
Talisman Energy and the Second Sudanese Civil War

Seeking Accountability in International Crimes

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Abstract

Holding corporations accountable for complicity in international crimes is especially difficult, due to lacking international legal guidelines and the fact that corporations do not become complicit for the same reasons that perpetrators commit crimes. The oil company Talisman Energy has been praised for its 2003 divestment from Sudan, but the corporation was never held accountable for its involvement in the second Sudanese civil war and victims were not compensated. This paper analyzes the Talisman Energy case through the lens of the International Commission of Jurists' framework for corporate complicity, and illustrates the advantages of an adaptable knowledge and foresight threshold complemented by measures of causality and proximity. Adopting a holistic framework like this in legal provisions may prevent wrongful acquittals in the future and contribute to transitional justice for the victims of international crimes. While there is more work to do to design the appropriate legal provisions, this exploratory study recommends three fields of action: a broader awareness of the corporate accountability gap; a consideration of corporate accountability in transitional justice programs; and further research on the overlap between corporate accountability and transitional justice.

Key words: *corporate complicity, transitional justice, international crimes, corporate social responsibility*



1. Introduction

As many authors have shown, corporations operating in conflict settings rarely manage to stay disconnected from the conflicts in their environment and often become entangled in their host governments' conflict efforts. As a result, some are accused of complicity in the gross human rights violations and international crimes committed by their host governments. However, holding corporations accountable for their complicity in international crimes is difficult, and victims face a number of structural and practical challenges in the process (see Huisman & Van Sliedregt, 2010; Kaleck & Saage-Maaß, 2010; Kelly, 2012). One reason for this is the lack of clear legal guidelines in international law as to what qualifies as corporate complicity. This results in different courts approaching the issue using different standards, which leads to different outcomes (Huisman & Van Sliedregt, 2010; Kaleck & Saage-Maaß, 2010). Some of these standards may not be suitable for determining corporate complicity, as companies are usually complicit for reasons other than the perpetrators' motives. This complicates the decision on whom to hold accountable, and how (Huisman & Van Sliedregt, 2010).

The Canadian oil company Talisman Energy was praised by the international community and became something of a poster child for corporate social responsibility (CSR) developments in the resource extraction industry after its divestment from Sudan in 2003 (Patey, 2014, pp. 72-73). What is not reflected in this praise is that the corporation is one of many multinational extractive industry enterprises that have been accused of complicity in international crimes, but were controversially acquitted and never officially held accountable. A case was brought against Talisman in 2001 for its involvement with the Sudanese government and military forces during the country's second civil war – an involvement which caused significant controversy among activists and legal scholars, just like the decisions to dismiss the case (Patey, 2014; Kelly, 2012).

In light of the web of obstacles that victims of conflict are already presented with, and

considering Talisman Energy's case as representative of many others, questions arise here about the significance of this well-known case for victims' chances of holding corporations accountable more generally. Therefore, this paper seeks to answer the question: *How does the case against Talisman Energy for its involvement in the Sudanese civil war illustrate (a) victims' struggles to hold corporations accountable in conflict environments, and (b) issues to be addressed in the development of a suitable legal framework to prosecute corporate complicity in international crimes?*

To address this question, the paper departs from an overview of corporate involvement in conflict and international crimes as well as the ways to hold companies accountable. The third section introduces the theoretical framework—the International Commission of Jurists' 'areas of inquiry' to assess corporate complicity in international crimes—and substantiates the selection of Talisman Energy as a case. In the fourth section, the case is introduced and analyzed through the lens of the theoretical framework, and some alternative routes toward transitional justice are discussed. The fifth section discusses the paper's contribution and the value of the areas-of-inquiry framework for transitional justice. The paper concludes that this three-pronged approach comes closer to doing the reality of corporate complicity justice, and adopting such a framework could be one significant step toward corporate accountability within international crimes.

2. Background

2.1. Corporations operating in armed conflict

In a 2002 working paper titled 'Multinational Enterprises in Situations of Violent Conflict and Widespread Human Rights Abuses,' the OECD observes that corporations are usually "unable to insulate their operations from conflict in the immediate vicinity of their operations" (OECD, 2002, p. 10). In many cases, they have been alleged to be involved in the human rights violations committed by their host countries' governments. One of the more direct ways they



can be involved is through forced resettlement. For example, in preparation for the operations of extractive industry companies (e.g., oil, gas or mining), villages are often relocated by the host government's army to clear the required land. This leads to the involuntary displacement of the residents by the government in the company's name, thus entangling the latter with the government's actions. By requesting government security forces to protect its employees or assets, the company risks becoming complicit if the government commits any crimes in the process (OECD, 2002, p. 11).

More indirectly, the taxes and royalties a company pays its host country may strengthen the government's means and motive for violence. They may provide crucial funding for war efforts and may increase the financial stakes of the conflict (OECD, 2002, pp. 3-4). This has been observed especially in the extractive industries, perhaps because natural resources tend to offer a particularly high margin of profit, making companies in this sector more willing to accept the additional costs and risks associated with operating in a context of armed conflict (OECD, 2002, p. 17). According to the OECD, these high revenues can "create powerful stakes for particularly destructive forms of rent seeking," which may explain why companies in the extractive industries are especially likely to become entangled in the conflicts happening around them (OECD, 2002, p. 14). This is one reason why scholarly attention has been focused largely on the involvement of extractive industry companies in armed conflict (see Collier & Hoeffler, 2000; Oyefusi, 2008).

Moreover, the role of these companies is particularly relevant because of the 'resource curse': Empirical research has repeatedly linked natural resources to armed conflict. Different mechanisms have been proposed to account for this relationship; for example, natural resources may provide a source of funding for insurgent groups (see, for example, Collier & Hoeffler, 2000), but they may also create incentives for government corruption, which in turn has been linked to armed conflict (see for example, Fearon, 2005). Regardless of the mechanisms, however, at least some types of natural resources—namely, oil,

gemstones, and drugs—appear to influence the onset, duration, and intensity of armed conflict (Ross, 2004, p. 61). Further nuancing the relationship, Le Billon (2001, p. 561) emphasizes that a country's economic dependence on its natural resources determines the strength of the resource curse. Since extractive industry companies may play a key role in expanding the infrastructure for, and the revenues from, natural resources, it is worth investigating their role in armed conflict.

2.2. *Corporate accountability and transitional justice*

In its 2002 working paper, the OECD observes that "companies recognize that their payments to governments are among their most important contributions to host societies, but [...] they are less likely to discuss the fact that these funds might be misused or diverted" (OECD, 2002, p. 20). Since the early 2000s, some companies seem to have become more aware and/or outspoken about the latter, as mirrored in the emergence of several initiatives to further corporate social responsibility within and outside armed conflict (such as the Voluntary Principles on Security and Human Rights and the Extractive Industries Transparency Initiative). While these may improve the *transparency* of corporate conduct, they are all voluntary agreements, which are not legally binding. What is still lacking are mechanisms to guarantee *accountability* when companies do engage in contexts of armed conflict and are alleged to have become entangled in international crimes (Kaleck & Saage-Maaß, 2010, p. 710). In the words of Kaleck and Saage-Maaß (2010) as well as Payne and Pereira (2016), there is an 'accountability gap.'

This gap can be traced back to several conceptual, practical, and legal challenges involved in holding corporations accountable for their complicity in crimes that were committed in conflict settings. Conceptually, business practices are commonly viewed as neutral to the conflict surrounding them, making it difficult to identify when they cross over into criminally relevant territory. Moreover, due to the conventional state-private distinction, traditionally,



corporations cannot be sued in international law. While the Nuremberg Tribunal following World War II declared some ‘groups and organizations’ as criminal (such as the Nazi Party Leadership Corps, SD, SS and Gestapo) and tried individuals based on their membership in these, the criminal organizations themselves were not punished.¹ Due to these conceptual uncertainties, there is no consensus on the extent to which international law applies to non-state actors such as corporations (Cassel, 2008, p. 315; Kaleck & Saage-Maaß, 2010, pp. 720-722).² The main practical obstacle lies in the fact that conflict settings crucially complicate investigations and inhibit access to the necessary information (Kaleck & Saage-Maaß, 2010, pp. 720-722).

Lastly, legal provisions and practices to hold corporations accountable for international crimes have been deemed insufficient. As a result, different courts approach the issue using different standards, leading to different outcomes and a blurred understanding as to what qualifies as corporate complicity (Kaleck & Saage-Maaß, 2010, p. 722). As Huisman and Van Sliedregt (2010) argue, some of the standards used by courts to establish corporate complicity are not suitable, as companies are not usually complicit for the same reasons leading principal perpetrators to commit international crimes, but get involved based on commercial and financial interests. Consequently, they may not share the principal perpetrator’s intentions, yet still be complicit in the commission of their crime. A suitable legal framework is needed to address these cases (Huisman & Van Sliedregt, 2010, pp. 820-823).

Mirroring the uncertainty about corporate complicity under international law, transitional justice programs³ often disregard the role of corporations in conflicts and international crimes (see Michalowski & Cardona Chaves, 2015, p.

173; Payne & Pereira, 2016, p. 20.3; Payne, 2020, p. 19), even though a concern for the latter could arguably benefit the former (Payne, 2020). Quinn (2016) outlines four central approaches to transitional justice, each of which proposes different processes and mechanisms to contribute to several core aims:

- accountability, punishment, and the promotion of human rights;
- reparation and compensation;
- truth-seeking;
- acknowledgement and reconciliation; as well as
- institutional reform and democratization.

An adequate legal framework to assess corporate complicity for international crimes in situations of conflict would not address all of these aims. Like trials and tribunals generally, it may even be detrimental to the acknowledgement of past violations, and reconciliation, which speaks to a fundamental dilemma in transitional justice: that between peace and justice (for an overview of this debate in peace and conflict studies, see, for example, Kersten, 2016). Nonetheless, a suitable legal framework for corporate complicity would arguably constitute an important contribution to three core aims of transitional justice. First, it might improve accountability for past violations by addressing the role of corporate perpetrators and complicit corporations. Second, the potential convictions of corporations who would be acquitted without such a framework may increase the chances that victims receive reparations. Lastly, trials are generally viewed as a potential instrument to establish detailed records of past violations (United Nations Security Council [UNSC], 2004, p. 13), so

¹It should be noted that in this particular setting, punishing the organizations themselves would not have been possible, as they had been dissolved by the time of the Nuremberg trials.

²While a scholarly debate on the potential to expand the ICC’s jurisdiction to include corporations and the establishment of the UN Working Group on Business and Human Rights may suggest a ‘corporate turn’ in transitional justice and a development toward clearer standards in international law, the proposed changes have not been formalized or affected the practice of transitional justice (Jespersgaard Jakobsen, 2023).

³Since its emergence, the concept of transitional justice and its mechanisms have evolved from a purely legal instrument to a broader set of processes and aims (Lawther & Moffett, 2017, pp. 1-2). In line with this development, this paper adopts the United Nations’ definition of transitional justice as “the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation” (UNSC, 2004, p. 4). This includes both judicial processes, such as trials, and non-judicial ones, such as truth commissions or reparations.



an adequate pathway toward assessing corporate complicity could contribute to the search for the truth about corporations' roles in international crimes. In sum, a suitable legal framework is needed to assess corporate complicity in international crimes, both to address the conceptual uncertainties and the 'accountability gap' in international law, and because it could contribute to the pursuit of transitional justice.

3. Research design

3.1. Theoretical framework

In a 2008 report on corporate complicity in international crimes, the NGO International Commission of Jurists (hereafter 'the Commission') developed a comprehensive framework to identify corporate complicity in international crimes (see Figure 1 below) (International Commission of Jurists, 2008; Huisman & Van Sliedregt, 2010; Kaleck & Saage-Maaß, 2010). This framework provides a multidimensional understanding of corporations' obligations under international law by applying three complementary areas of inquiry: causation, knowledge and foreseeability, and proximity. As Huisman and Van Sliedregt emphasize, neither one of the three elements suffices as proof of corporate complicity; a case may 'score' low on one scale, but high on another. Therefore, all three are equally important to consider and function as an interconnected, comprehensive approach (Huisman & Van Sliedregt, 2010, p. 827). As is further elaborated below, this allows for a more flexible knowledge/foresight threshold within international law than the 'purpose standard' or the *mens rea*, which are commonly used, for example, by the International Criminal Court (ICC), but may not be applicable to corporate entities (see below). Therefore, the Commission's 'areas-of-inquiry' framework may help to assess corporate complicity more accurately than courts that rely on strict knowledge/foresight standards. Viewing cases of alleged corporate complicity through the lens of this framework may then further the broader cause of accountability and transitional justice for the victims of international crimes.

The Commission distinguishes between the aforementioned three areas of inquiry: *causation*, i.e. to what extent the involvement of a corporation is causally linked to the crimes it is accused of being complicit to; *proximity* to the principal perpetrator and their actions; and *foresight or knowledge* of the crimes committed. On the causation scale, the Commission identifies three degrees of corporate involvement in international crimes: enabling, exacerbation, and facilitation. A corporation has *enabled* a crime if the crime could not have been committed without its help. This is the most direct causal link between a complicit corporation and the crime. In contrast, if the crime could have been committed with or without a corporation's help, but its involvement made it easier for the principal perpetrator to commit the crime, the company *facilitated* the crime. Between these two levels lies *exacerbation*, which describes cases in which a corporation's involvement was not indispensable for the commission of the crime but increased its gravity or range (Huisman & Van Sliedregt, 2010, pp. 819-820). The second element, proximity, is measured in *geographical distance* of the corporation to the principal perpetrator, and in duration and frequency of *contact* between the two actors (Huisman & Van Sliedregt, 2010, pp. 823-824).

The third element identified by the Commission is knowledge and foreseeability. Here, different documents and courts apply a spectrum of different standards. The broadest of these—and hence the easiest to prove—is the *dolus eventualis* or foresight. If a corporation had the information to foresee international crimes being committed with the help of its involvement, it was complicit by this standard. This standard is applied by Dutch national law, for example (Article 48 of the Dutch Penal Code, see International Crimes Database, 2013a, Section 7; Huisman & Van Sliedregt, 2010, pp. 820-823). The next, slightly less broad conception is *knowledge* of the principal perpetrator's *mens rea*, also known as their 'guilty mind' or intent. This requires not only that the corporation could have known, but that it demonstrably did know that it was contributing to international crimes (Huisman & Van Sliedregt, 2010, pp. 820-823).

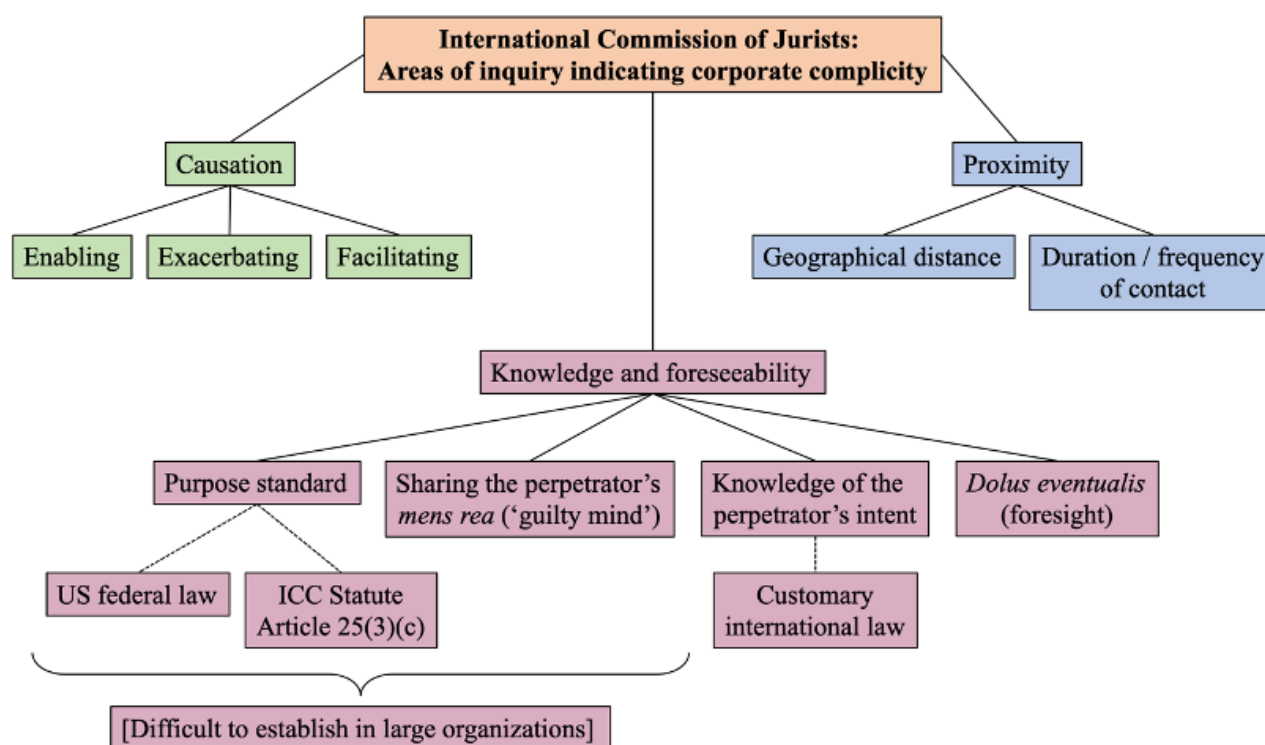


According to Huisman and Van Sliedregt (2010, p. 822), this is a customary standard in international law, but due to the lack of clear guidelines there is no official threshold. The logical next step would be proving that the corporation not only knew of the principal perpetrator's *mens rea* but shared it. As pointed out in the introduction, this is difficult to prove, because corporations involved in international crimes are often very large, and neither one specific member, nor every single member, shares the same intent (Kaleck & Saage-Maaß, 2010, p. 716). Moreover, companies often become complicit in crimes for profit-related reasons, and not for the purposes the principal perpetrators aim for (Ryngaert, 2016, p. 193). Huisman and Van Sliedregt (2010, p. 823), Kaleck and

Saage-Maaß (2010, p. 722), and others argue that this does not make them less complicit, but rather points to the need for a lower threshold. The strictest standard for knowledge and foreseeability is the *purpose standard*. According to this standard, a corporation must have entered its deal or relationship with the principal perpetrator specifically for the purpose of aiding in the commission of the crime. Although this degree of knowledge is the most difficult to prove, it is prescribed in Article 25(3)(c) of the Rome Statute and employed by the ICC with regard to individual perpetrators.⁴ On this basis, some legal systems have adopted the purpose standard to assess corporate complicity as well (Huisman & Van Sliedregt, 2010, p. 821).

Figure 1.

Areas of inquiry indicating corporate complicity according to the International Commission of Jurists



Note. This figure is based on International Commission of Jurists, 2008; Huisman and Van Sliedregt, 2010; Kaleck and Saage-Maaß, 2010.

⁴While the ICC generally only has jurisdiction over 'natural persons' (individuals), its provisions often serve as a reference point for legal frameworks to assess corporate complicity as well (see Cassel, 2008, pp. 315-317; Huisman & Van Sliedregt, 2010, p. 821).



3.2. Case selection

To apply and assess the use of the Commission's framework, I analyze the case of the *Presbyterian Church of Sudan v. Talisman Energy, Inc.* As laid out by Gerring (2007), "in order for a focused case study to provide insight into a broader phenomenon, it must be representative of a broader set of cases" (p. 91). The case of Talisman Energy is representative as it contains several characteristics commonly seen in corporations accused of complicity in international crimes. Talisman was a multinational corporation in the extractive industry, which was accused of complicity in international crimes committed by the Sudanese government and whose acquittal by three courts caused significant controversy among activists and legal scholars. It is thus a typical case of a company operating in conflict-affected countries (OECD, 2002) and typical of the accountability gap identified by Kaleck and Saage-Maaß (2010), Payne and Pereira (2016), and others.

Although the Commission's framework is not specific to extractive industry companies, there are several reasons to study an example from this sector, which follow from the prior empirical findings outlined in Section 2.1. First, natural resources offer an especially high margin of profit. This is likely to increase (a) the incentive for companies to get involved in conflict-affected settings despite the risks and (b) the significance of companies' taxes and royalties to the government's war efforts (OECD, 2002, pp. 3, 17). Second, as the OECD (2002, p. 3) observes, extractive industry companies appear to find it especially difficult to distance themselves from the conflict happening around them. Third, extractive industry companies are particularly relevant in this context as a vast body of literature has firmly established a correlation between the presence of natural resources and the onset, duration and intensity of armed conflict in a country (see, for example, Le Billon, 2001; Ross, 2004). This suggests that companies in this sector may be more likely to operate in situations of

armed conflict than those in other sectors, and especially in long-lasting and intense conflicts.

4. Case study

4.1. Case description

The second Sudanese civil war is one of the longest civil wars ever recorded, lasting from 1983 to 2005. The conflict, the resulting famine, and diseases killed over 2 million people (Council on Foreign Relations 2023, para. 3). Largely an extension of the first civil war, it was fought between the country's historically divided North and South, the former represented by the government and the latter by the insurgent group Sudan People's Liberation Movement/Army (SPLM/A). Rejecting the newly introduced Sharia law and increasingly centralized political and economic power, the SPLM/A officially aimed to establish a secular democracy in Sudan. Oil was a central issue in the conflict from the onset, as several oil discoveries in the 1970s near the North-South border increased competition for the economic benefits associated with controlling these areas (Ottaway & El-Sadany, 2012, p. 6; UCDP, 2023, Section 5).

Talisman Energy was a Canadian oil and gas company active from 1923 until 2015. In 1998—during the second Sudanese civil war—the company acquired Arakis Energy Corporation, whose substantial shares in an oil project in Sudan were thereby transferred to Talisman (Talisman Energy Inc., 1998, p. 23), and began significantly contributing to the development of oil infrastructure in the country (CBC News, 2015). Over the next four years and five months, Talisman reported a total of over CA\$600 million in profit from Sudan operations (Talisman Energy Inc., 1998, 1999, 2000, 2001, 2002, 2003).⁵ Meanwhile, the Sudanese government received several hundred million dollars (CA\$) in royalties from Talisman (Carmody, 2001, p. 3).

When the government's war efforts in-

⁵Each annual report by Talisman Energy includes an appendix titled *Supplementary oil and gas information* with a subsection reporting the results of operations from oil and gas producing activities divided by country/region. In sum, CA\$ 604.8 million are reported for Sudan from 1998, when Talisman acquired its shares, until 2003, when it divested. Specifically, \$1.7 million are reported in 1998, \$30.9 million in 1999, \$126.2 million in 2000, \$167 million in 2001, \$220 million in 2002, and \$59 million in 2003.



creased—which were later recognized as war crimes, ethnic cleansing, and genocide (Human Rights Watch, 2004; Human Rights Watch, 2010; Yale University Genocide Studies Program, 2024, para. 2)—critics started to suspect that Talisman’s money was helping to fuel the civil war. These suspicions were confirmed, when an investigation by the Canadian government found that Talisman’s operations were exacerbating and/or prolonging the war (CBC News, 2000). Nonetheless, Talisman continued to deny the connection, insisting that its oil production was helping to stabilize the political situation by creating job opportunities. Human rights organizations accused the company of knowingly turning a blind eye to the truth by referring only to the Sudanese government as a source of information on the war (CBC News, 2015).

In addition, the plaintiffs in the case later brought against Talisman claimed that the company relied on and cooperated with the Sudanese government and its military forces both to clear the required land for oil exploration and to provide security for its personnel. In doing so, it is argued, Talisman became complicit in the “massive civilian displacement, extrajudicial killing of civilians, torture, rape and the burning of villages, churches and crops” committed by the government (International Crimes Database, 2013b, Section 4).

When the company finally acknowledged the harm done through its economic contributions, it announced plans to remain involved in Sudan, in hopes of positively influencing the government. This was soon shown to be unlikely, as Talisman had already built significant oil extraction infrastructure and had thus become replaceable. This meant that it no longer had enough leverage to change the government’s course (CBC News, 2015; Patey, 2014, p. 76).

In 2001, the Presbyterian Church of Sudan charged Talisman with “backing the efforts of Sudan’s government to clear the land for oil exploration by attacking villages, bombing churches, and killing church leaders” (Kelly,

2012, p. 357), supported by several individual charges for complicity in the “ethnic cleansing against the non-Muslim Sudanese” in the region around Talisman’s oil concession (Business & Human Rights Resource Centre [BHRRC], 2014, para. 1). Under the Alien Tort Claims Act (ATCA), these cases were brought before a federal US court, the Court of Appeals, as well as the US Supreme Court, and dismissed three times separately (in 2006, 2009 and 2010)⁶ (BHRRC, 2014). These decisions were heavily scrutinized and criticized by legal scholars internationally, who viewed the acquittal as a symbolic gesture making any corporate liability case under ATCA seem hopeless (Kelly, 2012, p. 354). Pressured by the reputational damage from the start, Talisman Energy sold its shares in Sudan in March 2003 (Talisman Energy Inc., 2003, p. 17; Kobrin, 2004, p. 426).

Following its divestment from Sudan, Talisman made an effort to improve its image in terms of its social responsibility. In 2005, it became the first Canadian company to join the Extractive Industries Transparency Initiative—a move that was praised by the NGO Transparency International in 2008. Talisman also joined the UN Global Compact for environmental, labor and human rights (Patey, 2014, p. 73). While these commitments may have improved Talisman’s behavior in the following years (although their voluntary basis does not guarantee this), they do not serve transitional justice for the victims of the Sudanese civil war.

4.2. *Situating the case study in the framework*

To situate the case of Talisman Energy in the Commission’s framework for corporate complicity, all three elements—causality, proximity and knowledge or foreseeability—need to be addressed. Concerning causality, Talisman clearly did not enable the crimes committed by the Sudanese government: Sudan’s civil war began years before Talisman bought its shares, and gross human rights violations by the government and its military forces had already been

⁶As international courts do not have jurisdiction over corporations, ATCA has emerged as the most common pathway in cases such as this, as it allows non-US nationals to bring actions to US courts for violations that have taken place outside the US. Its use in the case of Talisman Energy is further elaborated in Section 4.3.



reported before 1998 (see Human Rights Watch, 1996; Eldin, 2020). The company was clearly not essential for the commission of the crimes, and hence did not enable them. By providing financial means and doing business with the Sudanese government, the corporation did, however, legitimize the government and its actions in the civil war on the international stage (see Huisman & Van Sliedregt, 2010, p. 817). Talisman thereby facilitated the crimes committed by the Sudanese government. Given that “oil revenues rose from zero in 1998 to almost 42% of total government revenue in 2001,” and that 60% of it was used to expand military spending and the domestic arms industry, Talisman may have also exacerbated the crimes (Rone, 2003, p. 508-509). However, to evaluate this, more information would be needed on how exactly the royalties were used and how relevant they were for the scope of the violence.

Two elements determine the matter of proximity. The first, geographical distance, is easier to assess. Since the Sudanese government’s war crimes took place mainly in the area surrounding the company’s oil concession, the crimes to which Talisman was accused of complicity were committed in close geographical proximity to its own operations. However, in public appearances, the corporation continuously distanced itself from the Sudanese government and its actions (CBC News, 2015), and there is little public information on the frequency of contact between the two parties. This part of the proximity indicator is thus less clear.

Lastly, there is knowledge and foresight. Talisman could not only have foreseen what its royalties were being spent on (at least once the civil war intensified soon after its arrival), but after the investigation proved the direct contributions through Talisman, the company clearly knew. The first and second, broadest standards of knowledge and foresight were thus met. As explained above, the *mens rea* of a corporation as large as Talisman is difficult to establish. On the one hand, CEO James Buckee publicly distanced himself from the aims and actions of the Sudanese government and vowed to use his company’s influence to improve the situation in Sudan (CBC News, 2015). On the other, there does

not seem to be any evidence of Talisman helping to pacify the conflict, and the company remained involved despite its knowledge of the government’s crimes and the role that oil-extraction revenue played in committing them (CBC News, 2015; Rone, 2003, p. 508). While the *mens rea* is difficult to establish, what is clear is that the company showed no sign of deliberately supporting the war crimes in Sudan. The strictest standard presented in the Commission’s framework, the purpose standard, could thus not be satisfied. US courts under ATCA, such as the three which dealt with the case in question, use this purpose standard. This was a central reason for the controversial acquittal of Talisman Energy after all three lawsuits (Huisman & Van Sliedregt, 2010, p. 821-822; Kelly, 2012, p. 354).

While the proximity criterion is difficult to apply to this case without all the relevant information, Talisman can be situated on the causality scale as facilitating and/or exacerbating the government’s crimes, which may indicate complicity to a certain degree. Given the strict standard applied for knowledge of the crimes, and considering the criticism from legal scholars internationally, a more comprehensive legal framework for corporate complicity, such as that of the Commission, may have been more appropriate. Since this includes a lower or more flexible threshold for knowledge and foreseeability, with such a framework, the courts may not have dismissed the case.

4.3. *Alternative routes towards transitional justice*

Since victims were unable to hold Talisman Energy accountable for its involvement in Sudan through ATCA for the reasons outlined above, the question arises whether there are alternative mechanisms that might have facilitated Talisman’s conviction. As explained in Section 2, international legal guidelines on how to approach corporate complicity in international crimes are largely insufficient, and corporations usually only agree to abide by voluntary CSR agreements, which are not legally binding and do not guarantee accountability. These agreements have also historically been



inaccessible for victims, as only states or official employer/employee organizations could initiate proceedings through them. This has slowly changed in the past two decades, which may make it easier to hold Talisman accountable in case of any future violations (Kaleck & Saage-Maaß, 2010, pp. 711-712). However, it will not further transitional justice for the Sudanese victims retroactively, considering that Talisman only joined some of these compacts in response to the controversy, and hence was not a member during its activity in Sudan.

An alternative path to seek accountability are national courts in the host country. These are geographically closer to the crimes, which facilitates evidence-finding. Should Talisman have shared the government's *mens rea*, in a best-case scenario for the victims, a national court may have made it possible to prove this and thereby satisfy a stricter knowledge-foresight standard. However, considering the (post-)conflict setting and the fact that the Sudanese government was the principal perpetrator of the crimes to which Talisman was accused of complicity, it likely would have been unable and/or unwilling to investigate the crimes and provide adequate legal protection for the victims. Lastly, most national courts cannot sanction corporate complicity on an international level (Ryngaert, 2016, p. 188; Kaleck & Saage-Maaß, 2010, pp. 714-715).

Among the few national courts which do have some punitive power in international crimes are US courts under ATCA.⁷ These also offer an external, uninvolved position and a stable legal framework (unlike Sudan during the civil war) that is accessible to parties from outside the United States. The victims' choice to charge Talisman through this mechanism was thus indeed the most realistic approach, as Talisman was not committed to any international standards yet, and the Sudanese legal system was not an option. US American courts' proceedings are also the closest to the ICC standard, which further legitimizes their viability in international law (Kaleck & Saage-Maaß, 2010, p. 716). However, the Commission argues that customary in-

ternational law often does not, and should not, strictly abide by the Rome Statute. Instead, the broader, knowledge-based standard often is, and should be, applied (see Figure 1), as in reality corporations usually do not become complicit for the same reasons as principal perpetrators commit crimes. Huisman and Van Sliedregt (2010) add that a broader knowledge standard may suffice, if courts recognize that corporate complicity is not solely determined by knowledge/foresight anyway. The three areas of inquiry according to the Commission are equally, separately relevant, but cumulative—one of them never suffices to prove complicity on its own (Huisman & Van Sliedregt, 2010, p. 827).

In the absence of a conviction to serve legal justice for the victims of the civil war and Talisman's complicity in it, it is relevant to consider if the company pursued other ways of realizing transitional justice. Since corporate complicity is usually indirect, it is likely challenging to determine who exactly was a direct victim of Talisman's involvement. Material reparations, such as financial compensation, may thus have been difficult (Howard-Hassmann, 2016, p. 254). Another option would have been symbolic reparations, such as an official apology on behalf of Talisman Energy. Empirical research suggests that acknowledgement and apology may show a perpetrator's remorse, restore trust, and facilitate a process of reconciliation—although apologies are insufficient on their own for the realization of transitional justice, and there is a lack of evidence on apologies by corporate actors (see, for example, the discussions on apologies in Howard-Hassmann, 2016; Jones, 2011). Talisman does not appear to have apologized to the victims of the civil war or offered any other gesture to further transitional justice for them. In the few statements given by individual managers and the corporation's CEO, they did not show remorse, but merely agreed to include social responsibility concerns in their future risk-mitigation and cost-benefit analyses—a 'corporate responsibility infrastructure' which Patey argues improved Talisman's

⁷ According to Zerk (2013, p. 89), this is (a) because the cause of action under ATCA is rooted in international law, meaning that a violation of international law justifies a lawsuit, and (b) because it is possible to bring actions to court under ATCA for violations outside the US.



reputation and standing, rather than its ethical practices. Furthermore, even after pulling out of Sudan, the company continued to profit retroactively from its involvement and made multiple attempts at getting involved there again (Patey, 2014, p. 73). In sum, it seems that not only were victims unable to hold Talisman Energy accountable legally, they also did not receive any other form of reparation or compensation.

5. Discussion

As outlined in Section 2, corporations operating in conflict-affected countries usually cannot keep their own operations disconnected from the conflict in their environment and are often accused of complicity in the crimes committed by their host governments. The extractive industry may be especially prone to this, due to a high profit margin raising incentives to get involved and increasing the risk of substantially contributing to the government's war efforts. In addition, companies in this sector may generally be more likely to operate in countries with long-lasting, highly intense conflicts. In the absence of legally binding CSR agreements and universally applicable legal provisions, holding these corporations accountable in case of complicity in international crimes is extremely challenging.

By viewing a typical case—the case of Talisman Energy's operations in Sudan—through the lens of the Commission's approach to corporate complicity, this paper illustrates the need for a multidimensional legal framework. Under ATCA (using the strict purpose standard), the US courts dismissed the case, but had the knowledge-foresight threshold been lowered and viewed in combination with Talisman's close geographical proximity and its strong potential impact on the scale of the crimes (causation criterion), this may have changed the verdict. Several scholars have pointed out that the purpose standard prescribed by the ICC and commonly applied under ATCA does not reflect the reality of corporate complicity, as companies usually act based on financial/commercial interests and not for the purpose of aiding in international crimes. As was the case for Talisman Energy, this may lead to controversial, and potentially

wrongful, acquittals. However, a lower threshold for knowledge and foreseeability might result in wrongful convictions. The Commission's framework offers a middle ground. By weighing knowledge and foreseeability against causation and proximity, the framework allows for flexibility in the knowledge/foresight threshold, thus decoupling corporate complicity from the purpose standard and allowing for a more realistic assessment of corporate complicity. By emphasizing that the three areas of inquiry are complementary and cumulative, the Commission safeguards against wrongful convictions, as the lowered knowledge-foresight threshold is not sufficient on its own to establish corporate complicity.

As several authors have emphasized, the current legal provisions to determine corporate complicity in international crimes are insufficient and do not reflect the empirical reality. Adopting a holistic framework like that of the Commission might be a crucial step toward closing the corporate accountability gap in international law and toward delivering transitional justice for the victims of international crimes in conflict settings.

6. Conclusion

This paper set out to answer the research question: How does the case against Talisman Energy for its involvement in the Sudanese civil war illustrate (a) victims' struggles to hold corporations accountable in conflict environments, and (b) issues to be addressed in the development of a suitable legal framework to prosecute corporate complicity in international crimes? An analysis of the case through the lens of the International Commission of Jurists' framework for areas of inquiry indicating corporate complicity in international crimes has shown that the courts in this case used a strict standard of knowledge and foresight, for which they were widely criticized. However, the alternative routes victims could have taken, as laid out by Kaleck and Saage-Maaß (2010) and others, would have been even less likely to rule in their favor. As explained above, the obstacles the Presbyterian Church and others faced in trying to hold Tal-



isman accountable were not isolated, but part of a broader set of issues concerning corporate complicity in international law, which act as a barrier for delivering transitional justice.

Ryngaert (2016) and Huisman and Van Sliedregt (2010) show that the ICC's and ATCA's purpose standard generally does not match the observable reality of corporate complicity in international crimes, as this is rarely motivated by a purpose, and instead by commercial and financial interests. Consequently, the Commission advocates a more flexible knowledge/foresight threshold. While a strict standard may prevent the wrongful conviction of corporations for crimes they were not complicit in, it risks a wrongful acquittal—which is how many view the outcome of the Talisman Energy case. The Commission's framework provides a balanced approach, as it does not rely entirely on this one threshold but complements it with causality and proximity as other indicators, emphasizing the need for all three (Huisman & Van Sliedregt, 2010). This adaptable, conscientious approach comes closer to doing the complex and varied reality of corporate complicity justice. It could be one significant step in the ongoing development of clear international guidelines for corporate complicity, and thereby contribute to the pursuit of transitional justice for the victims of international crimes in conflict settings.

Three main recommendations follow from this case study. First, scholars, human rights advocacy organizations, and other stakeholders need to generate a broader awareness of the lack of clear guidelines and the risk of wrongful ac-

quittals in cases of corporate complicity in international crimes. While this study suggests that in the long term, international legal provisions and practice should incorporate a multi-level framework of corporate complicity such as that of the Commission, there is more work to do to design the appropriate legal provisions. Broader knowledge of the inadequacy of the current provisions presents a stepping stone, as it may lead courts to adopt new interpretations of the existing law and move beyond the strict purpose standard.

Second, corporate accountability needs to be addressed in transitional justice programs. The case of Talisman Energy illustrates the need for a suitable legal framework for the sake of accountability, reparations, and truth-seeking. By advancing any of these goals, such a framework could contribute to the pursuit of transitional justice. Therefore, by ensuring that the role of corporate actors is not overlooked in judicial and non-judicial processes, peacebuilders can improve the prospect for transitional justice.

Finally, future research can build on this case study by further investigating the overlap and complementarities of corporate accountability and transitional justice. On the one hand, the literature on peacebuilding and transitional justice may offer various judicial and non-judicial pathways to corporate accountability. On the other hand, the knowledge on business practices and human rights in conflict settings may improve our understanding of transitional justice and the role of corporations within it.

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