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Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts

Doug Cassel*

I. INTRODUCTION: TOO MANY QUESTIONS, TOO MANY ANSWERS

¶1 Can transnational corporations or their executives be held criminally or civilly liable for aiding and abetting human rights violations committed by governments or militaries of foreign countries where they do business? What body of law determines the answer -- international law, the law of the foreign state, or the law of the home state?

¶2 If the answer is that corporations and their executives can be held liable, what standard defines "aiding and abetting" liability? Does merely doing business in a repressive state qualify? If a corporation sells goods or services to a repressive government, does the corporation aid or abet if it has *knowledge* that its products will be used to commit human rights violations? Or must corporate officers *intend* to assist the commission of violations?

¶3 For corporate executives, the answer to one question -- whether they can be held criminally liable as accessories to crimes against human rights -- has long been clear. As early as 1946, for example, a British military court convicted the two top officials of the firm that supplied Zyklon B to the Nazi gas chambers as accessories to war crimes.¹

¶4 Beyond that modest marker, however, there is room for argument, and often active debate, about everything else. To some extent the debate turns on whether international criminal law requires that those who aid and abet merely have *knowledge* of the principal crime, or must instead have a *purpose* to facilitate the crime. In United States federal court suits against corporations under the Alien Tort Statute ("ATS"),² this international law debate is compounded by a domestic dispute over whether the definition of "aiding and abetting" should be drawn from international law or from federal common law. Overlaying both debates is an even more basic disagreement about whether corporations can be held liable in tort for violations of international law at all. The confusion engendered by these multi-layered debates denies legal certainty, both to corporations and to victims of human rights violations facilitated by corporations.

¶5 The U.S. Supreme Court recently failed to muster a quorum in a case that might have clarified the extent of corporate liability for aiding and abetting under the ATS.³

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¹ See generally Trial of Bruno Tesch and Two Others (The Zyklon B Case), 1 Law Reports of Trials of War Crim. 93 (1947) (Brit. Mil. Ct., Hamburg, 1-8 March 1946); see also cases discussed *infra* Part II.A.

² Alien Tort Claims Act, 28 U.S.C. § 1350 (2007) (providing that federal district courts "shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States").

³ Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254 (2d Cir. 2007), *aff'd for lack of quorum sub nom.* American Isuzu Motors Inc. v. Lungisile Ntsebeza, 2008 U.S. LEXIS 3868 (May 12, 2008). See discussion of this case *infra* Part III.

Even if the Court eventually gives new guidance, however, many unanswered questions would remain beyond its reach. What civil or criminal liability might transnational corporations face in *other* national jurisdictions, and under what standards? What exposure to criminal convictions for aiding and abetting might corporate *executives* face in criminal courts elsewhere, including the International Criminal Court (“ICC”)?

¶6 The question of the proper scope of liability of corporations and their executives for aiding and abetting human rights violations is far from academic. Consider the following list of transnational corporations recently sued under the ATS for allegedly aiding and abetting human rights violations:⁴

- Caterpillar, for selling bulldozers to the Israeli military, which used them to demolish Palestinian homes,⁵
- Chiquita, for allegedly paying Colombian paramilitary groups to keep the company’s banana plantations “free of labor opposition and social unrest,”⁶
- Banque Nationale Paris Paribas, for alleged payments to Saddam Hussein’s regime in violation of the rules of the United Nations oil-for-food program,⁷
- A Boeing subsidiary (Jeppesen Dataplan), for allegedly servicing flights used by the CIA for “extraordinary renditions” of suspected terrorists to other countries where interrogators commonly use torture and other unlawful techniques,⁸
- Yahoo, for providing the Chinese government with internet records leading to the identification and alleged torture of a human rights activist,⁹
- Drummond mining company, for allegedly paying Colombian paramilitaries who murdered labor activists,¹⁰
- Wal-Mart, for failing to stop suppliers from committing labor abuses,¹¹
- Nestle, for buying cocoa and providing services to cocoa farmers employing child labor,¹²

⁴ The list is generally taken from the January 2008 petition for *certiorari* by corporate defendants in the South Africa *apartheid* litigation. Petition for a Writ of Certiorari at 23, n. 3, American Isuzu Motors Inc. v. Lungisile Ntsebeza, 2008 U.S. LEXIS 3868 (May 12, 2008) (affirming judgment below for lack of quorum).

⁵ See Corrie v. Caterpillar, Inc., 403 F. Supp. 2d 1019 (W.D. Wash. 2005), *aff’d on other grounds*, 503 F.3d 974 (2007), and *petition for reh’g filed*, No. 05-36210 (9th Cir. Oct. 9, 2007).

⁶ Complaint ¶ 2, at 459-99, Does v. Chiquita Brands Int’l, Inc., No. 07-CV-10300 (S.D.N.Y. Nov. 14, 2007).

⁷ Complaint at 8-10, Mastafa v. Australian Wheat Bd., Ltd., No. 07-CIV-7955 (S.D.N.Y. Sept. 11, 2007).

⁸ First Amended Complaint at 67-69, Mohamed v. Jeppesen Dataplan, Inc., No. 5:07-CV-02798 (N.D. Cal. Aug. 1, 2007). See generally also David Weissbrodt & Amy Bergquist, *Extraordinary Rendition: A Human Rights Analysis*, 19 HARV. HUM. RTS. J. 123 (2006) (discussing extraordinary rendition).

⁹ Second Amended Complaint at 2, Xiaoning v. Yahoo! Inc., No. 07-CV-2151 (N.D. Cal. July 30, 2007) (case settled).

¹⁰ Complaint ¶ 49, Doe v. Drummond Co., No. 06-CV-61527 (S.D. Fla. Oct. 10, 2006) (case dismissed).

¹¹ First Amend. Complaint ¶ 47, 172-177, Doe v. Wal-Mart Stores, Inc., No. 05-CV-7307 (C.D. Cal. Dec. 28, 2005) (case dismissed; appeal pending).

¹² Complaint ¶¶ 35-37, Doe v. Nestle S.A., No. 05-CV-5133 (C.D. Cal. July 14, 2005).

- Unocal, for participating in a Burmese gas pipeline construction project, whose contracted security forces allegedly engaged in forced labor, forced displacement, murder and rape,¹³ and
- Barclay's Bank and dozens of other major corporations, for doing business with the apartheid regime in South Africa.¹⁴

¶7 This article maps and discusses the main uncertainties in both international and U.S. ATS law concerning corporate aiding and abetting of foreign human rights violations. Part II looks at questions under international criminal law. Part III turns to issues under the ATS. The article concludes with a call for clarification of both.

II. AIDING AND ABETTING UNDER INTERNATIONAL CRIMINAL LAW

¶8 To what extent can corporations and corporate executives be prosecuted under international criminal law for aiding and abetting violations of human rights? Corporate executives have long been held criminally liable for committing violations of human rights norms that do not require state action (Part A). International criminal liability for aiding and abetting is also well-established (Part B). However, debate continues over whether aiding and abetting under international criminal law requires that those who aid and abet merely have *knowledge* of the crime, or must instead harbor a *purpose* to facilitate the crime (Part C); such a purpose is required to prove aiding and abetting in most, but not all, cases before the International Criminal Court (Part D). Finally, while corporations cannot generally be prosecuted before international criminal tribunals, recent trends in international criminal law require states to prosecute corporate violators of international norms where domestic legal systems permit prosecution of corporations, and where criminal prosecution is not possible, to impose proportional civil or administrative liability on corporations (Part E).

A. Corporate Executives

¶9 As human beings, corporate executives are no less subject to international criminal law than are other individuals. This message was laid down plainly at the principal Nuremberg trial, where German industrialist Gustav Krupp was originally indicted along with top Nazi government, party and military leaders, and escaped prosecution only by reason of age and infirmity.¹⁵ In subsequent trials before British, French and American military courts, assorted German industrialists were convicted of such war crimes as plundering private property and using slave labor.¹⁶

¶10 Most of these convictions were for crimes committed by the industrialists as principals. But as the *Zyklon B* case discussed below illustrates, some convictions were

¹³ Doe I v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002), *reh'g en banc granted*, 395 F.3d 978 (9th Cir. 2003), *and vacated and appeal dismissed following settlement*, 403 F. 3d 708 (9th Cir. 2005).

¹⁴ Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254 (2d Cir. 2007), *aff'd for lack of quorum sub nom* American Isuzu Motors Inc. v. Lungisile Ntsebeza, 2008 U.S. LEXIS 3868 (May 12, 2008)..

¹⁵ The Nurnberg Trial, 6 F.R.D. 69, 76 (1946).

¹⁶ For overviews see generally Matthew Lippmann, *War Crimes Trials of German Industrialists: The "Other Schindlers,"* 9 TEMP. INT'L & COMP. L.J. 173 (1995); Kyle Jacobson, *Doing Business with the Devil: The Challenges of Prosecuting Corporate Officials Whose Business Transactions Facilitate War Crimes and Crimes Against Humanity*, 56 A. F. L. REV. 167, 167-99 (2005).

for their actions as accomplices. In other words, international criminal responsibility of corporate executives as accomplices has long been recognized.

B. *Accomplice Liability Under International Criminal Law*

¶11 Since Nuremberg there has been no question that accomplices, including those who aid and abet crimes, are responsible under international criminal law. The Nuremberg Charter imposed individual responsibility on “accomplices participating in the formulation or execution of a common plan or conspiracy to commit” a crime enumerated within the Charter.¹⁷ Although the Nuremberg Tribunal limited application of this provision to crimes against peace and did not apply it to other crimes,¹⁸ the International Law Commission (“ILC”) of the United Nations in 1950 articulated Nuremberg Principle VII as follows: “Complicity in the commission of a crime against peace, a war crime, or a crime against humanity . . . is a crime under international law.”¹⁹

¶12 In the early 1990s, the UN Security Council established the International Criminal Tribunal for the Former Yugoslavia (“ICTY”)²⁰ and the International Criminal Tribunal for Rwanda (“ICTR”).²¹ Because the tribunals were established not by treaty, but by Council resolution, the UN Secretary-General reported that the provisions of the ICTY statute on individual criminal responsibility were intended to “codify existing norms of customary international law.”²² Both the ICTY and ICTR statutes impose individual criminal responsibility on any person who “aided and abetted in the planning, preparation or execution” of genocide, war crimes or crimes against humanity.²³

¶13 Similarly, but with greater precision, the ILC’s 1996 Draft Code of Crimes Against the Peace and Security of Mankind would impose criminal responsibility for genocide, crimes against humanity and war crimes (as well as other crimes) on an individual who “knowingly aids, abets or otherwise assists, directly and substantially, in the commission of such a crime, including providing the means for its commission.”²⁴ The ICTY deemed the ILC Draft Code an “authoritative international instrument.”²⁵

¹⁷ Nuremberg Charter, Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, Charter II, art. 6, *entered into force* Aug. 8, 1945, 82 U.N.T.S. 280.

¹⁸ See *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Trial Chamber, Judgment, ¶ 193 n. 217 (Dec. 10, 1998), reprinted in 38 I.L.M. 317, ¶ 193 n. 217 (1999).

¹⁹ *Principles of International Law Recognized in the Charter of the Nurnberg Tribunal and in the Judgment of the Tribunal*, [1950] 2 Y.B. Int’l L. Comm’n, 377, U.N. Doc. A/CN.4/SER.A/1950/Add.1.

²⁰ Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council on May 25, 1993, U.N. Doc. S/RES/827 (1993) [hereinafter ICTY Statute].

²¹ Statute of the International Criminal Tribunal for Rwanda, as adopted by U.N. Security Council Res. 955, Annex (1994), U.N. Doc. S/RES/955, Nov. 8, 1994 [hereinafter ICTR Statute].

²² The Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, ¶ 29, U.N. Doc. S/25704 (May 3, 1993).

²³ ICTY Statute, *supra* note 20, art. 7.1; ICTR Statute, *supra* note 21, art. 6.1.

²⁴ *Draft Code of Crimes Against the Peace and Security of Mankind*, [1996] 2 Y.B. Int’l L. Comm’n., ch. 2, arts. 2(3)(d), 17, 18, 20, U.N. Doc. A/CN.4/SER.A/1996/Add.1 (Part. 2), http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7_4_1996.pdf.

²⁵ *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Trial Chamber, Judgment, ¶ 227 (Dec. 10, 1998), reprinted in 38 I.L.M. 317, ¶ 227 (1999).

¶14 Finally, in 1998 the Rome Statute for the International Criminal Court imposed criminal responsibility on one who “aids, abets or otherwise assists” in the commission of genocide, war crimes or crimes against humanity.²⁶

¶15 In sum, it cannot be seriously questioned that international criminal law in the human rights field imposes individual criminal responsibility on those who aid and abet.

C. International Case Law on the Mens Rea Element of Aiding and Abetting: A Knowledge Test or A Purpose Test?

¶16 Aiding and abetting has two elements: the conduct of the person who aids and abets (*actus reus*) and the person’s mental state (*mens rea*).²⁷ There is little controversy in international criminal law that the *actus reus*, as summarized by the widely cited ICTY Trial Chamber Judgment in *Furundzija*, consists of rendering “practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime.”²⁸

¶17 The more contested issue is whether the aider and abettor need merely have *knowledge* that her actions will facilitate the commission of the crime, or whether she must harbor a *purpose* to facilitate the crime.

¶18 Several immediate post-World War II cases used a knowledge standard. For example, in the *Zyklon B* case mentioned above, the prosecutors before the British military court

did not attempt to prove that the accused acted with the intention of assisting the killing of the internees. It was accepted that their purpose was to sell insecticide to the SS (for profit, that is a lawful goal pursued by lawful means). The charge as accepted by the court was that they knew what the buyer in fact intended to do with the product they were supplying.²⁹

¶19 In the *Einsatzgruppen* case, the American military court also used a knowledge test, not a purpose test, to convict defendant Fendler:

The defendant knew that executions were taking place. He admitted that the procedure which determined the so-called guilt of a person which resulted in him being condemned to death was “too summary.” But, there

²⁶ ICC Statute, art. 25.3(c), *infra* note 35, (quoted in full *infra* note 36).

²⁷ *Furundzija*, Case No. IT-95-17/1-T, ¶ 191, 236.

²⁸ *Id.* ¶ 235. The “moral support” element, however, has been controversial before U.S. judges, who have rejected it. *Doe I v. Unocal Corp.*, 395 F.3d 932, 949, n. 24 (majority opinion), 963 (Reinhardt, J., concurring opinion) (9th Cir. 2002) (subsequent history truncated); *Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 254, 277 (2d Cir. 2007) (subsequent history truncated) (Katzmann, J., concurring). In the context in which the concept is used in international cases, however, it is defensible. For example, *Furundzija* cites the Synagogue Case, where the German Supreme Court convicted a long-time Nazi militant for aiding and abetting in the destruction of a synagogue. Although the senior Nazi did not physically take part, he was present intermittently at the crime scene, and of course he knew what was going on. *Furundzija*, Case No. IT-95-17/1-T, ¶ 205-207 (“It may be inferred from this case that an approving spectator who is held in such respect by the other perpetrators that his presence encourages them in their conduct, may be guilty of complicity in a crime against humanity.”).

²⁹ *Furundzija*, Case No. IT-95-17/1-T, ¶ 238; see also Lippman, *supra* note 16, at 181-82.

is no evidence that he ever did anything about it. As the second highest ranking officer in the Kommando, his views could have been heard in complaint or protest against what he now says was a too summary procedure, but he chose to let the injustice go uncorrected.³⁰

¶20 Reviewing these and other post-World War II cases, as well as the “knowingly aids, abets or otherwise assists” standard of the ILC Draft Code (quoted above), the ICTY Trial Chamber in *Furundzija* adopted a knowledge test: “The mens rea required is the knowledge that these acts assist in the commission of the offence.”³¹

¶21 In doing so, the ICTY acknowledged that the cases were not uniform. It cited, but rejected, a purpose test used by an appeals court to set aside a conviction by a German court, sitting in the French occupied zone, of three low-level female government employees who had been ordered to search Jewish women for jewelry and valuables before they were deported from Vichy France to Germany.³² In finding the women not guilty, the appeals court ruled that the “aider and abettor has to have acted out of the same cast of mind as the principal, i.e., out of an inhuman cast of mind, or, in the case of persecutions, motivated by a political, racist or religious ideology.”³³

¶22 In another case known as the *Ministries Case*, an American military court at Nuremberg rejected a knowledge test. In that case an executive of the Dresdner Bank was charged with providing loans to businesses, knowing that the money would be used to finance businesses utilizing slave labor. Declining to convict the bank officer, the court explained:

The real question is, is it a crime to make a loan, knowing or having good reason to believe that the borrower will us[e] the funds in financing enterprises which are employed in using labor in violation of either national or international law? . . . Loans or sales of commodities to be used in an unlawful enterprise may well be condemned from a moral standpoint and reflect no credit on the part of the lender or seller . . . but the transaction can hardly be said to be a crime³⁴

¶23 If *Furundzija* is correct that the majority of case law applies a *knowledge* test, then, one must also acknowledge that the case law is not uniform. At least some postwar cases require that the aider and abettor also have a criminal *purpose*.

³⁰ Trial of Otto Ohlendorf and Others (Einsatzgruppen), 4 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, 572 (William S. Hein & Co., Inc. 1997) (1949) *quoted in Furundzija*, Case No. IT-95-17/1-T, ¶ 218.

³¹ *Furundzija*, Case No. IT-95-17/1-T, ¶ 249.

³² *Id.* ¶ 224, n. 247, ¶ 225, ¶ 240, n. 262, (quoting LG Hechingen, 28.6.1947, KIs 23/47 and OLG Tubingen, 20.1.1948, Ss 54/47 (decision on appeal), reported in Justiz und NS-Verbrechen, case 022, Vol. I, 469 ff, 498).

³³ *Id.* ¶ 225.

³⁴ United States v. von Weizsaecker (The Ministries Case), 14 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, 308, 622 (William S. Hein & Co., Inc. 1997) (1949), *quoted in Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 292-93 (2d Cir. 2007), (subsequent history truncated) (Korman, J., concurring in part and dissenting in part).

D. The International Criminal Court: A Purpose Test

¶24 A few months before the ICTY Trial Chamber in *Furundzija* adopted a knowledge test for aiding and abetting, the Rome Statute of the International Criminal Court (“ICC”) adopted a purpose test for most, but not all, cases of aiding and abetting.³⁵ Article 25 (3) (c) of the ICC Statute makes criminally responsible one who, “[f]or the *purpose* of facilitating the commission of such a crime, aids, abets, or otherwise assists in its commission or its attempted commission, including providing the means for its commission” (emphasis added).³⁶

¶25 In retrospect, this standard seems surprising. Only two years earlier, as noted above, the respected International Law Commission adopted a “knowingly” aids or abets standard in its Draft Code. How did the ICC end up with a purpose test?

¶26 The drafting history shows that the purpose test was not adopted until the Rome Conference. Several prior drafts of the ICC Statute, including the final draft submitted to the Rome negotiators by the Preparatory Committee in 1998, bracketed the language of what ultimately became article 25 (3)(c). The bracketed language, indicating disagreement among the drafters, would have imposed responsibility on one who “[with [intent][knowledge] to facilitate the commission of such a crime,] aids, abets or otherwise assists in the commission”³⁷

¶27 There was thus a longstanding disagreement between advocates of a “knowledge” test and those who preferred an “intent” test. The dispute was not resolved until the final negotiating conference at Rome. In the end, neither term was chosen, and instead out popped the “purpose” test.

¶28 Why? I have not found any official explanation. DePaul Law Professor M. Cherif Bassiouni, who chaired the drafting committee at the conference, explains that the decision was taken not by his committee, but by the Working Group on the General Principles of Criminal Law,³⁸ chaired by Per Saland, Director of the Department for International Law and Human Rights of the Swedish Ministry for Foreign Affairs.³⁹ In a

³⁵ Rome Statute of the International Criminal Court, United Nations Diplomatic Conference on Plenipotentiaries on the Establishment of an International Criminal Court, *adopted* July 17, 1998, *entered into force*, July 1, 2002, U.N. Doc. A/CONF.183/9, 21, art. 25.3(c), 37 I.L.M. 999 (1998) [hereinafter ICC Statute]. Curiously, the *Furundzija* Court, although citing art. 25 of the then new ICC Statute in regard to *actus reus*, did not discuss it in regard to *mens rea*, in regard to which it cited only article 30 of the ICC Statute, dealing with knowledge and intent. *Furundzija*, Case No. IT-95-17/1-T, ¶ 231, 243-45.

³⁶ ICC Statute, *supra* note 35, art. 25.3(c) provides: “In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

(c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;”

³⁷ M. CHERIF BASSIOUNI, THE LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT: AN ARTICLE-BY-ARTICLE EVOLUTION OF THE STATUTE 194 (2005), (1998 Preparatory Committee Draft art. 23.7(d)); *see id.* at 197 (Zutphen Draft art. 17.7(d)); *see id.* at 198 (Decisions Taken By Preparatory Committee In Its Session Held 11 to 21 February 1997, article B(d)); *see also id.* at 203 (1996 Preparatory Committee, Proposal 3.2 “An accomplice is a person who knowingly, through aid or assistance, facilitates the preparation or commission of a crime.”)

³⁸ Telephone interview with Cherif Bassiouni, Professor, DePaul University College of Law, in Chicago, IL (Feb. 22, 2008).

³⁹ *See* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE xviii (Roy S. Lee ed., 1999) [hereinafter Lee].

compilation of reports on the drafting process edited by the Executive Secretary of the Diplomatic Conference, Mr. Saland discusses article 25, but not article 25 (3) (c), or how the bracketed dispute between “knowledge” and “intent” got resolved as “purpose.”⁴⁰

¶29 Professor Bassiouni believes the dispute had to do with differences between civil law and common law lawyers and different understandings of language.⁴¹ If so, the language in the end seems to have come out the same in both English and French: a “purpose” test.⁴²

¶30 Professor Dr. Kai Ambos, a leading scholar who was a member of the German delegation at the Rome Conference and in a position to know, explains that the “purpose” test was borrowed from the Model Penal Code of the American Law Institute.⁴³ Originally adopted in 1962, the Model Code specifies a purpose test for aiding and abetting, as follows:

Section 2.06. Liability for Conduct of Another; Complicity.

...
(3) A person is an accomplice of another person in the commission of an offense if:

(a) with the purpose of promoting or facilitating the commission of the offense, he

...
(ii) aids or agrees or attempts to aid such other person in planning or committing it⁴⁴

¶31 Professor Ambos’ explanation is supported by the similarity of language between Model Penal Code 2.06(3) (a) (“purpose of promoting or facilitating the commission of the offense”), and ICC Statute Article 25 (3) (c) (“purpose of facilitating the commission of such a crime”).⁴⁵

¶32 The question, then, is what a purpose test means.⁴⁶ In the Model Penal Code, a person acts “purposely” if he or she has a “conscious object” to cause a given result.⁴⁷ To

⁴⁰ *Id.* at 198-200.

⁴¹ Telephone conversation with Cherif Bassiouni, Professor, DePaul University College of Law, Chicago, IL (Feb. 22, 2008).

⁴² The equally authoritative French text of the first clause of article 25(3)(c) reads, “En vue de faciliter la commission d’un tel crime” Statut de Rome de la Cour pénale internationale, art. 25(3)(c) (July, 7 1998), available at <http://www.icrc.org/DIH.nsf/WebART/585-50025?OpenDocument>. This might literally be translated, “With a view toward facilitating the commission of such a crime” A more accurate translation is probably, “With the aim of facilitating the commission of such a crime”

⁴³ Kai Ambos, *General Principles of Criminal Law in the Rome Statute*, 10 CRIM. L.F. 1, 10 (1999). Professor Dr. Ambos is the Chair of Criminal Law, Criminal Procedure, Comparative Law and International Criminal Law at the Georg-August-Universität Göttingen in Germany.

⁴⁴ MODEL PENAL CODE: OFFICIAL DRAFT AND EXPLANATORY NOTES 29-30, § 2.06 (1985) (as adopted at the 1962 Annual Meeting of the American Law Institute) [hereinafter MODEL PENAL CODE].

⁴⁵ See full text of ICC Statute art. 25(3)(c), *supra* note 36.

⁴⁶ ICC Statute *supra* note 35, at 24, arts. 30.2, 30.3. The ICC Statute defines “knowledge” and “intent,” but not “purpose.” The word “purpose” is not used elsewhere in the substantive criminal articles of the Statute, except in article 25.3(d). See full text *infra* note 54.

⁴⁷ MODEL PENAL CODE § 2.02(2)(a) (“A person acts purposely with respect to a material element of an offense when: (i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and (ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that

aid and abet under the Code, one must have a conscious object to cause the commission of the principal crime.

¶33 However, this Code definition is not necessarily imported into the ICC Statute. The ICC Statute is a treaty. In international law the general rule is that a “treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”⁴⁸ The “preparatory work” of a treaty is only a “supplementary” means of interpretation, consulted only to “confirm” the meaning that results from the general rule, or if the general rule produces an unclear or absurd meaning.⁴⁹

¶34 In this case the drafting history simply confirms the meaning resulting from the general rule, because the “ordinary meaning” of “purpose” is that the person consciously intends to bring about the result in question.⁵⁰

¶35 Even so, “purpose” in the ICC Statute need not mean the exclusive or even primary purpose. A secondary purpose, including one inferred from knowledge of the likely consequences, should suffice. Consider, for example, the Zyklon B case. The court accepted that the purpose of the defendant businessmen in selling Zyklon B, while knowing that it would be used in the gas chambers, was to make a profit. For all the court knew, the defendants could not care less about Hitler’s goal of eliminating the Jews; they simply aimed to profit from his doing so. Yet by supplying gas in the knowledge that it would be used to kill human beings, one may infer that one of their purposes -- admittedly secondary -- was to encourage continued mass killings of Jews. Only so could they continue selling large quantities of gas to the Nazis for profit: if Hitler were to cease gassing Jews, the Nazis would no longer buy so much gas.⁵¹

they exist.”).

⁴⁸ Vienna Convention on the Law of Treaties, art. 31.1, May 23, 1969, 1155 U.N.T.S.331 [hereinafter Vienna Convention].

⁴⁹ *Id.* art. 32 (“Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.”).

⁵⁰ The first definition of “purpose” in Merriam-Webster’s Online Dictionary, for example, is “something set up as an object or end to be attained.” Merriam-Webster’s Online Dictionary Definition of Purpose, available at <http://www.merriam-webster.com/dictionary/purpose>.

⁵¹ Cf. *Direct Sales Co. v. U.S.*, 319 U.S. 703, 713 (1943). In upholding the conspiracy conviction of a drug company that supplied obviously excessive quantities of morphine to a physician who it must have known was selling them illegally, the Court inferred criminal intent from the company’s knowledge. The Court explained: “When the evidence discloses such a system, working in prolonged cooperation with a physician’s unlawful purpose to supply him with his stock in trade for his illicit enterprise, there is no legal obstacle to finding that the supplier not only knows and acquiesces, but joins both mind and hand with him to make its accomplishment possible. The step from knowledge to intent and agreement may be taken. There is more than suspicion, more than knowledge, acquiescence, carelessness, indifference, lack of concern. There is informed and interested cooperation, stimulation, instigation. And there is also a ‘stake in the venture’ which, even if it may not be essential, is not irrelevant to the question of conspiracy. Petitioner’s stake here was in making the profits which it knew could come only from its encouragement of Tate’s illicit operations. In such a posture the case does not fall doubtfully outside either the shadowy border between lawful cooperation and criminal association or the no less elusive line which separates conspiracy from overlapping forms of criminal cooperation.” (Footnote omitted.)

¶36 This seems to be the only reasonable interpretation of “purpose,” if article 25 (3) (c) is interpreted, as it must be, in light of the “object and purpose” of the ICC Statute.⁵² The purpose of the Statute is to ensure that “the most serious crimes of concern to the international community as a whole must not go unpunished.”⁵³ It is difficult to believe that the drafters would have intended that those who knowingly supply gas to the gas chambers, for the primary purpose of profit, should escape punishment.

¶37 A separate provision of article 25 -- article 25 (3) (d) -- provides an alternative theory of responsibility where a “group of persons” acts “with a common purpose.”⁵⁴ Anyone who intentionally facilitates a crime by such a group can be held responsible, if he or she has either the “aim” to further the group’s criminal activity or purpose, or the “knowledge” of the group’s intention to commit the crime.⁵⁵ The ICC Statute thus embraces a “knowledge” test as sufficient to impose criminal responsibility on one who aids and abets a group crime.⁵⁶

¶38 Per Saland, the Swedish diplomat who chaired the Working Group at Rome, explains that this provision emerged from a debate over whether to include criminal responsibility for conspiracy between common law lawyers, who favored it, and some civil law lawyers whose systems do not criminalize conspiracy. The solution was found at Rome by borrowing, “with slight modifications,” language from the International Convention on the Suppression of Terrorist Bombings, and inserting it into what is now article 25 (3) (d) of the ICC Statute.⁵⁷

⁵² Vienna Convention, *supra* note 48, art. 31.1.

⁵³ ICC Statute, *supra* note 35, at 4, pmbl.

⁵⁴ ICC Statute, *supra* note 35, at 22, art. 25.3(d) provides: “In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person”

(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

(ii) Be made in the knowledge of the intention of the group to commit the crime”

⁵⁵ ICC Statute, *supra* note 35, art. 25 (3)(d)(i), (ii).

⁵⁶ Professor Ambos does not agree that article 25 (3) (d) allows mere knowledge to suffice to aid and abet a group crime. Because he reads article 25 (3) (d) to require the “aim” of promoting the crime, he views it as duplicative of article 25 (3) (c), and hence “simply superfluous.” Ambos, *supra* note 43, at 12-13. With respect, Professor Ambos’ reading is not supported by the text of article 25(3)(d), which makes “knowledge” an alternate theory of liability for aiding and abetting a group crime. ICC Statute, *supra* note 35, art. 25(3)(d). Nor is his reading supported by the general presumption that drafters do not insert superfluous articles.

As put succinctly by another scholar, the better reading is that “under the ICC Statute, while intent is required to aid and abet a crime committed by a single person (or a plurality of persons not forming a joint criminal enterprise) [under article 25(3)(c)], knowledge is sufficient to aid and abet a joint criminal enterprise [under article 25(3)(d)].” A. Reggio, *Aiding and Abetting in International Criminal Law: The Responsibility of Corporate Agents and Businessmen For “Trading With The Enemy” of Mankind*, 5 INT’L CRIM.L.REV. 623, 647 (2005). Reggio suggests that a “possible reason” for the lower *mens rea* required to aid and abet group crimes is that they are considered “more serious than crimes committed by a single person.” *Id.* at 647, n. 102.

⁵⁷ Lee, *supra* note 39, at 199-200; see International Convention for the Suppression of Terrorist Bombings, art. 2(3)(c), Jan. 8, 1998, G.A. Res. 164, U.N. GAOR, 52nd Sess., Supp. No. 49, at 389, U.N. Doc. A/52/49 (1998) (making criminally responsible anyone who, “(c) In any other way contributes to the commission of one or more offences as set forth in paragraph 1 or 2 of the present article by a group of persons acting with a common purpose; such contribution shall be intentional and either be made with the aim of furthering the general criminal activity or purpose of the group or be made in the knowledge of the intention of the group to commit the offence or offences concerned.”).

¶39 In the context of the terrorist bombings convention, the purpose of this theory of criminal responsibility is understandable: anyone who contributes to the commission of a terrorist bombing by, say, supplying explosives or funds, and who has knowledge of a terrorist group's intent to commit a bombing, should be held criminally responsible.

¶40 Parallels could arise in the corporate context. For example, where a corporate executive contributes funds or explosives to a Colombian paramilitary group, knowing of its intent to murder labor leaders or bomb a union office, the executive should be held criminally responsible for aiding and abetting the crimes. His knowledge is sufficient; there is no need to prove that he shared the purpose to kill the labor leaders (although that too may be inferred from the circumstances). In some cases governmental bodies may also be sufficiently cohesive and criminal to qualify as "groups," so that corporate executives who knowingly assist them can be held criminally responsible for aiding and abetting.⁵⁸

¶41 In conclusion, despite the "purpose" test in ICC Statute article 25 (3) (c), one can make a responsible argument that customary international law, as reflected in the majority of the post-World War II case law, the case law of the ICTY⁵⁹ and ICTR,⁶⁰ the ILC Draft Code, and group crimes under article 25 (3) (d) of the ICC Statute, requires that those who aid and abet merely have *knowledge* that they are assisting criminal activity.

⁵⁸ Articles 9 and 10 of the Nuremberg Charter allowed the International Military Tribunal to declare a "group or organization" criminal. The Nurnberg Trial 1946, 6 F.R.D. 69, 131 (1946). The Tribunal's Judgment defined groups based on whether they had a common criminal purpose or activity, whether they committed crimes as a group rather than merely as a collection of individuals, and whether the group's members participated knowingly and voluntarily at a responsible level. The Tribunal viewed "group" as a "wider and more embracing term than 'organization.'" *Id.* at 146. In either case, the Tribunal explained, "A criminal organization is analogous to a criminal conspiracy in that the essence of both is cooperation for criminal purposes. There must be a group bound together and organized for a common purpose. The group must be formed or used in connection with the commission of crimes denounced by the Charter." *Id.* at 132.

The Tribunal found some but not all of the accused government agencies to be criminal groups in this sense. Finding that the Gestapo and SD were used for criminal purposes after 1939, the Tribunal declared to be criminal "the group composed of those members" who held positions above a certain level after 1939 and who became or remained members with knowledge that the group was being used to commit crimes under the Charter, or who were "personally implicated as members of the organization in the commission of such crimes." *Id.* at 139-40.

On the other hand, neither Hitler's Cabinet nor the military high command were deemed to be groups. After 1937 the Cabinet never "really acted as a group or organization." It never met and was "merely an aggregation of administrative officers subject to the absolute control of Hitler." Although "[a] number of the cabinet members were undoubtedly involved in the conspiracy to make aggressive war . . . they were involved as individuals, and there is no evidence that the cabinet as a group or organization took any part in these crimes." *Id.* at 144-45.

In the case of the military high command, the Tribunal noted that "their planning at staff level, the constant conferences between staff officers and field commanders, their operational technique in the field and at headquarters was much the same as that of the . . . forces of all other countries." It continued, "To derive from this pattern of their activities the existence of an association or group does not . . . logically follow. On such a theory the top commanders of every other nation are just such an association rather than what they actually are, an aggregation of military men, a number of individuals who happen at a given period of time to hold the high-ranking military positions." *Id.* at 146.

⁵⁹ Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Trial Chamber, Judgment, ¶ 193 n. 217 (Dec. 10, 1998), reprinted in 38 I.L.M. 317, ¶ 193 n. 217 (1999); see also Prosecutor v. Krstic, Case No. IT-98-33-A, Appeals Judgment, ¶¶ 134, 143 (Apr. 19, 2004); see also Prosecutor v. Tadic, Case No. IT-94-1-T, Trial Chamber Judgment, ¶ 674 (May 7, 1977).

⁶⁰ See, e.g., Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 545 (Sept. 2, 1998).

¶42 Moreover, even if a stricter interpretation of customary law might be required for ATS law in the U.S. (as discussed below), leading to the adoption of the more stringent standard of ICC Statute article 25 (3) (c) -- that the aider and abettor must do so for the “purpose” of facilitating a crime -- such purpose need not be exclusive or primary. One who knowingly sells gas to the gas chamber operator for the primary purpose of profit may be inferred to have a secondary purpose of killing people, so that he can keep selling more gas to kill more people. Such a merchant of death aids and abets the principal murderers. Neither the ICC Statute nor any other source of international law should be interpreted otherwise.

E. International Criminal Law Responsibility of Corporations

¶43 Corporations cannot generally be prosecuted before international criminal courts, and current international law does not generally impose criminal responsibility on corporations. The Nuremberg Charter did permit the International Military Tribunal to declare “groups or organizations” criminal. However, the Tribunal could do so only at the trial of an “individual.”⁶¹ Moreover, the only consequence of declaring an organization criminal was not to punish the organization, but rather to permit individual members to be put on trial for belonging to the organization, without the need in each case to retry its “criminal nature.”⁶² The Nuremberg Tribunal thus declared as criminal the groups consisting of the knowing and voluntary members (in some cases only those above a certain rank) of the Nazi Party Leadership Corps, SD, SS and Gestapo.⁶³

¶44 Otherwise only natural persons were tried at Nuremberg. Likewise the ICTY, ICTR and ICC Statutes all provide jurisdiction only over natural persons.⁶⁴ The reason is in part philosophical objections by some states to prosecutions of legal entities,⁶⁵ and in part the fact that only some national justice systems (such as the United States) allow corporations *per se* to be convicted of crimes.

¶45 Per Saland describes the unsuccessful effort at the Rome Conference to subject “legal entities” to ICC jurisdiction. He explains that a very difficult issue throughout the Conference was

whether to include criminal responsibility of legal entities This matter deeply divided the delegations. For representatives of countries whose legal system does not provide for the criminal responsibility of legal entities, it was hard to accept its inclusion, which would have had far-reaching legal consequences for the question of complementarity. Others strongly favored the inclusion on grounds of efficiency

⁶¹ Nuremberg Charter, *supra* note 17, art. 9.

⁶² *Id.* art. 10.

⁶³ The Nurnberg Trial 1946, 6 F.R.D. at 131-46.

⁶⁴ ICTY Statute, *supra* note 20, art. 6; ICTR Statute, *supra* note 21, art. 5; ICC Statute, *supra* note 35, art. 25(1).

⁶⁵ The argument is that individuals, but not abstract legal entities, can bear moral responsibility and hence deserve criminal conviction. See M.C. BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 378 (Kluwer Law Int. 2d ed. 1999).

Among the last opponents were Nordic countries, Switzerland, the Russian Federation and Japan. Some other countries opposed inclusion on procedural . . . grounds. Time was running out Eventually, it was recognized that the issue could not be settled by consensus in Rome⁶⁶

¶46 One can understand that countries whose domestic laws do not permit criminal prosecution of corporations would oppose prosecutions of corporations before the ICC. ICC jurisdiction is based on the concept of “complementarity”: the ICC can take jurisdiction only when national justice systems are unwilling or unable to do so.⁶⁷ Because countries whose domestic systems do not allow criminal prosecutions of corporations are “unable” to prosecute corporations, the ICC would automatically have jurisdiction. To allow prosecutions of corporations before the ICC would thus bypass the essential balance struck between national sovereignty and international jurisdiction.

¶47 This might suggest that the opposition was not so much on principle as on grounds of practicality: there was no time during the five-week Rome conference to revise domestic legislation. It was probably a bit of both: longstanding legal traditions tend to generate their own philosophical supporters. In any event, the jurisdiction of international courts over corporations is not established at present, nor likely in the near future.

¶48 This does not mean, however, that substantive international criminal law ignores corporate responsibility. In the last decade a widely accepted international law trend has emerged to impose criminal or civil liability on legal persons that aid and abet treaty violations, with a preference for criminal liability. At least three recent conventions -- the 1997 OECD convention on bribery of foreign public officials,⁶⁸ the 1999 UN convention on financing of terrorism,⁶⁹ and the 2000 UN convention on transnational organized crime⁷⁰ -- require States Parties to impose criminal sanctions on legal persons or, where that is not possible under domestic law, non-criminal sanctions, in accordance with their domestic legal principles.

¶49 The pattern was set by the OECD Convention, which makes clear a preference for criminal sanctions:

⁶⁶ Lee, *supra* note 39, at 199 (footnote omitted).

⁶⁷ ICC Statute, *supra* note 35, art. 17.

⁶⁸ Organization for Economic Cooperation and Development, Convention on Combating Bribery of Foreign Public Officials in International Business transactions, art. 2, Nov. 21, 1997, DAFFE/IME/BR(97)20, [hereinafter Bribery Convention] (entered into force, Feb. 15, 1999, art. 2 provides “Each party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons . . .”). The Convention has 37 states parties, including the US, as of June 19, 2007. See ratification table at <http://www.oecd.org/dataoecd/59/13/1898632.pdf> (last visited Feb. 23, 2008).

⁶⁹ International Convention for the Suppression of the Financing of Terrorism, art. 5, Dec. 9, 1999, G.A. Res. 109, U.N. GAOR, 54th Sess., Supp. No. 49, at 408, U.N. Doc. A/54/49 (Vol. I) (1999) [hereinafter Financing Terrorism Convention] (entered into force April 10, 2002, art. 5(3) mandates “effective, proportional and dissuasive criminal, civil or administrative sanctions”).

⁷⁰ Convention Against Transnational Organized Crime, art. 10, Nov. 15, 2000, G.A. res. 55/25, annex I, 55 U.N. GAOR Supp. (No. 49) at 44, U.N. Doc. A/45/49 (Vol. I) (2001) [hereinafter Transnational Organized Crime Convention], (entered into force Sept. 29, 2003, Art. 10(4) specifies that States must impose “effective, proportional and dissuasive criminal or non-criminal sanctions, including monetary sanctions”).

In the event that under the legal system of a Party, criminal responsibility is not applicable to legal persons, that Party shall ensure that legal persons shall be subject to effective, proportional and dissuasive non-criminal sanctions.⁷¹

Similar language appears in both UN Conventions,⁷² which also require sanctions for legal persons who aid and abet violators.⁷³ These principles have now gained wide international acceptance: the two UN treaties have 132 and 160 states parties, respectively, including the United States.⁷⁴ In addition, the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, with 126 States Parties, requires States to impose “liability,” which depending on their national law may be “criminal, civil or administrative,” on legal persons “complicit” in violations.⁷⁵

III. CORPORATE RESPONSIBILITY FOR AIDING AND ABETTING UNDER THE ATS

¶50 The two-centuries-old ATS grants federal courts “jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”⁷⁶ The extent to which corporate liability for aiding and abetting foreign violations of human rights is actionable under the ATS remains in dispute. Part A below discusses the scant guidance given to date by the Supreme Court. Part B describes the conflicting federal appeals court opinions. Part C argues that corporations can indeed be subjected to liability for aiding and abetting under the ATS. Part D offers brief observations (but not answers) on the questions of whether the ATS standard for aiding and abetting should be drawn from international criminal law or from federal common law, and whether it should be a “knowledge” test or a “purpose” test.

A. Limited Supreme Court Precedent

¶51 The Supreme Court has yet to give clear guidance on how to resolve ATS cases in which corporations are sued for aiding and abetting foreign human rights violations. The Court has addressed the ATS only once, in 2004 in *Sosa v. Alvarez-Machain*.⁷⁷ The case

⁷¹ Bribery Convention, *supra* note 68, art. 3(2).

⁷² Transnational Organized Crime Convention, *supra* note 70, art. 10(4); Financing Terrorism Convention, *supra* note 69, art. 5(3).

⁷³ Financing Terrorism Convention, *supra* note 69, arts. 5 (a) (accomplice liability), 5(c) (intentionally contributing to commission of crime by a group with a common purpose, as quoted at note 57 *supra* from the parallel language in the Terrorist Bombing Convention); Transnational Organized Crime Convention, *supra* note 70, art. 5(1)(b) (aiding or abetting).

⁷⁴ The Transnational Organized Crime Convention has 138 States Parties through November 15, 2007, while the Financing of Terrorism Convention has 160 States Parties through November 15, 2007. *Multilateral Treaties Deposited with the Secretary-General*, available at <http://untreaty.un.org/> (last visited Apr. 21, 2008). The US ratified the Terrorism Financing Convention on June 26, 2002, and the Transnational Organized Crime Convention on November 3, 2005.

⁷⁵ Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, May 25, 2000, G.A. Res. 54/263, Annex II, 54 U.N. GAOR Supp. (No. 49) at 6, U.N. Doc. A/54/49, Vol. III (2000) (entered into force Jan. 18, 2002). The Protocol has 126 states parties as of Feb. 25, 2008. See ratification table at http://www2.ohchr.org/english/bodies/ratification/11_c.htm (last visited 6 March 2008).

⁷⁶ Alien Tort Claims Act, 28 U.S.C. § 1350 (2007).

⁷⁷ *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). The Court also briefly considered an issue of

involved the kidnapping of a Mexican citizen in Mexico by a group of locals hired by the U.S. Drug Enforcement Agency (“DEA”). Sosa, whom the Court described simply as a Mexican “citizen,”⁷⁸ and five other Mexican “civilians,”⁷⁹ allegedly kidnapped Alvarez Machain in Mexico, held him overnight in a motel, and then flew him to Texas, where they turned him over to the DEA.⁸⁰

¶52 In the subsequent suit by Alvarez-Machain against Sosa under the ATS for arbitrary detention, all members of the Supreme Court agreed that Sosa was not liable under international law for a detention of “less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment.”⁸¹ All the justices likewise agreed, or at least did not dispute, that the ATS was originally intended to give federal courts jurisdiction to hear common law tort suits for the 18th-century law of nations paradigms of “violation of safe conducts, infringement of the rights of ambassadors, and piracy.”⁸²

¶53 Six justices went on to rule, however, that courts exercising ATS jurisdiction today may also, subject to “great caution,”⁸³ create causes of action under federal common law for “any claim based on the present-day law of nations,” so long as the claim rests on “a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms.”⁸⁴

¶54 The overnight detention of Alvarez-Machain did not meet this high bar.⁸⁵ However, other customary international law norms -- such as the prohibitions of genocide, war crimes, crimes against humanity, torture and forced labor -- would appear to have sufficiently widespread international acceptance and definitional specificity to meet the Court’s standard.⁸⁶

¶55 Where foreign governments or rebel or paramilitary groups violate such norms, and corporations are complicit, issues arise as to whether corporations can be held liable for aiding and abetting and, if so, under what body of law and by what standards. *Sosa* gives scant guidance in answering these questions. The case involved neither aiding and abetting, nor the liability of a corporation or corporate officer. Nor did the Court provide any guidance on these topics, except in two footnotes.

¶56 In one, the Court made clear that it is not enough, in order to recognize a common law cause of action under the ATS, that an international norm possesses the requisite international acceptance and specificity. In cases against private actors, such as corporations or individuals, courts must also consider whether the norm extends not merely to states, but also to the private actors.⁸⁷ Justice Breyer, concurring, explained,

jurisdiction over ATS claims in *Rasul v. Bush*, 542 U.S. 466, 484-85 (2004).

⁷⁸ *Id.* at 698.

⁷⁹ *Id.* Nothing in the Court’s opinion flagged any legal importance in terming Sosa a “citizen,” or his confederates “civilians.”

⁸⁰ *Id.*

⁸¹ *Id.* at 697, 712, 738.

⁸² *Id.* at 724-25, 729.

⁸³ *Id.* at 728.

⁸⁴ *Id.* at 724-25.

⁸⁵ *Id.* at 738.

⁸⁶ *See id.* at 732 (citing several earlier lower court opinions as “generally consistent” with the standard of general acceptance and specificity of the international norm).

⁸⁷ Footnote 20 stated: “A related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a

“The norm must extend liability to the type of perpetrator (*e.g.*, a private actor) the plaintiff seeks to sue.”⁸⁸ This merely made explicit what should be obvious: corporations or their officers cannot be sued for violating norms that apply only to states, such as the international ban on individual acts of torture in peacetime.⁸⁹ However, as discussed below, it shed little light on the separate question of whether a corporation can aid and abet a violation committed by state actors.

¶57 The Court’s second relevant footnote advised that courts on a “case-specific basis” give “serious weight” to the views of the Executive as to the impact of the *apartheid* litigation and similar cases on foreign policy.⁹⁰ As a practical matter, in cases like the *apartheid* litigation, where the State Department objects to ATS suits on foreign policy grounds, government objections pose a serious obstacle to suing corporations for aiding and abetting foreign human rights violations.⁹¹ But where the State Department does not object, or where a court overrides its objections, the Court’s *dictum* is of no help in deciding whether corporations or their officers can be held liable for aiding and abetting and, if so, under what source of law and by what standard.

B. Conflicting Appellate Opinions

¶58 The uncertainties besetting lower courts are reflected in a multiplicity of judicial views on how to resolve them. The two leading appellate analyses of corporate liability for aiding and abetting are the Ninth Circuit panel decision in 2002 in *Unocal*,⁹² and the Second Circuit panel decision in 2007 in *Khulumani* (the South African *apartheid* litigation).⁹³ In *Unocal*, Burmese residents were allegedly subjected to forced labor, forced displacement, murder and rape by Burmese military forces providing security for a natural gas pipeline being built by a project in which Unocal participated. In an opinion rendered before the Supreme Court decided *Sosa*, a Ninth Circuit panel held unanimously that corporations can be sued for aiding and abetting foreign human rights violators, and

corporation or individual. Compare *Tel-Oren v. Libyan Arab Republic* 726 F.2d 774, 791-795 (CA DC 1984) (Edwards, J., concurring) (insufficient consensus in 1984 that torture by private actors violates international law), with *Kadic v. Karadzic*, 70 F.3d 232, 239-241 (CA2 1995) (sufficient consensus in 1995 that genocide by private actors violates international law).” *Id.* at 732, n.20.

⁸⁸ *Id.* at 760.

⁸⁹ Torture does not require state action when committed in wartime, or when committed as part of a widespread or systematic attack on civilians. In such situations torture by non-state actors qualifies as, respectively, a war crime or a crime against humanity. ICC Statute, *supra* note 35, arts. 7(1)(f), 7(2)(e) (crimes against humanity), 8(2)(a)(ii), 8(2)(c)(i) (war crimes).

⁹⁰ Footnote 21 stated in part: “Another possible limitation that we need not apply here is a policy of case-specific deference to the political branches.” *Sosa*, 542 U.S. at 733 n.21. Citing an early stage of the *apartheid* litigation and noting that the South African government and the State Department both opposed it, the Court added, “In such cases, there is a strong argument that federal courts should give serious weight to the Executive Branch’s view of the case’s impact on foreign policy.” *Id.*

⁹¹ When the Second Circuit reached the issue in *Khulumani*, dissenting Judge Korman thought this language a sufficient signal from the Supreme Court to require dismissal of the case. *Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 254, 292, 298 (2d Cir. 2007), *aff’d for lack of quorum sub nom* American Isuzu Motors Inc. v. Lungisile Ntsebeza, 2008 U.S. LEXIS 3868 (May 12, 2008). However, the majority did not, leaving the issue to be addressed by the district court on remand. *Id.* at 261 n.9. The majority went so far as to suggest that while the courts should indeed give serious weight to the views of the Executive, to treat them as dispositive would raise serious separation of powers issues. *Id.* at 263 n.14.

⁹² *Doe I v. Unocal Corp.*, 395 F.3d 932, 932 (9th Cir. 2002) (subsequent history truncated).

⁹³ *Khulumani*, 504 F.3d 254, 254 (2d Cir. 2007), *aff’d for lack of quorum sub nom* American Isuzu Motors Inc. v. Lungisile Ntsebeza, 2008 U.S. LEXIS 3868 (May 12, 2008).

accordingly denied Unocal's motion to dismiss.⁹⁴ After *Sosa* was decided, Unocal settled with the plaintiffs, and the panel opinion was vacated as part of the settlement.⁹⁵

¶159 In *Khulumani*, victims of *apartheid* in South Africa sued dozens of transnational corporations for doing business with the *apartheid* regime. In a ruling handed down after *Sosa*, a divided Second Circuit panel, also holding that corporations can be sued for aiding and abetting, denied the corporate defendants' motion to dismiss.⁹⁶ On a petition for writ of *certiorari* brought by defendant corporations, four members of the Supreme Court recused themselves, and the Court in May 2008 therefore affirmed the judgment below for lack of a quorum.⁹⁷

¶160 Although five of the six appellate court judges in these two cases thought corporations can be sued under ATS for aiding and abetting, the six judges managed to generate five divergent opinions on whether, and by what law and standard, corporations can be held liable for aiding and abetting. They split as follows:

- Two judges in the *Unocal* majority ruled that corporations can be held liable under an aiding and abetting standard, as defined by international law to require a showing that the corporation engaged in "knowing practical assistance" to the human rights violator.⁹⁸
- Judge Reinhardt, concurring in the result, ruled that Unocal's liability was governed, "not by applying a recently-promulgated international criminal law aiding-and-abetting standard,"⁹⁹ but instead by federal common law, which permits liability under three separate theories: joint venture, agency and reckless disregard.¹⁰⁰
- In *Khulumani*, Judge Katzmann, one of two judges concurring in the brief *per curiam* denial of the motion to dismiss, ruled that corporate liability for aiding and abetting is indeed governed by an international criminal law standard, but not the "knowing practical assistance" standard adopted in *Unocal*; rather, at least for now, it must be shown that the corporation not only *knew* that its assistance would further a human rights violation, but also that its *purpose* was to assist the violation.¹⁰¹
- Also concurring in *Khulumani*, Judge Hall ruled that liability for aiding and abetting is governed, not by international law, but by federal common law; however, unlike Judge Reinhardt in *Unocal*, he embraced a common law aiding and abetting standard of knowing practical assistance, without addressing joint venture, agency or reckless disregard.¹⁰²

⁹⁴ See generally *Unocal*, 395 F.3d 932.

⁹⁵ *Doe I. v. Unocal*, 403 F. 3d 708 (9th Cir. 2005), *vacating* 395 F.3d 932 (9th Cir. 2002), and *dismissing appeal following settlement of* 395 F.3d 932 (9th Cir. 2002).

⁹⁶ *Khulumani*, 504 F.3d 254, 254.

⁹⁷ *American Isuzu Motors Inc., v. Lungisile Ntsebeza*, 2008 U.S. LEXIS 3868 (May 12, 2008).

⁹⁸ *Unocal*, 395 F.3d at 951.

⁹⁹ *Unocal*, (Reinhardt, J., concurring), 395 F.3d at 963.

¹⁰⁰ *Id.* at 963.

¹⁰¹ *Khulumani*, 504 F.3d at 264, 277 (Katzmann, J., concurring).

¹⁰² *Id.* at 284, 287, 288-89, (Hall, J., concurring).

- Dissenting in relevant part in *Khulumani*, Judge Korman denied that corporations can be liable under the ATS at all. Although agreeing with Judge Katzmann that the governing standard of aiding and abetting liability under the ATS is the international law standard of practical assistance for the *purpose* of facilitating the violation, Judge Korman opined that this standard applies only to individuals, not corporations, which can never be held liable for aiding and abetting under international law.¹⁰³

¶61 Some of this scatter might have narrowed if the Supreme Court had been able to muster a quorum and decided to accept the petition for review of the *Khulumani* judgment filed by the corporate defendants (under the name of *American Isuzu Motors Inc. v. Ntsebeza*).¹⁰⁴ The corporations proposed three questions for review, two of which would not have required the Court to address issues relating to aiding and abetting.¹⁰⁵ However, the United States as *amicus* recommended that the Court take only the one question which did relate to aiding and abetting: “Whether a private defendant may be sued under the ATS for aiding and abetting a violation of international law by a foreign government in its own territory.”¹⁰⁶

¶62 If the Court had taken the case and answered that question in the negative, major corporations might have breathed a huge sigh of relief. But not necessarily; in theory the Court could have answered that question, “No,” but still agreed with Judge Reinhardt that accomplice liability under the ATS is governed instead by federal common law doctrines of joint venture, agency and reckless disregard. In that outcome, the corporations might merely have hopped from the frying pan into the fire, because Reinhardt’s theories are sometimes easier to prove than aiding and abetting.¹⁰⁷

¶63 If the Court had gone further and joined Judge Korman in altogether ruling out corporate liability under the ATS for human rights violations overseas, corporations might have breathed even more freely. Yet they still would not have been entirely home free. Corporate *executives* might still be held liable for aiding and abetting. If the Court exempted corporations from liability, and stopped there, without reaching the question of or defining standards for aiding and abetting by *other* ATS defendants, then corporate executives would be left holding the bag of uncertainties. However, assuming that

¹⁰³ *Id.* at 292, 321-26, 332-33 (Korman, J., concurring in part and dissenting in part).

¹⁰⁴ See *Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007), *cert. filed sub nom. American Isuzu Motors Inc. v. Ntsebeza*, *aff’d for lack of quorum*, 2008 U.S. LEXIS 3868 (May 12, 2008).

¹⁰⁵ The other two questions proposed by petitioners involve separation of powers, political questions, international comity, and the U.S. statute implementing the Genocide Convention. Petition for Writ of Certiorari at i, *American Isuzu Motors Inc. v. Ntsebeza*, No. 07-919 (U.S. Jan. 11, 2008). None of these questions would require the Court to clarify the issues discussed in the text above.

¹⁰⁶ *Id.* at i(2); Brief for the U.S. as Amicus Curiae Supporting Petitioners at 6, 16-18, in *American Isuzu Motors Inc. v. Ntsebeza*, *aff’d for lack of quorum*, 2008 U.S. LEXIS 3868 (May 12, 2008). The U.S. explained that whereas the Court of Appeals “left open” the possibility of the district court on remand dismissing the case on foreign policy grounds, the appeals court held “categorically” that aiding and abetting may be pleaded under the ATS. *Id.* at 6.

¹⁰⁷ For example, in *Unocal* the majority found merely a triable issue as to whether Unocal aided and abetted the use of forced labor by the Burmese army in clearing the path for Unocal’s pipeline. *Doe I v. Unocal Corp.*, 395 F.3d 932, 952 (9th Cir. 2002) (subsequent history truncated). Yet the fact that the army acted as an agent of the project of which Unocal was a part of was, by comparison, relatively straightforward. *Id.* at 938, 972-974 (Reinhardt, J., concurring).

corporations indemnify their executives from such liability, the corporations would have to pick up their bags. In defending their executives in court, they would face the still unanswered questions about the source and scope of aiding and abetting liability. Only the financial stakes would be lower, since juries are not likely to award damages against corporate executives as large as against the corporations themselves.¹⁰⁸

¶64 As of this writing, however, controversies persist over three main questions relating to corporate liability for aiding and abetting under the ATS: (1) Whether corporations can be held liable at all under the ATS; (2) If so, whether the law governing their liability for aiding and abetting is international law or federal common law; and (3) Whether the standard of liability for aiding and abetting is based on a knowledge test, as in *Furundzija*, or a purpose test, as in article 25 (3) (c) of the ICC Statute. This article now turns to those questions.

C. *Whether Corporations Can Be Held Liable for Aiding and Abetting*

¶65 Although academic commentators raised the point earlier,¹⁰⁹ Judge Korman's partially dissenting opinion in the Second Circuit's 2007 ruling in the *apartheid* litigation appears to be the first time an appellate judge has opined that corporations cannot be held liable for aiding and abetting under the ATS.¹¹⁰ His argument comes down to the proposition that since international law does not impose criminal responsibility on corporations, and since U.S. courts rely on international criminal law to find a customary international law basis for ATS jurisdiction, there can be no ATS jurisdiction over corporate defendants.¹¹¹

¶66 As noted in the preceding section, Judge Korman is correct that current international criminal law does not generally impose international criminal responsibility on corporations. But the principal reason, as noted above, is not a peculiar reluctance to hold corporations criminally accountable for violating international norms. Rather the main reason is that the domestic legal systems of many States do not provide for criminal responsibility of legal persons for violating *any* law.

¶67 There is no comparable problem, however, in holding corporations *civilly* accountable to pay money damages for violations of norms. I am not aware of any legal system in which corporations cannot be sued for damages when they commit legal wrongs that would be actionable if committed by an individual. Indeed, as discussed above,¹¹² several widely ratified treaties in the last decade express a preference for States to impose criminal liability on corporations that aid and abet violations, but where that is not possible, require States at least to impose proportional civil or administrative liability.

¶68 Nor is international law hostile to requiring vindication of violations of international norms by payment of money damages. On the contrary, customary international law has long held that injuries caused by violations of international norms require reparation, including monetary compensation when full restitution is not

¹⁰⁸ See Lippmann, *supra* note 16, at 176-77.

¹⁰⁹ Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, Sosa, *Customary International Law, and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869, 924-29 (2007).

¹¹⁰ Khulumani, 504 F.3d at 292 (Korman, J., concurring in part and dissenting in part).

¹¹¹ *Id.* at 321-26.

¹¹² See *supra* Part II.E.

possible.¹¹³ Moreover, international law especially encourages broad reparations, including compensation, for victims of gross violations of international human rights and humanitarian law.¹¹⁴

¶69 At present, the argument for holding corporations *civilly* liable in tort for violating international norms is thus strong, even if corporations cannot be prosecuted before international criminal tribunals. But as Judge Korman rightly observes, the corporations that allegedly aided and abetted *apartheid* cannot be held to the present standard, because *apartheid* ended before the recent treaties were adopted.¹¹⁵ In the *apartheid* litigation, then, the question comes down to whether prohibitions on aiding and abetting are independent international criminal norms -- which corporations could not violate in the 1980s -- or whether, in suits for money damages, aiding and abetting liability is merely an ancillary remedy against those who assisted perpetrators who could and did violate primary international norms.

¶70 The answer, as recognized by the ICTR, is that aiding and abetting is not an “autonomous crime” under international law:

the physical act which constitutes the act of complicity does not have its own inherent criminality, but rather it borrows the criminality of the act committed by the principal perpetrator The accomplice has not committed an autonomous crime, but has merely facilitated the criminal enterprise committed by another.¹¹⁶

The ICTY takes the same view: “As opposed to the ‘commission’ of a crime, aiding and abetting is a form of accessory liability.”¹¹⁷

¶71 Citing both ICTR and the ICTY cases, Judge Katzmann, one of the judges in the majority in *Khulumani*, elaborated:

Viewing aiding and abetting in this way, as a theory of identifying who was involved in an offense committed by another rather than as an offense in itself, also helps to explain why a private actor may be held responsible for aiding and abetting the violation of a norm that requires state action or action under color of law

It is of no moment that a private actor . . . could not be held liable as a principal.¹¹⁸

¹¹³ E.g., see generally *Factory at Chorzow*, Jurisdiction, Judgment, 1927 P.C.I.J. (ser. A) No. 8; *Report of the International Law Commission to the General Assembly, Draft Articles on Responsibility of States for Internationally Wrongful Acts* (2001), G.A. Res. 56/83, Annex, Dec. 12, 2001, as corrected by UN Doc. A/56/49 (Vol. I)/Corr. 4, arts. 31, 34 and 36.

¹¹⁴ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Dec. 16, 2005).

¹¹⁵ *Khulumani*, 504 F.3d at 326.

¹¹⁶ *Prosecutor v. Akayesu*, ICTR No. ICTR-96-4-T, Trial Chamber Judgment, ¶ 528 (Sept. 2, 1998).

¹¹⁷ *Prosecutor v. Kunarac*, Case Nos. IT-96-23-T & IT-96-23/1-T, Judgment, ¶ 391 (Feb. 22, 2001).

¹¹⁸ *Khulumani*, 504 F.3d at 281.

¶72 For purposes of ATS law, as noted above, the United States as *amicus* unavailingly asked the Supreme Court to accept review of the following “question presented” in the *apartheid* litigation:¹¹⁹ “Whether a private defendant may be sued under the ATS for aiding and abetting a violation of international law by a foreign government in its own territory.”¹²⁰

¶73 As thus formulated, the question is far broader than merely that of whether corporations may be sued under ATS for aiding and abetting; it would encompass other “private defendants,” such as individual corporate executives, as well. Yet as noted above,¹²¹ there has been no question since Nuremberg that corporate executives can be prosecuted for aiding and abetting international crimes. For the Supreme Court to have given the answer sought by the defendant corporations and by the U.S. -- that private defendants cannot be sued under ATS for aiding and abetting -- the Court would have had to entertain a rationale even broader than the one employed by Judge Korman.

¶74 Whatever the Court’s interpretation of domestic law, there is no international law basis for such a broader rationale. The US argues as *amicus* that a basis in international *relations* is supplied by the risk that ATS suits against corporations for aiding and abetting will inevitably call into question the conduct of foreign governments on their own soil, thereby complicating U.S. foreign relations.¹²²

¶75 That policy concern, however, is best answered by case-by-case analysis, not by a blanket rejection of all ATS suits against corporations, let alone against all private defendants. In some cases, such as the *apartheid* litigation, where both the South African and US governments protest the litigation, the “foreign relations” argument for dismissal, whether based on deference to the Executive or on international comity toward the foreign government, may well be strong.

¶76 But in other cases -- such as *Unocal*, where the foreign government was the murderous military dictatorship in Burma -- the argument makes no sense. The best approach is to continue with the case-by-case approach to assessing foreign policy impacts, left intact by the Court in *Sosa*.¹²³

D. Whether the ATS Standard for Aiding and Abetting Should be Taken from International Law or from Federal Common Law, and Whether It Is a Knowledge or a Purpose Test

¶77 *Sosa* clarified that under ATS, international law supplies the jurisdictional basis, but the cause of action is then created (or not) as a matter of federal common law.¹²⁴ Judge Hall, concurring in *Khulumani*, confesses that “*Sosa* at best lends Delphian guidance on the question of whether the federal common law or customary international

¹¹⁹ Petition for Writ of Certiorari at i, *American Isuzu Motors Inc. v. Lungisile Ntsebeza*, *aff’d for lack of quorum*, 2008 U.S. LEXIS 3868 (May 12, 2008); Brief for the U.S. as Amicus Curiae Supporting Petitioners, *id.* at 6, 16-18.

¹²⁰ Brief for the U.S. as Amicus Curiae Supporting Petitioners, *id.* at 6, 16-18.

¹²¹ *See supra* Part II.A.

¹²² Brief for the Petitioners, at 12-14, 18-22, *American Isuzu Motors Inc.*, No. 07-919.

¹²³ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 730 n.21 (2004).

¹²⁴ *Id.* at 712 (jurisdictional statute), 724 (common law causes of action).

law represents the proper source from which to derive a standard of aiding and abetting liability under the ATCA.¹²⁵

¶78 I concur. However, if the Supreme Court in some future case were to agree with Judges Katzmann and Korman that the ATS test for aiding and abetting is to be taken from international law, then three points made in the discussion of international law above should still be borne in mind. First, the weight of international law authority supports the “knowledge” test adopted by the ICTY. Second, even under the ICC Statute, the international law test is not the simple “purpose” test found by Judge Katzmann in one clause of the ICC Statute. Not only article 25 (3) (c) with its purpose test, but also article 25 (3) (d), which includes a knowledge test for persons who assist group crimes, should be used where applicable. And third, as noted above, the word “purpose” in the ICC statute must be interpreted in light of the “object and purpose” of the treaty. So interpreted, it would require only that criminality be *a* purpose, not the sole or even primary purpose. Moreover, it would allow purpose in any event to be inferred from knowledge.

IV. CONCLUSION

¶79 The principal concern of major corporations about liability for aiding and abetting at present is the risk of being held liable in U.S. courts under ATS. But whatever happens in current ATS litigation, the issue of aiding and abetting may become more important in the future in other contexts -- including the International Criminal Court, national courts in other home countries of major corporations, and national courts in developing countries where large companies do business. If the standards were clarified for aiding and abetting, and especially for the *mens rea* element, the resulting legal certainty would be fairer for both corporate managers and victims of human rights violations, while avoiding needless sources of friction among states.

¶80 If and when the Supreme Court does undertake to clarify whether private actors can be held liable for aiding and abetting under the ATS, the following principles of international law should be borne in mind. First, even if corporations *per se* cannot be prosecuted before international criminal tribunals, corporate *executives* have long been subject to international criminal jurisdiction. Second, international criminal law has long recognized criminal responsibility for aiding and abetting. Third, at the present stage of development of international criminal law, *civil* liability in national courts of corporations which aid and abet violations of international criminal law is widely accepted and recognized by international law. Fourth, international law increasingly encourages criminal prosecution in national courts of corporations which aid and abet violations of international criminal law. Combining these principles, whatever may have been the status of corporate aiding and abetting liability in the *apartheid* era, international norms against corporate aiding and abetting of violations of international criminal law are now widely accepted internationally. They are also defined with the requisite specificity, arguably under the knowledge test used by the ICTY and ICTR, but in any event certainly by the more demanding ICC test, which generally (but not always) requires a purpose to facilitate the crime.

¹²⁵ *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 286 (2d Cir. 2007), *aff'd for lack of quorum sub nom American Isuzu Motors Inc. v. Lungisile Ntsebeza*, 2008 U.S. LEXIS 3868 (May 12, 2008).

¶81 In short, aiding and abetting international human rights crimes by private actors, including corporations and their executives, satisfies the tests set forth by the Supreme Court in *Sosa* for recognition of common law tort claims under the ATS.