Attributing Criminal Liability to Corporate Actors

Some Lessons from the International Tribunals

Norman Farrell*

Abstract

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

1. Introduction

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

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

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

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actors are allegedly committing direct violations of international humanitarian law during the conduct of hostilities. For example, private military companies are increasingly present in conflict zones as combatants and security providers.[2] At the other end of the spectrum, companies more tangentially connected to the commission of crimes are alleged to be implicated in those crimes through their business activities in areas in which violations of international humanitarian law occur. For example, a company may be operating in a country with few other means of revenue and, by paying taxes or royalties, provide the government with funds which may assist in its commission of crimes. In the middle of the spectrum, companies may be seen as enabling, exacerbating or facilitating abuses by others by, for example, supplying governments or rebel groups known for committing international humanitarian law violations with equipment or arms, buying resources from such groups, building airstrips that are used for aerial attacks on civilian populations or broadcasting radio and television programmes that incite people to violence. The increasing activities of multinational corporations in conflict zones, or perhaps, the closer scrutiny of such activities, have raised questions about the liability of corporations under domestic law and international law.[3]

Corporations as legal persons have not been investigated or prosecuted before international or hybrid criminal tribunals;[4] the tribunals do not have jurisdiction over legal persons such as corporations.[5] Despite this, the law and practice of the tribunals are relevant to efforts to characterize corporate criminality. By looking to the case law of the tribunals this article attempts to draw useful analogies between the attribution of responsibility to senior political or military leaders, who participate in criminal conduct through organized structures of power, and the potential attribution of responsibility to corporations or individual corporate officials.

2 P.W. Singer, *Corporate Warriors: The Rise of the Privatized Military Industry* (Ithaca: Cornell University Press, 2003); 'Five Blackwater Employees Indicted on Manslaughter and Weapons Charges for Fatal Nisur Square Shooting in Iraq', *USA v. Slough et al.*, Indictment filed 4 December 2008; see http://www.justice.gov/opa/pr/2008/December/08-nsd-1068.html (visited 2 March 2010).

3 For a similar approach, see the contribution by H. Vest in this issue of the *Journal*.

4 Reference to 'tribunals' throughout the article, unless otherwise stated, means the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), the Special Court for Sierra Leone (SCSL), the Extraordinary Chamber in the Courts of Cambodia (ECCC) and where applicable the International Criminal Court (ICC).

5 Under Art. 25 ICCSt., Art. 6 ICTYSt. and Art. 5 ICTRSt., the jurisdiction of the ICC, ICTY and ICTR is limited to prosecuting natural persons. The same is true for the hybrid tribunals, the SCSL and ECCC. The ECCC, classified as a hybrid tribunal, has jurisdiction over 'senior leaders of Democratic Kampuchea' and 'those who were most responsible' for the crimes, see: Law on the Establishment of the Extraordinary Chambers, with inclusions of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006). Though the Law does not specifically state that its jurisdiction is limited to natural persons, it is apparent that it does not include corporations. Likewise it is apparent that the SCSL has limited its jurisdiction to natural persons, see Arts 1, 7 and 9 SCSLSt., annexed to the Agreement between the UN and the Government of Sierra Leone on the Establishment of the SCSL, signed 16 January 2002.

Without addressing the separate questions of jurisdiction over corporations or the liability of corporations as such, the article strives to identify modes of liability under international law that would be most applicable to the corporate context by looking at how those modes of liability have been applied and interpreted before the tribunals. There exists some debate on whether existing international standards for individuals can be extended to corporations and whether the application of such standards would be effective in capturing the various ways in which corporations may be involved in criminal activity.[6] Nevertheless, there are reasons to examine the application of the modes of liability under international law, both to corporate entities and individual corporate officials. First, the modes of liability under international law are being applied in at least one domestic jurisdiction in relation to corporations.[7] Second, in jurisdictions where liability is ascribed to a corporation through the conduct and intent of its directing minds, the focus will be on the individual officials who are considered the directing minds of the corporation.[8] And third, in courts or countries where jurisdiction over corporations as legal persons does not exist, the prosecution of individual corporate officials may be the only means for indirectly holding corporations accountable for their contributions to international crimes. The way that international criminal law has addressed the inherent difficulty in prosecuting indirect perpetrators and facilitators who are remote from the crime therefore remains relevant to examining the potential liability of corporations or corporate leaders under international criminal law. In addition, though leadership cases at the tribunals have for the most part dealt with military and political leaders who operate through organized structures of power, the tribunals have on occasion prosecuted business leaders acting through corporate structures.[9] Throughout this article, the term corporate actor should be understood as, in principle, including both corporations as legal persons or corporate or business officials as natural persons.

In any event, the issues the tribunals have faced in leadership cases may contain valuable lessons to cases in the corporate context. It appears inevitable that, in assessing the liability of corporate actors for international crimes, courts will at least look to, if not rely on, the existing jurisprudence of the tribunals arising from prosecutions in other contexts. In some cases this has

6 For a thoughtful discussion on this issue, see D. Stoitchkova, *Towards Corporate Liability in International Criminal Law* (Antwerp: Intersentia, 2010), at 102–107. There may be other, or more appropriate, ways to address corporate involvement in criminal activity. That is separate than the topic this article attempts to address, which is the effect of applying modes of liability under international criminal law.

7 Though in the context of civil litigation for tort violations, under the United States Alien Tort Claims Act, 28 U.S.C. § 1350 courts are to apply international law, and the cases discussed subsequently in this article relate to the application of aiding and abetting under customary international law.

8 This basis for the imposition of liability on a corporation, termed the identification doctrine, has been called into question as overly restrictive. See Stoitchkova, *supra* note 6, at 108–112.

9 E.g. Judgment, *Bagaragaza* (ICTR-05-86-S), Trial Chamber, 17 November 2009 ('*Bagaragaza* Trial Judgment'); Judgment, *Musema* (ICTR-96-13-A), Appeals Chamber, 16 November 2001.

already occurred. Thus, an understanding of this jurisprudence is crucial to assessing the potential liability of corporate actors for international crimes.

The aspect of the tribunals' law and practice which immediately comes to mind as applicable to assessing the potential liability of corporate actors for international criminal law violations is the law which addresses the attribution of criminal liability to an accused who is physically, structurally and/or causally distant from the physical perpetrator(s) of the crimes. In the corporate context, what are the appropriate limits of liability for corporate actors, often removed from the crime(s) either by physical distance or by causal remoteness, but whose acts contribute, or assist in some way in the commission of a crime carried out by others? The issue of remoteness from the crime and the attribution of the criminal acts of others to an accused has been a central feature in ICTY — and to a certain extent, ICTR — trials.[10] It is expected to play a central role in the prosecution of accused before the other tribunals as well.[11]

This article therefore attempts to address the issue of remoteness and attribution, relying on the jurisprudence of existing international Tribunals, primarily the ICTY, though including the ICC, the ICTR, the ECCC and the SCSL in its analysis. It will do so by discussing the two forms of participation[12] established in international law as most relevant to the potential liability of corporate actors. The first is where an accused acts with others to commit a crime, a form of collective criminal action referred to in the jurisprudence of the tribunals as joint criminal enterprise or co-perpetration.[13] The second form of participation is aiding and abetting as an accessory form of liability.

10 Judgment, *Krajišnik* (IT-00-39-A), Appeals Chamber, 17 March 2009 ('*Krajišnik* Appeals Judgment'); Judgment, *Brđanin* (IT-99-36), Appeals Chamber, 3 April 2007 ('*Brđanin* Appeals Judgment'); Judgment, *Nahimana et al.* (ICTR-99-52-A), Appeals Chamber, 28 November 2007; Judgment, *Ntakirutimana and Ntakirutimana* (ICTR-96-10-A, ICTR-96-17-A), Appeals Chamber, 13 December 2004 ('*Ntakirutimana and Ntakirutimana* Appeals Judgment'); *Bagaragaza* Trial Judgment, *supra* note 9; Judgment, *Brima et al.* (SCSL-2004-16-A), Appeals Chamber, 22 February 2008 ('*Brima et al.* Appeals Judgment').

11 Decision on Appeal against Closing Order indicting Kaing Guek Eav Alias "Duch", *Duch* (001/18-07-2007-ECCC/OCIJ/(PTC-02)), Pre-Trial Chamber, 5 December 2008; Judgment, *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, (Docket No. 07-0016-cv) U.S.C.A. 2nd Circuit, 2 October 2009, available at http://www.docstoc.com/docs/12581037/Presbyterian-Church-of-Sudan-v-Talisman-Energy and http://caselaw.lp.findlaw.com/data2/circs/2nd/070016p.pdf (both visited 2 March 2010); Art. 25 ICCSt.; Decision on the Confirmation of Charges, *Katanga and Chui* (ICC-01/04-01/07), Pre-Trial Chamber I, 30 September 2008 ('*Katanga and Chui*'); Warrant of Arrest for Omar Hassan Ahmad Al Bashir, *Al Bashir* (ICC-02/05-01/09), Pre-Trial Chamber I, 4 March 2009, wherein the Chamber concludes that there are reasonable grounds to believe that Omar Al Bashir is criminally responsible as an 'indirect perpetrator' or 'indirect co-perpetrator' (at 7).

12 The phrase 'forms of participation' and 'modes of liability' are used interchangeably in this article.

13 In the ICTY and SCSL joint criminal enterprise is a form of commission that encompasses co-perpetration and indirect co-perpetration, see *Krajišnik* Appeals Judgment, *supra* note 10; Judgment, *Sesay, Kallon, Gbao* (SCSL-04-15-A), Appeals Chamber, 26 October 2009 ('*Sesay, Kallon, Gbao* Appeals Judgment'). Though indirect co-perpetration has not been addressed specifically, the ICTR Appeals Chamber has concluded that committing does not require direct and physical perpetration. See Judgment, *Seromba* (ICTR-01-66-A), Appeals Chamber, 12

2. Remoteness and Attribution

The issue of remoteness has been a central feature in ICTY trials. Both ICTY and ICTR cases have dealt with accused persons in leadership positions who are involved in the commission of crimes through organized structures, and who are, in one form or another, remote from the physical commission of the crimes. Remoteness from the crime, in the sense of the absence of physical proximity to the commission of crimes, or a hierarchical remoteness from the physical perpetrators, does not necessarily result in a lack of legal proximity.

For example, in *Krajišnik*, the accused Momčilo Krajišnik, a senior Bosnian Serb political leader, was convicted for crimes committed in a number of municipalities that were within the Bosnian Serb political entity, but geographically distant from the area in which the political leadership operated. In *Perišić*, the accused, who was the Chief of the General Staff of the Yugoslav Army (VJ) in Belgrade, Serbia has been charged with aiding and abetting in the execution of crimes committed in Bosnia and Croatia by, *inter alia*, providing substantial military assistance to the Bosnian Serb Army (VRS) and the army of the Serbian Krajina in Croatia (ARSK), over which he had no operational commanding role.

The ICTR, upon consideration of admitted facts on a guilty plea, convicted Michel Bagaragaza for complicity in genocide for his contributions as the Director General of the government office that controlled the tea industry in Rwanda. In that capacity, Bagaragaza controlled 11 tea factories employing approximately 55,000 people. Although not directly involved in crimes, Bagaragaza substantially contributed to the crimes by authorizing vehicles and fuel from tea factories to transport *Interahamwe* fighters for attacks; authorizing personnel from the factories to participate in the attacks and authorizing the attackers to be provided with heavy weapons. Further, Bagaragaza provided a substantial amount of money for the purchase of alcohol for *Interahamwe* fighters knowing that it was for the purpose of motivating them to continue with the killings.[14]

The Special Court for Sierra Leone is confronted with similar issues in *Taylor*. The accused is charged with crimes in Sierra Leone during a time when he was initially the Leader of the National Patriotic Front of Liberia and subsequently the President of the Republic of Liberia. The crimes in Sierra Leone for which Taylor is charged include crimes committed by Sierra Leone rebel forces.[15]

March 2008, § 161. In the ICC, Art. 25(3)(a) of the Statute sets out a form of committing which encompasses direct perpetration, indirect perpetration and co-perpetration. In the Decision on the Confirmation of Charges in *Katanga and Chui* (*supra* note 11) criminal responsibility was based on joint commission through another person, i.e. indirect co-perpetration, § 489.

14 *Bagaragaza* Trial Judgment, *supra* note 9.

15 Second Amended Indictment, *Charles Taylor* (SCSL-01-03-PT), 29 May 2007; Decision on 'Defence Notice of Appeal and Submissions regarding the Majority Decision concerning the Pleading of JCE in the Second Amended Indictment', *Charles Taylor* (SCSL-01-03-T), Appeals Chamber, 1 May 2009. Assuming President Omar Al Bashir will be brought to trial, the ICC

In cases where accused persons have been physically or structurally remote from the physical commission of the crimes, courts have confronted both the factual nexus connecting a high ranking official to the crimes, and the legal nexus resulting in the attribution of responsibility. The necessary link between an accused and the crime as a matter of both fact and law has been shaped by the existing jurisprudence on joint commission, or co-perpetration, and the jurisprudence on aiding and abetting. Both deal with criminal liability for acts of contribution or assistance to crimes that may be physically committed by others.[16]

3. Participants in Collective Criminal Action

The mode of liability of commission recognized in the ICTY, ICTR, SCSL and in an initial decision of the ECCC, as joint criminal enterprise is relevant to prosecutions of corporate actors for international crimes.[17] In particular, this mode of liability attributes individual criminal responsibility arising from collective criminal action. In terms of proximity to the crime, none of those operating together[18] need to be physically or directly involved in its commission. However, they must act in pursuit of a shared criminal objective and must share the direct intent for crimes falling within that objective.[19] The contribution of an individual accused need not be necessary or substantial but it should at least be a significant contribution to the crimes.[20] An accused's contribution to a joint criminal enterprise need not be criminal in and of itself, and may consist of acts which might otherwise be considered neutral political, military — or indeed business — activity.[21] In terms of attribution, the acts of other members of the criminal enterprise — and the crimes which are imputed to those other members — are attributed to the accused. In simple terms, persons acting together with the shared purpose involving the commission of crimes are jointly responsible for those crimes.

will face issues related to attribution of responsibility in that case: Warrant of Arrest for Omar Hassan Ahmad Al Bashir, *Al Bashir* (ICC-02/05-01/09), Pre-Trial Chamber I, 4 March 2009.

16 Other forms of participation, such as command responsibility, may also be relevant to corporate liability, but are not addressed in this article.

17 *Brđanin* Appeals Judgment, *supra* note 10; *Ntakirutimana and Ntakirutimana* Appeals Judgment, *supra* note 10; *Brima et al.* Appeals Judgment, *supra* note 10. On 8 December 2009, the Office of the Co-Investigating Judges of the ECCC issued a decision concluding that joint criminal enterprise was an applicable mode of liability under the ECCC Statute in relation to international crimes: Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise (002/19-09-2007-ECCC-OCIJ), Office of the Co-Investigating Judges, 8 December 2009.

18 Reference is to the first form, or basic form, of joint criminal enterprise. For the legal elements, see *Brđanin* Appeals Judgment, *supra* note 10, §§ 363–365.

19 This only addresses the *mens rea* for the first or basic form of JCE.

20 *Krajišnik* Appeals Judgment, *supra* note 10, § 215.

21 *Krajišnik* Appeals Judgment, *supra* note 10, § 218; *Ntakirutimana and Ntakirutimana* Appeals Judgment, *supra* note 10, § 466; *Sesay, Kallon, Gbao* Appeals Judgment, *supra* note 13, § 304.

This mode of liability can capture the criminal liability of leaders who work together to perpetrate crimes through organized structures of power in pursuit of a common criminal objective. For example, in the *Krajišnik* case, Krajišnik was found liable for persecution, forcible transfer and deportation carried out in a number of municipalities throughout the Bosnian Serb entity. He was remote geographically and structurally from most of the crimes. He was not an operational commander, neither operational on the field, nor directly ordering crimes to be carried out. However, as a key member of the political and state leadership Krajišnik participated in the development and implementation of governmental policies and the establishment of government bodies; he directed and authorized political and governmental organs to carry out acts in order to further the criminal objective; and he engaged in efforts to mislead the public and international observers about the crimes. The Appeals Chamber found that the fact that these activities were not necessarily criminal per se was irrelevant.[22] These acts significantly contributed to the execution of the common criminal objective, and were carried out with the intent to commit the crimes that formed part of the common criminal objective.

Joint criminal enterprise could apply similarly to the corporate context. For example, a corporation and governmental authorities in an area engage in a common objective to forcibly remove local people from places where they have the lawful right to reside in order to facilitate the extraction of oil. The corporation engages in discussions with government leaders about how to remove these people from areas where the oil company intends to operate. The corporation provides the means and equipment necessary to carry out the unlawful displacement operations. Depending on the specific facts, an argument could be made that the corporation and the leaders of the government forces share the common purpose to unlawfully forcibly transfer the local population. The provision of means necessary to carry out the forcible transfer is a significant contribution to the execution of this criminal objective. Assuming the requisite elements for crimes against humanity or war crimes are evident, the conduct of the corporate and government actors are best captured by this mode of liability.

The main challenge to prosecuting a corporate actor as a participant in a joint criminal enterprise — as opposed to as an aider and abettor — will be the need to prove that the various actors had a common criminal purpose and the corporate actor possessed the direct intent for the underlying crimes. This is significantly higher than the *mens rea* requirement of aiding and abetting under the jurisprudence of the ICTY, ICTR and SCSL where it would only be necessary to prove that the corporate actor knew that its acts assisted the principal in the specific crime and knew that the crimes were likely to occur. In many corporate scenarios, forms of assistance such as providing equipment or means, may on their face be considered a neutral or legitimate business activity. Further, such equipment or other forms of assistance may pass through multiple 'middle men' before reaching the principal perpetrators of the crime.

22 *Krajišnik* Appeals Judgment, *supra* note 10, § 218.

The more links in the supply chain, the more difficult it may be to establish the necessary *mens rea*. Take the example of a foreign company selling arms to a government, which in turn distributes those arms to a militia, which uses the weapons to carry out crimes. In such circumstances, the corporate actor may not in fact share an objective to commit those crimes with members of the government or the militia, and may not have the direct intent to commit those crimes. Even if they do, it may be difficult to establish this as a matter of evidence. Although physical or structural remoteness is not a per se obstacle to prosecuting corporate actors under this mode of liability, the common purpose and high *mens rea* standard may limit the applicability of joint criminal enterprise in the corporate context.

It is important to note that the manner in which collective action is criminalized in the Statute of the ICC is different in some respects from the mode of liability of joint criminal enterprise as adopted at the ICTY, ICTR and SCSL. At this stage, there is limited jurisprudence and it is unclear precisely how the elements will be interpreted. But the distinct structure and wording in the ICC Statute have implications for the attribution of criminal responsibility, including for corporate actors under its provisions. Article 25 of the ICC Statute sets out three ways in which acting with or through others can be considered criminal: joint commission (co-perpetration) under Article 25(3)(a), common purpose under Article 25(3)(d) and aiding and abetting under Article 25(3)(c).

The first, joint commission under Article 25(3)(a), appears to impose a higher *actus reus* standard than joint criminal enterprise under ICTY, ICTR and SCSL jurisprudence, as the co-perpetrators must exercise control over the crime.[23] Joint control is essential for liability, and it requires the co-perpetrators to have the power to set the machinery in motion and the power to stop it. Under the ICC Statute, the distinguishing factor between 'principal' and 'accessory' liability is control over the crime.[24] This joint control requirement imposes a stricter *actus reus* standard than the contribution requirement under joint criminal enterprise liability, as a JCE contribution need only be 'significant'. Joint criminal enterprise liability need not involve control over the crime, and need not even be a necessary contribution to the commission of the crime. In most corporate scenarios, it is unlikely that the corporate actor will exercise the necessary degree of control over the crime that is required by this mode of liability. And it does not address a situation where a corporate actor contributes to a crime, though without the strict control over the acts of the physical perpetrators.

However, Article 25(3)(d) ICC Statute would appear to cover such scenarios. It criminalizes a contribution to a crime when that contribution is made with

23 Decision on the Confirmation of Charges, *Lubanga* (ICC-01/04-01/06), Pre-Trial Chamber 29 January 2007 ('*Lubanga* Confirmation Decision'), § 341; Decision on the Confirmation of Charges, *Katanga and Chui*, *supra* note 11, § 525.

24 *Lubanga* Confirmation Decision, *ibid.*, § 338; Decision on the Confirmation of Charges, *Katanga and Chui*, *supra* note 11, § 486.

either the aim of furthering the criminal activity or purpose of the group, or in the knowledge of the intention of the group to commit the crime. There is no requirement that the contribution be made with the intent to commit the crime, or for the purpose of assisting in the crime. The contribution must simply be intentional and made with knowledge of the group's criminal intention. For example, assuming the knowledge or intent, though not being directly involved in a campaign of unlawful forcible transfer, a corporate actor could still be liable if his or her acts contribute to the group of persons acting with the common purpose to commit this crime.[25] With its more flexible contribution requirement, this form of liability is more likely to capture a broader range of culpability of corporate actors conducting business in areas of armed conflict.[26]

4. Aiding and Abetting

The international law that has developed in the area of aiding and abetting provides further guidance on the scope of international criminal liability for corporate actors. As discussed in more detail below, domestic courts have already looked to international law and international precedent in assessing the limits of criminal responsibility of corporate actors as aiders and abettors. As a form of complicity or accomplice liability, aiding and abetting can — like joint criminal enterprise — encompass crimes remote from the corporate actor. A number of issues related to aiding and abetting are relevant to prosecutions of corporate actors. The first is the mental element or *mens rea* necessary for a finding of aiding and abetting. Must the corporate actor whose acts contribute to the commission of a crime share the intent to commit such a crime? If not, is knowledge of someone else's criminal intent sufficient for liability or must the corporate actor provide assistance for the purpose of assisting the crime? If the *mens rea* of the aider and abettor must be the same as the principal perpetrator, corporate actors who knowingly — yet without sharing the intent of the principal perpetrator — provide a substantial contribution to a crime would not be held responsible. A second aspect of aiding and abetting relevant to the liability of corporate actors is the nature of any contribution to the ultimate criminal activity. What impact or effect of a corporation's activities on the commission of a crime would be considered sufficient to attract criminal liability? Does the contribution have to be substantial, or direct, or specifically directed to assist in the commission of a crime? How these questions are answered may significantly impact the scope of international criminal liability of corporate actors.

25 It appears that this may be similar to the second form of joint criminal enterprise, in that liability attaches when an accused knowingly furthers a system of ill-treatment.

26 The applicability of this scenario is dependent on other elements of war crimes or crimes against humanity being proven.

A. Mens rea for Aiding and Abetting

According to the law of the ICTY, ICTR and SCSL, there is no need for the aider and abettor to share the intent of the principal perpetrator. The requisite mental element for aiding and abetting is knowledge — in the sense of awareness — that the acts performed by the aider and abettor assist in the commission of the crime of the principal perpetrator and the awareness of the essential elements of the crime ultimately committed. The aider and abettor need not necessarily know the precise crime intended, and in fact committed, as long as he is aware that one of a number of crimes will probably be committed and one of those crimes is committed.[27] This standard also applies to specific intent crimes, i.e. the individual who aids and abets may be held responsible if he assists the commission of the crime knowing the principal perpetrator's specific intent.[28] Importantly, under this knowledge standard, the jurisprudence of the ICTY, ICTR and SCSL does not require the accused to consciously decide to act for the purpose of assisting in the commission of a crime.[29] Such a requirement has been explicitly rejected by the ICTY.[30]

This seems to be inconsistent with the elements for aiding and abetting of the Statute of the ICC. Under Article 25(3)(c), individual criminal responsibility arises when a person aids and abets for 'the purpose of facilitating in the commission of a crime'. What is meant by this has not yet been determined by the ICC. One interpretation is that the aider and abettor must share the intent of the principal perpetrator. Applied to an example in the business context, a corporate actor who assists in the unlawful forcible transfer of civilians through the provision of weapons, equipment or access must intend to unlawfully transfer people by force. A second interpretation is that Article 25(3)(c) requires the aider and abettor to intend to assist in the commission of the crime. This *mens rea* standard, though conceptually distinct, comes close to the full *mens rea* for the crime and may involve the difficult determination of motive. Although the accused need not share the intent of the principal perpetrator, the accused must act with the specific purpose of assisting the commission of the crime. Again, applied to an example in the business context, a corporate actor who provides assistance in the forcible transfer of civilians through the provision of weapons, equipment or access, must not only know

27 Judgment, *Mrksić and Šljivančanin* (IT-95-13/1-A), Appeals Chamber, 5 May 2009 ('*Mrksić and Šljivančanin* Appeals Judgment'), § 159; Judgment, *Vlasiljević* (IT-98-32-A), Appeals Chamber, § 102; Judgment, *Blaškić* (IT-95-14-A), Appeals Chamber, 29 July 2004 ('*Blaškić* Appeals Judgment'), § 49; *Sesay, Kallon, Gbao* Appeals Judgment, *supra* note 13, § 546; *Brima et al.* Appeals Judgment, *supra* note 10, §§ 242–243.

28 Judgment, *Blagojević and Jokić* (IT-02-60-A), Appeals Chamber, 9 May 2007 ('*Blagojević and Jokić* Appeals Judgment'), § 127; Judgment, *Simić* (IT-95-9-A), Appeals Chamber, § 86; Judgment, *Krstić* (IT-98-33-A), Appeals Chamber, 19 April 2004, §§ 140–141

29 *Sesay, Kallon, Gbao* Appeals Judgment, *supra* note 13, § 546; *Ntakirutimana* and *Ntakirutimana* Appeals Judgment, *supra* note 10, § 466; *Blaškić* Appeals Judgment, *supra* note 27, § 49.

30 The Appeals Chamber of the ICTY has specifically rejected the elevated *mens rea* requirement that the aider and abettor needs to have intended to provide assistance; *Mrksić and Šljivančanin* Appeals Judgment, *supra* note 27, § 159.

that his acts assist but he must have acted for the purpose of assisting in unlawful forcible transfer. It is noted that, somewhat anomalously, under Article 25(3)(d) it appears that you can aid and abet a group on the basis of a mere knowledge standard, as noted above.

Under either interpretation of the purpose standard, it would be more difficult to prosecute corporate actors than would be the case if the standard was 'knowing assistance' as applied by the ICTY, ICTR and SCSL. The actual impact of the application of these various *mens rea* standards is illustrated by a comparison of three decisions: the ICTY Appeals Chamber judgment in *Blagojević and Jokić*: the Dutch Court of Appeal judgment in *Van Anraat*, and the US Court of Appeals, Second Circuit decision in *The Presbyterian Church of Sudan v. Talisman Energy Inc.*

The ICTY Judgment in *Blagojević and Jokić* relates to the events surrounding the forcible transfer of women and children from Srebrenica and the killing of approximately 7,000 men and boys. Dragan Jokić was the Chief of Engineering of the Zvornik Brigade of the VRS, holding the rank of major. During the executions of the men and boys, Jokić engaged in acts of assistance, i.e. co-ordinating, sending and monitoring the deployment of Brigade engineering machinery and personnel for burial operations at the time of or after the mass killings. The Appeals Chamber found that this participation substantially affected the commission of the crimes and any claim that the acts were no more than his 'routine duties' would not exculpate him.[31] Furthermore, the Trial Chamber found that he carried out these acts with knowledge that his contribution would assist the killings. On appeal, Jokić argued that his acts were not specifically directed to assist the killing operation and were consistent with the need to bury the bodies without delay in the interests of public health. In support of his argument, Jokić also relied upon the fact that his acts, in themselves, were not unlawful. The Appeals Chamber dismissed these arguments, stating '[e]ven if Jokić were concerned about public safety and health, this would not change the fact that his actions substantially contributed to the crimes or the conclusion that he did so with knowledge that his actions would assist the organizers of the "murder campaign". Rather his arguments go to the issue of motive.'[32]

The Netherlands Court of Appeal in *Van Anraat* confronted a similar issue in determining whether Frans Van Anraat, a Dutch businessman, was an accessory to a violation of the laws and customs of war by the regime of Saddam Hussein in 1987 and 1988.[33] Van Anraat had, for commercial reasons, supplied large amounts of thiodyglicol (TDG) to the Iraqi regime knowing that it is a precursor for mustard gas, and knowing that it would be implemented on the battlefield, not only in the conflict between Iran and Iraq, but against the

31 *Blagojević and Jokić* Appeals Judgment, *supra* note 28, § 189.

32 *Ibid.*, § 202.

33 Although the court applied domestic rather than international law, the judgment is still useful to show the impact of various standards to the facts that may arise in cases dealing with corporate liability.

Kurdish population. Although Van Anraat claimed that the TDG he had shipped was intended for the textile industry, the Court concluded that Van Anraat supplied the TDG fully aware of its expected use and consequences.[34] As the Court did not make any factual findings that Van Anraat had provided TDG for the purpose of facilitating the use of chemical weapons against civilians, and since his actions appeared to be motivated by commercial considerations, it is apparent that the Court did not consider it to be a legal requirement under Dutch law that the assistance be for the purpose of facilitating the ultimate crimes. Thus, the Court found Van Anraat guilty on the basis of a knowledge standard.[35] On appeal, the Netherlands Supreme Court upheld the judgment of the Court of Appeal.[36]

The US Court of Appeal for the Second Circuit recently determined the standard for accessory liability under the Alien Tort Claims Act (ATCA)[37], a jurisdictional statute that allows for tort claims before US courts because of 'violations of the laws of nations' committed abroad. Under the ATCA, US courts, arguably, are required to apply international law. In *The Presbyterian Church of Sudan v. Talisman Energy, Inc.*,[38] the Sudanese appellants alleged that they were victims of violations of international law committed by the Government of Sudan, aided and abetted by Talisman Energy Inc. Talisman, a Canadian corporation, was alleged to have provided assistance which contributed to the crimes, in order to facilitate the development of Sudanese oil concessions by Talisman affiliates. The plaintiffs appealed from a lower court decision which granted summary judgment in favour of Talisman, in part based on the Court's determination that, on the evidence to be presented, it could not be inferred that Talisman provided assistance with the intention that it be used to violate international human rights. The Court of Appeal, in its

34 The Court of Appeal in The Hague (*Gerechtshof Den Haag*), judgment, *In the case of Frans van Anraat* (22-000509-06), 9 May 2007 ('*Van Anraat*'), §§ 11.18, 12.1.

35 The Court found that the accused knew that the chemicals he provided would be used to produce mustard gas, and was aware of the high risk of use of the mustard gas in war. During its discussion of his liability under a different count (i.e., count one genocide), the Court of Appeal noted that under Art. 48 of the Dutch Penal Code, persons who intentionally provide the opportunity, means or information necessary to commit criminal offences are considered to be accessories to those crimes. In assessing the applicable mental element, the Court stated that in the Dutch legal system willingly and knowingly accepting the reasonable chance that a certain consequence or a circumstance will occur, is sufficient to determine guilt; see *Van Anraat*, *ibid.*

36 Supreme Court of the Netherlands (*Hoge Raad der Nederlanden*), judgment, *Van Anraat* (LJN: BG4822), 30 June 2009. Original in Dutch, available at http://www.haguejusticeportal.net/Docs/NLP/Netherlands/Van%20Anraat%20Supreme%20Court%20Judgment_30-06-09_NL.pdf (visited 2 March 2010). As the original is in Dutch, the author was unable to assess whether the Supreme Court decision affects the holdings of the Court of Appeal. On the *Van Anraat* case, see the contribution by E. van Sliedregt and W. Huisman in this issue of the *Journal*.

37 Alien Tort Claims Act, 28 U.S.C. § 1350. This provision is alternatively known as the Alien Tort Statute (ATS). For a thorough analysis of the ATCA jurisprudence, see the contribution by K. Gallagher in this issue of the *Journal*.

38 Judgment, *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, (Docket No. 07-0016-cv) U.S.C.A. 2nd Circuit, 2 October 2009 ('*Talisman*').

determination of the elements of aiding and abetting under international law, relied on Article 25 of the ICC Statute, and concluded that aiding and abetting liability required a showing that the defendant provided substantial assistance with the purpose of facilitating the crime. The Court of Appeal rejected a simple knowledge standard, holding that 'only a purpose standard, therefore has the requisite "acceptance among civilized nations"'[39] as required by international law.

The reliance on this standard is significant. First, the US Court of Appeal concluded that the requisite *mens rea* for aiding and abetting under international law is that set out in a provision of the ICC Statute rather than the customary international law standard as accepted by the ICTY, ICTR and SCSL. Second, the Court applied a standard that required the substantial assistance provided by Talisman to be for the purpose of committing human rights abuses. As a starting point, the Court noted that none of the acts were inherently criminal or wrongful and accepted the lower court's assessment that the activities identified as assisting the Government of Sudan 'generally accompany any natural resource development business'.[40] The activities listed included Talisman helping to build all weather roads and improve airports, despite the awareness that the infrastructure might be used for attacks on civilians; and the consortium GNPOC, of which Talisman had a 25% stake through its subsidiary,[41] providing fuel for military aircraft used for bombing missions,[42] with some of the fuel being paid for by GNPOC. On these facts, a mere knowledge, rather than a purpose, standard might have caused the Court to reach a different conclusion.

As is evident from these three cases, the *mens rea* required for aiding and abetting an international crime will impact the evidentiary standard that is applied, which in turn may significantly impact corporate liability.

B. Mens rea for Aiding and Abetting — Knowledge or Purpose?

The different *mens rea* standards for aiding and abetting applied by the Tribunals,[43] the Dutch Court of Appeal in *Van Anraat* and the US Court of Appeal for the Second Circuit in *Talisman* raise the question of what the

39 *Ibid.*, at 43.

40 *Ibid.*, at 46.

41 *Ibid.*, at 48. The Court of Appeal did not address issues of control, imputation or piercing the corporate veil of Talisman, but assumed for the purposes of the litigation that the plaintiffs could surmount these hurdles.

42 *Ibid.*, at 51. Though the Court of Appeal does not specifically hold that the bombing missions violated international humanitarian law, it does refer earlier in its Judgment (at 14) to evidence that the CEO of Talisman was aware that the bombings were construed as violations of international humanitarian law and that the CEO wrote to the Sudanese Minister of National Defence urging restraint in light of this information.

43 ICTY, ICTR and SCSL. In the ECCC, the co-investigating judges have at least implicitly adopted a knowledge standard for aiding and abetting; see Closing Order indicting Kaing Guek Eav alias Duch, *Duch* (002/14-08-2006), Office of the Co-Investigating Judges, 8 August 2008, § 161.

mental element is for aiding and abetting under international law. As the Dutch Court of Appeal made reference to domestic law,[44] the focus will be on the Judgment in *Talisman* as the US Court of Appeals indicated that it was strictly applying international law.

The conclusion in *Talisman* that a purpose standard reflects customary international law is premised on three propositions: first, that no source of international law would impose liability for aiding and abetting on a knowledge standard;[45] second, that the standard accepted under international law is that set out in Article 25(3)(c) of the ICC Statute;[46] and, third, that international law at the time of the Nuremberg trials, after World War II, recognized aiding and abetting liability only for purposeful conduct.[47] Each of these propositions will be addressed briefly.

The ICTY is bound to apply rules of customary international law.[48] And the ICTY relied on sources of international law to determine the knowledge *mens rea* standard for aiding and abetting. The jurisprudence of the ICTY explicitly examined customary international law in order to establish the *mens rea* which accompanies aiding and abetting, and, based on the sources examined, concluded that the requisite standard was knowledge.[49] This has been followed by the ICTR and SCSL. As noted, the ICTY explicitly rejected the elevated *mens rea* requirement that the aider and abettor needs to have intended to provide assistance.[50] The US Court of Appeal in reaching its conclusion in *Talisman* relies on the concurring opinion of Judge Katzmann in *Khulumani v. Barclay National Bank, Ltd.*[51] In his discussion of international law sources, Judge Katzmann referred to the jurisprudence of the ICTY, concluding that the ICTY conducted a probing and thoughtful analysis of international law sources to confirm that aiding and abetting liability is recognized in customary international law. In spite of this, Judge Katzmann ignored ICTY jurisprudence in determining the *mens rea* component for aiding and abetting under customary international law. The Court of Appeal in *Talisman* did the same, concluding that the standard set out in the ICC Statute recognizes a norm obtaining

44 *Van Anraat*, *supra* note 34, §§ 7, 12.4.

45 *Talisman*, *supra* note 38, at 40.

46 *Ibid.*

47 *Ibid.*, at 42.

48 Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993) and Annex thereto, UN Doc. S/25704; *Blaškić* Appeals Judgment, *supra* note 27, §§ 110, 139, 141.

49 Judgment, *Tadić* (IT-95-17/1-T), Trial Chamber, 10 December 1998, § 191. Additionally, though not directly relevant as it deals with state responsibility, not individual criminal responsibility, the International Court of Justice (ICJ) addressed state responsibility for complicity in genocide, in violation of the Genocide Convention. In equating 'complicity' with acts which 'aid and assist', the ICJ found that a state providing assistance in the commission of genocide need only act knowingly, in that it is aware of the specific intent of the principal perpetrator. See *Case Concerning the 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.

50 *Mrksić and Šljivančanin* Appeals Judgment, *supra* note 27, § 159.

51 *Khulumani v. Barclay National Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007), at 268–277.

'universal acceptance'. The Court of Appeal conducted no assessment of the relationship between the standard under international law as concluded by the tribunals and the different standards adopted in the ICC Statute.

In this regard, the reasoning in *Talisman* is flawed. As noted above, the ICTY is bound to apply customary international law. On the other hand, the ICC Statute is not necessarily reflective of custom. The ICC is not bound by customary international law, and first must apply its Statute and its established elements of crimes.[52] As noted by Pre-Trial Chamber I when considering the applicability of a particular form of liability, the ICC Statute is the first source of applicable law and where a specific form of liability is expressly provided for, the state of customary international law is 'not relevant for this Court'.[53] The adoption of the ICC Statute by a large number of states has had an important impact on the content of customary international law and provides some evidence of state *opinio juris* as to the relevant customary international law at the time of adoption.[54] But it does not necessarily reflect a clear codification of customary international law and was not meant to eliminate existing customary international law.[55] Indeed the Statute may ultimately require a mental element higher than that required under customary international law.[56] In this regard, the purpose requirement set out in the ICC Statute has been viewed as an additional element, not required by, nor reflective of customary international law.[57] In addition, the interpretation of the *mens rea* for the forms of participation under Article 25 and its relationship to Article 30 of the ICC Statute, has yet to be established. Lastly, the Court of Appeal ignored the fact that the ICC Statute, under Article 25(3)(d), includes a knowledge standard for assisting in the commission of a crime by a group of persons. Based simply on the wording of a provision of the ICC Statute, it would be unwarranted at this stage to conclude that the purpose standard reflects customary international law.

In *Talisman* the Court of Appeal relied on one decision by the US Military Tribunal in 1949, in the Ministries case,[58] for the conclusion that international

52 Art. 21 ICCSt.

53 Decision on the Confirmation of Charges, *Katanga and Chui*, *supra* note 11, § 508.

54 Judgment, *Furundžija* (IT-95-17/1-T), Trial Chamber, 10 December 1998, § 227; Judgment, *Kunarac et al.* (IT-96-23 & 23/1), Trial Chamber, 22 February 2001, footnote 1210.

55 Art. 10 ICCSt. states that nothing in Part II of the Statute shall be interpreted as limiting existing or developing rules of international law. Art. 22(3) states that the article shall not affect the characterization of any conduct as criminal under international law independently of the Statute. See also, B. Van Schaack, 'Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals', 97 *Georgetown Law Journal* (2008), at 177, footnote 298.

56 A. Cassese, *International Criminal Law* (2nd edn., New York: Oxford University Press, 2008), at 74. This statement by Cassese was in circumstances where the mental element is not specified in the Statute and one has to deduce the mental element based on Art. 30.

57 R. Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (New York: Cambridge University Press, 2005), at 315–316.

58 Judgment, *Von Weizsaecker et al.*, U.S. Military Tribunal, Case No. 11, *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, Vol. 14 (William S. Hein & Co, 1997).

law at the time of the Nuremberg trials only recognized aiding and abetting liability for purposeful conduct. A review of that judgment, and various others at the time, does not support this conclusion. The passage relied upon in *Talisman* relates to a defendant, Karl Rasche, a banker who participated in loans made by the Dresdner Bank to various SS enterprises which employed slave labour and to those engaged in a resettlement programme. The Military Tribunal found that Rasche possessed knowledge of the purpose for which the loan was made. The real question for the Military Tribunal was whether it was prepared to conclude that the act itself of making such loans was a crime under international law. It was not prepared to do so. Thus, the judgment addresses whether the act itself was criminal, not whether knowledge that the loans assisted in the commission of a crime was sufficient to satisfy the *mens rea* component. Elsewhere in the judgment, in considering the liability for the mass deportation of Jews by the defendants Von Weizsaecker and Woermann the Tribunal made clear that knowledge did satisfy that component:

> Von Weizsaecker or Woermann neither originated it, gave it enthusiastic support, nor in their hearts approved of it. The question is whether they knew of the program and whether in any substantial manner they aided, abetted or implemented it.[59]

In *Ohlendorf et al.* (Einsatzgrupen case), the US Military Tribunal concluded that Waldemar Klingelhöfer, who claimed only to be an interpreter, served as an accessory to the crime of exterminating Jews, as he was aware that the functions he performed would assist in the executions.[60] In *Flick et al.* the defendants were leading officials of a large group of industrialist enterprises charged with war crimes and crimes against humanity principally because of conduct undertaken as officials of the enterprises. Count four charged Flick and another with contributing funds and influence to support the activities of the SS with knowledge of its criminal activities. The Military Tribunal concluded that one who knowingly contributes, by his influence and money, to support an organization responsible for extermination and mass murder, must be deemed to be, if not a principal then certainly an accessory, to such crimes.[61] In the case of *Tesch et al.* (Zyklon B case),[62] the British Military Court addressed the liability of Bruno Tesch, the owner of a company that distributed Zyklon B, a poisonous gas that was used in concentration and death camps. The Judge Advocate submitted that in order to convict, it must be established that Tesch knew that the gas his company distributed was to be used for the

59 *Ibid.*, at 478.

60 Judgment, *Ohlendorf et al.*, U.S. Military Tribunal II, Case No. 9, *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, Vol. 4 (William S. Hein & Company, 1997), at 569.

61 Judgment, *Flick et al.*, U.S. Military Tribunal IV, Case No. 5, *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, Vol. 6 (William S Hein & Co, 1997), at 1217.

62 Judgment, *Bruno Tesch and Two Others, Law Reports of Trials of War Criminals*, Vol. 1 (British Military Court, 1946), at 93.

purpose of killing human beings at the concentration camps. Tesch was found guilty of a war crime on this basis. In *Krauch et al.* (IG Farben case),[63] the defendants — all of whom were connected with the German industrialist firm IG Farben — were charged with using IG Farben as an instrument to commit the crime of aggression, war crimes and crimes against humanity. In deciding on the individual responsibility of the accused, the US Military Tribunal concluded that a defendant must either have participated in the illegal act or, being aware of that act, authorized or approved it. The action of authorization or approval was the contribution to the crime, and the mental element was that it was done in the knowledge of the illegal act. This approach was evident in relation to a count alleging that a company substantially owned by Farben sent large quantities of poison gas to concentration camps. The Military Tribunal acquitted the defendants on the basis that the evidence was insufficient to conclude that those who knew of the production and shipment of the gas also knew of the criminal purpose for which the substance was being used.

In summary, the law of the military tribunals at Nuremberg established under Control Council Law No. 10 does not support the US Court of Appeals' conclusion that international law at the time of the Nuremberg trials only recognized aiding and abetting liability for purposeful conduct. Further, the jurisprudence of the ICTY, which establishes the *mens rea* for aiding and abetting under international law, does not support the Court of Appeals' subsequent conclusion that the purpose standard for aiding and abetting has largely been upheld in the modern era. Even recognizing the important impact the adoption of the ICC Statute has had on the content of customary international law and that its adoption provides some evidence of the state of *opinio juris*, it is unwarranted to conclude that the *mens rea* requirement for aiding and abetting under international law requires purpose. Based on the jurisprudence of the ICTY, ICTR and SCSL as well as the case law of the military tribunals at Nuremberg, the *mens rea* for aiding and abetting under international law at present is based on a knowledge standard. It seems unnecessarily onerous to include an additional *mens rea* requirement that the assistance be provided with the purpose of aiding or abetting a crime. As noted, this higher *mens rea* requirement would make it difficult to prosecute corporate actors who knowingly assist in the commission of a crime, but whose acts are not carried out for this purpose. This difficulty would be heightened if the purposive element requires the aider and abettor to act with the *sole* purpose of contributing to the commission of crime, an issue that does not appear to be settled under this approach.

63 Judgment, *Krauch et al.*, U.S. Military Tribunal VI, *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, Vol. 8 (William S. Hein & Co., 1997), at 1081, 1153, 1169. On the *IG Farben* case see the contribution by F. Jessberger in this issue of the *Journal*.

C. Contribution — Direct, or Specifically Directed to Assist?

There was some confusion early in the jurisprudence of the ICTY whether the contribution to a crime needed to be a direct contribution, or be specifically directed to assist in the commission of the crime. When addressing the *actus reus* of aiding and abetting certain Trial and Appeals Chambers of the ICTY initially included a requirement that the aider and abettor carried out acts 'specifically directed to' assist the perpetrator of a crime which had a substantial effect upon the perpetration of the crime.[64] Though unclear, it appears that this element of the *actus reus*, was derived from language in the *Tadić* case that the contribution must be '*direct* and substantial'.[65] In later cases, the ICTY clarified that the contribution by an aider and abettor does not have to be 'specifically directed' to assist.[66] Though the 'specifically direct to assist' requirement was considered in the context of the *actus reus*, it was confusing as it seemed to incorporate a *mens rea* aspect. The requirement that the act be 'specifically directed' would appear to require an analysis not only of whether the act of the accused — objectively analysed — constituted assistance to the commission of the crime, but also an analysis of the accused's purpose in performing those acts.[67] This would be close — if not the same — as requiring the accused to intend to assist in the commission of the crime. As stated above, the Appeals Chamber of the ICTY has clarified that such a requirement is not part of either the *actus reus or* the *mens rea* of aiding and abetting.

Similar to the 'specifically directed' requirement, the requirement that the actions of an accused have a direct effect on the commission of a crime may narrow the applicability of aiding and abetting to corporate actors. Conduct that substantially contributes to a crime may not necessarily be direct in terms of the causal chain. The difference between a direct contribution and a substantial contribution appeared to be relevant in the case of *In re South African Apartheid Litigation* under the ATCA, decided by the Southern District of New York on 8 April 2009. In assessing the types of acts that would have a substantial effect on the commission of a crime, the Court distinguished between the provision of funds and the provision of poisonous gas. Relying on the Ministries case and the Zyklon B case tried before the military tribunals

64 E.g. Judgment, *Tadić* (IT-94-1-A), Appeal Chamber, 15 July 1999 ('*Tadić* Appeals Judgment'), § 229(iii); *Blaškić* Appeals Judgment, *supra* note 27, § 45.

65 *Tadić* Appeals Judgment, *supra* note 64, § 229 (emphasis added). Note the original language in the trial judgment in *Tadić* (§ 688), which drew on the International Law Commission Draft Code Art. 2(3)(a) & (d), requiring a direct and substantial effect on the commission of the crime; while the Appeals Judgment at § 229, introduces the words 'specifically directed to assist, encourage or lend moral support'. Note that the Trial Chamber in *Furundžija* concluded that use of the term 'direct' in qualifying the proximity of the assistance and the principal act is misleading as it may imply that the assistance needs to be tangible or have a causal effect on the crime. The *Furundžija* Trial Chamber concluded that the assistance must have a substantial, not direct, effect. See Judgment, *Furundžija* (IT-95-17/1-T), Trial Chamber, 10 December 1998, §§ 227–235.

66 *Mrksić and Šljivančanin* Appeals Judgment, *supra* note 27, § 159.

67 *Blagojević and Jokić* Appeals Judgment, *supra* note 28, § 184.

after World War II, the Court juxtaposed the acquittal of Rasche, the banker who facilitated large loans to a fund at the disposal of Heinrich Himmler with the conviction of Bruno Tesch for the manufacture, sale and training of men in the use of poison gas used in concentration camps. The Court held that,

> The distinction between these two cases is the quality of the assistance provided to the primary violator. Money is a fungible resource, as are building materials. However, poison gas is a killing agent, the means by which a violation of the law of nations was committed. The provision of goods specifically designed to kill, to inflict pain, or to cause other injuries resulting from violations of customary international law bear a closer causal connection to the principal crime than the sale of raw materials or the provision of loans. Training in a precise criminal use only further supports the importance of this link. Therefore, in the context of commercial services, provision of the means by which a violation of the law is carried out is sufficient to meet the actus reus requirement of aiding and abetting liability under customary international law.[68]

The Court may be correct in stating in this context that the provision of goods bore a closer causal connection to the principle crime than the provision of loans, but it is a different question whether the provision of weapons would necessarily be a more substantial contribution than the provision of raw materials or the provision of funds. That is an evidentiary issue. Though the supply of poison gas may be more directly linked to the crime in terms of causation, there does not seem to be any principled legal reason to preclude contributions such as funds, which may substantially contribute, but with more links, in the causal chain between the assistance and the crime. The *mens rea* requirement — whether mere knowledge or something greater — will in either case link the acts of assistance to the crimes in the mind of the accused, and the less causally direct assistance may have a greater effect on the ability of the principal to carry out the crime. Moreover, this 'directness' requirement could be relatively easily and deliberately circumvented by those who knowingly or purposively assist in crimes.

D. A 'Substantial' Contribution

The law on aiding and abetting at the ICTY, ICTR and SCSL requires the conduct in question to consist of practical assistance, encouragement or moral support to the principal offender which has a substantial effect on the commission of the crime.[69] A finding of 'substantial effect' can be based on a cumulative assessment of the accused's acts.[70] There is no need for the acts of assistance to serve as a condition precedent for the commission of

68 *In re South African Apartheid Litigation*, 8 April 2009, 2009 WL 960078 (S.D.N.Y.) at 21.

69 *Blaškić* Appeals Judgment, *supra* note 27, § 46; *Tadić* Appeals Judgment, *supra* note 64, § 229; Judgment, *Fofana and Kondewa* (SCSL-04-14-A), Appeals Chamber, 28 May 2008, §§ 71–72; *Ntakirutimana and Ntakirutimana* Appeals Judgment, *supra* note 10, § 530.

70 Judgment, *Blagojević and Jokić* (IT-02-60-T), Trial Chamber, 17 January 2005 ('*Blagojević and Jokić* Trial Judgment').

the crime,[71] nor must the assistance have caused the act of the principal offender. Importantly when thinking about corporate actors, ICTY case law also makes clear that the location of the *actus reus* may be removed from the location of the principal crime.[72] Further, as there is no requirement that the contribution must be 'direct', the provision of funds or neutral commodities can constitute the *actus reus* for aiding or abetting so long as such acts have a substantial effect on the commission of a crime.

Though there has been no specific definition of what constitutes a 'substantial' contribution, reference to the Appeals Chamber's findings in *Blagojević and Jokić* may be of some assistance. As previously noted, the accused Dragan Jokić was the Chief of the Engineering Brigade. Jokić also performed the function of Duty Officer of the Brigade on the evening when some of the mass executions took place. His acts as Chief of the Engineering Brigade — deploying engineering resources to mass execution sites in the knowledge that they were being sent to dig mass graves — constituted practical assistance that had a substantial effect on the commission of the crime.[73] Notably the Appeals Chamber concluded that the functions of Jokić as the Duty Officer, which centred on relaying information on two occasions about the detention of Bosnian Muslim men at a particular site (who were later executed), did not have a substantial effect on the murder of these men.[74] Thus, it appears the Court determined that the simple passing of information about the detention of the prisoners was not substantial in terms of their execution. Certainly, there is an argument that performing the function as the duty officer to transmit information about the imminent arrival of Bosnian Muslim men constitutes substantial effect. Such communication would be essential to provide the battalion information of where the prisoners were to be detained, and to provide adequate time to prepare for guarding the detainees and carrying out the executions. But the Appeals Chamber seems to have taken a fairly restrictive approach to what constitutes substantial effect. Contrast this finding with the assessment by the Appeals Chamber of Blagojević's argument that the practical assistance he provided through the actions of his Brigade were relatively inconsequential when compared to the overall operation and to the contributions of others. The Appeals Chamber noted the limited scope of assistance provided by Blagojević's brigade when compared with the acts and contribution of others, but concluded that his practical assistance nonetheless had a substantial effect on the commission of the crimes. The Chamber essentially concluded that a comparative assessment was not relevant; the issue is whether the contribution in itself had a substantial effect on the crime.

As well, as indicated earlier, routine business activity can constitute a substantial contribution if it has a substantial effect on the commission of a

71 *Blagojević and Jokić* Appeals Judgment, *supra* note 28, § 134.
72 *Blaškić* Appeals Judgment, *supra* note 27, § 48.
73 *Blagojević and Jokić* Trial Judgment, *supra* note 70, §§ 763–764.
74 *Blagojević and Jokić* Trial Judgment, *supra* note 70, § 765; *Blagojević and Jokić* Appeals Judgment, *supra* note 28, §§ 309–310.

crime. In this connection, a difficulty that may arise in business cases may be proving that the resources supplied were actually used by the principal. For example, in *Van Anraat*, the Prosecution had to prove that the TDG which was supplied by the defendant was used during the attacks charged, a significant evidentiary hurdle. Likewise in another Dutch case — against the businessman Guus Kouwenhoven — at first instance the court was satisfied that Kouwenhoven had supplied weapons to Charles Taylor and/or his armed forces (a finding that was overturned on appeal). However, the court was not satisfied that these weapons had been used in any of the violations of international humanitarian law charged. The court stated 'weapons can also be used for acts that are legally permitted or acts that cannot be included in the criminal offenses charged'.[75] Clearly the court held the Prosecution to a strict linkage standard, requiring an unbroken causal chain between the contribution and the commission of the crime.[76]

5. Conclusion

Attributing criminal liability to corporate actors requires an understanding of the legal standards that may be applicable. This underscores just how practically relevant the various standards are to the determination of whether corporate activity can attract criminal liability. Two key issues that will inevitably come under scrutiny are the corporate actor's contribution, direct or indirect, to groups that commit crimes and the corporate actors' knowledge or intent when doing so. A corporate actor who knowingly assists in the commission of an international crime[77] during armed conflict will expose itself to potential criminal liability. Regardless of the judgment in *Talisman*, corporations and business leaders need to be advised that liability can attach where they knowingly assist others who perpetrate crimes. Knowledge, as the requisite mental element for liability when assisting another in the commission of a crime is accepted under international law, in one form or another.[78] Furthermore, according to established jurisprudence, a contribution need not be direct, it need not be criminal per se and it could encompass what may otherwise be considered normal business transactions. There remain some questions as to the appropriate legal standards due to the apparent difference between the elements of

75 District Court of The Hague (*Rechtbank's-Gravenhage*), judgment *In the case of Public Prosecutor v. Guus van Kouwenhoven*, 09/750001-05, LJN AY 5160, § 6 (English translation).

76 On the *Kouwenhoven* case, also see the contribution by E. van Sliedregt and W. Huisman in this issue of the *Journal*.

77 For the sake of this article, reference to an international crime is meant to include those recognized as crimes against humanity, war crimes and genocide.

78 As noted in this article, knowledge as the mental element for aiding and abetting is recognized under international law by the ICTY, ICTR and SCSL. If, as *Talisman* suggests, customary international law has developed to reflect the elements set out in the ICC Statute, then Art. 25(3)(d) would be applicable. This article criminalizes contributions to a group sharing a common purpose when the contribution is made in the *knowledge* of the intention of the group.

co-perpetration and aiding and abetting under the law of the tribunals and that of the ICC. How that will affect corporate liability may depend on the laws of the national jurisdiction under which a corporate actor may be investigated or prosecuted. For countries applying strictly international law, liability will greatly depend on what is considered to constitute international law. But what appears clear is that corporations that conduct business in states, where an armed conflict is taking place, may inevitably come under scrutiny for their actions, and the attribution of criminal liability will not necessarily be affected by the physical and structural remoteness of the corporate actor from the commission of a crime.