

Developments in international criminal law and the case of business involvement in international crimes

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Abstract

In the wake of the mandate of the Special Representative of the United Nations Secretary-General for Business and Human Rights (SRSG), international criminal law looks set to play a role in measures towards the legal accountability of business actors involved in gross human rights and humanitarian law violations. Against the backdrop of the SRSG's now completed mandate, this article looks at three recent developments in international criminal law to consider the field's potential relevance to business actors involved in conflict. The first is the newest mode of liability recently adopted by the International Criminal Court, indirect perpetration through an organisation. The second is the aiding and abetting doctrine as applied by the Special Court for Sierra Leone in the Charles Taylor case. The third is the potential uptake of a practice of thematic prosecutions focusing on particular under-regulated issues of concern for the international community.

Keywords: international criminal law, business actors, indirect perpetration through an organisation, thematic prosecutions.



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The role of business actors¹ in the commission of international crimes and how this might be addressed through the mechanism of international criminal law has been a subject of sustained attention in recent years.² In the round-up of the mandate of Professor John Ruggie, the Special Representative of the United Nations (UN) Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (SRSG),³ attention to the particular promise of this field of international law as a key means of addressing the worst manifestations of business-related human rights abuses seems set to continue. The SRSG in his final Framework and Guiding Principles avoided recommendations towards binding obligations under international law for business entities. However, his treatment of international crimes is something of a special case. The SRSG has highlighted that those human rights abuses that also constitute international crimes are more amenable to direct and immediate judicial application to business entities.⁴ International crimes are generally understood to encompass genocide, crimes against humanity, and war crimes. Individuals who commit these crimes can be held liable under international law.⁵

It is not difficult to see why international criminal law is an appealing tool for addressing negative aspects of the relationship between business and human rights/humanitarian law, especially in conflict situations. The norms it prescribes, whilst not limited to conflict situations, are an outgrowth of international humanitarian law's concern with regulating the worst excesses of armed conflict. The peace and security paradigm has therefore been described as the 'traditional theatre of operation of international criminal law'.⁶ As economists and political scientists increasingly describe modern conflicts as intimately connected to economics, the potential relevance of the field of international criminal law to business actors becomes more pronounced.⁷ International criminal norms are

1 Throughout this paper the term 'business actors' refers to both collective business entities as legal persons, such as corporations, and business officials as natural persons.

2 See, e.g., 'Workshop', in *Journal of International Criminal Justice*, Vol. 6, No. 5, 2008, pp. 899–979; and *Journal of International Criminal Justice: Special Issue – Transnational Business and International Criminal Law*, Vol. 8, No. 3, 2010.

3 The SRSG's original mandate is set out in *Human Rights and Transnational Corporations and Other Business Enterprises*, Commission on Human Rights (CHR), UN Doc. E/CN.4/RES/2005/69, 20 April 2005. The UN Human Rights Council (HRC) extended the SRSG's mandate for a further three years in 2008. See HRC, *Mandate of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, UN Doc. A/HRC/RES/8/7, 18 June 2008.

4 See 'The UN SRSG and the special case of international crimes', below.

5 On definitional debates in international criminal law as to what constitutes an international crime, see Robert Cryer, Hakan Friman, Darryl Robinson, and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure*, 2nd edition, Cambridge University Press, New York, 2010, pp. 3–12.

6 Larissa van den Herik and Daniella Dam-de Jong, 'Revitalizing the antique war crime of pillage: the potential and pitfalls of using international criminal law to address illegal resource exploitation during armed conflict', in *Criminal Law Forum*, Vol. 15, 2011, p. 245.

7 *Ibid.*, pp. 238–250.

also often correlated to gross violations of human rights.⁸ There is a higher propensity for corporate violations of human rights of a more severe nature to take place in conflict situations.⁹ Further, unlike other fields of international law, international criminal law is seen to have functional enforcement mechanisms directed at individuals, both in the public and private spheres, and not at states. It is therefore commonly resorted to as a means of fulfilling gaps in the enforcement of international human rights law.¹⁰ In the context of business and human rights, these gaps include challenges for host states in regulating foreign corporations operating in their territory, for example due to dependence on foreign direct investment or due to unequal technical expertise and bargaining power.¹¹

At its inception at Nuremberg, international criminal law addressed the role of business actors in the commission of international crimes.¹² Since that time, prosecutors of international courts and tribunals have expressed a willingness to consider actions by the private and business sector in conflict areas in their

- 8 See, e.g., the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes (ICJ Expert Panel), *Corporate Complicity and Legal Accountability*, Vol. 2, International Commission of Jurists, Geneva, 2008, pp. 2–4.
- 9 See, e.g., HRC, *Protect, Respect and Remedy: a Framework for Business and Human Rights*, Report of the Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, UN Doc. A/HRC/8/5, 7 April 2008 (hereinafter the Framework), paras. 47–49; HRC, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, UN Doc. A/HRC/17/31, 21 March 2011 (hereinafter Guiding Principles), Principle 7, pp. 10–11. See also HRC, *Business and Human Rights in Conflict-Affected Regions: Challenges and Options towards State Responses*, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, UN Doc. A/HRC/17/32, 27 May 2011. While the Guiding Principles refer only to the inability of the host state to protect human rights in conflict contexts due to a lack of effective control, international criminal law teaches us that another factor often at play is an unwillingness on the part of host states to protect against international crimes due to the state's own involvement in such crimes.
- 10 L. van den Herik and D. Dam-de Jong, above note 6, p. 246. For an analysis of international criminal law as an enforcement tool for human rights law in the context of corporate conduct, see Larissa van den Herik and Jernej Letnar Cernic, 'Regulating corporations under international law: from human rights to international criminal law and back again', in *Journal of International Criminal Justice*, Vol. 8, No. 3, 2010, pp. 725–743.
- 11 See, e.g., Stephen R. Ratner, 'Corporations and human rights: a theory of legal responsibility', in *The Yale Law Journal*, Vol. 111, 2001, pp. 461–473; Sarah Joseph, 'Taming the leviathans: multinational enterprises and human rights', in *Netherlands International Law Review*, Vol. 46, No. 2, 1999, pp. 176–181.
- 12 Most significant were the trials of German industrialists before the US Military Tribunal sitting at Nuremberg under Control Council Order 10: *US v. Friedrich Flick et al.*, Opinion and Judgement of 22 December 1947, *Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10*, Vol. VI, 1952, pp. 1187–1223; *US v. Krauch et al.*, Judgement of 29 July 1948, *Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10*, Vol. VIII, 1952, pp. 1081–1210; *US v. Alfried Krupp et al.*, Judgement of 31 July 1948, *Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10*, Vol. IX, 1950, pp. 1327–1452. For a summary of the trials of German industrialists in the post-war period see Matthew Lippman, 'War crimes trials of German industrialists: the "other Schindlers"', in *Temple International and Comparative Law Journal*, Vol. 9, No. 2, 1995, pp. 173–267. For a detailed analysis of the legal theories considered for the industrialist trials, see Jonathan Bush, 'The prehistory of corporations and conspiracy in international criminal law: what Nuremberg really said', in *Columbia Law Review*, Vol. 109, No. 5, 2009, pp. 1094–1240.

investigations of international crimes.¹³ Although such intent has yet to be reflected in any formal indictments issued, statements of this kind nonetheless indicate that the role of business is of interest to powerful actors within modern international criminal institutions. All of these factors render international criminal law an appealing tool for addressing phenomena of business involvement in human rights and humanitarian law violations that also constitute international crimes.

There is a wide variety of ways in which business actors can be implicated in international crimes. These can include: the role of private military companies in the torture of prisoners within their custody; the involvement of transnational corporations in the extractive industries in abuses committed by security partners such as forced displacement in order to access land for mining or as retaliatory violence against threats to mining operations; the use of slave labour within business supply chains; the funding and supply of armed conflict through business networks; and the involvement of businesses in the plunder of goods and natural resources.¹⁴ Each is meritorious of detailed study in its own right. This paper, however, speaks in a more generalised way to the appeal of international criminal law for addressing the role of business actors, individual or corporate, in the commission of international crimes where such involvement is of a sufficiently proximate kind. For this reason the term ‘business case’ is used to denote scenarios involving corporations or private individuals acting in a business capacity and involved through that business in the commission of international crimes.

This paper aims to contribute to the growing literature on the prospective role of international criminal law as a tool to address business violations of human rights and humanitarian law in conflict situations. To do so, the paper is structured as follows. The first part considers the future significance of international criminal law to the question of business accountability for human rights and humanitarian law abuses in the wake of the SRSG’s mandate. It argues that in light of the SRSG’s conclusions, international criminal law is likely to continue to be turned to as a principal mechanism for addressing the most egregious examples of business involvement in human rights and humanitarian law abuses. Given this anticipated continued significance of the field, the second part of the paper turns to the assessment of two new developments in international criminal law. The first is the newest mode of responsibility in international criminal jurisprudence, indirect perpetration through an organisation. This part sets out some preliminary reflections on whether this form of criminal responsibility might have any bearing upon prosecutions of business officials for international crimes. It also comments on

13 For example, on the prosecutorial announcements and policies of the Office of the Prosecutor of the International Criminal Court with respect to business actors who finance or support international crimes, see Reinhold Gallmetzer, ‘Prosecuting persons doing business with armed groups in conflict areas: the strategy of the Office of the Prosecutor of the International Criminal Court’, in *Journal of International Criminal Justice*, Vol. 8, No. 3, 2010, pp. 947–956.

14 For a typology of fact scenarios that place companies within legal risk zones with respect to complicity in international crimes, see ICJ Expert Panel, above note 8, pp. 37–43. See also Wolfgang Kaleck and Miriam Saage-Maaß, ‘Corporate accountability for human rights violations amounting to international crimes: the status quo and its challenges’, in *Journal of International Criminal Justice*, Vol. 8, No. 3, 2010, pp. 700–709.

the aiding and abetting doctrine as applied by the Special Court for Sierra Leone in the *Charles Taylor* case. The second recent development considered in the paper is the practice of ‘thematic prosecutions’. This part considers how developments in this direction bode for the likelihood that business actors might become a focus in future international criminal indictments.

The UN SRSG and the special case of international crimes

The SRSG’s mandate: achievements and challenges

From 2005 until the completion of the SRSG’s mandate in June 2011, international discourse on the subject of business and human rights has been focused around the work of the SRSG. From early in his mandate, the SRSG confirmed the existence of a governance gap as it pertains to the conduct of business entities operating in the global economy.¹⁵ The idea of a ‘governance gap’ is the claim that there is a misalignment between the capacity of transnational corporations to contribute to serious human rights abuses and the governance capacity of governments to respond to those harms.¹⁶ The result of this regulatory gap is a permissive environment for corporate human rights abuses.¹⁷ The problem is particularly acute in the context of businesses operating in developing countries and in conflict zones.¹⁸ As a general rule, it is in conflict zones where the most egregious human rights violations can occur and where states hosting foreign business activities tend to be least capable of regulating the potentially negative impacts of those operations.¹⁹

In response to the governance gap problem and following extensive stakeholder consultations, the SRSG promoted the Protect, Respect and Remedy Framework as the overarching policy guide for future thinking and action on business and human rights at an international level.²⁰ The three pillars of the Framework refer to the state duty to protect against human rights abuses by third parties; the corporate responsibility to respect human rights through due diligence; and the right of victims of corporate-related human rights abuses to have access to effective remedies. Both the Framework and the SRSG’s subsequent Guiding Principles,²¹ which are intended to provide guidance as to how the Framework shall

15 HRC, *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts, Report of the Special Representative of the Secretary-General (SRSG) on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, UN Doc. A/HRC/4/035, 9 February 2007, (hereinafter the 2007 Report), paras. 1–4 and 82. On the dynamics of the problem see the Framework, above note 9, paras. 3–4 and 11–16.

16 *Ibid.*

17 *Ibid.*

18 *Ibid.*, para. 36 (on developing countries) and paras. 47–49 (on conflict zones).

19 *Ibid.*

20 *Ibid.*

21 The Guiding Principles, above note 9.

be operationalised, have been endorsed by the UN Human Rights Council²² and set the future agenda for UN activity regarding business and human rights.²³

The Framework and Guiding Principles have been lauded for a number of successes. These include effectively engaging states and companies in a fruitful dialogue²⁴ and the corporate uptake of policies aimed at ensuring corporate due diligence.²⁵ However, one point of criticism has been the failure of the SRSG to incorporate any explicit role for binding international human rights obligations for business actors.²⁶ Early in his tenure, the SRSG rejected the draft Norms on the Responsibility of Transnational Corporations and other Business Enterprises with Regard to Human Rights as a mechanism going forward.²⁷ The Norms had preceded the SRSG as a framework for dealing with issues related to business and human rights. They were intended to direct progress towards treaty-based, legally binding human rights obligations directed at corporations via the domestic laws of states in order to address the lacunae in law.²⁸

In contrast to the Norms, the notion of corporate responsibility with respect to human rights as conceived within the Framework is not equivalent to corporate legal obligations. Rather, the Framework ‘speaks of the corporate responsibility to respect all human rights as part of a corporation’s social license to operate even when not mandated by law’.²⁹ In other words, it defines the recommended conduct of corporations as dictated by the court of public opinion, rather than actual courts, although some conduct will have legal ramifications. The Framework has hence been criticised for continuing the current status quo of regulation via voluntarism³⁰ and therefore as unlikely to create sufficient pressure

22 HRC, *Mandate of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, Res. 8/7, 18 June 2008; HRC, *Human Rights and Transnational Corporations and Other Business Enterprises*, Res. 17/4, UN Doc. A/HRC/RES/17/4, 6 July 2011.

23 As a follow-up to the SRSG’s mandate, the HRC has established a Working Group on business and human rights whose work is largely directed towards the implementation of the Guiding Principles. See *ibid.*, para. 6.

24 Penelope Simons, ‘International law’s invisible hand and the future of corporate accountability for violations of human rights’, in *Journal of Human Rights and the Environment*, Vol. 3, No. 1, 2012, p. 9.

25 On the uptake of the Guiding Principles, see HRC, *Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, UN Doc. A/HRC/20/29, 10 April 2012, paras. 22–40.

26 P. Simons, above note 24, pp. 9–10.

27 See, e.g., the Framework, above note 9, paras. 6 and 51–53 (rejecting the Norms’ attempt to identify a limited set of rights for which corporations have responsibilities) and paras. 66–72 (rejecting the Norms’ reliance on spheres of influence).

28 For an outline of the Norms, their relationship to the work of the SRSG and the political debates that they have engendered, see David Kinley, Justine Nolan, and Natalie Zerial, ‘The politics of corporate social responsibility: reflections on the United Nations Human Rights Norms for Corporations’, in *Company and Securities Law Journal*, Vol. 25, No. 1, 2007, pp. 30–42.

29 Sara L. Seck, ‘Collective responsibility and transnational corporate conduct’, in Tracy Isaacs and Richard Vernon (eds), *Accountability for Collective Wrongdoing*, Cambridge University Press, Cambridge, 2011, p. 141.

30 See, e.g., Human Rights Watch, ‘UN Human Rights Council: weak stance on business standards’, news release, 16 June 2011, available at: www.hrw.org/news/2011/06/16/un-human-rights-council-weak-stance-business-standards (last visited 30 May 2012).

for corporate compliance with human rights where there are compelling economic reasons for businesses to cut corners.

For some commentators, such as Surya Deva, one of the challenges resulting from the SRSG's approach is that businesses are essentially directed elsewhere to determine the precise contours of legal obligations vis-à-vis societal expectation of conduct.³¹ By framing corporate responsibility broadly and without elaborating legal compliance issues for businesses operating, for example, in conflict areas, the Guiding Principles fail to guide business actors in specific terms as to how they must behave.³² For example, Guiding Principle 23 as it relates to companies operating in conflict zones recommends that companies should treat risks of being complicit in gross human rights abuses committed by other actors (such as security partners) as legal compliance issues. However, the Principle fails to specify what conduct would constitute complicity leading to legal liability.³³ Instead, the commentary of the Guiding Principles refers to international criminal law notions of complicity and the growing web of corporate liability in domestic courts for international crimes to explain the legal compliance ramifications for businesses operating in conflict zones.³⁴

In light of the primarily policy-based rather than law-based approach of the SRSG in his final framing documents, it is interesting to note the SRSG's differentiation of international crimes. From early in his work, the SRSG noted the particular legal risks for business actors complicit in international crimes. Whilst not explicitly stating that corporations are directly bound by the norms of international criminal law, the SRSG has gone as close as otherwise possible to making that case. In his 2007 report, the SRSG noted that 'long-standing doctrinal arguments over whether corporations could be "subjects" of international law . . . are yielding to new realities'³⁵ and that 'the absence of an international accountability mechanism . . . does not preclude the emergence of corporate responsibility today'.³⁶ Focusing in particular upon two parallel developments, the SRSG highlighted that the 'simple laws of probability alone suggest that corporations will be subject to increased liability for international crimes in the future'.³⁷ The first of these two developments is the growing international criminal jurisprudence as to forms of responsibility according to which individuals can be held liable for international crimes. This jurisprudence serves as guidance as to when business actors, individual or corporate, can be complicit in international crimes. The second development is the growing number of states with jurisdiction within their national courts to try corporations, as well as individuals, where such persons are involved in international crimes. This concerns in particular the States Parties to the Rome

31 Surya Deva, 'Guiding Principles on Business and Human Rights: implications for companies', in *European Company Law*, Vol. 9, No. 2, 2012, pp. 101–109.

32 *Ibid.*

33 *Ibid.*, p. 107.

34 Guiding Principles, above note 9, commentaries on Principles 17 and 23.

35 The 2007 Report, above note 15, para. 20.

36 *Ibid.*, para. 21.

37 *Ibid.*, para. 27.

Statute of the International Criminal Court (ICC). According to the SRSG, the interplay between these two developments creates ‘an expanding web of potential corporate liability for international crimes’.³⁸ Indeed, the SRSG has described the domestic implementation of Rome Statute crimes and the extension of those laws to corporate entities as ‘[b]y far the most consequential legal development’ of recent times with respect to addressing the prevailing governance gaps.³⁹ A number of commentators have therefore highlighted the special case of international crimes in the SRSG’s work, identifying these norms as an exception to the SRSG’s reluctance to articulate directly binding human rights norms on corporations under international law.⁴⁰

What is apparent from the SRSG’s work is that, more so than in other areas of human rights, business actors should anticipate that they might be prosecuted or litigated where they breach international criminal norms. Currently, this might happen either through domestic courts applying international criminal law against the business entity itself or in domestic courts or international tribunals against individual business officials. This is particularly pertinent to businesses operating in conflict zones where the risk of being caught up in international crimes is greater. The International Commission of Jurists (ICJ) has issued a similar warning. The ICJ’s Expert Panel on Corporate Complicity in International Crimes found that company lawyers and compliance officers have tended not to recognise the relevance of international criminal law to business operations.⁴¹ Nonetheless, it cautioned that ‘as the field of international criminal law develops and as companies operate in new contexts, international criminal law and its implementation in domestic and international jurisdictions will become evermore relevant to companies’.⁴²

The limitations of international criminal law for capturing business conduct

There is a risk of overemphasising the potential of international criminal law to bring about human rights compliance among businesses and to serve as an

38 *Ibid.*, para. 22. See also paras. 19–32 on ‘Corporate responsibility and accountability for international crimes’. See also the Framework, above note 9, para. 20.

39 The 2007 Report, above note 15, para. 84.

40 See, e.g., S. L. Seck, above note 29, pp. 140–141, 150–151, and 157; P. Simons, above note 24, pp. 9–10; International Law Association Committee on Non-State Actors, *First Report of the Committee: Non-State Actors in International Law: Aims, Approach and Scope of the Project and Legal Issues*, The Hague, 2010, p. 17, available at: www.ila-hq.org/en/committees/index.cfm/cid/1023 (last visited 30 May 2012) (identifying as an exception in the SRSG’s work the violation of *jus cogens* norms). It is worth noting that the SRSG has recently clarified his findings that there is strong evidence to support the idea that corporations may be liable for international crimes. This comes in direct response to claims that his work resolves that corporations do not have binding obligations under international law. See Professor John Ruggie, Professor Philip Alston, and the Global Justice Clinic at NYU School of Law, ‘Brief *Amici Curiae* of Former Special Representative for Business and Human Rights, Professor John Ruggie; Professor Philip Alston; and the Global Justice Clinic at NYU School of Law in Support of Neither Party’, in *Esther Kiobel v. Royal Dutch Petroleum*, No. 10-1491, 12 June 2012.

41 ICJ Expert Panel, above note 8, p. 5.

42 *Ibid.*

accountability mechanism for corporate human rights abuses. This is not only due to the current lack of prosecutorial practice directing international criminal investigations and indictments towards the business case;⁴³ it is also because criminal principles necessarily address only contributions of a sufficiently proximate kind to international crimes. Thus, only some business conduct will be sufficiently related to the commission of human rights or humanitarian law violations, and only certain human rights and humanitarian law violations constitute international crimes. International criminal law covers but a small segment of the field of concern.⁴⁴ For these (and other) reasons, there is value in the recommendations of the SRSG with respect to businesses operating in conflict zones that will 'embrace multiple regulatory sites'.⁴⁵ For example, one of the SRSG's regulatory recommendations, pertinent in particular to transnational corporations directly investing in developing states, is for states to exclude clauses from bilateral investment treaties that are capable of constraining the state from responding to human rights and human security risks created by foreign business operations.⁴⁶ Another recommendation, again relevant to transnational foreign direct investment projects, suggests that home states withhold or withdraw the support that they usually provide through export credit agencies to businesses that fail to engage in conflict-sensitive conduct.⁴⁷

Another problem for over-reliance on extant developments in international criminal law is that there may be grounds for cynicism with respect to the actual application of domestic law to corporations involved in international crimes in the territory of another state. For example, the implementation of domestic international crime laws and their extension to corporate legal persons has been to a large extent 'an unanticipated by-product' of states strengthening their legal regimes for individuals.⁴⁸ It is uncertain whether there will be the political will necessary to apply these laws to businesses as legal entities, particularly in relation to events beyond the boundaries of the prospective adjudicative state.⁴⁹ It is telling to look at the recent fate of the US Alien Tort Statute (ATS). To date, the ATS has been the most utilised law by victims of corporate human rights violations as a civil law

43 On the general exclusion of business actors from prosecutorial policy since Nuremberg, see William Schabas, 'War economies, economic actors and international criminal law', in Karen Ballentine and Heiko Nitzschke (eds), *Profiting From Peace: Managing the Resource Dimensions of Civil War*, Lynne Rienner Publishers, Boulder, 2005, p. 440; Florian Jessberger, 'On the origins of individual criminal responsibility under international law for business activity: IG Farben on trial', in *Journal of International Criminal Justice*, Vol. 8, No. 3, 2010, p. 801.

44 Making a similar point, see L. Van Den Herik and D. Dam-de Jong, above note 6, pp. 247–249.

45 See, e.g., S. L. Seck, above note 29, p. 158, referring to the work of Mark Drumbl. See Mark A. Drumbl, 'Collective responsibility and postconflict justice', in Tracy Isaacs and Richard Vernon (eds), *Accountability for Collective Wrongdoing*, Cambridge University Press, Cambridge, 2011, pp. 23–60.

46 See, e.g., the Framework, above note 9, paras. 33–42; Guiding Principles, above note 9, Principle 9, p. 12.

47 See, e.g., Guiding Principles, above note 9, Principle 4, pp. 9–10, and Principle 7, pp. 10–11. A criticism of both recommendations, however, is that they fail to address the root conditions that have undermined moves in this direction to date.

48 The 2007 Report, above note 15, para. 84.

49 Joanna Kyriakakis, 'Australian prosecution of corporations for international crimes: the potential of the Commonwealth Criminal Code', in *Journal of International Criminal Justice*, Vol. 5, No. 4, 2007, pp. 809–826.

remedy to what are essentially international criminal norms applied to the business dimensions of conflict.⁵⁰ The case of *Kiobel* recently heard by the Supreme Court of the United States addressed the question of whether the ATS applies to corporate defendants (as opposed to natural persons), as well as whether it operates extraterritorially at all.⁵¹ While the Court did not decide upon the former issue, it determined that a strong presumption exists against the application of the ATS to events in the territory of other states, unless the claims ‘touch and concern the territory of the United States . . . with sufficient force to displace the presumption’.⁵² In doing so, the Court significantly limited the scope of the ATS as a vehicle for human rights claims related to the conduct of corporations in the global economy. Court concern as to the application of the ATS to corporate conduct outside of the United States where there are limited links to the United States reflects the pressures that have been brought to bear by other states, as well as businesses, through *amicus* interventions and otherwise in ATS litigations of that type to date.⁵³ The uncertainty as to whether individual states will use their domestic ‘international crimes’ laws to address corporate actors, and the potential response of other states should they do so, put in doubt the SRSRG’s faith in unilateral state-centric responses to the phenomenon of business violations of international criminal law.⁵⁴

Despite such sobering factors, in light of the work conducted by the SRSRG, we can anticipate a continued expectation that international criminal law should function to further the human rights and humanitarian law compliance of business actors in conflict zones and act as a mechanism of accountability where they fail to do so.

50 For a discussion on the relationship between the ATS and the norms of international criminal law as applied to corporations, see Katherine Gallagher, ‘Civil litigation and transnational business: an Alien Tort Statute primer’, in *Journal of International Criminal Justice*, Vol. 8, No. 3, 2010, pp. 745–767.

51 *Kiobel v. Royal Dutch Petroleum*, 133 S. Ct. 1659, 2013. The decision under appeal was *Kiobel v. Royal Dutch Petroleum Shell*, 621 F 3d 111 (Second Circuit), 2010. For critical reviews of the Second Circuit’s decision in *Kiobel*, see Odette Murray, David Kinley, and Chip Pitts, ‘Exaggerated rumours of the death of an alien tort? Corporations, human rights and the remarkable case of *Kiobel*’, in *Melbourne Journal of International Law*, Vol. 12, No. 1, 2011, pp. 57–94; Julian G. Ku, ‘The curious case of corporate liability under the Alien Tort Statute: a flawed system of judicial lawmaking’, in *Virginia Journal of International Law*, Vol. 51, No. 2, 2010, pp. 353–396.

52 *Kiobel v. Royal Dutch Petroleum*, 133 S. Ct. 1659, 1669 (Roberts CJ), 2013. It is not clear what circumstances might meet this threshold, but the presence of a foreign corporation in the United States is not sufficient.

53 For example, the governments of Germany, the United Kingdom, and the Netherlands have all filed *amicus* briefs in the current *Kiobel* litigation, arguing that ATS cases involving extraterritorial conduct and limited links to the United States violate state sovereignty. Companies submitting briefs urging a narrow reading of the ATS in the case include Rio Tinto, BP, Chevron, and Coca-Cola. A full list of *amicus* briefs in the case can be accessed via the Supreme Court of the United States Blog; see ‘*Kiobel v. Royal Dutch Petroleum*’, available at: www.scotusblog.com/case-files/cases/kiobel-v-royal-dutch-petroleum/?wpm_switcher=desktop (last visited 7 January 2013). See also, the comments of Chief Justice Roberts listing the objections of other states to extraterritorial applications of the ATS as evidence of the diplomatic strife such claims engender and favouring a strong presumption against the extraterritoriality of the ATS: *Kiobel v. Royal Dutch Petroleum*, 133 S. Ct. 1659, 1669.

54 On challenges to the domestic prosecution of corporations for international crimes and the likely encouraging effect of action at an international level, see Joanna Kyriakakis, ‘Prosecuting corporations for international crimes: the role for domestic criminal law’, in Larry May and Zachary Hoskins (eds), *International Criminal Law and Philosophy*, Cambridge University Press, Cambridge, 2010, pp. 108–137.

The following parts of the paper now turn to two recent developments in international criminal law. First, the paper looks at the newest mode of liability being heralded at the ICC, indirect perpetration through an organisation. Second, the paper outlines the potential relevance of thematic prosecutions in future international criminal practice. Both parts consider the bearing, if any, that these developments might have on the promise of international criminal law with respect to accounting for businesses involved in international crimes.

Forms of individual criminal responsibility and the business case

Given the problem of limited fora for prosecuting corporations as legal entities and the underlying premise of individual responsibility in international criminal law, attention to the business case in international criminal law literature has often been directed at the utility of extant forms of individual responsibility to the prosecution of business officials for international crimes.⁵⁵ This issue is sometimes discussed not only in terms of the prosecution of individuals but also for the purpose of establishing guiding principles that could influence domestic actions taken directly against legal entities themselves.⁵⁶

There are numerous works on the subject of how various forms of individual criminal responsibility might be applied to the prosecution of individuals acting in a business capacity, including on the notions of joint criminal enterprise, command responsibility, and aiding and abetting.⁵⁷ Rather than rehearse this vast literature, this section instead looks at two particular aspects: on the one hand, the new form of liability that has emerged on the international stage, indirect perpetration through an organisation, and its relevance to the business case due to its novelty; and on the other hand, the use of aiding and abetting liability in the *Charles Taylor* case by the Special Court for Sierra Leone,⁵⁸ to capture individual criminal conduct through business-like networks. While he is not properly characterised as a business person, the case of Charles Taylor is interesting as it

55 There are a number of excellent analyses of the application of forms of criminal responsibility to the business case. See Hans Vest, 'Business leaders and the modes of individual criminal responsibility under international law', in *Journal of International Criminal Justice*, Vol. 8, No. 3, 2010, pp. 851–872; Norman Farrell, 'Attributing criminal liability to corporate actors: some lessons from the international tribunals', in *Journal of International Criminal Justice*, Vol. 8, No. 3, 2010, pp. 873–894; Christoph Burchard, 'Ancillary and neutral business contributions to "corporate-political core crime": initial enquiries concerning the Rome Statute', in *Journal of International Criminal Justice*, Vol. 8, No. 3, 2010, pp. 934–945; Kyle Rex Jacobson, 'Doing business with the Devil: the challenges of prosecuting corporate officials whose business transactions facilitate war crimes and crimes against humanity', in *The Air Force Law Review*, Vol. 56, 2005, pp. 167–231; Chia Lehnardt, 'Individual liability of private military personnel under international criminal law', in *European Journal of International Law*, Vol. 19, No. 5, 2008, pp. 1015–1034; ICJ Expert Panel, above note 8, pp. 11–36. For some of the limitations of responding to corporate crimes by prosecuting individuals within corporations, see Kyriakakis, above note 49, pp. 823–826.

56 See, e.g., the 2007 Report, above note 15, para. 23; N. Farrell, above note 55, pp. 874–876.

57 See references in note 55, above.

58 SCSL, *Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-03-01-T, Judgement (Trial Chamber II), 18 May 2012.

emphasises the business-like aspects of Taylor's involvement in the atrocities committed during the Sierra Leonean conflict.

Indirect perpetration through an organisation

One of the newest developments in international criminal jurisprudence with respect to forms of responsibility has been the adoption by the ICC of the notion of indirect perpetration through an organisation.⁵⁹ According to the idea of indirect perpetration through an organisation, a person can be liable as a direct perpetrator of a crime in cases where, despite not being physically present in the actual commission of the crime, they use their control over an organisation in order to ensure that the crime will occur.⁶⁰ It is based on a 'control of crime' theory of responsibility developed primarily in German legal doctrine.⁶¹

The notion of indirect perpetration through an organisation is derived from Article 25(3)(a) of the Rome Statute. Article 25(3)(a) states that a person will be criminally responsible for a Rome Statute crime where such a person 'commits the crime, whether as an individual, jointly with another *or through another person*, regardless of whether that other person is criminally responsible'.⁶² This has been interpreted to include controlling the commission of a crime by using an organisation as the vehicle through which the crime is committed.⁶³

The German control of crime theory, on which the ICC's indirect perpetration through an organisation is based, is a notion of liability developed in

- 59 ICC, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, Decision on Confirmation of Charges (Pre-Trial Chamber I), 30 September 2008, paras. 494–518; ICC, *Prosecutor v. Omar Al-Bashir*, Case No. ICC-02/05-01/09, Decision on the Prosecutor's Application for an Arrest Warrant (Pre-Trial Chamber I), 4 March 2009, paras. 213–216. Some commentators have suggested that this mode of liability looks set to be a leading instrument in the ICC in ascribing liability to military and political leaders; see, e.g., Gerhard Werle and Boris Burghardt, 'Indirect perpetration: a perfect fit for international prosecution of armchair killers?', in *Journal of International Criminal Justice*, Vol. 9, No. 1, 2011, p. 85.
- 60 For detailed analysis of this form of liability and its origins and application at the ICC, see the Special Symposium in the *Journal of International Criminal Justice*, Vol. 9, 2011, pp. 85–226; Neha Jain, 'The control theory of perpetration in international criminal law', in *Chicago Journal of International Law*, Vol. 12, No. 1, 2011, pp. 159–200; Florian Jessberger and Julia Geneuss, 'On the application of a theory of indirect perpetration in *Al Bashir*', in *Journal of International Criminal Justice*, Vol. 6, No. 5, 2008, pp. 853–869; Hector Olasolo, *The Criminal Responsibility of Political and Military Leaders as Principles to International Crimes*, Hart Publishers, Oxford, 2009, pp. 116–134 and 302–330; Harmen G. van der Wilt, 'The continuous quest for proper modes of criminal responsibility', in *Journal of International Criminal Justice*, Vol. 7, No. 2, 2009, pp. 307–314.
- 61 Indirect perpetration through an organisation was originally conceived by German legal theorist Claus Roxin with the particular experience of Nazi state-orchestrated crime in mind: see Thomas Weigend, 'Perpetration through an organisation: the unexpected career of a German legal concept', in *Journal of International Criminal Justice*, Vol. 9, No. 1, 2011, pp. 94–97; F. Jessberger and J. Geneuss, above note 60, pp. 859–862.
- 62 *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002), Article 25(3)(a) (emphasis added) (hereinafter Rome Statute).
- 63 See case references contained in above note 59. For a rejection of the idea that indirect perpetration through an organisation can be derived from the language of Article 25(3)(a), see ICC, *Prosecutor v. Mathieu Ngudjolo Chui*, Case No. ICC-01/04-02/12, Judgement Pursuant to Article 74 of the Statute, Concurring Opinion of Judge Christine Van den Wyngaert (Trial Chamber II), 18 December 2012.

order to capture the ‘armchair’ perpetrator as a principal rather than an accessory to a crime.⁶⁴ One of the core challenges in international criminal law has been to articulate forms of responsibility that respond to crimes organised and carried out in complex institutional and collective contexts in a way that appropriately assigns legal and moral culpability across the hierarchies of people involved in the crimes. Directly converse to most domestic crimes, the worst offenders in international criminal law tend to be those far removed from the messy business of pulling the trigger. Indirect perpetration through an organisation is a form of liability intended to describe those armchair masterminds not as the ones who ‘simply’ ordered, or planned, or aided the crime but as its *direct* perpetrators. Despite the name, it is a means by which the Court attributes direct liability on the perpetrator as a principal to the crime regardless of whether they are physically removed from the direct commission of the offence. Indirect perpetration is hence based upon the idea that principals and accessories are normatively different in terms of moral blameworthiness, an idea that has been challenged.⁶⁵ Through its adoption at the ICC, the Court has therefore ostensibly taken an interpretation that the various Article 25(3) forms of responsibility reflect a hierarchy of moral blameworthiness.⁶⁶

Indirect perpetration through an organisation, while known in some domestic legal systems, is novel in international jurisprudence. Previously the notion of joint criminal enterprise had been the principal vehicle for allocating responsibility to those individuals who, in collective contexts, make decisions at the highest level leading to the commission of international crimes.⁶⁷ However, while joint criminal enterprise was utilised significantly in the ad hoc tribunals, the ICC has rejected this doctrine in its early jurisprudence, adopting instead complex notions of co-perpetration and indirect perpetration based on the concept of control of the crime.⁶⁸

Putting aside the issue of a hierarchy of blameworthiness, the inclusion of the notion of committing a crime ‘through another person’ in Article 25(3)(a) led some commentators early on in the life of the Court to suggest that this form of liability may have a particular value to the prosecution of business officials who commit crimes through the instrumentality of a business organisation.⁶⁹ Indeed, at

64 G. Werle and B. Burghardt, above note 59, pp. 85–89.

65 See, e.g., Concurring Opinion of Judge Christine Van den Wyngaert, above note 63, paras. 24–26.

66 Gerhard Werle, ‘Individual criminal responsibility in Article 25 ICC Statute’, in *Journal of International Criminal Justice*, Vol. 5, 2007, pp. 953–975. Confirming the adoption by the ICC of a hierarchical reading of Article 25, see ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Judgement (Trial Chamber I), 14 March 2012, paras. 996–999. Dissenting on this issue, see the Separate Opinion of Judge Fulford, paras. 6–12. See also Concurring Opinion of Judge Christine Van den Wyngaert, above note 63, paras. 22–30.

67 For a description of joint criminal enterprise and a comparison of its use in the International Criminal Tribunal for the Former Yugoslavia (ICTY) with the model of indirect perpetration that has been adopted by the ICC, see Stefano Manacorda and Chantal Meloni, ‘Indirect perpetration versus joint criminal enterprise: concurring approaches in the practice of international criminal law’, in *Journal of International Criminal Justice*, Vol. 9, 2011, pp. 159–178.

68 *Ibid.*, p. 163.

69 See, e.g., Andrew Clapham, ‘The complexity of international criminal law: looking beyond individual responsibility to the responsibility of organizations, corporations and states’, in Ramesh Chandra Thakur

first blush the notion does appear to resonate with respect to the business case given the focus upon organisational structures as vehicles for wrongdoing. So at a descriptive level, for example, the American Military Tribunal sitting at Nuremberg described the wrongful conduct of leading industrialists during World War II as the commission of crimes *through the instrumentality* of their respective corporate concerns.⁷⁰ This language is evocative of a similar idea to indirect perpetration through an organisation.⁷¹ Further, notions underlying indirect perpetration through an organisation are similar to ideas found in corporate crime literature. For example, as described by Osiel, one of the strengths of the notion of indirect perpetration through an organisation is in the recognition of how those in control of organisational resources can harness those resources to perpetrate mass atrocities through willing subordinates.⁷² Likewise, crime in corporate contexts can be differentiated from other forms of domestic crime on the basis that the offences tend to involve directing large-scale resources towards certain goals. It is this harnessing of resources (human and otherwise) that means corporate crime can often tend toward far greater levels of community harm than other forms of crime.

Indirect perpetration through an organisation is also concerned with organisations that to some extent develop a life independent of the changing existence of their members.⁷³ A similar idea has been described by Fisse and Braithwaite in their critiques of attempts to individualise accountability in the context of corporate crimes. Fisse and Braithwaite have shown how in various ways business corporations transcend the individuals who may pass through the company without affecting change.⁷⁴ Finally, the centrality of ‘control’ to the notion of indirect perpetration through an organisation might be said to constitute the means by which the organisational veil is pierced in order to find the individual perpetrator behind the organisational structure. This is notionally similar to the centrality of control as the mechanism for piercing the corporate veil in order to identify the liable parent company in a corporate group.⁷⁵

Despite such notional similarities, in its strict form indirect perpetration through an organisation does not easily transpose to crimes committed in corporate contexts. Indirect perpetration through an organisation was originally conceived by

and Peter Malcontent (eds), *Sovereign Impunity to International Accountability: the Search for Justice in a World of States*, United Nations Press, Tokyo, 2004, p. 239.

70 See, e.g., *US v. Krauch et al.*, above note 12, pp. 1096, 1108, and 1297. However, at times the Tribunal also describes the organisation as acting through the individual defendants: see pp. 1147 and 1152.

71 It should be noted that the precise mechanisation of the industrialists’ use of the corporate instrument and how this related to their forms of responsibility is not clearly articulated by the US Military Tribunal in the industrialist cases. However, it did not involve the kinds of considerations that are central to the doctrine of indirect perpetration through an organisation. For an analysis of the elements of liability adopted in the industrialist cases see K. R. Jacobson, above note 55, pp. 177–195 and 210–212.

72 Mark Osiel, *Making Sense of Mass Atrocity*, Cambridge University Press, Cambridge, 2009, p. 95, as described by N. Jain, above note 60, p. 193.

73 N. Jain, above note 60, p. 171; H. Olasolo, above note 60, pp. 119–120.

74 Brent Fisse and John Braithwaite, *Corporations, Crime and Accountability*, Cambridge University Press, Cambridge, 1993, pp. 17–58.

75 For a critical analysis of the bases upon which the corporate veil can be pierced, see Peter Muchlinski, ‘Limited liability and multinational enterprises: a case for reform?’, in *Cambridge Journal of Economics*, Vol. 34, 2010, pp. 915–928.

German legal theorist Claus Roxin with the particular experience of Nazi state-orchestrated crime in mind.⁷⁶ According to Roxin's pure theory of *Organisationsherrschaft*, a person is responsible as a principal to a criminal act where they have at their disposal an organised power apparatus through which they can accomplish the offences in question, without having to leave the realisation of their crime to the risk of a change of heart or unexpected action by the direct perpetrator of the physical act.⁷⁷ To show this, there are three main elements in Roxin's theory that must be satisfied: (1) the existence of a hierarchically vertically structured organisation, (2) the fungibility of the direct offender, and (3) that the organisation is detached from law.⁷⁸ Each of these elements, which are interrelated and are directed ultimately towards the necessary conditions of control, poses challenges to the application of the notion to the business context.

First, Olasolo has argued that a rigid hierarchical organisational structure that enables maximised control is less likely to be found in corporate contexts than, for example, in military ones. This is because in the former the division of tasks is based around maximising productivity rather than formalising a culture of obedience to superiors.⁷⁹ Opacity in organisational lines in corporate structures might also undermine attempts to identify clear hierarchical lines of organisation.⁸⁰ We might also consider whether the necessary degree of control can be said to reside with, for example, members of the board of directors of a company or whether such control is diluted through the shareholder model. Looking more broadly at the context of transnational corporate groups, transnational corporations are increasingly organised horizontally on the basis of contractual relationships between formally independent business entities rather than hierarchically and vertically in terms of equity share ownership. This may make a rigid application of the hierarchy criterion harder to satisfy in such contexts. However, it is worth noting that even in such horizontal arrangements, control might still be evident through economic dependency across corporate groups.⁸¹

Second, fungibility refers to the idea that an indirect perpetrator can be assured automatic compliance with their will as directed through control of the organisation because those persons committing the actual crimes are essentially replaceable. In other words, if one person refuses to perform the criminal act, the indirect perpetrator can be assured that others will take their place. This condition can be evidenced by the sheer volume of those at the lower echelons of an organisation, as well as the nature of the organisation being such that compliance is assured (see conditions (1) and (3) above).⁸² In the context of a company, as

76 T. Weigend, above note 61, pp. 94–97; F. Jessberger and J. Geneuss, above note 60, pp. 859–862.

77 N. Jain, above note 60, p. 171.

78 *Ibid.*, pp. 173–178.

79 H. Olasolo, above note 60, p. 134. Note, however, that private military companies are likely to have similar, if not identical, organisational qualities to other military collectives: see C. Lehnardt, above note 54, p. 1026.

80 B. Fisse and D. Braithwaite, above note 74, pp. 36–41.

81 Graf-Peter Calliess, 'Introduction: transnational corporations revisited', in *Indiana Journal of Global Legal Studies*, Vol. 18, No. 2, 2011, pp. 604–605.

82 N. Jain, above note 60, pp. 174–177.

opposed to a state, military, or mafia-like organisation, the (potentially) more limited number of members at the lower levels,⁸³ as well as the potential specialty skills required of those persons to undertake their role, may make the fungibility of such persons difficult to evidence.

The third condition in Roxin's theory, detachedness from law, explicitly precludes the business case. For Roxin, the necessary degree of organisational control in the hands of the indirect perpetrator(s) 'can only be present if the apparatus as a whole is operating outside the legal order'.⁸⁴ As described by Jain, where an organisation acknowledges a legal order independent of itself, it cannot be said that the requisite degree of control exists because law ranks higher and this negates the inevitability that those at the lower end of the organisational hierarchy will act in compliance with the perpetrator's will.⁸⁵ In other words, there is not a sufficient degree of act-domination (meaning control over the perpetrator's acts) by the indirect perpetrator over the criminal act where the organisation in question operates within a polity based on the rule of law.⁸⁶ By their very nature, business entities are created and defined by operational legal orders (meaning they are entities operating under law) and would fail this criterion.⁸⁷

Despite the exclusion of crimes committed through otherwise lawful business organisations from Roxin's pure theory, it is possible that the principles of indirect perpetration may be adapted by the ICC so as to enable the prosecution of such cases utilising this mode of liability, where appropriate. For example, Roxin's doctrine has been adopted with modifications by the German Federal Court, which has explicitly acknowledged its potential relevance to crimes in business contexts.⁸⁸ Neither the German Federal Court nor the ICC has adopted detachedness from law as a separate element of liability.⁸⁹ Further, the ICC has shown some willingness to dilute fungibility by looking at a wider range of factors by which to be satisfied that the heads of an organisation can

83 See H. Olasolo, above note 60, p. 134; but on the application of the notion of fungibility in situations where there are low numbers of potential direct perpetrators and proposing a normative, rather than naturalistic, understanding of this criterion, see Kai Ambos, 'The *Fujimori* judgment: a president's responsibility for crimes against humanity as indirect perpetrator by virtue of organized power apparatus', in *Journal of International Criminal Justice*, Vol. 9, No. 1, 2011, pp. 154–156.

84 Gerhard Werle, Boris Burghardt, and Claus Roxin, 'Crimes as part of organized power structures: introductory note', in *Journal of International Criminal Justice*, Vol. 9, No. 1, 2011, p. 202.

85 N. Jain, above note 60, p. 173.

86 *Ibid.* For Jain's discussion of Kai Ambos' criticism of this third element of indirect perpetration through an organisation theory, see pp. 177–178.

87 See also H. Olasolo, above note 60, p. 134.

88 T. Weigend, above note 61, p. 99; Gerhard Werle and Boris Burghardt, 'The German Federal Supreme Court (Bundesgerichtshof, BGH) on indirect perpetration: introductory note', in *Journal of International Criminal Justice*, Vol. 9, No. 1, 2011, p. 210; German Federal Supreme Court (Bundesgerichtshof), 'Judgement of 26 July 1994 against Former Minister of National Defence *Keßler* and Others', trans. Belinda Cooper, in *Journal of International Criminal Justice*, Vol. 9, No. 1, 2011, pp. 224–225. It should also be noted that a related, although not identical, notion of functional perpetration in Dutch law has been developed specifically in the realm of economic crime. See Harmen van der Wilt, 'Joint criminal enterprise and functional perpetration', in Andre Nollkaemper and Harmen van der Wilt (eds), *System Criminality in International Law*, Cambridge University Press, Cambridge, 2009, pp. 176–181.

89 G. Werle and B. Burghardt, above note 88, p. 210; on the elements adopted by the ICC, see *Prosecutor v. Katanga and Chui*, above note 59, paras. 494–518.

be assured automatic compliance with their will, such as forcible training techniques which are likely to engender obedience.⁹⁰ Such an extension of fungibility might apply to private military companies but is unlikely to be relevant in other business contexts. We might query, however, whether fungibility could be further diluted to include economic pressures and corporate cultural expectations of compliance as it pertains to those at the lowest levels of corporate organisations.⁹¹

Further, if we consider indirect perpetration not simply as a potential model of individual criminal responsibility but also as an idea that might be transposed to the liability of corporations, then its insights with respect to the conditions for control may have some value when applied across corporate entities in a corporate group. As van der Wilt has argued, it is the way in which the theory of indirect perpetration through an organisation has been adapted – for example, its recent application to armed groups operating in African conflicts – that will ensure its longevity and continued utility in the context of international criminal law.⁹² And even if the notion of indirect perpetration through an organisation does not directly apply to many business cases, Bert Swart has argued that it is a development in the direction of corporate liability, as it signifies a shift from naturalistic to social conceptions of action in criminal law.⁹³

Ultimately however, and as discussed above, the current notion of indirect perpetration through an organisation at the ICC operates by holding someone accountable as a principal to the crime in the context of a hierarchy of moral blameworthiness. So long as it is cast in such terms, there is a strong argument that the requirements of this form of responsibility should not be diluted if it is to constitute a means of differentiating those most morally culpable. Further, while it is feasible that some business actors might be properly regarded as among those at the highest level of responsibility and hence appropriate subjects for such a form of principal responsibility, the reality is that more often than not business actors are implicated as accessories to international crimes. For this reason, it is usually the concepts of complicity, especially aiding and abetting, which are most readily transposed to the business case. The next section looks briefly at some current developments in this form of liability to explain its potential for such transposition.

90 *Ibid.*, para. 518; N. Jain, above note 60, pp. 186–187.

91 For reflections on how corporations are organisations that engender obedience, see Maurice Punch, 'Why corporations kill and get away with it: the failure of law to cope with crime in organisations', in Andre Nollkaemper and Harmen van der Wilt (eds), *System Criminality in International Law*, Cambridge University Press, Cambridge, 2009, pp. 42–68.

92 H. van der Wilt, above note 60, p. 312. On indirect perpetration through an organisation as a model of liability more concerned with policy responses to the challenges of systemic crime than strict theoretical consistency, see T. Weigend, above note 61, p. 101. For an argument in favour of a narrow application of this mode of liability at the ICC, see T. Weigend, above note 61, pp. 106–110.

93 See 'Discussion', in *Journal of International Criminal Justice*, Vol. 6, No. 5, 2008, pp. 950–951 (comments of Bert Swart); but see also p. 958 (response of Thomas Weigend).

Aiding and abetting and the Taylor judgement

Aiding and abetting is a form of derivative liability and covers those who assist another in the commission of a crime. There is some uncertainty as to how the notion of aiding and abetting will be applied by the ICC. Article 25(3)(c) of the Rome Statute provides that a person will be criminally responsible for a Rome Statute crime in cases where that person '[f]or the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission'.

First, there is the question of how a hierarchical reading of the Article 25 forms of responsibility will be consistent with the use of aiding and abetting at all, given the intention that the ICC should only deal with those most responsible for international crimes. In other words, if forms of principal perpetration rather than accessory liability best characterise the involvement of leading architects of international crimes and if the ICC will focus primarily on those most responsible, will secondary liability ever be the correct characterisation of responsibility in ICC prosecutions?

Second, there is uncertainty as to whether Article 25(3)(c) demands that an accomplice act in support of another with the *purpose of* assisting in a crime, a requirement at odds with the test under customary international law.⁹⁴ Under customary international law it is sufficient if a person provides assistance in circumstances where they *know* of the likelihood that their action will assist in the commission of an international crime.⁹⁵ To require purpose and not simply knowledge would render the notion of aiding and abetting largely inapplicable to the business case, where actors are generally motivated by the purpose of personal profit.⁹⁶

In contrast to inaction at the ICC, the recent judgement of the Special Court for Sierra Leone in the case of *Prosecutor v. Charles Ghankay Taylor*⁹⁷ relies significantly on the notion of aiding and abetting. It is an interesting example of how a person of a high level of authority might be properly cast as an accomplice in

94 It should be noted that there is no expectation that the ICC should apply principles consistently with customary international law. For applicable law at the ICC, see Rome Statute, above note 62, Article 21.

95 For a description of the test for aiding and abetting under customary international law, see ICJ Expert Panel, above note 8, pp. 17–24. A significant development since the writing of this article has been decisions of the International Criminal Tribunal for the Former Yugoslavia that import a 'specific direction' requirement as a material element of aiding and abetting. This new requirement demands that to constitute an accomplice under international criminal law a person must not only provide assistance that has a substantial effect on the commission of an international crime, but such assistance must additionally be specifically directed toward assisting such crime. See ICTY, *Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-A, Judgement (Appeal Chamber), 28 January 2013; ICTY, *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-T, Judgement (Trial Chamber I), 30 May 2013. It is beyond the scope of this paper to consider the issues raised by these new decisions; however, the introduction of a 'specific direction' requirement will have significant implications for satisfying aiding and abetting in the context of commercial relationships and international crimes.

96 Acknowledging the debate on the language of aiding and abetting under the Rome Statute but arguing that in practical terms it may have little impact on the application of the test to business, see ICJ Expert Panel, above note 8, pp. 22–24.

97 *Prosecutor v. Charles Ghankay Taylor*, above note 58.

international crimes and illustrates how what are effectively business transactions can fall within the scope of that mode of liability under customary international law.

Charles Taylor is the former president of Liberia and was prosecuted for his participation in various crimes against humanity and war crimes personally committed by members of a number of Sierra Leonean rebel groups, such as the Revolutionary United Front (RUF). Whilst the prosecution attempted to establish Taylor's individual criminal responsibility on the basis of his ordering or instigating the rebel crimes, or on the basis of command responsibility, these efforts failed because the Court found that whilst Taylor was influential with respect to the conduct of the rebel groups, he was ultimately apart from effective rebel command structures.⁹⁸ Further, whilst the prosecution succeeded in proving that Taylor and the RUF were military allies and trading partners, there was insufficient evidence to prove the existence of a plan under a joint criminal enterprise,⁹⁹ a form of principal liability where a group of people execute a common criminal agreement.¹⁰⁰

Instead, the role of Taylor as described by the Court is remarkably analogous to that of a business financier and facilitator of international crimes. According to the test applied by the Special Court for Sierra Leone (SCSL) for aiding and abetting, an offender's acts must provide substantial assistance to the commission of a crime with knowledge that such acts would assist the commission of the crimes or with awareness as to the substantial likelihood that such acts would render assistance.¹⁰¹ The Court describes at length the involvement of Taylor in the illicit diamond trade of the rebel groups, finding that Taylor facilitated that trade through, among other things, providing equipment, fuel, and personnel for mining.¹⁰² Taylor's personal responsibility was in turn based upon, among other things, having aided and abetted rebel crimes by facilitating a steady provision of arms and ammunition in return for diamonds, providing operational support in the form of funds, the use of a guesthouse to facilitate transfers, safe haven for rebels, communications training, and logistical and medical support to rights-violating rebel forces. The common feature of the assistance was to support, sustain, and enhance the functioning of the RUF and its capacity to undertake military operations in the course of which crimes were committed.¹⁰³ With respect to the provision of arms the Court held that, despite other sources of supply, Taylor's contribution to the armament of the RUF was substantial, as the RUF relied heavily and frequently on it and other suppliers were minor relative to the accused.¹⁰⁴ Overall Taylor's criminal conduct has parallels with the factual zones of legal risk

98 *Ibid.*, paras. 6972–9686.

99 ICJ Expert Panel, above note 8, paras. 6887–6900.

100 For a detailed analysis of joint criminal enterprise as developed in the jurisprudence of the ad hoc tribunals, see Gideon Boas, James Bischoff, and Natalie Reid, *International Criminal Law Practitioner Library Volume 1: Forms of Responsibility in International Criminal Law*, Cambridge University Press, Cambridge, 2007, pp. 8–141.

101 *Prosecutor v. Charles Ghankay Taylor*, above note 58, para. 6904.

102 *Ibid.*, paras. 5843–6149.

103 *Ibid.*, paras. 6906–6953. Taylor was also found guilty on the basis of having planned some of the rebel attacks: *ibid.*, paras. 6954–6971.

104 *Ibid.*, paras. 6913–6914.

identified by the ICJ Panel of Experts with respect to business actors and complicity in international crimes, such as providing goods and services to those committing international crimes and engaging with suppliers who commit international crimes.¹⁰⁵

With respect to the mental element of aiding and abetting, the Court held that the accused knew of the nature of atrocities being committed against civilians by the RUF and provided his support regardless.¹⁰⁶ Among other things, widespread public knowledge of the nature of the RUF's conduct was relevant in proving Taylor's knowledge as to his effective contribution through his actions to the commission of international crimes.¹⁰⁷ The Court made no inquiry into the personal goals of Taylor in reaching its determination as to his liability for aiding and abetting. It is also interesting to note that in sentencing Taylor to fifty years' imprisonment, the Court determined that Taylor's exploitation of the Sierra Leonean conflict for financial gain constituted an aggravating factor.¹⁰⁸ The Taylor decision thus provides further clarity as to how effectively business transactions can constitute aiding and abetting international crimes in the context of trading with notoriously criminal actors.

Given the particular relevance of aiding and abetting to the phenomenon of business involvement in international crimes, those interested in the future prospects for business prosecutions at the ICC will wait with particular interest to see how Article 25(3)(c) will be interpreted: whether it will be treated in a manner consistently with the approach adopted by the SCSL, or whether purpose will be a distinct requirement of accessory liability. And whilst perhaps of lesser practical import, so long as indirect perpetration through an organisation remains a favoured form of liability at the ICC, more discussion might be welcomed on how, if at all, it might apply to the prosecution of leading actors in the business world involved in international crimes.

Thematic prosecutions and the 'fourth generation' of international criminal law

Another trend in international criminal law that may have implications for the field's application to the business dimensions of conflict are the so-called 'thematic prosecutions'.¹⁰⁹ This term refers to the prosecutorial practice of selecting certain crimes and prioritising particular phenomena within international criminal indictments, usually for purposes related to the best use of limited

105 ICJ Expert Panel, above note 8, pp. 37–43.

106 *Prosecutor v. Charles Ghankay Taylor*, above note 58, paras. 6947–6952.

107 *Ibid.*, paras. 6948 and 6950.

108 SCSL, *Prosecutor v Charles Ghankay Taylor*, Case No. SCSL-03-01-T, Sentencing Judgement (Trial Chamber II), 30 May 2012, para. 99. Other aggravating factors were Taylor's abuse of his positions of political power and unique status as a head of state.

109 See, e.g., Morten Bergsmo (ed.), *Thematic Prosecution of International Sex Crimes*, Torkel Opsahl Academic EPublisher, Beijing, 2012.

resources,¹¹⁰ but often also due to the symbology of elevating attention on a given matter of international concern.¹¹¹ As described by deGuzman, thematic prosecutions are designed to ‘orient cases around particular themes of criminality’.¹¹² Examples to date include focusing on the phenomenon of child soldiers,¹¹³ on sexual violence in conflict,¹¹⁴ and on the targeting of peacekeeping forces.¹¹⁵ The literature analysing the justifications and ramifications of thematic prosecution is only beginning to emerge,¹¹⁶ but early indications at the ICC do suggest that thematic prosecution might be a practice adopted into the future.¹¹⁷ For example, the Office of the Prosecutor chose to focus upon crimes related to the use of child soldiers in the *Lubanga* case to the exclusion of other crimes despite the fact that this phenomenon, while a matter of legitimate international concern, did not reflect the full extent of victimisation within the conflict or the accused’s role therein.¹¹⁸

To some degree one might identify the practice of thematic prosecutions in international criminal law as early as Nuremberg, where the so-called subsequent Nuremberg trials were divided according to the particular participation of segments of German society in the war and their spheres of activity.¹¹⁹ So, for example, there were the trials of medical professionals for their role in medical experimentation on human subjects and in the program of mass euthanasia,¹²⁰ and of legal professionals for furthering Nazi programs of persecution, sterilisation, and extermination through the development of legislation and penal processes.¹²¹ Of course, the most relevant, for our purposes, were the trials of industrialists for the role of big industry in the use of slave labour, the spoliation of occupied territories, and the provision of

110 Morten Bergsmo and C. Wui Ling, ‘Towards rational thematic prosecution and the challenge of international sex crimes’, in *ibid.*, p. 4.

111 See, e.g., Margaret M. deGuzman, ‘An expressive rationale for the thematic prosecution of sex crimes’, in M. Bergsmo (ed.), above note 109, pp. 11–44.

112 *Ibid.*, p. 11.

113 See, e.g., *Prosecutor v. Thomas Lubanga Dyilo*, above note 66.

114 See, e.g., ICTY, *Prosecutor v. Dragoljub Kunarac et al.*, Case No. IT-96-23-T and IT-96-23/1-T, Judgement (Trial Chamber), 22 February 2001.

115 See, e.g., ICC, *Prosecutor v. Bahar Idriss Abu Garda*, Case No. ICC-02/05-02/09, Decision on Confirmation of Charges (Pre-Trial Chamber I), 8 February 2010.

116 The first major book on this subject has just been published. See M. Bergsmo (ed.), above note 109.

117 M. Bergsmo and C. Wui Ling, above note 110, pp. 2–3.

118 *Ibid.* As a result of the indictment’s focus exclusively upon crimes related to the use of child soldiers, the majority of the Trial Chamber held that they were unable to take crimes of a sexual nature into account for the purpose of its judgement, including the systemic sexual abuse of primarily girl child soldiers. See *Prosecutor v. Thomas Lubanga Dyilo*, above note 66, paras. 36, 60, 629–630, 896, and 913. For dissent on this issue see the Separate and Dissenting Opinion of Judge Odio Benito, paras. 15–21.

119 See M. deGuzman, above note 111, p. 11. For an outline of the subsequent Nuremberg trials, see Kevin Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law*, Oxford University Press, Oxford, 2011.

120 US Military Tribunal at Nuremberg, *US v. Karl Brandt et al.*, Judgement of 19 July 1947, *Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10*, Vol. II, 1950, pp. 171–300 (the Medical Case).

121 US Military Tribunal at Nuremberg, *US v. Josef Altstoetter et al.*, Opinion and Judgement of 3 December 1947, *Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10*, Vol. III, 1951, pp. 954–1199 (the Justice Case).

the material means for war.¹²² Whilst primarily practically driven, the thematic focus of these trials had a symbolic significance and served an important educative function by delineating the specific contributions of significant parts of German society to the atrocities committed.¹²³

The most detailed work on thematic prosecutions as a possible feature of international criminal practice has occurred within the field of sex crimes and armed conflict.¹²⁴ Thinking on this topic may provide some direction as to whether and when thematic prosecution of business actors for their involvement in conflict might also be justified. For example, deGuzman has argued that the strongest justification for the prioritisation of sex crime prosecutions at international courts, sometimes even at the expense of other norms, is to be found in the expressive rationale for international criminal justice.¹²⁵ Expressive theories of criminal justice essentially focus upon the social meaning ascribed to the practice of criminal justice. In particular, they identify as an independent value the normative message that is communicated by criminal pronouncements and punishments. Verdicts and punishments simultaneously stigmatise wrongdoing and reaffirm the real value of victims or goods whose inherent value has been denied in the commission of the wrongdoing.¹²⁶ For deGuzman, the expressive rationale supports prioritisation of sex crimes because those norms are in more urgent need of expression, in part due to the history of under-enforcement of international norms outlawing crimes of sexual violence.¹²⁷

In a different vein, Jain has argued that the institutional structure of the ICC might support thematic prosecutions centred on crimes that are 'less universally regarded, at least in practice, as equally deserving of condemnation'¹²⁸ on expressivist grounds both in light of the Court's explicitly forward-looking agenda, and given its role as an instrument of post-conflict rule of law development.¹²⁹ For Ambos, one of the arguments in favour of thematic prosecutions of sex crimes is the evidence of an increased awareness among the international community as to the use of sexual violence as a war tactic and the risks it poses to peace and security and in light of the trust evident amongst international policy-makers in the role criminal justice should play in addressing this phenomenon.¹³⁰

Might similar arguments be made in favour of prosecutions centred on the theme of business participation in international crimes or on the economic

122 See above note 12.

123 See, e.g., K. Heller, above note 119, p. 47.

124 See above note 108.

125 See M. deGuzman, above note 111, pp. 11–44.

126 See, e.g., Lawrence Friedman, 'In defence of corporate criminal liability', in *Harvard Journal of Law and Public Policy*, Vol. 23, No. 3, 2000, pp. 840–847.

127 M. deGuzman, above note 111, pp. 35–41.

128 Neha Jain, 'Going beyond prosecutorial discretion: institutional factors influencing thematic prosecution', in M. Bergsmo (ed.), above note 109, p. 226.

129 *Ibid.*, pp. 207–232.

130 Kai Ambos, 'Thematic investigations and prosecution of international sex crimes: some critical comments from a theoretical and comparative perspective', in M. Bergsmo (ed.), above note 109, pp. 311–312.

dimensions of conflict more broadly? Many of the ideas mentioned above have in fact been presented as arguments for the value of focusing on the business side of conflict in the future practice of international courts and tribunals. For example, with respect to the expressive rationale supporting a special focus on sex crimes, similar arguments have been made in the domestic and international contexts in defence of the necessity of corporate criminal (rather than civil or administrative) liability in relation to certain forms of corporate misconduct. The justifications provided for this are the particular moral messaging that occurs through the vehicle of criminal law and the need to properly acknowledge those injured by sufficiently severe corporate misconduct.¹³¹ This call is sometimes made on the basis that the role of business and economics in conflict has been a long under-represented phenomenon in international criminal justice, despite the evidence that modern conflicts might best be understood as revolving around economic, rather than political or ethnic, tensions.¹³² Further, it has been argued that given the role of international criminal law as a mechanism of post-conflict transitional justice with forward-oriented goals, the role of economic actors, such as business, and the impact of widespread economic crimes, such as the plunder of natural resources, might in some cases be more important subjects than other categories of international crimes and criminals to the goal of a durable peace.¹³³ The idea here is that it is often economic injustices that, if left unattended, can lead to a relapse into conflict. Finally, inasmuch as the legitimacy of thematic prosecutions might be supported on the basis that international policy-makers have evidenced a particular concern for the relevant phenomenon and a trust in the role of criminal justice to respond, the work of the SRSJ might suggest that a similar time is coming with respect to the role of business in international crimes.

It is beyond the scope of this paper to fully theorise the prospect of thematic prosecutions focusing on the economic dimensions of conflict, and there are of course due bases for caution with respect to the practice more broadly.¹³⁴ A more modest point is being made here, namely that, inasmuch as thematic prosecutions may constitute a feature of international criminal practice in the future, there may be a strong case for the unlawful conduct of businesses to be high on prosecutorial agendas. The question is then whether the current architecture of international criminal law is up to such a task.

In this context it is worth concluding with the recent work of van den Herik and Dam-de Jong, who suggest that it might be time for international criminal law to enter into a 'fourth generation' within which the framework of international criminal law is applied and developed, so as to better respond to the modern

131 See, e.g., L. Friedman, above note 126, pp. 833–858; Joanna Kyriakakis, 'Corporate criminal liability and the ICC Statute: the comparative law challenge', in *Netherlands International Law Review*, Vol. 56, No. 3, 2009, pp. 359–364.

132 On the exclusion of the economic dimensions of conflict from international criminal law and transitional justice more broadly, see Joanna Kyriakakis, 'Justice after war: economic actors, economic crimes and the moral imperative for accountability after war', in Larry May and Andrew Forcehimes (eds), *Morality, Jus Post Bellum, and International Law*, Cambridge University Press, Cambridge, 2012, pp. 115–120.

133 *Ibid.*, pp. 134–136.

134 M. Bergsmo and C. Wui Ling, above note 110, p. 10.

phenomenon of war as economic activity.¹³⁵ Focusing in particular on the close relationship between modern conflicts and competition for natural resources, they present a compelling argument that existing principles of international criminal law ought to be directed to the economic dimensions of conflict and that, given the limitations of international criminal law's current toolkit, which was developed in the context of different paradigms of conflict, there may be a need for the development of new criminal law tools to remain abreast of the modern realities of war.¹³⁶

Conclusion

The expectation placed on international criminal law to be a vehicle for legal accountability of business actors engaged in egregious human rights and humanitarian law abuses is in many respects driven by the lack of litigation alternatives at the international level. During discussions in 2008 on the subject of international criminal law and business, expert commentators noted that, despite the traditional reluctance of states to extend criminal law notions to abstract entities, questions as to the wisdom of expanding international criminal law are often forfeited given the lack of any established international tort or administrative law that might apply instead.¹³⁷ In the wake of the work of the SRSG and his failure to incorporate any role for binding human rights obligations at an international level, this status quo seems set to continue into the foreseeable future. As noted by the SRSG, it is with the expansion of international criminal law that the prospect of legal accountability for businesses involved in human rights and humanitarian law violations seems most promising. In light of this, we might expect to see continued pressure on the institutions and principles of international criminal law to be applied to cases of business involvement in international crimes.

This pressure for international criminal law to evolve and capture wrongful business conduct is also being generated by the very nature of modern conflicts themselves. With increasing awareness that economic concerns and actors have a central part in many modern conflicts – as financiers and enablers of violence, as direct actors in the case of private military companies, and as partners of rights-violating security forces – the demand that international criminal law evolve to address the business dimensions of conflict is likely to continue. After all, international criminal law has as one of its key goals and justifications the furtherance of peace and security.

This paper has outlined some recent developments related to the promise of international criminal law with respect to the business case. Notions of thematic prosecutions in international courts may augur in favour of future prosecutions dedicated to exposing the role of business actors in international crimes.

135 L. van den Herik and D. Dam-de Jong, above note 6, p. 250.

136 *Ibid.*, pp. 237–273.

137 See, e.g., 'Discussion', above note 93, pp. 978–979 (comments of George Fletcher).

The relevance of indirect perpetration through an organisation to the business case will depend strongly upon whether the Court applies Roxin's theory faithfully or adopts looser notions of control and automatic compliance. And it remains to be seen how the ICC will interpret aiding and abetting, although the SCSL's Taylor trial judgement indicates the ways in which this notion can apply to business-like interactions.

Courts and tribunals should begin to look more seriously at business actors and also at some of the neglected international crimes involving property in which they may be particularly prone to participating, such as the war crime of pillage. A move in this direction will allow a clearer delineation of truly rogue businesses from those businesses making genuine efforts to avoid participation in international crimes. However, there is also a cautionary tale to be told. International criminal law can and ought to capture only those business activities with a sufficiently direct and significant role in the commission of international crimes. It is clear that, even with an increased application of international criminal law to business, many humanitarian law and human rights abuses in which business actors may be implicated when working in conflict situations will not be captured. As emphasised by the SRSG, for these broader concerns the importance of multiple regulatory sites that encourage the development of broader conflict-sensitive business practices will be paramount.