

Corporate Accountability for Human Rights Violations Amounting to International Crimes

The Status Quo and its Challenges

Wolfgang Kaleck* and Miriam Saage-Maas**

Abstract

The article provides an overview of the development of case law concerning corporate accountability for international crimes since the Nuremberg Trials. The authors take into account a wide variety of both criminal and civil law cases, directed either against individual corporate officers or companies as such. Through an assessment of both historical and contemporary cases, the authors assemble an account of the nature of corporate involvement in international crimes. Although substantial international criminal law is well prepared to tackle corporate misbehaviour, enforcement mechanisms, available both at the international as well as the national level, are insufficient. The authors endeavour to analyse the normative and practical reasons for this accountability gap and to offer some possible solutions to this problem.

1. Introduction

In an era of myriad hyper-globalized economies, the involvement of corporations in human rights violations receives considerable public attention. As demonstrated by the fact that John Ruggie was mandated by the United Nations as Special Representative on Business and Human Rights, the challenge of establishing accountability mechanisms for powerful economic actors has been

* Lawyer and General Secretary of the European Center for Constitutional and Human Rights (ECCHR), Berlin (Germany) [kaleck@ecchr.eu].

** Director of the Business and Human Rights Program at the European Center for Constitutional and Human Rights (ECCHR) [saage-maasz@ecchr.eu].

acknowledged to a great extent by the international legal community. Nevertheless, many fundamental questions around the legal framework remain unsettled. As such, the scope of corporate accountability for human rights violations amounting to international crimes is currently a fiercely debated issue.

Case law shows that individuals within a corporation — and in some jurisdictions even the corporation as a legal entity — can be held criminally liable for the commission of international human rights crimes occurring in the process of 'doing business'. Tort law litigation in the United States and the United Kingdom has achieved a reasonable amount of success holding corporations accountable in civil courts for human rights violations caused by their business activity. The aim of this article is to examine not only historic precedents, but also current cases regarding corporate involvement in international crimes. Based on the existing precedent, which concerns both criminal and civil cases, as well as both the individual liability of corporate officers and the liability of corporate legal entities, we will set up categories of cases in which corporate involvement in the commission of international crimes is particularly relevant (Section 2). Subsequently, we will examine the inadequacies of the available national and international criminal enforcement mechanisms with respect to individual corporate officers and corporations as such. In this regard, alternative, i.e. non-criminal accountability mechanisms and civil reparation claims will also be considered (Section 3). After analysing the reasons for the existing weaknesses in the enforcement of international criminal law on corporate actors (Section 4), we will propose possible solutions to the existing accountability gap (Section 5).

2. Typical Scenarios of Corporate Involvement in International Crimes

A. Corporate Human Rights Violations Amounting to International Crimes in Criminal and Civil Courts

Few fields of human rights law are as well regulated as that of international criminal law. Since the Nuremberg Trials, the three international core crimes — genocide, crimes against humanity and war crimes — have been securely entrenched and most of their elements left unquestioned. Although several questions regarding the modes of (secondary) liability remain unresolved, the general principles of individual liability for international crimes are well established and have been applied by international and national courts.¹

1 K. Ambos, 'Article 25. Individual Criminal Responsibility', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (2nd edn., Munich et al.: C.H. Beck, 2008) 743–790; V. Militello, 'The Personal Nature of Individual Criminal Responsibility and the ICC Statute', 5 *Journal of International Criminal Justice (JICJ)* (2007) 941–952; A. Eser, 'Individual Criminal Responsibility', in A. Cassese, P. Gaeta and J.R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. I (New York: Oxford University Press, 2002).

Moreover, several decisions issued by different international and national courts since the late 1940s clearly demonstrate that individuals acting on behalf of a corporation may very well be subjected to liability under international criminal law. Yet, even though criminal liability of corporations has been introduced in several national jurisdictions, there are no known criminal law cases regarding international crimes against corporations as such. Nevertheless there have been several civil law suits in the United States, the United Kingdom and the Netherlands, claiming damages from corporations involved in international crimes or other human rights violations.

However, the number of cases in which business actors — individuals as well as legal entities have been legally held accountable for their involvement in international crimes is marginal compared to the considerable number of cases of corporate human rights abuses reported by victims, civil society organizations and state or UN agencies. Therefore, in order to achieve a more substantial understanding of corporate accountability for international crimes, it is necessary to interrogate the reasons for this marked discrepancy.

B. Post-World War II Cases: Precedent for Corporate Involvement in International Crimes

The main objective of the Trial of the Major War Criminals before the International Military Tribunal (IMT) at Nuremberg was to hold individual high-ranking civilian and military officials accountable for the Nazi regime's systematic human rights crimes. It is to be noted that the Nuremberg prosecutors acknowledged that the owners and directors of large German companies played a key role in supporting and facilitating the Nazi regime and its crimes.² In three other cases of the so-called Subsequent Nuremberg Trials before US Military Tribunals, high-ranking corporate officers and owners of the IG Farben trust, the Flick trust and the Krupp firm were indicted for crimes against humanity (slave labour and torture), war crimes (slave labour and pillage), complicity in the crime of aggression and mass murder, and aiding and abetting murder, cruelties, brutalities, torture, atrocities, and other inhumane acts committed by the SS.³ Also, in the 1946 *Zyklon B* case, a British Military Tribunal convicted the businessmen Bruno Tesch and Karl Weinbacher for aiding and abetting murder: Tesch was the owner, Weinbacher the general manager of Tesch & Stabenow, a company that supplied concentration camps with Zyklon B, a pesticide used by the Nazis in the gas chambers against millions of Jewish people during the Holocaust. Tesch and Weinbacher

2 J.A. Bush, 'The Prehistory of Corporations and Conspiracy in International Law: What Nuremberg Really Said', 109 *Columbia Law Review* (2009) 1094–1262.

3 Proceedings of all three cases are documented in *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10*, Vols VI (Flick), VII and VIII (IG Farben), IX (Krupp), Nuremberg October 1946–April 1949 (Washington, DC: United States Government Printing Office, 1953); available online at <http://www.mazal.org/IMT-HOME.htm> (visited 14 December 2009). On IG Farben, see the contribution by F. Jessberger in this issue of the *Journal*.

were convicted even though they were not physically present at the concentration camps when the gassing occurred.⁴

The importance of these and other post-Second World War cases is that civil actors were held accountable for using their positions in economic, military or state institutions to participate in the Nazi regime's crimes. The involvement of the corporate officers was framed in terms of both direct as well as secondary criminal liability, depending on the kind of actions. These precedents therefore already indicate the parameters for a first categorization of corporate involvement in the commission of international crimes: corporate actors can either directly commit international crimes or they can support state actors in their violations of international law.

C. Present Cases: Typical Forms of Corporate Involvement in International Crimes

In the decades after the establishment of the Nuremberg Principles during the Cold War, the enforcement of international criminal law remained a rare exception.⁵ While international crimes were committed in numerous regions of the world — the South African apartheid regime, the Latin American dictatorships, and the South Asian wars (Korea, Vietnam) and armed conflicts (Indonesia, Philippines) being only some of the most notorious examples — there were hardly any efforts to hold the perpetrators accountable. Needless to say, the near absolute impunity of the direct perpetrators impeded any discussion about the legal responsibility of other actors who may have been indirectly involved in the crimes, such as business entities.

Since the beginning of the 1960s, human and civil rights organizations in the United States have begun holding US military personnel and individuals residing in the United States accountable for their involvement in international crimes. Since the US criminal law system offers little opportunity for victims to be actively involved in the proceedings, the organizations mainly used civil law suits to claim compensation. In addition, civil law suits in the United States not only present the possibility of claiming punitive damages, but also the chance of attracting a broader public audience to the case. In the early 1990s, some of the human rights organizations began using the Alien Tort Claims Act (ATCA) to sue business entities for their involvement in international crimes.⁶ The ATCA is a jurisdictional statute that provides federal courts with the opportunity of entertaining a civil tort suit.⁷ Federal subject matter

4 *The Zyklon B Case, Trial of Bruno Tesch and Two Others*, in *Law-Reports of Trials of War Criminals*, The United Nations War Crimes Commission, Vol. 1 (London: H.M.S.O., 1947) 93–103.

5 G. Werle, *Principles of International Criminal Law* (2nd edn., The Hague: Asser Press, 2009), marginal no. 40 et seq.

6 B. Stephens et al., *International Human Rights: Litigation in US Courts* (2nd edn., Irvington-on-Hudson, New York: Transnational Publ., 2008). For a thorough analysis of the ATCA jurisprudence see the contribution by K. Gallagher in this issue of the *Journal*.

7 *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), at 713–714.

jurisdiction is established when (1) an alien sues (2) for a tort that is (3) committed in violation of the law of nations, or of a treaty of which the United States is a signatory.⁸ When the first ATCA cases were filed against corporations in the United States they considerably raised public awareness of the corporate role in international crimes.

The civil law cases in the United States inspired European law firms and human rights organizations to also begin holding economic actors accountable for their misconduct. Due to the differences between the legal systems in the United States and continental Europe, European victims and their representatives often used criminal law procedures rather than civil law suits. To date several cases against individual corporate officers or corporations have been brought before criminal as well as civil courts in the United States and in Europe alleging the involvement of business in international crimes.⁹ Present cases encompass two typical scenarios in which business actors can participate in international crimes: (1) the cooperation of corporations with military regimes and dictatorships and (2) the involvement of corporations in (civil) war and other conflict zones.

1. Cooperation of Businesses with Military Regimes and Dictatorships

Military regimes and dictatorships are capable of committing the most egregious human rights violations. Cases in which corporations cooperate — in varying degrees — with military regimes and dictatorships can be classified into three sub-categories: (a) cases in which corporations profit from state violence, (b) cases in which the regime's human rights abuses are facilitated by providing the necessary means and (c) cases in which corporations directly support repression without direct economic benefit.

(a) Profiting from state violence

Given that state authorities in military dictatorships use repression in the enforcement of political and economic models, workers and trade unionists as well as protestors and general opposition against these politico-economic projects are often harshly persecuted. In such situations national and transnational companies may profit from collaborating with a regime's abusive police or security forces.

8 *Flores v. Southern Peru Copper Corp.*, 414 F.3d 233, 242 (2d Cir. 2003); the United States Supreme Court has restricted the application of the ATCA to violations of international crimes that amount to *ius cogens* norms as it held that federal courts cannot recognize 'violations of any international law norm with less definite content and acceptance among civilized nations'. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), at 725.

9 For an overview of litigation efforts in Europe, see European Center for Constitutional and Human Rights, ECCHR European Cases Database (2009), available upon request at info@ecchr.eu.

In the first ATCA case brought in 1996 against a corporation, the Union Oil Company of California (Unocal), a major petroleum explorer and marketer, the plaintiffs argued that the corporate defendants aided and abetted the government of Myanmar in committing human rights abuses. In this case, the Myanmar military provided Unocal with security and other services for a pipeline project.¹⁰ The plaintiffs alleged that Unocal, through the Myanmar military, used forced labour from local villagers to provide construction services for the pipeline.¹¹ Plaintiffs also alleged that the Myanmar military committed acts of murder, torture, and rape, with some instances of rape occurring as part of the forced labour programme. The Californian District Court presiding over the *Unocal* case subsequently created an aiding and abetting standard under the ATCA, which consists of 'knowing practical assistance or encouragement that has a substantial effect on the perpetration of the crime.'¹² It found that hiring the Myanmar military to provide security for their pipeline project provided practical assistance with respect to forced labour.¹³ The Court then reasoned that this assistance had a 'substantial effect' on the perpetration of forced labour, which likely would not have occurred if Unocal had not hired the Myanmar military to provide security. Furthermore in the view of the Court, sufficient *mens rea* could be established because of Unocal's knowledge of the forced labour and their benefit from it.¹⁴

Similarly, in 1998, ATCA case plaintiffs alleged that the oil company Shell had supported the Nigerian government in torturing and killing activists who protested against the environmental damages that Shell's operations caused in the Niger Delta.¹⁵ The defendants were charged with complicity in human rights abuses against the Ogoni people in Nigeria, including summary execution, crimes against humanity, torture, inhumane treatment, arbitrary arrest, wrongful death, assault and battery, and infliction of emotional distress. Royal Dutch/Shell allegedly worked for decades with the Nigerian military regime to suppress any and all demonstrations that were carried out in opposition to the oil company's activities. According to the plaintiffs, the oil company and its Nigerian subsidiary provided monetary and logistical support to the Nigerian police and bribed witnesses to produce false testimonies. In 1995, the company and its subsidiary allegedly colluded with the Nigerian government

10 *Doe I v. Unocal*, 395 F.3d 932, 947 (9th Cir. 2002), at 939.

11 *Ibid.*, at 940.

12 *Ibid.*, at 58.

13 *Ibid.*, at 952.

14 *Ibid.*, at 954.

15 *Wiwa v. Royal Dutch Petroleum, Wiwa v. Anderson and Wiwa v. Shell Petroleum Development Company* were three lawsuits filed on behalf of relatives of murdered activists who were fighting for human rights and environmental justice in Nigeria. The lawsuits were brought against the Royal Dutch Petroleum Company and Shell Transport and Trading Company (Royal Dutch/Shell); the head of its Nigerian operation, Brian Anderson; and the Nigerian subsidiary itself, Shell Petroleum Development Company (SPDC). A synopsis of the case, documents, court orders and court decisions are available online at: Center for Constitutional Rights, *Wiwa et al. v. Royal Dutch Petroleum et al.*, <http://ccrjustice.org/ourcases/current-cases/wiwa-v-royal-dutch-petroleum> (visited 14 December 2009).

to bring about the arrest and execution of the Ogoni 9, a group of activists who were hanged in November 1995 after a trial before a special military tribunal based on fabricated charges. The parties settled all three lawsuits in spring 2009. The settlement, whose terms are public, provided a total of \$15.5 million to compensate the plaintiffs, establishes a trust for the benefit of the Ogoni people, and covered some of the legal costs and fees associated with the case.

The responsibility of both of the corporations in question seems to be rather clear. However, the critical issue in cases of corporations profiting from states-sponsored abuse concerns the extent to which a corporate actor is responsible for his, her, or its reliance on abusive police and security forces, when the reliance on police forces in democratic states would be rather unproblematic. In an ATCA lawsuit initiated by Nigerian victims against the oil company Chevron at the Southern District Court in New York the jury decided against holding the company accountable for the extralegal killings and torture committed by the Nigerian security forces.¹⁶ In this case, peaceful protesters had occupied an offshore oil drilling platform to draw attention to the environmental damages Chevron had caused in the Niger Delta. The company had asked the Nigerian security forces to end the protest and additionally offered to transport the armed forces to the platform. Several activists were killed or injured as a result of the demonstration's suppression. The jury cleared Chevron of the charges because it found that Chevron had not acted improperly by calling the Nigerian authorities to end the protests.

(b) Facilitating international crimes of a regime by providing the means for abuses

The second sub-category of cases concerns companies that facilitate state-sponsored human rights violations by providing the means to commit these abuses.

In 2005, a Dutch criminal court convicted the businessman Frans van Anraat of aiding and abetting war crimes for supplying the Iraqi government with chemicals needed for the production of mustard gas, which was used in massacres against Kurdish minorities in Iraq. The Court found that van Anraat's sale of those chemicals contributed to the deaths of the Kurds, and found him criminally liable for providing essential assistance to Saddam Hussein with the knowledge that his product would be used to commit human rights abuses.¹⁷

16 For a synopsis of the case, documents, court orders and court decisions see Earth Rights international, *Bowoto v. Chevron*, available online at <http://www.earthrights.org/legal/bowoto-v-chevron> (visited 14 December 2009).

17 *Public Prosecutor v. Van Anraat*, LJN AU8685, The Hague District Court, 23 December 2005 at 13; BA6734, Gerechtshof's-Gravenhage, 2200050906-2, judgment of 5 September 2007, available online at <http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=BA6734&u.ljn=BA6734> (visited 25 January 2010); Gerechtshof's-Gravenhage, 2200050906-2, judgment of 5 September 2007, at 14, available online at

In a similar vein, in an ATCA lawsuit filed in the United States by victims of the South African apartheid regime, the plaintiffs alleged that the corporate defendants (among others Daimler, IBM and UBS) aided and abetted human rights abuses committed by the apartheid regime by supplying weapons, vehicles with specific military equipment and computer systems designed to implement a racist passport system and segregation.¹⁸ In the spring of 2009, the Court followed the plaintiffs' arguments concerning those acts and rejected the defendants' motion for a dismissal.¹⁹ The Court, however, did not affirm the allegation that supplying regular cars and 'normal' computer systems to the security forces also constituted a relevant support of the regime's human rights abuses.²⁰ Here, according to the Court, a close link between the provision of goods and the crimes itself could not be established.

There are also cases in which banks have been accused of variously aiding and abetting the Argentinean junta and the South African apartheid regime.²¹ It has been argued that loans provided by banks to these regimes helped encourage a policy of growing military expenditure and that the regime could not have supported their systemic human rights abuses and torture apparatus without the loans of (foreign) banks.²² In other words, the untimely collapse of the regime due to bankruptcy would have expedited the end of the human rights abuses. However, civil claims based on the ATCA of apartheid victims against the Swiss Bank UBS and against Barclay's for financing the South African regime were dismissed by the US District Court. The Court stated that providing a 'bad actor' with financial means was not sufficiently

<http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=BA6734&uljn=BA6734> (visited 25 January 2010); the verdict was upheld by the Dutch Supreme Court in 2009, BG4822, Hoge Raad, 07/10742, judgment of 30 June 2009, available online at <http://www.haguejusticeportal.net/Docs/NLP/Netherlands/Van%20Anraat%20Supreme%20Court%20Judgment.30-06-09.NL.pdf>. (visited 22 March 2010). For a further discussion of the case see H.G. van der Wilt, 'Genocide, Complicity in Genocide and International v. Domestic Jurisdiction – Reflections on the *van Anraat* Case', 4 JICJ (2006) 239–257 and the contribution by E. van Sliedregt and W. Huisman in this issue of the *Journal*.

18 For an in-depth discussion of the lawsuit at its various stages see C. Hutchens, 'International Law in the American Courts – *Khulumani v Barclay National Bank Ltd.*: The Decision Heard 'Round the Corporate World', 9 *German Law Journal* (2008) 639 ff.; T. Nemerow, 'Untying the *Khulumani* Knot: Aiding and Abetting Liability under the Alien Torts Claims Act after *Sosa*', 40 *Columbia Human Rights Law Review* (2008) 231–239; M. Saage-Maaß, 'Geschäft ist Geschäft? Zur Haftung von Unternehmen wegen der Förderung staatlicher Menschenrechtsverletzungen', 1 *Kritische Justiz* (2010) 54–61.

19 *In re South African Apartheid Litigation*, 02 MDL 1499 (S.D.N.Y. 2009) at 57 et seq., 65 et seq., 70 et seq.

20 *Ibid.*, at 69.

21 *Ibid.*, at 57 et seq.

22 For a discussion of the Argentinean case, see J.P. Bohoslavsky and V. Oppenhaffen, 'The Past and Present of Corporate Complicity: Financing the Argentinean Dictatorship', 23 *Harvard Human Rights Journal* (forthcoming). With respect to the case of Chile, also see the contribution by J.P. Bohoslavsky and M. Rulli in this issue of the *Journal*.

connected to the primary violation to fulfill the *actus reus* requirement of aiding and abetting a violation of international law.²³

(c) Direct support of repressions

The third sub-set of cases covers companies that directly support the persecution of political dissidents. Typical actions in this category include high-ranking company managers passing on personal information of regime critics working in their factories to state security forces. Sixteen union activists working for Mercedes Benz in Argentina were arrested by the junta's military police and disappeared. In one case, the manager of the plant allegedly facilitated the arrest, torture and disappearance of a union worker by giving military personnel access to him in the workplace and by passing on the private addresses of the other workers, where they were later arrested. While criminal investigations in Argentina against the Mercedes manager are still ongoing,²⁴ the case was closed in Germany in 2004 by the Public Prosecutor of Nuremberg.²⁵ In a similar vein, at the Ford plant in the Buenos Aires Province, trade unionists were arrested by the military and held in prisons on the Ford plant property where they were tortured. The practice of passing on private information of anti-apartheid activists and facilitating their arrest, torture and killing is also part of the allegations against Mercedes Benz in the aforementioned South African lawsuit.²⁶ In its decision, the Court upheld the plaintiff's argument and decided that such acts do in fact constitute an aiding and abetting liability.

2. Corporations' Involvement in War Zones and other Conflict Areas

The second category of cases concerns corporate actors who are more directly involved in conflict zones, either by actively supporting one of the parties to the conflict or by economically profiting from the conflict.²⁷

(a) Fuelling conflict through the provision of goods and illicit funds

The best known examples are the cases in which corporations fuel ongoing conflicts involve European and US traders in weapons, diamonds and timber. The participation of these foreign entities effectively sustains the conflict in

23 *In re South African Apartheid Litigation*, 02 MDL 1499 (S.D.N.Y. 2009), at 70.

24 *Prodecimiento penal Nr. 4012, número de referencia 292 contra Santiago Omar Riveros, Juan Ronaldo Tasselkraut, José Rodríguez, Carlos Ruckauf ante el Tribunal Penal Federal de Primera Instancia de San Martín*.

25 *Juan Ronaldo Tasselkraut*, 407 Js 41063/98.

26 *In re South African Apartheid Litigation*, 02 MDL 1499 (S.D.N.Y. 2009) at 59.

27 ICJ, *Corporate Complicity & Legal Accountability. Report of the International Commission of Jurists. Expert Legal Panel on Corporate Complicity in International Crimes, Vol. 2: Criminal Law and International Crimes* (2008), available online at <http://www.icj.org/IMG/Volume.2.pdf> (visited 15 December 2009), at 37 et seq.

Liberia and Sierra Leone.²⁸ So far there has been only one criminal trial concerning corporate actors in these conflicts: the criminal trial against the Dutch Timber trader Guus Kouwenhoven. In his position as Director of Operations of the Oriental Timber Company (OTC) and of the Royal Timber Company (RTC), Kouwenhoven managed the biggest timber operations in Liberia. Closely linked to then-Liberian President Charles Taylor, Kouwenhoven allegedly facilitated the import of arms for the latter, thereby infringing resolutions of the UN Security Council. The Dutch prosecution authorities indicted Kouwenhoven with aiding and abetting war crimes committed by Liberian militias and with the violation of an UN arms embargo. According to the prosecution 'the militias hired by the former timber companies belonging to this Dutchman, are accused of participating in the massacre of civilians not even sparing the life of babies. Guus Kouwenhoven is accused of having supplied the arms to the militias to enable them to carry out these crimes.'²⁹ In June 2006, however, the Dutch court acquitted Kouwenhoven of the war crimes charges due to lack of evidence. He was nevertheless sentenced to an eight-year prison term for breaking the UN arms embargo against Liberia. In March 2008, a Dutch court of appeals overturned Kouwenhoven's conviction. The appeals court cited insufficient evidence and found that some witness testimony was contradictory.³⁰ The case is now pending before the Supreme Court.

Companies may also contribute to international crimes committed by the parties to a conflict by financing paramilitary or militia groups. In March 2007, Chiquita Brands admitted that from 1997 to 2004 it made payments to the United Self-Defense Forces of Colombia (*Autodefensas Unidas de Colombia*, AUC), a paramilitary organization that the US government had designated a terrorist group. The AUC is responsible for killing several thousand civilians, particularly trade union activists and leaders employed on the Chiquita Brands plantations.³¹ In 2007, a group of Colombians filed a lawsuit against Chiquita under the ATCA in a US federal court.³² The plaintiffs are family

members of Colombian trade unionists, banana workers, political organizers, and social activists who were targeted and killed by paramilitaries during the 1990s through 2004. The plaintiffs contended that the funds Chiquita paid to Colombian paramilitary organizations during this period ensured the company's complicity in extrajudicial killings, torture, forced disappearances, crimes against humanity and war crimes committed in Chiquita's Colombian banana-growing region.

(b) Providing military and intelligence services

Crimes, and specifically war crimes, committed by private companies contracted by governments to fulfill various military and intelligence tasks are one example of the direct commission of international crimes by business entities.³³ In *Saleh v. Titan*, an ATCA class action lawsuit was brought against two contractors of the US government Titan Corporation and CACI International Inc. Both were hired by the US government to provide interrogation and translation services at the infamous Abu Ghraib prison and other detention facilities in Iraq. Plaintiffs allege that defendants, through their employees, directed and participated in, inter alia, violations of international law, including torture, cruel, inhuman, or degrading treatment, war crimes and crimes against humanity. The case, however, was dismissed by the Court of Appeals for the District of Columbia in 2009 because, according to the majority opinion, the claims were 'preempted by Federal law'.³⁴

3. Accountability Mechanisms and Problems

In the previous section, we have attempted to show that the substantial regulations of international crimes, as well as the categories of legally-relevant cases regarding corporate complicity in international crimes, are considerably clear. Nevertheless, inadequacies in the existing accountability mechanisms as well as several other legal problems and factual obstacles hinder the enforcement of human rights law and especially international criminal law with regard to corporate actors. The following will give a short overview of the existing accountability mechanisms and the respective legal and factual problems.

28 *Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of Congo*, UN Doc. S/2002/1146, 16 October 2002.

29 AY5160, Rechtbank's-Gravenhage, 09/750001-05, judgment of 7 June 2006, English translation available online at <http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=AY5160&u.ljn=AY5160> (visited 14 December 2009). On Kouwenhoven also see the contribution by E. van Slidregt and W. Huisman in this issue of the *Journal*.

30 BC6068, Gerechtshof 's-Gravenhage, 220043306, judgment of 10 March 2008, available online at <http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=BC6068&u.ljn=BC6068> (visited 14 December 2009).

31 Chiquita settled a criminal complaint by the US government at that time and agreed to pay a \$25 million fine. United States Department of Justice, 'Chiquita Brands International Pleads Guilty to Making Payments to a Designated Terrorist Organization and Agrees to Pay \$25 Million Fine', Monday, 19 March 2007, available online at <http://www.justice.gov/opa/pr/2007/March/07nsd.161.html> (visited 14 December 2009).

32 *Doe v. Chiquita Brands International*, United District Court District of New Jersey, Class Action Complaint for Damages, available online at <http://www.earthrights.org/sites/default/files/legal/cbi-final-complaint-signed.pdf> (visited 25 January 2010).

33 ICJ, *Corporate Complicity & Legal Accountability*, *supra* note 27, at 42 et seq.

34 A synopsis of the case, documents, court orders and court decisions are available online at Center for Constitutional Rights, *Saleh et al. v. Titan et al.*, available online at <http://ccrjustice.org/ourcases/current-cases/saleh-v-titan> (visited 15 December 2009).

A. Enforcement Mechanisms at the International Level

1. Lack of Enforcement Mechanisms at the International Level

Since states are the principle addressees of international law, none of the human rights-related complaint procedures within the UN system has the mandate to monitor the activities of corporations as such. With the exception of the International Criminal Court (ICC), the international level also does not provide a venue to hear complaints about individual corporate officers. Likewise, the regional human rights courts neither have jurisdiction over corporate legal entities nor over individual corporate actors.

2. Jurisdiction of the International Criminal Court

The ICC does not have jurisdiction over legal entities. However, the Court could adjudicate corporate involvement in international crimes, when the focus is shifted from the corporation as such to the individuals acting on behalf of a corporation. However, due to its limited capacity, the Court can only deal with a fraction of international criminal cases. It is therefore to be expected that the ICC will concentrate its cases on persons directly involved in the crimes. Since corporate officers often only play a supportive role and are furthermore usually located at a considerable distance from the crime scene, to date they are not considered a priority in the Office of the Prosecutor's (OTP's) legal strategy.³⁵

3. Alternative International Complaint Mechanisms and Standard-settings

Other international standards related to corporate performance regarding human rights and social and environmental responsibilities have nonetheless been established. The most relevant alternative standards are the Conventions of the International Labour Organization (ILO) and the Guidelines for Multinational Enterprises of the Organisation for Economic Co-operation and Development (OECD). They are based on the belief that corporations have to respect human rights and have to adhere to certain social and environmental standards. These standards, however, lack the binding character of legal norms and are therefore called 'soft law'. Some of these standards are accompanied by non-legal complaint mechanisms. Even though these procedures are not directly aimed at holding corporations accountable for their involvement in international crimes, they contain elements of factual investigations and legal analysis and offer a forum for scrutinizing corporate behaviour.

35 Concerning the ICC OTP's strategy, see the contribution of R. Gallmetzer in this issue of the *Journal*.

(a) The ILO conventions

The ILO was founded in 1919 and became a specialized agency of the UN in 1946 with the aim of creating and improving international labour and social standards. The fundamental principles of the ILO, stated in a variety of declarations, are: freedom of association and the right to collective bargaining, elimination of all forms of forced labour or bonded labour, ending child labour, and eliminating discrimination in the workplace.³⁶ Moreover, the ILO is based on the principle of tripartite, which ensures that employers' and employees' representatives are equally positioned with respect to the governments of the 181 member states in the ILO. While the addressees of the ILO Conventions are solely states, the 'Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy' also addresses corporations.³⁷ All of the parties addressed by this declaration should contribute to the realization of the ILO Declaration on Fundamental Principles and Rights at Work by adhering to the General Declaration of Human Rights and correlating international pacts ratified by the UN General Assembly, as well as to the ILO's Constitution and its basic principles.³⁸

The Organization's Constitution and the rules of procedure contained in the Declaration on Fundamental Principle impose the duty on ILO members to deliver annual reports regarding the implementation of their obligations.³⁹ Every member of the ILO can register complaints against member states or against corporations at the International Labour Office for non-fulfilment of obligations anchored in the Conventions or in the Fundamental Principles.⁴⁰ Following such a complaint, a Commission of Inquiry is set up to write a report, make recommendations and determine a timeframe for their implementation.⁴¹ However, these ILO procedures are of limited benefit for victims of international crimes, as it only provides them with intermediate access: neither individual victims nor civil society organizations can initiate proceedings or be otherwise involved. Indeed, the ILO member states and representatives of employers and employees are the only entities to be able to do so.

36 'ILO Declaration on Fundamental Principles and Rights at Work', adopted 1998, available online at <http://www.ilo.org/declaration/thedeclaration/lang-en/index.htm> (visited 15 December 2009).

37 This tripartite fundamental declaration aims to 'encourage the positive contribution which multinational enterprises can make to economic and social progress and to minimize and resolve the difficulties to which their various operations may give rise.' *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*, 4th edn. No. 2, (2006), available at <http://www.ilo.org/public/english/employment/multi/tripartite/declaration.htm> (visited 15 December 2009).

38 *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*, Art. 8, available online at <http://www.ilo.org/empent/Whatwedo/Publications/lang-en/docName-WCMS.094386/index.htm>, (visited 15 December 2009).

39 *Constitution of the International Labour Organization*, Art. 22, August 2003, available online at <http://www.ilo.org/ilolex/english/constq.htm> (visited 15 December 2009).

40 The procedure for the examination of disputes in the Tripartite Declaration of Principles refers to Arts 24 and 26 of the Constitution of the International Labour Organization.

41 *Constitution of the International Labour Organization*, Art. 29.

(b) The OECD guidelines

In 1976, the thirty member states of the OECD issued their Guidelines for Multinational Enterprises, which contain explicit recommendations but are of a non-legally binding character. They refer to the ILO core labour standards and contain recommendations for corporations to fulfil human and labour rights as well as adhere to regulations on environmental protection, consumer protection, corruption, taxation and disclosure of information. These recommendations only address corporations whose headquarters are located in a state that has ratified the Guidelines. Complaints can therefore only be brought against companies from those countries.

Furthermore, the Procedural Guidance attached to the Guidelines offers a dispute settlement procedure. Complaints against individual companies for non-adherence to the Guidelines can be filed before a so-called 'National Contact Point' (NCP), which every member state is obliged to create.⁴² Since 2000, civil society organizations have had access to this procedure. The OECD complaint procedure is thus more accessible for victims and their representatives than the ILO proceedings.

If a complaint is filed against a corporation and is deemed worthy of further examination, the NCP opens a consultation process and attempts to mediate between the parties.⁴³ If the parties involved are unable to resolve their differences, the NCP can issue a final statement. In these statements the NCP does not have to clearly delineate accountability,⁴⁴ nor can it impose any sanctions. On the other hand, the statement often does contain recommendations for the implementation of the Guidelines.⁴⁵ Nonetheless, as the practices of the NCPs instituted by various countries lack any coherency, civil society organizations have been highly critical and have demanded a variety of improvements, such as more transparency in the Contact Points' decision-making, more parliamentary control of the NCP, and an impartial body of appeals for contentious cases.⁴⁶

42. *Procedural Guidance of the OECD Guidelines for Multinational Enterprises*, No. 1, (revision 2000), OECD Ministerial decision of June 2000; in Germany the NCP is located in the Federal Ministry of Economics and Technology.

43. *Procedural Guidance of the OECD Guidelines for Multinational Enterprises*, (revision 2000), § I.C., *Commentary on the Procedural Guidance of the OECD Guidelines for Multinational Enterprises*, (revision 2000), § 17.

44. Although some NCPs such as the UK National Contact Point do so. 'Final Statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Afrimex (UK) Ltd.', 28 August 2008, available online at <http://www.berr.gov.uk/files/file47555.doc> (visited 25 January 2010).

45. *Commentary on the Procedural Guidance of the OECD Guidelines for Multinational Enterprises*, § 18.

46. C. Heydenreich, *Viele Ansätze – wenig Kontrolle. Für multinationale Unternehmen fehlt bisher ein verbindliches Regelwerk*, German Watch (2006), available at <http://www.germanwatch.org/tw/kw-inko06.pdf> (visited 25 January 2010), at 2.

(c) Voluntary codes of conduct and the Global Compact

The debate on corporate social responsibility triggered the establishment of a variety of voluntary principles to guide corporate conduct. The general idea behind these codes of conduct is that corporate actors willingly commit themselves to certain practices such as the respect of human rights, basic labour rights and environmental standards.⁴⁷ These corporate conduct codes were initially developed as a reaction towards repressive regimes, such as South Africa,⁴⁸ and are initiated by governments and international organizations, as well as by private companies and non-governmental organizations (NGOs). Some codes of conduct pertain to a certain branch of industry, while others were implemented by and for only one specific corporation. Critics of these codes, however, draw attention to the lack of efficient monitoring regarding their implementation and the absence of any sanctioning mechanisms.⁴⁹

The UN Global Compact is another important example of the numerous voluntary corporate citizenship initiatives that have been established. In contrast to the ILO Conventions or OECD Guidelines, the Global Compact was not created by states through a negotiated international treaty. Rather, it was initiated by UN General Secretary Kofi Annan in cooperation with business actors and UN agencies.⁵⁰ Although the UN General Assembly unanimously passed the resolution in support of increased co-operation between the UN and the private sector, thereby endorsing the Global Compact,⁵¹ the latter does not have the status of an UN agency or any other standards-setting body. It sees itself as a pragmatic forum for education and dialogue between the different stakeholders in the field of business and human rights. It aims for the cooperative integration of corporations into the work of the UN and its specialized agencies to promote the realization of human rights and other common interests of the international community.⁵²

47. J. Levis, 'Adoption of corporate social responsibility codes by multinational companies', 17 *Journal of Asian Economics* (2006) 50–55.

48. E. Schrage, *Promoting International Worker Rights Through Private Voluntary Initiatives: Public Relations or Public Policy. A report to the US Department of State on behalf of the University of Iowa Center for Human Rights*, University of Iowa Center for Human Rights, January 2004, available at <http://www.business-humanrights.org/Links/Repository/360741/link.page.view> (visited 15 December 2009), at 2 et seq.

49. Clean Clothes Campaign, *Cashing In. Giant retailers, purchasing practices, and working conditions in the garment industry*, February 2009, available at <http://www.cleanclothes.org/resources/ccc/working-conditions/cashing-in> (visited 15 December 2009); I. Wick, *Arbeits- und Frauenrechte im Discountgeschäft. Aldi-Aktionswaren aus China*, SÜDWIND-Institut für Ökonomie und Ökumene, February 2009.

50. Annan described the Global Compact as an initiative created to 'safeguard sustainable growth within the context of globalization by promoting a core set of universal values which are fundamental to meeting the socio-economic needs of the world's people now and in the future', *Secretary-General proposes Global Compact on Human Rights, Labour, Environment, in Address to World Economic Forum in Davos*, UN Press Release SG/SM/6881, 1 February 1999.

51. *United Nations Millennium Declaration*, GA Res. 55/215, 21 December 2000.

52. See also the UN General Secretary's speech to the Svenska Dagbladet's Executive Club in Stockholm on 25 May 1999, UN Press Release SG/SM/7004.

Members of the Global Compact are state institutions, corporations, employers' and employees' organizations and civil society organizations.⁵³ Any number of these stakeholders can become a member of the Global Compact without the hindrance of overly bureaucratic formalities. To date, the initiative has grown to more than 6,700 participants.⁵⁴ Over 5,200 businesses in 130 countries around the world have agreed to the ten principles on human rights, labor standards, environmental protection, and fighting corruption. In addition, examples of best business practice are exchanged in annual reports, network meetings, and international conferences.⁵⁵ From its inception, however, the Global Compact has been criticized, in particular by NGOs who argue that transnational corporations have always rejected binding rules and sanctions and only agreed to the Global Compact 'after it had been degraded to a toothless instrument'.⁵⁶ Recurrent criticism led to the introduction of a new control mechanism in 2005. In particularly grave cases, it is now possible to exclude members from the pact, although this, to date, has never happened.⁵⁷

When it comes to the involvement of corporations in international crimes, voluntary self-restrictions prove absolutely inadequate. If a clearly defined, binding international law regulation is violated, there is clearly no room for discussion about possible voluntary standards to which an enterprise may or may not adhere. Nevertheless, these codes of conduct, in addition to the UN Global Compact, may be an indication of the fact that the boundaries between legally binding obligations and voluntary self-restriction are increasingly flexible.

B. Enforcement Mechanisms at the National Level

Corporate actors can also be held accountable for their involvement in international crimes at the national level both through criminal proceedings and civil lawsuits. These proceedings can either be directed against a company as such or against single corporate officers. The appropriate forum for such proceedings can either be the state, in which the violations occurred (the 'host state') or the state in which the company is based (the 'home state').

There are several advantages of conducting legal proceedings in the host state, above all a better access to the evidence, specifically to witness

testimonies. Additionally, proceedings that are conducted in proximity to the scene of the crime may better contribute to the social and political discourse that is necessary to properly deal with human rights abuses. Still, systematic flaws in the judicial system such as corruption, inadequacies of law or direct political intervention are more likely to occur in the host states than in the company's home state. Nevertheless, there are a number of examples in which victims of corporate human rights abuses have effectively used the national judicial system of host states to obtain justice.⁵⁸

No matter which national jurisdiction is chosen to pursue claims against corporate actors for the commission of international crimes, such cases always face a variety of legal and factual challenges in any legal forum. National legal systems are generally not well equipped to deal with international crimes caused by corporations. In other words, the legal norms and standards are not suited to sanction corporate involvement in international crimes, which regularly consists of corporate behaviour that comprises transnational actions and relations. Meanwhile, existing norms are insufficiently applied by courts and law enforcement agencies. In the following we will, as a matter of expertise, confirm this claim with regard to European jurisdictions.

1. Criminal Proceedings at the National Level

International criminal law has been widely incorporated into European national legislation.⁵⁹ Thus, the legal basis for criminal proceedings concerning corporate involvement in international crimes generally exists. Nevertheless, problematic issues persist particularly with respect to the following issues: corporate criminal liability, the extraterritorial application of law, the attribution of criminal actions to specific agents, the *mens rea* requirements, the difficulties of extraterritorial investigations and especially obtaining sufficient evidence.

Regarding corporate criminal liability, no uniform regulation exists in Europe. Some countries, such as Germany, do not provide for corporate

53 See also Global Compact, *Global Compact Participants*, available at <http://www.unglobalcompact.org/ParticipantsAndStakeholders/index.html> (visited 15 December 2009).

54 UN Global Compact, *Participants*, <http://www.unglobalcompact.org/ParticipantsAndStakeholders/>; UN Global Compact, *Global Compact Governance*, 30 June 2009 (visited 15 December 2009).

55 UN Global Compact, *About us: Global Compact Governance*, 6 November 2008, <http://www.unglobalcompact.org/AboutTheGC/stagesofdevelopment.html> (visited 15 December 2009).

56 N. Weiß, 'Transnationale Unternehmen – weltweite Standards? Eine Zwischenbilanz des Global Compact', 2 *MenschenRechtsMagazin* (2002) 82–89, at 88.

57 Global Compact, *Integrity Measures*, No. 4, available at <http://www.unglobalcompact.org/AboutTheGC/integrity.html> (visited 15 December 2009).

58 At the moment there is a major lawsuit against Chevron/Texaco pending in Ecuadorian courts. Plaintiffs are claiming damages for massive environmental and physical damages caused by the company's oil extraction between 1964 and 1992. Business and Human Rights Resource Center, 22 March 2010, *Case profile: Texaco/Chevron lawsuits (re Ecuador)*, available online at <http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/TexacoChevronlawsuitsreEcuador> (visited 22 March 2010). In Argentina criminal investigations are ongoing against 85 textile companies, including Adidas, Puma, Cheeky, Le Coq Sportif, among others. They have allegedly used slave labour in their production. For an in-depth case description, see W. Kaleck and M. Saage-Maaß, *Transnationale Unternehmen vor Gericht. Über die Gefährdung der Menschenrechte durch europäische Firmen in Lateinamerika* (Berlin, 2008), at 102–114.

59 R. Thompson, A. Ramasastry and M. Taylor, 'Translating Unocal: The Expanding Web of Liability for Business Entities Implicated in International Crimes', 40 *George Washington International Law Review* (2009) 310–374; Human Rights Watch, *Universal Jurisdiction in Europe: The State of the Art* (2006), available at <http://www.hrw.org/sites/default/files/reports/ij0606web.pdf>.

criminal liability at all, while other countries do have this provision, for instance Switzerland. However, in the case of the latter, the existing regulations have rarely been put into practice.⁶⁰

The extraterritorial application of criminal law is not a normative problem, since most European jurisdictions apply their criminal laws to international crimes committed abroad in accordance with the active and passive personality principle or the principle of universal jurisdiction. Moreover, it can be argued in some cases that at least a part of the incriminated actions — for example, the decision to undertake business in a certain conflict situation — took place in the corporation's home state, which consequently invokes the principle of territoriality. However, the capacity and willingness of law enforcement agencies to investigate extraterritorial cases appears to be a major obstacle.⁶¹

As corporations are generally composed of complex structures and webs of relations, those responsible for the company's involvement in a crime may be located at a great distance from the place of its actual commission. When a corporation uses suppliers that commit the crimes in question, the connection to the crime is even more distant.⁶² Even though the concept of superior responsibility could be applied in a few situations, it remains difficult to prove individual responsibility and to narrow down the accusation to a specific action of a specific actor in such a opaque business structure. Similarly, it is difficult to prove the alleged perpetrator's or accessory's knowledge of the crime, when he or she, again, may have been far removed from the scene. In situations where the crimes occurred in a distant country and in an insecure political situation, for example pre-, post- or during armed conflicts or internal repression, it is almost impossible to prove that the alleged perpetrator knew or should have known that a specific incident occurred.

2. Civil Lawsuits on the National Level

The most important cases of enforcement of human rights through civil proceedings, in particular with regard to corporate behaviour, concern the US lawsuits based on the ATCA. They contain punitive elements and apply similar third party liability standards as in international criminal procedures. In contrast to the United States, civil legislation in most European countries is not yet designed to handle cases of transnational human rights crimes in general and the involvement of corporate actors in particular.⁶³ Nevertheless, some

60 Art. 102 Schweizerisches Strafgesetzbuch, BBl. 2002 (Schweizerisches Gesetzblatt), at 5390.

61 W. Kaleck, 'From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998-2008', 30 *Michigan Journal of International Law* (2009) 931–972, at 961–964.

62 ICJ, Vol. 2, *supra* note 29, at 40 et seq.

63 C. Ryngaert, 'Universal Tort Jurisdiction over Gross Human Rights Violations', 3 *Netherlands Yearbook of International Law* (2007) 3–60, at 42. Ryngaert sees the commitment of European states to universal criminal jurisdiction as one explanation for this situation. *Ibid.*, at 57; also B. Stephens, 'Translating Filártiga: A Comparative and International Law Analysis of Domestic

countries have successfully provided civil remedies for human rights violations caused by corporations, including the UK and the Netherlands.⁶⁴

(a) Tort law

Tort law claims generally face problems that are very similar to those in criminal proceedings: the attribution of responsibility and the so-called 'corporate veil', the causality of tortuous action and damages, and the subjective standard of intent or negligence. These problems partly arise for the same reasons they do in criminal law: the complex nature of the crimes and intricate, turbid corporate structures ensure the difficulty of grasping and substantively proving claims according to the available legal concepts.

In general, the greatest obstacle for holding corporations accountable is the attribution of the tortuous acts to the company's headquarters, both for factual as well as for legal reasons. In German tort law, for example, causality between the tortuous action and the violation of rights, as well as causality between the violation of rights and the damage caused, must be proven. In both cases it is profoundly difficult to attribute the action in question or the responsibility for the causation of damages to the headquarters of a transnational business corporation. In order to do so, intimate information about the internal structures of the company and their decision-making processes is essential. Especially for the attribution of tortuous actions that were committed abroad, a nexus between the direct perpetrator and the company that is supposed to be held liable needs to be established. Theories of secondary liability such as aiding and abetting or joint criminal enterprise are not applicable in German tort law. Attribution becomes an even greater problem when a corporation has actually acted through a subsidiary or a supplier. With respect to the acts of its suppliers, the company will often be able to claim that it does not exercise sufficient control over the subsidiary. When the mother company acted through a subsidiary, the principle of company law, which states that an entity is only liable for its own actions and that the mother company is usually not liable for its subsidiary's obligations, becomes relevant.⁶⁵

Remedies for International Human Rights Violations', 27 *Yale Journal of International Law* (2002) 1–57; ECCHR, *European Cases Database*, *supra* note 11.

64 In the UK a number of cases have been brought against corporations for human rights violations: Business and Human Rights Resource Centre, *Case profile: Trafigura lawsuits (re Côte d'Ivoire)*, 22 March 2010, available online at <http://www.businesshumanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/TrafiguralawsuitsreCotedIvoire> (visited 22 March 2010); *idem.*, *Case profile: Shell lawsuit (re oil pollution in Nigeria)*, 22 March 2010, available online at <http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/ShelllawsuitreOilPollutioninNigeria> (visited 22 March 2010).

65 V. Emmerich and M. Habersack, *Aktien- und GmbH-Konzernrecht* (München: C.H. Beck, 2008), at 274; K. Schmidt and M. Lutter, *Aktiengesetz. Kommentar* (München: C.H. Beck 2008), at § 302 marginal no. 58.

(b) Consumer protection laws

A more indirect way of holding corporations accountable for the violation of international criminal law is to rely on consumer protection laws. According to some scholars it should be possible to bring a civil lawsuit against a corporation based on allegations of false advertisement, when a corporation that is actually involved in the commission of international crimes has committed itself to a code of conduct guaranteeing the respect of human rights in its business practices.⁶⁶ So far, however, very few lawsuits have been brought forth on this basis.⁶⁷

4. Reasons for the Accountability Gap

There are several reasons for the demonstrated lack of efficient accountability mechanisms in cases in which economic actors are involved in the commission of international crimes. In fact, a socio-legal study at the regional level would be necessary, first, to illustrate the dimension of the problem and, second, to address the reasons in an appropriate manner. Nonetheless, some preliminary conclusions can be drawn at present.

A. Continuum of Power Relations

Situations of political transition after conflicts, wars and regime changes may lead to the exchange and possibly also to the prosecution of political elites. Economic elites, however, are often seen as key actors in rebuilding a society. As a result, even if economic actors have substantially contributed to the systemic injustice, they may not be held accountable. Often the successors of repressive regimes are keen to keep certain company structures in their countries regardless of allegations of human rights abuses. This tendency can be observed as early as the follow-up trials of Nuremberg, as well as later in the South African truth and reconciliation process and the initial position of the South African government towards civil damages claims of apartheid victims. The Nuremberg follow-up trials were decisively influenced by the Western Allies and their intention to reintegrate the German economy into the Western system, and by extension, the German economic elites into the German society.⁶⁸ Until its recent policy change, the South African government officially justified their opposition to the lawsuits of apartheid victims against

66 R. Zimmer, *Soziale Mindeststandards und ihre Durchsetzungsmechanismen Sicherung internationaler Mindeststandards durch Verhaltenskodizes?* (Baden-Baden: Nomos, 2008), at 239–321; E. Kocher, 'Unternehmerische Selbstverpflichtungen im Wettbewerb', 8 *Gewerblicher Rechtsschutz und Urheberrecht* (2005) 647–652.

67 ECCHR has initiated such a complaint against the German discounter Lidl in April 2010. ECCHR, Lidl-Case, available online at <http://www.ecchr.de/lidl-case.html> (visited 16 June 2010).

68 Bush, *supra* note 4, at 1250–1262; Weinke, *supra* note 7, at 84.

several transnational corporations with its concern that such lawsuits could discourage foreign investment in South Africa and therefore be detrimental to the country's economic development.⁶⁹

B. Normative Problems

Specific normative problems, which will be examined in the following section, pose serious obstacles to the enforcement of international criminal law on business actors.

1. Non-state Actors and International Law — The Classic Concept of Subjectivity in International Law

The status of non-state actors is a continual conceptual problem in international law and is the main reason for the lack of enforcement mechanisms against corporations on the international level.⁷⁰ In fact, it is still largely debated whether non-state actors, and in particular corporations, are bound by international law at all.⁷¹ The classical theory of international law is grounded on the assumption of the separation between the public (i.e. state) and the private sphere. This strict separation is neither compulsory nor essential, but is rather the result of conventions in legal theory.⁷² Prior to the middle of the twentieth century, this assumption of a strict public/private divide stood largely unquestioned and indeed remains a predominant theoretical trend. Within this classical concept of public international law, states are the only actors and addressees of international law.⁷³

Nevertheless, several authors are challenging this view arguing that veritable changes to the international world order must necessarily lead to the imposition of international legal obligations on non-state actors such as

69 P.M. Maduna, 'Declaration by Justice Minister Penuell Maduna on Apartheid Litigation in the United States', 11 July 2003, available at www.info.gov.za/otherdocs/2003/apartheid.pdf (visited 15 December 2009). It should be mentioned though, that the South African government just recently gave up this position and now supports the lawsuit openly. Minister Justice and Constitutional Development, 'Re South African Apartheid Litigation' (MDL 1499), available at <http://www.kosa.org/documents/09-09-01.MinJusticeRSA.toJudge.Scheidlin.pdf> (visited 15 December 2009).

70 For an overview of the conceptual problems, see A. Clapham, *Human Rights Obligations of Non-state Actors* (Oxford: Oxford University Press, 2006), at 25–57. See also the contribution by L. van den Herik and J. Letnar Čerňič in this issue of the *Journal*.

71 This is clearly not the case concerning another group of non-state actors: the individual. It is acknowledged that the individual is obliged by international criminal law and may be prosecuted for the commission of international crimes before the ICC.

72 M. Bexell, 'Distribution of Responsibility for Human Rights Protection: The Public-Private Distinction', 79 *Friedenswarte* (2004) 103–118.

73 V. Epping, 'Völkerrechtssubjektivität', in K. Ipsen (ed.), *Völkerrecht* (München: C.H.Beck, 2004), at § 7; P. Heilborn, 'Subjekte des Völkerrechts', in K. Strupp (ed.), *Wörterbuch des Völkerrechts und der Diplomatie*, Vol. 2 (Berlin, Leipzig, 1925).

corporations. As a consequence, corporations could be held accountable for violations of these obligations alongside states.⁷⁴ Other authors depart from the theory of subjectivity in international law altogether. In order to include powerful non-governmental entities, they speak of 'participants' in international systems⁷⁵ or of 'constitutional subjects' of a 'global civil constitution'.⁷⁶ Another approach to this question is principally centred on a reconceptualization of the international legal personality of actors and the capacity to bear obligations under international law.⁷⁷

These theoretical problems become less compelling, however, when considering that it is already acknowledged that individuals as non-state actors are addresses of — and therefore bear obligations under — international criminal law. Seen from this perspective, is hardly unreasonable to consider conferring these obligations on corporations as legal entities.

2. Business Activity as Neutral Action

As illustrated in the previous passages, business actors can be involved in international crimes in a variety of ways that might meet the legal standards of either direct or secondary liability. The challenge in concrete individual cases is nonetheless to determine when neutral business activities — such as providing goods or funds — have actually turned into legally relevant behaviour per se. In cases that concern neutral business actions a line must be drawn between the morally condemnable behaviour of 'doing business with a bad actor'⁷⁸ and criminally relevant contributions to another entity's international crimes. This distinction becomes relevant when companies facilitate state-sponsored human rights abuses by providing the means to commit

74 P. Alston (ed.), *Non-State Actors and Human Rights* (New York: Oxford University Press, 2006); Clapham, *Non-state Actors*, supra note 70; O. De Schutter (ed.), *Transnational Corporations and Human Rights* (Oxford, Portland: Hart Publishing, 2006); for an review of these books see E. De Brabandere, 'Non-state Actors, State-Centrism and Human Rights Obligations', 22 *Leiden Journal of International Law* (2009) 191–209.

75 R. Higgins, *Problems and Process – International Law and How We Use It* (Oxford: Oxford University Press, 1994), at 50; P. Allott, *Eunomia: New Order for a New World* (Oxford: Oxford University Press, 1990), at 372 et seq.

76 G. Teubner, 'Globale Zivilverfassung: Alternativen zur staatszentrierten Verfassungstheorie', 63 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2003) 1–28, at 3 et seq.; similarly D. Thürer, 'The Emergence of Non-Governmental Organisations and Transnational Enterprises in International Law and the Changing Role of the State', in R. Hofmann (ed.), *Non-State Actors as New Subjects of International Law* (Berlin: Duncker und Humblot, 1999), at 51 et seq.

77 Clapham summarizes this as follows: 'We have an international legal order that admits that states are not the only subjects of international law. It is obvious that non-state entities do not enjoy all the competences, privileges, and rights that states enjoy under international law, just as it is clear that states do not have all the rights that individuals have under international law... We need to admit that international rights and duties depend on the capacity of the entity to enjoy those rights and bear those obligations; such rights and obligations do not depend on the mysteries of subjectivity.' Clapham, *Non-state Actors*, supra note 70, at 68–69.

78 *In Re South African Apartheid Litigation*, 02- md-1499, U.S. District Court, Southern District of New York (Manhattan), 8 April 2009, at 87.

these violations. Moreover, this differentiation is also crucial with respect to corporate activity in conflict zones, whereby corporate actors are supporting one of the parties to the conflict through illicit payments or by profiting from the conflict through trade with the parties, thereby fuelling the hostilities.

Furthermore, it is of utmost importance to determine when the neutral action of provision of goods or financial resources becomes an act of complicity with the perpetrator. To this end, it is necessary to make the distinction between the supply of goods that are per se dangerous such as weapons and the supply of goods with a specific make-up that may only *contribute*, in a certain scenario, to the commission of international crimes, such as computer programs or certain chemicals. This distinction gains further relevance when considering the *mens rea* requirements. Businessmen trading per se dangerous goods will need to have less knowledge of the actual criminal purpose for which the main perpetrator acquired the goods, to be criminally liable; whereas in the case of other goods, the trader will have to know more details about the circumstances in which his goods will be used to commit international crimes to be liable for aiding and abetting.

Some helpful criteria to distinguish corporate complicity in international crimes from neutral business activity have been developed by the International Commission of Jurists (ICJ) in its recent report on the involvement of corporations in international crimes. According to the ICJ a company runs the risk of being complicit in international crimes if by such conduct, the company or its employees '(1) enables the specific abuses to occur, meaning that the abuses would not occur without the contribution of the company, or (2) exacerbates the specific abuses, meaning that the company makes the situation worse, including where without the contribution of the company, some of the abuses would have occurred on a smaller scale, or with less frequency, or (3) facilitates the specific abuses, meaning that the company's conduct makes it easier to carry out the abuses or changes the way the abuses are carried out, including the methods used, the timing or their efficiency.'⁷⁹ On the subjective side, according to the ICJ report, the company or its employees need to actively wish to enable, exacerbate or facilitate the international crime; they must know or should know of the risk of their conduct contributing to the abuses; or they must be wilfully blind to that risk.⁸⁰ As a third criterion the ICJ report requires the condition of proximity. In other words, there must be a connection between the company or its employees and the principal perpetrator of the international crime or the victim of the abuses either because of geographic propinquity, or because of the duration, frequency, intensity and/or nature of the connection, interactions or business transactions concerned.⁸¹ The closer the company or its employees are to the situation or

79 ICJ, *Corporate Complicity & Legal Accountability, Report of the International Commission of Jurists, Expert Legal Panel on Corporate Complicity in International Crimes, Vol. 1: Facing the Facts and Charting the Legal Path* (2008), available online at <http://www.icj.org/IMG/Volume.1.pdf> (visited 15 December 2009), at 9.

80 *Ibid.*, 18–23.

81 *Ibid.*, 25.

the actors involved, the more likely it is that the company's conduct will be legally regarded as having enabled, exacerbated or facilitated the abuses, and the more likely it is that it will be assumed that the company knew or should have known of the risk.

C. Inadequacies of Legal Provisions and Judicial Practice

As it has been shown in the previous section, enforcement mechanisms exist at both the international as well as the national level whereby corporations or their individual officers can be held accountable for involvement in international crimes. These legal provisions, however, are largely insufficient: the existing legal framework, in addition to current judicial practice as well as the lack of resources available to law enforcement agencies, does not reflect the grave threats that corporations pose to human rights.

D. Practical Obstacles: Piercing the Corporate Veil

Efforts to hold corporate actors accountable for international crimes also face many practical obstacles. As in all extraterritorial crimes, and particularly in extraterritorial international crimes, investigations are difficult and cost-intensive. In situations of political transition, as well as in ongoing conflicts, impunity is widespread, often limiting efforts of fact-finding to concentrating on the direct perpetrators and the 'main' atrocities. Since business actors generally operate in the background, their involvement in the crimes is often not at the centre of investigations — neither in national or international prosecutions nor in UN missions or truth commissions.

In situations in which investigators do enquire into the involvement of corporations, it is extremely difficult for them to obtain pertinent information. Corporations are not as clearly structured as state agencies, and can generally be characterized by rather impenetrable structures and complex supply-chains. Adding to the tortuousness of this web of relations, corporations act through subsidiaries or suppliers, meaning that responsibilities can be shared between numerous officers. Generally speaking, actual crimes are often perpetrated by a local actor or actors, so attributing the crime to a transnational corporation operating in the background raise evidentiary as well as legal problems. Legal concepts of command responsibility or secondary liability may help to tackle the accountability of the transnational corporate actors operating behind the scenes, but those concepts do not generally apply under European civil law. Even if a legal construction allows attribution, sufficient evidence always needs to be gathered. Since corporations are not required to expose internal documents or decision-making structures, fact-finding is a challenging task. Access to sensitive information about company structures and supply chains is much more difficult to obtain than it is in the case of state-run agencies.

5. Solutions: Law Reform and Strategic Litigation

Several solutions to the aforementioned obstacles may be considered. First, specialized crime units that focus on international crimes and corporate involvement in international crimes must be strengthened. Law enforcement agencies have been gaining a considerable amount of expertise in investigating and prosecuting organized crime, international terrorism and, more recently, corruption. This newly acquired experience in terms of practical investigations and legal standards with regard to transnational crimes is effective in encouraging an accurate and fair handling of corporate involvement in international crimes.

In addition, substantial and procedural laws need to be improved. Though the ATCA can provide an alternative accountability mechanism for victims of international crimes in some cases, appropriate civil procedures in European countries remain to be effected. The European Coalition of Corporate Justice, a broad coalition of civil society organizations and trade unions⁸² does not advocate for a 'European ATCA', but rather for (1) the enhancement of direct liability of parent companies; (2) the establishment of a duty to care; and (3) the establishment of mandatory environmental and social reporting.⁸³ It is moreover necessary to establish clear legal standards and to prohibit the trade in certain goods that are per se dangerous, such as weapons and chemicals, for example by using the administrative or criminal law mechanism. Similarly, the prohibition of trading in specific goods in specific situations — as it has been done in the case of gold and timber trade in conflict zones in the Democratic Republic of Congo and Liberia — can be an appropriate means of hindering corporate involvement in international crimes.

Victims, affected communities and their representatives, as well as civil society organizations will have to play a key role in advancing corporate accountability. Due to the passive role state agencies often assume in both home and host states, these civil groups and organizations have been forced to take the necessary steps themselves to reveal, investigate and litigate the majority of cases in which corporate actors were held accountable for their involvement in international crimes. Furthermore, they collected evidence when authorities were still reluctant to do so and initiated legal proceedings. As witnessed in the case of the ATCA, they also made creative and professional use of existing laws. Unlike other methods of human rights protection, this type of strategic litigation has a unique importance as it emphasizes that human rights violations are not only political and moral scandals, but also that they violate specific legal norms. As international criminal law — and notably the field of corporate liability for international crimes — is a rapidly evolving one, it is

82 European Coalition for Corporate Justice, available at <http://www.corporatejustice.org/> (visited 15 December 2009).

83 E. Gregor and H. Ellis, *Fair Law: Legal Proposals to Improve Corporate Accountability for Environmental and Human Rights Violations*, European Coalition for Corporate Justice, (2009), available at <http://www.corporatejustice.org/IMG/pdf/ECCJFairLaw.pdf> (visited 15 December 2009).

particularly important to initiate cases in a carefully considered, strategic manner. This means evaluating the case not only by its chances of winning in court but also taking into consideration whether this case stands for a number of other similar cases that concern a typical or even systematic problem of corporate involvement in international crimes. Even unsuccessful court cases can trigger a significant public debate and lead to law reforms and other social changes, illustrating that the consequences of this strategic litigation can transcend a specific case.⁸⁴ Finally, legal disputes can indeed be considered fora for social and political dialogue, due to their ability to trigger widespread learning and mobilization.

84 J. Lobel, *Success Without Victory: Lost Legal Battles and the Long Road to Justice in America* (New York: New York University Press, 2003).

Regulating Corporations under International Law

From Human Rights to International Criminal Law and Back Again

Larissa van den Herik* and Jernej Letnar Čerňič**

Abstract

The discussion on corporate human rights obligations has been ongoing for some time. More recently, the potential for corporate accountability under a new domain of international law, namely international criminal law, is being explored. This raises questions as to the interrelationship between and the intersection of the two fields of international law. This article argues that the intricacies of accepting corporations as duty-bearers of human rights obligations are of a quite distinct nature than those permeating the international criminal law debate. Moreover, the corporate violations at stake are to a very large extent of a different nature. It is thus argued that the discussions on corporate liability in the two fields of international law run parallel rather than directly intersecting. The debate on corporate human rights obligations may well be informed by potential future developments within international criminal law, but international criminal law is not the panacea that solves all theoretical and practical obstacles surrounding the debate on corporate human rights obligations.

1. Introduction

Corporations, particularly transnational corporations, have in the last decades become generators of international trade and globalization. They are increasingly operating most of the foreign direct investments in developed and developing countries. They have assumed the role of cardinal actors in foreign

* Associate Professor of Public International Law at the Grotius Centre for International Legal Studies, Leiden University/Campus The Hague. [l.van.den.herik@law.leidenuniv.nl]

** Max Weber Postdoctoral Researcher at the European University Institute and an Adjunct Professor at New York University in Firenze. [jernej.letnar@eui.eu]

The 'justice cascade' of truth commissions and domestic, foreign, and international criminal trials holding former Latin America dictators to account, reflect a more general trend in world politics towards greater accountability.¹³⁴ The same has not yet evolved in terms of robust accountability for economic accomplices, which clearly erodes the ultimate preventive, restorative, and reparations goals of transitional justice processes. The civil claim recently filed by victims of the Argentine dictatorship against banks that financed this regime challenges this idea.¹³⁵ And the Chilean case offers another opportunity to seriously re-think the link between finance and human rights violations,

134 E. Lutz and K. Sikkink, 'The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America', 2 *Chicago Journal of International Law* (2001) 1–33; K. Sikkink and C. Walling, 'The Impact of Human Rights Trials in Latin America', 44 *Journal of Peace Research* (2007) 427–445.

135 Bohoslavsky and Oppenhaffen, *supra* note 4.

III. KEY ISSUES *DE LEGE LATA*: DEFINITIONS OF CRIMES AND ATTRIBUTION OF RESPONSIBILITY

Business Leaders and the Modes of Individual Criminal Responsibility under International Law

Hans Vest*

Abstract

The article tries to provide an overview of possible modes of individual criminal responsibility for business leaders with regard to typical business activities. Particular attention will be paid to aiding and abetting or otherwise assisting in a crime as this is arguably the most important mode of criminal responsibility business leaders may be faced with in future. Contested issues like the subjective requirements of accomplice liability under Article 25(3)(c) ICC Statute (including evidentiary strategies for proving the mental element) and the determination of objective limits for criminal responsibility will be discussed. Contributing to a crime by a group of persons acting with a common purpose according to Article 25(3)(d) ICC Statute provides another important mode of criminal responsibility of which business leaders have to be aware. As that provision is — arguably — simultaneously referring to the rare yet not impossible 'hard core' scenario of a business leader being a party to a common purpose joint criminal enterprise, this form will also briefly be discussed. Finally, the discussion on superior responsibility will result in a warning against (further) loosening the effective control test.

1. Introduction

When taking office, the Chief Prosecutor of the International Criminal Court (ICC), Luis Moreno Ocampo, publicly announced he would consider business leaders as accomplices in international crimes.¹ But apart from the 'business'

* Professor of Criminal Law, University of Bern (Switzerland). The author thanks the anonymous reviewer for valuable comments on earlier drafts. [hans.vest@krim.unibe.ch].

1 Presentation by the Chief Prosecutor on the occasion of the press conference of 16 July 2003 (ICC-OTP-20030724-28), available at <http://www.icc-cpi.int/Menus/Go?id=045f8e37-f401-44eb-8219-531fae932e86&lan=en-GB> (visited 20 April 2010).

of conscripting and enlisting child soldiers under the age of 15 years, so far there have been no indictments concentrating on or even including business activities.² Investigations initiated by the Office of the Prosecutor may have shown that prosecuting business activities is a more demanding task than anticipated or, in the light of the ICC's complementary function, may not be 'of sufficient gravity to justify further action'. Whatever may be the reason for the lack of said charges, their absence must be an impetus to undertake the necessary enquiries into the legal problems arising from business leaders '(d)oin[ing] business with the devil'.³

A. 'Business Leaders' and 'Business Activities' — A Definitional Arrangement

For the purpose of this article the term 'business leaders'⁴ will be understood as referring to the top actors of a (transnational) commercial company established under private or public law. Accordingly, the term 'business leaders' includes at least the members of the board and the managing directors of the respective corporation. Persons who de facto run a business corporation, such as majority shareholders, are included too. This description can only provide for a limited understanding of who exactly belongs to the category of business leaders. Yet, for the sake of a survey on the modes of individual responsibility under international criminal law a more detailed concept does not have to be elaborated. A basic description may at least point to the primary subjects of business leaders' liability.

Probably more important than the circle of potential subjects is the range of possible business activities that may be brought within the ambit of international criminal trials. In theory, no business activity, regardless of how ordinary or 'neutral' it seems to be, can explicitly be left outside the scope of, e.g. accessory liability to the commission of an international crime. Scenarios may cover providing raw materials, any kind of semi-finished products, end-products such as, e.g. weapons, goods and services including personal, technical and logistical assistance, information, cash, credit and banking facilities.⁵ Speaking of 'providing' these may, however, be misleading as it points primarily to *selling* such goods or services. *Buying*, e.g. mineral resources like 'blood diamonds'⁶ will also usually fuel and protract an armed conflict as well

2 K.R. Jacobson, 'Doing Business with the Devil: The Challenges of Prosecuting Corporate Officials whose Business Transactions Facilitate War Crimes and Crimes against Humanity', 56 *Air Force Law Review* (2005) 167–231, at 167 et seq.

3 Cf. the title of Jacobson's article, *supra* note 2.

4 This article will not deal with private military and security companies; on this topic see C. Lehnhardt, 'Individual Liability of Private Military Personnel under International Criminal Law', 19 *European Journal of International Law* (2008) 1015–1034.

5 Cf. the report of the International Commission of Jurists' Expert Panel on Corporate Complicity in International Crimes (ICJ Expert Panel), *Corporate Criminality & Legal Accountability Vol. 2: Criminal Law and International Crimes*, at 19, 37–43.

6 W. Schabas, 'Enforcing International Humanitarian Law: Catching the Accomplices', 83 *International Review of the Red Cross* (2001) 439–456, at 451. Diamonds, however, are only one

as fuel gross human rights violations.⁷ The rather simple thesis this article will develop is that, *in practice*, the criminal responsibility of business leaders for conducting 'ordinary business' seems to depend on a twofold test. First, on the factual relationship between the provision of material, goods or services and the perpetration of an international crime: the closer the business conduct is linked to the criminal act of the principal perpetrators and the more concrete the business conduct is adapted to the latter, the higher the possibility of the business leader's liability. Second, the business leader must have acted at least with knowledge that an international crime will be committed by the principal perpetrator. Hence, he has to know specifically for which purpose his partner will use his products, performance, or service.

Therefore, it seems advisable to give some specific examples of business activities which have been subjected to criminal prosecution in the past and which probably may be typical scenarios also in the future.

B. Typical Scenarios?

In the *Flick* case some defendants were members of the 'Circle of Friends of Himmler', which consisted of bankers, industrialists, government officials and SS officers. Initially set up as an advisory committee on economic issues, the Circle's members were soon invited to dinners and social events — such as the visit of Dachau concentration camp — in exchange for donations to a fund at the personal disposal of the 'Reichsführer SS'. Leading industrialists, Friedrich Flick and Otto Steinbrink were charged under count 4 with 'aiding and abetting criminal activities of the SS' for having provided 'extensive

example of a more general problem since a lot of other natural resources may give reason for heavy conflicts over the respective revenues; cf. *Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo*, UN Doc. S/2002/1146, 16 October 2002. Selling or buying natural resources, products or goods, even arms, is normally not an international crime per se, as has been correctly stressed by A. Reggio, *Aiding and Abetting in International Criminal Law: The Responsibility of Corporate Agents and Businessmen for "Trading with the Enemy" of Mankind*, 5 *International Criminal Law Review* (2005) 623–696, at 655 et seq. In times of war absolute or conditional contraband may constitute an exception, *ibid.*, at 666–669.

7 A historical example, showing the substantial intensification and acceleration of an international crime's scale by a faster disposal of the victims' corpses, is the delivery of specially developed high performance crematory facilities to Auschwitz by the German company 'Topf & Söhne' thereby at least assisting in the extermination campaign; see J.-C. Pressac, *Die Krematorien von Auschwitz. Die Technik des Massenmordes* (München/Zürich: Piper Verlag, 1994). One of the company's owners committed suicide at the end of the war while the other fled from the Soviets into the American occupation zone. Three higher officials of 'Topf & Söhne' were sentenced by a Soviet Military Tribunal to 25 years' imprisonment; A. Schüle, 'Technik ohne Moral, Geschäft ohne Verantwortung. Topf & Söhne — die Ofenbauer von Auschwitz', in I. Wojak/S. Meinel for the Fritz Bauer Institute (ed.), *Im Labyrinth der Schuld. Jahrbuch 2003 zur Geschichte und Wirkung des Holocaust* (Frankfurt am Main: Campus Verlag, 2003) 191–229, at 215.

financial and other support'.⁸ The US Military Court found both men guilty by observing that 'one who knowingly contributes to the support [of a criminal organization] must... be deemed to be, if not a principal, certainly an accessory to such crimes.' Furthermore, the Court reasoned that it would be a 'strain upon credulity to believe that [Himmler] needed or spent annually a million Reichsmark solely for cultural purposes or that the members of the Circle could reasonably believe that he did'.⁹

In the *Ministries* case defendant Karl Rasche, a member of the board of directors of the Dresdner Bank, was charged for both (i) financially supporting the 'Circle of Friends of Himmler' and (ii) granting loans to 'various SS enterprises which employed large numbers of inmates of concentrations camps, and also to Reich enterprises and agencies engaged in the so-called resettlement program'. With regard to the loans made by the Dresdner Bank to SS enterprises in the knowledge that the latter were involved in resettlement programmes and employing slave labour, the US Military Tribunal held that Rasche could 'well be condemned from a moral standpoint' yet his conduct could 'hardly be said to be a crime' as the accused only tried to generate a net profit. Regarding the financial support of enterprises, primarily created to exploit slave labour with knowledge of that purpose, however, the Court reached the opposite judgment.¹⁰

The *Zyklon B* case provides for one of the most notorious examples of a business corporation getting in touch with the devil. The owner of the Hamburg-based company Testa (Tesch & Stabenow), Bruno Tesch, his deputy Karl Weinbacher and chief gassing technician Joachim Drosihn were charged with having 'made themselves accessories before the fact' by distributing huge amounts of prussic acid for both pest control purposes and murdering extermination camp inmates.¹¹ The crucial question for the British Military Court was whether 'the accused knew of the purpose to which their gas was being put'.¹² According to the Court the prosecution had proven beyond reasonable doubt that Tesch and Weinbacher had acted with the requisite knowledge. They were sentenced to death by hanging whereas Drosihn was acquitted of all charges.¹³

8 *U.S. v. Friedrich Flick et al.* (Flick case), *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10* (TWC), Vol. VI (Washington, DC: US Government Printing Office, 1949–1953), at 103.

9 *Flick case*, *supra* note 8, at 1217, 1220. But see also the interpretation of the *Flick* judgment by C. Burchard in his contribution to this issue of the *Journal*.

10 *U.S. v. Ernst von Weizsäcker et al.* (*Ministries case*), TWC, Vol. XIV (Washington, DC: US Government Printing Office, 1949–1953), at 621 et seq., 852–855. For a survey of further post-World War case law see Jacobson, *supra* note 2, at 169–199. With regard to the *IG Farben case*, see the contribution by E. Jessberger in this issue of the *Journal*.

11 *Trial of Bruno Tesch and two others* (*Zyklon B case*), *Law Reports of Trials of War Criminals* (LRTWC), Vol. I (London: H.M.S.O., 1947–1949), at 101.

12 *Zyklon B case*, *supra* note 11, at 100.

13 *Ibid.*, at 101 et seq. The reasons for such acquittal remain uncertain; it may be due to his inferior position not allowing him to influence business operations, or due to lack of knowledge, or both.

More recent court decisions on the national level include the *van Anraat* and *van Kouwenhoven* cases.¹⁴ In the first case, the District Court of The Hague tried the Dutch businessman Frans van Anraat, who had delivered more than 1,100 tons of the chemical thiodiglycol (TDG) to Saddam Hussein's Iraqi regime during the 1980s. Under the industrial conditions in Iraq at that time, at least relevant parts of such a huge quantity could only have served as an ingredient to produce mustard gas. Mustard gas had been deployed by the Iraqi Armed Forces in the war against Iran as well as during the infamous 'Anfal Campaign' against the Kurds in Northern Iraq. Van Anraat was convicted for aiding and abetting war crimes but acquitted of the charge of complicity in genocide as there was no sufficient proof that, at the time of the delivery of TDG, he had actual knowledge of Saddam Hussein's special intent to destroy (in part) the Kurdish population.¹⁵ Another Dutch businessman, Guus van Kouwenhoven, is a key player in the Malaysian based Oriental Timber Company (OTC), the largest single foreign investor in Liberia. Van Kouwenhoven has been accused of having been involved in war crimes — committed by the government, rebels and militias — by selling arms to Liberia's government under former President Charles Taylor in exchange for logging rights. He has also been charged for the breach of the UN embargo imposed on Liberia. For the latter, van Kouwenhoven has been sentenced to an eight-year prison term by the District Court of The Hague, while being acquitted with regard to the war crime charges due to lack of evidence. The Appeals Court overturned the conviction because of insufficient and contradictory evidence.¹⁶

2. Aiding and Abetting through Business Activities

In the context of business involvement in the commission of international crimes, the relevant legal question to decide is whether 'ordinary' professional commercial activities as such may constitute, in whole or in part, assistance or otherwise participation in a crime. On the domestic level, where countless products and services are available in daily life which, per se, are normal and harmless (e.g. a kitchen knife) this question is very difficult to decide. On the international level, however, this issue usually provokes less legal dispute

14 For a detailed analysis of both cases, see the contribution by E. van Sliedregt and W. Huisman in this issue of the *Journal*.

15 Cf. H. van der Wilt, 'Genocide, Complicity in Genocide and International v. Domestic Jurisdiction: Reflections on the *van Anraat Case*', 4 *Journal of International Criminal Justice* (JICJ) (2006) 239–257 and idem, 'Genocide v. War Crimes in the *van Anraat Appeal*', 6 *JICJ* (2008) 557–567; cf. the judgments of 23 December 2005 (The Hague District Court) and 9 May 2007 (Court of Appeals) are available online at <http://www.haguejusticeportal.net> (visited 28 January 2010).

16 The Hague Court of Appeal, judgment of 10 March 2008; available online at <http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ijn&ijn=BC6068&u.ljn=BC6068> (in Dutch) (visited 19 March 2010).

since the link between the ordinary business activities and the core crimes is more visible; at least in some cases, a particular business activity — from an objective point of view — can only be looked at as assistance to an international crime (e.g. the delivery of mustard gas). If this degree of unambiguousness, however, is not reached, the accessorial responsibility of a business leader for providing ordinary products or services must depend on the mental element of aiding and abetting or committing.

Aiding and abetting requires a three-part test: (i) the (attempted) commission of a crime by the primary party; (ii) the material (physical or psychological) act of contribution which (iii) has to be committed knowingly.¹⁷ While aiding means giving physical (or material) assistance to a crime such as providing the means for its commission, abetting is facilitating the crime by means of supporting the perpetrator psychologically or morally, i.e. encouraging him.¹⁸ The distinction between these two forms of assistance, until now, has not played any major role in the case law of the ad hoc tribunals. Commonly, aiding and abetting is classified as an accessorial or derivative form of criminal responsibility. In this perspective, the accomplice 'derives his liability from the primary party with whom he has associated himself'.¹⁹

17 Schabas, *supra* note 6, at 446–450. Some scholars clarify that the *mens rea* of aiding and abetting has to be 'broken down into "dual intents": (1) the intent to assist the primary party; and (2) the intent that the primary party commit the offense charged'; see J. Dressler, *Understanding Criminal Law* (4th edn., New York: Lexis, 2006), at 511.

18 Cf. Dressler, *supra* note 17, at 506–507 where assistance by omission is added as a third mode; cf. also the ICJ Expert Panel, *supra* note 5, at 19–20. In this author's view one has to be careful not to outmanoeuvre the requirements of superior responsibility by substituting it through aiding and abetting by omission; cf. also the critical discussion of G. Boas, J.I. Bischoff and N.L. Reid, *Forms of Responsibility in International Criminal Law: International Criminal Law Practitioner Library Series*, Vol. I (Cambridge: Cambridge University Press, 2007), at 310–315.

19 Dressler, *supra* note 17, at 498. With regard to the sentencing parameters, no general differentiation between different modes of responsibility like planning, instigating, ordering, committing or assisting exists. The concrete penalty is administered according to the discretion of the judges who will refer to the specific individual conduct and the personal guilt of the respective accused. Sometimes, in the civil law discussion, this approach is called a 'unitarian concept of perpetrator' or 'unitary perpetrator model' (*Einheitstätermodell*); cf. K. Ambos, Art. 25', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (2nd edn., München: Beck-Hart-Nomos, 2008), at 746 marginal no. 2; Reggio, *supra* note 6, at 629, note 19, is citing Art. 110 of the Italian Penal Code as an example. Such an approach, while dominating common law discussion, nevertheless, has sometimes been questioned; J. Dressler, 'Reforming Complicity Law: Trivial Assistance as a Lesser Offense?' 5 *Ohio State Journal of Criminal Law* (2008) 427–448. With regard to international criminal law it may be preferable to speak of a 'differentiating model with uniform (unified) range of punishment'. Rule 145 ICC RPE determines that, in sentencing, due consideration should be given to 'the degree of participation of the convicted person'. Quite the contrary is the case in some civil law jurisdictions: in Germany or Switzerland, accessories (merely) assisting in the commission of a crime are entitled to a mandatory mitigation in punishment.

A. Aiding and Abetting According to the Statutes of the Ad Hoc Tribunals

The provisions of Article 7(1) ICTY Statute and Article 6(1) ICTR Statute on individual criminal responsibility include persons who have 'otherwise aided and abetted in the planning, preparation of execution of a crime'. 'The contribution of the aider and abettor may be provided at any stage — planning, preparation, or execution — of the criminal process' and 'may take the form of a positive act or an omission, and it may occur before, during, or after the act of the principal offender'.²⁰ Physical presence at the scene of the crime is, therefore, certainly not required. A causal link in the strong sense of a 'but-for' (or *conditio sine qua non*) test between the assistance and the principal crime is not required.²¹

1. Actus reus

According to the earlier jurisprudence of the ad hoc tribunals the *actus reus* of aiding and abetting requires both a *direct* and a *substantial* contribution. The case law has specified the meaning of these attributes with respect to the conduct in a specific case only but not in a general manner. Hence, the criteria seem to be more a matter of fact than of law.²² The International Law Commission's (ILC) commentary to the 1996 Draft Code²³ has tried to clarify the standard by requiring a 'significant facilitation of the crime'; but also this formula needs further clarification. A new appeals judgment, however, has stated that "specific direction" is *not* an essential ingredient of the *actus reus* of aiding and abetting'.²⁴ Yet, the task of defining 'substantial' in a material sense still remains to be done.

The 'substantial'-test must not necessarily refer to the *result of the crime* but may also refer to a relevant influence on the *manner the principal's main act is perpetrated*.²⁵ This latter alternative, however, i.e. the mere alteration of the criminal conduct as such, may become rather vague. Therefore, the criterion of a substantial contribution seems to vary according to both (i) the point of reference and (ii) the form of assistance. This may be necessary as there are differences between physical assistance on the one hand and psychological

20 G. Mettraux, *International Crimes and the Ad Hoc Tribunals* (New York: Oxford University Press, 2005), at 285. An *ex post facto* assistance, however, needs to be based on a prior agreement, see ICTY, Judgment, *Blagojević & Jokić* (IT-02-60-T), Trial Chamber, 17 January 2005, § 731.

21 Cf. the important suggestion for a causal 'increased and forbidden risk'-formula proposed by Ambos, *supra* note 19, at 759 marginal no. 21. This German theory must not be intertwined with cases of a 'would-be accomplice'; M.D. Dubber, *Criminal Law: Model Penal Code* (New York: Foundation Press, 2002), at 113.

22 Cf. for some references to the jurisprudence of the ad hoc tribunals, R. Cryer et al., *An Introduction to International Criminal Procedure* (Cambridge: Cambridge University Press, 2007), at 311.

23 *Draft Code of Crimes against the Peace and Security of Mankind*, Report of the ILC on the work of its 48th session, UN Doc. A/51/10, 6 May–26 July 1996, at 24, § 10.

24 Judgment, *Mrkšić & Šljivančanin* (IT-95-13/1-A), Appeals Chamber, 5 May 2009, § 159.

25 Judgment, *Tadić* (IT-94-1-T), Trial Chamber, 7 May 1997, § 689.

assistance on the other and between contributing to the result and contributing to the conduct of a crime. If moral support that merely influenced the modalities of a conduct had to reach the same level of substantiality as is required for physical assistance, the threshold, in the end, would be watered down. In any case, the 'substantial'-test does not set up a relevant hurdle as regards business behaviour, since it prevents only absolute minimal assistance from being penalized.

While there have been no cases of prosecuting business leaders by the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda has dealt with businessmen (at least) three times: in the Media trial,²⁶ *Ntakirutimana & Ntakirutimana*, and *Musema*. Yet, all those cases did *not* concern typical business activities in the sense of providing ordinary commercial goods or services — if it can be said that they were about business at all.²⁷ Gérard Ntakirutimana, medical director of Mugonero hospital, had played a leading role in the massacre unfolding in the hospital: 'Providing a weapon to one principal knowing that the principal will use that weapon to take part with others in a mass killing', the Appeals Chamber observed, will amount to aiding and abetting to the crime of extermination.²⁸ It seems obvious that the result must be the same in the case of a business man delivering weapons to a group, e.g. fighting in a civil war, even if arms production and/or arms trade is his ordinary business. On this line of reasoning, the *Blagojević & Jokić* Appeals Chamber has explicitly declared that:

where the accused knowingly participated in the commission of an offence and his or her participation substantially affected the commission of that offence, the fact that his or her participation amounted to no more than his or her 'routine duties' will not exculpate the accused.²⁹

The only difference to aiding and abetting common murder lies in the usually more serious difficulties to prove the *mens rea* of a businessman. While the *van Kouwenhoven* case may provide an example of those kinds of evidentiary problems, the *van Anraat* case, on the other hand, shows that such problems are not insurmountable.

26 For their professional activities, the accused, leading members of the *Radio-Télévision Libre des Mille Collines* (RTL) and the *Kangura* newspaper, were convicted for conspiracy and direct and public incitement to commit genocide; Judgment, *Ntakirutimana, Barayagwiza & Ngeze* (ICTR-99-52-T), Trial Chamber, 3 December 2003.

27 Alfred Musema, owner of the Gisovu Tea Factory near the city of Kibuye, was found guilty of genocide and crimes against humanity (extermination and rape). But this verdict was imposed for personally attacking Tutsi and raping a Tutsi woman, ordering his employees to kill Tutsi, and aiding and abetting in other killings, *not* for his business activities; Judgment, *Musema* (ICTR-96-13-T), Trial Chamber, 16 November 2001, §§ 889–926 and 942–951. Cf. *infra* Section 5.

28 Judgment, *Ntakirutimana & Ntakirutimana* (ICTR-96-10-A & IT-96-17-A), Appeals Chamber, 13 December 2004, § 530.

29 Judgment, *Blagojević & Jokić* (IT-02-60-A), Appeals Chamber, 9 May 2007, § 189.

2. *Mens rea*

With regard to the *mens rea*, the aider or abettor must know that his contribution facilitates the commission of the crime in question. That mental element does not require full or even certain knowledge but may be satisfied by 'awareness that the principal will be using, is using, or has used the assistance for the purpose of engaging in criminal conduct'.³⁰ With respect to a future conduct of the perpetrator, the aider and abettor must be aware³¹ of the substantial likelihood that a certain³² crime will be committed. Some writers have demanded a higher threshold when suggesting the aim of furthering the main crime — in general³³ or with regard to the specific form of assistance.³⁴ This problem will be analysed in more detail in the next section as it was intensified by Article 25(3)(c) of the ICC Statute. In the case law of the ad hoc tribunals the described *mens rea* threshold was applied also with regard to aiding and abetting specific intent crimes: In *Krstić* the Appeals Chamber of the ICTY decided that knowledge of the principal's genocidal intent suffices — without the need that the aider and abettor harbours himself the intent to destroy a protected group in whole or in part.³⁵

B. Article 25(3)(c) Rome Statute: Aiding and Abetting or Otherwise Assisting

As regards Article 25(3)(c) ICC Statute, the discussion on the exact requirements of aiding and abetting will certainly be reopened. Eser has summarized his inquiry into that subject by stressing that, while the objective requirements of aiding and abetting are lower than its counterpart in the jurisprudence of the ad hoc tribunals, this may be balanced by a higher subjective standard.³⁶ Yet, this interpretation has still to be tested in practice.

30 A. Cassese, *International Criminal Law* (New York: Oxford University Press, 2008), at 215.

31 Cassese, *supra* note 30, at 216 includes recklessness or *dolus eventualis*; contra, however, W. Schabas, *The UN International Criminal Tribunals* (New York: Cambridge University Press, 2006), at 308.

32 Cassese has advocated that the aider and abettor only has to know that the perpetrator will engage in a crime, but not its specific nature, *supra* note 30, at 216.

33 Cassese, *supra* note 30, at 217 (but cf. also *ibid.*, at 63–64 with regard to 'a war crime such as killing a prisoner of war or an enemy civilian' knowledge is sufficient); cf. with regard to the domestic common law debate also Reggio, *supra* note 6, at 677–680.

34 Schabas, *supra* note 31, at 306 et seq. referring in footnote 79 to the *Zyklon B* case.

35 Judgment, *Krstić* (IT-98-33-A), Appeals Chamber, 19 April 2004, § 140; G. Werle, *Principles of International Criminal Law* (2nd edn., The Hague: Asser Press, 2009), marginal no. 492; sceptical Mettraux, *supra* note 20, at 212 et seq. and Schabas, *supra* note 31, at 307. The relation between Art. 7(1) and Art. 4(3)(e) ICTYSt. will not be analysed as this source of difficulties and misunderstandings has not been taken over in the ICC Statute.

36 A. Eser, 'Individual Criminal Responsibility', in A. Cassese, P. Gaeta and J.R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. I (New York: Oxford University Press, 2002), at 801.

1. *Actus reus*

The relevant wordings of the ICC Statute's provision on aiding and abetting or otherwise assisting, in comparison with the tribunal's Statutes, does not necessarily imply an alteration to the established meaning of criminal assistance. On the contrary, the (particular) example referred to in Article 25(3)(c) ICC Statute, i.e. providing the means for the commission of a crime, seems to be perfectly sound when applied to a substantiality standard. It will be up to the ICC to decide whether the absence of the substantial formula implies that such higher threshold was consciously rejected³⁷ or not. Regarding both the material grounds as well as the principle of complementarity, in this writer's opinion, the better answer to this problem is that the question was left to the discretion of the ICC. As the 'substantial'-test was established and hardened by customary international law, it seems to be at odds to loosen it for the purpose of catching minor or very distant contributions. Furthermore, such a turn-around would fly into the face of the ICC's task to complement national judicial efforts in the fight against impunity. Assistance *not* of a substantial character can hardly ever meet the gravity threshold provided in Article 17(1)(d) ICC Statute as one of the preconditions assuring the Court's complementary function. Accordingly, this author suggests following the example of the ad hoc tribunals that, by referring to Article 2(3)(d) of the 1996 Draft Code, have read the substantial requirement into the respective statutory provisions on individual responsibility.³⁸ In international criminal law cases, until today, neither courts on the international nor at the domestic level have dealt with minor and/or very distant forms of assistance. There seems to be no material reason to change that practice with respect to business leaders.

Be that as it may, with regard to business activities one major task that has to be tackled is the drafting of a typology of possible support by business activities,³⁹ which would be helpful at least with a view to the ICC's Prosecutor's discretion. One may think of distinguishing between the following, under ordinary circumstances: *perfectly legal services* (defending an accused if not accompanied by connivance; medical treatment if not for the purpose of facilitating torture); providing *per se* completely *harmless goods* such as money or credit; delivering *dangerous goods* as (permitted or prohibited) weapons or 'dual use' goods (e.g. Zyklon B gas or airplanes which can be used also for military purposes); and buying '*tainted*' raw materials or products or providing

37 Cf. W. Schabas, *An Introduction to the International Criminal Court* (3rd edn., New York: Cambridge University Press, 2007), at 213.

38 The ICJ Expert Panel has argued in the same direction, *supra* note 5, at 18; Ambos, *supra* note 19, at 757 marginal no. 21 seems to have come to the same result as he quotes the relevant case law of the ad hoc tribunals without any reservation when summing up his discussion of Art. 25(3)(c) ICCSt.

39 Yet, such work cannot be the task of a paper dealing with the modes of business leaders' responsibility.

specific, crime-related products or services (e.g. the infamous crematoria installed by Topf & Söhne⁴⁰).

2. *Mens rea*

The case for a stricter *mens rea* standard with respect to the ICC's statutory provision is indeed much stronger than the one for a lower objective threshold, as aiding and abetting entails the *purpose* of facilitating the commission of a crime. Acting 'for the purpose of facilitating the commission of such crime' seems to refer to the culpability mode of purpose as defined, e.g. in § 2.02(a) of the American Model Penal Code (MPC), which served as an important source for that part of the ICC Statute.⁴¹ This purpose-based reading is supported by a comparison with Article 25(3)(d) ICC Statute on the contribution to a group crime, as this provision expressively distinguishes between assistance by intent and assistance by knowledge. Therefore, most legal scholars seem to vote for a purpose-based reading of Article 25(3)(c) ICC Statute.⁴² According to this view, the aider and abettor must share the intent of the principal.⁴³ The *Zyklon B* case has been cited in favour of the opinion that the one who sells gas 'to the operators of a camp *knowing* that they are using it to exterminate members of a national, ethnic, racial or religious group *intends* to commit genocide'. Schabas continues by pointing to the irrelevance of the aider and abettor's motive which must be sharply divided from intent — the first being the deeper ground of the action, the second its aim or scope.⁴⁴ The reasoning advanced by Schabas, theoretically, is perfectly sound although, as a consequence, in practice a lot of intricate problems may arise. A lawyer with a civil law background may also identify two further problems: first, it has to be determined at which point in time the assistant's knowledge of the principal's purpose (to which end the principle would use the provided goods, e.g. the *Zyklon B*), turns into shared intent? And, second, when does such shared intent constitute participation in a joint criminal enterprise?

40 Cf. *supra* note 7.

41 The wording of § 2.06(3)(a) MPC — 'with the purpose' — is very similar to the ICC provision. With regard to the MPC, 'purpose' is described relative to the nature of the conduct or its result as (i) 'conscious object to engage in conduct of that nature or to cause such result' and, relative to attendant circumstances, as (ii) awareness of their existence or the belief or hope that they exist; one could argue whether the purpose of aiding or abetting refers to the first or the second variant or both — or to something different yet to be defined. The latter alternative seems to be most likely as it is not one's own but *another person's future conduct* which constitute the point of reference aiding and abetting is referring to. See P.H. Robinson, 'Should the Criminal Law Abandon the Actus Reus – Mens Rea Distinction?' in S. Shute, J. Gardner and J. Horder (eds), *Action and Value in Criminal Law* (New York: Clarendon Press, reprint 2003), 187–211, at 205.

42 Cf. Ambos, *supra* note 19, at 760 marginal no. 23; Eser, *supra* note 36, at 801; Werle, *supra* note 35, marginal no. 492.

43 Dressler, *supra* note 17, at 514.

44 Schabas, *supra* note 31, at 307 (emphasis added).

This writer prefers an interpretation of 'intent' which includes certain knowledge⁴⁵ as a mode of intent which should be treated equal to 'purpose' or 'conscious object'.⁴⁶ Such an understanding, with regard to the consequences of a person's conduct, could probably be based on the equation of intent and knowledge in Article 30 ICC Statute, the provision on mental element. According to Article 30(3) ICC Statute 'knowledge' means awareness that a consequence 'will occur in the ordinary course of events'. Article 30(2)(b) ICC Statute *verbatim* provides for exactly the same formula as one of two alternative definitions of 'intent'.⁴⁷ One may, however, also argue *contra* emphasizing that the formula 'for the purpose of facilitating the commission of such crime' (Article 25(3)(c) ICC Statute) will be caught by the 'otherwise provided' clause of Article 30(1) ICC Statute.⁴⁸

This author will now return to the *Zyklon B* case and follow *de arguendo* such an understanding. While defendant Tesch's irrelevant motive indeed must have been financial greed, he could have argued that his intention was only to keep his company running profitably and — for the sake of the employees — surviving the war time. Without supplying the deadly gas, Tesch could have claimed, he may not have reached his ultimate aim to get his company through wartime. Yet, in the view of this author, he would not have escaped his fate as, under such conditions, the delivery of the poisonous gas constitutes a *pre-requisite necessarily linked to the ultimate purpose* Tesch wanted to pursue.⁴⁹ Hence, delivering the *Zyklon B* has to be considered as an *integral part* of the purpose the defendant decided to achieve or, to put it differently, in sake of reaching his ultimate economic aim he had *shared* the genocidal intent of the SS perpetrators.⁵⁰ One could reach the same result probably more easily and also more directly by following the argumentation put forward in a partially dissenting opinion attached to the *Krstić* Appeal Judgment. Judge Shahabuddeen has observed that the perpetrator's intent 'is not the same as the intent of the aider and abettor... The latter's intent is to provide the means by which the perpetrator, if he wishes, can realise his own intent'.⁵¹

If the ICC does not follow one of those interpretations, which allow a more expansive reading of 'for the purpose', there seems to be no other alternative

45 Cf. the summing up of the Judge Advocate, LRTWC, Vol. I, at 101.

46 H. Vest, 'A Structure-Based Concept of Genocidal Intent', 5 *JICJ* (2007) 781–797; cf. for a similar approach with regard to its result; G. Williams, 'Oblique Intention', 46 *Cambridge Law Journal* (1987) 417–438, at 418–430. Counterbalancing 'the objective versatility of the facilitative act' by a 'flight in subjectivity' as highlighted in C. Burchard's contribution to this issue of the *Journal*, in the view of this writer, does *not* make sense. Therefore, I would suggest rewriting Art. 25(3)(c) in terms of a 'knowledge-based' approach.

47 The other is that a person 'means to cause that consequence'.

48 Eser, *supra* note 36, at 801.

49 See for such argumentation K. Kühl, *Strafrecht. Allgemeiner Teil* (5th edn., München: Franz Vahlen, 2005), at 74 marginal no. 35.

50 The ICJ Expert Panel has noticed the fact that a business official knowingly aiding a crime 'in order to make a profit... could be interpreted as providing a further incentive to facilitate the crime "on purpose"', *supra* note 5, at 22.

51 Partial Dissenting Opinion of Judge Shahabuddeen, *Krstić*, *supra* note 35, § 66.

than to dismiss most cases involving business leaders, as they will act primarily, or at least simultaneously, for economic purposes. At least with respect to business leaders who provide the essential means for the commission of war crimes, e.g. in the *van Anraat* case the delivery of 1,100 tons of TGD enabling the production of mustard gas, it would hardly seem understandable if 'for the purpose' was not read expansively.

C. 'Neutral' Assistance: How Far Can Accomplice Liability Be Stretched?

If one agrees with the proposed understanding of Article 25(3)(c) ICC Statute as requiring a substantial contribution, the minimal limits of criminal responsibility will coincide with that standard which is still vague enough and needs further clarification. If one follows the opposite solution by rejecting any kind of (general) minimal threshold, those limits would have to be defined *ab ovo*.

In the understanding of the German speaking criminal law doctrine, 'neutral' assistance is a contribution to a crime which, per se, seems to be harmless, be it private or professional, e.g. loaning a kitchen knife or selling African deer meat. The legal problem arises when, regarding the first example, the loaner knows that the borrower will use the knife for threatening somebody to rob him. The second example has been taken from a decision of the Swiss Federal Court where large quantities (40 tons) of African deer were sold with correct declaration but in the clear awareness that, due to Swiss customer's preferences for native deer meat, nearly all of that meat would be resold and/or served under a false declaration. The court convicted the businessmen for complicity in fraud arguing that such business behaviour could, under the prevailing conditions, only have the sense of contributing to a crime.⁵² This reasoning is in line with the *van Anraat* case where the judges stated that the huge amounts of TDG the accused delivered to Iraq could not be used for agricultural purposes only and, therefore, were to be used at least partially by the armed forces.⁵³

For the purpose of defining the critical limit where 'neutral' assistance becomes punishable, the common law theory seems to refer to a principle for which the *causa proxima* formula stands. At present, writers are usually referring to the necessity of a case-by-case assessment.⁵⁴ While admitting that this is not satisfactory, the scope of this article does not allow for investigating the problems connected with that causal (or attributive) theory.⁵⁵ For much the same reasons, an in-depth analysis of the civil law discussion on the limits of accomplice liability is not possible. In the German speaking countries, especially in Germany itself, the scholarly discussion on the 'neutral' assistance

52 *Entscheidung des Schweizerischen Bundesgerichts* (BGE), Vol. 119 (1993), part IV, at 289 et seq.

53 Cf. *supra* note 15.

54 Reggio, *supra* note 6, at 671–672.

55 And this author with his civil law background seems not to be the right person for such a task. Cf. for a first analysis, K.J.M. Smith, *A Modern Treatise on the Law of Criminal Complicity* (Oxford: Clarendon Press, 1991), at 82 et seq.

problem has produced a huge and complicated array of conflicting concepts.⁵⁶ Following the *actus reus* — *mens rea* distinction one could confront subjective with objective theories: The 'subjective theory' focuses on *mens rea* and punishes 'neutral' assistance only when it has been committed with *dolus directus* (intent or knowledge); *dolus eventualis* normally will not suffice.⁵⁷ Objective doctrines are based on aspects of a general theory of objective attribution or imputation (*objektive Zurechnung*), which seems to constitute a certain kind of parallel to the proximate cause approach, trying to establish a theoretical basis for both the extent and the limits of individual criminal responsibility by, e.g. differentiating between individual domains of influence and accountability. According to one objective sub-doctrine, assistance, which is only (part of a) professional and per se permitted conduct, is not punishable at all. Another objective 'theory' argues that neutral 'assistance' may only incur criminal responsibility when it (clearly) increases a prohibited risk that the primary party commits the respective crime. This author, while not overlooking its limits, has some sympathy for this last approach. From that perspective, the owner of a shop delivering food and beverages to the guards of a concentration camp, is not responsible as an accomplice for crimes committed in that camp. Such conduct causes neither a prohibited nor an increased risk — nor any risk at all — that a crime will be committed in the camp.⁵⁸

3. Article 25(3)(d) Rome Statute: Contribution to a Group Crime

A person who contributes 'in any other way' to the, at least attempted, commission of a crime 'by a group of persons acting with a common purpose' will,

56 For a survey in relation to the discussion in international criminal law see P. Rackow, *Neutrale Handlungen als Problem des Strafrechts* (Frankfurt am Main: Peter Lang, 2007), at 483 et seq. See also the contribution by R. Hefendehl in this issue of the *Journal*.

57 The established case law of the Swiss Federal Court on this subject mainly seems to follow this argumentation; cf., e.g. *Entscheidung des Schweizerischen Bundesgerichts* (BGE), Vol. 119 (1993), part IV, at 289 et seq.; while also discussing the aspect of the 'prohibited increase of risk' approach (292 et seq.). The court has extended this jurisprudence also to a case of instigation by a journalist asking an administrative secretary to give secret information on previous convictions of arrested suspects after the (in Switzerland) so-called 'century robbery' at the 'Fraumünster' Post Office in Zürich: BGE 127 (2001), part IV, at 122.

58 Contra K. Ambos, *Der Allgemeine Teil des Völkerstrafrechts. Ansätze einer Dogmatisierung* (Berlin: Duncker & Humblot, 2002) 631–635, at 632, arguing that the merchant would contribute to the ongoing oppression and extermination. In connection with the German domestic trials against Nazi killers some 30–40 years ago, a scholarly discussion on the limits of the accomplice liability of persons belonging to professions like train drivers, station masters, workers constructing a concentration or extermination camp for crimes perpetrated therein has developed; see Rackow, *supra* note 56, at 486–499; H. Vest, 'Verantwortlichkeit für wirtschaftliche Betätigung im Völkerstrafrecht?', 119 *Schweizerische Zeitschrift für Strafrecht* (2001) 239–256, at 252–253 with footnote 61.

according to Article 25(3)(d) ICC Statute, also incur individual criminal responsibility. Cassese has recently emphasized that the 'gist' of the provision itself does not constitute a (new) regulation on joint criminal enterprise (JCE) to which the expression 'common purpose' is only referring to, but 'a different mode of responsibility'.⁵⁹

Regarding the *actus reus*, this particular form of contribution requires the commission or attempted commission of a crime by a group acting with a common purpose. It has been forwarded that a 'group' 'must consist of at least three persons who are connected by the same purpose'.⁶⁰ Seen from a systematic perspective, assisting only one principal 'in any other way' (than regulated in Article 25(3)(a)–(c) ICC Statute), would not suffice for criminal responsibility. It has been noticed that contribution to a group crime establishes 'the lowest objective threshold for participation'.⁶¹ Imagine, however, a slightly altered *Zyklon B*-like scenario not amounting to physical assistance because the accomplice lacks the required *mens rea*; such a kind of contribution certainly constitutes a very severe case covered by Article 25(3)(d) ICC Statute.⁶²

The *mens rea* of this kind of assistance must be intentional⁶³ requiring either (i) 'the aim of furthering the criminal activity of criminal purpose of the group' or (ii) 'the knowledge of the intention of the group to commit a crime'. In the first case, the participant must share the intent to further the criminal activity or purpose of the group 'where such activity or purpose involves the commission of a crime within the jurisdiction of the Court'. The second alternative calls for the knowledge that the group's intention is directed towards a certain crime.⁶⁴ Since the assistance is referring to a future conduct of a group of persons, the substantial likelihood that a certain crime will be committed may be enough.⁶⁵ If, e.g. in the case of an activity like an arms deal, the prosecution can only establish that the respective business leader has acted with knowledge and lacks purpose, Article 25(3)(d)(ii) ICC Statute may serve as a rescue clause in relation to the predominant reading of Article 25(3)(c) ICC Statute.

4. Participation in a Joint Criminal Enterprise or Joint Control?

As indicated above, the 'extended form of aiding and abetting' in Article 25(3)(d) ICC Statute is connected with contribution to a crime 'by a group of

59 Cassese, *supra* note 30, at 213.

60 Eser, *supra* note 36, at 802.

61 Ambos, *supra* note 19, at 761 marginal no. 25.

62 G. Fletcher and D. Ohlin, 'Reclaiming Fundamental Principles of Criminal Law and the *Darfur Case*', 3 *JICJ* (2005) 539–561, at 549.

63 See the in-depth discussion with Ambos, *supra* note 19, at 761–762, marginal no. 26–28.

64 Eser, *supra* note 36, at 803; Ambos, *supra* note 19, at 762–763, marginal no. 29–30.

65 But see the contribution of C. Burchard in this issue of the *Journal*.

persons acting with a common purpose'. This formulation, while not defining the JCE requirements, certainly reflects a reference to the JCE doctrine.⁶⁶ The three categories of JCE — the basic, systemic and extended form — have been the subject of continuing and sometimes controversial debate since the 1999 landmark decision of the Appeals Chamber in *Tadić*.⁶⁷

A. Article 25(3)(a) and (d) Rome Statute

As Article 25(3)(d) ICC Statute is referring to a common purpose one may ask whether — and when answering in the positive, to what extent — JCE has become part of the Statute.⁶⁸ The fact that no other provision mentions JCE does not clarify the issue. Yet, the possibility remains that the basic and, at least partly, the systemic form of the JCE may be covered by Article 25(3)(a) ICC Statute on perpetration, in particular its second, i.e. 'jointly with another' — and probably its third, i.e. 'through another' — alternative. The statutory regulation on the modes of individual criminal responsibility seems to be just another example of the compromises reached by the 1998 Rome States Assembly. Accordingly, there is little to wonder in that authors from both common law and civil law backgrounds have seen Article 25(3)(a) ICC Statute as representing their own legal tradition.⁶⁹

The Pre-Trial Chambers I and II of the ICC have summarily dismissed JCE in their first decisions on the confirmation of charges.⁷⁰ By contrasting the ICTY's case law on JCE and the decisions of ICC's Pre-Trial Chamber, one cannot escape the impression that the ICTY, on the one hand, is relying on the common law's joint criminal enterprise while rejecting the civil law concept of co-perpetration and the ICC, on the other hand and to the exact opposite, is completely negating JCE by exclusively referring to civil law's

co-perpetration⁷¹ and indirect perpetration through another person,⁷² both on the basis of the so-called '(joint) control of the crime' approach.⁷³ An article on business leaders' responsibility does not appear to be the appropriate place to comment on such an important development, but it is yet unavoidable to write a few words on the issue. In the view of this author both theories have their merits and flaws. Not only 'common plan, design or purpose' but also 'control' seems to be a rather vague concept where a lot of specification remains to be done. To give only two selected and, probably, selective examples:

On the one hand, with regard to the element of the common plan requirement of the joint criminal enterprise, 'it does not have to be an agreement of a contractual kind'. 'Congruent, even if separate, views will do'.⁷⁴ It is '(t)he interaction and co-operation among persons — their joint action — in addition to their common purpose, that makes those persons a group'.⁷⁵ They 'must be shown to act together, or in concert with each other'.⁷⁶ In the view of this writer, such an understanding appears to be a valuable advantage because it better matches the reality of collective or systemic action typical of most international crimes than the more formal mutual awareness and acceptance provided by the theory of joint control.

With respect to *joint control*, on the other hand, a participant is only a *co-perpetrator* when he (i) makes a coordinated and essential contribution and (ii) is able to frustrate the commission of the crime by withdrawing the agreed contribution.⁷⁷ This requires a test through a hypothetical judgment.⁷⁸ Regarding the collective and systemic nature of most international crimes and the long duration of perpetration, in the view of this writer, this test will lead to serious troubles, particularly on the leadership and organisational level.⁷⁹

Due to the typically collective or systemic perpetration of most international crimes,⁸⁰ somewhat new problems of international criminal law cases arise

66 Decision on Confirmation of Charges, *Lubanga* (ICC 01/04-01/06), Pre-Trial Chamber I, 29 January 2007, at §§ 334 et seq.

67 Judgment, *Tadić* (IT-94-1-A), Appeals Chamber, 15 July 1999, §§ 185–232. See with regard to a comprehensive and critical survey of the development of the JCE doctrine in a textbook, A. Zahar and G. Sluiter, *International Criminal Law: A Critical Introduction* (New York: Oxford University Press, 2008), at 221 et seq., and the monographs of C. Damgaard, *Individual Responsibility for Core Crimes: Selected Pertinent Issues* (Berlin/Heidelberg: Springer Verlag, 2008), at 127–261 and H. Olásolo, *The Criminal Responsibility of Senior Political and Military Leaders as Principals to International Crimes* (Oxford and Portland: Hart Publishing, 2009), at 153 et seq.

68 Cf. Reggio, *supra* note 6, at 647.

69 See M.D. Dubber, 'Criminalizing Complicity. A Comparative Analysis', 5 *JICJ* (2007) 977–1001, at 1000, pointing to § 2.06 MPC; J. Vogel, 'Individuelle Verantwortlichkeit im Völkerstrafrecht. Zugleich ein Beitrag zu den Regelungsmodellen der Beteiligung', 114 *Zeitschrift für die gesamte Strafrechtswissenschaft* (2002) 403–436, at 422, note 88, 427 and corresponding note 112, referring to § 25(2) German Criminal Code.

70 *Lubanga*, *supra* note 66, § 329; Decision on Confirmation of Charges, *Katanga and Ngudjolo Chui* (ICC 01/04-01/07), Pre-Trial Chamber I, 30 September 2008, §§ 506–510.

71 *Lubanga*, *supra* note 66, §§ 342–367; Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba, *Bemba* (ICC-01/05-01/08), Pre-Trial Chamber II, 15 June 2009, §§ 346 et seq.

72 *Katanga and Ngudjolo Chui*, *supra* note 70, §§ 495–518; Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, *Al Bashir* (ICC-02/05-01/09), Pre-Trial Chamber I, 4 March 2009, §§ 209–223.

73 *Lubanga*, *supra* note 66, §§ 330–332, 338; *Katanga and Ngudjolo Chui*, *supra* note 70, §§ 480–486 and, with regard to 'control over the organisation', §§ 500–510.

74 Partially Dissenting Opinion of Judge Shahabuddeen, Judgment, *Brānin* (IT-99-36-A), Appeals Chamber, 3 April 2007, § 5, 7.

75 Judgment, *Krajišnik* (IT-00-39/40-T), Trial Chamber, 27 March 2006, § 884.

76 *Krajišnik*, *supra* note 75, § 884.

77 *Katanga and Ngudjolo Chui*, *supra* note 70, §§ 524–525.

78 *Lubanga*, *supra* note 66, §§ 342, 347.

79 Positive on this issue, however, T. Weigend, 'Intent, Mistake of Law and Co-perpetration in the *Lubanga* Decision on Confirmation of Charges', 6 *JICJ* (2008) 471–487, at 480.

80 With regard to approaches trying to determine individual responsibility by simultaneously referencing the typically collective and systemic nature of most international crimes: K. Ambos, 'Joint Criminal Enterprise and Command Responsibility', 5 *JICJ* (2007) 159–183, at 179 et seq.; *idem*, 'Command Responsibility and Organisationsherrschaft: Ways of Atributting

and, therefore, it appears to be a better choice to develop new adjusted juridical solutions than to rely on one's own national legal background. Accordingly, a solution must not be assessed by the amount of common law or civil law sources and elements it might finally contain. Trying to take the best parts from differing judiciary traditions in order to improve the standard by finding a new synthesis better fitted for the new challenges of stately or otherwise organized criminality may provide a more forward looking alternative.

B. Business Leaders as Participants in a JCE or Co-perpetrators?

As the post-World War II cases referred to in the introduction may have shown, conduct of business leaders usually has concentrated on opportunistic contributions like the exploitation of slave or forced labour. Yet, it is not impossible for a business leader to become and act as a participant in a JCE or as a co-perpetrator. Farrell has developed a both useful and practical example:

[A] corporation and governmental authorities in an area engage in a common objective to forcibly remove local people from places where they have the lawful right to reside in order to facilitate the extraction of oil. The corporation engages in discussions with government leaders about how to remove these people from areas where the oil company intends to operate. The corporation provide means and equipment necessary to carry out the unlawful displacement operations.⁸¹

Such a 'joint venture'⁸² could serve as a scenario for the purpose of testing conflicting doctrines. The pursuit of, in the long run, different ultimate goals may not hinder a shared intent with regard to the joint commission of certain crimes amounting to a (probably more limited) joint criminal enterprise. The explicit common plan⁸³ reached by such unequal partners as a warlord and a business leader may typically only cover the protection of the extraction and the transport and the indebted price. The really interesting question, however, must be whether ulterior crimes are silently included in such an undertaking or, in particular, by continuing the relationship, will become integrated at a certain time. In practice, a continuing relationship may be an indication of a common plan and a shared intent. Yet, as the evidentiary standard for shared

International Crimes to the "Most Responsible", in A. Nollkaemper and Van der Wilt (eds), *System Criminality in International Law* (Cambridge: Cambridge University Press, 2009) 127–157, at 142 et seq.; H. van der Wilt, 'Joint Criminal Enterprise: Possibilities and Limitations', 5 *JICJ* (2007) 91–108, at 102 et seq.; idem, 'Joint Criminal Enterprise and Functional Perpetration', in Nollkaemper and Van der Wilt, *ibid.*, 158–182, at 176 et seq.

81 See the contribution by N. Farrell in this issue of the *Journal*, at 879.

82 The ICJ Expert Panel is, at least implicitly, acknowledging such a possibility, *supra* note 5, at 27–30.

83 Yet, to this author, the objective element of a common plan, purpose or design, notwithstanding its classification within the elements of the *actus reus*, rather seems to constitute a mixed element as it refers also to the criminal mind of the participants. In the view of Weigend, the gist of that element 'is the subjective meeting of minds'; *supra* note 79, at 480, note 37.

intent is quite high, for the business joint venture example it already may be too high.⁸⁴

With regard to co-perpetration by joint control over the crime the subjective element or *mens rea* requires that the co-perpetrators are 'mutually aware and mutually accept that implementing their common plan will result in the realisation of the objective elements of the crimes'.⁸⁵ The level so established is even higher than the shared intent both with regard to the legal element of mutual awareness and acceptance and, consequentially, the demands for its proof. With respect to business leaders in the joint venture scenario, the objective element of a '[c]oordinated essential contribution by each perpetrator resulting in the realisation of the objective elements of the crime' leading consequently to his 'power to frustrate the commission of the crime by not performing his task'⁸⁶ may be legally and evidentiary even more demanding. For such a conclusion one has only to point to the case of an arms trader like van Kouwenhoven presumably belonging to the inner circle of the former Liberian President Taylor: Here, the prosecution was not even capable of collecting enough evidence to convince the Appeals Court that the accused had violated the UN embargo.

5. Superior Responsibility of Civilians

Business leaders may also become criminally liable under the doctrine of superior responsibility.⁸⁷ Article 28(b) ICC Statute is the first regulation which *explicitly* deals with 'superior and subordinate relationships not described in paragraph (a)' on military commanders. Subparagraph (b)(ii) — which has no equivalent in paragraph (a) — states that the subordinates' crimes must concern activities within the superior's *effective* responsibility and control.⁸⁸ A superior is responsible if he fails to take the necessary and reasonable measures either to prevent or to suppress⁸⁹ an international crime committed by a

84 Farrell, *supra* note 81, at 880.

85 *Katanga and Ngudjolo Chui*, *supra* note 70, §§ 533 ff.

86 *Katanga and Ngudjolo Chui*, *supra* note 70, §§ 524–525.

87 ICJ Expert Panel, *supra* note 5, at 32–35. Most early cases before the ad hoc tribunals, however, were of (higher) representatives within the civil service (including a former Prime Minister (Kambanda) or lower-ranking prison camp authorities; B.B. Jia, 'The Doctrine of Command Responsibility: Current Problems', 3 *Yearbook of International Humanitarian Law* (2000) 131–165, at 132.

88 A military commander by means of his disciplinary power will have overall control and authority over all the activities of his forces. In a paper A. Zahar, primarily referring to the ICTY ruling in *Delalić et al.* (Judgment, *Delalić et al.* (IT-96-21), Trial Chamber, 16 November 1998; confirmed by the Appeals Chamber Judgment (IT-96-21-A), 20 February 2001) has synthesized the prerequisites of effective control: 'Command Responsibility of Civilian Superiors for Genocide', 14 *Leiden Journal of International Law* (2001) 591–616, at 607–613.

89 The fundamental difference in terms of wrongdoing and culpability between these two alternatives is often neglected, as M. Damaška notes correctly; 'The Shadow Side of Command Responsibility', 49 *The American Journal of Comparative Law* (2001) 455–496, at 461–470.

subordinate or fails to punish the perpetrators of such crime already committed. His responsibility may be derived from *de jure* or *de facto* authority. In the following, two of the three necessary elements will be discussed briefly: The superior-subordinate-relationship and the mental requirement. The failure to take all necessary and reasonable measures will not be treated.

With regard to the superior-subordinate-relationship it is well established that the superior must be in a position of 'effective control' in the sense of having the 'material ability to prevent or punish'; substantial influence is not enough.⁹⁰ The degree of control of a civilian leader over a subordinate must be similar to that of his military counterpart — but its manner and nature may be different.⁹¹ Although it is not possible to go into detail, it seems not unfair to say that, in practice, the effective control element of a civilian superior is — in the wording of Article 28(b) ICC Statute — more about submission of 'the matter to the competent authority for investigation and prosecution' than about 'power to prevent or repress' the commission of the subordinate's crime.⁹²

With respect to the *mens rea* of superior responsibility, the standard for a civilian superior is either knowledge of the crimes that will be or were already committed or conscious disregard of information clearly indicative of such crimes. In comparison with the one required of a military superior, the latter constitutes a much higher mental threshold.

A. *Musema* — an Untypical Business Leader

The *Musema* judgment of the ICTR mentioned above⁹³ seems to be the only newer precedent delivered by an international court with regard to superior responsibility of civilians. The Trial Chamber has noted that 'the influence at issue in a superior-subordinate command relationship often appears in the form of psychological pressure'.⁹⁴ In summarizing its factual findings, the Chamber held the accused had exercised *de jure* authority and *de facto* control over the Gisovu Tea Factory's employees 'while they were on the factory's premises' and while they were engaged in their respective professional duties.⁹⁵

90 B. Burghardt, *Die Vorgesetztenverantwortlichkeit im völkerrechtlichen Straftatsystem. Eine Untersuchung zur Rechtsprechung der internationalen Strafgerichtshöfe für das ehemalige Jugoslawien und Ruanda* (Berlin: Berliner Wissenschafts-Verlag, 2008), at 114–115.

91 G. Mettraux, *The Law of Command Responsibility* (Oxford: Oxford University Press, 2009), at 188.

92 The *Aleksovski* Trial Chamber has gone very far in this direction: 'The possibility of transmitting reports to the appropriate authorities suffices once the civilian authority, through its position in the hierarchy, is expected to report whenever crimes are committed, and that, in light of this position, the likelihood that those reports will trigger an investigation or initiate disciplinary or even criminal measures is extant'; Judgment, *Aleksovski* (IT-95-14/1-T), Trial Chamber, 25 June 1999, § 78; see the partly diverging opinions of Burghardt, *supra* note 90, at 114–119, 150–151, and Mettraux, *supra* note 91, at 156 et seq, particularly at 188–190.

93 Cf. *infra* Section 2.A.1.

94 *Musema*, *supra* note 27, § 140.

95 *Ibid.*, § 880. The Chamber, however, was not satisfied beyond reasonable doubt of his superior responsibility over the population of Kibuye *prefecture*, including the plantation workers (§ 881).

Strangely enough, on this basis, the Trial Chamber convicted Musema — who had already incurred direct responsibility for personally committing crimes, for ordering and for aiding and abetting some of the crimes of his subordinates — also on the basis of superior responsibility, by having failed to take the necessary and reasonable measures to prevent said crimes and to punish his subordinates.⁹⁶ Apart from the very problematic inference from Musema's substantial social and economic influence to the element of effective control⁹⁷ and the position of a superior, the case has *nothing* to do with business activities at all. A proper business case of superior responsibility may be, e.g. a business leader not preventing his subordinates to sell weapons to a government or rebel group known for widespread or systematic war crimes or crimes against humanity.⁹⁸

B. Open Questions

It is important to increase efforts to investigate the very rationale of the mode of superior responsibility.⁹⁹ If criminal law establishes a duty to act, a specific justification is required which allows equating an omission with a positive act as, e.g. that of a superior who controls high risks. In Germany, Austria and Switzerland this is called a 'position of guarantor' (*Garantenstellung*).¹⁰⁰ In the case of a military commander or superior, the disposition over armed forces and their particular objective and personal risks seems to legitimate such a duty.¹⁰¹ Regarding business leaders, one could ask if there are similar risks the superior has to oversee. In this author's view, such risks, however, should in any case be directly connected with the type of business pursued. Coming back to *Musema*, it seems absolutely clear that the production of tea

96 *Musema*, *supra* note 27, §§ 892 et seq., 898–900, 905–906, 914–915, 919–920, 924–925, 936 and 950–951.

97 See, e.g. *pro* J.A. Williamson, 'Command Responsibility in the Case Law of the International Criminal Tribunal for Rwanda', 13 *Criminal Law Forum* (2002) 365–384, at 370–372; *contra* Zahar, *supra* note 88, at 601–604.

98 See the 'leading decision' of the Swiss Federal Criminal Court concerning the owner and CEO of the 'Werkzeugmaschinenfabrik Oerlikon', Bührle, *Entscheidungen des Schweizerischen Bundesgerichts*, Vol. 96 (1970), Part IV, 155 et seq. In the view of the Court it could not be established that the accused Bührle himself had illegally ordered the sale of weapons in areas of tensions subject to an embargo decision of the Swiss government. Yet, as Bührle admitted having learned of the practice, the Court ruled that, with respect to his unique position in the corporation, he would have been obliged to prohibit these deliveries immediately; see M. Schubarth, 'Zur strafrechtlichen Haftung des Geschäftsherrn', 92 *Schweizerische Zeitschrift für Strafrecht* (1976) 370–396; H. Vest, 'Die strafrechtliche Garantenstellung des Geschäftsherrn', 105 *Schweizerische Zeitschrift für Strafrecht* (1988) 288–311. These seem to be the same evidentiary problems backing superior responsibility in international criminal law; Damaška, *supra* note 89, at 471, 481.

99 This failure may be one aspect of the civilian superior responsibility's ambiguity M. Nybondas has noticed; 'Civilian Superior Responsibility in the *Kordić* Case', *Netherlands International Law Review* (2003) 59–82, at 81–82.

100 Cf. with regard to superior responsibility Weigend, *supra* note 79, at 1002–1005.

101 Weigend, *supra* note 79, at 1004.

as such does not constitute any risk of perpetrating or contributing to war crimes, crimes against humanity and genocide at all. Accordingly, the situation in which the employees of a corporation form a militia does *not* amount to a typical risk such a private corporation faces and does not affect the corporate field of which the owner may have effective control.¹⁰² The situation changes when a business corporation is working in a sector such as the exploitation of natural resources¹⁰³ or the production and sales of weapons.¹⁰⁴ In such a field, *business-typical risks*, which can contribute to an armed conflict or gross human rights violations, may easily arise. Therefore business leaders must draft and implement a business policy which includes not aiding or encouraging international crimes. Additionally, they have to ensure their subordinates are not involved in, e.g. illegal arms trade deals — be it that they act on behalf of the corporation or follow personal initiative.

6. Conclusion

On the one hand, the enquiry into the subject of the responsibility of business leaders has demonstrated at least with regard to its theoretical foundation that important legal problems do not seem to be resolved yet. Such assessment refers not only to the primary *sedes materiae*, i.e. aiding and abetting and otherwise assisting where, *inter alia*, the precise requirements of *mens rea* have to be explored further but the discussion must be expanded to the issues of superior responsibility and, at the time given, the rather theoretical application of joint criminal enterprise or joint control liability.

On the other hand, regarding the case law involving business leaders, particularly in view of post-World War II case law, but also newer domestic decisions such as *van Anraat*, one may arrive at another and more satisfying conclusion. Regarding the verdicts, one does not get the impression that conflicting concepts, e.g. on the *mens rea* of aiding and abetting, in the end have had a decisive impact on the judgment. This, however, may be due to the obvious facts of the cases such as that of *van Anraat* delivering 1,100 tons of TDG.

Such clear-cut scenarios at first glance appear to spare the need for a more in-depth debate on the exact prerequisites under which ordinary business becomes criminal assistance. Yet, on closer inspection such a conclusion would be flawed. A simple example such as the delivery of weapons to a conflict area or provision of a loan to an atrocious regime at once reopens all the difficult questions. In situations where a product, good or service is only loosely connected to a particular criminal act one can only resort to an unsatisfying case by case decision. Accordingly, on both theoretical and practical levels, there is still a lot of work to be done.

102. This may be different when police forces are united in illegal death squads.

103. Cf. Panel of Experts on the *Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of Congo*, *supra* note 5.

104. Cf. the *Bührle* case decided by the Swiss Federal Court, *supra* note 98.

Attributing Criminal Liability to Corporate Actors

Some Lessons from the International Tribunals

Norman Farrell*

Abstract

The aim of this article is to draw analogies between the attribution of responsibility to senior military or political leaders who participate in criminal conduct through organized structures of power under international criminal law and the potential attribution of responsibility to corporations or corporate officials. Without addressing the separate question of jurisdiction over corporations, the article identifies co-perpetration and aiding and abetting as the two modes of liability under international law that would be most useful in the corporate context. The article examines how those modes of liability have been interpreted by international criminal tribunals and applies the relevant legal standards to situations in which business activities of corporations are linked to the commission of international crimes. Furthermore, the article addresses the inconsistencies between the elements and standards of these modes of liability under the law of the international ad hoc tribunals and the International Criminal Court and how this would affect their application in the corporate context.

1. Introduction

The range of corporate activities which have come under scrutiny for complicity in international crimes extends from the receipt of pillaged resources to direct participation in armed conflict.¹ At one end of that spectrum, corporate

* Deputy Prosecutor, International Criminal Tribunal for the former Yugoslavia. The views expressed herein are those of the author and do not necessarily reflect the views of the United Nations or the Office of the Prosecutor. The author wishes to specifically thank Ms Katharine Fortin for her valuable assistance in the preparation of this article, as well as Ms Katrina Gustafson, Mr Ken Roberts and Mr Fabricio Guariglia for their comments on an earlier draft. [farrelln@un.org]

1. See, for example, Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, UN Doc. S/2001/357, 12 April 2001 ('Report of the Panel of Experts 2001'); UNSC Res. 1856 (2008), 22 December 2008, § 21 wherein it urges that states 'take appropriate steps to end the illicit trade in natural resources, including if necessary through judicial means'.

The SWGCA furthermore recommends that a new paragraph 3bis be included in Article 25 ICCSt., which addresses modes of liability. The proposed new paragraph reads as follows:

In respect of the crime of aggression, the provisions of this article shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State.⁵⁷

At the same time, at least some members of the SWGCA appear to envisage that criminal responsibility for aggression may go beyond those who formally hold positions in the government or military. A 2009 report of the SWGCA notes that:

The view was also expressed that the language of this provision was sufficiently broad to include persons with effective control over the political or military action of a State but who are not formally part of the relevant government, such as industrialists.⁵⁸

This view clearly departs from the ruling in *IG Farben* that excluded per se private actors from criminal liability for the waging of aggressive war. In line with the *dicta* in *Krupp*, the door is left ajar — albeit in limited circumstances — for principal or accessorial liability of non-state actors, including business leaders and, therefore, business corporations.

6. Conclusion

The above survey may be summarized as follows: conceptually, it is arguable that transnational business corporations are bound by the prohibitions underlying the core crime of international law, despite the fact that currently no international criminal court or tribunal has jurisdiction to hold them accountable. As far as genocide, crimes against humanity and war crimes are concerned, the liability of transnational business corporations is not limited to crimes with an economical dimension; depending on the circumstances of the case, corporations can be held accountable for any crime. However, the contextual element of war crimes and crimes against humanity and the specific intent required for genocide limit the scope of application of international core crimes at least in practical terms. As regards the crime of aggression, liability of transnational business corporations is even more limited and conceivable only in restricted circumstances.

Thus, international criminal law appears to be prepared to address core crimes attributable to transnational business corporations. But it intervenes only in extraordinary circumstances. In particular, not any infringement of human rights by business corporations qualifies as a core crime under international law. Also, in respect of transnational business corporations international criminal law remains limited to 'most serious crimes of concern to the international community as a whole'.⁵⁹

57 *Ibid.*, at 13.

58 *Ibid.*, at § 25 (emphasis added).

59 ICCSt., fourth preambular paragraph.

IV. KEY ISSUES DE LEGE FERENDA: CORPORATE LIABILITY, SPECIFIC OFFENCES AND THE PROSECUTOR'S STRATEGY

A Possible Case for Imposing Criminal Liability on Corporations in International Criminal Law

Mordechai Kremnitzer*

Abstract

This brief comment presents a case for imposing criminal liability on corporations in international criminal law. Nowadays, corporations are powerful global actors. They are 'real' in the legal world and have a normative being. Operating through human beings, they have rights and obligations and are bearers of human rights. Consequently, argues the author, consistency within the legal system demands corporate criminal liability. Furthermore, their external structure and organization as well as the relationship between the corporation and its organs provide substantive reasons in favour of corporate liability. This comment also explains that there are clear advantages of corporate criminal liability as opposed to administrative or civil sanctions. In addition, it is suggested to expand the jurisdiction of the International Criminal Court over corporations.

1. Introduction

The importance and power of corporations, due to globalization and privatization, is not less than the power of states. In some instances, corporations are even stronger than states. Corporations are the foundation of economic activity and of many other activities including the media. In some states there are more corporations than residents.¹ Their growing role and importance can

* Bruce W. Wayne Professor of International Law at the Hebrew University of Jerusalem (Israel) and Vice President for Research in the Israel Democracy Institute. The author wishes to thank Adv. Amir Fuchs for his contribution to this comment. [motak@idi.org.il]

1 See CrimA 3027/90, *Mod'im Construction and Development Ltd. v. State of Israel*, ISRSC 35(4) (1991) 364, 383.

not and should not be ignored. The capabilities of corporations to do good and evil are enormous and their capacity to cause different types of harm is limitless. The purpose and motivation to make as much profit as possible may have a corruptive, at least tempting, influence.² In addition, corporations play an increasing role in war and quasi-war activities.³

These days there is a growing consensus, even in European countries,⁴ that criminal liability should be imposed on corporations. In this article we claim that this trend is justified. Moreover, we claim that there is full justification to impose on corporations the rules of international law applicable to natural persons, especially the most basic ones concerning genocide, crimes against humanity and war crimes, and to regard them as accountable for respecting these rules.⁵ This proposition follows from the requirement to take these norms seriously. If this is not done, states are encouraged to relegate to corporations more and more state activities in order to escape accountability. There is a rapid increase of private military companies and private military companies that operate in armed conflicts.⁶ However, it should be emphasized, that imposing criminal liability does not exclude civil remedies. And, more importantly, criminal liability of corporations is not a substitute for criminal liability imposed on individuals.

In this brief comment we first analyse the problem and the dilemma (Section 2). The legal basis of the model of corporate liability is then presented (Section 3), followed by a discussion of its advantages over a model that does not recognize corporate liability (Section 4). After producing some general arguments and counterarguments (Sections 5 and 6), the advantages of criminal corporate accountability over a model of administrative sanctions and over a model of civil actions are examined (Sections 7). In addition, we argue in favour of corporate liability at the international level (Section 8). Before concluding, we deal with some of the disadvantages and weaknesses of corporate liability (Section 9).

2. The Dilemma and a Possible Approach

The real question is what kind of accountability is appropriate. The main consideration in this respect is the nature and basic characteristics of the different types — criminal, civil and administrative — of legal accountability.

2 M. Kremnitzer and H. Genaim, 'The Criminal Liability of a Corporation', in A. Barak (ed.) *Shangar Book, Vol B* (Tel Aviv: Israel Bar Association, 2003) 33–113, at 74.

3 R. Slye, 'Corporations, Veils and International Criminal Liability', 33 *Brooklyn Journal of International Law* (2008) 955–974, at 961.

4 T. Weigend, 'Societas delinquere non potest? A German Perspective', 6 *Journal of International Criminal Justice (JICJ)* (2008) 927–945, at 928.

5 Slye, *supra* note 3, at 959–960.

6 International Commission of Jurists (ICJ) Expert Legal Panel on Corporate Complicity in International Crimes, *Corporate Complicity & Legal Accountability, Vol. 2: Criminal Law and International Crimes* (2008), 5; available online at http://icj.org/IMG/Volume_2.pdf (visited 8 June 2010). It should be noted that the current article deals with the corporations' criminal accountability in general and not in the specific context of complicity as such.

The challenge here is not to refrain from certain adaptations of conventional legal thinking to the specific character of the corporation. At the same time, the essence of the different types of legal accountability should not be distorted. For example, criminal liability should not be imposed on conduct that is not significantly anti-social or that can not be defined with reasonable precision and clarity. Therefore, there is tension between the will to cover by corporate liability as many possible 'holes' that are not covered by individual responsibility and the will to remain loyal to the nature and essentials of criminal liability. We should not get carried away by utilitarian thinking to the extent that distorts the essence of a legal discipline. Attention has to be paid to the propriety and legitimacy of developments in international criminal law. The area appropriate for criminal law should, as a rule, be restricted to acts accompanied by a subjective mental element, not including negligence. The subjective mental element may be stretched as far as the case of an organ of a company who suspects that criminal activity is taking place by a subordinate employee in the framework of the corporation (even when the suspicion relates only to a specific crime in general and does not include details concerning the concrete circumstances of the crime) and encourages, by omission or commission, this criminal activity. In contrast, when the essence of the wrongdoing consists of negligent conduct, in principle, the appropriate tools are administrative sanctions and civil law. The proportionality rule and the nature of criminal law, which is considered as a last resort means and intended to deal only with very serious anti-social conduct, should be respected.⁷

3. The Legal Basis for Imposing Criminal Liability on Corporations: The Legal Entity Argument

According to the legal entity argument, a corporation is a legal entity, entitled to rights and obligations, just like a human being. A corporation is a bearer of human rights and enjoys the protection of the law.⁸ In this sense, it is not at all artificial, but real in the legal world, and has a normative being.⁹ The social perception of corporations is that they are real players in the world. In a post-modern world, fictions and perceptions may be more real than hard reality. One of the characteristics of corporations is that they operate through human beings and some of these human beings have the legal power to reflect the actions and will of the corporation (the doctrine of the company's organs).¹⁰ This was explained by Lord Reid in the House of Lords decision *Tesco Supermarkets Ltd v. Natrass*:

Then the person who acts is *not* speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company [...] He is not

7 Kremnitzer and Genaim, *supra* note 2, at 78.

8 Slye, *supra* note 3, at 959.

9 CrimA 3027/90, *Mod'im Construction and Development Ltd. v. State of Israel*, *supra* note 1, at 380.

10 Kremnitzer and Genaim, *supra* note 2, at 54–57.

acting as a servant, representative, agent or delegate. He is an embodiment of the company, within his appropriate sphere, and his mind is the mind of the company. If it is a guilty mind then that guilt is the guilt of the company...¹¹

If this is accepted, then imposing criminal liability on the corporation for its acts carried out through its organs is justified. If these acts, including the mental element accompanying them, are bad enough, then no injustice is committed when the corporation is criminally answerable for them. If the corporation is capable of both acting and of doing so guiltily, why does it not deserve moral censure or reprobation?

4. The Reasons for Adding Corporate Criminal Liability versus Exclusive Personal Criminal Liability

There are two substantive reasons for imposing liability on the corporation in addition to imposing personal liability on its organs: the first argument is based on the structure and organization of corporations, the second relates to the relationship between the corporation and its organs.

A. Structure and Organization of the Corporation

The liability of the organ does not exhaust the contribution — real and potential — of the corporation to the criminal activity committed by its organs. The organ, and those beneath it who are involved in the criminal activity, are acting for the sake of enriching the corporation. This makes it easier to commit a crime — not on the sole basis of a totally selfish interest. Furthermore, the structure of authority within the corporation, legitimized by the law, encourages the commission of crimes and therefore makes it more difficult to resist.¹² Additionally, the separation of power within the corporation makes it more difficult to detect a crime, prove its commission and makes it easier to hide it, to escape individual liability and to cover-up the criminal activity.¹³ As a rule, the existence, the structure and the operational method of the corporation reduces the personal culpability of the individual perpetrators who are committing a crime in the framework of the corporation for its sake. Hence, there is the need to impose criminal liability on the corporation if we seriously wish to fully settle the 'criminal account'.

Sometimes, the sanctioning of the corporation is a real must, appropriate and even necessary. For example, the stigmatizing liquidation of a company that creates a media platform for incitement to genocide. Without such a step it can hardly be said that justice was done, was seen to have been done and that the law performed its role.

11 *Tesco Supermarkets v. Nattrass*, [1972] AC 153 (emphasis added).

12 Kremnitzer and Genaim, *supra* note 2, at 74.

13 Weigend, *supra* note 4, at 932.

B. Relationship between the Corporation and its Organs

In the relationship between the organs and the corporation, it is just to make the corporation 'pay' for misdeeds of its organs: The corporation benefits from their positive and successful activities. It is only fair that it will suffer from their wrongdoing. The corporation earns a good name for its own when the acts of its organs create the basis for such good name (for instance, through contribution to society). Why should the corporation's reputation remain immune when it deserves a blemish on its name due to crimes committed by it through its organs? She who enjoys the honey should not be protected from the sting.¹⁴

In addition, there is a utilitarian argument, according to which corporations, as opposed to individuals, have a deep pocket for monetary sanctions and for reparation to victims. Therefore, there is an enhanced chance for enforcement of sentences.

5. General Arguments that Justify Imposing Criminal Liability on Corporations

The first general argument that militates for corporate criminal liability is that we should aspire to consistency within the legal system: Once the corporation becomes a bearer of rights and duties and is expected to act according to rules, is it not an inescapable consequence that the corporation has the capacity of understanding the rules and of acting in accordance to them? If it fails consciously to comply, why should it not be blamed? With all due respect to the unique nature of criminal law, if the corporation has enough mind and free will to commit itself to a contract, where do the mind and the will disappear when we turn to the penal law?¹⁵

Second, in some cases, we are not dealing with a case of criminal liability of a corporation in addition to the criminal liability of the individual. It is either criminal liability on the corporation or none at all. In these instances, imposing criminal liability on the corporation is the only way to stand up to the fundamental principle according to which crimes of the worst nature must not remain unpunished. Imposition of criminal liability on the corporation enables accountability in cases where the culpable organ disappeared, died or is unavailable to appear before the court. It also enables accountability where individual accountability is impossible. This is the case, e.g. when a collective body of the corporation acts criminally but not unanimously, and the majority can not be identified, or when it can be proven that the corporation executed a criminal policy but there is no sufficient evidence against any individual who was responsible for this policy.¹⁶ This also applies to the case of a

14 Kremnitzer and Genaim, *supra* note 2, at 67–68.

15 *Ibid.*

16 Slye, *supra* note 3, at 961.

'fatherless' omission, i.e. when a legal duty is imposed on the corporation, it is not clear who was personally obliged to fulfil the duty and it can be proven that the non-fulfilment of the duty was conscious (on the level of its management); this makes for a *prima facie* case against the corporation.

Third, there is the argument of equality before the law or at least 'appearance of justice'. There is a need to treat corporations perceived as 'big fish' equally in comparison to individuals, for the sake of keeping and maintaining the legitimacy of the legal system. In other words, when low-ranking officials get blamed and the big corporations are immune, it makes a mockery of justice, and produces a lack of trust in the legal system. In addition, corporations, despite being 'artificial beings', are generally perceived as real and accountable entities that stand on their own two feet. When corporations are not brought to justice, lack of trust in the legal system follows.

Fourth, corporate liability enables accountability for an accumulation of the corporation's criminal activity carried out by different individuals acting separately. This may have crucial importance when criminality is dependent upon a significant scope of activities or upon gravity of crimes — an essential element in the international criminal offences — such as genocide, war crimes and crimes against humanity.¹⁷

Fifth, some weight should be given to the legal endorsement of criminal liability for corporations in many states — not only from the Anglo-American jurisprudence — but also states in Western Europe, such as France, The Netherlands, Switzerland and Denmark.¹⁸ This legal reality creates a *prima facie* indication of its utility. The burden of disproving it shifts to those who argue against it. If the concept of criminal accountability of corporations is so anomalous, how can we explain the trend towards endorsing criminal liability on corporations?

Sixth, a side benefit to imposing criminal liability on the corporation is the incentive for the shareholders to be careful and thorough in the appointment processes of organs and in the overseeing and supervision on the activities of the organs.¹⁹ An incentive to prevent criminal activity within the corporation applies to all those who have a vested interest in the corporation, for instance, its employees.

6. Two Unconvincing Counterarguments

One of the main arguments brought forward against corporate criminal liability is the issue of culpability. The argument reads that the element of

17 *Ibid.*, at 960–961; and see Arts 6–8 ICCSt.

18 S. Beale and A. Safwat, 'What Developments in Western Europe Tell Us about American Critique of Corporate Criminal Liability', 8 *Buffalo Criminal Law Review* (2005) 89–163, at 110–115.

19 On the other hand, the problem is that there is also a stronger incentive for the corporation to cover-up the criminal activity.

culpability is problematic because culpability is, to some extent, rooted in human dignity.²⁰ This is so, because criminalizing without culpability, on utilitarian justifications alone, is an objectification of the accused, who is used as a tool for obtaining public good; this offends the accused's human dignity. However, it should be pointed out that corporations, although bearers of human rights, have no human dignity since they are not a natural person.²¹ Because of this, and because personal freedom from imprisonment is not at stake, the threshold for imposing criminal liability may be lower in the case of corporations than in the case of individuals.

Regarding the second counterargument according to which 'real' penal sanctions are unavailable in cases of corporations,²² there is a clear response. It is true that a corporation cannot be imprisoned. But it can be dealt with through other sanctions including fines, reparation, limitations on its freedom of action, corporate probation, community service orders and, last but not least, liquidation (equivalent to the capital punishment) and even confiscation of its property.²³

7. The Advantages of Criminal Liability as Opposed to Administrative Sanctions and Civil Liability

The relative advantages of this restricted model of corporate criminal liability vis-à-vis the German model, which deals with corporations through administrative liability that includes heavy monetary sanctions — so-called *Ordnungswidrigkeiten* — described so competently by Thomas Weigend,²⁴ are threefold:

- (i) The impact on the good name of the corporation is graver and, due to the severity of the conduct, this is well deserved. This should not be underestimated since it adds to the deterrent effect that is much needed because of the motivation and opportunity of the corporation (its alter ego, the organs) to commit crimes.
- (ii) When non-criminal liability is imposed for a very serious crime committed consciously, it puts the severity of the crime and the importance of the protected value in doubt, if not in disrepute. Only criminal responsibility fits the requirement to take the core international crimes seriously.

20 Weigend, *supra* note 4, at 936.

21 T. Hörnle, 'Die verfassungsrechtliche Begründung des Schuldprinzips', in U. Sieber et al. (eds), *Strafrecht und Wirtschaftsstrafrecht – Dogmatik, Rechtsvergleich, Rechtstatsachen* (Köln: Heymanns, 2008) 325 et seq., cited according to Weigend, *supra* note 4, at 940.

22 Weigend, *supra* note 4, at 941.

23 Krennitzer and Genaim, *supra* note 2, at 73.

24 Weigend, *supra* note 4, at 931.

When non-penal, administrative instruments are used for the imposition of heavy sanctions, as in the case of *Ordnungswidrigkeiten*,²⁵ one can not but wonder as to the propriety of the instrument for this kind of sanctions. Is it not a distortion of the proper role of *Ordnungswidrigkeiten*?²⁶

Among the advantages of the criminal system over the civil one, only a few will be noted: The criminal system has a more equipped mechanism for investigation and collection of evidence. There is also a clear address of a prosecutor. These structural traits of criminal law are important because victims in such crimes are often helpless and unable to litigate. Criminal law may be the only mechanism in reality to be able to confront big and strong corporations.²⁷ Criminal proceedings have a better chance for a public acknowledgement of guilt and also a possibility for shorter proceedings. A criminal conviction carries a stronger educational message, and affects a larger audience — all the agents who are related to the corporation. It should also be noted that the criminal system requires the highest level of due process. Because we are dealing with extremely grave and condemnable acts, it is more just and fair; that the process be the criminal one, since it is the process that guarantees the best protection of the rights of the accused and of due process. These characteristics of the criminal process serve also as a guarantee for the innocents. The American model of the Alien Tort Statute²⁸ — which allows for tort claims before US courts for extraterritorial breaches of international law — does not constitute a valid alternative either, since it is unique to the United States and is hardly ‘transferable’ to regular states that are not super powers. In addition, the model has inherent problems with its implementation and is still under debate in the United States.²⁹

8. The Case for Liability on the International Level

It can be argued that the enforcement of criminal liability of corporations should be exclusively at the hand of states, and that there is no need for an international criminal system.

The problem is that states alone can not be trusted to enforce the law within their jurisdiction when international crimes are committed. The main problem is that states may prefer the investments and the economic activity of a culprit-corporation over the need to protect their citizens from

25 The maximum amount of the administrative fine in Germany is a million euro, and in cases the corporation obtained an illicit profit, the fine can even exceed this amount. See Weigend, *supra* note 4, at 931. This discussion resembles the debate regarding punitive damages that are used as punitive measure within a civil action.

26 Beale and Safwat, *supra* note 18, at 103.

27 As a minimum, there should be a linkage between criminal proceedings and a civil action. After the criminal proceedings end with a conviction, the facts that were established should be perceived as binding in a civil action.

28 Alien Tort Claims Act (ATCA), 28 U.S.C. § 1350.

29 See the contribution by K. Gallagher in this issue of the *Journal*.

such a corporation.³⁰ In addition, in cases where the state is collaborating with the corporation's deeds, it is clear that the state will lack the will to enforce the law on the corporation.³¹ There is, therefore, a need for an international forum such as the International Criminal Court (ICC), to enforce the law. Hence, the current ICC Statute should be amended to include responsibility over corporations, since it claims jurisdiction over natural persons only.³² It should be noted that the proposal made during the drafting of the Rome Statute to add legal entities to the jurisdiction of the ICC was finally declined. The main reasons cited for its rejection were that, first, it would shift the focus of the ICC away from individual criminal liability and, second, there is not yet a common international standard for corporate liability.³³ The International Commission of Jurists (ICJ) Expert Legal Panel on Corporate Complicity in International Crimes claims in its report that corporate liability should be included in the ICC jurisdiction, since domestic law proves that all obstacles can be overcome.³⁴

9. A Caveat

A disturbing point, however, about corporations' criminal liability is that the possibility of indicting a corporation with criminal charges may reduce the efforts invested for the sake of bringing individuals to justice. To the extent that the power to prosecute is in the hands of states, powerful firms may activate political pressure and prevent criminal charges against individuals, for instance, by offering states a deal that will limit criminal liability to the corporation alone.³⁵ This can happen when the main organs of the corporation want to protect themselves from individual responsibility and prefer that the corporation as a whole bear the consequences. It is clear that the main purpose of criminal law should be imposition of criminal liability on individuals and, therefore, most efforts should be directed to achieve this purpose, because the individual organs of the corporations are the ones who actually perform the crime.

One way to overcome this disturbing possibility is to deal with criminal liability of corporations through an international criminal law forum, where corporations have less power and possible impact. This reinforces the argument that criminal liability of corporations should not be left only for states. Another way to overcome it is to specifically state that liability of corporations can not be a substitute for individual liability.

30 See the contribution by L. van den Herik and J. Letnar Čeranič in this issue of the *Journal*.

31 *Ibid.*

32 Art. 25(1) ICCSt.

33 ICJ Report Vol 2, *supra* note 6, 56.

34 *Ibid.*, 57–59.

35 Beale and Safwat, *supra* note 18, at 102.

Yet another problem is that if the case concerning culpability of corporations is unconvincing and criminal liability is imposed despite it, it could weaken the requirement of culpability generally. The route suggested in this Article should be followed only if we are convinced that it would not contradict the basic principles of criminal law.³⁶

10. Conclusion

In conclusion, there is a need for imposition of criminal liability on corporations, in general, and in international law, specifically. The atrocities that corporations can commit are unlimited, and therefore their liability should not be limited. One can only wonder how justice would have been served, if in the *IG Farben* trial, it had been impossible to convict the individuals who managed the corporation. With the corporation immune from criminal liability, no one would have been made criminally accountable for the corporation's evil deeds. To prevent such an outcome in the future, especially in our time, where privatization is a major trend, it is necessary to impose criminal liability on corporations. There are also strong reasons not to leave the prosecution of corporations to the sole authority of states. It is, therefore, recommended to extend the jurisdiction of the ICC to include corporations.

³⁶ Weigend, *supra* note 4, at 944.

Ancillary and Neutral Business Contributions to 'Corporate–Political Core Crime'

Initial Enquiries Concerning the Rome Statute

Christoph Burchard*

Abstract

The Nuremberg economic cases are paradigmatic in demonstrating how business actors enabled, exacerbated and facilitated the commission of core crimes by financing an atrocious political regime, supplying the means to commit atrocities and benefiting from their proceeds. The hard cases for criminal law theory are those where such business contributions are only remotely linked, either factually or normatively, to the eventual commission of core crimes on the ground. The policy question whether such prima facie ancillary and neutral contributions should be criminalized and made subject to the jurisdiction of the International Criminal Court (ICC) is far from being resolved. This article identifies some of the methodological vantage points from which this policy question should be viewed. The article also considers whether the different modes of participation under the ICC Statute cover such prima facie ancillary and neutral business contributions. In particular, the article examines the question of whether particularized regulatory offences should be introduced which prohibit specific kinds of business contributions being made in furtherance of corporate–political core crime.

1. Introduction

In his very first report to President Truman, Justice Robert H. Jackson made clear his intention to 'accuse a large number of individuals and officials who were in authority in the government, in the military establishment... and in the financial, industrial, and economic life of [Nazi] Germany who by all

* Dr. iur.; ass. iur.; LLM (NYU); Senior Lecturer and Senior Researcher at the Chair of Prof. Dr. Joachim Vogel, University of Tübingen, Germany. [christoph.burchard@jura.uni-tuebingen.de].

functioning home jurisdiction of a transnational corporate actor, be considered to be unwilling or unable genuinely to carry out investigations?

This set of questions notwithstanding all enquiries into business involvement in core crime only pave the way for a further examination of business involvement in other transnational and socially injurious activities. The question is whether 'globalization' prompts an introduction of truly new international criminal offences — offences that are not directly related to individual or personal injuries, but rather embody collective concerns about an efficient flow of commodities and about an uninterrupted functioning of financial markets. Although it may sound repulsive and fallacious, is not the protection of such collective interests warranted because their infringement represents — as the financial crisis aptly illustrated recently — a real and substantive 'threat to the peace, security and well-being of the world' (Preamble ICC Statute)? And is it not necessary to 'put an end to the impunity for the perpetrators' (Preamble ICC Statute) of the 'political-industrial complex'?⁹¹

91. To remind ourselves of the famous warning of President Dwight D. Eisenhower in his Farwell Address to the Nation on 17 January 1961 against the 'military-industrial complex'.

Prosecuting Persons Doing Business with Armed Groups in Conflict Areas

The Strategy of the Office of the Prosecutor of the International Criminal Court

Reinhold Gallmetzer*

Abstract

This article sets out the strategy of the Office of the Prosecutor (OTP) of the International Criminal Court (ICC) with respect to investigations and prosecutions of persons who illegally finance armed groups in conflict areas or provide them with weapons or ammunition. In accordance with this strategy, the OTP is considering prosecuting such person(s) before the ICC. The OTP has further decided to actively support national proceedings related to the work of the ICC, including proceedings against persons supporting armed groups in conflict areas. To that end, the OTP has recently initiated a network with national law enforcement agencies and other specialized institutions and organizations to coordinate and strengthen the efforts of multiple national and international actors by exchanging evidence, mutually supporting investigations and by sharing expertise.

1. Introduction

A United Nations (UN) panel of experts has repeatedly found a link between the exploitation of natural resources, arms trafficking and armed conflict in the Great Lakes region, in particular in the Democratic Republic of Congo (DRC). Armed groups controlling areas rich in natural resources have built a self-financing war economy centred on the exploitation and trade of natural resources, such as gold, diamonds, cassiterite, wolframite and coltan. In their quest to control these areas and to exploit the natural resources, the armed groups have committed, and continue to commit, serious crimes. The UN

* Appeals Counsel, Office of the Prosecutor of the International Criminal Court and coordinator of the LEN. The views expressed in this article do not necessarily reflect the views of the Office of the Prosecutor [reinhold.gallmetzer@icc-cpi.int]

Experts Panel has also identified individuals and companies from all parts of the world who conduct business with these armed groups intended to extract and trade natural resources or to provide the armed groups with weapons or ammunition.¹ By financing armed groups or providing them with weapons, foreign individuals and companies fuel the conflict in the region and may be liable as accomplices or in other ways for crimes committed by members of the armed groups, punishable under the Statute of the International Criminal Court (ICC) and domestic legislation.²

The UN Security Council endorsed the UN Experts Panel's conclusions, and as a consequence, recently urged all states, especially those in the Great Lakes region, to 'take appropriate steps to end the illicit trade in natural resources, including if necessary through judicial means'.³ The UN Security Council resolution affirms that criminal prosecution of persons responsible for the illicit trade in natural resources is essential to combat the crimes armed groups commit in the DRC and to bring peace and stability to the region. It invokes the responsibility of national authorities worldwide to investigate and prosecute persons who support armed groups, including those that trade with them in natural resources or weapons.

The legal systems of many states are well equipped to prosecute individuals who illegally support armed groups in conflict zones.⁴ National authorities may do so either under their regular criminal code, or pursuant to specific international treaties implemented into the domestic legal system.⁵ Many states also have specialized war crimes or organized crime units within their

1. See the following reports of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo (UN Experts Panel): UN Docs S/2003/1027, 23 October 2003, in particular §§ 43–47; S/2002/1146, 16 October 2002, in particular §§ 12–21; and S/2008/773, 12 December 2008. Investigations conducted by non-UN bodies reached the same conclusions. See, e.g. Human Rights Watch, *The Curse of Gold* (1 June 2005); Report by Global Witness, *Faced with a gun, what can you do: War and the militarisation of mining in Eastern Congo* (July 2009).

2. References in this article to activities intended to finance armed groups or to provide them with weapons or ammunition are exclusively limited to such activities that are in violation of international or domestic legislation.

3. SC Res. 1856, 22 December 2008, at 2, § 21.

4. Some national jurisdictions may also criminally prosecute legal persons for their involvement in a crime; see G. Stessens, 'Corporate Criminal Liability: A Comparative Perspective', 43 *International and Comparative Law Quarterly* (1994) 493–520.

5. Relevant international treaties involving criminal punishment include the 1998 Rome Statute (Arts 5–8, 25 and 28); the 2003 UN Convention against Corruption (Arts 15–25); the 2000 UN Convention against Transnational Organized Crime (Arts 2, 3, 5, 6, 8 and 23) and its Protocols, especially the third Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition (Arts 3 and 5) and the 1999 International Convention for the Suppression of the Financing of Terrorism (Art. 2). In addition, UN embargoes and targeted sanctions adopted under Chapter VII of the UN Charter and their enforcement through national criminal law are a major tool in efforts to prosecute persons for illegally financing armed groups or for providing them with weapons or ammunition. UN Security Council sanctions appear to be well-implemented in the criminal legislation of many jurisdictions in the European Union, Australia, Canada and the United States. Regional instruments, such as the 2003 African Union Convention on Preventing and Combating Corruption

prosecution services that have a mandate to investigate and prosecute persons responsible for international or transnational crimes. Nevertheless, so far relatively few cases have been brought before the competent national courts against persons responsible for supporting armed groups in conflict zones.⁶ This lack may, in part, be due to (i) the difficulties domestic law enforcement agencies face in investigating persons responsible for crimes committed on foreign territory and in the context of an ongoing armed conflict; (ii) the relative novelty of the concept of criminal prosecution of business people and companies for their involvement in crimes committed by armed groups; and (iii) the limited resources of national authorities investigating and prosecuting transnational crimes, which often precludes taking up additional areas of operation.

To investigate the crimes committed on foreign territory, national authorities may have to overcome legal and/or diplomatic hurdles before commencing their investigations, or to obtain the necessary cooperation from the authorities of the foreign state. They may also lack any operational infrastructure on the ground, which is necessary to conduct effective investigations on the territory of a foreign country or to protect potential witnesses or their own investigators. In addition, national authorities who have never investigated and prosecuted business people or companies for their involvement in such crimes may find it particularly difficult to identify both the necessary evidence and the relevant legal theories to establish a link between the conduct of business people or companies and the crimes committed by armed groups.

(Art. 4(1)) and specialized national legislation on terrorism and terrorist-financing constitute additional relevant sources for criminal prosecution.

6. On the Dutch cases against Guus Kouwenhoven and Frans van Anraat, see the contribution by E. van Sliedregt and W. Huisman in this issue of the *Journal*. In Belgium, prosecutors charged Samih Ossaily and Aziz Nassour of numerous offences under Belgian criminal law relating to allegations that they smuggled diamonds out of Sierra Leone and illicit weapons into Liberia, in contravention of UN sanctions. They were also accused of laundering the proceeds of their alleged crimes. According to the indictment, the accused, who entertained close relations with Charles Taylor, the former President of Liberia, engaged in an arms-for-diamonds swap with the Revolutionary United Front (RUF) in Sierra Leone. The court in Antwerp in December 2004 convicted Nassour on eight counts and Ossaily on four counts of money-laundering, arms trafficking, dealing in conflict diamonds and belonging to a criminal organization, all of which are offences under the Belgian criminal code; see Nieuwsblad, *Allereerste veroordeling voor handel in bloeddiamant* (07 December 2004), available at <http://www.nieuwsblad.be/Article/Detail.aspx?articleID=ggqaq3c5> (visited 25 October 2009). In the DRC, a military prosecutor charged eight members of the armed forces of the state (FARDC) and three former employees of the Australia-based Anvil Mining Company, namely Pierre Mercier, Peter Van Niekerk and Cedric Kirsten. The latter were charged of complicity in the killing by FARDC members of up to 100 civilians in the village of Kilwa in October 2004. They were accused of having 'voluntarily failed to withdraw the vehicles placed at the disposal of the 62nd Brigade in the context of the counter offensive of [15–18] October 2004 to recapture the town of Kilwa' and of having 'knowingly facilitated the commission of war crimes by Ilunga Ademar and his men'. The military court of Lubumbashi cleared the three of all charges of complicity, finding they had been coerced by the FARDC into handing over the vehicles to the military; see <http://www.trial-ch.org/en/trial-watch/profile/db/legal-procedures/ademar.ilunga.618.html> (visited 19 January 2010).

2. The Role of the International Criminal Court

The ICC can play an important role in the global fight against impunity for persons fuelling international crimes through the illegal trade of natural resources and arms in the Great Lakes region and in other parts of the world. As far back as 2003, Luis Moreno-Ocampo, the Prosecutor of the ICC, noted that 'there is general concern that the atrocities allegedly committed in [the DRC] may be fuelled by the exploitation of natural resources ... and the arms trade, which are enabled through the international banking system.' He stated his belief that 'investigation of the financial aspects of the alleged atrocities will be crucial to prevent future crimes and for the prosecution of crimes already committed'.⁷ He further announced that 'the Office of the Prosecutor will work together with national investigators and prosecutors in order to determine the contribution, if any, that ... businesses are making to the commission of the crimes in the DRC'.⁸

The Office of the Prosecutor (OTP) may contribute to fighting impunity for these crimes in two ways: first, by prosecuting cases that fall within the ICC's jurisdiction; and second, by supporting national proceedings related to the work of the ICC. The Prosecutor has identified both options as strategic priorities for the coming years.⁹

As an example of the first option, in September 2008 the Prosecutor announced that he was launching a third investigation in the DRC. This investigation will focus on crimes committed in the Kivu provinces¹⁰ where, according to the UN Experts Panel, the conflict among various armed groups is fuelled by the illegal exploitation and trade of natural resources.¹¹ When elaborating on the context of the investigations in the Kivu provinces, the Prosecutor specified that 'the mandate of the ICC is to go up to the chain of command to those most responsible, to those who ordered *and financed* the violence'.¹² He has expressly stated that one option for his investigations in the

Kivu provinces includes 'a case of high officials having financed and organized militia in the DRC'.¹³

With respect to the second option, from the start of its operation in 2003, the OTP has been committed to encourage and support genuine national prosecutions.¹⁴ In particular, the Prosecutor announced that the OTP intends to share with national authorities information gathered in the course of its own investigation (with certain caveats) and to provide various additional forms of support to assist national authorities to fulfil their responsibilities to investigate and prosecute crimes under the Statute and thereby close the impunity gap for persons responsible for these crimes.¹⁵ The OTP recently expressly reiterated this commitment to cooperate with national law enforcement agencies in states within which it has already initiated investigations (situation countries), as well as in third states, with a view to joining efforts to end impunity for persons responsible for the most serious international or transnational crimes. Fatou Bensouda, the Deputy Prosecutor of the ICC, stated that for the purposes of its investigations in the Kivu provinces, the OTP is 'aiming at a coordinated approach whereby national judicial authorities in the region and beyond as appropriate will take over cases in order to ensure that all perpetrators are prosecuted'.¹⁶

To achieve this coordinated approach with national authorities, the OTP has initiated a network of national law enforcement agencies and other specialized organizations and institutions (LEN).¹⁷ The LEN has the potential of becoming an effective tool for the ICC and its states parties to fulfil their mandate to end impunity for persons responsible for crimes within the jurisdiction of the ICC, as well as to address other serious crimes under national law. The LEN will facilitate cooperation between the ICC, national authorities and other partner organizations in support of the investigation and prosecution of such crimes. Due to the serious challenges facing national authorities in investigating and prosecuting persons financing armed groups or providing them with weapons or ammunition, the LEN may be particularly relevant for providing assistance in such cases.

The fact that the ICC can only prosecute a limited number of crimes will necessarily leave an impunity gap. This gap will often include persons providing armed groups with finances, weapons and ammunition. The OTP has

7 Press Release of the Prosecutor, PIDS.009.2003-EN, 16 July 2003, at 3–4.

8 Press Release of the Prosecutor, ICC-OTP-20030926-37, 26 September 2003.

9 The policy statements in this article are based on public speeches of the Prosecutor and the Deputy Prosecutor of the ICC, as well as on public strategy papers of the Office, especially the paper on the prosecutorial strategy for the period from 2009 until 2012, 21 December 2009; see <http://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281427/TheOfficeoftheProsecutor2.pdf> (Prosecutorial Strategy 2009–2012); and the Report of the Bureau on Cooperation, ICC-ASP/8/44, 15 November 2009; see <http://www.icc-cpi.int/iccdocs/asp.docs/ASP8/ICC-ASP-8-44-ENG.pdf> (Report on Cooperation) (both websites visited 19 January 2010).

10 OTP Weekly Briefing, July 2009, at 1.

11 UN Experts Panel, UN Doc. S/2008/773, 12 December 2008.

12 L. Moreno-Ocampo, *Sexual Violence as International Crime: Interdisciplinary Approaches to Evidence*, Center on Law and Globalization, Keynote Address, The Hague, 16 June 2009, at 9 (emphasis added).

13 L. Moreno-Ocampo, *Address to the Assembly of States Parties*, 30 November 2007, at 3; available online at <http://www.icc-cpi.int/Menu/ASP/Sessions/Documentation/6thSession> (visited 19 January 2010).

14 See for instance, *Paper on some policy issues before the Office of the Prosecutor*, September 2003 (Paper on Policy Issues), at 3; see also Office of the Prosecutor, *Report on Prosecutorial Strategy*, 14 September 2006, at 5 and 9.

15 Moreno-Ocampo, *Address to the Assembly of States Parties*, *supra* note 13, at 6–7.

16 Statement of F. Bensouda, *Overview of situations and cases before the ICC, linked with a discussion of the recent Bashir arrest warrant*, Pretoria, 15 April 2009, at 5; see also *Deputy Prosecutor's remarks - Introduction to the Rome Statute establishing the ICC and Africa's involvement with the ICC*, 14 April 2009 (Deputy Prosecutor's Remarks), at 5.

17 See Prosecutorial Strategy 2009–2012, *supra* note 9, §§ 17, 32 and 59; Report on Cooperation, *supra* note 9, § 52.

recognized that national authorities, the international community and the ICC must therefore work together to ensure that all appropriate means for bringing other perpetrators to justice are used and that this gap is filled.¹⁸

The establishment of the LEN and the ICC's support for national criminal proceedings related to the work of the ICC are firmly based on the Rome Statute. The Rome Statute does not merely create an international judicial body situated in The Hague; it creates an international justice network, the Rome Statute System of Justice.¹⁹ Within this system, the Rome Statute affirms the interrelated duties and rights of both national authorities and the ICC to prosecute such crimes.²⁰ The ICC might be the face of this system, but its strength lies in the states' commitment.²¹

3. The LEN as a Principal Tool to Achieve Prosecution of Persons Doing Business with Armed Groups in Conflict Zones

The LEN is a tool to put the Rome Statute System of Justice into practice. Its purpose is to bring together investigators and prosecutors who are working on cases related to the activities of the ICC, along with others who can provide relevant information or specialized expertise. The LEN is a platform through which its members define concrete investigations and mutually support their investigative and prosecutorial activities by: (i) exchanging information, including relevant evidence; (ii) providing each other with legal, technical and operational assistance in support of investigative and prosecutorial activities; and (iii) sharing expertise through training and other initiatives.²²

18 Paper on Policy Issues, *supra* note 14, at 3.

19 See for instance W. Burke-White, 'Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice', 49 *Harvard International Law Journal* (2008), 53–108.

20 States parties have a duty: (i) to exercise their criminal jurisdiction over those responsible for the crimes referred to in the Rome Statute (paragraphs 4 and 6 Preamble, ICCSt.); and (ii) to enhance international cooperation intended to ensure that these crimes do not go unpunished (Preamble, ICCSt. paragraph 4). The ICC on the other hand may not only receive the assistance of states, it may also actively provide assistance to national authorities in support of their investigative and prosecutorial activities. Pursuant to Art. 93(10) ICCSt., '[t]he Court may, upon request, cooperate with and provide assistance to a State Party conducting an investigation into or trial in respect of conduct which constitutes a crime within the jurisdiction of the Court or which constitutes a serious crime under national law of the requesting state' (see also Rule 194 of the Rules of Procedure and Evidence). In addition, nothing under the Statute prevents the ICC from cooperating with states not party to the Rome Statute or with international or intergovernmental organizations.

21 L. Moreno-Ocampo, *2009 Global Creative Leadership Summit*, New York, 23 September 2009, at 3.

22 Prosecutorial Strategy 2009–2012, *supra* note 9, §§ 7, 17; Report on Cooperation, *supra* note 9, § 52 and Moreno-Ocampo, *Address to the Assembly of States Parties*, *supra* note 13, at 6.

Ultimately, the LEN aims at increasing the number of prosecutions for crimes under the Rome Statute or related serious crimes under national law before domestic courts and therefore closing the impunity gap for persons responsible for these crimes. It aims to address the criminal responsibility of persons responsible for these crimes at all levels of seniority and under any form of liability.²³ The LEN is therefore of particular relevance to investigation and prosecution of persons responsible for financing armed groups through resource exploitation or other support, which necessarily has a transnational dimension and will rely on close cooperation. The Prosecutor recently stated that the OTP's 'investigation teams are working with police and prosecutors from all over the world. We are sharing information, we are trying to connect dots, to unveil and disrupt the activities of the different networks of arm supplies and illegal businesses who are promoting the crimes under our jurisdiction.'²⁴ The members of the LEN include the OTP and national law enforcement agencies of both situation countries (i.e. states where the ICC is conducting an investigation) and non-situation countries. Many of these professionals will be drawn from specialized war crimes units or other units in charge of relevant areas, such as organized crime or financial investigations. In addition, international organizations and specialized national institutions, and non-governmental organizations with information or expertise relevant to supporting investigations and prosecutions of international or transnational crime may become partners to the LEN, either on a case-by-case basis or on a permanent basis.²⁵

4. The Contribution to the LEN by its Members and Partners

The OTP may contribute to the LEN, first and foremost, by sharing with national law enforcement authorities information gathered in the course of its own investigation,²⁶ or other relevant open source information that it collected and analysed.²⁷ The sharing of information in the OTP's possession will,

23 Moreno-Ocampo, *Address to the Assembly of States Parties*, *supra* note 13, at 6–7.

24 Moreno-Ocampo, *2009 Global Creative Leadership Summit*, *supra* note 21, at 4.

25 Prosecutorial Strategy 2009–2012, *supra* note 9, §§ 17 and 32; Report on Cooperation, *supra* note 9, § 52. Interpol has been expressly mentioned to be associated to the LEN. Furthermore, the UN Experts Panel and other international organizations who have conducted investigations into crimes committed in the Great Lakes region and the manner in which armed groups are financed and provided with weapons may be ideal LEN partners. In addition, the existing OTP network with international, regional and thematic organizations may be added to the LEN to the extent that it can be used to support investigations and prosecutions by the LEN members. In particular, the OTP's partner organizations to support the financial aspects of the investigations (Report on Cooperation, § 43) and the OTP's partner organizations to support national judiciaries (Report on Cooperation, § 52, a, ii) may be ideal partners for the LEN.

26 Moreno-Ocampo, *Address to the Assembly of States Parties*, *supra* note 13, at 6–7.

27 The OTP is increasingly conducting financial investigations with a view to establishing the channels and sources through which the physical perpetrators of the crimes are financed, Moreno-Ocampo, *Address to the Assembly of States Parties*, *supra* note 13, at 9.

however, be subject to a number of restrictions. Information which it obtained on condition of confidentiality may not be shared with any third party, unless the information provider consents.²⁸ Information may also not be shared if that would jeopardize the security of witnesses or other persons.²⁹ In addition, witness statements may not be shared without the consent of the witness.³⁰

In addition, the OTP may provide operational assistance to national law enforcement agencies conducting further investigations at the crime scene or make available its operative infrastructure in the situation countries.³¹ This may be particularly important as the authorities of both a situation country and a non-situation country may face difficulties in conducting effective investigations on a territory outside their control and in the context of an ongoing conflict.³² The OTP can further share with other members of the LEN its analytical reports in relation to matters such as the structure and the functioning of armed groups, their channels and sources of financing and weaponry, and the pattern of crimes. In addition, on a case-by-case basis, the OTP may produce analytical reports on a specific issue identified by a national authority. National authorities may build their investigations around these reports and supporting evidence, and may therefore be able to focus their own investigative efforts on any evidentiary gaps. Finally, the OTP can further share its legal expertise with national authorities by providing training and advice on specific legal issues.³³

28 Art. 54(3)(e) ICCSt.

29 The Deputy Prosecutor made it clear that the transfer to national authorities of information collected in course of the OTP's investigations will depend on the existence within the domestic jurisdiction of a system to effectively protect witnesses, judges and other court personnel. See Deputy Prosecutor's Remarks, *supra* note 16, at 5.

30 Under Art. 68(1) ICCSt, the Prosecutor has a duty to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.

31 In or near the countries where the OTP has opened an investigation, it has set up an operative infrastructure with field offices and qualified field staff. It also has a network of contacts with official authorities, international organizations, non-governmental organizations and persons with particular knowledge and skills, such as language skills or special knowledge of the relevant socio-economic, cultural and political background.

32 See for instance, the submissions by the DRC authorities to Trial Chamber II of the ICC made in the context of proceedings on a defence challenge of the admissibility before the ICC of the case against Germain Katanga and Mathieu Ngudjolo Chui. The DRC authorities noted the difficulties of conducting investigations in Ituri and stated that the following factors made it impossible for the DRC to investigate the alleged crimes: 'a country ravaged by rebel groups and armed gangs; generalised insecurity in Ituri, making victims and witnesses inaccessible, with the latter justifiably fearing for their safety in a country lacking any system for their protection; the unavailability of judicial structures, aggravated by the inadequacy of operational capacities; the uncertainties of the peace process, with a variety of politico-military agreements between ex-belligerents; the lack of expertise in dealing with mass crimes and in the collection and preservation of evidence of such crimes'. The DRC authorities added that 'sadly, since [2003] the situation has shown little improvement' (*Katanga et al.* (ICC-01/04-01/07-1189-Anx-tBNG), 16 July 2009, at 4).

33 This may include training and advice on applicable legal theories to establish a link between the crimes and a particular suspect; the identification of case theories and relevant legal instruments that facilitate the prosecution of persons responsible for the financing of armed

National law enforcement agencies can contribute to the LEN primarily through conducting investigations against persons responsible for crimes under the Rome Statute and other related serious crimes under national law and by prosecuting such cases before national courts. In the context of the LEN, national investigations and prosecutions should also be conducted against persons doing business with armed groups, including those that trade with them in natural resources or weapons. National law enforcement agencies may further directly support investigations by law enforcement authorities of other states and the ICC in many ways, for example: (i) by providing relevant lead information or evidence (whether or not on their own initiative), (ii) collecting information on behalf of a foreign agency or the ICC, and (iii) by providing operational support or technical assistance to the investigations that foreign authorities or the ICC conducts.

The LEN may further facilitate the direct sharing of information among the ICC's partner organizations and national law enforcement agencies. The information that various organizations gather or receive can be joined in a single database and the relevant portions can be made available to a competent national authority or to the ICC for further investigation and prosecution. In addition, in the context of the LEN, the ICC's network of specialized institutions in areas such as forensic or financial investigations may provide their support not only to the ICC, but also to the investigations by national law enforcement agencies. Finally, the ICC's partner organizations can also be involved in building capacity of ICC personnel, as well as of personnel of national law enforcement authorities, especially in situation countries.

5. Conclusion

The prosecution of persons responsible for illegally financing armed groups in conflict areas and for providing them with weapons or ammunition features prominently in the OTP's strategy for the coming years. The Prosecutor of the ICC has stated that the OTP may investigate, with an eye towards ICC prosecution, persons financing armed groups in the Kivu provinces of the DRC. In addition, the ICC's network with national law enforcement agencies and other specialized organizations may constitute an effective tool to support investigations and prosecutions, in national courts, of similar offences. This network is intended to coordinate and strengthen the efforts of multiple national and international actors by exchanging evidence, mutually supporting investigations and by sharing expertise. Such cooperation and support is intended to increase the number of cases involving these crimes before national courts and to support the investigations of the OTP. It can make investigations and

groups or for providing them with weapons; or the interpretation and application of international humanitarian law.

prosecutions conducted by national authorities and the ICC not only more efficient, but also more cost-effective.

Up until December 2009, 32 officials from 14 states participated in the activities of the LEN. In addition, Interpol and other partner organizations of the OTP have supported the projects undertaken by the ICC and national law enforcement agencies in the context of the LEN.³⁴ The German police authorities' recent arrest of Ignace Murwanashyaka, a leader of the FDLR rebel group operating in the Kivu provinces, and his aid Straton Musoni, for allegedly belonging to a terrorist organization and for having committed crimes against humanity in the Eastern DRC, is an example of the functioning of the LEN.³⁵ Immediately after their arrest, the OTP has announced that 'the OTP and Germany have been cooperating regarding the Kivu investigation for the last eight months'.³⁶

The need for effective cooperation to investigate crimes under the Rome Statute or other related national crimes is apparent. Cooperation to promote and support prosecution of persons financing armed groups or providing them with weapons may in addition have a particular deterrent effect on rationally acting enterprises and business people operating in this area. If an enterprise adapts its operations to avoid criminal prosecution, that could make it more difficult for criminal groups to obtain financing, weapons and ammunition. That could ultimately contribute to the prevention of crimes in compliance with the declared aim of the ICC and its State Parties.

34 Report on Cooperation, *supra* note 9, § 52.

35 As to the arrest of Ignace Murwanashyaka and Straton Musoni, see also BBC News, *Germany Arrests Top Rwanda Generals* (17 November 2009), available online at <http://news.bbc.co.uk/2/hi/africa/8364507.stm> (visited 17 November 2009). This source states among other things that '[t]he FDLR is accused of funding its arms purchases by smuggling gold and other minerals from areas it controls in the North and South Kivu provinces, just across the border from Rwanda.'

36 OTP Weekly Briefing, 10–16 November 2009, Issue no. 13, at 2.

V. DISCUSSION REPORTS

Core Crimes Inc.

Panel Discussion Reports from the Conference on 'Transnational Business and International Criminal Law', held at Humboldt University Berlin, 15–16 May 2009

Julia Geneuss,* Jan Philipp Book,**
Boris Burghardt*** and Oliver Schüttpelz****

1. First Session: Framework and Alternative Accountability Mechanisms

The first session offered an external, i.e. a non-'international criminal law' perspective on the Conference topic. Its purpose was to consider whether non-international criminal law mechanisms at either the international or the national level could provide some guidance on how to address corporate involvement in international crimes. The first paper, presented by Anita Ramasastry,¹ provided an overview of the involvement of corporations in international crimes. Larissa van den Herik² then outlined the accountability mechanisms for corporate violations of human rights under international law, and Katherine Gallagher³ presented a paper on the Alien Tort Claims Act (ATCA) litigation in the United States and its possible relevance for international criminal law. Finally, Roland Hefendehl⁴ elaborated on a domestic, i.e. the German criminal law approach to white-collar crime. The panel was chaired by George P. Fletcher.⁵

* Research Fellow in International Criminal Law, Humboldt-Universität zu Berlin, Germany. [julia.geneuss@rewi.hu-berlin.de]

** Research Fellow in International Criminal Law, Humboldt-Universität zu Berlin, Germany. [jan.book@rewi.hu-berlin.de]

*** Senior Research Fellow in International Criminal Law at the Chair of Prof. Dr. Gerhard Werle, Humboldt-Universität zu Berlin, Germany. [boris.burghardt@rewi.hu-berlin.de]

**** Former Research Fellow in International Criminal Law, Humboldt-Universität zu Berlin, Germany. [schuttpelz@gmx.de]

1 Professor of Law at the University of Washington, Seattle, USA.

2 Professor of International Law at the University of Leiden, The Netherlands.

3 Staff Attorney at the Center for Constitutional Rights, New York, USA.

4 Professor of Criminal Law at the University of Freiburg, Germany.

5 Professor of Jurisprudence at the Columbia University School of Law, New York, USA.