

Business and International Crimes

**Assessing the Liability of Business Entities
for Grave Violations of International Law**

Business and International Crimes: Assessing the Liability of Business Entities for Grave Violations of International Law

A joint project of the International Peace Academy
and Fafo

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Both the *Commentary* and the *Surveys* are included in digital form in full on the enclosed compact disc and are available on the Fafo AIS website www.fafo.no/liabilities/index.htm or via **www.newsecurity.info**

Individuals and companies take advantage of, maintain and have even initiated armed conflicts in order to plunder destabilized countries to enrich themselves, with devastating consequences for civilian populations.

UN Secretary-General Kofi Annan¹

¹ “The Protection of Civilians in Armed Conflict,” S/2002/1300, Report of the Secretary-General to the Security Council, 26 November 2002, para 58.

Foreword

There is a climate of impunity surrounding economic activities that promote or sustain conflict and human rights abuse. Many private business entities in search of extractive resources and inexpensive labour operate in developing countries beset by violence, repression, or war, where effective governance and accountability are absent. The exploitation of and trade in natural resources and other so-called “conflict commodities” provide a major source of revenue for criminalized elites or rebel factions. As Kofi Annan has noted, while others profit, the people who must survive in this violence and exploitation do so at the risk of their lives and livelihoods.

In many cases, local and international companies have become embroiled in allegations of human rights violations perpetrated by their employees, domestic business partners or subsidiaries, host state governments, or rebel factions. Although the ability of the perpetrators of abuse to translate ill-gotten assets into financial or military advantage often depends on extensive transnational criminal networks, mainstream business entities can also be implicated. Businesses can play a crucial facilitating role, providing access to global financial, commodities, and arms markets.

This climate of impunity raises a number of questions. In the absence of effective domestic rule of law, and little global economic regulation of these activities or sectors, what law applies? Is there international humanitarian law that applies to business entities? Can a company be held civilly or criminally liable when it uses slave labour, an international crime? What does the law say about corporations that deal with local combatant forces or private military companies? Do companies that provide financing to governments or rebel factions become complicit in the abuses committed by these business partners?

The two studies summarized here are an initial step toward answering these questions. The studies map the provisions of the relevant international and national laws, and summarize the jurisprudence developed by national and international case law. The objective of our approach has been to promote the systematic identification and strengthening of existing criminal law norms and practices as a mechanism to effectively deter and sanction illicit economic exploitation in repressive or war-torn countries.

To this end, *Business and International Crimes* is addressed to policymakers and practitioners in government and business, as well as affected communities and civil

society organizations. Ultimately, the project represents a modest attempt to provide some clarity about the nature and extent of the legal foundations for the regulation of private sector activity in those countries. It is our hope that the study will prompt further legal research by jurists, consideration of legal action by the appropriate authorities or affected communities, and development of internal compliance procedures by companies operating in conflict zones.

The first study, *A Commentary on the Liability of Private Sector Actors (Business Entities) for Grave Violations of International Law*, is a systematic mapping of the international crimes – as set out in statutes concerning genocide, war crimes, crimes against humanity, torture, and forced labour and enslavement – as they potentially apply to the behaviour of economic actors in repressive or war-torn states.

The second, *A Comparative Survey of Private Sector Liability for Grave Violations of International Law in National Jurisdictions*, provides a much-needed comparative survey of the relevant national legislation and legal framework in selected countries concerning the possible liability of business entities under domestic civil and criminal law for the commission, or complicity in the commission, of violations of international criminal and humanitarian law, both in and beyond national jurisdictions.

This Executive Summary is divided into two main sections, with appendices. Section one presents a bullet-point summary of the main findings distilled from the *Commentary* and *Surveys*. Section two is a narrative that explains the points made in the summary and includes references to the source documents. The Executive Summary outlines ways in which private sector actors can be held accountable to international norms; analyzes the extent to which it is, or could be, possible to hold business entities criminally or civilly liable in some jurisdictions; and highlights the major challenges to successful domestic legal action against a corporation accused of participating in grave violations of international law.

Any attempt at a comprehensive examination of the ways in which business entities have been implicated, to date, in grave breaches of international law raise a number of interesting questions. We have not sought to address all of these; rather, we have attempted to map the terrain. We urge readers to delve into the *Commentary* and *Surveys* in order to draw their own conclusions. In particular, we hope that *Business and International Crimes* – including the *Commentary* and *Surveys* contained on the enclosed CD – will be useful in the following respects:

- For communities and civil society organisations, the laws and principles described here may provide the basis for building mechanisms of accountability, both at home and internationally, for violations by economic actors.
- For those businesses, associations, governments, and NGOs working to improve the ethical values of production, the work summarised here can form a part of

the normative basis for the laws, guidelines, codes, and risk assessments needed to change company behaviour in conflict zones.

- For jurists and policymakers, the *Commentary* and *Surveys* provide food for thought, not least concerning the direction of the law, particularly as it pertains to possible jurisdiction and role of international institutions, such as the International Criminal Court (ICC).

The *Business and International Crimes* documents are the result of collaboration among a wide range of people and organizations. At the heart of the work were two projects. For both the International Peace Academy's *Economic Agendas in Civil Wars (EACW)* program and Fafo's *Economies of Conflict* project, the legal implications of economic activity in conflict zones were central issues. Beginning in the spring of 2002, IPA and Fafo, first separately and then collectively, initiated a series of discussions between legal and government practitioners, advocates, and researchers. The discussions became a series of meetings in 2002 and 2003 exploring how legal mechanisms could play a role in developing policies for conflict management and the protection of human rights. The meetings and communications between meetings became known among participants as the "Stenersen" process after the Villa Stenersen in Oslo, where, in October 2002, a consensus emerged concerning the need to explore the basis for the questions posed by the two studies summarized here. We have included a list of those who participated in meetings (see Appendix D), all of whom deserve our thanks for the insight gained from the discussions, which were invaluable in focusing the research work.

The studies that emerged from the Stenersen process were led by Professor Anita Ramasastry, Associate Professor, University of Washington School of Law, Seattle. The *Commentary* and the *Survey* questionnaire were both compiled by Professor Ramasastry, who also played a key role in the design of the project and whose clarity and focus was an inspiration to us non-lawyers. We are deeply grateful for her work on this project.

The Comparative Survey was developed initially by Anita Ramasastry and Robert Thompson. It was subsequently edited and revised by the other participants in the Stenersen process. The Comparative Survey aimed to survey major civil law and common law jurisdictions. Canada, France, Norway, the United Kingdom, and the United States were identified, in part, as countries that have been involved in legal or policy debates concerning business involvement in human rights violations arising in conflict zones. Moreover, the countries selected mirrored countries represented in the Stenersen process.

The survey instrument is a complex and ambitious tool. Survey respondents were asked to deliberate on matters of public international law, tort law, criminal law (especially as applied to legal persons) and civil procedure, among other subjects.

The Stenersen group sought out lawyers in each survey country who had a strong grasp of these topics, especially as they related to the potential liability of business entities. The individual survey responses differ greatly in the content and nature of the responses to specific questions. This reflects the different backgrounds and expertise of the attorneys, as well as the difference between common law and civil law jurisdictions. The surveys, once completed, were reviewed by other legal experts from each jurisdiction in order to verify the accuracy of responses. Readers should keep in mind that the Comparative Survey explores areas of the law that are ambiguous and murky. Thus, the survey responses are an attempt to provide clarity in areas where there is no existing or well-defined guidance or consensus.

The list of the various national practitioners who contributed to the *Surveys* is a long one (see Appendix B), as the *Survey* of necessity draws together threads from a number of areas of legal expertise in each jurisdiction. We are indebted to all of those who responded to the surveys and contributed their time and knowledge to provide us with direction and insight.

We must emphasise that none of the above bear responsibility for errors that have crept in during the lengthy editing process. In particular, it should be stressed that this Executive Summary was written and edited by non-lawyers. This was done on purpose, in order to make it more accessible to a wider audience of policy makers and the public. But, as the lawyers involved in the project have warned us, there are pitfalls in trying to communicate comparative legal concepts to a broad public. Inevitably, in large and cross-disciplinary projects, errors will occur, particularly as we have tried to communicate to several audiences at once. The lawyers who contributed to this project should not be held accountable for the errors herein. Nothing in this Executive Summary, the national surveys, or the Commentary should be read or used as legal advice.

What follows, we hope, will provide the basis for researches and practitioners to explore the principles and findings further and in greater detail than was possible here. We would like to thank those who coordinated the various inputs to each study, including Don Hubert on the Canadian survey and Christian Ruge on the Norwegian survey, both of whom also played crucial roles in the origins and strategies of the Stenersen process itself; Bob Thompson, for his work on the U.S. survey and for bringing his years of experience to bear on the questions with which we grappled; and Kaysie Studdard and Heiko Nitzschke for their work on coordinating the U.K. and France survey inputs. Kaysie deserves additional thanks for the initial draft of much of the Executive Summary that follows. Special thanks to Kathleen Jennings, Fafó AIS, for her work on editing the entire project output and shepherding it to publication.

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I Summary of Main Findings

It is possible to hold business entities accountable for international crimes...

- There is no theoretical obstacle to holding companies liable for international crimes.
- A number of national jurisdictions permit criminal or civil prosecutions of legal business entities and also permit prosecutions of certain grave breaches of international law, to the extent that international law has been incorporated into a jurisdiction's domestic law.
- In the past, individual officers and managers of business entities (rather than the entities themselves) have been held accountable in civil and criminal courts for violations of international criminal law, including genocide, crimes against humanity, and war crimes. These prosecutions contain valuable guidance about the way in which the conduct of such individuals might give rise to liability of the business entities that employed them.
- Jurisprudence, including criminal and civil rulings dating back to the various military tribunals established after World War II, provides a conceptual basis for holding business entities liable for violations of international criminal law.

...but the problem of jurisdiction remains a barrier to international prosecution.

- While business entities have been found to commit violations, no international forum has the power to prosecute a legal person for the international crimes in question. All business entities are legal persons. The jurisdiction of international courts or tribunals does not yet extend to legal persons, only to natural persons (individuals).
- The absence of any international forum with jurisdiction over both natural and legal persons may cause international tribunals that are confronted with business entity violations to adapt. By prosecuting officials of business entities, i.e. natural persons in positions of responsibility within a firm, courts could establish *de facto* company accountability.

- During the negotiations of the Rome Statute of the International Criminal Court (ICC), delegates considered the possibility of including legal persons within the scope of the court's jurisdiction. However, to date, the criminal liability of a business entity for violations of international law has neither been clarified by international treaty nor tested in any international forum.

Domestic courts are possible venues for assessing liability of companies operating abroad....

- The national laws of Canada, France, Norway, the United Kingdom, and the United States all have legal frameworks that permit businesses to be held civilly and/or criminally liable for activities of such businesses when operating abroad.
- Each jurisdiction provides some means, at least in theory, to pursue in domestic courts a case of either civil or criminal liability for certain violations of international law.
- Three of the countries surveyed (Canada, Norway, and the United Kingdom) have ratified the Rome Statute of the International Criminal Court and have revised their domestic criminal law to encompass the international crimes of genocide, war crimes, and crimes against humanity. France has also ratified the Rome Statute and is in the process of revising its own penal code accordingly. Each of these jurisdictions appears to permit prosecution of legal and natural persons for such crimes under the principle of complementarity. Although the United States has not joined the ICC, the U.S. Congress has “nationalized international law” by adopting statutes covering genocide, war crimes, torture, piracy, slavery, and trafficking in women and children² – all activities proscribed under international agreements.
- In theory, each of the jurisdictions surveyed could prosecute a business entity for the domestic equivalent of certain international crimes. For example, under French penal law, the equivalent of slavery or forced labour might be false imprisonment/illegal confinement.

.... especially through the doctrine of complicity.

- Business entities may not be direct perpetrators of crime(s), but rather accomplices to the violence.
- Complicity describes the act or state of being an accomplice – aiding and abetting – a criminal act. The concept of complicity on the part of individual accomplices

² 18 U.S.C. § 1591.

is well established in international law. However, the scope and use of complicity as it relates to business entities is still evolving.

- Of the five countries surveyed, the definitions of complicity were, though not identical, quite similar in their essential elements. Each of the countries founds the crime on both the substantive nature of the conspiratorial act and the accompanying mental element.
- With regard to economic actors, complicity occurs when a business entity aids or abets – that is, helps or encourages – the perpetrator(s) in carrying out the crime. For example, a corporation or its agents do not directly commit the underlying crime; rather, the case for complicity arises out of the corporation’s relationship to the perpetrators.
- Three elements must be present in order to find a defendant guilty of complicity under international law: a crime against humanity or war crime must have been committed; the accomplice must contribute in a material (“direct and substantial”) way to the crime; and there must be an element of intent and/or knowledge, such that the accomplice must have intended that the crime be committed or have been reckless as to its commission. This standard of complicity has been used by various international tribunals. It has also been applied in a civil context within the United States, where the U.S. Alien Tort Claims Act (ATCA) relies upon the law of nations in determining civil tort liability for certain violations of international law.
- The majority of companies alleged to have aided and abetted in violations of international law, at least in the context of U.S. cases brought under the ATCA, have been engaged in extractive enterprises and tend to conduct their operations through subsidiaries or joint ventures. In today’s global economy, a single commodity may pass through the hands of a multitude of overlapping – but legally distinct – corporate entities, making the problem of supply chain complicity particularly sensitive. The complexities of determining which economic activities and relationships are sufficient to establish corporate complicity mitigate against prosecutions: Do economic partnerships with repressive government actors or rebels make businesses complicit in ensuing human rights violations? When are business entities accomplices to violence and when are they mere bystanders?

However, most of the relevant international law is rarely applied domestically.

- In each country surveyed, liability under domestic criminal laws for violations of international norms relied upon the translation of international law into

domestic legislation. Unless the international norms are formally integrated into domestic legal systems – through the individual enactment in the domestic code of specific crimes that parallel international norms – some of the most important elements of *jus cogens* violations cannot be applied to private sector malfeasance. As noted above, however, genocide, war crimes, and crimes against humanity have been incorporated into domestic criminal law due to several countries' participation in the ICC.

- In addition, the record of individual governments in holding business entities accountable for their actions under criminal law leaves much to be desired, not least because criminal prosecutions against corporations accused of non-economic crimes hold the potential for creating political problems for governments who pursue them.
- Furthermore, such cases can be difficult to prosecute. Establishing complicity often requires “piercing the corporate veil,” or following liability upstream, beyond the acts of individuals within a corporate subsidiary to the parent multinational located in the state where the action is brought. In order to establish a sufficient link between a subsidiary and a parent entity, it must be established that the parent company exercises some degree of regular control and knowledge about events and decisions occurring in the subsidiary.
- More generally, the concept of prosecuting a business entity as a legal person is a difficult task. In each of the jurisdictions surveyed, a business entity could only be found liable to the extent that the actions of a certain representative (often a senior officer or person of similar stature) could be properly attributed to the business entity itself. Thus, there are significant evidentiary issues when dealing with corporate criminal liability as distinct from the liability of an individual employee or officer.

A civil suit – or tort action – is another legal avenue that can create domestic liability...

- In common law jurisdictions, civil suits rest upon a foundation of tort law developed over time by the judiciary. Most crimes against humanity and war crimes encompass acts that also constitute “torts.” (The term “tort” refers to that body of civil law that will allow a person to obtain compensation for another person or entity’s wrongful or harmful act that causes injury. Actions in torts are distinct from actions for breach of contract.) This is important because none of the jurisdictions surveyed recognize the violation of international law as a tort

in and of itself, with the exception of the United States, which has the federal Alien Tort Claims Act.

- Targeting the financial resources of large multinational corporations through a civil suit may be an effective way of creating incentives for business entities to change either behaviour and risk management techniques. Civil suits can be brought independently by wronged parties and impose a lesser burden of proof than criminal cases.

...but there are obstacles to tort litigation.

- Not all jurisdictions have strong traditions of tort litigation. Civil law jurisdictions, such as France and Norway, do not have as robust a system of tort litigation when compared to some common law jurisdictions. The surveys indicate that these civil law jurisdictions are at present unlikely to sustain cases involving grave breaches of international law.
- Establishing jurisdiction is a prerequisite for assessing the liability of corporate entities for actions committed abroad. Encouragingly, the country surveys all indicate that the nationality of the victims does not bar criminal or civil suits, although in some states physical presence in court of the perpetrators or victims may be a decisive factor.
- Also, the doctrine of *forum non conveniens* allows for a lawsuit to be dismissed if the court deems that a foreign jurisdiction is the more appropriate forum for its resolution, even if all other elements of jurisdiction and venue are satisfied in the court in question. Recent rulings on *forum non conveniens* in the United States and United Kingdom have shown that some courts are critical of dismissing a case involved with gross international legal violations on such forum grounds.

II Liability of Business Entities for International Crimes

Although legal scholars agree that international criminal law does exist, the precise contours of this body of law are often unclear. International criminal law can be categorized according to whether the conduct in question is international, constituting an offense against the world community.- International crimes have often been identified as acts that threaten world order and security, crimes against humanity and fundamental human rights, war crimes, and genocide. For the purposes of this project, the term “international crimes” refers to genocide, war crimes, crimes against humanity, torture, and forced labour or enslavement.

After World War II, various German and Japanese industrialists were prosecuted by military tribunals. Perhaps the most significant case is *United States v Krauch, et. al.* (also known as “the I.G. Farben case”; hereafter *Farben*). This case marked the first time that a court attempted to impose liability on a group of persons collectively in charge of a company for crimes, or complicity in crimes, committed during times of war.³ Additional cases drawn from the brutality of World War II and including allegations of war crimes by corporate entities include *U.S. v Friedrich Flick* (hereafter *Flick*), *U.S. v Von Weizsaecker* (hereafter *Ministries Case*), *U.S. v Alfried Krupp* (*Krupp*), the *Roechling Case*, and the *Zyklon B Case*.⁴

More recently, a variety of lawsuits have been brought against multinational corporations in U.S. federal courts under the United States Alien Tort Claims Act

³ *U.S. v. Krauch, et. al.* (the I.G. Farben Case), VIII Trials of War Criminals Before the Nuremberg Military Tribunals, iii-iv (1952).

⁴ *United States v. Friedrich Flick*, VI Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 (1950); *United States v. Von Weizsaecker* (Ministries Case), XIV Trials of War Criminals Before the Nuremberg Military Tribunals 621-22 (1952); *United States v. Alfried Krupp*, IX Trials of War Criminals Before the Nuremberg Military Tribunal at 1327 (1949); the *Roechling Case*, Superior Military Government Court of the French Occupation Zone Germany, 1949. XIV Trials of War Criminals Before The Nuremberg Military Tribunals Under Control Council Law No. 10 at 1097; *Trial of Bruno Tesch and Two Others* (The Zyklon B Case), British Military Court, Hamburg, 1946, I Law Reports Of Trials Of War Criminals 93 (1947).

(ATCA)⁵. Some of these lawsuits relate to the historical activity of European and Japanese corporations and banks for their activities during World War II. Other lawsuits focus on the conduct of multinational enterprises with respect to their recent investment activity overseas, specifically with respect to natural resource extraction in conflict zones.

A number of contemporary civil lawsuits in U.S. courts have alleged that private sector entities should be held liable for committing, or being complicit in, war crimes. An illustration of this are the cases of *Presbyterian Church of Sudan v Talisman Energy* (hereafter *Talisman*) and *Sarei v Rio Tinto* (hereafter *Rio Tinto*),⁶ with plaintiffs alleging that the defendant corporations aided and abetted certain war crimes including forcible displacement, military bombings and assaults on civilian targets, confiscation and destruction of property, torture, rape, and genocide.

Civil suits have also been brought in U.S. courts concerning crimes against humanity; representative cases include *Doe v Unocal* (hereafter *Unocal*), *Wiwa v Royal Dutch Petroleum Co* (*Wiwa*), *Talisman*, *Bowoto v Chevron* (*Bowoto*), *John Does v Exxon Mobil Corp* (*Exxon Mobil*), *Rio Tinto*, and *Beanal v Freeport-McMoran Inc.* (*Beanal*).⁷ The plaintiffs in the *Wiwa* case allege that Royal Dutch/Shell oil group was complicit in crimes against humanity, including wilful killing, torture, and arbitrary arrests and detention of community individuals and peaceful protesters. The acts in question were allegedly committed by Nigerian troops called in by Shell, in association with a Shell pipeline project. Similarly, the *Bowoto* case alleges that Chevron acted in concert with Nigeria's military and police. Certain Nigerian military and police officials are alleged to have committed crimes against humanity, including summary execution, torture, and cruel and inhuman and degrading treatment for the purpose of quelling peaceful protests against the corporation's environmental practices.

In the jurisprudence to date (identified in the *Commentary*), the most frequently found violations of international humanitarian law (IHL) and international criminal law (ICL) committed directly by business entities include:

⁵ The Alien Tort Claims Act is discussed in greater detail in the *Commentary* and in the United States survey. www.fafno.no/liabilities.

⁶ Respectively, the *Presbyterian Church of Sudan, et. al. v. Talisman Energy, Inc.*, Case No. 01CV9882 (S.D.N.Y. 2001), and *Sarei et. al. v. Rio Tinto, et. al.*, Case No.: CV 00-11695 MMM, 221 F. Supp.2d 1116 (C.D. Cal. 2002).

⁷ Respectively, *Roe, et. al. v. Unocal Corporation, et. al. and Doe, et al. v. Unocal Corporation, et al.*, Case Nos 00-56603; 00-56628 (9th Cir. 2002); *Wiwa v. Royal Dutch Petroleum Co., et. al.*, Case No.96 CIV 8386 (KMW) (S.D.N.Y. 2002); *Bowoto, et. al. v. Chevron, et. al.*, Case No. C99-2506 (N.D. Cal. 2000); *John Doe I, et. al. v. Exxon Mobil Corp., et. al.*, Case No.: 01CV01357 (D.D.C. 2001); *Rio Tinto*; and *Beanal, et. al. v. Freeport-McMoran, Inc., et. al.*, 197 F.3d 161 (5th Cir. 1999).

- Use of forced labour/enslavement (constitutes a crime against humanity when part of a systematic abuse of a civilian population);
- Pillage and plunder (a war crime)
- Deployment of child soldiers (a war crime)
- Use of land mines (a war crime)

Historically, forced labour was one of the most common forms of alleged violations of IHL/ICL by business entities. After World War II, German and Japanese industrialists were prosecuted by military tribunals for using forced labour in their commercial business operations. More recently, European and Japanese corporations have been sued in the United States for their past use of forced and slave labour during the war.⁸ Other lawsuits have been brought against multinational apparel manufacturers for their alleged use of forced labour in Saipan (the Northern Mariana Islands)⁹

After World War II, plunder was also a significant ground for holding German industrialists liable for the illegal appropriation of private property during wartime conflict.

In most cases, a business entity's possible liability is predicated upon a theory of complicity. In other words, for the majority of violations of IHL/ICL described in the *Commentary*, business entities are alleged to be liable on account of having aided and abetted violations by others (e.g., governments, paramilitary groups, etc), not as direct perpetrators.

⁸ For a further discussion of recent forced labour litigation under the U.S. Alien Tort Claims Act see Anita Ramasastry, "Corporate Complicity: From Nuremberg to Rangoon: An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations", 20 Berkeley J. Int'l. L. 91, 128-29 (2002) and Michael J. Bayzler, "Nuremberg in America: Litigating the Holocaust in United States Courts," 34 U. Rich. L. Rev. 1 (2000).

⁹ In 1999, Sweatshop Watch, Global Exchange, Asian Law Caucus, Unite, and Saipan garment workers filed three separate lawsuits against major apparel retailers and Saipan garment factories alleging violations of U.S. labor laws and international human rights standards. By the fall of 2002, 26 retailers and 23 Saipan garment factories had settled the lawsuit. Levis was the only company that did not settle. A U.S. federal judge approved the settlement in April 2003. Levis reached a settlement with plaintiffs in January 2004. The complaint in *Doe_I v. Gap* is available online at: www.sweatshopwatch.org/swatch/marianas/complaint.html.

2.1 Liability of Business Entities under International Law

There are at least two major obstacles to holding business entities liable under international humanitarian or criminal law. International law is often described as applying only to relations between states or, in the case of international crimes, to individuals (natural persons). As non-state actors, business entities are often viewed as falling outside the sphere of international law and, as legal persons, business entities are often viewed as not governed by the international criminal and humanitarian laws concerning genocide, crimes against humanity, and war crimes.

The view that international law applies only to states has become difficult to sustain.¹⁰ States themselves regularly negotiate international law to govern the activities of businesses. In fact, international law and practice over the past thirty years has seen a steady increase in the extent of regulation governing the rights and obligations of non-state actors across a wide range of sectors, from trade to environment to international peace and security.

Legal precedent dating back to the post-World War II criminal tribunals implicated business entities in violations of international law, in particular violations of *jus cogens* norms,¹¹ which include the international criminal and humanitarian laws of genocide, crimes against humanity, and war crimes. The cases of *Krupp*, *Flick*, and *Farben* are particularly relevant. The U.S. Military Tribunals prosecuted the heads of major German corporations for war crimes and crimes against humanity, consistently speaking in terms of corporate liability despite the fact that the jurisdiction of the Tribunals limited them to actually prosecuting natural persons. For example, in *Farben*, the Tribunal found that, as a corporate entity, Farben had violated Article 47 of the Hague Regulations on the Laws and Customs of War. In the Tribunal's assessment:

The result was the enrichment of Farben and the building of its greater chemical empire through the medium of occupancy at the expense of the former

¹⁰ While international human rights treaties place obligations in states in the first instance, there is a marked trend to extend these obligations beyond states to include individuals (for international crimes), armed groups, international organizations, and private enterprises. Amnesty International, "The UN Human Rights Norms for Business: Towards Legal Accountability" (Amnesty International Publications: London, 2004), p.7.

¹¹ *Jus cogens* describes a mandatory norm of international law from which no two or more states may exempt themselves or release another; see below, Annex 1. The violation of international statutes related to crimes against humanity, war crimes, torture, and genocide are prohibited as *jus cogens* norms.

owners. Such action on the part of Farben constituted a violation of rights of private property, protected by the Laws and Customs of War.¹²

Subsequent civil cases in Germany went further: “The fundamental principles of equality, justice and humanity must have been known to all civilized persons, and the I.G. Corporation cannot evade its responsibility any more than can an individual.”¹³

In recent years, a number of U.S. civil court cases brought under the Alien Tort Claims Act have reinforced the precedents of the World War II cases.¹⁴ The ATCA cases have reaffirmed that non-state actors are bound by the standards of the law of nations, and that they can be held liable for violations of international law (in *Kadic v Karadzic*, hereafter *Kadic*); and that business entities are not immune from suit for grave breaches of international law (in *Talisman*). Of the twenty ATCA cases currently pending, none have been dismissed on the issue of subject matter jurisdiction. At the same time, various enabling statutes in countries such as Norway and Canada make it theoretically possible to prosecute both legal and natural persons for war crimes, crimes against humanity, and genocide. Thus, it is imaginable that business entities could be held liable either civilly or criminally for violations of international law in multiple fora.

There is, however, the practical obstacle of jurisdiction. It may be theoretically possible to hold business entities accountable for certain violations of international law, but in order to do so an appropriate forum must be found to hear the case. This requires a particular jurisdiction have the power to hear certain subject matters against certain.

At present, no international forum has the mandate to prosecute cases against private business entities, even for violations of international law that have attained the status of *jus cogens*. In defendants – for example, environmental violations by companies or criminal violations by individuals the post-World War II U.S. Military Tribunal prosecutions cited above, the tribunals described violations committed by business entities. Nonetheless, the tribunal’s jurisdiction prohibited prosecution of a company. Instead, the actual prosecutions were against several companies’ senior management.

¹² See U.S. v. Krauch, et. al., The I.G. Farben Case, VIII Trials of War Criminals Before the Nuremberg Military Tribunals, iii-iv (1952) or *Commentary* A.1.a. “Trials of the Industrialists at Nuremberg”. www.fao.no/liabilities.

¹³ Wollheim v. I.G. Farben in Liquidation, Frankfurt District Court, June 10, 1953, court file no. 2/3/0406/51 quoted in Ferencz at 37.

¹⁴ See the United States Survey in the attached CD.

Similarly, the International Criminal Court (ICC) and the *ad hoc* international tribunals – including the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the Special Court for Sierra Leone – are mandated only for the prosecution of individual perpetrators, and their jurisdiction does not extend into the corporate arena. Although consideration was made of the inclusion of legal persons in the mandate of the ICC, member states decided against the move.¹⁵

In the absence of a competent international court to try corporate misconduct, victims are forced to turn to domestic fora to seek redress. However, domestic courts impose their own obstacles that may preclude a finding of corporate liability under international legal norms.

The national jurisdictions surveyed – Britain, Canada, France, Norway, and the United States – each provided some means, at least in theory, to prosecute a business entity for violations of international law. In each case, however, such a finding relied upon the translation of international law into domestic legislation.

Within each jurisdiction, corporations can be found liable for violations of international law only to the extent that the violations are incorporated into domestic legislation. Although all of the surveyed states are parties to many of the conventions pertaining to the substantive criminal acts in question, none of the domestic jurisdictions recognize ratified covenants as being automatically and wholly in force in their domestic legal system. The United States, for example, considers many international covenants to be “non-self-executing,” meaning that they cannot be relied upon in a domestic court to decide a criminal case. Similarly, civil law jurisdictions do not permit covenants to be relied upon in court without implementing legislation.

The incorporation of international norms into domestic provisions entails the individual enactment of specific crimes that parallel international norms discussed in the *Commentary*. Often the covenants relevant for our topic are not fully integrated into the legal system of the surveyed countries, either because the states feel that specialized implementing legislation is not required (for example, regarding forced labour in Norway) or because they have not completed the process of incorporating their international commitments into their penal codes.

¹⁵Clapham, A. (2000) “The Question of Jurisdiction Under International Criminal Law Over Legal Persons: Lessons from the Rome Conference on an International Criminal Court” in M. Kamminga and S. Zia-Ziarifi, eds, *Liability of Multinational Corporations Under International Law*. The Hague: Kluwer, 139-195.

The development of the International Criminal Court could bring about collateral benefits in the area of domestic criminal prosecutions for violations of human rights or international humanitarian law. The states that are parties to the Rome Statute of the ICC have formally committed to integrate the substantive provisions of the statute into their domestic legal systems. The surveys indicate that states such as Canada, the United Kingdom, France, and Norway are taking this responsibility seriously, and have or are attempting to integrate the ICC statute to a degree that other international treaties may not have been integrated.¹⁶

2.2 Liability under Domestic Criminal Law

Each of the *Surveys* found that business entities could indeed be held liable for violations of that jurisdiction's criminal or penal code. However, the record of individual governments holding corporations criminally accountable for international crimes – as opposed to financial or environmental transgressions – is sparse.¹⁷

This may be due, in part, to the context in which prosecutorial offices set priorities. In common law and civil law jurisdictions, criminal investigations and prosecutions are initiated by prosecutors acting on behalf of the public. Investigative judges, state prosecutors, and attorneys-general all operate in different environments of political accountability. All are meant to be independent, yet all operate in a public policy context with a significant amount of discretion in how they set investigative priorities. Many of the business entities likely to be the focus of prosecution are subsidiaries of multinational parent-corporations that have significant political influence and economic might. Experience indicates that governments are disinclined to make corporate misconduct a priority when the potential domestic economic and political fall out is high and the injured parties are citizens of a poor, far away country. Given the weight of the domestic caseload most prosecutors face, there is little

¹⁶ An important example in this regard is in Canada, where the domestic law, in the form of the Crimes Against Humanity and War Crimes Act (CAHWCA), provides for criminal prosecution in Canada of genocide, crimes against humanity, and war crimes. The CAHWCA integrated into domestic legislation the Rome Statute of the International Criminal Court in a manner that defined genocide, crimes against humanity, and war crimes in the Canadian statute in the exact language of the *jus cogens* international law.

¹⁷ Although there is a growing body of precedent in the United States related to the Alien Tort Claims Act, those are civil suits rather than criminal prosecutions.

incentive for independent prosecutors to make a priority out of an international criminal case against a corporation.

In addition, the applicable penal codes of each state pose a common obstacle to the prosecution of business entities: the difficulty of attributing the acts of a particular individual or individuals to the corporate entity as a whole.¹⁸

In Canada and the United Kingdom, for example, the “directing mind” doctrine means that a business entity may be held criminally liable for the actions committed by an agent or agents only if those actions can be interpreted as being consistent with the intent of the corporate entity as a whole. In common law countries such as the United States and United Kingdom, a *mens rea* element – or guilty mind – must be established for the corporation as a whole. This can be established either by a positive act or by an omission on the part of corporate employees. For example, a memorandum from upper management authorizing the use of forced labour in constructing a dam in a major public works project might establish a business entity’s criminal intent. It might also be sufficient to demonstrate merely that the directing management knew or should have known of such a pattern of illegal conduct that benefited the company.

The surveys indicate that there is a general difficulty in following liability upstream, beyond the acts of individuals within a corporate subsidiary to the parent multinational located in the state where the action is brought. This complex problem – often referred to as “piercing the corporate veil” – may be so serious as to preclude the effective use of domestic criminal law in deterring corporate complicity in some cases.¹⁹ It has implications for both criminal and civil actions.

Other limitations also complicate prosecutions of a subsidiary or joint venture company operating outside of the home state. One example comes from the Canadian survey. Although war crimes and crimes against humanity may be prosecuted criminally under Canadian law, for prosecution to proceed a person/s must either: be a Canadian citizen or employed by Canada in a civilian or military capacity; be a citizen of a state engaged in armed conflict against Canada or employed in a civilian or military capacity by such state; be a Canadian citizen in order to file an alleged offence; be a citizen of a state that was allied with Canada in an armed conflict; or be physically present in Canada at some point after the offence is alleged to have been committed. Under Canadian criminal law, the mere existence of a subsidiary relationship would not necessarily permit a prosecution to proceed.

¹⁸ There is some variation in the terminology and particular elements of the “mental element” from country to country; these are addressed with more specificity in the individual country surveys.

¹⁹ For more on “piercing the corporate veil” and the complications it entails for establishing criminal (as well as civil) liability for corporate actions, see below, “Jurisdiction.”

2.3 Domestic Liability for International Torts

A lawsuit seeking compensation for a tort – a breach of a duty that the law imposes on everyone – is an alternative to criminal prosecution, particularly in some common law jurisdictions where tort litigation is well established.²⁰ Indeed, while tort litigation does not create public accountability through prosecution by the state, it may be another effective way of holding business entities financially accountable while providing redress for victims. Such litigation could help create incentives for companies to ensure they do not engage in similar activities because it targets the financial resources of large corporations.

Tort litigation offers a lower evidentiary threshold than do criminal prosecutions in a number of ways. Civil tort lawsuits may be brought by individual victims. Plaintiffs need not wait for a prosecutor to decide to proceed, and the defendant in a tort action enjoys fewer protections than in a criminal case – including, crucially, a more relaxed burden of proof. It is also easier for plaintiffs (in some common law jurisdictions) to attribute liability to a corporate entity for the actions of its employees or agents, as compared with a criminal case. In particular, it may be less difficult to establish the element of causation under tort law than to establish that a corporation is criminally liable under a theory of aiding and abetting.²¹

The use of tort law against corporations for IHL/ICL violations is exemplified by the cases that have been brought under the U.S. Alien Tort Claims Act.²² The ATCA includes language permitting liability to be found for violations of “the law of nations,” which has been interpreted as effectively importing into the U.S. legal system certain elements of *jus cogens* international norms as torts, without requiring

²⁰ Legal terminology uses “civil” in at least two senses: to designate a jurisdiction’s legal tradition, e.g. Norway is a civil law jurisdiction; or to refer to a type of law within a jurisdiction, e.g. a civil action or lawsuit, as distinct from criminal law. We use “civil” here to denote a jurisdiction, and ‘tort litigation’ to refer to a civil action.

²¹ See complicity section below for more on what constitutes “aiding and abetting.”

²² The Alien Tort Claims Act was promulgated in 1789 to combat piracy; it states that U.S. courts have jurisdiction over civil suits by aliens for torts committed in violation of the law of nations (customary international law). The first successful modern application of the Act was in the case of *Filartiga v. Pena-Irala*. In that case, the U.S. Court of Appeals for the Second Circuit ruled that torture is a violation of customary international law, such that individuals have the right to sue their own government when torture is perpetrated against them. It also employed the concept of universal jurisdiction to find that it was appropriate for a U.S. court to hear the case, even though the occurrence of the act and the parties involved did not have a substantial connection to the United States. See also below, “Survey of Laws in the United States of America,” and http://www.pbs.org/wnet/justice/law_background_torture2.html (accessed 17 February 2004).

specific legislative enactment. The requirement that domestic actions rest upon domestic legislation still applies in the United States, but ATCA itself serves to fulfill this requirement.

In a recent case, *Sosa v Alvarez-Machain* (hereafter *Sosa*), the Supreme Court of the United States preserved ATCA as an avenue for claims based on violations of international law while limiting the scope of claims to those that “rest on a norm of international character accepted by the civilized world and defined with ... specificity.”²³ This standard will be worked out by lower courts, which now have the task of deciding precisely which norms are sufficiently well established to serve as a basis for liability under ATCA.²⁴ While the *Sosa* decision might be seen as limiting the scope of ATCA, it seems likely that all norms recognized by the international community as *jus cogens* may be the basis of lawsuits in the United States. In particular, genocide, forced labour, torture, and crimes against humanity will probably meet the *Sosa* standard.

ATCA is by far the most robust civil legal mechanism by which to hold corporate entities accountable for their egregious activities committed abroad, and other developed legal systems have not yet subscribed to this approach. Nonetheless, organizations and groups in other countries, such as the United Kingdom and the Netherlands, have considered using domestic tort law to mount legal challenges against business entities for various human rights violations committed offshore.²⁵ There are important distinctions between tort actions in common law versus civil law jurisdictions that affect their ability to hold private sector actors accountable. In common law jurisdictions, tort litigation is brought based on established legal

²³ *Sosa v Alvarez-Machain*, slip opinion, at 30-31 (October 2003).

²⁴ The Supreme Court specifically concluded that the norm against arbitrary detention advanced by the plaintiff did not meet these prongs.

²⁵ In October 2004, an English Court of Appeals issued a decision in the case of that may open the door to ATCA style litigation in the United Kingdom. The case, *Jones v. Saudi Arabia*, may open the door in England to ATCA style lawsuits as long as the defendant has sufficient contact with England, including assets or physical presence (though transitory presence probably will not be enough). Plaintiff Jones, a British national, served the Ministry of the Interior of the Kingdom of Saudi Arabia with a complaint and applied for permission to serve defendant Colonel. Azziz out of the jurisdiction and to compel the Kingdom's solicitors to accept service on his behalf. . Both defendants are alleged to have been responsible for Jones' torture, assault and battery, and false imprisonment during 67 days of solitary confinement in 2001. Three other plaintiffs seek to serve four other individual Saudi officials (including the Minister of the Interior) for torture and assault, including on a theory of negligence. The English Court upheld the appeal against Azziz and the other four individual defendants. The court rejected the claim of individual defendants that they were protected by a blanket application of sovereign immunity, and returned the matter to the master for further proceedings. The Court directed the master, on remand, to look at (continues next page...)

precedent developed over time by the judiciary. With the single exception of the ATCA, none of the common law jurisdictions recognize the violation of international law as a tort in and of itself.

At the same time, most crimes against humanity and war crimes inherently encompass acts that also constitute torts: for example, an act that constitutes torture under international and criminal law would also constitute assault under tort law, while rape and other forms of sexual abuse would likewise fall under the wide umbrella of assault. Similarly, forced labour can be seen as a manifestation of wrongful imprisonment.²⁶ However, certain threshold requirements apply to tort actions in *all* the jurisdictions surveyed. Specifically, each state provides that only those harmed by the actions of a corporation can bring a suit, and that plaintiffs must establish a certain level of direct correlation between the actions of the corporation and its agents and the harm suffered by the individuals concerned.

One of the most flexible – and therefore most important – features of tort law is the concept of negligence. Negligence generally means that a person or corporation's conduct falls below a legally recognized standard of taking reasonable care under circumstances. Negligence involves a lack of such concern for the probable consequences of an act or failure to act as a person of ordinary prudence would have had in conducting its affairs. Negligence is a relative term. Whether a certain act or

(...continued) such issues as forum non conveniens, exhaustion, and discretion (intrusiveness on foreign affairs, whether the defendant had a sufficient connection to the jurisdiction, whether he/she has assets that can be reached by the court). The court makes reference to U.S. decisions involving the Alien Tort Claims Act. The decision is available online at <http://www.redress.org/news/Jones%20v%20Saudi%20Arabia.pdf>.

A recent collection of essays, *Torture as Tort*, edited by a Canadian law professor, Craig Scott, asks the question, "What does it take for (internationally-prohibited) torture to be transformed into (domestically-sanctioned) tort?" Several of the essays discuss the various procedural and substantive obstacles posed by the use of a private civil right of action based on international human rights norms (in the absence of national legislation authorizing such claims). The various contributors conclude that existing doctrines permit the courts to overcome this barrier but that it is nonetheless difficult for civil suits to be commenced. See *Torture as Tort* (Craig Scott ed., 2001) (exploring the possibility of civil claims for torture). Other sources that examine the possibility of civil liability for human rights violations include: Human Rights Committee, International Law Association (British Branch), Report on Civil Actions in the English Courts for Serious Human Rights Violations Abroad, reprinted in 2001 *Eur. Hum. Rts. L. Rev.* 129 (discussing the possibility of civil human rights litigation in England). See also Menno T. Kamminga and Saman Zia-Zarifi (eds.) *Liability of Multinational Corporations under International Law* (Kluwer 2000) (includes chapters discussing possibility of civil human rights litigation in England and the Netherlands).

²⁶ Claims to this effect have been brought in the United Kingdom by foreign workers against their U.K.-based employers.

failure to act constitutes negligence depends upon the facts and circumstances of each particular case.

In certain cases, the concept of negligence may impute to business entities a minimum duty to avoid harming others in an unreasonable fashion. As such, it can be an effective tool in dispelling companies' claims that they did not know that war crimes or human rights violations were occurring, insofar as plaintiffs can demonstrate that a company failed to put in place the requisite protective systems to prevent such an outcome. For example, if a company hires members of another state's military forces for security purposes but fails to take sufficient measures to prevent them from torturing civilians in the course of providing "security," it is conceivable that the company's failure to implement protective measures could result in a determination of negligence, and that it would be required by a court to compensate the harmed individuals.

The doctrine of vicarious liability is also relevant to the issue of corporate accountability. In the United Kingdom, vicarious liability was illustrated in the recent case, *Lister v Helsley Hall*, in which the owners of a children's home were held liable for sexual abuse committed by an employee. The English court maintained that the nature of the employment – working with children – was so intricately linked with the children's safety that the company as a whole should be vicariously liable, even if the owners were not aware of the abuse. The vicarious liability principle could be further developed to attach to private sector actors with operations outside their home state.

In common law jurisdictions, the most formidable obstacles to the use of tort law appear to be the complicated issues of choice of forum and personal jurisdiction. This is particularly the case where business entities are alleged to be involved in crimes against humanity and war crimes abroad. Some survey respondents indicated that a focus on negligence could do a great deal to overcome objections pertaining to the forum, and could help to provide an appropriate recourse to the extent that the negligent acts (such as the decision to hire the torturers) occurred in the state where the action is brought, even if the harmful conduct occurred abroad. In a recent case before the British House of Lords, *Lubbe v. Cape PLC* (hereafter *Lubbe*), South African plaintiffs sought damages in an English lawsuit against a parent company for personal injuries arising out of commercial operations of South African subsidiaries. The parent was sued for an alleged breach of duty that related to its decisionmaking activity in England.²⁷ Given that other states are unlikely to enact provisions similar to the ATCA, this alternative approach, with an emphasis on negligence, could be significant.

²⁷ *Lubbe v. Cape Plc* [2000] 1 WLR 1545

The *Survey* indicates that tort litigation in civil law jurisdictions is not as robust as some common law jurisdictions in its relevance for international crimes. Although the civil jurisdictions surveyed – France and Norway – have developed systems to compensate those who have been wrongfully harmed, they tend to provide only for compensatory damages, resulting in less substantial damages than are prevalent in common law jurisdictions (where the settlements common in the United States tend to be higher).²⁸

The survey respondents also expressed doubts regarding the extraterritorial reach of tort litigation in civil jurisdictions, an issue that at the moment is unresolved. Although the application of tort actions in civil jurisdictions may indeed occur in the future, at present the scope and reach of tort principles in these jurisdictions remains unclear. This lack of clarity in the civil law approach led one respondent to conclude that tort litigation in civil jurisdictions does “not give many opportunities to sue for violations of international law.”²⁹

2.4 Complicity

Under both domestic and international criminal law, business entities might be held accountable for their role in certain human rights violations based on the doctrine of complicity. Complicity describes the act or state of being an accomplice to a criminal act. With regard to the private sector, complicity may arise when a corporate entity aids or abets – that is, substantially assists or encourages, the perpetrator(s) in carrying out a crime. For example, a company that employs security guards to

²⁸ Tort law varies considerably in various European jurisdictions. A group of European jurists has worked to create a set of Unified Principles of European Tort Law. These draft Principles are meant to encapsulate the principles of tort law that are common to most European nations. See European Group on Tort Law, Principles of European Tort Law located at <http://civil.udg.es/tort/>.

²⁹ See Norway *Survey* Question. II 7. For a useful analysis of how the U.S. legal system and the Alien Tort Claims Act do or do not translate into equivalent legal frameworks in other jurisdictions – see Beth Stephens, “Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights violations.” 27 *Yale J. Int’l. L.* 1 (2002). Stephens notes that “a legal tradition of impact litigation, the structure of attorneys’ fees and the availability of public interest litigators, default judgments, and discovery – combine to render civil litigation in U.S. federal courts an attractive option for public interest litigators, as well as their private, fee-oriented colleagues. Combined with favorable jurisdictional rules that enable suit against individuals transitorily in the country or corporations doing business in the United States, the U.S. legal system offers a uniquely supportive framework for civil lawsuits seeking damages for international human rights abuses.” *Id.* at 18.

monitor their property or installations in a conflict zone may be said to have aided or abetted those guards if they were then found to have committed war crimes. Similarly, a corporation could be said to be complicit in international crimes if it enters into an arrangement to profit from forced labour supplied by an associate, such as a rebel commander or government official.

In neither of the two examples does the business entity or its agent directly commit the underlying crime; rather, the case for complicity arises out of the corporation's relationship to the individual(s) that did. In this way, companies are far more likely to be complicit in the international crimes of others than they are to be the principle perpetrators. In fact, the evidence indicates that corporate misbehaviour in conflict zones mainly consists of support to the crimes of others, rather than direct violations of international law.

The concept of complicity on the part of individual accomplices is well established in international law. There are complicity provisions in the statutes establishing the ICTY and ICTR and in the Rome Statute of the ICC; and the International Law Commission's draft Code of Crimes allows for an individual to be held criminally liable if they are shown to be complicit in crimes against humanity and war crimes.³⁰

Three elements must be present in order to find a defendant guilty of complicity under international law: a war crime or crime against humanity must have been committed; the accomplice must contribute in a material ("direct and substantial") way to the crime; and there must be an element of intent and/or knowledge, such that the accomplice must have intended that the crime be committed or have been reckless as to its commission.³¹ This definition of complicity has been applied in various international tribunals. It is also relevant to domestic jurisdictions. Of the five countries surveyed, the definitions of criminal complicity were, although not identical, similar in their essential elements. As with the international definition, each of the countries bases the crime of complicity on both the substantive nature of the conspiratorial act (*actus rea*) and the accompanying mental element or intent (*mens rea*).

³⁰ Many of those convicted at the Nuremberg tribunals were found guilty as accomplices rather than as principals; see for example *U.S. v Krauch* ("the Farben case"). William A. Schabas, "Enforcing International Humanitarian Law: Catching the Accomplices," *International Review of the Red Cross*, Vol.83, No.842 (June 2001), pp. 442-443. The principle instruments, including the Genocide Convention and the Torture Convention, also explicitly recognize the concept of complicity.

³¹ *Ibid*; see also *Prosecutor v Tadic* (Case Number IT-94-1-T), Opinion and Judgment, 7 May 1997, paras.688-692.

In the United States, the doctrine of complicity is increasingly being applied to private sector actors in the same manner as to individuals. The ATCA cases working their way through U.S. courts in recent years have yielded some interesting perspectives on complicity. Although these cases do not have precedential value outside the United States, they nevertheless deserve examination, as they represent relevant interpretations of international law on the issue of corporate complicity. The most important of the present ATCA cases is the *Unocal* case, which deals with determining the definition of corporate complicity in the context of human rights violations. The United States Court of Appeals for the Ninth Circuit held that knowledge of the “precise crime” committed by state actors was not required to establish criminal liability. Rather, knowledge that “violence would probably be committed” by state actors as a result of corporate conduct – such as payments to the military, directives to provide security, the provision of detailed project and geographical information, and the building of infrastructure – may suffice to establish liability. In the *Unocal* case, the Ninth Circuit has grappled with the question of the correct legal standard for complicity.³² The case is currently on appeal in federal court. On September 15th, 2004, a California state judge denied Unocal’s motion to dismiss a related state law case.³³

In another ATCA case, *Talisman*, the U.S. Court of Appeals for the Second Circuit used the international standard for individual complicity to identify the essential elements that must be present in order to establish corporate complicity for grave breaches of international law. In particular, the court noted that any aid given by a corporation must be *direct and substantial*, taking international legal definitions and directly importing them into national precedent, such that the *criminal act most probably would not have occurred in the same way* if the company had not so acted.³⁴ This does not mean that the assistance given must be so vital that, but for the actions of the corporation, no crime would have occurred; rather, the aid must be significant enough to have an impact on the circumstances and means of the crime. Also, the complicit entity must have *some knowledge that the*

³² For various litigation documents from Unocal case see http://www.ccr-ny.org/v2/legal/corporate_accountability/corporateArticle.asp?ObjID=lrRSFKnmmm&Content=45 and <http://www.earthrights.org/unocal/index.shtml>.

³³ For recent information on the Unocal case, see the websites of the Center for Constitutional Rights (www.ccr-ny.org) and EarthRights International (www.earthrights.org).

³⁴ The precise meaning of the substantiality requirement has yet to be defined in U.S. courts. It derives from the jurisprudence of the ICTY in *Prosecutor v Tadic*, and states that aid given by an accomplice must be direct and substantial in order to invoke liability. It is not yet clear what extent of assistance is required to meet the “substantial” threshold. This final determination of this issue will have an impact on the development of corporate complicity.

assistance will facilitate the crime in some fashion. Finally, the court discussed the finding of the Rwanda tribunal that criminal liability can be established by either physical or moral support, so long as that support makes a substantial contribution to the crime.³⁵

For the purposes of litigation, the prospect of business entities being charged with complicity for aiding and abetting a violation of international law is limited by the difficulty of determining which type of corporate activities and relationships give rise to aiding and abetting. In some of the recent ATCA cases, corporate defendants have been alleged to have aided and abetted various state government entities, which are joint venture or contractual partners in various resource extraction projects. The complexities of various investment projects make it difficult to craft definitive standards as to what constitutes aiding and abetting. In today's global economy, a single commodity may pass through the hands of a multitude of overlapping – but legally distinct – corporate entities. Is a corporation guilty of aiding and abetting if they buy rough diamonds from a supplier they know has rebel connections? What if they purchase the same diamond from the supplier who's handling it after it has been polished in a third country? How far up the supply chain should complicity go? And to whom in the supply chain would complicity apply?

Attempts to establish corporate complicity in international crimes have thus far only been alleged when a corporate entity has apparently aided and abetted a state actor in the commission of a crime. In the major U.S. ATCA suits premised on a theory of corporate complicity – *Talisman*, *Wiwa*, *Unocal*, and *Exxon Mobil* – all of the offences were allegedly committed by state actors. Although the *Kadic* case established that non-state actors are also bound by the law of nations, this doctrine has thus far not translated into a focus on corporate involvement with non-state actors.

Although corporations may claim that such rulings will open the floodgates to baseless and vituperative lawsuits, thus far this has not occurred.³⁶ In fact, courts

³⁵ See *Talisman*, Opinion, 19 March 2003.

³⁶ As this report went to press, a federal district court in the Southern District of New York dismissed claims against a group of multinational corporations for their alleged roles in aiding and abetting apartheid in South Africa. The court dismissed the various lawsuits stating that aidor and abettor liability is not a recognized cause of action under the ATCA. Memorandum Opinion and Order, In re South African Apartheid Litigation (S.D.N.Y.) November 29, 2004. MDL No. 1499. The court found that plaintiffs, victims of apartheid who sought more than \$400 billion in damages through eight cases, had demonstrated “little that would lead this Court to conclude that aiding and abetting international law violations is itself an international law violation that is universally accepted as a legal obligation.” The 43-page opinion dismisses actions filed under the ATCA in different federal courts. The cases were subsequently consolidated before Judge Sprizzo by the Judicial Panel on Multidistrict Litigation, under MDL No. 1499. (Continues next page...)

dealing with claims brought under ATCA have dismissed a number of cases: some on the grounds of *forum non conveniens*, others on the grounds that a company's mere presence in a conflict situation does not warrant liability. The latter point is significant for corporations attempting to do "good business" in unstable states.

2.5 Jurisdictional Issues

- **Basis for criminal jurisdiction**

As discussed above, legal persons have, to date, been excluded from the jurisdiction of international tribunals or courts. Domestic legal systems are more complex, with a range of laws in which personal jurisdiction varies. Domestic courts, therefore, must first be satisfied that they possess subject matter jurisdiction over the crimes in question before proceeding on a case. Establishing jurisdiction is a prerequisite for ascribing liability to corporate entities for actions committed abroad. In each of the countries surveyed, the nationality of the victims does not bar criminal or tort litigation.

The *Surveys* describe **four grounds of criminal jurisdiction** in international law. To rely on any of these grounds for prosecution, states must have the principle appropriately integrated into their domestic penal code or statutes.

The first basis of criminal jurisdiction, territorial jurisdiction, involves prosecutions for crimes committed in the territory of the state in question. For postwar tribunals, or for trials involving the crimes of past administrations and their business allies (e.g. postwar Germany), this principle does not present an obstacle.

In cases of business entities facing allegations of international crimes committed abroad, some states may prosecute for certain acts, such as company decisions or transactions, that are generally associated with complicity (aiding and abetting) and that take place within their territory.

The courts of some states may also base jurisdiction on the nationality principle, maintaining the authority to prosecute their nationals for crimes committed abroad. A third principle of criminal jurisdiction permits prosecution to protect the national security of the state in question. Since the crimes in question here generally involve

(continued...) The complaints alleged that the companies benefited from the apartheid system's emphasis on maintaining a pool of black labour to serve the interests of the ruling white minority. The plaintiffs also charged that the companies supplied resources such as technology, money and oil to the South African government, or entities controlled by the government, and thus sustained the apartheid regime.

the protection of people, there does not appear to be much purchase in this principle (barring a reconsideration of national security to encompass war crimes and crimes against humanity that occur elsewhere). However, it is conceivable that a state may view the criminal behaviour of a business entity to be inimical to its national security, for example in the production of weapons used to threaten or invade its territory. To date, however, legal control of these sorts of activities has been attempted by use of state sanctions and sanctions prosecutions.

Universal jurisdiction requires that prosecutable crimes involve “heinous” acts, a standard met by the crimes considered in the *Surveys*. In principle, all of the states surveyed could properly seek to prosecute individuals under the universal jurisdiction principle. With the exception of the United Kingdom, however, the other countries require some nexus to the forum in order for a person to be tried for genocide, war crimes, or crimes against humanity.

- **Parent/subsidiary relationship and threshold for finding parent liable for actions of subsidiary**

One of the problems of establishing jurisdiction is the legal structure of contemporary business entities. Companies can be composed of complex, interlocking, domestic and foreign corporate sub-entities and subsidiaries. In this way, companies can elude national regulation. Indeed, some corporate entities – including many of the world’s most important extractive corporations – attempt to shield themselves from liability by purposefully erecting foreign subsidiaries and international joint ventures that utilize complex legal arrangements to appear independent. These subsidiaries are not fully subject to the laws of the parent company’s home state, and may be established in a second country with poor laws concerning governance, or may operate in a country in which the authorities are unwilling or are unable to apply the law. Often, international companies structure their subsidiary relationship this way so as to protect the bulk of an operation’s capital from legal attack of one sort or another. The effect of these efforts is to significantly cloud the question of jurisdiction for any court.

In cases in which a parent company is allegedly liable for actions of a subsidiary, the establishment of liability will demand that the connection between a subsidiary and a parent company is sufficiently substantial. This will usually require proof that a parent company exercises some degree of regular control and knowledge about events and decisions occurring in its subsidiary. This could include influence upon, or awareness of, employment and hiring practices, fiscal arrangements, operations, and other core managerial functions of the subsidiary. To do this requires overcoming a major hurdle common to each of the countries surveyed known as “piercing the

corporate veil.”³⁷ The existence, for example, of a memorandum detailing parent company supervision or knowledge in relation to the hiring of security personnel may in itself be enough to pierce the veil. Once established, the substantial or controlling role of the parent company will be crucial to arguing that the court of a parent company’s home state has jurisdiction to hear a particular case.

- **Forum non Conveniens**

Even when all other elements of jurisdiction and venue are satisfied for the court in question, the doctrine of *forum non conveniens* may result in a court declining to exercise jurisdiction. According to this doctrine – which operates in each of the countries surveyed – a case may be dismissed if the court deems that a foreign jurisdiction is the more appropriate forum. In deciding when another jurisdiction may be more appropriate, the court will take into account several factors including, but not limited to, the proximity of evidence, the availability of an alternative venue, practical considerations such as costs incurred, and the interests of the jurisdiction in trying a case. These considerations involve a balancing act between the rights of the victims, the alleged perpetrators, and the states involved.

Historically, the doctrine of *forum non conveniens* was a seemingly insurmountable obstacle for foreign parties seeking to redress crimes that occurred in third states, as courts weighed in favour of the interests of the alternative forum and the party seeking to avoid jurisdiction. Furthermore, courts have generally not given credence to the broader interests related to the effective resolution of cases involving crimes against humanity and war crimes – interests that can militate strongly in favour of the forum where the action is brought. In most jurisdictions, including Canada and Norway, courts continue to employ the doctrine to deny jurisdiction on a regular basis.

In recent cases in both the United Kingdom and the United States, however, courts have declined to utilize *forum non conveniens* to deny a hearing to victims of crimes against humanity and war crimes. In a British case, *Lubbe*, a multinational asbestos company based in England and involved, through subsidiary units, in South Africa, was charged with wrongful deaths and injuries stemming from negligence that led to exposure to the dangerous substance. The British court held that, “although another country might be a more convenient forum, if that would mean shutting the claimants out from justice, the U.K. courts may accept jurisdiction.” The *Lubbe* case is particularly notable because South Africa is considered by many observers to have a relatively developed judiciary.

³⁷ As noted in the summary above, “piercing the corporate veil” is the act of following liability upstream, such that the acts of individuals in corporate subsidiaries can be attributed to the parent multinational corporation, thereby establishing liability on the part of the parent corporation.

In the United States, a number of cases brought under the Alien Tort Claims Act were initially dismissed on the basis of the *forum non conveniens* principle. However, appellate courts have overturned decisions that rely heavily on the belief that other jurisdictions may be more appropriate arenas to try such cases. Bolstered by the passage of the Torture Victims Protection Act (TVPA) in 1991,³⁸ many U.S. courts have resolved the balance of interests in favour of adjudication of these matters in U.S. courts. In cases such as *Wiwa* and *Talisman*, for example, a number of issues were raised that cast doubt on defendants' contentions that an alternative forum would be more appropriate.

As recognized by the United States Court of Appeals for the Second Circuit in *Wiwa*, plaintiffs would put themselves in grave danger if they returned to the country where gross international law violations were committed. Additionally, the *Wiwa* court stated that, "it is not easy to bring such suits in the courts of another nation. Courts are often inhospitable. Such suits are generally time consuming, burdensome, and difficult to administer...because they assert outrageous conduct on the part of another nation, such suits may embarrass the government of the nation in whose courts they are brought."³⁹ Although this recent trend in U.S. courts has yet not been endorsed by the Supreme Court, the sentiment embodied in the appellate decisions – that it is in the interest of each state to prevent and punish war crimes and crimes against humanity to the maximum extent possible – sets an important precedent.

- **Sovereign Immunity**

Finally, one unresolved jurisdictional issue relates to sovereign immunity, which may be relevant depending on a company's relationship with its home state. All of the countries surveyed were uncertain about the standing of state-owned or partially owned companies and the protection afforded to them against domestic criminal and civil prosecutions.⁴⁰ For example, although the France survey claims that

³⁸ The Torture Victims Protection Act echoes the decision in *Filartiga v Pena-Irala* in declaring that U.S. courts have jurisdiction over foreign nationals in acts of torture committed abroad, and recognizing the U.S. interest in the prevention of torture on a global scale. In one respect, the TVPA expands on the ATCA by allowing American citizens who were victims of torture abroad to sue in U.S. courts (the ATCA provides remedy only for non-citizens); at the same time, the TVPA is more narrowly drawn than the ATCA in that the statute refers only to acts of the torture (whereas the ATCA covers all violations of customary international law).

³⁹ *Wiwa v. Royal Dutch Petroleum Co., et. al.*, Case No.96 CIV 8386 (KMW) (S.D.N.Y. 2002).

⁴⁰ With regards to this issue, the United States employs specific provisions from the Foreign Sovereign Immunities Act to protect state-owned or partially-owned companies against prosecution.

sovereign immunity cannot protect a state-owned enterprise, some international legal theorists consider that foreign public functionaries – including the managers of public, state-owned enterprises – enjoy immunity as an extension of sovereign immunity.

Appendix A: Glossary

Actus reas: The wrongful deed that comprises the physical components of a crime and that generally must be coupled with *mens rea* to establish criminal liability.

Aid and Abet: To assist or facilitate the commission of a crime, or to promote its accomplishment; aiding and abetting is a crime in most jurisdictions.

Complicity: Association or participation in a criminal act; the act or state of being an accomplice.

Conspiracy: An agreement by two or more persons to commit an unlawful act; in criminal law, conspiracy is a separate offence from the crime that is the object of the conspiracy.

Criminal law: The body of law defining criminal offences, regulating how suspects are investigated, charged, and tried, and establishing punishments for convicted offenders.

Doctrine of identification (alter ego doctrine): A corporation, organization or other entity set up to provide a legal shield for the person actually controlling the operation. Proving that such an organization is a cover or alter ego for the real defendant breaks down that protection, but it can be difficult to prove complete control by an individual. In the case of corporations, proving one is an alter ego is one way of “piercing the corporate veil.”

Double actionability rule: The test is a two-step process. First the law of the forum (*lex fori*) is applied to see if the defendant is liable. If the answer is affirmative, the law of the place of the tort (*lex loci delicti*) is applied. This encourages forum shopping, as the plaintiff will choose the jurisdiction with fewest defences or the narrowest interpretation of them.

Forum non conveniens: In civil procedure, the doctrine that an inappropriate forum – even though competent under the law – may be divested of jurisdiction if, for the convenience of the litigants and the witnesses, it appears that the action should be instituted in another forum in which the action might originally have been brought.

Joint-criminal enterprise: In criminal law, an understanding by two or more persons who set out to commit an offence they have conspired to commit. In negligence law, an undertaking by two or more persons with an equal right to direct and benefit from the endeavour, as a result of which one participant's negligence may be imputed to the others.

Jus cogens: A mandatory norm of general international law from which no two or more nations may exempt themselves or release one another.

Limited liability partnership: A partnership in which a partner is not liable for a negligent act committed by another partner or by an employee not under the partner's supervision.

Long-arm (exorbitant) jurisdiction: A statute providing for the maintenance of jurisdiction over non-resident defendants who have had contacts with the territory where the statute is in effect; most state long-arm statutes extend this jurisdiction to its constitutional limits.

Mens rea: The state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime; criminal intent or recklessness. Also termed mental element or criminal intent.

Negligence: The failure to exercise the standard of care that a reasonably prudent person would have exercised in the same situation; a tort grounded in this failure, usually expressed in terms of the following elements: duty, breach of duty, causation, and damages.

Parent Corporation: A corporation that owns more than 50 percent of the voting shares of, or has an otherwise controlling interest in, another corporation (called a subsidiary corporation). Also termed parent company.

Partnership: A voluntary association of two or more persons who jointly own and carry on a business for profit.

Piercing the corporate veil: The judicial act of imposing personal liability on otherwise immune corporate officers, directors, and shareholders for a corporation's fraudulent or wrongful acts. Also termed disregarding the corporate entity.

Pillage: The forcible seizure of another's property, especially in war. Also termed plunder.

Sovereign immunity: A government's immunity from being sued in its own courts without its consent.

Subject matter jurisdiction: Jurisdiction over the nature of the case and the type of relief sought; the extent to which a court can claim to affect the conduct of persons or the status of things.

Subsidiary Corporation: A corporation in which a parent corporation has a controlling share.

To Incorporate: (1) To obtain an official charter or articles of incorporation from the state for an organization, which may be a profit-making business, a professional business such as a law office or medical office or a non-profit entity that operates for charitable, social, religious, civic, or other public service purposes. The process includes having one or more incorporators (most states require a minimum of three for profit-making companies) choose a name not currently used by (nor confusingly similar to) any corporation, prepare articles, determine who will be responsible for accepting service of process, decide on the stock structure, adopt a set of bylaws, file the articles with the Secretary of State of the state of incorporation, and hold a first meeting of incorporators to launch the enterprise. Other steps follow such as electing a board of directors, selecting officers, issuing stock according to state laws and, if there is going to be a stock offering to the public, following the regulations of the Securities and Exchange Commission and/or the State Corporations Commissioner. If the corporation is nonprofit, it will have to apply for nonprofit status with the home state, and may, if desired, also apply to the Internal Revenue Service for federal non-profit recognition, both of which require detailed explanations of the intended operation of the organization. (2) To include into a unit.

Tort: A civil wrong for which a remedy may be obtained, usually in the form of damages; a breach of a duty that the law imposes on everyone.

Vicarious liability: Liability that a supervisory party (such as an employer) bears for the actionable conduct of a subordinate or associate (such as an employee) because of the relationship between the two.

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Business and International Crimes

There is a climate of impunity surrounding economic activities that promote or sustain conflict and human rights abuse. Many companies in search of extractive resources and inexpensive labour operate in developing countries beset by violence, repression, or war, where effective governance and accountability are absent. There are international laws that define a number of crimes in these situations, but companies, governments, and affected communities remain largely unaware of existing liabilities.

Business and International Crimes seeks to improve the understanding of existing norms that govern companies operating or invested in situations of armed conflict or repression. This Executive Summary, and the studies on the accompanying disk, map international and national laws and jurisprudence with the aim of improving the accountability of private sector actors by clarifying the liabilities they may face in connection with conflict or repression. The disk includes:

- A Commentary on the liability of companies for international crimes
- Comparative Surveys of liability in five national jurisdictions (Canada, France, Norway, U.K., U.S.)
- Links to cases and other resources on the website, www.faf.no/liabilities

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