



Commentary On the Legal Responsibility of Economic Actors for Violations of International Humanitarian and Criminal Law

Summary

This *Commentary* is an attempt to provide greater clarity and definition as to the liability under international law created by this sort of behavior. It enumerates the types of conduct that constitute breaches of international humanitarian or criminal law and outlines the relevant jurisprudence, both national and international. The *Commentary* is one part of a larger research project which includes *Surveys* of five national jurisdictions and an executive summary based on both the *Commentary* and *Surveys* entitled *Business and International Crimes*. All this material is available via the web on www.fafo.no/liability.

The *Commentary* sets forth examples in which business entities have been sued or prosecuted for crimes that constitute breaches of international humanitarian law or international criminal law. It also provides a summary of cases involving individual economic actors who have been prosecuted for such offenses. This provides the reader with an understanding of how business entities and their employees (or management) might be held legally responsible for violations of the relevant international law. By compiling the law and illustrative cases, the survey provides a comprehensive picture of the type of conduct that should be prevented and/or prosecuted after the fact when businesses are operating amidst conflict and violence.

The *Commentary* is meant to serve as a guide for all of those interested in further defining the rights and responsibilities of economic actors in conflict zones, including victims and affected communities, lawyers and legal researchers, advocates and campaigners, and businesses large and small.

- For researchers, the commentary provides a comprehensive examination of the ways in which business entities have been implicated, to date, in grave breaches of international law.
- Business associations, governments, and nongovernmental organizations (NGOs) working with the business community can begin to fashion guidance and other types of risk assessment tools that factor in the types of conduct described in this commentary.
- Communities affected by the kinds of violence controlled by the laws enumerated here, as well as NGOs and others advocating new policies of

accountability, voluntary guidelines or binding international instruments, may find the Commentary a useful tool.

Together with the *Surveys* of national jurisdictions, the Commentary may contribute to the consideration by Member States of the expansion of the jurisdiction of international institutions, such as the International Criminal Court, to include legal persons; or contribute to consideration of new instruments to deal with business participation in grave breaches of international law.

Framing the Issues

In conflict zones, individual perpetrators (e.g. government soldiers or armed rebels) may inflict harm on civilians that amounts to violations of international humanitarian law (IHL) or international criminal law (ICL)—namely war crimes, crimes against humanity, torture, genocide, or enslavement (forced labor). Crimes against humanity and genocide may also be committed in dictatorships or insurgencies, but in the absence of war. Individual perpetrators may be prosecuted later for such conduct in an international war crimes tribunal, such as the International Criminal Court (ICC), or in special purpose courts such as the ad hoc tribunals established for the former Yugoslavia and Rwanda, or the Special Court in Sierra Leone.

When business entities operate in conflict zones or in repressive states, they run the risk of becoming implicated in violence, including participating in the criminal activity of others. German and Japanese industrialists, for example, became entangled in the criminal activity of their governments during the Second World War. At Nuremberg, prominent German industrialists were prosecuted for war crimes, including the use of forced labor in their factories, plunder and the exploitation of property in occupied territories, and the provision of the deadly gas for use in the death camps. Similarly, a British military tribunal prosecuted Japanese mining officials as part of the Far East war crimes trials.

Unfortunately, this sort of behavior continues today. For example, a United Nations Panel of Experts identified a group of multinational enterprises alleged to have participated in some way in the plunder of natural resources in the Democratic Republic of the Congo (DRC). The reports also painted a detailed picture of the role of companies, both local and multinational, in the networks built to facilitate the exploitation of the DRC's natural wealth and the supply of combatants involved in the war. In the DRC, this relationship between plunder and exploitation helped sustain wars at the turn of this century that resulted in the death of over three million people due to violence and war-driven famine and disease.

The Commentary is organized around the definition of predicate offences, so as to provide a guide to the concrete definitions of the types of business entity conduct that are potentially actionable via prosecution before a domestic court or an international tribunal. These predicate offences are actions by, for example, individual entrepreneurs or businesspersons that constitute direct violations or violations as an accomplice to the actions of others.

In the jurisprudence to date, the most frequently found violations of IHL/ICL committed directly by business entities include:

- Use of forced labor/enslavement (constitutes a crime against humanity when undertaken as part of a systematic attack on a civilian population);
- Pillage and plunder (a war crime);
- Deployment of child soldiers (a war crime);
- Use of land mines (a war crime);
- Deprivation of means of living (possibly a crime against humanity).

Forced labor and plunder are the two most common categories of abuses by business entities alleged to be direct perpetrators of IHL and ICL. In most cases, a theory of complicity is the predicate for alleging a business entity's liability. In other words, for the majority of violations of IHL or ICL described in the Commentary, business entities are alleged to be liable on account of having aided and abetted violations by others (e.g., governments, paramilitary groups, etc), not as direct perpetrators. It should be noted that international humanitarian and criminal law are two subsets of a much broader list of unacceptable activities that may be controlled by other bodies of international law. Thus, the potential scope of using IHL to change the behavior of business entities is limited—although important.

However, there are significant hurdles to formally holding business entities liable for grave breaches of international law. First, there are limited fora where business entities might be held responsible for their conduct. International tribunals such as the newly constituted International Criminal Court have excluded legal persons, a category that includes business entities, from their jurisdiction. Second, many countries do not recognize an equivalence between legal persons and natural persons for purposes of prosecuting grave breaches of international law. Even in jurisdictions that do permit criminal prosecutions or lawsuits against legal persons, there remain other procedural and substantive impediments to bringing cases against business entities. As a result, no international tribunals have yet prosecuted business entities as such.

Business entities may not be direct perpetrators of crime but rather accomplices to it. How to define complicity or accomplice liability presents a significant challenge in the development of the law. When are business entities accomplices to criminal behavior and when are they mere bystanders? Do economic partnerships with repressive government actors or rebels make businesses complicit in ensuing human rights violations? There is as yet no definitive answer.

In addition to the problem of defining complicity is the issue of jurisdiction. Universal jurisdiction statutes under certain provisions of the criminal codes in a number of countries make it possible for a business entity to be prosecuted for war crimes or crimes against humanity committed outside those countries. The parallel study conducted alongside this *Commentary*—the *Surveys* of national jurisdictions—evaluates the legal basis for prosecuting business entities in Canada, France, the United Kingdom, the United States, and Norway for violations perpetrated abroad. But even the existence of

universal jurisdiction statutes does not solve the jurisdiction issue for plaintiffs seeking to hold companies accountable for abuses committed overseas. For example, many business entities operate overseas through independent subsidiaries or through joint venture vehicles. When a court tries to assess whether it has jurisdiction over a particular business entity, it needs to examine the structure of the business enterprise as a whole to determine whether it has jurisdiction over the conduct of the parent. This is difficult from an evidentiary standpoint.

Similarly, the evidentiary challenge involving legal entities can vary by jurisdiction. Various jurisdictions approach the issue of how to attribute liability to a business entity in different ways. Thus, while domestic prosecutions will reinforce those individual approaches, the problem of a variety of approaches to attribution presents another challenge to international legal development.

The United States is the only jurisdiction with a specific civil (tort) statute that permits claimants to seek civil redress from companies for violations of international criminal and humanitarian law. Over the past few years, a number of business entities have been sued in the United States under the federal Alien Tort Claims Act (ATCA) for such violations. Many of the defendant corporations are involved in business operations in conflict zones, often through subsidiaries. However, to date, there is no detailed jurisprudence under ATCA as to what type of alleged conduct would, in fact, constitute a war crime, crime against humanity, or other breach of international law with respect to business entities.

The *Commentary* which follows attempts to summarise this and other jurisprudence to map the content of the actual or existing liabilities for business entities.

Crimes against Humanity

Crimes against humanity, now established as *jus cogens* norms, were born out of the preamble of the Hague Convention that served to codify the customary law of armed conflict. At present, eleven international texts enumerate the offences considered crimes against humanity, although there are slight incongruencies among the definitions and the necessary elements involved. While variations abound, all texts and statutes date back to the Hague Convention of 1907, which codified armed conflict into customary international law. In 1945, the Allied powers at Nuremberg defined crimes against humanity as:

Murder; extermination, enslavement, deportation, and other inhumane acts committed against civilian populations, before or during [the] war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

The Control Council Law No.10 and the Charter of the Military Tribunal for the Far East utilized identical language to the Nuremberg Charter, enhancing the definition by stating that: “leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan.”

The United Nations Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, perhaps the closest text to a specialized international convention on crimes against humanity, deemed that these crimes may be committed in time of war or in time of peace, even if such acts do not constitute a violation of the domestic law of the country in which they were committed, and further elaborated that the “statute of limitations shall apply...irrespective of the date of their commission” (Article 1(b)), thereby altering the original Nuremberg definition of crimes against humanity to apply to acts committed outside the realm of a conflict zone.

The Rome Statute of the International Criminal Court (ICC) further extended the category of crimes against humanity by including explanatory language on enforced disappearance of persons, apartheid, enslavement, deportation or forcible transfer of population, torture, extermination, and forced pregnancy. The Rome Statute retained the requirement that the acts be committed as part of a widespread or systematic attack directed against a civilian population, listing the criminal acts as:

Murder; extermination; enslavement; deportation or forcible transfer of population; imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; torture; rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; persons against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; enforced disappearance of persons; the crime of apartheid; other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

The International Criminal Tribunal for the Former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR), and the Statute of the Tribunal of the Special Court for Sierra Leone all conform with the language set forth in the ICC Statute, whereby an act must be committed as part of a “widespread or systematic attack against any civilian population,” whereas Article 7 of the ICTY Statute states that “the International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, *and* directed against any civilian population.”

Although various interpretations exist as to the definitions and legal elements of particular crimes against humanity, agreement has been reached that crimes against humanity may occur either in war or peace, that violations may occur irrespective of the

nationality of the victim, that the acts must be the product of persecution against an identifiable group of persons irrespective of the makeup of that group or the purpose of the persecution, and that such acts must be part of a widespread or systematic attack against a civilian population.

The widespread or systematic attack component in effect creates a more arduous threshold for those seeking redress from such violations. A systematic attack—one centred on a specific policy or one that targeted a number of individuals—may be the work of a government or even a nonstate actor that holds a relationship with a business entity. Under this provision, a corporation may be held liable for aiding and abetting in such violations if a court can prove that there is a connection between the deed and the strategy, and that the corporation was knowledgeable of, or should have been aware of, the nature of the act as one part of a widespread or systematic attack; also, the elements of *mens rea* as well as *actus reus* remain necessary for a finding of liability on the part of a particular corporation.

Under exceptional circumstances, a systematic attack may be said to occur as a result of the deliberate failure to take action, which may be seen as deliberately encouraging an attack. Under this theory of the omission to act, a policy's existence must not be inferred simply due to the absence of governmental or organizational action: it still must be shown that a state or organization has actively promoted or encouraged an attack against a civilian population, although the term “attack” does not limit criminal acts to military attacks. The element of knowledge of a widespread attack against a civilian population does not necessarily require that the perpetrator was aware of all the characteristics of an attack, nor does it mean that the exact details of the plan or policy committed by an actor need be known to establish liability. In this sense, a corporation charged with aiding and abetting a crime committed by a State or rebel groups may still be found guilty for crimes of humanity without being fully aware of the plan or policy.

As the notion has evolved over the last century, crimes against humanity have been firmly established as *jus cogens* norms, or customary international law. The implications of this development are that violations of crimes against humanity are viewed as non-derogable and may be subject to States' exercising their jurisdiction in holding a person/s accountable, regardless of the jurisdiction in which the crime was committed. Furthermore, those charged with violating crimes against humanity lose their ability to claim the “defence of obedience to superior orders” and may not resort to the statute of limitations as listed in national jurisdictions.

War Crimes

International humanitarian law, the modern legal doctrine governing war crimes, incurs individual criminal responsibility for certain acts that occur during times of armed conflict. While specified acts that constitute crimes against humanity as well as war crimes overlap, such replication does not deflate the important norms that apply to both war and peace. War crimes were originally codified in the Hague Conventions of 1899 and 1907 and later identified in the 1945 Charter of the International Military Tribunal at Nuremberg as violations of the law or customs of war, including but not limited to:

Murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity

In addition, the four 1949 Geneva Conventions served to codify international humanitarian law in the aftermath of World War II, and established a set of war crimes in treaty form which became known as the “grave breach” provisions. In particular, the fourth Convention offered several advances to the protection of civilians during armed conflict, by ensuring applicability in all international conflicts, regardless of any formal declaration of a state of war; by elaborating on the basic principles necessary for non-international armed conflict; and by providing a list of grave breaches for which states were obliged to enact penal legislation to enable the prosecution or extradition of individual offenders. The grave breaches provisions, only applicable in international armed conflicts and occurring against protected persons or during combat activities, include:

Wilful killing; torture or inhuman treatment; wilfully causing great suffering or serious injury to body or health; extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly; compelling a prisoner of war or civilian to serve in the forces of the hostile power; wilfully depriving a prisoner of war or protected civilian of the rights of a fair and regular trial; unlawful deportation or transfer of a protected civilian; unlawful confinement of a protected civilian; and taking of hostages

Additional Protocol I of 1977 broadened the grave breach provisions for international conflicts to include:

Certain medical experimentation; making civilians and nondefended localities the object or inevitable victims of attack; the perfidious use of the Red Cross or Red Crescent emblem; transfer of an occupying power of parts of its population to occupied territory; unjustifiable delays in repatriation of POWs; apartheid; attack on historic monuments; and depriving protected persons of a fair trial

Indeed, the import of such grave breach provisions is that it places the onus of responsibility on states to extradite or prosecute individuals who have allegedly violated such acts, while other war crimes acts—indeed, the majority of international humanitarian legal provisions—do not have the same obligations, although they may be tried as war crimes under the “violations of the laws and customs of war” provision set forth in the Nuremberg Charter.

The grave breaches provisions enumerated in the Geneva Conventions and Additional Protocol I excludes civil war. In regulating armed conflict in internal conflict, Common Article 3, Additional Protocol II, and ICC Article 8 detail war crimes violations for intra-state armed conflict. Specifically, under Common Article 3, those acts that are considered violations of humanitarian law in times of civil war are:

Murder; mutilation; cruel treatment; torture; outrages upon personal dignity; taking hostages; sentencing or execution without due process; and failing to collect and care for the wounded and sick

The 1977 Additional Protocol II set forth new rules and protections specifically for internal war, such as:

Collective punishment; acts of terrorism; slavery; threatening to commit a war crime; starvation as method of combat; hostility directed against historic monuments, works of art, or places of worship; and attacks against dangerous forces, namely dams, dykes, and nuclear electrical generating stations

Such protections are notably fewer than for international armed conflict, and these elements fail to include criminal liability provisions, making prosecution unlikely. Additionally, the customary law status for such internal war crimes is not as well established, making it cumbersome to prosecute war crimes violations in internal conflict situations. To add additional weight to the heavy task of determining accountability for war crimes in civil conflict, the threshold for the protection under internal war is much higher, for there must be responsible command, two sets of armed forces, and sufficient control over territory to carry out sustained operations. The threshold is further raised, in that five objective criteria must be met: There must be: 1) confronting parties, one of which is a state government; and each must have; 2) responsible command structure; 3) control over territory; 4) sustained and concerted military operations; and 5) ability to implement Additional Protocol II. Excluded from protection are non-armed, isolated and sporadic acts of violence. For many countries mired in civil strife, governments will not invoke Additional Protocol II provisions, as the states will deny that a rival group, or rebel faction, has sufficient command.

While internal armed conflict provisions fail to include criminal liability provisions, contemporary advances have occurred that may enable the prosecution of war crimes. Through the UN Tribunals of the ICTY and the ICTR, as well as the ICC, the courts seem to be leaning in the direction of favouring a reading of Common Article 3 and other gross violations of the laws and customs of war in civil armed conflict, which warrant individual criminal responsibility. In fact, protections based on Common Article 3 and Additional Protocol II have been codified into the statutes of the ICTY, ICTR, ICC, and the International Law Commission's Draft Code of Crimes Against the Peace and Security of Mankind (ILC Draft Code).

A number of World War II cases serve as precedents for holding business entities accountable for their involvement in war crimes. In *U.S. v. Krauch, et. al.* (The I.G. Farben Case), twelve individuals working for a major German chemical and pharmaceutical manufacturer, which ultimately took control of factories in Nazi-occupied territories and employed concentration camp labour in the running of these factories, were indicted for plunder as well as slave labour. One important aspect of this case is that it represented the first time that a court attempted to impose liability on a group of persons collectively in charge of a company.

Forced Labour/Enslavement

Forced labour is defined as “all work or service that is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.” The statutes relating to forced labour offer a broad range of protections, such as freedom from: slavery and abductions; compulsory participation in public works projects; forced labour in agriculture and remote rural areas (coercive recruitment systems); domestic workers in forced labour situations; bonded labour; forced labour imposed by the military; forced labour in the trafficking in persons; and certain aspects of prison labour and rehabilitation through work. While there is universal consensus on the definition of forced labour, some of its elements remain debated issues of policy. According to the International Labour Organization (ILO), one of the most controversial elements of the norm against forced labour is the prohibition of compulsory participation in public works in the context of economic development. In many parts of the developing world, from Asia to Africa, such practices are commonplace. The ILO has exempted the following from its definition of forced labour: compulsory military service; normal civic obligations; certain forms of prison labour; emergencies; and minor communal services. Forced labour should not be used as a means of discrimination based on racial, social, national or religious grounds, for the purpose of economic development, as political coercion, labour discipline or punishment for political protests.

Similarly, “enslavement” consists of the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children, including acts such as debt bondage, serfdom, and any institution or practice whereby a child or young person under the age of 18 years is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour.

Forced Labour/enslavement is codified as an international crime against humanity through the Statutes of the ICC, the ICTY, the ICTR, and the Statute of the Far East War Crimes Tribunal and Control Council Law No. 10. Essentially, the necessary elements that are listed under Article 7(1) are, in addition to the widespread or systematic elements: that the perpetrator exercise any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.

Under modern legislation, the most important case involving charges of forced labour/enslavement is *Doe v. Unocal*. Filed under the U.S. Alien Tort Claims Act (ATCA) and currently on appeal in the Ninth Circuit, the case rests upon plaintiffs' allegations that Unocal violated the "law of nations" norm against forced labour, murder, rape, and torture by entering into a joint venture with the Burmese government, a country infamous for engaging in forced labour, for the purpose of providing security to the surrounding area while completing the construction of a natural gas pipeline. According to the plaintiffs, the Myanmar military forced the plaintiffs to work on and serve as porters for the project by building helipads that were used by Unocal and Total officials who visited the pipeline, as well as to ferry materials to the pipeline construction site. Additionally, plaintiffs claim that they were forced to build surrounding roads and roads directly leading to the pipeline and were made to act as porters, or workers who performed menial tasks such as hauling materials and cleaning the army camps for the soldiers hired to protect the pipeline. Furthermore, plaintiffs linked the forced labour violation with other "law of nations" violations, alleging that the military ordered summary executions of those who refused to participate in the forced labour program or of those who became too feeble to provide the commanded service sufficiently. One individual trying to escape the program was shot by soldiers and, in retaliation for his attempted escape, his wife and baby were thrown in a fire, resulting in permanent injuries for the wife and the death of the child. Others claim that rape was also a part of the forced labour program.

The Ninth Circuit judges, in considering the case, deemed that "forced labour is a modern variant of slavery to which the law of nations attributes individual liabilities such that state action is not required."¹ Furthermore, the "evidence suggests that Unocal knew that forced labour was being utilized and that Joint Venturers benefited from the practice," and thus may be liable for aiding and abetting with the military.² Although the District Court stated that Unocal could not be held liable under the ATCA for forced labour due to Unocal's conduct, which they claim did not rise to 'active participation' in the act, on appeal it was stated by the Ninth Circuit that a reconsideration of this would be necessary.³

Torture

Considered both a war crime and a crime against humanity, the prohibition of torture is a *jus cogens* norm, firmly rooted as a fundamental human right in the Universal Declaration of Human Rights, the International Covenant on Political and Civil Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the African Charter on Human and Peoples' Rights, and the American Convention on Human Rights. Furthermore, torture is prohibited in any armed conflict—international or internal—on any individual, combatant or civilian, under customary law and treaties such as the Geneva Conventions.

¹ 14210: Unocal Appeals

² 14212: Unocal Appeals

³ 14213-14214: Unocal Appeals

The most accepted definition of torture is the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Taken from the 1975 UN General Assembly's Declaration on Protection from Torture, torture is:

Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Torture, as a customary international norm, is universally prohibited and as is stated in the 1984 Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, "no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political stability or any other public emergency, may be invoked as a justification of torture."

The statutes of the ICTY, the ICTR and the ICC do not hold torture to be an independent crime, yet both Tribunals follow the definition provided by the Convention in prosecutions of torture as war crimes or crimes against humanity.

A necessary distinction to be made is that the prohibition of torture as codified in the Convention is merely illustrative, and the use of the phrase "for any reason based on discrimination of any kind" opens up the possibility for future application for a wide range of acts committed. While the prohibition against torture is thus widely encompassing, two limiting elements exist: the act must create severe mental or physical pain or suffering, and it must be "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." The ICTY further expanded its limiting elements to include:

(i) There must be an act or omission that causes severe pain or suffering, whether mental or physical,

(ii) Which is inflicted intentionally,

(iii) And for such purposes as obtaining information or a confession from the victim, or a third person, punishing the victim for an act he or she or a third person has committed or is suspected of having committed, intimidating or coercing the victim or a third person, for any reason based on discrimination of any kind,

(iv) And such act or omission being committed by, or at the instigation of, or with the consent or acquiescence of, an official or other person acting in an official capacity.

Under the ATCA, invigorated by the passage of the Torture Victim Protection Act (TVPA), a number of cases have been filed that involve economic actors aiding and abetting in acts that amount to torture: Such cases include *Unocal*, *Wiwa*, *Talisman*, *Bowoto*, *ExxonMobil*, and *RioTinto*. In each of these cases, plaintiffs allege that the corporations engaged in a working relationship with members of the host state military or government or later went on to commit systematic violations of human rights such as torture.

Genocide

In the wake of the atrocities committed during the Second World War, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide was created, establishing genocide as a crime under international law, regardless of whether the act occurred during war or peace. Maintaining individual criminal responsibility as well as state responsibility, the 1948 Convention thus defines genocide as:

Any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious groups, as such: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; forcibly transferring children of the group to another group

The definition establishes that in addition to the physical act itself, it is deemed criminal to conspire to commit genocide, to directly and publicly incite others to commit genocide, attempt to commit genocide, and to be complicit in genocide. In essence, then, in order to be charged under the Genocide Convention, the crime must have both a physical element—meaning that the perpetrator killed or caused the death of one or more persons, and that such person or persons belonged to a particular national, ethnical, racial or religious group—as well as a mental element—meaning that the perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such, and that the conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conducted that could itself effect such destruction.

Under the Convention, today considered customary international law and thus binding on all states regardless of their status as a signatory to the treaty, persons committing genocide or any of the other acts enumerated shall be punished, irrespective of their status as heads of state, public officials, or private individuals. However, in practice there are to date very few precedents for implementing the Genocide Convention in international tribunals or under national law.

Finding its place in international law as a result of the military tribunals from World War II, and further utilized in the international tribunals of the ICTR and the ICTJ, today cases are being brought against business entities that are alleged to have aided in

genocide. Under the ATCA, two civil action suits are currently being reviewed that include allegations of genocide: *The Presbyterian Church of Sudan v Talisman Energy*, and *Exxon Mobil*. In the *Talisman* case, the plaintiffs allege that Talisman colluded with the Sudanese government to commit gross violations of human rights, such as extrajudicial killing, displacement, war crimes, confiscation and destructive property, kidnapping, rape, and enslavement, against Christian and other non-Muslim minorities in the Sudan by conducting a deliberate campaign of ethnic cleansing to clear the land for oil exploitation, and that the collective acts amount to genocide. In the *Exxon Mobil* case, it is alleged that the Indonesian military provided security services for Exxon Mobil's joint venture in Indonesia's conflict-ridden Aceh, where the Indonesian military committed genocide, torture, crimes against humanity, sexual violence, and kidnapping while providing security to the corporation.