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Danielle Olson
DePaul University, Danielle.k.olson@gmail.com

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INTRODUCTION

As businesses are increasingly taking operations overseas, international criminal law and its implementation in domestic and international jurisdictions will become progressively more relevant to companies and its decision makers. For many companies, going global has meant adopting network-based operating models involving multiple corporate entities that spread across and within countries.[1] Consequentially, a variety of corporations from all sectors have a global presence in countries where crimes against humanity and other gross human rights abuses occur. The business transactions of these companies and their relationships with state governments, armed groups, and other businesses require them to understand what conduct may constitute a crime under international criminal law. Without a sound understanding of international criminal law, companies may fall vulnerable to corporate complicity in gross human rights violations, thus availing themselves to criminal liability under international law.

In recent years, questions concerning the human rights responsibilities of business have increased, particularly with respect to harms committed in countries where transnational corporations ("TNCs") have substantial investments or from which they source goods.[2] TNCs increasingly have been recognized as having the potential to impact a wide array of human rights in a variety of industry sectors including: extractive industries, pharmaceutical and chemicals, defense, utility and infrastructure, food and beverages, and Information Technology hardware and telecommunications.[3]

Due to their expansive network, the world's largest transnational corporations command substantial economic power. As of 2009, there were 82,000 TNCs worldwide, with 810,000 foreign affiliates.[5] Exports by foreign affiliates of TNCs were estimated to account for about a third of total world exports of good and services. In 2008, The number of people employed by these TNCs worldwide totalled about 77 million, amounting to more than double the labor force of Germany. In 2001, 500 of the world's largest TNCs had annual sales larger than the GNP of 100 countries and Wal-Mart alone had annual sales higher than the GNP of all 40 countries of Sub-Saharan Africa.[6] With great power comes great responsibility. And in the context of multinational business, with great responsibility comes a great risk of criminal liability for violating human rights.

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[1] John Ruggie, JUST BUSINESS: MULTINATIONAL CORPORATION AND HUMAN RIGHTS 2 (2013).
[2] Henkin, Cleveland, Helfer, Neuman, Orentlicher, HUMAN RIGHTS SECOND EDITION, Foundation Press 890 (2009).
[3] Adapted from Rory Sullivan, *NGO Influence on the Human Rights Performance of Companies,* 24 NETH. Q. HUM. RTS. 407 (2006).
[5] United Nations, World Investment Report 2009: Transnational Corporations, Agricultural Production and Development, xxi.
[6] Debra Johnson & Colin Turner, INTERNATIONAL BUSINESS THEMES AND ISSUES IN THE MODERN GLOBAL ECONOMY 12 (2003).

In a report from the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes, the experts described the wide range of circumstances under which corporations' liability for complicity in human rights abuses has been scrutinized:

> The international community has been shocked at reports from all continents that companies have knowingly assisted governments, armed rebel groups or others to commit gross human rights abuses. Oil and mining companies that seek concessions and security have been accused of giving money, weapons, vehicles and air support that government military force or rebel groups use to attack, kill and "disappear" civilians. Private air service operators have reportedly been an essential part of government programs of extraordinary and illegal renditions of terrorist suspects across frontiers. Private security companies have been accused of colluding with government security agencies to inflict torture in detention centers they jointly operate. Companies have reportedly given information that has enabled a government to detain and torture trade unionists or other perceived political opponents. Companies have allegedly sold both tailor-made computer equipment that enables a government to track and discriminate against minorities, and earth-moving equipment used to demolish houses in violation of international law. Others are accused of propping up rebel groups that commit gross human rights abuses, by buying conflict diamonds, while some have allegedly encouraged child labor and sweatshop conditions by demanding that suppliers deliver goods at even cheaper prices.[7]

Although these abuses are not new, what has changed is the renewed insistence by victims and their representatives for accountability when companies are involved in gross human rights abuses.[8] The strategy to protect human rights has shifted from nearly exclusive attention on the abuses committed by governments to close scrutiny of business enterprise activities, in particular, those of multinational and transnational corporations.[9] The movement towards greater corporate social responsibility is now entering a phase in which the parameters of this field are being defined.[10] As human rights instruments on the topic develop, the list of corporate responsibilities that businesses are expected to adopt in the field of human rights continues to grow.

This paper examines the main legal elements of corporate criminal responsibility for

[7] International Commission of Jurists, CORPORATE COMPLICITY AND LEGAL ACCOUNTABILITY, Report of the International Commission of Jurists Expert Legal Panel on Corporate complicity in International Crimes, available at http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/06/Vol.2-Corporate-legal-accountability-thematic-report-2008.pdf at 58.
[8] Id.
[9] Steven R. Ratner, CORPORATIONS AND HUMAN RIGHTS: A THEORY OF LEGAL RESPONSIBILITY, 111 Yale L.J. 443, 446-48 (2001).
[10] Andrew Clapham and Scott Jerbi, CATEGORIES OF CORPORATE COMPLICITY IN HUMAN RIGHTS ABUSES, 24 Hastings Int'l & Comp. L. Rev. 339 (February 26, 2008).

involvement in serious human rights violations, focusing specifically on the *mens rea*, or mental element requirement of a crime. It analyzes in detail what it means for a business to be complicit, the degree of knowledge corporations and their officials must have to be implicated in accomplice liability, and a case study demonstrating the consequences of such liability on corporations.

I. Criminal Responsibility for Business complicity in human rights abuses

A. What does it mean to be complicit in human rights abuses?

There are many situations in which businesses and their officials are the direct and immediate perpetrators of human rights abuses. However, businesses can also implicate themselves in gross human rights violations by working with another actor responsible for the direct perpetration of human rights abuses.[11] Human rights organizations, activists, international policy makers, government experts, and businesses themselves, now continuously use the phrase "business complicity in human rights abuses" to describe what they view as unacceptable business involvement in such circumstances.[12]

Previous cases demonstrating how businesses can become implicated in gross human rights abuses fall into four categories: (i) businesses and their managers are accused of being the main perpetrators; (ii) businesses supply equipment or technology in the context of a commercial trading relationship that is then used abusively or repressively; (iii) businesses are accused of providing information, or logistical or financial assistance, to human rights abusers that has "caused" or "facilitated" or exacerbated the abuse; and (iv) businesses are accused of being "complicit" in human rights abuses by virtue of having made investments in projects, joint ventures, or regimes that have poor human rights records or connections to known abusers.[13]

B. History of Jurisdiction for Corporate Criminal Liability

Current notions of corporate responsibility for facilitating human rights abuses are backed by legal theories whose origins can be traced back to the trials that followed the Second World War.[14] The first formal reaction toward corporate responsibility originated from criminal law when German industrialists who collaborated with the Nazi regime were held responsible for their financial and material support in violation of the customary international law proscribing genocide. Among the civilians who were tried for assisting in carrying out the genocide committed by the Nazi regime[15] was Bruno Tesch, who was found to have contributed

[11] International Commission of Jurists, Corporate Complicity and Legal Accountability, Report of the International Commission of Jurists Expert Legal Panel on Corporate complicity in International Crimes, available at http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/06/Vol.1-Corporate-legal-accountability-thematic-report-2008.pdf, 3.
[12] Id.
[13] Dr. Jennifer Zerk, Towards a Fairer and More Effective System of Domestic Law Remedies, A report prepared for the Office of the UN High Commissioner for Human Rights, 8.
[14] Juan Pablo Bohoslavsky and Veerle Opgenhaffen, The Past and Present of Corporate Complicity: Financing the Argentinean Dictatorship, 23 Harvard Human Rights Journal 160 (2010).
[15] See Anita Ramasastry, Corporate Complicity: From Nuremberg to Rangoon, An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations, 20 BERKELEY J. INT'L L. 91 at xx (2002).

commercially by providing the lethal gas used in the Auschwitz concentration camp.[16] Additionally, Friedrich Flick was found to have contributed financially by profiting from slave labor in the camps and then donating a portion of the profits to the Schutzstaffel ("S.S."). command to help sustain its activities.[17] The British Military Tribunal found that although the criminal character of the S.S. was not well known when Flick started attending fundraising dinners in the 1930s, his contributions and attendance continued long after the criminal character of the S.S. was generally known.[18]

In *United States v. Goering*, the Nuremberg Tribunal found that:

> Those who execute the plan do not avoid responsibility by showing that they acted under the direction of the man who conceived it . . . He had to have the cooperation of statesmen, military leaders, diplomats and businessmen. When they, with knowledge of his aims, gave him their cooperation, they made themselves parties to the plan he had initiated. They are not to be deemed innocent . . . if they knew what they were doing.[19]

These so-called "industrial cases," tried in both the Nuremberg and United Kingdom tribunals, have been a cornerstone for cases holding individuals who are complicit in human rights abuses responsible.[20]

C. International Criminal Law Corporate Responsibility

Traditionally, criminal justice systems could not hold a business criminally accountable as a legal entity.[21] Rather, criminal law pursued and attributed guilt only to individuals for criminal activity.[22] The Nuremberg Charter did give the International Military Tribunal the power to declare groups or organizations consisting of the knowing and voluntary members as criminal.[23] However, the Tribunal could only do so at the trial of an individual or natural person, and in some cases only included those above a certain rank as part of such group.[24] On the other hand, the International Criminal Tribunal for the former Yugoslavia ("ICTY"), the International Criminal Tribunal for Rwanda ("ICTR"), and the International Criminal Court ("ICC") Statutes all provide jurisdiction only over natural persons.[25] Although there was a proposal to add legal

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[16] Trial of Bruno Tesch and Two Others (The Zyklon B Case), 1 U.N. WAR CRIMES COMM'N, LAW REPORTS OF TRIALS OF WAR CRIMINALS 93, 93 (1947) (Brit. Mil. Ct. 1946).
[17] Id.
[18] Corporate Complicity and Legal Accountability Volume 1: Facing the Facts and Charting a Legal Path 21 Report of the International Commission of Jurist Expert Legal Panel on Corporate Complicity in International Crimes (2008).
[19] United States v. Goering (The Nuremberg Trial) 6 F.R.D. 69, 112 (Int'l Mil. Trib. 1946).
[20] Juan Pablo Bohoslavsky and Veerle Opgenhaffen, THE PAST AND PRESENT OF CORPORATE COMPLICITY: FINANCING THE ARGENTINIAN DICTATORSHIP, Harvard Human Rights Journal, Vol. 23 at 160.
[21] Corporate Complicity and Legal Accountability Vol. 2, *supra* note 7 at 56.
[22] Id.
[23] Doug Cassel, Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts, 6 NW. J. INT'L HUM. RTS. 315 (2008).
[24] Id., see also Nuremberg Charter, Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, Charter II, art. 9, entered into force Aug. 8, 1945, 82 U.N.T.S. 280.
[25] Corporate Complicity and Legal Accountability Vol. 2, *supra* note 7 at 56.

entities, including corporations, to the jurisdiction of the ICC during the negotiations of the Court's Statute, it failed.[26] As a result, the ICC still lacks jurisdiction over corporations, and, instead, only has jurisdiction over natural persons, such as individual company representatives and employees.[27] So far, no international criminal tribunal has acquired jurisdiction to try a company as a legal entity for crimes under international law.[28]

Although corporations cannot be prosecuted before international criminal tribunals, their legal risk of violating criminal international law is still of relevant concern. Businesses, including those in the United States, still face the risk of violating criminal international law that has been implemented and enforced under their national judicial system.[29] 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 the majority of the jurisdictions that already recognize the potential criminal responsibility of companies, companies can be held responsible for both national crimes and crimes under international law.[30] In the countries where crimes covered by the ICC have been incorporated into the national legislation, companies may be exposed to criminal responsibility in domestic courts for crimes enshrined in the Rome Statute.[31]

Even though corporations themselves cannot be brought under the jurisdiction of international criminal courts, individuals within these corporations can still be prosecuted in their individual capacity before international criminal tribunals.[32] Under the Statutes of the ICC and the *ad hoc* tribunals for Yugoslavia and Rwanda, a person can be responsible for committing, planning, ordering, or instigating a crime or for otherwise aiding and abetting a crime.[33] Company officials who are involved in committing crimes under international law are susceptible to the increased risks of being investigated, prosecuted, and punished in a wide range of jurisdictions.[34] Although this may not result in legal consequences to the corporation itself, the involvement of corporate leaders in human rights abuses cases can damage a company's reputation and cash flow. A genuine consideration of what it means to be complicit in human rights violations and a change in company policy to prevent criminal liability can save corporations money, time, and the risk of negative publicity. Companies should be aware that even if their company cannot yet be brought under the jurisdiction of international criminal courts, the actions taken by their personnel no matter where they operate are subject to the limits set by international criminal law.

II. RISK OF LIABILITY UNDER INTERNATIONAL CRIMINAL LAW

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

[26] Corporate Complicity and Legal Accountability Vol. 2, *supra* note 7 at 56.
[27] Id.
[28] Id.
[29] Id.
[30] Id. at 57
[31] Id.
[32] Id. at 11
[33] Id.
[34] Id. at 57

on their acts in the commission of a crime.[35] Labeling a perpetrator as an accomplice, and not a principle in the commission of a crime, does not necessarily diminish their legal liability under international law.[36] 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.[37]

Although there have been significant developments in clarifying the standards of liability for companies under criminal international law, there still remains some confusion in the courts as to the proper test for determining the *mens rea* element needed to link a corporation to a human rights abuse. This section will discuss the difference between the knowledge test and the purpose test and argue that going forward, courts should adopt a unified knowledge test to provide predictability for businesses in the future.

A. Accomplice Liability Under International Criminal Law

Since Nuremberg, the international community has accepted that accomplices, or those who aid and abet crimes, are responsible under international criminal law.[38] The Nuremberg Charter imposed individual responsibility on "accomplices participating in the formulation or execution of a common plan or conspiracy to commit" a crime enumerated within the Charter.[39] The International Law Commission ("ILC") of the United Nations in 1950 articulated Nuremberg Principle VII as follows: "Complicity in the commission of a crime against peace, a war crime, or a crime against humanity . . . is a crime under international law."[40]

The concept of accomplice liability is also a feature of international or criminal tribunals and is incorporated into the statutes of the ICTY, ICTR, the Special Court for Sierra Leone, the Extraordinary Chambers for Cambodia, and the Special Tribunal for Lebanon.[41] Specifically, the ICTY and ICTR statutes impose individual criminal responsibility on any person who "aided and abetted in the planning, preparation or execution" of genocide, war crimes or crimes against humanity.[42]

Similarly, the ILC's 1996 Draft Code of Crimes Against the Peace and Security of Mankind proposes to impose criminal responsibility for genocide, crimes against humanity and war crimes (as well as other crimes) on an individual who "knowingly aids, abets or otherwise assists, directly and substantially, in the commission of such a crime, including providing the

[35] Corporate Complicity and Legal Accountability Vol. 2, *supra* note 7 at 11.
[36] Id. at 12.
[37] Id.
[38] *See* Doug Cassel, Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts, 6 NW. J. INT'L HUM. RTS. 307 (2008).
[39] Nuremberg Charter, Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, Charter II, art. 6, entered into force Aug. 8, 1945, 82 U.N.T.S. 280.
[40] Principles of International Law Recognized in the Charter of the Nurnberg Tribunal and in the Judgment of the Tribunal, [1950] 2 Y.B. Int'l L. Comm'n, 377, U.N. Doc. A/CN. 4/SER.A/1950/Add. 1.
[41] 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.
[42] ICTY Statute, art. 7.1; ICTR Statute, art. 6.1.

means for its commission."[43] The ICTY deemed the ILC Draft Code an "authoritative international instrument."[44]

Finally, in 1998, the Rome Statute for the International Criminal Court imposed criminal responsibility on one who "aids, abets or otherwise assists" in the commission of genocide, war crimes or crimes against humanity.[45]

B. The Mens Rea Element of Aiding and Abetting: the Knowledge Test and the Purpose Test

Although it is generally accepted that accomplices are responsible under international criminal law, there still remains great controversy in international law regarding the degree to which one must prove that an accomplice had knowledge that its actions would facilitate the perpetration of a crime (the "knowledge test") and whether it is necessary to prove the intent of that person or entity to facilitate the crime (the "purpose test).[46]

Aiding and abetting has two elements of the crime: the conduct of the person who aids and abets (*actus reus*) and the person's mental state (*mens rea*).[47] There is little controversy in international criminal law that the *actus reus*, as summarized by the widely cited ICTY Trial Chamber Judgment in the *Furundzija* case consists of rendering "practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime."[48] The International Court of Justice ("ICJ") expert legal panel described the actus reus element as satisfied if the company's conduct had "enabled," "exacerbated," or "facilitated" the abuses.[49] Furthermore, if a company facilicated a gross human rights violation by enabling, exacerbating, or facilitating human rights abuses, the company or its officials would enter a zone in which they could be held criminally liable as an aider or abettor of a crime or as a participant in a common criminal plan, or under the law of civil remedies for intentionally or negligently causing harm to a victim.[50]

The more disputed issue is whether the aider and abettor need merely have knowledge that their actions will facilitate the commission of a crime, or whether they must harbor a purpose to facilitate the crime.[51]

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[43] Draft Code of Crimes Against the Peace and Security of Mankind, [1996] 2 Y.B. Int'l L. Comm'n., ch. 2, arts. 2(3)(d), 17, 18, 20, U.N. Doc. A/CN.4/SER.A/1996/Add.l (Part. 2), http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7_4_1996.pdf.

[44] Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Trial Chamber, Judgment, ¶ 227 (Dec. 10, 1998), reprinted in 38 I.L.M. 317, ¶ 227 (1999).

[45] ICC Statute, art. 25.3(c), infra note 35, (quoted in full infra note 36).

[46] See Doug Cassel, Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts, 6 NW. J. INT'L HUM. RTS. 304 (2008)

[47] Furundzija, Case No. IT-95-17/1-T, ¶ 191, 236.

[48] Id. ¶ 235.

[49] Corporate Complicity and Legal Accountability Volume 1: Facing the Facts and Charting a Legal Path 21 Report of the International Commission of Jurist Expert Legal Panel on Corporate Complicity in International Crimes (2008).

[50] Id.

[51] See Doug Cassel, Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts, 6 NW. J. INT'L HUM. RTS. 304 (2008)

The Knowledge Test

Several immediate post-World War II cases used a knowledge standard.[52] For example, in the *Zyklon B* case, the prosecutors before the British Military Tribunal convicted the two top officials of the firm that supplied Zyklon B to the Nazi gas chambers as accessories to war crimes.[53] The British military court did not attempt to prove that the accused acted with the intention, or purpose, of assisting the killing of the internees.[54] It was accepted that their purpose was to sell insecticide to the S.S. for profit, a lawful goal pursued by lawful means.[55] Instead, the charge accepted by the court was that the two top officials *knew* what the buyer intended to do with the product that they were supplying.[56]

Additionally, in the *Einsatzgruppen* case, the American military court also used a knowledge test, in contrast to the aforementioned purpose test, to convict defendant Fendler; the court determined that the defendant *knew* that executions were taking place.[57] Furthermore, the ICTY Trial Chamber in Furundzija adopted a knowledge test: "[T]he mens rea required is the knowledge that these acts assist in the commission of the offence."[58] The ILC code also adopted the knowledge test. Under 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.[59] The ILC Code is consistent with the subsequent findings of the Appeals Chamber of the *ad hoc* tribunals.[60]

Accordingly, the *mens rea* of aiding and abetting is knowledge that the acts performed by an individual assist the commission of the specific crime by the principal perpetrator.[61] Under this code, the aider and abettor need not share the *mens rea* element of the principal; but instead, must be aware of the essential elements of the crime that was ultimately committed by the principal.[62] Therefore, in crimes of specific intent, such as genocide, the aider and abettor must know of the principal perpetrator's specific intent.[63] 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.[64]

Under the knowledge test, a company representative who knows that the equipment the business is selling is likely to be used by a buyer for a crime would not escape liability because

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[52] Corporate Aiding and Abetting of Human Rights Violations at 308.
[53] Id. at 304
[54] Id.
[55] Id.
[56] Id.
[57] Trial of Otto Ohlendorf and Others (Einsatzgruppen), *4 Trials of War Criminals Before the Nurenberg Military Tribunals Under Control Council Law No. 10, 572* (William S. Hein & Co., Inc. 1997) (1949) quoted in Furundzija, Case No. IT-95-17/1-T, ¶ 218.
[58] Furundzija, Case No. IT-95-17/1-T, ¶ 249.
[59] ILC Yearbook 1996, p. 18: Article 2(3)(d) ILC Draft Code, p. 21 ¶ 11.
[60] Corporate Complicity and Legal Accountability Vol. 2, *supra* note 7 at 21.
[61] ICTY, *Blagojevik and Jokic,* (Appeals Chamber) 29 July 2004, ¶¶ 45-46; ICTY, *Vasiljevic,* (Appeals Chamber) 25 February 2004, para. 102.
[62] Corporate COmplicty and Legal Accountability at 21.
[63] ICTY, *Simic*, (Appeals Chamber) 28 Nov. 2006, ¶ 86; ICTY, *Blagojevic and Jokic* (Appeals Chamber) 9 May 2007, ¶ 127; ICTR, *Ntagerura*, (Appeals Chamber) 7 July 2006, ¶ 370.
[64] ICTY, *Krstic,* (Appeals Chamber) 24 March 2000, ¶ 162; ICTY, *Kmojelac,* (Appeals Chamber) 17 Sept. 2003, ¶ 52.

there is uncertainty as to the exact crime intended.[65] 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.[66] For example, vendors who sell goods or materials such as chemicals, computers, bulldozers, or digging equipment can be responsible as accomplices if they have knowledge, judged through an objective standard, that the purchaser would use them to commit crimes under international law.[67]

Some courts, however, have rejected the knowledge test, and instead have applied a higher *mens rea* standard which states that an individual will be guilty if they aid, abet, or otherwise assist in the commission, or it attempted commission, of an act "for the *purpose* of facilitating" the commission of a crime.[68]

The Purpose Test

A few months before the ICTY Trial Chamber in *Furundzija* adopted a knowledge test for aiding and abetting, the Rome Statute of the ICC adopted a purpose test.[69] Article 25(3)(c) of the Rome Statute makes one who, "[f]or the purpose of facilitating the commission of such a crime, aids, abets, or otherwise assists in its commission or its attempted commission, including providing the means for its commission . . ." criminally responsible.[70] This phrase introduced a mental element that went beyond the ordinary *mens rea* requirement of intent and knowledge required for other crimes under the Rome Statute and from the knowledge test described above.

The drafting history shows that the purpose test was not adopted until the Rome Conference.[71] Several prior drafts of the Rome Statute, including the final draft submitted to the Preparatory Committee to those negotiating the Statute in 1998, bracketed the language of what ultimately became article 25(3)(c).[72] The bracketed language, due to disagreement among the drafters, would have imposed responsibility on one who "[with [intent][knowledge] to facilitate the commission of such a crime,] aids, abets or otherwise assists in the commission . . ."[73] The disagreement was settled in the final negotiating conference, in which the knowledge and intent requirements were replaced with the "purpose" standard.[74]

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[65] Corporate Complicity and Legal Accountability, *supra* note 7 at 21.
[66] Id.
[67] Id.
[68] Id. at 22
[69] Rome Statute of the International Criminal Court, United Nations Diplomatic Conference on Plenipotentiaries on the Establishment of an International Criminal Court, adopted July 17, 1998, entered into force, July 1, 2002, U.N. Doc. A/CONF.183/9, 21, art. 25.3(c), 37 I.L.M. 999 (1998) [hereinafter ICC Statute].
[70] ICC Statute, art. 25.3(c)
[71] See Doug Cassel, Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts, 6 NW. J. INT'L HUM. RTS. 310 (2008)
[72] Id.
[73] M. Cherif Bassiouni, *The Legislative History of the International Criminal Court: An Article-by-Article Evolution of the Statute 194* (2005), (1998 Preparatory Committee Draft art. 23.7(d)); see id. at 197 (Zutphen Draft art. 17.7(d)); see id. at 198 (Decisions Taken By Prepatory Committee In Its Session Held 11 to 21 February 1997, article B(d)); see also id. at 203
[74] See Doug Cassel, Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts, 6 NW. J. INT'L HUM. RTS. 310 (2008)

M. Cherif Bassiouni, former professor of law at DePaul University College of Law, chaired the drafting committee at the conference, explained that the decision was not taken by his committee, but by the Working Group on the General Principles of Criminal Law,[75] chaired by Per Saland, Director of the Department for International Law and Human Rights of the Swedish Ministry for Foreign Affairs.[76] Professor Bassiouni believed the dispute had to do with differences between civil law and common law lawyers and different understandings of language.[77] If so, the interpretation in the end seems to have come out the same in both English and French: a "purpose" test.[78]

Another perspective on the purpose tests comes from Professor Dr. Kai Ambos, a leading scholar who was a member of the German delegation at the Rome Conference.[79] Dr. Ambos explained that the "purpose" test was borrowed from the Model Penal Code of the American Law Institute.[80] In the Model Penal Code, a person acts "purposely" if he or she has a "conscious object" to cause a given result.[81] Originally adopted in 1962, the Model Code specifies a purpose test for aiding and abetting, as follows:

> Section 2.06. Liability for Conduct of Another; Complicity. . . .
> (3) A person is an accomplice of another person in the commission of an offense if:
> (a) with the purpose of promoting or facilitating the commission of the offense, he . . .
> (ii) aids or agrees or attempts to aid such other person in planning or committing it . . . .[82]

The similarity between the language of the Model Penal Code 2.06(3)(a) ("purpose of promoting or facilitating the commission of the offense"), and the ICC Statute Article 25(3)(c) ("purpose of facilitating the commission of such a crime") support this explanation.[83]

C. Clarifying Confusion in the Courts

Due to the differing approaches of the *mens rea* standard under the ICC Statute and other tribunals and codes, there remains confusion within both international and national courts as to which standard should apply. This confusion reduces the level of predictability companies can rely on to make responsible business decisions. For that reason, domestic and international

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[75] Id.
[76] Roy S. Lee, ed., *The International Criminal Court; The Making of the Rome Statute, Issues, Negotiations, Results* (New York: UNITAR, 1999)
[77] Id. at 311
[78] Id.
[79] Kai Ambos, *General Principles of Criminal Law in the Rome Statute*, 10 CRIM. L.F. 1, 10 (1999). Professor Dr. Ambos is the Chair of Criminal Law, Criminal Procedure, Comparative Law and International Criminal Law at the Georg-August-Universität Göttingen in Germany.
[80] Id.
[81] MODEL PENAL CODE § 2.02(2)(a) ("A person acts purposely with respect to a material element of an offense when: (i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and (ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that
[8282] MODEL PENAL CODE: OFFICIAL DRAFT AND EXPLANATORY NOTES 29-30, § 2.06 (1985) (as adopted at the 1962 Annual Meeting of the American Law Institute) [hereinafter MODEL PENAL CODE].
[83] Art. 25(3)(c), ICC Statute.

legislatures and courts should clarify their *mens rea* standard by reviewing customary international law and its application in the development of the *mens rea* tests. Customary international law requires only that an aider and abettor act with the *mens rea* element of knowledge.[84] This rule has been recognized since the post-World War II military tribunals and endures in modern decisions of the international criminal tribunals, which were mandated specifically to apply customary international law.[85] Analysis of Nuremberg-era jurisprudence confirms that knowledge was the standard applied, leading to both convictions and acquittals.[86] Additionally, the standard that emerged at Nuremberg has been consistently adopted in the intervening decades by international tribunals, including those for the former Yugoslavia and Rwanda.[87]

Furthermore, the Rome Statute does not supersede or restrict existing customary international law.[88] It was drafted for a specific and unique court and resulted from a series of political compromises.[89] Not every provision was intended to reflect customary international law and, accordingly, it expressly states that its provisions should not be read to limit international law.[90] Additionally, for group crimes, the Rome Statute itself expressly provides a knowledge standard under article 25(3)(d).[91]

In conclusion, despite the "purpose" test in the Rome Statute, domestic and international legislatures and courts should standardize their level of *mens rea* and find that customary international law, as reflected in the majority of the post-World War II case law, the case law of the ICTY and ICTR, the ILC Draft Code, and group crimes under article 25 (3) (d) of the ICC Statute, requires that those who aid and abet merely have knowledge that they are assisting criminal activity.

III. Consequence of Violating Human Rights

The impact for violating human rights can be damaging to a corporation. Although thriving trade and business investments can help raise economies and individual standards of living, poor analysis of a business situation can alternatively injure both innocent civilians and the corporations involved.[92] The following case, in which a company found themselves implicated in a human rights violation, demonstrates why business leaders should take action to prevent human rights violations not only as a moral duty, but also because it is sound business practice.

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[84] *Brief by* William Aceves as Amicus Curiae, p, 5 Presbyterian Church of Sudan, et al. v. Talisman Energy, Inc., No. 09-1262, (2010).
[85] Id. at 2
[86] See, e.g., Trial of Bruno Tesch and Two Others (The Zyklon B Case), Law Reports of Trials of War Criminals 93, 101 (1947) (Brit. Mil. Ct., Hamburg, Mar. 1-8, 1946) (convicting two industrialists who supplied poison gas to Nazis because they "knew" that it would be used to kill concentration camp prisoners); United States v. Von Weizsaecker (The Ministries Case), 14 Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10 308, 478, 621- 22, 784, 854 (1949) (applying a mens rea of knowledge to all defendants but acquitting one whose actions did not meet the actus reus requirement).
[87] See, e.g., Prosecutor v. Furundžija, Case No. IT-95-17/1/T, Judgment, ¶ 236 (Dec. 10, 1998).
[88] William Aceves, *supra* note 84, at 3.
[89] Id.
[90] Id.
[91] Id. at 4
[92] Corporate Complicity and Legal Accountability Vol. 1, *supra* note 11 at 1.

A. Case study: Human Rights Impact of Southern Africa's Extractive Sector

In 2012, the South African Police shot to death 34 miners participating in a peaceful strike against Lonmin's Marikana mine for violating their human rights in South Africa.[93] Soon after, videos of the killings were broadcast worldwide of the tragedy that was dubbed the "Marikana Massacre."[94] What started as a nonviolent protest, resulted in a tragedy that left a crippling effect on the public, financial, and legal state of Lonmin. The Chief Executive Officer of the company, Ben Magara, described the incident as "the week that changed our lives."[95] Lonmin's share price on the Jnternational Securities Exchange fell 50.3% in the year subsequent to the event, compared to one of their competitors in the mining and platinum industry, Anglo American Platinum (Amplats), which fell only 22.3%.[96] Furthermore, Lonmin publically reported other financial difficulty.[97] Lonmin lowered its expected spending in South Africa from R2.9 billion to R2.1 billion, and imposed a hiring freeze to review its operations in the country, preserve cash, and recover from the strike.[98]

This event has compelled mining companies to acknowledge and confront how extractive operations can harm human rights and lead to extensive loss of life in extreme cases.[99] Furthermore, it has given the business community a leading example for understanding the effect of being implicated in a case where human rights have been violated.

Mining is central to the economies of southern African countries.[100] It accounts for 7% of the GDP in South Africa, 15% in Zimbabwe, and 24% in Zambia; it provides 390,000 jobs in South Africa and 60,000 in Zambia.[101] But, there is so much more that this wealth-generating industry could be doing with the right policies, incentives, and regulation.[102] Governments and companies can learn that it is in their interest to encourage industries to promote better policies and regulations in regards to human rights.

A briefing focused on challenges to the mining industry to eradicate harm and abuse of human rights in its operations by the Business and Human Rights Centre found that mining companies in general suffer major financial losses from inadequate respect for human rights.[103] In the period leading up the Marikana massacre, from mid-2012 to April 2013, losses to the South African mining industry due to strikes amounted to R15 billion (US $1.3 billion).[104] Losses due to delays in mining projects, including those caused by companies failing to obtain consent from local communities, and being blocked by communities' protests or legal claims,

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[93] Business unusual: Mining in the aftermath of Marikana The human rights impacts of southern Africa's extractive sector, Business & Human Rights Resource Centre, (February 2015).
[94] Daily Mail Reporter, South African Police are Filmed Shooting Dead 34 Miners… but Prosecutors Charge their 270 Fellow Strikers with Murder under Tainted Apartheid-era Law, (August).
[95] Loni Prinsloo, *'So You've Taken Billions, Lonmin? Give us just R1m'*, Business Times, (Feb, 2015).
[96] Id.
[97] Id.
[98] Id.
[99] Business unusual, *supra* note 93.
[100] Id.
[101] Id.
[102] Id.
[103] Id.
[104] Id.

were projected at US $20 million per week on average for active, large mine projects.[105] Furthermore, potential payments to 17,000 former mine workers for silicosis claims in a lawsuit against mining companies totaled R1.5 billion (US $4.4. billion).[106]

B. WHAT DO THESE NUMBERS TELL US?

What this case exhibits is that it is not only right to respect human rights, but that it is also an advantageous business practice.[107] Furthermore, it provides an example to demonstrate that a genuine commitment to mainstream respect for human rights into all aspects of corporate governance and management can be beneficial to employees, supply chains, the broader community, and, ultimately, shareholders.[108]

IV. CONCLUSION

It is in the best interest of businesses to understand, assess the risk, and implement a business model, which aims at preventing complicity in human rights violations. In order for corporations to better design these plans and assess their legal responsibility, national and international courts need to unify their standards for crimes under international criminal law. A genuine consideration of what it means to be complicit in human rights violations and how to prevent criminal liability can save corporations money, time, and public reputation. Furthermore, a plan on how to avoid complicity in human right abuses can reduce a corporation's legal liability.

Even if corporations themselves cannot be prosecuted before international criminal tribunals, corporate executives and other individuals within the company can. Additionally, corporations, especially those in the United States, face the risk of violating international law under their national judicial system. As national criminal laws develop to include corporate liability, so do the arguments to extend the jurisdiction of international tribunals to include corporate entities. Companies, no matter where they operate, should be aware that their actions are subject to the limits set by international criminal law.

International criminal law has long recognized criminal responsibility for aiding and abetting. In order for businesses to better assess their legal responsibility and to clarify when private actors can be held criminally liable, legislatures and courts, at both the national and international level, should provide a standardized definition and application of the level of *mens rea* for aiding and abetting. If the standards for aiding and abetting were clarified, the legal predictability would be fairer for both corporate managers and victims of human rights violations.

It is not only right to protect human rights; it is also sound business practice. Violating human rights can put a company at a disadvantage compared to its competitors because it can damage a company's reputation, lose people jobs, and cost a corporation billions of dollars. Taking responsibility and creating a plan to prevent corporate complicity in human rights abuses is advantageous to compete in the developing global market.

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[105] Id.
[106] Business unusual, *supra* note 93.
[107] Id.
[108] Id.