INDONESIA

SURVEY QUESTIONS & RESPONSES[1]

Survey conducted as part of *Commerce, Crime, and Conflict: A Comparative Survey of Legal Remedies for Private Sector Liability for Grave Breaches of International Law And Related Illicit Economic Activities.*

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?**

The relevant statutes for disclosure obligations are the Indonesian Company Law No. 20 of 1995 and the Capital Markets Law No. 8 of 1995 with related regulations. The Capital Markets Law imposes certain disclosure obligations, but its reach is limited to the extent it only applies in practical terms to listed companies. Most enterprises in Indonesia are private companies, with the result that the Capital Markets Law disclosure obligations are inapplicable. For private companies, the disclosure question would probably arise indirectly in connection with accountants' financial reports on company

[1] The initial responses to this survey of Indonesian law were provided by Harkristuti 'Tuti' Harkrisnowo, Faculty of Law, University of Indonesia and Professor David K. Linnan, USC School of Law, University of South Carolina. The contents of this survey response are intended for research purposes only and continue to be revised in light of peer review. The contents of this survey response are in no way intended as comment on specific cases or judgements, nor are they intended as legal advice on any of the issues covered. Due to constraints of space, many responses in this text provide only a basic introduction to the issue and the complexities of specific cases or provisions may not be fully explicated. Readers seeking practical legal advice should consult a lawyer in the relevant jurisdiction. Citations and references to this survey response should adhere to the following format: "Survey Response, Laws of Indonesia (Harkristuti Harkrisnowo and David K. Linnan), 'Commerce, Crime and Conflict: A Survey of Sixteen Jurisdictions' Fafo AIS, [date accessed] 2006". The contents of this survey response are published by Fafo AIS under a Creative Commons Attribution-Share Alike 2.5 License.

results delivered annually in conjunction with the annual shareholders' meeting (also required for listed companies). In practical terms, the accounting treatment of contingent liabilities and the like leaves a great deal of flexibility in terms of recognizing potential liabilities. It would be relatively unusual that knowledge of pending proceedings or potential legal violations might first come to shareholders in such fashion. Similarly, detailed expenditures at the level of government payments would typically be buried in general accounting entries. Either shareholders would learn of them as active business partners, assuming they are significant shareholders, or they probably only learn of them from the media as minority or small shareholders, assuming the issues at hand are highlighted in the media. The 1995 Company Law does contain provisions for the theoretical protection of minority shareholders, but in practice they are difficult to enforce so that minority shareholder protection is only a practical concern for listed companies, and then only to a limited extent. The question assumes an economic and legal framework on par with Western countries, as well as the idea that legal disputes are regularly resolved before the courts, which is not primarily the case in Indonesia. This reflects arguably both inadequacies with formal law enforcement, but also the idea that dispute resolution as a social issue may be better accomplished via a voluntary or negotiated resolution, as opposed to presenting a dispute to a neutral third party for binding adjudication.

That having been said, for listed companies in Indonesia, disclosure of information is available under capital markets regulations promulgated by the Capital Market Supervisory Agency (Bapepam), and various parallel listing regulations of Indonesian stock exchanges as self-regulatory organizations (SROs). Bapepam is in charge of implementing the provisions of Law No. 8 of 1995 on Capital Markets. Given overlapping disclosure obligations, traditionally to a great extent the SROs and Bapepam each insist that the other confront issuers in cases of insufficient disclosure.

Please see: http://www.bapepam.go.id/hukum/peraturan/index.htm

Bapepam is a subsidiary department under the auspices of the Ministry of Finance, thus is not an independent regulatory agency as with other institutions (e.g. the Indonesian Central Bank). Bapepam is organizationally separate but technically still a department of the Ministry of Finance.

The types of information that should be disclosed areas follows:

a. merging the business, buying shares, consolidation, establishing new joint company;
b. stock split or paying dividend;
c. obtaining huge dividend;
d. obtaining or losing important contract;
e. new product or innovation;
f. changing of controller shareholder or changing in management;
g. announcement of buying back or paying back bonds;
h. selling the addition shares to public or selling the limited shares privately in significant amount;

i. selling or losing the assets significantly;
j. important disputes with employees;
k. important litigation against the company or director or commissioners of the company;
l. launching offer to buy other company's share;
m. replacing company's auditor;
n. replacing trustee;
o. changing of fiscal year.

There are a variety of subsidiary Bapepam rules governing the right to obtain information in primary and secondary market transactions, but these are aimed at guaranteeing the integrity of the capital markets rather than governing corporate behavior as such.

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

Indonesia as traditional civil law jurisdiction inherited Continental public law views that government dealings and civil servant activities are generally confidential as a formal legal matter. There has not been a tradition of transparency in government despite some movements in that direction following our 1998 change in government (after 32 years of authoritarian New Order government under President Suharto). Starting around 2000 certain civil society elements with the support of foreign law reformers pushed adoption of freedom of information act legislation generally patterned on US FOIA models, which culminated in a bill to that effect being introduced in parliament in 2004. However, the bill did not become a law, and called up in response proposed counter-legislation along the lines of an official secrecy act (also not adopted to date). However, focusing on a FOIA-equivalent may be misplaced for two reasons. First, media is active even in the absence of a FOIA-equivalent, so the underlying issues quite often become known, even though they may be dealt with differently. Secondly, the Indonesian version in the government context of oversight tends to take place via certain anti-corruption and general auditing bodies (Badan Pemeriksa Keuangan or Financial Investigative Agency; BPK has a traditional audit function for government expenditures) as well as special national commissions (Komisi Pemberantasan Korrupsi or Commission for the Limitation of Corruption; KPK is a relatively recent addition to Indonesian government) rather than via the legislative branch. Oversight is then subject to the quality of the oversight body's personnel, but takes place formally within the bounds of confidentially, subject to the oversight body publicizing its results in a public report.

II. <u>Status of business entities under criminal law in Indonesia.</u>

3. Does your penal code (or judicial interpretations thereof) provide that business entities may be prosecuted criminally for violations of such code?

The present Indonesian Penal Code, which was stipulated during the Dutch colonial period in early 1900, does not recognize the legal entity as a subject of criminal law.

However, in 1955 Indonesia enacted a Law on Economic Crimes (Law No. 7/Drt/1955), which allows a legal entity to be subject to criminal liability. However, seldom has this provision been implemented, for when a legal entity is alleged as having committed a crime, in most cases, it was the director or the person on charge who was brought to court and sentenced.

Such practices continue even when several laws were enacted since the 1980s which include a legal entity as a subject of criminal law. These laws include but are not limited to:

- Law No. 4 of 1982 on environment (which was amended by Law No. 23 of 1997)
- Law No. 5 of 1997 on Psychotropic Drugs
- Law No. 22 of 1997 on Narcotics
- Law No. 10 of 1998 on Banking, Law
- Law No. 31 of 1999 on Corruption as amended by Law no. 20 of 2001
- Law No. 15 of 2002 on Terrorism
- Law No. 23 of 2004 on Child Protection
- Law No. 15 of 2003 on Money Laundering

There is currently a relatively unusual case pending under Law No. 23 of 1997 involving the Indonesian mining joint venture of the multinational Newmont Mining, which in Buyat Bay, North Sulawesi pumped offshore certain gold mine wastes (see further discussion at # 12). The wastes allegedly contained toxic levels of a variety of poisons, which caused illness in a local fishing village. There have been conflicting reports regarding causation, and concerning the factual premises of the case see online streaming video of the Feb 3, 2206 presentation of Dean Marsudi Triatmodjo, UGM at http://www.lfip.org/barnes/2006/video/video.htm. There were actually two cases brought against Newmont, a civil case before a Jakarta court (eventually settled after dismissal for U$30 million) and 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 a conviction will result in the pending criminal proceeding. It would be more typical for such matters to be resolved outside the criminal process, and local public opinion favors economic settlement or compensation over retribution. The criminal prosecution of the director would be viewed as a complication for foreign investment, so that its resolution may be equally tied to the eventual disposition of the corporate prosecution.

4. What type sanctions are applied to business entities, as opposed to natural persons?

Penal sanctions applicable to business entities:

- Fines
- Injunction orders
- Restitution
- Forfeiture
- Liquidation of a business entity.

Imprisonment, of course, cannot be inflicted upon a business entity.

Since many of the recent laws have included corporations as 'persons' subject to criminal procedures and penalties, the latest Bill on Revision of the Penal Code (as of 2005) has included corporations as subjects of criminal law.

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?**

As of today, there is no objective set of standards or criteria that are commonly held by the judiciary. As such, alike cases may yield different results, in accordance with the knowledge of the officers of the courts, i.e. the judges.

This issue has been on the agenda of many legal professionals, however, until today no agreement has been reached as to what criteria should be met in order for a business entity to be sentenced for a violation of a criminal provision.

Even in the academic community, the debates have not been resolved. The following questions are the major issues:

1. whether the position of an employee who commits the wrongdoing is a determining factor?
2. whether the degree of the guilt (intentional or negligence) should be put into account?
3. whether the scope of the action committed is within the boundary of the company's charter?

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)?

Indonesian Penal Code has a number of what we call accomplice like provisions, which may not be similar to the ones in other countries (except the Netherlands, for our Penal Code is a legal inheritance of the colonial era while we were colonized by them)

Article 55 of the Penal Code stipulates that:

(par. 1) Sentenced as perpetrator(s) of a criminal acts are:

1º. those committing, forcing others to commit, and or those jointly committing a criminal act;

2º. those by giving or promising, by abusing their authority or dignity, by violence, threat or misleading, or by providing opportunity, means or information, intentionally 'persuades' others to commit a criminal act.

(par. 2) The 'persuader' is criminally liable only for those crimes he or she persuades, and effects thereof.

Notes:

Forcing other to commit a crime carries a consequence that the person forced is NOT subject to penal sanction. For the forced person, this condition serves as a legal excuse that would relieve him/her of any legal responsibility completely.

a. the intention to commit a criminal act comes from the person who 'forces' another to do it'

b. the means of forcing are not limited, however, these means constitutes EXCUSES to those forced to commit a crime (duress, deception etc).

c. the 'forcer' does not physically commit the criminal act

d. the forced person fulfills all elements of the criminal act

e. only the 'forcer' is subject to penal sanction, and the 'forced' person is not.

Jointly committing a criminal act requires the following criteria:

a. both (or more) parties have the same intention to commit a particular criminal act;

b. there are physical cooperation (which also means that each person does not have to fulfill all of the elements of crime; instead both of their actions do fulfill the elements of crime)

c. both are subject to the same penal sanction,

Persuading others to commit a criminal act:

a. the intention to commit a criminal act comes from the persuader

b. the means of persuading are limited to those specified in par 1 point 2

c. the persuader does not physically commit the criminal act

d. the persuadee fulfills all elements of the criminal act

e. both the persuader and persuadee are subject to the same penal sanction

Article 56.

Sentenced as aides of a crime are:

1°. those intentionally providing assistance during the commisiion of a criminal act

2°. those intentionally providing opportunity, means or information to commit a criminal act.

Notes:

The difference between par (1).2 of Article 55 in comparison with Article 56.2, is that in Article 55, the 'persuader' does not commit a crime by him/herself, but he/she makes another person (the 'persuadee') do that. In addition, both the persuader and the persuadee are subject to the same penal sanction. While in Article 56, the aide merely assist the perpetrator in the commission of the crime (before or during), thus the aide is subject to 1/3 reduction of the sentence, while the perpetrator is not. Moreover,even if a persuader failed to persuade somebody to commit a crime,and the crime is not carried out, the persuader is still subject to criminal liability (this is stipulated in Article 163 bis of the Penal Code).

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?

Due to the lack of development in this very area, there is no easy way to answer this question. As mentioned before, the decision to bring a business entity to court alone could bring a lot of debates among the law enforcement agencies. Indonesian law would not favor parallel civil law (torts) treatment, because such an approach is foreign to us (see answer # 12).

In most cases, presumably the decision whether or not to prosecute a business entity instead of a person in charge of that business entity depends on the magnitude of the harm or injury resulted from the criminal act. This however, is not to be taken as a general agreement, for no research has been conducted.

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.

Indonesia is not as yet a party to the Rome Statute, although there are some discussions about joining. As of today, Indonesia has incorporated a) genocide and b) crimes against humanity into Indonesian domestic criminal law. Based on Law No. 26 of 2000 on Human Rights Court, genocide, crimes against humanity were stipulated as Gross Violation of Human Rights that deserve a special procedure and special judiciary. This Law borrows many concepts (substantive and procedural) from the Geneva Convention as well as the ICC. However, war crimes and crimes of aggression are not included in this law.

The special criminal procedure includes:

a. The pre-investigating power rests not with the police as is found in ordinary crime cases, but with the National Human Rights Commission

b. The Attorney General's Office is vested with the power to investigate AND also to prosecute.

c. Rules of evidence have been elaborated from the regular rules of evidence, for example it stipulates an additional evidence unknown in the regular Law of Criminal Procedure.

In terms of substantive criminal law, several issues worth mentioning are:

a. This law allows for the prosecution of genocide and crimes against humanity committed before the promulgation on this law (thus serving as an ex post facto law), although it requires endorsement form the legislature (Article 43 of the Law). This is an exception with regard to the principle of non-retroactivity stipulated in the Indonesian Constitution. Accordingly, this provision has been used several times to deal with East Timor and Tanjung Priok cases;

b. the concept of command responsibility has been incorporated, not only to military commander, but also to those civilians acting as commanders;

c. unlike other recent criminal laws, this law does not recognize corporations as a subject of law, hence a corporation cannot be charged with gross violations of human rights.

A special judiciary is created under the umbrella of the court of general jurisdiction. The special court established for this case consists of both regular judges and ad-hoc judges who were selected exclusively for this. For past gross violation of human rights occurring in a specific time, the court is to be established through a Presidential Decree, after the legislature has given their approval. The East Timor cases trials (12 of them) have found the individuals guilty, but the Supreme Court as reviewing instance ruled that these people be acquitted

Indonesia has also enacted a Law on Terrorism, and this law also carries some exceptional provisions such as on the issue of non-retroactivity, the exceptional rules of evidence etc.
http://www.state.gov/g/drl/rls/hrrpt/2004/41643.htm

http://www.eastwestcenter.org/events-en-detail.asp?news_ID=188

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?

Not applicable, because Indonesia is yet to adopt the Rome Statute.

10. Do your criminal courts have jurisdiction over those international crimes that have not been incorporated into your domestic law?

No, according to our Penal Code the jurisdiction of our court in criminal matters is limited to those crimes stipulated in our national law only.
Based on legality principle in Indonesian Penal Code Article 1, Indonesia courts only have jurisdiction over those crimes that have been incorporated into domestic law.

Two obstacles in particular pose the greatest threat to effective prosecutions. First, the Indonesian People's Consultative Assembly (MPR) passed a constitutional amendment in August 2000 (Article 28(I) of the Indonesian Constitution) enshrining the principle of non-retroactivity in Indonesian law, thus superseding Article 43 of the Law no. 26 of 2000. Second, the Indonesian Criminal Code does not contain provisions for collective responsibility.

The principle of non-retroactivity prohibits a government from prosecuting its citizens for acts that were not crimes under domestic law when they were committed. Article 28(I) of the Indonesian Constitution reads, "the right not to be charged on the basis of retroactivity is a basic human right that may not be breached under any circumstances" (emphasis added). Thus, even if the Indonesian Parliament were to enact legislation recognizing crimes against humanity, such legislation could only apply prospectively. In other words, Indonesia would still be precluded from prosecuting those individuals who committed past grave human rights violations.

The Indonesian Criminal Code also precludes such retroactive prosecutions. Article 1 of the Indonesian Criminal Code provides that an offense can only be prosecuted under a law that existed at the time the offense was committed. Thus, it is likely that Indonesian-led prosecutions would be limited to prosecuting alleged suspects for "ordinary crimes" as defined in Indonesia's Criminal Code. For instance, it is likely that past systematic mass murder would be tried under Article 340 of the Indonesian Criminal Code, which deals with premeditated murder and is punishable by the death sentence or life imprisonment, and torture would be tried under Article 355, which deals with premeditated attempts to cause serious injuries (grave assault) and is punishable by a maximum sentence of 12 years in prison. A more disturbing scenario is that there are certain crimes, such as forced displacement of persons, which cannot be prosecuted at all under the Indonesian Criminal Code.

The Indonesian government has yet to revise its domestic law to include provisions that would facilitate the prosecution of senior police and military officials for the crimes against humanity committed by those under their command. Although Indonesia has indicted some senior military officials and militia leaders, it is unclear when and how

they will be prosecuted. Failure to prosecute those in command contravenes the principle of collective responsibility, which the international community has recognized since the Nuremberg trials as a general principle of modern international 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?

The answer is largely no. In the case of international crimes comprising gross violations of human rights (torture, extra judicial killings, etc.), they are not subject to prosecution because Law No. 26 of 2000 specifically applies only to individuals. For other international crimes such as money-laundering, drug trafficking and terrorism a business entity could be prosecuted. With the exception of potential responsibility under such special laws, business entities cannot be prosecuted for international crimes in the Indonesian courts, because Indonesian courts would limit their jurisdiction to alleged suspects of "ordinary crimes" as defined in Indonesia's Criminal Code which is considered general law not recognizing criminal responsibility for entities .

With regard to the Convention Against Torture, we have ratified with Law No. 5 of 1998. However, it was not followed by any implementing regulation, for the Convention lacks both the sanction and legal procedures to deal with its violation. Moreover, this Convention does not include corporations as its subject

There is no provision in the Indonesian legal system that could be used to invoke international law.

IV. <u>Alternative Mechanisms</u>

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)?

Indonesia does not recognize the concept of tort in the common law sense, and so does not normally incorporate international law violation claims into domestic civil suits. Thus the only mechanism available for anybody who wants to sue individuals and or business entities is Article 1365 Burgerlijk Wetboek or the Civil Code. This article is probably the closest form to tort, for it allows a person to sue other for 'illegal behavior' which may cover any kinds of misdeeds. However, following civil law models generally, Indonesian legal scholars and law would disfavor the kind of broad interpretation of torts law involving directly or indirectly private attorney general concepts like punitive damages (instead, only economic damages would be recognized). Tort-like concepts are not employed for regulating behavior in a public law sense, but only narrowly for compensation in proven cases of economic loss (which is an unusually high burden to meet in a practical sense, given that litigation itself is not necessarily the first recourse).

To my knowledge, there has not been one case of private litigation that reached the court where international crimes become the foundation of such legal action.

In addition, the Indonesian legal community has a convention that if a criminal case is simultaneously brought to the civil court in conjunction with Article 1365 above, the disposition of the criminal court must comes first. Without a criminal court's verdict, no civil litigation would proceed. This convention has no basis other than accepted judicial practice.

There may be an implicit assumption in the question, that civil suit or remedy means private remedy or suit (meaning controlled by an individual or NGO, as opposed to by the government). The answer for private law suits is that they typically are not 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.

The first involved the Indorayon Pulp Mill located in North Sumatra, which was originally built by local investors starting 1983 as New Order investment project. Its operation involved significant pollution from the pulp mill to the extent that local villagers traditional livelihood was endangered by adverse effects on the local environment. The New Order government took no action initially, despite flagrant violation of environmental standards. A leading environmental NGO named Walhi then brought suit against Indorayon and five governmental departments in 1988 under the 1982 Environmental Law on account of the pollution, and the court seemed to accept the view that Walhi had standing to sue despite the lack of a statutory basis, except then it inexplicably found environmental damage not proven, undercutting the whole process. Thereafter, Walhi brought a series of suits against other Indonesian pulp industry plants apparently mimicking international NGO challenges to the paper industry's dioxin pollution, except none of the litigation challenges resulted in favorable court decisions. Then in 1998, the local community effectively shut down access to the Indorayon Pulp Mill for four months by denying entrance to truck when their long-running frustrations overflowed in the immediate aftermath of the New Order regime's end in 1998. Further violent confrontations ensued, with the only problem being that shutting down the pulp mill precluded servicing its debt in the hands of international investors. The pulp mill was closed from time to time 1998-2002, essentially in a contest pitting local public order against concerns about foreign investment under circumstances where several local people died, then the pulp mill reopened under another name. To the extent changes were achieved in Indorayon's operations, they reflected violent social conflict rather than success in litigation

The second involved repeated attempts reaching back to the 1990s to challenge alleged pollution at the Grassberg gold mine of Freeport-McMoran Mining, Indonesia's premier foreign investment project of the New Order era. However, these attempts to challenge the project judicially within Indonesia all failed, as did the parallel ATCA suit brought against Freeport in New Orleans. The problem within Indonesia was that the government was not inclined to attack its premier foreign investment project, while prior to Law No.

23 of 1997 there was no statutory recognition of class actions or similar forms of standing enabling a private legal action.

The third involves Newmont Mining's Buyat Bay project previously mentioned under # 3 as elucidated by Marsudi Triatmodjo. On the facts, the Indonesian Environment Ministry submitted a civil lawsuit to South Jakarta District Court in March 2005, demanding the company's subsidiary PT Newmont Minahasa Raya (NMR) and its president director Richard Ness pay compensation of $117.68 million for lost income and environmental damage and Rp150 billion ($16.3 million) for damaging Indonesia's reputation. The South Jakarta District Court threw out the lawsuit in November 2005, ruling that under the terms of the government's contract with NMR, any dispute must be settled through international arbitration or conciliation. The matter was then settled via the U$30 million settlement, and so the government's appeal on the civil side was dismissed.
Separately, NMR and Ness have been on trial criminally since August 2005 on charges of polluting Buyat Bay with toxic tailings waste from the now exhausted gold mine. The charges are based on police accusations that the company pumped potentially lethal amounts of mercury and arsenic into Buyat Bay, near its mining site in Minahasa regency, causing local villagers to suffer skin diseases, neurological disorders and other health problems. If convicted under the Law No. 23 of 1997's Article 41 on intentionally or negligently polluting the environment Ness could face up to 10 years in prison and NMR could be fined up to Rp500 million ($78,000).

Newmont has consistently denied any wrongdoing, saying its waste was treated in accordance with Indonesian government regulations and suggested the Buyat villagers could have fallen ill due to malnutrition and poor sanitation. It has also been said that the operations of thousands of illegal miners, who use mercury, could be to blame for any mercury-related illnesses. Separate studies by the Indonesian Environment Ministry, Health Ministry, World Health Organization, Japan's Minamata Institute and the Australian Commonwealth Scientific and Industrial Research Organization have all concluded that Newmont did not pollute the bay. However, a police investigation found significant levels of mercury. A subsequent joint probe by Indonesian government officials, university professors, activists and police also concluded the bay was polluted with excessive levels of arsenic and mercury.

As noted under #3 above, based on past practice, it is premature to conclude that a conviction will result in the still pending Newmont criminal proceeding. It would be more typical for such matters to be resolved outside the criminal process, and local public opinion favors economic settlement or compensation over retribution. The criminal prosecution of the foreign executive would be viewed as a complication for Indonesian attempts to attract foreign investment, so that his resolution may be equally tied to the eventual disposition of the corporate prosecution.

The final (potential) case, which is yet to be brought but where environmental activists are lobbying hard currently for prosecution under Law No. 23 of 1997, involves the so-called mud-flooding since May 29, 2006 in Sidoardjo, a village located alongside a highway close to Surabaya, Indonesia's second largest city located on Java. The Sidoardjo situation is commonly considered an environmental and human disaster, which has as of

August 2006 displaced approximately 12,000 people from their homes and closed a major highway. The problem arose in conjunction with a domestic oil and gas concern drilling close to the village, but allegedly because of manner in which the drilling was conducted they struck toxic mud rather than petroleum products. The mud has welled out of the drill hole uncontrollably ever since, covering the highway and residential areas. This has continued for over two months, during which period various suggestions have been made to deal with the situation in terms of remediation and compensation, which discussions have risen high enough to engage the Indonesian Vice-President. After two months, remediation seems problematic as resolution for the Sidoardjo situation.

Despite environmentalists' lobbying for criminal prosecutions in the Sidoardjo situation, it seems highly unlikely given that domestic companies involved with the drilling venture (but not the operator doing the drilling itself allegedly in a negligent fashion) are affiliated with high government officials. Instead, the assumption is that matters will eventually be regulated in terms of negotiated compensation. This would follow the consistent practice that paying compensation in a negotiated settlement, rather than following a civil judgment, much less a criminal conviction, is the commonest and best outcome to be hoped for in high profile environmental incidents. Indonesians would probably not distinguish between multinationals and local enterprises in this regard, except that MNCs may be more susceptible to a political or press campaign than significant local enterprises with the scale to engage in major natural resource projects presenting significant environmental challenges.

V. <u>Jurisdiction and related issues</u>

13. On what bases do the courts of your country assert personal jurisdiction over criminal and civil defendants?

Jurisdiction of the court is based on locus delicti for criminal case (i.e. where the crime is committed), and for civil case, it would be based on the residence of the defendant and locus of the claim being within Indonesia. Jurisidiction is typically not a great concern beyond what US lawyers would consider venue, because Indonesia is a single unitary jurisdiction, rather than a collection of multiple federal jurisdictions.

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?

Since business entities alleged to have committed international crimes (gross violation of human rights) are beyond the jurisdiction of Indonesian court, this issue is not regulated by any Indonesian laws. Further, jurisdiction would be excluded in cases involving alleged violations outside Indonesia (due to ideas normally about territoriality and jurisdiction, even without regard to the problem that we would not assimilate the international law violation to a domestic law violation). The question seems to assume application of an agency or similar theoretical approach based on control of the local subsidiary to extend liability from the violations within Indonesia committed by the local

subsidiary to the foreign parent company located overseas. Such theories are not currently accepted as a matter of civil and criminal law doctrine. To the extent the question arose, it would be dealt with most likely as a matter of diplomatic representations via the executive rather than via judicial process. The parent may have initially investigated the proposed business activity directly, but the business or foreign investment license was presumably granted to the local subsidiary or joint venture, with the result that the parent company would not normally be considered to be involved in terms of doing business by the time local operations actually commence and eventually result in some kind of violation.

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

Please refer to answer for question 14,

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?

Indonesian Penal Code does have stipulation for persons committing crimes outside Indonesia, based on a Passive nationality (where the interest of the state is violated), and active nationality doctrines (where the perpetrator is Indonesians committing a crime outside Indonesia).as ruled by Articles 4 (Indonesian and non-Indonesians) and 5 (Indonesian)

This stipulation serves as a general rules for all crimes, unless a particular Law specifically exempted that rule. This rule of course applicable to all the crimes prohibited in Laws reiterated in Answer #. 3, but not beyond them.

As of today, Indonesia has not been successful in bringing lawsuits against the criminal in the above Laws

In the case of a civil suit where the cause of action is centered abroad (for example, an Indonesian company violates its lease in Hong Kong), Indonesian courts would not entertain such a case since it would be regarded as a matter for foreign courts in the jurisdiction where the cause of action arose.

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?

In the public interest environmental law area specifically, the chief problem prior to Law No. 23 of 1997's recognition of class action status for environmental suits was that of standing itself. However, class action status has been recognized now by statute in the consumer protection and environmental areas. More generally, there may be problems with a court refusing jurisdiction in cases involving an entity under a contract containing an arbitration clause (as in the Newmont Mining civil suit discussed under # 3 and # 12 above).

In a broader sense the question is difficult to answer, because it assumes a litigation orientation in terms of resolution of technical procedural issues as preliminary to resolution of substantive issues. Traditionally, even Indonesian businessmen go to great lengths to avoid the courts. They are often considered corrupt institutions, with the result that outcomes are viewed as unforeseeable. The most accurate description of practically any litigation in Indonesia in areas like the environment or human rights from a Western perspective is that it is filed more typically as part of an integrated publicity campaign seeking an eventual political resolution based upon public pressure. But the resolution in that case is likely to come from a body like a government ministry, because when you assume orientation towards the substantive law provision and courts, that assumes Indonesians look to resolve their disputes before courts like Westerners. It may be more accurate to characterize dispute resolution generally in Indonesia as revealing a preference for political rather than judicial dispositions. If your chief goal is to achieve publicity rather than a judicial resolution, filing the litigation may accomplish most of your goals, regardless whether your lawsuit eventually succeeds. It is not uncommon for NGOs and similar organizations to file lawsuits claiming a basis in foreign models, but success in court is not necessarily the primary goal and so it is difficult to address in terms of the details of civil procedure. Presumably, the character of individuals or organizations bringing litigation as non-Indonesians would not be favorable to conducting a publicity campaign oriented towards Indonesian public opinion. Using a local NGO may be problematic too, to the extent that they are often criticized as pursuing foreign rather than Indonesian priorities in certain areas, which may undercut their own efforts to channel local public opinion in individual cases.

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*)?

Major foreign investment and similar contracts typically contain arbitration and choice of forum provisions mandating dispute resolution outside Indonesia, so that local cases involving complex multi-jurisdictional aspects which might be appropriate for *forum non conveniens* are exceedingly rare. To the extent such cases arise, they typically have involved attacks on foreign arbitration or jurisdiction clauses in multinational dispute resolution, in which case the local party insists on local jurisdiction regardless of where witnesses, etc. are available. This use of local jurisdiction as sword is more typical than discretionary dismissals, although as a matter of doctrine courts differ over whether a case must be heard once it is filed locally (which issue has arisen post-1998 creation of a special commercial court, where judges have addressed the issue in the context of suits still being filed in the courts of general jurisdiction despite certain cases like insolvency being mandated for the new commercial court). The closest thing to an Indonesian case involving a *forum non conveniens* dismissal involved a labor matter concerning a Swiss expatriate manager who signed a labor contract in Switzerland with a Swiss pharmaceutical company for work at its Indonesian operations. The Swiss manager came to Indonesia but was eventually fired, whereupon he filed an action in Jakarta. The judge dismissed the suit claiming no jurisdiction because of the idea that the Swiss manager, the

Swiss employer and the contract governed by Swiss law were all in Switzerland. However, that case dismissal has been strongly criticized as incorrect, because of Indonesian labor law provisions mandating the application of Indonesian law to all employment relations on Indonesian soil.

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?)

In practical terms the answer is no, that it is not possible to force a review in the case of a non-prosecution decision. The practical concern in ordinary non-prosecution cases is whether bribery or corruption might be involved, so that the focus is typically not on formal review in any case.