Regulating Business with Bad Actors: Aiding and Abetting and Beyond

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SUMMARY

I. COMPARATIVE LAW: ADVANTAGE OR DISADVANTAGE? ................................. 2

II. AIDING & ABETTING: REGULATING THROUGH UNCERTAINTY? .................. 5

III. BEYOND AIDING AND ABETTING: “FOREIGN TRADE LAW OFFENSES” AS
    REGULATORY ALTERNATIVES? .............................................................. 7

Gross violations of human rights do not simply occur. The more widespread and
systematic they become, the less likely it is that political “bad actors”¹ can commit them
alone, and indeed the more likely it is that these “bad” political actors depend, in order to
incite, commit, or tolerate such human rights violations, on inherently neutral goods and
services provided for by economic actors, who merely want to do “good” business. After
all, and sadly speaking to their proverbial industrialization, even your “regular massacres”
cannot transpire without roads to the crime site, trucks bringing the perpetrators there, and
weapons to carry everything through. In a globalized world, where such instrumentalities
for gross human rights violations are traded more or less freely to an ever-increasing degree,
one of the key questions then is how to draw the line between legitimate commercial
activities and those that trigger corporate complicity liability—a question that Sabine
Michalowski has rightly raised and lucidly answered in her extensive and thoughtful essay,²
which I was asked to briefly comment on.³

To meet this challenge, I will put some pressure on Michalowski’s comparative
methodology,⁴ her analytical treatment of aiding & abetting,⁵ and her not taking the analysis

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1. I borrow here Sabine Michalowski’s straightforward but nonetheless somewhat tantalizing term. See
generally Sabine Michalowski, Doing Business with a Bad Actor: How to Draw the Line Between Legitimate
2. See generally id.
3. Perhaps this is because I myself have given the aforementioned question some tentative thoughts in the
past. E.g., Christoph Burchard, Ancillary and Neutral Business Contributions to ‘Corporate-Political Core
4. Infra Part I.
5. Infra Part II.
beyond this classical mode of participation. Maybe paradoxically at first glance, I do so because I share her fundamental sentiment that “to knowingly assist in the commission of gross human rights violations is not an acceptable business practice.” I feel that this is indeed the crucial issue, the discussion of which should be brought to the fore more forcefully. And I also feel that we should continue on the regulatory turn that Michalowski initiates in her essay. Hence, we should focus on which regulatory modes are “best” in governing business interactions with bad actors under the present circumstances. In this respect, I posit that aiding and abetting liability (whatever the substantive contents of this doctrine may be) is but one of many regulatory tools, and at this point of time not necessarily the most balanced one available to curb prima facie neutral “business transactions that facilitate gross human rights violations other than by providing the direct means for their commission.”

I. COMPARATIVE LAW: ADVANTAGE OR DISADVANTAGE?

In order to prepare for her important doctrinal argument that the actus reus of corporate complicity liability should be determined on a case-by-case basis and that the appropriate mens rea standard should be one of knowledge, not of purpose, Michalowski follows a comparative methodology. In an informative and meticulous undertaking, she brings together jurisprudence from the U.S. Alien Tort Claims Act (ATS), international criminal law (the ICTY’s Perišić versus the SCSL’s Taylor ruling), and ordinary U.S. criminal cases. The tertium comparationis (that is, what these sources of law have in common) is aiding and abetting liability (the doctrinal common denominator) in dual-purpose scenarios (the factual common denominator). In the latter, Michalowski places the core of her analysis: when does doing seemingly ordinary business with known human rights violators, such as commercial transactions that are at face value neither socially injurious nor manifestly condemnable (like, for example, the building of roads for or the selling of trucks to a state, which later makes use of both commodities when abusing human rights), lead to criminal liability? In her focus on aiding and abetting liability, Michalowski finds an overarching doctrine under which courts balance countervailing interests and policy considerations when deciding “under what circumstances an otherwise legitimate act turns into an unlawful act of assistance in a third party’s crimes or human rights violations.”

This comparative exploration has two advantages: First, it uncovers rich illustrative material about the complexities and controversies surrounding the doctrinal discrimination between lawful and unlawful commercial involvements with bad actors under the aiding and abetting framework. Second, it better facilitates assessment of the different approaches and their interconnections than would a theoretical treatise not grounded in comparative examples.

6. Infra Part III.
7. Michalowski, supra note 1, at 454.
8. Id. at 445.
9. Id. Part IV.A.
10. Id. Part IV.B.
11. Professor Michalowski equates aiding and abetting liability with secondary complicity liability. See generally Michalowski, supra note 1. Dual-purpose assistance is assistance that may facilitate both lawful and unlawful activities. See id. at 430.
12. Id. at 442.
13. For example, Michalowski compares the case-by-case versus the typified approach concerning the actus
With this two-step methodology (a comparative report followed by analysis and policy recommendations), Michalowski is in excellent company, as it is a common mode of analysis, and perhaps the “gold standard” in comparative criminal law, at least in Germany and continental Europe. Yet, frankly, I take some issue with it. To speak generally and very summarily: First of all, this methodology tends to obscure key findings since they are often lost in the flood of comparative and analytical information. What is more, comparative approaches to criminal law frequently tend to suppress complementary, non-comparative analytical efforts (indeed, it is all too often “all or nothing” with comparative criminal law). And finally, when used to comparatively identify an “assembly kit” of doctrines in order then to normatively assess them, such an “evaluative comparative law framework”14 tends to leave the actual assessments in normative limbo. To put it simply, the comparative methodological framework does not provide any normative direction in and of itself.

Albeit to a much lesser degree, Michalowski’s article is susceptible to this critique. For one example, consider Michalowski’s finding that “the choice of the mens rea standard of purpose must reflect [the court’s] view that it is acceptable that corporations pursue their business interests by knowingly facilitating human gross human rights abuses.”15 This truly significant finding regrettably stands in the shadow of the far more “modest [comparative] aim of analyzing and drawing conclusions from the implications of different approaches to determining the necessary actus reus and mens rea elements of corporate complicity liability.”16 What is more, this finding is not explored to a greater depth. We do not learn why courts deem (or even have to deem) it appropriate for economic actors to do business with bad political actors as long as this is not done with the purpose of facilitating gross human rights violations. Is it that these courts only follow their own ethical—in this case, most probably their own neo-liberal—convictions (for example that one should not moralize the markets, or that the market regulates itself, such as by way of negative customer reactions to corporate complicity to human rights abuses)? Or is that these courts merely exercise judicial restraint and play out a specific constitutional role (e.g. because the appropriateness of doing business with a “bad actor” is a matter of foreign policy, and thus exclusively to be determined by political, not by judicial actors17)? Finally, I feel that the normative basis of Michalowski’s reaction to the above-mentioned finding, her countervailing sentiment that it is not appropriate for business actors to knowingly assist in the commission of gross human rights violations,18 has much more to it than we learn in her Article. Her main argument against a mens rea standard of purpose, and in favor of knowledge as the necessary mens rea standard, is that the former eliminates all “incentive for corporations to refrain from knowingly aiding and abetting abuses where to do so would be beneficial for business.”19 Indeed, under a purpose approach, there would be virtually no

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15. Michalowski, supra note 1, at 454.
16. Id. at 404.
17. Consider the example, rightly mentioned by Michalowski, of the in re South African Apartheid Litigation case: Is it for U.S. courts to hold business actors liable for doing business with an apartheid regime when the U.S. government, “consistent with most other world powers, supported and encouraged business investment in apartheid South Africa”? Id. at 418.
18. Id. at 454.
19. Id. at 456.
reason to implement “human rights due diligence” when doing business with bad actors. This speaks to what I would like to call a “regulatory turn” in shaping liability of commercial actors. Thus, as I understand it, the most rational approach to corporate complicity liability would be to induce self-regulatory processes within the economy in order to deprive bad political actors of the instrumentalties of gross human rights violations. With this regulatory turn, Michalowski has introduced an extremely promising analytical and normative idea, which I would like to probe a little further.

In light of this idea, it makes perfect sense that Michalowski brings both civil (tort) and criminal law together in her comparison. Indeed it follows that disciplinary context plays an even lesser role than Michalowski herself admits, as civil and criminal law ultimately serve similar regulatory functions and pursue the same goal, of forcing actors to regulate their own behavior. What is more, once we focus on regulating business with bad actors that are prone to committing gross human rights violations, and once we take the regulatory particularities of this scenario seriously, many jurisprudential limitations of corporate complicity liability that Michalowski produces comparatively and that she is wary of normatively become less convincing. Indeed, in light of this regulatory turn, her tertium comparationis may well be a little over-inclusive. First, the limitations on aiding & abetting liability suggested in Perišić do not quite fit, as the case does not deal with a business actor’s liability. As I see it, it would not be self-contradictory to argue that business actors should not get involved with “bad actors” at all, and that they thus should be kept to higher standards than political actors, who may have to choose the lesser of two evils in the furtherance of legitimate political goals. Second, many of the limitations on aiding and abetting liability that we find in US domestic criminal complicity cases in the context of ordinary commercial transactions do not quite fit either. I hesitate to positively compare the shopkeeper selling a dress to a known prostitute (a hypothetical raised in Fountain) with a transnational corporation doing business with a regime known for its poor human rights record. There are at least two features that set both scenarios apart so that limitations to aiding and abetting liability developed in the former scenario cannot easily be transferred to the latter. First, the social harm inherent in gross human rights abuses is significantly greater than with an ordinary crime, like prostitution. This difference in degree is sufficient to warrant treatment as a difference in kind. Hence, it would not be a doctrinal contradiction to hold a local shopkeeper not liable for knowingly facilitating a crime by conducting business with the perpetrator while at the same time expecting a transnational corporation to disengage from any involvement with known human rights violators. Further, transnational corporations doing business with bad political actors are much more capable of self-regulation than a local shopkeeper. While one can expect transnational corporations to implement human rights due diligence and compliance procedures, this may be too much to ask of a shopkeeper. Again, the differences in degree warrant consideration as a difference in kind. Accordingly, while one could—and I am only speaking hypothetically here—raise the mens rea of “ordinary” aiding and abetting liability

20. Id. at 455.
21. Michalowski, supra note 1, at 408.
23. See Kevin Jon Heller, Why the ICTY’s “Specifically Directed” Requirement Is Justified, OPINIO JURIS (June 2, 2013), http://opiniojuris.org/2013/06/02/why-the-ictys-specifically-directed-requirement-is-justified/, who supports the decision in Perišić by recalling the Western support of rebels in Syria despite widespread knowledge that these rebel groups commit gross human rights violations.
24. United States v. Fountain, 768 F.2d 790, 798 (7th Cir. 1985).
to the level of purpose in order to save an ordinary businessperson from excessive complicity liability, an international corporation need not necessarily, as a matter of doctrinal equal-treatment, enjoy the same privilege when dealing with a bad actor. In effect, it appears to me that Perišić as well as domestic criminal cases are but doctrinal “smoke grenades” that distract from the principal policy question, whether commercial activities with known human rights violators are to be considered legitimate or illegitimate.

II. AIDING & ABETTING: REGULATING THROUGH UNCERTAINTY?

Strikingly, Michalowski makes light of this question when arguing that courts have,

[i]instead of applying the existing liability standards to determine the lawfulness of the underlying act in the circumstances of each case (which is how complicity cases are dealt with outside of the commercial context, . . . approached the question the wrong way and allowed the definition of [aiding and abetting] liability to be guided by the perceived legitimacy of the commercially motivated act of assistance and adapted the applicable liability standards in light of this.  

I beg to differ. The burden of justification lies with the one curtailing freedom, and thus in our case with the one regulatorily intervening in seemingly neutral business with a bad actor. With regard to criminal liability—and as a criminal lawyer, I admit disregarding tort law in this respect—, I would argue that in order to ascribe direct or derivative criminal responsibility for any gross human rights violation one has to at least establish that the imputee has brought about the illegitimate and socially unacceptable risk that a wrong be committed down the line of events. This applies within and without the commercial context, and allows for case-by-case as well as for typified ascription of illegitimacy or unacceptability. For example, we should not hold an ordinary driver criminally responsible for a traffic accident that she or he has brought about while complying with all traffic regulations, because this behavior, although inherently risky, is considered socially appropriate, even necessary for our way of life. Conversely, we can hold the driver of a getaway car criminally responsible as an accomplice, because we do not consider this appropriate conduct, namely because it supports a dangerous principal violation of the law. Contrary to what Michalowski insinuates, this justification of accomplice liability is not the default, however. It is perfectly reasonable if courts, when deciding on the reach of aiding and abetting liability (be it with regard to the actus reus, the mens rea or their interconnection) allow themselves to be guided by the perceived legitimacy or illegitimacy of a commercially motivated business transaction with a bad actor. It goes without saying that this provides little insight into where to draw the line between legitimate and illegitimate business transactions with a bad actor. In other words, it is still very much

25. Michalowski, supra note 1, at 458.
27. I of course make no such claim with regard to civil (tort) liability.
28. As a side note, my exclusion of criminal responsibility would also apply if the driver intended to bring about an accident, for evil wishes alone do not warrant criminal punishment.
29. On the level of an individual person or a court, this decision will require a leap of faith. However, on a meta level, discourse (between courts, policy makers, businesspersons, academics, and so forth) will bring about more clarity.
open for debate whether the commercial rationale or motivation of doing business with a known human rights violator requires a higher or lower liability standard. Yet this debate cannot be solved by maintaining that the perceived legitimacy of such transactions bears no significance. Similarly, this debate cannot be solved by a doctrinal and imputational default that supposedly establishes the illegitimacy of these transactions. In my eyes, there is and should be no such default.

So how, then, should we draw the line between legitimate commercial activities and those that trigger corporate complicity liability? While Michalowski interprets this “how” substantively, arguing that the actus reus of aiding and abetting should be determined on a case-by-case basis and that the correct mens rea should be knowledge, I would like to explore the procedural dimension of the problem instead. This will shed light on aiding and abetting liability as a regulatory means that aims at inducing serious human rights due diligence when doing business with bad actors. When analyzed accordingly, some apparent truisms about aiding & abetting (truisms that transcend all doctrinal disputes) become less self-evident. First, it is courts that demarcate the socially acceptable (and even the socially desirable) from the legally condemnable. In our case, this is the distinction between legitimate and illegitimate business transactions with “bad actors.” But why is this a task for courts, and not for policy makers, international institutions, or specialized regulatory bodies? After all, it could be argued that such actors enjoy better economic expertise and greater (input, throughput or output) legitimacy. Second, courts decide cases ex post facto, after an economic actor has already gotten involved with a bad political actor. Why should this ex post perspective prevail? After all, and seen from the ex ante perspective, neither can an economic actor know for certain what will result from its involvement with a bad actor nor can it obtain (within the aiding & abetting framework) advance notice on this issue, such as by obtaining binding preliminary approval or disapproval of a business deal. This highlights how aiding and abetting liability—under both tort and criminal law—is inherently retrospective. From the point of view of a rational businessperson, who wishes to calculate liability risks prior to a commercial transaction, this retrospectivity translates into legal uncertainty. In turn, this uncertainty rises with doctrinal controversy about the preconditions of aiding & abetting liability, and would be multiplied further if Michalowski’s substantive argument that the actus reus of aiding and abetting be determined on a case-by-case rather than a typified basis were to prevail.

In light of the above-mentioned regulatory turn, this uncertainty has to be appreciated as a regulatory means; we are indeed regulating through uncertainty. As we can learn from the law and economics literature, uncertainty has regulatory impact, namely “effects on compliance with legal standards.” To cut a great amount of theory short, one can hypothesize: The greater the substantive uncertainty, and the lower the likelihood of being brought to court, the more we can expect a rational businessperson to undercomply with a given legal doctrine (such as aiding and abetting gross human rights violations). Given that—as Michalowski has so skillfully shown—the reach of complicity liability is highly controversial among courts and between jurisdictions, and also given that complicity charges against transnational corporation for human rights violations are still rarely brought to court, this equation essentially means that corporations are not regulatorily incentivized to implement human rights due diligence; they will not assess and implement measures to prevent aiding and abetting liability, because they are neither able nor compelled to do so.

There is, however, a countervailing hypothesis, on which Michalowski’s case against a typified approach to the actus reus of aiding and abetting liability rests. This hypothesis provides that the more a profit-maximizing economic actor is left in the dark on what is considered a legitimate transaction with a bad actor, the better we can impede any creative compliance with (read: conscious circumventions of) detailed legal standards. If—or so the argument goes—corporations knew exactly what qualified as acceptable business behavior, they could and would adapt accordingly. If, to use Michalowski’s example, the provision of commercial goods and services were typically considered a legitimate business transaction as long as these commodities did not have inherently harmful qualities and were not used directly to carry out gross human rights violations, a corporation could (at least most of the time) escape liability simply by selling nonmilitary goods and services to known human rights violators.

This raises the essential question: Shall we, when determining the substantive preconditions of aiding and abetting liability, make good use of uncertainty in order to prevent creative compliance, even though transnational corporations cannot and will not implement human rights due diligence due to said uncertainty? In other words, shall we use uncertainty to avoid the socially wasteful race between “hare and tortoise” (as one could metaphorically describe the relationship between regulators and an adaptive economy)? Or should we give corporations clear and determinate but typified directions that they can use in their decisionmaking and compliance procedures (for example, by way of typified “red flag” warnings), even if these directions are likely to be under- (and also over-)inclusive and even if they will thus prompt their creative circumvention? Truth be told, this is not a question that this brief comment can or should address. But I feel that it cannot be answered in a mere normative or even doctrinal manner and without recourse to empirical research. That is also the reason why I am not fully convinced by Michalowski’s comparatively grounded but at the end of the day normative rejection of a typified approach to the actus reus of aiding and abetting liability in the context of gross human rights violations. After all, maybe—and this “maybe” is for future research to clarify—human rights would be better served by incentivizing typified human rights due diligence based on a typified characterization of the legitimacy or illegitimacy of doing business with a bad actor, instead of going the whole nine yards and deciding upon this legitimacy on a case-by-case basis by applying doctrinal principles that are yet to be determined.

III. BEYOND AIDING AND ABETTING: “FOREIGN TRADE LAW OFFENSES” AS REGULATORY ALTERNATIVES?

Stepping beyond the scope of Michalowski’s research, I feel that one has to look beyond both aiding and abetting liability and the *lex lata* in order to assess the best means “to draw the line between legitimate commercial activities and those that trigger corporate complicity liability.”32 In this respect, once we pivot on how to regulatorily induce self-regulatory processes when doing business with bad actors (with the aim of reducing access to neutral instrumentalities of gross human rights violations), one can do what Michalowski—with very good cause, of course—has chosen not to do: adopt the policymakers’ perspective. This brings to light that the gradual “proceduralization” of

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white-collar criminal law has introduced new content to policymakers’ ‘regulatory paint-box,’ content that enables us to draw this line by different means and ends.

By the proceduralization of white-collar criminal law, I refer to a rationalization of criminal law that prioritizes the \textit{ex ante} perspective (contrary to the \textit{ex post} perspective of traditional modes of liability like aiding and abetting). This contemplates other actors, such as specialized regulatory agencies, playing a more active role, as opposed to the traditionally dominant criminal justice apparatus. The prime examples of this stem from foreign trade (or embargo) law offenses that make it punishable either to trade with certain explicitly listed bad actors in general or to trade specific goods and services in particular. Such offenses often allow for the defense that a competent actor permitted a particular business transaction prior to its execution. From the point of view of transnational corporations, who want to determine their liability before engaging in business with known human rights violators, this yields more foreseeability. And in shifting the legitimacy assessment to official actors, these offenses (normatively as well as factually) relieve the economy of a task that it is hardly competent to carry out; that is, to distinguish socially acceptable from socially condemnable business transactions. This would increase legal certainty, inducing more stringent self-regulatory compliance and due diligence procedures by economic actors who wish to get involved with bad actors. Hence, such procedures, if applied correctly, would ensure that, in the long run, bad actors will no longer gain unfettered access to the instrumentalities of gross human rights violations.

Is this a more promising vehicle than aiding and abetting liability? In other words, is it more promising to prevent gross abuses of human rights indirectly by way of independent offenses, which regulate the trade of neutral commodities between a good economic actor and a bad political actor, than to hold economic actors derivatively accountable as accomplices to human rights violations committed by their bad commercial partners? Frankly, I do not know. But the details of aiding and abetting liability can hardly be assessed in isolation without looking beyond this classical mode of participation. Michalowski has thus raised the essential question, namely on how to draw the line between legitimate and illegitimate commerce with bad actors. But in order to answer it holistically, we should not only look to doctrinal substance, but also to the who and the when. Is it for the economy to draw the line when doing an aiding and abetting risk assessment? Or is this for a national or international legislator to do when concretizing foreign trade restrictions? Or should courts instead draw the line by deciding ex post facto whether a commercial transaction with a bad actor created the unacceptable risk of a gross violation of human rights? In conclusion, Michalowski’s careful comparative exploration of the “substantive how” (of drawing the line between legitimate and illegitimate business transactions with bad actors) is an important and thought-provoking step towards clearer liability standards. But it is but one of many steps. I very much look forward to learning what further steps Michalowski will take in the future.

\textsuperscript{33} At least when compared to aiding and abetting liability.