

Anita Ramasastry and Robert C. Thompson

Commerce, Crime and Conflict

Legal Remedies for Private Sector Liability for Grave Breaches of International Law

A Survey of Sixteen Countries

Executive Summary

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Contents

Preface 5

1 Introduction 9

2 Summary of Findings 13

Appendix A: Summary of Responses 30

Appendix B: Survey Instrument / Questionnaire 32

Appendix C: Survey Participants 42

Preface

The evidence of recent years is conclusive: market-based economic activities — both licit and illicit — can sustain and benefit from conflict and human rights abuse, engender crippling levels of corruption, contribute to the loss of sovereign control over a nation's wealth and undermine social and economic development. Situations of war and repression are, of course, poor environments for regulating market-based economic activity. Both situations involve extensive informalisation of the economy and recession of the state, which often translates into a near total loss of regulatory effectiveness: Laws governing economic activities may become unenforceable or irrelevant, either because the state has lost legitimacy and the law is ignored, or because most economic activity takes place in the informal sector, both common characteristics of the so-called 'failed state'. Not uncommon to most regions of the globe, these patterns are particularly apparent in countries suffering from the 'curse' of natural resource wealth.

There is also ample evidence that our international system is poorly equipped to deal with this reality. For decades, international treaties and negotiations have aimed at lowering regulatory impediments to global economic activity and expanding the scope of market-based activity. The result is that the global trading system has outstripped the ability of our multilateral institutions to respond effectively to the economic dimensions of human rights abuse and armed conflict. Although victims and their supporters have increasingly resorted to the courts in attempts to seek redress from the abuses resulting from the links between economic actors, wars and dictatorships, there remains a climate of impunity surrounding economic activities that promote or sustain conflict and human rights abuse and a resulting lack of regulatory clarity as to what might constitute real liabilities in such situations.

This report is one attempt to address these problems.

Commerce, Crime and Conflict is an outgrowth of a previous study, *Business and International Crimes*, conducted in 2004 by the Fafo Institute for Applied International Studies (Fafo AIS), Oslo, and the International Peace Academy, New York. The *Business and International Crimes* (BIC) pilot launched a survey of five national jurisdictions (see www.faf.no/liabilities). The BIC survey amounted to a pilot study which, by comparing the legal systems of five countries, sought to discover if there were mechanisms or principles in existing domestic criminal or civ-

il law processes for holding business entities accountable for involvement in certain grave breaches of international law.

In the autumn of 2005, with support from the Government of Canada, Fafo initiated a new project to test the conclusions of the pilot study through a survey of a wider group of jurisdictions. The questionnaire was revised and expanded, and respondents were sought in an additional 8-10 countries. Ultimately, respondents were found in 11 countries. In addition, it was decided to revise the existing 5 responses from the pilot study in order to bring the total number of jurisdictions surveyed to 16. The report which follows is a summary of findings from the survey work. It maps the provisions of relevant national laws, and summarizes key jurisprudence developed by national case law. The objective of this work has been to promote the systematic identification and strengthening of existing criminal law norms and practices as one of the mechanisms to effectively deter and sanction illicit economic exploitation in repressive or war-torn countries.

Commerce, Crime and Conflict is addressed to policy makers and practitioners in government and business, as well as affected communities and civil society organizations. It is our hope that the study will prompt further legal research by jurists, the development of internal compliance procedures by companies operating in war zones and repressive dictatorships, and consideration of appropriate legal action by relevant government authorities or affected communities. In this way, *Commerce, Crime and Conflict* seeks to contribute to the building of international norms, the improvement of due diligence and self-regulation by the private sector, and increased use of legal mechanisms by appropriate authorities or affected communities.

The work has been conducted by a small team, coordinated from Fafo in Oslo, and a large number of survey respondents from 16 countries, all of them practicing lawyers or legal researchers. The Fafo team consisted of consultants Professor Anita Ramasastry, Associate Professor, University of Washington School of Law, Seattle, and Robert Thompson, a lawyer with extensive experience of government who now resides in New York City; both revised the questionnaire and provided invaluable input throughout the project, from its design through to the review of responses. It is the analysis of Professor Ramasastry and Mr. Thompson which forms the bulk of this report. I am deeply grateful to their unflagging commitment to the project and for their willingness to provide of their time, intellect and networks to see it through. What follows would not have been possible without them.

Similarly, the list of the various national practitioners who responded to the survey is a long one (see Appendix C). We are indebted to all of those who responded to the questionnaire, as well as to those who provided peer reviews of the responses. Almost all went out of their way to voluntarily contribute their time

and knowledge to the project. This spirit of support to the project's objectives is heartening and very much appreciated.

John Karlsrud, my colleague at Fafo, has earned my admiration for keeping this multinational team coordinated, and for the apparent ease with which he assumed the burden of working with the respondents to ensure the project stayed on track.

I should emphasize that none of the above bear responsibility for errors in the texts as a result of editing or summarizing in this report. It is always a difficult exercise to attempt to summarize lengthy legal documents or legislation in a common language our various audiences can understand. In large and cross-disciplinary projects, errors will inevitably be in the texts, especially when working in multiple languages and with translated texts. We welcome feedback and corrections. We ask only that, where errors are apparent, our readers check our summaries against the original references before providing a correction. Indeed, what follows, we hope, will provide the basis for researches and practitioners to explore further and in greater detail than was possible here.

As the authors note in the Introduction to this report, this report, and the surveys upon which it is based, represent a work in progress. Each survey is exactly that: a response to specific questions. These are not intended to reach the level of journal articles, nor are they intended as the final word on this subject. The survey responses continue to be refined and affected by legislation, interpretation by the courts, and debate amongst scholars. As far as resources allow, we will continue to update surveys through to the end of 2006 and make these available on our website www.faf.no/liabilities.

Finally, none of this would have been possible without the generous financial support to the survey project provided by the Canadian Department of Foreign Affairs and International Trade (DFAIT), and the support from the Ford Foundation to enable us to bringing our legal contributors together again to launch this report. On behalf of all the participants in the project, I extend sincere thanks.

Mark B. Taylor
Project Leader, *Commerce Crime and Conflict*
Managing Director,
Fafo, Institute for Applied International Studies

1 Introduction

Human rights organizations, industry groups and companies, governments and multilateral organizations have all been examining the human rights obligations of companies for a number of years. The objective has been to develop answers and policy recommendations in response to the problem of impunity surrounding economic activities linked to human rights abuse and armed conflict. The problem of impunity raises a number of questions: What laws might apply to economic actors in a war zone or linked to a repressive dictatorship? What concrete liabilities are created when a company is involved in an international crime? In what jurisdictions? How?

The processes which have sought to answer these questions have been difficult, in part because little comparative legal research has been available to inform the policy debate concerning if and when business entities might be legally responsible for participation in human rights violations. This report, and the surveys upon which it is based, have been formulated with a view to providing clarity as to the existing laws, norms and mechanisms relevant to the above questions. It is intended as a contribution to ensuring the accountability of economic actors for participation in human rights abuse, and as a contribution to the long-term development of national and international laws and norms.

The Research

Fafo's research in this area has focused on the application of international humanitarian law (IHL) and international criminal law (ICL) because such breaches represent harmful conduct of the most egregious nature. The main impetus for Fafo's survey work has been to contribute to the empirical basis upon which the policy debate concerning business and human rights is taking place. With this in mind, Fafo's research has sought to map what is the existing law 'on the books' in various jurisdictions. In doing so, the objectives were three-fold:

- **Policy:** to better understand the relevance of these laws for establishing governmental regulation and business's self regulation (due diligence) concerning economic activities associated with human rights abuse and armed conflict;

- **Norms:** to assist in the building of norms of international human rights law in this area, based in part on state practice from a variety of countries;
- **Accountability:** to explore how such laws could be used as a means of holding business entities accountable for participation in violations of ICL or IHL;

In 2005, Fafo received funding from the Canadian government to conduct a follow-up to the survey work conducted as part of its pilot study *Business and International Crimes (BIC)*.¹ This second and more ambitious comparative law study, *Commerce, Crime and Conflict (CCC)*, integrates the surveys conducted under BIC and adds another 11 jurisdictions. In effect, CCC surveys the jurisprudence of a total of sixteen nations,² representing both the common law and civil law traditions, wide geographic distribution, and varying levels of economic development.

In October 2005, Fafo gathered legal experts from the various countries to a roundtable meeting in Oslo to discuss the CCC survey, revise the questionnaire and begin work. The survey participants helped to revise and refine the original BIC Survey instrument, included as Appendix B: Survey Instrument / Questionnaire. A list of the Survey Participants is included as Appendix C. The respondents are experts, lawyers who have been actively involved in litigation in their home countries, often with respect to transnational corporations and human rights matters. As such, they brought both substantive knowledge and practical experience to bear when participating in this project. The project sought responses from these experts on a voluntary basis, allowing a number of months for them to work on the margins of their often very busy schedules.

The Summary of Responses in Appendix A below contains the questions of the revised survey used for CCC. It is there that the reader will find details as to the substance which the survey sought to cover. Among other things, the survey was designed to gather legal research on the current state of national (domestic) statutes relating to:

- The liability status of corporations and other legal (juridical) persons under national statutes governing grave breaches of international criminal and hu-

¹ *Business and International Crimes (BIC)* was conducted in 2004 in partnership with the International Peace Academy in New York. The BIC web site — www.faf.no/liabilities — provides summaries of international law developments, and permits the downloading of the original pilot surveys — Canada, France, Norway, the United Kingdom and the United States — as well as the executive summary of main findings.

² The sixteen countries surveyed include Argentina, Australia, Belgium, Canada, France, Germany, India, Indonesia, Japan, the Netherlands, Norway, South Africa, Spain, Ukraine, the United Kingdom and the United States.

manitarian law (genocide, crimes against humanity, forced labor, and war crimes).

- The extent to which IHL/ICL has been incorporated into the domestic laws of the surveyed countries.
- The content and status of the crimes of aiding and abetting (complicity) and conspiracy in the legal systems of the surveyed countries.
- The status of domestic criminal statutes that might apply extraterritorially to cover economic activities often associated with grave breaches, such as bribery of foreign officials, money laundering, importation of stolen property and importation of illicit drugs.
- The ability of victims of crimes to influence prosecutorial decisions and the availability of civil (tort) remedies for those victims.

In most cases, the surveys have been subject to peer review by one or more experts from, or with good knowledge of, the same jurisdiction. It must be stressed that this is a work in progress: the authors of this report, as well as many of the lawyers who acted as respondents, are of the view that the survey responses and analysis in this report are tentative and open to revision based on input from their peers. The broad topic of commerce, crime and complicity cuts across a number of legal disciplines. The survey is intended as a guide which highlights where deeper and more thorough research is needed. As the CCC survey charts new ground, the law is often unclear with respect to many of the questions posed to survey respondents. We continue to refine the survey responses and our summary analysis. Fafo will post regular updates at www.fafo.no/liabilities.

This report contains the conclusions that can be drawn from the responses to the questions in the questionnaires received to date. Analyses of responses to several other important questions in the questionnaire will be in a subsequent report.³ The findings of the survey are set forth below, followed by the author's recommendations for further policy and research work. Accompanying this preliminary report, as Appendix A is a table summarizing the responses by country. Appendix B is the original survey instrument. Appendix C is a list of the participants in the

³ These include Question One: disclosure requirements in national securities law; Question Two: the presence of right-to-know laws; Question Four: sanctions applied to legal persons; Question Five: standards for attributing the acts of officers and employees, etc. to a legal entity; Question Seven: practical considerations in bringing criminal actions against legal entities; Question Ten: enforcing "unincorporated" ICL/IHL; Question Fourteen: using parent/sub relations to establish jurisdiction over legal entities; Question Fifteen: piercing the corporate veil, Question Seventeen: obstacles to civil lawsuits for ICL/IHL violations; and Question Eighteen: *forum non conveniens*.

survey, including both the managers of the survey project and those who provided peer review for the responses. The authors wish to thank the many participants in the survey, all of whom worked without compensation, for the generous and extraordinary efforts that they have made to produce the results discussed in this preliminary report.

2 Summary of Findings

Most countries permit legal persons to be prosecuted for criminal offences

The results of the survey indicate that it is the prevailing practice to apply criminal liability to legal persons among 11 of the countries surveyed (Australia, Belgium, Canada, France, India, Japan, the Netherlands, Norway, South Africa, the United Kingdom and the United States). In five countries (Argentina, Germany, Indonesia, Spain and the Ukraine), current jurisprudence does not recognize such liability as a conceptual matter. In two of those countries (Argentina and Indonesia), the national legislature has ignored conceptual issues and has adopted specific statutes making legal persons liable for important crimes (e.g. environmental crimes, commercial crimes, corruption and terrorism). Germany has an interesting statute (§ 30 Gesetz über Ordnungswidrigkeiten/Administrative Offenses Act) whereby a legal person whose representative has committed a crime or an administrative offense may be held liable for payment of the monetary penalty imposed upon such representative.

The significance of such a finding is that state practice within domestic laws or many countries, across a variety of legal systems and traditions, has expanded criminal laws to include legal persons. While the manner in which a business entity or legal person may be found liable for a crime may vary from jurisdiction to jurisdiction, some of the key features found in most domestic legislation include requirements that an employee have a certain status within a company and be acting within his scope of employment (when committing an illegal act). Furthermore, many statutes specify how and when intent will be attributed to the business entity.

Various countries have developed different methods for attributing the actions of a responsible employee or board member to a company for purposes of finding intent and imposing criminal liability. Australia's Criminal Code is perhaps the most permissive and elaborates that fault may be attributed to a "body corporate that expressly, tacitly, or impliedly authorized the commission of a criminal offence." There are four ways in which this may be accomplished including proving that a 'corporate culture' existed within a body corporate that directed encouraged or

tolerated or led to non-compliance with a relevant provision of the criminal code, or providing that the body corporate failed to create and maintain a corporate culture that required compliance with a relevant provision of the criminal code.⁴

Indonesia is one country that has recently pursued a criminal prosecution of a multinational corporation relating to violations of Indonesian environment law. A case currently pending under Law No. 23 of 1997 involves an Indonesian mining joint venture with a multinational, which allegedly pumped offshore certain gold mine wastes into Buyat Bay, North Sulawesi. The wastes allegedly contained toxic levels of a variety of poisons, which allegedly caused illness in a local fishing village.⁵ Indonesia has not historically prosecuted corporations for criminal activity.

It is important to note that in those countries where legal persons may be excluded from prosecution, there may still be room to pursue management and directors of business entities that are complicit in international crimes. In Spain, for example, a Spanish magistrate indicted certain principal officers of a U.S. bank in 2005 for violating orders to freeze assets of General Augusto Pinochet.⁶ Investigations conducted by the U.S. Senate reported that Riggs Bank had allegedly assisted Pinochet in concealing his assets to avoid a Spanish court injunction. Spanish lawyers representing victims of Pinochet initiated the Riggs bank indict-

⁴ See Section 12.3 of the Australian Commonwealth Criminal Code. The term 'corporate culture means an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities take place.'

⁵ There have been two cases brought, a civil case before a Jakarta court (eventually settled after dismissal for US \$30 million) as well as a criminal case under Law No. 23 of 1997 in Manado, North Sulawesi which is still pending. Based on past practice, it is premature to conclude that the current criminal proceeding will result in a conviction of a corporate defendant. In Indonesia, it would be more typical for such matters to be resolved outside the criminal process. Local public opinion favors economic settlement or compensation over retribution. The criminal prosecution of the director likely would be viewed as a complication for foreign investment.

⁶ Riggs Bank was ultimately fined \$25 million by the U.S. Department of Justice for violations of U.S. anti money-laundering laws. Also, in February 2005, the bank agreed to pay \$9 million to Pinochet victims in connection with the allegations that the bank had concealed and illegally facilitated the movement of Pinochet money out of Britain. See MONEY LAUNDERING AND FOREIGN CORRUPTION: ENFORCEMENT AND EFFECTIVENESS OF THE PATRIOT ACT CASE STUDY INVOLVING RIGGS BANK, Report by the Minority Staff of the Permanent Subcommittee on Investigations, United States Senate, (July 15, 2004) located at http://hsgac.senate.gov/_files/ACF5F8.pdf; see also United States Department of Justice Press Release, *Riggs Bank Sentenced to Pay \$16 Million Fine for Criminal Violation of the Bank Secrecy Act* (March 29, 2005) located at http://www.usdoj.gov/usao/dc/Press_Releases/2005_Archives/March_2005/05104.html; Anita Ramasastry, *Stopping Banks from Hiding Human Rights Abusers' Money: A Recent Settlement by Riggs Bank Highlights the Issue*, FINDLAW (April 4, 2005), available at <http://writ.news.findlaw.com/ramasastry/20050404.html>.

ment as, in Spain, civilians may initiate a criminal complaint. The Riggs case is an example of a creative use of domestic criminal law to deal with business entities (or their employees) that are alleged to have aided and abetted the illegal conduct of others.

There has been widespread adoption of ICL at the national (domestic) level

The Survey found that nine of the sixteen countries surveyed have fully incorporated the Rome Statute's three crimes — genocide, crimes against humanity and war crimes — into their domestic jurisprudence. These countries are Argentina, Australia, Belgium, Canada, Germany, the Netherlands, South Africa, Spain and the United Kingdom. 'Fully incorporated' means that the wording of the domestic legislation, which enacts crimes found in the Rome Statute, essentially mirrors that of the Rome Statute.⁷ Two surveyed countries that are Parties, France and Norway, have not yet completed the process of drafting and adopting fully complementary legislation.⁸ France has pre-existing legislation that covers genocide and crimes against humanity. Norway's pre-existing legislation covers certain crimes against humanity and war crimes. Each of the five countries that is not a Party to the Rome Statute — Japan, India, Indonesia, Ukraine and the United States — has adopted legislation incorporating one or more of the three crimes into its domestic legislation.

⁷ As of 20 August 2006, 139 countries have signed the Rome Statute and 100 have become Parties thereto. Eleven out of the 16 countries in the Survey have ratified or accepted the Rome Statute as of that date. These are: Argentina (8 February 2001); Australia (1 July 2002); Belgium (28 June 2000); Canada (7 July 2000); France (9 June 2000); Germany (11 December 2000); Netherlands (17 June 2001); Norway (16 February 2000); South Africa (27 November 2000); Spain (24 October 2000); United Kingdom (4 October 2001). The Ukraine has signed, but not yet ratified the Statute. Four of the surveyed countries are not yet signatories: India, Indonesia, Japan and the United States.

⁸ The Rome Statute provides an incentive for Parties to adopt complementary legislation. Article 17 provides: Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where: a. The case is being investigated or prosecuted by State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; b. The case has been investigated by a State which has jurisdiction over it and the State decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute; c. The person concerned has already been tried for conduct, which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3.

In most places , legal persons are generally liable for grave breaches of ICL within domestic legal systems

The pattern of incorporation identified above is significant in that it makes clear that some of the important limitations that the Rome Statute places on the jurisdiction of the International Criminal Court (ICC) have been eliminated by domestic ICL legislation. For example, Article 25(1) of the Rome Statute limits the ICC's jurisdiction to crimes by individuals (natural persons). Since most of the countries that have incorporated ICL into their domestic statutes also do not make a distinction between natural and legal persons (see above), these jurisdictions include corporations and other legal persons in their web of liability.

Extra-territoriality and universal jurisdiction have expanded the web of jurisdiction

Domestic ICL statutes of many countries apply extraterritorially to cover grave breaches of ICL by their own nationals and by those who injure their own nationals. In eleven of the countries surveyed, ICL statutes apply to grave breaches committed by their own nationals abroad⁹ and also to grave breaches committed against their own nationals¹⁰ (Argentina, Australia, Belgium, Canada, Germany, Japan, Norway, South Africa, Ukraine, the United Kingdom and the United States). In a few cases, the ICL statutes of the home country apply only to their own nationals' acts abroad. India and the United States are examples.¹¹

The domestic ICL statutes of some countries extend to grave breaches of ICL throughout the world through application of the concept of universal jurisdiction. Whereas Article 12(2) of the Rome Statute limits the ICC's own jurisdiction to crimes committed by nationals of State Parties and crimes committed on the territory of State Parties, domestic ICL legislation in several countries is applicable universally, i.e., it applies to all persons who commit grave breaches of ICL anywhere in the world, irrespective of the nationality of the perpetrators or the victims. Australia, Canada, the Netherlands, Spain and the United Kingdom are examples among the countries surveyed.

The implication is that, today, a perpetrator of a grave breach of international criminal law has a greatly diminished chance of escaping accountability for his deeds in the face of this expanded web of complementary jurisdictions, both international (ICC) and domestic. In principle, there is now no place in the world to which

⁹ The 'active personality' concept of jurisdiction.

¹⁰ The 'passive personality' concept of jurisdiction.

¹¹ U.S. war crimes statutes also apply to nationals of other countries who commit war crimes against U.S. nationals.

a perpetrator may flee in order to escape criminal liability. Perhaps more significant is the fact that the geographic territory where a perpetrator may find effective refuge from actual legal prosecution has shrunk dramatically and is shrinking further.

Although still insufficient, the pool of resources available for enforcement of ICL has been expanded. To the limited funding available to the ICC has been added the combined resources of the national police agencies and prosecutors in the countries that the Survey shows have adopted ICL legislation.¹²

Aiding and abetting (complicity) is a crime in most countries – although there are differences as to the type of intent an accomplice must possess

Business actors are often linked to the actual perpetrators because businesses operating in conflict zones or in countries with repressive governments supply goods, buy raw materials and products, hire local security forces, etc. Businesses may engage in these activities in partnership with, or as part of an economic relationship with, entities that themselves engage in egregious human rights abuses. In this sense, a business' economic activities may aid a perpetrator in committing grave breaches. Business activities linked in this fashion to human rights abuse have given rise to the phrase 'corporate complicity', used by policymakers and advocates to refer to a wide variety of involvements.

The Survey sought to illuminate the legal complexities of 'corporate complicity' by conducting research on aiding and abetting (complicity) in two key areas: first, by asking whether complicity exists as a legal tool in the countries surveyed and, second, by exploring the interpretation of the *mens rea* – or 'state of mind' - requirement in domestic criminal laws.

The Survey found that each of the sixteen countries surveyed has statutes in place that address complicity. Although the wording of the relevant statutory language varies from country to country, complicity – or aiding and abetting another in the commission of a crime – is a crime in itself in the domestic law of every one of the countries surveyed. Based on the results of the Survey, it seems likely that complicity (i.e. aiding and abetting the criminal acts of another) is a crime in the laws of most countries throughout the world.

¹² To this resource pool must be added the funding and personnel available to many countries not taking part in the Survey that have in all likelihood also adopted domestic ICL legislation. Besides the 12 countries participating in the Survey who are Parties or a Signatory State, there are an additional 127 countries that have signed the Rome Statute (of whom 89 are Parties). There are 191 Members of the UN.

Most statutes define the crime using concepts such as ‘aiding’, ‘abetting’, ‘accessory’ (e.g. Japan, Germany), ‘solicitation’, ‘facilitation’, etc. Those who describe ‘aiding’ do so in such terminology as “aid and abet, by providing the opportunity, the means or information to commit a crime” (the Netherlands, Indonesia), or “aids, abets, counsels, commands, induces or procures” (United States).

Complicity usually requires an *actus reus*, or the taking of specific steps by the defendant to provide assistance to the commission of a crime. Often, the survey responses indicate that the main perpetrator need not be prosecuted in order for an accomplice to be charged.¹³ One key distinction is often made between one who solicits and one who facilitates. Someone who solicits another may incite them to commit a crime whereas a facilitator (sometimes referred to as an accessory before the fact) acts as another participant in the proscribed or prohibited conduct.¹⁴ Incitement is also a separate offence in many of the survey countries.

The second key area of inquiry explored the interpretation of the *mens rea* requirement in domestic criminal laws. Along with the *actus reus*, the culpability of a business accomplice will also be decided by the ‘state of mind’ of the business entity (as represented by its employees, directors and management) at the time. While in all cases complicity requires a principal perpetrator as the primary actor and accomplices as secondary actors, the criminal laws vary from country to country as to how the states of mind of the two intersect.

Several countries reported that the accomplice must share the same state of mind as the principal perpetrator, i.e. the accomplice must share the desire that a crime (e.g. torture) occur and must intend that his activities provide assistance to the perpetrator in the crime itself. This ‘shared intent’ doctrine is found in the laws of the United States, for example.¹⁵

It is awkward to apply the shared intent approach to business involvement in grave breaches, because in most cases the two actors most likely have inherently different motivations leading to inherently different states of mind:¹⁶ a business actor which aids or abet the commission of a crime is more likely to be motivated

¹³ Several countries (Belgium, India, Japan, Netherlands and Norway) reported that complicity could arise even though the crime itself was not completed.

¹⁴ Markus Dubber, *Complicity in Domestic Criminal Law: A Comparative Analysis*, JOURNAL OF INT’L CRIMINAL JUSTICE (forthcoming 2006) at 2. Draft available at <http://wings.buffalo.edu/law/bclc/web/complicityweb.doc>.

¹⁵ However, some U.S. states only require knowledge (of the crime) to impose accomplice liability, employing a foreseeability standard in determining whether the accomplice possessed a culpable mental state. A leading case on this subject *People v. Lauria* 251 Cal App. 2d 471 (CA. App. 1967).

¹⁶ While this may be true in most cases, one cannot say that all economic actors and business entities have a separate intent from a principal perpetrator. For example, during the Second World War,

by profit, whereas the perpetrator will be focused on the commission of the crime as his primary goal. It is likely that the ‘shared intent’ standard presents too high a threshold for ‘corporate complicity’ because it requires that it be shown that actions were taken out of a common ‘state of mind’ when in fact corporate complicity in the criminal acts of others appears to be more often based on actions motivated by mutual or common interests.

Another approach, found in at least two civil law countries surveyed, Germany and the Netherlands, require a lesser standard of intent – only that an accomplice has knowledge. This is awareness that one is engaging in certain conduct and practical certainty regarding the occurrence of a given result (also referred to as *Dolus Directus*). The knowledge standard also has its limitations when applied to the ‘corporate complicity’ context, since it may be difficult for the prosecution to prove that the business actor knew of the specific crime that the perpetrator intended. In two recent prosecutions in the Netherlands, the trial courts acquitted the defendants of complicity in grave breaches because they did not have sufficient evidence to establish that the defendants knew that the perpetrators intended to commit the specific crimes involved.¹⁷ Although Dutch criminal law has at times also employed different standard (described below), the Dutch judges felt constrained to use the knowledge standard, since the crimes involved were international crimes and therefore should be judged according to the international, not the domestic standard.¹⁸ Nonetheless, these cases illustrate how a business person who leaves his home country to engage in profit-making activity related to crim-

German and Japanese companies often shared a common intent with their governments in terms of war crimes such as pillage and plunder or the use of forced labor in various factories and mines.

¹⁷ The first case is that of Frans van Anraat (District Court, 23 December 2005, LJN; AU8685). Van Anraat was charged with complicity in war crimes and genocide, arising out of his supplying the chemical thiodiglycol (TDG) to Saddam Hussein during the 1980s. Hussein used the chemical as a raw material in the production of mustard gas that was employed both in the Iran-Iraq war (a war crime) and against the Kurdish village of Halabja (an act of genocide). The trial court found that van Anraat did not know of Hussein’s genocidal intentions and thus acquitted him of that specific charge, although van Anraat was convicted of complicity in war crimes. In the second case, the defendant Guus Van Kouwenhoven was charged with complicity with war crimes for having operated a timber trading company in close association with former President Charles Taylor of Liberia. He was acquitted of the complicity charge owing to lack of evidence that he was aware of Taylor’s war crimes, but convicted on a charge of violating sanctions imposed on timber trading by the UN. An appeal has been filed by both sides in the *van Anraat* case, and an appeal is expected in the *Van Kouwenhoven* matter.

¹⁸ A provocative article addressing the questions of which law should apply when an international crime is being tried in a domestic court is Hans G. van der Wilt, *Genocide, Complicity in Genocide and International v. Domestic Jurisdiction Reflections on the van Anraat Case* J. OF INT’L CRIMINAL JUSTICE 4 (2006), 239-257, at 240.

inal behavior may run afoul of his own home country's statutes, even when they apply the international standard, and be subject to both imprisonment and fines, resulting in loss of both his freedom and his ill-gotten gains.

Another approach found in the responses could be categorized as *Dolus Eventualis*, which means "indifference toward or acceptance of the chance that a proscribed result might occur."¹⁹ This 'foreseeability' standard requires that the prosecution need only prove that the defendant knew or, given all of the circumstances, should have known, that the perpetrator intended to commit one or more crimes, any one of which a reasonable person should have foreseen at the time the aid was rendered. This standard has been applied in, for example, the Netherlands and in Germany. This more lenient standard has the potential to be readily applied to business actions involved in 'criminal complicity'. If a business actor is aware that his customer, supplier or security agent is involved in ongoing grave breaches (although the specific crimes themselves may be unknown to the business actor) and that by supplying goods or money he is facilitating those breaches, then the 'foreseeability' standard could apply. It is likely that the 'foreseeability' test, when applied to the van Anraat and Van Kouwenhoven cases, may have led to a different result.²⁰

Under international criminal law, as set forth by the International Criminal Tribunals for Rwanda (ICTR) and the former Yugoslavia (ICTY), the appropriate *mens rea* for determining the guilt of an accomplice is 'knowledge'. This means that under international criminal law, someone might be convicted as an accomplice if he or she knew that their actions would result in the principal's commission of a crime. The ICTR stated in the *Akayesu* case that "[t]he intent or mental element of complicity requires in general that, at the moment he acted, the accomplice knew of the assistance he was providing in the commission of the principal offense. In other words the accomplice must have acted knowingly."²¹

¹⁹ Dubber, *supra* note 20.

²⁰ van der Wilt, *supra* note 24.

²¹ *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, (September 2, 1998) § 90. The Trial Chamber held that an accomplice may be tried in the absence of a conviction of a principal perpetrator (§ 531). The second issue explored was whether the accomplice desired that the principal offence be committed. The Chamber explored comparative law and noted that in all civil law systems and under common law (specifically English law). The accomplice need not ever be aware that the principal offence be committed (§ 539). The ICTR concluded that "As a result, anyone who knowing of another criminal's purpose voluntarily aids him or her in it, can be convicted of complicity, even though he regretted the outcome of the offence. (§ 539) For further discussion, see Andrew Clapham and Scott Jerbi, *Categories of Corporate Complicity in Human Rights Abuses*, 24 HASTINGS INT'L. & COMP L REV. (2001) 339.

In many of the jurisdictions employing the approaches just discussed, there are, as may be expected, numerous nuanced differences among courts and scholars that enliven the jurisprudence and portend future evolution in how the *mens rea* element may be applied to an allegation of ‘corporate complicity’. Some jurisdictions vary the intent required, based on the severity of the crime alleged. A lesser degree of intent might be required for being an accomplice to a crime such as terrorism or genocide, for example. Because the domestic ICL statutes are relatively recent and, for the most part, untested, there is room for local courts to interpret the wording as new cases involving ‘corporate complicity’ are brought before them.

One issue that the survey touched upon implicitly is the extent to which victims and others might bring civil lawsuits when an actionable tort or delict has been committed in connection with a grave breach of ICL/IHL. The number of lawsuits raising the ‘corporate complicity’ issue has grown rapidly in recent years, particularly in the United States under the Alien Tort Claims Act (ATCA). In the United States, prior to the recent Supreme Court decision in *Sosa v. Alvarez-Machain*, several important decisions provided grounds for an expectation that ATCA would provide a ready mechanism for civil recovery.²² Following *Sosa*, the issue of the availability of civil liability under ATCA is less certain, inasmuch as the Supreme Court in that case cautioned federal judges against expanding the reach of

²² In 2002, the U.S. Court of Appeals for the Ninth Circuit held that Unocal could be potentially found liable under the law for aiding and abetting the military in forced labor, murder and rape. The U.S. court, like the Dutch court in the van Anraat case had to decide whether to apply U.S. law or international criminal law, as providing the test for complicity. For the *mens rea*, the court also relied upon the ICTY’s decision in *Furundzija*. The court ultimately employed the two-pronged «aiding and abetting» test, *actus reus* and *mens rea*, set by the International Criminal Tribunal for the former Yugoslavia (ICTY) applicable rather than a domestic tort or criminal law standard. The ICTY Tribunal found that *mens rea* is fulfilled when the accomplice has reasonable knowledge that his or her «actions will assist the perpetrator in the commission of the crime.» *Doe I. v. Unocal*, 395 F.3d 932 (9th Cir. 2002 (Trial Chamber Dec. 10 1998)). Available at http://www.ccr-ny.org/v2/legal/corporate_accountability/docs/DoeUnocal9thCir.pdf. (quoting *Prosecutor v. Furundzija*, Case No. IT-95- 17/1-T (Int’l Crim. Trib. For Former Yugoslavia Trial Chamber Dec. 10, 1998)). On February 14, 2003, the Ninth Circuit, upon a vote of the majority of non-recused judges on the court, ordered that the case be reheard *en banc*. This order vacated the previous three-judge panel ruling in favor of the plaintiffs and held that the decision cannot be cited as precedent in future cases. This was as far as the federal *Doe v. Unocal* case went before the December 2004 settlement, although the *en banc* panel was days away from hearing oral argument when the settlement aborted that process. Although the Unocal case provides some clarity on how complicity might be understood in American civil tort litigation, there is still lack of certainty raised by other recent decisions. In 2003, another federal district also held that aiding and abetting or secondary liability is actionable under the ATCA court in the *Talisman* litigation, relating to the actions of a Canadian oil company in the Sudan that has been accused of aiding and abetting genocide. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289 (S.D.NY. 2003).

ATCA without a clear showing of legislative intent.²³ At least one district court has ruled that ATCA does not include complicity among the ‘law of nations’ giving rise to an ATCA claim.²⁴ The appeal of that case is pending before the Court of Appeals for the Second Circuit. During oral argument in the appeal, one of the panel members referred to the Supreme Court case relied upon by the district court that held that civil remedies for statutory torts are available only when authorized by the express language of the statute.²⁵ The Survey will continue to assemble research data on current and future cases as they are reported by lawyers in the countries surveyed. However, whether business entities may be liable as accomplices in civil lawsuits is an area that deserves substantial further legal inquiry beyond the scope of this study.

Most countries provide for civil recovery for victims of negligent and intentional torts or delicts

Of the countries surveyed, fifteen of the sixteen responded that it would be possible to bring civil legal claims — ordinary common law torts or civil law delicts — against business entities associated with IHL and ICL breaches. In Indonesia, there is no provision for domestic procedures for civil (tort) recovery in court. Indonesia reported that judicial interpretation of Indonesian civil law would make it quite difficult for a civil action to be brought. At the same time, civil lawsuits have been instigated pursuant to Indonesian environmental statutes. Those suits, however, have not yet been successful in terms of recovery through the litigation process.²⁶

²³ See *Sosa v. Alvarez-Machain* 542 U.S. 692, 726 (U.S. 2004)

²⁴ Another case that is being closely monitored is the *Khulumani* case, where victims of the South African apartheid regime have sued transnational corporations, banks and mining companies in their alleged role in profiting from and supporting the apartheid regime in south Africa. The case was originally dismissed by a federal district court judge in New York (in the same circuit as the *Talisman* case). The court found that judgments from the Nuremberg tribunals, and the international criminal courts for the former Yugoslavia and Rwanda were not binding sources of international law, even though such sources had been cited in the *Talisman* and *Unocal* litigation, as a basis for finding aiding and abetting liability. The *Khulumani* case is currently on appeal to the U.S. Court of Appeals for the Second Circuit. *In re South African Apartheid Litigation*, 346 F. Supp. 2d 538 (S.D.N.Y. 2004).

²⁵ *Central Bank of Denver v. First Interstate Bank of Denver*, 114 S. Ct. 1439 (U.S. 1994).

²⁶ According to the Indonesian survey response, private civil claims are not typically successful, except as a means to try to attract the public’s attention in terms of an integrated public relations campaign to drive a political rather than judicial resolution. There are four non-criminal, non-torts instances where litigation was or may be in the near future at least ventured under something like Law No. 23 of 1997, which is a statute relating to environmental harms.

In some countries, the victim of any criminal act may bring a civil action against the perpetrator. This was reported for Argentina, the Netherlands, South Africa and Ukraine. Accordingly, the enactment of ICL statutes now allows victims a clear path to seek civil recovery for injuries due to violation of domestic ICL. The response from Japan pointed out that an injured plaintiff seeking civil recovery in that country's court system must satisfy the court that the conduct in question was illegal. Accordingly, the existence of Japan's ICL statutes provides a means of satisfying that part of the plaintiff's burden. The respondent also points out that a violation of ICL that has not been incorporated into Japan's domestic jurisprudence may also satisfy this burden, although there are as yet no reported cases.

In three countries, victims may participate in criminal proceedings as *parties civiles*, and may join their claims for restitution with the trial of a criminal defendant. These are Belgium, France and Ukraine. Argentina allows victims to participate in the criminal trials as parties, but without a restitution mechanism. Two countries provide victims with the right to appeal a decision not to prosecute (the Netherlands, Ukraine).

Litigation against corporations for breaches of IHL and ICL has occurred in the United States under a specialized statute known as the Alien Tort Claims Act (ATCA). This statute enables victims from overseas to avail themselves of U.S. courts to sue for violations of the 'law of nations' which also constitute domestic torts. For example; In December 2004, Unocal Corporation settled a lawsuit that had been brought against it by Burmese plaintiffs in the United States. In 1996, the Burmese villagers filed a civil lawsuit against Unocal in United States district court under the ATCA. Unocal was sued for its alleged role in aiding and abetting the Myanmar government.²⁷ The *Unocal* case became the first instance where the statute was used to pursue a corporate entity for human rights violations. The Myanmar military had allegedly conscripted villagers and forced them to clear land and build infrastructure near a gas pipeline.²⁸

²⁷ See 28 U.S.C. § 1350. The alien tort statute is an eighteenth century statute that has been revived by human rights lawyers to bring civil damage suits on behalf of foreign human rights victims against their abusers, in U.S. court. The statute was originally used to deal with piracy, a crime against the law of nations, when it was committed outside of the U.S. The statute was revived in the 1980s to allow lawsuits against human rights abusers and has been used to bring civil lawsuits against Ferdinand Marcos and Radovan Karadzic, among others. It is now used to pursue corporations accused of aiding the human rights violations of others.

²⁸ Unocal, the Myanmar Government and others had a joint venture to build an oil pipeline in Burma. In its role as an economic partner, Unocal was alleged to have been an accomplice to the government's crimes of using forced labor. The use of forced labor is a violation of international law.

Following the *Unocal* case, a number of civil lawsuits have been brought in the United States under the alien tort statute against multinational enterprises for their alleged aiding and abetting of certain international crimes and human rights violations occurring overseas. The U.S. statute, however, is unique and there is no analog in other countries' legislation. None of the responding countries reported a domestic statute that resembles the alien tort statute in the U.S.

In the absence of a statute such as ATCA, jurists have begun to ask whether violations of international law could be reframed as torts or civil wrongs. In recent years, scholars outside the U.S. have examined the issue of whether one could characterize breaches of IHL and ICL and other serious human rights violations as 'torts' or civil delicts as a way of permitting victims to sue defendants for damages in civil lawsuits in other jurisdiction.²⁹ These procedures would apply to intentional or negligent infliction of harm, including harm arising out of a grave breach of ICL, i.e., the relatives of a victim killed in a genocide or as the result of an extrajudicial process would sue for wrongful death, a torture victim could sue for injuries, and someone who was subjected to forced labor could sue for false imprisonment.

In addition to the United States, Argentina, Australia, India, Japan, and the United Kingdom are examples of countries where civil litigation has been used as a means to provide redress to victims that have alleged that business entities were directly involved with or aided and abetted human rights violations. While the success of such lawsuits is limited at present, it represents an important development in terms of other domestic courts (rather than the United States) providing a forum for dispute resolution relating to human rights and IHL/ICL claims.

Survey respondents indicted that there were various possible impediments to the use of civil litigation as a means of dealing with corporate complicity. For example, one would need to know whether a country's jurisprudence allowed for class actions, or for contingency fees for attorneys, both of which have been shown to be critical in the U.S. in enabling indigent victims to join together, hire counsel and prosecute a tort action. In addition, the existence in many countries of fee-shifting procedures, whereby the losing party pays the attorney fees and costs of the winner, is a major inhibitor, particularly for victims with little financial means. More generally, the legal profession in many other jurisdictions has not used civil litigation as a tool for dealing with international human rights matters. This is a question of legal culture.

²⁹ 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); and Craig Scott, (editor), *TORTURE AS TORT: COMPARATIVE PERSPECTIVES ON THE DEVELOPMENT OF TRANS-NATIONAL HUMAN RIGHTS LITIGATION* (Oxford: Hart Publishing, 2001).

Litigation may be a viable avenue in some countries, but should be viewed as only one avenue among a multiplicity of options.

However, it is unclear whether a tort action is a viable means to ensure either accountability or restitution in many countries. Further research is needed to determine whether there are practical and legal obstacles that would inhibit victims from seeking civil recovery.

Many countries have criminal statutes that are applied extraterritorially to illicit economic activities frequently associated with perpetrators of grave breaches of ICL

The grave breaches of ICL do not occur in isolation. The UN Secretary-General, the Chief Prosecutor or the ICC, the Special Court for Sierra Leone, UN Panels of Experts reporting to the Security Council, and range of governments and non-governmental organizations have observed that various phenomena associated with wars and dictatorships gives rise illicit economic and business activities. These might include, for example, bribery of foreign officials, sanctions violations, money laundering, importation of stolen property and importation of illicit drugs. Thus, Guus van Kouwenhoven³⁰ was convicted in The Netherlands for violations of UN sanctions as part of his economic relationship with the regime of former Liberian President Charles Taylor. Taylor has been charged by the Special Court for Sierra Leone with a variety of war crimes and crimes against humanity.

With this in mind, in addition to examining the extraterritoriality of domestic ICL statutes, the survey sought information about a limited set of illicit business activities in order to gauge to some degree the extent to which national jurisdictions may apply their other domestic statutes extraterritorially.³¹ This part of the survey was less robust because of the tendency of a number of the respondents to focus on other aspects of the survey. Accordingly, the inquiry into the related crimes is still incomplete.

Nonetheless, the results of the Survey thus far are encouraging. Six of the countries are reported to have anti-bribery statutes that cover payments to foreign officials to obtain business concessions. These are Argentina, Australia, Japan, the Netherlands, South Africa and the United States. The statutes of all of these coun-

³⁰ Guus van Kouwenhoven was convicted in 2006 in the Netherlands of breaking a UN arms embargo (i.e. providing arms to the Taylor regime in Liberia in exchange for timber concessions). He was sentenced to 8 years in prison. The Survey will monitor the progress of any appeals in this case.

³¹ For a useful report which suggests prosecution of wrongdoers for illegal economic activity (as opposed to violations of ICL or IHL), see Open Society Justice initiative, *Legal Remedies for the Resource Curse: a digest using law to combat natural resource corruption* (September 2005) available at http://www.justiceinitiative.org/db/resource2?res_id=102966.

tries except Argentina apply to legal persons. None of the other countries surveyed has as yet reported in depth on this issue. Of the sixteen countries surveyed, all have ratified the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, with the exception of India, Indonesia, South Africa and Ukraine. It is likely that anti-bribery statutes with extraterritorial application are in place in many of the other 24 countries that have ratified the Convention because the Convention calls upon each signatory whose statutes apply to the actions of its own nationals abroad to adopt legislation or take other measures to ensure that bribery of foreign officials is covered.

Regarding money laundering: five countries reported the existence of domestic money laundering statutes that apply to the laundering of funds obtained by criminal activity abroad. These are Argentina, Japan, the Netherlands, South Africa and the United States. Again, none of the other countries surveyed has reported that it does not have such statutes. In fact, most appear up to date in such legislation: of the 16 countries surveyed, only one country was subject to review and monitoring by the Financial Action Task Force for having deficiencies in its anti-money laundering laws and compliance programs between 2005 and 2006. Based on FATF's evaluation, Ukraine amended its legislation and took other measures which satisfied the FATF eliminated its ongoing oversight.³²

Money laundering statutes can ensnare businesses that attempt to bring their money back to their home countries (or, for that matter, into any country that chooses to enforce its money laundering statute), as illustrated by the Riggs Bank investigations involving the leadership of Equatorial Guinea and General Pinocchet.

Regarding the importation of stolen property, two countries reported that it is a crime under their statutes. These are the Netherlands and the United States. Other countries have yet to report on their own statutes on this subject. As civil society investigators have pointed out, the importation into Europe and the United States of diamonds and timber originating in conflict zones has often occurred in the absence of regulation.

Regarding the importation of illicit drugs, three countries reported the existence of domestic legislation on the subject. These are the Netherlands, Spain and the United States. The rest of the countries in the Survey have yet to report on their statutes on this subject. That foreign officials and business people may be prosecuted for drug offenses is illustrated by the case of Manuel Noriega, former President of Panama, who was arrested in Panama and convicted in the U.S. of

³² Financial Action Task Force, OECD, ANNUAL REVIEW OF NON-COOPERATIVE COUNTRIES AND TERRITORIES 2005-06 (June 23, 2006) available at <http://www.fatf-gafi.org/dataoecd/0/0/37029619.pdf>.

involvement in drug smuggling. The Pinochet case may also be relevant: General Pinochet was allegedly connected to the illegal manufacture of cocaine at a secret military installation in Chile, which involved export to foreign markets.

Finally, there are a range of other illicit economic activities that have been identified by a variety of public policy and academic sources as related to patterns of grave breaches of IHL/ICL occur, particularly in connection with armed conflict.³³ These include: (a) financing of illicit business activities; (b) entering into contractual relationships to provide a future market for natural resources that will be captured by force of arms (the so-called ‘booty futures’); (c) dealing in resources which have been placed under sanctions and selling goods to buyers in conflict zones in violation of sanctions; (d) violation of the terms of special arrangements for curtailing illicit trade in natural resources, such as the Kimberley Process for ascertaining the provenance of diamonds being sold; (e) providing false documentation in connection with export/import and customs arrangements; (f) breaches of civil aviation laws, i.e. filing false flight plans to disguise illicit transportation of weapons and other contraband; (g) corruption; (h) kickbacks; (i) extortion; (j) monopolistic arrangements; (k) counterfeiting; (l) arms trafficking; (m) trafficking in persons; (n) use of child labor; (o) denial of the right of labor to organize; (p) smuggling and (q) gross discrimination against a minority group in employment practices. These correspond to a range of possible legal and regulatory remedies that may be of use in controlling the illicit economic behaviour which has helped sustain some of the perpetrators of serious human rights abuse.

Conclusions and Recommendations

The survey of sixteen national legal systems confirms the view that it is possible to hold business entities liable for the commission of international crimes. The survey illustrates a potential web of liability created by the integration of ICL/IHL provisions to a wide range of domestic legal systems containing provisions for the prosecution of legal persons, including business entities, as well as extraterritoriality and universality provisions which extend jurisdiction abroad. In addition, the survey points to provisions governing illicit economic activity that may provide remedies for dealing with the illicit economic behaviour which reinforces the impunity of some perpetrators of international crimes. In short, the survey indi-

³³ A number of these are described in detail in reports of UN Expert Panels investigating illicit exploitation in DR Congo or sanctions busting in relation to Angola, Sierra Leone or Liberia; see also *Legal Remedies for the Resource Curse* (OSI, 2005); Leiv Lunde and Mark Taylor, *Commerce or Crime* (Fafo, 2003); Karen Ballentine and Jake Sherman, eds, *The Political Economy of Armed Conflict: Beyond Greed and Grievance* (Lynne Rienner, 2003);

cates that there is law ‘on the books’ to begin to address the problem of impunity of economic actors associated with international crime.

Practical obstacles to prosecution will no doubt arise in individual cases, in large part as a result of the international nature of the economic actors and activities. It is beyond the scope of this report to determine whether extradition agreements, mutual assistance and regional/international cooperation agreements among enforcement agencies, and other such inter-governmental mechanisms are functioning properly. It is clear, however, that prosecutions of international activities will require increased cooperation and clear rules and procedures.

There are a number of key recommendations which are suggested by the survey results:

1. Detailed consideration is required to explore how the components of complicity found in the different national legal systems surveyed might be applied to business entities. This is both a task of legal research and policy dialogue at an international and inter-governmental level.

The objective should be to outline a common international approach to corporate complicity. Assuming sufficient evidence, the UN SRSG on Business and Human Rights might build on work conducted in this survey and elsewhere (e.g., by the International Commission of Jurists) to provide the basis for a definition. In particular, the following issues need to be addressed through additional investigation into domestic legal definitions:

- (a) which jurisdictions require knowledge as the required *mens rea* (intent) for criminal liability as an accomplice and under what circumstances.
 - (b) whether the complicity statute requires a showing that the defendant intended that the particular crime involved be committed, or merely a crime of some sort;
 - (c) whether accomplices may be held liable in a civil (tort) action.
2. States Parties should consider re-visiting the exclusion of legal persons from the jurisdiction of the International Criminal Court, as they begin the review of the Statute leading up to 2009.
 3. A more detailed analysis is necessary of the extraterritorial application of some countries’ ICL statutes. In some survey responses, more information is needed on the statutory basis for applying domestic ICL to grave breaches occurring abroad, especially as applicable to legal persons. The wider the web of liability extends, and the finer the ‘mesh’ of overlapping extraterritorial statutes,

the smaller will become the zone of sanctuary for the perpetrators of these crimes and their accomplices.

4. More research is required on the legal bases for bringing civil (tort) actions for violations of ICL and an examination of civil cases that have been brought to date outside of the United States.
5. More work needs to be done to identify the practical and legal challenges to bringing tort actions for violations of ICL in their respective jurisdictions. Issues of concern include: permitted use of contingency fees, the use of class action lawsuits, the availability of damages for pain and suffering, the availability of exemplary (punitive) damages, fee-shifting rules, the use of the 'act of State' doctrine to defeat judicial involvement in the conduct of foreign affairs, and further analysis of the doctrine of *forum non conveniens*.
6. Governments should consider fashioning the list of illicit economic activity to which domestic criminal statutes might apply into a coherent approach to economic activity in war and dictatorship. This may be a task for the UN Security Council in consultation with the International Criminal Court.
7. Governments should provide clear advice to their home companies just what domestic laws might apply to them at home and abroad.
8. Businesses operating in the complex environments where human rights abuse is prevalent should develop internal due diligence tools and procedures to ensure they avoid liability.

Appendix A: Summary of Responses

1. Have incorporated genocide, crimes against humanity and war crimes, all as per the statute of Rome:	2. Have incorporated genocide:	3. Have incorporated crimes against humanity:	4. Have incorporated war crimes:
Argentina* Australia Belgium Canada Germany Netherlands South Africa Spain United Kingdom Would apply the above laws A. To legal persons: Australia Belgium Canada Netherlands United Kingdom B. Universally: Australia* Canada Netherlands Spain (Def. need not be found in Spain) United Kingdom (Torture, war crimes)	France Indonesia Ukraine United States Would apply the above laws A. To legal persons: France B. Universally: France*	France Indonesia Norway* Ukraine United States Would apply the above laws A. To legal persons: France Norway B. Universally: France (Torture only)*	India* Japan* Norway Ukraine* United States Would apply the above laws A. To legal persons: India* Japan* Norway United States B. Universally: C. Only to crimes by and against their own nationals: Japan* Norway* Ukraine* D. Only to crimes by their own nationals: India*
C. Only to crimes by and against their own nationals: Argentina* Belgium* Germany United Kingdom (Crimes v. humanity) South Africa* D. Only to crimes by their own nationals: United States	C. Only to crimes by and against their own nationals: Indonesia* Ukraine D. Only to crimes by their own nationals: United States	C. Only to crimes by and against their own nationals: Indonesia* Norway* Ukraine United States* D. Only to crimes by their own nationals: United States*	C. Only to crimes by and against their own nationals: Japan* Norway* Ukraine* D. Only to crimes by their own nationals: United States* D. Only to crimes by their own nationals: India*

The responses covered in this summary report have focused on those questions concerned with IHL/ICL. The responses to a number of questions continue to be elaborated and have not been summarized here. An asterisk (*) indicates a priority for further research.

5. Civil recovery available for violation of Ihl/Icd if wrong is characterized as a civil wrong/tort/delict.	6. Legal persons criminally liable for majority of criminal offenses	7. Legal persons criminally liable for limited types of offenses	9. Complicity, i.e. aiding and abetting is a statutory crime:
Argentina* Australia* Belgium Canada France Germany India* Japan* Netherlands Norway South Africa* Spain Ukraine United Kingdom* United States* *Relevant litigation reported	Australia Belgium Canada France India Japan* Netherlands Norway South Africa South Africa United Kingdom United States *On a statute-by-statute, not general basis	Indonesia 8. Legal persons not criminally liable Argentina (very limited exception for war crimes and a few other offenses) Germany (one limited exception) Spain	Australia Belgium Canada France Germany India Indonesia Japan Netherlands Norway South Africa Spain Ukraine United Kingdom United States 13. Importation of stolen property is a crime: Netherlands* United States* *Legal persons are liable 14. Importation of illicit drugs is a crime:
Argentina Australia Belgium Canada France Germany India Indonesia Japan Netherlands Norway South Africa South Africa United Kingdom United States* 10. Conspiracy and/or joint participation are statutory crimes: Argentina Australia Belgium Canada France Germany India Indonesia Japan Netherlands Norway South Africa Spain United Kingdom United States	Argentina Australia* Japan* Netherlands* South Africa* United States* 11. Bribery of foreign officials to obtain business concession is a crime:	Argentina Japan (Lp) Netherlands* South Africa* United States* *Legal persons are liable 17. Prosecutors are legally required to investigate all reported crimes; decisions not to prosecute are subject to appeal:	Netherlands* United States* *Legal persons are liable 14. Importation of illicit drugs is a crime: Netherlands* Spain United States* *Legal persons are liable 18. Victims may appeal decisions not to prosecute:
Australia India Norway United states 19. Special citizen panel is convened for official corruption cases: Japan	Argentina (no damage awards) Belgium France Ukraine 20. Victims or associated persons may prosecute privately; if government refuses: South Africa (rarely used)	Germany Spain Netherlands Ukraine	

Appendix B: Survey Instrument / Questionnaire

A Comparative Survey of Legal Remedies for Private Sector Liability for Grave Breaches of International Law And Related Illicit Economic Activities

Survey of Selected Countries

Overview

There are three major goals of this survey. They are as follows:

First, the survey results will provide a much-needed comparative law study examining the similarities and differences between laws in various countries with respect to whether private sector entities can be sued or prosecuted for certain grave violations of international law such as genocide, war crimes, crimes against humanity, torture, enslavement/forced labor. Second, this survey will identify existing opportunities within selected national legal systems for dealing with the types of misconduct by the private sector that often occurs in zones of conflict. Third, the survey results will help to ascertain the current status of customary international law with respect to business entities and their potential accountability for violations of international law.

The survey also aims to find out whether business entities or individual economic actors (company directors, managers, bankers, traders and other natural persons) may be liable either civilly or criminally under a country's own law for violations of international law that may be actionable purely as a matter of domestic law. If existing statutory or code provisions or judicial precedents exist that may be applicable to violations of international law, your answers should reflect this information. For example, in France, executives of the French oil company TotalFinalElf are being prosecuted for false imprisonment of persons with respect to the alleged use of forced labor in connection with a pipeline project in Burma.

Similarly, violations of international law may have corollaries in tort law allowing for civil causes of action. The multinational oil company Unocal, for ex-

ample, was sued civilly in the United States for allegedly aiding and abetting the use of forced labor by the Burmese government in furtherance of a joint-venture oil pipeline project. This case eventually settled out of court. Of particular value would be legal authority that allows for civil or criminal legal action against business entities or individual economic actors that violate, conspire to violate, or aid and abet others in violating, international criminal or humanitarian law.

The potential for extraterritorial application of existing domestic civil and criminal laws to the illicit economic activities of business entities and other economic actors is an important part of our inquiry. For example, a business might import diamonds that had been acquired illegally, i.e. by means of outright theft or by fraudulent means, the diamonds may constitute “stolen property,” within the meaning of domestic criminal laws that makes it illegal to import or receive stolen property. Another example might be the laundering of money into your country that originated from the illegal sale of arms in a host country. A third example would be where a business entity paid a bribe to a government official in a host country: would either the business entity or its servants face a lawsuit of prosecution in your country? In this regard, the survey is intended to elicit examples of how unacceptable activities by business entities in conflict situations may give rise to criminal or civil liability in domestic jurisdictions where businesses are domiciled or headquartered. Please keep in mind that we are asking you to assess when a business entity, or its subsidiary from your jurisdiction, might be liable for engaging in misconduct overseas. We are also asking when plaintiffs (victims) may be able to sue such business entities in your country or when the government might choose to prosecute a business entity for its actions. The survey results may support legal and policy initiatives aimed at isolating both the actors involved and the fruits of their activities.

In many of the questions we ask you to provide several examples of various laws or cases. Please provide a *maximum* of 3 examples when answering any one question. As you work your way through the survey instrument you will no doubt feel that many of the questions asked require more in-depth treatment than your time allows. Please respond to the questions to your best ability. Please indicate, where needed, what issues you did not address and where additional details would provide a fuller picture. If there is a law review article or other publication that addresses any subject covered by this survey, we ask that you provide us with a brief explanation of why the publication is relevant and include an appropriate citation to the publication.

Definitions of terms

For the purposes of this survey, the following definitions apply:

The term “**business entity**” refers to a broad range of legal persons in various business forms including corporations, partnerships, joint ventures, limited liability companies, and state-owned enterprises, etc.

The term “**home country**” refers to the country under the laws of which a business entity is organized or the country in which the business entity has its principal place of business.

The term “**home court**” refers to a court located in the home country of a business entity.

The term “**host country**” refers to the country in which a business entity (or one of its subsidiaries or sister entities) is licensed/registered or engaging in economic activity, other than its home country.

The term “**international law**” for the purposes of this survey refers to certain grave breaches of international criminal law and international humanitarian law including genocide, war crimes, crimes against humanity, torture, and enslavement/forced labor.

The term “**servants of the business entity**” refers to directors, partners, joint venturers, officers, employees, agents and others who may act on behalf of a business entity.

citations to relevant authority

Whenever possible, we ask you to provide full citations to provisions of your country’s penal (criminal code) and to other relevant statutes.

Survey questions

I. Disclosure requirements for business entities

1. What sort of material information are business entities required to provide to their shareholders and/or public under your jurisdiction’s company law or securities laws that may be relevant to potential litigants? For example, are such entities required to provide information about:
 - material civil litigation?
 - risk factors that would impact a shareholder’s investment in the company?
 - any reported violations of law or pending proceedings arising from such violations?
 - revenues received from, or amounts paid to or on account of, a government or its officials or agents?

2. Is there a right to know statute enabling one to obtain information from your government?

Comment: We are trying to find out whether there are effective mechanisms in your jurisdiction for finding out material business information, which could lead to accountability for any illicit business activity. If your laws contain exceptions for “confidential business information” that would make it difficult to obtain relevant business information, please point this out.

II. Status of business entities under criminal law [in country X]

3. Does your penal code (or judicial interpretations thereof) provide that business entities may be prosecuted criminally for violations of such code?
4. What type sanctions are applied to business entities, as opposed to natural persons?

Comment: We seek to obtain information regarding the authority of national courts to impose criminal penalties on business entities. If your penal code routinely provides that business entities are included within the definition of “persons” subject to criminal penalties for violations of the penal code, you may answer this question by so stating and providing a complete citation to a typical provision that includes such a definition. For example, in some jurisdictions, natural persons and legal persons are treated the same for purposes of nearly all types of criminal prosecutions including murder.

If your penal code sometimes includes business entities within the definition of “persons” subject to criminal penalties, but does not generally do so, you may answer this question by so stating and providing: (a) two or three examples of typical crimes for which a business entity may be prosecuted that involve **economic activity**, (i.e. securities law violations, sale of contraband, false advertising, tax evasion, environmental harms, etc.) and (b) two or three examples of crimes for which a business entity may be prosecuted which involve **other types of criminal activity**, i.e. arson, theft, etc.

For each example given, please provide citations to the provision that defines the “persons” subject to prosecution along with full citations to the relevant provisions of the penal code that contain the selected example. If your penal code always omits business entities from the definition of “persons” subject to criminal prosecution, you may answer this question by so stating.

As for the question of sanctions, please indicate whether the sanctions that courts may impose on legal persons extend beyond monetary penalties. For ex-

ample, do such sanctions include asset forfeiture, injunctions? Based on your review of country's criminal law (above), what are the interim measures, remedies and/or restraint in relation to business entities, if any, and if not what might you suggest in this regard?

5. What are the standards applied in your jurisdiction for attributing liability to a business entity for the actions of individual servants? For example:
 - a. What must one demonstrate in order to convince the court that the actions of the servants of the business entity may be attributed to the business entity to establish the guilt of the business?
 - b. If, in order to find a business entity guilty of a crime, the court must find that the business entity intended to carry out an activity that is a crime, how must the prosecution demonstrate that such intent (mens rea) was present? ; and
 - c. What are the standards applicable in your jurisdiction for attributing the criminal liability of a business entity to the servants of the business entity?

Comment: We seek to obtain information regarding the legal test or criteria that must be met in order for a court to find that a business entity is criminally liable for the actions of those individuals who may act on its behalf, and vice versa. For example, must a certain type of officer or employee possess the relevant criminal intent in order to impute liability to the business entity?

Please answer parts (a) to (d) of this question by describing the legal test that must be met in each case and by providing citations to any recent appellate court decisions that apply the test or to penal code provisions that contain the test(s). If the standards are different where the proceeding involves a violation of international law, please provide an appropriate explanation of the differences.

6. Under your criminal law (penal code) what is the legal standard for convicting someone of being an accomplice to or aiding and abetting the commission of a crime by another (complicity)? What is the legal standard for convicting someone of plotting with another to commit a crime (criminal conspiracy)?

Comment: We would like to know whether the law in your jurisdiction provides that persons may be found guilty of a crime if they assist another in the commission of such a crime. Under U.S. laws, the term used for this is “**aiding and abetting**” liability. Other jurisdictions may use terms such as accomplice liability (complicity), joint wrongdoing, or joint criminal enterprise. We would also like to know if the laws of your jurisdiction provide that persons may be found to be conspir-

ators if they have plotted with another to commit the crime, even if the crime is ultimately not carried out. If a primary actor must first be found guilty before an accomplice is found liable, please indicate so.

You may answer these questions by providing a brief description of the concepts of aiding and abetting, complicity and conspiracy as they are applied in your jurisdiction. If one or both concepts are not recognized in your jurisdiction, please inform us. If these concepts may be applied to business entities, please inform us. To illustrate how such concepts are applied, please provide us with a citation to a recent appellate court decisions in which such concepts are applied or to the provisions of your penal code that contain such concepts.

7. Are there any other practical considerations or factors that must be present when the defendant in a criminal proceeding is a business entity rather than a natural person?

Comment: We would like to know if, in practice, there are any special factors that make the prosecution of a business entity different or more difficult than the prosecution of natural persons.

III. Status of International Law/International Humanitarian Law in your Country's Legal Framework

8. Which international crimes have been incorporated into your domestic criminal law? Please include any crimes enumerated in the Rome Statute of the International Criminal Court such as genocide, war crimes, crimes against humanity, and other relevant instruments.
9. Do your country's laws modify the provisions of the ICC Statute, such as concepts of aiding and abetting and conspiracy or liability of business entities rather than only natural persons?
10. Do your criminal courts have jurisdiction over those international crimes that have not been incorporated into your domestic law?
11. May a business entity be prosecuted for international crimes in the courts of your country, whether under domestic law or with reference to international law? If yes, under what circumstances?

Comment: You may provide complete answers to Questions 8 through 11 by briefly discussing the legal bases (statute, code provision, treaty such as the Torture Convention) for such prosecutions. If the laws of your jurisdiction authorize neither type of prosecution, please so inform us.

Please discuss what types of violations of international law can be prosecuted in the courts of your country and whether these violations are incorporated into your country's domestic penal law as enumerated in a statute or code provision. Does a doctrine such as the direct effect doctrine affect whether private litigants may invoke international law? Would your courts permit prosecutions based on purely on a customary international norm?

Please note whether nationals of your country must be among the victims of the violations. If there has been any such prosecution of either an individual or a business entity, please provide a brief description of the proceedings involved, including names of courts, dates of proceedings, names of parties defendant, crimes alleged, and both trial and appellate outcomes of the proceedings, providing citations to the criminal code provisions involved and to any published decisions.

IV. Alternative Mechanisms

12. Can you think of any bases in your country's tort law (civil law) for suing individuals and /or business entities for violations of international criminal law, IHL, (whether or not incorporated into domestic law)?

Comment: A federal statute in the U.S., known as the Alien Tort Claims Act (28 U.S.C. § 1350) ("ATCA") provides the basis for a tort (civil) action for the violation of international law. The statute requires that the plaintiff (injured party) must be an alien (i.e., non U.S. citizen) and that the alleged harm be both a tort and a violation of the "law of nations". Both individuals and business entities have been defendants in U.S. ATCA lawsuits.

Please describe whether there is an established legal basis in the laws of your country for the courts to entertain such a civil action, or if you believe that certain civil causes of action might be applied to cases where alleged harms are violations of international law.

Please describe who might have standing to bring such an action and how such a person or entity must demonstrate that the qualifications for standing have been met. If there have been any such civil actions brought against either an individual or a business entity, please provide a brief description of the proceedings involved (names of courts, dates of proceedings, names of parties defendant, causes of action alleged, and both trial and appellate outcomes of the proceedings, providing citations to the statutory or common law. In this regard, it may be useful to highlight major lawsuits against business entities for tortious or harmful conduct that has occurred outside of your country. Please inform us whether such a civil action must be tied to a criminal proceeding, such as the action civil proceeding in certain civil law jurisdictions.

V. Jurisdiction and related issues

13. On what bases do the courts of your country assert personal jurisdiction over criminal and civil defendants?
14. When parent and subsidiary entities are involved in a multinational setting, how does a court assert personal jurisdiction over parents or subsidiaries located out of country? What are the standards for overcoming limitations on jurisdictions over business entities within a multinational corporation?

Comment: We assume that the courts in your country have jurisdiction over residents, including business entities either organized or domiciled in your country. They presumably also have jurisdiction over parties who commit crimes within the jurisdiction, and may seek extradition of defendants who flee the jurisdiction. However, violations of international law may be committed by persons who are not residents of the jurisdiction in which the court is sitting, or by business entities that are neither organized in nor domiciled in such a jurisdiction. Also, the activities constituting such violations may have occurred outside of the jurisdiction.

Please describe whether the courts of your country may assert jurisdiction over the perpetrators of such violations, and, if so, on what legal basis. You may answer this question by describing each jurisdictional basis recognized by the courts of your country that could provide jurisdiction over either an individual or a business entity for a violation of international law.

Forms of personal jurisdiction over an individual might include:

- a. residence in your jurisdiction;
- b. temporary personal presence in your jurisdiction (tag jurisdiction); and
- c. ownership of property located in your jurisdiction, etc.

Forms of personal jurisdiction over business entities might include jurisdiction over:

- a. foreign business entities that commit violations within the territory of your country;
- b. business entities that are organized under the laws of your country, although domiciled elsewhere;
- c. business entities that are domiciled in your country or which maintain a principal place of business or a branch office in your country;
- d. business entities that do business in your country by selling products; and

e. property owned by a business entity that is located in your country, etc.

Please discuss the “nexus” between a business entity and your jurisdiction which a prosecutor or plaintiff must demonstrate in order to establish the court’s jurisdiction.

15. How may a court attribute the actions of a subsidiary to a parent business entity, i.e. “pierce the corporate veil”?

16. What types of actions (civil and criminal) might be asserted against a business entity with respect to activities taking place outside of your jurisdiction by a business entity over which your courts have jurisdiction?

Comment: We are interested in knowing of any examples where a domestic business entity has been held accountable under your jurisdictions’ domestic laws for actions taking place outside of the county. Please provide examples of any relevant lawsuits including those involving bribery of foreign government officials, racketeering, money laundering (of the proceeds of a crime committed abroad), importation of property illicitly obtained abroad, environmental claims, occupational healthy and safety or labor issues involving business entities.

A recent example involved a case where the courts of the U.K. allowed a civil suit to proceed against a U.K.-domiciled corporation brought by workers in South Africa who claimed to have suffered from exposure to asbestos in South Africa on account of the actions of a subsidiary of the defendant corporation.

The British House of Lords allowed the action to proceed because it was shown that (a) at least one of the plaintiffs was domiciled in the United Kingdom and (b) that South Africa did not have a civil legal aid scheme, indicating that the plaintiffs would not have access to legal counsel if the case were dismissed and had to be brought in South Africa.

17. If plaintiffs wanted to sue a business entity in your jurisdiction, what are some of the jurisdictional and procedural obstacles that they (and their lawyers) might face?

Comment: Please discuss what rights (i.e. standing) that individual citizens, foreign citizens, and nongovernmental organizations (both foreign and domestic) may have to initiate proceedings or to join in proceedings already in process, both criminal and civil. Please describe what legal and practical obstacles may inhibit the exercise of such rights, if they exist, such as: liability for attorney fees and costs, filing fees, prior approval by governmental authorities, access to qualified counsel, and the like.

Please also discuss what legal tactics a business entity is likely to employ to prevent a civil suit for damages or other relief. In answering this question, please describe the tactics employed in any recent proceedings. If examples from actual proceedings are not sufficient to provide us with a reasonable understanding of the tactics that are likely to be employed, please add to your answer your own views on the likely tactics, providing any code authority or cases that support your views, along with complete citations.

18. Do the civil courts of your country sometimes decline to exercise jurisdiction over matters where the events occurred in another country and/or the majority of witnesses and the bulk of other evidence is outside of your country, thereby making it more convenient for the parties to litigate in the courts of another jurisdiction (sometimes referred to as the doctrine of *forum non conveniens*)?

Comment: The doctrine of forum non-conveniens has recently been invoked by foreign business entities resisting civil suits relating harms that have occurred overseas. Businesses have asserted that a court should decline jurisdiction of a matter unless it is a home court of a business entity or in a court in the country in which the violation(s) occurred.

Plaintiffs have responded by arguing that the business entities involved could not be successfully sued civilly in either of the two suggested alternate forums, either because: (a) the home court does not provide reasonable access for the plaintiffs to bring their suit or else (b) the courts of the country in which the violation occurred could not be relied upon to provide a just result. You may answer this question by discussing whether the courts of your country apply the doctrine of forum non-conveniens or a similar doctrine, and briefly describing the standards that are applied in making such decisions. If a matter is dismissed under this doctrine, please note whether the courts require the defendant to consent to the jurisdiction of a foreign court.

19. Are there any checks and balances on prosecutorial discretion or decision making (e.g. when a prosecutor declines to prosecute a case, are there any measures in place to review his or her decision or an appeals mechanism?)

Appendix C: Survey Participants

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Commerce, Crime and Conflict

Based on the surveys of sixteen national legal systems, *Commerce, Crime and Conflict* maps the ways in which international criminal and humanitarian law has become more widely applicable to business entities than previously thought. The report provides both an analysis and a summary of how laws might apply in each of the surveyed countries – Australia, Argentina, Belgium, Canada, France, Germany, India, Indonesia, Japan, the Netherlands, Norway, South Africa, Spain, Ukraine, the United Kingdom and the United States – and finds that it is possible to hold business entities accountable for grave human rights abuses, such as genocide, war crimes and torture as well as other crimes against humanity.

Commerce, Crime and Conflict is a guide for victims and affected communities, lawyers and legal researchers, advocates and campaigners, government and businesses, and all of those interested in further defining the rights and responsibilities of economic actors in war and dictatorship.

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For more on the project see the *Business and International Crimes* website:
www.faf.no/liabilities

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