

**THE “KNOWLEDGE” STANDARD OF LIABILITY FOR AIDING AND ABETTING
INTERNATIONAL HUMAN RIGHTS VIOLATIONS:
PRACTICAL CONSIDERATIONS AND LEGAL AUTHORITY**

Presented to the U.N. Special Representative of the Secretary-General on Human Rights and
Transnational Corporations and Other Business Enterprises



EarthRights International

October 2009

EarthRights International (ERI) tenders this submission to the SRSG to note that:

1. In closing remarks at his October 2009 consultation, the SRSG announced that regardless of the recent decision by a US appeals court in *Presbyterian Church of Sudan v. Talisman Energy, Inc.*,¹ corporations that supply substantial assistance to human rights violators, *knowing* that their assistance will aid and abet human rights abuses, violate international law. ERI supports the SRSG's position and commends him for taking this principled stance.
2. A key way to ensure that companies respect human rights is by holding accountable all actors who knowingly aid and abet human rights abuses. Based on its experience with Total and Chevron on the Yadana gas pipeline in Burma, ERI is concerned that Daewoo and CNPC, the builders and operators of the planned Shwe Gas Project, will choose to provide support to Burmese military units to provide security for the Shwe pipeline, in full knowledge that their aid will facilitate the commission of crimes against humanity, torture, and other human rights violations.² A requirement that companies share the military's criminal intent in order to be liable for its acts would be inadequate to protect the inhabitants of the pipeline corridor; the companies could act with impunity, arguing that they contracted only for security, despite knowingly supporting the military's conduct and gladly accepting the benefits of its crimes.
3. The International Criminal Tribunals for Yugoslavia and Rwanda and the Special Court for Sierra Leone – which may apply only norms of customary international law that are already accepted as binding – have adopted a knowledge standard for aiding and abetting.³ Although the International Criminal Court requires intent for aiding and abetting individual crimes, it reserves a knowledge standard for assisting crimes by a “group of persons acting with a common purpose,”⁴ as in most instances of corporate complicity in human rights abuses.⁵ This approach comports with that of the Nuremberg Military Tribunals,⁶ as well as domestic practice in countries such as the US,⁷ UK,⁸ Canada,⁹ France,¹⁰ the Netherlands,¹¹ and Belgium.¹² Thus the vast majority of legal sources support the SRSG's position.

¹ ___ F.3d ___, 2009 U.S. App. LEXIS 21688 (2d Cir. Oct. 2, 2009).

² For more on Total and Chevron in Burma, see publications on ERI's website at www.earthrights.org/publications, e.g., ERI, *Total Impact: The Human Rights, Environmental, and Financial Impacts of Total and Chevron's Yadana Gas Project in Military Ruled Burma (Myanmar)* (2009); ERI, *The Human Cost of Energy: Chevron's Continuing Role in Financing Oppression and Profiting From Human Rights Abuses in Military-Ruled Burma* (2008); ERI, *Total Denial Continues* (2d ed. 2003). For more on Shwe, see ERI, *Another Yadana: The Shwe Natural Gas Pipeline (Burma-Bangladesh-India)* (2004); Shwe Campaign Site – Shwe Gas Movement, at www.shwe.org.

³ See *Prosecutor v. Tadić*, Case No. IT-94-1-A, ¶229 (July 15, 1999) (“In the case of aiding and abetting, the requisite mental element is knowledge . . .”); *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, ¶545 (Sept. 2, 1998); *Prosecutor v. Brima et al.*, Case No. SCSL-04-16-A, ¶242-43 (Feb. 22, 2008).

⁴ Rome Statute of the International Criminal Court, art. 25(3)(d), July 17, 1998, 2187 U.N.T.S. 3.

⁵ The Rome Statute prohibits its own application to “limit[] or prejudic[e] . . . existing or developing rules of international law,” *id.*, art. 10, and as a forward-looking compact between nations, the ICC is not constrained to abide solely by customary international law. Thus, where its definitions are more restrictive than those of the *ad hoc* criminal tribunals, they are not authoritative sources of generally applicable international law.

⁶ See, e.g., *U.S. v. Flick*, 6 Tr. War Crim. at 1217 (1952).

⁷ See *Halberstam v. Welch*, 705 F.2d 472, 481 (D.C. Cir. 1983) (“knowing substantial assistance” standard).

⁸ See, e.g., *BMTA v. Salvatori*, [1949] Ch. 556 (liability for knowingly helping obligee to breach contract).

⁹ *Preston v. The Queen* [1949] S.C.R. 156, 159 (defendant “understood what was taking place and . . . assisted”).

¹⁰ Code Pénal, art. 121-7 (Fr.) (prohibiting knowingly facilitating a crime by aiding and abetting).

¹¹ See, e.g., Van Anraat, Gerechtshof [Hof] [Court of Appeal], 's Gravenhage, 9 mei 2007, LJN BA4676 (Neth.) (affirming conviction for knowingly aiding and abetting war crimes).

¹² Code Pénal, art. 66 (Belg.) (prohibiting knowingly aiding the perpetrator of a crime); *Id.*, art. 136(6) (Belg.) (prohibiting manufacture or transportation of an instrument with knowledge that the instrument is intended to be used in the commission of a violation of international humanitarian law).