Enforcing international humanitarian law: Catching the accomplices

by
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Literally within days of the adoption of the Rome Statute of the International Criminal Court (ICC) at the end of the Rome Conference in July 1998[1] the *Financial Times*, the prestigious British business daily, published an article warning "commercial lawyers" that the treaty's accomplice liability provision "could create international criminal liability for employees, officers and directors of corporations". Writer Maurice Nyberg referred to condemnation of violations of human rights involving multinational corporations by non-governmental organizations like Human Rights Watch, adding that "[i]t takes little imagination to jump from complicity with human rights violations to complicity with crimes covered under the ICC Treaty". Besides the more obvious offences relating to involvement in arms trading and financing of "security" for overseas investments, the article warned that "mistreatment of pregnant workers" and even "systematic pregnancy testing" by foreign subsidiaries might entail liability as a crime against humanity, namely that of persecution based upon gender. "As gender discrimination is wide-

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spread and systematic in much of the world, the ICC Treaty could require parent companies and financial institutions to police the global workplace under threat of criminal liability to their senior executives", the *Financial Times* warned its well-heeled readership.[2]

To some extent the prospect of punishment is already there. International tribunals have been created by the Security Council to punish offenders in the Yugoslav wars and the Rwanda genocide: the International Criminal Tribunal for the former Yugoslavia[3] and the International Criminal Tribunal for Rwanda.[4] Hybrid approaches are also being considered, for example in Cambodia, where differences within the Security Council make action under Chapter VII of the United Nations Charter improbable. And in all likelihood the International Criminal Court should begin to operate some time in 2002, with an initial reach extending not only to the territory of at least sixty States but also to the nationals of those States, irrespective of where the offence is committed.

International penal repression, dating from its early manifestations at Nuremberg and Tokyo to the contemporary tribunals, has focused not so much on the "principal" perpetrator — that is, the concentration camp torturer or front-line executioner — as on the leaders who are, technically speaking, "mere" accomplices. The offenders who are the focus of international efforts are often themselves urbane and sophisticated individuals, with little or no personal experience in killing and torture. As the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia has noted,

> "Although only some members of the group may physically perpetrate the criminal act (murder, extermination, wanton destruction of cities, towns or villages, etc.), the participation and contribution of the other members of the group is often vital in facilitating the commission of the offence in question. It follows

1 Rome Statute of the International Criminal Court (ICC), of 17 July 1998, UN Doc. A/CONF.183/9. See text of Article 25 — Individual criminal responsibility, in the Annex to this paper.

2 Maurice Nyberg, "At risk from complicity with crime", *Financial Times*, 27 July 1998.

3 Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY), of 25 May 1993, UN Doc. S/RES/827.

4 Statute of the International Criminal Tribunal for Rwanda (ICTR), of 8 November 1994, UN Doc. S/RES/955.

that the moral gravity of such participation is often no less — or indeed no different — from that of those actually carrying out the acts in question."[5]

Many if not most of the humanitarian law violations committed in Kosovo, Sierra Leone, East Timor, Chechnya and the numerous other theatres of conflict in today's world could not take place without the assistance of arms dealers, diamond traders, bankers and financiers. The question, then, is how and to what extent these accomplices may be prosecuted by such institutions as the International Criminal Court, as the article in the *Financial Times* suggests.

The law of complicity in international criminal law

The Special Rapporteur of the International Law Commission charged with drafting the Code of Crimes against the Peace and Security of Mankind, Doudou Thiam, described the law of complicity as "a drama of great complexity and intensity".[6] The responsibility of accomplices was recognized in the Statute of the International Military Tribunal only in a general way: "[l]eaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan".[7] However, the Nuremberg Tribunal seems to have given its Charter a liberal interpretation informed by general principles of law. According to the United States Military Tribunal, "[t]his is but an application of general concepts of criminal law. The person who persuades another to commit murder, the person who furnishes the lethal weapon for the purpose of its commission, and the person who pulls the trigger are all principals or accessories to the crime."[8]

5 *Prosecutor* v. *Tadic* (Case No. IT-94-1-A), Judgment, 15 July 1999, para. 191.

6 *Eighth report on the draft Code of Crimes against the Peace and Security of Mankind*, by Doudou Thiam, Special Rapporteur, UN Doc. A/CN.4/430 and Add. 1, para. 38, p. 32.

7 Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (I.M.T.), 1951, 82 UNTS 279, Art. 6, *in fine*.

8 *United States of America v. Alstötter* et al. ("Justice trial"), 1948, 6 L.R.T.W.C. 1, p. 62.

1. The authorities

Many of those convicted at Nuremberg were held responsible as accomplices rather than as principals.[9] A provision in Control Council Law No. 10, which was used for the domestic prosecution of war criminals in post-war Germany, established criminal liability of an individual who was an accessory to the crime, took a consenting part therein, was connected with plans or enterprises involving its commission, or was a member of any organization or group connected with the commission of any such crime.[10] The concept of complicity is also recognized in the Convention on the Prevention and Punishment of the Crime of Genocide,[11] the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[12] and the International Convention on the Suppression and Punishment of the Crime of *Apartheid*.[13]

The statutes of the *ad hoc* tribunals for the former Yugoslavia and Rwanda contain a general complicity provision, applicable to all of the offences over which the two tribunals have subject matter jurisdiction. They establish criminal liability for persons who have "planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime" within the Tribunal's jurisdiction.[14] In a specific provision, they also criminalize the act of complicity in genocide.[15] The International Law Commission's draft Code of Crimes declared that individual criminal liability would be incurred, in the case of crimes against humanity and

9 *Formulation of Nurnberg Principles*, Report by J. Spiropoulos, Special Rapporteur, UN Doc. A/CN.4/22, para. 43. In *Prosecutor* v. *Tadic* (Case No. IT-94-1-T), Opinion and Judgment, 7 May 1997, para. 674, the Trial Chamber noted that the post-Second World War judgments generally failed to discuss in detail the criteria upon which guilt was determined.

10 Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 20 December 1945, Official Gazette of the Control Council for Germany, No. 3, Berlin, 31 January 1946, pp. 50-55, Art. II.2.

11 Convention on the Prevention and Punishment of the Crime of Genocide, of 9 December 1948, Art. III(e).

12 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, of 10 December 1984, Art. 4(1).

13 International Convention on the Suppression and Punishment of the Crime of *Apartheid*, 30 November 1973, Art. III.

14 ICTY Statute, Art. 7(1); ICTR Statute, Art. 6(1).

15 ICTY Statute, Art. 4(3)(e); ICTR Statute, Art. 2(3)(e).

war crimes, by a person who "knowingly aids, abets or otherwise assists, directly and substantially, in the commission of such a crime, including providing the means for its commission".[16] The Rome Statute of the ICC imposes criminal responsibility upon an individual who "[f]or the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission".[17]

According to the Rwanda Tribunal, aiding means giving assistance to someone, while abetting involves facilitating the commission of an act by being sympathetic thereto.[18] The two terms are disjunctive, and it is sufficient to prove one or the other form of participation, the Tribunal has declared.[19]

War crimes case law provides many examples of prosecution of accomplices, including some directly related to the Nazi genocide. The supplier of Zyklon B gas, which was used for mass extermination at Auschwitz and other concentration camps, was condemned by a British Military Court for violating "the laws and usages of war".[20] The accused's attorney argued, unsuccessfully, that he was "merely an accessory before the fact, and even so, an unimportant one".[21] But the manufacturers of Zyklon B successfully pleaded ignorance of the end use, arguing that they thought the gas was being used as a delousing agent. A United States war crimes tribunal acquitted the leading industrialists of Germany who were in charge of I.G. Farben:

> "The proof is quite convincing that large quantities of Zyclon B were supplies of the SS by Degesch [which was controlled by Farben] and that it was used in the mass extermination of inmates of concentration camps, including Auschwitz. But

16 *Report of the International Law Commission on the work of its forty-eighth session*, 6 May - 26 July 1996, UN Doc. A/51/10, p. 18.

17 ICC Statute, Art. 25(3)(c).

18 *Prosecutor* v. *Akayesu* (Case No. ICTR-96-4-T), Judgment, 2 September 1998, para. 423. According to Smith and Hogan, the words aiding and abetting connote different forms of activity. "The natural meaning of 'to aid' is 'to give help, support or assistance to'; and of 'to abet', 'to incite, instigate or encourage'." J.C. Smith/Brian Hogan, *Criminal Law*, 7th ed., Butterworths, London, 1992, p. 126.

19 *Prosecutor* v. *Kayishema and Ruzindana* (Case No. ICTR-95-1-T), Judgment, 21 May 1999, para. 197.

20 *United Kingdom* v. *Tesch* et al. ("Zyklon B Case"), (1947) 1 L.R.T.W.C. 93 (British Military Court).

21 *Ibid.*, p. 102.

> neither the volume of production nor the fact that large shipments were destined to concentration camps would alone be sufficient to lead us to conclude that those who knew of such facts must also have had knowledge of the criminal purposes to which this substance was being put. Any such conclusion is refuted by the well known need for insecticides wherever large numbers of displaced persons, brought in from widely scattered regions, are confined in congested quarters lacking adequate sanitary facilities."[22]

In prosecutions relating to concentration camps, personnel at Belsen were found to be "in violation of the laws and usages of war [and] together concerned as parties to the ill-treatment of certain persons..."[23] The Judge Advocate who successfully prosecuted the case conceded that "mere presence on the staff was not of itself enough to justify a conviction," but insisted that "if a number of people took a part, however small, in an offence, they were parties to the whole".[24] Nuremberg prosecutors also succeeded in obtaining a conviction of three I.G. Farben executives who were involved in the construction of the slave-labour factory at Auschwitz.[25] Flick and Steinbrinck were found guilty of complicity because of their financial support of Himmler's activities and, more generally, those of the SS.[26]

The accused who is not physically present when the crime takes place may still be an accomplice. As the Yugoslavia Tribunal observed, "direct contribution does not necessarily require the participation in the physical commission of the illegal act. That participation in the commission of the crime does not require an actual physical presence or physical assistance appears to have been well accepted at

22 *United States of America* v. *Carl Krauch* et al. ("I.G. Farben Case"), (1948) 8 T.W.C. 1169.

23 *United Kingdom* v. *Kramer* et al. ("Belsen trial"), (1947) 2 L.R.T.W.C. 1 (British Military Court), p. 4.

24 *Ibid.*, pp. 109, 120.

25 *Loc. cit.* (note 22), p. 1180.

26 *United States of America* v. *Friedrich Flick* et al. ("Flick Case"), (1948) 6 T.W.C. 1217-1221.

the Nuremberg war crimes trials."[27] Robert Mulka, a camp commander at Auschwitz, was convicted by a German court as an accessory in the murder of approximately 750 persons. Mulka was involved in procuring Zyklon B gas, constructing gas ovens, arranging for trucks to transport inmates to the gas chambers, and alerting the camp bureaucracy as to the imminent arrival of transports.[28] Fingering a victim to those who subsequently carry out the crime, if the informer knows that this will lead to the commission of a crime and intends this consequence or is recklessly indifferent to it, may also constitute complicity.[29]

Sometimes, complicity is established because the accused is employed in a criminal enterprise or belongs to some civilian or military unit. But complicity should never be equated with collective guilt, by which members of a regime or of its armed forces are deemed, by that fact alone, to share criminal liability.[30] In the judgment of the International Military Tribunal at Nuremberg, Kaltenbrunner was acquitted of crimes against peace owing to the absence of evidence showing a material act of participation, even though his guilty intent was hardly in doubt.[31] In the *Dachau* trial, employees of the notorious concentration camp were convicted as accomplices in its atrocities once their direct involvement in the running of the camp had been established.[32] In the *Mauthausen* case, the court concluded "[t]hat any official, governmental, military or civil... or any guard or

27 *Prosecutor* v. *Tadic*, loc. cit. (note 9), paras. 678, 691. In *Tadic*, the Trial Chamber cited *United Kingdom* v. *Golkel* et al., (1948) 5 L.R.T.W.C. 45 (British Military Court), pp. 53 ("it is quite clear that [concerned in the killing does] not mean that a man actually had to be present at the site of the shooting"), pp. 45-47 and 54-55 (defendants who only drove victims to woods to be killed there were found to have been "concerned in the killing"), and *United Kingdom* v. *Wielen* et al., (1948) 9 L.R.T.W.C. 31 (British Military Court, Hamburg), pp. 43-44, 46 (not necessary that a person be present to be "concerned in a killing").

28 *United Kingdom* v. *Tesch* et al. ("Zyklon B Case"), (1947) 1 L.R.T.W.C. 93 (British Military Court), pp. 93-101.

29 *France* v. *Becker* et al, (1948) 7 L.R.T.W.C. 67 (Permanent Military Tribunal at Lyon), pp. 70-71.

30 "If war crimes are being committed in Indochina, not every member of the armed forces is an accomplice to those crimes." *Switkes* v. *Laird*, 316 F. Supp. 358, 365 (S.D.N.Y. 1970).

31 *France* et al. v. *Goering* et al., (1946) 22 I.M.T. 203, pp. 536-537.

32 *United States* v. *Weiss*, (1948) 11 L.R.T.W.C. 5 (General Military Government Court of the United States Zone), pp. 12-14.

civil employee, in any way in control of or stationed at or engaged in the operation of the Concentration Camp Mauthausen, or any or all of its by-camps in any manner whatsoever, is guilty of a crime against the recognized laws, customs and practices of civilised nations..."[33]

In the *Krupp trial*, the United States Military Tribunal declared:

> "As already said, we hold that guilt must be personal. The mere fact without more that a defendant was a member of the Krupp Directorate or an official of the firm is not sufficient. The rule which we adopt and apply is stated in an authoritative American text as follows:
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> 'Officers, directors, or agents of a corporation participating in a violation of law in the conduct of the company's business may be held criminally liable individually therefor. So, although they are ordinarily not criminally liable for corporate acts performed by other officers or agents, and at least where the crime charged involves guilty knowledge or criminal intent, it is essential to criminal liability on his part that they actually and personally do the acts which constitute the offence or that they be done by his direction or permission. He is liable where his scienter or authority is established or where he is the actual present and efficient actor. When the corporation itself is forbidden to do an act, the prohibition extends to the board of directors and to each director separately and individually.'"[34]

Elements of complicity

There are three basic requirements for establishment of the guilt of an accomplice: a war crime or crime against humanity must have been committed; the accomplice must have contributed in a material way to the crime; the accomplice must have intended that the crime be committed or have been reckless as to its commission.

33 *Mauthausen Concentration Camp Case*, (1948) 11 L.R.T.W.C. 15 (General Military Government Court of the United States Zone), pp. 15-16.

34 *United States of America* v. *Alfried Krupp* et al. ("Krupp Case"), (1948) 9 L.R.T.W.C. 1, 151, 9 T.W.C. 1448.

First, complicity requires proof that the underlying or predicate crime has been committed by another person.[35] However, the principal offender need not be charged or convicted for the liability of the accomplice to be established. In some cases, prosecution may be quite impossible, because the principal offender is dead or has disappeared, is unfit to stand trial, or is a minor or immune from process. As the Rwanda Tribunal has explained, "[a]s far as the Chamber is aware, all criminal systems provide that an accomplice may also be tried, even where the principal perpetrator of the crime has not been identified, or where, for any other reasons, guilt could not be proven".[36]

Second, there must be a material act by which the accomplice actually contributes to the perpetration of the crime. The law seems somewhat unsettled as to the degree of participation that is necessary. In *Tadic*, a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia noted that the degree of aiding or abetting has not been specified by the case law, although it offered some examples as guidance.[37] The authorities suggest that the contribution of the accomplice must meet a qualitative and quantitative threshold. The Prosecutor of the Yugoslavia Tribunal has argued that "any assistance, even as little as being involved in the operation of one of the camps", constitutes sufficient participation to meet the terms of complicity. "[T]he most marginal act of assistance" can constitute complicity, she has pleaded in the past.[38] But the Tribunal has viewed the matter otherwise, saying that criminal participation must have a direct and substantial effect on the commission of the offence.[39] It has endorsed the approach of the International Law Commission requiring that assistance be "substantial", noting that while the latter provided no definition of "substantially", the case law required "a contri-

35 See *Prosecutor* v. *Jelesic* (Case No. IT-95-10-T), Judgment, 14 December 1999, para. 87.

36 *Prosecutor* v. *Akayesu*, loc. cit. (note 18), para. 530.

37 *Loc. cit.* (note 9), para. 681, citing Jordan Paust, "My Lai and Vietnam", *Mil. L. Rev.*, Vol. 57, 1972, p. 168.

38 *Ibid.*, para. 671.

39 *Ibid.*, paras. 691, 692. See also *Prosecutor* v. *Delalic* et al. (Case No. IT-96-21-T), Judgment, 16 November 1998, para. 326; *Prosecutor* v. *Furundzija* (Case no. IT-95-17/1-T), Judgment, 10 December 1998, paras. 223, 234; *Prosecutor* v. *Aleksovski* (Case No. IT-95-14/1-T), Judgment, 25 June 1999, para. 61.

bution that in fact has an effect on the commission of the crime".[40] The Tribunal indicated that participation is substantial if "the criminal act most probably would not have occurred in the same way had not someone acted in the role that the accused in fact assumed".[41] But "assistance need not constitute an indispensable element, that is, a *conditio sine qua non* for the acts of the principal".[42] The Rome Statute does not provide any indication as to whether there is some quantitative degree of aiding and abetting required to constitute the *actus reus* of complicity. The absence of words like "substantially" in the Statute, and the failure to follow the International Law Commission draft, may imply that the Diplomatic Conference meant to reject the higher threshold of the recent case law of The Hague.

Thirdly, the accomplice's act must be carried out with intent and with knowledge of the perpetrator's act. The International Law Commission's draft Code specifies that complicity must involve knowledge of the consequences. According to the commentary, the accomplice must "knowingly provide assistance to the perpetrator of the crime. Thus, an individual who provides some type of assistance to another individual without knowing that this assistance will facilitate the commission of a crime would not be held accountable."[43] The *ad hoc* Tribunal for the former Yugoslavia has said that "there is a requirement of intent, which involves awareness of the act of participation coupled with a conscious decision to participate by planning, instigating, ordering, committing, or otherwise aiding and abetting in the commission of a crime".[44] In the *Mauthausen Concentration Camp* case,

40 The International Law Commission required that accomplices participate "directly and substantially" in the commission of the crime. In addition, the commentary to the draft Code noted that "the accomplice must provide the kind of assistance which contributes directly and substantially to the commission of the crime, for example by providing the means which enable the perpetrator to commit the crime. Thus, the form of participation of an accomplice must entail assistance which facilitates the commission of a crime in some significant way." *Report of the International Law Commission on the work of its forty-eighth session*, 6 May - 26 July 1996, UN Doc. A/51/10, p. 24.

41 *Prosecutor* v. *Tadic*, loc. cit. (note 9), para. 688.

42 *Prosecutor* v. *Furundzija*, loc. cit. (note 39), para. 209.

43 *Loc. cit.* (note 40), p. 24.

44 *Prosecutor* v. *Tadic*, loc. cit. (note), para. 674. See also *United Kingdom* v. *Rohde* et al., (1948) 15 L.R.T.W.C. 51 (British Military Court, Wuppertal); *United States of America* v. *Alstötter*, *loc. cit.* (note 8), p. 88 (L.R.T.W.C.); *United States of America* v. *List*, (1948) 11 T.W.C. 1261 (United States Military Tribunal).

concerning the murder of inmates in gas chambers, the United States Military Tribunal found that every official, governmental, military and civil, and every employee, whether a member of the Waffen SS, Allgemeine SS, a guard, or civilian, was criminally liable as an accomplice. As the Trial Chamber noted in *Tadic*, "[t]his finding was based on the determination that 'it was impossible for a governmental, military or civil official, a guard or a civilian employee, of the Concentration Camp Mauthausen, combined with any or all of its by-camps, to have been in control of, been employed in, or present in, or residing in, the aforesaid Concentration Camp Mauthausen, combined with any or all of its by-camps, at any time during its existence, without having acquired a definite knowledge of the criminal practices and activities therein existing.' Thus the court inferred knowledge on the part of the accused, and concluded that the staff of the concentration camp was guilty of the commission of a war crime based on this knowledge and their continued participation in the enterprise."[45]

Applying the principles

How far can these general principles of complicity be extended to the case of contemporary atrocities? Can they, for example, be used to establish international criminal liability for a supplier of small arms, the managing director of an airline that ships prohibited weapons or even a diamond trader?

It is unnecessary here to go into detail about the range of humanitarian law violations being committed in, for example, the protracted conflict in Sierra Leone. There seems little doubt that many of them have probably reached the threshold of crimes against humanity, an assessment confirmed by the Security Council's recent decision to establish an international tribunal to deal with such crimes.[46] But the requirement that to come within that tribunal's jurisdiction the crimes committed must be international will prove more troublesome in circumstances where the assistance is in the nature of violating Security Council sanctions. This is not at present an international crime. The

45 *Loc.cit.* (note 9), para. 677.
46 UN Doc. S/RES/1315 (2000).

financier, shipper or merchant who facilitates breaches of a sanctions regime is not engaged as an accomplice unless specific crimes — essentially those listed in articles 6, 7 and 8 of the Rome Statute, that is, genocide, crimes against humanity and war crimes — are committed.

Once the underlying or predicate crime has been established, as committed by direct participants in the conflict, the material and mental elements of the accomplice's involvement must be established. The material element involves a contribution to the perpetration of the crime. As discussed above, there are conflicting authorities on this point. Transposed to the contemporary context, could it be said that the diamond trader, the supplier of fuel and similar items, the carrier, and so on, have made a substantial contribution, or any contribution, to conduct of the war in Sierra Leone on the side of armed groups responsible for atrocities?

Finally, knowledge that the person or persons being assisted by the accomplice are actually committing international crimes is a *sine qua non* for criminal liability. In domestic criminal law, the knowledge requirement is usually the linchpin of the case. This is because accomplices provide assistance that is ostensibly ambiguous in nature, and because if the criminal is acting on an individual and generally isolated basis it may seem unlikely that the accomplice is aware of his or her intentions. For example, there will often be considerable doubt as to whether the gun merchant actually knows the firearm being sold will be used to effect a bank robbery. If there is an admission or some other unequivocal evidence, then the prosecutor's problem is solved. But this will occur only in rare cases. Most gun merchants will argue that they know little of the end use of the firearms they sell. Because the individual customers may be hunters, or sharpshooters, or persons seeking protection, it will be unreasonable to deduce knowledge of the end purpose without some other specific elements.

However, with regard to violations of international humanitarian law, establishing knowledge of the end use should generally be less difficult because of the scale and nature of the assistance. Given the intense publicity about war crimes and other atrocities in Sierra Leone, made known not only in specialized documents such as those

issued by the United Nations and international non-governmental organizations but also by the popular media, a court ought to have little difficulty in concluding that diamond traders, airline pilots and executives, small arms suppliers and so on have knowledge of their contribution to the conflict and to the offences being committed.

How far can the net be thrown? Assuming, for example, that the guilt of the diamond vendor who trades with combatants in Angola or Sierra Leone can actually be established, does liability extend to the merchant in Antwerp or Tel Aviv who purchases uncut stones knowing of their origin and that their sale is being used to help finance a rebel group guilty of atrocities? Why not? If we take this one step further, what of the bank manager of the diamond merchant who has purchased stones from a trader dealing with militias in Sierra Leone? If the bank manager is aware of the provenance of the funds, then he or she ought also to be held guilty as an accomplice. At this level of complicity, the knowledge requirement is revived as the difficult part of the case for the prosecution. Finally, what of the young fiancé buying a low-cost diamond ring, knowing plainly that the revenue will be funnelled back to a terrorist army that chops the limbs off little children? The further we go down the complicity cascade, of course, the more difficult it is to establish the "substantial" nature of any assistance, assuming this to be a requirement for accomplice liability.

There has been little stomach for aggressive pursuit of accomplices precisely because the trail may reach so far into the realm of ordinary and "legitimate" commercial activity. Among States with major commercial interests in the international diamond trade are Belgium, the United States of America, the United Kingdom, South Africa, Israel, Japan, Saudi Arabia and China.[47] This is "white collar crime" in its most barbaric and cynical guise, stimulated and encouraged by international bankers, investors, transnationals, airlines and traders who are, in the most charitable of scenarios, wilfully blind to their participation in human rights violations. However, reports like that of the Security Council on the diamond trade with Angola demonstrate

47 Global Witness, *A Rough Trade*, December 1998, ‹www.oneworld.org/globalwitness/Angola/cover.htm› (consulted 17/08/00).

that such commerce makes a direct and significant contribution to breaches of international humanitarian law.

Corporate liability for breaches

If the recent dynamism of international criminal law has focused our attention on the individual perpetrator of crimes against humanity, globalization has directed it towards the role of another category of "non-State actor", the commercial corporation. The United Nations Secretary-General's "Global Compact", proposed at the World Economic Forum in Davos in 1999, calls upon businesses to "support and respect the protection of internationally proclaimed human rights within their sphere of influence and make sure they are not complicit in human rights abuses".[48] Non-governmental organizations such as Amnesty International have also urged the adoption of codes of conduct for businesses in their international business activities.[49] The Office of the United Nations High Commissioner for Human Rights has been exploring the question of international accountability for alleged corporate violations of human rights. The High Commissioner has requested the six treaty bodies, the special rapporteurs and the working groups appointed by the Commission on Human Rights to study how to promote corporate accountability within the context of their mandates.[50] The Sub-Commission on the Promotion and Protection of Human Rights has recently established a working group to examine the effects of the working methods and activities of transnational corporations on human rights.[51] It had its first meeting in August 1999, and made recommendations including development of a code of conduct and analysing the possible liability of States and transnational corporations that fail to fulfil their obligations.[52]

48 ‹www.unglobalcompact.org› (consulted 17/08/00).

49 ‹www.amnesty.it/ailib/aipub/1998/ACT/A7000198.htm› (consulted 17/08/00).

50 United Nations High Commissioner for Human Rights, *Business and Human Rights: A Progress Report*, January 2000, ‹www.unhchr.ch/business.htm› (consulted 18/08/00).

51 Res. 1998/8.

52 See *Principles relating to the human rights conduct of companies*, Working paper prepared by David Weissbrodt, UN Doc. E/CN.4/Sub.2/2000/WG.2/WP.1.

Participation in war crimes and crimes against humanity, at the level of suppliers and financiers, will usually be carried out through a corporate shell rather than in the individual names of the perpetrators. Prosecutors will of course attempt to pierce the corporate shell and get at the individuals behind it, and where the evidence is clear this should pose no great problem. "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced", wrote the Nuremberg Tribunal in 1946.[53] But it may also be of interest to establish the liability of the corporation itself, particularly when it holds substantial assets that may be subject to seizure and forfeiture.

International law in this area is relatively underdeveloped. The Nuremberg Charter permitted prosecution of "a group or organization" and allowed the Court to declare that it was a "criminal organization".[54] However, the Security Council did not include criminal organizations or legal persons within the *ratione personae* jurisdiction laid down in the two ad hoc Tribunals' statutes.[55] Proposals to the same effect during the drafting of the Rome Statute were unsuccessful. At Rome, although the French delegation argued strongly that criminal liability of "legal persons" or "juridical persons" should also be covered by the statute, no consensus was possible and draft provisions to this effect were dropped by the Working Group.[56] France had insisted that this would be important in terms of restitution and compensation orders for victims. But because many States did not provide for such a form of criminal responsibility in their national law, there were awesome and ultimately insurmountable problems of complementarity.

53 *France* et al. v. *Goering* et al., *loc. cit.* (note 31), p. 447. Cited in *Prosecutor* v. *Tadic* (Case no. IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 128.

54 *Loc. cit.* (note 7), Arts. 9 and 10.

55 UN Doc. S/25704 (1993), para. 51.

56 See Per Saland, "International criminal law principles", in Roy Lee (ed.), *The International Criminal Court - The Making of the Rome Statute: Issues, Negotiations, Results*, Kluwer Law International, The Hague, 1999, p. 199.

It may well be that these lacunae can be partially corrected by national legal systems exercising universal jurisdiction. Those that allow for corporate criminal liability will be in a position to prosecute, as they would prosecute individuals. Of course there are theoretical issues relating to determination of the "mental element" of a business corporation, but national practice has developed a range of acceptable approaches.[57]

Expanding the scope of the law

The 1993 resolution establishing a sanctions regime for Angola required "States to bring proceedings against persons and entities violating the measures imposed by the present resolution and to impose appropriate penalties".[58] The 1998 resolution applicable to Sierra Leone declared that "all States shall prevent the sale or supply, by their nationals or from their territories…" of arms and similar material. Recently, the Security Council has attempted to invigorate this type of provision by insisting that States enact criminal legislation. With respect to Angola, the Council urges "all States, including those geographically close to Angola, to take immediate steps to enforce, strengthen or enact legislation making it a criminal offence under domestic law for their nationals or other individuals operating on their territory to violate the measures imposed by the Council".[59] In the case of Sierra Leone, States are obliged to make it a criminal offence under domestic law for their nationals or other persons operating on their territory to violate paragraph 2 of Resolution 1171 (1998).[60] These initiatives seem inspired by recommendations of the Panel of Experts that included the establishment of an industry blacklist which would be "subject to criminal sanctions in Member States".[61] Moreover, "[d]ue to the unlimited opportunities it affords for diamond smuggling and other sanctions busting activities, the Panel recommends that dealing in undeclared rough diamonds be declared a criminal offence in countries hosting important diamond marketing

57 Eric Colvin, "Corporate personality and criminal liability", *Criminal Law Forum*, Vol. 6, 1995, p. 1.

58 UN Doc. S/RES/864 (1993), para. 21.

59 UN Doc. S/RES/1295 (2000), para. 27.

60 UN Doc. S/RES/1306 (2000), para. 17.

61 UN Doc. S/2000/203, para. 110.

centres".[62] The Panel of Experts established under Security Council Resolution 1237 (1999) was concerned with violations of the Security Council sanctions ordered against UNITA under Resolution 864.

Interestingly, the Security Council does not insist that States exercise universal jurisdiction over these crimes. This is unfortunate; as with other international crimes, universal jurisdiction may be essential for enforcement because States with territorial or personal jurisdiction may be unwilling or unable to prosecute. It would be useful to monitor the effectiveness of such Security Council resolutions, for example by verifying whether any States have in fact given effect to the requirement that they enact domestic criminal legislation.

The International Criminal Court will not have jurisdiction in cases of violation of Security Council resolutions, except to the extent that these also constitute genocide, crimes against humanity or war crimes. No amendments to the subject matter jurisdiction of the International Criminal Court may be made until seven years after the entry into force of its Statute, something that is not likely before the end of the decade.[63]

Other measures besides criminal sanctions may be considered, such as confiscation and forfeiture of proceeds of crimes. The Panel of Experts appointed by the Security Council with respect to Angola proposed the threat of forfeiture of diamonds and "collateral assets" where the legal origin of rough diamonds cannot be established by the possessor.[64] With regard to finances and other assets, it proposed freezing of assets and forfeiture.[65]

There is much to be said for civil and administrative approaches to these issues. In some jurisdictions, such as that of the United States, human rights activists have made significant progress in promoting their agendas with instruments such as the Alien Tort Claims Act.[66] However, efforts to apply a kind of universal jurisdiction

62 *Ibid.*, para. 112.
63 ICC Statute, Arts. 121(5), 123.
64 UN Doc. S/2000/203, para. 109.
65 *Ibid.*, paras. 126-128.

66 1789 Alien Tort Claims Act, s. 1350: "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."

before civil courts have faced considerable legal obstacles in many legal systems, the common law doctrine of *forum non conveniens* being perhaps the most important of them.[67]

Conclusion

The *Financial Times* was therefore quite right to warn business executives that a new world was dawning with the adoption of the Rome Statute. Just how robustly the new International Criminal Court will go after accomplices in the boardrooms will depend on prosecutorial policy. At present, the prospect of prosecution as an accomplice remains largely in the realm of theory, and the Nuremberg precedents suggest that judges may be extremely demanding as to evidence of knowledge of the underlying crimes. Developing the law offers significant promise of holding violators of human rights and international humanitarian law to account, thereby protecting victims and innocent civilians. But the logic of prosecution for complicity may lead further than many States, with vested commercial and financial investments, are prepared to accept at the present time. If those taking business decisions give pause for reflection at the prospect of criminal prosecution, and adjust their actions accordingly, then humanitarian law will have fulfilled its goal of deterrence.

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67 Some of the cases: *Jota* v. *Texaco*, 157 F.3d 153 (2d Cir. 1998); *Dow Chemical Co*. v. *Castro Alfaro*, 786 S.W.2d 674 (Tex. 1990); *Beanal v. Freeport-McMoran, Inc.*, 969 F.Supp. 362 (E.D.La. 1997); *John Doe I v. Unocal Corp.*, 963 F.Supp. 880 (C.D.Cal. 1997); *Recherches internationales Québec* v. *Cambior Inc.*, Superior Court of Quebec No. 500-06-000034-971, 14 August 1998.

Annex

Rome Statute of the International Criminal Court, 17 July 1998

Article 25 — Individual criminal responsibility

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.
2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.
3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

(a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;

(b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

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

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

> (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
>
> (ii) Be made in the knowledge of the intention of the group to commit the crime;

(e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;

(f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

Résumé

Faire respecter le droit international humanitaire : attraper les complices

par WILLIAM A. SCHABAS

La récente décision d'établir la Cour pénale internationale et l'adoption de son Statut (Statut de Rome) a, une fois de plus, soulevé la question de la responsabilité pénale, en droit international, du complice dans un crime. L'auteur examine d'abord l'interprétation que le Tribunal de Nuremberg a donnée de la notion de complice, pour passer ensuite à l'analyse de la jurisprudence des Tribunaux pénaux internationaux pour l'ex-Yougoslavie et pour le Rwanda. Il constate que ces Tribunaux ont eu l'occasion d'affiner leur jurisprudence par rapport aux complices, car, jusqu'à ce jour, ils se sont davantage occupés d'exécutants que des vrais instigateurs des crimes. La compétence du Tribunal pénal international en matière de responsabilité pénale des complices ne diffère guère de celle qu'on trouve dans le Statut de chacun des deux Tribunaux ad hoc. *Selon l'auteur, il n'est cependant pas exclu que la notion de complicité ne soit élargie à l'avenir pour englober, par exemple, la responsabilité des fournisseurs d'armes ou d'autres activités dans l'ombre des guerres modernes. Une telle évolution de la pratique des Tribunaux pénaux internationaux renforcerait la position du droit international humanitaire.*