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***DEPARTMENT OF POLITICAL SCIENCE, LAW,***

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Master's degree in

Human Rights and Multi-level Governance


## Corporate Criminal Liability Under International Law


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# Contents

Acronyms:

CSR: Corporate Social Responsibility

GC: Global Compact

GP: Guiding Principles

HRC: Human Rights Committee/Council

ICC: International Criminal Court

ICTR: International Criminal Tribunal for Rwanda

ICTY: International Criminal Tribunal for the former Yugoslavia

IHL: International Humanitarian Law

JCE- Join Criminal Enterprise

IMT: International Military Tribunal

MNCs: Transnational/Multinational Corporations

OHCHR: Office of the High Commissioner for Human Rights

RPE- Rule of Procedure and Evidence

SG: Secretary General

SR: Special Representative

STL: Special Tribunal for Lebanon

UN: United Nations

UNGA: United Nations General Assembly

Introduction

Nowadays there is a growing concern in the world that multinational corporations are enjoying and yielding power to our society or environment due to their finances.

The problem of corporate involvement in international core crimes metastasized fast beyond the borders of their host states due to the dominant dynamics of the twentieth century.

Emancipation of peoples after world war I and decolonization after World War II led to the formation of many new economically poor and politically weak states which created the ground for human rights violations by the creatures of multinational corporations.

After World War II Globalization reduced the transactional costs of doing business in multiple jurisdictions and in turn conferred enormous wealth on multinational corporations concretely global economic expansion which increased capital flows and liberalized international trade regimes allowed multinational corporations to dramatically increased their international operations during the cold war and afterward. [1]

The best example of when the criminal perpetrator does not carry out the final criminal act but participates by supporting those who do is Saddam Hussein's massacre of the Kurdish people in northern Iraq. [2]Hussein was not empowered to release the largest poison gas attacks with chemical weapons, with the components of the chemical weapons such as mustard gas, sarin, tabun, and tear gasses provided to him by German firms which allowed Iraq to produce 150 tons of mustard agent and 60 tons of Tabun during the war as well as the American corporation the Bechtel Group had an agreement with Saddam Hussein to build the chemical plant in Iraq. Firms in Germany and France outstripped all others in selling the most important specialized

[1] Joe R. Paul, Holding Multinational Corporations Responsible under International Law, 24 Hastings Int'l & Comp. L.Rev., 2001, p. 285

[2] B. P. Montgomery & F. Hennerbichler, The Kurdish Files of Saddam Hussein's Ba'ath Regime: Struggle for Reconciliation in Iraq, Scientific Research Publishing Inc., 2020, pp. 183-185

chemical industry equipment that is particularly useful for producing poison gas. Without this equipment, none of the other imports would have been of much use. [3]

Finally, these dynamics elevated the corporation from a key aider and abettor in criminal activity at the domestic level into the international arena.

Traditionally natural people were never considered a subject of international law. Historically the corporation always was civilly liable. This approach changed after World War II due to globalization or technological development alongside the development of human rights law, the doctrine of corporate criminal liability has gained worldwide attention, as the best alternative to react when facing international human rights abuses.

The evolution of corporate criminal law has faced many challenges over the years. Before the 20th century, it was believed that a corporation lacked the mens rea which are required for attaining a criminal conviction. The failure to find the mens rea was caused for several reasons: One of the main reasons why the mens rea was failed to find was that corporations are intangible legal entities therefore it became hard to prove the criminal intent of a fictional being as well as the major punishments imposed for a criminal activity i.e., imprisonment, could not be applied for corporations since the corporations are intangible legal entities.

The Nuremberg trial was an important start because international criminal tribunals which were erected in Germany and Japan prosecuted German executives for their company's support and acknowledged that without the German major chemical firm Farben Corporation Germany could not wage war. However, it was only moral recognition of responsibility.[4] The legal dimension of corporate criminal liability remains in the realm of controversy and speculation.

*Content of the thesis*

This thesis aims to discuss the causes which led to the commission of international crimes and International human rights violations by corporations and analyze that the corporates still enjoy a culture of impunity due to ineffective implementation of legal mechanisms at the international level resulting in that parent companies of multinational corporations still are failed to hold

[3] G. Milhollin & K. Motz, the means to make the poisions came from the West, NY Times, Apr.13, 2003

[4] Ronald C. Slye, Corporations, Veils, and International Criminal Liability, 33 Brook. J. Int'l L. 995, 2008

criminal liability for wrongdoings carried out by subsidiary. At the same time, this thesis aims to discuss the measures that could be for the strengthening of legal mechanisms in dealing with cases of corporate prosecution for international crimes. The thesis is divided into five chapters.

***The first chapter*** of this thesis considers how developed corporate criminal liability is and what kind of measures has been taken by international society toward corporate criminal liability as well as what type of challenges face the international legal system nowadays.

***The second part*** of the thesis provides an overview of the debate regarding International criminal tribunal jurisdiction. Firstly, I start the discussion with consideration of the Nuremberg trial's decision regarding legal precedents for collective accountability of corporations then continue the discussion about corporate agents' responsibility before ICC, Special Tribunal of Lebanon, African court of justice and human rights alongside the consideration their Statutes and protocols. The second part of the thesis there is also discussed the precedential decision of the Special Tribunal of Lebanon which held the presidential decision when specifically considering the legal entity as a natural person in the New TV S.A.L. Appeal Decision and recognized a criminal liability of the corporation.

***The third chapter*** analyzes the differences between corporate criminal and civil liability. There are discussed some precedent cases under Alien Tort Statute regarding the forum non-convenience and the latest decision regarding the Lafarge case as an example of corporate complicity in a crime against humanity under French criminal law.

***Forth chapter*** provides an overview of the theories of corporate criminal liability and discussed some domestic criminal legal system that deals with the prosecution of corporations for human rights violations alongside the presidential case studies.

***The final chapter*** provides a discussion about universal jurisdiction over jus cogens conduct what kind of advantages and disadvantages are raised between domestic and international prosecution and analyzes these obligations and what is necessary to make reparations under international law.

*Methodology*

I used secondary and primary sources. As secondary sources, I consulted mostly books, and articles found in journals covering the different themes of this thesis, corporate criminal and civil liability, theories of corporate criminal liability, litigation, or corporate prosecution at the domestic or international level. For the research I also used online news agencies to analyze the case, I used the Court decisions, precedent case law the statutes of the tribunals, and different countries' criminal or civil law.

*State of the art*

The debate over the corporation as a subject of international law never ends therefore the interest in legal entities as atrocity contributors are always higher.

This thesis has presented a criticism of the literature addressing the clarification of corporate criminal liability through a discussion of the theories of corporate criminal liability.

Nowadays we inhabit a more orderly global society where opportunities for corporate criminal accountability are highly improved but corporate prosecution for international crimes is still debatable as well as there are still no appropriate international mechanisms to deal with corporate human rights abuses. It is also a fact that justice often can be obtained neither in the country where the Multinational corporations have committed human rights abuses, nor in a developed country, and certainly not at the international level.

# CHAPTER I. INTERNATIONAL LEGAL SYSTEM AND CORPORATION

## 1. Historical development of corporate criminal liability

The development of corporation dates back from the ancient Rome Numa Pompilius ruling era (715-672 B.C ) when the second king of ancient Rome found that the city was ripped to pieces by Sabines and Romans he decided to subdivided these two rival groups into many smaller camps by establishment separate societies of carpenters, dyers, shoemakers, goldsmith,

brought about the aggregation into a single company appointing every company appropriate councils, courts or observances.[5]

From this time corporations were restricted by the kings though the peace of Westphalia in 1648 ended Europe's devastating thirty-year war and inaugurated a new era in Europe and world affairs by drawing out the sovereignty of the person of emperors and rulers and placing it within a legal person known as the state. Finally, Westphalia took the religion out of the rule and state sovereignty became a global governing principle.

The concept that self-regulation within the corporate industry is more effective than governmental regulation is rooted in American industrial revolution when newly independent American colonies rebelled against corporate monopoly resulted in increased demand for the corporate shareholder's limited liability[6]. Finally, the limited liability corporation as the dominant form of economic organization gained acceptance only after 20th century.[7]

If the corporations like citizens once were seen to be subject to the sovereignty of their home states now, they are viewed as a subject of international law and regulation.[8]

Since the 1990s, the impact of business operations on human rights has attracted a significant amount of attention at the international level, presently fifty-one of the hundred largest economies in the world are corporations, whilst forty -nine are countries. Due to the lobbying efforts and sheer force, corporations have increased rights and few corresponding obligations, therefore the legal system is not ready to deal with this challenge.

There are still no international mechanisms to deal with corporate human rights abuses therefore the international human rights legal framework remains largely state centered. The

[5] W. Blackstone, supra note 55, pp 468-469

[6] J. Hurst, the legitimacy of the business corporation in the law of the United States: 1780-1970, pp.24-25.

[7] Harvey L. Pitt and Karl A. Groskaufmanis, "Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct" Georgetown Law Journal 1559, Vol. 78, no. 5, 1990, pp.1575-1977

[8] Michael J. Kelly, Prosecuting Corporations for Genocide, Oxford University Press, 2016, pp.49-55

fact that justice often can be obtained neither in the country where human rights violations have occurred, nor in a developed country, and certainly not at the international level.[9]

During the last few centuries, corporations had become more dominant in society, and their potential to cause significant harm to the public increased.

In the early stages of its evolution, the artificial nature of the legal entity created the greatest obstacle in imposing criminal liability on corporations. During the 18th-19th century, the threat of harm caused by corporate activities increased significantly therefore the courts began to regulate and punish corporations as public entities for failure to repair public conveniences such as deteriorated roads, decaying bridges, etc., though corporate criminal liability was limited of nonfeasance. During the 19th century, the courts extended criminal liability to corporations for the improper performance of legal acts resulting in extending the civil law doctrine of vicarious liability to criminal cases in both the UK and the United States of America whilst for traditional mens rea offenses the British courts developed the identification doctrine. Until the development of vicarious liability or identification doctrine corporations could not act physically.

In HL Boulton Co Ltd v TJ Graham and Sons Ltd, case the court held that the corporation has a brain to control its action, and hands that hold the tool. Some of the people such as agents or servants in the company may be considered as hands who can do the work but cannot represent the mind or will, only directors and managers represent the directing mind and will of the company.

This approach that the offense of every servant or employee of the legal entity does not attribute to this corporation since the former is the minds" of the entity and the latter merely its hands" initiated by the House of Lords, in 1915 in a civil matter and was later transformed by English courts the realms of criminal law in the early 1940s

In other jurisdictions, such as the United States of America, the employees or servants are considered agents and the basis for the criminalization of corporate conduct represents a vicarious liability drawn from civil law. However, this position was not lightly attained

[9] N. Bernaz, Corporate Criminal Liability Under International Law, Journal of International Criminal Justice, Vol. 13, No.2, 2015, pp.318-319

between 1915 and 1940 period when an Asiatic Petroleum was charged with manslaughter for erecting an electric fence that electrocuted a miner.

This decision was criticized and argued based on the arguments that the corporation is an entity in which individuals are united within a bond of association that modifies their mental process therefore a corporation should be answerable criminally as well as civilly for the acts of its primary representatives."[10]

When the courts began to rationalize the essence of the human element in the corporate arrangement, they also realized that if corporations could benefit from the skills of their human elements, they should also bear the burden arising from the criminal conduct of those individuals because they acted as a legal entity.

From an early age it was clear that corporations possessed many of the same capacities such as owning property or entering contracts that were attributable to a natural person though the corporation was an abstraction, it had no mind and therefore had no knowledge and criminal intent.

By the end of the 19th century, it was established that a corporation was indictable for a breach of duty consisting of inaction, though corporate criminal liability was not established for crimes involving personal violence.

Over this period also developed a corporate acting theory which held that corporations could be responsible for the action of their agents. Later early 20th century when the theory of vicarious liability was well-developed courts could impose corporate criminal liability for the misconduct of employees acting within the scope of their employment.[11]

Despite some hindrances to applying international criminal law to legal entities in the mid-twentieth century the concept of international corporate crimes is now common. several international treaties have expressly included corporate crimes, including the apartheid

[10] CRN Winn "The criminal responsibility of corporations" (1929) 3 Cambridge Law Journal pp398 - 406

[11] K. F. Brickey, Corporate criminal accountability: A brief history and an observation, Washington University law Quarterly, 1982, Vol.60:393 pp. 397-403

convention and treaties governing corruption and bribery hazardous wastes, and other environmental violations.[12]

## 2. International legal system toward corporate criminal liability

It is fact the drafting in 1982 of a United Nations Code of Conduct for Transnational Corporations and the 2003 UN norms on the responsibilities of transnational corporations and other business and human rights failed on the other hand development of the standards of business and human rights in the modern age started around the 1990s when the giant sportswear company Nike was plagued with supporting by child labor, human trafficking or slavery in Pakistan and Cambodia whilst American Corporations Nestle USA, Inc as well as Shell Corp. were alleged of human rights violations in Cote d' Ivoire and Nigeria. [13]

After this scandal, the U.S passed Federal business supply transparency on trafficking and slavery bill in 2014 which requires all companies including retailers and manufacturers with global revues that exceed $100 million to publicly disclose and address conditions of child labor, human trafficking in their manufacturing networks in the U.S. or abroad.[14]

Before this bill, the trafficking victim protection reauthorization act came into force in 2003 as the first comprehensive federal law which imposed corporate civil liability for corporate negligence and created a private right of action for victims of child labor, human trafficking, etc. against fashion brands and retailers.

Thus, both corporations became the leaders in the adoption of codes of conduct and monitoring for transparency of corporate social responsibility which encouraged some important initiatives regarding the adoption of the norms on the responsibilities of Transnational Corporations and other business enterprises regarding human rights. The culmination of the combat was the adoption of two most important documents by the UN.

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[12] B. Stephen, „The amorality of profit: transnational corporations and human rights", Berkeley Journal of International Law, Vol.20, 2002, pp. 69-70

[13] Nestle USA, Inc, v Doe, 141 S. Ct., para 1931-1935, 2021

[14] H.R.3226-Business Supply Chain Transparency on Trafficking and Slavery Act of 2015, Sec. 3, See Text - H.R.3226 - 114th Congress (2015-2016): Business Supply Chain Transparency on Trafficking and Slavery Act of 2015 | Congress.gov | Library of Congress

In 2005 the Commission on Human Rights adopted its first resolution E/CN.4/RES/2005/69 which sets out the mandate of the Special Rapporteur of the secretary-general to identify and clarify standards of corporate responsibility in the case of human rights violations. In 2007 the Human rights council renewed the mandate in resolution A/HRC/REC/5/1 resulting in the submission of "Protect Respect and Remedy Framework by Prof. Ruggie at the 8th session of the Human Rights Council in 2008 with the following points: to identify and clarify standards of corporate responsibility for transnational corporations and other business enterprises co[15]ncerning human rights as well as to elaborate on the role of states in effectively regulating the role of transnational corporations and other business enterprises concerning human rights and to clarify how can be implicated concepts such as "complicity" and "sphere of influence" for transnational corporations and other business enterprises.[16]

In 2005 the GA adopted the resolution 60/147 and submitted basic principles and guidelines on the right to a remedy and reparation for victims of serious violations of international human rights law at the national and international levels.

In 2008 the human rights council renewed the SRSG's mandate once again in resolution A/HRC/REC/8/7 resulting in the adoption of the United Nations Guiding Principles on business and human rights and the fulfillment of the SRSG's mandate establishment of a Working Group on Business and Human Rights.[17]

3. The UN Guiding Principles on business and Human rights

The UN Guiding Principles on Business and Human Rights was endorsed by the UN Human Rights Council in 2011, targeting the implementation of the protection respect and remedy framework which obliges states to enforce laws that require business enterprises including transnational and other business enterprises that are owned or controlled by the states regardless of their size, structure, and location to:

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[16] Human Rights Council Resolution 5/1, "Protect, Respect and Remedy: a Framework for Business and Human Rights," A/HRC/5/1 , April 2008.

[17] OHCHR, "Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises".

- respect human rights,
- set out clearly that all business enterprises domiciled in their territory or jurisdiction respect human rights throughout their operations
- make an influence on other initiatives at the regional level, such as domestic measures with direct extraterritorial legislation and enforcement including criminal regimes that allow for prosecutions based on the nationality of the perpetrator no matter where the offense occurs as well as the development of multilateral soft law instruments such as redrafting Organization of Economic Co-operation and Development Guidelines for Multinational Enterprises.[18]

Under the first pillar focusing on protecting both home and host states must take responsibility to ensure that businesses operating in conflict areas are not contributing to human rights violations. For this aim, states must assist legal entities in identifying risks to prevent and mitigate any abuse because of their activities. States must also deny access to public support for business enterprises involved in human rights violations as well as states must ensure that their policies, legislation, regulations, and enforcement measures are working effectively to address these violations though there might be the chance that the host State is unable to protect human rights effectively, therefore the home State must assist business organizations regardless of their location.

Under the second section corporate responsibility to Respect human rights business enterprises wherever they operate must take appropriate measures to mitigate or avoid infringing on the human rights of others independently of states' willingness to fulfill their human rights obligation. The responsibility of the business enterprise to respect human rights is related to internationally recognized human rights such as the rights of indigenous peoples; national or ethnic, religious and linguistic minorities, women and children, persons with disabilities, and migrant workers and their families which are enshrined in Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights together with the eight ILO core conventions. When it comes to enterprises operating in conflict areas, they must respect international humanitarian law and should express their respect through a statement of policy that is approved at the most senior level of the business enterprise.

[18] OECD Guidelines for Multinational Enterprise, para.1.

Under the section, human rights due diligence business enterprises must assess the actual impact of human rights and the potential impact that the business enterprises may cause through their activities. Where business enterprises have large numbers of entities business enterprises should identify general areas where the risk of harmful human rights impacts is most significant, to conduct due diligence for human rights violations across them all.

The problem is that there is not one single definition of due diligence and it has very different meanings in business and international law. Human rights lawyers interpret due diligence as a standard of conduct required to respect an obligation, meanwhile businesses use it as a risk management process while the Guidelines use both approaches indiscreetly, without ever acknowledging their differences or how the two concepts relate to one another.[19]

When it comes to complicity it may have both non-legal and legal meanings. The business enterprise may be perceived as being complicit in the acts of another party where they are seen to benefit from abuse committed by that party while most jurisdictions prohibit complicity in the commission of a crime and held the criminal liability of business enterprises in the case though the relevant standard for aiding and abetting must knowingly provide practical assistance that has a substantial effect on the commission of a crime.

Under the due diligence obligation, the business enterprises also should communicate openly through in-person meetings, consultation with affected stakeholders, or formal public reports to show how they intend to address their negative human rights impacts, especially in conflict zones. The form of communication should be frequent and accessible, provide sufficient information, as well as keep the relevant stakeholders safe and protect commercial confidentiality.

States should also ensure governmental departments, agencies, and other state-based institutions that handle business activities implement the state's human rights obligations into policies, and laws and transfer this information to departments and agencies that shape business

[19] R. Davis, The UN Guiding Principles on Business and Human Rights and conflictaffected areas: state obligations and business responsibilities, International Review of the Red Cross 94, no. 887, 2012, pp 961-979.

practices including those responsible for investments, trade, and labor matters or securities regulation.[20]

In 2017 when the Human Rights Council with Resolution 17/4 established the Working Group on the issue of human rights and transnational corporations and other business enterprises it was composed of five independent experts with a mandate to promote the effective dissemination and implementation of the Framework and the Guiding Principles, to classify, exchange, and encourage good practices and lessons learned, to seek and receive information from Governments, transnational corporations, national human rights institutions, etc. and to make recommendations regarding the remedial process at the national, regional, and international levels and how to make it more accessible, with a specific focus on children, women living in conflict areas.[21]

WG is also responsible to develop a dialog on relevant themes and work in constant cooperation with relevant United Nations and other international bodies, the treaty bodies, and regional human rights organizations such as the Office of the United Nations High Commissioner for Human Rights, the International Labour Organization, the World Bank and its International Finance Corporation, the United Nations Development Programme and the International Organization for Migration, national human rights institutions, civil society organizations and other regional and subregional international organizations.[22]

The WG must also provide support to progress capacity-building and the inclusion of the Guiding Principles into the domestic legal system as well as conduct country visits and guide work of the Forum on Business and Human Rights to report annually to the Human Rights Council and the General Assembly [23]furthermore in 2017 HRC through Resolution provided

[20] Rachel Davis, "The UN Guiding Principles on Business and Human Rights and conflict-affected areas: state obligations and business responsibilities," *International Review of the Red Cross* 94, no. 887 (2012): 962-973.

[21] Skinner Gwynne L., and O. De Schutter, " the third pillar: Access to Judicial Remedied for Human Rights Violations by Transnational Business", 2013

[22] UN Guiding Principles on Business and Human Rights (UNGPs).

[23] OHCHR, "Working Group on the issue of human rights and transnational corporations and other business enterprises," United Nations Human Rights Office of The High Commissioner

the implementation of the Guiding Principles in light of the Agenda 2030 for Sustainable Development[24]

4. Corporate social responsibility (CSR)

The concept of corporate social responsibility is derived from social concerns about violations of human rights during business operations. Corporate social responsibility encourages corporations to adopt an ethical code of conduct and behave according to the values and objectives of the society

There are four types of corporate social responsibility: Financial responsibility, Legal responsibility, Ethical responsibility, and Philanthropic responsibility in other words Carrol's CSR pyramid which developed in 1991 to explain that corporations have not only economic and legal obligations but also ethical and philanthropic responsibilities, therefore, this new responsibility of the legal entity embodied in the human rights and ethical responsibilities represent the broader social agreement between business and society. Furthermore, Carrol's CSR pyramid tries to identify how corporations should take social responsibility to adapt their economically profitable, ethical, and legally compliant business behavior.

[24] Human Rights Council Resolution 35/7, "Business and human rights: mandate of the Working Group on the issue of human rights and transnational corporations and other business enterprises," A/HRC/35/7 (14 July 2017)

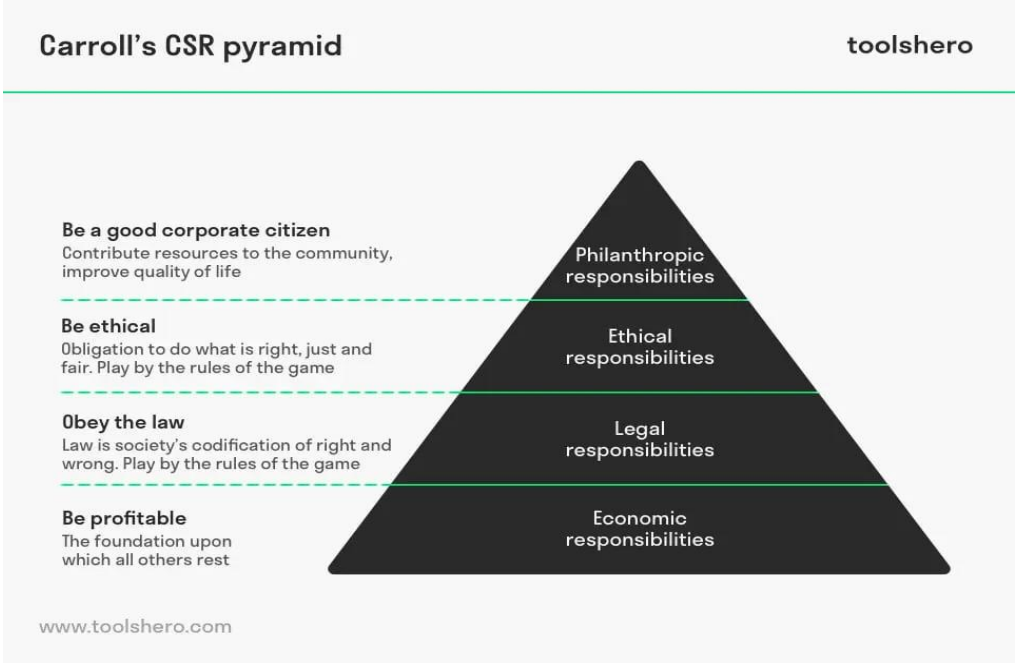


Figure 1: Carroll's pyramid of CSR

*Financial responsibility:*

The economic responsibility of business is the primary responsibility for legal entities in society which is oriented to produce goods and services that society needs and sell them at a profit. The profit performs three main functions:

It estimates the effectiveness of business activities

it measures the quality of risk necessary for the successful business activities

it protects the future supply of capital.

Economic responsibility as a pillar of corporate social responsibility ties together philanthropic, legal, and environmental responsibility through increasing social awareness, ensuring transparent financial reporting, or ensuring a diverse workforce.

*Legal responsibility*

There exists disagreement between the various views regarding the nature and scope of corporate legal obligations and human rights responsibilities of business

On the one hand, human rights responsibility constitutes the totality of responsibility of a corporation toward society

On the other hand, the laws, and regulations as codified ethics of the society are considered as the legal responsibilities of organizations to operate and function within those rules which determine how corporations can conduct their business activities according to the government requirements and law, but it represents partial fulfillment of the social agreement between business and society.

*Ethical responsibility*

When it comes to ethical responsibility it constitutes a new, border social agreement between corporations and society which goes beyond laws and regulations and constitutes high moral standards and practices that have been adopted by society that have not necessarily been written down.

*Philanthropic responsibility*

Philanthropic obligations like ethical responsibility can be considered as the true essence of corporate social responsibility towards a society which includes the voluntary activities and contributions of corporate resources as a mean of improving community well being [25]

5. Corporate obligations under international law

In the nineteenth century according to the traditional view, only states and their agents could be liable under international law. The great expansion of international human rights law in the two post-war decades is a clear indication that the aim of international law is not only to regulate relations between states but also between states and individuals.

[25] A.B. Carrol and K.M. Shabana, International Journal of Management Reviews the business case for corporate social responsibility: A review of Concepts, Research and Practice, Blackwell Publishing Ltd, 2010 pp 86-91

An examination of the Universal Declaration of Human Rights would seem to indicate that the use of the expression ‘‘every individual and every organ of society’’ in its preamble can be considered as evidence that the Declaration can apply to all non-state actors and also to companies. Similarly, the International Covenants on Civil and Political Rights and on Economic, Social, and Cultural Rights, which are binding treaties, contain in the first paragraph word “group” which says that nothing in the Covenant may be interpreted as implying for any State, group or person cannot be engaged in any activity which aims of the destruction of any of the rights and freedoms

After the evolution of international criminal law and international humanitarian law since the Second World War International law applies not only to states and individuals but also to non-state entities resulting in the creation of some essential conventions that have created obligations for companies in specific areas:

- the International Convention on the Suppression and Punishment of the Crime of Apartheid which holds the responsibility of ‘‘organizations, institutions and individuals for committing the crime of apartheid’’.
- The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal states that Parties shall prohibit ‘‘all persons’’ from transporting or disposing of hazardous waste
- United Nations Convention against Transnational Organized Crime, adopted by the General Assembly 2000

In addition, several "soft law" instruments deal exclusively with the responsibility of transnational corporations in respect of human rights:

- The Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy was adopted by consensus by the Governing Body of the International Labour Organization, which includes representatives of the member states' employers and workers and also of the private sector.
- The Organization for Economic Cooperation and Development Guidelines for Multinational Enterprises, drawn up in 1976 and revised in 2000, emphasizes the duty of enterprises to respect human rights.

- Finally, the Norms on the Responsibilities of Transnational Corporations and other Business [26]Enterprises concerning Human Rights, adopted by the UN SubCommission on the Promotion and Protection of Human Rights at its 55th session in 2003

One clear example that the international legal system is slowly but surely moving toward is that European Union Commission also updated a definition of Corporate Social responsibility resulting in the integration of social, environmental, ethical human rights and consumer concerns into their business operations

There are also two important initiatives worth mentioning: The first concern is about the adoption of the Malabo Protocol by the Member States of the African Union in June 2014, which will empower the African Court of Justice and Human Rights (ACJHR), which is a milestone for the regional court and the African continent to exercise jurisdiction ratione materiae over 14 international and transnational crimes such as genocide, a crime of aggression, war crimes, crimes against humanity, terrorism, money laundering, trafficking in drugs and persons, etc. as well as to include corporations among the possible defendants which recognize that For this Statute, the Court shall have jurisdiction over legal persons, except for States. The mental element of the corporate intention (mens rea) to commit an offense may be established by proof that it was the method of the corporation to do the act which made up the offense whilst corporate knowledge of the commission of an offense may be established by proof that the actual or constructive knowledge of the relevant information was possessed within the corporation. And this Knowledge may be possessed within a corporation even though the relevant information is divided among corporate personnel. as well as criminal responsibility of legal persons shall not exclude the criminal responsibility of natural persons who are perpetrators or accomplices in the same crimes.

The second is related to a specific provision on corporate criminal liability in the Draft Articles on the Prevention and Punishment of Crimes Against Humanity, adopted in 2016, which is still under consideration by the UN International Law Commission through its adoption in the first reading represents already a major development in the field of corporate criminal liability for international crimes.

Unfortunately, these international initiatives, in themselves, do not directly provide judicial remedies for victims of corporate human rights violations. Therefore, one of the key problems

[26] E. Mongelard, Corporate civil liability for violation of international humanitarian law Volume 88 Number 863 September 2006Pp. 668-673

facing victims of corporate human rights abuse is access to justice since these victims are not able to bring claims against the companies in their own countries frequently the state can be the main perpetrator of the abuse, making the companies operating within its territory which makes the difficulty to obtain justice before that state's judicial system.[27]

## CHAPTER II. INTERNATIONAL CRIMINAL TRIBUNALS JURISDICTION

### 1. What is a corporate crime?

Corporations are artificial bodies formed for profit that engage in businesses for the mutual benefit of people who share in the wealth they create. During business operations, a legal entity can commit an offense with help of its agents. Corporate crime is distinguished from the crime committed by an individual since first, it includes a legal entity that can encourage or deter crimes. Second, it arises different criminal responsibilities for individuals and corporations.

Individual criminal responsibility arises whenever a person with intent knowledge or recklessness engages in a conduct irrespective of the resulting harm while the collective conduct is performed on behalf of the authority of a corporation, this conduct may be ascribable to that legal entity as well as to each person who has been a part of the decision-making process or the execution of the decision.

Many scholars don't agree with the broad definition of crime, and they consider only these corporate offenses which are prosecuted under criminal law can be named "criminal" since when the corporation is fined under administrative or civil law corporation doesn't receive a stigma therefore corporate crime can be considered as a socially harmful act of omission or commission committed by individuals within the scope of their employment punishable by the state which must deter the corporate crime by imposing special monetary sanctions or non-fine criminal penalties such as restitution or remediation for violations of their duties and

[27] Nadia Bernaz, Corporate Criminal Liability under International Law, Journal of International CriminalJustice 13 (2015), 313 330

subjecting to strict criminal liability for their agents' wrongdoings as well states should induce companies to take appropriate prevention and policing measures.

Under customary international law, atrocious acts that can be considered as an attack on the international legal order represent international crimes and are prohibited by international law therefore most of the state to prevent, investigate and prosecute international crimes committed by corporations has implemented complex mechanism of international cooperation in fighting international crime.[28]

The offenses that are considered in corporate crime have a general characteristic of criminal behavior through judicial procedures that are different for corporate violations than for other violations of criminal law.

2. Legal person before International Tribunals

All the contemporary international criminal tribunals make human beings the only possible defendants when it comes to the core crimes this institution can prosecute. None of them explicitly has jurisdiction over legal persons such as corporations, they are only based on the principle of an individual (i.e., natural persons) criminal liability. In truth, there is no conceptual reason why corporations should be immune from liability under international criminal law.

The STL is a modern example of an international criminal tribunal asserting authority over corporations though currently there is no existing international criminal tribunal that has jurisdiction over a legal entity specifically for genocide. But this does not mean that the jurisdiction of an existing tribunal should not be broadened to include corporations or that domestic prosecutions cannot be commenced. Furthermore, the absence of international criminal jurisdiction over companies cannot be considered as the legal entity is not under international legal obligations.

Genocide, war crimes, crime against humanity, the crime of aggression are core international crimes prosecutable before the international criminal court (ICC), the international criminal

[28] Marshall B. Clinard, Peter C. Yeager, Corporate crime, Transaction Publisher, New Jersey, 2006, pp 14-16

tribunal for the former Yugoslavia, and the international criminal tribunal for Rwanda, But the statute creating these organs don't imbue them with jurisdiction over legal persons.[29]

When it comes to The ICJ does not hear criminal cases and only has jurisdiction over indisputable cases between states, not individuals. ICJ may provide advisory opinions when requested to do so by organs or approved agencies of the United Nations or has given opinions on questions concerning the 1948 Genocide convention, but none included corporations.

Luis Moreno Ocampo first chief prosecutor for the ICC has stated his desire to hold corporations and corporate officers accountable for criminal violations of international law. Although the Rome statute prescribes does not exist jurisdiction over legal entities, only over natural persons working for the corporations.[30]

There was no idea during the drafting of the Rome Statute claimed by any delegation that the "legal persons" could not demonstrate the requisite legal capacity to be the bearers of international obligations. If other treaties provided for corporate criminal liability for degrading the environment, terrorism, financing, and corruption which are direct forms of liability the same corporation can be also held criminally liable for complicity in international core crimes.

*3.* Nuremberg tribunal

In the aftermath of World War II, the Allied Powers the united states, the Soviet Union, France, and Great Britain established the first international tribunal, the International Military Tribunal in Nuremberg, Germany to prosecute and punish the major war criminals of the high-level Nazi leader from 1946 to 1949. [31]Since World War II, there has been a dramatic shift in customary international law. Before the Nuremberg trials, natural persons were not considered subjects of international law. Firstly, the criminal responsibility of organizations or legal entities appeared at the Nuremberg tribunal which applied the concept that the subjects of law in any legal system

[29] Rome Statute of the international criminal court art 6. U.N. Doc A/CONF.183/9 (1998), entered into force 1 July 2002

[30] Michael J. Kelly, Prosecuting Corporations for Genocide, Oxford University Press, 2016

[31] United States v. Goring, Trial of the major war criminals before the International Military Tribunal Judgment, 223, October 1946

are not necessarily identical in the extent of their rights or nature, individuals, not only states, have rights and duties under international law even though their status is not equal to the states.[32]

The trials were an important start because the tribunal acknowledged the importance of corporations when it declared Germany could not have waged war without the Farben Corporation.

## 2.1. Case Study- IG Farben Trials

*Legal precedents for collective accountability*

Subsequently Nuremberg trial held a dozen German executives and owners of the IG Farben trust, The flick trust, and the Krupp firm accountable for their company's support of the Nazi war effort and their use of slave labor but not their role in the Holocaust

At Nuremberg Tribunal, corporate business leaders as agents were indicted for:

- providing weapons and raw materials for conducting the aggressive war (the Farben, the Krupp),
- benefiting on a large scale from the illegal confiscations of plants and other private and public property in the occupied countries (the Farben, the Flick),
- supplying gas to the concentration camps (Zyklon B), and
- employing concentration camp inmates and other forced laborers as slaves in their factories (the Krupp, the Farben, and Roechling).[33]

The legal basis for these trials was the Allied Control Council Law No. 10 of 20 December 1945, which contained definitions of crimes and descriptions of the modes of liability. [34]

[32] Wash. &Lee L. Rev 1219, 2005, p.1216

[33] Chinese JIL (2013), p. 52

[34] Control Council Law No. 10: Punishment of Persons Guilty of War Crimes, Crimes against Peace, and Humanity, Amtsblatt of the Control Council in Germany No, 3, January 1946

The charter of this tribunal also contained some provisions on criminal organizations which says that at the trial of any individual member of any group or organization the Tribunal may declare that the group or organization of which the individual was a member was a criminal organization and In cases where a group or organization is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring individuals to trial for membership before national, military or occupation courts.

### *IG Farben and Krupp: acquittals for providing weapons / raw materials for crimes against peace*

The top management (Vorstand) and members of the supervisory board of IG Farben had been acquitted of complicity and conspiracy in many crimes, including the planning, preparation, initiation, and waging of wars of aggression, they were also charged with involvement in acts of plunder and spoliation whilst the court In United States v. Krupp case held that the business leaders were charged for preparing, planning, initiating, waging in crimes against humanity. As tribunal acknowledged the Krupp firm was one of the most valuable single contributors to the German war effort, though the evidence demonstrated that no Krupp officials had attended the meetings where aggressive intentions were organized. Finally, the prosecution rigidly limited responsibility to those who belonged to Hitler's inner circle since the court alleged that the accused had not taken relevant part in conspiring with the German government, and they had no actual knowledge in their waging of war therefore they were acquitted of complicity and conspiracy in crimes against peace.[35]

[35] Trial of Alfried Felix Alwyn Krupp von Bohlen und Halbach and Eleven Others (Krupp Trial), Unites States Military Tribunal, Nuremberg, Law Reports of Trials of War Criminals (UNWCC), Vol. X 1949. Pp..84-85

***Spoilation and plunder or occupied territories as a war crime***

The military Tribunal proved beyond a reasonable doubt that private property had unlawfully been confiscated in the invaded territories to establish a chemical factory which was hugely beneficial for the Farben corporation.

As the tribunal explained Hermann Schmitz was found guilty beyond the reasonable doubt not because he was a chairman of the board of directors of Farben Corporation but because he knew Farben's program therefore criminal responsibility does not automatically attach to the executive for membership of the company its necessary the agent of the corporation must be a participant in the crime or being aware of the illegal act.[36]

On the other hand, the Farben judgment was different regarding the Flick case. the military tribunal held that Flick had violated Hague Regulations when operating the Rombach plant, which was in occupied territory without the consent of the French corporation which was the owner[37]. finally, the tribunal mitigated punishment since the exploitation had not been to flicks personal advantage, he had not been aware of the unlawful confiscation therefore his acts don't constitute the contribution for systematic plunder of the Hitler regime.[38]

In the same IG Farben case, the court noticed that IG Farben had benefited tremendously from the unlawful seizures of plants in occupied territory, enabling the corporation to establish its chemical empire. Reversely, the fact that Flick did not reap the benefits from his investments in the Rombach plant which accrued to the legitimate owners, served as a reason to mitigate punishment

[36] Florian Jessberger, On the Origins of Individual Criminal Responsibility Under International Law for Business Activity: IG Farben on trial, 8 J.INT'L CRIM. Justice 783, 2010

[37] The Flick Case, n.34

[38] M. Lippman, The other Nuremberg: American Prosecutions for Nazi War Criminals in Occupied Germany, 3 IND.INT'L & COMP. L. REV.1 1992

***Enslavement and employment of forced labor***

when it comes to forced labor, The Tribunal held that the plant management lacked powers of control and could not influence the allocation of forced labor since they did not have free access to the concentration labor camps

***supply of essential commodities***

One of the most conspicuous forms of corporate assistance to the atrocities committed by the Nazi regime was the production and supply of poisonous gas, which was employed for the extermination of concentration camp inmates.

In the Farben case, three specific circumstances made the defendants released from this charge:

the gas was provided by a separate concern-Degesh, in which Farben had approximately 42 percent interest through Farben's executive board wielded no influence over Degesh's management policies.

large quantities of Zyklon B were supplied by Degesh to concentration camps, but it automatically doesn't mean that Degesh or Farben knew about its murderous purpose.

the extermination plans were kept under absolute secrecy which proves that was impossible that the accused could have had any knowledge of the use of Zyklon-B

Finally, the British trial convicted Bruno Tesch - the owner of the firm Tesch and Karl Weinbacher- the general manager of Tesch & Stabenow company for aiding and abetting murder. The court held that the Flick trust and its executives provided concentration camps with Zyklon B, a pesticide used by the Nazis in the gas chambers against millions of Jewish people during the Holocaust. [39]

Tesch, Joachim Drosihn, and Karl Weinbacher also were charged with a war crime since they provided poison gas to concentration camps well knowing the actual reason for using this gas[40]

[39]Trial of Bruno Tesch and Two Others (Zyklon B Case), British Military Court Hamburg, Law Reports of Trials of War Criminals (UNWCC), Vol. I, 1949, pp.93-102.

[40] E. Borgwardt, Commerce and Complicity: Human Rights and the Legacy of Nuremberg, in making the American Century,2014, pp.24-25

When it comes Mens rea requirements for criminal liability the corporation must have consented or at least accepted the actions of their agents, involving complicity in international crimes therefore knowledge and intent of persons acting on behalf of the corporation are attributed to the corporation itself.

The mens rea issue is clear and unproblematic in the IG Farben case when the court found that in respect of the charges of plunder and spoilation that some agents of this company occupying a leader position within the firm were aware whilst in Zyklon B the court deduced Bruno Tesch his guilty mind apart from the fact that he had suggested the use of prussic gas as a more hygienic method to kill the Jews

On the other hand, the charges of complicity in crimes against peace were dismissed, both in the IG Farben and the Krupp case since The defendants did not belong to the inner circle of the Nazi regime and were therefore not privy to the highly secret plans to engage in aggressive war.

Even the fact that these companies supplied weapons on a massive scale to boost Germany's rearmament did not make them complicit in crimes against peace, because rearmament as such was not a criminal offense.[41]

3. After the Nuremberg trial

Apart from the military tribunal cases, there is a couple of interesting domestic cases which give clear examples of corporate agents' criminal responsibility.

The Van Anraat case is important for several reasons. First, there was a strong functional connection between the war crimes and the nature of the assistance in this case as well as Van Anraat had strong cognitive and commercial skills

The Dutch businessman Frans Van Anraat who delivered some thousand tons of chemical weapons-Thiodiglycol to the Iraqi regime of Saddam Hussein from 1985 until1988 years was charged with complicity in genocide and war crimes before the district court of Hague since this chemical weapon were used by the Iraqi regime during the war with Iran as well as against

[41] Farrell Norman, Attributing Criminal Liability to Corporate Actors, 8 J. Int'l Crim. Just., 2010, pp.873-882

the Kurdish population as a whole or in part in northern Iraq resulted in thousand killed and injured with long term effects.

Finally, the district court held that it wasn't proven that van Anraat had the information from which he could have deduced the genocidal intent of his trading partner though he was convicted of complicity in war crimes.

The Appeals Court first discussed the means rea standard which requires proof of awareness and concluded that van Anraat knew that he delivered the Thiodiglycol to the Iraqi regime which could be used for manufacturing chemical weapons and had been used on the battlefield against the Iranian Enemy which is evidenced by concealing the nature of this commodity and its destination as well as the vast quantities rendered excluded the chance of any alternative use

When it comes to actus reus the appeals Court established that commodities which were supplied by Van Anraat were converted into chemical weapons for employment Therefore Van Arnaant was convicted as a natural person, as a director of his own company. Finally, this legal entity got huge profits from the selling of TDG belonged to its daily activities and the appeal court sentenced Van Anraat to a term of imprisonment of 17 years. [42]

Gus van Kouwenhoven was the President Direct of the Oriental Timber Company and its main shareholder during the second civil war in Liberia from 1999-2003 he was the head, heart, and hand of this company and had full powers to decide though wielded less control over the entire corporation then Van Arnaat. He was prosecuted by the court of Hague on charges of several crimes related to war crimes committed in a non-international armed conflict in Liberia 90s.

Finally, the company was accused of forcing tens of thousands of prisoners into torturous slave labor in factories constructed in and around concentration camps, but as attorneys claimed the executives simply followed orders from the German Government, Therefore the prosecution struggled to prove the extent of knowledge of individual executives and their participation in the genocidal project.

[42]Harmen G. van der Wilt Genocide, Complicity in Genocide and International v. Domestic Jurisdiction, Reflections on the van Anraat Case, 4 J.I. Criminal Justice, 2006, pp.239-240

After these trials, Kauwenhoven was charged with eight years in prison for only arms smuggling because the court of the first instance didn't find him guilty of war crimes and the corporation remained still intact. [43]

In 2008 Surprisingly the Court of Appeal acquitted him of all charges but in 2017 according to the decision of the supreme court of Hogue, he was convicted of 19 years in prison for illegal arms trafficking and complicity in war crimes in Liberia and Guinea. [44]

Finally, In February 2020 the magistrate ruled that Kouwenhoven could not be extradited to the Netherlands in terms of South Africa's Extradition Act since the crimes were not committed in the Netherlands.

## 4. Corporate agents before the ICC

International Criminal Court was established to guarantee lasting respect for human rights and the enforcement of international justice, which Preamble declared that the most serious crimes of concern must not go unpunished and that their effective prosecution must be ensured by taking appropriate measures at the national level and by enhancing international cooperation to eliminate impunity of the perpetrators for international core crimes and contribute to the prevention of such crimes though, in reality, it seems impossible for the prevention of war crimes, crimes against humanity and genocide to be delivered if corporate agents remain outside of the scope of investigations and prosecutions.

Under this Statute, Article 25(1)(3) (d)(ii) International criminal court can only prosecute natural persons and a person shall be criminally responsible for genocide, crime against humanity, war crimes, or a crime of aggression within the jurisdiction of the Court if the international contribution to the commission or attempted commission of such a crime by a

[43] L. van den Herik, The Difficulties of Exercising Extraterritorial Criminal Jurisdiction: The Acquittal of a Dutch Businessman for Crimes Committed in Liberia, 9 I. Criminal LR ,2009, p. 211

[44] Wim Huisman and Elies van Sliedregt, Rogue Traders: Dutch Businessmen, International Crimes and Corporate Complicity, 8 J. I. Criminal Justice ,2010 pp. 810-815.

group of persons acting with a common purpose made in the knowledge of the intention of the group to commit the crime.

Nowadays ICC does not have jurisdiction over corporate entities through corporate agents can be facilitators or drivers of atrocities, often with accountability. The concept of extending the court jurisdiction to legal entities "if the crime was committed on their behalf or by their officials" was suggested by the French plenipotentiaries at the preparatory committee in the establishment of the international criminal court in 1998.[45]

### 4.1. The French attempted to include corporate liability in the Rome Statute

During the adoption of the Rome Statute, some delegations held the view that providing for only the civil or administrative responsibility or liability of legal entities whilst others considered that responsibility should be extended to organizations lacking legal status. The proposal was quite limited to private corporations as opposed to state and public corporations and included the individual criminal responsibility of a leading member of a corporation.

According to this French proposal, the court may render a judgment over a legal entity for the crime charged, if: the natural person charged was in a position of control within the legal person under the national law and the crime was committed by the natural person acting on behalf of and with the explicit consent of the corporation during its activities.

A juridical person can be considered a corporation whose dominant objective is seeking private profit or benefit which is acting under the national law of a state as a non-profit organization.[46]

There are some reasons why this proposal was turned down by a majority vote. Firstly, this proposal reflects the agency theory which says that a legal person can only act through its organs or natural persons and their mens rea must be attributed to the legal entity which is opposite to the constructivist theory which shares the idea that legal entities can act and have a mens rea of their own. Second, the most vulnerable reason is that only these employees who

[45] William A. Schabas, A commentary on the Rome Statute (2d, ed), 2016

[46] Working Paper on Article 23, paras.5-6, A/Conf.183/C.1/WGGP/L.5/Rev.2, 3

July 1998.

exercise control within the corporation and act on behalf of the company can criminally implicate their employer.[47] The proposal highlighted the possible advantages of imposing criminal responsibility for corporations such as the possibility of securing compensation for victims of atrocity crimes and increased responsibility of corporate leaders who may aid and abet or be complicit in the commission of such offenses.

Another reason for the exclusion from the ICC jurisdiction was the inclusion of collective liability of legal entities which would diminish the Court's jurisdictional focus, on individuals.[48]

When the provision was drafted, the concept of corporate liability was not universally recognized, and many states did not allow for corporate criminal responsibility under their domestic legal regimes therefore the inclusion of such a provision would have proved to be a major obstacle regarding the implementation of a fundamental principle of complementarity which governs the relationship between the ICC and national legal system.

According to Article 17 of the Rome Statute, the states have the primary responsibility to prosecute international crimes. the statute of Rome allows the ICC to exercise jurisdiction only when states are unable or unwilling to investigate or prosecute without replacing judicial systems. States are unable or unwilling when they are shieldIng someone from his or her responsibility for ICC crimes, or when it has a weak legal system.[49]

Unfortunately, the proposal was withdrawn by the French delegation when it became clear that there was no possibility that it could be adopted by consensus.[50] However, twenty years after the drafting of the Rome Statute, many legal systems across the globe have recognized the principle of corporate criminal liability for atrocity crimes by adding offenses on corporate liability to their criminal codes.

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[47] Andre Nollkaemper and Harmen van der Wilt (eds.), System Criminality in

International Law (2009), p. 232.

[48] Caroline Kaeb, The Shifting Sands of Corporate Liability Under Internation-

al Criminal Law, 49 GEO. WASH. INT'L. REv. 351, at 353.

[49] O. Triffterer & Kai Ambos, A commentary to the Rome Statute of the International Criminal Court 986, (3d ed.), 2016

[50] Lydia de Leeuw, Corporate Agents and Individual Criminal Liability Under the Rome Statute, State Criminal Journal, Vol. 5 No. 2 (Autumn 2016), pp.242-267

This development has been accompanied by international instruments, such as multinational treaties, aimed at holding corporations accountable through provisions on corporate criminal liability as well as some special tribunals.[51]

## 5. The Special Tribunal of Lebanon

Alongside the ICC several internationalized tribunals have been established in cooperation with national governments to prevent human rights violations. After some years of negotiations between the Lebanese government and the United Nations in 2007, The special tribunal of Lebanon was established to carry out the investigation and prosecution of criminals responsible for the assassination of the former Lebanese Premier minister Rafic Hariri and 22 others in a bomb attack.[52]

The jurisdiction of the special tribunal of Lebanon generally covered specific periods corresponding to intense phases of unrest involving widespread human rights violations

Nowadays none of the statutes of the international criminal tribunals, recognize corporations as possible defendants to allegations of serious violations of international law through

the appeal panel of the special tribunal of Lebanon is the first hybrid court that held the precedential decision when specifically considering a legal entity as a natural person in the New TV S.A.L. Appeal Decision and recognized a criminal liability of a corporation. [53]

[51] Michigan Journal of International Law, Prosecuting climate crimes at the ICC, pp 498-500

[52] Martin Wählisch, "The Special Tribunal for Lebanon: An Introduction and Research Guide," Hauser Global Law School Program, New York University School of Law, 2012See, https://nyulawglobal.org/globalex///Special_Tribunal_Lebanon.html

[53] New TV S.A.L. and Khayat (STL-14-05/l/CJ), 2014, see https://www.stl-tsl.org/en/the-cases/contempt-cases/stl-14-05

## 5.1. Case study - The Special Tribunal Lebanon “Twin Case”/ The New TV S.A.L. and Akhbar Beirut S.A.L.

The Nuremberg Court famously held that despite the corporate moral obligation crimes against international law are committed by a natural person, not by abstract entities, and only by punishing individuals who commit international crimes can the provisions of international law be enforced. Since then, legal entities have gone unpunished for their criminal conduct under international law until this twin case which has paramount importance for the further development of liability of corporate entities in international criminal law since it represents the first time an International Criminal Tribunal defined a “ natural person” as a legal entity and asserted jurisdiction over the corporations which has been charged with contempt of court before an internationalized court, as well as adopted a broader definition of the crime of contempt to restrict a journalist’s freedom of expression and held that corporate criminal liability has become a general principle of law which is a legitimate source of international law.[54]

On the other hand, the case is limited in scope since it is "only" about an offense against the administration of justice, and not about a core international crime over which the Tribunal has jurisdiction. This fact became the reason for failing the tribunals to rely on this precedent, therefore it is necessary to expand their jurisdiction over contempt crimes beyond the scope of their core jurisdiction based on corporate criminal liability as a general principle of law.

Consequently, this decision is a major step moved forward in the development of corporate liability under international law which could have significant consequences in the business and human rights field.

[54] Monica Hakimi, In Re Akhbar Beirut & Al Amin, University of Michigan Law School Scholarship Repository, 2017.pp.134-137

***Background***

In August 2012 AL Jadeed S.A.L., Al Jadeed CO. S.A.L./NEW T.V. S.A.L. (N.T.V.), Lebanese broadcast media outlet with instructions of Ms. Al Khayat, Al Jadeed S.A.L.'s Deputy Head of News and Political Programmes Manager and one of the company's shareholders broadcasted five reports in which journalists approached alleged confidential witnesses in the Ayyash et al. Case, [55] related to the killing of 22 people including former Lebanese Prime Minister Rafik Hariri.

Another two Articles with similar content were published in January 2013 by Akhbar Beirut S.A.L a daily newspaper with instruction of Mr. Al Amin, Editor-in-Chief and Chairman of the Board of Directors of Al Akhbar.

The investigation against the individuals and corporations was conducted after the publication of names of individuals alleged to be witnesses before the Tribunal resulted in the Pre-Trial Judge in the Ayyash et al. case issuing a confidential order on 10 August 2012, directing Al Jadeed TV, not to disseminate and to remove any confidential information or materials allegedly related to witnesses before the tribunal from their website and any other resource accessible to the public and charges Akhbar Beirut S.A.L. and Mr. Al Amin with interfering with the Tribunal's administration of justice.

Despite the Judge's order Ms. Al Khayat, who was, at the time Al Jadeed S.A.L.'s Deputy Head of News and Political Programmes Manager, and one of the company's shareholders didn't obey the order and didn't ask the employees, agents, and affiliates to remove any confidential information from their websites.

[55] The Cases: Ayyash et al. (STL-11-01), The Special Tribunal of Lebanon, see, https://perma.cc/3TED-FSBK

**proceedings at the STL**

On 31 January 2014, Contempt Judge David Baragwanath issued orders instead of indictment against four persons, two natural persons, and two corporate entities.

In the indictment, Judge Baragwanath based on rule 60 bis of (RPEs) which provides for the authority to hold accountable those who knowingly interferes with the administration of justice, and stated that there were "sufficient grounds to proceed for contempt" against these four persons as there was enough prima facie evidence. Furthermore, prosecuting this crime does not in breach of the principle of legality since the Tribunal's power derives from its inherent jurisdiction to ensure the proper administration of justice. [56]

Finally, after reviewing all evidence the Contempt Judge Lettieri designated by the previous judge Baragwanath issued his judgments, finding:

**Al Jadeed TV and Ms. Khayat** are not guilty concerning the charges under **count 1** (knowingly and wilfully interfering with the administration of justice by broadcasting and/or publishing information on purported confidential witnesses in the Ayyash et al. Case)

**Al Jadeed TV** is not guilty concerning the charges under **count 2**. (With knowingly and wilfully interfering with the administration of justice by failing to remove from Al Jadeed S.A.L.'s website and YouTube channel information on confidential witnesses in the Ayyash et al. case,)

- **Ms. Khayat** is guilty of the charges under **count 2.**
- condemned **Ms. Khayat** to pay ten thousand Euros.[57]
- **Akhbar Beirut S.A.L.** was charged with **count 1** of contempt
- **Mr. Al Amin** was charged with **count 1** of contempt
- Sentenced Mr. Al Amin to pay a fine of 20,000 euros.
- Imposed a fine of 6,000 euros on **Akhbar Beirut corporate entity.**

[56] New TV S.A.L. and Khayat (STL-14-05/l/CJ), January 2014; & Order Designating Contempt Judge, Akhbar Beirut S.A.L. and Ibrahim Mohamed A1-Amin (STL-14-06/I/PRES), January 2014.

[57] The Cases: Al Jadeed S.A.L. & Ms Khayat ( STL-14-05) The Special Tribunal of Lebanon, see, https://www.stl-tsl.org/en/the-cases/contempt-cases/stl-14-05

The elements of corporate criminal liability (Actus reus and Mens rea)

In determining whether a person committed a crime, there were two issues to consider the concept of Mens rea and Actus reus derived from the Latin phrase *actus non facit reum nisi mens sit rea*, which means that just the act will not make a person guilty unless the mind or intent is also found to be guilty[58], therefore the basis of criminal liability lies in two main elements:

Mens rea - subjective element of crime when the perpetrator's state of mind or intent referred the culpable state of mind of the individual committing a prohibited criminal act

Actus reus - objective element of crime when the actual physical guilty act of committing the crime referred to the objective element of the external element of a crime which consists of three objective elements: Conduct which includes an element of the crime, Circumstances which make the act wrongful, Consequences- e.g., harm.

To establish that the acts or omissions of Al-Jadeed's and Al Beirut's agents trigger its criminal responsibility, the evidence must show that such individuals:

- acted within the scope of their employment
- had authority on behalf of the company and
- acted on behalf of the company.

Three objective elements of corporate liability such as crime, wrongful act, and harm are like those for natural persons but other elements concerning the attribution of the acts or omissions of a corporation's principals, employees, agents, and/or affiliates to only the corporation, therefore private acts, and other acts outside the scope of a person's agency are not attributed to the corporation.**[59]**

As The pre-trial judge asserted these corporations will be charged if the actus reus and mens rea of the agents and corporations in these cases would be satisfied, concretely:

- if the accused published information on purported confidential witnesses immediately not remove them from their websites.

[59] Ibidem, paras.23-59

- If such publication created a likelihood of undermining public confidence in the Tribunal's ability to protect the confidentiality of information relating to Tribunal witnesses. [60]
- If Ms. Al Kayat and Mr. Al Amin Knowingly and willfully interfered with the administration of justice
- If Ms. Al Kayat and Mr. Al Amin acted within the scope of their employment
- The corporate entity's agents- Ms. Al Kayat and Mr. Al Amin had authority on its behalf
- If Ms. Al Kayat and Mr. Al Amin acted on behalf of the company.

The pre-trial Judge Lettieri discussed the second element of mens rea for both cases and underscored that he did not find that the Akhbar Beirut/Al Amin or Al Jadeed New TV/ Ms. Al Khayat publications eroded public confidence or created the likelihood in the Tribunal.

After reviewing the evidence, including the testimonies of people the articles identified as witnesses, in the second case (Akhbar Beirut/Al Amin) Judge Lettieri found that:

Mr. Al Amin's articles created an objective likelihood that public confidence in the Tribunal would be undermined furthermore, such a likelihood was intended by the Articles' authors. As opposed to the previous case when According to the chapeau of Rule 60 bis (A), The contempt judge did not find Ms. Al Khayat guilty under Count 1 since "actus reus" of the offense had not been proven beyond a reasonable doubt, concretely as judge defined that:

*"The conduct must, when it occurred, have been of sufficient gravity to create, objectively, the likelihood of undermining the public confidence in the Tribunal's ability to protect the confidentiality of information about, or provided by, witnesses or potential witnesses, therefore, the personal feelings of a small number of people likelihood can only be proved through ascertainable facts."*

In addition, he also noted that "it would suffice if the publications created a real risk of the likelihood of that effect and not only proof of actual harm", though during the assessment of the harm, 3rd element of actus reus, the contempt judge didn't consider the episodes stated intention to reveal the identities of purported confidential witnesses, which in my opinion was

[60] Judgment, paras. 37–43

sufficient to prove that the Accused's conduct created a serious risk of undermining the public's confidence[61]

In my opinion, it is an error to require evidence through only "ascertainable facts“ to prove “the objective likelihood test” since the proper standard recognized in international law based on Rule 60 bis (A) of RPE which is equivalent to (ICTY Rule 77 (A)) requires proof of conduct which creates a real risk[62]

***Judge Lettieri's decision on jurisdiction***

When it comes to the legal entity of the contempt judge due to the lack of personal jurisdiction to hold contempt proceedings against legal persons, Al Jadeed's corporate media entity's criminal responsibility under count 1 and Al Akhbar Beirut's corporate entity's criminal responsibility under count 2 was dismissed because of the absence of a definition of legal entity.

In both cases Judge Lettieri relied on the canon - ubi lex voluit dixit, ubit noluit tacuit: one who wants something says it; one who does not want anything is silent and decided that the word “person” in Rule 60bis unambiguously applies only to natural persons and does not authorize the Tribunal to conduct contempt proceedings against legal persons. Furthermore, judge Lettieri explained that laws on a domestic level related to corporate liability provide for the criminal liability of the corporations as appose to international law, domestic laws also have established criminal responsibility to these legal persons and for their participation in the criminal proceedings.[63]

Thus, discussing the second case (Al **Akhbar Beirut/Al Amin*)*** Judge Lettieri deliberately refused to apply the findings of the Appeals Panel and insisted on the fact that **the New TV**

[61] Amicus Reply on the Judgment, para. 45-47

[62] Amicus Appeal Brief on the Judgment, paras 27-29, citing ICTY, Prosecutor v. Margetic, IT-95-14-R77.6, Judgement on Allegations of Contempt, 7 February 2007 ("Margetic Trial Judgment"), paras 64-70.

[63] New TV S.A.L. & Al Khayat, Case No. STL-14-05/I/CJ, July 2014

**S.A.L.** Appeal decision was a one and unique isolated decision from inter-national jurisprudences and it was only relevant for that particular case (Al Akhbar )[64]

**Judge Nosworthy Partially dissenting opinion**

Related to the binding effect of the New TV Jurisdiction Appeal Decision, the Appeals Panel, Judge Nasworthy argued that it would have been preferable for judicial certainty to avoid the fragmentation of the law, the Contempt Judge to follow the NEW TV Jurisdiction Appeal Decision and the pre-trial judge was not entitled to disregard it in Akhbar Beirut S.A.L.[65]

**Appeal panel's decision**

In October 2014, an Appeals Panel (Panel) overturned Judge Lettieri's decision on jurisdiction in Al Jadeed New Tv, deciding that:

***Rule 60bis Does Not Exclude Liability for Legal Persons***

The first issue the Appeals Chamber considered concerned the admissibility of the appeal after the Contempt Judge had *proprio motu* (on his initiative) certified the appeal and finally included that it indeed has jurisdiction over this issue.[66]

[64] New TV S.A.L., Karma Mohamed Tahsin Al Khayat Case NO. STL-1-40 05/PT/CJ/F0054/20140724/R001208-R001242/EN/dm., Judgment of contempt judge, July 2014, para.63.

[65] Judgment para 3-4

[66] New TV S.A.L. & Al Kayaht, Case No. STL-14-05/PT/AP/AR126.1 (Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings ), October 2014

***Interpretation of the Rules***

Firstly, the appeals chamber referred to STL RPE Rule 3 (A) which provides how the rules shall be interpreted in case of any ambiguity or lacuna in rules. Firstly, they shall be interpreted in a manner harmonious with the spirit of the statute and the principles of customary international law as enshrined in articles 31, 32, and 33 Vienna convention on the law of treaties (1969), in international standards of human rights, as well as the general principles of international criminal law and procedure and the Lebanese Code of Criminal Procedure. [67]Furthermore, Rule 3 (b) of RPE adds that any ambiguity must be interpreted as the most favorable to the accused. (dubio pro reo).[68]

In the decision of interpretation, the appeal panel relied on:

- Article 31 of the Viena Convention on treaties' general rules of interpretation says that a treaty shall be interpreted in good faith following the ordinary meaning
- As well as article 32 of the Viena Convention on treaties concerning supplementary means of interpretation which gives us the possibility to determine the meaning when the interpretation leaves the meaning ambiguous
- Article 33(4) of the Viena Convention on treaties determines that ‘” when a comparison of the authentic texts discloses a difference of meaning... the meaning which best reconciles the texts ... shall be adopted”

Furthermore, Vienna Convention on treaties 33(1) states that when a treaty has been authenticated in two or more languages, the text is equally authoritative in each language. Article 14 of the statute of STL says that the official languages of the Special Tribunal shall be Arabic, French, and English.[69]

In my opinion, it would give more unambiguous to these issues if the appeal judges explained their reasoning, but we should guess that the judges meant in their decision that Sometimes the English language contains gender language while other languages in these cases French

[67] Rule 3 (A) STL RPE.

[68] Rule 3 (B) STL RPE.

[69] Rule 14, STL RPEL

and Arabic languages don't which gives rise a different meaning to the official version in this context therefore making an assessment based on the gendered language in the English version, as the Contempt Judge had done, leads to ignoring the neutral, language while doesn't lead to ignoring the English version, as natural persons remain included.

the text of the rule 60 bis in all three official languages: Arabic, English, and French don't exclude legal persons and is not limited to only natural persons, Hence, "a person" in English, "une personne" in French and appropriate meaning in Arabic could mean a natural as well as a legal person in a legal context[70]

It is a fact that the report on the establishment of STL and Security Council Resolution 1664(2006) don't prescribe the personal jurisdiction of the tribunal[71] though the statute of the Lebanon Tribunal provides that the Tribunal shall have jurisdiction " over persons" responsible for international core crimes. the legal context of "persons" can include a natural human being or legal entity as well as It is the context in which the term is used that is often considered more important than its strict definition.

Therefore, the contempt judge when faced the ambiguity was mistaken in excluding legal persons from the ambit of the term "persons" in rule 60 bis[72]

***Jurisdiction***

Secondly, The appeal panel relied on some important articles of STL concretely: Article 1 of STL concerning Jurisdiction of the Special Tribunal which says that The Special Tribunal shall have jurisdiction over "persons", furthermore STL article 3 (2) (3) explains that superior shall be criminally responsible committed by subordinates under his or her effective authority and control and The fact that the person acted according to an order of a superior shall not relieve him or her of criminal responsibility

During the discussion of international standards on human rights, the Appeals Panel relied on the current trend and stated that

[70] Akhbar Beirut STL-1406/PT/CJ, supra note 17, para. 71. November 2014,

[71] Report on the Establishment of STL, S/2006/893, paras 19-20,

[72] The statute of the Special Tribunal for Lebanon, article 1, p.12

“Since the number of "states criminalizing the acts and conducts of legal persons are quite increased as well as some important steps are moved on an international level backed by the United Nations and the office of the High Commissioner for Human Rights concerning the effectiveness of domestic judicial mechanisms concerning corporations represents the base for recognition of corporate accountability by the Tribunal. [73]

Since there is no relevant international convention concerning the elements of corporate liability, nor international custom or general principles of law to rely on this law, the panel relied on the Lebanese criminal code which defines the owner of a journalistic publication or a television station could be either a natural or a legal person and could be criminally liable for the criminal activities of their directors' members of the administration, representatives, and employees when this "natural person":[74]

- was able to act on the corporate accused’s behalf and
- the criminal conduct was committed on behalf of the corporate accused.[75]

The appeal panel relied on this law along with the Lebanese court of cassation's interpretation of the words "employees" who act in the legal body's name based on the relevant powers granted him by this body, to attribute responsibility to a legal person, a specific natural person must be identified, and their criminal responsibility established[76]

The appeal panel also discussed this case from a moral perspective and found that the prosecution of only natural persons, rather than the legal persons that they serve, would fail to punish corporate cultures that encourage illegal behavior. Therefore, it would be contrary to the interests of justice, to shield legal persons when Rule 60bis does not restrict our inherent power to punish contemptuous acts.

[73] The U.N. Human Rights Council, The U.N. Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedie by Framework, UN Doc A/HRC/17/31, March 2011

[74] Judgment, paras. 44–45

[75] LCC, 2d paragraph of Article 210

[76] Jurisdiction Appeal Decision, para. 71. See also Al Akhbar Jurisdiction Appeal Decision, para. 58 .

Furthermore, the appeal panel also based on the Lebanese law on corporate criminal liability which says that Lebanon represents the domicile of the corporate accused, where the alleged acts and conduct in this case occurred.[77]

Finally, the appeal panel found that Rule 60bis is ambiguous and it covers both natural and legal persons themselves.

***Final decision***

The Appeals Panel of the Special Tribunal for Lebanon ("STL") located in Hague composed of Judge Ivana Hrdlickova, Judge Janet Nosworthy, and Judge Walid Akoum, issued its Judgment (with two Separate Opinions and one Partially Dissenting Opinion) stated at least, in Al Jadeed and Ms. Kayat case that the Contempt Judge, in applying his legal test for attribution to legal persons did identify Ms. Al Khayat as a natural person who had committed the relevant criminal conduct, but her conduct could not be attributed to Al Jadeed because she lacked the authority to act on its behalf, though on the other hand interpreting the rule to apply to legal persons does not oppose the principle of legality because it does not create a new offense or element of an offense.

Finally, the majority of the Appeals Panel confirmed Ms. Al Kayat's acquittal on both counts and set aside the fine of 10,000 Euros based on the argument that the pre-trial judge mistakenly found "beyond a reasonable doubt, when without sufficient evidence considered that Ms. Al Khayat's receipt of the email attaching the 10 August 2012 Order," was undoubtfully received and opened by her, Therefore a criminal responsibility of Al Jadeed(corporate entity) was dismissed on Count 2, not because of the lack of jurisdiction but for the lack of the mens rea of its representative Ms. Al Kayat.

Furthermore, as the Appeals Panel ruled there had been insufficient evidence to prove the broadcasts had "undermined public confidence in the Tribunal's ability to protect the confidentiality of information", therefore actus reus element of undermining public confidence has not also been established.

[77] New TV S.A.L., Karma Mohamed Tahsin Al Khayat Case No. STL-14-05/PT/AP/AR126.1, Appeal Panel's Decision, October 2014, para. 83-84

**Partially Dissenting Opinion of Judge Janet Nosworthy.**

The appeal panel's judge Nosworthy was the only one who in her partially dissenting decision shared the Amicus arguments and refused a pre-trial Judge Lettieri's position who unreasonably determined that Al Bassam had not been proven beyond the reasonable doubt that Ms. Al Bassam had knowledge of or was willfully blind to the court order or could remove the articled from ALl Jadeed's online platforms [78]since Ms. Al Bassam was fully notified of the order even though the evidence shows that she signed the report of service on Al Jadeed's behalf, on the 14th of August 2012[79], as well as Mr. Dsouki, Al Jadeed TV's one manager in his witness interview declared that he took his instruction from both Ms. Al Khayat and Ms. Al Bassam, therefore, contempt judge's determination that Ms. Al Bassam as Ms. Al Kayat's superior and the company's "director" and Head of News and Political Programs, did not have the same authority and ability as Ms. Al Kayat is illogical and unreasonable.

On the other hand, in her separate opinion judge Ivan Hrdlickova noted that Ms. Al Bassam's "specific ability to remove the episodes should not be considered synonymous with the fact that she was responsible for the news bulletin". Furthermore, no witness was called to testify at trial whether Ms. Al Bassam's role at Al Jadeed TV role gave her the ability to remove the Episodes from A I Jadeed TV's online platforms or not. [80]

This position denied judge Nosworthy and explained that the contempt judge unreasonable relied upon jurisprudence from the Lebanese Court of Cassation when determining employees who require explicit authorization from the relevant legal person to act on their behalf to attract criminal liability since Lebanese courts have not always required proof of explicit authorization by a legal person for an employee to act on its behalf there exist a lot of the number of

[78]Judgment, para.147-148.

[79] Judgment, para. 164, referring to Exhibit P00080.

[80] Judgment, para 4, referring to exhibit R001078, The appeals panel, STL-14—05/A/AP Separate opinion of Judge Ivan Hrdlickova para.95-96

occasions, upheld an application of Article 210 of LCC that is opposed to the strict approach adopted by the Contempt Judge in this case which was not necessary.[81]

These factors viewed, absolutely satisfy Article 210 of the LCC which says that :

"Legal persons shall be criminally responsible for the actions of their directors, members of the administration, representatives, and employees when such actions are undertaken on behalf of or using the means provided by such legal persons."

It engages the criminal responsibility of the legal person therefore a record of conviction should have been entered for Al Jadeed corporation on count 2 on basis of the mens rea and the actus reus standard of Ms. Al Bassam.

**Judge Akoum's Dissenting Opinion**

On the other hand in a completely dissenting opinion, the appeal panel Judge Akoum disagreed with the appeal panel's majority's holding a legal position that the Tribunal possesses jurisdiction ratione personae over legal persons for contempt since the fundamental principle of criminal law nullum crimen sine lege stricta (strict construction of criminal provision, the principle of legality and foreseeability) requires that elements of crime be set out before the occurrence of the alleged conduct though Rule 60 bis don't explicitly specify the elements of the crime of contempt other than for natural persons, therefore, the word "person" as contained in Rule 60 bis cannot be defined to include legal persons without a clear written provision on the matter otherwise broadly definition leads to a violation of the fundamental and holy principle criminal law concretely , "nullum crimen sine lege script "(crimes must be based on written provisions).

[81] Judgment, para. 70, fn. 136 ( citing Lebanon, Court of Cassation, Criminal Chamber 6, Decision No. 60/2010, March 2010

The fact that rule 3 (B) provides the most favorable interpretation of the accused doesn't mean that the core principle of criminal law- in dubio pro reo (when in doubt, side for the accused) that protects accused persons can be ignored when interpreting a rule[82]

Furthermore, since the legal person cannot act other than through a natural person, this must include a clear understanding of all legal systems which conduct and by which actor corporate liability attaches.

**Application to legal persons.**

Hence, even if "a person" in English, "une personne" in French, and an appropriate definition in Arabic could mean a natural as well as a legal person in a legal context,various and diverse legislators considered it necessary to include specific text addressing corporate criminal liability in the context of criminal law to eliminate any doubt

Thus, for example, the draft protocol on amendments to the protocol of the Statute of the African Court of Justice and Human Rights has an express and detailed provision relating to corporate criminal liability in Article 46 C

***STL decision to the ICC***

The applicability of this contempt decision to the ICC is limited, for some fundamental reasons:

Firstly, this contempt decision is related only to the STL's Rules of Procedure and not to the crimes listed in the STL statute which makes it less relevant to prosecute legal entities for the international core crimes under The Rome Statute.

According to rule 60 bis of STL Rules of Procedure and Evidence subject of responsibility is defined as a "person" whilst article 25(1) of the Rome Statute imply to "natural persons". Furthermore rule 2 of the STL rules of procedure and evidence considers the victim as a "natural

[82] New TV S.A.L., Karma Mohamed Tahsin Al Khayat Case No. STL-14-05/PT/AP/AR126.1, Appeal Panel's Decision- Separate Opinion of Judge W. Akoum, October 2014, Para.1-7

person" therefore this general term „person" may refer to either a natural person or legal entity as mentioned in article 60 bis.

Special Tribunal of Lebanon has a hybrid nature which uses domestic Lebanese laws, concretely According to article 2 of the Statute of the Special Tribunal for Lebanon, the provisions of the Lebanese Criminal Code apply to the prosecution and punishment of the crimes referred to in the article 1 of the statute of the special tribunal of Lebanon which says that the special tribunal shall have jurisdiction over persons responsible for the attack of 14 February 2005 resulting in the death of former Lebanese Prime Minister or similar crimes.[83]

**The precedential value of the New TV Jurisdiction Appeal Decision**

The Appeals Panel determined the issue of the precedential value of the New TV Jurisdiction for several reasons: firstly there is no third-tier appellate body or other higher judicial entity to which the Amicus Prosecutor may resort as a matter of principle and procedure, therefore appeal decision is final as well as there is no other mechanism or provision that offers the opportunity for a final decision on the issue to satisfy the requirements of finality and certainty Rule 60 bis (M) and there is also a dangerous risk of a future, the incongruous judicial scenario with some contempt judges finding that legal persons may be charged and, by contrast, others finding that they ought not to be charged.

[83] E. Mongelard, Corporate civil liability for violation of international humanitarian law Volume 88 Number 863 September 2006Pp. 668-673

6. The African court of justice and Human and Peoples' Rights.

In 2014, the African Union leaders adopted one of the most significant "Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights-Malabo Protocol. Which has not yet entered into force[84]. But when this statute enters into force the new court will investigate international crimes with different chambers such as:

- human and people's rights section,
- general affairs section and
- international criminal law section which will be a significant development for law-making and wider regional institution-building.

The human and people's rights section alongside with general affairs section address issues of state responsibility in respect of human rights violations and represent the civil jurisdiction of the court whilst the international criminal law section deals with individual criminal responsibility.

According to article 28 (A) of the Malabo Protocol drafters suggest 14 international crimes which are defined as Genocide, crimes against humanity, war crimes, crimes of aggression, war crimes, trafficking in hazardous wastes, as well as drugs and persons, etc. all these crimes within the jurisdiction of the court shall not be subject to any statute of limitations.

It is not only unprecedented in international law that the civil and criminal jurisdictions are considered in a single court which is the first in the world at the regional level to address both human rights and ICL, but it also causes this kind of procedural problems which will be unable to handle under the current proposal. On the other hand, the regional criminal court can theoretically help to fill an impunity gap by prosecuting situations that the ICC does not or cannot because of its limited jurisdiction.[85]

[84] African Union, Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, 27 June 2014

[85] M.Clarke, C. Jalloh and O. NmehielLe, The African Court of Justice and Human and People's Rights in context, Cambridge University Press, 2019, pp.1-13

6.1. Corporate Criminal Responsibility under Malabo Protocol

The inclusion of corporate criminal liability under Article 46C is one of the most significant aspects of the Malabo Protocol which is considered a rebel court document to undermine the ICC

According to Article 46C of the Malabo Protocol for this statute, the court shall have jurisdiction over legal persons. The article says that corporate intention to commit an offense may be established by proof that it was a policy of the corporation. When it comes to corporate knowledge of the commission of an offense which must be constructive knowledge of the relevant information even though the relevant information is divided between corporate agents. this article also establishes criminal responsibility of natural persons who are perpetrators in the same crimes[86]

Establishing criminal responsibility for core international crimes to corporate entities could be considered an essential part of Africa's legal policy to combat the involvement of corporate leaders who aid or abet in gross violations of human rights since in Africa most of the conflicts are related to natural resources such as oil, diamond, gold, etc., for which several multinational and national corporations have to fuel wars and do anything to obtain powera over those resources.[87]

[86] T. Michalakea, Article 46 C of the Malabo Protocol: A Contextually Tailored Approach to Corporate Criminal Liability and its contours, International Human Rights Law Review 7, 2018, Pp 235-240

[87] M.Clarke, C. Jalloh and O. NmehielLe, The African Court of Justice and Human and People's Rights in context, Cambridge University Press, 2019, pp.26-29

## CHAPTER III. CORPORATE PROSECUTION V LITIGATION

### 1. The Alien Tort Statute (ATS)

The Alien Tort Statute (ATS) is a U.S. federal law first adopted in 1789 that gives the federal courts jurisdiction to hear lawsuits filed by foreigners for torts committed in violation of international law outside the U.S territory.[88]

### 2. Individual jurisdiction under the AST

Two centuries after the first judiciary act, the United States Court of Appeals for the second circuit reshaped ATS with its precedential decision in Filartiga v. Pena-Irala case when it punished non-American citizen - Paraguayan authority for acts of torture committed outside the U.S. This decision changed the view that individuals could not make claims based upon international law and opened the doors for aliens to pursue human rights claims in U.S. courts.[89]

As the second circuit held:

- the act of torture committed by individuals acting under official authority constitutes a violation of the laws of nations,
- the district court of the United State did have subject matter jurisdiction over the case to hear the plaintiff's action since the claim was lodged when both parties were inside the United States and
- the criminal act violated the universally accepted norm of international human rights regardless of the nationality of the parties.

After this decision The Alien Tort Claim Act (ATCA) allows the district courts to exercise jurisdiction of any civil action by any alien committed in violation of the law of states or international agreements of the United States. Congress also applied this standard of individual liability when it passed the Torture Victims Protection Act of 1991 (TVPA).

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[88] Richard L. Herz, The Liberalizing Effects of Tort: How Corporate Liability Under the Alien Tort State Advances Constructive Engagement, Harvard Human Rights Journal, 2008 pp-207-2011

[89] Wash. & LEE L. REV. 2005 pp.1126-1129

24 years after the supreme court in Sosa v. Alvarez-Machain case applied another standard to limit jurisdiction such as specificity which covers the typical elements of a criminal cause of action such as the actus reus, the mens rea, harm causation, remedy, and defenses. The second element is universality which says that criminal cause of action must be universally recognized by the law of nations as a prohibited norm as well as obligatory nature which recognizes that prohibitive norms must be legally binding according to the law of nations.[90]

One of the most ambiguous questions that were first raised during the discussion of this case which remains unresolved under the ATS is whether a corporation is criminally liable for aiding and abetting human rights violations. The supreme court instructed lower courts to discuss whether international law extends the scope of criminal liability to the perpetrator being accused if the defendant is a corporation.[91]

3. Corporate criminal liability under AST

Even though a lot of ATS cases were filed against corporations only a few have gone to trial, though Doe v. Unocal Corp. case is the first case that moved further along in the federal courts than any other previous cases.

The most important legal precedent set during the Unocal litigation is that US corporations, like individuals, can be liable under ATCA for complicity in human rights violations. However, because the parties settled, the appropriate standard for determining third-party liability was never determined but this case "opened the doors" to human rights claims against MNCs, because the case established the principle that federal courts can exercise subject matter jurisdiction over human rights abuses involving MNCs which enter into joint ventures with foreign governments.

The plaintiffs in Doe Iv. Unocal Corp were villagers of Myanmar who alleged that Unocal Corporation was aiding and abetting Myanmar's military directly or indirectly subjecting them

[90] Sosa v. Alvarez-Machain, 542 U.S., 2004 para.692-724

[91] Matthew E. Cornell International Law Journal Vol. 44, Danforth, Corporate Civil Liability Under the Alien Tort Statute: Exploring its Possibility and Jurisdictional Limitations, 2011, pp662-664

to forced labor, wrongful death, false imprisonment, assault, rape, and torture when the company constructed a local natural gas pipeline.[92]

The villagers base their claims on the Alien Tort Claims Act, the Racketeer Influenced and Corrupt Organizations Act, as well as state law.

The courts discussed the case and found that forced labor is a modern variant of slavery - jus cogens violation, which doesn't require state action therefore applying an international standard of liability is preferable to a domestic one. Unocal corporation is liable under the ATCA for aiding and abetting the Myanmar Military since it knowingly assisted and encouraged the Myanmar military in subjecting the plaintiffs to forced labor.

The court of appeal for the ninth circuit also applied international law as developed in the decisions by international criminal tribunals namely the Nuremberg Military Tribunals. As the appeal court defined international human rights law is more developed in the term of criminal prosecutions than civil law resulting in applying the current standard for aiding and abetting of International Criminal Law says the actus reus requires practical assistance, encouragement, or moral support which substantially contributes to the commission of the crime as imposed in the decisions by the ICTY and the ICTR.[93]

The ninth circuit also held that the international criminal standard for aiding and abetting is like the domestic tort law standard. Judge Reinhardt rejected the majority's opinion regarding using the aiding and abetting international standards since the aiding and abetting principle is only promulgated by ad hoc international tribunals which are still undeveloped and have not reached even customary international law status as well as ICTY / ICTR definition of aiding and abetting was not a primary source and the court also didn't demonstrate what other sources it was based.[94]

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[92] Doe v. Unocal Corp., 9th circ, 2002, para. 932- 953

[93] T. Garmon, Domesticating international corporate responsibility, Tulane Journal of International and Comparative Law, Vol.11, 2003, pp.347-348

[94] David D. Christensen, Corporate liability for overseas human rights abuses: the alien tort statute after Sosa v. Alvarez-Machain, Wash. & LEE L. REV. Vol.62 1219, 2005 pp1157-1167

The court also stated that Unocal may be liable under the ATCA for aiding and abetting the Myanmar Military to murder and rape, but Unocal is not similarly liable for torture because of the lack of sufficient evidence [95]

Nowadays According to AST Suits can be brought against corporations for involvement in human rights violations abroad, so long as the corporation had sufficient contacts with the U.S., acted together with a government entity or official, and had sufficient control over the violations.

Non-U.S. citizens have the option of suing under the ATS for a wider range of violations and international core crimes such as:

- Crimes Against Humanity
- Genocide
- War Crimes
- Forced Disappearance
- Crimes Against Humanity
- Prolonged Arbitrary Detention
- Genocide
- War Crimes
- Slavery
- State-Sponsored Sexual Violence & Rape, etc.

Today, the Alien Tort Statute gives survivors of serious human rights abuses, wherever committed, the right to sue the perpetrators including corporations for the involvement of human rights violations abroad in the United States. The human rights cases that Criminal Justice Act brings in U.S. courts are civil lawsuits that result in an award of monetary damages for the plaintiff. They are not criminal prosecutions, and they will not result in jail. [96]

[95] J. Doe v. Unocal Cor., United States Court of Appeals, Ninth Circuit, 3d ed., 2002, pp.2-7

[96] Kiobel v Royal Dutch Petro. Co., 133 S.Ct.1659, 2013

3.1.Case study - Kiobel v Royal Petro. Co and Wiwa v. Royal Dutch Shell

They have been other cases involving corporate complicity in human rights violations such as Kiobel and Wiwa v. Royal Dutch Shell two companion cases to three lawsuits that extended corporate liability under ATCA to foreign corporations when they maintained continuous and systematic ties to the US.

Wiwa and Kiobel cases were consolidated from the beginning, but the Kiobel case was appealed to the Second Circuit and ended up heading to the supreme court, while Wiwa cases were settled in 2009 providing a total of 15,5 million in compensation [97]

***Wiwa v Royal Dutch Shell Co.***

Plaintiffs of these cases are some Nigerian refugees residing in the United States who filed suit in US federal court under the AST against the Dutch and British multinational corporation for aiding and abetting the Nigerian military in the systematic torture and killing of peaceful environmental protesters in the 1990s[98]

***Plaintiffs*:** Ken Wiwa – Resident of Canada and a citizen of Nigeria and Canada

***Defendants:***

1. Royal Dutch Petroleum Company ("Royal Dutch") which own Shell Petroleum
2. Transport and Trading Co., P.L.C. ("Shell Transport") which business is organized under the laws of England.
3. Shell Petroleum Inc. (SPI) which do business in the United States.

The human rights violation was related to Pollution resulting from oil production which has contaminated the local water supply and agricultural land upon which the region's economy is

[97] Skinner Gwynne L., Beyond Kiobel: Providing Access to Judicial Remedies for Violations of International Human Rights Norms by Transnational Business in a New World, 46 Colum. Human Rights Law Rev., 2014, pp.159-160

[98] Wiwa v Royal Dutch Shell Petroleum Company, U.S. District Court for the Southern District of New York, 96 Civ. 8386 (KMW) (HBP) para.1-4 November 10, 1995,

based. Since the Niger Delta is considered environmentally very sensitive to oil spills therefore oil operations in The Niger Delta have had adverse environmental consequences on the region[99] and its ecosystem represents one of the 5 most severely petroleum-damaged systems in the world [100]since the quantity of oil spilled in fifty years was approximately 13 million barrels which makes this ecosystem worse than other regions such as Azerbaijan, Siberia, Ecuador, etc, [101]as well as the Royal Dutch/Shell for decades worked with the Nigerian military regime to suppress any demonstrations of the Ogoni 9 that were carried out in opposition to the oil company's activities to the oil. The Ogoni 9 was a group of activists that were hanged on November 10, 1995, after a "trial" before a special military tribunal based on fabricated charges resulted detained and beating of Wiwa under false charges to prevent them from protesting as well as some activities were killed by Nigerian troops.

The damage from oil operations is cumulative, and chronic resulting in a severely impaired coastal ecosystem that deteriorated the livelihoods and health of the region's residents.[102]through man's environment is essential to his well-being and to the enjoyment of basic human rights including the right to life itself.

Finally, the oil company and its Nigerian subsidiary provided monetary and logistical support to the Nigerian police and bribed witnesses to produce false testimonies at trials resulting in the execution of the Ogoni. including John Kpuinen, Deputy president of the National Youth Council of Ogoni People (NYCOP) as well as Dr. Barinem Kiobel, The honorable Commissioner of the ministry of commerce and tourism and member of the Rivers state Executive Council, etc. [103]

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[99] A.Z. Shehu, "The Nigerian upstream oil and environmentalism: Government, the Niger delta and multi-national oil industry, 2009, p.158

[100] Odom, C.V. reflections on the aftermath of Wiwa v Royal Dutch Petroleum (shell), Confluence Journal of Private and Property Law (CJPPL) Vol. 3 Part 2, 2010, p 190-198

[101] Niger Delta Natural Resources Damage Assessments and Restoration Project ", May 2006.

[102]Amnesty International Report, June 2009.

[103] Odom, C.V. reflections on the aftermath of Wiwa v Royal Dutch Petroleum (shell), Confluence Journal of Private and Property Law (CJPPL) Vol. 3 Part 2, 2010, p 190-198

### 3.1.1. Proceedings in the suits

Nigerian Laws prohibit pollution of land and water, require oil corporations to ensure "good oil field practice" and to comply with internationally recognized oil production standard.

***The first lawsuit***

The first complaint against Royal Dutch and Shell Transport and the Trading Company was filed in the Southern District of New York in 1996 under the ATCA and (RICO) the Racketeering influenced, and Corrupt organizations act, as well as 18 U.S.C 1961-1968 international laws and treaties, Nigerian laws. According to this complaint, defendants were liable for crimes against Humanity, torture, cruel inhuman, and degrading treatment, arbitrary arrest, detention, etc.

After the consideration of the case, Magistrate Judge Pitman found that:

- the defendants' direct actions or investors' relation office in New York was not sufficient to constitute "doing business" in New York,
- when it comes to the forum as a non-conveniens issue, he determined that England was an “adequate alternative forum". [104]

Judge Wood, ordered in 1998, found that jurisdiction over the defendants was established based on their maintenance of the Investor Relations Office in New York, but accepted the Magistrate Judge's recommendation to dismiss for forum non-conveniens.

Finally, Royal Dutch and Shell Transport and Trade sought to dismiss this suit on grounds of "forum non-Convenience", though in 2000 the court of appeal reversed the district court's decision and ruled that the United States is a proper forum because of personal jurisdiction over the defendant who had an office in New York.

[104] Wiwa v Royal Dutch Petroleum Co., No. 96 Civ. 8386, WL 319887, February 2002, pp.13-14

***The Forum Non-Conveniens Analysis in this Case***

The rule of law applied by the district court was faulty for some reasons:

- regarding jurisdiction the district court based on the arguments that the plaintiffs were not residents of the Southern District of New York while the court failed to count in favor of the plaintiffs that two of them were residents of the United States

Defendants argue that England has a public interest in adjudicating this action since:

- Shell Transport is a British corporation whose liability for the actions of its subsidiary is governed by British law;
- England may have an interest in adjudicating matters affecting a British corporation, but the United States courts have an interest in adjudicating matters affecting its residents.
- Also, while one defendant is a British corporation whose actions are governed by British law, the second defendant is Royal Dutch whose shares are traded directly in the United States.

Consequently, England is a more appropriate forum, due to the increased price of shipping documents from England to the United States and the additional cost for witnesses flying to New York rather than London.[105]

***Second lawsuit***

Another lawsuit was also filed against Brian Anderson (former Managing Director of Royal Dutch/Shell's Nigerian subsidiary) in 2001. the U.S. district court found for the plaintiffs that they were entitled to bring their actions under the ATCA/TVPA, RICO.

[105] Wiwa v Royal Dutch Petroleum Company, U.S. court of appeals, 2nd circuit Docket Nos, 99-7223,99-7245, September 2000

***Third Lawsuit***

Despite the cases against Royal Dutch/Shell and Brian Anderson, another additional case was brought against shell Petroleum Development Company.

In 2006 plaintiffs' claims for aiding and abetting liability in general as well as claims for crimes against humanity, torture, and prolonged arbitrary detention were allowed. Surprisingly in 2008 the second circuit court denied plaintiffs additional jurisdictional discovery in Wiwa v SPDC and dismissed the case.

Finally, The US Supreme Court in 2013 also dismissed the case, telling US courts did not have jurisdiction in the matter but on the other hand the court held the injuries suffered by each plaintiff were reasonably foreseeable or anticipated by the Defendants as the natural consequence of the defendant's acts.

Finally, Shell denied culpability in the death of Ken Saro-Wiwa sand Ogoni nine though this oil Giant paid a total of $15.5 million to compensate the plaintiffs for the benefit of the Ogoni people as a humanitarian act.

The Wiwa settlement represents a significant victory for the plaintiffs and human rights attorneys generally. This case demonstrates that some victims of foreign human rights abuses at the hands of multinational corporations can find meaningful redress in U.S. courts.[106]

***Kiobel v. Royal Dutch Petroleum Co.***

In 2010 the appeals panel for the second circuit became the first and only appellate court to reject the proposition that corporations may be held liable for torts in violation of international law under the ATS due to some reasons:

The ATS applies to tort claims for a narrow set of internationally condemned human rights violations, without geographic limitation as determined in the Sosa v Alvarez Machain case

[106] Wiwa v Shell Petroleum Co. U.S. District Court Southern District of New York 96 Civ. 8386 (KMW)(HBP), 2009

The plaintiff may only sue under the ATS for international human rights abuses which are specific, universal, and obligatory.[107]

The corporate liability doesn't exist under customary international law to apply to the ATS, therefore ATS claims should be dismissed for lack of subject matter jurisdiction.[108]

After the appellate court's precedential decision, the plaintiff brought this case to the supreme court based on two questions:

- whether corporations are immune from tort liability for human rights abuses
- whether U.S. courts can hear claims of Aliens for human rights abuses committed in the territory of a foreign state under the ATS.

U.S. courts have extraterritorial jurisdiction over violations of customary international law by U.S. government contractors in foreign countries which is especially important in situations where contractors are in a weak state where local corrupt authorities do have not the power to challenge the U.S. government contractor corporations are aiding and abetting in the abuses rather than preventing them. Therefore, any foreign plaintiffs can bring an ATS claim into the district court for violation of customary international law committed abroad but overcome the presumption against extraterritorial application, the conduct must touch and concern the territory of the United States with sufficient force. [109]

In 2013 the supreme court made a decision based on principles of extraterritorial and personal jurisdiction and dismissed the plaintiffs' claims against the foreign corporation for the conduct that had occurred outside the United States, holding even though the plaintiff was a permanent resident of the U.S the Royal Dutch Shell did not sufficiently touch and concern the territory of the United States to displace the presumption against extraterritoriality[110]

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[107] Kiobel v Royal Dutch Petroleum Co., Judgment of The United States Court of Appeals (2nd circuit), Docket Nos. 06-4800-cv, 06-4876-cvSeptember 2010

[108] Chimene I. Keitner, Introductory note to U.S. Second Circuit Court of Appeals: Kiobel V. Royal Dutch Petroleum Co., Cambridge University Press, February 2017,

[109] A. Yull, the alien tort statute: a way to find jurisdiction over today's pirates U.S. government contractors, Public Contract Law Journal Vol. 47, No. 4. Summer 2018, 598-600

[110] Kiobel v Dutch Petroleum Co., 569 U.S. para.124-125, 2013

4. Corporate Prosecution vs litigation

Serious violations of international humanitarian law are often associated with criminal liability The fact that international humanitarian law violations are in the vast majority of cases prosecuted in criminal courts does not mean that civil liability for these violations does not exist

Some countries do not recognize the criminal liability of legal persons and civil liability offers certain advantages. If civil actions are brought against companies and the courts award large sums of money in damages induce them to change their corporate culture

For corporate civil liability, there must exist some legal bases of corporate civil liability, which international law can create obligations for companies

As well as states must establish liability for a violation of international humanitarian law and enforce this liability before the national courts, but companies will be prosecuted, if it will be proved that the legal entity is included within the definition of person.

For example, both the genocide convention text and the travaux preparators are unclear about whether corporations may be conducted for committing the crime of genocide or not since these documents don't provide clarification of the term person therefore it be read to include both natural and legal persons. However, international criminal law treaties and tribunal statutes specifically exclude corporations from criminal jurisdiction.

To enable the ICJ to identify the status of corporations under the Genocide convention one of the treaty's state parties should request clarification as well as two states bring a case before the court in litigation or ask for an advisory opinion to an approved body within the U.N.

Harold Honju Koh who was a legal adviser to the U.S. State Department during 2010-2017 considers corporations within the definition of person therefore he believes that corporations must be prosecuted and paid the cost for their human rights violations [111]

Civil litigation has some advantages concretely, a civil action enables victims to obtain material compensation for their sufferings, whereas some legal systems do not allow for this possibility

[111] Koh, Harold Hongju, "Separating Myth from Reality about corporate Responsibility Litigation, 7 J. INT'L ECON. L, 2004, pp.263-266

in criminal proceedings. Compensation is the core commodity in civil litigation. Thus, companies can pay the cost of their negligence. A certain amount of lawsuits can yield significant cash settlements or judgments as in the case of German corporate reparations for slave and forced labor employed during the Third Reich or the German-British Corporation Royal Dutch Shell which was aiding and abetting the Nigerian military in the systematic torture and killing of peaceful environmental protesters in the 1990s resulted in a settlement in providing for compensation.

On the other hand, this type of litigation often fails. For example, personal injury class action lawsuits were attempted in the 1990s against German corporations on behalf of American Gulf war veterans who were exposed to chemical weapons in Iraq. These efforts failed due to a lack of jurisdiction in the United States and the unwillingness of foreign counsel to partner in civil litigation.

One of the main advantages of corporate civil liability is the standard for a decision in a civil case which is based on the preponderance of the evidence, whereas, in a criminal trial, the existence of reasonable doubt is sufficient to prevent a guilty verdict. Most importantly a civil suit provides an easier route for victims to obtain the moral compensation afforded by recognition of liability by a court.[112]

5. Corporate Liability for its actions

There can be considered two precedential cases for holding companies responsible for violations of international humanitarian law heard by a US military tribunal.

In the first of these cases twelve top managers of the German industrial conglomerate Krupp were accused of: war crimes for spoliation and plunder of public and private property in occupied territory without consideration of the local economy and crimes against humanity by having used slave laborers such as employing prisoners of war, or concentration camp inmates in arms factories which constitutes a violation of article 46 and article 48 of the Hague

[112] Beyer John, c. & Schneider Stephen A. "Forced Labor under Third Reich: Part One, Nathan Assoc. Rep., 1999

Regulations based on the requirement that the laws in force in an occupied country and the private property must be respected.[113]

In the I.G. Farben case, twenty-three members of the German chemical and pharmaceutical company's board were accused of:

- war crimes,
- the plundering and spoliation of public and private property in occupied territory,
- crimes against humanity for having used forced labor.

Finally, the tribunal considered that a legal person could breach the laws and customs of war and international humanitarian law applied to a company. The tribunal held that the I.G. Farben was responsible for a specific violation of the rights of private property protected by the laws and customs of war on land and the Hague Regulation which prohibits pillage. [114]

## 6. Factors against prosecuting corporations for international crimes

Nowadays in the age of globalization when multinational organizations became more dominant actors, they sometimes become complicit, financially and physically in international crimes. despite the fact of enormous profits from such complicity, they are immune from international prosecution which is a result of the lack of a framework for international criminal jurisdiction. Some arguments criticize the creating jurisdiction to internationally prosecute corporations for international core crimes and examine the causes of corporate crime in terms of different elements:

The broadest policy critique leveled against prosecuting corporations is based on the view that only high-level corporate managers should be prosecuted individually since they make the decisions otherwise many innocent people will lose their jobs

[113] A. Ramasastry, Corporate Complicity: from Nuremberg to Rangoon-an examination of forced labor cases and their impact on the liability of multinational corporations", Berkley Journal of International Law, Vol. 20, 2002, pp.109-110

[114] E. Mongelard, Corporate Civil Liability for violations of international humanitarian law, International Review of the Red Cross, Volume 88 number 863 September 2006 pp. 667-676

***Economic factors***

Many scholars explain corporate violations of laws because of the decline of their profits or poor economic situations though corporate violations are not influenced by the poor economic situation, for example, the oil industry has great profits, but this industry is historically considered one of the most violators of the law.

The examination of the relation of the economic structure by the size of the corporation showed that violating firms compared to non-violating corporations are on average larger and less financially successful with relatively poorer growth rates.

In many cases, direct investment by multinational corporations has resulted in increased standards of living, but the shade of international criminal prosecution for corporate wrongdoing harms foreign investment in these countries.

On the other hand, only this information on the firm's financial and structural characteristics is not sufficient to explain corporate crime. [115]

It's also true that almost every international core crime such as genocide, crime against humanity, etc. since World War II has been occurred in a developing country but that should not stop a corporation from pursuing business opportunities in that country if the potential for profits is high and the risk of international crimes or other atrocities is low.

***The cultural***

The cultural group argues for the preference against treating companies criminally as a matter of law in civil law societies, unlike common law societies.

***Legal factors***

Legal critics against prosecuting corporations for international crimes fall into three categories:

- Procedural
- Substantive
- Cultural

[115] Michael, J. Kelly, Prosecuting Corporations for Genocide, Oxford University Press,2016, Pp. 179-185

The procedural group focuses on prosecutorial preference which means that prosecutors should always prefer to build cases against individual corporate officers instead of companies for better conviction rates.

The structure of any large corporation has many components: the board of directors, managers who have great autonomy over investment, marketing, etc., supervisory personnel, workers, etc. therefore within the corporate structure each group has its role and function related to others therefore many legal or ethical problems of a corporation comes from this modern corporate structure.

Organizations are seen as actors to whom legal notions of intent and culpability can be attributable often through their managers. It may be preferable to prosecute the company instead of the individual officers since punishing individual members of the organization is not always effective since they may have left the organization or criminal conduct may often be the result of certain business policies and corporate culture rather than the conduct of a few managers or employees.[116]

Traditionally under English common law corporations could not be held criminally liable for the simple reason that the law didn't consider them capable as artificial persons, of committing crimes.

Nowadays most courts in the United States hold corporations criminally liable based on the theory of respondent superior which is derived from the law of agency which defines a master-servant agency relationship.

The master-servant relationship is the employer-employee relationship where a master can be held criminally liable for a servant's act, if the employer has the right to exercise control over the employee, except for one case when the employer does not have the power to control the independent contractor's action.

The only time that the employer will be held liable for the actions of the independent contractor is if the independent contractor is incompetent and if the activity is inherently dangerous.

Generally, the basic rules of the agency are like the rules of respondent superiors when a corporation is held liable for the actions of its employees. Since corporations are not natural

[116] W. Huisman and Elies van Sliedregt, rogue traders, Dutch businessmen, international crimes, and corporate complicity, 8 J. Int'l Crim Justice, 2010, pp. 803-826

persons courts impute the requisite intent/men's rea as well as the act/actus reus of employees [117]to the corporations. But there are some necessary elements required to prove corporate criminal liability:

- Individuals must be acting within the scope of their employment,
- The individual must be acting with at least partial intent to benefit the corporation,
- The act and intent must be imputed to the corporation.

When the law first began holding corporations criminally liable for the acts of their employees' prosecutors had to show that the employee acted with full intent to benefit the corporation.

### 6.1. Case study- New York Central and Hudson River Railroad Co. V. United states

As the U.S. Supreme court in New York, Central and Hudson River Railroad Co. V. U.S. case held that the corporation may be held responsible for damages for the acts of its agent within the scope of his employment.

The second element of corporate criminal liability requires only a partial intent to benefit the corporation. Therefore, even if the employee is acting in his interest but also with at least partial intent of benefiting the corporation can still be held liable as well even if the employee is violating a corporate policy or rule if the act was within the scope of his employment and if there was intent to benefit the corporation still be held criminally liable. Furthermore, the court also held the "collective knowledge" of the corporation can be used to form corporate criminal liability and the act doesn't need to be attributable to the individual employee.

The main reason why courts held corporations criminally liable is that it would be unjust to refuse one or more persons for criminal prosecution when the criminal behavior is derived from the corporate culture therefore imposition of criminal liability is necessary to eradicate inappropriate criminal corporate behavior. Additionally, the size of corporations makes it impossible to adequately allocate responsibility to individuals.[118]

[117] Kelly Michele J, Prosecution Corporation for Genocide, New York: Oxford University Press, 2016

[118] New York Cent & Hudson RR. Co. v United States. No. 57, 212 U.S.481, February 1909

Nowadays Most of the states in the United States use respondent superior for imposing criminal liability on corporations whilst nineteen states in the United States use a different standard that requires the participation of a high managerial agent of the firm.

Corporate criminal liability based on respondent superior by the U.S Supreme court is justified by the pragmatic goal of preventing harm as well as if only individuals were held liable, it would encourage unlawful behavior because the liability of the employee would fail to deter the illegal corporate activity.

As the U.S. Supreme court interpreted the respondent superior elements broadly therefore it can be hard to achieve defense though the court suggested some elements that can help the corporation to avoid criminal liability under the respondent superior theory if the independent contractor is not subject to the control of the corporation and the activity of the contractor is not inherently dangerous, therefore the corporation could be safe and the employee did not have any intent to benefit the corporation with his actions.[119]

# CHAPTER IV. LEGAL THEORIES OF CORPORATE CRIMINAL LIABILITY

## 1. The major theories of corporate liability

Nowadays there exist two major identification and imputation theories of corporate liability which immunize the corporation from civil and criminal liability for both torts and crimes of their employees.

The identification theory acknowledges direct liability which is considered as a narrow responsibility theory whilst under the imputation theory related to vicarious liability the corporation has broader responsibility and is liable for its employee's intent who acts within the scope of employment for the benefit of the corporation

Nowadays when the traditional doctrines of individual criminal responsibility are not well suited to dealing with the crime conducted by legal entities its necessary to develop a legal theory concerning the criminal responsibility of corporations and apply this concept to states

[119] Cynthia E. Carrasco, Corporate Criminal Liability, 36, AM. CRIM, L.REV.,1999, pp.445-448

Many penalties argue that legal entities cannot be subjected to criminal responsibility in the same way as individuals. However, since legal entities are legal abstractions, whose policies are made by individuals is needed to distinguish between the criminal responsibility of individuals who are the decision-makers and executors of decisions to commit the crime, as well as individuals who are low-level actors of the entities whose individual role in the conduct has not been established. [120]

2. Vicarious liability

Legal persons can be held responsible for a violation of international humanitarian law, not only for their acts but also, for the acts of their employees.

In early common law, corporations were owned and operated by the government in England therefore corporations were not criminally prosecutable as separate entities as opposed to modern times when American Corporations are private enterprises whose actions can seriously injure other individuals and society.

Nowadays a vicarious liability has transferred criminal responsibility for an offense from an agent of the corporation to the corporation itself, though employee who commits crimes within the scope of their actual authority to benefit the corporation is also criminally liable.

According to vicarious liability, the corporation will be held liable even if it as an organization did not reward the misconduct as well as for the action of its employee during the scope of employment even if the illegal act is opposed to indicate corporate policy

In a strict liability vicarious liability can also induce state liability for the actions taken by its nationals.

There are three main theories of vicarious liability for perpetrators in criminal law:

- the command responsibility doctrine used to deal with military hierarchies,
- aiding and abetting and
- the joint criminal enterprise theory

[120]N. Parisi, "Theories of corporate Criminal Liability", Ellen Hochstedler ed. NCJ-94652, 1984. Pp. 2-26

3. Command responsibility/ superior responsibility

Despite 50 years of doctrinal evolution, the men's rea for command responsibility is still unclear.

Command responsibility as a form of vicarious liability is among the oldest theories found in the 1775 American articles of war in George Washington's army which says that:

"*A commander who shall refuse or omit to see justice done on the offender or offenders… shall upon due proof thereof be punished as ordered by a general court-martial in such manner as if he had committed the crimes or disorders complained of."* [121]

Under common law, the tort system, which deals with non-contractual liability, also recognizes this principle but is known as the principle of respondeat superior.

For command liability to arise there must be met a wrongful act on the part of the employee along with a relationship of subordination and the existence of damage caused by the agent in the exercise of his functions

Command responsibility does not mean strict liability. Strict liability exists in civil law and represents a liability for damage even if the damage is caused by no fault of the liable person As opposed to criminal law when a person can be responsible only if culpable (acting with guilty intent or recklessness).

Nowadays the doctrine of "command accountability" has been added to the Geneva Convention as the Yamashita Standard and adopted by the International Criminal Court in 2002.[122]

[121] Luban et, al., supra note 3, at 895 (quoting American articles of war of 1775 art. 12m quoted in William Winthrop, Military Law and Precedents 1480 (2nd ed. 1896)

[122] Protocol Additional to the Geneva Convention's That of 12 Aug 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol 1), June 8, 1977, Article 86, 1125 U.N.T.S. 3, 16 I.L.M. 1391 (1977)

4. Geneva Conventions and its additional protocol I

*Codification: Additional Protocol I*

The Additional Protocol I of 1977 to the Geneva Conventions of 1949 was the first international treaty to codify the doctrine of command responsibility.

Article 86(2) of this protocol is the first international provision to explicitly address the knowledge factor of command responsibility. A literal interpretation of this provision only imposes criminal liability on a commander where he could have learned of subordinates' unlawful conduct from information already available to him and he did not take all feasible measures within their power to prevent or repress the breach, Following this interpretation.

On the other hand, article 87 requires a commander to prevent, suppress and report to competent authorities any breaches of the Conventions and AP I. However, the Article does not impose an absolute or inflexible standard of conduct on the superior, but, rather, obliges the superior to undertake steps or measures that are, firstly, practicable, and, secondly, "within their power" as well as attaches liability to military commanders for actions not only of their military subordinates but also, for the actions of "non-military" (civilian) and "'other persons under their control".

5. Command Responsibility at the ICTY

The establishment of the ICTY by the Security Council has led to further international jurisprudence on the doctrine of command responsibility.

According to Article 7(3) of the ICTY Statute, the crimes committed by a subordinate do not relieve his superiors of criminal responsibility if he knew or had reason to know that the subordinate was about to commit or had done such acts. The Superior is also criminally liable if the superior failed to take the necessary and reasonable measures to prevent such acts.

The standards of knowledge can be defined in two different ways when "knew" can be referred to as actual knowledge, which can be established either directly or through circumstantial evidence whilst "had reason to know" has been perhaps the most contentious aspect of command responsibility before the ICTY.

The ICTY first considered the scope of command responsibility in the Celebici and Blaskic case where knowledge standards received conflicting interpretations.

The Trial Chamber assessed the standard of "had reason to know" under Article 7(3) of the ICTY Statute and held that a commander can be held criminally responsible only if some specific information about offenses committed by his subordinates was available to him.

As (ICTY) has emphatically held in the Celibici case that the doctrine of command responsibility encompasses "not only military commanders but also civilians holding positions of authority " and "not only persons in de jure positions but also those in such position de facto."[123]

In the Blaskic case, the ICTY again considered the meaning of "had reason to know" under Article 7(3) and agreed with Celebici that superiors have a proactive duty to remain apprised of the acts of subordinates Though the Blaskic Trial Chamber reached a different conclusion on the mens rea standard required by AP I, concretely the Blaskic Trial Chamber found that "had reason to know" in Article 7(3) of the ICTY Statute which says that any of the acts was committed by a subordinate does not relieve his superiors of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts also imposes a stricter "should have known" standard of mens rea.

On the other hand, The Appeal Chamber concurred with the Celebici Trial Chamber in its interpretation of Article 86(2) holding that the ordinary meaning of the provision indicated that the commander must have some information available to him, which puts him on notice of the commission of unlawful acts by his subordinates. The findings of the Celebici Appeals Chamber were recently confirmed by the Appeals Chamber in Blaskic.[124]

[123] A.H. Klip and G.K. Sluiter "Annotated leading Celebici case of International Criminal Tribunals", Vol. 3 ICTY, Antwerpen, Oxford: Intersentia/Hart, 1997-1999, pp. 669-683

[124] Elies van Sliedregt, Command Responsibility at the ICTY- Three Generations of Case Law and Still Ambiguity, A.H. Swart et. al. (eds), 2011, pp. 2-15

## 6. Command Responsibility Under the Rome Statute of the ICC

The doctrine of command responsibility as a part of customary international law has been incorporated into the statutes of the international criminal tribunals for example the doctrine of superior responsibility has been codified in article 28 of the Rome Statute of the International Criminal Court (ICC) which imposes individual liability on military superior for crimes committed by forces under their constructive order and control if this military commander either knew or should have known that the forces were committing or about to commit such crimes.[125]

Article 28(a) adopts the stricter "should have known" standard which is a conflicting interpretation of the knowledge requirement in article 86(2) of Additional Protocol I (AP I) though, on the other hand, the main advantage of this stricter knowledge requirement is that it serves as a deterrent mechanism and giving incentive to a commander to be aware of what his subordinates are doing additionally attributes to his knowledge that would have been reasonable for him to possess.

Some lawyers against the stricter "should have known" standard argue that this knowledge requirement places too heavy a burden on commanders to be informed of every action that occurs in their territory which is not acceptable. However, in applying the "should have known" test, ICC can take into consideration various specific factors, such as:

- the commander's position in the chain of command,
- their proximity to the situation,
- the reasonable possibility of making inquiries, and
- the reliability of information reaching the commander. [126]

As Trial Chamber in the Celebici case strongly suggested that the language of Article 28(a) may reasonably be interpreted to impose an affirmative duty to remain informed of the activities of subordinates. [127]The doctrine of command responsibility plays a fundamental role

[125] The Rome statute article 28(a)

[126] H. Levie, (1981) Protection of War Victims: Protocol I to the 1949 Geneva Conventions at 307.

[127] K. Ambos, Superior Responsibility in a Cassese et al. (eds), The Rome Statute of the International Criminal Court: a commentary, Oxford: Oxford University Press, 2002, p.852-853

in regulating the behavior of superiors and their subordinates in times of war that's why a precise formulation of the knowledge element of command responsibility is essential for the doctrine's effective operation as it happened in Celebici case when the trial chamber strongly suggested that the command responsibility standard should be reasonably be interpreted to impose an affirmative duty due to his subordinates acts.

The doctrine of command responsibility plays a fundamental role in regulating the behavior of superiors and their subordinates in times of war that's why a precise formulation of The knowledge element of command responsibility is essential for the doctrine's effective operation

7. The Yamashita standard

The Yamashita standard derived from the legal doctrine of command responsibility, when the U.S. Supreme Court, made a precedential decision and charged Imperial Japanese Army General Yamashita with "unlawfully disregarding, and failing to discharge, his duty as a commander to control the acts of his soldiers, who committed brutal atrocities and other war crimes: demolished homes, churches, hospitals and schools without any military necessity against the people of United States during the Second World War.

As a U.S. Supreme court decided a commander can be held accountable for crimes committed by his troops even if he did not order them, did not know about them, or did not have the means to stop them.[128]

The Yamashita Standard states that the highest ranking officer is responsible for, and should be prosecuted for the crimes of every officer and soldier under his order even if he is unaware of that the crime, or was aware and gave orders to stop it. Ignorance of the actions of his subordinates and failed attempts to stop them are cannot be considered a defense mechanism against criminal responsibility.[129]

The command theory of criminal liability moved from the military context to the corporate context based on a four-part legal theory of responsibility of a corporation such as corporations'

[128] 68, supra, at 340

[129] A lengthy report on Yamashita's Trial by one of MacArthur's officers) & 21. American Caesar: Douglas MacArthur, 1880-1964 by William Manchester, Arrow Books (1979) ISBN 0 09 90780.

relationship with the government and its nexus to affected populations as well as human rights issues and the responsibility of individuals who violates human rights within the corporate structure.

8. Accomplice liability (aiding and abetting)

According to Accomplice liability theory, the person or the entity who aids in the commission of the crime with intent and knowledge is guilty regardless of whether the crime's successful commission or regardless of the crime would not have succeeded the crime.
According to the complicity concept, some conditions have to be met. Firstly, a crime must have been committed by another person, secondly, the accomplice as a material act of assistance to the perpetrator of the crime must have been performed with intent and knowledge[130]

There are can be distinguished three types of complicity under which a legal entity can be held liable:

1. Direct corporate complicity occurs when a corporation directly participates in illegal acts with intent,
2. Beneficial complicity can occur when the corporation within its knowledge of benefiting from the regime commits human rights violations. Beneficial complicity imposes criminal liability on corporations only due to benefiting from the principal's acts.
3. Silent complicity appears when the corporation doesn't protest human rights abuses[131]

Accomplice liability is established in the statutes of the ICTY, ICTR, and SCSL, therefore there is no need for the aider and abettor to share the intent of the principal perpetrator, knowledge in the sense of awareness is enough The law on aiding and abetting at the ICTY, ICTR and SCSL requires that the conduct must consist of practical assistance, encouragement

[130] W. A. Schabas, ''Enforcing international humanitarian law: Catching the accomplices'', International Review of the Red Cross, Vol. 83, No. 842, June 2001, pp. 447–8.

[131] Eric Engle, Eextraterritorial Corporate Criminal Liability: A Remedy For Human Rights Violations, pp. 297-299

or moral support to the principal offender which has a substantial effect on the commission of the crime

Under this knowledge standard, the jurisprudence of the ICTY, ICTR and SCSL does not require the accused to consciously decide to act to assist in the commission of a crime. As opposed to the Statute of the ICC Under Article 25(3)(c), when individual criminal responsibility arises when a person aids and abets for 'the purpose of facilitating in the commission of a crime which means that he aider and abettor must share the intent of the principal perpetrator.

Thus, in the business context, a legal entity that assists in the unlawful forcible transfer of civilians through the provision of weapons, equipment, or access it's not only enough to know that he assists but the corporation must also intend to unlawfully transfer people and must also have acted to assist in the unlawful forcible transfer.[132]

Contribution as an element of actus reus derives from the Tadic case which says that contribution must be direct and substantial though in other cases such as The Prosecutor v Mrksic and Sljivancanin case the ICTY clarified that may not necessary that contribution by an aider and abettor be specifically directed to assist concretely: by the making a decision to withdraw the officers and soldiers who were guarding prisoners of war Mrkšić rendered substantial practical assistance to the Territorial Defence and paramilitary forces who were committed numerous murders. Furthermore, Mrkšić failed to prevent the torture of soldiers from occurring at the site of which he had been informed.

When it comes to Sljivancanin the ICTY stated that he was under a duty as an officer to protect the prisoners of war and this responsibility included the obligation not to allow the transfer of custody of the prisoners of war to anyone if he was not sure that they would not be tortured furthermore he did nothing to prevent their continuation therefore, fulfilling the actus reus of aiding and abetting is enough to establish that assisted or lent moral support to the perpetration of the crime which had a substantial effect on the realization of that crime.[133] Consequently, the legal entity can be charged for aiding and abetting if there exists a commission or attempt

[132] JCJ 8, Criminal liability and Corporate actor (2010), 881-883

[133] Markie and Sljivandanin Appeals Judgment, supra note 27, § 159.

to commit the crime as well as the physical or psychological act of contribution and knowledge element.[134]

Doctrinally aiding is related to providing physical or material assistance in the commission of a crime, whilst abetting is concentrated on psychological or emotional support to the person or entity committing the crime therefore the aider or abettor does not need to be present at the scene of the crime, the contribution can occur before, during or after the act of the principal offender.

### 8.1.Case study- Prosecutor v Akayesu

As the ICTR found in the Akayesu case The actus reus of the aider or abettor needs to amount to a direct and substantial contribution to the commission of the crime, whilst the mens rea required for aiding and abetting is mere knowledge of the criminal intent of the principal actor [135] consequently the specific intent for genocide is a higher intent requirement than for normal crimes,

If the accused knowingly aided and abetted in the commission of murder of members of national, racial, or religious group whole or part while he knew or had reason to know that the principal was acting with genocidal intent, the accused would be an accomplice to genocide even though he did not share the murder's intent to destroy the group. Therefore, the accomplice to genocide doesn't need necessarily to possess the specific intent to destroy in whole or in a part, a national ethnic, racial, or religious group.

Under the new ICC standard, the aider and abettor must share the intent of the principal perpetrator which is a much higher mens rea standard than that recognized by the ad hoc tribunals, but it is still necessary to develop individual criminal responsibility broadly under ICC to avoid dismissal most cases involving business leaders, who act for economic purposes.

[134] Hans Vest, Business Leaders and the Modes of Individual Criminal Responsibility under International Law, 8 J. Int'l Crim Justice 851-856 (2010)

[135] Prosecutor v Akayesu, Case No. ICTR-96-4-T

According to the statute of Rome only in this case if a person completely and voluntarily gave up the criminal purpose or prevents the completion of the crime shall be released from criminal liability.

If the Rome Statute is successfully amended to expand the ICC's jurisdiction over corporations as potential perpetrators, Article 25 (3) c) should also be amended to either incorporate the knowledge standard for the mens rea of aiding and abetting crimes when applied to corporate defendants

9. Joint Criminal Enterprise and Corporate criminal liability

Joint criminal enterprise is a creation of international criminal tribunals and has roots in conspiracy theory. Joint conspiracy theory which is part of a common law jurisdiction was used under the name of common purpose by prosecutors at both the Nuremberg and Tokyo trials to convict war criminals.[136]

Because every modern international tribunal adopted the JCE liability theory it has reached the status of customary international law. But some countries, such as Germany, The Netherlands, and Switzerland, don't include this form of liability in their criminal codes.

This legal concept firstly appeared in the Tadic appeals Judgment when the chamber of ICTY recognized the JCE derives from customary international law, and it is the international version of conspiracy liability.

Nowadays most international prosecutors use JCE to aim at senior military and political leaders.

There exist three types of JCE: basic, systematic, and extended as it is defined in Tadic case.

Basic JCE occurs when the person acts as a member in a group with a common plan or purpose to commit a war crime where all members of the group have the intention to commit the war crime. To satisfy the intent element the person must have voluntarily participated in one aspect of the common plan while Systemic JCE appears when the person who holds a position of authority, knows a plan design and acts as a member of an institution with a common plan, or

[136] Sanders A., New Frontiers in the ATS: Conspiracy and Joint Criminal Enterprise Liability After Sosa, 28 Berkley J. INT'L L., 2010, p. 619

purpose to commit war crimes systematically. When it comes to extended JCE exists when all members of the group have a shared intention and purpose to commit certain criminal acts.[137]

JCE is not found explicitly in the ICTY statute, though it is considered in articles 6 (1) and 7 (1) of the statute as a form of participation in the crime when the statute says that the international tribunal shall have jurisdiction over natural persons if this person committed or otherwise aided and abetted in the planning, preparation, or execution of international crimes[138]

JCE is also mentioned in article 25 3(d) of the Rome statute which says that a person shall be criminally liable if this person contributes to the commission or attempted commission of a crime by a group of persons with a common purpose and with the knowledge of the intention of the group to commit the crime.

As scholars stated JCE is also relevant to the prosecution of corporate actors for international crimes, though a business relationship cannot automatically be considered a common criminal plan since the corporation supplies a criminal regime with weapons or other items used in the commission of state crimes could not fall under this theory therefore just supplying weapons to a genocidal regime alone is not sufficient.

The accused must have a significant contribution to the crime itself though the contribution is not necessary to be criminal it may include acts that might be considered neutral political, military, or business activity.

The main challenge to prosecuting a corporate actor under JCE is that a prosecutor must prove that various persons had a common criminal purpose and direct intent for the crime that was committed. Since the weapons may pass through multiple middlemen before reaching the people who are responsible for the crime, the more difficult it may be to establish the necessary intent on the corporate agent

[137] Raha Wala, From Guantanamo to Nuremberg and Back: An Analysis of Conspiracy to Commit war Crimes under International Humanitarian Law, 41 Geo. J. INT'L L. 2010, pp.683-706

[138] Statute of the International Criminal Court for the Former Yugoslavia, art 7(1), U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/955, 1995

10. Contribution liability

contribution liability is an appropriate way to capture the typical role and criminal liability of corporate agents for two main reasons. Firstly, due to the nature of corporate entities, it is often doubtful or difficult to prove whether the corporate agents involved had the requisite intent under art. 25 (a)-(c) to commit, or aid and abet in the crime, or conducted their business to assist the principal perpetrators in the crime, as required under art. 25 (3) (d) (I) / art. 25 (3) (d) (ii) of Rome Statute. Secondly accused must have joint control over the crime.[139]

Consequently, whether a corporate agent incurs criminal liability for his or her business dealings depends on a twofold test. Firstly, it must be assessed whether their contribution to the commission of the international crimes committed by a group was significant. The contribution itself doesn't need to be unlawful under the Statute though it can be made to any member of the group acting with a common purpose, regardless of whether that member personally commits any element of the crime or not. Corporate agents as perpetrators of international crimes can provide their business partners with means by purchasing goods and then using the revenues to fund the commission of international crimes.

Whether the contribution of a corporate agent meets the actus reus threshold depends on several factors, such as if the contribution made by the agent for the commission of the crime is important or how the contributions have been used in the commission of the crime.

Contributions can range from the sale of weapons, detention facilities, or information technology to the purchase of minerals.

When a company is a major customer of a legal entity committing international crimes during the business, the buyer risks being an accomplice to the crime, if their business is used in the commission of core crimes or the ex post facto benefiting from involvement in the commission of core crimes.

As a second part of the legal test, the Court must explain whether the corporate actors made this contribution willingly, or contentiously that it would encourage the commission of international crimes by a group.
According to the provision, art. 30 of the Rome Statute person's intent can be determined when he "means to engage in the conduct" and he "means to cause the consequence or is aware that

[139] The Statute of the Rome, Art. 25 (a), (c), art. 25 (3) (d) (i) (ii)

it will occur in the ordinary course of events," whilst knowledge is defined in the same provision as the "awareness that a circumstance exists or a consequence will occur in the ordinary course of events."[140]

11. Identification doctrine

After the Mousell Bros case, English courts began holding corporations criminally liable for various intent-based crimes such as conspiracy to defraud, aiding and abetting regulatory offenses, and contempt of court. To prove manslaughter two elements had to be shown beyond a reasonable doubt that a person within the company was personally guilty of manslaughter through his or her gross negligence and the person was the “directing mind” of the company.

***Identification principle***

The corporation is directly liable for wrongful conduct engaged in by senior officers and employees on the basis that the state of mind of a senior employee was the state of mind of the corporation therefore high corporate member acts not as an agent of the corporation but as the corporation itself.

Consequently, the mens rea and actus rea of "sufficiently the high-ranking corporate member acts not as an agent of the corporation but as the corporation itself.

Sufficiently senior employees can identify themselves with the corporation such as members of the board of directors managing directors’ other persons responsible for the general management of the corporation and delegates responsible for management functions who can act independently.

For Strict liability crimes (when no intent need be shown) English identification principle holds the corporation liable only if the crime resulted in a benefit to the corporation.

[140] Michael, J. Kelly, Prosecuting Corporations for Genocide, New York: Oxford University Press,2016, pp107-108

Under the alternate theory of the respondent superior, a corporation can be liable for strict liability offenses and for crimes for which the law expressly or impliedly provides for indirect liability.

For mens rea crimes (where intent must be shown) although corporations are liable under the identification theory there is one big difference between England's identification principle and the American System: England doesn't allow the aggregate or collective intent theory.

The concept of the Doctrine of Identification derives from the English Law which developed as opposed to vicarious liability in the early 20th century. The law has developed the corporate identification doctrine to deal with the situation when the corporation is not held liable for having certain knowledge since it has no brain to possess the knowledge therefore the knowledge of a corporation's directing mind – the individual or individual who control the actions of the corporation – can be attributed to the corporation itself.[141]

## 11.1. Case study – Tesco Supermarkets, ltd. v Nattrass

In 1972 the House of Lords modified vicarious criminal liability for corporations in Tesco Supermarkets, ltd. case where it held that a store manager's conduct was not attributable to the corporation since the knowledge and belief was stated to be that of the cashier, and not that of the company as well as he was not a part of the "directing mind" of the corporation. Only when the relevant conduct is committed by a person with sufficient seniority can be considered as the direct mind and will of the company thus nowadays English courts determine the criminal liability of corporations according to the directing mind theory or the "identification principle".[142]

[141] Anthony O. Nwafor, Corporate Criminal Responsibility: A Comparative Analysis, Journal of African Law, Vol.57, No.1, 2013, pp. 84-93

[142] Jonathan Clough, punishing the parent: corporate criminal complicity in human rights abuses 33 brooks, J. Intl'l L. 899, 2008, pp.914-915

11.2. Case study- Deloitte & Touche v Livent Inc.

In 2017, the Supreme Court of Canada added an element to the *Canadian Dredge* test and held that a court may decline to apply the corporate identification doctrine if it would be against the public interest to hold the corporation liable.
In 2018, the Ontario Court of Appeal injected confusion into the *Canadian Dredge* test by turning *Livent* which meant that the knowledge of a directing mind could be attributed to a corporation even if the *Canadian Dredge* criteria doesn't work.[143]

11.3. Case study - Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd

The use of the identification doctrine originally arose out of the English case Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd under the United Kingdom's Merchant Shipping Act, of 1894. The development of the identification doctrine started with this case when the house of lords questioned whether a corporate shipowner could be liable for the loss of his cargo due to negligent shipping. A ship owned by Lennard's Carrying Co was transporting some goods from Novorossiysk to the Asiatic Petroleum Company when due to the ship accident the cargo was lost.

Lennard's Carrying Co Ltd argued that it was not liable and could be exempt under the Merchant Shipping Act 1894, section 502 stating that a ship owner would be released from liability for losses if there is no performed actual fault or privity of servant or agent which can be considered as the action of the legal entity itself.[144]

Before this case, only through vicarious liability could be punished a corporation for its agent's act though, after the Lennard case, the alter ego theory has become the most powerful method to impose liability on corporations.

[143] Deloitte & Touche v Livent Inc, 2017 SCC 63

[144] Lennard's Carrying Co. v. Asiatic Petroleum Co., A.C. 705, 713 (H.L), 1915

As the house of lords found the director, Mr. Lennard, did know or should have known about defects in the ship and held that liability could be imposed on a corporation for the acts of the directors since in this case Mr. Lennard did not rebut the presumption. Viscount Haldane explained the "directing mind" principle of corporate liability was based on the corporation as an abstraction that has no mind and a body of its own and its active and directing will must consequently be sought in an agent, but who is the directing mind and will of the corporation.

Historical the identification doctrine was adopted initially to resolve a civil case and was only later adopted for criminal law.

Second, if the two contexts, criminal and civil, apply the same test in this regard, this will serve the policy goal of judicial economy, as questions asked in both the civil and criminal trials will be the same, and their resolution may avoid the need for duplication in the later trial.

Since, throughout the history of the doctrine, the civil and criminal sides have essentially been inextricably intertwined with one another, it would seem logical that the two should continue to operate together if possible. But reliance on historical arguments alone is likely insufficient.

## 12. Aggregation Doctrine

The alternative model of identification doctrine for imposing criminal liability on legal entities can be considered the aggregation doctrine in other words collective knowledge doctrine which unites the actus reus and the mens rea of all relevant agents within the corporation to establish whether all these acts would amount a crime if they had been committed by one individual, for example the aggregation doctrine firstly used as appropriate methods for imposing criminal liability on the corporation in the United State v Bank of New England case when New England Bank was convicted individually since all employees knew collectively but none of them had committed a crime individually.[145]

The collective knowledge doctrine considers a corporation as a collective unit that tries to eliminate uncertainties and inequality associated with identification doctrine or senior management test and takes a step towards an organizational criminal liability rather than an

[145] United States v Bank of New England 821 F2d 844(1st Circ), 1987

individual liability. The aggregation doctrine reflects the corporate reality when it recognizes that each employee even the junior level within the corporation has responsibility and by aggregating them can be satisfied the mens rea and formed collective liability whilst the identification doctrine is restricted to the senior management levels.

On the other hand, even though the collective knowledge doctrine is the best derivative model and significantly superior to the identification doctrine is still unable to determine the reality of corporate decision-making and distinguish corporate fault qualitatively from human fault. furthermore, according to the aggregation doctrine corporation can be criminally liable if none of the agent's aggregated acts or omissions had sufficient mens rea as well as it can turn innocent activities of employees into corporate criminal acts. Finally, the aggregation doctrine was rejected in the case R v HM Corner for East Kent.[146]

13. The respondeat superior standard.

Respondeat superior is a common law rule developed primarily in the American federal courts and adopted by the Supreme Court of Canada in Canadian Dredge. The doctrine aims to hold corporations criminally responsible for the acts of any of their low or high-rank agents who: commit a crime on behalf of the corporation within the scope of their employment. [147]

The U.S. Supreme Court first acknowledged the respondeat superior standard as the most suitable method for imposing corporate criminal liability for intentional crimes in New York Central & Hudson River Railroad v. United States case

One of the main issues before the United States supreme court was the constitutionality of the Elkins ACT.

In response to this contention, the court stated that there was no valid objection in law and every reason in public policy why the corporation that profits from the transaction and can only act through its agents and officers shall be held punishable

[146] A. Ragozino, "Replacing the Collective Knowledge Doctrine with a Better Theory for Establishing Corporate Mens Rea: The Duty Stratification approach", 24 Southwestern University Law Review, 1995, pp.423-449

147 New York Cent. & H.R. R.R. v United states, 212 U.S. at 494-95; Developments-Corporate Crime, supra note 13, p.1247

In rejecting the corporation's contentions, the court first noted that it was well-settled law that a corporation would be held responsible for the acts of its agents in tort actions stating: in such cases, the liability is not imputed because the principal participates in the malice of fraud but because the act is done for the benefit of the principal while the agent is acting within the scope of his employment and criminal penalties imposed on the corporation.

As The court found the principle of respondent superior was well established in civil tort law, and only after this precedent did the same principle applied to criminal law therefore there is no longer any distinction in essence between the civil and criminal liability of corporations based on the element of intent or wrongful purpose.[148]

During the reforming of the doctrine of attribution, the US adopted the model penal code 1962 which adopted a more restrictive approach in dealing with corporate criminal liability than the traditional concept of respondeat superior and categorized corporate offenses into three categories:

The first category provides that corporations are liable only if "the commission of the offense was performed, by the board of directors or by high managerial agents having duties of such responsibility which represent the policy of the corporation and act on behalf of the corporation within the scope of his office or employment.

The second group represents those offenses that require mens rea but which are ordinarily committed by corporations without regard for the offender's position in the corporate hierarchy if the offender acted within the scope of his or her employment and with the intent to benefit the corporation but on the other hand corporation can be acquitted if they can prove that a supervisor who is charged employed due diligence to prevent its commission.

The third group comprises strict liability offenses. Accordingly, based on the respondeat superior rule, corporations may be held criminally responsible without proof of the fault element in an offense. It does not matter that the corporation did not benefit from the offense.[149]

[148]Egan v United States 137 F 2d 369 (8th cir), United States v Basic Construction Co 771 F 2d 570 (5th CCA), (1983)

[149] R Hefendehl "Corporate criminal liability: Model Penal Code section 2.07 and the

development in western legal systems" (2000)

14. Application of the respondeat superior.

New York Central railroad and subsequent cases demonstrate that corporate criminal liability is founded on agency principles derived from tort law under respondent superior when the acts and intentions of the corporate agents are imputed to the corporation. In addition, the agents who committed the offense remain personally liable.

The first component for the fulfillment of the respondeat superior standard is that the criminal act must be directly related to duties that the agent has the authority to perform within the scope of his employment and secondly the agent must be acting on behalf of the corporation or with the intent to benefit the corporation and not solely to advance the agent's interests or the interests of third parties.[150]

15. Civil law VS Common Law

The subject of international criminal law depends on whether national criminal law doctrine derives from the Romanist- civilist tradition or the common law tradition.

Across the spectrum of domestic jurisdictions, under the Romanist-civilist law system which is a model of legal order deriving from Roman law only individuals could be criminally responsible though recently there have been occurred extended criminal sanctions to legal entities when it comes to dealing with organized crimes or white-collar crimes

Civil law jurisdictions in European countries such as France Switzerland Denmark, Finland, and the Netherlands, Germany have all enacted limited forms of corporate criminal liability.

Germany and the United States are opposite on the spectrum of domestic jurisdiction. Germany affords companies complete immunity from criminal prosecution since the concept of guilt which is necessary to impute a person for a crime is inherent only to natural persons therefore its impossible to impute the guilt of an individual to a corporation while the United State extend complete criminal liability to all officers and the company.

[150] J. Burchell and J. Milton, "Principles of Criminal Law, Juta & Co Ltd, 3rd ed, pp.563-564

As the dominant legal systems in the developed world, civil and common law jurists simultaneously fill the benches of international criminal tribunals.

In common law systems contrary to civil law legal entities may receive a fine and their assets may be seized on the ground of belonging to a criminal organization, or on the concept of conspiracy and the head or decision makers of these legal entities can also be held individually responsible for harm caused by the entities. Nuremberg provides a good example of the criminal prosecution of Nazi leaders after World War II.

To effectively conducted a joint trial of twenty-three German defendants that included commanding officers, economic leaders, and civilian government officials, the trial used conspiracy as the method of charging crime against peace. [151]

As a legal theory imputing criminal liability among a group of perpetrators conspiracy has a long history in the common law-based American and British systems but is unknown in the civil law-based French and Russian systems.[152]

Thus, the civil lawyers at first at Nuremberg initially resisted the use of conspiracy as a mode of prosecuting the captured Nazi leaders, but finally, the American and British lawyer's views became dominant, and this method of attributing criminal wrongdoing was used.

Seventy years later the basic element of conspiracy lives on in the various forms of joint criminal enterprise theory that is used today in the modern international criminal tribunals by judges and prosecutors derived from both civil and common law traditions.[153]therefore, the arguments against holding corporations criminally liable for complicity in genocide under international law don't support it.

In the absence of an international tribunal, the General Assembly of the United Nations or one of its constituent bodies should request an advisory opinion from the International Court of Justice to prosecute a corporation for genocide

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[151] Jonathan A. Bush, The Prehistory of Corporations and Conspiracy in International Criminal Law: what Nuremberg Really Sais, 109 Colum. L. Rev., 2009. Pp.1094-1097

[152] Michael, J. Kelly, Prosecuting Corporations for Genocide, Oxford University Press,2016, Pp.191-192

[153] Beth Stephens, the amorality of profit: transnational corporations and human rights,20 Berkeley J. INT'L 45, 2002, pp. 76-77

If the ICJ gives the positive advice that corporations can be held criminally liable for complicity in genocide under international law, a new impetus to amend the statute of the international criminal court would commence.

16. Full corporate criminal liability

Full corporate criminal liability which developed in the United States and Canada, then in England, states that all corporations are criminally liable without limitation.

In determining whether a corporation may be criminally liable first is necessary to discuss ultra vires acts by corporate agents.

Ultra vires is a principle of common law that gives the legal entity duty to act lawfully even outside its jurisdiction since it can be held liable within its jurisdiction for its unlawful foreign acts. As it is accepted in England and the United States corporation founded for lawful commercial purposes may commit crimes and can be criminally liable for offenses against their employees to the corporate purpose. Therefore, under the system of full corporate criminal liability, there is no reason why criminal prosecution of corporations should be limited to economic wrongdoings therefore there is nothing, in theory, to prevent a corporation from being held liable for crimes such as murders, rape, human rights violations, etc.

Finally, common law systems overcame the problem that a corporation is an abstraction and can neither think nor act by itself and its active and directing will must consequently be sought in the agent who is the directing mind and will of the corporation as defined by Lord Viscount Haldone in the Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd case [154]

Finally, England's judicial system has adopted an identification doctrine to solve this problem and established that corporations can have a mind capable of criminal intent resulting in states having a responsibility to attribute to the corporation the intent and acts of its agents for the prosecution of a legal entity successfully. But there remains another problem how we can distinguish a corporation's liability and its vicarious liability for the acts of its agents acting in the scope of their authority

[154] Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd, House of Lard judgment A.C. 705, 1915

When it comes to the U.S. most states don't follow the high managerial agent standard for federal offenses ", Therefore corporation can be liable for the actions of any employee no matter what their ranks are even part-time employees who act within the scope of his working activities and with the intention at least partially to benefit the company.

However, American law limits corporate liability where the human actor was not acting within the scope of his employment or authority and did not intend to benefit the corporation.[155]

The most innovative concept of "corporate culture" appears to be embodied Australian Criminal Code Act of 1995 which defines corporate culture as a policy or rule or practice existing within the body corporate where the crime occurred.[156]

Australian Code applies to a body corporate in the same manner as it applies to individuals therefore a body corporate may be found criminally responsible and guilty of any offense the physical element of an offense committed by an employee, agent, or officer of a body corporate within the scope of their authority must also be attributed to the body corporate. Australian code doesn't hold criminally liable a company only because one of its employees committed an offense, but also for criminal practices as a culture of the company.[157]

The Australian model is almost identical to the US model of the penal code although a due diligence defense is not available in the case of acts or omissions by the supervisory board. Like U.S law Australian law does permit aggregate actions of employees.[158]

To sum up, the general principle of corporate liability is well-established in common law countries which recognize a wide measure of corporate criminal liability though on the other hand there are essential differences in the standards related to attribution of fault.

[155] L.H. Leigh, Criminal Liability of Corporations, and other groups: A comparative View, Michigan Law Review Vol.80, Issue 7, Mich.L 1508 ,1982, pp.1510-1518

[157] Journal of African Law Vol 57, NO 1, Corporate Criminal Responsibility, pp. 97-105

[158] A. Rose, Australian Criminal Code Act, Corporate Criminal Provisions, 6 Crim, L.F., 1995 PP.129-131

## 17. Canadian model of corporate criminal liability

Unlike in the United States, Canada does not approach the model of criminal liability under the doctrine of *respondeat superior*. Before 2004, unlike the American identification doctrine, the Canadian model could be used in narrow circumstances to hold the corporation liable when the employee who committed the alleged acts was a directing mind who had the authority to devise or developed corporate policy or made corporate decisions and acted for the benefit of the corporation.

In 2004 specific act to amend the criminal code came into force therefore many important changes were implemented in the domestic legal system.

The first and most important change the criminal law a directing mind is no longer necessary to hold corporate criminals liable through senior officers including every person who can be considered as a directing mind, as well as lower-ranking corporate officials or managers, is still required

The second most important change under the Act to amend the criminal code is that if the senior officer becomes aware of potential offense by anyone who is a part of a corporation and doesn't take appropriate measures to prevent wrongdoing even if the senior officer has no policy setting authority in the given area where the crime occurred the corporation will be criminally liable for its agent's action. Before this amendment under the common law if the person committed the crime in this area where he had the authority the corporation could be criminally liable for this crime as opposed to if the same person used another area of the same corporation in which he had no policy setting authority the person could not be considered as a direct mind, therefore, the corporation couldn't be liable.

Before the amendment, a directing mind could be convicted if he had committed the crime before the corporation but after the changes under the statute, it's possible to charge the corporation without convicting the senior officer even if the senior officer doesn't take all appropriate measures to prevent wrongdoing. When it comes to managers and other employees

associated with the corporation can render the legal entity criminally liable if they commit mens rea offenses under the Criminal Code.[159]

The legal reform of the common law performed by the statute made it easier in one respect but on the other hand made it more difficult to prosecute the legal entity criminally liable. Under the statute, only the result of an unintended benefit is not sufficient to convict the corporation but also the proof of intention to give a benefit to the corporation.[160]

## 17.1. Case study - Canadian Dredge & Dock Co. v. R

**Criminal liability of corporations for mental fault**

Canadian Dredge & Dock Co. v. R.' is one of the most important cases in the field of corporate criminal liability since first in history the Supreme Court of Canada introduced at common law in this case when held the four companies liable for bid rigging and found that a civil plaintiff proved "actual fault or privity" of a corporate defendant under the English identification doctrine.

The supreme court held that the conduct and mental states of the corporation can be represented by employees and senior officers or anyone else with executive authority in duty who acted wrongfully with intention even though a representative of the corporation may have defrauded the corporate employer or acted for his benefit contrary to instructions of the corporation since they are considered the "directing mind" of the legal entity.[161]

***The Canadian supreme court's judgment:***

[159] W. Cory Wanless, Corporate Liability for Journal Crimes Under Canada's Crimes against humanity and War Crimes Act, 7 J Int' l CRIM. JUST., 2009, pp. 201-206

[160] Darcy L. Macpherson, Civil and Criminal Application of the Identification Doctrine: Arguments for Harmonization, Alberta Law Review 45, no. 1, 2007, pp.191-193

[161] Darcy L. MacPherson, The Civil and Criminal Applications of the Identification Doctrine: Arguments for Harmonization, 45 ALTA. L. REV. 171 (2007)

From the beginning, corporate criminal liability was denied by the appellants, because the managers allegedly were acting in fraud against the appellant employers throughout for their benefit and were acting contrary to instructions of their employment.

Several companies also denied the existence of all theories of corporate criminal liability for mens rea offenses

Canadian Supreme court discussed some issues related to conspiracy to defraud, criminal liability raised where directing mind acting in fraud of corporation or for his benefit/ contrary to instructions, and finally stated the identification doctrine can be used only in this case when the directing mind regularly intentionally and defrauds the corporation and his wrongful actions are directed to the destruction of the undertaking of the corporation where the act is intended to finish receiving a benefit from any of its activities in the undertaking. [162]

Historically corporations were generally immune from criminal prosecution since in criminal law the state cannot convict one person of a mens rea crime by attributing the mental state of another person to the first, though the identification doctrine can be considered as a determining mechanism to change the substance of criminal law regarding corporations.[163]

Even though a corporation is a separate legal person from those who hold its shares or control its operations the fact remains that it has no brain of its own. the court also considered whether there is an individual who committed the *actus reus* with the requisite element of mental fault or not and if this individual is sufficiently superior for the court to the mental state of this individual should be attributed to the corporation[164] and finally held that even in mens rea offenses if the court finds the senior officers or managers are directing minds in the area of their authority their action and intent will be considered the action and intent of the company therefore corporation will be criminally liable for the action of its officer's action.[165]

[162] Canadian Dredge & Dock Co. v. R., May 23, 1985, pp.662-664

[163] Canadian Dredge, supra note **I** at 678-79, 683-84, 687, 689, 691, 693-94.

[165] Director of Public Prosecutions v. Kent and Sussex Contractors, Ltd., 1944 K.B. 146 (Div. Ct.) pp.155-56.

Furthermore, identification doctrine can prove the actual fault as opposed to the vicarious responsibility of the corporation both in tort and in criminal law.[166]

The identity doctrine units anyone else to whom was delegated the governing executive authority of the corporation therefore A corptoration may have more than one directing mind.

The action taken by the directing mind: must be within the scope of his authority, within the area of the corporate operation delegated to him, and must be designed or result partly for the benefit of the corporation for acts of directing the mind to become attributable to the corporation under the identification doctrine.

Finally, the supreme court held that the appellants received benefits in the form of contracts and subcontracts, direct payouts, and other benefits. It was a "share the wealth" project for the benefit of all parties except the public authorities who awarded the contracts therefore in their activities, the directing minds were acting partly for the benefit of the employing appellant and partly for their benefit.[167]

In the Deloitte & Touche v. Livent Inc. Case Supreme court of Canada held that even if the *Canadian Dredge* requirements are met, a court can decline to apply the corporate identification doctrine if it would not be in the public interest to hold the corporation liable.

In 2018, the Ontario Court of Appeal held in the *Livent* case that the knowledge of a directing mind could be attributed to a corporation even if the *Canadian Dredge* criteria were ***not*** met.

In 2002 Canada also adopted a statute in implemented key provisions of the international criminal court (ICC)'s Rome Statute. The Canadian Crime Against Humanity and War crimes act (CAHWCA) vests jurisdiction in Canadian federal courts to try individuals for the crimes comprehended in the Rome statute which created space for corporate liability for violations of international law that previously did not exist. [168]

As defined by both CAHWCA and international customary law The actus reus of the crime will be an act that aids or abets the commission of a war crime, Crime against humanity, or

[166] Canadian Dredgesupra note 1, R. v. St. Lawrence Corp. Ltd., 1969

[167]Canadian Dredge, par. 68

[168] W. Cory Wanless corporate liability for international crimes under Canada's crimes against humanity and war crimes act, 7 J INT'L CRIM.JUST.201,206 (2009)

genocide. According to the Canadian court's definition, any act that assists or helps in the commission of the offense constitutes aiding whilst Abetting is similarly widely defined and includes encouraging, promoting, or procuring the crime to be committed.

Since it is not specifically defined by CAHWCA, the seriousness of the crime demands that the mens rea meets constitutional standards. As a result, mens rea will only be fulfilled if the accused was aware of or willfully blind to the act of war crime or crime against humanity or genocide therefore, if the corporation knew or was willfully blind to the fact that its actions aided or abetted the commission of a war crime or crime against humanity or genocide by a third party it would have fulfilled the mens rea requirement.

Under Canadian law knowledge of specific details of the crime is not required, the corporation could still be held liable where it knowingly accepts an unintended benefit arising from an offense committed by its directing mind.[169]

18. Partial criminal liability

In all European systems which recognize various forms of corporate criminal liability, the natural person is primarily responsible.

The rule of personal responsibility also applies in France, particularly for acts that tend to harm the corporation itself.

French law allows for corporate criminal responsibility for any criminal violation of French law. However, there are two restrictions on when corporations may be held liable for criminal offenses:

A corporation is liable only when the provisions that have been breached explicitly declare that the law applies to corporations.

It's necessary that an employee or agent director, managers, or any persons vested with a delegation of powers who act within a specific mission for the company act on a legal person's

[169] MacPherson, “Reforming the Doctrine of attribution”, note 7 p. 207

behalf. the directors or presidents are personally liable for public welfare offenses imputable to their corporations. [170]

The directors, under this doctrine, must prevent infractions from occurring though they are liable only where they were aware of the facts of serious offenses.

Permissible punishment for corporations includes measures such as the closing of the business and limitations on activities to fines up to five times that allowed for individuals. [171]

When it comes to Belgium, the natural person is liable, and, in the case of omissions, liability rests on those persons who were responsible for preventing the infraction. On the other hand, corporations may not be criminally convicted but they may be affected indirectly by fines against their employees who may then be indemnified by the corporation, or the sanction may comprehend seizure of the assets of the corporation and if the agent of this corporation is responsible for infraction its business may be closed.

Despite the absence of a general principle of corporate responsibility in the system which recognizes partially criminal liability corporations can still reach a variety of other penal sanctions such as disqualifications or confiscations since a legal entity can be held civilly liable for the infraction of its agents for all the civil consequences including tax fines or customs fines.

19. The intercorporate conspiracy problem

The fundamental requirement of the criminal law of conspiracy is that two or more persons must be engaged in a criminal enterprise to have a conspiracy. the term person in the federal conspiracy statutes includes corporations. Thus, some courts have stated the intercorporate conspiracy issue in terms of whether the corporation can be counted to satisfy the multiplicity of Actros requirement or whether the corporation can conspire with its agents, the case law resolved this problem by viewing the corporation as an actual participant in the conspiracy

[170] Symposium, supra note 70, p.289

[171] Amann, supra note 73, n. 22, p.332

In the case United States v Consolidated Coal the corporation and eight of its agents were charged with conspiring to defraud the government. The court answered the main question of whether a corporation can be charged and convicted of conspiring solely with its employees and finally refused to find a conspiracy between a corporate defendant and an individual defendant. As alleged the individual defendants were employees of Console at the time of their participation in the conspiracy though Consol submitted that corporation's liability for conspiracy solely with its employees is impossible based on the Sherman Act, which has held higher standards and requires reliable facts consistent with sufficient to show that a conspiracy is plausible and not merely possible[172]

## CHAPTER V. Universal jurisdiction over Jus Cogens Conduct

### 1. The principle of Universal Jurisdiction

The principle of universal jurisdiction was first famously utilized in 1998 when former Chilean dictator Augusto Pinochet was charged with torture in London at the order of a Spanish court. Earlier, the prosecution and punishment of serious violations of human rights created two international criminal tribunals- the ad hoc tribunals for the former Yugoslavia and Rwanda[173]

Under customary international law universal jurisdiction applies to crimes prohibited by international law, first, if they are contrary to a peremptory norm of international law to infringe a jus cogens and secondly, they must be so serious and on such a scale that they can justly be regarded as an attack on the international legal order. Furthermore, every state has jurisdiction to exercise extraterritorial jurisdiction regarding crimes prohibited by international law.

According to the underlying theory for the availability of universal jurisdiction over jus cogens crime under international customary law, any country anywhere in the world can try a perpetrator for the most serious international crimes such as genocide, crime against humanity, war crimes, the crime of aggression, even the state asserting jurisdiction has no connection to

[172] Susan J. Hoffmann, (1983) Corporation Criminal Liability for Intercorporate Conspiracy, Kentucky Law Journal, Vol. 72: Iss.1.

[173] Michele J. Kelly, case studies "Ripe" for the international criminal court: practical applications for the Pinochet, Ocalan, and Libyan Bomber Trials, 8 INT; L & PRAC. n.17, 1999, PP.21-24

these crimes at all since universal jurisdiction is based on the atrocious nature of the crime and it doesn't depend on other extraterritorial bases for jurisdiction which stem from the nationality of the perpetrator or the victim or national security.

All states in the international community have a shared interest in preventing and punishing the crimes that fall into the jus cogens category which represents the highest hierarchical position among all other principles and is imperative

International crimes such as aggression, genocide, crimes against humanity, war crimes, piracy, slavery, and slave-related practices, as well as torture are considered jus cogens for several reasons:

- International opinion Juris, reflecting the recognition that these crimes are deemed part of general customary law.
- The preambles or other provisions of treaties applicable to these crimes indicate these crimes' higher status in international law
- The large number of states which have ratified treaties related to these crimes
- The ad hoc international investigations and prosecutions of perpetrators of these crimes

Due to the highest hierarchical position of such crimes every state has risen some legal obligations and duty to prosecute or extradite end extend universal jurisdiction over perpetrators of such crimes, as well as to impose the non-applicability of statutes of limitations any immunities up to for such crimes including Heads of State. There exists a universal application of these obligations in times of peace or war and this obligation cannot be non-derogated under states of emergency.[174]

when it comes to aunt dedere out judicare (either extradite or prosecute) the obligation ensures that individuals involved in the commission of such atrocious crimes cannot be punished based on regional customary law in Europe which says individuals cannot be extradited to states where they would face the death penalty.

[174] M. Cherif Bassiouni, International crimes: Jus Cogens and Obligation Erga Omnes, Vol.59: No.4, pp.63-71

[174]U.N. Doc A/CONF. 39/27. Vienna Convention on the Law of Treaties, May 23, 1969

## 1.1.Case study - Lundin Energy corporate complicity in war crimes in Sudan

Corporations' involvement in international crimes is not new, but multinational corporations are increasingly involved in the direct conduct of war crimes by providing the necessary equipment to conduct these crimes.

this is the first time since Nuremberg that a listed company will have accounted in court for war crimes in November 2021, Sweden charged two executives: Alex Schneiter and Ian Lund who signed a contract with the government for the exploitation of oil in the area that was not at that time under full government control, along with the International Petroleum Corporation oil and gas company which operated through its subsidiary Lundin Sudan Ltd for complicity in war crimes carried out by the Sudanese army Southern Sudan from 1999 to 2003.

Despite the prosecutor, Henric Attorps continued to request to proceed with the trial against Lund Energy over war crimes allegations in Sudan due to the poor health of Witnesses and old age the defendants refuse to cooperate until their appeals have been settled.

***Universal Jurisdiction***

The authorization to prosecute in the Lundin case refers to universal jurisdiction since Alex Schneiter as an agent of this oil corporation is neither a resident nor a citizen of Sweden.

Schneiter requested Stockholm District Court to dismiss the indictment against him based on the argument that "International law doesn't support the application of universal jurisdiction over crimes committed in a non-international armed conflict or over the accused who is not present in the territory of the State where he is indicted".[175]

When the district court and the Svea court of appeal denied his request Schneiter appealed the decision to the Swedish Supreme court. The main question that the supreme court must answer is whether international law must prohibit the exercise of jurisdiction or expressly permit the exercise of jurisdiction

[175] Prosecutor v. Ian Lundin and Alex Schneiter, motion from I.L., 11 November 2021, aktbil. 955

To the supreme court Prosecutor Eva Bloch submitted the written submission based on the Prosecutor General's opinion, concretely during the discussion of what follows from general international law prosecutor based on the lotus case as the leading precedent and stated that concerning prescriptive jurisdiction and adjudicative jurisdiction the Lotus case provides that international law gives the possibility to states to extend the application of their laws and adopt most suitable principles.[176]

According to Swedish Criminal Code, a Swedish court may exercise jurisdiction over crimes committed outside Sweden according to Swedish law where the crime has been committed by a Swedish citizen or a foreigner domiciled in Sweden resulting in a double criminality rule for a criminal act. (Active nationality principle)[177]

Furthermore, Swedish criminal code based on the universality principle a Swedish court may adjudicate crimes against international law, regardless of the nationality of the perpetrator and the place where the act was committed based on the universality principle.[178]

***Authorization to Prosecute***

The second most important question that the supreme court could consider is whether Sweden can prosecute someone who is not present on its territory or not because Alex Schneiter was a citizen of Switzerland didn't reside in Sweden and was not in Sweden when the charges were brought.

Prosecuting a crime committed outside of Sweden by a Swedish citizen requires the authorization of the Government, or authority empowered by the government in this case head of the Swedish Prosecution Authority is empowered to prosecute certain crimes which shall be based on the:

- the gravity of the crime,
- the link to Sweden and,

[176] Lotus, PCIJ, 7 September 1927, p. 19. See references to the Lotus case in the dissenting opinion of Judge Van den Wyngaert, Arrest Warrant Case, Judgment 14 February 2002, para. 49

[177] BrB Chapter 2, Section 2(1)

[178] BrB Chapter 2, Section 3(6)

when crimes are committed outside of Sweden, the interest of the State must exist to prosecute

This procedure filters out cases that Swedish courts are not suited to deal with. [179]

The prosecutor in her written submission based on another case when a Swedish court sentenced a non-Swedish citizen, a former Iranian official to a life sentence for mass execution of political prisoners in 1980 and states that international law doesn't require a territorial or national connection for the application of universal jurisdiction, the governmental procedures Universal jurisdiction for war crimes can be applied based on the main purpose of universal jurisdiction to make the court sure that those guilty of the most heinous crimes do not escape criminal accountability.

***Applicable law***

The defendants have been indicted for "grave crime against international law" as formulated in the criminal code of Swedish at the time of the alleged crimes in this case 1997-2003[180] Based on the principle of legality, as codified in the constitution and statutory law.

The provision on crime against international law was amended in 1986, resulting in the scope of crime against international law being limited to serious violations and the provision was moved to Chapter 22 section 6 of the Criminal Code, the provision applicable in the Lundin case.

Thus, the applicable provision provides the following:

*"A person guilty of a serious violation of a treaty or agreement with a foreign power or an infraction of a generally recognized principle or tenet relating to international humanitarian law concerning armed conflicts shall be sentenced for crime against international law to imprisonment for at most four years. "*

The text in Chapter 22 section 6 of the Criminal Code defining "grave crime against international law" does not immediately distinguish between IACs and NIACs. Instead, we need to interpret the words "serious violation" which can be considered as:

[179] Regulation (1993:1467) on a delegation to Prosecutor General to authorize prosecution in certain cases.

[180] BrB Chapter 22, Section 6

- use of any weapon prohibited by international law
- attacks on civilians or on persons who are injured or disabled
- initiating an attack knowing that it will cause damage to civilians or their property, etc.

***The complicity of Corporations and their agents.***

Under Swedish law, a legal entity cannot itself be criminally liable, Only individual representatives or agents of a corporation can be subjected to prosecution therefore where a court finally establishes that agents of a corporation have committed a criminal offense, a company may be subject to:

- a corporate fine and/or
- forfeiture of economic benefits deriving from the crime.

Under relevant rules applicable to the case, the corporate fine can amount to about US$340,000.

To establish a criminal offense, the Prosecutor must prove that:

- There exists relevant intent on the side of the alleged perpetrators,
- One or more of the Company's agents committed acts that, intentionally aided and abetted the primary perpetrators' criminal acts.

According to the Criminal Code, two types of mens rea exist in Swedish criminal law: intent and negligence.

Swedish statutory law does not define intent, it can be considered as the standard form of mens rea and negligence can only be applied if certain provision says that this form of mens rea is enough to establish liability.[181]

Intent can be divided into three categories: direct intent, indirect intent, and reckless intent[182]

Under the Criminal Code of Swedish Complicity could be committed with intent or recklessness and punishment shall be imposed not only on the person who committed the act but also on anyone who aided or abetted this by advice or action though it is not necessarily a

[181] BrB Chapter 1, Section 2(1)

[182] Lekvall and Martinsson, 2020, pp. 104-108

significant contribution to the crime for holding complicity liability, support the perpetrator in the latter's intention to commit a given crime is sufficient. [183]

In this case, the reckless intent Regarding The agreement signed between Sudan Ltd (Lundin Oil) and the Sudanese Government refers to the act of facilitation, not to the main crime.

Therefore, to prove the complicity of the corporation and its agents it is enough that the defendants had reckless intent, i.e., that they perceived that it was highly probable that a result would occur because of their conduct.

It is also enough for the Prosecution to prove that the defendants have supported the perpetrators in the latter's intention to commit a given crime. [184]

To conclude this case has paramount importance for creating a legal precedent to become a guideline for future cases

If the supreme court makes a decision that limits Sweden's ability to prosecute war crimes committed in international and or non-international armed conflicts based on universal jurisdiction it may lead to Sweden depriving victims of the most atrocious crimes of redress.

2. Domestic v International Prosecution

Once jurisdiction is established the mechanism for bringing the prosecution can vary across states depending upon the domestic criminal justice system

Before the twentieth century, the United States adhered to the British view that corporations could not be held criminally liable as legal persons. But the U.S supreme court reversed this traditional view after the 20th century corporations can be held criminally liable for a broad range of conduct that they can commit even aiding and abetting Moreover U.S law does not place procedural restrictions on prosecuting corporations.

[183] BrB Chapter 23, Section 4

[184] M. Klamberg, Prosecuting Corporate Executives for War Crimes in Sudan, New York University Journal of International Law, and Politics (JILP) Vol.54, 2022,

U.S. citizens may bring suit under ATS for two violations: torture and extrajudicial killing whilst Non-U.S. citizens can bring suit under the ATS for Crimes Against Humanity, war crimes, Genocide, Cruel, Inhuman, or Degrading Treatment, Slavery, State-Sponsored Sexual Violence & Rape, Torture, Extrajudicial Killing, Forced Disappearance, Prolonged Arbitrary Detention

All human rights cases that Non-American or American citizens bring in U.S courts under ATS are civil lawsuits that result in only an award of monetary damages for the plaintiff, and they will never result in jail.

In the United States two doctrines have been primary use in holding corporations criminally responsible:

- The model penal code section 2.7 makes the corporation for the behaviors of leaders in the organization and
- Respondent superior holds the employer responsible for the criminal acts of its employees.[185]

To the assertion of domestic jurisdiction over international crime such as genocide by individual states, the 1948 genocide convention confers jurisdiction on states to prosecute perpetrators of genocide committed in their territories. It's also obligating state parties to craft legislation sufficient to carry the treaty into effect.

International prosecution of corporations for international crimes is preferable to domestic prosecutions for several reasons including:

- Equal treatment and uniformity of results
- Protection of vulnerable societies
- Deterrence
- Victim relief
- Development of international criminal law

If companies know that there is no international accountability for their criminal actions, they will be engaging in complicit conduct easily since they can move themselves to jurisdictions

[185] Richard D. Hartley, Corporate Crime, 2008

where they will not be prosecuted therefore it's preferable to develop equal treatment and prosecute corporations for international crimes at the international level.

When it comes to the protection of vulnerable societies Most human rights violations and atrocities tend to occur in the societies least able to handle them since the developing world is poor ineffective governance and the rule of law therefore the risk of prosecution by the local regime is practically nonexistent.

Thus, it is a moral obligation for international society to contribute to the legal improvement of international criminal liability for international crimes by corporate complicity.

Therefore, deterrence as a goal for any criminal law system is an appropriate method for the trial to punish a legal entity.[186]

In the international criminal law system, one of the main goals represents support for victims. Thus, one of the main reasons why international prosecution is preferable to domestic for victim relief is that Seized corporate assets for companies involved in international crimes could be redirected towards victim compensation and rerouted back to invest in the communities that were destroyed.

Finally, the development of corporate criminal responsibility and prosecution for international crimes represent the main target for international society. The establishment of the ad hoc tribunals for the former Yugoslavia and Rwanda is a big step forward but on the other hand, a legal opinion and decision by the international court of justice is needed to bring enough pressure on the state's parties to the Rome Statute to extend the ICC's international core crimes jurisdiction over corporations.

## 2.1.Case Study – Lafarge S.A. Corporate Complicity in Crimes Against Humanity in Syria

According to the Geneva conventions and Additional Protocol I state has obligation to criminalize grave breaches of international human rights law in their national legislation, and prosecute such crimes, therefore even though Cement Syria (LCS) cannot be prosecuted at the

[186] Kelly Michele J, Prosecution Corporations for Genocide, pp.176-178

international level it can be held criminally liable for crimes against humanity at the domestic level.

On 15 November 2016 two ANGOs: the French NGO Sherpa, and the European Center for Constitutional and Human Rights (ECCHR) alongside 11 former Lafarge employees filed a complaint before French courts against Lafarge cement company for the facts that took place in 2013 and 2014 in Syria, around the Jalabiya factory owned by the Lafarge group such as buying war materials from terrorist jihadist groups to keep its cement factory in northern Syria through the early years of the country's civil war, as well as compensating terrorist enterprise for safe passage of workers and products based on articles 121(2) and 113(6) of the French Criminal Code which recognizes corporate criminal liability if perpetrators of crimes act in the company's behalf and makes a charge against the corporation for aiding and abetting in international core crimes under the principle of universal jurisdiction based on the article 689 of the French criminal code. [187]

In 2018 Lafarge Cement Syria (LCS) was accused by the French court for financing terrorism, forced labor, complicity in crimes against humanity and complicity in war crimes though in November 2019, a French appeal court dropped the crimes against humanity charges against the company because of a lack of intent to contribute to the crime based on a strict understanding of Article 121 of the French criminal code by demanding that the accomplice must share the intent required of the main perpetrator committing a crime and limited Sherpa's and ECCHR 's standing as civil parties in this criminal case

On the other hand, a French appeal court upheld the charge of financing terrorism against Lafarge based on the argument that money paid to various armed groups totaling 13 million euros originated from the accounts of Lafarge Cement Syria[188]

In resulted two NGOs Sherpa and ECCHR appealed the appellate court's decision to the Supreme Court.

[187] Business and Human Rights Resource Centre, "Lafarge lawsuit re-complicity in crimes against humanity in Syria, 2016

[188] Business and human right center, "Landmark Decision in Lafarge Case", 2018. See, Landmark Decision in Lafarge Case - Business & Human Rights Resource Centre (business-humanrights.org)

On 8 June 2021, the Supreme Court examined the case, dismissing the crimes against humanity and endangering the lives of others as well as the admissibility of the two NGOs as plaintiffs and in September 2021, the overturned the 2019 lower court decision and held that Lafarge's indictment for complicity in crimes against humanity was wrongly canceled by Paris appeal court. As the supreme court found Lafarge According to the established jurisprudence "knowledge of the direct perpetrators' intent to commit a crime sufficient for established complicity", therefore knowingly transferring millions of dollars to an organization whose purpose was criminal and put the lives of an employee at risk just for the sake of its financial profits is enough to identify Lafarge's involvement in the crime as complicity in resulted in the supreme court asked the investigating magistrates to reconsider the charges. [189] Apart from the corporation, eight Lafarge executives were also charged with financing a terrorist group and endangering the lives of others.

In May 2022, the Investigative Chamber of the Paris Court of Appeals replaced the charge of "complicity in crimes against humanity" against Lafarge. Additionally, the company is also charged with financing terrorism and endangering the lives of others.

As Lafarge argued it did not intend to contribute to terrorist enterprises, and only sought to continue the operation of its factory therefore it didn't consider itself a perpetrator in this crime though the Supreme Court categorically rejected this argument and clarified that "the accomplice acts to pursue a commercial activity, represent a motive and it is not related to the intentional element."

Finally, the supreme court's decision touches on some points, particularly in this case, the supreme court's decision defines the legal meaning of the "intention" of the accomplices of crimes against humanity. As the supreme court found "if the principal perpetrator has the knowledge to commit or is going to commit such a crime against humanity and by his aid or assistance, he participates in its preparation or commissions its sufficient to hold the company crime liable for complicity". Secondly, it is the first time that the Supreme Court ruled on the application of complicity in crimes against humanity that since French law provides for the criminal responsibility of companies, there is no distinction between legal and natural persons to be criminally liable for the complicity in a crime. Before this decision never had such a

[189] ECCHR, "Historical victory before French Supreme Court on the indictment of multinational Lafarge for complicity in crimes against humanity in Syria" , see ECCHR: Press release

charge been leveled against a holding company, for crimes committed abroad via a subsidiary. Finally, Lafarge SA has agreed to pay $777.8 million to resolve a criminal charge.[190]

3. Extradition of corporation

The duty to extradite or prosecute appears in at least seventy international criminal law conventions though extradition of a corporation has a quite different theoretical standard than extradition of an individual since multinational corporations are not extraditable and even if they are extraditable there is no general legal obligation to do so.

Nowadays "aut dedere out judicare" principle has not yet fully grown into customary international law, therefore no duty is attributable to states that may have jurisdiction over a corporation implicated in core international crimes such as genocide, crime against humanity, the crime of aggression, and a war crime. However, that view is now beginning to change, but whether the duty will become part of customary international law is still unclear.[191]

There can be distinguished narrow or broad approaches regarding the extradition of corporations.

The narrow approach evolves to bind states, not a party to the treaty to hold that the duty to extradite or prosecute a corporation can become customary international law concerning one offense defined in one treaty depending on state practice and the degree of opinion juris which is a practice that is generally followed but states feel legally free to disregard if does not contribute to customary law evidenced by nonparty states.

The broad approach holds that the duty has become a customary rule concerning a group of international offenses such as offenders who commit war crimes or crimes against humanity furthermore the second form includes acts of international terrorism because terrorism is such

[190]ECCHR, "USA: Lafarge pledges guilty to financially supporting ISIS in Syria and agrees to pay $777.8 million fine", Business and Human Rights Resource Center, 2022, See, USA: Lafarge pleads guilty to financially supporting ISIS in Syria & agrees to pay $777.8 million fine - Business & Human Rights Resource Centre (business-humanrights.org)

[191] Lee. A. Steven Genocide and the Duty to extradite or prosecute why the United States is in breach of its international obligations, 39 VA. J INT'L L. 425,447 (winter1999)

an atrocious crime that all states are bound to cooperate in ensuring that their perpetrators are brought to justice.

The third form of the broad approach extends the duty to all international offenses. This third argument is based on the six teleological points that historically, the duty to extradite or punish was not limited to international crimes. It's better to use the principle of "aut dedere out judicare" instead of the principle of "aut dedere aut punire", to avoid the punishment of the innocent offender. Through the nineteenth century, Grotius Vattel and others believed that general international law imposes a definite legal duty to extradite even absent a treaty, whilst other lawyers argued that the duty to extradite is only a moral obligation, not a legal obligation, and thus extradition is not legally binding unless it is contained within an extradition treaty. [192]

Since international crimes are jus cogens crimes, all states should cooperate in bringing those who commit such offenses to justice and it's not necessary to enforce direct before an international criminal court since each state prosecutes offenders in their own countries. The duty to extradite or prosecute represents the common interest of all states therefore the duty is owed to the civitas maxima the international community. The duty to extradite or prosecute has been accepted as a legal obligation in several multilateral treaties that define international crime therefore principle "aut dedere put judocare" has been accepted as a positive norm of general international law. Thus, the principle aut dedere aut judicare is a rule of general international law, which is also a jus cogens principle and cannot be changed by the treaty [193]

**4.** Obligation to make reparation under international law

Numerous international treaties or regional conventions ensure the right to a remedy for victims of violations of international human rights law:

- the Universal Declaration of Human Rights (article 8)
- the International Covenant on Civil and Political Rights (article2)

[192] Grotious Hugo, De Jure Belli Ac Pacis, bk II, ch. XXI, secs. III & IV, "Classics of International Law ", James B. Scott ed., F. Kelsey trans, 1925

[193] Bassiouni Cherif M. & Wise Edward M., "Aut Dedere Aut Judicare: The Duty to Prosecute or Extradite in International Law", 1995.

- the International Convention on the Elimination of All Forms of Racial Discrimination, (article 6) [194]
- the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (article 14) [195]
- the Convention on the Rights of the Child, and of international humanitarian law (article 39)
- the Hague Convention respecting the Laws and Customs of War on Land of 18 October 1907 (article3)
- the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977, (article 91)
- the Rome Statute of the International Criminal Court[196] (articles 68 and 75)
- the African Charter on Human and Peoples' Rights (article 7)[197]
- the American Convention on Human Rights (article 25)
- the Convention for the Protection of Human Rights and Fundamental Freedoms ( article 13) [198]

For a long time, lawyers and practitioners argued about what might be included under the term of reparation. According to the victimological view, reparation was analogized with a payment of money by the offender, and it was interchangeable with the notion of restitution when the state was obliged to pay compensation and cover damages caused by the crime.

The 1985 Declaration of Basic Principles of Justice for Victims of crime and Abuse of Power[199] along with the Draft Guidelines on Victim Redress adopted by the Sub-Commission on the

[194] Resolution 2106 A (XX), annex.

[195] United Nations, Treaty Series, vol. 1465, No. 24841

[196] The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, July 1998, Vol. I.

[197] United Nations, Treaty Series, vol. 1520, No. 26363.

[198] Ibid, Vol. 213, No. 2889

[199] G.A. Res. 40/34, November 29, 1985

Prevention of Discrimination and the Protection of Minorities represent the first steps moved and important ground for the adoption of an appropriate international norms [200]

After the adoption of innovative documents, the Rome Statute accompanying Rules of Procedure and Evidence, article 68 of the Statute stipulates that the court must take appropriate measures to protect the safety, physical or psychological well-being as well as dignity and privacy of victims and witnesses.

Unlike the ICTY and ICTR statutes, the Rome Statute of the ICC primarily provides for three types of victim's rights: protection, participation, and court-ordered reparations for the victims of atrocious crimes that fall within the jurisdiction of the court

After the adoption of the Rome statute, the discussion regarding reparation was caused by article 75 of the statute which requires the court to establish principles relating to reparations to, or restitution, compensation, and rehabilitation of the victim.

Article 75 of the statute directives the Court to protect the safety as well as physical and psychological well-being, dignity, and privacy of victims. The statute of Rome also requires States Parties to establish a trust fund for the benefit of victims and their families of international human rights violations and crimes within the jurisdiction of the Court.

Finally, Article 75 confirms the tendency toward recognition of an obligation under international law for nonstate entities.

According to the Rules of Procedure and Evidence, the Court may award reparations taking into account the scope and extent of any damage, loss, or injury and the most important part is that awards for reparations must be made directly against a convicted person who must have committed a wrongful act and that act must have given rise to the damage. [201]

Despite that such awards for reparations are made in the context of criminal proceedings, the court requires the same elements as an award for compensation in a civil suit therefore reparations can be considered as a way for victims to bring a civil claim via the Court against

[200] U.N. Doc. E/CN.4/1997/104, January 16, 1997

[201] Article 97 &98 of the Rules of Procedure and Evidence

the person responsible for the crimes as well as an additional sanction pronounced by the Court[202]

Before the Rome Statute of the ICC there was no international legal mechanism that enabled victims to make claims for reparation against the person directly responsible for a violation although as imposed by international law this duty to make reparation applies only to individuals convicted of a crime, there is nothing to indicate that such a duty could not be imposed on a legal person.

On the other hand, ICC is the only one of the international criminal tribunals that have the power to award reparations for core international crimes. Reparations to victims and survivors would of course be a key beneficial outcome of corporate criminal liability for international crimes though there is not a traditional method of compensation for the millions of victims that international crime has generated therefore it is unclear how the ICC will effectuate this statutory duty because there are no clear guidelines on whether monetary reparation need be made from the property assets *or* every asset belonging to the convicted persons' estate is subject to forfeiture.

If the Rome statute were amended to allow for corporate prosecution for international crimes the ICC could provide reparations for victims of violations of international human rights together. It must be remembered however that the ICC's exercise of jurisdiction is only complementary to the domestic exercise of jurisdiction since the ICC is not a supreme court but a backup system that works when national courts are not working.[203]

In the end, the discussion regarding reparation led to the adoption of UN General Assembly resolution 60/147, the Basic Principles and Guidelines on the Right to a Remedy and Reparation for victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law in 2005.

The preamble of this document quotes the keywords of the article of Rome Statute regarding the establishing principles related to reparations restitution, compensation, and rehabilitation.

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[202] P. Lewis and H. Friman, ‘‘Reparations to victims’’, in R. S. Lee, The International Criminal Court, Transnational Publishers, Ardsley, 2001, p. 483.

[203] Michael J. Kelly, Prosecuted Corporation for Genocide, Oxford University Press, 2016, pp

The Basic Principles and Guidelines on the Right to a Remedy and Reparation, don't entail new international or legal obligations but these principles aim to define the mechanisms, procedures, and methods for the implementation of existing legal obligations that allow victims of gross violations of international human rights law and serious violations of international humanitarian law to obtain reparation at domestic and international level. [204]

According to these basic principles, states are obliged to provide citizens with protection against business-related human rights abuse, and also provide victims with appropriate investigation and effective access to justice with access to an effective remedy.

States also have a responsibility to take appropriate measures to raise public awareness implement international human rights law in their domestic legal system and adopt effective legislation that provides fair, effective, and prompt access to justice irrespective of who may ultimately be the bearer of responsibility for the violation to enforce judgments for reparation against individuals or entities liable for the harm suffered. [205]

Remedies for gross violations of international human rights law include the victim's right to have:

- Equal and effective access to justice;
- Adequate, effective, and prompt reparation for harm suffered;
- Access to relevant information concerning violations and reparation mechanisms.

According to these principles the concept of reparation broadened and encompasses five distinct categories as laid out in articles 19 to 23:

- Restitution which includes restoration of liberty, enjoyment of hum rights, return to one's place of residence, restoration of employment and return to the property
- Compensation should be provided for any damage such as moral damage, material damage, physical or mental harm, etc. as proportional to the gravity of the violation of international human rights law.
- Rehabilitation that includes medical and psychological care and legal or social services

[204] P. Lewis & H. Friman, „Reparations to victims", in R.S. Lee, The International Criminal Court, Transnational Publishers, Ardsley 2001, pp,483-484

[205] Skinner Gwynne L., and O. De Schutter, "The third pillar: Access to Judicial Remedied for Human Rights Violations by Transnational Business", 2013

- The satisfaction which provides full and public disclosure of the verified facts and truth that doesn't cause additional harm to victims as well as
- A public apology and acceptance of responsibility, judicial sanctions against persons liable for the abuses, appropriate judicial decision restoring the dignity the reputation and right of the victim, etc.[206]

Guarantee of non-repetition which is focused to ensure effective civilian control of military and security forces and ensure that all civilian and military proceedings abide by international standards of impartiality as well as review and reform laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law end

Nowadays corporations are subject to criminal law in the common law, in civilian legal systems, and by extension in international law, therefore, corporations can be liable for crimes under customary international law, and on the other hand, the victims of violation have the rght to remedy.[207]

[206] The Basic Principles and Guidelines on the Right to a Remedy and Reparation,

[207] M. Groenhuijsen, Victim's rights, and the international criminal court: The model of the Rome statute and its operation, January 2009, pp.302-305

## Conclusion

This thesis aims to discuss that corporations have not only economic and legal obligations but also ethical, human rights, and philanthropic responsibilities which represent a broader bridge between business and society as well as analyze the evolution of corporate liability from civil liability to criminal accountability and suggest existing practice how international law deal with challenges face legal entities prosecution nowadays.

In the first chapter, I analyzed that even though in the nineteenth century only states and their agents could be liable under international law in the two post-war decades international law is not focused only on regulation relations between states but also between states and individuals or every organ of society as it's written in the preamble of the Universal Declaration of Human Rights. The evolution of international criminal law caused the creation of some essential conventions or documents such as guiding principles of business and human rights which established the obligations for states to enforce laws that require business enterprises to respect human rights and instructions on how the international legal system can combat toward human rights violations committed by corporations or MNC.

One of the relevant examples that the international legal system is moving forward is that the European Union Commission took appropriate measures regarding updating the definition of corporate social responsibility resulting in the integration of social, ethical, and human rights obligations into their business operations.

The second chapter represents a discussion about international criminal tribunals jurisdiction starting with the Nuremberg tribunal's precedential decision for corporate collective accountability when the tribunal held a chemical company's criminal liability as an abettor and aider in waging the war crime, finishing with the Special Tribunal of Lebanon's also precedential decision when the appeal panel of this hybrid court specifically considered legal entity as a natural person in the New TV S.A.L. case and held criminally liable though this acknowledgment of corporate criminal liability by STL does not apply to the ICC since this contempt decision is related only to the STL's Rules of Procedure which makes it less relevant to prosecute corporations for international core crimes under the Rome Statute since according to the article 25 of the Rome Statute the ICC doesn't still have jurisdiction over legal entities

The third chapter represents an overview of the advantages and disadvantages of corporate civil liability for violation of international humanitarian law and International human rights law.

As I analyzed civil litigation provides an easier route for victims to obtain material, moral compensation for their sufferings as German-British Corporation Royal Dutch Shell which was aiding and abetting the Nigerian military in the systematic torture and killing of peaceful environmental protesters in the 1990s resulted in a settlement in providing for compensation under Alien Torture Statute as well as the latest presidential decision in Lafarge case when the supreme court of France decided that Lafarge SA has to pay more than $777 million to resolve a criminal charge related to the complicity in crimes against humanity.

Unfortunately, some legal systems do not allow for this possibility in criminal proceedings due to the high standard of beyond the reasonable doubt, However, to companies prosecuted and pay the cost of their negligence first this legal entity must include the definition of person which remains the main challenge face international legal system.

At the end of this chapter, I also discussed some critical factors against corporate prosecution for international crimes such as policy critique which says that only decision-makers and corporate managers should be prosecuted individually otherwise many innocent people will lose their jobs as well as there is also discussed economic, cultural, and legal critical arguments.

The fourth chapter is oriented on a discussion of how can be applied the civil theories of corporate liability to criminal law. I have analyzed all legal theories of corporate criminal liability starting with vicarious liability, and superior responsibility and finishing with identification doctrine and how to apply this concept to states. International legal theories provide the tools for corporate prosecution so even if the jurisdiction is not yet available. As I have considered in this chapter the Canadian model of statutory incorporation of international criminal law with the prospect of prosecuting corporate agents represents the most promising one to follow since unlike the United States, Canada does not approach the model of criminal liability under the doctrine of respondeat superior which means that directing mind is not necessary to hold corporate criminally liable but senior official including low ranking employees or managers is still required who has the responsibility to take appropriate measures to prevent wrongdoing even if the senior officer has no policy setting authority in the given area where the crime occurred otherwise the corporation will be even criminally liable for its agent's action though this broad definition to convict corporate criminal liability is limited by the proof of intention to give a benefit on the corporation.

In the final chapter, I discussed the universal jurisdiction over jus cogens conducts under international customary law when any country anywhere can try a perpetrator for serious international crimes. under this chapter I analyzed the Lundin Energy precedential case referred to the universal jurisdiction of MNC and its executives The Supreme court of Sweden has not still decided, therefore it should answer the main question of whether international law must expressly permit the exercise of jurisdiction or is it enough that international laws do not prohibit the exercise of jurisdiction.

Thus, when jurisdiction has been established the mechanism for bringing the prosecution can vary across states depending upon the domestic criminal justice system though as I analyzed international prosecution of a corporation for international crimes is preferable to domestic because of protection of vulnerable societies or victim relief since if companies know that there is no international accountability for their criminal actions, they will be engaging in complicit conduct easily, therefore, its preferable to develop an equal treatment and prosecute corporations at the international level.

When it comes to corporate extradition it is still unclear " but dedere out judicare" principle how can be fully grown into customary international law. Even though a duty to extradite or prosecute represents the common interest of all states there doesn't still exist a general legal obligation or duty to extradite the corporations.

There doesn't still exist any legal mechanism or duty that enables victims to make claims for reparation against a legal person. the Rome Statute of the ICC imposes the duty to make reparation only to individuals who are directly responsible for a violation which represents the only one of the criminal tribunals that have this power though it is still unclear how the ICC will effectuate this statutory duty because there are no clear guidelines on whether monetary reparation need be made from the property assets *or* every asset belonging to the convicted persons' estate is subject to forfeiture.

To sum up the absence of criminal liability under international law for companies that engaged in atrocities is one big gap that can be filled by triggering the legal opinion that the international court of justice holding multinational corporations criminally liable for international crime is the best chance for expanding the jurisdiction of the international criminal court to move forward.

Since ICJ is the judicial organ of the United Nations system it has jurisdiction over contentious cases between states and requests for advisory opinions on matters of international law lodged by certain U.N. organs.

ICJ can share the presidential decision by the special tribunal for Lebanon which noted that the word "person" in Rule 60 bis doesn't refer strictly to natural persons, but it also includes a legal person. Therefore, in the wake of the STL ruling, ICJ can hold a similar ruling. the affirmative ruling by the ICJ would be authoritative not only for the states seeking the interpretation but also for the other states parties to the treaty. The positive side of such a ruling can be considered that state parties can establish a domestic legal system to effectuate such an outcome but on the other hand the state parties that strongly disagree with the court's interpretation can leave the treaty regime to avoid criminal liability from their corporations.

International Criminal Court was established to guarantee of enforcement of international justice, which Preamble declared that the most serious crimes of concern must not go unpunished and that for their effective prosecution every State must take appropriate measures to exercise its criminal jurisdiction over those responsible for international crimes if corporate agents remain outside of the scope of investigations and prosecutions it will be impossible to reach the goal of the preamble.

Thus, nowadays when none of the statutes of the international criminal tribunals, recognize corporations as possible defendants to allegations of serious violations of international law even the ICC does not have jurisdiction over corporate entities whilst corporate agents can be facilitators or drivers of atrocities , its time and its necessary to amend article 25 of the Rome statute to include legal persons in the jurisdiction of the ICC to impose criminal penalties on the legal entity for collective action and fulfill its obligation successfully since prosecuting only the individuals cannot change criminal culture of corporation.[208]

[208] C. Kaeb, A New Penalty Structure for Corporate Involvement in Atrocity Crimes: About Prosecutors and Monitors In, Harvard International Law Journal, Vol.57, 2016 pp, 21-22

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