



Corporate Responsibility for the Violation of International Criminal Law Before the International Criminal Tribunal

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ABSTRACT

Corporations have been involved in international human rights abuse and commission of international crimes, which could lead to the devastating effect to communities in many parts around the world. However, the challenge in holding corporations criminally responsible has existed as long as the mechanisms and regulations for corporate responsibility have not been actively developed. At present, international criminal tribunal has no jurisdiction over corporations and this raises concern over the corporate responsibility for the violation of international crimes. Unfortunately, it is less likely to see clear international standards which provide details of the requisite engagement of corporations before corporations can be held accountable for committing international crimes before the international criminal tribunal. The way forward is to develop the international corporate responsibility for international crimes by tracing to the legacy of judgments of the International Military Tribunals in Nuremberg in bringing non-state actors to trials. The alternative solution also lies with international organizations like the United Nations to play a significant role in developing the soft norms to become the hard and binding international law on corporate criminal responsibility.

KEYWORDS : Corporate responsibility, international crimes, international criminal tribunal, international criminal law, human rights

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BACKGROUND AND SIGNIFICANCE OF THE PROBLEM

The application of human rights standards and international criminal law to corporate activities has become an increasingly prominent debate in international law and business areas.² There has also been considerable public attention to the involvement of corporations in activities which lead to or support the commission of international crimes.³ The corporations could operate their businesses with the negative consequences amounting to violation of international crimes such as operating with gross negligence of human rights amounting to crimes in international law, or in the midst of armed conflicts and being implicated in the perpetration of international crimes, or having a partnership with the repressive government. However, according to the research, the international mechanisms and norms to regulate corporate behaviors involving international crimes have not been well developed.

The important issues arisen include: whether corporations can be perpetrators of international crimes; how to prove the corporate conduct; what would be the corporate responsibility under international criminal law; how the states deal with corporations engaging in international crimes; whether and how the international criminal tribunal can exercise its jurisdiction over corporate crimes. Despite the need to regulate corporate behaviors involving international crimes, it is important to note that these questions have been subject to scholarly debates and remain unsettled.

The lack of more consistent and efficient mechanisms and norms for corporate responsibility in international crimes presents a rising and urgent need for the research to address any possible way to ensure that corporations would not escape from their involvements in international crimes or their criminal

² Anna Triponel, "Business & Human Rights Law: Diverging Trends in the United States and France," *American University International Law Review* Volume 23 (2008): 856.

³ Wolfgang Kaleck and Miriam Saage-MaaB, "Corporate Accountability for Human Rights Violations Amounting to International Crimes: The Status Quo and Its Challenges," *Journal of International Criminal Justice* Volume 8 (2010): 699.

accountability. Moreover, the current lack of the international criminal tribunal to hear the claims against corporations does not mean that corporations will not be liable at all for their involvements in international crimes, but it presents the significant need for more research and greater effort in the field of corporate criminal responsibility under international law.

RESEARCH OBJECTIVES

1. To analyze the gaps for corporate responsibility before the international tribunals.
2. To conduct research and study on the desirability and feasibility of granting international criminal tribunals the jurisdiction over international crimes committed by corporations.
3. To analyze fundamental challenges and constraints in establishing the criminal system under international law to regulate corporate behaviors.
4. To offer possible solutions to tackle and regulate corporate misbehaviors concerning international crimes.

RESEARCH ASSUMPTION

The research is based upon the assumption that despite its nature of juristic entity, the corporation should be the subject under international law and should be responsible for the perpetration of international crimes. It challenges the traditional assumption that only state is the main actor under international law and that international criminal law is exclusively addressed to crimes committed by individuals.

RESEARCH METHODOLOGY

This research is a qualitative research, which uses the information from the study of documents; legal provisions; international guidelines; articles; international and foreign court decisions and the literature review to conclude the research results.



RESEARCH RESULTS AND DISCUSSION

1. Involvement of Corporations with International Crimes

1.1 Corporations, Human Rights and International Crimes

Corporations can make a positive contribution to human rights and development, particularly through provision of employment, transfer of technology, and the betterment of livelihood for local communities.⁴ On the other hand, in pursuit of profits especially in the area of armed conflicts, corporations could engage in the violation of international human rights and commission of international crimes which negatively affect the community and society. This can be seen from the fact that certain NGOs, such as Global Witness and Human Rights Watch, have reported corporate contribution to or corporations which profited from international human rights violation amounting to international crimes, particularly in the African region.⁵ Moreover, the UN Experts Panel has identified corporations from all parts of the world conducting their businesses with the armed groups intended to trade natural resources and provide the armed groups with weapons or ammunition.⁶ The international community has been thus shocked at reports from all continents that corporate have knowingly assisted governments, armed rebel groups or others to commit gross human rights abuses and international crimes.⁷

⁴ Adam McBeth, (2008). "Crushed by an Anvil: A Case Study on Responsibility for Human Rights in the Extractive Sector," **Yale Human Rights & Development Law Journal** Volume 11 : p. 128.

⁵ Global Witness, (2006), **Global Witness Submission to the ICJ Expert Legal Panel on Corporate Complicity in International Crimes**, Retrieved May 26, 2012, from the World Wide Web: http://www.globalwitness.org/sites/default/files/pdfs/gw_icj_submission_30_11_06.pdf.

⁶ Reinhold Gallmetzer, (2010), "Prosecuting Persons Doing Business with Armed Group in Conflict Areas: The Strategy of the Office of the Prosecutor of the International Criminal Court," **Journal of International Criminal Justice** Volume 8 : pp.947-948.

⁷ International Commission of Jurists, (2008). **Corporate Complicity & Legal Accountability**, Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes: Facing the Facts and Charting a Legal Part Volume 1 : p. 1, Retrieved March 17, 2012, from the World Wide Web: http://www.icj.org/IMG/Volume_1.pdf.

Corporations have also taken part in a massive scale in the exploitation of natural resources and corruption of national governments.⁸ For instance, Enron Corporation has been accused of collaborating with the Indian authorities to violently repress local residents opposing to a massive energy project.⁹ Royal Dutch Shell was sued for alleged complicity in the execution of activists protesting its environmental and development policies in Nigeria.¹⁰ Unocal Corporation was sued with the complicity in human rights violations committed by the Burmese government.

According to the research, corporations may engage with international crimes mainly through three scenarios: (1) provision of goods, services and information used in relation to the human rights violation amounting to international crimes; (2) supply-chain relationship such as supplying 'blood diamonds' in support of civil wars or armed conflicts; and (3) hiring security services such as private military corporation involving in the perpetration of international crimes.

1.2 The Need to Hold Corporations Responsible at the International Level

Due to negative consequences made by corporations and because many states might fail to control corporate activities, the regulation of corporate behavior seems intuitively an obvious task of international law.¹¹ The relevance of international criminal law to corporate actions is principally derived from the growing evidence and information suggesting that corporations have been involved in international crimes.¹² Given that individual officials of corporations can be prosecuted for international crimes violations, corporation should be held criminally

⁸ Beth Stephens, (2002), "Stefan A. Riesenfeld Symposium 2001: The Amorality of Profit: Transnational Corporations and Human Rights," **Berkeley Journal of International Law** Volume 20 :p. 51.

⁹ Ibid.

¹⁰ United States Supreme Court Decision *Wiwa v. Royal Dutch Petroleum Co.* (2001).

¹¹ Ole Kristian Fauchald and Jo Stigen, (2009), "Corporate Responsibility before International Institutions," **George Washington International Law Review** Volume 40 : p.1027.

¹² Larisa van den Herik and Jernej Letnar Cernic, (2010), "Regulating Corporations under International Law: From Human Rights to International Criminal Law and Back Again," **Journal of International Criminal Justice** Volume 8: p.739.



responsible for three reasons: "(1) collective action is likely to result in greater harm than individual action; (2) the individual actions of each corporate [officials] may be insufficient to hold any of them liable under international law, even though a wrong has clearly been committed; and (3) effective deterrence of collective actions requires systemic punishment."¹³

The increasingly important roles which corporations play internationally also make it paradoxical if international legal framework fails to regulate corporate behaviors and activities. Thus, at international level, there has been a corresponding shift on global actors from exclusive attention on the abuses committed by governments to close scrutiny of the activities done by business enterprises.¹⁴ Moreover, the notion that international law only governs inter-state relation requires modification as it is inadequate to meet the current demands when even governments occasionally act through corporations.¹⁵ In addition, corporations have now become participants in international legal system and so by this implication, the corporations should be considered to have international legal personal capable of being held responsible for international crimes under international law.¹⁶

The deterrence also seems to be a sound reason to hold corporations responsible for their involvement in international crimes.¹⁷ In addition, the need to regulate corporate conducts involving international crimes comes from the concerns that the tremendous growth and strength of multinational corporations could

¹³ Ronald C. Slye, (2008), "Corporate Liability for Grave Breaches of International Law: Corporations, Veils, and International Criminal Liability," **Brooklyn Journal of International Law** Volume 33 : p.960.

¹⁴ Steven R. Ratner, (2001), "Corporation and Human Rights: A Theory of Legal Responsibility," **Yale Law Journal** Volume 111 : p.463.

¹⁵ Surya Deva, (2003), "Human Rights Violations by Multinational Corporations and International Law: Where from Here?," **Connecticut Journal of International Law** Volume 19 : 51.

¹⁶ The Special Representative of the Secretary-General, Report of the Special Representative of the Secretary-General on the Issue of the Human Rights and Transnational Corporation and Other Business Enterprises, U.N. Doc. A/HRC/4/35 (2007), p. 8.

¹⁷ Adam McBeth, "Crushed by an Anvil: A Case Study on Responsibility for Human Rights in the Extractive Sector," p. 824.

render them difficult for regulatory targets. As corporate power is increasingly international and disassociated from the nation-state, the regulation of the multinational corporations could become more difficult.¹⁸ Since they have multiple production facilities, they can evade state power and the constraints of national regulatory system by moving their operations between their different facilities around the world.¹⁹ Therefore, the prevention of such corporate evasion requires international consensus on the norms applicable to corporate criminal accountability and coordinated enforcement mechanism, especially the norms at the international level.

2. Nuremberg Legacy : History of Corporate Responsibility under International Criminal Law

Nowadays, international law reaches not only states, but has developed to cover the non-state entities and this emerged from the legacy of the Nuremberg trials in holding non-state actors responsible for international crimes. The Nuremberg trials exemplified an early attempt to prosecute business for its involvement and contribution to international crimes,²⁰ and particularly, they have greatly influenced the recognition and development of standard for complicit liability for international crimes. The Nuremberg military tribunals prosecuted the German industrialists, many of whom were convicted for aiding and abetting the Nazis in their atrocities.²¹ Such Nuremberg trials have triggered the reassessment of corporations and their criminal accountability.²²

¹⁸ Beth Stephens, "Stefan A. Riesenfeld Symposium 2001: The Amoral of Profit: Transnational Corporations and Human Rights," p. 58.

¹⁹ Ibid.

²⁰ Desislava Stoitchkova, (2010), **Towards Corporate Liability in International Criminal Law**, (N.p. : Intersentia), p. 42.

²¹ Gwynne Skinner, (2008), "Nuremberg's Legacy Continues: The Nuremberg Trials' Influence on Human Rights Litigation in U.S. Courts under the Alien Tort Statute," **Albany Law Review** Volume 71 : p.322.

²² Beth Stephens, "Stefan A. Riesenfeld Symposium 2001: The Amoral of Profit: Transnational Corporations and Human Rights," p. 46.



According to the *In re Tesch* case (also known as The *Zyklon B* case) decided by the British Military Tribunal in 1946, the top company officials of Tesch were convicted of knowingly supplying Zyklon B, the highly toxic gas used to kill persons, to the Nazi regime for use in concentration camps. In this case, the tribunal convicted the defendants that they either 'knew' or 'must have known' of the use of Zyklon B gas. Moreover, it was deemed that in the absence of direct evidence, knowledge could be construed from a person's position within the organization.²³ The French Military Tribunal also convicted the directors of the iron and steel company in *Roechling et al.* case for crimes against peace and war crimes. It was deemed that the directors knew of the atrocious working conditions in the Roechlin plants but failed to do anything to alleviate them.

The post-World War II convictions of businessmen by the US Military Tribunals (the USMT) at Nuremberg are the most cited international precedents for corporate contributions to international crimes.²⁴ The USMT convicted the civilian industrialists who are executives in the *Flick* case for providing money vital to the Nazi's financial existence and for the deployment of slave labor, while knowing of their crimes. The *Flick* case is often referred to as the legal precedent on the provision of financial resources to perpetrators of international crimes causing complicity liability or aiding and abetting at least if the resources substantially contributed to the commission of core crimes.²⁵

The USMT in *Krupp* case convicted Alfred Krupp and other executives of the munitions corporation for supplying Nazi government with armament during the war. The language used by the tribunal was clear that "the Krupp firm, through defendants ... participated in these violations" and "while individuals were

²³ Desislava Stoitchkova, (2010), **Towards Corporate Liability in International Criminal Law**, (N.p. : Intersentia), p. 53.

²⁴ Wim Huisman and Elies van Sliedregt, (2010), "Rogue Trader: Dutch Businessman, International Crimes and Corporate Complicity," **Journal of International Criminal Justice** Volume 8 : p.804.

²⁵ Andrea Reggio, (2005), "Aiding and Abetting in International Criminal Law: The Responsibility of Corporate Agents and Businessman for "Trading with the Enemy" of Mankind," **International Criminal Law Review** Volume 5 : p.632.



nominally on trial, the Krupp company itself, acting through its employees, violated international law.”²⁶ The *Krupp* case reflects the doctrine of direct complicity as the USTM found corporate directors of Krupp firm responsible for aiding the Nazi regime.²⁷ In *I.G. Farben* case, the USMT convicted all members of executive body of the I.G. Farben, largest chemical and pharmaceutical manufacturer at that time for having acted “through the instrumentality of Farben” engaging in plunder, slavery and complicity in aggression and mass murder justifiable under the Nuremberg Charter.²⁸ This *I.G. Farben* case depicted that the company, as a principal and organization, perpetrating its own crimes.²⁹

These cases support the theory of corporate responsibility, especially corporate complicity in international crimes. The tribunals at Nuremberg discussed many of the industrialist cases in terms of corporate complicity that corporations themselves had been active in and thus responsible for human rights violations.³⁰ In fact, the prosecutors deliberately targeted corporations to highlight the roles that business organizations had played during the war and the symbiotic relationship they had with the Hitler regime.³¹ This legacy of Nuremberg contributes to the development of the new approaches to human rights accountability, emphasizing on corporate violation of international criminal law by determining the line between

²⁶ Gwynne Skinner, “Nuremberg’s Legacy Continues: The Nuremberg Trials’ Influence on Human Rights Litigation in U.S. Courts under the Alien Tort Statute,” p. 345.

²⁷ Ibid.

²⁸ Desislava Stoitchkova, (2010), **Towards Corporate Liability in International Criminal Law**, (N.p. : Intersentia), p. 54.

²⁹ Julia Geneuss, Jan Philipp Book, Boris Burghardt and Oliver Schuttpelz, (2010), “Discussion Report on Core Crimes Inc: Panel Discussion Reports from the Conference on ‘Transnational Business and International Criminal Law’, held at Humboldt University Berlin, 15-16 May 2009,” **Journal of International Criminal Justice** Volume 8 : p. 964.

³⁰ Anita Ramasastry, (2002), “Stefan A. Riesenfeld Symposium 2001: Corporate Complicity: From Nuremberg to Rangoon: An Examination of Forced Labor Cases and Their Impact on Liability of Multinational Corporations,” **Berkeley Journal of International Law** Volume 20 : p.105.

³¹ Gwynne Skinner, “Nuremberg’s Legacy Continues: The Nuremberg Trials’ Influence on Human Rights Litigation in U.S. Courts under the Alien Tort Statute,” p. 362.



the legally acceptable pursuit of profits and corporate criminal behaviors.³²

3. Corporate Criminal Responsibility under International Framework

3.1 Possible Regulations of Corporations

The international criminal law has long involved with the conduct of individual natural persons but when it comes to the juristic persons such as corporations, the debates surrounding this issue have remained unsettled. In practice, as well as in theory, concepts such as international corporate criminal law have not been developed and explored fully.³³ Nevertheless, according to the research, the current trend of international law permits criminal obligations for non-state actors. The individuals and corporations attain subject status to the extent that international law endows them with rights and duties.³⁴ Since corporations possess rights and duties under international law, this should imply that corporations are legally responsible for complying with international criminal law.³⁵

The international law can possibly regulate the behavior of corporations in both direct and indirect way. The direct regulation means that corporations can be held responsible under international law. In such case, corporations can be brought before an international mechanism already existing or to be created afterwards.³⁶

³² Beth Stephens, "Stefan A. Riesenfeld Symposium 2001: The Amoral of Profit: Transnational Corporations and Human Rights," p. 46.

³³ Christoph Burchard, (2010), "Ancillary and Neutral Business Contributions to 'Corporate-Political Core Crime': Initial Enquiries Concerning the Rome Statute," **Journal of International Criminal Justice** Volume 8 :p. 920.

³⁴ Jan Arno Hessbruegge, (2005), "Human Rights Violation Arising from Conduct of Non-State Actors," **Buffalo Human Rights Law Review** Volume 11 : p.28.

³⁵ Tawny Aine Bridgeford, (2003), "Imputing Human Rights Obligations on Multinational Corporations: The Ninth Circuit Strikes Again in Judicial Activism," **American University International Law Review** Volume 18 : p.1015.

³⁶ Ole Kristian Fauchald and Jo Stigen, "Corporate Responsibility before International Institutions," p. 1031.

However, the international legal framework at present for directly holding corporations criminally responsible is poorly developed.³⁷ Regarding the indirect regulation, the obligations will possibly be applied through the domestic legal systems of states through their implementation and enforcement mechanisms. In absence of the international norms holding corporations directly responsible under international criminal law, the feasible application is to hold states responsible for having failed in their duty to implement international law.³⁸ The effect of indirect obligation upon corporation is that the managers and directors of corporations will be subject only to the domestic law and judiciary system of particular states but corporations themselves can cause a state to violate its international obligations. In this regard, the international human rights law may hold a state responsible because the state fails to fulfill its obligation to protect or its due diligence duty.³⁹

3.2 Corporate Responsible Before International Tribunals

Currently, there is no international court or tribunal that can exercise criminal jurisdiction over juristic persons like corporations for their violation of international criminal law. Article 25 of the Rome Statute, which outlines the jurisdiction of the International Criminal Court (the "ICC") over criminals, limits the jurisdiction of the ICC to "natural persons". The Statutes of the ad hoc tribunals contain provisions similar to Article 25 paragraph 1 of the Rome Statute, limiting their jurisdiction to natural persons only.⁴⁰ The concept of corporate criminal responsibility came in the drafting process of the Rome Statute from the proposal of French delegations to extend the ICC's jurisdiction to legal person, which means to include corporations. Such proposal appeared in the draft Article 23 paragraphs

³⁷ Ibid. p. 1035.

³⁸ Ibid.

³⁹ Jan Arno Hessbruegge, (2004), "The Historical Development of the Doctrines of Attribution and Due Diligence in International Law," **New York University Journal of International Law and Politics** Volume 36 : p.268.

⁴⁰ Volker Nerlich, (2010), "Core Crimes and Transnational Business Corporations," **Journal of International Criminal Justice** Volume 8 : pp.896-897.



5 and 6 which provided that:⁴¹

“23 (5) The court shall have jurisdiction over legal persons, with the exception of States, when the crimes committed were committed on behalf of such legal persons or by their agencies or representatives.

23 (6) The criminal responsibility of legal persons shall not exclude the criminal responsibility of natural persons who are perpetrators or accomplices in the same crimes.”

This proposal is aimed to be a practical mechanism for assuring compensation when the individual perpetrator does not have enough assets to pay reparations and to serve as a deterrent purpose engendering greater caution in profit-motivated decision-making process of potential criminal impact.⁴² The negotiators demonstrated general support for the theoretical principle that corporations can be bound by criminal law, to the extent that “no delegation challenged the conceptual assumption that legal persons are bound by international criminal law.”⁴³

The disagreement arose over the complexities involved in international trial of non-natural entity: how to serve the indictment and punishment; who would represent the legal entity; how to prove the intention of non-natural person; how assets would be taken without affecting the rights of third persons; and how to ensure that natural person cannot hide behind the group responsibility.⁴⁴ Some delegations discarded the French proposal as immature or unfeasible in terms of the ongoing debates surrounding the Nuremberg precedents and the lack of relevant

⁴¹ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Report of the Preparatory Committee on the Establishment of an International Criminal Court, U.N. Doc. A/CONF.183/2/Add.1 (1998), p. 49.

⁴² Desislava Stoitchkova, (2010), **Towards Corporate Liability in International Criminal Law**, (N.p. : Intersentia), p. 14.

⁴³ Beth Stephens, “Stefan A. Riesenfeld Symposium 2001: The Amoralism of Profit: Transnational Corporations and Human Rights,” p. 65.

⁴⁴ Ibid.

consolidated development of international criminal law.⁴⁵ Also, states insisted on complementarity doctrine as a cornerstone of the Rome Statute being concerned that without their domestic laws providing for corporate responsibility for international crimes, the ICC would render the case admissible due to the inaction, inability and unwillingness of the states. Eventually, no agreement to allow the proposed text could be reached and the French delegations withdrew the proposal.

3.3 Soft-law Initiatives

The attempt to regulate the operations of the multinational corporations has been of predominantly non-binding nature and the “soft law” approach enjoys the broader political support.⁴⁶ The primary soft law is the Guidelines for Multinational Enterprises, which were drafted by the Organization for Economic Cooperation and Development (OECD), calling on corporations to “respect the human rights of those affected by their activities”.⁴⁷ Although supervision remains voluntary and is characterized by the absence of sanctioning mechanisms, the effectiveness of the Guidelines is controlled by the network of National Contact Points, operating at a domestic level in cooperation with the Investment ommittee.⁴⁸

The International Labor Organization also adopted a non-binding declaration of principles calling for corporations to respect human rights with the reference to the Universal Declaration of Human Rights as well as the International Covenant on Civil and Political Rights and the International Covenant on Economic,

⁴⁵ Desislava Stoitchkova, (2010), **Towards Corporate Liability in International Criminal Law**, (N.p. : Intersentia), p. 15.

⁴⁶ John Gerard Ruggie, (2007), “Current Development: Business and Human Rights: The Evolving International Agenda,” **American Journal of International Law** Volume 101 : p.833.

⁴⁷ Organization for Economic Cooperation and Development, (2008), **OECD Guidelines for Multinational Enterprises**, p. 16, Retrieved March 16, 2012, from the World Wide Web: <http://www.oecd.org/dataoecd/56/36/1922428.pdf>.

⁴⁸ Vassilis P. Tzevelekos, (2010), “In Search of Alternative Solutions: Can the State of Origin Be Held Internationally Responsible for Investors’ Human Rights Abuses That Are Not Attributable to It?,” **Brooklyn Journal of International Law** Volume 35 : p.163.



Social and Cultural Rights.⁴⁹ In January 1999, the then UN Secretary-General Kofi Annan articulated nine principles for corporate responsibility which were later added to the ten principles in 2004, known as the Global Compact. The Global Compact articulates two principles: (1) "Business should support and respect the protection of internationally proclaimed human rights;" and (2) "make sure that they are not complicit in human rights abuses".⁵⁰ This reflects the expansion of the role of corporations regarding the human rights. However, the UN Global Compact is a non-regulatory instrument that does not provide for legal enforcement of its provisions but merely provides a framework for corporation to endorse voluntarily.⁵¹

The forefront efforts to prevent corporate abuses of human rights is the 2003 United Nations Norms on the Responsibilities of Transnational Corporations and other Enterprises with Regard to Human Rights (the "UN Norms"), recommended by the United Nations' Commission on Human Rights' Sub-Commission on the Promotion and the Protection of Human Rights.⁵² The UN Norms have been overwhelmingly supported by international human rights organizations as they seek to impose on multinational corporations direct and legally-binding obligations under international human rights law.⁵³ Under the UN Norms, multinational corporations shall not "engage in nor benefit from war crimes, crimes against humanity, genocide, torture, forced disappearance, forced or compulsory

⁴⁹ International Labor Organization, (2001), **Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy**, 3rd Edition, (Geneva: International Labor Office), p. 3, Retrieved March 16, 2012, from the World Wide Web: http://www.ilo.org/wcmsp5/groups/public/@ed_emp/@emp_ent/documents/publication/wcms_101234.pdf.

⁵⁰ United Nations Global Compact, (2004), **The Ten Principles**, Retrieved March 16, 2012, from the World Wide Web: <http://www.unglobalcompact.org/aboutthegc/thetenprinciples/index.html>.

⁵¹ Vassilis P. Tzevelekos, "In Search of Alternative Solutions: Can the State of Origin Be Held Internationally Responsible for Investors' Human Rights Abuses That Are Not Attributable to It?," p. 164.

⁵² United Nations Economic and Social Council, Commission on Human Rights, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/Cn. 4/Sub.2/2003/12/Rev.2 (2003).

⁵³ Desislava Stoitchkova, (2010), **Towards Corporate Liability in International Criminal Law**, (N.p. : Intersentia), p. 12.

labour, hostage-taking, extrajudicial, summary or arbitrary executions, other violations of humanitarian law and other international crimes against the human person as defined by international law, in particular human rights and humanitarian law.”

While international criminal law is not progressively or fully developed on corporate criminal responsibility, the soft-law initiatives reflecting self-regulation by corporations will continue to dominate as the preferred option for controlling corporate engagement in breaching international crimes. Even if these soft-law instruments are not legally binding as the statement of law, they reflect the declaration of basic principle of human rights that requires the development to become legally binding through their incorporation into customary international law or international treaties.⁵⁴

4. Corporate Criminal Responsibility under National Law

4.1 Domestic Criminal System prosecuting Corporations

Corporations can be responsible for international crimes committed according to the national criminal law under the domestic jurisdiction. Common law countries, such as England, the US and Canada were among the first to impose corporate criminal liability⁵⁵ and this notion has been embraced by many other nations afterwards. Generally, domestic jurisdiction tends to cover and criminalize serious human rights violation including the acts which are considered as international crimes, such as genocide, war crimes and crimes against humanity. In many countries, corporations can be held liable for breaches of these international crimes not only when committed inside the domestic jurisdictions but also when committed abroad. For instance, Australia law allows the assertion of jurisdiction over corporations for the extraterritorial offenses of genocide, crimes against humanity and war crimes enacted in the Commonwealth Criminal Code, which gives

⁵⁴ Beth Stephens, “Stefan A. Riesenfeld Symposium 2001: The Amoral of Profit: Transnational Corporations and Human Rights,” p. 81.

⁵⁵ Desislava Stoitchkova, (2010), **Towards Corporate Liability in International Criminal Law**, (N.p. : Intersentia), p. 17.



effect to the crimes within the ICC's jurisdiction under Australian law.⁵⁶

4.2 Obstacles in Domestic Criminal System

Not all domestic jurisdictions provides for corporate criminal accountability for the violation of international criminal law. Despite the national system in place for the international crimes committed by corporations, the national criminal system cannot always be relied on and may be proved inadequate. For instance, the criminal justice and judicial system of the state might be too weak to effectively control and prosecute a powerful multinational corporation. Moreover, the state might not investigate and prosecute the crimes due to the corruption or fear of losing profits from the operation of corporations.

The situation could involve criminal claims invoked against corporations in both host state and home state. The host state, where the operation is located and the international crimes occur, will generally have the strongest claim to jurisdiction; however, the legal process and resources for investigation and prosecution are often lacking for the developing countries with instability or in conflict.⁵⁷ Moreover, in spite of the existence of judicial process and sufficient resources, the host state might be reluctant to prosecute the alleged crimes committed by corporations due to the conflict of interest and the benefits gained from the operation of corporations earned by leading authorities of host country, especially when the host state itself involves in the perpetration of international crimes. And even if the host state starts the investigation and prosecution processes against corporations, there are still serious questions and doubts regarding the impartiality and fairness of these processes in certain countries, particularly given the vested interest of the government in the corporate operation.⁵⁸

⁵⁶ Joanna Kyriakakis, (2007), "Australian Prosecution of Corporations for International Crimes: The Potential of the Commonwealth Criminal Code," **Journal of International Criminal Justice** Volume 5 : p.810.

⁵⁷ Adam McBeth, "Crushed by an Anvil: A Case Study on Responsibility for Human Rights in the Extractive Sector," p. 129.

⁵⁸ Ibid.

Beyond the host state, the alternative is the jurisdiction of the home state of multinational corporations, generally where they hold their nationals. Nevertheless, the sanction and prosecution of corporate activities involving serious crimes abroad might be a low-priority task in the home state.⁵⁹ In addition, even if the home state wants to pursue criminal charges against corporations according to its national criminal system, the home state could still encounter many challenges and difficulties mainly because the corporate activities take place in another state. In order to investigate the crimes committed on foreign territory, national authorities may encounter legal or diplomatic hurdles before invoking corporate responsibility and investigating the matters. The home state may also lack any operational resources necessary to conduct effective investigations on the territory of host state or to protect victims and potential witness in host states.⁶⁰

4.3 Example of Domestic Cases

Recently, in the Netherlands, a businessman has been investigated and prosecuted for their business activities directly related to international crimes. In *Frans Van Anraat* case, Van Anraat sold Thiodyglycol TDG used to produce chemical weapons to the Iraqi regime of Saddam Hussein which were later deployed against civilians.⁶¹ In 2007, the Court of Appeal considered this case and found Van Anraat guilty of complicity in war crimes. The mere production or stockpiling of poisonous gas is not a crime but the Court of Appeal established the causal link⁶² between the gas supplied by Van Anraat and the criminality of the underlying

⁵⁹ Ole Kristian Fauchald and Jo Stigen, "Corporate Responsibility before International Institutions," p. 1028.

⁶⁰ Reinhold Gallmetzer, "Prosecuting Persons Doing Business with Armed Group in Conflict Areas: The Strategy of the Office of the Prosecutor of the International Criminal Court," p. 949.

⁶¹ District Court of The Hague, Decision No. AX6406 (2005); Court of Appeal of The Hague, Decision No. BA6734 (2007).

⁶² The conviction of Van Anraat was based on his complicity in war crimes. The prosecutor established (1) that the substance provided by Van Anraat were the same substance used by Iraq to produce chemical weapons and (2) that the chemical weapons were used to commit the war crimes. The Court of Appeal of The Hague stated that "the Court finds the defendant (together with his co-perpetrators) guilty of being an accessory to providing the opportunity and the means for the proven attacks with mustard gas".



conduct.⁶³ In 2009, the Supreme Court endorsed the conviction of Van Anraat and he was sentenced to 16 years and 6 months imprisonment.⁶⁴

The other case is the *Anvil Mining* case of Australia, which reflects the attempt of home country to prosecute corporations for international crimes committed abroad. The Australian prosecutor started a criminal investigation into the relationship between the Anvil Mining company and war crimes committed by the Congolese army.⁶⁵ The Australian legislation asserts jurisdiction not only the company incorporated in Australia but also the other companies in the Anvil enterprise from the responsibility in Anvil's operations on the basis of aiding and abetting the perpetrator in the Congolese military.⁶⁶ However, the investigation was halted for the unclear reasons and there has been no public report on the outcome of the investigation. This Australian case has thus demonstrated that the avenues available to victims of human rights violations involving multinational corporations is of little use if the political will to invoke those avenues in a transparent and meaningful fashion is lacking.⁶⁷ In the absence of political will, the possibility to prosecute against multinational corporations for extraterritorial or international crimes is impossible.⁶⁸ Nevertheless, Australia is an interesting example of government playing a normative role in the development of criminal responsibility of corporations for involvement in international crimes.⁶⁹

⁶³ Wim Huisman and Elies van Sliedregt, "Rogue Trader: Dutch Businessman, International Crimes and Corporate Complicity," p. 809.

⁶⁴ The Netherlands Supreme Court, Decision No. BG4822 (2009).

⁶⁵ Adam McBeth, "Crushed by an Anvil: A Case Study on Responsibility for Human Rights in the Extractive Sector," pp. 149-155

⁶⁶ Ibid.

⁶⁷ Joanna Kyriakakis, "Australian Prosecution of Corporations for International Crimes: The Potential of the Commonwealth Criminal Code," p. 826.

⁶⁸ Australian Corporate Accountability Network, (2011), **Submission to the 2011 United Nations Universal Period of Australia**, Retrieved May 26, 2012, from the World Wide Web: http://lib.ohchr.org/HRBodies/UPR/Documents/Session10/AU/ACAN_AustralianCorporateAccountabilityNetwork_eng.pdf.

⁶⁹ Joanna Kyriakakis, "Australian Prosecution of Corporations for International Crimes: The Potential of the Commonwealth Criminal Code," p. 826.

5. Challenges and Ways Forward for Corporate responsibility Before the International Tribunal

5.1 Challenges in Holding Corporations Criminally Responsible

Prosecuting corporations for the commission or complicity in international crimes is easier said than done. Efforts to hold corporate actors accountable for international crimes face many obstacles. According to the nature of crimes committed internationally or extraterritorially, the investigations tend to be difficult and cost-intensive. Additionally, since corporations generally operate in the background, their involvement in the international crimes is often not the center of investigations, neither in national or international levels.

Despite the growing attention towards the human rights impact by corporate activities worldwide and the increased recognition of multinational corporations' responsibilities under international law, the regulation of corporate activities for criminal responsibility remains largely deficient. As long as there are no effective international compliance or enforcement mechanisms, states are ultimately left with the final discretion as to how corporate criminal responsibility should be imposed. However, the domestic jurisdiction cannot be proved to be efficient in holding corporations criminally responsible for international crimes.

The current absence of an international forum having jurisdiction over corporate responsibility for international crimes reflects the persistent problem of the inadequate remedies for the human right abuse and perpetration of international crimes. Such absence presents the pressing need for international norms and availability of international criminal tribunal for the direct international accountability of corporations under international criminal law. It should be emphasized that despite the fact that the international criminal tribunal does not have jurisdiction over corporation, it does not mean that international criminal law is not concerned with corporations involving international crimes.⁷⁰ The ICC could still adjudicate corporate involvement in international crimes, when the focus is shifted from the corporation as such to the individuals acting on behalf of a corporation.⁷¹

⁷⁰ Volker Nerlich, "Core Crimes and Transnational Business Corporations," p. 908.

⁷¹ Wolfgang Kaleck and Miriam Saage-MaaB, "Corporate Accountability for Human Rights Violations Amounting to International Crimes: The Status Quo and Its Challenges," p. 710.



Moreover, the existence of international corporate criminal responsibility is not dependent on the existence of an international mechanism to enforce such responsibility.⁷² This is in line with the current trend in international law which broadens its scope of application from the traditional view that international law applied only to the state-like entities. According to the Nuremberg legacy, the international law has developed to the point that crimes under international criminal law can be committed not only by perpetrators linked to a state but also non-state actors. Such development should be concretely expanded from the Nuremberg legacy to cover the criminal accountability of both natural person and juristic person.

5.2 Ways Forward for Corporate Criminal Responsibility

Nowadays, there is an increasing consensus that there must be legal standards for corporations to follow when operating its business involving human rights violations. This notion was affirmed by the Expert Panel of the International Commission of Jurist (the "ICJ Expert Panel") which provided frameworks for the corporate complicity as an avenue to hold corporate responsible for international crimes, as can be seen in its 2008 Report on *Corporate Complicity and Legal Accountability*. Such frameworks were based on the notion that corporations are rarely the principals or direct perpetrators of international crimes as corporations often provide assistance or aid and abet qualified as accomplices of the international crimes.

The ICJ Expert Panel developed criteria that link corporations to gross human rights violations and explored to what extent corporations and their officials can be held responsible. According to the ICJ Expert Panel, there will usually be a sufficiently close link between a business entity and gross human rights violations if the conduct in question has (1) enabled, (2) exacerbated or (3) facilitated the abuses.⁷³ To consider when corporations could be held criminally responsible, the

⁷² Ole Kristian Fauchald and Jo Stigen, "Corporate Responsibility before International Institutions," p. 1041.

⁷³ International Commission of Jurists, **Corporate Complicity & Legal Accountability**, p. 8.

ICJ Expert Panel considers (1) the knowledge and foreseeability of the company and (2) the proximity to the principal perpetrator of international crimes or the victims.⁷⁴

On the subjective side on the mental state of the corporation (*mens rea*), the ICJ Expert Panel considers whether the corporation's official knows that his/her act will facilitate, encourage or provide support for the commission of a crime and nonetheless proceeds to do so.⁷⁵ In such case, the corporation and the official could possibly face with criminal charge for aiding and abetting. With regard to the crimes of specific intent, such as genocide, the official must also know of the principal perpetrator's specific intent.⁷⁶ The ICJ Expert Panel referred to the approach to judge *mens rea* of aider and abettor from the Nuremberg legacy and other ad hoc tribunals and found that the assessment is based on all relevant circumstances established through direct and indirect or circumstantial evidence.⁷⁷ The *actus reus* requirement for corporate complicity in aiding and abetting liability under international law is met by any act or omission that is deliberate and directly affects the commission of the crime itself.

RECOMMENDATIONS

Despite the fact that the international criminal tribunal currently does not have any direct jurisdiction over corporations, there should still be the continued attempt to prohibit and prosecute corporations, just like individuals, in committing or assisting in the commission of international crimes. This requires more research and development in the field by experts and relevant organizations. In this regard, specialized crime units that emphasize on international crimes and corporate

⁷⁴ Ibid.

⁷⁵ International Commission of Jurists, (2008), **Corporate Complicity & Legal Accountability**, Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes : Criminal Law and International Crimes Volume 2, p. 22, Retrieved March 17, 2012, from the World Wide Web: http://www.icj.org/IMG/Volume_2.pdf.

⁷⁶ Ibid. p. 21

⁷⁷ Ibid. p. 22



involvement in international crimes must be strengthened.⁷⁸ There should also be the continued effort of the ICC's state parties to review the provisions of the Rome Statute in the future review conference of the Rome Statute to allow the ICC to have jurisdiction over the legal entity.

While the international criminal tribunal does not have jurisdiction over the violation of international criminal law by corporations, the expected alternative lies in the criminal justice and judicial system of domestic jurisdiction to apply criminal law for the perpetration of international crimes to both natural and juristic persons like corporations. With the accountability gap in domestic legal system and enforcement mechanism, the NGOs and international organizations such as the United Nations, should play an active role in calling on the attention of the states to develop their criminal law and judicial system to effectively tackle international crimes committed by corporations. It should be noted that the civil remedies at domestic and international level are still needed in deterring and punishing egregious corporate activities, especially in domestic system which does not provide for the criminal liability of corporations.

To advance the goal of effective accountability mechanisms for corporations involving in international crimes, the United Nations should play a key role and consider codifying the existing international law standard for corporate complicity in international crimes in order to provide reference points for national law, relevant definition, permissible benchmark for corporate and core minimum requirements. In this regard, the UN Norms could serve as a great source of customary international law and perhaps even lead to the hard international law.⁷⁹ The UN Norms were meant by the drafters to provide a basis for creating consensus essential for adopting the hard international law governing corporate

⁷⁸ Wolfgang Kaleck and Miriam Saage-MaaB, "Corporate Accountability for Human Rights Violations Amounting to International Crimes: The Status Quo and Its Challenges," p. 723.

⁷⁹ Larry Cata Baker, (2006), "Multinational Corporations, Transnational Law: The United Nation's Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law," **Columbia Human Rights Law Review** Volume 37 : p.380.

behaviors involving international crimes.⁸⁰

The strategic litigation by victims and prosecutors will also help shed light on the issue of corporate criminal accountability under international law. Such litigation will have a role of stimulating the urgent need in developing international norms and enforcement mechanisms which deal with international crimes committed by corporations. In certain occasions, the Prosecutor of the ICC, Luis Moreno Ocampo, has announced the plans to investigate entrepreneurs and businessmen who play a role in financing violent conflicts leading to the commission of international crimes.⁸¹ Thus, there should be more cases initiated in a carefully considered and strategic manner before the ICC against corporations' officials and businessmen involving in international crimes.

CONCLUSION

Pursuant to the Preamble of the Rome Statute, the ICC is determined to put an end to impunity for the perpetrators of the international criminal law and to contribute to the prevention of international crimes in order to stop the threat to peace, security and well-being of the world. Due to the increased involvement of corporations in international crimes, while the ICC still does not have the jurisdiction over corporations and the international criminal law does not sufficiently address the issue of corporate criminal responsibility, the way to achieve the ultimate goal of the Rome Statute as reflected in the Preamble seems to be obscure and incomplete. The Nuremberg legacy has already paved the way for the international system to put in place the norms and effective compliance mechanisms directed at corporate criminal responsibility. This is for the world community with the strong political will to explore this legacy and develop the international criminal law for the better future of the Rome Statute.

⁸⁰ Ibid.

⁸¹ Wim Huisman and Elies van Sliedregt, "Rogue Trader: Dutch Businessman, International Crimes and Corporate Complicity," p. 803.



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