CHAPTER 4

PRINCIPLES OF CORPORATE COMPLICITY UNDER INTERNATIONAL CRIMINAL LAW

ORIGINS OF CORPORATE CULPABILITY UNDER INTERNATIONAL LAW

Since World War II, there has been a growing trend to recognise non-state actors as subjects of international law. This trend is also true of the more particular areas of international human rights (HR) and humanitarian law. The broader category of human rights law is continually evolving in response to the awareness that limiting HR liability to individuals and states is inadequate as this fails to regulate powerful non-state actors. Political instability often implicates corporations with brutal regimes and even illegal acts. When can a corporation be implicated as a criminal for such acts?

The evolution, from a principle of “no criminal liability” to a principle where corporations are capable of committing crimes under international law is revealed in the war crimes trials at Nuremberg. In the Krupp trial (United States V. Krupp, Trials Of War Criminals Before The Nuremberg Military Tribunals). It is clear that the corporation was implicated in the crimes of its directors. Because of the Krupp firm’s desire to employ compulsory labor the tribunal imputed criminal intent to the corporation - although the court did not actually declare the Krupp Corporation a criminal organization. The Farben trial (United States V. Krauch,) also implicated corporations as criminal instrumentalities. In Farben, the court refers to corporate obligations and treats the corporation as a criminal instrument. Moreover,
Nuremberg also recognized that a corporate body - the state security service (the SD) could be guilty of a crime\textsuperscript{161}.

In essence, the trend to include non-state actors as international subjects is a reflection of the increasing recognition that legal personality is not pre-determined but, rather, is a legal tool that serves practical purposes. In the \textit{Reparations for Injuries Case} \textsuperscript{162}, the International Court of Justice (ICJ) stated: ‘The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and the nature depends on the needs of the community’. In \textit{Barcelona Traction} \textsuperscript{163} for example, the ICJ considered that the international legal personality of a corporation depends entirely on the municipal law of the state in which that corporation operates. A more current view would appear to be that international legal personality depends on two key elements, firstly, that the actor is capable of possessing international rights and duties and secondly, that the actor has the capacity to maintain those rights by bringing international claims.

International criminal law is a body of international law designed to prohibit certain categories of conduct collectively viewed by the international community as serious violation and to make perpetrators of such conduct criminally accountable for their commission. Principally, it deals with genocide, war crimes, crimes against humanity and aggression. In addition there are crimes against international law, which may not be part of the body of


\textsuperscript{163} \textit{Barcelona Traction, Light and Power Co (Second Phase) (Belg. V. Spain)} [1970] ICJ Rep. 3 (Feb. 5) at 34-5
international criminal law i.e. Rome Statute and Ad hoc military Tribunals. The prosecution of international crimes is an important component of the process of transforming societies into rights-respecting democracies. Investigations and trials of leaders who have committed crimes and caused mass political or military atrocities is a key demand of victims of human rights abuses. Prosecution of such criminals can play a key role in restoring dignity to victims, and restoring trusting relationships in society.

Public International Law, also known as "Classical" international law governs the relationships, rights, and responsibilities of states. Criminal law generally deals with prohibitions addressed to individuals by individual states, and penal sanctions for violation of those proscriptions. International criminal law comprises elements of both in that although its sources are those of international law, its consequences are penal sanctions imposed on individuals.

4.1 INTERNATIONAL CONFLICTS AND INTERNATIONAL CRIMINAL LAW

Though some precedents of international criminal law can be found in the time before the First World War, it was only after the WW - 1 that a truly international criminal tribunal was envisaged to try perpetrators of crimes committed in this period. Thus, the Treaty of Versailles stated that an international tribunal was to be set up to try Wilhelm II of Germany. After the Second World War, the Allied powers set up an international tribunal to try not only war crimes, but crimes against humanity committed under the Nazi regime. Significance of ‘crimes against humanity’ lies in the recognition by the international community of international crimes committed not only in

164 However, the Kaiser was granted asylum in the Netherlands as a result of which the intended prosecution of Wilhelm II could not be initiated.
actual combat zone but in addition to such acts, those acts which violate the collective sanctity of humanity. The international tribunal not only provided a legal basis for international criminal prosecution (under the London Charter) but also expanded the scope of international crimes by going beyond the crimes committed during war time. The Nuremberg Tribunal held its first session in 1945 and pronounced judgments on 30 September/ 1 October 1946. A similar tribunal was established for Japanese war crimes\(^{165}\). Successful experiment of prosecution of war crimes and crimes against humanity by an international tribunal gave birth to International Criminal Law. At that time, principles of international criminal law had not been laid down but the same were developed during the course of Nuremberg and Tokyo trials.

Subsequent armed conflicts which threatened international peace and security were brought within the ambit of international criminal tribunals which though, were also set up on ad-hoc basis to deal with specific situations and specific crimes committed in those situations. However, their significance lies in the fact that these international tribunals were given definite jurisdiction under respective statutes which now form a part of international criminal law even though they might have limited application under the Rome Statute since it is a complete code in itself. Yet, general principles of international criminal law like *Joint criminal liability* or *trial detention* will have common applicability. After the beginning of the war in Bosnia, the United Nations Security Council established the *International Criminal Tribunal for the Former Yugoslavia* (ICTY) in 1993 and, after the genocide in Rwanda, the *International Criminal Tribunal for Rwanda* was set up in 1994. The United Nations has now set up a Tribunal for

\(^{165}\) The International Military Tribunal for the Far East. It operated from 1946 – 48.
Bangladesh to try the crimes committed during the Bangladesh war of Liberation especially pertaining to the massacre of *chakma* refugees. The most significant development in international criminal law was the setting up of permanent international criminal court for which the International Law Commission had commenced preparatory work in 1993. In 1998, at a Diplomatic Conference in Rome, the Rome Statute establishing the ICC was signed.

Sources of International criminal law are the same as those that comprise international law. Article 38(1) of the 1946 Statute of the International Court of Justice lay down the following sources of international law: treaties, customary international law, and general principles of law recognised by civilised nations; and as a subsidiary measure, judicial decisions and the most highly qualified juristic writings. The important aspect about source of International Criminal law is that it draws heavily from national criminal law systems since the bed rock of international criminal law is the principle of individual criminal liability and national criminal Law systems effectively deal with this issue. International criminal law has thus borrowed the concept of criminality from municipal laws for the purpose of international law. Public international law on the other hand deals with rights of the individual states.

Today, the most important institution for the purposes of ICL is the International Criminal Court (ICC) which is a permanent tribunal to

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168 There are a number of important ad-hoc tribunals set up under the UN resolutions. For example, International Criminal Tribunal for the former Yugoslavia, International Criminal Tribunal for Rwanda, Special Court for Sierra Leone (investigating the crimes committed during the Sierra Leone
prosecute individuals for genocide, crimes against humanity, war crimes, and aggression. It came into being on 1 July 2002—the date its founding treaty, the Rome Statute\textsuperscript{169} of the International Criminal Court, entered into force and it can only prosecute crimes committed on or after that date. The court can generally exercise jurisdiction only in cases where the accused is a national of a state party, the alleged crime took place on the territory of a state party, or a situation is referred to the court by the United Nations Security Council. It is designed to complement existing national judicial systems: it can exercise its jurisdiction only when national courts are unwilling or unable to investigate or prosecute such crimes. Primary responsibility to investigate and punish crimes is therefore left to individual states\textsuperscript{170}.

\textsuperscript{169} As of April 2012, 121 states are states parties to the Statute of the Court, including all of South America, nearly all of Europe and roughly half the countries in Africa. A further 32 countries, including Russia, have signed but not ratified the Rome Statute \cite{9}; one of them, Côte d’Ivoire, has accepted the Court’s jurisdiction. Three of these states—Israel, Sudan and the United States—have ”unsigned” the Rome Statute, indicating that they no longer intend to become state parties and, as such, they have no legal obligations arising from their former representatives’ signature of the Statute. This ”unsigned” is a an unprecedented event in so far as Treaty Based Law is concerned. 41 United Nations member states have neither signed nor ratified or acceded to the Rome Statute; some of them, including China and India, are critical of the Court. The Palestinian National Authority, which neither is nor represents a United Nations member state, has formally accepted the jurisdiction of the Court. On 3 April 2012, the ICC Prosecutor declared himself unable to determine that Palestine is a ”state” for the purposes of the Rome Statute.

\textsuperscript{170} To date, the Court has opened investigations into seven situations in Africa: the Democratic Republic of the Congo; Uganda; the Central African Republic; Darfur, Sudan; the Republic of Kenya; the Libyan Arab Jamahiriya and the Republic of Côte d’Ivoire. Of these seven, three were referred to the Court by the states parties (Uganda, Democratic Republic of the Congo and the Central African Republic), two were referred by the United Nations Security
The International Criminal Tribunal for Rwanda (ICTR) is an international court established in November 1994 by the United Nations Security Council in Resolution 955 for prosecution of those responsible for the Rwandan Genocide and other serious violations of the international law in Rwanda, or by Rwandan citizens in nearby states, between 1 January and 31 December 1994. The tribunal has jurisdiction over genocide, crimes against humanity and war crimes, which are defined as violations of Common Article Three and Additional Protocol II of the Geneva Conventions (dealing with war crimes committed during internal conflicts).

The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, more commonly referred to as the International Criminal Tribunal for the former Yugoslavia or ICTY, is a body of the United Nations established to prosecute perpetrators of serious crimes committed during the wars in the former Yugoslavia. The Court was established by Resolution 827 of the United Nations Security Council, which was passed on 25 May 1993. It has jurisdiction over four clusters of crime committed on the territory of the former Yugoslavia since 1991: grave breaches of the Geneva Conventions, violations of the laws or customs of war, genocide, and crime against humanity.

Although, ICC is the only permanent court dealing with international crimes, for the purpose of development of international criminal law, the principles of liability applied by various ad–hoc international criminal tribunals are equally relevant. Study of the principles of criminal liability under international criminal law is most relevant for

Council (Darfur and Libya) and two were begun proprio motu by the Prosecutor (Kenya and Côte d'Ivoire)
the purpose of this research since determining the liability of a legal person is a complex issue. It is not possible to formulate new legal principles of criminal liability in order to enlarge the jurisdiction of international criminal court to include crimes committed by ‘legal persons’ since the said exercise would be too time consuming. Basis of enlarging the jurisdiction of ICC has to be found in existing principles of (public) international law in general, and specifically international criminal law in its present form.

4.2 PRINCIPLES OF LIABILITY UNDER INTERNATIONAL CRIMINAL LAW

Current jurisdiction of International Criminal Law (ICL) in the ICC is based on the Principle of Individual Criminal Liability i.e. Article 25 of the Rome Statute. This is a general principle of law and is found in most of the municipal criminal law systems. International Criminal Law also recognises that individual perpetrators of crimes are as guilty as the persons’ in-charge of the armed/belligerent groups. So the focus has shifted from prosecuting States to persons who can individually be held responsible for actual crimes irrespective of the official position that they were holding i.e. their individual act is subject matter of criminal prosecution. This Principle was recognized in the Nuremburg and Tokyo Trials. Subsequently, it was a part of the Statute setting up the ICTY and ICTR.

Judging criminal liability under the principle of Individual Criminal Liability principle is easier in case of natural persons. However, in case of ‘legal persons’, it gets complex. Primarily, the word ‘individual’ does not encompass a legal person since the term is understood more
in the sense of referring to a single natural person\textsuperscript{171}. Additionally, a corporate crime can rarely be attributed to one individual because corporate crimes are usually the result of collective decisions of the high officers/ Board of Directors. In the corporate maze, investigations will rarely ever pin point the culpability on a single officer or director. Nevertheless, in such a situation, it can be well argued that a corporation is in fact an individual entity, clothed with such a status by law\textsuperscript{172}. Hence, the Officers or Directors of the Corporations have to be prosecuted as abettors or aiders, and it is the Corporation itself which has to be prosecuted in its individual capacity. This proves to be the road block in so far as current state of ICL is concerned, especially when the jurisprudence of the ad-hoc international tribunals as also the ICC is reviewed. None of these forums acknowledge the responsibility of ‘legal persons’ in relation to the crimes that can be prosecuted by the said Tribunals. Their jurisdiction is only over natural persons.

In addition to the principle of individual criminal responsibility, there are other principles of International Criminal law which are relevant for the present research. These are \emph{Nullum Crimen Sine Lege}, \emph{Nullum Peona Sine Lege} and \emph{Principle of Command/ Superior Responsibility}. These principles are being discussed below:

\emph{Nullum Crimen Sine Lege}, often described as the moral principle of law, states \emph{that there can be no crime without law...in other words, unless an act is described as criminal by applicable law, no one can be accused of a crime on the basis of that act alone.} This principle has been incorporated in Art. 22 of the Rome Statute which lays down... \emph{A person shall not be criminally responsible under the Statute unless the conduct in question\textsuperscript{171}...}  

\textsuperscript{171} Article 25 of the Rome Statute which lays down the principle of Individual Responsibility, in any case makes it very clear that jurisdiction of the Court is over natural persons.

\textsuperscript{172} A company has separate existence than its shareholders and management.
constitutes, at the time it takes place, a crime within the jurisdiction of the Court.

Nullum Peona Sine Lege which is incorporated in Article 23 of the Rome Statute is a corollary of the first principle and it states that there can be no punishment without law. Article 23 states...A person convicted by the Court may be punished only in accordance with this Statute. In other words an act cannot be punished unless law prohibits it. In nutshell, for charging an individual under the ICL, it is important that either the act complained of is described as a specific crime or that act is specifically prohibited by law.

Applying the ratio of these two principles to corporate criminal liability, it can be safely averred that unless International criminal law recognises corporate criminality (i.e. recognition of culpability of acts of legal persons) and attaches culpability to the typical crimes that are committed by Corporations, effective prosecution of TNC’s under international criminal law is not feasible.

Principle Of Command/ Superior Responsibility which is laid down in Article 28 of the Rome Statute presumes that the Superior has an affirmative duty to act in preventing violations of law. Under International Humanitarian Law, a duty is cast on the Commander to ensure that his troops respect the laws of armed conflict. As per this principle, a commander i.e. anyone in a position of command, whatever his rank might be, who issues an order to commit a crime, is equally guilty of the offence with the subordinate who actually commits it under the orders/command of the Superior. In relation to Corporate Crimes i.e. TNC crimes, the Principle of Command Responsibility can be applied by analogy. Article 28 lays down the Responsibility of commanders and other superiors as under:
In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

(ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and

(iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.
This article not only lays down the responsibility of military commander but also of superiors who fail to exercise due control over their subordinates. This principle can be logically applied to incriminate those officers who while sitting in the high offices planned and ordered a criminally culpable act (Command/superior responsibility). Principle of Command responsibility assumes significant importance when liability of ‘legal person’ is in question because of the requirement of mens rea under the Rome Statute\textsuperscript{173}. Article 28 read with Article 30 is of immense help in transferring the mens rea of a corporate crime committed by lower rung officers of a Company/corporation to the management/high officers. Thus the Directors of a corporation can be made liable for the acts of its subordinates if it can be proved that they had knowledge of such a crime being committed/about to be committed and took no steps to prevent it. Once the mens rea of lower level officials can be attributed to the senior management, the same can be imputed to the corporation itself under the identification theory of corporate mens rea. In the preceding chapter, a number of tests were discussed which the Courts have applied for judging the presence of mens rea of a corporation in an alleged crime. Application of the principle of superior responsibility to corporate crimes can to a great extent reduce the reliance of the Courts on other tests e.g. benefits test, to

\textsuperscript{173} Article 30 Mental element

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.

2. For the purposes of this article, a person has intent where:
   (a) In relation to conduct, that person means to engage in the conduct;
   (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

3. For the purposes of this article, ‘knowledge’ means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. ‘Know’ and ‘knowingly’ shall be construed accordingly.
judge whether or not a particular crime has been committed by or on behalf of the corporation i.e. legal person.

The idea behind discussing the principles of ICL is basically to assess their relevance and applicability for judging culpability of a legal person under the international criminal law regime i.e. criminal liability of a multinational corporation or entity liability. In addition, another issue which also needs to be addressed is the *required standard* to judge the culpability of a Corporation when it is not directly involved in an international crime e.g. crimes against humanity or genocide but is aiding and abetting the forces which are actually involved in commission of such crimes by giving them material and logistical support. Presuming that jurisdiction of ICL is enlarged to include prosecution of ‘legal person’, this ‘standard’ would also form a part of the ICL principles. It is important to lay down such a standard since under the current state of ICL which acknowledges only 4 core crimes as international crimes, entity complicity in those is likely to be indirect and not direct. Criminal indictment for indirect participation would necessarily require an objective standard to be laid down beyond which it can be securely concluded that the ‘entity’ has indeed criminally participated in a ‘crime’. In this regard, a discussion on the study conducted by the International Commission of Jurists (based in Geneva) is very relevant. The Report published by the said Commission lays down the standard for a Corporation to follow beyond which the Corporation steps into the danger zone giving rise to the presumption that it has participated in the commission of an international crime. The Report shall be discussed later.

A number of countries have enacted laws in line with their signing/ratification of the Rome statute i.e. to bring their domestic laws in conformity with the international law obligations. A brief study
of the laws of such countries would be useful to analyse whether such
countries impose criminal liability on domestic corporations for crimes
covered under the Rome statute. In case a corporation can be judged
as guilty in a domestic jurisdiction for crimes covered under the Rome
statute, it will provide a very sound argument to enlarge the scope of
Rome Statute since national criminal law systems are a source of
international criminal law.

4.2.1 **United Kingdom:** Under section 51(1) of the International
Criminal Court Act 2001, ‘genocide’ and ‘crimes against humanity’,
committed either in the United Kingdom or by United Kingdom
nationals abroad, can be prosecuted. There are a number of statutes
that impose criminal liability on UK and/or non-UK nationals who
commit particular acts outside the jurisdiction, but this can only be
exercised where the individual is present or visits the United Kingdom;
otherwise the United Kingdom government would need to seek
extradition from the state in which he is located. In this context, so far
as ‘legal person's’ criminal liability is concerned, it is a rule of
statutory interpretation that unless a contrary intention appears, the
word "person" includes a body of persons corporate or unincorporated.
British criminal laws have since long acknowledged corporate criminal
culpability. Infact, British law has broken new ground by enacting the
*Corporate Manslaughter and Corporate Homicide Act 2007* under which
corporations can now be prosecuted for manslaughter i.e. causing
death of employees by gross negligence where a duty of care existed
and was disregarded.
4.2.1.1 Corporate Manslaughter and Corporate Homicide Act 2007

The 2007 Act\textsuperscript{174} puts the law on corporate manslaughter (in Scotland, corporate culpable homicide) onto a new footing, setting out a new statutory offence. In summary, an organisation is guilty of the offence if the way in which its activities are managed or organised causes a death and amounts to a gross breach of a relevant duty of care to the deceased. A substantial part of the breach must have been in the way activities were managed by senior management. The offence addresses a key defect in the law that meant that, prior to the new offence, organisations could only be convicted of manslaughter (or culpable homicide in Scotland) if a “directing mind” at the top of the company (such as a director) was also personally liable. The reality of decision making in large organisations does not reflect this and the law therefore failed to provide proper accountability and justice for victims. The new offence allows an organisation’s liability to be assessed on a wider basis, providing a more effective means of accountability for very serious management failings across the organisation. As the law stood, before a company could be convicted of manslaughter, a “directing mind” of the organisation (that is, a senior individual who could be said to embody the company in his actions and decisions) also had to be guilty of the offence. This is known as the identification principle. The Act applies to: companies incorporated under companies legislation or overseas; other corporations including public bodies incorporated by statute such as local authorities, NHS bodies and a wide range of non-departmental public bodies; organisations incorporated by Royal Charter; limited liability partnerships, all other partnerships, and trade unions and

\textsuperscript{174} A Guide to the Corporate Manslaughter and Corporate Homicide Act 2007, Published by UK Ministry of Justice October 2007
employer’s associations, if the organisation concerned is an employer; Crown bodies such as Government departments, police forces.

The offence is concerned with the corporate liability of the organisation itself and does not apply to individual directors, senior managers or other individuals. Under the Act, a parent company cannot be convicted because of failures within a subsidiary. Companies within a group structure are all separate legal entities and therefore subject to the offence separately. In practice, the relevant duties of care that underpin the offence are more likely to be owed by a subsidiary than a parent. The new offence applies to foreign companies and other corporate bodies operating in the UK, whether incorporated in the UK or abroad. The Act sets out specific rules for the jurisdiction of the new offence – that is to determine whether a death in a particular place will fall under the new offence. The principle of Crown immunity, which is a long established legal doctrine that means that Crown bodies (such as Government departments) cannot be prosecuted, does not apply to prosecutions under the Act. The new offence operates in respect of Crown bodies in the same way that it operates for corporations. The new offence builds on the responsibilities that employers and organisations already owe to their employees, in respect of the premises they occupy and for the activities that they carry out. For the new offence to apply, the organisation concerned must have owed a “relevant duty of care” to the victim. This term is explained further below. The offence itself occurs where an organisation is in gross breach of a relevant duty because of the way its activities were managed and organised and this

175 Individuals can already be prosecuted for gross negligence manslaughter/culpable homicide and for health and safety offences. The Act does not change this and prosecutions against individuals will continue to be taken where there is sufficient evidence and it is in the public interest to do so.
causes a death. A duty of care is an obligation that an organisation has to take reasonable steps to protect a person’s safety. The offence is concerned with the way in which activities were managed or organised. This represents a new approach to establishing corporate liability for manslaughter/culpable homicide and does not require the prosecution to establish failure on the part of particular individuals or managers. It is instead concerned with how an activity was being managed and the adequacy of those arrangements. This approach is not confined to a particular level of management within an organisation: the test considers how an activity was managed within the organisation as a whole. Factors that might be considered will range from questions about the systems of work used by employees, their level of training and adequacy of equipment, to issues of immediate supervision and middle management, to questions about the organisation’s strategic approach to health and safety and its arrangements for risk assessing, monitoring and auditing its processes. The Act does not require the prosecution to prove specific failings on the part of individual senior managers. It will be sufficient for a jury to consider that the senior management of the organisation collectively were not taking adequate care, and this was a substantial part of the organisation’s failure.

176 These duties exist, for example, in respect of the systems of work and equipment used by employees, the condition of worksites and other premises occupied by an organisation and in relation to products or services supplied to customers.

177 Referring to Senior Management which would include people who make significant decisions about the organisation, or substantial parts of it. This includes both those carrying out headquarters functions (for example, central financial or strategic roles or with central responsibility for, for example, health and safety) as well as those in senior operational management roles. Exactly who is a member of an organisation’s senior management will depend on the nature and scale of an organisation’s activities. Apart from directors and similar senior management positions, roles likely to be under consideration include regional managers in national organisations and the managers of different operational divisions.
The Corporate Manslaughter Act has thus put entity culpability i.e. causing death by gross negligence on the same pedestal as that of natural persons. The acceptance of this legal position would imply that in case any corporation is involved directly or indirectly as an aider or abettor in a crime under the International Criminal Court Act, 2001 under the UK law, it can be prosecuted in the same manner as a natural person. This, in the understanding of the researcher, would constitute an important principle of national law available for adoption by International criminal law.

4.2.2 United States: As has been discussed in previous chapters, US legal approach towards corporate criminality is unique. US legal system was the pioneer in extending criminal culpability to the concept of juristic personality of a company. In addition, US legal system gives a special position to international law within its municipal law system. Viewed in this perspective, no study on corporate criminality and international law can be complete without considering the US legal approach. However, for the limited purpose of the present chapter, study of US criminal law approach to ‘legal person’ would not be much relevant since US has unsigned the Rome Statute, whereas in this part of research, I am trying to filter principles of corporate criminality by referring to the laws of those countries which have signed the Rome Statute and recognise corporate culpability in their national legal systems. Nevertheless, national criminal laws form the most important source of international criminal law and keeping in mind that aspect, US laws and their approach to corporate crimes continue to be relevant throughout the research.

The U.S. courts do not subscribe to the doctrine of universal jurisdiction. US Congress has enacted statutes covering genocide, war
crimes, torture, piracy, slavery, and trafficking in women and children to meet the U.S. obligations under international agreements. One of the most spectacular legislations enacted by US congress is the *Alien Tort Statute* 178. Although no legislative history or other evidence specifically explains the reason for this grant of federal question jurisdiction, it graphically illustrates the importance that was attributed to international disputes at that time 179.

Under the ATS, right has been given to an alien to file a claim in US courts alleging tortuous liability against the defendant for an ‘action’ which occurred outside USA 180. Corporations/Companies are covered under the ATS. One of the most significant rulings under the ATS has come in the case of *Filártiga V. Américo Norberto Peña-Irala* 181. The *Filartiga* ruling allows a range of tort claims for alleged breaches of the "law of nations". Companies may also be liable for the illegal exploitation of resources abroad under the *National Stolen Properties Act* and the *Racketeering Influenced Corrupt Organizations Act* (RICO). The courts have allowed claims for forced labour and personal injuries when employed as a slave labourer, and claims by citizens of "foreign" countries for injuries inflicted by security forces employed by a subsidiary of U.S. corporations. US international law principles thus

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178 Enacted by the Judicial Act of 1789, it included the grant of subject matter jurisdiction to the Federal courts over ‘all causes where an alien sues for a tort only, committed in violation of the law of nations or a treaty of the United States.
180 The Court interpreted the Alien Tort Statute, 28 U.S.C., which provides: The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.
181 *Filártiga V. Américo Norberto Peña-Irala* 630 F.2d 876 (2d Cir., June 30, 1980). In this case, action was bought against a former Paraguayan police official for the alleged torture and murder of the plaintiff’s (Filartiga) deceased Paraguayan relative. The Court held that customary international law prohibits official torture and SS1350 provides a jurisdictional basis for suits in federal courts for violation of this of ‘laws of nation’ prohibition.
recognise the international legal personality of multinational corporations and provide for their criminal prosecution under international law.

4.2.3 Canada: In Canada, the Crimes Against Humanity and War Crimes Act, S.C. 2000 (CAHW) has incorporated the following as domestic crimes: genocide, crimes against humanity, war crimes, breach of responsibility by a military commander or a superior (usually a civilian superior), offences against the administration of justice of the International Criminal Court, and possession or laundering of proceeds derived from these crimes. CAHW invokes universal jurisdiction as defined in customary international law. Companies are not expressly included or excluded from prosecution for international crimes under CAHW which means that general policy of Canadian law towards corporate criminality should be applicable.

4.2.4 France: The new Criminal Code includes a series of provisions describing crimes against humanity in considerable detail, including genocide and aggravated war crimes. A limited number of international crimes have equivalents in French domestic law. Extraterritorial jurisdiction is based on a connection with France through -

- the nationality of the perpetrator (active personality jurisdiction) of the crime or the victim (passive personality jurisdiction);

- the events constituting the crime represent a connected series of acts or an indivisible act occurring both in France and another state, or where there were acts of complicity in France for a crime committed abroad, if the acts are criminal under all relevant systems of law; or

- the concept of universality where French public policy interests are affected.
In French law, a civil action can be brought jointly with a penal action before a criminal court. Corporate liability is covered in Articles 121/2 of the new Criminal Code which provides that legal persons will be liable in the cases identified by the Legislature and Article 213-3 provides that legal persons may incur criminal liability for all crimes against humanity.

4.2.5 **Norway**: Norwegian municipal law incorporates specific areas of international law, but there must be a matching penal provision in the domestic criminal law as a precondition to enforcement. Norway is a signatory to the International Criminal Court which has complementary jurisdiction to municipal criminal courts. Norway prosecutes international crimes using domestic penal law, e.g. genocide can be treated as homicide, torture as an offence against the person. Norwegian criminal law is applicable to acts committed abroad by any Norwegian national or any person domiciled in Norway when the act is a felony under the law of the country in which it is committed. If a business entity domiciled in Norway is involved in unlawful activity committed outside the jurisdiction, both civil and criminal actions are available subject to the rule of "double actionability" i.e. the activity must have been unlawful under the laws of both Norway and the country of commission. The Norwegian Code of Compensation allows actions for damages for the loss and damage arising from the breach of international law. Non-nationals can be sued in Norway if any business activity occurs in Norway.

4.2.6 **Australia**\(^{182}\): On 1 July 2002 new provisions for the prosecution of genocide, crimes against humanity and war crimes came into operation within the Australian Commonwealth Criminal Code. The

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offences were introduced as a part of Australia’s ratification of the Rome Statute of the International Criminal Court. As part of its ratification of the Rome Statute, Australia introduced offences ‘equivalent’ to the ICC Statute offences of genocide, crimes against humanity and war crimes into its domestic federal criminal legislation, i.e. into the Criminal Code 1995 (Cth.) (Criminal Code). The enactment of these offences within the Criminal Code prima facie confers jurisdiction to certain Australian courts already exercising federal criminal jurisdiction to prosecute corporations for such offences. Division 268 of the Criminal Code enacts within Australian federal criminal legislation the crimes of genocide, crimes against humanity and war crimes (referred to collectively hereafter as the ‘Division 268 offences’). The offences were inserted by the International Criminal Court (Consequential Amendments) Act 2002 (Cth.) for the purpose of creating, as offences against Australian criminal law, the offences over which the ICC has jurisdiction, so that Australia will be in a position to take full advantage of the principle of complementarity. Throughout the drafting and passage of the implementing legislation, the key concern that emerged was the issue of maintaining Australian sovereignty. To address discontent on this issue, the government introduced a number of measures to confirm the primacy of Australian law and legal process over matters otherwise within the ICC’s jurisdiction. This was reinforced by, among other things, statements by the government confirming that Division 268 offences would be interpreted according to Australian domestic law and principles. The Criminal Code contains a clear presumption that all offences contained therein apply equally to bodies corporate as to natural persons. Part 2.5, section 12.1 of the Criminal Code states:

(1) This code applies to bodies corporate in the same way as it applies to individuals. It so applies with such modifications as
are set out in this Part, and with such other modifications as are made necessary by the fact that criminal liability is being imposed on bodies corporate rather than individuals.

(2) A body corporate may be found guilty of any offence, including one punishable by imprisonment.

A number of domestic jurisdictions thus hold corporations i.e. legal persons liable for international crimes even under domestic criminal law i.e. by incorporation of international crimes in domestic criminal law which are included in the Rome statute. The fact that a number of domestic criminal jurisdictions acknowledge corporations/legal person as being included in the definition of ‘person’ and can hold them responsible for international crimes albeit by having recourse to domestic statutes, is a strong argument for incorporating this ‘generally accepted principle of domestic criminal law’ in the Rome Statute.

4.3 INTERNATIONAL CORPORATE PERSONALITY

In addition to the domestic enactments of various nations, it will also be relevant to discuss the international legal personality of Multinational corporations i.e. study of various international instruments which hold corporations as being capable of being punished for violation of international law i.e. that multinational corporations are subjects of international law. This aspect will strengthen the argument to incorporate legal person within the definition of Rome Statute. A part of this study (by way of discussing relevant provisions of various international legal instruments) has already been undertaken in the preceding chapter.
An important document in this regard is the *Amicus* brief\(^{183}\) relating to those sources of international law which demonstrate as to whether or not customary international law recognises corporate criminal liability. In the views of the amicus, a norm of international law allowing for the imposition of criminal liability upon corporations has arisen in recent years which is evidenced by the recognition of one form or another of the criminal or quasi-criminal liability of corporations in treaties, and in the domestic law of virtually every state\(^{184}\). The latter reflects a “general principle of law recognised by civilised nations” that contemplates the criminal liability of corporations in certain circumstances.

The *Amicus* further argued that general principles of international law weigh in favour of the imposition of criminal liability upon corporations. The recognition of corporate criminal liability in domestic jurisdictions manifestly qualifies as a “general principle of law” within the meaning of the Statute of the International Court of Justice\(^{185}\). A 2006 survey of sixteen countries by the FAFO Institute for Applied Studies in Norway found that:

> “State practice within domestic laws [of] many countries, across a variety of legal systems and traditions, has expanded criminal laws to include legal persons”\(^{186}\). Countries as diverse as India, Argentina, Indonesia, Japan, and South Africa have embraced corporate criminal

\(^{183}\) Amicus curiae brief by *Prof. John Dugard* and *Advocate Anton Katz* on whether customary international law recognises corporate criminal liability in *Balintulo MPH O V. Daimler AG*, United States Court of Appeal, Second Circuit, decided on 21.8.2013.

\(^{184}\) Whether or not any international tribunal currently enjoys criminal jurisdiction with respect to corporations is a question entirely distinct from the subject matter of this submission, viz. whether corporations are in principle subject to international criminal liability.

\(^{185}\) Art 38(1)(c).

liability. Common law countries, such as the United States of America, the United Kingdom, and South Africa, have long recognised the criminal liability of corporations. It is trite that common principles of law recognised by States are a source of international law\textsuperscript{187}. Although the principle was originally quite restricted, it may now be said as a general rule that corporations may be held liable in common law countries for any crime save one which, by its nature, can only be committed by a natural person.

Federal courts in the United States have employed the model of vicarious liability to attribute \textit{mens rea} to corporations. In the United Kingdom and Australia, a qualified vicarious liability applies; corporations are only liable if the conduct is committed by an individual of sufficient seniority within the corporation\textsuperscript{188}. South Africa and Canada are examples of countries where forms of vicarious liability for legal persons have been imposed by statute\textsuperscript{189}. Contemporary common law jurisprudence thus unambiguously embraces corporate criminal liability. This has constituted a significant building block in the development of a corresponding principle in international law.

Civil law jurisdictions have in the past been unwilling to allow criminal liability to be imposed upon legal persons\textsuperscript{190}. Criminal law

\begin{footnotesize}
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\item \textsuperscript{187} Section 38(1) of the Statute of the International Court of Justice; \textit{Barcelona Traction Light and Power Company Ltd} 1970 ICJ Reports 3 at 33-35 (drawing upon common consensus of States that corporations enjoyed the benefits of limited liability.)
\item \textsuperscript{188} \textit{Tesco Supermarkets Ltd v. Nattrass} [1972] AC 153 (HL) at 171; \textit{Hamilton V. Whitehead} (1988) 155 CLR 121 at 127.
\item \textsuperscript{189} Criminal Procedure Act 51 of 1977 at section 332 (South Africa); \textit{North Western Dense Concrete CC and Another v. Director of Public Prosecutions, Western Cape} 2000 (2) SA 78 (C) (South Africa)
\item \textsuperscript{190} This was not always the case. Until the end of the eighteenth century, the criminal liability of collective entities was recognised in Germany. However, under the influence of idealist philosophers such as Kant, theories of
\end{itemize}
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punished a person who had committed an ethical wrong. Such a wrong could be committed only by a moral agent, one that had the capacity to comprehend ethical norms but violates them. Corporations did not possess this quality: a corporation was not an agent vested with a conscience, or with consciousness of its actions. Therefore, according to this theory of criminal justice, corporations cannot be held accountable for their actions. This approach has shifted dramatically, under the influence of, *inter alia*, globalisation, and the rise of multinational corporations. France, the Netherlands, Belgium, Switzerland, Austria, and Italy have all introduced criminal punishments, in one form or another, for corporations. In Spain, criminal courts may order the suspension of operations or the winding-up of a legal person implicated in criminal activities. There are still certain civil law systems that do not attribute criminal liability as such to corporations. For example, Germany has not introduced criminal liability as that concept is understood in the common law. But there is a functional equivalent thereof, by way of a system of administrative penalties. Notably, the European Court of Human Rights has held that any penalty which is punitive in character and aims to have a deterrent effect should be characterised as a criminal penalty. Under the criminal law of the People’s Republic of China, companies and enterprises may be criminally responsible; and most

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191 Código Penal, art. 129 (Spain)


193 Öztürk V. Germany, Judgement of 21 February 1984, Series A, no. 73 at para 53.

194 Criminal Law of the PRC 1979, art 30-31.)
of the Japanese penal code is applicable to corporations\textsuperscript{195}. This revolution in civil law jurisprudence has facilitated the emergence of a norm of international customary law allowing for the imposition of criminal liability on corporations; it must be borne in mind that it was largely the erstwhile reluctance of the civil law community to embrace such liability that inhibited the crystallisation of the international norm in earlier decades.

The \textit{Amicus} further opined that although neither Nuremberg nor the Rome statute imposed criminal liability directly upon corporations, neither weighs against the imposition of such liability at international law. Submissions were made to the International Military Tribunal at Nuremberg (the “IMT”), regarding the potential liability of states, individuals, and corporations. The IMT held: “\textit{Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provision of international law be enforced}.”\textsuperscript{196}

The quoted language must be understood as rebutting the contention that only \textit{States} could be liable under international law. There was in fact strong support for the imposition of corporate criminal liability\textsuperscript{197}.

\begin{flushleft}
\textsuperscript{196} \textit{Trial of the Major War Criminals Before the International Military Tribunal} (1947) at 223. This quote is often used as proof that judicial persons could not be criminally liable under international law. In context in the judgment, however, it is clear that it actually refers to the unacceptability of the excuse of several of the accused that their actions were state policy.
\end{flushleft}
International criminal law remained largely in stasis during the Cold War. It was only during the negotiations of the Rome Statute in 1998 that debate reawakened. Some civil law countries were at this point more receptive to corporate criminal liability. A particular stumbling block was the principle of complementarily that underpins the ICC\(^198\). The result was that corporate criminal liability was not provided for in the Statute as adopted; the jurisdiction of the ICC was limited to natural persons\(^199\). Any argument that the omission of corporate criminal liability from the Rome Statute evinces that corporations are not subject to such liability is gainsaid by the language of the Statute itself: Art. 10 provides that “nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this statute.” Broad acceptance of the imposition of criminal liability upon corporations is manifested in both international and regional treaties which require criminal\(^200\) penalties to be imposed upon corporations in certain circumstances. These treaties include:

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\(^{198}\) It is provided in the Rome Statute of the International Criminal Court (the “Rome Statute”) (July 17, 1998, 2187 U.N.T.S 3), that the ICC may only prosecute where national courts are unwilling or unable to do so – the ICC “complements” national criminal jurisdiction. This important principle balances the ICC’s powers with respect for the sovereignty of States. However, if a State does not have a legal framework to prosecute corporations, it will be “unable” to prosecute an accused corporations and the ICC will be able to intervene immediately. This sidestepping of the principle of complementarity was not welcomed by the many civil law countries which, at that time, did not recognise corporate criminal liability. See Daniel Aguirre, *The Human Right to Development in a Globalized World* 203 (2008) (“Indications of the acceptance of corporate criminal liability were evident during the drafting of the Rome Statute creating the International Criminal Court. Negotiators demonstrated support for the concept of corporate responsibility but procedural and definitional problems ultimately led to its exclusion.”)

\(^{199}\) Article 25(1) of the Rome Statute provides that: “The Court shall have jurisdiction over natural persons pursuant to this Statute”.

\(^{200}\) The treaties discussed here usually refer to “criminal, civil or administrative” liability with “effective, proportionate and dissuasive” sanctions (see for example Article 26 of the UN Convention Against Corruption (2003)). The purpose of such phrasing is clearly to accommodate legal systems, like that
• The Organisation of American States Inter-American Convention Against Corruption (1996).  
• The UN International Convention for the Suppression of Terrorism (1999).  
• The UN Convention against Transnational Organised Crime (2000).  
• The UN Convention Against Corruption (2003).  
• The Council of Europe Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse (2007).  

The Preamble to the Universal Declaration of Human Rights envisages that “every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and
education to promote respect for these rights and freedoms and by progressive measures, National and International, to secure their universal recognition and observance.” In his commentary on the foregoing language, Prof Henkin states that the phrase “every individual” includes “juridical persons”. Henkin adds that “every individual and every organ of society excludes no one, no company, no market, and no cyberspace”. The United Nations Security Council, when issuing resolutions under Chapter 7 of the United Nations Charter, routinely requires States to take punitive measures against legal persons, but also goes further and requires that reports be made directly to it concerning violations of domestic measures by such legal persons. In several resolutions, the Security Council has referred directly to groups committing “criminal” acts, for example:

“Reaffirming that terrorism in all its forms and manifestations constitutes one of the most serious threats to peace and security and that any acts of terrorism are criminal and unjustifiable regardless of their motivations, whenever and by whomsoever committed; and reiterating its unequivocal condemnation of Al-Qaida, Osama bin Laden, the Taliban — and associated individuals, groups, undertakings and entities — for ongoing and multiple criminal terrorist acts aimed at causing the death of

212 Charter of the United Nations, June 26, 1945
213 Notably the freezing of assets; see for example the measures to be taken against legal persons suspected of assisting in Iran’s nuclear weapons programme in UN Security Council Resolutions 1803 (S/RES/1803 (2008)) and 1737 (S/RES/1737 (2006)), or against the Taliban in Afghanistan in UN Security Council Resolution 1373 (S/RES/1373 (2001) at para 1).
214 In United Nations Security Council Resolution 1306 (S/RES/1306 (2000)), the Security Council was concerned about companies profiting off “blood diamonds” from the war in Sierra Leone. Not only were States required to put in place measures to prevent the import of such diamonds to their territory, but a Committee of the Security Council was required to monitor violations of such measures by “entities” and report thereon to the Security Council identifying such entities (at paras 1 and 7).
innocent civilians and other victims, destruction of property and greatly undermining stability."

Equally pertinent is the fact that the from the abovementioned treaties, four UN treaties have been ratified by 171, 151, 135, and 143 States respectively. A large proportion of States thus support the treaties and the requirement of corporate criminal liability that goes with them. The Amicus concluded in the words of Prof Steven Ratner:

“international law has already effectively recognized duties of corporations . . . The question is not whether non-state actors have rights and duties, but what those rights and duties are”. Of course, an entity need not be deemed a subject of international law in the broadest sense in order to bear rights and duties there under. To render States and, in some cases, individuals, liable at international law, while allowing according a very powerful actor on the international stage – the modern Multi-National Corporation – the benefit of criminal immunity, would be anomalous. Indeed, to leave

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215 See the preambles to Resolutions 1617 (S/RES/1617 (2005)) and 1904 (S/RES/1904 (2009)). In Resolutions 1904 and 1822 (S/RES/1822 (2008)).
217 Reparations for Injuries Case International Court of Justice Reports (1949) at 178 (ICJ) (“[t]he subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community.”).
218 Article 1 of Protocol 1 of the European Convention on Human Rights (“ECHR”) 87 U.N.T.S. 103 (“every natural or legal person is entitled to the peaceful enjoyment of his possession.”) In Sunday Times V. UK (No. 2) 13166/87 [1991] ECHR 50 Judgment (26 November 1991), a newspaper’s right to freedom of expression under Article 10 of the ECHR was upheld. The Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, has written that the emergence of corporations as participants at the international level has made it “more difficult to maintain that corporations should be entirely exempt from responsibility” in international law (Report of the Special Representative A/HRC/4/35 19 February 2007 at para 20). Ronald C. Slye, Corporations, Veils and International Criminal Liability, 33 Brooklyn Journal of International Law 955, 959 (2008) (“Given that
corporations unrestrained by international criminal law would allow a dangerous lacuna\(^{219}\). On this basis, the “general principles of law recognise by civilised nations,” international instruments, and customary international law, all recognise corporate criminal responsibility in principle.

**4.3.1 International Investment Law**

At this stage, while discussing the essentials of multinational corporations as subjects of international law, a brief reference to *International Investment Law* would not be out of place. Multinational Corporations operate primarily under International Investment Law i.e. the dominant activity of ‘transnational investment’ is governed by this field of law. Hence, the rights and obligations of a multinational corporation are largely governed by International Investment Law, subject of course to the domestic commercial and tax laws within which all entities have to abide. This field of international law is based on numerous, largely bilateral treaties (sometimes multilateral also) and is adjudicated by arbitral panels established on a case-by-case basis. In other words, there is no definite body of rules which governs this field uniformly. However, at the same time there are certain principles of this Law which are generally included while negotiating an Investment treaty. For example: Most Favoured Nation\(^{220}\) (MFN)

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220 In a multilateral treaty, the benefits given to a signatory country or advantageous terms extended to a signatory by one signatory state have to be extended to be all the member states.
status, Principle of National Treatment\textsuperscript{221}, Fair and Equitable Treatment, Rule of Expropriation\textsuperscript{222}. Some of the BIT’s, especially where the host state are underdeveloped war ravaged/internal strife torn economies, also contain Umbrella Clause which refers to the provision in the Treaty by virtue of which the parties are committed to not only the clauses in the specific Treaty but also to commitments given under other international instruments of like nature or otherwise. Needless to say, this clause generally is for the benefit of the Investor.

Decisions of Arbitral Tribunals, which adjudicate between Investor and Host State disputes on the basis of the respective Investment Treaties, have played a big role in development of International Investment law. According to a book - \textit{Principles of International Investment Law}\textsuperscript{223}, in the last decade, approximately 300 investment treaty disputes have cumulated. However, scope of arbitral panels in case of Investment treaty disputes is largely restricted to violations of treaty of ‘commitments’ or ‘investor protection guarantees’ given by the Host state. Moreover, arbitrations in this area is largely modeled on the pattern of international commercial arbitration. It is thus trite to conclude that not only are the multinational corporations subjects of international investment law where in they enjoy exclusive rights, international investment law is one branch of international law which has grown primarily out of the operations of the multinational corporations outside their national boundaries i.e. multinational operations. International Investment Law thus unambiguously confers international legal personality on multinational corporations. The

\textsuperscript{221} There should be no discrimination between entities or citizens resident or domiciled in the host state and those entities which are nationals of another state in so far as equitable treatment is concerned.

\textsuperscript{222} Compulsory acquisition of assets of a foreign Company must be preceded or followed by fair and equitable compensation).

\textsuperscript{223} Rudolf Dolzer, Christoph Schreuer; Oxford University Press, New York 2008
corollary is that if for commercial aspects, multinational corporations can be infested with rights which can be asserted at international forums under international law, there is no reason for leaving them out when their actions call for criminal prosecutions under international law.

Having discussed the various provisions which govern entity liability under international criminal law and the status of multinational corporations as subjects of international law, we now proceed to another important ingredient of this research which is discussing the principles which specifically deal with judging the corporate complicity or culpability in criminal acts.

Corporate criminal liability in both civil and common law jurisdictions evolved from the enforcement of individual criminal responsibility for wrongful acts of the corporation. That is, in first instance, directors, then officers and finally employees of corporations were held liable for corporate wrongs. Finally, this has resulted in extending criminal liability to the corporation itself. As ideas of punishment have been developed, this has allowed criminal liability for legal persons other than individuals to arise. Holding corporations as a whole, rather than merely the constituent members, criminally accountable is important for several reasons. Firstly, corporations may be structured specifically to avoid legal liability. Recognising corporate legal personality, and thus imposing criminal liability on the corporate entity, ensures that individuals cannot hide behind corporate activity, nor can the corporate entity as a whole shelter behind the criminal liability of individual members. Secondly, recognising that the corporate entity as a whole is criminally liable allows for more effective legal and moral sanctioning of wrongful corporate activity. As such, criminal liability of corporations through the recognition of legal
personality directly encourages the adoption of better standards, more responsible corporate behaviour and deterrence from future misconduct. Thirdly, recognising the corporate entity as having legal personality for purposes of criminal law ensures the availability of effective means of punishment 224.

4.4 CORPORATIONS AS CRIMINALS UNDER INTERNATIONAL CRIMINAL LAW

Even though corporations can be "persons" in certain legal contexts, they cannot so easily be criminals. The prosecution of corporations for crimes requiring mens-rea or ‘specific intention’ has been challenging. For such crimes, the law has attempted to fasten the criminal liability of corporations to the intent of individuals within the corporation. However, Organizational theory of corporate decision making, confirms that borrowing intent from individual corporate actors may not be productive, since some corporate acts can never be traced to the intent of any one individual. This suggests a framework to replace the conventional rule of imputing criminal intent directly from individuals to the corporation. In other words, a theory needs to be developed by application of whose principles, it can be safely concluded in a given case that the Corporation/legal person itself had the criminal intent to commit the offence complained against. This approach would be in consonance with the argument that Corporations/legal persons are not only vicariously liable for a criminal act committed by its officers but can be held guilty in their own status. This chapter will devote some time in enumerating certain principles by applying which criminal liability through ‘intent’ of a corporation can be established. The standards to prove individual

guilt and corporate culpability are vastly different. If both are to be prosecuted in the same forum (e.g. International Criminal Court), then rules for judging the culpability have to be clear and unambiguous, as far as possible.

The issue of corporate liability in international criminal law dates back to what most consider to be the birth of international criminal law itself — the post-WWII Nuremberg and control council trials. Of particular interest for present purposes are two of the trials involving industrial enterprises, the *Krupp*225 and *I.G. Farben*226 cases. The Krupp case involved the trial of Alfred Krupp and nine other officials of the Krupp industrial firm, all of whom were convicted of charges relating to, *inter alia*, the use of slave labour during WWII. The trial established that during the course of WWII the firm had played a key role in war-time activities presenting an inextricable part of German policy for occupied countries such as France, Norway and Poland. Notably, in passing sentence the tribunal ordered the forfeiture of all Krupp’s property, both public and private.

The I.G. Farben case involved 24 directors and officers of the Farben corporate enterprise. Charges included the use of slave labour and the design and production of the poisonous gas used in concentration camps of the German regime as well as for other criminal activities. In both of these decisions, although the corporate enterprise was ultimately not declared to be a criminal organisation, the trial judgments contained reasoning which marked the emergence of a recognition of the criminal potential of the corporate entity. In the Krupp trial the tribunal ultimately upheld the strict principle of

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225 *United States V. Krupp* Trials of War Criminals before the Nuremberg Military Tribunals Under Control Council Law No. 10 (1950).
226 *United States V. Krauch, et. al. (I. G. Farben)* 8 Trials of War Criminals before the Nuremberg Military Tribunals Under Control Council Law No. 10 (1952).
individual liability, declaring that the defendants could be liable only if they had ‘actually and personally’ committed the offence as charged. However, the tribunal also noted that it should not be possible to escape criminal liability under the corporate guise. Despite not declaring the Krupp Corporation to be a criminal organisation, the tribunal used Krupp’s employment of slave labour to impute criminal intent to the corporation. Similarly, the I.G. Farben case implicated the criminal liability of the corporation as a whole through its direct references to corporate obligations and repeated consideration of the corporation as a criminal instrument. Thus, the lengthy discussions on corporate misconduct in these trials mark the beginning of the evolution from the principle of ‘no corporate criminal liability’ to recognition that corporations may in fact be capable of committing crimes under international criminal law.

4.5 CORPORATE CRIMINAL INTENT

In judging corporate criminal intent, Andrew Weissmann has tried to break new ground with reference to approach of US courts. The author creates a three-part test to determine corporate intent, asking whether a corporate practice or policy violated the law, whether it was reasonably foreseeable that such a policy would lead a corporate agent to violate the law, or whether the corporation adopted that agent’s violation of the law. The author argues that this framework more accurately identifies culpability for criminal acts within complex

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227 I.G. Farben, above n 84 ("While the Farben organisation, as a corporation, is not charged under the indictment with committing a crime and is not the subject of prosecution in this case, it is the theory of the prosecution that the defendants individually and collectively used the Farben organisation as an instrument by and through which they committed the crime enumerated in the indictment")

228 Mr. Weissmann is a partner in the New York office of Jenner & Block LLP. An extended version of this article appeared in the Indiana Law Journal as Rethinking Corporate Criminal Liability, 82 IND. L. J. 411, 427 (2007).
corporate structures. Discussed below are the main arguments advanced by Andrew Weissmann:

Under current US federal common law, a corporation is liable for the actions of its agents whenever such agents act within the scope of their employment and at least in part to benefit the corporation. A corporation, being merely a person in law only, and not a real one, can act only through its employees for whom it should be held responsible. Courts applying federal common law have upheld convictions based on vicarious criminal corporate liability even where the agent was acting contrary to express corporate policy and where a bona fide compliance program was found to be in effect. As to the limitation that employees must be acting within the scope of their actual or apparent authority, this requirement has been interpreted expansively. Similarly, the requirement that an employee act to

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230 In re Hellenic, Inc., 252 F.3d 391, 395 (5th Cir. 2001) (“An agent’s knowledge is imputed to the corporation where the agent is acting within the scope of his authority and where the knowledge relates to matters within the scope of that authority.”) United States V. 7326 Highway 45 N., 965 F.2d 311, 316 (7th Cir. 1992) (holding agent’s culpability and knowledge may only be imputed to the corporation where agent was acting as authorized and motivated at least in part by an “intent to benefit the corporation”) (citing United States v. Cincotta, 689 F.2d 238, 241-42 (1st Cir. 1982)).
231 See United States V. Basic Construction Co., 711 F.2d 570, 573 (4th Cir. 1983) (“A corporation may be held criminally responsible for antitrust violations committed by its employees . . . even if, as in Hilton Hotels and American Radiator, such acts were against corporate policy or express instructions.”); United States V. Hilton Hotels Corp., 467 F.2d 1000, 1004-07 (9th Cir. 1972) United States V. Twentieth Century Fox Film Corp., 882 F.2d 656, 660 (2d Cir. 1989) (“We agree with the District Court that Fox’s compliance program, however extensive, does not immunize the corporation from liability when its employees, acting within the scope of their authority, fail to comply with the law and the consent decree.”)
232 In accordance with traditional agency law principles, the scope of employment is the agent’s apparent, not actual, authority within the corporation. Joel M. Androphy et al., General Corporate Criminal Liability, 60 TEX. B.J. 121, 121-22 (1997) (discussing role of apparent authority in corporate criminal prosecutions).
benefit the company has likewise been relaxed by interpretation; under the current doctrine, it “is not necessary that the employee be primarily concerned with benefiting the corporation, because courts recognize that many employees act primarily for their own personal gain”. Indeed, such is the state of modern doctrine of vicarious criminal corporate liability that under federal law, a corporation can be held liable for agents no matter what their place in the corporate hierarchy and regardless of the efforts on the part of corporate managers to deter criminal conduct.

Prosecutors have excessive power due to the current application of the doctrine of vicarious liability. A single employee’s criminal conduct can be sufficient to trigger criminal liability on the part of the corporation. Where such potential liability exists, corporations as a practical matter can rarely afford to take criminal cases to trial because liability can be triggered by such minimal employee conduct. A prosecutor’s leverage is further enhanced because a criminal indictment can have devastating consequences for a corporation and risks the market imposing what is in effect a corporate death penalty. The willingness of companies post-Enron to agree to strict deferred prosecution agreements so as to avoid an indictment was greatly enhanced when Wall Street saw firsthand the consequences of the decision by Arthur Andersen LLP to reject the government’s offer of a deferred prosecution agreement in the winter of 2002.

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233 Corporate criminal liability has been predicated on the actions of low-level employees, including salespeople, manual laborers, truck drivers, and clerical workers. E.g., United States V. Dye Construction Co., 510 F. 2d 78 (10th Cir. 1975)

234 Although the company was at the time haemorrhaging clients and may have likely folded even absent prosecution, the company’s decision to face indictment rather than enter into a deferred prosecution agreement was
Rethinking the standard for criminal corporate liability to require the government to show that the company did not have a bona fide compliance program to detect the criminal conduct will serve to correct, in part, the imbalance in power between the government and a corporation facing possible prosecution for the action of an errant employee. The government has virtually unfettered discretion to exact a deferred prosecution agreement from a corporation, mandating fines and internal reforms\textsuperscript{235}. Prosecutors under this proposed revision to criminal corporate liability standards will wield an enormous stick in dealing with such companies. Moreover, since corporate management will be greatly incentivized to protect the corporation from criminal liability by creating a strong and effective compliance program, the proposed new vicarious liability standard will have the advantage of maximizing the chances that such criminality will not take root in the first place.

4.5.1 Criminal Corporate Liability - Deterrence and Retribution:
None of the traditional goals of the criminal law supports the application of agency principles of vicarious liability where a corporation has taken all reasonable measures to conform its employees’ conduct to the law. Where nothing more can be expected of a corporation than actions it has already undertaken, the goals of the criminal law are satisfied.

This approach makes some sense and is backed up with logic. Consider this, even when the Corporation is prima facie held guilty of a criminal wrong by the DOJ such as to warrant a prosecution by a widely viewed as effectively extinguishing any hope of Andersen’s continued viability absent an acquittal. For instance, the Citigroup and JPMorgan Chase cases - Both of these major financial institutions entered into settlements with state prosecutors after criminal charges were threatened in relation to the companies’ “prepay” transactions with Enron.
criminal court, the Deferred Prosecution Agreement steps in which is basically an offer to the Corporation to clear the rot in its organisation. This is usually achieved by obligating the Corporation to have in place compliance programs and in part by paying fines. Thus, if the Corporation has already put in place compliance programs or systemic checks to prevent criminal acts by its officers and employees, there is hardly a ground left for still trying to prosecute the Corporation and browbeat it into submission by forcing it to enter into a DPA.

Deterrence traditionally is broken down into two components, specific and general. Specific deterrence refers generally to incapacitating the criminal to prevent future conduct in that individual. For a real person, that incapacitation comes usually in the form of imprisonment including restrictions on one’s liberty or supervised release. Prison of course is not an option for a corporation. Specific deterrence of a company could, however, take the form of causing the dissolution of the company, barring the company either permanently or for a period of time from engaging in certain businesses, or subjecting the corporation, like an individual, to a probationary period during which its conduct is restricted and monitored by a court. General deterrence refers to the effect punishment of a specific defendant will have on other members of society who might be tempted to engage in similar conduct. General deterrence is particularly apt with respect to corporate criminal conduct. The criminal law also serves a retributive function. What actions are deemed to be “criminal” is a judgment by society as to what is out of bounds of acceptable societal behaviour. The corporation that transgresses that boundary can be as subject to retribution as an individual. Nevertheless, there is a difference between corporate and individual retribution. When a corporation is held *criminally* responsible for the criminal actions of an employee,
retribution requires us to first determine what it is that the corporation did or did not do that warrants criminal sanction. Where an employee has been encouraged to engage in the crime by the corporation, the analysis is simple. But what of the company that did everything it reasonably could to prevent such conduct? Imposition of corporate liability where a corporation has taken all reasonable steps to deter and detect the criminal conduct of its employee furthers none of the goals of the criminal law. If anything, the conviction would send to corporations with effective compliance programs the opposite message—that no good deed will go unpunished.

Where, as in Enron or WorldCom, a corporation’s senior management engages in crime that enables the company to generate artificial earnings to meet Wall Street expectations, or where an executive fudges the numbers in a quarter while management closes its eyes to what is occurring, the company has either actively encouraged crime or tolerated it. In such cases, the company should be held responsible for the conduct of its employees because it has not taken the necessary steps to prevent and detect such crimes from occurring. Suppose, a lower-level executive and a few of her assistants at her direction destroy documents that the employees believe would hurt themselves and the company. Suppose also that the corporation has extensive programs and policies in place to prevent such activity, but that the employees nevertheless committed the crime and were soon found out and turned over by the company to the government. The corporation has taken all reasonable measures to prevent and detect such criminal action by its employees, and nothing beneficial is gained by allowing criminal liability to attach. But it is hard to understand why the mere employment of one who commits a crime,

236 As in the case of Satyam Computers
absent unusual facts such as a complete abdication of screening, would trigger the sanctions of the criminal law.

In assessing the need for deterrence and retribution, a corporation is fundamentally different than an individual. Companies, unlike most individuals, cannot control absolutely the people’s conduct for which they can be criminally liable. Indeed, the DOJ has recognized this principle that a corporation cannot control every action of their employees and that they consequently should not be held responsible for all such actions. In the typical post-Enron deferred prosecution agreements, the defendant company agrees to a statement of facts and also agrees that it will not contradict that set of facts, through any of its employees or other agents. An employee’s statement contradicting the agreed-upon statement of facts can be imputed to the defendant company and constitute a breach of the agreement. Notably, however, if an employee does contradict the statement of facts, the company has a set period of time—typically forty-eight to seventy-two hours—to repudiate the statement of the employee and thus cure any breach. Such a caveat recognizes the basic fact that an organization and an individual are different for purposes of imposition of criminal liability—an organization cannot control the actions of its employees in the manner that an individual typically can control her own actions. Accordingly, even the DOJ has adopted in these agreements a provision recognizing that a corporation can only do so much and that imposition of criminal liability is inappropriate where the company has done all that it can reasonably be expected to control the conduct of its employees. Where a company has already instituted effective mechanisms that reasonably deter and detect crime by its employees, the goals of criminal corporate law are satisfied.
4.5.2 The Benefits of Limiting Criminal Corporate Liability:
The rationale for altering the law is strong. A standard of corporate criminal liability that is tied to whether the company has taken all reasonable steps to prevent and detect crime by its employees would strongly incentivize meaningful and necessary self-regulation. A company would have strong reasons to implement an effective compliance program, both to deter criminal activity at the outset and to use as a shield in the event criminality nevertheless occurred. Under the current legal regime, a corporation is given no benefit at all under the law for even the best internal compliance program if such crime nevertheless occurs. The fear that companies will seek to implement mere “show” programs that will fool courts and regulators is unrealistic. Any effort to pass off intentionally a fake program as a real one would risk the company obstructing justice. Prosecutors and courts are called on now to assess the effectiveness of such compliance programs in connection with deferred criminal prosecutions.

4.5.3 Defining An Effective Compliance Program:
A company that assesses its criminal risk and sets up reasonable systems to address that risk should suffice to provide a safe harbor from criminal prosecution. Specific guidance can be found in DOJ memoranda and the numerous deferred prosecution agreements reached by the DOJ and corporations as well as in the Sentencing Guidelines governing corporations. These sources provide guidance as to the measures that are appropriate for a company to take in order

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237 Cf. Diana E. Murphy, The Federal Sentencing Guidelines for Organizations: A Decade of Promoting Compliance and Ethics, 87 IOWA L. REV. 697, 710-11 (2002) (then-chair of the U.S. Sentencing Commission noting that sentencing guidelines, by giving reduction in sentence to a corporation that has an effective compliance program, have encouraged companies to adopt effective compliance systems)
to adequately deter and detect criminal conduct by corporate employees.

4.5.3.1 The DOJ’s Internal Approach - The Thompson Memorandum: In 2003, the DOJ issued revised guidelines (the Thompson Memorandum\textsuperscript{238}) for its prosecutors as to the factors to be considered in connection with whether or not to bring a criminal case against a corporation. The Thompson Memorandum places particular emphasis on analysis of the \textit{concrete} steps taken by the corporation to cooperate. Thus, a corporation seeking leniency before the DOJ must demonstrate “the efficacy of the corporate governance mechanisms in place within a corporation, to ensure that these measures are truly effective.” Notably, the DOJ concedes that the mere fact that an employee commits a crime that is motivated in part to benefit the corporation is insufficient to conclude that a program is ineffective. In assessing a corporate compliance program, a prosecutor is to ask a series of sensible questions such as: do the company’s directors exercise independent and informed review over proposed actions; are there internal audit systems in place; is there a reporting system within the company that provides management and the board of directors with timely and accurate information about the company’s compliance with the law; does the compliance program address detection of the types of misconduct “most likely” to occur in the company’s particular business; are employees adequately informed about the corporation’s compliance program.

\textsuperscript{238} The Thompson Memorandum, named after the then-Deputy Attorney General of the United States, enumerates a series of factors to be considered by federal prosecutors before instituting criminal action against a corporation. \textsuperscript{6} These factors include the criminal history of the corporation, the likely collateral consequences of prosecution, the level and role of criminal conduct of the corporate employees, and the existence of an effective corporate compliance program.
There is significant logic in accepting the standard of corporate criminal liability as proposed by Weismman. Especially, in criminal prosecutions, where the effect of a possible conviction can have cascading negative effects on the corporation’s viability as a going concern, the principle of vicarious liability must be limited and invoked only in those cases where either the Corporation was purposely oblivious of the illegal activities of its employees (lack of due diligence) or despite aware of being the potentiality of criminal activities, it failed to ensure that such activities of its employees are tracked and kept under a strict vigil. The proposed standard to judge corporate criminal liability will undoubtedly prove be a significant principle of international criminal law if adopted by the Rome Statute to prosecute legal persons. The same also allay fears of the corporations that they will be sent up to face prosecutions simply on account of some of its employees having indulged in criminal acts.

An issue which needs to be addressed in relation to vicarious liability of corporations is whether a criminal act of an employee, which benefits the corporation in part, can be said to have been executed with the tacit consent of the Corporation. In my understanding, this question can be answered with the aid of the proposed standard of judging corporate criminality (as above). It would have to be seen whether the dominant objective of the employees’ act was to benefit the Corporation or to benefit himself. If the dominant objective was to benefit the Corporation, the question whether effective compliance programs were in place would come into play because presence of such compliance programs would negate such a possibility (a strong reporting system will immediately send a clear signal to the Management that an act on the part of the Corporation by one of its employees is likely to illegally benefit the Corporation which in turn will trigger the necessary remedial measures). In such a situation, the
Corporation can successfully plead innocence on the basis of due diligence/not guilty.

4.6 CORPORATE COMPLICITY

In addition to the principles discussed above which can aid the prosecution of a company in the most objective manner possible i.e. especially where mens rea is an important ingredient of the alleged offence, Geneva based International Commission of Jurists has conducted a landmark study regarding the parameters which must be laid down to judge whether a Corporation has willingly participated in a crime. The study concentrated highly on the role of Corporations which are accused of providing aid and help to the armed groups who have been accused of international crimes like genocide and gross human rights abuses, and hence, the relevance of this study report can hardly be over stated. Notably, one of the objectives of the study was to encourage the companies to test their conduct on the benchmark laid down in the study so that the entities know where to draw the line when involved in a conflict situation and not to cross the same. This study would prove to be immensely helpful should the Rome Statute be revised paving way for prosecution of corporations for international crimes. This is because the current core international crimes, as recognised under the Rome Statute, are more likely to be committed directly by armed groups than by corporations. The role of corporations in such crimes is more likely to be that of aiding and/or

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239 The International Commission of Jurists is a non-governmental organization devoted to promoting the understanding and observance of the rule of law and the legal protection of human rights through the world. It is headquartered in Geneva, and has 85 national sections and affiliated organisations. It enjoys consultative status in the UNESCO, The Council of Europe and the African Union.
abetting. Reproduced below is the relevant part of the aforementioned study.

**Business Complicity and Accountability in the 21st Century**

*Company Conduct and the Call for Accountability:*

*Six decades ago senior company officials were convicted for actively helping the Nazi regime to commit some of the worst war crimes imaginable. These business leaders, often working through their companies, supplied poisonous gas to concentration camps knowing it would be used to exterminate human beings; actively sought slave labour to work in their factories; acquiesced or helped in the deportation, murder and ill-treatment of slave workers; donated money to support the criminal S.S., and enriched their companies by plundering property in occupied Europe.*

The international community has been shocked at reports from all continents that companies have knowingly assisted governments, armed rebel groups or others to commit gross human rights abuses. Oil and mining companies that seek concessions and security have been accused of giving money, weapons, vehicles and air support that government military forces or rebel groups use to attack, kill and “disappear” civilians. Companies have allegedly sold both tailor-made computer equipment that enables a government to track and

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241 German Industry and the Third Reich: Fifty Years of Forgetting and Remembering By S. Jonathan Wiesen: The great majority of German businessmen behaved in a decidedly unheroic manner during the Nazi era. Most of them, especially leaders of larger companies, not only refrained from risking their lives to save Jews, but actually profited from the use of forced and slave labor, the "Aryanization" of Jewish property, and the plundering of companies in Nazi-occupied Europe at http://archive.adl.org/braun/dim_13_2_forgetting.html#.VCQf3cq6ZMs accessed on 3.4.2014
discriminate against minorities, and earth-moving equipment used to demolish houses in violation of international law. Others are accused of propping up rebel groups that commit gross human rights abuses, by buying conflict diamonds.

The ICJ Expert Legal Panel – Complicity in Gross Human Rights Abuses:

It is in this context that the ICJ established the Expert Legal Panel on Corporate Complicity in International Crimes (the Panel). The Panel was mandated to consider in what situations companies and/or their individual representatives could be held legally responsible under criminal and/or civil law when they are “complicit” with governments, armed groups, or other actors in gross human rights abuses.

Clarifying the Legal and Policy Meaning of Complicity:

For a number of years now the word “complicity” has been used on a daily basis to describe the different ways in which one actor becomes involved in an undesirable manner in something that someone else is doing. While there are many situations in which businesses and their officials are the direct and immediate perpetrators of human rights abuses, allegations are frequently made that businesses have become implicated with another actor in the perpetration of human rights abuses. In such circumstances, human rights organisations and activists, international policy makers, government experts, and businesses themselves, now continuously use the phrase “business complicity in human rights abuses” to describe what they view as undesirable business involvement in such abuses.

What does it mean for a business to be complicit? What are the consequences of complicity? How can businesses avoid becoming complicit? How should they be held to account for their complicity? In
many respects, although the use of the term is widespread, there continues to be considerable confusion and uncertainty about the boundaries of this concept and in particular when legal liability, both civil and criminal, could arise for such complicity. It is this which the Panel aims to clarify in this report.

Applying Civil and Criminal Laws to Gross Human Rights Abuses:

The Panel’s report does not involve an analysis of international human rights law as a mechanism of accountability, but rather focuses on two branches of law: criminal law (principally international criminal law, supplemented by criminal law concepts common to national systems) and the law of civil remedies found in both common law countries and civil law jurisdictions. In terms of the bases on which criminal responsibility may be imposed, the report has focused on aiding and abetting, common purpose and superior responsibility. While no international forum yet has jurisdiction to prosecute a company as a legal entity, it is widely accepted that corporate officials could face trial for crimes under international law at the international level. Indeed, even at its conception after the Second World War, international criminal law was applied to the sphere of company activity, and business officials who had become involved in crimes under international law, perpetrated by the Nazis in the course of their business transactions, were held criminally accountable. Furthermore, as national legal systems incorporate international criminal law into their domestic legislation, they often include legal entities, including companies, in the list of potential perpetrators.

A Zone of Legal Risk:
The Panel describes the kind of conduct that a company should avoid if it is to ensure that it does not become complicit in gross human rights abuses, and as a result find itself in a zone of risk.

**Preventing Complicity: When Could a Company be Held Legally Accountable for Complicity in Gross Human Rights Abuses -**

Through consultations, research and by drawing on the experiences of the Panel members themselves, the Panel has developed an approach which it believes will help any business, non-governmental organisation (NGO) or other relevant actor to assess whether a company could face legal liability in circumstances where it is complicit in gross human rights abuses, and will help companies to identify behaviour they should avoid.

The approach poses a number of questions in three areas of inquiry:

1. **Causation/Contribution:** Did the company’s conduct enable, exacerbate or facilitate the gross human rights abuses?

2. **Knowledge & Foreseeability:** Did the company know, or should it have known, that its conduct would be likely to contribute to the gross human rights abuses?

3. **Proximity:** Was the company close or proximate (geographically, or in terms of the duration, frequency and/or intensity of interactions or relationship) to the principal perpetrator of the human rights abuses or the victims?

**The Principles: Causation, Knowledge and Proximity -** The Panel considers that a prudent company should avoid the following conduct, because it crosses a threshold beyond which the company and/or its individual representatives could be held responsible under criminal law and/or the law of civil remedies, for complicity in gross human rights
abuses committed by a government, armed group, or other actor. A company should avoid conduct if: **First,** by such conduct, the company or its employees contribute to specific gross human rights abuses, whether through an act or failure to act, and whatever form of participation, assistance or encouragement the conduct takes, it:

1. **Enables the specific abuses to occur,** meaning that the abuses would not occur without the contribution of the company, or

2. **Exacerbates the specific abuses,** meaning that the company makes the situation worse, including where without the contribution of the company, some of the abuses would have occurred on a smaller scale, or with less frequency, or

3. **Facilitates the specific abuses,** meaning that the company’s conduct makes it easier to carry out the abuses or changes the way the abuses are carried out, including the methods used, the timing or their efficiency.

**Second,** the company or its employees actively wish to enable, exacerbate or facilitate the gross human rights abuses or, even without desiring such an outcome, they know or should know from all the circumstances, of the risk that their conduct will contribute to the human rights abuses, or are willfully blind to that risk\(^2\)\(^4\)\(^2\).

\(^2\)\(^4\)\(^2\) Mens Rea or guilty mind has varying degrees i.e. there are various manifestations of a guilty mind. At the top of this ladder is doing an act with a specific intention wherein the guilty mind is said to be of the highest degree. Below specific intention is the ‘knowledge’ which a person has about the effect of his act though he ‘may not’ intend to cause that effect but nevertheless performs that act. Next comes ‘carelessness’ wherein a person has no intention to commit a crime but has knowledge that his act will result in such a crime and yet he takes no caution to prevent that ‘result’ either in the hope that the likely ‘result’ will not occur or he is of the opinion that he will be able to avoid that ‘result’. Within these three broad degrees, criminal law also recognises sub degrees also e.g. where the facts of a particular case are such that the accused should have known (knowledge) that his act will
Third, the company or its employees are proximate to the principal perpetrator of the gross human rights abuses or the victim of the abuses either because of geographic closeness, or because of the duration, frequency, intensity and/or nature of the connection, interactions or business transactions concerned. The closer in these respects that the company or its employees are to the situation or the actors involved the more likely it is that the company’s conduct will be found in law to have enabled, exacerbated or facilitated the abuses and the more likely it is that the law will hold that the company knew or should have known of the risk.

The following sections explore in more detail the broad description of the elements set out above, asking what degree of involvement a company needs to have in a gross human rights abuse before it could be considered criminally responsible or liable in civil law.

Causation and Contribution: Enabling, Exacerbating, Facilitating Human Rights Abuses -

As long as the company’s conduct provides a sufficient level of assistance or encouragement to the gross human rights abuses (by enabling, exacerbating or facilitating), it does not matter what the nature of the conduct is. The company could give advice or support that encourages the principal perpetrator to commit the act; purchase, hire or

result in a particular illegality. Criminal Law makes all the three forms and sub forms (or sub degrees) of mens rea culpable though the severity of punishment reduces as the degree of mens rea goes down from ‘intent’ to ‘knowledge’ to ‘carelessness’. The common thread running through all the manifestations of mens rea is that the (guilty) mind is aware of and alive to the ill effects of the ‘act’ in question and yet performs that act.

243 Criminal law attaches penal liability not only to the actual perpetrator of a crime but to all those who helped him in commission of the offence. Thus the help could be in the form of aiding by supplying necessary tools/arms/ vital information for commission of crimes, or by abetting (instigating the commission of a crime), or by physically assisting in the actual crime. Thus criminal law attaches varying degrees of liability to all those, along with the actual perpetrator, without whom the offence or crime could not have been committed or carried out successfully.
provide goods or services such as weapons, tools, financing, fuel, computer systems, vehicles or transportation, security or infrastructure. The contribution of a company to human rights abuses could be in the form of a business agreement, through which the company makes a deal in which it is foreseen that in fulfilling its side of the agreement, the business partner will commit acts that amount to gross human rights abuses. The company’s conduct could be a positive act, or it could be an omission – failure to act – such as deciding not to refuse government imposed forced labour and therefore contributing to gross human rights abuses.

The international criminal law of aiding and abetting looks for practical assistance, encouragement or moral support, which has a substantial effect on the perpetration of the crime. By explaining in the following paragraphs what it considers “enable”, “exacerbate” and “facilitate” to mean in practice, the Panel aims to illustrate conduct that companies should avoid. Of course, in order for legal accountability to arise, in addition to having enabled, exacerbated or facilitated the human rights abuses, a company will need to be shown to have the necessary state of mind (Knowledge & Foreseeability: Section 2.2) and the proximity244 of the company to the perpetrator and victims will also be a key ingredient (Section 2.3).

244 In Criminal law, when proving the fact in issue or a relevant fact, the prosecution, and the accused in defence, is permitted to rely on circumstantial evidence where direct evidence is not available to prove the said issue or fact. As the proverb goes – men might lie but circumstances seldom do. The circumstances often provide clinching evidence or basis for strong presumptions against the accused. Where the testimonial evidence is found to be doubtful or unconvincing on the face of it, courts often rely on circumstantial evidence for corroboration. The aforementioned principle of ‘proximity’ is a species of circumstantial evidence. Where direct evidence of complicity of a corporation in human rights abuses/crimes is not available, the prosecutors or investigators can rely on surrounding circumstances to prove a link between the crime and corporation.
“Enables”: Without the Company’s Conduct the Abuses would not have Occurred -
This is the clearest scenario. A company could be responsible under both criminal law and the law of civil remedies if the specific abuses carried out by the principal actor would not have happened without the company’s contribution. For example, a government security agency may not be able to arrest, torture and kill trade unionists or other political opponents unless a company that employs them identifies them to the government. An armed group or government forces may only be able to penetrate inaccessible territory and forcibly displace and kill a community based around the prospective site of a mining operation, because of airplanes or an airstrip provided by a company. In such situations, the company has inserted itself in the chain of causation by a crucial act or omission that “enables” another actor to commit the gross human rights abuses. Without the contribution of the company, it is unlikely that the abuses would have occurred.

“Exacerbates”: The Company’s Conduct Makes the Abuses and the Harm Worse:
A company could also be responsible under both criminal law and the law of civil remedies where the principal perpetrator would still have carried out the human rights abuses, but the company’s conduct either increased the range of human rights abuses committed by the principal actor, the number of victims, or the severity of the harm suffered by the victims (i.e. exacerbated or aggravated the harm). Such scenarios fulfill the test under the law of civil remedies in that at least some of the harm would not have occurred without the involvement of the company. They would also satisfy the aiding and abetting test under criminal law if the company’s conduct had a substantial negative effect by increasing the number or scale of the crimes committed or the number of victims or the severity with which they are harmed.
“Facilitates”: The Company’s Conduct Changes the Way the Abuses are Carried Out -

A company could also be responsible under criminal law and the law of civil remedies where the human rights abuses would still have occurred without the assistance or encouragement of the company, but where the company’s contribution made it easier to carry out the abuses or changed the way in which the abuses were carried out, even if it did not aggravate or exacerbate the harm. Under the law of aiding and abetting in international criminal law, it is not necessary to show that the crime would not have occurred without the assistance or encouragement of the accomplice, only that the crime would not have happened in the same way. The assistance or encouragement would still be said to have had a “substantial effect” if it changed, for example, the methods used to carry out the crime, or the timing or location, or if it resulted in it affecting more or different people, or increased its efficiency.

In light of its analysis, the Panel considers that a company would be wise to avoid any conduct that enables, exacerbates or facilitates gross human rights abuses committed by others. A company should avoid not only situations where the gross human rights abuse would not occur in the absence of its involvement, but also where its conduct aggravates the situation by causing a wider range of abuses to be committed by the principal actor or increasing the harm suffered, as well as situations where its contribution changes the way the human rights abuses are carried out, including the methods used, the timing and the efficiency.

The Causation “Continuum”: 
Although in different types of situation the process of assessing whether a company’s conduct was linked sufficiently to the perpetration of gross human rights abuses may be difficult, the Panel believes it to be possible if the three-fold analysis above is applied, to assess whether the conduct of the company is sufficiently implicated in the human rights abuses. Some of the clearest situations may arise when a company’s conduct is used directly by the principal perpetrator to commit the abuses. In such situations, the involvement of the company is often very tangible and the link between its conduct and the ability of the principal perpetrator to carry out the gross human rights abuses is relatively clear. More complex are situations where the contribution made by the company is not necessarily used directly by the perpetrator, but nevertheless it builds up the general capacity of the perpetrator – in the form of much-needed revenue, products, infrastructure such as roads, railways, communication systems or power stations.

Sales of conflict diamonds by the rebel group União Nacional para a Independência Total de Angola (UNITA) were said to be essential to its survival, including providing it with the finances necessary to continue the war, in which its forces systematically committed war crimes. Direct links have been made between the oil revenue the Sudanese Government receives and its ability to purchase military hardware used to forcibly displace civilians. The different degrees to which businesses contributed to the perpetuation of apartheid in South Africa and the associated gross human rights abuses, illustrate the complexities of analysing whether company conduct is sufficiently close to the human rights abuses to be said to have enabled, exacerbated or facilitated the abuses. The South African Truth and Reconciliation Commission (TRC) concluded that business was central to the economy that sustained the apartheid state. It distinguished three levels of moral responsibility.
Companies that actively helped to design and implement apartheid policies were found to have had “first-order involvement.” This included, for example, the mining industry which worked with the government to shape discriminatory policies such as the migrant labour system for their own advantage. Companies which knew the state would use their products or services for repression were considered as having “second-order involvement:” this included more indirect assistance, such as banks’ provision of covert credit cards for repressive security operations or the armaments industry’s provision of equipment used to abuse human rights. Finally, the Commission identified “third-order involvement:” ordinary business activities that benefited indirectly by virtue of operating within the racially structured context of an apartheid society.

**Silent Presence:**

Companies often face allegations of complicity because they have business operations in countries where gross human rights abuses are occurring and they fail to intervene with the authorities to try to stop or prevent the abuses – in other words, they are silent onlookers. The company could be silent when abuses occur in or around its business operations, such as when its workers from a particular ethnic group are arbitrarily detained and tortured or an armed group kills civilians in an area where the company is operating. Under existing criminal or civil legal principles, the fact that a company is present in the country or area of the country where gross human rights abuses are being committed, without more, would not usually make the company responsible for involvement in the human rights abuses committed in the country or region. However, in some situations, presence and silence are not neutral in law. Although as yet untested in court, the Panel considers there might be special situations in which a company or
its individual officials exercise such influence, weight and authority over the principal perpetrators that their silent presence would be taken by the principal to communicate approval and moral encouragement to commit the gross human rights abuses. In such a situation, depending on the circumstances, the company could be responsible for aiding and abetting any crime that occurs.

**Receiving an Economic Benefit:**

Closely related to the question of silent presence is the accusation that a company should be considered complicit because it benefits commercially from a business relationship with those who commit gross human rights abuses (usually also being silent about the abuses). There are at least two situations in which this might arise. First, a company might earn a profit from buying or selling goods or services to or from an actor that is committing gross human rights abuses. Second, a company might benefit commercially from a favourable business environment created in a country by another actor, enabling it to establish lucrative operations in the country. As in the case of a company’s presence, making a profit, by itself, is legally neutral. Although companies may not in general incur legal responsibility solely for making a profit in a business environment built on human rights abuses, in reality “mere passive economic benefit” can quickly slide into a more active contribution that enables, exacerbates or facilitates gross human rights abuses. In other situations, companies may have actively assisted a government to create the commercial environment from which they benefit, such as companies in South Africa that helped the government create the apartheid system, which thereafter produced large quantities of cheap labour.

**Common “Defences” and Excuses:**
The Panel has encountered a number of common responses relating to causation, sometimes articulated by companies when they face allegations of complicity in gross human rights abuses, the legal relevance of which should be dealt with directly:

“We were carrying out a legitimate business activity” - The fact that a business is carrying out what in other circumstances would be a legitimate act in the ordinary course of its business (such as providing a loan, selling or purchasing goods, carrying out construction work or extracting resources) does not absolve the company of legal responsibility if the necessary causal link with the gross human rights abuse (as well as knowledge or foreseeability) is established. For example, if a Bank provides loan to a state which is allegedly involved in human rights abuses, unless it can be shown that the Bank specifically knew that the money that it is lending will be channelised into purchasing arms or will in some other way be applied for human rights abuses, mere fact of providing a loan would not be sufficient to establish the complicity of the Corporation.

“If we did not provide the assistance, another company would have done so and the abuses would still have occurred” - It is not a defence to criminal or civil liability that another company would have worked with the principal actor if the company in question had not done so. By enabling, exacerbating, or facilitating gross human rights abuses

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245 HSBC Money laundering case is a relevant example here. The South American branches of HSBC knew it well that money from drug traffickers is being laundered through their Bank to other locations but they chose not to investigate the money laundering. This was because of the fact that they were getting business from these countries where money laundering laws were not effective and so they chose to remain silent. However, ‘silent’ here would amount to concealment because there was a duty to speak or reveal the money laundering being carried out right under its nose. More importantly, the tag line of the Bank – the world’s local Bank, helped it in gaining business since the extensive operations of the Bank around the world made money laundering much easier.
committed by the principal actor, the company may have inserted itself in the chain of causation and must accept the consequences.

“Our business is located in another country, we were nowhere near the place where the human rights abuses occurred” - Especially in our world of technology and instant communications, a company does not have to be present where human rights abuses take place, in order for its conduct to enable, exacerbate or facilitate those abuses. It will ultimately depend on the minute analysis of the causal link between the acts of the Corporation and the human rights abuses or international crime, irrespective of space and time, though in a given case they might be exculpatory factors.

“We had no control or influence over the actions of the principal actor so why should we be blamed?” - It will always be a question of fact whether the conduct of the company enabled, exacerbated or facilitated the gross human rights abuses. A company that does exercise control or influence over an actor that commits gross human rights abuses will be scrutinised more carefully to assess the impact of its conduct. However, a company could be held legally liable in criminal or civil law for providing a third party with the means to commit gross human rights abuses through arms-length business transactions and without any close personal relationships or particular political or economic leverage246.

246 In other words, where a corporation is entering into commercial relations with a state or non-state actor knowing fully well that they will use the same for committing rights abuses or crimes, it can be well presumed that it aided the abuse of rights or commission of crimes even in the absence of intention that rights should be abused or crimes should be committed. This inference can be drawn from the fact that in a crime, an aider or abettor either shares a common ground for committing the crime or he has his personal agenda for providing aid or abetting the crime. There can also be a situation where the aid is provided out of sheer personal relationships without expecting a reward in return. However, in all the three fact situations, the one who aids or abets cannot escape liability because he wilfully contributed in the commission of crime. Criminal law makes culpable a conduct which is done with intention and knowledge or only intention or only knowledge.
“We had no choice, we were compelled to provide the assistance” - In criminal law there may be limited circumstances in which an accused could plead the defence of duress or necessity. Although there are variations across different legal systems, broadly, company officials would have to show that they faced the threat of death or serious bodily injury if they refused to carry out an order to help commit the human rights abuses.247

“The principal actor involved in the human rights abuse has not been held legally responsible so how can we?” - It is not necessary in either criminal law or the law of civil remedies for the principal actor to be held liable before a secondary actor is prosecuted or sued. In fact, given the difficulty of holding governments or armed groups legally accountable for gross human rights abuses, in most situations of alleged business involvement in those abuses, a company will be prosecuted or sued independently of the principal actor.248

“We are a socially responsible company and have spent a lot of money to improve the humanitarian and development well-being of the community.” - Companies operating in complex environments often argue that their involvement in the perpetration of gross human rights abuses is outweighed by the benefit the company brings to the community: creating jobs and trade and giving money for humanitarian and development projects. In law, however, such good deeds are irrelevant to deciding whether a company should be held responsible for other conduct that enables, exacerbates or facilitates gross human rights abuses. At most, the broader, beneficial record of the company will sometimes be taken into account as mitigating circumstances when a

247 There is a caveat for this defense – corporation should not have placed itself i.e. by its own acts, in such a situation of duress

248 What is required to be proved in such a situation is the actual commission of crime and the specific role attributed to the corporation. In the absence of trial of principal actor/s, the Corporation can of course plead that unless the principal actor is sent up for trial, it will not be possible for prosecution to prove the role attributed to the corporation e.g. abetment. However, this is more a ground for acquittal rather than a ground for avoiding trial.
court determines sanctions or the extent or kind of remedy or reparation due to the victim.

**Knowledge and Foreseeability of Risk:**

In addition to having helped to cause the gross human rights abuses, to be legally responsible in relation to such abuses, a company must also have the necessary state of mind. Companies often say that they never wished or desired to contribute to the perpetration of human rights abuses, and that they did not know their conduct would constitute such a contribution. However, the fact that a company neither wished nor desired to contribute to gross human rights abuses is irrelevant to the question of whether, in adopting a particular course of conduct, it became complicit in those abuses and subsequently entered a zone of legal risk. In both criminal and civil law, legal responsibility can arise where a company actively sought to contribute to gross human rights abuses, or simply where it knew\(^{249}\) that its course of conduct was likely to contribute to such abuses and, even though it may not have wanted the abuses to occur, undertook the course of conduct anyway.

**The Company Wishes to Participate in Commission of Gross Human Rights Abuses:**

Where a company participates with others in the commission of a crime, criminal law places more emphasis on the shared criminal intent of the company and less on the size of its contribution to executing the plan. Under international criminal law and most national criminal systems, each member of a group that comes together intentionally to perform a

\(^{249}\) It is easier to prove that a person had knowledge than to prove is intention though in both cases, it is the conduct of the person and circumstantial evidence which corroborates the prosecution case regarding knowledge or intention. In case of a legal person, law takes the help of fiction and attributes the knowledge of its principal officers (who are actually complicit in the crime) to the legal person i.e. corporation
criminal plan, could be held responsible\textsuperscript{250} for the foreseeable crimes committed by the others as part of that common plan, even if any particular individual only in practice assisted in a minor way and did not realise that the others in the group would commit the other offences.

The Company Knows, or Should Know, that its Conduct is Likely to Contribute to Gross Human Rights Abuses:

Even where a company does not actively wish to contribute to gross human rights abuses, it may still be legally responsible if it knew or should have known that its conduct was likely to help cause such abuses. A criminal court will often require evidence that the company officials did, subjectively, know the consequences of their actions. No court will take a statement that “we did not know” on face value. It will instead conduct its own inquiry and analysis on the facts to determine whether the subjective knowledge of the company could be implied from the surrounding facts and circumstances. Friedrich Flick, a German industrialist, was convicted after the Second World War for donating large sums of money to the head of the S.S. that helped the S.S. carry out criminal acts. The Court found that although the criminal character of the S.S. was not well known when Flick started attending fund-raising dinners in the 1930s, his contributions and attendance continued long after the criminal character of the S.S. was generally known. A further example is the case of Bruno Tesch, convicted of supplying poisonous gas to the Nazi Auschwitz concentration camp. This was not only because of evidence that he advised the Government on more efficient ways to train the S.S. in the killing of concentration camp inmates, but also because of inferences the court was invited to draw from the fact that he delivered ever-larger quantities of the gas to

\textsuperscript{250} Under International Criminal Law, this is called the principle of Joint Criminal Liability (JCL)
the camps, far beyond what could have been used for the legitimate extermination of pests. Under international criminal law, it is not necessary for the company to know the precise crime the principal offender is committing, as long as the company knows that it is contributing to one of a group of crimes being committed.

Evidence of Knowledge & Foreseeability:

There are a number of objective circumstances and factors that will help a court to assess what the company knew or should have known -

“A company’s own inquiries produce information or a company should have undertaken such inquiries” - Sometimes inquiries carried out by or on behalf of the company will indicate that there is a real possibility that another actor with whom the company is involved is committing or is likely to commit gross human rights abuses.

“Information brought to the attention of the company.” - An outside source, such as a non-governmental organisation, a local community or government regulatory authority, may have brought to the attention of the company the fact that its business activities could contribute to gross human rights abuses, or that the actor with which it is involved has a record of similar gross human rights abuses in similar circumstances.

“Publicly available information.” - There is often a large body of publicly available information that businesses can and should access, about the human rights record of those in power in areas where they operate or are planning to operate and the risks of doing business with certain government agencies, armed opposition groups or other companies. A court may find that a company knew (or a prudent company would have known) of such publicly available information.
“Unusual circumstances.” - For example, a customer might order an extraordinary quantity of a product, such as chemicals, which it is highly unlikely, could be used for anything except unlawful activities.

“Duration of the business relationship.” The longer a business is in a relationship with the principal perpetrator, for example if it repeatedly sells products that are used to commit gross human rights abuses, the more likely a court will consider that the company must have known, or should have known, about the likely impact of its conduct.

“Position of an individual business official in the company.” - A court could draw conclusions about the official’s knowledge from the position he or she holds in the company. This will be particularly pertinent if the official was, for example, a member of decision-making boards and committees.

**Willful Blindness: Knowledge and Foreseeability in a Globalised World:**

What if a company does not carry out due diligence fact-finding and assessments, perhaps even to avoid knowing too much – or anything – about the purpose for which another actor wants the company’s assistance or business? The Panel emphasises that such a strategy will not be rewarded by the law, and instead of minimising a company’s chances of legal accountability, will increase the zone of legal risk. Therefore the Panel considers that no prudent company would seek to protect itself from legal liability by a “don’t ask, don’t tell” approach to certain risks.

**Proximity: Its Impact on Causation and Knowledge or Foreseeability** -
It makes sense that the closeness of a company to the principal perpetrator, to the victims, or to the harm inflicted on the victims, is highly relevant in determining legal responsibility. First, the closer the company, the more likely it is that it will have the power, influence, authority or opportunity necessary for its conduct to have a sufficient impact on the conduct of the principal perpetrator to establish legal liability. Secondly, it is more likely that the company will know or could have foreseen what is really going on.

Evidence of Proximity -

Some of the factors that may be taken into account in assessing the proximity of a company to the principal perpetrators and/or the victims and the harm caused include the following.

“Geographical proximity” - A company may have more knowledge and more opportunity to influence events if the human rights abuses are occurring in same place, or nearby, the company’s operations. Mixing day-to-day with actors responsible for human rights abuses, or with the victims of the abuses, means that a company is much more likely to understand any likely link between its conduct and the abuses committed by these actors.

“Economic and political relationships” - In practice, the more a company economically dominates a marketplace, the more it has access to the corridors of power, access to inside information and the opportunity to influence the actions of third parties who depend on the business relationship.

“Legal relationships” - A company may have considerable control, influence and knowledge because of the legal nature of the business relationship it has with a third party that violates rights. A joint venture
or other long-term strategic partnership may lead to shared decision-making and close coordination between the parties\textsuperscript{251}.

“Intensity, duration & texture of relationships” - The quality of the relationship, the openness, closeness, frequency and duration of informal or personal contacts and discussion will also be evidence towards the degree of proximity between a company and perpetrators or victims. There are many complex shades of relationships between a company and host or home governments, armed groups or other actors.

\textit{Analysing Situations in which Businesses Commonly Face Allegations of Complicity:}

The Panel looks in particular at the application of the three principles of causation, knowledge and proximity in four specific situations where companies commonly face allegations of complicity in gross human rights abuses: (1) where businesses provide goods or services which are used by another actor in carrying out gross human rights abuses; (2) where businesses use security providers that in the course of providing security carry out gross human rights abuses; (3) where businesses purchase from a supplier, that in the course of production or sourcing of the materials, commits gross human rights abuses, and (4) where a company’s business partner perpetrates gross human rights abuses in the context of a project in which the two actors are jointly involved.

\textit{“Providing Goods and Services” -}\textsuperscript{251} The knowledge relating to decisions can also be inferred and attributed to the parent company where the actions are alleged to be that of the subsidiary in conjunction with actual perpetrator. This shared knowledge will make the parent corporation liable under 2 principles – JCL and Vicarious liability for the act of the subsidiary.
Businesses often face allegations of complicity when they provide goods or services, such as vehicles, weapons, technology and communications equipment, financial assistance, or logistical services, to actors who use them to commit gross human rights abuses. Sometimes allegations of complicity stem from the fact that a company has tailored particular goods or services to a specific use. The Panel considers that in such situations, a company could find itself in a zone of legal risk under criminal and/or civil law, if the goods or services are used to commit gross human rights abuses. In tailoring or modifying the goods or services and providing them to the actor concerned, the company’s conduct may be a causal factor in the abuses.

The Panel also considers that even where the goods or services are not tailored or modified, but are generic goods or services which the company provides to many customers, there may still be situations in which a company will find itself in a zone of legal risk if it provides them to an actor who uses them in the course of carrying out gross human rights abuses. A court may also delve deeper into a situation where the products in question can have both a lawful and unlawful

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252 i.e. the buyer is able to commit the human rights abuses (enabling), or is able to commit more serious harm (exacerbating) or is able to carry out the abuses more efficiently (facilitating) as a result of tailor made goods. In case of tailor made goods, the Court may infer that the goods in question were manufactured or modified with the knowledge that the same shall be used for committing crimes. Of course, the Court will not be convinced solely with this factor and will have to consider evidence to this effect along with other corroborating factors especially the proximity factor i.e. with the main perpetrator.

253 Where generic good are supplied to a perpetrator of rights abuses, intention will not be a determining factor since in such cases the intention would not go beyond economic gains for business relationship with such an Actor. However, the knowledge that its goods and services shall be used for Rights Abuse will in all probability be a determining factor for judging whether or not the corporation/legal person is complicit in the alleged crime. Here also, proximity factor will play a determining role for judging the guilt of the corporation.
uses: so-called dual use goods. For example, a British Military Court convicted Bruno Tesch, a company owner, of war crimes for knowingly supplying Zyklon B poisonous gas to Auschwitz where the S.S. used it to kill prisoners. Although Zyklon B was a widely-used insecticide, Bruno Tesch was held responsible because the Court found he continued to supply ever-larger quantities, even after he found out that it was being used to kill people. Where there is proximity between the company and the purchaser, or the victims of the gross human rights abuses, the Panel believes the more likely it will be that courts will consider that the company had knowledge or should have known of the risk that the products would be used for a certain purpose.

“Providing Security for Company Operations” -

Although it is legitimate for companies to ensure their staff and operations are secure, there have been repeated allegations of company complicity in gross human rights abuses, in situations where companies have used the services of private security forces or state security forces that have perpetrated gross human rights abuses while providing company security. In the context of these kinds of interactions and close relationships, when gross human rights abuses are perpetrated by the security forces, the Panel believes that criminal or civil courts may hold that a company knew of the risk that the abuses would occur. This will be all the more likely, where the security forces in question have a record of gross human rights abuses.

“Supply Chains” -

Businesses often face allegations of complicity when gross human rights abuses are perpetrated by actors in their supply chain. The allegations are usually that the company concerned failed to take steps
to ensure that the supply of materials did not involve human rights abuses or that the company in fact imposed such conditions of supply that it became directly implicated in the supplier’s perpetration of gross human rights abuses. The Panel considers that proximity will be an especially critical ingredient in this context. Many companies have complex supply chains involving several other companies and in most situations, the further down the supply chain, the less knowledge the company will have, or be expected to have, about the practices of its suppliers and often the less impact its conduct will have on the conduct of the supplier.

“Formal Business Partnerships” -

Companies are sometimes said to be responsible for human rights abuses that are carried out by another actor, with whom they have entered into a business partnership\textsuperscript{254} with the aim of carrying out a particular business enterprise. There is usually quite close collaboration and coordination between the partners and detailed negotiations about the actions that each will take to fulfil their side of the partnership agreement. The Panel considers that a company may find itself in a zone of legal risk when it enters into a formal business partnership, such as a joint venture, and its partner commits gross human rights abuses in the context of the business partnership. The Panel believes that whether or not legal liability may arise will depend on the circumstances surrounding the agreement, including the impact of the agreement on the conduct of the principal actor and the information available to the allegedly complicit company beforehand and during implementation of the agreement about the likely and actual conduct of its partner. There will often be a high level of proximity in such contexts, which will in turn impact on the level of knowledge a company will be

\textsuperscript{254} e.g. Joint Ventures
deemed to have had, or expected to have had, about the risk that its partner would perpetrate gross human rights abuses.

The above Report of the ICJ lays down some very significant principles for judging the culpability of a corporation in the context of their prosecution under ICL. These principles have the potential of being gradually absorbed in the international criminal law jurisprudence so as to become established principles of ICL. Since the culpability of ‘legal persons’ is not so easily discernible as in the case of natural person, the principles laid down in the Report will be a great aid to a criminal court in judging whether or not a corporation (legal person) is involved in the commission of crimes. The most conspicuous advantage of this report is that even if the list of international crimes is not expanded beyond the four core crimes, the juristic person (presuming that at least the jurisdiction of Rome statute is extended over legal person) can be objectively prosecute with the aid of principles of corporate culpability as enumerated in the report.