



September 12, 2008

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Dear Carlos,

Many thanks for having sent me an advance copy of the International Commission of Jurists report on Corporate Complicity in International Crimes. It is a welcome and important addition to the ongoing discourse on legal accountability for corporate involvement in human rights abuses, and I congratulate the ICJ panel for it.

Volumes 2 and 3 represent a commendable effort to map existing legal standards for corporate complicity in various areas of law. And they provide very useful legal analysis, which, I was pleased to see, supports the findings on the legal implications of complicity set out in my most recent report to the Human Rights Council on this subject (UN Doc. A/HRC/8/16).

The panel's work affirms that international criminal law is of growing importance beyond the domain of international tribunals, and indeed beyond criminal law. It notes, as I did, that the international criminal law test for aiding and abetting (requiring (i) an act or omission having a substantial effect on the commission of an international crime and (ii) knowledge of contributing to the crime) has great relevance for the question of how to establish indirect corporate involvement in human rights abuses.

We also agree on the fact that mere presence where an abuse occurs, or deriving incidental benefit from a relationship with one who commits an abuse or even from the abuse itself, is unlikely to result in legal liability for complicity. Moreover, the report's description of common though often legally invalid defences and excuses against charges of complicity provides helpful guidance to counter myths and misconceptions. Finally, I welcome the panel's consideration of areas of law beyond international criminal law, such as civil remedies and company law.

However, I do have concerns about some of the analysis in Volume 1. In particular, I fear that the use of a *non-legal* concept, the "zone of legal risk," to explain the risk of *legal* liability for corporate complicity may create confusion for companies and others who will look to this report for clarity about the law.

Three potential problems stand out in this regard. First, the concept of a “zone of legal risk,” with its triad of “causation, knowledge and proximity,” conflates the diversity of legal tests across jurisdictions and areas of law, presenting them as though they were one undifferentiated whole. But of course they are not, and this diminishes the guidance the analysis is able to provide. Second, it gives the impression that all elements of this so-called zone are equally necessary or even relevant for establishing legal liability. But this is not necessarily the case either. Take the case of proximity: in aiding and abetting under international criminal law, the act or omission of the accomplice in fact need not be “close” to the crime, perpetrator or victim.

Third, and more fundamentally, I wonder how wise it is to fashion guidance for companies based solely on avoiding legal liability. From a company perspective, legal liability does not represent the only concern or risk, and companies need guidance that considers more than what law currently can provide—but which the analysis of social norms, or a company’s social license to operate, would encompass.

As you know, a key objective of my renewed United Nations mandate is to provide such guidance to companies and others regarding what it means to respect human rights. In that context, while I find it very helpful to explore legal tests, it is equally important to recognize that the law is not the only relevant benchmark for behavior, and sometimes not the most relevant.

In closing, let me return to where I began: by once again expressing my admiration to the ICJ panel for its important contributions, and thanking you for sharing the report with me.

With continued good wishes,

Sincerely,



John G. Ruggie

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