# Doing Business with a Bad Actor: How to Draw the Line Between Legitimate Commercial Activities and Those that Trigger Corporate Complicity Liability

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## ABSTRACT

One of the most complex and highly debated problems in the context of corporate liability for complicity in human rights violations is how to distinguish lawful commercial activities from those that give rise to corporate complicity liability. In many cases in which corporations are accused of aiding and abetting human rights violations, the act of assistance consists of what would usually be regarded as an ordinary and perfectly acceptable business activity, such as providing financing to a government or supplying it with goods or infrastructure. Merely doing business with a bad actor is not sufficient to impose liability on corporations for that actor's human rights violations, but no clear criteria on what transforms legitimate business transactions into reprehensible acts of complicity exist.

This Article approaches the question of determining the relevant liability standards by providing an in-depth analysis of jurisprudence stemming from three different contexts: Alien Tort Statute (ATS) cases on corporate complicity; ad hoc international criminal tribunals on the closely related question of dual-purpose act liability (where the assistance provided could be used for both lawful and unlawful activities); and U.S. criminal cases where the act of assistance consisted of a commercial activity. Jurisprudence stemming from these three different contexts has in common that many courts feel that the generally applicable standards for determining complicity liability need to be adapted and restricted where assistance consists of a commercially motivated or a dual-purpose act. This is largely achieved by requiring either that the assistance reach a certain significance threshold (limitations at the actus reus level of liability), or that the mental state with which it was carried out made the assistance particularly reprehensible (limitations at the mens rea level of liability).

In the particular context of corporate complicity liability in human rights violations, academic debate of liability standards largely focuses on whether the relevant mens rea standard should be one of purpose or one of knowledge. While clearly important, this Article goes beyond this question and argues that the mens rea standard cannot be understood and determined in isolation. Without taking a holistic look at all elements of liability and their interaction, it is not possible to sufficiently understand the concerns that triggered adoption of a purpose standard of mens rea, the legitimacy of these concerns, and alternative ways of addressing them.

The purpose of this Article is not to present detailed liability criteria that will work equally in all contexts. Rather, it serves the more modest aim of analyzing and drawing conclusions from the implications of different approaches to determining the necessary actus reus and mens rea elements of corporate complicity liability,

while recognizing that the details need to be developed with reference to the specific contexts in which the question of corporate complicity liability arises.

## INTRODUCTION

Corporate complicity in human rights violations has received a lot of attention in recent years.[1] Complicity means that the corporation does not itself commit human rights violations, but rather assists others in carrying them out.[2] It thus relates to the situation of indirect corporate involvement in human rights abuses and frequently arises in the context of business transactions with "bad actors," often states, which commit gross human rights violations.[3] Assistance can take many different forms and can range from acts that only marginally impact the act carried out by the principal to those without which the principal offense would not be possible.

One of the most complex and highly debated problems in this context is how to distinguish lawful commercial activities from those that give rise to corporate complicity liability. In many cases in which corporations are accused of aiding and abetting human rights violations, the act of assistance consists of what would usually be regarded as an ordinary and perfectly acceptable business activity, such as providing financing to a government or supplying it with goods or infrastructure.[4] This raises the question of what transforms legitimate business transactions with governments (or in some instances other actors, such as armed groups) into reprehensible acts of complicity.

It is instantly obvious that the problem is not mainly legal in nature. Rather, how the law responds depends decisively on highly political and ideologically-fraught questions, such as whether and to what extent it is legitimate to pursue business interests, even if this has an adverse human rights impact. There might also be perfectly legitimate reasons for supplying governments, even those with the worst human rights records, with certain goods and services, such as to enable them to carry out governmental tasks that clearly benefit the population, like building schools. Are corporations, and should they be, responsible for how their business partners use their goods and services? If so, under what circumstances, and on what grounds?

More clarity on how to distinguish complicity from legitimate business transactions is of the utmost importance for various reasons. Corporations need to

1. *See generally* Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Clarifying the Concepts of "Sphere of Influence" and "Complicity"*, Hum. Rts. Council, U.N. Doc. A/HRC/8/16 (May 15, 2008) (by John Ruggie) [hereinafter Ruggie, *Clarifying the Concepts*]; Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, principle 17 & cmt., Hum. Rts. Council, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) (by John Ruggie) [hereinafter Ruggie, *Guiding Principles*]; 3 INT'L COMM'N OF JURISTS, CORPORATE COMPLICITY & LEGAL ACCOUNTABILITY (2008).

2. Ruggie, *Clarifying the Concepts*, *supra* note 1, para. 29–30.

3. *See* 3 INT'L COMM'N OF JURISTS, *supra* note 1, at 28 (noting that allegations of complicity might arise when companies transact business with bad actors who commit human rights violations).

4. *Id.* at 28–29.

be given clear guidance on their responsibilities, not just to avoid criminal and civil complicity claims, but also to be in compliance with human rights standards in highly significant soft law instruments, such as the U.N. Guiding Principles on Business and Human Rights, which include a responsibility to avoid complicity in human rights violations.[5] Courts need to have a good understanding of the policy implications of the choice and application of liability standards in this context, which is more and more important given that civil or criminal litigation against corporations is increasingly initiated in different states.[6] States need to know where their responsibilities lie when regulating corporate behavior and providing remedies for potential corporate abuse. And victims need to know under what circumstances they might have claims for damages against corporations that were complicit in the human rights violations they suffered.

At the judicial level, this problem has to date most explicitly, extensively, and influentially been addressed under the U.S. Alien Tort Claims Act (Alien Tort Statute, or ATS)[7] which for many years has been the most significant vehicle worldwide to address corporate complicity through litigation.[8] Despite the uncertain future of corporate complicity litigation under the ATS since the U.S. Supreme Court decision in *Kiobel*,[9] an analysis of cases decided in this context remains

5. Ruggie, *Guiding Principles*, *supra* note 1, principle 17 & cmt. For a critical discussion see generally Sabine Michalowski, *Due Diligence and Complicity: A Relationship in Need of Clarification*, *in* HUMAN RIGHTS OBLIGATIONS OF BUSINESS: BEYOND THE CORPORATE RESPONSIBILITY TO RESPECT? 218 (Surya Deva & David Bilchitz eds., 2013) [hereinafter Michalowski, *Due Diligence*].

6. For Canada *see*, *e.g.*, Anvil Mining, Ltd. v. Association canadienne contre l'impunité, 2012 QCCA 117 (Can. Que. C.A.) (deciding case concerning human rights abuses in the Democratic Republic of the Congo). For the United Kingdom, *see*, *e.g.*, Guerrero v. Monterrico Metals PLC, [2010] EWHC (QB) 3228 (deciding suit regarding conduct in Peru); *see also* Charis Kamphuis, *Foreign Investment and the Privatization of Coercion: A Case Study of the Forza Security Company in Peru*, 37 BROOK. J. INT'L L. 529, 542–48 (2012) (discussing the *Guerrero* case). For the Netherlands, *see*, *e.g.*, Hof 's-Gravenhage 9 mei 2007, NJFS 2007, 183 m.nt (van Anraat) (Neth.) (deciding case concerning conduct of Dutch citizen in Iraq); *see also* Wim Huisman & Elies van Sliedregt, *Rogue Traders: Dutch Businessmen, International Crimes and Corporate Complicity*, 8 J. INT'L CRIM. JUST. 803, 807–10 (2010) (discussing cases involving conduct abroad tried by Dutch courts).

7. The Alien Tort Statute (ATS), which provides that "[t]he 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," has been one of the main legal tools used to try to hold corporations to account for their complicity in violations of the law of nations. 28 U.S.C. § 1350 (2012); *see generally*, *e.g.*, Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244 (2d Cir. 2009) (applying the ATS in an action against a Canadian corporation for complicity liability); Khulumani v. Barclay Nat'l Bank, Ltd., 504 F.3d 254 (2d Cir. 2007) (overturning the district court's dismissal of the claim under the Alien Tort Claims Act); Doe I v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002) (finding a violation under the Alien Tort Claims Act).

8. 3 INT'L COMM'N OF JURISTS, *supra* note 1, at 54; *see* Alan O. Sykes, *Corporate Liability for Extraterritorial Torts under the Alien Tort Statute and Beyond: An Economic Analysis*, 100 GEO. L.J. 2161, 2162 (2012) ("Recent years have witnessed an enormous increase in litigation against corporate defendants under the Alien Tort Statute.").

9. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1665 (2013) (holding that the presumption against the extraterritorial application of U.S. legislation applies to the ATS.) This has serious repercussions because in many of the cases filed under the ATS all relevant acts of assistance were committed abroad. Many courts have rejected ATS-based claims against corporations after *Kiobel* because of these extra-territoriality concerns. *See generally* Mujica v. AirScan Inc., 771 F.3d 580 (9th Cir. 2014); Baloco v. Drummond, 767 F.3d 1229 (11th Cir. 2014); Cardona v. Chiquita Brands Int'l, Inc., 760 F.3d 1185 (11th Cir. 2014); Chowdhury v. Worldtel Bangl. Holding, Ltd., 746 F.3d 42 (2d Cir. 2014); Balintulo v. Daimler AG, 727 F.3d 174 (2d Cir. 2013); Adhikari v. Daoud & Partners, No. 09–cv–1237,

important, and not only because corporate complicity cases continue to be brought under the ATS. More importantly, these cases constitute the most detailed engagement of a judiciary with the question of how to distinguish lawfully doing business with a bad actor from commercial activities that trigger complicity liability for human rights violations committed by a business partner.[10] Furthermore, this jurisprudence has highly influenced global attempts to conceptualize corporate liability.[11] The importance of understanding the relevant policy considerations identified by these courts, and their implications for defining legal principles and standards in this context, thus transcend ATS litigation and U.S. courtrooms. Part I of this Article will therefore provide a detailed analysis of selected ATS cases and assess different approaches to liability standards based on the policy considerations these approaches reflect.

While only ATS cases have expressly dealt with the question of corporate complicity in human rights violations, courts in other contexts had to deal with comparable issues. The ad hoc international criminal tribunals, for example, on whose analysis of liability standards for aiding and abetting liability ATS jurisprudence heavily relies, have recently struggled to apply these principles to so-called dual-purpose assistance cases, i.e., cases in which the accomplice provided "general assistance which could be used for both lawful and unlawful activities."[12] These have many similarities with the typical scenario in corporate complicity cases. Where, for example, military vehicles are sold to a regime that, to the seller's knowledge, uses such vehicles both for lawful and unlawful purposes, it is not clear what link between the sale and the unlawful use would be necessary to justify complicity liability of the seller. Part II of this Article demonstrates that the approaches developed by the ad hoc tribunals to resolve this question, based largely on policy considerations on how to establish a sufficient link between the act of assistance and the violation carried out by the principal, provide an interesting basis for reflection on liability standards for corporate complicity in human rights violations. The same is true for U.S. domestic criminal complicity cases where the act of assistance consists of a commercial act, and some of these cases and the policy discussions that informed the courts' approaches to defining liability standards in this context will therefore be discussed in Part III.

2013 WL 4511354 (S.D. Tex. Aug. 23, 2013); Kaplan v. Cent. Bank of the Islamic Republic of Iran, 961 F. Supp. 2d 185 (D.D.C. 2013); Hua Chen v. Honghui Shi, No. 09 Civ. 8920(RJS), 2013 WL 3963735 (S.D.N.Y. Aug. 1, 2013). Others courts have found that the facts sufficiently touched and concerned the U.S. to rebut the presumption against extra-territoriality. *See generally* Mastafa v. Chevron Corp., 770 F.3d 170 (2d Cir. 2014); Al Shimari v. CACI Premier Tech., Inc., 758 F.3d 516 (4th Cir. 2014); Krishanti v. Rajaratnam, No. 2:09–cv–05395, 2014 WL 1669873 (D. N.J. Apr. 28, 2014); Du Daobin v. Cisco Sys., Inc., 2 F. Supp. 3d 717 (D. Md. 2014); Ahmed v. Magan, No. 2:10–cv–00342, 2013 WL 4479077 (S.D. Ohio Aug. 20, 2013); Sexual Minorities Uganda v. Lively, 960 F. Supp. 2d 304 (D. Mass. 2013); Mwani v. Laden, 947 F. Supp. 2d 1 (D.D.C. 2013). For interesting analyses of *Kiobel* see generally Sarah H. Cleveland, *After* Kiobel, 12 J. INT'L CRIM. JUST. 551 (2014); Louise Weinberg, *What We Don't Talk About When We Talk About Extraterritoriality:* Kiobel *and the Conflict of Laws*, 99 CORNELL L. REV. 1471 (2014).

10. *See* Ruggie, *Clarifying the Concepts*, *supra* note 1, para. 29 (stating that the more than forty cases brought under the ATS constitute the "largest body of domestic jurisprudence regarding corporate responsibility for violations of international law").

11. 3 INT'L COMM'N OF JURISTS, *supra* note 1, at 6; Ruggie, *Clarifying the Concepts*, *supra* note 1, para. 29.

12. Prosecutor v. Perišić, Case No. IT-04-81-A, Appeals Judgement, para. 44 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 28, 2013).

Jurisprudence stemming from these three different contexts has in common that all courts feel the need to limit liability for acts of assistance that consist of an ordinary commercial transaction, or a dual-purpose act, by requiring either that the assistance reach a certain significance threshold (limitations at the actus reus level of liability), or that the mental state with which it was carried out make the assistance particularly reprehensible (limitations at the mens rea level of liability). In the particular context of corporate complicity liability in human rights violations, academic debate of liability standards largely focuses on whether the relevant mens rea standard should be one of purpose or one of knowledge.[13] While clearly important, this Article goes beyond this question and argues that the mens rea standard cannot be understood and determined in isolation. Without taking a look at all elements of liability and their interaction, it is not possible to sufficiently understand the concerns that led to stricter limitations of complicity liability through adopting a purpose standard of mens rea, or to appreciate fully the implications of this approach. In light of a holistic discussion of the interplay of the various elements of complicity liability, this Article will show that the fear that without a mens rea standard of purpose, corporate complicity liability might be limitless is unjustified, and that better alternatives to restricting liability exist.

When referring to complicity, this Article understands it to be synonymous with aiding and abetting, the main form of participation in which the central question of this Article arises, namely whether and under what circumstances ordinary commercial activities can give rise to liability for human rights violations committed by third parties. To talk about corporate complicity in general terms might seem to imply that this is a uniform concept. This, however, is not the case, and context is crucial when refining the criteria to be applied in any given scenario. Legal complicity liability might require stricter limitations and allow for less flexibility than liability under soft law instruments. Criminal liability partly serves different functions, and has different consequences, from civil complicity liability,[14] which might need to be reflected in the nuances of the criteria to be applied. The legal context of the jurisdiction in which liability is established is also of crucial importance. It will also make a difference whether liability is determined retrospectively, in order to give rise to compensation or punishment, or looked at prospectively in order to fulfill due diligence responsibilities.

13. *See generally* Shriram Bhashyam, *Knowledge or Purpose? The Khulumani Litigation and the Standard for Aiding and Abetting Liability under the Alien Tort Claims Act*, 30 CARDOZO L. REV. 245 (2008); Doug Cassel, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts*, 6 NW. J. INT'L HUM. RTS. 304 (2008); Bryan Cox, Comment, *Confused Intent: A Critique of the Fourth Circuit's Adoption of a Purpose Mens Rea Standard for Aiding and Abetting Liability under the Alien Tort Statute [*Aziz v. Alcolac, Inc.*, 658 F.3d 388 (4th Cir. 2011)]*, 51 WASHBURN L.J. 705 (2012); Sabine Michalowski, *The* Mens Rea *Standard for Corporate Aiding and Abetting Liability – Conclusions from International Criminal Law*, 18 UCLA J. INT'L L. & FOREIGN AFF. 237 (2014) [hereinafter Michalowski, *The Mens Rea Standard*]; David Scheffer & Caroline Kaeb, *The Five Levels of CSR Compliance: The Resiliency of Corporate Liability under the Alien Tort Statute and the Case for a Counterattack Strategy in Compliance Theory*, 29 BERKELEY J. INT'L L. 334 (2011); Angela Walker, *The Hidden Flaw in* Kiobel*: Under the Alien Tort Statute the* Mens Rea *Standard for Corporate Aiding and Abetting is Knowledge*, 10 NW. J. INT'L HUM. RTS. 119 (2011).

14. *See* Nathan Isaac Combs, Note, *Civil Aiding and Abetting Liability*, 58 VAND. L. REV. 241, 250–53 (2005) (discussing different purposes of criminal and tort law); James G. Stewart, *A Pragmatic Critique of Corporate Criminal Theory: Lessons from the Extremity*, 16 NEW CRIM. L. REV. 261, 281–89 (2013) (discussing the practical distinction between corporate civil and criminal liability).

In light of these considerations, the purpose of the discussion that follows is not and cannot be to present detailed liability criteria that will work equally in all contexts. Rather, it will serve the more modest aim of analyzing and drawing conclusions from the implications of different approaches to determining the necessary actus reus and mens rea elements of corporate complicity liability, while recognizing that the details need to be developed with reference to the specific context in which the question of corporate complicity liability arises. Nevertheless, while the exact legal definitions of complicity as well as the applicable liability standards differ from State to State, this Article will show that the broad policy considerations that influence how to address the issue are not specific to any particular jurisdiction or context. Indeed, the international nature of the problem is reflected in the many efforts at the international level to define corporate complicity and to develop standards for corporate human rights responsibilities.[15]

## I. THE U.S. COURTS' APPROACH TO CORPORATE COMPLICITY LIABILITY UNDER THE ALIEN TORT STATUTE

Given that complicity liability requires both an actus reus and a mens rea,[16] liability criteria need to define both the relevant act of assistance and the necessary mental element. At the objective level, the liability standard determines what effect the corporate activity must have on the commission of the offense, including how close the causal link between the act of assistance and the offense committed by the principal needs to be, to justify the imposition of secondary liability on the corporation. Thus, the actus reus standard defines whether, for example, in a given case the sale of military vehicles to a regime that uses them to carry out extrajudicial killings qualifies as an act of aiding and abetting this violation. The mens rea standard defines the state of mind with which the corporation must have provided the assistance in order to incur liability. In the example of the sale of military vehicles, the question asked at this level would be whether liability requires that the corporation acted with knowledge that the sale would further these violations, with the desire of facilitating them, or with some other mental state. These two components of aiding and abetting liability thus restrict the liability of the accomplice in different ways.

As the relevant liability standards provide the tool for determining whether an act is lawful or gives rise to complicity liability, their definition raises important policy issues regarding the limits of lawful commercial activities and the scope of corporate complicity liability.

15. *See generally*, *e.g.*, 3 INT'L COMM'N OF JURISTS, *supra* note 1; *Global Compact Principle Two*, UNITED NATIONS GLOBAL COMPACT (last updated Jan. 14, 2015), http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html; Ruggie, *Clarifying the Concepts*, *supra* note 1.

16. Prosecutor v. Taylor, Case No. SCSL-03-01-A, Appeals Judgment, paras. 346–47 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 26, 2013).

### *A. Restricting Corporate Complicity Liability at the Actus Reus Level*

The standard actus reus test in U.S. ATS aiding-and-abetting cases, drawn from international criminal law,[17] is that of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime.[18] Thus, not every act of assistance is sufficient to form the actus reus of aiding and abetting. Rather, the act must have an effect on the commission of the principal offense, and a substantial effect at that. Assistance having a substantial effect "need not constitute an indispensable element, that is, a *conditio sine qua non* for the acts of the principal."[19] "An accessory may be found liable even if the crimes could have been carried out through different means or with the assistance of another."[20]

How to apply this test in corporate complicity cases and decide under what circumstances commercial acts have a substantial effect on the commission of human rights violations by third parties is a difficult task which only very few courts in ATS cases have taken up, an exception being the district court decision in In re *South African Apartheid Litigation.*[21] The case arose from claims by South African victims' groups against several multinational corporations, including banks, automobile manufacturers, and information technology firms,[22] for aiding and abetting crimes committed by the South African apartheid regime.[23] When the case reached the district court for the second time in 2009, the court discussed in detail how to determine whether an act had a substantial effect on the commission of gross human rights violations. The court started its analysis of this issue by suggesting that:

> It is (or should be) undisputed that simply doing business with a state or individual who violates the law of nations is insufficient to create liability under customary international law. International law does not impose liability for declining to boycott a pariah state or to shun a war criminal.

17. *See*, *e.g.*, Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgement, para. 235 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998) (finding that actus reus requires "practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime"); Prosecutor v. Du[ko] Tadi (Prosecutor v. Tadić), Case No. IT-94-1-T, Opinion and Judgement, para. 688 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997) (requiring the act to have a substantial effect on the illegal act); Prosecutor v. Blagojević & Jokić, Case No. IT-02-60-A, Appeal Judgement, paras. 127, 134 (Int'l Crim. Trib. for the Former Yugoslavia May 9, 2007) (observing that substantial effect is a "fact-based inquiry"); United States v. von Weizsaecker (The Ministries Case), 14 TRIALS OF WAR CRIMINALS 478 (1950) ("The question is whether they knew of the program and whether in any substantial manner they aided, abetted, or implemented it.").

18. *In re* Chiquita Brands Int'l, Inc., 792 F. Supp. 2d 1301, 1350 (S.D. Fla. 2011); Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 258 (2d Cir. 2009); Khulumani v. Barclay Nat'l Bank, Ltd., 504 F.3d 254, 277 (2d Cir. 2007) (Katzmann, J., dissenting); Doe I v. Unocal Corp., 395 F.3d 932, 951 (9th Cir. 2002).

19. *Furundžija*, Case No. IT-95-17/1-T, para. 209.

20. *In re* S. African Apartheid Litig., 617 F. Supp. 2d 228, 258 (S.D.N.Y. 2009); *accord Tadić*, Case No. IT-94-1-T, para. 688.

21. In re *S. African Apartheid Litig.*, 617 F. Supp. 2d at 257. The last surviving claims in this case were recently dismissed in light of the Supreme Court decision in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), and its application to the apartheid litigation case by the Second Circuit in *Balintulo v. Daimler AG*, 727 F.3d 174 (2d Cir. 2013). *In re* S. African Apartheid Litig., No. 02 MDL 1499(SAS), 2014 WL 4290444 (S.D.N.Y. Aug. 28, 2014).

22. *In re* S. African Apartheid Litig., 346 F. Supp. 2d 538, 542–43 (S.D.N.Y. 2004).

23. *Id.* at 544–45.

> Aiding a criminal "is not the same thing as aiding and abetting [his or her] alleged human rights abuses."[24]

Thus, the provision of goods or services to a State that commits gross human rights violations, or any other commercial dealings with such a State, do not in and of themselves give rise to complicity liability.[25] Some commentators,[26] as well as some of the judges hearing the case at an earlier stage,[27] suggested that the claims in In re *South African Apartheid Litigation* deserved to be dismissed on the basis that the complaints asserted no more than that the defendants had engaged in commerce with the apartheid regime. The District Court, on the other hand, understood the plaintiffs' allegations as arguing that the defendant corporations' activities had a substantial effect on the crimes carried out by the apartheid regime.[28] The court stressed that where this can be demonstrated, liability does not follow from merely doing business with the regime, or from aiding and abetting the regime as such, but rather from the fact that the corporation aided and abetted the violations committed by the regime.[29]

This conclusion made it necessary to engage with the question of how to determine whether a commercial activity has a substantial effect on gross human rights violations. The court sought recourse in Nuremberg case law to answer this question,[30] even though the 'substantial effect' formula was not used by Nuremberg tribunals but was rather developed many years later by the International Criminal Tribunal for the Former Yugoslavia.[31] In the *Ministries Case*,[32] the Nuremberg Tribunal acquitted Karl Rasche, a member of the board of managers of Dresdner Bank during the Nazi period, because:

> A bank sells money or credit in the same manner as the merchandiser of any other commodity. . . . Loans or sale of commodities to be used in an unlawful enterprise may well be condemned from a moral standpoint and

24. In re *S. African Apartheid Litig.*, 617 F. Supp. 2d at 257 (citing Mastafa v. Australian Wheat Bd., No. 07 Civ. 7955(GEL), 2008 WL 4378443 (S.D.N.Y. Sept. 25, 2008)).

25. *Id.*

26. Michael D. Ramsey, *International Law Limits on Investor Liability in Human Rights Litigation*, 50 HARV. INT'L L.J. 271, 280 (2009) (observing that some of the claims seemed to rest on "little more than allegations that the defendants' operations aided the South African economy").

27. In re *S. African Apartheid Litig.*, 346 F. Supp. 2d at 551; *see also* Khulumani v. Barclay Nat'l Bank, Ltd., 504 F.3d 254, 293–94 (2d Cir. 2007) (Korman, J., dissenting in part) ("Thus, car companies are accused of selling cars, computer companies are accused of selling computers, banks are accused of lending money, oil companies are accused of selling oil, and pharmaceutical companies are accused of selling drugs.").

28. *See* In re *S. African Apartheid Litig.*, 617 F. Supp. 2d at 257–59 (discussing the application of the "substantial assistance" standard in the context of commerce with human rights violators).

29. *Id.*; *see also Khulumani*, 504 F.3d at 289 (Hall, J., concurring) (arguing for extending liability in "cases in which a defendant played a knowing and substantial role in the violation of a clearly recognized international law norm").

30. In re *S. African Apartheid Litig.*, 617 F. Supp. 2d at 258.

31. *See* Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgement, paras. 245, 249 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998) (applying the "substantial effect" test by the International Criminal Tribunal for the Former Yugoslavia (ICTY)).

32. United States v. von Weizsaecker ("The Ministries Case"), 14 TRIALS OF WAR CRIMINALS 308 (1950).

> reflect no credit on the part of the lender or seller in either case, but the transaction can hardly be said to be a crime.[33]

In the *Zyklon B Case*, on the other hand, Bruno Tesch, whose factory had manufactured and sold the lethal gas that was used in Nazi concentration camps, was found guilty of aiding and abetting crimes against humanity for supplying the gas used to execute allied nationals.[34] For the court in In re *South African Apartheid Litigation*, the different outcomes in the two cases rest on:

> [T]he quality of the assistance provided to the primary violator. Money is a fungible resource, as are building materials. However, poison gas is a killing agent, the means by which a violation of the law of nations was committed. The provision of goods specifically designed to kill, to inflict pain, or to cause other injuries resulting from violations of customary international law bear a closer causal connection to the principal crime than the sale of raw materials or the provision of loans.[35]

This led the court to the conclusion that, in the context of the provision of commercial goods or services, it is sufficient, but also necessary, that the aider and abettor provide the means by which a violation of the law is carried out.[36]

Based on this definition, the court found the actus reus of aiding and abetting the crime of apartheid to be established regarding the allegation that "IBM and Fujitsu supplied computer equipment designed to track and monitor civilians with the purpose of enforcing the racist, oppressive laws of apartheid" as well as the software and hardware to run the system "used to track racial classification and movement for security purposes."[37] These acts were essential for "implementing and enforcing the racial pass laws and other structural underpinnings of the apartheid system"[38] and constituted "the means by which the South African Government carried out both racial segregation and discrimination."[39]

However, the court rejected the idea that "the mere sale of computers to the Department of Prisons—despite the widely held knowledge that political prisoners were routinely held and tortured without trial—. . . constitute[d] substantial assistance to that torture."[40] Equally, with regard to the allegation that IBM had supplied computers to armaments manufacturers that were crucial to the South African Defense Forces, the court suggested that "the sale of equipment used to enhance the logistics capabilities of an arms manufacturer is not the same thing as selling arms used to carry out extrajudicial killing; it is merely doing business with a bad actor."[41]

33. *Id.* at 622.

34. The Zyklon B Case, 1 LAW REPORTS OF TRIALS OF WAR CRIMINALS 93, 101–02 (1947).

35. In re *S. African Apartheid Litig.*, 617 F. Supp. 2d at 258.

36. *See id.* at 258–59 (premising liability on the provision of the means by which a crime is committed, which is sufficient to meet the actus reus requirement).

37. *Id.* at 268 (internal quotations omitted).

38. *Id.*

39. *Id.*

40. *Id.*

41. In re *S. African Apartheid Litig.*, 617 F. Supp. 2d at 268–69.

When analyzing the claims against the automotive defendants, the court was satisfied that the sale of "heavy trucks, armored personnel carriers, and other specialized vehicles to the South African Defense Forces and . . . the South African police unit charged with investigating anti-apartheid groups"[42] was sufficient to establish the actus reus of aiding and abetting extrajudicial killings.[43] This was because "[t]hese vehicles were the means by which security forces carried out attacks on protesting civilians and other antiapartheid activists; thus by providing such vehicles to the South African Government, the automotive companies substantially assisted extrajudicial killing."[44] However, allegations that Ford and General Motors sold cars and trucks to the South African police and military forces, and continued to do so after export restrictions were imposed, were insufficient to support a claim because the particular vehicles "without military customization or similar features that link[ed] them to an illegal use" and were "simply too similar to ordinary vehicle sales."[45]

It becomes clear that the court's approach to the actus reus was motivated by a wish to limit complicity liability for ordinary sales and the provision of ordinary commercial services. The question of the substantial effect of the act of assistance on the commission of the violations was approached by focusing on the inherent quality of the products and on whether they provided the direct means for the relevant violations. Where this was not the case, the court refrained from any analysis of the use the regime would make of the goods, and of the effect of the sale on the violations. As, for example, computers and computer programs were not the direct means of committing torture, no further analysis of the link between the technology and the violations to assess whether its provision had a substantial effect on their commission was carried out.[46] Consequently, in practice, the conclusion that "[t]he provision of goods specifically designed to kill, to inflict pain, or to cause other injuries resulting from violations of customary international law bear a closer causal connection to the principal crime than the sale of raw materials or the provision of loans,"[47] did not give rise to a heightened analysis of potential causal links in the latter case (e.g., the sale of computers), as the statement might suggest. Rather, the court seems to automatically reject the existence of a causal link in these cases, while automatically assuming such a link in the former scenario (e.g., the sale of poison gas).[48]

The court accordingly excluded as too remote from the commission of the principal offense the provision of goods that are inherently neutral, and which cannot, by their very nature, be the instrument with which violations are carried out. In such cases, no mens rea analysis is necessary as liability already fails at the actus reus/causation stage. On the other hand, supplying goods that are specifically

42. *Id.* at 264.

43. *Id.*

44. *Id.*

45. *Id.* at 267 ("The sale of cars and trucks without military customization or similar features that link them to an illegal use does not meet the *actus reus* requirement of aiding and abetting a violation of the law of nations.").

46. *Id.* at 269.

47. In re *S. African Apartheid Litig.*, 617 F. Supp. 2d at 258.

48. *See id.* at 258–59 (discussing relevance of type of goods provided to whether the actus reus requirement is satisfied).

designed for harmful purposes or that provide the direct means for carrying out gross human rights violations does amount to the actus reus required for complicity liability. In those cases, complicity liability can only be avoided if the defendants acted without the necessary mens rea.

As a mens rea analysis then only becomes necessary where the goods or services provided by the defendant corporation are inherently harmful or specifically designed to assist with the realization of harmful purposes, the mens rea test does not limit liability for neutral or harmless goods or services that were put to detrimental use, but rather restricts liability for the provision of inherently harmful goods or the direct means with which gross human rights violations were committed. The fact that liability is severely restricted at the actus reus level might explain why the court had no problems with adopting a mens rea test of knowledge. The court declared that "[o]ne who substantially assists a violator of the law of nations is equally liable if he or she desires the crime to occur or if he or she knows it will occur and simply does not care."[49] The restrictions placed on the actus reus of aiding and abetting liability are thus counterbalanced by the wide reach of a mens rea standard of knowledge once the actus reus is made out and the corporate activities at issue are shown to go beyond ordinary commercial sales or other ordinary commercial services.[50]

### *B. Restricting Corporate Complicity Liability at the Mens Rea Level*

Many courts that have had to decide corporate complicity cases under the ATS have largely bypassed the actus reus analysis and instead focused their efforts on the mens rea assessment. Regarding the necessary mens rea, the ad hoc international criminal tribunals whose jurisprudence is influential on the approach to liability standards under the ATS apply a knowledge standard;[51] i.e., they require knowledge that these acts assist the commission of the offense. However, the accomplice need not share the principal's wrongful intent.[52] Until October 2009, in line with the jurisprudence of the international criminal tribunals, most U.S. courts adopted a mens rea standard of knowledge that the act of the corporation would assist in the commission of the offense.[53] This changed with the decision in *Presbyterian Church of Sudan v. Talisman Energy, Inc.*,[54] in which the Second Circuit decided that liability for aiding and abetting gross human rights violations under the ATS required that the corporation act with the primary purpose of facilitating the violations, a decision

49. *Id.* at 262.

50. It is worth noting, though, that since the 2009 district court decision in In re *South African Apartheid Litigation*, the Second Circuit has adopted a mens rea standard of purpose, which is therefore now the applicable standard for future decisions. Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 247 (2d Cir. 2009).

51. Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgement, para. 245 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998); Prosecutor v. Vasiljević, Case No. IT-98-32-A, Appeals Judgement, para. 102 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 25, 2004); Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, Judgement, paras. 162–63 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 24, 2000); Prosecutor v. Perišić, Case No. IT-04-81-A, Appeals Judgement, para. 48 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 28, 2013).

52. *Furundžija*, Case No. IT-95-17/1, para. 245.

53. Doe I v. Unocal Corp., 395 F.3d 932, 950–51 (9th Cir. 2002); Cabello v. Fernández-Larios, 402 F.3d 1148, 1157–58 (11th Cir. 2005); *In re* "Agent Orange" Prod. Liab. Litig., 373 F. Supp. 2d 7, 54 (E.D.N.Y. 2005); Almog v. Arab Bank, PLC, 471 F. Supp. 2d 257, 290–91 (E.D.N.Y. 2007).

54. *Talisman,* 582 F.3d at 258–59.

which has since been followed by some federal courts of appeals,[55] while others have confirmed adherence to the knowledge standard.[56]

Even though corporate actors might sometimes knowingly accept that their activities will likely contribute to gross human rights violations that are being carried out, particularly when working in States with poor human rights records, or in the middle of armed conflicts, corporations will only very rarely act with the purpose of facilitating them.[57] Rather, corporate activities will usually primarily be driven by business interests.[58] As a consequence, if corporate responsibility for complicity in gross human rights violations required that the corporation act with the primary purpose of facilitating violations, they would hardly ever be subject to such liability, whereas a mens rea standard of secondary purpose or of knowledge would widen the range of scenarios in which corporations might face complicity charges.[59] The mens rea test to be applied is thus an important, if not in many cases the determinative, factor for defining the scope of corporate complicity liability, as the application of a purpose test will in most cases simply rule out such liability.

The next Part will introduce the reasons behind the switch to a mens rea standard of purpose in corporate complicity cases decided under the ATS, using some recent key cases as examples.

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

In *Talisman*, the plaintiffs alleged that in the course of its oil extraction project in an area of Sudan that was afflicted by a civil war, the defendant built all-weather roads that linked the concession area to military bases.[60] These roads facilitated the oil extraction, but also military activities.[61] The plaintiffs alleged that the roads allowed the military to launch attacks year-round in areas often previously

55. Aziz v. Alcolac, Inc., 658 F.3d 388, 400–01 (4th Cir. 2011).

56. Doe VIII v. Exxon Mobil, 654 F.3d 11, 39 (D.C. Cir. 2011). In *Sarei v. Rio Tinto, PLC*, the Ninth Circuit left open which of the conflicting views on the prevalent mens rea standard under international criminal law it found more convincing, as the court regarded the purpose standard to be met in the case before it. 671 F.3d 736, 765 (9th Cir. 2011) (Schroeder, J., plurality opinion), *vacated*, 133 S. Ct. 1995 (2013).

57. *Cf.* Christoph Burchard, *Ancillary and Neutral Business Contributions to 'Corporate–Political Core Crime': Initial Enquiries Concerning the Rome Statute*, 8 J. INT'L CRIM. JUST. 919, 939 (2010) (assuming that "core criminal policies" are not the primary motivation of business actors); Hans Vest, *Business Leaders and the Modes of Individual Criminal Responsibility under International Law*, 8 J. INT'L CRIM. JUST. 851, 862–63 (2010) [hereinafter Vest, *Business Leaders*] (remarking that with this standard "there seems to be no other alternative than to dismiss most cases involving business leaders, as they will act primarily, or at least simultaneously, for economic purposes").

58. *Cf.* Burchard, *supra* note 57, at 939 (assuming that, in the context of international criminal law, business leaders are frequently influenced by "motives and interests that are incongruent with core criminal policies"); Vest, *Business Leaders*, *supra* note 57, at 855–59.

59. *See*, *e.g.*, Burchard, *supra* note 57, at 939 (discussing the scope of corporate liability in light of a corporation's purpose and knowledge with regard to an act); Vest, *Business Leaders*, *supra* note 57, at 862–63 ("At least with respect to business leaders who provide the essential means for the commission of war crimes . . . it would hardly seem understandable if 'for the purpose' was not read expansively.").

60. Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 249 (2d Cir. 2009).

61. *Id.*

inaccessible due to seasonal flooding.[62] The defendants also upgraded two airstrips in the concessions.[63] This served the purpose of enhancing the safety and convenience of the defendant's personnel, but at the same time supported military activity, as the government used the airstrips to refuel military aircraft, supply troops, take defensive action, and initiate attacks, including regular bombing runs.[64] Security arrangements made for oil company personnel in coordination with the government and military forces resulted, according to the plaintiffs, "in the persecution of civilians living in or near the oil concession areas."[65]

The court highlighted early on that none of the acts the defendant corporation was accused of were "inherently criminal or wrongful."[66] Moreover, "'[t]he activities which the plaintiffs identify as assisting the Government in committing crimes against humanity and war crimes generally accompany any natural resource development business or the creation of any industry.'"[67] Thus, the court regarded this as a case of routine business transactions that were facially lawful. Indeed, the Second Circuit accepted the District Court's assessment in the same case that:

> [T]he plaintiffs' theories of substantial assistance serve essentially as proxies for their contention that Talisman should not have made any investment in the Sudan, knowing as it did that the Government was engaged in the forced eviction of non-Muslim Africans from lands that held promise for the discovery of oil.[68]

In light of such a perception of the complaint, it comes as no surprise that the court looked for ways to reject it. It did so based on a rewriting of the relevant mens rea standard. The court deviated from the vast majority of previous decisions that applied a mens rea standard of knowledge and instead adhered to Judge Katzmann's analysis in *Khulumani*,[69] according to which Nuremberg case law and the Rome Statute of the International Criminal Court demonstrate that the relevant standard for aiding and abetting a violation of international law is that of purpose.[70] Its rejection of the claim then relied on this, it is submitted, mistaken[71] interpretation of international precedent.[72]

62. *Id.*

63. *Id.*

64. *Id.* at 249–50.

65. *Id.* at 249.

66. *Talisman*, 582 F.3d at 261.

67. *Id.* at 260–61 (quoting the findings of the district court in the same case).

68. *Id.* at 261 (alteration in original) (quoting the district court's opinion).

69. Khulumani v. Barclay Nat'l Bank, Ltd., 504 F.3d 254, 276–79 (2d Cir. 2007) (Katzmann, J., concurring); *accord id.* at 332–33 (Korman, J., concurring in part, dissenting in part). Judge Hall, on the other hand, pronounced himself in favor of a standard of knowledge in that case, though based on the view that the relevant mens rea standard has to be derived from U.S. federal law. *Id.* at 287–89. Even though two judges thus agreed on a mens rea standard of purpose, Judge Korman did so in his partial dissent, stating that had he reached the issue, he would have supported Judge Katzmann's view with regard to the applicable mens rea test. As a consequence of this split in opinion, the court in *Talisman* did not regard Judge Katzmann's view to set a binding precedent and therefore addressed the question afresh. *Talisman*, 582 F.3d at 258.

70. *Talisman*, 582 F.3d at 258–59.

71. For a critical discussion of the *Talisman* court's understanding of international precedent see generally Michalowski, *The Mens Rea Standard*, *supra* note 13.

72. *See Talisman*, 582 F.3d at 259, 263, 268 (applying purported mens rea standard of purpose in

When considering the corporation's liability with regard to building the all-weather roads and airstrips, the court acknowledged the defendant's awareness of the use made of these facilities by the Sudanese military.[73] Under the knowledge standard of mens rea that was prevalent in U.S. case law on aiding and abetting liability under the ATS prior to *Talisman*,[74] this might have been sufficient to establish the necessary mens rea of aiding and abetting liability. However, under the newly introduced mens rea standard of purpose, awareness was not decisive and the court found it necessary to undertake an analysis of the purpose with which the activities of the corporation had been carried out.[75] It attached significance to the fact that all-weather roads and airstrips were necessary for developing an oil-extraction project in a remote location.[76] This meant that there were, therefore, "benign and constructive purposes for these projects, and (more to the point) there [was] no evidence that any of this was done for an improper purpose."[77] The court further clarified that:

> Even if Talisman built roads or improved the airstrips with the intention that the military would also be accommodated, GNPOC had a legitimate need to rely on the military for defense. It is undisputed that oil workers in that tumultuous region were subjected to attacks: rebel groups viewed oil installations and oil workers as enemy targets; . . . rebels launched a nighttime mortar attack against a Heglig camp where 700 oil workers were living; and in Block 5A the attacks caused that concessionaire (Lundin Oil AB) to close down operations for an extended period. In these circumstances, evidence that GNPOC was coordinating with the military supports no inference of a purpose to aid atrocities.[78]

Thus, given the mens rea requirement of purpose, to knowingly assist gross human rights violations carried out by a government would not result in corporate liability as long as the corporation was not motivated by an improper desire to bring about these violations but rather acted in pursuit of a legitimate purpose or interest, such as the defense of its activities against rebel attacks, or more generally the desire to guarantee the smooth and safe running of its business operations. Indeed, the court understood the mens rea test of purpose as requiring that the act of assistance be directly motivated by the wish to bring about atrocities and that this, moreover, constitute the primary reason for the act.[79] Purpose thus seems to be synonymous with motive.

The plaintiffs had deduced the corporation's awareness of the effect of its acts of assistance on the gross human rights violations carried out by Sudanese forces

dismissing plaintiffs' claim).

73. *Id.* at 262.

74. *See*, *e.g.*, Doe VIII v. Exxon Mobil, 654 F.3d 11, 39 (D.C. Cir. 2011) (applying a knowledge standard for mens rea for the ATS under customary international law).

75. *Talisman*, 582 F.3d at 263–64.

76. *Id.*

77. *Id.* at 262.

78. *Id.*

79. *See id.* at 263 (stating that the defendants must act with the purpose to assist the international law violations).

from the fact that senior Talisman officials had protested against the government's use of their infrastructure, and from their possession of security reports that expressed concern about the use of airstrips by the military.[80] However, the court held not only that knowledge was insufficient to establish the mens rea but that this "evidence of knowledge (and protest) cuts against Talisman's liability."[81] This was because such a protest indicated the corporation's opposition to the violations and therefore negated any inference of a desire to facilitate them.[82] The court concluded that:

> There is evidence that southern Sudanese were subjected to attacks by the Government, that those attacks facilitated the oil enterprise, and that the Government's stream of oil revenue enhanced the military capabilities used to persecute its enemies. But if ATS liability could be established by knowledge of those abuses coupled only with such commercial activities as resource development, the statute would act as a vehicle for private parties to impose embargos or international sanctions through civil actions in United States courts. Such measures are not the province of private parties but are, instead, properly reserved to governments and multinational organizations.[83]

This is in line with Judge Sprizzo's view in In re *South African Apartheid Litigation*, which regarded it to be relevant in the context of considering corporate liability that the U.S. government, "consistent with most other world powers, supported and encouraged business investment in apartheid South Africa" and opted for a policy of constructive engagement, relying on "the tool of economic investment as a means to achieve greater respect for human rights and a reduction in poverty in developing countries."[84] He moreover pointed out that:

> In a world where many countries may fall considerably short of ideal economic, political, and social conditions, this Court must be extremely cautious in permitting suits here based upon a corporation's doing business in countries with less than stellar human rights records, especially since the consequences of such an approach could have significant, if not disastrous, effects on international commerce.[85]

While Judge Sprizzo relied on these considerations to reject corporate aiding and abetting liability altogether, the court in *Talisman* used them to justify the need for a restrictive mens rea test of purpose as the only way to effectively limit liability. Without a thorough actus reus assessment, it is not clear whether the court thought that most routine business transactions, including the ones at issue in the *Talisman* case, could potentially amount to relevant acts of aiding and abetting human rights violations, or if the imposition of liability was only justified where, in addition to assistance that has a substantial effect on human rights violations, the corporation

80. *Id.* at 262.
81. *Talisman*, 582 F.3d at 262
82. *See id.* (discussing the significance of Talisman's knowledge).
83. *Id.* at 264.
84. *In re* S. African Apartheid Litig., 346 F. Supp. 2d 538, 554 (S.D.N.Y. 2004).
85. *Id.*

acted with more than knowledge. An alternative interpretation might be that the court, while doubting that in such cases even the actus reus requirement would be satisfied, adopted the view that it was easier and more effective to restrict liability at the mens rea level, thereby bypassing all discussions of the potential effect of commercial activities on human rights violations that would otherwise be necessary. Indeed, the court's actus reus analysis is largely inconclusive. On the one hand, the Second Circuit seems to approve of the district court's negative view that there was not even a relevant act of substantial assistance.[86] At the same time, it accepts that Talisman's various activities that were at issue in this case had assisted the government,[87] without, however, undertaking any analysis as to whether these acts would amount to practical assistance that had a substantial effect.

Whatever the court's views on whether the actus reus requirement was met in this case, the decision in *Talisman* clearly rests decisively on the court's assessment of the corporation's mens rea. The court's approach demonstrates its view that even acts that have a substantial effect on violations of human rights carried out by others should be shielded from complicity liability unless the corporation had the desire to facilitate these, rather than simply knowingly accepting their occurrence as a side effect of pursuing their business interests.

### 2. *Kiobel v. Royal Dutch Petroleum Co.* (concurring opinion)

The *Talisman* ruling was cited with approval by Judge Leval in his concurring opinion in *Kiobel*.[88] The main importance of the Second Circuit decision in *Kiobel* clearly lies in the majority holding that international law does not recognize civil liability of corporations for aiding and abetting violations of the law of nations, and that therefore claims based on corporate complicity cannot succeed under the ATS.[89] However, Judge Leval's concurring opinion, while of crucial importance regarding its meticulous rejection of the majority's approach to rejecting corporate liability under international law, at the same time demonstrates that even if such liability were accepted, a mens rea standard of purpose would shield corporations from liability in a great number of scenarios.

In *Kiobel*, the defendant corporations had for several decades been engaged in oil exploration and production in the Ogoni region of Nigeria.[90] According to the plaintiffs, in response to protests by groups of local citizens against adverse effects of the oil operations, the defendant resorted to the Nigerian government to suppress the Ogoni resistance.[91] The most important allegations were that:

> Throughout 1993 and 1994, Nigerian military forces . . . shot and killed Ogoni residents and attacked Ogoni villages—beating, raping, and arresting residents and destroying or looting property—with the assistance

86. *Talisman*, 582 F.3d at 262.

87. *Id.*

88. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 154 (2d Cir. 2010) (Leval, J., concurring in the judgment).

89. *Id.* at 148–49 (majority opinion).

90. *Id.* at 123.

91. *Id.*

> of defendants. Specifically, plaintiffs allege that defendants, *inter alia*, (1) provided transportation to Nigerian forces, (2) allowed their property to be utilized as a staging ground for attacks, (3) provided food for soldiers involved in the attacks, and (4) provided compensation to those soldiers.[92]

The majority in *Kiobel* did not proceed to an analysis of the facts of the case, as it negated any basis for corporate aiding and abetting liability under the ATS.[93] Judge Leval, however, who disagreed on that fundamental point, had to analyze whether the plaintiffs' allegations were sufficient to make out a case of aiding and abetting liability.[94] Following precedent in *Talisman*, Judge Leval stated that it was not enough for the plaintiffs to allege that the defendant corporations had knowingly contributed to human rights violations carried out by officials of the Nigerian government.[95] It rather needed to be shown that they acted "with a purpose of bringing about the abuses."[96] According to him,

> the Complaint fails to allege facts . . . showing a purpose to advance or facilitate human rights abuses. The provision of assistance to the Nigerian military with *knowledge* that the Nigerian military would engage in human rights abuses does not support an inference of a purpose on Shell's part to advance or facilitate human rights abuses. An enterprise engaged in finance may well provide financing to a government, in order to earn profits derived from interest payments, with the knowledge that the government's operations involve infliction of human rights abuses. Possession of such knowledge would not support the inference that the financier acted with a purpose to advance the human rights abuses.[97]

In the scenario painted here, a question might arise with regard to the necessary actus reus, as it would require some detailed analysis to show that providing financing to a government would have a substantial effect on the human rights violations it commits.[98] However, Judge Leval skipped this issue completely and instead concentrated on the mens rea assessment. Applying *Talisman*, he took the position that one cannot infer intent to violate human rights from an act of knowing participation that is primarily motivated by business reasons.[99] As a consequence, as long as the principal purpose of a corporation is making profit, and it is indifferent to whether gross human rights violations are carried out by the government of the state

92. *Id.*

93. *Id.* at 140–41.

94. *See Kiobel*, 621 F.3d at 154 (Leval, J., concurring in the judgment) (discussing the standard to be applied in analyzing whether plaintiff's allegations were sufficient).

95. *Id.* (asserting that purpose standard of mens rea liability applied).

96. *Id.* at 188.

97. *Id.* at 193.

98. For a detailed discussion see generally Sabine Michalowski, *No Complicity Liability for Funding Gross Human Rights Violations?*, 30 BERKELEY J. INT'L L. 451 (2012) [hereinafter Michalowski, *No Complicity Liability*].

99. *See Kiobel*, 621 F.3d at 158 (Leval, J., concurring in the judgment) (explaining how profiting through the mere provision of financing or military equipment for an entity accused of violating human rights will not support an inference that a corporation "acted *with a purpose* to promote or advance those violations" (emphasis in original)).

in which it operates, it can knowingly participate in them without risking complicity liability.

This becomes particularly clear when Judge Leval discusses the allegations that "representatives of Shell and its Nigerian subsidiary met in Europe 'to formulate a strategy to suppress MOSOP [Movement for Survival of Ogoni People] and to return to Ogoniland.'"[100] According to Judge Leval, even "that Shell 'knew' the Nigerian military would use 'military violence against Ogoni civilians' as part of the effort to suppress MOSOP . . . does not support an inference that Shell *intended* for such violence to occur."[101] Thus, to enlist the help of the government in the suppression of the protests, knowing that this would be implemented, at least partly, through measures that involve gross human rights violations would not be sufficient to result in liability for aiding and abetting.

Judge Leval also accepted the argument already advanced in Talisman that it was legitimate for "an entity engaged in petroleum exploration and extraction . . . [to] provide financing and assistance to the local government in order to obtain protection needed for the petroleum operations with knowledge that the government acts abusively in providing the protection."[102] He concluded that there were insufficient allegations of

> facts which support a plausible assertion that Shell rendered assistance to the Nigerian military and police for the purpose of facilitating human rights abuses, as opposed to rendering such assistance *for the purpose* of obtaining protection for its petroleum operations with awareness that Nigerian forces would act abusively. In circumstances where an enterprise requires protection in order to be able to carry out its operations, its provision of assistance to the local government in order to obtain the protection, even with knowledge that the local government will go beyond provision of legitimate protection and will act abusively, does not without more support the inference of a purpose to advance or facilitate the human rights abuses and therefore does not justify the imposition of liability for aiding and abetting those abuses.[103]

The court did not specify what "more" would be necessary to justify the inference of a mens rea of purpose. It becomes clear, though, that purpose is understood as primary purpose—that is, a desire that the human rights violations should occur—instead of indifference to or acceptance of such violations as a consequence of knowing assistance.

Judge Leval invoked policy considerations in favor of a mens rea standard of primary purpose in the context of corporate complicity litigation, his main concern being to find an acceptable way to apportion and restrict liability.[104] In his view, it is the mens rea that limits the extent of corporate liability and delineates the boundaries between legitimate business activities and conduct that gives rise to

100. *Id.* at 192.
101. *Id.*
102. *Id.* at 193.
103. *Id.* at 193–94.
104. *Id.* at 158.

corporate liability,[105] and only a purpose standard can effectively achieve this aim. He invokes two scenarios to show the, in his view undesirable, consequences of applying a knowledge standard. The first is that of "corporations engaged in the extraction of precious resources in remote places . . . [which] will contribute money and resources to the local government to help it render the protection the corporation needs for its operations"[106] and that are sued for aiding and abetting if the government troops then commit atrocities. The second case is that of "[t]he shoemaker who makes Hitler's shoes [who] should not be held responsible for Hitler's atrocities, even if the shoemaker knows that a pair of shoes will help Hitler accomplish his horrendous agenda."[107] It seems as if for Judge Leval, Hitler's shoemaker is in the same league as "business corporations engaged in finance or in the sale of food or military supplies [which] might raise funds for, or sell supplies to, a government that is known to violate the law of nations."[108] Both examples refer to cases of "profit-motivated provision of finance or supplies, done with awareness of the purchasing government's record of atrocities."[109]

> [An] imposition of liability . . . would go too far in impeding legitimate business, by making a business corporation responsible for the illegal conduct of local government authorities that is beyond the corporation's control, and which the corporation may even deplore. . . . Concerns of this nature might well give pause to a court contemplating the imposition of liability on a business corporation for aiding and abetting in a government's infliction of human rights abuses, where the corporation did not promote, solicit, or desire the violation of human rights.[110]

Judge Leval made these observations in the context of a concurring opinion that makes a forceful plea in favor of preserving the possibility of suing corporations under the ATS for their complicity in human rights violations. It would thus be possible to interpret his discussion as an attempt to alleviate concerns that the existence of such causes of action would lead to limitless corporate liability by showing that the purpose test sets clear restrictions on such liability. Nevertheless, in uncritically applying the purpose test to these cases and justifying it based on the policy considerations discussed above, his approach, just like that adopted in *Talisman*, suggests that as long as the facilitation of human rights violations is just a byproduct of business motivated decisions, it should not result in liability. He seems to regard even their direct furtherance as legitimate as long as the reasons for that furtherance are business related, including guaranteeing the safety of business operations and personnel.[111]

105. *See Kiobel*, 621 F.3d at 158 (Leval, J., concurring in the judgment) (asserting that the court "will not support the imposition of aiding and abetting liability on the corporation for that government's abuses unless the corporation acted *with a purpose* to promote or advance those violations").

106. *Id.* at 157.

107. *Id*. at 158.

108. *Id.* at 157.

109. *Id.*

110. *Id.* at 158.

111. *Kiobel*, 621 F.3d at 158 (Leval, J., concurring in the judgment).

His observation that liability should not attach for illegal conduct of the business partner that is beyond the corporation's control[112] is interesting. Unfortunately, it is not further explored, and whether and how the purpose test might address this issue therefore is not made clear. Neither is it evident why promoting and soliciting human rights violations is mentioned in the same breath as desiring them, as the first two scenarios seem to refer to the actus reus, while the last is clearly a mens rea element.

### 3. *Doe v. Nestle*

In *Doe v. Nestle*, victims of child slavery who were forced to work on cocoa plantations in the Ivory Coast brought an aiding and abetting case against corporations that control the production of Ivorian cocoa.[113] The plaintiffs alleged that the "defendants operate in the Ivory Coast 'with the unilateral goal of finding the cheapest sources of cocoa.'"[114] According to the plaintiffs, even though they were well aware of the child slavery problem in the Ivory Coast (through first-hand knowledge acquired during their numerous visits to Ivorian farms, and through the reports of domestic and international organizations),[115] they "continue[d] to supply money, equipment, and training to Ivorian farmers, knowing that these provisions [would] facilitate the use of forced child labor."[116] In the United States, the defendants also lobbied against efforts to curb the use of child slave labor by requiring importers and manufacturers to certify their products as "slave free."[117]

When discussing whether or not these allegations were sufficient to meet the mens rea requirement for corporate aiding and abetting under the ATS, the court left open whether or not the necessary standard was one of purpose or knowledge, as it found that plaintiffs' factual allegations met the requirements of the purpose test.[118] While the purpose standard would not be "satisfied merely because the defendants intended to profit by doing business in the Ivory Coast,"[119] an inference of purpose could be based on allegations that the corporation did not use their control over the Ivory Coast cocoa market to stop "the use of child slave labor by their suppliers."[120] This, coupled with the cost-cutting benefit they allegedly received from the use of child slaves, justified the inference that the defendants acted with purpose.[121] The defendants' alleged lobbying efforts against legislative labeling requirements were regarded as corroborating the inference that they acted with the purpose of facilitating slave labor.[122]

112. *Id.*
113. Doe I v. Nestle USA, Inc., 766 F.3d 1013, 1017–18 (9th Cir. 2014).
114. *Id.* at 1017.
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.* at 1024.
119. *Nestle*, 766 F.3d at 1025.
120. *Id.*
121. *Id.*
122. *Id.*

The court distinguished this case from *Talisman* where the defendant did not "in any way benefit from the underlying human rights atrocities carried out by the Sudanese military, and in fact, those atrocities ran contrary to the defendant's goals in the area, and even forced the defendant to abandon its operations."[123] In *Nestle,* the corporation "profited by doing business with known human rights violators . . . [and] sought to accomplish their own goals by supporting violations of international law."[124] It did not matter that the plaintiffs in *Nestle* "conceded that the defendants did not have the subjective motive to harm children," that instead, "the defendants' motive was finding cheap sources of cocoa" and that there was "no allegation that the defendants supported child slavery due to an interest in harming children in West Africa."[125] Thus, the court concluded that "the defendants sought a legitimate goal, profit, through illegitimate means, purposefully supporting child slavery."[126]

4. *Sarei v. Rio Tinto*

*Sarei v. Rio Tinto* is another case where a court left open whether the relevant mens rea standard was one of knowledge or of purpose, as it found that the purpose standard had been met.[127] In that case, the majority opinion suggested that in order to satisfy the mens rea standard of purpose it was sufficient to allege that the defendant corporation

> issued the PNG government "an ultimatum": displace the local residents interfering with its mining operations, no matter the means, or Rio would abandon all investments on PNG. When the PNG government employed military means to fulfill Rio's demands, Plaintiffs allege, Rio provided the PNG military helicopters and vehicles to carry out the operations, even after reports of war crimes became public. When initial efforts were insufficient to displace the locals, PNG imposed a blockade on Bougainville; Plaintiffs allege that at a meeting "between PNG officials and two top Rio executives, one top Rio manager encouraged continuation of the blockade to 'starve the bastards out . . . .'" Moreover, Rio allegedly assured the PNG government that the continued maintenance of the blockade was enough to prevent Rio from withdrawing from PNG, while Rio simultaneously attempted to repress reporting of the humanitarian crisis unfolding on the island. These allegations support much more than "an inference of mere knowledge on Rio Tinto's part," it supports an inference that Rio Tinto actively *encouraged* the killing of Bougainvilleans.[128]

123. *Id.* at 1024.

124. *Id*.

125. *Nestle*, 766 F.3d at 1025.

126. *Id.* at 1025–26.

127. *See* Sarei v. Rio Tinto, PLC, 671 F.3d 736, 765–67 (9th Cir. 2011) (Schroeder, J., plurality opinion), *vacated*, 133 S. Ct. 1995 (2013) ("Because plaintiffs allege that Rio Tinto specifically intended to harm them in aiding and abetting the commission of war crimes, we need not decide whether the broader interpretation of 'purpose' [which is inferred from the knowledge of likely consequences] would also sustain liability . . . .").

128. *Id.* at 766 (citations omitted). Judge Leval indicated in *Kiobel* that he would agree to a finding of

According to the court, these were sufficient factual allegations to support a claim that "Rio Tinto specifically intended to harm the residents of Bougainville."[129] It seems crucial for a finding of liability under the purpose test that the corporation expressly incited the government's commission of gross human rights violations in order to protect its business interests, instead of simply knowing and accepting that such violations might occur. This is so even though encouragement seems to be an actus reus rather than a mens rea element of complicity liability.

5. In re *Chiquita Brands*

Another case in which a court found that a corporation had acted with a mens rea of purpose is In re *Chiquita Brands*.[130] An action was filed by "family members of trade unionists, banana-plantation workers, political organizers, social activists, and others tortured and killed by the Autodefensas Unidas de Colombia (AUC), a paramilitary organization operating in Colombia," against Chiquita for aiding and abetting the crimes committed by the AUC.[131] According to the court and based on admissions made by Chiquita itself:

> Chiquita formed an agreement with the AUC, paying them to pacify the banana plantations and to suppress union activity. In return for Chiquita's support, the AUC agreed it would drive the guerrillas out of Chiquita's banana-growing areas and maintain a sufficient presence to prevent the guerrillas from returning. Furthermore, the AUC would provide Chiquita with security, labor quiescence, and ensure that the unions were not infiltrated by leftists sympathetic to the FARC or ELN guerrillas. This arrangement benefitted Chiquita, as labor unrest and strikes were minimized while profits increased.[132]

The plaintiffs also alleged that Chiquita assisted the AUC by facilitating arms shipments.[133]

The court clarified, in line with *Talisman*, that allegations of mere knowledge that the AUC would commit such offenses were insufficient. Rather, the plaintiffs needed to plead that "Chiquita paid the AUC with the specific purpose that the AUC commit the international-law offenses alleged in the complaints," which had to allege that "Chiquita intended for the AUC to torture and kill civilians in Colombia's banana-growing regions."[134] The Court found this test to be satisfied, for example, with regard to the allegations that:

> Chiquita supported terrorist groups in Colombia by paying them and assisting them to obtain arms and smuggle drugs. Chiquita knew that these

purpose on the basis of such facts. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 158 (2d Cir. 2010) (Leval, J., concurring in the judgment).

129. *Rio Tinto*, 671 F.3d at 766.

130. *In re* Chiquita Brands Int'l, Inc., 792 F. Supp. 2d 1301, 1351–52 (S.D. Fla. 2011).

131. *Id.* at 1305.

132. *Id.* at 1309 (citations omitted).

133. *Id.* at 1310.

134. *Id.* at 1344–45.

> groups used illegal violence against civilians and intended that they employ this strategy to quell social and labor unrest in the Northeast Colombian region of Uraba and safeguard the stability and profitability of Chiquita's enterprises in Colombia. . . . Chiquita's acts of assistance to the AUC were made with the intent that the AUC continue carrying out acts of killing, torture, and other illegal violence against the civilian population of Uraba in accordance with the AUC's strategy for suppressing the FARC and deterring its sympathizers. In exchange for its financial support to the AUC, Chiquita was able to operate in an environment in which labor and community opposition was suppressed. . . . Chiquita intended that the AUC continue carrying out acts of killing, torture, and other illegal violence against the civilian population of Uraba in accordance with the AUC's strategy for suppressing the FARC and deterring its sympathizers. In providing the AUC with money and assistance with their arms and drug trafficking, Defendants intended that the AUC obtain arms and continue their practice of killing civilians, especially those civilians who were perceived as threats to the profitability of the banana industry. The leadership of the AUC did, in fact, carry out killings of union members, social organizers and other undesirable groups, as well as civilians with no known or suspected ties to the guerrillas, knowing that Chiquita expected and intended that they do so using the arms and money provided by Chiquita.[135]

The court even held that the defendants had the necessary mens rea for aiding and abetting a war crime, that is "the alleged offenses be carried out in furtherance of a conflict [such that] . . . Chiquita shared the principal's same purpose, i.e., to torture and kill as a means to defeat militarily its enemy."[136] In this respect, the court stressed that "[t]he fact that Chiquita may not have had a military objective of its own, or that it was motivated by financial gain, is not dispositive. A 'lack of motive does not negate intent to assist the underlying acts that may be war crimes.'"[137] Quoting *Drummond II*,[138] the court opined that if it was required that defendants act

> in direct furtherance of a 'military objective' . . . an ATS action would not lie where defendants were motivated by ideology or the prospect of financial gain, as plaintiffs allege here. Indeed under defendants' proposed rule, it is arguable that nobody who receives a paycheck would ever be liable for war crimes.[139]

Applying this reasoning to the case before it, the court then held that:

> The complaints' allegations that Chiquita assisted the AUC with the intent that the AUC's interests were furthered over the FARCs [sic] in the Colombian civil war sufficiently allege the *mens rea* for aiding and abetting

135. *Id.* at 1345–46.

136. *Chiquita Brands Int'l*, 792 F. Supp. 2d at 1348.

137. *Id.* at 1349 (quoting Doe v. Drummond Co. (Drummond II), No. 2:09–CV–01041–RDP, 2010 WL 9450019, at *13 (N.D. Ala. Apr. 30, 2010)).

138. *Drummond II*, 2010 WL 9450019, at *13.

139. *Chiquita Brands Int'l*, 792 F. Supp. 2d at 1349 (quoting *Drummond II*, 2010 WL 9450019, at *13).

> the AUC's war crimes, irrespective of the fact that the company may have chosen the AUC's side for financial, as opposed to military, reasons.[140]

In finding the purpose test to be met even where the corporation was clearly primarily motivated by the wish to further its business interests and not by a desire to facilitate human rights violations, it seems as though, unlike the court in *Talisman*, the court in *Chiquita* did not equate purpose with primary purpose and motive. At the same time, it is very likely that the outcome in *Chiquita* was highly influenced by the fact that the acts of assistance were not regarded as legitimate business activities.

### 6. Link between the Heightened Mens Rea Standard of Purpose and the Commercial Nature of the Act

In recent years, quite a few courts have moved from a mens rea test of knowledge to one of purpose, motivated by the wish to restrict corporate complicity liability in the context of commercial activities. Indeed, when examining how purpose was defined in these cases and how its existence or absence was established, it becomes clear that the application of the mens rea test was highly influenced by how the courts perceived and characterized the activities which provided the actus reus of aiding and abetting.

In *Talisman* and *Kiobel*, the activities of the defendant corporations, which according to the plaintiffs should be regarded as assisting in gross human rights violations, were classified by the courts as ordinary business activities that pursued a legitimate purpose.[141] To compensate for the facial legitimacy or routine commercial nature of the corporate activities at issue, the courts limited liability to acts that were carried out with a more culpable state of mind than mere knowledge. This approach is based on the assumption that it is legitimate to pursue business interests even where it is clear that the relevant activities substantially assist in human rights violations. Even the direct support of such violations seems to be regarded as legitimate as long as the reasons for such behavior are business-related, which includes guaranteeing the safety of business operations and personnel.[142] *Doe v. Nestle* suggests that an exception to this might be made where the corporation directly benefited from the violations.[143]

This can be contrasted with In re *Chiquita*, where the court clearly did not regard payment to the AUC, a group classified as a terrorist organization, as either an ordinary business practice or as justified in pursuance of legitimate business interests.[144] Indeed, the court stressed that arms shipments for and payments to the AUC were not supplied "for ordinary commercial purposes, but were specifically intended to assist the AUC's military campaign against the FARC."[145] The purpose test was found to be met, even though the acts of the defendant corporation were

140. *Id.*

141. Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 262 (2d Cir. 2009); Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 193 (2d Cir. 2010) (Leval, J., concurring in the judgment).

142. *Kiobel*, 621 F.3d at 158 (Leval, J., concurring in the judgment).

143. Doe I v. Nestle USA, Inc., 766 F.3d 1013, 1023–26 (9th Cir. 2014).

144. *Chiquita Brands Int'l*, 792 F. Supp. 2d at 1307, 1350–51.

145. *Id.* at 1350.

primarily motivated by its business interests.[146] Thus, where the activities go beyond the merely commercial or beyond the legitimate protection of a corporation's interests in the context of conducting business, a more relaxed version of purpose is instead applied. The definition of purpose was not confined to primary purpose and motive; the fact that the corporation was first and foremost motivated by financial interests did not exclude a secondary purpose of facilitating the violations carried out by the AUC, and the court was more easily prepared to infer the necessary purpose from the knowing actions of the corporation than in *Talisman* and *Kiobel*.

*Sarei v. Rio Tinto* demonstrates that the line that separates legitimate from illegitimate corporate activities is crossed where the corporation expressly demands that the government protect its business interests by carrying out gross human rights violations.[147] Such encouragement is considered to meet the standards of the purpose test.[148] This suggests a mixing of the actus reus and mens rea requirements, as encouragement is a particular form of aiding and abetting, not an element of mens rea.[149] Nevertheless, in the case of direct encouragement of the commission of human rights violations, it might be easier to infer a primary purpose that the corporation wants these violations to happen. This case also shows that the equation of motive and purpose can be misleading, as it is not clear that Rio Tinto acted with the primary purpose of bringing about human rights violations.[150] It is much more plausible that the corporation acted with the objective to maximize its profits and was prepared to pursue this goal through all necessary measures, including the direct encouragement of human rights violations. Comparing this with the case of Shell in *Kiobel,* where Shell allegedly discussed and supported a strategy to suppress the protest movement, knowing that violence would be used,[151] in both cases the corporation allegedly knew that the protection it wanted to obtain would involve the commission of gross human rights violations. The same can be said for the defendant in *Talisman*.[152] The main difference between the cases at the mens rea level seems to be that Talisman apparently would have preferred that the protection be provided without the human rights violations,[153] and that Shell might have hoped that its interests could be protected through legitimate means, even though both

146. *Id.* at 1348–49.

147. Sarei v. Rio Tinto, PLC, 671 F.3d 736, 766–67 (9th Cir. 2011) (en banc) (Schroeder, J., plurality opinion), *vacated*, 133 S. Ct. 1995 (2013).

148. *Id.*

149. *See*, *e.g.*, Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgement, para. 235 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998) (finding that encouragement may satisfy the actus reus requirement).

150. The court found the plaintiffs' allegations sufficient to support a claim that Rio Tinto acted with intent to assist in the commission of war crimes. *See Rio Tinto*, 671 F.3d at 766–67 (Schroeder, J., plurality opinion) ("We conclude that the allegations are sufficient to state a war crimes claim."). Due to the Supreme Court's decision in *Kiobel*, however, it will never be known whether the plaintiffs could prove at trial that Rio Tinto's primary purpose was to cause the violations. *See* Sarei v. Rio Tinto, PLC, 722 F.3d 1109 (9th Circ. 2013) (mem.) (affirming dismissal of plaintiffs' claims on basis of sharp limitations as to applicability of ATS in *Kiobel*).

151. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 189–90 (2d Cir. 2010) (Leval, J., concurring in the judgment).

152. Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 262 (2d Cir. 2009).

153. *See id.* ("[P]laintiffs adduce evidence that senior Talisman officials protested to the Government and that security reports shared with senior Talisman officials expressed concern about the military's use of GNPOC airstrips.").

corporations knew that this was not going to happen.[154] Rio Tinto, on the other hand, requested the protection of its interests by the means of gross human rights violations.[155] This makes a difference not just regarding the mental element, but also at the actus reus level, as Rio Tinto's act went beyond indirect assistance and constituted active direct encouragement.[156]

All of this shows that the mens rea standard of purpose is not applied equally in all cases, but that it is employed in its strict version only where the act constituting the actus reus is regarded as a legitimate commercial act that results in indirect assistance to human rights violations, such as the building of all-weather roads as part of the infrastructure of an investment project. The nature of the act of assistance is thus relevant for the application of the purpose test in that courts are prepared to infer a purpose to assist in bringing about the violations where the act of providing assistance is either in itself unlawful or goes beyond a mere business activity, even if the primary aim was identified as making profit.

### *C. Concluding Remarks*

As has become obvious, the various approaches to complicity liability under the ATS are highly influenced by the nature of the underlying act or transaction as commercial or business related. While the approaches differ dramatically, particularly with regard to the relevant mens rea standard, they are all driven by the shared conviction that the nature of the underlying act or transaction as commercial or business related provides it with a cloak of prima facie legitimacy that complicates the liability analysis significantly, particularly in the context of the provision of goods or services that might have legitimate as well as illegitimate uses. Before analyzing the different approaches, this Article will examine how comparable problems were addressed by courts in other contexts. These experiences will then inform the response to the main questions at the heart of this Article, i.e., how to draw the line between lawful and legitimate commercial transactions and corporate complicity.

## II. COMPLICITY LIABILITY FOR DUAL-PURPOSE ACTS – LESSONS FROM THE AD HOC INTERNATIONAL CRIMINAL TRIBUNALS

Ad hoc international criminal tribunals, whose jurisprudence heavily influenced the liability standards applied by U.S. courts in corporate complicity cases under the ATS,[157] consistently apply an actus reus standard of an act of assistance that has a

154. *Kiobel*, 621 F.3d at 193 (Leval, J., concurring in the judgment); *Talisman*, 582 F.3d at 262.

155. *See Rio Tinto*, 671 F.3d at 766 (Schroeder, J., plurality opinion) (describing the defendant's request for "military action for its own private ends and directed the military response even 'while reports of war crimes surfaced'").

156. *See id.* ("These allegations support much more than 'an inference of mere knowledge on Rio Tinto's part; it supports an inference that Rio Tinto actively *encouraged* the killing of Bougainvilleans." (citation omitted)).

157. *See*, *e.g.*, Doe I v. Unocal Corp., 395 F.3d 932, 948 (9th Cir. 2002) (relying on standards set forth by the international criminal tribunals); *Kiobel*, 621 F.3d at 132–37 (stating that "the history and conduct of [international] tribunals is instructive" for deciding if corporations that allegedly aided and abetted the

substantial effect on the commission of the crime,[158] coupled with a mens rea test of knowledge, rather than purpose.[159] However, a recent controversy between different Appeals Chambers[160] shows that even outside the particular context of corporate complicity liability, courts struggle to apply these standards to aiding and abetting liability in cases of dual-purpose acts, i.e., where the act of assistance has the potential to contribute both to lawful and unlawful activities of the principal offender. This has clear similarities with the scenarios discussed in many of the corporate complicity cases under the ATS, such as the building of airstrips and all-weather roads in South Sudan.[161] While international criminal law does not provide for corporate liability,[162] it could well apply to the directors of corporations for aiding and abetting those crimes for which the ad hoc tribunals have jurisdiction.

The following discussion of two of the most recent decisions on aiding and abetting liability for dual purpose acts does not aim to assess the coherence of each approach in the context of the jurisprudence of the ad hoc international criminal tribunals and customary international law. Instead, it will limit itself to highlighting the reasons behind the different approaches to aiding and abetting liability and to assessing what can be learned from this for liability standards in the context of corporate complicity.

The Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) discussed the question of dual-purpose liability in *Perišić*.[163] Perišić was accused of having assisted in the commission of crimes carried out by the Army of the Republika Srpska (VRS) through various acts, including the large-scale

Nigerian government in committing human rights abuses were liable under the ATS).

158. Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgement, para. 235 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998); Prosecutor v. Du[ko Tadi] (Prosecutor v. Tadić), Case No. IT-94-1-T, Judgment, para. 688 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997); Prosecutor v. Blagojević, Case No. IT-02-60-A, Appeals Judgement, paras. 127, 134 (Int'l Crim. Trib. for the Former Yugoslavia May 9, 2007).

159. *See*, *e.g.*, *Furundžija*, Case No. IT-95-17/1-T, para. 245 (stating that "it is not necessary for the accomplice to share the *mens rea* of the perpetrator," but requiring only knowledge); Prosecutor v. Vasiljević, Case No. IT-98-32-A, Appeals Judgement, para. 102 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 25, 2004) (requiring "knowledge that the acts performed by the aider and abettor assist the commission of the specific crime of the principal"); Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, Appeals Judgement, paras. 162–63 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 24, 2000) ("[I]t is not necessary to show that the aider and abettor shared the *mens rea* of the principal, but it must be shown that the aider and abettor was aware of the relevant *mens rea* on the part of the principal."); Prosecutor v. Perišić, Case No. IT-04-81-A, Appeals Judgement, para. 48 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 28, 2013) (finding that the relevant requirement is "knowledge that assistance aids the commission of criminal acts, along with awareness of the essential elements of these crimes").

160. *Compare Perišić*, Case No. IT-04-81-A, para. 43 (reasoning in favor of an actus reus element of specific direction), *with* Prosecutor v. Šainović, Case No. IT-05-87-A, Appeals Judgement, para. 1649 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 23, 2014) (deciding that specific direction "is not an element of aiding and abetting liability under customary international law"), *and* Prosecutor v. Taylor, Case No. SCSL-03-01-A, Appeals Judgment, para. 486 (Special Court for Sierra Leone Sept. 26, 2013) ("[T]he Appeals Chamber concludes that 'specific direction' is not an element of the actus reus of aiding and abetting liability . . . ."). As *Šainović* does not provide a discussion of issues relevant to this Article, the discussion will focus on the decisions in *Perišić* and *Taylor*.

161. Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 249 (2d Cir. 2009).

162. *See* Ole Kristian Fauchald & Jo Stigen, *Corporate Responsibility Before International Institutions*, 40 GEO. WASH. INT'L L. REV. 1025, 1035–39 (observing that international law does not allow for corporate criminal liability).

163. *Perišić*, Case No. IT-04-81-A.

provision of military assistance, equipment, and supplies.[164] He, however, alleged that he had provided his assistance to support the (lawful) general war effort of the VRS, not to aid and abet the crimes it committed.[165] In *Perišić*, the Appeals Tribunal held that the actus reus of aiding and abetting liability not only required that the act have a substantial effect upon the perpetration of the crime, which is what most ICTY decisions limit their actus reus analysis to.[166] Rather, relying on the Appeals Chamber decision in *Tadić* which first defined the actus reus standard to be applied by the ICTY, *Perišić* held that it was also required that the act be "*specifically directed* to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.)."[167]

According to the Appeals Chamber, the combination of substantial effect and knowledge alone could not in all cases adequately ensure that liability would only attach when a sufficient link between the accomplice and the principal offense exists, particularly where the accused is geographically removed from the commission of the offense, or the assistance consists of a dual-purpose act.[168] In such cases, the relevant link cannot be established simply by showing that the assistance made a substantial contribution to the crimes committed. Rather, in addition, "evidence establishing a direct link between the aid provided by an accused individual and the relevant crimes committed by principal perpetrators is necessary."[169]

The Appeals Chamber explained that specific direction "may involve considerations that are closely related to questions of *mens rea* [and] . . . evidence regarding an individual's state of mind may serve as circumstantial evidence that assistance he or she facilitated was specifically directed towards charged crimes."[170] This pragmatic approach aims to achieve at the actus reus level what the generally accepted test of knowledge prevents at the mens rea level; i.e., it aims to make liability subject to the requirement that the act be motivated by assisting an unlawful act.[171]

164. *Id.* paras. 2–3, 54.

165. *Id.* para. 20.

166. For an overview, see Prosecutor v. Šainović, Case No. IT-05-87-A, Appeals Judgement, paras. 1621–26 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 23, 2014) (describing *Perišić* doctrine and subsequent applications).

167. *Perišić*, Case No. IT-04-81-A, para. 26 (citing Prosecutor v. Du[ko Tadi] (Prosecutor v. Tadić), Case No. IT-94-1-A, para. 229 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997)).

168. *Id.* para. 39.

169. *Id.* para. 44.

170. *Id.* para. 48.

171. In favor of this approach, see *id.* para. 4 (Meron, J. and Agius, J., separate opinion); Kai Ambos & Ousman Njikam, *Charles Taylor's Criminal Responsibility*, 11 J. INT'L CRIM. JUST. 789, 804–07 (2013); Kevin Jon Heller, *Why the ICTY's "Specifically Directed" Requirement Is Justified*, OPINIO JURIS (June 2, 2013), http://opiniojuris.org/2013/06/02/why-the-ictys-specifically-directed-requirement-is-justified/. For a critical analysis see, for example Christopher Jenks, *Prosecutor v. Perišić. Case No. IT-04-81-A*, 107 AM. J. INT'L L. 622, 625 (2013); Marco Milanovic, *The Limits of Aiding and Abetting Liability: The ICTY Appeals Chamber Acquits Momcilo Perisic*, EJIL: TALK! (Mar. 11, 2013), https://www.ejiltalk.org/the-limits-of-aiding-and-abetting-liability-the-ICTY-appeals-chamber-acquits-momcilo-perisic/; James G. Stewart, *Guest Post: The ICTY Loses its Way on Complicity – Part 1*, OPINIO JURIS (Apr. 3, 2013) http://opiniojuris.org/2013/04/03/guest-post-the-icty-loses-its-way-on-complicity-part-1/ [hereinafter Stewart (2013(2))]. *See also Perišić*, Case No. IT-04-81-A, para. 3 (Liu, J., dissenting in part).

Addressing a question that has a clear parallel in the context of corporate complicity through commercial transactions with regimes that commit gross human rights violations, the Appeals Chamber emphasized that providing assistance to an organization that solely engages in criminal aims and activities might allow an inference that the assistance is specifically directed towards the commission of crimes.[172] General assistance to an organization that carries out legitimate as well as criminal activities, on the other hand, cannot automatically be construed as being specifically directed towards the furtherance of the criminal activities.[173] While evidence regarding the volume of assistance and knowledge of the crimes might establish substantial effect and "serve as circumstantial evidence of specific direction,"[174] it "does not automatically establish a sufficient link between aid provided by an accused aider and abettor and the commission of crimes by principal perpetrators."[175] Instead, specific direction is only established if it is "the sole reasonable inference after a review of the evidentiary record as a whole."[176]

Based on its understanding of the relevant legal principles, the Appeals Chamber held that specific direction could not be shown on any count of aiding and abetting of which Perišić was accused.[177] Even in light of the magnitude of the assistance provided, "the types of aid provided to the VRS do not appear incompatible with lawful military operations."[178] That the assistance was specifically directed "towards VRS crimes is [therefore] not the sole reasonable inference that can be drawn from the totality of the evidence on the record."[179] The overall conclusion was that

> while Perišić may have known of VRS crimes, the VJ aid he facilitated was directed towards the VRS's general war effort rather than VRS crimes. Accordingly, . . . Perišić was not proved beyond reasonable doubt to have facilitated assistance specifically directed towards the VRS Crimes in Sarajevo and Srebrenica.[180]

Applying this standard to corporate complicity cases, it would not be sufficient to show that a corporation knowingly provided substantial assistance for the commission of human rights violations. Instead, a direct link between the act of assistance and the violations would need to be established, for which it would not be sufficient to demonstrate the quantity and significance of the assistance. Rather, the only reasonable inference from all relevant facts would have to be that the assistance was specifically meant to further the human rights violations.[181] In the context of the

172. *Perišić*, Case No. IT-04-81-A, para. 48.

173. *Id.* paras. 52–53.

174. *Id.* paras. 56, 68.

175. *Id.* para. 56.

176. *Id.* para. 68.

177. *Id.*

178. *Perišić*, Case No. IT-04-81-A, para. 65.

179. *Id.* para. 57.

180. *Id.* para. 69.

181. *Id.* para. 56 (citing Prosecutor v. Krajišnik, Case No. IT-00-39-A, Appeals Judgement, para. 202 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 17, 2009)); Prosecutor v. Stakić, Case No. IT-97-24-A, Appeals Judgement, para. 219 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 22, 2006).

South Africa case,[182] for example, it would not be sufficient that financing was provided at a very large scale to the regime and its security forces, or that numerous military vehicles were sold to the regime. Liability would rather depend on whether it could be demonstrated that the money was loaned, or the vehicles sold, in order to assist the regime with carrying out its atrocious crimes and not to assist it with exercising its legitimate governmental tasks. However large scale the assistance, and notwithstanding the likelihood that the assistance would in reality go towards unlawful ends, no complicity liability would exist, unless it can be shown that it can only have been meant to further unlawful ends.

Just like the U.S. courts deciding cases of corporate complicity liability, the ICTY was primarily motivated by the wish to limit aiding and abetting liability to situations in which a sufficiently close link between the act of assistance and the crime can be established. However, the means through which the restriction is achieved differs from the various approaches under the ATS. It is not relevant that the act of assistance is inherently harmful. Nor is a direct purpose to bring about the violations required as part of the mens rea. However, in practice, the actus reus element of specific direction might be comparable to the purpose element of mens rea, as it requires that the assistance be specifically aimed at furthering the crimes committed, and knowledge alone is not sufficient to infer specific direction.

A few months after *Perišić*, the Appeals Chamber of the Special Court for Sierra Leone (SCSL) disagreed with *Perišić* in its *Taylor* decision on the crucial point of whether specific direction is necessary to establish a sufficiently close link between the accomplice and the crime, particularly in cases of dual purpose assistance.[183] The Appeals Chamber of the SCSL insisted that this role could satisfactorily be assumed by the actus reus element of substantial effect[184] and that a case-by-case analysis of the necessary proximity of the accomplice to the crime was both necessary and sufficient to distinguish the culpable from the innocent.[185] Specifying further the criteria that should inform the actus reus analysis in each case, the Appeals Chamber suggested that:

> Merely providing the means to commit a crime is not sufficient to establish that an accused's conduct was criminal. Where the crime is an isolated act, the very fungibility of the means may establish that the accused is not sufficiently connected to the commission of the crime. Similarly, on the facts of a case, an accused's contribution to the causal stream leading to the commission of the crime may be insignificant or insubstantial, precluding a finding that his acts and conduct had a substantial effect on the crimes. In terms of the effect of an accused's acts and conduct on the commission of the crime through his assistance to a group or organisation, there is a readily apparent difference between an isolated crime and a crime committed in furtherance of a widespread and systematic attack on

182. *In re* S. African Apartheid Litig., 617 F. Supp. 2d 228 (S.D.N.Y. 2009).

183. Prosecutor v. Taylor, Case No. SCSL-03-01-A, Appeals Judgment, paras. 473–80 (Special Court for Sierra Leone Sept. 26, 2013).

184. *Id.* para. 390.

185. *Id.* paras. 390–92, 480.

> the civilian population. The jurisprudence provides further guidance, but it is the differences between the facts of given cases that are decisive.[186]

The Appeals Chamber thus embraces a case-by-case approach to the substantiality of the act of assistance. Of particular relevance for the discussion of corporate complicity liability is the suggestion that the focus of the liability analysis needs to be on the actual effect of the assistance on the crime, not on its potential effect based on the nature of the product or service provided.[187] This differs considerably from the approach to the actus reus element adopted in In re *South African Apartheid Litigation*.[188]

*Taylor* also highlighted the importance of the qualitative and not just quantitative effect of assistance, e.g., where the accomplice, as in the case of Charles Taylor, provides supplies at a particularly crucial time.[189] It further stressed that "an accused need not be the only source of assistance in order for his acts and conduct to have a substantial effect on the commission of the crimes."[190] Therefore, that only some of the supplies used for the commission of a crime can be attributed to the accomplice does not exclude liability but rather requires a thorough analysis of whether, taking into consideration the other sources of assistance, the accomplice's "acts and conduct had a substantial effect on the commission of the crimes."[191]

Even though Charles Taylor was physically remote from the crimes committed, the Appeals Chamber confirmed his conviction as an accomplice because of the extensive, sustained, and vital nature of the assistance, and the key impact it had on the commission of the crimes.[192] Moreover, "in addition to knowing of the [Revolutionary United Front (RUF)]/[Armed Forces Revolutionary Council (AFRC)]'s intent to commit crimes, Taylor was aware of the specific range of crimes being committed during the implementation of the RUF/AFRC's Operational Strategy and was aware of the essential elements of the crimes."[193] He consequently also acted with the relevant mens rea.[194]

The decision in *Taylor* shows that it is possible to determine the link between the assistance and the offense committed that is necessary to justify imposing aiding and abetting liability by combining an actus reus standard of substantial effect—to be established on a case-by-case basis—with a mens rea standard of knowledge. In providing some interesting reflections on the elements that guide a case-by-case determination of substantial effect, many of which could equally be relevant for the actus reus assessment in corporate complicity cases, it offers an interesting alternative to the approach adopted in In re *South African Apartheid Litigation*.

The *Taylor* decision has drawn criticism, though, in particular because of its "reliance on a vague 'substantial effect' requirement as the lone physical limitation

186. *Id.* para. 391.

187. *Id.* para. 394.

188. *In re* S. African Apartheid Litig., 617 F. Supp. 2d 228, 264–65 (S.D.N.Y. 2009) (placing importance on the nature of the product provided).

189. *Taylor*, Case No. SCSL-03-01-A, para. 514.

190. *Id.* para. 516.

191. *Id.*

192. *Id.* para. 520.

193. *Id.* para. 540.

194. *Id.*

on complicity liability"[195] and for leaving "undefined the distinction between innocent and culpable aid in cases where," unlike in *Taylor* itself, "the provision of assistance is not essential to the commission of an underlying offense."[196] This criticism is largely based on concerns specific to the context of international criminal law, which requires clarity in order not to lose legitimacy, and because individual criminal liability requires a high degree of legal certainty and foreseeability.[197]

In light of *Taylor*, an analysis of the actus reus of corporate complicity liability would require a thorough examination of all the factors of the individual case. Where, for example, money is provided to a regime that commits gross human rights violations, liability would depend on how substantially the money assisted in the violations carried out by the regime, in light of all the different income sources it had at its disposal. Similarly, regarding the sale of military vehicles, liability would depend on the systematic nature of the violations carried out with their help and how important the vehicles provided were for the commission of the offenses, among other factors. At the same time, given that no showing of direct assistance is necessary,[198] no link between the actual good sold and the violation carried out would need to be established. Thus, a defendant could not avoid liability by alleging that massacres carried out could not be linked to the precise vehicle sold, or the money lent.

The dispute between the two Appeals Chambers in *Perišić* and *Taylor*[199] closely reflects the debate of the feasible liability standard in the context of corporate complicity, in particular regarding whether a combination of substantial effect at the objective level, and knowledge at the subjective level, leads to boundless liability or whether, if taken seriously, these criteria together can strike an adequate balance between overinclusiveness and impunity. Just like in the context of corporate complicity under the ATS, the choice of liability standard seems to have depended largely on whether it was regarded to be unacceptable to provide knowing assistance only if it is clearly meant exclusively to be used for unlawful purposes, or whether assistance that has a dual purpose should result in liability if it is made with the knowledge that it will substantially further unlawful purposes.

## III. U.S. DOMESTIC CRIMINAL COMPLICITY CASES IN THE CONTEXT OF COMMERCIAL TRANSACTIONS

Important insights for the question of how to draw the line between legitimate business transactions and acts that trigger complicity liability can also be gained from

195. Recent Case, *Special Court for Sierra Leone Rejects "Specific Direction" Requirement for Aiding and Abetting Violations of International Law*—Prosecutor v. Taylor, 127 HARV. L. REV. 1847, 1851 (2014).

196. *Id.*

197. *Id.* at 1851, 1853–54.

198. *Taylor*, Case No. SCSL-03-01-A, paras. 357, 362.

199. The decision in *Prosecutor v. Šainović*, Case No. IT-05-87-A, Appeals Judgement (Int'l Crim. Trib. for the Former Yugoslavia Jan. 23, 2014), in which the Appeals Chamber of the ICTY held, in clear disagreement with *Perišić*, that the actus reus of aiding and abetting liability does not require a demonstration of specific direction, has not been discussed because the decision does not provide a detailed discussion of the implications of applying or rejecting a specific direction requirement on the facts of the case, but rather focuses its analysis on the legal question of the relevant standard. *Id.* paras. 1617–51.

U.S. domestic complicity cases. Quite a few courts had to tackle the problem of the limits of complicity liability, in the form of conspiracy, aiding and abetting, or both, where the act of assistance consisted of a commercial transaction.

In U.S. criminal law, it seems that, in principle, every act of assistance can qualify for aiding and abetting liability, without any requirement that it have a substantial effect on the commission of the crime.[200] This, of course, would potentially lead to very far-reaching liability, particularly in the commercial context, which might explain why courts put a lot of effort into finding principles according to which such liability can be limited.

A good starting point for an analysis of criminal complicity cases is provided by the influential *Peoni* case, which introduced a mens rea test of purpose to U.S. criminal complicity law. In *Peoni*, Judge Learned Hand made the often repeated statement that the various definitions of complicity liability "have nothing whatever to do with the probability that the forbidden result would follow upon the accessory's conduct."[201] Instead, "they all demand that he in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed. All the words used—even the most colorless, 'abet'—carry an implication of purposive attitude towards it."[202] This very closely resembles the purpose test applied by many courts in the context of ATS litigation and makes clear that mere knowledge, coupled with a relevant act of assistance, would not suffice to trigger complicity liability.

Of particular relevance for corporate complicity liability is *Falcone*, a case where the complicity charge was based on the accusation that the defendant had sold large amounts of sugar, i.e., a product that clearly has lawful uses and no inherently harmful qualities (at least none that are relevant in the context of the commission of crime) to customers who then sold it to illegal distilleries.[203] The question before the court was "whether the seller of goods, in themselves innocent, becomes . . . an abettor of . . . the buyer because he knows that the buyer means to use the goods to commit a crime."[204] The court issued a strong warning against an approach that attributes liability simply because someone "does not forego a normally lawful activity, of the fruits of which he knows that others will make an unlawful use."[205] Such a doctrine would carry a risk "of great oppression"[206] which can only be avoided by closely limiting the scope of liability to the cases in which the accomplice "in some sense promote[s] their venture himself, make[s] it his own, ha[s] a stake in its outcome."[207]

*Falcone* was sometimes relied on for the suggestion that legal sales can never amount to conspiracy, even if the seller knows that they will be used for illegal

200. 18 U.S.C. § 2(a) (2014); Baruch Weiss, *What Were They Thinking?: The Mental States of the Aider and Abettor and the Causer Under Federal Law*, 70 FORDHAM L. REV. 1341, 1347–48 (2002).

201. United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938).

202. *Id.*

203. United States v. Falcone, 109 F.2d 579, 580 (2d Cir. 1940) (describing how plaintiff sold large quantities of sugar to grocers who subsequently sold the sugar to illegal distilleries).

204. *Id.* at 581.

205. *Id.*

206. *Id.*

207. *Id.*

purposes.[208] However, this view was rejected by the U.S. Supreme Court in *Direct Sales*.[209] A registered drug manufacturer and wholesaler who conducted a nationwide mail-order business had supplied a registered physician with vast quantities of morphine sulphate, which the latter then illegally distributed to addicts.[210] The Court held that *Falcone* does not stand for a general proposition that "one who sells to another with knowledge that the buyer will use the article for an illegal purpose cannot, under any circumstances, be found guilty of conspiracy with the buyer to further his illegal end."[211] Liability would instead depend on the nature of the commodities sold. While the goods in *Falcone* were sugar, cans, and other such goods, and therefore articles of free commerce, the morphine sulphate sold in *Direct Sales* was a restricted commodity, "incapable of further legal use except by compliance with rigid regulations."[212] The significance of this difference was

> like that between toy pistols or hunting rifles and machine guns. All articles of commerce may be put to illegal ends. But all do not have inherently the same susceptibility to harmful and illegal use. Nor, by the same token, do all embody the same capacity, from their very nature, for giving the seller notice the buyer will use them unlawfully. Gangsters, not hunters or small boys, comprise the normal private market for machine guns. So drug addicts furnish the normal outlet for morphine which gets outside the restricted channels of legitimate trade.[213]

For the Court, the relevance of the nature of the goods was twofold: to make "certain that the seller knows the buyer's intended illegal use . . . [and] to show that by the sale he intends to further, promote and cooperate in it."[214] Regarding the relationship between intent and knowledge, the Court observed that even though intent "is not identical with mere knowledge that another purposes unlawful action, it is not unrelated to such knowledge. Without the knowledge, the intent cannot exist."[215] Whether goods have an inherent capacity for harm or have their sale restricted "makes a difference in the quantity of proof required to show knowledge that the buyer will utilize the article unlawfully."[216] However, "not every instance of sale of restricted goods, harmful as are opiates, in which the seller knows the buyer intends to use them unlawfully, will support a charge of conspiracy."[217] This would rather depend on additional facts, such as whether a single transaction rather than a

208. *See* United States v. Piampiano, 271 F.2d 273, 274 (2d Cir. 1959) (noting appellant's reliance on *Falcone* for the proposition that "a mere supplier, even one aware of the illegal purpose of his purchaser, cannot be held as a co-conspirator").

209. *See* Direct Sales Co. v. United States, 319 U.S. 703, 714–15 (1943) (holding that a registered drug manufacturer participated in a conspiracy to illegally distribute drugs when he frequently sold a physician large quantities of morphine sulphate by mail with the intent to further the physician's illegal drug sales, even though the sales were facially lawful).

210. *Id.* at 704–05.

211. *Id.* at 709.

212. *Id.* at 710.

213. *Id.*

214. *Id.* at 711.

215. *Direct Sales*, 319 U.S. at 711.

216. *Id.*

217. *Id.* at 712.

continuous business relationship was at issue, and whether it involved "nothing more on the seller's part than indifference to the buyer's illegal purpose and passive acquiescence in his desire to purchase."[218]

The Court concluded from the aggressive sales practices of the supplier of the morphine sulphate and the long cooperation with the physician who supplied this drug illegally to addicts that the defendant not only knew and acquiesced, but moreover had "a 'stake in the venture' which, even if it may not be essential, is not irrelevant to the question of conspiracy,"[219] the stake being "making the profits which it knew could come only from its encouragement of Tate's illicit operations."[220]

Liability thus followed from a combination of different factors, ranging from the nature of the goods as restricted so that they could not be sold on the free market, to the sales practices and the duration of the buyer/seller relationship. In addition to knowledge, intent was necessary which could not be inferred from knowledge alone, but from knowledge coupled with particular features of the act of assistance, such as its continuous nature.[221] The nature and intensity of the act of assistance is thus relevant primarily for an inference of the mens rea in the form of knowledge and intent, but is not regarded as fulfilling the function of weeding out, already at the actus reus level, acts that simply are not sufficiently pertinent to qualify as criminally relevant assistance with the principal offense. It is not clear, on the other hand, what level of knowledge would be required to infer intent where the goods at issue were neutral and/or unrestricted.

For corporate complicity liability, this would have the implication that liability might, just like the court in In re *South African Apartheid Litigation* suggested,[222] be highly influenced by the nature of the goods and services as harmless, neutral or unrestricted, as opposed to inherently harmful or restricted by law. However, the impact of this does not materialize at the actus reus level. Instead it influences the quantity of proof required to establish knowledge of and intent regarding the unlawful use that will be made of the goods provided, which can be inferred much more easily where the nature of the good invites such a use. However, even in the case of restricted or inherently harmful goods, a case-by-case analysis is necessary to determine the actual existence or absence of knowledge and intent. Given that intent requires having a stake in the venture,[223] corporate complicity liability would then depend on questions such as whether the corporation benefits from the successful commission of the principal offense. While this might exceptionally be the case in situations such as that of *Rio Tinto*,[224] in most cases of corporate complicity in human rights violations it will be difficult to satisfy this criterion. For example, in In

218. *Id.* at 712 n.8.

219. *Id.* at 713.

220. *Id.*

221. *See Direct Sales*, 319 U.S. at 711, 713 (stating that "[w]hile [intent] is not identical with mere knowledge that another purposes unlawful action, it is not unrelated to such knowledge," and when there is "prolonged cooperation" there is "no legal obstacle to finding that [the party] not only knows and acquiesces, but joins both mind and hand" with the principal to commit the crime).

222. *In re* S. African Apartheid Litig., 617 F. Supp. 2d 228, 258–59 (S.D.N.Y. 2009).

223. *See Direct Sales*, 319 U.S. at 713 (finding allegations were sufficient to support theory of liability because defendant had acquired a stake in the venture).

224. Sarei v. Rio Tinto, PLC, 671 F.3d 736, 766 (9th Cir. 2011) (Schroeder, J., plurality opinion) (discussing allegations that Rio Tinto solicited war crimes to protect its economic interests), *vacated*, 133 S. Ct. 1995 (2013).

re *South African Apartheid Litigation*, for the corporations' business interests it will have been irrelevant whether or not the military committed extrajudicial killings with the vehicles sold.[225] This might be different in cases where sales of particular goods soar because of the human rights violations for which they are needed, for example where the demand for weapons depends on sustaining the conflict or repression in a given country, or where goods are specifically tailored for the commission of violations, such as the computer programs that were designed to implement apartheid policies.

In light of *Falcone* and *Direct Sales*, some courts answered the question that the court in *Blankenship* aptly summarized as "Where does the 'mere' sale end, the conspiracy begin?"[226] by stating that the supply of "goods, innocent in themselves . . . to a purchaser who, to the supplier's knowledge, intends to and does use them in the furtherance of an illegal conspiracy"[227] does not cross the complicity threshold.[228] In *Blankenship*, however, a case in which one of the defendants leased his house trailer to a group that was to use it to cook methamphetamine, accepted a down-payment for the lease but then got cold feet and dropped out of the agreement,[229] the court was not entirely convinced by the approach adopted in those two cases. While "[o]ne may draw a line, as *Falcone* and *Direct Sales* did, between knowledge of other persons' crimes and intent to join them,"[230] the court expressed doubts that the criteria to determine the circumstances in which an inference of intent to join was permissible were delineated clearly enough by the courts.[231] It suggested instead that a more functional approach would be to ask "whether the imposition of liability on transactions of the class depicted by the case would deter crime without adding unduly to the costs of legitimate transactions."[232] Thus, the court moved the focus of the analysis from the mens rea of wishing the crime to succeed to policy considerations of deterrence and a cost/benefit assessment of imposing liability.

This modified approach built on several decisions in which courts applied a mens rea test of purpose but centered the liability analysis on the deterrence of crime. The question of deterrence lay, for example, at the heart of the discussions of hypothetical complicity scenarios related to prostitution, presented in slight variation in different decisions. *Fountain*, for example compared two hypothetical cases:

> In the first, a shopkeeper sells dresses to a woman whom he knows to be a prostitute. The shopkeeper would not be guilty of aiding and abetting prostitution unless the prosecution could establish the elements of Judge

225. *See* In re *S. African Apartheid Litig.*, 617 F. Supp. 2d at 243 (discussing the sale of military vehicles to the South African government).

226. United States v. Blankenship, 970 F.2d 283, 286 (7th Cir. 1992).

227. United States v. Campisi, 306 F.2d 308, 310 (2d Cir. 1962) (quoting United States v. Tramaglino, 197 F.2d 928, 930 (2d Cir. 1952)).

228. *Id.* at 310–11.

229. *Blankenship*, 970 F.2d at 284.

230. *Id.* at 286.

231. *See id.* (arguing that differentiating between a mere sale of goods and participation in a conspiracy by drawing a line between knowledge of other persons' crimes and intent to join them is problematic because it restates the elements of a conspiracy without indicating "when an inference of intent to join is permissible").

232. *Id.* at 287.

> Hand's test. Little would be gained by imposing criminal liability in such a case. Prostitution, anyway a minor crime, would be but trivially deterred, since the prostitute could easily get her clothes from a shopkeeper ignorant of her occupation. In the second case, a man buys a gun from a gun dealer after telling the dealer that he wants it in order to kill his mother-in-law, and he does kill her. The dealer would be guilty of aiding and abetting the murder. This liability would help to deter—and perhaps not trivially given public regulation of the sale of guns—a most serious crime. We hold that aiding and abetting murder is established by proof beyond a reasonable doubt that the supplier of the murder weapon knew the purpose for which it would be used.[233]

Thus, deterrence considerations made the court move from a standard of purpose to one of knowledge if commercial transactions assist with the commission of the most serious crimes: "One who sells a gun to another knowing that he is buying it to commit a murder, would hardly escape conviction as an accessory to the murder by showing that he received full price for the gun."[234] The fact that the act of assistance will in all likelihood have been primarily, if not exclusively, motivated by business considerations is clearly regarded to be irrelevant in this scenario. Under this approach, a mens rea test of knowledge should be sufficient in corporate complicity cases, given the seriousness of the human rights violations that are at stake in these cases.

In *Giovannetti*, the court further developed the policy considerations raised in *Fountain*, and approached the question of triviality slightly differently. Changing the example to the sale of an address book to a prostitute, the court observed that the seller

> can hardly be said to be seeking by his action to make her venture succeed, since the transaction has very little to do with that success and his livelihood will not be affected appreciably by whether her venture succeeds or fails. And, what may well be the same point seen from another angle, punishing him would not reduce the amount of prostitution—the prostitute, at an infinitesimal cost in added inconvenience, would simply shop for address books among stationers who did not know her trade.[235]

The observation that deterrence would not be served by punishing the seller of the address book, as it could easily be obtained elsewhere from an unsuspecting seller, is interesting and goes back to the question of the free availability of the goods on the market, raised by the Supreme Court in *Direct Sales*.[236] However, decreasing crime generally is not the only goal of deterrence. At the individual level, deterrence aims to discourage individuals from committing criminal acts with the relevant mens rea.[237] To exclude an act from any form of liability on the basis that someone else

233. United States v. Fountain, 768 F.2d 790, 798 (7th Cir. 1985).

234. *Id.* (quoting Backun v. United States, 112 F.2d 635, 637 (4th Cir. 1940))

235. United States v. Giovanetti, 919 F.2d 1223, 1227 (7th Cir. 1990).

236. *See* Direct Sales Co. v. United States, 319 U.S. 703, 710 (1943) (discussing the relevance to the analysis of "articles of free commerce," such as toy pistols).

237. Weiss, *supra* note 200, at 1484.

would have done the same, with or without the relevant mens rea, completely ignores the individual aspect of deterrence and would result in unjustified impunity of those who themselves meet the applicable liability criteria. The relevant question should therefore not be whether the assistance would have easily been available from other sources, but rather whether or not the act of assistance, if carried out with the relevant mens rea, was substantial enough for the commission of the crime to warrant the accomplices criminal liability.

If, as *Giovannetti* suggests, it was decisive whether the seller's livelihood depended on the success of the principal offense, this would presumably also exclude the liability of the seller of the gun in the *Fountain* example, for it can hardly be relevant to the seller whether or not the buyer commits murder with the gun, uses it for lawful purposes, or does not use it at all. More relevant seems to be the court's statement that "the transaction has very little to do" with the success of the crime,[238] which points towards the requirement of a link between the assistance rendered and the principal offense. In all of these cases this issue was regarded as a mens rea consideration. Only where a sufficient link exists between the assistance and the crime can it be inferred that by rendering the assistance the accomplice desired its success.

*Blankenship* brought yet another consideration into the discussion of the prostitution examples. The court commented that to hold the stationer in the prostitution example liable as an accomplice would not significantly deter prostitution, but "raise the costs of legitimate business, for it would either turn sellers into snoops (lest they sell to the wrong customers) or lead them to hire blind clerks (lest they learn too much about their customers); either way, the costs of business would rise, and honest customers would pay more."[239] It is not, however, clear why complicity liability would create the risk of turning businesspeople into snoops and thereby raise the costs of legitimate business transactions, as none of the liability standards under discussion in the criminal law context impose on businesses the obligation to find out the motivations behind the commercial transactions of their customers. As the court in *Blankenship* itself explains, "[b]ecause a lessor almost inevitably knows his tenant's business, the imposition of a criminal penalty is likely to deter but not to raise the costs of legitimate transactions."[240] If liability depends on actual knowledge, which seems to be the minimum mens rea standard in criminal complicity cases, the imposition of liability would not raise the costs of legitimate transactions while potentially deterring those that further crime.

In *Irwin*, though not in the context of assistance in the form of commercial transactions, the court provided an interesting analysis of the interrelatedness of the various elements of complicity liability. The court highlighted that in cases "where the evidence of the defendant's intent must be inferred from the aid given,"[241] the act and intent elements of complicity liability "really merge and our review focuses on whether the aid given was sufficient to support the inference of intent to further the crime."[242] The court suggested that "[b]ecause the aid that the defendant gave often

238. *Giovanetti*, 919 F.2d at 1227.

239. United States v. Blankenship, 970 F.2d 283, 287 (7th Cir. 1992).

240. *Id.*

241. United States v. Irwin, 149 F.3d 565, 572 (7th Cir. 1998).

242. *Id.*

pulls double duty . . . as direct evidence of affirmative assistance and circumstantial evidence of intent,"[243] a case might be made to modify the analysis by focusing instead "on the amount of assistance knowingly given."[244] It then discussed in some detail the implications of removing any requirement for desire to make the offense succeed from the mens rea of complicity liability and commented that it was unlikely that someone would provide material assistance without any desire that the crime succeed.[245] Instead, "[m]aterial assistance deliberately given is *itself* evidence of intent."[246] This differs fundamentally from *Peoni* and *Falcone,* as it can hardly be said that every accomplice who provides deliberate assistance has a stake in the venture.

The court in *Irwin* was reluctant to drop the intent element completely and rather suggested that liability would be justified either where material assistance was rendered knowingly, or where minor assistance was provided with intent.[247] Regarding the threshold the act of assistance must meet to justify an inference of intent, the court ruled out that trivial assistance could support such an inference, while critical assistance clearly would,[248] and emphasized that "[t]here is no magic formula to easily determine on which side of the sufficiency line the evidence in a case falls."[249] Thus, a case-by-case analysis would be necessary to determine whether, in any given case, the assistance was sufficiently important to justify an inference of intent.

The analysis of these cases shows that in domestic criminal law cases, U.S. courts apply a mixture of approaches in order to limit complicity liability for commercial acts that assist with the commission of criminal offenses. Even though, in principle, any act of assistance seems to be sufficient to satisfy the actus reus requirement of complicity liability, without having to meet a substantiality or materiality threshold, courts generally agree that the application of such a test would lead to too far-reaching liability in the context of commercial transactions. Since the influential *Peoni* decision, most courts seem to have accepted that intent in these cases cannot simply be inferred from knowing participation, but instead requires a showing that the accomplice have a stake in the venture. This, however, has caused its own problems, which courts try to overcome in different ways. Some courts shift the focus of the analysis to questions of deterrence and the costs of imposing liability on ordinary commercial activities;[250] others consider the impact of the substantial or trivial nature of the goods and the transactions on inferring both knowledge and intent.[251] The seriousness of the principal offense is another consideration.[252]

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. *Irwin*, 149 F.3d at 572–73

248. *Id.* at 573.

249. *Id.*

250. United States v. Blankenship, 970 F.2d 283, 287 (7th Cir. 1992).

251. *See* Direct Sales Co. v. United States, 319 U.S. 703, 710–15 (1943) (relying on distinctions between restricted goods that are inherently susceptible to harmful or illegal use and "normal goods" and the distinction between isolated, small-scale sales and recurring large-scale sales to find that suppliers engaging in massive sales of goods that are inherently susceptible to illegal use likely acted with intent).

252. *See* United States v. Fountain, 768 F.2d 790, 798 (7th Cir. 1985) (suggesting that courts may take into account the seriousness of the offense when determining whether a supplier is criminally liable for aiding and abetting).

## IV. ASSESSING THE DIFFERENT LIABILITY STANDARDS

The preceding overview of case law from different contexts shows that the attribution of secondary liability in the context of acts that are facially lawful or could serve both lawful and unlawful purposes is complex and highly controversial. The one clear tendency that all approaches share is that of searching for criteria according to which to limit liability to cases where a sufficient link between the assistance and the principal offense can be established. Fundamental differences, however, materialize when it comes to the question of what link to regard as necessary and sufficient to justify the imposition of complicity liability in the context of commercial transactions. The answer to this question seems to depend largely on each court's view of how the various interests and policy considerations should be balanced, and, in particular, under what circumstances an otherwise legitimate act turns into an unlawful act of assistance in a third party's crimes or human rights violations.

As has become obvious, the various approaches to complicity liability under the ATS and U.S. domestic criminal law are highly influenced by the nature of the underlying act or transaction as commercial or business related. However, unless commercial acts are per se exempt from complicity liability, which is not an approach favored by any of the courts dealing with corporate complicity cases, to identify the underlying act as commercial can and should be only the starting point of the discussion, focusing the analysis on whether this nature of the act justifies specific liability standards, and if so, which.

> While agreement exists that carrying out ordinary business transactions or other lawful acts with the knowledge that they might assist in gross human rights violations or crimes, without more, should not give rise to liability, differences arise with regard to what more is required to justify the imposition of aiding and abetting liability. This question has been answered differently by different courts. One approach combines an actus reus test of substantial effect with a mens rea requirement of knowledge. Within that approach, differences exist as to whether the question of substantial effect should be determined on a case-by-case basis,[253] by adopting an approach that focuses on the nature of the assistance,[254] or by requiring that the act be specifically directed to the commission of unlawful acts.[255]

Closely linked to the approach in *Perišić*, other courts restrict liability primarily at the mens rea level and require a mens rea of primary purpose[256] or intent in the form of having a stake in the success of the principal offense.[257] The focus in *Doe I v. Nestle* on the fact that the defendant corporations directly benefited from the human

253. Prosecutor v. Taylor, Case No. SCSL-03-01-A, Appeals Judgment, paras. 368–70 (Special Court for Sierra Leone Sept. 26, 2013).

254. *In re* S. African Apartheid Litig., 617 F. Supp. 2d 228, 258–59 (S.D.N.Y. 2009).

255. Prosecutor v. Perišić, Case No. IT-04-81-A, Appeals Judgement, para. 36 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 28, 2013).

256. Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 258–59 (2d Cir. 2009).

257. United States v. Falcone, 109 F.2d 579, 581 (2d Cir. 1940); United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938).

rights violations[258] points in a similar direction. Other courts to some extent combine the evaluation of actus reus and mens rea elements and make the evidence that is necessary to infer knowledge and intent at the mens rea level dependent on the nature of the act.[259]

It becomes clear that the commercial nature of the act of assistance has an impact on approaches both to the actus reus and mens rea in complicity cases. Given that the liability standards, at the actus reus and mens rea levels (and combined), play the role of determining the "more" that is necessary to turn a commercial activity into an act of corporate complicity, it is important to be clear about the implications of the different approaches that can be adopted in this respect. If the "more" is to be found at the actus reus level, it would have to embody an activity that goes beyond making a mere commercial transaction. In a mens rea–based interpretation, on the other hand, the "more" would be the mental element with which the commercial transaction was carried out. Where both elements are combined, it might well be that stricter actus reus standards can be balanced out by relaxing the mens rea standard or vice-versa.

### *A. The Actus Reus Analysis*

In the context of commercial transactions, no courts seem to adopt the approach that the knowing provision of any assistance, however trivial, results in complicity liability. Instead, all courts that apply a knowledge standard of mens rea require some form of materiality or substantiality of the act of assistance for the commission of the principal offense. Indeed, the triviality of the assistance in the prostitution examples given by U.S. courts in the domestic criminal complicity context makes clear why assistance that has no more than a minimal effect on the commission of the offense should not result in liability.

However, in the context of commercial transactions, particularly the provision of goods or services that might have legitimate as well as illegitimate uses, to determine the materiality or substantial effect of assistance can be difficult.[260] This is because in many cases no direct link between the assistance and the violations can easily be established, for example where fungible goods are provided by several corporations to a regime that might use them for lawful as well as unlawful purposes. It will then often be impossible to determine whose goods were used for violations and whose for lawful purposes. To determine with precision at which point assistance crosses the threshold from the trivial to the substantial also might not always be obvious.

The court in In re *South African Apartheid Litigation* tried to overcome these difficulties by making the decision of whether or not assistance has a substantial effect on the commission of human rights violations dependent on objective characteristics of the act of assistance.[261] In cases in which the act of assistance

258. Doe I v. Nestle USA, Inc., 766 F.3d 1013, 1024 (9th Cir. 2014).

259. Direct Sales Co. v. United States, 319 U.S. 703, 711–12 (1943).

260. It has even been argued in this context that this "intermix of both socially injurious and neutral uses frustrates any fair and rationale, [sic] let alone evidentiary [sic] feasible, imputation of consequences to remotely involved business actors who contributed to the causal chain of events long before the actual commission of a core crime." Burchard, *supra* note 57, at 938.

261. *In re* S. African Apartheid Litig., 617 F. Supp. 2d 228, 257–58 (S.D.N.Y. 2009).

consists of the lawful provision of commercial goods or services that do not have inherently harmful qualities and are not the direct means through which the violations are carried out, the actus reus of aiding and abetting liability is not met, so that such acts are exempt from complicity liability.[262] While this question was not expressly addressed by the court, this would presumably apply even if such an act was motivated by the purpose of bringing about gross human rights violations. However, a business activity can no longer be regarded as neutral and exempt from liability if it consists of providing the direct means through which a violation is carried out, if the goods or services provided are inherently harmful, or where goods or services are specifically tailored to assisting the business partner with the violations.[263] Such acts, combined with knowledge that the activities have a substantial effect on the commission of the violations, pass the complicity threshold.[264]

To limit the actus reus in cases of commercial activities in such an absolute way might have the advantage of providing a clear-cut approach which removes the need to develop more refined criteria according to which the substantial effect of commercial activities on gross human rights violations can be established.[265] However, while it is necessary to find a principled way to distinguish between acceptable business activities and those that give rise to complicity liability, and to avoid casting the net so widely that corporations are held indiscriminately liable for all offenses committed by regimes with which they do business, the approach to the actus reus of aiding and abetting liability adopted in In re *South African Apartheid Litigation* raises several fundamental problems.[266]

In eliminating any need to perform a case-by-case analysis of the effect of the act of assistance on the violation, and of the closeness of the defendant to it, this approach shields certain acts (such as the sale of goods that are not inherently harmful but might potentially be used for harmful purposes) automatically from liability. A corporation could, for example, escape liability by selling only commercial, but not military, vehicles to a regime, with the knowledge or even intent that they will be used to commit gross human rights violations. At the same time, it seems that the inherently harmful nature of the goods or services in and of itself gives rise to an assumption of substantial effect, whether or not this effect actually materializes in the individual case.[267] This is an anomaly in both criminal and civil

262. *Id.*

263. *Id.* at 257–59.

264. *Id.* at 257–59, 262.

265. Indeed, this approach seems to have motivated the South African government to change its mind. After the actus reus standard had been limited in this way, it withdrew its objection to the apartheid litigation in the United States. Jeff Radebe, South Africa's Minister of Justice, commented that because the court dismissed the claims that were considered to be based solely on the fact that the defendant corporation had been doing business with the apartheid regime, and upheld only those claims that referred to corporate aiding and abetting in the commission of serious crimes under international law, its concerns no longer persisted. Letter from Jeffrey Radebe, Minister of Justice and Constitutional Dev., Republic of S. Afr., to Shira A. Scheindlin, Judge, U.S. Dist. Court for the S. Dist. of N.Y. (undated), *available at* http://www.khulumani.net/khulumani/documents/file/12-min.justice-jeff-radebe-letter-to-us-court-2009.html.

266. For an in-depth discussion, see generally Michalowski, *No Complicity Liability*, *supra* note 98, at 458–70.

267. *See id.* at 470 ("On the other hand, the approach might also have unfair consequences by

law, where the attribution of responsibility usually depends on an analysis of the facts of each case, not on a categorical approach that excludes liability for a whole species of acts based on their abstract nature.

It might well be that military vehicles have a more substantial effect on the commission of violations, that a causal link between the sale and the violation can be shown more easily in that case, or that the necessary mens rea might be more easily discerned. However, while it might be easier to link vehicles with extrajudicial killings if they have a military customization that makes their use for harmful purposes more likely while such a link might be more difficult to establish where vehicles do not have such specifications, it is doubtful that the imposition of liability is justified by the abstract nature of the act or product, rather than by its effect on the commission of the violations that were carried out. Where the impact of the sale on the violations is the same, it is difficult to see on what grounds the two sales should be distinguished at the actus reus level, the function of which is to establish the necessary link between the act of assistance and the commission of the principal offense.[268] In the example of the sale of vehicles, it should instead be necessary to demonstrate in each case that the sale of a military vehicle had a substantial effect on the commission of the crimes, or, conversely, that the sale of ordinary vehicles did not. Otherwise there is a risk of both under- and overinclusiveness.

A risk of underinclusiveness would exist because a considerable gap in corporate accountability would be created, encouraging, or at least providing no incentive to refrain from, business transactions that facilitate gross human rights violations other than by providing the direct means for their commission. Such an approach would imply that it is acceptable and legitimate for corporations to provide business partners with inherently neutral goods or services, if they know, or potentially even wish, that they make a substantial contribution to the commission of gross human rights violations.

Such an approach might also have unfair consequences of over-inclusiveness by presuming causation where inherently dangerous goods are provided to a regime that commits grave human rights violations, even if the transaction was not prohibited and might even have been politically encouraged, without any showing that the provision of the product, did, in fact, have a substantial effect on the commission of human rights violations. According to the court in In re *South African Apartheid Litigation*, "[a]lthough such goods may have legitimate uses, that issue is addressed by the *mens rea* element."[269] At first sight it might seem odd that the use of a product should be a mens rea rather than an actus reus concern. The court must have had in mind an assumption that the provision of inherently harmful products satisfies the actus reus requirement. Complicity liability can then only be avoided if the corporation demonstrates that it was unaware of the harmful use the business partner would make of the inherently harmful products. The fine line

presuming causation where inherently dangerous goods are provided to a regime that uses them to commit grave human rights violations.").

268. Norman Farrell, *Attributing Criminal Liability to Corporate Actors: Some Lessons from the International Tribunals*, 8 J. INT'L CRIM. JUST. 873, 891 (2010) (observing that "there does not seem to be any principled legal reason to preclude contributions such as funds, which may substantially contribute, but with more links, in the causal chain between the assistance and the crime").

269. *In re* South African Apartheid Litig. 617 F. Supp.2d 258, n.157.

between acceptable business transactions and complicity liability would rest on mens rea alone in those cases.

A categorical approach to the actus reus as suggested in In re *South African Apartheid Litigation* thus leads to arbitrary results. The imposition of liability should instead depend on a thorough analysis in each case in which complicity in gross human rights violations is alleged. This was also the conclusion of the Appeals Chamber of the SCSL in *Taylor,* which regarded a case-by-case approach for determining the substantial effect of an act of assistance as both necessary and sufficient in order to establish the relevant link between the assistance and the principal offense.[270] The tribunal rejected a categorical approach to determining the actus reus of aiding and abetting liability, even in cases of dual purpose acts that might include commercially-based activities.[271] Unlike the approach in In re *South African Apartheid Litigation*, the tribunal in *Taylor* held that the focus of the analysis had to be on the specific effect of the assistance in each case, not on an abstract assessment of its dangerousness.[272] It rightly pointed out that "perfectly innocuous items, such as satellite phones, could be used to assist the commission of crimes, while instruments of violence could be used lawfully. The distinction between criminal and non-criminal acts of assistance is not drawn on the basis of the act in the abstract, but on its effect in fact."[273] The focus of the liability analysis therefore needs to be on the actual effect of the assistance on the crime, not on its potential effect based on the nature of the product or service provided.

Instead of developing a checklist of factors that need to be met, or identifying situations in which liability is always excluded, the SCSL made clear that the analysis would always have to take account of the circumstances as a whole, as the culpability of an accomplice can only be determined based on an assessment of all relevant factors in each case.[274] Where the assistance was provided to a group or organization, for example, the tribunal in *Taylor* did not conclude that the actus reus of aiding and abetting could not be satisfied unless the group exclusively dedicated itself to pursuing criminal purposes. Rather, this depends on the circumstances, and one important factor for finding substantial effect might be that the assistance was given in the context of widespread and systematic crimes, rather than one isolated criminal act.[275] Nevertheless, the court in *Blankenship* rightly emphasized that "[s]ometimes a single transaction extends over a substantial period and is the equivalent of enduring supply,"[276] as in *Giovannetti*, which involved premises leased for the purpose of illegal gambling.[277] This confirms the main message in *Taylor* that in the end, the overall assessment will depend on the circumstances of each case.

Where the assistance provided was not the only source of assistance the principal offender obtained, the effect of the accomplice's act on the commission of

270. Prosecutor v. Taylor, Case No. SCSL-03-01-A, Appeals Judgment, paras. 390–91 (Special Court for Sierra Leone Sept. 26, 2013).

271. *Id.* paras. 393–95.

272. *Id.* para. 395.

273. *Id.*

274. *Id.* paras. 390–91.

275. *Id.* para. 391.

276. United States v. Blankenship, 970 F.2d 283, 287 (7th Cir. 1992).

277. United States v. Giovanetti, 919 F.2d 1223, 1225 (7th Cir. 1990).

the crimes overall is regarded as crucial. It is consequently important to assess in each case the effect of the assistance on the crime, based on the quantity and quality of the assistance, including its timing and whatever other factors might be relevant in each case. As highlighted in *Perišić*, substantial effect can, for example, be established based on the volume of assistance.[278] And in his dissent in *Perišić*, Judge Liu opined that substantial effect depends on factors such as "the magnitude, critical importance, and continued nature of the assistance."[279]

In light of *Taylor*, an analysis of the actus reus of corporate complicity liability would require a thorough examination of all the factors of the individual case. Where, for example, money is provided to a regime that commits gross human rights violations, liability would depend on how substantially the money assisted the violations carried out by the regime, in light of all the different income sources it had at its disposal. Similarly, regarding the sale of military vehicles, liability would depend on the systematic nature of the violations carried out with the vehicles' help and how important the vehicles provided were for the commission of the offenses, among other factors. At the same time, given that no showing of direct assistance is necessary, no link between the actual goods sold and the violation carried out would need to be established, so a defendant could not avoid liability by alleging that massacres carried out could not be linked to the precise vehicle sold, or the money lent.

Even though the definition of "substantial effect" on a case-by-case basis is clearly not easy and straightforward, such an analysis nevertheless provides the most convincing way to establish liability at the actus reus level. Furthermore, it cannot easily be avoided, as it is even relevant in determining whether the mens rea requirement is satisfied if the purpose standard is applied, since many courts link the inference of purpose to the substantiality of the assistance. Accordingly, even the adoption of a heightened mens rea standard of purpose does not make the potentially complicated substantiality analysis obsolete, unless, as in some ATS cases, courts apply it in such a way that a finding of purpose is effectively excluded in cases in which the act of assistance was a commercial or business-related activity that was primarily motivated by business interests.

### *B. The Mens Rea Analysis*

Some courts in ATS litigation[280] and some U.S. criminal courts[281] impose restrictions at the mens rea level and regard a particularly blameworthy mental state in the form of purpose as the "more" that needs to be present in order to turn an otherwise lawful and acceptable business activity into a reprehensible act of complicity. The ICTY Appeals Chamber's decision in *Perišić* applied—though at the actus reus level—a comparable approach, in cases of dual-purpose acts that can only result in liability if they were rendered with the aim of furthering unlawful

278. Prosecutor v. Perišić, Case No. IT-04-81-A, Appeals Judgement, paras. 56, 68 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 28, 2013).

279. *Id.* para. 9 (Liu, J., dissenting in part).

280. *E.g.*, Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 258–59 (2d Cir. 2009).

281. *E.g.*, United States v. Falcone, 109 F.2d 579, 581 (2d Cir. 1940); United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938).

purposes.[282] In order to assess whether this is the test according to which liability for corporate complicity in human rights violations should be determined, it is important to be clear about the reasons behind and the implications of such an approach.

### 1. The Relevance of the Nature of the Act for Defining and Inferring Purpose

The commercial nature of the act of assistance is relevant both as a justification for imposing a mens rea standard of purpose and for how the purpose test is applied in individual cases. Under the ATS, courts are prepared to infer purpose to facilitate violations carried out by the principal from the knowing act of providing assistance that is either in itself unlawful or goes beyond a mere business activity, even when profit is the primary aim.[283] On the other hand, they refuse to infer purpose from engagement in ordinary commercial activities undertaken with the knowledge that they will assist the commission of human rights violations.[284] Indeed, the fact that these activities are usually business motivated speaks against an inference of purpose for these courts.[285]

Courts that apply a purpose test recognize that the purpose to facilitate the commission of the offense can, and in fact often must, be inferred from the act of assistance itself or from the surrounding circumstances.[286] Short of a confession with regard to the accomplice's mens rea, the mental element will have to be established based on circumstantial evidence, which in most cases will make it necessary to resort to the aider and abettor's knowledge with regard to the consequences of the act of assistance.[287] As courts are not prepared to infer purpose from the knowing undertaking of ordinary commercial transactions, this approach largely seems to exclude any corporate complicity liability outside of already objectively unlawful business transactions.

An exception to this approach can be found in *Doe I v. Nestle*, where the court was prepared to infer purpose even though the act of assistance—providing assistance to cocoa farmers—was not unlawful, and was carried out with the primary purpose of profit and not with the desire to harm the children who worked on these farms under conditions of slavery.[288] Thus, in *Nestle*, just as in *Talisman*,[289] the aim pursued by the corporation was that of enhancing its profits, even if that meant assisting the commission of gross human rights violations. The court nevertheless

282. *Perišić*, Case No. IT-04-81-A, para. 44.

283. Sarei v. Rio Tinto, PLC, 671 F.3d 736, 766–67 (9th Cir. 2011) (Schroeder, J., plurality opinion), *vacated*, 133 S. Ct. 1995 (2013); *In re* Chiquita Brands Int'l, Inc., 792 F. Supp. 2d 1301, 1349 (S.D. Fla. 2011).

284. *See* discussion *supra* Part I.B.6.

285. *See*, *e.g.*, *Talisman*, 582 F.3d at 262 (finding that because there were "benign and constructive purposes" for the projects, there was no purpose to commit human rights violations).

286. *Id.* at 264; *see also* Khulumani v. Barclay Nat'l Bank, Ltd., 504 F.3d 254, 276 n.11 (2d Cir. 2007) (Katzmann, J., concurring) (noting that the intent to purposefully facilitate illegal activities "could be inferred" under certain circumstances).

287. *See* Cassel, *supra* note 13, at 312 (arguing for an interpretation of the purpose test that allows purpose to be inferred from knowledge).

288. Doe I v. Nestle USA, Inc., 766 F.3d 1013, 1024–26 (9th Cir. 2014).

289. *Talisman*, 582 F.3d at 262.

distinguished *Talisman* on the basis that in *Nestle*, the corporation allegedly directly benefited from the violations, i.e., child slave labor, as it lowered its production costs and raised its profits.[290] In *Talisman,* on the other hand, the corporation did not receive such benefits, according to the court in *Nestle*.[291]

However, Talisman clearly benefited from the military protecting its investment.[292] Whether or not it benefited from the human rights violations carried out in order to provide this protection might depend on whether it would have been possible in the specific context of this investment in a conflict zone for the military to provide Talisman with the protection in a lawful way. More importantly, however, the court in *Talisman* made very clear that in cases of otherwise legitimate commercial transactions the mens rea of purpose was only met when the corporation desired the human rights violations to take place.[293] This is difficult to reconcile with the finding in *Nestle* that the defendants purposefully supported child slavery,[294] even though they "did not have the subjective motive to harm children."[295] These inconsistencies could have been avoided had the court in *Nestle* applied a knowledge standard of mens rea, instead of leaving this question open. Alternatively, the court could have clarified that purpose can, in fact, be inferred from the knowing provision of assistance without any need to show a primary purpose in the form of a desire to assist with bringing about the violations. This would, however, have required the court to deviate from the purpose standard in the form of motive adopted in *Talisman*.

The inconsistencies in the application of the purpose standard are also evident when comparing the *Chiquita* and *Kiobel* cases. In *Chiquita*, the court seems to infer a desire to bring about the violations from the illegitimacy of the underlying activities, even though it specifically states that the corporation was primarily pursuing its business interests and driven by profit.[296] It might be easy to deduce knowledge in such a case, but to infer a purpose directed at the commission of human rights violations in *Chiquita* seems as fictitious as to deny the presence of such a purpose in *Kiobel* where Shell, in pursuit of its business interests, knowingly facilitated them.[297] It is in most cases simply not possible to know what, beyond furthering its business interests, motivated the corporate activities. A mens rea standard in which knowledge serves as the basis on which to determine the individual's state of mind might then "lead to a more objectified interpretation of the factual findings"[298] than a standard that requires inferences regarding the accessory's primary, secondary, exclusive, or other purposes that motivated the act of participation. Moreover, "[t]he distinction of an aim pursued and a known

290. *Nestle*, 766 F.3d at 1024.

291. *Id.*

292. *See Talisman*, 582 F.3d at 261–63 (explaining the allegations that Talisman was assisting the government, and, in turn, was benefitting from the government's creation of a "buffer zone" around the Talisman oil fields by "displacing huge numbers of civilians," allowing Talisman to operate).

293. *Id.* at 263–64.

294. *Nestle*, 766 F.3d at 1025–26.

295. *Id.* at 1025.

296. *In re* Chiquita Brands Int'l, Inc., 792 F. Supp. 2d 1301, 1349 (S.D. Fla. 2011).

297. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 193 (2d Cir. 2010) (Leval, J., concurring in the judgment).

298. Hans Vest, *A Structure-Based Concept of Genocidal Intent*, 5 J. INT'L CRIM. JUST. 781, 795–96 (2007).

consequence conclusively connected with such aim is not basic enough to justify a different legal result: both cases should be handled equally."[299]

This brings into focus another problem of the purpose approach. Given that those courts that applied a purpose test under the ATS tended to bypass any actus reus analysis, the motive with which the act of assistance was carried out becomes the main point of reference for distinguishing between the acceptable and the unlawful. However, this is unsatisfactory, as it is doubtful that the motive behind the act of assistance can be determined with sufficient certainty to provide a reliable criterion for delineating complicity liability.

This concern is echoed in domestic criminal law cases. In this context, courts also attach significance to the nature of the assistance and are more easily prepared to infer intent where the goods were inherently harmful, their sale or resale restricted, or the transactions themselves dubious.[300] The nature of the assistance thus influences the amount of evidence needed to establish knowledge and intent.[301] Nevertheless, some courts expressed doubts that the criteria to determine the circumstances in which an inference of intent to join was permissible were delineated clearly enough.[302] In order to overcome this and other problems with the mens rea test of purpose, such as impunity in cases of assisting serious offenses[303] or dangerous acts,[304] some courts introduced a substantiality element for the act of assistance and suggested that "where the evidence of the defendant's intent must be inferred from the aid given," a case might be made to modify the analysis by focusing instead "on the amount of assistance knowingly given."[305] Indeed, it was pointed out that "[m]aterial assistance deliberately given is itself evidence of intent."[306] Most courts use this approach for determining the mens rea, rather than for an actus reus analysis, and infer both knowledge and intent from the substantial nature of the assistance, while rejecting such an inference where the assistance is trivial.[307] Thus, while courts in the ATS context refused to infer intent based on the substantial nature of the assistance in cases of ordinary commercial transactions, in domestic cases courts felt that it was justified to make such an inference.

299. *Id.* at 789 (emphasis omitted).

300. *See* Direct Sales Co. v. United States, 319 U.S. 703, 711–12 (1943) (describing factors taken into account to determine sellers' knowledge of whether goods will be used unlawfully).

301. *Id.*

302. United States v. Blankenship, 970 F.2d 283, 286 (7th Cir. 1992).

303. United States v. Fountain, 768 F.2d 790, 798 (7th Cir. 1985).

304. *See* United States v. Zafiro, 945 F.2d 881, 887–88 (7th Cir. 1991) (dictum) ("It might be better in evaluating charges of aiding and abetting to jettison talk of desire and focus on the real concern, which is the relative dangerousness of different types of assistance . . . .").

305. United States v. Irwin, 149 F.3d 565, 572 (7th Cir. 1998).

306. *Id.* (emphasis omitted). *See also* Tenore v. Am. & Foreign Ins. Co. of N.Y., 256 F.2d 791, 794–95 (7th Cir. 1958) (discussing intent in the context of insurance and stating that "[i]f a false statement is knowingly made by the insured with regard to a material matter, the intent to defraud will be inferred").

307. *See*, *e.g.*, *Fountain*, 768 F.2d at 798 (comparing the more trivial act of assisting prostitution through supplying a dress and the more serious act of assisting murder by providing the murder weapon in conducting mens rea analysis).

### 2. Analysis of the Reasons for Adopting a Purpose Test in U.S. Criminal Law

Courts have adopted a mens rea standard of purpose in the domestic context as a reaction to the lack of a substantiality or materiality requirement at the actus reus level;[308] the mens rea standard ensures that not every sale of a lawful good to another person can result in complicity liability if the buyer then uses it for unlawful purposes. The main reason behind promoting a mens rea standard of purpose seems to be "to promote autonomy by precluding criminal impediments to otherwise lawful activities that depend on social interaction, especially business."[309]

The question, nevertheless, is whether the balance between not inhibiting lawful activities and deterring crime is best achieved by imposing a mens rea test of purpose, as it is doubtful that the test really delivers what it seems to promise. Indeed, in the domestic cases discussed in this Article, it is difficult to see why, as the courts assume, the prevention of activities is better achieved by imposing a mens rea test of desire than one of knowledge.[310] It might well be right that not much would be gained by imposing liability in the prostitution cases, while it would be justified to hold the seller of the gun liable. The effect of selling a dress or an address book to a prostitute on the commission of the crime of prostitution is in all likelihood minor, whereas the sale of a gun that is used for murder has a much more profound impact on the commission of the principal offense. However, the difference between the two cases seems to lie at the actus reus and not the mens rea level. In one case, the assistance is crucial for committing the crime; in the other its potential to further the crime is so minimal that it is difficult to establish a link between the crime and the assistance.

Whether or not the different nature of the assistance in the two cases might also impact the possibility of inferring intent to further the crime seems much less relevant. Indeed, given the courts' focus on deterrence in these cases, it is not obvious what, exactly, would be gained by criminalizing the sale of the dress even if the seller acted with the purpose to assist with prostitution, unless, exceptionally, the dress was a significant factor in facilitating the crime. The furtherance of prostitution would not be any greater if the seller acted with the relevant purpose. Similarly, regarding Judge Leval's example in *Kiobel* of Hitler's shoemaker,[311] he could be an aider and abettor of Hitler's crimes if he expressed his desire that the shoes assist him with his crimes. However, little would be achieved if liability depended decisively on the shoemaker's motives, as it is rather unlikely that the shoes will have had any effect on the crimes committed.[312]

308. Weiss, *supra* note 200, at 1483 (using the "bad purpose and purposeful intent approaches protect[s] the marginally involved participant").

309. James G. Stewart, *The End of "Modes of Liability" for International Crimes*, 25 LEIDEN J. INT'L L. 165, 191 (2012).

310. *See* Weiss, *supra* note 200, at 1484 (asserting the superiority of the knowledge test for deterrence purposes).

311. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 158 (2d Cir. 2010) (Leval, J., concurring in the judgment).

312. *See* Sykes, *supra* note 8, at 2203 ("Instead, civil aiding and abetting liability is most likely to be useful when it penalizes actors who have a meaningful capacity to exert control or impose restraint on the primary wrongdoer.").

In the U.S. criminal case of *Zafiro,* the court appreciated this and opined that "[i]t might be better in evaluating charges of aiding and abetting to jettison talk of desire and focus on the real concern, which is the relative dangerousness of different types of assistance . . . ."[313] What would matter then is no longer the desire of the accomplice to further the principal offense, but rather whether the assistance is sufficiently essential to impose complicity liability and whether the accomplice knew this. The liability test would thus be transformed to a test of providing knowing assistance of more than a trivial nature. *Hanauer v. Doane* nicely expressed some other reasons in support of a knowledge test for mens rea:

> Can a man furnish another with the means of committing murder, or any abominable crime, knowing that the purchaser procures them, and intends to use them, for that purpose, and then pretend that he is not a participator in the guilt? . . . [No, h]e cannot be permitted to stand on the nice metaphysical distinction that, although he knows that the purchaser buys the goods for the purpose of aiding the rebellion, he does not sell them for that purpose.[314]

Since *Hanauer v. Doane* was decided, the knowledge standard has clearly lost traction with U.S. courts, but this analysis of the criminal cases has shown that courts often do, in fact, apply a substantial assistance plus knowledge test, even though they claim to insist on purpose as the necessary mens rea standard.

### 3. Analysis of the Reasons for Adopting a Purpose Standard in Corporate Complicity Cases

In the context of corporate liability under the ATS, where the actus reus requires an act of assistance that has a substantial effect on the commission of the violation of the law of nations, the adoption of the purpose test reflects the view that legitimate commercial transactions are only transformed into blameworthy acts of complicity where the abuses were desired by the corporation and the facial harmlessness of the act is counterbalanced by a particularly reprehensible state of mind. The approach to the mens rea test both in *Talisman* and in Judge Leval's concurring opinion in *Kiobel* was at least partly motivated by the concern that without a strict mens rea standard of purpose liability would stretch too far, expressing a clear distrust in the possibility of limiting liability sensibly at the actus reus level in cases of commercial transactions. The purpose test might then be regarded as an appropriate tool to limit liability if the claims are perceived as unjustified interference in legitimate business decisions. In this vein, courts have expressed concerns that litigation would allow "private parties to impose embargos or international sanctions through civil actions in United States courts,"[315] and dissuade companies from carrying out business with regimes that have "less than stellar human rights records."[316]

313. United States v. Zafiro, 945 F.2d 881, 887–88 (7th Cir. 1991) (dictum).

314. Hanauer v. Doane, 79 U.S. 342, 347 (1870). *But see* Weiss, *supra* note 200, at 1367 (noting that the knowledge standard was disfavored by subsequent U.S. case law).

315. Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 264 (2d Cir. 2009).

316. *In re* S. African Apartheid Litig., 346 F. Supp. 2d 538, 554 (S.D.N.Y. 2004).

Thus, two interrelated reasons seem to lie behind the adoption of a purpose approach: the fear that in the context of commercial activities, the actus reus test is not capable of separating mere commercial transactions with bad actors from those that are worthy of creating complicity liability, and, relatedly, the perception that business transactions with bad actors are legitimate, even where they assist that actor with gross human rights violations, as long as this result was not the primary motive behind the corporate act.

However, to concentrate on the legitimacy of the underlying action or its commercial nature is unhelpful and misleading. Aiding and abetting liability does not require that the act of assistance consist of an activity that is illegitimate in and of itself, regardless of the circumstances of the individual case.[317] What makes a commercial act illegitimate—and gives rise to the imposition of complicity liability—is that in a specific case an act that might under other circumstances be perfectly legitimate assist with carrying out a crime or gross human rights violation and thus meet the actus reus requirements of complicity liability. In the context of the ATS cases, this means that it amounted to practical assistance that had a substantial effect on the commission of gross human rights violations.

While doing business with a State that commits gross human rights violations does not in itself give rise to liability,[318] this is not what the cases against corporations for aiding and abetting are about. In all cases, with more or less detail and different degrees of plausibility, the plaintiffs alleged that certain acts of the defendant corporations had a substantial effect on the commission of gross human rights violations carried out by the governments with which they were doing business. Where the allegations do not meet this standard and simply consist of asserting business transactions between the corporation and the violating state, the claims can be thrown out because of the lack of an actus reus. However, where such an effect can be shown, the act turns from a lawful, harmless, and legitimate activity to an act of aiding and abetting gross human rights violations.

If it is recognized that, at the objective level, the line of acceptable business practices is crossed where substantial assistance with gross human rights violations is rendered, then the issue to be addressed at the mens rea level is not that of how to shield corporations from liability for carrying out legitimate business with states with dubious human rights records. Instead, the question turns into whether liability is only justified if such acts are committed with an exceptionally guilty mind in the form of primary purpose, or whether it is already warranted where the corporation knew of the effect its commercial activities would have on human rights violations. Consequently, the choice of the mens rea standard of purpose reflects the view that it is acceptable that corporations pursue their business interests by knowingly facilitating gross human rights abuses, and in some cases even relying on them for their safety and protection, as long as they do not actively desire or procure them. The perception of commercial transactions as legitimate, even where they have a

317. *See* Stewart (2013(2)), *supra* note 171 ("There is nothing inherently illegal in driving a car away from a bank, but this conduct becomes a paradigmatic example of complicity when it assists a bank robbery.").

318. *In re* S. African Apartheid Litig., 617 F. Supp. 2d 228, 257 (S.D.N.Y. 2009); Mastafa v. Australian Wheat Bd., No. 07 Civ. 7955(GEL), 2008 WL 4378443, at *4 (S.D.N.Y. Sept. 25, 2008); Doe I v. Nestle S.A., 748 F. Supp. 2d 1057, 1090 (C.D. Cal. 2010).

substantial effect on the commission of human rights violations, is thus clearly an important reason behind courts' desire to limit liability.

In the academic discussion, this issue is sometimes linked to the question of the potential virtue of foreign investment even in the most abusive contexts, clearly a divisive issue.[319] Without engaging with this discussion in detail, it should be noted that corporations are free to do business and engage constructively with regimes that commit gross human rights violations on a large scale, as long as they avoid any complicity in these violations.[320] The aim of complicity liability is not to proscribe all business with certain regimes, but rather to discourage the corporate furtherance of the human rights violations they commit.[321] This does not conflict with constructive engagement, as there is nothing constructive about complicity in human rights violations. Conversely, constructive engagement does not give corporations a blank check to be complicit in gross human rights violations carried out by regimes with which they are engaging.[322] Indeed, as Judge Hall rightly suggested in his concurring opinion in *Khulumani v. Barclay National Bank, Ltd.*, "business imperatives [do not] require a license to assist in violations of international law."[323]

Contrary to the message that the adoption of the purpose test conveys, to knowingly assist in the commission of gross human rights violations is not an acceptable business practice,[324] and victims of such practices should not have to endure their consequences without the possibility of obtaining an effective remedy. The Guiding Principles on Business and Human Rights issued by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises,[325] which were endorsed by the U.N. Human Rights Council, reinforce this in the specific context of human rights responsibilities of corporations.[326] According to Guiding Principle 11, corporations have the responsibility to respect human rights, which "means that they

319. *See* Ramsey, *supra* note 26, at 313 (describing the question of investment in countries with abusive regimes as a "troublesome valve judgment").

320. *See*, *e.g.*, Brian Jacek, *Alien Invasion: Corporate Liability and Its Real Implications under the Alien Tort Statute*, 43 SETON HALL L. REV. 273, 312–14 (2013) (citing Robert Knowles, *A Realist Defense of the Alien Tort Statute*, 88 WASH. U. L. REV. 1117, 1139–40 (2011), for the proposition that "[m]ere investment in an 'authoritarian regime has never been sufficient ground for liability under the ATS'").

321. *See* Richard L. Herz, *The Liberalizing Effects of Tort: How Corporate Complicity Liability under the Alien Tort Statute Advances Constructive Engagement*, 21 HARV. HUM. RTS. J. 207, 210 (2008) ("Without the threat of liability, companies face no consequences for being complicit in the very abuses that constructive engagement is designed to prevent.").

322. *Id.* at 222; *see also* Jacek, *supra* note 320, at 312–14 (allowing a knowledge requirement "create[s] an incentive for corporations to implement internal compliance structures within the corporation to prevent and limit liability"); Michalowski, *No Complicity Liability*, *supra* note 98, at 521–22 ("[C]onstructive engagement cannot give corporations a blank check to be complicit in gross human rights violations carried out by regimes with which they are engaging.").

323. Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 289 (2d Cir. 2007) (Hall, J., concurring).

324. *See*, *e.g.*, *id.* at 289 (dismissing the idea that "business imperatives require a license to assist in violations of international law"); Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgement, paras. 238, 245 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998) (following the holding of the *Zyklon B Case*); The Zyklon B Case, 1 LAW REPORTS OF TRIALS OF WAR CRIMINALS 93, 94, 102 (1947) (finding that the knowing provision of the poison gas to those committing gross human rights violations subjects the defendants to liability). See also the discussion *supra* in Part IV.A.

325. Ruggie, *Guiding Principles*, *supra* note 1, cmt. to principle 17.

326. *See generally id.*

should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved."[327] This responsibility includes the avoidance of complicity in human rights violations carried out by their business partners.[328] The Guiding Principles impose on corporations the responsibility to carry out human rights due diligence in order to become aware of the human rights impacts of their business operations (Guiding Principle 17), including the risk of complicity.[329] Due diligence requires proactive behavior to "become aware of, prevent and address adverse human rights impacts."[330] These responsibilities thus go even further than the knowledge standard, as corporations cannot hide behind their ignorance.[331] While not legally binding on the corporations, the Guiding Principles are widely recognized[332] and show that knowing complicity in human rights violations is not regarded as an acceptable and legitimate business practice and that victims of such practices should not be left without a remedy.[333]

Judge Leval forcefully criticized the majority in *Kiobel*, which squarely rejected civil liability of corporations under the ATS, on the grounds that such a rule has the effect "to immunize the profits earned from the most heinous acts known to mankind" and "operates to the detriment of the objective of international law to protect fundamental human rights."[334] However, the application of the purpose test has a similar effect when it provides impunity to corporations that knowingly facilitated gross human rights violations for the purpose of profit maximization. Indeed, it regards the pursuance of commercial interests as legitimate even where it furthers gross violations of the human rights of others, as long as the corporation is simply indifferent to them or might prefer that they do not occur.[335] Given that this will be the situation in the vast majority of corporate complicity cases, Chief Justice Jacobs might well have been right when commenting in the *Kiobel* decision denying an en banc rehearing of the Second Circuit's decision that, if the relevant mens rea test is one of purpose, the question of whether or not the ATS provides for a remedy in cases of corporate complicity "is one of no big consequence"[336] as this excludes the possibility of successfully arguing a case of corporate liability under the ATS so effectively that "[t]he incremental number of cases actually foreclosed by the majority opinion in *Kiobel* approaches the vanishing point."[337] As a consequence, under the purpose test, there is no incentive for corporations to refrain from knowingly aiding and abetting abuses where to do so would be beneficial for business. Instead, individuals and corporations will be isolated from the known and

327. *Id.* principle 11.

328. *Id.* principle 17 & cmt. *See also* Ruggie, *Clarifying the Concepts*, *supra* note 1, paras. 26, 71 (stating that corporations should practice due diligence to avoid complicity in human rights violations).

329. Ruggie, *Guiding Principles*, *supra* note 1, cmt. to principle 17.

330. Ruggie, *Clarifying the Concepts*, *supra* note 1, para. 23.

331. For a discussion *see*, *e.g.*, Radu Mares, *Defining the Limits of Corporate Responsibilities Against the Concept of Legal Positive Obligations*, 40 GEO. WASH. INT'L L. REV. 1157, 1205–06 (2009).

332. *Id.* at 1165 n.26.

333. Ruggie, *Guiding Principles*, *supra* note 1, principle 22 & cmt. (suggesting in this respect that "[w]here business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes").

334. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 159 (2d Cir. 2010) (Leval, J., concurring in the judgment).

335. Michalowski, *The Mens Rea Standard*, *supra* note 13, at 272.

336. *Id.* at 240 (quoting Kiobel v. Royal Dutch Petroleum, 642 F.3d 268, 270 (2d Circ 2011)).

337. *Id.* (quoting *Kiobel*, 642 F.3d at 271).

foreseen consequences of their actions as long as they are indifferent to their occurrence and motivated by business or other interests.

The latter is, of course, precisely what proponents of the purpose/specific direction approach want to achieve. In support of the approach in *Perišić*, for example, Professor Kevin Jon Heller has commented that otherwise, if

> individuals who interact with organizations engaged in both lawful and unlawful acts . . . are aware of the unlawful acts, they cannot provide the organization with any assistance that might end up facilitating them — even if they do not intend to facilitate those acts, and even if they do everything in their power to prevent their facilitation.[338]

Similar issues could arise in the case of corporations that provide regimes that have very bad human rights records with goods or services that can be used to commit human rights violations. The above statement is, nevertheless, not entirely true, unless the applicable liability standard is that of knowing provision of any form of assistance, which is neither the case in international criminal law nor under the ATS. In both cases, the actus reus requires the provision of assistance that has a substantial effect on the commission of the principal offense. Nevertheless, Heller tries to show the, in his view, untenable consequences of a liability standard of knowing substantial assistance by citing the example of providing weapons to rebels in Syria who lawfully fight against the Assad regime, despite widespread knowledge that these rebel groups commit war crimes and crimes against humanity.[339] In his view, governments and organizations that provide weapons in these circumstances would incur aiding and abetting liability "[u]nless . . . the actus reus of aiding and abetting requires proof that the defendant specifically directed his assistance to an organization's unlawful acts."[340] With a specific direction requirement—or, presumably, a mens rea test of purpose—in place, "as long as the British government and the CIA do everything they can to ensure that their provision of weapons facilitate only lawful rebel actions, they cannot be held legally responsible for any international crimes committed, despite their best efforts, with those weapons."[341]

A finding that the assistor did everything possible "to ensure that their provision of weapons facilitate only lawful rebel actions" would clearly go a long way to show that there was no specific direction to assist the unlawful use.[342] However, the specific direction requirement isolates the assistor from the unlawful acts and their consequences, as long as a reasonable conclusion that the assistance was provided for lawful purposes is possible, regardless of the presence or absence of attempts to ensure that the assistance provided will only be put to a lawful use. Just like a purpose test of mens rea, it thus allows the individual or corporation providing assistance to evade liability as long as they can show that they did not, in fact, intend the logical consequences of their acts to come about. As Judge Liu emphasizes in his forceful partial dissent in *Perišić*, the adoption of the specific direction requirement

338. Heller, *supra* note 171.

339. *Id.*

340. *Id.*

341. *Id.*

342. *Id.*

"risks undermining the very purpose of aiding and abetting liability by allowing those responsible for knowingly facilitating the most grievous crimes to evade responsibility for their acts."[343]

The *Zyklon B* case in which industrialists were accused of supplying the Nazis with large quantities of the poison gas Zyklon B that was used for the mass killings of concentration camp victims—but also had lawful uses—provides a good example for demonstrating the unacceptable consequences of applying a purpose test.[344] As industrialists, the defendants' primary purpose was presumably to make a profit with the gas they sold to the Nazi regime. Indeed, the Trial Chamber in *Prosecutor v. Furundzija* stressed that "their purpose was to sell insecticide to the SS (for profit, that is a lawful goal pursued by lawful means)."[345] However, the lawfulness of the underlying transactions was regarded as irrelevant when determining the defendants' culpability, and rightly so.[346] It would be difficult to justify holding them accountable for the atrocities they knowingly facilitated in pursuance of their business interests only if they desired the killings to take place, while indifference to the effects of their actions, or even repugnance, should exonerate them, if they nevertheless knowingly provided the gas.[347]

As this analysis has shown, the purpose test of mens rea faces many objections, spanning from the need to infer purpose in most cases from knowledge, to the undesirable consequences of a test that regards as legitimate the knowing provision of substantial assistance to further crimes or human rights violations, as long as the main objective of the act is business oriented.

## CONCLUSION FOR DEVELOPING CRITERIA FOR DETERMINING CORPORATE COMPLICITY LIABILITY

This Article has shown that the commercial and routine nature of an activity does not preclude complicity liability. The question is rather under what circumstances, and according to which criteria, complicity liability can be triggered in the context of commercial activities. In particular, does the commercial context require or at least justify applying separate, more restrictive liability criteria than those used to determine complicity liability outside of this specific context?

In the ATS cases, many courts answered that question in the affirmative and roughly distinguished two situations: (1) corporate acts that are facially lawful and consist of commercial transactions, such as the sale of goods or provision of services

343. Prosecutor v. Perišić, Case No. IT-04-81-A, Appeals Judgement, para. 3 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 28, 2013) (Liu, J., dissenting in part).

344. The Zyklon B Case, 1 LAW REPORTS OF TRIALS OF WAR CRIMINALS 93, 94 (1947),

345. Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgement, para. 238 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998).

346. *See* The Zyklon B Case, 1 LAW REPORTS OF TRIALS OF WAR CRIMINALS 93, 102 (sentencing defendants to death for sale of insecticide to the SS, presumably based on their knowledge that it would be used to kill human beings).

347. *See* Khulumani v. Barclay Nat'l Bank, 504 F.3d 254, 290 (2d Cir. 2007) (Hall, J., concurring) ("The Zyklon B Case provides a clear example of when liability would attach . . . when a defendant provides 'the tools, instrumentalities, or services to commit [human rights] violations with actual . . . knowledge that those tools, instrumentalities or services will be (or only could be) used in connection with that purpose.'" (citation omitted)).

that are used by a third party to commit human rights violations; and (2) corporate behavior that is itself unlawful and clearly falls outside of legitimate business transactions, such as incitement to commit crimes or human rights violations, or paying paramilitary or terrorist groups to protect corporate investments. In the first scenario, liability was only found if either the assistance was inherently harmful or provided the direct means for carrying out the violations, or where the defendant acted with the direct purpose of assisting their commission. In the second type of cases, the courts easily find the line between legitimate commercial activities and those that trigger corporate complicity to be crossed, as the unlawfulness of the corporate activity will in most cases mean that it cannot be associated with ordinary commercial dealings.

However, as argued in Part IV, even where it can be easily and uncontroversially determined that the act of assistance was unlawful or exceeded the commercially acceptable, liability should still require establishing a link between the act and the violations, and it is still necessary to establish the relevant mens rea.[348] At the same time, aiding and abetting liability does not require that the act of assistance be unlawful on its face. Indeed, "acts which in themselves may be benign, if done for a benign purpose, may be actionable if done with the knowledge that they are supporting unlawful acts."[349] This is why someone who drives the getaway car after a bank robbery can be held liable as an accomplice, even though the act of driving is clearly, in principle, lawful. Basing the determination of the liability standards in corporate complicity cases on the lawful, ordinary, or routine nature of the act of assistance is therefore flawed.

Instead of applying the existing liability standards to determine the lawfulness of the underlying act in the circumstances of each case (which is how complicity cases are dealt with outside of the commercial context), it seems that the courts have approached the question the wrong way and allowed the definition of liability to be guided by the perceived legitimacy of the commercially motivated act of assistance and adapted the applicable liability standards in light of this. This is not to suggest that liability standards can or should be determined in isolation from the reality of, and the policy considerations applicable in, any given situation. Nevertheless, if the commercial nature of an act that otherwise meets the criteria of complicity liability is the primary reason to adapt and lower liability standards—which in many cases might result in exempting corporate actors from liability—this would require a justification that goes beyond the mere fact of the commercial nature or motivation of the act. As this Article has demonstrated, none of the explanations that have been advanced satisfactorily substantiates such a claim.

It does not follow, however, that the commercial nature of the act of assistance might not be of relevance when determining complicity liability. While not determinative, whether or not the act of assistance consisted of the provision of routine and lawful commercial services, and whether the goods and services provided were neutral or inherently harmful, might influence the depth of the analysis that is

348. *See supra* Part IV.

349. Almog v. Arab Bank, PLC, 471 F. Supp. 2d 257, 291 (E.D.N.Y. 2007). *See also* Linde v. Arab Bank, PLC, 384 F. Supp. 2d 571, 588 (E.D.N.Y. 2005) (finding that "given plaintiffs' allegations regarding the knowing and intentional nature of the Bank's activities, there is nothing 'routine' about the services the Bank is alleged to provide").

required in each case, both at the actus reus and the mens rea level. One might even reverse the burden of proof where the act of assistance consists of the provision of an inherently harmful product or service or the act of assistance is itself unlawful, to reflect the likelihood that the act of assistance will have a significant effect on the business partners' commission of gross human rights violations, and the likelihood that the corporation knows this.[350] Such a reversal of the burden of proof would need to be rebuttable and open to showing that, in the individual case, the provision of a harmful product did not have a substantial effect on the commission of the crime, or that despite its harmful nature and significant effect, the corporate actor did not have the relevant knowledge to justify the imposition of complicity liability. It would not therefore make a case-by-case analysis obsolete, but rather shift the starting point of the analysis to a presumption in favor of liability in these scenarios.

For the case-by-case analysis, at the actus reus level, it is primarily the nature of the assistance that is of relevance. It might be easier to establish that the provision of inherently harmful goods or services such as the supply of weapons has a substantial effect on the commission of human rights violations such as extrajudicial killings than where money is provided that is used to buy the weapons. However, not every gun sold facilitates an unlawful killing, while money might be lent for the purpose of buying weapons to carry out extrajudicial killings. Thus, all depends on the circumstances of each case, and a thorough analysis is necessary in all situations, even though its intensity might differ depending on the nature of the act of assistance.

Such a case-by-case analysis clearly creates some uncertainty and room for different assessments of individual cases. Some criteria to make such evaluation of the effect of an act of assistance on the commission of human rights abuses, and the substantiality of this effect, more predictable are: the closeness of the accomplice to the commission of the offense; the quality and quantity of the assistance provided; whether the assistance provided the direct means with which the violations were carried out; whether the assistance was provided in the context of a continuing relationship or a one-off transaction or given in the context of systemic rather than isolated violations, to name but a few. Nevertheless, as the discussion of *Taylor* and some of the U.S. criminal cases has shown, such a check list, however comprehensive, can achieve no more than provide points to consider as part of a detailed analysis of the specific circumstances of each case. This, however, is not unusual in law, and courts are used to carrying out such analyses in both criminal and civil cases, based on general liability standards such as substantial effect.[351] Corporations are equally capable, and under the U.N. Guiding Principles on Business and Human Rights are expected,[352] to carry out complicity risk assessments in the context of their commercial relationships.

350. For a comparable argument for cases in which the business partner has a particularly bad human rights record, see Michalowski, *No Complicity Liability*, *supra* note 98, at 520 ("Where a regime is widely known to commit gross human rights violations . . . it could be argued that lenders have a heightened due diligence obligation to inquire into the use of money they are lending with respect to the violations taking place.").

351. *See*, *e.g.*, Gonzales v. Raich, 545 U.S. 1, 17 (2005) (determining whether a regulated activity had a "substantial effect" on interstate commerce such that it could be federally criminalized); Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2585 (2012) (considering whether the failure to have health insurance has a "substantial and deleterious effect on interstate commerce").

352. Ruggie, *Guiding Principles*, *supra* note 1, principle 17 & cmt.

If a thorough actus reus analysis were carried out even in cases in which the alleged assistance consisted of a commercial transaction, aiding and abetting liability would have two filters, one with regard to the act of assistance itself, another concerning the mental state. As particularly the discussion of the prostitution examples in U.S. criminal cases demonstrated, many cases could already be thrown out at the actus reus level, based on the immateriality of the assistance provided. Equally, in the In re *South African Apartheid Litigation* case, the provision of computers to prison authorities might not have had a sufficiently close link to instances of torture to justify a finding that the actus reus of complicity liability is met, unless, based on specific facts in an individual case, such a link can exceptionally be shown. A case-by-case approach to determining the substantial effect of the assistance, coupled with a knowledge test of mens rea, thus does not create limitless corporate complicity liability, as is often alleged.[353]

To address Judge Leval's concern that unless a mens rea test of purpose is applied, Hitler's shoemaker, for example, might be liable for aiding and abetting the atrocious crimes committed by Hitler,[354] it seems that the shoemaker's liability can be much more appropriately excluded at the actus reus than at the mens rea level. It is rather unlikely that the shoes Hitler was wearing had a substantial effect on the crimes he carried out. The shoemaker then cannot be held liable as an accessory to Hitler's crimes, whatever the motives for providing Hitler with shoes. If, however, as Judge Leval suggests, liability depended decisively on the shoemaker's reasons for providing the shoes,[355] he or she could be an aider and abettor of Hitler's crime when making the shoes with the desire that they should assist him with his crimes. This is another demonstration of the fact that even in cases of commercial transactions, the objective and subjective elements of aiding and abetting liability serve different functions, and insubstantial assistance or acts that are too remote to have had a substantial effect on the violations can and should be filtered out at the actus reus level of liability.

At the mens rea level, the commercial nature of the assistance is also potentially highly relevant. It will often be easier to infer knowledge of the business partner's unlawful use of the goods or services provided where a transaction already on its face goes beyond accepted commercial practice, or involves dealing with goods that are particularly prone to unlawful use. Routine commercial transactions, on the other hand, might raise less ground for suspicion with regard to their harmful effects. However, the commercial character of the transaction is not a reason to exclude liability where knowledge can nevertheless be shown, nor does the inherently harmful character of the goods or services automatically give rise to an inference of knowledge with regard to their intended unlawful use. Instead, a thorough analysis based on the facts and circumstances of each case has to be carried out to establish the relevant knowledge.

353. *See* Mares, *supra* note 331, at 1206 (noting that "the threshold of knowledge [required for complicity] might not be very demanding to attract liability").

354. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 158 (2d Cir. 2010) (Leval, J., concurring in the judgment).

355. *Id.*

Two Nuremberg cases, the *Farben* case[356] and the *Zyklon B* case,[357] provide a good demonstration of how this can work in practice. In both cases industrialists were accused of supplying the Nazis with large quantities of the poison gas Zyklon B that was used for the mass killings of concentration camp members. In the *Farben* case, the defendants were acquitted even though:

> The proof is quite convincing that large quantities of Cyclon-B were supplied to the SS by Degesch and that it was used in the mass extermination of inmates of concentration camps, including Auschwitz. But neither the volume of production nor the fact that large shipments were destined to concentration camps would alone be sufficient to lead us to conclude that those who knew of such facts must also have had knowledge of the criminal purposes to which this substance was being put. Any such conclusion is refuted by the well-known need for insecticides wherever large numbers of displaced persons, brought in from widely scattered regions, are confined in congested quarters lacking adequate sanitary facilities.[358]

The tribunal relied heavily on testimony according to which the use of Zyklon B for the extermination of concentration camp inmates had been "Top Secret" and that none of "the defendants had any knowledge whatever that an improper use was being made."[359] In the *Zyklon B* case, on the other hand, the industrialists were convicted because there was witness testimony to the effect that one of the defendants knew of the criminal use made of the gas,[360] and because the structure of the defendants' enterprise made it implausible that they did not have the relevant knowledge. This shows that even where harmful substances are sold to criminal regimes, inferences of knowledge with regard to their unlawful use are not automatic, but rather depend on an in-depth analysis of all the surrounding circumstances. It can be assumed that the provision of the gas will have had a substantial effect on the commission of the killings, so that the actus reus will have been met in both cases. Nevertheless, the mens rea in the form of knowledge provided a corrective according to which the two cases were distinguished.

Just like the substantial effect requirement at the actus reus level, the mens rea standard of knowledge needs further clarification. In this Article, the assumption, based on the case law discussed, has been that actual knowledge would be necessary, rather than a mere showing that the corporation should have known what effect its commercial transactions would have on the commission of human rights violations.[361] Actual knowledge can be proven if, based on all the circumstances of the case, a reasonable inference can be made that the corporation must have known the

356. The Farben Case (I.G. Farben Case), 8 TRIALS OF WAR CRIMINALS 1 (1952).

357. The Zyklon B Case, 1 LAW REPORTS OF TRIALS OF WAR CRIMINALS 93 (1947).

358. The Farben Case (I.G. Farben Case), 8 TRIALS OF WAR CRIMINALS 1, 1169 (1952).

359. *Id.*

360. The Zyklon B Case, 1 LAW REPORTS OF TRIALS OF WAR CRIMINALS 93, 95–96 (1947).

361. *But see* Doe I v. Unocal Corp., 395 F.3d 932, 953 (9th Cir. 2002) (suggesting that the appropriate test is whether "Unocal knew or should reasonably have known that its conduct—including the payments and the instructions where to provide security and build infrastructure—would assist or encourage the Myanmar Military to subject Plaintiffs to forced labor").

relevant facts.[362] This is different from the "should have known" standard which would be satisfied even if no showing or inference of existing knowledge can be made, but where the accomplice would have had the relevant knowledge had the diligence that could be expected from a reasonable person been exercised.[363] In the context of corporate complicity in human rights violations, an argument can be made for imposing due diligence responsibilities which would require active inquiries into the use the business partner might make of goods or services provided. The imposition of such duties might well raise the cost of business. However, compliance with them has the benefit of reducing the risk of legal claims of corporate complicity "by showing that [the corporation] took every reasonable step to avoid involvement with an alleged human rights abuse,"[364] as well as that of preventing the occurrence of human rights violations through illegitimate uses of corporate products and services. While currently not a legal requirement in most contexts, such due diligence responsibilities are postulated in the U.N. Guiding Principles on Business and Human Rights.[365] However, their scope has so far not been outlined clearly.[366]

Another mens rea related question that still needs refining is what, precisely, the accomplice needs to know to incur liability.[367] It has been suggested that while the aider and abettor would not "necessarily have to know all factual (e.g., date, location, offender, victim) or normative (e.g., gravity) details of the principal crime . . . there should be a requirement that the accessory, at minimum, knows about the 'offence' that he facilitates."[368] The ad hoc international criminal tribunals, while requiring knowledge "that the acts performed by the aider and abettor assist [in] the commission of the specific crime of the principal,"[369] nevertheless clarify that knowledge of "the precise crime that was intended and which in the event was committed" is not necessary.[370] Rather, knowledge that "one of a number of crimes will probably be committed" is sufficient.[371] Whether or not corporations acted with the necessary mens rea would then depend on whether they knew of the types of crimes to be committed, and of the effect of their assistance on these crimes.

As the International Commission of Jurists explains, a corporation that knows "that the equipment the business is selling is likely to be used by a buyer for one of a number of crimes would not escape liability because there is uncertainty as to the exact crime intended."[372] In many of the corporate complicity cases such knowledge can be inferred either because the human rights violations committed by a regime are well-documented and generally known, or because they came to the knowledge

362. *In re* S. African Apartheid Litig., 617 F. Supp. 2d 228, 265 (S.D.N.Y. 2009).

363. Mares, *supra* note 331, at 1205–06.

364. Ruggie, *Guiding Principles*, *supra* note 1, principle 17 & cmt.

365. *Id.*

366. For discussion, see generally Michalowski, *Due Diligence, supra* note 5.

367. For discussion, see generally Michalowski, *The Mens Rea Standard*, *supra* note 13.

368. Burchard, *supra* note 57, at 939.

369. Prosecutor v. Blaškić, Case No. IT-95-14-A, Appeals Judgement, para. 45 (Int'l Crim. Trib. for the Former Yugoslavia July 29, 2004) (quoting Prosecutor v. Vasiljević, Case No. IT-98-32-A, Appeals Judgement, para. 102 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 25, 2004)).

370. *Id.* para. 50 (quoting *Vasiljević*, Case No. IT-98-32-A, para. 287).

371. Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgement, para. 246 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998).

372. 2 INT'L COMM'N OF JURISTS, CORPORATE COMPLICITY & LEGAL ACCOUNTABILITY 21 (2008).

of the corporation in the context of its business relations, as was allegedly the case in *Talisman*[373] and *Kiobel*.[374]

To summarize the main findings of this Article, the line between merely doing business with a bad actor and acts that give rise to complicity liability is crossed when a corporate activity, whether or not of a routine commercial nature, has a substantial effect on the commission of human rights violations, and the corporation had the relevant knowledge. Clearly, the application of such a test in practice, and how to clarify its criteria, depends on context. However, clarity about the broad features of the test to be applied in order to determine the objective and mental elements of corporate complicity liability is an important step towards setting the framework that should guide the future debate on corporate complicity liability and corporate due diligence responsibilities. Just as important is to challenge recent trends in the influential ATS jurisprudence that are based on mistaken assumptions and should not serve as a model for future developments.

373. Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 262 (2d Cir. 2009).

374. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 193 (2d Cir. 2010) (Leval, J., concurring in the judgment).