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*Te Whare Wānanga
o te Ūpoko o te Ika a Māui*



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Te Kauhanganui Tātai Ture

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INTEGRATING RESPONSES TO VIOLATORS AND CORPORATE ACCOMPLICES: A ROLE FOR THE SECURITY COUNCIL?

*Shireen Daft**

There is a long history of corporate involvement in the large-scale atrocities that the world has witnessed. This trend has only increased as globalisation has spread and conflicts have become increasingly economically driven. Thus access to international markets and relationships with private business have become more important than ever to the world's worst human rights violators. Most discussions of corporate accountability treat corporate complicity exclusively within a broader framework of corporate behaviour. This paper takes an alternative approach. It analyses the potential of international law to address corporate complicity within frameworks that target the primary perpetrator, in this case via the actions of the Security Council.

I INTRODUCTION

There is a long history of corporate involvement in the large-scale atrocities that the world has witnessed. During World War II, IBM provided data management that ensured that the Holocaust would run smoothly, while the Deutsche Bank has admitted that its Polish branch knowingly financed the construction of the Auschwitz crematoria.¹ Both during the Holocaust² and as alleged

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1 See generally Beth Stephens "The Amoral of Profit: Transnational Corporations and Human Rights" (2002) 20 Berkeley J Int'l L 45; and International Council on Human Rights Policy *Beyond Voluntarism: Human rights and the developing international legal obligations of companies* (International Council on Human Rights Policy, Versoix, 2002) at 126.

2 See for example John Betton and Thomas J Hench "'Any Color as Long as It's Black': Henry Ford and the Ethics of Business" (2002) 4 Journal of Genocide Research 533; and Benjamin B Ferencz *Less than Slaves: Jewish Forced Labor and the Quest for Compensation* (Indiana University Press, Bloomington, 2002).

more recently in Burma,³ companies used forced labour supplied by repressive regimes. In Rwanda, coffee companies were accused of storing weapons used in the 1994 genocide. Both Pol Pot and Charles Taylor used the global market to export timber to finance their regimes, while diamonds fuelled the regimes in Sierra Leone and Angola. Oil continues to finance the human rights violations in the Sudan. Zyklon B and Agent Orange were both produced by private companies, as were the chemical components of mustard gas employed by Saddam Hussein's regime against the Kurdish people.⁴ Some corporations have relied on local militaries with notorious human rights records for the protection of their facilities and staff, while yet others have provided these same militaries with logistical support.⁵ Moreover, there is a recognised trend that conflict is increasingly economically driven, with "[g]reed ... at the heart of some of the world's worst tragedies."⁶ Thus access to international markets and relationships with private business have become more important than ever to the world's worst human rights violators. The emphasis in this paper will be on corporate complicity in situations of gross and systematic violation of human rights, because this is where both the need and the will are the greatest.

Cicero once commented "the sinews of war, infinite treasure",⁷ and this maxim has been given new meaning in the modern theatre of human rights abuse. As demonstrated by the examples given above, resources can be the key to systematic violations of human rights – either as the reason for the violence or as the means of sustaining human rights violations. Given the increasing monopoly that corporations, especially transnational corporations (TNCs),⁸ hold over these resources and world trade in general, the role of business is clearly crucial in how human rights violations unfold.⁹ The effect of globalisation has only heightened the interconnectivity between human rights

3 See for example *Doe v Unocal* 395 F 3d 932 (9th Cir 2002) at 950, which was ultimately settled out of court.

4 *The Netherlands v Frans van Anraat* Hof Gravenhage 9 May 2007, LJN: BA4676.

5 As alleged for example in *Presbyterian Church of Sudan v Talisman Energy Inc* 453 F Supp 2d 633 (SD NY, 2006) [*Talisman 2006*].

6 Diane Marie Amann "Capital Punishment: Corporate Criminal Liability for Gross Violations of Human Rights" (2001) 24 *Hastings Int'l & Comp L Rev* 327 at 336.

7 Marcus Tullius Cicero *Philippics* (translated ed: Walter CA Kerr (translator) Cicero *Philippics* (Harvard University Press, Cambridge (Mass), 1926)) at Oratio 5 Section 5.

8 According to David Weissbrodt, transnational corporations (TNCs) hold 90 per cent of the world's technology and are involved in at least 70 per cent of world trade. The top one thousand TNCs account for 80 per cent of the world's industrial output: see David Weissbrodt "Business and Human Rights" (2005) 74 *U Cin L Rev* 55 at 58–59.

9 See for example Statement of United Nations Secretary-General Kofi Annan as cited in United Nations Office of the Global Compact *Enabling Economies of Peace: Public Policy for Conflict-Sensitive Business* (New York, April 2005) at 4.

violations and business. The three keystones of economic globalisation (economic deregulation, privatisation and trade liberalisation) all have the potential to greatly enhance the lives of individuals. However, they have also created unprecedented opportunities to abuse human rights for warlords, governments and non-state actors, including businesses.¹⁰ Globalisation tends to distance economic actors from the environment affected by their operations, especially given the nature of "arm's-length" market exchanges.¹¹ Being removed from the human face of rights violations makes it much easier to claim neutrality or, as Beth Stephens puts it, to claim "the amorality of profit".¹²

Most discussion of corporate accountability treats corporate complicity exclusively within a broader framework of corporate behaviour. This paper takes an alternative approach. It analyses the potential of international law to address corporate complicity within frameworks that target the primary perpetrator, primarily the host state. There are a number of reasons to distinguish corporate complicity from other forms of corporate accountability. Corporate complicity is based on notions of responsibility derived from domestic and international criminal law jurisprudence. This is significant because while an accomplice can be tried without a principal perpetrator being convicted or even identified,¹³ the forums in which primary actors and accomplices are brought to account will almost always be the same.¹⁴ Such an approach will be referred to here as a "complementary approach", as it views corporate actors within the broader context of a situation, rather than in an isolated framework specific only to corporate actors.

There are three main rationales behind the adoption of such an approach. The first is that it is in accordance with the rule of law. Law should be predictable and consistent.¹⁵ Applying different standards and enforcing international human rights law under different mechanisms for states and corporations will make adhering to these principles difficult. On the other hand, a complementary approach will provide consistency in the law and could help reduce the concerns of corporations worried that corporate responsibility is a replacement for state responsibility.¹⁶ Moreover, attempts to redress situations of massive human suffering will best be served by comprehensive approaches

10 See for example Rebecca M Bratspies "'Organs of Society': A Plea for Human Rights Accountability for Transnational Enterprises and Other Business Entities" (2005) 13 Mich St J Int L 9 at 9–10.

11 John Gerard Ruggie "Current Development: Business and Human Rights: The Evolving International Agenda" (2007) 101 Am J Int'l L 819 at 824.

12 Stephens, above n 1, at 45.

13 See Andrew Clapham and Scott Jerbi "Categories of Corporate Complicity in Human Rights Abuses" (2001) 24 Hastings Int'l & Comp L Rev 339 at 342.

14 The same criminal code and/or body of doctrine will be applied and the same jurisdictional court will be used to try both parties. Discussed below in Part II on Corporate Complicity.

15 See for example Lon L Fuller *The Morality of Law* (Yale University Press, New Haven, 1964).

16 See for example Clapham and Jerbi, above n 13, at 339.

that acknowledge all facets of a situation, including the adverse effects of corporate activity. Given the diversity of potential acts that can constitute corporate complicity, this approach thus creates the opportunity to address the issue in a context-specific manner.

The second reason is that one of the major issues in addressing corporate regulation in home states is a lack of political will – states are both unwilling to impede the economic activities of their own businesses, and equally reluctant to be seen to be interfering in the affairs of other states. However, in regard to gross violations of human rights, there is increasing recognition that the international community has a responsibility to protect against such atrocities.¹⁷ While this responsibility will still be subject to limitations and lingering political concerns, applying a complementary approach that addresses not only the primary acts of abuse, but also the activities of corporations which facilitate the behaviour, could provide an added impetus for home states to act and to comply with international initiatives.

Finally, there are already mechanisms in place which are designed to address the state as a perpetrator of human rights or gross humanitarian violations. This paper will analyse one particular international institution (the United Nations Security Council), but there are many other institutions which could equally adapt their responses to situations involving states in order to incorporate corporate complicity. Introducing new international instruments can be a long drawn out process and has proven a particular challenge in relation to the regulation of corporations. Therefore utilising what is already in place offers a more practical and expedient solution to the problem of corporate complicity. However, while this paper endorses a move towards a complementary approach to address complicity, it exposes problems specific to the Security Council context. It demonstrates that the political considerations of the Council introduce a new set of variables, with the result that complicity becomes even more complex.

In light of the above discussion, this paper will explore the role of the international community in holding corporations accountable for complicity in the systematic violation of human rights. It will do so by means of an analysis of one of the major international institutions, the Security Council, and its efforts and relevance to corporate complicity. There are broader lessons to be learnt from this analysis that can be applied more widely to efforts to restrain corporate complicity. Before analysing the potential role of the Security Council, it is essential to first develop an understanding of what corporate complicity is and the existing international standards.

II CORPORATE COMPLICITY

Put simply, corporate complicity "refers to indirect involvement by companies in human rights abuses – where the actual harm is committed by another party, including governments and non-State

¹⁷ Discussed in more detail below in Part II, Section E.

actors."¹⁸ Corporate complicity is not a new concept at the international level. While the Nuremberg Military Tribunals did not have jurisdiction over legal persons, a number of industrialists were found guilty of a range of human rights abuses, including complicity in aggression.¹⁹ In *United States v Krauch* the United States Military Tribunal at Nuremberg acknowledged that the Corporation itself was integral to the commission of the crimes concerned:²⁰

While the Farben organization, as a corporation, is not charged under the indictment with committing a crime and is not the subject of prosecution in this case, it is the theory of the prosecution that the defendants individually and collectively used the Farben organization as an instrument by and through which they committed the crimes enumerated ...

While the focus of international human rights law has been the actions of the states, it has long been recognised that non-state actors, including corporations, have a duty to refrain from assisting states in the commission of human rights violations:²¹

The existing legal regime has an irrefutable policy justification: if international law is to be effective in protecting human rights, everyone must be prohibited from assisting governments in violating those principles.

A The Legal Standard for Corporate Complicity

It has been accepted by international fora, national courts and academics alike, that aiding and abetting liability "is a specifically defined norm of international character" that is an appropriate test for analysing corporations complicit in human rights violations.²²

The international criminal law standard for aiding and abetting has been derived from the decision of the Trial Chamber of the International Criminal Tribunal for Former Yugoslavia in

18 United Nations Human Rights Council *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 (2008) at [73].

19 See for example *United States v Krauch* in Vol VIII *Trials of War Criminals Before the Nuremberg Military Tribunals under Central Council Law No 10 Nuernberg, October 1946 – April 1949* (US Govt Print Off, Washington DC, 1952).

20 At 1108.

21 See Andrew Clapham *Human Rights Obligations of Non-State Actors* (Oxford University Press, Oxford, 2006) at 80. See also EarthRights International *The International Law Standard for Corporate Aiding and Abetting Liability* (presented to the United Nations Special Representative to the Secretary General on Human Rights and Transnational Corporations and other Business Enterprises, July 2006).

22 *Talisman 2006*, above n 5, at 668.

Prosecutor v Furundzija.²³ This decision was based on an expansive exploration of existing standards of aiding and abetting in international case law and other international instruments. The Trial Chamber case held that:²⁴

... the legal ingredients of aiding and abetting in international criminal law [are] the following: the actus reus consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime. The mens rea required is the knowledge that these acts assist the commission of the offence.

This standard has been applied in the context of corporate complicity in the decision of the United States Court of Appeal in *Doe v Unocal*.²⁵ *Unocal* was decided under the now well-known Alien Tort Claims Act.²⁶ At issue were allegations of the use of forced labour, murder, rape and torture related to the construction of the Yadana gas pipeline project. In that case, the standard is simplified to "knowing practical assistance or encouragement that has a substantial effect on the perpetration of the crime".²⁷ Interestingly, there was a shift between *Furundzija* and *Unocal* in the standard of aiding and abetting applied. In *Furundzija*, it was held that the mens rea requirement could be satisfied even if the accomplice did not know the precise crime that was going to be committed, but only that "one of a number of crimes would probably be committed".²⁸ However, in the *Unocal* decision this approach was taken one step further and the test applied was what Unocal knew or should have known.²⁹

According to international criminal law, the standard of knowledge is stricter in relation to the crimes of persecution and genocide. In those instances, the complicit actors must not only have knowledge of the crimes that they are facilitating, but must also be aware that the crimes are being

²³ *Prosecutor v Furundzija (Judgment)* ICTY Trial Chamber IT-95-17/1-T, 10 December 1998.

²⁴ At [249].

²⁵ *Unocal*, above n 3, at 950. This decision was vacated upon the parties reaching final settlement in January 2006.

²⁶ Alien Tort Claims Act 28 USC § 1350 (US).

²⁷ *Unocal*, above n 3, at 951.

²⁸ *Furundzija*, above n 23, at [246].

²⁹ *Unocal*, above n 3, at 951.

committed with a discriminatory intent. However, as with the general standard, complicity does not require the abettor to share this intent.³⁰

The standard adopted in *Unocal* is increasingly being treated as the international legal standard for corporate complicity, despite the fact that the decision was vacated when the parties reached a final settlement in January 2006. This standard has been applied in *Presbyterian Church of Sudan v Talisman Energy Inc (Talisman 2005)*.³¹ This case concerns allegations of the oil company's involvement in human rights abuses surrounding the company's oil concessions in Sudan. These abuses included acts of genocide, torture, rape and massive civilian displacement. The company is said to have assisted the Sudanese military by upgrading the airstrips used by the military, payment of royalties and providing general logistical support to the military, amongst other assertions.³²

Nevertheless, the most recent decisions in the Talisman litigation have proven to be problematic. In 2006, although the Court endorsed the international standard developed in *Furundzija* and other international decisions, it proceeded to outline a test that included showing "that the defendant acted with the intent to assist that violation, that is, the defendant specifically directed his acts to assist in the specific violation".³³ The Court of Appeals upheld this decision in 2009.³⁴ As the Plaintiff's Appeal Brief points out, this requirement of "intent" is at odds with the established international law on aiding and abetting.³⁵ As explicitly pointed out in *Furundzija*, "it is not necessary for the accomplice to share the mens rea of the perpetrator, in the sense of positive intention to commit the crime."³⁶ Moreover, the Court stated that the activities the plaintiffs identified as complicity "generally accompany any natural resource development business or the creation of industry."³⁷ The

30 *Prosecutor v Miroslav Kvocka (Judgment)* ICTY Trial Chamber IT-98-30/1, 2 November 2001 at [262]; and *Prosecutor v Alfred Musema (Judgment)* ICTR Trial Chamber ICTR-96-13, 27 January 2000 at [182]. It is noted in *Musema* that where the accused is unaware of the genocidal intent, other charges such as murder may still be relevant. See also Kriangsak Kittichaisaree *International Criminal Law* (Oxford University Press, Oxford, 2001) at 246.

31 *Presbyterian Church of Sudan v Talisman Energy Inc* 374 F Supp 2d 331 (SD NY 2005) [*Talisman 2005*].

32 At 337–341.

33 *Talisman 2006*, above n 5, at 668.

34 *Presbyterian Church of Sudan v Talisman Energy Inc* 582 F 3d 244 (2d Cir 2009).

35 Opening Brief for Plaintiffs-Appellants (Brief No 07-0016, 26 February 2007). Further appeals have been launched. On 15 April 2010, the plaintiffs filed a petition for writ of certiorari with the Supreme Court asking the Court to hear an appeal on the lower Court's dismissal of the case. On 20 May 2010, EarthRights International filed an amicus brief with the Supreme Court urging it to hear the appeal and overturn the dismissal of the case. On 4 October 2010, the United States Supreme Court denied the petition for writ of certiorari.

36 *Furundzija*, above n 23, at [245].

37 *Talisman 2006*, above n 5, at 332.

Supreme Court refused leave to appeal this decision. As it stands, this decision sets a very dangerous precedent as it creates a far higher threshold that will exempt large swathes of corporate activity that on previous tests would have constituted complicity.

The same Court of Appeals has called into question whether an international standard of corporate complicity exists at all.³⁸ In *Kiobel* the Court correctly pointed out that no international court or tribunal has ever convicted a corporation of a violation of international law.³⁹ The Court took this absence as a deliberate rejection of the notion of international corporate liability,⁴⁰ despite Judge Leval's separate opinion pointing out that there is no basis in international law to assert that while individuals can violate international law, corporations cannot.⁴¹ Indeed, as Judge Leval himself points out, the majority's interpretation of international law frustrates the objects and purposes of international law, and allows corporations to not only act with impunity, but to retain the profits of such activities.⁴² Moreover, while no international court or tribunal has ever held a corporation liable, the subject of this paper, the Security Council, *has* turned its attention to corporate activities in relation to international law. The *Kiobel* decision is currently under appeal to the United States Supreme Court, with a decision expected in 2013.

B Categories of Corporate Complicity

Though the law of corporate complicity is still very much in a nascent phase of development, approaches to the concept tend to follow a set structure. Corporate complicity is traditionally divided into three categories: direct complicity, beneficial complicity and silent complicity.⁴³

1 Direct complicity

Direct complicity is the most basic application of the legal standard asserted above; a state acts in a way that knowingly assists a violation of human rights. There is a range of activities that could fall under the umbrella of direct complicity. In an attempt to make the issue of complicity clearer, the International Commission of Jurists Panel on Corporate Complicity drew on familiar principles

38 *Kiobel v Royal Dutch Petroleum* 621 F 3d 111 (2nd Cir, 2010).

39 At 132.

40 At 120.

41 At 151.

42 At 159–160.

43 Particularly influential in this regard are Clapham and Jerbi, above n 13. This model has been adopted by the United Nations Global Compact, a non-binding initiative establishing basic principles for corporations, and inviting corporate participation with universal human rights, labour and environmental standards. It should be noted that other distinctions are also made, such as distinguishing between direct and indirect complicity.

from criminal and civil law.⁴⁴ The Panel focused on three particular areas, with particular focus on the issue of causation. Beyond causation, the other two issues relate to the knowledge of a company and proximity of the company to the human rights violations. The approach of the Panel is a significant step forward in the definition of corporate complicity, as it demonstrates a move away from trying to categorise corporate activity via the nature of the conduct.⁴⁵

As long as the company's conduct provides a sufficient level of assistance or encouragement to the gross human rights abuses ... it does not matter what the nature of the conduct is.

In relation to causation, the Panel developed a three-layered approach: did the company enable, exacerbate or facilitate the abuses? A company can be seen as enabling human rights abuses if those abuses would not have happened without the contribution of the company. Thus the conduct must be a necessary factor in the perpetration of the abuse.⁴⁶ A company exacerbates human rights abuses if its contribution increases the range or scope of the abuse or heightens the severity of the harm incurred.⁴⁷ Finally, a company facilitates human rights abuse if the actions of the company make it easier to carry out the abuses or shape the way that they are carried out.⁴⁸

Thus, for example, providing information about a person that enables human rights abuse based on that information, such as occurred to activist Wang Xiaoning when Yahoo! released information about his internet activities to the Chinese authorities,⁴⁹ could constitute complicity.⁵⁰ Providing vital logistical support to armed forces known for violent behaviour could also constitute enabling the abuse. Providing logistical support to armed forces known for violent behaviour, as Talisman is accused of doing in Sudan, is one of the least controversial examples of direct complicity. Similarly, Australian company Anvil Mining⁵¹ has been accused of supplying logistical support and employees to facilitate the Congolese military force's counter-offensive in Kilwa in response to a

44 See International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes *Corporate Complicity and Legal Accountability, Volume 1: Facing the Facts and Charting a Legal Path* (International Commission of Jurists, Geneva, 2008).

45 At 10.

46 At s 2.1.1. However, it need not be the only, or a sufficient factor.

47 At s 2.1.2.

48 At s 2.1.3.

49 A civil suit against Yahoo! was settled out of court in 2007: see Joint Stipulation of Dismissal *Wang Xiaoning v Yahoo! Inc* No CO7-02151 CW/JCS (ND Cal Nov 13, 2007).

50 *France v Becker* (1948) 7 LRTWC 67 at 70–71 (Perm Mil Trib at Lyon).

51 While the company is incorporated in Canada, it has major operations and its primary headquarters in Australia.

small insurgent group occupying the town.⁵² Anvil trucks and planes were used to transport the soldiers to and from the town, to transport detainees to Lubumbashi and according to eyewitness testimony, to transport corpses and looted goods. Anvil has admitted that three of its drivers were used to drive these vehicles. It has also admitted to paying a certain number of the soldiers. The counter-offensive led to a confirmed 73 deaths, with at least 28 of these allegedly the result of summary execution. According to the United Nations (UN) Mission in the Democratic Republic of Congo, the military forces engaged in summary executions (of insurgents and civilians believed to be collaborating with those insurgents), torture, widespread looting and extortion of civilian property and goods (some of which the armed forces then sold back to the civilians) and arbitrary detentions. Some of the detainees subsequently disappeared or died in custody.⁵³

Another example comes from South Africa under apartheid, where some firms informed on trade union officials to the security police or called the security police in to disperse workers who were striking peacefully.⁵⁴ Adam McBeth convincingly argues that in relation to apartheid, direct involvement in specific human rights violations may not be needed, given that the apartheid system is itself a crime against humanity.⁵⁵ Thus any acts that help prop up such a regime, including simple investment in the state's infrastructure, directly contribute to the human rights violation that is apartheid.⁵⁶

However, in some circumstances it may be difficult to distinguish whether such support "enables", "exacerbates" or merely "facilitates" the relevant human rights abuses. Trade in conflict resources would likely constitute "facilitating", but this financial assistance can potentially prolong conflict, which could amount to "exacerbation".

Conflict resources are defined by Global Witness as:⁵⁷

-
- 52 Three Anvil employees, alongside nine Congolese soldiers, faced charges before a military court in the Democratic Republic of Congo in 2007. The trial, held before a military court, ended on 28 June 2007 with the acquittal of all defendants on war crimes charges. The United Nations High Commissioner for Human Rights and a number of NGOs have all expressed grave doubts about the legitimacy and fairness of the trial: Global Witness *Kilwa Trial: A Denial of Justice* (Global Witness, London and Washington, July 2007).
- 53 United Nations Organization Mission in the Democratic Republic of Congo *Report on the conclusions of the Special Investigation into allegations of summary executions and other violations of human rights committed by FARDC in Kilwa (Province of Katanga) on 15 October 2005* (Kinshasa, 2005).
- 54 International Council on Human Rights Policy, above n 1, at 126.
- 55 Adam McBeth "Holding the Purse Strings: The Continuing Evolution of Human Rights Law and the Potential Liability of the Finance Industry for Human Rights Abuses" (2005) 23 Neth Q Hum Rts 7.
- 56 At 24.
- 57 Global Witness *The Sinews of War: Eliminating Trade in Conflict Resources* (Global Witness, London and Washington, 2006) at 10.

... natural resources whose systematic exploitation and trade in a context of conflict contribute to, benefit from or result in the commission of serious violations of human rights, violations of international humanitarian law or violations amounting to crimes under international law.

The most well-known example is trade in conflict diamonds,⁵⁸ but many other resources have been utilised. This includes little known minerals such as coltan and cassiterite, which are commonly used for components of many modern "necessities", such as mobile phones and computers.⁵⁹ It is now recognised that the presence of exploitable natural resources greatly increases the chances of conflict breaking out in a region, and that profit from natural resources becomes a major motive for combatants to continue fighting.⁶⁰ As explained by Global Witness:⁶¹

The ability of parties to a conflict to exploit natural resources depends on their access to external markets. Take away the ability to profit from resource extraction and they can no longer exacerbate or sustain conflict.

Thus the interaction of corporations with warring factions (whether they be militias or governments) has a "substantial effect" on the continuation of conflict and human rights abuses. In Sudan, key government officials have gone on record saying that the earnings supplied by oil companies would be used to finance munitions factories.⁶² In 2000, the Sudanese military acknowledged that "Sudan will be capable of producing all the weapons and ammunition it needs by the end of the year thanks to its growing oil industry".⁶³

As with conflict resources, financial institutions can directly contribute to human rights violations. Whether these contributions are sufficient to constitute "enabling" the violations is unclear. For example, the Deutsche Bank has admitted that its Polish branch knowingly financed the

58 The General Assembly has defined conflict diamonds as "rough diamonds which are used by rebel movements to finance their military activities, including attempts to undermine or overthrow legitimate governments": *Resolution adopted by the General Assembly – The role of diamonds in fuelling conflict: breaking the link between the illicit transaction of rough diamonds and armed conflict as a contribution to prevention and settlement of conflicts* UN Doc A/RES/55/56 (2001).

59 See generally Global Witness *Under-Mining Peace: The Explosive Trade in Cassiterite in Eastern DRC* (Global Witness, London and Washington, 2005).

60 See Paul Collier "Economic Causes of Civil War and Their Implications for Policy" in Chester A Crocker, Fen Osler Hampson and Pamela Aall (eds) *Leashing the Dogs of War: Conflict Management in a Divided World* (United States Institute of Peace, Washington, 2007) 197 at 202. See also Global Witness *The Sinews of War*, above n 57, at 2–3.

61 Global Witness *The Sinews of War*, above n 57, at 1.

62 Craig Forcese "Globalizing Decency: Responsible Engagement in an Era of Economic Integration" (2002) 5 *Yale Hum Rts & Dev L J* 1 at 15.

63 At 15.

construction of the Auschwitz crematoria.⁶⁴ However, courts have shown a reluctance to extend liability this far. The United States Military Tribunal at Nuremberg was unwilling to find Karl Rasche, Chairman of Dresdner Bank, guilty of facilitating slave labour by granting loans to entities using slave labour. The United States Military Tribunal stated:⁶⁵

We cannot go so far as to enunciate the proposition that the official of a loaning bank is charged with the illegal operations alleged to have resulted from loans or which may have been contemplated by the borrowers.

This argument was heavily drawn upon by Swiss Bank defendants in litigation over Holocaust assets.⁶⁶ As Inés Tófaló points out, a key reason behind this reluctance is a floodgates argument, that the link between investment and loans is too attenuated and might unduly widen the scope for complicity.⁶⁷ However, the Equator Principles,⁶⁸ while only a voluntary set of guidelines, show that there is increasing recognition of the links between finance and social risks and a growing acceptance that corporations do have responsibilities to prevent the utilisation of finance for human rights abuse.⁶⁹ Kyle Jacobson acknowledges that financial assistance for human rights abuse will often be very difficult to prove given the fungible nature of money. It is difficult to prove that payments were directed to activities that amount to human rights abuses, when they could just as easily be used to build a school or a hospital, or a thousand other uses.⁷⁰

While the distinctions developed by the International Commission of Jurists Panel on Corporate Complicity do clarify the definition of complicity, there remains a range of grey areas where the exact influence of the corporate activity may be difficult to assess. Thus, there should not be an over

64 See International Council on Human Rights Policy, above n 1, at 126.

65 *US v Von Weizsaecker Vol XIV Trials of War Criminals Before the Nuremberg Military Tribunals under Central Council Law No 10 Nuernberg, October 1946 – April 1949* (US Govt Print Off, Washington DC, 1952) at 622.

66 *Re Holocaust Victims Assets Litigation* 105 F Supp 2d 139 (ED NY 2000).

67 Inés Tófaló "Overt and Hidden Accomplices: Transnational Corporations' Range of Complicity for Human Rights Violations" in Olivier De Schutter (ed) *Transnational Corporations and Human Rights* (Hart Publishing, Portland, 2006) 335 at 345.

68 Equator Principles, <http://www.equator-principles.com/>. The Equator Principles are a voluntary, non-binding framework for financial institutions to assess environmental and social risks in financing major projects, and provide minimum standards of due diligence.

69 See McBeth, above n 55, at 31; and Justine Nolan "With Power Comes Responsibility: Human Rights and Corporate Accountability" (2005) 28 UNSWLJ 581 at 592.

70 Kyle Rex Jacobson "Doing Business with the Devil: The Challenges of Prosecuting Corporate Officials Whose Business Transactions Facilitate War Crimes and Crimes Against Humanity" (2005) 56 A F L Rev 167 at 229.

reliance on these specific terms. The move away from strict categorisation of complicity (for example by classes of complicity – direct, beneficial, silent – or by nature of conduct – for example forced labour, financial assistance, and so on) is useful in its fluidity and ability to address diverse situations, but may not offer the predictability and certainty that is desired by the business sector.

2 *Beneficial complicity*

Beneficial complicity is defined as "the corporate position vis-à-vis government violations when the business benefits from human rights abuses committed by someone else."⁷¹ But as the International Council on Human Rights Policy has pointed out, in practice "passive" benefit very quickly slides into more active forms of complicity such as direct or indirect assistance.⁷² The examples that are typically highlighted in this context demonstrate this dynamic. The most common example is violations committed by military forces providing security for a project or company facilities.⁷³ As the decision in *Unocal* demonstrates,⁷⁴ such activity can be held to be aiding and abetting the human rights violations. The Court in that case found that the act of hiring the Myanmar military to provide security and build infrastructure was sufficient to constitute "practical assistance" to the regime.⁷⁵ Furthermore, the Court argued that this assistance had a "substantial effect" on the perpetration of violations, as the violations would likely not have occurred had they not been hired by Unocal in that capacity.⁷⁶

Beneficial complicity could also apply in situations where a government acts in anticipation of corporate activity. An example of this would be in Sudan when the government cleared local populations from oil-rich fields. The atrocities committed to achieve this included, among a range of other measures, the slitting of the throats of children in the region.⁷⁷ Even if the corporations provided nothing that could constitute assistance to such abuse, they could be considered beneficially complicit if they had knowledge that these acts have occurred and were still willing to operate in the area.

71 Clapham and Jerbi, above n 13, at 346.

72 International Council on Human Rights Policy, above n 1, at 132.

73 Clapham and Jerbi, above n 13, at 346.

74 Though keeping in mind the decision has no legal force, since the case was settled.

75 *Unocal*, above n 3, at [11].

76 At [12].

77 See Forcese, above n 62, at 12.

3 *Silent complicity*

Silent complicity is used to describe companies which are merely present in a country where human rights violations are occurring and do not take any action to decry the abuses. Their mere presence can bolster economies, and enhance and legitimise the viability of a repressive system.⁷⁸ Silent complicity is arguably difficult to distinguish from beneficial complicity. The reason that the market in such countries may be attractive to investors might be a direct result of the human rights violations. For example, there may be downward pressure on wages, or the effect the conflict has had on infrastructure in a region may provide corporations with opportunities they otherwise would not have had. If it can be demonstrated that the corporation would not otherwise have entered the area without the prevailing conditions, then this implies that the corporation has an interest in the perpetration of human rights abuses.⁷⁹

In the words of Sir Geoffrey Chandler: "Silence is not neutrality. To do nothing is not an option".⁸⁰ He goes on to state that "[s]ilence or inaction will be seen to provide comfort to oppression and may be adjudged complicity."⁸¹ The moral justification behind this position clearly rests on the presumption that corporations now exert a great deal of power and influence, even over states.⁸²

The power to effect change is a central part of most ethical responsibility arguments, underpinned by a fundamental assumption that with the power to effect change for the better comes a responsibility to do so.

That said, the Special Representative of the Secretary-General cautions against attributing legal responsibility on the basis that "can implies ought".⁸³ The caution is not only on the basis that this is laying too great an expectation on corporate behaviour. He also raises the very pertinent point that corporations exerting influence over states is not something to be encouraged lightly.⁸⁴

78 See for example Tófaló, above n 67, at 347.

79 At 350.

80 Geoffrey Chandler "Oil Companies and Human Rights" in *Oxford Energy Forum* (Oxford, November 1997) at 3 as quoted in Christopher L Avery *Business and Human Rights in a Time of Change* (Amnesty International, United Kingdom, 2000) at 22 (footnotes omitted).

81 At 22.

82 Margaret Jungk *Complicity in Human Rights Violations: A Responsible Business Approach to Suppliers Project* (Danish Institute for Human Rights, Copenhagen, 2006) at 10.

83 United Nations Human Rights Council *Protect, Respect and Remedy*, above n 18, at [69].

84 At [69].

There are, however, circumstances in which silent complicity can attract legal liability. The *Furundzija* case was focused primarily on the ways in which intangible assistance can amount to complicity, including the notion of "moral support". Drawing from the *K and A (Synagogue Case)*,⁸⁵ the Trial Chamber found that "an approving spectator who is held in such respect by the other perpetrators that his presence encourages them in their conduct, may be guilty of complicity".⁸⁶ The Trial Chamber concluded that presence could constitute moral support if the spectator's "status was such that his presence had a significant legitimising or encouraging effect on the principals."⁸⁷ Some TNCs exert tremendous influence over host governments. This can be reflected in the way that some states relax labour laws in order to attract business.⁸⁸ However as a criminal standard, the circumstances and the degree of influence over the state would have to be exceptional. Nonetheless, the potential is there for the law to move in this direction.

C The Complicity Cascade

One issue that this triumvirate of complicity categories does not resolve is the question of how far the notion of complicity can extend. William Schabas refers to this potential trickle-down effect of complicity as the complicity cascade.⁸⁹ He asks, if the diamond merchant who purchases stones from combatants in Sierra Leone can be found complicit, what of the other merchants further down the supply chain? And if they are complicit, what of the banks that finance their activities or the consumer who buys the diamond?⁹⁰ This issue is further complicated by the nature of the modern transnational corporate network. Is a parent company responsible for the activities of its subsidiaries; does complicity pierce the corporate veil?⁹¹ The standard for complicity can help provide the answers. Where there is knowledge and "substantial assistance" of the abuse, there is the potential for complicity. Obviously the further down the cascade, the more difficult it will be able to establish "substantial" assistance, and there are as yet no set thresholds to distinguish the degrees of assistance.⁹²

85 *K and A (Synagogue Case)* StS 18/48, German Supreme Court in the British Occupied Zone, 10 August 1948.

86 *Furundzija*, above n 23, at [207].

87 At [232].

88 See for example David Kinley and Junko Tadaki "From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law" (2004) 44 Va J Int'l L 931.

89 William Schabas "Enforcing International Humanitarian Law: Catching the Accomplices" (2001) 83 International Review of the Red Cross 439 at 451.

90 At 451.

91 See for example Ruggie, above n 11, at 824.

92 Schabas, above n 89, at 451.

D Need for a Global Standard

It is important to draw on international legal standards to determine the scope of liability for corporate complicity. "If the laws of complicity are left to develop haphazardly in different national jurisdictions, companies may be put at risk in a global economy."⁹³ The primary goal of establishing standards for corporate complicity is their deterrent effect. But if corporations are not given clear guidance on what constitutes complicity, then they are unlikely to cease activities they view as legitimate.⁹⁴

As Steven Ratner has argued:⁹⁵

Without some international legal standards, we will likely continue to witness both excessive claims made against such actors for their responsibility and counterclaims by corporate actors against such accountability ... The resultant atmosphere of uncertainty will be detrimental to both the protection of human rights and the economic wealth that private business activity has created worldwide.

It is also important to recognise that the international standards that have been drawn on thus far are criminal standards. While these standards are certainly relevant, international human rights law and its accompanying responsibilities go beyond the limits of criminal law as reflected in concepts such as beneficial complicity. With the exception of the International Criminal Court, none of the instruments discussed below use the term "corporate complicity" nor are the standards or categories set out above consciously applied. For example, without any universal standards having been developed on corporate responsibility, the UN Expert Panel on the Democratic Republic of Congo was forced to rely on the voluntary Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises to determine unacceptable behaviour, despite the fact that not all of the businesses involved came from OECD member countries.⁹⁶ There is an ad hoc approach to these issues, creating the risk that international law will develop unevenly and with uncertainty as to the bounds of corporate complicity.

93 Irene Khan "'Responsibility and Complicity' and the moral expectations of society" in Matt Shinn (ed) *The 2005 Business and Human Rights Seminar Report: Exploring Responsibility and Complicity* (London, 8 December 2005) 15 at 18.

94 Jacobson, above n 70, at 225.

95 Steven R Ratner "Corporations and Human Rights: A Theory of Legal Responsibility" (2001) 111 Yale LJ 443 at 448.

96 See below in Part IV, Section B.

E International Responsibility for Corporate Complicity

1 The state duty to protect

The duty of states to protect their citizenry against abuse is one of the fundamental principles of the international human rights regime and has been firmly enshrined as such.⁹⁷ "State sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself."⁹⁸ In cases of corporate complicity, however, corporations cannot rely on host states to be the final arbiters of what is acceptable or unacceptable. This is because the state may itself be operating in an unacceptable manner, either by being the principal perpetrator of the human rights abuse, or being unwilling or unable to stop the primary perpetrators.

There is no authority in international law or in current international practice that this duty extends to protecting the nationals of other states. However, the Special Representative of the Secretary-General of the UN in his 2008 Report points out that while there may be no such expectation of extraterritorial protection of the nationals of other states in current human rights law, states are not precluded from doing so.⁹⁹ Also, Robert Howse points out that:¹⁰⁰

The very existence of international human rights ... and the institutions developed to deal with these areas suggest that the international community accepts that a state's legitimate concern about the morality of the treatment of individuals is not limited to its own nationals.

There are, however, a range of reasons why a home state will not be inclined to exert itself to protect non-nationals beyond its jurisdiction. There may be a lack of political will for a state to exert itself beyond its duties to its own citizenry, especially given the uncertainty that continues to surround extraterritoriality.¹⁰¹ A home state may be unwilling to impede the activities of its economic actors and the subsequent benefits to its own economy. Moreover, Menno Kamminga points out that TNCs are becoming increasingly stateless. Their ability to freely move their capital and investments to a better economic climate has the result that they now largely lack any loyalty to

97 Most notably in art 2(1) of both the International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976) and the International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (opened for signature 16 December 1966, entered into force 3 January 1966).

98 Report of the International Commission on Intervention and State Sovereignty *The Responsibility to Protect* (International Development Research Centre, Ottawa, 2001) at XI.

99 United Nations Human Rights Council *Protect, Respect and Remedy*, above n 18, at [19].

100 Robert Howse as cited in Katherine Zeisel "The Promotion of Human Rights by Selective Public Procurement under International Trade Law" in Olivier De Schutter (ed) *Transnational Corporations and Human Rights* (Hart Publishing, Portland, 2006) 361 at 371.

101 United Nations Human Rights Council *Protect, Respect and Remedy*, above n 18, at [14].

one particular state.¹⁰² There are also international relations at stake, which political actors will take into consideration. States are very reluctant to be seen as interfering in the affairs of other sovereign states, and proposals for home states to regulate TNCs exacerbate North-South tensions in this respect.¹⁰³ Extraterritorial regulation coming from the North will be interpreted as paternalistic and possibly economically protectionist in nature.

2 *International community and the responsibility to protect*

While there is no existing duty for states to intervene to protect the nationals of other countries, it is being increasingly recognised that in situations of egregious human rights violations, the international community does share the responsibility to protect individuals from harm, in situations where the territorial state is the perpetrator or has systematically failed to uphold its duty to protect. The Responsibility to Protect (R2P) doctrine gained its first recognition in the Report of the International Commission on Intervention and State Sovereignty (ICISS) and has subsequently been recognised by both the UN General Assembly and the Security Council.¹⁰⁴ While it tends to be associated with humanitarian intervention, the doctrine is much broader than that and focuses on prevention.¹⁰⁵ There has been renewed focus on the doctrine recently, as it was employed as a justification for the decision to take international action in 2011 to assist Libyan rebels to topple Gaddafi's regime.

As the doctrine of R2P seeks a comprehensive approach to address serious human suffering, it is not a stretch to include actions against corporate complicity within its purview. On the emergence of the doctrine, the ICISS Report comments:¹⁰⁶

The current debate takes place in the context of a broadly expanded range of state, non-state and institutional actors, and increasingly evident interaction and interdependence among them ... It is a debate that is being conducted within the framework of new standards of conduct for states and individuals, and in a context of greatly increased expectations for action.

102 Menno T Kamminga "Holding Multinational Corporations Accountable for Human Rights Abuses: A Challenge for the EC" in Philip Alston (ed) *The EU and Human Rights* (Oxford University Press, Oxford, 1999) 553 at 553–554.

103 Leiv Lunde and Mark Taylor *Commerce or Crime? Regulating Economies of Conflict* Fafo Report 424 (Fafo, Oslo, 2003) at 32.

104 *2005 World Summit Outcome* GA Res 60/1, UN Doc A/Res/60/1 (2005) at [138]–[140]; *Resolution on the Protection of Civilians in Armed Conflict* SC Res 1674, UN Doc S/Res/1674 (2006); and *Reports of the Secretary-General on the Sudan* SC Res 1706, UN Doc S/Res/1706 (2006).

105 "Prevention is the single most important dimension of the responsibility to protect": Report of the International Commission on Intervention and State Sovereignty, above n 98, at XI.

106 At [1.12].

Later, the Report explicitly recognises the need to engage the business community for effective conflict prevention.¹⁰⁷ Thus effective pursuit of the R2P doctrine involves a concomitant responsibility to prevent corporate actors from contributing to human atrocities. While the Report openly acknowledges that its success will depend on the right political will,¹⁰⁸ it is hoped that the doctrine will provide an added impetus to encourage the international community to act. In the future it may eventually come to be recognised as part of customary international law, especially as its foundations are based in emerging state practice and obligations under the UN Charter.¹⁰⁹ At present, however, it remains a rather nebulous concept, and one that states are more inclined to restrict rather than expand.

III CORPORATE COMPLICITY AS A SECURITY ISSUE: THE ROLE OF THE SECURITY COUNCIL

The Security Council is charged with the maintenance of international peace and security. The Security Council has considerable political and legal clout to discharge this responsibility. Under the auspices of Chapter VII of the UN Charter, the Security Council has the unique authority to make decisions that are binding on all member states. In the past two decades, it has been increasingly recognised that large-scale human suffering is both a consequence of and a contributing factor to conflict and instability, and that massive human rights violations constitute a direct threat to international peace and security.¹¹⁰ A very early example of human rights considerations influencing the work of the Security Council was the imposition of the mandatory sanctions regime on South Africa from 1977 to 1994, demonstrating a universal consensus on the unacceptability of the practice of apartheid.¹¹¹ In the contemporary context, the R2P regime has increasingly influenced the Security Council's rhetoric, though it remains questionable whether the doctrine is being exercised in practice. While reference to the doctrine was made in the recent resolutions in regard to Libya, namely Resolutions 1970 and 1973, the selective use of the doctrine does show a current lack of political will to consistently realise the doctrine.¹¹² The Libyan resolutions may demonstrate, however, that the tide is turning, and that recognition of a broader, more humanitarian-oriented, sense of security is emerging amongst the international community.

107 At [3.36].

108 See Ch 8.

109 At XI: Synopsis, Foundations.

110 See for example Global Witness *The Sinews of War*, above n 57, at 9.

111 *Resolution on South Africa* SC Res 418, UN Doc S/RES/418 (1977) at [2]–[5].

112 *Resolution on peace and security in Africa – Libya* SC Res 1970, UN Doc S/RES/1970 (2011); and *Resolution on the situation in Libya* SC Res 1973, UN Doc S/RES/1973 (2011).

The interconnectivity of international peace and security with human rights principles is also recognised in the increased interaction that now occurs between the Security Council and the Office of the High Commissioner on Human Rights (OHCHR).¹¹³ It was during Mary Robinson's term in office that the Security Council members were first briefed by the High Commissioner on the issue of the protection of civilians during armed conflict. Robinson's interaction with the Security Council opened a pathway for information and insights on human rights to be incorporated into the work of the Council.¹¹⁴ It is now the practice that OHCHR staff from the UN's New York Office Headquarters brief the Security Council Presidency on the human rights issues that are on their agenda every month.¹¹⁵ That said, the exact relationship between human rights and the work of the Security Council, specifically whether the Council is itself bound by human rights obligations, remains uncertain.¹¹⁶

A Corporations and the Sanctions Regime

The most obvious way in which the decisions of the Security Council can impact on business and corporate complicity is in the form of sanctions authorised by Security Council resolutions. Designed to affect the actions of the primary perpetrators of human rights and humanitarian violations, the resolutions have a secondary impact, restraining corporations from assisting or deriving benefit from these violations. The effectiveness of sanctions in stopping the activities of primary perpetrators remains in dispute. Their effectiveness in restraining corporate behaviour, their secondary role, is entirely dependent on whether or not the sanctions are respected and followed by the business community.¹¹⁷

The sanctions regime has become an indispensable tool for the Security Council in reacting to large scale human suffering. It represents an approach to such situations "between words and wars".¹¹⁸ Under art 41, Chapter VII of the UN Charter, the Security Council may impose

113 See Katarina Månsson "UN Peace Operations and Security Council Resolutions: A Tool for Measuring the Status of International Humanitarian Law?" (2008) 26 Neth Q Hum Rts 79 at 93.

114 At 93.

115 At 93.

116 See United Nations Security Council *Cross-Cutting Report No 3: Rule of Law* (New York, 2011) at 5.

117 See for example International Peace Academy and Fafo (special rapporteur Alexandra Guáqueta) *Economic Agendas in Armed Conflict: Defining and Developing the Role of the UN* (International Peace Academy and Fafo, New York, 2002) at 10; and United Nations Global Compact *Enabling Economies of Peace* (UN Global Compact Office, New York, 2005) at 33.

118 Peter Wallensteen, Carina Staibano and Mikael Eriksson *Making Targeted Sanctions Effective: Guidelines for the Implementation of UN Policy Options – Final Report of the Stockholm Process on the Implementation of Targeted Sanctions* (Department of Peace and Conflict Research, Uppsala University, 2003) at iii.

restrictions on economic relations between UN members and a targeted country or group "to maintain or restore international peace and security." Prior to 1998, sanctions were largely a blunt instrument, aimed at comprehensive restrictions on a state's ability to operate at the international level. This approach raised legitimate concerns that such sanctions were doing more harm than good, and had a disproportionate impact on civilian populations as compared to those targeted by the sanctions.¹¹⁹

As Richard Haas has argued:¹²⁰

... sanctions can have the perverse effect of bolstering authoritarian, statist societies. By creating scarcity, they enable governments to better control distribution of goods. The danger is both moral, in that innocents are affected, as well as practical, in that sanctions that harm the population at large can bring about undesired effects that include bolstering the regime ...

The use of comprehensive sanctions (if they are followed by corporations) could halt corporate complicity in human rights violations, but if in doing so legitimate business is also stopped, the attempt is counter-productive and can in fact facilitate further human rights violations. This highlights the extreme importance of delineating the limits of corporate complicity and acknowledging that in some circumstances the removal of corporate activity does more harm than good.

In the past decade, however, the sanctions regime has undergone reform and comprehensive embargoes have now been replaced with sanctions targeted specifically at key decision-makers, of both state and non-state actors. These come in the form of travel and financial restrictions and, of particular interest to the issue of corporate complicity, sanctions targeted at the resources that are essential to the continued rule of human rights violators and the perpetration of human suffering.¹²¹ The Security Council has directed sanctions at a number of particular commodities that are seen to be fuelling particular conflicts. In June 1998, through Resolution 1173,¹²² the Security Council forbade the importation of rough diamonds from Angola that were not accompanied by a certificate of origin. The Security Council later placed similar restrictions on rough diamonds from Sierra Leone in 2000,¹²³ Liberia in 2001¹²⁴ and, more recently, against all rough diamonds coming from

119 See for example Report of the International Commission on Intervention and State Sovereignty, above n 98, at [4.5]; and United Nations Inter-Agency Standing Committee *Sanctions Assessment Handbook: Assessing the Humanitarian Implications of Sanctions* (October 2004) at 5.

120 Richard N Haas *Economic Sanctions and American Diplomacy* (Council on Foreign Relations Press, New York, 1998) as cited in Forcese, above n 62, at 18 (footnotes omitted).

121 This was the result of three progressive international initiatives – Bonn-Berlin, Interlaken and Stockholm: see International Peace Academy and Fafo, above n 117, at 140.

122 *Resolution on Angola* SC Res 1173, UN Doc S/RES/1173 (1998).

123 *Resolution on the situation in Sierra Leone* SC Res 1306, UN Doc S/RES/1306 (2000).

Côte d'Ivoire in 2005.¹²⁵ Timber is another conflict resource that has been recognised by the Security Council.¹²⁶

Despite the key role that resources have played and continue to play, there have been no targeted trade restrictions placed on commodities from the Democratic Republic of the Congo (DRC). For example, Resolution 1896 sets out the latest sanctions imposed on the DRC, and includes arms embargoes (though no longer covering the DRC government), aviation and financial restrictions, but no trade sanctions on commodities.¹²⁷ Resolution 1804 did, however, call upon member states:¹²⁸

... to consider taking the measures necessary to prevent the provision ... of any financial, technical or other forms of support to or for the benefit of the FDLR, ex-FAR/Interhamwe or other Rwandan armed groups operating in the territory of the Democratic Republic of the Congo

In a significant step forward, Resolution 1952 invoked principles of due diligence. It directed the associated Sanctions Committee to consider whether "individuals or entities" have provided support to illegal armed groups in the eastern part of the DRC through illicit trade including as a consequence of not having exercised due diligence, as that concept was outlined in the Resolution.¹²⁹

In the particular context of corporate complicity there are a number of limits to the sanctions regime that must be recognised. The first and most obvious criticism is aimed at the very nature of the Security Council, in particular the power and influence of the five permanent members.¹³⁰ Take for example the case of the Sudan. Despite the R2P mandate that states that the Security Council must exhaust all possible measures before resorting to armed intervention, the Security Council has made no attempt to threaten the Sudanese regime with an oil embargo, despite the acknowledged links between oil and Sudanese military capacity.¹³¹ This is a result of China's strategic interest in

124 *Resolution on the situation in Liberia* SC Res 1343, UN Doc S/RES/1343 (2001).

125 *Resolution on the situation on the Cote D'Ivoire* SC Res 1643, UN Doc S/RES/1643 (2005).

126 *Resolution on the situation in Liberia* SC Res 1478, UN Doc S/RES/1478 (2003); and *Resolution on Cambodia* SC Res 792, UN Doc S/RES/792 (1992).

127 Extended and unaltered by *Resolution on the Democratic Republic of Congo* SC Res 1952, UN Doc S/RES/1952 (2010); and *Resolution on the Democratic Republic of Congo* SC Res 2021, UN Doc S/RES/2021 (2011).

128 *Resolution on the Democratic Republic of Congo* SC Res 1804, UN Doc S/RES/1804 (2008) at [8].

129 Resolution 1952, above n 127.

130 See for example Philippe Le Billon "Getting It Done: Instruments of Enforcement" in Ian Bannon and Paul Collier (eds) *Natural Resources and Violent Conflict: Options and Actions* (World Bank Publications, Washington, 2003) 215 at 233.

131 See quote cited from Forcese cited in the text above accompanying n 62, at 15 (footnotes omitted).

the Sudanese oil fields, which has resulted in China blocking all such sanctions with the threat to use its veto.¹³² The China National Petroleum Corporation holds the largest stake in Sudan's most profitable wells and exports approximately 60 per cent of Sudan's oil output.¹³³

A particular concern in relation to targeted commodity sanctions is that the targeted actors may shift from using the sanctioned resource to fuel their activities to another resource that has not been sanctioned. This concern may lie behind the Council's reluctance to impose restrictions on any specific Congolese resources. Indeed, when the coltan boom in the DRC ended and a global boom in cassiterite began, armed forces in the region quickly shifted their artisanal efforts to the more profitable resource.¹³⁴ Likewise in Cambodia, when the export of round logs was banned, a proliferation of sawmills emerged across the country, since processed timber had not been sanctioned.¹³⁵

One of the primary limitations of sanctions regimes is the impunity with which they have been violated, including by corporate actors,¹³⁶ as discussed in the following section.

B Violations of Sanctions by Corporate Actors

In an attempt to address rampant violations of sanctions, it is increasingly common for Security Council resolutions imposing sanctions to contain provisions requiring member states to enact domestic legislation criminalising acts in breach of the resolution.¹³⁷ However, as William Schabas points out, the Security Council does not insist that states exercise universal jurisdiction over violations.¹³⁸

The implementation of sanctions is overseen by Security Council-mandated sanctions committees. The role of these committees includes the solicitation and review of reports on measures that states have taken to implement the sanctions; to report periodically to the Security Council on persons and entities that are reported to be in violation of sanctions; and to recommend appropriate measures and guidelines to facilitate the implementation of sanctions.¹³⁹ The problem is

132 See Jan Kleinheisterkamp "The UN Security Council's Incapacity of Coping with Conflict-Related Economic Interests" (2005) 37 *Stud Transnat'l Legal Pol'y* 108 at 116.

133 At 117.

134 Global Witness *Under-Mining Peace*, above n 59, at 8.

135 See Global Witness *The Logs of War: The Timber Trade and Armed Conflict* (London, 2002) at 55.

136 International Peace Academy and Fafo, above n 117, at 10.

137 See for example in relation to Sierra Leone: Resolution 1306, above n 123, at [17].

138 Schabas, above n 89, at 455.

139 Le Billon, above n 130, at 230–231.

that, as yet, sanctions committees have not been well managed by the Security Council. They have no investigative powers of their own, relying exclusively on the submissions of member states. They consist of part-time staff and as such are poorly resourced, and their mandates are often unclear.¹⁴⁰ There is also very little interaction between the various sanctions committees, thus many issues are not being promulgated across the committees, such as best practice and awareness of actors engaged in multiple sanction-busting activities. These problems have been recognised by the Stockholm Process which has made a number of useful recommendations for the Security Council to consider, such as use of a standard framework for the committees, clear and complete mandates and increased coordination between committees.¹⁴¹

The limitations of sanctions committees have also been addressed by the emergence of UN expert panels mandated by the Security Council to conduct independent investigations into sanctions violations and related concerns. These are independent ad hoc panels of experts, selected and appointed by the UN Secretariat. They report to the Security Council or to sanctions committees. The first expert panels emerged as a response to a briefing of the Security Council conducted by the non-governmental organisation, Global Witness, on the issue of conflict diamonds.¹⁴² The "Final Report of the UN Panel of Experts on Violations of Security Council Sanctions Against UNITA (S 2000/203)", explicitly and publicly named sanction-busters, including the companies involved and gave significant credibility to the problem of conflict diamonds.¹⁴³

For companies concerned with their public reputations, naming and shaming can have an enormous influence on corporate behaviour. However, the work of the expert panels will only truly fulfil its potential if the recommendations made are implemented by the Security Council, a step that has thus far been lacking.¹⁴⁴ The expert panels also have similar problems to those experienced by the sanctions committees, in that there is little coordination between the panels, and as a result no progressive development of institutional knowledge being created for future use.¹⁴⁵

C The UN Expert Panel on the DRC

In 2000 the UN Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of Congo was established. This panel was unique

140 Global Witness *The Sinews of War*, above n 57, at 13.

141 Wallensteen, Staibano and Eriksson, above n 118, at 24–26.

142 See for example International Peace Academy and Fafo, above n 117, at 7.

143 At 7.

144 At 14. See also Wallensteen, Staibano and Eriksson, above n 118, for suggestions of how to address this concern.

145 Global Witness *The Sinews of War*, above n 57, at 14.

because it did not emerge to analyse sanction busting in the DRC; after all there were no sanctions in place. Over a series of reports the Panel revealed the ways in which illicit trade and exports were being used to fuel the conflict in the DRC.¹⁴⁶ It demonstrated the vicious circle that was in evidence in the DRC between conflict and resource exploitation. Natural resources were the main source of conflict and in turn control over those resources helped perpetuate the fighting.¹⁴⁷

To fulfil its mandate, the Panel undertook visits to the country and surrounding regions and met with a range of relevant actors, including companies and private individuals.¹⁴⁸ In its 2001 Report, the Panel published an annex that contained a sample of companies involved in importing minerals from the country, which the Panel accused of being "ready to do business regardless of elements of unlawfulness and irregularities" and of strengthening the parties to the conflict.¹⁴⁹ This report represents perhaps the first authoritative account of corporate complicity in an ongoing situation which names individual companies.

The October 2002 Report of the Panel had an even more significant impact on the recognition of corporate complicity. In an unprecedented move, the Panel listed 29 companies and 54 individuals against whom it recommended the imposition of travel and financial bans.¹⁵⁰ Another annex listed a further 85 companies which the Panel considered to be in violation of the OECD Guidelines for Multinational Enterprises (OECD Guidelines). In doing so, the Panel raised awareness of the largely ignored situation in the DRC and helped raise the awareness of companies that may not have known of their role in the situation.¹⁵¹ However, it is problematic that the October 2002 Report did not

146 See especially in this regard *Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth in the Democratic Republic of the Congo* UN Doc S/2001/357 (2001) [*First Report on DRC 2001*].

147 *First Report on DRC 2001*, above n 146. See also Rights and Accountability in Development, *Unanswered Questions: Companies, Conflict and the Democratic Republic of Congo* (Oxford, 2004).

148 See Asimina-Manto Papaioannou "The Illegal Exploitation of Natural Resources in the Democratic Republic of Congo: A Case Study on Corporate Complicity in Human Rights Abuses" in Olivier De Schutter (ed) *Transnational Corporations and Human Rights* (Hart Publishing, Portland, 2006) 263 at 271–272.

149 *First Report on DRC 2001*, above n 146.

150 *Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth in the Democratic Republic of the Congo* UN Doc S/2002/1146 (2002) [*October 2002 Report on the DRC*].

151 See for example *Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth in the Democratic Republic of the Congo* S/2003/1027 (2003) [*Final Report on the DRC 2003*] at [10]:

While the processors of coltan and other Congolese minerals is Asia, Europe and North America may not have been aware of what was happening in the Democratic Republic of Congo, the Panel's investigations uncovered such serious concerns that it was decided to raise the awareness

specifically outline how each of the enumerated companies had breached the obligations of the OECD Guidelines. The strong negative reaction to the October 2002 Report unfortunately resulted in a watered down last Report from the Panel in 2003.¹⁵² The annexes of this report categorise the companies in terms of resolved cases, cases referred to government or OECD national contact points and cases in which the companies had provided no response to the previous report. While sweeping statements are made about how the different categories were determined, there are no explanations in terms of specific companies and the action that they have taken.

The 2003 Report was also forced to justify its approach of "naming and shaming" in response to criticism that it had failed to respect considerations of due process. It emphasised that it was a fact-finding and not a judicial body, and that its mandate precluded it "from determining the guilt or innocence of parties that have business dealings linked to the Democratic Republic of Congo".¹⁵³ The non-binding nature of the principles in the OECD Guidelines was also emphasised.¹⁵⁴ Further, it justified the processes of the Panel by pointing out that throughout the course of its mandate, it tried to establish dialogue with all of the implicated companies and invited all parties that were so inclined to have their responses published in an addendum to the 2003 Report.¹⁵⁵ The Panel lacked review mechanisms such as now exist for targeted sanctions (discussed briefly below), but the active engagement with corporations and the requests for responses did partly address concerns about due process. The example of the Panel, especially the "naming and shaming" aspect of its penultimate report, had a demonstrable effect on the activities of corporations. There was a decrease in demand for coltan from the region, and although this could in part be accounted for by a general downward trend in the market, it was also a result of "manufacturers'" desire to disassociate themselves with what came to be known (as a result of the work of the Panel) as "blood tantalum".¹⁵⁶ However constructive engagement with corporations is to be preferred over a naming and shaming process. The role of the Security Council and its panels should not be punitive for, as the 2003 Report noted, it is not a judicial body. "Naming and shaming" processes have the potential to blur this line. The role of the Security Council should be to stop the activities, not to punish them. Engagement with

of the international business community to those issues ... in the context of the OECD ... Guidelines ... The purpose was to bring to the attention of the companies ... their responsibilities vis-a-vis the source of their raw materials.

152 See for example Mark Taylor (ed) *Economies of Conflict: The Next Generation of Policy Responses* Fafo Report 436 (Fafo, Oslo, 2003) at 22–23, on the intense lobbying of companies of their respective governments to be de-listed.

153 *Final Report on the DRC 2003*, above n 151, at [16].

154 At [12] and [15].

155 At [17].

156 Papaioannou, above n 148, at 20.

corporations and raising awareness, both well within the capacity of the expert panels, should be the focus of such measures.

The work of the Expert Panel in raising awareness amongst the business community of how their actions were contributing to the human rights situation in the DRC is something that the Security Council needs to consider replicating. Kyle Jacobson convincingly argues that the Security Council should alert corporate actors to persons, governments and groups that are presumed to be committing war crimes or crimes against humanity, and that transactions with such persons could constitute a criminal violation under international criminal law.¹⁵⁷ Not only can such a step raise awareness, but in cases where corporations ignore the warning it will make it much easier to establish that the corporation knew its acts were facilitating the relevant human rights abuse. Can the Security Council, however, go beyond awareness-raising and hold corporations directly accountable for acts of complicity?

D Corporations as Subjects of Security Council Action

With the emergence of the targeted sanction regime of the Security Council, there seems little doubt that the Security Council can impose its jurisdiction directly on both individuals and entities, including corporations. Currently both Iranian and North Korean companies are subject to sanctions imposed by the Security Council, as are a range of "entities" associated with terrorist organisations.¹⁵⁸ The ability of the Security Council to impose obligations directly on non-state actors has also been acknowledged by the International Court of Justice. Thus, in the International Court of Justice's Advisory Opinion in respect to the Unilateral Declaration of Independence by Kosovo:¹⁵⁹

The Court recalls in this regard that it has not been uncommon for the Security Council to make demands on actors other than United Nations Member states and intergovernmental organizations.

It went on to state that interpretation of Security Council resolutions must be done on a case-by-case basis to determine "for whom the Security Council intended to create binding legal obligations. The language used by the resolution may serve as an important indicator in this regard."¹⁶⁰ Thus on the surface there seems no reason why corporate complicity could not be the subject of direct

157 Jacobson, above n 70, at 230.

158 See for example United Nations Security Council Presidential Statement *Non-proliferation/Democratic Peoples' Republic of Korea* UN Doc S/PRST/2012/13 (2012) extending sanctions relating to North Korea to three Korean companies. The compiled list of "blacklisted" individuals and entities associated with Al-Qaida is available at <http://www.un.org/sc/committees/1267/AQList.htm>.

159 *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Advisory Opinion)* [2010] ICJ Rep 403 at [116].

160 At [116].

Security Council action. The due process concerns noted above then become part of a broader discussion about the role of the Security Council and should not be treated as an isolated discussion, particular to corporate complicity. Due process was a topic addressed by a study commissioned by the UN Office of Legal Affairs.¹⁶¹ This is an issue largely beyond the scope of the paper, raising broad questions about the nature and role of the Security Council. But the examination of that study does demonstrate how complicity might complicate the discussion.

The study emphasised that the listing of individuals and entities by sanctions committees was a "measure of an administrative character".¹⁶² These listings "are not penalties imposed on account of a criminal offence committed by that person".¹⁶³ It emphasised that the Security Council has no role to play as a criminal court and that sanctions "are not meant to penalize a person [or corporation] but to make him or her change his or her attitude and conduct."¹⁶⁴ To reduce lingering concerns about due process, the study also led to the introduction of processes of delisting and an ombudsman to ensure that a review process is available to those targeted. The study highlighted that the rationale for sanctions against individuals and entities must be the same as applied against states: to maintain or restore international peace and security.¹⁶⁵ This maintenance of peace and security is certainly a rationale that can support action in cases of complicity. Action preventing corporations or individuals from assisting or encouraging fundamental human rights violations is in line with this primary responsibility of the Security Council and may be essential to achieving peace and security. While the language of complicity does draw on criminal law concepts it must be emphasised again that in this context, complicity has a much broader role. Security Council action taken against complicit corporate actors would need to be geared towards stopping the action rather than punishing corporations. This seems relatively unproblematic, or at least no more so than any action taken by the Security Council to stop human rights violations.

From a legal perspective, there seems to be no reason for the Security Council to treat complicit actors differently to primary actors, so long as the proposed action meets the criteria of being necessary to maintain international peace and security. But the Security Council is, of course, primarily a political body, and the political considerations of the Council do present a series of challenges. The first and most obvious is the ever present challenge to the efficacy of the Security Council: the potential for the veto to be invoked. After all many of the world's TNCs are

161 Bardo Fassbender "Targeted Sanctions Imposed By The UN Security Council And Due Process Rights: A Study Commissioned By The UN Office Of Legal Affairs And Follow-Up Action By The United Nations" (2006) 3 Int'l Org L Rev 437.

162 At [12.6].

163 At [12.6].

164 At [12.6].

165 At [12.6].

headquartered in the United States or in one of the other permanent members of the Security Council. Taking action against complicit actors requires Council members to take action against their own nationals and potentially against their own economic interests.

In addition, complicity presents an interesting challenge to the legitimacy of the Security Council. After all, complicity can only be invoked in situations the Security Council has itself acknowledged to be threats to international peace and security. Ergo, reluctance to curb the behaviour of their own citizens which contributes to such situations would demonstrate a double standard that would grossly undermine any claim to institutional legitimacy on behalf of the Council. This appeal to legitimacy might produce the political will necessary for member states to target complicity.

However it might also lead the Security Council down a far more treacherous path. If the Security Council is expected to lay sanctions against their own citizens and corporations, this could well have a negative impact on the broader activities of the Security Council. If we were governed by angels,¹⁶⁶ complicity should certainly be an issue addressed by the Security Council. But we are governed by human beings, and the Security Council is comprised of member states with their own national interests. As noted above, the relationship between human rights and the Security Council remains unclear. The Security Council's recognition of human rights violations as threats to international peace and security has developed significantly since the 1990s. However, it is important to note that human rights violations have never "provided the exclusive underpinning of a pronouncement or determination of a threat [to the peace]".¹⁶⁷ And while the UN Secretary-General has urged the permanent members of the Security Council to refrain from using the threat of the veto in situations which manifestly invoke the R2P doctrine, and to reach a mutual understanding to that effect, no such understanding has been reached.¹⁶⁸ Indeed this goal may be as far away as ever, as demonstrated by the employ of the veto in 2012, blocking both military intervention and economic sanctions against Syria, despite the escalating violence.¹⁶⁹ Where it is likely that the sanctions may adversely affect their own citizens, it is expected that this will make the relevant Security Council member all the more reluctant to acknowledge human rights violations as

166 As per the famous line from James Madison in Clinton Rossiter (ed) *The Federalist Papers* (New American Library, New York, 1961) at 322.

167 Karel Wellens "The UN Security Council and New Threats to the Peace: Back to the Future" (2003) 8 J Conflict & Sec L 15 at 44.

168 United Nations Secretary-General *Report on Implementing the Responsibility to Protect* UN Doc A/63/677, (2009) at [61].

169 United Nations Security Council "Security Council Fails to Adopt Draft Resolution on Syria That Would Have Threatened Sanctions, Due to Negative Votes of China, Russian Federation" (press release, 19 July 2012).

disturbing international peace and security. The practical implications of acknowledging human rights violations in this way could thus produce less, not more, action by the Security Council to put an end to such situations. Both history and current events must make us rightfully cautious about trusting the Security Council to take action independent of consideration of the national interests of member states.¹⁷⁰

Finally, it is also worth mentioning another enduring limit to Security Council action in relation to corporate activity (complicit or otherwise). The Security Council has no independent ability to apply its own determinations and must rely on member states to implement sanctions. In other words, while the Security Council can impose obligations on non-state actors, these obligations are not, and cannot be, self-executing.¹⁷¹ This does of course weaken the efficacy of such governance, especially when states are expected to direct such sanctions at their own corporate entities. However this is a question directed at the efficacy of the sanctions regime as a whole, and not one specific to complicity. In relation to coupling complicity with action against primary perpetrators, it is worth keeping in mind that at international law, member states do not have discretionary rights with regard to the implementation of Security Council sanctions:¹⁷²

Instead, they must comply with the terms of the Council resolutions as they stand. In particular, Member States have no authority to review the names of individuals and entities specified by the responsible committee of the Security Council ...

In other words, to fulfil their obligations a state would need to enact a resolution in full. It could not choose whom to apply it against and whom to protect.

The issue of compliance and complicity does open up new questions of whether or not the sanctions regime of the Security Council can or should more directly control corporate actors. But to do so would seem to require fundamental structural changes in the institutional operation of the Security Council that are beyond the scope of this paper. It is, however, the direction in which discussion should move. The endemic nature of corporate complicity in human rights violations discussed above demonstrates that corporate activity is an area of pressing concern and one that can and does threaten international peace and security.

IV CONCLUSIONS

The grave human costs of armed conflict provide a powerful motivator to undertake action that promotes conflict prevention. Corporations can clearly play an enormous role in sustaining armed

170 See for example Virgil Hawkins "Measuring UN Security Council Action and Inaction in the 1990s" (2003) 12(2) African Security Review 61.

171 See for example Fassbender, above n 161, at [6.4].

172 At [6.4].

conflict and human rights violations. The application of, or attention to, concepts of corporate complicity and corporate responsibility are not directed at impeding globalisation or the general principles of free trade. While some impediment may be an inevitable consequence of their application, restrictions to trade, based on placing certain values (specifically human rights and humanitarian principles) above trade liberalisation, is not fatal to the global market. If the regulation of corporate complicity is correctly handled, in a way that does not prevent or discourage legitimate corporate activity, then the impediment to continuing trade should be minimal and, more importantly, justified. The underlying goal is to bring corporate activity into line with universal human rights standards, which apply to all individuals and all organs of society.

As the rule of law tends to falter in the face of armed conflict, moral responsibilities increase in importance. Further, public opinion thus far has had a demonstrable impact on how companies act, whereas allegations of corporate complicity rarely reach courts and almost invariably fail. Knowledge of human rights violations creates a responsibility for corporations to act (even if the action taken is merely to withdraw). In situations of armed conflict this responsibility goes further. If a corporation willingly enters or remains in an area of armed conflict, then it is argued that there should be a responsibility to exert due diligence, and be aware of potential complicity before it occurs. A corporation "should know" how its operations will affect a community and how its products and services might contribute to conflict.

One of the most important benefits that can be gained from a complementary approach is the specialised nature of the response. If corporate complicity is analysed in the broader context of the economic and social relationships of a specific crisis, a more detailed understanding of the contours of corporate complicity can be developed and more effective responses can be devised. It is important to appreciate that the possibilities for corporate complicity are potentially endless and that an effective response is going to require flexibility. Complementary approaches that are situation-specific offer this, while at the same time utilising existing and established international institutions. Solutions looking to broader concerns of corporate responsibility may lack the capacity to analyse corporate complicity in the same sophisticated manner and instead make sweeping generalisations that may not be reflected in a specific context.

A complementary approach also helps emphasise the gravity of the offence. For situations that fall within the purview of the Security Council, that is threats to "international peace and security", it is particularly important for the Council to be consistent in its response to all actors involved. Treating it as part of the broader problem gives the issue of corporate complicity the sense of urgency that surrounds the actual violations. This sense of urgency is often vital to effective human rights responses, especially in terms of eliciting the necessary political will to act. Responses to corporate complicity that are separate from the main issue may lack this urgency and thus fail to be as effective. On the other hand, a complementary approach does produce pitfalls particular to the political nature of the Security Council. Actively targeting corporations requires its members to take action against their own national corporations and economic interests. It could also have the

counter-effect of making the Council all the more reluctant to act in these situations so as not to place its own citizens in the firing line. Thus such an approach must be navigated with due caution and with an awareness of the political factors at play. But even if enforcement is to be approached with caution, there is the potential for the Security Council to engage in awareness-raising and standard-setting. Advocating and establishing clear guidelines in relation to due diligence of corporations is something that the Security Council has begun in relation to the DRC. Such considerations should become a regular part of Security Council resolutions.

There is also increasing appreciation of the importance of safeguarding legitimate business interests as far as possible. Thus, approaches such as targeted sanctions must be applied so as to prevent corporate complicity without limiting the ability of responsible businesses to maintain their activities. This not only helps encourage positive engagement with business, but also appreciates the positive benefits that corporate activities can bring to affected populations. It also appreciates the importance of investment and development in establishing sustainable peace and the promotion of human rights.

What has also been demonstrated is the continuing vital role that states must play if enforcement of international initiatives is to be effective. Sanctions require domestic enforcement and oversight to produce meaningful results. Where states have vested interests in the continued operations of companies within their territory, especially in the case of state-owned companies, they may be able to shield these companies from the effects of international law. What is needed is the continued development and promotion of international norms and mechanisms to influence both state and corporate behaviour. The R2P doctrine is particularly important in providing added impetus to efforts to regulate corporate complicity. The establishment of the expert panels by the Security Council has offered a greater opportunity to both analyse and influence corporate behaviour in situations of serious human rights violations. The role of expert panels is particularly important as they offer relative objectivity in comparison to the Security Council itself. One of the most important functions of the expert panels is in raising awareness of the role of corporate activity in such situations. One of the measures used by the panels has been naming and shaming. Naming and shaming does have its limits but, as discussed, it has produced demonstrable effects. However, naming and shaming should give way to development of more constructive means of engaging with corporations. Greater effectiveness on the part of the expert panels requires greater consistency in the application and processes of the panels both in their day-to-day operations and in the realisation of their recommendations. The issue of complicity needs to be given similar consideration to the primary rights violation if effective strategies are to be produced. For this reason, greater resources need to be supplied to the panels and committees of the Security Council if they are to have the primary responsibility for addressing complicity within the Council.

No single institution is likely to provide the solution to corporate complicity on its own. Each international institution will have something unique to offer the equation. This paper looks at just one (the Security Council), but all international institutions should embed approaches to addressing

corporate complicity in their activities. An effective framework can be developed if international institutions work in concert, with shared standards and norms to guide them, alongside corporations, industry, states and civil society. This seems a more effective strategy to regulate corporate actors than the creation of an entirely new regime to deal with corporations in isolation. In the case of the Security Council, its role in the international system is as the gatekeeper of international peace and security. Surely corporate acts that contribute to already volatile situations involving gross and systematic human rights violations fall under its aegis.

However, it needs to be emphasised that this approach in no way diminishes the importance of the broader corporate responsibility framework. It is, of course, essential to pursue greater corporate awareness of their human rights obligations and hopefully to create a culture of corporate respect for human rights. Ideally corporations will not just stop being part of the problem but become part of the solution. The approaches discussed here merely reflect some possible responses when violations occur. The lessons learnt from the various mechanisms that have been employed across a range of international institutions should be taken into consideration in any attempts to regulate corporate behaviour, especially complicit behaviour.

