# Corporate Complicity & Legal Accountability

## VOLUME 2 Criminal Law and International Crimes

Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes

INTERNATIONAL COMMISSION OF JURISTS

While there are situations in which businesses and their officials are directly and immediately responsible for human rights abuses, allegations are frequently made that businesses have become implicated with another actor in the perpetration of human rights abuses. In such circumstances, human rights organisations and activists, international policy makers, government experts, and businesses themselves, now use the phrase "business complicity in human rights abuses" to describe what they view as undesirable business involvement in such abuses. This development has spawned reports, analysis, debate and questions. What does it mean for a business to be "complicit"? What are the consequences of such complicity? How can businesses avoid becoming complicit? How should they be held to account for their complicity? In many respects, although the use of the term is widespread, there continues to be considerable confusion and uncertainty about the boundaries of this concept and in particular when legal liability, both civil and criminal, could arise.

In 2006, in order to address some of these questions the International Commission of Jurists asked eight expert jurists to form the Expert Legal Panel on Corporate Complicity in International Crimes. The Panel was asked to explore when companies and their officials could be held legally responsible under criminal and/or civil law when they are complicit in gross human rights abuses and to provide guidance as to the kind of situations prudent companies should avoid.

In this second Volume of its final report the Panel asks in what circumstances international criminal law could hold companies and/or their officials criminally responsible when they are involved with others in gross human rights abuses that amount to crimes under international law. This volume also looks briefly at the important role that criminal law plays in ensuring the accountability, and preventing the impunity, of actors involved in such abuses.

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**International Commission of Jurists**

The International Commission of Jurists (ICJ) is a non-governmental organization devoted to promoting the understanding and observance of the rule of law and the legal protection of human rights throughout the world. It is headquartered in Geneva, Switzerland, and has 85 national sections and affiliated organizations. It enjoys consultative status in the United Nations Economic and Social Council, UNESCO, the Council of Europe and the African Union. The ICJ maintains cooperative relations with various bodies of the Organization of American States.

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This volume was drafted by Magda Karagiannakis. Andrea Shemberg also contributed to the text. Federico Andreu-Guzmán provided legal review. The Panel reviewed the volume during the drafting process a minimum of three times. The volume was edited by Madeleine Colvin, Leah Hoctor and Róisín Pillay. Neeltje Eekhout, Marlena Ong and Priyamvada Yarnell assisted in the production.

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# TABLE OF CONTENTS

# Forward

In March 2006 the International Commission of Jurists asked eight expert jurists to form the Expert Legal Panel on Corporate Complicity in International Crimes (the Panel). The Panel was created to explore when companies and their officials could be held legally responsible under criminal and/or civil law when they are involved with other actors in gross human rights abuses.

The Panel members are leading lawyers in different fields of expertise, from five continents, and representing both common law and civil law legal traditions. They are: Andrew Clapham, Claes Cronstedt, Louise Doswald-Beck, John Dugard, Alberto León Gómez-Zuluaga, Howard Mann, Usha Ramanathan, and Ralph G. Steinhardt.

Throughout the process the ICJ engaged several experts, as advisers to the Panel, including: Eric David, Errol Mendes, Peter Muchlinski, Anita Ramasastry and Cees van Dam.

The Project's Steering Group was comprised of: Widney Brown & Peter Frankental (Amnesty International), Arvind Ganesan (Human Rights Watch), Patricia Feeney (Rights and Accountability in Development), John Morrison (Business Leaders Initiative on Human Rights; TwentyFifty Ltd.), Sune Skadegaard Thorsen (Lawhouse DK; ICJ Denmark), and Salil Tripathi (International Alert).

The Panel received research papers from leading academics, practitioners and corporate counsel on several relevant topics. These included: Larissa van den Herik (International Criminal Law), David Hunter (International Environmental Law), Olivier de Schutter, (Law of the European Union), Jennifer Zerk (Common Law Tort Liability), Celia Wells (Corporate Criminal Law), Jonathan Burchell (Comparative Criminal Law on Joint Liability), Beth Stephens (U.S. Litigation Against Companies for Gross Violations of Human Rights), Rachel Nicolson and Emily Howie (Separate Legal Personality, Limited Liability and the Corporate Veil), Sunny Mann (Competition Law) and John Sherman (The United States Sentencing Guidelines for Organisational Defendants).

In October 2006, at a multi-stakeholder consultation, organised in cooperation with Friedrich-Ebert-Stiftung, the Panel engaged with key stakeholders including representatives of: ABB, Amnesty International, BP, Building and Wood Workers International, the Business Leaders Initiative for Human Rights, the Centre for Corporate Accountability, Chatham House, The Coca-Cola Company, the German Forum for Human Rights, Global Witness, Human Rights Watch, the ILO Governing Body, the International Committee of the Red Cross, the International Confederation of Free Trade Unions, the International Council on Human Rights Policy, National Grid, the Office of the UN High Commissioner for Human Rights, Rights and Accountability in Development, and Sherpa.

The Panel also sought input from lawyers, business representatives and others via an online request for submissions. Among others submissions were received from: the Corporate Responsibility Coalition (CORE), EarthRights, Global Witness, and the International Criminal Defence Attorney's Association.

The Panel met in plenary three times during the process. The three volumes of this report set out final conclusions and recommendations. The report as a whole has been approved by each member of the panel and reflects their collective views. However it may happen that there are specific statements in the report which do not accord with, or comprehensively reflect, the precise view of every Panelist.

# 1 Introduction

In this Volume, the Panel asks in what circumstances international criminal law, and to some extent domestic criminal law, could hold companies and their officials criminally responsible when they participate with others in gross human rights abuses that amount to crimes under international law. This volume also looks briefly at the important role that criminal law plays in ensuring the accountability, and preventing the impunity, of actors involved in such abuses and considers the ways in which international criminal law has developed over time.

As explained in Volume 1, the focus of the Panel's analysis has not been the legal accountability of businesses and their officials when they are the direct and immediate perpetrators of gross human rights abuses. Rather it has addressed avenues to legal accountability when businesses are allegedly involved with other actors in gross human rights abuses. Therefore, in Section 2 below, the Panel looks at the development of accomplice liability in international criminal law, and outlines the differences in criminal law between principal perpetrators and accomplices. In Sections 3, 4 and 5, it looks in more detail at three particular bases of criminal liability and in Section 6 the Panel applies the legal analysis outlined in previous sections to a number of situations in which companies commonly face allegations that they have become caught up in gross human rights abuses amounting to crimes under international law.

In Section 7, the Panel considers some of the defences which criminal defendants often call on in seeking to demonstrate their innocence, and in Section 8 it outlines the jurisdictions in which companies or their representatives may be subject to criminal proceedings if they become involved in gross human rights abuses amounting to crimes under international law. In Section 9 the Panel assesses the possibilities for holding company entities themselves, as opposed to their officials, criminally responsible.

## 1.1 Criminal Responsibility and "Business Complicity in Gross Human Rights Abuses"

As outlined in Volume 1, for a number of years now the word "complicity" has been used on a daily basis in policy documents, newspaper articles and campaigning slogans. Frequently it is not used in a legal sense but rather in a colloquial manner to convey that someone has become caught up and implicated in acts that are negative and unacceptable. Such use of the term has become commonplace in the context of work on business and human rights, and it has provided a tool to explain in simple terms the fact that companies can become involved in human rights abuses in a

manner that incurs responsibility and blame. Human rights organisations and activists, international policy makers, government experts, and businesses themselves, now continuously use the phrase "business complicity in human rights abuses" in this way.

However, as Volume 1 also notes, in the context of criminal law the concept of complicity has a historical technical meaning that is closely linked to the concept of "aiding and abetting." This specific meaning does not correspond to the full extent of the policy concept of "business complicity in human rights abuses." Therefore in order to avoid confusion and misinterpretation, the Panel does not use the word complicity in Volume 2. Rather throughout Volume 2 it refers to the *involvement* of businesses with others in gross human rights abuses amounting to crimes under international law.

In its analysis of criminal law in Volume 2 the Panel has chosen to consider other headings of criminal responsibility in addition to "aiding and abetting," in order to properly reflect the zone of potential legal risk which it believes may exist for companies when they are involved with other actors in gross human rights abuses amounting to crimes under international law. Indeed, international criminal law contemplates various forms of criminal accountability, additional to aiding and abetting, through which an actor incurs responsibility for crimes committed by another. These include for example instigating, ordering, planning or conspiring to commit a crime and the responsibility of a superior who fails to prevent or punish the commission of a crime. Each of these forms of participation in a crime committed by others is governed by its own legal rules and sometimes these forms of participation are defined as separate and distinct offences or crimes from the concept of aiding and abetting. However, it is important to note the view of the International Law Commission (ILC) that, in a general way, all of these forms of participation in crimes are forms of *complicity*.[1]

## Gross Human Rights Abuses

As noted in Volume 1, the Panel's analysis has focused on actions that constitute human rights violations by governments and/or impairments of human rights by non-state actors, including for example armed groups and other companies. Throughout its report the Panel uses the term "human rights abuses" to describe all such conduct. The Panel was asked to consider some of the most egregious human rights abuses, which will often have devastating effects, not only on individual victims and their families, but on the

1 International Law Commission, *Yearbook of the International Law Commission*, 1996, Vol. II (Part Two), UN Doc. A/CN.4/SER.A/1996/Add.l (Part 2), (ILC Yearbook 1996) pp. 18-20.

communities and societies in which they take place. Throughout this Volume the Panel uses the term "gross human rights abuse" to describe such abuses. For example, among others, crimes against humanity, enforced disappearances, slavery and torture are generally acknowledged to constitute gross human rights abuses. The concept of gross human rights abuses is continuously expanding and abuses that were once not considered to amount to gross human rights abuses, are now widely accepted as encompassed by the term.

## 1.2 Crimes and Gross Human Rights Abuses

International criminal law is a body of law that criminalises "the most serious crimes of concern to the international community" because "they threaten the peace, security and well-being of the world." [2] Although international criminal law has different historical origins from human rights law, both bodies of law share the same underlying and fundamental principle: the protection of, and respect for, humanity.[3] Therefore, international criminal law includes as crimes many activities that are also gross human rights abuses and conduct that gives rise to a gross human rights abuse will also often involve crimes under international law. In its report, the Panel has focused on crimes against humanity, war crimes as well as some other gross human rights abuses which international law requires states to criminalise. It explains these three categories here.

### Crimes Against Humanity

These crimes were first defined and punished in Nuremberg and Tokyo after the Second World War and, with some variation regarding their definition and application, they have been a core feature of war crimes courts and tribunals since then and have been incorporated in various international treaties and other international instruments.[4] Crimes against humanity are crimes under international customary law. These crimes, which have most recently been incorporated into the International Criminal Court (ICC) Statute, include widespread or systematic murder,

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2 Paras. 3 and 4 of the Preamble of the ICC Statute.

3 See for discussion: International Criminal Tribunal for the Former Yugoslavia (ICTY), *Furundzija*, (Trial Chamber), 10 December 1998, para. 183; L. Doswald-Beck & S. Vité, "International humanitarian law and human rights law", in: *International Review of the Red Cross*, No. 293, 30 April 1993, pp. 94-119.

4 Article 6(c) of the Charter of the International Military Tribunal at Nuremberg, London, 8 August 1945 (Nuremberg Charter); Article 5(c) Charter of the International Military Tribunal for the trial of the major war criminals in the Far East, Tokyo, 19 January 1946 (Tokyo Charter); Article 18 of the ILC Draft Code of Crimes Against the Peace and Security of Mankind 1996 (ILC Draft Code); Principle VI(c) ILC Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal (1950); Article 5 ICTY Statute; Article 3 Statute of the International Criminal Tribunal for Rwanda (ICTR); Article 2 Statute of the Special Court for Sierra Leone (SCSL).

extermination, enslavement, deportation or forcible transfer, imprisonment, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, forced sterilisation or any other form of sexual violence, enforced disappearances and arbitrary detention and apartheid. Crimes against humanity can also include other inhumane acts and persecutory acts which are committed on political, racial, national, ethnic, cultural, religious or gender grounds. Significantly, all crimes against humanity are punishable when they are committed by anyone, including company officials, and both in times of peace or armed conflict.[5]

### War Crimes

War crimes encompass serious violations of the laws and customs of war and international humanitarian law applicable to both international and non-international armed conflicts. They include grave breaches of the 1949 Geneva Conventions and Protocol I (which are applicable in international armed conflicts), breaches of Common Article 3 of the Geneva Conventions and Protocol II (which are applicable in internal armed conflicts) and other serious breaches of the laws and customs of war. War crimes can be committed by any person who is taking part in hostilities, including, among others, civilians representing companies. For an act to constitute a war crime it does not have to be the product of a plan or policy,[6] or to reach a particular scale: a single act such as an arbitrary and unlawful killing, torture or a rape will suffice. The ICC Statute contains a comprehensive list of war crimes.[7] They include: wilful killing, torture, inhuman treatment, wilfully causing great suffering or serious injury, extensive destruction or appropriation of property not justified by military necessity, unlawful deportation or transfer or displacement of the civilian population and intentionally directing attacks against civilian populations. They also include property offences such as pillage and unlawfully destroying or seizing property.

### Other Gross Human Rights Abuses Amounting to Crimes under International Law

Certain other gross human rights abuses, such as genocide, slavery, torture, extrajudicial execution and enforced disappearance are also crimes under customary international law and/or treaties and conventions.[8] These are acts which international law requires states to prevent and penalise in their criminal law.

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5 Article 18 ILC Draft Code; ICTY, *Tadic*, (Appeals Chamber) Decision of October 2, 1995 paras. 140 7 141; Article 7 ICC Statute; Article 7 ICC Elements of Crimes.

6 W.J. Fenrick, in: O. Triffterer (ed.), *Commentary on the Rome Statute*, (1999) article 8, margin No. 4.

7 Article 8 ICC Statute; Article 8 ICC Elements of Crimes.

8 See egs: Convention on the Prevention and Punishment of the Crime of Genocide; Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED) (not yet in force); Inter-American Convention to Prevent and Punish Torture; Inter-American Convention on Forced Disappearance of Persons; UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions.

## 1.3 International Criminal Law and Businesses

The Panel has found that many in-house company lawyers and compliance officers are acutely aware of the recent developments in corporate governance rules, sometimes including criminal penalties for directors, affecting corporate activities worldwide. However, they rarely think that international criminal law is relevant to their business operations. Few, for example, see the modern-day relevance of the war crimes tribunals after the Second World War that prosecuted and convicted a number of businessmen for various forms of involvement in the crimes of the Nazis.[9] Yet the precedents set 60 years ago still inform the situations in which company officials can be held liable for involvement in crimes under international law involving gross human rights abuses.

The Panel believes that as the field of international criminal law develops and as companies operate in new contexts, international criminal law and its implementation in domestic and international jurisdictions will become evermore relevant to companies. The rapid increase of private military companies and private security companies operating in areas of armed conflict is one example of how companies work in situations where they may become implicated in the perpetration of war crimes. In addition, a wide variety of companies from all sectors – including natural resource extractive industries, infrastructure and engineering companies, financiers, retail and garment businesses and the communications industry – now have either global supply chains or a global presence and find themselves, or their clients or suppliers, operating in the midst of armed conflicts or in countries where crimes against humanity and other gross human rights abuses amounting to crimes under international law occur. The business transactions of these companies and their relationships with governments, armed groups and other businesses require them to understand what conduct may constitute a crime under international law. Furthermore, the risks of becoming involved in gross human rights abuses amounting to crimes under international law exist in all contexts, and are not, as some believe, a problem only for companies working in situations of armed conflict or in developing countries. For example, private airline companies have faced criticism for allegedly transporting prisoners to locations where they faced torture and enforced disappearance, as part of the US government practice of rendition of terror suspects.[10]

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9 At Nuremberg, a number of business representatives were tried for involvement in slave labour, crimes against humanity and war crimes. E.g. *United States v. Krupp* (Krupp Case), Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10 (1948) (Trials of War Criminals), Vol.IX, *United States v. Carl Krauch* (Farben Case), Trials of War Criminals, Vol. VIII, *United States v Friedrich Flick* (Flick Case), Trials of War Criminals, Vol. VI. *The Zyklon B case: Trial of Bruno Tesch and two others,* British Military Court, 1-8 March 1946, *Law Reports of Trials of War Criminals,* The United Nations War Crimes Commission, Volume I (1947) Case No. 9 (Zyklon B Case).

10 See eg. First and Second report of Mr. Marty to the Parliamentary Assembly of the Council of Europe (AS/Jur (2006) 16 Part II (7 June 2006)).

In this context, the Panel considers it important to highlight that although no international forum yet has jurisdiction to prosecute a company as a legal entity, it is accepted that corporate officials could face trial for international criminal activity at the international level. Furthermore, as discussed in Section 9, national legal systems often include legal entities, including companies, in the list of potential criminal perpetrators. As these countries take steps to incorporate international criminal law into their national legal systems, business entities could increasingly face the risk of prosecutions for such crimes in national courts.

## 1.4 The Important Role of Criminal and International Criminal Law

The Panel considers that criminal law provides a powerful and appropriate tool to deter and punish companies and their officials who participate in gross human rights abuses amounting to crimes under international law. However, the aim of criminal law is not merely to punish wrongdoers. The existence of clear criminal prohibitions on certain behaviour is also an effective means of shaping corporate conduct, particularly in pointing to the systems and procedures companies should put in place to build a culture of compliance and prevention.

Furthermore, while the criminal law has been viewed traditionally as aimed at punishing and deterring the perpetrators, in fact national criminal law in a number of civil law countries does provide victims of crimes with legal standing enabling them to be a party to criminal proceedings (for example as a *partie civile*). They are thereby able to defend their interests as well as to claim and obtain redress and remedy as part of the criminal process.[11] Furthermore in some civil law countries, domestic criminal law also allows, in varying ways, Non Governmental Organisations (NGOs) to have legal standing in criminal proceedings.[12] In contrast, in common law jurisdictions, these possibilities, either for victims of crimes or for relevant organisations, may not exist at all, or may only be available to a much lesser degree.

It should also be noted that while for many years international criminal law has not placed great emphasis on providing remedies and reparation (monetary or non-monetary) to the victims of crimes, there have been significant signs of a shift in this regard, and in particular towards allowing victims take part in criminal proceedings.[13] For example, the Statute of the ICC allows victims to present their views and

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11 A variety of procedural forms for such interventions exist, such as private action, popular indictment, complaint, joint complaint, civil plaintiff and intervening third party. The entitlement and powers accorded under each procedural form vary according to the law of each country.

12 For example in France, the Code of Criminal Procedure expressly provides for non-profit associations with a certain purpose to act as civil plaintiffs in proceedings relating to such practices. In Spain, the law of criminal procedure permits NGOs to act as plaintiffs and participate in a popular indictment. In Guatemala, the Code of Criminal Procedure (Decree No. 51-92, Article 116) provides that an "association of citizens" can be associated plaintiffs "against public officials or employees who have directly violated human rights".

13 See, *inter alia,* Article 8, Optional Protocol to the Convention on the Rights of the Child on the sale of

concerns through legal representation at any stage of the proceedings and to seek reparations for the harm suffered as the result of the crimes allegedly committed.[14] The Court can also order that fines and penalties be paid into a Trust Fund[15] for victims and their families.

There are particular consequences associated with participation in a crime under international law that distinguish such conduct from domestic criminal offences. It is these aspects of crimes under international law, considered below, that enhance the role that international criminal law can play in a globalised world.

As will be discussed in Section 8, for some crimes under international law a person may be prosecuted by an international court or in a court in another country, even if the act is not criminal in the domestic law of the country where it was committed, and even if it is tolerated or encouraged by authorities in that country.[16] Second, alleged perpetrators and other persons suspected of involvement in crimes under international law can be extradited to a country that is able to prosecute, and for some crimes they must be either extradited or prosecuted, in fulfillment of obligations of *aut dedere aut judicare*. Third, some crimes under international law, for example war crimes and crimes against humanity, are considered to be so serious that no 'statute of limitations' will apply, so that a suspect can be prosecuted and tried no matter how many years have elapsed since the crime occurred. What flows from this, is that it is more difficult for a person to escape accountability for involvement in an international crime by fleeing to another country and/or waiting for time to elapse.

## 1.5 The Development of International Criminal Law and its Increasing Relevance to Business

Through its research and analysis, the Panel has noted some significant developments in the scope and enforcement of international criminal law, especially over the last 15 years. Parallel to this has been the evolution of domestic criminal law systems, where most prosecutions take place.

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children, child prostitution and child pornography; Article 6, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime; UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law; UN Updated Set of Principles for the protection and promotion of human rights through action to combat impunity (Report of Diane Orentlicher, independent expert to update the Set of principles to combat impunity, E/CN.4/2005/102/Add.1, 8 February 2005).

14 See Chapters 4 (Section 3) and 5 of the Regulations of the Court.

15 See Article 79 ICC Statute.

16 For a discussion on the relevance and importance of international criminal law when domestic criminal law measures fail, see J.L. Bischoff, Forced Labour in Brazil: International Criminal Law as the *Ultima Ratio* Modality of Human Rights Protection, in: *Leiden Journal of International Law*, Vol. 19, 2006, pp. 151–193.

First, the number of international tribunals and jurisdictions for prosecuting crimes under international law has significantly risen. For example, the United Nations has set up two *ad hoc* tribunals following the well-documented war crimes and crimes against humanity perpetrated in the 1990s during the war in the former Yugoslavia and the genocide in Rwanda.[17] As detailed in the following Sections, not only was the establishment of these bodies important, but jurisprudence from both tribunals has clarified when an individual may be held accountable for involvement in crimes under international law.

Moreover, the establishment of these tribunals helped to motivate states to reach agreement in 1998 for the setting up of a permanent ICC, half a century after the United Nations General Assembly first asked the UN International Law Commission to draw up a statute for such a court. The Statute of the Court came into force on 1 July 2002. After intensive negotiations, states decided not to give it the power to prosecute legal entities such as companies. However, the review of the ICC Statute in 2009 provides an opportunity for states to consider this option.[18]

Alongside the ICC's exercise of jurisdiction, prosecutions at the national level will continue to be important. Such prosecutions will become increasingly possible as more states incorporate all or some aspects of gross human rights abuses amounting to crimes under international law into their domestic laws, thereby opening up more jurisdictions where individuals can be brought to justice. In any event, regardless of international criminal law, traditional criminal prosecutions for offences of murder or assault, for instance, will often provide a relevant option in this context.[19]

Further, the range and scope of crimes under international law is also expanding. For example, the ICC Statute has clarified that certain abuses committed during internal armed conflict (as opposed to international armed conflicts) are also war crimes. This includes offences of sexual violence such as rape, pillage and unlawful displacement of civilian populations, all of which can now be prosecuted before the ICC.[20] In the last two decades, many other treaties have expanded the range of crimes under international law which States Parties are required to incorporate in their domestic criminal law,[21] thereby adding new tools for corporate accountability.

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17 In 1993, the ICTY was established by Security Council resolution 827 to prosecute serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. In 1994, the ICTR was established by Security Council resolution 955 to prosecute persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda between 1 January 1994 and 31 December 1994.

18 See Section 9 below for a discussion about when legal entities can be held responsible for crimes.

19 For example, while assault is a crime in most countries, it will not be an international crime unless it amounts to torture or other serious mistreatment constituting a war crime or crime against humanity.

20 See Article 8 ICC Statute.

21 E.g. Article 4 CAT; Article 4 ICPPED; Articles 2-4 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others; Article 5 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; Article 6 Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime.

Despite the possibilities, it is nonetheless true that at the national level, considerable obstacles remain to using either international or national criminal law, especially for crimes committed in other countries. Prosecutors often lack an understanding of international criminal law, especially if it is recently incorporated into national laws. It is often difficult to carry out investigations and obtain admissible evidence if crimes were committed in other countries, and governments are sometimes reluctant, for reasons of foreign relations, to permit prosecutions of business representatives or companies for crimes committed abroad.

However, as noted above, regardless of the number of prosecutions, the aim of criminal law is also to deter. As companies understand the relevance of international criminal law as it is applied at both international and national levels, the Panel believes that a culture of compliance will develop. With some determination on the part of prosecutors, both company officials and companies themselves can be made accountable for committing or being involved in gross human rights abuses amounting to crimes under international law. Such use of international law will be an essential part of the global strategy to end the impunity which surrounds such crimes.

### Box 1: The Prosecution of Frans Van Anraat

In December 2004, Frans van Anraat, a Dutch businessman, was arrested on charges of being an accomplice in the genocide and war crimes committed by Saddam Hussein. In his role as an export broker, Van Anraat delivered thousands of tons of thiodiglycol (TDG) a substance used for creating mustard gas to Saddam Hussein's Iraqi regime. This gas was used in Saddam Hussein's chemical weapons programme, which included its use on the Kurdish population of Iraq. During the trial it was shown that van Anraat knew he was exporting this substance to Iraq, he was aware that it could be used for producing poison gas and that there was a reasonable chance it would be used for chemical attacks as Iraq had done during the Iran-Iraq war. The District Court of The Hague acquitted him of being an accomplice in genocide because there was insufficient evidence that he had known of the Iraqi regime's genocidal intent towards the Kurds. He was however convicted of being an accomplice in the war crimes of inhuman treatment and causing the death or severe bodily harm of others by the use of chemical weapons contrary to international law.[22] The Court found that Anraat, "consciously and solely acting in pursuit of gain, has made an essential contribution to

22 *Public Prosecutor v. Van Anraat*, LJN AX6406, The Hague District Court, 23 December 2005, para. 17.

the chemical warfare program of Iraq…which enabled, or at least facilitated, a great number of attacks with mustard gas on defenceless civilians".[23] Anraat was sentenced to 15 years of imprisonment. His conviction for war crimes was upheld on appeal and his sentence was increased to 17 years of imprisonment.[24]

23 *Public Prosecutor v Van Anraat*, LJN AX6406, The Hague District Court, 23 December 2005 at para. 17.

24 *Public Prosecutor v. Van Anraat*, LJN BA6734, The Hague Court of Appeal, 9 May 2007.

# 2 When Could a Company Official Be Responsible as an Accomplice under International or National Criminal Law?

## 2.1 Principal Perpetrators and Accomplices

Under both international and domestic criminal laws, those involved in the commission of a crime can be held responsible either as principal perpetrators or as accomplices, depending on their acts and role in the commission of a crime. The principle of individual criminal responsibility and punishment for crimes under international law, reaffirmed at Nuremberg, is the cornerstone of international criminal law.[25] It contemplates various forms of participation in crimes for which an individual may incur responsibility, including involvement in crimes physically committed by another person such as aiding and abetting.

The distinction between principal perpetrators and accomplices is not always uniform between international law and national law. For example, under the Statutes of the ICC and the *ad hoc* tribunals for Yugoslavia and Rwanda,[26] a person can be responsible for committing[27], planning[28], ordering[29], or instigating[30] a crime or for otherwise aiding and abetting a crime. Both international law and national laws commonly characterise a person who directly or physically commits a crime as a principal perpetrator. Those who plan, order or instigate a crime might be described as either principal perpetrators or accomplices depending on specific national laws. However, aiding and abetting another to commit a crime is most commonly characterised as a form of accomplice liability in both international and national criminal law systems. Accomplice liability can also include criminal responsibility for assistance given after the physical perpetration of a crime. Sometimes it needs to be clear that this assistance had been agreed upon by the perpetrator and the accomplice

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25 ILC Yearbook 1996 p. 19.

26 See Article 7(1) ICTY Statute; Article 6(1) ICTR Statute; Article 25 ICC Statute.

27 Committing refers to the physical participation of an accused in the actual acts, which constitute the material elements of a crime. ICTR, *Rutaganda,* (Trial Chamber) 6 December 1999, para. 40; ICTY, *Galic,* (Trial Chamber) 5 December 2003 para. 168. See also Article 25(3)(a) ICC Statute.

28 Planning occurs when one or several persons contemplate designing the commission of a crime at both the preparatory and execution phases. ICTR *Akayesu,* (Trial Chamber) 2 September 1998, para. 480; ICTR, *Rutaganda,* (Trial Chamber) 6 December 1999, para. 37; ICTY, *Galic,* (Trial Chamber) 5 December 2003, para. 168.

29 Ordering means a person in a position of authority using that authority to instruct another to commit an offence. ICTR, *Akayesu,* (Trial Chamber) 2 September 1998, para. 483: ICTR, *Rutaganda,* (Trial Chamber) 6 December 1999, para. 39. ICTR, *Gacumbitsi,* (Appeals Chamber) 7 July 2006, paras. 181-183. See also Article 25(3)(b) ICC Statute.

30 Instigating means prompting another to commit an offence which is actually committed, either through an act or omission. ICTR, *Gacumbitsi,* (Appeals Chamber) 7 July 2006, para. 129. See also Article 25(3)(b) ICC Statute, which prohibits soliciting or inducing the commission of a crime.

prior to the perpetration of the crime, but some national legal systems criminalise such assistance even when there has not been a previous agreement between the perpetrator and the accomplice. Other systems characterise this behaviour as a separate offence of concealment.

Labelling a perpetrator as an accomplice and not a principal in the commission of a crime under international law does not necessarily diminish their legal liability. The concept of accomplice liability is especially important in international criminal law because of the often large-scale and complex nature of the crimes and, consequently, the number of people who participate in them. Indeed, the main focus of the international criminal courts and tribunals since Nuremberg has not been the perpetrators on the ground such as the executioners, torturers and rapists, but those who conceived, led, controlled or facilitated their acts, whose responsibility may be even greater than that of a principal perpetrator who directly or physically committed the crime.

It is important to note that one single act or omission may be sufficient to attract criminal liability for involvement in gross human rights abuses amounting to crimes under international law. For example, in order to be criminally liable for aiding and abetting a crime against humanity (which requires a crime to be carried out in a widespread or systematic way) a company representative need not have participated in the entire plan or attack. It is sufficient if the company representative assists *one act* that takes place in the context of the widespread or systematic attack, with the knowledge that that act is part of a widespread or systematic attack, or takes a calculated risk that the act being assisted may or may not be part of such an attack. So if a company offers trucks, the use of airstrips, fuel, helicopters, shelters or buildings or provides services that substantially assist the principal perpetrator to carry out *one act* such as killing, unlawful destruction of houses, rape or other acts of torture, and this act forms part of a widespread or systematic attack, there may be a basis for criminal liability of the company representative for aiding and abetting crimes against humanity.

What kind of involvement by a company official in gross human rights abuses amounting to crimes under international law will potentially give rise to liability as an accomplice? In discussing this fundamental question, it is important to address the development of accomplice liability in international law, from its origins following the Second World War. The following section analyses this development.

## 2.2 The Development of Accomplice Liability in International Law

### Nazi Businessmen at Nuremberg

The Nuremberg proceedings represented an important stage in the development of the law relating to accomplice liability, as well as of international criminal law

generally. The Nuremberg Charter sought to punish crimes against peace, war crimes and crimes against humanity. It embedded accomplice liability by stating that "leaders, organisers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan." [31] This provision was mirrored in Tokyo Charter.[32]

At Nuremberg, the first of the four counts of the prosecution charged all of the defendants with being leaders, organisers, instigators, or *accomplices* in the formation or execution of a common plan or conspiracy to commit crimes against the peace through waging aggressive war (Count 2) war crimes (Count 3) and crimes against humanity (Count 4). Counts 3 and 4 also expressly alleged that all the defendants participated in the common plan as "leaders, organizers, instigators, and *accomplices*." The Nuremberg Tribunal was not however specific about the basis of each defendant's liability in terms of delineating their role as a leader, an organiser, an instigator or an accomplice.

It was alleged before the Tribunal that, in order to execute the common plan, the defendants undertook acts which included using "organizations of German business as instruments of economic mobilization for war" and they, "in particular the industrialists among them, embarked upon a huge re-armament program." [33] In its final Judgment, the Tribunal held that in the "reorganization of the economic life of Germany for military purposes, the Nazi Government found the German armament industry quite willing to cooperate, and to play its part in the rearmament program." [34] Several of those convicted at Nuremberg and subsequent proceedings, were involved in industry and banking, and provided financial and industrial support to the Nazi regime. For the most part, however, they operated not only as private businessmen, but also as state agents, often holding high office. They cannot therefore be considered solely as private businessmen, but they did fulfil functions that in many situations could also be undertaken by private companies and their officers. Their trials illustrate how international criminal law can establish liability of those involved and operating in close co-operation with perpetrators of gross human rights abuses.

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31 Article 6 Nuremberg Charter.

32 Article 5 Tokyo Charter.

33 Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945 – 1 October 1946, Vol. 1, p. 35.

34 Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945 – 1 October 1946, Vol. 1, p. 183.

## Box 2: The Trial of Walther Funk

A leading example of a Nazi businessman's case is the trial of Walther Funk. He took office as Minister of Economics and Plenipotentiary General for War Economy in early 1938 and as President of the Reichsbank in January 1939. He was made a member of the Ministerial Council for the Defence of the Reich on August 1939, and a member of the Central Planning Board in September 1943. The Nuremberg Tribunal's findings with respect to his stewardship of the German national bank were damning: in 1942 Funk agreed with Himmler that the Reichsbank was to receive certain gold and jewels and currency from the SS and instructed his subordinates, who were to work out the details, not to ask too many questions. As a result of this agreement the SS sent to the Reichsbank the personal belongings taken from the victims who had been exterminated in the concentration camps. Funk claimed that he did not know that the Reichsbank was receiving articles of this kind. The Tribunal found that "Funk either knew what was being received or was deliberately closing his eyes to what was being done."[35] The aid given to the SS by the bank would in common-law terms render the participants as accessories after the fact in the crimes against those concentration camp victims.[36]

By 1943, Funk was a member of the Central Planning Board which determined the total number of labourers needed for German industry and required this labour to be produced, usually by deportation from occupied territories. He was aware that this board was essentially importing slave labour. In addition, as President of the Reichsbank, Funk was indirectly involved in the utilisation of concentration camp labour. Under his direction, the Reichsbank set up a revolving fund of 12,000,000 Reichsmarks to the credit of the SS for the construction of factories to use concentration camp labourers. He was found guilty of crimes against peace, crimes against humanity and war crimes.[37]

The Tribunal, therefore, was concerned not only with Funk's specific acts but also his knowledge of the crimes he was contributing to. The Tribunal used all the available evidence before it, including evidence about the accused's subjective state of mind in conjunction with other evidence regarding the objective circumstances at the time, to determine whether the defendant had knowledge. Importantly, the Funk case indicates that wilful blindness

35 Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945 – 1 October 1946, Vol. 1, p. 306.

36 T. Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir*, Knopf, New York, 1992, p. 398.

37 Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945 – 1 October 1946, Vol. 1, pp. 304-307.

about the contribution that a senior financial actor or his institution makes to a crime cannot be used as a shield in criminal proceedings.

### Developments since the Second World War

Post World War II initiatives of the UN General Assembly resulted in the Nuremberg Principles[38] and eventually in the International Law Commission's second version of the draft Code of Crimes against the Peace and Security of Mankind which was adopted in 1996 (ILC Code).[39] These instruments encapsulated principles of accomplice liability.

The ILC Code considered that any act other than the commission or the attempt to commit a crime, fell within the general category of accomplice liability.[40] These forms of liability included: ordering, failing to prevent or repress a crime as a superior, direct participation in planning or conspiring to commit a crime or directly and publicly inciting a crime.[41] The Code also provided that an individual will be held responsible if he "knowingly aids, abets or otherwise assists, directly and substantially, in the commission of such a crime, including providing the means for its commission."[42]

Other major instruments dealing with crimes under international law such as torture or other cruel, inhuman or degrading treatment,[43] people trafficking for the purpose of prostitution[44] and enforced disappearance[45] have embedded in them the principle of accomplice liability. This principle is also included in the Genocide Convention and the statutes of the *ad hoc* tribunals which incorporate the terms of the Genocide Convention.[46] In the context of state responsibility for genocide, the

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38 ILC, *Yearbook of the International Law Commission,* 1954, Vol. II, UN Doc. A/CN.4/SER.A/1954/Add.l, pp. 150-152.

39 ILC Yearbook 1996, p. 17.

40 Article 2(3)(b)-(f), see ILC Yearbook 1996, p. 18 & 20.

41 Article 2 (3)(b) to (f); see ILC Yearbook 1996, p. 18.

42 Article 2(3)(d), see ILC Yearbook 1996, p. 18.

43 Article 4 (1) CAT.

44 Article 17(4) Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others.

45 Article 6 ICPPED.

46 Article 3(e) Convention on the Prevention and Punishment of the Crime of Genocide; Article 4(3)(e) ICTY Statute; Article 2(3)(e) ICTR Statute. Criminal liability for complicity in genocide will arise irrespective of the extent of participation of the accused: ICTR, *Akayesu,* (Trial Chamber) 2 September 1998, paras. 542-543, citing *Attorney General of the Government of Israel v. Adolph Eichmann*, Jerusalem District Court, 12 December 1961, in: *International Law Reports* (ILR), vol. 36, 1968, p. 340. The ICTR has found that an accused is liable for complicity in genocide if he aided or abetted or instigated one or more persons in the commission of genocide, knowing that that other person had the specific intent of genocide: ICTR, *Musema*, (Trial Chamber) 27 January 2000, para. 183; ICTR, *Akayesu,* (Trial Chamber) 2 September 1998, paras. 533-548.

International Court of Justice has found that accomplice liability under the Genocide Convention includes "the provision of means to enable or facilitate the commission of the crime." [47]

The concept of accomplice liability is also a feature of international or hybrid criminal courts and is incorporated into the statutes of the ICTY, ICTR, the SCSL, the Extraordinary Chambers for Cambodia, and the Special Tribunal for Lebanon.[48] Most importantly, it is a feature of the ICC Statute,[49] which represents the most significant recent source of the current state of international criminal law, both in general and as it applies to accomplice liability. The Statute of this Court has been signed by in excess of a hundred states and this number is growing.

Thus, there can be no question that accomplice liability is firmly entrenched in international criminal law and is expressed in different modes of liability. Those most likely to be pertinent to corporate officials who become involved with others in crimes under international law are discussed in the next sections.

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47 International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, para. 419.

48 Article 7(1) ICTY Statute; Article 6(1) ICTR Statute; Article 6(1) SCSL Statute; Article 29 Law on the Establishment of the Extraordinary Chambers with inclusion of amendments as promulgated on 27 October 2004, Article 3 Statute of the Special Tribunal for Lebanon.

49 Article 25(3)(c) ICC Statute.

# 3 Accomplice Liability for Aiding and Abetting under International and National Criminal Law

In the simplest terms, aiding and abetting occurs when a person knowingly helps another to commit a crime. As such it is often described as a form of assistance provided to the principal perpetrator, with knowledge. The person who is giving the assistance, encouragement or moral support must know that his or her actions would contribute to the crime. This knowledge can be inferred from all relevant circumstances, including both direct and circumstantial evidence. It is not necessary to show that the practical assistance *caused* the crime or even made it worse; rather it has to be shown that it had a 'substantial effect' on it. A useful way of describing this is to say that the crime would not have happened in the same way had the contribution not been given. The question is: did the assistance or encouragement change how the crimes were committed or the way in which they were accomplished?

The Statue of the ICC provides that a person will be guilty where, for the purpose of facilitating the commission of a crime, the person aids, abets or otherwise assists in its commission or its attempted commission, including by providing the means for its commission.[50] Aiding and abetting is also criminalised under the statutes of the ad hoc and hybrid international tribunals[51] as well under the ILC Draft Code of Crimes against the Peace and Security of Mankind.[52]

## 3.1 International Criminal Law

### 3.1.1 Act or Omission

An issue for criminal law is what level of assistance or contribution should be criminalised. Should even minor and remote assistance constitute aiding and abetting? International criminal law answers this by imposing the following threshold: the assistance should have a substantial effect on the crime before it can be characterised as aiding and abetting. However, it does not require that the crime would not have occurred without it. This assistance can occur before, during or after the crime has occurred.

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50 Article 25(3)(c) ICC Statute.

51 Article 29 Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia (Extraordinary Chambers of Cambodia) for the prosecution of crimes committed during the period of democratic Kampuchea, 27 October 2004; Article 7(1) ICTY Statute; Article 6(1) ICTR Statute; Article 6(1) SCSL Statute.

52 Article 2(3)(d) ILC Draft Code.

### Substantial Effect

The ILC Code provides that the accomplice must provide the kind of assistance which contributes "directly and substantially" to the commission of the crime, for example by providing the means which enable the perpetrator to commit the crime. Thus, the assistance must facilitate the crime in some significant way. According to the ILC, this standard is consistent with the other relevant international provisions including the Nuremberg Charter and the ICTY and ICTR Statutes.[53] Further, the ILC commentary states that assistance after the crime could constitute aiding and abetting, if this assistance had been agreed upon by the perpetrator and the accomplice prior to the perpetration of the crime.[54] This is certainly the case, however a corporate official may be liable for aiding and abetting after the fact, even if he or she did not agree to provide that help before the crime was committed. Neither the terms of the ILC Code, nor the statutes or appellate jurisprudence from the *ad hoc* tribunals, provide that a previous agreement to provide help after fact is an element of aiding and abetting liability.

The Appeals Chamber of both *ad hoc* tribunals has explained that the *actus reus* of aiding and abetting consists of acts directed to assist, encourage or lend moral support to the perpetration of a crime, and which have a substantial effect upon its perpetration.[55] Proof of a cause-effect relationship between the conduct of the aider and abettor and the commission of the crime, or proof that such conduct served as a condition precedent to the commission of the crime, is not required. Further, the act may occur before, during or after the principal crime has been committed.[56]

Both the ILC and subsequent international case law are therefore consistent in the requirement that the help provided must have a substantial effect on the crime in order to attract responsibility. Although the substantiality requirement was not included in the Nuremberg Charter and the statutes of the *ad hoc* tribunals, it has been established by the subsequent case law of those tribunals. Further, despite the absence of a substantiality requirement in the ICC Statute, it has been suggested that it would be applicable before the ICC.[57] In the absence of interpretive ICC case law, it would be prudent for corporate officials to avoid providing *any* help to potentially criminal activities.

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53 ILC Yearbook 1996, p. 18: Article 2(3)(d) ILC Draft Code, p. 21, para. 11.

54 ILC Yearbook 1996, p. 21 para. 12.

55 ICTY, *Blagojevic and Jokic,* (Appeals Chamber) 9 May 2007, para. 127; ICTY, *Simic*, (Appeals Chamber) 28 November 2006, para. 85; ICTY, *Blaskic*, (Appeals Chamber) 29 July 2004, paras. 45-46; ICTY, *Vasiljevic*, (Appeals Chamber) 25 February 2004, para. 102; ICTR, *Ntagerura*, (Appeals Chamber) 7 July 2006, para. 370.

56 ICTY *Blaskic*, (Appeals Chamber), 29 July 2005, para. 48; Also see ICTY, *Blagojevic and Jokic,* (Appeals Chamber), 9 May 2007. para. 127, ICTY, *Simic* (Appeals Chamber) 28 November 2006, para. 85; ICTR *Ntagerura*, (Appeals Chamber), 7 July 2006, para. 372.

57 Kai Ambos, in: O. Triffterer (ed.), *Commentary on the Rome Statute*, (1999) article 25, margin Nos. 15-18.

It is the Panel's view that the requirement that the assistance have a substantial effect on the crime serves to eliminate criminal responsibility for inconsequential or trivial contributions. At the same time, this standard does not require that the crime would not have occurred without this assistance.

### Examples of Acts of Aiding and Abetting

Ultimately, whether an act constitutes aiding and abetting is a question of fact to be decided in the circumstances of each case.[58] Specific examples of aiding and abetting will be discussed in detail in Section 6 below. In summary these examples can include:

- the provision of goods or services used in the commission of crimes;[59]
- the provision of information which leads to the commission of crimes;[60]
- the provision of personnel to commit crimes;[61]
- the provision of logistical assistance to commit crimes;[62]
- the procurement and use of products or resources (including labour) in the knowledge that the supply of these resources involves the commission of crimes;[63]
- the provision of banking facilities so that the proceeds of crimes can be deposited.[64]

### Failure to Act and Silent Presence

Not only a positive act, but also an omission or failure to act can amount to the assistance required of an aider and abetter, if that omission had a decisive effect on the crime.[65] An omission may attract this form of liability if a person does nothing when they have the power to prevent, stop or mitigate the crime. It can also apply in

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58 See e.g. ICTY, *Blagojevic and Jokic,* (Appeals Chamber) 9 May 2007. para. 134.

59 See e.g. Zyklon B Case, p. 93-102; *Public Prosecutor v. Van Anraat*, LJN AX6406, The Hague District Court, 23 December 2005.

60 See e.g. *Gustav Becker, Wilhelm Weber and 18 others*, as cited in ICTY, *Tadic,* (Trial Chamber) 7 May 1997, para. 687.

61 See e.g. ICTY, *Blagojevic and Jokic,* (Appeals Chamber) 9 May 2007, paras. 130-135.

62 ICTY, *Brdanin*, (Trial Chamber), 1 September 2004, paras. 571-583: 533. ICTY, *Brdanin*, (Appeals Chamber) 3 April 2007, paras. 305 – 306.

63 See e.g. Farben Case, p. 1187; Krupp Case, p. 1399; Flick Case, p. 1202. Also see *Commissioner v. Roechling* (Roechling Case), Trials of War Criminals Vol. XIV, pp. 1085-1089.

64 See e.g. Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945 – 1 October 1946, Vol. 1, pp. 305-306; T. Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir*, Knopf, New York, 1992, pp. 381-398.

65 ICTY, *Blaskic,* (Appeals Chamber) 29 July 2004, para. 47.

circumstances where the silence significantly legitimises or encourages or provides moral support to the crime.

A failure to act can attract liability when the accessory is physically present during the commission of the crime. However presence alone at the scene of the crime is not conclusive of aiding and abetting, unless it is shown to have a significant legitimising or encouraging effect on the principal perpetrator.[66] Courts in criminal cases after the Second World War convicted people for silently endorsing crimes, even where they were not formally and hierarchically superior to the principal perpetrators, but had status and authority.[67] The ICTR has also convicted a commune mayor for aiding and abetting sexual violence, partly because he showed his approval by allowing the violence to take place in the official commune office.[68]

A person can be liable for aiding and abetting even if at a remote location away from the physical perpetration of the crime, if he or she becomes aware of the crime and does nothing to stop it or influence it, despite having the power to do so. For example, if a military commander is aware that prisoners are being mistreated by soldiers on a recurring basis over a period of time, yet continues to send the prisoners out to work for those soldiers or does not prevent them from being sent out when he or she is in a position to do so, then the commander is aiding and abetting their mistreatment.[69] The ICTY convicted a local government official who was in charge of medical facilities of aiding and abetting, because he deliberately denied adequate medical care to prisoners in detention facilities. This lent substantial assistance to their confinement under inhumane conditions.[70]

Although as yet untested in court, the Panel considers that there could be situations in which a company official exercises such influence, weight and authority over the principal perpetrators of a crime that his or her silent presence could be taken by the principals to communicate approval and moral encouragement to commit the crime. Further, if these company officials actually have the authority to prevent, stop or mitigate a crime and do not do so, they may be considered as aiding and abetting it. The greater the political and economic influence wielded by the company, or the personal or professional influence yielded by the company official, the more likely that company executives could find themselves exposed to accomplice liability. This is particularly so if they operate in countries where serious crimes are known to be committed.

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66 ICTY, *Krnojelac,* (Trial Chamber) 15 March 2002, para. 89.

67 See ICTY, *Furundzija,* (Trial Chamber) 10 December 1998, paras. 199-209; *Gustav Becker, Wilhelm Weber and 18 others*, as cited in ICTY, *Tadic,* (Trial Chamber) 7 May 1997, para. 687.

68 ICTR, *Akayesu,* (Trial Chamber) 2 September 1998, paras. 691-694.

69 ICTY, *Aleksovski,* (Appeals Chamber) 24 March 2000, paras. 169 and 172.

70 ICTY, *Simic,* (Appeals Chamber) 28 November 2006, para. 134.

### 3.1.2 Mental State (*Mens Rea*) – Knowledge and Purpose

According to the ILC Code, a person can only be found guilty of aiding and abetting or otherwise assisting if they know that their help will facilitate a crime.[71] The ILC Code is consistent with the subsequent findings of the Appeals Chamber of the *ad hoc* tribunals. Accordingly, the requisite mental element *(mens rea)* of aiding and abetting is knowledge that the acts performed assist the commission of the specific crime of the principal perpetrator.[72]

The aider and abettor need not share the *mens rea* of the principal but must be aware of the essential elements of the crime which was ultimately committed by the principal.[73] However:

> *"it is not necessary that the aider and abettor knows either the precise crime that was intended or the one that was, in the event, committed. If he is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abettor".*[74]

Therefore, a company representative who knows that the equipment the business is selling is likely to be used by a buyer for one of a number of crimes would not escape liability because there is uncertainty as to the exact crime intended.

In crimes of specific intent, such as genocide, the aider and abettor must know of the principal perpetrator's specific intent.[75] In the case of genocide, the aider and abettors must know that the people whom they are helping intend to destroy a particular national, ethnic, religious or ethnic group.[76] In relation to persecution as a crime against humanity, the aider and abettor need not share the intent, but must be aware of the discriminatory context in which the crime is to be committed and know that his support or encouragement has a substantial effect on its perpetration.[77]

Applying this to company officials accused of aiding and abetting, if they have the necessary knowledge as to the impact of their actions, it is irrelevant that they only intended to carry out normal business activities. For example, vendors who sell

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71 ILC Yearbook 1996, p. 18: Article 2(3)(d) ILC Draft Code, p. 21 para. 11.

72 ICTY, *Blagojevic and Jokic,* (Appeals Chamber) 9 May 2007, para. 127; ICTY, *Simic,* (Appeals Chamber) 28 November 2006, para. 86; ICTY, *Blaskic,* (Appeals Chamber) 29 July 2004, paras. 45-46; ICTY, *Vasiljevic,* (Appeals Chamber) 25 February 2004, para. 102.

73 ICTY, *Simic,* (Appeals Chamber) 28 November 2006, para. 86; ICTY, *Aleksovski* (Appeals Chamber) 24 March 2000, para. 162.

74 ICTY, *Blaskic,* (Appeals Chamber) 29 July 2004, para. 50.

75 ICTY, *Simic,* (Appeals Chamber) 28 November 2006, para. 86; ICTY, *Blagojevic and Jokic* (Appeals Chamber) 9 May 2007, para. 127; ICTR, *Ntagerura*, (Appeals Chamber) 7 July 2006, para. 370.

76 ICTY, *Krstic*, (Appeals Chamber) 19 April 2004, paras. 140-141.

77 ICTY, *Aleksovski,* (Appeals Chamber) 24 March 2000, para. 162; ICTY, *Krnojelac,* (Appeals Chamber) 17 September 2003, para. 52.

goods or materials such as chemicals, computers, bulldozers or digging equipment can be responsible as accomplices if they have knowledge, judged objectively, that the purchaser would use them to commit crimes under international law .

On the issue of *mens rea*, the ICC Statute provides that a person will be guilty where, "for the purpose of facilitating" the commission of a crime, the person aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission.[78] This phrase introduces a mental element that goes beyond the ordinary *mens rea* requirement of intent and knowledge required for other crimes under the ICC Statute[79] and from the knowledge standard discussed above. In this sense it marks a textual departure from the approach of the ILC Code and the appellate jurisprudence of the *ad hoc* tribunals. The phrase was borrowed from the Model Penal Code of the American Law Institute and generally implies a specific subjective requirement stricter than knowledge.[80]

In the absence of case law from the ICC, it remains an open question whether this notionally higher subjective standard will have a practical effect, given the way in which the state of mind of an aider and abettor is assessed by the courts. As will be discussed, this assessment is conducted on the basis of all relevant circumstances, including both direct and indirect or circumstantial evidence. Therefore, practically speaking, if it is established that a corporate official had knowledge that an act would facilitate the commission of a crime, and yet proceeded to act, then the purpose to facilitate could be found to exist. The fact that the official knowingly aided a crime in order to make a profit does not diminish his assistance; indeed it could be interpreted as providing a further incentive to facilitate the crime "on purpose". Accordingly, whilst there may be an apparent difference in the *mens rea* standard, there may well be very little practical difference.

Therefore in the Panel's view, a company official who knows that his acts will facilitate, encourage or provide moral support for the commission of a crime and nonetheless proceeds, will be in grave danger of being held criminally accountable for aiding and abetting.

### Evidence of Mental State

The approach to judging the mental state (*mens rea*) of an aider and abettor, from Nuremberg to the *ad hoc* tribunals and beyond, is that this assessment is conducted on the basis of all relevant circumstances, established through direct and indirect or circumstantial evidence. Therefore, objective facts can be used to infer the subjective mental state of the defendant.[81] This means that the requisite knowledge need

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78 Article 25(3)(c) ICC Statute.

79 Article 30 ICC Statute.

80 Kai Ambos, in: O. Triffterer (ed.), *Commentary on the Rome Statute*, (1999) article 25, margin No. 19.

81 See Farben Case, p. 1187; Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945 – 1 October 1946, Vol. 1, pp. 305-306; ICTY, *Tadic,* (Trial Chamber) 7 May 1997,

not have been explicitly expressed by the defendant,[82] but may be inferred from the circumstances.[83] More recently the SCSL confirmed that "knowledge may be inferred from all relevant circumstances".[84]

Practically speaking, it is not easy to prove knowledge to a criminal standard. The mere presence of a company in an area where the crime is carried out or the fact that it is making a profit from the criminal activity will not in and of itself be enough to show that the company's officials know that their goods or services are being utilised in criminal activity. The kinds of evidence relevant to state of mind would include, for example, information readily available to the company representative at the time the company provided the assistance. This information could be available within the company. There may be oral or documentary evidence of records of meetings between the principal perpetrator and company officials regarding the criminal intent of the perpetrator. For example, in the case of Dr. Bruno Tesch, the owner of a firm which arranged for the supply of the poison gas Zyklon B to the SS (Zyklon B Case), Tesch's bookkeeper provided evidence of a travel report. This report recorded an interview by Tesch with leading members of the Wehrmacht, during which he was told that the burial, after shooting, of Jews in increasing numbers was proving more and more unhygienic, and that it was proposed to kill them with prussic acid. Dr. Tesch, when asked for his views, proposed the use of the gas and undertook to train the SS in its use.[85]

Specific information provided to company officials to the effect that the company's products or services were being used to commit crimes, could be relevant. This is particularly so in the context of the information revolution which has meant that there is a plethora of information available to most business people about the activities of their partners and clients. Reputable sources could include international organisations, other business people, governments or civil society. Third party independent reports and oral evidence from sources such as the UN and reliable NGOs on the ground in a situation where gross violations or abuses of human rights have occurred have been an important source of evidence before the *ad hoc* tribunals.

There could be widespread knowledge that crimes are being committed using a company's goods or services, which could also be relevant to the question of whether company officials knew their acts were facilitating crimes. In the Krstic case relating to the commission of crimes against humanity and genocide in Srebrenica, reports of missing Bosnian Muslim men were appearing in the Chinese media three

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paras. 675-676, 689; ICTR, *Akayesu,* (Trial Chamber) 2 September 1998, para. 548; ICTY, *Aleksovski,* (Trial Chamber) 25 June 1999, para. 65; ICTY, *Krstic,* (Appeals Chamber) 19 April 2004, pp. 26-54 (considering all direct and circumstantial evidence to conclude the accused had the *mens rea* to aid and abet genocide).

82 ICTY, *Limaj*, (Trial Chamber) 30 November 2005, para. 518.

83 ICTY, *Galic,* (Trial Chamber) 5 December 2003, para. 172.

84 SCSL, *Fofana and Kondewa,* (Trial Chamber) 7 August 2007, para. 231.

85 Zyklon B Case, p. 95.

days after the takeover of the town,[86] which made the accused's denial of knowledge difficult to sustain. However, great care has to be exercised when ascribing knowledge on this basis. The precise content, veracity and timing of the so called common knowledge must be examined scrupulously.[87]

The context of the business transaction would also be relevant. For example, during World War Two, it was apparent to the officials of Farben enterprise in Germany that they did not have enough labour to use in the two coal mines they acquired to support their Auschwitz plant, therefore they would have to use slave labour.[88] It might also be relevant, for example, that a client ordered an unusually large amount of a delousing chemical and that such quantities could probably only be useful for unlawful activities.[89]

The past behaviour of the principal perpetrator and duration and nature of the business relationship between the principal perpetrator and the company official may also be relevant.

Significantly, knowledge can also be imputed from the position and experience of the accomplice in the company.[90] As one commentator has stated:

> *"A competent business person in a leadership position will know the context behind the major efforts of his business. Indeed, it is only logical that a person selling a product will try to assess the needs of his or her customer in order to increase sales. Thus, tribunals will impute knowledge to certain corporate officials if the officials ordinarily must have knowledge of that type to effectively carry out his or her duties."*[91]

## 3.2 National Criminal Law

As under International Criminal Law, the majority of national criminal systems include accomplice liability as a form of accessory criminal liability. Generally speaking, national criminal laws conceive accomplice liability in a strict sense, limiting criminal liability to acts that aid, abet or otherwise assist in the commission of a crime committed by another individual. National criminal laws also criminalise other forms of participation in crimes committed by others – such as instigation, conspiracy,

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86 ICTY, *Krstic,* (Trial Chamber) 2 August 2001, para. 88 (fn.179).

87 See e.g. ICTY, *Blagojevic and Jokic,* (Appeals Chamber) 9 May 2007, paras. 229-236.

88 Farben Case, p. 1187.

89 Zyklon B Case, p. 101.

90 See *United States v. Ernst von Weizsaecker* (Ministries Case) Trials of War Criminals, Vol. XIV, p. 622. Also see the assessment of the liability for each of the defendants in the Farben Case.

91 K.R. Jacobson, Doing Business With the Devil: The Challenges of Prosecuting Corporate Officials Whose Business Transactions Facilitate War Crimes and Crimes Against Humanity, in: *The Air Force Law Review*, Vol. 56 (2005), pp. 167-231, p. 195.

or ordering, which are considered by the ILC as modes of accomplice liability.[92] However, these other forms of criminal liability are frequently defined in national law as separate and distinct offences or crimes[93] or are considered as forms of criminal liability for perpetration, rather than accomplice liability. Nonetheless, national penal laws are consistent with international criminal law in the sense that they criminalise acts, through crimes or forms of criminal liability, which assist the commission of a crime by a perpetrator who has the intent to provide such assistance.

Accomplice liability in national law requires that the accused has the requisite mental state (*mens rea*). Although this is construed differently across national jurisdictions, all require that the defendant has a particular subjective intention. In some jurisdictions, the accomplice must share the same intent as that of the principal perpetrator, i.e. that he or she intends the crime to take place and that his or her acts assist it.[94] It has been said that this a high threshold of liability for companies or their officials since their acts will be motivated by profit, but this, in the Panel's view, confuses motivation with intent: a company or its officials could intend, for example, to assist in the use of forced labour, although their wider motivation in providing the assistance would be to secure the resulting profit. In other jurisdictions the intent of the accomplice need not be the same as the principal perpetrator,[95] and it is sufficient that the alleged aider and abetter knew that the perpetrator intended to commit a crime.[96] In other jurisdictions, an accomplice may be found liable if he or she considers the commission of the offence possible and accepts this risk. For example, in South Africa, *dolus eventualis* (subjective foresight of the possibility of the unlawful circumstance existing or unlawful consequence resulting and nevertheless going ahead with the conduct) is sufficient for accomplice and perpetrator liability.[97] Under German law intent includes *dolus eventualis*.[98] In the United Kingdom, an accomplice can be found guilty on the basis of knowledge, but also to 'recklessness' i.e. knowledge of the *risk* that an offence would be committed.[99]

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92 ILC Yearbook 1996, pp. 18-20.

93 This is often the case, for example, with instigation, conspiracy or criminal association, concealment, or the crime of omission ("delito de omission", Latin-American law; "abstention criminelle", French law).

94 A. Ramasastry and R.C. Thompson, *Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law; A survey of Sixteen Countries; Executive Summary*, FAFO, 2006 (FAFO Executive Summary), p. 18.

95 Eg. Article 121-7 of the French Criminal Code is directed at "the person who knowingly" makes himself an accomplice.

96 FAFO Executive Summary, p. 19. Also see Jonathon Burchell, "Joint Liability and Corporate Complicity", Draft Report written for the ICJ Expert Legal Panel on Corporate Complicity in International Crimes, (2006) (Burchell) pp. 8-9, www.icj.org.

97 Burchell, p. 9.

98 German criminal law distinguishes between two basic modes of culpability—intention (*Vorsatz*) and negligence (*Fahrlässigkeit*). Intention (*Vorsatz*) encompasses *Absicht*, *dolus directus*, or *dolus eventualis*.

99 *R v. Bainbridge* [1960] 1 QB 219; *DPP for Northern Ireland v. Maxwell* [1978] 3 All ER 1140 (HL); cited in Burchell p. 9.

There is no general national law consensus as to whether a causal connection must be established between the conduct of the accomplice and the commission of the offence by the principal perpetrator. Even among the jurisdictions that do require such a link, there is no consensus about the extent to which it must be present.[100]

Significantly, and as reflected in international criminal law, in national criminal laws the liability of an accomplice is not dependent on the conviction of the principal perpetrator.[101] This means that in national and international law, a company or its officials who assist in the commission of a crime, risk being held criminally liable while the principal perpetrators escape punishment.

100 Burchell, pp. 4-6.

101 FAFO Executive Summary p. 18; Burchell, p. 4.

# 4 Common Purpose Liability under International and National Criminal Law

## 4.1 International Criminal Law

Both national law and international criminal law include offences of participating in a crime pursuant to a common purpose. In international criminal law, an individual can be held criminally liable if he or she is part of a group of several people who share a common purpose and then embark on criminal activity in execution of it. Whoever contributes to the commission of crimes by the group or some members of it, may be liable.

The ILC Code does not explicitly include an offence of participating in a crime according to common purpose. However, it does criminalise participation in planning or conspiring to commit a crime which, according to the ILC, encapsulates these forms of liability.[102]

Whilst the individual criminal responsibility provisions of the *ad hoc* tribunals do not include an explicit reference to common purpose liability in their statutes, in the jurisprudence of these tribunals, the idea of participating in a crime where there is a common purpose has nonetheless been found to be a way of "committing" a crime.[103] The tribunals have led the way in explaining this principle, which they refer to as joint criminal enterprise (JCE). Three categories of JCE are set out in the jurisprudence, reflecting customary international law at the time of the Balkan Wars and Rwandan Genocide, and based in particular on war crimes cases tried after World War II.[104] The first category is a "basic" form of JCE, where all the perpetrators act pursuant to a common purpose, and possess the same criminal intention. A simple example is a plan by a number of people to commit a murder, where, although each of the participants may carry out a different role, each of them has the intent to kill.[105] The second category is a "systemic" form of JCE. This is characterised by the existence of an organised system of ill-treatment; the defendant's awareness of the nature of that system; and his active participation in the enforcement of the

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102 See Article 2 (3)(e), which states that an individual shall be responsible for a crime if that individual "Directly participates in planning or conspiring to commit such a crime which in fact occurs"; ILC Yearbook 1996, p. 18 Article 2 (3)(e) and p. 21, paras. 14-15.

103 ICTY, *Tadic*, (Appeals Chamber), 15 July 1999, para. 190; ICTY, *Vasiljevic*, (Appeals Chamber), 25 February, 2005, para. 95; ICTY, *Krnojelac*, (Appeals Chamber), 17 September, 2003, paras. 28-32, 73.

104 Two important cases on the meaning of JCE and its foundations in customary law and the World War II jurisprudence can be found in ICTY, *Tadic*, (Appeals Chamber), 15 July 1999, paras. 195-228; ICTY, *Brdanin*, (Appeals Chamber), 3 April 2007, paras. 389–432; Also see ICTY, *Krnojelac*, (Appeals Chamber), 17 September 2003, paras. 83-84; ICTR, *Ntakirutimana & Ntakirutimana*, judgement (Appeals Chamber) of 13 December 2004, para. 462; ICTY, *Stakic*, (Appeals Chamber), March 22, 2006, paras. 64 and 65.

105 ICTY, *Stakic*, (Appeals Chamber) 22 March 2006, para. 65.

system.[106] In order to be held liable for this form of JCE, the perpetrator must have personal knowledge of the system and intent to further its criminal purpose.[107] The "extended" category of JCE liability allows conviction of a participant in a JCE for certain crimes committed by other participants in the JCE, even though those crimes were outside the common purpose of the enterprise. An example is a common purpose or plan to effect ethnic cleansing, that is, to force members of one ethnic group out of a particular area at gun point with the consequence that in doing so one or more of the victims is shot and killed. While murder may not have been explicitly acknowledged to be part of the common purpose, it was nevertheless foreseeable that the forcible removal of civilians at gunpoint might well result in the murder of civilians.[108] Liability attaches if, under the circumstances of the case, (i) it was *foreseeable* that such a crime might be perpetrated by one or other members of the group and (ii) the accused willingly took that risk.[109]

Under the jurisprudence of the *ad hoc* tribunals, an individual's participation in a JCE need not involve commission of a specific crime – for example murder, extermination, torture, rape – but may take the form of assistance in, or contribution to, the execution of the common purpose.[110] The person's involvement must form a link in the chain of causation, so that the action furthered the criminal plan. However, it is not necessary that the offence would not have occurred but for that individual's participation.[111]

A recent example of the application of JCE to a high-level civilian is the Krajisnik case. Momcilo Krajisnik was a leading politician, speaker of Parliament, close associate of Radovan Karadzic and member of the Bosnian Serb Presidency during 1992. He participated in a joint criminal enterprise with other Serb politicians, government officials, and military and paramilitary commanders at all levels. The JCE had as its objective the permanent removal, by force or other means, of Bosnian Muslim, Bosnian Croat or other non-Serb inhabitants from large areas of Bosnia and Herzegovina through the commission of mass crimes. He furthered the JCE by acts including the formulation and promotion of policies; supporting, maintaining and instigating political and military groups which committed the crimes; failing to investigate; and covering up crimes committed by these groups. He did this because he wanted Muslims and Croats moved out of the Bosnian-Serb territories

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106 ICTY, *Tadic*, (Appeals Chamber), 15 July 1999, paras. 202-203; ICTY, *Krnojelac*, (Appeals Chamber), 17 September 2003, para. 89; ICTY, *Vasiljevic*, (Appeals Chamber), 25 February 2004, para. 98; ICTR, *Ntakirutimana & Ntakirutimana*, (Appeals Chamber), 13 December 2004, para. 464.

107 ICTY, *Stakic*, (Appeals Chamber), 22 March 2006, para. 65.

108 ICTY, *Tadic*, (Appeals Chamber), 15 July 1999, para. 204, ICTY, *Vasiljevic*, (Appeals Chamber), 25 February 2004, paras. 95-101, ICTR, *Ntakirutimana & Ntakirutimana*, (Appeals Chamber), 13 December 2004, para. 465.

109 ICTY, *Stakic*, (Appeals Chamber), 22 March 2006, para. 65.

110 ICTY, *Tadic*, (Appeals Chamber), 15 July 1999, para. 227; ICTR, *Ntakirutimana & Ntakirutimana*, (Appeals Chamber), 13 December 2004, para. 466.

111 ICTY, *Tadic*, (Appeals Chamber), July 15, 1999, para. 199.

in large numbers. If suffering, death, and destruction were necessary to achieve Serb domination and a viable statehood, he accepted that the victims would pay this heavy price. He was convicted of persecutions as crimes against humanity and sentenced to 27 years imprisonment.[112]

The principle of joint criminal enterprise has been criticised as approaching a form of collective guilt. As such it could be inconsistent with the rationale and development of the concept of individual criminal responsibility. However, the Appeals Chamber of the *ad hoc* tribunals, after establishing the firm legal foundations of JCE, has explained its importance given that crimes under international law are often manifestations of collective criminality carried out by individuals pursuing a common criminal design. Some individuals physically perpetrate the crime and others may participate or contribute in an equal or even more vital way to the crimes. The moral culpability of the second group of individuals is often no less than that of the principal perpetrators and the law seeks to reflect this.[113]

It has also been said that "JCE as a mode of liability is prone to overreaching and, therefore, has the potential to lapse into guilt by association".[114] The Appeals Chamber of the *ad hoc* tribunals has rejected this criticism, emphasising the high threshold of criminal culpability, which requires each element of the crime to be established beyond reasonable doubt. When all these elements are proven to this standard, the accused will have been shown to have done far more than merely associate with criminals.[115]

Importantly, the ICC Statute encompasses the concept of criminal responsibility for participating in a common criminal plan; however, a distinction is made between principal perpetrators and accessories. Under Article 25(3)(a) of the ICC Statute, a person shall be liable as a principal perpetrator if he commits a crime "jointly with another or through another". This has been interpreted as a form of co-perpetration.[116] Under this form of liability a perpetrator must knowingly and intentionally provide a co-ordinated and *essential* contribution to a common plan which involves an element of criminality. The quality of this contribution establishes his joint control over the crime.[117]

Article 25(3)(d) of the ICC Statute provides that a person shall be liable if he intentionally contributes to the commission of a crime by a group of persons acting with a common purpose, with the aim of furthering the crime or the criminal purpose, or knowing that the group intends to commit the crime. This provision represents a

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112 ICTY, *Krajisnik*, (Trial Chamber), 27 September 2006, para. 1078 et seq.

113 ICTY, *Tadic*, (Appeals Chamber), 15 July 15, paras. 188- 192 and 226.

114 ICTY, *Brdanin*, (Appeals Chamber), 3 April 2007, para. 371.

115 ICTY, *Brdanin*, (Appeals Chamber), 3 April 2007, paras. 426-432.

116 ICC *Dyilo*, *Decision on the Confirmation of Charges*, 29 January 2007, para. 322 et seq.

117 ICC *Dyilo*, *Decision on the Confirmation of Charges*, 29 January 2007 para. 340-341.

compromise between various "conspiracy" formulations considered by the parties to the Statute.[118] The ICC Pre-trial Chamber has characterised it as a form of residual accessory liability.[119] This provision does not appear to require the higher qualitative standard of contribution which is stipulated by Article 25(3)(a).

## 4.2 National Criminal Law

National legal systems also seek to punish group criminality and protect society against collective criminal agreements. This is most commonly expressed in laws punishing joint criminal enterprise or common purpose crimes and conspiracy.

In jurisdictions that punish conspiracy, the offence encompasses an *agreement* with another to commit a crime accompanied by intent to commit that crime.[120] There is specific authority in France[121] and the Netherlands[122] for extending conspiracy liability to cover a conspiracy to commit crimes under international law. Among those jurisdictions that punish conspiracy, the majority viewpoint is that a mere agreement to commit a crime is not sufficient. There must also be an overt act by at least one conspirator in furtherance of the agreement.[123] The minority position is that conspiracy does not require an overt act in furtherance of the conspiratorial agreement.[124] Under some national laws, a withdrawal from a conspiracy of a common purpose is a ground for exculpation.[125]

Some jurisdictions, such as the United Kingdom, Canada, South Africa, Germany, Belgium and Japan punish participants acting with a common purpose to commit a crime or participants in a joint criminal venture. Some jurisdictions refer to the participants as co-perpetrators and others as merely accomplices. Others do not make this distinction. The Canadian Criminal Code simply refers to a participant in a common purpose as a 'party' to the crime. A significant number of those countries that regard participants in a common purpose as co-perpetrators do so by specifically *imputing* or *attributing* the conduct of the perpetrator in the common purpose

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118 Kai Ambos, in: O. Triffterer (ed.), *Commentary on the Rome Statute*, (1999) article 25, margin No. 20.

119 ICC *Dyilo*, *Decision on the Confirmation of Charges*, 29 January 2007, para. 337.

120 United States; Australia, France, the Netherlands, Belgium, Spain, Japan and South Africa. See Para. 6 of the FAFO Survey Questions and Responses prepared for each of the aforementioned countries. The FAFO Survey Questions and Responses formed the basis of the FAFO Executive Summary.

121 Articles 212-3 of the French Criminal Code.

122 Article 80 Dutch Criminal Code.

123 United States, Australia, France and Japan. Belgian law requires that the criminal conspiracy has 'directly triggered' the offence. See para. 6 of the FAFO Survey Questions and Responses prepared for each of the aforementioned countries.

124 FAFO Survey Questions and Responses United Kingdom para. 3, FAFO Survey Questions and Responses Spain para. 6, FAFO Survey Questions and Responses South Africa, para. 6.

125 See eg. Article 171 of Spanish Penal Code; Art 17 of Ukranian Criminal Code.

to the other participants.[126] Other national criminal laws define as a specific crime an association to commit crimes, either in general or in relation to specific crimes.

The national crimes of conspiracy and common purpose find their international criminal law counterparts in concepts of joint criminal enterprise discussed above. In sum, under both national and international laws, companies and their officials risk being held criminally liable in circumstances where they pursue a common purpose or make an agreement with others to commit crimes. Further, these principles may permit the acts of others with whom they are acting to be imputed to them, thereby potentially increasing their personal criminal liability.

126 See para. 6 of the FAFO Survey Questions and Responses; and see Burchell, pp. 17-20.

# 5 Superior Responsibility

If a company official is held responsible for involvement in a crime under international law, can that person's company superiors also be criminally responsible? In international criminal law, this can occur if the elements of the principle of superior responsibility are met.

The principle that military and civilian superiors may be held criminally responsible for the acts of their subordinates is well-established in conventional and customary law.[127] This applies both in the context of international as well as internal armed conflicts.[128] However it is important to note that superior responsibility does not impose strict liability for the offences of subordinates.[129] Furthermore, superiors are not charged with the crimes of their subordinates, but with their failure to carry out their duty as superiors to prevent or punish the criminal conduct of their subordinates or persons under their control.[130]

Superior responsibly is not limited to crimes physically committed by subordinates in person but encompasses any modes of individual criminal responsibility including aiding and abetting.[131] So, hypothetically, if a local manager of private security forces is engaged in assisting in interrogations in a war zone which involve torture, by organising the guarding of interrogation rooms, he or she may be guilty of aiding and abetting torture and his or her superiors could be held responsible as superiors, if the other elements of this offence are made out.

The principle of superior responsibility has been enunciated by the ILC[132] and applied by the Nuremberg and Tokyo Tribunals[133], the *ad hoc* Tribunals and the SCSL[134] and the Extraordinary Chambers of Cambodia.[135] Most importantly, it is encompassed in the terms of the ICC Statute.[136]

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127 ICTY, *Delalic*, (Appeals Chamber), 20 February 2001, para. 195.

128 ICTY, *Prosecutor v Hadzihasanovic*, *Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility*, (Appeals Chamber) 16 July 2003, para. 13.

129 ICTY, *Delalic,* (Appeals Chamber), 20 February 2001, paras. 239, 313.

130 ICTY, *Krnojelac*, (Appeals Chamber), 17 September 2003, para 171.

131 ICTY, *Oric*, (Trial Chamber), 30 June 2006, paras. 301-305.

132 ILC Yearbook 1996, p. 18: Article 2 (3)(c) and p. 25: Article 6 pp. 25 and 26 paras. 4-6.

133 Whilst not provided for in the Charters of the Nuremberg or Tokyo Tribunals, nor expressly addressed in Control Council Law No. 10, it was nonetheless applied in cases following the Second World War: *United States v. Wilhelm List,* Trials of War Criminals, Vol. XI, p. 1230, *United States v Wilhelm von Leeb,* Trials of War Criminals, Vol. XI, pp. 462, 512.

134 See Article 7(3) ICTY Statute, Article 6(3) ICTR Statute, Article 6(3) SCSL Statute. The ICTY has reiterated this principle in various Judgements referred to in this section.

135 Article 29 Law on the Establishment of the Extraordinary Chambers in the courts of Cambodia for the prosecution of crimes committed during the period of democratic Kampuchea, 27 October 2004.

136 Article 28 ICC Statute.

The essential elements of superior responsibility are: [137]

(a) a superior-subordinate relationship between the superior (the accused) and the perpetrator of the crime;

(b) the accused knew or had reason to know that the crime was about to be, was being, or had been, committed; and

(c) the accused failed to take the necessary and reasonable measures to prevent the crime, or to stop the crime or punish the perpetrator thereof.

A superior-subordinate relationship is characterised by a hierarchy between the superior and subordinate,[138] involving the effective exercise of power or control. It may exist either by virtue of a person's *de jure* or *de facto* position of authority.[139] The critical element of the superior's effective control over the persons committing the offence must be established and this is defined as the material ability to prevent or punish the commission of the offence.[140]

In terms of the mental element, it must be established that the superior had either actual or constructive knowledge. Active knowledge is established through either direct or circumstantial evidence, that the superior knew subordinates were about to commit or had committed crimes. Constructive or imputed knowledge means that the superior had in his or her possession information that would at least put the superior on notice of the risk of offences being committed.[141] Knowledge may be presumed if a superior had the means to obtain the relevant information regarding a crime and deliberately refrained from doing so, that is, was wilfully blind to the offence,[142] or if the superior was so negligent about obtaining relevant information that malicious intent can be inferred from the failure to do so.[143]

Finally, it must be established that the superior failed to take necessary and reasonable measures to prevent or punish the crimes of his or her subordinates. The measures required of the superior are limited to those within his power, including those that may be beyond any formal powers. However, the superior is not asked to perform the impossible.[144]

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137 ICTY, *Delalic*, (Trial Chamber), 16 November 1998, para. 346. Also see: ICTY, *Delalic*, (Appeals Chamber), 20 February 2001, paras. 189-198, 225-226, 238-239, 256, 263.

138 ICTY, *Delalic*, (Appeals Chamber), 20 February 2001, para. 303.

139 ICTY, *Delalic*, (Appeals Chamber), 20 February 2001, para. 193; ICTR, *Niyitegeka,* (Trial Chamber) 16 May 2003, para. 472.

140 See ICTY, *Hadzihasanovic,*(Trial Chamber), 15 March 2006, para. 83. See also: ICTR, *Bagilishema*, (Trial Chamber), 7 June 2001, paras. 39 and 44.

141 ICTY, *Delalic*, (Appeals Chamber), 20 February 2001, paras. 223, 241.

142 ICTY, *Delalic*, (Appeals Chamber), 20 February 2001, para. 226.

143 ICTR, *Akayesu,* (Trial Chamber), 2 September 1998, para. 479, 489. Also see ILC Yearbook 1996, p. 26, para. 5.

144 ICTY, *Delalic*, (Trial Chamber), 16 November 1998, para. 395.

### Superior Responsibility and Civilians

Although the principle of superior responsibility traditionally applies to military personnel, it is also applicable to civilians. In this sense it can be relevant to corporate officials: particularly those who operate in conflict zones conducting private security functions, or mining or resource companies which employ their own security personnel. Companies in such situations may need to exercise strict control over their employees for safety purposes or, in the case of private security firms, because they operate jointly with army personnel and therefore need to be organised in a similar way in order to co-ordinate action.

The ICC Statute encompasses civilian superior responsibility by referring to a military commander or a "person acting as a military commander" as a superior.[145] This is consistent with the jurisprudence of the *ad hoc* tribunals. Civilian superiors will only be held liable if they were part of a superior-subordinate relationship, even if that relationship was an indirect one and therefore did not involve a strict military style structure.[146] Showing that the superior was merely an influential person will not ordinarily be sufficient to establish this. However, the concept of effective control is different for civilian superiors, in that a civilian superior's sanctioning power must be interpreted broadly. It is not expected that civilian superiors will have disciplinary power over their subordinates equivalent to that of military superiors in an analogous command position. For a finding that civilian superiors have effective control over their subordinates, it suffices that civilian superiors, through their position in the hierarchy, have the duty to report whenever crimes are committed and that in light of their position, there is likelihood that those reports will trigger an investigation or initiate disciplinary or criminal measures.[147]

The kernels of superior responsibility for civilians can be found in the Tokyo Tribunal proceedings and in cases against German industrialists. The International Military Tribunal for the Far East held Japanese Foreign Minister, Koki Hirota, guilty of having disregarded his duty to take adequate steps to secure the observance and prevent breaches of the laws of war in relation to the rape of Nanking. He received reports of the atrocities that were being committed by Japanese forces and raised the issue with the War Ministry, who told him that the atrocities would be stopped, but in fact they continued for a month. He was held responsible because he did not go to the Cabinet and insist that immediate action be taken to put an end to the atrocities. He was content to rely on assurances which he knew were not being implemented

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145 Article 28(a) ICC Statute. This principle is also recognised by ILC Code. The reference to superior in that code covers military commanders or other civilian authorities who are in a similar position of command and exercise a similar degree of control with respect to their subordinates. ILC Yearbook 1996, pp. 25 and 26 para. 4.

146 ICTR, *Semanza,* (Trial Chamber) 15 May 2003, para. 401.

147 ICTY, *Brdanin*, (Trial Chamber), 1 September 2004, para. 281.

while hundreds of murders, and rapes of women and other atrocities were being committed daily. His inaction amounted to criminal negligence.[148]

Another pertinent example is the Flick case. In that case, an official of the Flick firm, Weiss, was convicted of war crimes and crimes against humanity for increasing the production quota in a plant producing freight cars and then obtaining the necessary additional forced labour which was required to meet it. His superior in the company, Flick, was convicted because he knew and approved of these steps.[149] The United Nations War Crimes Commission commented that it seemed clear that the tribunal's finding of guilt with respect to Flick was based on an application of the responsibility of a superior for the acts of his inferiors which he has a duty to prevent.[150]

In an important and relatively recent decision, the Rwanda tribunal has held a civilian factory manager Alfred Musema, responsible as a superior for the actions of his employees who participated in genocide. The Trial Chamber in that case found him responsible for the atrocities committed by his employees because he exercised *de jure* authority over them while they were at the Gisovu Tea Factory and while they were engaged as employees performing duties outside factory premises. He exercised legal and financial control over these employees, particularly through his power to appoint and remove them from their positions at the factory. He was therefore in a position to take reasonable measures, such as removing, or threatening to remove, individuals from their positions if they were identified as perpetrators of crimes. He was also in a position to take reasonable measures to attempt to prevent or to punish the use of factory vehicles, uniforms or other property used in the commission of crimes.[151] He was found guilty both as an individual perpetrator and as a superior for genocide and crimes against humanity.

It is apparent that international criminal law regarding superior responsibility has developed slowly over the last half century to expand its application to civilians, thus making it relevant to corporate personnel. Accordingly, the Panel considers that any company operating in countries in conflict, or where gross human rights violations or abuses are widespread or systematic, should be especially vigilant to exercise due diligence and put into place policies and procedures of management oversight to ensure that superiors take necessary and reasonable measures to prevent or punish acts committed by subordinates that could amount to crimes.

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148 Similarly, the tribunal found Prime Minister Hideki Tojo and Foreign Minister Mamoru Shigemitsu criminally liable for their omissions to prevent or punish the criminal acts of the Japanese troops: *The Complete Transcripts of the Proceedings of the International Military Tribunal for the Far East*, reprinted in R. John Pritchard and Sonia Magbanua Zaide (eds.), The Tokyo War Crimes Trial, Vol. 20 (Garland Publishing: New York & London 1981), pp. 49, 816, 49, 791, 49, 831 cited in ICTY, *Delalic,* (Trial Chamber), 16 November 1998. paras. 357-358.

149 Flick Case, p. 1202.

150 ICTY, *Delalic*, (Trial Chamber), 16 November 1998, para. 360.

151 ICTR, *Musema,* (Trial Chamber) 27 January 2000, para. 880.

## Box 3: Key Questions Drawn from the Panel's Analysis of Criminal Law

Throughout the preceding sections the Panel has considered three forms of accomplice liability in criminal law that would be the most relevant to companies and their officials: aiding and abetting, common purpose liability and superior responsibility. The following provides a snap-shot of the key questions that will have to be addressed for each form of criminal liability in order to determine whether a corporation or its officials can be held criminally liable for their acts or omissions.

**Aiding and Abetting**

*What did the company official specifically do or fail to do in relation to a crime, either before, during or after it was committed?*

*Did this have an effect on the commission of the crime? If so, was this effect substantial?*

*What did the company's officials know, based on all the circumstances, about the commission of a crime when they acted or failed to act?*

**Common Purpose Liability**

*Did the company official act to pursue a common purpose (albeit non criminal in nature) with other people?*

*If so, were crimes committed to further that common purpose?*

*If so, to what extent did the company official knowingly contribute to the commission of the crime or the furtherance of the common purpose?*

**Superior Responsibility**

*Was the company official in effective control of persons who committed crimes, such as employees or contractors?*

*If so, did the company official know or should they have known what these persons did?*

*If so, what did the company official do to prevent or punish such acts?*

In the following section the Panel analyses, with reference to these questions, a number of factual scenarios in which allegations of company involvement in gross human rights abuses amounting to crimes under international law are often made.

# 6 Factual Scenarios

The following section analyses the zone of legal risk in criminal law in respect of situations in which companies are often alleged to have participated in gross human rights abuses amounting to crimes under international law. The Panel addresses three situations in particular: the provision of goods and services to those who commit crimes, the use of suppliers that commit crimes, and the commission of crimes by hired security services.

The potential exposure of company officials to accusations of criminal responsibility in these scenarios will always depend on the particular factual situation, as will the type of liability to which they may be exposed. No matter what the basis of responsibility alleged (aiding and abetting, common purpose liability or superior responsibility), two critical questions will always be asked. First, what did the official do or fail to do in terms of his or her own behaviour or that of an actor over whom he or she had effective control and second, what was his or her mental state at the time.

## 6.1 Providing Goods or Services

Often, companies face criticism for having provided actors who commit gross human rights abuses amounting to crimes under international law with the means to commit the crimes, through the provision of goods or services. In this Section, the Panel explores when a company in such a situation might find itself within a zone of legal risk facing accusations of criminal responsibility.

The Panel believes that the more indirect the assistance of the company is to the crime, the more difficult it will be to establish that the company officials knew that this assistance was being provided. A company official may not ordinarily be criminally responsible if he sold legitimate and generic goods to a government that then used the goods to help it accomplish a criminal act. However, company officials are more likely to be held criminally responsible if the company provides more direct assistance or is more closely involved in the commission of the criminal act. For example, liability is more likely if the company specifically tailors its products to assist the perpetrators of the crime.

The officials of companies that trade in inherently dangerous goods such as weapons or chemicals that can be used to create weapons, face greater risks. They need to be especially vigilant about the use of their goods, as they cannot but be aware of the consequences of their illegitimate usage.

Companies that provide services must be aware that if the provision of their services includes the utilisation of their employees, it may be easier to establish knowledge on their part about the way in which these services assist in the commission of crimes. This is because it is likely that their employees will be reporting back up

the management chain to their supervisors about the activities that they participate in.

If a company finds itself unwittingly caught up in a situation where its goods or services are substantially assisting a criminal act, it is more likely to be exculpated from criminal responsibility if it withdraws from the contractual relationship as soon as the company representatives become aware of this. If a company pulls out of the contract long after officials become aware of this (perhaps only in response to public pressure), then those officials are more likely to be in a zone of legal risk in relation to criminal responsibility. An end-use certificate or other contractual arrangements that aim to limit the purposes for which goods or services can be used will not of itself shield company officials from criminal liability. A criminal court is likely to look behind such documents or other similar mechanisms and in judging this type of evidence the court will look to see what the company officials actually knew, using direct and circumstantial evidence, about the use that the product was to be put to when it was sold.

### Goods

In a number of situations, the provision of goods that have helped someone to commit a crime have been found to constitute criminal assistance.[152] A notable example of this was the trial of Dr. Bruno Tesch in the Zyklon B case.[153] Tesch's firm supplied poisonous gas to the Nazis and trained the SS in its use. This gas, which was ostensibly sold for use in lice extermination, was in fact used by the SS in mass killings in concentration camps. The defendants claimed that they did not know how the gas was being used. The Tribunal found that it was impossible that they did not know and Tesch and his deputy were convicted of war crimes.[154]

A more recent example discussed in detail above concerned the case of the Dutch businessman, Mr van Anraat. He was convicted of being an accomplice in war crimes for supplying chemicals used to produce mustard gas (TDG) to Saddam Hussein's government. This regime subsequently used that gas to attack Kurdish civilians. A critical issue in this case was knowledge of the accused, and the finding that Anraat at the very least must have known that the mustard gas would be used not only in the Iran-Iraq war, but also upon Kurdish civilians.[155] The Court also considered the effect of the assistance provided by Anraat on the crimes committed. It found that, from 1985, the Iraqi regime relied entirely on Anraat for the crucial and significant of supplies of the TDG chemical that it used to produce mustard gas.[156]

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152 ICTY, *Tadic,* (Trial Chamber), 7 May 1997, para. 684.

153 Zyklon B Case, p. 93-102.

154 Zyklon B Case, p. 93-102.

155 *Public Prosecutor v. Van Anraat*, LJN BA6734, The Hague Court of Appeal, 9 May 2007 para. 12.1.1.

156 *Public Prosecutor v. Van Anraat*, LJN BA6734, The Hague Court of Appeal, 9 May 2007 para. 12.5.

### Information

The provision of information has also been the subject of criminal prosecutions, including in Second World War cases, when defendants were convicted for denouncing members of the French resistance to German authorities, and for providing lists of French youths who refused to be drafted to arresting authorities.[157]

### Services

Providing personnel that participate in the commission of crimes may also give rise to accusations of criminal responsibility. In one case, a military commander was found guilty of aiding and abetting murder as a war crime and crime against humanity, in relation to the mass murders and expulsions that occurred in Srebrenica in the summer of 1995. He did so by permitting his subordinates to, among other things, forcibly transfer women, children and elderly people and to guard prisoners who were mistreated and subsequently murdered. It did not matter that his troops were a relatively small group in respect of the total number of troops utilised in the mass murder and transfer operation. Nor did it matter that his troops were not direct participants in mistreatment or murders. These acts were nonetheless considered to constitute a substantial contribution to the crimes.[158]

This example could be particularly pertinent to officials of private security companies who provide their employees as close protection security personnel or as detention facility personnel, such as guards or translators for interrogations. If crimes occur during security operations or in detention then these officials could be at serious risk of criminal prosecution. Similarly, companies that run private detention centres for governments run the risk of accomplice liability if the detention is illegal or if torture or inhuman treatment is practised in the centres, even if such conduct is upon orders of the government client, or carried out by government agents.

Each of the three main forms of criminal liability discussed above may be relevant to these scenarios; however the principle of superior responsibility may be particularly relevant to private contractors. This is because they may operate jointly with army personnel and therefore need to be organised in a similar way in order to co-ordinate action. Liability may attach to senior managers of these private contracting firms if it can be shown that they had effective control over their employees on the ground, they knew or should have known that these employees were participating in crimes and they failed to take measures to prevent the crimes or punish their employees.

The providers of financial or banking services may also risk criminal liability for aiding and abetting crimes. In general, the Panel considers that the criminal liability

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157 *Gustav Becker, Wilhelm Weber and 18 others*, as cited in ICTY, *Tadic,* (Trial Chamber) 7 May 1997, para. 687.

158 ICTY, *Blagojevic and Jokic*, (Appeals Chamber) 9 May 2007, paras. 130-135.

of a financier will depend on what he or she knows about how his or her services and loans will be utilised and the degree to which these services actually affect the commission of a crime. Criminal liability may be less likely for a lender or financier who supports a general project or organisation as opposed to the financier who knowingly facilitates specific criminal activities through funding them or dealing with the proceeds of the crimes.

## 6.2 Supply Chain Relationships

The Chief Prosecutor of the ICC has publicly denounced companies that use suppliers who commit crimes under international law. For example, he specifically warned business people of the risks of international criminal legal liability for those who receive diamonds while knowing that the people delivering them had obtained them through genocide.[159] Beyond the diamond trade, companies have faced criticism for their use of suppliers that engage in crimes such as slave labour, torture, or crimes against humanity.

If company officials procure and use resources for their business activities, such as labour or goods, in the knowledge that this will involve the commission of crimes, then they may be considered to be aiding and abetting their commission. For example, officials of the Farben firm in Germany utilised prisoners of war, foreign slave labour and concentration camp labour for their enterprises, including a plant at Auschwitz used for the production of rubber and gasoline. Farben also acquired a controlling interest in two mines, the coal from which was to be used to manufacture fuel at the Auschwitz plant. The location of the plant was chosen by Farben officials in part because of the availability of concentration-camp labour for construction work. The mines were acquired when knowledge could be imputed to Farben officials that they could not be operated by voluntary labour and therefore forced labour had to be used. Farben officials procured and used concentration-camp and forced foreign labour for the enterprises, knowing about the inhumane treatment these people were suffering at the hands of the SS and that their work at the plant aggravated their misery. As a result, the Farben officials who participated in the construction and production, and in the allocation of labour for these enterprises were convicted of war crimes and crimes against humanity.[160]

The officials of Krupp, another industrial concern which produced iron, steel and processed these into ships and tanks for the Nazi war effort, also used slave labour and were convicted for doing so.[161] Similarly, officials of the Flick firm were convicted

159 "Firms Face 'Blood Diamond' Probe" 23 September 2003, http://news.bbc.co.uk/2/hi/business/3133108.stm.

160 Farben Case, p. 1187.

161 Krupp Case, p. 1399: Also see Roechling Case, pp. 1085-1089.

of war crimes and crimes against humanity for procuring prisoner of war labour needed to meet their production quota at a plant producing freight cars.[162]

Simply using goods from a supplier who commits crimes is not in and of itself enough for a company representative or the company to be liable as an accomplice. However, for companies that are major customers of a supplier who is committing crimes in the course of business, there is a risk that buying the goods could be sufficient to satisfy one of the elements of accomplice liability, i.e. that the companies' buying practice substantially affected the commission of the crimes by encouraging their commission. It would not, for example, be necessary to connect the company's orders from the supplier directly with a case of slavery in terms of cause and effect. It would be enough to show that the company's actions encouraged the supplier to continue using slave labour. Demanding a low price from suppliers (especially when the supplier is in a weak bargaining position and therefore more likely to be compelled to accept the price), while knowing from the economics of the deal that the supplier will have to use criminal employment practices, such as slavery, to satisfy the demand, may also be enough to show knowing encouragement. It would also have to be shown that the company knew it was encouraging the criminal activity through purchasing goods. Knowledge of the criminal activity might be demonstrated if government reports, independent monitoring reports or other available material or information indicate that criminal practices were used by the supplier.

There are risks that companies can avoid in supply chain dynamics. For example, companies should avoid using suppliers where there is a foreseeable risk that criminal labour practices are being used. When a company is in an influential position with suppliers it can impose high standards of behaviour and make explicit its opposition to criminal practices. Monitoring supplier conduct is also a useful way to avoid liability, in that it could exculpate the company if after finding criminal practices, it discontinued using the supplier. To avoid the risk of liability, when company representatives suspect or are aware that crimes are being perpetrated by suppliers, in a way that favours the supplier's ability to provide the company with the relevant goods, they should take immediate action to cancel orders, manifest disapproval of the crimes and condition any subsequent orders on a cessation of criminal activity.

### Box 4: Taking Over Property: Plunder & Theft

It could also be possible for company officials to face criminal accusations if their business cooperates with governments or other groups that illegally and

162 Flick Case, p. 1202.

forcibly remove people from their land to make way for company ventures.

If a government or other group, in cooperation with a company, seizes the land or private property of those who are associated with the opposing side of an armed conflict (for example a minority ethnic group involved in an internal armed conflict for independence), and the company knowingly takes that property for its own private use (unrelated to the conflict), there may be a basis for criminal liability. At Nuremberg, the industrialist Alfried Krupp was convicted of plunder for having taken over numerous factories, machines and other private property in territories seized by the Nazis. Importantly, the transfers of property to Krupp appeared to be legal because transfers were signed off by the owners and certified to be "voluntary" and "legal." Nonetheless as the property had been transferred "involuntarily" and in the context of occupation, Krupp was found to have committed war crimes. This was despite the fact that he was acting out of pure business interests, taking advantage of the opportunities presented to businesses because of the Nazi occupation, and not involved in the politics of the war.[163]

Outside the context of armed conflict, pillage is called "theft", and all domestic criminal jurisdictions prohibit theft. Laws prohibiting theft or receipt of stolen property may also be relevant to instances of transfer of private property to companies for business use.

## 6.3 Hiring Security Services

Risks of criminal liability can arise in a number of different situations where companies work with security services. For example, it may be that the company calls in security services to carry out a legitimate security operation to protect company resources or people and these external security providers subsequently commit crimes during the operations. The company or its employees may also be exposed to criminal liability if they assist those providing security services and committing the crimes, for example by providing personnel, logistical support, information, materials, or weapons.

If a private security firm which a company has hired commits crimes under international law, in the context of providing security for the company, or with materials provided by the company, and if the company has knowledge of the crimes, there may be a basis for aiding and abetting liability if the components of knowledge and substantial contribution outlined in Section 3 above are present.

163 Krupp Case, p. 1327.

Common purpose liability may also be incurred. It may not be difficult to establish that the company and the security provider were acting with the common purpose of securing the company's personnel and assets. Further it may not be contentious that crimes were committed in furtherance of that purpose. The critical issue will again be one of intention and knowledge: to what extent did the company official knowingly contribute to the commission of the crimes or the furtherance of the purpose?

Superior responsibility deserves a particular mention in this context. If, for example, a company security manager is in effect directing the external security services in their actions, then there may be an increased risk of criminal liability for him or her. The first question in respect of this form of liability will be: was the company official in effective command and control of the external security forces that committed the crimes? In this regard it is not enough to show that the security forces were paid by the company or its official: that official must have had the ability to actually direct the security forces' activities by issuing binding orders which would be obeyed by the security forces concerned. It will then be asked: did the company official know or should he or she have known that the security personnel were about to commit or did commit crimes? A court will then inquire as to what the company official did to prevent or punish the crimes. In order to avoid liability, company officials must show that they took all possible action within their power to do so. After a crime has been the committed, company officials would be advised to immediately end the operational activities of security personnel, initiate an internal investigation, report the incident to the law enforcement authorities and co-operate with them in their investigations.

# 7 Defences

In national and international criminal jurisdictions a person can only be found guilty for gross human rights abuses if all of the elements of an offence are proven by the prosecution beyond a reasonable doubt. Thus the first and main way in which defendants seek to avoid liability is by attacking the prosecution evidence with the ultimate aim of successfully arguing that one or more of the elements of the offence have not been proved beyond a reasonable doubt. These arguments are not, legally, defences. For example, although it is often asserted with respect to an alibi, that it is a defence to a criminal charge of physically committing a crime, it is in fact not, strictly speaking, a defence. A defendant who raises an alibi is merely denying that he was in a physical position to commit the crime with which he is charged, so the *actus reus* element of the crime is not established.[164]

There are, however, a number of defences in international criminal law that can serve to absolve criminal liability even if the elements of the offence *are* proved by the prosecution. Historically, neither the Nuremberg Tribunal nor subsequent World War II courts recognised any defences in their charters or founding documents. However, defences were raised during the court proceedings and the United Nations War Crimes Commission drew certain conclusions with respect to their application.[165] These conclusions are referred to in the commentary to the ILC's Code and will be addressed in this Section, along with subsequent international developments in jurisprudence and as a result of the ICC Statute.

## 7.1 Valid Defences

### Self Defence

The first and most obvious defence is self-defence. This is applicable in international criminal law as it is national criminal law. Self-defence could absolve a person from criminal responsibility, in relation to the use of force against another person resulting in death or serious injury, if this use of force was necessary to avoid an immediate threat of his or her own death or serious injury caused by that other person.[166] The ICC Statute includes this defence. It provides that in order to successfully invoke this defence a person must act reasonably and proportionately to defend him or herself or another person against an imminent and unlawful use of force. This can

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164 By raising that issue, the defendant does no more than require the prosecution to eliminate the reasonable possibility that the alibi is true, ICTY, *Delalic*, (Appeals Chamber), 20 February 2001, para. 581. Usually if an alibi is asserted, the defence must provide notice of this to the prosecution including the evidence that will rely upon to establish it. See Rule 67 of both the ICTY and ICTR Rules of Procedure and Evidence and ICTR, *Kayishema & Ruzindana*, (Trial Chamber), 21 May 1999, para. 234.

165 ILC Yearbook 1996, pp. 39-40, paras. 4-6.

166 ILC Yearbook 1996, p. 40, paras. 7-8.

be invoked to protect property in the case of war crimes, however the property must be essential for human survival or for the accomplishment of a military mission.[167]

Accordingly, this defence would not cover circumstances where criminal acts were undertaken by company officials in order to protect company property for commercial reasons. For example, if company officials sought the protection of an empty private factory by government troops during a conflict, and those troops murdered or seriously harmed civilians while they were protecting that building, then the company officials may not be able to invoke self-defence to potential charges of aiding and abetting crimes under international law during that operation.

### Insanity

If a person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct or capacity to control that conduct, he or she will not be criminally responsible for the conduct.[168]

If the defendant raises the issue of lack of mental capacity, this challenges the presumption of sanity by a plea of insanity. That is a defence in the true sense, in that the defendant bears the onus of establishing that, more probably than not, at the time of the offence, the defendant was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of his or her act or, if the defendant did know it, he or she did not know that the act was wrong. Such a plea, if successful, is a complete defence to a charge and it leads to an acquittal.[169]

### Duress/Necessity Defence

Duress or coercion was recognised as a possible defence or extenuating circumstance in some of the war crime trials conducted after the Second World War. The United Nations War Crimes Commission concluded that duress generally required three essential elements: that the act was done to avoid an immediate danger both serious and irreparable; that there was no other adequate means of escape; and that the remedy was not disproportionate to the evil.[170] In one case it was said that, "there is no law which requires that an innocent man must forfeit his life or suffer serious harm in order to avoid committing a crime which he condemns. The threat, however, must be imminent, real and inevitable. No court will punish a man who, with a loaded pistol at his head, is compelled to pull a lethal lever." [171]

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167 Article 31(1)(c) ICC Statute. Albin Eser in: O. Triffterer (ed.), *Commentary on the Rome Statute*, (1999) article 31, margin Nos. 28-34.

168 Article 31(1)(a) ICC Statute.

169 ICTY, *Delalic*, (Appeals Chamber) 20 February 2001, para. 582.

170 ILC Yearbook 1996, p. 40, para. 10.

171 *United States v. Otto Ohlendorf,* Trials of War Criminals, Vol. IV, p. 480.

In contrast, the Appeals Chamber of the *ICTY* tribunal has found, that duress does not afford a complete defence for a soldier charged with crimes against humanity or war crimes in international law, but it may be taken into account in mitigation of punishment.[172]

This defence has usually been argued in the military context where a subordinate was ordered to participate in a crime by a superior. Although superior or government orders are not a defence to crimes under international law, such orders have been considered in the context of duress.

The United Nations War Crimes Commission and the ILC have made a distinction between defences of duress on one hand and military necessity on the other. They note that military necessity was a possible defence or extenuating circumstance in very limited circumstances during some of the war crimes trials after the Second World War, but in general was more often rejected rather than accepted as a defence.[173]

Two significant cases in this regard are the Flick and Fabern cases, already discussed above.

In the Flick case, most of the officials of that firm were acquitted of war crimes and crimes against humanity for forced labour. In relation to those defendants who were acquitted, the Tribunal reasoned:

> *"the defendants here involved were not desirous of employing foreign labour or prisoners of war. It further appears, however, that they were conscious of the fact that it was both futile and dangerous to object to the allocation of such labour. It was known that any act that could be construed as tending to hinder or retard the war economy programs of the Reich would be construed as sabotage and would be treated with summary and severe penalties, sometimes resulting in the imposition of death sentences."*[174]

The two convictions that were handed down in this case were on the basis of the active participation of Weiss, with the knowledge and approval of his superior Flick, in the solicitation of increased freight car production quota for the Linke-Hofmann Werke plant and the allocation of Russian prisoners of war for use in the work of manufacturing the increased quotas.[175] The Tribunal held that these steps were not initiated in governmental circles but in the plant management. They were not taken

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172 ICTY, *Erdemovic*, Joint Separate Opinion of Judge McDonald and Judge Vohrah, (Appeals Chamber) 7 October 1997, paras. 73-75, 88.

173 ILC Yearbook 1996, p. 41, para. 11.

174 Flick Case, p. 1197.

175 Flick Case, p. 1198.

as a result of compulsion or fear, but admittedly for achieving maximum capacity. Therefore they were a matter of choice and not forced.[176]

In the Farben case, the defence of necessity was considered by the Tribunal, after reviewing the other relevant cases from the Second World War. The Tribunal found that:

> *"an order of a superior officer or a law or governmental decree will not justify the defence of necessity unless, in its operation, it is of a character to deprive the one to whom it is directed of a moral choice as to his course of action. It follows that the defence of necessity is not available where the party seeking to invoke it was, himself, responsible for the existence or execution of such order or decree, or where his participation went beyond the requirements thereof, or was the result of his own initiative."*[177]

As discussed above, in that case the defence was rejected in part because some of the defendants had requested the government to provide slave labour and located their factory near Auschwitz concentration camp in order to benefit from the source of labour nearby.[178] The Tribunal found that the defendants:

> *"were not moved by a lack of moral choice, but, on the contrary, embraced the opportunity to take full advantage of the slave-labour program. Indeed, it might be said that they were, to a very substantial degree, responsible for broadening the scope of that reprehensible system."*[179]

The more recent ICC Statute merges the traditionally separate concepts of military necessity and duress, although all the pre-conference proposals distinguished between the two.[180] The Statute now excuses criminal conduct if it has been caused by duress resulting from a threat or imminent death or serious bodily harm, to the person receiving the threat or another person. However, the person receiving the threat must act necessarily and reasonably to avoid the threat and not intend to cause greater harm than the one sought to be avoided.[181]

According to these standards, a company official could possibly successfully plead duress and avoid culpability, for example, if a rebel group forced him or her at gunpoint to provide fuel, trucks and other materials to serve the group's criminal plans. But if the official goes beyond what is demanded by, for example, offering

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176 Flick Case, p. 1202.

177 Farben Case, p. 1179.

178 Farben Case, p. 1187.

179 Farben Case, p. 1179.

180 Albin Eser in: O. Triffterer (ed.), *Commentary on the Rome Statute*, (1999) article 31, margin Nos. 35. See generally Nos.36-40.

181 Article 31(1)(d) ICC Statute.

more or other types of resources or other help, then he or she will not be able to successfully avail of this defence.

## 7.2 Arguments that do not Constitute Defences

There are a number of arguments that will not serve to absolve a defendant of crimes under international law. First, and in general, committing crimes pursuant to government orders or national laws, or orders of superiors, is not a defence, but may be considered in mitigation of punishment.[182] The ICC Statute adds that this argument cannot be successfully introduced unless the person committing the offence was under a legal obligation to obey the order; did not know the order was unlawful; and the order was not manifestly unlawful. For the purpose of this provision, orders to commit crimes against humanity and genocide are considered manifestly unlawful.[183] Practically speaking, it will be very difficult for any person including a company official to argue that a government direction or law ordering or permitting the perpetration of murder, rape, torture, forced transfer of civilians or other similar crimes, was not manifestly unlawful.

Second, arguing that an adversary in a conflict committed similar crimes is not a defence to committing them. This is the so-called *tu quoque* argument. In essence this asserts that one party's breaches of international humanitarian law justify similar breaches by the other side in a conflict. This is inapplicable in contemporary international humanitarian law, the bulk of which lays down absolute obligations that are unconditional and not based on reciprocity.[184]

By analogy, it would seem that arguments that a company's conduct is justifiable because other companies are or would engage in similar conduct, should fail. Similarly, arguments asserting that if a particular company did not undertake a certain course of conduct giving rise to its involvement in criminal activity, another company would do so, should also fail. Indeed there is support for the proposition that the culpability of an aider and abettor is not negated by the fact that his or her assistance could easily have been obtained from another.[185] In the case of Van Anraat, (the business man convicted of supplying the raw materials for the production of mustard gas to Sadam Hussein for use on Kurdish civilians) the Hague District Court found that the accused could not avoid liability "neither by relying on the fact

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182 Article 5 ILC Code; Article 7(4) ICTY Statute; Article 6(4) ICTR Statute and see Farben Case, p. 1179. In addition, the official position of any accused person, whether as Head of State or Government or as a responsible Government official, will not relieve such person of criminal responsibility nor mitigate punishment. This is expressly excluded as a defence by the relevant international instruments. Article 7(2) ICTY Statute; Article 6(2) ICTR Statute: Article 27 ICC Statute; Article 7 ILC Code. See also: Article 2(3) CAT, Article 6(2) ICPPED.

183 Article 33 ICC Statute.

184 ICTY, *Kupreskic*, (Trial Chamber), 14 January 2000, paras. 515-520.

185 LG Hechingen, 28.6.1947, Kls 23/47 and OLG Tübingen, 20.1.1948, Ss 54/47 (decision on appeal), reported in *Justiz und NS-Verbrechen*, case 022, vol. I, p. 469 ff cited in ICTY, *Furundzija*, (Trial Chamber), 10 December 1998, para. 224.

that it was not his decision to have these chemical attacks executed, nor by relying on the fact that these crimes would also have occurred without his contribution, because someone else would certainly have made the contribution."[186]

International criminal law is not concerned with commercial reciprocity or competition, or moral equivalency; it serves to protect the fundamental and non-derogable rights of all human beings to life, personal integrity and dignity. As such, these arguments do not and should not shield the participants in crimes from responsibility if the elements of the crime are made out.

### Box 5: Defences Not Available in International Criminal Law

A number of defences to allegations of aiding and abetting, joint criminal enterprise and superior responsibility are not available under international law. For example, it is not a defence that:

- A principal actor has not been tried or convicted. Accomplice guilt is not dependant on the prior trial and conviction of the principal.
- The crime would have occurred anyway. It is sufficient if the assistance of the business or business official changed in a substantial way how the crimes were committed, such as the way they were carried out or the timing.
- The business or business official did not want the principal crime to occur. As long as a sufficient level of knowledge (or in the case of superior responsibility: foreseeability) is present, accomplice liability may exist.
- A company official was just following the orders of a superior. Additionally, superiors may be held liable if they failed to prevent or punish crimes of subordinates.
- The company or company official was complying with national law. Compliance with domestic law will not in any way guarantee protection from prosecution for crimes under international law.

186 *Public Prosecutor v. Van Anraat*, LJN AX6406, The Hague District Court, 23 December 2005, para. 17.

## Box 6: Prosecuting UN Sanctions Violations

The UN Security Council has the power under Chapter VII of the United Nations Charter to issue embargoes on certain conduct, including for example arms embargoes on States or even non-state actors. For example, there are mandatory arms embargoes in force concerning Al Qaida, Osama bin Laden, the Taliban, the Democratic Republic of Congo, Sierra Leone, Sudan, Côte d'Ivoire, the Democratic People's Republic of Korea and Somalia.[187] The UN Security Council cannot prosecute individuals who violate UN embargoes. Rather, it is states that must enact domestic legislation to guarantee that those within their jurisdiction are not violating embargoes.

The first prosecution for the violation of a national law specifically tied to a UN embargo, occurred in Italy in 2002 and concerned Leonid Efimovich Minin,[188] a Ukrainian who was arrested and charged in Italy with using fake End User Certificates for illicit arms sales to Sierra Leone and Liberia. An Italian court found there was a lack of jurisdiction over Minin because no part of the alleged crimes occurred in Italy, and it was unclear if parts of the arms shipments even took place in Italian airspace.

A second notable case concerned the prosecution of Guus Van Kouwenhoven. In 2006 the District Court of The Hague (The Netherlands), convicted him of violating a UN embargo against selling arms to the Charles Taylor regime in Liberia. The UN embargo had been incorporated into domestic law in the Netherlands, allowing the prosecution of Dutch nationals even if their activities took place outside the Netherlands.[189] In 2008, this conviction was overturned on appeal and the accused was acquitted, mainly for reasons related to the insufficiency of the evidence.[190]

Although neither of these cases resulted in convictions, they may signal a new willingness on the part of national authorities to initiate prosecutions

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187 See the UN See the UN Security Council Sanctions Committees website at: http://www.un.org/sc/committees/.

188 See Wannenburg, Gail "Catching the middlemen fuelling African conflicts", The South African Institute of International Affairs, available at: http://www.saiia.org.za/index.php?option=com_content&view=article&id=713:catchingthemiddlemenfuellingafricanconflicts&catid=76:war-and-organised-crime-opinion-&Itemid=213 .

189 Judgement in the case against Guus K., Rb Den Haag 7 juni 2006, LJN AY5160. Kouwenhoven was also charged with involvement in war crimes, for his part in supplying Charles Taylor with weapons, among other charges. He was acquitted because the supply of weapons to the armed forces was not enough to prove his involvement in the war crimes of the armed forces, as the weapons could also be used for acts that are legally permitted of for other acts.

190 Judgement in the case against Guus Kouwenhoven, Hof Den Haag 10 maart 2008, LJN BC7373.

against business people who are involved in sanctions violations which give rise to crimes under international law. The cases also illustrate that while business people are at risk of being prosecuted for violations of arms embargoes, there are barriers to successful prosecutions, including the lack of adequate national legislation and the difficulty of collecting and presenting sufficient probative evidence concerning extra territorial conduct, to convince Courts of the criminal acts, intent and knowledge of the accused.

# 8 Where Can Prosecution for Crimes under International Law Take Place?

Prosecutions for crimes under international law may take place both in international jurisdictions, for example the ICC, and in national courts. The Panel notes that there is an ever-growing web of laws which make it increasingly difficult for those involved in gross human rights abuses amounting to crimes under international law, including company officials, to find jurisdictional sanctuaries which will shield them from the practical application of international criminal law.

## National Courts

Many national jurisdictions have incorporated prohibitions of crimes under international law into their national laws, making these crimes part of their national criminal laws. For example, a cross-section of both civil law and common law national systems have now incorporated the criminal prohibition of genocide, crimes against humanity and war crimes into their domestic law,[191] and the ICC Statute encourages states to adopt complimentary jurisdiction[192] over these crimes. This trend is likely to continue as more states sign and ratify the Statute. Furthermore, independently of the ICC Statute, several states, such as the US, India, Indonesia and the Ukraine, which have not ratified the Statute, have incorporated one or more of the three crimes covered by the ICC in their national criminal legislation.[193]

If a state has not incorporated crimes under international law into its national criminal laws, in most cases these crimes can nonetheless be investigated and prosecuted under national criminal laws punishing crimes such as murder, assault and theft. Further, while international jurisdictions (such as the ICC) may only have the jurisdiction to prosecute company officials (and not company entities as legal persons), national criminal laws in a variety of countries may permit the criminal prosecution of company entities. Hence there are ample possibilities for companies or their officials to be prosecuted under domestic criminal laws when they are involved in crimes under international law.

## National Extraterritorial Jurisdiction and Universal Jurisdiction

Most commonly, states exercise national criminal jurisdiction over crimes which are committed on their territory, regardless of the nationality of the accused or of the

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191 These include Argentina, Australia, Belgium, Canada, Germany, the Netherlands, South Africa, Spain and the United Kingdon. France and Norway are going through the process of incorporating the ICC definitions into their domestic laws, however France has pre-existing domestic legislation that criminalises genocide and crimes against humanity and Norway has pre-existing legislation that criminalises crimes against humanity and war crimes. See FAFO Executive Summary, p. 15.

192 Article 17 ICC Statute, and see also preambular paragraph No. 6 of the ICC Statute.

193 FAFO Executive Summary p. 15.

victim (territorial jurisdiction). Under international law, a state can also exercise its national criminal jurisdiction in relation to crimes committed outside its territory if the crimes are committed abroad by its nationals (extra-territorial jurisdiction on active personality grounds). There is also some evidence of an emerging acceptance on the part of some states of the exercise of jurisdiction by a state when the crimes are committed against its nationals (extra-territorial jurisdiction on passive personality grounds); or the crimes are committed against or threaten its national interests (extra-territorial jurisdiction on protective grounds).[194]

For some crimes under international law, the principle of "universal jurisdiction" may apply. Universal jurisdiction means that any state has the authority to investigate, prosecute and punish certain crimes under international law which are universally condemned, irrespective of where the crimes occurred or the location or nationality of the victims or perpetrators. In such instances, no connection is needed between the prosecuting state and the perpetrator. For example, crimes against humanity are often described as crimes under international law in respect of which universal jurisdiction can be exercised.[195] National legislation enabling the exercise of this kind of jurisdiction exists in a number of both common and civil law countries.[196]

Finally, in respect of certain crimes under international law some treaties include a set of obligations known as *aut dedere aut judicare*, which means "extradite or prosecute," requiring states to exercise their criminal jurisdiction over the suspected perpetrators of those crimes when the alleged offenders are present in any territory under their jurisdiction. If they do not prosecute these individuals, then they must extradite them to another state where they will be prosecuted.

### Amnesties and Statutes of Limitation

Amnesties and similar measures granted under national law a for gross human rights abuses amounting to international crimes including genocide, crimes against humanity and war crimes are generally viewed as incompatible with international law principles.[197] Article 6(5) of Additional Protocol II to the Geneva Conventions, which allows for amnesties for those who have participated in an armed conflict,

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194 ILC, *Second Report on the Obligation to Extradite or Prosecute (Au Dedere au Judicare)* United Nations A/CN.4/585 General Assembly, 11 June 2007 p. 21. para. 97.

195 For a discussion see the Joint Separate Opinion of Judges Higgins, Kooijimans and Buergenthal, Case Concerning the Arrest Warrant of 11 April 2000, (Democratic Republic of the Congo v. Belgium) http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=36&case=121&code=cobe&p3=4; and see SCSL, *Kallon, Decision on Challenge to Jurisdiction: Lomé Accord Amnesty* (Appeals Chamber), 13 March 2004, paras. 67-70.

196 These include Spain, the Netherlands, the United Kingdom, Canada and Australia. See for a discussion FAFO Executive Summary p. 16.

197 See: ICTY, *Furundzija*, 10 December 1998, para. 155 and SCSL, *Kallon, Decision on Challenge to Jurisdiction: Lomé Accord Amnesty* (Appeals Chamber), 13 March 2004, paras. 73 and 88. See also International Commission of Jurists, *The Right to a Remedy and to Reparation for Gross Human Rights Violations – A Practitioners' Guide* , June 2007, pp. 177-191.

is sometimes invoked to justify amnesties for crimes committed in internal armed conflict.[198] The International Committee of the Red Cross, however, has rejected this interpretation and made clear Article 6 (5) was intended for those who "were detained or punished merely for having participated in the hostilities. It does not seek to be an amnesty for those who have violated international humanitarian law." [199]

International customary law prohibits statutes of limitation in respect of criminal prosecutions for genocide, crimes against humanity and war crimes.[200] Beyond this prohibition, there is an emerging trend in international jurisprudence, comparative law, and as a result of new instruments, to prohibit or limit the application of statutes of limitations in respect of prosecutions for other gross human rights abuses amounting to crimes under international law.[201] For example in the Furundzija case, the ICTY stated that one of the consequences of the peremptory nature of the prohibition of torture was "the fact that torture may not be covered by a statute of limitations." [202] These prohibitions or caveats on the application of statutes of limitation mean that criminal liability cannot be eliminated by the passage of time,

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198 According to this provision, '[a]t the end of hostilities, the authorities in power shall endeavor to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.'

199 Letter of the ICRC Legal Division to the ICTY Prosecutor, 24 November 1995 and to the Department of Law at the University of California, 15 April 1997. The Inter-American Commission on Human Rights has followed this approach by referring to the ICRC's statement. See Report No. 1/99, Case 10,480 Lucio Parada Cea and others v El Salvador, 27 January 1999, para 116.

200 See: Article II.5 Control Council Law No 10 on the Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity (1945), Convention on the Non- Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (1968), European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes (1974), Article 29 ICC Statute; Articles 4 and 5, Law on the Establishment of the Extraordinary Chambers in the courts of Cambodia for the prosecution of crimes committed during the period of democratic Kampuchea, 27 October 2004; Section 17.1 Regulation nº 2000/15 adopted by the UN Transitional Administration in East Timor on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, UNTAET/REG/ 2000/15, 6 June 2000.

201 See for example: ICTY, *Furundzija*, 10 December 1998, paras 155 and 157; Inter-American Court of Human Rights, Judgment of 14 March 2001, Case of Barrios Altos (Chumbipuma Aguirre and others vs. Peru), paragraph 41; Barrios Altos Case, Interpretation of the Judgment on the Merits, Judgment of 3 September 2001, Series C No 83, para 15; Case Trujillo Oroza v Bolivia (Reparations), Judgment of 27 February 2002, Series C No 92, para 106; Case Caracazo v Venezuela (Reparations), Judgment of 29 August 2002, Series C No 95, para 119. Committee against Torture: Conclusions and recommendations on Turkey, 27 May 2003, CAT/C/CR/30/5, Recommendation, para 7(c); Conclusions and recommendations on Slovenia, 27 May 2003, CAT/C/CR/30/4, Recommendation, para 6(b); Conclusions and recommendations on Chile, May 2004, CAT/C/CR/32/5, para 7 (f). Human Rights Committee: Concluding Observations on Argentina, 3 November 2000, CCPR/CO/70/ARG, para 9 and General Comment No 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para 18. See Principle 6, UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN General Assembly Resolution 60/147 (2005). Also see Principles 22 and 23, Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity. For a discussion see: International Commission of Jurists, *The Right to a Remedy and to Reparation for Gross Human Rights Violations – A Practitioners' Guide*, June 2007.

202 ICTY, *Furundzija*, 10 December 1998 paras. 155, 157.

and prosecutions can take place at any point, even decades after the crimes are committed.

### The International Criminal Court

The ICC's jurisdiction over genocide, crimes against humanity and war crimes applies to individuals, including corporate officials, accused of these crimes, but not to corporate entities. The ICC's jurisdiction extends to those directly responsible for committing the crimes as well as others who are implicated in them.

The Court does not have universal jurisdiction and may only exercise jurisdiction if the accused is a national of a State Party or a state otherwise accepting the jurisdiction of the Court; the crime took place on the territory of a State Party or a state otherwise accepting the jurisdiction of the Court; or the United Nations Security Council has referred the situation to the Prosecutor, irrespective of the nationality of the accused or the location of the crime.[203]

The principle of "complementarity" means that even if the Court does have jurisdiction over a case it will not pursue an investigation or prosecution if the case has been or is being investigated or prosecuted by a state with jurisdiction.[204] However, a case may be admissible if the investigating or prosecuting state is unwilling or unable to genuinely to carry out the investigation or prosecution. For example, a case would be admissible if national proceedings were undertaken for the purpose of shielding the person from criminal responsibility or there has been an unjustified delay in proceedings, or if proceedings were not being conducted independently or impartially.[205]

### The Developing Web of Jurisdictions

In the Panel's opinion, the increasing competence of national criminal systems to punish crimes under international law (directly as such or under national criminal law), and the jurisdiction of the ICC, mean that there is a growing web of national and international jurisdictions that are able to call international criminals to account for their actions. Company officials who are involved in committing crimes under international law are therefore also susceptible to the increased risks of being investigated, prosecuted and punished in a wide range of jurisdictions. Companies should be aware that their actions, no matter where they operate, are subject to the limits of international criminal law.

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203 Articles 12-17 ICC Statute. In this instance the Court's jurisdiction is limited to events taking place since 1 July 2002: Article 11 ICC Statute. The Statute entered into force on this date.

204 Article 17(1) ICC Statute.

205 Article 17(2) ICC Statute.

# 9 Can Companies Be Prosecuted?

Traditionally, it was widely considered that criminal justice systems could not hold a business, as a legal entity, criminally accountable. Rather, the criminal law pursued and attributed guilt to individuals for criminal activity. Businesses were traditionally classified with animals, children and the insane as non-accountable.[206] Individual company representatives and employees could be prosecuted for a variety of activities, but not the business entity itself. Although human beings are largely still the target of criminal prosecutions, there are examples in national criminal law which provide for the criminal liability of legal entities, in particular companies.[207]

So far, no international criminal tribunal has had jurisdiction to try a company as a legal entity for crimes under international law. Although there was a proposal to add legal entities to the jurisdiction of the ICC during the negotiations of the Court's Statute, it failed, and as a result the ICC currently has jurisdiction only over natural persons.[208] The proposal, put forward by France, was limited to private corporations as opposed to state and public corporations and was linked to the individual criminal responsibility of a leading member of a corporation who was in a position of control and committed the crimes, acting on behalf of and with the explicit consent of the corporation in the course of its activities. The proposal was rejected because of a number of concerns: first, that it would detract from the focus of the Statute on individual criminal responsibility; second, that the Court would be confronted with overwhelming problems of evidence: and third, that there was not yet a recognised standard of corporate responsibility across all states, hence this would make the principle of complementarily unworkable.[209]

In the Panel's view this reasoning should not preclude the States Parties to the ICC Statute from including a provision for corporate criminal responsibility in the future. The fact that a corporation may be held liable for crimes under international law does not *per se* detract from individual criminal responsibility. Indeed, sometimes it might be more appropriate to hold a corporation responsible rather than a corporate official, if the commission of the crime had been facilitated by an explicit and collective decision of the management of a company.

The Panel has found that there could be evidentiary challenges in establishing business responsibility at the ICC. However the conduct of cases involving business entities as defendants can be likened in an evidentiary sense to large, complex cases against presidents, prime ministers and generals which the ICC is currently

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206 Celia Wells, "Corporate Criminal Liability", Paper written for the ICJ Expert Legal Panel on Corporate Complicity in International Crimes, p. 33, www.icj.org.

207 See egs. Article 121-2 French Criminal Code; Article 5 Dutch Criminal Code.

208 Article 25(1), ICC Statute.

209 Kai Ambos, in: O. Triffterer (ed.), *Commentary on the Rome Statute*, (1999) article 25, margin No. 4.

investigating. Experience from the *ad hoc* tribunals has demonstrated that intricate chains of command and the operation of complex multilayered governmental and military structures can be proven through the analysis of voluminous documentation, and on the basis of expert and insider evidence. If it is possible to undertake this evidentiary exercise in relation to establishing the guilt of a head of state then it should also be possible to do in relation to company directors and their companies.

Although there are national jurisdictions which include company entities among those that can be prosecuted as criminal defendants, the Panel notes that not all jurisdictions hold businesses responsible under their national criminal laws. However, as national criminal laws develop to include this type of liability, so do the arguments for an expansion of international courts' jurisdiction over company entities.

In France, from 1994, it was accepted that some crimes could be committed by companies. As of January 2006 a legislative amendment took force which meant that legal entities such a companies would be found guilty of any offence, major or minor, under the French Penal Code.[210] Belgian law requires companies to designate a responsible person who bears automatic criminal liability for any crimes that occur in the course of business activity, without the necessity of proving any illegal activity on his or her part. The designee in turn, receives extra compensation and reimbursement for criminal fines imposed.[211] Essentially, these types of regimes allow national criminal law to exert more influence over a company's operations, than those with are confined to scrutiny over the actions of individuals within a company.

In the majority of those jurisdictions that already recognise the potential criminal responsibility of companies, companies can be held responsible for both national crimes and crimes under international law.[212] Further, in the countries that have incorporated the ICC crimes into their national legislation, companies may be exposed to criminal responsibility in domestic courts for the crimes enshrined in the ICC Statute.

Despite these important developments, significant opposition to the imposition of criminal sanctions on companies as legal entities remains. The reasons for this appear to be broadly conceptual, and at times political. National criminal laws were developed many centuries ago, and they are built and framed upon the notion of the individual human being as a conscious being exercising freedom of choice, thought

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210 See, *Memorandum of the Ministry of French Foreign Affairs, R*e: Criminal liability of private law legal entities under French law and extra-territoriality of the laws applicable to them: Review of the situation and discussion of issues p. 2. Available at: http://www.lancs.ac.uk/fss/organisations/humanrights/inthron/Resources/documents/Criminalliabilityoflegalentities050606_000.doc

211 Celia Wells, "Corporate Criminal Liability", Paper written for the ICJ Expert Legal Panel on Corporate Complicity in International Crimes, p. 34-35, www.icj.org.

212 Burchell, p. 35.

and action. Businesses as legal entities have been viewed as fictitious beings, with no physical presence and no individual consciousness. As such, many perceive it to be impossible to prove that a business entity had criminal intent, or knowledge. Furthermore, many believe that punishing individuals who commit crimes with the aim of imbuing a sense of wrong done, shame and remorse, is a central purpose of any criminal justice system. Questions arise as to how this can be achieved when the target is an artificial entity without the attributes of a human being. Another perceived obstacle is the fact that traditional criminal sanctions may not always be appropriate in respect of business. A business cannot be put in prison. A fine may not have a serious impact on the behaviour of a large wealthy business, particularly if financial sanctions can be passed on to customers, thus attenuating although not obliterating their punitive effects. Other punishments tailored for business entities may include steps such as revoking the corporate charter or registration. However it will not always be entirely clear whether it is in the interest of society to close a business down because it commits a crime. Furthermore, the political sensitivities of enacting criminal legislation applicable to companies should not be ignored: governments often seek to encourage company investment and commercial activity as an important element of domestic or regional economic growth. Therefore they are often reluctant to include company entities among those subject to their criminal law.

The Panel believes there are no insurmountable conceptual obstacles to imposing criminal liability on businesses as legal entities. Of course, as with any process which involves applying old concepts and laws to new contexts, difficulties may arise for authorities engaged in translating concepts of intent and knowledge, developed in relation to individuals, to business entities. However, the fact that increasing numbers of jurisdictions are applying criminal law to companies is evidence that these difficulties can be overcome. Different countries have developed different ways of holding business entities criminally accountable: in some jurisdictions, the business can be held criminally liable for the acts of its employees, in others a business is directly accountable for the acts of senior management because the law considers them to be the 'brain' of the business, and as such the guilt of the business is inferred from their intention and knowledge.[213] Recently, some jurisdictions have sought to find a third way of addressing company criminality. For example, in Australia, a route has been developed which focuses on the culture within the business, and the way in which the business is run. Where knowledge or recklessness is a fault element, it can be attributed to a company that has expressly, tacitly or impliedly authorised or permitted the commission of a crime. A company will be taken to have authorised or permitted the commission of an offence if it is proved that 'corporate culture' existed which either actively encouraged or tolerated the non-compliance or failed to promote compliance.[214]

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213 See Celia Wells, "Corporate Criminal Liability", Paper written for the ICJ Expert Legal Panel on Corporate Complicity in International Crimes, pp. 32-43, www.icj.org.

214 See Allens Arthur Robinson "Brief on Corporations and Human Rights in the Asia-Pacific Region", Prepared

The Panel considers that allowing the criminal liability of a business entity may enable victims' redress and remedy. For example, the possibility of prosecution of a business entity may provide an effective impetus to improving business behaviour and deterring similar behaviour by other companies as compared with a finding of guilt only on the part of a high ranking company officer. Criminal sanctions on companies could include orders to change internal policies and processes and reporting requirements, which may go to the heart of the company's wrongdoing. A criminal conviction of a company, and the public attention such a conviction may give rise to, can also provide incentives to improve business culture.

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for Professor John Ruggie, United Nations Special Representative of the Secretary General for Business and Human Rights (August 26) at pp. 28-29, available at: http://www.reports-and-materials.org/Legal-brief-on-Asia-Pacific-for-Ruggie-Aug-2006.pdf.