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Criminal Complicity or Business as Usual

A Study on *Mens Rea* Requirements for Corporate Complicity in War Crimes

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Summary

This thesis examines the levels of *mens rea* required for corporate actors to be held liable for complicity in war crimes committed by States in non-international armed conflicts. The notion that corporations acting in conflict-torn areas can affect negatively upon the state of conflicts and in some cases even contribute to the commission of war crimes by other actors is becoming increasingly accepted. This calls for research regarding the ways corporate actors can be held accountable for potential wrongdoing under current regulations of international criminal law.

The investigation is conducted using the legal doctrinal method and is written from an international as well as, in part, comparative perspective. Primary sources consisting in international treaties and past court rulings are studied in combination with legal doctrine primarily on the topics of international criminal law, complicity and *mens rea*.

The results of the investigation show that current regulations on *mens rea* do make it possible to hold corporate representatives accountable for complicity in war crimes committed by States, but that it is generally required that they had a relatively good amount of knowledge about the possible implications of their involvement. The investigation further finds that *mens rea* requirements tend to differ depending on which court tries a case, with international courts generally applying stricter requirements of *mens rea* than national ones. These differing requirements of *mens rea* give testament to a fragmentation of international criminal law, meaning that a case could lead to conviction if tried by one court and acquittal if tried by another. The varying *mens rea* requirements can be seen as constituting a problem with regard to the efficiency of international criminal law, while on the other hand promoting equality and foreseeability within each national system.

Sammanfattning

Denna kandidatuppsats undersöker gällande krav på *mens rea* för att företagsrepresentanter ska kunna hållas juridiskt ansvariga för medverkan i krigsbrott begångna av Stater inom ramen för icke-internationella väpnade konflikter. En alltmer vedertagen uppfattning är att företag som bedriver affärsverksamhet i konflikthärjade områden kan ha en negativ påverkan på den aktuella konflikten samt, i vissa fall, till och med bidra till andra aktörers krigsbrott. Med anledning av detta finns ett behov av forskning om hur representanter för företag kan hållas ansvariga för eventuellt klandervärt handlande under gällande internationell straffrätt.

Den föreliggande undersökningen utförs med hjälp av en rättsdogmatisk metod samt genom tillämpande av ett internationellt och, till del, komparativt perspektiv. Primära rättskällor i form av internationella överenskommelser och tidigare domstolsavgöranden studeras i kombination med juridisk doktrin främst på ämnena internationell straffrätt, medhjälp samt *mens rea.*

Uppsatsens resultat visar att rådande krav på *mens rea* gör det möjligt att hålla representanter för företag straffrättsligt ansvariga för medverkan i krigsbrott begångna av Stater, men att det generellt krävs att de haft relativt god kunskap om hur deras inblandning kunde komma att påverka förekomsten av brott. Vidare finner undersökningen att kraven på *mens rea* tenderar att se något olika ut beroende på vilken domstol som prövar ett visst mål, då internationella domstolar generellt tillämpar högre krav på *mens rea* än nationella domstolar. Dessa varierande krav på *mens rea* visar på en fragmentering inom den internationella straffrätten, vilken innebär att ett och samma mål kan leda till fällande dom i en domstol och friande dom i en annan. Att olika krav på *mens rea* tillämpas av olika domstolar kan vara problematiskt när det gäller att ge den internationella straffrätten maximalt genomslag, medan det däremot främjar likställighet och förutsebarhet inom varje nationellt rättssystem.

Abbreviations

AP II	Additional Protocol II (1977) of the Geneva Conventions
IAC	International armed conflict
ICJ	International Commission of Jurists
ICC	International Criminal Court
ICL	International criminal law
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International humanitarian law
IMT	International Military Tribunal
NIAC	Non-international armed conflict
NGO	Non-governmental organization
WWII	World War II

1 Introduction

1.1 Background

After an investigation lasting more than a decade, resulting in a staggering 80 000 pages long preliminary investigation report, a Swedish prosecutor in November of 2021 formally brought charges against two high ranking representatives for Lundin Oil[1] for complicity in gross crimes against international law[2]. The case concerns the alleged involvement of Lundin Oil in war crimes committed by the Sudanese government between 1999 and 2003 and has attracted great attention and interest in Sweden as well as internationally, not least since criminal indictments against corporate actors regarding involvement in international crimes are rare.[3]

The notion that corporations' involvement can have an aggravating effect on conflict and crime is becoming increasingly accepted, which is paving the way for discussions regarding ways to hold companies accountable.[4] What is important to keep in mind, though, is that doing business in a conflict-torn area or with actors guilty of international crimes is not in itself a crime, nor necessarily a form of complicity. Business actions or agreements that in other situations would be entirely lawful and even expected of a company *can*, however, be so, depending on the context and circumstances in the specific case.[5]

One of the central things that determines where to draw the line between legitimate business and complicity is the mental element. For a company - or more precisely its representatives - to be held liable for complicity, it does not suffice that the company's involvement contributed to crimes in some way;

[1] The name used here is the one the corporation went by during the years in Sudan.
[2] In Swedish: *medhjälp till folkrättsbrott, grovt brott.*
[3] Regarding past cases, see e.g. Kyriakakis, p. 3 ff.
[4] Kyriakakis (2021), p. 1 ff.
[5] Michalowski (2014), p. 405.

there must also be proven criminal intent. In other words, the company representatives must have had enough knowledge about, or insight into, how their involvement could come to affect an ongoing or future crime.[6] A crucial question hence arises, if one seeks to understand the laws surrounding corporate complicity; how much knowledge, insight or understanding is much enough?

1.2 Purpose and Research Questions

An increased general debate about the implications of companies' involvement in conflict and crime calls for academic research on how international law can be used to hold companies accountable for potential wrongdoing. The purpose of this study is to examine the *mens rea* requirements for corporate complicity where the alleged complicity consists in a company having done business with a State responsible for war crimes committed as part of a NIAC. The term business relations is to be understood in a broad sense, and different forms of relations and situations are explored.

The main research question this study aims to answer is hence the following:

- To what extent do current *mens rea* requirements make it possible to hold company representatives liable as accomplices in cases where they have conducted business with a State guilty of committing war crimes during a non-international armed conflict?

The investigation is divided into sections based on the following two sets of sub-questions:

- What are the *mens rea* requirements for complicity in war crimes committed during a non-international armed conflict? How have these requirements been applied in past court rulings?
- How do companies conducting business with States engaged in non-international armed conflicts affect the development of the conflict,

[6] Michalowski (2014), p. 414.

and the occurrence of crimes during it? What are the most common behaviors that could constitute potential complicity?

The answering of the sub-questions provides an understanding of how *mens rea* requirements for war crimes work in cases of corporate complicity. This in turn provides a base for, in accordance with the main research question, a concluding analysis of the possibilities to hold corporate actors accountable under current regulations of international law. Since few cases of corporate complicity in international crimes have been tried, there is little clarity as to how *mens rea* requirements are to be applied in such cases. That justifies and gives relevance to this work.

1.3 Methodology

The aim of this investigation is to examine current legal regulations and the ways in which they are applied, which calls primarily for a *de lege lata* perspective to be used. The essay for this purpose adopts a legal doctrinal method, consisting in finding an answer to the question through the application of legal norms coming from generally accepted sources of positive law.[7] By investigating the issue of corporate complicity in international crime using sources of legal norms and doctrine, the desire is to bring added clarity to an important field of academic research.

An international perspective is the backbone of the investigation at large. The topic of complicity in international crimes could be delimited to its application only by a specific national court, but the choice to use an international perspective, meaning that regulations and rulings from different courts and legal systems are studied, allows for a broader and more complete understanding of the matter.

Given that cases of complicity in international crimes can be tried by different courts, both national and international ones, it is of importance to examine

[7] Kleineman (2018), p.21.

any potential differences and discrepancies that can be observed between these. International law has been, and is being, developed and applied by different institutions and courts, and is therefore by nature a complex, decentralized and sometimes inconsistent area of law. Understanding this is key to understanding ICL. The essay hence uses in part a comparative perspective, where regulations and past rulings from different jurisdictions and courts are examined, compared and discussed.[8]

1.4 Material and Previous Research

This investigation relies on a combination of primary and secondary sources of ICL. Due to ICL being a form of international law, its sources are those listed in article 38(1)(a)-(d) of the Statute of the International Court of Justice.[9] These include international conventions and treaties, international customary law, general principles and, as subsidiary sources, judicial decisions and legal doctrine from the most qualified publicists.

Primary sources used consist predominantly in the Geneva conventions (especially AP II from 1977 regulating NIACs), the Rome Statute and case law from national as well as international courts. The Geneva conventions, which are formally binding to most States and in part considered to reflect international customary law[10], are used to answer what constitutes war crimes in NIACs. To determine the content of IHL customary law, the ICRC Customary International Humanitarian Law Study is consulted. The study is generally considered to at large reflect customary law.[11] The matter of complicity is then investigated by studying its construction in the Rome Statute and in case law from the ICC, ICTY, ICTR and national courts. Findings from these primary sources are supplemented by legal doctrine on the topics of ICL, individual criminal responsibility, complicity and *mens rea* in international law. The secondary sources consulted are first and foremost

[8] Ishwara Bhat (2020), p. 268.
[9] Cryer, Robinson and Vasiliev (2019), p. 8.
[10] Ibid, p. 267.
[11] See e.g. Sivakumaran (2012) chapter 4.

used to interpret, systematize and comprehend the findings from the primary sources. The relatively weak standing of legal doctrine itself as a source of international law, in comparison to in some national legal systems, has hence been considered.

The part of the investigation that concerns the topic of corporate complicity is at large based on a series of reports by the ICJ[12], titled "Corporate Complicity & Legal Accountability". The ICJ is an NGO consisting in 60 highly regarded jurists from around the world, whose reports and other works are aimed to promote human rights and the rule of law globally.[13] The reports investigate corporate behaviors that might lead to criminal liability for complicity under ICL, and despite them being from 2008 and hence written more than a decade before the current essay, they are believed to be of value when it comes to establishing what sort of behaviors might constitute corporate complicity.

Even though there is good amount of research to be found both on the topic of corporate complicity and on *mens rea* requirements in ICL, there seems to be a relative lack of works that focus on combining the two. That speaks for the relevance of this investigation. Previous works and research on the topics of corporate complicity and *mens rea* requirements in international law respectively have been consulted as secondary sources in the chapters of the present essay that deal with those topics. No work is however used for any purpose beyond interpretation and systematization of the primary source material, which is why they need not be presented or discussed individually at this early point of the investigation. They are all to be found in the bibliography chapter at the end of the essay.

[12] Observe that this essay refers to the International Commission of Jurists, not the International Court of Justice.
[13] See ICJ:s own webpage, https://www.icj.org/about/.

1.5 Delimitations

To fit this investigation into the limited scope of a bachelor thesis, several delimitations have been made. This does not mean that aspects that have been left out lack relevance or importance, but merely that they are not sufficiently connected to the research question that is to be answered.

The investigation does not study the entirety of the topic of corporate complicity but focuses only on complicity consisting in a corporation having some form of business relations with a guilty State. Furthermore, only complicity in war crimes committed during NIACs are studied. By focusing on one type of armed conflict, the aim is to be able to draw clearer conclusions regarding the application of *mens rea* requirements.

The matters of evidence and provability of *mens rea* are not addressed in this investigation. This investigation is hence to be seen as a piece of work that belongs to a greater context of works, that together give a full and just picture of the ways corporations can be held liable for complicity in war crimes committed by States.

1.6 Remarks About the Term 'Corporate Complicity'

When the term 'corporate complicity' is used in this essay, it refers to a wide concept that is not necessarily in accordance with the legal usage of the two words when separated. The term is widely used in academia as well as in general society and debate to refer to the involvement of different forms of business entities in crimes and human rights abuses.[14]

The term 'corporation' is used to describe any business entity or group of entities. This usage of the term is in line with that of the ICJ in their report

[14] See e.g. Kyriakakis (2021), Michalowski (2014) and ICJ (2008).

series “Corporate Complicity & Legal Accountability”[15], as well as that of several other sources used for the investigation.[16] The term ‘company’ is occasionally used as a synonym, to increase textual fluency. Most of the corporations mentioned in this work furthermore operate across national borders, but no terminological distinction is made in reference to this. It is simply not the structure of the businesses mentioned that is of interest to this work.

The term ‘complicity’ is when used conventionally often understood in a broad sense as one actor participating in some way in the unlawful act of another. What forms of participation are considered to qualify under this broad definition of ‘complicity’ varies across criminal legal systems, and sometimes also between crimes within one same system.[17] Important to point out is that this investigation is not about what constitutes complicity, but about *mens rea* requirements for complicity. The term is used in a wide sense, referring to all kinds of involvement in crimes committed by another. This is also in line with the usage in the initial one of the ICJ’s reports.[18]

Lastly, it must be emphasized that this work investigates individual criminal responsibility for corporate actors’ complicity in international crime. The topic of criminal responsibility for the corporation itself is not addressed.

1.7 Remarks About the Term ‘Mens Rea’

The term *mens rea* is used to refer to the mental element of crimes. Although this term is well established in legal practice as well as doctrine, it should be said that other terms can also be used to describe largely the same phenomenon. The reason the term *mens rea requirements* has been chosen over other terms in the current work is that it is generally considered to be wide and independent of any specific legal system. Alternative terms, such as

[15] ICJ (2008:1), p. 4.
[16] See e.g. Kyriakakis (2021), p. 7.
[17] Jackson (2015), p. 10 and.p. 32.
[18] ICJ (2008:1), p. 3 f.

intent requirements[19] or *fault requirements*[20], can hold connotations to other terms used differently in different jurisdictions. The construction of the mental element of crimes is complex, and the aspiration is that usage of the broad and well-establish term *mens rea* will minimize the risk of misinterpretations and flawed comparisons when regulations and rulings from different legal systems are discussed.

1.8 Outline

The investigation consists of three main sections, not counting the introductory one. The first one is aimed at examining *mens rea* requirements for complicity in war crimes in a wide sense, to create an understanding of relevant rules and regulations. The first part hence intends to answer the first set of sub-questions previously mentioned. The second part is then intended to explore the concept of corporate complicity, by responding to the second set of sub-questions. By conjoining the findings from these first two parts, the objective is to have established how *mens rea* requirements for complicity in war crimes function in the specific case of corporate complicity.

The third and final section of this work consists of an analysis, aimed to discuss the findings of the previous sections. This discussion will hold an analytical perspective, meant to explore whether, and under what circumstances, the current *mens rea* requirements make it possible to hold companies legally accountable for complicity when conducting business with a State guilty of war crimes.

[19] Used e.g. in Lekvall and Martinsson (2020).
[20] Used e.g. in Jackson (2015).

2 *Mens rea* Requirements for Complicity in War Crimes in NIACs

2.1 War Crimes in Non-International Armed Conflicts

The so-called laws of war are established in the field of IHL. Not all violations of IHL, however, constitute war crimes.[21] Some IHL instruments, for example the Geneva Conventions, include provisions that clearly mark which rules are to be understood as fundamental enough that a breach can give rise to criminal responsibility, while international customary law can call for criminal responsibility also in some cases where there is no codified provision doing so.[22]

Up until the 1990s, it was widely considered that the laws of war crimes only applied to IACs, and therefore that IHL provisions regarding NIACs did not lead to criminal responsibility. The reason many States opposed the notion that regulations of war crimes should be applicable also to NIACs was a conception that the sovereignty of States made NIACs a fully internal matter, in which the international community had no say.[23]

The ICTR Statute of 1994 established a new perception, that serious violations of Common Article 3 of the Geneva conventions and core provisions of AP II could lead to criminal liability, which extended the concept of war crimes to also cover NIACs.[24] The ICTY shortly after came

[21] See *Prosecutor v. Dusko Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), para. 94; Cryer, Robinson and Vasiliev (2019), p. 263.
[22] ICRC Customary IHL Database; see also Cryer, Robinson and Vasiliev (2019), p. 263.
[23] Cryer, Robinson and Vasiliev (2019), p. 266.
[24] ICTR Statute article 4.

to a similar conclusion in *Tadić*.[25] What was said on the matter in *Tadić* came to in turn be highly influential for the ICC Statute, which hence also recognizes that Common Article 3 as well as several other fundamental provisions make for war crimes in the context of NIACs.[26]

It is outside the scope of this investigation to examine the full contents of IHL provisions that can lead to criminal responsibility in NIACs. For a contextual understanding, though, it can be said that Common article 3 of the Geneva Conventions establishes that individuals who are not taking part in the fighting shall be treated humanely. The provision is nowadays considered to constitute a part of customary international law.[27] The principle is developed and concretized in AP II[28] as entailing a right for each person not taking part in the conflict to be granted "respect for their person, honour and convictions and religious practices".[29] Various acts are then listed as constituting a breach against the fundamental guarantees established through the regulation, among which can be mentioned violence in the form of murder, torture or mutilation, collective punishments, the taking of hostages, rape, slavery, and more.[30] Special rights are established for children.[31]

2.1.1 Defining 'Non-International Armed Conflict'

For IHL to be applicable, there needs to be an armed conflict. Especially in NIACs, determining the scope of the term can prove difficult. Drawing the line between an armed conflict and, for example, internal tensions or turmoil can prove a matter of great political importance and controversy.[32]

[25] *Prosecutor v. Dusko Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), para. 126.
[26] Rome statute article 8(2); about the link to *Tadić*, see Cryer Cryer, Robinson and Vasiliev (2019), p. 267.
[27] ICRC Rule 87; Sivakumaran (2012), p. 255.
[28] Note that not all of AP II is considered customary law.
[29] Additional Protocol II article 4(1).
[30] Additional Protocol II article 4(2).
[31] Additional Protocol II article 4(3).
[32] Cryer, Robinson and Vasiliev (2019), p.271 ff.

In past times, armed conflict traditionally required a State to declare war upon another State. Modern-day IHL, however, centers instead on a more objective qualification of armed conflict. There is hence no need for either party of the conflict to acknowledge the conflict or the occurrence of any violence; what matters is instead the factual state of the situation at hand.[33] A clear definition of what makes an armed conflict is however lacking. A definition made by the ICTY in the 1995 *Tadić* case has, nonetheless, come to be relatively generally accepted and has been referred to by several authoritative actors.[34] The *Tadić* definition reads as follows:

> "An armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State"[35]

The term 'non-international conflict' is also lacking a clear and universal definition, despite the concept being central when determining the applicability of IHL regulations. The distinction between an international and non-international conflict can oftentimes be one of great political charge, that might well be at the very heart of a conflict. Take the example of wars of national liberation: the separatist side would claim Statehood, hence making the conflict an international one, while the already established State would claim the separatists to be no more than a rebellious group acting within the State's jurisdiction, making it a non-international matter.[36] A deeper analysis of this is however out of the scope of this investigation, which means it suffices to say it is a complex and quite often highly debated topic.

[33] Ibid, p. 270.
[34] Sivakumaran (2012), p. 155.
[35] *Prosecutor v. Dusko Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), para. 70.
[36] Cryer, Robinson and Vasiliev (2019), p.271 ff.

2.2 *Mens rea* Requirements for Complicity in War Crimes

The requirement of intent, knowledge or insight can be found in virtually all criminal law systems and stems from the idea that for criminal legal responsibility to arise, someone must be established to be *guilty*. The mere occurrence of a prohibited act is hence usually not enough if the perpetrator is free of *guilt*.[37] What constitutes guilt, in other words what mental element is required for any certain crime, is a question whose answer differs between legal systems and over time. Requirements regarding the mental element, or *mens rea*, also often differ between the principal perpetrator and accomplices.[38]

Complicity is in ICL doctrine commonly divided into two groups, the first being 'instigation' and the second 'aiding and abetting', where the former refers to situations where someone encourages or urges someone else to commit a criminal act and the latter to someone assisting or providing moral support to someone who commits a crime.[39] *Mens rea* requirements tend to be different between the two groups, which is why they are often examined and discussed somewhat separately.[40]

2.2.1 Ad Hoc Tribunals: ICTY and ICTR

Apart from for the crime of genocide, the statutes of ICTY and ICTR establish no *mens rea* requirements. The matter has instead been decided through jurisprudence.[41] ICTY and ICTR have both held that instigation requires either that the defendant acted with an intention that the crime be committed or that he or she was aware of the substantial likelihood that the crime would

[37] Badar (2013), p. 419.
[38] Huisman and van Sliedregt (2010), p. 810.
[39] Jackson (2015), p. 66.
[40] See the structure of the discussion in Jackson (2015), p. 67-80.
[41] Cryer, Robinson and Vasiliev (2019), p. 366.

be committed.[42] In *Orić,* the ICTY said that there for instigation exists no requirement that the idea to perpetrate the crime came from the instigator, but only that the instigator "brought about [the perpetrator's decision to commit the crime] by persuasion or strong encouragement".[43]

In *Tadić*, the ICTY said that liability on the grounds of aiding and abetting arises for "acts specifically directed to assist, encourage or lend moral support to the perpetration [of a crime]".[44] As for the required mental element, the ICTY held in *Kunarac* that an aider or abettor must "take the conscious decision to act in the knowledge that he thereby supports the commission of the crime".[45] There exists, however, no requirement that the purpose of the aider or abettor's act was to support the crime. This is in accordance with international customary law.[46] It is not necessary that the aider or abettor knows exactly which of a number of international crimes will be committed, as long as he or she knows at least one of the crimes will probably be committed.[47]

2.2.2 ICC

Regulations on the mental element required for criminal liability can be found in article 30 of the Rome Statute, which says that criminal responsibility arises only when the material elements of a crime are committed with intent or knowledge. The prerequisite of intent is described as meaning that the perpetrator either means to engage in certain conduct, means to cause a certain consequence, or is aware that a consequence will occur in the normal course of events. Knowledge is defined as "awareness that a circumstance exists or a consequence will occur in the ordinary course of events".[48]

[42] *Kordić & Čerkez* (Appeals Chamber Judgment), para. 32; *Nahimana* (Appeals Chamber Judgment), para. 480.
[43] *Orić* (Trial Chamber Judgment). para. 271.
[44] *Tadić* (Appeals Chamber Judgment), para. 229(iii).
[45] *Kunarac, Kovač, Vuković* (Trial Chamber Judgment), para. 392.
[46] Jackson (2015), p. 75.
[47] Ibid, p. 76.
[48] Rome statute article 30.

The Rome Statute does not explicitly use the term 'instigation' but talks instead of criminal responsibility for those who solicit or induce another to commit wrongdoing, which in legal doctrine has been understood as an at large similar thinking.[49] In *Ntaganda*, the Pre-Trial Chamber of the ICC said that 'inducing' requires "at least aware[ness] that the crimes will be committed in the ordinary course of events as a consequence". This was said to go in line with the regulations in article 30 of the Rome Statute.[50]

In the case of aiding or abetting, the Rome Statute seems to be stricter than the ad hoc tribunals, in the sense that article 25(3)(c) puts up a requirement that the purpose of the assistance given must have been the facilitating of the commission of the crime. This is not in accordance with international customary law and sets the *mens rea* requirements high.[51]

2.2.3 National Courts

ICL is often associated with international courts and tribunals, and although that is sometimes where legal cases concerning war crimes are tried, it is far from always so. National courts are, in fact, the primary place where international crimes are intended to be tried.[52]

For a national prosecution to be possible, there needs to be applicable domestic criminal law that grants jurisdiction in the case in question.[53] Some instruments of international law, such as the Geneva Conventions, include provisions that require States to implement domestic legislation that makes it possible to bring certain international crimes before national courts.[54] When a case concerning international law is brought before a domestic court based on national legislation, national rules regarding the mental element are often used. This could potentially constitute a problem when the national

[49] Rome Statute article 25(3)(b); on the connection to 'instigation' see Jackson (2015), p.67.
[50] *Ntaganda* (Decision on the Confirmation of Charges), para. 153.
[51] Jackson (2015), p. 76.
[52] Cryer, Robinson and Vasiliev (2019), p. 69.
[53] Ibid, p. 78.
[54] See e.g. Geneva Convention I article 49.

criminalization is required by the State's international commitments, such as by it being party to a treaty. Clear discrepancies between national *mens rea* requirements and those coming from international instruments could, in that case, possibly lead to a situation where the application of national *mens rea* requirements make the proceedings insufficient in terms of living up to a requirement to prosecute.[55]

[55] Cryer, Robinson and Vasiliev (2019), p. 74-80.

3 Corporate Complicity in International Crime

3.1 The Role of Corporations in Conflict and Crime

The last few decades have seen a clear increase in academic interest in the role of corporations in human rights violations, conflicts, and international crime[56], of which this essay is set out to focus on the latter. The most common way for corporations to be involved in international crime is as accomplices, and the complicity can consist of a wide range of different conduct. The motifs behind the conduct can also vary greatly, although they most commonly relate to a desire for financial profit.[57]

In 2008, the ICJ released a series of three reports titled "Corporate Complicity & Legal Accountability". The reports highlight four main situations where companies face allegations of complicity: first, when providing goods or services that are used by other actors when committing crimes; second, when using security providers that commit crimes while carrying out their tasks; third, when purchasing goods from a supplier that in production or sourcing of materials has been guilty of crimes; and fourth, when conducting business with another actor, who in the context of the joint projects commits crimes or abuses.[58]

[56] Kyriakakis (2021), p. 1 ff.
[57] Huisman and van Sliedregt (2010), p. 816.
[58] ICJ Expert Legal Panel on Corporate Complicity in International Crimes (2008:1), p. 27.

3.2 Individual Responsibility for Corporate Complicity in International Crimes

Legal regulations on a national level have for long enabled the prosecution of individuals for war crimes.[59] In international law, however, it was not until the IMT at Nuremberg that the principle of individual criminal responsibility was codified, with a famous quote from one of the rulings being the following:

> "Crimes against international law are committed by men, not by abstract legal entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced".[60]

Cases regarding criminal responsibility for corporate actors' complicity in international crimes have only been tried a handful of times, which means that even though the topic has come to be relatively well researched in academia in recent years[61], there is still a lack of court rulings on the matter. The few rulings that exist are hence of great interest if one aims to form an understanding of how regulations on *mens rea* have been applied.

3.2.1 Nuremberg: Zyklon B

One of the arguably more well-known cases of corporate complicity tried during the IMT at Nuremberg is commonly known as Zyklon B. The case concerns the criminal liability of corporate actors who produced and delivered poisonous gas that was used to murder millions of people in Nazi concentration camps. Three men were prosecuted in the Zyklon B case, two of whom were convicted. Both the convicted men were found to have known about how the gas was being used, which was considered enough in terms of

[59] Cryer, Robinson and Vasiliev (2019), p. 264.
[60] *Trial of the Major War Criminals before the International Military Tribunal*, Nuremberg 1947, Vol. 1, 171–367; about the quote being commonly used, see Sliedegt (2012), p. 18, and Damgaard (2008), p. 3.
[61] See e.g. Kyriakakis (2021), p. 1 ff.

the mental element of the crime.[62] The third man was acquitted due to reasons not relating to *mens rea*.[63] The Zyklon B case is often cited as showing that international law puts up requirements that the prosecuted must have known about the implications of their involvement, but not that the purpose of their acts must have been to contribute to the crime.[64]

3.2.2 A. Van Anraat

For the following section, the primary material is in Dutch and has hence not been consulted. Instead, the case summaries found in the works of Kyriakakis and Huisman & van Sliedregt are used.

Dutch businessman Frans van Anraat traded in chemicals in the 1980s and was in the mid-2000s found guilty by a Dutch court of having been complicit in war crimes committed by the government of Saddam Hussein. The chemicals distributed by van Anraat were used for chemical weapons during the war between Iraq and Iran, making way for the massacre in Halabja in 1988. The attack killed around 5000 people, primarily Kurds.[65]

Van Anraat faced allegations of complicity in genocide and war crimes. The Dutch district court found that although the Iraqis had committed genocide against the Kurdish people, van Anraat did not fulfill the *mens rea* requirements to be convicted for complicity in that crime. The court used the *mens rea* requirements established by ICTY och ICTR, which means the defendant would have needed to be aware that he assisted in the crime in question. On the account of war crimes, the court decided to instead use national *mens rea* requirements. Dutch national criminal law considered it enough that the perpetrator was aware of the considerable risk that they contribute to a crime, leading to van Anraat being convicted. The reason for the different *mens rea* requirements applied for the different crimes was stated

[62] Zyklon B, 95-102.
[63] Zyklon B, 102.
[64] Kyriakakis (2021), p. 70.
[65] Huisman and van Sliedregt (2010), p. 807.

to be the fact that the crime of genocide is based on a special genocidal intent, that was considered important to 'preserve'.[66]

The Dutch Court of Appeals, and later the Supreme Court, also reached the verdict that van Anraat was guilty of complicity in war crimes, but not in genocide. They did, however, come to the conclusion that national *mens rea* requirements should be used for the charges of both genocide and war crimes.[67]

3.2.3 Lundin Oil

As briefly accounted for in the introductory chapter, a Swedish court will before long try two representatives of Lundin Oil for complicity in war crimes allegedly committed by the Sudanese government. Important to underline is that the case has not yet been tried, which means it is not known which *mens rea* requirements will be used by the court. What is accessible, though, is the prosecutor's indictment. While naturally not being comparable to a verdict, what still makes the indictment of some importance as a source of information is the fact that Swedish prosecutors according to 23:2 of the Swedish Code of Judicial Procedure[68] are to only indict if there are objective grounds to believe it will lead to a conviction.

According to the indictment, the Lundin representatives are guilty of complicity on the grounds of having promoted[69] the Sudanese government's war crimes. The crimes consist of attacks of civilians in violation of the principles of distinction and proportionality in order to clear an area where Lundin sought to extract oil. Lundin made agreements with the government that established the responsibility of the latter to ensure the company's security in the area. The corporation furthermore agreed to fund the construction of a road in an area that was not controlled by the government,

[66] Huisman and van Sliedregt (2010), p. 807 f.
[67] Ibid, p. 809 f.
[68] Swedish: *Rättegångsbalken*.
[69] Own translation; in Swedish *främja.*

leading to that area also having to be conquered and subsequently cleared. Evidence is presented that seems aimed to prove the two representatives had knowledge about the methods used by the Sudanese government to abide by the agreement between the parties. Despite this, the business relations persisted.[70]

[70] The prosecutor's indictment in case B 11304-14 at Stockholms tingsrätt.

4 Analysis

4.1 Findings: *Mens Rea* Requirements for Corporate Complicity in War Crimes

There seems to be no one clear answer as to how we should understand the mental element requirements for corporate complicity in international crimes. Previous cases concerning the matter provide little uniform and comprehensive guidance, seemingly indicating that the answer depends on which court tries the case in question.

All of the situations pointed out by the ICJ as the primary ones where corporations contribute to the commission of international crimes seem to fit under the description 'conducting business', and they all seem to be open to the other party being a State. For the sake of this analysis, each of the four exemplified situations is discussed separately.

A corporation providing goods or services that are used to commit crimes
This situation could, if adjusted to the specific circumstances studied in this investigation, be for example one where a corporation provides chemicals to a State, that then uses it to commit war crimes. The facts in that hypothetical situation resemble those in the van Anraat case, where the national court decided to use national *mens rea* requirements lower than those coming from international law. It was then considered enough that the defendant was aware of the considerable risk that the sold goods would be used in war crimes.

An interesting question that arises with regards to this first example is to what extent the type of goods that are sold, a factual circumstance, affect the *mens rea* requirements. In the case of van Anraat, the goods sold were a rare type of chemicals that the defendant claimed he thought would be used in factories,

but no such factories existed in the area in question.[71] Even though the seller of chemicals in such a case doesn't *know* that the goods would be used for war crimes, it could be possible one could argue that an almost obvious foreseeability (such as when the product can be used for virtually nothing but a war crime) would live up also to stricter *mens rea* requirements. This is merely speculative, but does seem reasonable. This would effectively mean that the type of goods sold, which is linked to the level of foreseeability and likelihood that they end up being used to commit crimes, have a direct effect on *mens rea* requirements.

A corporation uses security providers that commit crimes when delivering the service

For this situation to fit into the scope of this essay, it seems reasonable to imagine a case where a corporation operates in an insecure area, where the government lacks efficient control. These factual circumstances share similarities with those in the case of Lundin, which has not yet been ruled upon by any court. The case is, however, centered around alleged knowledge on part of the corporation about the effect the security agreements had on the conflict. What could make a corporation liable for complicity in this sort of situation would then be an awareness that the State would provide the agreed security through the commission of war crimes. If this is the criterium, it seems reasonable to think it is easier to convict a corporation whose business relations with a guilty State lasted for a long period of time, including after the corporation must have become aware of methods used by the State to 'secure' the area, than convicting one that just entered business relations with a State.

A corporation buys goods from a supplier that has committed crimes in production or sourcing of materials

This situation shares less similarities with the cases discussed previously in this work, why parallels to actual past court rulings cannot be made.

[71] Huisman and van Sliedregt (2010), p. 809.

A hypothetical situation where this third example from the ICJ would be covered by what is investigated in this work could be one where a State engaged in a NIAC protects its own factories or extraction fields by committing war crimes. A corporation that encourages the continued production or extraction during a conflict, either by insisting that current business agreements are maintained or by entering into new ones, should in that case be risking criminal liability. Based on the findings in ICJs report, the *mens rea* requirement would also in this case be centered around knowledge.

A corporation conducts business with another actor that commits crimes within the context of the joint project

It should be underlined that the ICJ seems to focus more on human rights abuses than on crimes in this example. To accommodate it to the premises of this work, it is possible to imagine a situation where a corporation enters into an agreement with a State, to jointly extract resources in the State's territory. It should suffice to say that this closer business relationship between the State and the corporation should mean it would be hard for the corporation to successfully claim a lack of knowledge about any crimes, and that the *mens rea* requirements, generally speaking, should be met relatively easily.

4.2 Final Discussion and Thoughts

This investigation finds three general ways in which *mens rea* requirements have been interpreted and applied when cases of corporate complicity in international crimes have been tried: first, one relatively strict requirement when cases are tried according to ICC's regulations; second, one slightly more lenient one if cases are instead tried by according to the ad hoc tribunals' standards; and third, one potentially even lower one when national regulations are applied rather than international ones. The nature of the latter naturally depends on the national laws in the country where the case is tried,

which means that option does not necessarily have to be lower than the other two.

The fact that different *mens rea* requirements apply to cases of the same nature depending on which court tries them can be problematic. War crimes are considered to give rise to universal jurisdiction for the very reason that they somehow concern everyone, and this universality could be argued to be put out of play when all cases are not tried equally. The same case could, in theory, lead to conviction in a national court, and acquittal if instead tried in the ICC. In the same way, it could lead to conviction in one country's national court, where the requirements of intent are low, and acquittal in another country's court, that applies higher requirements. If war crimes are truly to be treated as if they were of common concern to everyone, one could ask if they should not be judged equally no matter where they are tried.

A clear benefit to the current discrepancy in *mens rea* requirements between different courts is that it promotes equality and predictability within each separate system. Applying national *mens rea* requirements also to international criminal cases when tried in a national court means that there is concordance between all criminal cases tried in that court, be they national or international in character. Especially since most international crimes tried by national courts are done so based on national legislation, this does make sense. What it boils down to is fundamentally a question of priority and values: should we primarily promote uniformity and equality within each national legal system, or should ICL be uniform and equal?

If one would argue that uniformity in ICL is the preferred path, it leads to an even more value-oriented discussion. If the relatively strict standards that this investigation finds the ICC, ICTY and ICTR to go by would apply to all cases of corporate complicity in war crimes, corporate actors would generally need to have relatively good knowledge about how their involvement has contributed to crimes in order for them to be held legally accountable. These high *mens rea* requirements can arguably be explained by the fact that rules

on complicity in the ICC, ICTY and ICTR have been developed and used primarily to target other types of accomplices, such as military leaders and heads of State. Maybe, the fundamental differences between involvement of such actors and businesses in crimes and atrocities call for slightly differentiated *mens rea* requirements, if the desire is to hold corporate actors legally liable for their actions.

4.3 Conclusions

This investigation finds that current *mens rea* requirements do make it possible to hold companies liable for complicity in many of the situations where their business has played a part in the commission of NIAC war crimes by States, but that it generally is required, especially if the case is tried by an international court, that the corporate actors had relatively good knowledge about the implications of their involvement. The investigation further finds that international courts go by *mens rea* requirements deriving from ICL sources, while national courts seem to be left to decide whether to apply either international or national *mens rea* requirements. The differentiating *mens rea* requirements used by different courts mean that a company who had grounds to suspect its business relations with a State would contribute to war crimes, but did not actually know it for sure, could walk free if tried by one court, and be convicted if tried by another.

Relatively high and at times differentiating *mens rea* requirements could be reasons as to why so few corporate representatives have been held accountable for complicity in international crimes as of yet. Corporations should be a force for good in the world, and ICL is a valuable tool that ought to be used to ensure that is the case.

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