of whether it is appropriate for the Courts of another jurisdiction to hear and determine a claim. These considerations will typically arise in forum non conveniens applications or upon consideration of the 'political question' or 'international comity' doctrines.
103. This issue is currently of particular relevance with respect to the ATCA, where US Federal Courts are increasingly being asked to consider whether it is more appropriate for the courts of the jurisdiction in which the offending TNC activity has taken place to exercise jurisdiction over claims against that TNC.

### **C.13 Other Key Areas Identified During Research and Drafting of the Brief**

104. Research for the brief did not uncover any additional key areas for inclusion in the brief beyond those agreed with the UNSRSG in November 2005.

## **D. JURISDICTIONS IN THE ASIA-PACIFIC REGION REVIEWED**

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105. The countries that are the subject of this brief represent a cross-section of countries in the Asia-Pacific region. This cross section has been established in part by reference to the level of corporate and TNC activity within each jurisdiction, standards of governance, geography, culture, political ideology and government structure, regional and global influence and the type of legal system.
106. These countries also represent a balance between States that have established legal systems in the common law and civil law traditions.
107. Accordingly, the countries selected for review are:
- Australia;

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<sup>2</sup> *Nike Inc v Kasky* 539 US 654 (2003)

- India;
- Indonesia;
- New Zealand;
- Myanmar;
- PNG; and
- the PRC.



## E. AUSTRALIA

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### E.1 Executive Summary

108. Although Australia has ratified a number of key international human rights instruments, it has not fully incorporated the substance of those treaties into domestic law.
109. Australia's Constitution does not contain a bill of rights. While the Federal Constitution does recognise and provide limited protection for certain express rights, and while the Courts have determined that certain implied rights exist under the Constitution, it is not a comprehensive source of protection of human rights.
110. Corporations are subject to obligations arising under Federal legislative instruments that protect or may be relevant to human rights, such as anti-discrimination legislation, workplace relations legislation and environmental legislation. Further, the *Criminal Code Act 1995* (Cth) (the **Criminal Code**) applies, with necessary modifications, to both bodies corporate and natural persons. Corporations may also be subject to relevant State laws, and may be subject to claims based upon rights recognised by common law.
111. In one Australian State, recent human rights legislation requires corporations whose functions are of a public nature or who are established by statute, to act in such a way that is compatible with human rights and to give proper consideration to human rights in their decision making.
112. Australian courts have been prepared to exercise jurisdiction in respect of claims made against corporations for conduct occurring overseas.

### E.2 Overview of the Legal System of Australia

#### (a) Australia – Background

113. Following over 40,000 years of inhabitation by indigenous Australians, six largely self-governing British Crown colonies were established over the course of the late 18<sup>th</sup> and 19<sup>th</sup> centuries. These colonies federated on 1 January 1901, forming the Commonwealth of Australia.
114. The Commonwealth of Australia is a constitutional monarchy with a parliamentary system of government. Queen Elizabeth II is the head of state, and is represented in Australia by, at the national level, the Governor-General, and by a Governor in each of Australia's six states. The total population is approximately 20.4 million people.
115. The Commonwealth of Australia consists of the six states, two major mainland territories, and a number of territories in the Pacific, Indian and Southern oceans. The states are New South Wales, Victoria, Queensland, South Australia, Western Australia and Tasmania. The two major mainland territories are the Northern Territory and the Australian Capital Territory.
116. At the federal level there are three branches of government:

- the legislature: the Commonwealth Parliament, comprising the Queen,<sup>3</sup> the Senate, and the House of Representatives;
- the executive: the Federal Executive Council (the Governor-General as advised by the executive councillors. In practice, the councillors are the Prime Minister and Ministers of State, upon whose advice the Governor-General acts, with rare exceptions); and
- the judiciary: the High Court of Australia and other federal courts.

**(b) Law of Australia**

117. The *Commonwealth of Australia Constitution Act 1900* (UK) (the **Constitution**) established Australia's federal system of government. The Constitution defines the boundaries of law-making powers between the Commonwealth and the states and territories, and embodies the doctrine of separation of powers, prescribing the authority of the executive, legislative and judicial branches of government.

118. The law in Australia consists of:

- Acts passed by the Federal Parliament acting within the scope of its powers under the Constitution, together with subordinate legislation made under such Acts;
- Ordinances made in respect of the territories, together with delegated or subordinate legislation made under such Ordinances;
- Acts passed by state parliaments and the legislative assemblies of the three self-governing territories, together with delegated or subordinate legislation made under such acts;
- so much of the common or statute law of England that was received, and remains unrepealed;
- the Australian common law, developed from the English common law and interpreted and modified by the courts. Australian common law is based on the doctrine of precedent;<sup>4</sup> and
- an extremely limited recognition of indigenous customary law.

**(c) Judiciary**

119. The court system is divided into federal, state, and territorial courts, which handle both civil and criminal matters.

120. The Constitution vests the judicial power of the Commonwealth of Australia in the High Court, which sits at the top of the unified Australian court system. The High Court is vested with a broad appellate jurisdiction<sup>5</sup> and has original jurisdiction in a number of areas.

<sup>3</sup> Through her representative, the Governor-General, who in practice exercises little or no power over Parliament.

<sup>4</sup> "Australia's Legal System" (Attorney-General's Department: <http://www.ag.gov.au/www/agdHome>)

<sup>5</sup> The *Australia Act 1986* (Cth) abolished the avenue of appeal to the Privy Council from State courts exercising State jurisdiction.

121. In addition to the High Court, the federal court system comprises the Federal Court, the Family Court and Federal Magistrates Court. In addition to courts, the Federal Parliament has also established various commissions and tribunals, including the Human Rights and Equal Opportunity Commission, the Australian Industrial Relations Commission, the Social Securities Appeal Tribunal and the Administrative Appeals Tribunal.
122. The courts of the states and territories are generally similar in structure, though there are slight variations. Courts of summary jurisdiction sit at the base of this hierarchy and their jurisdiction is both civil and criminal - generally hearing matters concerning small debts, small property claims and minor criminal offences. The next courts in the hierarchy are called District Courts in some states and County Courts in others. Australian state and territory courts have original jurisdiction in all matters arising under state/territory laws, as well as Commonwealth laws where the Commonwealth Parliament has conferred federal jurisdiction.
123. Above the District Courts are the state and territory Supreme Courts, possessing both original and appellate jurisdiction.
124. The independence of the judiciary is safeguarded by its constitutionally entrenched separation from the legislative and executive arms of government.

### **E.3 Human Rights Law Obligations of Corporations in Australia**

#### **(a) Human Rights in the Constitution and Statutory Bills of Rights at State/Territory Level**

125. The Constitution does not contain a list of personal rights or freedoms enforceable in the courts. It does contain, however, specific guarantees with respect to rights in the following areas:
  - the right to vote (s 41);<sup>6</sup>
  - the right to a trial by jury for all indictable offences (s 80);
  - the right to religious freedom (s 116); and
  - the right to just compensation for property acquired by the Commonwealth Government (s 51(xxxi)).
126. In recent years the High Court has considered whether it is possible to imply from the Constitution particular rights and freedoms. Most notably, it has held that, based on the provisions establishing a system of representative government, there exists an implied freedom of communication as to matters of government and politics.<sup>7</sup>

<sup>6</sup> This right is not absolute. Section 41 gives a limited form of protection to the franchise by providing that adults who have or acquire the right to vote for the lower house of a State Parliament, cannot be prevented from voting in Commonwealth elections by any law passed by the Commonwealth Parliament. It has generally been interpreted narrowly by the High Court. There have also been attempts to find implied constitutional protection of the right to vote by drawing implications from the requirement that members of Parliament be "directly chosen by the people": see, for example, *Attorney-General (Cth); Ex Rel McKinlay v Commonwealth* (1975) 135 CLR 1; *McGinty v Western Australia* (1996) 186 CLR 140 at 166.

<sup>7</sup> *Lange v Australian Broadcasting Commission* (1997) 189 CLR 520; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Theophanous v The Herald & Weekly Times Ltd* (1994) 182 CLR 104



127. The relevance of constitutional rights to corporations, whether explicit or implied, is limited because the rights relate to the conduct (including legislation) of the Commonwealth and the States and are not enforceable as such against corporations.
128. The *Human Rights Act 2004* (ACT) (the **HRA**) was the first statutory bill of rights to have been passed in Australia. It derives from the ICCPR and protects a wide array of rights, including rights to protection from torture and cruel, inhuman or degrading treatment (s 10); movement (s 13); thought, conscience, religion and belief (s 14); peaceful assembly and freedom of association (s 15); expression (s 16); and fair trial by an independent and impartial court or tribunal (s 21).
129. Rather than vesting rights in individuals, the HRA requires that before Australian Capital Territory statutes come into force, the Attorney-General must issue a compatibility statement, setting out whether, in the Attorney General's opinion, the bill is consistent with the human rights enunciated in the HRA. Further, the Supreme Court may declare that an Australian Capital Territory law is not consistent with a human right enunciated in the HRA, though such a declaration of incompatibility does not affect the validity, operation or enforcement of the law (s 32).
130. On 20 July 2006, the State of Victoria passed the Charter of Human Rights and Responsibilities Act 2006 (Vic) (**the Victorian Charter**). Similarly to the HRA, the Victorian Charter primarily protects civil and political rights. The Victorian Charter also requires statements of compatibility to be prepared in respect of each bill presented to parliament, and where the bill is incompatible, to state the nature and extent of the incompatibility (s 28). Further, the Victorian Charter requires the courts, so far as is possible, to interpret all statutory provisions in a way that is compatible with human rights (s 32). The Victorian Charter provides that where a question of law arises in any proceeding before a court or tribunal that relates to the application of the Victorian Charter, the question may be referred to the Supreme Court (s 33). The Supreme Court is empowered to make a declaration that a statutory provision is inconsistent with the human rights set out in the Victorian Charter (s 36).
131. The Victorian Charter also places obligations on all 'public authorities' to act in a way that is compatible with human rights and, in making a decision, to give proper consideration to a relevant human right (s 38). 'Public authority' has a broad definition that includes, in certain circumstances, corporations.

**(b) Human Rights in Other Domestic Law**

132. Although the Constitution does not expressly grant the Federal Government the power to legislate in the human rights area, it is accepted that the Federal Government has power to pass legislation implementing treaties pursuant to the external affairs power (s 51 (xxix) of the Constitution).<sup>8</sup>

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<sup>8</sup> *Commonwealth v Tasmania* (1983) 158 CLR 1

133. A treaty to which Australia is a party has no direct application in domestic law in the absence of implementing legislation.<sup>9</sup>
134. Many of the human rights contained within human rights treaties, or developed through customary international law, have been directly enshrined in Australia's domestic law. It is clear that domestic legislation dealing with areas such as environmental protection, anti-discrimination, labour rights, occupational health and safety and product safety impose legal obligations on companies.

(i) **Human rights treaties and Australian law**

135. Australia is party to the six major United Nations human rights treaties:
- International Convention on the Elimination of All Forms of Racial Discrimination (**ICERD**);
  - ICCPR;
  - ICESCR;
  - Convention on the Elimination of All Forms of Discrimination against Women (**CEDAW**);
  - Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (**CAT**); and
  - Convention on the Rights of the Child (**CROC**).
136. The Commonwealth has not introduced legislation to permit the direct implementation of most of the human rights treaties to which Australia is a party. Some aspects of particular treaties have, however, been enacted into domestic legislation. The following list contains examples of federal legislation implementing or otherwise relating to the implementation of the international human rights treaties to which Australia is a party (the instruments to which they relate are identified in the parentheses):
- *Racial Discrimination Act 1975* (**ICERD**);
  - *Sex Discrimination Act 1984* (**CEDAW**);
  - *Human Rights and Equal Opportunity Commission Act 1986* (the **HREOC Act**)(ICCPR; CROC; *Declaration of the Rights of the Child*; *Declaration on the Rights of Mentally Retarded Persons*; *Declaration on the Rights of Disabled Persons*; *Declaration on the Elimination of all forms of Intolerance and on Discrimination based on Religion or Belief*, *ILO Convention Concerning Discrimination in Respect of Employment and Occupation*);
  - *Privacy Act 1988* (ICCPR; Organisation for Economic Cooperation and Development: *Guidelines on the Protection of Privacy and Transborder Flows of Personal Data*);

<sup>9</sup> *Dietrich v The Queen* (1992) 177 CLR 292; *Kruger v Commonwealth* (1997) 190 CLR 1. A limited exception to this general rule is that individuals are entitled to a 'legitimate expectation' that Commonwealth decision-makers will take account of international treaties ratified by Australia but not yet implemented by legislation when a decision is made that affects their private rights: *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

- *Crimes (Torture) Act 1988* (CAT);
  - *Disability Discrimination Act 1992* (*ILO Convention Concerning Discrimination in Respect of Employment and Occupation*; ICCPR);
  - *Human Rights (Sexual Conduct) Act 1994* (ICCPR);
  - *Evidence Act 1995* (ICCPR);
  - *Racial Hatred Act 1995* (ICERD);<sup>10</sup> and
  - the *International Criminal Court (Consequential Amendments) Act 2002* (Cth) (Rome Statute)
137. The Human Rights and Equal Opportunity Commission, created by the *HREOC Act*, is Australia's primary mechanism for the protection of human rights. Pursuant to the *HREOC Act*, Commissioners administer Commonwealth anti-discrimination legislation and perform various functions to guard against discrimination in contravention of the rights contained in the instruments scheduled to the *HREOC Act*. The Commission cannot, however, enforce its decisions in the courts. Although several human rights treaties and declarations, including the *ICCPR* and *ICESCR*, are appended to the *HREOC Act*, this does not in itself make the treaties part of domestic law. The terms of a treaty are 'incorporated' into Australian law only to the extent that substantive provisions are enacted to give effect to the requirements of the treaty.
138. The High Court has demonstrated some willingness to make use of treaties as part of Australian law. In the seminal case of *Mabo v Queensland (No 2)* (1992) 175 CLR 1 (*Mabo*), Justice Brennan, in the course of explaining why the doctrine of terra nullius (which declined recognition to the rights and interests in land of the country's indigenous inhabitants) could no longer be accepted as part of the law of Australia stated:
- The expectations of the international community accord in this respect with the contemporary values of the Australian people. The opening up of the international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the International Covenant on Civil and Political Rights brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.<sup>11</sup>
- Other examples exist of minority judgments which have suggested that Australian law should be interpreted consistently with international law.<sup>12</sup>

<sup>10</sup> The *Racial Discrimination Act 1975* (Cth) and the *Racial Hatred Act 1995* (Cth) together constitute an almost complete enactment of CERD.

<sup>11</sup> Per Brennan J, at 42. However, there has been more recent debate in the High Court as to the relevance of international law of the Constitution and State; see *Dow Jones v Gutnick* (2002) 194 ALR 433 ; *Al-Kateb v Godwin* 208 ALR 124 (2004).

<sup>12</sup> See for instance *Dow Jones v Gutnick* (2002) 194 ALR 433 and *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513 at 657-8 and *Gleeson CJ in Al-Kateb v Godwin* (2004) 219 CLR 562.

139. The prevailing position in Australia, however, is that enunciated by Justice Callinan, also of the High Court, who has held that '[t]here is no requirement for the common law to develop in accordance with international law'.<sup>13</sup>
140. The position therefore remains that treaties ratified by Australia have no direct effect in Australian law, unless given effect by an Act of Parliament.<sup>14</sup>

**(ii) Customary international law and Australian law**

141. While treaties are the most significant source of human rights law, customary international law provides a further source.
142. Several cases have considered whether customary international law could be a source of domestic law in Australia,<sup>15</sup> with perhaps the most influential and commonly cited judicial pronouncement on the matter being that of Justice Dixon, quoting the eminent international lawyer, Brierly, that: 'international law is not a part, but is one of the sources, of English law'.<sup>16</sup>
143. The Australian approach to implementation of rules of customary international law, however, remains unclear. Judicial pronouncements such as that of Justice Brennan in *Mabo* (quoted in paragraph 139), are typically ambiguous in referring to 'international law' as they do not identify whether this term encompasses customary international law.
144. In *Nulyarimma v Thompson* (1999) 165 ALR 621 (***Nulyarimma***) the Full Federal Court considered whether the prohibition of genocide, a peremptory norm of customary international law, formed part of the law of Australia. Justices Wilcox and Whitlam concurred in holding that the rule of customary international law which makes genocide a crime has not been transformed into Australian common law. However, Justice Merkel afforded detailed consideration of the existing authorities and the relationship between customary international law and domestic law. Justice Merkel recognised customary international law as a source of the common law, to be incorporated in the absence of conflicting domestic legislation. While Justice Merkel's judgment represents the most thorough exploration of the issue in Australian case law to date, it was the minority view in the case.

**E.4 Criminal Liability of Corporations in Australia**

**(a) Application of Australia's *Criminal Code* to Corporations**

145. Part 2.5 of the *Criminal Code* extends liability for all offences within the *Criminal Code* to corporations. Within Part 2.5, s 12.1 of the *Criminal Code* provides that the *Criminal Code* applies, with necessary modifications, equally to bodies corporate as to natural persons, specifying that a 'body corporate may be found guilty of any offence, including one punishable by imprisonment'. Section 12, which came into full operation in late 2001,

<sup>13</sup> *Western Australia v Ward* (2002) 191 ALR 1.

<sup>14</sup> There is, however, a limited exception to this rule in relation to decisions of Commonwealth administrators affecting private rights: *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

<sup>15</sup> *Chow Hung Ching v the King* (1948) 77 CLR 449; *Chung Chi Cheung v The King* (1939) AC 160 at 167-168.

<sup>16</sup> *Chow Hung Ching v the King* (1948) 77 CLR 449; 470-471.

represents a significant shift in the Australian legal system and has been heralded as 'ambitious and progressive, with many elements that are not contained in the criminal legal systems of most other countries, in particular liability based on a corporate culture conducive to the criminal conduct in question'.<sup>17</sup>

146. Section 12.3 of the *Criminal Code* provides that where knowledge or recklessness is a fault element it can be attributed to a company that has expressly, tacitly or impliedly authorised or permitted the commission of the offence: s 12.3(1). By virtue of s 12.3(2)(c) and (d), the corporation will be taken to have authorised or permitted the commission of an offence if it is proved that 'a corporate culture' existed, which either actively encouraged or tolerated non compliance<sup>18</sup> or failed to promote compliance.<sup>19</sup>

**(b) The Potential Extension of Liability for Genocide, War Crimes and Crimes Against Humanity to Corporations**

147. *The International Criminal Court (Consequential Amendments) Act 2002* (Cth) was enacted as part of the ratification of the *Rome Statute*. It amends the *Criminal Code* to include the crimes of genocide, crimes against humanity and war crimes. While not yet tested in the courts, it appears possible that this statute may render companies liable to be prosecuted for certain serious international offences committed in other countries.<sup>20</sup>
148. It should be noted that no proceeding may be brought under the amended *Criminal Code* without the Attorney-General's written consent and offences must be prosecuted in his name.<sup>21</sup>

**(c) Corporate Criminal Liability Outside the *Criminal Code***

149. The extension of liability for all offences within the *Criminal Code* to corporations was introduced primarily in response to the difficulties in determining the situations in which the requisite mental and conduct elements of a crime could be attributed to a corporation for the purposes of establishing criminal liability. Pursuant to the House of Lords decision in *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153, which has been followed by Australian Courts,<sup>22</sup> attribution of the requisite mental and conduct elements to the corporation resulting in personal corporate liability will occur where those elements can be traced to the

<sup>17</sup> OECD Directorate for Financial and Enterprise Affairs: "Australia: Phase 2 – Report on the application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendations on Combating Bribery in International Business Transactions"(approved and adopted by the Working Group on Bribery in International Business Transactions on 4 January 2006), page 47.

<sup>18</sup> Section 12.3(2)(c).

<sup>19</sup> Section 12.3(2)(d).

<sup>20</sup> Joanna Kyriakakis, "Freeport in West Papua: Bringing Corporations to Account for International Human Rights Abuses under Australian Criminal and Tort Law" (2005) 31 *Monash University Law Review* 95, at 105

<sup>21</sup> Section 268.121

<sup>22</sup> See, for example, *Trade Practices Commission v Tubemakers of Australia Ltd* (1983) A.T.P.R. 40-358; *Entwells Pty Ltd v National and General Insurance Co Ltd* (1990-1991) 5 A.C.S.R. 424; *Collins v State Rail Authority of New South Wales* [1986] 5 NSWLR 209.

board of directors, managing director or persons to whom full management powers have been delegated (the **Tesco principle**).

150. A recognition of the limitations of the Tesco principle in relation to large corporations resulted in the abandonment of the principle under federal legislation, in favour of broad vicarious liability for the actions of employees acting on the corporation's behalf.<sup>23</sup> Thus, criminal liability of corporations at common law only exists at the state level.
151. At the federal level, common examples of corporate crime involve breaches of the *Corporations Act 2001* (Cth) and *Trade Practices Act 1974* (Cth) (**TPA**)(particularly in relation to competition and consumer protection law).
152. The most common examples of corporate crime committed against the laws of the states and territories involve cases of environmental pollution and dangerous industrial practices, as well as other breaches of workplace safety. There are numerous examples of corporate misconduct arising in the many areas of corporate activity which are regulated by legislation in the states and territories. In particular, corporate breaches of legislation relating to fair trading, food production and handling, building and construction, as well as environment protection legislation and workplace health and safety laws often result in criminal sanctions.<sup>24</sup>

#### E.5 Civil Liability of Corporations in Australia

153. Tort law provides another means by which individuals can enforce health, safety and environmental rights against corporations.
154. BHP Ltd (now BHP Billiton Ltd) was the subject of considerable public scrutiny in relation to allegations that its mining operations in PNG had caused extensive pollution of the Ok Tedi River. Proceedings were brought in the Supreme Court of Victoria on behalf of 35,000 villagers in PNG (the **Ok Tedi case**).<sup>25</sup> The defendants challenged the jurisdiction of the Victorian Court to entertain common law claims in respect of a project located in a foreign country. The Court ruled that it may have jurisdiction over actions in negligence if a claim could be formulated in circumstances where:

[F]irst, the circumstances giving rise to the claim are of such a character that, if they occurred within Victoria, a cause of action would have arisen entitling the plaintiff to enforce against the defendant a civil liability of the kind which the plaintiff claims to enforce; and second, by the law of the place in which the wrong occurred, the circumstances of the occurrence gave rise to, and at the time of the judgment continue to give rise to, a civil liability of the kind which the plaintiff claims to enforce.<sup>26</sup>

155. This nexus requirement was further diluted following a High Court case in 2002 which removed the need for plaintiffs to comply with this 'double actionability rule'.<sup>27</sup>

<sup>23</sup> See, for example, s 84 of the *Trade Practices Act 1974* (Cth); s 85 *Proceeds of Crime Act* (Cth).

<sup>24</sup> Law Reform Commission of NSW, "Issues Paper 20 (2001) – Sentencing: Corporate Offenders", available at <http://www.lawlink.nsw.gov.au/lrc.nsf/pages/ip20chp01#H4>

<sup>25</sup> *Dagi v BHP and Ok Tedi Mining Ltd (No 2)* [1997] 1 VR 428.

<sup>26</sup> *Ibid* at 443.

<sup>27</sup> *Regie Nationale des Uisneis Renault SA v Zhang* (2002) 210 CLR 491 (HCA).

156. In this way common law may provide a mechanism by which particular breaches of human rights can be formulated as torts, with this tort law then applied in the context of overseas conduct and to corporate groups.<sup>28</sup> Common law causes of action may also be asserted in an effort to overcome the obstacle of the 'corporate veil' by asserting that a parent company has sufficient control, knowledge and involvement in its subsidiary's business, so as to give rise to duty of care to those affected by the subsidiary's operations.
157. Further, the approach adopted by Australian courts regarding the principle of *forum non conveniens* (discussed below at paragraphs 187-188) goes some way to reducing the jurisdictional difficulties or obstacles facing overseas plaintiffs seeking to sue Australian companies in Australian courts.

## **E.6 Relevant Findings/Decisions of Judiciary in Connection with Corporate Activity**

### **(a) TNCs in Australia**

158. Australia has a lengthy history of TNC involvement, with TNCs having been particularly attracted to Australia's extensive natural resources. Australia's economic and political stability have traditionally provided an attractive operating environment.
159. The Commonwealth Government has successfully sought to encourage foreign investment in Australia, with AT Kearney's Foreign Direct Investment (**FDI**) Index 2004 ranking Australia 7<sup>th</sup> as a preferred investment destination.<sup>29</sup> A strong focus of the campaign, largely conducted by Invest Australia (a Commonwealth Government agency), has been to attract TNCs to locate their Asia-Pacific headquarters in Australia.<sup>30</sup>

### **(b) Overview of Litigation and Judicial Decisions**

#### **(i) Environment, health and safety**

160. Each Australian jurisdiction has enacted its own environmental legislation, giving rise to a vast array of statutes imposing controls on corporations in relation to the environment, health and safety. In recent years, however, the Federal Government has played an increasingly active role in harmonising Australian environmental standards, laws and procedures.<sup>31</sup>

<sup>28</sup> Sarala Fitzgerald, "Corporate Accountability for Human Rights Violations in Australian Domestic Law" (2005) 11 *Australian Journal of Human Rights* 33, at 46.

<sup>29</sup> "Australia's Legal System" (Attorney-General's Department: available at <http://www.ag.gov.au/www/agdHome>), cited in OECD Directorate for Financial and Enterprise Affairs: "Australia: Phase 2 – Report on the application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendations on Combating Bribery in International Business Transactions" (approved and adopted by the Working Group on Bribery in International Business Transactions on 4 January 2006), page 8.

<sup>30</sup> *Ibid.*

<sup>31</sup> Jennifer Hill, "Corporate Criminal Liability in Australia: An Evolving Corporate Governance Technique" (2003) *Journal of Business Law*, January 2003 at 1.

161. Enforcement activity in Australia regarding the criminal liability of corporations has primarily focused on regulatory offences regarding environmental, health and safety offences.<sup>32</sup> As a result, corporations have a high profile in the areas of environmental, health and safety law. In 2004, the Commonwealth Department of Public Prosecutions prosecuted 52 cases involving regulatory offences, predominantly relating to environmental and health and safety offences, committed by corporations.<sup>33</sup>
162. In the areas of occupational health and safety, the decision whether to prosecute is a matter for the discretion of the relevant occupational health and safety authority. Criminal prosecutions for occupational health and safety violations in Australia have been rare, with a greater reliance on regulatory techniques such as improvement notices.<sup>34</sup>
163. Depending on the type of action and the jurisdiction, environmental litigation may take place in the general court system or in a specialist court or tribunal. Civil proceedings to enforce federal environmental law are generally undertaken in the federal court or a state or territory Supreme Court.
164. Prosecutions of corporations for breaches of environmental law have been particularly common, with numerous corporations being subject to penalties for environmental offences. In *Environment Protection Authority v Sydney Water Corp Ltd* (1999) 102 L.G.E.R.A. 232, for example, the court imposed a significant fine for conduct resulting in a spill from an effluent treatment plant which polluted Sydney's northern beaches.
165. Corporations may also be subject to litigation in domestic courts for alleged harms caused outside Australia, including environmental damage, as discussed in relation to the Ok Tedi case (see paragraph 154 above).

**(ii) Trade practices law**

166. While we are not aware of any cases in which the TPA has been used in a human rights context, it is possible that it may be utilised in circumstances where a corporation falsely represents itself as an ethical entity or engages in unconscionable conduct that results in an impact on human rights.<sup>35</sup> The use of the TPA in this context is discussed at paragraphs 206-209 below.

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<sup>32</sup> In 2004, the Commonwealth Department of Public Prosecutions prosecuted 52 cases involving regulatory offences, predominantly relating to environmental and health and safety offences, committed by corporations: OECD Directorate for Financial and Enterprise Affairs: "Australia: Phase 2 – Report on the application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendations on Combating Bribery in International Business Transactions" (approved and adopted by the Working Group on Bribery in International Business Transactions on 4 January 2006), page 48

<sup>33</sup> OECD Directorate for Financial and Enterprise Affairs: "Australia: Phase 2 – Report on the application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendations on Combating Bribery in International Business Transactions" (approved and adopted by the Working Group on Bribery in International Business Transactions on 4 January 2006), page 48

<sup>34</sup> See Harry Glasbeek, "Occupational Health and Safety Law: Criminal Law as a Political Tool" (1998) 11 *Australian Journal of Labour Law* 95, 101, cited in Hill above n 28 at 32.

<sup>35</sup> David Kinley and Sarah Joseph, 'Multinational corporations and human rights: questions about their relationship', 27(1) *Alternative Law Journal* 7, at 8.



(iii) **Native title and rights to self determination**

167. Companies operating in Australia, particularly those in the resources field, are subject to legislation in respect of indigenous land. *The Native Title Act 1993* (Cth) (**NTA**) supports the right to self determination for Australia's indigenous people by protecting their native title to traditional lands. Companies must consider the effects of the NTA when their projects involve land over which native title exists or may exist.
168. The NTA was enacted in response to the landmark *Mabo* judgment (discussed above at paragraph 138), in which the High Court recognised indigenous peoples' native title to certain land, and was amended in 1998 following the 1996 High Court decision in *Wik Peoples v the State of Queensland*.<sup>36</sup> These amendments had several important effects, one of the most notable being the establishment of a regime for Indigenous Land Use Agreements (**ILU Agreements**). A registered ILU Agreement enables parties to avoid the 'right to negotiate' procedures provided to registered native title claimants in respect of certain future acts, such as the creation or variation of a mining right.<sup>37</sup> Several Australian mining companies have entered into ILU Agreements with indigenous Australians, covering such issues as land use and cultural protection.<sup>38</sup>

(iv) **Employment, discrimination and equal opportunity**

169. A wide variety of domestic legislation protects various internationally recognised human rights in the area of employment, discrimination and equal opportunity.<sup>39</sup> The recently amended *Workplace Relations Act 1996* (Cth) (**WRA**), for example, purports to protect rights contained in various International Labour Organisation (**ILO**) and other human rights conventions, with provisions prohibiting the termination of a person's employment on such grounds as race, sex, age, disability, pregnancy, religion, political opinion and membership of a trade union.<sup>40</sup> The *Racial Discrimination Act 1975* and *Sex Discrimination Act 1984* also impose rights-related constraints on corporations' employment practices.
170. The protections afforded to particular human rights in the Australian workplace relations legislation are readily enforceable by individuals, with corporations having often found themselves subject to remedies including fines and injunctions. Despite this, however, the

<sup>36</sup> *Wik Peoples v. The State of Queensland* (1996) 134 ALR 637 was a decision of the High Court of Australia regarding the right of access by the Wik peoples of Cape York Peninsula in North Queensland to Crown land held under pastoral leases for cattle grazing. The court decided (4 judges to 3) that the rights of indigenous people who can prove a connection to the land can coexist with the rights of the leaseholders (or pastoralists), but where there is any inconsistency between the two, the rights of the pastoralist will prevail. This decision cast doubt upon many of the assumptions upon which the NTA had been drafted, in particular the assumption that pastoral leases automatically give exclusive possession to the pastoralist, and therefore extinguish native title.

<sup>37</sup> See article by Ben Zilmann at <http://www.aar.com.au/services/nat/roundup/cth.htm?print=true>

<sup>38</sup> Fitzgerald above n 25 at 42

<sup>39</sup> See the *Workplace Relations Act 1996* (Cth), the *Race Discrimination Act 1975* (Cth), the *Sex Discrimination Act 1984* (Cth), the *Affirmative Action (Equal Employment Opportunity for Women) Act 1986* (Cth) and the *Human Rights and Equal Opportunity Act 1986*.

<sup>40</sup> Section 170CK

WRA and other legislation relevant to employment rights have been criticised for, among other things, limiting the right of employees to take industrial action.<sup>41</sup>

171. Federal legislation was recently enacted that has effected substantial amendments to Australia's industrial relations landscape. The *Workplace Relations Amendment (Work Choices) Bill 2005* (Cth) was the subject of much community and parliamentary debate, which included particular scrutiny of the impact of the Bill on the rights of Australian workers as protected under international law. The Bill was passed in largely unamended form and came into effect in March 2006.<sup>42</sup>
172. In late 2005, the ILO Committee on Freedom of Association held that recently enacted law regulating industrial relations in the building industry<sup>43</sup> was inconsistent with Australia's commitment to freedom of association, recommending that the Federal Government take 'the necessary steps' to promote collective bargaining.<sup>44</sup> Aspects of the recently enacted *Workplace Relations Amendment (WorkChoices) Act 2005* (**Workchoices Act**) substantially mirror the collective bargaining provisions that were the subject of the ILO's recommendation. The ILO's finding came less than 6 months after the ILO's Committee on the Application of Standards found the Federal Government was not meeting its international obligations to protect the rights of workers to collective bargaining.<sup>45</sup>
173. Notably, though, the *Workchoices Act* has been criticised for impacting on numerous labour rights in Australia, for instance, by reducing access to unfair dismissal laws, reducing the powers of the Industrial Relations Commission to act as an independent arbitrator and curtailing the rights to collectively bargain.<sup>46</sup>

#### (v) Privacy

174. The *Privacy Act 1988* (Cth) has recently been extended to cover the private sector, protecting individuals from corporate invasions of personal privacy. An individual may complain to the Privacy Commissioner if he or she believes there has been a breach of a National Privacy Principle in relation to personal information relating to the individual. Determinations of the Privacy Commissioner, which may include declarations for compensation, may be enforced in court.

<sup>41</sup> Norris R (2000) "Human rights and employment: an exploration of some issues" 6 *Australian Journal of Human Rights* 123; Fitzgerald, above n 28 at 33.

<sup>42</sup> OECD Directorate for Financial and Enterprise Affairs: "Australia: Phase 2 – Report on the application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendations on Combating Bribery in International Business Transactions" (approved and adopted by the Working Group on Bribery in International Business Transactions on 4 January 2006), pages 44 and 58.

<sup>43</sup> Building and Construction Industry Improvement Bill 2003 (Cth).

<sup>44</sup> 338<sup>th</sup> Report of the Committee on Freedom of Association (November 2005), available at <http://www.ilo.org/public/english/standards/relm/gb/docs/gb294/pdf/gb-7-1.pdf>

<sup>45</sup> Provisional Record - Report of the Committee on the Application of Standards, International Labour Conference, Ninety-third Session, Geneva, 2005: <http://www.ilo.org/public/english/standards/relm/ilc/ilc93/pdf/pr-22-2.pdf>

<sup>46</sup> 'New Industrial Relations Laws: What the Federal Government Changes Mean for You'. Australian Council of Trade Unions (2006) p2.

175. The private sector provisions of the *Privacy Act* were described at the time of their introduction by the then Attorney-General as a 'light touch' approach to privacy protection, establishing a co-regulatory regime aimed at being responsive to business and consumer needs.<sup>47</sup>
176. On 18 May 2005, the Attorney General released the Privacy Commissioner's report into the operation of the private sector provisions of the *Privacy Act*.<sup>48</sup> The review, which was the first major examination of the private sector provisions in the *Privacy Act* since they commenced in December 2001, concluded that the National Privacy Principles had worked well in practice and delivered to individuals protection of personal and sensitive information.
177. Although the emphasis of the Office of the Privacy Commissioner is on providing advice, assistance and information,<sup>49</sup> the Office has actively pursued cases where it has identified breaches of the *Privacy Act*. While the Office has sought to ensure that corporations remedy breaches and address complainants' concerns, it has made limited or no use of the more formal enforcement measures, such as making determinations or seeking injunctions.<sup>50</sup>

#### **E.7 Human Rights Related Investigations of Corporations in Australia**

178. Under the legislation administered by the Human Rights and Equal Opportunities Commission (discussed at paragraph 137 above), the Commission has responsibilities for inquiring into alleged infringements under five anti-discrimination laws - the *Racial Discrimination Act 1975*, the *Sex Discrimination Act 1984*, *Disability Discrimination Act 1992* and the *Age Discrimination Act 2004*, as well as inquiring into alleged infringements of human rights under the *HREOC Act*.
179. Matters which can be investigated by the Commission include discrimination on the grounds of race, colour or ethnic origin, racial vilification, sex, sexual harassment, marital status, pregnancy, or disability.
180. With respect to criminal offences under the *Criminal Code*, the Australian Federal Police commenced an investigation in August 2005 into the alleged complicity of Anvil Mining, in relation to an incident that took place in the Democratic Republic of Congo in October 2004.<sup>51</sup> An Australian law firm is representing three Congolese claimants seeking compensation from Anvil. The claims against Anvil centre upon its alleged complicity in

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<sup>47</sup> Privacy Amendment (Private Sector) Bill 2000 Second Reading Speech House of Representatives Hansard, 8 November 2000, p 22370.

<sup>48</sup> Getting in on the Act: the Review of the Private Sector Provisions of the *Privacy Act 1988* (Cth), available at <http://www.privacy.gov.au/act/review/index.html>

<sup>49</sup> This approach is set out in *Information Sheet 13 – the Federal Privacy Commissioner's Approach to Promoting Compliance with the Privacy Act*, available at [http://www.privacy.gov.au/publications/IS13\\_01.html](http://www.privacy.gov.au/publications/IS13_01.html)

<sup>50</sup> Getting in on the Act: the Review of the Private Sector Provisions of the *Privacy Act 1988* (Cth), available at <http://www.privacy.gov.au/act/review/index.html>, at 125-126

<sup>51</sup> Rights and Accountability in Development (RAID) Bank Information Centre. "World Bank Buries Internal Report on Controversial Congo Mining Project" available at <http://www.business-humanrights.org/Categories/Issues/Abuses/Complicity?types=Investigations>

human rights abuses by reason of its alleged provision of support to Congolese Government troops in the form of vehicles and other logistical support.

181. In November 2005, in response to the Volcker Report emanating from the UN Inquiry into the manipulation of the Oil for Food Program, the Federal Government established a Commission of Inquiry to investigate whether the companies mentioned in the Volcker Report had breached any domestic laws. This inquiry has focused on the domestic legal obligations contained in the bribery and corruption provisions of the *Criminal Code*. The Inquiry has not yet completed its investigation.

## **E.8 If and how 'Complicity' and 'Sphere of Influence' are Understood in Domestic Courts**

### **(a) Sphere of Influence**

182. While no established principles have emerged in Australia regarding the concept of 'sphere of influence' in the context of human rights violations, conceptually it is similar to the common law concept of 'duty of care'. As discussed at paragraph 156 above and at paragraph 183 below, in circumstances where an Australian parent company has sufficient control, knowledge and involvement in its subsidiary's business, it may have a duty of care to those affected by the subsidiary's operations.
183. Although it did not proceed to trial, the Ok Tedi litigation mentioned above raised increasing awareness among Australian corporations that they may be called to account for allegations of harm in their overseas operations.<sup>52</sup> Many such overseas operations are conducted by way of joint venture or by a subsidiary. In determining the extent to which an Australian corporation might be held liable for the actions of its partners or agents, the courts will have regard to such factors as those set out in *Smith, Stone & Knight v Birmingham Corporation* (1939) 4 All ER 116, and *Adams v Cape* [1990] 1 Ch 433.<sup>53</sup> These factors include whether the profits are treated as the profits of the parent company; whether the company was the head and the brain of the trading venture; the contributions towards financing the subsidiary; and the degree of control the parent corporation exercises or is entitled to exercise over the running of the business conducted by the subsidiary.

### **(b) Complicity**

184. A corporation may be criminally responsible under the principles of complicity<sup>54</sup> absent the requisite relationship with the agents of harm for those agents to be characterised as employees, agents or officers of the company.<sup>55</sup> The potential scope for corporate criminal liability as an accomplice is broad, with the *Criminal Code* attaching liability to any person

<sup>52</sup> Sophie Ellen McMurray, "Corporate compliance with human rights" (2003) *Australian Business Law Review* 265 at 269.

<sup>53</sup> Per Merkel J in *Bray v F Hoffman-La Roche Ltd* [2002] FCA 243. See discussion in McMurray, *ibid* at 266.

<sup>54</sup> *Criminal Code Act 1995* (Cth) s 11.2

<sup>55</sup> Kyriakakis above n 18 at 109-110

(or corporation) who aids, abets, counsels or procures the commission of an offence by another person.<sup>56</sup>

## E.9 Extraterritorial Application of Domestic Laws to TNCs

### (a) Legal Limits on the Application of Human Rights Standards/Laws to Corporations

#### (i) Jurisdiction

185. In order for Australian states to exercise jurisdiction over extraterritorial claims there must be the requisite nexus between the extraterritorial act and the jurisdiction. Despite this constitutional limitation, it has been noted that the Australian approach to exercising jurisdiction over extraterritorial matters is relatively lenient.<sup>57</sup>

186. Where a foreign corporation conducts business in the Australian state, it is subject to the personal jurisdiction of the state courts.<sup>58</sup> Superior state courts are authorised under their rules to hear cases involving damage suffered partly within jurisdiction.<sup>59</sup> Further, the superior state courts' rules permit service outside jurisdiction.<sup>60</sup> The consequences of permitting services outside jurisdiction were illustrated in *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491 (HCA) (**Renault**), in which a French car manufacturer with no presence in Australia was sued in the Supreme Court of New South Wales by a New South Wales resident who had suffered injuries in a car accident in New Caledonia.<sup>61</sup>

#### (ii) Forum Non Conveniens

187. The doctrine of *forum non conveniens* presents as a potential procedural hurdle for many transnational human rights litigants. The Australian courts have adopted a plaintiff-deferential approach to the *forum non conveniens* issue.<sup>62</sup>

188. In broad terms, Australian Courts will not decline to exercise jurisdiction in a matter unless it can be demonstrated that the Australian Court is a 'clearly inappropriate forum'. The doctrine in Australia was further explained by the High Court in *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538, in which the majority held that the doctrine would only operate when trial within the Australian forum 'would be productive of injustice,...oppressive in the

<sup>56</sup> *Criminal Code Act 1995* (Cth) s 11.2

<sup>57</sup> Barnali Choudhury, 'Beyond the Alien Tort Claims Act: alternative Approaches to Attributing Liability to Corporations for Extraterritorial Abuses', 26 *Northwestern Journal of International Law & Business* Fall 2005 43 at 53; Sarah Joseph, *Corporations and Transnational Rights Litigation* (2004), at 123.

<sup>58</sup> Joseph above n 49 at 123. Joseph also notes that cases such as *BHP v Oil Basins Ltd* [1985] VR 725, in which a foreign corporation's presence within Victoria was established by the fact that its agents and solicitors collected investment cheques on its behalf, indicated that the 'doing business' standard is applied leniently in Australia.

<sup>59</sup> See, eg, Rules of the Supreme Court of Victoria, Rule 7.01(1)(j); Rules of the Supreme Court of NSW, Part 10, rule 1A(1)(e).

<sup>60</sup> See, eg, Part 10 of the Rules of the Supreme Court of NSW.

<sup>61</sup> Joseph above n 54 at 123.

<sup>62</sup> Choudhury above n 54 at 53.

sense of seriously and unfairly burdensome, prejudicial and damaging or vexatious, in the sense of serious and unjustified trouble and harassment'.

**(iii) Choice of Law**

189. The question of whether, in international tort cases, the applicable law against which tortious conduct is measured should be that of the forum hearing the action, or that where the tort occurred, was settled in *Renault*. The majority in *Renault* stated that the substantive law at the site of the tort would be the applicable law in all foreign tort cases. Importantly, however, *Renault* did not resolve the issue of the applicable law in terms of damages.

**(b) Corporate Code of Conduct Bill (2000) (Cth)**

190. One means of securing human rights observance by TNCs is by their home jurisdiction enacting legally binding standards governing offshore operations. In 2000 an attempt was made to secure the enactment of the *Corporate Code of Conduct Bill* (the **Bill**) in order to institute a home-state model of extraterritorial regulation aimed at ensuring TNC accountability for human rights violations.
191. The Bill applied to Australian corporations employing more than 100 people overseas, requiring such corporations to meet international standards relating to environmental performance, employee health and safety, employment and human rights. In addition, it imposed a duty to observe the consumer health and safety standards and laws of both Australia and the host state, and to desist from indulging in unfair or anti-competitive trade practices. The Bill also made corporate officers liable to civil penalties for contraventions and gave a person suffering loss or damage as a result of contravention a right of action for injunctive relief and compensation. The Senate referred the Bill to the Parliamentary Joint Committee on Corporations and Securities which, by majority, recommended that the Bill 'not be passed because it is unnecessary and unworkable'. The Joint Committee noted that incidents of Australian companies' inappropriate behaviour are so 'few in number' that there is no 'systematic failure'. The Bill lapsed.

**(c) The TPA**

192. The TPA provides for extraterritorial application of its extensive provisions on restrictive trade practices, unconscionable conduct, consumer protection, and those offences that attach to these provisions. It applies to the conduct overseas of any corporation that is considered to carry on business in Australia.
193. The TPA has not yet been used in the context of the human rights impacts of Australian corporations operating overseas.

**(d) Bribery of Foreign Public Officials**

194. Section 70.2 of the *Criminal Code* in general terms establishes an offence to provide (or cause to be provided) a benefit to another person, where such a benefit is not legitimately due, with the intention of influencing a foreign public official in order to retain or obtain business or a business advantage.<sup>63</sup> The foreign public official may not necessarily be the person 'influenced' in order for the offence to have been committed.
195. However, under s 70.3 of the *Criminal Code*, various defences are provided to the offence created by s 70.2. These defences relate to whether the conduct would be regarded as lawful in the foreign public official's country, and was performed by an individual acting as an employee of an international or governmental organisation, or other position under a law of the foreign country.
196. The Australian authorities have agreed with the findings of an Organisation of Economic Cooperation and Development report that the defence set out in s 70.3 of the *Criminal Code* may operate more broadly than is contemplated by the Commentary on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions by, for example, operating to exclude liability where the conduct in question is prohibited in the foreign country by a mechanism that falls short of creating an offence. Australia has undertaken to amend the defence as soon as possible so as to ensure consistency with Commentary on the Convention.<sup>64</sup>
197. Whereas corporations were previously provided a measure of protection from criminal liability pursuant to the *Tesco* principle, (unless the bribe was paid or authorised by either the board of directors or a person with full managerial powers), pursuant to the *Criminal Code* a corporation may be criminally liable with respect to bribes paid by any employee, particularly if it can be shown that the firm's 'corporate culture' encouraged, tolerated or failed to discourage such conduct (see discussion at paragraph 146 above).
198. Although no cases have been prosecuted under s 70.2 of the *Criminal Code*, the Australian Federal Police are currently conducting investigations into potentially contravening conduct.<sup>65</sup>
199. Australia has endorsed the Asian Development Bank (OECD) Anti-Corruption Plan for Asia and the Pacific, and has ratified the UN Convention Against Corruption, which came into force in Australia on 9 January 2006. The Convention is the first binding global instrument on corruption, creating obligations to prevent and criminalise corruption and requiring countries to cooperate with each other in the investigation and prosecution of corruption

<sup>63</sup> The offence was introduced in Australia by the *Criminal Code Amendment (Bribery of Foreign Public Officials) Act 1999* (Cth) and was part of a coordinated international initiative under the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

<sup>64</sup> *Ibid.*

<sup>65</sup> OECD Directorate for Financial and Enterprise Affairs: "Australia: Phase 2 – Report on the application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendations on Combating Bribery in International Business Transactions" (approved and adopted by the Working Group on Bribery in International Business Transactions on 4 January 2006), page 4.

offences and in recovering the proceeds of the crime. The *Criminal Code* incorporates these obligations into Australian law.

**(e) Slavery**

200. Section 270 of the *Criminal Code* creates a number of offences relating to slavery. Section 270.3 provides that a person (including a corporation) who:

...whether within or outside Australia, intentionally:

- (A) possesses a slave or exercises over a slave any of the other powers attaching to the right of ownership; or
- (B) engages in slave trading; or
- (C) enters into any commercial transaction involving a slave; or
- (D) exercises control or direction over, or provides finance for:
  - (1) any act of slave trading; or
  - (2) any commercial transaction involving a slave;

is guilty of an offence.

201. This section has not been utilised in the context of TNC or other corporate activity.

**E.10 Potential Financial Incentives for Corporate Human Rights Compliance**

202. Governments in Australia, at the federal, state and local level use a combination of economic incentives such as licence fees and environmental levies to reduce pollution. One such financial incentive is the load-based licensing scheme introduced in New South Wales under the *Protection of the Environment Operations (General) Regulation 1998*. Load-based licensing links licence fees to pollutant loads emitted.

203. Other examples exist of more indirect financial incentives, such as the risk of prosecution faced if corporations fail to comply with their statutory obligations to report environmental compliance and performance.

204. In 1998, a new provision was inserted into the *Corporations Act 2001* (Cth) requiring that annual directors' reports of certain companies include details of the corporation's performance in relation to environmental regulation.<sup>66</sup> The provision requires that Australian companies that 'are subject to any particular and significant environmental regulation under a law of the Commonwealth or of a State or Territory' should disclose 'details of the entity's performance in relation to environmental regulation'.<sup>67</sup> The introduction of the provision has significantly increased the number of companies disclosing information on their performance in relation to environmental regulations.<sup>68</sup>

<sup>66</sup> Section 299(1)(f). See also Australian Securities and Investments Commission (ASIC), Practice Note 68.

<sup>67</sup> This trend has also been reflected at state level. In NSW, for example, the *Protection of the Environment Operations Act 1997* (NSW) and the *Contaminated Land Management Act 1997* (NSW) each contain provisions requiring the compulsory disclosure of information.

<sup>68</sup> Geoffrey R. Frost and Linda English, 1 November 2002, "Mandatory Corporate Environmental Reporting in Australia: Contested Introduction Belies Effectiveness of Its Application", *Australian Review of Public Affairs*, available at <http://www.australianreview.net/digest/2002/11/frost.html>



205. The *Corporations Act 2001* (Cth) includes a provision that encourages product issuers to assess the environmental and social aspects of particular companies in the context of offering certain investment products to investors.<sup>69</sup> Superannuation funds, for example, must disclose the extent to which they take into account labour standards, environmental, social and ethical considerations in their selection, retention or realisation of the investment.

#### E.11 Legal Liability Arising from Published Business Practice Standards

206. Section 52 of the TPA provides, in very wide and general terms, that a corporation shall not 'in trade or commerce engage in conduct that is misleading or deceptive or likely to mislead or deceive'. Section 53 prohibits certain types of 'false or misleading' representations in relation to the supply or possible supply of goods or services. Section 75 AZC provides for criminal prosecutions in respect of certain types of false or misleading representations. render such representations.<sup>70</sup>
207. Sections 52 and 53 are actionable by any person, regardless of whether he or she has suffered damage from the misrepresentation.<sup>71</sup> While aggrieved consumers and investors are potential plaintiffs, the Australian Competition and Consumer Commission (**ACCC**) is entitled to institute action, and may seek such remedies as injunctions,<sup>72</sup> declarations<sup>73</sup> and other orders.<sup>74</sup> Of potential significance for corporations in this regard is the fact that the ACCC has indicated that it will be scrutinising corporate privacy codes to ensure that they are not misleading and deceptive.<sup>75</sup> This may indicate a willingness to enforce compliance with the TPA in relation to representations about corporate codes of conduct.<sup>76</sup>
208. Importantly for TNCs, as discussed at paragraph 192 above, the TPA applies to conduct within Australia by foreign corporations and by trading or financial corporations incorporated in Australia.<sup>77</sup> Further, sections 52, 53 and 75AZC apply to conduct in overseas jurisdictions by corporations incorporated or carrying on business in Australia.<sup>78</sup>
209. Commentators have noted that, following the recent High Court case of *Gutnick v Dow Jones & Co Inc* [2002] HCA 56, misleading and deceptive material placed on a

<sup>69</sup> Section 1013D(1)(1), introduced in 2002.

<sup>70</sup> These provisions have not tested in Australian courts in relation to representations and conduct of the type alleged to have occurred in the US case of *Nike Inc v Kasky* 539 US 654

<sup>71</sup> *Truth about Motorways Pty Ltd v Macquarie Infrastructure Management Ltd* (2000) 200 CLR 591 (FCA) 601-2.

<sup>72</sup> *Trade Practices Act 1974* (Cth) s 80

<sup>73</sup> *Trade Practices Act 1974* (Cth) s 163A

<sup>74</sup> *Trade Practices Act 1974* (Cth) ss 86C and 86 D.

<sup>75</sup> ACCC, Regulators Co-operate to Improve Privacy Compliance, Media Release 45/02, 12 March 2002, available at <<http://www.accc.gov.au/media/mediar/htm>>

<sup>76</sup> See Tamiaka Spencer, 'Talking about Social Responsibility: Liability for Misleading and Deceptive Statements in Corporate Codes of Conduct', 29 *Monash Law Review* 299 (2003) at 312.

<sup>77</sup> *Trade Practices Act 1974* (Cth) s 4(1).

<sup>78</sup> *Trade Practices Act 1974* (Cth) s 5(1).

corporation's website outside Australia, with the intention or knowledge that it would be accessed in Australia, may constitute a contravention of the TPA.<sup>79</sup>

#### **E.12 Consideration of Australian Jurisdiction by Other Relevant Jurisdictions**

210. We are not aware of any cases in which courts in any other jurisdictions have had cause to consider or assess the competence of the Australian court system.

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<sup>79</sup> See *Tamieka Spencer*, above n 72. In *Gutnick v Dow Jones & Co Inc* [2001] VSC 305, a defamation case, it was held that a US corporation publishing defamatory material on its website, which it knew would be likely to be read in Australia, had committed a tort in Australia. The decision was upheld by the High Court: *Gutnick v Dow Jones & Co Inc* [2002] HCA 56. Spencer has noted that the same reasoning would be likely to apply in a case of alleged misleading and deceptive context: *Spencer* above n 75 at 308.

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**F. INDIA**

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**F.1 Executive Summary**

211. India is a constitutional democracy with a common law tradition, and a Federal system of Government.
212. The Constitution provides for individual rights (Fundamental Rights) and for the enforcement of Fundamental Rights before the Supreme Court of India. The Supreme Court has demonstrated a willingness to interpret the Fundamental Rights contained in the Constitution in accordance with India's obligations under international law. The Supreme Court is also acknowledged for its innovative role in developing the jurisprudence on Fundamental Rights, including developing a conducive jurisdiction in which to bring public interest litigation.
213. Corporations operating in India do not, as a general rule, have obligations to guarantee the rights under the Constitution. However, there is some scope in which the Supreme Court has applied such obligations to corporations, in order to ensure that their activities do not contravene certain of the Fundamental Rights.
214. India also has a National Human Rights Commission and other active enforcement and investigative mechanisms by which human rights are monitored.
215. The most significant area in which human rights have been considered by Courts in the context of corporate activity relates to the circumstances in which the corporation has been responsible for pollution of the environment.

**F.2 Overview of the Legal System of India****(a) India – Background**

216. The Republic of India was formerly a part of the British Empire before gaining independence in 1947. The Indian Constitution provides for a 'sovereign, socialist, secular, democratic republic'.<sup>80</sup> India has a quasi-federal form of government consisting of legislative, executive and judicial branches. The President is the head of State, with a largely ceremonial role including duties such as signing laws into action, issuing pardons and, in limited circumstances, interpreting the Constitution. The legislature of India is a bicameral Parliament, which consists of an upper house called the Rajya Sabha (Council of States), and a lower house called the Lok Sabha (House of the People). Executive power is vested in the President, who is required to act upon the advice of the Prime Minister and Cabinet (the Council Ministers), essentially vesting a great deal of executive power in the Prime Minister.<sup>81</sup>
217. India is divided into 29 federated states and seven centrally administered union territories. Within each state, Panchayats (local rural governments), are established at the village,

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<sup>80</sup> *Preamble of the Constitution of India.*

<sup>81</sup> *Doing Business in Asia 20-005* (CCH Asia Pte Limited, Singapore) updated to 15 February 2006.

intermediate and district level.<sup>82</sup> Despite its federal structure, the Indian political system is highly centralised in nature.<sup>83</sup>

218. The Legislature of a state may delegate to the Panchayats such powers and authority as may be necessary to enable them to function as institutions of self-government, including the power to tax, albeit with conditions as to financial accountability and social justice imposed by the State.<sup>84</sup>

219. The following commercial activities are State monopolies in India:

- manufacture of arms, ammunition and allied items of defence equipment; production of atomic energy; mining of coal and lignite;
- production of minerals specified in the Schedule to the Atomic Energy (Control of Production and Use) Order 1953; and
- railway transport and production of mineral oil.

However, the Government is now permitting select private sector investment in the mining industry.<sup>85</sup>

#### **(b) Law of India**

220. The primary sources of Indian law, in order of primacy, are:

- the Constitution,
- written statutes;
- uncodified personal law;<sup>86</sup>
- judge-made law; and
- customary law.<sup>87</sup>

221. The Indian Constitution divides the law making powers between the governments of the states and the Union of India (the Union), by creating three 'lists': the Union List, the State List and the Concurrent List.<sup>88</sup> The Union List contains the exclusive law making powers of the Union and includes areas of national importance, such as defence, foreign affairs and income tax. The areas of exclusive state jurisdiction, set out in the State List, include areas such as local Government, state matters and agriculture. The Concurrent List contains

<sup>82</sup> See *Constitution of India* Part IX.

<sup>83</sup> See discussion of Indian Federalism in Krishna, S., 'Constitutionalism, Democracy, and Political Culture in India', in Franklin, D. and Baun, M. (eds), *Political Culture and Constitutionalism: A Comparative Approach*, (ME Sharpe, London) 1995, p 164.

<sup>84</sup> See *Constitution of India* Part IX.

<sup>85</sup> *Doing Business in Asia* 20-005 (CCH Asia Pte Limited, Singapore) updated to 15 February 2006.

<sup>86</sup> The status of the personal laws of minority communities, and the plurality of religious laws in general, is much debated in India. Article 44 of the Constitution of India legislates a commitment to the gradual establishment of legal uniformity in India, the aim being that the state "shall endeavour to secure for the citizens a uniform civil code throughout the territory of India."

<sup>87</sup> *Preamble of the Constitution of India*.

<sup>88</sup> *Constitution of India, Article 246*.

areas of legislative power shared by the Union and State legislatures. It includes matters such as social security and control of pricing. In the event of inconsistency between the laws of a state and the Union in relation to matters in the Concurrent List, the law of the Union prevails, unless the President gives assent to the state law, in which case the state law shall prevail in the state in which it is made.<sup>89</sup>

222. As regards written statute, almost all Indian law is codified. There is a uniform civil code in respect of matters including trade, commerce, property and civil procedure. However the law of torts is not codified nor are some of the personal laws.
223. As a result of India's colonial history, Indian Courts refer to English common law where the statute is silent or where there is no relevant Indian law on point.
224. Personal laws, namely inheritance, succession, marriage, divorce, adoption and maintenance are determined by reference to religious and customary laws.<sup>90</sup>
225. As a country with enormous cultural and religious diversity, customary laws (that is, local customs and conventions) which are not inconsistent with statute, may be taken into account or recognised by courts in limited circumstances.<sup>91</sup>

### (c) The Judiciary

226. India's judiciary is established by the Constitution as an independent body, separate from the executive and legislative arms of government.<sup>92</sup>
227. The Supreme Court is the highest court in the country. There are eighteen appellate High Courts, each having jurisdiction over a State or a group of smaller States. Each of the States has a hierarchy of lower courts, and different State laws provide for different jurisdictions of those courts.
228. A conflict between the legislature and the judiciary is referred to the President. The Supreme Court has jurisdiction in respect of the following matters:<sup>93</sup>
- original jurisdiction over disputes between States, and between States and the Union;
  - original jurisdiction to enforce the fundamental rights set out in the Constitution;
  - appellate jurisdiction from decisions of any court or tribunal in India (Article 136); and
  - advisory jurisdiction in certain matters referred by the President.

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<sup>89</sup> *Constitution of India, Article 254.*

<sup>90</sup> Some of the personal laws that have been codified include the *Hindu Marriage Act 1955*, the *Indian Christian Marriage Act 1872*, the *Parsi Marriage and Divorce Act 1936*, the *Indian Divorce Act 1869*, the *Indian Succession Act 1956* and the *Dissolution of Muslim Marriage Act 1939*.

<sup>91</sup> See, for example, *Constitution of India*, Articles 371A and 371G, which recognise the customary laws of the Nagaland and Mizoram peoples. See also *Indian Evidence Act, 1872* s130.

<sup>92</sup> As established by the *Constitution of India*, Part V, Chapter IV.

<sup>93</sup> See *Constitution of India*, Part V, Chapter IV.

229. In the late 1970s and early 1980s the Supreme Court recognised a jurisdiction to hear Public Interest Litigation (**PIL**), pursuant to which it hears claims of breaches of fundamental constitutional rights, whether the claim is brought by a person affected by the breach or not. Under the PIL jurisdiction, where there is a violation of a fundamental or other legal right of a person or class of persons who by reason of poverty or disability or socially or economically disadvantaged position cannot approach a Court, it is open to any 'public spirited individual or social action group' to bring an action upon filing a writ, or even by more informal means, such as by way of a letter addressed to a judge.<sup>94</sup>

### F.3 Human Rights Law Obligations of Corporations in India

#### (a) Human Rights in the Constitution

##### (i) Fundamental Rights, Directive Principles and Fundamental Duties

230. India's Constitution provides for 'Fundamental Rights', 'Directive Principles' and 'Fundamental Duties'.
231. The Fundamental Rights, contained in Part VII of the Constitution, are enforceable rights and are discussed in paragraphs 236 to 237 below.
232. The Directive Principles, contained in Part IV of the Constitution, are guidelines to be used by the Government while framing laws and policies. The principles relate to social justice, economic welfare, foreign policy and legal and administrative matters. Although unenforceable, they are expressed to be 'nevertheless fundamental in the governance of the country' and it is the duty of the State<sup>95</sup> to apply the Directive Principles in making laws.<sup>96</sup>
233. The Fundamental Duties contained in Part IV–A of the Constitution are moral obligations on all citizens of India. These duties concern personal duties, the environment, the State and society, and the Nation. Like the Directive Principles, they are not enforceable by a court of law.<sup>97</sup>
234. The Fundamental Rights are basic human freedoms that universally apply to all citizens. These rights are enforceable in the Supreme Court<sup>98</sup> (see paragraph 237) and take

<sup>94</sup> *SP Gupta v Union of India* [1981] Supp SCC 87; *MC Mehta v Union of India* [1987] 1 SCC 395. The PIL jurisdiction was developed in response to the suspension of fundamental rights that occurred during the State of Emergency in 1975-1977 and also to provide for access to justice for those persons who for reasons of, for example poverty or illiteracy, could not bring claims on their own behalf. See also *Narmada Bachao Andolan v Union of India* [2000] INSC 542.

<sup>95</sup> Defined in Article 12 of the *Constitution of India* as the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.

<sup>96</sup> See *Constitution of India*, Article 37. It has been held that the Directive Principles of State policy must be read into the Fundamental Rights and a matter of interpretation. *Dharwad District P.W.D. Literate Daily Wages Employees v State of Karnataka* [1990] 2 SCC 396, *Rhandir Singh v Union of India* [1982] 1 SCC 618.

<sup>97</sup> The preamble is also not a part of the Constitution of India and is not enforceable in a court of law. However, the Supreme Court has, in the case of *Kesavananda Bharati v. State of Kerala* [1973] 4 SCC 225, recognised that the Preamble may be used to interpret ambiguous areas of the Constitution where differing interpretations present themselves.

<sup>98</sup> Article 32 of the *Constitution of India* gives the Supreme Court original jurisdiction to enforce Fundamental Rights, including to issue directions, orders or writs, including habeas corpus, mandamus, quo warrant and certiorari.

precedence over other laws of the country, subject to certain restrictions. The Fundamental Rights contained in the Constitution include:

- Right to equality before the law (Article 14) which includes provision for affirmative action laws, by allowing the State to make laws for the advancement of 'any socially or educationally backward classes of citizens'.
- Right to social equality and equal access to public areas (Article 15) which includes a guarantee of non-discrimination on the basis of caste, colour, language etc.
- Right to equality in matters of public employment (Article 16).
- Abolition of Untouchability (Article 17) which makes the practice of untouchability an offence.
- Right to freedom of speech and expression (Article 19(2)), subject to reasonable restrictions by the State in the interests of, among other things, public order, security of state, decency or morality.
- Right to freedom to assemble peacefully without arms (Article 19(1)(b)), subject to reasonable restrictions by the State in the interests of public order and the sovereignty and integrity of India (Article 19(3)).
- Right to freedom to form associations or unions (Article 19(1)(c), subject to reasonable restrictions by the State on the freedom in the interests of public order, morality and the sovereignty and integrity of India (Article 19(4)).
- Right to freedom to reside and settle in any part of the territory of India (Article 19(1)(e)), subject to reasonable restrictions by the State in the interest of the general public or for the protection of the scheduled tribes (Article 19(5)).
- Right to freedom to practice any profession or to carry on any occupation, trade or business (Article 19(1)(g)), subject to reasonable restrictions by the State in the interests of the general public.
- Right to protection of life and personal liberty (Article 21), except as otherwise required by law.
- Rights of a person arrested under ordinary circumstances (Article 22), includes a right to be told the grounds for their arrest; a right to legal representation; and a right to be brought before the nearest magistrate within 24 hours. The right is not available to persons detained under laws providing for preventive detention.<sup>99</sup>

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<sup>99</sup> Under preventive detention, the government can imprison a person for a maximum of three months. If the government forms the view that a person being at liberty can be a threat to the law and order or to the unity and integrity of the nation, it can detain or arrest that person to prevent him from doing this possible harm. After three months such a case is brought before an advisory board for review.

- Right against exploitation (Articles 23 and 24) includes the abolition of Begar<sup>100</sup> and trafficking in human beings; and abolition of employment of children below the age of 14 years in a factory or mine or any other hazardous employment.
  - Right to freedom of religion (Articles 25, 26, 27 and 28).
  - Cultural and educational rights (Articles 29 and 30), including special measures, to protect the rights of minorities, such as the right to language and to establish educational institutions.
235. In addition to the limitations placed on particular Fundamental Rights, the Constitution places limitations on all of the Fundamental Rights in times of a state of emergency or martial law.<sup>101</sup>
236. As regards enforceability of Fundamental Rights, Article 32 of the Constitution guarantees the right to move the Supreme Court for enforcement of the Fundamental Rights, and grants the Supreme Court power to issue directions, orders or writs in enforcement of these rights.<sup>102</sup> The right to move the Supreme Court to enforce Fundamental Rights is, of itself, a right guaranteed by the Constitution. The Supreme Court has also held that its powers under s 32 are not only injunctive in nature, and that it has all powers ancillary and incidental to those powers, including, in exceptional circumstances, power to grant remedies such as compensation for a breach of a Fundamental Right.<sup>103</sup> The Court held, however, that remedial powers should only be granted where
- infringement was patent and incontrovertible, the violation was gross and its magnitude was such as to shock the conscience of the court and it would have been gravely unjust to the person whose fundamental right was violated, to require him to go to the civil court for claiming compensation.<sup>104</sup>
237. In *SMT Nilabati Behera v State of Orissa* [1993] INSC 153 the Supreme Court confirmed, after considering the authorities, that monetary compensation is available, but expressed the circumstances in which it is available in slightly different terms:
- Of course, relief in exercise of the power under Article 32 or 226 [which gives state High Courts the jurisdiction conferred upon Supreme Courts by Article 32] would be granted only once it is established that there has been an infringement of the fundamental rights of the

<sup>100</sup> Begar is a generic or collective term for forms of work, especially in modern or early modern history, in which adults and/or children are employed against their will by the threat of destitution, detention, violence (including death), or other extreme hardship to themselves, or to members of their families. Many of these forms of work may be covered by the term forced labour, although this tends to imply forms based on violence. Unfree labour includes all forms of slavery.

<sup>101</sup> In times of a 'state of emergency', the President has the power to suspend the right to move the Supreme Court for the enforcement of rights, save for the enforcement of the right to protection in respect of conviction for offences and the protection of life and personal liberty (*Constitution of India*, Article 359(1)). During a period of time in which martial law is in force, Parliament is also empowered to indemnify certain persons acting in official capacities 'for any act done by him in connection with the maintenance or restoration of order' (*Constitution of India*, Article 34).

<sup>102</sup> Article 32 of the *Constitution of India* gives the Supreme Court original jurisdiction to enforce Fundamental Rights, including to issue directions, orders or writs, including *habeas corpus*, *mandamus*, *quo warrant* and *certiorari*.

<sup>103</sup> See *MC Mehta v Union of India* [1987] 1 SCC 395.

<sup>104</sup> *Ibid.*



citizen and no other form of appropriate redressal by the court in the facts and circumstances of the case, is possible.

**(ii) Other Rights contained in the Constitution**

238. In addition to Fundamental Rights, Directive Principles and Fundamental Duties, the Constitution provides for the reservation of places for the Scheduled Castes and Scheduled Tribes in legislative positions, educational positions and in employment in the public service.<sup>105</sup> This effectively provides for affirmative action on behalf of the Scheduled Castes and Scheduled Tribes in those sectors.

**(iii) Application of constitutional provisions in context of corporate activity**

239. As a general rule, the Fundamental Rights contained in the Constitution protect 'citizens' (by definition human beings)<sup>106</sup> and 'persons' from certain prohibited State action.<sup>107</sup> On the basis of our research, we are not aware of any cases in which corporations have sought to enforce their rights as 'persons' under the Constitution.
240. There is no express provision in the Constitution which provides for Fundamental Rights to be enforced against corporations. Many of the Fundamental Rights are expressed in terms of protection of individuals against certain prohibited action of the State. The State is defined in the Constitution as (Article 12):
- the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.
241. Courts have held that whether a corporation is an 'other authority' for the purpose of Article 12 involves a consideration of the extent to which the corporation was established by the Constitution or statute,<sup>108</sup> or to which the corporation can be seen as being an instrumentality or agency of the State,<sup>109</sup> and is not limited to whether the State has control of the corporation.<sup>110</sup>
242. The question of whether corporations could be liable for breaches of Fundamental Rights in the Constitution was considered in *RD Shetty v International Airport Authority of India* [1979] INSC 112. In that decision the Supreme Court considered the circumstances in which a corporation is properly considered to be a State authority or to act as an agent of the State, such that it is bound by the obligations of the State in the constitution. The Supreme Court held that such a determination will be a matter of fact, taking into account the following circumstances:

<sup>105</sup> See *Constitution of India*, Part XVI. The content of the Scheduled Castes and Scheduled Tribes is determined by Presidential decrees, but includes the Dalits or (Untouchables).

<sup>106</sup> See Article 5 of the *Constitution of India*, which defines citizen by reference to their birth and residence.

<sup>107</sup> Some Fundamental Rights are also enforceable against private individuals: see *Shri Bodhisattwa Gautam v Miss Subhra Chakraborty* [1996] 1 SCC 490.

<sup>108</sup> *Rajasthan State Electricity Board, Jaipur v Mohan Lal* [1967] 3 SCR 377.

<sup>109</sup> *Sukhdev Singh v Bagatram Sardar Singh Raghuvanshi* [1975] 1 SCC 421.

<sup>110</sup> *Ramana Dayaram Shetty v International Airport Authority of India* [1979] 3 SCC 489.

- whether there is any financial assistance given by the State and if so, the magnitude of such assistance,
- whether there is any other form of assistance, given by the State, and if so, whether it is the usual kind or it is extraordinary,
- whether there is any control of the management and policies of the corporation by the State and what is the nature and extent of such control,
- whether the corporation enjoys State-conferred or State-protected monopoly status and whether the functions carried out by the Corporation are public functions closely related to government functions.

243. The Court held:

In pursuance of the industrial policy resolution of the Government of India, corporations were created by the Government for setting up and management of public enterprises and carrying out public functions. The corporations so created, acting as instrumentality or agents of Government, would obviously be subject to the same limitations in the field of constitutional and administrative law as Government itself though in the eyes of law they would be distinct and independent legal entities.

244. Thus, where corporations are established under statute and are controlled by the State, or funded primarily by the State, they are likely to have the Constitutional obligations of the State, including with respect to recognising and adhering to Fundamental Rights.

245. Whether private corporations are subject to the same obligations is less clear. It may be a matter of construing the public interest in the industry, by reference to government policy in relation to the industry and other external factors.<sup>111</sup> In *MC Mehta v Union of India*<sup>112</sup> (the Shriram Case) the Supreme Court considered whether it had the power under Article 32 to issue a writ against the Delhi Cloth Mills Ltd, the parent company of Shriram, for violation of the right to life guaranteed by Article 21 of the Indian Constitution.<sup>113</sup> The Supreme Court did not decide the point, but it did appear to tacitly support the concept of imposing those obligations in certain circumstances, noting:<sup>114</sup>

why should a private corporation under the functional control of the State engaged in an activity which is hazardous to the health and safety of the community and is imbued with public interest and which the State ultimately proposes to exclusively run under its industrial policy, not be subject to the same limitations [?]<sup>115</sup>

246. Corporations are not subject to the Constitutional provisions that create affirmative action for Scheduled Castes and Scheduled Tribes, as the affirmative action provisions relate to positions in the public service.

<sup>111</sup> As stated at paragraph 219 above, in India certain industries are government monopolies, although increasingly government enters into partnership with private corporations in order to develop those industries.

<sup>112</sup> [1986] 2 SCC 176 as amended by [1987] 1SCC 395.

<sup>113</sup> The Shriram Case concerned a burst tank of oleum gas, which had resulted in death and injury to a number of workers and the public.

<sup>114</sup> *MC Mehta v Union of India* [1987] 1SCC 395.

<sup>115</sup> *Ibid.*

**(b) Human Rights in Other Domestic Law****(i) The Protection of Human Rights Act 1993**

247. The *Protection of Human Rights Act 1993* (***Human Rights Act***) establishes the National Human Rights Commission (the Commission) and provides for the possible establishment of human rights courts.
248. Human rights are defined in the *Human Rights Act* as:
- those rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by Courts in India.<sup>116</sup>
249. The Commission is comprised of judges or former judges of the Supreme and High Courts, as well as two members with knowledge or practical experience in matters relating to human rights.<sup>117</sup>
250. The functions of the Commission include inquiring into any complaint of a violation of human rights (or abetting thereof), or negligence in the prevention of violation of human rights by a public servant;<sup>118</sup> intervening in any pending Court proceeding involving the allegation of violation of human rights; researching and providing recommendations to Government on human rights law reform and promotion of human rights.<sup>119</sup>
251. Although the Commission is endowed with the powers of a civil court in the conduct of its investigations, enabling it to, for example, summon witnesses and take evidence on affidavit,<sup>120</sup> its decisions are not binding and enforceable in the same manner as a civil court. They are merely recommendatory in nature. The Commission is described as a complementary institution. At the end of an inquiry, the Commission may make recommendations to the State or Union government for the initiation of proceedings or any other action the Commission sees fit, including that the government act, or desist from acting in a particular way, or that it take other measures to stop the violations or that the government provide compensation to victims and their families.<sup>121</sup> The government concerned is not bound to act in the manner recommended by the Commission, but it is required to furnish an 'Action Taken' report that sets out the action taken, or proposed to be taken, in response to the recommendations.<sup>122</sup>
252. The *Human Rights Act* applies to government, and does not directly apply to corporations. However corporations can be indirectly affected by the recommendations of the Commission. In the case of a breach by a corporation of the human rights set out in the

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<sup>116</sup> *Protection of Human Rights Act*, 1993, s 2

<sup>117</sup> *Protection of Human Rights Act*, 1993, s 3: There are also provisions for the creation of State-based Human Rights Commissions.

<sup>118</sup> A public servant is defined according to s21 of the *Indian Penal Code*, 1860.

<sup>119</sup> *Protection of Human Rights Act*, 1993, s12

<sup>120</sup> *Protection of Human Rights Act*, 1993, s13(1)

<sup>121</sup> *Protection of Human Rights Act* 1993, s 18(1)-(4)

<sup>122</sup> *Protection of Human Rights Act* 1993, s 18(5)

*Human Rights Act*, the Commission can ask the government to take action against the corporation. In Madhya Pradesh the Commission issued directions for a factory owner, who the Commission found to be responsible for the breach of the right to health and medical care of its workers, to take care of the widows and children of deceased workers and to establish a school.<sup>123</sup>

253. The *Human Rights Act* also provides for the establishment, at the behest of the Government and with the concurrence of the Chief Justice of the state High Court, of a Court of Session to be a Human Rights Court to try 'offences' under the Act. On the basis of our research, to date no functioning Human Rights Courts have been established as anticipated by the *Human Rights Act*.<sup>124</sup>

#### (ii) Labour laws

254. The *Bonded Labour System (Abolition) Act* 1976 abolished the practice of bonded labour, freed all bonded labourers, and voided all contracts and agreements by virtue of which any person was required to work as a bonded labourer.
255. There are a number of Acts in Indian law that seek to protect the working conditions of employees and that seek to regulate industrial relations. For example, the *Factories Act* 1948, protects the basic working conditions of employees in factories,<sup>125</sup> and the *Minimum Wages Act* 1948 enables the government to fix the minimum wages of employees in specified industries on the basis of collective bargaining.<sup>126</sup> The *Contract Labour (Regulation and Abolition) Act* 1970 prohibits employment by way of contract labour in certain workplaces, and provides a system of registration of employers and regulation of industry.
256. The *Industrial Disputes Act* 1947 recognises the general right to strike or to declare a lock out.<sup>127</sup> Under the *Industrial Disputes Act*, these rights may only be exercised under certain conditions.<sup>128</sup> In the case of government servants, there is an express prohibition against striking under the Government Servants' Conduct Rules.<sup>129</sup>

#### (iii) Environmental laws

257. The Parliament of India has enacted legislation relating to the protection of the environment, including the *Environment (Protection) Act* 1986 (**EPA**), the *Air (Prevention*

<sup>123</sup> See generally the *Human Rights Commissions: A Citizen's Handbook* published by the Commonwealth Human Rights Initiative in 2004 at [http://www.humanrightsinitiative.org/publications/hrc/hrc\\_handbook.pdf](http://www.humanrightsinitiative.org/publications/hrc/hrc_handbook.pdf)

<sup>124</sup> The state of Tamil Nadu has notified certain courts under the Human Rights Act, but those courts are not yet operating as Human Rights Courts and do not have rules and processes in place.

<sup>125</sup> Every worker is entitled to annual leave with pay (s79). Working hours are limited to nine hours per day (s54) and a maximum of 48 hours per week (s51). The *Factories Act* 1948 does not apply to workers in mines (s 2).

<sup>126</sup> See s 3 of the *Minimum Wage Act* 1948.

<sup>127</sup> Under the *Constitution of India*, the right to strike in the Constitution is not an absolute right but rather flows from the fundamental right to form a union under Article 17.

<sup>128</sup> For example, s22(1) provides that a strike will be illegal if six weeks' notice is not provided to a public utility service employer.

<sup>129</sup> Rule 22 of the Tamil Nadu, *Government Servants Conduct Rules* 1973 provides that 'no Government servant shall engage himself in strike or in incitements thereto or in similar activities'.

and Control of Pollution) Act 1981, the *Factories Act* 1948, the *Forest (Conservation) Act* 1980 and the *Water (Prevention and Control of Pollution) Act* 1974. The *Water (Prevention and Control of Pollution) Act* 1974 and the *Air (Prevention and Control of Pollution) Act* 1981 contain similar provisions making it illegal to knowingly cause or permit any poisonous, noxious or polluting matter into any stream or well or into the air, and also to establish any industry operation or process or any treatment and disposal system that is likely to do the same.

258. The EPA defines environment as 'water, air and land and the inter relationship which exists among and between water, air, land and human beings, other living creatures, plants, micro-organisms and property'. Section 3 of the EPA empowers the Government to:

Take all such measures as it deems necessary or expedient for the purpose of protecting and improving the quality of the environment and preventing, controlling and abating environmental pollution.

259. These statutes provide comprehensive environmental guidelines for the establishment of industries and reporting measures, particularly for those industries deemed to involve projects with high environmental impact.<sup>130</sup> It is compulsory for certain industries to undertake a mandatory environmental audit to ensure that they comply with the minimum standards prescribed by the relevant legislation.

#### (iv) Laws in relation to Caste

260. The Indian Parliament has passed laws in order to protect persons from discrimination in the provision of services or in relation to access to facilities on the ground of untouchability,<sup>131</sup> including setting out punishment for discriminatory acts (see *Protection of Civil Rights Act* 1955 and the *Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act* 1989). Punishment for discriminating on the ground of untouchability can include the cancellation of any licence under any law in respect of any profession, trade, calling or employment in relation to which the offence is committed.<sup>132</sup>

#### (v) Compensation for compulsory acquisition

261. Article 300A of the Indian Constitution states that a person shall not be deprived of his property except by authority of law,<sup>133</sup> but does not guarantee compensation of a compulsory acquisition. However, the *Land Acquisition Act*, 1894 (**Acquisition Act**) requires the Government to compensate upon compulsory acquisition. The *Acquisition Act* governs the ability of the government to compulsorily acquire private property for a public purpose and specifies both the procedure for doing so<sup>134</sup> and the method of calculating

<sup>130</sup> These industries include, among others, mining, coal, fertiliser, petroleum and chemical industries.

<sup>131</sup> These provisions are extremely broad and include access to employment, hospitals, shops, restaurants, privately run venues and public conveyances (s 4).

<sup>132</sup> See *Protection of Civil Rights Act* 1955, s 8. Despite these legislative and Constitutional provisions, it is reported that Dalits remain a severely disadvantaged group in Indian society (see *Chennai Judicial Exchange on Access to Justice: A Report*, November 2004, p8, at <[http://www.humanrightsinitiative.org/publications/jc/chennai\\_judicial\\_exchange.pdf](http://www.humanrightsinitiative.org/publications/jc/chennai_judicial_exchange.pdf)>)

<sup>133</sup> Historically, the right to own property was protected as a fundamental right by Article 31, which has since been repealed. Article 300A effectively derogates such a right to a much weaker statutory right.

<sup>134</sup> *Land Acquisition Act*, 1894, ss 4-12.

compensation.<sup>135</sup> The *Acquisition Act* permits a person to appeal to a court, however there is only scope to appeal the amount of compensation the person will receive.<sup>136</sup>

**(c) Constitutional and Legislative Rights in the Context of Corporate Activity**

262. India has developed a number of Export Processing Zones or Special Export Zones, which offer a range of incentives to foreign investment, including exemption from taxes, subsidised utilities and the ability to operate as a wholly owned foreign corporation. It has been reported that labour laws are unofficially suspended within these special zones and that there is an unofficial ban on union activity.<sup>137</sup>

**(d) International Human Rights Law**

**(i) Recognition of international human rights law**

263. The following international human rights treaties have been ratified by India:
- the ICCPR, (ratified on 10 April 1979);
  - the ICESCR (ratified on 10 April 1979);
  - the CEDAW, (ratified on 9 July 1993);
  - the ICERD, (ratified on 3 December 1968);
  - the *Convention on the Political Rights of Women* (ratified on 1 November 1961)
  - the *Convention on the Prevention and Punishment on the Crime on Genocide* (ratified on 27 August 1959);
  - the CROC, (ratified on 11 December 1993);<sup>138</sup>
  - the *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others* (ratified on 9 January 1953); and
  - the *Slavery Convention*, ratified on 18 June 1927 and the *Supplementary Convention on the Evolution of Slavery, Slave Trade and Institutions and Practice Similar to Slavery* (ratified on 23 June 1960);
264. India has not ratified any of the relevant Optional Protocols to these instruments, nor has it accepted any of the individual complaints procedures under those conventions it has ratified. It has entered substantive reservations to the ICCPR, ICESCR, and the CEDAW.

<sup>135</sup> *Land Acquisition Act, 1894*, ss 15, 23-25.

<sup>136</sup> *Land Acquisition Act, 1894*, s 21.

<sup>137</sup> See Ramanathan, U., *Business and Human Rights: The India Paper*, International Environmental Law Research Centre Working Paper 201-2003 at <<http://www.ielrc.org/content/W0102.pdf>>, p 28 and citations referred to therein.

<sup>138</sup> India submitted a declaration regarding the progressive implementation of Article 32 of the *Constitution of India* on child labour, particularly with reference to paragraph 2(a) on the provision of a minimum employment age. But see the decision of the Supreme Court in *SMT Nilabati Behera v State of Orissa* [1993] INSC 153 in which the court stated that it could 'refer to' Article 9(5) of the ICCPR (which provides an enforceable right to compensation for victims of unlawful detention) in its consideration of whether compensation is available as a remedy for victims of unlawful arrest or detention who bring their case under s 32 of the Constitution for breach of Article 21 (fundamental right to life).

265. India has signed, but not ratified, both the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* 1984 and the *Convention against Corruption* 2005.

266. India is a member of the ILO and is a party to the major conventions of the ILO.

**(ii) Incorporation of international human rights law into Indian domestic law**

267. It is unusual for human rights related legislation to expressly refer to, or incorporate, provisions of international human rights instruments, given the strong rights-based legal tradition of India's domestic system. However the *Protection of Women From Domestic Violence Act* 2005 was said to implement some of India's international obligations under CEDAW.

268. As a general rule, international law is only part of India's law where India has signed or ratified an international legal instrument and the Parliament has given effect to the treaty obligations through implementation of domestic legislation.<sup>139</sup> The Indian Supreme Court has held that India must implement a treaty to which it is a party, and that any constitutional deficiency that may prevent the State implementing the obligations should be overcome.<sup>140</sup> However, where Parliament does not incorporate India's international obligations into domestic law, courts cannot compel Parliament to enact such a law, and in the absence of such a law they cannot enforce any of the rights or obligations under the treaty.<sup>141</sup>

269. India has not incorporated the ICCPR and the ICESCR into domestic law, and therefore those treaties do not have the force of law in India. Nor does the Indian Constitution give effect to all the human rights contained in those instruments.<sup>142</sup>

270. However Indian courts may take international human rights law into account when interpreting Indian statute law. Indian legislation should be interpreted in accordance with India's international obligations.<sup>143</sup> The Supreme Court supported the decision of the Kerala High Court, in which the High Court judge used Article 11 of the ICCPR, which states that 'no one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation', to assist in an interpretation of provisions of the *Code of Civil Procedure*, that gave the court discretion to detain a person for non-payment of a judgment

<sup>139</sup> *Attorney-General for Canada v Attorney-General for Ontario* [1937] AC 326; which remains the law in India following the commencement of the Constitution: see *Maganbhai Ishwarbhai Patel v Union of India* [1970] 3SCC 400; *State of Gujarat v Vora Fiddali Badruddin Mithibarwala* [1964] 6SCR 461; *Jolly George Verghese v Bank of Cochin*.

<sup>140</sup> See *Maganbhai Ishwarbhai Patel v Union of India* [1970] 3SCC 400.

<sup>141</sup> See *Jolly George Verghese v Bank of Cochin* [1980] 2SCC 360.

<sup>142</sup> See Pathak, R.S., 'Human Rights and the Development of the Environmental Law in India', 14 (1988) *Commonwealth Law Bulletin*, 1171-1180.

<sup>143</sup> *Resavananda Bharathi v State of Kerala* (1973) Supp SCR 1. See also Krishnaiyer J in *Jolly George Verghese v Bank of Cochin* [1980] 2SCC 360; *SMT Nilabati Behera v State of Orissa* [1993] INSC 153 in which the Supreme Court stated that the 'wide powers given to this Court by Article 32, which itself is a fundamental right, imposes a constitutional obligation on this Court to forge new tools, which may be necessary for doing complete justice and enforcing the fundamental rights guaranteed in the Constitution...' citing *Union Carbide Corporation v Union of India* [1991] 4 SCC 584.

debt.<sup>144</sup> The judge clearly stated that the international covenants do not create enforceable rights, but were matters to which it could refer.

271. International human rights law is also relevant to the interpretation of the Fundamental Rights contained within Indian Constitution.<sup>145</sup> The Supreme Court has held that where domestic law does not 'occupy the field' any international treaty to which India is a party, that is not inconsistent with the Fundamental Rights and is in harmony with the spirit of Fundamental Rights, must be read into the constitution in order to promote the purposes for which the constitutional rights were granted.<sup>146</sup>
272. Further, the Supreme Court of India has indicated that its task is to innovate methods and strategies to enlarge the range and meaning of the Fundamental Rights and to advance the human rights jurisprudence.<sup>147</sup>
273. The status of customary international law in Indian law is less clear. Customary international law cannot be enforced in India where it conflicts with statutes.<sup>148</sup> However there has been some judicial acknowledgement that the doctrine of incorporation applies to customary law in India<sup>149</sup> and that therefore 'the rules of international law are incorporated into national law and considered to be part of national law, unless they are in conflict with an Act of Parliament.'<sup>150</sup>

#### F.4 Criminal Liability of Corporations in India

##### (a) Application of *Penal Code* to corporations

274. Corporations can be liable for breaches of India's *Penal Code*. By virtue of section 11, the *Indian Penal Code*, 1860 (***Penal Code***) also applies to 'any company or association or body of persons, whether incorporated or not'. Where the primary offender is a corporation, directors and officers may still be liable, in addition to the criminal liability of the corporation, if their own participation in the offence amounts to abetting the offence within the meaning of sections 107 and 108 of the *Penal Code*.

<sup>144</sup> *Jolly George Verghese v The Bank of Cochin* AIR 1980 SC 470.

<sup>145</sup> *People's Union for Civil Liberties v Union of India* [1996] INSC 1673 and *Vishakha v State of Rajasthan* [1997] INSC 701.

<sup>146</sup> See *Vishakha v State of Rajasthan* [1997] INSC 701. In *Kesavananda Bharati v State of Kerala*, the Supreme Court stated that it 'must interpret language of the Constitution, if not intractable, which is after all a municipal law, in the light of the United Nations Charter and the solemn declaration subscribed to by India' (AIR 1973 SC 1461 at 1510). In a later minority judgment, Khanna J stated that the Supreme Court should adopt a construction of the Constitution that would, if possible, not bring it in conflict with the provisions of the Universal Declaration of Human Rights (*ADM Jabalpur v S Shukla* AIR 1976 SC 1207 at 1260).

<sup>147</sup> *Ajay Hasia v Khalid Mujib*, AIR 1981 SC 487 at 493; *MC Mehta v Union of India* [1987] 1SCC 395.

<sup>148</sup> See, for example, *Jolly George Verghese v bank of Cochin* [1986] INSC 20.

<sup>149</sup> See *Gramophone Company of India v Birendra Bahdur Pandey* [1984] 2SCC 534. *PUCL v Union of India* [1997] 3 SCC 433; *CERC v Union of India* [1995] 3 SCC 42.

<sup>150</sup> See *Gramophone Company of India v Birendra Bahdur Pandey* [1984] 2SCC 534. See support for this proposition in *Vellore Citizens Welfare forum v Union of India* [1996] 5 SCC 647, where the Supreme Court stated that it is 'almost accepted' that the rules of customary international law that are not contrary to domestic law shall be deemed to be incorporated into domestic law.



275. Foreign corporations may also be found criminally liable. In the Bhopal case, discussed in more detail in paragraphs 296 to 302 below, criminal charges were laid against an Indian company and its officials, as well as the foreign corporation and its officers, under various provisions of the *Penal Code* including s304A, for causing death by negligence. In the criminal trial of the Indian nationals in the Bhopal case in 1996, the Supreme Court held that the evidence could only sustain a prima facie case under s304A (causing death by negligence) of the *Penal Code* and quashed a majority of the other charges, including culpable homicide not amounting to murder.<sup>151</sup>
276. However, the Bhopal case demonstrates that where criminal charges are laid against companies and company officials overseas, and where foreign investment is of paramount concern, there may not be support for extradition processes to enforce the *Penal Code*. This has led some commentators to note that by not pursuing the extradition of officers of the foreign corporation or its CEO, which is necessary to enable the criminal proceedings to continue, the Indian government has in effect handed those parties criminal immunity.<sup>152</sup>
277. Victims' attempts to pursue claims against the Company and its CEO in the United States for avoiding the criminal charges in India were dismissed in 2001.<sup>153</sup>
278. We are not aware of any cases in which a corporation has been found liable under the *Penal Code*.

#### (b) Other Forms of Corporate Criminal Liability

279. The Supreme Court has ruled that a company will not be liable for an offence that calls only for imprisonment or for imprisonment as well as a fine under the relevant law.<sup>154</sup> This significantly reduces the scope of criminal liability of corporations under the laws of India.
280. Corporate criminal liability is also imposed by a number of other statutes.
281. The *Prevention of Corruption Act, 1988* (**Corruption Act**) proscribes corruption and bribery in the public service. Offences under the Corruption Act cover the taking of inducements as a motive or reward for acting in a particular way, or inducing a public servant to act in a particular way.<sup>155</sup> In addition, a public servant who abets the commission of the above

<sup>151</sup> *Keshub Mahindra v State of Madhya Pradesh* [1996] 6 SCC 129, as referred to in *Twelfth Report of the Committee on Government Assurances* (2003-2004), Lok Saba (House of the People), "Extradition of Former Chairman, Union Carbide Corporation", p. 32, <http://164.100.24.208/Is/CommitteeR/Govt/12.pdf>.

<sup>152</sup> "Extradition of Former Chairman, Union Carbide Corporation" *Twelfth report to the Committee on Government Assurances* (2003-2004), Lok Saba (House of the People), <http://164.100.24.208/Is/CommitteeR/Govt/12.pdf>, pp 24-25. Opinion of the Learned Attorney General of India dated August 2001, *Twelfth Report of the Committee on Government Assurances* (2003-2004), Lok Saba (House of the People), "Extradition of Former Chairman, Union Carbide Corporation", pp.92-93, <http://164.100.24.208/Is/CommitteeR/Govt/12/pdf>. Ramanathan U., *Business and Human Rights: The India Paper*, International Environmental Law Research Centre Working Paper 2001-2002, at <http://www.ielrc.org/content/w0102.pdf>.

<sup>153</sup> *Bano and others v Union Carbide Corporation and Warren Anderson* 273 F.3d 120.

<sup>154</sup> In *Assistant Commissioner v. Velliappa Textiles Ltd* (2003) 101 LD 183, it was held by the Supreme Court that a company could not be liable for a fine under the *Income Tax Act* as the relevant section contemplated the punishment to be imprisonment plus a fine.

<sup>155</sup> *Prevention of Corruption Act, 1988*, ss7-9.

offences may also be punished with imprisonment and a fine.<sup>156</sup> By virtue of section 109 of the *Penal Code*, corporations may also be liable for abetment by offering a bribe, regardless of whether the bribe is received or rejected.<sup>157</sup>

282. However, corporations or their officers could, on another construction also be liable as public servants. 'Public servant' is defined broadly ' [as] any person who holds an office by virtue of which he is authorised or required to perform any public duty,'<sup>158</sup> where 'public duty' means 'a duty in the discharge of which the State, the public or the community at large has an interest'<sup>159</sup>. As is discussed in more detail in paragraphs 308 and 309 below, the Courts have held that some industries are imbued with public interest. However, on the basis of the Supreme Court decision in *Velliappa*, it is unlikely that corporations will be held liable as public servants under this legislation, as the offences are punishable with both imprisonment and a fine.
283. The *Foreign Contribution (Regulation) Act, 1976* (***Foreign Contribution Act***) regulates the acceptance and utilisation of foreign contributions by certain persons or organisations, such as by candidates for election and organisations of a political nature (as defined by the government).<sup>160</sup> Foreign contributions are not to be accepted by employees of government companies.<sup>161</sup> The *Foreign Contribution Act* applies to the whole of India and also to 'associates, branches of subsidiaries, outside India, of companies and bodies corporate, registered or incorporated in India'.<sup>162</sup> This means that multinational corporations who operate in a joint venture arrangement with an Indian interest will also be affected by the *Foreign Contribution Act*. Penalties for infringement are fine or imprisonment of up to three years.
284. The law relating to corporations in India is codified in the *Companies Act 1956* (*Companies Act*). The *Companies Act* contains provisions empowering courts to lift the corporate veil if, in the process of winding up, it appears that the business of the company has been carried out for fraudulent purposes. Persons who were parties to the carrying on of the business in that matter may be deemed to have unlimited personal liability and may also be subject to imprisonment, a fine or both.<sup>163</sup>
285. Contraventions of the provisions of the *Environment (Protection) Act* are criminal in nature.<sup>164</sup> For example, pursuant to s 7, 'No person carrying on any industry, operation or process shall discharge or emit or permit to be discharged or emitted any environmental

<sup>156</sup> *Prevention of Corruption Act, 1988*, s10.

<sup>157</sup> It has also been held that bribes paid to get lawful things done quickly are also covered by the Corruption Act: *Som Prakash v State of Delhi AIR 1974 SC 989*.

<sup>158</sup> *Prevention of Corruption Act, 1988*, s2(c)(viii).

<sup>159</sup> *Prevention of Corruption Act, 1988*, s2(b).

<sup>160</sup> *Foreign Contribution (Regulation) Act, 1976*, ss 4 -5

<sup>161</sup> *Foreign Contribution (Regulation) Act, 1976*, s 4: 'Government company' is defined in s 617 of the *Companies Act, 1956* to mean a company in which the government has at least 51% of shareholding.

<sup>162</sup> *Foreign Contribution (Regulation) Act, 1976*, s1(2).

<sup>163</sup> *Companies Act, 1956*, s542.

<sup>164</sup> See s 15 which provides for penalties, including imprisonment.

pollutants in excess of such standards as may be prescribed'. Under s 16, where a company has committed any offence under the Act, every person who was responsible for the conduct of the business of the company may be deemed to be guilty of that offence and liable to be prosecuted and punished accordingly.

### F.5 Civil Liability of Corporations in India

286. There are numerous common law and statutory sources of civil liability of corporations in India.
287. Tortious liability exists in common law and it has not, generally speaking, been codified. However actions for nuisance and 'other wrongful acts affecting the public', can be brought under s.91 of the *Code of Civil Procedure*, 1908 (**Civil Procedure Code**). In addition, remedies such as temporary injunctions<sup>165</sup> and perpetual injunctions<sup>166</sup> are provided for by statute. The *Civil Procedure Code* also permits the granting of interim compensation in a suit for damages in tort.<sup>167</sup>
288. As stated above (at paragraph 236) breaches of the Fundamental Rights under the constitution may result, in certain circumstances, in the award of compensation.<sup>168</sup>
289. When a corporation is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety to persons, it owes an absolute and non-delegable common law duty to ensure that no harm results to anyone from such activity. If the harm results to anyone due to such activity, the enterprise is absolutely liable to compensate for such harm and cannot avoid liability by pleading that it was not negligent.<sup>169</sup>
290. Following the Bhopal incident, the Indian government reconsidered the legislative framework governing the establishment and functioning of industries in which hazardous substances are handled. The *Public Liability Insurance Act*, 1991 (**PLI Act**) was passed to require corporations to obtain public liability insurance for the purpose of providing immediate relief to persons affected by an accident occurring while handling any hazardous substance and fixes the liability on the owner of an industrial unit for the damage caused to a third party.<sup>170</sup>
291. Section 7 of the *Factories Act* requires every person who designs, manufactures, imports or supplies any article for use in any factory to 'ensure, so far as is reasonably practicable, that the article is so designed and constructed as to be safe and without risks to the health of the workers when properly used'.

<sup>165</sup> *Code of Civil Procedure*, 1908, s94 and Order 39.

<sup>166</sup> *Specific Relief Act*, 1963, ss37-42.

<sup>167</sup> *Code of Civil Procedure*, 1908, s9. The Bhopal case was the first case in India for the grant of interim relief in a suit for damages for a tort. See also commentary by Nariman F.S., "Some Reflections", *Elusive Justice – symposium on the Bhopal gas disaster after 20 years* at <<http://www.india-seminar.com/2004/544.htm>>.

<sup>168</sup> See the *Shriram Case*.

<sup>169</sup> See the *Shriram Case* discussed at paragraph 306.

<sup>170</sup> *Public Liability Insurance Act*, 1991, s3.

292. Following the Bhopal incident, s 7B was inserted into the *Factories Act*, which provides:

Where a person designs, manufactures, imports or supplies an article on the basis of a written undertaking by the user of such article to take the steps specified in such undertaking to ensure, so far as is reasonably practicable, that the article will be safe and without risks to the health of the workers when properly used, the undertaking shall have the effect of relieving the person designing, manufacturing, importing or supplying the article from the duty imposed by clause (a) of sub-section (1) to such extent as is reasonable having regard to the terms of the undertaking.

293. This provision has been criticised as enabling a manufacturer or importer of articles to divest itself of liability by requiring undertakings from the users of articles.
294. Under the *Factories Act* every 'occupier' shall ensure, so far as is reasonably practicable, the health, safety and welfare of all workers while they are at work in the factory. The *Factories Act* was amended after Bhopal so that 'in the case of a company, any one of the directors shall be deemed to be the occupier'.<sup>171</sup> In addition, provisions for dealing with hazardous industrial processes were inserted into the new Chapter IVA and the onus of proof was shifted to the person who is alleged to have failed to comply with a duty or requirement.<sup>172</sup>
295. However, some commentators note that enforcement of provisions of the *Factories Act* rely upon the Factories Inspectorate, to investigate allegations of breach. As a result the significance of these legislative changes in making a significant change for the conditions of work, or decreasing the potential for disaster, have been open to question.<sup>173</sup>

## F.6 Judicial Findings in Connection with Corporate Activity

### (a) Overview of Judicial Decisions

There are numerous judicial decisions pertaining to human rights in connection with corporate activity. Below is an overview of key decisions.

#### (i) Bhopal

296. On 2 December 1984, toxic methyl isocyanate gas (**MIC**) escaped from a pesticide manufacturing plant in Bhopal which was run by Union Carbide of India Limited (**UCIL**), a subsidiary of a US company, Union Carbide Corporation (**UCC**). The toxic gas blew into the nearby neighbourhoods, allegedly causing the death of 4000 people, with tens of thousands of people sustaining serious injuries.<sup>174</sup> 50.9 per cent of UCIL was owned by UCC.<sup>175</sup> Although UCIL operated the plant at Bhopal, UCC had supplied the design for the

<sup>171</sup> *Factories Act, 1948*, s2(n)(ii).

<sup>172</sup> *Factories Act, 1948*, s104A.

<sup>173</sup> Ramanathan U., *Business and Human Rights: The India Paper*, International Environmental Law Research Centre Working Paper 2001-2002, p.11 at <http://www.ielrc.org/content/w0102.pdf>. Curmally A., "Chapter 5: Environment and Rehabilitation", *India Infrastructure Report 2002* (Oxford University Press, New Delhi) 2002, pp97-101.

<sup>174</sup> *Union Carbide Corporation etc etc v Union of India etc etc* [1991] 4SCC 584.

<sup>175</sup> *In re Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December, 1984* 634 F. Supp. 842 at 844.

plant and had at times been involved in maintenance of the plant and training of employees.<sup>176</sup>

297. The claim against the companies responsible for the disaster was settled in 1989, so there was no reported decision concerning the issue of corporate liability. However, some observations can be made in connection with the litigation instigated in both India and the US in the wake of the incident.
298. Following the disaster, 145 complaints were filed against UCC on behalf of 200,000 victims in various district courts in the United States for claims in tort, which were subsequently consolidated. The US cases are dealt with in more detail below.
299. In March 1985, the Indian parliament passed the *Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985* (the **Bhopal Act**) which, among other things, gave the Union of India exclusive rights to bring claims on behalf of all current and potential victims of the disaster. The purpose of passing the *Bhopal Act* was stated as being 'to ensure that the interests of the victims of the disaster are fully protected and that the claim for compensation or damages for loss of life or personal injuries or in respect of other matters arising out of or connected with the disaster are processed speedily, effectively, equitably and to the best advantage of the claimants.'<sup>177</sup> The Union of India then proceeded to institute its own proceedings in tort in the United States.
300. The Union of India also issued civil proceedings in tort against UCC and UCIL on behalf of the victims in the District Court in Bhopal, which was settled on 15 February 1989. The Court authorised the settlement of the proceeding. The settlement terms were:
  - that US\$470 million be paid to the Union of India in full settlement of all claims, rights and liabilities related to and arising out of the Bhopal Gas disaster, by 31 March 1989.
  - that all civil proceedings related to and arising out of the Bhopal Gas disaster shall be transferred to the Supreme Court of India and concluded as part of the settlement, and
  - that all criminal proceedings related to and arising out of the disaster shall be quashed 'wherever these may be pending'.<sup>178</sup>
301. The Court's reasons for sanctioning settlement were published on 4 May 1989, where it was stated that '[t]he basic consideration motivating the conclusion of the settlement was the compelling need for urgent relief.'<sup>179</sup> The Court also acknowledged public criticisms of the settlement,<sup>180</sup> but concluded that in this case, '[c]onsiderations of excellence and

<sup>176</sup> *In re Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December, 1984* 634 F. Supp. 842 at 853-857.

<sup>177</sup> Preamble, *The Bhopal Gas Leak Disaster (Processing of Claims) Act 1985*.

<sup>178</sup> *Union Carbide Corporation v Union of India and Others, etc* [1989] 1 S.C.A.L.E. 380. The order quashing of the criminal charges was later set aside by the Supreme Court on the basis it was unlawful.

<sup>179</sup> *Union Carbide Corporation v Union of India, etc* [1987] 2SCC 540.

<sup>180</sup> Such criticisms were that the settlement represented a lost opportunity for the Supreme Court to develop the law in relation to economic exploitation of developing countries by the economic forces of wealthier countries, to set limits on the

niceties of legal principles were greatly over-shadowed by the pressing problems of very survival for a large number of victims.<sup>181</sup>

302. In October 1991, the settlement was reviewed by the Supreme Court. During the course of that review the Supreme Court expressed its expectation (on the basis that UCC and UCIL had offered prior to settlement to do so and also on humanitarian grounds) that UCC and UCIL would bear the financial burden for the establishment and equipment of a hospital in Bhopal, and would cover its operational expenses for a period of 8 years.<sup>182</sup>

(ii) **MC Mehta v Union of India – the Shriram case**

303. In *MC Mehta v Union of India* [1987] 1SCR 819 (**the Shriram Case**) the Supreme Court considered corporate activity in the context of the Fundamental Rights contained in the Constitution.
304. In *MC Mehta* the Supreme Court considered a number of issues in relation to allegations made against a factory run by Delhi Cloth Mills Limited through its operation, Shriram Foods and Fertilizer Industries (**Shriram**). On 4 December 1985 a major leakage of oleum gas occurred at one of the factories operated by Shriram resulting in death and injury to a number of people who worked at the plant as well as others within the nearby community. The Delhi Legal Aid and Advice Board and the Delhi Bar Association, using PIL jurisdiction in the Supreme Court, filed applications for awards of compensation to the persons who had suffered harm from the escape of oleum gas, on the basis of a contravention of the fundamental right to life enshrined in Article 21 of the Constitution. Three judges of the Supreme Court referred certain questions of seminal importance to the full bench of the Supreme Court.
305. The full bench of the Supreme Court stated that, in exceptional cases, where a Constitutional right has been infringed, compensation for infringement is available as an ancillary to the Supreme Court's express powers under Article 32 of the Constitution.<sup>183</sup> Such compensation should be 'co-related to the magnitude and capacity of the enterprise because such compensation must have a deterrent effect'.<sup>184</sup> The Supreme Court specifically said

the larger and more prosperous the enterprise, the greater must be the amount of compensation payable by it for the harm caused on account of an accident in the carrying on of that hazardous or inherently dangerous activity by the enterprise.<sup>185</sup>

306. However, compensation is only awarded under Article 32 in exceptional cases.<sup>186</sup> In this case 'infringement was patent and incontrovertible, the violation was gross and its

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permissibility of ultra-hazardous technologies in the interest of protecting the constitutional rights of the citizens and the environment and to prescribe absolute and deterrent standards of liability if harm is caused by such enterprises.

<sup>181</sup> *Union Carbide Corporation v Union of India, etc* [1989] 2SCC 540.

<sup>182</sup> *Union Carbide Corporation etc etc v Union of India etc etc* [1991] 4SCC 584.

<sup>183</sup> See the *Shriram Case*.

<sup>184</sup> See the *Shriram Case*.

<sup>185</sup> See *Shriram Case* at 844.

magnitude was such as to shock the conscience of the court', such that it would have been unjust to require a person to go to a civil court to claim compensation.<sup>187</sup>

307. As discussed at paragraph 242 above, the Court considered whether a corporation could be liable for breaches of the Fundamental Rights under the Constitution, but it did not decide the point.<sup>188</sup>
308. However, the Supreme Court clarified the rule in *Rylands v Fletcher* in relation to liability for the tort of public nuisance. In recognition of the different Indian legal context, the Supreme Court recognised absolute liability for certain hazardous and inherently dangerous industries. The Court stated that:<sup>189</sup>
- where an enterprise is engaged in hazardous or inherently dangerous industries which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas;
  - the enterprise owes an absolute and non delegable duty to the community to ensure that no harm results to anyone on account of the hazardous or inherently dangerous nature of the activity which it has undertaken.
309. The corporation is under an obligation to ensure that the activity is conducted with the highest standards of safety and if any harm results on account of the activity, the corporation has an absolute liability to compensate for such harm, regardless of whether the enterprise has taken all reasonable care or whether the harm occurred without any negligence.

## F.7 Decisions in Relation to Pollution of the Environment

### (a) "Polluter Pays" Principle

310. The Supreme Court has incorporated the "Polluter Pays" principle into Indian environmental law. The principle is applied only in the context of hazardous and inherently dangerous industries and can be stated as follows:

Where the activity carried on is hazardous or inherently dangerous, the corporation carrying on such activity is liable to make good the loss caused to any other person by its activity irrespective of the fact whether it took reasonable care while carrying on the activity.<sup>190</sup>

The rule is enlivened by the nature of the activity being conducted.

<sup>186</sup> Such as where infringement is 'gross and patent, that is, incontrovertible and ex facie glaring and either such infringement [is] on a large scale affecting the fundamental rights of a large number of persons, or it should appear unjust or unduly harsh or oppressive on account of theft, poverty or disability or socially or economically, disadvantaged position' to require the persons affected by the infringement to take further action in civil courts: see the *Shriram Case*.

<sup>187</sup> See the *Shriram Case*.

<sup>188</sup> See the *Shriram Case*.

<sup>189</sup> See the *Shriram Case*.

<sup>190</sup> See for example, *Indian Counsel for Enviro Legal Action v Union of India*; *Vellore Citizens Welfare Forum v Union of India* [1996] INSC 1050 and *S. Jagannath v Union of India* [1996] INSC 1529; *Vellore Citizens Welfare Forum v Union of India* [1996] INSC 1050.

311. On the basis of the Polluter Pays principle, polluting industries are held absolutely liable to compensate for environmental harm caused to villages or persons in the affected areas and are required to not only compensate victims of pollution but also to pay the cost of restoring the environmental degradation.<sup>191</sup>
312. The principle has been applied in the context of mining,<sup>192</sup> tanneries,<sup>193</sup> asbestos,<sup>194</sup> industrial prawn fishing,<sup>195</sup> and production of hazardous chemicals.<sup>196</sup>

**(b) "Precautionary" Principle**

313. An adjunct to the "Polluter Pays" principle is the "Precautionary" principle, which has also been made part of Indian law.<sup>197</sup> The "Precautionary" principle requires the State Government and statutory authorities to anticipate and prevent the sources of environmental degradation where there are threats of serious and irreversible damage. Lack of scientific certainty should not be used as the reason for postponing measures to prevent environmental degradation and the onus of proof is said to be on the actor or the developer/industry to show that the action is environmentally benign.<sup>198</sup>

**(c) Orders Against Corporations**

314. The Courts have avoided making determinations that corporations have obligations to adhere to the Fundamental Rights set out in the Constitution. Instead, they have found the corporations liable under the "polluter pays" principle and made orders against government authorities, directing them to use their powers under India's environmental protection legislation to enforce the "polluter pays" and "precautionary" principles.<sup>199</sup>
315. For example, in *Vellore Citizens' Welfare Forum v Union of India*<sup>200</sup>, a petition was filed against the Government for the pollution caused by tanneries and other industries in Tamil Nadu. The claim was that the untreated effluent being discharged from the factories was making river water unfit for human consumption, the soil unfit for cultivation and well water unfit for drinking on the grounds that it was contaminated. The Supreme Court stated that although the leather industry is of vital importance to India, it has no right to damage India's ecology, degrade the environment and impose a health hazard to persons.

<sup>191</sup> See *Indian Counsel for Enviro Legal Action v Union of India; Vellore Citizens Welfare Forum v Union of India* [1996] INSC 1050 and *S. Jagannath v Union of India* [1996] INSC 1529.

<sup>192</sup> See *MC Mehta v Union of India* [2004] INSC 185

<sup>193</sup> See *Vellore Citizens Welfare Forum v Union of India* [1996] INSC 1050.

<sup>194</sup> *CERC v Union of India* [1995] INSC 91.

<sup>195</sup> *Jagannath v Union of India* [1996] INSC 1629.

<sup>196</sup> *Indian Counsel for Enviro Legal Action v Union of India* [1996] 3SCC 212 (the *Bichhri Case*).

<sup>197</sup> See *Vellore Citizens Welfare Forum v Union of India* [1996] INSC 1050.

<sup>198</sup> *Vellore Citizens Welfare Forum v Union of India* [1996] INSC 1050.p 15

<sup>199</sup> *Vellore Citizens Welfare Forum v Union of India* [1996] INSC 1050; *Indian Counsel for Enviro-Legal Action v Union of India* [1996] 3 SCC 212.

<sup>200</sup> [1996] INSC 1050.



316. The Supreme Court ordered the Union of India to establish a Pollution Control Board under s3(3) of the *Environment (Protection) Act* <sup>201</sup> with adequate powers to control pollution and protect the environment. The Board was charged with the obligations to assess the damage to the ecology and environment in the affected areas, identify individuals and family who had suffered because of the pollution and to assess the compensation payable to them. The Board was to determine the compensation to be recovered by reference to the cost of reversing the damage to the environment and the authority was also to develop schemes to remediate that damage. The Courts also fined the tanneries 10,000 rupees which was also to be used as compensation for affected persons and for restoring the damaged environment. The local courts were then directed to recover the relevant amounts from the polluters and to disburse the compensation awarded by the authority to affected persons.
317. In another case, involving serious environmental damage, the Supreme Court has made orders in effect to shut down industries for breach of Fundamental Rights. *Enviro-legal action v Union of India (the Bichhri Case)* 1996 3 SCC 212 (Ind Sc) involved pollution by chemical industries situated north of a village called Bichhri, resulting in aquifers and the subterranean supply of water being rendered unfit for consumption or irrigation purposes. Public interest litigation was organised by an environmental group on behalf of the villagers and a district magistrate ordered the closure of one of the manufacturer's premises. A report from the National Environmental Engineering Research Institute found that the respondent was responsible for the contamination and the Court ordered that the respondents pay for the removal, treatment and safe storage of the chemical waste. However, the continuing failure of the respondents to comply with the Court's orders led to further orders being made by the Pollution Control Board, including disconnecting electricity to the plant.
318. The Court ordered the respondents, whom they classified as "rogue industries", and who had persistently violated the law, to close their plants with re-opening dependent on compliance with directions of the Court. It also ordered the Government, under section 3 of the *Environment (Protection) Act*, to determine the necessary measures that the polluters were to take in order to remediate the area and to defray the cost of remedial action. The villagers' rights to claim for damages for loss suffered by them were retained and the respondents were held absolutely liable to compensate them for harm caused, including harm caused to the soil and underground water.
319. The Supreme Court will have another opportunity to consider the extent to which corporations have obligations to adhere to the Fundamental Rights set out in the Constitution when it hears five special leave petitions, which, at the date of this Brief, are pending, as a result of a dispute between the Perumatty Panchayat in Kerala and Coca Cola. Coca Cola established a factory in Plachimada in the state of Kerala, in March 2000. Complaints were made against Coca Cola for extracting large amounts from the ground water, causing water and land pollution, distributing toxic waste as fertiliser and selling drinks containing high levels of pesticides. The local Panchayat refused to renew Coca

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<sup>201</sup> This provision expressly empowers the Government to take all such measures as it deems necessary or expedient for the purposes of protecting and improving the quality of the environment.

Cola's license to operate on the grounds of over-extraction of water. An appeal to the High Court of Kerala resulted in Coca Cola being granted permission to extract up to 500,000 litres of water from the common groundwater resources per day at its facility. The Court also urged the Perumatty Panchayat to renew Coca Cola's licence.<sup>202</sup>

320. On 4 January 2006 the Panchayat renewed Coca Cola's licence for three months subject to 13 conditions, including that Coca Cola shall not use groundwater from Perumatty Panchayat for industrial purposes, or for producing soft drinks, aerated carbonated beverages or fruit juice. Other stipulations to renewal of the licence included that Coca Cola revealed the components used for making soft drink in order to ensure that no hazardous items are used. As a result, Coca Cola rejected the conditions as impractical. The Coca Cola bottling plant remains closed while the five special leave petitions remain pending before the Supreme Court.<sup>203</sup>

**(d) Principles to be Derived From the Litigation**

321. In a number of cases involving pollution of the environment, brought as public interest cases under article 32 of the Constitution, the Supreme Court has demonstrated its willingness to make far-reaching orders in order to enforce constitutional and common law rights.
322. The right to life in article 21 of the Constitution has been interpreted very broadly to include the right to enjoyment of pollution-free water and air.<sup>204</sup> The Supreme Court has also held that there is a fundamental common law right to pollution free air and water<sup>205</sup> and the right to livelihood.<sup>206</sup>
323. It is clear from the case law, particularly in judgments considering pollution of the environment, that the Courts support the use of the public interest jurisdiction in order to enforce fundamental constitutional or other rights. This is evident in the judgments themselves. For example in *MC Mehta* the Court noted its "deep sense of appreciation for the bold initiative taken by the practitioner in taking this public interest litigation before the Court."
324. The Supreme Court of India has identified its own mandate to develop the law in order for the protection of fundamental human rights. In *Ajay Hasia v Khalid Mujib* [1981] 2 SCR 79, the Supreme Court, discussing the importance of human rights, stated:

<sup>202</sup> 'Coca Cola Affected Community in India Promises Escalation of Campaign, Despite Court Ruling' at <http://www.indiaresource.org/press/2005/cokeplachimadahc.html>.

<sup>203</sup> 'Coca Cola moving out of Plachimada?', India Together 27 January 2006 at <http://www.indiatogether.org/2006/jan/env-cokesaga.htm>.

<sup>204</sup> See *MC Mehta v Union of India* [2004] INSC 185, see also *Consumer Education & Research Centre v Union of India* [1995] INSC 91 at para 24 that sets out the jurisprudence on broad interpretation of right to life.

<sup>205</sup> See *Vellore Citizens Welfare Forum v Union of India* [1996] INSC 1050.

<sup>206</sup> *Olga Tellis* (1985) 3 SCC 545, in which case the Supreme Court held that the removal of dwellings from pavements in Bombay constituted an infringement of the right livelihood from pavement dwellers, which fell within the ambit of the constitutional right to life under article 21. See also Tiwana, M, *Chennai Judicial Exchange on Access to Justice: A Report* November 2004, p 20 at [http://www.humanrightsinitiative.org/publications/jc/chennai\\_judicial\\_exchange.pdf](http://www.humanrightsinitiative.org/publications/jc/chennai_judicial_exchange.pdf).

The Courts should be anxious to enlarge the scope and width of the fundamental rights by bringing within their sweep every authority which is an instrumentality or agency of the Government or through the corporate personality of which the Government is acting, so as to subject the Government in all its myriad activities, whether through natural persons or through corporate entities to the basic obligation of the fundamental rights.

325. In the *Shiram* case the court acknowledged that it had expanded the definition of "State" under the Constitution in order to 'inject respect for human rights and social conscience in our corporate structure.'<sup>207</sup> However, it said that the purpose of expansion was 'not to destroy the *raison d'être* of creating corporations but to advance the human rights jurisprudence.'

#### **F.8 Human Rights Related Investigations/Prosecutions of Corporations**

326. A number of institutions in India, including the Parliament, Supreme Court, the National Human Rights Commission, and the police undertake formal inquiries into alleged human rights violations of corporations. International organisations such as the ILO have also undertaken such inquiries.
327. The State has ordered numerous inquiries into corporate actions arising from allegations of human rights violations. For instance, in January 2006, the Government ordered a judicial inquiry into the deaths of 13 persons following clashes between police and community groups during protests against transnational corporation Tata Steel's construction work at its steel plant at Kalinga Nagar in the State of Orissa. The judicial inquiry was ordered to be conducted under the *Commission of Inquiry Act*, with a judge of the Orissa High Court nominated to head the inquiry.<sup>208</sup> The results of this inquiry are not known.
328. Coca Cola's operations in Kerala have also been the subject of Government investigation. As stated above, Kerala's Pollution Control Board issued a 'stop order' to the company as a result of findings that its activities were polluting surrounding land and water wells. Subsequently, the Indian Government established a Joint Parliamentary Committee to investigate the matter. In February 2004, the Committee made a finding that Coca Cola's products contain very high amounts of pesticides. These investigations continue, with the Supreme Court directing the centre for public interest litigation to 'constitute an expert panel to determine whether there were any harmful chemical contents'<sup>209</sup> in various products.
329. The Supreme Court has also initiated investigations into the human rights impacts of corporations. For instance, in June 2005, an 'apex court committee'<sup>210</sup> convened by the Supreme Court, undertook investigations (including holding public hearings) into allegations that Bharat Aluminium Co Ltd, a subsidiary of Vedanta Alumina, was engaging

<sup>207</sup> See the *Shriram Case*.

<sup>208</sup> 'Govt Orders Judicial Probe into Kalinga Nagar Firing', *Suntimes*, Orissa, 5 January 2006, at <http://www.minesandcommunities.org/Action/press858.htm>.

<sup>209</sup> 'Supreme Court Directs Government to set up Panel to Examine Coca Cola Contents', *Indian Express*, 27 February 2006 at <http://www.indiaresources.org/news/2006/1020.html>.

<sup>210</sup> R. Krishna Das, 'Land Grab Mud on Blaco', *The Telegraph*, Calcutta, 24 June 2005 at [http://www.telegraphindia.com/1050619/asp/nation/story\\_4887047.asp](http://www.telegraphindia.com/1050619/asp/nation/story_4887047.asp).

- in illegal deforestation and had occupied 1,000 acres of Government land without permission in the State of Chattisgarh.<sup>211</sup> These issues were also investigated by the Agriculture and Forest Minister of Chattisgarh.<sup>212</sup>
330. The Supreme Court has, on other occasions, appointed committees to monitor corporate activity. For instance, following the court-order closure of Kumremukh Iron Ore Co Ltd's operations in Karnataka, (due to environmental impacts on surrounding forest area and agricultural land downstream) the Supreme Court appointed a committee to monitor the project's closure process.<sup>213</sup>
331. In December 2004, the Central Empowered Committee of the Supreme Court, following its investigations into Vedanta Alumina's Karlapat Mines in Orissa, held that the mines were too close to 'eco sensitive' Karlapat Wildlife Sanctuary, in contravention of provisions of the EPA.<sup>214</sup>
332. As stated above, the National Human Rights Commission (**NHRC**) actively investigates alleged violations of human rights and issues directions for compliance, including in the context of corporate activity. In one matter, involving a breach of the right to health and medical care that occurred in slate factories in Madhya Pradesh, the NHRC issued directions for the widows and children of deceased workers to be supported by factory owners and for the factory owners to establish schools, with the assistance from the state, for the education of workers' children.<sup>215</sup>
333. In another matter involving industrial hazards causing death at a factory in Uttar Pradesh, the NHRC directed the government to finalise criminal cases against the factory owner, ordered that the factory should not be permitted to resume production without complying with safety requirements, directed the Labour Department to investigate the lapse of safety and directed the District Magistrate to ensure early payment of all financial benefits in case of death and injuries.<sup>216</sup>
334. The NHRC also undertakes investigations and issues directions in response to instances of bonded labour. For instance, following receipt of a complaint that 20 persons were being kept as bonded labour in a stone quarry in Haryana, the NHRC investigated the matter and found that 19 adults and 10 children, members of the Banjara Monadic Tribe, had been forcibly confined and forced to work in the quarry without pay, in contravention of the *Bonded Labour System (Abolition) Act* and the *Indian Penal Code*. Following the release of these persons, the NHRC requested that the relevant district officials issue Release Certificates to the adult bonded labourers and to organise rehabilitation and welfare services as required. The NHRC also followed the progress of rehabilitation of the

<sup>211</sup> 'Kalahandi District Collector Saswat Miskra', Insight, Orissa Bureau, 15 June 2005 at <<http://minesandcommunities.org/Action/press657.htm>>.

<sup>212</sup> 'Balco Rejects Land Grab Allegations', 24 June 2005 at <<http://www.minesandcommunities.org/Action/press657.htm>>.

<sup>213</sup> Sankaras, P., 'One Likely Victory', 22 November 2005 at <<http://www.minesandcommunities.org/Action/Press811.htm>>

<sup>214</sup> 'Greens See Red Over Proposed Mining near Karlapat Sanctuary', The Pioneer, Bhubarieswar, 10 November 2005 at <<http://www.minesandcommunities.org/Action/Press811.htm>>.

<sup>215</sup> Death of Workers in Madhya Pradesh Case No 7894/96-97/NHRC.

<sup>216</sup> Uttar Pradesh Case No 19900/24/97-98.

workers, including allocation of State housing, allotment of cultivable land and organisation of employment.

335. There are also numerous reports of police acting on complaints of human rights violations by corporations. A recent example are reports of police and labour department officials investigating allegations of child labour at factories using crystals produced by the Swarovski company.<sup>217</sup>

## **F.9 If and How 'Complicity' and 'Sphere of Influence' Are Understood in Domestic Courts**

### **(a) Complicity**

336. To the best of our knowledge, the concept of 'complicity' has not been judicially considered by courts in India.
337. The related concept of aiding and abetting is recognised in criminal law. Directors and officers of a company may be criminally liable for an offence, if their own participation in the offence amounts to abetting within the meaning of sections 107 and 108 of the *Penal Code*.

### **(b) Sphere of influence**

338. On the basis of our research, there is no doctrine of 'sphere of influence' in Indian law. There is, however the related common law doctrine of duty of care, which concerns the extent to which liability extends for harm caused. It is interesting to note that in the case of 'hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas', the owner of the factory owes an 'absolute and non delegable duty' to the community to ensure that no harm is done.<sup>218</sup> The sphere of influence in those cases is thus very broad.

## **F.10 Extraterritorial Application of Relevant Domestic Laws to TNCs**

339. As stated at paragraph 283 above, the *Foreign Contribution Act* applies to related bodies corporate outside of India, and prohibits the making of certain payments to candidates or political organisations.
340. We are not aware of any other laws that extend their application to the extraterritorial activity of corporations.

## **F.11 Potential Financial Incentives for Corporate Human Rights Compliance**

341. We are not aware of any legislation or government policy in India which provides financial incentives to corporations specifically for compliance with human rights standards.

<sup>217</sup> MacDougall, D., 'The price of sparkle is Child Slavery', The Guardian, at <http://www.business-humanrights.org/Updates/Archive?Observer-Thepriceofsparkleischildslavery>.

<sup>218</sup> See the *Shriram Case*. This liability exists regardless of whether the harm occurred due to negligence of the owner of the factory.

**F.12 Published Business Practice Standards**

342. India has provisions under its consumer protection laws by which corporations can be held to account for false and misleading statements. These have not been used with respect to human rights published standards.<sup>219</sup>

**F.13 Consideration of Indian Jurisdiction by Other Relevant Jurisdictions**

343. The only consideration of the Indian jurisdiction by other relevant jurisdictions of which we are aware is in the context of the Bhopal incident.
344. In 1986, UCC applied to the District Court to have the consolidated torts action (including the action brought by the Union of India) dismissed on *forum non conveniens* grounds, on the basis that India was a more convenient forum for the dispute.<sup>220</sup> On the basis of a variety of factors, Keenan J granted UCC's motion on the conditions. Keenan J considered many aspects of the Indian political and legal system in the judgment.<sup>221</sup>
345. His Honour noted innovation in the Indian judicial system, endemic delays in the Indian legal system, the procedural and practical capacity of Indian courts as well as private interest concerns such as sources of proof, access to witnesses and the possibility of viewing the site of the incident, and public interest concerns such as administrative difficulties and the interests of India and the United States respectively.
346. His honour came to the following conclusions regarding the Indian judicial system at that time.
- (a) Keenan J accepted numerous examples of novel and innovative treatment of complex legal issues by the Indian judiciary put forward by the expert for the Union of India and recognised 'the innovativeness of the Indian courts'.<sup>222</sup>
  - (b) In relation to endemic delays in the Indian legal system, Keenan J acknowledged that while delays and backlog exist in Indian courts, United States courts are also subject to delay and backlog.<sup>223</sup> At the same time, however, his Honour accepted the evidence of the Defendant's expert that while delays are a fact of life, there is no reason to assume that the Bhopal litigation will be treated like any other litigation. Keenan J went on to acknowledge that the enactment of the *Bhopal Act* in response to the disaster is a demonstration of how the Indian system has already approached the matter with imagination, creativity and flexibility, and as such it could be expected that 'the most significant, urgent and extensive litigation ever to arise from a single event could be handled through special judicial accommodation in India, if required'.<sup>224</sup>

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<sup>219</sup> See the *Consumer Protection Act* 1986 and also the *Monopolies and Restrictive Trade Practices Act* 1969.

<sup>220</sup> *In re Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December, 1984* 634 F. Supp. 842.

<sup>221</sup> *Ibid.*

<sup>222</sup> *Ibid.*

<sup>223</sup> *Ibid.*

<sup>224</sup> *Ibid.*

- (c) In relation to the procedural and practical capacity of Indian courts, Keenan J accepted that Indian lawyers have previously dealt with complex technology transfers competently and are capable within the technological and scientific areas of legal practice where required.<sup>225</sup> His Honour acknowledged that Indian attorneys revert to experts where necessary and the mere fact that large firms are not permitted in India did not correlate to a lower quality of legal service being provided.<sup>226</sup>

In respect to the adequacy of tort law in India, his honour noted that 'with the groundwork of tort doctrine adopted from the common law and the precedential weight awarded British cases, as well as Indian ones, it is obvious that a well-developed base of tort doctrine exists to provide a guide to Indian courts presiding over the Bhopal litigation'.<sup>227</sup>

- (d) In addition, Keenan J was particularly aware that 'India, a country with a vastly different standard of living, wealth, resources, level of health care and services, values, morals and beliefs than our own...may, in balancing the pros and cons...give different weight to various factors than would our society.'<sup>228</sup> As such, he concluded that he should not impose American standards upon India in spite of such differences.<sup>229</sup>

347. In 2001, victims of the disaster attempted to claim damages under the *Alien Tort Claims Act* in the United States, on the basis that UCC and its CEO were fugitives from criminal prosecution in India, and therefore should be barred from defending any action against them in the United States. However, the court dismissed the claim, stating that it can only invoke this law of fugitive disentitlement to protect the enforceability of its decisions and to discourage flights from its own administration of justice, not that of another jurisdiction.

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<sup>225</sup> Ibid.

<sup>226</sup> Ibid.

<sup>227</sup> Ibid.

<sup>228</sup> Ibid.

<sup>229</sup> Ibid.



## G. INDONESIA

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### G.1 Executive Summary

348. Indonesia has legislated for the protection and advancement of human rights, including by the establishment of an independent Human Rights Commission with investigatory powers and an Ad Hoc Human Rights Court.
349. Under Indonesian law, corporations are not expressly given either the legal obligation to uphold Indonesia's Law No. 39 Year 1999 concerning Human Rights (***Human Rights Law***) or rights under the *Human Rights Law* that they might enforce. This situation contrasts with Indonesia's *Environmental Management Law*, which expressly provides for both civil and criminal liability for corporations that breach its provisions.
350. Although Indonesia has amended its Constitution to include reference to human rights, and passed legislation that aims to protect human rights, there are limited examples of individuals enforcing those rights against corporations through the Indonesian Courts. Corporations and their officers have, however, been the subject of investigation by the Indonesian authorities, as shown by the prosecutions and civil suit discussed below.

### G.2 Overview of Legal System of Indonesia

#### (a) Indonesia – Background

351. Indonesia is an archipelago nation of over 17,000 islands in South East Asia with a population of 240 million. It is a republic with a presidential system and three branches of national government: the People's Consultative Assembly (***MPR***), the House of Representatives (***DPR***), and the judiciary. There are also provincial, district and local levels of government. Indonesia's history since independence in 1945 can be characterised as comprising three distinct periods: the period from 1945 to 1968 under the leadership of President Sukarno; from 1968 to 1997 under President Suharto's 'New Order' regime; and the period since 1997 during which Indonesia has moved towards greater political decentralisation and democracy. For example, Indonesia held its first popular presidential election in 2005, and there have been recent constitutional amendments including amendments to include provisions establishing human rights.<sup>230</sup>
352. A World Bank report in October 2003 observed that there is a:
- ...perception that the tremendous gains in transparency and democratic competition since the fall of the New Order have not been matched by genuine government accountability for demonstrable results in restoring integrity to the public sector and reducing corruption.<sup>231</sup>

#### (b) Law of Indonesia

353. The law of Indonesia is a mix between three systems of law:

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<sup>230</sup> *The Second Amendment of 2000 to The 1945 Constitution.*

<sup>231</sup> *Indonesia Country Assistance Strategy FY04-07*, World Bank, 29 October 2003, page 25, at <http://siteresources.worldbank.org/INTINDONESIA/Resources/CAS/CAS04-07.pdf>



- Adat or traditional law;
  - Dutch law; and
  - national laws passed since independence.
354. Adat law varies from region to region throughout Indonesia according to the traditions and customs of a particular area. Adat law is rarely transcribed into writing. The use of Adat law declined during the New Order regime, as the central government sought to apply uniform and codified laws across the whole of Indonesia. Nevertheless, Adat law still applies at a local level although the law related to companies, and to trade and commerce, is centralised.<sup>232</sup>
355. Some Dutch law remains from the period of colonisation, prior to 1945. This law primarily covers commercial activity. After independence, Dutch laws in place at the time of independence were interpreted under the Constitution as having ongoing national application until overridden by newer national legislation.<sup>233</sup>
356. Indonesia's national laws derive from a variety of sources. The highest source of national law is the Constitution,<sup>234</sup> which contains numerous provisions related to the creation and regulation of governmental bodies and the courts, and which, since 2001, has contained provisions establishing human rights. The Constitution can only be amended by a vote supported by a majority of the MPR.<sup>235</sup> The constitutional preamble contains five broad principles known as the Pancasila. Those principles consist of:
- a belief in a supreme being;
  - the principle of a just and civilised society;
  - the principle of the unity of Indonesia;
  - the principle of leadership of the people by wisdom of thoughts in deliberation amongst their representatives; and
  - the principle of achieving social justice for all the people of Indonesia.
357. Article 1(3) of the Constitution provides that Indonesia 'shall be a state based on the rule of law'. The hierarchy of other sources of national Indonesian laws consists of:
- MPR Resolution: these generally deal with constitutional issues and are broad statements of state policy.
  - Legislation: created by the DPR as part of its legislative function.

<sup>232</sup> Tabaljun, Dr B. S., 'The Indonesian Legal System: An Overview', 2 December 2002, at <<http://www.llrx.com/features/indonesia.htm>>

<sup>233</sup> *Ibid.*

<sup>234</sup> *The 1945 Constitution of the Republic of Indonesia, As Amended by the First Amendment of 1999, the Second Amendment of 2000, the Third Amendment of 2001 and the Fourth Amendment of 2002 (Constitution).*

<sup>235</sup> Articles 3(1) and 2(3), *Constitution*.

- Government Resolution in Lieu of Law: the President may promulgate regulations in lieu of a statute under emergency powers, which have the same status as legislation but must be withdrawn unless approved by the next sitting of the DPR.
  - Government Regulation: regulations which are promulgated by the President to implement a statute.
  - Presidential Decree: statements made by the President containing material which is required by a statute, or which implements a statute.
358. In general terms, national legislation is drafted so as to have broad application, and the detail of implementing laws is dealt with by regulations promulgated by the Executive. Accordingly, the Executive has a significant capacity to exercise legislative power.

**(c) The Judiciary**

359. Indonesia is a civil code jurisdiction and, therefore, does not follow the doctrine of precedent.<sup>236</sup> A consequence of this system is that cases and judicial findings are rarely published or reported. The judiciary is under no obligation to follow previous decisions, although, as a matter of practice, they seek to maintain a degree of consistency of judicial decision-making across the different courts in the judicial hierarchy.
360. During the period between independence and the fall of the "New Order" regime in 1998, Indonesia's judicial system was perceived as increasingly lacking in independence, and subject to executive control. In his 13 January 2003 report on Indonesia's judiciary and justice system, the United Nations Special Rapporteur on the Independence of Judges and Lawyers said that he had been informed that:
- ...since independence, the administration of justice had suffered much damage as it had been used by the executive as a tool to implement government policy. In turn, judicial power steadily eroded.<sup>237</sup>
361. The Special Rapporteur also reported that he had been informed:
- ...in the present post-Soeharto era, the judiciary was no longer perceived as an instrument of government policy but rather as open to the highest bidder in a system in which the mechanisms of control and accountability are weak and ineffective at best and non-existent at worst. This has ... in turn served to create a mentality within certain elements of Indonesian society in which it is considered routine to attempt to bribe judges, where the office of the judge and the judiciary as an institution have completely lost their prestige and dignity...<sup>238</sup>
362. Since the fall of the "New Order" regime, new measures have been introduced to increase the distinction between the Executive and Judicial branches of government, and to increase transparency. A new body was established under Articles 24A(3) and 24B of the

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<sup>236</sup> Tabaljun, note 3.

<sup>237</sup> *Civil and Political Rights, Including Questions of: Independence of the Judiciary, Administration of Justice – Report of the Special Rapporteur on the Independence of Judges and Lawyers Dato' Param Cumaraswamy, Submitted in Accordance with the Commission on Human Rights Resolution 2002/43 – Report on the Mission to Indonesia 15-24 July 2002, E/CN.4/2003/65/Add.2, 13 January 2003, page 4.*

<sup>238</sup> *Ibid.*

Constitution, known as the Judicial Commission, with responsibility for proposing candidates for the judiciary to the DPR (which then nominates them to the President for selection), and for guarding and protecting judicial ethics. The constitutional provisions governing the Judicial Commission are broad, and the scope and exercise of its powers remains unclear.

363. The lowest court in the Indonesian legal system is the District Court, of which there are 250.<sup>239</sup> There is a District Court in each district (a district is the third highest governmental level in Indonesia). Above the State Court is the provincial High Court, which has appellate jurisdiction for the State Courts within its province (a province is the second highest level of government).<sup>240</sup> Each of Indonesia's twenty provinces has a High Court.<sup>241</sup> At the pinnacle of the Indonesian judicial system is the Supreme Court, established under Article 24(1) of the Constitution. The Supreme Court has appellate jurisdiction from the State and High Courts, and original and exclusive jurisdiction in respect of jurisdictional disputes between courts at lower levels. The Supreme Court is also empowered to give non-binding opinions and advice about legal matters as requested by the government.
364. In addition to the standard court hierarchy described above, there are additional specialist courts operating in Indonesia. The Administrative Court was established in 1986, designed to permit the public to challenge administrative decisions in a cheap and uncomplicated forum.<sup>242</sup> The Commercial Court was established in 1998 to deal with bankruptcy and insolvency, as well as other commercial matters<sup>243</sup>. The Constitutional Court was established in 2001 with the jurisdiction, amongst other things, to determine the constitutionality of legislation<sup>244</sup>.

#### (d) The Human Rights Court

365. An ad hoc Human Rights Court was established in 2000 under *Law No.26 Year 2000 Establishing the Ad Hoc Human Rights Court (Human Rights Court Law)*. The Court is empowered to hear and rule upon gross violations of human rights, defined by Chapter III of the *Human Rights Court Law* to include genocide and crimes against humanity. The process for bringing a prosecution commences with an inquiry by the National Commission on Human Rights (**Komnas HAM**), a body which is funded by, but independent from, the government, which is then submitted for investigation to the Attorney-General, who decides whether or not to prosecute. If an ad hoc Human Rights Court rules that a gross violation of human rights has taken place, it may rule with respect to compensation, restitution and rehabilitation (Chapter VI of the *Human Rights Court Law*), and, depending on the nature of the violation, may impose the death penalty or imprisonment ranging from five years to life

<sup>239</sup> Tabaljun, note 3.

<sup>240</sup> *Ibid.*

<sup>241</sup> *Ibid.*

<sup>242</sup> *Law No. 5 of 1986 for State Administrative Courts.*

<sup>243</sup> *Law No.4 of 1998 Concerning Bankruptcy.* See also Tabaljun, note 3.

<sup>244</sup> Article 24(2) and Article 24C, *Constitution*, included by the *Third Amendment of 2001*.

(Chapter VII of the *Human Rights Court Law*). The Human Rights Court is equivalent to a District Court,<sup>245</sup> and its rulings are subject to appeal to the High and Supreme Courts.<sup>246</sup>

366. In September 2004, a law was passed to provide for the establishment of a Truth and Reconciliation Commission to resolve cases involving gross violations of human rights committed prior to the enactment of the *Human Rights Court Law*.<sup>247</sup> The Commission can investigate, grant reparations and recommend presidential amnesties.

### G.3 Human Rights Law Obligations of Corporations in Indonesia

#### (a) Human Rights in the Constitution

367. Prior to 2001, the Constitution provided only that Indonesian citizens should have equal status before the law and government (Article 27), the right to work and to live in human dignity (Article 27(2)), and the right and duty to participate in the defence of the nation (Article 27(3)). However in 2001, Chapter XA of the Constitution was introduced which dramatically increased the number of constitutional human rights. The rights distinguish between rights held by persons (all people in Indonesia), and those held by citizens (people who hold Indonesian citizenship). The rights and freedoms held by all persons are as follows:

- right to live and to defend their life and their living (Article 28A);
- right to form a family and to continue their family line through legitimate marriage (Article 28B(1));
- right of children to viable life, growth and development, and to protection from violence and discrimination (Article 28B(2));
- right to develop themselves through the fulfilment of basic needs, and the right to education and to obtain benefit from science and technology, art and culture (Article 28C(1));
- right to advance themselves in struggling to obtain collective rights to develop their community, their people, and their nation (Article 28C(2));
- right to the recognition, the security, the protection and the certainty of just laws and equal treatment before the law (Article 28D(1));
- right to work and to receive just and appropriate rewards and treatment (Article 28D(2));
- right to citizenship (Article 28D(4));
- freedom of religion, freedom of choice of education, occupation, place of residence and freedom of movement (Article 28E(1));

<sup>245</sup> Article 3, *Human Rights Court Law*.

<sup>246</sup> Article 2 of the *Human Rights Court Law* provides that a 'Human Rights Court is a court within the context of a Court of General Jurisdiction'. Such courts are subject to appeal to the High and Supreme Courts: Tabaljun, note 3.

<sup>247</sup> Law No. 27 Year 2004 on the Truth and Reconciliation Commission.

- freedom to possess and express convictions and beliefs (Article 28E(2));
  - freedom of association and the expression of opinions (Article 28E(3)): Note that these freedoms are subject to an express constitutional restriction that they will be regulated by law (Article 28);
  - right to communicate and to obtain and transmit information (Article 28F);
  - right to protection of themselves, their family and property, and protection from threats of fear from doing or not doing something that is a basic right (Article 28G(1));
  - right to freedom from torture or treatment that lowers human dignity, and to obtain political asylum from other countries (Article 28G(2));
  - right to physical and spiritual welfare, to have a home, a healthy living environment and to obtain health services (Article 28H(1));
  - right to assistance and special treatment in order to gain the same opportunities and benefits in the attainment of equality and justice (Article 28H(2));
  - right to social security (Article 28H(3));
  - right to private property without arbitrary interference (Article 28H(4));
  - right to live, the right not to be tortured, the right to freedom of thought and conscience, the right not to be enslaved, the right to be individually recognised by the law, and the right not to be prosecuted under retrospective laws; these are basic human rights that may not be interfered with under any circumstances at all (Article 28I(1));
  - right to freedom from discriminatory treatment and to obtain protection from such treatment (Article 28I(2)) and;
  - respect for cultural identity and rights of traditional communities in accordance with the continuing development of civilisation (Article 28I(3)).
368. In addition to these rights pertaining to all persons, each citizen has the right to obtain the same opportunities in government (Article 28D(3)).
369. The Constitution places obligations on individuals and the State to uphold these rights. Article 28I(4) provides that protecting, advancing and upholding human rights is the role of the State. Article 28I(5) provides that the implementation of human rights is to be guaranteed, regulated and provided for in regulations and legislation. Each person is required both to respect others' basic human rights (Article 28J(1)), and to submit to the limits determined by law in the enjoyment of their rights and freedoms (Article 28J(2)).
370. The Constitution does not specifically provide that human rights obligations apply to corporations. It does provide, in Article 28A, that any person is entitled to live and defend his or her life and way of life.

**(b) Human Rights in Other Domestic Law**

371. The State's obligation to implement human rights by way of legislation is (partially) discharged in the *Human Rights Law*. The *Human Rights Law* sets out an extensive range of basic and specific human rights, and obligations imposed both on the State and on individuals. The *Human Rights Law* also establishes and regulates the activities of Komnas HAM.
372. The definitions in Article 1 of the *Human Rights Law* include a broad definition of 'human rights', and specific definitions of 'torture' and 'human rights violations'. The definition of 'human rights violations' is significant and defines that term to mean:
- ...all actions by individuals or groups of individuals, including the state apparatus, both intentional and unintentional, that unlawfully diminish, oppress, limit and/or revoke the human rights of an individual or group of individuals guaranteed by the provisions set forth in this Act, and who do not or may not obtain fair and total legal restitution under the prevailing legal mechanism.
373. It is not clear whether or not this definition applies to corporations, although it would apply to individuals acting in their capacity as officers of corporations, and a 'group of individuals' may be interpreted as applying to corporations. The *Human Rights Law* does not mention corporations at all, and does not equate corporations with individuals. We are not aware of any judicial decision in respect of the *Human Rights Law*, or any other law, under which a corporation has been held to be an individual. Nevertheless, it is possible that a court could deem a corporation to be an individual based on the concept of a corporation being a subject of the law.
374. The human rights protected by the *Human Rights Law* are extensive and are set out below.

**(i) Chapter 2 – Basic Rights**

375. Chapter 2 of the *Human Rights Law* sets out broad statements of human rights concerned primarily with the notion of fundamental protection of human rights under the law. It also delegates responsibility to the Government to uphold human rights.
376. The following rights are set out in chapter 2:
- equality in dignity in human rights (Article 3(1));
  - right to equal and fair treatment before the law (Article 3(2));
  - right to protection of human rights and obligations without discrimination (Article 3(3));
  - right to live, the right not to be tortured, the right to freedom of thought and conscience, the right not to be enslaved, the right to be individually recognised by the law, and the right not to be prosecuted under retrospective laws like human rights that cannot be diminished under any circumstances (Article 4);
  - recognition as an individual with the right to demand and obtain equal treatment and protection before the law (Article 5(1));
  - right to just support and protection from an objective, impartial judiciary (Article 5(2));

- entitlement of disadvantaged groups in society to greater protection of human rights (Article 5(3));
  - protection of the differences and needs of indigenous peoples, including cultural identity of land rights in accordance with contemporary development (Article 6); and
  - the right to use national and international legal means, including under international law ratified by Indonesia, against violations of human rights (Article 7(1)).
377. Article 8 provides that the principal responsibility for protecting, promoting, upholding, and fulfilling human rights lies with the Government.

**(ii) Chapter 3 – Human Rights and Freedoms**

378. Chapter 3 sets out more detailed and specific human rights and freedoms that are protected under the *Human Rights Law*. The following rights and freedoms are set out in chapter 3:
- right to life, peace, happiness and an adequate and healthy environment (Article 9);
  - the right to marry legally and bear children (Article 10);
  - the right to self development (Articles 11 to 16);
  - the right to justice, including:
    - the right to submit to justice and to have a hearing by an independent and impartial tribunal (Article 17);
    - the presumption of innocence (Article 18(1));
    - the right to legal aid (Article 18(4));
    - the right not to be charged more than once in relation to a matter where a tribunal has already made a legally binding decision (Article 18(5));
  - the right to freedom of the individual, including the prohibition of slavery, the right to not be subject to research without approval, the right to freedom of religion, freedom of politics, freedom of expression, freedom of peaceful assembly and association, the right to strike, the right to maintain or change nationality, the right for Indonesian citizens for freedom of movement within Indonesia and outside (Articles 20 to 27);
  - the right to security, including the right to seek political asylum from another country, to protection of individual and family, to security and protection against the threat of fear from any act or omission, the right to freedom from arbitrary interference with the home, or correspondence (without court order), from torture, or cruel inhuman and degrading punishment or treatment, the right to freedom from abduction and assassination, freedom from arbitrary arrest, detention, torture or exile (Articles 28 to 35);
  - the right to welfare, including the right to own property which cannot be subjected to arbitrary or unlawful seizure, the right to work with free choice of employment,

the right to just conditions of work, the right to equal pay for equal work, the right to fair and adequate remuneration, the right to form and join trade unions, the right to a place to live and an adequate standard of living, the right to social security necessary for an adequate existence, and the right to special care for people with special needs (Articles 36 to 42);

- the right to participate in Government (Articles 43 and 44);
- women's rights including adequate representation in civil and political organisations, adequate access to schooling and education, the right to take criminal and civil legal action as individuals unless determined otherwise under religious law, equal rights and responsibilities with respect to children and property during and after marriage (Articles 45 to 51); and
- children's rights, including having the right to protection, the right to life from conception, the right to practice religion, the right to know one's parents, the right to protection before law against all forms of physical and mental violence or assault, the right not to be separated from one's parents against one's wishes, the right to access education and schooling, the right to adequate health services, the right not to be involved in war or armed conflict, the right to protection from sexual exploitation. Children may not be subject to sentence of death or life imprisonment, and may only be arrested and jailed as a last resort (Articles 52 to 66).

#### (iii) Chapter 4 – Human Obligations

379. Chapter 4 of the *Human Rights Law* sets out a range of obligations imposed on individuals as follows:

- an obligation to comply with Indonesian legislation and law, including unwritten law and international law concerning human rights ratified by Indonesia (Article 67);
- an obligation to participate in measures to defend the state (Article 68);
- an obligation to respect and uphold the human rights of others (Article 69); and
- an obligation to observe the limitations in the *Human Rights Law* to ensure the rights and freedoms of others are respected.

#### (iv) Chapter 5 – Government Duties and Obligations

380. Chapter 5 imposes on the government an obligation to respect, protect, uphold and promote human rights as laid down in the *Human Rights Law*, other legislation and international law concerning human rights ratified by Indonesia (Article 71).

381. The duties and responsibilities imposed by Article 71 are to include measures towards effective implementation in law, politics, economics, social and cultural aspects, state security and other areas (Article 72).

#### (v) Chapter 6 – Limitations and Prohibitions

382. The State retains, in Article 73, a limited entitlement to restrain the rights and freedoms provided in the *Human Rights Law*. However, the entitlement may only be exercised solely for the purpose of guaranteeing recognition in respect of the basic rights and freedoms of



another person, filling moral requirements, or in the public interest. A further aid to the interpretation of this Article is Article 74, which provides that no provision of the *Human Rights Law* shall be interpreted to mean that any party whatsoever is permitted to degrade, impair or eradicate the basic rights and freedoms governed by the *Human Rights Law*.

**(c) Impact of International Human Rights Law in Indonesia**

383. The Indonesian Government is empowered to enter into treaties by virtue of Article 11(1) of the Constitution. Under this Article, the President is authorised to conclude treaties with other States with the approval of the DPR. Article 11(3) provides that further provisions regarding international agreements shall be regulated by law.
384. *Law No.24 Year 2000 – On Treaties (Law on Treaties)* sets out the process to be followed by the Indonesian Government in entering into bilateral and multilateral international agreements. Article 9(2) provides that the ratification of a treaty shall be by way of a law or a Presidential decree. For a treaty to be ratified 'by way of law' means that it is to be approved by the DPR. However, this may not mean that it is incorporated into domestic law in the absence of domestic legislation.
385. Instruments of international human rights law ratified by Indonesia form part of its domestic law. Article 7(2) of the *Human Rights Law* provides that those instruments of international law concerning human rights that are ratified by Indonesia are recognised under the Human Rights Law as legally binding in Indonesia. It is less clear as to whether accession to an instrument of international human rights law, without the approval of the DPR necessary for 'ratification' under Indonesian law, would have the same effect.
386. Indonesia has ratified the following instruments of international human rights law:
  - the *Convention on Corruption* (ratified on 21 March 2006);
  - the CAT (ratified on 28 October 1998);
  - the CEDAW (ratified on 13 September 1984);
  - the CROC (ratified on 5 September 1990).
387. Indonesia acceded on 25 June 1999 to the ICERDO.
388. Indonesia has signed but not ratified the following instruments of international human rights law:
  - *Optional Protocol to the CEDAW* (28 February 2000);
  - *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (22 September 2004);
  - *Optional Protocol to the CROC on the Involvement of Children in Armed Conflict* (24 September 2001); *Optional Protocol to the CROC on the Sale of Children, Child Prostitution and Child Pornography* (24 September 2001).
389. Indonesia has not ratified or signed the ICCPR, ICESCR or the *Rome Statute of the International Criminal Court*, although it has made a commitment, by way of Presidential Decree, to ratify both Covenants and the Rome Statute.

#### G.4 Criminal Liability of Corporations in Indonesia

390. Indonesian law provides that a 'person' or individual is a carrier of a right, or a 'subject before the law'. A 'subject before the law' is divided into two categories: an individual (person) or a legal entity (rechts-person). A corporation would be regarded as a legal entity and, hence, as a 'subject before the law' capable of being brought before the court for violating either the criminal or civil law. It would appear, therefore, that a corporation may be liable under the *Penal Code of Indonesia* (**Penal Code**).

391. Notably, *Law No. 23 Year 1997 Concerning Environmental Management (the Environmental Management Law)* contains express provisions under which companies can be found to be criminally liable for various environmental crimes committed by employees or associates in the name of the company. The relevant provisions are described in detail at paragraphs 410-416 below.

#### G.5 Civil Liability of Corporations in Indonesia

392. As stated at paragraph 390 above, a corporation can sue or be sued in its own name for unlawful actions, as it is a subject of the law.

393. Furthermore, Article 1367 of the Indonesian *Civil Code* provides that:

...a person is not only responsible for the damages caused by his own deed, but also for damages caused by the deeds of persons under his responsibility. Employers and those who appoint other persons to represent their affairs are responsible for any damage caused by their employees or assistants in doing the job for which they are employed.

394. Accordingly, a corporation may be held liable in civil law for the actions of its employees, officers or agents. The responsibility of the corporation for the actions of its employees, officers or agents is only avoided if the corporation can prove that it could not have prevented the action for which it otherwise is responsible.

395. The *Environmental Management Law* also contains provisions for the resolution of civil claims made against a party causing environmental damage. Article 34(1) provides:

Every action which infringes the law in the form of environmental pollution and/or damage which gives rise to adverse impacts on other people or the environment, obliges the party responsible for the business and/or activity to pay compensation and/or to carry out certain actions.

396. In our view, this obligation extends to companies.

397. Article 35(1) provides that there is strict liability in respect of businesses or activities which:

- give rise to a large impact on the environment;
- use hazardous or toxic materials; and/or
- produces hazardous or toxic waste.



## G.6 Human Rights Findings of Domestic Courts with Regard to TNCs

### (a) TNCs in Indonesia

398. TNCs have been involved in Indonesia for a significant period, particularly as a result of Indonesia's extensive mineral, oil and gas deposits. The involvement of TNCs in the mining, oil and gas industries in Indonesia has continued since at least the 1960s.

### (b) Judicial Consideration of Constitutional Human Rights, the Human Rights Law, and International Human Rights Law in Connection with Corporate Activity

399. Due to the difficulties in obtaining access to reported decisions of the Indonesian courts, information on judicial consideration of human rights for the purpose of this brief is taken from secondary sources only. From that information it is clear that human rights laws have been applied to individuals, primarily in the military or the police. From our research, we have not identified any judicial decisions that have considered corporate activity in the context of the human rights laws.

400. In view of this, it is difficult to draw conclusions regarding judicial principles that have been developed in relation to human rights in Indonesia. It appears that, in the past, there has been few examples of individuals seeking to enforce human rights against corporations. This is perhaps not surprising given that constitutional human rights, and statutorily based human rights law, are both relatively recent phenomena in Indonesia. These laws, however, do now exist and there appears to be an increasing interest, both by individuals and the State, to utilise the legal system to pursue their rights against corporations.

## G.7 Human Rights Related Investigations and Prosecutions in Indonesia

401. There are a range of matters involving TNCs of which we are aware that, while not directly related to human rights allegations, show that the State is willing to investigate the conduct of, and institute legal action against, TNCs in certain circumstances. By way of example, we briefly report on investigations and prosecutions involving :

- Newmont Mining Corporation (**Newmont**), a United States mining company; and
- Monsanto, a United States agricultural company.

### (a) Newmont

402. In September 2004, six executives of Newmont were arrested for the alleged pollution of Buyat Bay in North Sulawesi, caused by its PT Newmont Minahasa Raya (**NMR**) gold mine.<sup>248</sup> Concurrently, Buyat Bay residents filed a civil claim seeking US\$543 million in damages from NMR for alleged heavy metals poisoning<sup>249</sup>. This claim was dismissed by the South Jakarta Court in January 2005, based on a settlement agreement reached

<sup>248</sup> Jane Perlez, 'Indonesia Detains 6 From U.S. Mining Business Over Pollution', *New York Times*, 24 September 2004.

<sup>249</sup> Jane Perlez and Evelyn Rusli, 'Spurred by Illness, Indonesians Lash Out at US Mining Giant', *New York Times*, 8 September 2004.

between NMR and three Buyat Bay residents<sup>250</sup>. In March 2005, Indonesia's Ministry of Environment filed a civil lawsuit for US\$133 million in compensation over the alleged pollution. In February 2006, this civil suit was withdrawn in light of an agreement by Newmont to make a payment of US\$30 million over 10 years into a special foundation to fund environmental monitoring and community initiatives in the mine area<sup>251</sup>. The criminal charges against five of Newmont's executives were dropped, but continue to be pursued against Richard Ness, the NMR's head of operations<sup>252</sup>.

**(b) Monsanto**

403. The matter involving Monsanto began with a US investigation into alleged payments to Indonesian government officials in violation of the Foreign Corrupt Practices Act<sup>253</sup>. Monsanto entered into a settlement on 6 January 2005 with the US Department of Justice. Under the agreement, Monsanto agreed to pay penalties totalling US\$1.5 million. Materials released by the Securities and Exchange Commission suggested that Monsanto had authorised an Indonesian agent to pay US\$50,000 to a local official to induce the official to repeal a government decree requiring an environmental impact statement prior to cultivation of agricultural products promoted by Monsanto. Monsanto also admitted to making payments totalling in excess of US\$700,000 to over 140 officials in Indonesia between 1997 and 2002<sup>254</sup>.
404. Since the announcement of the settlement, the Indonesian Corruption Eradication Commission has commenced its own investigation into Monsanto's conduct in Indonesia<sup>255</sup>. As far as we are aware, this is the first investigation by the Commission into the activities of a foreign company in Indonesia. Although at first instance the Commission will investigate the conduct of the Indonesian officials who received payments, it has not ruled out investigating action which may be taken against Monsanto under Indonesian law<sup>256</sup>.

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<sup>250</sup> Gargi Chakrabarty, 'Newmont waste claims dropped', *Rocky Mountain News*, 16 February 2005; Newmont Press Release, 'Newmont Settlement with Buyat Bay Residents is Validated by Court Records', 11 January 2005, at <[http://www.newmont.co.id/news/news\\_detail.php?news\\_id=FANC01292048](http://www.newmont.co.id/news/news_detail.php?news_id=FANC01292048)>.

<sup>251</sup> 'Jakarta says to withdraw civil suit against Newmont', *The Jakarta Post*, 17 February 2006.

<sup>252</sup> *Ibid.* See also Ben Sharples, 'Newmont ends Indonesia stoush', 16 February 2006, MiningNews.net, at <<http://www.miningnews.net/storyview.asp?storyid=54110&sectionsource=s88&highlight=buyat>>.

<sup>253</sup> U.S. Securities and Exchange Commission Release No. 50978 / January 6, 2005 at <[www.sec.gov/litigation/admin/34-50978.htm](http://www.sec.gov/litigation/admin/34-50978.htm)>; 'Monsanto Announces Settlement with DOJ and SEC Related to Indonesia', Monsanto Press Release at <[www.monsanto.com/monsanto/layout/media/05/01-06-05.asp](http://www.monsanto.com/monsanto/layout/media/05/01-06-05.asp)>.

<sup>254</sup> *Ibid.*

<sup>255</sup> Muningsari Sri Sarawati, 'KPK to investigate Monsanto bribery case', *The Jakarta Post*, 10 January 2005, available at <[www.thejakartapost.com/yesterdaydetail.asp?fileid=20050110.B02](http://www.thejakartapost.com/yesterdaydetail.asp?fileid=20050110.B02)>; Muningsari Sri Sarawati, 'Monsanto lobbied me: Nabiel', *The Jakarta Post*, 13 January 2005, available at <[www.thejakartapost.com/detailheadlines.asp?fileid=20050113.A04&iirc=5](http://www.thejakartapost.com/detailheadlines.asp?fileid=20050113.A04&iirc=5)>

<sup>256</sup> Muningsari Sri Sarawati, 'KPK to investigate Monsanto bribery case', *The Jakarta Post*, 10 January 2005, available at <[www.thejakartapost.com/yesterdaydetail.asp?fileid=20050110.B02](http://www.thejakartapost.com/yesterdaydetail.asp?fileid=20050110.B02)>.

405. These examples appear to demonstrate an increasing willingness of the Indonesian government to examine the conduct of TNCs. It remains to be seen whether this will extend more directly into the area of domestic or international human rights law.

#### **G.8 If and How "Complicity" and "Sphere of Influence" Are Understood in Domestic Courts**

##### **(a) Complicity**

406. To the best of our knowledge, the concept of 'complicity' only applies in Indonesia in two contexts:
- (a) individuals or groups undertaking criminal activity; or
  - (b) individuals or other entities involved in committing environmental crimes.
407. We are not aware of any instances where the concept of complicity has been applied in the context of corporate activity. That is, we are not aware of any cases in which a corporation or its officers have been found to have criminal liability on the basis of complicity in criminal acts. Nevertheless, in the case of environmental breaches, corporations may be found to be liable for actions taken by individuals on their behalf.

##### **(i) Criminal activity**

408. Article 55 of the *Penal Code*, provides that those who participate in punishable acts shall be punished as principals for the punishable act. Participation means those who 'perpetrate, cause others to perpetrate, or take a direct part in the execution of the act', or 'those who intentionally provoke the execution of the act by gifts, promises, abuse of power or of respect, force, threat or deception or by providing an opportunity, means or information.'
409. Article 56 provides that accomplices shall be punished, being 'persons who deliberately aid in the commission of a crime', or 'persons who deliberately provide opportunity, means or information for the commission of the crime'.

##### **(ii) Environmental crimes**

410. There are substantial provisions concerning corporate complicity set out in the *Environmental Management Law*. These provisions expressly extend to corporations.
411. In anticipation of the possibility of increasing emergence of criminal actions carried out by a corporation, this Law also regulates the responsibility of corporations.
412. Chapter IX of the *Environmental Management Law* contains this Law's criminal provisions. The key environmental offences set out in Chapter IX are as follows:
- (a) intentionally in contravention of the law carrying out an act resulting in environmental pollution or damage (Article 41). The maximum penalty is imprisonment for 10 years and a fine of 500,000,000 rupiah;
  - (b) negligently performing an action that causes environmental pollution or damage (Article 42). The maximum penalty is imprisonment for three years and a fine of 100,000,000 rupiah;

- (c) intentionally releasing or disposing of, importing, exporting, trading in, transporting or storing toxic materials, or operating a dangerous installation, while knowing or with good reason to suppose that the action can give rise to environmental pollution or damage or endanger public health or life; or providing false information or destroying or concealing information in relation to such actions (Article 43). The maximum penalty is six years imprisonment and a fine of 300,000,000 rupiah;
  - (d) carelessly performing an action described in Article 43 (see paragraph (c) above) (Article 44) The maximum penalty is imprisonment for three years and a fine of 100,000,000 rupiah.
413. The maximum penalty related to each of the offences is increased by 50% if death or serious injury is caused by the criminal action. Article 45 further provides that if a criminal action is 'done by or in the name of' a legal body, company, association, foundation, or other organisation, the fine may be increased by one third.
414. The important provisions for corporate criminal complicity are contained in Article 46. They provide, relevantly to the actions of companies, as follows:
- (a) if a criminal action is done by or in the name of a company, criminal charges and any sanctions are to be imposed against the company, **and** those who carry out the actions or who act as leaders in carrying it out (Article 46(1));
  - (b) if a criminal action is done by or in the name of a company, and is done by persons who (based on work or other relations) act in the 'sphere' of the company, criminal charges and any sanctions are to be imposed against those who give orders or act as leaders regardless of whether those people carry out the criminal action individually or with others (Article 46(2)).
415. It follows that corporations are capable of being found criminally liable for the actions of their employees, or those otherwise within the company's 'sphere' that have acted by the company or in its name.
416. Those who carry out an environmental crime (including companies) may, in addition to the criminal sanctions, be subject to 'procedural measures' including seizure of profits received through the criminal action, closure of all or part of a business, reparation of the consequences of the criminal action, or placing the business under administration for up to three years (Article 47).
417. We have not located any similar provisions concerning complicity in the *Human Rights Law* or the *Human Rights Court Law* as those described above under the *Environmental Management Law*.
- (b) Sphere of influence**
418. We are not aware of any reference to the concept of 'sphere of influence' in Indonesian law, other than that referred to in the *Environmental Management Law* above.
419. There is extensive reference to the terms 'negligence' and 'carelessness' in the *Environmental Management Law*. Such terms are also used throughout the Indonesian *Penal Code* as a basis for determining criminal liability. Under Indonesian law, however, 'negligence' and 'carelessness' are determined by the Courts without reference to concepts

such as 'duty of care' which are used in common law jurisdictions. Accordingly, we do not consider that the Indonesian concept of negligence is not comparable to the concept of a sphere of influence.

#### **G.9 Extraterritorial Application of Domestic Laws to TNCs**

420. We have not been able to ascertain any statutory provisions or rulings of Indonesian courts under which domestic laws expressly extend to the extraterritorial activities of corporations.
421. Article 5 of the *Human Rights Court Law* provides that the *Human Rights Court* has the authority to hear and rule on cases of gross violations by Indonesian citizens outside the territorial boundaries of Indonesia, but it is unclear whether this applies to corporations. A 'person' is defined in Article 1 to be an 'individual, group of people, civil or military, or police, having individual responsibility'. We consider that this would apply to individual officers of a corporation who are Indonesian citizens taking actions extraterritorially, but it is less clear whether it would apply to expatriate officers of Indonesian corporations or to the corporations themselves.
422. Indonesia's criminal law, contained in the *Penal Code*, applies by virtue of Article 4 to any person outside Indonesia who is guilty of crimes broadly relating to treason, crimes related to coins and stamps, forgery, piracy and crimes concerning aviation.

#### **G.10 Potential Financial Incentives for Corporate Human Rights Compliance**

423. We are not aware of any specific financial incentives for corporate human rights compliance in Indonesian law. There are, however, some provisions which deal more indirectly with dealings between companies and individuals.
424. For example, *Law No.11 Year 1967 on the Provisions of Mining (the Mining Law)* has provisions dealing with compensation to be paid by a company seeking to develop a mine in Indonesia. Article 25 of the *Mining Law* requires the holder of a Mining Authorization to pay for the damage caused by its operations to the surface of the land, to the holder of title to the land that is damaged. Article 26, while it requires those holding title to allow the holder of the Mining Authorization to operate on the land, imposes a prerequisite that the title holders be compensated or indemnified in advance. Article 27 sets out an escalating process for determining compensation, involving first negotiation, then Ministerial determination, and finally review by the courts.
425. The Government Regulation on the implementation of the *Mining Law* (the ***Mining Regulation***) contains complementary provisions to those described above. Article 17 entitles the Minister to reject an application for a Mining Authorization if, upon objection from those having title to the land or other interested parties, the relevant proposed mining activities will be 'surely detrimental' to the interests of the local people or inhabitants. Significantly, by virtue of Article 39 of the *Mining Regulation*, the Minister is empowered to cancel a Mining Authorization if work starts before compensation has been paid or indemnity given in accordance with Articles 25 to 27 of the *Mining Law*.

#### **G.11 Legal Liability Arising from Published Business Practice Standards**

426. We are not aware of any findings of legal liability of corporations in Indonesia arising from their published business practice standards. We note, however, that Article 6(2) of the

*Environmental Management Act* imposes an obligation on every person carrying out a business to 'provide true and accurate information regarding environmental management'. However, the Environmental Management Act, in its extensive civil and criminal liability provisions, does not appear to impose any consequences upon a failure to comply with Article 6(2).

427. We are not otherwise aware of any Indonesian legislation or judicial findings under which a corporation may be, or has been, held criminally or civilly liable for failing to comply with its published business practice standards.

#### **G.12 Consideration of the Indonesian Jurisdiction by Other Relevant Jurisdictions**

428. There have been two ATCA proceedings in Federal Courts in the United States of America involving projects located in Indonesia.

##### **(a) Freeport**

429. In August 1996, Tom Beanal, a resident of Irian Jaya and the leader of the Amungme Tribal Council of Lambaga Adat Suki Amungme (the **Amungme**), brought a class action against Freeport-McMoran Inc and Freeport-McMoran Copper & Gold Inc (together, **Freeport**) in the Eastern District of Louisiana. The claim related to the Grasberg mine, an open pit copper, gold and silver mine situated in Irian Jaya.<sup>257</sup>
430. Beanal alleged under the ATCA and the *Torture Victim Protection Act* (US) (**TVPA**) that the Grasberg mine breached international environmental laws, that Freeport had committed cultural genocide by destroying the Amungme's habitat and religious symbols, and that Freeport's private security force acted together with the State of Indonesia to commit human rights violations. These allegations were denied by Freeport.
431. The District Court twice dismissed Beanal's claims without prejudice and invited him to re-plead.<sup>258</sup> In March 1998, the District Court dismissed Beanal's claims with prejudice.<sup>259</sup> On 29 November 1999, the District Court's decision was upheld by the Fifth Circuit Court of Appeals.<sup>260</sup> The Court of Appeals emphasised that US courts must ensure "that environmental policies of the United States do not displace environmental policies of other governments", especially when "[alleged] abuses occur within [a] sovereign's borders and do not affect neighbouring countries". The Court found that in relation to both the environmental allegations and allegations of cultural genocide, the relevant international laws said to have been breached had failed to attract universal acceptance. The Court found further that Beanal's claims of torture and genocide were not pleaded with the requisite factual specificity and definiteness to survive a motion to dismiss.

<sup>257</sup> *Beanal v Freeport McMoran*, 969 F.Supp. 362, 366 (E.D.La. 1997).

<sup>258</sup> The first dismissal without prejudice is reported at *Beanal v Freeport McMoran*, 969 F.Supp. 362 (E.D.La. 1997). The second is referred to at *Beanal. v Freeport-McMoran*, 197 F.3d 161, 163 (5<sup>th</sup> Cir. 1999).

<sup>259</sup> *Beanal. v Freeport-McMoran*, 197 F.3d 161, 163 (5<sup>th</sup> Cir. 1999).

<sup>260</sup> *Beanal. v Freeport-McMoran*, 197 F.3d 161 (5<sup>th</sup> Cir. 1999).



**(b) Exxon**

432. In June 2001, eleven Indonesian citizens filed suit under the ATCA and the TVPA in the US District Court of Columbia against Exxon Mobil Corporation, Mobil Corporation, Mobil Oil Corporation and Exxon Mobil Oil Indonesia Inc (together, **Exxon**) and PT Arun LNG Company (**PT Arun**).<sup>261</sup> The claim, which is also brought as a state-based tort law claim, relates to the defendants' natural gas extraction pipeline and liquification facility in Aceh, Indonesia.
433. The plaintiffs allege that the defendants contracted with a unit of the Indonesian national army to provide security for the pipeline, in the context of the ongoing conflict between the Indonesian Government and Acehese rebels. The defendants allegedly made payment conditional on the army providing security, made decisions about where to build bases, hired mercenaries to train the troops and provided logistical support. The plaintiffs allege that Exxon and PT Arun were therefore liable for human rights violations committed by the Indonesian military, as either aiders and abettors, joint venturers or as proximate causes of the alleged misconduct.<sup>262</sup> These allegations were denied by Exxon Mobil.
434. In response to a 29 July 2002 request by the District Court, the US State Department filed a Statement of Interest, and reiterated its position in a 15 July 2005 letter. The State Department stated that adjudication of the lawsuit risked "a potentially serious impact on significant interests of the United States, including interests related directly to the on-going struggle against international terrorism"<sup>263</sup>.
435. On 14 October 2005, the District Court dismissed the plaintiffs' ATCA and TVPA claims. The Court supported the view that aider and abettor liability should not be available under the ATCA, but also ruled that "assessing whether Exxon is liable for these international law violations would be an impermissible intrusion in Indonesia's internal affairs". The Court stated that to make the defendants liable would be "highly unfair to corporations operating in states with potentially problematic human rights records which under the color of law rule may (or may not) be subject to liability for doing business there and benefiting from the state's infrastructure".<sup>264</sup>
436. The Court did not dismiss the plaintiff's state law claims, on the basis that these could be conducted in such a manner as to avoid intrusion into Indonesian sovereignty.<sup>265</sup> The plaintiffs filed amended state law claims in January 2006.<sup>266</sup> In March 2006 the Court ruled that the amendments should be allowed, dismissing a motion by Exxon effectively to

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<sup>261</sup> *John Doe I, et al. v Exxon Mobil Corp., et al.*, No. 01-CV-1357 (D.D.C.) (*Doe v Exxon Mobil*).

<sup>262</sup> Complaint for Equitable Relief and Damages in *Doe v Exxon Mobil*, filed 11 June 2001, available at <<http://www.laborrights.org/projects/corporate/exxon/exxoncomplaint.pdf>>.

<sup>263</sup> Letter from William H. Taft, The Legal Advisor, Department of State to Judge Louis F. Oberdorfer, 29 July 2002, available at <<http://www.laborrights.org/projects/corporate/exxon/stateexxonmobil.pdf>>.

<sup>264</sup> *Doe v Exxon Mobil Corp.*, 393 F.Supp. 2d. 20 (D.D.C. 2005).

<sup>265</sup> *Ibid.*

<sup>266</sup> First Amended Complaint for Equitable Relief and Damages in *Doe v Exxon Mobil*, filed 20 January 2006, available at <<http://www.laborrights.org/projects/corporate/exxon/Exxon%20First%20Amended%20Complaint%20Jan%2006.pdf>>.

have those claims dismissed.<sup>267</sup> Exxon has stated that it will appeal this decision, but, as at the date of this Brief, those claims are ongoing.<sup>268</sup>

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<sup>267</sup> Memorandum of Opinion in *Doe v Exxon Mobil*, Judge Louis F. Oberdorfer, 2 March 2006, available at <<http://www.laborrights.org/projects/corporate/exxon/DenyingDismissal030206.pdf>>.

<sup>268</sup> Slobodan Lekic, The Associated Press, 'Exxon Mobil Announces Plans to Appeal Aceh Torture Case Ruling', 9 March 2006, available at <[http://www.laborrights.org/press/ExxonMobil/exxonappeal\\_abcnews\\_030906.htm](http://www.laborrights.org/press/ExxonMobil/exxonappeal_abcnews_030906.htm)>.



## H. MYANMAR

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**Note** – this section has been drafted without assistance from a legal practitioner in Myanmar. The references to legislation and other information contained in this section have been accessed via the internet or other publicly available sources.

### H.1 Executive Summary

437. Myanmar is ruled by a military dictatorship and the legal institutions that operate in Myanmar appear to be subject to the overarching power of the executive and the military. There is no constitutional protection of individual rights, and the Courts appear to be rarely used by individuals as fora for the enforcement of any other rights that exist in law.
438. Myanmar has only ratified three of the international human rights treaties, and their implementation into domestic law has had little substantive effect on the rights enjoyed by individuals.

### H.2 Overview of Legal system of Myanmar

#### (a) Myanmar- Background

439. Myanmar, formerly Burma, is a nation of reportedly over 50 million people<sup>269</sup> situated in South-East Asia. It borders the PRC to the north and north-east, Laos and Thailand to the east, the Andaman Sea and the Bay of Bengal to the south and Bangladesh and India to the west.
440. The country is divided into 14 first-order administrative regions: seven States with a majority non-Burmese population, and seven Divisions with a majority Burmese population. These States and Divisions are then divided further into districts, each comprised of several townships (administrative regions centred around a town).<sup>270</sup>
441. Myanmar, formerly a British colony, attained its independence in 1948. In 1962, a military coup led by General Ne Win abolished the 1947 constitution and established a military government which ruled by decree.<sup>271</sup> Since then, Myanmar has remained under the power of a succession of military regimes.

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<sup>269</sup> The Government of Myanmar does not consistently report reliable data on the country, including the country's population. The US State Department believes that Burma's population is around 52 million, while other estimates are lower. See *Burma: Time for Change: Report of Independent Task Force*, Council on Foreign Relations, June 2003, page 11.

<sup>270</sup> Report of the Commission of Inquiry appointed under article 26 of the Constitution of the International Labour Organization to examine the observance by Myanmar of the Forced Labour Convention, 1930 (No. 29), Geneva, 2 July 1998, available at <http://www.ilibio.org/obl/docs/myanmar-OBL.htm>

<sup>271</sup> Background Note, 'Burma', US Department of State (Dec 2004), available at <http://www.state.gov/r/pa/ei/bgn/35910.htm>, page 3

442. In 1988, the State Law and Order Restoration Council (**SLORC**), assumed power, abolishing the 1974 constitution and ruling by martial law. The SLORC changed the name of the country to Myanmar in 1989.<sup>272</sup>
443. In 1990, SLORC held Myanmar's first multi-party elections in almost 30 years and the National League for Democracy (NLD) won over 80% of the seats.<sup>273</sup> The NLD's leader, Aung San Suu Kyi, had been under house arrest since 1989 and remained so during the elections. The NLD's victory was not, however, recognised by the SLORC and many political activists were imprisoned. Aung San Suu Kyi is still under house arrest today.
444. In 1997, the regime changed its name to the State Peace and Development Council (**SPDC**). General Than Shwe is the current Chairman of the SPDC.
445. In 2003, General Khin Nyunt, then Prime Minister, announced a "seven-point road map for national reconciliation and democratic transition". The seven cited steps included drafting a new constitution and the holding of free and fair elections.<sup>274</sup>
446. The United Nations General Assembly passed a resolution in December 2005, expressing grave concern at the systematic violation of human rights in Myanmar. In December 2005 the UN Security Council was briefed and held talks on the situation in Myanmar.<sup>275</sup>
447. The natural gas sector is the main area of foreign investment and involvement. Myanmar has the world's 10<sup>th</sup> largest known reserves of natural gas.<sup>276</sup> According to a 2003 IMF report, natural gas made up 25.3% of Myanmar's \$2.8 billion of exports.<sup>277</sup> France's Total and Malaysia's state oil company Petronas currently operate in Myanmar and reportedly provided Myanmar with about \$1 billion in revenues in 2005. In 2004, a consortium led by South Korea's Daewoo International and including Korea Gas, India's ONGC Videsh and the Gas Authority of India discovered new gas reserves larger than any existing fields. Another group of investors, including the PRC's National Offshore Oil Corp, signed six contracts with the Myanmar Government to explore new gas fields in June 2005. India is also planning a \$1 billion pipeline to ship natural gas from Myanmar.<sup>278</sup> Recently, the PRC

<sup>272</sup> The National League for Democracy, Myanmar's main opposition group, reject this name change, as does the United States, Britain and other governments. However, the United Nations uses the name Myanmar and that name will generally be used in this report.

<sup>273</sup> Threat to the Peace: A Call for the UN Security Council to Act in Burma', prepared by DLA Piper Rudnick Gray Cary US LLP, 20 September 2005, page 3.

<sup>274</sup> United Nations General Assembly, 'Interim report of the Special Rapporteur of the Commission on Human Rights on the situation of human rights in Myanmar', 12 August 2005, page 7.

<sup>275</sup> 'UN stages rare Burma discussion', *BBC News*, 17 December 2005, available at <http://news.bbc.co.uk/go/pr/fr/-/2/hi/asia-pacific/4537004.stm>.

<sup>276</sup> 'China embraces Military regime and \$1.2B in trade: '25<sup>th</sup> province': Beijing resists global efforts to end military dictatorship', *The Financial Post*, 11 March 2006, available at <http://www.burmanet.org/news/2006/03/13/financial-post-china-embraces-myanmar-regime-and-12b-in-trade-25th-province-beijing-resists-global-efforts-to-end-military-dictatorship-tim-johnson/>.

<sup>277</sup> Background Note, 'Burma', US Department of State (Dec 2004), available at <http://www.state.gov/r/pa/ei/bgn/35910.htm>.

<sup>278</sup> Michael Schuman, 'Going Nowhere', *Time Asia*, 22 January 2006.

has increased its investments in Myanmar, signing several energy deals. Bilateral trade between the countries reached US\$1.2 billion last year.<sup>279</sup>

448. The military dominates the Myanmar economy through controlled entities such as the Union of Myanmar Economic Holdings, the Union Solidarity Development Association and the Myanmar Economic Corporation. The Myanmar Investment Commission, also controlled by the SPDC, approves all foreign investment in Myanmar. Most foreign investment is carried out through joint ventures with the military regime.<sup>280</sup> Any "foreign company" (one foreign shareholder makes a company "foreign") not involving a state-owned economic enterprise or the government must obtain a "Permit to Trade" under the *Companies Act*, prior to commencing business in Myanmar.<sup>281</sup> A state-owned economic enterprise is also usually required to supervise or "sponsor" the foreign company.<sup>282</sup> For joint ventures with state-owned economic enterprises, the *Foreign Investment Law* applies, and an application for a permit under that act must be made to the Myanmar Investment Commission.<sup>283</sup>

#### (b) Law of Myanmar

449. There are four primary sources of law in Myanmar: legislation, custom, general principles of law and judicial decisions. Legislation is the most important source of law in Myanmar. This includes quasi-legislation, such as executive decrees and notifications. Custom in Myanmar generally derives from Buddhist traditions and is particularly influential in family law and inheritance law. General principles of law used internationally can apparently be influential in Myanmar where there are gaps in local laws. The doctrine of precedent was historically of import in Myanmar, but its application is currently uncertain due to the difficulties in accessing case law (see para 453 below). *Doing Business in Asia* states that 'many of the pre and post independence decisions are still considered persuasive'.<sup>284</sup>
450. Myanmar's legal system was originally based on the common law model inherited from England. English statutes were implanted by the British law codes of the pre-independence Indian statutes. Since independence, Myanmar has introduced its own legislation.<sup>285</sup>

<sup>279</sup> 'China embraces Military regime and \$1.2B in trade: '25<sup>th</sup> province': Beijing resists global efforts to end military dictatorship', *The Financial Post*, 11 March 2006, available at <http://www.burmanet.org/news/2006/03/13/financial-post-china-embraces-myanmar-regime-and-12b-in-trade-25th-province-beijing-resists-global-efforts-to-end-military-dictatorship-tim-johnson/>.

<sup>280</sup> Threat to the Peace: A Call for the UN Security Council to Act in Burma', prepared by DLA Piper Rudnick Gray Cary US LLP, 20 September 2005, pages 10 to 13.

<sup>281</sup> CCH *Doing Business in Asia* (loose leaf, update 71-3-06), 30-102

<sup>282</sup> *Ibid.*

<sup>283</sup> *Ibid*

<sup>284</sup> *Ibid*

<sup>285</sup> *Ibid*

451. Following the military coup in 1988, there has been no constitution in Myanmar. However all other pre-existing laws were expressly allowed to remain in force until they were annulled or repealed (*SLORC Declaration No 6/88*).
452. Presently, the ruling SPDC exercises executive and legislative powers and issues laws, decrees and rules in Myanmar. Individual ministers and departments also issue *ad hoc* policy "guidelines" which purport to impact the operation of existing laws, but do not amend those laws.<sup>286</sup>
453. It is difficult to access any Myanmar case law, at least outside of Myanmar. In the Superior Court of California's July 2003 decision on the defendant's choice of law motions in *John Doe 1 & Ors v Unocal Corporation and Ors (Doe v Unocal)*,<sup>287</sup> the Court notes that an expert in Burmese law was unable to acquire any published appellate decisions since 1976. Judge Chaney denied Unocal's motion to apply Burmese law to the case and instead undertook to apply Californian law.

**(c) Judiciary**

454. The Myanmar court system consists of courts at the township, district, state and national levels. The Supreme Court is the court of final appeal and has general jurisdiction over civil and criminal matters. State or divisional courts have power to adjudicate on appeal or transfer cases from Township courts, and they have original jurisdiction in more serious criminal and higher value civil matters. Township courts have jurisdiction over petty civil and criminal matters.<sup>288</sup>
455. The *Judiciary Law* 2000 laid down the following principles (clause 2):
- (a) administering justice independently according to law;
  - (b) protecting and safeguarding the interests of the people and aiding in the restoration of law and order and regional peace and tranquillity;
  - (c) educating the people to understand and abide by the law and cultivating in the people the habit of abiding by the law;
  - (d) working within the framework of law for the settlement of cases;
  - (e) dispensing justice in open court unless otherwise prohibited by law;
  - (f) guaranteeing in all cases the right of defence and the right of appeal under the law; and
  - (g) aiming at reforming moral character in meting out punishment to offenders.

Criticisms of the *Judiciary Law* include that the provision relating to judicial independence refrains from being an absolute right, qualified by the words 'according to law'; no security of tenure is provided to judges, and there are no provisions for how judges are to be

<sup>286</sup> *Ibid*

<sup>287</sup> 2002 US App Lexis 19263 (9<sup>th</sup> Circuit 2002)

<sup>288</sup> *Ibid*

appointed and removed, or their conditions of service.<sup>289</sup> These matters do not appear to be provided for in any other law in Myanmar, and so are left to the military's discretion.<sup>290</sup>

456. Foreign parties to commercial contracts commonly arbitrate disputes as an alternative to litigation through the Myanmar courts.<sup>291</sup>

457. The US Department of State claims that 'the junta rules by Decree and there is no guarantee of a fair public trial; the judiciary is not independent'.<sup>292</sup> Furthermore:

The SPDC appoints justices to the Supreme Court who, in turn, appoint lower court judges with the approval of the SPDC. These courts then adjudicate cases under decrees promulgated by the SPDC that effectively have the force of law... During the year, 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 formally were in place, the court system and its operation remained seriously flawed, particularly in regard to the handling of political cases. The misuse of blanket laws including the Emergency Provisions Act, the Unlawful Associations Act, the Habitual Offenders Act, and the Law on Safeguarding the State from the Danger of Subversive Elements and the manipulation of the courts for political ends continued to deprive citizens of the right to a fair trial. Pervasive corruption further served to undermine the impartiality of the justice system.<sup>293</sup>

458. The Special Rapporteur has stated that:

The misuse of the machinery of law, order and justice by the Government of Myanmar to instigate systematic political repression rather than protect basic human rights and fundamental freedoms is to be regretted. The Special Rapporteur believes that judicial procedures must undergo serious and immediate reform to bring them into line with international standards and the rule of law. The lack of due process, particularly in political trials, and the abuse of the judicial system to silence peaceful political dissent are of serious concern to the Special Rapporteur.<sup>294</sup>

### H.3 Human Rights Law Obligations of Corporations in Myanmar

#### (a) Human Rights in the Constitution

459. Although it does not currently have a constitution in place, Burma has previously had constitutions which afforded varying levels of protection of human rights.

460. Myanmar's former 1947 Constitution was drafted at the time of the country being granted independence from Britain and it clearly reflected a British influence, creating a

<sup>289</sup> 'A Brief Analysis On the Judiciary of Burma', (August 2004) 18 *Legal Issues on Burma Journal* 2, 17. The article notes that on 14 November 1998, the SPDC "permitted to retire" five out of six judges in the Supreme Court.

<sup>290</sup> John Southalan, 'Impunity and Judicial Independence', (April 2004) 17 *Legal Issues on Burma Journal* 40, 64-5.

<sup>291</sup> CCH, 362, 30-013

<sup>292</sup> Background Note, 'Burma', US Department of State (Dec 2004), available at <http://www.state.gov/r/pa/ei/bgn/35910.htm>.

<sup>293</sup> US Department of State, Country Reports on Human Rights Practices – 2004 'Burma', February 28 2005, available at <http://www.state.gov/g/drl/rls/hrrpt/2004/41637.htm>

<sup>294</sup> United Nations General Assembly, 'Interim report of the Special Rapporteur of the Commission on Human Rights on the situation of human rights in Myanmar', 12 August 2005, page 20.

Westminster separation of powers institutional structure.<sup>295</sup> The 1947 Constitution was a progressive document which provided for fundamental human rights.<sup>296</sup> As stated earlier, the 1947 Constitution was abolished following the 1962 military coup.<sup>297</sup>

461. Although there was protection of human rights under the 1974 Constitution, they were often expressly restricted. For instance, article 157 stated 'Every citizen shall have freedom of speech, expression and publication to the extent that the enjoyment of such freedom is not contrary to the interests of the working people and of socialism.' The 1974 Constitution was suspended on September 18, 1988 and all organs of state power that operated under the Constitution were abolished (*State Law and Order Restoration Council Declaration 2/88*).<sup>298</sup>
462. On 9 January 1993 a National Convention started to meet in order to draft a new constitution. The first session of the National Convention met sporadically for three years then collapsed in 1996 without an agreement.<sup>299</sup> The junta reconvened the National Convention in May 2004 without the participation of the National League for Democracy and other pro-democracy ethnic groups, who had boycotted the Convention. The National Convention recessed in July 2004, and a second session was held from February 17 to March 31 2005.<sup>300</sup> The third session of the National Convention began on 5 December 2005. According to the "road map", the National Convention will be followed by the writing of a constitution, which will be subject to approval by referendum, and then by multi-party elections. No constitution has yet been agreed.

#### **(b) International Human Rights Law in Myanmar**

463. In 1948, Myanmar was one of the 48 countries that voted for the *Universal Declaration of Human Rights*.<sup>301</sup> Myanmar has also acceded to or ratified:
- the ICERD (on 21/08/97, with a reservation on article 29)
  - the *Convention on the Prevention and Punishment of the Crime of Genocide* (ratified on 14/3/56); and

<sup>295</sup> For instance, Section 141 stated that all judges would be independent in the exercise of their judicial functions and subject to the laws and the constitution and section 144 stated that neither the salary of a judge nor his rights and privileged would be varied to his disadvantage after his appointment. See Russell Thirgood, 'The State: Enemy of the People – Suppression of Human Rights in Burma' (2002) 8(2) *Australian Journal of Human Rights* 1, 8

<sup>296</sup> See Russell Thirgood, 'The State: Enemy of the People – Suppression of Human Rights in Burma' (2002) 8(2) *Australian Journal of Human Rights* 1. For instance, women were entitled to the same pay as men in respect of similar work (sections 14 and 15) and citizens had the rights to assemble peacefully, form associations and unions and to reside in any part of the country and follow any trade or profession (section 17).

<sup>297</sup> *Ibid*

<sup>298</sup> *Ibid*.

<sup>299</sup> United Nations General Assembly, 'Interim report of the Special Rapporteur of the Commission on Human Rights on the situation of human rights in Myanmar', 12 August 2005, page 6.

<sup>300</sup> Background Note, 'Burma', US Department of State (Dec 2004), available at <http://www.state.gov/r/pa/ei/bgn/35910.htm>, page 3.

<sup>301</sup> Russell Thirgood, 377.



- the CROC (on 14/08/91).<sup>302</sup>
464. Myanmar's Chief Justice ratified the Beijing Statement of Principles of the Independence of the Judiciary in the Lawasia Region, 1995, which provides, among other things, that only persons of competence, integrity and independence are to be appointed as judges (clause 12) and that judges should be given security of tenure (clause 18).<sup>303</sup>
465. There have been attempts by the Government of Myanmar to integrate international instruments into domestic law. For instance, the *Child Law*, 1993 was drafted following the accession to the *Convention on the Rights of the Child*.<sup>304</sup> However, as discussed below, the *Child Law* has been criticised as being severely undermined by the imposition of other legislation that seriously limits the rights set out in the *Child Law*.

**(c) Human Rights in Other Domestic law**

466. The *Penal Code* in Myanmar provides for the punishment of persons who impose forced labour on others. In 2004, the US Department of State noted that the Government did not arrest anyone under this statute, however six cases were brought to court by alleged victims. Of these six cases, three were being processed, two were dismissed and one person withdrew his charges.<sup>305</sup> There are problems of enforcement of such laws in Myanmar. The Asian Legal Resource Centre reported that two villagers, Ko Khin Zaw and U Ohn Myint, filed a complaint regarding forced labour in the Henzada Township Court, Ayeyawaddy Division in July 2004, after being jailed for failing to do sentry duty at a village monastery. Their complaint was summarily thrown out of the court. However, the same judge then entertained a complaint of criminal defamation by the local administrative officials. The two villagers were found guilty, and were offered a fine or six-months' imprisonment. The two men chose jail.<sup>306</sup>
467. Myanmar has limited environmental protection laws.<sup>307</sup> The *Protection of Wild Life and Wild Plants and Conservation of Natural Areas Law* 1994, is the most generally applicable environmental protection law in Myanmar. In addition to prohibiting hunting without a licence and killing protected animals, it imposes penalties on persons or organisations who

<sup>302</sup> See <http://www.unhchr.ch/tbs/doc.nsf/newhvstatusbycountry?OpenView&Start=1&Count=250&Expand=118#118>.

<sup>303</sup> Russell Thirgood, n377, 21.

<sup>304</sup> Khin Maung Win, 'Human Rights Norms in Burmese Society, (April 2004) 17 *Legal Issues on Burma Journal* 24, 36.

<sup>305</sup> US Department of State, Country Reports on Human Rights Practices – 2004 'Burma', February 28 2005, available at [www.state.gov/g/drl/rls/hrrpt/2004/41637.htm](http://www.state.gov/g/drl/rls/hrrpt/2004/41637.htm)

<sup>306</sup> Asian Human Rights Commission Press Release 'ACRC statement on 'Impunity and the un-rule of law in Myanmar' received by Commission of Human Rights, 4 April 2005 available at <http://www.ahrchk.net/pr/mainfile.php/2005mr/162/>

<sup>307</sup> Alan K.J. Tan, 'Preliminary Assessment Of Myanmar's Environmental Law', *Asia-Pacific Centre for Environmental Law Report*, updated as at 5 April 2002, available at <http://law.nus.edu.sg/apcel/dbase/myanmar/reportmy.html#Top>.

Also, see article by Peter Gutter entitled 'Environment and Law in Burma' in (2001) 9 *Legal Issues in Burma Journal* 1 where it is stated that the current environmental laws in Burma are 'weak and vague'. He continues 'There are no up-to-date laws for some of the most important aspects of environmental protection, such as the prevention of water pollution, air pollution, and industrial waste. The laws that do exist are too general and often the penalties are not strong enough to deter foreign companies. There is no environmental regulatory agency that can make sure that the ministries are actually enforcing the laws under their charge.'

pollute or dispose of pollution in natural areas or cause water or air pollution. Penalties include imprisonment for up to three years and/or a fine of kyats 10,000 (approximately US\$1500). Myanmar's general law also provides for either a public or private right of redress against pollution which constitutes a nuisance.<sup>308</sup> Other penalties for non-compliance with environmental controls are contained within industry-specific legislation and are enforced by the relevant Ministries, and may include revocation of permits and licences, the imposition of fines and imprisonment for company officers.<sup>309</sup>

468. The *Protection and Preservation of Cultural Heritage Law*, 1998 seeks to protect and preserve Myanmar's cultural heritage. The act establishes cultural heritage regions and prohibits, *inter alia*, altering or destroying ancient monuments and exploring for petroleum, natural gas, precious stones or minerals, in those regions. Breaches of the law are punishable by a term of up to seven years, fines or reimbursement of the cost of restoring the site.<sup>310</sup>
469. Sellers of defective goods within Myanmar are liable in contract, under the *Sale of Goods Act (India Act 3/30)* and possibly in the tort of negligence, as developed by the Myanmar courts. There is apparently no specific product liability or consumer protection legislation in Myanmar yet.<sup>311</sup>
470. The legal relationship between employer and employee in Myanmar is governed by the employment contract, legislation and decisions, and awards made by the Central Trade Disputes Committee.<sup>312</sup> Legislation in this area includes the *Factories Act* 1951 (requirements for safe working conditions and working hour limits), *Mines Law*, 1994 (safety requirements in the mining industry), *Workmen's Compensation Act* 1923 (deals with employers paying compensation for work-related injuries of employees) and *Minimum Wages Act*, 1951 (provides for minimum wages for specific industries).<sup>313</sup> Despite the existence of the *Trade Unions Act* 1926, the law apparently remains unused and trade unions and other types of organised labour do not exist in Myanmar.<sup>314</sup> According to the Bureau of Democracy, Human Rights, and Labor (US Department of State), numerous health and safety regulations existed, but in practice the government did not make the necessary resources available to enforce the regulations.<sup>315</sup>
471. There is little intellectual property protection in Myanmar. There is apparently no legislation in Myanmar giving proprietary rights to a trademark through registration.<sup>316</sup> There is also

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<sup>308</sup> CCH n362, 25-201

<sup>309</sup> CCH n362, 25-202

<sup>310</sup> CCH n362, 25-201

<sup>311</sup> CCH n362, 30-011 and 30-012

<sup>312</sup> CCH n362, 60-003

<sup>313</sup> CCH n362, 60-004 and 60-005

<sup>314</sup> CCH n362, 60-014

<sup>315</sup> Country Reports on Human Rights Practices - 2005, Released by the Bureau of Democracy, Human Rights, and Labor, March 8, 2006

<sup>316</sup> CCH n362, 65-001 and 65-004

apparently no specific legislation in Myanmar dealing with unfair competition or anti-competitive practices.<sup>317</sup>

472. In 1993, Myanmar enacted the *Child Law*, following the accession to the *Convention on the Rights of the Child*. The Act sets out numerous rights to be afforded to children (including the inherent right to life), as well as offences for, *inter alia*, employing a child to perform work which is hazardous to the life of the child or which may cause disease to the child or which is harmful to the child's moral character, and purchasing any property sold by a child, with the exception of purchasing property from a child who earns a livelihood by selling. Human Rights Watch has commented that, 'The Child Law includes provisions protecting the civil rights and freedoms of children; however, these rights are subject to important qualifications which essentially undermine their efficacy'.<sup>318</sup> Their report notes that the legislation grants the right that every child 'has the right to freedom of expression in accordance with the law', but this right is futile because this is subject to a number of other existing laws that restrict freedom of expression, including the *Unlawful Association Act* 1957 and the *Printers and Publishers Registration Law* 1962.
473. The Special Rapporteur reported in August 2005 that legislation is being drafted to tackle the major issue of human-trafficking in Myanmar. A police anti-trafficking unit was recently established.<sup>319</sup>
474. The Special Rapporteur has stated that:
- Throughout the country, civilians are unable to make complaints or obtain redress for human rights violations by State agents. It is deeply regrettable that when victims of human rights violations attempt to complain, they invariably find no avenue of redress available. Furthermore, they are frequently subjected to threats and reprisals.<sup>320</sup>
475. The Special Rapporteur has called on the freedom of movement, assembly and association to be guaranteed in the new Constitution, as the 'basic requirements for national reconciliation and the path to democratization'.<sup>321</sup>

#### H.4 Criminal Liability of Corporations in Myanmar

##### (a) Application of Myanmar's *Penal Code* to corporations

476. Article 11 of Myanmar's *Penal Code* states that 'The word "person" includes any company or association, or body of persons, whether incorporated or not'. Accordingly it appears that many of the offences listed in the *Penal Code* apply to companies.

<sup>317</sup> CCH n362, 65-015

<sup>318</sup> Human Rights Watch, 'Children's Rights And The Rule Of Law', 1997, available at <http://www.hrw.org/reports/1997/burma2/>

<sup>319</sup> *Ibid.*

<sup>320</sup> United Nations General Assembly, 'Interim report of the Special Rapporteur of the Commission on Human Rights on the situation of human rights in Myanmar', 12 August 2005, page 20.

<sup>321</sup> United Nations General Assembly, 'Interim report of the Special Rapporteur of the Commission on Human Rights on the situation of human rights in Myanmar', 12 August 2005, page 19.

**(b) Corporate Criminal Liability outside the *Penal Code***

477. Corporations may also have criminal liability outside the terms of the *Penal Code* such as liability for environmental damage.
478. Other acts expressly state that employees or directors can be held liable for the acts of a company, for instance, the *Foreign Exchange Regulation Act*, states that where a company commits an offence under the *Act*, every director, manager and secretary will be punishable as if they committed the offence, unless they can prove that the offence was committed without their knowledge. The *Act* provides for imprisonment of up to three years and fines.<sup>322</sup>

**H.5 Civil Liability of Corporations in Myanmar**

479. Any Myanmar incorporated or registered company, including foreign companies approved under the *Foreign Investment Law*, 1988, that engages any "unregistered" foreign company, partnership or other legal entity for the performance of works or provision of services in Myanmar, may be subject to liability for the foreign contractor's infringements of the *Companies Act*, taxation law and other, and may have its permits to trade cancelled. This could result in the personal liability of directors and officers of the company concerned.<sup>323</sup>
480. Unincorporated joint ventures are subject to the provisions of the *Partnership Act*, which deem each "Partner" to be jointly and severally liable for all debts of the partnership.<sup>324</sup>

**H.6 Relevant Findings/Decisions of Judiciary in Connection with Corporate Activity****(a) Overview of Litigation and Judicial Decisions**

481. We have not been able to locate any domestic human rights cases initiated by an individual in Myanmar against a corporation.
482. On the basis of our research, there has not been a case brought by a private citizen in Myanmar against a member of Government for damage resulting from the conduct of government or individual acts in the context of corporate activity.<sup>325</sup>

**(b) Principles that May be Derived from that Litigation**

483. We have not been able to source reports of any relevant litigation and therefore no relevant principles have been established.

**H.7 Human Rights Related Investigations/Prosecutions of Corporations in Myanmar**

484. We have not been able to locate any human rights related investigations or prosecutions of corporations that have occurred in Myanmar.

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<sup>322</sup> CCH n362, 55-034

<sup>323</sup> CCH n362, 30-014

<sup>324</sup> CCH n362, 30-113

<sup>325</sup> 'A Brief Analysis On the Judiciary of Burma', (August 2004) 18 *Legal Issues on Burma Journal* 2, 3.

## H.8 If and How "Complicity" and "Sphere of Influence" are Understood in Domestic Courts

### (a) Complicity

485. Complicity is not of itself a concept in domestic Myanmar law, however, abetting a criminal offence is a similar concept contained in the *Penal Code*. The *Penal Code* contains a section entitled 'of abetment' (Chapter V), which includes the following:

107. A person abets the doing of a thing, who--

First. -- Instigates any person to do that thing; or

Secondly.-- Engages with one or more other person or person in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy and in order the doing of that thing; or

Thirdly.-- Intentionally aids, by any act or illegal omission, the doing of that thing...

108. A person abets an offence, who abets either the commission of an offence, or the commission of an act which would be an offence if committed by a person capable by law of committing an offence with the same intention or knowledge as that of the abettor...

108A. A person abets an offence within the meaning of this Code who, in the Union of Burma, abets the commission of any act without and beyond the Union of Burma which would constitute an offence if committed in the Union of Burma.

109. Whoever abets any offence shall, if the act abetted is committed in consequence of the abetment, and no express provision is made by this Code of the punishment of such abetment, be punished with the punishment provided for the offence.

### (b) Sphere of Influence

486. A legal understanding of 'sphere of influence' has not been developed in Myanmar law. From our research, it appears that the tort of negligence is still recognised under the law in Myanmar, although it is not used or applied. It is therefore possible that the duty of care concept continues under Myanmar law.

## H.9 Extraterritorial Application of Relevant Domestic Laws to TNCs

487. There are no specific rules relating to the capacity of foreign companies and foreign-owned subsidiaries to sue and be sued in the courts of Myanmar.<sup>326</sup> The rules of civil procedure (*Code of Civil Procedure* 1909) provide for service and execution of process when the defendant resides outside the jurisdiction of the relevant court, including in foreign countries. The Code also provides for the issue of commissions by Myanmar courts to examine witnesses living outside the jurisdiction.<sup>327</sup>
488. We are not aware of any legislation that seeks to hold corporations to account for their activities outside of Myanmar.

<sup>326</sup> CCH n362, 70-002

<sup>327</sup> CCH *Doing Business in Asia* (loose leaf, update 71-3-06), 70-005 and 70-012

**H.10 Potential Financial Incentives for Corporate Human Rights Compliance**

489. Any investment permitted under the *Foreign Investment Law* is subject to conditions for the implementation of environmental controls in and around the project site. There are no specific environmental restrictions in the *Foreign Investment Law*, but in 1994 the Myanmar Investment Commission issued a notification that all permitted enterprises (even those permitted prior to the notification) had to install sewage treatment plants, industrial waste water treatment plants and other pollution control procedures. The notification is attached to, and its terms are incorporated into, the conditions of all *Foreign Investment Law* permits issued since July 1994.<sup>328</sup>
490. The agricultural, energy, forestry, industrial, mining, transportation and tourism sectors all have specific legislation enacted to protect the environment and this legislation is enforced by the relevant Ministries in particular through the issue of licences, the issue of which is conditional upon complying with the environmental protection controls. For example, the *Private Industrial Enterprises Law* 1990 requires private investors to implement a minimum level of technical know-how in their investments which avoids or reduces pollution.<sup>329</sup>
491. There are apparently no special incentives for establishing non-polluting plants or encouraging non-polluting activities, but this may be a factor favourably considered by the Myanmar Investment Commission in determining whether to approve an investment application under the *Foreign Investment Law*. The granting of various permits and licences throughout an investment in Myanmar are conditional upon the relevant organisation complying with the pollution and environment controls imposed by the relevant Ministry.<sup>330</sup>
492. The *Insurance Law* 1993 provides that an entrepreneur or organisation operating an enterprise which may cause pollution must take out compulsory general insurance with Myanmar Insurance.<sup>331</sup>

**H.11 Legal Liability Arising from Published Business Standards**

493. We are not aware of any legislation by which a corporation might be found liable for false and misleading conduct or misrepresentation in its published business practice standards pertaining to human rights.

**H.12 Consideration of Myanmar's jurisdiction by other relevant jurisdictions**

494. In the *Doe v Unocal* hearing on 31 August 2000 in front of the Central District Court of California, there was some discussion of the nature of the Burmese state. The Court stated that SLORC were regularly criticised for 'committing such human rights abuses as torture, abuse of women, summary and arbitrary executions, forced labor, forced relocation, and arbitrary arrests and detentions.'

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<sup>328</sup> CCH *Doing Business in Asia* (loose leaf, update 71-3-06), 25-201.

<sup>329</sup> CCH *Doing Business in Asia* (loose leaf, update 71-3-06), 25-201.

<sup>330</sup> CCH *Doing Business in Asia* (loose leaf, update 71-3-06), 25-205

<sup>331</sup> CCH *Doing Business in Asia* (loose leaf, update 71-3-06), 25-201.

495. State Superior Court Judge Victoria Gerard Chaney analysed the possibility of applying Burmese law in the 30 July 2003 hearing in the *Doe v Unocal* case. She found that a recent U.S. State Department report concluded that since 1988 'there [i]s no effective rule of law' in Burma. The judge stated that it is 'questionable whether Burma has a functioning judiciary actively interpreting statutes and establishing decisional law upon which this court may rely' and determined that law in Burma is 'indeterminate'. Unocal's motion to apply Burmese law to the case was therefore denied.
496. The Australian case of *NAEE & Anor v Minister for Immigration* [2003] FMCA 105 was concerned with reviewing a Refugee Tribunal's decision to refuse a protection visa to a Burmese applicant. The Court ruled the Tribunal's decision to be a nullity, mainly on procedural grounds, and stated 'It is apparent from the country information in the court book and also general knowledge that Burma is ruled by a military dictatorship and a ruthless and corrupt one at that'.
497. The United States has been firm in its criticism of the ruling government of Myanmar. In 2003, Congress passed the *Burmese Freedom and Democracy Act* which, in combination with an accompanying Executive Order, imposed an import ban on all goods from Burma; prohibited export of financial services; instituted a targeted asset freeze of assets associated with the SPDC and established stricter visa restrictions on current and former Burmese officials preventing them from visiting the US. President Bush extended the sanctions in 2005.<sup>332</sup>
498. The EU has banned all contacts with members of the junta and imposed economic sanctions, including EU opposition to loans to Myanmar by international financial institutions and a ban on trade benefits.<sup>333</sup>

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<sup>332</sup> 'Threat to the Peace: A Call for the UN Security Council to Act in Burma', prepared by DLA Piper Rudnick Gray Cary US LLP, 20 September 2005, pages 40 to 41.

<sup>333</sup> *Burma: Time for Change: Report of Independent Task Force*, Council on Foreign Relations, June 2003, page 23.



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## I. NEW ZEALAND

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### I.1 Executive Summary

499. New Zealand has ratified key international human rights instruments, although not all of its obligations under those instruments have been incorporated into domestic law.
500. The constitution of New Zealand is made up of a number of documents but does not contain a constitutionally-entrenched bill of rights. Rather, New Zealand has enacted the *New Zealand Bill of Rights Act 1990 (NZBORA)* which affirms New Zealand's commitment to the ICCPR and offers legislative protection for many of the rights enumerated in the ICCPR. However, the NZBORA only applies to governmental institutions.
501. Other human rights, such as those relating to discrimination, privacy, environment and employment are protected in a range of legislation. By virtue of these statutes, corporations are subject to a variety of obligations to consider and protect human rights and may be subject to criminal penalties and civil liability for breaches of those obligations. In addition, some statutes imposing human rights obligations on corporations have extraterritorial application.

### I.2 Overview of legal system of New Zealand

#### (a) New Zealand – Background

502. Before colonisation, New Zealand was populated by indigenous Maori. In 1840, chieftains of the Maori entered into a compact with representatives of the British Crown, the Treaty of Waitangi, in which they ceded sovereignty to Queen Victoria while retaining territorial rights. The British colony of New Zealand became an independent dominion in 1907.
503. New Zealand is a constitutional monarchy, with Queen Elizabeth II the head of state. The Queen is represented in New Zealand by the Governor-General. The Governor-General exercises the Queen's prerogative powers.
504. An integral feature of the New Zealand legal system is the separation of power among the three different branches of government: the legislature, the executive and the judiciary. Although each branch has a distinct role, the separation is not absolute.
505. The New Zealand Parliament has one chamber, called the House of Representatives.
506. One hundred and twenty Members of Parliament are elected to the House of Representatives for a three year term. New Zealanders aged 18 years and over elect the Members of Parliament by voting in elections.
507. The House's responsibilities are to debate and pass legislation, provide a Government, supervise the Government's administration by requiring it to explain policies and actions, supply money, and represent the views of the people of New Zealand. It has a number of Select Committees which examine proposed legislation in detail, often hearing submissions from interested members of the public.
508. The Executive is made up of the Prime Minister, Cabinet and the public sector. The Executive conducts the Government, deciding on policy and administering legislation.



509. New Zealand operates as a unitary state, not as a federal system like Australia or Canada.

**(b) Law of New Zealand**

510. New Zealand does not have a written constitution, in the sense of a single entrenched legislative instrument spelling out the powers of the various arms of government. It does have a number of constitutional documents which together spell out some of the rights of citizens. These, together with New Zealand's constitutional conventions, form the nation's constitution. Key written sources include the *Constitution Act 1986*, the NZBORA, the *Electoral Act 1993*, the Treaty of Waitangi and the Standing Orders of the House of Representatives. Aspects of the constitution are also found in United Kingdom and other New Zealand legislation, judgments of the courts, and broad constitutional principles and conventions.<sup>334</sup>

511. The whole body of existing English law, both legislation and common law, as well as the English constitutional conventions, was received into New Zealand on 14 January 1840. The *English Law Acts* of 1854, 1858 and 1908 confirmed New Zealand as a common law country.<sup>335</sup> For some time, the Parliament at Westminster legislated for New Zealand, but from 1865, New Zealand received limited legislative powers of its own. In 1931 the United Kingdom Parliament passed the Statute of Westminster, to facilitate a move towards independence for the Dominions (former colonies) by removing the limitations on their legislative powers. In 1947 New Zealand passed the *Statute of Westminster Adoption Act* which formally granted New Zealand independence from the United Kingdom.

512. New Zealand courts consider authorities from a variety of other common law jurisdictions, especially Canada, Australia, the United Kingdom, and the USA.

**(c) Judiciary**

513. The independence of the judiciary is an important principle of the New Zealand constitution, and freedom from political interference is an essential feature of the judiciary's position. This is reflected in the standing orders (or rules) of the House of Representatives which prohibit members from criticising a judge. Judges are appointed by the Governor-General. All judges are lawyers with at least seven years experience.

514. The *Supreme Court Act 2003* ended the 143-year jurisdiction of the UK Privy Council as the final appeal court for New Zealand cases, providing for the establishment of a Wellington-based New Zealand Supreme Court which came into existence in January 2004.

515. Under the Supreme Court sits the Court of Appeal, which in most cases is the court of final jurisdiction. Below the Court of Appeal is the High Court of New Zealand, with seats in main centres throughout the country. Finally in this general court system is the District Court, in which the majority of civil and criminal cases commence. District Courts are to be found in most towns and cities in New Zealand.

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<sup>334</sup> New Zealand Ministry of Justice, at [http://www.justice.govt.nz/pubs/other/pamphlets/2001/legal\\_system.html](http://www.justice.govt.nz/pubs/other/pamphlets/2001/legal_system.html).

<sup>335</sup> Auckland District Law Society, at <http://www.adls.org.nz/public/public50/nzls02/>.

516. In addition to these courts of general jurisdiction, there are also a number of courts of special jurisdiction, such as the Maori Land Court, the Maori Appellate Court, the Employment Court, the Environment Court, the Family Court and the Youth Court.<sup>336</sup>
517. In addition to the various courts, there exist several Administrative Tribunals that exercise judicial power, while there is also an array of Authorities, Commissions, Ombudsmen, and Boards that exercise statutory decision-making powers.

### **I.3 Human Rights Law Obligations of Corporations in New Zealand**

#### **(a) Human Rights in the Constitution and Statutory Bills of Rights**

518. As discussed above, New Zealand does not have a 'written constitution' which has the status of superior law. As such, there is no constitutionally entrenched bill of rights. Human rights are, however, given some legislative protection, including pursuant to the NZBORA.
519. According to its title, the NZBORA has two major purposes:
- To affirm, protect, and promote human rights and fundamental freedoms in New Zealand; and
  - To affirm New Zealand's commitment to the ICCPR.
520. The NZBORA has three parts: General Provisions (ss 2-7); Civil and Political Rights (ss 8-27); and Miscellaneous Provisions (ss 28-29).
521. Pursuant to section 3, the NZBORA applies 'only to acts done (a) By the legislative, executive, or judicial branches of the government of New Zealand; or (b) By any person or body in the performance of any public function, power or duty conferred or imposed on that person or body by or pursuant to law'.
522. Section 3 makes it clear, through use of the word 'only', that if an act does not fall within this compass the NZBORA does not apply. The NZBORA has, however, been interpreted in ways which bring non-state actors within the scope of its human rights obligations. According to the government publication *'The Guidelines on the New Zealand Bill of Rights Act 1990: A Guide to the Rights and Freedoms in the Bill of Rights Act for the Public Sector'*, 'section 3(b) provides that the NZBORA applies to non-government bodies, but only in respect of their public functions. At present the scope of section 3(b) is not completely certain, because the courts have not settled the precise margins of the 'public function' test. However, the fact that a particular organisation is essentially private in nature does not, by itself, mean that it is never performing a 'public function, power or duty'.<sup>337</sup>
523. It is clear, however, that the NZBORA aims to affirm individual civil and political rights against the State. It does not purport to stipulate standards for the regulation of private conduct and does not purport to modify the legal obligations of private citizens and/or

<sup>336</sup> The Family Court and the Youth Court are divisions of the District Court.

<sup>337</sup> Clapham, A. *Human Rights Obligations of Non-State Actors*, Oxford University Press, 2006, p 46.

corporations as between one another.<sup>338</sup> An unresolved issue is whether Judges will develop the common law in conformity with the NZBORA. The point has not yet arisen directly for determination in New Zealand (although it was assumed by Hardie Boys J in *Simpson v Attorney-General*<sup>339</sup> (**Baigent's case**) and by Elias CJ in *Lange v Atkinson*.<sup>340</sup> If so, it may be that the NZBORA will come to influence private as well as public law (see paragraph 569 below).<sup>341</sup>

524. Although it sets out basic human rights, the NZBORA cannot be used to strike down inconsistent legislation. Section 4 of the NZBORA specifically precludes a court from holding an inconsistent enactment inoperative or of no effect on grounds of inconsistency with the NZBORA.
525. Part II of the NZBORA enumerates the various substantive rights that are guaranteed. These rights are grouped together under the four subheadings of life and liberty of the person; democratic and civil rights; non-discrimination and minority rights; and rights upon search, arrest and detention. The rights enumerated in Part II are not absolute. Section 5 is the justified limitations clause requiring that limits on rights are to be 'reasonable', that is that they must be capable of being 'demonstrably justified in a free and democratic society'.<sup>342</sup>
526. The NZBORA encourages courts to attribute to legislation a meaning that complies with protected rights by requiring the courts to adopt a meaning 'consistent' with the protected rights 'wherever an enactment can be given' such a meaning.<sup>343</sup> This provision, however, applies only in the event of an 'ambiguity or uncertainty'.<sup>344</sup>
527. Further, all bills are assessed for consistency with the NZBORA before they are introduced into Parliament. Where there is an inconsistency in a bill, the Attorney-General must inform Parliament.<sup>345</sup> While this does not prevent Parliament passing inconsistent laws, it is designed to ensure that any issues are fully debated.
528. In *Baigent's case* the Court of Appeal held that effective and appropriate remedies are available for breach of the NZBORA. This is in spite of the NZBORA not having a remedy provision. Since *Baigent's case*, the courts have provided various remedies for infringement of the rights and freedoms identified in the Act. In *Baigent's case*, the fact that

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<sup>338</sup> Discussed in Potter, J. and Ekins, R., 'The New Zealand Bill of Rights Act 1990: A Judicial Perspective' (2002) 12 *Journal of Judicial Administration* 85 at 87-88.

<sup>339</sup> [1994] 3 NZLR 667 at 702.

<sup>340</sup> [1998] 3 NZLR 424.

<sup>341</sup> This is a conclusion reached extra-judicially by Lord Cooke of Thorndon in 'A Sketch from the Blue Train' [1994] NZLJ 10 at 11 and by The Right Hon Dame Sian Elias, Chief Justice of New Zealand in 'The impact of international conventions on domestic law', speech delivered to inaugural meeting International Association of Refugee Law Judges Australia/New Zealand Chapter, 10 March 2000 at <<http://www.refugee.org.nz/IARLJ3-00Elias.html#24>>.

<sup>342</sup> NZBORA, s 5.

<sup>343</sup> NZBORA, s 6.

<sup>344</sup> Joseph, P.A., *Constitutional and Administrative Law in New Zealand* (2 ed, Brookers, Wellington, 2001), p 1046, referring to the observations of Hardie Boys J in *Knight v Commissioner of Inland Revenue* [1991] 2 NZLR 30 at 43 (CA).

<sup>345</sup> NZBORA, s 7.

New Zealand citizens can resort to international tribunals to obtain remedies for infringement of ICCPR rights<sup>346</sup> was held to be a factor obligating New Zealand courts to provide those remedies under domestic law.<sup>347</sup> *Baigent's case*, and subsequent Court of Appeal decisions that approved *Baigent's case*, have been criticised as constituting 'a wave of judicial upgradings' of the NZBORA.<sup>348</sup>

#### **(b) Human Rights in Other Domestic Law**

529. All proposals to Cabinet for new legislation must certify compliance with relevant international obligations (including human rights norms) or else contain an explanation as to why the legislation should proceed notwithstanding inconsistency with those obligations.<sup>349</sup> Importantly, however, the New Zealand Parliament may exercise its sovereignty in a manner inimical to New Zealand's international obligations by enacting legislation inconsistent with those obligations. In such circumstances, it is the duty of the courts to give effect to that decision.<sup>350</sup>
530. Many of the human rights contained within human rights treaties, or developed through customary international law, have been directly enshrined in New Zealand's domestic law. A wide range of statutes, including the *Human Rights Act 1993 (HRA)*, impose legal obligations on companies in relation to areas such as environmental protection, anti-discrimination, labour rights, occupational health and safety and product safety.

#### **(i) The Human Rights Act 1993**

531. The *Human Rights Commission Act 1977* came into effect on 1st September 1978. In 1993 it was amended and merged with the *Race Relations Act 1971* to become the HRA. The HRA added considerably to the grounds of discrimination articulated in the earlier legislation. The long title of the HRA states that it is an Act 'to give better protection of human rights in New Zealand in general accordance with the United Nations Covenants or Conventions on Human Rights'. The HRA prohibits discrimination on various grounds in the private sphere. The sphere of application is identified as 'Areas of public life' and includes access to public places, vehicles and facilities, education, employment, industrial and professional associations, provision of goods and services, land, housing and accommodation. The prohibited grounds of discrimination are sex, race, colour, ethnic or national origins, religious belief, ethical belief, age, family status, marital status, disability, political opinion, employment status and sexual orientation.

<sup>346</sup> International complaint mechanisms have been used by New Zealanders who claim an interference with rights guaranteed by certain human rights treaties. In particular, several communications have been made to the Human Rights Committee under the First Optional Protocol to the International Covenant on Civil and Political Rights.

<sup>347</sup> See *Baigent's case* (1994) 1 HRNZ 42 (CA) at 83, per Hardie Boys J.

<sup>348</sup> Allan, J., "Take heed Australia: A statutory bill of rights and its inflationary effect" (2001) 6 *Deakin Law Review* 322.

<sup>349</sup> Cabinet Office, Department of the Prime Minister and Cabinet, *Cabinet Manual*, paragraphs 5.35 and 5.39, at <<http://www.dpmc.govt.nz/cabinet/manual/manual.pdf>>.

<sup>350</sup> Butler A.S. and Butler P., "The Judicial Use of Human Rights Law in New Zealand" [1999] *VUWLRev* 15, citing Richardson J in *Ashby v Minister of Immigration* [1981] 1 NZLR 222 at 229 (CA).

532. The HRA is aimed at giving all people equal opportunities and preventing unfair treatment on the basis of irrelevant personal characteristics. People who think they have been discriminated against may complain to the Human Rights Commission. Remedies under the HRA are civil only.<sup>351</sup>

(ii) **Privacy**

533. Privacy in New Zealand is governed by the *Privacy Act 1993* (**Privacy Act**). Section 6 of the *Privacy Act* sets out 12 information privacy principles, which guide how personal information can be collected, used, stored and disclosed by an agency. "Agency" is defined as any person or body of persons, corporate or unincorporate, public or private sector, to the exclusion of some government entities, such as the Sovereign, Governor-General, House of Representatives and members of Parliament in their official capacity.<sup>352</sup>
534. The *Privacy Act* also establishes the Privacy Commissioner,<sup>353</sup> who may receive complaints from any person alleging that any action is or appears to be an interference with that individual's privacy.<sup>354</sup> Upon receiving a complaint, the Commissioner may investigate if the action is, or appears to be, an interference with the privacy of an individual, choose not to investigate the complaint or act as a conciliator in relation to the action being brought.<sup>355</sup>
535. In addition to investigating complaints about breaches of privacy, the Commissioner also develops codes of practice for specific industries or sectors in relation to privacy.<sup>356</sup> The codes of practice modify the operation of the *Privacy Act* for specific industries, agencies, activities or types of personal information. There is, for example, a Health Information Privacy Code, Credit Reporting Privacy Code and Telecommunications Information Privacy Code.<sup>357</sup>

(iii) **Environment**

536. The *Resource Management Act 1991* (**RMA**) is the principal piece of environmental legislation in New Zealand and promotes the sustainable management of natural resources. The RMA permits National Environmental Standards in the form of regulations, which prescribe technical standards, methods and requirements in addition to those already contained in the Act.<sup>358</sup> National Environmental Standards are currently in place regarding air quality, and more standards have been proposed for the regulation of drinking-water sources, water allocation limits, the clean-up of contaminated land, land transport noise, electricity transmission and generation, and telecommunications

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<sup>351</sup> HRA, s 92I.

<sup>352</sup> Privacy Act, s 2.

<sup>353</sup> Privacy Act, s 12.

<sup>354</sup> Privacy Act, s 67(1).

<sup>355</sup> Privacy Act, ss 69 and 70.

<sup>356</sup> Privacy Act, s 13.

<sup>357</sup> New Zealand Privacy Commissioner, at <http://www.privacy.org.nz/privacy-act/introduction-to-codes-of-practice>.

<sup>358</sup> RMA, ss 43 and 44.

facilities.<sup>359</sup> The obligations set out by the RMA and the National Environmental Standards also apply to companies, as the definition of 'person' includes the Crown, a corporation, and also a body of persons, whether corporate or unincorporated.<sup>360</sup>

537. Other Acts, such as the *Ozone Layer Protection Act 1996* (**Ozone Protection Act**) and the *Hazardous Substances and New Organisms Act 1996* (**HSNO Act**) regulate specific aspects of environmental impact. The *Ozone Protection Act* sets out New Zealand's commitments under the *Montreal Protocol on Substances that Deplete the Ozone Layer* and prohibits the import, manufacture, sale or export of such substances except as allowed under the *Ozone Layer Protection Regulations 1996*.<sup>361</sup> The *HSNO Act* prevents and manages the adverse effects of hazardous substances and new organisms (that is, genetically modified organisms),<sup>362</sup> prohibits the import, manufacture, development, use and storage of hazardous substances<sup>363</sup> and requires applications for approval for conduct involving hazardous substances.<sup>364</sup>

#### (iv) Employment

538. The principal legislation governing industrial relations is the *Employment Relations Act 2000* (**ERA**), which aims to build productive employment relationships founded on the principle of 'good faith', address the inequality of bargaining power, support collective bargaining, ensure individual choice in employment and promote mediation while reducing the need for judicial intervention. The *ERA* also contains protections against unjustifiable dismissal or disadvantage, which includes the grounds for discrimination under the *HRA* and special provisions dealing with sexual and racial harassment.
539. Pursuant to the *ERA*, employment relationships for employees in New Zealand are governed by an individual employment agreements (**IEA**) or a collective agreements (**CA**). Both IEAs and CAs must contain minimum terms, which are set out in the *ERA* and incorporated by other legislation. Disputes arising out of employment relationships are determined by specialist institutions (the Employment Relations Authority and the Employment Court).
540. The *Health and Safety in Employment Act 1992* (**HSE Act**) serves as the primary legislation to ensure workplaces are safe. The Act imposes duties on employers to identify and, where practicable, eliminate, isolate, or minimise significant hazards in the workplace. Offences under the *HSE Act* carry maximum penalties of \$500,000.
541. Corporations are prosecuted and held liable for breaches of the *HSE Act*. Under the *HSE Act*, employers must take all practicable steps to identify and manage hazards in the workplace and ensure employees aren't harmed. Amendments to the *HSE Act* in 2002

<sup>359</sup> New Zealand Department of Environment <http://www.mfe.govt.nz/laws/standards/index.html>.

<sup>360</sup> RMA, s 2(1)

<sup>361</sup> Ozone Protection Act, ss 6 and 13.

<sup>362</sup> HSNO Act, s 4.

<sup>363</sup> HSNO Act, ss 25-25B.

<sup>364</sup> HSNO Act, ss 27-29B.

clarified the definition of "harm" to include any mental or physical harm caused by work-related stress.<sup>365</sup>

**(c) International Human Rights Law**

542. Treaties and conventions are binding on New Zealand courts when ratified and legislated into domestic statutes, but they may also be persuasive as a matter of statutory interpretation even when not ratified: in construing a piece of legislation in the event of ambiguity, the court will deem that Parliament would not have chosen to legislate contrary to the spirit of an international treaty.<sup>366</sup>
543. New Zealand is party to the six major United Nations human rights treaties:
- the ICCPR;
  - the ICERD;
  - the ICESCR;
  - the CEDAW;
  - the CAT; and
  - the CROC.
544. New Zealand's parliamentary treaty examination process, made permanent in 2000, requires all multi-lateral treaties and major bi-lateral treaties of particular significance to be presented to the House of Representatives Select Committee for consideration, before the executive takes binding treaty action (that is, ratification, accession, acceptance, approval, withdrawal or denunciation).<sup>367</sup> The appropriate Minister (in consultation with the Minister for Foreign Affairs) must seek Cabinet approval via the appropriate Cabinet committee for the proposed treaty action. The National Interest Analysis sets out the advantages for New Zealand becoming, or ceasing to be, a party to a treaty. Once Cabinet's approval has been obtained, the treaty and National Interest Analysis is presented to the House of Representatives. The treaty may be then considered further, may be referred to another committee, or public submissions may be sought, before the government takes any binding treaty action.<sup>368</sup> It is however, a requirement in New Zealand that legislation be passed to bring domestic law into compliance with a treaty to which New Zealand has become a party.<sup>369</sup>

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<sup>365</sup> In April 2005, an engineering firm became the first company in New Zealand to be convicted for failing to provide a safe working environment, after an employee broke down from work-related stress. The firm was fined \$8000 and ordered to pay reparation of \$1300: <http://www.dol.govt.nz/News/Media/2005/stress-prosecution.asp>.

<sup>366</sup> *Rajan v Minister of Immigration* [1996] 3 NZLR 543 at 551; *New Zealand Air Line Pilots' Association Inc v Attorney-General* [1997] 3 NZLR 269 at 289.

<sup>367</sup> Cabinet Office, Department of the Prime Minister and Cabinet, *Cabinet Manual*, paragraph 5.83, at <http://www.dpmc.govt.nz/cabinet/manual/manual.pdf>.

<sup>368</sup> *Id.*, paragraph 5.88.

<sup>369</sup> *Id.*, paragraph 5.91.

545. The following list contains examples of domestic legislation implementing or otherwise relating to the implementation of the international human rights treaties to which New Zealand is a party (with the instruments to which they relate):

- *HRA (ICERD; ICCPR; ICESCR; CEDAW; United Nations Convention on Human Rights; 1951 Convention relating to the Status of Refugees; ILO Convention Concerning Migration for Employment; ILO Convention Concerning Equal Remuneration; ILO Convention Concerning Discrimination In Respect of Employment and Occupation; ILO Convention Concerning Employment Policy);*
- *NZBORA (CEDAW; CAT; ICCPR; 1951 Convention Relating to the Status of Refugees);*
- *Privacy Act (ICCPR; 1951 Convention Relating to the Status of Refugees; Recommendation of the Council of the Organisation for Economic Co-operation and Development Concerning the Protection of Privacy and Transporter Flows of Personal Data);*
- *Evidence Act 1908 (ICCPR; CAT);*
- *Crimes Act 1961 (ICCPR; CEDAW; CAT; 1951 Convention Relating to the Status of Refugees);*
- *Crimes of Torture Act 1989 (CAT; ICCPR);*
- *Family Proceedings Act 1980 (ICCPR; CEDAW; ICESCR; 1951 Convention Relating to the Status of Refugees); and*
- *Summary Proceedings Act 1957 (ICCPR; CEDAW; CAT).*

546. The New Zealand Court of Appeal has stated that '[t]he Courts in interpreting legislation will do their best conformably with the sub-matter and the policy of the legislation to see that their decisions are consistent with our international obligations.'<sup>370</sup> The Court has used this method of statutory interpretation in many cases to incorporate New Zealand's international obligations, even where those obligations have not been expressly incorporated into domestic statute.<sup>371</sup> While it is clear that international law has been playing an increasing role in New Zealand jurisprudence, the focus of both judicial and academic attention to this phenomenon has been confined to the manner in which : international human rights treaty law affects administrative decisions.<sup>372</sup>

<sup>370</sup> *Ashby v Minister of Immigration* [1981] 1 NZLR 222 at 226.

<sup>371</sup> See, for example, *Van Gorkom v Attorney-General* [1977] 1 NZLR 535; *Gross v Boda* [1995] 1 NZLR 569; *Governor of Pitchairn and Associated Island v Sutton* [1995] 1 NZLR 426; *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641; *Commissioner of Inland Revenue v JFP Energy Inc* [1990] 3 NZLR 536; *New Zealand Air Line Pilots' Association Inc v Attorney-General* [1997] 3 NZLR 269; *Tangior v Wellington District Vehicle Services Committee* (1996) 3 HRNZ 267; *Nicholls v Registrar of the Court of Appeal* [1998] 2 NZLR 385.

<sup>372</sup> *Ashby v Minister of Immigration* [1981] 1 NZLR 222; *Tavita v Minister of Immigration* [1994] 2 NZLR 257; *Puli'uvea v Removal Review Authority* (1996) 2 HRNZ 510; *Rajan v Minister of Immigration* [1996] 3 NZLR 543. For academic discussion, see Poole M., "International Instruments in Administrative Decisions: Mainstreaming International Law" (1999) 30 VUWLR 91; Keith K., "Roles of the Courts in New Zealand in Giving Effect to International Human Rights – with some History" (1999) 29 VUWLR 27; Keith K., "The Impact of International Law on New Zealand Law" (1998) 7 *Waikato Law Review* 1; Dyzenhaus D., Hunt M. and Taggart M., "The Principle of Legality in Administrative Law: Internationalisation as



547. Many decisions of the Court of Appeal consider whether international obligations should be taken into account in the exercise of a Minister's power or discretion. In *Ashby v Minister of Immigration*<sup>373</sup> the Court affirmed and applied the conventional limits to its role in applying international law in the context of interpreting the scope of a wide statutory discretion. However it left the door open to a less cautious approach in appropriate circumstances in the future. Cook J stated '... it is only when a statute expressly or by implication identifies a consideration as one to which regard *must* be had that the Courts can interfere for failure to take it into account.'<sup>374</sup> However, His Honour contemplated a greater role for incorporating international obligations, stating 'I would not exclude the possibility that a certain factor might be of such overwhelming or manifest importance that the Courts might hold that Parliament could not possibly have meant to allow it to be ignored.'<sup>375</sup> In *Tavita v Minister of Immigration*<sup>376</sup> the Court once again used the ICCPR and CROC in its statutory interpretation of a provision of the *Immigration Act 1987*. As an issue of general policy, the Court stated that it 'is an unattractive argument, apparently implying that New Zealand's adherence to the international instruments has been at least partly window-dressing [...] The law as to the bearing on domestic law of international human rights and instruments declaring them is undergoing evolution.'<sup>377</sup> The Court was not required to reach a final decision in this case, as it referred the decision back to the Minister, however Cooke P did state:

If and when the matter does fall for decision, an aspect to be borne in mind may be [...] that since New Zealand's accession to the Optional Protocol the United Nations Human Rights Committee is in a sense part of this country's judicial structure, in that individuals subject to New Zealand jurisdiction have direct rights or recourse to it. A failure to give practical effect to international instruments to which New Zealand is a party may attract criticism. Legitimate criticism could extend to the New Zealand courts if they were to accept the argument that, because a domestic statute giving discretionary powers in general terms does not mention international human rights norms or obligations, the executive is necessarily free to ignore them.<sup>378</sup>

548. In *Sellers v Maritime Safety Inspector*<sup>379</sup> Keith J took the incorporation of international law via conventional rules of interpretation a bit further. This case involved the extent to which the *Maritime Transport Act 1994* should be interpreted by reference to New Zealand's relevant international law of the sea obligations. His Honour stated that 'For centuries national law in this area has been essentially governed by and derived from international law with the consequence that national law is to be read, if at all possible, consistently with

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Constitutionalisation" (2001) 1 *Oxford University Commonwealth Law Journal* 5; Bracegirdle A. "Domestic procedures for international treaty actions: Description of new Zealand procedures" (2003) 14 PLR 28. See Dunworth, T., "The rising tide of customary international law: Will New Zealand sink or swim?" (2004) 15(1) *Public Law Review* 36.

<sup>373</sup> [1981] 1 NZLR 222

<sup>374</sup> *Id* at 225-226.

<sup>375</sup> *Id* at 225-226.

<sup>376</sup> [1994] 2 NZLR 257.

<sup>377</sup> *Tavita v Minister of Immigration*, [1994] 2 NZLR 257 at 226.

<sup>378</sup> *Ibid*.

the related international law. That will sometimes mean that the day-to-day (or at least year-to-year) meaning of national law may vary without formal change.<sup>380</sup>

549. The role of customary international law in New Zealand has received relatively little judicial or academic attention.<sup>381</sup> It appears that the incorporation approach, which treats customary international law, upon its proof as such and without more, as part of the common law, is utilised by the New Zealand courts.<sup>382</sup>

#### I.4 Criminal Liability of Corporations in New Zealand

##### (a) Application of New Zealand's *Crimes Act* to corporations

550. The *New Zealand Crimes Act 1961* (***Crimes Act***) contains the majority of New Zealand's criminal laws. With certain exceptions, the Crimes Act imposes liability on 'persons'. The definition of 'person' under the Crimes Act is defined as including 'the Crown and any public body or local authority, and any board, society, or company and any other body of persons, whether incorporated or not, and the inhabitants of the district or any local authority'.

##### (b) Corporate Criminal Liability Outside the *Crimes Act*

551. Corporations are capable of being charged with, and convicted of, statutory offences under a wide range of legislation. According to section 29 of the *Interpretation Act 1999*, 'person' includes a corporation sole, a body corporate and an unincorporated body. All criminal statutes are therefore presumed to apply to artificial bodies as well as to natural persons.
552. A number of statutes contain provisions which deal specifically with the liability or punishment of corporations.<sup>383</sup> Pursuant to the *Commerce Act 1996* (***Commerce Act***)<sup>384</sup> and the *Fair Trading Act 1986* (***FTA***)<sup>385</sup> for example, where it is necessary to establish the state of mind of the body corporate it is sufficient to show that a director, servant or agent of the body corporate, acting within the scope of that person's actual or apparent authority, had that state of mind.
553. The general position at common law is that a corporation is in the same position in relation to criminal liability as a natural person, and may be convicted of crimes involving *mens rea*.<sup>386</sup> In New Zealand there are in fact very few crimes for which a company may not be

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<sup>379</sup> [1999] 2 NZLR 44.

<sup>380</sup> Ibid at 62.

<sup>381</sup> Dunworth, T., "The rising tide of customary international law: Will New Zealand sink or swim?" (2004) 15(1) *Public Law Review* 36 at 47, citing as an exception Keith K., "International Law and New Zealand Municipal Law" in Northey J.F. (ed), *The AG Davis Essays in Law* (1965) p 130-148.

<sup>382</sup> *Marine Steel Ltd v Government of the Marshall Island* [1981] 2 NZLR 1 (HC); *Governor of Pitcairn v Sutton* [1995] 1 NZLR 426 (CA). This was also the conclusion reached regarding the state of the law in New Zealand by Merkel J in *Nulyarimma v Thompson* (1999) 165 ALR 621.

<sup>383</sup> See, for example, *Commerce Act 1996*, s 90.

<sup>384</sup> Section 90.

<sup>385</sup> Section 45.

<sup>386</sup> Wilkinson, M., "Corporate Criminal Liability – the move towards recognising genuine corporate fault" (2003) 9 *Canterbury Law Review* 142.

- convicted.<sup>387</sup> The question of how concepts of individual moral fault in criminal offences may be applied to corporations has been the subject of much judicial and academic discussion in New Zealand.
554. Courts have developed two main techniques for attributing to a corporation the acts and states of mind of the individuals it employs: vicarious liability and attribution liability. Pursuant to the principles of vicarious liability, there is automatic liability for offences committed by officers, employees and agents acting within the scope of authority or employment. The second model involves identification liability, pursuant to which the liability of a more restricted range of company personnel is attributed to the corporation.
555. It is in relation to this second model that New Zealand case law has made advances on the attribution model propounded in the House of Lords decision in *Tesco Supermarkets Ltd v Nattrass*.<sup>388</sup> In *Tesco*, the requisite mental element and conduct elements to the corporation where those elements can be traced to the 'directing mind and will' of the company (the **Tesco principle**).<sup>389</sup> In *Meridian Global Funds Management Asia Ltd v Securities Commission*<sup>390</sup> (**Meridian**) the Privy Council (on appeal from the High Court of New Zealand) effectively extended the class of person who might be identified as the company, by relaxing the strictness of the 'directing mind and will' test.<sup>391</sup> The decision has been stated to have rendered the identification approach a 'potentially powerful tool' for holding companies liable.<sup>392</sup> This attribution liability approach in *Meridian* focuses on those responsible for the area of activity in which the offence took place, and attributes responsibility to the corporation for the conduct of the relevant individuals.
556. Section 338 of the *RMA* sets out offences for which corporations may be held criminally liable. Any contravention of a civil remedy under the Act (see paragraph 562 below), such as an enforcement order, abatement notice or water shortage direction, constitutes an offence under the *RMA*. In addition, contraventions of the duties and restrictions relating to water,<sup>393</sup> the use and subdivision of land,<sup>394</sup> use of coastal marine areas,<sup>395</sup> use of beds of

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<sup>387</sup> *Purser Asphalts & Contractors Ltd v Police* [1990] 1 NZLR 693 at 695.

<sup>388</sup> [1972] AC 153.

<sup>389</sup> The *Tesco* principle was applied in New Zealand in *Nordik Industries Ltd v Regional Controller of Inland Revenue* [1976] 1 NZLR 194 at 202.

<sup>390</sup> [1995] 3 NZLR 7.

<sup>391</sup> Wilkinson, M., "Corporate Criminal Liability – the move towards recognising genuine corporate fault" (2003) 9 *Canterbury Law Review* 142 at 154.

<sup>392</sup> Davies, P.L., *Gower's Principles of Modern Company Law* (6<sup>th</sup> ed, 1997) p 231, cited in Wilkinson, M., "Corporate Criminal Liability – the move towards recognising genuine corporate fault" (2003) 9 *Canterbury Law Review* 142 at 156.

<sup>393</sup> *RMA*, s 14.

<sup>394</sup> *RMA*, ss 9 and 11.

<sup>395</sup> *RMA*, s 12.

lakes and rivers<sup>396</sup> and the discharge of contaminants into the environment<sup>397</sup> are deemed strict liability offences under the *RMA*.<sup>398</sup>

557. Directors and managers of corporations may also be held criminally liable for breaches of the *RMA*.<sup>399</sup> In addition, where a corporation is convicted of an offence relating to the disposal of waste or the discharge of harmful substances or contaminants, and the Court believes the offence was committed in the course of producing a commercial gain, the Court may also order that the corporation pay an amount not exceeding three times the value of any commercial gain resulting from the commission of the offence.<sup>400</sup>

Corporations have been prosecuted under the *RMA*,<sup>401</sup> although it appears that fines imposed under the *RMA* have not approached the maximum of \$200,000.<sup>402</sup> This may be in part because although the fine should address economic and educative goals, the Court of Appeal in the past has emphasised that 'it is important that the fine not place the company at risk, especially in the current climate where the continuation of employment is so important'.<sup>403</sup>

558. In *Machinery Movers Ltd v Auckland Regional Council*<sup>404</sup> (***Machinery Movers***) the High Court noted that the *RMA* is silent on the matters that should be taken into account for sentencing and approved of the sentencing factors in the United States case of *R v Bata Industries Pty Ltd*<sup>405</sup> (***Bata***). *Bata* stipulated that in sentencing corporations convicted of environmental offences, the court should take into account the following factors:

- The size, wealth, nature of operations and power of the corporation;
- The extent of attempts to comply;
- Remorse;
- Profits realised by the offence; and
- Criminal record or other evidence of good character.

559. In the sentencing notes of almost every prosecution under the *RMA* since *Machinery Movers*, some or all of the sentencing factors as stated in *Bata* and approved in *Machinery Movers* have been referenced.<sup>406</sup>

<sup>396</sup> *RMA*, s 13.

<sup>397</sup> *RMA*, s 15.

<sup>398</sup> *RMA*, s 341.

<sup>399</sup> *RMA*, s 340(3).

<sup>400</sup> *RMA*, s 339B.

<sup>401</sup> See, for example, *Machinery Movers Ltd v Auckland Regional Council* [1994] 1 NZLR 492; *Doug Hood Ltd v Canterbury Regional Council* [2000] 1 NZLR 490; *Bay of Plenty Regional Council v Bay Milk Products Ltd* [1996] 3 NZLR 120.

<sup>402</sup> *Establishing a Business in New Zealand: A guide for international business* (March 2006) p 23 at <[http://www.minterellison.co.nz/publications/EstablishingBusiness\\_NZ\\_Mar06v3.pdf](http://www.minterellison.co.nz/publications/EstablishingBusiness_NZ_Mar06v3.pdf)>.

<sup>403</sup> *Machinery Movers Ltd v Auckland Regional Council* [1994] 1 NZLR 492 at 509.

<sup>404</sup> *Id* at 501.

<sup>405</sup> (1992) 9 Or (3d) (liability); 7 CLR (NSI) (sentencing).

<sup>406</sup> The *RMA* Planning Resource, at <http://www.qualityplanning.org.nz/rma-enforcement/7-prosecution/>

560. Criminal liability and penalties also apply to corporations who breach other environmental legislation (see previous discussion at paragraphs 536 and 537 above).<sup>407</sup>

### **I.5 Civil Liability of Corporations in New Zealand**

561. As discussed at paragraphs 529 to 541 above, provisions in domestic legislation dealing with areas such as privacy, environmental protection, anti-discrimination and health and safety implicitly place some human rights obligations on corporations. In addition, corporations in New Zealand can be held liable for tortious acts including negligence.<sup>408</sup> We are not aware of any cases where a corporation has been held liable in tort for infringements of human rights.

562. In relation to the environment, many of the duties and restrictions required under the *RMA* require an application to be submitted to, or consent or approval from, the relevant government agency or local council. Any infringement of the *RMA* is dealt with at first instance by the relevant agency or local council, which may issue an abatement notice<sup>409</sup> (which acts as a warning notice) or an infringement notice<sup>410</sup> (which imposes an infringement fee). However, an aggrieved person, corporation or local or other authority may apply to the Environment Court for a declaration<sup>411</sup> or enforcement order<sup>412</sup> which may:

- prohibit a person or corporation from doing a particular act;
- require a person or corporation to do a particular act;
- require a person or corporation to remedy or mitigate any adverse effect on the environment caused by that person or corporation; or
- require that person or corporation to reimburse any other person for costs and expenses associated with avoiding remedying any adverse effect on the environment.<sup>413</sup>

563. Where a civil proceeding is brought successfully against a corporation before the Human Rights Review Tribunal (*HRRT*), a variety of civil remedies are available, including declarations, forms of injunctive relief, damages, orders to redress loss and damage

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<sup>407</sup> For example, the commission of an offence under the HSNO Act may lead to a summary conviction and fine of up to \$500,000 (ss 109 and 114) or an infringement notice and an infringement fee (ss 111 and 113). Pecuniary penalties and civil liability also apply to breaches relating to new organisms under the HSNO Act (ss 124A-124I). Under the Ozone Protection Act, every person who commits an offence under the Act is liable on summary conviction and a fine of up to \$200,000 (s 15).

<sup>408</sup> See, for example, *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282; *Connell v Odum* [1993] 2 NZLR 257; *Fleming v Securities Commission* [1995] 2 NZLR 514.

<sup>409</sup> RMA, ss 322-325B.

<sup>410</sup> RMA, ss 343A -343D.

<sup>411</sup> RMA, ss 310-313.

<sup>412</sup> RMA, ss 314-321 and 325B.

<sup>413</sup> RMA, ss 314-321.

suffered and orders to implement training, policy or programs.<sup>414</sup> Where the HRRT wishes to award a remedy beyond its monetary limit of \$200,000,<sup>415</sup> it may refer the decision of quantum to the High Court.<sup>416</sup>

564. The *Privacy Act* provides for proceedings to be brought before the HRRT where a person has been investigated in relation to alleged interference with the privacy of an individual, or in respect of a person about whom a complaint has been made and conciliation has not resulted in a settlement.<sup>417</sup> Either the Director of Human Rights Proceedings or the aggrieved individual may bring the proceeding against a person or corporation in the HRRT.<sup>418</sup> If the HRRT is satisfied on the balance of probabilities that any action of the defendant is an interference with the privacy of an individual, it may grant a variety of remedies, including a declaration, an order amounting to an injunction or damages.<sup>419</sup>
565. In *Hosking v Runting and Pacific Magazines NZ Ltd*<sup>420</sup> the Court of Appeal acknowledged the existence of a new tort of invasion of privacy,<sup>421</sup> although its application is restricted to wrongful publicity given to private lives.<sup>422</sup> The Court acknowledged that the scope of the tort should be left to the 'incremental development by future Courts',<sup>423</sup> so that in the meantime the cause of action remains relatively untested. The Court stated that the remedy for committing a breach of invasion of privacy is primarily damages, although injunctive relief may be appropriate in some circumstances.<sup>424</sup>

#### (a) Vicarious Liability

566. Vicarious liability in New Zealand follows the common law. The general rule at common law is that 'a principal is liable to third persons in a civil suit for the frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasances or misfeasances, and omissions of duty of his agent *in the course of his employment*,

<sup>414</sup> HRA, s 92I.

<sup>415</sup> HRA, s 92Q and *District Courts Act 1947*, s 29.

<sup>416</sup> HRA, s 92R.

<sup>417</sup> *Privacy Act*, s 82.

<sup>418</sup> *Privacy Act*, ss 82 and 83. See, for example, *CBN v McKenzie Associates* [2004] NZHRRT 48; *Cable v NZ Insolvency & Trustee Service* (CRT Decision No 10/99, Complaints Review Tribunal which is now the HRRT). However, it has been noted that unrepresented plaintiffs face difficulties in bring a successful claim against a represented corporation in an adversarial forum (albeit one without the formality of the regular courts): McBride, T., "Recent New Zealand case law on privacy: Part I – the Privacy Act and the Bill of Rights Act" [2000] PLPR 2, commenting on *Ilich v Accident Rehabilitation & Compensation Insurance Corporation* (unreported, Complaints Review Tribunal (NZ), 12 May 1999).

<sup>419</sup> *Privacy Act*, s 85.

<sup>420</sup> [2005] 1 NZLR 1.

<sup>421</sup> The requirements for a successful claim for interference with privacy are: (1) The existence of facts in respect of which there is a reasonable expectation of privacy; and (2) Publicity given to those private facts that would be considered highly or substantially offensive to an objective reasonable person – see *Hosking v Runting and Pacific Magazines NZ Ltd* [2005] 1 NZLR 1, per Gault and Blanchard JJ at [117]; per Tipping J at [249] and [255]–[256].

<sup>422</sup> *Hosking v Runting and Pacific Magazines NZ Ltd* [2005] 1 NZLR 1, per Gault and Blanchard JJ at 118.

<sup>423</sup> *Id* at 117.

<sup>424</sup> *Id* at 149.

although the principal did not authorize, or justify, or participate in, or indeed know of such misconduct, or even if he forbade the acts, or disapproved of them.<sup>425</sup> The principle of vicarious liability has been applied in relation to corporations by courts in New Zealand.<sup>426</sup>

567. In addition, some statutes provide for a form of vicarious liability, such as the *RMA*,<sup>427</sup> the *HRA*,<sup>428</sup> the *Commerce Act*<sup>429</sup> and the *FTA*.<sup>430</sup>

## I.6 Relevant Findings/Decisions of Judiciary in Connection with Corporate Activity

### (a) Overview of Litigation and Judicial Decisions

568. The *NZBORA* affirms individual civil and political rights against the State, but it does not purport to stipulate standards for the regulation of private conduct and does not purport to modify the legal obligations of private citizens and corporations as between one another.<sup>431</sup> Accordingly, there is very little judicial comment regarding the *NZBORA* in connection with corporate activity.
569. In *Lange v Atkinson*<sup>432</sup> however, Elias J considered whether the *NZBORA* is applicable in litigation between private individuals and corporations, neither of whom are subject to the *NZBORA* in terms of section 3 (which says that the *NZBORA* applies 'only' to governments and persons or bodies performing public functions). Elias J answered the question in the affirmative, noting that the *NZBORA* expressly applies to the judiciary, and that declaration of the common law of defamation is a judicial function. On that approach, the common law will always be susceptible to arguments based on the *NZBORA*, irrespective of whether or not it arises in a case involving a public actor.<sup>433</sup>

### (b) Principles That May Be Derived From That Litigation

570. There are few judicial decisions concerning the liability of corporations for breaches of human rights under New Zealand legislation. As the scope of the *NZBORA* is limited to governmental bodies, corporations are not liable for breaches of human rights under the *NZBORA* (except to the extent that such rights are protected by other domestic statutes such as the *HRA*). When corporations are found liable for breaches of human rights under other domestic legislation, the conduct in question tends to be comparatively minor (for

<sup>425</sup> *McGowan & Co Ltd v Dyer* (1873) LR 8 QB 141 at 145 per Blackburn LJ, affirmed in *Credit Lyonnais Bank Nederland NV v Export Credits Guarantee Department* [2000] 1 AC 486 (HL) per Lord Woolfe MR.

<sup>426</sup> See, for example, *Ferguson Construction Co Ltd v Hargreaves* [1973] 1 NZLR 634; *Steel Structures Ltd v Rangitikei County* [1974] 2 NZLR 306 at 310-311.

<sup>427</sup> Section 340(1).

<sup>428</sup> Section 68.

<sup>429</sup> Section 90(2).

<sup>430</sup> Section 45(2).

<sup>431</sup> Discussed in Potter, J. and Ekins, R., "The New Zealand Bill of Rights Act 1990: A Judicial Perspective" (2002) 12 *Journal of Judicial Administration* 85 at 87-88.

<sup>432</sup> [1998] 3 NZLR 424.

<sup>433</sup> Rishworth, P., "Bill of Rights, Human Rights", [1998] *New Zealand Law Review* 584.

example, acts of discrimination, breaches of privacy or environmental infringements with the result that no definitive human rights principles have emerged from those decisions. In addition, some of these statutes (for example, the *RMA* as a regime for environmental protection) contain a complex regulatory framework for applications, approvals and consents before tribunals or courts have jurisdiction to resolve disputes. This may be a factor as to why the number of judicial decisions in relation to some of these statutes appears to be comparatively low.

## **I.7 Human Rights Related Investigations/Prosecutions of Corporations in New Zealand**

571. A variety of governmental institutions in New Zealand are given powers to investigate and prosecute claims of breaches of human rights.

### **(i) The Human Rights Commission**

572. The Human Rights Commission (the **HRC**) is a statutory body that administers the HRA. The HRC has a Chief Commissioner, a Race Relations Commissioner, an Equal Employment Opportunities Commissioner and no more than five other Commissioners whose offices are part time.<sup>434</sup> The HRC has a broad spectrum of functions, including advocating human rights, promoting research and education for a better understanding of human rights, publishing guidelines and voluntary codes of practice, inviting public submissions and reporting to the Prime Minister on matters affecting human rights, enquiring into any matter which may involve the infringement of human rights and bringing proceedings before the HRRT for breaches of the *HRA* against individuals and corporations.<sup>435</sup>

573. The HRC has the power to resolve disputes relating to unlawful discrimination. If a dispute is not resolved by mediation, the complainant has the option of taking the dispute to the Director of Human Rights Proceedings for representation in the HRRT. The HRRT's decisions are legally binding.

574. The HRRT considers and adjudicates proceedings relating to:<sup>436</sup>

- complaints of breaches of human rights under the *HRA*;<sup>437</sup> and
- investigations of the HRC into matters which appear to involve the infringement of human rights (which may include infringements of human rights under the *NZBORA*).<sup>438</sup>

575. The HRRT may make interim orders, which may be appealed either to the HRRT or, with the leave of the HRRT, to the High Court which may vary or rescind the order.<sup>439</sup> Orders for the award of costs, the award of damages and interim orders made by the Tribunal

<sup>434</sup> HRA, s 8(1).

<sup>435</sup> See, for example, *Caitlin Lewis and Brett David Edwards v Talleys Fisheries Ltd* [2005] NZHRRT 19.

<sup>436</sup> HRA, s 94.

<sup>437</sup> That is, breaches of Part 1A or Part 2 of the HRA: see HRA, s 92B.

<sup>438</sup> That is, breaches of Part 1A or Part 2 of the HRA: see HRA, s 92E.

<sup>439</sup> HRA, s 96.



may, on registration of a certified copy in the District Court, be enforced in all respects as if they were an order of that Court.<sup>440</sup> The HRRT may refer to the High Court for an opinion on any question of law.<sup>441</sup> Final determinations and other orders of the Tribunal can be appealed to the High Court by virtue of section 123(2) of the *HRA*.

**(ii) The Waitangi Tribunal**

576. The Waitangi Tribunal was established in 1975 by the *Treaty of Waitangi Act 1975*. The Tribunal is a permanent commission of inquiry charged with making recommendations on claims brought by Māori relating to actions or omissions of the Crown, which breach the promises made in the Treaty of Waitangi. The Tribunal can examine any claim by a Māori or group of Māori that they have been prejudiced by laws and regulations or by acts, omissions, policies, or practices of the Crown since 1840 that are inconsistent with the principles of the Treaty of Waitangi. The relevance of the Treaty of Waitangi and the Waitangi Tribunal to corporations, however, is limited by the fact that claims may be made only in respect of legislation or against the Crown - not against private individuals or corporations.

**I.8 If and How 'Complicity' and 'Sphere of Influence' Are Understood in Domestic Courts**

**(a) Complicity**

577. 'Complicity' itself is not directly referenced in domestic New Zealand law. The *Crimes Act*, however, extends liability for offences to every person who aids others to commit an offence, abets any person in the commission of the offence, or incites, counsels or procures any person to commit the offence.<sup>442</sup> While we are not aware of any cases in which a corporation or its officers have been found to have criminal liability on the basis of complicity in criminal acts, it appears that the potential scope for corporate criminal liability as an accomplice exists under the *Crimes Act*.

**(b) Sphere of Influence**

578. While no established principles have emerged in New Zealand regarding the concept of 'sphere of influence' in the context of human rights violations, it bears many conceptual resemblances to the common law concept of 'duty of care' – an element to any claim in negligence and one that has been broadly applied in the context of corporations.
579. For a negligence claim to be established, it must be shown that a duty to take reasonable care was owed by the defendant to the plaintiff at the time of the act of negligence.<sup>443</sup> A corporation owes a common law duty of care to others in the same way as a duty of care is owed by a natural person.<sup>444</sup>

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<sup>440</sup> *HRA*, s 121(1).

<sup>441</sup> *HRA*, s 122.

<sup>442</sup> Section 66(1) (parties to offences) is a general provision that applies to all offences under the Criminal Code.

<sup>443</sup> *Wilson & Horton Ltd v Attorney-General* [1997] 2 NZLR 513 at 519.

<sup>444</sup> See *Wilson & Horton Ltd v Attorney-General* [1997] 2 NZLR 513.

## I.9 Extraterritorial Application of Domestic Laws to TNCs

### (a) *Crimes Act*

580. Section 7A of the *Crimes Act* is entitled 'Extraterritorial jurisdiction in respect of certain offences with transnational aspects'. This section provides that even if the acts or omissions alleged to constitute an offence occurred wholly outside New Zealand, proceedings may be brought for specified offences against a body corporate, or a corporation sole, incorporated under the law of New Zealand. The offences to which this section applies relate are those 'with transnational aspects', and include offences relating to terrorist acts, corruption and people trafficking.

### (b) *Bribery of Foreign Public Officials*

581. New Zealand signed the *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* on 17 December 1997. The *Crimes (Bribery of Foreign Public Officials) Amendment Act 2001* implements the Convention by including sections 105C, 105D and 105E, pursuant to which the bribery of a foreign public official in business transactions is a territorial criminal offence and an extra-territorial criminal offence for New Zealand citizens and residents and for bodies incorporated in New Zealand.
582. Section 105D establishes jurisdiction over a person who is:
- a New Zealand citizen;
  - ordinarily resident in New Zealand;
  - a body corporate incorporated in New Zealand; or
  - a 'corporation sole' incorporated in New Zealand.
- even where the offence of bribing a foreign public official is committed wholly outside of New Zealand.
583. While section 105D establishes nationality jurisdiction over the foreign bribery offence, in order for New Zealand to establish nationality jurisdiction, the act must constitute an offence under the law of the country where the foreign public official's 'principal office' is situated.

### (c) *Commerce Act and Fair Trading Act*

584. Competition and consumer protection law is largely regulated by the *Commerce Act* and the *FTA*. Each of these Acts has limited extraterritorial jurisdiction. These Acts can apply to conduct by corporations outside New Zealand if that conduct adversely affects competition (or, if relevant, violates consumer protection provisions) in domestic markets. However, this extraterritorial reach applies only in circumstances where the corporation is either incorporated or carries on business in New Zealand.

## I.10 Potential Financial Incentives for Corporate Human Rights Compliance

585. We are not aware of any specific financial incentives for human rights compliance in New Zealand law.

586. Several incentives exist, however, for corporations to behave in an environmentally conscious manner. The New Zealand Government has, for example, developed the 'Projects to Reduce Emissions Programme' (the **Programme**) to support initiatives that will reduce emissions of greenhouse gases.
587. The Programme supports initiatives that will reduce greenhouse gas emissions over the first commitment period of the Kyoto Protocol (2008 – 2012) beyond the reductions that would have occurred without the project, by awarding them emissions units, or "carbon credits". Emission units are internationally tradable and add to the financial value of a project that will reduce greenhouse gas emissions. They are available for projects that are additional to business-as-usual, which means that they help bring forward projects that would not otherwise be economic. In order to be eligible for the award of emission units, the tendered project must pass through a number of tests to determine their economic and environmental credentials.<sup>445</sup>
588. Projects must also take place in New Zealand and result in a reduction in the total greenhouse gas emissions that will be reported by New Zealand in the greenhouse gas inventory. However, the country of origin of the applicant is not a factor in the assessment. International firms are able to participate in the tender, either directly or indirectly by way of a relationship with a New Zealand-based company.<sup>446</sup>

#### **I.11 Legal Liability Arising from Published Business Practice Standards**

589. We are not aware of any findings of legal liability of corporations in New Zealand arising from their published business practice standards. We note, however, that section 13 of the *FTA* provides that a person<sup>447</sup> shall not 'in trade, in connection with the supply or possible supply of goods or services or with the promotion by any means of the supply or use of goods or services' make any false or misleading representations as to particular characteristics of the good or service. Section 13 may potentially be contravened in circumstances where a corporation makes misleading or false statements about its ethical practices, for instance by falsely representing that its product was not manufactured using child labour.

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<sup>445</sup> See New Zealand Climate Change Office, at <<http://www.climatechange.govt.nz/policy-initiatives/projects/index.html>>.

<sup>446</sup> Ibid.

<sup>447</sup> 'Person' is defined in s 2 of the *FTA* to include 'any association of persons whether incorporated or not'.

**I.12 Consideration of New Zealand Jurisdiction by Other Relevant Jurisdictions**

590. When deciding a *forum non conveniens* issue as to whether proceedings should more appropriately be brought in Australia or New Zealand, Australian courts are of the view that 'substantial justice will be done' in New Zealand.<sup>448</sup>
591. United States Courts appear to have taken a similar view of the New Zealand court system.<sup>449</sup>

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<sup>448</sup> *James Hardie Industries Pty Ltd v Grigor* (1998) 45 NSWLR 20 at 40. See also *Reese Bros Plastics Ltd v Hamon-Sobelco Australia Pty Ltd* (1988) 5 BPR 11,106; *Bates v McDonald* (1985) 2 NSWLR 89.

<sup>449</sup> See, for example, *Lueck v Sundstrand Corp.* 236 F. 3d 1137 at 1143-45 (9<sup>th</sup> Circ. 2001); *Jones et al. v Raytheon Aircraft Services Inc.* No. 04-02-00279-CV, 2003 WL 21919598 (Tex. App., San Antonio, August 13, 2003).



## J. PAPUA NEW GUINEA

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### J.1 Executive Summary

592. The Independent State of Papua New Guinea (**PNG**) has entrenched a number of human rights in its Constitution. Constitutional rights consist of *fundamental rights* that apply to every person in PNG, and the *remaining rights* which may be restricted or regulated by law in certain circumstances.
593. Constitutional rights may be asserted by either individuals or corporations against the State. It is not clear whether the Constitution imposes human rights obligations on corporations.
594. Human rights standards are also contained in a number of other PNG statutes that deal with matters such as criminal law, employment, labour, indigenous issues and land.
595. Corporations have consistently asserted their Constitutional rights, and have successfully relied upon the right to freedom, the right to protection of the law and the right to freedom of expression.
596. Individuals have also asserted their Constitutional rights against the State and, less commonly, against corporations in the context of corporate activity. The right to freedom of information and the right to protection from unjust deprivation of property have been argued by individuals in cases against the State to enforce these rights in connection with corporate activity.
597. PNG has also signed and, in a number of instances, ratified a range of international human rights instruments and incorporated many of their provisions into its domestic law. In one case, international human rights standards were used by a court to establish a minimum standard of police conduct when regulating illegal activity on a mining site. The international human rights obligations were imposed upon the Department of Mining, directing them to ensure police do not use excessive force, rather than on the corporation engaged in mining.
598. The extent to which a corporation can be found criminally liable is the subject of legal debate in PNG. While there has been some judicial consideration of whether a corporation is capable of having "criminal intent", this has not been conclusively determined. "Complicity" has only been applied to individuals or groups engaging in criminal activity.
599. With respect to civil liability, a company can be liable itself for the breach of a duty it owes and it can also be vicariously liable for breaches of its employees and agents.
600. There is no discussion of "sphere of influence" in the law of PNG.
601. The only PNG legislation which seeks to exercise extraterritorial jurisdiction in the context of corporate activity of transnational corporations (**TNCs**) is the *Compensation (Prohibition of Foreign Legal Proceedings) Act 1995*, which prohibits persons from pursuing legal proceedings in foreign courts for compensation arising from mining projects.
602. The PNG court system has been considered to be effective by courts in Australia and the United States in the context of *forum non conveniens* applications.

## J.2 Overview of Legal system of PNG

### (a) PNG - Background

603. Located in the South West Pacific Ocean, PNG is a constitutional monarchy and a member of the Commonwealth. Having been colonised in the late 1800s, it gained its independence from Australia on 16 September 1975.
604. More recently, a secessionist revolt commenced on the PNG island of Bougainville in 1988 and was resolved in 1997, with Bougainville being declared an autonomous region shortly thereafter. Bougainville elected its first President in June 2005.
605. PNG has had to address problems of governance, corruption<sup>450</sup> and other law and order issues.

### (b) Law of PNG

606. The law of PNG consists of the Constitution, ordinary statutes enacted by Parliament or adopted at Independence from overseas jurisdictions and judge made law.
607. The Constitution was enacted at Independence and is entrenched, meaning that its provisions overbear any statutory enactments which the courts find to be inconsistent with it. Statute law is largely adopted from overseas jurisdictions, in particular from England and Australia.
608. The Constitution declares the "underlying law" – that is, the separate common law of PNG – to consist of customary law derived from the custom of the various peoples of PNG and the common law of England as it stood at the date of PNG's Independence. In practice, the courts have found great difficulty in developing the common law by applying traditional custom in a modern legal system and so the development of the underlying law has relied more so on either English law prior to Independence or the common law of England and Australia post-independence. In recent years, however, increased efforts have been made to incorporate customary law into judicial decision-making.

### (c) The Judiciary

609. The judicial system consists of Village Courts, District Courts (located in urban centres and presided over by stipendiary magistrates), the National Court (which is the superior trial court) and the Supreme Court (which is functionally an appellate division of the National Court). The Supreme Court also has jurisdiction under the Constitution to give advisory opinions, called "references" on the constitutionality of legislation.
610. Advocacy follows the conventions of English common law and so is adversarial rather than inquisitorial.
611. The role of the judiciary has been pivotal in the constitutional development of PNG. Many of the traditional roles of the judiciary have been given constitutional status in PNG, unlike

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<sup>450</sup> The World Bank. Papua New Guinea Interim Country Assistance Strategy 2006. Chapter III Development Challenges and Plans. <http://siteresources.worldbank.org/INTPAPUANEWGUINEA/Resources/III-Development-Challenges-Plans.pdf>

in other common law jurisdictions. These include judicial law making and the enforcement of human rights.

612. In general, even though the judiciary is operating in a weak governance environment, it has maintained a reputation for independence, impartiality and consistency.
613. Notably there is a constitutional limit on the independence of the PNG judiciary that permits the Parliament to give directions to any court, by passing legislation, on the exercise of judicial powers or functions (s157).

#### **(d) Transnational Corporations in PNG**

614. The resources sector is the principal sector in PNG in which TNCs operate.
615. PNG is richly endowed with natural resources, though exploitation of these resources has been hampered by rugged terrain, the high cost of developing infrastructure, serious law and order problems and a system of land title which has often made identifying the owners of land for the purpose of negotiating appropriate agreements problematic. Nevertheless, mineral deposits, including oil, copper and gold account for over 70% of export earnings.<sup>451</sup>
616. TNCs have been operating in the resources sector in PNG for over 50 years. Placer Dome, for instance, has had a presence in PNG since the 1920s.<sup>452</sup>

### **J.3 Human Rights Law Obligations of Corporations in PNG**

#### **(a) History of Human Rights and Corporations in PNG**

617. Numerous commentators, including PNG's Constitutional Planning Committee, state that the development of human rights law in PNG has been strongly informed by a number of historically altering events experienced by the nation including colonisation and the introduction of TNC activity, particularly in the natural resources sector. As a result, human rights law in PNG has a comparatively strong emphasis on indigenous land rights and labour rights.<sup>453</sup>

#### **(b) Human Rights in the Constitution**

618. At Independence, in September 1975, the concept of human rights was an important issue among newly emerging states in the South Pacific, including PNG, which has entrenched human rights in its Constitution. PNG's Constitution today contains the following rights and freedoms:
- right to freedom (s 32);
  - right to life (s 35);
  - freedom from inhuman treatment (s 36);
  - protection of the law (s 37);

<sup>451</sup> [http://en.wikipedia.org/wiki/papua\\_new\\_newguinea](http://en.wikipedia.org/wiki/papua_new_newguinea) (page 6 of 10).

<sup>452</sup> <http://www.placerdome.com/operations/png.htm>

<sup>453</sup> Final Report of the Constitutional Planning Committee – 5/3/03

- liberty of the person (s 42);
  - freedom from forced labour (s 43);
  - freedom from arbitrary search and entry (s 44);
  - freedom of conscience, thought and religion (s 45);
  - freedom of expression (s 46);
  - freedom of assembly and association (s 47);
  - freedom of employment (s 48);
  - right to privacy (s 49);
  - right to vote and stand for public office (s 50);
  - right to freedom of information (s 51);
  - right to freedom of movement (s 52);
  - protection from unjust property deprivation (s 53);
  - special provisions in relation to certain land (s 54);
  - quality of citizens (s 55); and
  - freedom from slavery (s 253).
619. The rights to life, freedom from inhuman treatment, protection of the law and freedom from slavery are considered *fundamental rights* and apply to every person in PNG regardless of their race, ethnicity, colour, creed, religion or sex. The rights listed from s 42 to s 55 are *qualified rights* which may be restricted or regulated by law in certain circumstances, subject to s 38 of the Constitution.
620. The Constitution empowers the National and Supreme Courts to enforce and grant compensation for the breach of the human rights enshrined in the Constitution (s 57, s 58 and s 162(1)(b)). There has been some discussion that this enforcement role should be extended to District Court level to increase access to justice in this regard. In general, though, the judiciary has demonstrated a promptness in dealing with abuses of human rights and ordinary PNG citizens have been quick to invoke their rights under the Constitution.<sup>454</sup>
621. The Constitution, at s 34, specifically states that the fundamental and qualified rights contained in the Constitution from s 32 to s 54, apply as far as may be:
- as between individuals as well as between governmental bodies and individuals;
  - to and in relation to corporations and associations in the same way as it applies to and in relation to individuals
  - except where or to the extent that the contrary intention appears in this Constitution.

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<sup>454</sup> Kwa, E. *Constitutional Law of Papua New Guinea*. Sydney. LawBook. p103



622. The fact that a corporation can access the basic rights and freedoms in the PNG Constitution is also entrenched at s 22 of the Constitution, which states that 'the provisions of this Constitution that recognise rights of individuals include corporations and associations'.
623. While, in accordance with s 34, all the rights listed from s32-54 apply in the context of corporate activity, only some of those rights have been applied in that context.
624. Also, while s 34 may be read as imposing human rights obligations on individuals, government bodies and corporations, when read in conjunction with s 22 it is unclear if the Constitution imposes human rights obligations on corporations or rather simply entitles corporations to access and enforce those human rights that are available to individuals. This is further discussed at 1.6 below.

**(c) Human Rights in Other Domestic Law**

625. Human rights standards are contained in a number of other PNG statutes including, for instance, in its *Claims By and Against the State Act*, *Criminal Code*, *Defamation Act*, *Discriminatory Practices Act*, *Employment Act*, *Fairness of Transactions Act*, land related legislation, *Mining Act*, *Oil & Gas Act*, the *Underlying Law Act 2000* and the *Village Courts Act*.
626. Given the breadth of judicial consideration of this legislation, this brief concentrates on the judicial consideration of the express human rights contained in the Constitution and incorporated from international law.

**(d) Common Law and Custom**

627. Human rights standards are also contained in the traditional range of common law and customary law rights that are available in PNG, unless excluded by statute. These include, for instance, the common law prohibition on trespass and customary law provisions pertaining to marriage.

**(e) International Human Rights Law in PNG**

628. International human rights law is incorporated into PNG's law where PNG has signed or ratified an international legal instrument and has then given effect to its resulting obligations through domestic law.

The following international human rights laws have been ratified by the State of PNG (note this does not include international environmental law):

- ICERD (entered into force in PNG on 26 February 1982 and brought into effect through rights contained in PNG Constitution) *NB: ICERD post dates the Constitution*;
- CEDAW (entered into force in PNG on 11 February 1995 and recognised in the rights contained in the PNG Constitution);
- the *International Labour Organisation Declaration on Fundamental Principles and Rights at Work 1998* (PNG is a member state of the ILO); and
- *Convention Against Corruption* (signed 22 December 2004 but not yet ratified).

629. Amongst other international instruments, PNG has not yet ratified the ICCPR, ICESCR or the *International Labour Organisation Convention 169: Concerning Indigenous and Tribal Peoples in Independent Countries*.

#### J.4 Criminal Liability of corporations in PNG

##### (a) PNG's *Criminal Code* - Application to Corporations

630. Whether corporations can be held liable for criminal acts is still a subject of legal debate in PNG, with the provisions in the *Criminal Code* that relate to companies generally seeking to hold directors and relevant employees criminally liable for commission of criminal acts and omissions .
631. In accordance with the *Interpretation (Interim Provisions) Act 1975*, companies have become recognised as legal 'persons'. With respect to criminal liability, however, in general a distinction can be drawn between minor offences of a regulatory kind, where criminal intent need not be established and for which corporations have been found liable, and other offences which require intent.
632. There has been some judicial consideration of 'corporate intent' with regard to the liability of a corporation for the actions of its employees. In *Bromley and Manton Pty Ltd v Eremas Andrew* [1978] PNGLR 498, Pritchard J discussed the application of s 24 of the *Criminal Code* entitled *Intention: Motive* in the context of corporations. This section provides that a "person" is not criminally responsible for—
- a) an act or omission that occurs independently of the exercise of his will; or
  - b) an event that occurs by accident.
633. Though discussing an offence under the *Prices Regulation Act 1949*, rather than under the *Criminal Code*, Pritchard J held that where the company has delegated the responsibility of the conduct of its business to an employee:
- the will of that employee is the will of that company; and knowing the law to have been broken by its employees through receipt of warning notices, it permitted that situation to continue, and the offences could not be said to have occurred 'independently of the will' of the appellant.

His Honour also noted that in England the criminal responsibility of companies for the acts of their servants or agents has turned on the principles of the extent of delegation of authority and scope of employment. As a common law country, the development of PNG law will often derive from sources such as UK jurisprudence.

634. Other provisions in the *Criminal Code* that relate to corporate activity include:
- s 35 – offences by partners and members of companies with respect to partnership or corporate property;
  - s 414 – directors and officers of corporations fraudulently appropriating property, keeping fraudulent accounts or falsifying books of accounts;
  - s 478 – circulating false copies of rules or lists of members of societies or companies;
  - s 505 – concealment by officers of companies on reduction of capital; and

- s 506 – falsification of books of companies.

635. The above provisions seek to hold individual persons liable for the various offences therein and not the company itself.

**(b) Other Forms of Corporate Criminal Liability**

636. We are not aware of any legal avenues outside of the *Criminal Code* by which corporations might be held liable for criminal activity in PNG.

**J.5 Civil Liability of Corporations in PNG**

637. As stated in the previous section, the *Interpretation (Interim Provisions) Act 1975* provides that companies incorporated by registration have the legal capacity of a natural person. As a result, they are subject to civil liability. A company can be directly liable for any breach of a duty that it owes and it also can be vicariously liable for the torts of its employees and agents.

638. Where direct liability of the corporation depends upon relevant corporate intent, this must be established on the part of "the directing will and mind" of the corporation. As discussed in the previous section, there has been some judicial consideration of "corporate intent" with regard to the liability of a corporation for the actions of its employees in PNG. In the case of *Bromley* (cited above), Pritchard J stated that where a company has delegated the responsibility of the conduct of its business to an employee, the will of that employee is the will of that company.

639. A company may also be found to be vicariously liable for the wrongful acts or omissions of its employees or agents, even if the specific act or omission was unknown to the corporation at the time it occurred. As this liability does not depend upon proof of any actual wrongdoing by the corporation, it is a form of strict liability ie. the corporation cannot escape liability by proving lack of negligence or intention to cause harm on its part. This form of liability arises under the principles of tort law and can also be created by statute.

640. A common form of vicarious liability is when an employer is responsible for the torts of an employee which are committed in the course of employment. Vicarious liability can also be imputed to a principal where his or her agent commits a tort whilst acting in a representative capacity.

**J.6 Relevant Findings/Decisions of Judiciary in Connection with Corporate Activity**

**(a) Judicial Consideration of Constitutional Human Rights in Connection with Corporate Activity**

641. The PNG judiciary has an active history with respect to the enforcement of constitutional freedoms and rights in the context of corporate activity. The following is an analysis of the judgments dealing with constitutional rights that have been applied in connection with corporate activity.

**(i) Right to Freedom – s32**

642. Section 32(1) defines the concept of freedom:

Freedom based on law consists in the least amount of restriction on the activities of individuals that is consistent with the maintenance and development of PNG and of the society in accordance with this Constitution.

This right has most frequently been invoked by individuals against the State as a result of brutality by police (see, for instance, *The State v Jessie Amalakwin (No. 1)* National Court Judgment numbered and reported 17 December 1996; *Helen Bia Sam v Paul Haurom* [1998] PNGLR 346).

643. The only judicial reference to s 32 of the Constitution in the context of corporate activity is in the case of *The State v NTN Pty Ltd and NBN Limited* [1992] FNGLR1. In this case, the applicant, NTN Pty Limited, had been granted a licence by the State to establish a commercial television station in PNG. The station was due to commence broadcasting in July 1986, but as a result of a change in government and the introduction of new legislation, television broadcasting was prohibited until January 1988. NTN claimed this was a breach of its right to freedom of expression. The National Court found in favour of NTN Pty Limited. In doing so, the right to freedom of expression was interpreted by reference to the definition of the fundamental right to freedom contained in the Constitution, reinforcing the notion that these freedoms should not be regulated or restricted if avoidable (see freedom of expression – s 46 below).

**(ii) Protection of the law – s37 – a fundamental right**

644. Section 37 of the Constitution originates from the European Convention on Human Rights (*Premdas v Independent State of PNG* (1979)).
645. There are a number of aspects to this right including that:
- nobody may be convicted of an offence that is not defined by law;
  - a person charged with an offence shall be afforded a fair hearing within a reasonable time by an independent and impartial court;
  - a person charged with an offence shall be presumed innocent until proven guilty according to law;
  - a person shall be permitted to defend himself before the court in person or by a legal representative; and
  - the right of review of conviction and sentence by a higher court or tribunal.
646. The right not to be tried again for an offence following acquittal by a competent court, as required by s 37(8), was discussed in the context of corporate activity in the case of *Koai Keke v PNG Colour Laboratories* [1992] PNGLR 265. In this case, Keke, an employee of PNG Colour Laboratories, appealed a decision of a lower court which had found that PNG Colour Laboratories had not unfairly dismissed Keke. The company defended the appeal by proclaiming its right under s 37(8) not to be tried again for an offence for which it has already been acquitted. The company's right was upheld.
647. Section 37(11) and (12) were considered in the context of corporate activity in the case of *Amadio Pty Ltd v The State, Patterson Lowa, Isaac Moke and Mt Kare Holdings* [1992] PNGLR 218. In this case, the Minister for Minerals and Energy, using his statutory power, granted prospecting authorities to Mt Kare Holdings. The plaintiff submitted that it had

applied for the prospecting authority over the land the subject of the grant, and further that it was a company owned by persons who claimed to have an interest according to custom in the land. Mt Kare Holdings Pty Ltd sought leave to appear at the initial application of the plaintiff to have the decision to grant the prospecting authority judicially reviewed. Such an appearance was not usual legal process. The court discussed the basic constitutional rights of a fair hearing of any matter by any court or similar body, and the requirement for any court or authority to hold its hearings in public – s37(11) and (12) respectively. Consequently, the defendants were allowed to have legal representation at this early stage of the application.

**(iii) Freedom of expression – s46 – a qualified right**

648. Freedom of expression has primarily been relied upon in the context of claims of defamation. However, in the NTN case, referred to in paragraph 51 above, the imposition of a postponement of commencement of broadcasting was found to comprise a breach of the right to freedom of expression under s46 of the Constitution, more specifically the right to freedom of mass communication media.

**(iv) Freedom of assembly and association – s47 – a qualified right**

649. This right gives every person in PNG the right peacefully to assemble and associate, and to form or belong to, or not to belong to, political parties, industrial organisations or other associations. As a qualified right, this freedom can be restricted or regulated by law.
650. In *Steamships Trading Co Limited v Ruba Leva* [1988-89] PNGLR 248, this right was relied upon by an individual who was dismissed from employment allegedly on the grounds of absence from the workplace due to attending an industrial union meeting. The appeal was upheld on a number of grounds, including that dismissal of the employee was "unfair in view of the right to assemble, associate and belong to an industrial association guaranteed by s47 of the Constitution".
651. We are not aware of any other instances where s 47 has been enforced to address circumstances in which a corporation has sought to prevent an individual or group engaging in industrial activity or other activity involving assembly.

**(v) Right to Freedom of Information – s52 – a special right of citizens**

652. This right was asserted by landowners in *Kuberi Epi Others v Turama Forest Industries and the State* [1998] PNGLR 87 where the landowners claimed they had not been properly informed of negotiations between the developer and the State as they had not been provided with the contracts governing this development. The court held that as the landowners were not a party to the negotiations between the developer and the State, they could not have access to the document requested. The document requested was a private contract of a commercial nature and as such was confidential.

**(vi) Protection from unjust deprivation of property – s53 – a special right of citizens**

653. The right to protection from unjust deprivation of property was entrenched in the Constitution as a result of the Constitutional Planning Committee's concern to protect indigenous land rights in PNG, which was a contentious issue before and after independence.

654. Section 53 provides that possession may not be taken of any property, except in accordance with an act of Parliament and unless the property is required for a public purpose, or a reason justified in a democratic society. This is a special right only afforded to citizens of PNG.
655. This right was relied upon by a naturalised citizen to receive "just compensation" for the expropriation of property, in the case of *Frame v The Minister for Lands, Surveys and Environment* [1979] PNGLR 626. In this case, a coffee plantation was compulsorily acquired under the provisions of the *Lands Acquisition Act 1974*.
656. Notably, in discussing whether the right should only be afforded to automatic citizens of PNG, Kapi J stated in his judgment:
- ...These provisions are consistent with the intentions of the founding fathers of our Constitution. They recognized that there was an element of control of the economy by foreigners and the impact of multi-national corporations on this country before Independence, and their desire was for Papua New Guinean automatic citizens to take control of their own economy after Independence.
657. This right was also relied upon, albeit unsuccessfully, by citizens of PNG who had taken possession of vacant land that was the subject of a lease by the State to a company, PNG Ready Mixed Concrete Pty Ltd. In *PNG Ready Mixed Concrete Pty Ltd v The Independent State of PNG* [1981] PNGLR 396, Miles J of the National Court held that an order which had the effect of depriving the occupants of their right to possession did not amount to a compulsory taking of property under s53 of the Constitution, as s53 provides the just compensation to be made by an expropriating "authority". A company seeking to enforce its right to possession could not be categorised either as an "authority" or as engaging in an act of expropriation.
658. The decision that a company was not an 'authority' might be read as supporting the contention that corporations are not considered to be subject to the human rights obligations prescribed in the Constitution.

**(b) Judicial Consideration of International Human Rights Law in the Context of Corporate Activity**

659. We are only aware of one instance in which international human rights law has been considered by the courts in the context of TNC activity. In the case of *Placer Dome (PNG) Limited v Director of the Department of Mining* the National Court made orders that the Department of Mining, in implementing an action plan to address illegal mining at the Porgera mine site, abide by international human rights standards regarding the use of force.
660. The court-endorsed action plan to address illegal mining, to be implemented by the Department of Mining in conjunction with the Porgera Joint Venture and the Royal Papua New Guinea Constabulary, includes the United Nations Development Program providing human rights training to PNG police seconded to the project. This training covers the *US/UK Voluntary Principles on Security and Human Rights* and the *UN Code of Conduct for Law Enforcement Officials*.

661. The action plan also requires that all police and security force activity undertaken to address illegal mining be conducted in accordance with the standards contained in these international instruments.

**(c) Principles That May Be Derived From Litigation in PNG**

662. As seen from the preceding outline of those human rights entrenched in the Constitution, and from the international human rights instruments recognised by PNG, it is clear that PNG possesses a relatively extensive legal framework whereby human rights may be enforced by, or potentially against, corporations with respect to their activity in PNG.
663. However, it is clear that corporations have been more forthcoming and successful in enforcing their rights as against the State than have individuals or groups in enforcing their constitutional rights as against corporations. This could be a result of the lack of clarity as to whether the Constitution imposes human rights obligations on corporations.
664. While there has been relatively regular reliance on this constitutional human rights regime by both individuals and corporations in the context of corporate activity, there have not been sufficient instances of enforcement of any of the rights contained in the Constitution in this context to have established a body of jurisprudence and settled principles of law in PNG regarding the human rights obligations of corporations.

**J.7 Human Rights Related Investigations/Prosecutions of Corporations in PNG**

665. The Anti-Discrimination and Human Rights Unit of the Ombudsman Commission of PNG was established in May 2005, specifically to enable the Ombudsman Commission to investigate and report on allegations or instances of discrimination and human rights abuse. The Anti-Discrimination and Human Rights Unit claims to have a constitutional mandate to investigate human rights violations both in the public and private sectors.
666. Where the Commission investigates and draws the conclusion that a particular individual's rights have been infringed, it has power to impose such penalties as are prescribed by law. It does not have the prerogative to award damages to the victim outside the confines of the law. It may, however, make recommendations and seek the assistance of the courts and the constabulary to effect its purpose.
667. To the best of our knowledge, the Ombudsman Commission has not yet undertaken any investigation into human rights violations alleged to have occurred in connection with corporate activity.

**J.8 If and How "Complicity" and "Sphere of Influence" are Understood in Domestic Courts**

**(a) Complicity**

668. As far as we can ascertain, the concept of "complicity" has only been judicially applied in PNG in the context of individuals or groups undertaking criminal activity. We are not aware of any instances where the concept of complicity has been applied in connection with corporate activity.

669. The legal definition of complicity that is currently in use in PNG is drawn from s 7 of the *Criminal Code (Chapter 262)*. This section states that when an offence is committed, those persons who are deemed to have taken part in committing the offence and to be guilty of the offence and who may be charged with actually committing it include:
- every person who actually does the act or makes the omission that constitutes the offence;
  - every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;
  - every person who aids another person in committing the offence; and
  - any person who counsels or procures any other person to commit the offence.
670. To date, this section of the *Criminal Code* has not been applied in connection with corporate activity. As stated above, whether corporations can be held liable for criminal acts is still a subject of legal debate in PNG. The provisions in the *Criminal Code* that relate to companies generally seeking to hold "responsible" directors and relevant employees for acts and omissions committed.
671. The term complicity has also not been applied in the context of corporate activity at common law in PNG.

**(b) Sphere of Influence**

672. With respect to the concept of "sphere of influence", as a result of its political origins, there is no direct point of reference for this concept in the law of PNG.
673. The legal doctrine that is perhaps conceptually closest is the common law doctrine of "duty of care", which serves to define the extent of interests that are protected when the tort of negligence occurs. In PNG, this legal doctrine is derived from English common law and as such has been broadly applied in the context of corporations.
674. We are not aware, however, of any instances in which the concept of duty of care has been judicially applied with respect to the impact of a corporation on human rights.

**J.9 Extraterritorial Application of Domestic Laws to TNCs**

675. The only PNG legislation which seeks to exercise extraterritorial jurisdiction with respect to the activity of TNCs is the *Compensation (Prohibition of Foreign Legal Proceedings) Act 1995*. This Act is made pursuant to s 38 of the Constitution, being an act that regulates or restricts a number of the qualified rights contained in the Constitution, namely the right to freedom of conscience thought and religion (s 45 of the Constitution); the right to freedom of expression (s 46 of the Constitution); and the right to peaceful assembly and association (s 47 of the Constitution).
676. The Act prohibits the taking or pursuing of legal proceedings in foreign courts in relation to compensation claims arising from mining projects (s 4), unless the claim is brought to enforce a PNG court judgment or there is a written agreement between the parties.
677. If the Act is contravened and compensation proceedings are taken or pursued in a foreign court in respect of a the compensation claim, that compensation claim will cease to be



actionable in PNG and each act or omission alleged to give rise to that compensation claim will be deemed to have been justifiable in PNG. Further, if the prohibited foreign legal proceedings are taken or pursued, the person taking or pursuing the claim may be subject to a fine or five years imprisonment (s 5). Judgments of foreign courts in respect of those proceedings are not enforceable in PNG (s 6).

678. The term "compensation claim" is broadly defined to include environmental and property claims relating to either a mining or petroleum project, including claims which extend to "any other matter" in connection with those projects.

#### **J.10 Potential Financial Incentives for Corporate Human Rights Compliance**

679. We are not aware of any legislation or government policy in PNG that provides financial incentives to TNCs or other corporations specifically for compliance with human rights standards.
680. There are provisions in the *Environment Act* that require compliance with certain environmental standards in order for a corporation to be granted a permit to exploit natural resources. Also, the *Environment Act* and the *Mining Act* both require that compensation be paid to landowners for deprivation of the use of land or damage to that land. Failure to comply with these provisions can lead to audits and investigations of resource projects, financial penalties for non-compliance and potentially the withdrawal of a corporation's permit or lease.
681. These are the only provisions that we have found that might be characterised as providing some financial incentive to TNCs to operate in accordance with human rights standards.

#### **J.11 Legal Liability Arising From Published Business Practice Standards**

682. We are unaware of any action or potential action against any TNC operating in PNG as a result of actual or alleged misrepresentations with regard to published business practice standards pertaining to human rights.
683. That is not to say, however, that such an occurrence could not eventuate. The law in PNG regarding misrepresentation is derived from and still follows the common law principles developed in England and has been applied extensively in connection with corporate activity (See, for instance, *Kapi J in Wahgi Savings and Loans Society Ltd v Bank of South Pacific Ltd* (unreported judgment of the Supreme Court) (1980) SC 185).
684. As a result, though such an occurrence has not eventuated in PNG, considering the reception of English principles of common law, it remains plausible that a corporation may become the subject of a civil suit for damages resulting from conduct contrary to representations or statements regarding human rights standards published in corporate practice guidelines.

#### **J.12 Consideration of the PNG Jurisdiction by Other Relevant Jurisdictions**

685. The effectiveness of the PNG court system has been considered by courts in Australia and the United States, in the context of *forum non conveniens* applications.
686. In *Australian Power and Water v Independent Public Business Corporation of Papua New Guinea* [2003] NSWSC 1227 (19 December 2003), the Supreme Court of New South

Wales refused to stay a proceeding involving issues affecting PNG, on the basis that New South Wales was not an inappropriate forum. In the course of his discussion McDougall J noted that PNG is a developing country and that the plaintiffs had professed to being afraid as to law and order, or safety, if the proceedings were heard in PNG. However, his Honour held that there was insufficient disparity, in terms of procedural delay and juridical advantage, to distinguish between PNG and New South Wales. His Honour also refused to take the plaintiff's fears about safety into account, because of the plaintiff's earlier willingness to perform relevant contracts in PNG.

687. In an earlier Australian decision, *Maganic v Bougainville Copper Limited* (Unreported, Supreme Court of New South Wales, 27 November 1987), Brownie J of the New South Wales Supreme Court held that a negligence proceeding should be stayed, on the basis that the balance of convenience dictated that the National Court of PNG was the proper forum for the dispute. Justice Brownie noted that the proceeding could be heard some years earlier in PNG than in New South Wales.
688. A more comprehensive review of the PNG court system was undertaken by the United States District Court for the Central District of California in *Sarei & Ors v Rio Tinto* (Amended Order Granting defendants' Motion to Dismiss, 9 July 2002). Judge Morrow concluded that the PNG judicial system is independent and honest, and that the Courts of PNG were an "adequate" forum for adjudication of the dispute, notwithstanding reservations about the availability of class actions and the scope of discovery relative to the United States' legal system.



## K. THE PEOPLE'S REPUBLIC OF CHINA

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### K.1 Executive Summary

689. The People's Republic of China (**PRC**) was founded in 1949.
690. Legislative authority rests with the People's Congress and the State Council is the executive body of the Government.
691. Over the last couple of decades, the PRC has gradually modernised its legal system and now possesses a legislated hierarchy of laws, with the Constitution the highest law within the PRC.
692. The PRC has a nationwide court system with the highest court being the Supreme People's Court. Jurists of the PRC generally follow similar rules to other *Civil Law* jurisdictions. Judicial decisions are not considered official sources of law, although decisions from the Supreme People's Court are often used as guidelines by lower courts.
693. The Constitution has provided for fundamental human rights since 1954. The enforcement of rights contained in the constitution is in the process of gradual development. It has not yet been determined whether rights entrenched in the Constitution may be relied on by or enforced against corporations, though it appears there is scope for this to occur. The capacity of the courts to enforce constitutional rights remains limited.
694. Other than the Constitution, in recent times the PRC Government has enacted various laws which protect certain categories of human rights, particularly in the areas of labor and the environment.
695. International instruments acceded to by the PRC take effect without the need for implementing legislation and override contrary provisions of domestic legislation where the domestic legislation so provides. The PRC has signed or ratified a broad range of international human rights laws.
696. The PRC's *Criminal Law* applies to corporations.
697. The civil liability of corporations is primarily defined in the law entitled *General Principles of the Civil Law of the People's Republic of China 1986 (Civil Law)*. PRC's *Company Law* also places a broad range of civil law obligations on limited liability or joint stock companies and the directors, supervisors and senior managers of those companies. The *Company Law* also provides for civil liability of 'foreign companies'.
698. We are not aware of any judicial decisions concerning constitutional human rights in connection with corporate activity. Judicial decision making that specifically enforce the constitutionally guaranteed rights of individuals is an area of law that is in the early stages of development.
699. There have been numerous proceedings against corporations in the courts in the PRC which effectively deal with non-constitutional human rights, particularly in the areas of labor rights and land rights, and most prolifically, environmental pollution.

700. There are numerous instances where companies operating in the PRC have been investigated or prosecuted for human rights related breaches of environmental or work safety laws.
701. Definitions of complicity are included in both the *Criminal Law* and the *Civil Law*, both of which apply to corporations.
702. There are no direct references to the concept of 'sphere of influence' in the laws of PRC.
703. To the best of our knowledge, the only PRC legislation that provides for extraterritorial jurisdiction over corporations is the *Criminal Law*.
704. We are not aware of any laws or policies of the PRC that place an express obligation on corporations to meet human rights standards in order to gain business advantage.
705. It is possible that a corporation operating in the PRC could be held liable under the PRC's consumer protection laws or the *Anti-Unfair Competition Law 1993* if it publishes business practice standards that do not accurately reflect the conditions of its operations within the PRC. We are not aware of this having occurred to date in the context of corporate human rights standards.

## K.2 Overview of Legal System of the PRC

### (a) The PRC - Background

706. The current ruling government was founded in 1949 when the Chinese Communist Party (**CCP**), led by Chairman Mao Zedong, took power.
707. The PRC is a one-party political system, with the Chinese Government consisting of authorities representing the CCP. All members of the Chinese Government must be members of the CCP.<sup>455</sup>
708. In 1978, the PRC launched its "open door policy" and modernisation program under its new leader, Deng Xiaoping.
709. The PRC joined the World Trade Organisation in November 2001. This was widely viewed as a landmark event in the PRC's long-standing endeavour to pursue economic reform and open up to the outside world.
710. With respect to the PRC's conception of human rights, the Government has stated that:  
the evolution of the situation in regard to human rights is circumscribed by the historical, social, economic and cultural conditions of various nations, and involves a process of historical development. Owing to tremendous differences in historical background...countries differ in their understanding and practice of human rights.<sup>456</sup>

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<sup>455</sup> Marc Rosenberg, "The Chinese Legal System Made Easy: A Survey of the Structure of Government, Creation of Legislation, and the Judicial System Under the Constitution and Major Statutes of the People's Republic of China" (2001) 9 *University of Miami International and Comparative Law Review* 225, 228.

<sup>456</sup> PRC Government White Papers, "Human Rights in China", <http://www.china.org.cn/e-white/7/7-1.htm>.

**(b) Law of the PRC**

711. In 1978, when the PRC launched its 'open door policy', the legal system adopted by the PRC was "an unenforceable collection of political slogans and general principles" and the 1954 Constitution was the only statute in operation.<sup>457</sup> Since then, the PRC has passed laws on a wide range of subjects and has gradually modernised its legal system.
712. Today, the hierarchy of laws in the PRC is defined by the *Law on Legislation of the People's Republic of China 2000* (PRC), as follows:<sup>458</sup>
- the Constitution of the PRC;
  - national laws issued by the National People's Congress (**NPC**);
  - administrative regulations issued by the State Council;
  - local decrees issued by local People's Congresses; and
  - administrative and local rules issued by administrative agencies or by a local People's Government.
713. The Constitution is the highest law within the PRC. The current version was adopted by the NPC on 4 December 1982, with further revisions in 1988, 1993, 1999 and 2004. The 2004 amendments included guarantees regarding private property and human rights. The three previous state constitutions – those of 1954, 1975 and 1978 – were superseded in turn. The Constitution has five sections: the preamble, general principles, the fundamental rights and duties of citizens, the structure of the State and the national flag and emblems of the State.
714. Legislative authority rests with the People's Congress. The supreme legislative authority in the People's Congress is the NPC. Its permanent body is the Standing Committee of the NPC which exercises the NPC's functions and powers as set out in the Constitution.<sup>459</sup>
715. The State Council (the Central People's Government of the PRC) is the executive body of the government of the PRC and is the highest organ of State power and State administration.
716. Since 1979, the NPC and its Standing Committee have enacted legislation on a wide range of topics. China now has a comprehensive scheme of legislation, including national laws, administrative regulations and local rules.
717. In areas where there is no legislation or the laws are incomplete, basic principles are established through policy directives issued by the CCP and through normative documents issued by various organs of government and by the CCP.

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<sup>457</sup> Cohen, J., "China's Legal System in Transition", *People's Daily Online*, 1, <http://english.people.com.cn/>, adapted from Jerome A. Cohen's statement for the Congressional Executive Commission on China Hearing, July 26, 2005.

<sup>458</sup> Law on Legislation of the People's Republic of China 2000 (PRC); see also [http://en.wikipedia.org/wiki/Law\\_of\\_the\\_People's\\_Republic\\_of\\_China](http://en.wikipedia.org/wiki/Law_of_the_People's_Republic_of_China).

<sup>459</sup> Constitution of the People's Republic of China 1982, Article 67.



(c) Judiciary

718. The PRC has a nationwide court system which includes over 3000 basic courts and almost 200,000 judges. From 1949 until recently, the judiciary was comprised of former military and police officers without legal education. Now, however, law graduates are increasingly recruited as judges, as part of a general growth in the culture of legal education in the PRC.<sup>460</sup>
719. According to Article 2 of the *Organic Law of the People's Courts 1980* (PRC) (as revised by the *Decision Concerning Revision of the Organic Law of the People's Courts 1983* (PRC)) the court system of the PRC is structured according to the following hierarchy:<sup>461</sup>
- the Supreme People's Court (or National Supreme Court, or Supreme Court);
  - the higher People's Courts;
  - the intermediate People's Courts; and
  - the basic or local People's Courts.
720. The Supreme People's Court sits in Beijing. The higher People's Courts sit in the provinces, autonomous regions and special municipalities, the intermediate People's Courts sit at the prefecture level and the local People's Courts sit at the level of counties, towns and municipal districts. There are also specialist military, maritime and railway courts.
721. The court system is mirrored by a parallel hierarchy of prosecuting authorities called People's Procuratorates, with the Supreme People's Procuratorate at the top.
722. Jurists of the PRC generally follow similar rules to other *Civil Law* jurisdictions.<sup>462</sup> This is partly attributable to the European influence in the PRC between the nineteenth and twentieth centuries as well as the inheritance by the PRC of the Chinese legal tradition, where statutes or codes were always highly valued and generally efficiently administered and enforced.
723. Judicial decisions may be issued in the form of short opinions – most are limited to a statement of the facts and a legal conclusion. Nevertheless, the PRC courts have issued a large number of interpretations and other documents, either separately or with other agencies, that are the equivalent of supplementary legislation.
724. Judicial decisions on cases are not considered official sources of law, although decisions from the Supreme People's Court are often used as guidelines by lower courts, though they are not compelled to do so.<sup>463</sup>

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<sup>460</sup> Cohen, J., "China's Legal System in Transition", *People's Daily Online*, 1, <http://english.people.com.cn/>, adapted from Jerome A. Cohen's statement for the Congressional Executive Commission on China Hearing, July 26, 2005, 1.

<sup>461</sup> See also [http://en.wikipedia.org/wiki/Law\\_of\\_the\\_People's\\_Republic\\_of\\_China](http://en.wikipedia.org/wiki/Law_of_the_People's_Republic_of_China).

<sup>462</sup> Luo, W. & Liu, J., 'A Complete Research Guide to the Laws of the People's Republic of China', 15 January 2003. <http://www.llrx.com/featuresd/prc.htm>

<sup>463</sup> Luo, W. & Liu, J., 'A Complete Research Guide to the Laws of the People's Republic of China', 15 January 2003. <http://www.llrx.com/featuresd/prc.htm>, 3.

725. As a result, commentators have stated that the judiciary currently lacks the jurisdiction to effect human rights reform at any level and also lacks the institutional capacity to prosecute other human rights breaches.<sup>464</sup>

### **K.3 Human Rights Law Obligations of Corporations in the PRC**

#### **(a) Human Rights in the Constitution**

726. The Constitution of the PRC has provided for fundamental human rights since 1954. In 2004, the PRC inserted a new general provision into its Constitution which states that “the State respects and preserves human rights”, and included guarantees regarding private property.<sup>465</sup>
727. The PRC Constitution contains the following rights and freedoms, most of which are contained in Chapter II, entitled “The Fundamental Rights and Duties of Citizens”:
- Right to private property and to compensation for private property expropriated or requisitioned (Art 13);
  - General provision regarding human rights (Art 33(3));
  - Right to stand for election (Art 34);
  - Freedom of speech, of the press, of association, of procession and of demonstration (Art 35);
  - Freedom of religious belief (Art 36);
  - Right to personal freedom (Art 37);
  - Right to personal dignity (Art 38);
  - Protection of the home (Art 39);
  - Freedom and privacy of correspondence (Art 40);
  - Freedom of speech (Art 41);
  - Right to work (Art 42);
  - Right to rest (Art 43);
  - Right to retirement (Art 44);
  - Right to social security (Art 45);
  - Right to education (Art 46);
  - Freedom to engage in research (Art 47);
  - Gender equality (Art 48);
  - Freedom of marriage (Art 49);

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<sup>464</sup> Freidman, L, ‘Turning to the Courts: Human Rights before the Bench’ – A Review of M. Gibney & S. Frankowski, *Judicial Protection of Human Rights: Myth or Reality?*, (1999), *Harvard Human Rights Journal*, Vol 13, Spring 2000 316.

<sup>465</sup> Constitution of the People’s Republic of China 1982, Articles 13 and 33(3).

- Protection of rights of Nationals abroad (Art 50); and
  - Protection of Private Property (Art 13).
728. The enforcement of rights contained in the PRC Constitution is in the process of gradual development. Historically, it was generally accepted that the Constitution contained the nation's basic guiding principles, outlined the structure of government and set out the rights and duties of citizens, but was not a source of enforceable legal rights.<sup>466</sup>
729. Article 78 of the *Law on Legislation of the People's Republic of China 2000* (PRC) states that "[t]he Constitution is the highest legal authority" and that no law or regulation may contravene it. However, Article 88 provides for the power to "amend or cancel a law, administrative regulation or local regulation". By Article 88(i), the NPC has the power to amend or withdraw any "inappropriate law enacted by its Standing Committee, and to withdraw any autonomous regulation or special rule approved by its Standing Committee in contradiction of the Constitution...". This is the limit of the power to review the constitutionality of laws of the NPC. In practice, it is in any case quite difficult for the NPC to review laws or activities that may be in breach of the Constitution, as meetings of the NPC are only held once a year.<sup>467</sup>
730. The theoretical power to interpret and apply the Constitution, insofar as State Council administrative regulations are concerned, resides in the Standing Committee of the NPC. Article 88(ii) of the *Law on Legislation of the People's Republic of China 2000* (PRC) provides that the NPC Standing Committee has the power to "invalidate any administrative regulation which contravenes the Constitution or any law, and to invalidate any local regulations which contravene the Constitution or any law or administrative regulation".
731. Although we are not aware of any instances where the NPC Standing Committee has directly ruled any of the PRC's administrative regulations to be unconstitutional, it appears that the Standing Committee's constitutional power is being increasingly acknowledged.<sup>468</sup> In 2003, a university graduate named Sun Zhigang died while in police custody. Zhigang had been imprisoned under a State Council regulation on "shelter and repatriation" of migrants. Three law professors petitioned the NPC Standing Committee to declare the regulation unconstitutional. The State Council quickly rescinded the relevant regulation, thereby removing the need for a constitutional decision by the NPC Standing Committee, but nonetheless creating an important precedent of effective enforcement of the Constitution.
732. Notably, the capacity of the courts to enforce constitutional rights remains limited. The courts cannot strike down an NPC law for violation of the Constitution, because of their subordinate position relative to the NPC, and generally do not quote articles from the

<sup>466</sup> Cohen, J., "China's Legal System in Transition", *People's Daily Online*, 1, <http://english.people.com.cn/>, adapted from Jerome A. Cohen's statement for the Congressional Executive Commission on China Hearing, July 26, 2005, 3.

<sup>467</sup> Wikipedia, 'Constitution of the People's Republic of China', [http://en.wikipedia.org/wiki/Constitution\\_of\\_the\\_People's\\_Republic\\_of\\_China](http://en.wikipedia.org/wiki/Constitution_of_the_People's_Republic_of_China) incorporating public domain text from the Library of Congress Country Studies – China <http://lcweb2.loc.gov/frd/cs/cntoc.html>

<sup>468</sup> Cohen, J., "China's Legal System in Transition", *People's Daily Online*, 1, <http://english.people.com.cn/>, adapted from Jerome A. Cohen's statement for the Congressional Executive Commission on China Hearing, July 26, 2005, 3.



Constitution as part of a judgment. However, see the case of *Qi Yuling v Chen Xiaoqi*, discussed below at paragraphs 765 to 767 below, for indications of how modern jurisprudence in the PRC is progressing in this area.

733. It has not yet been established whether the rights entrenched in the Constitution can be relied upon by, or enforced against, corporations. There is no express provision in the Constitution that provides for the application of Constitutional rights in the context of corporate activity. The Constitution does, however, reference State Owned Enterprises, economic organisations and companies, which could be considered to imply that such corporations are at least intended to be able to rely on, and perhaps be subject to, the terms of the Constitution. As stated above, however, there has been very little enforcement of rights granted by the Constitution or other legal action based on the Constitution to assist with determination of this issue.

**(b) Human Rights in Other Domestic Law**

734. In recent times the PRC government has enacted various laws which protect certain categories of human rights.
735. In the area of labor, for instance, the PRC Government has enacted the *Trade Union Law*, 1992, the *Law of the Protection of Woman's Rights and Interests* 1992 (amended with effect from December 2005 to include provisions concerning sexual harassment and domestic violence)<sup>469</sup> and the *Labor Law* 1995 (currently under revision). Obligations regarding the rights and interests of employees are also placed on companies by the PRC's recently revised *Company Law*, which came into force on 1 January 2006. The *Company Law* also places a requirement on company employees to organise and maintain a labor union.<sup>470</sup>
736. Reform in labor law continues to occur. For instance, the Standing Committee of the NPC is also considering an amendment to the *Criminal Law* that would criminalise the concealment of work safety accidents, because of concerns about mining safety (see paragraphs 787 to 788 below).<sup>471</sup> Under the proposal, those found trying to conceal an accident could be imprisoned for up to seven years.
737. In the area of the environment, the Standing Committee of the NPC has approved 13 international conventions and enacted 26 domestic laws over the last 20 years, including, for example, the *Environmental Protection Law* 1989 and the *Environmental Impact Assessment Law* 2003.<sup>472</sup> The PRC's *Civil Law* (discussed below) and its environmental

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<sup>469</sup> International Confederation of Free Trade Unions, *Internationally Recognised Core Labour Standards in the People's Republic of China: Report for the WTO General Council Review of the Trade Policies of the People's Republic of China*, 6 April 2006.

<sup>470</sup> Articles 17 and 18, *Company Law of the People's Republic of China*; "Contracts of workers covered by new law", *China Daily*, 21 March 2006, <http://humanrights-china.org/zt/situation/20040200632791018.htm>.

<sup>471</sup> "China to criminalise accident cover-ups", *Reuters*, 27 April 2006, <http://go.reuters.com/newsArticle.jhtml?type=worldNews&storyID=11981483>.

<sup>472</sup> "26 laws on environmental protection enacted", *Xinhuanet*, 21 November 2005, <http://www.humanrights-china.org/zt/situation/2004020051129134054.htm>.

laws provide that victims of environmental pollution have the right to claim damages from the party or parties whose negligence or misconduct caused the pollution.

738. The PRC Government also passed a *Protection of Cultural Relics Law* in 2002.
739. In the PRC, legal aid is regarded as an important aspect of the constitutional guarantee that all citizens are equal before the law.<sup>473</sup> A Legal Aid Centre is appointed under the auspices of the Ministry of Justice. In 2005, Chinese lawyers gave legal aid to 433,965 litigants in 253,665 cases – increases of 48 percent and 33 percent respectively from 2004.<sup>474</sup>

**(c) International Human Rights Law in the PRC**

740. International treaties acceded to by the Standing Committee of the NPC and the State Council take effect without the need for implementing legislation and will override contrary provisions of domestic legislation where the domestic legislation so provides.<sup>475</sup> For example, Article 142 of the *Civil Law* provides that if an international treaty of the PRC contains provisions differing from those in the PRC's civil laws, the provisions of the international treaty shall apply.
741. The following international human rights laws have been signed or ratified by the PRC (note this does not include international environmental law):
- the CEDAW (ratified by the PRC on 4 November 1980 and entered into force on 3 September 1981);
  - the ICER (ratified by the PRC on 29 December 1981 and entered into force on 28 January 1982);
  - the CAT (ratified by the PRC on 4 October 1988 and entered into force on 3 November 1988).
  - the CROC (ratified by the PRC on 2 March 1992 and entered into force on 1 April 1992.
  - the ICCPR (signed by the PRC on 5 October 1998 and not yet ratified);
  - the ICESCR (ratified by the PRC on 27 March 2001 and entered into force on 27 June 2001); and
  - the *Convention Against Corruption* (2004) (ratified by the PRC on 27 October 2005 and entered into force on 14 December 2005).
742. As stated above at paragraph 737, the Standing Committee of the NPC has also approved 13 international environmental conventions.
743. The PRC was one of the founding members of the United Nations and has been a permanent member of the UN Security Council since 1945.

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<sup>473</sup> See PRC Ministry of Justice Homepage, <http://www.legalinfo.gov.cn/english/LegalAid/LegalAid1.htm>.

<sup>474</sup> "More than 430,000 Chinese receive legal aid in 2005", *Xinhuanet*, 10 January 2006, <http://humanrights-china.org/zt/situation/200402006117154535.htm>.

<sup>475</sup> CCH Looseleaf, *Doing Business in Asia*, ¶20-003.

744. The PRC is also a member of the ILO and has ratified 23 ILO Conventions, including Convention 182 on the Worst Forms of Child Labor, which the PRC ratified on 8 August 2002.

745. The PRC entered into the World Trade Organization in 2001.

#### **K.4 Criminal Liability of Corporations in the PRC**

##### **(a) Application of the PRC's *Criminal Law* to Corporations**

746. Article 30 of the *Criminal Law* of the People's Republic of China 1979 (***Criminal Law***) states that any

"company, enterprise, institution, organisation or group which commits an act endangering society that is considered a crime under the law shall bear criminal responsibility."<sup>476</sup>

747. The *Criminal Law* goes on to state that:

"If a company commits a crime under the *Criminal Law* it shall be fined and those persons who are directly in charge and other persons who are directly responsible for the crime shall receive criminal punishment."<sup>477</sup>

748. The *Criminal Law* sets out a series of criminal offences relating to human rights, including:

- Crimes of property violation (Articles 263-276);
- Crimes of endangering public health (Articles 330-337);
- Crimes of undermining protection of environmental resources (Articles 338-346);
- Crimes of disrupting administration of cultural relics (Articles 324-329); and
- Crimes of Bribery (Articles 382-396).

##### **(b) Corporate Criminal Liability Outside the *Criminal Law***

749. The PRC's *Company Law* also provides that where a company violates the present law that pertains to companies and a crime is constituted, it shall be subject to criminal liabilities.<sup>478</sup>

#### **K.5 Civil Liability of Corporations in the PRC**

750. The primary legislation that enunciates civil law in the PRC is the *General Principles of the Civil Law*.

751. Article 36 states that a "legal person" that is subject to the *Civil Law* includes an organization that has capacity for civil rights and civil conduct, independently enjoys civil rights and assumes civil obligations in accordance with the law. A legal person's capacity for civil rights and capacity for civil conduct is considered to begin when the legal person is established and to end when the legal person terminates.

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<sup>476</sup> *Criminal Law* of the People's Republic of China (***Criminal Law***), Article 30.

<sup>477</sup> *Ibid*, Article 31.

<sup>478</sup> Article 216 of the *Company Law* of the PRC.

752. Under the *Civil Law*, a 'legal person' must have the following qualifications:
- establishment in accordance with the law;
  - possession of the necessary property or funds;
  - possession of its own articles of association, own name, organization and premises; and
  - the ability to independently bear civil liability. <sup>479</sup>
753. The *Civil Law* specifically states that a foreign-capital enterprise established within the PRC will qualify as a legal person if it has the qualifications of a legal person and has been approved and registered by the administrative agency for industry and commerce in accordance with the law. <sup>480</sup>
754. As a legal person, the enterprise shall bear civil liability for the operational activities of its legal representatives and other personnel. <sup>481</sup>
755. According to Article 49 of the *Civil Law*, an enterprise as a legal person shall bear civil or criminal liability, or its legal representative may be given administrative sanctions, for any of the following:
- conducting illegal operations beyond the range approved by the registration authority;
  - concealing facts from the registration and tax authorities, and practising fraud;
  - secretly withdrawing funds or hiding property to avoid repayment of debts;
  - disposing of property without authorisation after the enterprise is dissolved or declared bankrupt;
  - failing to apply for registration and make a prompt public announcement when the enterprise changes or terminates, causing interested persons to suffer heavy losses; or
  - engaging in other activities prohibited by law, damaging the interests of the state or the public interest.
756. Furthermore, under the *Civil Law*, an organisation can be liable for:
- breach of contract (Articles 111-116); and
  - infringement of rights, including property rights, creditor's rights, intellectual property rights and personal rights (Articles 117-133).
757. More generally, a civil action in the PRC is based on determining the civil liability of one party for damage done to the property or person of another. <sup>482</sup> Civil liability depends on the

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<sup>479</sup> General Principles of the Civil Law of the People's Republic of China 1986 (*Civil Law*), Article 37.

<sup>480</sup> Civil Law, Article 41.

<sup>481</sup> Civil Law, Article 43.

existence of civil duties, which may arise from the provisions of the law or an agreement between the parties. The four basic elements which underpin civil liability are as follows: first, a wrongful act; second, a culpable mental state; third, direct causation; and fourth, damage to another party.

758. The law of the PRC recognises certain legal justifications which preclude civil liability – necessity, fault of the injured party/voluntary assumption of risk, self-defence and force majeure (ie. unforeseeable events). If no justification applies and one party is found to have injured another, the remedies which are theoretically available include cessation of infringements, return of property, compensation for losses, payment of breach of contract damages, elimination of ill effects and rehabilitation of reputation, and apology.
759. The PRC's *Company Law* also places a broad range of civil law obligations on a limited liability company or joint stock company established within the territory of the PRC.<sup>483</sup>
760. This includes the requirement that, in conducting business operations, a company:
- shall comply with the laws and administrative regulations, social morality and business morality. It shall act in good faith, accept the supervision of government and general public, and bear social responsibilities.<sup>484</sup>
761. The *Company Law* also places civil law obligations on the 'directors, supervisors and senior managers'<sup>485</sup> to comply with laws, administrative regulations and articles of association. This includes a specific obligation not to take any bribe or other illegal gain by taking advantage of their powers,<sup>486</sup> nor to take secret commissions.<sup>487</sup> An individual violating the law in this way which results in loss to the Company is 'liable for compensation'.<sup>488</sup> The *Company Law* also specifically provides that if a director or senior manager damages the interests of shareholders by violation of any law, the shareholders may lodge a suit in the People's Court.<sup>489</sup>
762. The *Company Law* also provides for 'foreign companies', being those 'established beyond the territory of China according to any foreign law'.<sup>490</sup> A branch of a foreign company established within the PRC does not have the status of a legal person but does bear civil liabilities for the business operations of its branches carried on in the PRC by the laws of the PRC and 'may not injure the social public interests of China'.<sup>491</sup>

<sup>482</sup> Marc Rosenberg, "The Chinese Legal System Made Easy: A Survey of the Structure of Government, Creation of Legislation, and the Judicial System Under the Constitution and Major Statutes of the People's Republic of China" (2001) 9 *University of Miami International and Comparative Law Review* 225, 228.

<sup>483</sup> Article 2 Company Law of the People's Republic of China.

<sup>484</sup> Article 5 Company Law of the People's Republic of China.

<sup>485</sup> Article 148 Company Law of the People's Republic of China.

<sup>486</sup> Ibid

<sup>487</sup> Article 149(6) Company Law of the People's Republic of China.

<sup>488</sup> Article 150 Company Law of the People's Republic of China.

<sup>489</sup> Article 153 Company Law of the People's Republic of China.

<sup>490</sup> Article 192, Company Law of the People's Republic of China.

<sup>491</sup> Article 197, Company Law of the People's Republic of China.

763. Any company found to have breached the obligations contained in the *Company Law* bears 'the corresponding civil liabilities of compensation and shall pay corresponding fines and pecuniary penalties'.<sup>492</sup>

## **K.6 Relevant Findings/Decisions of Judiciary in Connection with Corporate Activity**

### **(a) Overview of Litigation and Judicial Decisions**

#### **(i) Constitutional human rights.**

764. We are not aware of any judicial decisions concerning constitutional human rights in connection with corporate activity. As stated above, it remains to be seen whether the rights entrenched in the Constitution may be relied upon or enforced against corporations.
765. There are very few judicial decisions that have aimed to enforce constitutional provisions in the PRC. However, in what has been termed a "landmark" decision of the Supreme People's Court,<sup>493</sup> the 2001 case of *Qi Yuling v Chen Xiaoqi et al* involved a claim that the defendant Chen Xiaoqi had, with the participation of other defendants including the governmental Education Committee of Tengzhou City, conspired to impersonate the plaintiff Qi Yuling and thereby effectively appropriate the plaintiff's right to an education.
766. According to the report of the case, the Supreme People's Court held that:<sup>494</sup>
- The right to receive education, which Qi Yuling claimed, was based on Article 46(1) of the Constitution. Viewing from the facts of this case, by means of infringing the right of name, Chen Xiaoqi and the other defendants infringed Qi's basic right to receive education that she was entitled to enjoy under the Constitution. Their infringement caused concrete damages, thus they shall bear pertinent civil responsibilities.
767. As a result of this judgment by the Supreme People's Court, the High People's Court of Shandong Province ordered on 28 August 2001 that the defendant Chen Xiaoqi should cease using the plaintiff's name, and that all defendants should provide an apology and monetary compensation to the plaintiff. Also of interest is that the plaintiff was compensated for "serious mental damages from the infringement of her right of name and her right to receive education".
768. As far as we are aware, this is the first occasion upon which a judicial decision sought to specifically enforce an individual's constitutional rights.
769. Although there apparently remains a reluctance among lower courts to base decisions expressly on constitutional rights, lower People's Courts have begun to hear a range of

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<sup>492</sup> Article 215, *Company Law of the People's Republic of China*.

<sup>493</sup> Cohen, J., "China's Legal System in Transition", *People's Daily Online*, 1, <http://english.people.com.cn/>, adapted from Jerome A. Cohen's statement for the Congressional Executive Commission on China Hearing, July 26, 2005, 5. See also Shen Kui, "Is it the Beginning of the Era of the Rule of the Constitution: Reinterpreting China's 'First Constitutional Case'" (2003) 12 *Pacific Rim Law and Policy Journal* 199.

<sup>494</sup> *Qi Yuling v Chen Xiaoqi et al: Dispute Over Infringement of a Citizen's Basic Right to Receive Education Protected by Constitution Through Infringement of Right of Name*, 28 August 2001, <http://www.lawinfochina.com/dispecontent.asp?db=2&id=124>.

anti-discrimination complaints challenging administrative actions against individuals.<sup>495</sup> For example, on two occasions plaintiffs brought suit alleging denial of equal protection of laws and, although their cases were unsuccessful in the courts, the challenged administrative action was terminated. In another two cases, courts have granted relief to plaintiffs without specifying the Constitution as the basis for that relief.

770. This nascent area of law in the PRC, where the judiciary seeks to specifically enforce the constitutionally guaranteed rights of individuals, is just now beginning to develop. It is difficult to assess in greater depth, because of the difficulty in accessing PRC court judgments.

**(ii) Non-constitutional human rights**

771. There have been numerous proceedings against corporations in the courts in the PRC which effectively deal with human rights issues, though not with constitutional rights as such. These non-constitutional rights cases have covered labor rights, land rights and other general human rights, though they have been most prolific in respect of the impacts of environmental pollution. A selection of these cases is presented below.
772. Recently, proceedings have been brought by Chinese victims of Japanese atrocities committed during the Second World War.<sup>496</sup> The proceedings have been brought against the Japanese Government and against Japanese companies that are alleged to have profited from the atrocities. Chinese companies and citizens have donated to a special fund to help cover the costs of these lawsuits and Chinese legal experts believe there is scope for the proceedings to be brought under the law of the PRC.
773. With respect to labor rights, an example of a court-sanctioned mediation of an occupational health and safety and personal injury dispute is the case of Deng Wenping, a migrant worker who contracted silicosis while working in a jewellery factory in Southern PRC.<sup>497</sup> Deng took action against the Perfect Gem & Pearl Manufacturing Company, alleging grossly inadequate workplace safety. In a settlement mediated by the Huizhou Intermediate People's Court and the Boluo County Court, Deng received a total of 230,000 yuan (US\$28,000) in July 2005, having earlier received 90,000 yuan from the company in 2001.
774. With respect to rights pertaining to land, there are numerous published reports of property developers being prosecuted for violent or otherwise forced evictions under national, provincial or municipal regulations that cover the process of forced evictions for governmental or commercial purposes.<sup>498</sup> There are also numerous reports of lengthy delays in forced eviction cases being heard in Court, as was the case with the 'farmers of Zigong', whose land was acquired by local government for the purposes of constructing a

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<sup>495</sup> Cohen, J., "China's Legal System in Transition", *People's Daily Online*, 1, <http://english.people.com.cn/>, adapted from Jerome A. Cohen's statement for the Congressional Executive Commission on China Hearing, July 26, 2005, 5.

<sup>496</sup> "Chinese war victims get legal aid", *China Daily*, 27 February 2006, <http://www.humanrights-china.org/zt/situation/20040200636142637.htm>.

<sup>497</sup> "The short working life of Deng Wenping", *China Labor Bulletin*, 14 February 2006, <http://www.minesandcommunities.org/Action/press925.htm>.

<sup>498</sup> See, for instance, [www.hrw.org/reports/2004/china0304/2.htm](http://www.hrw.org/reports/2004/china0304/2.htm)

'new High-Tech Development Zone'. According to media reports, since 1995 the farmers of Zigong have filed lawsuits in local courts six times without receiving any response to date.<sup>499</sup>

775. On the environmental front, a recent high profile case related to the environmental pollution of the Yellow River in 2005.<sup>500</sup> The Baotou Water Supply Company brought suit after the local irrigation administration of the Hetao region decided to release more than one million tonnes of sewerage produced by two paper mills into the Yellow River. The pollution extended beyond 400 kilometres and disrupted drinking water supply for more than 14 days. After a mediation orchestrated by the court, the administration and the paper mills agreed to pay 2.3 million yuan in compensation.
776. In another broadly reported recent environmental case, in February 2004, the Sichuan Chemical Company Ltd (**Sichuan Chemical**) discharged ammonia nitrate directly into the Tuo River in Sichuan, resulting in the Government shutting off water to millions of people for up to a month. This caused direct economical losses of approximately 300 million yuan and significant environmental damage. The company was fined 1 million yuan by the Environmental Bureau of Sichuan Province.<sup>501</sup> Criminal trials are also in train, discussed below at paragraph 785.
777. An example of individual legal action against environmental impacts of corporate activity is that of Ding Ning, a Harbin citizen who sued the Jilin Petrochemical Company, a subsidiary of China National Petroleum Corporation (**CNPC**), in the Court of Nangang District of Harbin, for pollution of the Songhua River in Harbin in November 2005.<sup>502</sup> Although a spokesperson for CNPC had openly apologised for the pollution, plaintiff Ding Ning persisted in a claim for nominal damages and a court-ordered apology, stating in his pleadings that the contamination of the river 'greatly affected the normal life of Harbin residents'.<sup>503</sup> The results of this case are not known.
778. Collective legal action was also taken as a result of this pollution incident, when several restaurant and public bathhouse owners, together with individual residents, filed a collective lawsuit against the chemical plant that caused the spill in both the Jilin Provincial People's High Court and the Heilongjiang Provincial People's High Court. According to Tanfiu Liu of Freshfields. It remains to be seen whether either court will hear the case.<sup>504</sup>

<sup>499</sup> [www.peacehall.com/news/gb/english/2006/01/2006010403.57.shtml](http://www.peacehall.com/news/gb/english/2006/01/2006010403.57.shtml)

<sup>500</sup> "China punishes water polluters", *CCTV.com*, 1 May 2006, <http://english.cctv.com/program/bizchina/20060105/100663.shtml>

<sup>501</sup> [www.chinalawandpractice.com/default.asp](http://www.chinalawandpractice.com/default.asp)? Page 5Af=F&SID=4375&M=2&Y=2005 Criminal trials are also in train, discussed below at [x]

<sup>502</sup> "China petroleum sued for polluting river", *Xinhuanet*, 25 November 2005, [http://news.xinhuanet.com/english/2005-11/25/content\\_3836253.htm](http://news.xinhuanet.com/english/2005-11/25/content_3836253.htm).

<sup>503</sup> [www.edition.cnn.com/2005/world/asiapcf/11/26/china.city/index.html](http://www.edition.cnn.com/2005/world/asiapcf/11/26/china.city/index.html)

<sup>504</sup> Liu, Tanfiu. 'Pollution of the Songhua River: A Catalyst for Environmental Reform'. [www.freshfields.com](http://www.freshfields.com)



(iii) **International human rights**

779. We are not aware of any instances in which parties to a legal proceeding, judicial proceeding or a judicial decision have made reference to international human rights law in connection with corporate activity.

(b) **Principles That May be Derived from that Litigation**

780. Numerous rights are enshrined in the Constitution and other statutes and codes in the PRC. However, the judiciary does not yet have an established role in enforcing the rights contained in the Constitution and we are not aware of any instances where the NPC or its Standing Committee have enforced those rights.
781. We are not aware of any instances where the human rights contained in the Constitution have been judicially considered in the context of corporate activity.
782. Numerous proceedings have been brought in PRC Courts which deal with the human rights obligations of corporations legislated for outside of the Constitution, particularly in the areas of labor and property and environmental pollution.
783. Many commentators consider the recent increase in the number of successful claims against corporations relating to the impacts of environmental pollution indicates an increased willingness and commitment by the PRC judiciary to more rigorously enforce relevant environmental and tort laws.<sup>505</sup>

**K.7 Human Rights Related Investigations/Prosecutions of Corporations in the PRC**

784. There are numerous instances where companies operating in the PRC have been investigated or prosecuted for breach of environmental or work safety laws.
785. In the recent Tuo River Pollution case, as well as civil action being taken against the company discussed above at paragraph 776, two separate criminal trials were run in relation to the contamination of the Songhua River and hence the water supplies for about one million people. The first of these trials was the prosecution of three managers of Sichuan Chemical: the former general manager, deputy manager and manager of environmental safety, each charged with causing large scale pollution of the Tuo River region. The second trial involved prosecution of three Environmental Protection Bureau officials, charged with criminal negligence in monitoring and supervising environmental protection. Both criminal proceedings were commenced in the Sichuan Chengdu Jinjina District People's Court. Under the PRC *Criminal Law*, if convicted, such crimes can carry a maximum sentence of up to seven years imprisonment.<sup>506</sup>
786. Also, following the Jilin Petro-chemical company pollution of the Songhua River in November 2005, a working group of the PRC's State Council was tasked with investigation of the pollution. Members of the working group were drawn from across PRC Government agencies, including those representing production safety, environmental protection,

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<sup>505</sup> See for instance, commentary by Liu, Tanfu. Ibid.

<sup>506</sup> Barale, L. & Wei Zhou, L., 'The Tuo River Pollution Case', *China Law & Practice*, February 2005.

railways, construction and labor. The results of this investigation are not known.<sup>507</sup> However, at a press conference held prior to the commencement of the investigation, a senior State Environmental Protection Administration official said that the subsidiary chemical plant of the Jilin Petrochemical Company should pay for the environmental damages. In December 2005, the Chinese media reported that Beijing's Saver law firm was preparing a class action to sue Jilin Petrochemical company or even CNPC under either the *Law on Prevention and Control of Water Pollution* or the *Environmental Protection Law*.<sup>508</sup>

787. Another area of concern for authorities in the PRC is mining safety. The CCP is presently targeting unsafe and illegal mines, through six of its administrations – the CCP Central Commission for Discipline Inspection, the Ministry of Supervision, the Commission for Supervision and Management of State-owned Properties under the State Council, the State Administration for Industry and Commerce, the State Administration of Production Safety, and the State Administration of Coal-Mine Safety.<sup>509</sup> The focus of the current strategy is to ensure that officials divest their interests in mining projects – more than 7,000 have done so far – and to close all mines having a production capacity of less than 30,000 tonnes on the principle that a mine of that size is not generally adequately equipped to ensure the safety of its workers.<sup>510</sup> To date, 5,000 unsafe coal mines have been shut down on government orders.<sup>511</sup>
788. Part of the commitment to improving mining safety consists in prosecution of those deemed responsible for mining accidents.<sup>512</sup> For example, in Henan Province, after an accident on 24 May 2003 which killed 15 miners, eight of those blamed for causing the accident were prosecuted for negligence. A manager with the Long'an District Office for Administration of Mineral Resources, who had issued a licence without inspecting the mine, was dismissed from the civil service and faced prosecution. After a massive accident in March 2003 in Shanxi province killed 72 miners, the central authorities issued a record fine of 21.18 million yuan and ordered the mine to close down immediately.

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<sup>507</sup> 'Government work group to probe into river pollution' [http://www.chinadaily.com.cn/english/doc/2005-11/25/content\\_498023.htm](http://www.chinadaily.com.cn/english/doc/2005-11/25/content_498023.htm)

<sup>508</sup> Shaoda, 'Paying the Bill for Songhua River Pollution' December 2005, [www.china.or.cn/english/2005/Dec/150917.htm](http://www.china.or.cn/english/2005/Dec/150917.htm)

<sup>509</sup> Wu Jing, 'Crackdown on officials' mining interest intensifies', *Xinhuanet*, 13 April 2006, [http://news.xinhuanet.com/english/2006-04/14/content\\_4425826.htm](http://news.xinhuanet.com/english/2006-04/14/content_4425826.htm).

<sup>510</sup> Daniel Griffiths, 'The high price paid by China's miners', *BBC News*, 5 April 2006, <http://news.bbc.co.uk/1/hi/business/4879188.stm>.

<sup>511</sup> 'China Legislator Praises Safety in Year of Disasters', *Reuters*, 10 March 2006, <http://www.planetark.org/dailynewsstory.cfm/newsid/35574/newsDate/10-Mar-2006/story.htm>.

<sup>512</sup> 'Continuing Carnage in China's coal mines: Official Responses and recommendations', *China Labor Bulletin*, 6 September 2003, <http://www.china-labor.org.hk/public/contents/article?revision%5fid=18237&item%5fid=3178>.

**K.8 If and How "Complicity" and "Sphere of Influence" Are Understood in Domestic Courts****(a) Complicity**

789. Definitions of complicity are included in both the *Criminal Law* and the *Civil Law* in the PRC. The *Criminal Law* provides in Article 27 that "[a]n accomplice is one who plays a secondary or supplementary role in a joint crime".

790. Article 61 of the *Civil Law* states that:

[If] two sides have conspired maliciously and performed a civil act that is detrimental to the interests of the State, a collective or a third party, the property that they thus obtained shall be recovered and turned over to the State or the collective, or returned to the third party.

791. For a discussion of the application of the *Criminal Law* and the *Civil Law* of corporations see paragraphs 746-748 and 750-756 above respectively.

**(b) Sphere of Influence**

792. There are no direct references to the concept of 'sphere of influence' in the law of the PRC.

793. By way of analogy, there is, however, the tortious doctrine of negligence and resultant liability for damage caused to affected parties.

**K.9 Extraterritorial Application of Domestic Laws to TNCs**

794. To the best of our knowledge, the only PRC legislation that provides for extraterritorial jurisdiction is the *Criminal Law*. The *Criminal Law* states that it is applicable "to all who commit crimes within the territory of the PRC except as specially stipulated by law."<sup>513</sup>

795. It is also applicable to foreigners who, outside PRC territory, commit crimes against the PRC State or against its citizens, provided that the law stipulates a minimum sentence of not less than 3 year fixed term of imprisonment for such crimes. An exception is to be made if a crime is not punishable according to the law of the place where it was committed.<sup>514</sup>

796. Article 146 of the *Civil Law* provides a general legal commitment to the principles of international comity by stating that the law of the place where an infringing act is committed shall apply in handling compensation claims for any damage caused by the act, and that if both parties are citizens of the same country, the law of their own country may be applied.

**K.10 Potential Financial Incentives for Corporate Human Rights Compliance**

797. We are not aware of any laws or policies of the PRC that place an express obligation on corporations to meet human rights standards in order to gain business advantage.

798. From an environmental perspective, however, the PRC's *Environmental Impact Assessment Law 2003 (EIA Law)* places certain requirements on domestic and foreign

<sup>513</sup> *Criminal Law*, Article 6.

<sup>514</sup> *Criminal Law*, Article 8.

investors in relation to the establishment, expansion or change in business plans that could affect the environment of the PRC.

799. Foreign investors are most affected by the EIA Law's section on "construction projects". Under this law, corporations are required to draft Environmental Impact Reports for any "construction projects" that they plan to undertake. "Construction project" includes not only the construction of new facilities, but also the renovation or expansion of existing facilities. The required content of the Environmental Impact Report varies depending on the potential environmental impact of the project.
800. Recently the PRC's State Environmental Protection Administration has begun a corporate reputation incentive scheme to reward environmental performance.<sup>515</sup> The title of "National Environment-friendly Enterprise" has been awarded to 32 enterprises since 2004, in businesses as diverse as power generation, brewing, electronics, paper-making and chemical production.

#### **K.11 Legal Liability Arising in the PRC from Published Business Practice Standards**

801. It is possible that a corporation operating in the PRC could be held liable under the *Anti-Unfair Competition Law 1993 (UCL)* if it publishes business practice standards that do not accurately reflect the conditions of its operations within the PRC.
802. The UCL provides a number of rights of action for businesses whose reputation is harmed through deliberate or reckless misinformation spread by competitors.
803. Of particular relevance is Article 14 of the UCL which provides that business operators shall not fabricate or spread false facts that harm the commercial reputation of competitors or their merchandise.
804. An injured party may institute proceedings directly in the People's Court pursuant to Article 20 of the UCL. Article 20 provides that where a business operator violates any provisions of the UCL, it shall be liable for damages as well as the reasonable expenses incurred by any business operator that has suffered injury as a result of a violation of the UCL and who has the violation investigated. Under the UCL, the Manager bears the responsibility for all violations of the law by a company or enterprise.<sup>516</sup> "Manager" is defined to mean the legal person, the other economic organisations and the individuals who deal with commercial business or profitable service.<sup>517</sup> Therefore it is possible that a Manager's "duty" could be extended so that it is liable for the actions or omissions of its sub-contractors.
805. There are also other broad provisions contained in the PRC's consumer protection laws, *Contract Law* and *Civil Law* which may be relied upon to bring an action for misrepresentation by a corporation regarding its published business practice standards concerning human rights.

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<sup>515</sup> "Government honours 21 enterprises for environmental protection", *Xinhuanet*, 20 October 2005, [http://news.xinhuanet.com/english/2005-10/20/content\\_3656509.htm](http://news.xinhuanet.com/english/2005-10/20/content_3656509.htm).

<sup>516</sup> Anti-Unfair Competition Law of the People's Republic of China 1993, Article 20.

<sup>517</sup> *Ibid*, Article 2.

806. We are not aware of any instances where a corporation in the PRC (Chinese or foreign) has been prosecuted for breaches of the UCL or any other legislation in relation to the publication of business practice standards relating to human rights.

#### K.12 Consideration of the PRC Jurisdiction by Other Relevant Jurisdictions

807. The PRC court system was considered in the context of a *forum non conveniens* application in the United States, by the District Court for the Eastern District of Missouri, on 29 March 2004.<sup>518</sup> The proceeding, *BP Chemicals v Jiangsu Sopo Corporation Group*, involved allegations that the defendant Jiangsu Sopo (**Sopo**) had misappropriated trade secrets belonging to the plaintiff BP Chemicals, in connection with the so-called "921" chemical plant in the PRC. Sopo applied to have the proceeding dismissed on the basis that it ought to be heard in the PRC.
808. The District Court acknowledged that the PRC has laws prohibiting the misappropriation of trade secrets and that a variety of forums might be available in the PRC to entertain the claims made by BP Chemicals. However, the District Court refused to dismiss the proceeding and held that the PRC courts comprised an inadequate forum for the dispute.
809. The main reason for the District Court's decision was concern that the PRC Government would intervene specifically in support of Sopo, a state-owned corporation, rather than any general concerns about the PRC court system. The Court explained that:
- Because the 921 plant is a part of Chinese industry with local, regional and national importance, the likelihood of governmental interference is high. SOPO is a powerful, state-owned enterprise with significant ties to the local Communist Party...
- Both experts agree that when the interests of the State are involved, the law is not always followed. This appears to have already happened – privileged documents held by BP's Chinese Counsel were seized by the Zhenjiang Intermediate Court...Although significant reforms have been undertaken in connection with China's entry into the World Trade Organisation and China has been found to be an adequate alternative forum in other cases, this case is unique in its importance to the Chinese Government. After considering the facts as stated at the hearing and the evidence produced by the parties, I do not believe that BP would be afforded a fair and adequate hearing by the Chinese courts.
810. The District Court subsequently maintained its position, that the PRC was an inadequate forum, notwithstanding that BP Chemicals filed a further proceeding in the PRC.<sup>519</sup>
811. There have also been attempts to take civil action in the US against public officials of the PRC, including former President Jiang Zemin, by members of the Falun Gong organisation. The Falun Gong have brought suit under the Alien Tort Claims Act (US) (**ATCA**) and the

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<sup>518</sup> *BP Chemicals v Jiangsu Sopo Corporation Group* 2004 US Dist LEXIS 27855.

<sup>519</sup> *BP Chemicals v Jiangsu Sopo Corporation Group*, Case No 4:99CV323 CDP, 26 April 2006.

Torture Victim Protection Act (US), claiming torture, genocide and other crimes against humanity.<sup>520</sup> The proceeding against Jiang Zemin was dismissed by the Seventh Circuit Court of Appeals on the grounds of sovereign immunity.

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<sup>520</sup> See, for example, *Wei Ye v Jiang Zemin*, United States Court of Appeals for the Seventh Circuit, Case No 03-3989, 8 September 2004.

## **L. Conclusion**

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812. The UNSRSG stated in his Preliminary Remarks at the World Mines Ministries Forum in March 2006 that:
- human rights impact assessment today is as underdeveloped as environmental impact assessment was a generation or so ago....
813. The same can be said for the legal regimes that exist to hold corporations to account for their direct and indirect human rights impacts.
814. In those countries where human rights are provided for in the State Constitution or human rights dedicated legislation, there is often confusion about whether these rights can be enforced against corporations. This confusion extends to whether enforcement is limited to within the State or if it has extraterritorial reach.
815. As a result of the comparatively extensive development of environmental impact and management laws, it is often indirectly through this avenue that individuals and groups seek to hold corporations accountable for their human rights impacts.
816. This is particularly the case with respect to large scale extractive industries projects operating in the Asia Pacific Region.
817. In those countries where a human rights law regime is not in place, those seeking to hold corporations to account for human rights impacts may also be reliant on more traditional methods of criminal and civil liability. These common law or statutory mechanisms were not necessarily developed with the human rights violations of corporations in mind. While it is true that some of these doctrines have proved particularly flexible in responding to what in recent times has come to be defined as corporate human rights violations, other traditional legal doctrines may not be adequately equipped to accommodate these types of claims.
818. In this respect, development of human rights jurisprudence with respect to corporations has depended to some extent on a judicial willingness to entertain these claims and to engage with innovative uses of existing law.