Bil’in and beyond – prosecuting corporate complicity in war crimes under Canadian law

by

Shane Moffatt

A thesis submitted in conformity with the requirements for the degree of Master of Laws

Graduate Department of Law

University of Toronto

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This paper outlines a prosecutorial framework by which Canadian corporations can be held criminally liable for their involvement in war crimes, crimes against humanity or genocide. Combining the provisions of the *Crimes Against Humanity and War Crimes Act* with the corporate liability standards found in the Canadian *Criminal Code*, a standard of liability emerges which appears well designed to generate findings of guilt against multinational corporations with complicated ownership structures, a myriad of representatives and far-flung operations. This model standard, it is hoped, might furthermore contribute to the global debate regarding multinational corporate accountability. By applying the proposed framework to two Canadian corporations constructing internationally illegal settlements on the farmlands of Bil’in in the West Bank, I therefore seek to test its practical relevance, as well as to demonstrate the theoretical underpinnings and legal sources (domestic and international) which would support its application, both in this instance and beyond.
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1) Introduction

1.1 Legal accountability: an urgent priority

Victims of human rights abuses and groups working on their behalf have increasingly turned to the law to constrain company power: to hold those responsible for abuses accountable and to seek remedies and reparations. This has led to a dynamic development of law: a search for how different branches of national and international law can be harnessed to hold increasingly powerful non-state actors accountable when they do harm.¹


Multinational Corporations (MNCs) have been charged with human rights abuses since their arrival on the world stage.² In recent years, however, international corporate lawlessness has come under increasing scrutiny,³ culminating in the first mandate of a

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² In the 1970’s, British Prime Minister Edward Heath dubbed Roland “Tiny” Rowland’s Lonhro Corporation “the unacceptable face of capitalism” for its activities in Africa. However, in the 1770’s, the British East India Trading Company was already conducting itself as “a rogue state: waging war, administering justice, minting coin and collecting revenue over Indian territory,” according to Nicholas B. Dirks in The Scandal of Empire: India and the Creation of Imperial Britain (Cambridge, Massachusetts: Harvard University Press, 2006) at 13.

Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises in 2005. In 2008 Special Representative John Ruggie warned that “the escalating exposure of people and communities to corporate-related abuses” makes reforming the system of multinational corporate liability an urgent policy priority. It is clear that any reform must bring corporations into a legal order based upon the principle of accountability, since without a framework of accountability, voluntary codes for businesses are likely to prove ineffective.

States have a duty under international human rights law to prevent and punish domestic human rights abuses by corporations. Although there is disagreement whether international law actually requires States to prevent human rights abuses committed abroad by corporations based within their territory, there is at the very least greater consensus that they are not prohibited from doing so where a recognized basis of

writes that that “defining corporate complicity in law is becoming more important as a growing number of companies are accused of involvement in gross human abuse.”


7 See ICHR, “Beyond Voluntarism”, supra note 3 at 157.


9 See Ruggie, “Protect, respect and remedy”, supra note 5 at para. 19.
jurisdiction exists.\textsuperscript{10} But for victims of corporate impunity, international law has had its limitations – specifically, it generally imposes direct obligations upon States and not third parties such as MNCs.\textsuperscript{11} As a result their advocates often file domestic civil suits to achieve a measure of redress. Pamela Merchant, Executive Director of the Center for Justice and Accountability in the United States goes so far as to describe legal actions brought under the Alien Tort Claims Act as “critically important” for the survivors of abuse.\textsuperscript{12}

Unfortunately, civil suits produce mixed results, in spite of numerous grave allegations against high profile (and deep pocketed) MNCs.\textsuperscript{13} For example, in 2001 Switzerland’s Supreme Court turned down a lawsuit filed by Gypsy International Recognition and Compensation Action, which accused IBM of aiding the Nazi Holocaust.\textsuperscript{14} Earlier that year a lawsuit filed on behalf of concentration camp survivors, also against IBM, based on “profits made through its violations of international law,”\textsuperscript{15} was discontinued in order to expedite compensation payments to survivors of the Nazis’ policies.\textsuperscript{16} In June 2009 Shell Oil Company agreed to an out of court settlement on

\begin{thebibliography}{9}
\bibitem{10} \textit{Ibid}. Ruggie also notes that “there is increasing encouragement at the international level, including from the treaty bodies, for home States to take regulatory action to prevent abuse by their companies overseas”.
\bibitem{11} Carlos Vazquez, “Direct vs. Indirect Obligations of Corporations Under International Law” (2005) 43 Colum. J. Transnat’l L. 43 (2005) 927 at 930 (“direct regulation of non-state actors remains a very narrow exception to the general rule that international law directly imposes obligations only on states and supranational organisations”).
\end{thebibliography}
“humanitarian grounds” for its past activities in Nigeria,\textsuperscript{17} while in December 2008 \textit{Chevron Corporation} was declared not liable for causing the deaths of protestors in the Niger Delta after a ten-year legal campaign.\textsuperscript{18} A case taken by the \textit{International Labor Rights Fund} against \textit{ExxonMobil} for its involvement in the violent suppression of villagers in the Indonesian province of Aceh has already had two of its three claims dismissed by a U.S. Federal District Court\textsuperscript{19} and a 2008 petition\textsuperscript{20} against two Canadian corporations operating in the Occupied Palestinian Territories (OPT) is far from certain to succeed.

1.2 Criminal complicity

In response to the \textit{International Commission of Jurists}’ series of reports in 2008 on corporate complicity in international crime,\textsuperscript{21} the \textit{Economist} magazine wrote that national governments are under increasing pressure to dust off old laws, or pass new ones, aimed at MNCs.\textsuperscript{22} In this paper I “dust off” two relatively new pieces of Canadian legislation which, combined, offer us a legal standard of corporate complicity that might contribute


\textsuperscript{20} Motion Introducing a Suit, No: 500-17-044030-081, Province of Quebec, District of Montreal, Superior Court, online: AlHaq <http://www.alhaq.org/pdfs/Bil’in-Green%20Park.pdf> [Bil’in Petition].


\textsuperscript{22} See “Companies and Human Rights” \textit{The Economist}, supra note 3.
to the debate, both inside and outside of Canada, on how MNCs can be held accountable for violations of international law. This analysis necessarily draws upon the sources of international law which inform our understanding of Canadian domestic law and which can enrich, and be enriched by, that same law.

In concrete terms, I assert that by employing the provisions of the *Crimes Against Humanity and War Crimes Act* in conjunction with the corporate complicity standards of the *Criminal Code*, we are presented with a legal framework which allows for the criminal prosecution of Canadian corporations for committing, aiding or abetting rights abuses which rise to the level of war crimes, crimes against humanity and genocide. Although this paper seeks to contribute to a debate regarding standards of complicity standards and to provide arguments in favour of criminal liability, it is also intended to be of practical relevance: the alleged aiding and abetting of war crimes by Canadian corporations is far from unprecedented. I therefore use the case of Green Park International Inc. and Green Mount International Inc. to explore in detail the elements of a crime using this prosecutorial framework. Doug Cassel is entirely right: “The question of the proper scope of liability of corporations and their executives for aiding and abetting human rights violations is far from academic.”

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24 Cassel, “Corporate Aiding and Abetting”, supra note 13 at 305.
1.3 Structure of paper

In Section 2, I outline the Canadian law governing war crimes and the intention of its implementing Programme. I then describe in Section 3 how the Canadian *Criminal Code*’s corporate liability provisions can be used to prosecute Canadian MNCs involved in war crimes and crimes against humanity. Section 4 examines the involvement of the *Green Park* and *Green Mount* corporations in the illegal transfer of civilians into the West Bank, while Section 5 in turn explains how the framework put forward in Section 3 can be employed against these same corporations.

I conclude with some observations on the importance of this framework for the rule of law (both Canadian and international) and for the peoples impacted by *Green Park* and *Green Mount*’s profiteering.
2) Canada’s War Crimes Legislation and Enforcement Programme

Canada’s War Crimes Program is based on a clear policy that Canada is not and will not become a safe haven for persons involved in war crimes, crimes against humanity or genocide.25

- Department of Justice Canada, May 2007.

2.1 Legislative and procedural framework governing war crimes prosecutions in Canada

Canada ratified the Rome Statute of the International Criminal Court (Rome Statute)26 in July 2000 and subsequently incorporated its provisions into domestic law via the Crimes Against Humanity and War Crimes Act27 (CHWC) in October of that year. The Rome Statute, which entered into force internationally on 1 July 2002, lists the crimes of genocide, crimes against humanity and war crimes recognised by the States parties in Articles 6, 7 and Article 8 (paragraph 2). These acts are criminalised for the purposes of Canadian law under Sections 4(4) and 6(4) of the CHWC.28

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27 Crimes Against Humanity and War Crimes Act, R.S.C. 2000, c.24 [CHWC].
28 The Rome Statute list of crimes is not intended to be exhaustive for the purposes of the CHWC, which also allows for the prosecution of other, non-listed, international crimes [in Sections 4(3) and 6(3)] and “developing permutations of the rules at customary international law”. For a full analysis of the CHWC’s adaptive approach to emerging rules of international law, see David Turns, “Aspects of National Implementation of the Rome Statute: The United Kingdom and Selected other States” in Dominick McGoldrick, Peter Rowe and Eric Donnelly, eds., The Permanent International Criminal Court (Oxford and Portland, Oregon: Hart Publishing, 2004) 337 at 358-361 [Turns, “Aspects of National Implementation]. Also see infra note 141.
In order to give effect to the Canadian Government’s stated policy that Canada not become a safe haven for war criminals, the *Crimes Against Humanity and War Crimes Programme* (hereinafter the *Programme*) was launched in 1998. The *Programme* involves a specialist unit in the Department of Justice (DOJ), the Royal Canadian Mounted Police (RCMP) and the Canada Border Services Agency (CBSA). Each specialised unit liaises within an *Interdepartmental Operations Group*.

**2.2 Canadian experience of prosecuting war crimes**

Prior to the CHWC, war crimes prosecutions were governed by the *Criminal Code*. The leading case of this era was *R. v. Finta*. Finta, a Hungarian police officer during WWII charged with manslaughter, kidnapping and the forced deportation of 8,617 Hungarian Jews, was controversially acquitted by the Supreme Court in a four-to-three split decision. Cherif Bassiouni, appearing as an expert witness at trial, suggested at one point that the accused must have had knowledge of international law in order to find that he or she has committed a war crime or crime against humanity. In his dissent, La Forest J described this as impoverished view of the nature and sources of international

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29 See “Backgrounder”, supra note 25.
31 *Ibid*.
35 *Criminal Code*, R.S.C. 1985, c. C-46, ss. 7(3.71) to (3.77).
37 *Finta*, ibid at 771.
law, arguing that where international law is found wanting, domestic law provides the appropriate standard of liability.

In 1995 the Supreme Court found that a Rwandan national resident in Canada, Léon Mugesera, had previously committed the offence of incitement to genocide and was therefore subject to removal under the *Immigration and Refugee Protection Act*. In May 2009 Désiré Munyaneza, another Rwandan national, became the first person convicted under the CHWC. He was found guilty on seven counts of war crimes, genocide and crimes against humanity.

### 2.3 Canada’s Crimes Against Humanity and War Crimes Programme in practice

#### 2.3.1 Focus on immigration and asylum

Following the prosecution’s failure to secure a conviction in *Finta*, there was a notable shift away from criminal prosecution of war crimes/crimes against humanity and towards

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39 *Finta*, ibid at 765.


42 See *Munyaneza*, ibid. at 200.
immigration control on the part of the Canadian authorities. The *Crimes Against Humanity and War Crimes Programme* itself operates on the premise that the most effective measure to deny safe haven is the early detection and prevention of entry of suspected human rights abusers into Canada. The ability to exclude and remove persons suspected of involvement in violations of crimes under the CHWC is legislated for in the *Immigration and Refugee Protection Act* (IRPA).

Although the *Programme* contains both a criminal and an immigration element, the majority of its activities have been heavily focused on excluding war criminals from Canada, either prior to or after their arrival in the country. The number of cases concluded using the *IRPA* (including all cases reviewed in Canada and abroad, entries prevented and exclusions from Canada) since 1998 is 29,968. In contrast, the DOJ/RCMP had 57 active files under investigation for that same period.

### 2.3.2 Cost of programme activities

According to a 2008 review of the *Programme*, the cost of denying a visa to persons outside of Canada ranges from $639 to $7,832, while the cost of a criminal prosecution...

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43 See Eboe-Osuji, “In Sync at Last”, supra note 38.
44 See Canada Border Service Agency, *Canada’s Program on Crimes Against Humanity and War Crimes: Ninth Annual Report 2005-2006* (“The most effective way to deny safe haven to people involved in war crimes, crimes against humanity, or complicit in war crimes or crimes against humanity is to prevent them from coming to Canada”), online: Canada Border Service Agency <http://www.cbsa-asfc.gc.ca/security-securite/wc-cg/wc-cg2006-eng.html>.
47 See “Ninth Annual Report”, supra note 44.
49 *Ibid.* at 47.
under the CHWC ranges between $4,027,284 and $4,170,372. With a five-year budget (years 2005/6 – 2009/10) of $78 million, this makes criminal prosecutions prohibitively expensive in all but the rarest cases.

2.3.3 Decisions to prosecute

The Interdepartmental Operations Group coordinates the investigation of all crimes against humanity and war crimes, with oversight provided by a Steering Committee composed of senior managers from each partner agency. In order to commence a prosecution under the CHWC, the personal consent in writing of the Attorney General or Deputy Attorney General is required and proceedings may be conducted only by the Attorney General or counsel acting on their behalf. The official criteria for selecting cases fall under three categories:

i. Nature of the allegation: credibility, severity, strength of evidence;

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53 See Department of Justice Canada, Overview of Operations, Mandates and Structure, supra note 34.

54 See CHWC, supra note 27, Section 9(3).
ii.  *Nature of the investigation:* progress to date, presence of witnesses in Canada, availability of documentary evidence, likelihood of continuing offence, likelihood of cooperation of other countries; and

iii.  *Other Considerations:* no prospect of conviction elsewhere, likely continuation of offence, general national interest.  

2.4 Corporate safe haven?

The CHWC has been lauded as going “a long way to laying the ghost of Finta to rest.”  

Certainly, the *Programme* fairs better in comparison with its counterpart in the United Kingdom, which in 2006 had a total of two investigators working part-time on universal jurisdiction issues, or with the German “programme” with one full time investigator.

For some, the Canadian programme’s immigration control approach can in part be justified in light of the country’s attractiveness to immigrants with a murky past.  

But although it is sensible to robustly pursue the Canada’s interest in not becoming a safe haven for war criminals, organisations such as the *Canadian Centre for International Justice* (CCIJ) have called for more prosecutions under the CHWC. The

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59 See Eboe-Osuji, “In Sync at Last”, supra note 38, “It is not surprising then that many seeking to escape from the bogeyman of their own native lands head for Canada, even from such lands of glorious, perennial sunshine and warmth as Rwanda. The bogeyman is often oppression or want or both. Occasionally, however, it is a past that is murky with questions of criminal behaviour.” Nonetheless, Eboe-Osuji also point hopes that Canada will “revert to prosecution”.
60 HRW, “State of the Art”, supra note 50 at 31: “Similarly, the forum state’s interest in not becoming a “safe haven” for perpetrators of such crimes could reasonably form part of the overall “public interest” in prosecuting such crimes”.

CCIJ recently claimed that Canada “is among those countries with a very poor record in ensuring that justice is served when war criminals and human rights abusers are present within its borders.”61 This criticism packs an added punch when Canadian corporations are alleged to facilitate ongoing war crimes and crimes against humanity overseas.62

While international criminal tribunals have more often targeted natural persons,63 the appropriate question to ask is whether the involvement of a corporation in a war crimes represents merely overzealous behaviour or criminality of the most serious magnitude.64 If we conclude that corporate crimes, like their victims, are quite real, then fairness dictates that corporations too must bear the negative consequences of their lawbreaking.65 Otherwise the “no safe haven” policy of the Canadian government risks being made a mockery.

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61 See Canadian Centre for International Justice, Backgrounder, online: Canadian Centre for International Justice <http://www.ccij.ca/resources/ccij-backgrounder.pdf>
62 See supra note 23.
63 See e.g. Article 25 (1), Rome Statute (Individual criminal responsibility) “The Court shall have jurisdiction over natural persons pursuant to this Statute”; International Criminal Tribunal for the Former Yugoslavia (ICTY) Statute, Art. 6; and International Criminal Tribunal for Rwanda (ICTR) Statute, Art. 5. However, the Nuremberg Charter did allow the International Military Tribunal to declare “groups or organisations” criminal, albeit at the trial of natural person only (Nuremberg Charter, Article 9) – as noted in, “Corporate Aiding and Abetting”, supra note 13 at 315.
3) Applying the CHWC to multinational corporations operating from within Canada

If the standards were clarified for aiding and abetting, and especially for the mens rea element, the resulting legal certainty would be fairer for both corporate managers and victims of human rights violations, while avoiding needless sources of friction among states.  


3.1 Introduction

Corporations have not traditionally been considered criminally liable under international law. By contrast, there is a long tradition in civil and common law legal systems of according criminal liability to corporations, including for international crimes. In Canada, corporations can be prosecuted for violations of international law where those crimes have been implemented into domestic law. Ronald C. Slye at the University of Seattle justifies this tradition on at least three grounds. First, corporate actions have a

66 Cassel, “Corporate Aiding and Abetting”, supra note 13 at 325.
69 Such as crimes under the CHWC, see A Comparative Survey of Private Sector Liability for Grave Violations of International Law in National Jurisdictions: Canada – Survey Questions and Responses, a 2004 survey conducted by the Fafo Institute for Labour and Social Research, the Fafo Institute for Applied International Studies and the International Peace Academy at 5 [Fafo Survey], online: FAFO <http://www.fafo.no/liabilities/Canada%20survey%20standardized%20Nov%2004.pdf>.
70 Ronald C. Slye, “Corporations, Veils and International Criminal Liability” (2008) 33 Brook. J. Int'l L. 955 at 960. Also see Paul Fauconnet, La Responsabilité, Etude sociologique, 2nd ed. (Paris: Félix Alcan, 1928) at 315 (“les associations de toute nature ont repris dans les sociétés contemporaines un rôle important, il est de plus en plus nécessaire de reconnaître, comme contre-partie à la liberté et aux droits toujours plus étendus que nous leur accordons, leur responsabilité pénale.”)
greater capacity for harm than individual actions. Second, where a wrong has clearly been committed by a corporation, the individual actions carried out by natural persons associated with the corporation may be insufficient to pursue a criminal charge. Third, effective deterrence requires systematic punishment of corporate wrongdoing.

Slye also notes that the disconnects and analogies between international criminal law and domestic corporate law present us with a unique opportunity for a complementary analysis of benefit to both systems.71 This paper undertakes such an analysis and by so doing explores and propounds a fusion72 of domestic and international which is capable of holding Canadian corporations accountable for their actions overseas.

3.2 The CHWC and corporate entities

The CHWC can be used to prosecute Canadian multinational corporations.73 Although the Act itself is silent on the issue of corporate liability, business entities are included within the definition of “person” under Section 2 of the Criminal Code:

“every one”, “person”, “owner, and similar expressions include Her Majesty and public bodies, bodies corporate, societies, companies and inhabitants of counties, parishes, municipalities or other districts in relation to the acts and things that they are capable of doing and owning respectively.”74

71 Slye, ibid. at 973, “...there are some interesting analogies, and even disconnects, between doctrines that have developed in international criminal law and those that have developed in domestic corporate criminal law. An increased attention to them may benefit both domestic and international legal systems.”
72 On the use of “fusion”, see infra notes 93-99 and accompanying text.
73 See Fafo Survey, supra note 69 at 4.
74 Furthermore, section 35 of the Interpretation Act (Interpretation Act, R.S.C. 1985, c. I-21.), governing the interpretation of federal law in Canadian, states: In every enactment ... person, or any word or expression descriptive of a person, includes a corporation.
Section 2(2) of the CHWC is clear that, “Unless otherwise provided, words and expressions used in this Act have the same meaning as in the Criminal Code.” Since Sections 4 and 6 of the CHWC, listing crimes committed inside and outside of Canada, refer to “every person who” commits an offence, the Criminal Code definition of “person” therefore applies to corporations for the purposes of the CHWC.

3.3 Personal jurisdiction of Canadian courts under the CHWC

Section 8 of the CHWC provides that Canadian courts exercise universal jurisdiction to examine offences falling within the scope of the Act.75 This covers all Canadian persons who are present in Canada after having committed an offence.76 Section 9 clarifies that a case against Canadian persons for crimes committed under the CHWC may be initiated in any province as though the crimes had been committed in that province.77 Canadian courts therefore enjoy jurisdiction to hear cases against Canadian-registered corporations whenever their activities have violated, or continue to violate, the CHWC.78

A criminal prosecution based on universal jurisdiction has the distinct advantage of not being encumbered by tort law’s “real and substantial connection” test79 or the

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75 But see Turns, “Aspects of National Implementation”, supra note 28 at 361 (suggesting that Canadian courts exercise something more approaching a ‘partial’ universal jurisdiction since universality is not explicitly identified as the basis of jurisdiction, however wide the Act’s jurisdictional net is “cast…about”).
76 See CHWC, supra note 27, Section 8 (b).
77 Ibid., Section 9 (1).
78 Note that this adheres to the “recognized basis of jurisdiction” as a legitimate ground for preventing abuse by a state’s corporations overseas, see supra note 10 and accompanying text.
challenge presented by *forum non conveniens*, which might yet prove insurmountable hurdles to the villagers of Bil’in in their petition. Also, if a corporation is to remain registered in Canada, it cannot flee the country in the same manner as a natural person.

But by what *standard* will the corporation be held liable?

### 3.4 Corporate criminal liability in Canada

Bill C-45, which became law in March 2004, significantly altered Canada’s approach to corporate criminal responsibility. With respect to an offence that requires the prosecution to prove fault, an “organisation” is now party to the offence under Section 22.2 of the *Criminal Code* if, with the intent at least in part to benefit the organisation, one of its senior officers:

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80 *Amchem Product Inc. v. B.C (Workers’ Compensation Board* [1993] 1 S.C.R. 897, 3 W.W.R. 441 (S.C.C.) at para 21: “The choice of the appropriate forum is still to be made on the basis of factors designed to ensure, if possible, that the action is tried in the jurisdiction that has the closest connection with the action and the parties and not to secure a juridical advantage to one of the litigants at the expense of others in a jurisdiction that is otherwise inappropriate.”

81 According to University of Toronto Law Professor Ed Morgan, “The Quebec court is going to have to find that there's a real and substantial connection to Quebec, which seems a stretch to me.” See “Palestinians take construction firms to court in Quebec – They're building condos on our land, villagers say” *The Montreal Gazette* (21 June 2009), online: The Montreal Gazette <http://www.montrealgazette.com/news/Palestinians%20take%20construction%20firms%20court%20Quebec/1718011/story.html>.

82 See HRW, “State of the Art”, supra note 50 at 28. Human Rights Watch provides the example Danish authorities having five days, during which the suspect was attending a conference in Copenhagen, to investigate a complaint and apply for an arrest warrant before he departed the jurisdiction.

83 Bill C-45, *An Act to amend the criminal code (criminal liability of organisations)*, 2nd Sess., 37th Parl., 2003 (as passed by the House of Commons 30 October 2003).


85 “Organisation”, according to Section 2 of the *Criminal Code* refers to a “public body, body corporate, society, company, firm, partnership, trade union or municipality”. 17
(a) acting within the scope of their authority, is a party to the offence;

(b) having the mental state required to be a party to the offence and acting within the scope of their authority, directs the work of other representatives of the organization so that they do the act or make the omission specified in the offence; or

(c) knowing that a representative of the organization is or is about to be a party to the offence, does not take all reasonable measures to stop them from being a party to the offence.

Of further relevance are the expanded definitions of “representative” and “senior officer” in Section 2 of the Criminal Code:

“representative”, in respect of an organization, means a director, partner, employee, member, agent or contractor of the organization;

“senior officer” means a representative who plays an important role in the establishment of an organization’s policies or is responsible for managing an important aspect of the organization’s activities and, in the case of a body corporate, includes a director, its chief executive officer and its chief financial officer;

In brief, sub-section 22.2 (a) requires a senior officer to actually commit the crime in question for the direct benefit of the organisation. Sub-section 22(b) enables a corporation to be convicted on the basis of a senior officer ordering, with intent and for the benefit of the corporation, the commission of a crime by the corporation’s representatives, even where such representatives do not share the senior officer’s criminal

86 See Department of Justice Canada, A Plain Language Guide, supra note 84 at 7.
Lastly, sub-section (c) envisages a situation where a senior officer knows that the corporation’s representatives are going to commit an offence but does not stop them because she wants the organisation to benefit from the crime.88

3.5 A new standard of complicity for corporate involvement in war crimes

The Section 22.2 regime has replaced the previous common law concept of corporate liability based on the fault of a corporation’s “directing minds” with liability based on the fault of “senior officers” who are responsible for both their own actions and those of the corporation’s representatives.89 The expanded definition of “representative” is surely of major significance for the purposes of this paper, since MNCs very often out-source their ventures through contractors or other agents in a host nation.90 We thus have three clear chains of legal accountability along which to pursue MNCs for offences under the CHWC.

Firstly, under 22.2(a), where a senior officer is herself involved in the commission of a crime under the CHWC, as per the elements of a crime established in Article 25 of the Rome Statute, in order to at least in part to benefit the corporation.91

Secondly, under 22.2(b), where a senior officer, acting within the scope of her authority, becomes a party to an offence under the CHWC for having ordered, solicited or

87 Ibid.
88 Ibid.
89 See Roach, “Changed Face”, supra note 84 at 374.
90 As in the case of Green Park and Green Mount (see infra Sections 4 and 5). Also see ICTJ, “A Matter of Complicity”, supra note 19 at 10; and John Vidal, supra note 17.
91 I operate on the understanding that the Canadian courts will at this time primarily look to the ICC standards to govern the elements of a crime under the CHWC – See Muyaneza, supra note 41 at [60], affirming that the CHWC “is aimed at implementing the Rome Statute of the International Criminal Court.” But also see further discussion, infra note 188.
induced (for the benefit of the corporation) “the commission of such a crime which in fact occurs or is attempted”\textsuperscript{92} by the corporation’s representatives.

Lastly, under 22.2(c), where representatives of the corporation are involved in the commission of a crime under the CHWC, again as per Article 25 of the Rome Statute, and a senior officer fails to take reasonable measures to prevent the commission of this crime in order to benefit the corporation. 22.2(c) arguably charts the more onerous path to a finding of corporate liability, as it not only involves the determination of an offence under international criminal law by a company’s representative(s) but also a further finding that a senior has knowingly not taken reasonable measures to prevent the commission of this offence.

3.6 Interrelationship between Section 22.2 and the CHWC

As Karen Knop discerns, international law is not simply a conveyor belt that “delivers law to the people,”\textsuperscript{93} but rather involves a complex process of translation and internalisation at the domestic level.\textsuperscript{94} In this instance, international criminal law has been incorporated into the domestic legal order via the CHWC, with the result that war crimes and crimes against humanity are no longer purely creatures of the international order.\textsuperscript{95} But the translation process cannot end there. In the words of La Foret J. in his prescient

\textsuperscript{92} See Rome Statute, Article 25 (3) (b).
\textsuperscript{94} Ibid. at 506.
\textsuperscript{95} See Louis LeBel and Gloria Chao, “The Rise of International Law in Canadian Constitutional Litigation: Fugue or Fusion? Recent Developments and Challenges in Internalizing International Law” (2002) 16 Sup. Ct. L. Rev. 23 at 50 [LeBel and Chao, “Fugue or Fusion”].
dissent in *Finta*, where “international law does not have specific standards,”⁹⁶ domestic law steps into the breach. Since the language of the CHWC makes it clear that corporations are subject to its provisions, *some* standard for holding corporate entities liable is plainly required. The recently updated Section 22.2 provides this standard. Tying these strands together is part of what the *International Commission of Jurists* calls the “dynamic development of the law”.⁹⁷

This approach presents a fusion of the two legal orders in constructing a new unified standard of liability,⁹⁸ which can be justified at the domestic level.⁹⁹ While this necessarily involves a degree of uncertainty and creativity,¹⁰⁰ the benefits of this unified liability standard are clear: to the international legal order, its application to corporations at the domestic level;¹⁰¹ to the domestic order, a ready-made regime of corporate accountability which can prevent the circumvention of Canada’s “no safe haven” policy; to the victims of unscrupulous Canadian MNCs, a powerful deterrent.

Finally, since international law¹⁰² and international criminal tribunals¹⁰³ remain inextricably linked to the interpretation of Canada’s domestic war crimes law, one can

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⁹⁶ See *Finta*, supra note 36 at 755; and see Lebel and Chao, *ibid.* at 50.
⁹⁷ See ICJ, “Volume 1”, supra note 1 at 2.
⁹⁸ See LeBel and Chao, “Fugue or Fusion”, supra note 95 at 25.
⁹⁹ Knop, “Here and There”, supra note 35 at 520. Importantly, the “fusion” framework which I propose is not open to the criticism that it circumvents the parliamentary process, since I rely on Acts of Parliament to ground my proposals.
¹⁰¹ See infra notes 222-226 and accompanying text.
¹⁰² See Sections 4(4) and 6(4), CHWC and *Munyaneza*, supra note 41 at 132.
¹⁰³ See *Mugesera*, supra note 40 at 126. “Though the decisions of the ICTY and the ICTR are not binding upon this Court, the expertise of these tribunals and the authority in respect of customary international law with which they are vested suggest that their findings should not be disregarded lightly by Canadian courts applying domestic legislative provisions, such as ss. 7(3.76) and 7(3.77) of the *Criminal Code*, which expressly incorporate customary international law. Therefore, to the extent that *Finta* is in need of clarification and does not accord with the jurisprudence of the ICTY and the ICTR, it warrants reconsideration.” The Court demonstrates in this passage a willingness (as a matter of prudence, rather than judicial precedence - See Eboe-Osuji, “In Sync at Last”, supra note 38) to overrule its earlier findings in *Finta* which are inconsistent with subsequent jurisprudence of the ICTR and the ICTY.
neither conceptualise nor operationalise its provisions without reference to the international legal order.\textsuperscript{104} With this in mind, it is worth noting that much of the work of the international tribunals has focussed on the accomplices to war crimes, rather than direct perpetrators,\textsuperscript{105} resulting in a clear trend towards aiming international criminal law at businessmen and companies through the “vehicle of complicity”.\textsuperscript{106} This is a trend of which Canadian justice ought to be cognisant. As we shall see next in Chapter 4, there is certainly a corresponding awareness amongst MNCs that they risk exposing themselves to serious charges where they commit, aid or abet violations of international law.

\textsuperscript{104} As is reiterated throughout Sections 4 and 5 infra.


\textsuperscript{106} See Clapham, “Extending”, supra note 67 at 913. Clapham also points out that a Dutch court which sentenced businessman Frans van Anraat to 17 years imprisonment for supplying Saddam Hussein with chemicals to make poison gas was in no doubt on this issue: “The powers, rights and freedoms of corporations today continue to grow. It is only right that their responsibilities should keep pace with these developments”. For more on this case, see “Saddam’s ‘Dutch link’” BBC News (23 December 2005), online: BBC News <http://news.bbc.co.uk/2/hi/middle_east/4358741.stm>. 
4) Aiding and abetting the transfer of a civilian population into occupied territory: the case of Bil’in Village Council v Green Park International Inc. and Green Mount International Inc

The real story is Israel’s attempt to take control of the West Bank by building the illegal wall and settlements that threaten to destroy dozens of villages like Bilin and any hope for peace.107

- Mohammed Khatib, secretary of Bil’in’s Village Council, July 2005.

We have to reach an agreement with the Palestinians, the meaning of which is that in practice we will withdraw from almost all the territories… because without that there will be no peace.108

- Ehud Olmert, former Prime Minister of Israel, September 2008.

4.1 Factual scenario

A petition taken to the Superior Court of Quebec alleges that two Canadian corporations registered in that same province, Green Park International Inc. and Green Mount International Inc. (hereinafter Green Park and Green Mount), are constructing, marketing and selling residential units located to the east of the Israeli West Bank settlement of

Modi’in Illit, \(^{109}\) on a development illegal under Israeli\(^ {110}\) and international law,\(^ {111}\) known as “Matityahu East B”.\(^ {112}\) The Matityahu settlement had been described as “a massive $230 million project, with 5,800 apartments planned.”\(^ {113}\) The plaintiffs, Bil’in village Council and its elected head, are seeking a declaration that the construction is illegal, demolition of the buildings, return of the land on which the units are being constructed, and $2 million in punitive damages.\(^ {114}\)

Modi’in Illit, with a population of approximately 45,000 is itself already one of the larger Israeli settlements in the West Bank.\(^ {115}\) The route of the West Bank barrier (hereinafter the Barrier), however, extends significantly to the east of Modi’in Illit in a manner which separates the Palestinian villagers of Bil’in from their olive farms and grazing land and annexing those lands for the Matityahu East development.\(^ {116}\) According to a 2005 joint report by B’tselem\(^ {117}\) and Bimkon\(^ {118}\):

\(^{109}\) See Bil’in Petition, supra note 20 at para. 9.
\(^{110}\) See “Documents reveal W. Bank settlement Modi’in Illit built illegally” Haaretz (3 January 2006), online: Haaretz <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=665389> (“Illegal permits were issued for a new West Bank project while buildings were being constructed or even completed, according to documents Haaretz has obtained. The project is the Modi’in Illit settlement neighborhood of Matityahu East, which is being built on land belonging to the Palestinian village of Bil’in. An eyewitness reported that the illicit construction is proceeding, despite recent instructions from the settlement’s planning and construction committee to stop the work.”)
\(^{111}\) See infra Section 4.4.
\(^{114}\) See Bil’in Petition, supra note 20 at 12-14.
\(^{116}\) See Settlement 210/8/1, supra note 112.
\(^{117}\) An Israeli NGO describing itself as “The Israeli Information Center for Human Rights in the Occupied Territories”, online: Btselem <http://www.btselem.org/English/About_BTselem/Index.asp>.
\(^{118}\) Bimkom translates as “Planners for Planning Rights”. The group describes itself as “an Israeli non-profit organization formed in 1999 by a group of planners and architects, in order to strengthen democracy and human rights in the field of planning”, online: Bimkon.org <http://eng.bimkom.org/Index.asp?ArticleID=106&CategoryID=134&Page=1>.
the route chosen (for the Barrier) has caused greater harm to Palestinian farmers living in the nearby villages than would have resulted had the route been determined solely on the desire to protect the bloc as it exists today. Our findings also prove that Israel’s goal is to gain control of privately-owned Palestinian land on the Israeli side of the barrier and thereby enable construction on that land as well.\textsuperscript{119}

The Matityahu East development and its accompanying segment of the Barrier have severely impacted the economic and social well-being of the local Palestinian population.\textsuperscript{120} In an interview with \textit{B’tselem} and \textit{Bimkon}, Suliman Yassin, then a 69-year old resident of Bil’in, testified:

“...the Israeli army expropriated most of my farmland so they could build the separation fence. In February 2004, I received an order taking twenty-five dunams.\textsuperscript{121} The order came as a big surprise. Ten dunams planted with trees remain on the western side of the fence, and in a few days I won’t be able to get to them. …Our life has become hell. I feel humiliated and harassed all the time, and I don’t know what to do.”\textsuperscript{122}

\begin{flushright}

\textsuperscript{120} For a detailed survey of the consequences for the villagers Bil’in, see \textit{ibid.} at 60-64. On the economic impact of the Barrier generally, see “Palestinian farmers fear advance of West Bank wall” \textit{Financial Times} (23 September 2006), online: FT.com <http://www.ft.com/cms/s/0/1bb19598-4aa1-11db-8738-0000779e2340.html?nclick_check=1> (“They have watched the effects of the wall in the northern West Bank and fear further land confiscations, shrinking markets and the erosion of their sphere of existence.”)

\textsuperscript{121} 1 dunam is equal to approximately \(\frac{1}{4}\) of an acre.

\textsuperscript{122} See Bimkom and B’tselem, “Under the Guise”, supra note 119 at 63-64.
\end{flushright}
In September 2007, the Israeli Supreme Court ordered the re-routing of a section of the Barrier which cuts through farmland belonging to the villagers of Bil‘in,\(^{123}\) on the basis that the current route is highly prejudicial to the villagers and not justifiable on security grounds.\(^{124}\) If implemented, this decision would only allow the villagers to re-coup 50% of their land. However the Barrier has yet to be re-routed and construction on Matityahu East continues unabated.\(^{125}\) According to Michael Sfard, an Israeli lawyer representing Bil‘in, it is hard to shake the impression that the Israeli authorities are trying to hold up proceeding until changes on the ground make implementing the order impossible.\(^{126}\)

Bil’in’s petition has attracted considerable media attention in Canada,\(^{127}\) arguing that in constructing, marketing and selling residential units in Matityahu East, Green

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\(^{123}\) See “Defense Min. yet to start court-ordered reroute of Bil’in fence” *Haaretz* (24 April 2008), online: Haaretz <http://www.haaretz.com/hasen/spages/977462.html> (“In September 2007, the High Court ruled that a 1,700-meter segment of the separation fence near Bil’in must be dismantled and moved to an alternative route. The court said Israel built the segment in question on land appropriated from Palestinians, falsely citing security needs when the main objective was to enable the expansion of a nearby settlement, Modi’in Ilit (Kiryat Sefer).”).


\(^{125}\) See “Defense Min. yet to start court-ordered reroute of Bil’in fence” *Haaretz* (24 April 2008), online” Haaretz <http://www.haaretz.com/hasen/spages/977462.html> (“A spokesman for the (defence) ministry, Shlomo Dror, said Wednesday that the omission stems from budget constraints, and said he hoped that planning the alternative route would be included in the work plan for 2009 - in other words, a year and a quarter after the High Court ruling, at the very least... contractors recently began to lay the groundwork for building the eastern part of the neighborhood, on land the High Court ruled should be east of the fence.”)

\(^{126}\) Ibid. Also see Tony Judt, “Fictions on the Ground,” Op-Ed., *The New York Times* (22 June 2009), online: The New York Times <http://www.nytimes.com/2009/06/22/opinion/22judt.html?pagewanted=2&ref=opinion> (“There are occasions, however, when political hypocrisy is its own nemesis, and this is one of them. Because the settlements will never go, and yet almost everyone likes to pretend otherwise, we have resolutely ignored the implications of what Israelis have long been proud to call "the facts on the ground.""

\(^{127}\) See “Bil’in villagers may just succeed,” Henry N. Lowi, Barrister and Solicitor, Ontario and Israel Bars, Letter to the Editor, *The Toronto Star* (20 June 2009), online: Toronto Star <http://www.thestar.com/article/653282> (writing that “If the Canadian Department of Justice would choose to prosecute the two Quebec corporations and their Quebec directors for war crimes, it could do so under Canada's War Crimes legislation”); “Court to decide if builders can be sued for settlements” *The Canadian Jewish News* (11 June 2009), online: Canadian Jewish News <http://www.cjnews.com/index.php?option=com_content&task=view&id=17081&Itemid=86>; and “Land grabs and lawsuits” *The Montreal Mirror* (1 August 2008), online: The Montreal Mirror <http://www.montrealmirror.com/2008/073108/news2.html>.
Park, Green Mount and their sole director Annette Laroche are aiding and abetting Israel in the transfer of part of its civilian population into occupied territory, in violation of:

“Article 49(6) of the Fourth Geneva Convention dated August 12, 1949; … Articles 8(2)b(viii) and 25 (c) of the Rome Statute of the International Criminal Court dated July 17, 1998; Section 6 (1)(c), 6(3) and 6 (4) of the Canadian Crimes against Humanity and War Crimes Act S.C. 2000, c.24…”

4.2 Ownership structure

One wealthy entrepreneur involved in the Matityahu East construction is Lev Leviev, an Israeli businessmen and owner of Africa Israel Investments. Leviev jointly owns the Danya Cebus company, also involved in the constructions at Matityahu East. In June of 2008, the United Nations Children’s Fund (UNICEF) severed all ties with Leviev due to his suspected involvement in building settlements in the West Bank. Chris de Bono, senior adviser to the executive director of UNICEF, explained that they had found “reasonable grounds for suspecting” that Leviev’s companies were building settlements in occupied territory. Subsequently, in March 2009, the British Embassy in Tel Aviv

128 See Bil’in Petition, supra note 20 at para. 24.
131 See “UNICEF cuts ties”, supra note 129.
132 Ibid.
decided not to move into a building owned by Leviev because of his company’s role in the West Bank.\textsuperscript{133}

Emily Schaeffer, another Israeli lawyer representing Bil’in in their Canadian action, has learned that both Green Park and Green Mount’s majority shareholder is a corporation listed in Panama.\textsuperscript{134} In Canada, the only known individual connected with either company is one Annette Laroche, their mutual sole director and corporate officer.\textsuperscript{135} Lawyers for Bil’in believe that Laroche is “a nominal director”.\textsuperscript{136} The complex ownership structure has been elsewhere referred to a deliberate attempt to avoid liability.\textsuperscript{137} Fortunately, quite irrespective of their labyrinthine ownership structures, both companies are registered in the province of Quebec and therefore classify as persons subject to prosecution under the CHWC.\textsuperscript{138}

\textbf{4.3 Transfer of a civilian population into occupied territory is a war crime under Canadian law}

Under Section 6(3) of the CHWC, war crimes are defined as:

\begin{itemize}
  \item \textsuperscript{133} See “Embassy Snub”, supra note 130.
  \item \textsuperscript{134} “Court to decide if builders can be sued for settlements” The Canadian Jewish News (11 June 2009), online: The Canadian Jewish News <http://www.cjnews.com/index.php?option=com_content&task=view&id=17081&Itemid=86>.
  \item \textsuperscript{135} See Bil’in Petition, supra note 20 at para.6; and “Court to decide if builders can be sued for settlements”, supra note 134.
  \item \textsuperscript{136} See “Court to decide if builders can be sued for settlements”, \textit{ibid}.
  \item \textsuperscript{137} See “Bil’in vs Green Park” Corporate Watch (23 July 2009), online: Corporate Watch <http://www.corporatewatch.org.uk/?lid=3414>.
  \item \textsuperscript{138} Relying on Section 8 of the CHWC – “A person who is alleged to have committed an offence under section 6 or 7 may be prosecuted for that offence if... (b) after the time the offence is alleged to have been committed, the person is present in Canada”. On jurisdiction of the Canadian courts, further see supra Section 3.3. In case of Green Park and Green Mount, they have already committed the offence of aiding and abetting a war crime, albeit one which is committed afresh every day – see infra note 155 and accompanying text.
\end{itemize}
... an act or omission committed during an armed conflict that, at the time and in the place of its commission, constitutes a war crime according to customary international law or conventional international law applicable to armed conflicts, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.

In order to constitute a war crime, therefore, the prohibited act must firstly be related to an armed conflict. The transfer of Israeli settlers into the OPT meets this requirement, according to the International Court of Justice (ICJ) in its 2004 Wall Advisory Opinion (hereinafter the Wall).  

Furthermore, Section 6(4) of the CHWC accepts the Rome Statute’s definitions of war crimes, crimes against humanity and genocide:

For greater certainty, crimes described in articles 6 and 7 and paragraph 2 of article 8 of the Rome Statute are, as of July 17, 1998, crimes according to customary international law, and may be crimes according to customary international law before that date. This does not limit or prejudice in any way the application of existing or developing rules of international law.

In Article 8(2) (b) (viii), the Rome Statute explicitly lists as a war crime:

139 See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, [2004] I.C.J. Rep. 136 at paras. 73-74 [the Wall], online: International Court of Justice <http://www.icj-cij.org/docket/files/131/1671.pdf>:

73. In the 1967 armed conflict, Israeli forces occupied all the territories which had constituted Palestine under British Mandate (including those known as the West Bank, lying to the east of the Green Line).

74. On 22 November 1967, the Security Council unanimously adopted resolution 242 (1967), which emphasized the inadmissibility of acquisition of territory by war and called for the “Withdrawal of Israel armed forces from territories occupied in the recent conflict”, and “Termination of all claims or states of belligerency”.

The Canadian Supreme Court in Munyaneza also accepted that the act be committed “either during or in the aftermath of the fighting, provided that it is committed in furtherance of, or at least under the guise of, the situation created by the fighting” – See Munyaneza, supra note 41 at [149].

140 The fifth, sixth and seventh counts in Munyaneza charged the defendant with committing a war crime, as defined in subsections 6(3) and 6(4) of the Crimes Against Humanity and War Crimes Act, S.C. 2000, c. 24, thereby committing the indictable offence of a war crime (see Munyaneza, supra note 41 at [130]).
The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;

From the wording of the text, there can be little doubt that such transfer of a civilian population is a war crime for the purposes of the CHWC. The United Kingdom, a co-signatory of the Rome Statute, also accepts the Statute’s definitions of war crimes for the purposes of its implementing legislation in Article 50 of the (UK) International Criminal Court Act (2001). In 2003, then legal advisor to the Israeli government Elyakim Rubinstein articulated his government’s understanding that for Israel to ratify the Rome Statute would “turn hundreds of thousands of Israeli civilians into war criminals.” The government of Israel evidently shares with Canada and the United Kingdom the belief that to sign the Rome Statute is to accept the “transfer of a civilian population into occupied territory” as a war crime.

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141 Canada not incidentally also recognises that such a population transfer constitutes a war crime under customary international law as of July 17, 1998. See Fafo Survey, supra note 69 at 4; and See Turn, “Aspects of National Implementation”, supra note 28 at 359 (explaining that Section 6 (4) of the CHWC is designed to allow for new crimes to evolve under customary international humanitarian law and subsequently, but non-retroactively, made enforceable under the CHWC, while at the same time cementing the current Rome Statute list of crimes as having customary status).

142 International Criminal Court Act 2001 (U.K.), c. 17, s. 50: Meaning of “genocide”, “crime against humanity” and “war crime”
- “genocide” means an act of genocide as defined in article 6,
- “crime against humanity” means a crime against humanity as defined in article 7, and
- “war crime” means a war crime as defined in article 8.2.

143 See Notes from the Inter Disciplinary Center, Israel and the International Criminal Court (Herzliya Conference, 13 March 2003), online: ICCNow.org <http://www.iccnow.org/documents/Israel_Summary13March03.pdf>.

4.4 The construction of Israeli settlements in the Occupied Palestinian Territories is a war crime under Canadian law

The transfer of a civilian population into occupied territory is also defined as war crime under paragraph 6, Article 49 of the Forth Geneva Convention. The recent advisory opinion of the International Court of Justice (ICJ) with respect to Israel’s obligations under this Convention has settled the legal debate: Israel’s policy in the West Bank violates the international prohibition of such population transfers.

Naturally, the Israeli government disputes this. According to the Israeli Ministry of Foreign Affairs:

“Israel’s presence in the territory is often incorrectly referred to as an ‘occupation’. However, under international law, occupation occurs in territories that have been taken from a recognized sovereign.”

Since the West Bank, according to this view, does not constitute occupied territory,

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203 at 209 (“After 1998, when the Rome Statute was opened for signature, States had to accept the whole package or nothing”).


147 See Israel Ministry of Foreign Affairs, *Israel, the Conflict and Peace: Answers to frequently asked questions* — “What is the status of the territories?” (November 2007), online: Israel Ministry of Foreign Affairs <http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Palestinian+terror+since+2000/Israel+-+the+Conflict+and+Peace+-+Answers+to+Frequent.htm#territories>. 
“the Israeli claim to these territories is legally valid (and) it is just as legitimate for Israelis to build their communities as it is for the Palestinians to build theirs… even if the Fourth Geneva Convention were to apply to the territories, Article 49 would not be relevant to the issue of Jewish settlements.”

This produces two legal claims. First, the West Bank does not constitute and “occupied territory”. Second, and consequentially, Israeli settlements therein are not illegal.

Israel’s claim that they do not occupy the West Bank in a strict legal sense rests on the argument that since Jordanian sovereignty over the territory prior to 1967 was never recognised internationally, the territory is more accurately described as “disputed”. This argument was unanimously dismissed by the International Court of Justice (ICJ) in the Wall Advisory Opinion:

The Palestinian territories which before the conflict lay to the east of the Green Line and which, during the conflict, were occupied by Israel, there being no need for any enquiry into the precise status of those territories.

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148 See Israel Ministry of Foreign Affairs, *Israel, the Conflict and Peace: Answers to frequently asked questions* – “Are Israeli settlements legal?” (November 2007), online: Israel Ministry of Foreign Affairs

149 See “What is the status of the territories?”, supra note 147. Contrast with De Waart, “Stumbling-Block”, supra note 146 at 829: “In the context of the Fourth Geneva Convention the discussion on ‘disputed’ versus ‘occupied’ is irrelevant, for the Convention applies regardless of claims of sovereignty,” relying on 1949 Geneva Convention, Article 1: ‘The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances’.

150 See the Wall, supra note 139 at para. 101. This was affirmed by Judge Buergenthal – see Declaration of Judge Buergenthal, at para. 2 [Declaration of Judge Buergenthal], online: International Court of Justice
<www.icj-cij.org/docket/files/131/1687.pdf> (“I share the Court’s conclusion that international humanitarian law, including the Fourth Geneva Convention, and international human rights law are applicable to the Occupied Palestinian Territory and must there be faithfully complied with by Israel.”)
Not only is the ICJ, as the authoritative legal body of international society, quite clear that the West Bank is “occupied” according to international law, but the United Nations Security Council has repeatedly affirmed the international consensus view that the status of Israel is that of an occupying power. The existence of numerous Israeli settlements in the West Bank has done noting to alter this legal reality.

Since Israel is internationally recognised as an occupying power in the West Bank, all existing and future settlements constitute an illegal transfer of a civilian population according to the ICJ:

…information provided to the Court shows that, since 1977, Israel has conducted a policy and developed practices involving the establishment of Settlements in the Occupied Palestinian Territory, contrary to the terms of Article 49, paragraph 6.

In his separate Declaration, Judge Buergenthal took a similar view:

I agree that this provision applies to the Israeli settlements in the West Bank and that their existence violates Article 49, paragraph 6.

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153 See the Wall, supra note 139 at para. 78, (As observed in Alexander Orakhelashvili, *Peremptory Norms in International Law* (Oxford: Oxford University Press, 2006) at 221). Orakhelashvili further points out, at page 222, that “this accords with the findings of the UN General Assembly and Security Council that the incorporation of Walvis bay into South Africa was null and void and the territory continued to be the integral part of South West Africa, GA Res 32/9D, SCR 432(1978)”.


155 See the Wall, supra note 139 at para. 120.
If Israel’s policy of settling the West Bank is a violation of paragraph 6, Article 49 of the Fourth Geneva Convention,\(^{157}\) then the construction of Matityahu East on the farmland and olive groves of Bil’in village is also a violation of the CHWC via Section 6(4).\(^{158}\)

4.5 Recent response of multinational corporations in the West Bank

In November 2008, *United Civilians for Peace* (a Dutch NGO platform)\(^{159}\) charged *Unilever* (an Anglo-Dutch multinational corporation) with “direct complicity in the State of Israel’s violations of human rights by contributing to the maintenance and expansion of illegal settlements in the OPT in violation of International Law.”\(^{160}\) This charge related to Unilever’s 51% stake of the Israeli *Beigel and Beigel* company, located in the Barkan industrial zone within the West Bank Israeli settlement of Ariel.\(^{161}\) By December of 2008, Unilever had announced its intention to fully divest itself from *Beigel and Beigel*.\(^{162}\)

In September 2008, *SwedWatch* (a Swedish NGO)\(^{163}\) similarly accused *Assa Abloy* (a Swedish locksmith company) with violating international law by providing

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\(^{156}\) See Declaration of Judge Buergenthal, supra note 150 at para. 9.

\(^{157}\) *I.e.* “The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.”

\(^{158}\) Listing as a war crime “The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies…”.

\(^{159}\) See online: United Civilians for Peace <www.unitedcivilians.nl>.


\(^{161}\) See “Improper Advantage”, ibid. at page 4. And see Ariel at the heart of the West Bank/future Palestinian State in “A Different Kind of Settlement”, supra note 115.

\(^{162}\) “Unilever to sell stake in plant based in West Bank settlement” The Guardian (1 December 2008), online: Guardian.co.uk <http://www.guardian.co.uk/world/2008/dec/01/israel-palestine-unilever>.

\(^{163}\) A non-governmental organisation “whose task is to critically examine Swedish business relations with developing countries focusing on environmental and social concerns. SwedWatch consists of five member organisations: The Swedish Society for Nature Conservation, Church of Sweden, UBV/Latin America,
employment within the Barkan industrial zone and thus facilitating the transfer of settlers into the OPT.\footnote{See SwedWatch Report No. 22, \textit{Illegal Ground – Assa Abloy’s business in occupied Palestinian territory} (Diakonia, Church of Sweden and SwedWatch, 2008) at 7, online: Diakonia <http://www.diakonia.se/documents/public/IN_FOCUSISrael_Palestine/Report_Illegal_Ground/Report_M ul-T-lock_081021.pdf> (“The mere fact that companies exist makes it possible, in theory, for such population transfers to take place due to job opportunities arising due to their operation in illegal settlements in occupied territories. Article 49(6) prohibits not only deportations or forced transfers of population, but any measures taken by an occupying power in order to organise or encourage transfers of parts of its own population into the occupied territory.”).} One month later, Assa Abloy announced that it would be relocating to within Israel’s pre-1967 borders.\footnote{Ibid.} According to spokeswoman Ann Holmberg, they had previously failed to “understand that we might be violating international law.”\footnote{Ibid.}

Most recently, in June 2009, a French court\footnote{Tribunal de Grande Instance de Nanterre.} declared itself competent to hear a case against Veolia (a French corporation) instigated by the \textit{Association-France-Palestine Solidarité} (AFPS). AFPS is seeking the annulment of a contract between Veolia and the Israeli government to link Jerusalem with its settlements in the West Bank via a light rail transit system. The action is based on a French law allowing the annulment of corporate contracts which violate international law, in this case the Geneva Convention.\footnote{“Veolia, futur exploitant du controversé tramway de Jérusalem, paie son implication” \textit{Le Monde} (4 June 2009), online Le Monde <http://www.lemonde.fr/economie/article/2009/06/04/veolia-futur-exploitant-du-controverse-tramway-de- jerusalem-paie-son-implication_1202311_3234.html>. (“procédure de l’Association France-Palestine Solidarité (AFPS), qui demande l’annulation de ce contrat “hors la loi” parce qu’il vise à relier au centre de Jérusalem des colonies juives implantées dans des quartiers palestiniens occupés par l’Israël. L’AFPS base sa démarche sur la IV\textsuperscript{e} Convention de Genève, qui considère comme illégale toute colonie de peuplement en territoire occupé.”)} The court stated that Israel could not benefit from sovereign immunity in the action since “it

Friends of the Earth Sweden and Fair Trade Center. The work is mainly financed by the Swedish International Development Cooperation Agency, Sida,” online: SwedWatch <www.swedwatch.org>.
is in reality the occupying power in the area of the West Bank where the disputed
tramway will be laid.” Veolia has since declared its intention to abandon the project.  

4.6 Conclusion

With the illegality of Israel’s settlements in the West Bank conclusively and definitively
settled, what is now required is an increased focus on the means of ensuring compliance
with international law, according to John Dugard, then Special Rapporteur on human
rights in the Occupied Palestinian Territories. To properly contextualise this appeal by
the Special Rapporteur, finding D of the ICJ in the Wall is highly relevant:

“All States are under an obligation… not to render aid or assistance in maintaining the situation
created by such construction; all States parties to the Fourth Geneva Convention relative to the
Protection of Civilian Persons in Time of War of 12 August 1949 have in addition the obligation,
while respecting the United Nations Charter and international law, to ensure compliance by Israel
with international humanitarian law as embodied in that Convention;”

Some States have seemingly been influenced by this newly-clarified legal situation. For
example, in September 2009 Norway's sovereign wealth fund sold its stake in the Israeli
company Elbit Systems, which supplies surveillance equipment for the West Bank

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169 Ibid., “Le tribunal a estimé qu'Israël, en tant qu'Etat étranger, ne bénéficierait pas d'une immunité de juridiction, “puisqu'il est en réalité puissance occupante de la partie de la Cisjordanie où sera exploité le tramway litigieux”.”

170 See “Jerusalem rail operator jumps ship, Tel Aviv group isn't even responding” Haaretz (9 June 2009), online: Haaretz <http://www.haaretz.com/hasen/spages/1091186.html>.


172 See the Wall, supra note 139 at 202 (By thirteen votes to two).
Barrier. In November 2008, concern that an EU-Israel free trade provision was being improperly applied to Israeli goods originating from the West Bank prompted the British government to table a proposal at the European Council to discuss ways of policing the rule. Israel’s ambassador to the U.S., Ron Prosor, describes this initiative by the British government as “part of an attempt by Downing Street to influence Israeli policy toward the settlements.” It thus appears reasonable to consider this action by the British government in light of the erga omnes obligations articulated by the ICJ in the Wall.

Even the corporations which operate in the West Bank are clearly becoming aware of their potential liability for facilitating a violation of international law. Yet in May 2009, Canadian Foreign Minister Lawrence Cannon “trod into the controversy” by suggesting that the expansion of Israeli settlements in the West Bank is illegal and would hurt Middle East peace efforts. Chapter 5 next considers how the Canadian authorities can offer more than lip-service to their stated position by using the framework

173 See “Norway fund sells Israeli shares on ethical grounds” Reuters (3 September 2009), online: Reuters.co.uk <http://uk.reuters.com/article/idUKLNE58201O20090903?rpc=60&pageNumber=1&virtualBrandChannel =O>.  
175 Ibid.  
176 “Israel infuriated by U.K. plan to label West Bank produce” Haaretz (14 November 2008), online: Haaretz <http://www.haaretz.com/hasen/spages/1037263.html>. The British government also decided not to move into a Tel Aviv property owned by Lev Leviev, a developer involved in Matityahu East – see supra Section 4.2.  
177 A full discussion of existent erga omnes obligations vis-à-vis the West Bank is outside of the scope of this paper. However, Alexander Orakhelashvili speculates that in this case they may necessitate “the taking of third-party countermeasures with a view to ensuring that the relevant impediments to the Palestinian self-determination are brought to an end” (see Orakhelashvili, supra note 153 at 287). The construction of a new Israeli settlement on the farmland surrounding Bil’in is certainly such an impediment.  
178 See supra Section 4.5.  
180 See Foreign Affairs and International Trade Canada, Canadian Policy on Key Issues in the Israeli-Palestinian Conflict, supra note 154: “As referred to in UN Security Council Resolutions 446 and 465,
proposed in Chapter 3 to shut down the ongoing crimes of *Green Park* and *Green Mount*. Israeli activist Mairav Zonszein says of the new U.S. administration’s efforts to kick start the peace process: “If Obama aims to crack down on Israel's blatant expansion of settlements, he should start from within his own borders.”\(^{181}\) So should Lawrence Cannon and his government.

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5) Applying the Law in Practice

Is the director or officer of corporations responsible for the behaviour of corporations? She never had any knowledge of what the corporations were doing.\(^{182}\)


5.1 Section 22.2 (c) – two steps

So the convoluted ownership structures of *Green Park* and *Green Mount* has made it possible to identify only one natural person connected with either corporation: their shared sole director Annette Laroche. Nonetheless, this is sufficient to secure a conviction against both corporations for their involvement in the mass transfer\(^{183}\) of settlers into the West Bank. Under Section 22.2 (c) of the *Criminal Code*:

\[
\text{In respect of an offence that requires the prosecution to prove fault – other than negligence – an organisation is party to the offence if, with the intent at least in part to benefit the organization, one of its senior officers:}
\]

\[
(c) \text{ knowing that a representative of the organization is or is about to be a party to the offence, does not take all reasonable measures to stop them from being a party to the offence.}
\]


\(^{183}\) See the explosion in settler population since the 1990s in “A Different Kind of Settlement”, supra note 115.
In order to employ Section 22(c) against either Green Park or Green Mount, we must first demonstrate that a representative of the corporation is committing or has committed a crime based on the ICC elements of a crime. Second, we must ascertain that a senior officer was aware of, but did not take adequate measures to prevent them, with the intent at least in part to benefit the company.

5.2 Representatives

5.2.1 Definition of representative

Recalling Section 2 of the Criminal Code, a representative means a “director, partner, employee, member, agent or contractor of the organization”. Although Green Park and Green Mount may have contracted-out their construction operations in Matityahu East, this definition ensures that they remain responsible for all contractors, employees and other agents constructing residential buildings and selling condominium units on their behalf to the civilian population of Israel. Based on the allegations, it seems sensible to divide their representatives into two rough groupings: construction workers and salespersons.

5.2.2 Aiding and abetting a war crime under the CHWC

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184 See supra Section 4.2.
185 See Bil‘in Petition, supra note 20 at para. 9.
Bilin’s representatives may not be physically transporting Israeli settlers into the West Bank, but they are certainly aiding and abetting the Israeli government in doing so. Article 25(3)(c) of the Rome Statute makes an individual liable where she:

For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission.

This Article has become somewhat controversial in its approach to the requirement of subjective intent.\textsuperscript{186} The generally accepted standard for aiding and abetting under international criminal law has been (a) the provision of substantial assistance, with (b) such assistance provided willingly and with knowledge of the perpetrator’s criminal intent, or at least the risk of crimes.\textsuperscript{187}

Nevertheless, for the purposes of the CHWC, I assume that the ICC standards are the more authoritative.\textsuperscript{188} Article 25(3)(c) very clearly implies a subjective requirement stricter than knowledge\textsuperscript{189} and while it does not explicitly entail a substantiality

\begin{itemize}
\item \textsuperscript{186} See e.g. Robert Cryer, infra note 189.
\item \textsuperscript{187} See Antonio Cassese, \textit{International Criminal Law}, 2nd ed. (Oxford: oxford university press, 2008) at 214 – 217 (citing the ICTY Trial Chamber in \textit{Furundzija}: “it is not necessary that the aider and abetter should know the precise crime that was intended and which in the event was committed. If he is aware that one of a number of crimes will probably be committed, and one of those crimes is on fact committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abettor.”)
\item \textsuperscript{188} The guiding role of the Rome Statute is clear from, inter alia, Sections 4(4) and 6(4), CHWC (full title: \textit{Crimes Against Humanity and War Crimes Act - An Act respecting genocide, crimes against humanity and war crimes and to implement the Rome Statute of the International Criminal Court, and to make consequential amendments to other Acts}):
\begin{enumerate}
\item Interpretation — customary international law
\item For greater certainty, crimes described in Articles 6 and 7 and paragraph 2 of Article 8 of the Rome Statute are, as of July 17, 1998, crimes according to customary international law.
\end{enumerate}
\end{itemize}

And See \textit{Munyaneza}, supra note 41 at [60] and [130]. Though this may not be definitive, given the other sources of international law which are drawn upon at [131-135] and the development of international law provisions of the CHWC (see supra note 28).

requirement with respect to assistance provided by an aidor/abettor, it has been suggested that it would nonetheless be required before the International Criminal Court (ICC).\textsuperscript{190} Erring on the side of caution, I accept both requirements.

5.2.3 \textit{Actus Reus}

Under international law, an act of aid or assistance furthering the commission of a crime may occur before, during or after the principle crime has been committed.\textsuperscript{191} In the case of \textit{Green Park} and \textit{Green Mount}, the crime which their representatives are aiding and abetting is the \textit{ongoing} illegal policy of transferring Israeli settlers into the West Bank, conducted since at least 1977.\textsuperscript{192} The International Criminal Tribunals have already found that the provision of logistical assistance, the provision of information, the provision of personnel, the provision of goods and services, or the provision of banking facilities can constitute a substantial contribution under international law.\textsuperscript{193}

I therefore submit that construction of the Matityahu East settlement by \textit{Green Park} and \textit{Green Mount}’s construction workers and the marketing of the settlement by

\textsuperscript{190} See e.g. ICJ, “Volume 2”, ibid at 18.
\textsuperscript{192} See supra note 155 and accompanying text. The prohibition on population transfers of this nature furthermore precludes “any measures taken by an occupying Power in order to organize or encourage transfers of parts of its own population into the occupied territory” – see the Wall, supra note 139 at para. 120. \textit{Green Park} and \textit{Green Mount}’s construction workers and salesperson are certainly assisting these inducements.
\textsuperscript{193} See ICJ, “Volume 2”, supra note 189 at 19.
their salespersons to Israel’s civilian population is a substantial contribution to the transfer of settlers into the West Bank. As we have seen, other MNCs have been forced to abandon their operations in the West Bank for far less.\textsuperscript{194}

\section*{5.2.4 Mens Rea}

The \textit{International Commission of Jurists} has recently questioned whether the notionally higher subjective \textit{mens rea} standard in Article 25(3)(c) will have any practical effect, given that the state of mind of an accomplice is assessed on the basis of direct, indirect or circumstantial evidence.\textsuperscript{195} A requisite knowledge or intention need not be explicitly expressed but rather “may be inferred from all relevant circumstances”.\textsuperscript{196} The \textit{Commission} goes on to explain that where a corporation’s representative knowingly aids a crime in order to make a profit, this does not diminish the intentionality of their assistance.\textsuperscript{197} On the contrary, the pursuit of a profit might be interpreted as providing an added incentive to facilitate the crime “on purpose”.\textsuperscript{198}

With regards to intentions \textit{Green Park} and \textit{Green Mount}’s construction workers and salespersons, their employment and wages certainly provided them with an incentive to carry out their activities in the first instance. But, unless they are saboteurs or wish to become swiftly unemployed, they must by now intend that settlers purchase and inhabit the residential units which they are constructing and marketing. In other words, they must

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\begin{itemize}
\item \textsuperscript{194} While Veolia was providing substantial infrastructure, and the other two corporations were providing employment, none of these companies was actually constructing and selling Israeli settlements in the manner of \textit{Green Park} and \textit{Green Mount}.
\item \textsuperscript{195} See ICJ, “Volume 2”, supra note 189 at 22.
\item \textsuperscript{196} \textit{Ibid.} at 23 (citing SCSL, Fofana and Kondewa, (Trial Chamber) 7 August 2007, para. 231).
\item \textsuperscript{197} \textit{Ibid.} at 22.
\item \textsuperscript{198} \textit{Ibid.}
\end{itemize}
\end{flushright}
by now intend to successfully facilitate the settlement policy, an internationally recognised crime.

5.3 Senior officer

5.3.1 Definition

The explicit reference to “a director” in Section 2 of the Criminal Code makes it implausible that sole director Laroche could not be treated as a senior officer for the purposes of Section 22.2.¹⁹⁹

5.3.2 Intention to benefit

Ms. Laroche’s actions (providing a nominal director to allow for the corporations’ existence) and non-actions (turning a blind eye to the involvement of the companies she nominally directs in a war crime) strongly indicate an intention to benefit the organisations.²⁰⁰

5.3.3 Reasonable steps

The continued operations and existence of Green Park and Green Mount indicate Laroche has taken no steps whatsoever to prevent its ongoing involvement in the crimes

¹⁹⁹ Though the potentially broad interpretations of “important role” may be the subject of intense litigation in future cases, see Roach, “Changed Face”, supra note 84 at 376.
²⁰⁰ See infra note 201 at 4.
described above. But what “reasonable measures” ought she have taken? Leading Canadian corporate law firm Blake, Cassels & Graydon LLP caution that although there are no court decisions providing guidance to date, “senior officers who do nothing or who turn a blind eye to a criminal offence may well expose the organization to criminal liability.” Based on this advice, inaction can hardly be described as a “reasonable measure”. It is generally hard to imagine circumstances in which a corporation might successfully argue that its sole director took reasonable measures while the company’s representatives simultaneously assisted in the commission of a war crime.

5.3.4 Knowledge

Bilin’s petition makes a number of clear allegations relating to the construction and marketing of the Matityahu East settlement. Ms. Laroche is a named defendant in this petition. Perhaps, at some earlier time, she was plausibly unaware of the activities in which Green Park and Green Mount are involved. However, as a result of the petition and the detailed allegations therein, she is almost certainly now aware of (and therefore responsible for) the activities of her companies’ representatives. As well as being legally sound, this is entirely justifiable. A director such as Annette Laroche enjoys the power to make binding commitments on behalf of a corporation. The outside world is therefore

201 See Paul B. Schabas and Tony S.K. Wong, “Canadian Criminal Law for Businesses: New Developments and What You Need to Know” (paper prepared for client seminar, Keeping the collar white: what you need to know to protect your organisation from liability, April 2008) at 4, © Blake, Cassels, Graydon LLP, online: Blakes, Cassels, Graydon LLP <http://www.blakes.com/pdf/Calgary/white_collar/Tab_3CRIMINAL_LAW_PAPER_FOR_LEXPERT.pd f>.
202 See e.g. Bil’in Petition, supra note 20 at paras. 9 and 27.
203 Ibid., at 1.
204 See Ronald Levy, representing Green Park and Green Mount, supra note 182.
entitled to rely on her authority (or that of any other senior officer) and cannot be expected to make enquiries as to the corporation’s internal governance.  

Looking beyond this case, it seems advisable for victims of Canadian MNCs to initiate a civil suit which lists in detail the allegations against a company’s representatives and names a relevant senior officer as a defendant. This removes the spectre of plausible deniability and makes a successful criminal prosecution using Section 22.2 (c) more likely.

5.4 Outstanding issues

A 2006 report by Human Rights Watch highlights a number of obstacles to the domestic investigation and prosecution of international crimes, including lack of resources, lack of familiarity with applicable legal standards, onerous evidence gathering requirement and a lack of political will. This paper has primarily sought to clarify the legal standard involved in a corporate war crimes prosecution. However, questions of political will, evidentiary requirements and resources remain.

5.4.1 Sentencing

Section 735 of the Criminal Code provides that a guilty corporation will be fined in lieu of imprisonment. Pursuant to Section 718.21(e), the court shall also take into account

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205 See Roach, “Changed Face”, supra note 84 at 393.
207 The amount is “in the discretion of the court” unless the offence is a summary conviction offence, at which point the maximum is $100,000.
“the cost to public authorities of the investigation and prosecution of the offence.”

This provides prosecutors with more resources to conduct “time intensive investigations and prosecutions of corporate crime.”

Given the publicised financial difficulties experienced by the War Crimes Programme and the costs associated with prosecutions under the CHWC, this provision could be of crucial practical relevance.

### 5.4.2 Evidentiary requirements

The prosecution of Desiré Munyaneza for a litany of crimes during the Rwandan genocide relied heavily on witness testimony to provide evidence at trial. The court heard from a total of 66 witnesses, including experts, in 4 countries (Canada, Tanzania, France and Rwanda). The need to hear from a large group of witnesses in various jurisdictions is thus not an insurmountable impediment to war crimes prosecutions in Canada. Much of this will of course be contingent upon the cooperation and assistance of the host government (i.e. where the crime has occurred or is occurring), which is made difficult when it does not have clean hands. Whether the government of Israel

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208 See Roach, “Changed Face”, supra note 84 at 389.
209 Ibid. at 390.
210 See supra Section 2.3.2.
211 Ibid.
214 Also see HRW, “State of the Art”, supra note 50 at 20. Human Rights Watch lists a number of measures which can diminish the specter of witness intimidation, such as conducting interviews in neutral venues such as embassies, not allowing investigators to be seen with witnesses in public places, the provision of mobile phones, or providing funds for a witness to leave the country in order to provide testimony. In the Munyaneza trial, the presiding judge granted anonymity to all the witnesses who requested and justified it, along with the right to testify behind a screen (see Munyaneza, ibid. at [2091]).
216 Ibid.
would permit Palestinian witnesses to testify in a case against *Green Park* and *Green Mount* is a matter for speculation.

5.4.3 Political will

Prosecutorial discretion is “pivotal” to whether those involved in war crimes will be prosecuted by domestic courts exercising universal jurisdiction. In Canada, there are a number of commendably transparent criteria which guide the Attorney General’s final decision to prosecute. With respect to *Green Park* and *Green Mount*, these criteria seem to favour a prosecution: the allegations are serious, they are certain to continue, there is strong documentary and witness evidence and there is very little reasonable prospect of the corporations being prosecuted in Israel.

However, it remains possible that political considerations might weigh against the prosecution of an MNC in Canada. For this reason, Human Rights Watch has recommended that the international community’s commitment to repressing war crimes, crimes against humanity and genocide be considered when evaluating public interest

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217 HRW, “State of the Art”, supra note 50 at 30
218 See HRW, “State of the Art”, supra note 50 at 30 – 31 “…prosecutorial discretion can be particularly non-transparent if the criteria are difficult to ascertain. Indeed, the principles governing the exercise of prosecutorial discretion are commonly found only in internal guidelines, or articulated on a case-by-case basis. Without a degree of transparency and publicity concerning how prosecutorial discretion will be exercised, it is difficult for complainants and victims to know with any certainty when a complaint will be investigated, or the reasons behind a decision not to open an investigation. A lack of transparency also makes it easier for non-legal reasons—such as concerns that a prosecution will be embarrassing to the foreign relations of the forum state—to be parsed as legal ones.”
219 See Department of Justice Canada, Modern War Crimes Programme, supra note 30.
220 See Johnston, “Lifting the Veil”, supra note 23 at 177.
considerations. To conclude this paper, I will expand on the benefits of enforcing these fundamental international norms at national level.

6) Conclusion

International law, writes Mary Ellen O’Connell, is the “single, generally accepted means to solve the world’s problems.”\(^{222}\) As far as the settlements in the West Bank are concerned, “for the sake of Palestinians and Israelis alike, it is time for the rule of law to triumph.”\(^{223}\) But without national action, international rules become unenforceable,\(^{224}\) making national courts in many respects “the most important institutions” involved.\(^{225}\) The Preamble to the Rome Statute furthermore reminds States parties that “it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.” Consequently, the Canadian courts have a crucial role to play in upholding the international legal order. Without their active participation in enforcing, at a minimum, the international laws which have been incorporated into domestic law by Parliament, it is hard to see how the rule of law can prevail.

The debate surrounding standards of corporate complicity for violations of international law is at its heart a debate which aims to improve the operation of


\(^{223}\) Jeremy Hobbs, Executive Director of Oxfam International. See Oxfam International, *Five years of illegality. Time to dismantle the Wall and respect the rights of Palestinians* (Oxfam International, July 2009) Editorial, online: Oxfam <http://www.oxfam.org/sites/www.oxfam.org/files/bp104-palestinians-five-years-of-illegality.pdf>. Also see De Waart, “Stumbling-Block”, supra note 146 at 837 (“All peace initiatives in the Middle East since 1967 will continue to fail as long as Israel is not compelled to recognize that its settlement policy in the OPT is contrary to international law. Such recognition is also in the interest of Israel itself.”).

\(^{224}\) ICHR, Beyond Voluntarism, supra note 3 at 45.

\(^{225}\) See O’Connell, supra note 224 at 328. This concept is inseparable from the promise of the International Criminal Court – see “A war-crimes trial that set a precedent before its verdict” *The Globe and Mail*, Web Exclusive Commentary by Richard Dicker (Director, International Justice Programme, Human Rights Watch) and Jayne Stoyles (21 March 2009), online: The Globe and Mail <http://www.theglobeandmail.com/news/opinions/a-war-crimes-trial-that-set-a-precedent-before-its-verdict/article1147397/> (“The vision has always been that the ICC will handle only a handful of cases at a time against the highest level perpetrators, while serving as a catalyst for war-crimes trials in national courts around the world.”)
international law at the domestic level. At the same time, since laws pertaining to war crimes no longer falls within the sole purview of the international order,\textsuperscript{226} this debate has also become one about improving the operation of Canadian law.

But we need a standard of complicity able to meet the very particular challenges which corporations pose to the traditional legal order. By using domestic corporate law to formulate a coherent legal standard of complicity for violations of international law, we begin to conceptualise new ways in which a national legal system is able, and ought, to uphold the international norms which inform our domestic laws and values. Some even expect that the operation of model standards of corporate liability would help generate an international consensus around corporate responsibility and accountability.\textsuperscript{227}

Corporations are by their nature complex structures, which call for standards of liability that can rationally analyse the actions of their agents and in so doing generate a finding of guilt. Without the model standard provided by Section 22.2, it had become nearly impossible to make a finding of corporate criminal liability in Canada.\textsuperscript{228} \textit{Green Park} and \textit{Green Mount} provide a striking example of impunity in action. Since the companies’ representatives are outside of Canadian jurisdiction and as their Canadian director does not herself appear to be a likely candidate for a war crimes prosecution, the alternative is according them the freedom to violate the CHWC. There is nothing natural,

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\begin{itemize}
  \item \textsuperscript{226} See LeBel and Chao, “Fugue or Fusion”, supra note 95 at 50-51.
  \item \textsuperscript{227} ICHR P, Beyond Voluntarism, supra note 3 at 162.
\end{itemize}
or inevitable, about this freedom, for which the State of Canada bears a moral responsibility.\textsuperscript{229}

Harry Glasbeek writes of the “structured criminogenic nature” of all corporations, which allows governments to falsely proclaim the even-handed application of our laws.\textsuperscript{230} Whether all corporations are intrinsically designed to commit crimes and avoid liability is outside of the scope of this paper. However, criminogenic is surely an apt description of \textit{Green Park} and \textit{Green Mount}, or any other corporation violating Canadian war crimes legislation. And can it possibly be even handed to prosecute natural persons for their past crimes, while allowing Canadian MNCs to profitably engage in the war crimes industry today?

\textsuperscript{229} See ICHRP, Beyond Voluntarism, supra note 3 at 46.
\textsuperscript{230} See Glasbeek, “Invisible Friend”, supra note 64.