Corporate Code of Conduct Bill 2000: Overcoming Hurdles in Enforcing Human Rights Obligations Against Overseas Corporate Hands of Local Corporations[†]

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I Introduction

I have argued elsewhere that the introduction of the Corporate Code of Conduct Bill 2000 (Cth)[1] — which sought to impose and enforce internationally recognised human rights standards on the overseas activities of Australian corporations — in the Australian Senate could be defended in principle.[2] It was further contended that the 'lack of practical and effective implementation and enforcement techniques is the

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† This article develops further a theme that I presented in a paper at the *21st Law and Society Conference*, organised by the Justice Policy Research Centre, University of Newcastle, Newcastle, Australia, on 8-10 December 2003. In essence, the article supplements and elaborates on the arguments made, and published as Surya Deva, 'Acting Extraterritorially to Tame Multinational Corporations for Human Rights Violations: Who Should "Bell the Cat"?' (2004) 5 *Melbourne Journal of International Law* 37.

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1 The Corporate Code of Conduct Bill 2000 (Cth) was introduced in the Senate on 6 September 2000. The Bill could not be passed as the Parliamentary Joint Statutory Committee on Corporations and Securities found the Bill to be 'impracticable, unworkable, unnecessary and unwarranted'. See the report of the Parliamentary Committee available at <http://www.aph.gov.au/senate/committee/corporations_ctte/corp_code/report/report.pdf> at 6 October 2003.

2 '[I]t is legitimate and justified for a state to impose and enforce internationally recognised human rights obligations on the overseas activities of corporations incorporated within its territory, as well as the overseas subsidiaries of such corporations, by enacting an extraterritorial law.' Surya Deva, 'Acting Extraterritorially to Tame Multinational Corporations for Human Rights Violations: Who Should "Bell the Cat"?' (2004) 5 *Melbourne Journal of International Law* 37, 65 (hereinafter Deva, 'Who Should "Bell the Cat"?'). Though there the argument was made with reference to both Australian and a similar US Corporate Code of Conduct Bill 2000, it holds true even vis-à-vis the Australian Bill alone, on which I intend to focus in this article.

most problematic aspect of the global search for corporate accountability for human rights violations', and that the Bill hardly did enough to overcome this problem.[3] Though I could briefly point out the significant enforcement-implementation omissions of the Bill,[4] which would have seriously jeopardised the efficacy of the Bill if it were to become a law, the issue required much more detailed consideration. Therefore, the present article.

In the above background, this article intends to achieve two objectives. First, it examines the two most important issues that seriously limit the viability and efficacy of any extraterritorial regime — the Bill in the present case — aimed at the accountability of multinational corporations (MNCs)[5] for human rights violations.[6] The two issues are: the (mis)use of the doctrine of *forum non conveniens* by MNCs to avoid or delay their liability for human rights violations, and the effect of the twin vintage principles of separate personality and limited liability on the question of liability within a corporate group. Regarding the misuse of the doctrine of *forum non conveniens*, I argue that that the Bill should have laid down that the courts will apply a traditional (and restrictive) test to judge the appropriateness of the forum; the Australian courts ought not to dismiss the proceedings on the ground of *forum non conveniens* unless they are satisfied that such proceedings amount to an abuse of process in the sense of vexation, harassment or oppression of involved corporations. On the other hand, to overcome the problems posed by the twin principles of corporate law, the Bill should have based liability within a corporate group on the enterprise principle.[7] Alternatively, it could have followed, what I call, a theory of 'limited eclipsed personality': in cases of alleged human rights violations, the separate personality of the subsidiaries of a

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3 Deva, above n 2, 55.

4 Deva, above n 2, 55-57.

5 An 'MNC', in this article, is taken to mean an economic entity, in whatever legal form, that owns, controls, or manages operations, either alone or in conjunction with other entities, in two or more countries. Despite the difference in terminology of MNCs and transnational corporations (TNCs), 'MNCs' have been used to encompass both the entitites. See generally David C Korten, *When Corporations Rule the World* (1995), 125; Peter T Muchlinski, *Multinational Enterprises and the Law* (1995) 12–15; Cynthia D Wallace, *Legal Control of the Multinational Enterprise* (1982) 10–12 .

6 See Peter T Muchlinski, 'Holding Multinationals to Account: Recent Developments in English Litigation and the Company Law Review' (2002) 23 *Company Lawyer* 168, 169.

7 Whereas the traditional 'entity principle' treats each corporation as a separate person, the 'enterprise principle' treats all the constituent corporations of a group as one legal person, for a particular purpose, provided they are part of an integral business group. Phillip Blumberg, *The Multinational Challenge to Corporation Law: The Search for a New Corporate Personality* (1993), viii-ix (hereinafter Blumberg, *The Search for a New Corporate Personality*); Phillip Blumberg, 'Asserting Human Rights against Multinational Corporations under United States Law: Conceptual and Procedural Problems' (2002) 50 *American Journal of Comparative Law* 493, 494–95 (hereinafter Blumberg, 'Conceptual and Procedural Problems').

corporate group should be eclipsed in that victims should be free to sue the immediate or ultimate parent corporation[8] as a matter of *principle*.[9]

Despite the hardships-mitigating proposals advanced above, it is fair to accept that judicial enforcement of human rights obligations vis-à-vis MNCs will continue to have some limitations. Therefore, as a second objective this article canvasses an alternative non-judicial implementation/enforcement mechanism which does not encounter the difficulties associated with a judicial process. To be precise, I charter a course to involve various societal organs and market constituents — such as non-government organisations (NGOs), media, consumers, investors, shareholders and trade unions — in ensuring that MNCs respect their human rights obligations. In my view, the Bill should have supplemented the judicial (or administrative) enforcement mechanism with non-judicial enforcement initiatives in order to achieve a robust regulatory regime.

However, it might be helpful to indicate a *contextual* signpost for the readers before we proceed further. The arguments advanced in this article should be understood in the context of my quest to formulate an 'integrated theory of legal responsibility'.[10] To be precise, I support and defend an extraterritorial regulatory regime — preferably by home states of MNCs — not as the most ideal or unproblematic framework but only as part of a wider spectrum of regulatory regimes.[11] In my view, the very nature, structure and modus operandi of MNCs make the *coordinated* and *simultaneous* employment of multiple regulatory regimes as well as the multiple regulatory techniques essential.

II Extraterritoriality and the Implementation/Enforcement related Hurdles

In this section first I outline how the Bill sought to implement and enforce extraterritorially the human rights standards against a corporation formed within the limits of the Commonwealth if it 'employs or engages

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[8] As large corporations could have hundreds of subsidiaries, the question will often arise 'should the ultimate holding company be held liable, or should it be an intermediate holding company?' Daniel D Prentice, 'Some Aspects of the Law Relating to Corporate Groups in the United Kingdom' (1999) 13 *Connecticut Journal of International Law* 305, 307.

[9] Borrowing from Dworkin, I use 'principle' in the sense of 'a standard that is to be observed ... because it is requirement of justice or fairness or some other dimension of morality': Ronald Dworkin, *Taking Rights Seriously* (1978) 22.

[10] The theory is *integrated* in that it emphasises the need for employing different modes of implementation (incentives, coercion and market mechanisms) and sanction (civil, criminal and social) at various levels of operation (institutional, national, regional and international), in order to develop an effective as well as efficient regulatory mechanism. The theory is *legal* in that it asserts the need for legally binding obligations and enforcement mechanisms. See Deva, 'Who Should "Bell the Cat"?' above n 2, 46; generally Surya Deva, 'Human Rights Violations by Multinational Corporations and International Law: Where from Here?' (2003) 19 *Connecticut Journal of International Law* 1 (hereinafter Deva, 'Where from Here?').

[11] Deva, 'Who Should "Bell the Cat"?', above n 2, 63

the services of 100 or more persons in a country other than Australia', or is a holding, subsidiary or sister concern of such a corporation.[12] Then I move on to examine the two most critical hurdles which confront any regime of legal responsibility that seeks to make MNCs accountable for human rights violations. But more importantly it is also suggested how these conceptual and procedural difficulties could and should have been dealt with by the Bill to overcome the possible hardships faced by victims of corporate human rights abuses.

A *How the Bill Sought to Implement/Enforce Human Rights Obligations?*

Part 3 and Part 4 of the Bill contained provisions related to reporting and enforcement respectively. Some of the more notable of such provisions are noted below.

1 *Annual Compliance Report*

All the covered overseas corporations were supposed to lodge an annual compliance report to the Australian Securities and Investment Commission (ASIC).[13] Such a report should have contained a statement regarding (i) the environmental impact of the activities of the corporation; (ii) any foreseeable risk factors arising out of corporate activities; (iii) contravention of standards or laws relating to the environment, employment, health and safety, and human rights by the corporation; and (iv) the social, ethical and environmental policies of the corporation.[14] A non-compliance with this provision would have resulted in a criminal penalty — both for the corporation and its executive officers.[15] It is interesting to notice that the ASIC, in turn, was required to prepare an annual report on compliance and forward it to the Treasurer so as to be laid before the Federal Parliament.[16]

2 *Civil Penalties*

A corporation and/or its executive officers found contravening a provision of the Bill was to be liable for a civil penalty.[17] The Bill though had provided for a limitation period of six years, within which the Treasurer, the Attorney General or the Chairperson of the ASIC has to move the federal

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[12] Above n 1, cl 4.
[13] Above n 1, cl 14(1).
[14] Above n 1, cl 14(2). Notably, similar provisions were inserted in the *Corporations Act 2001* (Cth). See below n 118.
[15] Above n 1, cl 14(4)/(5).
[16] Above n 1, cl 15.
[17] Above n 1, cl 16(1)/(2).

court for imposition of such a penalty.[18]

3 *Civil Actions*

The Bill had provided that any person who suffers, or is likely to suffer, loss or damage as a result of the activities of a corporation may bring a civil action for compensation in the federal court.[19] It also empowered the court to grant an injunction to prevent any further as well as future loss/damage.[20] Two facts regarding the standing of a person to approach the court deserve special mention. First, not only a body corporate or an association of persons was given a right to approach the court but also there was no restriction on a non-resident of Australia suing the delinquent corporation/its executive officers.[21] Second, the Bill recognised a *pro bono publico* action by an association or group of persons 'whose principal objects include protection of the public interest'.[22]

B *Bill's Response to Conceptual/Procedural Hurdles: Ignoring the Obvious?*

The Bill though sought to impose and enforce human rights obligations on the overseas activities — through subsidiaries or otherwise — of Australian corporations, it failed to take into account several apparent conceptual and procedural hurdles involved in achieving the intended task. Out of many foreseeable hurdles,[23] two of the most pressing, and common, problems are examined below: the doctrine of *forum non conveniens*, and the principles of separate personality and limited liability. It should be noted that whereas the first difficulty is procedural, the second one is conceptual in nature.

1 *Forum non Conveniens*

The doctrine of *forum non conveniens*, which was evolved to protect a defendant from possible harassment arising from the plaintiff's choice of forum, has become a trump card[24] for the parent corporation of a

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[18] Above n 1, cl 16(3).
[19] Above n 1, cl 17(1)/(2).
[20] Above n 1, cl 17(3)(a)/(4).
[21] Above n 1, cl 17(5).
[22] Above n 1, cl 17(6).
[23] Arguably, there are several other conceptual or procedural difficulties in addition to the two hurdles dealt with in this article, e.g., involvement of large number of victims; disadvantaged position of victims vis-à-vis MNCs; delay involved in determination of questions of liability; enforcement of foreign judgments.
[24] *Forum non conveniens* 'has proved to be an insuperable obstacle to American trial in virtually every case.' Blumberg, 'Conceptual and Procedural Problems', above n 7, 505.

corporate group to 'defeat-delay-frustrate' suits brought against it for alleged violation of human rights by its subsidiaries.[25] While pointing out more vigorous emergence of the doctrine with the rise of MNCs after the Second World War, Cassels observes that the 'doctrine shields multinationals from liability for injuries abroad.'[26] The shield becomes almost foolproof when one notices the fact that the majority of cases in which the doctrine is invoked by courts are either abandoned or settled out of court for a small amount of compensation.[27]

Given the looming obstacles posed by the application of the doctrine of *forum non conveniens* in the past,[28] it is doubtful whether the Bill did enough to avert foreseeable hardships to potential victims. Undoubtedly, cl 17(1)/(5) of the Bill expressly conferred a standing on non-Australian residents to approach the Australian federal courts in order to redress human rights abuses by Australian corporations committed abroad. But it seems that this jurisdiction enabling provision will not be conclusive of the question whether the Australian courts *must* try the case; the Australian courts could still decline jurisdiction if it is proved that they are 'clearly inappropriate' forum.[29] At best, this provision could only be one of the factors to be taken into consideration by the court while deciding whether the Australian court is the 'clearly inappropriate' forum.

Though obviously no opportunity arose for the Australian courts to

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[25] Rogge argues:

> 'Is it possible for the citizens of developing countries to bring a class action suit in American courts for the negligent actions of a US-based transnational corporation? The experiences of plaintiffs from developing countries show that it is extremely difficult. *Almost invariably, in mass transnational tort actions, transnational corporations invoke the common law doctrine of the inconvenient forum – forum non conveniens – as a first line of defence.*' (emphasis added)

Malcolm J Rogge, 'Towards Transnational Corporate Accountability in the Global Economy: Challenging the Doctrine of *Forum Non Conveniens* in Re: Union Carbide, Alfaro, Sequihua and Aguinda' (2001) 36 *Texas International Law Journal* 299. See also Kathryn Lee Boyd, 'The Inconvenience of Victims: Abolishing Forum Non Conveniens in US Human Rights Litigation' (1998) 39 *Virginia Journal of International Law* 41.

[26] Jamie Cassels, *The Uncertain Promise of Law: Lessons from Bhopal* (1993) 144. Similarly, Justice Doggett, while rejecting the plea of *forum non conveniens* in a case brought by the farm workers of Costa Rica against Shell Oil/Dow Chemicals, observed that 'what is really involved is not convenience but connivance to avoid corporate accountability': *Dow Chemicals Co & Shell Oil Co v Domingo Castro Alfaro* 786 SW 2d 674, 680 (1990, Texas SC).

[27] D Robertson, '*Forum Non Conveniens* in America and England: A Rather Fantastic Fiction' (1987) 103 *Law Quarterly Review* 398, 405; Muchlinski, above n 6, 169. Even Bhopal case could be argued as an example of this trend. See, for a critical purview of the application of the doctrine in Bhopal case, Upendra Baxi (ed), *Inconvenient Forum and Convenient Catastrophe: The Bhopal Case* (1986) 1–30 .

[28] See generally Blumberg, 'Conceptual and Procedural Problems', above n 7, 501–26 .

[29] 'Granted that there is an obligation on the domestic courts of this country to exercise jurisdiction which is conferred upon them ... it does not extend to cases where it is established that the forum is clearly inappropriate': *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538, 559. The Australian courts have preferred to apply the test of 'clearly inappropriate forum' than the test of 'more/most suitable forum', which is applied by the courts in the US and UK. See *Oceanic Sun Line Special Shipping Co v Fay* (1988) 165 CLR 197; *Voth v Manildra Flour Mills* Proprietary *Ltd* (1990) 171 CLR 538; *Dagi v BHP (No 2)* (1997) 1 VR 428.

test the effect of cl 17 of the Bill on the application of *forum non conveneiens* doctrine, one can draw an analogy from some cases filed in the US courts under the Alien Tort Claims Act (ATCA).[30] It is noteworthy that MNCs have successfully pleaded the doctrine of *forum non conveniens* in cases filed under the ATCA,[31] which confers an original jurisdiction on the US district courts to entertain suits by aliens for torts committed in violation of the law of nations or a treaty of the US. Out of many, two decisions are cited below to illustrate this point. First is the case of *Aguinda v Texaco, Inc*, a case related with environmental pollution caused by Texaco in Ecuador, where the district court dismissed the plaintiffs' claim by invoking the doctrine of *forum non conveniens*.[32] Similarly, in *Wiwa v Royal Dutch Petroleum Co* the US District Court dismissed on *forum non conveniens* ground a case in which the plaintiffs alleged human rights abuses at the hands of Nigerian authorities with direct/indirect participation of the defendant Dutch and British oil companies.[33]

Critics could, however, point out that the US Court of Appeals has subsequently overruled the district court's decisions in both *Aguinda*[34] and *Wiwa*,[35] and that the position has changed significantly after the Court of Appeals' decision in *Wiwa* case.[36] One should though notice

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30 28 USC 1350 (2004).

31 'A procedural impediment to the alien plaintiff's suit is the doctrine of *forum non conveniens* which, considering the extraterritorial nature of the litigation, the corporate defendant is sure to invoke.': David I Becker, 'A Call for the Codification of the Unocal Doctrine' (1998) 32 *Cornell International Law Journal* 183, 195, and generally 195–7. See also Lisa Lambert, 'At the Crossroads of Environmental and Human Rights Standards: Aguinda v Texaco, Inc, Using the Alien Tort Claims Act to Hold Multinational Corporate Violators of International Laws Accountable in US Courts' (2000) 10 *Journal of Transnational Law & Policy* 109, 127–9; Blumberg, 'Conceptual and Procedural Framework', above n 7, 503, 516–22; Gregory G A Tzeutschler, 'Corporate Violator: The Alien Tort Liability of Transnational Corporations for Human Rights Abuses Abroad' (1999) 30 *Columbia Human Rights Law Review* 359, 396–9; 'Developments in the Law – International Criminal Law: Corporate Liability for Violations of International Human Rights Law' (2001) 114 *Harvard Law Review* 2025, 2036.

32 *Aguinda v Texaco, Inc* 945 F Supp 625 (SDNY 1996), relying on *Sequihua v Texaco, Inc*, 847 F Supp 61 (SD Tex 1994).

33 *Wiwa v Royal Dutch Petroleum Co and Shell Transport & Trading Co*, 96 Civ 8386 (KMW)(HBP), 1998 US Dist LEXIS 23064.

34 The *Aguinda* decision was reversed (and the case remanded back to the district court for reconsideration) because 'dismissal for *forum non conveniens* is not appropriate, at least absent a commitment by Texaco to submit to the jurisdiction of the Ecuadorian courts for purposes of this action.' *Jota/Ecuador v Texaco, Inc*, 157 F 3d 153 (1998) 159. It is, however, interesting to note that on reconsideration the district court again dismissed the suit on *forum non conveniens* ground [*Maria Aguinda v Texaco, Inc; Gabriel Ashanga Jota v Texaco, Inc*, 303 F 3d 470 (2001)], and this time the Court of Appeal did affirm that decision. *Aguinda v Texaco, Inc*, 303 F 3d 470 (2002).

35 *Wiwa v Royal Dutch Petroleum Co. and Shell Transport & Trading Co*, 226 F 3d 88 (2000).

36 Aaron X Fellmeth, 'Wiwa v Royal Dutch Petroleum Co: A New Standard for the Enforcement of International Law in the US Courts?' (2002) 5 *Yale Human Rights & Development Law Journal* 241. See also Matthew R Skolnik, 'The Forum non Conveniens Doctrine in Alien Tort Claims Act Cases: A Shell of its Former Self after Wiwa' (2002) 16 *Emory International Law Review* 187. Blumberg, however, takes a more cautious and realistic view of the effect of decision in *Wiwa*; Blumberg, 'Conceptual and Procedural Problems', above n 7, 520–2.

that at neither of these occasions did the Court of Appeals rule that the doctrine of *forum non conveniens* has no role to play in cases filed under the ATCA. In fact, the Court, while overruling the district court's ruling in *Wiwa*, noted that even the Torture Victim Prevention Act 1991 (TVPA) has not 'nullified, or even significantly diminished, the doctrine of *forum non conveniens*'.[37] More importantly, the decision of Court of Appeals for the Second Circuit — affirming the district court's second dismissal in *Aguinda* on the ground of *forum non conveniens* — was delivered after the Court of Appeals' decision in *Wiwa*; a fact which again illustrates that ghost of *forum non conveniens* will still haunt victims.[38] Thus, it is clear that even 'the ACTA and TVPA laws do not guarantee that US courts will hear a case. *Forum non conveniens* must also be considered.'[39]

It could further be suggested by skeptics that the approach of Australian courts to the doctrine of *forum non conveniens* differs vastly from the stand taken by the US and UK courts — the former applying the test of 'clearly inappropriate forum' whereas the latter the test of 'more/most suitable forum'. Because of this difference, some might contend that it will be much more difficult for defendants — Australian corporations in the present case — to get a dismissal from the Australian courts on the ground of *forum non conveniens*.[40] The argument looks impressive prima facie, but does not seem to carry much weight on closer scrutiny. Though the two tests in question are different in their appearance and also in terms of questions which they pose,[41] the difference almost disappears when it comes to their application as well as the results ensued. In fact, they might deliver same results. The High Court of Australia in *Voth* was aware of this when it observed: 'The "clearly inappropriate forum" test is *similar to and, for that reason, is likely to yield same results* as the "most appropriate forum" test in majority of case.'[42]

The Court further noted that the difference between the two tests would be of critical significance only in those 'rare' cases in which 'it is held that an available foreign tribunal is the natural or more appropriate forum but in which it cannot be said that the local tribunal is a clearly inappropriate one'.[43] It also seems that whichever tests is applied, many of factual and legal considerations underpinning their application in a

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[37] *Wiwa v Royal Dutch Petroleum Co. and Shell Transport & Trading Co*, 226 F 3d 88 (2000), 106.

[38] *Aguinda v Texaco, Inc*, 303 F 3d 470 (2002).

[39] Fellmeth, above n 36, 242. See also Skolink, above n 36, 219–22 .

[40] See Peter Prince, 'Bhopal, Bougainville and OK Tedi: Why Australian *Forum Non Conveniens* Approach is Better?' (1998) 47 *International & Comparative Law Quarterly* 573.

[41] '[T]he question which the former test ['clearly inappropriate forum'] presents is slightly different in that it focuses on the advantages and disadvantages arising from a continuation of the proceedings in the selected forum rather than on the need to make a comparative judgment between the two forums.' *Voth v Manildra Flour Mills* Proprietary *Ltd* (1990) 171 CLR 538, 558.

[42] Ibid (emphasis added).

given case will be the same.[44] For example, in order to prove that the Australian federal court is a clearly inappropriate forum the defendant — an Australian corporation — might contend that the alleged violation did not occur within the territories of Australia, that the Australian court will have no access to witnesses or evidences, or that they lack expertise in applicable (foreign) law.[45] In essence, these are the factors which are pleaded by a defendant before the US/UK courts which tend to apply the test of 'more/most suitable forum'. Therefore, the difference between the two tests boils down invariably to how one describes a glass half filled.

In view of above analysis, there are reasons to believe that the bestowal of standing on non-Australian residents by cl 17(5) of the Bill would not have made any significant difference to how the *forum non conveniens* argument is resolved by the Australian courts. This is not to suggest however that courts are helpless or non-courageous to prevent (mis)use of the doctrine by MNCs to evade or delay liability for human rights violations,[46] or that the legislature by making a law could not influence how the courts exercise their discretion on the question of *forum non conveniens*. The Bill, for example, could have laid down that the Australian federal courts will not entertain a plea for *forum non conveniens* dismissal on behalf of Australian corporations unless they are satisfied that such proceedings amount to an abuse of process in the sense of vexation, harassment or oppression of involved corporations.

One could though point out, in response to the above suggestion, that the suggested traditional (and restrictive) test is no longer applied by the courts anywhere. But in defence of adopting a traditional test, it could be said that as the parent corporation of a group exploit to the fullest extent the doctrine of *forum non conveniens* to frustrate even genuine claims of human rights violations by their subsidiaries, it is necessary that the doctrine is applied with restraint at least in cases related to human rights violations. Blumberg, for example, argues that presence of international

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[43] Ibid.

[44] 'This is not to deny that considerations relating to the suitability of the alternative forum are relevant to the examination of the appropriateness or inappropriateness of the selected forum': Ibid. The Court continued further: 'The availability of relief in a foreign forum will always be a relevant factor in deciding whether or not the local forum is a clearly inappropriate one': Ibid.

[45] See also Andrew Bell, 'Human Rights and Transnational Litigation – Interesting Points of Intersection' in Stephen Bottomley & David Kinley (eds), *Commercial Law and Human Rights* (2002) 115, 119.

[46] Two relatively recent decisions of the House of Lords are quite instructive on how British corporations could be made accountable in the UK for their human rights violative conduct abroad. *Connelly v RTZ Corp plc* [1997] 4 All ER 335 (Lord Goff); *Lube v Cape plc* [2000] 1 WLR 1545. The Court in *Lube* observed: '[I]t is the interest of all the parties, not those of the plaintiff only or the defendant only, and the ends of justice as judged by the court on all the facts of the case before it, which must control the decision of the court [involving *forum non conveniens*].' Id, 1554 (Lord Bingham). In clear departure from the position taken by the US courts, the House of Lords in the instant case also ruled that there is 'no room for considerations of public interest or public policy which cannot be related to the private interests of any of the parties or the ends of justice in the case.' Id, 1566 (Lord Hope).

human rights should be considered among the public interest factors to be taken into consideration by courts while hearing the plea of *forum non conveniens*.[47] Boyd goes one step further and suggests that the doctrine should have no application in cases related to human rights violations[48] It can also be said, in support of the stand taken by Blumberg and Boyd, that since the realisation of human rights is no longer a matter internal to national boundaries, the doctrine of *forum non conveniens* should not be invoked where violation of human rights is at stake. No forum — out of available forums based on some connection to the cause of action — should easily be designated as inconvenient when it comes to redressing violation of human rights.

2 *Principles of Separate Personality and Limited Liability*

Even if victims of human rights violations by an MNC are able to ward off the ghost of *forum non conveniens*, there is no guarantee that they will be able to make such a corporation accountable for its wrongful acts or omissions. The reason is that the parent corporation of a corporate group employs the twin principles of separate personality and limited liability as another line of defence to defeat claims of human rights abuses committed by its subsidiaries. Though the (mis)use of these principles was/is a matter of public knowledge,[49] the Bill hardly touched upon this issue. Consequently, even if the Australian courts assume jurisdiction to hear cases of alleged human rights violations by Australian corporations operating abroad, the Australian parent of such an overseas corporation

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47 Blumberg, 'Conceptual and Procedural Problems', above n 7, 526.

48 'Given the protections that currently exist to protect sovereignty and comity in cases against foreign defendants and the relative lack of logistical inconveniences in the modern world, *abolition of federal courts' discretion to dismiss human rights cases under forum non conveniens is warranted*. Most important, such abolition will eliminate a court's ability to dismiss cases for doctrinally unsound reasons in light of more compelling interests in human rights litigation.' (emphasis added) Boyd, above n 25, 86.

49 [S]trong empirical evidence indicates that increasing exposure to tort liability has led to the widespread reorganisation of business firms to exploit limited liability to evade damage claims. The method of evasion differs by industry. For example, placing hazardous activities in separate subsidiaries seems to be the dominant mode of insulating assets in the tobacco and hazardous waste industries. In contrast, disaggregating or downsizing firms seems to be the primary strategy for avoiding liability in the chemical industry and, more recently, in the oil transport industry. Indeed, one study finds that, over the past twenty-five years, a very large proportion of small firms entering all hazardous industries in the United States are motivated primarily by a desire to avoid liability for consumer, employee, and environmental harms.

Henry Hansmann & Reinier Kraakman, 'Toward Unlimited Shareholder Liability for Corporate Torts' (1991) 100 *Yale Law Journal* 1879, 1891 (footnotes omitted). See also Robert B Thompson, 'Unpacking Limited Liability: Direct and Vicarious Liability of Corporate Participants for Torts of the Enterprise' (1994) 47 *Vanderbilt Law Review* 1, 2; Richard S Farmer, 'Parent Corporation Responsibility for the Environmental Liabilities of the Subsidiary: A Search for the Appropriate Standard' (1994) 19 *Iowa Journal of Corporation Law* 769, 771; above n 24–7.

will still not be liable as a matter of principle. Instead, the issue will have to be litigated in each and every case afresh, thus creating various difficulties discussed below.

(a) Why to Sue a 'Parent' Corporation?

A natural query will be: why is there a 'need' to sue the parent corporation when human rights are admittedly violated by its subsidiary, a separate legal entity? The need to sue the parent corporation is felt by at least three considerations which have a direct bearing on delivery of justice to victims of human rights violations. First and foremost factor is the inability of victims — outsiders to corporate decision-making process — to find out the *real* juristic persons responsible for human rights violations. The inability could be two-fold: either the real violators are shadowed by apparent violators, or it is difficult to locate the real violators in view of complex corporate structure.[50] The 'apparent' violators are not always the 'real' violators; the subsidiary corporation, an apparent actor, might be just the executor of human rights violative actions/decisions/policies taken or controlled by the real actor, i.e. parent corporation.[51] Besides, there could be cases where in view of complex interrelation of parent, subsidiary and sister concerns, victims are unable to bifurcate the decision making process, discern the distinction amongst different concerns and thus, find out the real violators.[52] Such situations of doubt or uncertainty about locating the 'power centre' would compel victims to sue the parent corporation, or both the parent and its subsidiary.

Second, it may be practically futile to sue a subsidiary corporation because of its economic incapacity to compensate the victims adequately.[53]

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[50] Meeran cites RTZ as an example of complex corporate structure in the following words: 'Indeed so confusing was the corporate structure of RTZ that even the Director of Environmental Affairs and of Medical Services was unsure which RTZ company he worked for.' Richard Meeran, 'The Unveiling of Transnational Corporations: A Direct Approach' in Michael K Addo (ed) *Human Rights Standards and the Responsibility of Transnational Corporations* (1999) 161, 162 (note 2).

[51] For example, in the *Bhopal* case it was the Union Carbide Corporation (UCC) that controlled many such decisions taken by its Indian subsidiary UCIL.

[52] The argument advanced by the Union of India in *Bhopal* case aptly explain this in following words: 'The complex corporate structure of the multinational, with networks of subsidiaries and divisions, makes it exceedingly difficult or even impossible to pinpoint responsibility for the damage caused by the enterprise to discrete corporate units or individuals.' Union of India's Complaint, as quoted in Upendra Baxi and Thomas Paul (eds), *Mass Disasters and Multinational Liability: The Bhopal Case* (1986) 4.

[53] This was one of the reasons which necessitated suing of UCC for Bhopal gas disaster, since the assets of UCIL were not sufficient to provide sufficient compensation to the victims. An inquiry into the financial position of the Medical Research and Compensation Fund, a no-profit company established by James Hardie Industries, once again highlights this problem. See the Report of the Special Commission of Inquiry into the Medical Research and Compensation Fund (September 2004) (hereinafter 'Jackson Report'), 7, 41-64, available at <http://www.cabinet.nsw.gov.au/publications.html> at 1 November 2004.

Such an *economic incapacity* of subsidiaries is driven by several factors. For example, the number of victims in cases of corporate abuse of human rights is ordinarily very large requiring large resources to compensate adequately all the victims.[54] Further, the parent corporation may deliberately keep its subsidiaries, especially those engaged in hazardous activities, economically incapable so as to avoid the possibility of paying large amount in terms of compensation.[55] Also, a subsidiary corporation's resort to insolvency or bankruptcy proceedings may indirectly hamper any chance of victims getting adequate compensation.[56] In such a scenario the victims again have no option but to sue the parent corporation.

Third, though in majority of cases the victims of human rights violation by MNCs are from developing countries,[57] the legal system of these countries where the alleged subsidiary is incorporated and operated may not be efficient enough to afford a viable remedy to such victims.[58] In the context of Unocal's alleged involvement in human rights violations in Myanmar, Ramasastry observes: 'Victims in the host country are unable to seek redress in their own country. The courts are unable or ill equipped to handle their cases or the host government will not pursue enforcement

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[54] The *Bhopal*, *Dow Corning*, *James Hardie* and *Unocal* cases are living testimony of this claim. See Muchlinski, above n 6, 177–8.

[55] Nina A Mendelson, 'A Control-Based Approach to Shareholder Liability for Corporate Torts' (2002) 102 *Columbia Law Review* 1203, 1205, 1246 and the material cited in notes 179–82 therein. See also A Ringleb and S Wiggins, 'Liability and Large Scale, Long-Term Hazards' (1990) 98 *Journal of Political Economy* 574; and a series of articles/reports by Elisabeth Sexton on how James Hardie Industries tried to limit its liability arising from asbestos related claims: Elisabeth Sexton, 'Hardie Casts a Long Shadow', *Sydney Morning Herald* (Sydney), 24-25 April 2004, 41; Elisabeth Sexton, 'James Hardie a Shell of its Former Self, Inquiry Told', *Sydney Morning Herald* (Sydney), 8-9 May 2004, 43; Elisabeth Sexton, 'Hardie Shortfall Blows to $1.3bn', *Sydney Morning Herald* (Sydney), 8 June 2004, 3; Elisabeth Sexton , 'Hardie Blocked Access to $1.9bn', *Sydney Morning Herald* (Sydney), 8 June 2004, 27. The Jackson's Report also conclude that the 'principal purpose' of restructuring adopted by James Hardie Group was to ensure that neither the parent company faces 'the stigma of possible future asbestos liabilities' nor its assets are available to satisfy such claims. Jackson Report, above n 53, 8-15.

[56] It can be argued that Dow Corning used this tactic to frustrate the global settlement agreement reached to compensate the victims through out the world. For a detailed account, see Evan Caplan, 'Milking the Dow: Compensating the Victims of Silicone Gel Breast Implants at the Expense of the Parent Corporation', available at <http://implants.clic.net/tony/Smoke/9.htmt> at 13 February 2003.

[57] Establishing subsidiaries in developing economies, seeking foreign investment for development at any cost, suits MNC due to various reasons, e.g., lack of strict legal regulatory regime, ill-equipped legal system, and availability of cheap and ignorant labour.

[58] Lord Diplock, while examining a plea of *forum non conveniens*, observed:

> The possibility cannot be excluded that there are still some countries in whose courts there is a risk that justice will not be obtained by a foreign litigant in particular kinds of suits whether for ideological or political reasons, or because of inexperience or inefficiency of the judiciary or excessive delay in the conduct of the business of the courts, or the unavailability of appropriate remedies.

The Abidin Daver [1984] AC 398, 411. Blumberg also notes some of these factors: Blumberg, 'Conceptual and Procedural Problems', above n 7 , 508–9.

against the perpetrators (e.g. security forces or the military).'[59] In view of the unavailability of an appropriate/efficient forum at home — a place where a subsidiary is incorporated and operated — victims are tempted to sue the parent of such a subsidiary, which is usually incorporated in a country with a much more developed legal system. The 'temptation' to sue the parent corporation, if driven by considerations of seeking justice, is arguably justified in that it also involves the exercise of a human right.[60]

(b) Principles of Separate Personality and Limited Liability: Inappropriate Use of Appropriate Principles?

The prevailing system of responsibility of a parent corporation for (in)actions, including violation of human rights, of its subsidiary is governed by two principles of corporate law evolved long ago.[61] The first principle recognises the 'separate personality' of a corporation from its shareholders and owners,[62] whereas the second principle establishes the 'limited liability' of investors by protecting them from the risks of business.[63] Notably, both these principles were evolved at a time when the concept of parent and subsidiary corporations was unknown, and when corporations even lacked the power to acquire and hold shares of other corporations unless expressly granted such a right by a special statute or charter provisions.[64] However, the twin principles were extended to govern the relation of parent and subsidiary corporations of a corporate group on the assumption that since they are applicable to ordinary

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[59] Anita Ramasastry, 'Corporate Complicity: From Nuremberg to Rangoon – An Explanation of Forced Labour Cases and Their Impact on the Liability of Multinational Corporations' (2002) 20 *Berkeley Journal of International Law* 91, 92.

[60] Article 14(1) of the ICCPR provides: 'In the determination ... of his rights and obligations in a suit at law, everyone shall be entitled to a *fair and public hearing by a competent, independent and impartial tribunal established by law.*' (Emphasis added) See also the *European Convention on Human Rights*, art 6(1).

[61] L C B Gower, Gower's *Principles of Modern Company Law* (4th ed, 1979) 97–102; Blumberg, *The Search for a New Corporate Personality*, above n 7, 1–20; Cindy A Schipani, 'Infiltration of Enterprise Theory into Environmental Jurisprudence' (1997) 22 *Iowa Journal of Corporation Law* 599, 601–3.

[62] Though the principle is centuries old, the case of *Saloman v Saloman & Co* [1897] AC 22 (HL) is considered 'the best known illustration of the doctrine.' *Briggs v James Hardie & Co Pty Ltd* (1989) 7 ACLC 841, 847 (Justice Meagher). Commenting on the influence of this case, Prentice observed:

> The company law of English lawyers is such that an attempt to persuade the court to depart from principles embodied in the *Salomon* case is not likely to be made, and even if made, is not likely to succeed. The hegemony of *Salomon* is so well entrenched in English law that for most purposes it can only be effectively diluted by legislative intervention.

Dan D Prentice, 'Veil Piercing and Successor Liability in the United Kingdom' (1996) 10 *Florida Journal of International Law* 469, 471.

[63] 'Limited liability is one of the cornerstones of modern corporate law.': Schipani, above n 61, 599.

[64] Blumberg, *The Search for a New Corporate Personality*, above n 7, 52.

shareholders, they should also apply on same parity to situations when the shareholder is a corporation.[65]

This extension presents an anomalous situation since it makes no distinction between *corporations as investors* and *investors simpliciter*.[66] In the context of the application of the principle of limited liability to corporate groups, Blumberg writes that it has made a mockery of underlying objective of the doctrine — a doctrine designed to protect investors in an enterprise is now protecting the enterprise itself.[67] Same holds true about the application of the doctrine of separate personality of a corporation from its ordinary shareholders, to parent-subsidiary relations within a corporate group. It enables the parent corporation, by misappropriating the fiction of separation, to shift the liability to those shoulders which cannot bear it.

The result of this inappropriate, perhaps indefensible, extension is a situation of corporate *irresponsibility* for human rights violations. Mitchell offers a consequential account of what the limited liability entails in the following words:

> It means that no matter how much environmental damage a corporation causes, no matter how much debt it defaults on, no matter how many Malibus explode or tires burst or workers and consumers die of asbestosis, no matter how many people it puts out of work without their pension benefits or other protections; in short, no matter how much pain it causes, the corporation is responsible for paying damages (if at all) only in the amount of assets it has.[68]

The above adverse consequences resulting from the (mis)use of the principle of limited liability assumes alarming connotations when the principle is used by a parent corporation of a corporate group as a device to restrict, or even evade, liability.[69] Similar consequences follow from the

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[65] Blumberg, 'Conceptual and Procedural Problems', above n 7, 494–5. See also Muchlinski, above n 6, 177; Thompson, above n 49, 35–9. *Compare* Stephen B Presser, 'Thwarting the Killing of the Corporation: Limited Liability, Democracy, and Economics' (1992) 87 *Northwestern University Law Review* 148, 174–5.

[66] Blumberg argues: 'The parent is itself engaged in the business. Along with its subsidiaries, it collectively conducts a common business under its central control.' Blumberg, *The Search for a New Corporate Personality*, above n 7, 232. And he continues at another place:

> While a parent corporation is indeed the shareholder of its subsidiaries, it differs radically from the original shareholder in the older stereotype. Unlike the shareholder-investors in the simple corporation, or the public shareholder-investors in the modern parent corporation, the parent corporation is typically not a passive investor. Instead, it is a major part of the enterprise, engaged along with its subsidiaries in the collective conduct of a common business under centralized control.

Phillip I Blumberg, 'The Corporate Entity in an Era of Multinational Corporations' (1990) 15 *Delaware Journal of Corporate Law* 283, 327.

[67] Blumberg, *The Search for a New Corporate Personality*, above n 7, 59.

[68] Lawrence E Mitchell, *Corporate Irresponsibility: America's Newest Export* (2001) 53.

[69] 'In the case of groups, not only were the public investors of the parent corporation insulated from liability for its obligations, but the parent was insulated from liability for the obligations of its subsidiaries. In the complex multi-tired modern multinational, three, four, five or more separate layers of limited liability are not uncommon.': Blumberg, 'Conceptual and Procedural Problems', above n 7, 495.

application of separate personality principle to the relationship of parent and subsidiaries within a corporate group. Out of several cases that are stark reminders of an unsatisfactory legal position in this area, the *James Hardie* case stands apart from the rest in one respect, that is, here the parent company resorted to the principle of separate personality not to contest but *preempt* liability for human rights violations.[70]

(c) Disrobing of separate personality and difficulties of proof

It is though fair to state that in order to reduce the (mis)appropriation of the principle of separate personality by MNCs to thwart their liability, courts have evolved various limiting techniques such as of attribution, agency, alter ago, or lifting of corporate veil.[71] Out of these, the principle of lifting of corporate veil deserves special mention.[72] The principle enables courts to lift the veil and disrobe the separate personality of a corporation when it is a sham, or used as a 'cloak' for fraud or illegality, or when corporation is a 'puppet' of the owner.[73] This principle could definitely help in making the parent corporation liable for human rights violations by its subsidiaries, but its scope is limited[74] — in view of various difficulties

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[70] The Jackson Report finds that 'the operating assets of the [James Hardie] Group would not be available to asbestos claimants was a purpose of these changes': Jackson Report, above n 53, 15. It also concluded that 'there was no *legal* obligation for [James Hardie Industries] to provide greater funding' to the subsidiary it had established to compensate victims of asbestos related diseases: Id, 8. Apparently, this conclusion was a necessary corollary of the principle of separate personality.

[71] The status of 'agency' as a separate principle and its relation with lifting of corporate veil is still unclear. For example, some commentators find a contradiction between these two terms whereas others treat agency as only 'the *means* of lifting the veil': S Ottolenghi, 'From Peeping behind the Corporate Veil, to Ignoring it Completely' (1990) 53 *Modern Law Review* 338, 345–6.

[72] 'The corporate veil is a device whose very purpose is to protect the wealth and the dignity of the powerful men it shrouds.' John Braithwaite and Peter Drahos, 'Zero Tolerance, Naming and Shaming: Is there a Case for it with Crimes of the Powerful?' (2002) 35 *The Australian & New Zealand Journal of Criminology* 269, 274.

[73] See, for example, Walkovsky v Carlton 276 NYS 2d 585, 223 NE 2d 6 (1966); Wallersteiner v Moir [1974] 3 All ER 217; Tata Engineering & Locomotive Co Ltd v State of Bihar AIR 1965 SC 40; LIC v Escorts Ltd AIR 1986 SC 1370, etc. See also Gower, above n 61, 112–38; Prentice, above n 62, 473; Roman Tomasic, Stephen Bottomley and Rob Mcqueen, Corporations Law in Australia (2nd ed, 2002) 2–50.

[74] An empirical investigation by Thompson shows that 'courts pierce [the veil] less often in tort than in contract contexts, and a piercing decision is not less but more likely when the shareholder behind the veil is an individual rather than another corporation.' Robert B Thompson, 'Piercing the Corporate Veil: An Empirical Study' (1991) 76 *Cornell Law Review* 1036, 1038 and also 1056, 1068–9. On the basis of his study, he further concludes that there is a 'total' absence of piercing of the corporate veil in public corporations. Id, 1047–8, 1070. See also the observation of Prentice, above n 62.

related to proof — and is also subject to fluctuating judicial discretion.[75] Unless the veil is pierced, the plaintiff victims are not sure about the outcome of the proceedings. In effect, this makes the victims' fight for the realisation of human rights against corporations both 'conditional' and 'uncertain'. Conditional because *effective*[76] relief is dependent on the lifting of veil, and *uncertain* because it is not sure whether the veil is going to be lifted or not.[77]

Difficulties of proof primarily relate to the 'level' of required proof,[78] and the prevailing judicial approach to generally rely upon the 'entity principle' rather than the 'enterprise principle'. Since all the above doctrines that justify a departure from the principles of separate personality and limited liability demand a high level of proof regarding parent corporation's participation in decision making and implementation, formulation of general policies, and supervision of finance of subsidiary, they hardly afford any real help to the plaintiffs.[79] As parent corporations ordinarily keep 'distance by design' from their subsidiaries, it becomes almost impossible to prove close relation between two legally separate — though economically and factually one[80] — persons. The experiences learnt during the trial of *Bhopal* and *Unocal* cases amply illustrate this.[81] For example, during the proceedings of the *Bhopal* case before the US District Court, despite ample documentary evidences presented by Government of India to establish that Union Carbide Corporation (UCC) closely controlled its Indian subsidiary UCIL,[82] Justice Keenan was not

[75] For example, the court refused to lift the veil in *Adams v Cape Industries plc* [1991] 1 All ER 929. 'The overall problem with veil-piercing jurisprudence is that it is a wilderness of isolated precedents, or to put it slightly differently, the cases hunt in packs of two with the respective pack members going off in different directions.' Prentice, above n 62, 474, and generally for an analysis of *Adams* case, 474–7. Easterbrook and Fischel think that the judicial decisions on piercing are 'freakish' and 'unprincipled'. Frank H Easterbrook and Daniel R Fischel, 'Limited Liability and Corporation' (1985) 52 *University of Chicago Law Review* 89, 89. See also the observations in *Briggs* case, above n 62, 855, 862, 863.

[76] In many situations relief could be *effective* only if the parent corporation is made liable.

[77] 'It is impossible to list the cases in which the veil will be lifted: there can be no *numerus clausus*.' Ottolenghi, above n 71, 352, and also 338–9.

[78] For example, courts generally require plaintiff to prove control 'not just through stock ownership but the complete domination of the policy, practices and will of the subsidiary.' Farmer, above n 49, 773.

[79] See Becker, above n 31, 198. In the context of proceedings under the Alien Tort Claims Act, Lambert suggests that it is crucial to conduct prior research about the interrelation of parent and subsidiary for success in proceedings. Lambert, above n 31, 130.

[80] To the economists and the public, the multinational group is a single enterprise or firm. It is perceived as a single actor. This perception is accurate, supported by the common control, common business purpose, economic integration, financial and even administrative interdependence, and often common public persons that characterize the group's operations. This is the economic reality.
Blumberg, 'Conceptual and Procedural Problems', above n 7, 493–4.

[81] Farmer demonstrates similar difficulties that victims of asbestos exposure faced during proceedings against Cape Industries. Farmer, above n 49, 775–9.

[82] See the Government of India's Memorandum in Opposition to UCC's Motion to Dismiss Actions on the Grounds of Forum non Conveniens in Baxi & Paul (eds), above n 52, 61–80.

much impressed. He rather endorsed the contention of UCC that it was not intimately involved in the operation of the Bhopal plant. In any case, whatever control UCC might have had over UCIL, it was not sufficient for Justice Keenan to warrant continuance of trial in the US courts. In fact, this increasing difficulty has also led the victims to plead direct fault of parent corporation rather than its liability as the parent.[83]

As mentioned above, the task to establish parent's control over subsidiary becomes more stringent because of judicial approach to generally rely upon the entity principle rather than the enterprise principle.[84] The decision of Court of Appeal for the Ninth Circuit in *Doe v Unocal Corporation*[85] illustrates this. The case involved an action by villagers of Myanmar against a number of MNCs including Total SA, the French parent of the Total Group. Total pleaded that the US courts have no jurisdiction over it merely because of its interrelation with California based subsidiaries of Total Group. The Court accepted the argument and held that mere existence of a relationship between the parent and subsidiary is not sufficient to attract jurisdiction.[86] Though the Court found that the parent played an active part in decision making of subsidiaries, it was not considered sufficient to invoke the doctrine of alter ego or agency.

The judicial inclination to base its decisions on entity principle tilts the balance in favour of parent corporations to that extent that it makes the imposition of liability on a parent corporation for human rights violations by its subsidiaries highly improbable.[87] It is, therefore, desirable that the courts take into account the fact that in many situations despite multi-layered legal structuring of corporate entities only one business is involved. Blumberg makes a forceful argument for the application of enterprise principle to situations involving human rights violations by subsidiaries. He argues:

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[83] The Government of India pleaded, in alternative, that UCC is directly liable for the Bhopal disaster. See Baxi & Paul (eds), above n 52, 179.

[84] See Prentice, above n 62, 475–7. Blumberg though argues that enterprise principle is increasingly gaining recognition in American law, primarily on the statutory level but also in judicial decisions. Philip I Blumberg, 'The Increasing Recognition of Enterprise Principles in Determining Parent and Subsidiary Corporation Liabilities' (1996) 28 *Connecticut Law Review* 295. But judicial acceptance of enterprise principle in cases of human rights violation has not been *an ordinary rule to be followed as a matter of 'principle'* as I argue that it should be. He himself admits at 329:

> In contrast to American statutory law, ... the courts have been much less ready to apply enterprise concepts in the place of traditional principles of entity law. ... the determination of controversies by reference to entity law continues as a vital, if not predominant, force in American law. The only recognised exception to this rule is courts' alternative use of "piercing the veil" jurisprudence.

[85] 248 F.3d 915 (2001).

[86] Id, 926.

[87] Blumberg argues that the outcome in *Doe v Unocal* 248 F 3d 915 (2001) 'illustrates vividly the effectiveness of entity law in shielding the overseas affiliates of multinational groups from American jurisdiction.' Blumberg, 'Conceptual and Procedural Problems', above n 7, 499.

> Entity law serves its traditional objectives well when it shields public investors from the debts of the parent corporation of the world's great enterprises in which they have invested. However, this is no longer the case when it shields the parent corporation from liability for the acts of its subsidiaries, and each subsidiary from liability for the acts of its sub-subsidiaries.[88]

Despite the logic inherent in the above argument, it is only a matter of conjectures whether the Australian courts would have adopted the enterprise principle while deciding the question of liability of an Australian parent corporation for wrongs committed by its overseas subsidiaries.[89] Ideally, the Bill should have addressed this issue and provided a yardstick to be applied by the Australian courts. On the contrary, it failed to live up to the expectations by not even taking cognizance of the issue involved.

(d) Need for Balancing: A Theory of 'Limited Eclipsed Personality'

Victims of human rights violations by MNCs, in effect, face a Hobson's choice: suing the subsidiary may not deliver justice due to various reasons noted before, whereas choice of suing the parent is often met with almost unassailable pleas based on the notions of separate personality and limited liability. As shown above, even the judicial recourse to various principles, including the doctrine of lifting of corporate veil, not only presents inhuman difficulties related to proof of control[90] but also makes the outcome conditional and uncertain.[91] Apparently, there is a growing tension between the application of the twin principles to a corporate group and the quest of victims of corporate human rights abuses to seek justice. How could this tension be resolved to the satisfaction of both the interest groups?

It can be said that the principles of separate personality and limited liability were evolved to serve certain public purposes, including the

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[88] Blumberg, 'Conceptual and Procedural Problems', above n 7, 528–9. See also D Aronofsky, 'Piercing the Transnational Corporate Veil: Trends, Developments and the Need for Widespread Adoption of Enterprise Analysis' (1985) 10 *North Carolina Journal of International Law and Commercial Regulation* 31.

[89] The Australian courts, in fact, generally favour and apply the entity principle. See Robert Baxt, Keith Fletcher and Saul Fridman, *Corporations and Associations: Cases and Materials* (9th ed, 2003) 208; Ian Ramsay, 'Allocating Liability in Corporate Groups: An Australian Perspective' (1999) 13 *Connecticut Journal of International Law* 329, 330 (though he also notes a partial movement to enterprise principle). See also Tomasic et al, above n 73, 179–86.

[90] Arguably, it will be increasingly difficult to prove control in future as the structure of MNCs moves from classical 'pyramidal' model to 'heterarchical' model. See Muchlinski, above n 6, 170.

[91] 'Piercing the corporate veil is the most litigated issue in corporate law and yet it remains among the least understood. ... The boundaries of this exception are usually stated in broad terms that offer little guidance to judges or litigants in subsequent cases.': Thompson, above n 74, 1036, and generally 1036–8. See also Schipani, above n 61, 608–10.

promotion of entrepreneurship so as to contribute to individual/societal development.[92] But at the same time they should not be used to defeat another equally important social objective, i.e. the promotion of human rights.[93] It is important, therefore, to balance[94] the business concerns of corporations represented by these two principles with the concerns of human rights activists. Such a balancing will not allow corporations to play a key role in the development of society but will also ensure that these principles do not become corporate tools for systematic avoidance/evasion of legal responsibility for human rights violations by exploiting a series of legal fictions.[95] It can further be argued that by curtailing the inappropriate, perhaps unintended, use of twin principles to parent-subsidiary relations within a corporate group, both the above social objectives could be harmoniously pursued.

How could the Bill under consideration here have attained such a balancing? Arguably, the Bill could have adopted one of various alternative options that are currently subject matter of discussion.[96] Moreover, one simple legislative device could have been to incorporate a provision providing for liability amongst a corporate group to be governed by the enterprise principle. At this stage it may not be out of place to refer to the recent Corporate Responsibility Bill 2003 (UK) which seeks to do exactly

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92 'Limited liability for equity investors has long been explained as a benefit bestowed on investors by the state.': Easterbrook and Fischel, above n 75, 93, and generally 93–7. See, for the reasons or benefits of the principles of limited liability and/or separate personality, Blumberg, *The Search for a New Corporate Personality*, above n 7, 125–33; Thompson, above n 74, 1039–41; Ramsay, above n 89, 341–2; Schipani, above n 61, 603–6.

93 Mendelson argues, and shows, how 'limited liability for corporate torts can encourage socially costly corporate activity' and also allows the 'shifting the costs of this activity to tort and environmental victims': Mendelson, above n 55, 1204–5, 1232–47.

94 Though some commentators have suggested that limited liability could be abolished without serious adverse consequences. See, for example, Henry Hansman, as quoted in Cassels, above n 26, 210. It seems, however, that in the given circumstances attaining equilibrium will be a better option because the total abolition of twin principles would hamper the attainment of the first objective (promoting entrepreneurship) whereas their unrestricted use would defeat the second objective (promotion of human rights).

95 There is evidence that larger corporations have been segregating their more hazardous activities into smaller, financially unaccountable companies in order to shield their assets from damages. See above n 55.

96 Farmer examines four of such proposals. They are: 'unlimited liability for corporate parent'; 'parent corporation liability for knowable risks'; 'parent corporation liability for negligent supervision of subsidiary activities'; and 'parent corporation liability for equipping the subsidiary with insufficient assets': Farmer, above n 49, 795–803. He, however, reject all these proposals in favour of his own 'superior' alternative under which the parent corporations should be liable only if, firstly, it fails to take reasonable steps to assess the risk of subsidiary's activities and secondly, does not take reasonable steps to ensure that the subsidiary maintains sufficient assets to meet the present and future liabilities: Id, 804–5. In my view, even this 'superior' principle may not be suitable as it will again bring the problems of proof, for example, about the reasonableness of steps taken by a parent corporation. In fact, the recent inquiry by the New South Wales government against the restructuring adopted by James Hardie Industries exposes the inadequacy of the principle proposed by Professor Farmer. See Jackson Report, above n 53.

that.[97] It expressly provides that 'a parent company of a corporate group shall be liable to pay compensation' in respect of the damage caused in terms of physical/mental injury or environmental harm.[98]

Besides taking recourse to the enterprise principle, the Bill could also have achieved the balance, I argue, by laying down that liability within a corporate group will be governed by a theory of 'limited eclipsed personality'.[99] By *eclipsed personality* I mean that in cases of alleged human rights violations, the separate personality of the subsidiaries of a corporate group should be eclipsed in that victims should be free to sue the immediate or ultimate parent corporation of that group as a matter of principle. In other words, if the court — to use Ottolenghi's progressive categorisation of veil lifting doctrine[100] — on 'peeping behind the veil' founds that a company is a subsidiary of another parent company within a corporate group, then it should 'extend the veil' so as to treat the whole group as one.[101]

This conditioning of the principle of separate personality within a corporate group should happen not as something that is subject of adjudication in each and every case but as a matter of principle, which could be defended on the basis of several policy considerations.[102] It should be no argument for the parent corporation to plead that it is separate from its subsidiaries (because legal separation does not coincide with economic and factual reality), or that it had no control over them (because it is the factum of control which should matter and not the extent of it). In sum, the theory of eclipsed personality will ensure that the principles of separate personality and limited liability are not used as a pretext to frustrate genuine claims of human rights violations.[103]

In view of the term 'eclipse' itself denoting a limited phenomenon, one could perceive the limited nature of the theory of 'eclipsed personality'. I have, however, made this limited scope of the theory explicit by qualifying it with the word 'limited'. The theory is *limited* on two counts.[104] First, the

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[97] The Corporate Responsibility Bill 2003 (UK), Bill No 129, was moved in the British House of Commons by Linda Perham on 19 June 2003, available at <http://www.publications.parliament.uk/pa/cm200203/cmbills/129/2003129.pdf> at 5 June 2004. It is though interesting to note that the final report of the Steering Group on Company Law Review (2001) UK, available at <http://www.dti.gov.uk/cld/final_report/index.htm> did not deal with this issue. See Muchlinski, above n 6, 168.

[98] Above, n 97, cl 6.

[99] The Indian Supreme Court has applied the 'doctrine of eclipse' to judge the validity of pre/post-constitution laws vis-à-vis fundamental rights. See Mahendra P Singh (ed), *Shukla's Constitution of India* (10th ed, 2001) 31–3.

[100] The four progressive categories are: 'peeping behind the veil'; 'penetrating the veil'; 'extending the veil'; and 'ignoring the veil': Ottolenghi, above n 71, 340.

[101] Ottolenghi, above n 71, 347.

[102] See Muchlinski, above n 6.

[103] Aronosky has proposed that the presumption of parent corporations liable for the activities of their subsidiaries should be rebutted only where the parent corporations can show that 'its conduct and economic status within an enterprise are completely unrelated to the dispute before the court.': Aronofsky, above n 88, 32.

[104] The limited scope of the theory signifies an attempt to make a balance, the need for which I emphasised above.

theory is proposed to be applied to determine the question of liability only within a corporate group. Thus, it will have no application where shareholders of a corporation are human beings as opposed to legal persons because a distinction needs to be made between these two categories of shareholders,[105] more so when Thompson's empirical study tells us that courts are less likely to lift the veil when the shareholder is another corporation.[106] Second, the theory is also limited in the sense that it proposes to eclipse the separate personality of the subsidiaries of a corporate group only in those cases that involve violation of human rights; the separate personality of subsidiaries might continue to exist for other purposes.[107] It is though worth considering whether the proposal could be applied in other cases, say, torts,[108] especially if that also amount to the violation of a human right.[109] As human rights protect dignity and worth of human beings and consequently, human beings lose their 'human' character on violation of human rights,[110] it is plausible to draw a distinction between violation of human rights on the one hand and violation of other interests/rights of the people on the other. In sum, it is the involvement of special situation (corporate groups) as well as the special issue (human rights) which justify a special treatment (theory of eclipsed personality) of the question of corporations' liability.

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[105] Apparently, almost all of the cases of corporate human rights abuses that have reached before courts involved corporate groups. See also above n 65 and 66.

[106] 'When potential targets of piercing were individuals, courts pierced in 43.13% of the cases (339 of 786). Piercing was the outcome in 37.21% of cases where the target was another corporation (237 of 637).': Thompson, above n 74, 1056 (note 108).

[107] Arguably, one principle cannot be applied in all situations, a conclusion which Miller also draws after comparing veil piercing approaches in the US, UK and the EU (especially Germany): 'It is overly simplistic and unrealistic to expect that either the entity liability or enterprise liability principles can be universally applied in all legal contexts.': Sandra K Miller, 'Piercing the Corporate Veil among Affiliated Companies in the European Community and in the US: A Comparative Analysis of the US, German and UK Veil-Piercing Approaches' (1998) 36 *American Business Law Journal* 73, 148.

[108] It is though interesting to note that the Australia's Companies and Securities Advisory Committee had examined the question whether the existing principles of tort liability be changed for corporate groups. The Committee concluded as follows: 'The introduction of a general tort liability for parent companies in corporate groups is undesirable. This liability would undermine the separate entity principle and could have negative consequences for the economy. This area should be dealt with by specific legislation where the extension of liability beyond the tortfeasor company is desirable in the public interest.': Companies and Securities Advisory Committee, *Corporate Groups: Draft Proposals* (October 1999) Issue 14, 36.

[109] The commission of a tort signifies that a 'wrong' is done by the tortfeasor which in turn implies violation of a legal 'right'. See Anthony Dugdale (ed) *Clerk & Lindsell on Torts* (16th ed, 1989) 12. So, if tort is a violation of a legal right, on occasions it is possible that the right which is violated is a human right. In fact, several cases filed in the US courts under the ATCA, which admittedly provide for a cause of action for torts committed in violation of the law of nations or a treaty of the US, clearly involved human rights violations.

[110] Czerny writes: 'Human rights translates the human condition into those fundamental, essential, non-negotiable and enforceable terms which are *necessary in order that life might be life*, that is, in order that life must begin, grow, develop and flourish in all its attributes.' (emphasis added): Michael Czerny, 'Liberation Theology and Human Rights' in Kathleen Mahoney and Paul Mahoney (eds), *Human Rights in the Twenty-first Century* (1993) 36.

(e) Why Should a Parent Corporation be Liable? Justifications for the Theory of 'Limited Eclipsed Personality'

Various reasons could be advanced to support the proposition that a parent corporation, of a corporate group, should be liable for human rights violations by its subsidiaries. First, since the parent corporation exercises control over the affairs of its subsidiaries, it is also best situated to control human rights violations by them. The parent should not control only the 'profit bearing activities' of its subsidiaries and be unconcerned about human rights issues. As corporations are part of society and it is also their business to respect and promote human rights,[111] it is both fair and just to make the parent corporation liable for human rights abuses by its subsidiaries if such violations are the result of parent's failure to exercise adequate control over its subsidiaries.

Second, 'deep(er) pocket' theory provides another justification for why the immediate/ultimate parent should be responsible for human rights violations by its subsidiaries. Economic efficiency demands that consistent with other relevant considerations liability for a wrong should be placed on those shoulders that can bear it best.[112] Given so, the parent corporation — which is usually more capable to bear the burden of liability — should shoulder the responsibility of compensating victims, who are usually poor and in need of quick relief. If in a given case the parent finds that the burden is too heavy or improperly placed, it can always ask for appropriation from its subsidiaries. Ideally, the determination of who out of parent or subsidiary is liable should be an internal matter of a corporate group, rather than being a contest between victims on the one hand and corporations of a group on the other.

Third, the parent corporation derives economic benefit out of subsidiary's existence and therefore, should be willing to share even losses for the actions of its subsidiary, especially when those actions or omissions are controlled (or could have been controlled) by the parent. Farmer rightly suggests that 'it is difficult to argue against the imposition of liability on a corporate parent which, when its subsidiary faces huge liabilities due to parent-directed environmental neglect, funnels assets away from the subsidiary or otherwise minimises its losses by manipulating the corporate form.'[113]

Fourth, in view of 'the difficulties courts encounter when applying the corporate veil piercing doctrine and its control element in a real-life

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[111] See Steven R Ratner, 'Corporation and Human Rights: A Theory of Legal Responsibility' (2001) 111 *Yale Law Journal* 443; Barbara A Frey, 'The Legal and Ethical Responsibilities of Transnational Corporations in the Protection of International Human Rights' (1997) 6 *Minnesota Journal of Global Trade* 153; Beth Stephens, 'The Amorality of Profit: Transnational Corporations and Human Rights' (2002) 20 *Berkeley Journal of International Law* 45.

[112] See W Page Keeton et al (eds), Prosser and Keeton on the Law of Torts (5th ed, 1984) 500.

[113] Farmer, above n 49, 787.

context',[114] it is desirable to replace the existing approach with a more consistent approach. The proposal to base liability within a corporate group on the theory of limited eclipsed personality — which ought to be followed as a matter of principle — would not only lead to a more consistent approach but would also result in speedy and cost effective resolution of disputes, something that is in the economic interest of corporations as well.

Lastly, whereas the twin principles of separate personality and limited liability inadvertently encourage unreasonable risk taking (especially within the context of a corporate group), the principle of 'eclipsed personality' would promote responsible and 'human rights conscious' corporate behaviour. This should, in turn, help in strengthening the journey of human rights realisation in private sphere, while at the same time not unreasonably curtailing the incentives for investment as the proposal contemplates eclipsing of the separate personality of a subsidiary only for a limited purpose.

III 'Social' Enforcement of Human Rights Standards

I have argued above that the Bill did not take into account the procedural/conceptual hurdles posed by the doctrine of *forum non conveniens* and the twin principles of corporate law and also suggested how the said problems could be overcome. It is, however, conceivable that the court-based approach of extraterritorial enforcement of human rights standards will have its limitations. Given this, it seems a more pragmatic and viable option that a law which seeks to impose and enforce human rights obligations extraterritorially *also* rely upon non-judicial enforcement of such obligations. As it is envisaged that various constituents of society will perform the role of regulators, I will term such non-judicial enforcement as 'social' enforcement.[115] Below are some thoughts on how the Bill could have operationalised *social* enforcement of human rights obligations against overseas corporations.

A *Why the Enforcement is 'Social'*

The enforcement of human rights standards against corporations is *social* on three counts: it occurs within the informal vistas of society, by societal organs and through social sanctions. To begin with, human rights obligations are to be enforced outside the state-centered enforcement mechanisms. In other words, the enforcement instead of revolving

[114] Farmer, above n 49, 775, and also 775–9.

[115] Though judiciary is a part of society, here 'social enforcement' is used as excluding court-based enforcement of human rights.

around formal state regulatory institutions such as courts, tribunals and departments, will take place within and around the informal institutions of society, e.g. communication mediums, educational institutions, factories, markets, public gathering spaces. Second, the proposed enforcement does not involve state policing. The enforcement is not secured by state agencies but by various societal organs such as media; NGOs; consumers, investors, and shareholders (acting individually or through their organisations); public-spirited social activists; and trade or labour unions. Lastly, the enforcement is also social because it does not rely on civil or criminal sanctions but on social sanctions. Corporations are expected to observe human rights standards not on account of court-administered coercion but because of persuasion, negotiation, consumers-investors-shareholders' behaviour, market incentives, social pressure, and social shaming.

B *Means of Achieving Social Enforcement*

Human rights obligations could be enforced even through non-judicial means.[116] Given so, one could ask whether the instant Bill should have also tried to institutionalise the social enforcement of human rights norms by involving various potential societal organs. Though, as pointed out earlier, the Bill made a provision under which public-spirited associations could have played a role in enforcing human rights obligations against covered corporations,[117] it did not pursue this policy beyond that. Arguably, the Bill should have played an *enabling* role by providing opportunities for the social enforcement of human rights in at least the following five ways.

1 *Human Rights as (Corporate) Culture*

It is doubtful whether corporations and their executives are sufficiently exposed to the culture of human rights in concrete terms; education, understanding or some practical experience of human rights issues is generally not considered an essential component of the necessary qualifications of the directors/executives of a company. This is, in fact, one critical but under-investigated reason for corporations infringing human rights obligations, or at least showing aloofness to such obligations. This gap is though not surprising given that by and large there is no sharing of landscape between the corporation law and the human rights law: human

[116] See, for example, Linda C Reif, 'Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection' (2000) 13 *Harvard Human Rights Journal* 1. See, for a jurisprudential argument, Jeremy Waldron, *Law and Disagreement* (1999). Fabre offers a critique of Waldron's account: Cecile Fabre, 'The Dignity of Rights' (2000) 20 *Oxford Journal of Legal Studies* 271.

[117] Above n 22.

rights do not figure in law relating to corporations and vice versa.[118]

The Bill, in my view, should have tried to fill in the above gap by making a provision for the human rights education/training of the directors of the covered Australian and overseas corporations.[119] It is also desirable that such training pays special attention to two aspects: first, how to assess the human rights implications of business decisions and second, how to balance business interests of a corporation with its human rights obligations. It is plausible to argue that by adopting these measures the Bill would have encouraged the internalisation and institutionalisation of the culture of human rights, which in turn should have lead to a better compliance with human rights standards.[120]

2 *Human Rights as Basis for Information, and Participation in Decision Making*

The fact that most of the time corporate decisions — even those which affect stakeholders — are shrouded in secrecy, and taken without any participation of affected societal constituents, is another reason that contributes to MNCs' involvement in human rights violative activities. The Bill could have removed, or at least try to limit, this underlying reason. For example, it should have incorporated a provision regarding the right of stakeholders to obtain information — easily, speedily and at a minimum cost — not only about the human rights policies of a corporation generally but also about a specific project which raises human rights concerns. The access to such information would have facilitated the engagement of stakeholders in decision taking processes,[121] besides also providing impetus to non-judicial enforcement of human rights obligations in several other ways discussed below. It is reasonable to hope that the involvement of stakeholders and civil society organs in at least those corporate decisions

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[118] There are, however, some moves to bridge this gap. See, for example, ss 299(1)(f) and 1013D(l) of the *Corporations Act 2001* (Cth). Whereas s 299(1)(f) provides for giving details of company's environmental performance in the director's report if its operations are subject to environmental regulation, s 1013D(l) lays down that if the product has an investment component, the product disclosure statement (PDS) should provide the information about the extent to which labour standards or environmental, social or ethical considerations are taken into account in the selection, retention or realisation of the investment. See also *Corporations Regulations 2001* (Cth), reg 7.9.14C.

[119] Notably, the recent UK Bill lays down that 'any relevant training, qualifications and experience that company's directors has as regard to (i) the environment and (ii) social matters' shall be part of the annual report to be prepared and published by every company. Above n 97, cl 3(1)(e).

[120] One could draw an analogy with the reflexive model of environmental law which 'seeks to influence the decision making processes of institutions' and 'aims to establish environmental ethics in institutions, particularly businesses.' See Eric W Orts, 'A Reflexive Model of Environmental Regulation' (1995) 5 *Business Ethics Quarterly* 779, 787–8.

[121] Clause 4 of the UK Bill provides that 'companies shall take reasonable steps to consult and respond to opinions expressed by stakeholders who may be affected by any proposed projects that may have significant effects on them.': Above n 97.

that directly or indirectly affect them would have ensured that MNCs do not blatantly ignore human rights concerns while making business decisions.

Besides participating in decision making processes and thus limiting the chances of human rights violative decisions being taken at the first instance, civil society organs could also be engaged in monitoring compliance with human rights standards. For example, the Bill could have first required the covered corporations to release their compliance reports (*public disclosure*) and then get those reports being verified by local NGOs, media organisations and consumers associations (*third-party certification*).[122] Such an initiative would have been not only more effective but also a more efficient method of ensuring compliance at the local level.

3 *Human Rights as Bargaining Plank during Negotiations*

Human rights obligations could also work as a bargaining plank during negotiations between corporations on the one hand and their stakeholders on the other. For example, workers — whether acting individually or through labour/trade unions — could rely on human rights norms as a guide to negotiate their working conditions in areas such as wages, work safety, health and social security. This will obviously work more effectively in those countries where workers rights are protected and trade unions or other labour organisations exist.

Besides, one could also think of another area in which human rights norms should strengthen the bargaining position of local people, especially the disadvantaged sections of society such as tribals or aborigines. For example, local communities could negotiate with corporations the operating conditions of a particular business activity on the touchstone of applicable human rights standards. Arguably, the Bill should have availed these avenues and taken the lead in establishing a participatory enforcement initiative.

4 *Human Rights as Moulding Choices/Preferences of Consumers and Investors*

Another non-judicial mechanism by which the Bill could have secured observance of human rights standards by MNCs is through the involvement of consumers and investors. Though corporations themselves try to mould the choices and preferences of consumers,[123] in a market scenario they also

[122] Orts quotes the European Union's Eco-management and Audit Scheme, which introduces these two stages, as an example of emerging model of reflexive environmental law: Orts, above n 120, 786–7.

[123] For example, corporations in order to expand their market promote consumerism and try to influence / change social and cultural habits, primarily through advertising. See Balmurli Natrajan, 'Legitimating Globalisation: Culture and its Uses' (2002) 12 *Transnational Law*

have to take into account, willingly or otherwise, the choices/preferences of consumers as well as investors. The logic is simple: positive or negative response of consumers and investors directly affect the bottom line of corporations. How could the Bill could have utilised this opportunity offered by market constituents? In my view, the Bill should have promoted socially responsive conduct on the part of consumers and investors; human rights could have been promoted as one of the yardsticks to guide the choices and preferences of consumers as well as investors. In view of past experiences[124] and also because of the fact that consumers/investors' choices could work as *rewards* in a market setting,[125] the behaviour of consumers and investors could have brought a long lasting positive effect on the corporate observance of human rights standards.

5 *Human Rights as 'Naming and Shaming' Device*

Corporations generally take their reputation seriously; they invest lots of resources, time and energy in building up their goodwill as it brings several positive financial and non-financial benefits. Given so, it is natural to assume that corporations will do everything, reasonable and within their means, to safeguard and preserve their reputation. The Bill could have exploited this *fragile* business asset possessed by all corporations.

Fisse and Braithwaite have demonstrated, though their case studies, why and how adverse publicity — both at the informal and formal levels — could help in controlling harmful business conduct.[126] The

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& Contemporary Problems 127, 127-30; Robert McCorquodale and Richard Fairbrother, 'Globalisation and Human Rights' (1999) 21 *Human Rights Quarterly* 735; Krishna Kumar (ed), *Transnational Enterprises: Their Impact on Third World Societies and Culture* (1980).

[124] See Robert McCorquodale, 'Human Rights and Global Business' in Bottomley & Kinley (eds), above n 45, 89, 110–3; Su-Ping Lu, 'Corporate Codes of Conduct and the FTC: Advancing Human Rights through Deceptive Advertising Law' (2000) 38 *Columbia Journal of Transnational Law* 603, 607, 613, 624; Scott Greathead, 'The Multinational and the "New Stakeholder": Examining the Business Case for Human Rights' (2002) 35 *Vanderbilt Journal of Transnational Law* 719, 725–7; Eric Engle, 'Corporate Social Responsibility (CSR): Market-Based Remedies for International Human Rights Violations?' (2004) 40 *Willamette Law Review* 103, 109–11; Deva, 'Where from Here?', above n 10, 58-59. But see Erin Elizabeth Macek, 'Scratching the Corporate Back: Why Corporations Have No Incentive to Define Human Rights' (2002) 11 *Minnesota Journal of Global Trade* 101, 110–5, who evaluates the efficacy of consumer pressure.

[125] [R]ewards in markets are effective in shaping behaviour implies that indirect regulatory strategies which have the effect of enhancing market rewards for desired behaviour can be effective. Hence green labeling, mandated disclosure of the fuel efficiency of motor vehicles, and other mandatory disclosure rules can achieve regulatory objectives by enabling consumers to supply rewards in the market for desired behaviour.

John Braithwaite, 'Rewards and Regulation' (2002) 29 *Journal of Law & Society* 12, 24. See, for limitations of this approach, Orts, above n 120, 784-85.

[126] Brent Fisse and John Braithwaite, *The Impact of Publicity on Corporate Crimes* (1983). They argue that 'publicity as a technique of social control may have special merit where corporations are the targets.': Id, 1.

Bill, therefore, should have made provisions not only for adopting 'naming and shaming' as part of its enforcement strategy[127] but also encouraging people to get involved in this initiative so as to make it work. For example, a provision for *cyber shaming*[128]of those Australian corporations (as well as their overseas corporate hands) which indulge in human rights violations could have discouraged both the named and other corporations to ifringe human rights in future.

C *Advantages of Relying on Non-Judicial Social Enforcement Mechanism*

Besides the fact that social enforcement will supplement the judicial enforcement of human rights standards against MNCs and consequently contribute to the evolution of a robust mechanism of corporate accountability, the social enforcement could have several advantages over the latter. First and foremost, the doctrine of *forum non conveniens* will no longer create any inconvenience to social enforcement of human rights obligations. As obligations will be enforced through actors-institutions operating outside the formal court settings, no forum will ever become inappropriate or inconvenient, especially when information technology has enabled global networking amongst civil society organs.[129] Second, even the principles of separate personality and limited liability will have limited effect on curtailing the liability of a parent corporation for wrongs committed by its subsidiaries as the 'social perception' of these principles is bound to differ from the 'judicial perception'. Since public perception is influenced more by realties than by legal fictions or technicalities and is also not constrained by various rules-principles-doctrines, it may be closer to the business reality of a corporate group.[130]

Third, social enforcement will promote a responsible behaviour on the part of all concerned and may in fact be able to *prevent* and *preempt*

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[127] See Braithwaite and Drahos, above n 72, 272–5.

[128] By 'cyber shaming' I mean putting the names (and details of the alleged abuses) of corporations that are involved in human rights violations on a website. It would also be desirable to give enough publicity to such listing to make the naming and shaming work more effectively. It is worth considering whether such publicity should include a direction to the concerned corporation to display on its *own* website that it has been blacklisted for human rights violations. See also Braithwaite and Drahos, who make a reference to a list of 'Dirty Dozen' and the internet 'Hall of Shame', above n 72, 274.

[129] Baxi calls this 'cyber-space solidarity'. Upendra Baxi, *The Future of Human Rights* (2002), 133. See also John Braithwaite and Peter Drahos, *Global Business Regulation* (2000), 497; Noreena Hertz, *The Silent Takeover: Global Capitalism and the Death of Democracy* (2001), 145–50; Scott Pegg, 'An Emerging Market for the New Millennium: Transnational Corporations and Human Rights' in Jedrzej G Frynas and Scott Pegg (eds), *Transnational Corporations and Human Rights* (2003) 1, 10.

[130] '[Counsel] suggested beguilingly that it would be technical for us to distinguish between parent and subsidiary in this context; economically, he said, they were one. But we are concerned not with economics but the law. The distinction between the two is, in law, fundamental and cannot be bridged.': *Bank of Tokyo Ltd. v Karoon* [1987] AC 45, 64 (Lord Goff). See also above n 80.

human rights violations in certain situations. Such a role will be feasible because human rights will figure during various stages of decision taking process and will, therefore, caution corporations against indulging in human rights violative activities. Fourth, social enforcement will not only reduce the burden of judiciary but will also result in swift settlement and reduction of 'enforcement cost' in terms of court fees, counsel fees, and other enforcement related expenditures.

IV Conclusion: Looking ahead

In view of free market economy, corporations, acting alone or in connivance with states,[131] are increasingly becoming prime suspects of infringing human rights norms. They not only abuse human rights but also abuse various legal principles to *legally* claim impunity from the first type of abuses. This article has tried to show that corporations — especially if they are part of a corporate group — employ the doctrine of *forum non conveniens* and the twin corporate principles of separate personality and limited liability to evade, delay, restrict or deny liability for human rights violations. In fact, the combined invocation of these principles affords MNCs a shield against legal actions for non-observance of human rights obligations. Arguably, such a shield becomes almost unassailable when the regulatory regime is municipal — whether territorial or extraterritorial — whereas the targeted corporations are multi/trans-national.

The existing regulatory regimes hardly offer an adequate, principled solution to the question of liability for human rights violations within a corporate group. Most of the regimes either do not address these issues or allow the question of the liability of a parent corporation for human rights violations by its subsidiaries to be adjudicated afresh in each and every case. The Bill under investigation was no exception to this general unsatisfactory trend. I have argued how the Bill could and should have dealt with the corporate (mis)use of the doctrine of *forum non conveniens* and the principles of separate personality and limited liability by offering a principled solution. To be precise, it should have incorporated at least three measures. First, the Bill should have laid down that the Australian courts will not dismiss the proceedings on the ground of *forum non conveniens* unless they are satisfied that such proceedings amount to an abuse of process in the sense of vexation, harassment or oppression of involved

[131] See Andrew Clapham and Scott Jerbi, 'Categories of Corporate Complicity in Human Rights Abuses' (2001) 24 *Hastings International and Comparative Law Review* 339, 341–9 (who refer to three categories of corporate complicity: direct, indirect and silent); Deva, 'Where from Here?', above n 10, 8–9; Human Rights Watch, *The Enron Corporation: Corporate Complicity in Human Rights Violations* (1999) <http://www.hrw.org/reports/1999/enron> at 1 May 2004. See also Anita Ramasastry, 'Corporate Complicity: From Nuremberg to Rangoon: An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations' (2002) 20 *Berkeley Journal of International Law* 91.

corporations.

Second, corporations — which prefer to operate through a structure of parent and subsidiary concerns[132] — undoubtedly play a key role in the development of society. It is also beyond doubt that the principles of separate personality and limited liability help them in doing so. There is, however, an urgent need to limit the application of the twin principles to a corporate group. As even the doctrine of lifting of corporate veil not only presents inhuman difficulties of proof but also makes the relief both conditional and uncertain, the Bill should have based liability for human rights violations within a corporate group on the enterprise principle. Alternatively, it could have adopted the theory of 'limited eclipsed personality': in cases of alleged human rights violations, the separate personality of the subsidiaries of a corporate group should be eclipsed in that victims should be free to sue the immediate or ultimate parent corporation as a matter of principle.

Lastly, despite the above or similar other reform proposals, the Bill should have acknowledged the limitations inherent in a court-based extraterritorial enforcement of human rights obligations against overseas corporations. An understanding of these limitations would have required the Bill to recognise the need for and institutionalise a non-judicial enforcement mechanism by engaging various civil society organs. This would, in turn, have contributed positively to the overall strength of the regulatory framework.

Apparently, though all the above arguments or proposals were made with special reference to the provisions as well as omissions of the Bill, their value extends well beyond the scope of the Bill and could be applied in the context of various regulatory initiatives. The proposals advanced in this article also underscore the fact the realisation of human rights in a free and globalised economy will have its own set of challenges. One of the challenges will be in ensuring that MNCs are not only made accountable for human rights obligations in an effective, cost-efficient and speedy manner, but also that they contribute to the realisation of human rights by taking positive steps.[133] This challenge could be overcome only through the innovative use of law, legal institutions and societal organs. This would not, however, be easy as the James Hardie saga once again demonstrates.

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[132] See Tomasic et al, above n 73, 181; Ramsay, above n 89, 338–9.

[133] The recent UN Norms clearly conceive of positive human rights obligations of corporations. UN Sub-Commission on the Promotion and Protection of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN ESCOR, 55th Session, Agenda Item 4, UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (13 August 2003), [1] and [12]. See also Surya Deva, 'UN's Human Rights Norms for Transnational Corporations and Other Business Enterprises: An Imperfect Step in the Right Direction?' (2004) 10 *ILSA Journal of International & Comparative Law* 493, 499; Surya Deva, 'Human Rights Standards and Multinational Corporations: Dilemma Between "Home" and "Rome"' (2003) 7 *Mediterranean Journal of Human Rights* 69, 87–9. *Compare* Thomas Donaldson, *The Ethics of International Business* (1989) 83–4.