THE INTERNATIONAL LAW STANDARD FOR CORPORATE AIDING AND ABETTING LIABILITY

Presented to the U.N. Special Representative
to the Secretary General on Human Rights and
Transnational Corporations and other Business Enterprises

EarthRights International

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About EarthRights International

EarthRights International (ERI) is a non-government, non-profit organization combining the power of law and the power of people to protect earth rights. Earth rights are those rights that demonstrate the connection between human well-being and a sound environment, and include the right to a healthy environment, the right to speak out and act to protect the environment, and the right to participate in development decisions. ERI is at the forefront of efforts to link the human rights and environmental movements.

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EARTHRIGHTS INTERNATIONAL

FOREWORD

This paper grew out of EarthRights International's support for the United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (the Norms).[1] The Norms were adopted by the U.N. Sub-Commission on the Protection and Promotion of Human Rights in August 2003, and are the result of consultations of members of an Expert Working Group with other U.N. agencies, business associations, corporations, and NGOs, as well as U.N. Member States.

The Norms represent an important step forward, providing the first comprehensive, international statement of the human rights responsibilities of companies. While recognizing the primary role of States in guaranteeing human rights, the Norms identify the key human rights responsibilities of companies (Article 1). In doing so, the Norms should be used as a benchmark for corporate conduct, helping corporations to improve their human rights performance. The Norms can also assist government efforts in establishing compatible and socially beneficial regulatory regimes across national boundaries.

At its 60th session, in 2004, the Commission on Human Rights requested that the Office of the High Commissioner on Human Rights

> compile a report setting out the scope and legal status of existing initiatives and standards relating to the responsibility of transnational corporations and related business enterprises with regard to human rights, *inter alia*, the draft norms [on the responsibilities of transnational corporations and other business enterprises with regard to human rights] and identifying outstanding issues.[2]

In February 2005, after consultations with a wide range of actors, including business, inter-governmental organizations, civil society and others, the High Commissioner submitted its report on the responsibilities of transnational corporations and related business enterprises with regard to human rights.[3]

The Commission then requested that the Secretary-General appoint a Special Representative on the issue of human rights and transnational corporations and other business enterprises (SRSG).[4]

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[1] Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights, U.N. ESCOR, Comm'n on Hum. Rts., Sub-Comm'n on the Promotion & Protection of Hum. Rts., 55th Sess., U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003), a*vailable at* http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2003.12.Rev.2.En?Opendocument.

[2] Responsibilities of transnational corporations and related business enterprises with regard to human rights, U.N. ESCOR, Comm'n on Hum. Rts., 60th Sess., U.N. Doc. E/CN.4/DEC/2004/116 (Apr. 22, 2004), *available at* http://ap.ohchr.org/documents/E/CHR/decisions/E-CN_4-DEC-2004-116.doc.

[3] Report of the United Nations High Commissioner on Human Rights on the responsibilities of transnational corporations and related business enterprises with regard to human rights, U.N. ESCOR, Comm'n on Hum. Rts., 61st Sess., U.N. Doc. E/CN.4/2005/91 (Feb. 15, 2005).

[4] Human Rights and transnational corporations and other business enterprises, U.N. ESCOR, Comm'n on Hum. Rts., 61st Sess., E/CN.4/2005/L.87 (Apr. 15, 2005).

The SRSG's mandate calls on him, *inter alia*,

> To identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights;
>
> To elaborate on the role of States in effectively regulating and adjudicating the role of transnational corporations and other business enterprises with regard to human rights, including through international cooperation;
>
> *To research and clarify the implications for transnational corporations and other business enterprises of concepts such as "complicity" and "sphere of influence"*;
>
> To develop materials and methodologies for undertaking human rights impact assessments of the activities of transnational corporations and other business enterprises;
>
> To compile a compendium of best practices of States and transnational corporations and other business enterprises.

In July 2005, Harvard Professor John Ruggie was appointed the SRSG.[5]

Since this appointment, EarthRights International has engaged Professor Ruggie. As a member of the ESCR-Net Corporate Accountability Working Group, ERI contributed to a Joint NGO Report on Human Rights and the Extractive Industry, including a series of case studies highlighting patterns of violations and gaps in the protection of human rights, which was submitted to Professor Ruggie at a consultation in November 2005.[6] ERI also submitted a separate report to Professor Ruggie on earth rights abuses by corporations in Burma.[7] At a consultation in Bangkok in June 2006, ERI presented Ruggie with an Asian Civil Society Statement signed on to by 21 Asian NGOs.[8]

The current paper was prepared for and submitted to Professor Ruggie on July 11, 2006. ERI has published this paper so that other constituencies may benefit from the research presented here.

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[5] Secretary-General Appoints John Ruggie of United States on Issue of Human Rights, Transnational Corporations, Other Business Enterprises, Press Release, U.N. Doc. SG/A/934 (Jul. 28, 2005) (emphasis added), *available at* http://www.un.org/News/Press/docs/2005/sga934.doc.htm.

[6] Joint NGO Report on Human Rights and the Extractive Industry & Consultations with UN Special Representative on Human Rights and Business, International Network for Economic, Social & Cultural Rights (Dec. 9, 2005), *available at* http://www.escr-net.org/GeneralDocs/Rprt_Consult_Extract.pdf.

[7] Submission to the Special Representative on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Earth Rights Abuses by Corporations in Burma, Collective Summary and Recommendations, EarthRights International (Nov. 10, 2005), *available at* http://www.earthrights.org/files/Reports/eri_submission.pdf.

[8] Asian Civil Society Statement to U.N. Special Representative on Transnational Business and Human Rights at the Asia Regional Consultation, (Jun. 27, 2006), *available at* http://www.earthrights.org/content/view/345/41/.

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I. INTRODUCTION

This paper outlines the international law standard for corporate aiding and abetting liability as set forth in international and national jurisprudence and laws. This paper does not attempt to address the enormous array of complex issues surrounding the topic of corporate accountability for human rights violations, including any critique of existing voluntary mechanisms, an analysis of the availability of national enforcement mechanisms, advice on the feasibility of an international mechanism, or a study of the various procedural obstacles to the use of such forums.

International law and jurisprudence recognize that corporations have legal personality, and therefore corresponding legal rights and obligations. Although international law recognizes that corporations have direct obligations with respect to human rights, this paper focuses on the obligation of corporate actors not to assist others in the commission of human rights abuses. In that context, this paper reiterates the well-established international law standard for corporate aiding and abetting liability: Anyone that knowingly provides practical assistance, encouragement, or moral support that has a substantial effect on the perpetration of a human rights abuse violates international law. Numerous national and international decisions and instruments have developed this standard. The Nuremberg Tribunals applied this standard, and more recently, the International Criminal Tribunals for the Former Yugoslavia and Rwanda have recognized this standard as customary international law. In addition, U.S. courts interpreting the Alien Tort Statute (ATS), which allows redress for violations of international law, have consistently reached the same conclusion.

This paper seeks to assist the Special Representative to the Secretary General on Human Rights and Transnational Corporations and other Business Enterprises in meeting one of the objectives of his mandate: "To research and clarify the implications for transnational corporations and other business enterprises of concepts such as 'complicity'…" The standard described herein applies in war as well as peace, and permits criminal sanction, and therefore can be considered the minimum that international law provides. Accordingly, the "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights" or any other codification of the international human rights standards applicable to businesses must at least encompass this international law baseline in order to properly reflect international law.

We hope that a shared understanding of existing norms governing corporate complicity will end any lingering debate on this issue and leave resources both to consider other important issues related to corporate obligations under international human rights law and, more importantly, to help stop human rights violations and hold responsible parties accountable.

II. CORPORATE LEGAL OBLIGATIONS UNDER INTERNATIONAL HUMAN RIGHTS LAW

The international law norm against aiding and abetting human rights abuses is derivative of the norms against the primary human rights abuses at issue. Thus, for present purposes, it is not necessary to engage in an exhaustive analysis of what primary human rights obligations corporations themselves may bear. It is only necessary to note that corporations have legal personality and rights as well as obligations under international law, and thus, like other international actors, they are prohibited from assisting in well-recognized violations of international law such as human rights abuses.

As reflected in the Preamble of the Universal Declaration of Human Rights, the international community has long recognized that "every individual and *every organ of society* … shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance [emphasis added]." Although international human rights law has commonly focused on protecting individuals from abuse perpetrated by states, it has recognized at least since the Nuremberg Tribunals that all actors, including non-state actors, have duties to refrain from assisting states in the commission of such abuses. The existing legal regime has an irrefutable policy justification: If international law is to be effective in protecting human rights, everyone must be prohibited from assisting governments in violating those principles.[1]

In this respect, transnational corporations (TNCs) are no different from individuals or other actors. A review of the rights and obligations of TNCs under international treaties confirms that TNCs possess sufficient international legal personality to exercise rights as well as to bear obligations.[2] It is indisputable, for example, that companies enjoy legal rights and owe legal duties under foreign investment law and some multilateral conventions.[3] Corporations are subject to European Union Law, various bribery conventions, and anti-corruption law.[4] International law

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[1] A. Clapham, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS, Oxford University Press 80 (Oxford, 2006).
[2] D. Kinley and J. Tadaki, *From Talk to Walk: the Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 VJIL 931, 947 (2004); *see also* INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY, BEYOND VOLUNTARISM: HUMAN RIGHTS AND THE DEVELOPING INTERNATIONAL LEGAL OBLIGATIONS OF COMPANIES 125 (2002), *available at* http://www.ichrp.org/paper_files/107_p_01.pdf; D. Kokkini-Iatridou and P. de Waart, *Foreign Investments in Developing Countries – Legal Personality of Multinationals in International Law*, 14 Neth. Y.B.I.L. 87 (1983); P. Malancazuk, *Multinational Enterprises and Treaty-Making – A Contribution to the Discussion on Non-State Actors and the 'Subjects' of International Law*, in MULTILATERAL TREATY-MAKING: THE CURRENT STATUS OF CHALLENGES TO AND REFORMS NEEDED IN THE INTERNATIONAL LEGISLATIVE PROCESS (V. Gowlland-Debaas ed. 2000).
[3] *See* W. Greider, *The Right and U.S. Trade Law: Invalidating the 20th Century*, THE NATION, Oct. 15, 2001, *available at* http://www.thenation.com/docprint.mhtml?i=20011015&s=greider (discussing *Methanex Corp. v. U.S.*). *See also* Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, Jun. 21, 1993, art. 2, ¶ 6, E.T.S. No. 150, *available at* http://conventions.coe.int/treaty/en/Treaties/Word/150.doc and the International Convention on Civil Liberty for Oil Pollution Damage, Nov. 29, 1969, art. 1, ¶ 2 (entered into force Jun. 19, 1975), *available at* http://www.admiraltylawguide.com/conven/civilpol1969.html.
[4] *See* [European] Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222 (entered into force Sep. 3, 1953) (Art. 1 obligation to *secure* Convention rights). *See also* OECD, *Steps Taken by State Parties to Implement and Enforce the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, 2006, *available at* http://www.oecd.org/dataoecd/50/33/1827022.pdf (describing state steps to enforce anti-bribery obligations against corporations).

holds corporations liable for labor and environmental violations.[5] Non-binding international norms produced by the Organisation for Economic Cooperation and Development (OECD) and the International Labour Organization (ILO) define duties applicable to business.[6] Similarly, the U.N. and the European Union have defined standards of multinational corporate practice.[7] The Rio Declaration on Environment and Development,[8] Agenda 21[9] and the Copenhagen Declaration for Social Development[10] seek to improve the legal and policy framework in which TNCs conduct business.

The legal obligations of TNCs include human rights obligations. The concept of "every organ of society" in the Universal Declaration encompasses private enterprises such as TNCs.[11] As noted international law scholar Louis Henkin has commented, "The Universal Declaration is not addressed only to governments. It is a common standard for all peoples and all nations. Every individual includes juridical persons. Every individual and every organ of society excludes no one, no company, no market, no cyberspace. The Universal Declaration applies to them all."[12] Accordingly, companies are not only morally and socially responsible for respecting and protecting human rights, but also *legally* liable as "organs of society."[13] Corporations, therefore, do have international law obligations, including in the field of human rights.

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[5] *See, e.g.*, Council of Europe, Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment, Jun. 21, 1993, 32 I.L.M. 1228 (1993). In addition, several international environmental treaties contemplate liability and compensation for damages. *See, e.g.*, Cartagena Protocol on Biosafety, Jan. 29, 2000, art. 27, 39 ILM 1027 (2000); Convention on Biological Diversity, Jun. 5, 1992, art. 14, 31 ILM 818 (1992); Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal ("Basel Convention"), Mar. 22, 1989, art. 12, 28 I.L.M. 657 (1989), *available at* http://www.basel.int/text/documents.html. The Basel Convention applies to persons, which are defined as any natural or legal person.

[6] *See* ILO, Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (1977) (rev. 2000), *available at* http://www.ilo.org/public/english/standards/norm/sources/mne.htm; OECD, The Revised OECD Guidelines for Multinational Enterprises (2000), *available at* http://www.oecd.org/dataoecd/56/36/1922428.pdf.

[7] *See* U.N. Global Compact, The Ten Principles, *available at* http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html; *Resolution on EU standards for European Enterprises operating in developing countries towards a European Code of Conduct*, EUR. PARL. DOC., Res. A4-0508/98, preamble, O.J. (1999) C 104/180.

[8] Rio Declaration on Environment and Development, Report of the U.N. Conference on the Human Environment, Rio de Janeiro (1992), *available at* http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm.

[9] U.N. Conference on Environment and Development, Jun. 3-14, 1992, Agenda 21 Programme of Action for Sustainable Development, U.N. Doc. A/CONF.151/26 (1992), *available at* http://www.un.org/esa/sustdev/documents/agenda21/english/Agenda21.pdf.

[10] World Summit for Social Development, Copenhagen Declaration on Social Development, Mar. 12, 1995, U.N. Doc. A/CONF.166/9 (1995), *available at* http://www.un.org/esa/socdev/wssd/agreements/decparti.htm.

[11] S. Deva, *UN's Human Rights Norms for Transnational Corporations and Other Business Enterprises: An Imperfect Step in the Right Direction*, 10 ILSA J. INT'L & COMP. L. 493, 495 (2004); *see also* L. Henkin, *Keynote Address: The Universal Declaration at 50 and the Challenge of Global Markets*, 25 BROOK. J. INT'L L. 17, 25 (1999); M. Robinson, *The Business Case for Human Rights*, in Visions of Ethical Business, Financial Times Management 14 (1998); S. Vieira de Mello, *Human Rights: What Role for Business?*, 2(1) New Academy Review 19 (2003).

[12] Henkin, *supra* note 11, at 24-25.

[13] *See generally* Clapham, *supra* note 1, at 265-70; BEYOND VOLUNTARISM, *supra* note 2; *see also* D. Aguirre, *Multinational Corporations and the Realisation of Economic, Social and Cultural Rights*, 35 CAL. W. INT'L L.J. 53, 70 (2004); S.R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443 (2001).

The remainder of this paper examines the particular circumstance of legal responsibility for participating in or assisting abuses committed by others, especially government authorities and armed groups. Many of the most egregious allegations of corporate complicity involve situations in which TNCs have aided and abetted a state, or another actor, in committing criminal violations of international human rights law.[14] Typically, the charge made is that a company colludes, conspires or acquiesces in a pattern of abuses committed by state forces, but that would not have happened, or would not have happened in the same way, had it not been for the presence or support of the company.[15] As detailed below, it has been clear at least since the Nuremberg Tribunals that international law prohibits corporate officials and corporations from abetting the commission of atrocities.

III. THE CUSTOMARY INTERNATIONAL LAW STANDARD FOR CORPORATE AIDING AND ABETTING LIABILITY

The accepted sources of international law, as articulated in the statute of the International Court of Justice, are well-known, and include international conventions, international custom, as evidence of a general practice accepted by law and the general principles of law recognized by civilized nations, and judicial decisions and the works of the most highly qualified publicists of the various nations as secondary sources. The common view of customary international law is that "there are two essential elements of custom, namely practice and *opinio juris*," the belief of states that their conduct is required by legal obligation.[16] Human rights norms develop like other customary international law norms, but the state practice relevant here typically falls into two categories: responses to violations of the norm, and development of treaties in conformity with the norm.[17] The actions of states at the U.N. or other international forums, especially in condoning or condemning particular activities, may be taken as evidence of *opinio juris*.[18]

There is ample evidence of a customary international law norm regarding aiding and abetting as well as a remarkable degree of consistency in the domestic legal principles of many nations. This paper looks in depth at three particular lines of authority which establish this norm: international criminal law, which represents one form of response by states and the international community to violations of the norm against aiding and abetting human rights violations; a pattern of conventions consistent with the norm; and international law jurisprudence in U.S. courts under the ATS, which are also a response to violations of the norm. This section examines the sources

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[14] *See, e.g.*, BEYOND VOLUNTARISM, *supra* note 2, at 125.
[15] *See id.*; *see also* M. Jungk, *A Practical Guide to Addressing Human Rights Concerns for Companies Operating Abroad, in* HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITIES OF TRANSNATIONAL CORPORATIONS (M.K. Addo ed. 1999).
[16] OPPENHEIM'S INTERNATIONAL LAW 27 (R. Jennings & A. Watts eds., 9th ed. 1992).
[17] A. D'Amato, *Human Rights as Part of Customary International Law: A Plea for Change of Paradigms*, 25 GA. J. INT'L & COMP. L. 47, 81-98 (1995-1996); *see also* I. Brownlie, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 5 (5th ed. 1998) (noting that other evidence that may be relied upon to show custom includes "diplomatic correspondence, policy statements, press releases, the opinions of official legal advisers, official manuals on legal questions, e.g. of military law, executive decisions and practices, orders to naval forces etc., comments by governments on drafts produced by the International Law Commission, state legislation, international and national judicial decisions, recital in treaties and other international instruments, a pattern of treaties in the same form, the practice of international organs, and resolutions relating to legal questions in the U.N. General Assembly").
[18] OPPENHEIM'S INTERNATIONAL LAW, *supra* note 16, at 28; O. Schachter, INTERNATIONAL LAW IN THEORY AND PRACTICE 338 (1991).

of the customary international law norm; the following section turns to general principles of law. Both sections incorporate judicial decisions and the writings of scholars.

All of these lines of evidence point to a common legal standard: like other actors, a corporation is responsible for aiding and abetting human rights violations when it provides substantial assistance to the primary human rights violator, with knowledge that its conduct will assist or contribute to the commission of human rights violations.

A. International Criminal Law

Since at least the Nuremberg tribunals, international criminal law has recognized and defined the responsibility of individuals and corporations for aiding and abetting human rights abuses. More recently, the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), as well as other bodies, have affirmed these aiding and abetting standards. As the ICTY jurisprudence was expressly based upon customary international law, it is particularly useful in determining the general international law aiding and abetting standard.

1. The Standard as Defined in Furundzija

The most widely cited formulation of aiding and abetting liability is derived from the ICTY's 1998 judgment in *Prosecutor v. Furundzija*. Although the ICTY's statute included a prohibition on "aiding and abetting" crimes, it did not define this term; thus, the ICTY "examine[d] customary international law" in order to determine the appropriate standard.[19] After surveying 50 years of international law on the subject, the ICTY concluded that the customary aiding and abetting standard contains the following elements: the *actus reus* (required conduct) of practical assistance, encouragement, or moral support, which has a substantial effect on the perpetration of human rights crimes;[20] and the *mens rea* (required mental state) of knowledge that one's acts would contribute to the commission of such abuses.[21] The ICTY has since reiterated this standard, holding defendants liable for aiding and abetting where they knowingly carry out acts comprising practical assistance, encouragement or moral support to the principal.[22]

2. Actus reus

The *actus reus* requirement for aiding and abetting liability under international criminal law is met by any act or omission that is deliberate and "directly affect[s] the commission of the crime itself."[23] The assistance need not have caused the act of the principal, but it must have had a

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[19] *Prosecutor v. Furundzija*, ICTY Case No. IT-95-17/1-T (Trial Chamber Dec. 10, 1998), ¶ 191, *available at* http://www.un.org/icty/furundzija/trialc2/judgement/index.htm.
[20] *Id.* ¶¶ 232-35.
[21] *Id.* ¶ 243.
[22] *Prosecutor v. Blagojevic and Jokic*, ICTY Case No. IT-02-60 (Trial Chamber Jan. 17, 2005), ¶ 726, *available at* http://www.un.org/icty/blagojevic/trialc/judgement/index.htm.
[23] *Prosecutor v. Tadic*, ICTY Case No. IT-94-1-T (Trial Chamber May 7, 1997), ¶ 678, *available at* http://www.un.org/icty/tadic/trialc2/judgement/index.htm; *see also* A. Clapham & S. Jerbi, *Categories of Corporate Complicity in Human Rights Abuses*, 24 HASTINGS INT'L & COMP. L. REV. 339, 341 (2001).

"substantial effect" on the commission of the crime. The assistance may be provided by either an act or omission, and may occur before, during or after the act of the principal."[24]

To begin to address these issues, it is suggested that the concept of complicity should be divided into three categories: direct, indirect and silent complicity.

Direct complicity is the most active and obvious form of assistance. For example, a company that promoted, or assisted with, the forced relocation of people in circumstances that would constitute a violation of international human rights could be considered directly complicit in the violation.[25] Following World War II, the Nuremberg Tribunal found that direct action includes acts such as appropriating property and machinery from Jews in occupied territories, in such a manner as to aid and abet illegal German aggression.[26] The Nuremberg Tribunal found corporate directors of the Krupp factory liable for aiding the Nazi regime where the defendants had plundered and spoiled civilian property in occupied territories, and deported and used prisoners of war and concentration camp inmates as forced laborers.[27]

Indirect complicity may attach to any action that has a substantial effect on the abuses, even though the aider and abettor does not have a direct role. For example, the Nuremberg Tribunal convicted corporate employees of aiding and abetting for selling poisonous gas to concentration camps with the knowledge that it would be used to commit mass murder, despite the fact that they had no control over the manner in which the gas was used.[28] The *Flick* case also found aiding and abetting liability in the absence of control over the actual perpetrator; there, one accused (Steinbrinck) was convicted "under settled legal principles" for knowingly contributing money to a Nazi organization, despite the fact that he had no control over the organization and even though it was "unthinkable" he would "willingly be a party" to atrocities.[29] Likewise, the tribunal held another accused (Flick) liable for a slave labor program initiated and operated by the Nazis, after he ordered increased production with the awareness that slave labor would be employed to meet the higher quotas. The Nuremberg Tribunal found liability even as it

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[24] *Blagojevic and Jokic*, *supra* note 22, ¶ 726; *see also Tadic*, *supra* note 23, ¶¶ 689, 691-92 (stating that culpable acts include "participation [that] directly and substantially affected the commission of that offence through supporting the actual commission before, during, or after the incident").

[25] Clapham & Jerbi, *supra* note 23, at 342.

[26] *The Farben Case*, Military Tribunal VI, Case 6: *U.S. v. Krauch*, *in* 8 TRIALS OF WAR CRIMINALS UNDER CONTROL COUNCIL LAW NO. 10, p. 1169 (1948) (Defendants were directors of IG Farben, a large German conglomerate of chemical firms. In World War II, a Farben subsidiary, manufactured Zyklon B, the poison gas used at the extermination camps. IG Farben also developed processes for synthesizing gasoline and rubber from coal, and thereby contributed much to Germany's ability to wage a war despite having been cut off from all major oil fields. The charges against the directors consequently centered on preparing to wage an aggressive war, but also on slave labor and plundering).

[27] *The Krupp Case*, Military Tribunal IV, Case 10: *U.S. v. Alfried Krupp et al.*, Jul. 31, 1948, *in* 9 TRIALS OF WAR CRIMINALS UNDER CONTROL COUNCIL LAW NO. 10, p. 4 (1948) (Twelve former directors of the Krupp Group were accused of enabling the armament of German military forces and thus participating in the Nazis' preparations for an aggressive war, and of using slave laborers in their companies).

[28] *Trial of Bruno Tesch and Two Others*, 1 LAW REPORTS OF TRIALS OF WAR CRIMINALS 93 (Brit. Mil. Ct. 1947).

[29] *U.S. v. Friederich Flick, in* 6 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO.10, pp. 1217, 1222 (1947) (Defendants were Friedrich Flick and five other high-ranking directors of Flick's group of companies).

acknowledged that he did not "exert any influence or [take] any part in the formation, administration or furtherance of the slave-labor program."[30]

Silent complicity may be found, under appropriate circumstances, from omissions alone. Like direct and indirect complicity, if silence in the face of horrendous human rights violations amounts to "a direct and substantial contribution to the commission of an offense," it may be a basis for aiding and abetting liability.[31] This may result from, for example, the presence of the defendant coupled with authority, where the defendant declines to use that authority.[32] Thus, in *Furundzija*, a military commander interrogated a woman while his subordinate raped and tortured her. The ICTY held that "in certain circumstances, aiding and abetting need not be tangible, but may consist of moral support or encouragement of the principals in their commission of the crime."[33] Although the ICTY did not find that the defendant verbally encouraged the rape and torture, his tolerance of the practice and continued interrogation constituted intangible moral support and encouragement. This judgment followed similar cases from the post-World War II period that found Nazi commanders guilty for being present where crimes against humanity were committed.[34] Jurisprudence from the ICTR similarly supports the notion that if an individual is in a position of power, prolonged inaction may be tantamount to encouragement.[35]

3. Mens rea

Although direct action, indirect action and silence may all lead to liability for aiding and abetting under the international criminal standard, such liability may only attach if the requisite mental state element is met. The Nuremberg Tribunal established that he who "knowingly by his influence and money contributes to the support thereof must … be deemed to be, if not a principal, certainly an accessory to such crimes."[36] Drawing on this precedent and decades of international law, the ICTY in *Furundzija* found that knowledge was the appropriate *mens rea*, expressly rejecting the idea that an aider and abettor must intend that the abuses occur.[37] The Appeals Chamber in *Vasiljevic* subsequently affirmed, "Knowledge on the part of the aider and abettor that his acts assist in the commission of the principal perpetrator's crime suffices for the *mens rea* requirement of this mode of participation."[38]

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[30] *Id.* at 1196, 1198.
[31] *Prosecutor v. Akayesu*, ICTR Case No. ICTR-96-4-T (Trial Chamber Sep. 2, 1998), ¶¶ 477, 548, *available at* http://69.94.11.53/ENGLISH/cases/Akayesu/judgement/akay001.htm.
[32] *See, e.g., Prosecutor v. Aleksovski*, ICTY Case No. IT-95-14/1 (Trial Chamber May 30, 2001), ¶ 65, *available at* http://www.un.org/icty/aleksovski/appeal/judgement/nob-aj010530e.htm.
[33] *Furundzija*, *supra* note 19, ¶ 199.
[34] *See Furundzija*, *supra* note 19, ¶ 205; *see also Tadic*, *supra* note 23; *Akayesu*, *supra* note 31.
[35] *Prosecutor v. Kayishema and Ruzindana*, ICTR Case No. ICTR-95-1-T (Trial Chamber May 21, 1999), ¶ 202, *available* at http://69.94.11.53/ENGLISH/cases/KayRuz/judgement/index.htm; *Prosecutor v. Galic*, ICTY Case No. IT-98-29-T (Trial Chamber Dec. 5, 2003), ¶¶ 169, 170-172, *available at* http://www.un.org/icty/galic/trialc/judgement/index.htm.
[36] *Flick*, *supra* note 29.
[37] *Furundzija*, *supra* note 19, ¶ 252; *see also Tadic*, *supra* note 23 ¶¶ 689, 691-92 (holding that the "accused will be found criminally culpable for any conduct where it is determined that he knowingly participated in the commission of an offence that violates international humanitarian law").
[38] *Prosecutor v. Vasiljevic*, ICTY Case No. IT-98-32 (Appeal Chamber Feb. 25, 2004) ¶ 102, *available at* http://www.un.org/icty/vasiljevic/appeal/judgement/index.htm.

The accomplice need not "share the *mens rea* of the perpetrator, in the sense of positive intention to commit the crime."[39] Thus, the accomplice need not desire that the principal offense be committed; it is enough to know the likely effect of the assistance.[40] In *Prosecutor v. Delalic*, the ICTY reiterated this standard, and further noted, "The relevant act of assistance may be removed both in time and place from the actual commission of the offense."[41] Moreover, the Tribunal specifically concluded that these aiding and abetting standards are principles of customary international law.[42] Furthermore, knowledge of the specific crime being facilitated is not necessary; instead, liability attaches when the actor knows that its conduct will facilitate one of a variety of possible crimes likely to be committed.[43]

4. Applicability to Corporations

International criminal cases, drawing on customary international law, also indicate that corporations are capable of violating international law and specifically the prohibitions on aiding and abetting abuses. The Nuremberg Tribunal, although lacking jurisdiction to prosecute corporations directly, did have authority to declare that an entity was a criminal organization,[44] and took pains to point out that the corporations whose officials stood accused of human rights crimes were also themselves liable. In the *I.G. Farben* case, the Tribunal found "proof … beyond a reasonable doubt that offenses against property … were committed by Farben…. The action of Farben and its representatives, under these circumstances, cannot be differentiated from acts of plunder or pillage committed by officers, soldiers, or public officials of the German Reich," and "constituted a violation of the Hague Regulations" on the conduct of warfare.[45] Specifically in reference to aiding and abetting liability, the Tribunal suggested that when "businessmen" cooperate in activities that result in human rights crimes, "with knowledge," then they are guilty along with the principals.[46] In a case involving enslavement of prisoners of war by a Japanese mining company, "it can be inferred" from the Tokyo Tribunal's opinion that the Tribunal, " held the mining company legally responsible for deaths, injuries, and the suffering of the POWs."[47]

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[39] *Furundzija*, *supra* note 19 at ¶ 245.
[40] *See* Clapham & Jerbi, *supra* note 23, at 342 (discussing the *Akayesu* case, *supra* note 31, and stating that "anyone who knowing of another's criminal purpose, voluntarily aids him or her in it, can be convicted of complicity even though he regretted the outcome of the offence").
[41] *Prosecutor v. Delalic*, ICTY Case No. IT-96-21 (Trial Chamber Nov. 16, 1998), ¶ 327, *available at* http://www.un.org/icty/celebici/trialc2/judgement/index.htm.
[42] *Id.* ¶ 321.
[43] In the *Farben* case, the Tribunal found that good faith mistakes such as the belief of certain industrialists that poisonous gas sold to the Nazis would be used only for delousing purposes may clear individuals of aiding and abetting liability. *U.S. v. Krauch*, *supra* note 26 at 1169.
[44] Charter of the International Military Tribunal (hereinafter "Nuremberg Tribunal Charter"), Aug. 8, 1945, art. 9, 59 Stat. 1544, 1547, 82 U.N.T.S. 279.
[45] *Id.*
[46] *The Nuremberg Trials* (*U.S. v. Goering*), 6 F.R.D. 69, 112 (Int'l Mil. Trib. 1946).
[47] A. Ramasastry, *Corporate Complicity: From Nuremberg to Rangoon, An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations*, 20 BERKELEY J. INT'L L. 91, 114 (2002) (discussing the Kinkaseki Mine trial, in which nine civilian employees of the Nippon Mining Company were prosecuted for abusing prisoners of war forced to work in a mine in occupied Chinese territory; eight of the nine were convicted, including the mining company manager and supervisor, who did not directly participate in the abuse of the prisoners). *See also* 4 TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA, REPORT, ch. 2 (1998) (hereinafter "TRC REPORT") (describing the Commission's rejection of claims by business leaders of innocence

More recently, the South African Truth and Reconciliation Commission (TRC) classified levels of culpability for businesses complicit in the apartheid regime.[48] Companies that actively helped to design and implement *apartheid* policies, such as those in the mining industry, were guilty of *first-order involvement*. Those that knew their products or services, such as banks[49] or the armament industry, would be used for repression were guilty of *second-order involvement*.[50]

The international criminal law standards of complicity are very similar to those recently articulated in the Commentary to the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights. The Commentary states that TNCs are obliged to ensure "that their activities do not contribute *directly or indirectly* to human rights abuses, and that they do not *directly or indirectly* benefit from abuses *of which they were aware or ought to have been aware*."[51]

Thus, despite the fact that international criminal tribunals, to date, have not had direct jurisdiction over corporations, international criminal jurisprudence and subsequent developments show that TNCs are held to the same standards applicable to individuals. At a minimum, then, corporations may be liable when they knowingly provide practical assistance, encouragement, or moral support that has a substantial effect on the commission of human rights violations.

B. International Convention Law

A variety of multilateral treaties as well as draft instruments reflecting the views of the international community are consistent with the *Furundzija* court's interpretation of the customary international law principles for aiding and abetting liability. Liability for aiding and abetting and other forms of complicity is provided, although not defined, in various post-World

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based on their non-state status), *available at* http://www.info.gov.za/otherdocs/2003/trc/2_5.pdf.

[48] *See* TRC REPORT, *supra* note 47; *see also* B. S. Lyons, *Getting to Accountability: Business, Apartheid and Human Rights*, 17 NETH. Q. HUM. RTS. 135, 144-54 (1999).

[49] Addressing the issue of knowledge, the Truth Commission made it clear that even if the Bank providing the credit cards did not know the specific use that was made of them, "there was no obvious attempt on the part of the banking industry to investigate or stop the use being made of their facilities in an environment that was rife with gross human rights violation." TRC REPORT, *supra* note 47, ¶ 31.

[50] *Id*. ¶ 75; *see also id*. ¶¶ 73-80.

[51] Commentary on the Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights, U.N. ESCOR, Comm'n on Hum. Rts., Sub-Comm'n on the Promotion & Protection of Hum. Rts., 55th Sess., Agenda Item 4, ¶ 1(b), U.N. Doc. E/CN.4/Sub.2/2003/38/Rev.2 (2003) (emphasis added), *available at* http://daccessdds.un.org/doc/UNDOC/GEN/G03/160/18/PDF/G0316018.pdf?OpenElement.

War II criminal tribunal statutes,[52] in the 1948 Genocide Convention,[53] and in ICTY, [54] ICTR, [55] and Special Court for Sierra Leone statutes.[56]
More specifically, the 1996 Draft Code of Crimes Against the Peace and Security of Mankind states that an individual is responsible if he "knowingly aids, abets or otherwise assists, directly and substantially, in the commission of [such] a crime, including providing the means for its commission."[57] As the *Furundzija* court noted, the Draft Code is "an authoritative international instrument" which is, at a minimum, "indicative of the legal views of eminently qualified publicists representing the major legal systems of the world."[58]

Similarly, the Rome Statute of the International Criminal Court, which came into force in 2002, provides a more detailed definition of categories of complicity. In particular, Article 25(3) provides liability for anyone who, among other things, "contributes to the commission or attempted commission of … a crime by a group of persons acting with a common purpose," as long as the contribution is "intentional" and made either with "the aim of furthering the criminal activity or criminal purpose of the group," or "in the knowledge of the intention of the group to commit the crime."[59] Although the Rome Statute apparently requires "intent," its definition of "intent" makes it clear that this element is satisfied by awareness that a particular consequence "will occur in the ordinary course of events."[60] Thus, as long as an aider or abettor intends to do the acts that assist the commission of a human rights crime, knowing that the crime "will occur in the ordinary course of events," the intent element is satisfied. The Rome Statute, like the Draft Code, is therefore consistent with the *Furundzija* standard and further evidence that this standard is expressive of customary international law. [61]

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[52] *See* Charter of the International Military Tribunal for the Far East, Jan. 19, 1946, art. 5 ¶ 2, T.I.A.S. No. 1589; Nuremberg Tribunal Charter, *supra* note 44, art. 6, 59 Stat. at 1547; Allied Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, Dec. 20, 1945, art. II ¶ 2.
[53] Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. 3(e), 78 U.N.T.S. 277.
[54] Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of Humanitarian Law Committed in the Territory of the Former Yugoslavia, May 25, 1993, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993), *reprinted in* 32 I.L.M. 1159 (1993).
[55] U.N. Security Council Resolution 955 (1994) Establishing the International Tribunal for Rwanda, Nov. 8, 1994, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg., U.N. Doc. S/RES/955 (1994), *reprinted in* 33 I.L.M. 1598 (1994).
[56] Statute of the Special Court for Sierra Leone, Jan. 16, 2002, *available at* http://www.specialcourt.org/documents/Statute.html.
[57] *Draft Code of Crimes Against the Peace and Security of Mankind*, U.N. GAOR, Int'l Law Comm'n, 48th Sess., art. 2(3)(d), U.N. Doc. A/CN.4/L.533 (1996), *available at* http://untreaty.un.org/ilc/documentation/english/a_cn4_l532.pdf.
[58] *Furundzija*, *supra* note 19, ¶ 227; *see also* Reg. No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, U.N. Transitional Administration in East Timor, ¶ 14.3, U.N. Doc. UNTAET/REG/2000/15 (2000), *available at* http://www.un.org/peace/etimor/untaetR/Reg0015E.pdf; Statute of the Iraqi Special Tribunal, Dec. 10, 2003, art. 15(b), *available at* http://www.cpa-iraq.org/human_rights/Statute.htm.
[59] Rome Statute of the International Criminal Court, Jul. 17, 1998, art. 25(3), U.N. Doc. A/CONF.183/9, 37 I.L.M. 999 (entered into force Jul. 1, 2002), *available at* http://www.un.org/law/icc/statute/romefra.htm.
[60] *Id.* art. 30(2)(b).
[61] *See* M. Shinn, *The 2005 Business and Human Rights Seminar Report: Exploring Responsibility and Complicity: 8 December 2005, London* 2 (2005), *available at* http://www.bhrseminar.org/BusinessHumanRightsSeminarReport2005.pdf (reporting that Luis Moreno-Ocampo, Chief Prosecutor for the International Criminal Court, stated that companies that are complicit in serious international crimes can be investigated by him).

C. U.S. Decisions Under the Alien Tort Statute

The Alien Tort Statute (ATS), codified at 28 U.S.C. § 1350, allows an alien to bring a suit in U.S. federal court for a tort committed in violation of international law, or "the law of nations."[62] In numerous cases, courts have treated corporations identical to individuals in terms of their international human rights obligations.[63]

1. Standard for Aiding and Abetting Liability

U.S. law has long held that aiding and abetting violations of international law gives rise to liability. In 1795, *Talbot v. Jansen* held that the liability of a French citizen who assisted a U.S. citizen to capture unlawfully a Dutch ship sprang from his actions in "aiding him to arm and outfit, in co-operating with him on the high seas, and using him as the instrument and means of capturing vessels."[64] ATS cases have applied the same rules of liability as well.

In *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, the court engaged in an extensive review of international law materials to determine that aiding and abetting liability was appropriate for corporations complicit in human rights violations. [65] The *Talisman* court concluded by stating that there is no disagreement that the notion of aiding and abetting liability in international law is a core principle that forms the foundation of customary international legal norms.[66] Other cases have overwhelmingly come to the same conclusions,[67] although there are exceptions.[68]

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[62] 28 U.S.C. § 1350; *see Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004) (approving of prior decisions holding that "'actionable violations of international law must be of a norm that is specific, universal and obligatory'" (quoting *In re Estate of Marcos Human Rights Litig.*, 25 F. 3d 1467, 1475 (9th Cir. 1994))).

[63] *See, e.g., Doe v. Unocal Corp.*, 395 F.3d 932, 949 (9th Cir. 2002), *ordered not citable by grant of rehearing en banc*, 395 F.3d 978 (2003); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 104 (2nd Cir. 2000) (holding that the ATS "reaches the conduct of private parties provided that their conduct is undertaken under the color of state authority or violates a norm of international law that is recognized as extending to the conduct of private parties"); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 445 (D.N.J. 1999) ("No logical reason exists for allowing private individuals and corporations to escape liability for universally condemned violations of international law merely because they were not acting under color of law."); *Presbyterian Church of Sudan v. Talisman Energy, Inc.* ("*Talisman I*"), 244 F. Supp. 2d 289, 314 n.24 (S.D.N.Y. 2003) (upholding corporate liability "[i]n light of the fact that numerous courts have upheld [ATS] actions against corporate defendants" and the fact that "overwhelming precedent demonstrates that corporations are subject to *jus cogens*" human rights claims); *see also Bigio v. Coca-Cola Co.*, 239 F.3d 440, 448 (2d Cir. 2000); *Carmichael v. United Techs. Corp.*, 835 F.2d 109, 113-14 (5th Cir. 1988); *Aguinda v. Texaco Corp.*, 303 F.3d 470 (2d Cir. 2002); *Deutsch v. Turner Corp.*, 317 F.3d 1005 (9th Cir. 2003).

[64] *Talbot v. Jansen*, 3 U.S. 133, 156 (1795).

[65] *Presbyterian Church of Sudan v. Talisman Energy, Inc.* ("*Talisman II*"), 374 F. Supp. 2d 331, 337-41 (S.D.N.Y. 2005).

[66] *Id.* at 340-41.

[67] *See, e.g., Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1157 (11th Cir. 2005) (noting that "the courts that have addressed the issue have held that [the ATS] reaches conspiracies and accomplice liability"); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1355-56 (N.D. Ga. 2002) (holding a former Serb soldier liable for aiding and abetting war crimes and other human rights violations in Bosnia-Herzegovina); *Bowoto v. ChevronTexaco Corp.*, 312 F. Supp. 2d 1229, 1247 (N.D. Cal. 2004); *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117, 128 (E.D.N.Y. 2000); *Villeda Aldana v. Fresh Del Monte Produce, N.A.*, 416 F.3d 1242 (11th Cir. 2005); *Talisman I*, *supra* note 63, at 320-24; *Burnett v. Al Baraka Inv. & Dev. Corp.*, 274 F. Supp. 2d 86, 100 (D.D.C. 2003); *In re Agent Orange Prod. Liab. Litig.*, 373 F. Supp. 2d 7, 112-21, 132-35 (E.D.N.Y. 2005); *In re Terrorist Attacks on Sept. 11, 2001*, 349 F. Supp. 2d 765, 826

The most detailed discussion of the elements of aiding and abetting liability under the ATS is found in the Ninth Circuit Court of Appeals' decision in *Doe v. Unocal Corp*. Unocal had partnered with the Burmese government on a pipeline project, used the Burmese military to provide security and logistical support for the project, provided assistance to the military, and failed to stop abuses of which it was aware, including widespread forced labor. The court adopted the *Furundzija* aiding and abetting standard, finding that it reflected customary international law, and ruled that Unocal could be held liable for aiding and abetting the Burmese military.[69]

2. Actus reus

As noted above, the *Unocal* court adopted most of the *Furundzija* standard directly, holding that "the standard for aiding and abetting under [the ATS] is . . . knowing practical assistance or encouragement that has a substantial effect on the perpetration of the crime."[70] In adopting the *Furundzija* standard, the *Unocal* court made several observations. First, the court was impressed that "[t]he *Furundzija* Tribunal based its *actus reus* standard for aiding and abetting on an exhaustive analysis of international case law and international instruments. The international case law considered consisted chiefly of decisions by American and British military courts and tribunals dealing with Nazi war crimes, as well as German courts in the British and French occupied zones dealing with such crimes in the aftermath of the Second World War."[71] The court concluded that "[i]t is hard to argue with the *Furundzija* Tribunal's reliance on these sources."[72] Second, the court noted that the *Furundzija* standard was also similar to the notion of aiding and abetting liability under U.S. domestic law, as expressed in the Restatement (Second) of Torts, and discussed further below.[73]

The *Unocal* court did not adopt, however, the "moral support" element of the *Furundzija* standard, finding it unnecessary to do so.[74] Subsequently, the district court in *Mehinovic v. Vuckovic* adopted the full *Furundzija* standard for the aiding and abetting *actus reus*: "practical assistance, encouragement or moral support which has a substantial effect on the perpetration of

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(S.D.N.Y. 2005); *Doe v. Saravia*, 348 F. Supp. 2d 1112, 1148 (E.D. Cal. 2004); *Doe v. Qi*, 349 F. Supp. 2d 1258, 1332 (N.D.Cal. 2004); *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1173 n.6 (C.D.Cal. 2005).

[68] The most notable exception is *In re South Africa Apartheid Litigation (Khulumani v. Barclays)*, 346 F. Supp.2d 538 (S.D.N.Y. 2004). The decision in that case, however, was likely due to the limited nature of the allegations against the corporations, who were merely accused of benefiting from, or failing to prevent, the apartheid system. *See* R. Chambers, *The Unocal Settlement: Implications for Developing Law on Corporate Complicity in Human Rights Abuses*, Global Policy Forum (Fall 2005), *available at* http://www.globalpolicy.org/intljustice/atca/2005/09unocal.pdf.

[69] *Doe v. Unocal Corp.*, *supra* note 63, at 949. Although this case was ordered not citable in the Ninth Circuit after e*n banc* review was granted, *see* 395 F.3d 978 (9th Cir. 2003), the case was settled before the *en banc* court issued its opinion. *See* EarthRights Int'l, *Final Settlement Reached in Doe v. Unocal*, Mar. 21, 2005, *available at* http://www.earthrights.org/content/view/113/41/.

[70] *Doe v. Unocal*, *supra* note 63, at 947.

[71] *Id.* at 950 n. 26.

[72] *Id. See also Talisman II*, *supra* note 65, at 338-40 (holding that decisions of the ICTY and ICTR, the Rome Statute, and other international conventions are proper sources for determining customary international law).

[73] *Doe v. Unocal*, *supra* note 63, at 949.

[74] *Id.* at 951 (finding the "moral support" element to be unnecessary because there was "sufficient evidence in the present case that Unocal gave assistance and encouragement" to the Burmese military).

the crime."[75] The court pointed out that "this formulation does not require the tangible assistance of the aider and abettor."[76] The *Talisman* court did the same.[77]

3. Mens rea

As with *actus reus*, ATS cases have generally adopted the *Furundzija mens rea* standard, finding this standard to reflect customary international law.[78] The *Unocal* court held that the requisite mental state is knowledge that the acts would assist in the abuses or at least that a reasonable person should have known this:

> As for the *mens rea* of aiding and abetting, the ICTY held that what is required is actual or constructive (i.e., "reasonabl[e]") "knowledge that [the accomplice's] actions will assist the perpetrator in the commission of the crime." *Furundzija* at ¶ 245. Thus, "it is not necessary for the accomplice to share the *mens rea* of the perpetrator, in the sense of positive intention to commit the crime." *Id*. In fact, it is not even necessary that the aider and abettor knows the precise crime that the principal intends to commit. *See id*. Rather, if the accused "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." *Id*.[79]

This test puts companies on notice that they could be held liable for human rights abuses where they knew or should have known that their conduct would substantially assist or encourage a government to commit certain human rights abuses. The court in *Mehinovic* reached similar conclusions, which also adopted the *mens rea* standard recognized by the ICTY,[80] and the *Talisman* court, which referred to World War II tribunal jurisprudence. *Talisman* noted, "Some knowledge that the assistance will facilitate the crime is necessary. Thus, for example, a U.S. war crimes tribunal acquitted several businessmen who ran the German company I.G. Farben, accepting that they honestly believed that the Zyklon B would be used as a delousing agent."[81] A corporation that has no reason to believe that its acts will contribute to human rights abuses, therefore, has nothing to fear from aiding and abetting liability.

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[75] *Mehinovic supra* note 67, at 1355.
[76] *Id*.
[77] *Talisman I*, *supra* note 63, at 323-24; *see also Talisman II*, *supra* note 65, at 340.
[78] *Doe v. Unocal Corp.*, *supra* note 63, at 951 n. 27 (noting that "[t]he *Furundzija* Tribunal based its *mens rea* standard for aiding and abetting on an analysis of the same international case law and international instruments [used to determine Furundzija's *actus reus* standard]…. The Tribunal's reliance on these sources again seems beyond reproach").
[79] *Id.* at 950-51.
[80] *Mehinovic*, *supra* note 67, at 1355 (expressly noting that the noted that the aider and abettor need not "share the same wrongful intent as the principal. Rather, it is sufficient that the accomplice knows that his or her actions will assist the perpetrator in the commission of the crime."
[81] *Talisman I*, *supra* note 63, at 324.

IV. DOMESTIC LAW STANDARDS FOR AIDING AND ABETTING LIABILITY

A sampling of representative legal systems of the world demonstrates broad agreement on the basic elements of aiding and abetting liability, for corporations as well as individuals. As the ICTR has noted, "the ingredients of complicity under Common Law do not appear to be different from those under Civil Law."[82] The discussion below briefly outlines the elements of aiding and abetting under the legal systems of the United States, Britain, Canada, Australia, and Belgium, with respect to criminal or civil law (or both). Each legal system defines aiding and abetting (or its equivalent) in a similar way to the customary international law standard discussed above: knowing, substantial assistance or encouragement. Although there is some variation on the scope of liability for complicity, in general the differences are found in how far liability may be extended *beyond* the customary international law standard.

Domestic law and jurisprudence in the following jurisdictions show that the customary international law standard discussed above, derived from international criminal law and consistent with international conventions and ATS jurisprudence, is also consistent with general principles of law.

A. United States

In the U.S., the principles of secondary liability of aiders and abettors to human rights abuses date back to the 1700s, when assisting in the slave trade was prohibited.[83] Today, U.S. civil aiding and abetting standards are remarkably similar to the customary international law standard. As described in the Restatement (Second) of Torts, a person may be liable for another's tort if he or she "knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself."[84] Many states, including New York and California, have adopted this formulation.[85] Federal courts have also applied a similar standard; in *Halberstam v. Welch*, the District of Columbia Court of Appeals emphasized that knowledge, not intent, was the appropriate test: "Aiding-abetting focuses on whether a defendant knowingly gave 'substantial assistance' to someone who performed wrongful conduct, not on

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[82] *Prosecutor v. Akayesu*, *supra* note 31, ¶ 535.

[83] *See* Act of Mar. 22, 1794, ch. 11, §1, 1 Stat. 347 (Act enacted by Congress barring the building or equipping of vessels fitted for the "carrying on of the slave trade"). As part of that law, Congress required forfeiture and payment of $2,000 by "all and every person, so building, fitting out, equipping, loading, or otherwise preparing, or sending away, any ship or vessel, knowing or intending that the same shall be employed in such trade or business...or any ways *aiding or abetting* therein." *Id.* § 2, 1 Stat. at 349. *See also* Act of Mar. 2, 1807, ch. 22, § 3, 2 Stat. 426 (law prohibiting the importation of slaves and requiring forfeiture and payment of $20,000 by persons who aided or abetted in the "building, fitting out, equipping, loading, or otherwise preparing or sending away" of vessels intended for the importation of slaves) and Act of May 15, 1820, ch. 113, § 5, 3 Stat. 600, 601 (Congress determination that the slave trade was so repugnant that perpetrators as well as their aiders and abettors should be subject to the death penalty and the slave trade formally should be equated to the international crime of piracy).

[84] Restatement (Second) of Torts § 876 (1977).

[85] *See*, *e.g.*, *Pittman v. Grayson*, 149 F.3d 111, 122-23 (2d Cir. 1998) (aiding and abetting requires that the defendant have given "substantial assistance or encouragement" to the primary wrongdoer); *Saunders v. Superior Court*, 27 Cal. App. 4th 832, 846 (1994) ("Liability may also be imposed on one who aids and abets the commission of an intentional tort if the person (a) knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act or (b) gives substantial assistance to the other in accomplishing a tortious result and the person's own conduct, separately considered, constitutes a breach of duty to the third person").

whether the defendant agreed to join the wrongful conduct."[86] Thus, aiding and abetting requires that "the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance [and] the defendant must knowingly and substantially assist the principle violation."[87]

B. Britain

British criminal law, which prohibits aiding and abetting the commission of any offense,[88] also incorporates similar elements. British case law holds that encouraging and enabling someone else to commit an offense can be the *actus reus* of the offence for an aider and abettor. In *Mok Wei Tak v. The Queen*, the wife of a corrupt government official was charged with aiding and abetting his acts of bribery where she allowed him to keep some of his money in her bank account so as not to raise suspicion and actively concealing that fact later. While her actions did not directly lead to his committing bribery, they allowed him to continue to conceal them after the fact.[89] Again mirroring the customary international law standard, the *mens rea* element requires only that the abettor is sufficiently aware of the actions leading to the offense; the prosecution does not have to show that the charged had any desire that the offense be committed.[90] Indeed, British courts have even gone beyond actual knowledge, holding in *Mok Wei Tak* that recklessness as to knowledge was sufficient.[91]

British legal scholars suggest that the tort law standard is similar to that of criminal aiding and abetting. In one case, *Hume v. Oldacre*, a huntsman who trespassed was held accountable not only for his own damage but for the damage caused by the people he had encouraged to come with him.[92] Under British tort law, the plaintiff must show that the defendant's act materially contributed to the plaintiff's loss or was one of multiple actions that materially contributed to a common result.[93] The mental state element is also similar; for example, in *Emerald Construction Co. Ltd v. Lowthian*, a tort case involving a building contract, the court held, "Even if they did not know of the actual terms of the contract, but had the means of knowledge--which they deliberately disregarded--that would be enough."[94] The same standards apply to corporations,

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[86] *Halberstam v Welch*, 705 F.2d 472, 478 (D.C. Cir. 1983).
[87] *Id.*
[88] Accessories and Abettors Act, 1861, 24 & 25 Vict. c. 94. § 8 (Eng.).
[89] *Mok Wei Tak v. The Queen*, 2 A.C. 333 (P.C. 1990) (appeal taken from Hong Kong).
[90] *Nat'l Coal Board v. Gamble*, [1959] 1 Q.B. 11 (1958) ("[A]n indifference to the result of the crime does not of itself negate abetting. If one man deliberately sells to another a gun to be used for murdering a third, he may be indifferent about whether the third lives or dies and interested only in the cash profit to be made out of the sale, but he can still be an aider and abettor.").
[91] *Mok Wei Tak*, *supra* note 89 (fact that the wife knew that her husband maintained a standard of living beyond what his official salary would allow and that he had no legitimate explanation for this was sufficient for knowledge). *See also Valentine v. Mackie*, 1980 S.L.T. (Sh. Ct.) 122 (where the defendant was accused of aiding and abetting his friend in drunk driving, the court held that "a reasonable person with the accused's knowledge would have appreciated that the driver was likely to be over the limit, and accordingly he had the necessary knowledge to be guilty of aiding and abetting the driver").
[92] G. L. Williams, TORTS AND CONTRIBUTORY NEGLIGENCE: A STUDY OF CONCURRENT FAULT IN GREAT BRITAIN, IRELAND AND THE COMMON-LAW DOMINIONS (1998).
[93] *McGillivray v. Davidson*, 1993 S.L.T. 693.
[94] J.F. Clerk, CLERK & LINDSELL ON TORTS 24.20 (18th ed. 2000).

which under British tort law "may be sued for wrongs involving fraud or malice as well as for wrongs in which intention is immaterial."[95]

C. Canada

The Canadian Criminal Code establishes that "anyone who does or omits to do anything for the purpose of aiding any person to commit an offence or abets any person in committing it is a party to the offence."[96] Canadian criminal law is clear that either an act or an omission can be sufficient to establish the *actus reus* necessary to prove aiding and abetting. An act or an omission when an act is obliged can lead to aiding and abetting if the act or omission encourages the commission of the crime.[97] The *mens rea* has also been described in terms very similar to the customary international law standard. To prove aiding and abetting, "it is only necessary to show that [the defendant] understood what was taking place and by some act on his part encouraged or assisted in the attainment thereof"; it is *not* necessary to prove "a common intention" with the principal.[98]

D. Australia

Australian criminal accomplice liability attaches to a corporation for a variety of acts, including when a corporation acts "as an aider (one who helps, supports or assists the principle) or abettor (one who incites or encourages the principle)."[99] Similar standards of aiding and abetting liability apply civilly, such that tort liability extends to anyone, "besides the actual perpetrator … who 'aids and abets,' whether or not he actively intervenes. Knowingly assisting, encouraging or merely being present as a conspirator at the commission of the wrong would suffice."[100] Thus, as in the customary international law standard, knowing substantial assistance leads to liability.

E. Belgium

The Belgian Penal Code has incorporated very specific aiding and abetting liability in the human rights context, criminalizing complicity in war crimes, crimes against humanity, and genocide by prohibiting the manufacture and transportation of instruments used to commit or facilitate the commission of such abuses.[101] As in the customary international law standard, the required mental element is knowledge that these instruments will be used to commit or facilitate the abuse in question; an individual found to be complicit in such a grave breach shall be punished as if he or she had committed the breach itself.

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[95] *Id.* at 4-79.
[96] M.L. Friedland, CASES AND MATERIALS ON CRIMINAL LAW AND PROCEDURE 335 (5th ed. 1978).
[97] *The Queen v. Kulbacki*, [1966] 52 W.W.R. 633 (Man. Ct. App. 1966) (finding a man criminally liable for driving a motor vehicle dangerously because he allowed another person to drive his car and did not stop her from driving recklessly, but clarifying that "every passenger in an unlawfully driven motor vehicle is not necessarily subject to conviction as an aider and abettor, as it is conceivable that a passenger might not have any authority over the car or any right to control the driver").
[98] *Preston v. The Queen* [1949] S.C.R. 156, 159.
[99] J. Kyriakakis, *Freeport in West Papua: Bringing Corporations to Account for International Human Rights Abuses under Australian Criminal and Tort Law*, 31 MONASH U. L. REV. 110 (2005) (*citing* S. Bronitt & B. McSherry, PRINCIPLES OF CRIMINAL LAW 159-60 (2001)).
[100] J. Fleming, THE LAW OF TORTS 230.
[101] Belgian Penal Code, Title I, article 136(6), *available at* http://www.ulb.ac.be/droit/cdi/Codepenal2003.html.

V. CONCLUSIONS AND RECOMMENDATIONS

Corporations have legal personality and, like individuals, are prohibited from assisting in the commission of human rights abuses. International law applies to corporations, and their obligations not to assist in human rights abuses exist in addition to any direct obligations they may have not to commit human rights abuses. Although international tribunals typically have not had jurisdiction over corporations, they have commented on the responsibility of corporations, and domestic courts apply international law to both real and juridical persons. Clearly, both real and juridical persons are capable of aiding and abetting human rights violations. International criminal law recognizes aiding and abetting liability for individuals in international crimes, and corporations are no different. In sum, international law imposes aiding and abetting liability upon those complicit in egregious human rights abuses, including corporations.

The international law standard for corporate complicity liability for international human rights violations is knowing practical assistance, encouragement, or moral support that has a substantial effect on the perpetration of the abuses. Where a corporation assists another entity—whether it be a state, a rebel group, or an individual—to commit human rights abuses, the international law standard for assessing its complicity is the standard used by international criminal tribunals and as set forth in customary international law and the general principles of law of many nations. As recognized by the Nuremberg Tribunals and the ICTY and subsequently adopted by U.S. courts applying customary international law, any real or juridical person that provides practical assistance, encouragement or moral support that he knows will aid or abet internationally prohibited human rights abuses is responsible for aiding and abetting. Although someone who reasonably believes that his actions will not assist human rights abuses will not be liable, a person need not intend for the abuses to occur in order to be held responsible, but only needs to intend to engage in the acts of assistance. The aider and abettor need not have control over the perpetrator of the abuses, but can be held responsible for direct complicity in planning the abuses, indirect complicity in providing funds or other support, or taking actions that have a substantial effect on the abuses, or silent complicity on the part of persons in positions of authority whose omissions and failures to act give assistance to the perpetrators.

The absence of an international forum with jurisdiction over corporate liability for aiding and abetting human rights abuses does not mean that corporations are not violating international law. The lack of remedies in international human rights law is a persistent problem, but it does not undermine the nature of the legal obligations. One of the cardinal principles of the Nuremberg prosecutions is that the defendants were always under international legal obligations not to commit atrocities, even though no tribunal had previously existed to hold them accountable. From World War II until the creation of the ICTY there were no international tribunals with authority to punish war crimes, crimes against humanity, and genocide, but these abuses were unquestionably contrary to accepted norms of international law. Similarly, while a reliable mechanism for holding corporations accountable for their violations of international human rights law does not yet exist, corporations remain legally responsible.

The absence of international remedies and an international tribunal, however, points to a pressing need for increased international accountability. Many host countries are unwilling or unable to hold TNCs liable for aiding and abetting the worst abuses of internationally guaranteed human

rights, especially where the host country itself is perpetrating the violations. At the same time, the TNCs' home countries may protect their corporations through intricate legal structures and webs of subsidiaries. Thus, international civil remedies are necessary to complement domestic legal systems in deterring and punishing illegal corporate action.

To advance the goal of effective accountability mechanisms for corporations engaged in aiding and abetting international human rights abuses, the United Nations, and particularly the SRSG, should communicate this standard to the international community. Through his mandate, the SRSG is required to clarify the standards applicable to corporations regarding human rights. As noted above, it is clear that international law recognizes a well-defined standard for corporate aiding and abetting liability, as set forth in the *Furundzija* case and subsequently adopted by *Unocal* and other U.S. cases, and reflected in international instruments and the common rules of domestic legal systems. In order to meet his mandate, the SRSG's final report must reflect the modern understanding of aiding and abetting liability in international law and its applicability to TNCs. Indeed, just as the U.N. codified the existing customary norm against torture in the U.N. Convention Against Torture, in order to "make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world,"[102] the U.N. should likewise codify the existing international law standard for corporate aiding and abetting liability. The affirmation of this recognized international law norm would not diminish the importance of existing customary international law. Nor does it diminish the importance of national regulation. The codification of the international law standard is important, however, in order to provide further reference points for national law; benchmarks, core minimum requirements, and a definition of what is permissible. As the central actor in international law, the U.N. must take the lead in reiterating, declaring and promoting the application of the well-established standard for corporate aiding and abetting liability under international human rights law. We urge codification of this standard derived from international criminal and domestic civil jurisprudence from around the world.

[102] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, preamble, 1465 U.N.T.S. 113 (entered into force Jun. 26, 1987).