

**A Comparative Survey of Private Sector Liability for Grave Violations of
International Law in National Jurisdictions**

Survey of Selected Countries

Overview of Survey Instrument and Goals

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 legislation 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 misconduct of the private sector 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 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 example, is being 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.

Of particular value would be legal authority that allows for civil or criminal legal action against business entities that violate, conspire to violate, or aid and abet others in violating, international humanitarian law in war zones, including war zones in developing areas of the world.

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.

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. Similarly, citations to relevant cases and statutory or code provisions would also be helpful.

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.

DEFINITIONS OF TERMS

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

The term “**business entity**” refers to a broad range of 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 “**international law**” for the purposes of this survey refers to certain grave violations of international 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. Please also provide the relevant text of those provisions. Similarly, whenever possible, please provide the full name and citation to any court cases to which you refer.

SURVEY QUESTIONS

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

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

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 including the text of, and 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 the text of 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.

2. 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? and;
 - 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 (means rea) was present?

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. 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) and (b) of this question by describing the legal test that must be met in each case and by providing either a copy of a recent appellate court decision that applies the test or a current penal code provision that contains the test together with a complete citation. If the standards are different where the proceeding involves a violation of international law please provide an appropriate explanation of the differences.

3. Under your criminal code (penal law), what is the legal standard for convicting someone of 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. law, the term for this is “**aidor and abettor**” **liability**. Another term used is **complicity**. We would also like to know if the laws of your jurisdiction provide that persons may be found to be conspirators if they have plotted with another to commit the crime, even if the crime is ultimately not carried out.

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 copy of a recent appellate court decision in which such concepts are applied or the provisions of your penal code that contain such concepts, along with full citations.

4. Are there any other special elements not required in the conviction of a natural person that must be present when the defendant in a criminal proceeding is a business entity?

Comment: We would like to know if the laws of your country contain provisions, not addressed above, that apply uniquely to prosecutions of business entities. Please discuss any such provisions and include, where necessary to present a reasonably complete explanation of such provision, a recent court decision in which each such provision is applied or the provisions of your penal code, which pertain, along with full citations.

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

5. May an individual be prosecuted for violations of international law in the courts of your country?
6. May a business entity be prosecuted for violations of international law in the courts of your country?

Comment: You may provide complete answers to Questions 5 and 6 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 enumerated in a statute or code provision. 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.

III. Alternative Mechanisms: Civil Law/Tort

7. 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 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 civile proceeding in certain civil law jurisdictions.

8. What types of causes of action might be asserted against a business entity with respect to actions committed outside of your country but which involve a business entity that is domiciled in your jurisdiction?

Comment: We are interested in knowing of any examples where a domestic business entity has been held accountable for actions taking place outside of the county. 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 authorities providing the basis for the proceedings involved and to any published decisions.

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 so that the plaintiffs would not have access to legal counsel if the case were dismissed and had to be brought in South Africa.

IV. Jurisdiction

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

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. In describing each form of jurisdiction, please provide us with the text of the statute(s) or judicial decisions, which provide for such jurisdiction, along with complete citations.

10. 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.

11. Do the courts in 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. If they do, please provide the text of a recent appellate court decision in which such a doctrine was applied or the text of a code provision which contains the legal test for application of such a court decision or code provision to any of the above questions be different?

12. Would the doctrine of sovereign immunity be applicable to protect a state-owned enterprise?

Comment: State-owned enterprises may sometimes assert sovereign immunity when sued in either foreign or home courts. The courts' decisions regarding this assertion may turn on whether the activity involved was commercial in nature, as opposed to the exercise of a governmental function. How have the courts of your jurisdiction dealt with such assertions? 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 authorities for the relevant decisions. If no cases have yet arisen, how would the courts treat such an occasion were it to arise?