



FACULTY OF LAW  
Lund University

Jan Willem Bosman

Business actors and serious  
human rights violations: where  
do courts draw the line?

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Radu Mares

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# Summary

This research is an attempt to reveal and evaluate the boundaries of business actors aiding and abetting serious human rights violations. Four different bodies of law, consisting of contemporary international criminal law and case law involving business actors in both national and international law, are examined. In comparing these movements, judges' interpretations and the features found important by them are highlighted and an effort is made to establish where courts draw the line in such cases; in other words, which involvement in serious human rights violations leads to responsibility of a business actors for aiding and abetting such crimes? And which involvement is not sufficient? Finally, these findings are evaluated and applied on legal literature concerning corporate complicity.

The most important conclusions of this thesis are the following. Firstly, although courts apply varying aiding and abetting standards, the analysed business cases are influenced by international criminal law. This conclusion, although not groundbreaking, enables a more in depth comparison between the national and international law sources. Secondly, recent judgments in business cases are fairly similar to the judgments from the military tribunals following the Second World War. Both the interpretation of the complicity standard and facts, as well as the outcome of the cases demonstrate strong similarities. Thirdly, the common features that judges attach value to are knowledge, participation, influence and position within a corporation and influence on the principal offender. It is finally very hard to rigorously draw lines which particular circumstances are required to hold a business actor responsible as an aider or abettor. The most beneficial way to assess whether a defendant is accountable, is to use the mentioned features and interpret them similar to the way courts interpret them. This is a more advantageous approach then applying the three category test which is incidentally used in legal literature.<sup>1</sup>

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<sup>1</sup> Andrew Clapham and Scott Jerbi, *Categories of Corporate Complicity in Human Rights Abuses*, New York, 21-22 March 2001, <http://www.reports-and-materials.org/Clapham-Jerbi-paper.htm>, last visited 16 December 2007, and Anita Ramasastry, *Corporate Complicity: From Nuremberg to Rangoon An Examination of Forced Labor Cases and their Impact on the Liability of Multinational Corporations*, Berkely Journal of International Law, 2002, 20 Berkely J. Int'l L. 91,\* 102-103

# Preface

Multinational corporations are still regularly associated with human rights abuses committed mainly in developing countries and conflict areas. Considering international law, these international actors are however not bound by this body nor by international criminal law, unlike states or individuals. With the creation of the International Criminal Court, the state parties did not adopt a provision granting jurisdiction for corporations and therefore only individual business men can be charged with international crimes. Nevertheless, since the trials following the London Charter of the International Military Tribunal, not a single business actor has been prosecuted for serious human rights violations before an international court. The fact that only a few outdated examples of business actors aiding and abetting such crimes exist, proves the need to develop this area. Furthermore, corporate complicity is often described as uncertain and especially the business world is demanding certainty of complicity rules to stimulate foreign investment. This demand is reflected in recent judgments regarding corporate complicity.<sup>2</sup>

These reasons underline the need to clarify the meaning and boundaries of aiding and abetting and, in particular, to examine in which circumstances a business actor should be held accountable for serious human rights violations. The purposes of this research focuses on meeting this demand.

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<sup>2</sup> *Khulumani v. Barclay Nat. Bank Ltd.*, United States District Court, S.D. New York, Trial Pleading, 2002 WL 32153622, see opinion Judge Korman \* 29-73

# Abbreviations

ATCA	Alien Torts Claims Act
CEO	Chief Executive Officer
GNPOC	Greater Nile Petroleum Operating Company Limited
HVO	Military units of the Bosnian Croats
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICTY	International Criminal Tribunal for the former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
ILC	International Law Commission
IMT	International Military Tribunal at Nuremberg
MOSOP	Movement for Survival of the Ogoni People
NGO	Non-Governmental Organisation
OECD	Organisation for Economic Co-operation and Development
OTC	Oriental Timber Corporation
S.S.	Schutzstaffeln
TDG	Thiodiglycol
TGNBV	Talisman Greater Nile B.V.
VOC	Dutch East India Company (Verenigde Oost-Indische Compagnie)
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNGA	United Nations General Assembly
UNSG	United Nations Secretary-General
UNSC	United Nations Security Council

# 1 Introduction

In the following thesis, complicity in serious human rights violations by business actors will be considered. An attempt will be made to answer the following thesis question: *Regarding the standards used for and applied in complicity in serious human rights violations, what lessons can be learned from contemporary international criminal law and cases involving business actors?*

This research has multiple aims. The main purpose is to clarify the meaning and boundaries of aiding and abetting by business actors in serious human rights violations. It is still quite unclear in national and international law under what circumstances a business actor may or may not be held responsible for aiding and abetting serious human rights violations. There are only a few judicial examples that consider whether a business actor aided or abetted serious human rights violations in national jurisdictions, while the examples present in international law fora are even scarcer. The post World War Two military tribunals prosecuted for the first time business men and industrialists for complicity in international crimes. After these trials however, not a single business actor has been prosecuted in an international criminal court. While business actors were not prosecuted in international fora since the late 1940s, individual criminal responsibility experienced a great revival in the 1990s, its climax being the establishment of the International Criminal Court (ICC). A number of examples of individuals allegedly aiding and abetting serious human rights violations have since been considered in international criminal tribunals and the law concerning aiding and abetting developed into a reasonably clear and well established body of law.

The international case law concerning business actors aiding and abetting serious human rights violations is rather outdated and the only recent examples of business actors standing trial for this mode of participation can be found in national courts. Therefore this thesis will analyse recent domestic examples of business actors allegedly aiding and abetting serious human rights violations and compare these cases with the business cases from the post World War Two criminal tribunals and contemporary international criminal law. When considering aiding and abetting, the domestic cases rely on international criminal law and refer to the standard of aiding and abetting that has been used by international criminal tribunals. The assessment of the courts concerning the meaning and boundaries of this mode of participation is therefore very relevant from an international law perspective, as well as a national law perspective.

The main question in this thesis is divided into four sub questions. Firstly, which standards of aiding and abetting have been applied by courts in international and national fora concerning business actors allegedly complicit in serious human rights violations? And, is recent domestic case

law concerning this issue influenced by international law? Secondly how do courts apply the different standards? Which features are found important in this regard and how are these features interpreted? And finally in which circumstances should a business actor be held responsible for aiding and abetting serious human rights violations and in which circumstances should it not? Legal literature focused on corporate complicity in human rights abuses has categorised complicity in three forms, namely direct corporate complicity, beneficial corporate complicity and silent complicity.<sup>3</sup> The final question will examine the benefits of such a categorisation and apply the conclusions of this research to the three complicity forms.

To get a clear picture of the various courts' deliberations, the research will mainly concentrate on case law and to a lesser extent on other international sources such as conventions, international customary law and scholarly works in the field of international law. Aiding and abetting is defined as the mode of participation which, broadly speaking, consists of participating in crimes through knowingly offering some sort of moral or physical support that assists the main perpetrator of the crime. Legal literature sometimes refers to this mode of participation as "corporate complicity". However, in international criminal law, complicity is explained broader than aiding and abetting and covers joint criminal enterprise as well. Since international criminal law labels this category of complicity as aiding and abetting, this term will be used in the thesis to describe this particular form of participation.

Furthermore serious human rights violations are defined as international crimes and other grave human rights breaches. Only covering international crimes would unnecessarily limit the scope of this thesis and therefore other serious offences are incorporated in this research as well. These particular violations mainly constitute the crimes prosecuted in the international criminal tribunals in Nuremberg, Yugoslavia, Rwanda and the International Criminal Court (ICC), such as war crimes, crimes against the peace, genocide and crimes against humanity. The other crimes that are incorporated in this research consist of forced relocation, murder and rape. The thesis will concentrate on criminal cases and "business actors" will be defined in their broadest sense. Hence, for the purpose of this thesis, this term includes corporations, as legal entities, and individual persons as defendants. The focus on both legal persons and natural persons enables a more extensive analysis of available case law.

Firstly, the case law involving business actors in the industrialist trials following the post World War Two military tribunals at Nuremberg will be

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<sup>3</sup> Andrew Clapham and Scott Jerbi, *Categories of Corporate Complicity in Human Rights Abuses*, New York, 21-22 March 2001, <http://www.reports-and-materials.org/Clapham-Jerbi-paper.htm>, last visited 16 December 2007, and Anita Ramasastry, *Corporate Complicity: From Nuremberg to Rangoon An Examination of Forced Labor Cases and their Impact on the Liability of Multinational Corporations*, Berkely Journal of International Law, 2002, 20 Berkely J. Int'l L. 91,\* 102-103

considered and evaluated. Secondly, the meaning and boundaries of aiding and abetting according to contemporary international criminal law will be given, together with an analysis of cases of international criminal tribunals of the former Yugoslavia and Rwanda. Subsequently, two recent Dutch cases involving businessmen engaged in international crimes will be considered, as well as the recent US federal case law under the Alien Torts Claims Act (ATCA). Finally a conclusion will be drawn in which the main question will be answered utilising the sub questions. The litigation under the ATCA is tortuous and not criminal, as the other case law is. One can therefore question why this civil litigation is considered in a thesis with a typical international criminal law topic. The nature of the ATCA is hybrid and US federal courts use international criminal law standards to assess alleged liability for aiding and abetting. Furthermore the litigation under the ATCA is at present the most promising development in the area of corporate responsibility for serious human rights violations. Therefore not covering this movement in a thesis on corporate complicity for serious human rights violations would be academically negligent.

The conducted research uses and combines a number of works from different scholars. Anita Ramasastry has examined the liability of multinational corporations in forced labour cases and compared case law from the Nuremberg tribunals with recent litigation under the ATCA.<sup>4</sup> In addition to analysing case law concerning forced labour, Ramasastry uses the mentioned categorisation of corporate complicity into three types. While this thesis overlaps on certain points with her article, its scope is more narrowed and focused on the standard and interpretation of aiding and abetting than her article. This thesis additionally includes more recent case law under the ATCA, and examines two Dutch cases. Furthermore the analysis of contemporary international criminal law in this thesis is more in depth, which enables a more elaborated comparison with recent business cases. The three categories of corporate complicity are also discussed in Andrew Clapham and Scott Jerbi's article.<sup>5</sup> These co-authors discuss the categorisation of corporate complicity and use both contemporary international criminal law as a guide, as well as examples of the ATCA litigation, to delineate the different categories. In the conclusion of this thesis, the three different categories of complicity, as discussed in Clapham and Jerbi's article, will be evaluated using the findings of this research. V.S. Khanna formulated in his article possible standards of corporate liability, using case law of U.S. courts, to examine when a corporation should be held criminally liable for occurring harm in the United States.<sup>6</sup> His conclusions regarding the most desirable test for aiding and abetting will be used in evaluating the case law under the ATCA.

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<sup>4</sup> Anita Ramasastry, *Corporate Complicity: From Nuremberg to Rangoon An Examination of Forced Labor Cases and their Impact on the Liability of Multinational Corporations*, Berkely Journal of International Law, 2002, 20 Berkely J. Int'l L. 91

<sup>5</sup> Andrew Clapham and Scott Jerbi, *Categories of Corporate Complicity in Human Rights Abuses*, New York, 21-22 March 2001, <http://www.reports-and-materials.org/Clapham-Jerbi-paper.htm>, last visited 16 December 2007

<sup>6</sup> V.S. Khanna, *Corporate Liability Standards: When should corporations be held criminally liable?*, American Criminal Law Review, Fall 2002, 37 Am. Crim. L. Rev. 1239

Before commencing the analysis of chosen cases and international criminal law, a short history, together with the most notable recent developments of corporate responsibility will be given. This is essentially to create a framework that places the thesis in a broader perspective and that shows the importance of research in this area.

## 2 History and recent corporate responsibility movements

Although the Nuremberg trials considered the first cases in which a corporation stood trial for international crimes, corporations committing atrocities dates back well before the Second World War. It is believed that the first multinational corporation participating in atrocities is the Dutch East India Company (VOC).<sup>7</sup> Jan Pieterszoon Coen, a Dutch official who possessed a high position within the corporation in the early 17<sup>th</sup> century, had the most notorious reputation when it came to committing atrocities.<sup>8</sup> Coen's brutal conduct consisted of severe treatment of indigenous people in Java, pillaging Jakarta and driving out the local population, deporting Indonesian prisoners who surrendered and killing thousands of innocent people through starvation.<sup>9</sup> Unfortunately international criminal law was not as evolved in the 17<sup>th</sup> century as it is today and neither Coen nor the VOC ever stood trial for the atrocities committed.

The prime examples in legal history that normally is used for indicating the foundation of businesses accountability for international crimes are the industrialist trials at Nuremberg after the Second World War and the prosecution of Japanese mining company officials before the post War Crimes Court in the Far East. The indicted charges against the industrialists varied among the different individuals from slave labour to knowingly supplying poisonous gas to concentration camps. The corporation of which its officials faced the most infamous charges was IG Farben. The defendants working for this corporation were charged with plunder, slavery and complicity in aggression and mass murder.<sup>10</sup> The military tribunals tried the individuals and not the corporation since they had no legal basis or authority to try legal persons. However, it was clear that IG Farben stood trial for the alleged international crimes. This can be derived from the judgments in which the judges explicitly referred to acts of IG Farben, thereby sending a clear message that IG Farben stood trial.<sup>11</sup>

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<sup>7</sup> The VOC is the original Dutch abbreviation for: Verenigde Oost-Indische Compagnie

<sup>8</sup> <http://www.voc-kenniscentrum.nl/themas.html#Jan>, visited 16 October 2007

<sup>9</sup> <http://www.voc-kenniscentrum.nl/themas.html#Jan>, visited 16 October 2007

<sup>10</sup> *The I.G. Farben Trial*, Trial of Carl Krauch and twenty-two others, United States Military Tribunal, Nuremberg, 14<sup>th</sup> August, 1947-29<sup>th</sup> July, 1948, Law Reports of Trials of War Criminals, *selected and prepared by the United Nations War Crimes Commission*, Volume X, case no. 57

<sup>11</sup> *The I.G. Farben Trial*, page 50, and: Andrew Clapham, *The question of Jurisdiction Under International Criminal Law Over Legal Persons: Lessons from the Rome Conference on an International Criminal Court*, from: M.T. Kamminga and S. Zia-Zafiri (eds.), *Liability of Multinational Corporations under International Law*, Kluwer Law International 2000, page 170 and 171

The Nuremberg trials were followed by civil litigation in German courts by victims that were forced to work for German companies<sup>12</sup> This litigation spread to other countries and eventually, in the late 1990's, led to suits in United States federal courts under the ATCA of victims demanding compensation from German and Japanese companies that were allegedly complicit in international crimes. However, not merely claims resulting from business crimes during the Second World War were brought before national courts; DOW and Monsanto Chemicals were held accountable for complicity in the devastating consequences of the use of "agent orange" on human beings in a civil litigation brought by Korean veterans before a South Korean Court.<sup>13</sup> The United Kingdom has also opened its doors for civil suits regarding multinationals that violate human rights. However no suits of corporations involved in international crimes have been considered as yet. In addition to legal suits, a UN special rapporteur on human rights and business has been established and voluntary initiatives such as the UN Global Compact, the OECD Guidelines for Multinational Enterprises and Bill Clinton's new model, Clinton Global Initiative, are met by the business world with increasing popularity. Furthermore a vast growth in corporate social responsibility initiatives shows the increasing attention in the area of business and human rights.

Parallel to the legal developments in business and human rights, international criminal law has expanded greatly after the Nuremberg trials. Following the establishment the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), a vast amount of experience and case law has evolved in this area. This experience has been used to direct the establishment and functioning of the Rome Statute, the treaty creating a permanent international criminal court (ICC). The establishment of the ICC has been quite successful. While the text was drafted and signed in 1998, already in July 2002 the court has been launched and now consists of 105 member states who have ratified or acceded the court's statute. The court, however, only has jurisdiction over natural persons and not over legal entities, such as corporations. During the conference in Rome, the French delegation had proposed to include legal entities in the jurisdiction of the court.<sup>14</sup> However, the time was proven too short to find agreement among the delegations to include legal persons in the statute's jurisdiction.<sup>15</sup>

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<sup>12</sup> See for an analysis of these cases: Benjamin B. Ferencz, *Less than Slaves, Jewish Forced Labor and the quest for compensation*, Cambridge, Massachusetts and London, England, 1979

<sup>13</sup> Ilaria Bottigliero, *Can Corporations be held legally responsible for serious human rights violations?*, IIAS Newsletter #42, Summer 2006, [http://www.iias.nl/nl/41/IIAS\\_NL41\\_0608.pdf](http://www.iias.nl/nl/41/IIAS_NL41_0608.pdf), last visited 6 January 2008

<sup>14</sup> Andrew Clapham, *The question of Jurisdiction Under International Criminal Law Over Legal Persons: Lessons from the Rome Conference on an International Criminal Court*, page 146

<sup>15</sup> Andrew Clapham, *The question of Jurisdiction Under International Criminal Law Over Legal Persons: Lessons from the Rome Conference on an International Criminal Court*, page 150

Today corporations possess a very powerful position in the world economy. According to the United Nations Conference on Trade and Development (UNCTAD) survey published on 12 August 2002, 29 multinationals are among the world top 100 economies, based on their assets.<sup>16</sup> This shows that in some instances multinational corporations have more assets than states and therefore possess extensive powers. These corporate actors are furthermore more and more linked to gross human rights violations, especially in developing countries and conflict situations. Examples of these instances are claims under the ATCA involving major oil companies, mining companies, soft drink producers, banks, pharmaceuticals and car companies in various parts of the world and recent cases of private security companies being responsible for arbitrary execution in Iraq and abuses in the Abu-Graib prison.

However while state actors generally are bound by international law when they severely violate human rights, corporations, as a fairly new actor on the public international stage, do not have such legal responsibilities. Despite the developments of individual criminal responsibility and the use of civil litigation in national courts to remedy gross human rights abuses, international law and international criminal law have not notably responded to the call for binding international measures to prevent and punish corporations that are complicit in international crimes. These arguments underline the importance of developing this area of law even more and show the value of research in this area.

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<sup>16</sup> <http://www.unctad.org/Templates/webflyer.asp?docid=2426&intItemID=2079&lang=1>, last visited on 16 October 2007

### 3 The Nuremberg trials and other military tribunals

In the following chapter the Nuremberg trials and other trials of war criminals after the Second World War will be considered. Firstly, a short introduction of the trials will be given, together with the legal basis of complicity in the London Charter<sup>17</sup>. Secondly, the five most important cases in which corporations were charged for complicity are provided, followed by an analysis. Instead of giving full summaries of the cases, only the relevant passages relating to complicity are covered.

After the Second World War, the four victorious powers to which Germany had surrendered unconditionally, Great Britain, France, the Soviet Union and the United States acting in the interest of all nations, established the Military Tribunal at Nuremberg to try the twenty-four major war criminals.<sup>18</sup> During the war Great Britain, the Soviet Union and the United States had already discussed what to do with the persons responsible for war crimes and eventually an agreement was negotiated, the London Charter of the International Military Tribunal, that led to the creation of the tribunal. Subsequently, the four allied powers adopted Control Council Law no. 10 in order to try war criminals and other similar offenders that were not prosecuted by the Nuremberg Tribunal; these tribunals are normally referred to as military tribunals.<sup>19</sup> The crimes covered by the trials were war crimes, crimes against humanity and crimes against the peace. The crime of genocide developed only during and after the trials.

Article six of the London Charter established the possible range of persons that could be held guilty of a crime; it stated that “leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.” The meaning of accomplices is explained in the case law of the tribunals.

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<sup>17</sup> London Charter of the International Military Tribunal, also referred to as London Charter or Nuremberg Charter

<sup>18</sup> Kriangsak Kittichaisaree, *International Criminal law*, Oxford, 2001, page 17

<sup>19</sup> *Supra* note 17, page 19

### 3.1 Zyklon B trial 20

In the *Zyklon B* case three defendants were charged with supplying poison gas to the Nazis while knowing that this gas was to be used for the purpose of killing allied nationals interned in concentration camps. The central questions in this case was whether the accused possessed knowledge of the atrocities in the concentration camps and were aware that the gas would be used for killing human beings. Two of the defendants, Tesch and Weinbacher were the leading figures of a company, called “Tesch and Stabenow”, which sold the gas to the Nazis. Tesch was the sole owner, while Weinbacher was a “procurist”, which meant that he had the right to act in the name and on behalf of the firm.<sup>21</sup> The third defendant, Drosihn, was the first senior gassing technician. Zyklon B was a highly dangerous poison gas that was used in small quantities for delousing clothes and disinfecting buildings.<sup>22</sup> From 1942 to 1945 the gas was however used by the S.S. to exterminate human beings in concentration camps, leading to the death of four and a half million people in one camp alone, known as Auschwitz/Birkenau.<sup>23</sup> The prosecution alleged that the defendants had become aware of the improper use of the gas and continued to arrange supplies to the Nazis in increasing amounts, leading up to deliveries of nearly two tons per month to only the Auschwitz concentration camp.<sup>24</sup>

The prosecution presented a number of employees of the firm that testified that Tesch had Weinbacher knew of the use of the gas to kill human beings. A former bookkeeper testified that he read a report dictated by Tesch in which the latter proposed to use poisonous gas after he was consulted by the S.S. and that he undertook to train the S.S. men.<sup>25</sup> He had subsequently made a note of this but destroyed it on advice of another witness. This witness however confirmed his story. Another witness had furthermore read in approximately 1942 a travel report in which Tesch stated that the gas could both be used for killing human beings as well as vermin.<sup>26</sup> A third witness testified that she had dictated a travel report for Tesch who had told her that the gas was used for killing human beings.<sup>27</sup> More persons testified that the company send the gas to the concentration camps, the highest quantities consigned to Auschwitz. Further evidence consisted of a description of a poisonous gas course at an S.S. (Schutzstaffeln) hospital, descriptions of the use of the gas in concentration camps, an estimation of the amount of victims in concentration camps as a result of the use of Zyklon B and an affidavit of a former high ranking German government

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<sup>20</sup> Case nr. 9, *The Zyklon B*, Case trial of Bruno Tesch and two others, British Military Court, Hamburg, 1<sup>st</sup>-8<sup>th</sup> of March 1946, Law Reports of Trials of War Criminals, *selected and prepared by the United Nations War Crimes Commission*, Volume I, page 93

<sup>21</sup> *Supra* note 19, page 93

<sup>22</sup> *Supra* note 19, page 94 and 101

<sup>23</sup> *Supra* note 19, page 94

<sup>24</sup> *Supra* note 19, page 94

<sup>25</sup> *Supra* note 19, page 95

<sup>26</sup> *Supra* note 19, page 95

<sup>27</sup> *Supra* note 19, page 95

official stating that it was common knowledge in 1943 in Germany that gas was being used for killing people.<sup>28</sup>

After the prosecution put forward its evidence, the defence counsels for Tesch denied any knowledge of the defendant regarding the use of Zyklon B to exterminate human beings and maintained that the gas was only used for normal purposes and sold to exterminate vermin.<sup>29</sup> Furthermore, the quantities of the delivery of Zyklon B were quite normal, taking into account the number of people in the concentration camps, and instruction courses on the use of the gas were only held for the purpose of teaching the method to exterminate vermin.<sup>30</sup> Weinbacher's counsel added that Weinbacher had no knowledge of the notes or reports of Tesch and did not have any reason to believe that the Zyklon B was used improperly.<sup>31</sup> Drosihn's counsel underlined that the technician had nothing to do with the business concerning the supply of gas and knew very few of the activities of the business.<sup>32</sup> He further contended that Drosihn did not know at that time of the gassing of human beings and never carried out instruction in concentration camps or for S.S. personnel.<sup>33</sup>

The defence counsels proceeded with presenting evidence, followed by the closing address of both the counsels and prosecution. Finally, the judge advocate summed up the evidence and emphasized that three facts must be proven, namely that Allied nationals were gassed with use of Zyklon B, that this gas was provided by Tesch and Stabenow and that the accused knew that the gas was to be used for the purpose of killing human beings.<sup>34</sup> In continuing his summary, he underlined the real strength of the prosecutions case, namely that "when you realize what kind of a man Dr. Tesch was, it inevitably follows that he must have known every little thing about his business."<sup>35</sup> Furthermore, he drew attention to the fact that both businessmen were very sensitive about the Zyklon B deliveries.<sup>36</sup>

Although no direct evidence was presented that could specifically impute knowledge to Weinbacher about how the gas was used in concentration camps, the judge advocate pointed out that, as with Tesch, the real strength of the case of the prosecution was not the individual direct evidence, but the general atmosphere and conditions of the firm itself.<sup>37</sup> The tribunal subsequently found the two heads of the company guilty and acquitted Drosihn since he was not in a position either to influence the transfer of gas

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<sup>28</sup> *Supra* note 19, page 96

<sup>29</sup> *Supra* note 19, page 96

<sup>30</sup> *Supra* note 19, page 96

<sup>31</sup> *Supra* note 19, page 96 and 97

<sup>32</sup> *Supra* note 19, page 97

<sup>33</sup> *Supra* note 19, page 97

<sup>34</sup> *Supra* note 19, page 101

<sup>35</sup> *Supra* note 19, page 101

<sup>36</sup> *Supra* note 19, page 101

<sup>37</sup> *Supra* note 19, page 102

to Auswitz or to prevent it and therefore even knowledge of the use of the gas could not make him guilty.<sup>38</sup>

## 3.2 Flick trial 39

The Flick trial was the first trial of the post World War Two cases which charged a major industrial actor for war crimes, crimes against humanity and financial support to a criminal organization. Since only natural persons could stand trial, Friedrich Flick, as active head of a large group of industrial enterprises, together with five other influential assistants were accused of the charges. The Flick concern was engaged in mining coal and iron, making steel and building machinery and other related products and employed at least 120.000 persons. Flick always had been a supporter of individual enterprises and it was his policy once a company came under his voting domination, to leave in charge the management which had proved its worth.<sup>40</sup> Therefore most companies were fairly autonomous and there were no central buying, selling or accounting agencies. The five other defendants were Steinbrinck, Flick's chief assistant, Weiss, Burkart and Kaletsch, three supervisors of the three main industries of the Flick concern, and Terberger, a local administrator. Flick was found guilty for spoliation of public and private property in occupied territories and for financial support to the S.S.. Both Flick, and Weiss were furthermore found guilty of war crimes, concerning the employment of slave labour and prisoners of war. Steinbrick was found guilty for financial support of and membership in the Schutzstaffeln. The other three defendants were acquitted.

The evidence relating to the employment of slave labour clearly indicated that the German slave-labour program had its origin in Reich Governmental circles and the employment of such labour in German industry had been directed and implemented by the Reich Government.<sup>41</sup> Labourers procured under Reich regulations were shown to have been employed in some of the plants of the Flick concern and in some of the enterprises prisoners of war were engaged in war work.<sup>42</sup> The accused had no control of the administration of this labour supply, even when it affected their own plants.<sup>43</sup> Furthermore, the evacuation by the S.S. of sick concentration camp labourers from the labour camp at the Groeditz plant for the purposes of liquidating them, was done despite the efforts of the plant manager to frustrate the perpetration of the atrocity and illustrated the extent and

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<sup>38</sup> *Supra* note 19, page 102

<sup>39</sup> *The Flick Trial*, Trial of Friedrich Flick and five others, United States Military Tribunal, Nuremberg, 20<sup>th</sup> April – 22<sup>nd</sup> December, 1947, Law Reports of Trials of War Criminals, *selected and prepared by the United Nations War Crimes Commission*, Volume IX, Case No. 48

<sup>40</sup> *Supra* note 38, page 6

<sup>41</sup> *Supra* note 38, page 7

<sup>42</sup> *Supra* note 38, page 7

<sup>43</sup> *Supra* note 38, page 7

supremacy of the control of the Schutzstaffeln.<sup>44</sup> The evidence established that the four accused, that were subsequently acquitted, were not desirous of employing foreign labour or prisoners of war. However, they were conscious of the fact that it was both futile and dangerous to object the allocation of such labour.<sup>45</sup> With regard to Flick and Weiss the judges came to another conclusion. They found that because of the active steps taken by Weiss with the knowledge and approval of Flick to increase the production quota of freight cars and Weiss's part in the procurement of a large number of Russian prisoners of war for work in the manufacture of such cars, these defendants were guilty of complicity in war crimes.<sup>46</sup>

With regard to financial support to the S.S., which was adjudged as a criminal organisation by the International Military Tribunal in Nuremberg, both Flick and Steinbrick were convicted for paying donations through companies they possessed or had control over. The two accused were members of a group known as the "Friends of Himmler" or "Keppler Circle", an organisation that was composed of some 30 business leaders and a number of the most important S.S. leaders.<sup>47</sup> The members of the circle represented Germany's largest enterprises and contributed about a million marks each year from 1933 to 1945.<sup>48</sup> The contributions began long before the war at a time when the criminal activities of the S.S., if they had begun, were not generally known.<sup>49</sup> However, the evidence showed that the contributions continued after the criminal activities of the S.S. must have been commonly known.<sup>50</sup> The judgment therefore states: "One who knowingly by his influence and money contributes to the support thereof must, under settled legal principles, be deemed to, if not a principal, certainly an accessory to such crimes".<sup>51</sup> According to the judges, the fact that the S.S. was not declared criminal at that time was therefore not relevant. Steinbrick was furthermore charged with being a member of the Schutzstaffeln. The tribunal in finding him guilty thereby noted that knowledge of the criminal activities of the S.S. was widespread; it continued that "we cannot believe that a man of Steinbrick's intelligence and means of acquiring information could have remained wholly ignorant of the character of the S.S.". <sup>52</sup> Question marks can be raised whether his membership was in the capacity of a major industrialist or in a purely personal or individual capacity. The tribunal, however, considered the counts relating to both the donations and the membership together, which implies that they should be seen as related to each other and therefore related to a business setting.

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<sup>44</sup> *Supra* note 38, page 7

<sup>45</sup> *Supra* note 38, page 7

<sup>46</sup> *Supra* note 38, page 21

<sup>47</sup> *Supra* note 38, page 5

<sup>48</sup> *Supra* note 38, page 5

<sup>49</sup> *Supra* note 38, page 15

<sup>50</sup> *Supra* note 38, page 15

<sup>51</sup> *Supra* note 38, page 29

<sup>52</sup> *Supra* note 38, page 29

### 3.3 IG Farben 53

The multinational IG Farben was one of Germany's largest corporations with over 180.000 employees and having an interest in 400 German firms and 500 firms in other countries. Carl Krauch and twenty two other officials were indicted for "acting through the instrumentality of Farben and otherwise" thereby committing crimes against peace, war crimes and crimes against humanity during the war and before.<sup>54</sup>

With respect to the charges of the first and the fifth count, the evidence presented by the prosecution was the same. The first count alleged the participation in the planning, preparation, initiation and waging of aggressive wars through the instrumentality of Farben. All the defendants held high positions in the financial, industrial and economic life of Germany and were alleged to have committed these crimes by being principals in, accessories to, ordered, abetted, took a consenting part in, were connected with the plans and enterprises involving, and were members of organisations or groups, including Farben, which were connected with commission the said crimes.<sup>55</sup> The fifth count charged the defendants with participation as leaders, organisers, instigators and accomplices in the formulation and execution of a common plan or conspiracy to commit, or which involved the commitment of crimes against the peace.<sup>56</sup>

The prosecution attempted to establish that some time before the outbreak of the war there existed in Germany common knowledge of Hitler's intention to wage an aggressive war.<sup>57</sup> This, however, was rebutted in the judgment. Therefore, the question arose whether the accused possessed personal knowledge of the criminal intentions of the German government and, if so, were parties to the plan or conspiracy, or, knowing of the plan, furthered its purpose and objective by participating in the preparation of the war.<sup>58</sup> All the accused were acquitted for different reasons namely lack of direct participation, connection to or involvement in the crime, knowledge of the policies, or being a dominant or leading figure.<sup>59</sup> Furthermore the judges referred to the cautious approach to establish guilt of any defendant under the mentioned charges that the International Military Tribunal at Nuremberg (IMT) used. According to the IMT's judgments, guilt could only be established "where the evidence of both knowledge and active participation was conclusive."<sup>60</sup> The Farben judgment furthermore gives guidance on

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<sup>53</sup> *The I.G. Farben Trial*, Trial of Carl Krauch and twenty-two others, United States Military Tribunal, Nuremberg, 14<sup>th</sup> August, 1947-29<sup>th</sup> July, 1948, Law Reports of Trials of War Criminals, *selected and prepared by the United Nations War Crimes Commission*, Volume X, case no. 57

<sup>54</sup> *Supra* note 52, page 1

<sup>55</sup> *Supra* note 52, page 3

<sup>56</sup> *Supra* note 52, page 5

<sup>57</sup> *Supra* note 52, page 14

<sup>58</sup> *Supra* note 52, page 16

<sup>59</sup> *Supra* note 52, page 30-34

<sup>60</sup> *Supra* note 52, page 34

how to establish this evidence by stating that “the solution of this problem requires a consideration of basic facts disclosed by the record. These facts include the positions, if any, held by the defendants with the state and their authority, responsibility, and activities thereunder, as well as their positions and activities with or on behalf of Farben.”<sup>61</sup> With regard to the fifth count, the judgment reads “since none of the defendants participated in the planning or knowingly participated in the preparation and initiation or waging of a war or wars of aggression or invasions of other countries, it follows that they are not guilty of the charge of being parties to a common plan or conspiracy to do these same things.”<sup>62</sup>

Under the third count the defendants were charged with the supply of Zyklon B, used for the extermination of inmates of concentration camps, the supply of Farben drugs for medical experimentation upon concentration camp inmates and participation in the slave labour program.

Regarding the supply of poison gas, the defendants were found not guilty. The judgment is very short on this account and merely states that the evidence falls short of establishing the guilt of any of the defendants for the supply and use of the gasses.<sup>63</sup> The property rights of Zyklon B belonged to a firm commonly referred to as Degussa, although the actual manufacture of the gas was performed by two independent concerns.<sup>64</sup> Degussa had for a long time sold the gas through the instrumentality of Degesch. Farben, together with two other firms entered into an agreement whereby it became the sales outlet for insecticides and related products for all three concerns.<sup>65</sup> Farben took 42,5 per cent interest in Degesch and five members of its board were representatives of Farben.<sup>66</sup> However the evidence did not show that the representatives had any persuasive influence on the management policies of Degesch or any significant knowledge as to the uses to which its production was being put.<sup>67</sup> It was clearly established that Zyklon B was supplied by Degesch to the S.S. and that the gas was actually used for exterminating human beings. However the extermination program was kept secret to a large extent, which was shown by one of the testimonies, who negative the assumption that any of the accused had had any knowledge that Zyklon B was improperly used.<sup>68</sup>

For the supply of Farben drugs for criminal medical experimentation upon concentration camp inmates all the defendants were acquitted as well. Evidence showed that healthy inmates were deliberately infected with typhus by the German authorities against their will; subsequently the drugs produced by Farben were administered by way of medical experimentation

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<sup>61</sup> *Supra* note 52, page 35

<sup>62</sup> *Supra* note 52, page 40

<sup>63</sup> *Supra* note 52, page 57

<sup>64</sup> *Supra* note 52, page 24

<sup>65</sup> *Supra* note 52, page 24

<sup>66</sup> *Supra* note 52, page 24

<sup>67</sup> *Supra* note 52, page 24

<sup>68</sup> *Supra* note 52, page 24

as a result of which many of them died.<sup>69</sup> Due to the fear of German officials that typhus would spread to the civilian population, desperate efforts were made to find a remedy to cure or immunise against it.<sup>70</sup> Consequently, an urgent need for finding a way to greatly expand the production and effectiveness of the vaccines arose. Farben had been experimenting with a new vaccine that would greatly expand the amount of vaccinations being produced. However, the new vaccine lacked scientific verification and acceptance by the medical profession and Farben was extremely anxious to win recognition for its product.<sup>71</sup> Therefore, the concern participated in conferences with governmental health agencies and sent samples of the vaccine to recognised physicians, who in turn submitted detailed reports covering their experiences.<sup>72</sup> Although the prosecution alleged that the accused supplied the drug well knowing that concentration camp inmates were being used for medical experimentation against their will, the judges found that the evidence fell short of establishing the guilt of the accused.<sup>73</sup>

The question before the court on the counts relating to slave labour was “whether the accused through the instrumentality of Farben and otherwise embraced, adopted and executed the forced labour policies of the Third Reich, thereby becoming accessories to and taking a consenting part in the commission of war crimes and crimes against humanity.”<sup>74</sup> The evidence discloses that the planning of a new production plant was discussed at a conference in the Reich ministry of Economics. Farben was instructed to choose an appropriate site for this plant and the site at Auschwitz was chosen.<sup>75</sup> Despite conflicting evidence as to the importance of the concentration camp, it seemed clear that while the location near the camp may not have been the determining factor, it was an important one and from the beginning it was planned to use concentration camp labour to supplement the supply of workers.<sup>76</sup> From October 1941 concentration camp inmates, and subsequently other forced workers were employed in the plant.<sup>77</sup> Although Farben did not deliberately pursue or encourage an inhuman policy, it accepted the situation and had actively sought the employment and utilisation of forced labourers while being aware of the sufferings and hardship to which they were exposed.<sup>78</sup> With regard to the mining activities the same remarks were given by the judges. Consequently, the five defendant acting through Farben were found guilty for being connected with these project and for taking an active part in the procurement of forced labour full aware of the hardship and suffering of the forced

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<sup>69</sup> *Supra* note 52, page 24

<sup>70</sup> *Supra* note 52, page 24

<sup>71</sup> *Supra* note 52, page 25

<sup>72</sup> *Supra* note 52, page 25

<sup>73</sup> *Supra* note 52, page 25 and 57

<sup>74</sup> *Supra* note 52, page 25

<sup>75</sup> *Supra* note 52, page 25

<sup>76</sup> *Supra* note 52, page 25

<sup>77</sup> *Supra* note 52, page 26

<sup>78</sup> *Supra* note 52, page 27

labourers.<sup>79</sup> The defence of necessity was not available for them since the evidence showed quite clearly that the accused had willingly and intentionally embraced the opportunity to take full advantage of the slave labour programme and exercised initiative in the procurement of forced labour, prisoners of war and concentration camp inmates.<sup>80</sup>

### 3.4 The Krupp Trial 81

Alfried Felix Alwyn Krupp von Bohlen und Halbach and the eleven other accused were all officials of Fried. Krupp A.G. and its successor Fried. Krupp Essen. The enterprise was founded in 1812, was subsequently transformed into a corporation in 1903 which was succeeded in December 1943 by an unincorporated firm in accordance with a special Hitler degree and from that moment on Alfried became the sole owner of the firm.<sup>82</sup> The Krupp concern was a large enterprise of the Krupp family which owned and controlled directly and through subsidiary holding companies, mines, steel and armament plants, two subsidiary operating companies and a machine factory.<sup>83</sup> Before 1943, Gustav Krupp, Alfried's father, had a very great influence over the company due to his wife's ownership of practically all of the stocks of the concern.<sup>84</sup> Gustav was originally one of the accused before the IMT trial of Goering *et al.* but was found mentally and physically incapable of standing trial and the proceedings in that case relating to him were stayed.<sup>85</sup> A motion of the prosecution to amend the indictment by naming his son as an accused was denied and subsequently Alfried was indicted as one of the twelve accused in this trial.<sup>86</sup>

The accused were charged with crimes against peace, war crimes and crimes against humanity. The judgment relating to the accusations of crimes against peace and crimes involving prisoners of war and slave labour are relevant for this thesis and will be considered.

The defendants were charged under the first count for participating in the waging of aggressive wars and that they "through the high positions they held in the political, financial, industrial and economic life of Germany, committed crimes against peace by having been principals in, accessories to, ordered, abetted, took a consenting part in, were connected with plans and enterprises involving, and were members of organisations and groups, including Krupp, connected with the commission of crimes against

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<sup>79</sup> *Supra* note 52, page 27 and 28

<sup>80</sup> *Supra* note 52, page 28

<sup>81</sup> *The Krupp Trial*, Trial of Alfried Felix Alwyn Krupp von Bohlen und Halbach and eleven others, United States Military Tribunal, Nuremberg, 17<sup>th</sup> November, 1947-30<sup>th</sup> June, 1948, Law Reports of Trials of War Criminals, *selected and prepared by the United Nations War Crimes Commission*, Volume X, case no. 58

<sup>82</sup> *Supra* note 80, page 69

<sup>83</sup> *Supra* note 80, page 78

<sup>84</sup> *Supra* note 80, page 78

<sup>85</sup> *Supra* note 80, page 78

<sup>86</sup> *Supra* note 80, page 78

peace.”<sup>87</sup> The Krupp firm was the principle German manufacturer of large calibre artillery, armour plate and other high quality armaments, the largest private builder of U-boats and warships and the second largest producer of iron and coal in Germany and therefore contributed substantially to the ability of Germany to wage its aggressive wars and continued its distribution even after Germany’s first invasion in 1939.<sup>88</sup> Moreover the high position held by the accused in the political, financial, industrial and economic life of Germany facilitated the co-operation between the activities of the Krupp firm and the German programme for rearmament.<sup>89</sup> Evidence further showed that the restrictions which the Versailles treaty placed upon the armament of Germany and on the Krupp firm had been systematically circumvented and violated by the firm and persistent attempts made to deceive the Allied Control Commissions.<sup>90</sup> Despite this evidence, none of the defendants were held guilty. To be found guilty of participating, playing a consenting part or aiding and abetting aggressive wars the defendants must have done this knowingly.<sup>91</sup> The judgment thereby refers to the IMT that required “actual knowledge” for a guilty verdict.<sup>92</sup> In a fairly lengthy concurring opinion, the presiding judge H.C. Anderson elaborated the required knowledge and guilty mind. He stated that “It is essential therefore to determine whether the proof was sufficient to show that the defendants manufactured and sold armament to the government with the knowledge that the product was going to be used in some invasion or war of aggression against another nation (...) and with the intent to aid in the accomplishment of the criminal purpose of those initiating and waging such conflict.”<sup>93</sup> With regard to establishing the required knowledge he contended that “the requisite knowledge, I think, can be shown either by direct or circumstantial evidence but in any case it must be knowledge of facts and circumstances which would enable the particular individual to determine not only that there was a concrete plan to initiate and wage war, but that the contemplated conflict would be a war of aggression and hence criminal. Such knowledge being shown, it must be further established that the accused participated in the plan with the felonious intent to aid in the accomplishment of the criminal objective.”<sup>94</sup> He subsequently emphasized that “the individual intention is of major importance.”<sup>95</sup>

During the war period, the Krupp concern had used vast amounts of slave labourers and prisoners of war for manning its factories that had to work under severe inhuman conditions. The tribunal determined that in relation to the Geneva and The Hague convention on humanitarian law, “practically every one of the foregoing provisions were violated in the Krupp

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<sup>87</sup> *Supra* note 80, page 71

<sup>88</sup> *Supra* note 80, page 81

<sup>89</sup> *Supra* note 80, pages 81 and 82

<sup>90</sup> *Supra* note 80, page 82

<sup>91</sup> *Supra* note 80, page 106

<sup>92</sup> *Supra* note 80, page 106

<sup>93</sup> *Supra* note 80, page 122

<sup>94</sup> *Supra* note 80, page 123

<sup>95</sup> *Supra* note 80, page 123

enterprises.”<sup>96</sup> Turning to the question of individual responsibility, the Tribunal underlined that guilt must be personal. It thereby stated that “the mere fact without more that a defendant was a member of the Krupp directorate or an official of the firm is not sufficient.”<sup>97</sup> The judges furthermore quoted and adopted an authoritative American text considers that a staff member of a corporation needs personally and actually do the acts that constitute the offence; he is liable where his scienter or authority is established, or where he is the actual present and efficient actor.<sup>98</sup> The tribunal finally noted that the essential facts relating to this guilt, may be shown by both circumstantial and direct evidence and found a number of defendants guilty.<sup>99</sup>

### 3.5 Rasche 100

The defendant in this case, Rasche, was a German banker and was charged with complicity in war crimes and crimes against humanity. The prosecution alleged that he participated in these crimes through the lending of large sums of money to various S.S. enterprises, which employed large numbers of inmates from concentration camps, and to Reich enterprises and agencies that were involved in the forceful replacement of citizens.<sup>101</sup> The court found it unnecessary to recapitulate the evidence that had been presented on earlier occasions about the unlawful nature of these enterprises.<sup>102</sup> It furthermore stated that the evidence did not prove that Rasche was ever a member of any delegation of the Reich Leader S.S. or that the banker had any relationship with Himmler or the S.S.. On Rasche’s advise the Dresdner Bank however did make large annual contributions to a fund that was placed at Himmler’s disposal although there was no evidence that Himmler discussed his illicit policies with Rasche or that the latter knew that any part of the fund was intended to be or was ever used by Himmler for unlawful purposes.<sup>103</sup>

The court admitted that it had more difficulties with the problem of Rasche’s participation in the loans made by the Dresdner Bank to numerous S.S. enterprises that employed slave labour and were involved in the forceful replacement of citizens.<sup>104</sup> It stated that “bankers do not approve or make loans in the number and amount made by the Dresdner Bank without ascertaining, having, or obtaining information or knowledge as to the

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<sup>96</sup> *Supra* note 80, page 141

<sup>97</sup> *Supra* note 80, page 150

<sup>98</sup> *Supra* note 80, page 150

<sup>99</sup> *Supra* note 80, page 150

<sup>100</sup> *United States v. Von Weizsaecker*, Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10, Volume XIV, October 1946 –April 1949, U.S. Government Printing Office, Washington D.C.

<sup>101</sup> *Supra* note 99, page 621

<sup>102</sup> *Supra* note 99, page 621

<sup>103</sup> *Supra* note 99, page 621 and 622

<sup>104</sup> *Supra* note 99, page 622

purpose for which the loan is sought, and how it is to be used.”<sup>105</sup> According to the court it was inconceivable that the defendant did not possess the knowledge of the criminal enterprises and consequently found that he did.<sup>106</sup>

Turning to the question of whether making a loan is a crime, knowingly or having good reasons to believe that the money will be used in financing international crimes, the court answered negatively.<sup>107</sup> By borrowing money, a bank does not become a partner in the enterprise and although loans or sale of goods to be used in an unlawful enterprise may be morally condemned, this does not constitute a crime.<sup>108</sup> The court concluded that the loans did not comprise an international crime and acquitted the defendant on this count.<sup>109</sup>

### 3.6 Analysis

Considering the Nuremberg cases, some lessons can be drawn from its findings. In the *Zyklon B* case knowledge is playing a central issue in the finding of a guilty verdict as well. The judge advocate creatively guided the judges in pointing at circumstantial evidence that quite clearly established the knowledge of the two main defendants of the illicit use of Zyklon B. Another important issue of this judgment is the emphasis on influence and position in a corporation. Drosihn, the gassing technician, was acquitted for complicity since he was not in a position either to influence the transfer of gas to the concentration camp in Auswitz or to prevent it. Even knowledge of the improper use of the gas could not make him guilty. Finally, the court does not seem to go as far as to require the prosecution to prove that the Zyklon B gas that was delivered by Tesch and Stabenow was actually used in the gas chambers. The defendants were charged with “supply of poison gas used for the extermination of allied nationals interned in concentration camps well knowing that the said gas *was to be so used*.”<sup>110</sup> This means that the prosecution does not need to establish the actual use of a chemical weapon as long as it can establish that the supplied agent was to be used as such a weapon.

The tribunal in *Flick* found two defendants guilty for complicity in war crimes regarding the employment of slave labour. The tribunal acquitted four other defendants for this charge since they were not desirous of employing slave labour but knew that it was futile and dangerous to object the government’s slave labour policies. Two other defendants however took active steps or approved this, to employ more labourers. The court draws the line of complicity at this participation. While mere obeying an oppressive

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<sup>105</sup> *Supra* note 99, page 622

<sup>106</sup> *Supra* note 99, page 622

<sup>107</sup> *Supra* note 99, page 622

<sup>108</sup> *Supra* note 99, page 622

<sup>109</sup> *Supra* note 99, page 622

<sup>110</sup> *Supra* note 19, page 93, italics inserted

government's policy does not lead to complicity, steps taken to more extensively make use of this policy does. The same counts for the continuation of voluntary contributions to the S.S. after the criminal activities of this organisation must have been commonly known. With regard to Steinbrick's membership of the S.S., the court found the defendant guilty stating that the criminal activities of this organisation were so widespread that a man of the defendant's intelligence and means of acquiring information could not have remained wholly ignorant to this. In deciding on this issue the court adopted two personally related features in its reasoning, namely the defendant's intelligence and his means of acquiring information. In doing this it went beyond a purely objective test and inferred knowledge from a widespread practise together with personal characteristics and surrounding circumstances. Finally, it should be noted that the court in considering Steinbrick's assistance, refers to supporting the crimes by contributing through influence and money. Consequently, influence is a feature the court attached value to.

In *IG Farben* personal knowledge and participation or active participation are the two requirements for complicity in crimes against the peace. The court noted that there did not exist a common knowledge of the intentions to wage aggressive wars. Furthermore, none of the accused possessed personal knowledge of the intentions and consequently all defendants were found not guilty. In its deliberations, the court gave some relevant guidance with regard to the necessary evidence. It considered that the position of the defendant with the state and his authority, responsibility and activities in it, as well as his position and activities with or on behalf of the corporation. Again influence is found important since position and activities are mentioned in relation to a company.

In acquitting the defendants for complicity in international crimes for the supply of Zyklon B, the tribunal found conclusive that the defendants did not possess any persuasive influence on the management of Degesch and that they did not have any significant knowledge as to the uses its production was being put. This is a reasonable position the court took, since a defendant should only be punished for acts he knew the criminal character of and could influence or prevent. The ruling, however, raises question about some of the presented evidence in the *Zyklon B* case that alleged that the gassing of human beings in concentration camps was common knowledge.

Furthermore, all defendants were acquitted for the supply of Farben drugs for medicinal experimentation upon concentration camp inmates. The court firstly established that German authorities deliberately infected healthy concentration camp inmates with typhus and subsequently the Farben drugs were administered by way of medical experimentation as a result of which many of them died. Although Farben participated in conferences with governmental health agencies and sent samples of vaccines to recognised physicians, the court found not proven that the defendants knew of the experiments.

The court should have elaborated their finding on this issue. In the ruling against Steinbrick in *Flick*, the judges took into consideration the intelligence and means of acquiring information of the defendant. It consequently found that the defendant knew of the criminal activities of the S.S.. In *Rasche* the tribunal found that “bankers do not approve or make loans in the number and amount made by the Dresdner Bank without ascertaining, having, or obtaining information or knowledge as to the purpose for which the loan is sought, and how it is to be used.”<sup>111</sup> It consequently found that it was inconceivable that the defendant did not possess the knowledge of the criminal enterprises.

The medical experimentations on human beings probably were not as widely known as the criminal character of the Schutzstaffeln. However the experimentations already took place in 1939 and increased during the Second World War. By 1943, results of extremely cruel experiments were openly discussed among specialists and published in leading surgical journals.<sup>112</sup> Since Farben was a major player in the pharmaceutical industry and therefore was in the ultimate position to acquire information, would the company not have had the slightest suspicion of the practices of the governmental authorities and certain physicians? And should the firm not have been more cautious in the distribution of its samples?

Regarding the complicity in slave labour, the tribunal found five defendants of Farben guilty. It noted that although the firm did not deliberately pursue or encourage an inhuman policy, it accepted the situation and had actively sought the employment and utilisation of forced labourers. The defendants were found guilty for being connected to the projects that allocated the Farben enterprises near the concentration camps and for active procurement in forced labour.

The *Krupp* judgment firstly reiterates once more the need for knowledge in complicity of international crimes. Although the prosecution proved that the accused substantially contributed to the ability of Germany to wage its aggressive wars and through their high positions in political, financial, industrial and economic life, facilitated the cooperation between the Krupp concern and the German rearmament program, they were not found guilty for participating in crimes against the peace. The judgment refers to the IMT’s requirement of actual knowledge and acquitted the defendants for crimes against the peace. The concurring judge furthermore considered that in order to possess required knowledge and a guilty mind, the evidence must show that the defendants acted with the knowledge that its products were going to be used for a criminal aggressive wars against another nation and that they participated in this criminal enterprise with the felonious intent to aid in the accomplishment of this criminal objective. This is quite a requirement since knowledge of a defendant that he participates in the accomplishment of international crimes through economic transactions

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<sup>111</sup> *Supra* note 99, page 622

<sup>112</sup> George J. Annas and Michael A. Grodin, *The Nazi Doctors and the Nuremberg Code*, Oxford University Press 1992, page 35 and 36

combined with indifference as to whether he actually aids does not make him guilty of complicity. The result of this strict interpretation would be that companies can freely deliver arms to groups or governments that are known to commit international crimes and get away with it.

Secondly, the tribunal in considering the slave labour accusations again underlined the requirement of individual responsibility, by stating that the mere fact that a defendant was a member of the board of directors is not sufficient. In order to be found guilty, a defendant personally and actually needs to perform the acts that constitute the offence; consideration should be made to whether he was present and whether he was an efficient actor.

*Rasche*, finally, offers an interesting example of where courts draw the line negatively in cases of business allegedly aiding and abetting. In this case the defendant was acquitted for his participation in the alleged offences. The court decided that making loans available or selling goods that are to be used in unlawful enterprises, although controversial from a moral point of view, does not amount to an international crime.

Considering the Nuremberg business cases in general, a few conclusions can be drawn as well. First of all most businesses who were tried were major corporations with various managerial, corporate and legal structures, varying from a family enterprise to one of the largest multinational corporations in Germany; they operated in different economic areas and maintained varying relations with the violating government. In assessing the involvement in international crimes the tribunals however did not spend any time to consider these differences. Knowledge, influence and participation seem to be determinative features while the alien character of a major and complex corporation as a defendant did not prove to be a hurdle at all for establishing guilty complicity.

Secondly, the rulings on slave labour established that only active participation in the forced labour policy lead to complicity. Obeying a cruel governmental policy and benefiting from this seems not sufficient for complicity. In this respect the circumstances under the fearsome Nazi regime should be considered, meaning that disobeying the regime's policies was both dangerous and useless.

Finally, the tribunal does not deem necessary a duty on the defendants to acquire information about a suspicious practise. In for example *Flick* and *Rasche*, the court examined whether the defendants possessed knowledge of the criminal activities of the S.S. and its enterprises and concluded that both defendants knew. In its decision in *Rasche* the tribunal considered that bankers do not make loans available involving large sums of money without investigating the purpose of it, while in *Flick* the court derived the required knowledge from the defendant's intelligence and means of acquiring information. This clever way of deriving knowledge from personal characteristics and surrounding circumstances however does not mention any duty of the defendants to investigate in a certain matter. Thus if the

tribunal had conferred the defendants such a duty, it had not be required to infer knowledge from the circumstantial evidence.

## 4 International Criminal Law

In the following chapter, aiding and abetting according to contemporary international law will be given. The purpose of this is to give the most authoritative standard of aiding and abetting in international criminal law and demonstrate how this standard is interpreted by international tribunals in case law. After a quick introduction in the terminology of aiding and abetting, the standard of aiding and abetting will be considered according to international instruments, followed by four cases of the ICTY and ICTR. In the analysis, both the instruments and case law will be critically evaluated.

The two ad hoc tribunals in Arusha and The Hague are the most authoritative tribunals before the ICC was established. The tribunals were created by the Security Council under chapter 7 of the Charter of the United Nations; therefore all United Nations members are obliged to cooperate with the tribunals.<sup>113</sup> This gives the rulings of the tribunals a very authoritative meaning. Furthermore the international character of the tribunals with international judges and prosecutors shows the cooperation with and acceptance of the two courts by the international community. The ICTY demonstrated this in its judgment in that it considered itself the first truly international tribunal to be established by the United Nations to hold individuals criminally responsible under international humanitarian law.<sup>114</sup> It added that although the Nuremberg and Tokyo tribunals had already been established, these tribunals were multinational in nature but represented only part of the world community.<sup>115</sup> Turning to the two most prestigious tribunals to consider the most authoritative case law on aiding and abetting therefore makes sense. The judgments of the ICC would have been the ultimate touchstones to analyse aiding and abetting in contemporary international criminal law. The court has however not delivered a judgment on this topic yet.

Under international criminal law, complicity has materialised into two separate categories namely co-perpetration or common criminal design and aiding and abetting.<sup>116</sup> Co-perpetration or common criminal enterprise requires a plurality of persons participating in a common plan, design of purpose that amounts to, or involves the commission of a crime.<sup>117</sup> The common purpose is thereby not linked to causation and thus it is not necessary that without the participation of an accused, the offence would not have been committed.<sup>118</sup> The subjective elements of this mode of participation vary from intent to commit certain crimes, to personal knowledge of the nature of a system of ill-treatment combined with intent to

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<sup>113</sup> Kriangsak Kittichaisaree, *International Criminal Law*, Oxford, 2001, Page 26

<sup>114</sup> *Supra* note 112, page 24

<sup>115</sup> *Supra* note 112, page 24, referring to: *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-T, ICTY T. Ch. II, 7 May 1997, para. 1

<sup>116</sup> *Supra* note 112, page 237

<sup>117</sup> *Supra* note 112, page 238

<sup>118</sup> *Supra* note 112, page 238

further this system or a foreseeable consequence of the implementation of the common criminal purpose combined with the accused willingly taking that foreseeable risk.<sup>119</sup> Aiding and abetting means giving assistance to someone or facilitating the commission of a crime by being sympathetic, including giving exhortation or encouragement.<sup>120</sup> The actus reus of aiding and abetting requires practical assistance, encouragement, or moral support, which has substantial effect on the perpetration of the crime.<sup>121</sup> The mens rea of this mode of complicity is knowledge that the accused's act assist the commission of the offence of the principle, while sharing the same intention as the principal perpetrator is not necessary.<sup>122</sup>

In considering complicity in international criminal law, the focus will be on aiding and abetting and co-perpetration or participating in a joint criminal enterprise will be covered to distinguish between this form of complicity and aiding and abetting.

## 4.1 Aiding and abetting according to international instruments

As early as 1907, the Hague Land War Convention already contained provisions in which individuals could be held individually responsible for violations of the treaty.<sup>123</sup> Regarding participation, states were authorised, but not obliged, to penalize co-responsibility of individuals according to article 50 of the convention.<sup>124</sup> The complicity provisions developed in the Nuremberg and Tokyo IMT Charters and article six, which has been cited earlier, listed the various forms of participation.<sup>125</sup> The ILC further elaborated complicity in its *Seven Nurnberg Principles* in 1950 stating that “complicity in the commission of a crime against peace, a war crime, or a crime against humanity (...) is a crime under international law.”<sup>126</sup> In 1991 the ILC for the first time clearly distinguished between the different forms of individual criminal responsibility in its Draft Code of Crimes against the Peace and Security of Mankind however without describing the different forms of commission nor clarifying the required degree of participation.<sup>127</sup> The 1991 draft was followed by the draft code of 1996, which clarified the notion of

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<sup>119</sup> *Supra* note 112, pages 238-240

<sup>120</sup> *Supra* note 112, page 241

<sup>121</sup> *Supra* note 112, page 241, referring to *Furundzija*

<sup>122</sup> *Supra* note 112, page 244

<sup>123</sup> Albin Eser in: *The Rome Statute of the International Criminal Court: a commentary*, edited by Antonio Cassese, Paola Gaeta and John R.W.D. Jones, Oxford, 2002, Page 784

<sup>124</sup> *Supra* note 122, page 784

<sup>125</sup> *Supra* note 122, page 784

<sup>126</sup> Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, *Yearbook of the International Law Commission, 1950*, vol. II, Para. 97

<sup>127</sup> *Supra* note 122, page. 785, referring to Draft Code of Crimes against the Peace and Security of Mankind (1991/96)

complicity to some extent by requiring in order to punish a person for aiding, abetting or otherwise assisting, that a crime had in fact been committed.<sup>128</sup>

In response to the atrocities committed in the former Yugoslavia, the Security Council (SC) of the UN, acting under its chapter VII mandate of the UN Charter, labelled the situation in this area as a threat to the peace. Subsequently it established through SC resolution 827 of 25 May 1993 an international criminal tribunal to try the perpetrators of genocide, war crimes and crimes against humanity in the territory of the former Yugoslavia to restore and maintain peace in the former Yugoslavia.<sup>129</sup> The statute of the tribunal was adopted by the Security Council following a report of the UN Secretary-General on 3 May 1993.<sup>130</sup> The tribunal has its seat in The Hague, the Netherlands, and consists of international judges elected by the UN General Assembly and an international prosecutor, elected by the Security Council on nomination by the UN Secretary-General.<sup>131</sup>

The ICTR was set up similarly to the ICTY, namely by a Security Council resolution, resolution 955 of 8 November 1994, responding to the genocide and other systematic and widespread and flagrant violations of international humanitarian law that had been committed in Rwanda in 1994.<sup>132</sup> The tribunal is located in Arusha, Tanzania, and shares except for a few provisions, the same statute as the ICTY. The prosecutor of the ICTY furthermore serves also as the prosecutor of the ICTR and judges of the appeals chamber of the ICTY also sit as judges in the appeals chamber of the ICTR.<sup>133</sup> Two judges of the ICTR are however appointed as members of the appeals chamber of the ICTY to ensure consistency in the application of the law.<sup>134</sup>

Turning to aiding and abetting again, both the statute of the ICTY and ICTR do not elaborate the meaning of accomplice liability and merely mention persons who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in the statute.<sup>135</sup> The two tribunals have however explained the meaning of these articles in its case law, which will subsequently be considered.

Article 25 of the Rome Statute is probably the most authoritative provision on complicity that can be found in an international text with 139 signatory states and 105 ratifying states from various parts of the world. This article

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<sup>128</sup> *Supra* note 122, page 785

<sup>129</sup> *Supra* note 112, page 22, referring to: UN Doc. S/RES/808 (1993); UN Doc. S/RES/827 (1993)

<sup>130</sup> *Supra* note 112, page 22, referring to: Report of the Secretary-General pursuant to para. 2 of Security Council Res. 808 (1993) and Annex thereto, UN Doc. S/25704

<sup>131</sup> *Supra* note 112, page 23

<sup>132</sup> *Supra* note 112, page 24

<sup>133</sup> *Supra* note 112, page 24 and 26

<sup>134</sup> *Supra* note 112, page 26

<sup>135</sup> Article 7 ICTY Statute and article 6 ICTR Statute

establishes individual criminal responsibility of natural persons and criminalizes for the purpose of facilitating the commission of a crime from the statute, someone who “aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission.”<sup>136</sup> Article 25 is the only elaboration on the notion of aiding and abetting, although article 30 ICC Statute adds some general remarks to the necessary mental element of the listed crimes. The first provision in this article states that “unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the court only if the material elements are committed with *intent and knowledge*.”<sup>137</sup> The exception to this rule, which has been explicitly rendered in the statute, is the provision relating to command responsibility. Regarding this responsibility of commanders and other superiors, the statute holds that a superior is held criminally liable in case a crime of crimes are committed by forces under his effective control in case he “either knew or, owing to the circumstances at the time, *should have known* that the forces were committing or about to commit such crimes.”<sup>138</sup> Apparently the lawmakers of the text have chosen to only exclude command responsibility from the requirement in article 30 and not any form of complicity, which means that the standard for aiding and abetting is a subjective one. Furthermore this article seems to imply that an accessory’s mental state needs to exceed mere knowledge and require intention to commit a crime.

Save for a few findings regarding the standard used in contemporary international law, these documents do not clearly explain the exact boundaries of the standard of aiding and abetting nor its practical implementation. Therefore it benefits to consider the actual implementation of the aiding and abetting provisions laid down in the international criminal statutes. The landmark cases covering this topic stem from the two ad hoc tribunals in The Hague and Arusha and will be given below.

## 4.2 Furundzija 139

The accused, Anto Furundzija, was a local commander of a special unit within the armed forces of the Croatian Defense Council called the “Jokers”.<sup>140</sup> Furundzija questioned on or about 15 May 1993 a female Muslim civilian, apparently trying to obtain a list of names and information about the activities of her sons.<sup>141</sup> During the questioning, which took place in the presence of a large number of soldiers, the defendant’s associate

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<sup>136</sup> Article 25(3)(c) ICC Statute

<sup>137</sup> Article 30(1) ICC Statute (*italics inserted*)

<sup>138</sup> Article 28(a)(i) ICC Statute (*italics inserted*)

<sup>139</sup> ICTY, Judgment, *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T, 10 December 1998

<sup>140</sup> William Schabas, *Annotated Leading Cases of International Criminal Tribunals, Volume III: the International Criminal Tribunal for the Former Yugoslavia 1997-1999*, Andre Klip and Goran Sluiter (eds), page 753

<sup>141</sup> *Supra* note 139, page 753

forced the woman to undress and then rubbed a knife against her inner thigh and lower stomach, threatening to put it inside her vagina if she would not tell the truth.<sup>142</sup> Subsequently the woman was taken to another room where Furundzija continued to interrogate her, as well as a male captive who had already been badly beaten.<sup>143</sup> While this was going on, Furundzija's partner beat both individuals on the feet with a baton, then forced the woman to have oral and vaginal intercourse with him and to lick his penis clean when it was over.<sup>144</sup> Furundzija was present and did nothing to stop the sexual assault.<sup>145</sup> Therefore, he was charged with complicity in war crimes, namely torture and outrages upon personal dignity including rape, being maintained in a state of forced nudity and humiliation of personal and sexual integrity.<sup>146</sup>

In defining aiding and abetting, the tribunal stated that it would examine customary international law to establish its meaning since no treaty law on this subject exists.<sup>147</sup> In considering the requirements of the offence, the tribunal maintained a clear distinction between the *actus reus*, or objective element of the crime, and *mens rea*, or subjective element of the crime.

With regard to the *actus reus* element, the judges compared international case law mainly from the German post second world war tribunals, to consider both the nature of assistance and the effects of assistance on the act of the principal. Furthermore two international instruments were used to cover the *actus reus*, namely the 1996 Draft Code of Crimes Against the Peace and Security of Mankind adopted by the International Law Commission (ILC) and the 1998 Rome Statute, at the time of the judgment a non-binding instrument since it had not entered into force yet.

Regarding the nature of assistance, the tribunal noted that the German cases suggest that the assistance given by an accomplice need not be tangible and can consist of moral support in certain circumstances.<sup>148</sup> It continued, that although any spectator can be said to be an encouraging spectator, the spectator in the German cases was only found to be complicit if his status was such that his presence had a significant legitimising or encouraging effect on the principals.<sup>149</sup> According to the judges this finding was supported by the ILC's draft code.<sup>150</sup> Regarding the effect of the assistance given to the principal, the tribunal stated that "none of the cases above suggests that the acts of the accomplice need bear a causal relationship to, or be a *condition sine qua non* for, those of the principal."<sup>151</sup> It furthermore found that two German cases suggested "that the relationship between the

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<sup>142</sup> *Supra* note 139, page 753

<sup>143</sup> *Supra* note 139, page 753

<sup>144</sup> *Supra* note 139, page 753

<sup>145</sup> *Supra* note 139, page 753

<sup>146</sup> *Supra* note 139, page 754

<sup>147</sup> *Supra* note 138, par. 191

<sup>148</sup> *Supra* note 138, par. 232

<sup>149</sup> *Supra* note 138, par. 232

<sup>150</sup> *Supra* note 138, par. 232

<sup>151</sup> *Supra* note 138, par. 233

acts of the accomplice and of the principal must be such that the acts of the accomplice make a significant difference to the commission of the criminal act by the principal.”<sup>152</sup> Possessing a role in a system without influence would therefore not be enough to establish criminal responsibility.<sup>153</sup> The tribunal finally concluded that the assistance must have a substantial effect on the commission of the crime and held that “the actus reus of aiding and abetting in international criminal law requires practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime.”<sup>154</sup>

Regarding the mens rea requirement, the tribunal needed to decide whether the accomplice has to share the mens rea of the principal or whether mere knowledge that his actions assist the perpetrator in the commission of a crime suffices to constitute the mens rea in aiding and abetting.<sup>155</sup> As with the actus reus, the German cases as well as the ILC’s draft and the Rome Statute were examined. From this study the judges concluded that an accomplice is not required to share the mens rea of the perpetrator, in the sense of positive intention to commit the crime.<sup>156</sup> The tribunal further concluded, deriving from the German cases, that the clear requirement of the vast majority of these cases “is for the accomplice to have knowledge that his actions will assist the perpetrator in the commission of the crime.”<sup>157</sup> It derived this finding particularly from cases in which persons were convicted for having driven victims and executioners to the site of an execution.<sup>158</sup> The tribunal noted that “if it were not proven that a driver would reasonably have known that the purpose of the trip was an unlawful execution, he would be acquitted.”<sup>159</sup> Furthermore, it is not necessary that the aider and abettor “should know the precise crime that was intended and which in the end was committed. If he is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abettor.”<sup>160</sup> After addressing the ILC’s draft and the *Tadic* judgment, the judges covered two German cases that are decided out of line with the current findings of the court. The tribunal finally concluded that the legal ingredients of aiding and abetting in international criminal law consist of practical assistance, encouragement, or moral support, which has a substantial effect on the perpetration of the crime, combined with the knowledge that these acts assist the commission of the offence.<sup>161</sup>

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<sup>152</sup> *Supra* note 138, par. 233

<sup>153</sup> *Supra* note 138, par. 233

<sup>154</sup> *Supra* note 138, par. 234 and 235

<sup>155</sup> *Supra* note 138, par. 236

<sup>156</sup> *Supra* note 138, par. 245

<sup>157</sup> *Supra* note 138, par. 245

<sup>158</sup> *Supra* note 138, par. 245

<sup>159</sup> *Supra* note 138, par. 245

<sup>160</sup> *Supra* note 138, par. 246

<sup>161</sup> *Supra* note 138, par. 249

## 4.3 Aleksovski 162

Zlatko Aleksovski was the prison warden of Kaonik prison and was prosecuted for acts occurring in this prison between January and May 1993.<sup>163</sup> The Kaonik prison was used by the HVO (the military units of the Bosnian Croats) to detain prisoners including Muslims.<sup>164</sup> Aleksovski was prosecuted and convicted in first instance for failure to take measures to prevent psychological abuse and physical mistreatment of the detainees or failure to punish the guards responsible for such acts, while he had the authority to do so.<sup>165</sup> Furthermore, he was convicted for failure to take measures incumbent upon and available to him to address the poor conditions in the prison with regard to sanity conditions, space and heating and aiding and abetting in the use of detainees for trench digging for the HVO at or near front lines between the HVO and the army of Bosnia and Herzegovina and use them as human shields in order to ensure the surrender of predominantly Muslim inhabited villages.<sup>166</sup> The trial chamber however found that it had not been proven that the defendant “participated directly” in the mistreatment of the prisoners by the HVO soldiers outside the prison, arguing that this was not claimed by the prosecution and therefore he was not individually responsible for that mistreatment.<sup>167</sup> The prosecution appealed this decision arguing that the defendant had aided and abetted in the unlawful treatment of the Bosnian Muslim detainees, which included their treatment outside the prison.<sup>168</sup> It alleged that the evidence established that Aleksovski was aware of the mistreatment of the prisoners outside the prison and that therefore he must be held individually responsible for that mistreatment as an aider and abettor.<sup>169</sup>

In first instance, the trial chamber presumed that the prosecution had not charged the defendant with aiding and abetting crimes committed by the HVO soldiers outside the prison and therefore did not consider this matter. The defendant was therefore held guilty for other offences, but not for aiding and abetting. This was the very reason the prosecution appealed this part of the judgment.

After the submissions of the party, the appeal’s chamber continued with stating that the *Furundzija* judgment had extensively considered the issue of aiding and abetting. It subsequently gave the *Tadic* judgment to differentiate between aiding and abetting and a joint criminal enterprise and noted that the trial chamber in the present case had relied upon the *Furundzija*

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<sup>162</sup> ICTY, Judgment, *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, 24 March 2000

<sup>163</sup> Andre Nollkaemper and Liesbeth Zegveld, *Annotated Leading Cases of International Criminal Tribunals, Volume IV: the International Criminal Tribunal for the Former Yugoslavia 1999-2000*, Andre Klip and Goran Sluiter (eds), page 411

<sup>164</sup> *Supra* note 162, page 411

<sup>165</sup> *Supra* note 162, page 411

<sup>166</sup> *Supra* note 162, page 411

<sup>167</sup> *Supra* note 161, par. 157

<sup>168</sup> *Supra* note 161, par. 158

<sup>169</sup> *Supra* note 161, par. 159

judgment. The tribunal continued with giving evidence that established the defendant's awareness of the mistreatment of the detainees by the HVO. This awareness could be derived from the nature of the prisoner's injuries seen by Aleksovski and the fact that he joined a detainee, who had been beaten, to the doctor, stating that the detainee should tell the truth about the cause of his injuries. The tribunal concluded therefore "that the Appellant (Aleksovski) was aware that the prisoners were being mistreated by the HVO soldiers on a recurring basis over a period of time (without specifying the precise nature of that mistreatment), yet with that awareness he continued to participate in sending the prisoners out to work under those soldiers and (having responsibility for the welfare of the prisoners) he failed to take measures open to him to stop them from going out to work in such conditions."<sup>170</sup> The trial chamber had not adopted this conclusion for two reasons, namely for lack of the defendant's direct authority over the main perpetrators and for lack of direct participation in the mistreatment of the prisoners.<sup>171</sup> The appeals chamber rejected this view and agreed with the above-mentioned conclusion that Aleksovski was individually responsible for the mistreatment by the HVO soldiers outside the prison by way of having aiding and abetted in it.<sup>172</sup>

## 4.4 Tadic 173

In *Tadic*, the appeals chamber of the ICTY distinguished between acting in pursuance of a common purpose or design to commit a crime, or joint criminal enterprise, and aiding and abetting. The facts of this case or not very relevant for the distinction and therefore only the conclusions with regard to this differentiation will be given.

The tribunal gave four differentiations between the two categories. First of all, the aider and abettor is always an accessory to a crime perpetrated by another person, the principal.<sup>174</sup> Secondly, in the case of aiding and abetting, no proof is required of the existence of a common concerted plan, let alone of the pre-existence of such a plan; no plan or agreement is required and therefore the principal may not even know about the accomplice's contribution.<sup>175</sup> Thirdly, the aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime, and this support has a substantial effect upon the perpetration of the crime.<sup>176</sup> By contrast, in the case of acting in pursuance of a common purpose or design, it is sufficient for the participant to perform acts that in some way are directed to the furthering of

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<sup>170</sup> *Supra* note 161, par. 169

<sup>171</sup> *Supra* note 161, par. 170

<sup>172</sup> *Supra* note 161, par. 172

<sup>173</sup> ICTY, Judgment, *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, 15 July 1999

<sup>174</sup> *Supra* note 172, par. 229

<sup>175</sup> *Supra* note 172, par. 229

<sup>176</sup> *Supra* note 172, par. 229

the common plan or purpose.<sup>177</sup> Fourthly, the mental element required in the case of aiding and abetting is knowledge that the acts performed by the aider and abettor assist the commission of a specific crime by the principal.<sup>178</sup> In the case of acting in pursuance of a common purpose or design, more is required, namely either intent to perpetrate the crime or intent to pursue the common criminal design plus foresight that those crimes outside the criminal purpose were likely to be committed.<sup>179</sup>

## 4.5 Akayesu 180

Jean-Paul Akayesu was a former schoolteacher and mayor or ‘bourgmestre’ of Taba commune, a town near to the capital of Rwanda, Kigali.<sup>181</sup> The findings of the tribunal established that over 2000 Tutsi were killed in the Taba commune.<sup>182</sup> Akayesu was charged and convicted for active participation in the massacres, tolerating, ordering and in some cases directly engaging in killings, beatings and rapes.<sup>183</sup> The passages that are relevant for this thesis are the elaborations by the tribunal of the charge on complicity in genocide.

Genocide distinguished itself from war crimes and crimes against humanity in that it requires a special intent to destroy, in whole or in part, a national, ethnical, racial or religious group. The criminal acts that would constitute serious human rights violations therefore need to be accompanied with this special intent.

In covering the crime of complicity in genocide, the Rwanda tribunal first gave the applicable sources of law, referring to both international and national criminal law standards. It then continued with the actus reus of the crime, comparing most criminal civil law systems and the Rwandan Penal Code system and concluded that complicity under the statute of the tribunal consists of three modes of participation, namely procuring means, such as weapons, instruments or any other means, aiding and abetting and instigation. It furthermore noted, that complicity by aiding and abetting implies a positive action, which excludes complicity by failure to act or omission.<sup>184</sup>

Regarding the mental element or mens rea of complicity in genocide, the accomplice does not need to possess the special intent of genocide to be held

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<sup>177</sup> *Supra* note 172, par. 229

<sup>178</sup> *Supra* note 172, par. 229

<sup>179</sup> *Supra* note 172, par. 229

<sup>180</sup> ICTR, Judgment, *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, 2 September 1998

<sup>181</sup> William Schabas, *Annotated leading cases of International Tribunals, Volume II: The International Criminal Tribunal for Rwanda 1994-1999*, Andre Klip and Göran Sluiter (eds), page 539

<sup>182</sup> *Supra* note 180, page 539

<sup>183</sup> *Supra* note 180, page 539

<sup>184</sup> *Supra* note 179, par. 536

complicit in this crime; the tribunal in this regard stated that “if the accused knowingly aided and abetted (...) while he knew or had reason to know that the principal was acting with a genocidal intent, the accused would be an accomplice to genocide, even though he did not share the murderer’s intent to destroy the group.”<sup>185</sup> The tribunal in this respect quoted an English case that established that indifference to the result of a crime does not of itself negate abetting and referred to the case of Adolf Eichman before the Supreme Court of Israel to emphasize the strength of its finding.<sup>186</sup> The tribunal concluded that an “accused is liable as an accomplice to genocide if he knowingly aided or abetted or instigated one or more persons in the commission of genocide, while knowing that such a person or persons were committing genocide, even though the accused himself did not have the specific intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.”<sup>187</sup> Finally, the chamber addressed the difference between complicity under article 2(3)(e) of the Statute of the ICTR and planning, instigating, ordering, committing or otherwise aiding and abetting genocide under the articles 2 to 4 of the Statute. While a person accused of aiding and abetting, planning, preparing or executing genocide must act with a genocidal intent, no such requirement needs to be proven for establishing complicity in genocide.<sup>188</sup> Complicity in genocide furthermore requires a positive act while aiding and abetting may consist of failing to act or refraining from action.<sup>189</sup> In elaborating this puzzling differentiation, the tribunal referred to an English case, two French cases and the Tadic judgment in first instance.<sup>190</sup>

## 4.6 Analysis

The recent Rome statute seems to establish intent and knowledge for a finding of aiding and abetting. Although the article on complicity is silent on this subject, this finding can be derived from article 25 in conjunction with article 30 of the Statute. A certain hesitation is required in reaching this conclusion since the ICC has not yet considered this provision and therefore it is yet to be seen how the court will assess aiding and abetting and how it will interpret the knowledge and intent requirement in article 30. A stronger argument that can be implied from the statute is that the knowledge required for mens rea in complicity cases will be a subjective standard, or in other words a defendant’s personal knowledge. Since article 25 expressly refers to knowledge and the provision in article 30 relating to command responsibility the only explicit exception to this rule is, aiding and abetting seems to require actual and personal knowledge.

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<sup>185</sup> *Supra* note 179, par. 541

<sup>186</sup> *Supra* note 179, par. 539, 542 and 543

<sup>187</sup> *Supra* note 179, par. 545

<sup>188</sup> *Supra* note 179, par. 547

<sup>189</sup> *Supra* note 179, par. 548

<sup>190</sup> *Supra* note 179, par. 548

The judgments of the two ad hoc tribunals elaborate the meaning of aiding and abetting in international law and delineate its application. In *Furundzija*, the tribunal decided on the case using international customary law. The moment the tribunal bowed its head over the case, the Rome statute had not entered into force yet and therefore no existing binding treaty provisions existed at that time. In the judgment the tribunal however did cover the Rome Statute and this, together with building upon judicial precedents from the IMT tribunals and drafts of the ILC, gives the ruling a very authoritative legal value. In *Furundzija* the tribunal decided in a nutshell that with regard to the actus reus for aiding and abetting assistance need not be tangible and can consist of moral support in certain circumstances; the status of the accomplice needs to be such, that his presence had a significant legitimising or encouraging effect on the principal. Furthermore no causal relationship between the accomplice and principal is necessary; the necessary element is that the acts of the accomplice make a significant difference to the commission of the crime. In other words, the assistance must have a substantial effect on the commission of the crime.

Regarding the mens rea, the ICTY ruled that knowledge of the accomplice that his actions assist the perpetrator is sufficient for a finding of aiding and abetting. In this connection the tribunal used an argument referring to a driver that “would reasonably have known” of the unlawful character of a criminal undertaking. This implies an objective element, used by the court in establishing mens rea, consequently going beyond mere personal knowledge. Furthermore, no knowledge of the precise crime is required as long as the defendant was aware that a number of crimes will probably be committed, and one of those crimes in fact was committed. This might open the door to a rather wide use of complicity since the reference to “probably committed” allows for a wide range of crimes that come within its ambit.

In *Aleksovski* the tribunal applied the *Furundzija* judgment to the case and therefore hardly any time was spent to elaborate the legal standing of aiding and abetting in international law. The prison warden of the Kaonik prison was charged and found guilty for failure to prevent the mistreatment of detainees in and outside the prison by soldiers of the HVO. The tribunal held that the defendant was aware of the mistreatment and although he did not have any direct authority over the soldiers, he was nevertheless guilty for continuing to participate in the sending of prisoners out to work while he had a responsibility for their welfare and had failed to take measures to stop the mistreatment.

The *Tadic* judgment uses the *Furundzija* standards and distinguishes these from the concept of co-perpatration or joint criminal enterprise. In doing that, it emphasized the importance of the *Furundzija* judgment and reinforced its legal value in international criminal law.

*Akayesu* furthermore established that the mens rea for genocide is a double intent, namely that an accomplice is criminally liable in case he knowingly aided and abetted a principal in a crime which he knew or had reason to

know that this principal had a genocidal intent. This implies a subjective test for the aiding and abetting part plus an objective test regarding the genocidal intent. Although at first sight the tribunal required a positive action for complicity, it underlined in the conclusion that aiding and abetting may consist of failing to act or refraining from action.

The facts of the analysed cases relating to aiding and abetting reveal certain similarities. First of all, knowledge plays a central role in the establishment of aiding and abetting. The tribunal seems to require personal knowledge since it numerously refers to the knowledge of a defendant or his awareness. Furthermore, this subjective test can a contrario be inferred from the provisions relating to command responsibility that can be found in the statutes of the ad hoc tribunals and the Rome Statute. With respect to this responsibility, an objective test is provided for in the statutes that places responsibility upon commanders or superiors that knew or should have known that their subordinates were committing international crimes. The ICTY however leaves the door ajar for objective elements in referring to an example in which a driver reasonably would have known he was assisting a criminal activity in the *Furundzija* case.

Secondly, all the defendants possessed a certain status which the tribunal viewed as important for establishing guilt. In *Furundzija* the defendant was a local commander of a special unit within the armed forces, while Aleksovski was a prison warden with responsibility over its detainees and Akayesu was a mayor of a community. The tribunal in *Furundzija* ruled that assistance need not be tangible and can consist of moral support in certain circumstances, one of these circumstances being the status of the defendant that his presence had a significant legitimising or encouraging effect on the principals. This means that mere presence can meet the threshold of aiding and abetting a crime. The question arises how far this status requirement stretches beyond prison wardens, commanders and mayors to other persons or actors such as a corporation in an unstable development country that possesses a large amount of power and influence in the local government that commits international crimes?

Thirdly, although the ICTY required that acts of the accomplice need to make a significant difference to the commission of the crime and that the assistance must have a substantial effect it, the acts of the accomplice can consist of omissions as well. In *Furundzija* the defendant was convicted for aiding and abetting war crimes in that he continued questioning a woman who was seriously mistreated by another soldier. He was convicted for failing to stop the abuse. Aleksovski was as well convicted for failure to stop the mistreatment, in his case, of the detainees under his responsibility. Under the special circumstances of these cases a failure to prevent a serious harm is enough for a guilty verdict. Again a similarity can be drawn to a corporation that is silent on abuses of a government in circumstances that would require it to speak out or try to stop the abuses. Finally, the cases show and emphasize that it is not necessary to prosecute the principal

offender in order to hold an accessory criminally liable for aiding and abetting.

The judgment in *Furundzija*, in which the standard for aiding and abetting is formulated and applied, is a clear reasoning that takes due account of precedents in international criminal law and recent developments in this area. The judgment considers extensively the most important features of aiding and abetting such as the required degree of participation, the necessary intent, the status of the offender and causality and discusses many examples to clarify its extent. Furthermore the argumentation of the tribunal logically builds on the post- World War Two case law and provisions of the London Charter, non-binding instruments from the ILC and the ICTY and ICTR statutes together with the ICC statute. For this reason, the judgment possesses a very authoritative and important ruling in international criminal law. Consequently, the argumentation extends the use of the *Furundzija* standard to not only other cases before the ICTY and ICTR, but to international criminal law in general.

## 5 Two Dutch examples

In two recent Dutch criminal cases, the judiciary considered whether businessmen could be held complicit for war crimes and genocide. The first case that will be discussed is the *Van Anraat* case concerning the Dutch chemicals trader that provided Iraq with substances used for mustard gas. Subsequently the *Kouwenhoven* case will be considered, in which a Dutch arms dealer stood trial for complicity in war crimes of Charles Taylor in Liberia. The two cases will first be described to the extent necessary for aiding and abetting. Finally, the two judgments will be critically reviewed and placed in context with the industrialist cases and contemporary international criminal law.

### 5.1 Van Anraat 191

Frans van Anraat was indicted for complicity in genocide and war crimes for delivering thiodiglycol (TDG) to Iraq during the Iran-Iraq war in the eighties, while he both knew that this substance was used for producing poisonous mustard gas and subsequently utilised as a chemical weapon by the Iraqi military. He was charged for complicity in genocide and war crimes and was found guilty for the second charge but was acquitted for the first one. The judgment relating to complicity in war crimes will be covered first before considering the count on genocide.

TDG is a chemical that is utilised for the production of the poisonous mustard gas, while in small quantities it can be used in the textile industry. Van Anraat had started to deliver the TDG through his owned companies to Iraq or Iraqi purchasers that used a cover name in 1985.<sup>192</sup> While others stopped their deliveries in 1984 the latest, he continued delivering until 1988.<sup>193</sup> The shipments totally consisted of at least 1.100 tons of TDG delivered in 34 shipments.<sup>194</sup> The defendant tried to conceal the nature and destination of the shipments and the TDG was bought from Japanese or American companies, subsequently shipped to Italy where the TDG was placed on trucks to continue by road to Iraq.<sup>195</sup> Evidence furthermore established that it was completely unthinkable that the large amounts of TDG would be used in the textile industry; the only plausible application of the substance was the production of mustard gas.<sup>196</sup> Moreover in negotiations with the exporting companies, the defendant was warned for the improper use of TDG and was cautioned for exportation of this

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<sup>191</sup> *Van Anraat*, Court of Appeal the Hague, Rolnummer: 22-000509-06, Parketnummer: 09-751003-04, 9 May 2007

<sup>192</sup> *Supra* note 190, par. 11.5

<sup>193</sup> *Supra* note 190, par. 12.5

<sup>194</sup> *Supra* note 190, par. 11.5

<sup>195</sup> *Supra* note 190, par. 11.7-11.11

<sup>196</sup> *Supra* note 190, par. 11.10

substance.<sup>197</sup> The defendant, however, was aware of this and subsequently undertook further measures to conceal the nature and use of TDG.<sup>198</sup> The court consequently concluded that the defendant knew from 1984 onwards, or at least from 1986 that the delivered TDG would serve for the production of poisonous gas.<sup>199</sup>

The presented evidence moreover showed that the defendant knew that the names of the purchasers of the TDG were cover names for Al-Muthanna, the production plant in which the mustard gas was composed.<sup>200</sup> It also proved that the defendant maintained good relations with the direction of the plant and that he was aware of the war between Iraq and Iran.<sup>201</sup>

The court subsequently concluded that the defendant not only knew about the production of the mustard gas through the use of the supplied TDG, but that it also knew that the gas would be used by Iraq in its war against Iran.<sup>202</sup> It derived this finding from the fact that Van Anraat knew that the TDG was used for producing mustard gas by a the country who was waging a long lasting war with another country and who tried to conceal the production of this gas.<sup>203</sup> It furthermore noted that the defendant had direct and durable contact with eminent individuals involved in the production of the mustard gas in Al-Muthanna.<sup>204</sup> The court continued that the defendant knew that in the “ordinary course of events” the gas would be improperly used, and underlined the horrifying regime of Iraq at that time. Anticipating its findings on causality, the court found the defendant wilfully guilty of complicity in war crimes.<sup>205</sup> Additionally the court referred to a piece of evidence from an American company establishing that the defendant “was anxiously wishing to make shipments” of the TDG on 6 May 1988. This was after the infamous Halabja attacks where Iraq used mustard gas on the Kurdish minority near its border with Iran, killing thousands of innocent people.<sup>206</sup> The defendant had, however, contemplated in another testimony that he was shocked by the Halabja attacks in March 1988.

In considering the causality between the acts of the defendants and the poisonous gas attacks, the court found it necessary to establish both the role that the defendant’s deliveries played in the production of the mustard gas and the actual use of the with gas filled ammunition in the war.<sup>207</sup> An expert witness considered this and established that the gas was indeed both used

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<sup>197</sup> *Supra* note 190, par. 11.10

<sup>198</sup> *Supra* note 190, par. 11.10 and 11.11

<sup>199</sup> *Supra* note 190, par. 11.12

<sup>200</sup> *Supra* note 190, par. 11.13

<sup>201</sup> *Supra* note 190, par. 11.13

<sup>202</sup> *Supra* note 190, par. 11.16

<sup>203</sup> *Supra* note 190, par. 11.16

<sup>204</sup> *Supra* note 190, par. 11.16

<sup>205</sup> *Supra* note 190, par. 11.16

<sup>206</sup> *Supra* note 190, par. 11.17

<sup>207</sup> *Supra* note 190, par. 12.1.1

for the production of mustard gas and actually used as a chemical weapon.<sup>208</sup>

Putting the facts of the case into a juridical framework, the court stipulated that the central question is whether the defendant provided “opportunity and/or means” to commit the crimes.<sup>209</sup> In this respect it clarified, referring to Dutch case law, that it is not required that the given aid was indispensable, nor that a causal relationship existed between the help and the offence; it is sufficient that the aid of the accomplice has advanced or encouraged the actual commission of the crime or has simplified it.<sup>210</sup> It moreover stated that, seen from an international criminal law perspective, the standards used for aiding and abetting are not notably more demanding.<sup>211</sup>

While van Anraat was sentenced to 17 years imprisonment for complicity in war crimes, he was acquitted for complicity in genocide. The court decided in connection to the count on genocide that although the evidence strongly indicates that the Iraqi principal offenders were guided in their acts by a genocidal intent, it did not establish that the defendant knew or reasonably could have known this.<sup>212</sup> Neither did the evidence establish that the accused in any other way possessed relevant information from which it could derive a genocidal intent.<sup>213</sup> The court noted in this respect that the Iraqi authorities tried to prevent their actions against the Kurds from reaching the public and even Dutch ambassadors at that time were not aware of the actions against the Kurds.<sup>214</sup> In its considerations it had already pointed out that in international criminal law the notion of complicity in genocide is in a developing stage and it has not crystallised which exact form of guilty mind suffices for a finding of complicity.<sup>215</sup> It considered that “the central question in this issue is whether knowledge or a less stringent, objective form of intent is required such as deliberately accepting the considerable chance that a certain consequence or circumstance will occur, is the correct test in cases of complicity in genocide.”<sup>216</sup> Without clarifying which standard should be applied in this case, the court ruled that the evidence could not prove the defendant guilty of complicity no matter which of the two tests would be used.<sup>217</sup>

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<sup>208</sup> *Supra* note 190, par. 12.2.6-12.3

<sup>209</sup> *Supra* note 190, par. 12.4

<sup>210</sup> *Supra* note 190, par. 12.4

<sup>211</sup> *Supra* note 190, par. 12.4

<sup>212</sup> *Supra* note 190, par. 7

<sup>213</sup> *Supra* note 190, par. 7

<sup>214</sup> *Supra* note 190, par. 7

<sup>215</sup> *Supra* note 190, par. 7

<sup>216</sup> *Supra* note 190, par. 7, literally translated from Dutch into English

<sup>217</sup> *Supra* note 190, par. 7

## 5.2 Kouwenhoven 218

In *Kouwenhoven*, the Dutch businessman Guus Kouwenhoven was charged with complicity in war crimes and the supply of weapons to Charles Taylor's Liberia between 2000 and 2002 during the Liberia civil war. Kouwenhoven owned a large timber corporation, Royal Timber Company (RTC), which operated in an area covering over 400 thousand hectare of wood.<sup>219</sup> He furthermore was shareholder of 35 percent and director of Oriental Timber Corporation (OTC), a merger between RTC and an Indonesian corporation that was closed down in 2003.<sup>220</sup> Kouwenhoven held close economic and personal ties with Charles Taylor. Taylor provided for security guards employed at the premises of OTC while the corporation paid their salaries since the government lacked the sufficient funds for this.<sup>221</sup> These security guards were alleged to have committed atrocities and the defendant was charged for having participated in them. Moreover loads of weapons were sold to Taylor and facilities and materials were put at the disposal of Taylor and his armed forces.<sup>222</sup> Beside this, Kouwenhoven transferred large sums of money to Liberia's former president in exchange for agreements relating to the timber production.<sup>223</sup> These large sums directly fuelled the civil war and the commission of atrocities in Liberia and Sierra Leone and thus non-governmental organisations (NGOs) labelled Kouwenhoven's timber as blood-timber.<sup>224</sup>

Kouwenhoven was, as president of the OTC, charged with complicity in war crimes in a number of different modes of participation under Dutch domestic law, varying from co-perpetration to aiding and abetting.<sup>225</sup> These allegations involved the selling and supply of loads weapons, placing staff members at disposal of the conflict, threatening to dismiss staff members if they did not comply with this, placing a helicopter and trucks used in the conflict at the disposal of Charles Taylor, placing a RTC camp at the disposal of Charles Taylor, supplying money, cigarettes, marihuana to Taylor's armed forces and giving instructions on how to use the heavy weapons.<sup>226</sup> The war crimes Kouwenhoven was allegedly participating in consisted of 3 events taking place between 2000 and 2002.

Without differentiating on these numerous allegations of different degrees of participation, the court acquitted the defendant on all the charges relating to war crimes. The court first established that the alleged war crimes had

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<sup>218</sup> *Kouwenhoven*, District Court of The Hague, Public Prosecutor's Office number: 09/750001-05, 7 June 2006 (official English translation of actual case)

<sup>219</sup> *Supra* note 217, par. 7.1

<sup>220</sup> *Supra* note 217, par. 7.1

<sup>221</sup> *Supra* note 217, par. 7.1

<sup>222</sup> *Supra* note 217, par. 8

<sup>223</sup> *Supra* note 217, par. 7.2

<sup>224</sup> <http://www.ens-newswire.com/ens/jun2006/2006-06-12-02.asp>, last visited 9 November 2007

<sup>225</sup> *Supra* note 217, par. 2

<sup>226</sup> *Supra* note 217, par. 2

indeed taken place. It continued that the evidence however “did not convince the court that the defendant was actually involved in, nor had the knowledge of the facts charged under 1,2 and 3, inasmuch as many different and even contradictory statements were recorded and written documents have not been able to give sufficient evidence to prove that involvement.”<sup>227</sup> According to the court the testimonies about the events in which the charges on war crimes referred to, were inconsistent.<sup>228</sup> Furthermore, it did not find sufficient grounds for actual involvement of the defendant in and knowledge of the described atrocities; the facts that some employees of the corporation were possibly involved in the atrocities does not provide sufficient proof for this either.<sup>229</sup> Therefore, the court stated, “it can not be concluded with a reasonable degree of certainty whether these security employees participated in these facts by order of, with the consent or with the knowledge of the defendant.”<sup>230</sup> It subsequently noted, however, that it “will consider proven that the defendant together and in conjunction with another or others supplied weapons to Charles Taylor and/or his armed forces.”<sup>231</sup> This did not establish, according to the judges, in itself sufficient proof that the defendant participated in the commission of war crimes, especially since the weapons can also be used for acts that are legally permitted or acts that cannot be included in the described criminal offences.<sup>232</sup>

After describing the evidence that is relevant for the charges, the court found the defendant guilty for prohibited arms trade with Liberia.<sup>233</sup> Although this is not an international crime, the judgment on these charges is still relevant for this thesis since it gives some guidance on how to assess the defendant’s participation in these violations as head of the corporation. Furthermore Kouwenhoven was not found guilty for complicity in war crimes despite these findings of the court and therefore the reasoning of the court also relates to the defendant’s acquittal of complicity in war crimes.

The court first described the relationship between Taylor and Kouwenhoven and concluded that the defendant maintained strong ties with Liberia’s former president, both personally as well as in his capacity as president of the OTC.<sup>234</sup> The interests of Taylor were furthermore entwined considerably with the financial interests of the defendant, due to the defendant’s investments in Liberia.<sup>235</sup> The court proceeded with describing the role of the defendant within the OTC, holding that “the defendant played an important role in the business operations of the OTC and in particular because of his ongoing contacts with Charles Taylor, the President of Liberia, during which he acted as representative of OTC.”<sup>236</sup> Finally it

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<sup>227</sup> *Supra* note 217, par. 6

<sup>228</sup> *Supra* note 217, par. 6

<sup>229</sup> *Supra* note 217, par. 6

<sup>230</sup> *Supra* note 217, par. 6

<sup>231</sup> *Supra* note 217, par. 6

<sup>232</sup> *Supra* note 217, par. 6

<sup>233</sup> *Supra* note 217, par. 10

<sup>234</sup> *Supra* note 217, par. 8

<sup>235</sup> *Supra* note 217, par. 8

<sup>236</sup> *Supra* note 217, par. 8

outlined the role of the defendant regarding the importation of weapons, establishing that there was a direct relationship between OTC and the importation of weapons for Charles Taylor. It furthermore found, that “the defendant had continuously and from the start, played a role in this structural weapon importation.”<sup>237</sup> Consequently, it considered proven that the defendant, together with other(s), had supplied weapons to Charles Taylor and/or Liberia.<sup>238</sup>

Kouwenhoven was sentenced to 8 years imprisonment, the highest sentence possible for arms dealing under Dutch legislation. The judges in considering the sentence, took note of the seriousness of the committed facts, the circumstances under which the violations have been committed, and the personal circumstances of the defendant.<sup>239</sup> These circumstances consist of the fact that the defendant has contributed essentially to infringements of international peace and to the destabilisation in the region to which Liberia belongs. The judgment stated that “the defendant played a crucial role in these violations of the prohibitions by means of his close cooperation with the former President of Liberia, Taylor and through his important position within the OTC, which permitted him to facilitate the importation of weapons via the port of Buchanan,”<sup>240</sup> His actions, that were only driven by financial interests, were committed knowingly and wilfully in violation with the international legal order and therefore the court found that the maximum penalty should be imposed.<sup>241</sup>

Both the prosecution and Kouwenhoven appealed the decision, which is now pending at the appeals court in The Hague. The trial chamber ruled on 19 March 2007 in a preliminary hearing that the defendant’s custody would be suspended for the moment because of the expected elapse of time due to investigations and the search for witnesses in Liberia.<sup>242</sup> In reply to the defence counsel’s wish to hear Charles Taylor, the court asked the investigative judge to inquire whether it is possible to hear the former president, who is currently kept in Scheveningen, a stone’s throw away from the appeal chamber’s courtroom. It is yet to be seen whether Taylor will testify and when the court will continue its proceedings.

## 5.3 Analysis

In the *Van Anraat* case, as in many of the other cases concerning complicity, one of the central questions was whether the defendant knew that it assisted the Iraqi authorities in the commission of international crimes. The court assessed both the defendant’s knowledge of the use of the TDG in large

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<sup>237</sup> *Supra* note 217, par. 8

<sup>238</sup> *Supra* note 217, par. 8

<sup>239</sup> *Supra* note 217, par. 13

<sup>240</sup> *Supra* note 217, par. 13

<sup>241</sup> *Supra* note 217, par. 13

<sup>242</sup> Court of Appeal The Hague, the Netherlands, Rolnummer: 22-004337-06, Parketnummer(s): 09-750001-05, 19 March 2007

quantities as mustard gas and the production and use of the actual chemical weapons during the Iran-Iraq war in the 1980's. It found that the defendant possessed the required knowledge and Van Anraat was convicted for complicity in war crimes while he was acquitted for complicity in genocide. The judgment is relevant seen from a perspective of international criminal law since the judges explicitly refer to the standard of aiding and abetting under international criminal law. It emphasized that the used standard under Dutch law is not more demanding than the standard of aiding and abetting under international law.

The court spends time to consider whether the TDG that was supplied by the defendant was actually used in both the production of the gas and its use as a chemical weapon. In doing this, it went beyond the test exercised by the judges in the *Zyklon B* case. There the British war tribunal merely demanded that the gas was actually used to exterminate human beings, that the defendants knew of the use of this and that they still continued to supply it. Consequently, the court found the two defendants found guilty of complicity in international crimes, without spending any time to survey whether the gas supplied by the company was actually used in the gas chambers. The judges in the *Van Anraat* case do not make very clear whether the prosecution needs to prove the actual use of the delivered TDG as a chemical weapon. Anticipating the finding of proof of actual usage of the chemicals as a weapon, they find the defendant guilty. Does this mean that the establishment of actual usage is necessary or not? In case the court requires proof of this, prosecutors will have a very hard time to hold business entities accountable for supplying questionable goods. This would be very unfortunate since obvious cases where a defendant delivers almost half of the amount of gas, that is subsequently used to kill human beings with on a large scale, could be hampered by this strict interpretation of causality.

In establishing knowledge of the defendant, the court reveals the means used to do this. The court divided their ruling on knowledge into two considerations, namely the knowledge of the use of TDG to produce mustard gas and the knowledge that the latter was used as an illegal weapon in the war against Iran. With respect to the first consideration, the court underlined the awareness of the defendant of the improper use of TDG in large quantities. This was mainly demonstrated by oral or written testimonies of the defendant's business partner; it furthermore derived this from the defendant's concealment of both the nature of TDG and destination of his shipments. Turning to the knowledge of the eventual use of the TDG as a chemical weapon in the war, the court derived the defendant's knowledge from a number of facts. These facts are the knowledge of cover names for the production plant of the chemical gas used by the Iraqi authorities, the close cooperation between defendant and the plant managers, the fact that Iraq was waging a long lasting war with Iran and the defendant's knowledge that the gas would be improperly used in the "ordinary course of events", emphasizing the horrible regime in Iraq. It however did not establish that at the time of the deliveries it was personally

known by the defendant or commonly known that Iraq used the TDG as a chemical weapon.

In examining the evidence, the court had an easier time than the judges in the *Zyklon B* case, who did not have any direct evidence that imputed knowledge to the defendants. In *Van Anraat* the defendant's business partner provided the court with extensive evidence. Furthermore, the circumstantial facts found important by the court were the war situation in Iraq, the horrible regime, secrecy surrounding the deliveries, close cooperation with plant managers of the weapon production plants and knowledge of the highly suspicious nature of the supplies. Except for the defendant's cooperation with plant managers, these facts all deserve the label of suspicious practices that combined together clearly establish the necessary guilty mind. The reference of the court to the close cooperation is speculative since this cooperation does not mean that the plant managers actually informed the defendant about the illicit practices in their plants.

The judges are wrestling with the count of genocide concerning whether an international or a national standard should be used in cases of complicity in the crime. Eventually the judges circumvent this matter, and decide that using any of the two standards would lead to an acquittal of the defendant. One can disagree with the reluctance of the court on this point since the evidence shows that the defendant even after the Halabja attacks on the Kurds still pursued to obtain large quantities of TDG while he was aware of the attacks.

In *Kouwenhoven* the defendant, as president of a large multinational corporation operative in the timber industry, was charged with participation in war crimes and arms dealing in violation of international law. The defendant was acquitted for all the counts relating to war crimes. The court seems to base its findings on the lack of consistent proof of consent and knowledge of the defendant regarding the commission of the crimes. It therefore concluded that staff members of the corporation may have participated in a number of war crimes, but the defendant cannot be held responsible for these acts. As in other cases, the knowledge of the defendant is of major importance to a finding of complicity.

Kouwenhoven was however found guilty of the supply of weapons and received the highest sentence for his participation in it. In considering the sentence the judges took into account the seriousness of the committed facts, the circumstances under which the violations have been committed, and the personal circumstances of the defendant. These circumstances consisted of the essential contribution to infringement of international peace and destabilisation in the region of Liberia. The judges added that his actions were only driven by financial interest and were committed knowingly and wilfully in violation with the international legal order.

However, a finding of complicity in war crimes was not established since arms dealing in itself was not sufficient proof of participation in the

commission of war crimes, especially since the weapons can also be used for acts that are legally permitted or acts that cannot be included in the described war crimes in the charges.

The case brought forward by the prosecution clearly demonstrates a lack of reliable evidence, which makes it for the court very hard to decide to what extent Kouwenhoven can be blamed for the committed offences. The war crimes charge is limited to only three occasions while the evidence could not even establish which of the two fighting parties committed the offences. Therefore, the fact that Kouwenhoven was not aware of the three occasions is not surprising.

The court, however, subsequently considers that since the weapons can also be used for acts that are legally permitted or cannot be included in the charged criminal offences, supplying weapons is not sufficient evidence of complicity in the offences. The court should have elaborated this reasoning more. The provided weapons were AK-47's (Automat Kalashnikov 47), RPG's (Ruchnoi Protivotankovye Granatamy or also referred to as Rocket Propelled Grenade of Russian Powerful Gun) and GMG's (General Machine Gun). These weapons are generally not used on occasional deer or foxhunts but are commonly known to be assault rifles or heavy machine guns. The delivery of the weapons was to Africa's most notorious warlord, commonly known for his record of atrocities. Kouwenhoven, as owner of this large timber corporation, was in the ultimate position to acquire all the means of information about Taylor and the committed atrocities. Should the court therefore have added so lightly that the weapons could be used for acts that do not constitute international crimes? Must Kouwenhoven not have known that these weapons would be used in international crimes? And even if he knew, would this knowledge be sufficient for a conviction or did the prosecution need to prove that the weapons were used in the actual crimes? There are no easy answers to these questions and with the scarce and unreliable evidence, the eventual decision of the court is very understandable.

## 6 The Alien Torts Claims Act

The Alien Torts Claims Act (ATCA) is a federal act passed by the United States of America and dates back to 1789. The text of it reads, “the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”<sup>243</sup> The purpose of the drafters of the act was to create a forum for violations of the law of nations, probably such as violations of rights of ambassadors, of safe conduct and piracy.<sup>244</sup> The act was hardly used for almost two centuries until in 1980 the United States court of Appeal awarded a civil remedy to Dolly and Joel Filartiga for the fact that their son was tortured to death by a local police inspector in Asuncion, Paraguay.<sup>245</sup> The right to be free from torture was recognised by the judges as being part of the law of nations and the torturer had become “like the pirate and slave trader (...) an enemy of mankind.”<sup>246</sup> This opened the door for more civil suits and subsequently the act was used not only against individuals, but as well against multinational corporations. In 2004 the Supreme Court of the United States left the precedent intact without further clarifying its meaning or scope in *Sosa*.<sup>247</sup>

A case under the ATCA can be triggered if three conditions are met, namely an alien that sues, for a tort, committed in violation of international law or a treaty of the United States.<sup>248</sup> The cases under the ATCA are civil suits and not criminal cases. Therefore, only private parties can start a lawsuit, opposed to a prosecutor in criminal cases. There exist no penalties under the ATCA and the only possible way to find redress for human rights violations is compensation. Further general differences between civil and criminal cases are that the purpose of criminal law is to punish and deter perpetrators and for this reasons, among others, a guilty mind, referred to as *mens rea*, is required in order to find a defendant guilty for a crime. In a civil case the purpose of the suit is to remedy one who has suffered a loss and mere establishment of causing damages, in certain cases in combination with negligence, is sufficient for liability. Civil cases generally are decided on the balance of probability, while in criminal cases a heavier burden is required, mostly referred to as “guilt beyond reasonable doubt.”

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<sup>243</sup> Paul L. Hofman & Daniel A. Zaheer, *The rules of the road: federal common law and aiding and abetting under the Alien Tort Claim Act*, 26 Loy. L.A. Int'l & Comp. L. Rev 47, under I

<sup>244</sup> *Sosa v. Alvarez-Machain et al.*, Supreme Court of the United States, decided June 29, 2004, 542 U.S. 692 (2004), page 20 and 21

<sup>245</sup> *M. E. Filartiga v. Pena-Irala*, United States Court of Appeals, Second Circuit, decided June 30, 1980, 630 F.2d 876

<sup>246</sup> *Supra* note 244, par. IV

<sup>247</sup> *Supra* note 243

<sup>248</sup> *Wiwa v. Royal Dutch Petroleum Co.*, United States District Court, S.D. New York, decided February 28, 2002, 2002 WL 319887, see Discussion, par. 3

Using civil litigation in a thesis that focuses on criminal cases looks odd and the fundamentally different character of the two areas of law seems to complicate comparisons between civil and criminal cases. However the judgments under the ATCA use features typically found in criminal cases, such as knowledge, and even applies international criminal law tests in the case law that will be considered. The litigation under the ATCA is at the moment the most promising development in the area of corporate responsibility for and complicity in international crimes. Not covering this development at all would therefore not be appropriate. The judgments furthermore show which facts play a role in the finding of a judgment and are therefore very useful for the actual application of a certain complicity standard.<sup>249</sup>

After the landmark decision of *Filartiga* a great number of multinational corporations were tried before United States federal courts. Many of these suits however were dismissed in pre-trial phases, while others are still pending or have been settled. The only case that actually made it before a federal jury to decide, was the recent procedure against Drummond coal company. Drummond was alleged to be complicit in the murder of three trade union leaders by paramilitary forces, but was acquitted by the jury in Alabama's district court.<sup>250</sup> Although the fact that paramilitary forces murdered the three men was not disputed, the jury did not establish liability on Drummond on the evidence before it.<sup>251</sup> The judge previously had not allowed four of the witnesses who had testified that the president of Drummond had handed over a suitcase full of money to the paramilitaries. This was according to the plaintiffs' lawyers the very reason for the acquittal.<sup>252</sup> The legal representatives of the plaintiffs have appealed the decision.

In the following paragraphs, four cases will be covered. Firstly the most notable case of the ATCA litigation, the *Unocal* case, will be considered. This case served as an important first step in the ATCA litigation concerning corporations complicit in serious human rights violations. After this, the case against Shell in Nigeria concerning the oppression of the Ogoni people will be covered, followed by the case against Talisman in the Sudan and the South African litigation of businesses allegedly supporting the apartheid regime in the South Africa. In the analysis the case law will be critically reviewed and compared to the Nuremberg cases and contemporary

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<sup>249</sup> See for an elaborated analysis of the hybrid nature of the ATCA: Jaykumar A. Menon, *The Alien Tort Statute, Blackstone and Criminal/Tort Law Hybridities*, Journal of International Criminal Justice, volume 4, 2006, page 372-386

<sup>250</sup> Kyle Whitmire, *Alabama Company Is Exonerated In Murders At Colombian Mine*, New York Times, published 27 July 2007  
<http://www.nytimes.com/2007/07/27/business/27drummond.html?ex=1343275200&en=b0dc4c8b43c0282&ei=5124&partner=permalink&expprod=permalink>, last visited 5 January 2008

<sup>251</sup> *Drummond Verdict on July 26, 2007*,  
[http://www.iradvocates.org/Drummond\\_Verdict\\_on\\_July\\_26.doc](http://www.iradvocates.org/Drummond_Verdict_on_July_26.doc), last visited on 24 November 2007

<sup>252</sup> *Supra* note 250

international criminal law. The four cases are chosen because of their importance, the fact that they are recently decided and the courts in these cases have elaborated the standard of aiding and abetting and its application in actual examples of corporations allegedly complicit in international crimes and serious human rights violations. The last three cases are still pending and are in different phases of the trial procedure.

## 6.1 John Doe v. Unocal Corporation 253

In this case a number of Myanmar villagers filed a suit for damages against Unocal Corporation for complicity in crimes committed by the Myanmar army, consisting of forced labour, murder, rape and torture.<sup>254</sup> On appeal the court found Unocal liable for the committed crimes and awarded damages to the villagers. The case was appealed to the Supreme Court of the United States, but both parties settled the outcome and the judgment on appeal was vacated. The *Unocal* case therefore did not create binding precedent. It however set an example for future cases and the court's interpretation of the facts is very relevant for this thesis. The decision and reasoning of the court was furthermore followed by other judges in other cases that are discussed later.

In 1992, multinational corporation Unocal undertook a joint venture with a French multinational oil giant, Total S.A., and the Myanmar government to extract oil and build a pipeline in the rural Tenneserim region of Myanmar.<sup>255</sup> The government of Myanmar, who has ruled the country through a military dictatorship that has been widely infamous for its poor human rights record, provided security for the project and build helipads and cleared roads along the proposed pipeline route for the benefit of the project.<sup>256</sup> The facts of the case show that the security forces were hired by Unocal and this was laid down in a contract of which Unocal was fully aware.<sup>257</sup> Furthermore, the court found sufficiently proven that Unocal/Total directed the military in where to build the helipads and where to secure the facilities.<sup>258</sup> Moreover, e-mail contact between Unocal's director of information and its spokesman, evidence the fact that Unocal "could influence the army not to commit human rights violations, that the army might otherwise commit such violations, and that Unocal knew this."<sup>259</sup>

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<sup>253</sup> *John Doe v. Unocal Corporation*, United States 9th Circuit Court of Appeals, argued and submitted December 3 2001, filed September 18, 2002, Nos. 00-56628, D.C. No. CV-96-06112-RSWL

<sup>254</sup> The name Myanmar will be used throughout this thesis. This is merely for practical reasons and does not imply any standpoint taken in the recognition of Myanmar as the rightful name for Burma/Myanmar.

<sup>255</sup> Anita Ramasastry, *Corporate Complicity: from Nuremberg to Rangoon an examination of forced labor cases and their impact on the liability of multinational corporations*, Berkeley Journal of International Law 2002, 20 Berkeley J. Int'l L. 91, Par. IV

<sup>256</sup> *Supra* note 252, 14195

<sup>257</sup> *Supra* note 252, 14195 and 14196

<sup>258</sup> *Supra* note 252, 14197

<sup>259</sup> *Supra* note 252, 14197 and 14198

After giving this short introduction, the court proceeded with giving witness evidence of the committed crimes by the Myanmar military and showing the long and well-known history of forced labour in Myanmar.<sup>260</sup> Subsequently, it turned to the question whether Unocal knew of the crimes committed by the military. In this respect, it explained that Unocal's own consultants and partners in the joint venture made Unocal aware of the use of forced labour in the country.<sup>261</sup> After the oil corporation invested in the project, it received further information from both the mentioned sources and from human rights organisations.<sup>262</sup> Unocal's president even acknowledged that the Myanmar military might be using forced labour in meetings with NGOs.<sup>263</sup> Two months after his statement, one of Unocal's representatives confirmed him that the Myanmar military might be committing human right violations in connection with the project.<sup>264</sup> The same representative wrote to a Total representative that regarding the matter of forced labour it is very important where the responsibility of the project ends.<sup>265</sup> This implies that he knew of the existence of the forced labour.<sup>266</sup> Subsequently, one of Unocal's consultants reported that "egregious human rights violations have occurred, and are occurring now, in Southern Burma."<sup>267</sup> E-mail contact between Total and Unocal further underlined Unocal's awareness of the use of forced labour, although its president stated that human rights violations had not occurred in the vicinity of the pipeline route in a later meeting.<sup>268</sup>

The judgment continues with the proceedings and analysis of the case for liability under the ATCA. This will only be covered to the extent that is relevant for this thesis. The court ruled, in considering the claim against Unocal, that the standard for aiding and abetting is "knowing practical assistance or encouragement that has a substantial effect on the perpetration of the crime."<sup>269</sup> It subsequently held that a reasonable fact finder could find that Unocal's conduct met this standard.<sup>270</sup>

The standard used by the court is the *Furundzija* standard, which has been discussed before. In elaborating its judgment the court discusses the ICTY judgment and summarises it in the above given form, scrapping moral support from the original definition. Since the court found that the conduct of Unocal constituted aiding and abetting, it did not feel the need to decide whether Unocal would be complicit if it had only given moral support to the military.<sup>271</sup> In a footnote the court considered this and explained the choice

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<sup>260</sup> *Supra* note 252, 14199

<sup>261</sup> *Supra* note 252, 14199

<sup>262</sup> *Supra* note 252, 14199-14204

<sup>263</sup> *Supra* note 252, 14200 and 14201

<sup>264</sup> *Supra* note 252, 14201

<sup>265</sup> *Supra* note 252, 14201

<sup>266</sup> *Supra* note 252, 14201

<sup>267</sup> *Supra* note 252, 14202

<sup>268</sup> *Supra* note 252, 14203 and 14204

<sup>269</sup> *Supra* note 252, 14212

<sup>270</sup> *Supra* note 252, 14212

<sup>271</sup> *Supra* note 252, 14219

for the *Furundzija* standard. It noted that there may not be a difference between encouragement and moral support.<sup>272</sup> The standard borrowed from international criminal law is especially helpful for “ascertaining the current standard for aiding and abetting under international law as it pertains to the ATCA”, while the question whether this is also true for moral support, was not answered.<sup>273</sup>

The court continued and established that Unocal’s involvement met the required actus reus for aiding and abetting. In this respect it mentioned that Myanmar’s military used forced labour and that Unocal gave practical assistance through hiring the military to provide security and build infrastructure in exchange for money or food and direct them in this.<sup>274</sup> The assistance had a substantial effect on the perpetration of the crime since it “most probably would not have occurred in the same way without someone hiring the Myanmar Military to provide security, and without someone showing them where to do it.”<sup>275</sup> Secondly, it established that a reasonable fact finder could conclude that Unocal’s conduct met the mens rea requirement of aiding and abetting, namely “actual or constructive (i.e., reasonable) knowledge that the accomplice’s actions will assist the perpetrator in the commission of the crime.”<sup>276</sup> The court concluded that “Unocal knew or reasonably should have known that its conduct – including the payments and the instructions where to provide security and build infrastructure – would assist or encourage the Myanmar Military to subject the Plaintiffs to forced labor.”<sup>277</sup>

Unocal argued that it was not vicariously liable for the torts committed by the Myanmar military since the pipeline was constructed by a separate corporation, namely the Gas Transportation Company. It furthermore stated that there is no basis to pierce the corporate veils of the Unocal Pipeline Corp. or the Unocal Offshore Co. that would hold the mother corporation responsible.<sup>278</sup> The court however disagreed with this and concluded that the two corporations were alter egos of Unocal and that any actions by the two corporations are attributable to Unocal.<sup>279</sup> The direct involvement of the Unocal president, CEO and other officers and employees show the direct involvement of Unocal in these two corporations.<sup>280</sup> Furthermore, according to the court, the theory of vicarious liability was not necessary to address since Unocal was already held liable for its own actions and the actions of its alter ego subsidiaries, which aided and abetted the Myanmar military.<sup>281</sup>

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<sup>272</sup> *Supra* note 252, 14219 and 14220

<sup>273</sup> *Supra* note 252, 14220

<sup>274</sup> *Supra* note 252, 14222

<sup>275</sup> *Supra* note 252, 14222

<sup>276</sup> *Supra* note 252, 14222

<sup>277</sup> *Supra* note 252, 14222

<sup>278</sup> *Supra* note 252, 14222

<sup>279</sup> *Supra* note 252, 14223

<sup>280</sup> *Supra* note 252, 14223

<sup>281</sup> *Supra* note 252, 14223

Regarding the rape and murder allegations in connection with the forced labour program, the court used the same evidence to establish liability of Unocal for these acts. It referred to the elaborated reasoning in the *Furundzija* case about the used standard, explaining that an aider and abettor does not need to know the precise crime that the principal intends to commit.<sup>282</sup> It is sufficient that he is aware that a number of crimes will probably be committed, and one of these crimes is in fact committed.<sup>283</sup> In that instance he has intended to facilitate the commission of that crime and is guilty as an aider and abettor.<sup>284</sup> The court concluded that “because Unocal knew that acts of violence would probably be committed, it became liable as an aider and abettor when such acts of violence – specifically, murder and rape – were in fact committed.”<sup>285</sup> It however did not find the corporation liable for torture since the record did not contain sufficient evidence to establish these claims.<sup>286</sup>

As has been mentioned earlier, the Unocal case does not create binding precedent since the ruling has been vacated. Furthermore a strong concurring opinion was delivered by judge Reinhardt, who disagreed with the use of the international criminal law standard and proposed the use of federal common law to determine civil liability.

## 6.2 *Wiwa v. Royal Dutch Petroleum Co.*

In the litigation against Royal Dutch/Shell in Nigeria, the British-Dutch oil company was sued under the ATCA for complicity in violations of international law committed by the Nigerian authorities against the activities of a minority group, the Ogoni people, in the region where Shell operated. Ken Saro-Wiwa, the leader of the MOSOP, the Movement for Survival of the Ogoni People, and John Kpuinen, the deputy president of MOSOP’s youth wing, were hanged after being convicted for murder by a special tribunal.<sup>287</sup> The MOSOP had formed the opposition against both the coercive appropriation of Ogoni land without fair compensation and the severe damage to the local environment and economy resulting from Shell’s operations in the region.

The oil company together with Brian Anderson as one of its officials were alleged of having recruited the Nigerian police and military to suppress MOSOP and to ensure a smooth continuation regarding Shell’s development activities.<sup>288</sup> Through Anderson, Shell provided logistical support, transportation and weapons to the Nigerian authorities to attack Ogoni

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<sup>282</sup> *Supra* note 252, 14227

<sup>283</sup> *Supra* note 252, 14227

<sup>284</sup> *Supra* note 252, 14227

<sup>285</sup> *Supra* note 252, 14227 and 14228

<sup>286</sup> *Supra* note 252, 14228

<sup>287</sup> *Wiwa v. Royal Dutch Petroleum Co.*, United States District Court, S.D. New York, February 28, 2002, 2002 WL 319887, see background, \*2

<sup>288</sup> *Supra* note 286, see background \*2

villages and suppress the opposition to Shell's activities concerning oil excavation.<sup>289</sup> The Ogoni residents were beaten, raped, shot and/or killed during these raids.<sup>290</sup> The two leaders were hanged after their conviction and allegedly the defendants had bribed witnesses to testify falsely at the trial and conspired with the Nigerian authorities to orchestrate the trial and offered to free Ken Saro-Wiwa in return for an end to MOSOP's international protests against the oil company.<sup>291</sup> Furthermore, members of Ken Saro-Wiwa's family were beaten during his trial, including his elderly mother.<sup>292</sup>

Relatives of Wiwa and Kpuinen, together with a victim of one of the raids sued Shell for violations of international law consisting of summary executions, crimes against humanity, torture, cruel and inhuman treatment, arbitrary arrest and detention, violations of the right to life, liberty and security of the person, and typical domestic liabilities such as wrongful death and a number of forms of infliction of emotional or physical distress.<sup>293</sup> Motions to dismiss were filed by the defendants to prevent the matter being brought before a jury. In considering a motion to dismiss, the court is bound to "accept[ ] as true the factual allegations in the complaint as true and draw[ ] all inferences in the plaintiff's favor."<sup>294</sup> In other words a court decides whether the presented allegations would give rise to liability if they were proven to be true.

The court, in considering the motions, used a federal theory to assess the complicity allegations. It examined whether the alleged facts constituted a "substantial degree of cooperative action between the corporate defendants and the Nigerian government in the alleged violations of international law."<sup>295</sup> The court underlined the payments to the Nigerian military and police, the delivery of weapons by defendants to the same authorities, the coordination with them on intelligence matters concerning the anti-Ogoni campaign, the assistance in planning the raids and terror campaigns in the Ogoni region, the bribery of witnesses in the Saro-Wiwa trial, the providing of boats and helicopters to the Nigerian authorities to facilitate attacks on Ogoni villages, the payments to the Nigerian military to respond violently to complaints regarding oil spills and to restrain and monitor the protests against the oil company in general.<sup>296</sup> It subsequently found that the plaintiff's allegations sufficed to support a claim that defendants were "wilful participant[s] in joint action with the state or its agents."<sup>297</sup> For this reason the claims can be considered under the ATCA and the court

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<sup>289</sup> *Supra* note 286, see background \*2

<sup>290</sup> *Supra* note 286, see background \*2

<sup>291</sup> *Supra* note 286, see background \*2

<sup>292</sup> *Supra* note 286, see background \*2

<sup>293</sup> *Supra* note 286, see background \*2

<sup>294</sup> *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, United States District Court, S.D. New York, June 13, 2005, 374 F.Supp.2d 331, see discussion

<sup>295</sup> *Supra* note 286, see background \*13

<sup>296</sup> *Supra* note 286, see background \*13

<sup>297</sup> *Supra* note 286, see background \*13

consequently denied the motions to dismiss except for two motions, which did not constitute a violation of international law, according to the court.

### **6.3 Presbyterian Church of Sudan v. Talisman Energy, Inc.**

In the pending trial of *Presbyterian Church of Sudan v. Talisman Energy, Inc.* current and former residents of Sudan brought a claim under the ATCA against Talisman, alleging that the corporation was complicit in the government of Sudan's policy of ethnic cleansing.<sup>298</sup> In the pre-trial phase Talisman attempted to dismiss the motions against it on a number of grounds. In the two judgments that were the result of these attempts, the United States District Court in New York denied Talismans' motions. In 2006 however, the court granted Talisman a summary judgment, which has been appealed by the plaintiffs.

Talisman tried to dismiss the suit on a number of grounds, among one, the proposition that aiding and abetting and conspiracy allegations are not actionable theories of civil liability under the ATCA.<sup>299</sup> It dismissed the particular motion relating to complicity, stating that working with and encouraging the Sudanese government in ethnic cleansing and providing material support knowingly that this would be used in carrying out unlawful acts, would properly allege that Talisman aided and abetted or conspired with Sudan to commit various violations of the law of nations.<sup>300</sup> In establishing that the notion of complicity was well established in international law, it referred to sources of international criminal law, namely the IMT Charter, cases under the Charter of the IMT and Control Council Law No. 10, the statutes of the ICTY and ICTR, the Rome statute and case law of the ICTY and ICTR. Furthermore Talisman stated that an actor is only liable as an accomplice if it both intended to facilitate the violation and its assistance significantly contributed to the commission of the actual violation.<sup>301</sup> In response to this, the court considered that the actus reus of aiding and abetting under the ATCA is the same as the standard used in the case law of the two ad hoc tribunals, namely practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime.<sup>302</sup> The court continued that "some knowledge that the assistance will facilitate the crime is necessary."<sup>303</sup> In this respect it referred to the *IG Farben* case in which the US war tribunal accepted that the businessmen in the company honestly believed that the Zyklon B gas they delivered was used as a delousing agent.<sup>304</sup> It concluded that

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<sup>298</sup> *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, United States District Court, S.D. New York, March 19, 2003, 244 F.Supp.2d 289, see introduction

<sup>299</sup> *Supra* note 297, 2003, Par. 1.a

<sup>300</sup> *Supra* note 297, 2003, Par. 1.b

<sup>301</sup> *Supra* note 297, 2003, Par. 1b [10]

<sup>302</sup> *Supra* note 297, 2003, Par. 1b [10]

<sup>303</sup> *Supra* note 297, 2003, Par. 1b [10]

<sup>304</sup> *Supra* note 297, Par. 1b [10]

“knowledge may be actual or constructive.”<sup>305</sup> To elaborate the constructive knowledge, the court used another example from the Nuremberg cases regarding employees and residents in a concentration camp who were found to possess the knowledge of the criminal activities taking place in the camp, without requiring a demonstration of their actual knowledge.<sup>306</sup>

In 2005 the same district court approved its earlier ruling after Talisman attempted to dismiss the motion saying, among other things, that secondary liability under international law is not supported by sufficient evidence and is not sufficiently defined in international law to support a claim under the ATCA.<sup>307</sup> Again the court used the same international sources to define aiding and abetting under international law and underlined the strong legal value of these sources.

In September 2006 the district court of New York however granted Talisman a summary judgment, constituting a major victory for the oil company. The plaintiffs have appealed the decision in February 2007. According to US federal law, a summary judgment may not be granted unless all of the submissions taken together “show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”<sup>308</sup> The moving party, in this case Talisman, bears the burden to “demonstrate the absence of a material factual question, and in making this determination the court must view all facts in the light most favourable to the nonmoving party.”<sup>309</sup> The court described a material fact as “one that would affect the outcome of the suit under the governing law, and a dispute about a genuine issue of material fact occurs if the evidence is such that a reasonable factfinder could return a verdict for the non-moving party.”<sup>310</sup> The plaintiffs need to present “such facts as would be admissible evidence” and must make sure that the specific facts demonstrate that there is a genuine issue for trial.<sup>311</sup>

Before considering the motion of Talisman, the court sketched the background of the conflict in Sudan, described Talisman’s activities in the region and considered the presented evidence that would link the oil company with serious human rights violations. In considering this fairly lengthy judgment, the background of the suit will be given first together with the factual allegations before considering the actual conclusions of the court.

The Sudan has been subjected to a long history of civil wars and armed struggles between government forces and a number of rebel groups. The most recent civil war started in 1983 and consisted of a struggle of a

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<sup>305</sup> *Supra* note 297, Par. 1b [10]

<sup>306</sup> *Supra* note 297, Par. 1b [10]

<sup>307</sup> *Supra* note 293, Discussion Par. 1

<sup>308</sup> *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, United States District Court, S.D. New York, September 12, 2006, 435 F.Supp.2d 633, \*662

<sup>309</sup> *Supra* note 307, \*662

<sup>310</sup> *Supra* note 307, \*662

<sup>311</sup> *Supra* note 307, \*662

liberation army against government forces. In 1991 the liberation movement split and fought each other as well as the government.<sup>312</sup> The oil rich region in the Sudan boarded the conflict area. The government had divided the oil rich land into blocks in which different oil companies were allowed to extract oil. SPC, the company that was bought by another company, Arakis, which in turn was subsequently acquired by Talisman, had purchased the rights of 3 different blocks. In 1996 the operating oil companies in the region established a consortium to conduct oil exploration in the Sudan and to construct and maintain a pipeline.<sup>313</sup> The consortium members furthermore established the Greater Nile Petroleum Operating Company Limited (GNPOC) to perform the operations for the members under their agreements with the government.<sup>314</sup> GNPOC's shares were divided over four oil companies and SPC owned 25% of the shares.

Talisman did not get involved in oil extraction in the African country until 1998, when it acquired Arakis. The court stipulated that as a result of the Khartoum agreement in 1998, Talisman acquired Arakis in a period of hope.<sup>315</sup> Talisman officials met with government officials of the Sudan, visited various GNPOC sites and found that GNPOC had an agreement with the Sudanese army regarding security of GNPOC oil operations.<sup>316</sup> The latter's security advisors met daily with the Sudanese army. In one of the roundtable meetings, Talisman was informed by a representative of a Canadian NGO that GNPOC and the government were using the Sudanese military to forcibly evict civilians and create around the oilfields a "cordon sanitaire".<sup>317</sup> He furthermore stated that oil revenues would be used to buy weapons and fund militias in order to further the genocidal policies of the government.<sup>318</sup>

After Talisman had acquired Arakis, it transferred the interest the latter held in GNPOC to Talisman Greater Nile B.V. (TGNBV), an indirect subsidiary of Talisman. TGNBV was a wholly owned subsidiary of Goal Olie, which was wholly owned by two English companies, who in turn were wholly owned by Talisman UK.<sup>319</sup> Talisman UK was a direct and wholly owned subsidiary of Talisman.<sup>320</sup> Talisman sold its subsidiaries only five years after it started its operations, to an Indian oil and gas company on 12 March 2003.<sup>321</sup> Talisman and TGNBV's relationship was structured through an agreement and consisted of the former giving advice to the latter.<sup>322</sup>

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<sup>312</sup> *Supra* note 307, \*643

<sup>313</sup> *Supra* note 307, \*646

<sup>314</sup> *Supra* note 307, \*646

<sup>315</sup> *Supra* note 307, \*647

<sup>316</sup> *Supra* note 307, \*647

<sup>317</sup> *Supra* note 307, \*648

<sup>318</sup> *Supra* note 307, \*648

<sup>319</sup> *Supra* note 307, \*648

<sup>320</sup> *Supra* note 307, \*648

<sup>321</sup> *Supra* note 307, \*648

<sup>322</sup> *Supra* note 307, \*649

Talisman further provided its subsidiary with employees, including Capeling who acted as a general manager of TGNBV.<sup>323</sup>

Between 1999 and 2003 the government was very much engaged in providing security for GNPOC.<sup>324</sup> In October 2000, Talisman and TGNBV worked on drafting guidelines for GNPOC's interaction with the military and listed acceptable and unacceptable services and supplies.<sup>325</sup> It distinguished between defensive support for GNPOC's oil exploration and offensive military action.<sup>326</sup> The military was allowed to use the corporation's communications facilities, accommodations at rig and facility sites and checkpoints, repair non-combat vehicles and give emergency treatment.<sup>327</sup> Furthermore, soldiers ride in GNPOC trucks that delivered employees at well sites, military officers were allowed to fly on GNPOC flights and two roads were build from and to army camps, airports and oil sites.<sup>328</sup>

As part of securing the oil field operations, key area villages were cleared by the Sudanese forces.<sup>329</sup> Witness testimony alleged that villages were destroyed and the government forces attacked the villages with small firearms, artillery, helicopter gunships and bombers. Another witness testified that the government forces between 1997 and 2003 routinely attacked undefended villages in the oil concession to clear the area for oil exploration.<sup>330</sup> One of TGNBV's security advisors confirmed the existence of a "buffer zone" strategy in a written report in 1999, while another report demonstrates that the population of the county located in one of the blocks had decreased with 50%, which is attributed primary to oil development.<sup>331</sup> The report however further noted that the displacement was "more or less complete by the time Talisman arrived on the scene" but nevertheless proceeded during period of Talisman's involvement.<sup>332</sup> Talisman's CEO was moreover informed by a government official about the fact that 400.000 people had been displaced in the Sudan.<sup>333</sup>

Plaintiffs furthermore alleged that two airstrips, that were controlled and maintained by GNPOC, were used by the military to attack rebels and civilians. The airstrips were used extensively by the military and as of 2000, a dozen flights came into one of them each week.<sup>334</sup> Talisman and in particular its CEO initially opposed the use of the airstrips by the government for its helicopters gunship since it would attract rebel attacks on

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<sup>323</sup> *Supra* note 307, \*649

<sup>324</sup> *Supra* note 307, \*649

<sup>325</sup> *Supra* note 307, \*649

<sup>326</sup> *Supra* note 307, \*649

<sup>327</sup> *Supra* note 307, \*650

<sup>328</sup> *Supra* note 307, \*650

<sup>329</sup> *Supra* note 307, \*650

<sup>330</sup> *Supra* note 307, \*650

<sup>331</sup> *Supra* note 307, \*651

<sup>332</sup> *Supra* note 307, \*651

<sup>333</sup> *Supra* note 307, \*651

<sup>334</sup> *Supra* note 307, \*652

the airfields and constitute a threat to the safety of TGNBV and GPNOC personnel.<sup>335</sup> Although the objections of Talisman were obeyed at first, the military resumed its combat operations by June 2000, while by October 2000 military bombers would “fly around the clock.”<sup>336</sup> Further promises by the government to not use the strips for bombing attacks were made, but shortly after that, the attacks continued.<sup>337</sup> Furthermore, the problem of monitoring was pointed out by TGNBV. The use of helicopter gunship was ideal for securing the oilfields, however once they were away from the fields there existed no means of monitoring.<sup>338</sup>

After a rocket attack from rebel forces, Talisman’s CEO, Buckee, changed his former standpoints and the security staff of TGNBV started to believe that the presence of the helicopter gunship would contribute to the safety of the GNPOC premises.<sup>339</sup> Buckee furthermore wrote a letter to the minister of national defense of the Sudanese government about the bombings, stating that “Talisman has no capacity to verify reports of bombing” and that “the bombings are universally construed as violations of international humanitarian law.”<sup>340</sup> He finally urged the minister to “stop any bombing that has a chance of inflicting damage on civilians.”<sup>341</sup>

On 20 February 2002, a military aircraft attacked a World Food Program site in a town in one of the blocks, that was described by a TGNBV report as “effectively a no-go area” for the government.<sup>342</sup> A security advisor of TGNBV noted that it was reasonable to assume that the gunship that attacked the site operated out of one of the airstrips.<sup>343</sup> Evidence established that a white gunship was used to attack civilians, while there was a white helicopter that was owned by the military operative at one of the GNPOC airstrips.<sup>344</sup> A witness of the plaintiff established that two days before government forces attacked a community in one of the blocks, he travelled with “someone from the company” who claimed he was assessing the area for developments projects, while the witness suspected the purpose of the journey was to gain military intelligence.<sup>345</sup> Another witness, whose evidence was found inadmissible, declared that three officials of TGNBV had stated that community development was a great cover for security work.<sup>346</sup> Another witness testified that a certain attack was ordered by Talisman, delivered by an employee of the corporation, named Alwad Alnof. He furthermore stated that he was transported to the battle scene in a helicopter belonging to Talisman, while neither Talisman nor TGNBV had

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<sup>335</sup> *Supra* note 307, \*652

<sup>336</sup> *Supra* note 307, \*652

<sup>337</sup> *Supra* note 307, \*653

<sup>338</sup> *Supra* note 307, \*654

<sup>339</sup> *Supra* note 307, \*654

<sup>340</sup> *Supra* note 307, \*654

<sup>341</sup> *Supra* note 307, \*654

<sup>342</sup> *Supra* note 307, \*654

<sup>343</sup> *Supra* note 307, \*654

<sup>344</sup> *Supra* note 307, \*654

<sup>345</sup> *Supra* note 307, \*655

<sup>346</sup> *Supra* note 307, \*655

any helicopters in the Sudan or evidence shows that any of its employees controlled GNPOC equipment.<sup>347</sup> Since Alnof has never been identified by the plaintiffs, the court concluded that there is no reason to believe that this person was an employee of Talisman, its subsidiary or GNPOC.<sup>348</sup>

Talisman was furthermore present at brainstorming sessions that were held to discuss whether GNPOC should extend its operations in one of the blocks, “south of the river”.<sup>349</sup> The presented evidence however did not indicate that actual plans were drawn and help from the government was called upon to accomplish this.

In considering the denial of Talisman’s knowledge about the serious human rights violations committed by the Sudanese authorities, the court noted that the corporation had informed itself very well about the nature of the conflict in Sudan and the government’s use of violence against non-Muslim African civilians.<sup>350</sup> Furthermore, through TGNBV’s security reports and other sources, it was kept up to date about the ongoing war efforts.<sup>351</sup> Despite this awareness, Talisman officials made numerous public statements denying its knowledge of human rights violations in the oil concession areas.<sup>352</sup>

Regarding the plaintiffs’ injuries, the court pointed out that many plaintiffs frequently had stated that they were displaced by the government, without clarifying how they distinguished government forces from other armed groups.<sup>353</sup> The Presbyterian Church of Sudan claimed that 64 churches were lost due to government attacks.<sup>354</sup> Again, the court found problems with the witness statements since it did not ascertain whether the churches were destroyed by government forces.<sup>355</sup>

The plaintiffs had claimed liability of Talisman on two grounds, namely conspiracy with the government in committing violations of international law and aiding and abetting the same violations. The court granted Talisman summary judgment regarding the charge of conspiracy before considering the actual allegations. The court decided that under international law, the only two conspiracies that are recognised are conspiracies to commit genocide and wage aggressive wars.<sup>356</sup> Furthermore, the plaintiffs could not rely on US federal law either in case the plaintiffs continued its charge, since this has never found acceptance in international law.<sup>357</sup>

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<sup>347</sup> *Supra* note 307, \*655

<sup>348</sup> *Supra* note 307, \*655

<sup>349</sup> *Supra* note 307, \*656

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<sup>351</sup> *Supra* note 307, \*657

<sup>352</sup> *Supra* note 307, \*657

<sup>353</sup> *Supra* note 307, \*658 and 659

<sup>354</sup> *Supra* note 307, \*661

<sup>355</sup> *Supra* note 307, \*661

<sup>356</sup> *Supra* note 307, \*663

<sup>357</sup> *Supra* note 307, 2006, \*665

With respect to aiding and abetting, the US court used the standard formulated in the *Unocal* case, namely “knowing practical assistance or encouragement which has a substantial effect on the perpetration of the crime.”<sup>358</sup> It however interpreted this standard very differently. This different interpretation will be considered below and in the analysis. In elaborating the meaning of the standard, the court turned to international law and in particular the ICTY judgments that use this test formulated in the *Furundzija* case. The court divided the standard in five different requirements that have to be met for a finding of liability under the ATCA and concluded that the plaintiffs had not raised sufficient evidence to meet all requirements.<sup>359</sup> These requirements are firstly that the principal violated international law and secondly that the defendant knew of the specific violation.<sup>360</sup> The third requirement is that the defendant acted with the intent to assist that violation; in other words the defendant specifically directed his acts to assist in the specific violation.<sup>361</sup> Fourthly, a defendant’s acts had a substantial effect upon the success of the criminal venture and finally the defendant was aware that the acts assisted the specific violation.<sup>362</sup> The court found that the substantial assistance lacked, while it contended in a later part that the required intent and necessary causal link were not proven either.

Before considering the requirement of substantial assistance, the court put some question marks to whether the three alleged crimes, genocide, war crimes and crimes against humanity, actually occurred in the region and whether the presented evidence could support the commission of the three crimes. It then continued with examining whether Talisman gave substantial assistance assisted through their acts that allegedly constituted any of the three crimes.<sup>363</sup> These acts were the upgrading of two airstrips, designating areas south of the river for oil exploration, providing financial assistance to the government through the payment of royalties, providing logistical support to the Sudanese military and a number of other acts.<sup>364</sup> Firstly the court considered that the acts of Talisman did not possess a necessary or obvious criminal component.<sup>365</sup> Therefore, according to the court, the plaintiffs’ theories of substantial assistance basically contended that “Talisman should not have made any investment in the Sudan, knowing as it did that the government was engaged in the forced eviction of non-Muslim Africans from lands that held promise for the discovery of oil.”<sup>366</sup> The issue at stake therefore is one of intent and consequently the plaintiff must be able to demonstrate that the business activity “was in fact specifically directed to assist another to commit a crime against humanity or war crime.”<sup>367</sup> The

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<sup>358</sup> *Supra* note 307, \*666

<sup>359</sup> *Supra* note 307, \*668

<sup>360</sup> *Supra* note 307, \*668

<sup>361</sup> *Supra* note 307, \*668

<sup>362</sup> *Supra* note 307, \*668

<sup>363</sup> *Supra* note 307, \*671

<sup>364</sup> *Supra* note 307, \*671 and 672

<sup>365</sup> *Supra* note 307, \*672

<sup>366</sup> *Supra* note 307, \*672

<sup>367</sup> *Supra* note 307, \*672

court continued with stating that the plaintiffs have not shown any evidence that Talisman, TGNBV or GNPOC participated in any attack against civilians, or possessed any illicit intent.<sup>368</sup> It concluded that plaintiffs' claim essentially means that knowing that serious human rights violations would be committed, Talisman should not have invested in the Sudan.<sup>369</sup> Against this background the examination of the evidence should be placed.<sup>370</sup>

Regarding the claims of upgrading the two airstrips, the court noted that GNPOC operated the strips and that there is no evidence that Talisman had any role in operating or upgrading them.<sup>371</sup> After showing evidentiary gaps of the plaintiffs' reasoning, it concluded that "the plaintiffs have not shown that Talisman took any steps to upgrade the Heglig or Unity airstrips or that it did so with the intent that the government of the Sudan would use the airstrips to launch attacks on civilians."<sup>372</sup>

The court was fairly short on the allegations of expansion the oil operations to areas "south of the river", since there is not any evidence presented by the plaintiffs that GNPOC ever adopted a plan to explore these areas. Moreover, the court pointed to the complete lack of evidence that would show illicit intent in this respect.<sup>373</sup>

In considering the alleged financial assistance provided by Talisman to the Sudanese government that subsequently would be used to buy weapons, the court concluded that the plaintiffs had failed to provide evidence that would establish liability of Talisman. In this respect the court noted that even if evidence would show that Talisman had paid money to the government, knowing that this money would be used to buy helicopter and airplanes which consequently would be utilised in attacks against innocent civilians, the plaintiffs still would need to show that Talisman specifically directed those payments to the procurement of weapons and their improper use.<sup>374</sup> The court concluded that knowledge that such attacks had occurred and would likely occur again simply does not provide circumstantial evidence of an intent to assist in those attacks by the payment of royalties.<sup>375</sup> It furthermore underlined the attempts of Talisman to discourage the Sudanese authorities from committing the attacks and stimulate them to spend the money on developments projects. Finally, it considered that the government was responsible for the security of the GNPOC operations during a civil war; this sometimes requires the use of military force and would not necessary lead to a violation of international law if this for example is not directed at civilians.<sup>376</sup> Therefore the connection between the royalty

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<sup>368</sup> *Supra* note 307, \*672

<sup>369</sup> *Supra* note 307, \*672 and 673

<sup>370</sup> *Supra* note 307, \*672 and 673

<sup>371</sup> *Supra* note 307, 2006, \*673

<sup>372</sup> *Supra* note 307, 2006, \*674

<sup>373</sup> *Supra* note 307, \*675

<sup>374</sup> *Supra* note 307, \*676

<sup>375</sup> *Supra* note 307, \*676

<sup>376</sup> *Supra* note 307, \*676

payments and government attacks on civilians was too indirect in order to establish an intent to assist the government in these crimes.<sup>377</sup>

Concerning the acts of assistance to the military, the plaintiffs alleged that Talisman along with its GNPOC partners assisted the Sudanese military through supplying fuel and accommodation and the building of roads.<sup>378</sup> Especially the construction of roads was of great assistance for the military in waging the war, since it had better vehicles and the roads enabled its forces to be more mobile.<sup>379</sup> The court however noted that the decision to build the roads was not made by Talisman but by GNPOC and there was no evidence shown by the plaintiffs that Talisman influenced this decision in any way.<sup>380</sup> It continued that the submitted evidence by the plaintiffs did not establish that Talisman provided any accommodation or fuel to the military either.<sup>381</sup> The plaintiffs therefore failed to show that Talisman substantially aided the Sudanese military, or that it specifically directed any assistance to the government's violations of international law.<sup>382</sup>

Finally, the plaintiffs alleged that Talisman assisted the government both by using its community development program as a cover for military intelligence and by publicly denying knowledge of the human rights violations.<sup>383</sup> The court however concluded that the first allegation was only backed up by inadmissible and inconsistent evidence. Secondly, mere denying knowledge of human rights violations did not constitute substantial assistance and did not raise a question of fact whether the statements were specifically directed to assist the government in the commission of the crimes.<sup>384</sup>

Beside a failure to prove that Talisman substantially assisted the government, the court proceeded with assessing the causation between the plaintiffs' injuries and Talisman's alleged participation in international violations.<sup>385</sup> In this respect, Talisman argued that Sudan was a country in the midst of a civil war and therefore not every civilian injury can be attributed to attacks directed at civilians.<sup>386</sup> Furthermore, not every attack is an attack by the military or militia aligned with the government.<sup>387</sup> Consequently a plaintiff must both show that he or she was injured or displaced in an attack by forces of the government and that this attack either targeted civilians or was undertaken to displace civilians.<sup>388</sup>

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<sup>377</sup> *Supra* note 307, \*676

<sup>378</sup> *Supra* note 307, \*676

<sup>379</sup> *Supra* note 307, \*676

<sup>380</sup> *Supra* note 307, \*676

<sup>381</sup> *Supra* note 307, \*676

<sup>382</sup> *Supra* note 307, \*676 and 677

<sup>383</sup> *Supra* note 307, \*677

<sup>384</sup> *Supra* note 307, \*677

<sup>385</sup> *Supra* note 307, \*677

<sup>386</sup> *Supra* note 307, \*677

<sup>387</sup> *Supra* note 307, \*677

<sup>388</sup> *Supra* note 307, \*677

In reviewing the evidence, the court considered that only three plaintiffs had demonstrated that they were displaced or injured by government attacks to which GNPOC arguably provided assistance.<sup>389</sup> In its reasoning, it filtered out plaintiffs who were not able to identify that government forces or forces aligned with the government committed the violations or that the displacement occurred because of targeted attacks against civilians.<sup>390</sup> It noted that even aerial attacks on civilians cannot be linked to Talisman through GNPOC, since the plaintiffs had not presented any admissible evidence that identified the two airstrips as the strips from which the government flew on a particular mission.<sup>391</sup> The plaintiffs had not offered any evidence that would support an interference that the attacks were launched from the two strips operated by GNPOC and may not shift the burden of proof by arguing that Talisman had not shown that the attacks originated from other airfields.<sup>392</sup>

The court concluded that Talisman was entitled to summary judgment and that plaintiffs' allegations failed on numerous grounds. It continued with analysing the motion to amend, filed by plaintiffs, and with examining the choice of law applicable for determining whether Talisman could be held liable for the acts of its subsidiaries. Through the motion to amend, the plaintiffs tried to extend Talisman's liability to the acts of GNPOC and TGNBV. Talisman should be held liable through a veil piercing theory of liability or since TGNBV acted as Talisman's agent.<sup>393</sup> While the old complaint focused on the cooperation between Talisman and the Sudanese government, the new complaint involved Talisman's role through GNPOC and TGNBV in aiding and abetting GNPOC in ethnic cleansing, or conspiring with GNPOC, the other oil corporations and TGNBV.<sup>394</sup>

In considering the new complaint, the court chose to consider which corporate law should be applicable to examine whether the corporate veil could be pierced and whether Talisman would be liable through agency liability. Both theories consider whether a corporation should be held liable for acts of its subsidiaries. Since GNPOC is incorporated under the law of Mauritius, TGNBV and its parent corporation under the law of the Netherlands, and Talisman (UK), Supertest and Igniteserve under the English law, the court analysed the laws of each country and concluded that the corporate veil could not be pierced and that Talisman could not be held liable for its subsidiaries through agency liability.<sup>395</sup>

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<sup>389</sup> *Supra* note 307, \*677

<sup>390</sup> *Supra* note 307, \*677

<sup>391</sup> *Supra* note 307, \*678

<sup>392</sup> *Supra* note 307, \*678

<sup>393</sup> *Supra* note 307, \*679

<sup>394</sup> *Supra* note 307, \*679

<sup>395</sup> *Supra* note 307, \*689

## 6.4 Khulumani v. Barclay Nat. Bank Ltd.

In this case, popularly known as the South African litigation case, three groups of plaintiffs brought actions on behalf of individuals allegedly injured by practises of apartheid in South Africa.<sup>396</sup> The claims were brought under the ATCA and under another act against corporations that did business in South Africa for supporting and profiting from the apartheid regime.<sup>397</sup> The claims mainly focus on financial institutions that made loans available and invested in the country and on computer companies that sold technology, equipment and services to apartheid and often used the provided forced labour from the regime.<sup>398</sup> Allegedly, as a result of the companies' transactions and business activities, serious human rights violations were committed by the apartheid regime. Similar to the *Talisman* case, the defendants submitted motions to dismiss that were granted in first instance. The plaintiffs appealed the decision and the Court of Appeals held among other things that the plaintiffs may plead the theory of aiding and abetting liability under the ATCA.<sup>399</sup> As with the *Talisman* trials, the case is still pending and has not come before a jury yet. The latest pre-trial judgment was delivered on 12 October 2007.

In first instance Judge Sprizzo concluded that it did not find sufficient evidence in international law that could justify the notion of aiding and abetting an international violation as a universally accepted legal obligation.<sup>400</sup> Two out of three judges disagreed with his views in the appeals decision. Judge Katzmann repeated the exercise that was made in the *Talisman* decision of 2003 and referred to international sources such as the IMT Charter, the cases under the Charter of the IMT and Control Council Law No. 10, ILC commentaries, the statutes and case law of the ICTY and ICTR, and the Rome Statute. He concluded with respect to the actus reus of aiding and abetting that his research uncovered nothing to indicate that a standard other than the one used in *Furundzija* should be applied.<sup>401</sup> This means "practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime." He concluded that a defendant may be held liable under international law when he provides practical assistance to the principal which has a substantial effect on the perpetration of the crime and does so with the purpose of facilitating the commission of that crime.<sup>402</sup> The judge had stated that the

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<sup>396</sup> *Khulumani v. Barclay Nat. Bank Ltd.*, United States Court of Appeals, Second Circuit, October 12, 2007, 2007 WL 2985101, see background

<sup>397</sup> Rachel Chambers, *The Unocal Settlement: Implications for the Developing Law on Corporate Complicity in Human Rights Abuses*, <http://www.wcl.american.edu/hrbrief/13/unocal.pdf?rd=1>, last visited on 25 November 2007, Par 130-133

<sup>398</sup> *Khulumani v. Barclay Nat. Bank Ltd.*, United States District Court, S.D. New York, Trial Pleading, 2002 WL 32153622

<sup>399</sup> *Supra* note 397, see Holdings

<sup>400</sup> *Supra* note 397, see opinion Judge Katzmann \* 9

<sup>401</sup> *Supra* note 397, see opinion Judge Katzmann \* 15

<sup>402</sup> *Supra* note 397, see opinion Judge Katzmann \* 15

Rome Statute articulated the mens rea requirement in article 25, in which a defendant would be held guilty as an accomplice if he aided or abetted the commission of a crime “for the purpose of facilitating the commission of such a crime.”<sup>403</sup> He continued with underlining the authoritative meaning of this treaty and argued that this interpretation of mens rea was entirely consistent with the application of accomplice liability under the sources of international law he already discussed.<sup>404</sup>

Judge Hall who concurred with Katzmann’s opinion formulated three different scenarios in which a defendant should be found liable. Firstly, by “knowingly and substantially assisting a principal tortfeasor, such as a foreign government or its proxy, to commit an act that violates a clearly established international norm.”<sup>405</sup> Secondly, by “encouraging, advising, contracting with, or otherwise soliciting a principal tortfeasor to commit an act while having actual or constructive knowledge that the principal tortfeasor will violate a clearly established customary international law norm in the process of completing that act.”<sup>406</sup> Finally, by “facilitating the commission of human rights violations by providing the principal tortfeasor with the tools, instrumentalities, or services to commit those violations with actual or constructive knowledge that those tools, instrumentalities, or services will be (or could be) used in connection with that purpose.”<sup>407</sup>

Judge Korman finally used the example of the officer of the Dresdner Bank, who was acquitted for aiding and abetting international crimes before a United States Military Tribunal after the Second World War for providing loans to businesses knowing that the funds would be used to finance enterprises that were involved in international crimes.<sup>408</sup> According to judge Korman, the theory that was rejected by the tribunal is the same as the allegations in the underlying case. He furthermore argued that the movement towards recognition of corporate liability only materialised after the collapse of the apartheid regime.<sup>409</sup> Therefore, the established norm during the apartheid regime was that corporations were not legally responsible for violations of norms proscribing crimes against humanity.<sup>410</sup> Since it is inappropriate to apply statutes enacting civil liability retroactively, the complaints should be dismissed.<sup>411</sup> Korman continued with considering the other judges’ opinions and notes that Judge Hall’s opinion is contradictory to other domestic case law and the doctrine of aiding and abetting in civil cases is very uncertain. He concluded that this vague standard for aiding and abetting formulated by Judge Hall would create practical problems that are harmful to the political and economic

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<sup>403</sup> *Supra* note 397, see opinion Judge Katzmann \* 14

<sup>404</sup> *Supra* note 397, see opinion Judge Katzmann \* 14

<sup>405</sup> *Supra* note 397, see opinion Judge Hall \* 25

<sup>406</sup> *Supra* note 397, see opinion Judge Hall \* 25

<sup>407</sup> *Supra* note 397, see opinion Judge Hall \* 25

<sup>408</sup> *Supra* note 397, see opinion Judge Korman \* 29

<sup>409</sup> *Supra* note 397, see opinion Judge Korman \* 62

<sup>410</sup> *Supra* note 397, see opinion Judge Korman \* 62

<sup>411</sup> *Supra* note 397, see opinion Judge Korman \* 62

interest of the United States.<sup>412</sup> The current decision would “generate tremendous uncertainty for private corporations, who will be reluctant to operate in countries with poor human rights records for fear of incurring legal liability for those regimes’ bad acts.”<sup>413</sup> In turn, the uncertainty would both lead to stagnation of the United States encouragement to reform such countries through economic engagement and generally discourage the free flow of trade and investment.<sup>414</sup> Regarding the opinion of Judge Katzmann, Korman argued that there did not exist any well-established and universally recognised definition of aiding and abetting at the time of the apartheid regime, which can sufficiently be considered as customary international law.<sup>415</sup> He continued with indicating that the facts of the used ICTY and ICTR decisions, in which the standard for aiding and abetting was defined, were very different from the facts in the underlying case. Since courts should decide on a case-by-case basis, the judgments of the ICTY and ICTR cannot be applied in the current case.<sup>416</sup>

## 6.5 Analysis

In the *Unocal* case, the court chose to use an adjusted international criminal law standard to address the corporation’s alleged complicity. In assessing Unocal’s involvement in the human rights abuses, the court seems to take a number of factors into account; these are Unocal’s knowledge of human rights abuses, its ability to direct the military, its influence on the military that could persuade them not to commit the violations, and knowledge of this possible deterrent role.

The government of Myanmar was, already before Unocal decided to start a joint venture with them, infamous for its serious violations of human rights and its practises of forced labour. The corporation was made aware of this before it moved in Myanmar. This awareness was demonstrated in e-mails of Unocal employees to each other and to Total, through warnings of its consultants, by NGOs that complaint about the suppressive practises of the government. Furthermore, even spokesmen of Unocal did not deny that violations were taking place in connection with the project.

The standard that the court used in assessing the alleged complicity is the standard formulated in *Furundzija*, save for a slight modification. The court chose to leave moral support out of the definition. It however did this without demonstrating how this modified standard would differ from the original one and what the practical implications of this new standard will be. Applying this standard, the court decided that the actus reus of aiding and abetting, consisting of practical assistance, was fulfilled. Unocal hired the military for security and for building of infrastructure in exchange of money

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<sup>412</sup> *Supra* note 397, see opinion Judge Korman \* 67

<sup>413</sup> *Supra* note 397, see opinion Judge Korman \* 67

<sup>414</sup> *Supra* note 397, see opinion Judge Korman \* 67

<sup>415</sup> *Supra* note 397, see opinion Judge Korman \* 69

<sup>416</sup> *Supra* note 397, see opinion Judge Korman \* 73

and directed the military in this. The mens rea requirement, consisting of knowing or reasonably should have known that acts of the corporation assisted or encouraged the military to commit the crimes, was met too. Concerning the rape and murder allegations, the court considered the elaboration in *Furundzija* and found the oil company liable for these two claims too. It noted that the accessory does not need to know the precise crime that the principal intends to commit, but is aware that a number of crimes will probably be committed and in fact are committed.

Finally the court dismissed the defences raised by Unocal that it is not responsible for liability of its subsidiaries and that there was no basis to pierce the corporate veil. It found that the two corporations that operated in Myanmar, were alter egos of Unocal and that any actions by them were attributable to Unocal. The direct involvement of Unocal's president, CEO and other officers showed the strong ties between Unocal and its subsidiaries.

Generally the judgment in *Unocal* should be applauded since the judges have made a very courageous decision to use an international standard and hold the corporation responsible for its involvement in human rights abuses abroad. Beside setting an example to corporations that the ATCA will not tolerate serious human rights violations, the court has demonstrated the boundaries of when particular involvement in human rights abuses becomes illegal. Close cooperation with an infamous regime, knowledge of human rights abuses, ability to direct the military and to limit or prevent human rights violations by the military and knowledge of this influential and deterrent position will result in a corporation aiding and abetting such violations. This drawn line is a beneficial one since it deters a corporation to close its eyes for and participate in serious human rights abuses committed by a government. Furthermore, the used standard requires that the involvement of the corporation has a substantial effect on the crime. This allows corporations to continue their business transactions with repressive regimes as long as the corporation does not get significantly involved in human rights abuses committed by the state authorities. For this reason, neither the economic growth of the corporation nor the growth of the country are significantly hampered by this ruling.

More specifically, the court chose a way out clause in applying the standard formulated in *Furundzija*, by excluding moral support from the definition. This raises the question why there is a need for another definition of aiding and abetting and where the dividing line lies between encouragement and moral support? The new definition only complicates the already complex area of aiding and abetting in international law without clarifying its purpose, meaning and implications and therefore this new standard is very unfortunate.

Furthermore, the ruling is very similar to the Nuremberg cases concerning the question of responsibility of a corporation for its subsidiaries. The court decided that due to Unocal's influence it could be held responsible for its

subsidiaries in Myanmar and therefore “pierce the corporate veil.” This welcoming approach is parallel to the approach taken in the *IG Farben* case, where the tribunal did not spend time to examine the corporate structure either. Here, the tribunal ruled that employees of IG Farben were not guilty for the supply of poisonous gas through Degesch, a corporation that was for 42,5 % owned by Farben, since they did not have any persuasive influence on the management policies of Degesch or any significant knowledge as to the uses to which its production was being put.

Finally, the court used a subjective standard of knowledge with an objective edge. In its test it concluded that Unocal knew or reasonably should have known that it aided and abetted the serious human rights violations. This implies that a corporation is liable for such violations when it closes its eyes for abuses and denies any knowledge.<sup>417</sup>

In the *Shell* case the US District Court in New York applied a national standard to determine whether the involvement of the oil company in the violating acts of the Nigerian authorities amounted to aiding and abetting. The judgment was however delivered before the decision in the *Unocal* case and other rulings that applied an international criminal law standard.

The court examined whether there existed a “substantial degree of cooperative action between the corporate defendant and the Nigerian authorities.” This seems to be a slightly stricter standard than the one applied in the *Unocal* case since it speaks of cooperative action and not mere practical assistance. Since the court concluded that in the *Shell* case the presented facts amounted to aiding and abetting, the same facts would very likely constitute aiding and abetting under the *Unocal* standard too. Turning to the facts, the court concluded that payments to the military and police, delivery of weapons to them, cooperation with them in a campaign against a minority group, assisting in planning raids and terror campaigns, bribery of witnesses, providing facilities such as boats and helicopters to facilitate attacks on minority villages, and payments to the military to respond violently to complaints, would put liability on the corporation for wilful participation in the crimes.

The judgment of the New York court is very reasonable since the alleged assistance consisted not only of knowingly cooperating in human rights abuses through directing the military, as was the case in *Unocal*, but in the delivery of weapons, the providing of facilities, the bribery of witnesses and other means to facilitate attacks on civilians as well.

In the two proceedings in *Talisman* concerning the motions to dismiss, the court used international sources to formulate the standard of complicity. The actus reus was identical to the one in *Furundzija* namely practical

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<sup>417</sup> See for a more thorough analysis of the judgment: Paul L. Hoffman & Daniel A. Zaheer, *The rules of the road: federal common law and aiding and abetting under the alien tort claims act*, Loyola of Los Angeles International & Comparative Law Review, Fall 2003, 26 Loy. L.A. Int'l & Comp. L. Rev. 47, \*47-88

assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime. Regarding the mens rea, the court concluded that “some knowledge that the assistance will facilitate the crime is necessary.” In elaborating the subjective requirement, the court referred to actual and constructive knowledge and used a number of Nuremberg cases to explain these notions. It furthermore did not attempt to show in what way “some knowledge” would differ from “knowledge” and therefore it must be assumed that practically the mens rea requirement is the same as the one used in *Furundzija*.

In the decision of the same court on the summary judgment, the judge elaborated the actual application of the standard of aiding and abetting. In considering the request for a summary judgment, the court decided on the evidence presented that the upgrading of the two airstrips, designating areas south of the river for oil exploration, providing financial assistance to the government through the payment of royalties, providing logistical support to the Sudanese military, using the community development program as a cover for military intelligence and publicly denying knowledge of human rights violations did not make Talisman liable as an aider and abettor for the crimes committed by the Sudanese authorities. The court reached this decision even though Talisman knew that the government committed serious human rights violations and must have known that it indirectly contributed to these violations. The court seemed to attach value to the fact that Talisman’s acts were not inevitably criminal, that the corporation made efforts to discourage the government in its attacks on civilians, that many decisions or acts of GNPOC could not be attributed to Talisman, that the assistance given by Talisman was not specifically directed at assisting the government and that much of the presented evidence by the plaintiffs was inadmissible and inconsistent. Furthermore, the presented case lacked sufficient causation for two reasons. Firstly, most plaintiffs were not able to identify that government forces or aligned forces were committing atrocities, opposed to for example other armed bands. Secondly, the plaintiffs had not adequately proven that the attacks on civilians were launched from the two airstrips that were operated by GNPOC. Finally, the court analysed the corporate laws of different nations to examine whether Talisman was responsible for acts of its subsidiaries. It concluded that Talisman could not be held liable for the acts of GNPOC and TGNBV in the Sudan.

The underlying case shows the complexity of both the meaning and scope of aiding and abetting, and a multinational corporation as a defendant. Opposed to many other examples of corporate complicity, this case does not mainly focus on the knowledge requirement. In the underlying case the evidence established quite obviously that Talisman knew of the civil war before moving into the Sudan, and was continuously informed about the governments’ forced evictions of civilians around the oil fields. The question for the court to be answered concentrated on the actual assistance from Talisman to the government.

The standard used by the court regarding the actus reus is the one applied in the *Unocal* ruling, namely “knowing practical assistance or encouragement which has a substantial effect on the crime.” In examining whether the acts of Talisman consisted of aiding and abetting, the court instead of considering the mens rea and actus reus requirement separately, combined the two and analysed whether Talisman substantially assisted the Sudanese government’s violations. It considered that the acts of Talisman did not possess a necessary or obvious criminal component. Since the plaintiffs were not able to show that the business activity was “specifically directed to assist another to commit a crime against humanity or a war crime”, it consequently argued that the plaintiffs’ theory basically contended that Talisman should not have invested in the Sudan, knowingly that the government was engaged in serious human rights violations relating to the oil business.<sup>418</sup> The reason for the court to use this reference to “specifically directed” is the ICTY judgment of *Vasiljevic*.<sup>419</sup> Here the Appeals Chamber of the ICTY concluded that the actus reus of aiding and abetting consisted of “acts *specifically directed* to assist, encourage, or lend moral support to the perpetration of a certain specific crime” and that the support must have “a substantial effect upon the perpetration of the crime.”<sup>420</sup> The mens rea of aiding and abetting, used by the court in *Talisman*, consisted of “knowledge that the acts performed by the aider and abettor assist the commission of the specific crime of the principal.”<sup>421</sup>

The court in applying these requirements, mixed the mens rea and actus reus. It contended that the plaintiffs must demonstrate that the business activity was specifically directed to assist another to commit a crime against humanity or war crime. This is an examination of the required intent, which according to the ICTY rulings consists of knowledge. This unfortunate interpretation first of all complicates the meaning of aiding and abetting and amounts to even more uncertainty. Secondly, it places a much heavier burden to prove complicity. If a plaintiff needs to demonstrate that a business activity of a defendant was “specifically directed” to assist a principal in its international crimes, hardly any corporation could be found liable for aiding and abetting serious human rights violations.

The evidence quite clearly established that Talisman knew of the government’s attacks and therefore must assumed to have known that it was indirectly assisting the government in its attacks on civilians, even although it tried to discourage the military to commit the offences. Before Talisman moved in the Sudan, it was informed about the conflict in the country and the human rights violations of the government. During the time it operated, security advisors kept the corporation up to date about the buffer zone

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<sup>418</sup> *Supra* note 307, \*672

<sup>419</sup> ICTY, Judgment, *Prosecutor v. Vasiljevic*, Case No. IT-98-32-A, Appeals Chamber, 25 February 2004

<sup>420</sup> *Supra* note 307, \*666, referring to *Prosecutor v. Vasiljevic*, Case No. IT-98-32-A, Appeals Chamber, 25 February 2004

<sup>421</sup> *Supra* note 307, \*666, referring to *Prosecutor v. Vasiljevic*, Case No. IT-98-32-A, Appeals Chamber, 25 February 2004

strategy of the Sudanese military and the displacement of a great number of people. Letters from Talisman's CEO, who attempted to limit the bomb attacks on civilians, only confirms awareness of bomb attacks on civilians. Finally, one of TGNBV's security advisors noted in his report that it was reasonable to assume that a gunship which attacked a World Food Program site in a nearby town, operated out of one of the GNPOC airstrips.<sup>422</sup> Taking the evidence into consideration, one could say that the mens rea requirement has been fulfilled. However, regarding the actus reus, one should agree with the court that the practical assistance offered by Talisman to the government was not substantial. In elaborating the standard of aiding and abetting, the appeals chamber of the ICTY in *Furundzija* noted that "the relationship between the acts of the accomplice and of the principal must be such that the acts of the accomplice make a significant difference to the commission of the criminal act by the principal."<sup>423</sup> Consequently, possessing a role in a system without influence would not be sufficient to incur criminal responsibility on a defendant.

For this reason the court should have decided to grant summary judgment to Talisman and not for lack of mens rea. The acts of Talisman did not make the required significant difference, especially since the corporation missed an influential role in the serious human rights abuses. In the Nuremberg cases discussed in *Furundzija*, a differentiation was made between military commanders and mere bystanders in relation to the influence in a specific crime. The role which Talisman possessed lies somewhere in between the two, but taking into account the limited influence it had in GNPOC and could exercise on the infamous and recalcitrant Sudanese regime, the corporation's position is more likely one of a bystander. Furthermore, the assistance to the government was already restricted by GNPOC, since the former was only allowed to use the latter's facilities for defensive military purposes. Finally, all the facts of a particular case should be taken into account in considering whether certain acts, which could have both a criminal and legal component, constitute aiding and abetting serious human rights violations. In this instance, Talisman attempted to discourage the Sudanese government to use the provided money and facilities to attack civilians. In the midst of a civil war, the recalcitrant Sudanese government persisted in doing this. Eventually, after 5 years, Talisman moved out of Sudan and sold its subsidiaries to an Indian company, sending a clear message to the Sudanese government that it could not proceed with their joint venture. These mitigating facts, together with the above given arguments, make the outcome of the case very reasonable and just.

Regarding the motion to amend, filed by the plaintiffs to hold Talisman liable for acts of its subsidiaries, the court considered corporate law of different countries to establish whether Talisman could be held liable under agent liability or under the theory of piercing the corporate veil. It concluded that under both theories, this was not possible and therefore Talisman could not be held liable. The application of a theory of legal

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<sup>422</sup> *Supra* note 307, \*654

<sup>423</sup> *Supra* note 138, par. 233

separation is regrettable in instances of alleged complicity in serious human rights violations. In *Unocal* the court reviewed Unocal's influence in its two subsidiaries in Myanmar and held the corporation responsible for its behaviour, arguing that the two subsidiaries were alter egos of Unocal. This accepted exception in US law pinpoints the exact essence of this issue, namely an examination to what extent a subsidiary was influenced by another corporation. Beside the advantage that this approach is fairly clear, it avoids the need to analyse complex corporate structures and laws from various legal systems. This limits a corporation's possibility to evade liability for serious human rights violations on procedural grounds, which should be stimulated given the importance of deterring serious human rights violations.

Finally, a concluding remark should be made concerning the benefit of the litigation in *Talisman*. One can doubt the practical benefits of this lawsuit against the oil corporation for international crimes committed by a notorious African government. While other corporations, such as Unocal, closed their eyes for atrocities committed by the government, *Talisman* at least made some attempts to discourage or limit them. After five years in the Sudan, the oil corporation moved out of the African region and an Indian corporation, that might not be as willing to discourage the Sudanese government in its attacks on civilians, acquired its subsidiaries.

In the South African litigation case, the Court of Appeals vacated the trial chambers judgment and held with a three to two majority that the plaintiffs' case under the ATCA can proceed in US federal courts. The three different judgments in this very recent decision show that the American judges are still struggling with the question what the standard for aiding and abetting should be and how this standard should be interpreted.

Judge Katzman opted for the *Furundzija* standard regarding the actus reus, while the mens rea constituted the "purpose to facilitate the crime", borrowed from the Rome Statute. The actus reus in his analysis differs from the one used in *Unocal* since it includes moral support. Katzman's formulation of the mens rea requirement, which he loosely derived from the Rome Statute, is quite unfortunate. The ICC has not interpreted this treaty provision yet and therefore its exact meaning is still unclear. Furthermore, in *Furundzija* the ICTY considered the provisions of the Rome Statute in formulating the applicable standard for aiding and abetting. Why then formulate a speculative standard in a new treaty yourself, while an international court has already elaborately interpreted this treaty, together with the other international law sources? Finally, this speculative and new mental requirement seems to place an unfortunate heavy burden to proof aiding and abetting. Beside the fact that an accomplice now needs to act with the purpose of facilitating the crime, he also needs to do this with knowledge and intent.

Judge Hall sketched three different scenarios in which a corporation would be found liable for complicity, together with a combined mens rea, that

consisted of knowledge. Hall's opinion regarding the actus reus complicates the meaning and scope of aiding and abetting even more. His approach is unnecessary since all three scenarios would be able to fall under the quite elaborated *Furundzija* standard. The use of an international standard should furthermore be stimulated. The reasons for this will be given later.

The third judge disagreed with both of his colleagues, mainly on procedural grounds. He firstly contemplated that the facts of the case were very similar to the facts of the acquitted Dresdner banker in the Nuremberg trials, Rasche. For this reason alone, the companies should not be found liable. He dismissed the case based on the principle that laws should not be applied retroactively. In relation to the two opinions of the other judges, he argued that Hall's opinion was contradictory to other domestic case law and that the doctrine of aiding and abetting is very uncertain in domestic law. This uncertainty would lead to a decline of US corporations investing in countries with poor human rights records and stagnate US encouragement to reform such countries. It moreover would discourage the free flow of trade and investment. Concerning Katzman's opinion he noted that during the time of apartheid there did not exist a sufficiently recognised customary law definition of aiding and abetting. Furthermore the facts of the cases before the ICTY and ICTR in which the standard was formulated and applied, were too different from the underlying case. Therefore, the standard was not applicable.

I sincerely disagree with Judge Korman's decision. Although the facts of this case are fairly similar to the facts of the defendant Rasche, a court should decide on this issue in considering the merits and not in this pre-trial phase. Furthermore the allegations in *Khulumani v. Barclay Nat. Bank Ltd.* go beyond the mere provision of loans and entail the application of forced labour by corporations.

The argument that a clear definition in customary international law was not formulated at the time of apartheid is not accurate either. Already in the post World War Two tribunals, aiding and abetting in international law evolved and lay its foundations. International customary law regarding aiding and abetting was created and subsequently developed by the ILC. This is for example evidenced by the use of the case law of the war tribunals and ILC documents in the formulation of the aiding and abetting standard in the *Furundzija* judgment.

The viewpoint of the judge regarding the use of a vague standards that would create uncertainty and consequently lead to a decrease in economic interactions in certain countries is understandable. The law should be clear and the use of vague and different standards only complicate the exact boundaries of aiding and abetting. The solution to this problem is however not simply neglecting the theory of aiding and abetting. The solution is to clarify the meaning and boundaries of this theory and the only way to do this is to formulate and elaborate the standard of aiding and abetting. Furthermore the ruling in *Unocal* has shown that corporations only will be

held accountable in cases where the corporate involvement in a regime's human rights abuses is significant. The *Talisman* case for example confirms this since the oil corporation was not held accountable for its part in the human rights abuses committed by the Sudanese authorities. The estimated decline in economic activity by US corporations in countries with problematic regimes will therefore not be substantial.

The argument that the movement towards recognition of corporate complicity only materialised after the fall of apartheid is too narrowly formulated too. Although the IMT Statutes did not recognise jurisdiction of legal persons, many defendants were tried for aiding and abetting crimes "through the instrumentality" of certain corporations. Moreover in for example the case of *IG Farben*, the tribunal made it very clear by continuously referring to the IG Farben, that the company stood trial for the atrocities.<sup>424</sup> Furthermore, corporate liability in domestic civil law has been recognised by every single country since the recognition of legal persons. Korman has a point that the prosecution for serious human rights violations of legal entities under international law as such, had not materialised yet at the time of apartheid and may not have materialised yet at this moment. However interpreting the above given arguments with the least bit of creativeness shows the regrettable viewpoint he takes.

Finally, the argument that the facts of the cases before the ICTY and ICTR, in which the standard of aiding and abetting was formulated and applied, were so different that the standard cannot be used for the underlying case is peculiar. Facts of cases will always differ and the art of decision making in judicial cases is to use an abstract test for all situations to reach a just outcome. The mere fact that the circumstances of the case in which the test was formulated differ from the matter before the court, is therefore odd. Adding to this, the tribunal used many examples of different rulings with varying factual circumstances in formulating its standard in *Furundzija*. In doing this, it extended the standard to a broad area of cases and consequently simplified its application for various instances.

Looking at the ATCA cases together, a number of conclusions can be drawn. First of all the evolution of the formulation of a standard of aiding and abetting has not materialised in a generally accepted standard in US federal courts yet. While in the *Shell* ruling, US courts used its own federal case law to examine the corporations alleged complicity, this changed with the *Unocal* case. Here, the judges applied a modified international law standard. The same standard was subsequently used in the summary judgment in *Talisman*, while the court had used a standard nearly identical to the *Furundzija* formulation in the same litigation regarding the motions to dismiss. In the most recent judgment in the *South African Litigation*, the judges formulated two different standards, namely a national and an

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<sup>424</sup> Andrew Clapham, *The question of Jurisdiction Under International Criminal Law Over Legal Persons: Lessons from the Rome Conference on an International Criminal Court*, from: M.T. Kamminga and S. Zia-Zafiri (eds.), *Liability of Multinational Corporations under International Law*, Kluwer Law International 2000, page 170 and 171

international. The international standard was again formulated differently from the ones used in earlier trials. This use of various standards does not make the law on corporate complicity much clearer or easier to work with and courts should work towards a single standard on aiding and abetting. On the other hand it has only been since 2002 that the Court of Appeals in *Unocal* used an international standard and therefore the courts should be given some more time to identify the exact meaning and boundaries of aiding and abetting.

The use of an international standard should be stimulated. Firstly it replies to the growing demand of the international community to use international standards to address grave human rights breaches, which can be inferred from the establishment of a number international criminal tribunals and the ICC. Secondly, using such a standard would contribute to the development of international law concerning corporate complicity. In this regard it could clarify the boundaries and meaning of aiding and abetting and push the movement towards corporate responsibility in international and national law even more. This pressure could convince states and the international community as a whole to adopt legislation regarding corporate responsibility and establish jurisdiction over corporations or legal persons in national and international fora for serious human rights violations. Thirdly an international standard would create certainty for corporations operating abroad since business actors then know that in whatever country they operate, the minimum required behaviour is clear. Finally, the use of the international standard formulated in *Furundzija* has proven its value in the cases in which it has been applied. It furthermore has shown that a standard tailored to cases of individual defendants or small groups of individuals can be utilised for giant corporations too, which in itself is a very promising conclusion. Therefore, there is no reason why the original *Furundzija* standard should not be used in the litigation under the ATCA.

Scholars have opted for different standards of corporate liability too. Khanna for example proposed a composite standard that combines a strict liability regime, a negligence regime and a corporate mens rea regime to achieve the ultimate standard for corporate liability. According to him, a mens rea regime would rarely be desirable since it would only impose liability on the corporation in cases where harm is caused by its agents and a sufficient amount of information exists within the corporation to meet one of the mens rea standards.<sup>425</sup> Using a mens rea standard would consequently limit the gathering of information by the company and the flow of information in the company.<sup>426</sup> This would lead to a decrease of precautions and levels of care.<sup>427</sup> There is something to say for the argument that if a corporation only will be punished for human rights violations of which it knew that these were committed, it would limit the gathering and free flow

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<sup>425</sup> V.S. Khanna, *Corporate Liability Standards: When should corporations be held criminally liable?*, American Criminal Law Review, Fall 2002, 37 Am. Crim. L. Rev. 1239, \* 1240

<sup>426</sup> *Supra* note 424, \* 1240-1241

<sup>427</sup> *Supra* note 424, \* 1240-1241

of sensitive information. The concerns of the author can however be met using a mens rea standard and the use of a mens rea standard is more appropriate in cases of serious human right violations.

Firstly, a corporation does not only gather information, but receives information from a number of different sources such as NGOs, roundtable meetings, the media and the like. This means that it would have a hard time to prevent receiving sensitive information from all these different sources. Secondly a corporation that does attempt to prevent the gathering and free flow of information, only demonstrates that it closes its eyes for sensitive issues and consequently provides any prosecutor or plaintiff an argument that shows that it is aware of a sensitive issue and does not care to look into it. The use of a mens rea standard is furthermore more appropriate in cases of complicity in grave human rights breaches since it answers the demand of the right to be presumed innocent until proven guilty. An objective inference of guilt from certain facts without spending too much attention to a suspect's state of mind might jeopardise this principle. The presumption of innocence is a well established norm which has been accepted as a general principle of international law and which is laid down in article 14 ICCPR. Fourthly, serious human rights violations are characterised by an illicit intent or high degree of recklessness by the perpetrator. Not using a mens rea standard would therefore not meet the demand of the seriousness of such crimes. And finally, the rulings in *Rasche* and *Flick* show that in certain cases, courts assume that a defendant possessed the required knowledge using circumstantial evidence. This enables a court to find a violation of international law, instead of a violation of a duty of care. This, turning back to the argument made concerning the seriousness of such crimes, suits the character of serious human rights violations more.

## 7 Conclusion

The purpose of this thesis has been to analyse where the border of culpability or liability lies in cases of business actors allegedly aiding and abetting serious human rights violations. In which circumstances should a business actor be held responsible for aiding and abetting such violations and in which circumstances should it not? In considering this question, case law and other sources from four different legal developments have been described and critically analysed in order to establish what the standard of aiding and abetting is in this area, and how the judges interpreted and applied these standards in actual cases. In the following conclusion the main question will be answered, together with the sub questions. Firstly, an examination will be made whether the purposes of the conducted research have been met. Secondly, the questions which standards of aiding and abetting have been applied by courts in international and national fora concerning business actors allegedly complicit in serious human rights violations and whether recent domestic case law concerning this issue is influenced by international law, will be answered. Thirdly, a conclusion will be drawn on how the courts applied the different standards. In this regard the features that were found important by courts, together with how these features were interpreted will be addressed. Finally, the main question will be answered, namely in which circumstances should a business actor be held responsible for aiding and abetting serious human rights violations and in which circumstances should it not?

The purposes of the conducted research have been accomplished to a large extent. The analysed sources, in particular case law, considered the standard of aiding and abetting fairly extensive and the meaning and boundaries of this mode of participation was discussed in elaborated judgments. These cases therefore provided interesting materials that enabled answering the main questions of this thesis. The judgments moreover offered examples of business entities with various different structures and sizes, operating in different economic areas and countries and were charged with aiding and abetting for different crimes that were considered in several national and international fora. These examples of business aiding and abetting serious human rights violations under varying circumstances increase the relevance of this thesis. The conclusions of this research are derived from all these different cases and can therefore be applied to a broad area of similar cases. Moreover, not only instances of actors that were held guilty or liable were considered, but as well cases in which defendants were acquitted. This enabled a diverse examination of aiding and abetting and demonstrated to a certain extent where courts or tribunals set the boundaries for this mode of participation.

Unfortunately, a number of the analysed cases were still pending or only decided on preliminary motions. Especially many of the US federal cases under the ATCA are still pending and therefore the analysed case law does

not create very strong precedent yet. Furthermore, the unclear future developments in these courts and in international criminal law might make some of the conclusions in this thesis temporarily applicable. Developments of law can never be predicted but the rapid evolution and changes in the area of corporate responsibility and international criminal law underlines this proposition. Furthermore, the scarce examples of business entities being tried for complicity in international crimes in courts obstructed an examination of different examples from more jurisdictions. Finally, a number of questions remain unanswered after the conducted research. For example answering how to exactly determine mens rea of a corporation has not succeeded; how many or which particular staff members of a corporation need to know about human rights violations to impute knowledge to the corporation?

## 7.1 Conclusion 1

*Which standards of aiding and abetting have been applied by courts in international and national fora concerning business actors allegedly complicit in serious human rights violations and is recent domestic case law concerning this issue influenced by international law?*

In the analysed case law the standards that have been used by courts to assess alleged complicity of business actors, differ from national standards, to purely international law standards and to modified international law standards. The two Dutch cases use a national standard to assess the alleged aiding and abetting. In *Van Anraat*, the court however referred to international law standards and concluded that the national standard is not more demanding than the international law standard. The federal courts in the US under the ATCA have used various standard. These consist of national law standards, international law standards and a number of modified international law standards. Therefore, the standards of aiding and abetting that have been applied by courts vary considerably although the two analysed regimes and in particular the judgments under the ATCA are influenced by international law. Before considering this, a remark should be made about the scope of this research. The purpose of this thesis has not been to compare different complicity standards in various legal systems and only two domestic regimes for aiding and abetting have been examined. The conclusions that can be drawn from these two examples therefore are the conclusions from two national regimes and not from a great number of different states. One should take this limited scope in the back of its head in considering the following part regarding the influence of international law on business cases.

Recent case law concerning business actors aiding and abetting serious human rights violations is influenced by and shows similarities with analysed precedents from Nuremberg and contemporary international criminal law. This is demonstrated by the direct use of case law from Nuremberg and sources of international criminal law in recently decided

business cases. In the ATCA litigation the courts often have used the aiding and abetting standard formulated in *Furundzija* and have repeated the exercise of the ICTY, consisting of examining international criminal law sources to establish the standard. The ICTY in turn had used the *Zyklon B* case explicitly in formulating the aiding and abetting standard. Therefore this case, dating back to the Nuremberg era, directly influenced both contemporary international criminal law and the current litigation in US federal courts against corporations under the ATCA.

Furthermore, the Dutch and US federal courts utilise the same features that were found important by the military tribunals after the Second World War in considering aiding and abetting, and interpret similarly the factual circumstances in their decisions. Examples of such features, which will be considered more extensively further below, are knowledge, influence and participation. *Van Anraat* for example corresponds in many respects with the *Zyklon B* ruling concerning the finding of the required knowledge. The cases against high officials of a number of major corporations that used slave labour during the Second World War and the acquittal of the Dresdner banker Rasche, demonstrates the required degree of involvement in certain offences to establish aiding and abetting. The defendants in these cases were only convicted when the courts could establish that they had sufficiently participated in the offences. In the slave labour cases the courts decided that a defendant needed to have actively sought the use of such labour to be found guilty as an aider or abettor. In *Rasche* on the other hand, the German banker was acquitted for aiding and abetting international crimes since the loans he supplied to the Nazis, even though he knew the money would be used in international crimes, did not establish sufficient participation in the crimes.

Recent judgments such as *Unocal* and *Talisman* fairly overlap with the reasoning of the war tribunals although the required level of participation regarding the slave labour is not as strict under the ATCA case law. In *Unocal* the court established that the oil company not only knew about the serious human rights violations of the Myanmar military, but that it hired these forces and directed them in where to operate. This made them liable as an aider and abettor for the offences committed by the military. In *Talisman* the court decided that doing business with a human rights violating government and operating in its country did not amount to aiding and abetting. Here the company was not as directly involved in directing the military and therefore it lacked the necessary participation to be held liable for the government's crimes. The fact that courts nowadays are satisfied with more limited degrees of participation in comparison to the post World War Two slave labour cases is very understandable. While an oil corporation can easily move out of a human rights violating country safely, this was not the case in Nazi Germany, where severe consequences awaited persons who did not obey the government's policies.

Furthermore, the recent cases concerning business actors aiding and abetting serious human rights violations is influenced by contemporary international

criminal law. In *Van Anraat* the Dutch judges explicitly referred to the standard of international law and contended that the international standard is not significantly heavier than the Dutch one. In the examined ATCA cases, the judges regularly used the *Furundzija* standard to examine the alleged complicity. Unfortunately, this trend has not been followed by all US judges and still a number of them use national law standards to assess aiding and abetting. Furthermore, many of the US judges have modified the *Furundzija* standard in different ways. Of course it is their right to do this instead of blindly adopting an unfamiliar, international definition. However, the judges in many cases do not substantially clarify why the original standard should be changed and what the implications are of this new change. Moreover, all these different standards only complicate matters and increase uncertainty of the law. Standards are abstract definitions and therefore one can question whether so much attention should be paid to such small changes since what really matters is their practical application. Taking all facts into account, the application of the modified *Furundzija* standards might eventually have similar outcomes. Nevertheless the law should be clear and therefore the US judges should uniform their approach. So far not a single case of corporate complicity under the ATCA made it to the US Supreme Court so hopefully once the court will decide on such a case, it will apply an international standard.

## 7.2 Conclusion 2

*How do courts apply the different standards? Which features are found important in this regard and how are these features interpreted?*

While courts decide on a case-by-case basis, they attach value to similar features in assessing whether a corporation is an aider or abettor in serious human rights violations. The most important features consist of knowledge of the commission of a crime, participation in its commission, influence and position in a corporation and influence on the principal, and will be discussed below.

With respect to the knowledge requirement, the courts tend to apply a subjective knowledge test in the analysed cases, but use circumstantial evidence to meet this standard. In the cases of the war tribunals following the Second World War, the judges underlined the necessary personal or actual knowledge in the majority of the trials. Cases such as *Krupp* or *IG Farben*, relating to the supply of poisonous gas or conspiracy allegations demonstrate this. However, in instances where the knowledge of certain crimes was so widespread, such as the knowledge of the criminal activities of the S.S., the courts concluded, without saying it in so many words, that these instances were common knowledge. An example of such common knowledge is the case concerning the donations to the S.S. in *Flick*. Dutch and US courts apply a subjective knowledge test as well and interpreted this very similar to the post World War Two tribunals.

The disadvantage of this subjective approach could be that corporations do not have a duty to seek for relevant sensitive information that relates to their business operations and is possibly connected with human rights violations. Khanna for example underlines the disadvantage of a subjective mens rea test in his article.<sup>428</sup> In interpreting the knowledge requirement, the courts however creatively use circumstantial evidence to establish guilt in instances where no direct evidence that imputes knowledge to the defendant exist. In the *Zyklon B* case, the judges considered, beside witness statements, the “general atmosphere and conditions of the firm itself” and the personal characteristics of both defendants and found the two leading figures of the company guilty for aiding and abetting international crimes.<sup>429</sup> In *Van Anraat* the Dutch court conducted a similar exercise, but divided the knowledge requirement in two. Firstly, it established that the defendant possessed the knowledge that the chemical agent he was supplying, TDG, was used to produce poisonous gas. The court noted that the defendant was aware of the possible improper use of the chemical in large quantities and derived from this and from the concealment of the nature and destination of the TDG’s shipping that Van Anraat knew of the production of poisonous mustard gas. Secondly, the court found that the defendant knew that the mustard gas would eventually be used as a chemical weapon in the war with Iran. It underlined that the defendant knew of the cover names for the production plant of the chemical gas used by the Iraqi authorities and emphasized both the close cooperation between defendant and the plant managers and the fact that Iraq was waging a long lasting war with Iran. Furthermore it stressed that the defendant knew that the gas would be improperly used in the “ordinary course of events”, emphasizing the horrible regime in Iraq. The approach taken by the courts in these two cases to derive knowledge from circumstantial evidence should be applauded although one should not stretch this creative “gap filling” too far as it would collide with the right to be presumed innocence until proven guilty. The circumstantial approach enables a finding of knowledge in instances where there does not exist any specific or first hand evidence, but where the facts surrounding the case clearly establish a defendant’s guilt. Furthermore, the disadvantage of the use of an objective standard is that once a court adopts such a standard, a corporation would not be held accountable for serious human rights violations anymore, but simply for not informing itself about the violations. This would place an improper label on the corporation’s wrongdoing and divert the attention from the actual charge of aiding and abetting. Caution should of course be taken with too flexible assumptions of knowledge but the considered cases prove that courts generally do not use circumstantial evidence too loosely. A disadvantage of not conferring a duty of care on a corporation is demonstrated by the judgment in *IG Farben* concerning the allegation of knowingly aiding or abetting medical experiments on concentration camp inmates. Illegal medical experimentations already took place in 1939 and increased during the Second World War. By 1943 results of extremely cruel experiments were openly discussed among specialists and published in leading surgical

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<sup>428</sup> V.S. Khanna, \* 1240-1241

<sup>429</sup> *Zyklon B*, page 101

journals.<sup>430</sup> Farben was a major player in the pharmaceutical industry and therefore in the ultimate position to acquire information about such illegal practises. Not conferring a duty to inform oneself in a case like this seems unfair and shows the disadvantage of a subjective approach.

Finally, the knowledge requirement in the recent business cases has a different focus than the industrialist cases of the Second World War. While in Nazi Germany corporations were established in Germany and did not have a choice to move out of the country, multinational corporations nowadays plan their operations and determine where they want to do business. Therefore, courts should attach value to knowledge that a corporation possessed before it started business operations in a country where human rights are seriously violated, and in particular with a regime which is infamous for its poor human rights record.<sup>431</sup>

With respect to the necessary degree of participation in a crime, the courts required a substantial involvement from the defendant in the commission of a crime. In *Rasche* and *Talisman* the court decided that the contributions of the defendants in these crimes were not sufficient for a finding of aiding and abetting. Making funds available for a horrific regime and passively benefiting from serious human rights violations of a dictatorship therefore does not meet the required level of participation. Actively seeking slave labour, donating money to a criminal organisation and a more influential role in benefiting from a dictatorship's serious human rights violations does amount to a sufficient degree of participation as *Flick*, *IG Farben*, *Krupp* and *Unocal* prove.

Discouraging efforts undertaken by the corporation to prevent or limit human rights abuses can have a negating effect on the participation requirement. This can be derived from two discussed cases. The first case is *Flick*, in which four officials of the company undertook efforts to frustrate the extermination of concentration camp labourers. Although slave labour was used in the company, the four were acquitted since they were not desirous of employing such labour and were conscious of the fact that it was both futile and dangerous to object the allocation of slave labour.<sup>432</sup> Secondly in *Talisman* the US judge attached value to the efforts that the oil company had undertaken to limit or prevent the human rights violations of the Sudanese government.

Regarding the position of a defendant in a corporation and influence he has on its daily business, courts generally only find high officials who have a significant influence on the operations and on the decisions of the company liable or guilty. In the *Zyklon B* case for example, the two leading figures of the company were convicted for aiding and abetting international crimes through the sale of poisonous gas. A third defendant was acquitted since he

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<sup>430</sup> George J. Annas and Michael A. Grodin, *The Nazi Doctors and the Nuremberg Code*, Oxford University Press 1992, page 35 and 36

<sup>431</sup> Anita Ramasastry, \* 149

<sup>432</sup> *The Flick Trial*, Page 7

was not in a position either to influence the transfer of gas to Auschwitz or to prevent it. Knowledge of this person could therefore not make him guilty of the crime. In *IG Farben* the judges considered in relation to this topic that both a defendant's position within the German state, together with his authority, responsibility and activities, and his position and activities with or on behalf of the company were facts that should be taken into account. This implies that the tribunal attaches certain value to position and influence of a defendant within a corporation. The judgment in *IG Farben* with regard to the supply of poisonous Zyklon B gas confirms the importance of a defendant's influence and position in illicit transactions. Here Farben's officials were acquitted for supplying the gas through a company they owned for 42,5 per cent, Degesch. The tribunal noted that the evidence did not show that the representatives had any persuasive influence on the management policies of Degesch or any significant knowledge as to the uses to which its production was being put.<sup>433</sup>

The influence of a company on state authorities that commit human rights abuses is also valued by courts. In *Unocal* the court for example stresses the oil corporation's influence on the military, which it could use to limit or prevent the abuses committed by the latter. The limited influence that Talisman possessed in the Sudan, with a very recalcitrant and persisting government, has played role in the company's acquittal too; especially since Talisman could demonstrate that it made a number of efforts to discourage the Sudanese authorities to commit human rights violations without success. The importance of status of an influential position is reflected in contemporary international criminal law. In the analysed case law from the ICTY and ICTR, all the defendants possessed a certain status which the tribunal considered to be important for examining whether the defendant was guilty for aiding and abetting. Furundzija was a local commander of a special unit within the armed forces, Aleksovski was a prison warden with responsibility over its detainees and Akayesu was a mayor of a community. The ad hoc tribunals take due account of this status. In *Furundzija*, the tribunal ruled that assistance need not be tangible and can consist of moral support in certain circumstances, one of these circumstances being the status of the defendant, so that his presence had a significant legitimising or encouraging effect on the principals.

Examples of other features that courts have measured in their deliberations are the infamous reputation of a specific government, the conflict situation in a country, the nature of assistance of an aider and abettor and the existence of compelling circumstances. The judgments in *Van Anraat* and *Talisman* referred to the war situation in the country as an important factor. The *Van Anraat* judgment stressed the horrific regime in Iraq, while the nature of assistance, consisting of the supply of a possibly dangerous chemical, resulted together with other evidence in a guilty verdict of aiding and abetting war crimes. In *Kouwenhoven*, the assistance consisted of the supply of small arms. This did not lead to the alleged complicity in war

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<sup>433</sup> *The I.G. Farben Trial*, page 24

crimes. An example of compelling circumstances was the impossibility to go against the Nazi government in the allocation of slave labourers. Therefore, the war courts required from the prosecution that it proved more than the mere obeying of the defendants to the slave labour policies of the Nazis. In legal literature the duration of a business relationship, duration of knowledge of human rights violations, nature of assistance to the host state, contractual agreements and collaboration in a business venture have been viewed as important facts in cases of corporate complicity in international crimes.<sup>434</sup>

### 7.3 Conclusion 3

*In which circumstances should a business actor be held responsible for aiding and abetting serious human rights violations and in which circumstances should it not?*

Answering this question in abstract terms is impossible and courts should decide on a case by case basis whether a business actor aided or abetted. Both the features that were found important by courts, together with their interpretation have been analysed above. Applying these analysis on a particular case, would lead to a rough estimation of the answer whether a business actor is liable or guilty as an aider or abettor. To use this approach is most beneficial in assessing complicity and its result is more precise than using the three category test. In legal literature this test is formulated to label different modes of complicity, consisting of direct corporate complicity, beneficiary complicity and silent complicit.<sup>435</sup> According to Clapham and Jerbi, direct complicity stems from international criminal law and consists of intentional participation in human rights violations.<sup>436</sup> For this mode of complicity it is not necessary that an accomplice has the intention to do harm, as long as he has knowledge of foreseeable harmful effects.<sup>437</sup> The analysed business cases, in which defendants were held guilty or liable for aiding and abetting serious human rights violations, would generally fall under this category. The second category, beneficial complicity, is a more indirect form of complicity and means that business benefits from human rights abuses committed by someone else.<sup>438</sup> The example given in Clapham and Jerbi's article to explain this mode of participation, is the

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<sup>434</sup> Anita Ramasastry, \* 150

<sup>435</sup> Andrew Clapham and Scott Jerbi, *Categories of Corporate Complicity in Human Rights Abuses*, New York, 21-22 March 2001, <http://www.reports-and-materials.org/Clapham-Jerbi-paper.htm>, last visited 16 December 2007, and Anita Ramasastry, *Corporate Complicity: From Nuremberg to Rangoon An Examination of Forced Labor Cases and their Impact on the Liability of Multinational Corporations*, Berkely Journal of International Law, 2002, 20 Berkely J. Int'l L. 91,\* 102-103

<sup>436</sup> Andrew Clapham and Scott Jerbi, *Categories of Corporate Complicity in Human Rights Abuses*, par. 3

<sup>437</sup> Andrew Clapham and Scott Jerbi, *Categories of Corporate Complicity in Human Rights Abuses*, par. 3

<sup>438</sup> Andrew Clapham and Scott Jerbi, *Categories of Corporate Complicity in Human Rights Abuses*, par. 4

*Unocal* case.<sup>439</sup> The choice for this case is rather unfortunate since it blurs the delineation between beneficial and direct complicity. *Unocal* actively participated in the violations and therefore this case would suit better in the first category. The case of *Talisman* is probably a better example of beneficial complicity. Here the Canadian oil company benefited from the governments' forced relocation of people and its security from the military. The governments' services however went hand in hand with grave human rights breaches and although *Talisman* did not participate in the violations, it profited from the oil extraction that was made possible by the improper acts of the government. Thirdly, silent complicity reflects the expectation that companies raise systematic or continuous human rights abuses with the appropriate authorities.<sup>440</sup>

In case one would be forced to make a conclusion in which circumstances a business actor would be held responsible for aiding and abetting serious human rights violations using the three categorisations, then direct complicity would constitute aiding and abetting, while beneficial and silent complicity would not. The difficulty of straightforward categorisations is however demonstrated by Clapham and Jerbi's article. Here the two authors use the *Unocal* case to explain beneficial liability. Even so, the New York District Court found that the corporation's involvement constituted active participation and consequently held it liable for aiding and abetting. This difficulty of delineating corporate complicity only underlines the need for clarifying its meaning and boundaries and demonstrates the benefit of this research.

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<sup>439</sup> Andrew Clapham and Scott Jerbi, *Categories of Corporate Complicity in Human Rights Abuses*, par. 4

<sup>440</sup> Andrew Clapham and Scott Jerbi, *Categories of Corporate Complicity in Human Rights Abuses*, par. 5

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