

Additional Commentary

AUSTRALIA SECTION:

Jonathan Clough submitted the following supplemental material on November 25, 2008:

1. In Australia, common purpose is found in s.11.2(3)(b) *Criminal Code Act 1995* (Cth). The defendant must have intended to aid, abet, counsel or procure the commission of an offence, and have been reckless as to the offence actually committed.
2. The Australian Criminal Code contains provisions in relation to ICL in respect of command responsibility and superior orders, which also apply outside the military context.

Cth Crim Code s 268.115

268.115 Responsibility of commanders and other superiors

(1) The criminal responsibility imposed by this section is in addition to other grounds of criminal responsibility under the law in force in Australia for acts or omissions that are offences under this Division.

(2) A military commander or person effectively acting as a military commander is criminally responsible for offences under this Division committed by forces under his or her effective command and control, or effective authority and control, as the case may be, as a result of his or her failure to exercise control properly over those forces, where:

(a) the military commander or person either knew or, owing to the circumstances at the time, was reckless as to whether the forces were committing or about to commit such offences; and

(b) the military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(3) With respect to superior and subordinate relationships not described in subsection (2), a superior is criminally responsible for offences against this Division committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over those subordinates, where:

(a) the superior either knew, or consciously disregarded information that clearly indicated, that the subordinates were committing or about to commit such offences; and

(b) the offences concerned activities that were within the effective responsibility and control of the superior; and

(c) the superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

268.116 Defence of superior orders

(1) The fact that genocide or a crime against humanity has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, does not relieve the person of criminal responsibility.

(2) Subject to subsection (3), the fact that a war crime has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, does not relieve the person of criminal responsibility.

(3) It is a defence to a war crime that:

(a) the war crime was committed by a person pursuant to an order of a Government or of a superior, whether military or civilian; and

(b) the person was under a legal obligation to obey the order; and

(c) the person did not know that the order was unlawful; and

(d) the order was not manifestly unlawful.

BELGIUM SECTION:

Bruno Demeyere stated in an e:mail dated December 17, 2008 that he had examined the draft and found no references to the Belgium Response or the Belgium Supplemental Response that needed to be updated. No supplemental material was submitted.

CANADA SECTION:

Elise Groulx submitted the following information on December 23, 2009:

1. In implementing the Rome Statute, Canada adopted a legal regime that includes some degree of extraterritoriality in the Crimes against Humanity and War Crimes Act, which forms part of the Canadian Criminal Code. Under that act a person can be prosecuted for war crimes, crimes against humanity or genocide if, at the time the offence is alleged to have been committed, this person or the victim was a Canadian citizen or if, after the time the offence is alleged to have been committed, this person is physically present on the Canadian territory.¹

2. In Canada, the definition of *person* found in the Criminal Code includes both physical and moral persons.²

¹ *Crimes against Humanity and War Crimes Act, 2000. C-24, article 8.*

² *Canadian Criminal Code, R.S., 1985, c. C-46, article 2.*

3. The Canadian Crimes against Humanity and War Crimes Act, adopted in 2000, has codified the doctrine of command responsibility and incorporated it into its internal legislation³. It imposes a standard-of-care obligation on senior officers.

4. As stated above, moral persons are included in the *rationae personae* criminal jurisdiction of Canada. The Canadian Criminal Code establishes specific standards to establish guilt regarding offences where the *mens rea* to be proven by the Prosecutor is one of negligence. In particular, article 22.1 of the Canadian Criminal Code states clearly that a corporation can be a party to an offence when its representatives, acting within the scope of their authority, commit a crime.

Of course corporations can also be held responsible for crimes against humanity, war crimes and genocide, which are now crimes in Canada since they form part of the Canadian criminal code.⁴

³ 2000, C-24, articles 5 et 7.

⁴ Criminal Code, R.S., 1985, c. C-46, Offense of negligence – organizations.

22.1 In respect of an offence that requires the prosecution to prove negligence, an organization is a party to the offence if

(a) acting within the scope of their authority

(i) one of its representatives is a party to the offence, or

(ii) two or more of its representatives engage in conduct, whether by act or omission, such that, if it had been the conduct of only one representative, that representative would have been a party to the offence; and

(b) the senior officer who is responsible for the aspect of the organization's activities that is relevant to the offence departs — or the senior officers, collectively, depart — markedly from the standard of care that, in the circumstances, could reasonably be expected to prevent a representative of the organization from being a party to the offence.

2003, c. 21, s. 2.

Other offences — organizations

22.2 In respect of an offence that requires the prosecution to prove fault — other than negligence — an organization is a party to the offence if, with the intent at least in part to benefit the organization, one of its senior officers

(a) acting within the scope of their authority, is a party to the offence;

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

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

5. In reference to the statement in the draft that prosecutors sometimes have absolute prosecutorial discretion when it comes to filing criminal cases, Elise Groulx stated:

“This is also the case in Canada, where *the Crimes against Humanity and War Crimes Act states that no proceedings* may be commenced without the personal consent, in writing, of the Attorney General or Deputy Attorney General of Canada, and those proceedings may only be conducted by the Attorney General of Canada or counsel acting on their behalf.”⁵

6. Elise Groulx supplied the following quotation:

‘In August 2008, during a presentation made before the Canadian Bar Association, Justice Ian Binnie of the Supreme Court of Canada said that Canadian lawmakers should consider enacting new legislation that would enable victims to sue Canadian corporations domestically for their alleged complicity in human rights violations committed abroad. Justice Binnie went on to say that Canada and many other nations have signed on to international treaties and conventions that guarantee various labor and human rights, yet most have not created forum to hear, debate and legally determine complaints alleging that domestic corporations indirectly participated in human rights abuses by aiding and abetting those who carried them, such as state actors or governments of the foreign jurisdictions where they do business. Justice Binnie suggested that: “if that legislation [the Alien Tort Claims Act] were replicated in more countries, there would be more avenues whereby companies could clear their names of allegations made against them, or complainants could obtain redress, depending on what the evidence shows.”⁶

FRANCE SECTION:

Joseph Brehan By e:mail dated December 9, 2008, stated, in reference to the draft article:

“I have read through the whole of the article and I have not found any misinterpretation of the French law or of our answers [contained in the original France Response].”

INDIA SECTION:

Surya Deva submitted the following information on December 3, 2008:

1. The Indian Geneva Convention Act of 1960, the full text of which is available at: <http://indiacode.nic.in/>, punishes a grave breach of any of the four conventions. Section 3 provides: “(1) If any person within or without India commits or attempts to commit, or abets or procures the commission by any other person of, a grave breach of any of the Conventions he shall be punished.. . . (2) Subsection (1) applies to persons regardless of their nationality or citizenship.”

⁵ 2000, C-24, article 9 (3).

⁶ Cristin Schmitz, “Binnie Calls for Corporate Accountability,” *Lawyer Weekly*, August 29 2008, on line: <http://www.lawyersweekly.ca/index.php?section=article&articleid=745>.

2. As far as I know, there is no law banning specifically the use of child soldiers in India. Nevertheless, article 24 of the Constitution—a fundamental right which prohibits the employment of a child below 14 years of age in any hazardous employment—might achieve the same result. In 1986, a law was enacted to implement article 24.
3. Although an analogy could be drawn from general or special penal law provisions, it is doubtful that the Indian courts have extraterritorial or universal jurisdiction to try international crimes [other than the identified war crimes], because as you note (on pp. 14-15 of the draft article), India has not legislated most of the ICL violations. For instance, I doubt if an Indian court would have entertained a complaint to prosecute Saddam Hussein for genocide!
4. At least in India, a distinction is made in the prosecution of natural and legal persons in the sense that corporations could not be prosecuted for crimes which it cannot commit (e.g., rape) or crimes which are punishable only by an imprisonment (see Indian Response, p.6.). Unlike UK, India does not have a corporate manslaughter statute yet.
5. Whatever principles have been developed in the context of the civil liability of a parent corporation for wrongs committed by its subsidiaries, it would be difficult to apply them *in toto* to attribute criminal liability. One reason is that the liability based on omission is generally an exception and more difficult to establish under criminal law.
6. Under the Indian law (sec. 120A, IPC), conspiracy is a crime if two or more people do ‘some’ act in pursuance of the agreement to commit an act by illegal means. However, if the agreement was to commit an offence, the mere agreement would amount to conspiracy.
7. The Indian Penal Code embodies the principle of “common object” to impose criminal liability on a group. Section 149 reads: “If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence.” What is an “unlawful assembly” is defined in section 141. It may be useful to refer to: ‘Common Intention and the Enterprise of Constructing Criminal Liability’ (199) *Singapore Journal of Legal Studies* 494.

It should also be noted that “common object” is different from the “common intention” principle laid down in section 34: “When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.” The former does not require a prior concert or a common meeting of minds before the particular criminal act.

8. The Indian Supreme Court has developed the concept of constitutional torts – torture or custodial violence has been held to be a violation of the fundamental right to life and personal liberty under article 21 of the Constitution (e.g., *Nilabati Behera v State of Orissa* (1993) 2 SCC 746; *DK Basu v State of West Bengal* AIR 1997 SC 610) These rulings have generally been against state/public authorities, but it is likely that even non-state actors might be subject to this principle. In fact, the *Vishaka* ruling on sexual harassment extends to the private sector (*Vishaka v State of Rajasthan* AIR 1997 SC 3011) and in one case (*Bodhisattwa Gautam v Subhra Chakraborty* AIR 1996 SC 922) the court granted compensation against an individual on the ground of a rape being a violation of article 21. The decision in ‘X’ v *Hospital ‘Z’* (1998) 8 SCC 296 might also be relevant here.

INDONESIA SECTION:

David Linnan provided the following comments by an e:mail dated December 17, 2008:

1. ICL Not in Penal Code. In Indonesia, the ICL statute is in a special ad hoc law concerning human rights violations, but it specifically is not in the penal code. As a jurisdictional matter it takes things out of the ordinary courts. It is in human rights court law 26/2000.

2. Crimes Against Humanity. There is a problem with concluding that 26/2000 contains the crimes against humanity set forth in the Rome Statute. Although the statute purports to track the Rome Statute list, the official commentary on the statute has caused some NGOs like Amnesty International to doubt this at the detail level, see <http://amnesty.org/en/library/asset/ASA21/005/2001/en/dom-ASA210052001en.pdf>. It would be acceptable to say that the human rights court statute appears generally to follow the Rome [Statute] definition of crimes against humanity, but questions have been raised in the details (citing the Amnesty piece).

3. Ex Post Facto Issue. I would add here a point generally that was raised by the human rights tribunal law (no 26/2000) which was prominent in the Indonesian survey and in practical terms, but I think missing from your piece. This is the transitional justice problem that exists in Civil Law countries in particular as a technical matter once you move out of the human rights community as such. In the common law world (see the US constitution) we do not like ex post facto laws. Similarly, in Civil Law criminal law doctrine, the Nulla Peona principle typically blocks prosecutions for crimes not on the books at the time the events in question happened. The Indonesians amended their constitution 2000-02 to clarify that ex post facto laws were unconstitutional, I think in part with an eye towards things like law no. 26/2000. In some Civil Law type countries (the Netherlands), you have direct incorporation of international law under their constitution (monism-dualism issues) so that there is no problem with applying international crimes under municipal law without running afoul of the ex post facto problem. But in places like Indonesia, I think the transitional justice efforts get pushed at best in the direction of things like a truth and reconciliation commission because the ex post facto problems kill any real prospects of judicial treatments of the gross human rights violations that were the practical genesis of law 26/2000.

3. Superior Responsibility. On page 41 [of the review draft of the Article] you ask reviewers to give a supplementary response re superior responsibility. I direct you to a book chapter by Hikmahanto Juwana (immediate past dean of the University of Indonesia Faculty of Law and former expert witness on command responsibility in the domestic East Timor trials) entitled "The Concept of Superior Responsibility under International Law as Applied in Indonesia" at pages 238-51 in a book I edited entitled *Enemy Combatants, Terrorism, and Armed Conflict Law: A Guide to the Issues* (Praeger 2008). I direct you to Hikma saying that command responsibility was not the same things as superior responsibility as distinct legal doctrines, and that the domestic human rights court got it wrong as applied to the former provincial governor in East Timor who was convicted. For the purposes of a survey, I think it accurate to say that there is a lively discussion of superior responsibility in Indonesian law, but disagreement on what it really means at the level of legal doctrine (which is Hikma's message).

4. Anti-Bribery Laws Not in Penal Code. The Indonesia Response in paragraph number 3 mentions Law No. 31 of 1999 on Corruption as amended by Law no. 20 of 2001, so Indonesians do have anti-bribery laws, just not in the traditional penal code.

JAPAN SECTION.

Shimpei Yamamoto provided the following comments in his e:mail of November 27, 2008:

1. War Crimes. While the Japanese government took a position that most of the crimes under the Rome Statute were already covered by the existing law in acceding to the Statute⁷, Japan has not incorporated by statute the three core crimes of ICL (genocide, crime against humanity, and war crimes) except for some crimes incorporated by the “Law concerning Punishment of Grave Breaches of International Humanitarian Law” of 2004 such as destruction of historic monuments, etc., to which special protection has been given (Art.3), delay in the repatriation of prisoners of war (Art.4), transfer of own civilian population into occupied territory (Art.5), and delay in the repatriation of civilians (Art.6)⁸. Accordingly, the most of the three core crimes can only be prosecuted based on the presence of analogous “ordinary” crimes in the Japan penal code, e.g., “genocide” or “murder of a prisoner of war” would be punished as “murder.”⁹ Similarly, while the Japanese government has taken a position that torture is covered by the existing law (e.g., for the purpose of torture by Japan’s police officers, the Penal Code Art.195 and 196 provides for the offenses of “a specific police officer’s act of physical violence and cruelty, or a specific police officer’s act of physical violence and cruelty causing death or injury), it is pointed out by the Committee against Torture in 2007 that the existing law is not sufficient to cover “torture” under the Torture Convention (CAT/C/JPN/CO/1, para. 10). (See also Japan Response, p. 21)

2. Parent/Subsidiary Matters. In commenting a statement in the peer review draft to the effect that “there is an interesting doctrine used in Japan that allows workers in a foreign subsidiary to sue a parent in Japanese courts for a breach of its “obligation of security,” i.e. the duty to ensure the health of its workers, even foreign workers employed by a subsidiary, while it depends on factual circumstances.” Mr. Yamamoto changed the word “allows” to “could allow” and made the comment: “We do not know an exact case where the doctrine was used where a subsidiary is abroad and the parent is in Japan. At least the obligation is not a general obligation of the parent, but only arises depending on each factual scenario.”

3. Superior Responsibility. “Co-principal” provision (Art.60 of the Penal Code) and “indirect principal theory” (Japan Response, p.11-12) cover a part of “superior responsibility.”

⁷ (As mentioned by my email sent to Bob in May) At the time of the accession to the Rome Statute, Japan adds only “Crimes of Obstruction of the ICC” by “Law on Cooperation for the International Criminal Court” of 2007 such as (i) destruction of evidence; intimidation of witnesses; corrupting of witnesses; destruction of evidence related to organized crimes (more severe punishment applies); and perjury (all of the above are for a case the ICC exercises its jurisdiction); and (ii) bribe; obstruction of official duty; and compelling of performance (these are regarding ICC staff). These offenses will apply in Japan and to Japanese (both inside and outside of Japan)

⁸ Japan Response, p. 18

⁹ Japan Response, p. 18, p.21

4. Availability of Victim Reparations Mechanisms. In Japan a new act was enacted in 2007 to establish the system similar to “*action civile*,” in which a victim can file a claim for damages against the defendant of certain types of crimes in criminal procedures that will entry into force during this year, although a victim does not have the right to initiate the investigation or prosecution.

5. Fee-Shifting Mechanisms. In civil tort cases, approximately 10% is added to the judgment to pay for a winning plaintiff’s legal fees.

6. Availability of Legal Aid. Japan allows for legal aid, but very insufficiently for foreign plaintiffs. Especially, additional Japanese fee scales are quite low, not enough for translation costs, and no allowing funds for an expensive factual investigation, especially where events occurred abroad.

7. Witness Protection Program. Certain measures of protection was established by a new act in 2007 and will enter into force during this year, though the effect and the practice of such protection remain to be seen.

8. Universal Jurisdiction of ICL. In reference to a statement in the peer review draft regarding the presence of universal jurisdiction of ICL laws, Mr. Yamamoto added, with reference to Japan’s ICL laws: “Only when so required by an international treaty which Japan is a party.”

9. Sentencing for Complicity: In reference to a statement in the peer review draft regarding differential sentencing for convictions for aiding and abetting and convictions for the underlying crime, Mr. Yamamoto commented: “Principal, co-principal (including co-principal by conspiracy), and incitement are under the same sentence range. In contrast, the range of the sentence for aiding (accessoryship) is reduced: e.g. life imprisonment instead of death in capital cases, one-half reduction of sentence for noncapital crimes. However, since most of accomplices are punished as ‘co-principals’ including co-principals by ‘conspiracy.’ the same range of the sentence as principals are applied to them in practice.”

10. Legal Aid Fee Scales. Legal aid is available for foreigners, but insufficiently for foreign plaintiffs. Especially, additional Japanese fee scales are quite low, not enough for translation costs, and no allowing funds for an expensive factual investigation, especially where events occurred abroad.

NETHERLANDS SECTION:

Nicola Jägers provided the following supplemental comments on December 1, 2008:

1. The Netherlands’ universal jurisdiction is predicated on the offender being present in the Netherlands.

2. In reference to the statement in the peer review draft regarding the presence of an *action civile* mechanism in the Netherlands, Prof. Jägers commented: “To be completely correct: private persons cannot initiate criminal proceedings in the Netherlands. They can ‘join in’ to request compensation.”

3. In reference to the presence of obstacles that victims of ICL violations face when seeking justice in to civil courts, Prof. Jägers referred to the law review article that she co-authored: Nicola M.C.P. Jagers & Marie-Jose van der Heijden, Corporate Human Rights Violations: The Feasibility of Civil Recourse in the Netherlands, *33 Brooklyn J. Int'l L.* 833 (2008).

Nicola Jägers provided the following supplemental comment by e:mail dated January 12, 2009:

“The Criminal Law in Wartime Act (1950) does not contain definition and elements of crimes but makes use of a general reference clause. It refers to the ‘laws and customs of war,’ just like, for example, Article 3 of the ICTY Statute. In case law these laws and customs of war are said to consist of widely ratified treaties and customary international law, which prohibit and penalize humanitarian law violations.”

NORWAY SECTION:

Jo Stigen provided the following supplemental comments on December 16, 2008:

1. In commenting on the description of the test for *dolus eventualis* contained in the peer review draft, Mr. Stigen stated: “Note that according to Norwegian penal law, *dolus eventualis* also requires that the perpetrator has ‘positively accepted’ the result; he or she must have reflected on the risk and concluded that ‘I would proceed even if I knew for certain that the result would occur.’ This is more than the common law ‘recklessness’ which only requires that the perpetrator has ‘accepted the risk.’ ”
2. In commenting on a reference to the need for domestic courts to clarify the tests for the *mens rea* of aiding and abetting, Mr. Stigen stated: “The new Norwegian penal code, which has not yet entered into force, the various forms of *mens rea* will be codified, see Penal Code of 2005 (not entered into force) §§ 22 (*dolus*) and 23 (*culpa*).”
3. In commenting on a description of the *dolus eventualis* test for JCE found in the Brdanin case, Mr. Stigen stated: “Again, note the slightly different understanding of *dolus eventualis* in various European countries. In Norway, the form of *mens rea* described here would rather be labeled as ‘conscious negligence’ (i.e. it would not qualify as *dolus eventualis* (cf. comment above).”
4. In responding to a request for information relating to command/superior responsibility in his country’s penal code, Mr. Stigen stated: “In the new 2005 Penal Code, there is for the first time a special provision on command responsibility in § 109. It covers both military and civilian commanders, and the *mens rea* standard is similar for both (in contrast to the Rome Statute Art. 28); either knew or should have known suffices.”
5. In commenting on the question of prosecutorial discretion, Mr. Stigen stated: “This is the case also in Norway, with the exception of universal jurisdiction, where the Government must authorize any charge, cf. § 13(1) in the current Penal Code from 1902). With the 2005 Penal Code in force, even these cases will be subject to full prosecutorial discretion.”
6. In commenting on a statement in the peer review draft relating to whether countries other than the Surveyed Countries might also have incorporated ICL, Mr. Stigen stated: “In Norway, we had not implemented ICL provisions before we joined the ICC, despite the fact

that we were party to most of the relevant crimes conventions. It seems that crimes conventions without any enforcement mechanism are weak mechanisms.”

Mr. Stigen also provided the following supplemental comment by e:mail dated December 30, 2008:

“For genocide, crimes against humanity and war crimes (the definitions of which are blue-prints from the Rome Statute) it is universal jurisdiction. The only criterion is that the suspect is found on Norwegian territory when the person is charged. The reference is: Norway’s Penal Code (2005), Section 5, paragraphs 1(3) and 3.”

Mr. Stigen provided the following supplemental comments by e:mail dated January 5, 2009:

“Here, intent is not defined but according to our jurisprudence it will cover purpose, knowledge and *dolus eventualis*. In the new penal code (2005) not yet in force (not that the particular provisions on genocide etc. have entered into force, but the general principles of criminal law have not) section 22 (“Intent”) says that intent covers purpose, knowledge and *dolus eventualis* and defines these three forms of *mens rea*. As for the required *mens rea* for aiding and abetting, this is not regulated in particular. In principle, *dolus eventualis* should suffice also here. There is, I believe, a few cases confirming this. Note that the *dolus eventualis* test is applied rather rarely, sometimes in drug trafficking cases where the suspect claims he did not know that he was carrying drugs, but the court finds that he has reflected and concluded that he would carry out the act even if he knew for sure that he was carrying drugs.”

SOUTH AFRICA SECTION:

Charles Abrahams provided the following supplemental comments on December 17, 2008:

1. “I am not aware of any law [in South Africa] providing for superior responsibility that could apply to corporate officials supervising those who commit ICL violations.
2. Mr. Abrahams provided the following comment on the extraterritorial reach of South African ICL:

“By adopting the Rome Statute of the International Criminal Court through the Implementation of the Rome Statute of the International Criminal Court Act, the South African legislation provides for the exercise of extraterritorial jurisdiction based on amongst others, nationality, residence based on close and substantial connection to South Africa, passive personality and universal jurisdiction.

Section 4(3) thereof provides:

- “In order *to* secure the jurisdiction of a South African court for purposes of this Chapter, any person who commits a crime contemplated in subsection (1) outside the territory of the Republic, is deemed to have committed that crime in the territory of the Republic if-
- (a) that person is a South African citizen: or
 - (b) that person is not a South Africa citizen but is ordinarily resident in the Republic; or

- (c) that person, after the commission of the crime, is present in the territory of the Republic; or
- (d) that person has committed the said crime against a South African citizen or a person ordinarily resident in the Republic.

Section 4(1) of the Act creates jurisdiction for a South Africa court over ICC crimes by providing that '[d]espite anything to the contrary in any other law of the Republic, any person who commits [an ICC] crime, is guilty of an offence and liable on conviction to a fine or imprisonment.'¹⁰ Whilst this section asserts the traditional principle of territoriality, Section 4(3) provides for extraterritoriality with Section 4(a) starting with the recognized basis of nationality for jurisdiction, Section 4(b) extending jurisdiction over South African residents on the basis that they have a close and substantial connection with South Africa at the time of the offence, Section 4(c) providing for universal jurisdiction by extending it to a person who 'after the commission of the crime, is present in the territory of the Republic,' whilst Section 4(d) is founded on the passive personality principle in international law.¹¹

SPAIN SECTION:

Olga Martin-Ortega provided the following supplemental material on December 4, 2008:

1. She suggested that the authors of the Article might wish to examine the law review article that she had authored: Olga Martin-Ortega, *Deadly Ventures? Multinational Corporations and Paramilitaries in Colombia*, 16 *Revista Electronica De Estudios Internacionales* (2008). A reference to this article appears in the Article.

2. In commenting on a reference to universal jurisdiction in the peer review draft, Ms. Martin-Ortega stated: "IN RELATION TO SPAIN:

1) Maybe you want to mention that Spanish listing of crimes under the competence of Spanish court for crimes committed abroad is very extensive, including offenses which are not normally considered in other jurisdictions, e.g. FGM.

2) In relation to the QUERY:

Spain can only exercise universal jurisdiction in the cases established in the Law (Judicial Power, art. 23.4):

- Torture is not explicitly included

- Apartheid could potentially be one of the crimes susceptible of prosecution by the Spanish courts through the clause "any other crimes that in accordance with international treaties or conventions should be prosecuted in Spain" (art. 23.4, h) but Spain is not a member of the apartheid Convention."

3. In commenting on a reference in the peer review draft to the potential liability of legal persons for fines imposed on their representatives, Ms. Martin-Ortega stated: "Also in Spain, legal persons can be civilly liable for the crimes committed by their representatives,

¹⁰ Dugard, J, *International Law A South African Perspective* (3rd Edition), 2005, p. 198

¹¹ *Id.*, p 198-199

administrators or workers in the performance of their duties (art. 120 CP not mentioned in the original Spain Response).”

4. In commenting on a reference in the peer review draft to the nuanced differences in the aiding and abetting laws of the Surveyed Countries, Ms. Martin-Ortega stated: “The nuance in the Spain case is not the one cited (which is related to the punishment) but the fact that in Spain the accessories of the crimes are defined as

- Abettor (in Spanish provocateur)
- Conspirator (Two or more people get together to prepare and execute a crime)
- cooperators (that without whose help in the execution of a crime this would not have occurred)
- Accomplice, any other individual not included in the previous categories that cooperate in the execution of the crime with actions prior or posterior to it.

For this purpose all of these categories fall under ‘aid and abet’ therefore the category considered here of ‘complicity’ is wider than the one referred to by the Spanish Penal Code as ‘accomplice’ (it includes conspirators, provocateurs, cooperators and accomplices).”

5. In commenting on a request in the peer review draft for information relating to the presence of command/superior responsibility concepts, Ms. Martin-Ortega stated: “In Spain, the Penal Code establishes the civil responsibility of the owner of a company or a legal persons for the crimes committed by its executives, administrators and workers of the company (art. 120.3 Penal Code, and 615-621 of the Criminal Procedure Law).”

6. In commenting on a reference in the peer review draft to the presence of the *action civile* mechanism in the laws of the Surveyed Countries, Ms. Martin-Ortega stated: “I can confirm that this is the case in Spain.”

7. In commenting on a reference in the peer review draft to the presence of “loser pays” provisions in the laws of the Surveyed Countries, Ms. Martin-Ortega stated: “In Spain too the unsuccessful party must pay the other party’s procedural costs.”

8. In commenting on a reference in the peer review draft to the absence of class action laws in the Surveyed Countries, Ms. Martin-Ortega stated: “It exists in Spain, the Constitution foresees it in art. 125, but courts are reluctant to accept it.”

9. In commenting on a reference in the peer review draft to bans on the use of contingency fees in the Surveyed Countries, Ms. Martin-Ortega stated: “This is the case in Spain.”

10. In commenting on a reference in the peer review draft to the presence of fee-shifting provisions in the laws of the Surveyed Countries, Ms. Martin-Ortega stated: “This is the case in Spain.”

11. In commenting on a reference in the peer review draft to the lack of legal aid for indigent plaintiffs in the Surveyed Countries, Ms. Martin-Ortega stated: “Not the case in Spain.”

12. In commenting on a reference in the peer review draft to the potential application of *forum non conveniens* in the courts of the Surveyed Countries, Ms. Martin-Ortega stated:

“Forum non convenience as such does not exist in Spain, courts would declare they do not have jurisdiction according to Spanish procedural laws but would not consider the convenience of judging the case in any other fora.”

13. In commenting on a reference in the peer review draft to the difficulties of collecting on judgments under the laws of the Surveyed Countries, Ms. Martin-Ortega stated: “Be aware of EU rules on recognition of civil judgments.”

14. In commenting on a reference in the peer review draft to efforts by victims to bring actions for products liability and other forms of corporate malfeasance, Ms. Martin-Ortega stated: “There is an interesting case in this respect in Spain against the Swedish Canadian company Boliden AB for the environmental disaster of the Aznalcollar mine, which affected the Doñana Natural Reserve in the South of Spain in 1998. The criminal case against the Spanish subsidiary, Boliden Apirsa, was dismissed in 2001. Also in 2003 the civil case brought by the regional government –Junta de Andalucía- was dismissed. In 2004 the Junta de Andalucía started an administrative procedure to recover the costs it had incurred in cleaning the waste and repairing the damage. In December 2007 the Superior Court of Andalucía (highest regional instance) annulled the administrative ruling in which Boliden had been condemned to pay 90 millions of euros alleging that the administrative jurisdiction was not the competent one and rather the case should have proceeded in civil jurisdiction. The case is now before the Supreme Court where the Junta de Andalucía is trying to reopen the administrative jurisdiction. The Supreme Court will decide whether it is the civil or administrative jurisdiction the competent one to know of the case.”

15. Ms. Martin-Ortega provided the following comment in response to a question about the test for the *mens rea* of aiding and abetting in the laws of Spain: “In Spain, *dolus* is defined as having two elements: intellectual element, this is to be aware of the actions taken and that they constitute a crime, and volitive element, to want to take such actions. In order for complicity to be considered a crime the actions need to have *dolus*, this is the accomplice must be aware of the actions of the principal actor and want them. Therefore I would say we use an intent test.”

UKRAINE SECTION:

Oksana Bilobran provided the following supplemental material on November 29, 2008:

Ukraine Supplemental response

Torture

In April 2008 following the recommendations of the Committee against Torture Ukraine has brought its definition of torture in line with the Article 1 of Torture Convention. Now According to the Article 127 of Criminal Code of Ukraine torture means willful causing of severe physical pain or physical or mental suffering by way of battery, martyrizing or other violent actions for the purpose of inducing the victim or any other person to commit involuntary actions, including to obtain information or confession from the victim or any other person, to punish the victim or any other person for something that person has done or is suspected of doing or for the purpose of intimidating or discrimination of the victim or any other person.

Crimes against Humanity and War Crimes

Ukraine doesn't use the terms "Crimes Against Humanity" and "War Crimes" in its national criminal law. Some of the crimes against humanity and war crimes, or at least the idea of these crimes have been incorporated into different sections of Criminal Code, in particular:

- Chapter XX Criminal Offences against Peace, Security of Mankind and International Legal Order, (Crimes of Propaganda of war; Planning, preparation and waging of an aggressive war; Use of weapons of mass destruction, Development, production, purchasing, storage, distribution or transportation of weapons of mass destruction, Ecocide, Genocide, Trespass against life of a foreign state representative, Illegal use of symbols of Red Cross and Red Crescent, Piracy, and Mercenaries). The broadest crime in this Chapter is *Violation of rules of the warfare*. It covers such activities as Cruel treatment of prisoners of war or civilians, deportation of civilian population for forced labor, pillage of national treasures on occupied territories, use of methods of the warfare prohibited by international instruments, or any other violations of rules of the warfare recognized by international instruments consented to by binding by the Parliament of Ukraine. Therefore such crimes against humanity as for example deportation can be qualified under the crime of Violation of rules of the warfare
- Chapter XIX Criminal Offences against the Established Procedure of Military Service (Military Offences).(Crimes of Excess of authority or official powers by a military official; Neglect of duty in military service; Omissions of military authorities (defined as Willful failure to prevent a crime committed by a subordinate, or failure of a military inquiry authorities to institute a criminal case against a subordinate offender, and also willful failure of a military official to act in accordance with his/her official duties, if it caused any significant damage); Marauding; Violence against population in an operational zone; Ill treatment of prisoners of war; Unlawful use or misuse of the Red Cross and Red Crescent symbols)
- Chapter II Criminal Offences against Life and Health of a Person, (Crimes of Murder, Trafficking in human beings and other illegal transfer deals in respect of a human being, Violation of security of residence, Knowingly unlawful apprehension, taking into custody or arrest, Knowingly unlawful apprehension, taking into custody or arrest). Though prosecution for these crimes activities is meant to protect individual human beings and not humanity as a whole.

International and non-international conflict

Due to the collision of norms there is no unanimous opinion as to whether Criminal Code of Ukraine differentiates between international and non-international conflicts. The wording of the Criminal code doesn't explicitly distinguish between crimes committed in international and non-international conflicts. But it has separate sets of crimes that criminalize similar activity:

One: Articles 433 and 434 of the Chapter on Military Offences provide a basis for criminal liability for "Violence against population in an operational zone" and "Ill treatment of prisoners of war." These crimes can only be committed by the military personnel.

Two: Article 438. "Violation of rules of the warfare" of the Chapter Criminal Offences against Peace, Security of Mankind and International Legal Order also prohibits cruel treatment of prisoners of war or civilians (setting much higher punishment than the same crime in the Military offence Chapter)

Therefore dilemma exists in qualifying the crimes of ill-treatment of prisoners of war and civilians. Some scholars suggest that such actions should be qualified under Articles 433 and 434 of the Military offences (“Violence against population in an operational zone” and “Ill treatment of prisoners of war”) if they are committed by the military personnel and in **non-international conflicts**. In all other cases, including in the settings of **international conflicts**, the violator should be prosecuted under Article 438. “Violation of rules of the warfare” since this crime comes from the Chapter aimed to protect International legal order.ⁱ

Other scholars argue that if these offences are committed by the military personnel in any conflict (both international and non-international) it should be prosecuted under Articles 433 “Violence against population in an operational zone” and 434 “Ill treatment of prisoners of war” of the Chapter on Military Offences, since these are special norms set for military personnel only. Respectively if such violations are committed by non-military personnel, in either international or non-international settings, they should be prosecuted under Article 438 “Violation of rules of the warfare.”ⁱⁱ It’s worth mentioning that if the crime is prosecuted as Violation of rules of the warfare the sentence would be much higher than if the same activity is prosecuted under the Articles “Violence against population in an operational zone” or “Ill treatment of prisoners of war.” Therefore it is clear that some revisions to Criminal Code of Ukraine should be made to correct this collision.

Universal Jurisdiction

Article 8 of the Criminal Code of Ukraine provides jurisdiction over crimes committed by foreign nationals or stateless persons residing outside Ukraine “in such cases as provided for by the international treaties.” This article establishes a Universal jurisdiction over the international crimes that are set in international treaties that Ukraine is a Party to. Ukraine’s participation in the Genocide and Torture Conventions and the 1949 Geneva Conventions, each of which binds Ukraine to either prosecute or extradite offenders on a universal basis, satisfies this requirement of Criminal Code for the application of Universal Jurisdiction principle.

Joint criminal enterprise

Instead of doctrine of joint criminal enterprise Criminal Code of Ukraine uses doctrine of complicity. According to Article 26 of the Criminal Code of Ukraine complicity is the willful co-participation of several criminal offenders in an intended criminal offense. (For more information on complicity in Ukraine see pp. 9-12 of original response).

Superior (command) responsibility

Under Article 60 of the Constitution of Ukraine Commander is liable for the issuance of “manifestly criminal ruling or order” if such illegal order is made by a commander in wartime he/she can be prosecuted under the Article 438 “Violation of rules of the warfare. Criminal Code provides for criminal responsibility of a commander for **willful** failure to prevent a crime committed by a subordinate, or failure of a military inquiry authorities to institute a criminal case against a subordinate offender, and also willful failure of a military official to act in accordance with his/her official duties, if it caused any significant damage (Article 426. Omissions of military authorities).

In case when a commander neither issued an illegal order nor willfully failed to prevent a crime committed by a subordinate, but failed to control his subordinates and **unwillingly**

failed to prevent a crime he/she can be prosecuted for Neglect of duty in military service (Article 425 of Criminal Code).

ⁱ See Valentyna Myronova, *Improvement of Criminal Law about Liability for Violation of Rules of the Warfare*, Magazine of Applicable Science #15, available at http://mndc.naiu.kiev.ua/Gurnal/15text/g15_25.htm, last visited 11/29/08.

ⁱⁱ See M. Melnyk and M. Havronyuk, *Scientific and Applicable Comment to Criminal Code of Ukraine*. Third Edition, 2005.- p. 999