



# Corporate Complicity & Legal Accountability

## VOLUME 1 Facing the Facts and Charting a Legal Path

Report of the International Commission of Jurists  
Expert Legal Panel on Corporate Complicity  
in International Crimes



While there are situations in which businesses and their officials are directly and immediately responsible for human rights abuses, allegations are frequently made that businesses have become implicated with another actor in the perpetration of human rights abuses. In such circumstances, human rights organisations and activists, international policy makers, government experts, and businesses themselves, now use the phrase “business complicity in human rights abuses” to describe what they view as undesirable business involvement in such abuses. This development has spawned reports, analysis, debate and questions. What does it mean for a business to be “complicit”? What are the consequences of such complicity? How can businesses avoid becoming complicit? How should they be held to account for their complicity? In many respects, although the use of the term is widespread, there continues to be considerable confusion and uncertainty about the boundaries of this concept and in particular when legal liability, both civil and criminal, could arise.

In 2006, in order to address some of these questions the International Commission of Jurists asked eight expert jurists to form the Expert Legal Panel on Corporate Complicity in International Crimes. The Panel was asked to explore when companies and their officials could be held legally responsible under criminal and/or civil law when they are complicit in gross human rights abuses and to provide guidance as to the kind of situations prudent companies should avoid.

In this first Volume of its final report, the Panel brings together in one synthesis its understanding of criminal law and civil law, based on the studies in Volumes 2 and 3. In policy language the Panel describes the kind of conduct that a company should avoid if it is to ensure that it does not become complicit in gross human rights abuses, and as a result find itself in a zone of legal risk.



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The International Commission of Jurists (ICJ) is a non-governmental organization devoted to promoting the understanding and observance of the rule of law and the legal protection of human rights throughout the world. It is headquartered in Geneva, Switzerland, and has 85 national sections and affiliated organizations. It enjoys consultative status in the United Nations Economic and Social Council, UNESCO, the Council of Europe and the African Union. The ICJ maintains cooperative relations with various bodies of the Organization of American States.

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OF JURISTS

This volume was drafted by Nicholas Howen. Input was provided by Leah Hctor, Magda Karagiannakis and Andrea Shemberg. Wilder Tayler provided legal and policy review. During the drafting process the Panel reviewed the volume a minimum of three times. The volume was edited by Leah Hctor and Róisín Pillay. Stephen Coakley provided research assistance. Priyamvada Yarnell assisted in the production. In addition to the Steering Group Members and Advisors, thanks are due to Carlos Lopez and who provided comments on the draft.

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## Forward

In March 2006 the International Commission of Jurists asked eight expert jurists to form the Expert Legal Panel on Corporate Complicity in International Crimes (the Panel). The Panel was created to explore when companies and their officials could be held legally responsible under criminal and/or civil law when they are involved with other actors in gross human rights abuses.

The Panel members are leading lawyers in different fields of expertise, from five continents, and representing both common law and civil law legal traditions. They are: Andrew Clapham, Claes Cronstedt, Louise Doswald-Beck, John Dugard, Alberto León Gómez-Zuluaga, Howard Mann, Usha Ramanathan, and Ralph G. Steinhardt.

Throughout the process the ICJ engaged several experts, as advisers to the Panel, including: Eric David, Errol Mendes, Peter Muchlinski, Anita Ramasastry and Cees van Dam.

The Project's Steering Group was comprised of: Widney Brown & Peter Frankental (Amnesty International), Arvind Ganesan (Human Rights Watch), Patricia Feeney (Rights and Accountability in Development), John Morrison (Business Leaders Initiative on Human Rights; TwentyFifty Ltd.), Sune Skadegaard Thorsen (Lawhouse DK; ICJ Denmark), and Salil Tripathi (International Alert).

The Panel received research papers from leading academics, practitioners and corporate counsel on several relevant topics. These included: Larissa van den Herik (International Criminal Law), David Hunter (International Environmental Law), Olivier de Schutter, (Law of the European Union), Jennifer Zerk (Common Law Tort Liability), Celia Wells (Corporate Criminal Law), Jonathan Burchell (Comparative Criminal Law on Joint Liability), Beth Stephens (U.S. Litigation Against Companies for Gross Violations of Human Rights), Rachel Nicolson and Emily Howie (Separate Legal Personality, Limited Liability and the Corporate Veil), Sunny Mann (Competition Law) and John Sherman (The United States Sentencing Guidelines for Organisational Defendants).

In October 2006, at a multi-stakeholder consultation, organised in cooperation with Friedrich-Ebert-Stiftung, the Panel engaged with key stakeholders including representatives of: ABB, Amnesty International, BP, Building and Wood Workers International, the Business Leaders Initiative for Human Rights, the Centre for Corporate Accountability, Chatham House, The Coca-Cola Company, the German Forum for Human Rights, Global Witness, Human Rights Watch, the ILO Governing Body, the International Committee of the Red Cross, the International Confederation of Free Trade Unions, the International Council on Human Rights Policy, National Grid, the Office of the UN High Commissioner for Human Rights, Rights and Accountability in Development, and Sherpa.

The Panel also sought input from lawyers, business representatives and others via an online request for submissions. Among others submissions were received from: the Corporate Responsibility Coalition (CORE), EarthRights, Global Witness, and the International Criminal Defence Attorneys Association.

The Panel met in plenary three times during the process. The three volumes of this report set out final conclusions and recommendations. The report as a whole has been approved by each member of the Panel and reflects their collective views. However it may happen that there are specific statements in the report which do not accord with, or comprehensively reflect, the precise view of every Panelist.

# 1 Business Complicity and Accountability in the 21st Century

## 1.1 Company Conduct and the Call for Accountability

Six decades ago senior company officials were convicted for actively helping the Nazi regime to commit some of the worst war crimes imaginable. These business leaders, often working through their companies, supplied poisonous gas to concentration camps knowing it would be used to exterminate human beings; actively sought slave labour to work in their factories; acquiesced or helped in the deportation, murder and ill-treatment of slave workers; donated money to support the criminal S.S., and enriched their companies by plundering property in occupied Europe.

Reports of business participation in gross human rights abuses did not stop with the end of the Second World War. The recognition that thriving trade and business investment can help to raise people's standard of living has not allayed concerns that businesses can also do considerable harm. With huge advances in the ability to document human rights abuses and communicate globally in an interconnected world, there has been a renewed spotlight on some of the most egregious corporate conduct across the world – some of which stretches back over the last sixty years – and calls for accountability.

The international community has been shocked at reports from all continents that companies have knowingly assisted governments, armed rebel groups or others to commit gross human rights abuses. Oil and mining companies that seek concessions and security have been accused of giving money, weapons, vehicles and air support that government military forces or rebel groups use to attack, kill and “disappear” civilians. Private air service operators have reportedly been an essential part of government programmes of extraordinary and illegal renditions of terrorist suspects across frontiers. Private security companies have been accused of colluding with government security agencies to inflict torture in detention centres they jointly operate. Companies have reportedly given information that has enabled a government to detain and torture trade unionists or other perceived political opponents. Companies have allegedly sold both tailor-made computer equipment that enables a government to track and discriminate against minorities, and earth-moving equipment used to demolish houses in violation of international law. Others are accused of propping up rebel groups that commit gross human rights abuses, by buying conflict diamonds, while some have allegedly encouraged child labour and sweatshop conditions by demanding that suppliers deliver goods at ever cheaper prices.

Although these abuses are, unfortunately, not new, what has changed is the renewed insistence by victims and their representatives on accountability when companies are involved in gross human rights abuses. This is driven by several related developments.

First, in the context of global economic interdependence, and related social and political impacts, business is a major actor, and is gaining greater than ever reach and power. Complex relationships between businesses and individuals, communities and governments mean that business operations can and do impact immeasurably on human beings. Some businesses now wield considerable political influence and possess more economic power than some governments. Many have developed close business and political relationships with those in power, including governments or armed groups that perpetrate gross human rights abuses. Through privatisation and sub-contracting, companies now often exercise sensitive functions that were once reserved for the state. Businesses in the 21<sup>st</sup> century operate across borders, through supply chains, product distribution, direct operations or relationships within corporate groups.

Second, we have seen the emergence of a broadening concept of ethical responsibility in our interconnected world. We are all seen in some way to be implicated in harm being inflicted in often distant lands, whether it is fuelling the loss of rain-forests by buying furniture made of tropical wood or encouraging child labour by buying footballs made in child sweatshops. With this heightened sense of moral responsibility for the fate of others, even the distant and most complex actions of businesses are also closely scrutinized.

Third, victims of human rights abuses and groups working on their behalf have increasingly turned to the law to constrain company power: to hold those responsible for abuses accountable and to seek remedies and reparations. This has led to a dynamic development of law: a search for how different branches of national and international law can be harnessed to hold increasingly powerful non-state actors accountable when they do harm. It has prompted discussions about whether and how to adapt the international human rights system so that it holds not only governments, but also companies, accountable. Justice for such abuses is also a significant aspect of the relatively new International Criminal Court, which can hold individuals, including company officials, personally responsible for gross human rights abuses that amount to international crimes.

## **1.2 The ICJ Expert Legal Panel – Complicity in Gross Human Rights Abuses**

It is in this context that the ICJ established the Expert Legal Panel on Corporate Complicity in International Crimes (the Panel).

The Panel was mandated to consider in what situations companies and/or their individual representatives could be held legally responsible under criminal and/or civil law when they are “complicit” with governments, armed groups, or other actors in gross human rights abuses.

The Panel's purpose in clarifying the different legal avenues towards such accountability is not only to encourage the greater use of these specific avenues, but to encourage companies to prevent themselves from becoming "complicit."

### **1.2.1 Clarifying the Legal and Policy Meaning of Complicity**

For a number of years now the word "complicity" has been used on a daily basis in policy documents, newspaper articles and campaigning slogans, to describe the different ways in which one actor becomes involved in an undesirable manner in something that someone else is doing. Frequently, the term is not used in the legal sense denoting the position of the criminal accomplice, but rather in a rich and multi-layered colloquial manner to convey the connotation that someone has become caught up and implicated in something that is negative and unacceptable. Such use of the term has become commonplace in the context of work on business and human rights, and it has provided a tool to capture and explain in simple terms the fact that companies can become involved in human rights abuses in a manner that incurs responsibility and blame.

While there are many situations in which businesses and their officials are the direct and immediate perpetrators of human rights abuses, allegations are frequently made that businesses have become implicated with another actor in the perpetration of human rights abuses. In such circumstances, human rights organisations and activists, international policy makers, government experts, and businesses themselves, now continuously use the phrase "business complicity in human rights abuses" to describe what they view as undesirable business involvement in such abuses. Just as the concept of impunity in the sphere of human rights has taken on a meaning so much more multi-faceted, sophisticated and colourful than the strict historical legal meaning of impunity, in the context of business and human rights, the concept of complicity is now used in a much richer, deeper and broader fashion than before.

This development has spawned reports, analysis, debate and questions. What does it mean for a business to be complicit? What are the consequences of complicity? How can businesses avoid becoming complicit? How should they be held to account for their complicity? In many respects, although the use of the term is widespread, there continues to be considerable confusion and uncertainty about the boundaries of this concept and in particular when legal liability, both civil and criminal, could arise for such complicity. It is this which the Panel aims to clarify in this report. The Panel looks at when legal liability might arise for such complicity and from there outlines conduct which it believes companies should avoid in order to avoid crossing a line and entering a zone of legal risk.

Throughout this Volume and in Volume 3 the Panel uses the term "complicity" in the manner described above – as a valuable tool enabling evocative description of the various ways in which companies become involved in undesirable ways in the perpetration of human rights abuses by other actors.

Because the concept of complicity has a specific and technical meaning in criminal law, closely linked to the concept of “aiding and abetting,” in its discussion in Volume 2 of international and domestic criminal law the Panel refers not to complicity, but to “involvement” in crimes. This is intended to take account of two things. First, that in criminal law complicity has a particular and limited legal meaning. Second, that because this criminal law concept does not necessarily correspond to the full remit of the policy concept of “business complicity in human rights abuses” described above, the Panel chose to focus on other headings of criminal responsibility in addition to “aiding and abetting,” in order to properly reflect the zone of potential legal risk which it believes may exist for companies who are involved with other actors in gross human rights abuses.

### **Box 1: Companies, Businesses and Corporations**

Although the title of the Panel’s report uses the phrase “corporate complicity,” throughout its inquiry the Panel has considered all business entities irrespective of structure or composition, of whether they are large or small, multinational, transnational or national, state or privately owned. The Panel’s analysis and findings are intended to apply across the board to all business entities and throughout its report the Panel uses the terms *company* and *business* interchangeably in order to capture the extent of its inquiry.

Furthermore, throughout the report, when the Panel refers to the legal accountability of companies or businesses, it should be understood as referring to the legal liability of a company entity and/or company official, bearing in mind that whether one or both may be held liable will depend on the jurisdiction and body of law at question. Criminal law will often (though not always) only apply to individuals (natural persons), and therefore in many jurisdictions, including at present the International Criminal Court, only company officials (and not company entities) can be prosecuted. On the other hand, across all types of jurisdictions, civil liability can arise for both company entities (legal persons) and for company officials (natural persons).

### **Box 2: Gross Human Rights Abuses**

The Panel’s analysis has focused on actions that constitute human rights violations by governments and/or impairments of human rights by non-state actors, including armed groups and other companies. Throughout its report, the Panel uses the term *human rights* abuses to describe all such conduct.



The Panel was asked to consider some of the most egregious human rights abuses, which will often have devastating effects, not only on individual victims and their families, but on the communities and societies in which they take place. Throughout its report, to describe such conduct the Panel uses the term “gross human rights abuse” which is generally understood as describing an infringement of a flagrant nature that amounts to a direct and outright assault on internationally recognised human rights. Gross human rights abuses include for example, crimes against humanity, enforced disappearances, extrajudicial executions, prolonged arbitrary detention, slavery and torture. The concept of gross human rights abuses is continuously developing and expanding, and abuses that were once not considered to amount to gross abuses, are now widely accepted as encompassed by the term.

### **1.2.2 Applying Civil and Criminal Laws to Gross Human Rights Abuses**

The Panel’s report does not involve an analysis of international human rights law as a mechanism of accountability, but rather focuses on two branches of law: criminal law (principally international criminal law, supplemented by criminal law concepts common to national systems) and the law of civil remedies found in both common law countries and civil law jurisdictions. The Panel believes that these bodies of law currently offer some of the richest avenues towards ensuring the legal accountability of companies when they are complicit in gross human rights abuses.

#### **International & National Criminal Law (Volume 2)**

Conduct that gives rise to a gross human rights abuse will also often involve breaches of international criminal law, and therefore will often constitute a crime under international law. International criminal law creates criminal offences in respect of an ever broadening range of acts, known as crimes under international law. It also imposes obligations on governments to prosecute and punish these crimes. In Volume 2 of its report, the Panel looks in detail at the ways in which criminal responsibility may arise for companies when they are implicated with another actor in the commission of gross human rights abuses amounting to crimes under international law. It also looks briefly at national criminal accountability in relation to such crimes.

Where the report looks at crimes under international law, it primarily addresses the following:

- crimes against humanity, genocide and apartheid;
- war crimes, including grave breaches of the 1949 Geneva Conventions and Protocol I (which are applicable in international armed conflicts), breaches

of common article 3 of the Geneva Conventions and Protocol II (which are applicable in internal armed conflicts) and other serious breaches of international humanitarian law.

- other gross human rights abuses which international law requires states to penalise in their domestic criminal law, for example torture and slavery.

In terms of the bases on which criminal responsibility may be imposed, the report has focused on aiding and abetting, common purpose and superior responsibility. These bases of criminal liability are explored in detail in Volume 2.

While no international forum yet has jurisdiction to prosecute a company as a legal entity, it is widely accepted that corporate officials could face trial for crimes under international law at the international level. Indeed, even at its conception after the Second World War, international criminal law was applied to the sphere of company activity, and business officials who had become involved in crimes under international law, perpetrated by the Nazis in the course of their business transactions, were held criminally accountable. Furthermore, as national legal systems incorporate international criminal law into their domestic legislation, they often include legal entities, including companies, in the list of potential perpetrators.

### **Civil Liability (Volume 3)**

Conduct at the heart of gross human rights abuses will often also contravene the domestic law of tort in common law jurisdictions and the law of non-contractual obligations in civil law jurisdictions. In Volume 3, the Panel explores the comparative law of domestic civil liability and the ways in which, across jurisdictions, civil liability could arise for companies and/or their officials when they are complicit in gross human rights abuses.

The laws of tort and non-contractual obligations are hundreds of years old, and in all jurisdictions have regulated the interactions of different actors, including businesses, in society, long before international human rights standards were developed. They are intended to protect personal interests, such as bodily and mental integrity, personal liberty, dignity and property and provide for liability in situations where harm is caused to someone's interests as a result of another actor's behaviour and where that actor and the victim are not in a contractual relationship. These bodies of law have always applied to the conduct of businesses, and it is clear that business conduct can cause harm to the interests the law of civil remedies protects, and that both business entities and individual business officials can be held legally liable.

### **A Zone of Legal Risk (Volume 1)**

In Volume 1, the Panel brings together its understanding of criminal law and civil law, based on the studies in Volumes 2 and 3, in one synthesis. The Panel describes the kind of conduct that a company should avoid if it is to ensure that it does not become complicit in gross human rights abuses, and as a result find itself in a zone of legal

risk. In other words, Volume 1 seeks to elaborate a set of generic, core principles that capture the kind of complicit conduct that could give rise to legal liability.

### **1.2.3 Changing Corporate Conduct to Prevent Complicity**

The Panel recognises that views are continuously emerging and developing about where to draw the line between corporate conduct that should attract legal liability and conduct that reflects a legitimate business choice or at most could be criticised in policy or ethical terms. Nevertheless, Volumes 2 and 3 of this report demonstrate that the basic principles of criminal and civil legal responsibility are clear. Volumes 2 and 3 also point to the direction in which the law is evolving, even if legislation and court jurisprudence will still need to clarify the legal position in a number of grey areas.

This report does not offer companies the certainty they often ask for about when they will or will not be held legally responsible for complicity – it will not enable companies to know with certainty in a specific situation whether legal liability will definitely arise or not. Indeed, this would be impossible in such a report, as each case will always depend on its unique and usually complex facts. However, this report does point broadly to thresholds of behaviour beyond which the Panel considers businesses will be at least in a zone of potential legal liability. On this basis it suggests the sort of conduct companies should, at a minimum, avoid. It also indicates to prosecutors, lawyers and victims when, how and why the law could and should be used to hold businesses legally accountable when they are involved in gross human rights abuses.

The Panel underscores that it has been tasked to consider only one method of accountability in respect of complicity: when businesses could be held *legally* accountable or face allegations of legal liability in relation to complicit conduct. There are company acts and omissions that may be currently beyond legal sanction, but that may nonetheless be criticised publicly by different actors as unacceptable behaviour as a matter of morality or ethics, or that may give rise to market-place or public image implications for companies. The Panel believes that it is very important to preserve such tools of accountability, which can have a significant impact in terms of improving business practice, and the work of the Panel should not be used to justify limiting the concept of complicity to situations in which legal liability may arise or be alleged. Furthermore, the law is also changing and evolving rapidly and complicit conduct for which businesses may not face legal responsibility today, may well attract legal liability in the future, as the law responds to developing concepts of moral responsibility. Businesses should therefore also be guided by public policy and ethical considerations, as well as market-place realities, beyond a technical appreciation of whether they currently could face allegations of legal liability or legal sanctions.

## 2 Preventing Complicity: When Could a Company be Held Legally Accountable for Complicity in Gross Human Rights Abuses

When a company is implicated with other actors in gross human rights abuses, how close does it have to be to the abuses to enter a zone of legal risk where it and/or its individual officials could be exposed to legal liability under criminal law and/or the law of civil remedies?

Through consultations, research and by drawing on the experiences of the Panel members themselves, the Panel has developed an approach which it believes will help any business, non-governmental organisation (NGO) or other relevant actor to assess whether a company could face legal liability in circumstances where it is complicit in gross human rights abuses, and will help companies to identify behaviour they should avoid. This approach is outlined in this Volume, which should be read in conjunction with Volumes 2 and 3. These provide a more detailed and precise legal analysis of the criminal law and the law of civil remedies respectively.

Box 3 (page 9) describes this approach from the perspective of conduct that a company should avoid if it is not to enter into a zone of legal risk. The approach poses a number of questions in three areas of inquiry:

1. *Causation/Contribution*: Did the company's conduct enable, exacerbate or facilitate the gross human rights abuses? Causation and Contribution are explored in Section 2.1 (page 10).
2. *Knowledge & Foreseeability*: Did the company know, or should it have known, that its conduct would be likely to contribute to the gross human rights abuses? Knowledge and Foreseeability are explored in Section 2.2 (page 18).
3. *Proximity*: Was the company close or proximate (geographically, or in terms of the duration, frequency and/or intensity of interactions or relationship) to the principal perpetrator of the human rights abuses or the victims? The implications of proximity are explored in Section 2.3 (page 23).

Section 3 (page 27) applies this approach to more specific situations and common controversies in which allegations of corporate complicity are sometimes made.

### **Box 3: The Principles: Causation, Knowledge and Proximity**

The Panel considers that a prudent company should avoid the following conduct, because it crosses a threshold beyond which the company and/or its individual representatives could be held responsible under criminal law and/or the law of civil remedies, for complicity in gross human rights abuses committed by a government, armed group, or other actor.

A company should avoid conduct if:

First, by such conduct, the company or its employees contribute to specific gross human rights abuses, whether through an act or failure to act, and whatever form of participation, assistance or encouragement the conduct takes, it:

1. Enables the specific abuses to occur, meaning that the abuses would not occur without the contribution of the company, or
2. Exacerbates the specific abuses, meaning that the company makes the situation worse, including where without the contribution of the company, some of the abuses would have occurred on a smaller scale, or with less frequency, or
3. Facilitates the specific abuses, meaning that the company's conduct makes it easier to carry out the abuses or changes the way the abuses are carried out, including the methods used, the timing or their efficiency.

Second, the company or its employees actively wish to enable, exacerbate or facilitate the gross human rights abuses or, even without desiring such an outcome, they know or should know from all the circumstances, of the risk that their conduct will contribute to the human rights abuses, or are wilfully blind to that risk.

Third, the company or its employees are proximate to the principal perpetrator of the gross human rights abuses or the victim of the abuses either because of geographic closeness, or because of the duration, frequency, intensity and/or nature of the connection, interactions or business transactions concerned. The closer in these respects that the company or its employees are to the situation or the actors involved the more likely it is that the company's conduct will be found in law to have enabled, exacerbated or facilitated the abuses and the more likely it is that the law will hold that the company knew or should have known of the risk.

There are differences in the language that criminal and civil branches of law use to describe the causal link and knowledge necessary to ground liability, which are briefly described in this volume and which are explored in more depth in Volumes 2 and 3. Moreover the requirements needed to fulfil these elements within criminal and civil law are different and there are different levels of proof required. Furthermore, across jurisdictions there are differences and distinctions even within the same branch of law, be it criminal or civil, and different courts in different jurisdictions could reach different conclusions on similar fact situations. Nevertheless, the Panel considers that the description above of the level of involvement by a company and the degree of knowledge on its part that could attract legal liability is consistent with established criminal and civil law in both common law and civil code countries. Furthermore, the Panel considers that as a matter of legal and public policy, corporate conduct of this type should attract legal liability, whether criminal and/or civil and whether of an individual business official and/or of the company as a legal entity.

The following sections explore in more detail the broad description of the elements set out above, asking what degree of involvement a company needs to have in a gross human rights abuse before it could be considered criminally responsible or liable in civil law.

## **2.1 Causation and Contribution: Enabling, Exacerbating, Facilitating Human Rights Abuses**

As described above, the Panel considers that there will usually be a sufficiently close link in law between a company's conduct and gross human rights abuses if the company's conduct has "enabled," "exacerbated," or "facilitated" the abuses. If a company helps to cause gross human rights abuses in these ways, the company or its officials enter a zone in which they could be held legally liable, under criminal law as an aider or abettor of a crime or as a participant in a common criminal plan, or under the law of civil remedies for intentionally or negligently causing harm to a victim.

As long as the company's conduct provides a sufficient level of assistance or encouragement to the gross human rights abuses (by enabling, exacerbating or facilitating), it does not matter what the nature of the conduct is. The company could give advice or support that encourages the principal perpetrator to commit the act; purchase, hire or provide goods or services such as weapons, tools, financing, fuel, computer systems, vehicles or transportation, security or infrastructure. The contribution of a company to human rights abuses could be in the form of a business agreement, through which the company makes a deal in which it is foreseen that in fulfilling its side of the agreement, the business partner will commit acts that amount to gross human rights abuses. The company's conduct could be a positive act, or it could be an omission – failure to act – such as deciding not to refuse government imposed forced labour and therefore contributing to gross human rights abuses. In today's

global marketplace, therefore, every company, no matter what its core business, needs to consider whether there are situations in which its conduct could contribute to the perpetration of gross human rights abuses.

There are significant differences in the way criminal law (see Volume 2) and the law of civil remedies (see Volume 3) describe how close the complicit conduct should be to the abuses to be said to have “caused” the abuses. The international criminal law of aiding and abetting looks for practical assistance, encouragement or moral support, which has a *substantial effect* on the perpetration of the crime. Broadly, the law of civil remedies asks whether or not the harm would still have occurred *without, or in the absence of*, the conduct of the company. Nevertheless, many of the corporate acts or omissions that contribute to gross human rights abuses will be prohibited by both criminal law and the law of civil remedies. By explaining in the following paragraphs what it considers “enable”, “exacerbate” and “facilitate” to mean in practice, the Panel aims to illustrate conduct that companies should avoid. Of course, in order for legal accountability to arise, in addition to having enabled, exacerbated or facilitated the human rights abuses, a company will need to be shown to have the necessary state of mind (Knowledge & Foreseeability: Section 2.2) and the proximity of the company to the perpetrator and victims will also be a key ingredient (Section 2.3).

### **2.1.1 “Enables”: Without the Company’s Conduct the Abuses would not have Occurred**

This is the clearest scenario. A company could be responsible under both criminal law and the law of civil remedies if the specific abuses carried out by the principal actor would not have happened without the company’s contribution. There are always many causes that contribute to a particular outcome, but in this situation, the company’s conduct must be at least *one* such crucial ingredient – a necessary, though usually not the only, factor in the perpetration of the abuses.

For example, a government security agency may not be able to arrest, torture and kill trade unionists or other political opponents unless a company that employs them identifies them to the government. Community protestors around the site of a business operation might be tortured or extra-judicially executed by state or private security personnel only because the company has hired them to provide security services. An armed group or government forces may only be able to penetrate inaccessible territory and forcibly displace and kill a community based around the prospective site of a mining operation, because of airplanes or an airstrip provided by a company.

In such situations, the company has inserted itself in the chain of causation by a crucial act or omission that “enables” another actor to commit the gross human rights abuses. Without the contribution of the company, it is unlikely that the abuses would have occurred. For example, a violent attack on a community by government forces will need many ingredients, including sufficient soldiers, weapons, vehicles,

fuel, and information about who and when to attack. All are necessary but none alone are sufficient. A company will have “enabled” the government forces to carry out the attack if it has contributed one of the necessary ingredients.

### **2.1.2 “Exacerbates”: The Company’s Conduct Makes the Abuses and the Harm Worse**

A company could also be responsible under both criminal law and the law of civil remedies where the principal perpetrator would still have carried out the human rights abuses, but the company’s conduct either increased the range of human rights abuses committed by the principal actor, the number of victims, or the severity of the harm suffered by the victims (i.e. exacerbated or aggravated the harm). Such scenarios fulfil the test under the law of civil remedies in that at least some of the harm would not have occurred without the involvement of the company. They would also satisfy the aiding and abetting test under criminal law if the company’s conduct had a substantial negative effect by increasing the number or scale of the crimes committed or the number of victims or the severity with which they are harmed.

For example, a government that is unlawfully and forcibly evicting hundreds of thousands of squatters may also be able to destroy their belongings and houses and injure inhabitants by using earth-moving equipment used to demolish the houses. Police that regularly torture detainees might be able to inflict more serious injuries if they are supplied with particular equipment such as electric batons.

### **2.1.3 “Facilitates”: The Company’s Conduct Changes the Way the Abuses are Carried Out**

A company could also be responsible under criminal law and the law of civil remedies where the human rights abuses would still have occurred without the assistance or encouragement of the company, but where the company’s contribution made it easier to carry out the abuses or changed the way in which the abuses were carried out, even if it did not aggravate or exacerbate the harm.

Under the law of aiding and abetting in international criminal law, it is not necessary to show that the crime would not have occurred without the assistance or encouragement of the accomplice, only that the crime would not have happened in the same way. The assistance or encouragement would still be said to have had a “substantial effect” if it changed, for example, the methods used to carry out the crime, or the timing or location, or if it resulted in it affecting more or different people, or increased its efficiency.

In some jurisdictions, under the law of civil remedies, similar principles apply; however in others, in order to satisfy the causation test, it will need to be shown that the company’s conduct changed the nature or extent of the harm suffered, or that it changed the victims of the harm, rather than simply affecting the way in which the harm was carried out. The Panel considers however that in practice this



difference may often be immaterial, as changing the way in which harm is inflicted will often also change the extent, nature or victims of that harm.

For example, while a government may be already committing gross human rights abuses, in the process of targeting dissidents or a minority group, the more sophisticated software it buys from a company may change the way in which the abuses are carried out, thereby also enabling it to commit the abuses in a more efficient way, subjecting the victims to more extensive harm, or affecting more people.

### **Enables, Exacerbates, Facilitates: A Zone of Legal Risk**

In light of its analysis, the Panel considers that a company would be wise to avoid any conduct that enables, exacerbates or facilitates gross human rights abuses committed by others. A company should avoid not only situations where the gross human rights abuse would not occur in the absence of its involvement, but also where its conduct aggravates the situation by causing a wider range of abuses to be committed by the principal actor or increasing the harm suffered, as well as situations where its contribution changes the way the human rights abuses are carried out, including the methods used, the timing and the efficiency.

#### **2.1.4 The Causation “Continuum”**

Although in different types of situation the process of assessing whether a company's conduct was linked sufficiently to the perpetration of gross human rights abuses may be difficult, the Panel believes it to be possible if the three-fold analysis above is applied, to assess whether the conduct of the company is sufficiently implicated in the human rights abuses.

Some of the clearest situations may arise when a company's conduct is used directly by the principal perpetrator to commit the abuses. For example, this could include situations in which police arrest an agitating unionist worker because of a tip-off by a company, or an armed group uses vehicles or aircraft provided by a company to attack civilians, or a company hires and pays a government or private security force, renowned for human rights abuses, to suppress local protests. In such situations, the involvement of the company is often very tangible and the link between its conduct and the ability of the principal perpetrator to carry out the gross human rights abuses is relatively clear.

More complex are situations where the contribution made by the company is not necessarily used directly by the perpetrator, but nevertheless it builds up the general capacity of the perpetrator – in the form of much-needed revenue, products, infrastructure such as roads, railways, communication systems or power stations. Sales

of conflict diamonds by the rebel group *União Nacional para a Independência Total de Angola* (UNITA) were said to be essential to its survival, including providing it with the finances necessary to continue the war, in which its forces systematically committed war crimes. Direct links have been made between the oil revenue the Sudanese Government receives and its ability to purchase military hardware used to forcibly displace civilians.

The different degrees to which businesses contributed to the perpetuation of *apartheid* in South Africa and the associated gross human rights abuses, illustrate the complexities of analysing whether company conduct is sufficiently close to the human rights abuses to be said to have enabled, exacerbated or facilitated the abuses. The South African Truth and Reconciliation Commission (TRC) concluded that business was central to the economy that sustained the apartheid state. It distinguished three levels of moral responsibility. Companies that actively helped to design and implement *apartheid* policies were found to have had “*first-order involvement*.” This included, for example, the mining industry which worked with the government to shape discriminatory policies such as the migrant labour system for their own advantage. Companies which knew the state would use their products or services for repression were considered as having “*second-order involvement*.” This included more indirect assistance, such as banks’ provision of covert credit cards for repressive security operations or the armaments industry’s provision of equipment used to abuse human rights. This contrasted with more indirect transactions that could not have been reasonably expected to contribute directly or subsequently to repression, such as building houses for state employees. Finally, the Commission identified “*third-order involvement*.” ordinary business activities that benefited indirectly by virtue of operating within the racially structured context of an apartheid society.

### **Silent Presence**

Companies often face allegations of complicity because they have business operations in countries where gross human rights abuses are occurring and they fail to intervene with the authorities to try to stop or prevent the abuses – in other words, they are silent onlookers. The company could be silent when abuses occur in or around its business operations, such as when its workers from a particular ethnic group are arbitrarily detained and tortured or an armed group kills civilians in an area where the company is operating. Alternatively, the abuses could occur in another part of the country but be connected with the company in some way, or they could be widespread through the country.

Under existing criminal or civil legal principles, the fact that a company is present in the country or area of the country where gross human rights abuses are being committed, without more, would not usually make the company responsible for involvement in the human rights abuses committed in the country or region. However, in some situations, presence and silence are not neutral in law. Although as yet untested in court, the Panel considers there might be special situations

in which a company or its individual officials exercise such influence, weight and authority over the principal perpetrators that their silent presence would be taken by the principal to communicate approval and moral encouragement to commit the gross human rights abuses. In such a situation, depending on the circumstances, the company could be responsible for aiding and abetting any crime that occurs. The greater the political and economic influence wielded by the company, the more likely that company executives could find themselves in such situations. Furthermore, under the law of civil remedies, there will be situations in which the law considers that a company has an obligation to take proactive steps to protect an individual, or a class of actors, from harm, and that a failure to do so would be a cause of the harm suffered. This is more likely to be the case where there is a close relationship between the company and the other actor, for example in the context of a business partnership or parent-subsidiary relationship. Also, in cases where a company has a particularly close relationship with the victims of gross human rights abuses, a company's failure to intervene, speak up or take proactive protective steps could possibly place the company in a zone of legal risk.

Even where there are no legal concerns, presence in a country where gross human rights abuses occur could pose moral dilemmas for company officials, or give rise to negative public perception or market place implications. However, the law steps in to sanction "presence" only from a point when there is a sufficient and direct causal link (and knowledge or foreseeability) between that presence and specific human rights abuses: i.e. if the company's conduct can be said to be enabling, exacerbating or facilitating specific human rights abuses.

### **Receiving an Economic Benefit**

Closely related to the question of silent presence is the accusation that a company should be considered complicit because it benefits commercially from a business relationship with those who commit gross human rights abuses (usually also being silent about the abuses). There are at least two situations in which this might arise. First, a company might earn a profit from buying or selling goods or services to or from an actor that is committing gross human rights abuses. Second, a company might benefit commercially from a favourable business environment created in a country by another actor, enabling it to establish lucrative operations in the country. For example, a government might commit gross human rights abuses that provide the company with an infrastructure or access to resources.

As in the case of a company's presence, making a profit, by itself, is legally neutral. A company will not be held *legally* responsible merely for commercial engagement with the perpetrator of a gross human rights abuse unless the circumstances surrounding the transaction in fact mean that the company has enabled, exacerbated or facilitated specific human rights abuses.

Although companies may not in general incur legal responsibility solely for making a profit in a business environment built on human rights abuses, in reality "mere

passive economic benefit” can quickly slide into a more active contribution that enables, exacerbates or facilitates gross human rights abuses. For example, a company that indicates to a government, in a country where it plans to set up operations, that trade union activity or continuing anti-development protests by local communities would be a major obstacle to it investing in the country may have more of an impact on the abuses that may be committed to remove such obstacles. In other situations, companies may have actively assisted a government to create the commercial environment from which they benefit, such as companies in South Africa that helped the government create the *apartheid* system, which thereafter produced large quantities of cheap labour.

### **Paying Taxes**

Companies are sometimes accused of propping up repressive regimes by paying local taxes in the ordinary course of their operations in a particular country. Armed groups often also impose quasi-taxes on businesses. For example, during the 10-year armed conflict in Nepal, most businesses regularly paid a 5% “tax” to the Communist Party of Nepal (Maoist) when they operated in Maoist-controlled territory. During the civil war in Sierra Leone, the Revolutionary United Front (the RUF) charged a levy on anyone entering territory it controlled.

Again in many cases, a company will not be legally responsible for gross human rights abuses if it pays generic taxes to the actors who commit those abuses. In many cases the money will not be sufficiently linked to specific human rights abuses to make a company liable. However, the connection between the company’s conduct and the human rights abuses could become more tangible, for example if the company pays a special tax, such as a “war tax,” that is directly used by the government to finance security forces for the purpose of carrying out military operations that are known to include the commission of gross human rights abuses. There may also have to be closer scrutiny if the tax revenue is a crucial contribution to the existence of a regime that systematically carries out gross human rights abuses. In such situations, it may in fact transpire that the companies carrying out business in the country have become part of a web of significant support and contribution that enables, exacerbates or facilitates the perpetration of human rights abuses.

#### **2.1.5 Common “Defences” and Excuses**

The Panel has encountered a number of common responses relating to causation, sometimes articulated by companies when they face allegations of complicity in gross human rights abuses, the legal relevance of which should be dealt with directly:

- **We were carrying out a legitimate business activity.** The fact that a business is carrying out what in other circumstances would be a legitimate act in the ordinary course of its business (such as providing a loan, selling or purchasing goods, carrying out construction work or extracting resources)

does not absolve the company of legal responsibility if the necessary causal link with the gross human rights abuse (as well as knowledge or foreseeability) is established.

- **If we did not provide the assistance, another company would have done so and the abuses would still have occurred.** It is not a defence to criminal or civil liability that another company would have worked with the principal actor if the company in question had not done so. By enabling, exacerbating, or facilitating gross human rights abuses committed by the principal actor, the company may have inserted itself in the chain of causation and must accept the consequences.
- **Our business is located in another country, we were nowhere near the place where the human rights abuses occurred.** A company does not have to have any business presence in or even near the place where human rights abuses occur to be found legally liable when it is allegedly complicit in those abuses. Especially in our world of technology and instant communications, a company does not have to be present where human rights abuses take place, in order for its conduct to enable, exacerbate or facilitate those abuses.
- **We had no control or influence over the actions of the principal actor so why should we be blamed?** It will always be a question of fact whether the conduct of the company enabled, exacerbated or facilitated the gross human rights abuses. As will be discussed in Section 2.3 (on proximity), a company that does exercise control or influence over an actor that commits gross human rights abuses will be scrutinised more carefully to assess the impact of its conduct. However, a company could be held legally liable in criminal or civil law for providing a third party with the means to commit gross human rights abuses through arms-length business transactions and without any close personal relationships or particular political or economic leverage.
- **We were just abiding by national laws.** In some situations, the company's allegedly complicit conduct is not unlawful, or will not be the subject of a legal claim, in the country in which the business operated. However, when company representatives commit gross human rights abuses that amount to crimes under international law, they can be arrested and face criminal prosecution in many more jurisdictions than the country in which the crime occurred. Under the law of civil remedies, obstacles to suing companies in jurisdictions other than where the harm occurred are gradually being dismantled and it is increasingly possible for the actions of a company in one country to be the subject of a civil liability claim in the country where the company is domiciled or with which it has other links.
- **We had no choice, we were compelled to provide the assistance.** In criminal law there may be limited circumstances in which an accused could plead the defence of duress or necessity. Similar defences may also be relevant in

the context of the law of civil remedies. Although there are variations across different legal systems, broadly, company officials would have to show that they faced the threat of death or serious bodily injury if they refused to carry out an order to help commit the human rights abuses. For example, a rebel group could force company officials at threat of death to provide fuel, trucks and other materials to enable the group to attack a village. But officials could not plead the defence if the threat was of damage to company property or profit or if they went beyond what was demanded and, for example, also provided weapons or gave information about how to avoid government forces.

- **The principal actor involved in the human rights abuse has not been held legally responsible so how can we?** It is not necessary in either criminal law or the law of civil remedies for the principal actor to be held liable before a secondary actor is prosecuted or sued. In fact, given the difficulty of holding governments or armed groups legally accountable for gross human rights abuses, in most situations of alleged business involvement in those abuses, a company will be prosecuted or sued independently of the principal actor.
- **We are a socially responsible company and have spent a lot of money to improve the humanitarian and development well-being of the community.** Companies operating in complex environments often argue that their involvement in the perpetration of gross human rights abuses is outweighed by the benefit the company brings to the community: creating jobs and trade and giving money for humanitarian and development projects. In law, however, such good deeds are irrelevant to deciding whether a company should be held responsible for other conduct that enables, exacerbates or facilitates gross human rights abuses. At most, the broader, beneficial record of the company will sometimes be taken into account as mitigating circumstances when a court determines sanctions or the extent or kind of remedy or reparation due to the victim.

## 2.2 Knowledge and Foreseeability of Risk

In addition to having helped to cause the gross human rights abuses, to be legally responsible in relation to such abuses, a company must also have the necessary state of mind. This raises questions of intention, knowledge or foreseeability of risk, which, as discussed more fully in Volumes 2 and 3, are dealt with differently by the criminal law and the law of civil remedies.

Companies often say that they never wished or desired to contribute to the perpetration of human rights abuses, and that they did not know their conduct would constitute such a contribution. However, the fact that a company neither wished nor desired to contribute to gross human rights abuses is irrelevant to the question of whether, in adopting a particular course of conduct, it became complicit in those

abuses and subsequently entered a zone of legal risk. For the most part, neither the law of civil remedies analysed in Volume 3, nor the criminal law causes of action considered in Volume 2, require a desire to cause harm on the part of a company, when determining whether that company had the state of mind necessary to give rise to legal responsibility. In both criminal and civil law, legal responsibility can arise where a company actively sought to contribute to gross human rights abuses, or simply where it knew that its course of conduct was likely to contribute to such abuses and, even though it may not have wanted the abuses to occur, undertook the course of conduct anyway.

Furthermore, as discussed in Volume 3, in the law of civil remedies, liability can arise even where a company has no knowledge as to the risk of harm, because the law may hold that it should have known, as the risk was reasonably foreseeable. Also, as outlined in Volume 2, a criminal court will not take a company's claim that it had no knowledge at face value. While international and domestic criminal laws do often require that a company had actual knowledge of the possible consequences of its actions, even if a company claims it did not know, a court may imply or impute from the circumstances that the company did in fact have knowledge.

Therefore the Panel considers that in today's world, where communication processes, information sources and expertise are continuously developing, expanding and multiplying, it is unwise for a company that is seeking to avoid legal liability to fail to take steps to regularly and carefully assess the potential human rights impacts of its conduct and inform itself about the risks – thereby providing itself with the opportunity to change its conduct.

### **2.2.1 The Company Wishes to Participate in Commission of Gross Human Rights Abuses**

Where a company shares with the principal actor the wish or desire to commit at least some of the gross human rights abuses perpetrated, both the principal actor and the company could always (as long as the requirements of causation are fulfilled) be responsible in both criminal law and the law of civil remedies.

If the company's contribution to the gross human rights abuse is sufficient, criminal law could treat the company officials as principal perpetrators, responsible for crimes of violence such as murder. Where a company participates with others in the commission of a crime, criminal law places more emphasis on the shared criminal intent of the company and less on the size of its contribution to executing the plan. Under international criminal law and most national criminal systems, each member of a group that comes together intentionally to perform a criminal plan, could be held responsible for the foreseeable crimes committed by the others as part of that common plan, even if any particular individual only in practice assisted in a minor way and did not realise that the others in the group would commit the other offences.

Although they are often said to be rare, situations of this type do, unfortunately, occur, especially when a company shares with a government or armed group a common commercial interest and the potential returns are high. For example, company executives might share with a government a desire to forcibly and unlawfully suppress and expel a local community that is blocking a very large development. It could be agreed that the government security forces, well-known for their excessive use of force, will travel to the area using company helicopters and intimidate the community leaders. Both the company and government officials could be legally responsible if the security forces, in fulfilling this plan, arbitrarily detain, torture and extra-judicially execute the community leaders, even if the methods were not expressly part of the plan. Security companies contracted to interrogate detainees in detention centres where a government uses and allows torture as a technique of interrogation, might share with the government the desire to use such methods, regardless of whether they thought it was right or wrong.

### **2.2.2 The Company Knows, or Should Know, that its Conduct is Likely to Contribute to Gross Human Rights Abuses**

Even where a company does not actively wish to contribute to gross human rights abuses, it may still be legally responsible if it knew or should have known that its conduct was likely to help cause such abuses.

Under the law of civil remedies, in determining whether a company is liable, courts in both common law and civil law countries will ask whether a reasonable person in the company's shoes, with the information reasonably available at that time, would have known that there was a risk that its actions could harm a person. This means that the court will look at both what the company itself knew, and what a reasonable company in its shoes would have known about the risk that harm would occur. The civil law term "reasonable person" does not mean an average person, but a responsible, careful member of society. In this way, the fact that a company did not know there was a risk of harm will be irrelevant under the law of civil remedies, as the law will regularly hold that in fact it should have known. In assessing what a reasonable person would have known in the circumstances, the Court will take a range of factors into account, including best practice in due diligence and risk assessment.

International and domestic criminal law is often more stringent in requiring that there be proof that the company officials did in fact know that their conduct would help the principal offender to carry out the crime. A criminal court will often require evidence that the company officials did, *subjectively*, know the consequences of their actions. In many cases, it will not be sufficient only that a reasonable person in the same shoes would have known.

In such instances, in the absence of open admissions, the knowledge of the company or its officials becomes something a criminal court must assess. No court will take a statement that "we did not know" on face value. It will instead conduct its own inquiry and analysis on the facts to determine whether the subjective knowledge



of the company could be implied from the surrounding facts and circumstances. Friedrich Flick, a German industrialist, was convicted after the Second World War for donating large sums of money to the head of the S.S., that helped the S.S. carry out criminal acts. The Court found that although the criminal character of the S.S. was not well known when Flick started attending fund-raising dinners in the 1930s, his contributions and attendance continued long after the criminal character of the S.S. was generally known. A further example is the case of Bruno Tesch, convicted of supplying poisonous gas to the Nazi Auschwitz concentration camp. This was not only because of evidence that he advised the Government on more efficient ways to train the S.S. in the killing of concentration camp inmates, but also because of inferences the court was invited to draw from the fact that he delivered ever-larger quantities of the gas to the camps, far beyond what could have been used for the legitimate extermination of pests. The lesson is that company officials will not be shielded from criminal responsibility even if they steadfastly deny they knew the consequences of their conduct, if the objective facts indicate otherwise.

For a company to be liable, it is not necessary that it knows or should have known the full extent of the gross human rights abuses to which it contributes, provided that some of the abuses are known. Under international criminal law, it is not necessary for the company to know the precise crime the principal offender is committing, as long as the company knows that it is contributing to one of a group of crimes being committed. Under the law of civil remedies, the company will be liable for harm that is a reasonably foreseeable consequence of its conduct. For example, if a company provides security forces with information that enables them to torture and forcibly disappear trade unionists working in the company, in law it would be sufficient if violence and resulting personal injury was reasonably foreseeable, even if it was not clear at the time that the security forces would specifically inflict torture or forcibly disappear the trade unionists.

### 2.2.3 Evidence of Knowledge & Foreseeability

It is clear, therefore, that the internal deliberations and knowledge of company officials, as well as the surrounding objective circumstances, are both relevant in determining whether a company knew or should have known that gross human rights abuses would result from its actions. There are a number of objective circumstances and factors that will help a court to assess what the company knew or should have known.

1. **A company's own inquiries produce information or a company should have undertaken such inquiries.** Sometimes inquiries carried out by or on behalf of the company will indicate that there is a real possibility that another actor with whom the company is involved is committing or is likely to commit gross human rights abuses. As noted above, and explained in Volume 3, even where a company does not make such investigations and claims that it had no knowledge of the risk of abuses occurring, civil courts will often find that

a reasonable company would have undertaken such inquiries, identified the potential risks and thereby have taken the necessary steps to minimise those risks.

2. **Information brought to the attention of the company.** An outside source, such as a non-governmental organisation, a local community or government regulatory authority, may have brought to the attention of the company the fact that its business activities could contribute to gross human rights abuses, or that the actor with which it is involved has a record of similar gross human rights abuses in similar circumstances.
3. **Publicly available information.** There is often a large body of publicly available information that businesses can and should access, about the human rights record of those in power in areas where they operate or are planning to operate and the risks of doing business with certain government agencies, armed opposition groups or other companies. These sources can include expert reports from bodies of the United Nations, first-hand media reports and reports of non-governmental organisations. Sometimes the volume of information is so overwhelming and omnipresent that it would be implausible for a company carrying out normal business activities to say it was not aware of how certain products or finance or assistance would be used. A court may find that a company knew (or a prudent company would have known) of such publicly available information.
4. **Unusual circumstances.** There may be an unusual element or circumstance surrounding an otherwise normal business transaction that would make a reasonable person suspicious of the purpose of the transaction or from which one would infer that company knew the purpose for which the other party wanted to do business and the consequences of the company fulfilling its side of the transaction. For example, a customer might order an extraordinary quantity of a product, such as chemicals, which it is highly unlikely could be used for anything except unlawful activities.
5. **Duration of the business relationship.** The longer a business is in a relationship with the principal perpetrator, for example if it repeatedly sells products that are used to commit gross human rights abuses, the more likely a court will consider that the company must have known, or should have known, about the likely impact of its conduct.
6. **Position of an individual business official in the company.** A court could draw conclusions about the official's knowledge from the position he or she holds in the company. This will be particularly pertinent if the official was, for example, a member of decision-making boards and committees. The official's position could also be relevant in the context of the employees or contractors he or she supervised, instructed and received reports from. This becomes

increasingly relevant the closer these employees or contractors are to the commission of the gross human rights abuse at issue.

Any of the warning signs described above would lead a prudent company to take measures to ensure that it is not enabling, exacerbating or facilitating gross human rights abuses. A prudent company would carry out research and assessment and put in place preventive procedures to act on the assessments it makes.

#### **2.2.4 Wilful Blindness: Knowledge and Foreseeability in a Globalised World**

What if a company does not carry out due diligence fact-finding and assessments, perhaps even to avoid knowing too much – or anything – about the purpose for which another actor wants the company’s assistance or business? Could a company better avoid liability if it ensures that it does not know, if it is willfully blind, by not inquiring too much about how goods sold or finances provided will be used? The Panel emphasises that such a strategy will not be rewarded by the law, and instead of minimising a company’s chances of legal accountability, will increase the zone of legal risk. Therefore the Panel considers that no prudent company would seek to protect itself from legal liability by a “don’t ask, don’t tell” approach to certain risks.

It is clear that the law of civil remedies will not tolerate such an approach. As long as a careful actor in the company’s shoes would have appreciated the risks, then what the company itself did or did not know about the risk (purposefully or otherwise) will be irrelevant. In defining what a company should have known, the law of civil remedies will often hold that a reasonable company’s level of knowledge would have been based on due diligence, including risk assessment, and will include the information such steps would have brought to light in its assessment of what a company should have known.

Although in many instances a criminal court would need to go further and examine whether the company had in fact sufficient awareness that its conduct could contribute to one or more particular gross human rights abuses, nevertheless, the Panel considers that a criminal court will often be able to infer from the surrounding circumstances that a company did in fact know that its conduct was enabling, exacerbating or facilitating gross human rights abuses. With fewer places to hide and claim “we did not know”, a prudent company would avoid trying to construct false walls of wilful blindness between itself and the impact of its actions.

### **2.3 Proximity: Its Impact on Causation and Knowledge or Foreseeability**

The last two sections asked how much a company will have to contribute to the human rights abuses (causation) and how much it must know about the

consequences of its conduct (knowledge and foreseeability), before it could be held legally liable in criminal law and/or the law of civil remedies. Running through this analysis is the idea that the closer – or more proximate – a company is, in time and space and relationship, to those who carry out the human rights abuses or those who suffer the abuses, the more likely it is that the company could be held legally responsible when it is complicit. This section explores what the Panel means by “proximity.” As discussed in Volume 3 the words “proximity” or “proximate” have technical legal meanings in the law of civil remedies. However the Panel does not use the term “proximity” here in that way but rather uses it in the non-legal sense to convey a certain level of closeness.

Companies are often exhorted to support and respect human rights within their “sphere of influence.” This concept of “sphere of influence” is still rather vague. It shares with proximity the notion of closeness, and can be useful in encouraging companies not only to “do no harm” (including avoiding complicity) to those to whom they are closest, but also to proactively promote human rights in relation to those within the concentric circles of its influence. However, for the purposes of analysing when legal responsibility for complicity might arise, the Panel has used the separate, more expansive, and more descriptive concept of “proximity,” the content of which mirrors more closely existing legal reasoning.

It makes sense that the closeness of a company to the principal perpetrator, to the victims, or to the harm inflicted on the victims, is highly relevant in determining legal responsibility. First, the closer the company, the more likely it is that it will have the power, influence, authority or opportunity necessary for its conduct to have a sufficient impact on the conduct of the principal perpetrator to establish legal liability. Secondly, it is more likely that the company will know or could have foreseen what is really going on.

For example, in criminal law, the deeper the interaction between accomplice and principal perpetrator, the more implausible it will be for a company or company official charged with aiding and abetting to claim he or she did not know the consequences of the practical assistance given to a principal offender.

In the law of civil remedies the closer a company’s relationship to the person harmed, the more the law will consider that the company should have foreseen the risk that its conduct could harm that person, and therefore the higher the requirements on the company to avoid or limit harm will be. These requirements may include taking steps to avoid the infliction of harm, or depending on the closeness of the relationship, fulfilling a duty to protect the person from harm, by taking positive protective steps. Where there is an absence of proximity, sometimes courts may hold that a company’s conduct that appears to be part of the chain of events leading to harm is too far down that chain – too distant or remote from the harm – for a reasonable person to have foreseen it.

## Evidence of Proximity

Some of the factors that may be taken into account in assessing the proximity of a company to the principal perpetrators and/or the victims and the harm caused include the following.

- 1. Geographical proximity.** A company may have more knowledge and more opportunity to influence events if the human rights abuses are occurring in same place, or nearby, the company's operations. Mixing day-to-day with actors responsible for human rights abuses, or with the victims of the abuses, means that a company is much more likely to understand any likely link between its conduct and the abuses committed by these actors.
- 2. Economic and political relationships.** In practice, the more a company economically dominates a marketplace, the more it has access to the corridors of power, access to inside information and the opportunity to influence the actions of third parties who depend on the business relationship.
- 3. Legal relationships.** A company may have considerable control, influence and knowledge because of the legal nature of the business relationship it has with a third party that violates rights. A joint venture or other long-term strategic partnership may lead to shared decision-making and close coordination between the parties. Despite the fiction that every legal entity is completely separate, the relationship of parent-subsidiary or cross-membership of boards between different companies in long-term business arrangements will sometimes lead to a proximity that increases the shared knowledge and influence.
- 4. Intensity, duration & texture of relationships.** The quality of the relationship, the openness, closeness, frequency and duration of informal or personal contacts and discussion will also be evidence towards the degree of proximity between a company and perpetrators or victims.

There are many complex shades of relationships between a company and host or home governments, armed groups or other actors. A company's connection with and proximity to an actor that impairs rights may at times be weak because the company has little market power in relation to that actor or is engaged in a quick, one-off transaction, or has a long-term but negligible presence in a country. But sometimes there will be a complex web of personal, economic, legal and/or political interactions that create a proximity of a certain level, that may (if the requirements of causation and state of mind are met) place the company in a clear zone of legal risk in cases where the actor concerned commits gross human rights abuses.

The Panel considers that a prudent company should be aware that the closer it is to the principal perpetrator of gross human rights abuses or the victims of abuses, the more likely it is to face allegations of complicity, and the closer it will be to a

zone of legal risk wherein its conduct may have enabled, exacerbated or facilitated the abuses. Furthermore, it will be more likely that the law will consider that the company knew of the abuses, or that it should have known. The Panel believes that a prudent company would take measures to assess the risks of such an entanglement before entering into it, thereby allowing itself the opportunity to take the necessary preventative steps.

### **3 Analysing Situations in which Businesses Commonly Face Allegations of Complicity**

In the following pages the Panel looks in particular at the application of the three principles of causation, knowledge and proximity in four specific situations where companies commonly face allegations of complicity in gross human rights abuses: (1) where businesses provide goods or services which are used by another actor in carrying out gross human rights abuses; (2) where businesses use security providers that in the course of providing security carry out gross human rights abuses; (3) where businesses purchase from a supplier, that in the course of production or sourcing of the materials, commits gross human rights abuses, and (4) where a company's business partner perpetrates gross human rights abuses in the context of a project in which the two actors are jointly involved. These kinds of situations are explored in more detail, in Volumes 2 and 3, in relation to the contours of criminal law and the law of civil remedies respectively.

The Panel would underline that the discussion in the following paragraphs is not intended to be comprehensive. There are numerous situations and contexts beyond those captured here in which allegations of complicity may arise, and indeed even within the four business relationships highlighted here, there are many potential contexts and situations which the Panel does not address.

#### **3.1 Providing Goods and Services**

Businesses often face allegations of complicity when they provide goods or services, such as vehicles, weapons, technology and communications equipment, financial assistance, or logistical services, to actors who use them to commit gross human rights abuses.

##### **Tailor-Made Goods and Services**

Sometimes allegations of complicity stem from the fact that a company has tailored particular goods or services to a specific use.

The Panel considers that in such situations, a company could find itself in a zone of legal risk under criminal and/or civil law, if the goods or services are used to commit gross human rights abuses. In tailoring or modifying the goods or services and providing them to the actor concerned, the company's conduct may be a causal factor in the abuses. For example, it may be that because of the adaptation of the particular goods or services, the buyer is able to commit the human rights abuses (enabling), or is able to commit more serious harm, or to more individuals, (exacerbating) or is able to carry out the abuses more efficiently or differently (facilitating).

The Panel also considers that courts may often hold that a company that tailors goods or services to the needs of a particular buyer, must have known, or at the very least, should have known, of the purpose for which goods or services will be used. For example, on the request of the buyer, a computer company might modify generic computer software. In order to meet the needs of the purchaser it will need to know the purpose for which the software will be used. If the purpose of the modification is to allow a government to track and target a minority group, for systematic discrimination, or even elimination, then the company which supplies the software and tailors it appropriately, may find itself in a zone of legal risk.

### **Generic Goods and Services**

The Panel also considers that even where the goods or services are not tailored or modified, but are generic goods or services which the company provides to many customers, there may still be situations in which a company will find itself in a zone of legal risk if it provides them to an actor who uses them in the course of carrying out gross human rights abuses. Although the provision of generic goods and services is different to providing goods tailored to the needs of a particular customer, the Panel believes that there will be situations in which the provider of generic goods or services will be held liable.

Sometimes, even though the provision of goods or services may be an integral factor in a chain of causation, criminal and civil courts may hesitate to find a company in this situation legally accountable, because the misuse of their generic goods or services is considered to be beyond their control. However the Panel believes that this hesitation will and should decrease substantially where there is evidence that a company knows of the likelihood that its goods or services will be used to perpetrate gross human rights abuses.

Furthermore, courts may look more closely at situations where there are factors that would have led a prudent company to ask questions, such as where there are unusual circumstances surrounding the transaction, where the practices of the purchaser are known or where a company is selling goods that are inherently dangerous, such as weapons, ammunition or certain chemicals. A court may also delve deeper into a situation where the products in question can have both a lawful and unlawful uses: so-called dual use goods. For example, a British Military Court convicted Bruno Tesch, a company owner, of war crimes for knowingly supplying *Zyklon B* poisonous gas to Auschwitz where the S.S. used it to kill prisoners. Although *Zyklon B* was a widely-used insecticide, Bruno Tesch was held responsible because the Court found he continued to supply ever-larger quantities, even after he found out that it was being used to kill people (see Volume 2).

The Panel believes the issue of proximity will also play a key role in situations involving the provision of generic goods or services. Where there is proximity between the company and the purchaser, or the victims of the gross human rights abuses, the Panel believes the more likely it will be that courts will consider that the



company had knowledge or should have known of the risk that the products would be used for a certain purpose.

### **3.2 Providing Security for Company Operations**

Although it is legitimate for companies to ensure their staff and operations are secure, there have been repeated allegations of company complicity in gross human rights abuses, in situations where companies have used the services of private security forces or state security forces, that have perpetrated gross human rights abuses while providing company security. The Panel believes that in such circumstances companies will often find themselves in a zone of legal risk.

In such instances the level of proximity between the company and the security forces will usually be high. In order for the security services to be provided, the company and the security forces will need to share a certain level of information. The security forces may be present on the company's premises, and/or have access to its equipment. At times the company may pay a fee to the security providers.

In the context of these kinds of interactions and close relationships, when gross human rights abuses are perpetrated by the security forces, the Panel believes that criminal or civil courts may hold that a company knew of the risk that the abuses would occur. This will be all the more likely, where the security forces in question have a record of gross human rights abuses. Where this is the case it is more than likely that a civil court will hold that a company should have known about the risk, because a prudent company in its shoes would have undertaken an effective risk assessment.

The Panel also considers that in such contexts, there will often be a number of causal links between the company's conduct and the gross human rights abuses. It may be that the very act of engaging the security forces causes or contributes to the perpetration of gross human rights abuses. Furthermore, it will often be the case in such situations that the company ends up providing the security forces with logistical assistance, or equipment, that will also implicate it in the chain of events leading to the perpetration of gross human rights abuses.

### **3.3 Supply Chains**

Businesses often face allegations of complicity when gross human rights abuses are perpetrated by actors in their supply chain. The allegations are usually that the company concerned failed to take steps to ensure that the supply of materials did not involve human rights abuses or that the company in fact imposed such conditions of supply that it became directly implicated in the supplier's perpetration of gross human rights abuses.

The Panel considers that proximity will be an especially critical ingredient in this context. Many companies have complex supply chains involving several other

companies and in most situations, the further down the supply chain, the less knowledge the company will have, or be expected to have, about the practices of its suppliers and often the less impact its conduct will have on the conduct of the supplier. Conversely, the closer the supplier is to the company or the more key the supplier is to the company's business, the more knowledge the company will have, or be expected to have, and the more impact its conduct will have on the situation, increasing the likelihood that it could be enabling, exacerbating or facilitating gross human rights abuses.

In some situations, a company will be the sole buyer of all goods produced by one supplier. In such situations, the purchasing company will usually have a high level of influence over its supplier, and could for example dictate a price for the products that is so low and demand a speed of delivery that is so short, that the only way the supplier could comply is to perpetrate human rights abuses, such as using child labour or forced labour. In such situations, the Panel believes that it could be said that the company enabled, exacerbated or facilitated the harm suffered by the workers. If, on the other hand, the purchasing company is one of many purchasers and contributes only a small amount to the supplier's income, the causal link between the purchase and the use of child or forced labour may be more tenuous.

Sometimes, if the supplier is quite distant in the supply chain from the purchasing company, this will also lessen the extent to which that company will be considered to know or expected to know, about the fact that gross human rights abuses may be occurring. Nevertheless, a court may hold that factors such as the context or place in which the supplier is operating, the past record of the supplier, and the conditions of the supply contract, alerted, or should have alerted, the company to the risk that gross human rights abuses could be taking place in the context of its supply chain.

### **3.4 Formal Business Partnerships**

Companies are sometimes said to be responsible for human rights abuses that are carried out by another actor, with whom they have entered into a business partnership with the aim of carrying out a particular business enterprise. Joint ventures are common examples of such business partnerships, in which the parties each contribute different skills or resources to implement a business objective that one alone cannot achieve and in relation to which they share the profits and losses. There is usually quite close collaboration and coordination between the partners and detailed negotiations about the actions that each will take to fulfil their side of the partnership agreement.

The Panel considers that a company may find itself in a zone of legal risk when it enters into a formal business partnership, such as a joint venture, and its partner commits gross human rights abuses in the context of the business partnership.

The Panel believes that whether or not legal liability may arise will depend on the circumstances surrounding the agreement, including the impact of the agreement on the conduct of the principal actor and the information available to the allegedly complicit company beforehand and during implementation of the agreement about the likely and actual conduct of its partner.

There will often be a high level of proximity in such contexts, which will in turn impact on the level of knowledge a company will be deemed to have had, or expected to have had, about the risk that its partner would perpetrate gross human rights abuses. The terms of the partnership agreement itself will often be considered to constitute the causal link between the company and the abuses. A court may find, for example, that without the agreement, the abuses would not have occurred in the same way, to the same victims, or to the same extent.