ANNEX A

ELEMENTS OF DISCUSSION ON THE LIABILITY OF CORPORATIONS UNDER INTERNATIONAL LAW

The following legal arguments have been discussed by the jury regarding the absence of formal legal provisions as to corporate obligations under international law. Although these arguments were not included in the format used in the final conclusions findings of the London session, they are proposed as an annex to further highlight the 'unsatisfactory' nature of the current law in not recognising corporation's direct legal obligations under international law in circumstances whereby there have been judicial decisions confirming that corporations do have actionable rights arising under public international law, and that there are powerful arguments to support the contention that international law ought to impose direct legal obligations on corporations. Indeed the ICJ Expert Panel believed that there are no insurmountable conceptual obstacles to imposing criminal liability on businesses as legal entities under international law[1].

Although the war crimes trials that followed the Second World War were not conducted against corporations (certain German companies) but against the natural persons who ran them, the fact remains that some excerpts from the judgments handed down in the cases concerned refer to violations perpetrated by the corporations themselves. For instance, it was found that the seizure of certain companies of the allied states by German companies violated international law; in the *I.G. Farben* case, in which the accused were 23 senior executives of the I.G. Farben Company, the judgment convicting them states, inter alia, that:

> "Offences against property […] were committed by Farben […] Farben proceeded permanently to acquire substantial or controlling interests in property contrary to the wishes of the owners. […] The action of Farben and its representatives, under these circumstances, cannot be differentiated from acts of plunder and pillage committed by officers, soldiers, or public officials of the German Reich. […] Such action on the part of Farben constituted a violation of the Hague Regulations."[2]

Similarly, in the *Krupp* case in which 12 executives of the German Krupp company were convicted of subjecting foreign workers to forced labour in inhuman conditions, the judgment states, inter alia, that:

"the confiscation of the Austin plant based upon German inspired anti-Jewish laws and its

1 The ICJ Report, Vol II, p.57.
2 U.S. Mil. Trib., Nuremberg, *Krauch et al.*, 29 July 1948, *Ann. Dig.*, 1948, pp. 675-676.

subsequent detention by the Krupp firm constitute a violation of Article 43 of the Hague Regulations […] it is conclusively shown that throughout German industry in general, and the firm of Krupp and its subsidiaries in particular, prisoners of war of several nations including French, Belgian, Dutch, Polish, Yugoslav, Russian, and Italian military internees were employed in armament production in violation of the laws and customs of war."[3]

In these two cases the United States Military Tribunal in Nuremberg convicted corporations of breaches of IHL although they had not been charged.

- Contemporary practice further confirms that corporations can be bound by international norms under public international law. Thus the ECHR has ruled that a corporation can demand compensation for damage resulting from a violation of the European Convention on Human Rights:

"In the light of its own case-law and that practice, the Court cannot therefore exclude the possibility that a commercial company may be awarded pecuniary compensation for non-pecuniary damage.
The Court reiterates that the Convention must be interpreted and applied in such a way as to guarantee rights that are practical and effective. Accordingly, since the principal form of redress which the Court may order is pecuniary compensation, it must necessarily be empowered, if the right guaranteed by Article 6 of the Convention is to be effective, to award pecuniary compensation for non-pecuniary damage to commercial companies, too." [4]

It also conceded that a company could invoke the rights secured "to everyone" within the jurisdiction of a state party to the Convention (Art. 1). Thus, with regard to Art. 8 of the Convention, the Court has stated the following:

"The Court reiterates that the Convention is a living instrument which must be interpreted in the light of present-day conditions (see, *mutatis mutandis*, *Cossey v. the United Kingdom*, judgment of 27 September 1990, Series A no. 184, p. 14, § 35 *in fine*). As regards the rights secured to companies by the Convention, it should be pointed out that the Court has already recognised a company's right under Article 41 to compensation for non-pecuniary damage sustained as a result of a violation of Article 6 § 1 of the Convention (see *Comingersoll v. Portugal* [GC], no. 35382/97, §§ 33-35, ECHR 2000-IV). Building on its dynamic interpretation of the Convention, the Court considers that the time has come to hold that in certain circumstances the rights guaranteed by Article 8 of the Convention may be construed as including the right to respect for a company's registered office, branches or other business premises […]".[5]

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[3] *Id.*, *Krupp et al.*, 31 July 1948, www.mazal.org/archive/nmt/09/NMT09-T1327.htm, pp. 1353 and 1376.
[4] ECHR, Grand Chamber, *Comingersoll S.A. v. Portugal*, 6 April 2000, § 35.
[5] *Id.*, *Sté. Colas Est et al. v. France*, 16 April 2002, § 41.

In the *Wall* case, the ICJ stated:

> "Moreover, given that the construction of the wall in the Occupied Palestinian Territory has, *inter alia*, entailed the requisition and destruction of homes, businesses and agricultural holdings, the Court finds further that Israel has the obligation to make reparation for the damage caused to **all** the natural or **legal persons** concerned." [6] (emphasis added)

International law recognises that a corporation possesses rights. It is unsatisfactory in these circumstances not to recognise that corporations are subject to direct legal obligations under international law (although they have always been subject to indirect obligations, such as in the case of UN anti-terror conventions referred to below which require states to incorporate corporate criminal responsibility in respect of these specific conventions.

- On the more specific question of the criminal responsibility of a corporation under international law, it may be noted that this was already recognised in commercial law in 1957 when abuse of a dominant position and agreements designed to distort competition were characterised as crimes in the Rome Treaty establishing the EEC (Arts. 85-86, which became Arts. 81-82 after the 1997 Amsterdam Treaty and Arts. 101-102 after the 2007 Lisbon Treaty). Since then other international legal instruments have required states to incorporate the criminal responsibility of corporations in their legislation: for instance, the 1999 UN International Convention for the Suppression of the Financing of Terrorism (Art. 5), the 2000 UN Convention against Transnational Organized Crime, which criminalises participation in an organised criminal group, the laundering of proceeds of crime, corruption, and obstruction of justice (Arts. 5, 6, 8, 23), and the 2001 European Convention on Cybercrime (Art. 12).

- It can therefore be argued that the criminalisation of war crimes and crimes against humanity by the above-mentioned instruments is by no means restricted to natural persons. While it is true that the jurisdiction of international criminal courts is limited to natural persons *stricto sensu* (Statutes of the ICTY, Art. 6, ICTR, Art. 5, ICC, Art. 25, § 1; etc.), this only concerns the courts' jurisdiction *ratione personae* and does not concern the applicability of the substantive law contained in the courts' statutes. The statutes either refer to crimes committed by "persons" (Statutes ICTY, Arts. 3-5, ICTR, Arts. 2-4) or the criminalising provisions are couched in impersonal terms (for instance, Arts. 7-8 of the ICC Statute begin with the words "crime against humanity means" or "'war crimes' means"; these words are following by a list of types of behaviour without any precise indication of the legal status of the perpetrator – natural person or corporation).

Other instruments such as the 1949 GCs (common Arts. 49/50/129/146) or the Convention on the

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[6] *Legal Consequences of the Construction of a Wa11 in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 198, par. 152.

Prevention and Punishment of the Crime of Genocide (Arts. IV-VI) refer to “persons” without limiting the scope of application of the crimes they define to natural persons.