

Business in Armed Conflict Zones: How to Avoid Complicity and Comply with International Standards

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Frans van Anraat is a Dutch businessman who was conducting business with Iraq in the 1980s. There was no law barring business transactions with Iraq in the 1980s, and he had not broken any Dutch export laws. He sold chemical components in Iraq, which were then used to make chemical weapons in the attacks on the Kurds in 1988, especially in Halabja, and against the Iranian town of Sardasht in 1987 and 1988. As is now widely-known, the Iraqi Government of Saddam Hussein had used poison gases against Iranians during the Iran-Iraq War of 1980-1988, and during "Operation Anfal" in Iraqi Kurdistan in 1988. Tens of thousands of civilians in Kurdistan died or were maimed in that operation.

Van Anraat said his business dealings in Iraq were regular and within the law, and that he was not selling chemical weapons to the Saddam regime. But an investigation by U.S. customs authorities showed that van Anraat had been involved in four shipments to Iraq of thiodiglycol, an industrial chemical which can be used to make mustard gas. It also has civilian uses.

The Dutch Government initiated prosecution against van Anraat, saying he was aware of the real purpose for the chemicals. The prosecution said van Anraat was "suspected of delivering thousands of tons of raw materials for chemical weapons to the former regime in Baghdad between 1984 and 1988".

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In December 2005, a court in the Netherlands found van Anraat guilty of complicity in war crimes. According to the judge, van Anraat's deliveries facilitated the attacks and constituted a war crime for which the court imposed the maximum sentence of 15 years imprisonment. The judge stated: "He cannot counter with the argument that this would have happened even without his contribution." The court stated that the attacks against the Kurds had been carried out with the intent to destroy, in whole or in part, the Kurdish population in Iraq, thus qualifying them as acts of genocide. Van Anraat however, was acquitted of the charge of genocide, as it could not be proven that he was aware of the regime's genocidal intent.

Van Anraat appealed against the judgment, saying that the court could not find him guilty beyond a reasonable doubt, and it was unlikely that the judges could have known who was selling which chemicals to Iraq at that time. In May 2007, a Dutch Appeals Court in the Hague increased van Anraat's sentence to 17 years, asserting that he had repeatedly sold chemicals with the knowledge that they were being turned into mustard gas. The Court of Appeals also upheld the initial decision to acquit him of complicity in genocide.²

In recent years, the web of liabilities for businesses operating in zones of conflict has been expanding, and businesses can no longer assume that their activities in these zones will not be scrutinized. International policymakers are paying close attention to the issue. Prosecutors are investigating the connections between those persons assisting perpetrators of grave abuses, even if they are not aware of them, and Civil society organisations are campaigning against the links of commodities, finance, and commerce to conflict. While full-scale prosecutions such as the one against van Anraat are relatively rare, investigations and proceedings initiated by complainants under tort law have added to the pressure on businesses to act responsibly. Responsible companies have begun taking steps to protect themselves against

² LJN: BA4676, Gerechtshof 's-Gravenhage, 2200050906 - 2

the risk of being found complicit, and international understanding about the notion of complicity has grown.

Businesses have operated in zones of conflict since time immemorial. Armies need money to buy weapons and ammunition; soldiers need food; civilians still need supplies to continue their daily lives; and businesses have to function. Some businesses have played a direct role in conflict by providing the means with which wars are fought. Others have provided infrastructure support – intentionally or not – that has facilitated the continuation of conflicts. Some have supported their national governments while others have aided armed groups – sometimes by choice, sometimes under duress.

There are other indirect ways in which business has contributed to conflict, including paying taxes, royalties, sharing profits with joint venture partners, and otherwise aided and abetted governments or armed opposition groups. Although the chain linking business with conflict varies in length, the number of businesses which are, or appear to be, unaware of it is surprising. The links can expose businesses to the risk of being deemed complicit in grave human rights abuses, including war crimes, crimes against humanity, and genocide. Those crimes are extreme manifestations of the horrors of war, but businesses should be aware that the risks exist. Businesses have paid relatively little attention to these problems, partly because prosecutors have not focused on the role of business in conflict until recently, and partly because there is a high threshold of evidence required to prosecute a criminal case of complicity. It means that prosecutors have opted for cases that are more straightforward. It makes more sense to charge a general whose troops committed mass atrocities under his command, than to charge a financier who may have provided funds to buy particular weapons. Money is fungible, and the onus is on the prosecutor to prove that the financier knew the intent of the army when he arranged for the funds to be transferred. This means businesses, which are often one step removed from those who have carried out illegal acts, have felt they can rest comfortably. It is changing.

Many businesses have maintained that in zones of conflict they have no choice but to comply with requests and orders, even if they are illegal. Nuremberg Trials showed however that such a defence is not tenable. Companies also seek comfort from the fact that under the law, while a

company is “a person,” it is not “a natural person”, and as such, a company is not covered under the jurisdiction of the Rome Statute of the International Criminal Court. However, a handful of executives and businesspeople have been accused, and some convicted,³ of inciting genocide. Businesses operating in conflict zones that have not considered the potential consequences of their role, even if unintended or inadvertent, in an environment where genocide may be imminent and have not considered possible preventive measures in this respect, are running the risk of being held liable.

Genocide⁴ is a grave crime with a precise legal definition and meaning, and it takes lawyers, jurists, and scholars to interpret its application in a specific context. It is reasonable to assume that, with the exception of private military or security companies, few businesses are likely to be *directly* charged with involvement in committing genocide, crimes

3 The landmark cases in this regard are the ones at the International Crimes Tribunal for Rwanda, involving 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 inciting and vindictive 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 October 2000. In August 2003, prosecutors sought life sentences against Ferdinand Nahimana, a director of the radio station, and Jean Bosco Barayagwiza, associated with the station. They were found guilty in December 2003, and they appealed. 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.

4 Articles II and III of the Genocide Convention of 1948 define genocide as “any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, such as: (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

against humanity⁵ or war crimes.⁶ However *indirect* involvement is a different matter. In that context, businessmen can be, and have been, implicated and prosecuted for complicity in grave abuses.

Most businesses justifiably argue that they do not intend to take part in such crimes. A vast majority of businesses have no criminal intent. Most businesses view themselves as making a positive contribution to society – many perform services essential for civilian life to continue during an armed conflict. There are several positive examples of the role businesses have played in zones of conflict. Some businesses have been driven by humanitarian convictions and attempted 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.⁷ Similarly, businesses in Zimbabwe, South Africa, and Angola have played a role in helping the warring parties come together for negotiations. In a few cases, as in Northern Ireland, trade unions⁸ have played a constructive role in helping to eliminate sectarianism. Employees themselves, as in Rwanda⁹ and the Niger Delta¹⁰, have taken exceptional measures to assist victims during an armed conflict.

Many of these actions are unusually noteworthy. But they are not necessarily 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. Responsible businesses have relied on codes of conduct that apply under specific circumstances, sometimes with government and civil society participation. These codes are useful, but they cannot substitute for compliance with existing laws, because such codes of conduct are not necessarily legally enforceable.

To ensure that businesses do not contribute to genocide and that they aid in the peace process, it is necessary to determine clear rules for what they should not do, what they must do, and what they can do. Encouragingly, commendable work has been undertaken in all three areas to which we shall now turn.

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 Hoeffler¹¹ at the World Bank, and then at Oxford, has shown that it is wrong to neglect greed as an important aspect in sustaining wars¹². Subsequent research¹³ has shown that both greed and grievance play a role in armed conflict.

As the International Committee of the Red Cross (ICRC) has pointed out,¹⁴ businesses get protection from, and have obligations under, international humanitarian law (IHL). IHL is non-derogable and applies to state and non-state actors in times of conflict under all circumstances. Businesses have always operated in situations of armed conflict, but not always and not necessarily, out of choice. Once a business is operating in a conflict zone, it is not easy for that business to leave due to the important consideration of safety and security for its employees. As the ICRC has observed:

5 The International Military Court at Nuremberg after World War II defined crimes against humanity under Article 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."

6 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."

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

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

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

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

11 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.

12 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.

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

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

“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, under conditions of genocide or crimes against humanity, businesses always have the option to leave.

Companies in the extracting sector have faced accusations about their conduct in conflict zones. Their response has frequently referred to the need to operate wherever resources are available and to make long term investments irrespective of temporary crises. That is true at one level, but their presence can contribute to violent conflict. When they operate in remote regions on the periphery of state authority, their presence may exacerbate tensions, including the legitimisation of forces undermining the state. They must ensure that their presence mitigates tensions rather than contributing to them.

The end of the Cold War brought new markets and opportunities. Businesses began investing in countries in which they previously had not. Higher commodity prices meant that businesses invested in areas where raw materials were found, irrespective of political stability. And it led to companies investing in a country even if a conflict were raging. Based on expediency, dealings were conducted with armed opposition groups in areas where state authority was weak. Although these decisions are often driven by the dictates of the market, local managers are not trained to consider the consequences of agreements with armed opposition groups which may lack legal authority in the area under their control. If communities object to the investment, state forces step in under the doctrine of eminent domain. They may use force, with tragic results.

To protect their assets and personnel, companies have been known to make 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 the parties engaged in conflict. All of these activities significantly increase the risks for companies operating in such zones, risks not only for their reputation but also for their assets and employees. There is also the risk of being sued, as an enterprise or individual staff member, and prosecuted in international crimes tribunals or at the International Criminal Court.

In addition to avoiding 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.”

A company is a legal entity set up to organise economic activities in an efficient way. It is an “organ of society”, as the Universal Declaration of Human Rights characterises non-state actors. But it is an organ of society for a specific purpose – economic activity – and not a more general purpose, or with unlimited obligations. A company is also a social organisation. Companies are made up of people, and they organise people’s lives under rules which must be consistent with human rights law. Laws usually do not bar economic activity in zones of conflict (unless sanctions have been applied). Some companies will therefore continue to operate in zones of conflict. They take risks because their primary aim is to make a profit for their shareholders. This is not to suggest that the profit motive is detrimental. But it is important to remember that companies are not expected to be driven by other considerations.

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.

Companies are not *good* or *bad*; the specific conduct of companies can be *good* or *bad*.

Many large companies make major 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 to ascertain whether crimes against humanity, war crimes, or genocide are being, or have been, committed. However they are not clear about the extent of their role in supporting it, and what they should do to prevent it.

Companies today operate in an environment of greater public scrutiny, stricter laws, better enforcement, and a more egalitarian architecture of international law than had prevailed during the colonial era. Recognizing that companies operating internationally are not adequately regulated, either by home or host states, and that there is no all-encompassing 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 Leonean conflicts.

These reports have resulted in sustained international campaigns against many companies and industries, and adverse commentary from international experts,

including the expert panels¹⁶ of the United Nations. In some cases, such as 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 important outcome of the campaign and focus on the conflicts in Sierra Leone, Liberia, and Angola,¹⁷ with the ensuing sanctions, was the creation of the Kimberley Process Certification Scheme¹⁸ that was 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 commodities, such as gemstones from Burma, because of that government's human rights record.

As early as 2000, the UN Global Compact initiated a policy dialogue for companies operating in zones of conflict. It has since revived the project and issued a new set of guidelines. In 2000, the International Business Leaders Forum and International Alert published *The Business of Peace*, and in 2002 the UN published¹⁹ guidelines for 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

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 unanimously adopted 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

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: http://www.international.alert.org/peace_and_economy/peace_and_economy_projects.php?t=1

sub-contractors compliance with the OECD's guidelines for multinational enterprises. The UN experts panel for the Democratic Republic of Congo has used this as a benchmark to judge corporate conduct.

Meanwhile, at the United Nations, attempts were made in the former Sub-Commission for the Protection and Promotion of Human Rights to draft norms for transnational corporations and other business enterprises. The UN Secretary General subsequently appointed John Ruggie as his special representative for business and human rights. Professor Ruggie, who had been an assistant secretary-general at the UN, is an internationally-respected authority on international relations at Harvard University. He has developed a framework which clarifies the role and responsibility of business and the state. Ruggie has explained it as follows:

*"The framework comprises three core principles: the State duty to **protect** against human rights abuses by third parties, including business; the corporate responsibility to **respect** human rights; and the need for more effective access to **remedies**. The three principles form a complementary whole in that each supports the others in achieving sustainable progress."*

Elaborating on the *corporate responsibility to respect*, Professor Ruggie has suggested that businesses should develop 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".

While this international architecture is being developed, victims are making ingenuous 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. This Act allows foreigners to sue in US courts for damages for violations of the customary "laws of nations" such as the prohibition of slavery, genocide, torture, crimes against humanity and for war crimes. While none of the almost 50 cases filed against companies has been successful, a few involving the oil companies Unocal and Shell have

been settled out of court without the admittance of wrongdoing. However, these were cases under civil law, and not criminal law, meaning that they did not deal with genocide, crimes against humanity, or war crimes in the criminal sense. Nevertheless, such lawsuits are forcing companies to rethink their policies, and a growing number now say that they would prefer clear and transparent rules that are applied universally. They have begun developing voluntary codes of conduct in anticipation of future legislation.

To critics, the main problem with codes of conduct is their voluntary nature. "Codes of conduct work only for the well-intentioned" is a remark made frequently by civil society activists, businesses and academics in the sphere of corporate social responsibility. 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.

If banning business activity in conflict zones could have solved the problem of complicity in conflict, well-meaning governments would have attempted it more frequently. But such blanket bans do not work. Whenever comprehensive bans of this nature are imposed, predatory companies have stepped in. They have continued to trade and invest, and sometimes worsened the environment. 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. The example of Nigerian oil theft – also known as bunkering – has shown that even apparently "unlootable" commodities such as oil are being stolen openly by armed groups and sometimes even with the collusion of official entities. As a result, revenues and weapons continue their flow to these armed groups.

Responsible businesses are not predators. They maintain that they are good corporate citizens, investing over the long term, and it is not their intention to profit from conflict. Yet they become the target of public attention during conflict and have been accused of benefiting from abuses that occur during conflict. Companies sued under the ATCA are often leading brand-names²². But that does not detract from the gravity of abuses, and litigation

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."

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

under ATCA does not necessarily provide effective remedy to the victims. The process is dependent on the admittance of a case by judges in a particular area and on the question of applying international law to determine a tortuous act involving a party that, in another area of jurisdiction, might be considered only indirectly responsible. As noted earlier, no case implicating a company for genocide has been filed under ATCA.

Companies are reluctant to get drawn into discussions about genocide for several reasons. Firstly, many companies disagree, conceptually and philosophically, with the idea that their activities might harm civilians in an armed conflict. They find the idea of their being implicated in such a crime to be offensive. This is partly because companies have not clearly thought through the consequences and implications of all their actions in a zone of conflict, and they often lack the willingness or ability to explore these consequences, including the unintentional ones. 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 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 the air force was bombing civilians, the company's immediate response was that its action should not be viewed in isolation. It was also providing aviation fuel to an international relief agency that was distributing food. Its understanding was that, although adverse things can occur, they were not responsible for them and in addition they were providing needed aid. To the 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 Zyklon-B gas used in those camps, may also have initially seen their transactions 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 companies operating in a zone of conflict must realise, above all, that they are often only a few steps away from committing grave abuses. When security forces relocate a large number of people against their will so that a company can drill for oil, the company may believe it is only fulfilling an exploration contract as it in no way ordered, authorised, or

forced the relocation. 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 that they were unaware that the labourers were working against their will.

Secondly, companies believe that the definitions of genocide, war crimes, and crimes against humanity are 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. While that may be the case, it indicates a tactical response, rather than strategic thinking.

Thirdly, companies think they are protected from risks because they are not "natural persons" and the Rome Statute applies to natural persons. While companies cannot be prosecuted, company officials can. Before the Rome Statute took effect during the Nuremberg Trials, individual businessmen had been prosecuted and held accountable.

During World War II, German businesses colluded with, and profited from, the Nazi regime. 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. He 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 substantial sums of money to various SS enterprises, which employed large numbers of inmates from the concentration camps, and also to enterprises and agencies of the Reich that were engaged in so-called resettlement programs. It concluded that Rasche had actual knowledge of the purposes for which loans were sought. But it also concluded that his granting of

²³ For further details, see the work of Anita Ramasastry at findlaw.com. <http://writ.news.findlaw.com/ramasastry/20020703.html>

loans was not a violation of international law.²⁴ 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 victims of the Nazis to be deposited at the Reichsbank. He also arranged for gold teeth and dental 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 killed in the 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 cases. The International Crimes Tribunal for Rwanda (ICTR) has a similar standard-setting ruling in the *Akayesu*²⁸ case. It has charged another businessman in the *Kabuga*²⁹ case, in which the Tribunal is seeking to prosecute a businessman who is allegedly complicit in abuses. The case of *Frans van Anraat*,³⁰ described earlier, falls in a similar category. While a lower court found 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

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 the 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 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 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.

29 Felicien Kabuga is a Rwandan businessman currently in hiding against whom the ICTR 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>

New York to develop a clearer understanding of companies and their liabilities under criminal law. It was followed by a multi-country study³² which examined different criminal jurisdictions in different parts of the world, and concluded that domestic law has jurisdiction and prosecutions are possible. One consequence of that project was the *Red Flags*³³ initiative, which specifies in clear terms what companies must not do. They are drawn from cases that have been filed and include nine specific activities:

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

These *Red Flags* state the legal liability risks to which companies are exposed. But companies are looking for guidance about what they can do if they are operating in a conflict zone. 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 to 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 risks. *Aiding and abetting*, and *knowing* (or *should have known*) are other important concepts. 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

PROXIMITY ³⁵		
VIOLATION	VIOLATOR	VICTIM
AID/ABET ³⁶		
KNOWLEDGE ³⁷		
DURATION ³⁸		
BENEFIT ³⁹		
INTENT ⁴⁰		

For a company wishing to act responsibly in a zone of conflict, its responsibilities would therefore include:

- Complying with international humanitarian law
- Identifying early trends and possible sources of violence
- Sharing information with other companies, government officials, trade unions and civil society
- Operating in a way that does not discriminate between classes of people
- Ensuring the transparency of operations
- Scrutinising local partners
- Establishing accountability mechanisms
- Providing quick, effective remedies in the context of their own operations for matters that do not concern grave human rights abuses
- Ensuring the rights of people to participate
- Providing opportunities to speak out
- Providing safety and security to the vulnerable
- Offering refuge where appropriate

These are the steps that are necessary for companies to undertake on their own. Their conduct and actions, together with similar conduct by other businesses and concerned actors, can help create collective action to prevent violent conflict and, in some instances, genocide.

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 relationships.
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 commissioning 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 greater the risk.

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 the abuse to take place, the risk increases.

³² <http://www.fafo.no/liabilities/index.htm>
³³ www.redflags.info.
³⁴ The reports are accessible at: <http://www.business-human-rights.org/Updates/Archive/ICJPaneloncomplicity>

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. This is because the company has been scrupulous in engaging local communities, and has initiated 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 and respecting human rights. The Extractive Industry Transparency Initiative⁴³ provides a framework for companies to ensure transparency for their transactions with the countries in which they operate.

The challenge for the international community is to develop a framework that creates powerful incentives for businesses to act in a positive way, and to establish strong disincentives to ensure that businesses do not act in a negative way. Some things governments – and in particular home states – can do to ensure that companies operate within the law include:

- **Advise 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 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 that can play an effective role in disseminating it or providing assistance or resources, then those states should work with the respective businesses as a matter of priority.

- **Collaborate:** Home states should be inclusive in developing strategies to prevent genocide, working with businesses that operate in conflict zones. Businesses often have access to information and intelligence that states do not, and businesses should be encouraged to share their insights on a confidential basis with the relevant authorities.⁴⁴
- **Promote:** Home states can act collectively to lobby other states to act in ways that uphold international law. This includes promoting the effective governance of wealth generated from natural resources.⁴⁵ Furthermore, home states can also foster a climate of peace 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 can 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 such

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 para-state 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 contributed to the loss of sovereign control over 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."

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>

⁴² www.voluntaryprinciples.org

⁴³ www.eitransparency.org

as export credit guarantees, access to intelligence briefings, and concessional lending.

- **Warn:** Home states should clearly warn companies that operate within their jurisdiction of the risks they face if they fail to comply with the laws. In certain instances, states should consider the issuing of a public warning.
- **Prevent:** although it may not be legal for a state to prevent a company from operating in a particular field, states have sufficient means at their disposal to prevent illegal activities from occurring. Examples of the measures available to them include:
 - o Restrictive trade policies to prevent specific businesses from participating in public bidding or contracts
 - o Refusal of export finance, export credit, or any other assurances
 - o Refusal to offer political risk insurance
 - o Refusal to grant concessional lending⁴⁶
- **Prosecute:** Home states should empower their prosecutors offices and cooperate with international tribunals.

Preventing genocide is too important a task to be left in the hands of any one actor. Some businesses have been part of the problem; many businesses can be a part of the solution. To advance the agenda of genocide prevention, business should be seen as a part of the solution. Areas where businesses have specific skills should be leveraged. They should be encouraged to play a role in spheres where they have core competency. But they should not be seen as an alternative, or substitute, to international collective action. Businesses are often lacking expertise, capacity, skills, or the mandate to perform tasks the state should perform. But their presence in fragile states and conflict zones presents challenges and provides opportunities. The international community must face the challenge and harness business considerable skills for the greater good.

⁴⁶ While the World Trade Organisation's rules prevent states from preferring one business over another under normal circumstances, or preferring one form of trade over another, the WTO's rules are not meant to be incompatible with international law. 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.

