

## NOTES

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# CONFLICT MINERALS AND CRIMES AGAINST HUMANITY IN THE DRC: HOW TO HOLD INDIVIDUAL CORPORATE OFFICERS CRIMINALLY LIABLE

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### INTRODUCTION

International criminal law is concerned with holding perpetrators responsible for the gravest crimes committed by humanity. The larger and more heinous the crime, however, the more complicated the prosecution. Identifying the relevant actors, producing sufficient evidence to impose liability, and bringing criminals to justice is a challenging endeavor. This complex process becomes even more daunting when factoring in complicit actors. This Note discusses the different legal mechanisms to hold individual corporate officers criminally liable for complicity in committing crimes against humanity and other human rights atrocities in the Democratic Republic of the Congo (“DRC”) as a result of their participation in the conflict mineral trade. Part I provides an overview of the conflict in the DRC, where rebel groups have profited off the conflict mineral trade for over a decade, committing atrocious crimes against civilians in their wake, and then addresses how corporations have contributed to the ongoing violence. Next, Part II defines the elements of crimes against humanity and analyzes how the atrocities committed in the DRC satisfy them. Then, Part III addresses the three potential mechanisms of liability: accomplice liability, superior responsibility, and joint criminal enterprise: category three (“JCE III”), by looking at each mechanism’s elements and any differences between the different inter-

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national courts. Finally, Part IV applies each of these legal mechanisms to the actions of individual corporate officers in facilitating these crimes in the DRC by way of financing the conflict mineral trade and analyzes whether or not these actors could be liable for their actions.

Historical precedent supports holding individuals liable for international crimes, and therefore individual corporate officers, not the corporation itself, would consequently be liable. International criminal law imposes duties and liabilities on individuals as well as states.<sup>1</sup> In the Supreme Court case *Ex Parte Quirin*,<sup>2</sup> the defendants were charged with spying and sabotage during World War II. Chief Justice Stone, in his opinion for the Court, stated that “[f]rom the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations *as well as of enemy individuals*.”<sup>3</sup> International crimes are committed by men, not abstract entities, and this theory of “individual responsibility” harks back to the 1919 Treaty of Versailles.<sup>4</sup> Under international law, generally, “any person may be tried for the commission of an international crime.”<sup>5</sup>

Holding corporate officers criminally liable for crimes against humanity can play an important role in compensating victims, punishing the actual perpetrators, and deterring other corporations from engaging in similarly criminal conduct. Criminal accountability for corporations and their officers when they are complicit in human rights abuses is a rare undertaking, but with regard to gross human rights abuses, like crimes against humanity, States have a duty to take measures consistent with international law to prevent corporations located within their jurisdictions from committing human rights abuses both within their territories and in others.<sup>6</sup> Not only do States have a duty to take measures, but international courts have duties to prosecute international crimes.

Corporations operating in war-torn countries, like the DRC, is not a new phenomenon. Businesses can maximize profits by purchasing raw materials

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1 JORDAN J. PAUST ET AL., *INTERNATIONAL CRIMINAL LAW: CASES AND MATERIALS* 39 (4th ed. 2013).

2 317 U.S. 1 (1942).

3 *Id.* at 27–28 (emphasis added).

4 PAUST ET AL., *supra* note 1, at 40.

5 *Id.* at 43.

6 *See, e.g.*, Comm. on the Rights of the Child, General Comment No. 16 (2013) on State Obligations Regarding the Impact of the Business Sector on Children’s Rights, ¶¶ 42–44, U.N. Doc. CRC/C/GC/16 (Apr. 17, 2013); Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 28 on the Core Obligations of States Parties Under Article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women, ¶ 36, U.N. Doc. CEDAW/C/GC/28 (Dec. 16, 2010); Comm. on Econ., Soc. & Cultural Rights, General Comment No. 15: The Right to Water, ¶¶ 23, 31, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003); Comm. on Econ., Soc. & Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health, ¶¶ 39, 51, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000).

from countries at cheap prices and at the expense of human rights abuses occurring in that State.<sup>7</sup> Some corporations have become increasingly aware of the effect that the conflict minerals trade has on propagating gross violations of human rights and have tried to clean up their supply chains. However, other corporations, despite becoming aware of their use of conflict minerals, have nevertheless refrained from taking steps to comply. Without any type of serious civil sanction or enforcement mechanism to force companies to stop using conflict minerals, international criminal law can fill the gap. This Note discusses the ways in which individual corporate officers could be criminally liable by indirectly contributing to crimes against humanity committed in the DRC.

## I. BACKGROUND: HISTORY OF THE CONFLICT MINERAL TRADE IN THE DRC

### A. *The DRC Conflict*

Before discussing the ways in which individual corporate officers could be liable for crimes against humanity, this Note must first describe the source of why these atrocities are occurring: the conflict minerals trade. Tin, tantalum, tungsten, and gold—the four most prominent conflict minerals—are used to make many consumer electronics, including cell phones and laptops.<sup>8</sup> In the mineral-rich eastern DRC, the extraction of these minerals has created an outburst of various human rights abuses, fueling the conflict between rebel groups and the Congolese army.<sup>9</sup>

Conflict has long been a part of the DRC's history, beginning with the Belgian colonial era,<sup>10</sup> continuing after its independence in 1960,<sup>11</sup> and since the 1990s, when a deadly conflict erupted in the eastern DRC that was partly the result of hundreds of thousands of refugees fleeing the Rwandan genocide.<sup>12</sup> From the early 1990s, the conflict has not ceased; the DRC has been referred to as the home of the world's deadliest war since World War

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7 Julia Graff, Note, *Corporate War Criminals and the International Criminal Court: Blood and Profits in the Democratic Republic of Congo*, 11 HUM. RTS. BRIEF 23, 23 (2004).

8 Colin Fitzpatrick et al., *Conflict Minerals in the Compute Sector: Estimating Extent of Tin, Tantalum, Tungsten, and Gold Use in ICT Products*, 49 ENVTL. SCI. & TECH. 974, 974 (2015).

9 See Rep. of the Group of Experts on the Democratic Republic of Congo (2012), transmitted by Letter Dated 12 November 2012 from the Chairman of the Security Council Comm. Established Pursuant to Resolution 1533 (2004) Concerning the Democratic Republic of the Congo Addressed to the President of the Security Council, ¶¶ 146–58, U.N. Doc. S/2012/843 (Nov. 15, 2012) [hereinafter U.N. Final Report].

10 See, e.g., ADAM HOCHSCHILD, *KING LEOPOLD'S GHOST: A STORY OF GREED, TERROR, AND HEROISM IN COLONIAL AFRICA* (1998).

11 See, e.g., JASON K. STEARNS, *DANCING IN THE GLORY OF MONSTERS: THE COLLAPSE OF THE CONGO AND THE GREAT WAR OF AFRICA* (2011).

12 Louise Arimatsu, *The Democratic Republic of the Congo 1993–2010*, in *INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS* 146, 148–49 (Elizabeth Wilmshurst ed., 2012).

II,<sup>13</sup> and as the deadliest conflict in all of Africa's documented history.<sup>14</sup> Despite a peace treaty technically ending the civil war in 2002,<sup>15</sup> the human rights abuses continue to rage on. It is estimated that the conflict has led to the deaths of over five million people.<sup>16</sup> Furthermore, rebel groups, as well as the Congolese army, share responsibility in these deaths and atrocities committed, such as mass rape, systematic attacks on refugee camps, and enlistment of child soldiers.<sup>17</sup>

Control over the conflict mineral mines in the eastern DRC has been a "key factor" to propagating violence in the region.<sup>18</sup> The international conflict mineral trade is a multimillion dollar industry. In 2008 alone, tin, tantalum, tungsten, and gold provided the armed groups with approximately \$180 million in profits.<sup>19</sup> Both rebel groups and Congolese army commanders have controlled these mines, using the profits from smuggling the minerals in and out of the country and selling the minerals to refineries and smelters to finance the conflict.<sup>20</sup> In addition to the human rights abuses committed as a result of the conflict, the armed forces controlling the mines have also imposed "excruciating labor conditions" on the miners and child laborers,

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13 JOHN PRENDERGAST, *CAN YOU HEAR CONGO NOW?: CELL PHONES, CONFLICT MINERALS, AND THE WORST SEXUAL VIOLENCE IN THE WORLD I* (2009), <http://www.enoughproject.org/files/publications/Can%20Your%20Hear%20Congo%20Now.pdf>.

14 See INT'L RESCUE COMM., *MORTALITY IN THE DEMOCRATIC REPUBLIC OF CONGO: RESULTS FROM A NATIONWIDE SURVEY*, at iii, [http://www.kongo-kinshasa.de/dokumente/ngo/IRC\\_DRC\\_Mortalit\\_Dec04.pdf](http://www.kongo-kinshasa.de/dokumente/ngo/IRC_DRC_Mortalit_Dec04.pdf) (last visited Dec. 31, 2018).

15 LAURA DAVIS & PRISCILLA HAYNER, INT'L CTR. FOR TRANSITIONAL JUSTICE, *DIFFICULT PEACE, LIMITED JUSTICE: TEN YEARS OF PEACEMAKING IN THE DRC* 6 (2009), <https://ictj.org/default/files/ICTJ-DRC-Difficult-Peace-2009-English.pdf>.

16 STEARNS, *supra* note 11, at 4.

17 See U.N. Final Report, *supra* note 9, ¶ 147 (describing sexual violence by armed groups); *id.* ¶ 148 (describing killing of civilians); *id.* ¶¶ 153–58 (describing recruitment of child soldiers); Arimatsu, *supra* note 12, at 158 (recounting the shelling of refugee camps).

18 *The Democratic Republic of the Congo: Securing Peace in the Midst of Tragedy Before the Subcomm. on Afr., Glob. Health, and Human Rights of the H. Comm. on Foreign Affairs*, 112th Cong. 9–10 (2011) (statement of Mr. Donald Yamamoto, Principal Deputy Assistant Secretary, Bureau of African Affairs, U.S. Department of State) [hereinafter Yamamoto Testimony] ("The illicit trade [in] minerals and other natural resources also encourages violence, and the effective Congolese response and regional international responses by governments and industries will be key to resolving these problems.").

19 JOHN PRENDERGAST & NOEL ATAMA, *EASTERN CONGO: AN ACTION PLAN TO END THE WORLD'S DEADLIEST WAR* 6 (2009), [http://www.enoughproject.org/files/publications/eastern\\_congo.pdf](http://www.enoughproject.org/files/publications/eastern_congo.pdf).

20 See Interim Rep. of the Group of Experts on the Democratic Republic of the Congo, transmitted by Letter Dated 21 May 21 2010 from the Chair of the Security Council Comm. Established Pursuant to Resolution 1533 (2004) Concerning the Democratic Republic of the Congo Addressed to the President of the Security Council, ¶ 77, U.N. Doc. S/2010/252 (May 25, 2010) ("In the Kivu provinces, it appears, almost every mining deposit is controlled by an armed group."); Remi Moncel, *Cooperating Alone: The Global Reach of U.S. Regulations on Conflict Minerals*, 34 BERKELEY J. INT'L L. 216, 221 (2016).

harsh enough to result in death.<sup>21</sup> Even though the DRC does not dominate the global production of tin, tungsten, tantalum, and gold,<sup>22</sup> the conflict mineral trade has had a disproportionate impact on the magnitude of the conflict.

### B. *How Corporations Are Involved*

The minerals sourced from the DRC ultimately end up in a broad range of electronic devices, including medical devices, industrial tools, jewelry, cell phones, and laptops, produced by major electronic companies all over the world.<sup>23</sup> However, the supply chain tracing these minerals back to their sources involves a complicated process. For example, minerals are extracted from the DRC, then sold to trading houses and other intermediaries in the region, exported or smuggled to other countries with smelters to be melted, exported again in their refined form to be manufactured and assembled into the final products, when they are finally sold to international consumers.<sup>24</sup>

United States companies, concentrated in a few sectors, are major consumers of the aforementioned minerals; however, U.S. regulations have significant ripple effects on the global supply chain.<sup>25</sup> For example, the Securities and Exchange Commission (SEC) estimates that its regulations will affect around 6000 U.S. and foreign companies.<sup>26</sup> One specific piece of legislation, section 1502 of the Dodd-Frank Act, amended the Securities Exchange Act of 1934 to address “the exploitation and trade of conflict minerals originating in the Democratic Republic of the Congo,” which was financing “conflict characterized by extreme levels of violence in the eastern [DRC], particularly sexual- and gender-based violence, and contributing to an emergency humanitarian situation therein.”<sup>27</sup> This provision, implemented in 2010, requires all publicly traded companies to exercise due diligence in tracing their supply chains and report to the SEC any existence of conflict minerals originating from the DRC or neighboring countries.<sup>28</sup> This provision does not explicitly ban or punish companies from using conflict minerals, but rather it is intended to “foster public action” against their use.<sup>29</sup> For some companies, including Apple, HP, Intel, and SanDisk, this

21 Moncel, *supra* note 20, at 222; *see, e.g.*, U.N. Final Report, *supra* note 9, at 170.

22 Moncel, *supra* note 20, at 223.

23 *See id.* at 222.

24 *Id.*; *see also* JOHN PRENDERGAST & SASHA LEZHNEV, FROM MINE TO MOBILE PHONE: THE CONFLICT MINERALS SUPPLY CHAIN (2009).

25 Moncel, *supra* note 20, at 223.

26 JIM LOW ET AL., KPMG, CONFLICT MINERALS PROVISION OF DODD-FRANK: IMMEDIATE IMPLICATIONS AND LONG-TERM OPPORTUNITIES FOR COMPANIES 2 (2011), <https://institutes.kpmg.us/content/dam/institutes/en/government/pdfs/2012/conflict-minerals-provision-dodd-frank.pdf>; Moncel, *supra* note 20, at 223–24.

27 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1502(a), 124 Stat. 1376, 2213 (2010) (codified as amended at 15 U.S.C. § 78m(p) (2012)).

28 *See* 15 U.S.C. § 78m(p)(1)(A); 17 C.F.R. § 240.13p-1 (2018).

29 Moncel, *supra* note 20, at 226.

provision has incentivized them to become “conflict-free” and remove all conflict minerals from their supply chains;<sup>30</sup> however, other companies have not submitted to public or governmental pressure to make such instrumental changes.

To what extent can and should these companies, who have submitted reports to the SEC via the Dodd-Frank Act, but not made attempts to clean up their supply chains, be held liable? The SEC has stated that companies with conflict minerals in their supply chains have an obligation to disclose “the facilities used to produce the conflict minerals, the country of origin of the minerals and the efforts to determine the mine or location of origin.”<sup>31</sup> Requiring companies to submit reports regarding their use of conflict minerals is a far cry from requiring companies to become conflict-free. In 2014, the first year that companies were required to submit reports, approximately twenty percent of companies reported their supply chains as conflict-free, while the other eighty percent said they were unable to make a final determination.<sup>32</sup> Without a governmental enforcement procedure that punishes corporations who refuse to eliminate the use of conflict minerals, what other remedies are available? This Note discusses how specific legal remedies in international criminal law could enforce individual liability for corporate officers engaging in the conflict mineral trade.

## II. CRIMES AGAINST HUMANITY

To assess whether or not individual corporate officers could be held criminally liable, first this Note addresses the applicability of crimes against humanity to the atrocities committed in the DRC. Crimes against humanity were first recognized as an international crime during the Nuremberg and

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30 See Jay Celorie, *HP's Journey to a Conflict-Free Supply Chain*, 3BL MEDIA (Aug. 11, 2014), <https://3blmedia.com/News/HPs-Journey-Conflict-Free-Supply-Chain>; Alex Hern, *Apple Plans to Cease Using Conflict Minerals*, GUARDIAN (Feb. 14, 2014), <http://www.theguardian.com/technology/2014/feb/14/apple-conflict-minerals>; *Responsible Supply Chain*, W. DIC., <https://www.westerndigital.com/company/corporate-sustainability/responsible-supply-chain> (last visited Dec. 22, 2018); Ariel Schwartz, *Intel's CEO Reveals The Company's Plans to Build a Conflict-Free Supply Chain by 2016*, FAST COMPANY (Sept. 3, 2014), <http://www.fastcoexist.com/3034867/intels-ceo-reveals-the-companys-plans-to-build-a-conflict-free-supply-chain-by-2016>.

31 Keith F. Higgins, *Statement on the Effect of the Recent Court of Appeals Decision on the Conflict Minerals Rule*, U.S. SEC. & EXCHANGE COMMISSION (Apr. 29, 2014), <https://www.sec.gov/news/public-statement/2014-spch042914kfh>.

32 Olga Usvyatsky, *An Initial Look at Conflict Minerals & Dodd Frank Section 1502*, AUDIT ANALYTICS (June 23, 2014), <https://www.auditanalytics.com/blog/an-initial-look-at-conflict-minerals-dodd-frank-section-1502/>. In addition, the percentage proportions in 2015 were roughly equivalent to 2014. David Trilling, *Conflict Minerals and Firms' Ignorance Over Their Supply Chains*, BUS. ETHICS (Sept. 20, 2016), <http://business-ethics.com/2016/09/20/1237-conflict-minerals-and-firms-ignorance-over-their-supply-chains/>.

Tokyo trials following World War II.<sup>33</sup> The International Criminal Tribunal for the Former Yugoslavia (“ICTY”) and the International Criminal Tribunal for Rwanda (ICTR) ad hoc tribunals additionally codified crimes against humanity as a category of offense,<sup>34</sup> and Article 7 of the International Criminal Court Rome Statute (“ICC Rome Statute”) lays out the elements of crimes against humanity.<sup>35</sup> This Note evaluates the elements of crimes against humanity as defined by the ICC Rome Statute for the purposes of establishing whether or not these offenses occurred in the DRC, specifically because the ICC opened up an investigation into the crimes in the DRC in 2002.

### A. *Elements*

Article 7 of the ICC Rome Statute establishes four elements that must be satisfied to prosecute a defendant for committing crimes against humanity: (1) the commission of the crime as part of a “widespread or systematic attack;”<sup>36</sup> (2) against a civilian population;<sup>37</sup> (3) with knowledge of the attack directed against any civilian population;<sup>38</sup> and (4) involving “a course of conduct involving the multiple commission of acts . . . against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.”<sup>39</sup>

Article 7(1)(a)–(k) goes on to list the crimes that, when committed as part of a widespread or systematic attack as directed against a civilian population with knowledge of the attack, amount to crimes against humanity.<sup>40</sup> The crimes include, but are not limited to, murder, extermination, enslavement, forcible transfer of a population, imprisonment, torture, rape, persecution, and other “inhumane acts” that cause great mental or physical suffering.<sup>41</sup>

### B. *Application*

In 2002 the DRC ratified the ICC Rome Statute, and since July 2002 the court has exercised jurisdiction over crimes listed therein, allegedly commit-

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33 See G.A. Res. 95(I), Affirmation of the Principles of International Law Recognized by the Charter of the Nurnberg Tribunal (Dec. 11, 1946); J. Spiropoulos, *Formulation of Nürnberg Principles*, [1950] 2 Y.B. Int’l L. Comm’n 181, 182, U.N. Doc. A/CN.4/22.

34 Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993) [hereinafter ICTY Statute]; Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994) [hereinafter ICTR Statute].

35 Rome Statute of the International Criminal Court art. 7, July 17, 1998, 2187 U.N.T.S. 90.

36 *Id.* art. 7(1).

37 *Id.*

38 *Id.*

39 *Id.* art. 7(2)(a).

40 *Id.* art. 7(1)(a)–(k).

41 *Id.*

ted in the DRC by rebel forces or by its own armed forces.<sup>42</sup> The ICC investigations have focused on war crimes and crimes against humanity committed in the eastern DRC, specifically the Ituri region, North Kivu, and South Kivu.<sup>43</sup> In June 2004, the ICC's Office of the Prosecutor issued a press release acknowledging that "[s]tates, international organizations and non-governmental organizations have reported thousands of deaths by mass murder and summary execution in the DRC since 2002. The reports allege a pattern of rape, torture, forced displacement and the illegal use of child soldiers."<sup>44</sup> The investigation has since revealed evidence of the following specified crimes, committed by both the rebel and Congolese armed forces, that fall under the category of crimes against humanity: murder and attempted murder, torture, rape, sexual slavery, inhuman acts, persecution, forcible transfer of population, attacking a civilian population, destroying property, and pillaging.<sup>45</sup> There are currently six open cases at the ICC and two of those cases have led to convictions: *Prosecutor v. Thomas Lubanga Dyilo*<sup>46</sup> and *Prosecutor v. Germain Katanga*.<sup>47</sup>

While both Lubanga and Katanga were convicted of war crimes, Katanga was also found guilty of one count of crimes against humanity: murder.<sup>48</sup> Katanga, a former rebel leader in the DRC, was convicted of murder as a crime against humanity for his part in a civilian massacre that occurred in the Bogoro village in the eastern DRC.<sup>49</sup> The massacre involved the killing of over 200 civilians, with reports stating that around 173 of the victims were under the age of eighteen.<sup>50</sup> The conviction of Katanga for committing crimes against humanity provides evidence that the atrocities committed in the DRC satisfy the elements of crimes against humanity. Even though Katanga's conviction is the only official conviction by the ICC for crimes against humanity, the ongoing cases involve charges of crimes against humanity as well.<sup>51</sup> Outside of these trials, because control over the conflict mineral mines in the eastern DRC has been a "key factor" to propagating

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42 See generally *Situation in the Democratic Republic of the Congo ICC-01/04*, INT'L CRIMINAL COURT, <https://www.icc-cpi.int/drc> (last visited Nov. 21, 2018).

43 See *id.*

44 See *id.* (quoting Press Release, Int'l Criminal Court, The Office of the Prosecutor of the International Criminal Court Opens its First Investigation (June 23, 2004), <https://www.icc-cpi.int/pages/item.aspx?name=the+office+of+the+prosecutor+of+the+international+criminal+court+opens+its+first+investigation>).

45 See *id.*

46 *Prosecutor v. Dyilo*, ICC-01/04-01/06-2842, Judgment (Mar. 14, 2012), <https://www.icc-cpi.int/pages/record.aspx?uri=1379838>.

47 *Prosecutor v. Katanga*, ICC-01/04-01/07-3436, Judgment (Mar. 7, 2014), [https://www.icc-cpi.int/CourtRecords/CR2015\\_04025.pdf](https://www.icc-cpi.int/CourtRecords/CR2015_04025.pdf).

48 See *id.* at 658.

49 See *DRC: All You Need to Know About the Historic Case Against Germain Katanga*, AMNESTY INT'L (Mar. 6, 2014), <https://www.amnesty.org/en/latest/news/2014/03/drc-all-you-need-know-about-historic-case-against-germain-katanga/>.

50 See *id.*

51 See *Situation in the Democratic Republic of the Congo ICC-01/04*, *supra* note 42.



violence in the region,<sup>52</sup> corporations could also be implicated in various forms of complicit liability for these atrocities.

Individual corporate officers could be held criminally liable for violations of international criminal law, specifically crimes against humanity. These violations include subjecting local populations, including children, to forced labor in the extraction of minerals from the rebel-controlled and government-controlled mines; the torture, rape, and murder of thousands of civilians as a consequence of both government and rebel armed groups fighting to maintain control of these mines; and the destruction of agricultural infrastructure forcing civilian farmers to work in slave-like conditions in the mines.<sup>53</sup> Corporations play an indirect but invaluable role in propagating the atrocities in the DRC by ultimately funding the continuing economic success of the mines controlled by rebel and military armed forces. Even if the crimes committed in the DRC implicating the corporate actors do not rise to the level of crimes against humanity, the actors would still be liable for gross human rights atrocities. The next Part examines the legal mechanisms to hold individual corporate officers liable for their complicity in these human rights abuses.

### III. SCOPE OF LIABILITY FOR INDIVIDUAL CORPORATE OFFICERS

Businesses are increasingly going global, adopting network-based operating models spread across multiple countries. As a consequence, many corporations have a presence in countries where human rights abuses, including crimes against humanity, occur. The relationship between the corporation and the state government, armed groups, and other businesses could therefore implicate them in these crimes. There exists a global movement toward holding these corporations and their individual officers liable for the human rights abuses that occur.<sup>54</sup> Businesses can implicate themselves in these abuses both directly and indirectly by working with another actor responsible for the direct perpetration. This Note focuses on the legal theories that can hold individual corporate officers liable for their indirect conduct.

International criminal law attributes guilt to individual officers and cannot hold businesses accountable as a legal entity.<sup>55</sup> The ICTY, ICTR, and ICC Rome Statute all provide jurisdiction over natural persons.<sup>56</sup> These entities state that an individual can be held responsible for “committing, plan-

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52 Yamamoto Testimony, *supra* note 18, at 9–10 (“The illicit trade [in] minerals and other natural resources also encourages violence, and the effective Congolese response and regional international responses by governments and industries will be key to resolving these problems.”).

53 Graff, *supra* note 7, at 25.

54 2 INT’L COMM’N OF JURISTS, CORPORATE COMPLICITY & LEGAL ACCOUNTABILITY: CRIMINAL LAWS AND INTERNATIONAL CRIMES 58 (2008), <https://www.icj.org/wp-content/uploads/2012/06/Vol.2-Corporate-legal-accountability-thematic-report-2008.pdf>.

55 *Id.* at 56.

56 *See id.*; *see also* ICTY Statute, *supra* note 34, art. 6, at 14; ICTR Statute, *supra* note 34, art. 5, at 63; Rome Statute, *supra* note 35, art. 25(1).

ning, ordering, or instigating a crime or for otherwise aiding and abetting a crime.”<sup>57</sup> This Part provides an overview of three legal doctrines that could apply to the indirect conduct of individual corporate officers: accomplice liability, superior responsibility, and JCE III.

### A. *Accomplice Liability*

Since Nuremberg, the international community has held accomplices, or individuals who aid and abet crimes, responsible under international criminal law.<sup>58</sup> International ad hoc tribunals and courts have incorporated accomplice liability as well. The ICTY and ICTR specifically impose individual criminal responsibility on an individual who “aided and abetted in the planning, preparation or execution” of genocide, war crimes, or crimes against humanity.<sup>59</sup> The ICC Rome Statute imposes liability on an individual who “aids, abets or otherwise assists” in the commission of genocide, war crimes, or crimes against humanity.<sup>60</sup> Aiding and abetting has two elements: (1) the conduct of the person who aids and abets, and (2) the person’s mental state.<sup>61</sup>

#### 1. *Actus Reus*

The actus reus element of aiding and abetting is widely accepted by the international community. The *Furundžija* case decided by the ICTY Trial Chamber summarized this element as an individual rendering “practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime.”<sup>62</sup> Furthermore, the International Court of Justice (ICJ) expert legal panel described that a company satisfies this element if the company’s conduct has “enabled, exacerbated or facilitated” the human rights abuses in question.<sup>63</sup> Therefore, if a company enabled, exacerbated, or facilitated the commission of crimes against humanity, then its individual officers could be held liable as aiders or abettors of the crime.

Article 25 of the ICC Rome Statute governs accomplice liability under the ICC.<sup>64</sup> To satisfy the actus reus of accomplice liability under the ICC, the court provides that a person is individually responsible if he or she “aids, abets or otherwise assists in its commission or its attempted commission,

57 1 INT’L COMM’N OF JURISTS, *supra* note 54, at 11 (footnotes omitted).

58 See Doug Cassel, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts*, 6 NW. J. INT’L HUM. RTS. 304, 307 (2008).

59 ICTY Statute, *supra* note 34, art. 7(1), at 15; ICTR Statute, *supra* note 34, art. 6(1), at 63.

60 Rome Statute, *supra* note 35, art. 25(3)(c).

61 Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment, ¶¶ 191, 235 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998).

62 *Id.* ¶ 235.

63 1 INT’L COMM’N OF JURISTS, CORPORATE COMPLICITY & LEGAL ACCOUNTABILITY: FACING THE FACTS AND CHARTING A LEGAL PATH 9 (2008), <https://www.icj.org/wp-content/uploads/2012/06/Vol.1-Corporate-legal-accountability-thematic-report-2008.pdf>.

64 Rome Statute, *supra* note 35, art. 25(3)(c).

including providing the means for its commission”<sup>65</sup> or “[i]n any other way contributes” to a crime or an attempted crime by a group of persons acting with a common purpose.<sup>66</sup>

## 2. Mens Rea

The more controversial element is the level of mens rea required for the aider and abettor to possess. Two tests have emerged regarding the degree of mens rea that must be proved for accomplice liability: (1) the accomplice had knowledge that his or her actions would facilitate the perpetration of the crime (the “knowledge test”), and (2) whether it is necessary to prove the intent of that individual to facilitate the crime (the “purpose test”).<sup>67</sup>

Under the “knowledge test,” the mens rea required of aiding and abetting is knowledge that the acts performed by an individual assist in the commission of the specific crime by the principal perpetrator.<sup>68</sup> For specific intent crimes like crimes against humanity, the aider and abettor must know of the principal perpetrator’s specific intent.<sup>69</sup> The knowledge is viewed through an objective standard, and if the officer has the necessary knowledge it is irrelevant that they only intended to carry out normal business activities.<sup>70</sup>

Not all courts apply the “knowledge test,” instead requiring a higher level of mens rea under the “purpose test,” which states that an individual will be guilty if he or she aids, abets, or otherwise assists in the commission, or attempted commission, of an act “for the purpose of facilitating” the commission of the crime.<sup>71</sup> The ICC Rome Statute adopted the “purpose test” just a few months before the ICTY in *Furundžija* adopted the “knowledge test.”<sup>72</sup> Article 25(3)(c) of the ICC Rome Statute holds an individual criminally responsible if he or she “[f]or the purpose of facilitating the commission of

65 *Id.*

66 *Id.* art. 25(3)(d).

67 See Cassel, *supra* note 58, at 304.

68 See Prosecutor v. Vasiljević, Case No. IT-98-32-A, Judgment, ¶ 102 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 25, 2004), <http://www.icty.org/x/cases/vasiljevic/acjug/en/val-aj040225e.pdf>.

69 See Prosecutor v. Blagojević, Case No. IT-02-60-A, Judgment, ¶ 127 (Int’l Crim. Trib. for the Former Yugoslavia May 9, 2007), [http://www.icty.org/x/cases/blagojevic\\_jokic/acjug/en/blajok-jud070509.pdf](http://www.icty.org/x/cases/blagojevic_jokic/acjug/en/blajok-jud070509.pdf); Prosecutor v. Simić, Case No. IT-95-9-A, Judgment, ¶ 86 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 28, 2006), <http://www.icty.org/x/cases/simic/acjug/en/061128.pdf>; Prosecutor v. Ntagerura, Case No. ICTR-99-46-A, Judgment, ¶ 370 (Int’l Crim. Trib. for Rwanda July 7, 2006), <http://unictr.irmct.org/sites/unictr.org/files/case-documents/ict99-46/trial-judgements/en/060707.pdf>.

70 See *Blagojević*, IT-02-60-A, Judgment, ¶ 127; *Simić*, Case No. IT-95-9-A, Judgment, ¶ 86; *Ntagerura*, Case No. ICTR-99-46-A, Judgment, ¶ 370.

71 See *Blagojević*, IT-02-60-A, Judgment, ¶ 127; *Simić*, Case No. IT-95-9-A, Judgment, ¶ 86; *Ntagerura*, Case No. ICTR-99-46-A, Judgment, ¶ 370.

72 Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment, ¶ 236 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998), <http://www.icty.org/x/cases/furundzija/tjug/en/fur-j981210e.pdf>.

such a crime, aids, abets, or otherwise assists in its commission or its attempted commission, including providing the means for its commission.”<sup>73</sup> This heightened requirement for the individual to act with the purpose of facilitating the crime does not supersede the “knowledge test” adopted by previous courts.<sup>74</sup> Furthermore, the ICC adopts a “knowledge test” with respect to group crimes under Article 25(3)(d), requiring a group who aids and abets to merely have knowledge that they are assisting in the criminal activity.<sup>75</sup>

### B. Superior Responsibility

The superior responsibility doctrine holds civilian superiors liable for the criminal acts of their subordinates.<sup>76</sup> Superior liability takes two forms. First, direct or active superior responsibility occurs when the leader takes active steps to bring about the crime, including conduct such as ordering his subordinates to act unlawfully.<sup>77</sup> Under the ICTY Statute, a superior who engages in this conduct will be found to have “planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime.”<sup>78</sup> The second type of superior responsibility, which is at issue in this Note, is indirect or passive superior responsibility. Indirect superior responsibility holds superiors liable for their “culpable omissions.”<sup>79</sup> The ICC specifically imposes liability on civilian leaders who “knew, or consciously disregarded information which clearly indicated” that their subordinates were committing or going to commit crimes.<sup>80</sup> Therefore, the doctrine of superior responsibility establishes an affirmative duty that certain superior officers have with regard to the conduct of their subordinates in order to protect the civilian population from criminal harm.

Three elements have developed from the caselaw of the ICTY and ICTR that must be satisfied in order for an individual to be convicted under indirect or passive superior responsibility: (1) the superior had “effective control” over his subordinate; (2) the superior “knew or had reason to know of his subordinates’ crimes”; and (3) the superior “failed to take the necessary [and reasonable] steps” to prevent the act or punish the perpetrator.<sup>81</sup> The focus of controversy regarding these elements has to do with the requisite mens rea of “knew or had reason to know” and what is “effective control.” In the end,

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73 Rome Statute, *supra* note 35, art. 25(3)(c).

74 Danielle Olson, Note, *Corporate Complicity in Human Rights Violations Under International Criminal Law*, 1 DEPAUL INT’L HUM. RTS. L.J. 1, 9, 11 (2015).

75 Rome Statute, *supra* note 35, art. 25(3)(d).

76 See Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CALIF. L. REV. 75, 120 (2005).

77 *Id.*

78 ICTY Statute, *supra* note 34, art. 7(1), at 15.

79 Danner & Martinez, *supra* note 76, at 120–21.

80 Rome Statute, *supra* note 35, art. 28(b)(i).

81 Danner & Martinez, *supra* note 76, at 122.

these terms amount to a question of fact, to be proven based on the evidence of facts and circumstances in an individual case.

## 1. Mens Rea

The debate over the appropriate mens rea for a superior depends on whether the superior must have knowledge of the crimes committed by his subordinates or if he may still be liable for his subordinates' conduct without any actual knowledge. The ICTY and ICTR state that the accused is liable when he "knew or *had reason to know* that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof."<sup>82</sup> These two tribunals, therefore, require a lower level of mens rea than actual knowledge.

Determining the proper amount of liability, somewhere in between strict liability and ordinary negligence, has been at issue in much of the ICTY and ICTR caselaw. In the ICTR Trial Chamber's judgment in *Akayesu*,<sup>83</sup> the court said that superior responsibility should be based on, at minimum, negligence "so serious as to be tantamount to acquiescence or even malicious intent."<sup>84</sup> The ICTY's decision in the *Čelebići* camp case,<sup>85</sup> decided shortly after *Akayesu*, agreed with rejecting the basic negligence standard, stating that requisite knowledge can be determined by proper evidence and that "a superior is not permitted to remain wil[l]fully blind to the acts of his subordinates."<sup>86</sup> However, the court also recognized that a superior is criminally liable "only if some specific information was in fact available to him which would provide notice of offences committed by his subordinates."<sup>87</sup> *Čelebići* embraced a recklessness requirement, showing the superior had notice of information that necessitated further investigation into the acts of his subordinates if not conclusive proof of their crimes.<sup>88</sup> Therefore, the standard, in the ICTY and ICTR contexts, to satisfy mens rea is that information was available to put the superior on *notice* of the crimes being committed by his subordinates.

In regard to civilian leaders, the ICC has a more stringent variation on the ICTY and ICTR standard, imposing liability when they "knew, or consciously disregarded information which clearly indicated" their subordinates

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82 ICTY Statute, *supra* note 34, art. 7(3), at 15 (emphasis added); ICTR Statute, *supra* note 34, art. 6(3), at 63 (emphasis added).

83 See Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment (Int'l Crim. Trib. for Rwanda Sept. 2, 1998), <http://unictr.irmct.org/sites/unictr.org/files/case-documents/ictr-96-4/trial-judgements/en/980902.pdf>.

84 *Id.* ¶ 489.

85 Prosecutor v. Delalić, Case No. IT-96-21-T, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998), [http://www.icty.org/x/cases/mucic/tjug/en/981116\\_judg\\_en.pdf](http://www.icty.org/x/cases/mucic/tjug/en/981116_judg_en.pdf).

86 *Id.* ¶ 387.

87 *Id.* ¶ 393.

88 See *id.*; Danner & Martinez, *supra* note 76, at 127.

were committing or were about to commit crimes.<sup>89</sup> The ICC distinguishes the mens rea required for civilian leaders from military leaders, the latter only requiring a “knew or . . . should have known”<sup>90</sup> negligence standard, and the former requiring knowledge or “conscious[ ] disregard[ ].”<sup>91</sup> Many scholars believe the differing standards are inconsistent with customary international law, believing that all superiors should be held to the same standard<sup>92</sup> and that the negligence standard for military leaders is too loose.<sup>93</sup> However, other scholars are not as quick to pass judgment on the meaning of “conscious disregard,” noting that little caselaw exists applying the doctrine of superior responsibility to civilian superiors.<sup>94</sup> Additionally, hybrid tribunals established after the ICC Rome Statute came into effect have adopted the “effective control” and “knew or had reason to know” standards, and not explicitly distinguishing between military and civilian superiors.<sup>95</sup>

## 2. Effective Control

The element of “effective control” centers around the relationship between superiors and their subordinates. The current standard, established by *Čelebići*, defines “effective control” as the material ability to prevent and punish offenses.<sup>96</sup> Civilian leaders can be considered superiors under the doctrine of superior responsibility.<sup>97</sup> The superior-subordinate relationship to show “effective control” raises difficulty in the evidentiary context. For example, in *Čelebići*, two civilian defendants were acquitted of superior responsibility charges because of a lack of proof to establish “effective con-

89 Rome Statute, *supra* note 35, art. 28(b)(i).

90 *Id.* at art 28(a)(i).

91 *Id.* at art. 28(b)(i).

92 See GUÉNAËL METTRAUX, *THE LAW OF COMMAND RESPONSIBILITY* 101 (2009) (“Under customary law, the state of mind that must be proved is the same for all categories of superiors.”).

93 See *id.* at 26–27.

94 See James D. Levine II, *The Doctrine of Command Responsibility and Its Application to Superior Civilian Leadership: Does the International Criminal Court Have the Correct Standard?*, 193 MIL. L. REV. 52, 83–84 (2007); Greg R. Vetter, *Command Responsibility of Non-Military Superiors in the International Criminal Court (ICC)*, 25 YALE J. INT’L L. 89, 110 (2000).

95 See, e.g., Statute of the Special Court for Sierra Leone, art. 6 ¶ 3, S.C. Res. 1315, U.N. Doc. S/Res/1315 (Aug. 14, 2000), <http://www.rscsl.org/Documents/scsl-statute.pdf>; Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, art. 29, No. NS/RKM/1004/006, (Oct. 27, 2004) (Cambodia), <https://perma.cc/R4FD-LN3B>.

96 Prosecutor v. Delalić, Case No. IT-96-21-A, Judgment, ¶ 197 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001), <http://www.icty.org/x/cases/mucic/acjug/en/cel-aj010220.pdf>.

97 See, e.g., *id.* ¶¶ 195–96; Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, Judgment, ¶ 76 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 24, 2000), <http://www.icty.org/x/cases/aleksovski/acjug/en/ale-asj000324e.pdf>; Prosecutor v. Musema, Case No. ICTR-96-13-A, Judgment and Sentence, ¶ 148 (Int’l Crim. Trib. for Rwanda Jan. 27, 2000), <http://unictr.irmct.org/sites/unictr.org/files/case-documents/ict96-13/trial-judgements/en/000127.pdf>.

trol” of their subordinates at the Čelebići prison camp.<sup>98</sup> Defendant Delalić was acquitted because the court failed to prove he exercised de facto or de jure control over the camp,<sup>99</sup> even though he coordinated the Bosnian Muslim and Bosnian Croat forces in the area.<sup>100</sup> Defendant Delalić was also acquitted because the prosecutor failed to prove beyond a reasonable doubt that he was within the chain of superior at the Čelebići camp or that he exercised “superior control” over subordinates.<sup>101</sup>

The ICC Rome Statute also distinguishes civilian superior responsibility separately from military superior responsibility. Article 28(b) states that, in regard to nonmilitary superior and subordinate relationships, “a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates.”<sup>102</sup> The ICC, therefore, recognizes that a superior can exercise “effective control” over a subordinate without existing in a government or military hierarchy.<sup>103</sup> In the end, establishing that a superior has “effective control” in order to impose liability is intended to limit the scope of potential defendants to those with the requisite culpability.

### C. JCE III

Joint criminal enterprise (JCE) is one of the most complex and controversial theories of liability. The ICTY and ICTR statutes do not explicitly define JCE; rather it has largely been a product of judicial interpretation and caselaw in the Yugoslav Tribunal.<sup>104</sup> The ICTY outlined the definition of JCE in the *Tadić* case, where the Appeals Chamber faced the question of whether the defendant could be liable for the murder of five men when he did not personally kill them but the armed group to which he belonged did.<sup>105</sup> The Appeals Chamber concluded that there are three types of joint criminal enterprise liability.<sup>106</sup> The first two categories deal with liability for crimes that fall within the “common design,” however, this Note focuses on the third, most far-reaching category of JCE that involves criminal acts that fall outside the common design (JCE III).<sup>107</sup>

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98 Prosecutor v. Delalić, Case No. IT-96-21-T, Judgment, ¶¶ 721, 810 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998), [http://www.icty.org/x/cases/mucic/tjug/en/981116\\_judg\\_en.pdf](http://www.icty.org/x/cases/mucic/tjug/en/981116_judg_en.pdf).

99 *Id.* ¶¶ 720–21.

100 *Id.* ¶¶ 4–5.

101 *Id.* ¶ 810.

102 Rome Statute, *supra* note 35, art. 28(b).

103 *Id.* Article 28 applies the “effective control” test to both military and civilian superiors.

104 Danner & Martinez, *supra* note 76, at 103–04.

105 Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, ¶ 183 (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999), <http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf>.

106 *See id.* ¶ 195.

107 Danner & Martinez, *supra* note 76, at 106.

## 1. Actus Reus

Like the first category of JCE, JCE III requires (1) a plurality of persons, (2) the establishment of a joint criminal enterprise, and (3) the accused's knowing and intended participation in the joint criminal enterprise.<sup>108</sup> The first element, plurality of persons, requires at least two persons to be involved in the criminal act.<sup>109</sup> The persons need not be organized in a military, political, or administrative structure—a spontaneous group gathered together to commit a crime is sufficient.<sup>110</sup> The second element, the establishment of a joint criminal enterprise or common plan, comes into existence through an agreement between a group of persons to commit a crime or crimes, and it can be inferred through circumstances.<sup>111</sup> Some circumstances to consider would be the widespread or systematic nature of the crimes indicating the existence of an agreement or plan to execute,<sup>112</sup> the existence of a state or regional policy,<sup>113</sup> or a coordinated cooperation between both groups.<sup>114</sup>

To show the third element of participation, the *Tadić* Appeals Chamber stated that, in order for the prosecution to prove that the defendant intended to, and did, in fact, contribute to a criminal plan, one or more participants need to have committed crime(s) that, while being outside the shared intent of the participants, were nevertheless a “natural and foreseeable consequence of the effecting of that common purpose.”<sup>115</sup> The following acts are examples of indicators that the crimes were “natural and foreseeable” consequences: the crimes occurred frequently in effort to effectuate the common purpose;<sup>116</sup> the common purpose was executed under circumstances that invited and provoked further violence, such as the vulnerable conditions of persons or the presence of military.<sup>117</sup>

## 2. Mens Rea

JCE III allows for natural and foreseeable crimes to impute liability on an individual on the condition that the individual was subjectively aware of the “predictable consequence of the execution of the common design” but

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108 *Tadić*, Case No. IT-94-I-A, ¶¶ 204, 220, 227.

109 Prosecutor v. Stakić, Case No. IT-97-24-T, Judgment, ¶ 435 (Int'l Crim. Trib. for the Former Yugoslavia July 31, 2003), <http://www.icty.org/x/cases/stakic/tjug/en/stak-tj030731e.pdf>.

110 Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment, ¶ 611 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001), <http://www.icty.org/x/cases/krstic/tjug/en/krs-tj010802e.pdf>; *Tadić*, Case No. IT-94-I-A, ¶¶ 196, 227.

111 See Verena Haan, *The Development of the Concept of Joint Criminal Enterprise at the International Criminal Tribunal for the Former Yugoslavia*, 5 INT'L CRIM. L. REV. 167, 180 (2005).

112 See *Krstić*, Case No. IT-98-33-T, ¶ 612; *Stakić*, Case No. IT-97-24-T, ¶¶ 619–20.

113 *Stakić*, Case No. IT-97-24-T, ¶ 471.

114 *Id.* ¶ 364, 478.

115 *Tadić*, Case No. IT-94-I-A, ¶ 204.

116 *Id.*

117 *Krstić*, Case No. IT-98-33-T, ¶ 616.



was nevertheless “reckless or indifferent to that risk.”<sup>118</sup> The Appeals Chamber convicted Tadić of the murder of the five men, considered a crime against humanity, under this JCE III theory of liability,<sup>119</sup> however more recent judgments have unanimously required adverted recklessness or *dolus eventualis*.<sup>120</sup> Adverted recklessness is an individual’s awareness that a crime is a possible or most likely consequence in the execution of the enterprise but nevertheless he or she participates in the enterprise.<sup>121</sup>

Since its inception, JCE III responsibility has received significant criticism. First, many national criminal justice systems do not have liability for crimes committed outside the scope of the common objective.<sup>122</sup> Second, some critics suggest that individuals should not be held guilty for a crime committed that the individual did not commit, intend, or know would occur.<sup>123</sup> However, others view JCE III responsibility as less problematic than complicity crimes since the former requires the extra element of an “underlying agreement or common purpose.”<sup>124</sup> Third, proof of reasonable foreseeability does not solely depend on direct evidence but it can be based on circumstantial evidence.<sup>125</sup>

In the *Brdanin*<sup>126</sup> ICTY case, the court reaffirmed the elements of JCE III, stating that it is proven “only if [1] the crime charged was a natural and foreseeable consequence of the execution of that enterprise, and [2] the accused was aware that such a crime was a possible consequence of the execution of that enterprise, and, with that awareness, participated in that enterprise.”<sup>127</sup> The first element is objective; it does not depend on the state of mind of the accused. The second element is subjective; the prosecutor therefore must establish this state of mind in the accused. The prosecutor, therefore, need only show adverted recklessness to the risk that the crime would be a natural and foreseeable consequence.

#### IV. ANALYSIS OF LIABILITY

##### A. *Accomplice Liability*

The first mechanism to impose liability on individual corporate officers for crimes against humanity committed in the DRC is accomplice liability.

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118 *Tadić*, Case No. IT-94-I-A, ¶ 204.

119 *Id.* ¶ 233.

120 *See generally* Prosecutor v. Stakić, Case No. IT-97-24-T, Judgment (Int’l Crim. Trib. for the Former Yugoslavia July 31, 2003), <http://www.icty.org/x/cases/stakic/tjug/en/stak-tj030731e.pdf>.

121 *Id.* ¶ 442.

122 *See* Danner & Martinez, *supra* note 76, at 109.

123 PAUST ET AL., *supra* note 1, at 81.

124 *Id.*

125 *Id.*

126 Prosecutor v. Brdanin, Case No. IT-99-36-T, Judgment (Int’l Crim. Trib. for the Former Yugoslavia Sept. 1, 2004), <http://www.icty.org/x/cases/brdanin/tjug/en/brd-tj040901e.pdf>.

127 *Id.* ¶ 265.

This Section analyzes how the elements of accomplice liability established by the ad hoc tribunals and the ICC would apply to the facts of this case.

## 1. ICTY and ICTR Elements

The ICTY and the ICTR impose accomplice liability on an individual who “aided and abetted in the planning, preparation or execution” of crimes against humanity.<sup>128</sup> The ICTY defined the actus reus of this crime in the *Furundžija* case, stating that an individual is liable for rendering “practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime.”<sup>129</sup> In this scenario, an individual corporate officer would be held liable as an aider and abettor in crimes against humanity if the company were found to have enabled, exacerbated, or facilitated the commission of the crimes.<sup>130</sup> First, the “practical assistance” given by a corporation to the armed groups in the DRC can be reduced to the monetary benefit these groups obtain through the conflict mineral trade, which directly perpetuates the continuation of atrocities in the region. The international conflict mineral trade is a multimillion-dollar industry through which armed groups in the DRC profited \$180 million in 2008 alone.<sup>131</sup> The indirect financing of these armed groups not only provides “practical assistance” to maintaining the groups’ control of the region’s mines, but it also encourages the groups to continue their current practices.<sup>132</sup> The steady cash flow, combined with the lack of any practical criminal repercussions, “substantial[ly] effect[s] . . . the perpetration of the crime[s],”<sup>133</sup> because without it, there would be no monetary incentive to continue mining and continue committing human rights atrocities.

The ICTY adopts the “knowledge test” requiring a person charged with aiding and abetting a crime to have knowledge that his or her actions assist in the commission of the crime committed by the principal perpetrator.<sup>134</sup> Therefore, an individual corporate officer would need to know that the principal perpetrators, the armed groups in the DRC, were going to commit crimes against humanity. Furthermore, because knowledge is viewed objectively, if a corporate officer has knowledge of the crimes committed, it is irrelevant that he or she only intended to carry out normal business activities,

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128 ICTY Statute, *supra* note 34, art. 7(1), at 15; ICTR Statute, *supra* note 34, art. 6(1), at 63.

129 Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment, ¶¶ 191, 235 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998), <http://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf>.

130 2 INT’L COMM’N OF JURISTS, *supra* note 63, at 21.

131 PRENDERGAST & ATAMA, *supra* note 19, at 6.

132 *Furundžija*, Case No. IT-95-17/1-T, ¶ 235.

133 *Id.*

134 See Prosecutor v. Vasiljević, Case No. IT-98-32-A, Judgment, ¶ 102 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 25, 2004), <http://www.icty.org/x/cases/vasiljevic/acjug/en/val-aj040225e.pdf>.

including mining materials to produce electronic devices.<sup>135</sup> Knowledge can readily be established here by the numerous reports generated by human rights organizations, the United Nations, and the ICC investigation of the DRC that show the causal connection between the conflict minerals trade and human rights atrocities occurring in the DRC for over a decade.<sup>136</sup> Additionally, the 6000 companies affected by the Dodd-Frank legislation have knowledge of the crimes occurring in the DRC as a result of the conflict minerals trade.<sup>137</sup> Because this legislation requires companies to exercise due diligence in investigating whether or not conflict minerals are used in the production of their electronic devices, and then submit reports on their findings, a company therefore gives itself knowledge of its accomplice liability.

## 2. ICC Elements

To satisfy the *actus reus* of accomplice liability under the ICC, Article 25 provides that a person is individually responsible if he or she “aids, abets, or otherwise assists in its commission or attempted commission, including providing the means for its commission,”<sup>138</sup> or “in any other way contributes” to a crime or an attempted crime by a group of persons acting with a common purpose.<sup>139</sup> The inclusion of “providing means for [the crime’s] commission” could arguably cover the act of providing financial assistance by fostering the conflict mineral trade. An individual corporate officer working for a company who manufactures electronics made with conflict minerals, therefore, “provid[es] the means” for armed groups to commit crimes against humanity in exercising control over the mineral extraction and trade.

Whereas the *ad hoc* tribunals employ the “knowledge test” for *mens rea*, the ICC has adopted the “purpose test.”<sup>140</sup> The “purpose test” would only impose liability on an individual corporate officer if he or she aids, abets, or otherwise assists in the commission, or attempted commission, of the crimes against humanity “for the purpose of facilitating” the commission of these atrocities.<sup>141</sup> This heightened *mens rea* requirement would be difficult to establish because most companies involved in the conflict minerals trade do not source conflict minerals with the purpose of facilitating human rights abuses, absent evidence to show the contrary. However, the ICC adopts the “knowledge test” with respect to groups who aid and abet in the commission of a criminal activity.<sup>142</sup> A group of individual corporate officers could therefore be held liable under this variation of accomplice liability since the

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135 2 INT’L COMM’N OF JURISTS, *supra* note 63, at 21.

136 *Situation in the Democratic Republic of the Congo ICC-01/04*, *supra* note 42; see U.N. Final Report, *supra* note 9, ¶¶ 146–58; Moncel, *supra* note 20, at 220.

137 See 15 U.S.C. § 78m(p) (2012); Low ET AL., *supra* note 26, at 2.

138 Rome Statute, *supra* note 35, art. 25(3)(c).

139 *Id.* art. 25(3)(d).

140 2 INT’L COMM’N OF JURISTS, *supra* note 54, at 21.

141 *Id.* at 22.

142 Rome Statute, *supra* note 35, at art. 25(3)(d).

“knowledge test,” as demonstrated by the analysis with regard to the ad hoc tribunals, is more easily satisfied.

### B. Superior Responsibility

The second form of liability to consider is superior responsibility. Human rights advocates and scholars have argued for a “duty of care” to be applied to corporations and liability for individual officers engaging in human rights abuses.<sup>143</sup> Superior responsibility could, therefore, be a justifiable basis to hold corporations accountable.<sup>144</sup> This Section analyzes how the elements of superior responsibility established by the ad hoc tribunals and the ICC would apply to the facts of this case.

#### 1. ICTY and ICTR Elements

The *Akayesu* and *Čelebići* camp cases in the ICTR and ICTY, respectively, embraced a recklessness standard of mens rea where a superior is criminally liable “only if some specific information was in fact available to him which would provide notice of offences committed by his subordinates.”<sup>145</sup> Therefore, if an individual corporate officer were put on notice of the crimes being committed by his or her subordinates, then he or she would be criminally liable. In this case, notice of the crimes committed by rebel and military groups in the eastern DRC due to the conflict mineral trade comes from two sources: knowledge of the human rights abuses occurring in the eastern DRC by published reports from the United Nations and the ICC,<sup>146</sup> and knowledge of conflict minerals in their supply chains via the published reports required by the Dodd-Frank Act.<sup>147</sup> Because companies are required to report on their use of conflict minerals to the SEC, the companies are putting themselves on notice of the use of the minerals and how the conflict mineral trade directly influences the human rights atrocities taking place in the DRC.

The second element of establishing effective control produces more difficulty in its application to individual corporate officer complicity. The *Čelebići* camp case provides the current standard that effective control is the material ability to prevent and punish offenses.<sup>148</sup> In that case, two of the defendants were acquitted of charges under superior responsibility because the prosecutor failed to establish that both defendants exercised de facto or

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143 See, e.g., Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 473 (2001).

144 See *id.*

145 Prosecutor v. Delalić, Case No. IT-96-21-T, Judgment, ¶ 393 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998), [http://www.icty.org/x/cases/mucic/tjug/en/981116\\_judg\\_en.pdf](http://www.icty.org/x/cases/mucic/tjug/en/981116_judg_en.pdf).

146 *Situation in the Democratic Republic of the Congo ICC-01/04*, *supra* note 42; see U.N. Final Report, *supra* note 9, ¶ 170; Moncel, *supra* note 20, at 222.

147 See 15 U.S.C. § 78m(p) (2012); LOW ET AL., *supra* note 26, at 2.

148 *Delalić*, Case No. IT-96-21-A, ¶ 197.

de jure control over their respective subordinates.<sup>149</sup> Here, a prosecutor may find similar difficulty in showing that a corporate officer exercised a material ability to prevent and punish the armed groups committing the atrocities in the DRC in connection with the conflict mineral trade. Because the supply chain is a complex and convoluted network, the highest corporate officers, even if they have notice of the crimes being committed, arguably do not exercise control over the armed groups. However, the indirect financing of the atrocities via the conflict mineral trade could amount to de facto control of the armed groups since removing that financial backing would effectively destroy the mining operation. In fact, the driving purpose of the Dodd-Frank Act was to help end the atrocities being committed in the DRC by requiring companies to investigate and report on their uses of conflict minerals.<sup>150</sup> Furthermore, even if the highest corporate officers cannot be held liable, corporate officers further down the supply chain might act with effective control.

## 2. ICC Elements

Article 28(b) of the ICC Rome Statute governs civilian superiors under the doctrine of superior responsibility.<sup>151</sup> For a superior to be criminally liable in the ICC, the prosecutor must prove that the superior “either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit” a crime.<sup>152</sup> This mens rea requirement might be difficult to prove in this case because it requires showing intent akin to willful blindness.<sup>153</sup> However, knowledge of the conflict mineral trade and the human rights abuses committed as a result of companies not cleaning up their supply chains is arguably common knowledge of which a corporation claiming it did not know how its actions affect the DRC conflict could amount to willful blindness.

First, knowledge of the human rights atrocities committed in the DRC is widely available. Since July 2002, the ICC has been investigating the crimes committed in the DRC, reporting on the war crimes and crimes against humanity that have taken place as a result of the conflict.<sup>154</sup> The investigation has also led to two convictions, with one, former rebel leader Germain Katanga, charged with crimes against humanity for a massacre of over 200 civilians.<sup>155</sup> Second, knowledge of how the conflict mineral trade has directly supported the human rights atrocities has been reported by various human rights organizations and the United Nations.<sup>156</sup> Furthermore, the United States, in adopting the Dodd-Frank legislation, requires around 6000

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149 *Id.* ¶¶ 720–21, 810.

150 *See* 15 U.S.C. § 78m(p) (2012); LOW ET AL., *supra* note 26, at 2.

151 Rome Statute, *supra* note 35, art. 28(b).

152 *Id.* art. 28(b)(i).

153 Graff, *supra* note 7, at 25.

154 *See Situation in the Democratic Republic of the Congo ICC-01/04*, *supra* note 42.

155 *See DRC: All You Need to Know*, *supra* note 49.

156 *See* U.N. Final Report, *supra* note 9, ¶ 170; Moncel, *supra* note 20, at 222.

U.S. and foreign companies to submit reports on the existence of conflict minerals in their supply chains.<sup>157</sup> In 2014, twenty percent of the companies who submitted reports found no conflict minerals in their supply chains,<sup>158</sup> and some major companies have committed to becoming conflict-free, including Apple, HP, Intel, and SanDisk.<sup>159</sup> Combining the common knowledge of the DRC conflict with the explicit requirement of companies reporting on the existence of conflict minerals in their supply chains could amount to knowledge that their subordinates, the workers along the supply chain going all the way down to where the minerals are mined, are committing crimes. Even if this does not amount to actual knowledge, the existence of this information and a company refusing to do anything to clean up its supply chain could amount to willful blindness.

If the prosecutor can establish the requisite knowledge to satisfy the *mens rea* element of the crime, then he or she must establish that the individual corporate officer had effective control over its subordinates.<sup>160</sup> This may be difficult to establish since it seems unlikely that a court would deem a corporate officer of having effective control over “his or her rebel trading partners or of fellow corporate actors with whom he or she designs and implements criminal plans.”<sup>161</sup> Thus, because of the complexity of a corporation’s supply chain, the lines establishing control between how the minerals get from the mines into the electronics eventually sold by these corporations to consumers becomes attenuated.<sup>162</sup> The companies sourcing conflict minerals from the DRC also do not have a relationship with the government or rebel groups controlling the mines in so much that these subordinates “are acting at the behest of the corporation” when the crimes are committed.<sup>163</sup> However, in connection with establishing knowledge of the atrocities being committed, a prosecutor may be able to establish effective control by virtue of these organizations funding the commission of these crimes. If every corporation vowed to clean up its supply chain and rid itself from the use of conflict minerals, the armed groups controlling the mines would no longer make a profit, and without a profit, the mining operations would cease to exist. In the end, the argument that corporations maintain effective control over the subordinate armed groups committing crimes against humanity solely on the basis of their financial support may be too attenuated to succeed, but relevant facts and circumstances of a particular case might show enough *de facto* control to satisfy this element.

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157 See 15 U.S.C. § 78m(p) (2012); LOW ET AL., *supra* note 26, at 2.

158 See Dann Berg, *Intel, HP, SanDisk Ranked Best in Conflict Mineral Report*, LAPTOP (Aug. 16, 2012), <https://www.laptopmag.com/articles/intel-hp-sandisk-ranked-best-in-conflict-mineral-report>.

159 See *id.*

160 Rome Statute, *supra* note 35, art. 28(b).

161 Graff, *supra* note 7, at 25.

162 See *supra* notes 25–26.

163 Graff, *supra* note 7, at 25.

### C. JCE III

The third form of liability applicable to the conduct of individual corporate officers complicit in crimes against humanity occurring in the DRC is JCE III. JCE III holds individuals liable for criminal acts that fall outside the criminal enterprise.<sup>164</sup>

#### 1. Actus Reus

In order to show JCE III liability for individual corporate officers, the prosecutor would need to show the existence of (1) a plurality of persons, (2) the establishment of a joint criminal enterprise or common plan, and (3) the accused's knowing and intended participation in the joint criminal enterprise.<sup>165</sup> The showing of a plurality of persons would not be difficult since the conflict mineral trade involves multiple individuals at multiple levels along the supply chain, and a single corporate officer is usually not responsible for making decisions on behalf of the corporation. Furthermore, there are multiple armed groups in the eastern DRC committing these atrocities in connection with the conflict minerals trade.<sup>166</sup> The persons need not be organized in a military or administrative structure,<sup>167</sup> but here both the armed groups and corporate officers are organized in those structures respectively.

More difficulty arises in trying to satisfy the second element of showing the existence of a joint criminal enterprise or common plan between the corporate officers and the armed groups committing the atrocities. The joint criminal enterprise or common plan would be a business relationship agreement to enter into the smuggling and use of conflict minerals. Because of the complex, multistaged supply chain from armed groups extracting minerals from the mines to the corporations selling the final manufactured products,<sup>168</sup> showing an actual agreement between the corporate officers at the top and the armed groups at the bottom is highly unlikely. However, an agreement showing the existence of a common plan can be inferred through circumstances.<sup>169</sup> In this scenario, companies that are required to investigate their supply chains under the Dodd-Frank Act and discover the use of conflict minerals in their products, but nevertheless continue to use these minerals, could be viewed as entering into an agreement with the armed groups to continue the business relationship. Therefore, the crimes against humanity

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164 Dannier & Martinez, *supra* note 76, at 106.

165 Prosecutor v. Tadić, Case No. IT-94-I-A, Judgment, ¶¶ 204, 220, 227 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999), <http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf>.

166 See Moncel, *supra* note 20, at 221.

167 Tadić, Case No. IT-94-I-A, ¶ 227; see also Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment, ¶ 611 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001), <http://www.icty.org/x/cases/krstic/tjug/en/krs-tj010802e.pdf>.

168 See Moncel, *supra* note 20, at 222; see also PRENDERGAST & LEZHNEV, *supra* note 24.

169 See Haan, *supra* note 111, at 180.

and other atrocities that occur “outside” and as a result of this agreement would fall under the application of JCE III.

## 2. Mens Rea

Even if the individual corporate officers did not participate in the atrocities directly, JCE III would hold them liable for natural and foreseeable crimes if they were subjectively aware of the “predictable consequence of the execution of the common design.”<sup>170</sup> This standard of adverted recklessness would be shown if an individual corporate officer was aware that the atrocities were a possible or most likely consequence in the execution of the enterprise (sourcing conflict minerals from the DRC) but nevertheless participated in the enterprise.<sup>171</sup> Corporate officers in companies that knowingly engage in the conflict mineral trade, therefore, would be liable. The conflict mineral trade has been a “key factor” in the propagation of violence in the eastern DRC.<sup>172</sup> A “natural and foreseeable consequence” to continuing to source minerals from this conflict zone is the commission of crimes against humanity and other atrocities by the armed groups that control the mines. Not only does continuing participation in the conflict mineral trade objectively satisfy the mens rea requirement, but the adverted recklessness of companies knowingly participating in the conflict mineral trade could amount to subjective satisfaction. The Dodd-Frank Act requires businesses to investigate and report on whether or not conflict minerals are used in the production of various electronics.<sup>173</sup> Companies consequently put themselves on notice of whether or not they are involved in the conflict mineral trade. Therefore, if a company discovers it uses conflict minerals but then refrains from cleaning up its supply chain, then its corporate officers could be deemed reckless to the risk of crimes against humanity occurring as a natural and foreseeable consequence to participating in the conflict mineral trade.

## CONCLUSION

Holding individual corporate officers criminally liable for their corporations’ complicity in human rights atrocities can help bring an end to the crimes against humanity occurring in the DRC by eliminating the single-most contributing factor to the violence: the conflict minerals trade. The Dodd-Frank Act has acted as a domestic, civil attempt to incentivize corporations to

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170 *Tadić*, Case No. IT-94-I-A, ¶ 204.

171 *Prosecutor v. Stakić*, Case No. IT-97-24-T, Judgment, ¶ 442 (Int’l Crim. Trib. for the Former Yugoslavia July 31, 2003), <http://www.icty.org/x/cases/stakic/tjug/en/stak-tj030731e.pdf>.

172 See Yamamoto Testimony, *supra* note 18, at 9–10 (“The illicit trade [in] minerals and other natural resources also encourages violence, and the effective Congolese response and regional international responses by governments and industries will be key to resolving these problems.”).

173 See 15 U.S.C. § 78m(p) (2012); LOW ET AL., *supra* note 26, at 2.



clean up their supply chains, and it has had moderate success with major companies committing to becoming “conflict free.” However, international criminal law provides enforcement mechanisms that capture the conduct of corporations who choose to continue sourcing their raw materials from conflict zones.

First, under accomplice liability, even if individual corporate officers might not be liable under the ICC’s “purpose test,” under the “knowledge test” adopted by the ad hoc tribunals these officers could most likely be liable of aiding and abetting in the commission of crimes against humanity by providing monetary assistance to the armed groups committing the acts and having knowledge that their assistance contributes toward the commission of these crimes. Accomplice liability might be the most easily satisfied because of the lower mens rea required.

Second, the liability of individual corporate officers under the doctrine of superior responsibility might reach different outcomes depending on whether the crimes would be prosecuted under the ICC or a separate international court or tribunal that adopts the jurisprudence of the ICTY and ICTR. With respect the ad hoc tribunals’ jurisprudence, individual corporate officers would likely satisfy the “notice” requirement; however, establishing “effective control” could be difficult due to the complex supply chain network. However, a court may find individual corporate officers to exercise de facto control over the armed groups if providing financial assistance amounts to the material ability to prevent the crimes, since removing profits eliminates the value of the mines. Under the ICC elements, the individual corporate officers must be willfully blind to the armed group’s actions. Companies that investigate and report on their supply chains, under Dodd-Frank, but continue to use conflict minerals could satisfy this willfully blind mentality, however, the ICC would also require these officers to exercise “effective control” over the armed groups, running into the same difficulties as the ad hoc tribunal analysis.

Third, JCE III would impose liability on individual corporate officers if a prosecutor could show the existence of a common plan or joint criminal enterprise between the corporate officers and armed groups. This element may be difficult due to the attenuated connection between the armed groups committing the atrocities and the officers, but the continuation of a business enterprise in the conflict minerals trade could amount to an agreement. If the officers acted with averted recklessness toward the risk that crimes against humanity and other atrocities would occur as a result of their continued financing of the conflict mineral trade, that may be enough to show an implicit agreement between the corporation and the armed groups.

Each of these doctrines under international criminal law could provide a viable enforcement mechanism against individual corporate officers involved in the conflict minerals trade in the DRC. The degree of liability for a specific company’s corporate officers would depend on the evidence of facts and circumstances that arise from an investigation, as well as whether or not the individual corporate officers would be indicted by the ICC or a separate

international court adopting the jurisprudence of the ad hoc tribunals. Reports by human rights organizations and the United Nations, in addition to information available as a result of the Dodd-Frank Act, provide a foundation of evidence for liability. But in order for accountability to actually occur, the ICC or another international court must administer their own investigations to determine the culpability of individual corporate officers under these doctrines of international criminal law.