

ANTONIO CASSESE PRIZE FOR INTERNATIONAL CRIMINAL LAW STUDIES: A BOOK PROPOSAL

Atrocity, Commerce and Accountability

The International Criminal Liability of Corporate
Actors

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1. Introduction: Five Principal Themes

The introduction sets out five themes that frame the specific case studies that follow in subsequent chapters of the book. This section contains a short overview of these five themes.

A. *Criminal Liability of Corporate Actors for International Crimes*

The book builds upon and significantly develops a growing body of literature focused on the liability of commercial actors for international crimes. In recent years, a range of policy-based organizations,¹ academics,² and the

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1 For policy-related research, see FAFO Institute and the International Peace Academy, *Business and International Crimes: Assessing the Liability of Business Entities for Grave Violations of International Law*, available online at <http://www.fafon.org/liabilities/index.htm> (visited 3 January 2010); International Commission of Jurists, *Report of the Expert Legal Panel on Corporate Complicity in International Crimes* (2008), available online at <http://www.business-humanrights.org/Updates/Archive/ICJPaneloncomplicity> (visited 3 January 2010).

2 In addition to the excellent articles produced within the *Journal of International Criminal Justice* in the past and as part of the upcoming special edition on this topic, see A. Clapham, 'The Question of Jurisdiction under International Criminal Law over Legal Persons: Lessons from the Rome Conference on an International Criminal Court', in M. Kamminga and S. Zia-Zarifi (eds), *Liability of Multinational Corporations Under International Law* (The Hague: Kluwer Law International, 2000); C. Chiomenti, 'Corporations and the International Criminal Court', in O. De Schutter (ed.), *Transnational Corporations and Human Rights* (Oxford: Hart Publishing, 2006), at 287; J. Kyriakakis, 'Corporations and the International Criminal Court: the Complementarity Objection Stripped Bare', 19 *Criminal Law Forum* (2008) 115–151.

International Criminal Court (ICC) Prosecutor³ have highlighted the possibility of international criminal responsibility of business representatives or corporate entities within certain domestic jurisdictions. There is, however, a real need for a comprehensive exploration of these issues. This book uses three specific case studies to offer new theoretical insights to existing debates in both international and domestic criminal law. Specifically, the project demonstrates how the realities of commercial implication in international crimes offers new perspectives on: (i) the debate over the merit of civil versus criminal law remedies for corporate wrongdoing;⁴ and (ii) the comparative value of individual criminal liability of business representatives as compared with corporate criminal liability.⁵ Both bodies of literature frequently assume companies operate within a single perfect jurisdiction, ignoring the fact that some carry out business in foreign conflict zones.

B. Beyond Transitional Justice: International Criminal Liability as an Element of Global Governance

International criminal justice is frequently viewed uniquely through a transitional justice lens as one means of promoting reconciliation between previously warring factions after some political transition on the ground.⁶ From a historical perspective, the description is understandable because the vast majority of international criminal prosecutions have taken place in societies attempting to address the impact and transcend the causes of recent violent histories. However, by employing examples of the contemporary liability of commercial actors for international crimes, this research illustrates how this

- 3 ICC Press Release, 'Communications Received By The Office Of The Prosecutor Of The ICC' (ICC-OTP-20030716-27), 16 July 2003, available online at <http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2003/press%20conference%20of%20the%20prosecutor%20%20press%20release> (visited 3 January 2010). See also, Mr L. Moreno-Ocampo, 'Second Assembly of States Parties to the Rome Statute of the International Criminal Court, Report of the Prosecutor of the ICC', 8 September 2003, available online at <http://www.icc-cpi.int/NR/rdonlyres/C073586C-7D46-4CBE-B901-0672908E8639/143656/LMO.20030908.En.pdf> (visited 3 January 2010).
- 4 For example, R. Posner, *Economic Analysis of Law* (5th edn., New York: Little, Brown & Co., 1998), at 464; V. Khanna, 'Corporate Criminal Liability: What Purpose Does It Serve?' 109 *Harvard Law Review* (1996) 1477–1534; L. Friedman, 'In Defense of Corporate Criminal Liability', 23 *Harvard Journal of Law & Public Policy* (2000) 833–859.
- 5 See, for example, J. Coffee, "'No Soul to Damn: No Body to Kick': An Unscandalized Inquiry into the Problem of Corporate Punishment', 79 *Michigan Law Review* (1981) 386–459, at 410; B. Fisse and J. Braithwaite, *Corporations, Crime and Accountability* (Cambridge: Cambridge University Press, 1993), at 36; C. Wells, *Corporations and Criminal Responsibility* (2nd edn., Oxford: Oxford University Press, 2001), at 52.
- 6 See for instance, R. Teitel, *Transitional Justice* (New York: Oxford University Press, 2000); C. Stahn, 'The Geometry of Transitional Justice: Choices of Institutional Design', 18 *Leiden Journal of International Law* (2005) 425–466; M. Drumbl, *Atrocity, Punishment and International Law* (New York: Cambridge University Press, 2007).

conception of international justice is overly restrictive.⁷ International criminal law is not a simple tool for reconciling warring parties or precipitating societal change during a time of post-conflict transition; the discipline is part of an increasingly robust system of global governance that applies regardless of whether there is political transition on the ground and irrespective of the needs for post-conflict reconciliation.

C. *International Criminal Justice as a Means of Affecting the Course of Ongoing Violence*

This theme explores the role of international criminal justice in influencing the trajectory of ongoing hostilities. Traditionally, international criminal trials have followed the military defeat of one warring faction, perpetuating the enduring perception that in many instances international criminal justice still amounts to ‘victor’s justice’.⁸ The new possibility posed by a permanent International Criminal Court, combined with increasing engagement of domestic courts, is that international criminal justice can influence the course of continuing violence before there is a victor. As the Prosecutor of the ICC has acknowledged (in terms that appear slightly contradictory), ‘[my] Office is part of a new system dealing with a complex new reality: transitional justice during ongoing conflicts’.⁹ The prosecution of business entities and their representatives serves as a prime example of this relatively novel possibility. The development allows law enforcement agencies to prioritize the prosecution of commercial crimes that fuel armed violence in a bid to extinguish ongoing hostilities, as distinct from simply punishing acts of rape, torture and murder once the violence has run its course.

7 For a similar observation see F. Mégret, ‘The Politics of International Criminal Justice’, 13 *European Journal of International Law* (2002) 1261–1282, at 1262 (‘because international criminal justice seemed ornamental at best, it could be safely relegated to the periphery of some discrete subdiscipline, for example under the catch-all expression of “transitional justice”, somewhere at the intersection of public policy, history and ethical theory.’)

8 For apt examples, see M. Koskeniemi, ‘Between Impunity and Show Trials’, in J.A. Frowein and R. Wolfrum (eds), 6 *Max Planck Yearbook of United Nations Law* (The Hague: Kluwer Law International, 2002) 1–35; A. Garapon, *Des crimes qu’on ne peut ni punir ni pardonner* (Paris: Odile Jacob, 2002), chapitre 2; G.J. Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton: Princeton University Press, 2000), at 8–20; G. Simpson, *Law, War and Crime: War Crimes Trials and the Reinvention of International Law* (New Hampshire: Polity Press, 2007), at 16–17.

9 L. Moreno Ocampo, ‘Transitional Justice in Ongoing Conflicts’, 1 *International Journal of Transitional Justice* (2007) 8–9; for similar views of another international prosecutor, see R. Goldstone, ‘Bringing War Criminals to Justice During an Ongoing War’, in J. Moore (ed.), *Hard Choices: Moral Dilemmas in Humanitarian Intervention* (Lanham, MD: Rowman and Littlefield, 1998).

D. *A Critique of a Prosecutorial Policy that Focuses Exclusively on those 'Who Bear the Greatest Responsibility'*

A large number of international criminal courts expressly profess a commitment to only prosecuting those 'who bear the greatest responsibility' for crimes within their jurisdiction.¹⁰ As part of this research, I will use specific illustrations of corporate liability for international crimes to criticize this commitment, since it deprives international criminal justice of the ability to pursue commercial actors during hostilities—businesses that fuel violence are seldom more responsible than the leaders who instigate atrocities. But as each of the studies explored in subsequent chapters reveals, precluding the prosecution of businesses or their representatives would be regrettable because they play a vital role in sustaining violence. Moreover, commercial actors are more easily apprehended and generally appear more likely to be deterred by the threat of criminal sanction than armed groups.¹¹ Consequently, their liability for international crimes offers a new perspective to the literature addressing prosecutorial discretion.¹²

E. *Prosecuting Corporate Actors to Overcome Perceptions of Geographical Bias*

The enforcement of international criminal justice is increasingly perceived as geographically biased, as it predominantly tends to involve perpetrators from

10 Art. 1(1) Statute of the Special Court for Sierra Leone; ICC Office of the Prosecutor, *Paper on some policy issues before the Office of the Prosecutor*, Sept 2003, at 7. Extraordinary Chambers in the Courts of Cambodia Internal Rules (Rev.4) as revised on 11 September 2009, Preamble, available online at <http://www.sc-sl.org/LinkClick.aspx?fileticket=uClnIdIMJeEw%3D&> (visited 3 January 2010).

11 Although deterrence is empirically difficult to establish, rebel groups are not likely to be seriously deterred by the prospect of international criminal liability, since they are already perpetrating a range of domestic criminal offences by waging rebellion. In this light, evidence that corporate actors are deterred by the threat of criminal liability at all is significant. In this regard, see S. Simpson, *Corporate Crime, Law, and Social Control* (New York: Cambridge University Press, 2002), at 22–44; See also T. Makkai and J. Braithwaite, 'The Dialectics of Corporate Deterrence', 31 *Journal of Research in Crime and Delinquency* (1994) 347–373; D. Thornton et al., 'General Deterrence and Corporate Environmental Behavior', 27 *Law & Policy* (2005) 262–288; J. Gobert and M. Punch, *Rethinking Corporate Crime* (Bath: Butterworths, 2003), at 292–296.

12 For a small subsection of an abundant literature, see A. Danner, 'Enhancing the legitimacy and accountability of prosecutorial discretion at the International Criminal Court', 97 *American Journal of International Law* (2003) 510–552; L. Côté, 'Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law', 3 *Journal of International Criminal Justice* (2005) 162–186; M. Brubacher, 'The Development of Prosecutorial Discretion in International Criminal Courts', in E. Hughes et al. (eds), *Atrocities and International Accountability: Beyond Transitional Justice* (Tokyo: United Nations University Press, 2007); A. Greenawalt, 'Justice Without Politics? Prosecutorial Discretion and the International Criminal Court', 39 *New York University Journal of International Law and Politics* (2007) 583–673.

poorer developing nations. At least one African president, for instance, has recently denounced the ICC as ‘a new form of imperialism created by the West to control the world’s poorest countries.’¹³ Although claims of this sort are obviously overstated, the accusations are not entirely unfounded—the ICC has indicted the sitting President of Sudan and the former Vice-President of the Democratic Republic of Congo for pillage, while numerous western business representatives alleged to have perpetrated the same offence escape scrutiny. There is, therefore, a pressing need to explore opportunities to progressively overcome these perceptions of bias. As Mirjan Damaška rightly argues, ‘the task of international criminal courts is to make incremental headway toward a system unstained by the flaw of selectivity.’¹⁴ After presenting this theme within the introduction, the remainder of the book highlights how prosecuting western businesses or their representatives is a realistic means of achieving this incremental headway, thereby bolstering international criminal law’s claim to legitimacy.

2. International Criminal Liability of Commercial Actors for Pillaging Natural Resources

In the aftermath of the Second World War (WWII), a host of businessmen were convicted of pillaging natural resources and raw materials. A German businessman named Hermann Roehling, for instance, was found guilty of pillaging 100 million tons of iron ore from mines in occupied France.¹⁵ Somewhat inexplicably, this and other equivalent precedents have not been redeployed to punish strikingly similar corporate practices before modern international or domestic criminal courts. This failure is largely the result of legal amnesia. For example, in the 1990s, a Security Council-appointed Panel of Experts charged with investigating violations of a UN embargo on Angolan diamonds found that prominent western businesses had acquired large quantities of diamonds from the Angolan rebel group *União Nacional para a Independência Total de Angola* (UNITA).¹⁶ Yet although UNITA had no title in the diamonds, and at least one

13 See AFP, ‘Rwanda’s Kagame says ICC Targeting Poor, African Countries,’ 31 July 2008 available online at <http://afp.google.com/article/ALeqM5ilwBZg00Jx3N9hSX-Wu8zEyQGig> (visited 3 January 2010).

14 M. Damaška, ‘What is the Point of International Criminal Justice?’ 83 *Chicago-Kent Law Review* (2009) 329–365, at 362. But see, for scepticism about the possibility of international criminal law being anything other than highly selective, F. Mégret, ‘The Creation of the International Criminal Court and State Sovereignty: the “Problem of an International Criminal Law” Re-examined’, in J. Carey, W. Dunlap and R. Pritchard (eds), *International Humanitarian Law* (Ardsey, NY: Transnational Publishers, 2006).

15 *France v. Roehling*, 14 Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10 [hereinafter, Trials of War Criminals], at B, at 1113 and 1124 (1949).

16 See Final Report of the Panel of Experts Established Pursuant to Resolution 1237 (1999), UN Doc. S/2000/203, §§ 75–114. See also Final Report of the Monitoring Mechanism on Angola Sanctions established by Resolution 1295 (2000), UN Doc. S/2000/1225, 21 December 2000.

case derived from WWII had convicted an individual for pillaging 'cut and uncut precious stones',¹⁷ calls for accountability of the companies alleged to have misappropriated Angolan gems mysteriously made no mention of pillage.¹⁸

The type of impunity observed in the case of Angola is also evident in other more recent resource wars. In 2000, a Panel of Experts appointed by the UN Security Council to investigate the link between illegal exploitation of natural resources and ongoing violence in the Democratic Republic of Congo unearthed what it described as a 'self-sustaining war economy' in which hostilities create 'win-win situations for all belligerents'.¹⁹ But in denouncing 84 predominantly western companies for illegally exploiting natural resources during the Congolese war,²⁰ the UN Panel relied on the OECD Guidelines on Multinational Enterprises as the guiding legal framework.²¹ This ignored the conviction of Paul Pleiger, the Director of a company named the Mining and Steel Works East Inc., for pillaging coal from mines located in Poland only decades earlier.²² Despite a large body of analogous precedent, a British parliamentary inquest into corporate pillage of Congolese resources mistakenly concluded that 'there is little in the way of "hard law" to regulate the activities of multinational companies operating in the developing world.'²³

Companies pillaging oil, uranium and other strategic resources from conflict zones have benefited from a similar legal misunderstanding. At the end of the

Also see, C. Dietrich, *Hard Currency: The Criminalized Diamond Economy of the Democratic Republic of Congo and its Neighbours*, June 2002, available at <http://action.web.ca/home/pac/attach/hcrepote.pdf> (visited 3 January 2010) at 28.

17 *U.S.A. v. Von Weizsaecker et al. (Ministries Case)*, 14 *Trials of War Criminals* 314, 720 (1949) [hereafter *Ministries Case*] (finding Wilhelm Stuckart guilty of pillage for having signed a decree that provided for the expropriation of various Polish property including both 'gold and silver', and 'cut and uncut precious stones')

18 One leading advocacy group argued that diamond traders 'dealing with UNITA should be penalized with confiscation of diamonds ... heavy fines and loss of tax concessions'. See Global Witness, *A Rough Trade: The Role of Companies and Governments in the Angola Conflict* 8 (1998), available online at <http://www.globalwitness.org/mediaLibrary/detail.php/90/en/a.rough.trade> (visited 3 January 2010), at 3.

19 *Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo*, UN Doc. S/2001/357 (2001), 12 April 2001.

20 *Ibid.* Annexes I–III.

21 The OECD Guidelines for Multinational Enterprises are a set of voluntary principals and standards adopted by OECD governments, with which companies are expected to comply. In 2000, the guidelines were revamped to create National Contact Points capable of hearing cases, although these contact points have no investigative capacity, cannot sanction violations and only apply in a limit number of countries. See OECD Watch, *Guide to the OECD Guidelines for Multinational Enterprises' Complaint Procedure: Lessons from Past NGO Complaints*, November 2006, available online at <http://oecdwatch.org/publications-en/Publication.1664/> (visited 3 January 2010). For commentary, see N. Jägers, *Corporate Human Rights Obligations: In Search of Accountability* (Mortsel, Belgium: Intersentia, 2002), at 101–109.

22 *Ministries Case*, *supra* note 17, at 741.

23 See All Party Parliamentary Group on the Great Lakes Region, *The OECD Guidelines for Multinational Enterprises and the DRC*, February 2005, available at <http://www.appggreatlakes.org/index.php/document-library-mainmenu-32/links-mainmenu-23> (visited 3 January 2010), at 6.

WWII, the Nuremberg Tribunal convicted Walther Funk of pillage for his role in the management of the Continental Oil Company, which exploited copious quantities of crude oil throughout occupied Europe.²⁴ Unfortunately, this precedent and the others like it were overlooked during the apartheid occupation of Namibia from 1968 to 1990, which involved prodigious exploitation of Namibian oil, uranium and other resources by prominent western businesses. While the UN Council for Namibia and the UN General Assembly both openly denounced a large number of western companies for the 'plunder of Namibian natural resources',²⁵ the UN Council's repeated attempts at initiating legal proceedings against these corporate entities in domestic courts were stymied by misguided theories of civil liability.²⁶

In this chapter, I will recast these incidents into a framework based on the modern war crime of pillage. Pillage is a war crime in all international criminal tribunals and most domestic legal systems. The liability of commercial actors for pillaging natural resources perfectly captures all of the themes identified within the introduction to this research proposal. For one reason, the illicit trade of natural resources now represents a predominant means of conflict financing²⁷ — in countries as diverse as Papua New Guinea, Myanmar and the Democratic Republic of Congo, revenues generated from natural resource predation supply both the means and motivation for violence.²⁸ Companies, of course, play an indispensable role by extracting or purchasing the illicit resources. Consequently, by incapacitating companies involved in extracting or purchasing pillaged resources, international criminal justice can starve armed groups of the means of financing war and impede inter-state aggression for increasingly scarce resources. Like other examples illustrated within the research, these criminal trials of commercial actors would highlight the role of international criminal justice as an element of global governance in ongoing

24 Judgment, International Military Tribunal (Nuremberg) (1946), 1 Trial of the Major War Criminals before the International Military Tribunal 171, 306 (1945).

25 UN General Assembly, Fourth Committee Report, UN Doc. A/41/726, 17 October 1986 (recalling 'that the exploitation and depletion of those resources, particular the uranium deposits, as a result of their *plunder* by South African and certain Western and other foreign economic interests ...') (emphasis added).

26 *Implementation of Decree No. 1 for the Protection of the Natural Resources of Namibia: Study on the Possibility of Instituting Legal Proceedings in the Domestic Courts of States*, reproduced in 80 *American Journal of International Law* (1986) 442–491; See also N. Schrijver, 'The UN Council for Namibia vs. Urenco, UCN and the State of the Netherlands', 1 *Leiden Journal of International Law* (1998) 25–49.

27 I. Bannon and P. Collier, 'Natural Resources and Conflict: What Can We Do?' in I. Bannon and P. Collier (eds), *Natural Resources and Violent Conflict: Options and Actions* (Washington: The World Bank, 2003) 1–16; M. Ross, 'The Natural Resource Curse: How Wealth Can Make You Poor in Natural Resources and Violent Conflict', in Bannon and Collier (eds), *ibid.*, 17–42, at 30; D. Keen, *The Economic Functions of Violence in Civil Wars* (London: International Institute of Strategic Studies, 1998).

28 K. Ballentine and J. Sherman, 'Introduction', in K. Ballentine and J. Sherman (eds), *The Political Economy of Armed Conflict: Beyond Greed and Grievance* (Boulder: Lynne Rienner Publishers, 2003), at 3.

hostilities — contradicting the frequent misperception that international criminal law is coterminous with transitional justice.

3. International Criminal Law as a Means of Regulating the Trade in Weapons

Weapons are the largest commercial market in the world. Global spending on weaponry is estimated at approximately US \$1,226 billion per annum, a figure 15 times greater than the current worldwide expenditure on aid.²⁹ Since 1996, states have increased weapon demands by at least a third, making military spending higher now than the figure achieved at the peak of the Cold War.³⁰ Once again, companies are at the centre of this globalized growth industry — the top 100 companies involved in the production and marketing of arms and ammunition reportedly posted a 60% increase in profit between the years 2000 and 2004 alone.³¹ The production and sale of these weapons frequently serves legitimate purposes, such as peace-keeping, national or collective self-defence and law enforcement, but this is not always the case.

In many instances, corporate actors have sold arms to notoriously brutal regimes, regardless of the fact that the weapons are used to perpetrate international offences.³² In countries as diverse as Angola, the former-Yugoslavia and Cambodia, extensive evidence points to the supply of arms in circumstances where vendors could only be aware of the virtual certainty that their commerce facilitated war crimes, crimes against humanity, and even genocide.³³ In fact, as a general reflection of the sheer magnitude of these sorts of commercial practices, arms vendors supply weapons to all contemporary armed conflicts, despite the serious and widespread violations of human rights and humanitarian law these commercial practices ultimately engender.

Traditionally, arms embargoes instituted by the UN Security Council, regional organizations or individual states have acted as the primary

29 See SIPRI, 'Military Expenditure by Region in Constant US Dollars, 1988–2008', available online at <http://www.sipri.org/research/armaments/milex/resultoutput/worldreg> (visited 3 January 2010).

30 *Ibid.*

31 SIPRI, 'Armaments, Disarmament and International Security', *SIPRI Yearbook* (Oxford: Oxford University Press, 2006), at 388.

32 See in particular L. Lumpe (ed.), *Running Guns: The Global Black Market in Small Arms* (London: Zed Books, 2000); R. Stohl and S. Grillot, *The International Arms Trade* (Cambridge: Polity Press, 2009); R. Stohl, M. Schroeder, and D. Smith, *The Small Arms Trade: A Beginner's Guide* (Oxford: Oneworld Publications, 2007).

33 For a selection of allegations in Angola, the former Yugoslavia and Sierra Leone, see *Final Report of the Monitoring Mechanism on Angola Sanctions established by Resolution 1295* (2000), UN Doc. S/2000/1225, 21 Dec 2000; United Nations Security Council, 'Letter dated 26 February 1999 from the Chairman of the Security Council Committee Established Pursuant to Security Council Resolution 1160 (1998)', UN Doc. S/1999/216, 4 March 1999; for allegations relating to the transfer of weapons to the Khmer Rouge, see F. Deron, *Le Procès des Khmers Rouges* (Paris: Gallimard, 2009), chapitre: *Coupables mais pas justiciables*.

mechanism for curbing arms flows to conflict zones.³⁴ And yet a growing body of literature indicates that arms embargoes are largely ineffective in practice;³⁵ and that violations of these embargoes almost invariably go unpunished.³⁶ Consequently, commentators readily accept that ‘nowhere is the need for reform and strengthening of enforcement greater than in the area of arms embargoes’.³⁷ This sentiment has led to a number of modern initiatives, such as the process of clarification led by the International Committee of the Red Cross in recent years,³⁸ which are intended to prevent illicit arms flows from fuelling violations of basic human rights and humanitarian law.

One particular initiative has attracted considerable attention. By Resolution 61/89 of 6 December 2006, the UN General Assembly ‘requested the Secretary-General to seek the views of Member States on the feasibility, scope and draft parameters for a comprehensive, legally binding instrument establishing common international standards for the import, export and transfer of conventional arms’.³⁹ A central purpose of this proposed UN Arms Treaty, to which several permanent members of the Security Council have professed support in recent weeks, is to make the human rights and international humanitarian law record of end-users relevant to the legality of arms transfers, and to compel states to ensure enforcement of violations. The numerous advocates of this proposed treaty regime rightly argue that a globalized problem demands regulation on an international plane, since national or even regional regulation of the arms trade simply prompts weapon vendors to relocate to less onerous jurisdictions.

Although the aspirations underpinning the desire for a new treaty governing arms transfers are noble, the project appears to have overlooked the pre-existing value of international criminal law. In the vast majority of

34 For a helpful overview of the various layers of regulation, see H. Anders and S. Cattaneo, *Regulating Arms Brokering: Taking Stock and Moving Forward the United Nations Process* (Brussels: GRIP, 2005).

35 See generally, D. Tierney, ‘Irrelevant or Malevolent? UN Arms Embargoes in Civil Wars’, 31 *Review of International Studies* (2005) 645–664. See also D. Fruchart, P. Holtom, and S. Wezeman, *United Arms Embargoes: Their Impact on Arms Flows and Target Behaviour* (Molnycke, Sweden: Elanders, 2007), available online at <http://books.sipri.org/files/misc/UNAE/SIPRI07UNAE.pdf> (visited 3 January 2010).

36 Based on available evidence, the numerous violations of arms embargoes in various theatres throughout the world have resulted in only a handful of prosecutions. See B. Wood, *Strengthening Compliance with UN Arms Embargoes — Key Challenges for Monitoring and Verification*, 16 March 2006, available online at <http://www.amnesty.org/en/library/info/IOR40/005/2006> (visited 3 January 2010).

37 D. Cortright and G. Lopez, *The Sanctions Decade: Assessing UN Strategies in the 1990s* (Boulder: Lynne Rienner, 2000), at 210.

38 International Committee of the Red Cross, *Arms Transfer Decisions: Applying International Humanitarian Law Criteria* (2007), available online at <http://www.icrc.org/web/eng/siteeng0.nsf/html/p0916> (visited 3 January 2010).

39 *Towards An Arms Trade Treaty: Establishing Common International Standards for the Import, Export and Transfer of Conventional Arms*, 18 December 2006, UN Doc. A/RES/61/89 available online at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/499/77/PDF/N0649977.pdf?OpenElement> (visited 3 January 2010).

national criminal systems, providing the means to commit a crime renders the provider an accomplice to the principal's offence. The same is true in international criminal law, where provision of the means to perpetrate an offence coupled with awareness of the substantial likelihood of this eventuality renders the supplier guilty of the resulting international crime in a number of international criminal jurisdictions.⁴⁰ Although the ICC appears to codify higher standards of accomplice liability,⁴¹ there is little literature that thoroughly explores the relationship between these competing definitions in light of the intricacies of the global trade in weaponry.⁴²

A number of both historical and contemporary international criminal cases point to important practical implications. For instance, in post-WWII Germany, industrialists who knowingly provided Zyklon B to Nazis responsible for gas chambers were convicted of the horrendous crimes their commerce facilitated.⁴³ More recently, the Dutch War Crimes Prosecutor convicted Frans Van Anraat of the war crime of inhuman treatment for supplying chemical weapons to Iraq, which were used by Saddam Hussein to gas Kurds.⁴⁴ In another case, Guus Van Kouwenhoven was prosecuted for providing the Liberian President Charles Taylor with weapons used to fight a notoriously brutal civil war characterized by massive violations of international criminal law.⁴⁵ These precedents have important consequences once extrapolated across the largest market in the world, and when viewed as an element of international governance rather than a mere tool in effecting socio-political change in transitional societies.

40 For a helpful synthesis of findings from a comparative survey of various national jurisdictions, see R. Thompson, M. Taylor, and A. Ramasastry, 'Translating UNOCAL: The Expanding Web of Liability for Business Entities Implicated in International Crimes', *George Washington University International Law Review* (forthcoming). For the law derived from ad hoc tribunals, see G. Boas, J. Bischoff, and N. Reid, *Forms of Responsibility in International Criminal Law* (Cambridge: Cambridge University Press, 2007), at 278–340.

41 Art. 23(3)(c) ICC Statute reads, '[f]or the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission'. The purpose element appears higher than both customary international and national criminal law. For discussion, see G. Werle, *Principles of International Criminal Law* (The Hague: T.M.C. Asser Press, 2005), at 125–128.

42 Some texts deal with arms transfers without addressing international criminal law. See, for instance, Z. Yihdego, *The Arms Trade and International Law* (Oxford: Hart Publishing, 2007). Other helpful contributions do so as part of a broader project. See, in this regard, A. Boivin, 'Complicity and Beyond: International law and the Transfer of Small Arms and Light Weapons', 859 *International Review of the Red Cross* (2005) 467–496. Still others write excellent journalistic accounts of reprehensible commercial practices, without focusing directly on the parameters of criminal liability. See K. Austin, 'Illicit Arms Brokers: Aiding and Abetting Atrocities', 9 *Brown Journal of World Affairs* (2002) 203–216.

43 *Trial of Bruno Tesch and Two Others*, 1 Law Reports of Trials of War Criminals 93 (Brit. Mil. Ct. 1947).

44 Judgment in *the case against Frans van Anraat*, District Court of The Hague, Criminal Law Section, Public Prosecutor's Office Number 09/751003-04, 23 December 2005.

45 Judgment in *the case of Guus Van Kouwenhoven*, District Court of The Hague, Criminal Law Section, Public Prosecutor's Office Number 09/750001-05, 7 June 2006.

In exploring these consequences, this chapter harnesses these cases and an increasing interest in accessorial liability for international crimes,⁴⁶ in order to demonstrate the added value of international criminal law in dealing with illicit arms transfers by corporate actors. The chapter introduces the possible role of international criminal law as a vehicle for at least partially addressing the shortcomings of arms embargoes, and shows how a pre-existing body of universal law is already capable of achieving many of the aspirations of the proposed Arms Treaty. In other words, the chapter sheds light on what Judge Weeramantry once described as ‘a blind spot in human rights and international law’.⁴⁷ Ultimately, however, the chapter’s overarching focus is to demonstrate the potential role of international criminal law in quelling ongoing atrocities by prosecuting corporate actors who supply the means to further atrocity. This undertaking, once again, demonstrates the role of international criminal justice in regulating powerful economic markets, independent of notions of transitional justice.

4. Superior Responsibility of Individuals Directing and Contracting Private Military Companies

States are increasingly contracting out their monopoly on the legitimate use of violence to private military or security companies. In 2004, the global market for private military services was estimated to be \$100 billion per annum and is growing at such a rate that its value is projected to reach \$202 billion by 2010.⁴⁸ In years past, the number of government civilian employees and contractor personnel operating in Iraq ranged from 20,000 to 30,000, making private military personnel the second largest armed contingent in the country.⁴⁹ In late 2009, the number of private military contractors in Afghanistan exceeded that of regular military forces.⁵⁰ This privatization of military functions to corporate actors is widely regarded as one of the great challenges

46 For a small sample of this literature, see M.D. Dubber, ‘Criminalizing Complicity: A Comparative Analysis’, 5 *Journal of International Criminal Justice* (2007) 977–1001; E. Van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (The Hague: T.M.C. Asser Press, 2003); A. Clapham and S. Jerbi, ‘Categories of Corporate Complicity in Human Rights Abuses’, 24 *Hastings International & Comparative Law Review* (2001) 339–349; C. Kutz, *Complicity: Ethics and Law for a Collective Age* (New York: Cambridge University Press, 2000).

47 C.G. Weeramantry, ‘Traffic in Armaments: A Blind Spot in Human Rights and International Law’, 2 *Development Dialogue* (1987) 68–90.

48 C. Holmqvist, *Private Security Companies: The Case for Regulation*, SIPRI Policy Paper No. 9, January 2005, available online at <http://books.sipri.org/productinfo?c.product.id=191> (visited 3 January 2010).

49 M. Schmitt, ‘Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees’, 5 *Chicago Journal of International Law* (2005) 511–546.

50 M. Schwartz, *Department of Defense Contractors in Iraq and Afghanistan: Background and Analysis*, 14 December 2009, Congressional Research Service, available online at <http://www.fas.org/sgp/crs/natsec/R40764.pdf> (visited 3 January 2010).

that international humanitarian and criminal law will face in the coming years.

One of the most serious of these challenges is that the privatization of armed conflict potentially undermines the doctrine of superior responsibility, which has proved the most important means of ensuring compliance with the laws of war during conflict. According to extensive analysis carried out by the International Committee of the Red Cross, the key to ensuring respect of international humanitarian law 'is not to persuade combatants that they must behave in a different way, or to win them over personally, but rather to influence the people who have an ascendancy over them.'⁵¹ For this reason, the doctrine of superior responsibility renders a commander of military operations guilty of the crimes perpetrated by subordinates where he or she knew or had reason to know of the offences and failed to take all necessary and reasonable measures to prevent their occurrence or punish their commission.

The privatization of military operations through commercial contract has the potential to undermine superior responsibility's function by creating a perception that the chain of command does not flow into or out of corporations. For instance, a real danger exists that those employing private military companies to perform discrete military operations will wash their hands of responsibility for calling the personnel to account for international crimes perpetrated in the process because the perpetrators were not under their formal command. Even within the company itself, directors of PMCs are extremely unlikely to report offences perpetrated by their military employees for fear of suffering a decline in commercial reputation and exposing the corporation to risks of civil liability. For both these reasons, superior responsibility plays a particularly important role in countermanding incentives that are likely to inhibit accountability.

In response, this chapter explores the extent to which the doctrine of superior responsibility binds both the director of the Private Military Company and individuals from outside the corporate structure who contract these forces to perform discrete military tasks. Until now, much of the literature focused on the accountability of PMCs has only considered the criminal liability of direct perpetrators.⁵² A group of 17 states, however, has formally agreed that superior responsibility has a potential role in binding directors and those

51 International Committee of the Red Cross, 'The roots of behaviour in war: Understanding and preventing IHL violations', 86 *International Review of the Red Cross* (2004) 189–206.

52 C. Lehnardt, 'Individual Liability of Private Military Personnel under International Criminal Law', 19 *European Journal of International Law* (2008) 1015–1034; K. Weigelt and F. Marker, 'Who is Responsible? The Use of PMCs in Armed Conflict and International Law', in T. Jäger and G. Kümmel (eds), *Private Military and Security Companies: Chances, Problems, Pitfalls and Prospects* (Wiesbaden, Germany: VS Verlag, 2007) 377–394. Some of the literature in international humanitarian law only superficially acknowledges the potential relationship between superior responsibility and corporate managers. See for instance E.-C. Gillard, 'Business Goes to War: Private Military/Security Companies and International Humanitarian Law', 88 *International Review of the Red Cross* (2006) 525–572, at 545.

who contract private military contractors.⁵³ This chapter explores this supposition based on the now-extensive literature addressing superior responsibility.⁵⁴ The chapter articulates the circumstances under which a company director or party contracting military services will be a ‘superior’, the type of information that will trigger an obligation to verify whether international crimes have occurred, and the mechanisms available to these ‘superiors’ to discharge the obligations to prevent and punish military employees’ breaches of international criminal law.

The undertaking has broad ramifications. This segment of the book sheds new light on notions of director liability in commercial law, which are frequently less onerous than the doctrine of superior responsibility. In addition, this chapter contributes to the Joint Swiss-ICRC conference on the regulation of Private Military Companies,⁵⁵ and offers a new series of reflections to debates about the regulation of private military companies. But most importantly for the purposes of this thesis, the specific focus on the intersection between superior responsibility and private military companies will once again demonstrate how enforcement of international criminal law can *prevent* subsequent crimes irrespective of whether political transition accompanies prosecution. Prevention, then, emerges as a recurrent theme further binding all three illustrations.

5. Conclusion

The conclusion to the book revisits the initial themes outlined within Chapter 1 in light of the three case studies presented. Specifically, the final section synthesizes how these examples demonstrate the ability of international criminal liability to influence corporate behaviour in an increasingly globalized world, the role of international criminal justice as an element of global governance rather than transitional justice, and the importance of prosecuting corporate actors in order to prevent atrocity in ongoing conflicts. These findings also show how a resurgence of the international criminal responsibility of commercial actors for international crimes might simultaneously act as a catalyst for a more philosophically principled system of supranational criminal law.

53 According to the Montreux Document organized by the ICRC and the Swiss government, then signed by 17 other nations, ‘Superiors of PMSC personnel, such as: (a) governmental officials, whether they are military commanders or civilian superiors, or (b) directors or managers of PMSCs, may be liable for crimes under international law committed by PMSC personnel under their effective authority and control, as a result of their failure to properly exercise control over them, in accordance with the rules of international law. Superior responsibility is not engaged solely by virtue of a contract.’ See *The Montreux Document on Private Military and Security Companies*, 17 September 2008, available online at <http://www.eda.admin.ch/eda/en/home/topics/intla/humlaw/pse/psechi.html> (visited 3 January 2010).

54 See, for instance, M. Damaška, ‘The Shadow Side of Command Responsibility’, 49 *American Journal of Comparative Law* (2001) 455–496; A. Marston Danner and J.S. Martinez, ‘Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law’, 93 *California Law Review* (2005) 75–169; G. Mettraux, *The Law of Command Responsibility* (Oxford: Oxford University Press, 2009).

55 *The Montreux Document on Private Military and Security Companies*, *supra* note 53.