Mass Grave Aesthetics
Or how profit motivated business can trigger multinational corporations' criminal liability for participating in international or transnational crimes

Þorvarður Arnar Ægústsson

Mentor: Kolbrún Benediktsdóttir

June 2017
Mass Grave Aesthetics

Or how profit motivated business can trigger multinational corporations’ criminal liability for participating in international or transnational crimes

Þorvarður Arnar Ágústsson

Mentor: Kolbrún Benediktsdóttir

University of Iceland
Faculty of Law

June 2017
# TABLE OF CONTENTS

Preface ........................................................................................................................................ vi

1. Introduction ............................................................................................................................ 1

2. Interaction between domestic and international law .............................................................. 3
   2.1. International criminal law in general ............................................................................... 3
   2.2. Prosecuting international crimes in domestic law ........................................................... 5
   2.3. Transnational criminal law ............................................................................................... 6

3. Jurisdiction .............................................................................................................................. 7
   3.1. General principles ............................................................................................................. 7
   3.2. Business relationship ....................................................................................................... 10
       3.2.1. Domestic courts ........................................................................................................ 10
       3.2.2. The ICC ................................................................................................................... 14

4. Accomplice liability ................................................................................................................ 17
   4.1. Comparative accomplice liability .................................................................................... 17
       4.1.1. General principles .................................................................................................. 17
       4.1.2. Different levels of *Mens Rea* with a focus on shared intent and purpose .......... 18
       4.1.3. *Dolus Indirectus* and *Dolus Eventualis* .............................................................. 22
       4.1.4. Causation and substantial effect ............................................................................. 23
       4.1.5. The issue of superior responsibility within the corporate structure .................... 23
   4.2. Corporate complicity ........................................................................................................ 26
       4.2.1. Actions and consequences of a company’s involvement ........................................... 26
       4.2.2. The *Actus Reus* and the *Mens Rea* of a company ............................................. 27
       4.2.3. The actions of a company must have a substantial effect ....................................... 30
   4.3. Corporate complicity at the ICC ..................................................................................... 35
       4.3.1. General notions ....................................................................................................... 35
       4.3.2. The extent of contribution required ...................................................................... 36
       4.3.3. The *Mens Rea* for aiding and abetting under the Rome Statute ......................... 37
4.3.4. A practical interpretation of the *Mens Rea* requirement for aiding and abetting ................................................................. 43

4.3.5. Common Purpose or Residual Liability .............................................. 44

4.3.6. Profit motivated business within this framework: A conclusive assessment... 47

5. Financial involvement commensurate to participation .................................. 48

5.1. International crimes ............................................................................. 48

5.1.1. Genocide ......................................................................................... 48

5.1.2. War crimes .................................................................................... 52

5.1.3. Crimes against humanity ................................................................. 58

5.2. Transnational crimes .......................................................................... 63

5.2.1. General .......................................................................................... 63

5.2.2. Business with terrorists .................................................................. 64

5.2.3. Organized crimes ........................................................................... 66

5.2.4. Industrialized human rights abuses .................................................. 68

6. Corporate criminal liability ......................................................................... 72

6.1. Domestic ............................................................................................. 72

6.1.1. The nature of legal entities and their responsibility ............................. 72

6.1.2. A comparative study of corporate criminal liability ......................... 74

6.2. International ........................................................................................ 77

7. Individual liability of a company’s representative ....................................... 82

7.1. General approach ................................................................................ 82

7.2. Legal personality and limited liability................................................ 82

7.3. Identifying the responsible representative through the corporate structure .... 84

8. Acquiring evidence to establish knowledge ............................................... 87

8.1. Establishing knowledge from facts ....................................................... 87

8.2. A guilty mind in the context of a larger chain of transactions: A case study...... 88

8.1.3. Obtaining evidence.......................................................................... 94
9. Conclusion .................................................................................................................. 97

BIBLIOGRAPHY ........................................................................................................ 99

TABLE OF CASES ..................................................................................................... 105
This thesis is dedicated to the memory of my friend and my brother, Francis Omondi, with whom I lived during some of the best months of my life.

Francis was brutally murdered in Nairobi, Kenya, the night of 04.04.2017, only 27 years old.
The motive for his death is still unclear and the perpetrators have not been identified.
Preface

White collar crime has come to be viewed as a practice which harms society severely. The law enforcement has continued the pursuit of white collar criminals and corporate criminal liability has become increasingly relevant. Other aspects of business criminality have largely been left unaddressed although the result from these corporate actions is without a doubt much more harmful. These are actions which are in themselves a usual factor in business but within a given situation could render a company complicit in criminal activity. The fact that companies are regularly linked to disastrous criminal activity, such as the atrocities in Darfur or the Sierra Leone civil war, sparked the question of why these actors have enjoyed impunity. I decided to research the legal environment to make an assessment on the merits of holding business actors liable for business involvement which crosses into the grey area between legitimate business and criminal activity.

I would like to thank my mentor, Deputy District Prosecutor Kolbrún Benediktsdóttir, my family and friends who have supported me throughout my studies and my constantly supportive wife, Fabiola Prince.

Reykjavík, 18.04.2017
Þorvarður A. Ágústsson
1. Introduction

For a long time, the laws governing international crimes had been seen only as a branch of international law which customarily affects only interstate relations. In the wake of a time of great unrest, it became evident that individuals were the ones with whom international criminal law would concern itself. The rise of totalitarian regimes and the birth of powerful dictators introduced a new era of brutality and inhumanity. The international community could no longer stand idly by as states proceeded to crush their own beating hearts, rendering live conditions upon their citizens, which could lead to nothing else than a lamented nation. Judges were summoned and trials were held over those responsible. A time of impunity was to be foregone and a military title, a badge or a governmental role could no longer shield those who participate in crimes.

But as the dust of war settled, a bigger picture of the tragedies became visible. Individuals, who had officially remained on the sideline, had shamelessly utilized the opportunity to gain easy profit from the misfortunes of others. These actors would not refrain from conducting business with the perpetrators of mass crimes, turning a blind eye towards the effectual implications consequential to their business involvement. One could ask whether the civil war in Sierra Leone would have even occurred had the diamond dealers refused to conduct business with the rebel forces.

Trials related to the involvement of business actors in international crimes are traceable back to the Second World War but despite the successful attempts to hold business leaders accountable, prosecutors quickly abandoned this policy of non-impunity. Business leaders started to become invisible to the eye of justice, hiding behind the fictional juridical person referred to as a company.

As companies become bolder and a more vital part of conflicts, the mask of impunity starts to fade. The international community is waking up from its dormant sleep of toleration and once again starts to re-introduce the concept of corporate responsibility. One needs only to look at the statistics of those states which have suffered the most in recent years in order to understand the impact exerted by multinational corporations. The 100 lowest ranking nations on the “Fragile States Index” have all suffered through some form of large-scale business related conflicts in the past 6 years.¹ International criminal law is no longer directed only against the “heads of states” or high ranking officers. While theories of corporate complicity

¹Brian Ganson and Achim Wennmann: Business and Conflict in Fragile States, p. 17.
have started to gain momentum, a more tangible reality of those theories has reached the surface of the legal world as states have returned to their efforts of holding business leaders accountable for their business involvement. At the same time, the first provision enabling an international court to determine jurisdiction over legal entities has recently been introduced.\(^2\) As the first convictions have now seen the light of day, with the notable case of Van Anraat or the lesser known case of Emmanuel Shallop of Shallop Diamond, prosecutors are reaching further in order to realize how far into the abyss of legal responsibility they can dig, determining the threshold of involvement necessary to generate criminal liability.

The following discussion will focus on one of the lower forms of complicity or financial complicity through bilateral business transactions. This form of complicity has received very little attention in scholarly discussions, whereas most scholarly articles related to corporate complicity are focused on arms dealers or similarly on relatively direct involvement. While such discussion is practical for this limited number of cases, a discussion focusing on the lower thresholds of complicity is applicable to a wider scope of situations. The principles governing the lower thresholds of corporate complicity will be discussed in the light of a more direct involvement and the theories already set forth by other scholars adjusted to lower forms of involvement accordingly. An attempt is made to realize a general principle of business complicity from researching cases extending from the Second World War to currently impending cases. The effect of corporate complicity is contextualized against the backdrops of theoretical cases and abandoned attempts.

Legal ramifications are discussed and solutions and alternatives are proposed. The interplay between international courts, domestic courts and different legal theories is explained, as the positives and negatives of each system are weighted. This field of law is largely unexplored in the rapidly changing environment of international criminal law. The particular interest to discover the possibilities of holding corporate actors responsible renders the legal regime increasingly dynamic and the theories set forth will hence take note of the limited precedents available for scholarly research, particularly with regard to the relatively recently established International Criminal Court. The main objective of this thesis is therefore to challenge the long lived defense that a business leader is only carrying out business as usual and cannot become responsible for the effect his actions have on the commission of a crime. The theory that an accomplice is free from guilt if he acts

\(^2\) Article 46(C) of the Malabo Protocol.
indifferently towards the consequences is criticized and an attempt is made to define the limits of the extended scope of responsibilities.

2. Interaction between domestic and international law

2.1. International criminal law in general

While the legislation of different legal systems in the world may differ in various respects, there is still a common denominator. One of the underlying principles of different legal systems is the fact that there are certain actions that are prohibited, and undertaking such actions will result in a punitive reciprocation.

The field of law covering those punitive actions is called criminal law. International crimes and many transnational crimes are essentially human rights abuses and the field is consequently closely linked to human rights law. The power of a state to regulate affairs is derived from its sovereignty. A state will normally exercise this power within a specific territory although some exceptions are to be found. States are expected to exercise this power through legislating, adjudicating via set laws and implementing rules and regulatory frameworks. This is referred to as a states’ jurisdiction. Seeing how a state is the competent authority within its jurisdiction, it is natural that said state will generally want to control which actions are to be deemed as being of a punitive nature.

Since the world community’s public opinion started to shift towards greater respect for human rights an interesting situation has developed. Some rights have been considered so inherent to human beings and of such great importance to the world that they have earned the status of *ius cogens*, meaning that acts in discrepancy with such rules can never be justified. A major shift in international law that occurred in relation to these increasing demands was the fact that human rights abuses have ceased to be considered a state’s personal matter. It has in fact been argued that a state is not accorded a competence to exclude itself from the operative provisions of international law.

This shift in law reflects the public’s ever-changing temperament towards which actions can be tolerated and which actions are too severe to go unpunished. Some of the most

---

9This alleged shift in law is still debated among some scholars. The debate mostly revolves around the extent to which human rights can be considered *ius cogens*. 

3
vitiolic crimes or the most clandestine violations of human rights have persisted while perpetrators have not been held accountable. International criminal law thus developed as a response to cruel human rights abuses to secure the enforcement of international humanitarian standards. International criminal law is interlinked with human rights law since both bodies have the main objective of providing a minimum standard of humane treatment.\textsuperscript{10} An international crime is almost always an example of a severe human rights abuse.\textsuperscript{11} The interaction between these bodies of law is generally transparent through international treaties. Obligations are imposed on states and states decide on how to enforce them upon their citizens.\textsuperscript{12} Failure to uphold such obligations is a matter of state responsibility.

It is only in the most serious cases of human rights abuses that individuals are held responsible for breaches of international law. In the pursuance of justice it became imperative to broaden the jurisdiction for certain crimes. International crimes are now widely understood to be “those offences over which international courts or tribunals have been given jurisdiction under general international law.”\textsuperscript{13} Such tribunals of an international nature have existed ever since the downfall of Nazi Germany, emerging from human tragedies such as the Rwandan genocide or the ethnic cleansings in former Yugoslavia. Although these international courts differed from one another they all shared one thing, they were temporary.

From the ashes of blood-soaked Africa and the ruins of war-torn Yugoslavia rose a new era of international criminal law. The International Criminal Court (ICC) was established in order to secure human rights for all and justice for the victims of international crimes.

The development of the statute of the ICC is one of the most important moments in international criminal law, establishing a judicial institution with the competence to investigate and try international crimes, thus setting out a code for this developing body of law. The significance of this development in law cannot be overstated. By codifying a part of the existing customary law, the Rome Statute crystallized a part of the unwritten law for the first time, consequently contributing to the further development of customary law.\textsuperscript{14} That being said, the Rome Statute is not intended to reflect customary law.\textsuperscript{15}

\textsuperscript{10}Robert Cryer et al.: \textit{An Introduction to International Criminal Law and Procedure}, p.13.
\textsuperscript{12}Note that such obligations can also emerge through customary law. The nullum crimen sine lege principle generally prohibits convictions based purely on customary law but in international law the source of criminalized prohibitions is not restricted to states being parties to the relevant treaty e.g. when the prohibition has become customary law. International courts are however limited to their assigned jurisdiction which includes defined crimes. Customary law can however affect the application of those provisions. See Robert Cryer et al.: \textit{An Introduction to International Criminal Law and Procedure}, pp.18-20.
\textsuperscript{13}Robert Cryer et al.: \textit{An Introduction to International Criminal Law and Procedure}, p.4 and 15.
\textsuperscript{14}Robert Cryer et al.: \textit{An Introduction to International Criminal Law and Procedure}, pp. 146 and 151-152.
\textsuperscript{15}See Article 10 of the Rome Statute.
The ICC is not intended to take over states’ duties. States are still expected to exercise their jurisdiction over crimes of an international nature. The court is rather intended to be complementary, becoming a last resort when a state is unable or unwilling to implement adequate legal procedures to bring the alleged perpetrators to justice.\textsuperscript{16} It should be noted that the assertion of extraterritorial jurisdiction leads to the overlaps of sovereignties. It is therefore paramount to understand that international crimes are first and foremost intended to be prosecuted at the domestic level.

The history of the domestic prosecution of the perpetrators of international crimes dates back to the American Civil War in the 1860s when the culprits of war crimes were tried for their actions. While the Second World War gave birth to a series of prosecutions under international tribunals, the aftermath was primarily dealt with on a national level, spanning over thousands of domestic cases around the globe and prosecuting both for international crimes and crimes under the national penal law.\textsuperscript{17} The significance of those domestic cases underlines the primary nature of domestic courts and the important role states play in the deliverance of justice.

2.2. Prosecuting international crimes in domestic law

International crimes are quite significant with respect to jurisdiction. They can be prosecuted at a national level based on territory, extraterritorially or at selected international courts. Most perpetrators of international crimes nevertheless escape prosecution be it because of the magnitude of the crime or because of political obstacles.\textsuperscript{18} International crimes are primarily intended to be addressed on a national level but they are generally committed in states with a poorly functioning government. The law enforcement may in addition be weakened by the wounds inflicted on the system through long term violations of international law. It is therefore perhaps not surprising that the number of prosecutions is low.

Some treaties concerning international or transnational crimes create an obligation for states to investigate and prosecute the offences addressed by the treaty. Such an obligation can be avoided by extraditing suspects to another State Party, which in turn intends to prosecute the perpetrators. This principle is referred to as aut dedere aut judicare, meaning that a state must either prosecute or extradite.

\textsuperscript{16}See paragraph 6 and 10 of the preample to the ICC statute.
\textsuperscript{17}Robert Cryer et al.: \textit{An Introduction to International Criminal Law and Procedure}, pp. 70-71.
\textsuperscript{18}For an example of political obstacles, see Belgium’s attempt to prosecute George H. W. Bush, Dick Cheney and Colin Powel for war crimes allegedly committed in the Gulf War in 1991.
The relationship between domestic law and international law is approached differently among nations with respect to which “school” of law they have adopted. Countries adhering to monism see international law and domestic law as a part of the same legal system, international law being superior to domestic law. Monistic states will in theory be able to build a criminal case on international treaties without incorporating them into domestic law. The opposite is true for dualistic states, whereas such transformations or incorporations of treaties into national law are paramount for them to become legally binding.\(^{19}\)

Most states take influence from both schools of law in their actual application but as a rule states are formally categorized as either monistic or dualistic. Monistic states are in more danger of violating international law by neglecting their duty to enact the ratified treaty into its domestic legislation.

Customary international law plays a significant role within international criminal law and affects the application of those provisions to a great extent, especially at international criminal courts or tribunals. Domestic law might not be as liberal due to a strict approach to the *nullum crimen sine lege* principle. In most democratic civil law countries, criminal offences must derive from the written law enacted by the Parliament or the secondary legislation emanating from the government.\(^{20}\) Dualistic states may therefore have ratified treaties describing certain actions as international crimes, without performing the necessary adjustments in domestic law in order to prosecute for such offenses in their national courts.

International crimes are considered so serious that states recognize them not only as a violation of internal penal law but also as a matter for international concern. As such, these issues are not always ones to be addressed on a national level and can often not be ascribed to the state concerned.\(^{21}\)

### 2.3. Transnational criminal law

Transnational criminal law is often confused with international criminal law. This is understandable given the international nature of the legal regime. Transnational criminal law however, operates independently from international courts but in close contact with other states. The transnational element of law has been described as the part of domestic law “which regulates actions or events that transcend national frontiers.”\(^{22}\) This means that a crime is not transnational when it only affects the state it was committed in, whereas

---

\(^{19}\) Lori F. Damrosch et al.: *International Law*, p. 160.

\(^{20}\) Antonio Cassese et al.: *Cassese’s International Criminal Law*, p. 23.


\(^{22}\) Phillip C. Jessup; *Transnational Law*, p. 2.
international crimes can be committed within a state by a citizen of that state with no direct effects on other states.

Transnational crimes are in other words crimes that are committed with relations to more than one state, in one way or another. This could be a case of a single offense such as smuggling drugs or a case of criminal operations via organized crime networks. Such organized crimes have become problematic as multinational corporations have utilized such networks for the trafficking of human beings, narcotics, weapons, diamonds, stolen goods, contrabands, laundered money and in order to spread international terror.\textsuperscript{23} In these times of globalization, crimes are increasingly adopting a transnational nature and thus listing up all possible transnational crimes is neither efficient nor pragmatic.

The problems related to transnational criminal law are mainly those of jurisdiction and state co-operation. Having acknowledged the importance of eradicating transnational crimes, multiple treaties have been adopted in order to target such crimes. The treaties will either address the criminality of a behavior, the applicable jurisdiction or how states should co-operate in the event of cross-border criminal activities. It would however not be consistent with the reality to act as if the treaties had solved the aforementioned problems.

As transnational crimes are almost perpetual, the discussion must be narrowed down to correspond with the subject. Transnational criminal activity in the corporate world will mostly relate to organized crimes. The coverage of transnational crimes will consequently focus on organized crimes, human rights abuses and terrorism. These are areas which are problematic yet interlinked with the corporate world.

3. Jurisdiction
3.1. General principles
One of the main problems in international and transnational criminal law is to determine which jurisdiction should proceed to process a given case. A crime touching upon two or more states can become troublesome when more than one state seeks to assert their jurisdiction over the matter. This becomes even more perplexing when international criminal courts and tribunals are introduced to the scenario.

First thing to consider is when a domestic court can assert its jurisdiction over a case. The most widespread principle is the territorial theory allowing courts to assert their jurisdiction over conducts that take place within the territorial boundaries of the state in question. The

\textsuperscript{23}David Luban, Julie R. O’Sullivan and David P. Stewart: \textit{International and Transnational Criminal Law}, p. 4.
second principle of jurisdiction, which has gained general acceptance, is the active nationality principle. From this principle rises a right to assert a jurisdiction over a state’s nationals with respect to their conduct abroad. The third principle is called the passive personality principle allowing states to exercise their jurisdiction over crimes committed against their nationals abroad. This principle is debated but cannot be overlooked due to the mere fact that it is increasingly used, for example by the United States. Another classic example is the states’ assertion of jurisdiction over crimes that threaten state-security.  

Universal jurisdiction is the most controversial form of jurisdiction, enabling any state to exercise jurisdiction over the perpetrators of certain offenses, which the international community generally considers heinous or harmful to mankind.

The category of offenses, over which any country can exercise its jurisdiction, includes piracy, crimes against humanity, war crimes, genocide and torture. The exact extent of crimes which are subject to universal jurisdiction is however under debate and the list of crimes is likely to expand in the coming years. It should therefore be noted that this is not an exhaustive list. Other offenses which have also been claimed subject to universal jurisdiction are slavery, hostage-taking and hijacking. Belgium has been one of the most visual supporters of universal jurisdiction, incorporating universal jurisdiction into its legislation and repeatedly undertaking attempts to exercise such jurisdiction.

Complementary to the domestic courts are the international tribunals and the ICC. While the ICC is the international court of modern international criminal law, other options of international jurisdiction should also be considered. The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (hereinafter ICTY) and the International Criminal Tribunal for Rwanda (hereinafter ICTR) were established to bring justice to victims of events that rank among the worst human tragedies in history.

The tribunals had a concurrent jurisdiction with domestic courts but gained primacy over the domestic courts. The reason for this was that domestic courts would not necessarily be able or willing to conduct fair trials. The statute of the ICTY and the ICTR did however not conclude in which instances or how primacy should be exercised. The judges of the ICTY drew up three rules providing that the tribunal may assert its primacy at the request of the

---

Prosecutor, namely when an international crime is being investigated or treated in court as an ordinary criminal offence, the national court handling the case proves to be unreliable or when a case is closely related or may be relevant to other cases being tried by the tribunal. These rules were later adopted by the judges of the ICTR.\textsuperscript{29}

Limiting the primacy of the tribunals could be seen as a notion of bringing the courts closer to serving a complementary purpose, respecting the sovereignty of the concerned states focusing only on major cases and only when domestic courts have proven to be an objectionable choice.

Other \textit{ad hoc} tribunals have also been established to address tragedies around the world, sometimes mixing elements associated with international and domestic courts, as in the case of the Special Court for Sierra Leone. Due to the nature of \textit{ad hoc} tribunals, these will not be covered in this thesis except when their relevance is significant to the possible prosecution of corporate complicity. Their application to international criminal law will however be further examined with the objective of reflecting the applicable customary law.

The ICC’s jurisdiction is not established with a given scenario in mind, unlike the \textit{ad hoc} tribunals. The approach must therefore be general and more cautious.

The ICC is, as a general rule of thumb, a complementary court. The court is only to take over a case when the case is of sufficient gravity to justify the exercise of the court’s jurisdiction. It cannot however exercise its jurisdiction if a national court asserts its jurisdiction over the case, if it is being duly investigated or prosecuted by national authorities or if these authorities have decided not to prosecute. Nevertheless, such decisions must be made in a proper manner.\textsuperscript{30}

This leaves the court in a position to take over a grave case pending before the national authorities if the state is unable or unwilling to genuinely handle the investigation or prosecution. Furthermore, the court can take over a case when a state has decided not to prosecute a person for such grave offenses and said decision is a result of its unwillingness or inability to do so.\textsuperscript{31} If a person has however been convicted or acquitted for a crime then the ICC cannot try a person for said offense, given that the trial was fair and proper.\textsuperscript{32}

The court’s jurisdiction is also limited to other factors. The court cannot prosecute persons for offenses which happened before 1 July 2002, which was the date when the Rome Statute

\textsuperscript{29}Antonio Cassese et al.: \textit{Cassese’s International Criminal Law}, pp. 293-294.
\textsuperscript{30}Article 17 of the Rome Statute of the International Criminal Court.
\textsuperscript{31}Antonio Cassese et al.: \textit{Cassese’s International Criminal Law}, pp. 296-297.
\textsuperscript{32}Article 20 of the Rome Statute of the International Criminal Court.
entered into force. The territorial jurisdiction of the ICC is limited to the territory of the states that have become parties to the Rome Statute or accepted its jurisdiction. The court can also however exercise active personality jurisdiction. The court can consequently exercise its jurisdiction over persons, who are nationals of a signatory state, or a state which has accepted the jurisdiction thereof, based on the active personality jurisdiction, or persons who have committed a crime within such a state, its vessels or aircrafts on the basis of territorial jurisdiction.

This jurisdiction can however be expanded by the Security Council, by referring a case to the court, acting under chapter VII of the Charter of the United Nations, extending to individuals who are neither the nationals of a state who has become a party to the statute or accepted ICC’s jurisdiction, nor committed a crime within such territory. The court is in addition limited to certain grave offenses listed in Article 5 of the Rome Statute.

3.2. Business relationship

3.2.1. Domestic courts

In the case of accomplice liability in international or transnational crimes, the most obvious base for the exercise of jurisdiction is the territorial principle. A national court will be able to exercise its jurisdiction where an offense took place. If an aider or abettor took part in an offense within the state where the principal offense was committed, the jurisdiction would be exercised in said state on the basis of the principle of territorial jurisdiction.

If the accomplice act was committed in a separate state from the principal offense, more than one jurisdiction might collide. When a principal perpetrator receives financial assistance from a corporation through mutual business agreements, such assistance is often the result of a series of negotiations and meetings leading up to the final agreement. This however holds greater significance over a case concerning conspiracy than it does with respect to complicity.

It is essential to separate the complicit act from the principal offense. If a transaction can amount to a complicit act it ought to be determined where such a transaction took place or where an agreement was concluded resulting in a contract. The Harvard Research team describes that territorial jurisdiction can be asserted when the crime is committed within a state’s jurisdiction, stating that:

---

33 Article 11 of the Rome Statute of the International Criminal Court.
34 Article 12 of the Rome Statute of the International Criminal Court.
35 Article 13(b) of the Rome Statute of the International Criminal Court.
36 See further in chapter 4.1.
[a] crime is committed “in whole” within the territory when every essential constituent element is consummated within the territory; it is committed “in part within the territory” when any essential constituent element is consummated there. If it is committed either “in whole or in part” within the territory, there is territorial jurisdiction.\textsuperscript{37}

This means that if the complicit offense was fully committed within a territory or a part of the crime was committed within the territory, said state has jurisdiction. The conduct need not to have originated in the prosecuting state, neither does it have to end there. It is enough that one of the elements of the offense occurs in its territory.\textsuperscript{38}

Business transactions are generally carried out via the internet or other similar media. Internet crimes have raised concern over the problem of opening up too many jurisdictions because of its global dissemination. Judges have however looked at these crimes from a traditional perspective, recognizing that it is just another form of cross-border-communication or a remote commission of a crime. It could therefore open up jurisdictions within the states from which the communication or transaction is sent or where it is received.\textsuperscript{39}

When applying the territorial jurisdiction, one must understand that even an act such as complicity constitutes part of a crime and complicit actions can be broken down into multiple actions which all make up the complicit crime. If for example a company enlists children to manufacture their products within a state where child labor is not criminalized, it should not matter if the company operates within a prosecuting state which does criminalize child labor. The reason for this is that the crime is partly taking place in the prosecuting state even though the principal perpetrators never entered that state.\textsuperscript{40} This legal argument is however only applicable if the company does in fact commit a part of the crime within the territory of a prosecuting state.

If a business entity reaches an agreement with a perpetrator in one country but completes a transaction, fulfilling the contract in another state, the question of which state can claim jurisdiction arises. Subjective territoriality gives the state where an offence began the right to exercise its jurisdiction. Objective territoriality however means that the state where the offense incurred can prosecute. Both theories are internationally acknowledged and thus both states could prosecute albeit the rules of double jeopardy will prevent both states from prosecuting for the same offense.\textsuperscript{41} If however one of the states has incorporated a rule of law enabling courts to convict legal entities for offenses, said state could in theory prosecute a

\textsuperscript{37}M. Cherif Bassiouni: \textit{International Criminal Law, Volume II}, p. 43.
\textsuperscript{38}Robert Cryer et al.: \textit{An Introduction to International Criminal Law and Procedure}, p. 52.
\textsuperscript{39}Michail Vagias: \textit{The Territorial Jurisdiction of the International Criminal Court}, pp.131-133.
\textsuperscript{40}Alice de Jonge: \textit{Transnational Corporations and International Law}, p. 92.
\textsuperscript{41}Claire de Than and Edwin Shorts: \textit{International Criminal Law and Human Rights}, p. 38.
company for its complicity while the other state prosecutes its representatives or employers. This would not be violating the *ne bis in idem* principle.\(^{42}\)

In the example above both the state where the agreement was made and the state where the transaction was made hold jurisdiction via the subjective territoriality principle. The state where the principal offense incurs would however also be able to claim jurisdiction based on the principle of objective territoriality. This is because the financial transaction will assist the principal committing a crime. The consequences of its actions are an element of the crime inevitably being present within the same territory as the principal offense.

This is just as well the case with many multinational corporations or worldwide enterprises, perhaps having a long term business relationship with a perpetrator, participating in multiple contracts, or completing transactions through subsidiary companies located in different states. Tracing such a net of transactions involves a great degree of complexity, yet at the same time it opens up multiple options for jurisdictions. States are however not always too enthusiastic to prosecute on the grounds of subjective territoriality.

A common theory of extraterritorial jurisdiction is the claim that a crime which occurred in state \(A\) but is prosecuted in state \(B\) must be criminalized in both states. This principle of *double criminality* is old and almost outdated. The principle has been weakened in recent years and does not seem to apply to territorial jurisdiction.\(^{43}\) The principle does not seem to reflect customary international law but might nevertheless have a bearing on the states’ willingness to extradite.\(^{44}\) The principle may however be of increased relevance in other circumstances.

Jurisdiction could also be exercised on the basis of the active nationality/personality principle, prosecuting the representatives or employers in the state where they are nationals. States are more likely to reserve the right to prosecute their nationals for acts abroad when they constitute serious offenses. This tendency to prosecute on the basis of nationality has firmer roots and seems to be stronger in civil law systems than in common law systems.\(^{45}\) Business men operating away from the state of nationality can therefore become subject to the jurisdiction of the state of operation, the state where the principal offense was committed as well as the state of nationality.

\(^{42}\)Jónatan Pórmundsson: *Afbrot og refsiábyrgð II*, p.41.
\(^{43}\)Jónatan Pórmundsson: *Afbrot og refsiábyrgð*, p. 110.
When exercising jurisdiction via the active personality principle, one must be mindful of the double criminality principle. The double criminality principle applies to acts committed exclusively abroad by a national but the principle is not without exceptions. Although it might apply to some transnational crimes, it does not apply to international crimes such as genocide, war crimes or crimes against humanity since they involve *jus cogens* violations. So if we return to the former example of a business man who does business with an actor which utilizes child labor, it may be inferred that the basis of jurisdiction might greatly impact the outcome of the case. If the business man conducts his transactions within a foreign state which does not criminalize child labor, the state of which he is a national, could not exercise jurisdiction based on territorial principles since no part of the crime is committed within that state and would be barred from exercising jurisdiction based on the active personality principle since the actions are not criminalized in both states. That is unless the child labor practice is of a scale which could constitute a crime against humanity or a war crime under enslavement. If the transaction is however completed within a state which does criminalize child labor, it would not matter whether the receiving state does so too since the first state could claim territorial jurisdiction.

The principle of active personality can be applied accordingly to legal entities which have been customarily regarded as nationals of the state in which their headquarters are stationed or where their seat of management is located.

Another approach is to prosecute in the state of which the victim is a national on the basis of the passive personality principle. As this discussion mostly revolves around major crimes, often targeting groups of peoples, it will in most cases overlap with the territorial principle. This approach could theoretically become useful in some situations of international or transnational crimes, for example when a perpetrator targets tourists as victims. Certain terrorist organizations, such as Al-Shabaab, Boko Haram and Al-Qaeda have targeted tourists in order to secure wide media coverage. The passive personality principle could additionally become useful in the case of war crimes. A state may send their troops to take part in an armed conflict within another state. If the militia of the second state commits war crimes against the troops of the first state, said state may exercise jurisdiction against the principal perpetrator as well as an aider or abettor.

---

46 Jónatan Pórmundsson: *Afjóðaglepir og refsiðbyrgð*, p. 110.
Universal jurisdiction is a possible procedure for the most severe offenses as listed above, this is no exception with accomplice liability. Even supposing that universal jurisdiction can only encompass the aforementioned crimes, one must still bear in mind that there is no universal agreement on which crimes could be subject to universal jurisdiction. Corporate complicity could therefore theoretically face prosecutions anywhere in the world if they are suspected of aiding or abetting numerous crimes.

In order for a state to exercise its jurisdiction it will have to have the relevant basis for such jurisdiction in its national legislation. The fact of the matter is that states are declaring the right to exercise universal jurisdiction for an increasing number of offenses. If the suspect is however not present at the prosecuting state, all ambiguities regarding the legality of universal jurisdiction might become serious obstacles for extradition.\(^4^9\)

In some cases, an accomplice to crime could find himself within the scope of ad hoc tribunals or international courts. It could be fitting for an international court to address an act constituting complicity when the court has already convicted the principals of the crime. But as a rule of thumb, the process starts in national courts. An accused may decide to ask the court to dismiss a case on the basis of overlapping jurisdictions. A business man found guilty of complicity in war crimes by selling mustard gas to Saddam Hussein’s government through multiple companies in different countries, had appealed the case to the European Court of Human Rights claiming that his rights under Article 6 of the European Convention of Human Rights had been violated since the national court did not address his argument of admissibility. The court found, in its decision of \textit{ECHR, Frans Cornelis Adrianus van Anraat V. The State of The Netherlands, 6. July 2010 (65389/09)}, that the Supreme Court was not compelled to respond to the applicant’s argument because the argument was only set forth in the final stages of the proceedings. The applicant held that the Iraqi Special Tribunal had jurisdiction since he was an accomplice of Saddam Hussein pursuant to the Statute of the Iraqi Special Tribunal. It is unlikely that such arguments would have been sufficient to warrant a dismissal in the light of the primary nature of national courts.

3.2.2. The ICC

Historically, states have been reluctant to prosecute company representatives complicit in human rights abuses. The damage caused by the actions of the perpetrators does generally not exert an impact on the corporate actor’s state of residence and the states that do suffer the crime are often not in the position to target business leaders of remote states. The ICC might

serve as a bridge of justice in these cases since the fact of the matter is that states are generally either unwilling or unable to target company officials who have assisted in the commission of an international crime.

The court can only exercise its jurisdiction over certain crimes as described in Article 5 of the Rome Statute. Those crimes are genocide, crimes against humanity, war crimes and eventually the crime of aggression. Domestic courts would therefore be preferable since corporate officials could also be convicted of other offenses, such as breaching an arms embargo in case they would be acquitted of other accusations. In some cases, the domestic prosecutor may decide to prosecute solely for minor offences, which brings up the question of whether the ICC should take over such cases.

In the Belgian case The Court of Appeal of Antwerp, Case No. C/268/10, 17 February 2010, Emmanuel Shallop, a Lebanese businessman of Shallop Diamonds, was found guilty for facilitating the trade in conflict diamonds for the Revolutionary United Front (RUF) leaders in Sierra Leone. Mr. Shallop used a legal entity in Liberia to export the diamonds mined for the RUF in Sierra Leone. When the police raided Shallop’s premises they found RUF spokesman, Gibril Massaquoi, present with a bag containing more than 15,000 US$. Documents were found at the scene which indicated that Bassem Mohamed of RUF had been organizing deals involving conflict diamonds. Among the types of information found in these papers were impending payments to Emmanuel Shallop and Mirib Shallop. These transactions were labeled as payments for “washing plants and batteries” and were organized through a Swiss bank account. Despite the amount of evidence he was not charged with complicity in international crimes and was convicted only for money laundering, tax fraud, violations of custom regulations and importing conflict diamonds in contravention of a legal ban at the time. Shallop was sentenced to 4 years in jail, a 5-year ban from employment in the diamond trade and to pay a fine.

The fact that the ICC is not completely limited to a certain territory or certain persons cannot be overlooked. It brings about the possibility to end the impunity ascribed to certain shadow-contractors. The practice of the court is still in its infancy so it remains to be seen whether or not the court will seek to deliver corporate actors to justice. The chief prosecutor of the International Criminal Court, Luis Moreno-Ocampo, referring to the illegal exploitation

---

52 The Court of Appeal of Antwerp, Case No. C/268/10, 17 February 2010.
of resources in the Democratic Republic of Congo (DRC), expressed special interest in the role of private actors in fueling war crimes and crimes against humanity.\textsuperscript{53}

The territorial jurisdiction or the active personality jurisdiction should be applied in accordance with the states’ general application of those principles. In order to understand the scope of the ICC’s jurisdiction one might consider the previous discussion in Chapter 3.2.1. with regard to corporate complicity. Seeing how the territorial jurisdiction has gained a broad application, it is evident that representatives of multinational corporations could become subject to the ICC’s jurisdiction for financing offenses even if their company is based within a non-signatory state, if the receiving party is operating within a signatory state.

Theories of the ICC’s ability to apply territorial jurisdictions to crimes, which only have an indirect, non-criminal effect in signatory states, have gained some increased currency.\textsuperscript{54} These theories are however highly debated and it seems doubtful in the author’s opinion that the court would assert its jurisdiction under such circumstances. The court has been allocated jurisdiction over certain crimes committed by certain actors or within certain territories. Any attempt to exercise jurisdictions over crimes committed by non-signatory nationals within a non-signatory territory would require a Security Council referral unless one of the elements of the crime was committed within a signatory state.

So although the jurisdiction of the ICC is quite wide, it does not encompass all scenarios. It should in addition be noted that while the ICC could \textit{de facto} exercise jurisdiction over a national of a non-signatory state such as U.S. corporate officials who finance international crimes in a signatory state, any attempt to exercise such authority is dependent on the possibility of the state’s co-operation or willingness to extradite.

\textsuperscript{53} Second Assembly of States Parties to the Rome Statute of the International Criminal Court Report of the Prosecutor of the ICC, Mr Luis Moreno-Ocampo 8 September 2003, p. 5.

\textsuperscript{54} Michail Vagias: \textit{The Territorial Jurisdiction of the International Criminal Court}, pp. 162-163.
4. Accomplice liability

4.1. Comparative accomplice liability

4.1.1. General principles

The jurisprudence of criminal law is centered on the axiom that there are certain actions that are wrong and should be punished. In the same way, it is generally accepted that one who assists in the commission of such criminal acts also does wrong. That is why criminal liability is generally extended to an accomplice in crime.\(^{55}\) Complicity, in its essence, focuses on criminalizing actions or omission which, although not necessarily criminal in themselves, generate criminal liability based on a criminal offense, principally committed by another actor.\(^{56}\)

An accomplice generally receives lower sentences than a principal or a co-perpetrator. There is however nothing which pre-determines that an accomplice cannot be considered as responsible as a principal perpetrator.\(^{57}\)

Aiding and abetting has generally been criminalized in international criminal courts or tribunals as is evidenced by Article 7(1) SICTY, Article 6(1) SICTR, Article 6(1) SSCSL and Article 25(3)(c) of the Rome Statute. A customary criterion of international complicity has developed through the application of these provisions which will be further discussed in chapter 4.2.

The most likely venue for a case concerning a company accused of aiding or abetting a perpetrator is within domestic jurisdictions. Accomplice liability is included in the majority of states’ penal codes and is generally limited to generating criminal liability extending to actors who aid, abet or assist the commission of a crime. The required causal link to establish criminal liability, be it knowledge or direct intent, is different in various branches of domestic law, both due to differences in language and contrasting approaches in criminal law. Therefore, one must first look at the applicable legislation within the competent jurisdiction.

Although the application of accomplice liability may differ between states, the latter generally share a theme of common requirements which are construed differently. A state’s national law will always require that the accused holds a certain mental state, generally referred to as the *mens rea* of the accused, meaning a guilty mind.\(^{58}\)

\(^{55}\)Miles Jackson: *Complicity in International Law*, p. 12.

\(^{56}\)Marina Aksenova: *Complicity in International Criminal Law*, p. 48.


\(^{58}\)Corporate Complicity & Legal Accountability. Volume 2, Criminal Law and International Crimes, pp. 24-25.
4.1.2. Different levels of Mens Rea with a focus on shared intent and purpose

An actor may become responsible for complicity if he “intentionally influenc[es] the decision of the primary party to commit a crime, [or] intentionally help[s] the primary actor commit the crime, where the helping actions themselves constitute no part of the actions prohibited by the definition of the crime.” The definition above is the key to complicity in most parts of the world, requiring the mens rea of intent unless otherwise noted. Intent however means different things depending on the jurisdiction in question. The different use in language and the different standards of mens rea are imperative to this discussion. Mens rea in common law is for example divided into purpose, knowledge, recklessness and negligence. At the same time, many European states such as Germany, speak of intent which encompasses three forms of mens rea standards, namely dolus directus, dolus indirectus and dolus eventualis, all of which would satisfy the mens rea requirement for aiding or abetting. This range of intent in German law seems to encompass the common law perception of purpose, knowledge, recklessness and to some extent negligence.

Purpose and knowledge as a form of mens rea in common law seem to be encompassed by the term dolus directus which in German and Nordic law is divided into purpose and certain knowledge. The common law perception of “knowledge” as a form of mens rea does however, with respect to its lower threshold, also seem to extend to the concept of dolus indirectus which would also encompass recklessness although recklessness may also have lower levels of knowledge extending to a level called dolus eventualis.

In some states it will sometimes prove sufficient to entertain recklessness as a basis for conviction. A comparative approach to complicity has revealed that:

There is no natural or automatically ascertainable proper level of mental involvement or culpability; it is a normative issue of what mental states, bearing in mind the social circumstances and consequences and possibilities for control, ought to be taken as appropriate subjects of criminal sanctions.

In some jurisdictions, the accomplice must share the principal’s intent meaning that he must intend for his actions to assist the crime. This is true for most U.S. courts including the

---

60 The word intent will hereby be used as a term which describes different levels of knowledge and the will to act, encompassing, dolus directus, dolus indirectus and dolus eventualis but excluding negligent behavior, negligence being a lower level of knowledge, for example a knowledge of a risk for something to happen. The lower levels of intent might also encompass knowledge of such a risk but the probability of the consequences to result from the behavior would be higher than in the case of negligence.
61 Markus D. Dubber and Tatjana Hörnle: Criminal Law, p. 223.
64 Miles Jackson: Complicity in International Law, p. 46.
U.S. Supreme Court. Since motivation is generally not the required element for criminal liability, it is not necessary that this would exclude liability for financial assistance in business when the accomplice knows perfectly well that his assistance will aid in the commission of a crime but still proceeds to assist in the commission thereof in order to gain profit. The legal interpretation of the concept of intention extends beyond the narrow linguistic sense of the word, including an assessment of responsibility. The result of an appropriate interpretation would, in the author’s opinion, lead to a requirement of a higher threshold of knowledge, while actively contributing to the commission of a crime, in accordance with the elevated level of intent. Shared intent is in many jurisdictions a term used in order to require purposeful assistance which may border a requirement for a special motive.

Other jurisdictions will however not require that the principal and the accomplice share the same intent. The French criminal code requires that an actor knowingly makes himself an accomplice meaning that he does not have to wish to become an accomplice but his knowledge, coupled with the intention to act, results in liability since he still decides to become complicit regardless of his motivation.

The difference between these states will therefore be further highlighted depending on what level of mens rea is accepted as a basis of liability in the concerned state. If motivation is ruled out as a requirement then the mens rea is basically nothing else than different levels of knowledge coupled with the determination to commit an act.

An actor can generally become responsible not only for the consequences he has actively ordered to bring about but also for those consequences he knows will occur in the ordinary course of events. Nordic law breaks the required levels of knowledge into three stages of intentional actions, dolus directus, dolus indirectus and dolus eventualis. Dolus directus, or direct intent, is then divided into “purpose” on the one hand, meaning that the actor must wish for the consequences to happen and “inevitable consequences” or “certain knowledge” on the other hand, meaning that the actor believes the commission of the offense to be an inevitable result from his actions. All these forms of intent are equally valid as a basis for conviction. The practical effect of determining which state of intent is at play has only to do with the severity of the penalties imposed. Even at the highest state of intent, namely the purpose

---

67 Miles Jackson: *Complicity in International Law*, p. 47.
69 Marina Aksenova: *Complicity in International Criminal Law*, p. 29.
70 Miles Jackson: *Complicity in International Law*, p. 47
requirement, purpose is still separated from motivation.\textsuperscript{71} A man can thus still be considered to purposefully commit a crime in order to seek another goal, that goal being the motivation, despite his utter abhorrence towards the consequences.

In states where the accomplice must share the intent with the principal the prosecution may be bound to prove purposeful assistance. This, in accordance with the previous analysis, will be achieved through proving a higher standard of knowledge that goes beyond probability. If such knowledge of the principal’s purpose is present in the mind of a company official, they will be taking an informative decision on whether or not to help him achieve the commission of the crime. The company will have to evaluate whether or not it is willing to facilitate the commission of a crime in order to gain profit. The means to gain profit will be to facilitate a crime, which in turn serves as the necessary stepping stone to achieve profit and could be considered as purpose. An actor which has obtained the knowledge that a perpetrator intends to use the accomplice’s resources with the purpose to commit a crime does share his intent if he brings the resources regardless of his motivations. This would however border the “inevitable consequences” form of intent in Nordic law. Nevertheless, such distinction is insignificant, whereas Nordic law does not require the aider or abettor to share the principal’s intent.

In some states, complicity may be completely limited to the purpose requirement. The Model Penal code drafted by the American Law Institute recognizes four forms of \textit{mens rea}, purpose, knowledge, recklessness and negligence, whereas accomplice liability is limited to purpose.\textsuperscript{72} Interpreting the concept of purpose is therefore paramount to such states. The fact of the matter is that scholars disagree on how the concept of purpose should be applied in criminal law. Some scholars have interpreted the concept to the extent that it almost mirrors that of motivation. The Model Penal Code defines actions of purpose with respect to the material element of the offense in question. The actions are ones of purpose if the element involves the nature of the actor’s conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.\textsuperscript{73}

Upon analyzing the wording of the article, there is no reason why it should exclude liability for those who do not joyously wish for the consequences of the offense if they

\textsuperscript{71}Jónatan Pórmundsson: \textit{Afbrot og refsiábyrgð II}, pp. 60 and 65-69
\textsuperscript{72}Article 2. Section 2.06 (3) of the Model Penal Code.
\textsuperscript{73}Article 2. Section 2.02 of the Model Penal Code.
objectively act in a manner which they know will result in the commission of said offense. But since many scholars intend to interpret the concept in accordance with motivation there is no guarantee that such views might not triumph over others in those courts. Examining the drafting history of the Model Penal Code, it is also clear that lower levels of knowledge, such as *dolus directus* in the second degree, were not intended to become a sufficient element to meet the purpose standard but some of the U.S. states, which adapted the Model Penal Code article, have nevertheless construed the requirement to be sufficiently fulfilled by proof of mere knowledge. In other states, knowledge satisfies the purpose requirement only with regard to the more severe offenses. Many U.S. jurisdictions will however require that the accomplice beholds an almost *dolus specialis* longing for the crime to prevail. But a point to consider is in fact the history of the purpose requirement within the Model Penal Code which brings to light the original intention of the drafters which was only to hinder the prosecution of accidental aid.\(^74\)

The clash of interpretation is a dispute that is deeply rooted in the U.S. jurisprudence. Professor Kadish says that shared intent is implied in U.S. law in order to safeguard those who carry out legitimate actions from constant worries about what someone else might possibly do.\(^75\) The rationale behind the interpretation does not function if it were to exclude the conviction of an actor which acts out of profit with undeniable knowledge of his assistance to a crime. This is the reason why a motivation-based interpretation is principally flawed. That is not to say that the view of an unspecified U.S. court will be foreseeable, some courts accept a loose view of intention, knowledge being sufficient while others require *dolus directus* in the first degree with respect to the desired results.

The jurisprudence in international customary law has historically not been this strict when U.S. judges sit down to inflict judgment upon non-nationals guilty of aiding or abetting international crimes, as can be seen in the case of *U.S. vs. Friedrich Flick, et al.*, *Military Tribunal V*, 22. December 1947.\(^76\) The American Military Tribunals ruled that although neither Flick nor Steinbrinck believed in the Nazi Party’s ideologies nor approved of their malicious actions, such shared intent was not a *mens rea* requirement. The corporate actors were found guilty of aiding in the commission of the atrocities on the basis that they must have known that their financial support would not be spent exclusively for cultural purposes.

\(^{75}\)Sanford H. Kadish: “Reckless Complicity”, p. 371.
\(^{76}\)USA v. Friedrich Flick, et al., American Military Tribunal VI, 22 December 1947, Case No. 5, *Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10, Vol. VI (The Flick Case).*
Since some of the states in the U.S. have incorporated the purpose requirement for aiding and abetting into their penal codes, the jurisprudence of such states would require further analysis with respect to how purpose will be interpreted in said state.77

4.1.3. Dolus Indirectus and Dolus Eventualis

In states where shared intent is neither a requirement nor is accomplice liability limited to purpose, it will be unnecessary to prove such a strict level of knowledge for aiding and abetting. Those states will be free to consider lower thresholds of intent in any circumstances. This basically means that the aider or abettor must know that his action will result in aiding a crime but the level of knowledge required is lower.

Some legal systems will generate accomplice liability when an actor is aware of the possibility of his actions to aid in the commission of a crime but accepts the risk. An example of this form of liability is the dolus eventualis state of intent encompassed in German, South African and Nordic law.78

Dolus eventualis has been regarded as the lowest form of intent. Provisions regarding aiding and abetting generally require intent without special reference to the scales of intent. Those states interpret the concept of intent broadly, encompassing dolus eventualis which is therefore an appropriate level of mens rea for aiding or abetting.79 The central idea is that the actor is aware that his actions may result in a criminal offense. This form of intent is therefore closely related to recklessness but is dissimilar in that a bonus pater criterion will not satisfy the required level of mens rea. States which adhere to the doctrine are able to convict actors suspected of an offense when it has been proven that although an actor could not have been sure that his actions would result in the commission of a crime he would still have proceeded to act the same way had he been aware that his action would have resulted in said crime. Proving such mental states is difficult to say the least but the doctrine is also applicable in other less demanding situations. A more relevant interpretation is to determine guilt by proving that the accused was indifferent towards whether or not his actions would result in the commission of a crime. The actor will however have to be aware of the possibility of the consequences. In some legal systems, notably in the case of Denmark and Iceland, theories of

---

77Kevin Jon Heller and Markus D. Dubber: The Handbook of Comparative Criminal Law, p. 565 and 574.
79Section 25 of the German Criminal Code refers to intentionally assisting another person in the intentional commission of an unlawful act and Art. 22 of the Icelandic Penal Code refers to a “person who in word or deed provides aid in the commission of a punishable act”.

22
convictions based on willfully hiding from uncomfortable facts have come to surface. This is a form of intent referred to as dolus Alexanderson.  

4.1.4. Causation and substantial effect

As national laws in numerous jurisdictions across the world require a subjective set of mind, they generally require an objective link between the commission of a crime and the alleged assistance carried out by the accused. This is a de minimis requirement which is approached differently in each state. Causality serves as a general principle in both civil and common law jurisdictions. Some states may require that the actions of the accused form a necessary prerequisite for the commission of the crime while others lower the threshold requiring a less fundamental participation in the commission of the crime. Other states will wholeheartedly reject that there is a need to establish such causality requiring only that the accomplice assisted or might have helped in the commission of the crime.

Since no general consensus has been reached on whether or not a causal link should be required, it would be necessary to study the case law of the state in question before determining whether actions generate liability or not. Since those states that do require such connection between the conduct of the accomplice and the commission of the crime approach the extent of participation very differently, further discussion will be limited to the substantial effect requirement in international customary law as they are reflected by modern case law.

As the jurisdiction for international crimes is expanding, so are the possibilities for prosecuting the crimes that occurred in another state. The likelihood of a corporate official being convicted is therefore highly dependent on which state has jurisdiction. Although a representative of an entity would not be held accountable for actions taken within a state where national law permits such actions, one must still be mindful of international jurisdictions.

4.1.5. The issue of superior responsibility within the corporate structure

The case of superior liability or command responsibility is a peculiar one mainly due to the extensive inconsistencies bound to its various forms. This form of liability is fundamentally intended to grasp the relationship between a soldier and his military commander. With the

---

82See chapter 4.2.3.
83As covered in chapter 3 an act can be subject to prosecution in multiple jurisdictions albeit this must be covered on a case by case basis.
passage of time, its form has evolved into a more generic form of liability and could in some instances properly be applied to the command relationship between an employee and his superior.

This form of responsibility may be relevant in these cases under certain jurisdictions. In some jurisdiction this form of liability falls directly under the basic concept of complicity. In other jurisdictions, this will be considered a lower form of participation, whereas a superior is held accountable for his failure to intervene and may even grasp situations where a superior fails to be aware of the offense taking place. This seems to suggest criminal liability based on negligence which would only require a state of knowledge lower than aiding or abetting.

Article 28(b) of the Rome Statute concerns superior liability and seems to encompass the superior-subordinate-relationship inherent to many business entities. The conduct must however be related to the employees work. A superior must be in a position of effective control meaning that he has the ability to prevent or punish actions by his subordinates. The article could fit the company hierarchy making a superior responsible for failure to prevent his company’s criminal behavior if he knows about the crime or consciously ignores the possibilities of those crimes being committed. A situation where the corporate staff takes direct part in crimes largely falls outside of the scope of this thesis but should still be borne in mind especially with respect to transnational crimes, such as organized crimes or other treaty crimes. Apart from those cases, it has also been argued that a company official could be criminally liable as a superior of an aider or abettor.

The required level of knowledge seems to be different between jurisdictions; some might establish superior liability based on negligence while others would treat it in a similar manner to aiding and abetting. The actus reus of Article 28 seems to collide with Article 25(3)(c) and 25(3)(d) of the Rome Statute and negligent mens rea is only applicable to military officials, whereas the superior liability of a civilian must fulfill the mens rea of Article 30. When it comes to a representatives liability based on negligence, one might consider whether such low levels of involvement are appropriate for a business actor with respect to the seriousness of the crime. When it comes to the higher levels of knowledge one could also ask why anyone should base conviction on superior liability rather than aiding or abetting. In fact, the purpose of Command Responsibility within the Rome Statutes was only such that Article 28 would be

87Corporate Complicity & Legal Accountability. Volume 2, Criminal Law and International Crimes, p. 32.
utilized when Article 25 did not capture the alleged involvement of a superior in a crime. Article 25 therefore prevails when it clashes with Article 28.89

This author happens to think that aiding and abetting is a more appropriate form of addressing corporate involvement in crimes. The reason is partly that the complicated structure of legal entities opens the door for multiple actors to take part in the decision-making and the court’s approach towards their participation should be directed towards assessing their involvement in aiding or abetting a crime rather than determining a superior liability for commanding another act which falls short of the principal perpetration of a crime. This is secondly so because a private firm is able to manipulate the legal structure and therefore liability based on an individual’s position may not be suitable for corporations. An official in a military is trusted for his position which is firmly based on a respectable system of ranks created by the states themselves. A company official is usually not in a situation comparable to an army official. Although a corporate representative is responsible for his firm and his responsibilities should not be undermined, the fact of the matter is quite fortunately still that most companies are operated without any connection to perpetrators of crimes. The rationale which justifies holding a superior responsible for negligence may consequently not necessarily apply in situations where a company manager does not take his job seriously, not unless a certain level of knowledge is obtained. In other cases an official might be heavily involved in criminal activity, in which case it would not be appropriate to address his involvement only by means of negligent supervision.

The case of superior responsibility is better understood in the context of a superior’s role within the corporate structure and will therefore be re-visited in chapter 7.3.

The aforementioned criticism should not be understood as a complete rejection of the relevance of superior responsibility to corporate complicity. The theory is particularly important with respect to the liability of corporate entities as juridical persons and legal provisions generating corporate criminal liability often mirror theories of superior responsibility. A superior’s failure to act may also be important when the failure to prove acts of aiding or abetting is foreseeable. An example could be a case of terrorist financing or arms dealing in contrast to a legal ban. An employee might be the principal of such a crime, acting on his own initiative, or a failure to prove the superior’s orders is foreseeable. Generally, this form of responsibility is however not necessary since there are numerous examples of

corporate officials being considered as principal perpetrators or aiders or abettors of white collar crimes due to their negligent supervision.\(^90\)

4.2. Corporate complicity

4.2.1. Actions and consequences of a company’s involvement.

The ever-growing conduct of corporations taking active part in international crimes or other human right abuses is becoming an issue of a global scale. Corporate officials are benefitting from a deplorable situation for assured profit. The business world is steadfastly exploiting the natural resources and riches of less developed countries and selling weapons and ammunition to warlords or well-known tyrants of human rights violations.

In international law a person is able to participate in a crime and becomes criminally liable for such participation by knowingly assisting a perpetrator in the commission of the crime. This can be done through encouragement, moral support and most importantly by means of practical assistance.\(^91\) Aiding and abetting thus covers any act which contributes to the commission of an offense including acts contributing to an attempted commission of a crime.\(^92\) It does not matter at what time and place during the preparation and performance of the crime the assistance was rendered if the principal crime reaches at least the stage of an attempt.\(^93\)

Although the prosecution of corporate complicity in international crimes is almost inexistent in modern legal systems, the idea to expand prosecutions to corporate actors is gaining increasing international acclaim. The oldest examples thereof date back to the tribunals prosecuting the axis after the Second World War. Bruno Tesch and Karl Weinbacher were convicted of war crimes before the British Military Tribunal in Hamburg, on the basis of their provision to the SS of Zyklon B that was subsequently used at Auschwitz. Their complicity was sufficiently proved as the court constituted that the accused knew that the gas was to be used for the purpose of killing human beings.\(^94\)

There are many obstacles against prosecuting the principal actors of an international crime, especially when the perpetrator is a group of rebels or similar non-state actors. Most business involvements are in fact dealt with independently and not concurrently with the

---

\(^90\)See for example Supreme Court of Iceland, Case No. 145/2014, 12. February 2015: A superior in a bank was considered guilty of aiding and abetting via negligent supervision.

\(^91\)Antonio Cassese et al.: Cassese’s International Criminal Law, p. 193.

\(^92\)Otto Triffterer: Commentary on the Rome Statute of the International Criminal Court, p. 756. (Special Print)

\(^93\)Antonio Cassese et al.: The Rome Statute of the International Criminal Court, p. 798.

\(^94\)The Zyklon B Case, Trial of Bruno Tesch and Two Others, British Military Court, 8. March 1946, Case No. 9., LRTWC Vol. 1, p. 93.
principal actor. Holding the principal actor responsible is not necessary for the prosecution of complicit acts.

Accomplice liability may differ slightly in different legal systems but an internationally recognized standard of complicity has recently developed. This standard might not be implied in every national legal system but instead it serves as a benchmark for corporations to adjust their actions to. Much of this will be analyzed on the basis of case law expressly highlighting the legal framework of complicity.

4.2.2. The Actus Reus and the Mens Rea of a company

The existence of liability for aiding and abetting is uncontroversial.\(^{95}\) What is required is that the accessory needs to be aware that his actions are helping the perpetrator in the commission of the crime but the principal perpetrator does not have to be aware of the help. Although the complicit actor does have to be aware of the crime he does not need to share a common plan with the principal, a purpose or his intent.

The corporate accomplice needs to be aware that the principal perpetrator has been using, is using or will be using the assistance to engage in criminal activity. In other words, he needs to be aware of the essential elements of the crime. He does however not need to be fully aware of the specificities of said crime. The relevant company official or employer does therefore need to know about the intentions of the perpetrator but will generally not have to know the exact crime.\(^ {96}\)

Although the accomplice will not have to be completely aware of which crime is taking place, he will have to have an idea of the probability of a number of crimes occurring but still proceed to act in a way which will aid or abet the principal. This is because the knowledge of the crime is the fundamental basis for the *mens rea* requirement. If an actor has no inkling of the possibility of an offense occurring, he cannot be held responsible for that particular offense. If he is however aware of the possibility that his actions will contribute towards the commission of another offense but acts regardless he has acquired the necessary *mens rea* to be sanctioned. This is because such “sticking the head in sand” attitude towards crimes to acquire profit is an action which may constitute the intent level of *dolus eventualis*.\(^ {97}\)

This means that a company that sells firearms to a rebel group knowing that they are likely to use those weapons to continue committing mass atrocities will find itself within the

---


\(^{96}\)Antonio Cassese et al.: *Cassese’s International Criminal Law*, p. 194.

\(^{97}\)Jónatan Pórmundsson: *Afbrot og refstábyrgð II*, p. 79.
scope of criminal liability. It does not matter whether the company’s purpose was to commit
the crime if it was aware that the crime would in all probability be committed and that its
actions would aid in the commission thereof.

To analyze the current customary law, one cold look at the discussion in *The Prosecutor v. Charles Ghankay Taylor, SCSL-03-01-A, A. Ch. 26. September 2013*:

The former president of Liberia was convicted for aiding and abetting war crimes, crimes against humanity, and other serious violations of international humanitarian law, committed from November 30, 1996 to January 18, 2002 during the course of Sierra Leone’s civil war. The court found that although Taylor may have publicly supported the peace process in the region, he privately undermined the negotiations by continuing to support the RUF through financial, operational, and moral support. The judges did not accept the prosecution’s claim that Taylor had effective command and control over the RUF rebels, finding him only responsible for aiding and abetting their activities as well as planning attacks.

There is therefore no need to establish command or control if other forms of support are proved, as is evidenced by the court’s judgment. Many have considered financial assistance in the form of cash or loans as a neutral support, a regular factor in business. This is ignoring the effects business can have on the commission of such human rights abuses. If business transactions were inherently neutral and without proper effect on the receiver, there would be no reason for a legal regime to criminalize the funding of terrorism.98

The trial of *The United States of America vs. Friedrich Flick, et al., Military Tribunal V, 22. December 1947*99, is predominantly centered on slave labor charges but an interesting aspect of the judgment are the charges brought against Flick and a director of one of Flick’s companies, Steinbrinck, for their membership in the “Circle of Friends of Himmler”, which granted the Nazis financial assistance. The court noted that although the criminal character of the S.S. had not been apparent when Flick started attending fund-raising dinners, he proceeded to attend after such criminal character had attained general knowledge.

This case is an example of how a *mens rea* could be determined through a long time business relationship. A business man can be excused if he accidentally or unknowingly assists the commission of a crime by carrying out his business as usual but as soon as he realizes that his actions are assisting the perpetrator he must refrain from continuing said business.

98See for example the International Convention for the Suppression of the Financing of Terrorism, GA Res. 54/109.
A general principle in criminal law is that the motivation for the crime does not usually matter. An actor can kill another in order to gain his wealth as a legal heir to his belongings. His motivation is financial gain but the method to achieve the goal is murder. The actor will find himself responsible for said murder because his intent was to commit murder in order to achieve his goal. The motivation will therefore not matter in determining guilt unless the specific crime in question includes specific requirements of motivation.

One of the criterion for accomplice liability mentioned in the Tadic case was that the conduct needed to be “specifically directed” towards aiding or abetting the crime of relevance. This criterion was not seen as having a significant bearing in the jurisprudence of the ad hoc Tribunals and was regularly ignored. These standards were however raised in Prosecutor v. Perišić, Case No. IT-04-81-A, ICTY A. Ch., 28 February 2013 when the accused was acquitted because the specific direction could not be proved. This was also the case in the judgment of Prosecutor v. Stanišić and Simatović, Case No. IT-03-69-T, ICTY T. Ch., 30 May 2013, but the case was appealed. The appeal chamber overturned the judgment, convicting both suspects. The Appeals Chamber re-affirmed that “specific direction” is not an element of aiding and abetting liability under customary international law. Accordingly, the Appeals Chamber found that the Trial Chamber erred in law in requiring that the acts of the aider and abettor be specifically directed to assist the commission of a crime.

This was in accordance with the findings of the Appeal Chamber post-Perišić. The SCSL had also criticized the “specific direction” criteria, independently inspecting and evaluating the jurisprudence of post-Second World War international law. The SCSL came to the conclusion that those cases did not require an actus reus element of “specific direction” and neither did state practice or the ILC Draft Code of Crimes.

With these recent judgments it should be safe to conclude that specific direction is not a necessary element of the actus reus. Having concluded that the aider and abettor need not know the precise crime being committed as long as he knows that he is contributing to one of a group of crimes being committed, it is almost paradoxical to require specific intent.

---

100Jónatan Þórmundsson: Afbrot og refsiábyrgð II, p. 114.
102See Prosecutor v. Šainović et al., Case No. IT-05-87-A, ICTY, A. Ch., 23 January 2014 and Prosecutor v. Popović et al., Case No. IT-05-88-A, ICTY, A. Ch., 30 January 2015.
103Prosecutor Against Charles Ghankay Taylor, Case No. SCSL-03-01-A, SCSL A. Ch. 26 September 2013.
4.2.3. *The actions of a company must have a substantial effect*

Similarly to domestic law, international law also requires some link between the offense and the conduct of assistance.

It has been well researched and documented that the trade of gold, diamonds and other minerals from war-torn zones prolongs fighting and thus contributes directly to the commission of atrocities. According to the UN Environmental Program, at least forty percent of recent intrastate conflicts had links to natural resources, and the presence of natural resources makes conflicts twice as likely to occur. Even so, nobody has ever been convicted of international crimes directly connected to the trade of diamonds from conflict zones as a war crime or crime against humanity.\(^\text{104}\)

The end of the Cold War gave birth to new types of conflicts. The illegal exploitation of natural resources became a key source of funding for armed conflicts worldwide. The involvement of corporate actors in modern conflict zones is enabling violence and the perpetuation of human rights abuses.\(^\text{105}\) Furthermore the international community does not seem to view such funding as a neutral act. In the *Nicaragua case*\(^\text{106}\) the judgment concluded that funding contras with money\(^\text{107}\) amounted to an unlawful intervention, thus recognizing the impact such intervention can have on armed conflicts. This does not change if the funding is a result of business agreements. The SCSL stated, in the case of *Prosecutor Against Charles Ghankay Taylor, Case No. SCSL-03-01-A, SCSL A. Ch. 26 September 2013*, that the conduct itself does not have to be intrinsically criminal, the criminality of the conduct is determined by its factual effect.

An example of this is the case of Michel Desaedeleer. Mr. Desaedeleer was arrested in Spain on the 28\(^\text{th}\) of August 2015 as a result of an arrest warrant issued by Belgian authorities. The arrest warrant was issued after a complaint had been filed by the citizens of Sierra Leone who had been forced to work in the diamond mines of Sierra Leone for the RUF.

Michel Desaedeleer is alleged to have signed a contract with the founder of the RUF, Foday Sankoh, resulting in the exploitation of diamond and gold. His assistance was essential to exporting the diamonds out of the country enabling them to buy weapons. Michel Desaedeleer is accused of being an accomplice of Charles Taylor and Foday Sankoh by participating in enslavement and the looting of blood diamonds in the period 1999 to 2001.

\(^{104}\) *Civitas Maxima, 2015 Annual Report*, p. 16.


\(^{107}\) The judgment noted that funding contras with money and weapons constituted an unlawful intervention whereas humanitarian assistance did not, provided that it was equally distributed.
He was indicted for crimes against humanity and war crimes and was consequently put into preventive custody. He was awaiting trial when he died in custody on the 28th of September 2016.\textsuperscript{108}

An important factor in determining whether or not a business relationship constitutes an act of aiding or abetting, is assessing whether the contribution has a substantial effect on the perpetration of the crime.\textsuperscript{109} This is regardless of whether the accomplice is present at the place of commission of the principal offense or not. The ad hoc tribunals have held that in order to attract liability for complicity, the acts of assistance, encouragement, or support must have had a substantial effect on the commission of the crime. This requirement is predominantly considered to reflect customary law.\textsuperscript{110}

This could mean that the criminality of an action could differ according to whom the corporation does business with and the digits of the transaction. If it is a powerful state with a wholly functioning government, such contributions might be minimal. That being said, it should be noted that some companies will rival some of the wealthiest states. The oil and gas company ExxonMobil generated revenues of US$467 billion in 2011 alone, which is roughly the size of Norway’s entire economy.\textsuperscript{111} If however the business is conducted with independent groups, such as rebels controlling diamond mines, selling those diamonds might be fundamental to financing their war. The lines might get blurred when those same rebels perform a coup d’\textsuperscript{\textipa{e}}tat and become the functioning government continuing their reign of violence. This does not mean that a corporate entity can consider itself free to do business with states committing human rights violations; it just means that the magnitude of the business has to be greater in order to have a substantial effect.

Other obstacles arise when the complicit business partner is not sending the principal perpetrator weapons or other facilities which are to be used directly in the commission of a crime. Cash will not be used directly as a tool for committing crimes but it can nevertheless be the prerequisite for obtaining such tools or power. In order to determine responsibility, one has to prove that the funds had a substantial effect on the commission of the crime and that the business leader was aware of that. A direct link has for example been found between Sudan’s government’s ability to purchase military logistics and its oil revenue.\textsuperscript{112} A UN report also revealed that the RUF will have earned something between $ 25,000,000 and $
125,000,000 per month thanks to the illegal trade of diamonds which fueled the civil war in Sierra Leone. The panel noted that the RUF had been able to support 3,500-5,000 armed combatants and as many camp followers for several years and internal RUF communicators regularly attributed the importance of blood diamonds.\textsuperscript{113}

Another thing to consider is the economic power which a company holds over the principal. If the principal is dependent on the company’s financial support, some greater responsibility could be laid on the company. A company could in fact become influential within a group of international criminals to the extent that it can largely control the situation. This however is not necessary and a company which has no control over a situation will just as well become responsible for aiding or abetting if it knowingly enables, exacerbates or facilitates the crime. An arms-length business transaction will \textit{inter alia} be sufficient.

The substantial effect is the level of the causal link required to establish a minimum connection between the accomplice and the principal. The principle of causation and contribution holds that the causal link is usually sufficiently determined if an entity engages in conducts that enable, exacerbate or facilitate the crime concerned.\textsuperscript{114} The most obvious case is where the commission of a crime was previously impossible for the perpetrator to achieve but with the financial turnout from the company, becomes a viable possibility. This is however not necessary, and criminal responsibility could also rise if it were foreseeable that crimes would still have occurred without the company’s financial support. The fact that another corporate actor would have taken its place in business does not absolve said company of responsibility. The corporate actor will still be held responsible if causation has been established.\textsuperscript{115}

To exacerbate a crime means that if an actor is already in the position to commit international crimes, a corporate actor can still make business decisions which aggravate the situation. This can happen in numerous ways, the financial assistance might enable the perpetrators to increase their range, the number of victims, the effectiveness of their foul play or the severity of the harm caused by the offense.

Criminal liability could also rise without exacerbating or otherwise aggravating the commission of a crime. A corporate actor could also become responsible if his actions change

\begin{flushleft}
\textsuperscript{114}\textit{Corporate Complicity & Legal Accountability. Volume 1, Facing the Facts and Charting a Legal Path, p. 11-12.}
\textsuperscript{115}\textit{Corporate Complicity & Legal Accountability. Volume 2, Criminal Law and International Crimes, p. 49.}
\end{flushleft}
the way the offense is carried out, for example by accelerating how soon the crime can be committed or by rendering the commission of a crime easier.

Take for example a domestic case from the Netherlands, *Court of Appeal of The Hague, 9. May 2007, case: 2200050906-2*, concerning the case of a Dutch business man who supplied the chemical raw material necessary to produce mustard gas. The Iraqi government used mustard gas to attack Kurds and the accused was convicted of aiding and abetting war crimes. When examining Article 48 of the Dutch Penal Code the court said

Prior case law of the Supreme Court of the Netherlands has held that assistance need not be indispensable; it suffices that the assistance offered by the accessory has indeed promoted the offence or has made it easier to commit that offence.

The judgment was later confirmed at the Supreme Court of Justice.\(^{116}\)

Reaching these lower thresholds of complicity, it should be noted that the term “substantial effect” must mean something more than simply a neutral effect, or a minimal effect. Thus minor contributions do not constitute a participation in a crime.\(^{117}\)

The conduct must have a direct impact but the standard for substantial effect is not too high and although some minor contributions have been excluded, any assistance which is more than *de minimis* is sufficient to warrant criminal liability.\(^{118}\) The ICTY has confirmed the broad concept of aiding and abetting developed in *Tadić, Čelebići* and *Furundžija*\(^ {119}\) as evidenced by the subsequent case law.\(^ {120}\)

In the *Flick case* the accused were found guilty not for furthering specific crimes but for supporting the SS in general. The court found that a part of the financial assistance would have supported the general maintenance of the criminal organization if not the criminal activities themselves.\(^ {121}\)

Corporate actors will often cling to the idea that by incorporating elements of humanitarian assistance, they will be able to neutralize the effect of their actions by referring to the positive aspects of their business. Those deeds become irrelevant when said entity

---

\(^{116}\) *The Supreme Court of the Netherlands, Judgment, 30 June 2009, Public Prosecutor v. Van A., Case No. 07/10742.*

\(^{117}\) *Miles Jackson: Complicity in International Law*, p. 73.


\(^{120}\) *Otto Triffterer: Commentary on the Rome Statute of the International Criminal Court*, p. 757. (Special Print)

\(^{121}\) *USA v. Friedrich Flick, et al., American Military Tribunal VI, 22 December 1947, Case No. 5, Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10, Vol. VI (The Flick Case).*
inserts itself in the chain of causation. Such elements could nonetheless effect the imposed punishment in some instances. It is however evident that such actions could in fact be taken in order to conceal the link between the entity and the offense by attempting to sway public opinion.

In the light of the cases of the ad hoc tribunals the objective threshold of accomplice liability is considered relatively low.

Apart from enabling, exacerbating or facilitating a crime, the purchase of goods from a perpetrator of international or transnational crimes could possibly provide encouragement to the principal of a crime. This is especially so in the cases where the profit made from the transactions is great enough to motivate the perpetuity of the crime. The effect of the financial support rebels receive through the revenues made by selling natural resources has already been discussed. The other side of the coin is however worthy of discussion, or in other words the possible abetting effect those actions may have.

One of the motives for armed conflicts is the profit achieved by selling the resources which the militia is able to retrieve from the territory it manages to occupy.\textsuperscript{122} By purchasing these resources the corporation is creating demand. Let alone the possible scenario where the pillage of resources itself could constitute a war-crime, it is blatantly obvious in these cases that when the pillage of resources is the motive for a crime, the purchase of those resources is the moral encouragement needed to motivate perpetrators to perpetuate the situation. Not all business with perpetrators of crimes can be described as encouraging the furtherance of criminal activity. A business transaction might be so vague with respect to the larger context of the operation that it neither facilitates nor has an encouraging effect on the principal actor.

The effect business has could be inferred from some circumstantial evidence. With all things considered, a few factors might indicate when financial complicity might generate criminal liability to a business partner. A company should be able to adapt to a simple set of principles in order to avoid liability or adjust to certain corporate aesthetics which could preclude it from aiding or abetting the commission of atrocities. The doctrine laid forth to identify predatory economic behavior is intended to shed light on the business conditions which could constitute an act of enabling, exacerbating or facilitating a crime. A transaction is likely to aid or abet if any of the following factors are present:\textsuperscript{123}

\begin{enumerate}
\item\textsuperscript{122}Michael A. Lundberg: “The Plunder of Natural Resources During War: A War Crime (?)”, p. 1.
\item\textsuperscript{123}This doctrine is developed by the author with respect to the limited case law, general theories of aiding and abetting and other scholarly opinions. These principles have been adjusted to financial participation via business relationship.
\end{enumerate}
It is of a large scale. A large scale transaction could be a singular high sum or a consistent source of income for the perpetrator. It does not have to be the major part of the income but it does have to make a difference.

The absence of the business would be noticed: A consumer who buys clothes from a store which includes perpetrators of child labor in its supply chain does not become complicit in those actions. This is not because another consumer could take his place but because his limited involvement does not have an actual effect. If the store however stops sourcing from those suppliers it might lessen the burden on the victims because of an identifiable decline in demand. The criterion could therefore be the absence of this transaction having an effect\textsuperscript{124} on the commission of the crime if no-one were to fill the gap. The last part of the criteria is theoretical; it does not matter whether or not someone does fill the gap.

There is dependency: A perpetrator may be operating a costly operation which is sponsored through the sale of goods. Although not dependent on a specific company, the criminal activity might be dependent on the sale of those goods.

The transaction creates motive: The sale of goods is not always done to finance a criminal operation. Criminal activity is sometimes operated in order to sell goods. Some of the worst atrocities have been fueled by the greed of the principal which is able to sell resources in the shadow of the conflict. The fight for resources is directly linked to the demand for resources.

The terms of business demand violations of human rights: The terms agreed upon might inevitably bring about conditions which would violate international human rights law. This could be assumed through common sense or the business related knowledge of the contracting parties. One could easily identify examples such as manufacturing costs which exceed the negotiated price. A contract does not have to mention forced labor to include a demand for industrialized human rights abuses.

The business actor is influential: The status of the company might not matter with regard to aiding a crime but it might have a bearing on the act of abetting. A major actor which maintains a business relationship with a regime known for human rights violations might be considered as approving the conduct and thus morally encouraging it.

Many of these gauges of judgment are interlinked and all conditional circumstances are highly relevant in order to perceive the nature of the business and consequently the level of involvement.

4.3. Corporate complicity at the ICC

4.3.1. General notions

The case law presented above revealed the existing customary law on accomplice liability in international criminal law. It sufficiently determined that there is no requirement for shared

\textsuperscript{124}Effect is to be understood in accordance with the previous discussion, not as an indispensible effect but even as an effect which makes the commission of a crime easier or different.
intent and that the substantial effect requirement excludes only minor contributions. It can therefore be concluded that corporate complicity could in all probability be subject to prosecution in international courts.

Having concluded the existence of such customary law, an observation of Article 25(3)(c) of the Rome Statute reveals that the ICC might not apply the same principles when prosecuting aiders or abettors. The paragraph describes aiding and abetting under the Rome Statute which in most jurisdictions is the most likely revenue for targeting business leaders. Aiding and abetting is a form of assistance which falls short of instigation but goes beyond other involvement, such as contributing to group activities.

4.3.2. The extent of contribution required

Article 25(3)(c) does not mention a causal requirement. It has already been determined that the ad hoc tribunals did not require a tangible contribution to a crime but only an action which makes a significant difference in the commission of a crime. Paired with the mens rea requirement, determining this objective effect is thus essential to conviction. Although the previous discussion has already revealed that this requirement has been interpreted loosely, upholding but a low objective requirement, the objective requirement of Article 25(3)(c) under the Rome Statute may be even lower depending on how the “otherwise assist” phrase is being interpreted.

But since the substantial effect requirement is now generally acknowledged as a part of customary law, it might just as well be applicable at the ICC. As an obiter dictum in the Lubanga case, the court held that Article 25(3)(c) required substantial effect as determined by the ad hoc tribunals. This begs the question of whether the court will also follow the customary mens rea application reflected by the tribunals. The judgment does not warrant a conclusive assessment since obiter dictum remarks are not binding.

Interpreting the objective requirement for Article 25(3)(d) in the Mbarushimana case, the court noted that the intention of including Article 17(1)(d) was to require that all acts, whether committed by a principal or an accomplice, reach a certain threshold of significance. The court suggested that the jurisprudence of the ad hoc tribunals indicated that a substantial

---

125 Article 25(3)(b).
126 Article 25(3)(d).
127 Otto Triffterer: Commentary on the Rome Statute of the International Criminal Court, p.756. (Special Print)
128 Otto Triffterer: Commentary on the Rome Statute of the International Criminal Court, pp.757-759. (Special Print)
129 The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, ICC Trial Chamber I, 14 March 2012, para. 997.
contribution was required for Article 25(3)(c) while acknowledging that the principles of the ad hoc tribunals could not be applied blindly. There is still considerable doubt as to whether the court has adopted a standard of substantial contribution, but where early jurisprudence seemed to indicate the possibility of such a requirement, such a requirement has not been as visible in later practice.

The applicability of such a substantial effect requirement could depend on how strictly the mens rea requirement of “purpose” is interpreted. If the interpretation is strict, an inclusion of such a requirement might restrict the extent of the article too much. The most instructive tool to assume the threshold of contribution required is therefore probably the case law of the ad hoc tribunals.

4.3.3. The Mens Rea for aiding and abetting under the Rome Statute

The article determines that a person becomes criminally responsible if said person “[f]or the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission.”

The article imposes serious difficulties with respect to interpretation. While Article 30 had defined the phrases of “intent” and “knowledge”, Article 25(3)(c) introduces the purpose phrase without a definition. While intent and knowledge are somewhat understood differently in various legal systems, so is purpose not understood uniformly. One of the first things to become apparent when evaluating the mens rea of the Rome Statute is that no explanation is given about the difference of intent and purpose but these phrases are in some jurisdictions tantamount. The phrase intent is also treated as equivalent to purpose in Article 6 but there is still some disagreement about whether the terms are synonymous or separated. There is always a possible explanation that these phrases are thrown around without much precision. Article 30 also states that the necessary mens rea under the statute should be intent “and” knowledge which has been interpreted as intent “or” knowledge.

The wording of Article 25(3)(c) is partly borrowed from the Model Penal Code drafted by the American Law Institute. The interpretation of the concept of purpose has therefore

---

130 The Prosecutor v. Callixte Mbarushimana, Case No. ICC-01/04-01/10, ICC PTC I, Decision on the confirmation of charges, 16 December 2011, para. 276, 279 and 281.
131 Marina Aksenova: Complicity in International Criminal Law, p. 155.
132 Flavio Noto: Secondary Liability in International Criminal Law, p. 188.
133 Article 25(3)(c)
134 Jónatan Pór mundsson: Alþjóðaglæpir og refstábyrgð, p. 146.
135 Otto Triffterer: Commentary on the Rome Statute of the International Criminal Court, p. 760. (Special Print)
become a center of debate with respect to accomplice liability under the Rome Statute. The possible interpretation of the concept of “purpose” under domestic law has previously been discussed with special references to the US’s Model Penal Code in chapter 4.1.2. and some of the arguments presented will prove relevant to this discussion to some extent. One should however not rely too heavily on U.S. jurisprudence since the U.S. legal system is fundamentally different from that of the ICC. There is, in addition, no general and complete U.S. consensus on how to apply the purpose requirement.

The Rome Statute is a result of series of negotiations. The states involved in negotiating the drafting of the statute had a very different understanding of much of the jurisprudence. In order to find a nexus between the states, the drafters would have to choose phrases which accommodated various legal traditions. It was therefore the intention of the drafters to incorporate the different views of numerous legal experts from both civil and common law states. Borrowing the “purpose phrase” from the Model Penal Code was therefore not a way to bring in the extensive body of case law developed in the U.S. but rather to pay tribute to various legal traditions. The article is therefore open to interpretation.

Article 30 already determines the mens rea required under the statute such that other articles mentioning a mens rea approach should in all probability be interpreted to depart from Article 30. It is therefore interesting that one theory of interpretation assesses that Article 25(3)(c) adds nothing to the mens rea laid out by Article 30 but serves only to stress the mens rea requirement of Article 30 with respect to its departure from the customary application of aiding and abetting. In order to fully understand that argument it is imperative to realize that some jurisdictions understand the words intent and purpose as virtually referring to the same concept. The argument proposed is based on the assumption that since the Model Penal Code aims to exclude responsibility based on mere knowledge a reference to a purpose would underline the incompatibility between the precedents set out by Article 30 and those set by the ad hoc tribunals which require only knowledge. This argument would however be dependent upon earlier jurisprudence, when scholars generally believed that Article 30 would require both knowledge and intent.

But even though such jurisprudence is rejected and scholars have started to opt for a requirement of intent or knowledge, those who adhere to this theory claim that Article 25(3)(c) does still not go past Article 30. In order to supplement the argument one might

---

consider that the ICTY later determined that reckless indifference could constitute knowledge. These scholars therefore note that purpose only stresses that the mens rea of Article 30 needs to be fulfilled and that dolus indirectus or dolus eventualis will not suffice, but a dolus directus in the second degree might.\textsuperscript{138}

Since Article 30 requires either intent or knowledge it would be possible that purpose was laid to exclude the knowledge based mens rea. Both intent and knowledge were customarily interpreted as a dolus directus level of mens rea and do not seem to have been intended to include lower levels such as dolus indirectus or dolus eventualis.\textsuperscript{139} But the Rome Statutes language is an independent one, not reliant completely on the interpretations of other jurisdictions.

Confirming the departure from the jurisprudence of the ICTY and ICTR, Kai Ambos holds that the concept of purpose “generally implies a specific subjective requirement stricter than mere knowledge”. Without commenting on what purpose implies in the context of Article 25(3)(c), Ambos concludes that the subjective threshold of the subparagraph is higher than that of the ordinary mens rea of Article 30.\textsuperscript{140}

Scholars prefer to tread lightly when discussing the phrase, acknowledging that there is a possibility that such requirement might be interpreted tantamount to shared intent, apprehending that it would unfortunately render the article futile when an accomplice acts with the motivation to gain profit.\textsuperscript{141} The following argument will reveal why the article should not logically lead to that conclusion.

Even if the elevated mens rea requirement is accepted, it does not necessarily have much of a bearing on the actual determination of guilt. The Pre Trial Chamber of the ICC stated, as an obiter dictum, that since Article 25(3)(c) requires purposeful assistance it differs from the ad hoc tribunals which do not require shared intent. The court thus underlined that knowledge alone is not enough but also hints that shared intent may be required.\textsuperscript{142} The International Commission of Jurists remained skeptical that such elevated standard would make a significant difference considering that the ICC assesses a person’s state of mind, basing its conclusion on all relevant circumstances, evaluating direct and indirect or circumstantial evidence. The commission stated that a company official could find himself legally

\textsuperscript{139}Jónatan Þórmundsson: Alþjóðaglæpir og refsiábyrgð, p. 145.
\textsuperscript{140}Otto Triffterer: Commentary on the Rome Statute of the International Criminal Court, p. 760. (Special Print)
\textsuperscript{141}Antonio Cassese et al.: Cassese’s International Criminal Law, p. 195.
\textsuperscript{142}The Prosecutor v. Callixte Mbarushimana, Case No. ICC-01/04-01/10, ICC PTC I, Decision on the confirmation of charges, 16 December 2011, para. 274 and 281.
accountable if he knows that his acts encourage, facilitate or lend moral support to a
perpetrator but still proceeds to act. The commission stated the following on Article 25(3)(c):

[P]ractically speaking, if it is established that a corporate official had
knowledge that an act would facilitate the commission of a crime, and yet
proceeded to act, then the purpose to facilitate could be found to exist. The
fact that the official knowingly aided a crime in order to make a profit does
not diminish his assistance; indeed it could be interpreted as providing a
further incentive to facilitate the crime “on purpose”. Accordingly, whilst
there may be an apparent difference in the mens rea standard there may well
be very little practical difference.¹⁴³

This argument is familiar when compared to the separation of intent and motivation. But it
is still based on the precondition that motivation were not a requirement for criminality. There
is inter alia nothing which predetermines that the Rome Statute will not have aimed to alter
the required standard by introducing an elevated mens rea requirement akin to motivation. It
is therefore necessary to dive deeper into the abyss of legal interpretation.

The term purpose is subject to numerous interpretations. One theory has been to separate
different stages of purpose with respect to an actor’s motives. The theory is based on the
assumption that there is an ultimate purpose and an intermediate purpose.¹⁴⁴ The secondary or
intermediate purpose would therefore be the prerequisite for the primary or ultimate
purpose.¹⁴⁵

A related argument is the certain knowledge doctrine. The doctrine relies on the theory
that although mere knowledge may not be enough for conviction, “certain knowledge” might
be. Purpose could therefore be derived from “certain knowledge” since an actor’s contribution
could translate into shared intent when his knowledge reaches a certain state.¹⁴⁶ This
argument is partly derived from examining the equation of intent and knowledge under
Article 30, highlighting that the low level of knowledge under Article 30(2)(c) is rejected for
an alternative level of knowledge which matches one of the definitions of intent under Article
30(2)(b).¹⁴⁷

There are numerous reasons for why some of those interpretations of purpose might be
more desirable than a motivation based mens rea. An argument one may consider is best
perceived by assessing the underlying logic which justifies why some states limit legal

¹⁴³ Corporate Complicity & Legal Accountability. Volume 2, Criminal Law and International Crimes, p. 22
¹⁴⁴ The means to achieve the ultimate purpose
¹⁴⁵ Hans Vest: “Business Leaders and the Modes of Individual Criminal Responsibility under International Law”,
pp. 861-862.
¹⁴⁶ Flavio Noto: Secondary Liability in International Criminal Law, pp. 182-183
¹⁴⁷ Hans Vest: “Business Leaders and the Modes of Individual Criminal Responsibility under International Law”,
p. 862.
responsibility to persons who desire for atrocities to happen. Not to ignore that there are indeed states who have interpreted the purpose concept to require such desire but it should also be recognized that those states are typically structured in the particular manner that judges are barred from lowering the sentences with respect to the extent of the actual involvement of aiders or abettors. It makes sense in these jurisdictions that the mens rea requirement is high since no discount is given on punishment with regard to the level of participation. The ICC on the other hand is obliged to take into account the level of involvement when sentencing a convict.\[148\] There is therefore no logical reason to require such strict interpretation of purpose and Article 17(1)(d) will in addition hinder the prosecutors from introducing cases of minor involvements to the court.

Another argument to keep in mind is that of the drafting history of the Rome Statute. One of the key aspects of Article 25 was that of legal entities. Many of the states involved had not adopted a doctrine of criminal responsibility for non-natural persons. The original drafting however included an attempt to extend the jurisdiction of the court to legal entities or “juridical persons”.\[149\] This proposal was the subject of a conflict related not to whether such legal entities could become criminally responsible but whether they should. There was no debate on whether or not a representative of the company could become criminally responsible under the Rome Statute while acting on behalf of the legal entity or exercising such control over the entity. The proposal even gained further acceptance from the majority after it was altered to require a closer link between the responsibilities and the actions of a natural person.\[150\]

There was no debate on how exactly such responsibility could rise and the proposal was not limited to a representative being the principal perpetrator.\[151\] The article would indeed stand independent\[152\] of the general aiding and abetting standard in that the company itself would not be required to fulfill the mens rea standard of Article 25(3)(c). It would however make very limited sense to include the provision, since it relied on the conviction of the representative, if the representative could not become guilty of aiding or abetting. A representative acting as a principal in genocide or war crimes is almost unheard of. For the representative to be acting on behalf of a company his actions must be financially motivated or in other way connected to the company’s normal conduct of business. As a consequence,

---

\[149\] See further discussion on this aborted attempt in chapter 6.2.
\[151\] The proposal was withdrawn because the time to negotiate was running out.
\[152\] As lex specialis.
the prerequisite for that article to gain acceptance must have been that a representative could become responsible as an aider or abettor under Article 25(3)(c) while acting in the pursuit of profit. This argument may however be undermined by the possible application of Article 25(3)(d) but its application is however limited to assisting groups and its novel nature indicates that states will rather have kept their traditional understanding of aiding and abetting in mind.

Another point in favor of interpreting the concept to encompass other forms of mental states than an underlying desire for the malicious results is the fact that the latter interpretation is contrary to the object and the purpose of the Rome Statute. Picking and choosing actors involved in grave crimes such as genocide on the basis of whether they carried out their actions out of motives related to some extreme ideologies or financial motives would not just be illogical, it would be immoral. The Rome Statute aims to end impunity with respect to the most serious crimes committed and to ignore the fact that states generally turn a blind eye towards business leaders is to undermine the Rome Statute’s purpose, to make sure that such crimes do not go unpunished. In the absence of case law ruling on this matter all interpretation attempts are but mere speculations. Some scholars such as Vogel have even gone so far as to state that the ICC will eventually interpret the mens rea requirement for aiding and abetting in consistency with the principles of customary law developed through the case laws of the ad hoc tribunals, the mens rea level of knowledge being sufficient.

This approach has however been rejected by most scholars, which is not surprising considering the remarks made by the court in the Mbarushimana case. A common argument to support the rationale of scholars which favors a strict interpretation of purpose is the justification that the low objective required in Article 25(3)(c) warrants a higher subjective requirement. Limiting liability to purpose comparable to motivation is said to balance the low objective requirement caused by the absence of a substantial effect phrase. But as the previous analysis of subparagraph (c) revealed, a required objective of the substantial effect is probable to apply which would nullify the rationale for the requirement.

154 See the preamble of the Rome Statute.
4.3.4. A practical interpretation of the Mens Rea requirement for aiding and abetting

If both intent and knowledge under Article 30 require a mindfulness of the probability of a crime being committed, then the *mens rea* displays an assessment of this likelihood of the consequences resulting from the actor’s actions. A purpose does not necessarily have to be directed towards the final consequences of the crime. The provision speaks of a purpose to facilitate the commission not a purpose to bring about the end result of the crime. Bearing in mind the theories above relating to purposeful assistance being determined through a high level of knowledge, all those theories in one way or another essentially just claim the simple fact that motivation is one thing and that a purpose to facilitate is another thing which has to do with the determination to act with the knowledge of the result it will bring about. In an interesting turn of events, this interpretation was confirmed in the *Bemba Gombo* judgment. The ICC’s Trial Chamber notes that:

Mindful of the twofold intent of the accessory (viz. firstly, the principal offence and, secondly, the accessory’s own conduct), the Chamber clarifies that this elevated subjective standard relates to the accessory’s facilitation, not the principal offence.

Additionally, liability for aiding and abetting an offence requires proof that the accessory also had intent with regard to the principal offence pursuant to Article 30 of the Statute, which applies by default. This means that the aider or abettor must at least be aware that the principal perpetrator’s offence will occur in the ordinary course of events. Finally, it is not necessary for the accessory to know the precise offence which was intended and which in the specific circumstances was committed, but he or she must be aware of its essential elements.\(^{157}\)

This interpretation is an important step towards bringing an article, previously rendered useless, to life by a simple interpretation. So by splitting the *mens rea* requirement for aiding and abetting into two separate levels, it would be clear that motivation should not matter. A standard *mens rea* of Article 30 is sufficient to fulfill the accessory’s subjective mindset towards the principal offense. But purpose is still left as a requirement within the wording of the article and does in the court’s opinion relate to the accessory’s own conduct. This could either be to stress that the conduct could not be performed recklessly or to require a particular level of determination to act. Thus the twofold level of *mens rea* would be the strict determination to perform an act, such as a transaction, but this determination coupled with regular intent or knowledge of the principal crime would generate liability. It therefore highlights the accessory’s knowledge of the effect his conduct has on the principal crime.

---

\(^{157}\)The Prosecutor v. Bemba Gombo et al., Case No. ICC-01/05-01/13-1989-Red, ICC Trial Chamber VII, 19 October 2016. para. 97 and 98.
Purpose could be determined when an actor knowingly acts deliberately or indifferently with a high level of determination towards the complicit conduct which translates into *dolus directus* because of his awareness of the result of his assistance regardless of his desire for those consequences.\textsuperscript{158} What is intent or purpose for that matter other than a level of determination in the face of one’s knowledge?

ICC’s Chief Prosecutor’s interest in these cases, with his work being focused on the DRC begs the question of whether he would bring such a case to the tribunals. In his report, he gave the following statement:

As the UN Human Rights Rapporteur indicated last week, the crimes reportedly taking place in Ituri potentially constitute genocide, crimes against humanity or war crimes, all of which fall within the jurisdiction of the International Criminal Court.\textsuperscript{[.....]} Different armed groups have taken advantage of the situation of generalized violence and have engaged in the illegal exploitation of key mineral resources such as cobalt, coltan, copper, diamonds and gold. According to information received, crimes reportedly committed in Ituri appear to be directly linked to the control of resource extraction sites. Those who direct mining operations, sell diamonds or gold extracted in these conditions, launder the dirty money or provide weapons could also be authors of the crimes, even if they are based in other countries.\textsuperscript{159}

Whether or not such remarks are aimed solely at the national courts or mark a manifesto of the Office’s complete fight against impunity is unclear. But given the extensive argument presented above, there is no reason to conclude that the *mens rea* required will necessarily result in some sort of insurmountable obstacle. No decisive conclusion can however be warranted in the absence of coherent case law determining the proper application of subparagraph (c). Should the approach of a strict interpretation prevail, it would prove practical to consider the other relevant venue for the fight against corporate impunity, the form of a liability linked to assisting a group with a common purpose.

\textit{4.3.5. Common Purpose or Residual Liability}

Legal systems have for a long time aimed to criminalize group participation in the commission of a crime. National jurisdictions have sought out to do so by either criminalizing the association with a group committing crimes, by categorizing participants acting with a


\textsuperscript{159} Second Assembly of States Parties to the Rome Statute of the International Criminal Court Report of the Prosecutor of the ICC, Mr Luis Moreno-Ocampo 8 September 2003, p. 2 and 4.
common purpose as co-perpetrators or by criminalizing agreements made between actors to commit a crime in conspiracy.\textsuperscript{160}

The \textit{ad hoc} tribunals similarly recognize a form of liability called joint criminal enterprise. This form has a lower objective threshold but a higher subjective threshold than aiding and abetting. The participants in a joint criminal enterprise must either share a common criminal plan, design or purpose with the principal group in order to be considered co-perpetrators. They would however also become responsible by participating in a system of criminal commission, having knowledge of the criminal behavior, but they will still have to act with the intent to further its criminal purpose.\textsuperscript{161} With respect to corporate complicity, this form of liability is generally irrelevant both at the \textit{ad hoc} tribunals and at national jurisdictions. But the form of common purpose liability expressed in Article 25(3)(d) of the Rome Statute introduces a new dynamic approach to such group contribution which may become essential to convicting corporate actors if Article 25(3)(c) is rendered futile.

The article does in fact require less effort for the prosecutor in the fight against corporate complicity since both the objective and the subjective seem to be lower than for aiding or abetting. Its application is however limited to the circumstances where the principal perpetrator is a group with a common purpose. Those circumstances might however be common in this field. One can simply think of business with terrorists, abusive governments or rebels selling conflict minerals. “A common purpose must include an element of criminality, but does not need to be specifically directed at the commission of a crime. The agreement need not be explicit, and its existence can be inferred from the subsequent concerted action of the group or person”.\textsuperscript{162}

The subparagraph aims to make an actor criminally responsible if he in any other way than covered by the preceding paragraphs contributes to the commission or attempted commission of such crimes by a group of persons acting with a common purpose. The phrase “in any other way” establishes the lowest objective threshold for participation under Article 25 of the Rome Statute. It therefore suggests a subsidiary liability in case the requirements of Article 25(3)(c) are not met.\textsuperscript{163} The subjective threshold is consequently lower than for aiding and abetting, limiting responsibility to actors who intentionally contribute to the commission of a crime. Such contribution shall either: (i) Be made with the aim of furthering the criminal

\textsuperscript{160}Corporate Complicity & Legal Accountability. Volume 2, Criminal Law and International Crimes, pp. 30-31.

\textsuperscript{161}Antonia Cassese et al.: Cassese’s International Criminal Law, pp. 163-166.

\textsuperscript{162}The Prosecutor v. Callixte Mbarushimana, Case No. ICC-01/04-01/10, ICC PTC I, Decision on the confirmation of charges, 16 December 2011, para. 271.

\textsuperscript{163}Otto Triffterer: Commentary on the Rome Statute of the International Criminal Court, p. 761. (Special Print)
activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or (ii) Be made in the knowledge of the intention of the group to commit the crime.

The first form of the mens rea suggested is one familiar to that of the ad hoc tribunals and is of little relevance to this discussion. But the mens rea required by the second part of the subparagraph is highly relevant to actors who knowingly contribute to the commission of a crime through business. Article 25(3)(d)(ii) makes for an alternative option requiring only knowledge to fulfill the subjective requirement.

An actor can therefore become criminally responsible if he is aware of the group’s intention to commit a crime but does not share that intent. His contribution to the crime must be linked with the crime so he must intend to engage in the conduct and be aware that his conduct contributes to the activities carried out by the group.\(^\text{164}\) Calling this form of liability “common purpose liability” is therefore a bit misleading since Article 25(3)(d)(ii) does not require shared intent.

On the other hand however, some commentators have expressed their doubts about the relevance of this article claiming that Article 25(3)(d)(ii) may require specific knowledge rather than specific intent since the text describes knowledge of the intent of the group to commit “the” crime.\(^\text{165}\) This argument is sound but there is still no reason to jump to conclusions at this point. The framework of the language and the otherwise vague discussion on this fact would also indicate that the intentions of the drafters may just as well have been to refer to “the crime in question”, meaning that they would not be referring to the specifics of the crime but merely that there is a crime to speak of in general.

There is however some jurisprudence which does seem to indicate that there is a requirement for a specific knowledge of the accused, meaning that he would have to know the specific crimes the group aims to commit.\(^\text{166}\)

The actor can be, but need not be, a part of the group\(^\text{167}\) so a business leader does not need to be affiliated with the group. Since the mens rea standard is easily fulfilled, the actual test would be to link the contribution to the commission of a crime.

The ICC has found that the threshold for a level of contribution requires that a contribution be at least significant which is less than substantial. The extent of the

---

\(^\text{164}\) Antonia Cassese et al.: Cassese’s International Criminal Law, p. 199.
\(^\text{165}\) Jessie Chella: The Complicity of Multinational Corporations in International Crimes, p. 274.
\(^\text{166}\) Marina Aksenova: Complicity in International Criminal Law, p. 163.
\(^\text{167}\) The Prosecutor v. Callixte Mbarushimana, Case No. ICC-01/04-01/10, ICC PTC I, Decision on the confirmation of charges, 16 December 2011, para. 275.
contribution is determined by examining the conduct and the context in which it is performed. Criminality can be publicly known in many areas, so requiring a threshold level of assistance becomes paramount to avoiding the overextension of the article. Without it, every landlord, grocer, utility provider, secretary, janitor or even taxpayer in the area of operation could become responsible for indirectly contributing to a group committing international crimes.\textsuperscript{168}

All things considered, Article 25(3)(d) may very well become the appropriate fallback\textsuperscript{169} if Article 25(3)(c) should be interpreted to include a strict \textit{mens rea} requirement or require a substantial effect.\textsuperscript{170} Since international crimes are unlikely to be committed by a single individual and a common purpose can be determined by circumstantial evidence the actual question which arises is whether the article may overwrite Article 25(3)(c) completely.

4.3.6. \textit{Profit motivated business within this framework: A conclusive assessment.}

After an extensive discussion on Article 25(3)(c) and (d) there has yet to be made a conclusive proposal on the merits of prosecuting business actors under the ICC. While some scholars seem to think that the purpose requirement will preclude the prosecution of an aider or abettor which beholds alternative motivations such as enrichment, others develop theories which aim to water down the purpose requirement until its relevance is next to nothing. In reality, there is no telling how the requirement will be interpreted but the limited jurisprudence so far points to a separation of the will to commit a facilitating act and the knowledge or intent to bring about the criminal outcome.

The language employed by the Rome Statute is of a dynamic nature and inconsistencies and the imprecise nature of the words leave some room for interpretation. Article 25(3)(c) will probably find a common ground somewhere in between those different poles and even in the most strict scenarios it would still be able to encompass some forms of business participation. It would be difficult to deny that a business actor which knowingly signs a contract with a rebel organization to continue to buy proceeds of pillaged resources from the group is doing so with the purpose of promoting the rebels to continue to pillage. Pillage is a war crime, thus the business actor would purposefully aid or abet war crimes.\textsuperscript{171} But with respect to recent case law, it seems that such strict interpretation is nevertheless unnecessary, yet a more complete picture of the interpretation is prone to develop over time.

\begin{footnotesize}
\textsuperscript{168}The Prosecutor v. Callixte Mbarushimana, Case No. ICC-01/04-01/10, ICC PTC I, Decision on the confirmation of charges, 16 December 2011, para. 277, 279, 283 and 285.
\textsuperscript{171}See chapter 5.1.2.
\end{footnotesize}
Article 25(3)(d)(ii) is also a feasible option which could capture some cases which fall short of Article 25(3)(c). But Article 30 already limits cases to a *dolus directus* involvement which requires a particular level of knowledge greater than *dolus indirectus* or *dolus eventualis*. Many cases will therefore not fulfill the requirements of the Rome Statute and domestic courts should still be the optimum venue for corporate complicity.

5. Financial involvement commensurate to participation

The discussion above should lay the groundwork for further speculations regarding business complicity in international and transnational crimes. Many of these offenses include specific elements which may affect the application of these principles. The following discussion will therefore discuss practical aspects of business complicity and the interplay between these elements and the components inherent to business relationships of a multinational nature.

5.1. International crimes

5.1.1. Genocide

In the middle of the last century, the Nazis established a political ideology which sought to exalt the supremacy of the Aryan race over others. Members of the National Socialist Party held fundraisings in order to finance their operation and carried out widespread propaganda to further their genocidal death-march. Their intentions were not clear at first but at some point became generally known to those who participated in the system. The intentions of the ethnic tribe of Hutus to destroy the minority Tutsis in 1994 Rwanda had on the contrary been clear very soon in this process of chaos. The significance of determining these intentions of destruction may not have much of a bearing when determining the moral guilt of an accomplice who knows his assistance will result in the deaths of civilians, but to determine legal guilt, knowledge of such intent is fundamental as the following discussion will seek to illuminate.

Genocide is a narrow crime defined to apply only for very limited aspects of the worst atrocities. The definition is crucial for conviction, but since the term was only coined post-World War II the Nazis could not be convicted on the grounds of genocide. The crime of genocide was defined in the Convention on Genocide held on the 9th of December 1948, and its definition contained in article II is now considered to have obtained the status of *ius cogens*.\(^\text{172}\) The core element found in the definition is that in order for an act to be considered

\(^{172}\text{Robert Cryer et al.: An Introduction to International Criminal Law and Procedure, pp. 205-207.}\)
as genocide, the act has to be committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group.

As stated before, an accomplice will generally not have to know exactly what crime is being committed. The exception to that rule is when a crime holds special requirements such as specific intent. The intent to destroy is a complex requirement and an important one for the discussion of complicity. The intent should be centrally focused on destroying the group for the sake of its characteristic. This intent is not however identical to motive. This intention could nevertheless be inferred from the general context or the factual circumstances of the acts carried out by the principals.\textsuperscript{173}

This requirement for specific intent had for a long time been subject to scholarly debate regarding accomplice liability. One theory was that the aider or abettor needs to share this specific intent but the \textit{ad hoc} tribunals expressly declared that such shared intent was not required.\textsuperscript{174} In order to convict an actor of complicity in genocide through aiding or abetting, one needs to prove that the actor knew that he was substantially assisting a perpetrator in the commission of genocide.\textsuperscript{175} It is therefore not necessary that one shares the specific intent with that perpetrator if one is aware of it. This does however not mean that if an aider or abettor truly does share the intent for genocide he, by definition, becomes a principal himself.

Thus it is important whether or not the corporate official was aware of the principal’s specific intent to destroy a group. In the \textit{Rutaganda case} a business man was found guilty of aiding and abetting the crime of genocide by distributing weapons to the \textit{Interhamwe} militia. The business man’s knowledge will have been evident but he was involved with creating the \textit{Interhamweza MRND} and will also have made references to cleansing the dirt when distributing weapons.\textsuperscript{176} The assessment of knowledge is less demanding given the business man’s involvement in the criminal group, but businessmen purely motivated by profit would likely distance themselves from the buyer.

One could also consider how such knowledge was determined in \textit{Flick et al.}\textsuperscript{177}, understanding that the accused may not have been aware of the criminal intentions of the Nazi regime in the beginning but continued to support them financially after their criminal behavior became generally known.

\textsuperscript{173}David Luban, Julie R. O’Sullivan and David P. Stewart: \textit{International and Transnational Criminal Law}, pp. 992 and 1014.
\textsuperscript{175}Antonio Cassese et al.: \textit{Cassese’s International Criminal Law}, p. 194.
\textsuperscript{176}Prosecutor v. Rutaganda, Case No. ICTR-96-3, ICTR, T. Ch. I, 6 December 1999, para. 28, 30, 385 and 386.
\textsuperscript{177}USA v. Friedrich Flick, et al., American Military Tribunal VI, 22 December 1947, Case No. 5, Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10, Vol. VI (The Flick Case).
This intent to destroy a group can be executed through the following methods:
(a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group. Methods of genocide are evidently abundant. If a company does business with torchbearers of genocide, they may need to consider the possible assistance the business could be contributing to the atrocities. A company who sells thousands of machetes to a tribe who has evidently and systematically been participating in killing the members of another tribe would have a hard time arguing that they were not aware that they could be assisting the commission of genocide. If however the conflict seems to be arbitrary on the outside it would not matter if the principal actors were targeting another tribe with the intent of destroying that group unless other factors would prove that the company were aware of these intentions.

Failing to prove the secondary actor’s knowledge of specific intent will result in the acquittal of genocide but may result in the conviction of another crime. These principles are generally applicable at national courts as evidenced by the judgment of the Supreme Court of the Netherlands, Case No. 07/10742, 30 June 2009 in the case of Van Anraat. The Court acquitted the accused of complicity to genocide because of insufficient evidence proving that the business man knew that he was making a contribution to the attacks that were aimed at the destruction of the Kurdish population at the time of delivering the substances. The Accused was however convicted of complicity in war crimes. The Court of Appeal had stated that:

International criminal law is still developing regarding the question of the degree of intention required for a conviction for complicity in genocide. Certain decisions of international criminal tribunals have held that the accomplice must have known that the perpetrator acted with genocidal intentions; Article 48 of the Dutch Penal Code on the other hand provides for a lesser degree of intention, namely that the accomplice willingly and knowingly accepts the reasonable chance that a certain consequence or circumstance will occur.

By referring to the reasonable chance standard the court is simply assessing the stage of knowledge sufficient to satisfy the mens rea requirement. This requirement is however fulfilled in Dutch national law if the accomplice has the dolus eventualis mens rea of the conduct, being aware of the risk for the perpetrator to engage in such criminal conduct. The court’s comment indicates that such knowledge must however be higher in international

---

courts. The Netherlands are a monistic state and the court is thus bound to comply with international customary law.

The District Court of The Hague had already confirmed that the case law of ICTY and ICTR required knowledge of specific intent. Establishing that although the accused must have known that the chemicals sold to Saddam Hussain will have assisted him in mass killings the prosecution had been unable to establish beyond reasonable doubt that the accused knew of his genocidal intentions. The judgment was confirmed at all levels of appeal.

Selling weapons would be the obvious example of contributing to genocide while other less harmful products, such as golf clubs, are less likely to render suspicion but if a worldwide press release informs the public that a group of rebels are committing genocide with blunt objects such as golf clubs, bats etc., further business could render the company liable. Business with some objects, such as furniture or clothes, is inherently neutral. A business with the company on the purchasing end however opens up multiple options for assistance. Perpetrators of genocide will generally need funds to dig into for the purchase of weapons, facilities or propaganda. The Flick et al. case even determined that cash for general maintenance could substitute assistance. Given that the perpetrators are either not capable of acting without financial support or at least not so financially strong that such assistance would not exacerbate or facilitate the genocidal campaign, such business could very well cross the objective threshold. But in order to establish complicity in genocide, the significance of the case lies in demonstrating knowledge of said atrocities and knowledge of the specific intent. If such knowledge is determined, proving the knowledge of causation could easily follow, given that the conduct did indeed affect the situation.

The atrocities in Sudan, most notably Darfur, gained global attention following the vivid descriptions of the atrocities committed. China has been accused of trading oil for weapons but the significance of the oil industry and its revenues has been linked to the long duration of the conflict. A report noted that foreign oil companies were responsible for exacerbating the long-running conflict already plagued by gross human rights abuses. The report marked the companies, Talisman Energy, Lundin Oil AB, China National Petroleum Company, Sudapet limited among others as major business actors in the Sudanese oil industry even linking specific human rights abuses, such as forceful deportation, to the furtherance of specific constructions. The fact that these companies carried their activity out for a long period of

\[\text{District Court of The Hague, Case No. 09/751003-04, 23 December 2005.}\]

\[\text{For further discussion on how causation is proved see chapter 9.}\]

\[\text{Sudan, Oil, and Human Rights, pp. 59, 69, 307, 408.}\]
time with Sudan’s conflict in the spotlight makes the case an excellent example of a possible complicity in genocide. But in order to prove knowledge of the specific intent, it must also be proved that the companies knew that atrocities were taking place at the time they were conducting their operations. The press sometimes referred to the situation as genocide but others debated that this was not the case. The UN published a report stating that although war crimes and crimes against humanity could be confirmed there was insufficient evidence to prove that the subjective elements of genocide were fulfilled although the objective elements were present.183 If the UN was unable to find sufficient evidence to determine the specific intent it would seem unreasonable to expect corporate actors to know about said intentions. But knowledge is generally determined with respect to the actions, not the legal interpretation. The Office of the Prosecutor of the ICC seemed to interpret the UN’s findings differently and submitted an arrest warrant for the president of Sudan for alleged participation in genocide.

Article 25(3)(d)(ii) of the Rome Statute may provide for less concrete knowledge of those specific intentions but its current practice gives no reason to believe that it will sway from customary law. Although there is inter alia nothing which binds states to limit the definition of genocide to such dolus specialis requirement, this is the price to be paid for labeling genocide as the crime of crimes in international law.

5.1.2. War crimes

The body of law labeled the Law of Armed Conflicts or International Humanitarian Law is constituted by customary rules and treaty rules. Ius in bellum are the rules established in order to secure the fundamental protection of all actors who are directly affected by an armed conflict. Serious violations of those rules constitute war crimes.184 This means that not all violations of those rules constitute war crimes. The ICTY has determined which requirements need to be fulfilled for acts to amount to war crimes under the court. The violations need to infringe a rule of the International Humanitarian Law and must be criminalized as part of customary law or applicable treaty laws. These rules must protect important values and the breach must involve grave consequences for the victim. Lastly they must entail individual criminal responsibility.185

War crimes can take place both in international and internal armed conflicts and thus also extend to civil wars.\textsuperscript{186} This requirement to a nexus with armed conflict means that an accomplice would need to know about the aspects of the situation which make up an armed conflict.

There is however no legally binding list of actions which could constitute such serious violations of international humanitarian law. The 1949 Geneva Conventions and the First Additional Protocol of 1977 however list up a sub-category of war crimes entitled “grave breaches” of those provisions. The ICC also limits its jurisdiction to certain offenses listed in Article 8 of the Rome Statute but the article is not reflecting customary law although it is influenced by those customs.\textsuperscript{187} The most interesting restriction of the Rome Statute is that it limits those war crimes to acts carried out as part of a plan or policy or as a part of a large scale commission of such crimes. These restrictions differ from customary law in that they require that the crime is of a certain magnitude whereas customary law provides that a single act could amount to a war crime.\textsuperscript{188}

The number of conducts which constitute war crimes are myriad but for a general reference one might consider the exhaustive list for war crimes under the Rome Statute, keeping in mind that customary law allows for a broader interpretation. The crime could serve as a fallback provision in genocide cases when it is foreseeable that the knowledge of specific intent could not be proven. This was true in the Van Anraat case and one could easily imagine such charges of war crimes as a general complementation when prosecuting for genocide. Genocide is directed towards civilians as well as other members of the targeted group but International Humanitarian Law calls for a proportional military strategy which required armed forces to take all the necessary steps to limit civilian casualties and spare civilian objects. Targeting civilians is therefore a severe violation of International Humanitarian Law.\textsuperscript{189} While the prosecutor might not need to prove that the company, which with its actions enabled, exacerbated or facilitated the crime, knew about the specific intent of the perpetrator he will still need to prove that the company knew about the basic intentions of the principal perpetrator or at least be aware of the possibility that civilians might be targeted or other war crimes committed.

Some actions of a company might be of the nature that knowledge could almost certainly be inferred from the act alone. One of the violations of International humanitarian law is the

\textsuperscript{186}Robert Cryer et al.: \textit{An Introduction to International Criminal Law and Procedures}, p. 273.
\textsuperscript{187}Antonio Cassese et al.: \textit{Cassese’s International Criminal Law}, p. 194.
\textsuperscript{188}Robert Cryer et al.: \textit{An Introduction to International Criminal Law and Procedures}, p. 284.
use of certain chemicals or biological weapons or other weapons which cause superfluous or unnecessary injury.\textsuperscript{190} Selling weapons of such nature to a militia should under normal circumstances alarm the seller. In the same way, one could argue that selling chemicals or other substances used for the production of such weapons to a dictator or a rebel group could alert caution. The same applies to products which could exclusively or expectedly be used for torture\textsuperscript{191}. This would depend on the conditions and circumstances of the business. A helpful but not exhaustive guideline would be to ask the following questions. (I) What is the usage for the chemical? (II) Has conflict begun or appeared to be imminent? (III) Does the actor have a history of such or similar violations or (IV) does the volume of the sale indicate the intentions of the military purpose?

Comparing the guideline to the \textit{Van Anraat case} is useful in order to grasp the whole context of how knowledge is determined in such a case. The court stated that under Dutch law, three basic requirements are needed to be fulfilled for an accused to be convicted for complicity to war crimes. First of all a war crime must have been committed, secondly the accomplice must have contributed in a material way to the crime and thirdly the accomplice must either have intended for the crime to be committed or have been reckless as to its commission. Van Anraat claimed to have thought that the chemicals, which were eventually used to produce mustard gas, were intended only for the textile industry. Other business partners had already expressed their concerns to him warning that the chemicals could easily be converted to poisonous gas. The court found that the accused was aware of the chemical warfare conducted by the Iraqi government and that he must have known of such war crimes even at the time of the first shipment. An expert witness testified that buying the chemicals for use in the textile industry could not be economically reasonable. Another witness testified that a negligible amount of the chemical could indeed be used for other and civil purposes but the amount of the chemical sold indicated that this could not be the case. The prosecutor proved the use of chemical weapons on the battlefield through witness testimonies made by members of the army, victims and the doctors who treated them. The court noted that the witness testimonies had sufficiently established a link between the chemical supplied by the accused and the attacks carried out by the Iraqi government. The court found that the accused, consciously and solely for the gain of profit contributed to the chemical warfare and convicted the accused of complicity to war crimes. The fact that the crimes would still have occurred

\textsuperscript{191} Torture can amount to a war crime, see for example common Article 3 of the Geneva convention or The War Crimes Act, 18 U.S.C. § 2441 under the U.S. domestic law.
without his contribution because others would have supplied the chemicals was irrelevant and so was the fact that it was not his desired decision to use the chemicals for military attacks.\textsuperscript{192}

Through more generalized means, financial aid could have devastating effects on the outcome of an armed conflict but the significant role natural resources play in armed conflicts has already been highlighted.\textsuperscript{193} So while financial assistance through such business actions could by itself contribute a substantial effect to the commission of a war crime, another interesting aspect of the business needs further discussion, namely the fact that the plundering of natural resources is \textit{inter alia} a war crime. Plunder is prohibited in international customary law and the rule is applicable in both inter-state and civil wars. Additionally the practice of pillage has been criminalized in international courts as evidenced by their statute and further criminalized in most states’ national law.\textsuperscript{194} Some of the most dynamic NGOs have currently joined forces to fight the continuation of the practice under the banner of the “Stop-Pillage” campaign. The campaign has stated the following:

The exploitation of natural resources requires commercial involvement in buying, transporting, and eventually commercialising\textsuperscript{sic} resources that have been illegally acquired. To put an end to this predatory economic behavior\textsuperscript{sic}, it is necessary to recognize the complicity of businesses in the supply chain, and to prosecute the companies that engage in illegal actions.\textsuperscript{195}

A number of trials have centered on the practice of pillage and the actions of individual actors. In \textit{United States of America vs. Ernst von Weizsäcker, et al.} or \textit{The Ministries Case},\textsuperscript{196} the vice president of the Reich Bank was found guilty of war crimes and crimes against humanity for accepting property taken by the SS from victims in various concentration camps. The court assessed the secrecy surrounding the transactions as evidence of the accused’s knowledge. The case also involved a director of a German bank, Dresdner Bank, which was found guilty of participating in the act of pillage by transferring properties which previously belonged to Jews to the interest of the German government.

Modern day companies may have escaped the hammer of justice so far but the actions of some convicted perpetrators of pillage do in some cases have an uncanny resemblance to the

\begin{flushright}
\footnotesize
\textsuperscript{192} \textit{Public Prosecutor v. Van Anrat.}, District Court of The Hague, Case No. 09/751003-04, Judgment, 23 December 2005. For a useful summary, see also Santiago Oñate et al.: “Lessons Learned: Chemicals Trader Convicted of War Crimes”.
\textsuperscript{193} See chapter 4.2.
\textsuperscript{194} James G. Stewart: \textit{Corporate War Crimes}, pp. 11-13.
\textsuperscript{195} \textit{Stop Pillaging: Media Kit}, p. 9.
\textsuperscript{196} \textit{USA v. Oswald Pohl et al.}, American Military Tribunal IV, 3 November 1947, Case No. 4, \textit{Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, Vol. III} (The Justice Case).
\end{flushright}
modern corporate resource business. On 26 April 2012, Charles Ghankay Taylor was found guilty of complicity in war crimes and crimes against humanity by supporting the RUF financially and logistically. One of the charges brought against him was the act of pillaging. He was further accused of giving the RUF logistical support with the purpose of ensuring the destabilization of the country enabling him to further access Sierra Leone’s natural resources. Taylor was sentenced to 50 years in prison for providing weapons, financial and moral support to the RUF. The judgment was upheld at the Appeals Chamber, which however noted that the Trial Chamber had erred in law when citing that aiding and abetting generally warrants a lesser sentence than other forms of participation.

The criminal elements of the offense, as they are determined by the ICC, require first and foremost that the perpetrator appropriated a property of some sort. The perpetrator must also have intended to deprive the owner of the property with the intention to gain private or personal use. For this appropriation to become penalized, it must have been conducted without the consent of the owner. Furthermore, it is required that the conduct was associated with and took place in the context of an armed conflict, whether international or internal. Lastly the mens rea element inherent to criminal law comprehendingly requires the perpetrator to be aware of factual circumstances that established the existence of an armed conflict. Much of this reflects the customary prohibition with the exception that pillage is not customarily restricted to the purpose of private or personal use. Pillage is however restricted to properties subject to previous ownership. Courts have generally turned to the concerned states’ national law in order to determine how the ownership of said property is assessed.

The nature of the beast is incorporated in the fundamental fact that corporate involvement constituting war crimes therefore stretches towards other actors than those who have been established as the conductors of warfare. Plunder extends war crimes to those who utilize the opportunity, presented by a conflict, to seize a property which does not belong to them. If a

---

198 The Prosecutor Against Charles Ghankay Taylor, Case No. SCSL-03-01-T, SCSL T. Ch. II, 26 April 2012.
199 Prosecutor Against Charles Ghankay Taylor, Case No. SCSL-03-01-A, SCSL A. Ch. 26 September 2013
200 International Criminal Court, Elements of Crimes, ICC-ASP/1/3, art. 8(2)(b)(xvi).
201 James G. Stewart: Corporate War Crimes, p. 20.
representative of a company engages in the practice of pillage no reasonable defense will be acknowledged by hiding behind the structure of the legal person he represents.\footnote{James G. Stewart: \textit{Corporate War Crimes}, p. 77.}

One of the noticeable consequences of this extension is the likelihood of a company representative generating liability by other means than aiding and abetting, possibly through ordering or soliciting the plunder or even as a principal perpetrator. As for the classical complicit actions of a company, the act of plunder offers not only a reasonably relevant ground for prosecuting companies for facilitating the violation but also a likely venue for the act of abetting the plunder. Although business leaders might not be fully aware to what extent their actions are facilitating a crime, which might depend on the need for facilitation, it would be less convincing to argue that they did not know that the plunder was taking place. If the company officials knew they were purchasing the product of pillage, moral encouragement to continue such actions could ensue from the business. The central element is the knowledge of the pillage and the knowledge that purchasing the goods might encourage the continuation of pillaging.

In some cases, business actors have exposed themselves to twofold levels of complicity in war crimes via financial and logistical involvement. These corporate actors fuel the conflict through the purchasing of natural resources from conflict zones and use their finance and transport links to send weapons back to these same conflict zones.\footnote{Michael A. Lundberg: “The Plunder of Natural Resources During War: A War Crime(?)”, p. 497.} This could add to the severity of involvement and in some cases become the focal point for assessing whether or not the participation falls above or below the threshold of exerting a substantial effect. This would certainly be the case when a transaction is inherently low when compared to the militias overall capacity to finance the conflict. Notwithstanding the general criteria of a substantial effect proposed to apply to financial support, a business with natural resources obtained by a paramilitary death squat could ostensibly give moral support when the financial support is vague. While this is true with other means of warfare or in fact wherever it pays to perpetuate the chaos of conflict, business with pillaged resources inevitably reflects demand. Corporate actors therefore must know that by buying the product of pillage they incite the perpetrator to balance demand with increased supply.

The previously promising case of Michel Desaedeleer\footnote{See discussion in chapter 4.2.3.} dealt with the pillage of blood diamonds. The fact that the national prosecutor characterized the act as a war crime is reassuring considering how domestic courts have generally been reluctant to confirm
corporate war crimes. An example of national courts’ cautious approach regarding corporate war crimes is the Dutch case of Guus Van Kouwenhoven in *The Supreme Court of the Netherlands, Case No. 08/01322, 24 April 2010*, concerning a Dutch business man which was the owner of Liberian timber companies. Kouwenhoven used these timber companies to facilitate the imports of arms for President Charles G. Taylor in breach of SC Resolution nr. 1343. He was accused of complicity in war crimes and of providing militias, which participated in the massacres of whole villages, sparing not even babies, with arms, thus enabling them to carry out their practice of terror. The District Court of The Hague found that the accused had indeed provided arms but that he had not had knowledge of the war crimes committed. He was however found guilty of violating national laws which prohibited all arms export to Liberia and sentenced the business man to 8 years in jail. He was acquitted of all charges at the Court of Appeal but the judgment was overturned by the Supreme Court claiming that the Court of Appeal erred in law by denying the prosecutor to introduce two key witnesses. The case has been referred back to the Court of Appeal which will undertake to assess the case anew on all facts and evidence. This gives way to the introduction of new evidence to prove Kouwenhoven’s alleged knowledge of his contribution to war crimes. The trial is still impending due to the excessive amount of evidence introduced.

5.1.3. Crimes against humanity

Cruelty has a special place in the history of mankind and history has a tendency to repeat itself. Just as the international community has refused to consider human rights abuses as the private matter of the concerned state so has it recognized that some actions, albeit directed towards individuals, should manifestly be considered a crime against human dignity.

Originally intended to fill the gaps between the extensive numbers of war crimes, crimes against humanity have not been consistently defined by international instruments. A more coherent picture of the crime has developed through the years and the term is now synonymous to those of murder, torture, rape, sexual slavery, persecution or general enslavement. While the crime surely does encompass the aforementioned crimes, its application is even broader, extending to numerous inhumane acts with no nexus to the armed conflicts required. There has been some controversy as to the level of state involvement required for the offenses to amount to crimes against humanity. Many scholars have

---

concluded that the actions need to relate to state policy in one way or another albeit the ICTR extended these acts to non-state actors notwithstanding that there seems to be a growing consensus to include non-state actors within the framework of other tribunals. The ICTY seems to have rejected the state policy element and there are reasonable grounds to believe that the ICC will do the same. The Pre-Trial Chamber I has commented on these issues interpreting the element as a requirement intended to ensure that an attack must be thoroughly organized and additionally follow a regular pattern. It would in itself also fulfill the criteria for a government to tolerate the widespread actions of non-state actors. It has further been cited that a non-state entity could constitute a government if it holds de facto authority over the area of consideration.

Some jurisdictions take on a broader view of the crime, extending it to any collective efforts to inflict crimes of a massive scale on a civilian population. The ICC’s jurisprudence seems to support this interpretation.

An important aspect of the crime is the requirement for the crime to reach a certain level of magnitude before it can be described as a crime against humanity. The crimes encompassed by the term can generally stand independently as a criminal offence in domestic law meaning that a single act of rape could not constitute a crime against humanity. If however rape were to be used as a tool to terrorize individuals of a given community as a part of a policy or plan, the nature and gravity of the offense would transform completely.

The aspect mentioned above is the requirement for the crime to be widespread or systematic but it will additionally have to be directed against any civilian population within a given area. These requirements are of direct relevance in the study of complicity but while the practice of a crime is more likely to have reached an aider or abettor’s attention when widespread or systematic, that same actor would also need to know that these elements are a part of the crime if he were to be convicted as an aider or abettor to crimes against humanity.

The actus reus requires, in other words, that it should be determined that the actions were a part of a comprehensive policy or a consistent pattern of human rights abuses. The mens rea required thus logically bids that the perpetrator is aware of the broader context of the crime.

---

209 Article 3 of the Statute of the International Criminal Tribunal for Rwanda.
210 M. Cherif Bassiouni: Crimes Against Humanity, p. 28.
It has already been mentioned how multinational companies have utilized the instability in the third world as a means to maximize profit. Whereas corporate entities may indifferently support war crimes or the crime of genocide through business transactions, crimes against humanity are no different in this respect. The representative may for example realize that the construction permit obtained from a government with a bad human rights reputation will logically lead to the forcible deportation of the local population under Article 7(1)(d). Corporate actors may however also depend on severe human rights abuses as a direct link in their chain of supply. These are examples which could be dealt with as regular national crimes although often with transnational elements. But if human rights abuses constitute a stable source of resources in their supply chain it raises the question of whether these human rights abuses might indeed be prosecuted as crimes against humanity.

Child labor has become institutionalized in certain states, providing companies with a stable source of cheap labor. Those states refrain from enforcing a minimum age standard for employment or do not sanction a violation of such standards with appropriate penalties. The Democratic Republic of Congo is among those states. Children are exposed to hazardous working conditions which are prohibited by domestic laws but persist nevertheless due to western companies conducting business with cobalt from unregulated mines. Seeing how the DRC does not live up to its human rights obligations and seems to tolerate the widespread and systematic practice of child labor, it might be feasible to identify the abuse as a crime against humanity. The worst forms of child labor have sometimes been regarded as a crime against humanity. States could therefore arguably prosecute corporate actors for aiding or abetting crimes against humanity if they include suppliers, who engage in child labor, in their supply chain. This may depend on the domestic interpretation of crimes against humanity which may differ between states. Similarly to the purchase of pillaged resources, a company which depends on suppliers which utilize child labor to lower the price may be seen as abettors of the crime. This criminal activity exists for the sole reason of demand, bringing a business partner in closer proximity with the crime. One could even propose that a company may share the principal’s desire of a certain criminal outcome due to the proximity between the lowered prices and the crime.

216 Forcible deportation in Sudan seems to be interlinked with the construction route of foreign oil companies. See discussion in chapter 5.2.
218 The DRC is a party to the Worst Forms of Child Labour Convention.
220 *This is what we die for*, pp. 14, 19 and 55.
The ICC might also be an ideal venue for prosecution. Although the practice may be widespread or systematic, the offense would still need to fall within the scope of Article 7(1) of the Rome Statute. Those who have been most vocal about these crimes falling within the scope of the ICC’s jurisdiction seem to rely on Article 7(1)(c) as the proper grounds for jurisdiction meaning that they consider child labor a form of slavery.\(^\text{222}\)

The International Labour Organization (ILO) was at the forefront of developing the Worst Forms of Child Labour Convention (No. 182). Parties to the convention agree to take effective measures in order to secure the prohibition and elimination of the worst forms of child labor. A part of these effective measures is to criminalize child labor via domestic law. Engaging in such grave human rights abuses should generally trigger criminal liability regardless of whether or not the minor receives a payment.\(^\text{223}\) These state obligations stem from multiple sources such as Article 10(3) of the ICSECR but have also been reintroduced through series of other international documents.\(^\text{224}\) Children are not in the position to choose whether or not they should endure poor working conditions and are in many cases forced to work by their parents or other individuals in a position to dictate their actions. The practice is a form of oppression and a violent attack may not be needed to obtain authority over the victims.

While the Rome Statute phrases crimes against humanity as a widespread or systematic attack, it is clear that the definition of an attack should not be understood in the literal linguistic sense and could for example encompass non-violent actions such as ongoing practices of apartheid or other form of oppression.\(^\text{225}\)

But for child labor to fall within the ambit of Article 7(1)(c) of the Rome Statute, the person responsible for the child will have to exercise some form of power attached to the ownership of a person.\(^\text{226}\) There is a current trend in international criminal law to downplay the classical requirement of ownership. The ICTY stated the following in *Prosecutor v. Kunarac et al.* *Case No. IT-96-23 & IT-96-23/1-A, ICTY A. Ch. 12 June 2012*:

> The Appeals Chamber accepts the chief thesis of the Trial Chamber that the traditional concept of slavery, as defined in the 1926 Slavery Convention and often referred to as “chattel slavery”, 145 has evolved to encompass

\(^{222}\)Emily Camastra: “Hazardous Child Labor as a Crime against Humanity”, p. 342.


\(^{224}\)See for example the Convention on the Rights of the Child or the Protocol on the Sale of Children, Child Pornography and Child Prostitution.


\(^{226}\)Article 7(2)(c).
various contemporary forms of slavery which are also based on the exercise of any or all of the powers attaching to the right of ownership.  

The court went on to state that slavery could encompass instances when the perpetrator wields control over a person and that the lack of resistance could not be interpreted as consent notwithstanding that the prosecutor is not required to prove the lack of consent. In *The Justice Case*, the tribunal stated that “[t]here is no such thing as benevolent slavery. Involuntary servitude, even if tempered by humane treatment, is still slavery.”

The broadened understanding of the concept of slavery and the development of interpretation in the international community may indicate the possible interpretation of Article 7(1)(c) of the Rome Statute. But the requirement for an execution of an element of ownership cannot be rendered null and void and although the article may encompass contemporary forms of slavery it may not necessarily encompass all forms of contemporary slavery.

One of the suggestions for the interpretation of the ownership requirement is for the ICC not to focus on complete physical control over a person but rather focus on extreme economic exploitation in accordance with modern development. While not able to draw the line to separate the forms of contemporary slavery which do not fall under the ambit of Article 7(1)(c) from those who do, the criteria laid forth should at least encompass hazardous child labor.

The child labor practice in the DRC cobalt mines appears to be a clear example of hazardous child labor. Exposure to high levels of cobalt can result in both short-term and long-term health problems. Long-term exposure to dusted cobalt may lead to “hard metal lung disease” which can be fatal. Children are sent into the mines to perform artisanal mining without the most basic safety equipment and may be forced to work for a period of 24 hours. Accidents are common and conditions are life threatening. Yet many of the world’s largest

---

227 Para 117.
228 Para 119 and 120.
232 With respect to the severe harm caused by cobalt exposure there is an interesting discussion on the harms of long-time exposure of a lot less harmful chemicals in the mines of South Africa in the case of *Nkala and Others v Harmony Gold Mining Company Limited and Others*, South Gauteng High Court, Case No. 48226/12, 13 May 2016. The case is however a class action civil case and is therefore only of complementary benefits to this discussion.
233 *This is what we die for*, pp. 22, 24, 29.
electronics companies are alleged to source cobalt from the unregulated mines of the DRC and repeatedly fail to exercise due diligence.234

The arrest and induction of Michel Desaëdeleer and the characterization of forced labor connected to the blood diamond trade as a crime against humanity displays another attempt to prosecute contemporary forms of slavery as a crime against humanity. Forced labor could therefore possibly be included in Article 7(1)(c) or possibly through Article 7(1)(k). Corporate actors who engage in business with human rights violators should additionally keep in mind that although a grave offense would not fit under the scope of one of the specific subparagraphs of Article 7, the ICC may be able to include various forms of severe human rights violations under the ambit of the fallback subparagraph (k) of Article 7(1).

5.2. Transnational crimes

5.2.1. General

A number of offenses have multinational elements without being categorized as international crimes. These may be classic examples of transnational crimes, such as drug trafficking or crimes which in some circumstances could amount to international crimes but would in the absence of a certain elemental factor amount only to domestic offenses. The transnational element is not necessarily inherent to all of these offenses but the multinational element of the business transactions would render the complicit act as a transnational crime. The crimes in question all have one thing in common; however, they are all prohibited via treaty law.

When a human rights abuse such as terrorism falls short of being categorized as a crime against humanity, it may become more difficult to determine financial complicity, the reason being that terroristic acts which do not constitute crimes against humanity may lack the features of being systematic or widespread. Corporate actors doing business with the perpetrators of isolated terroristic activities are less likely to be aware of these intentions notwithstanding that if they do however know that the business relationship is facilitating terroristic activity the basic principles of complicity will apply. When dealing with other human rights abuses, such as forced labor or child labor, these activities might be in such proximity with the industrial structure laying the groundwork for the company that knowledge might be inevitable. It is still unclear to what extent these crimes may fall under the scope of the definition of crimes against humanity in which case states will have to react through domestic criminal law.

234 See chapter 8.
Some states may also decide to deal with international crimes as domestic crimes. It is indeed possible to prosecute acts amounting to war crimes, crimes against humanity or even genocide as domestic offenses such as murder. Any discussion on corporate complicity would therefore be incomplete without the realization that there are alternative ways of dealing with these offenses. The principles applicable to corporate complicity, as they were discussed under chapter 4.1 and 4.2., are relevant to both international and transnational crimes. The following discussion will highlight other aspects of transnational crimes by focusing on the criminal offenses which are most likely to supplement the discussion.

5.2.2. Business with terrorists
The war on terror or the fight against terrorism has taken new heights in the recent years with states such as the U.S. going as far as disregarding basic human rights to bring alleged terrorists to justice.

Acts of terrorism, not unlike torture, could amount to both war crimes and crimes against humanity but could also constitute an independent offense. Yet there is no common consensus on the definition of terrorism.

The term terrorism is still developing and has not been concretely manifested as a defined and clear term, neither through customary law nor treaty law. States may therefore approach the crime from different angles but common elements of the crime can still be discussed.

Terrorism objectively encompasses serious domestic crimes such as murder, kidnapping, bombing, hijacking or other grave harmful conducts. The act is transnational in nature encompassing some foreign elements and may be directed against both civilians and state officials. Subjectively, terrorism is a purpose crime with the aim either to spread, fear, panic or chaos among the population, to compel a government or an international organization to perform an act or abstain from performing an act, or to destabilize a country or destroy its structure. The actions are further motivated by political, ideological or religious motivation.

For a company to become complicit in acts of terrorism, the representatives must logically know about these objective and subjective elements. It should therefore not be required that the company shares the beliefs of the terrorist or wishes for the commission of the crimes to become successful, only that the company is aware of their intentions. Should the company only be aware of the intention to kill but not aware of the fact that there is an ideological

---


64
motivation behind the crime, the company would not be complicit in terrorism although it could become complicit for aiding or abetting murder. There is no reason to believe that it is required that the company should know whether the motivation is political or religious, only that they know that there is some greater ideological motivation behind the crime than just the will to commit a crime. It should similarly not be required for the company to know what the terrorist wants to coerce a government to do as long as they are aware of the basics of their intentions.

The necessary mens rea required for aiding or abetting is therefore troublesome for the prosecution and in a way resembles that of the mens rea required for aiding or abetting the crime of genocide. A company could in many cases be completely clueless regarding the intentions of terrorists. Some terrorist organizations have proclaimed their intentions worldwide. A company sending large amounts of cash to Al-Qaida against a UN resolution could hardly state that they were not aware of the intentions of the terrorist group. But for the actions to amount to complicity in terrorism the amount must reach digits high enough to actually aid or abet the perpetrators. Terrorism is remarkably expensive and terrorists are frequently looking for ways to finance their operation. Some banks have been sending cash to terrorist organizations, hiding the aid as anonymous funding among the funding sent to charities.\textsuperscript{237} Terrorist have also found their way in the organized crimes scene and rely on multiple methods to finance their activity. Due to these reasons, a business partner may be less likely to cross the threshold of the objective requirement than he is when purchasing natural resources which serve as the primary source of income for a group of paramilitary rebels.

Due to these difficulties a legal regime which criminalizes material support for terrorists has prevailed in most states national laws in accordance with the treaty law.\textsuperscript{238} Although states may therefore evade the hassle of proving that the support had a substantial effect, it must still prove that the actor knew about the intentions of the terrorists. Even states such as the US, which have been particularly strict on terrorist sympathizers, acknowledge the need to prove such knowledge.\textsuperscript{239} A national prosecutor may therefore prosecute a company official for either complicity in terrorism or for the independent crime of terrorist support.

\textsuperscript{237}Steve Barber: “The “New Economy of Terror:” The Financing of Islamist Terrorism”, pp. 4-5.
\textsuperscript{238} See the \textit{International Convention for the Suppression of the Financing of Terrorism}.
\textsuperscript{239} Angela A. Barkin: “Corporate America--Making a Killing: An Analysis of Why it is Appropriate to Hold American Corporations Who Fund Terrorist Organizations Liable for Aiding and Abetting Terrorism”, p. 171.
5.2.3. Organized crimes

The problem of organized crimes may only be complementary to this discussion but it may propose an alternative way of dealing with corporate complicity.

Seeing how courts may exercise jurisdiction over criminal activity practiced abroad one could assume that the locations of criminal practice were immaterial to the law enforcement. One would however be mistaken. The principle of sovereignty requires states to respect the sovereign power of a state to manage its territory. Criminals are not bound by those rules and effectively use them to shackle the law enforcement from investigating their criminal behavior. These criminals may for example suppress children to work in sweatshops as an indentured laborer, traffic people for forced labor or sexual slavery or engage in corruption or money laundering. The principle of states’ sovereignty hinders the process of law enforcement with respect to pursuing transnational crimes. This results from the legal obstacles restraining the law enforcement’s competence to its territory. Examples of this are the extradition procedures and legal constraints of evidence gathering. This is made more difficult due to the rapid development in technology, making international transactions with illicit gains easy to complete but hard to investigate. All of those obstacles work to the advantage of criminal groups. Moreover, the criminal actions of a group are psychologically more likely to go to the extreme than an individual would.\footnote{David Luban, Julie R. O’Sullivan and David P. Stewart: International and Transnational Criminal Law, pp. 506-507.} It should just as well be emphasized that the ICC’s Office of The Prosecutor has identified transnational organized crimes as a typical means of financing international crimes.\footnote{Strategic Plan 2016 – 2018, para. 30.}

In order to address the problem, a convention was held in Palermo, Italy in December 2000. Multiple states signed the “United Nations Convention against transnational organized crime” which calls for international co-operation to combat the transnational crime rings. Organized criminal groups are defined in the convention as “a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit”.\footnote{Article 2(a) of the 2000 United Nations Convention against transnational organized crime.} This definition seems to apply to companies who invest most of their time in illegal behavior. Furthermore a business agreement between two parties creates a bond between them. This bond exists only for the purpose of mutual benefits and if one party benefits by receiving aid to commit a crime, then this relationship exists with the aim to commit a crime in order to obtain financial
benefits. Article 5 of the convention creates an obligation for states to criminalize participation in an organized criminal group including participation in the form of aiding, abetting or facilitating the commission of a serious crime.

Criminal groups have proven influential in modern societies, often wielding considerable powers, corrupting political institutions and undermining democracy while they invade and take over legitimate entities, businesses and even governments. These criminals may use business enterprises such as companies or other legal entities to operate through. The UN convention consequently obliges states to adopt appropriate measures to hold legal persons liable if they participate in the commission of a crime linked to an organized criminal group. Such punishment, directed against a legal person would only be complementary to the punishment of the representatives or other conductors of the concerned offenses. The convention suggests that states can adopt measures to confiscate or seize the proceeds of transnational crimes without the state being required to prove which properties were obtained through illicit enrichment. This principle could be applied to organized crimes post-conviction without breaching the principle of the presumption of innocence.

The US tackled the issue of organized crimes by adopting the Racketeer Influenced and Corrupt Organizations Act (RICO), extending the legal accountability of punishable acts to those who assisted or ordered the crime. RICO was initially developed to target the mafia and allows the prosecution to try numerous criminals at once. Subsection 18 U.S. Code 1962(c) of RICO notes that: “It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity or collection of unlawful debt.”

The section applies to anyone who through a business conducts a series of crimes. This could be a representative of a legal entity or a member of a rebel group. The section is however not limited to organized crimes but can be evoked whenever predicate crimes are committed by someone associated with an enterprise, the term enterprise being interpreted loosely. RICO also defines the concept person broadly, encompassing any legal entity who can hold rights. The act could therefore theoretically apply to any business men or legal

244Article 10 of the 2000 United Nations Convention against transnational organized crime.
entities who continually aid or abet international or transnational crimes. This should however be read against the backdrop of the high level of the *mens rea* element required by U.S. criminal law for aiding and abetting.248

It is unclear whether the UN convention aims to encompass business relationship with the perpetrators of serious crimes but states are certainly able to incorporate a broader definition into their domestic law. Germany, Austria and Canada have all restricted their definition on organized crimes to actors with the main objective to commit crimes, whereas Israel has rejected these restrictions, adopting an interpretation so broad that it encompasses almost all forms of joint crimes.249

The convention emphasizes the duty of the states to include provisions of corporate criminal liability in their jurisdiction which could sanction legal entities for their involvement in organized crime. It has therefore been argued that the convention is the key to bringing corporations to justice for business practices which violate human rights.250

Apart from business men becoming complicit in organized crimes through aiding or abetting via business transactions their business network could be identified as an organized criminal group by effectively conducting dark networks for money laundering, arms smuggling or the purchase of blood diamonds. Targeting business leaders as participants of organized criminal groups could therefore become a realistic strategy when prosecuting larger crime rings.

5.2.4. *Industrialized human rights abuses*

Multinational companies operate all around the world in countries that cannot or will not provide enough oversight or regulation of their human rights practices, shielded by the fact that legal obligations to secure human rights are yet to be adopted. In reality, many companies take advantage of these poor human rights records, making business decisions which result in serious human rights violations. The human rights violations which result from a company’s business in a fragile state are varied and in different relations to the business relationship. States may drive people away from their homes in order to build roads or pipelines through their villages and civil opposition could lead to enforced disappearance. The former example displays a relatively direct link between a company’s operation and the principal, especially

248See chapter 4.1.
when it is clear from the beginning that human settlement stands in the way of the operation. The states human rights record could become of serious importance in those cases. In the latter case, it would become a lot harder to establish that a business man could know that enforced disappearance was a likely result of the business plan since the actor would have to know not only that the state would resort to those measures, which are typically very secretive, but also that enough opposition would take place for the state to resort to enforced disappearance. Other human rights abuses may become closely interlinked with a company’s industry. These are crimes like slavery, child labor or forced labor.

Corporations have a responsibility to respect human rights wherever they may operate in the world. This responsibility originates from the UN Guiding Principles on Business and Human Rights (UNGPs)\(^ {251} \), so if a state where a company operates is either unwilling or unable to enforce existing and applicable laws or if it lacks the appropriate regulatory framework to protect human rights from abuse, the company must itself act to ensure respect for human rights within their operations.\(^ {252} \)

But soft law is inherently toothless making the application of enforcement mechanism necessary. Severe human rights abuses are subject to numerous treaties. States are expected to protect human rights and failure to apply national law in a manner consistent with human rights norms can result in a state’s violation of international law. The part of international human rights law which is of relevance to this discussion is the negative obligation of states. Negative obligations oblige states to refrain from certain actions and to prevent others from engaging in said actions. “States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.”\(^ {253} \) States will not fulfill their responsibility to secure human rights protection exclusively by compensating a victim. Perpetrators of clandestine human rights abuse must additionally face adequate prosecution.\(^ {254} \)

As the process of globalization continues, states also have to consider their responsibility for potential human rights violations committed by multinational entities which operate within different states. If a company or business actor is complicit in human rights abuses overseas, the businessman, the company’s representative or, depending on the domestic law in question, the legal entity itself may be subject to the jurisdiction of the state from which it

\(^ {251} \text{Guiding Principles of Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework. UN Doc HR/PUB/11/04.} \)

\(^ {252} \text{This is what we die for, p. 40.} \)

\(^ {253} \text{Views of CEDAW Committee, Jan. 26, 2005. UN Doc. CEDAW/C/32/2003 (2005), para. 9.2.} \)

\(^ {254} \text{ECHR, Siliadin v. France, 26. October 2005 (73316/01), para. 148.} \)
The state’s failure to enforce a business actor’s compliance with human rights may *inter alia* constitute a violation of human rights law even though the principal crime is committed within another state. A major obstacle to enforcing transnational compliance with international human rights law is the deficiency of an international enforcement mechanism. Such is the nature of international institutions that those who suffer from human rights violations are generally only able to make complaints regarding a state’s failure to secure human rights protection if they are either nationals of said state or subjects to its jurisdiction. Nonetheless, companies generally operate within a state where child labor, forced or hazardous labor or other severe human rights abuses are penalized. States have the capacity to exercise jurisdiction over a person if a part of the crime is committed within its territory. A state from which a business actor conducted the financial transaction is consequently competent to enforce its penal legislation due to such complicity in human rights abuses similar to the state where the human rights abuses are taking place.

Slavery is an example of an illicit activity which corporations might benefit from. The concept refers to a deprivation of freedom in the legal sense but practices which have been coined as being similar to slavery are the most frequently occurring human rights abuses which could constitute a form of slavery. Practices similar to slavery are subject to the Supplementary Convention of 1926 on the Abolition of Slavery, The Slave Trade and Institutions and Practices Similar to Slavery. Slavery as a practice was deemed a legitimate business prior to the latter part of the eighteenth century but the practice has deep historic roots. It’s addressed in multiple instruments such as the Universal Declaration of Human Rights (UDHR) which abolishes both slavery and servitude. Article 3 of UDHR is recognized as a *ius cogens* rule which binds all states. No derogation from these rules are authorized due to its binding effect. Slavery and forced labor is of great concern for the legal community but the relevance of human rights is generally dependent on a person’s right to freedom. Yet the practice has not been eliminated.

---

256 The victims are entitled to justice and due prosecution of the alleged violators of human rights.  
257 See for example Article 1 of the first Optional Protocol to the ICCPR and Article 2 of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.  
261 Article 3  
262 Javaid Rehman: *International Human Rights Law*, p. 82.  
As with any serious human rights abuse, states are bound secure to an applicable legislations which sanction all practices similar to slavery. The European Court of Human Rights (ECtHR) has made references to Article 4 of the European Convention of Human Rights, noting that states are required to penalize virtually all forms of slavery recognizing that servitude and forced labor would also constitute a form of slavery. The ECtHR affirmed that “The Organisation and its member States must promote and protect the human rights of the victim and ensure that the perpetrators of the crime of domestic slavery are brought to justice so that slavery can finally be eliminated from Europe.”

In addition to the prohibition within Article 3 of the UDHR, multiple other provisions stemming from international or regional documents condemn and prohibit slavery and related practices. Slavery is in fact generally criminalized in states’ domestic law including other practices such as servitude and forced labor. The reprehensibility of such practices is considered so fundamental that states have incorporated the general prohibition of slavery into their constitution, as evidenced by the United States Constitution, the Nigerian Constitution or the Kenyan Constitution which also directly prohibits servitude and forced labor. A common approach is also to prohibit slavery indirectly by addressing lesser deprivation of freedom or by providing greater protection as is the case with the Icelandic Constitution.

Since the right to be free from slavery, forced labor or servitude is among the most fundamental human rights, it is penalized practically worldwide. Slavery was customarily defined as an international crime, and is therefore arguably subject to universal jurisdiction. States generally fulfill their obligation to criminalize all forms of slavery and since states generally criminalize various forms of participation such as corporate complicity, their criminal jurisdictions will extend to complicity in transnational human

265 The most notable examples are Article 8 of the International Covenant on Civil and Political Rights, Article 4 of the European Convention of Human Rights, Article 5 of the African Charter on Human and Peoples Rights or Article 6 of the American Convention of Human Rights.
266 Article 13 of the United States Constitution from 17. September 1789.
268 Article 30 of the Kenyan constitution from 27. August 2010.
271 Although dealt with as a transnational crime in modern legal theories.
rights violations.\textsuperscript{274} Child labor has also been prohibited in most states criminal legislation but attempts to enforce the legislation remain vague yet some states have utilized their national law in order to directly regulate companies responsible for child labor.\textsuperscript{275}

The role of the ICC has previously been discussed in relation to how the court could assess its jurisdiction over human rights abuses, such as slavery or child labor when the practice is carried out in a widespread or systematic manner. The discussion above should shed a light on the possible prosecution of these actions when they fall short of the crimes under the scope of the ICC’s jurisdiction. Corporate actors could therefore face prosecution for complicity in industrialized human rights abuses such as slavery, forced labor or child labor regardless of whether or not it constitutes a crime against humanity or a war crime.

\section*{6. Corporate criminal liability}

\subsection*{6.1. Domestic}

\subsubsection*{6.1.1. The nature of legal entities and their responsibility}

Modern society is built up of people who live together through a set of codes referred to as law. Each and every individual is in theory equal before the law and is expected to comport himself according to the law. A person is in other words subject to the law. But through the fictive tendencies of the human mind, an apocryphal actor in the society was made up, not a person of nature but one of juridical existence. This juridical person is best known in the form of a corporation but exists equally through other forms of legal entities. These entities are conducted by natural persons who, through an often complicated system of governance, take decisions which are officially executed on behalf of the legal entity. Many states seem to treat a juridical person only as a holder of civil rights and duties but refrain from recognizing the criminal liability of a corporate entity despite those criminal actions stemming officially from said entity.\textsuperscript{276} Investing in a company which sees no problem with breaking the law in order to increase profit may therefore in fact benefit some shareholders.

Studies have shown that companies may gain additional profits from leaning their business towards conflict zones, making such investments more appealing to their shareholders. The demand for company involvement within a given conflict zone is notably high with respect to the constant need to fuel the financially costly conflict. Companies seem

\footnotesize\textsuperscript{274} States are in addition obliged to enforce laws aimed at requiring business actors to ensure basic human rights. See principle 3 of the United Nations Guiding Principles of Business and Human Rights.

\footnotesize\textsuperscript{275} Shima Baradaran and Stephanie Barclay: “Fair trade and Child labour”, p. 28.

\footnotesize\textsuperscript{276} Mark Pieth and Radha Ivory: \textit{Corporate Criminal Liability}, pp. 6 and 14.
to gain extra bargaining power with the ability to wield more influence to gain more economically favorable deals, such as lower license costs. Additionally, long-term warfare weakens all systematic transparency, making it easier for companies to conduct illicit business operations in the shadow of war.\textsuperscript{277} It has been noted that sanctioning companies by imposing fines may not be appropriate when a company is involved in international crimes. While the shareholders might not have done wrong, heavy fines would make an easy profit less attractive and possibly lessen the pressure from shadow operators who, in the power of their shares, might otherwise have supported the board to continue their illicit behavior.

A corporation which is fined for criminal offenses may be tempted to avoid these fines by going bankrupt. In those cases, one might ask whether going through the trouble of prosecuting a company is worth it. Troubles with enforcing fines are nothing short of a regular thing for national prosecutors. Criminal proceedings are upheld against criminals whom in many cases are neither willing nor able to pay those fines. Larger companies have a legacy to uphold and cannot risk bankruptcy and those who can may already have benefited enough from the illicit deals to be forced to pay a large amount to the state through bankruptcy proceedings. Another way for a corporation to evade a fee is to operate through subsidiaries keeping a parent-company clean and taking all incriminating decisions through a daughter-company. This, albeit complicating the case, is not a trump card against the prosecution. A parent-company could still incur liability as a director of its daughter-company and if the daughter-company is merely executing orders from the parent-company or its board of directors, a judge could look through the subsidiary and make the parent company liable for its own decisions.\textsuperscript{278,279}

Additionally, for someone to state that it would be morally wrong to calculate fines on a company which took part in some of the worst crimes of existence, one should keep in mind that the ICTY has stated that “not a single penalty which the council can render can match in total the horror of all that had happened, nor its terrible consequences for thousands of victims.”\textsuperscript{280}

\textsuperscript{277}Massimo Guidolin and Eliana La Ferrara: “Diamonds Are Forever, Wars Are Not: Is Conflict Bad for Private Firms?”, pp. 1978-1979
\textsuperscript{278}Stefán Már Stefánsson: \textit{Hlutafélagaréttur}, pp. 391-393.
\textsuperscript{279}Source of reference dealt with tort cases but the principles are for the most parts applicable in criminal cases.
\textsuperscript{280}Lajco Klajn: \textit{The Past in Present Times}, p. 249.
6.1.2. A comparative study of corporate criminal liability

A company is in many ways quite similar to a natural person when it comes to criminal law since *mens rea* is still relevant but when determined, a company can as a rule of thumb become liable for any offense a natural person could be prosecuted for. Criminal liability can therefore be imposed on both incorporated and unincorporated bodies.\(^{281}\) The idea of a legal entity being held responsible, either independently or concurrently with its representative or employer, is gaining widespread acceptance. While common law countries have for a long time adhered to the principles of corporate responsibility, it is only recently that many European states have adopted a similar approach, largely due to a growing number of legal instruments, stemming from the European Union, which require member states to make entities responsible for certain actions.\(^{282}\)

But a juridical person is not able to go to jail. Nor is it able to physically execute a crime without the participation of natural persons. But a company cannot logically become responsible for all the actions of its employees. Some limitations are essential to the existence of a company’s responsibility.

A classic example of these limitations is the French Penal Code. The French Penal Code enables the court to hold a legal entity responsible for any type of crime listed therein.\(^{283}\) The entity will however only be held responsible if the actions are carried out on its behalf. This approach is widely accepted in other states whose national laws greatly mirror that of the French approach.\(^{284}\) A legal entity can be tried independently, regardless of whether or not the individual responsible is tried. French laws however formally require that the court be able to designate the employee or the organ responsible for triggering corporate liability. Substantively, the courts have deemed it adequate to prove that all the elements of the offense were inevitably committed by a natural person within the corporation.\(^{285}\)

Germany follows a similar approach, whereby it is not necessary to identify which employee committed the crime in German law. In order to sanction a company, the prosecution need only prove that the crime was committed by a representative of the company, an organ or a person which exercises control over a company. These actions must


\(^{282}\)Thomas Weigend: “Societas delinquere non potest?”, p. 928.

\(^{283}\)French law requires an explicit provision for corporate liability. The French legislator made such a provision, extending the criminal liability of all crimes within the national Penal Code. See Act 2004-204 dated 9th of March 2004.


be carried out on behalf of the company either by the abovementioned officials or by an employee under the approval of an official or a culpable lack of supervision. A company will however only be sanctioned under German law if the offense was related to a violation of the company’s obligation or if it resulted in enrichment for the company.\textsuperscript{286} Although quite similar to German law, Icelandic laws neither require that a company’s obligation be violated nor that the company was enriched by those actions. In Icelandic law, it is sufficient to determine that the offense was logically correlated with the entity’s course of business.\textsuperscript{287} Conversely, U.S. legislation generally has a mandatory requirement for enrichment. U.S. criminal law typically requires that the offense was performed within the scope of the actor’s employment, in furthersance of the corporation’s interests, and that the actions were authorized, tolerated, or ratified by the competent management.\textsuperscript{288}

States are evidently taking different approaches when it comes to the liability of a legal entity. Some states may not acknowledge that particular form of liability and others may recognize it as appropriate for any kind of crime. While states such as Iceland acknowledge this form of liability\textsuperscript{289}, it would not be possible to try companies for aiding or abetting international crimes for the mere reason that those crimes have not been incorporated into the Icelandic penal code.\textsuperscript{290} Australia, however, specifically includes the crimes of the ICC statute in its federal criminal law which also encompasses the liability of legal entities. Australia also incorporates a special protocol in order to establish that the fault element of a crime, when required, is attributed to a body corporate that expressly, tactically or impliedly authorized or permitted the commission of the offence. One of the ways to establish this \textit{mens rea} of the company, if so to say, is by establishing whether the company failed to create and maintain a corporate culture that required compliance with the relevant provision.\textsuperscript{291}

Developing a specific method to determine the \textit{mens rea} of a juridical person is probably an approach that will evolve in the coming years and might even develop to a point where there is a common consensus between states on how exactly a guilty mind of a corporation is to be determined. Still, certain states such as Kenya have not seen a reason to differentiate between criminal charges brought against a natural person on the one hand and a juridical

\textsuperscript{286}Thomas Weigend: “Societas delinquere non potest?” p. 931.
\textsuperscript{287}Jónatan Þormundsson: \textit{Afbrot og refsiðbyrgð II}, p. 53.
\textsuperscript{288}Kevin Jon Heller and Markus D. Dubber: \textit{The Handbook of Comparative Criminal Law}, p. 578.
\textsuperscript{289}See chapter II.A. of the Icelandic Penal Code.
\textsuperscript{290}Nor anywhere else in Icelandic law. Should the legislator incorporate the crime of genocide, war crimes or crimes against humanity into the Icelandic Penal Code it would also encompass the responsibilities of legal entities unless specifically stated otherwise. A bill is currently in development.
person on the other hand. Kenya has therefore proceeded to process criminal charges brought against corporations without developing clear principles on how the *mens rea* has been determined.  

A noticeable discussion held by certain scholars has revolved around the difficulties of establishing a *mens rea* for a company. In reality this mental state is determined by analyzing the minds of the individuals who acted on behalf of the company. Previous examples should indicate the different methods available to establish such *mens rea*. It is nevertheless true that a determination of a culpable mind of a representative is just as troublesome in these cases as it is when said representative is himself accused of personal responsibility. Yet corporate criminal liability has become a method used in order to simplify the prosecution in some states. Belgian law requires companies to appoint a person in office as an official bearer of responsibility. Said official will automatically become responsible for any crimes that occur in the company’s course of business. As the liability is automatically triggered once a crime has been committed, it is not necessary to prove any illegal activity on the official’s part. The company however needs to reimburse the official who receives extra compensation and thus ultimately concerns the company.

The German method has already displayed another way to avoid the problem of having to pinpoint the exact individuals responsible for committing the crime in question. Iceland has followed the example of Germany by not requiring that the individual responsible for committing the crime be identified but only that it is evident that someone acted culpably on behalf of the company. A company could therefore be subject to prosecution when the prosecutor is not able to prove which employee or official is responsible for the act, albeit a company could just as well be held responsible parallel to the responsible employee. This also means that a company could become criminally liable even when the acting official himself is not criminally responsible by reason of mental disorder for example.

This is not to say that all states will allow the prosecutor to freely decide whether or not he prosecutes a company. Switzerland for example allows such voluntary prosecution with respect to economic crimes, such as money laundering or the financing of terrorism, merely because the company did not provide the necessary structure or did in fact not utilize that structure in order to prevent such offenses. A legal entity will however only be made responsible for other offenses in Swiss law if the individual responsible cannot be identified.


294 Jónatan Þórmundsson: *Afbrot og refstábyrgð II*, pp. 54-55.
and the reason that the prosecution cannot identify said individual is due to the entity’s state of disorganization.295

States have increasingly incorporated elements of corporate criminal liability into their national penal codes. States may have different approaches and may limit these provisions in different ways but the trend is evident and growing. A logical continuation of that trend is the introduction of corporate criminal liability within the statutes of international criminal courts or tribunals. Such inclusion has been fiercely debated among states with different ideas and attitudes towards sanctioning corporations. While the shift to corporate criminal liability has begun domestically it did so only very slowly and inefficiently within the international system. But in the last years, a sudden and unforeseen development took place when the African Union took a step that the United Nations had been unable to take so far.

6.2. International

The almost successful attempt to include corporate criminal liability within the Rome Statute has often been the starting point for a discussion on corporate complicity in international criminal law. Some have argued that cases involving corporations would take the focus off the court’s main objective but Article 17(1)(d) already limits the court’s competence to handle only cases of certain gravity. One could however ask whether there was any reason for an international criminal court to target business entities with respect to states being perfectly capable of processing such cases. As a starting point, one might counter-question whether any of the arguments presented to justify an international criminal’s court jurisdiction over a natural person would not apply to a juridical person. Even more so, states may be reluctant to target multinational corporations due to the economic benefits received by the thriving business within its venue. There are also numerous examples, ranging all the way back to the Holocaust, of large corporations avoiding prosecution by reaching a cash-settlement against the promise of impunity.296 This means that the company is never publicly or officially found guilty of its complicity. The previous discussion highlights how corporations may serve as a leading role in financing a conflict and therefore, in some cases, either enable a perpetrator to engineer a disaster which never would have occurred or create the demand for an international crime to be committed. In those cases, taking out the corporations would be like targeting the heart of the hydra rather than one of its many heads.

295Mark Pieth and Radha Ivory: Corporate Criminal Liability, p. 21.
Initially, paving the way for corporate criminal liability seemed like a slow process, but the world community is finally caving in. “In at least two international courts, corporate criminal liability for international crimes is either a newly minted phenomenon created within a regional treaty, or far more controversially, an inherent power in contempt proceedings before an ad hoc international criminal tribunal.” With respect to corporate criminal liability finally entering a regional treaty, concerning a court with the power to prosecute international crimes, one can look towards the continent which has had to tolerate the worst abuses resulting from corporate greed, namely Africa. June 2014 saw a historical moment for international criminal law, whereas members of the African Union (AU) eventually approved the Malabo protocol which gave rise to the African Court of Justice and Human Rights and its ability to try corporations for international crimes.

Article 46C concerns corporate criminal liability and reads:

1. For the purpose of this Statute, the Court shall have jurisdiction over legal persons, with the exception of States.

2. Corporate intention to commit an offence may be established by proof that it was the policy of the corporation to do the act which constituted the offence.

3. A policy may be attributed to a corporation where it provides the most reasonable explanation of the conduct of that corporation.

4. Corporate knowledge of the commission of an offence may be established by proof that the actual or constructive knowledge of the relevant information was possessed within the corporation.

5. Knowledge may be possessed within a corporation even though the relevant information is divided between corporate personnel.

6. The criminal responsibility of legal persons shall not exclude the criminal responsibility of natural persons who are perpetrators or accomplices in the same crimes.”

The court could therefore hold corporations liable for crimes within its jurisdiction. These are for example the core international crimes of genocide, war crimes, crimes against humanity, the crime of aggression among other crimes such as terrorism, illicit exploitation of

---

298 The Malabo protocol is not yet in force as few states have yet to ratify the protocol. The protocol is not without flaws. It has been heavily criticized for giving state officials immunity from the court’s jurisdiction and some writers have feared that African states may be abandoning the ICC. But the court should essentially work alongside the ICC which has always been a complementary court and the proximity of the ACC could well benefit the prosecution.
299 The court is able to handle both interstate civil and criminal cases. The criminal branch often goes by the name of the African Criminal Court, henceforth ACC.
natural resources and others.\textsuperscript{300} That being said, the crime of aggression may not be very relevant to corporate liability and it has been noted that the court might find it impossible for a corporation to be held responsible for the crime of aggression.\textsuperscript{301}

The provision grants the prosecutor the power to prosecute companies regardless of whether or not the natural person responsible is also charged. Indeed the court seems to be able to assume a separate \textit{mens rea} and knowledge for the company, an internal culpability. This is a culpability reflected through internal policies, both formal and informal, but culpability can also be determined by aggregating the statements provided by personnel of the company in order to assimilate their knowledge which can be attributed to the company.\textsuperscript{302} This is similar to an approach used in Australian law in order to hold a company negligent.\textsuperscript{303} The court would therefore be able to assume corporate policy without hard evidence when the court finds said policy to be the most reasonable explanation for the commission of the crime in question.\textsuperscript{304}

Multinational corporations could indeed become subject to the ACC’s jurisdiction which is able to exercise jurisdiction under the principles of territorial jurisdiction, passive personality jurisdiction and active personality jurisdiction. The Malabo protocol additionally includes a clause granting the court the power to try extraterritorial acts by non-nationals which threaten a vital interest of a signatory state.\textsuperscript{305} How the application of this last mentioned form of jurisdiction would complement the already wide jurisdiction remains to be seen. The protocol however makes a cautious disclaimer that the acceptance of a state which is not party to the statute may be needed for the court to exercise its jurisdiction over its nationals. The statute does not propose under which circumstances such an acceptance would be needed but it should be safe to assume that such an acceptance would always be unnecessary when acting under either territorial or active personality jurisdiction.

With this extended jurisdiction, corporations will for the first time in the history of modern legal systems be subject to the jurisdiction of an international criminal court.\textsuperscript{306}

\begin{footnotesize}
\footnote{\textsuperscript{300}Article 28(A) of the Malabo Protocol.}
\footnote{\textsuperscript{301}Dr Joanna Kyriakakis: “Corporate Criminal Liability at the African Criminal Court: Briefing Paper”, p. 2.}
\footnote{\textsuperscript{302}Dr Joanna Kyriakakis: “Corporate Criminal Liability at the African Criminal Court: Briefing Paper”, p. 4.}
\footnote{\textsuperscript{303}George O. Otieno Ochich: “The Company as a Criminal: Comparative Examination of some Trends and Challenges Relating to Criminal Liability of Corporate Persons”, pp. 21-22.}
\footnote{\textsuperscript{304}Article 46(C)(3).}
\footnote{\textsuperscript{305}Article 46E bis.}
\footnote{\textsuperscript{306}The Malabo Protocol needs at least 15 ratifications before entering into force. These multinational companies are of course already subject to at least two jurisdictions, including an African jurisdiction, but the ACC’s prosecutor’s ambition to try legal entities and their representatives is still uncharted. Just as the AU has developed an independent stand against the ICC, one can only speculate as to how western states will react to a}
\end{footnotesize}
Although the ACC is the only concrete example of an international criminal court with actual jurisdiction over juridical persons there is another example of a court reaching towards this field of law. The Special Tribunal for Lebanon (STL) took the interesting step of indicting a media company for contempt. The initial decision\(^{307}\) was dated 31\(^{st}\) of January 2014 and therefore marks the first proceedings in the history of international criminal law, involving a legal entity before an international tribunal. The court mentions, in its argument to justify its jurisdiction over corporation, that it does not consider its jurisdiction broad enough to justify a prosecution for international crimes.\(^{308}\) The decision was later reversed\(^{309}\) by another contempt judge\(^{310}\) but the reversal decision was again reversed by the Special Tribunal for Lebanon’s Appeals Panel who upheld the initial decision.\(^{311}\)

The argument presented basically highlights the fact that throughout *the Statute of the Special Tribunal for Lebanon* and *the Rules of Procedure and Evidence of the Special Tribunal for Lebanon*, the subjects of prosecution are repeatedly referred to as persons. There are however examples of the prosecuted referred to as “him” or “her” but not “it” which the judge of contempt understands as precluding legal entities as the accused but not from being held in contempt since Article 60 bis of the Rules of Procedure and Evidence of the Special Tribunal for Lebanon, concerning contempt does not make such references.\(^{312}\)

The argument is not very convincing since it seems to draw influence heavily on the almost arbitrary use of the words “he” or “she”. Notwithstanding that corporate liability was probably not the initial idea of the drafters of the statute it would have still been more convincing to either accept that the concept of persons encapsulates juridical persons as well as natural persons or reject the notion completely. That being said, the court is bound to apply its power in pursuance to Lebanese criminal law\(^{313}\), which does in fact recognize corporate criminal liability, a point which is underlined by the Appeal Panel’s headnote. The main problem with this argument is that it relies on the fact that there is nothing in the statute that

---

\(^{307}\) *New TV S.A.L, Contempt Proceeding before the Special Tribunal For Lebanon, Case No. STL-14-05/1/CJ*, 31 January 2014.

\(^{308}\) See paragraph 21 of the abovementioned case (Redacted version).

\(^{309}\) Based on the principle of ubi lex voluit dixit, ubi noluit tacuit.

\(^{310}\) *New TV S.A.L, Decision on Motion before the Special Tribunal For Lebanon, Case No. STL-14-05/PT/CJ*, 24 July 2014.

\(^{311}\) *New TV S.A.L, Decision in Interlocutory Appeal before the Special Tribunal For Lebanon, Case No. STL-14-05/PT/AP/ARI26.1*, 2 October 2014.

\(^{312}\) See paragraph 22 of the initial proceedings.

\(^{313}\) Article 28 of the Statute of the Special Tribunal for Lebanon.
suggests that the term “person” excludes juridical persons.\textsuperscript{314} But corporate criminal liability has historically been understood as an abnormal form of criminal liability which requires a specific legal provision.\textsuperscript{315} The argument is therefore flawed unless conservative ideas regarding the fundamental basis for corporate criminal liability are to be challenged. And the court does indeed challenge this basis. The court refers to the current trend in domestic law which has become apparent in most of modern states’ national law, including corporate criminal liability. This is a point which cannot be overlooked and does in fact seem to indicate a possible shift. But the court’s following remarks are painfully at odds with the application of international criminal law. The court goes on to describe the recent uprising of the principle of corporate criminal liability as bringing this form of liability to the verge of attaining the status of a general principle of law applicable under international law.\textsuperscript{316} The court is essentially claiming that it is not sure whether or not the shift in law has occurred, meaning that it cannot with authority interpret the statute or the rules of the procedure to encompass corporate criminal liability.\textsuperscript{317}

Maybe it is time to re-evaluate the basis for corporate criminal liability, maybe the shift has already taken place, this author is not one to say, but in order to draw that conclusion the court must take that step completely. It is not warranted to assume that the court can exercise jurisdiction, previously bound to special provisions, without expressly stating that there has been a shift in law.

While the criticism received by the ACC seems to be untimely, it would seem quite justifiable to criticize the progressive interpretation of the STL. With the troublesome negotiations following any discussion concerning corporate criminal liability at international tribunals, it does seem that the court only tried to remedy the flaws of interstate co-operation. At a time when culprits of criminal behavior are able to avoid liability or at least deter investigation by hiding behind a complicated system of corporate institutionalism, it does seem to be in accordance with the international manifesto, to end impunity, to include corporate liability. But it is not the court’s job to take that step. The court’s decision is therefore arguably out of line. While the fundamental basis for the provisional requirements for corporate criminal liability has merely been shaken by the STL, the ACC’s imminent shift from the customary approach made by international tribunals, paired with the already

\textsuperscript{314}See for example para. 36 of the Appeal Panel’s judgment.
\textsuperscript{315}Jónatan Börmundsson: Afbrót og refsiábyrgð II, p. 30.
\textsuperscript{316}See para. 67 of the Appeal Panel’s judgment.
\textsuperscript{317}Note the phrase “on the verge of obtaining”.

81
apparent shift in national law, does seem to bring international criminal law closer to a complete rupture.

7. Individual liability of a company’s representative

7.1. General approach

Regardless of the importance of corporate criminal liability, one should recognize that the most imperative part of bringing corporate actors to justice must be the prosecution of the natural person responsible for the actions. This could be a single business leader or a whole board of directors. Unlike juridical persons, a business leader can be detained or imprisoned. But a company has customarily been understood to have an identity separate from that of its personnel or shareholders. It is a structure determined partly by law and one of which business leaders have utilized as a front in business. Business leaders have therefore often acted audaciously under the veil of the legal personality of their corporation, as if by acting on behalf of an apocryphal person their liability might be somehow limited. Although the rationale behind that mentality is fundamentally flawed, some insight into company law should be useful for those who wish to venture onwards in the pursuit of the true catalyst responsible for enabling, facilitating or exacerbating the commission of a crime.

A company in the scope of corporate or company law has some identifiable features which are common in all jurisdictions. These are five structural characteristics that make up a corporation and its juridical existence, namely: “(1) legal personality, (2) limited liability, (3) transferable shares, (4) centralized management under a board structure, and (5) shared ownership by contributors of capital.” Some of these characteristics may affect criminal liability indirectly.

7.2. Legal personality and limited liability

Legal personality as a concept has already been discussed. Although the concept of limited liability is also of relevance to this discussion, the principle has led some people to believe that an actor will not become personally responsible for actions done on behalf of a company. The notion is partly true but only to a limited extent.

First of all, the principle of limited liability is not a characteristic of all forms of legal entities but is traditionally a part of companies such as incorporations, limited liability

---

318 Andreas Cahn and David C. Donald: *Comparative Company Law*, p. 9.
companies or a limited liability partnership. The principle of limited liability supposes that a shareholder is not personally responsible for the company’s obligations and that his financial responsibility to the company’s creditors is limited to the purchased shares. The company’s directors will similarly not undergo personal responsibility for business contracts or other obligations made on behalf of the company due to the company’s legal personality. This does not mean however that the principle is engineered for individuals to avert personal responsibility for culpable behavior or somehow lead to the juridical person serving as a bypass of individual criminal responsibility. This is a fact obvious for anyone familiar with company law and in fact logical as well from the perspective of criminal law and its jurisprudence. It does not matter whether the victims of crimes are fronted by the face of a juridical person or the individual himself, the principles of juridical identity and that of limited liability are not relevant in criminal law since one is not able to utilize the legal structure of a corporate entity in order to receive immunity from criminal responsibility for acts which he directs, orders, counsels, aids or abets.

A company does not act unless through its agents and it is by the decision of these agents that an action is taken on behalf of the company. Therefore when a director, manager or another member of the personnel of a company takes a decision to involve a company in criminal behavior, he becomes responsible for that decision, similar to an individual taking a decision to become complicit outside of such a framework. His motives, to serve the company or the shareholders, are irrelevant, as is compatible with basic principles of criminal law. While determining the mens rea for a company has been the subject of scholarly discussion, a determination of a representative’s mens rea would not seem to be abnormal or in any way differ from the usual principles. Still representatives may be tempted to defend their actions by referring to their role as servants of a juridical person. In The Justice Case regarding the case of Karl Rasche, the court noted that the company’s policies reflected those of its director. The court could therefore assess that the director of the bank was involved in the bank’s policy of pillage.

---

319Examples are not exhaustive.
320Stefán Már Stefánsson: Hlutafélagaréttur, pp. 34-35.
321James G. Stewart: Corporate War Crimes, p. 79.
322In the case of Van Anraat a business leader who took a decision to establish a business relationship with Saddam Hussein received a penalty of 17 years imprisonment for his complicity in war crimes.
323See previous discussion on motives and mens rea in chapters 4.1.2. and 4.1.3.
So while one may have linked the actions to a company or even its policy, any individual responsible for the company’s action should be criminally liable based on the principle of individual responsibility. But in order to find the individual who took part in the company’s action requires evidence and a further insight into the corporate structure.

7.3. Identifying the responsible representative through the corporate structure

A company’s structure is often complicated and a decision may not be taken by a single individual. This may psychologically lead to those involved being more willing to participate in a tragic decision\textsuperscript{325} but strictly speaking relieves no-one of his responsibility but rather exposes more participants to criminal liability.\textsuperscript{326}

If there is evidence to show that an actor took part in a decision, knowing that he aided or abetted a crime, said actor would \textit{ipso facto} becomes criminally liable regardless of his position or affiliation with the company. A court could draw its conclusion about the official’s knowledge from the position he holds in the company.\textsuperscript{327} If for example it is evident that the employees of a company aided or abetted the commission of a crime, a superior could theoretically become responsible via superior responsibility for either commanding such actions, tolerating the actions or failing to prevent said actions.\textsuperscript{328} But basing his responsibility on superior liability is not an option within all jurisdictions and probably not a necessary step. A superior who commands or authorizes a corporate crime is usually regarded as a principal of the crime.\textsuperscript{329} When a representative takes a decision to participate in criminal behavior it does, in the author’s opinion, make more sense to view the merits of the case comprehensively with respect to the representative’s part in the act of aiding and abetting. Whether the corporate structure creates intermediaries in the decision-making should not change the form of liability. The question should essentially be: does the individual participate in making a decision to engage in business with a perpetrator of international or transnational crimes? If so, then it should be safe to proceed to inspect the objective and subjective requirements in order to conclude whether the actor is guilty of aiding or abetting. Failure to act could thus be a factor in the decision-making, the superior’s involvement being inferred from his superior responsibilities. A company official could therefore take part in the decision-making by abstaining from interfering. In other words, a supervising manager who

\textsuperscript{325}David Luban, Julie R. O’ Sullivan and David P. Stewart: \textit{International and Transnational Criminal Law}, p. 506.

\textsuperscript{326}Assuming both objective and subjective requirements are fulfilled.

\textsuperscript{327} \textit{Corporate Complicity & Legal Accountability. Volume 1, Facing the Facts and Charting a Legal Path}, p. 22.

\textsuperscript{328} \textit{Corporate Complicity & Legal Accountability. Volume 2, Criminal Law and International Crimes}, pp. 32-35.

knows that a crime is ongoing and tolerates its commission *de facto* encourages the continuation of the crime through a rule of anticipated reactions. His tolerance is therefore an act of willfully allowing his authority to be used in the commission of the crime.\textsuperscript{330}

Since a company’s management is mostly centralized in one way or another, the power of decision-making is delegated to the company’s management, meaning that the shareholder does not formally make decisions.\textsuperscript{331} Acknowledging that anyone who surely does contribute to illicit business deals may be liable, including lawyers or other representatives, the two heads of the corporate structure should usually be the first ones to enter the scope of investigation, the board of directors or the executive management, usually CEOs.\textsuperscript{332}

CEOs do have some actual power to take decisions on behalf of a company and can involve a company in criminal behavior. The CEO participates at board meetings where he can make suggestions and represent a company outwardly and can therefore make business decisions or contracts with a third party but his authority is mostly limited to day to day management.\textsuperscript{333} A CEO could therefore incriminate himself but the board of directors on the other hand has traditionally been seen as the body primarily responsible for a company’s business and there are examples of penal legislations holding the head of directors automatically liable for a company’s criminal behavior.\textsuperscript{334,335}

A company is bound only by contracts or business agreements made by an individual with authority to act on behalf of the company. The board of directors is the authoritative source of power in almost all states’ company law and is the main body responsible for dealing with third parties. The board also has the capacity to delegate that power of representation to other agents, committees or individual board members.\textsuperscript{336} The possible scope of criminal liability is therefore quite wide but the prosecution should under normal circumstances be able to trace the chain of authority from its source namely, the board of directors.

It is true that the shareholders do not officially make decisions on behalf of the company nor are they responsible for the company’s behavior. That being said, there are certainly ways in which a shareholder might incriminate himself. A shareholder may be able to influence

\textsuperscript{331}Andreas Cahn and David C. Donald: *Comparative Company Law*, p. 299.
\textsuperscript{332}The proposal presupposes a two-tier board structure.
\textsuperscript{333}Stefán Már Stefánsson: *Hlutafelagaretur*, p. 311.
\textsuperscript{334}Jónatan Pórmundsson: *Afbrot og refsiabyrgð II*, p. 35.
\textsuperscript{335}All the provisions referred to in the source of reference are examples of Icelandic law and have all been repealed either before or after the source’s publication. Other forms of liability which imposes sanctions on a corporate officer still exist in other states such as for example “strict liability crimes” in the U.S., but are generally well delineated and do not extend to all criminal behavior.
\textsuperscript{336}Andreas Cahn and David C. Donald: *Comparative Company Law*, p. 315.
company policy for example through shareholder meetings. Company law may reserve an authority for shareholders’ meetings in order to discuss important issues. The shareholders may be able to vote on these issues and eventually make binding decisions. As a matter of principle, a shareholder may in some states be able to rule on any subject matter which concerns the company. A shareholder can therefore just like any other actor make decisions which lead to a crime being committed. There is no reason to overlook such involvement, which is of actual legal effect.

But a shareholder’s official power is still very limited. There is no obligation to vote or take part in shareholders’ meetings and a shareholder which does not concern himself with the company’s activity can barely be held responsible for its actions. The principle of substantive contribution indicates that a criminal liability may only be determined when a large shareholder acts in the power of his shares. A shareholder may also generate liability when acting under informal powers, namely the influence of his shares. A share generally holds certain rights, such as the right to vote on important issues and elect or remove a director. Shareholders may even have extensive control over the company’s management, which is for example the case in the UK. A shareholder may influence the board of directors to do business which aids or abets criminals by for example threatening to remove them from their position. A shareholder would therefore expose himself to criminal liability which would extend to the directors if they were to follow the instructions of the shareholder.

With respect to the structure of company law it is apparent that the number of individuals who can theoretically become criminally liable for actions which officially stem from a company is extensive and the discussion presented above is in no way exhaustive. While understanding that corporate structure may be useful to trace a transaction to the one responsible for it, the criminal law demands not that such decision is to be taken in conformity with company law. Company law may however be useful in order to determine the liability of those who should have taken actions in order to prevent criminal involvement. Essentially, the principles of criminal law would simply hold those responsible who actually took part in the decision-making. This may extend to those responsible for monitoring the management if they for example willfully turned a blind eye towards the complicit behavior if it reaches a level where it could be interpreted as an affirmative participation in the decision-making.

337 Stefán Már Stefánsson: Hlutafélagaréttur, p. 246.
338 Andreas Cahn and David C. Donald: Comparative Company Law, p. 548.
339 Andreas Cahn and David C. Donald: Comparative Company Law, p. 262.
making. Eventually, determining the official involvement in decision-making may be the least of the prosecutor’s problems. The bigger challenge is to prove that those involved were aware of the consequences.

8. Acquiring evidence to establish knowledge

8.1. Establishing knowledge from facts

Cases concerning corporate complicity in international or transnational crimes are often extremely complicated, as is obtaining relevant evidence. Very seldom does a company have a direct intent to aid in a crime with the hope for the crimes to befall its victims. Most corporate complicity cases will therefore be centered on proving the involvement of a company, the *mens rea* of the representatives and that the involvement actually had some effect on the commission of a crime.

The *mens rea* might very well be the hardest requirement to prove. Companies will often be placed far away from the principal offense and representatives will usually deny that they knew about the offense and furthermore deny that they were aware that their assistance had a substantial effect on the commission of the offense.

The International Commission of Jurists states that “company officials will not be shielded from criminal responsibility even if they steadfastly deny they knew the consequences of their conduct, if the objective facts indicate otherwise.” Acknowledging that states often go differently about proving *mens rea* it would seem as if one of the most important factors may be how states approach the lower levels of intent. Establishing intent may become easier in those states which enable convictions on the grounds of the *dolus Alexanderson* principle.

In most cases however, a criminal court will require evidence that the company officials subjectively knew the consequences of their actions. In some circumstances, it may be appropriate to draw conclusions of one’s knowledge through one’s position within a firm. The Wisconsin Supreme Court once stated that “those taking an active part in the management of the corporation's business cannot avoid personal liability for acts done in the regular course of business with their acquiescence.”

Knowledge may be inferred from all relevant circumstances, for example it may be proven by circumstantial evidence. The prosecution of Michel Desaedeleer was for

---

341 Corporate Complicity & Legal Accountability. Volume 1, Facing the Facts and Charting a Legal Path, p. 21.
342 Corporate Complicity & Legal Accountability. Volume 1, Facing the Facts and Charting a Legal Path, p. 20.
343 State ex rel. Kropf v. Gilbert, December 5th 1933 Case: 251 N.W. 478, 213 Wis. 196.
344 Otto Trifterer: Commentary on the Rome Statute of the International Criminal Court, p. 760. (Special Print)
example mostly based on testimonies, but victims of Sierra Leone will have recognized Desaedeleer’s presence at the diamond mines during the looting.345

If an entity has performed acts that influence the situation in a malevolent manner, then it does not matter whether the entity is present at the place where the principal crime was committed or not. Its presence could however help to determine a causal link. The closer the company is to the principal and the deeper the interactions are, the more implausible it becomes for the company to deny that they were aware of the consequences of their assistance. Proving the necessary mens rea for prosecution may become less complicated when a company has held long term relationship with the perpetrator. A company may choose to dilute their relationship with a perpetrator by dividing the decision-making between other companies. In such situations, it may become helpful to consider that in real life, subsidiaries and parent-companies may have joint decision-making and there may often be close coordinations between the two. The same applies to companies which share board members.346

8.2. A guilty mind in the context of a larger chain of transactions: A case study

A single transaction may extend to and through many business partners who all serve their role in the larger context. Further problems are introduced when the relevant company is only a middleman in a larger chain of business associates or at the end of the line in a long supply chain. The same principles that have been discussed equally apply to those individuals and complications are mostly proof related. In this chapter, a series of case studies will bring the issue to light along with a complementary discussion on the point in the transactions timeline where knowledge should have been evident.

Within this age of corporate transparency some scholars have claimed that for a large company which operates a transnational business, it would simply not be possible for it to claim that it did not know that it was participating in crimes. “Myriad internal and external economic and financial pressures practically mandate that all sectors of a corporation justify themselves along cost-benefit lines. And that path reveals to the company exactly what is happening as it conducts business. Modern corporate governance practices not only encourage but in many cases require such levels of self-examination for the simple reason that doing so tends to reduce costs and increase profits.”347

346Corporate Complicity & Legal Accountability. Volume 1, Facing the Facts and Charting a Legal Path, pp. 24-25.
347Michael J. Kelly and Luis Moreno-Ocampo: Prosecuting Corporations for Genocide, p. 81.
In the modern business world, middlemen have adapted a central role in the illicit chain of transactions necessary to deliver natural resources from the conflict zones to the global markets. Holding those middlemen accountable is therefore a necessary step in order to address the practice of pillaging. In the case of *Argor-Heraeus SA*, a company was accused of refining nearly three tons of gold pillaged by the rebels in the north of the Democratic Republic of the Congo (DRC) between 2004 and 2005. The gold was allegedly obtained in an area of the DRC controlled by a rebel group (FNI) which finances its operation by selling gold. The profit is used to buy weapons in contrast with the UN arms embargo. A significant amount of gold was sold to a Ugandan company (UCI) through a Congolese gold trader, Dr. Kisoni Kambale. The gold was then sold from the UCI to a British company called Hussar ltd. based in Jersey. In order to earn profits from the gold, Hussar ltd. would have to refine it. By refining the gold, it would also become impossible to determine its origins. In 2004 South African company Rand Refinery stopped refining the tainted ore because it suspected that the gold had been acquired illegally. A Swiss company, Argor-Heraeus, took Rand Refinery’s place in refining the gold in July 2004, at the behest of Hussar ltd., continuing the service for a period of 11 months at which time it claims to have ceased to refine gold for Hussar ltd. after learning about the relations the gold trade had with the conflicts in the region. It refined almost three tons of gold for the company in this period. The war in the region had been going on for many years at this time and the origins of the gold were more than likely to have come from the region given that Uganda only carries a negligible amount of gold. This amount of gold could therefore not have come from Uganda. It is also notable that the refinement continued until June 2005, notwithstanding that the UN had already identified both Hussar’s and UCI’s role in the pillaging of the region in its widely covered report from the UN Group of Experts on DRC. According to the UNGE, Argor-Heraeus could not have been unaware that the gold had been pillaged form the DRC. Furthermore, the UNGE recommended sanctions on both Hussar ltd. and Argor-Heraeus due to their support to the FNI rebels leading to a violation of the arms embargo.\(^{348}\) A complaint was made against Argor-Heraeus for laundering the proceeds of major crimes, providing evidence in the form of accounting documents, permits, and data from the Ugandan Ministry of Energy and Mineral Development among other reports and articles from the press which indicated that the consequences of pillage in the DRC were generally known to the public.\(^{349}\)

---

\(^{348}\) The Security Council did however not sanction these companies but sanctioned numerous African companies as well as Dr. Kisoni.

\(^{349}\) *Stop Pillage: Media Kit*, pp. 4-8.
The Swiss authorities opened an investigation of Argor-Heraeus for war crimes and aggravated money laundering followed by a search and seizure operation. The company lodged an appeal against the investigation and the search but the appeal was rejected. On the 10\textsuperscript{th} of March, 2015, the Office of the Attorney General of Switzerland closed the case due to a lack of evidence. The Attorney General held that there was not enough evidence to support that the company was aware of the criminal origin of the gold to prosecute it.\textsuperscript{350}

With respect to the extensive forms of evidence laid down before the prosecutor, this case serves as a reminder for just how difficult it is to prove complicity of a middleman in business. The decision seems odd since the UNGE had already stated that the company could not possibly be unaware of the facts. A key point to keep in mind however is that although the case was dropped because of a lack of evidence, it only reflects the assessment of the Swiss Attorney General, the files never reached a courtroom.

The impending case of Hussar ltd. in the United Kingdom should prove to be more promising in terms of shedding a light on the evidence required to convict in such cases. Hussar ltd. had cultivated its business for a longer period of time and must have been aware of the reason why Rand Refinery found it necessary to cancel further business plans with the company.

This case reflects the difficulties of proving the knowledge of a resource originating from a zone of conflict. Conflict zones are generally ones of chaos and most states do not require that companies assure legitimate origins. The DRC has become a center of abuse with its abundance of resources. In 2012, the DRC itself incorporated the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas\textsuperscript{(OECD Guidance)}\textsuperscript{351} into national law for tin, tantalum, tungsten\textsuperscript{352} and gold although its government has not been praised for an efficient enforcement of these laws. The OECD Guidance suggests how companies could implement due diligence standards to their business. Companies will accordingly have to identify, prevent, mitigate and account for how they address their actual and/or potential adverse impacts on human rights as an integral part of business decision-making and risk management systems.\textsuperscript{353}

\textsuperscript{350}Argor-Heraeus SA and Hussar Limited: https://www.trialinternational.org.
\textsuperscript{351}Organisation for Economic Co-operation and Development’s Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas.
\textsuperscript{352}Tin, tantalum and tungsten are together referred to as 3T.
\textsuperscript{353}OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, p. 64.
Other states have also altered their legislation in order to target the difficulties of tracing the origins of raw materials. In January 2013, the Dodd-Frank Act\textsuperscript{354} Section 1502 came into force in the US, obliging certain US-listed companies to examine and inspect their supply chains in order to check if the gold or 3T in their products are funding armed groups or fuelling human rights abuses in the DRC and neighboring states and to submit reports of due diligence actions in relation to the purchase of conflict minerals. The European Union is currently reviewing a similar legislation that would require companies which belong to the inner market to undertake due diligence steps on their 3T and gold supply chain in accordance with the OECD Guidance.\textsuperscript{355}

The Dodd-Frank Act legislation does not cover other minerals such as cobalt\textsuperscript{356} nor does any legal system in the world currently require companies in the cobalt supply chain to carry out due diligence or disclose their efforts. Proving the knowledge of a contribution to an offense will therefore remain very difficult in relation to cobalt.

The fact is unfortunate with respect to the serious human rights violations related to the mining of cobalt. Many of the largest electronics companies have been accused of gross human rights violations by supplying cobalt from the unregulated mines of the DRC. These companies include Apple, Samsung, Sony, Dell, Microsoft and others.\textsuperscript{357}

When a company is distant from the principal perpetrator in the supply chain, it can sometimes be excused of its ignorance. The same principles would be at play in these circumstances, that is the knowledge and substantial effect. But even when a substantial effect has been determined, a company which aids a principal far away in the supply chain might not be considered to know about the offense or might not be expected to know as much as a company doing business with a perpetrator at face value. This is \textit{de facto} only an obstacle in the process of proving the necessary \textit{mens rea} which could still be proved by analyzing the past records of the supplier or the company, the context or the place in which the supplier is operating, the conditions of the supply contract which might indicate that it alerted or should have alerted the company or any other method which reflects the representatives mindset.\textsuperscript{358}

\textsuperscript{354}Dodd–Frank Wall Street Reform and Consumer Protection Act, July 21, 2010.
\textsuperscript{355}Proposal for a Regulation of the European Parliament and of the Council setting up a Union system for supply chain due diligence self-certification of responsible importers of tin, tantalum and tungsten, their ores, and gold originating in conflict-affected and high-risk areas.
\textsuperscript{356}Section 1502(e)(4): Conflict Mineral - The term “conflict mineral” means— (A) columbite-tantalite (coltan), cassiterite, gold, wolframite, or their derivatives; or (B) any other mineral or its derivatives determined by the Secretary of State to be financing conflict in the Democratic Republic of the Congo or an adjoining country.
\textsuperscript{357}This is what we die for, p. 55.
\textsuperscript{358}Corporate Complicity & Legal Accountability Volume 1, p. 30.
A company may be expected to follow up on publicly available information relating to a supplier or the area of operation. Conflict zones are regularly covered in UN expert reports and human rights conditions are researched by NGOs and featured in their reports. The information further echoes through public media and in some cases might become so omnipresent that a company cannot carry out normal business without realizing the consequences of its actions. A company may even be expected to undertake inquiries which could reflect an offense. In some cases, a company might have carried out such inquiries which indicate a possibility of serious human rights abuses. Such inquiries might reflect the mens rea of an official. Such information could also be brought to the attention of the company by an outside source. Knowledge could also be indicated by an unusual element in the business or other circumstances surrounding the business.

The process that cobalt goes through in order to reach a consumer’s electronics from the mines of the DRC is a good example of the difficulties of proving knowledge in a company dealing through a large chain of suppliers.

Cobalt is used in the lithium-ion rechargeable batteries that power electronic devices such as laptops and smartphones. The DRC is the single most important source of cobalt in the world by far. Half of the world’s cobalt was mined in the DRC in 2015.

The fact that many of the mines in the DRC supply cobalt through grave human rights abuses has arguably reached the status of public knowledge. After cobalt has been obtained from mines, it is purchased by independent traders, most of whom are Chinese. These traders then further sell the mineral to larger companies within the DRC who export the product. A major company in this field is the Congo Dongfang Mining International (CDM), the daughter company of the Chinese Zhejiang Huayou Cobalt Company Ltd (Huayou Cobalt). The CDM smelts the ore and exports it to Huayou Cobalt which processes the mineral and sells it further to battery component manufacturers in China and South Korea who then proceed to sell it to battery manufacturers. From there on, major consumer brands buy the manufactured product from the battery manufacturers eventually ending up in the hands of the consumer as mass produced electronics.

The electronics giants regularly claimed to have a zero tolerance policy with respect to child labor in their supply chain but are not willing to provide details of specific

---

359See chapter 4.
360See for example The Zyklon B Case, Trial of Bruno Tesch and Two Others, British Military Court, 8 March 1946, Case No. 9., LRTWC Vol. 1, p. 93.
361Corporate Complicity & Legal Accountability, volume 1, p. 22.
363This is what we die for, pp. 47-48.
investigations and checks that they have undertaken in order to identify and address child labor in their cobalt supply chains. Many companies deny sourcing cobalt from the DRC or from Huayou Cobalt despite being listed as customers in documents of other companies who are listed as buying from Huayou Cobalt. While these companies deny all relations to Huayou Cobalt they have not provided an explanation\textsuperscript{364} regarding from whom they’ve sourced cobalt despite a direct request to do so being made by Amnesty International.\textsuperscript{365}

Having considered the predominance of cobalt in the global market originating from the DRC, it is unlikely that none of these large companies are sourcing cobalt from the DRC. But in the absence of hard laws obliging companies to investigate their source of cobalt, those “end of the chain” companies will probably escape liability through a “head in the sand” attitude. There is however a question of whether they can keep on claiming the defense of excusable ignorance after having received a letter from Amnesty International which highlights their alleged involvement.

This was certainly the case with Argor-Heraeus SA but awareness of human rights violations or the possibility of contributing to such violations can be determined by the information brought to the attention of the company or anything which could alert said company. If a company could not with equity ignore the precision of the information brought to its attention, a continuation to act contrary to the alert without further research could generate criminal responsibility on the basis of the lower forms of intent especially with regard to dolus Alexanderson. One could for example recall the previous discussion on the Van Anraat case. The business man had been warned about the possible misuse of the chemicals sold but his knowledge was inferred from the circumstantial evidence.\textsuperscript{366}

While the OECD guidance is not legally binding, it can serve as a criterion for how such due diligence could be operated, for both conflict minerals and other resources when suspicion arises that they are affecting human rights abuses substantially. The OECD guidance breaks the supply chain in half, expecting companies to establish transparent business by securing their half of the chain. The first part of the supply chain encompasses all activities undertaken from the mine to smelters or refiners.

Those are the “upstream companies” which include miners, local traders or exporters from the country of the mineral’s origin, international concentrate traders, mineral re-processors and smelters or refiners. Companies operating in the other half of the supply chain are

\textsuperscript{364}Which they are not legally bound to provide.

\textsuperscript{365}This is what we die for, p. 64.

\textsuperscript{366}See chapter 5.1.2.
referred to as “downstream companies” and include metal traders and exchanges, component manufacturers, product manufacturers, original equipment manufacturers (OEMs) and retailers.

Upstream business actors should be able to trace the source of the mineral back to the point of extraction, mapping the circumstances of its extraction, trade, handling and export. They are expected to establish “on-the-ground assessment teams which are to generate and share verifiable, reliable, up-to-date information on the qualitative circumstances of mineral extraction, trade, handling and export.” The information gathered should then be passed on to their downstream customers.

The OECD guidance only requires “downstream” companies to be able to trace the relevant minerals contained by their products back to the refiner. Downstream companies would however be required to review the due diligence process of the smelters or refiners in their supply chain and make an assessment on whether they comply with the due diligence measures put forth in the OECD Guidance.367

Following these steps will limit companies’ risk of becoming criminally responsible for complicity by contributing financial assistance to a supplier. Taking such actions will nevertheless not free companies from accountability if the subjective and objective requirements for criminal liability are fulfilled. In the absence of evidence proving knowledge this guidance might however reflect the investigation a company might need to undertake in order to reflect a trustworthy operation.

If the research of a large electronic retailer displays that the due diligence steps taken by the upstream companies were insufficient, any information indicating human rights violations might render the retailer responsible if he then proceeds to sell ignoring the risk.368 Since the upstream companies are closer to the perpetrators, their knowledge is easier to determine. Therefore a company acting under the OECD guidance will make business more transparent but knowledge will still be determined by inspecting any information at the feat of the company and its responsive actions.

8.1.3. Obtaining evidence
A company’s knowledge can be assumed by gathering information from business documents, files on due diligence or communication with business partners or third parties. Another

367OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, p. 32.
368Depending on the mens rea requirement of the relevant jurisdiction, see chapter 4.
obstacle to overcome in the process of building a case against a corporate actor is the chaotic nature of many of the international and transnational crimes. Many a time these offenses will occur in a territory plagued by war, disorder or utter corruption. Documents to strengthen a case may be sparse and the multi-state element of the offense does not help. Determining that a business relationship with a perpetrator is aiding the commission of a crime is still a decisive factor for prosecution. In the absence of documents which display the complete contribution of a business partner it might be feasible to document the means a perpetrator can finance his criminal activity. The civil war in Sierra Leone was mostly financed by diamonds which enabled the rebel forces to buy logistical support. It has however been very hard to determine how much the RUF was able to mine. Years of illicit mining and the exportation of contrabands served to reduce all official historical production figures. There were therefore no reliable statistics for what had actually been mined in Sierra Leone for at least two decades.\textsuperscript{369}

This should however not undermine the possibility of prosecution. The \textit{ad hoc} tribunals have repeatedly confirmed the low objective requirements for complicity thus determining that the business relationship exists and that the company official’s knowledge of his possible contribution might often be sufficient. This can be accomplished by means of inter-state co-operation. Investigation on foreign soil has often been problematic and diplomatic hurdles are to be expected. But a lot of the evidence may already be accessible through UN reports and the ICC’s prosecutor has started investigating within the borders of conflict states such as the Congo, Sudan, and the Central African Republic as well as investigating spontaneous\textsuperscript{370} conflicts like in Kenya.

The ICC is therefore well prepared to handle these cases and the ICC’s prosecutor has declared his willingness to assist domestic prosecutors, with a direct reference to the business involvement in Congo. The Office of the Prosecutor has also announced that it intends to share information, gathered in the course of the investigation, with national authorities and that it is prepared to give various additional forms of assistive support to national prosecutors in order to end impunity. Declarations from the OTP indicated that the OTP’s intention is to investigate these situations thoroughly, finding those who are most responsible, those who ordered and financed violence, and shifting the cases to national prosecutors through a system


\textsuperscript{370}The Kenya post-election violence started quite sporadically and lasted only about two months in the period of December 27, 2007 – February 28, 2008 but the ethnic violence fueled by tribalism resembled genocide in many ways, not unlike the 1994 Rwanda genocide but on a smaller scale.
of coordinated approach with national authorities. The prosecutor has initiated a network of national law enforcement agencies and other specialized organizations and institutions which will facilitate cooperation between national prosecutors, the ICC and other partner organizations.\textsuperscript{371}

This network is still developing further but is intended to become a fully operational mechanism benefiting both the OTP and national prosecutors. In its 2016 – 2018 strategic plan, the OTP suggests a development of centers which could preserve valuable knowledge from experienced practitioners, preserve evidence, and create an open source crime database for the prosecution and a special platform for the exchange of confidential information in order to minimize duplicated efforts. It also suggests the creation of a global training and technical support capacity by third parties.\textsuperscript{372}

This new mechanism created by the ICC’s prosecutor ensures a pragmatic utilization of the OTP’s resources and supports the trade-flow of information and shared expertise in addition to providing legal, operational and technical assistance.\textsuperscript{373}

The OTP recently stated that its mandate by the Rome Statute is limited to investigating and prosecuting ICC crimes and only when the relevant states are unable or unwilling to handle the cases themselves. It then stated that it had “no mandate to deal with other instances of criminality closely associated with atrocity crimes, even though such crimes often fuel the continuation of a conflict.”\textsuperscript{374} It is unclear whether the reference to crimes which fuel the continuation of a conflict should be understood as a manifesto from the OTP, declaring that for now, its mandate will not extend to corporate complicity or whether its direct reference to ICC crimes means that it will not be able to prosecute in instances which fall short of complicity in the core crimes but reaches a level of complicity in domestic offenses. The comments following the paragraph point to the latter.

This ICC’s mandate is a limited resource and while the court could prosecute business individuals and might at some point do, it has always been foreseeable that the court would be unable to handle all possible cases. The system created by the Law Enforcement Mechanism is therefore an incredibly positive step for international criminal law which has for a long time been plagued by the legal constraints inherent to multinational investigations. So regardless of

\textsuperscript{372} Strategic Plan 2016 – 2018, para. 96.
\textsuperscript{373} Reinhold Gallmetzer: “Prosecuting Persons Doing Business with Armed Groups in Conflict Areas”, p. 952.
\textsuperscript{374} Strategic Plan, 2016 – 2018, para. 93.
whether or not the OTP intends to handle corporate cases by itself in the near future or not, the mechanism it has developed is another step closer towards the end of impunity.

9. Conclusion

International human rights law has produced plenty of guiding principles which aim to end the maleficent practice of multinational corporations regarding complicity in human rights abuses. These are non-binding documents of a voluntary nature with no repercussions if a company is unwilling to undergo a proper due-diligence procedure or unwilling to actually apply its business in accordance with the principles of human rights law. This is despite multiple initiatives and methods viable to the companies which could effectively prevent or at least manage the risk business actors invoke when they undertake a large-scale business operation within a conflict zone. States have argued that there is no need for a binding document to preclude business complicity in international or transnational crimes which could invoke corporate criminal liability because most corporations try to accord their business legitimately. It seems a bit ironic that states do not seem to trust natural persons for acting in accordance with the law but seem to think that there is no need to hold fictional juridical persons, which are essentially created as a mask for natural persons, to the same standards.

But the last pieces to build up a legal regime criminalizing corporate complicity are slowly falling together. A return to former efforts to prosecute business actors has surfaced and most states have now incorporated a form of corporate criminal liability. While business transactions directed towards a certain group could inter alia be criminalized, it might not reflect the severity of the crime itself. Principally, there is no need to limit the scope of liability to such specialized provisions of criminal law. Basic legal doctrines such as aiding or abetting are perfectly capable of encompassing business complicity which has a negative effect on conflicts or other international or transnational criminal situations. Basically all states have a form of criminal liability which in one way or another encompasses the idea of aiding or abetting and the multinational element inherent to business deals opens up a variety of competent jurisdictions fully equipped to prosecute illicit business activity. While states are not equally equipped to deal with business complicity there are certainly no doctrinal ineptitudes which impede the deliverance of justice.

Alas, states have not followed a policy which brings an end to the impunity of business actors but the increased interest in this field and the recent attempts to venture onwards on the

---

375 Brian Ganson and Achim Wennmann: Business and Conflict in Fragile States, p. 192.
path to prosecute business actors is a manifestation of what is yet to come. This development is evident not just from the recent efforts made by national prosecutors but also by the writings of scholars, the unexpected initiative of the African Union to include corporate criminal liability as a form of liability under an international criminal court and the community’s complete shift towards a different human rights approach.

National courts are in all probability the most appropriate jurisdiction to deal with these offenses. The OTP has expressed its willingness to help national authorities to overcome the greatest obstacle inherent to most prosecutions of international crimes, namely the investigation. The OTP’s investigation in African states has produced voluminous amounts of evidence or other documents which could be useful for national prosecutors and is contemplating an extensive forum for international co-operation.

The ICC is similarly fit to try business actors for complicity but has no jurisdiction over the legal entities and is barred from cases which do not reach a certain scale of seriousness. The mens rea requirements of Article 25(3)(c) may additionally limit the application of the provision to very strict situations in which the business actor has a very high level of knowledge but the jurisprudence of the court is still too limited to draw a conclusion on the development of a doctrine. The purpose to facilitate may possibly be inferred from the level of commitment the business actor has towards the act which aids or abets without the need for such purpose to translate to a mental state motivated by criminal result. Article 25(3)(d)(ii) could follow any shortcomings of Article 25(3)(c) guaranteeing that serious criminal conduct does not go unpunished.

There seems to be no reason to question the possibilities of holding business actors or the legal entities accountable for their complicity. There is no dearth of potential, only the absence of policy.
BIBLIOGRAPHY


Andreas Cahn and David C. Donald: *Comparative Company Law: Text and Cases on the Laws Governing Corporations in Germany, the UK and the USA*. New York 2010.


Miles Jackson: *Complicity in International Law*. Oxford 2015.


TABLE OF CASES

Domestic courts

Belgium:

The Court of Appeal of Antwerp, Case No. C/268/10, 17 February 2010 (Unpublished)

Michel Desaedeleer, Indictment/investigation. Case cancelled 28 September 2016 due to the death of the accused.

Iceland:

Supreme Court of Iceland, Case No. 145/2014, 12. February 2015

The Netherlands:

District Court of The Hague, Case No. 09/751003-04, 23 December 2005

Court of Appeal of The Hague, Case No. 2200050906-2, 9 May 2007

The Supreme Court of the Netherlands, Case No. 07/10742, 30 June 2009

The Supreme Court of the Netherlands, Case No. 08/01322, 24 April 2010

South Africa:

South Gauteng High Court, Case No. 48226/12, 13 May 2016

Switzerland:


The United Kingdom:


The United States:

State ex rel. Kropf v. Gilbert, The Winston Supreme Court, Case No. 251 N.W. 478, 213 Wis. 196, 5 December 1933

Treaty Bodies

The International Court of Justice:


The International Criminal Court:


The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, ICC Trial Chamber I, 14 March 2012

The Prosecutor v. Callixte Mbarushimana, Case No. ICC-01/04-01/10, ICC PTC I, Decision on the confirmation of charges, 16 December 2011

The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07, PTC I, Decision on the confirmation of charges, 30 September 2008.

International Criminal Tribunal for the former Yugoslavia:

Prosecutor v. Stanišić and Simatović, Case No. IT-03-69-A, ICTY, A. Ch., 9 December 2015

Prosecutor v. Šainović et al., Case No.IT-05-87-A,ICTY, A. Ch., 23 January 2014

Prosecutor v. Popović et al., Case No.IT-05-88-A, ICTY, A. Ch., 30 January 2015

Prosecutor v. Perišić, Case No.IT-04-81-A ,ICTY A. Ch., 28 February 2013

Prosecutor v. Stanišić and Simatović, Case No. IT-03-69-T, ICTY T. Ch., 30 May 2013

Prosecutor v. Tadić, Case No. IT-98-32-A, ICTY A. Ch., 15 July 1999

Prosecutor v. Kunarac et al., Case No. IT-96-23& IT-96-23/1-A, ICTY A. Ch., 12 June 2012

Prosecutor v. Mucić et al., Case No. IT-96-21-A, ICTY, T. Ch., 20 February 2001

Prosecutor v. Furundžija, Case No. IT-95-17/1-A, ICTY, A. Ch., 21 July 2000

International Criminal Tribunal for Rwanda:


Military Tribunals and Commissions in the zones of occupation in Germany:


Trial of Bruno Tesch and Two Others, British Military Court, 8 March 1946, Case No. 9, LRTWC Vol. 1, p. 93 (The Zyklon B Case)
USA v. Oswald Pohl et al., American Military Tribunal IV, 3 November 1947, Case No. 4, Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, Vol. III (The Justice Case)

USA v. Friedrich Flick, et al., American Military Tribunal VI, 22 December 1947, Case No. 5, Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10, Vol. VI (The Flick Case)

USA v. Ernst von Weizsäcker, et al., American Military Tribunal IV, 11 April 1949, Case No. 11, Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, Vol. XII (The Ministries Case)

The Special Court for Sierra Leone:

The Prosecutor Against Charles Ghankay Taylor, Case No. SCSL-03-01-T, SCSL T. Ch. II, 26 April 2012.

Prosecutor Against Charles Ghankay Taylor, Case No. SCSL-03-01-A, SCSL A. Ch. 26 September 2013

The Special Tribunal for Lebanon:

New TV S.A.L, Contempt Proceeding before the Special Tribunal For Lebanon, Case No. STL-14-05/1/CJ/, 31 January 2014

New TV S.A.L, Decision on Motion before the Special Tribunal For Lebanon, Case No. STL-14-05/PT/CJ, 24 July 2014

New TV S.A.L, Decision in Interlocutory Appeal before the Special Tribunal For Lebanon, Case No. STL-14-05/PT/AP/ARI26.1, 2 October 2014

European Court of Human Rights

ECHR, Siliadin v. France, 26. October 2005 (73316/01)

Other Treaty Bodies
