

SECOND REGIONAL FORUM ON THE PREVENTION OF GENOCIDE

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I have been asked to respond to three specific questions with regard to business and genocide:

- *How have economic issues and business communities contributed in the past to prevent/incite genocides?*
- *What are the main challenges, success and failures until now?*
- *How should international actors and state actors act in order to enhance their synergies with the business community regarding prevention of genocide?*

I shall answer them together, as the answers are interwoven and cannot be addressed *ad seriatim*, and also raise other relevant issues.

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Businesses have always operated in zones of conflict. Many businesses have contributed taxes, royalties, profits to joint venture partners, and otherwise aided and abetted governments or armed opposition groups, which may have committed grave human rights abuses. Many businesses have continued to do so, saying they have to comply with requests from the relevant authorities – state or non-state – and they have no choice but to comply. Businesses are artificial persons, and not natural persons, and as such, not covered under the jurisdiction of the Rome Statute of the International Criminal Court. But a handful of executives or businesspeople have been accused of, and some convicted,² of

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² The landmark cases in this regard are the ones at the International Crimes Tribunal for Rwanda, involving the Radio Télévision Libre des Mille Collines. The station broadcast from July 8, 1993, to July 31, 1994, and its role in the Rwandan Genocide is widely cited as an example of what hate speech can do when it is unregulated and unrestricted, operating in an environment which has no effective alternatives. The ICTR took up the case in Oct 2000. In Aug 2003, prosecutors sought life sentences against Ferdinand Nahimana, a director at the radio station, and Jean Bosco Barayagwiza, associated with the station. They were found guilty in Dec 2003, and they appealed;

actually inciting genocide. But not many businesses have thought through creatively to understand the potential of their role, even if unintended or inadvertent, in an environment where genocide may be imminent, and what they can do to prevent it.

Genocide³ is a grave crime, with a precise legal definition and meaning, and it takes lawyers, jurists, and scholars to interpret its precise application in a specific context. Using the word loosely does not help. It is fair and reasonable to assume that with the exception of private military companies or private security companies, it is extremely unlikely that a business would have *direct* involvement with committing genocide, crimes against humanity⁴, or war crimes,⁵ but *indirect* involvement is a different matter, and in that context, businessmen can be, and have been implicated and prosecuted⁶ for being complicit in grave abuses, including genocide.

Most business, with justification, can argue that they do not intend ever to take part in such heinous acts. They further argue that there are no clearly defined legal responsibilities that apply to them in such contexts. This is not entirely accurate, as the International Committee for Red Cross and Red Crescent points

in November 2007, the appellate court reduced their sentences to 30 and 32 years, respectively. In 2009, Valerie Berneriki, a broadcaster, was found guilty of incitement to genocide by a *gacaca* court (traditional community justice courts of Rwanda, revived in 2001), and sentenced to life imprisonment. Felicien Kabuga, president of the radio station, remains a fugitive.

³ Art. II and III of the Genocide Convention of 1948 define genocide as "genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group." The punishable acts are: (a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide; and (e) Complicity in genocide.

⁴ The International Military Court at Nuremberg after World War II defined crimes against humanity under Art. 6[c] as "Murder, extermination, enslavement, deportation, and other inhumane acts committed against civilian populations, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated."

⁵ Article 147 of the Fourth Geneva Convention defines war crimes as: "Wilful killing, torture or inhuman treatment, including... wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile power, or wilfully depriving a protected person of the rights of fair and regular trial, ...taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."

⁶ See, for example, the Tecschi case from the Nuremberg Tribunal, and the Frans van Anraat case, discussed later. http://www.fao.no/liabilities/part_II-5genocide.htm

out⁷, businesses get protection from and have obligations under international humanitarian law, and the humanitarian law is non-derogable and applies to state and non-state actors at all times. Governments have only recently begun taking up the responsibility of prosecuting direct perpetrators, and one effect of the focus on direct perpetrators is that it makes it easier for those who are one or more steps removed from the crime to assume, if not conclude, that the likelihood of their being prosecuted is low.

Enlightened businesses have, in turn, created codes of conduct that apply in specific circumstances, sometimes with government and civil society participation and sometimes without, but those codes are no substitute for compliance with existing laws. Driven by best impulses, some businesses have tried to help broker peace. Some business leaders in Sri Lanka have helped bring communities together, and taken active steps to recruit people who have given up arms.⁸ Similarly, businesses in Zimbabwe, South Africa, and Angola have played a role in helping warring parties come together to negotiate. In a few cases, as in Northern Ireland, trade unions⁹ have played the constructive role of helping eliminate sectarianism. Employees themselves, as in Rwanda¹⁰ and the Niger Delta¹¹, have taken exceptional measures to assist victims during an armed conflict.

But these actions, while individually heroic, are not drawn from a notion or conception of legal responsibility. These are moral, value-based responses. Such values and social norms, including social expectations of business, do contribute towards making laws, but business values cannot be enforced in a court of law –

⁷ *Business and international humanitarian law: An introduction to the rights and obligations of business enterprises under international humanitarian law* (ICRC, Geneva, November 2006. Accessible at: <http://www.icrc.org/Web/eng/siteeng0.nsf/html/business-ihl-150806>.

⁸ See *Local Business, Local Peace: The Peacebuilding Potential of the Domestic Private Sector*. (International Alert, London, 2007. Accessible at: http://www.international-alert.org/peace_and_economy/peace_and_economy_projects.php?t=3

⁹ http://www.gppac.net/documents/pbp/9/3_n_ire.htm

¹⁰ For example, the exemplary conduct of Paul Rusesabagina, manager of Hotel Mille Collines, later documented in the film, *Hotel Rwanda*.

¹¹ In particular, the assistance provided to refugees from sectarian violence by some oil companies during the Warri crisis of 2004-05.

relying on a company's value statement does not help in creating a set of rules that can apply to every individual or context.

To ensure that businesses don't contribute to genocide, and that they help build peace, it is necessary to set out clear rules of what they should not do, what they must, and what they can. Encouragingly, good work has been going on in both areas, to which we shall now turn.

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Political scientists have explained violent conflict between and within nations in terms of ethnicity, history, memory, culture, or sociology. The work of Paul Collier and Anke Hoeffler¹² at the World Bank, and then at Oxford, has shown that it is wrong to neglect greed as an important aspect in sustaining wars¹³. Subsequent research¹⁴ has shown that both greed and grievance play a role in armed conflict.

The attention of the international community on the role of business in conflict zones is welcome, but the role itself is not new. Businesses have always operated in situations of armed conflict. Soldiers and civilians alike need food, water, electricity, petrol, banking facilities, telephone services, among myriad other services that make daily life possible. Once a business operates in a conflict zone, it is not easy for that business to leave because one important consideration for that business is the safety and security of its own employees. As the ICRC has observed:

¹² Paul Collier and Anke Hoeffler. "The Economic Causes of Civil Wars." *Oxford Economic Papers*. vol 50 iss 4, (1998), pp 563–573. And "Greed and grievance in civil war" *Oxford Economic Papers*, vol 56 iss 4, (2004), pp 563–595.

¹³ For a good examination of greed 'sustaining' conflict, see Ian Bannon and Paul Collier, eds. *Natural resources and violent conflict: options and actions*. World Bank, 2003.

¹⁴ *The Political Economy of Armed Conflict: Beyond Greed and Grievance*. Karen Ballentine and Jake Sherman (eds.) Lynne Rienner Publishers, 2003

Business enterprises are reluctant to abandon their personnel, their operations and their capital investments when an armed conflict breaks out around them. A withdrawal of business enterprises from conflict zones may also be undesirable: countries struggling to overcome the torments of armed conflict usually need economic development and private investment. The rules of international humanitarian law that protect civilians and civilian property prohibit attacks against business enterprises' personnel – as long as they are not taking a direct part in hostilities – and against business enterprises' facilities.

However, it should be noted that in a situation of genocide or crimes against humanity, businesses should have, and always have the option of divestment, even though it is not always easy for a business to suspend operations and leave immediately, due to the nature of its investment and production processes. Some companies in the extractive sector, often facing the brunt of accusations over their conduct, have argued that they have little choice but to operate wherever they find resources, and that they invest for the long term, and cannot take decisions based on temporary crises.

That is certainly true at one level, but their presence can contribute to violent conflict, and when they operate in remote regions, their presence may exacerbate tensions, including legitimizing forces that undermine the state.

Business activity is now more visible in countries that historically shunned investment. The end of the cold war meant new markets and opportunities opened up. Rise in commodity prices meant businesses invested where the raw materials were found, irrespective of political stability. This meant that companies invested in a country even if a conflict raged in that country. Companies do not always pause to reconsider before entering into agreements with armed opposition groups who may not have legal authority over the area they command; even if it means they may be operating in an environmentally fragile area where indigenous communities live. If communities like the ones in

Guatemala, whose images we saw earlier today, object to the investment, state forces step in, under the doctrine of eminent domain. As we've seen, they may use force, with tragic consequences.

To protect their assets and people, companies have entered into agreements with security forces – or, in some cases armed groups – to ensure that their operations are not disturbed. Some companies have also entered into financial arrangements with state or non-state actors, often contributing royalties to parties engaged in conflict. All these activities significantly raise risks for companies operating in such zones. These risks are not only to their reputation; they also put at risk their assets and people. They also run the risk of being sued, and in some cases, their staff, in their individual capacity, can be prosecuted in international crimes tribunals or at the International Criminal Court.

Beyond avoidance of risks, compliance with the law and meeting obligations are also of great importance. Elaborating on business obligations, the ICRC has added:

Business enterprises carrying out activities that are closely linked to an armed conflict are required to respect relevant aspects of international humanitarian law. Furthermore, they may be in a position to play an important role in promoting respect for international humanitarian law among political and military authorities or other business enterprises within their sphere of influence. An understanding of international humanitarian law is thus an important ingredient in the ability of a business enterprise to live up to its obligations under the law and to any commitments it may have under the various codes of conduct or voluntary initiatives to which it may have subscribed. An appreciation of the implications of business operations in the dynamics of conflict is also key in identifying potentially significant risks¹⁵ of criminal and civil liability for complicity in violations of international humanitarian law.

¹⁵ The way international laws and norms have progressed, it appears that the notions of due diligence and avoidance of risk are converging, and such a norm could emerge as a legal obligation over time.

A company is a legal entity; an artificial “person”. It is an “organ of society”, as set out in the Universal Declaration of Human Rights, but it is an organ of society for a specific purpose – of undertaking economic activity. But a company is also a social organisation. Companies are made up of people; and they organise lives under rules, which must be consistent with human rights law. Laws do not bar economic activity in zones of conflict, and so some companies do and will continue to operate in zones of conflict. They take high risks because their primary aim – some would argue their *raison d’etre*, or obligation – is to make profit for their shareholders. This is not to suggest that the idea of profit motive is wrong. But it is useful to acknowledge that when companies invest in a specific area, they do so in pursuit of profit, and they are not driven by benign motives or malign intent. Companies are not *good* or *bad*; specific conduct of companies can be *good* or *bad*.

Many large companies make large-scale investments only after undertaking detailed studies of the country’s political and legal infrastructure. They have analyzed the risks of expropriation, repatriation, and taxation. They know if they are investing in a country in conflict; they have enough information and analysis available to ascertain if crimes against humanity, war crimes, or genocide are being, or have been committed. What they are not clear about is the extent of their role in supporting it, and what they should do to prevent it.

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Companies today operate in an environment of greater public scrutiny, stricter laws, better enforcement, and a more egalitarian architecture of international law than what prevailed during the colonial era. As companies are active in difficult environments – for example, one of the few functioning entities in Somalia today is a soft drinks manufacturer – international organisations, including the United Nations, expect the private sector to play a leading role in building the economic foundations of a post-conflict society. Doing so without recognizing the power imbalance and past asymmetry of relationships – where companies opened reluctant economies to trade, and ended up dominating the politics, and in some cases, ruling countries – is counter-productive.

Recognising that companies operating internationally are not adequately regulated either by home or host states, and there is no overarching treaty or law to regulate their conduct, Non-Government Organizations (NGOs) began researching corporate conduct in the mid-1990s in order to lobby for binding accountability mechanisms. Among them, Global Witness, founded in 1993, focused on the links between natural resources and armed conflict, and through a series of investigations drew international attention to conflict commodities, focusing on timber, diamonds, oil, and other minerals. Human Rights Watch produced an important report on the Niger Delta in 1997, highlighting ways in which companies were involved with human rights violations in the region. Amnesty International published human rights principles for companies in 1998. Partnership Africa Canada reported in 1999 on links between rebel forces and the diamond trade in the Angolan and Sierra Leonian conflicts.

These reports – and it is an illustrative list, not an exhaustive one – have resulted in sustained international campaigns against those companies and industries, and adverse commentary from international experts, including the expert panels¹⁶ of the United Nations. In some cases, as with diamonds from Angola and Sierra Leone, the U.N. Security Council has imposed sanctions against specific commodities, to prevent the flow of funds to armed opposition groups engaged in violent conflict and committing widespread human rights abuses. One result of the focus on the conflict in Sierra Leone, Liberia, and Angola¹⁷, was the creation of the Kimberley Process Certification Scheme¹⁸, set up to ensure that companies do not procure diamonds from armed groups waging a war against legitimate governments. Unilateral sanctions have been imposed on other

¹⁶ In its October 2002 report (S/2002/1146), the *United Nations Expert Panel on Illegal Exploitation of Natural Resources and other Forms of Wealth in the Democratic Republic of Congo (DRC)* said that 85 companies had not observed the OECD Guidelines for Multinational Enterprises and challenged the governments adhering to the Guidelines to use them to promote responsible behaviour among companies active in the DRC. In October 2003, the Panel reported on its efforts to verify, reinforce and update its earlier findings. This report describes the conclusions drawn by the Panel from its dialogue with many of the companies accused of not observing the Guidelines in its 2002 report.

¹⁷ On 1 December 2000, the United Nations General Assembly adopted, unanimously, a resolution on the role of diamonds in fuelling conflict, breaking the link between the illicit transaction of rough diamonds and armed conflict, as a contribution to prevention and settlement of conflicts (A/RES/55/56). In taking up this agenda item, the General Assembly recognized that conflict diamonds are a crucial factor in prolonging brutal wars in parts of Africa, and underscored that legitimate diamonds contribute to prosperity and development elsewhere on the continent.

¹⁸ www.kimberleyprocess.com

commodities, such as gemstones from Burma, because of the government's human rights record.

As early as in 2000, the UN Global Compact initiated a policy dialogue for companies operating in zones of conflict. It has since revived that project, and a new set of guidelines is being prepared. In 2000, the International Business Leaders' Forum published, together with the NGO International Alert, *The Business of Peace*, and in 2002 the UN published¹⁹ guidance to companies operating in conflict zones. International Alert also published *Conflict Sensitive Business Practice: Guidance for the Extractive Sector*²⁰. In the past year, the Organisation of Economic Cooperation and Development has launched an initiative to ensure mining sub-contractors' compliance with the OECD's guidelines for multinational enterprises, which the UN experts' panel for the Democratic Republic of Congo had used as a benchmark to judge corporate conduct.

Following the process at the former Sub-Commission for the Protection and Promotion of Human Rights to develop draft Norms for transnational corporations and other business enterprises, the UN Secretary General appointed John Ruggie, an authority on international relations at Harvard who had been a senior official at the UN, as his special representative for business and human rights. Professor Ruggie has developed a framework which clarifies the role and responsibility of business and the state as follows:

- The state has a duty to *protect* against abuses committed by non-state actors, including business;
- Business has the responsibility to *respect* all human rights and to demonstrate this through ongoing due diligence processes; and,
- Where gaps exist, there is need for greater access for victims to effective *remedies*, judicial and non-judicial.

¹⁹ Business Guide to Conflict Impact Assessment and Risk Management. Global Compact, June 2002. http://www.unglobalcompact.org/docs/issues_doc/7.2.3/BusinessGuide.pdf.

²⁰ Full text available here: http://www.international-alert.org/peace_and_economy/peace_and_economy_projects.php?t=1

Elaborating on the *corporate responsibility to respect*, Professor Ruggie has suggested that businesses should establish and operationalise a policy, ensuring its implementation. Doing this thoroughly would require due diligence processes, which he has defined as:

A comprehensive, proactive attempt to uncover human rights risks, actual or potential, over the entire life cycle of a project or business activity, with the aim of avoiding and mitigating those risks.

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While this international architecture is being built, victims have made ingenious use of laws to seek redress. Victims of human rights abuses initiated legal proceedings in the United States against companies under the Alien Tort Claims Act²¹ of 1789, which allows foreigners to sue in US courts for damages for violations of customary 'laws of nations' such as the prohibition of slavery, genocide, torture, crimes against humanity, and war crimes. While none of the almost 50 cases filed against companies has been successful, in a few cases, involving oil companies Unocal and Shell, the companies have settled cases out of court without admitting any wrongdoing. These cases, it should be stressed, are civil law cases, using the tort law, and do not deal with genocide in the criminal sense. But such lawsuits are forcing companies to review their thinking, and a growing number of companies accept the need for uniform standards to ensure 'a level playing field' and their pursuit of voluntary codes of conduct, rather than regulation, is a step in that direction – to be ahead of the game.

A typical code would require companies to follow high standards, but there are sufficient loopholes in many codes to make the interpretation of any code, as well as its application, difficult, and in any case legally difficult to enforce. 'Codes of conduct work only for the well-intentioned', is a remark made frequently by businesses and academics in the sphere of corporate social responsibility.

²¹ The Alien Tort Statute (28 USC § 1350; ATS, a section of the U.S. Code that reads: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

Frequently, there are no mechanisms to verify or monitor the conduct, and as the language in many codes is unclear, external parties find it hard to establish accountability or assess performance.

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It would be a simple matter if banning business activity in zones of conflict was all that was required. But such blanket bans do not work. Whenever comprehensive bans of this nature are imposed, predatory companies step in, continuing to trade and invest, and sometimes worsening the context. Predators are drawn by the potential to make extraordinary profits, because sanctions create scarcity. As Collier and Hoeffler have noted, sometimes civil wars are prolonged if armed groups have access to lootable resources. As the example of Nigerian oil theft – euphemistically referred to as bunkering – has shown, even apparently ‘unlootable’ commodities as oil are being stolen openly by armed groups, sometimes with collusion of official entities, continuing the flow of revenues and weapons to the armed groups.

Responsible businesses have often argued that they are not predators. They say they are good corporate citizens, that they invest for the long term, and that it is not their intention to profit from conflict. Indeed, some companies have provided exemplary service to besieged communities caught in conflict.

And yet, despite their intent, their professed philosophy, some of the leading companies in the world have ended up being accused of benefiting from grave abuses. A survey of lawsuits filed under the ATCA would show that the companies being sued are often well-known²². But that does not detract from the gravity of abuses being highlighted. Litigation under ATCA has become a proxy for a range of reasons, including the fact that U.S. judges under the law are expected to take note of ‘the law of nations’ and can exercise jurisdiction. But these are cases under civil laws, and it is a matter of speculation how the cases

²² It is true that some law firms and some legal activists look for specific companies as targets, the victims who are plaintiff are not necessarily guided by such motives; the abuses they have suffered are real.

would play out in a criminal court, given the different threshold for evidentiary standards.

Companies are reluctant to get drawn into discussions about genocide for several reasons. One, many companies conceptually and philosophically disagree with the idea that their activities might harm civilians in an armed conflict. As noted earlier, it is possible that they have not thought through the consequences of their actions, and they often lack the willingness or ability to explore all consequences – included unintended – of their specific actions. A company that builds a highway and permits communities and the government to use it may not realize that an armed group or government forces can use the same highway to move its forces rapidly. When a leading human rights organization pointed out to a major oil company that the company was supplying aviation fuel to the air force in a particular African country, and that air force was bombing civilians, the company said that it was also providing aviation fuel to an international relief agency that was distributing food aid. Its implication – one good deed compensated for the other bad deed. To a company, both transactions were legitimate. The companies that built the railroads that took inmates to concentration camps during World War II, or the companies that supplied the gas used in those camps, also possibly saw those transactions, initially, as entirely innocent. Their failure to understand the legal and moral implications contributed to the Holocaust. The notion of *known or should have known* becomes important in this context, as does the notion of *aiding and abetting*.

The central fact companies operating in a zone of conflict must realize is that they are often only a few steps away from someone committing grave abuses. When security forces remove a large number of people against their will, so that a company can drill for oil, the oil company may believe it is only carrying out an exploration contract, since it did not order, authorise, or in any other way support the forced removal. But its planned activities and relationships may have contributed to the crime. Likewise, companies that have hired labourers from sub-contractors or government agencies to build pipelines in Burma have claimed they were unaware that the labourers were working against their will.

Two, companies believe that the definition of genocide, war crimes, and crimes against humanity is so precise, so arcane, and so legalistic, with such onerous evidentiary standards, and the criminal threshold for prosecution and liability is so high, that they are unlikely to be charged for their actions. That's not strategy, however; that's gaming and betting. And those bets can, and have, gone wrong.

Three, companies think they are protected from risks because they are not natural persons. The Rome Statute applies to 'natural persons', and as companies are 'artificial persons', companies believe the Statute does not apply to them. But company officials may be prosecuted and held accountable.

During World War II, German businesses colluded with and profited from the Nazi regime, and several businessmen were arrested, prosecuted, and found guilty for their conduct during the war. During the Nuremberg Trials²³, the Military Tribunal prosecuted two bankers, Karl Rasche and Emil Puhl, for their role in the crimes perpetrated by the Nazi regime. Rasche was the Chairman of Dresdner Bank, which served as the bank for the Third Reich. Rasche was convicted of looting and of being a member of the Schutzstaffel (SS). He was acquitted, however, of charges that he had played a role in providing loans for the construction of Auschwitz. The Tribunal noted that, as a board member of the bank, Rasche was intimately involved in loaning large sums of money to various SS enterprises, which employed large numbers of inmates of concentration camps, and also to Reich enterprises and agencies engaged in the so-called resettlement programs. And it concluded that Rasche had actual knowledge as to the purposes for which loans were sought. But it also concluded that Rasche's granting of loans was not a violation of international law.²⁴

²³ For further details, please see the work of Dr Anita Ramasastry at findlaw.com.

²⁴ The Tribunal held: *"The real question is, is it a crime to make a loan, knowing or having good reason to believe that the borrower will use the funds in financing enterprises which are employed in using labor in violation of either national or international law? Does [Rasche] stand in any different position than one who sells supplies or raw materials to a builder building a house, knowing that the structure will be used for an unlawful purpose? A bank sells money or credit in the same manner as the merchandiser of any other commodity. It does not become a partner in enterprise, and the interest charged is merely the gross profit, which the bank realizes from the transaction, out of which it must deduct its business costs, and from which it hopes to realize a net profit. Loans or sale of commodities to be used in an unlawful enterprise may well be condemned from a moral standpoint and reflect no credit on the part of the lender or seller in either case, but the transaction can hardly be said to be a crime. Our duty is to try and punish those guilty of violating international*

The Tribunal made the distinction between providing capital and actively participating in Nazi looting efforts. Emil Puhl's case was different. He was deputy to the president of the German Reichsbank. Puhl's job included arranging for gold, jewellery, and foreign currency from Nazi victims to be deposited at the Reichsbank. He also arranged for gold teeth and crowns from concentration camp victims to be recast into gold ingots.

Puhl was prosecuted and convicted, and sentenced to five years imprisonment, for his "role in arranging for the receipt, classification, deposit, conversion and disposal of properties taken by the SS from victims exterminated in concentration camps."²⁵

Besides the Nuremberg verdicts, there are other cases which provide some guidance. The International Crimes Tribunal for the Former Yugoslavia (ICTY) has had two important rulings clarifying complicity - the *Tadic*²⁶ and *Furundzija*²⁷ case. The International Crimes Tribunal for Rwanda (ICTR) has a similar standard-setting ruling in the *Akayesu*²⁸ case, and has charged another

law, and we are not prepared to state that such loans constitute a violation of that law, nor has our attention been drawn to any ruling to the contrary."

²⁵ Unlike with Rasche, the tribunal noted: "[Puhl's] part in this transaction was not that of mere messenger or businessman. He went beyond the ordinary range of his duties to give directions that the matter be handled secretly by the appropriate departments of the bank."

²⁶ Dusko Tadic was arrested in 1994 in Germany on suspicion of having committed offences at the Omarska camp in the former Yugoslavia in June 1992, including torture and aiding and abetting genocide. In that case, the ICTY elaborated on what constitutes complicity: "First, there is a requirement of intent, which involves awareness of the act of participation coupled with a conscious decision to participate by *planning, instigating, ordering, committing, or otherwise aiding and abetting* in the commission of a crime. Second, the prosecution must prove that the participation in the conduct of the accused contributed to the commission of the illegal act." Additionally the contribution, or assistance, needs "to have a substantial effect on the commission of the crime."

Everyone who is part of the "conspiracy" is responsible for the crimes committed, even if the individual only assisted by providing logistical support. Even if the contribution is slight, criminal law holds participants in such a project with common design to be complicit.

²⁷ Anton Furundzija was the local commander of the Croatian Defence Council Military Police unit known as the "Jokers". He was charged with two counts of violations of the customs of war, arising out of interrogations of a Bosnian Muslim woman and a Bosnian Croat man, in which Furundzija questioned the pair while another police officer threatened sexual violence against the woman, beat them, and raped the woman in the presence of the man and others. Advancing the concept of 'mere presence,' the ICTY held: "*It may be inferred that an approving spectator who is held in such respect by the other perpetrators that his presence encourages them in their conduct, may be guilty of complicity in a crime against humanity. [P]resence, when combined with authority, can constitute assistance in the form of moral support, that is, the actus reus of the offence. The supporter must be of a certain status for this to be sufficient for criminal responsibility.*"

²⁸ Jean-Paul Akayesu was the *bourgmestre*, or mayor, of the Commune where atrocities, including rape and sexual violence, occurred during the Rwanda conflict. The Tribunal considered his position of sufficient authority to conclude that he was criminally liable for aiding and abetting. The *Akayesu* ruling extended the principle for non-state actors, and provided three important building blocks in clarifying complicity.

businessman in the *Kabuga*²⁹ case, where the Tribunal is seeking to prosecute a businessman who is allegedly complicit in abuses. The case of *Frans van Anraat*,³⁰ a Dutch businessman who sold chemicals to Saddam Hussein's Iraq, which were then used to make chemical weapons used in Halabja, led to van Anraat's conviction. When he appealed, the higher court not only upheld the verdict, but increased the sentence. While a lower court did find another Dutch businessman – *Guus van Kouwenhoven*³¹ guilty of trading arms for timber in Liberia, a higher court acquitted him.

To provide some clarity on these issues, the Norwegian think tank FAFO worked with the International Peace Academy (now Institute) in New York to develop clearer understanding of companies and their liabilities under criminal law. A multi-country study³² followed, which examined different criminal jurisdictions from the north and south, and concluded that prosecutorial action under domestic laws is possible. One consequence of that project was the *Red Flags*³³ initiative, which specifies, in clear terms, what companies must not do. These circumstances are drawn from cases that have been filed, and include nine specific circumstances:

- Expelling people from their communities
- Forcing people to work
- Handling questionable assets
- Making illicit payments
- Violating sanctions
- Engaging abusive security forces
- Trading goods in violation of international sanctions
- Providing the means to kill

²⁹ Felicien Kabuga is a Rwandan businessman currently in hiding, against whom the ICTR has issued a warrant of arrest in 1999 on eleven counts, including genocide, conspiracy to commit genocide, and complicity in genocide.

³⁰ <http://www.redflags.info/index.php?topic=meanstokill>

³¹ <http://www.redflags.info/index.php?topic=sanctions>

³² <http://www.faf.no/liabilities/index.htm>

³³ www.redflags.info.

- Allowing use of company assets for abuses
- Financing international crimes

Red Flags clarify what companies must not do. But what is it that companies can do? Relying on corporate social responsibility initiatives, or codes of conduct, may be a helpful first step, but it is not sufficient. How can companies operate in zones of conflict, and what must they do to help build peace, and avoid circumstances in which they might become complicit?

A core part of due diligence must mean developing an understanding of complicity. It means understanding proximity – to the violator, the violation, and the victim. The closer the proximity, the higher the complicity risk. Aiding and abetting and knowing – or should have known – are similarly important. In this context, it is important to note the work of the International Commission of Jurists, whose multi-year study has enhanced our understanding of the notion of complicity.³⁴

PROXIMITY³⁵

VIOLATION

VIOLATOR

VICTIM

AID/ABET³⁶

KNOWLEDGE³⁷

DURATION³⁸

BENEFIT³⁹

INTENT⁴⁰

³⁴ The reports are accessible at: <http://www.business-humanrights.org/Updates/Archive/ICJPaneloncomplicity>

³⁵ **PROXIMITY:**

To the Violator: The closer the company is to the violator/abuser, the higher the risk. Proximity may be through transactional, geographic, or other business relationship.

To the Violation: The closer the company is to the actual violation, the higher the risk.

To the Victim: The closer the victim is to the company, the greater the risk.

³⁶ **AID/ABET:** If the company has assisted in the commissioning of the abuse, the risk increases.

³⁷ **KNOWLEDGE:** (Known and should have known): What did the company know, and when did it know it? The more a company knows, the risk increases.

³⁸ **DURATION:** The longer the abuse has gone on, the risk increases.

³⁹ **BENEFIT:** If the company derives a benefit from the abuse, risk increases.

⁴⁰ **INTENT:** (Mens Rea) If the company intended for the abuse to take place, the risk increases.

The primary obligation for protection of human rights rests with the state. But as noted earlier, companies have the responsibility to respect rights. For companies that operate in zones of conflict, in practical terms, it means they should:

- Comply with the international humanitarian law
- Identify early trends and possible triggers of violence
- Share information with other companies, government officials, trade unions and civil society
- Operate in a way that does not discriminate between classes of people
- Make operations transparent
- Scrutinise local partners
- Establish accountability mechanisms
- Provide quick, effective remedies in the context of own operations in matters that do not concern grave human rights abuses
- Ensure the rights of people to participate
- Provide opportunities to speak out
- Provide safety and security to the vulnerable
- Offer refuge where appropriate

These are singular actions. These are not the only steps. These are necessary. These may not be sufficient. But these actions, together with similar actions by other businesses, and, indeed all actors, can help create collective action to prevent violent conflict, and in some instances, genocide.

Many, if not most, companies comply with the law and help to generate prosperity by creating jobs, paying taxes, producing goods and providing services. There are several examples of corporate presence creating an island of peace in a conflict-ridden area. The Norwegian oil company Statoil has been praised for its operations⁴¹ in the Niger Delta, where its facilities have rarely been targeted by protestors. This is because the company has been scrupulous in

⁴¹ See in particular its Akassa Development Project, in collaboration with BP and the NGO Pro-Natura. Details at <http://www.pronatura-nigeria.org/adf.htm>

engaging local communities, and has developed development programmes in consultation with all stakeholders. It has been transparent about what it does and can do, and has brought in independent NGOs to operate the programmes. Extractive industries have come together to form two initiatives. The Voluntary Principles⁴² for Security and Human Rights provides guidance to companies so that they can operate while protecting their people and assets while respecting human rights. The Extractive Industry Transparency Initiative⁴³ provides a framework for companies to make transparent their transactions with countries in which they operate.

But such collective action is feasible only when companies operate with all businesses operating in the area, and include other actors, and the initiatives have the support of local governments and the international community. Creating that wide a tent does mean that some standards could get diluted; the onus is on those who wish to uphold the highest standards to insist on adherence to international law.

In conclusion, some reflections on developing ways of dealing with the role of business in zones of conflict using the SRSG's framework:

Businesses will operate in zones of conflict. Except in some cases, it is not illegal to do so. Some business conduct may have beneficial effects for human rights; some business conduct may have harmful impact on human rights. Businesses can, and have contributed to, and benefited from, conflict, as well as peace. The challenge for the international community is to develop a framework that creates powerful incentives for businesses to act in a positive way, and establish strong disincentives to ensure that businesses do not act in a negative way. To repeat: businesses are not "good" or "bad"; but their specific actions – and their effects – can be "good" or "bad".

⁴² www.voluntaryprinciples.org

⁴³ www.eitransparency.org

Applying the SRSG framework, it would appear that states should take the following steps as part of its duty to protect.

- ***Advice and Inform:*** Home states should offer clear advice to businesses about the countries in which they are about to invest. Home states should also help businesses familiarise themselves with international law, in particular international humanitarian law, when they operate in conflict zones. States should provide information about local partners, including those in the civil society, with whom companies can collaborate to foster a peace-building environment, and so that their activities are consistent with the genocide prevention agenda. When home states have information that can prevent genocide, and they know of businesses who can play an effective role in disseminating information, providing assistance or resources, then the states should work with those businesses as a matter of priority.
- ***Collaborate:*** Home states should be inclusive in developing strategies to prevent genocide, by working with businesses that operate in conflict zones. Businesses often have access to information and intelligence that states do not have, and businesses should be encouraged to share their insights on a confidential basis with relevant authorities.⁴⁴
- ***Promote:*** Home states can act collectively to lobby other states and the host state to act in ways that uphold international law. This includes promoting effective governance of wealth generated from natural resources.⁴⁵ Furthermore, home states can also foster a climate of peace

⁴⁴ The UN Secretary-General's Special Representative for Business and Human Rights has initiated a programme of work with states to ensure that companies in zones of conflict do not contribute to human rights abuses. The main objective of the project is to help identify policy options that home, host and neighboring states have, or could develop, to prevent and deter corporate related human rights abuses in conflict contexts—where the international human rights regime cannot possibly be expected to function as intended. The measures could include providing advice and guidance to companies; structuring incentives via export credit, risk insurance, development assistance, or investments by parastatal agencies; and through the individual and collective roles of states in fostering corporate accountability. Further details of the project can be found at: <http://198.170.85.29/Ruggie-conflict-project-note-Oct-2009.pdf>

⁴⁵ In a recent report *Lessons Unlearned: How the UN and Member States must do more to end natural resource-fuelled conflicts* Global Witness (2010) has argued: "The problem with natural resources is not so much the nature of resources themselves, their abundance or their scarcity, but how they are governed, who is able to access them and for what purposes. In many places, predatory natural resource exploitation has

and justice by providing specific technical assistance to train the local judiciary, police forces, and the army. They can channel development assistance towards security sector reform, including improved prison conditions. They could provide training to foster a climate that supports non-discrimination.

- ***Incentivise:*** Home states can provide incentives for good behaviour by granting preferential access to certain opportunities, structures like export credit guarantee, access to intelligence briefings, and concessional lending.
- ***Warn:*** Home states should clearly warn companies that operate within their jurisdiction and laws of the risks they face if they fail to comply with laws. In certain instances, states should consider public warning.
- ***Prevent:*** It may not be legal for a state to prevent a company from operating in a particular context, but states have sufficient means at their disposal to prevent illegal activities from taking place. Examples of what states can do, include:
 - Restrictive trade policies, to prevent specific businesses from participating in public bidding or contracts;
 - Refusal of export finance, export credit, or any other assurances;
 - Refusal to offer political risk insurance;
 - Refusal to grant concessional lending.⁴⁶
- ***Prosecute:*** Home states should empower their prosecutors' offices, and cooperate with international tribunals.

contributed to the loss of sovereign control over the resources, undermined social and economic development, enabled crippling levels of corruption and helped sustain armed violence. This dynamic of exploitation and violence is in reality a downward spiral in which the informalisation of the state, or what is sometimes referred to as 'state fragility' – leaves people to fend for themselves while natural resource production falls under the control of those with access to coercive force. If the state is not an effective provider of services, security or legitimacy, armed groups will often claim those roles, reinforcing the strength of the latter vis-à-vis the state."

⁴⁶ While the World Trade Organisation's rules do prevent states from preferring one business over another in normal circumstances, or preferring one form of trade over another, the WTO's rules are not meant to be incompatible with international law, and as such, when international peace and security are at stake, the WTO grants exemptions for mechanisms which are outwardly restrictive, but intended to serve the broader goal of international peace and security, as, for example, it has done with the Kimberley Process Certification Scheme.

Preventing genocide is too important a task to be left in the hands of any one actor alone. Some businesses have been part of the problem; many businesses can be a part of the solution.