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LEGAL REDRESS
FOR CORPORATE PARTICIPATION IN INTERNATIONAL HUMAN RIGHTS ABUSES
A PROGRESS REPORT

By Justice Ian Binnie

Note:[1] *The ever-changing world economy allows not only the exchange of money, but also the exchange of ideas—ideas that go beyond pure commerce and include those regarding human rights and individual freedoms. Commerce cannot truly flow freely between nations when nations censor and oppress their citizens. Corporations sometimes find themselves in situations where they enable, exacerbate, or facilitate human rights abuses by foreign nations whose laws, policies (or lack thereof), and inaction create situations that often leave citizens caught in the middle.*

The following article is the result of the Honorable Mr. Justice Ian Binnie's participation in a continuing legal education program conducted by the Tort Trial & Insurance Practice Section at the 2008 ABA Annual Meeting in New York City entitled "Ordering Liberty in an International Economy."[2] The article addresses corporate complicity in international human rights abuses by exploring causes, challenges, and possible remedies.

Justice Binnie, a member of Canada's highest court for over 10 years, has also served as a Commissioner to the International Commission of Jurists based in Geneva, Switzerland. This Commission is "dedicated to the primacy, coherence and implementation of international law and principles that advance human rights." It works to promote the rule of law and the independence of the bar and bench. Its mission is to provide "impartial, objective and authoritative . . . legal expertise . . . to ensure that developments in international law adhere to human rights principles and that international standards are implemented at the national level."[3]

Ordering liberty through law in an international economy is more difficult than it used to be. When the reach of business operations was more or less coextensive with the nation states in which they resided, there was no doubt which state was in charge, although in practice the control may have been imperfectly exercised. Today, however, transnational companies have power and influence approaching and sometimes exceeding that of the states in which they operate but without the public law responsibilities of statehood. This has created a challenge for the international community as it seeks to develop remedies for harms arising out of the involvement of such companies in human rights abuses. The International Commission of Jurists (ICJ), a human rights organization of judges and lawyers based in Geneva, Switzerland, published in 2008 a comprehensive study on the subject, *Report of the International Commission of Jurists' Expert Legal Panel on Corporate Complicity in International Crimes*.[4]

Professor John Ruggie of Harvard University, the United Nations special representative on business and human rights, has recently observed:

> The root cause of the business and human rights predicament lies in the governance gaps created by globalization—between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation.[5]

In Ruggie's view "escalating charges of corporate-related human rights abuses are the canary in the coal mine, signalling that all is not well."[6] Extremely serious allegations, most of which have not been proven in any court, have been made against some of the world's largest and most influential companies. In one case, a large oil company was alleged to have made knowing use of forced labor compelled through rape, murder, and other violence for a gas pipeline joint venture with a military dictatorship renowned for its brutality.[7] In another, a large mining company was alleged to have made use of military assistance to brutally quell an uprising at its mine in circumstances where it knew or ought to have known of the risk that war crimes would be committed.[8] Two other cases involve brutalities committed by government security forces in Nigeria, allegedly acting with material assistance and at the behest of two large oil companies.[9] The particular allegations may never be proved, but they raise troubling issues for the human rights community.

The scope of the governance problem mentioned by Ruggie has increased by virtue of the combined effect of several related factors, including the ever-expanding reach of global trade, concomitant global economic interdependency, the increasing economic influence of transnational companies, and the increasing political influence of such companies in war-torn and economically depressed countries in which the latent risk of human rights abuse is highest. Some of the same factors, of course, make it difficult to develop an effective framework of legal remedies to address corporate participation in human rights abuses. The economic influence of transnational companies is often such that states, competing amongst each other for investment opportunities, have little incentive to regulate. Even where the incentive exists, the political influence of transnational companies, particularly in conflict-ridden and economically underdeveloped countries, may be such that a state has little real power to impose its will.

Despite the obstacles, the international community is moving toward a solution. In doing so, it is building upon a significant measure of experience. The problem of redressing human rights abuses committed by or on behalf of private enterprise confronted members of the

AP Photo: Burning oil pipeline belonging to Shell Petroleum Co., Asagba Okwan Asarama, Nigeria, 2005

RUGGIE'S REPORT proposes a useful statement of principles to inform the development of legal and nonlegal mechanisms of corporate accountability for participation in HUMAN RIGHTS ABUSES.

Military Tribunal half a century ago at Nuremburg. Among the accused were business leaders who had profited from financing the Nazi regime and enabling its rearmament. More recently, much useful work has been done by independent commissions of inquiry, including the South African Truth and Reconciliation Commission that dealt convincingly with allegations that companies in certain sectors of the economy (especially mining) helped to design and implement abuses associated with apartheid policies.

Elements of a comprehensive legal framework for addressing corporate participation in human rights abuses have been sketched out in recent work by academics and nongovernmental organizations, including Ruggie's report to the United Nations Commission on Human Rights and the 2008 report of the International Commission of Jurists. Ultimately, while we do not yet have a framework capable of closing the governance gaps, we appear to be on the right road to that end.

I now want to discuss some of the basic principles informing the development of such a comprehensive legal framework and the progress that has been made, and is still to be made, in developing individual elements of it.

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Framing the Problem

There are often said to be conceptual difficulties in attributing criminal culpability to companies for their involvement in human rights abuses. Companies are not as a matter of law or politics directly accountable to the public in the manner that states are. They are economic enterprises that exist for the benefit of their own constituents, principally shareholders. However, like states, they are artificial persons without a will or mind of their own. Some still argue that the principles and purposes of criminal liability ill suit corporate misconduct.[10] It is said that the culpability of companies is properly left to civil law, where the application of principles of liability to corporate entities is well established and widely understood.

Corporate entities, of course, have no body to imprison, no soul to damn and no conscience to trouble. But the purposes of criminal punishment extend beyond triggering remorse and rehabilitation. Criminal punishment conveys strong social stigma and is the highest expression of disapproval and condemnation of conduct inconsistent with the ties that bind civil society. The economic repercussions of a bad press, particularly where it raises the threat of an effective product boycott, can reasonably be expected to motivate the directing minds of corporate entities. Prosecutions give the press something to write about.

The conceptual difficulties with criminal liability appear to have been overstated. While interesting, they do not pose an insurmountable obstacle. There are well-established tests for attributing the conduct of directing minds to corporate entities. Legal systems around the world have successfully extended and modified principles of civil and criminal liability to corporate entities. Attribution even of criminal culpability for certain mens rea offenses is now increasingly common through proof of the misconduct of the directing minds. Problems at the international level can be addressed in the same way.

Ruggie's report does not offer a fine-grained analysis of potential avenues of legal accountability of corporations for human rights abuses, but it proposes a useful statement of principles that ought to inform the development of legal and nonlegal mechanisms of accountability. First, he emphasizes that states have the primary responsibility for ensuring the security of human rights. He couches this responsibility in terms of the "state duty to protect."[11] Fundamentally,

it is up to states individually and collectively to ensure that human rights are secure against abuse by corporate entities. Recognition of this reality does nothing to diminish the responsibility of companies to respect human rights. It simply underscores the fact that states alone have the coercive power to secure human rights in law.

Ruggie emphasizes that the "United Nations is not a centralized command-and-control system that can impose its will on the world,"[12] but it might nevertheless be expected that initiatives undertaken by the United Nations will contribute to an awakening of member states to their duty to protect human rights through law.[13]

Second, as to companies, he concludes that there is no need for novel solutions. The legal basis of the duty to respect human rights ought to be related to well-established corporate concepts and legal principles. Recognizing that corporations are rarely the principal perpetrators of human rights violations, the Ruggie report suggests that the criminal law concept of "complicity" may help to define legal culpability.[14] This recommendation is consistent with that of the ICJ report, and other reports and academic writings.

Some, but not all, violations of human rights amount to criminal acts. The degree of correlation varies from state to state. Certain human rights are typically protected by constitutional but not criminal law, such as freedom of speech, freedom of association, freedom of religion, and the right to be free of adverse discrimination. Other human rights are generally protected by criminal law alone. The ICJ report identifies some such rights as defined by the Statute of the International Criminal Court:

> *[I]nternational criminal law includes as crimes many activities that are also gross human rights abuses and conduct that gives rise to a gross human rights abuse will also often involve crimes under international law. In its report, the [ICJ] focused on crimes against humanity, war crimes as well as some other gross human rights abuses which international law requires states to criminalise. . . . Crimes against humanity* are crimes under international customary law . . . [and] include widespread or systematic murder, extermination, enslavement, deportation or forcible transfer, imprisonment, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, forced sterilization or any other forms of sexual violence, enforced disappearances and arbitrary detention and apartheid . . . *[W]ar crimes* encompass serious violations of the laws and customs of war and international humanitarian law . . . War crimes can be committed by any person who is taking part in hostilities . . . [Acts identified as war crimes] include: wilful killing, torture, inhuman treatment, wilfully causing great suffering or serious injury, extensive destruction or appropriation of property not justified by military necessity, unlawful deportation or transfer or displacement of the civilian population and intentionally directing attacks against civilian populations. . . . [O]ther gross human rights abuses, such as genocide, slavery, torture, extrajudicial execution and enforced disappearance are also crimes under customary international law and/or treaties and conventions.[15]

There is obviously some overlap between these categories. Some criminal acts that may have human rights implications are not mentioned (e.g., criminal battery, kidnapping, fraud, etc.). Nevertheless, by relating particular human rights violations to acts traditionally punished by the criminal law, the ICJ has provided a useful corrective to overbroad theories of criminal culpability. Companies may negatively impact the whole gamut of human rights,[16] but they may be criminally culpable only in relation to the violation of a subset of these rights.

Prosecutions

Conceptual issues. It is rarely alleged that corporations are the principal perpetrators of human rights violations. Rather, it is usually argued that they should be deemed culpable by virtue of their contribution to, or acquiescence in, human rights violations by others, including employees, private security firms, government agents (e.g., police, intelligence, or military) or nongovernmental groups (e.g., rebel groups, paramilitary organizations). "Complicity" is the term most commonly used to denote culpability of this sort. It is common parlance amongst academics[17] and human rights organizations. Clarification of the meaning of the concept is part of the mandate of the UN special representative on business and human rights. He has not had much to say about it as yet, but a draft of the ICJ report does contain a discussion of the notion. It explains:

> The concept of "corporate complicity" is relatively new. Although it has echoes in some branches of law, such as the law of accomplices in criminal law, those active in the area of business and human rights are gradually seeking to describe what "corporate

complicity" means in terms of legal policy, good business practices, as well as in different branches of the law. But there continues to be considerable confusion and uncertainty about when a company should be considered to be complicit in human rights violations committed by others.[18]

In part the confusion may be attributable to the inherent generality of the concept, which broadly speaking invokes "the liability of one person for the act of another."[19] The relationship between complicity and more traditional forms of accomplice liability has been debated in the jurisprudence of the International Criminal Tribunals for Rwanda and Yugoslavia.[20] The International Criminal Court Statute is said to be unclear.[21] The ICJ report lends clarity, offering the following three-part definition of complicity as applied to corporations:

> First, by such conduct, the company or its employees contribute to specific gross human rights abuses, whether through an act or failure to act, and whatever form of participation, assistance or encouragement the conduct takes, it:
>
> (i) *Enables* the specific abuses to occur, meaning that the abuses would not occur without the contribution of the company, or
>
> (ii) *Exacerbates* the specific abuses, meaning that the company makes the situation worse, including where without the contribution of the company, some of the abuses would have occurred on a smaller scale, or with less frequency, or
>
> (iii) *Facilitates* the specific abuses, meaning that the company's conduct makes it easier to carry out the abuses or changes the way the abuses are carried out, including the methods used, the timing or their efficiency.
>
> Second, the company or its employees actively wish to enable, exacerbate or facilitate the gross human rights abuses or, even without desiring such an outcome, they know or should know from all the circumstances, of the risk that their conduct will contribute to the human rights abuses, or are wilfully blind to that risk.
>
> Third, the company or its employees are proximate to the principal perpetrator of the gross human rights abuses or the victim of the abuses either because of geographic closeness, or because of the duration, frequency, intensity and/or nature of the connection, interactions of business transactions concerned. The closer in these respects that the company or its employees are to the situation or the actors involved the more likely it is that the company's conduct will be found in law to have enabled, exacerbated or facilitated the abuses and the more likely it is that the law will hold that the company knew or should have known of the risk.[22]

Recognizing that the concept of complicity remains vague and contested, the ICJ report frames the potential culpability of companies in terms of specific forms of criminal liability widely recognized as a matter of international law, namely, aiding and abetting liability, joint criminal enterprise liability, and the doctrine of superior responsibility.

As mentioned earlier, the Nuremburg prosecution included some leading Nazi business leaders. The Nuremburg Charter stated 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 persons in the execution of such plan." Accomplice liability was also entrenched in the 1954 and 1996 versions of the Draft Code of Offences against the Peace and Security of Mankind issued by the International Law Commission. The International Law Commission Code establishes the widely recognized principle that a person is liable as an accomplice if he "knowingly aids, abets or otherwise assists, directly and substantially, in the commission of . . . a crime"[23] and entrenches common purpose or conspiracy liability and the superior responsibility doctrine. Liability for aiding and abetting was also established under the Rome Statute of the International Criminal Court and under the statutes of the International Criminal Tribunals for Rwanda and Yugoslavia, the Extraordinary Chambers in the Court of Cambodia, and the Special Court for Sierra Leone. Variants upon joint criminal enterprise, common purpose, or conspiracy liability are also reflected in the Rome Statute of the International Criminal Court and the jurisprudence of the International Criminal Tribunals for Rwanda and Yugoslavia. The superior responsibility principle is encompassed in the Rome Statute and the statute of the Cambodia Tribunal and is reflected in the jurisprudence of the International Criminal Tribunals for Rwanda and Yugoslavia and the Nuremberg and Tokyo Tribunals.

Accepting a measure of variability in the formulation of actus reus and mens rea from state to state, liability for aiding and abetting and

participation in a joint criminal enterprise is widely available under national criminal law,[24] as is confirmed by a 2006 survey, *Commerce, Crime and Conflict*, conducted by the Fafo Institute for Applied International Studies with the support of the Canadian Department of Foreign Affairs and International Trade.[25] Unquestionably, however, more work needs to be done on the applicability of principles of accomplice liability to companies.

Enforcement issues. I turn now to some problems of enforcement, which lie within the ambit of the duty to protect imposed on states, acting individually and collectively.

Significant gaps continue to exist. First, the jurisdiction of the International Criminal Court does not extend to corporate entities. This reflects the will of the signatories of the state parties to that court, but this omission may eventually need to be revisited, at least in respect of the most serious human rights abuses. There is increasing recognition of the sheer extent of corporate participation in such abuses and of the practical difficulties in establishing national jurisdiction in respect of firms acting extraterritorially, directly or through foreign subsidiaries. By granting the International Criminal Court jurisdiction over corporate entities, the international community may ensure that such entities do not escape punishment for culpable conduct because of procedural gaps within and between national criminal law systems.

Second, some states do not confer jurisdiction upon their own courts to try corporate entities for criminal conduct. The Fafo survey found that, with some exceptions for particular offenses, corporations cannot be tried criminally in a significant number of countries, including Argentina, Germany, Indonesia, Spain, and the Ukraine.[26] In these countries, individual members of corporate management may be prosecuted. However, the deterrent effect of such prosecutions on corporate practices and culture may be less powerful than direct prosecution, which would have the effect of stigmatizing the corporate "brand" as a whole and make avoidance of corporate damage through the effective use of scapegoats more difficult.

Third is the problem of foreign subsidiaries. Prosecutors and/or courts in states that do allow corporations to be subject to criminal prosecution may refuse or be unable to pierce the veil of corporate personality to hold parent companies to account for the acts of foreign subsidiaries, or to prosecute companies for criminal acts committed extraterritorially. These decisions may at times be premised on valid concerns relating to jurisdiction or the rules of evidence. But sometimes they reflect a lack of will to act or a deliberate decision to grant trade issues priority over human rights claims.[27] Given that many allegations of corporate complicity in human rights violations arise in relation to operations in war-torn and/or economically repressed countries with weak or nonexistent legal systems, the refusal of the home state to prosecute or try a case can be an effective barrier to redress.

Efforts must be made to encourage more concerted action by the home countries (to discipline the parent companies) as well as local jurisdictions (to prosecute the affiliates). Where the national will to take effective action is missing, a claimant that can show the exhaustion of local remedies should have access to an international body such as the International Criminal Court. Anything less makes the customary high-minded pronouncements of states in support of human rights ring hollow.

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Civil Actions

Most of the literature on corporate responsibility for participation in human rights violations has focused on the possibility of effective redress through criminal law. However, attention should also be paid to the question of whether civil actions afford a proper and effective means by which to vindicate human rights.[28] In the United States, of course, there is the Alien Tort Claims Act (ACTA).[29] While ACTA and the claims brought under it are rather unique, the experience under ACTA has raised important issues of broader relevance to the international context.

As is well known, ACTA is a venerable statute, dating from

1789, which states that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[30] Originally enacted to deal with problems such as piracy, litigants have achieved some success in recent decades using ACTA as a basis upon which to bring claims against states and private parties (including corporations) for their perpetration of, or participation in, human rights abuses.[31]

It seems, however, that few if any of these cases have been concluded. Many have been dismissed for a variety of reasons; some have settled. One of the most interesting obstacles has been debate over the theory of liability upon which claims may be brought under ACTA. The debate turns on the construction of the phrase "a tort . . . committed in violation of the law of nations." An early and still popular view is that liability may be established under ACTA simply on the basis of proof of liability under international law.[32] Recently, however, some courts have challenged this generous theory of liability. They emphasize that, while ACTA requires a claimant to establish a violation of the law of nations, liability in practice ought to be governed by the common law of torts.[33] A general appeal to principles of international criminal law alone will not suffice. This trend in the ACTA jurisprudence raises a question of broader relevance: Is it possible to achieve effective redress for violations of human rights through civil law under recognized principles of civil liability?

A variety of objections have been levied against the civil enforcement of human rights. It is sometimes said that the nature of a private law action is fundamentally inconsistent with the public interest in human rights and the values that they protect. In particular, it is argued that it may be dangerous to have rights of public importance defined, weighed, and possibly unduly constrained in the context of litigation in which the primary focus lies with the claims to compensation of the individual litigants. I think it is an error to see private and public law remedies (including the criminal law) as mutually exclusive in the international arena any more than in the domestic arena. Both have their advantages. Both have their problems. We should proceed on all fronts.

I offer the following additional observations. First, human rights violations affect a broad spectrum of human interests, only some of which may be protected by principles of civil liability. Greater focus by the legal community on the notion of "protected interests" may assist victims in framing a cause of action and make it more likely that the claim will make it to trial. Second, human rights violations that harm interests already protected under civil law should be understood as already actionable. For example, rape, assault, and torture may be the basis for claims of battery or intentional infliction of emotional distress; violations of privacy may give rise to an action for breach of confidence;[34] violations relating to property may found claims in trespass, conversion, or nuisance;[35] misconduct by public officials may establish a claim of misfeasance in public office. Third, at a very practical level, domestic law reform is needed if domestic courts are to play a useful role in remedying international human rights abuses. For example, statutes of limitation are often unduly strict on their face or as interpreted and applied; statutory and common-law obstacles to veil-piercing exist and these may inappropriately shield parent companies from liability in respect of subsidiaries; and there can be inordinate difficulty establishing jurisdiction (especially where liberal use is made of the doctrine of forum non conveniens). In some cases, there will be good reason to limit or deny the possibility of civil recovery. However, as a general matter the state duty to protect means that a concerted effort be made to eliminate barriers to recovery that are unnecessary or arbitrary in their operation.

Conclusion

It is beyond question that companies have the ability to significantly influence human rights around the world for good or for ill. Sometimes influence implies obligation. In light of mounting evidence of corporate complicity in human rights abuses, there is, at the very least, an obligation upon the legal community to clarify the human rights–related duties of companies as a matter of national and international civil and criminal law. The recent reports by Ruggie and the ICJ point to the road ahead but more work needs to be done to achieve even a minimal level of effectiveness. ■

Notes

1. These introductory paragraphs were contributed by Nathaly J. Vermette, a Canadian lawyer based in Montreal, who is the immediate past chair of the TIPS Intellectual Property Committee, former liaison to *The Brief* Editorial Board from the TIPS General Committee Board, and cochair of the 2008 continuing legal education program for which Justice Binnie authored and presented this article.

2. The program was cosponsored by the following TIPS committees: Admiralty and Maritime Law; Intellectual Property Law; International Law; Media, Privacy and Defamation Law; and Business Litigation. The program also was cosponsored by the International Litigation Committee of the ABA Section of International Law.

3. International Commission of Jurists, About Us, www.icj.org/rubrique.php3?id_rubrique=11&lang=en.

4. International Commission of Jurists, Report of the International Commission of Jurists' Expert Legal Panel on Corporate Complicity in International Crimes (2008), http://icj.org/news.php3?id_article=4405&lang=en. [hereinafter ICJ Report]. This report is comprised of three volumes. Volume 1 is entitled *Facing the Facts and Charting a Legal Path*, Volume 2 is entitled *Criminal Law and International Crimes*, and Volume 3 is entitled *Civil Remedies*.

5. John Ruggie, Protect, Respect and Remedy: A Framework for Business and Human Rights at 3 (Report of the Special Representative of the Secretary-General of the United Nations on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, A/HRC/8/5, Apr. 7, 2008) (advanced edited version) [hereinafter Ruggie Report].

6. *Id.*

7. John Doe I v. Unocal Corp., 963 F. Supp. 880 (C.D. Cal. 1997).

8. Sarei v. Rio Tinto PLC, 456 F.3d 1069 (9th Cir. 2006).

9. Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88 (2d Cir. 2000); Bowoto v. Chevron, 312 F. Supp. 2d 1247 (N.D. Cal. 2004).

10. *See* John C. Coffee, Jr., *"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 Mich. L. Rev. 386 (1980–81); V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?* 109 Harv. L. Rev. 1477 (1996).

11. Ruggie Report, *supra* note 5, at ¶¶ 27–50. For a different view, see, e.g., United Nations Subcommission on the Protection and Promotion of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 55th sess., item 4, at preamble & art. 1. (United Nations Commission on Human Rights Aug. 26, 2003).

12. Ruggie Report, *supra* note 5, at ¶ 107.

13. *Id.*

14. *Id.* at ¶¶ 73–81.

15. 2 ICJ Report, *supra* note 4, at 3–4 (emphasis added).

16. Michael Wright, *Corporations and Human Rights: A Survey of the Scope and Patterns of Alleged Corporate-Related Human Rights Abuse* (addendum to the Ruggie Report, *supra* note 5).

17. *See, e.g.*, Anita Ramasastry, *Corporate Complicity from Nuremberg to Rangoon: An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations*, 20 Berkeley J. Int'l L. 91, 104–13 (2002); Rachel Chambers, *The* Unocal *Settlement: Implications for the Developing Law on Corporate Complicity in Human Rights Abuses*, 13 Hum. Rts. Brief 14 (Fall 2005).

18. 1 ICJ Report, *supra* note 4, at 10 (Mar. 10, 2008 draft).

19. George P. Fletcher, *Complicity*, 30 Isr. L. Rev. 140, 140 (1996).

20. *See* Joseph Rikhof, *Complicity in International Criminal Law and Canadian Refugee Law*, 4 J. Int'l Crim. Just. 702 (2006).

21. Rome Statute of the International Criminal Court, art. 25. For criticism, *see* Markus D. Dubber, *Criminalizing Complicity: A Comparative Analysis*, 5 J. Int'l Crim. Just. 977, 1000–01 (2007).

22. 1 ICJ Report, *supra* note 4, at 9. Detailed explanation and illustration of these elements of the definition of complicity are also provided.

23. Art. 2, § 2(d).

24. 2 ICJ Report, *supra* note 4, at 24–25.

25. Anita Ramasastry & Robert C. Thompson, Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law—A Survey of Sixteen Countries (Fafo Sept. 2006); *see also* Ramasastry, *supra* note 17, at 142–46; Lillian Manzella, *The International Law Standard for Corporate Aiding and Abetting Liability* (EarthRights Int'l 2006), www.earthrights.org/files/aiding_and_abetting_paper.pdf.

26. Ramasastry & Thompson, *supra* note 25, at 13.

27. *See* Robert McCorquodale & Penelope Simons, *Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law*, 70 Mod. L. Rev. 598 (2007).

28. *See, e.g.*, Jane Wright, Tort Law and Human Rights (2001); Human Rights in Private Law (Daniel Friedman & Daphne Barak-Erez eds., 2001); Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation (Craig Scott ed., 2001).

29. 28 U.S.C. § 1350 (2000). For useful discussion of ACTA, see, e.g., Craig Forcese, *ACTA's Achilles Heel: Corporate Complicity, International Law and the Alien Tort Claims Act*, 26 Yale J. Int'l L. 487 (2001); Tarek F. Maassarani, *Four Counts of Corporate Complicity: Alternative Forms of Accomplice Liability under the Alien Tort Claims Act*, 38 N.Y.U. J. Int'l L. & Pol. 39 (2005–06); Richard L. Herz, *The Liberalizing Effects of Tort: How Corporate Complicity Liability under the Alien Tort Statute Advances Constructive Engagement*, 21 Harv. Hum. Rts. J. 207 (Summer 2008).

30. 28 U.S.C. § 1350 (2000).

31. Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980); John Doe I v. Unocal Corp., 963 F. Supp. 880 (C.D. Cal. 1997); Sosa v. Alvarez-Machain, 542 U.S. 692 (U.S. 2004).

32. *See, e.g.*, Forcese, *supra* note 29; *Unocal*, *supra* note 31, at 26–27; Bowoto v. Chevron, 557 F. Supp. 2d 1080, 1088 (N.D. Cal. 2004); Presbyterian Church of the Sudan v. Talisman, 244 F. Supp. 2d 289 (S.D.N.Y. 2003).

33. For example, in *In re South African Apartheid Litigation*, 346 F. Supp. 2d 538, 550 (S.D.N.Y. 2009), the court said of aiding and abetting liability: "the applicability of that concept [to a tort claim is] dubious at best." In *Unocal*, *supra* note 31, in his concurrence Justice Reinhardt said that "the ancillary legal question of Unocal's third party tort liability should be resolved by applying general federal common law tort principles, such as agency, joint venture, or reckless disregard." 963 F. Supp. at 963.

34. Wright, *supra* note 28, at 178–82.

35. *Id.* at 183–94.