Sustainability Perspectives

June 2005

Canadian Energy and Mining Companies
Navigating International Humanitarian Law in the 21st Century

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The Ethical Funds Company™

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Disclaimer

This document does not represent formal legal advice. Corporations should seek independent counsel to assess the specific legal risks they face.

Preface

Energy and mining companies explore the world for the resources that fuel the global economy. They go wherever the resources are found.

In many cases, fossil fuels and minerals are found in countries where human rights violations and violent conflict are endemic. In these situations, companies are exposed to legal risks that are not widely understood at present. The emerging body of law that presents these risks is tied directly to the International Criminal Tribunals for Rwanda and the former Yugoslavia, and to the Nuremberg War Crimes Trials that followed World War Two. The potential damage to companies, both financial and reputational, should concern the officers and directors who manage these companies and the shareholders who own them.

These risks are relatively new. The rapid evolution and increasingly energetic enforcement of international law during the 1990s means that companies are exposed to legal risks that did not exist 15 years ago. Energy and mining companies need to understand this evolution and take steps to protect human rights and corporate interests.

In *Canadian Energy and Mining Companies: Navigating International Humanitarian Law in the 21st Century,* **The Ethical Funds Company** offers a snapshot of the scale of the problem for Canadian energy and mining companies listed on the S&P/TSX Composite Index and describes the basic contours of the activity that is presenting new risks to companies. We provide a general assessment of these risks and offer practical guidance for those wishing to support international human rights and avoid legal liabilities.

Business has an interest in human rights and international humanitarian law. And it has a role in shaping the conditions that decide whether human rights and the law are supported or denied. Our hope is that by publishing and distributing this information, companies can avoid legal risks, support peace, prevent human rights violations, and maximize their contribution to local, regional, and national economies.

The Ethical Funds Company

Launched in 1992, **The Ethical Funds Company** is Canada's leading manager of socially responsible mutual funds. In addition to evaluating all investments according to their financial, social, and environmental performance and outlook, **The Ethical Funds Company** promotes corporate accountability – making good companies better – and gives investors a voice in encouraging sustainable business practices.

The International Legal Resources Centre (ILRC) provided legal expertise in the development of this publication. The views expressed in this publication are those of **The Ethical Funds Company**.

Highlights

- Twenty-four Canadian energy and mining companies operating in 17 countries where human rights violations are endemic are exposed to prosecution under international law. Twenty of these companies do not have in place or do not disclose policies sufficient to reduce risk exposures.

- Crimes against humanity, war crimes, and genocide represent the most significant legal liabilities today. New human rights liabilities will arise in future.

- American, British, French, and Canadian companies have been implicated in crimes when contracting host country security forces to protect corporate assets and/or after building transportation infrastructure that is subsequently used by host governments to inflict harm on civilian populations.

- International human rights law and international humanitarian law have evolved from the Geneva and Hague Conventions, the Nuremberg War Crimes Trials, and United Nations conventions. The International Criminal Tribunals for Rwanda and for the former Yugoslavia have also contributed to the enforcement and rapid evolution of international human rights law that has taken place over the past 15 years.

- Corporate officers, directors, and employees, as individuals, are now exposed to criminal prosecution under the Rome Statute of the International Criminal Court and Canada's Crimes Against Humanity and War Crimes Act (CAHWCA). Corporations are not liable under the Rome Statute, but they are liable under the CAHWCA. Canadian corporations and their directors, officers, and employees increasingly risk indictment in foreign countries under the doctrine of "universal jurisdiction." And, there is a trend toward making corporations subject to criminal prosecution under international treaty law.

- The greatest risk is for energy and mining companies operating in countries where human rights violations are endemic and with "continuous presence and substantial operations" in the United States. These companies face potential civil litigation under the Alien Tort Claims Act. An unfavourable ruling in the US could mean the payment of enormous damages.

- Criminal and civil liability may arise for companies deemed complicit in human rights violations. Courts have defined complicity as "practical assistance or encouragement that has a significant effect on the perpetration of the crime and the knowledge that these acts aid and abet the perpetrator." Courts have also held that companies can be deemed complicit if they *should reasonably have known* that their conduct would assist or encourage the principal.

- Courts in developed countries are increasingly reluctant to send cases back to the countries where violations occurred, holding that viable legal remedies in these countries do not exist and for fear that victims will face further persecution.

- Officers and directors need to anticipate new areas of liability. Prudent companies will minimize human rights liabilities by putting in place a full suite of due diligence procedures that will serve to protect human rights and safeguard corporate interests.

Part One - Sectors At Risk

Twenty-four Canadian energy and mining companies operating in 17 countries where human rights violations are endemic are exposed to the risk of prosecution under international law. Twenty of these companies do not have in place or do not disclose policies and practices sufficient to reduce legal risk exposures.

We have conducted a global country risk assessment that estimates the risk of human rights violations for 152 countries. We identify nine countries where the risk of human rights violations is extreme, and an additional 25 countries where the risk is high. (See Appendix A)

This assessment is based on the view that countries with poor human rights records, high levels of corruption, few protections for political freedoms and civil liberties, and high levels of conflict are likely to experience human rights violations in future.

Our scoring system and final country scores are based on three main sources of information: Transparency International's *Corruption Perception Index*, Freedom House's index of country protection for political and civil liberties, and the Heidelberg Institute on International Conflict Analysis's *Conflict Barometer*.

We use data published by energy companies (integrated oil and gas, oil and gas exploration and production, and energy equipment and services), and metals and mining companies (aluminum, diversified metals and mining, and gold) listed on the S&P/TSX Composite Index to determine where each is pursuing resource development opportunities globally. This analysis shows 27 companies active in 17 of the 34 countries where the risk of human right violations is extreme or high.

These companies have a total market capitalization of $168 billion, representing 15% of the total market cap of the S&P/ TSX Composite Index as of May 1, 2005. Three of these companies are small cap (a market cap of less than $500 million), seven are mid cap (between $500 million and $1.5 billion), and 14 are large cap (greater than $1.5 billion).

On the basis of data published by these companies in 2004, we find that of these 27 companies, just three disclose a comprehensive human rights policy and management system sufficient to identify, assess, and control for human rights-related risks. A fourth company is currently developing management systems for human rights policy implementation in 2005 and 2006.

We conclude that 24 Canadian energy and mining companies with operations in countries where the risk of human rights violations is severe or high do not have in place policies, board oversight mechanisms, or management systems necessary for protecting international human rights standards and corporate interests.

Crimes against humanity, war crimes, and genocide represent the most significant legal liabilities today. Other human rights legal liabilities are also present and more will arise in future.

Most Canadian companies define human rights in terms of compliance with employment equity and anti-discrimination legislation in the domestic setting. A growing number of companies are establishing supplier codes of conduct to ensure compliance with international labour standards (e.g., no child labour, no forced labour, freedom of association, and the right to collective bargaining) when sourcing products from developing countries.

Few companies understand the recent evolution of international law designed to deter more violent forms of human rights violations. These violations tend to occur most often in countries where there is a high risk of violence. They include:

- **Crimes Against Humanity**
  Include murder, extermination, enslavement, deportation, imprisonment, torture, sexual violence, forcible transfer of population, persecution or any other inhumane act or omission that is committed as part of a widespread or systematic attack on a civilian population.

- **War Crimes**
  An act or omission committed during an armed conflict. War crimes include willful killing, torture or inhumane treatment, extensive destruction and appropriation of property not justified by military necessity, unlawful deportation, unlawful confinement of civilians, and taking of hostages.

- **Genocide**
  An act or omission committed with intent to destroy, in whole or in part, an identifiable group of persons. Genocide is also defined as deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.

Crimes against humanity, war crimes, and genocide fall under the category of international humanitarian and human rights law. The crimes of genocide, slavery, summary execution, disappearance, torture, cruel, inhuman or degrading treatment, prolonged arbitrary detention, and systematic racial discrimination have acquired the status of *jus cogens* norms, defined as norms that are specific, universal, obligatory, and non-derogatory. They are viewed by courts as binding even if states do not agree to them. Courts view the violation of these norms to be of universal concern by virtue of their depravity, the toll of human suffering they produce, and the consequential disruption of domestic and international order that accompanies these acts.

There are other international human rights standards, below the level of *jus cogens* norms. Social and cultural rights, for example, include the enjoyment of just and favourable conditions of work, such as fair wages and equal remuneration for work of equal value. Civil and political rights include the right to a fair trial, self-determination, religious freedom, and freedom from discrimination. Environmental rights include the right to water and ecological resources.

These standards do represent legal risks to companies as litigation has been initiated in several countries. As an active area of law, legal liabilities in these categories are constantly evolving. Companies should pay particular attention to crimes associated with corruption, extortion, and violations of environmental and labour standards recognized in international conventions.

The greatest legal risk at this time, however, can be assigned to companies involved in crimes that violate *jus cogens* norms.

American, British, French, and Canadian companies have been implicated in these crimes when contracting host country security forces to protect corporate assets and/or after building transportation infrastructure which is subsequently used by host government military forces to inflict harm on civilian populations.

To date, most cases involve instances where companies hire military or police forces to protect corporate assets (e.g., drilling platforms, mineral operations, pipelines). Military forces then use excessive force to protect assets and violate national laws as well as *jus cogens* norms. In other cases, it is alleged that military forces working under contract – and with at least the knowledge of corporate officials – have used rape, torture, and murder to force people to participate in construction projects. Cases are also pending in which companies have built roads and airfields for project development that is subsequently used by governments to take military action against civilian populations. In still other cases, it is alleged that companies have encouraged governments to suppress community opposition to resource development, resulting in arbitrary arrest and detention, torture, murder, and ethnic cleansing.

Part Two - Origins Of The Law

Today's international humanitarian and human rights law has evolved from the Geneva and Hague Conventions, the Nuremberg War Crimes Trials, and a series of United Nations conventions adopted over the past six decades. International Criminal Tribunals for Rwanda and the former Yugoslavia have drawn upon these conventions to define universal norms, and have contributed directly to the rapid evolution and enforcement of international human rights law since about 1990.

The most important sources specific to international humanitarian law and international human rights law are:

■ Geneva and Hague Conventions

The basis for today's international humanitarian law can be traced to the nineteenth century when the International Committee of the Red Cross (ICRC) began to organize conferences for the purposes of limiting war atrocities. The Geneva Conventions safeguard wounded military personnel and civilians in conflict zones. The Hague Conventions establish the rights and obligations of belligerents in the conduct of military operations. Both sets of conventions have evolved over time to define the behaviours that constitute war crimes and crimes against humanity.

■ Nuremberg

The legitimacy of legal prosecution of war crimes, genocide, and crimes against humanity was affirmed and the law expanded at the Nuremberg Trials and the Charter of the Military Tribunal for the Far East. These military tribunals were created at the end of the Second World War to prosecute German and Japanese officials responsible for the Holocaust and the manner in which the Axis Powers conducted the war.

German and Japanese industrialists were among those prosecuted. The *I.G. Farben* case marked the first time that a court imposed war crimes liability on corporate officers and directors. *I.G. Farben* invented, produced, and distributed Zyklon B used in the gas chambers in Nazi concentration camps. Corporate officials from Krupp and Roechling were also tried and convicted for the use of slave labour in their industrial operations.

United Nations Conventions

Over the past six decades, the United Nations has drafted a series of conventions leading to the articulation of a broad set of international human rights norms. The main inspiration for these conventions can be found in the Universal Declaration of Human Rights.

Adopted December 10, 1948, the Declaration has spawned more than 60 human rights instruments. In its 30 articles, it recognizes the right to life, liberty, and security of person; the right to an adequate standard of living; the right to freedom of peaceful assembly and association; the right to freedom from arbitrary arrest and the presumption of innocence until proven guilty; the right to seek and to enjoy in other countries asylum from persecution; the right to own property; the right to freedom of opinion and expression; the right to education, freedom of thought, conscience, and religion; and the right to freedom from torture and degrading treatment.

The Declaration imposes duties on individuals as well as states to respect human rights. Its preamble provides that "every individual and organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms by progressive measures, national and international, to secure their universal and effective recognition and observance." Article 30 prohibits any interpretation of the Declaration that implies a right on the part of "any State, group or person...to engage in activity or to perform any act aimed at the destruction of the rights and freedoms" set out in the Declaration.

UN conventions on Genocide (1948) and Torture (1984) also serve as sources for defining international human rights law. The UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (1970) deems that these crimes may be committed in a time of war or in time of peace. This convention expands international humanitarian law to cover acts committed outside of conflict zones.

International Criminal Tribunals

International Criminal Tribunals for Rwanda and the former Yugoslavia have prosecuted individuals associated with rights violations that occurred during conflicts in those countries in the 1990s. Tribunal rulings are shaping legal definitions of complicity and have helped to erode the concepts of diplomatic immunity and national sovereignty as protections against prosecution for human rights violations.

Neither the Criminal Tribunals for the former Yugoslavia or Rwanda have jurisdiction over corporations, as legal persons. The possibility of the Tribunals asserting this jurisdiction was discussed but eventually dismissed.

Part Three - Emerging Risks

Corporate officers, directors, and employees, as individual "natural persons," are exposed to criminal prosecution under the Rome Statute of the International Criminal Court and Canada's Crimes Against Humanity and War Crimes Act (CAHWCA).

Since Nuremberg, it has been generally accepted that individuals can be prosecuted for violations of international humanitarian law. Theoretically, this includes individuals acting on behalf of corporations. The main areas of

exposure for individuals (including corporate officers, directors, and employees) are found in the Rome Statute of the International Criminal Court and Canada's Crimes Against Humanity and War Crimes Act.

International Criminal Court

Established July 1, 2002, The International Criminal Court (ICC) is a permanent, treaty-based court established to promote the rule of law and ensure that grave international crimes do not go unpunished.

The Court is complementary to national criminal jurisdictions and is governed by the provisions of the Rome Statute. One hundred and twenty states adopted the Rome Statute in July 1998 at the United Nations Diplomatic Conference on the Establishment of an International Criminal Court.

The Rome Statute (adopted by the United Nations in 1998) specifies up to 30 years or life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person. The ICC may also order a fine or forfeiture of proceeds, property, and assets derived directly or indirectly from the crime.

Parties to the Rome Statute of the ICC have committed to integrate the substantive provisions of the statute into their domestic legal systems. While the court is designed to complement domestic legislation, the ICC also operates under the principle of subsidiary jurisdiction whereby it will prosecute individuals when a state does not or cannot perform this function. The Rome Statute is not retroactive: crimes committed prior to July 1, 2002 are not subject to the ICC.

Crimes Against Humanity and War Crimes Act

Canada has led other signatories to the Rome Statute by passing the Crimes Against Humanity and War Crimes Act in 2000. The CAHWCA has integrated the Rome Statute of the ICC into domestic legislation.

This legislation mirrors the Rome Statute in most respects and allows the Attorney General of Canada to prosecute individuals for offence outside Canada.

CAHWCA specifies life imprisonment for offences resulting in intentional killings and up to life imprisonment for all other offences. Unlike the Rome Statute, the CAHWCA is retroactive.

Corporations are not liable under the Rome Statute. But they are liable under the CAHWCA.

At the 1998 Rome Conference on the International Criminal Court, delegates debated a French proposal to extend the ICC's jurisdiction to corporations as "legal persons." After three weeks of debate the delegates failed to reach agreement. As a result, the Rome Statute provides for jurisdiction on individuals as "natural persons" only.

Canadian corporations are subject to CAHWCA.

Determining whether a corporation has committed a prohibited act and whether a corporation has the requisite mental state is far more complicated than for an individual, because corporations can only act through their employees and agents. Over the years, Canadian courts have dealt with criminal charges against corporations, and case-by-case, they have elaborated rules for determining when a corporation should be convicted of a crime.

In general, a corporation is guilty of a crime if its "directing mind" committed the prohibited act and had the necessary state of mind. To be a "directing mind," a person must have so much authority in the corporation that he or she can be considered the "alter ego" or "soul" of the corporation. Determining who is a directing mind depends on the facts of each case, but generally the person must have authority to set policy rather than simply having authority to manage. As well, the directing mind has to be intending, at least in part, to benefit the corporation by the crime.

Canadian corporations and their directors, officers, and employees in future may risk criminal prosecution in foreign countries under the concept of universal jurisdiction.

Under the doctrine of universal jurisdiction, states may claim criminal jurisdiction over individuals and corporations under international law for violation of *jus cogens* norms committed in another country. The principle is based on the notion that certain crimes are so harmful to international interests that states are entitled – or even obliged – to bring proceedings against the perpetrator, regardless of the location of the crime or the nationality of the perpetrator or victim.

The principle of universal jurisdiction for the prosecution of war crimes, genocide, and crimes against humanity is not new. Israel, for example, cited universal jurisdiction in 1961 when it tried, convicted, and executed Adolf Eichmann for crimes committed during World War Two.

What is new is the willingness of states to use universal jurisdiction and decisions made by highly regarded courts that erode sovereign immunity defenses.

The Netherlands, Belgium, Switzerland, Denmark, and Germany have all recently employed the Geneva Conventions to prosecute war criminals for actions committed against non-nationals by non-nationals.

In 1998, the British House of Lords allowed Chile to extradite Augosto Pinochet to be tried for crimes against humanity, denying the former dictator's efforts to assert a sovereign immunity defense.

In June 2003, Spain was successful in extraditing from Mexico a former Argentine military officer accused of torturing and murdering hundreds of people (including Spaniards) under Argentina's military dictatorship from 1976 to 1983. This extradition marked the first time that one country has extradited a person to another country for human rights violations that occurred in a third. In April 2005, this individual was found guilty and will serve 30 years in prison.

In February 2005, the UK-based Riggs Bank agreed to pay US$9 million to Pinochet's victims for the bank's role in concealing and spiriting Pinochet's money out of the UK in 1999. The settlement represented the first time any institution or person other than the Chilean government has been forced to pay recompense to Pinochet's victims.

In April 2005, Belgium re-opened an investigation into alleged crimes against humanity committed by the French oil giant Total in Myanmar. Plaintiffs claim that Total funded the military to protect corporate assets in Myanmar. It is alleged that military personnel committed crimes against humanity while under contract to Total. The probe is the first to involve a company rather than an individual under universal jurisdiction.

There is a trend toward making corporations increasingly subject to criminal prosecution under new treaty law.

Recent developments suggest there is a trend toward making corporations increasingly subject to criminal prosecution under treaty law. Several multilateral treaties that address bribery, corruption, and organized crime recognize that legal persons can commit international crimes and require that states provide legal remedies.

The most recent example is the UN Convention Against Transnational Organized Crime. This Convention defines international crimes as participation in an organized criminal group, money laundering, corruption, and obstruction of justice, and obliges states to establish criminal, civil or administrative liability for legal persons who commit these crimes. Such multilateral treaties mark an important development in international law. They not only recognize that legal persons, such as corporations, can commit international crimes but also provide regimes for international enforcement.

The greatest risk is for energy and mining companies operating in countries where human rights violations are endemic and with "continuous presence and substantial operations" in the United States. These companies face potential civil litigation under the Alien Tort Claims Act. An unfavourable ruling in the US could mean the payment of enormous damages.

Alien Tort Claims Act

The United States Alien Tort Claims Act (ATCA), enacted in 1789, grants district courts jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations." It is widely believed that the original intent of ATCA was to allow victims to sue perpetrators for acts of piracy on the high seas.

ATCA remained largely unused until 1980 when, in *Filartiga v. Pena-Irala*, the US Court of Appeals established the following precedents that have subsequently survived several court challenges:

1. The law of nations is part of US federal common law.
2. The law of nations can be ascertained by consulting the work of jurists, the general practice of nations, or by judicial decisions in any jurisdiction enforcing that law.
3. A norm must command the general assent of nations.
4. The law must be interpreted not as it was in 1789, but as it has evolved and exists today.
5. Foreigners have the ability to invoke ATCA against entities present in the US.

The 1980 decision was highly controversial and led to considerable debate about the intended purpose and scope of ATCA. The US Congress mitigated much of the uncertainty when, in 1991, it enacted the Torture Victim Prevention Act and codified the conclusions of the *Filartiga* decision. In June 2004, the US Supreme Court held that ATCA continues to allow victims to sue both corporations and government officials in US courts for the most serious abuses of human rights norms.

Filartiga has also given rise to a new stream of litigation in the US. Under the ATCA, cases have been brought against the former dictator of Haiti, Prosper Avril; the self-proclaimed leader of the Bosnian Serbs, Radovan Karadzic; and Ferdinand Marcos, the Philippines dictator, along with several corporations.

As of April 2005, of the 21 ATCA suits brought against state actors, seven have been dismissed, nine have been settled for the plaintiffs, and five are ongoing. Of the 26 ATCA suits brought against corporations, nine have been dismissed, three have been settled for the plaintiffs, and 14 are ongoing.

Jurisdiction over Canadian Corporations

US Courts have asserted jurisdiction over foreign companies in cases where foreign companies are doing business with a fair measure of permanence and continuity. In *Wiwa v. Shell*, courts have asserted jurisdiction over Royal Dutch Shell because the company is listed on the New York Stock Exchange and because it maintains an investor relations department in New York. In *Presbyterian Church of Sudan v. Talisman Energy*, a listing on the NYSE plus a business subsidiary in the State of New York has been deemed sufficient to allow US courts to assert jurisdiction over this Canadian company in this case.

Damages

ATCA cases have the potential to yield enormous damages. A number of ATCA suits against government officials have resulted in awards reaching the billions of dollars. Although these awards have gone largely unpaid, as the guilty cannot be tracked down or expedited, future judgments against corporations will likely be enforceable.

Two groundbreaking settlements between corporations and Nazi-era victims and their heirs – including a US$1.25 billion settlement with Swiss banks and a US$5 billion settlement with the German government and German corporations – are suggestive of the magnitude of the settlements that could arise. In December 2004, Unocal announced a settlement with plaintiffs who had been suing the California-based oil company for human rights violations associated with the construction of the Ydana Pipeline in Myanmar in the early 1990s. Though the terms of the settlement are not in the public domain, it is reported that in addition to compensating the plaintiffs, the settlement funds will develop programs to improve living conditions, health care, and education, and protect the rights of people from the areas adjacent to the pipeline right-of-way. This marks the first settlement in an ATCA case targeting a corporation.

Part Four - Defining Complicity

Criminal and civil liability may arise for companies directly involved in human rights violations and for those companies deemed complicit in human rights violations. Courts have defined complicity as "practical assistance, encouragement, or moral support that has a significant effect on the perpetration of the crime and the knowledge that these acts aid and abet the perpetrator." Courts have also held that companies can be deemed complicit if they *should reasonably have known* that their conduct would assist or encourage the principal.

Direct Involvement

Direct involvement by corporations in violations of international humanitarian law is a rare occurrence. In July 2004, a lawsuit was filed under ATCA against two US private security firms, Titan Corporation and CACI International, for committing torture at the Abu Ghraib prison in Iraq.

Complicity

Corporations are far more likely to be found complicit in international crimes committed by other people. Current legal tests for determining complicity are derived from decisions made at Nuremberg and, more recently, at the

International Criminal Tribunals for Rwanda and the former Yugoslavia. US federal courts have drawn on decisions made at these tribunals when ruling on ATCA cases.

Complicity is defined as "practical assistance, encouragement, or moral support that has a significant effect on the perpetration of the crime, and the knowledge that these acts aid and abet the perpetrator."

Courts use two legal concepts to determine complicity: *actus rea* (the wrongful act that comprises the physical components of a crime) and *mens rea* (the state of mind indicating criminal intent or recklessness).

- *Actus Rea*

  In *Prosecutor v. Furundzija*, the International Tribunal for the former Yugoslavia held that in order to qualify, the assistance need not constitute an indispensable element of the crime; rather, it suffices that "the acts of the accomplice make a significant difference to the commission of the criminal act by the principal." The acts of the accomplice have the required substantial effect on the commission of the crime where "the criminal act most probably would not have occurred in the same way without someone acting in the role that the accomplice in fact assumed."

- *Mens Rea*

  Furundzija also helps define the requirement for *mens rea*: "It is not necessary for the accomplice to share the *mens rea* of the perpetrator in the sense of positive intention to commit the crime." It is not even necessary that the aider and abettor knows the precise crime that the principal intends to commit. Rather, if the accused "is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of the crime, and is guilty as an aider and abettor."

US courts, further, have ruled that companies can also be deemed complicit if they *should reasonably have known* that conduct would assist or encourage the principal.

Courts in developed countries are increasingly reluctant to send civil cases to the countries where the violations occurred, holding that viable legal remedies in these countries do not exist and for fear that victims will face further persecution.

Corporations have argued that courts should dismiss cases brought against them because the country where the alleged violation occurred is the more appropriate forum for legal proceedings. This argument is based on a legal doctrine called *forum non conveniens*. In civil procedure, courts have held that cases can be moved to more appropriate locations for the convenience of the litigants and the witnesses.

Corporations charged with international crimes have attempted to invoke *forum non conveniens* to have cases moved to the countries where the crimes are alleged to have occurred. US federal courts are rejecting this argument, holding that in many cases these countries provide no viable legal remedy to the crime because of corruption and a weak legal infrastructure. Judges have also expressed the concern that victims returning to the country where the crime occurred risk imprisonment or execution at the hands of those responsible for the original violation.

Part Five - Recommendations

Officers and directors need to anticipate new areas of liability. Prudent companies will minimize human rights liabilities by putting in place a full suite of due diligence procedures that will serve to protect human rights and safeguard corporate interests.

A full suite of procedures to prevent complicity in human rights violations will include:

■ Country Risk Assessments, Mitigation, and Impact Benefit Plans

Companies need to make good faith efforts to closely examine local practices and ensure their operations do not contribute to state capacity to violate international humanitarian law. Country risk assessments should include identification of: security risks; potential for violence; human rights records; levels of corruption; the rule of law; and the protection of civil liberties.

If considering operations in a country where conflict is occurring, a conflict impact assessment should be made at the pre-investment phase to determine the possible impacts of investment, intended and otherwise. Mitigation plans should be established to ensure the development of conflict-sensitive business practices that benefit host communities as well as the wider regional and international contexts. Company investments should avoid exacerbating conflict and define the contributions it can make to contribute to peace and stability.

■ Human Rights Policy

In addition to economic, social, cultural, civil, and environmental rights, human rights policies should include specific reference to the protections individuals require in order to be free from genocide, torture, war crimes, and crimes against humanity. Some companies make an explicit commitment not to be complicit in human rights violations but fail to make reference to the categories of rights violations that occur under international humanitarian law.

We recommend that companies make these specific commitments in the context of articulating a broader human rights policy. Reference should be made to the Universal Declaration of Human Rights and the newly-minted United Nations Norms on Responsibilities of Transnational Corporations with regard to Human Rights, to anticipate rising public expectations and further evolution of international human rights law.

Reference to the Global Compact, a voluntary set of human rights-related commitments, should not be relied upon as the sole means for articulating a human rights policy. The principles of the Global Compact, while referencing the UN Declaration of Human Rights, and while providing a useful learning forum for corporate participants, does not make specific and direct reference to obligations that fall under international humanitarian law.

■ Security Arrangements

Companies must ensure that security forces hired to protect corporate assets do not become involved in violations of international humanitarian law.

Policy development in this area should be guided by the United Nations Code of Conduct for Law Enforcement Officials and the UN Basic Principles on the Use of Force and Firearms.

Companies should adopt the US/UK Code of Conduct on Security and Human Rights. The Principles are designed to guide companies in maintaining the safety and security of their operations within an operating framework that ensures respect for human rights and fundamental freedoms.

These Principles were first developed by the governments of the United States and the United Kingdom in association with resource extraction companies (Chevron, Texaco, Freeport McMoran, Conoco, Shell, BP, Rio Tinto), human rights organizations (Amnesty International, Human Rights Watch, International Alert, Lawyers Committee for Human Rights, Fund for Peace, Council on Economic Priorities), business associations involved in promoting corporate social responsibility (Business for Social Responsibility and the Prince of Wales Business Leaders Forum), and labour (the International Federation of Chemical, Energy, Mine and General Workers' Unions). This multi-stakeholder development process provides a high level of credibility for these Principles.

■ Transparency of Revenue Payments and Revenue Management Plans

Energy and mining companies have the capacity to generate enormous revenues for host countries. When spent effectively, these revenues have the potential to improve lives. When allocated ineffectively they can fuel corruption, exacerbate conflict, and increase the ability of governments to violate international humanitarian law.

All companies, Canadian and foreign, should disclose royalty and tax payments to governments in host countries. By providing full disclosure of these revenue transfers, companies can help reduce corruption and allow citizens, multilateral organizations, and international human rights groups to hold governments accountable for the use of proceeds in funding social and economic development and implementing environmental safeguards.

In Canada, energy and mining companies are required to disclose revenues and royalties paid to host governments. Most companies offer this disclosure in their annual report. Despite this disclosure, many host governments receiving those payments are not required to disclose all revenues received from resource companies. In many cases, it is clear that they are not disbursing those funds to communities under stress.

To address this situation, companies should encourage host governments to participate in the Extractives Industry Transparency Initiative (EITI). The EITI is a coalition of resource companies that work in partnership with host governments to ensure transparency of revenue payments.

In addition, companies should begin to raise with governments the need for transparent Revenue Management Plans to ensure that the proceeds from resource development benefit the impoverished and those involuntarily impacted by resource development.

■ Crisis Management, Monitoring, and Action Plan

Despite comprehensive country risk assessments, situations can deteriorate. When host governments become implicated in violations of international humanitarian law, companies must protest such violations in the strongest terms possible with government officials, re-evaluate their country risk assessment, and determine the point at which

operations will cease or disposal of assets will occur. Companies must also have in place a communications plan to ensure that the public knows all steps are being taken to end the violations, and that there is threshold for rights violations that will trigger exit.

■ Joint Ventures

Companies should attain clear agreement with project partners on the need for and importance of these procedures, particularly in cases where other companies have operational control.

■ Management System and Disclosure

Full implementation of a comprehensive human rights policy will include specification of board and senior management responsibilities, staff allocations, training opportunities, integration of human rights policy implementation into compensation plans, monitoring mechanisms, and public reporting. Reporting of human rights-related risks and procedures for mitigation should be disclosed to shareholders in the Annual Report, Annual Information Form, the Management Discussion & Analysis (under risks and uncertainties), and in corporate responsibility or sustainability reports.

Final Note

In publishing *Canadian Energy and Mining Companies: Navigating International Human Rights Law in the 21st Century*, **The Ethical Funds Company** is not providing firm-specific legal advice. Companies operating in countries where human rights violations occur should seek their own legal counsel to specify the risk characteristics unique to their situation.

Nor do we assess the less tangible but still significant reputational risks to companies. We believe, however, that the impact on corporate reputation and employee morale of an allegation of complicity in war crimes, genocide, or crimes against humanity is both obvious and potentially devastating. The recent emergence of a body of law that links legal risk exposures today to international criminal tribunals in Rwanda and in the former Yugoslavia, and to the war crimes trials at Nuremberg following World War Two, should be sufficient to motivate directors and officers to make all efforts to avoid any potential complicity in human rights violations.

In 2005, **The Ethical Funds Company** began to ask a select number of companies to develop human rights policies, management systems, and to disclose more information on this activity to company stakeholders. We have been pleased with the results. In 2006, **The Ethical Funds Company** will expand this campaign and engage in a structured dialogue with all the energy and mining companies in which we own stock and which operate in countries where there is potential for complicity in human rights violations.

We are confident that our engagement with these companies will lead to the rapid development of the policies and management systems needed to protect human rights. We are hopeful that all energy and mining companies, both Canadian and foreign, will take note of this publication and develop the capacity to meet the policy and management system challenges we have described.

The Ethical Funds Company believes that international human rights law will continue to evolve. Prudent and forward-thinking companies will develop a comprehensive set of policies and management systems, not just in the area of international humanitarian law, but also in the broader set of economic, environmental, social, and cultural rights. We believe companies share an interest with all members of society in recognizing, promoting, and enhancing these rights. They represent the evolution of humanity and are a necessary condition for creating a more just, sustainable, and stable world.

References and Resources

Preface

The International Legal Resources Centre (ILRC) is a Montreal-based organization that monitors human rights in Africa and Latin America. The ILRC provides human rights expertise in the context of corporate social responsibility initiatives to Canadian business, governments, and other organizations. The ILRC enjoys consultative status with the University of Quebec at Montreal's Social Responsibility and Sustainable Development Chair, www.ceh.uqam.ca. For more information about the ILRC visit http://www.cirj.org.

Part One - Sectors At Risk

For country specific human rights records see:

Amnesty International Report, 2004 http://web.amnesty.org/report2004/index-eng

Human Rights Watch, http://www.hrw.org/countries.html

The main sources of information for our global country risk assessment are:

Global Corruption Report 2005, Transparency International, http://www.globalcorruptionreport.org/download.html#download

Freedom in the World 2004: the Annual Survey of Political Rights and Civil Liberties, Freedom House, http://www.freedomhouse.org/research/survey2005.htm

Conflict Barometer 2004: 13th Annual Conflict Analysis, Heidelberg Institute on International Conflict Analysis, University of Heidelberg, http://www.hiik.de/en/ConflictBarometer_2004.pdf

A note on terminology: international humanitarian and international human rights law

Both International humanitarian law and international human rights law strive to protect the lives, health, and dignity of individuals, albeit from different angles. While very different in formulation, the essence of some of the rules is similar, if not identical. For example, the two bodies of law aim to protect human life, prohibit torture or cruel treatment, prescribe basic rights for persons subject to a criminal justice process, prohibit discrimination, comprise provisions for the protection of women and children, and regulate aspects of the right to food and health.

The rules of international humanitarian law, however, deal with many issues that are outside the purview of international human rights law, such as the conduct of hostilities, combatant, and prisoner of war status and the protection of the Red Cross and Red Crescent emblems. Similarly, international human rights law deals with aspects of life in peacetime that are not regulated by international humanitarian law, such as freedom of the press, and the right to assembly, to vote, and to strike

International humanitarian law is a set of international rules, established by treaty or custom, specifically intended to solve humanitarian problems directly arising from armed conflict. It protects persons and property that is affected by an armed conflict, and limits the rights of the parties to a conflict to use methods and means of warfare of their choice. The main treaty sources applicable in international armed

conflict are the four Geneva Conventions of 1949 and their Additional Protocol I of 1977. The main treaty sources applicable in non-international armed conflict are article 3 common to the Geneva Conventions and Additional Protocol II of 1977.

International human rights law is a set of international rules, established by treaty or custom, on the basis of which individuals and groups can expect and/or claim certain behavior or benefits from governments. Human rights are inherent entitlements that belong to every person as a consequence of being human.

Numerous non-treaty based principles and guidelines ("soft law") also belong to the body of international human rights standards. The main treaty sources for international human rights law are the International Covenants on Civil and Political Rights and on Economic, Social, and Cultural Rights (1966), as well as Conventions on Genocide (1948), Racial Discrimination (1965), Discrimination Against Women (1979), Torture (1984) and Rights of the Child (1989), among others.

While the two bodies of law have had a separate historical development, recent treaties include provisions from both bodies of law. Examples are the Convention on the Rights of the Child, its Optional Protocol on the Participation of Children in Armed Conflict, and the Rome Statute of the International Criminal Court.

For definitions of war crimes, genocide, and crimes against humanity, see Rome Statute of the International Criminal Court, July 17, 1998, arts. 6-8, UN Doc. A/CONF.183/9, 37 ILM 999, 1004-09, available at http://www.un.org/law/icc/

For discussion of *jus cogens* violations, see *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714-19 (9th Cir. 1992), *Tachiona v. Mugabe*, No.00 Civ.6666 (VM), 2002 WL 31799018, and Restatement (Third) of Foreign Relations Law of the United States, available for order at http://www.ali.org/ali/foreign.htm

To view the International Covenant on Economic, Social, and Cultural Rights, United Nations, 3 January 1976, see http://www.unhchr.ch/html/menu3/b/a_cescr.htm

To view the International Covenant on Civil and Political Rights, United Nations, 23 March 1976, see http://www.unhchr.ch/html/menu3/b/a_ccpr.htm

For examples of cases dealing with non *jus cogens* norms, see *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161 (5th Cir. 1999), *Sarei v. Rio Tinto PLC*, F. Supp. 1116 (C.D. Cal. 2002), and *Recherches Internationales Quebec v. Cambior Inc.*, C.S. 1998 Q.J. No. 2554 (Q.L.)

For cases where corporations are alleged to have violated international humanitarian law, see *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 163 (5th Cir. 1999), *Doe v. Unocal Corp.*, 963 F. Supp. 880, 883 (C.D. Cal. 1997), *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 92-93 (2d Cir. 2000), *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 224 F. Supp. 2d 289 (SDNY 2003). Also see "Belgium to Reopen Rights Probe on Total in Myanmar," Reuters, April 14, 2005. For information on these lawsuits, see www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/AlienTortClaimsActUSA?&batc_start=31

Part Two - Origins Of The Law

The International Court of Justice (ICJ) is the most widely-quoted authority on the sources of international law. According to the ICJ, the sources are:

1. International conventions, establishing rules recognized by states;
2. International custom,
3. The general principles of law recognized by most countries; and
4. Judicial decisions and the teachings of the most highly qualified legal experts.

Located at the Hague, Netherlands, the International Court of Justice settles legal disputes submitted to it by governments and gives advisory opinions on legal questions referred to it by international organizations and agencies.
See http://www.icj-cij.org/icjwww/icjhome.htm

For information on the Geneva Conventions see http://www.genevaconventions.org/

For information on the Hague Conventions see http://www.hcch.net/index_en.php

The most relevant cases emerging from the Nuremberg Trials include *United States v. Krauch* et. al. (the I.G. Farben case), VIII Trials of War Criminals Before the Nuremberg Military Tribunals, iii-iv (1952), *US v. Alfried Krupp*, XIV Trials of War Criminals Before the Nuremberg Military Tribunals 621-22 (1952), and the Roechling Case, Superior Military Government Court of the French Occupation Zone Germany, 1949.

Information on the Universal Declaration of Human Rights and the International Criminal Tribunals for Rwanda and the former Yugoslavia can be found at http://www.un.org/rights/

The United Nations Convention Against Genocide can be found at http://www.hrweb.org/legal/genocide.html

The United Nations Convention Against Torture can be found at http://www.unhchr.ch/html/menu3/b/h_cat39.htm

The United Nations Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity can be found at http://www.unhchr.ch/html/menu3/b/p_limit.htm

In law, "persons" are defined as entities with legal rights and obligations, including the ability to sue and be sued, sign contracts, receive gifts, and appear in court. Individuals are "persons" in law unless they are minors or mentally incapacitated. "Persons" also include businesses, partnerships, corporations or associations.

Part Three - Emerging Risks

The International Criminal Court's Web site can be found at http://www.un.org/law/icc/

For Canada's Crimes Against Humanity and War Crimes Act, see http://www.dfait-maeci.gc.ca/foreign_policy/icc/crimes-en.asp

For information on how Canadian courts determine corporate criminal liability, see http://canada.justice.gc.ca/en/dept/pub/c45/#3

For information on the UN Convention Against Transnational Organized Crime, see http://www.unodc.org/unodc/en/crime_cicp_convention.html

For information on the doctrine of universal jurisdiction, see http://www.u-j.info/index/72646,74575

The application of universal jurisdiction is highly politicized, as attempts have been made in Europe to prosecute high-ranking members of the Bush Administration for crimes associated with the War in Iraq. It was reported that in 2003 Belgium was pressured by Washington to repeal its 1993 universal jurisdiction law under the threat of losing its status as host to the headquarters of the North Atlantic Treaty Organization (NATO). In addition, in some cases, domestic laws limit the ability of governments to pursue cases under the doctrine of universal jurisdiction on the basis of the nationality of the alleged criminal and the territory where they are found.

For information on the Alien Tort Claims Act, see http://www.hrw.org/campaigns/atca/intro.htm

Filartiga v. Pena-Irala, 630 F.2d 876-79 (2d Cir. 1980), available at http://www.icrc.org/ihl-nat.nsf/0/27721c1b47e7ca90c1256d18002a2565?OpenDocument

Sosa v. Alvarez-Machain, 124 S. Ct. 2739 (2004)

For a concise history of ATCA and the significance of the June 2004 US Supreme Court decision see: "In Our Court: ATCA, Sosa, and the Triumph of Human Rights: A Report about the Alien Tort Claims Act," EarthRights International, July 2004, available at http://www.earthrights.org/pubs/inourcourt.pdf

See also "Business and International Crimes: Assessing the Liability of Business Entities for Grave Violations of International Law," International Peace Academy, 2004, available at http://www.fafo.no/liabilities/467.pdf

Terence O'Hara, "Settlement Ends Case in Spain," Washington Post, February 26, 2005.

For rulings on jurisdiction, see *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 92-93 (2d Cir. 2000) and *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 224 F. Supp. 2d 289 (SDNY 2003).

The largest settlement to date in an ATCA case against a foreign government official is the US$4.5 billion award that 23 plaintiffs won against Radovan Karadzic in *Kadic v. Karadzic*. See also *Hilao v. Estate of Marcos*, 103 F. 3d 767,772,787 (9th Cir. 1996), *Mushikiwabo v. Barayagwiza*, No. 94 CIV. 3627, 1996 WWL 164496, at 3-4 (SDNY April 1, 1996), and *Xuncax v. Gramajo*, 886 F. Sup. 162, 197-99 (D. Mass. 1995), Holocaust Victim Assets Litigation, 105 F. Supp. 2d 139, 141 (EDNY 2000), John M. Goshko, "Swiss Banks' Pact Ends New York Threat of Sanctions," Washington Post, August 14, 1998.

See Edmund & Jones LLP, "Iraqi Civilians File Claim Against Private US Firms Claiming Murder, Torture, and Abuse in Abu Ghraib Prison," PRNewswire, July 27, 2004.

Part Four - Defining Complicity

Both the Rome Statute and the CAHWCA provide definitions of complicity. For the most significant court decisions on definitions of complicity, see *Prosecutor v. Furundzija* (Case No. IT-95-17/1-T), Judgment December 10, 1998, *Prosecutor v. Musema* (Case No. ICTR-96-13-T) Judgment, January 27, 2000), and *Doe v. Unocal*, DC No CV-96-06959-RSWL, (9th Cir).

The Rome Statute of the International Criminal Court also recognizes complicit liability. See article 25 at http://www.un.org/law/icc/statute/romefra.htm

For court rulings rejecting *forum non conveniens* see *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 92-93 (2d Cir. 2000) and *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 224 F. Supp. 2d 289 (SDNY 2003).

Canadian courts agreed with this line of reasoning in *Recherches Internationales Quebec v. Cambior Inc.* but held that Guyananese courts provided a viable legal remedy for the 1995 tailings pond spill into the Omai and Essequibo Rivers from a gold mine owned by Cambior.

Part Five - Recommendations

For more information on country risk assessments and social impact analysis, see Conflict-Sensitive Business Practice: Guidance for Extractive Industries, International Alert, March 2005, available at: http://www.international-alert.org/pdf/pubbus/conflict_sensitive_business_practice_all.pdf

Universal Declaration of Human Rights is available at: http://www.un.org/rights/

Information the Global Compact is available at: http://www.unglobalcompact.org/Portal/Default.asp

The UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises With Regard to Human Rights is available at: http://www1.umn.edu/humanrts/links/norms-Aug2003.html

For information on human rights policies for business see:
- http://www.amnesty.ca/business/principles.php
- http://www.unhchr.ch/business.htm
- http://www.business-humanrights.org/Home

For information on security policy see:
- http://www.unhchr.ch/html/menu3/b/h_comp42.htm
- http://www.unhchr.ch/html/menu3/b/h_comp43.htm
- http://www.voluntaryprinciples.org/

For information on transparency of revenue payments see:
- http://www.eitransparency.org/
- http://www.publishwhatyoupay.org/english/
- http://www.savethechildren.org.uk/mt/Linkage.pdf

National Instrument 51-101 Standards of Disclosure for Oil and Gas Activities under Form 51-101F1 Statement on Reserves Data and Other Oil and Gas Information asks that companies disclose by country and in aggregate, revenues, and royalties.

The Standards and Guidelines for Valuation of Mineral Properties of the Special Committee of the Canadian Institute of Mining, Metallurgy and Petroleum on Valuation of Mineral Properties states that the valuation report should, under "Property Ownership, Status, and Agreements," "describe any applicable agreements such as options, joint ventures, farm ins, royalties, back-in rights, payments, and the like. Under "Mining and Processing Operations" companies are asked to provide an outline of capital and operating costs, contracts, taxes, and royalties.

For a description of emerging standards of the full range of corporate human rights obligations, see the "Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights" at: http://www1.umn.edu/humanrts/links/norms-Aug2003.html.

Appendix A - Risky Countries

Extreme Risk
Algeria
Columbia
Democratic Republic of Congo
Cote D'Ivoire
Haiti
Iraq
Myanmar (Burma)
Sudan
Yemen

High Risk
Angola
Cameroon
Chad
China
Ecuador
Eritrea
Ethiopia
Georgia
Indonesia
Iran
Kazakhstan
Kyrgyzstan
Lebanon
Libya
Nepal
Nigeria
Pakistan
Republic of Congo
Russia
Tajikstan
Turkmenistan
Uganda
Uzbekistan
Vietnam
Zimbabwe

Countries where Canadian companies are active are in italics.

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