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# IN SEARCH OF VIABLE STANDARDS OF CULPABILITY FOR CORPORATE COMPLICITY LIABILITY IN HUMAN RIGHTS ABUSES

## PROCURA DE PADRÕES VIÁVEIS DE CULPABILIDADE PARA A CUMPLICIDADE E RESPONSABILIDADE CORPORATIVA NOS ABUSOS DOS DIREITOS HUMANOS

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**Abstract**
This paper aims to explore the appropriate and viable standards of *actus reus* and *mens rea* to hold corporations liable for complicity in human rights abuses and to clarify the implications of these standards in the context of the UN 'Protect-respect-remedy' Framework and Guiding Principles on Business and Human Rights. As the appropriate standards remains in contention, this paper argues that the "substantial effect" and "knowledge" standards constitute the most appropriate and viable standards of the *actus reus* and *mens rea* for corporate complicity liability in human rights abuses. Furthermore, these standards are apt to the Framework and Guiding Principles, which require corporations to exercise due diligence to avoid and address complicity issues through concrete acts of "knowing and showing".

**Keywords**
Complicity and human rights. Due diligence. Actus reus and mens rea. Business and human rights. Aiding and abetting.

**Resumo**
Este artigo visa explorar os padrões apropriados e viáveis de *actus reus e mens rea* para responsabilizar as empresas por cumplicidade em abusos de direitos humanos e para esclarecer as implicações desses padrões no contexto do Marco de 'Protect-respect-remed' da ONU e dos Princípios Orientadores sobre Empresas e Direitos Humanos. Como as normas apropriadas permanecem em disputa, este artigo argumenta que as normas de "efeito substancial" e "conhecimento" constituem as normas mais apropriadas e viáveis do *actus reus e mens rea* para responsabilizar as corporações por cumplicidade em abusos de direitos humanos. Além disso, essas normas são adequadas ao Marco e aos Princípios Orientadores, que exigem que as corporações exerçam a *due diligence* para evitar e resolver questões de cumplicidade através de atos concretos de "conhecer e mostrar".

**Palavras-chave**
Cumplicidade e direitos humanos. *Due diligence. Actus reus e mens rea.* Empresas e direitos humanos. Auxílio e incentivo.

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## 1. INTRODUCTION

This paper aims to explore the appropriate and viable standards of the *actus reus* and *mens rea* required to hold corporations liable for complicity (or it is also known as aiding and abetting[1]) in

[1] In criminal law the notion of complicity is used in a more limited term, which is often equated in whole or in part with the notion of aiding and abetting. The International Criminal Tribunal of Former Yugoslavia (ICTY) used complicity and aiding and abetting interchangeably, though for the most part the term complicity was employed more often. See *Prosecutor v. Duškr hadić*, ICTY, IT-94-1-T, Trial Judgment (7 May 1997) ¶¶ 674, 688 [hereinafter: Tadić Trial Judgment]; The Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*),

human rights abuses and to clarify the implications of these standards in the context of the recent UN 'Protect- respect-remedy' Framework (hereinafter: the UN Framework)[2] and Guiding Principles on Business and Human Rights (hereinafter: the Guiding Principles)[3]. The relevance of this examination arises from the following gap in the UN Framework and the GPs. On the one hand, the United Nations Special Representative of the Secretary General on Business and Human Rights (SRSG), John Ruggie (2008; 2009; 2010)[4] in his reports under the UN Framework emphasizes that:

> [t]he corporate responsibility to respect human rights includes avoiding complicity […]. Complicity refers to indirect involvement by companies in human rights abuse – where the actual harm is committed by another party, including government and non-state actors.[5]

In order to become aware of, prevent and address the risks and impacts of complicit business activities, the SRSG urges corporations to exercise human rights due diligence[6].

On the other hand, most of the discussions in the Framework and the Guiding Principles concern with the function of due diligence to address human rights risks in terms of potential adverse human rights impacts rather than actual impacts – meaning human rights abuses that have already occurred, including as a result of complicity. In the commentary to the Guiding Principles, the SRSG recognizes that although to some extent exercising "appropriate human rights due diligence should help business enterprises address the risks of legal [and non-legal] claims" for alleged complicity, they "should not assume that, by itself, this will automatically and fully absolve them from liability."[7] In other words, although the corporations have exercised human rights due diligence, they can still be liable for the actual impacts of their complicit business activities. Having said that, no further elaboration was provided in the Framework and the Guiding Principles in terms of how the corporations should be held accountable if despite having exercised the due diligence process the human rights abuses occurred as a result of complicit business activities.

The fact that the SRSG raises the issue of corporate complicity within the scope of corporate responsibility to respect human rights is timely and important because there has been increasing number of foreign direct liability claims against corporations, - mainly those that have been filed by the plaintiffs under the Alien Tort Claims Act (ATCA)[8] in the United States (US), - most of which are

ICJ Case 91, Judgment, 353 (26 February 2007) (Judge Keith). In the same manner, this paper will use both complicity, and aiding and abetting interchangeably.

[2] Ruggie, John, *Protect, Respect and Remedy: a Framework for Business and Human Rights*, A/HRC/8/5 (7 April 2008), [hereafter: Ruggie 2008]; Ruggie, John, *Business and Human Rights: hrwards Operationalizing the 'Protect, Respect and Remedy' Framework*, A/HRC/11/13 (22 April 2009) [hereinafter: Ruggie 2009]; Ruggie, John, *Business and Human Rights: Further Steps hrward the Operationalization of the 'Protect, Respect and Remedy' Framework*, A/HRC/14/27 (9 April 2010) [hereinafter: Ruggie 2010].

[3] Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, A/HRC/17/31 (21 March 2011) [hereafter: Guiding Principles].

[4] The SRSG is granted with a mandate by the Commission on Human Rights to clarify (1) the standards of corporate human rights responsibility and (2) the implication for corporations of the concept of complicity. See Commission on Human Rights, Human rights and transnational corporations and other business enterprises, Resolution 2005/69, E/CN.4/RES/2005/69 (2005).

[5] Ruggie 2008, *supra* note 3, ¶ 73.

[6] Ibid.; Ruggie, John, *Clarifying the Concepts of "Speere rf influence" and "Complicity"*, A/HRC/8/16 (15 May 2008) ¶ 29 [hereinafter: Ruggie on Clarifying].

[7] Guiding Principles, princ. 17, cmtr; Ruggie 2010, *supra* note 3, ¶ 86.

[8] The ATCA granted jurisdiction to the district courts "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" (28 U.S.C.
§ 1350 (2000)).

related to corporate involvement in human rights abuses committed by the third parties abroad.[9] However, so far none of these lawsuits has reached the decision on the merits and none of the corporations accused in these lawsuits has been held liable. One of the main obstacles, - besides legal and procedural barriers such as inapplicability of law and/or forum,[10] jurisdictional limits[11] and settlement out of the court,[12] - is the difficulty to determine the precise standards of business activities both in terms of material fact (*actus reus*) and mental state (*mens rea*) in order to establish complicity liability. Legal jurisprudence and opinions among scholars have indicated that the precise standards of the *actus reus* and *mens rea* for aiding and abetting liability remain a contentious issue, although the standards of the *actus reus* are less controversial than those of the *mens rea*. On the issue of the *actus reus*, the question would be whether to apply the standards of "specific direction" or that of "substantial effect", [13] while the question concerning the standards of *mens rea* focuses on whether to apply the standard of "purpose" or that of "knowledge"[14]. A consensus on the *actus reus* and *mens rea* standards that has legal basis in customary international law and can provide viable means for a legal corporate accountability is required in this regard in order to hold corporations liable for complicity in human rights abuses.

In the Commentary to the Guiding Principles, the SRSG points out the main trend of thoughts in international criminal law jurisprudence, which considered "knowledge" and "substantial effect" as the physical and mental standards of aiding and abetting.[15] Yet, there is no further elaboration on the link between these standards and corporate due diligence obligations for the purpose of liability. This paper tries to provide the link between the two and it observes that compared with the "specific direction" and "purpose" requirements, the "substantial effect" and "knowledge" requirements

[9] It was found that among the over 40 ATCA lawsuits against corporations, most have related to the allegations for complicity in human rights abuses. See SRSG on Clarifying, supra note 7, ¶ 29.

[10] E.g. *In re Unirn Carbide Crrp Gas Plant Disaster at Berpal*, India in December, 1984, 634 F Supp 842 (S D NY 1986) (dismissed because the Indian legal system was considered as an appropriate forum to determine liability); *Aguinda v hexacr, Inc*, 303 F3d 470 (2d Cir 2002) (affirming the applicability of *forum non conveniens* dismissal under ATCA); *Aguinda v hexacr, Inc,* 303 F3d 470 (2d Cir 2000) (dismissed on the ground of *forum non conveniens*).

[11] *Kirbel v. Rryal Dutce Petroleum Cr.,* 133 S. Ct. 1659, 1669 (2013) (limiting the extraterritorial reach of ATCA only to claims that "touch and concern the territory of the United States").

[12] EarthRights International, *Final Settlement Reaceed in Dre v. Unrcal*, (10 May 2005) http://earthrights.org/news/unocalsettle final.shtml (last visited, Nov. 02, 2016).

[13] Cases applying substantial effect: See *Prosecutor v. Antr Furundžija,* ICTY, IT-95-17/1- T, Trial Judgment (10 December 1998) ¶¶ 235, 249 [hereinafter: Furundžija Trial Judment]; *Prosecutor v. Cearles Geankay haylrr* (Appeal Judgment), SCSL-03-01-A, AC, SCSL (26 September 2013) ¶ 520 [hereinafter: Taylor Appeal Judgment]; *Prosecutor v. Nikrla Šainrvić* et.al, ICTY, IT-05-87-A, Appeal Judgment (23 January 2014) ¶ 1649 [hereinafter: Šainović Appeal Judgment]. Cases applying specific direction standard: See e.g. *Prosecutor v. Blagrjević and Jrkić*, ICTY, IT-02-60-A, Appeal Judgment, (9 May 2007) ¶ 127 [hereinafter: Blagojević and Jokić Appeal Judgment]; *Prosecutor v. Mrmčilr Perišić*, ICTY, IT-04-81-A, Appeal Judgment, (28 February 2013) ¶¶ 20, 26 [hereinafter: Perišić Appeal Judgment].

[14] Cases applying knowledge standard: E.g. *trial of Fredrice Flick and Five Oteers*, 48 Law Reports of Trials of War Criminals, Vol. 9 (United States Military Tribunal, 20 April to 22 December 1947) at 29 [hereinafter: *Flick hrial*[]; *trial of Brunr hesce and hwr Oteers*, 9 (British Military Court, Hamburg, 1 – 8 March 1946) at 93, 101 [hereinafter: *Zyklrn B Case*]; *Prosecutor v. Antr Furundzija,* ICTY, IT-95-17/1-T, Trial Judgment (10 December 1998), para. 245; *haylrr Appeal Judgment*), ¶ 540; *Šainrvić Apeal Judment,* ¶ 1649; Unocal Corp., 395 F.3d 932, 953 (9th Cir. 2002); Doe v. Exxon Mobil Corp., 654 F.3d 11 (D.C. Cir. 2011). Cases applying purpose standard: E.g. *Presbyterian Ceurce of Sudan v. halisman Energy, Inc.*, 582 F.3d 244, 258-259 (2d Cir. 2009); *Kirbel v. Rryal Dutce Petrrleum Cr.,* 621 F.3d 111, 188 (2d Cir. 2010); *Aziz v. Alcrlac*, 658 F.3d 388 (4th Cir. 2011). For further discussion, See Cassel, Douglass, "Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts", *6 NW. J. INh'L HUM. RhS. 304* (2008); Michalowski, Sabine, "Doing Business with a Bad Actor: How to Draw the Line Between Legitimate Commercial Activities and Those that Trigger Corporate Complicity Liability", *50(2) hexas International Law Journal 404* (2015); Michalowski, Sabine, "The Mens Rea Standard for Corporate Aiding and Abetting Liability – Conclusions from International Criminal Law", *18 UCLA J. INh'L. & FOR. AFF. 237* (2014); Olson, Danielle, "Corporate Complicity in Human Rights Violation Under International Criminal Law", *1 (1) International Human Rigets Law Journal* (2015).

[15] Guiding Principles, princ. 17, cmtr.

constitute the most appropriate and viable standards of the *actus reus* and *mens rea* for corporate aiding and abetting liability in human rights abuses. Furthermore, in the context of the recent global attempts to formulate regulatory framework for corporate responsibility and accountability, the "substantial effect" and the "knowledge" standards are apt to the widely endorsed UN Framework and Guiding Principles, which require corporations to exercise due diligence[16] as an affirmative responsibility to respect human rights, including to avoid and address complicity issues through concrete acts of "knowing and showing".[17]

The argument in this paper structures as follows. After this short introduction in Part I, Part II will trace back the required standards of aiding and abetting liability in criminal law, in particular under the jurisprudence of the Nuremberg, the ICC, ad hoc and hybrid tribunals. Part III discusses the understanding and application of the required *actus reus* and *mens rea* standards under the ATCA in the US, given that its legal reasoning in dealing with corporate complicity allegations have been heavily influenced by the abovementioned criminal law jurisprudence. Part IV examines the extent to which the knowledge standard has played an important role in holding corporations accountable by focusing on the UK legal system as one of the most progressive legal proceeding in dealing with corporate involvement in the human rights abuses by the third parties. Part V provides a conclusion for the argument on the reason why the "substantial effect" and "knowledge" requirements constitute the most appropriate and viable standards of *actus reus* and *mens rea* to hold corporations liable for complicity in human rights abuses.

## 2. THE NOTION OF CORPORATE COMPLICITY IN CRIMINAL LAW

### 2.1 The Standards of Aiding and Abetting in the Nuremberg Trials

The landmark cases of criminal offences for complicity in relation to business activities are the trial of business actors for their contributions to the large-scale of crimes committed by the Nazis. The Nuremberg International Military Tribunal (IMT) found that the aggressive war and crimes by the Nazis were committed on the basis of the cooperation between political elites and business actors.[18] The IMT noted that "[w]hen they, with knowledge of [Hitler's] aims, gave him their co-operation, they made themselves parties to the plan he had initiated."[19] The IMT implicitly recognized crime of aggression as the *physical* element of accomplice liability, whereas the knowledge of the Hitler's aims of aggression represented *mental* element of complicity liability. This notion of complicity liability had significant influence on the understanding of complicity liability in the subsequent trials in the Nuremberg trials under the Control Council No 10, which included the charges against some industrialists(KYRIAKAKIS, 2012).[20]

[16] Ruggie 2008, *supra* note 3, ¶¶ 56-64; Ruggie 2009, *supra* note 3, ¶¶ 70-84; Ruggie 2010, *supra* note 3, ¶¶ 79-86; Guiding Principles, princ. 17-21.
[17] Ruggie 2010, *supra* note 3, ¶ 80.
[18] Trial of the Major War Criminals Before the International Military Tribunal, Vol. I, 223 (Nuremberg 14 November 1945 – 1 October 1946) at 226.
[19] Id.
[20] Kyriakakis, Joanna, "Justice after War: Economic Actors, Economic Crimes, and the Moral Imperative for Accountability after War" in Lary, May and Forcehimes, Andrew T. (eds.), Morality, Just Post Belum, and International Law, Cambridge: Cambridge University Press, 2012, at 115.

In the *Farben trial*,[21] 13 out of the 24 corporate executives were found guilty on one or more counts of indictment of various international crimes, covered within crimes against peace, crimes against humanity and war crimes.[22] However, they were not guilty for the accusation that they participated in the planning, preparation and waging war (count 1) and involved in common plan and conspiracy to commit crime of aggression (count 5) through their involvement in the rearmament of the Nazi regime.[23] Relying on the basic premise of the IMT that "rearmament of itself is not criminal under the Charter," the Tribunal argued that the "participation in the rearmament of Germany was not a crime on the part of any of the defendants in this case, unless that rearmament was carried out, or participated in, with knowledge that it was a part of a plan or was intended to be used in waging aggressive war."[24] Thus, in order "to be held guilty under either Counts I or V, or both […] it must be shown that they were parties to the plan or conspiracy, or, knowing of the plan, furthered its purpose and objective by participating in the preparation for aggressive war."[25] In examining whether the defendants were aware of Hitler's military aims, the Tribunal found that the required mental element did not exist in the accusation filed against them, because the defendants were not military experts who would presumably know that their participation would assist Hitler's preparation for aggression.[26] This means that had the defendants been informed of Hitler's military aims or had they been military experts, they would have been deemed liable.

In the *Flick trial*, 3 of the 6 defendants were convicted of war crimes for, inter alia, using their influence and financial capability to support the Nazis (SS).[27] The Tribunal held that someone "who knowingly by his influence and money contributes to the support thereof must, under settled legal principles, be deemed to be, if not a principal, certainly an accessory to such crimes."[28] Using similar arguments, the Tribunal in the *Brunr hesce et.al trial* charged the defendants with war crimes for supplying poison gas to the Nazis while being fully aware that the latter would be used for murdering the inmates in the concentration camps.[29] The Tribunal focused on the question of whether Tesch had knowledge of the SS' intention regarding the use of the gas they provided, rather than on whether they had supplied the gas with the intention or purpose to killing the inmates.[30]

In the aforementioned cases, the Nuremberg Tribunal consistently applied the *mens rea* standard of knowledge, without paying much attention on the analysis of the *actus reus* aspect of an assistance.[31] It is enough for the defendant to have knowledge of the purpose for which their assistance will be used in order to be liable for aiding and abetting.

[21] *Trial of Karl Krauce and hwenty-hwr Oteers*, Case No. 57, Law Reports of Trials of War Criminals, Vol. 10 (United States Military Tribunal 29 July 1948) [hereinafter: *Farben trial*)
[22] Farben trial at 1-2
[23] *Id.* at 35-36.
[24] *Id.* at 36.
[25] *Id.* at 35.
[26] *Id.* at 36-37.
[27] *trial of Fredrice Flick and Five Oteers*, Case No. 48, Law Reports of Trials of War Criminals, Vol. 9 (United States Military Tribunal, 20 April to 22 December 1947) [hereinafter: *Flick trial*].
[28] Flick trial at 29.
[29] *trial of Brunr hesce and hwr Oteers*, Case No. 9 (British Military Court, Hamburg, 1 – 8 March 1946) at 93 and 101 [hereinafter: *Zyklrn B Case*].
[30] Olson, *supra* note 15, at 8; Cassel, *supra* note 15, at 304.
[31] Michalowski, *supra* note 15, at 249; Oslon, *supra* note 15, at 8.

### 2.2 Aiding and Abetting in the ICC, Ad Hoc and Hybrid Tribunals

The ICC Statute recognized aiding and abetting as a method of accessorial liability, although no explanation is provided on what does the terms "aids" and "abets" entail.[32] Article 25(3)(c) of the ICC Statute stipulates that a person shall be criminally liable if that person "aids, abets or otherwise assists in its commission or its attempted commission."[33] A similar understanding of aiding and abetting is echoed by the Statutes and jurisprudence of the ad hoc tribunals for Former Yugoslavia (ICTY)[34] and Rwanda (ICTR),[35] hybrid tribunals for Sierra Leone (SCSL)[36] and Cambodia,[37] and recognized in the International Law Commission's 1996 Draft Code of Crimes against the Peace and Security of Mankind.[38] Both the ICC and ad hoc/hybrid Statutes and jurisprudence include the elements of crime that constitute aiding and abetting liability, namely *actus reus* and *mens rea*.[39] However, it remains a disputed issue as to what should the *actus reus* and *mens rea* consist of in order for a person's conduct to give rise to aiding and abetting liability.[40]

#### 2.2.1 Actus Reus

The ICC Statute lacks the criteria for an act that constitutes the *actus reus* of aiding and abetting liability. Only in describing the relationship between the material element and mental element of a crime in Article 30, the ICC Statute recognizes three basic categories of *actus reus*, namely conduct, consequence and circumstance, (BADAR, 2008)[41] each of which is mentioned in correspondence to either the *mens rea* element of intent, knowledge or both. Conduct correlates to intent ("means to engage in the conduct"), consequences correspond to both intent ("means to cause the consequence") and knowledge (awareness of the occurrence of a crime), while circumstance relates to knowledge (awareness of the context).[42] However, no further explanation is provided as to the extent to which an act can be qualified for the *actus reus* of aiding and abetting. As indicated in the *Mens Rea* Section below, the ICC instead focused its analysis on the *mens rea* element of a criminal act.

It was the ICTY in *Furundzija Case* which defined *actus reus* as "practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime."[43]

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[32] *Prosecutor v. hermas Lubanga Dylr* (Judgment pursuant to Art 74 of the Statute, Situation in the Democratic Republic of Congo) ICC-01/04-01/06 (14 March 2012) ¶ 978.
[33] Statute of the International Criminal Court (1998), Art. 25 (1) [hereinafter: ICC Statute].
[34] Statute of the ICTY, S/RES/827 (25 May 1993) last amended on 17 May 2002, Art. 6 (1) [ hereinafter: ICTY Statute]; Blagojević and Jokić Appeal Judgment ¶ 192.
[35] Statute of the International Criminal Tribunal for Rwanda, S/RES/955 (8 November 1994), last amended on 13 October 2006), Art. 6(1) [hereinafter: ICTR Statute].
[36] Statute of the Special Court for Sierra Leone, S/2002/246, appendix II, Art. 6(1) [hereinafter: SCSL Statute].
[37] *Kaing Guek Eav* (*Duce Case*), Judgment, 001/18-07-2007/ECCC/TC, Extraordinary Chambers in the Courts of Cambodia, ¶¶ 517, 532 (26 July 2010).
[38] ILC Draft Code of Crimes against Peace and Security of Mankind with Commentaries (1996), Art. 2(3)(d).
[39] Furundžija Trial Judgment, ¶ 236; Ruggie on Clarifying, supra note 7, ¶¶ 35-44; International Commission of Jurists, *Corporate Complicity & Legal Accountability, Volume 2: Criminal Law & International Crime*, (Geneva 2008) at 17-24 [hereinafter: International Commission of Jurists Vol. 2].
[40] See generally Michalowski, *supra* note 15; Oslon, *supra* note 15; Cassel *supra* note 15
[41] Badar, M. (2008), "The Mental Element in the Rome Statute of the International Criminal Court: A Commentary from A Comparative Criminal Law Perspective" *Criminal Law Forum 19(3/4)* at 474.
[42] ICC Statute, Art. 30 (2-3).
[43] *Ibid.* paras. 235 and 249. This has been confirmed in *Prosecutor v. Blagrje Simic,* ICTY, IT-95-9-A, Appeal Judgment (28 November 2006, para. 86; and *Prosecutor v. Andre Ntagerura, Emmanuel Bagambiki, Samuel Imaniseimwe,* ICTR, ICTR-99-46-A, Appeal Judgement, (7 July 2006), para. 370.

This implies that not every assistance that has an impact on the commission of crimes can constitute the *actus reus* of aiding and abetting.(PLOMP, 2012)[44] It can be dictated through a "fact-based inquiry"[45] and "assessed on a case-by-case basis in the light of the evidence as a whole."[46] This notion of the *actus reus* of aiding and abetting was further constricted and it has become a contentious issue after the ICTY's holding in *hadić*.[47] The case concerned the allegations of crimes against humanity filed against Duško Tadić for persecution, inhumane acts, cruel treatment, forced transfers and detentions of the non-Serbian civilians.[48] In this case, the Appeals Chamber described aiding and abetting as "acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime […] and this support has a substantial effect upon the perpetration of the crime."[49] This description was made simply to differentiate aiding and abetting from "acting in pursuance of common purpose or design," which only requires "acts that in some way are directed to the furthering of common plan or purpose."[50] However, such notion of aiding and abetting, which added a "specifically directed" element to the "substantial effect" requirements for the *actus reus*, has been explicitly and implicitly endorsed by some of the subsequent cases.[51]

One of the recent cases was *Perišić*, involving accusation against Momčilo Perišić for his large-scale military assistance in the commission of crimes perpetrated by the Army of Republika Srpska (VRS).[52]Perišić pleaded that his acts were an unstoppable general assistance "directed to a war effort", and not "specifically directed" to facilitate the crimes committed by the VRS.[53] In response, the Appeal Chamber argued that the *actus reus* of aiding and abetting required both "substantial effect" and "specifically directed" elements of assistance[54] by repeating in verbatim the ruling of the aforementioned Tadić Chamber. According to the Perišić Chamber, the "specifically directed" element is necessary because the evidence of a culpable link between the assistance provided by an accused individual and the crime of principal perpetrators that could give rise to aiding and abetting liability could not always be proved by the "substantial effect" requirement alone. This will particularly be the case where the accused aider and abettor is geographically remote from the crime, or provided general assistance that could be used both for lawful and unlawful purposes[55]. The

[44] Plomp, Caspar, "Aiding and Abetting: The Responsibility of Business Leaders under the Rome Statute of the International Criminal Court", *30(79) Ultrecet Journal of International and European Law 4* (2012) at 9; Michalowski, *supra* note 15, at 410.
[45] *Prosecutor v. Kalimanzira*, ICTR, ICTR-05-88-A, Appeal Judgment, para. ¶ 86 (20 October 2010) [hereinafter: Kalimanzira Appeal Judgment]; Blagojević and Jokić Appeal Judgment, ¶ 134; *Prosecutor v. Milan Lukić and Sredrje Lukić*, ICTY, IT-98-32/1-A, Appeal Judgment, ¶ 438 (4 December 2012) [hereinafter: Lukić and Lukić Appeal Judgment].
[46] *Prosecutor v. Issa Hassan Sesay, et al.*, SCSL, Case No. SCSL-04-15-A, Appeal judgment, ¶ 769 (26 October 2009); Olasolo, Hector and Rojo, Enrique Carnero, "Forms of Accessorial Liability under Article 25(3)(b) and (c)" in Stahn, Carsten (ed.), The Law and Practice of International Criminal Law, Oxford: Oxford University Press, 2015, at 580; See generally Michalowski, *supra* note 15.
[47] *Prosecutor v. Duškr hadić*, ICTY, Case No. IT-94-1-A, Appeal Judgment (15 July 1999) [hereinafter: Tadić Appeal Judgment].
[48] *Prosecutor v. Duškr hadić*, ICTY, IT-94-1-T, Trial Sentencing Judgment, ¶¶ 1-2. (14 July 1997) [hereainafter: Tadić Trial Judgment].
[49] *Id.* ¶ 229 (iii)
[50] *Id.*
[51] Explicitly (verbatim): See, E.g. Blagojević and Jokić Appeal Judgement, ¶ 127. Implicitly: See, E.g. Ntagerura et.al Appeal Judgment, ¶ 370. For the whole list of cases, See Perišić Appeal Judgment, ¶ 28 (note 70).
[52] Perišić Appeal Judgment, ¶ 2-3.
[53] *Id.* ¶ 20.
[54] *Id.* ¶ 26.
[55] Perišić Appeal Judgment, ¶¶ 39, 44; Olasolo and Rojo, *supra* note 47, at 583.

"specifically directed" element is, therefore, required in order to ensure that such culpable link exists.[56]

Thus, the "specifically directed" element is not automatically established simply because having evidence of the volume of assistance consists of dual- purpose act and knowledge about the crimes.[57] This is applicable only if it is "the sole reasonable inference after a review of the evidentiary record as a whole."[58] Accordingly, the Appeal Chamber held that although "Perišić may have known of VRS crimes", his assistance "was directed towards the VRS's general war effort rather than VRS crimes" and therefore he "was not proved beyond reasonable doubt to have facilitated assistance specifically directed towards the VRS Crimes in Sarajevo and Srebrenica."[59]

This notion of *actus reus* was, however, not endorsed by the recent decision of the SCSL in *haylrr*, after a number of rejections of the specific direction requirement by a limited number of Appeal Chambers[60] prior to *Perišić*. The case was concerned with the conviction on 11 charges against Charles Taylor for war crimes, crimes against humanity and other violations of international humanitarian law in the course of civil war in Sierra Leone.[61] The Chamber held that "specific direction" is not an element of the *actus reus* of aiding and abetting"[62] after finding that: inter alia (1) no provisions are made in the relevant Statute, customary international law and State practice, which classified "specific direction" as an element of *actus reus* of aiding and abetting.[63] (2) The reference to "specific direction" in *hadić* as a precedent is inappropriate because *hadić* did not canvas the customary international law concerning the elements for aiding and abetting, but simply discussed the difference between aiding and abetting and joint criminal enterprises.[64] The Chamber, therefore, concluded that "the *actus reus* of aiding and abetting liability […] is that the accused's acts and conduct of assistance, encouragement and/or moral support had a substantial effect on the commission of each charged crime"[65] and that the substantial effect of such conduct "is to be assessed on a case-by-case basis in the light of the evidence as a whole." [66]

Upon examining the Taylor case, the Appeal Chamber found that although the defendant was remote from the crimes, his assistance was "extensive" and "sustained" and significantly impacted the crimes committed by the Revolutionary United Front (RUF) and Armed Forces Revolutionary Council (AFRC), as it enabled, facilitated and enhanced the RUF/AFRC Operational Strategy.[67] Taylor, therefore, met the requirements for complicity liability because his assistance to the RUF/AFRC had a substantial effect on the commission of the crimes, and because he acted with knowledge that his assistance would have a substantial impact on the commission of crimes.[68] Besides the evidence of *actus reus*, the defendant was also aware of the intention of the RUF and AFRC to commit the crimes,

[56] Perišić Appeal Judgment,¶ 44; Blagojević and Jokić Appeal Judgement, ¶ 189.
[57] Perišić Appeal Judgment,¶ 56.
[58] *Id.* ¶ 68.
[59] *Id.* ¶ 69.
[60] *Prosecutor v. Mile Mrksić and Veselin Sljivacanin*, ICTY, IT-95-13/1-A, Appeal Judgement, ¶159 (5 May 2009) [hereinafter: Mrksić and Sljivacanin Appeal Judgment]; reaffirmed in Lukić and LukićAppeal Judgment, ¶ 424.
[61] Taylor Appeal Judgment, ¶¶ 4-14.
[62] *Id.* ¶ 481.
[63] *Id.* ¶¶ 471-477.
[64] *Id.* ¶ 478.
[65] *Id.* ¶ 481.
[66] *Id.* ¶ 475.
[67] *Id.* ¶ 520.
[68] *Id.* ¶ 540.

which demonstrated that he satisfied the *mens reas* threshold as well.[69] It is apparent that aiding and abetting liability is established through a combination of substantial effect (*actus reus*) and knowledge (*mens rea*) standards.

Concurring with the Taylor Appeal Chamber, the ICTY in *Sainrvic et.al*[70] rejected "specific direction" as an element of the *actus reus* of aiding and abetting. In analyzing the *actus reus* for allegations filed against Saiňović at.al for crimes against humanity in the forced displacement, murder and persecutions of Kosovo's Albanian Population,[71] the ICTY Appeal Chamber found that the analysis of the previous case law in *Perišić* was built on the flawed premise that the *hadić* Chamber established a precedent regarding "specific direction."[72] Similarly, a number of appeal judgments upon which the *Perišić* decision was founded did not clearly establish "specific direction" as requirement for the *actus reus* of aiding and abetting.[73] The Saiňović Chamber concluded that the essential element of the *actus reus* for aiding and abetting under customary international law is not "specific direction", but "substantial effect", and the required *mens rea* is represented by the knowledge that the assistance contributes to the commission of the offence.[74] This judgment, which followed the decision of *haylrr*, brought back the focus of the *actus reus* analysis of aiding and abetting liability to the degree of impact (substantial effect) of an assistance.

### 2.2.2 Mens Rea

#### 2.2.2.1 Intent and knowledge: Article 30 of the ICC Statute and Jurisprudence

Article 30 notes that aiding and abetting liability arises "only if the material elements are committed with intent and knowledge."[75]An individual has criminal intent, if the subject "means to engage" in a crime (referring to conduct) or if the subject "means to cause" that crime, or "is aware that it will occur in the ordinary course of events" (referring to consequence).[76] Knowledge is indicative of the perpetrator's awareness that certain circumstances exist (referring to circumstance), or that a consequence will arise in the ordinary course of events (referring to consequence).[77] Thus, only the consequence of a crime is covered by both intent and knowledge in each case.

The Pre-Trial Chamber I of the ICC in *Lubanga* (initial test of Article 30) argued that the reference to "intent" and "knowledge" cumulatively requires a "volitional element" on the part of the accused.[78] This volitional element basically encompasses situations in which the accused (1) knows that his/her actions or omissions will bring about the material elements of the crimes and (2) undertakes such actions or omissions with a concrete intent to bring about the material elements of

[69] *Id.*
[70] *Id.* ¶ 478.
[71] Sainovic, et al. Appeal Judgment, ¶¶ 6-11.
[72] *Id.* ¶ 1623 (J Tuzmukhamedov dissenting).
[73] *Id.*
[74] *Id.* ¶ 1649.
[75] ICC Statute, Art. 30(1).
[76] *Id.* Art. 30(2)
[77] *Id.* Art. 30(3) (c).
[78] *Prosecutor v. hermas Lubanga Dylr* (Decision on the Confirmation of Charges) ICC- 01/04-01/06, ¶ 351 (29 January 2007) [hereinafter: Lumbanga Confirmation Decision].

the crimes" (known as *dolus directus* of the first degree).[79] This first degree intent is said to be similar to the culpability term "purposely" under § 2.02 of the US Model Penal Code (MPC): a person acts "purposely" with regard to the material element of a crime (result) if it is his conscious object to bring about such result.[80] Thus, an individual does not only know the consequence, but also has the will (purpose) to achieve such results.[81] As the mental element requires both knowledge and concrete intent, some have argued that it can be very problematic and difficult to prosecute the aider and abettor.[82]

Article 30 also encompasses another volitional element that may arise in situation in which the accused, without a concrete intent to materialize the phyphysical element of the crime, "is aware that such elements will be the necessary outcome of [his/her] actions or omissions" (known as *dolus directus* of the second degree).[83]This type of *dolus directus* is considered to be equivalent to "knowledge" or "awareness", given that Article 30(3) defines "knowledge" as "awareness" that "a consequence will occur in the course of event."[84] Although this type of *dolus directus* does not need to be as demanding a *mens rea* requirement as the first one above, it is still stricter then the recklessness standard. Proof of having awareness of the consequence of assistance in the commission of the crime is sufficient in order to establish the *mens rea* for aiding and abetting (FINNIN, 2012).[85]

Besides the two types of *dolus directus* mentioned above, pursuant to Article 30(2)(b) of the ICC Statute, the Lubanga Pre-Trial Chamber raised the third intent, known as *dolus eventualis*.[86] This exists in a situation in which the accused "(a) is aware of the risk that the objective elements of the crime may result from his or her actions or omissions, and (b) accepts such an outcome by reconciling himself or herself with it or consenting to it."[87] The situation described here basically refers to an awareness of the possibility or likelihood for the materialization of a crime (result), which would otherwise be recklessness on the part of the accused if the latter failed to foresee it. The subsequent decisions in the *Bemba Pre-hrial* and *Lubanga trial*, however, disagreed with the inclusion of this *dolus eventualis* within Article 30 on the ground that, inter alia, the degree of awareness of a consequence in *dolus eventualis* does not reach the threshold of knowledge set up in Article 30, which requires inevitability or certainty, rather than simply probability or likelihood.[88] It remains to be seen whether the ICC will stick to the present position of exclusion or whether it will adopt the inclusion of *dolus eventualis* within Article 30.

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[79] *Id.*

[80] Model Penal Code, § 2.02(2)(a)(i). This has been confirmed, by the US Supreme Court,
E.g. in *United States v. Bailey*, 444 U.S. 394, 399 (1980). See also Badar, Mohamed, "Dolus Eventualis and the Rome Statute without it?" 12 (3) *New Criminal Law Review* (2009), at 438- 439.

[81] Ibid. at 439.

[82] Plomp, *supra* note 45, at 13; Cryer, Robert, et.al, *An Introduction to International Criminal Law and Procedure, heird Edition*, Cambridge: Cambridge University Press, 2014, at 377; Michalowski, *supra* note 15, at 239-240.

[83] ICC Statute, Art. 30(2)(b); Lubanga Confirmation Decision, ¶ 352.

[84] Badar, *supra* note 81, at 439-440.

[85] Finnin, Sarah, *Elements of Accessory Mrdes Liability : Article 25(3)(b) and (c) of the rome Statute rf International Criminal Court*, Leiden.Boston: Martinus Nijhoff, 2012, at 191.

[86] Lubanga Confirmation Decision, ¶ 352.

[87] Ibid.; See also Blaškić Trial Judgment, ¶ 286.

[88] *Prosecutor v. Jean-Pierre Bemba Grmbr*, ICC-01/05-01/08, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute (15 June 2009), ¶¶ 362-363; Lubanga Judgment Pursuant to Article 74 of the Statute, ¶ 1011-1012.

The opinions among legal scholars on this issue also remain divided.[89] This discourse will not be provided in this context, as it is beyond the scope this study. Nonetheless, in the context of the recent attempt to utilize human rights due diligence obligations in dealing with corporate complicity, the proposition for the inclusion of *dolus eventualis* provided by Badar may be useful to give incentives for corporate actors to exercise due diligence in order to foresee the risk of their business conduct on human rights (Pillar II) and to remedy the victims (Pillar III) as stipulate under the recent UN Framework and Guiding Principles on Business and Human Rights. According to Badar, *dolus eventualis* is particularly required in cases where there is clear evidence (1) "from which the Court can infer the perpetrator's acceptance of the illegitimate consequences of his act" and (2) of recklessness on the part of the accused when deciding to contribute to the crime.[9091] Badar further argues that since there are different levels of punishment (from strong to weak) according to the gravity of the crime, "[a]dopting the concept of *dolus eventualis* puts things on the right track and acknowledges criminal responsibility based on the accurate balance between guilt and punishment, so each degree of guilt has a corresponding punishment."[9192] This in turn will ensure that the accused is punished and the affected groups and individuals receive appropriate remedy as specified by the UN Framework and Guiding Principles (Pillar III).

## PURPOSE OR KNOWLEDGE?: ARTICLE 25(3) (C) AND (D) OF THE ICC STATUTE

Aside from the "intent" and "knowledge" under Article 30 described above, Article 25 explicitly requires the "purpose of facilitating the commission" of the crime by the principal perpetrators.[92] As indicted previously, this purpose requirement was originally derived from the US MPC (AMBOS, 1999, 2008)[93]. In terms of complicity liability, the MPC § 2.06 provided that an individual is an accomplice of another person in the commission of an offence if "with the purpose of promoting or facility the commission of the offense, he […] aids or agrees or attempts to aid such other person in planning or committing it."[94] Since the language of Article 25(3)(c) reflects the language of the first half of the MPC § 2.06, some have interpreted Article 25(3)(c) as a requirement for the aider and abettor to act with the "purpose" of assisting the commission of crime in order to be liable for aiding and abetting under the ICC Statute.[95] In her concurring opinion on the *Ngudjrlr trial*, Judge Christine Van den Wyngaert noted that:

[89] For the academic discourse on the issue of intent, See e.g. Finnin, Sarah, "Mental Elements under Article 30 of the Rome Statute of the International Criminal Court: A Comparative Analysis", *61(2) Internatirnal and Crmparative Law Quarterly* (2012); Werle Gerhard and Jessberger, Florian, *Principle rf Internatirnal Criminal Law, teird Editirn*, Oxford: Oxford University Press, 2014, at 2073-2085; Cuilfoyle, Douglas, *Internatirnal Criminal Law*, Oxford: Oxford University Press, 2016, at 187-196; Badar, Mohamed, "The Mens Rea Enigma in the Jurisprudence of the International Criminal Court", in Van Den Herik, Larissa and Stahn, Carsten, *hee Differsificatirn and Fragmentatirn rf Internatirnal Criminal Law*, Leiden.Boston: Martinus Nijhoff, 2012, at 503-534.
[90] Badar (2012), *supra* note 90, at 534
[91] Id.
[92] *Id.* Art. 25(3)(c).
[93] Ambos, Kai, "General Principle of Criminal Law in Rome Statute", *10 CRIM. L. F. 1*, 10 (1999); Ambos, Kai, "Article 25: Individual Criminal Responsibility" in Triffterer, Otto (ed.), *Commentary rn the Rrme Statute of the International Criminal Court, heird Edition*, Munchen: Beck, 2008, at 757.
[94] Model Penal Code § 2.06(3)(a)(ii).
[95] Olasolo and Rojo, *supra* note 47, at 584; Ambos (2008), *supra* note 92, at 757. In civil courts, See, E.g. *Presbyterian Ceurce rf Sudan v. halisman Energy Inc.* 582 F.3d 244, 259 (2nd Cir. 2009).

> [t]he drafters of the Rome Statute deliberately decided to provide a stricter mental element for aiding and abetting under Article 25(3)(c) than for the corresponding notion under Article 7(1) of the ICTY Statute: Article 25(3)(c) requires purpose, as opposed to aiding and abetting under the ICTY jurisprudence, which only requires knowledge.[96]

This implies that simply having knowledge that the assistance will result in the commission of a crime is not sufficient to trigger aiding and abetting liability under Article 25(3)(c).[97] Rather it requires a "purpose", which is, as described earlier, equivalent to *dolus directus* of the first degree.

Having said that, the following Article 25(d) on individual responsibility for contributing to a crime of a group of persons acting with common purpose conversely requires that the contribution shall be "intentional" and either "made with the aim of furthering the criminal activity or criminal purpose of the group" or "made in the knowledge of the intention of the group to commit the crime."[98] Thus, despite Article 25(3)(c) seems to suggest the need for a "purpose" requirement, the text of Article 25(3)(d) requires no more than knowledge".[99] Since Article 25(3)(c) appears to limit the aiding and abetting liability to cases in which there exists the "purpose" of facilitating the crimes, "the prosecution must demonstrate that the aider and abettor's conscious objective is to facilitate the crime." (BADAR, 2013; AMBOS, 2008) [100] Advocating such a strict notion of aiding and abetting as parameter for liability, some have even argued that any "other lower mental element, such as conditional intent/*dolus eventualis* or negligence, is not sufficient either."[101] If this is the case, it is difficult to imagine whether there is any possibility at all to hold the alleged aider and abettor liable for their contribution to the crimes.

Another question for only advocating the high threshold of purpose requirement mentioned above would be how to apply it in practice. The application of such a high threshold of purpose requirement will be faced with practical difficulties. Because the aiding and abetting liability is mainly concerned with an indirect involvement of those who assist in fulfilling the role of a principal perpetrator, which basically refers to an accessorial element that must be understood in relation to the consequence of facilitating the crime, rather than the conduct itself of the principal perpetrator.[102] Since an assessorial element is one of a consequence, the *mens rea* for aiding and abetting liability must be established on the ground that a person "means to cause that consequence or is aware that it will occur in the ordinary courts of events."[103] In other words, the *mens rea* for aiding and abetting requires knowledge and intent, - in this case referring to the "means to cause" a consequence (*dolus directus*), - which basically means "purposely facilitating" a consequence. If this is the case, Plomp points out that:

> it should be asked if the additional *mens rea* requirement of *purposely facilitating* a crime would, in practice, meaningfully differ from the intent requirement of *meaning tr cause* a

[96] Concurring Opinion of Judge Christine Van den Wyngaert in the case of the *Prosecutor v. Mateieu Ngudjrlr Ceui*, ICC-01/04-02/12, Judgment pursuant to Article 74 of the Statute (18 December 2012), ¶ 25.
[97] Decision on the Confirmation of Charges in the Case of the *Prosecutor v. Mbaruseimana*, ICC-01/04-01/10, Pre-Trial Chamber I (16 December 2011), ¶ 274; Lubanga Confirmation Decision, ¶ 337.
[98] ICC Statute, Art. 25(3)(d).
[99] *Dre VIII v. Exxon Mobil Crrp.,* No. 097125, WL 2652384, 46 (D.C. Cir. 8 July 2011).
[100] Badar, Mohamed, E. The Concept of Mens Rea in International Criminal Law: The Case for A Unified Approach, UK: Hart Publishing, 2013, at 407; Ambos (2008), *supra* note 92, at 757.
[101] Olasolo and Rojo, *supra* note 47, at 584.
[102] E.g. Plomp, *supra* note 45, at 14-15.
[103] ICC Statute, Art. 30(2)(b).

> consequence, so that separate pieces of evidence either fulfill the Article 30 requirement or the additional requirement exclusive to aiding and abetting.[104]

According to the author, efforts to uphold the notion of a requirement additional to "intent and knowledge" would be "impracticable or fruitless because the Court […] would plausibly find it hard to interpret the facts as evidencing one of the two, but not the other."[105] This difficulty may provide a legal gap that allows corporations to avoid liability. Such avoidance is in fact one of the legal barriers under the State-based judicial mechanisms that must be overcome by the State via its courts as stipulated by the Guiding Principles on Business and Human Rights.[106]

#### 2.2.2.3 KNOWLEDGE: THE AD HOC AND HYBRID JURISPRUDENCE

In contrast to the arguments for a high threshold of purpose requirement under Article 25(3)(c), the ad hoc and hybrid tribunal decisions have indicated a different trend, which established a less strict *mens rea* standard of aiding and abetting liability. The ICTY in *Furundžija*, an initial case of this trend, provided that the *mens rea* of aiding and abetting requires the accomplice "to have knowledge that his actions will assist the perpetrator in the commission of the crime."[107] It added that the accomplice would have "intended to facilitate the commission of that crime, and is guilty as an aider and abettor" if the subject is "aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed."[108] Therefore, it is "not necessary that the aider and abettor should know the precise crime that was intended and which in the event was committed."[109] Nor does it require the accomplice to "share the *mens rea* of the perpetrator, in the sense of positive intention to commit the crime."[110] While knowledge is sufficient to trigger the aiding and abetting liability, intent is necessary only in order to establish a heightened mode of liability, as in the case of "common design, where the *actus reus* consists of participation in a joint criminal enterprise and the *mens rea* required is intent to participate."[111]

While agreeing with the *Furundžija* Chamber outlined above, the SCSL Tribunals added an even less demanding requirement of knowledge standards by including the aider and abettor's "aware[ness] of the substantial likelihood that his act would assist the commission of a crime by the perpetrators"[112] as a culpable *mens rea* for aiding and abetting. Nonetheless, this less demanding

[104] Plomp, supra note 45, at 14.
[105] *Id.* at 14-15.
[106] Guiding Principles, princ. 26, cmtr.
[107] Furundžija Trial Judgment, ¶ 245.
[108] *Id.* ¶ 246.
[109] *Id.* Confirmed, E.g. in *Prosecutor v. hiermir Blaškić*, ICTY, IT-95-14-T, Trial Judgement ¶ 287 (3 March 2000) [Blaškić Trial Judgment]; Blaškić Appeal Judgment, ¶ 50; Saiňović et.al Appeal Judgment, ¶ 1772.
[110] Furundžija Trial Judgment, ¶ 245. See also Blaškić Appeal Judgment, ¶ 45-46; *Prosecutor v. Ndaeimana*, Case No. ICTR-01-68-A, Appeal Judgment, ¶ 157 (16 December 2013) [Nahimana Appeal Judgment]; Saiňović et.al Appeal Judgment, ¶ 1649; Taylor Appeal Judgment, ¶¶ 436, 483.

[111] Furundžija Trial Judgment, ¶ 249. This has been confirmed in, E.g. Vasiljević Trial Judgment, ¶ 71; Perišić Appeal Judgment, ¶ 48.
[112] *Prosecutor v. Brima et.al*, SCSL-04-16-T, Trial Judgment, ¶ 776 (20 June 2007); *Prosecutor v. Brima*, SCSL-2004-16-A, Appeal Judgment ¶ 242 (22 February 2008); *Prosecutor v. Seisay et.al*, SCSL-04-15-A, Appeal Judgment, ¶546 (26 October 2009); Taylor Appeal Judgment, ¶ 438 (further explanation of "awareness of substantial likelihood" in note 1363- 1364).

requirement of the *mens rea* for aiding and abetting has no support in the jurisprudence of other international criminal courts (O'KEEFE, 2015).[113]

Following *Furundžija*, the ICTY, ICTR and SCSL appeal cases, including the recent *haylrr* and *Saiñrvić* cases, have instead consistently applied the *mens rea* standard of knowledge.[114] The Appeal Chamber in in *haylrr* confirms the Trial Chambers conclusion that Taylor: (1) "knew that his support to the RUF/AFRC would assist the commission of crimes in the implementation of the RUF/AFRC's Operational Strategy," (2) "was aware of the specific range of crimes being committed during the implementation of the RUF/AFRC's Operation Strategy and was aware," and (3) "was aware of the essential elements of the crimes."[115] Consequently, the Chamber concluded that Taylor met the requisite *mens rea* (standard of knowledge) for aiding and abetting liability.[116] With similar trend, the ICTY Appeal Chamber in *Saiñrvić,* after confirming the substantial effect as the appropriate *actus reus* standard of aiding and abetting, held that "the required *mens rea* is the knowledge that these acts assist the commission of the offense."[117]

### 2.3 Summary: Substantial Effect and Knowledge as the Dominant Trend

Other than the three elements of the *actus reus* – conduct, consequence and circumstance – which are mentioned in connection to *tee mens rea* elements of intent and knowledge in Article 30, the ICC Statute lacks the definitions regarding the threshold that constitutes the *actus reus* of aiding and abetting. As to the threshold of *mens rea,* the ICC Pre-Trial Chamber in *Lubanga* elaborated that the *mens rea* elements of intent and knowledge under Article 30 require the presence of a volitional element which encompasses the three- degree of *dolus*: *dolus directus* of the first degree and second degree and *dolus eventualis*.

In contrast to the ICC, the *ad hoc* and hybrid tribunals have developed the basic threshold of the *actus reus* on the basis of the substantial effect and/or specific direction elements. However, unlike substantial effect, specific direction has no base in customary international law, because no provisions in the relevant Statutes and jurisprudence of the ad hoc and hybrid tribunals designate specific direction as an element of the *actus reus*.[118] Although the ICTY made reference to specific direction in *hadic* and applied it in *Perisic* and few other cases, the tribunal did not canvas customary international law concerning the elements for aiding and abetting. The reference to specific direction in *hadic* was made simply to discuss the difference between aiding and abetting and joint criminal enterprises.[119] Likewise, the application of specific direction in *Perisic* and few cases is made simply

[113] O'Keefe, Toger, *International Criminal Law*, Oxford: Oxford University Press, 2015, at 191.
[114] E.g. Mrkksić and Sljivacanin Appeal Judgement, ¶ 159; Simić Appeal Judgment, ¶ 86; Orić Appeal Judgement, ¶ 43; Blaskic Appeal Judgement, ¶ 49; Perišić Appeal Judgment, ¶ 48; Ntawukulilyayo Appeal Judgement, ¶ 222; Kalimanzira Appeal Judgement, ¶ 86; Rukundo Appeal Judgement, ¶ 53; Ndahimana Appeal Judgment, ¶ 157. For relevant discussion, See Badar (2012), *supra* note 101, at 512.
[115] Taylor Appeal Judgment, ¶ 540.
[116] Id.
[117] Sainovic Appeal Judgment, ¶1649 (citing Blaškić Appeal Judgement, ¶ 46 and making reference to Furundžija Trial Judgement, ¶ 249 and Taylor Appeal Judgement, ¶ 436).
[118] Taylor Appeal Judgment, ¶¶. 471-477.
[119] Ibid. ¶ 478.

to hold that it was an essential element of the *actus reus* of aiding and abetting in the absence of a deep analysis of its customary practices.[120]

Under the Statutes and jurisprudence of the ad hoc and hybrid tribunals, *actus reus* is associated with actual knowledge of the consequence of such acts and omissions, and knowledge that the perpetrator will commit either one of the possible crimes. Although some courts under the ATCA, as discussed in the next section, have considered Article 25 (3)(c) as the basis of the "purpose" standard of aiding and abetting under the ICC Statute, there is no requirement for a purpose standard of aiding and abetting under the Statutes and jurisprudence of the ad hoc and hybrid tribunals. Instead, aiding and abetting liability under customary international law requires acts and omissions (assistance, encouragement, support) that have a substantial effect on the commission of the crime by a principal perpetrator (*actus reus*). This *actus reus* must be associated with actual knowledge of the consequence of such acts and omissions, and knowledge that the perpetrator will commit either one of the possible crimes.

Hence it can be argued that the "substantial effect" and "knowledge" requirements are the dominant trend to define the threshold of aiding and abetting at the *actus reus* and *mens rea* levels in customary international law. Other additional requirements, such as the "specific direction" for *actus reus* and "purpose" for *mens rea* received very little support instead. Even the *Ministries Case*[121] (discussed below), which was considered to have applied the purpose standard,[122] has been criticized and debunked for mistakenly interpreting the relevant sources of international law.[123] It is interesting to see how this *actus reus* and *mens rea* requirement for aiding and abetting has been applied in domestic jurisprudence, in particular under the ACTA in the US, in dealing with corporations accused of aiding and abetting the abuses of human rights.

## 3. AIDING AND ABETTING UNDER THE ATCA IN THE US

Legal proceedings for corporate complicity under the ATCA in the US have relied heavily on the notion of the *actus reus* and *mens rea* for aiding and abetting liability under the international criminal law jurisprudence, in particular the ad hoc jurisprudence.[124] This means that aiding and abetting liability is determined by the type of impact of a corporate conduct may have on the commission of an offence (*actus reus*) and on the mental state required in order for such a contribution to be made (*mens rea*). However, in contrast to the criminal proceedings described above, in which only corporate executives can be held liable, under the ATCA jurisprudence, especially

[120] *Sainrvic Appeal Judgment*, ¶ 1623 (J Tuzmukhamedov dissenting).

[121] *United States v. Erns Vrn Weizsaecker, et al*, Case. No. 11, 14 Trials of War Criminal Before the Nuremberg Military Tribunals Under Control Law No. 10, Vol. XIV, 622 (1949) [*Ministries Case*].

[122] *Presbyterian Ceurce rf Sudan v. halisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir. 2009).

[123] See generally, Michalowski, *supra* note 15; also Heller, Kevil Jon, *hee Nuremberg Military tribunals and tee Origins of International Criminal Law*, Oxford: Oxford University Press, 2011, at 5; Walker, Angela, "The Hidden Flaw in Kiobel: Under the Alien Tort Statute the mens rea standard for corporate aiding and abetting is knowledge", *10 NW. J. INhL'L HUM. RhS. 119* (2011), at 131-135.

[124] *Dre I v. Unrcal Crrp.*, 395 F.3d 932, 950 (9th Cir. 2002); Lincoln, Ryan, S., "To Proceed with Caution: Aiding and Abetting Liability under the Alien Tort Statute", *28 BERKELEY J. INhL'L LAW 604* (2010) at 606; Michalowski, *supra* note 14, at 407

since *Dre v. Unrcal*,[125] corporations as legal entities can be subjected to aiding and abetting liability as well.

### 3.1 Actus Reus

In line with the notion of aiding and abetting liability formulated by the ad hoc tribunals since *Furundzija*,[126] the ATCA courts in the *Dre v. Unrcal*[127] and subsequent cases argued that the *actus reus* standard requires practical assistance, encouragement, or moral support that has a substantial effect on the perpetration of the crime.[128] In *Unrcal*, the plaintiffs claimed that Unocal aided and abetted Burma's military forces in the commission of human rights abuses in order to further their joint venture on the oil and gas pipeline with the Burmese regime.[129] Referring to the "aiding and abetting" test in *Furundžija*, the Court of Appeal observed that the fact that Unocal equipped the military forces with practical means to subject the plaintiffs to forced labour, without which the perpetration of forced labour would likely not have occurred, was sufficient in order to establish the *actus reus*.[130]

The fact that the assistance must have a "substantial effect" on the commission of tort by the perpetrator presupposes that not every corporate assistance or contribution is sufficient in order to constitute the *actus reus* of aiding and abetting liability.[131] In this respect, in *In re South African Apartheid Litigation*,[132] in which several MNEs (banks, automobile companies and IT firms) were accused of aiding and abetting the South African apartheid regime in the systematic discrimination of black citizens,[133] the district court noted that "simply doing business with a state or individual who violate the law of nations is insufficient to create liability under customary international law" because aiding a criminal "is not the same thing as aiding and abetting [his or her] alleged human rights abuses."[134] Consequently, any business transactions, such as the provision of goods or services, to a regime or individual that commits human rights abuses "do not in and of themselves give rise to complicity liability."[135] This can be said about the nature of business transactions between the defendant corporations and the South African apartheid regime, whereby the former was simply doing ordinary businesses with the latter (RAMSEY, 2009).[136] However if it can be proved that the actions of the accused corporation in this business transaction have a substantial effect on the commission of an offence by the apartheid regime, this can constitute an *actus reus* of aiding and abetting liability.[137] If this is the case, then the liability established from this *actus reus* does not arise

[125] Unocal Corp., 395 F.3d, 947–956; Walker, *supra* note 122, at 119, 136.
[126] Furundžija Trial Judgment, ¶ 235 *Prosecutor v. Duškr hadićć*, ICTY, IT-94-1-T, Opinion and Judgement, ¶ 688 (7 May1997); Blagojević and Jokić Appeal Judgement, ¶ 127.
[127] Unocal Corp., 395 F.3d, 951.
[128] *In re South African Apartheid Litigation*., 617 F. Supp. 2d 228, 257 (S.D.N.Y. 2009); *halisman Energy, Inc.,* 582 F.3d, 258; *In re Ceiquita Brands Int'l, Inc.*, 792 F. Supp. 2d 1301, 1350 (S.D. Fla. 2011); *Keulumani v. Barclay Nat'l Bank, Ltd.*, 504 F.3d 254, 277 (2d Cir. 2007) (J. Katzmann, dissenting opinion)
[129] *Dre v. Unrcal*, 963 F. Supp. 883, 883 (C.D. Cal. 1997).
[130] Unocal Corp., 395 F.3d, 952.
[131] Michalowski (2015), supra note 15, at 410.
[132] *In re South African Apartheid Litigation*, 346 F. Supp. 2d 538, 542-543 (S.D.N.Y. 2004).

[133] *Id.* at 544-545.
[134] SA Apartheid Litigation, 617 F. Supp. 2d, 257.
[135] Michalowski (2015), *supra* note 15, at 411.
[136] Ramsey, Michael D., "International Law Limits on Investor Liability in Human Rights Litigation", *50 HARV. INh'L L.J. 271* (2009), at 280; SA Apartheid Litigation, 346 F. Supp. 2d, 551.
[137] SA Apartheid Litigation, 617 F. Supp. 2d, 257-259.

from "merely doing business with the regime, or from aiding and abetting the regime as such, but rather from the fact that the corporation aided and abetted the violations committed by the regime."[138]

How should the substantial effect of assistance be determined? In answering this, the court in *In re South African Apartheid Litigation* looked at the quality of the assistance provided to the principal perpetrator by analyzing the difference between the two decisions of the Nuremberg cases.[139] In the *Ministries Case*, Karl Rasche was accused of aiding and abetting crimes against humanity by facilitating large loans to the S.S.[140] The Tribunal found Rasche not guilty, holding that "[l]oans or sale of commodities to be used in an unlawful enterprise may well be condemned from a moral standpoint and reflect no credit on the part of the lender or seller in either case, but the transaction can hardly be said to be a crime."[141] According to the court of the South African Apartheid Litigation, such a conclusion was reached because "money is a fungible resource" that is not specifically design to kill.[142]

This would be different from the poison gas sold by Bruno Tesch's company to the Nazis, who then used it to murder the inmates in the concentration camps in the *Zyklrn B Case*.[143] In this case, Tesch was found guilty for aiding and abetting crimes against humanity because poison gas was considered as a killing agent, and thus constituted the means by which a crime was committed.[144] In this regard, the court of the South African Litigation argued that the:

> provision of goods specifically designed to kill, to inflict pain, or to cause other injuries resulting from violations of customary international law bear a closer causal connection to the principal crime than the sale of raw materials or the provision of loans.[145]

The fact that Tesch carried out training on a precise criminal use of the gas to kill human beings only further supports the significance of this link.[146] The court concluded that, "in the context of commercial services, the provision of the means by which a violation of the law of nations is carried out is sufficient to meet the *actus reus* requirement of aiding and abetting liability under customary international law."[147]

The court then used this premise to establish the *actus reus* of aiding abetting the crime of apartheid in an allegation against technology companies (IBM and Fujitsu).[148] The court agreed that the provision of computer equipment, including software and hardware by these two companies specifically designed to monitor the racial classification and movement of people for security purposes (by IMB) and to create an automatic database incorporating information on the black population (by Fujitsu),[149] has enabled the regime to track and monitor civilians with the purpose of

[138] Michalowski (2015), *supra* note 15, at 411.
[139] SA Apartheid Litigation, 617 F. Supp. 2d, 259.
[140] *Id.* at 258; Ministries Case at 621-622.
[141] SA Apartheid Litigation, 617 F. Supp. 2d, 258 (Citing Ministries Case at 612).
[142] Id.
[143] Id.
[144] Id.
[145] *Id.*; Zyklon B Case at 142.
[146] SA Apartheid Litigation, 617 F. Supp. 2d, 258; Zyklon B Case at 95.
[147] SA Apartheid Litigation, 617 F. Supp. 2d, 259.
[148] *Id.* at 268.
[149] Id.

enforcing the racist and oppressive laws of apartheid. [150] Since the provision of computer equipment was essential for the implementation and enforcement of the racial pass laws, in particular for carrying out both racial segregation and discrimination by the apartheid regime, IBM and Fujitsu were considered to have met the *actus reus* requirement of aiding and abetting the crime of apartheid.[151] Having said that, the court acknowledged that not every provision of computer equipment to the South African government or its defence contractors gives rise to the *actus reus* of aiding and abetting liability.[152] The court listed several examples of allegations against IBM for aiding and abetting torture and extrajudicial killing resulting from the sale of computer equipment to the government agents in charge of prisons and from the rent of computers to the armament manufactures which constituted vital resources for the South African military forces. In these cases, the court argued that, "the mere sale of computers to the Department of Prison despite wildly held knowledge" of the routinely torture practices without trial does not constitute substantial assistance to that torture.[153] Similarly, "the sale of equipment used to enhance the logistics capabilities of an arms manufacturer is not the same thing as selling arms used to carry out extrajudicial killing; it is merely doing business with a bad actor."[154] The defendant, therefore, could not be said to have aided and abetted torture and judicial killing by the apartheid regime.

A similar distinction was made by the court in dealing with the allegations of aiding and abetting apartheid, torture and judicial killing filed by the Ntsebeza plaintiffs against automotive defendants (Daimler, Ford, GM).[155] As for the allegations of aiding and abetting judicial killing, for instance, the court agreed that the sale of specialized military equipment, such as heavy trucks and armoured personnel carriers, to the South African defence force and police who were responsible for investigating the antiapartheid groups was sufficient to constitute the *actus reus* of aiding and abetting judicial killing.[156] The main reason was that this military equipment was:

> the means by which security forces carried out attacks on protesting civilians and other antiapartheid activists; thus by providing such vehicles to the South African Government, the automotive companies substantially assisted extrajudicial killing.[157]

This would be different from an allegation of aiding and abetting filed by the Khulumani plaintiffs against Ford and GM for selling ordinary vehicles (car and trucks) to the South African police and military agencies.[158] In this case, the court disagreed that these two giant MNEs have met the *actus reus* of aiding and abetting a violation of the law of nations because "[t]he sale of cars and trucks without military customization or similar features that link them to an illegal use" is "simply too similar to ordinary vehicle sales."[159]

It is apparent that not every contribution, but only the assistance that has substantial effect on the commission of a crime, gives rise to the *actus reus* of aiding and abetting. The substantial effect

[150] Id.
[151] Id.
[152] Id. at 268
[153] Id.
[154] Id. at 268-269.
[155] Id. at 264.
[156] Id. at 264-265.
[157] *Id.* at 264
[158] *Id.* at 267.
[159] *Id.*

of a contribution is determined by looking at "the inherent quality of product" and the type of the causal link between the goods and services provided and the relevant violations.[160] If the causal link is not obvious, such as in cases where the assistance is non-fungible or remote from the commission of the crime, a case-by-case analysis of each individual case is required in order to identify various character of assistance, for instance whether it is extensive and sustained and therefore vital to the commission of the crime.[161] Thus, it would be necessary to establish the *actus reus* on the basis of the substantial effect of each particular corporate conduct to the commission of a crime.

### 3.2 Mens Rea

As in the case of the *actus reus* element, the *mens rea* element of aiding and abetting under the ATCA has been heavily influenced by the *mens rea* requirement employed by the ad hoc Tribunals.[162] The vast majority of courts under the ATCA that ever dealt with the *mens rea* standard of corporate aiding and abetting, in particular the Eleventh and Ninth Circuit Courts of Appeal,[163] and some district courts of the Second Circuit,[164] have considered knowledge to be the appropriate standard (SCARBOROUGH, 2007).[165]This is in line with the *mens rea* standard under general US domestic tort law, as stipulated under the Restatement (Second) of Torts § 876, which applied the knowledge standard to a substantial assistance in the commission of a crime by a third party in establishing aiding and abetting liability.[166] This subsection only provides a brief synopsis of the knowledge standard and an analysis of the idea of mistakenly applying the purpose standard.

In *Drel v. Unrcal*,[167] in which Unocal was accused of aiding and abetting the crime of rape, murder, forced labor and torture by the military forces during the course of building the pipeline project in Burma,[168] the Ninth Circuit, while relying heavily on the ad hoc decisions in *Furundžija* and *Musema*,[169] defined aiding and abetting as "knowing practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime."[170] Upon finding genuine issues of material fact that could determine whether the Unocal could meet the *mens rea* standard through actual and constructive knowledge,[171] the court held that "Unocal knew or should reasonably have known that its conduct - including the payments and the instructions where to provide security

[160] Michalowski (2015), *supra* note 15, at 443.
[161] *Id.*
[162] Lincoln, supra note 125, at 606.
[163] E.g. *Sinaltrainal v. Crca-Crla Cr.*, 578 F.3d 1252 (11th Cir. 2009); *Rrmerr v. Drummrnd Cr.*, 552 F.3d 1303 (11th Cir. 2008); *Cabellr v. Fernandez-Larirs*, 402 F.3d 1148 (11th Cir. 2005); *Aldana v. Del Mrnte Frese Prrduce, N.A., Inc.*, 416 F.3d 1242 (11th Cir. 2005); *Brwrtr v. Ceevrrn Crrp.,* No. C99-02506 SI, 2006 U.S. Dist. LEXIS 63209, 17-19(N.D. Cal. Aug. 21, 2006); *Dre v. Saravia*, 348 F. Supp. 2d 1112, 1148–1149 (E.D. Cal. 2004).
[164] E.g. *SA Apartheid Litigation*, 617 F. Supp. 2d, 262; *Almrg v. Arab Bank, PLC*, 471 F. Supp. 2d 257, 288-94 (E.D.N.Y. 2007); *In re Agent Orange Product Liability. Litigation*, 373 F. Supp. 2d 7, 91 (E.D.N.Y. 2005); *In re herrrrist Attacks rn Sept.11, 2001*, 392 F. Supp. 2d 539, 554 (S.D.N.Y. 2005); *Brdner v. Banque Paribas*, 114 F. Supp. 2d 117, 134 (E.D.N.Y. 2000).
[165] Scarborough, Philip, A., "Rules of Decision for Issues Arising Under the Alien Tort Statute", *107 COLUM. L. REV. 457* (2007), at 479; See also generally Walker, *supra* note 124; Michalowski, *supra* note 15; Oslon, *supra* note 15; Cassel, *supra* note 15.
[166] Restatement (Second) of Tort § 876 (1979).
[167] Unocal Corp., 395 F.3d 932 (9th Cir. 2002).
[168] *Id.* at 936.
[169] *Prosecutor v. Furundžija*, ICTY, IT-95-17/1-T, 249, Judgment (10 December1998); *Prosecutor v. Musema*, ICTR-96-13-T, Judgment (27 January 2000).
[170] Unocal Corp, 395 F.3d, 951.
[171] *Id.* at 950 (citing Furundžija Trial Judgment, ¶ 245).

and build infrastructure - would assist or encourage the Myanmar Military to subject Plaintiffs to forced labor."[172]

Some scholars expressed doubts as to whether the *Furundžija* decision, from which the Unocal court derived its notion of *mens rea*, agreed with the inclusion of the constructive knowledge: "should have known" standard.[173] Instead it was argued that the appropriate understanding of constructive knowledge, as the ad hoc tribunal seemed to suggest, is the "must have known" standard, which refers to "situations where for evidential reasons, the presence of actual knowledge needs to be inferred from the relevant circumstances.[174] In the *Zyklrn B Case*, the Trial Chamber, upon examining all the available information concerning the position of Tesch in the firm, found evidence that he "must have known" every detail about his business, including the supply of the Zyklon B gas for unlawful purposes to the SS.[175] Thus, the accomplice must know all the relevant facts by taking into account all the circumstances of each case.[176]This requirement is not needed by the "should have known" standard as it only requires that the accomplice would have the necessary knowledge expected from a reasonable person's diligence.[177] As a moral conduct to respect human rights, however, the "should have known" principle is the standard required under the UN Framework Guiding Principles on business and human rights mentioned above, as they are expected to know the risk and impact of their conducts upon human rights.

Along the lines of *Unrcal*, most of the subsequent court ligations under the ATCA followed the international criminal law jurisprudence by applying the *mens rea* standard of knowledge in order to establish corporate aiding and abetting liability.[178] However, a shift in the court decision that could become an alternative applicable precedent for future litigations occurred in October 2009, when the Second Circuit adopted the *mens rea* standard of "purpose" in *Presbyterian Ceurce rf Sudan v. halisman Energy, Inc.*[179] In this case, the plaintiffs accused Talisman Energy of aiding and abetting war crimes, crimes against humanity and genocide committed by the Sudanese government by means of a security arrangement that allowed for military and armed campaigns of ethnic cleansing against the non-Muslim population as part of their initiative to clear up the areas around the company's oil extraction project. This security arrangement included the creation of buffer zones and the construction of connecting roads between concession areas and military bases and providing facilities to encourage both business activities in the area of oil extraction and military activities to secure it.[180] In practice, this security arrangement resulted in a severe persecution of civilians, including displacement, extrajudicial killing, torture, rape and the burning of villages, churches and crops.[181]

In its decision, the court ignored the customary application of the knowledge standard adopted in most of the previous court decisions. Instead it followed the concurring opinion of Judge

[172] *Id.* at 953.
[173] Michalowski (2014), *supra* note 15, at 268.
[174] *Id.* (Citing Tadić Trial Judgment, ¶ 659 and BlaskićAppeal Judgment, ¶ 599).
[175] Zyklon B Case at 101.
[176] Michalowski (2014), *supra* note 15, at 269.
[177] *Id.* at 269; See also Mares, Radu, "Defining the Limits of Corporate Responsibilities Against the Concept of Legal Positive Obligations, *40 GEO. WASH. INh'L L. REV. 1157* (2009), 1205-1206.
[178] E.g. *Arab Bank, PLC*, 471 F. Supp. 2d, 290-291; *Cabellr v. Fernández-Larirs*, 402 F.3d 1148, 1157–1158 (11th Cir. 2005); *In re Agent Orange Product Liability Litigation*, 373 F. Supp. 2d, 54; *Meeinrvić v. Vuckrvić*, 198 F. Supp. 2d 1322, 1356 (N.D. Ga. 2002).
[179] Talisman Energy, 582 F.3d, 258-259.
[180] *Id.* at 249.
[181] *Id.* at 249-250.

Katzmann in *Kulumani*,[182] which presented a conclusion from an analysis about the state of international law on the issue of aiding and abetting, stating that there is no source of international law that would not require purposeful assistance for the *mens rea* of aiding and abetting liability.[183] The court noticed that "the purpose standard has been largely upheld in the modern era, with only sporadic forays in the direction of a knowledge standard"[184] and therefore "the *mens rea* standard for aiding and abetting liability in [ATCA] actions is purpose rather than knowledge."[185] The court observed that there was evidence that Talisman had partially financed the construction of roads and infrastructure while having knowledge of the government's human rights abuses, but there was no evidence of the unlawful purpose of carrying out the construction project. Accordingly, the Second Circuit agreed with the district court in terms of dismissing the case because the plaintiffs could not prove that Talisman had provided substantial assistance to the Sudanese government with the "purpose" of aiding the commission of the crime by the government and its military forces.[186]

Later, the opinion of Judge Katzmann in *Keulumani* as it was adopted in *halisman*, was used as a basis of Judge Level's concurring opinion in *Kirbel*.[187] In this case, the plaintiffs accused Shell of aiding and abetting the human rights abuses committed by the Nigerian government through the provision of transportation, food and compensation to its military, who attacked, killed and committed other crimes against the Ogoni people.[188] Judge Level argued that the plaintiffs' allegations were legally insufficient to trigger aiding and abetting liability due to the absence of a "reasonable interference that Shell provided substantial assistance to the Nigerian government with a purpose to advance or facilitate the Nigerian government's violation of the Ogoni people."[189]

The application of the *mens rea* standard of purpose in *halisman* and *Kirbel* on the basis of Judge Katzmann's opinion has drawn criticisms.[190] Without going into detail as this has been done by other authors,[191] it should be noted that by making reference to the concurring opinion of Judge Katzmann alone, while ignoring the common practices of the *mens rea* standard of knowledge under other federal and international laws, the Talisman and Kiobel courts created a state of inconsistency, which was built on the erroneous interpretation of the notion of aiding and abetting under customary international law and the erroneous understanding of international law framework in dealing with personal criminal liability.

In fact, in contrast to Judge Katzmann's interpretation, the Tribunal in the *Ministries Case* (a case used to back up his argument and considered to be the only Nuremberg case that ever applied the purpose standard) had suggested that the assessment of the Rasche's aiding and abetting liability was built on the *mens rea* standard of knowledge rather than that of the purpose.[192] In considering

[182] Barclay Nat'l Bank Ltd., 504 F.3d, 276-279.
[183] *Id.* at 277; See also Talisman Energy, 582 F.3d, 258-259.
[184] Talisman Energy, 582 F.3d, 259.
[185] *Id.*
[186] *Id.* at 262-263.
[187] *Kirbel v. Rryal Dutce Seell, Cr.*, 621 F.3d 111(2d Cir. 2010).
[188] *Id.* at 123.
[189] *Id.* at 192 (J. Level, concurring opinion).
[190] For detailed criticism, Generally, see e.g. Bhashyam, Shriram, "Knowledge or Purpose? The Khulumani Litigation and the Standard for Aiding and Abetting Liability under the Allien Tort Claim Act", *CARODOSO L. REV 245* (2008); Morrissey, James, "Presbyterian Church of Sudan v. Talisman Energy, Inc.: Aiding and Abetting Liability Under the Alien Tort Statute", *20 MINN. J. INh'L L. 144* (2011); Lincoln, *supra* note 123; Michalowski (2014), *supra* note 14.
[191] See the list of works of some authors, *supra* note 191.
[192] Ministries Case, at 853. See also Michalowski (2014), *supra* note 15, at 247-248.

Rasche's role in providing the loans given by Dresdner Bank to the SS, a regime which employed slave labor, the Tribunal, despite having established that Rasche had acted with the requisite knowledge, dismissed his liability simply because it was "not prepared to state that such loans constitute a violation of [international] law."[193] For the Tribunal, providing loans even with knowledge of the possibility of the latter being use by the recipients in order to violate national or international laws does not make the recipients a partner in the enterprises, because it is simply a common business transaction that is operated in the same manner as the merchandiser of any other commodity.[194] The Tribunal, therefore, held that:

> [l]oans of sale of commodity to be used in unlawful enterprises may well be condemned from a moral standpoint and reflect no credit on the part of the lender or seller in either case, but the transaction can hardly be said to be a crime.[195]

The Second Circuit in Talisman, however, interpreted these lines of arguments as a rejection by the Tribunal "to impose criminal liability on a bank officer who made a loan with the knowledge, but not with purpose, that the borrower would use the fund to commit a crime."[196]

Although Judge Katzmann[197] and some commentators[198] concurred with such an interpretation, it is untenable because of two main reasons. First, focusing on the *Ministries Case* alone undermined the fact that numerous cases of the Nuremberg tribunals, as discussed earlier, applied the *mens rea* standard of knowledge (not purpose) to convict aiders and abettor. Second, there was no clear indication to suggest that the Tribunal of the *Ministries Case* favored the purpose standard. Instead, the Tribunal's arguments in response to other allegations in the same case were obviously built on the *mens rea* standard of knowledge. For instance, in relation to the charge that Tesch was criminally liable for the annual contribution made by his bank to Himmler, whom then used the fund for unlawful purposes, the Tribunal denied his liability because no evidence existed to indicate that he had knowledge of Himmler's unlawful use of the fund he had contributed.[199] Similarly, in the Tribunal's assessment of liability for crimes against humanity against Emil Puhl (another defendant in the *Ministries Case*), who was accused of complicity in stealing the properties of the inmates in concentration camps, the Tribunal held that although he had been involved in the looting with requisite knowledge, "he neither originated the matter and that it was probably repugnant to him."[200] In this instance, the Tribunal applied the knowledge standard, despite on the basis of the latter reasons he could not be held liable.

Therefore, as pointed out by Judge Rogers in *Dre v. Exxon Mobil*,[201]the focus of analysis on the charge of aiding and abetting against Rasche does not support the argument for a "purpose" standard if it is considered in conjunction with the charge against Puhl and other defendants in the

[193] Ministries Case, at 622.
[194] Id.
[195] Id.
[196] Talisman Energy, 582 F.3d, 259.
[197] Barclay National Bank ltd., 504 F.3d, 276 (J. Katzmann concurring opinion).
[198] Bhashyam, *supra* note 191, at 269; Ramsey, *supra* note 137, at 307.
[199] Ministries Case at 622.
[200] *Id.* at 621.
[201] *Dre VIII v. Exxon Mobil Crrp.*, No. 097125, WL 2652384 (D.C. Cir. 8 July 2011).

Nuremberg cases that applied the "knowledge" standard for aiding and abetting liability.[202] In considering the petition for dismissal by Exxon, the D.C. Circuit argued that the opinion in *halisman* (the basis of which the Kiobel court built its arguments), misapprehended the premise for aiding and abetting under customary international law.[203] Furthermore, the reference only to the Rome Statue, besides *Ministries Case*, as the sources for the interpretation of aiding and abetting liability while ignoring the dominant trend for the application of the *mens rea* standard of knowledge under customary international law is a flaw, because aiding and abetting is embodied in customary international law, which relies on the ICTY, ICTR and the Nuremberg tribunals as its authoritative sources.[204] The D.C. Circuit also reaffirmed that in nature Rome Statute is not a customary international law, but a treaty,[205] as the ICC have recognized that "the Rome Statute does not necessarily represent customary international law."[206]

Even if it is accepted that the Rome Statute is an authoritative sources of aiding and abetting liability, argument for the purpose standard in *Kirbel* on the basis of the Second Circuit's interpretation in *Keulumani* and *halisman* "appears inconsistent with its provisions".[207] As discussed earlier, despite Article 25(3)(c) seems to "require a proof of "purpose", the text of Article 25(3)(d) requires no more than "knowledge"".[208] As many cases that ever employed either article 25 or 30 of the Rome Statute applied the knowledge standard, the D.C. Circuit disagreed with the application of the *mens rea* standard of purpose in Kiobel, holding that the relevant *mens rea* element for adding and abetting liability is knowledge.[209] Three days after *Exxon Mobil* decision, the Seventh Circuit in *Flrmr v. Firestone Natural Rubber Crrp.*[210] concurred with the D.C. Circuit decision and referred to Kiobel decision as an "outlier" because its majority opinion relied on an incorrect factual premise and an erroneous analysis about the *mens rea* standard under customary international law.[211]

Despite such flaws, the court still applied the *mens rea* standard of purpose in the aftermath of Kiobel decision. The Fourth Circuit in *Aziz v. Alcrlac*,[212] concerning the selling of thiodiglycol (used to manufacture mustard gas) by Alcolac to Saddam Hussein, held that liability under ATCA is imposed for adding and abetting the commission of international law only if the defendant conduct is purposeful.[213] On the basis of the argument in *halisman* case, the Circuit argued that the *mens rea* standard of specific intent for aiding and abetting liability embodied in the Rome Statute is consistent with the principle of international law and the only standard that has earned the necessary acceptance among civilized nations for its application under the [ATCA] and therefore "more

[202] *Id.* at 50.
[203] *Id.* at 69
[204] *Id.* at 39 and 50.
[205] *Id.* at 42.
[206] *Id.* at 45.
[207] *Id.* at 46.
[208] *Id.*
[209] *d.* at 47, 50 (citing *Prosecutor v. hermas Lubanga Dyilr*, ICC/01/04-01/06, Pre-Trial Chamber Decision on the Confirmation of Charges (29 January 2007); *Prosecutor v. Germain Katanga and Mateieu Ngudjrlr Ceui,* ICC-01/14-01/07, Decision on the Confirmation of Charges, ¶¶ 528, 530 (30 September 2008); *Prosecutor v. Jean-Pierre Bemba Grmbr*, ICC- 01/05-01/08, Decision on the Confirmation of Charges, ¶ 359 (15 June 2009) and *Prosecutor v. Abdallae Banda Abakaer Nrurain and Salee Mreammed Jerbr Jamus,* ICC-02/05-03/09, Decision on the Confirmation of Charges, ¶¶ 156–157 (7 Marc 2011). See also *Dre v. Exxon Mobil*, 2015 WL 5042118, 15 (D.D.C. 6 July 2015)
[210] *Flrmr v. Firestone Natural Rubber Cr.*, 643 F.3d 1013 (7th Cir. 2011)
[211] *Id.* at 1017.
[212] *Aziz v. Alcrlac*, 658 F.3d 388 (4th Cir. 2011).
[213] *Id.* at 401.

authoritative than that of the ICTY and ICTR Tribunals."[214] It further argued that there is no consensus that liability is only imposed on those who knowingly, but not purposefully, aid and abet the violation of international law.[215]

These lines of arguments that favored the purpose standard of aiding and abetting in *Aziz* have been criticized as a flaw on the basis of the similar arguments against *halisman* and *Kirbel* discussed above.[216] Aiding to these arguments is a flaw to apply a treaty to entities that are not bound by it. Unless its provisions have reached a status of customary international law, a treaty only binds entities that are party to it.[217] Entities involved in the *Aziz Case* are the nationals of the US and Iraq, two States that are not party to the Rome Statute. Consequently, the Statute is not applicable to the inquiry in the *Aziz Case* because no aiding and abetting provisions related to this case reflect customary international law.[218]

The fact that some courts still favored the purpose standard, despite such an obvious flaws in its legal reasoning and clear indications of the almost unanimous consensus on the knowledge standard of aiding and abetting in customary international law, indicates that the split still remains in terms of the *mens rea* standard for aiding and abetting. Of course, there are advantages and disadvantages to applying the *mens rea* standard of purpose. As Michalowski correctly points out, on the one hand, a high threshold for the *mens rea* standard of purpose can be relevant to avoid a too far-reaching scope of liability in the context of commercial transactions. On the other hand, the option to apply such a *mens rea* standard of purpose "reflects the view that it is acceptable that corporations pursue their business interests by knowingly facilitating gross human rights abuses, and in some cases even relying on them for their safety and protection, as long as they do not actively desire or procure them."[219] Indeed, the purpose standard indicates that the pursuit of business profits even at the expense of human rights abuses is considered to be legitimate so long as there is no motive to cause such abuses.[220]

In this respect, the application of a high *mens rea* threshold of purpose may pose a serious barrier to hold corporations liable for human rights abuses, as it gives more leeway for the corporations accused of complicity to evade any liability charges, and remedies for the affected group may not be available, so long as they can show that their main intention is to generate commercial interests.[221] In contrast, the success rate of the plaintiffs diminishes, or even stagnates, because they have to bear additional burden of proof that the defendant corporation has an intention to assist the commission of a crime, rather than an intention to simply generate commercial interests (VAN HO, 2013).[222] This burden of proof can become a "particularly difficult evidentiary test and is likely to

[214] *Id.* at 400-401.
[215] *Id.* at 400.
[216] For extensive discussion on the flaw of arguments for the purpose standard in *Aziz v. Alcrlac*, See, e.g. Cox, Bryan, W., "Confused Intent: A Critique of the Fourth Circuit's Adoption of a Purpose Mens Rea Standard for Aiding and Abetting Liability Under the Alien Tort Statute [Aziz v. Alcolac, Inc., 658 F. 3d 388 (4th Cir. 2011.]", *51 Waseburn Law Journal 705* (2012).

[217] *Id.* at 726; Cassese, Antonio, International Law, Second Edition, Oxford: Oxford University Press, 2005, at 163.
[218] Cox, *supra* note 217, at 726-727.
[219] Michalowski (2015), *supra* note 15, at 454-455.
[220] Michalowski (2014), *supra* note 15, at 273-274.
[221] Bhashiyam, *supra* note 191, at 248; Michalowski (2014), *supra* note 15, at 272.
[222] van Ho, Tara, L., "Transnational Civil and Criminal Litigation", in Michalowski, Sabine (ed.), Corporate Accountability in the Context of Transitional Justice, Oxon: Routledge, 2013, at 64.

exclude claims that would succeed if the required *mens rea* was "knowledge"".[223] The exclusion of claims on the basis of the erroneous interpretations and application of the *mens rea* standards and the unnecessary additional burden of proof that follows would result in denial of access to justice and remedy for the victims. This is another legal barrier that must be overcome in order to implement an effective and meaningful State-based judicial mechanism as specified by the Guiding Principles on Business and Human Rights.[224]

Moreover, since under the purpose standard there is no obligation for corporations to refrain from knowingly aiding and abetting human rights violations,[225] doing business at the expense of human rights abuses is likely to become business as usual, if it is beneficial for the corporations. This posture does not only disregard the customary practice in international law, which condemns knowingly aiding and abetting international crimes as demonstrated by the courts and tribunals that applied the *mens rea* standard of knowledge mentioned above, but also opposes the global ethical principles for business, such as those formulated in the UN Framework and GPs on Business and Human Rights.[226] Under the Framework and the GPs the corporations are required to avoid complicity as part of their responsibility to respect human rights.[227] For that purpose, they have the responsibility to exercise due diligence in order to identify the risk of their business activities and relationships, and to be aware of, prevent and address the adverse human rights impacts.[228] By exercising human rights due diligence, corporations are expected to take transformational behavior (the SRSG used the term "game-changer") from "naming and shaming" to "knowing and showing".[229] This means that they do not need to wait until external stakeholders point out their failure in order to respect human rights, but to proactively use due diligence mechanism in order to know the human rights risks of their business activities and to show that they take all reasonable actions in order to avoid complicity and address the impacts that may arise.[230] In this respect, the *mens rea* standard of knowledge is compatible with the idea of promoting corporate responsibility, as "multinational companies will be deterred from dealing with dubious governments if they will be on the hook for being aware that the goods and services they provide are being used to further human rights violations."[231]

Additionally, the knowledge standard is also in line with the law of negligence in both domestic criminal and civil law in many countries,[232] as some jurisdictions may only require the accomplice to have knowledge of the perpetrator's intention to commit a crime in order to bear liability,[233] such as in the context of the law of negligence in the UK discussed in the next section.

[223] *Id.*
[224] Guiding Principles, princ. 26, cmtr.
[225] Michalowski (2014), *supra* note 15, at 273.
[226] *Id.* For a set of core documents in this regard, See *supra* note 3.
[227] Ruggie 2008, ¶ 70, Guiding Principles, princ. 13, 19.
[228] Guiding Principles, princ. 17; Ruggie 2008, *supra* note 3, ¶ 73; Ruggie on Clarifying, *supra* note 7, ¶ 29.
[229] Ruggie 2010, *supra* note 3, ¶¶ 80, 83.
[230] *Id.*
[231] Bhashiyam, *supra* note 191, at 248.
[232] Ruggie on Clarifying, *supra* note 7,¶ 45-47.
[233] *Id.* ¶ 25.

## 4. KNOWLEDGE REQUIREMENTS IN THE LAW OF NEGLIGENCE: THE UK CASE

Aside from the ATCA in the US, the law of negligence can constitute viable avenue to hold corporations liable for their contribution to the human rights abuses by a third party. In the UK, the main allegations of the negligence liability under the Corporate Manslaughter and Homicide Act (CMHA)[234] is the most serious managerial failure – meaning that the latter "falls far below what can reasonably be expected of the organization in the circumstances[235]" - that may result in death. This reasonable conduct relates to the "relevant duty of care to a duty owed by an organization under the law of negligence."[236] It includes the duty owed to employees as occupiers of premises, suppliers of goods and services and contractors.[237] The Act puts aside the requirement of offence by individual corporate actors and allows the jury to consider whether attitudes, policies and practices (corporate culture) within the organization encourage non-compliance with the law and whether senior managers have knowledge thereof and act accordingly.[238]

Comparably, the knowledge standard is consistent with the tort laws that prosecute every act which causes harm to others whether it is intentional or negligent.[239] This is known as 'fault liability': a "situation in which *earm, intentional* or *negligent* conduct and *causation* are prerequisite for liability." (INTERNATIONAL COMMISSION OF JURISTS, 2008)[240] To act with intent means to freely undertake a course of conduct with knowledge that such conduct will likely have harmful effects.[241] Failing to acknowledge an already foreseen risk of harm constitutes negligence. However, in order for a company to be held liable for complicity in committing harm, such negligent and intentional conduct has to be connected, or contributory, to the harm.[242]

In *Ceandler v. Cape plc,*[243] Chandler claimed that Cape plc owed him a duty of care for the asbestosis he suffered as a result of the unhealthy working environment at Cape Products (South African subsidiary).[244] Against the Cape plc's motion of dismissal,[245] the High Court of Justice in the UK accepted Chandler's claim based on the finding that the working conditions at Cape Products were

[234] Corporate Manslaughter and Corporate Homicide (CMCH) Act 2007.
[235] CMCH Act s. 1(4)(b).
[236] CMCH Act s. 2.
[237] CMCH Act s. 2
[238] CMCH Act s. 8 (2-3). For similar corporate culture-based attribution of offense to corporations, Australia, See, Criminal Code Act 1995, Act No. 12 of 1995 as amended, taking into account amendments up to Telecommunications Legislation Amendment (Universal Service Reform) Act 2012, art. 12; US, See, United States Sentencing Commission, *Federal Sentencing Guidelines Manual* (2006) §8C2.5(b)(1). For discussion, See Robinson, Allens, Arthur, "Corporate Culture' as A Basis for the Criminal Liability of Corporations, Prepared for the United Nations Special Representatives of the Secretary General on Human Rights and Business" (February 2008), at 29.
[239] E.g. German Civil Code, Art. 823; French Civil Code, Art. 1382-1383; Finnish Tort liability Act, Art. 1 (1), Italian Civil Code Act, Art. 2043, Philippines Civil Code Act, Art. 20 (Ch.2); General Principles of the Civil Law of the People's Republic of China, Art 106 (Sec 1, Ch VI); Spanish Civil Code, Art 1.089; Chilean Civil Code, Art 2314; Brazilian Civil Code, Art 927; Colombian Civil Code, Art 2341. In common law jurisdictions, tort or negligence liability, E.g. *Air Canada v. Mcdrnnell Douglas Crrp.*, [1989] 1 S.C.R. 1554 (Canadian Supreme Court); *Drnrgeue v. Stevensrn* ([1932] A.C. 562 (England and Wales) on negligence. There is also legal code in the EU legal system, E.g Principles on European Tort Law, Article 1 (101).
[240] International Commission of Jurists, *Corporate Complicity & Legal Accountability, Volume 3: Civil Remedies,* 10 (Geneva, 2008) [hereafter: International Commission of Jurists Vol. 3].
[241] *Id.* at 12-15.
[242] *Id.* at 21-23
[243] *Ceandler v. Cape PLC*, [2011] EWHC 951; [2012] EWCA (Civ) 525.
[244] *Id.* ¶ 7.
[245] *Id.* ¶ 68.

unsafe and this was "a systematic failure of which Cape was well aware."[246] The Court held that Cape plc had failed its duty of care to Chandler.[247] The Court of Appeal then upheld this decision, noting that Cape plc had oversight responsibility and control over the business operations if its subsidiary related to the health and safety of its employees.[248] This implied that Cape plc had knowledge and foreseeability about the unhealthy working conditions and unsafe practices at Cape Products, but no necessary measures had been taken in order to improve the conditions. These were the appropriate circumstances, which the Court considered as enabling the law to impose on the parent company a duty of care to the employees of its subsidiary. It was precisely in these circumstances that the Cape plc had infringed its duty of care to Chandler.

Nonetheless, the circumstances that can trigger the duty of care liability of parent company is not straightforward, but it needs to be examined in a case- by-case basis. This has been clarified in *hermpsrn v. hee Renwick Grrup Plc*,[249] concerning claim for a duty of care liability against the Renwick Group filed by Mr Thompson who suffered an asbestos-related illness caused by working condition in its subsidiary. The court of appeal held that liability would not arise simply because of the presence of a director appointed by parent company to its subsidiary, or the presence of the subsidiary as division of the parent company.[250] Instead, liability may arise only if the requirements of *Caparr v. Dickman* have been satisfied,[251] such as in the case of the abovementioned *Ceandler v. Cape Plc*.[252] In other words, the relevant circumstances must be exhaustive and there must be sufficient evidence of superior knowledge and proximity, which show the fairness and reasonableness of attaching a duty of care responsibility.

Chandler's claim was not directly related to corporate complicity in human rights abuses. Instead it was about healthy and safe working conditions. However, the degree of proximity, knowledge and foreseeability between Cape Products and Cape plc implicitly raised the issue of complicit business relationships in allowing the adverse impacts of the asbestos production to occur.[253] The requirement for corporations to exercise due diligence to identify the human rights risks of their conduct in relation to their business partners and subsidiaries as stipulated by the UN Framework and the Guiding Principles would presuppose that they would have knowledge or foreseeability of the impacts of their conduct towards human rights. Consequently, the corporation (parent corporation) can no longer avoid liability for the conduct of its subsidiary, or even an outside contractor engaged by the subsidiary, simply by relying on the notion of a separated corporate form (corporate veil).

## 5. CONCLUSION

In legal sense, since not all business relationships and transactions with the abusive actors in itself constitutes complicity liability, it is necessary to identify the circumstances and criteria that

[246] *Id.* ¶ 73; *Ceandler v. Cape PLC*, [2012], ¶ 3.
[247] *Id.* ¶ 77; *Ceandler v. Cape PLC*, [2012], ¶ 1.
[248] *Ceandler v. Cape PLC*, [2012], ¶ 33.
[249] *hermpsrn v hee Renwick Grrup Plc* [2014] EWCA Civ 635 (13 May 2014).
[250] *Id.* ¶ 28.
[251] *Id.* ¶¶ 24-26.
[252] *Id.* ¶¶ 29-32.
[253] *Id.* ¶ 80.

amount to complicity liability.[254] The difficulty arises where business activities and transactions that are outwardly lawful are later utilized by a third party for unlawful purpose, such as to infringe human rights. As long as complicity liability is concerned, the circumstances and criteria that give rise to complicity liability centralizes on the *actus reus* and *mens rea* element in relation to the consequence of such business activities in the commission of human rights violation. This article advocates the dominant trend of the notion of aiding and abetting, which is the build on the ground of the *actus reus* standard of "substantial effect" and the *mens rea* standard of "knowledge". The reasons for this are twofold. Firstly, the substantial effect and knowledge standards are in line with the customary understanding and application of aiding and abetting in international law and domestic law, including the law of negligence. This is in contrast with the specific direction and purpose standard, which should be considered as an "outlier" since it was based on the misinterpretation of the ICC Statute and customary international law.

Secondly, the notion of complicity which is constituted of the *actus reus* standard of substantial effect and the *mens rea* standard of knowledge provides the most workable means to hold corporations liable for aiding and abetting the crimes and tort by someone else (third parties), compared to a very narrow prospect of liability of applying the heightened *actus reus* standard of "specific direction" and the *mens rea* standard of "purpose". As to the specific direction requirements, so long as the corporations can show that their assistance is not specifically directed towards unlawful purposes (crimes) by a third party, despite having a substantial effect on the occurrence of such crime, they can avoid liability. Thus, applying the specific direction requirement entails the risk of "undermining the very purpose of aiding and abetting liability by allowing those responsible for knowingly [enabling, exacerbating and] facilitating the most grievous crimes to evade responsibility for their acts."[255] With respect to the purpose requirement, since the main objective of business activities is to perpetuate commercial interests, corporations in particular those investing in countries with a poor human rights record and widespread armed conflict, will very rarely act with the intention of enabling or facilitating human rights abuses, despite knowing that their business operation may contribute to such abuses.[256] If the *mens rea* standard of purpose applies, it is highly unlikely that the corporations can be held accountable for complicity in human rights abuses. In this case, they can only be held liable if the *mens rea* standard of knowledge is applied. Additionally, increasing number of corporations have incorporated and implemented due diligence as stipulate by the UN Framework and Guiding Principles in order to know the human rights risks and address the impacts of their business activities with their business partners (knowing and showing). The fact that they have knowledge of the impact of their conduct, including for instance knowledge of the intention for which goods and services they provided would be utilized to abuse human rights by their business partners, may help the courts to establish the *mens rea* element of aiding and abetting if the knowledge standard is applied.

[254] Michalowski (2015), *supra* note 15, at 459.
[255] Perišić Appeal Judgment, ¶ 3 (J. Liu dissenting opinion).
[256] Michalowski (2015), *supra* note 15, at 415.

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