

EXPOSING THE HIDDEN SOUL OF GUILT: CORPORATE ACCOMPLICE LIABILITY IN INTERNATIONAL CRIMINAL LAW

NICHOLAS LANOIE

Although international law has traditionally refrained from imposing duties and obligation on non-state actors, this basic trend of international law is shifting. From the Nuremberg trials of the 1940s to cases against Serbian leaders for war crimes in the 1990s, courts now recognize a level of individual duty to humanity implicit in international law. Article 25 of the Rome Statute codifies this shift by asserting International Criminal Court jurisdiction over individuals who commit crimes that fall within the jurisdiction of the court. It remains to be seen whether Article 25 extends to legal persons like corporations. This paper will argue that Article 25(c) of the Rome Statute extends accomplice liability for international crimes to corporations under the standard of “facilitating, aiding and abetting” – crimes for which the court has jurisdiction. If successful, corporate social responsibility will move from a mere theory of moral obligation to one with significant legal application.

Key Words: Accomplice Liability, Rome Statute, human rights, Israel, Boeing

1. Introduction

Can companies which supply weapons to occupying forces be held accountable for human rights violations or violations of humanitarian law? Analyzing Boeing Company’s (“Boeing”) sales of Apache helicopters to Israel as an example of a non-state entity facilitating international crimes will help explore this question. Apache helicopters are used by the Israeli military in its occupation of the West Bank and Gaza Strip. Apaches are used to willfully kill civilians in attacks against Palestinian hospitals and refugee camps, and to destroy civilian property in a manner not justified by

military necessity. Thus, by selling Apache helicopters, which are used to violate international humanitarian law in Israel's occupation of the West Bank and Gaza Strip, Boeing falls within the reach of Article 25(c) jurisdiction as an accomplice liable for war crimes and crimes against humanity.

2. Central Assumptions

Four critical assumptions underlie the argument. First, Articles 4 and 2 of the Fourth Geneva Convention affirm that the Convention applies generally to occupied territories.¹ United Nations ("UN") resolutions have designated the West Bank and Gaza Strip as occupied territories.² Accordingly, the Fourth Geneva Convention protects those Palestinians, as a protected class of people, residing in the West Bank and Gaza.³

¹ Geneva Convention Relative to the Protection of Civilian Persons in Time of War arts. 2 & 4, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. Article 2 provides that "the Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party" and Article 4 provides that "persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals."

² S.C. Res. 242, ¶ 1, U.N. Doc. S/RES/242 (Nov. 22, 1967) (adopted in the aftermath of the Six Day War and designating the West Bank and Gaza Strip as occupied territories and calling for Israeli withdrawal) and S.C. Res. 338, U.N. Doc. S/RES/3388 (Oct. 22, 1937) (adopted in response to the Yom Kippur War and re-iterating the provisions of resolution 242).

³ The International Court of Justice has echoed this view, despite Israel's protestations that the Geneva Convention is not applicable in the occupied territories. See *Legal Consequences of the Construction of a Wall in the Occupied Territory*, Advisory Opinion, 2004 I.C.J. 131 (July 9). After citing a statement issued at a 1999 conference of states that are party to the Convention, and referencing multiple UN Security Council resolutions, the Court found that "the Fourth Geneva Convention is applicable to any occupied territory in the event of armed conflict". *Id.* at 177.

Second, through its use of Apache helicopters (among other weapons) Israel has violated the following articles of the Fourth Geneva Convention:

Article 33, which prohibits collective punishment of civilian populations;⁴

Article 53, which prohibits the occupying power from shelling in residential neighborhoods and destroying real property unless such destruction is rendered absolutely necessary by military operations;⁵ and

Article 18, which prohibits the occupying power from destroying public health infrastructures.⁶ Israel also violates

Article 51 of the Additional Protocol I to the Geneva Conventions of 1949 because its employment of Apache heli-

⁴ Convention Relative to the Protection of Civilian Persons in Time of War art. 33, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287:

No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited. Pillage is prohibited. Reprisals against protected persons and their property are prohibited.

⁵ Convention Relative to the Protection of Civilian Persons in Time of War art. 53, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287:

Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.

⁶ Convention Relative to the Protection of Civilian Persons in Time of War art. 18, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287:

Civilian hospitals organized to give care to the wounded and sick, the infirm and maternity cases, may in no circumstances be the object of attack but shall at all times be respected and protected by the Parties to the conflict.

Israel has violated several other articles of the Fourth Geneva Convention, but Articles 33, 53, 55, and 18 cited here most implicate Boeing because they correspond to violations for which Apache helicopters have been used.

copters in its military occupation amounts to indiscriminate attacks on civilian populations.⁷

Third, Israel's use of Apache helicopters in the Occupied Territories in an effort to contain militants violates Provision 5(a) of Basic Principles on the Use of Force and Firearms by Law Enforcement

⁷ Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 51, *adopted June. 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I]. Relevant provisions include:*

2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.
4. Indiscriminate attacks are prohibited. Indiscriminate attacks are:
 - (a) those which are not directed at a specific military objective;
 - (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or
 - (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.
5. Among others, the following types of attacks are to be considered as indiscriminate:
 - (a) an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and
 - (b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.
8. Any violation of these prohibitions shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians, including the obligation to take the precautionary measures provided for in Article 57.

Officials.⁸ Provision 5(a) authorizes law enforcement personnel to employ firearms only if doing so is unavoidable and proportional to the offence and desired outcome.⁹ This provision has been used to argue that Israel violates international law by using excessive, disproportionate force against civilians.¹⁰

Lastly, Israel is subject to the jurisdiction of the International Criminal Court (“ICC”). Israel’s occupation of the West Bank and Gaza Strip is a violation of international humanitarian law (“IHL”) (as codified by the Fourth Geneva Convention setting forth the international law of armed conflict).¹¹ Israel violates IHL by committing war crimes and crimes against humanity against Palestinians in the occupied territories in pursuit of its sustained presence and de facto control of the areas. The ICC has jurisdiction over the crimes of genocide, crimes against humanity, war crimes, and the

⁸ Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, U.N. Doc. A/CONF.144/28/Rev.1 (1990) (adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders).

⁹ *Id.*:

5 (a) Whenever the lawful use of force and firearms is unavoidable, law enforcement officials shall exercise restraint in such use and act in proportion to the seriousness of the offence and the legitimate objective to be achieved.

¹⁰ Kathleen Cavanaugh, *Selective Justice: The Case of Israel and the Occupied Territories*, 26 *FORDHAM INT’L L.J.* 934, 951-3 (2003).

¹¹ An abbreviated yet comprehensive summary of Israeli conduct is provided in Ardi Imseis, *On the Fourth Geneva Convention and the Occupied Palestinian Territory*, 44 *H. Int’l L.J.* 65, 102-22 (2003), and also in Lucien J. Dhooze, *We Arm the World: the Implications of American Participation in the Global Arms Trade*, 16 *Ariz. J. Int’l & Comp. Law* 577, 637 (1999). See also Dr. Lama Jamjoum, *The Effects of Israeli Violations during the Second Uprising “intifada” on Palestinian Health Conditions*, 29 *Social Justice* (2002) (includes a thorough examination of the way Israeli violations of the Geneva Conventions have contributed to a severe health crisis).

crime of aggression.¹² Thus, Israel and officers in the Israeli Defense Forces (“IDF”) would fall under the jurisdiction of the ICC.

Israel is *prima facie* guilty of war crimes and crimes against humanity in the occupied territories. The elements of both war crimes and crimes against humanity discussed below are not exhaustive, but are used to illustrate how Israel’s use of Apache helicopters¹³ supplied by Boeing facilitates Israel’s violations of IHL. According to Rome Statute Article 8 (2)(a), grave breaches of the Geneva Convention of August 12, 1949 include the willful killing of protected persons, the willful causing of great suffering or serious bodily injury, and extensive destruction and appropriation of property not justified by military necessity. Similarly, under the ICC’s extensive definition of war crimes as “other serious violations of the laws and customs applicable in international armed conflict,” a war crime can occur in non-international armed conflict. Israel can be deemed to violate war crimes such as intentionally attacking a civilian population, intentionally launching an attack knowing that it will cause loss of life and injuries to civilians and damage to civilian objects, intentionally attacking medical units, and employing methods of warfare which are of a nature to cause superfluous injury and are indiscriminate in violation of humanitarian law.¹⁴

¹² Rome Statute of the International Criminal Court, 37 I.L.M. 999 (1998) [hereinafter Rome Statute]:

Article 5: *Crimes within the Jurisdiction of the Court*

(1). The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction ... with respect to the following crimes:

- (a) The crime of genocide
- (b) Crimes against humanity
- (c) War Crimes
- (d) The crime of aggression

¹³ See *infra* notes 26-35, 37-44, and accompanying text for examples.

Israel is *prima facie* guilty of crimes against humanity. The ICC Statute defines these to be acts like murder, persecution based on ethnicity, and inhumane acts committed as part of a widespread or systematic attack directed against a civilian population with knowledge of the attack.¹⁵ According to the US Department of State, Amnesty International, Human Rights Watch, and the United Nations Fact Finding Mission on the Gaza Conflict, Israel has committed these grave breaches and more general war crimes with the use of Apache helicopters against a class of people protected by the Geneva Convention.¹⁶

¹⁴ Apache helicopters are implicated in violations of the following war crimes: Rome Statute, Article 8(2)(b)

- (i) [intentionally directing attacks against civilians],
- (ii) [intentionally directing attacks against civilian objects],
- (iv) [intentionally launching attack with knowledge that it will cause loss of civilian life and damage to civilian objects],
- (v) [attacking or bombing by whatever means, undefended locations that are not military objectives],
- (viii) [transfer of occupying power's own civilian population into territory of occupation],
- (ix) [intentionally directing attacks against civic, health, and religious buildings that are not military objectives], (xi) [killing or wounding individuals of hostile nation/army],
- (xiii) [destroying enemy property if not required by necessity of war], and
- (xxiv) [attacking non-military objectives and personnel using emblems of the Geneva Convention]. Even if the Geneva Conventions did not cover Palestinians as protected persons, Israel could still be liable for violations of Article 8(2)(c)(i) [violence to people], and 8(2)(e)
- (i) [intentional attacks against civilians],
- (ii) [intentional acts against civilian buildings/property],
- (iv) [intentional attacks against civilian buildings with religious, educational, or charitable purpose], and
- (xii) [destroying property of an adversary].

¹⁵ Rome Statute, Article 7(1)(a) [murder], (h) [persecution of identifiable group based on enumerated list of factors], and (k) [other inhumane acts].

¹⁶ Bureau of Democracy, Human Rights, and Labor - U.S. Department of State, *Israel and the Occupied Territories Report on Human Rights Practices (1997-2008)*; Amnesty International, *World Reports: Israel (2002-2008)*; Human Rights Watch, *World*

These assumptions are critical because logically accomplice liability cannot attach without a principle actor. In this case, Boeing supplies weapons but does not directly commit any human rights violations, nor does Boeing order or induce such crimes. Thus, it is important to note that the principle actor is the Israeli government, and that Article 31-grounds for excluding criminal responsibility are not applicable.¹⁷

Finally, it is necessary to clarify what issues are not within this article's narrow scope. The article will not cover broader issues of Israel's liability for violations of international law in its occupation under IHL, the Rome Statute, or Human Rights Law. Also, the article will not deal with the legal ramifications of the US's role as an international arms dealer.¹⁸ Finally, this article will not address the illegality of Apache helicopter sales to Israel under US laws which limit the sale of arms by American corporations, such as Boeing, to gross violators of human rights, under the Foreign Assistance Act of 1961,¹⁹ the Arms Export Control Act,²⁰ and the International Traffic in Arms regulation.²¹

Reports: Israel (2003-2008); U.N. Human Rights Council, Fact-Finding Mission on the Gaza Conflict, *Human Rights in Palestine and Other Occupied Arab Territories*, ¶¶ 1935, 1968(b), U.N. Doc. A/HRC/12/48 (Sept. 25, 2009) [hereinafter *Goldstone Report*] available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf>.

¹⁷ Article 31 excludes people who suffer from mental illnesses or intoxication, or who act in self defense or under duress from criminal responsibility.

¹⁸ For an excellent discussion of the manner in which US sales of Apache helicopters violate US law, Dhooge, *supra* note 11, at 608-9. See also US Department of State, Background Paper: The U.S. Approach to Combating the Spread of Small Arms (2001). According to the State Department Report, all arms sales from American companies or American nationals abroad are regulated by the State Department. Thus, Boeing's sales to Israel are indirectly approved and licensed by the US government.

¹⁹ 22 U.S.C. §2304(a)(2) (2012). This act prohibits sales to countries that engage in a pattern of human rights violations.

²⁰ 22 U.S.C. §2751- 2799 (2012). This act restricts the sale of arms for self defense purposes but also places Israel on a short list of countries that can borrow or buy weapons on credit.

²¹ 22 CFR §120-130 (2012). This act prohibits arms sales to gross human rights abusers.

3. Background on Apache Helicopters and Their Use in the Occupied Territories

Apache helicopters are highly advanced pieces of military equipment that have been likened to “flying tanks” because they are able to survive heavy artillery fire and inflict massive damages. The helicopters represent a revolutionary design made to fly close to the ground so that they can engage ground forces in combat.²² The helicopter includes a 30mm automatic canon at the tip of its nose, and Boeing can equip them with two hellfire missile sets (which each hold four missiles) or two hydra rocket chain launchers (which hold 19 aerial rockets).²³ The Apache also has night vision capabilities for the pilot and gunner, and is designed to evade radar signals and heat-seeking missiles.²⁴ These highly sophisticated machines were made to terrify ground forces, not to fight un-armed civilians.

Apache helicopters are important to Israel’s military occupation of the West Bank and Gaza Strip.²⁵ Because they are designed to devastate places and opponents in combat, Apaches are highly effective at destroying civilian Palestinian lives and property with minimal threat of harm to the Israeli soldiers inside. Since 2000, Israel has used Apache helicopters in its collective punishment measures, including the shelling of residential neighborhoods, destroying civilian property, and destroying public health infrastructures.²⁶ Human Rights Watch and Amnesty International assert that

²² See generally CHRIS BISHOP, APACHE AH-64 BOEING (McDONNELL DOUGLAS) 1976-2005 (2005).

²³ *Id.*

²⁴ *Id.*

²⁵ Steve Rodan, *Israel Uses Helicopters in Fight with Palestinians*, JANE’S DEFENSE WKLY., OCT. 10, 2000 AVAILABLE AT [HTTP://WWW.JANES.COM/AEROSPACE/MILITARY/NEWS/JDW/JDW001010_1_n.shtml](http://www.janes.com/aerospace/military/news/jdw/jdw001010_1_n.shtml) (LAST VISITED JAN. 11, 2010).

²⁶ Jamjoum, *supra* note 11, at 57-8.

in 2000 the Israeli Defense Force (IDF) used Apache helicopters against protesting civilians.²⁷ Apache helicopters have been used to attack a residential neighborhood in Nablus and Bet Sahour.²⁸ Israel's use of Apache helicopters in this manner have resulted in United Nations Security Council condemnation as an excessive use of force against Palestinians.²⁹ In 2001, Israeli soldiers using Apache helicopters attacked and killed civilians in Hebron, Jenin, and other parts of the Occupied Territories.³⁰ During the Second Intifada, in 2002, Israel used Apache helicopters to launch an attack against Jenin's refugee camp.³¹ According to the IDF, over 100 Palestinians died in this attack.³²

²⁷ HUMAN RIGHTS WATCH, *WORLD REP. 2001: THE EVENTS OF 2000*, 351, 393 (2001) AND AMNESTY INTERNATIONAL, *ISRAEL AND THE OCCUPIED TERRITORIES: STATE ASSASSINATIONS AND OTHER UNLAWFUL KILLINGS*, Feb. 21, 2001 *available at* <http://www.amnesty.org/en/library/info/MDE15/005/2001/en> (last visited Aug. 2, 2012).

²⁸ Rodan, *supra* note 24.

²⁹ S. C. Res. 1322, ¶ 2, U.N. Doc. S/RES/1322 (Oct. 7, 2000).

³⁰ THE PALESTINIAN CENTRE FOR HUMAN RIGHTS, *WKLY. REP. ON ISRAELI HUMAN RIGHTS VIOLATIONS IN THE OCCUPIED PALESTINIAN TERRITORIES*, Dec. 5, 2001 *available at* <http://www.pchrgaza.org> (follow "Publications" link; then follow "Reports" link) (last visited Aug. 2, 2012); THE PALESTINIAN CENTRE FOR HUMAN RIGHTS, *WKLY. REP. ON ISRAELI HUMAN RIGHTS VIOLATIONS IN THE OCCUPIED PALESTINIAN TERRITORIES*, Dec. 26, 2001 *available at* <http://www.pchrgaza.org> (last visited Aug. 2, 2012); THE PALESTINIAN CENTRE FOR HUMAN RIGHTS, *WKLY. REP. ON ISRAELI HUMAN RIGHTS VIOLATIONS IN THE OCCUPIED PALESTINIAN TERRITORIES*, Jan. 3, 2002 *available at* <http://www.pchrgaza.org> (last visited Aug. 2, 2012); and THE PALESTINIAN CENTRE FOR HUMAN RIGHTS, *ASSASSINATION OF PALESTINIANS: AN ISRAELI OFFICIAL POLICY – REP. ON EXTRA-JUDICIAL KILLINGS COMMITTED BY THE ISRAELI OCCUPATION FORCES*, Sept. 29, 2000-Sept. 28, 2001 *available at* <http://www.pchrgaza.org/files/Reports/English/killing2.htm> (last visited Aug. 2, 2012).

³¹ AMNESTY INTERNATIONAL, *PRELIMINARY FINDINGS OF AMNESTY INTERNATIONAL DELEGATES' VISIT TO JENIN*, April 22, 2002 *available at* <http://www.amnesty.org/ar/library/asset/MDE15/058/2002/ar/0f49fb00-faf9-11dd-9fca-0d1f97c98a21/mde150582002en.pdf> (last visited Aug. 2, 2012), and AMNESTY INTERNATIONAL, *ISRAEL AND THE OCCUPIED TERRITORIES: SHIELDED FROM SCRUTINY: IDF VIOLATIONS IN JENIN AND NABLUS: EXECUTIVE SUMMARY*, Nov. 4, 2002 *available at* <http://www.amnesty.org/en/library/info/MDE15/149/2002/en> (last visited Aug. 2, 2012).

³² *Id.*

Between February 2002 and April 2002, the IDF launched two major strikes against the Palestinians in the Occupied Territories using Apache helicopters, tanks, and armored personnel carriers.³³ In December 2002, Apache helicopters were used in the Israeli invasion of al-Bureij refugee camp in the Gaza Strip.³⁴ The helicopters were used to shell and fire missiles on the refugee camp and resulted in the death of ten Palestinians, injury to twenty, and the destruction of homes.³⁵ The Security Council condemned these 2002 acts and demanded a ceasefire.³⁶ In 2003 the IDF used Apache helicopters to shell Palestinian houses in Gaza City, Khan Younis, and Beit Hanoun.³⁷ Helicopters were also employed in Rafah in 2004.³⁸ Gaza suffered more attacks in 2005³⁹ and 2006 under Operation

³³ Press Release, Palestinian Centre for Human Rights, The Palestinian Centre for Human Rights Expresses its Grave Concern at the latest Attacks by the Israeli Military against Palestinian Civilians in the Gaza Strip (Feb. 11, 2002) available at <http://ow.ly/azsuW> (last visited Aug. 2, 2012); Press Release, Palestinian Centre for Human Rights, Israeli Forces Invade Jabalya Refugee Camp; at Least 23 Palestinians Killed and Dozens Wounded in the Gaza Strip in Past 24 Hours (Mar. 12, 2002) available at <http://ow.ly/azsFf> (last visited Aug. 2, 2012); Press Release, Palestinian Centre for Human Rights, Israel Assassinate Six Palestinians in Rafah (June 24, 2002) available at <http://ow.ly/azsNy> (last visited Aug. 2, 2012).

³⁴ Josh Ruebner, *Using American-made Weapons, Israel Continues to Strike with Impunity*, WASH. REP. ON THE MIDDLE EAST, MAR. 1, 2003.

³⁵ *Id.*

³⁶ S. C. Res. 1435, ¶ 2, U.N. Doc. S/RES/1435 (Sept. 24, 2002); S. C. Res. 1405, ¶ 2, U.N. Doc. S/RES/1405 (Apr. 19, 2002); S. C. Res. 1403, ¶ 1, U.N. Doc. S/RES/1403 (Apr. 4, 2002); S. C. Res. 1402, ¶ 2, 3, U.N. Doc. S/RES/1402 (Mar. 30, 2002); and S. C. Res. 1397, ¶ 1, 2, U.N. Doc. S/RES/1397 (Mar. 12, 2002).

³⁷ THE PALESTINIAN CENTRE FOR HUMAN RIGHTS, WKLY. REP. ON ISRAELI HUMAN RIGHTS VIOLATIONS IN THE OCCUPIED PALESTINIAN TERRITORIES, May 15, 2003 available at <http://www.pchrgaza.org> (last visited Aug. 2, 2012).

³⁸ THE ELECTRONIC INTIFADA, TODAY'S EVENTS IN RAFAH, May 18, 2004 available at <http://electronicintifada.net/v2/article2701.shtml> (last visited Aug. 2, 2012); See also HUMAN RIGHTS WATCH, RAZING RAFAH, Oct. 17, 2004 available at <http://www.hrw.org/en/node/11963/section/1> (last visited Aug. 2, 2012).

³⁹ THE ELECTRONIC INTIFADA, ISRAEL ESCALATES ATTACK ON PALESTINIAN TOWNS, July 16, 2005 available at <http://electronicintifada.net/v2/article4004.shtml> (last visited Aug. 2, 2012).

Summer Rains,⁴⁰ and the IDF has deployed Apache helicopters in isolated incidents throughout 2007⁴¹ and 2008.⁴² Finally, the Israel Defense Forces employed Apache helicopters against civilians in the Operation Cast Lead campaign of 2008-2009.⁴³ The human rights organization Al-Haq reports that of the 1409 Palestinians that the Israeli army killed, 92 Palestinians died from helicopter fire.⁴⁴ The Security Council expressed grave concern for the acts of Operation Cast Lead.⁴⁵

⁴⁰ Press Release, American-Arab Anti-Discrimination Committee, Israel's Siege on Gaza Continues, ADC Appeals to US Administration to Stop the Violence, July 7, 2006 available at <http://www.adc.org/index.php?id=2837> (last visited on Aug. 2, 2012); Press Release, The Electronic Intifada, Israeli Attacks on Educational Institutions in the Gaza Strip Violate International Law, July 6, 2006 available at <http://electronicintifada.net/v2/article4914.shtml> (last visited Aug. 2, 2012); Press Release, The Electronic Intifada, Palestinians Prepare for Peace While Israel Practices War, July 2, 2006 available at <http://electronicintifada.net/v2/article4887.shtml> (last visited Aug. 2, 2012).

⁴¹ Rami Almeghari, *More Civilian Deaths in Gaza*, LIVE FROM PALESTINE, May 21, 2007 available at <http://electronicintifada.net/v2/article6921.shtml> (last visited Aug. 2, 2012).

⁴² George Bisharat, *Israel is Committing War Crimes*, THE WALL ST. J., Jan. 10, 2009, at A9.

⁴³ Ewa Jasiewicz, *Gaza Today: This is Only the Beginning*, FREE GAZA MOVEMENT NEWSL., Dec. 28, 2008 available at <http://www.freegaza.org/en/home/56-news/601-gaza-today-this-is-only-the-beginning> (last visited Aug. 2, 2012); Ewa Jasiewicz, *The Ceasefire: Finding Bodies in Gaza*, THE PALESTINE CHRON., Jan. 12, 2009 available at http://palestinechronicle.com/view_article_details.php?id=14657 (last visited on Aug. 2, 2012); Ewa Jasiewicz, *All Signs Point to Systemic Targeting of Civilians*, LIVE FROM PALESTINE, Jan. 11, 2009 available at <http://electronicintifada.net/v2/article10168.shtml> (last visited Aug. 2, 2012); and Goldstone Report ¶¶ 714, 919, 1077.

⁴⁴ Al-Haq, 'OPERATION CAST LEAD' - A STATISTICAL ANALYSIS 5 n.7 (August 2009) available at <http://www.alhaq.org/attachments/article/252/gaza-operation-cast-lead-statistical-analysis%20.pdf> (last visited Aug. 2, 2012). The Mezan Center for Human Rights determined that 83% of the Palestinian casualties were civilian non-combatants. See THE MEZAN CENTER FOR HUMAN RIGHTS, CAST LEAD OFFENSIVE IN NUMBERS STATISTICAL REPORT ON: PERSONS KILLED AND PROPERTY DAMAGED OR DESTROYED IN THE GAZA STRIP BY THE ISRAELI OCCUPATION FORCES DURING OPERATION CAST LEAD 7 (2009) available at <http://www.mezan.org/upload/8941.pdf> (last visited Aug. 2, 2012).

⁴⁵ S. C. Res. 1860, ¶ 5, U.N. Doc. S/RES/1860 (Jan. 8, 2009).

McDonnell Douglas manufactured the Apache helicopter until the company merged with Boeing in 1997. Boeing considers the Apache as the core of its military lineup along with the F-15 Eagle fighter and F/A- 18 Hornet.⁴⁶ Because sales within the United States to the Department of Defense have slowed, Boeing has increasingly looked overseas for buyers and markets. According to Steve Krause, the general manager for business development at Boeing's Information, Space and Defense System Group, "foreign sales of the Apache helicopter are critical to the future of the Apache program."⁴⁷

But in an effort to make money, Boeing may be exposing itself to serious international criminal liability as an accomplice to war crimes and crimes against humanity. In 2000, human rights groups in the US, including Human Rights Watch and Amnesty International, launched a campaign to suspend the sale of Apache helicopters to Israel because of the manner in which Israel's use of the helicopters constitute war crimes when they are used to attack Palestinian civilians.⁴⁸

4. Historical Roots of Imposing Individual Liability in International Law

In the past, the "law of nations" was deemed to apply only to nations; individuals and juridical persons (such as corporations) acted in a realm beyond the scope of international law. This principle has slowly evolved and increasingly individuals and corporations are being held to some international legal standards. In the United

⁴⁶ Steve Wilhelm, *Military Sales Slow Abroad*, BUSINESS JOURNAL, JAN 16, 1998, AT 2.

⁴⁷ *Id.*

⁴⁸ HUMAN RIGHTS WATCH, SUSPEND HELICOPTER SALES (2000).

States, for instance, legislators have codified individual responsibilities and obligations under international law. The Restatement (Third) of the Foreign Relations Law (1986) proclaims: "Individuals may be held liable for offenses against international law, such as piracy, war crimes and genocide."⁴⁹ Indeed, these three categories have, by definition, been viewed as crimes that implicate individual (not simply state) culpability.

This notion was first tested in the Nuremberg Trials of Nazi leaders and German industrialists. The tribunal addressed the basis for its jurisdiction in strong language that emphasized an individual moral duty implicit in international law. The tribunal rejected state action as a defense to crimes against humanity and war crimes, stressing the importance of individual morality:

"The very essence of the charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual states. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state if the state in authorizing actions moves outside its competence under international law."⁵⁰

Thus, the court categorically stated that international law imposes duties and obligations on individuals, not just states.

In *US v. Friedrich Flick*, the court emphasized its basis for individual jurisdiction by asserting that it is unsound to argue that international law is a matter wholly outside the work, interest, and knowledge of private individuals. International law, as such, binds every citizen just as does ordinary municipal law. Acts adjudged

⁴⁹ *Restatement (Third) pt. II, introductory note.*

⁵⁰ Judgment of the International Military Tribunal for the Trial of German Major War Criminals, Nuremberg, Sept. 30 & Oct. 1, 1946, Cmd. 6964; 41 AM. J. INT'L L. 172.

criminal when committed by an officer of the government are criminal also when committed by a private individual. The guilt only differs in magnitude, not in quality.⁵¹ This bold statement categorically declares that international law imposes duties and obligations on individuals, not just states. As a result of this new paradigm, Mr. Flick was charged as a war criminal because he was an industrialist who benefited from and supported the Nazi regime and took part in its gross human rights violations.

5. Corporations as Subjects of International Law

Human rights theory rejects efforts to limit duty holders to states or to state agents. The need for corporate responsibility stems from several realities in the modern, inter-dependent world. Steve Rattner contends that placing human rights obligations solely on states involves an out-moded manner of comprehending our world: "A system in which the state is the sole target of international legal obligations may not be sufficient to protect human rights."⁵² Corporations are powerful global actors for which some states lack the resources or will to control. Furthermore, other states solicit corporations to cooperate in impinging human rights. These realities make pure state reliance impractical.⁵³

⁵¹ *US v. Friedrich Flick, et al.*, V Trial of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 at 1187, 1192 (1946).

⁵² Steven Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 461 (2001).

⁵³ *See id.* for a more comprehensive and historical approach to human rights duties of non-state corporate actors. Increasingly, municipal courts have subjected corporations to liability for international human rights violations. *See Jordan J. Paust, Human Rights Responsibilities of Private Corporations*, 35 VAND. J. TRANSNAT'L L. 801 (2002); Scott Greathead, *The Multinational and the "New Stakeholder": Examining the Business Case for Human Rights*, 35 VAND. J. TRANSNAT'L L. 719 (2002).

The Nuremberg tribunal presented the earliest cases to prosecute company executives for human rights abuses. The framing of human rights and corporate responsibility has changed little since that time. In the 1940s and today, corporations are linked to the state through theories of corporate complicity. Corporate complicity suggests that transnational corporations (TNCs) are linked to human rights violated either through direct involvement or tacit support of government violations. Issues of passive involvement/complicity assume that the corporation has some ability to prevent abuses.⁵⁴ Sometimes corporations are not merely complicit, but are direct actors. International law and American law under the Alien Tort Claims Act has not fully addressed issues of liability for direct action.

It is unclear whether TNCs are legally bound to respect human rights as put forth in international treaties, such as the Universal Declaration of Human Rights, because human rights covenants are instruments of international law that bind ratifying governments, not non-state actors. Human rights law assigns the regulation of non-state actors to governments that may, in turn, regulate corporations as private actors.⁵⁵ However, the Rome Statute explicitly opens the field of juridical persons subject to its jurisdiction. In so doing, it places an obligation on TNCs to respect human rights,

⁵⁴ Barbara Frey, *The Legal and Ethical Responsibilities of Transnational Corporations in the Protection of International Human Rights*, 6 MINN. J. GLOBAL TRADE 153, 183 (1997). Because the way corporations manage their affairs and business can have implications for international law, corporate governance is emerging as an international legal concern. See Timothy L. Fort, *Corporate Governance in a Global Environment: The Search for the Best of All Worlds*, 33 VAND. J. TRANSNAT'L L. 829 (2000); Timothy L. Fort & Cindy A. Schipani, *Corporate Governance and Sustainable Peace: Intra-Organizational Dimensions of Business Behavior and Reduced Levels of Violence*, 36 VAND. J. TRANSNAT'L L. 367 (2003); Tara J. Radin, *700 Families to Feed: The Challenge of Corporate Citizenship*, 36 VAND. J. TRANSNAT'L L. 619 (2003).

⁵⁵ Frey *supra* note 52, at 163.

or at least to refrain from involvement in serious breaches of international humanitarian law and/or international criminal law. Unlike previous ad-hoc international criminal tribunals like the International Criminal Tribunal for Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ITCR), the ICC has clear jurisdiction over crimes of aggression, war crimes, crimes against humanity, and genocide. The Rome Statute provides international jurisdiction and places legal ramifications on non-state parties who take part in serious crimes that violate IHL.⁵⁶ In many ways, international criminal law has come full circle back to the Nuremberg cases by asserting that an individual has duties under international law with regards to serious and extreme human rights violations.

⁵⁶ A growing body of scholarship explores this idea in more detail, see Jonathan Clough, *Punishing the Parent: Corporate Criminal Complicity in Human Rights Abuses*, 33 BROOK. J. INT'L L. 899 (2008); David Scheffer, *The Growing Relevance and Enforceability of Corporate Human Rights Responsibility*, 6 NW. U. J. INT'L HUM. RTS. 218 (2008); Anna Triponel, *Business & Human Rights Law: Diverging Trends in the United States and France*, 23 AM. U. INT'L L.R. 855 (2008); Markus D. Dubber, *Criminalizing Complicity*, 5 J. INT'L CRIM. JUST. 977 (2007); Eric Engle, *Extraterritorial Corporate Criminal Liability: A Remedy for Human Rights Violations?*, 20 ST. JOHN'S J. LEGAL COMMENT 287 (2007); Geraldine Szott Moohr, *Why Punish? Of Bad Apples and Bad Trees: Considering Fault-Based Liability for the Complicit Corporation*, 44 AM. CRIM. L.R. 1343 (2007); Michael S. Moore, *Causing, Aiding, and the Superfluity of Accomplice Liability*, 156 U.P.A. L.R. 395 (2007); Lillian Aponte Miranda, *The U'wa and Occidental Petroleum: Searching for Corporate Accountability in Violations of Indigenous Land Rights*, 31 AM. INDIAN L.R. 651 (2006); Sandra Coliver, *Holding Human Rights Violators Accountable by using International Law in U.S. Courts: Advocacy Efforts and Complementary Strategies*, 19 EMORY INT'L L. REV. 169 (2005); Zaha Hassan, *"When Caterpillars Kill": Holding U.S. Corporations Accountable for Knowingly Selling Equipment to Countries for the Commission of Human Rights Abuses Abroad*, 6 SAN DIEGO INT'L L.J. 341 (2005); Kyle Rex Jacobson, *Doing Business with the Devil: The Challenges of Prosecuting Corporate Officials whose Business Transactions Facilitate War Crimes and Crimes Against Humanity*, 56 A.F. L.R. 167 (2005); Tarek F. Maassarani, *Four Counts of Corporate Complicity: Alternative Forms of Accomplice Liability under the Alien Torts Claims Act*, 38 N.Y.U. J. INT'L L. & POL. 39 (2005); and Andrew Clapham, *Categories of Corporate Complicity in Human Rights Abuses*, 24 HASTINGS INT'L & COMP. L.R. 339 (2001).

6. Nuremberg Theories of Accomplice Liability

International law, including the Nuremberg Charter, recognizes the doctrine of complicity. In fact, the Nuremberg Charter imposed criminal liability on individuals who aided and abetted the Nazi regime.⁵⁷ The Nuremberg Charter limited jurisdictions to natural persons, not juridical persons or corporations.⁵⁸ Recognizing this, several industrialists were charged as war criminals based on the actions of their companies as a whole. Their eventual convictions were based, in part, on the principle that the so-called neutral position and amoral positions their companies proclaimed during the war amounted to corporate complicity with the crimes committed by the Nazi regime.⁵⁹ Thus, people and companies that aid and abet in the commission of international crimes risk criminal liability as accomplices to the principal actors.

In the Zyklon B and Krauch cases, the defendants were found guilty of war crimes and crimes against humanity as accomplices to the crimes of the Nazi regime. In the Zyklon B case, German manufacturers were convicted of supplying poisonous gas to Nazi concentration camps.⁶⁰ The conviction rested on the industrialist's knowledge of the purpose for which their product was to be used. Similarly, in *United States v. Krauch*,⁶¹ pharmaceutical industrialists were convicted because they knowingly supplied experimen-

⁵⁷ Thomas Michael McDonnell, *Cluster Bombs over Kosovo: A Violation of International Law?*, 44 ARIZ. L. R. 31, 103 (2002).

⁵⁸ Charter of the International Military Tribunal, annexed to Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, Article 6.

⁵⁹ Beth Steven, *The Amorality of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT'L L. 45, 60 (2002).

⁶⁰ The Zyklon B Case, 1 Law Reports of Trials of War Criminals 93 (Brit. Mil. Ct. 1946).

⁶¹ *US v. Krauch*, 8 Trials of War Criminals, 1081, 1169-72 (1952).

tal vaccines to the Nazis. The company's conviction rested on the knowledge that the medicines would be used in illegal medical experiments on people in concentration camps.

The Farben case represents a unique moment in the Nuremberg Tribunals because twenty-three employees of the chemical and pharmaceutical plant were convicted of war crimes based on the company's own actions rather than on theories of complicity.⁶² This marked the first time a court attempted to impose liability on a group of people who were collectively in charge of a company.⁶³ In the I.G. Farben trial, employees were convicted as war criminals for violating international law's prohibitions against pillage, plunder, and (for five of the directors) slave labor. It is here that we see a company violating IHL and being held accountable for such violations. The military tribunal based its findings on the role of Farben as a corporate entity. Thus, the company was deemed the instrumentality through which individual actors were able to collectively engage in criminal acts.⁶⁴ At the same time, this prosecution is not completely unique because the company was held accountable indirectly through prosecution of its top executives. Similarly, in the US prosecution of the Krupp Firm for war crimes and crimes against humanity, grounded in the use of forced labor and the plunder of civilian property, the military tribunal sentenced twelve of the industrialists at the head of that firm with war crimes and crimes against humanity based on the actions of the company as the prime actor and perpetrator of the crimes.⁶⁵

⁶² The I.G. Farben Trial, US Military Tribunal, Nuremberg, Aug. 14, 1947-July 29, 1948, 8 *Trials of War Criminals Before the Nuremberg Military Tribunals* 1108, 1140 (1948).

⁶³ Anita Ramasastry, *Corporate Complicity: From Nuremberg to Rangoon, an Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations*, 20 *BERKELEY J. INT'L L.* 91, 99 (2002).

⁶⁴ *Id.*

⁶⁵ *US v. Krupp*, IX *Trials of War Criminals* at 1436 (1952).

Thus, a general theme emerges from the Nuremberg Trials. Companies are examined for their role in violations of the law of war. In these circumstances, the industrialists were not deemed war criminals because of individual acts, but rather because their acts arose out of the behavior and actions of their companies. More importantly, the tribunal found that the defendants' knowledge of how their products would be used strongly supported the convictions. Such knowledge stood as an essential element in assessing whether or not an industrialist could be deemed an accomplice to war crimes or crimes against humanity.

7. More Expansive Theories of Corporate Complicity and Accomplice Liability

In pursuit of profits and economic gain German industrialists partnered with the repressive Nazi regime. Similarly, today companies partner with repressive governments in the interest of profits and if increasing shareholder value. This is most notable in extraction industries where the immutability of geography is a determinant for these relationships.⁶⁶ At times this means it is almost impossible for companies to operate without becoming complicit in human rights abuses. A theory of corporate complicity that views companies as responsible for a state's human rights violations has been argued in U.S. courts in *Royal Dutch Shell v. Wiwa*, *John Doe v. Union Oil Company of California (Unocal I)*, and *John Doe v. Union Oil Company of California (Unocal II)*.

⁶⁶ See Caroline Kaeb, *Emerging Issues of Human Rights Responsibility in the Extractive and Manufacturing Industries: Patterns and Liability Risks*, 6 NW. U. J. INT'L HUM. RTS. 327 (2008).

Unocal I⁶⁷ and Unocal II⁶⁸ are the most significant and advanced cases involving state action.⁶⁹ In these case, the court clarified and expanded upon principles previously touched upon. In 1991, Unocal (an American oil company⁷⁰) and Total S.A. (a French oil concern) entered into an agreement with Burma/Myanmar's State Law and Order Restoration Council (SLORC), the repressive military government in control at the time,⁷¹ regarding the Yadana oil and gas fields.⁷² SLORC's job was to clear the pipeline route and provide security. Plaintiffs assert that defendants knew or should have known that SLORC had a history of human rights abuses that violate customary human rights law.

In Unocal I, the plaintiffs, Burmese nationals, brought an Alien Tort Claims Act (ATCA) claim against the government of Burma, Unocal and Total for grave human rights violations, including forced labor and torture. The Burmese government and Myanmar Oil and Gas Enterprise (MOGE), a state-owned oil enterprise of Myanmar, were dismissed under the Foreign Sovereign Immunities Act, thus leaving plaintiffs to push their claim against Unocal. The court had to wrestle with whether under the ATCA the plaintiffs could bring their claims against a private actor, like Unocal, or did ACTA's scope restrict actions to states/state actors only.

In finding that the statute did permit suits against private actors,

⁶⁷ John Doe I v. Unocal Corp, 963 F.Supp. 880, 891-2 (DC Cent. Dist. of California, 1997) (hereinafter Unocal I).

⁶⁸ John Doe I v. Unocal Corp, 110 F.Supp.2d. 1294, 1306 (CD Cal 2000) (hereinafter Unocal II), and John Doe I v. Unocal Corp. 395 F.3d 932 (2002)

⁶⁹ RALPH STEINHARDT, LITIGATING CORPORATE RESPONSIBILITY *available at* <http://www.globaldimensions.net/articles/cr/steinhardt.html> (last visited Aug. 27, 2012).

⁷⁰ On August 10, 2005, Unocal merged with Chevron Corporation and became a wholly owned subsidiary and has now ceased operations as an independent company.

⁷¹ This military junta changed its name to the State Peace and Development Council (SPDC) in 1997.

⁷² The fields are located about 37 miles off the coast.

the court articulated two separate circumstances where a private actor may bear international responsibility for breaches of IHL. The first circumstance exists when an individual commits a class of wrongs defined by treaty or custom as not requiring state action to be wrongful. The court reasoned that forced labor is analogous to slavery, and because slavery warrants individual liability if proven, it follows that forced labor will similarly carry individual liability if proven. As the court explained, a plaintiff does not need to ground their claims in state action if they can prove allegations of forced labor at the hands of private individuals. This analysis follows the *Kadic* court, which ruled that state action is not necessary when one alleges a violation of the law of nations as long as the definition of the law allegedly violated does not require state action.⁷³

The second circumstance allows a court to impose corporate liability if a “joint action” test is satisfied. Under the test, a private actor can be liable for violations of IHL if the offensive conduct is infused with state action. Thus the action is wrong by virtue of the actor’s relationship with the state. The court suggested that if a corporation knows that a foreign government violates international law and the corporation accordingly reaps benefits flowing from the violation, the corporation may be held liable for the violation.

Joint action may also be proved by conspiracy, if both co-conspirators shared the same goal. In this sense, even though *Unocal*

⁷³ *Kadic v. Karadžić*, 70 F.3d. 232, 245 (2d Cir. 1995). Thus the issue of state-action in the *Kadic* case is relevant to discern the legal difference between two different kinds of torture. Extrajudicial killings that involved torture need state action pursuant to the definition of extrajudicial killings, whereas state action is not an element of torture, when committed in the context of genocide, because genocide in general does not require state action. Rape, torture, and summary execution “when not perpetrated in the course of genocide or war crimes—are proscribed by international law only when committed by state officials under color of law.” *Id.*

knew (or should have known) that the military committed, would commit, and was committing human rights violations, the only shared goal was a profitable project, not deprivation of rights. According to the court, Unocal did not share the same common goal as the military and cannot be held responsible under this theory for lack of an intent to commit a violation of IHL.

In *Wiwa I v. Royal Dutch Shell*⁷⁴ and *Wiwa II v. Royal Dutch Shell*,⁷⁵ Nigerians from the Ogoni region alleged that Royal Dutch/Shell (hereinafter Shell) directly or indirectly participated in grave human rights violations carried out by the Nigerian government and military so as to secure oil production facilities. Plaintiffs argued that although the abuses were carried out by the Nigerian government and military, they were instigated, orchestrated, planned and facilitated by Shell Nigeria. Shell provided money, weapons and logistical support, including vehicles and ammunition, for use by the military when it raided villages.⁷⁶

Unlike the Unocal case, which was based on corporate complicity, this case more closely resembles that of *Farben* because it included allegations of direct corporate involvement in human rights abuses. Perhaps because of this key difference, the court here was more willing than the Unocal court to examine whether liability could rest in state action under a joint action theory.⁷⁷ The *Wiwa II*

⁷⁴ *Wiwa I v. Royal Dutch Shell*, 226 F.3d 88 (2000) (hereinafter *Wiwa I*)

⁷⁵ *Wiwa II v. Royal Dutch Shell*, 2002 US Dist. Lexis 3293 (hereinafter *Wiwa II*)

⁷⁶ Craig Forcese, *ATCA's Achilles Heel: Corporate Complicity, International Law and the Alien Tort Claims Act*, 26 *YALE INT'L L.* 487, 490 (2001). See also Richard L. Herz, *The Liberalizing Effects of Tort: How Corporate Complicity Liability under the Alien Tort Statute Advances Constructive Engagement*, 21 *HARV. HUM. RTS. J.* 207 (2008).

⁷⁷ See also Ariadne Sacharoff, *Multinationals in Host Countries: Can they be Held Liable Under the Alien Tort Claims Act for Human Rights Violations?*, 23 *BROOKLYN J. INT'L L.* 927, 963 (1998) (arguing that Shell had taken on a state function and should have been held liable as a de-facto state).

court did not follow Unocal's high standard of proximate cause liability. Rather, it clarified that joint action does not mean one acts in concert with the Nigerian government, but more simply put, there must be a substantial degree of cooperation between corporate defendants and the Nigerian government. Because the corporate defendants had knowledge that their subsidiary, Shell Nigeria, engaged in significant cooperative action that led to the deprivation of rights, the defendants could be held liable for harms. Furthermore, unlike the Unocal case, here there is proof that the corporation participated in or influenced the military's unlawful conduct.

In both the Shell and Unocal cases, the court applied a negligence standard of knowledge. The central inquiry rested on whether the company knew, or should it have known, that the state was committing human rights violations on its behalf. In the present analysis of Boeing, the question of knowledge is equally important to establish the proper mens rea for accomplice liability under the Rome Statute. However, in Boeing's situation, it is also more easily answered than in the cases that faced the US courts. It is impossible for Boeing not to know Israel uses its Apache helicopters in a manner that violates IHL and international criminal law. Israel's use is highly publicized in the mainstream media by American, European, Israeli, and Palestinian sources. Thus, much like the makers of Zyklon B knew their products were used to kill people in concentration camps in violation of international laws, the makers of Apache helicopters know that their product is used to kill civilians and occupy territory by means that are deemed illegal under international law.

8. International Regulation of the Arms Trade in Conventional Weapons

Although there are well established treaties on missiles and biological and chemical weapons, there are few restraints on conven-

tional weaponry. Despite this neglect, the Protocol I provides some guidance. It prohibits methods of warfare that inflict unnecessary suffering on civilians or combatants. The Protocol goes so far as to say that the right of a party engaged in an armed conflict is limited as to the method or means by which it will conduct its warfare. It is illegal to use weapons that cause superfluous injury and unnecessary suffering. This has been interpreted to mean that any use of force should be relevant and proportional, i.e. not excessive. Weapons must be used in an appropriate manner during war, and that manner involves using a weapon for the purpose for which it was made.⁷⁸

According to Human Rights Watch,

“weapons appropriate to some situations can be used in ways that constitute illegal and excessive use of force when used in ways or for purposes for which they were not intended.”⁷⁹

Israel’s use of Apache helicopters does not meet the standards of proportionality and propriety outlined in the Protocol I. According to Boeing’s literature on the helicopter, “the chief function is to take out heavily armored ground targets, such as tanks and bunkers.” However, Israel uses these helicopters on civilian targets, not armored cars or bunkers. There are numerous reports of these weapons being used against civilian populations in the street and in their homes.

⁷⁸ McDonnell *supra* note 42, at 67.

⁷⁹ HUMAN RIGHTS WATCH ISRAEL, THE OCCUPIED WEST BANK AND GAZA STRIP, AND THE PALESTINIAN AUTHORITY TERRITORIES: INVESTIGATION INTO THE UNLAWFUL USE OF FORCE IN THE WEST BANK, GAZA STRIP, AND NORTHERN ISRAEL SECTION IV (2000).

9. Boeing Fulfills the Legal Requirements for Accomplice Liability Under the Rome Statute: The Mens Rea and Actus Reus of the Rome Statute

Corporate defendants are included in the ICC definition of a juridical person. Andrew Clapham admonishes opponents of that position by explaining that the lack of ICC jurisdiction over legal persons for war crimes should not mislead one into thinking that the laws of war and international human rights do not apply to companies.⁸⁰ Thus, the central question becomes how to hold corporations criminally responsible for violations of international law.

Countries approach corporate criminal responsibility differently. But the various international tribunals may offer a better approach. The Nuremberg tribunal, the International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) bound individuals and corporations with international criminal responsibility. As discussed above, the Nuremberg tribunal required a finding of knowledge as the central element to convictions grounded in a finding of corporate complicity and accomplice liability. The adoption of the ICTY Statute in 1993 was the first time that support for accomplice liability had been codified since the military courts of World War II.⁸¹ Similarly, the ICTR further developed international law's definition of aiding and abetting. It held that the actus reus for accomplice liability was "practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime." The mens

⁸⁰ Andrew Clapham, *The Question of Jurisdiction Under International Criminal Law Over Legal Persons: Lessons from the Rome Conference on International Criminal Court*, in *LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW* AT 178 (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000).

⁸¹ Mirjan Damaska, *The Shadow Side of Command Responsibility*, 49 *AM. J. COMP. L.* 445, 486 (2001).

rea for an accomplice was “knowledge that his actions [would] assist the perpetrator in the commission of the crime.” Under the ICTR rules, an accomplice need not intend to commit the crime or have knowledge of the exact crime to be committed. For instance, in *Prosecutor v. Akayesu*,⁸² the tribunal held that an accomplice’s indifference or apathy about the principal’s acts will have no mitigating effect on whether one is found to have aided in a criminal violation. Importantly, an accomplice can be tried even if the principal actor is not tried. According to Beth Stevens, this means that a party who knows of state actor’s criminal purpose and actions, yet still voluntarily aids in it, can be convicted of complicity even though they may later regret having assisted in the crime.⁸³

It is important to note that when assessing accomplice liability for crimes against humanity and war crimes, neither the ICTY, the ICTR, nor the Nuremberg trials focused on the importance of state action as an element of the crime. Although state action can be deemed an element of the crime, a party does not need to be a state to bear some responsibility for international crimes. At Nuremberg and in the proceedings of the ICTR, state action is implicit within the standards for assessing whether there is criminal liability. None of the tribunals deal with whether or not an individual can be held responsible for IHL violations in the absence of state action. Although this is an interesting theoretical query, it is not important to our discussion of Boeing as suppliers of Apache helicopters to Israel because Israel is a state actor and thus, lack of state action issues are not implicated.

The drafters of the Rome Statute continued to define accom-

⁸² *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, Sept. 2 1998.

⁸³ Steven *supra* note 57, at 60.

pllice liability where the ICTR and ICTY stopped short. Defining the necessary actus reus, Article 25(3)(c) state that

“in accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person ... for the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission.”

Article 25(3)(d) expands on this statement by describing the parameters of accomplice liability:

[If someone] [i]n any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose such contribution shall be intentional and shall either:

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

Subsection (d) invokes a mens rea that involves an intent or knowledge of the principle’s intent. For subsection (c), the actus reus is clearly to facilitate, aid, abet or assist in the commission of a crime. This broad provision makes it possible to hold Boeing responsible under d(ii) because the company knows that the helicopters will be used in a way that violates the Geneva Convention.

Article 30 provides the corresponding elements of the mens rea:

- (1) Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
- (2) For the purposes of this article, a person has intent where:

- (a) In relation to conduct, that person means to engage in the conduct;
 - (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
- (3) For the purposes of this article, “knowledge” means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. “Know” and “knowingly” shall be construed accordingly.

Here Boeing meets the mens rea for the crime of accomplice liability under the first test of intent (meaningful engagement in the conduct that violates international law) because the company has engaged in arms sales with Israel.⁸⁴ Such sales are neither accidental nor do they take place in obscurity on the black market. In fact, the US State Department has implemented a series of procedures through which an American company’s foreign arms sales are licensed. In some circumstances, the US government buys weapons and then re-sells them to Israel or the US government leases the arms to Israel,⁸⁵ but no publicly available documents suggest that Apache helicopters are sold to Israel by these non-direct means. Accordingly, Boeing’s direct sales to Israel constitute an intent to sell.

Furthermore, the mens rea is fulfilled under the second test for intent; the company is aware of what will occur in the ordinary course of events. The way in which Israel uses Apache helicopters

⁸⁴ For more detailed discussion of the parameters of mens rea, see generally Candace Courteau, *The Mental Element Required for Accomplice Liability*, 59 LA. L.R. 325 (1998) and Grace E. Mueller Southern, *The Mens Rea of Accomplice Liability*, 61 S. CAL. L.R. 2169 (1998).

⁸⁵ Sean D. Murphy, *Contemporary Practices of the United States Relating to International Law*, 95 AM. J. INT’L L. 873, 902 (2001).

in violation of international laws is well documented and highly publicized. Although Israel engages in legitimate use of the Apache helicopters, it is also confirmed that Israel's use of Apaches *in the Occupied Territories* violates international law. Clearly, there is knowledge that serious consequences flow from Boeing's sales of Apache helicopters to Israel.

10. Conclusion

Corporate apathy has a price. In the economic drive to make money, corporations are stumbling over international laws that aim to keep severe humanitarian crimes at bay by making private violators responsible. Corporations do not have an affirmative duty to prevent violations of IHL, but they have a duty to refrain from acting in a way that violates international criminal law and international humanitarian law. Thus, non-state actors like corporations can be held liable for violations of international criminal law and IHL when they are complicit in abuses and when they directly commit abuses. Furthermore, private actors violate international laws when they are complicit in the acts of a state that violate international law.

Although Boeing may not be the principal perpetrator of human rights violations against the Palestinian people, Boeing knows that its equipment is being used in a manner that violates IHL and international criminal law. With such knowledge comes the great responsibility to prevent tragedy, and when that responsibility is shirked, a company must be called to account as an accomplice to war crimes and crimes against humanity. Under the Rome Statute of the ICC the Boeing Company, possessing both the *actus reus* and the *mens rea*, may be held accountable for war crimes and crimes against humanity as an accomplice, even if the principal actor, Israel, evades it.