CORPORATIONS ON TRIAL: INTRODUCING CORPORATE COMPLICITY FOR INTERNATIONAL CRIMES INTO THE ICC TO END IMPUNITY

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By

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Declaration

I, **NJAGI CYNTHIA WAMBUI**, do hereby declare that this research is my original work and that to the best of my advertence and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: .....

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This dissertation has been submitted for examination with my approval as University Supervisor.

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Abstract

Following the mandate of Special Representative John Ruggie's guidelines on Business and Human rights, urging the need for corporate regulation in international environmental law, questions have arisen on the possibility of corporate accountability in other spheres of law such as international criminal law. Evident concerns such as the effect of the corporate veil on personal jurisdiction and enforcement in international criminal tribunals arise. The corporate veil, gives the entity a separate abstract legal personality, making establishment of criminal responsibility under the current regime difficult due to the assumption of a lack of requisite mens rea. Even so, the individuals making up the corporation can be held criminally liable under international law either individually or when acting as an entity, be prosecuted jointly as a group.[1] It is therefore reasonable to infer that persons operating jointly as an organisation or a corporation should suffer prosecution for violations that would constitute grave crimes under international criminal law.[2]

[1] Article 25(3)(d), *Rome Statute*, 17 July 1998, UNTS 2187,38544.

[2] Savanovic A 'Corporate Criminal Liability in International Criminal Law' Lund University, Sweden, 2017,15.

CHAPTER ONE: INTRODUCTION

1.1 Background

The question of corporate criminal liability under international law is not a recent one. Discussions on its inclusion in international law can be traced back to the International Military Tribunal of Nuremberg, created after World War Two. This tribunal, created to prosecute German officials, had the ability under its charter to declare any group or organization a criminal organization.[3] However, it has been argued that this provision was included simply as a tool to ensure criminal accountability for individuals who were members of such criminal organizations and not to provide for corporate criminal accountability as a juridical person *per se*.[4] Indeed, it was the Nuremberg Tribunal which held that crimes are "committed by men, not by abstract entities".[5] Nonetheless this notion has been touched upon in the Special Tribunal for Lebanon and select national jurisdictions that have widened their scope to include Corporate entities, however the ICC and other *ad hoc* tribunals have been reluctant.

It can be said that the lack of such a mechanism in international criminal law has contributed to commission of grave crimes by individuals hiding under the guise of the corporate veil to avoid prosecution. In November 2013, Swiss authorities announced the opening of a criminal investigation into one of the world's largest gold refineries 'Argor-Heraeus' for its alleged complicity in the war crime of pillage in the Democratic Republic of Congo (DRC).[6] The case was however closed in 2015, due to insufficient evidence. Similarly, on 14 May 2013, the Dutch public prosecutor declined to pursue a case against Lima Holding B.V. for its alleged responsibility for violations of international humanitarian law (IHL) committed in the Occupied Palestinian Territories by Israel.[7] The company had been accused by several human rights organisations of having contributed, through the supply of cranes and other aerial work

[3] Jonge FDE, 'International Corporate Criminal Liability at the Special Tribunal for Lebanon: Prosecutor v. Karma Al Khayat and Al Jadeed' Peace Palace Library, May 8 2015, -< https://www.peacepalacelibrary.nl/2015/05/international-corporate-criminal-liability-at-the-special-tribunal-for-lebanon-prosecutor-v-karma-al-khayat-and-al-jadeed/>- on 26 February 2019

[4] Jonge FDE, 'International Corporate Criminal Liability at the Special Tribunal for Lebanon: Prosecutor v. Karma Al Khayat and Al Jadeed' Peace Palace Library, May 8 2015, -< https://www.peacepalacelibrary.nl/2015/05/international-corporate-criminal-liability-at-the-special-tribunal-for-lebanon-prosecutor-v-karma-al-khayat-and-al-jadeed/>- on 26 February 2019.

[5] United Nations War Crime Commission, *Law Reports of War Criminals Volume IX,*1949, 29.

[6] Moerloose de B, 'Challenging the Pillage Process: Argor-Heraeus and Gold from Ituri, Open society Foundations, Working Paper 10, 2016,3-6, -https://www.opensocietyfoundations.org/sites/default/files/legal-remedies-10-demoerloose%20-20161107.pdf- on 26 February 2019.

[7] Diakonia International Humanitarian Law Resource Centre, *The Unsettling Business of Settlement Business, 2013, 9.*

platforms, to the construction of the wall, which the International Court of Justice had ruled violated IHL.[8] The Dutch public prosecutor decided not to pursue the case, however, in view of the fact that the said company had taken significant steps to cease its activities in Israel and the Occupied Palestinian Territories since the criminal complaint was filed.[9]

Similarly, in the case of *Prosecutor v Frans van Anraat,* the accused, who supplied chemical weapons components to Saddam Hussein, was convicted in the Netherlands in 2005 as an accessory to war crimes committed against the Kurds in Iraq in the 1980s.[10] The court held that the accused "knowingly and in pursuit of profit made an essential contribution to the Iraqi chemical weapons programme". The court added: "His contribution enabled, if not facilitated, the execution of a large number of bombings of defenceless civilians using mustard gas".[11]

Several instances have appeared in the international sphere as well. In 2007, The International Criminal Tribunal of Rwanda convicted three individuals for using Rwanda's Radio-Television *Libre des Mille Collines* (RTLM) to publically inciting the violence which contributed largely to the conflict between the *Hutus* and the *Tutsis* in the Rwandan Genocide. Likewise, the Special Tribunal for Lebanon charged Alma Khayaat and Al Jadeed alongside corporate persons (New TV S.A.L and Akhbar Beirut S.A.L.) with the willful interference with the administration of justice when disclosing confidential information regarding protected witnesses amounting to contempt of court.[12] Similarly, the SCSL charged Charles Ghankay Taylor in his capacity as a business director at the trafficking of "blood diamonds" for arms in the *Prosecutor v. Charles Taylor case*.[13]

While the aforementioned scenarios are important cases in terms of the individual criminal responsibility and/or civil liability of directors of companies for international crimes, these cases contain little in relation to the liability of the companies *per se* as legal or juridical

[8] *Legal consequences of the Construction of a wall in the Occupied Palestinian Territory,* Advisory Opinion, ICJ Reports 2004, 163.

[9] Dienke De Vos, 'The Emerging Norm of Corporate Criminal Accountability for international Crimes,' European University Institute, 9 December 2017 -https://me.eui.eu/dieneke-de-vos/blog/the-emerging-norm-of-corporate-criminal-accountability-for-international-crimes/- on 27 February 2019.

[10]Dienke De Vos, 'The Emerging Norm of Corporate Criminal Accountability for international Crimes', European University Institute, 9 December 2017 -https://me.eui.eu/dieneke-de-vos/blog/the-emerging-norm-of-corporate-criminal-accountability-for-international-crimes/- on 27 February 2019.

[11] *Prosecutor v Frans Cornelis Adrianus Van Anraat* (2007), Court of Appeal of The Hague, The Netherlands.

[12] *Prosecutor v Karma Al Khayat and Al Jadeed* (2015), The Special Tribunal for Lebanon.

[13] *Prosecutor v Charles Ghankay Taylor* (2012), The Special Court for Sierra Leone.

persons, and as such an important question remains unresolved.[14] To date, international criminal law has failed to recognise the criminal liability of corporations. The international criminal system still operates on the premise of individual criminal responsibility.[15] Arguably, one of the reasons why other international courts and tribunals have not followed the Special Tribunal for Lebanon, is the legal principle of *societas delinquere non potest*,[16] stating that a legal person cannot have a mind of its own or possess the ability to make decisions and therefore cannot have criminal intent. In the past, efforts to introduce corporate criminal liability at the international level have been met with resistance, mostly due to the existence of divergent approaches to corporate criminal liability among national jurisdictions. Most Notably during the 1998 Rome Conference for the Establishment of an International Criminal Court, the French plenipotentiaries submitted a proposal to extend the Court's jurisdiction also to legal entities, "when the crime was committed by a natural person on behalf or with the assent of a group or organization of every kind.''[17] The Court would do this by declaring the group or organisation criminal, while additionally prosecuting those most responsible and 'placing penalties such as Fines' and 'forfeiture of instrumentalities of crime and proceeds, property and assets obtained by criminal conduct.'[18]

Statement of the Problem

The overall research problem addressed in this study is that despite the Rome Statute's recognition of group crimes under Article 25(3)(d), little has been done to prosecute groups of persons acting with a common purpose made with the aim of furthering the criminal activity or criminal purpose of the group knowingly and intentionally.[19] This has been justified due to the popular opinion that corporates are abstract non-existent entities, however this proposition wrongfully implies that the corporate functions in a vacuum without direction from natural persons with common purpose. In addition to this criminal activity within corporations has been used widely as an exception to pierce the corporate veil in civil law yet this is not being

[14]Tommaso A, 'Corporate criminal liability under international law, 'The Law of Nations, 13 March 2018 - https://lawofnationsblog.com/2018/03/13/corporate-criminal-liability-international-law/- on 27 February 2019.

[15] [15]Tommaso A, 'Corporate criminal liability under international law, 'The Law of Nations, 13 March 2018 - https://lawofnationsblog.com/2018/03/13/corporate-criminal-liability-international-law/- on 27 February 2019.

[16] *Prosecutor v Karma Al Khayat and Al Jadeed (2015), The Special Tribunal for Lebanon.*

[17] [17] United Nations, Paragraph 5'United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court: Reports and other documents' at Rome, 15 June -17 July 1998, 258.

[18] United Nations, Paragraph 7'United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court: Reports and other documents' at Rome, 15 June -17 July 1998, 258. paragraph

[19] Article 25(3)(d), *Rome Statute*, 17 July 1998, UNTS 2187,38544.

applied. Interestingly IHL recognises non state actors as subjects since the London Charter after World War II.[20] This therefore extends this principle to the entirety of the Rome Statute due to the Statute's recognition of principles of IHL as a source of law[21] and also due to the evolution of IHL into custom. In light of the above, it is evident that introduction of corporate criminal liability shall enable the fulfilment of the ICC's primary mandate to end impunity.

Research Objectives

The general objectives of this research is to demonstrate that corporations can be held liable under international criminal law and most importantly the ICC. The specific objectives are rendered as;

a. To demonstrate that men's rea can be established even in cases of corporate crimes to enable standing in the ICC
b. To analyse the substantive and procedural considerations that would influence the jurisdiction of the ICC in cases of corporate criminal liability.
c. To assess current situations that could be brought before the ICC pursuant to paragraph b.
d. Pursuant to paragraph a, and analyses in b and c above, provide recommendations suggesting dual penalties with regard to corporate crimes in form of both individual prosecution and monetary sanctions to promote deterrence.

Hypothesis

This research is premised on the hypotheses that;

a. Subjects of international law; in this case legal persons such as corporations have entitlements in form of rights which exist concurrently with legal obligations which should be enforced by accountability mechanisms such as courts.
b. Article 25(3)(c) on aiding abetting responsibility enables the ICC to prosecute cases concerning corporates and organisations.
c. Criminal activity is a lawful exception to remove the corporate veil.
d. Monetary sanctions can constitute criminal sanctions and should therefore be considered in indictment of corporates as legal persons.

[20] Article 9, *Nuremberg Charter (Charter of the International Military Tribunal)*, 8 August 1945.
[21] Article 21(1)(b), *Rome Statute*, 17 July 1998, UNTS 2187,38544.

Research Questions

This research seeks to provide answers to the following questions;

a. Can *mens rea* be established in light of corporate crimes?
b. Can the principle of complementarity and triggering preliminary examination in the ICC be respected with regard to transnational corporate crimes to enable indictment?
c. Is the ICC bound by principles of international humanitarian law with regard to jurisdictional matters of legal persons where applicable?
d. In light of paragraphs a, b and c is it possible to establish liability under the current ICC regime.

Justification of the Study.

According to the Preamble of the Rome Statute, the main purpose of the ICC is to prevent the "most serious crimes of concern to the international community" because these crimes "must not go unpunished."[22] These crimes include genocide, crimes against humanity, war crimes, and the crime of aggression.[23] The ICC strives to prevent atrocities from happening through the deterrent effect of a guarantee of accountability. With large scale atrocities being committed by formidable organisations such as ISIS, who have proven to be a constant threat, due to its constant funding, it is evident that there is a need to resolve this question. Additionally, majority of these cases involve transnational companies, leaving domestic courts that have established this rule powerless. It is therefore evident that an international mechanism needs to be established to ensure the end of impunity.

Theoretical framework

This paper is anchored on the Aggregate Theory of Corporations and the Deterrence theory. The aggregate theory of corporations which gained momentum in the 19th century[24] stipulates that corporations are formed when groups of people with a common interest come together for a common purpose, and these private individuals are the basis for all of the acts committed by the corporation, it has no independent separate existence from its owners.[25] This theory and real entity theory essentially presume corporations stand in the shoes of natural persons and

[22] Article 1, *Rome Statute*.
[23] Article 5 *Rome Statute*.
[24] Padfield S, Corporate Social Responsibility & Concession Theory, 6 *William and Mary Business Law Review* 1, 2015, 22.
[25] Harper Ho, Theories of Corporate Groups: Corporate Identity Reconceived, 42 *Seton Hall Law Review,* 2014, 883.

thus have available to them all the rights of natural persons.[26] Its main competing theory is the concession theory which views the corporation as a creation of law hence a creation of the State.[27] This theory however becomes defeated by the theory of contracts especially with regard to cases of transnational corporation which are hinged on contractual agreements. Whether one choses to rely on the concession theory or the aggregate theory the establishment of the entity is hinged on the basis of consent therefore propagating the idea of a common purpose as coined within the aggregate theory.

It is worthy to note that the concession theory arose due to the need to differentiate forms of liability[28] within the corporate to prevent all parties from have same levels of liability yet different levels of control. This aspect of the theory would be relevant with regard to establishing liability in a court of law however the aspect of a non-existing entity would not. In any case even if the general principles propose the concession theory, in the context of corporate crimes the concept of piercing the veil would apply and reveal 'a group of individual acting with a similar purpose' hence taking us back to the aggregate theory.

The deterrence theory of punishment can be traced to the early works of classical philosophers such as Thomas Hobbes and Cesare Beccaria. In *Leviathan*, published in 1651, Hobbes disputed philosopher Thomas Aquinas, who insisted that people naturally do good rather than evil. Instead, Hobbes assumed that men are creatures of their own volition who want certain things and who fight when their desires are in conflict. In the Hobbesian view, people generally pursue their self-interests for example such as material gain. Beccaria on the added the notion that since people are rationally self-interested, they will not commit crimes if the costs of committing crimes prevail over the benefits of engaging in undesirable acts.[29]

Together these theorists rely on three individual components: severity, certainty, and celerity. The more severe a punishment, it is thought, the more likely that a rationally calculating human being will resist from criminal acts. To prevent crime, therefore, criminal law must emphasize penalties to encourage adherence to the law. Punishment that is too severe is unjust, however

[26] Padfield S, Corporate Social Responsibility & Concession Theory, 6 *William and Mary Business Law Review* 1, 2015, 22.
[27] Harper Ho, Theories of Corporate Groups: Corporate Identity Reconceived, 42 *Seton Hall Law Review,* 2014, 883.
[28] Padfield S, Corporate Social Responsibility & Concession Theory, 6 *William and Mary Business Law Review* 1, 2015, 20.
[29] Onwudiwe I and Onyeozili C. E, 'Deterrence Theory', - https://marisluste.files.wordpress.com/2010/11/deterrence-theory.pdf- ,2010 ,235.

punishment that is not severe enough will not deter criminals from committing crimes. In the context of current international law regime, the ICC is required to punish the most heinous of crimes and should therefore propound punishment severe enough to promote deterrence. This paper proposes a dual system of punishment, individual prosecution and monetary sanctions for reparations. Considering majority of the cases of this nature involve corporations, an evident concern would be of monetary concern.

1.2 Literature Review

There exists a surfeit of material including international case law such as *The media case* in the ICTR, and the *Charles Taylor Case* in the SCSL discussing corporate criminal liability in international criminal law and cases of prosecution within domestic courts, however majority of these focus on prosecution of corporate officials which happens to be irrelevant to this research. This research focuses on holding corporations liable as a legal person in itself in conjunction with prosecution of corporate officials.

The notion of corporate criminal liability was first touched upon at Nuremberg during the trials of German war criminals after WWII. However, only individual corporate officers were prosecuted for crimes such as genocide[30]despite the provision in the Nuremberg Charter[31] that is allowing for the prosecution of a group or organisation. Some examples of this are the cases of *Flick and Krupp* in which the directors of the companies were prosecuted for war crimes and crimes against humanity. It was held in the case of Krupp that it was the corporation per se acting in violation of international law through its employees and that it had the required mens rea for the crimes committed.[32]Despite clear arguments and provisions prohibiting corporations from commencing illicit human rights violations, very little has been done to enforce this.

The Special Tribunal for Lebanon (STL) intrepidly decided to widen its scope to include Corporate entities. Arguably, one of the reasons why other international courts and tribunals have not followed the STL, is the legal principle of *societas delinquere non potest* that prevailed at the time of the creation of the ICC and the ad hoc Tribunals' Statutes. David Scheffer in his

[30] United Nations War Crime Commission, *Law Reports of War Criminals Volume IX*,1949, 29.
[31] Article 9, *Nuremberg Charter (Charter of the International Military Tribunal)*, 8 August 1945.
[32] United Nations War Crime Commission, *Law Reports of War Criminals Volume IX*,1949, 57.

extensive publications[33] and amicus curiae briefs[34] has commented extensively on the reasons of exclusion of criminal liability for juridical persons during the U.N. talks leading to the Rome Statute in July 1998,[35] stating that there were an insufficient number of national jurisdictions that held corporations liable under criminal law, as opposed to civil tort liability, which has long been universal.

Today, the global landscape regarding corporate criminal liability in national jurisdictions has changed including in many of the States Parties to the Rome Statute.[36] Interestingly, ICC's first Chief-Prosecutor stated that corporations should be subjected to prosecution internationally.[37]Captivatingly, the preparatory works stated that prosecution of legal entities should be enabled for grave crimes, however there was too little time to fully consider the proposal.[38]

Due to this change and in light of the several atrocities that have involved corporations ever since the entry into force of the ICC Statute there is a need to review this system. Given that individual employees of a corporation can be prosecuted for international criminal law violations and, as stated during the Nuremberg judgment, it is people, not corporations, who commit crimes, what would be the benefit of prosecuting the corporate entity itself?[39] On this Ronald C Slye, states that corporations, in addition to officials or other employees, should be held criminally liable for three reasons:

1. Collective action is likely to result in greater harm than individual action;
2. The individual actions of each corporate employee may be insufficient to hold any one of them liable under international law, even though a wrong has clearly been committed; and
3. Effective deterrence of collective actions requires systemic punishment.[40]

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[33] David Scheffer & Caroline Kaeb, The Five Levels of CSR Compliance: The Resiliency of Corporate Liability under the Alien Tort Statute and the Case for a Counterattack Strategy in Compliance Theory, 29 *Berkley Journal. Of International Law,* 2011 334.

[34] Supplemental Brief of Ambassador David J. Scheffer, North Western University School of Law, as Amicus Curiae in Support of the Petitioners, Kiobel v. Royal Dutch Petroleum Co.,2013, 10-1491.

[35] United Nations, 'United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court: Reports and other documents' at Rome, 15 June -17 July 1998, 258.

[36] Scheffer D, 'Corporate Liability Under the Rome Statute,' 57 *Harvard International Law Journal*, 2016, 36

[37] Podgers J., 'Corporations in the Line of Fire', 90 *American Bar Association Journal,* 2004, 13.

[38] Scheffer D, 'Corporate Liability Under the Rome Statute,' *Harvard International Law Journal*,36.

[39] Slye R, 'Corporates, Veils, and International Criminal Liability,' 962.

[40] Clapham A, The Question of Jurisdiction Under International Criminal Law over Legal Persons: Lessons from the Rome Conference on an International Criminal Court, in M. Kamminga and S. Zia-Zarifi (ed*), Liability of Multinational Corporations Under International Law,* Kluwer Law International, Netherlands 2000,139, 145.

Holding individual corporate officials and employees criminally liable may not adequately deter certain corporate wrongdoing and harms and there may not be sufficient individual culpability to successfully prosecute anyone individual. Caleb wheeler affirms that when it comes to organizational actions that result in harm, sanctioning the entity itself will be more effective in influencing behaviour than prosecuting isolated individuals. If the harm one seeks to deter is created by the aggregation of individual acts, or if the harm is created by a policy, system, or decision-making process, placing accountability on the aggregate actor rather than individual actors will create more effective deterrence.[41]

1.3 RESEARCH DESIGN

Research Design and Methodology

This research will draw material from secondary sources, published books, scholarly papers, journal articles, theses to show the current position on the issue and other relevant studies carried out by international criminal law and company law bodies. Additionally, the research will also use primary sources such as treaties and case law to show the interpretation of the research problem. In the fourth chapter therein, the research will focus primarily on the Rome Statute and ICC case law to review matters of jurisdiction, investigations, complementarity and admissibility. The paper will also contain a review of relevant jurisprudence to establish the boundaries within which the type of recommendations to be provided.

Assumptions

The research paper will be premised on the following assumptions;

a. There exists a lacuna in the international criminal law system regarding corporate criminal liability.
b. Lack of corporate criminal accountability in international courts and tribunal prevents deterrence.
c. A dual mechanism of punishment shall promote deterrence.
d. Monetary sanctions can constitute criminal sanctions and should therefore be considered in indictment of corporates as legal persons.
e. Criminal activity is a lawful exception to remove the corporate veil.

[41] Slye R, 'Corporates, Veils, and International Criminal Liability,' 33 *Brooklyn Journal of International Law* 3, 2008, 962.

Limitations of the study

The scope of this study is confined to in the first instance The Rome Statute and Cases from the International Court and ad hoc tribunals. With regard to cases from domestic courts the research shall focus on select countries practicing common law and Civil law to show the international custom with regard to this issue. This paper focuses two main actors, namely the private companies and transnational corporations.

1.4 Chapter Break down

Chapter one- Introduction

This chapter provides: the introduction to this dissertation; the problem this dissertation seeks to solve; the justification and the intended scope of this dissertation; the research objectives; the research questions; the literature review; the theoretical framework; the hypothesis; the assumptions; the design and methodology; and the limitations of this dissertation.

Chapter two- The Historical Development of Corporate Criminal Liability

This chapter, gives an overview of the historical development of corporate *mens rea*, ascertaining that imposing criminal liability on corporations makes sense, because corporations are not, fundamentally, fictional entities.[42] It also analyses how corporate *mens rea* can be applied to the International Criminal Court -the subject of this thesis- to enable the international prosecution of corporations.

Chapter three- Substantive and Procedural Considerations in International Criminal Prosecution.

This chapter assesses the viability of introducing juridical persons into the ICC, focusing on question of substance and procedure in the Rome Statute. For instance, jurisdiction, complementarity and admissibility.

Chapter Four-Exploring Prospective Cases before the ICC

In this chapter, the research will look at case law from national courts and other *ad hoc* tribunals with regard to their positions on corporate criminal liability as a basis on general principles of criminal law recognised under the Rome Statute.

Chapter Five-Conclusion and recommendations

This chapter will propose the use of a dual mechanism of prosecution and monetary sanctions inclusive of fines and forfeiture of instrumentalities of crime and proceeds, property and assets

[42] Beale Sun S, 'A Response to the Critics of Corporate Criminal Liability' *American Criminal Law Review* 46, 2009,1483.

obtained by criminal conduct and lastly appropriate forms of reparations to ensure justice for the victims. This mechanism in the ICC shall enable promotion of deterrence

CHAPTER 2: THE HISTORICAL DEVELOPMENT OF CORPORATE CRIMINAL LIABILITY: CORPORATE MENS REA

Introduction

Apart from governments and governmental agencies, corporations have become the most active and effective agents of action in our society.[43] It is increasingly they, who are our most evident producers, distributers, land managers, tax payers, polluters, investors, and service providers.[44] Corporations have evolved and developed in structure and function throughout history. The multitude of roles the corporations play in the present day human life have been necessitated by the demands of society, as it kept on 'developing', which in turn influenced its structures, functions and consequently it's powers. Because of their size, complexity, and control of vast resources, corporations have gained the ability to engage in misconduct that dwarfs that which could be accomplished by individuals.[45] A question therefore arises, 'How does the law ensure accountability?' The oft quoted statement of Chief Justice Holt, *'a corporation is not indictable, but the particular members of it are'*, is considered explaining the position of law at that point of time.[46]

Many events have prompted the reassessment of this position and encouraged the exploration of corporate criminal liability. From the global financial crisis, the British Petroleum oil spill and the Pike River mine explosion, it is clear the devastating harms that can arise out of abuse of corporate power.[47] States have attempted to legislate on corporate criminal liability to accommodate the organisational frameworks of corporate criminal liability, however the applicability remained largely ineffective. A large majority of States continuously struggle to hold corporates to account and seemingly remain content on relying on corporate criminal laws that are largely idealistic and difficult to implement.[48]

This chapter, gives an overview of the historical development of corporate *mens rea*, ascertaining that imposing criminal liability on corporations makes sense, because corporations

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[43] Balakrishnan K, 'Corporate Criminal Liability- Evolution of the Concept' *Cochin University Law Review*, 2, 1998, 255.
[44] Balakrishnan K, 'Corporate Criminal Liability- Evolution of the Concept' 256.
[45] Beale Sun S, 'A Response to the Critics of Corporate Criminal Liability' *American Criminal Law Review*, 46, 2009,1483.
[46] Wong K, 'Breaking The Cycle: The Development of Corporate Criminal Liability' University of Otago, Dunedin, 2012, 8.
[47] Wong K, 'Breaking The Cycle: The Development of Corporate Criminal Liability' University of Otago, Dunedin, 2012, 8
[48] Balakrishnan K, 'Corporate Criminal Liability- Evolution of the Concept' 260.

are not, fundamentally, fictional entities.[49] It shall also analyse how corporate *mens rea* can be applied to the International Criminal Court -the subject of this thesis- to enable the international prosecution of corporations.

2.1 Common Law

The modern corporation could be said to have come into existence around the fifteenth century, however if its origin is sought, it could be the twelfth century or perhaps the Roman law where a legal person was said to have been recognised.[50] Sir Henry Maine suggested the inclusion of corporate responsibility and the law followed suit recognising the system of organisations and corporates.[51] Associations of different forms were emerging during the medieval period, however English Common Law through grants from the Crown or Acts of Parliament,[52] only enabled the incorporation of ecclesiastical and public bodies such as guilds, monasteries, boroughs and universities.[53]

As time passed by, the law started paying attention to these groups and their acts, prompting the recognition of corporations as legal persons. Recognition of the corporation as a legal person provided the premise for establishing corporate legal accountability.[54] Initially the position in law was that corporates could not be indicted but the individuals in it could. This was justified by the principle *of societas delinquere non potest* (a legal entity cannot be blameworthy).[55] This sentiment, as seen in jurisprudence shifted over time. The general consensus was that the principles that allowed courts to establish the liability of corporations for tort, could be extended to the establishment of their criminal liability.[56]This extrapolation however took some time to be realised, as early corporation's functions and powers were confined activities that would not ordinarily give rise to criminal sanctions. By the early 19th century, the advent of capitalism gave corporations more dominance in society, increasing their

[49] Beale Sun S, 'A Response to the Critics of Corporate Criminal Liability' *American Criminal Law Review* 46, 2009,1483.
[50] Balakrishnan K, 'Corporate Criminal Liability- Evolution of the Concept' 256.
[51] Balakrishnan K, 'Corporate Criminal Liability- Evolution of the Concept' 256.
[52]Brickey K 'Corporate Criminal Accountability: A Brief History and an Observation' 60 *Washing University Law Review*, 2, 1982, 397.
[53] Khanna S, 'Corporate Mens Rea: A legal Construct in Search of Rationale' The Centre for Law and Economics and Business, Discussion paper no 200, September 1996.
[54] Khanna S, 'Corporate Criminal Liability: What purpose does it serve?' 7 *Harvard Law Review* 109, 1996, 1485.
[55] Diskant E 'Comparative Corporate Criminal Liability: Exploring the Uniquely American Doctrine Through Comparative Criminal Procedure" *Yale Law Journal*, 129.
[56] Wheeler C, Re-Examining Corporate Liability at the International Criminal Court Through the Lens of the Article 15 Communication Against Chiquita Brands International' 19 Melbourne Journal of International Law 1, 2018, 370.

potential to cause harm.[57] The Courts therefore began regulating corporate conduct through corporate criminal liability consequently developing the concept of corporate *mens rea.*

The doctrine of corporate liability was first established in *Queen v. The Birmingham and Gloucester Railway Company,* in 1842.[58] The corporation was charged with nonfeasance; the failure to fulfil a statutory duty.[59] Four years later, in *Queen v. The Great North of England Railway Company,* liability was extended to misfeasance; the performance of lawful action in an illegal manner.[60] The case involved a railroad company that destroyed a highway in the construction of its own bridge.[61] The large majority of cases at this point in time, involved cases of public nuisance,[62] misfeasance and nonfeasance or strict liability cases. Corporates could therefore only be charged for cases that did not require *mens rea* as an element of the offence. An example of a such a criminal case was the, *Herald of Free Enterprise Case* ,1897 where the Herald of Free Enterprise sunk in the port of Zeebrugge, Belgium, killing 193 people, which eventually led to the passing of the Corporate Manslaughter and Corporate Homicide Act 2007.[63]

In 1889 however, English Criminal Law included corporates as persons that could be held criminally liable. Smith and Hogan, explained this position stating;

> 'The fact that an offence requires *mens rea* does not reveal a contrary intention for the state of mind of the corporation's controlling officers, as well as their acts which may be attributed to the corporation.'[64]

The development of corporate criminal liability led to the creation of three doctrines, the identification/alter ego doctrine, vicarious liability in criminal cases and collective responsibility or the aggregation doctrine. To explain the basic structure of the corporation and the implications for liability one can consider this statement by Denning LJ in *HL Boulton (Engineering) Co Ltd v TJ Graham and Sons Ltd*;

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[57]Pieth M and Radha I '*Emergence and Convergence: Corporate Criminal Liability Principles in Overview'* in Pieth M, Radha I (eds) *Corporate Criminal Liability. Ius Gentium: Comparative Perspectives on Law and Justice*, Springer Dordrecht, London, 2011, 4.
[58]*Queen v. The Birmingham and Gloucester Railway Company* (1842), Queen's Bench
[59] Merriam Webster Dictionary, 11 ed.
[60] Merriam Webster Dictionary, 11 ed.
[61] *Queen v. The Great North of England Railway Company* (1848), Queen's Bench.
[62] *Commonwealth v Hancock* (1974), Supreme Court of Pennsylvania.
[63] *Herald of Free Enterprise* (1987), House of Lords.
[64] Smith and Hogan, *Criminal Law*, Butterworths, London (1992), 180.

'The corporation is like a body, it has a brain and a nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such.'[65] The following doctrines interprets the above statements in the context of criminal liability in differently.

2.1.1 Vicarious Criminal Liability

This doctrine is based on the agency relationship. The principal being the company and the employees the agent. Here the principal is held criminally liable for offences committed by his employees acting as agents. Therefore, the mental state of the agent extending vicariously to that of the corporation. This is the dominant form of liability in the United States of America as was seen in the *New York Central Case.*[66] The defendant was charged with granting rebates to sugar refineries under the Elkins Act 1903.[67] The Act provided that the 'act, omission or failure of any officer, agent or employee acting in the scope of their employment is deemed to be the corporation's act, omission or failure.'[68] Under US federal law, vicarious criminal liability may be imputed to the corporation despite the actions of the agents or employees being contrary to company policies, or even rogue employees going against instructions from the corporation.[69]

In the UK in the case of; *Moore v. I. Bresler Ltd*, the secretary of the respondent company who was also the general manager and sales manager of a branch, was charged with defrauding the company by making false tax returns. On appeal to the quarter session, the charges were dismissed on the ground that the defendants did not commit the offense as the agents of the company nor with its authority, but in fraud of the company as well. On appeal to it was held that the accused was acting within the scope of their employment and that their intent to defraud and deceive did not make them any less an agents of the company.[70] Unlike the US, the UK

[65] *HL Boulton (Engineering) Co Ltd v TJ Graham and Sons Ltd* (1957) Queen's Bench.
[66] *New York Central and Hudson River Railway Co v United States*, (1909), United States Supreme Court.
[67] Wong K, 'Breaking The Cycle: The Development of Corporate Criminal Liability' University of Otago, Dunedin, 2012, 13.
[68]Wong K, 'Breaking The Cycle: The Development of Corporate Criminal Liability' University of Otago, Dunedin, 2012, 13.f
[69] *United States v Hilton Hotels Corp* (1972), Ninth Circuit.
[70] Diskant E 'Comparative Corporate Criminal Liability: Exploring the Uniquely American Doctrine Through Comparative Criminal Procedure" *Yale Law Journal*, 131.

applies vicarious liability more strictly. Vicarious liability only applies to regulatory offenses that do not require proof of *mens rea.*[71] Additionally, the courts favour the position that prima facie a principal should not be criminally responsible for the acts of its servants unless it is the intention of the legislature.[72]

2.1.2 The Alter Ego Doctrine

Also known as the identification doctrine, this doctrine suggests that the guilty mind of some of the agents of the company, are considered to be the embodiment of the company itself. It is essentially limited to those that direct the mind and will of the company, such that they become the very centre of the personality of the corporation or its alter ego.[73] These would be those that make the primary decisions for the company, manage and control the affairs of the company. They would include, the board of directors, managers or any other superior officers. Some argue that it is simply a form of vicarious liability limited to a specific group.[74] The rationale of this doctrine is that a corporation is incapable of dissociating itself from these group of individuals with regard to its actions that are primarily under the direction of these employees.[75] A company is incapable of acting or reasoning except in so far as its general manager or directors and so on, have either acted or thought.[76]

This was further elaborated on by Lord Diplock in the *Tesco Case;*[77]

> 'A corporation, owes its corporate personality and its powers to its constitution, the memorandum and articles of association. In my view, therefore, the question : what natural persons are to be treated in law as being the company for the purpose of acts done in the course of business, including the taking of precautions and the exercise of due diligence to avoid the commission of a criminal offence, is to be found by identifying those natural persons who by the memorandum and articles of association or as a result of action taken by the directors, or by the company in the general meeting pursuant to the articles, are entrusted with the exercise of the powers of the company.'[78]

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[71] Wong K, 'Breaking The Cycle: The Development of Corporate Criminal Liability' University of Otago, Dunedin, 2012, 13.f
[72] *Mousell Bros Ltd v London and North-Western Railway Co* (1917), King's Bench.
[73] Wong K, 'Breaking The Cycle: The Development of Corporate Criminal Liability' University of Otago, Dunedin, 2012, 13.f
[74] Balakrishnan K, 'Corporate Criminal Liability- Evolution of the Concept' 265.
[75] Diskant E 'Comparative Corporate Criminal Liability: Exploring the Uniquely American Doctrine Through Comparative Criminal Procedure" *Yale Law Journal*, 131.
[76] *DPP v. Kent and Sussex Contractors Ltd and Another* (1944), King's Bench.
[77] *Tesco Supermarkets Ltd. v. Nattrass,* (1971), House of Lords.
[78] *Tesco Supermarkets Ltd. v. Nattrass*, (1971), House of Lords

For corporate criminal liability too arise, individual criminal liability must be present as well. While making this determination courts concern themselves not with status *per se*, but with the individual's ability to direct company policy and decisions. [79]

2.1.2 Aggregation Doctrine

Aggregation or collective knowledge involves the assessment of several parties in a corporate and combine them to fulfil the elements of a crime.[80] This approach recognises the complex organisational structures in corporates, especially with regard to policy making. Modern corporate structures would have separation and decentralisation of powers and roles, therefore creating the possibility of even lower ranking employees for instance, through voting structures, to be involved or rather in more control of the corporates outcome. Additionally, organisational failures and combined individual wrong doing would enable courts to view corporations as non -fictitious real entities in their own right.[81]

2.2 Nuremberg: Declaring an Organisation Criminal?

The Nuremberg trials can be viewed as the mainspring of individual criminal responsibility in international law. The tribunal not only set the precedent that developed the concept of individual criminal responsibility, but also established the subject matter of international criminal law and modes of attaching liability based on the participation in the crimes. As was stated in the trial of *France et al v Goring et al* in 1946;

> 'Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.'[82]

This statement was seen as a declaration on the intention of international criminal law to be restricted to natural persons and not abstract entities, for instance corporations. Ironically, these tribunals also recognised the concept of group complicity applying them to the organisations and multi-national corporations that were complicit in the commission of atrocities. During World War II, German and Japanese corporations directly utilized forced labour in their own factories and operations as part of a government industry partnership.[83] Their direct

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[79] James Gobert,"Corporate Criminality New Crimes for the Times", *American Criminal Law Review* 1994,723.
[80] Khanna S, 'Corporate Criminal Liability: What purpose does it serve?' 7 *Harvard Law Review* 109, 1996, 1485.
[81] Beale Sun S, 'A Response to the Critics of Corporate Criminal Liability' *American Criminal Law Review* 46, 2009,1480.
[82] *France et al v Goring et al* (1946) 22 International Military Tribunal, 203.
[83] Maglie C, 'Models of Corporate Criminal Liability in Comparative Law', 3 *Washington University Global Studies Law Review* 4, 2005, 548.

participation in certain war crimes and crimes against humanity led to the prosecution of their officers and employees. The concept of group complicity was expressed in the IMT Charters of Nuremberg and the Far East, and the Control Council Law No.10.

The Tribunal could declare groups or organisations criminal in connection with the criminality of the individual acts of its members, or for membership in organisations already declared criminal. In effect, therefore, a member of an organisation which the Tribunal has declared to be criminal may be subsequently convicted of the crime of membership and be punished for that crime by death or by fine dependent on the tribunals discretion.

A criminal organisation is analogous to a criminal conspiracy in that the essence of both is cooperation for criminal purposes.[84] The group must be formed or used in connection with the commission of crimes denounced by the Charter. Some of the groups or 'abstract entities' included the Leadership Corps of the Nazi Party, The Gestapo or state police; The Reich Cabinet, and The General Staff and High Command of the German Armed Forces.[85] Prosecutions involving atrocities committed by corporations were the IG Farben Trials.

2.3 The Rome Conference: The French Proposal

During the preparatory phase of the Rome Statute, the French plenipotentiaries submitted a proposal to extend the Court jurisdiction also to legal entities "if the crime was committed on their behalf or by their officials".[86] The proposal was restricted to private corporations and not to state or public corporations. It was hinged on the identification doctrine, in that the individual criminal responsibility of a key member of the corporation, who was in a position to direct or influence the commission of the crimes, acting on behalf of or with the consent of the corporation in 'the course of its activities'.[87] Unfortunately, there was lack of consensus as majority as there was little uniformity regarding the domestic application of corporate criminal liability leading to France withdrawing its proposal.

Notwithstanding this failure, this concept has remained at the centre of the international debate. Several developments have emerged showing more willingness to extend international criminal responsibility to corporations. Two initiatives, in particular, are worth mentioning. The first

[84] https://avalon.law.yale.edu/imt/judorg.asp on 19 November 2019.
[85] https://avalon.law.yale.edu/imt/judorg.asp on 19 November 2019
[86] Bernaz N, 'Including Corporate Criminal Liability for International Crimes in the Business and Human Rights Treaty: Necessary but Insufficient' Business and Human Rights Centre,-<https://www.business-humanrights.org/en/including-corporate-criminal-liability-for-international-crimes-in-the-business-and-human-riights-treaty-necessary-but-insufficient>- on 19 November 2019.

concerns the adoption in June 2014 of the Malabo Protocol by the African Union. The Protocol, amends the Statute of the proposed African Court of Justice and Human Rights to extend the Court's jurisdiction subject matter jurisdiction to a number of international and transnational crimes and to include corporations among the possible defendants.[88] The second regards the inclusion, in 2016, of a specific provision on corporate criminal liability in the Draft Articles on the Prevention and Punishment of Crimes Against Humanity, by the UN International Law Commission.[89] These initiatives seem to suggest that the international legal system is slowly recognising the need for corporate criminal accountability for international crimes.

Conclusion

Despite the concept of corporate criminal accountability being controversial in international criminal law, it is widely accepted in several domestic legal systems. Throughout its historical development, it is evident that the existence of corporate mens rea is a possibility, and would require novel interpretation and the application of the law. The subsequent chapters, shall delve into several proposals, that would guide the court on the means to apply these concepts to its Statute substantively and procedurally.

[88] Article 46C, *Malabo Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*, 27 June 2014.
[89] Tommaso A, 'Corporate criminal liability under international law, 'The Law of Nations, 13 March 2018 - https://lawofnationsblog.com/2018/03/13/corporate-criminal-liability-international-law/- on 19 November 2019.

CHAPTER 3: SUBSTANTIVE AND PROCEDURAL CONSIDERATIONS IN INTERNATIONAL CRIMINAL PROSECUTION.

Introduction

Having established that *mens rea* can be attached not only to natural persons but also to corporations, and demonstrated that corporations cannot be viewed as abstract entities within the context of criminal action, this chapter shall focus on the practicality of the application of corporate criminal liability in the ICC. There are several considerations that must be made while hypothesizing the inclusion of corporate criminal responsibility into the Rome Statute. Firstly, substantive considerations such as the elements of the crime in question and modes of liability. Secondly, procedural considerations such as the complementarity and gravity threshold with regard to admissibility, trigger mechanisms and the factors enabling the exercise of the Court's jurisdiction. This chapter elaborates on the functioning of the court procedurally and substantively, and determines to what extent corporates can be held liable under the current regime showing that international corporate criminal liability is not simply an idealistic suggestion but a realistic one as well. This analysis begins with the investigative process, which considers the procedural limitations, and subsequently assesses substantive issues that would be considered during the trial process.

3.1 Procedural Considerations

3.1.1 Triggering the Investigative Process.

Article 13 of the Rome Statute outlines three methods for triggering a preliminary examination into a situation; State Party Referral[90], the prosecutor exercising her *proprio motu* powers subject to authorisation by the pre-trial chambers pursuant to Article 15[91], and Security Council Referral.[92] Of the three methods of triggering a preliminary examination, the Prosecutor to exercising her *propio motu* powers seems to be the most suitable means of initiating an investigation into alleged illegal conduct of corporate bodies.[93] This is due to the fact that States especially those from civil jurisdictions would be less likely to approve corporate criminal liability in comparison to common law jurisdictions that readily accept the concept of corporate *mens rea*. The Security Council has been very reluctant with regard to referring situations to the ICC. So far, the Council has referred only two situations to the court; the situations in

[90] Article 13(a), *Rome Statute of the International Criminal Court.*
[91] Article 15(1), *Rome Statute of the International Criminal Court*.
[92] Article 13(b), *Rome Statute of the International Criminal Court.*
hjk[93] Martini D, 'Corporate Criminal Responsibility at the ICC', 2017, 4.

Darfur, pursuant to resolution 1593 (2005), and in Libya, in resolution 1970 (2011).[94] This is mostly due to the veto powers of the permanent members as was seen in the most recent attempt by the Council to activate the court's jurisdiction, where China and Russia vetoed a resolution referring the situation in Syria to the ICC on 22 May 2014.[95] Security Council referrals can only succeed when member interests are lacking which is unlikely especially while dealing with multinational corporations whose majority are either incorporated in the West or in Europe. Despite these evident hurdles, Security Council referrals may be beneficial in situations where the court is facing jurisdictional restrictions.

Nevertheless, the author asserts that investigations would most likely succeed under an independent Prosecutor and therefore *Proprio Motu* investigations would be the most appropriate means of investigating. *Proprio Motu* investigation has the most flexibility and allows the Prosecutor to bypass state parties and the Security Council.[96] For example, in September of 2003, then ICC prosecutor Luis Moreno Ocampo during the International Bar Association meeting announced his intention to investigate the illegal export of natural resources, trade in arms, and the banking system helping fund illegal business operations taking place in the Democratic Republic of the Congo (DRC).[97] He affirmed that these activities would only stop when illegal business activity from companies in 25 countries ceased their activities.[98]In the end, the prosecutor neither opened an investigation nor pursued any individuals involved in these illegal activities as he had intimated.[99] Nevertheless, this stance prompted the regulation of corporate activity in conflict areas[100] and the inclusion of corporate criminal liability in several jurisdictions. As more states acknowledge that certain corporate activities contribute to sustaining armed conflicts or crimes against civilians, the Pre- Trial Chamber is gaining political acknowledgement to take these situations into consideration.[101]

3.1.2 Jurisdiction

As provided within the ICC Statute, the court can exercise jurisdiction where the accused person is the national of a state party,[102] or the conduct in question took place in the territory

[94] UNSC S/RES 1953(2005) Situation in Darfur.
[95] UNSC S/RES 1970(2011) Peace and Security in Africa.
[96] Martini D, 'Corporate Criminal Responsibility at the ICC', 2017, 4.
[97] Martini D, 'Corporate Criminal Responsibility at the ICC', 2017, 7.
[98] Martini D, 'Corporate Criminal Responsibility at the ICC', 2017, 7.
[99]Martini D, 'Corporate Criminal Responsibility at the ICC', 2017, 7.
[100] The United States in 2010 passed section 1502 of the Dodd Frank Act regulating companies in the DRC, similarly the European Union has implemented regulation on the importation of minerals, tantalum, gold and tungsten from West Africa and Central Africa.
[101] Martini D, 'Corporate Criminal Responsibility at the ICC', 2017, 5.
[102] Article 12(2)(b), *Rome Statute of the International Criminal Court*.

of a state party.[103] In addressing whether the court has jurisdiction over the conduct in question, the court must also consider the period in which the corporation committed the conduct in question. The Court may only exercise jurisdiction if the conduct occurred after 1 July 2002, if the conduct is continuous in nature hence occurred before 2002 but continued after the date of entry into force, or if the state of incorporation submits a declaration pursuant to article 12(3). The question of nationality with regard to natural persons is uncontroversial, but may be problematic in the context of corporations and would need to be applied different. The International Court of Justice in the *Case concerning Barcelona Traction, Light and Power Company Limited* stated that the nationality of company is its country of incorporation.[104]In determining the nationality of corporations one must consider the type and structure of the organisation. For instance, national corporations, public or private that operate in one state and takes part in international crimes, would be under the jurisdiction of the ICC, if the state of the corporation is party to the statute. The structure of the organisation need not be considered. If the organisation happens to be a transnational corporation this must be considered. Transnational corporations operate in more than one state, and differ in organisational structure. A typical model functions with headquarters based in one country while other facilities such as production facilities operate in another. This model often allows the company to take advantage of benefits of incorporating in a given locality, while also being able to produce goods and services in areas where the cost of production is lower.[105] In other instances, the transnational organisation bases its parent company in one state and operates subsidiaries in other states that function independently while the functions of the parent company are confined to the state of origin. These structures have an implication on the jurisdiction of the court.

The author uses the following assessment to explain the application of jurisdiction in the context of legal persons;

a) If parent company X incorporated in State A facilitates the commission of war crimes by funding and providing ammunition to rebel groups through its production facility X incorporated in State B hence enabling an armed conflict, in state B, the conduct in question may be attached to the parent company. This is because the two are not

[103] Article 12(2)(a), Rome Statute of the International Criminal Court.
[104] The Case Concerning Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) Para 74. Belgium v Spain, Judgment, ICJ Reports 1970, p 74.
[105] https://corporatefinanceinstitute.com/resources/knowledge/strategy/multinational-corporation/-on 12 December 2019.

considered separate legal entities. The Court will therefore consider the entity's nationality, by considering whether State A is party to the Rome Statute, or whether State B where the conduct in question occurred; is party to The Statute enabling the exercise of territorial jurisdiction.

b) In another scenario if subsidiary Z, incorporated in state Y commits crimes in state B, then parent company Z shall not be held liable as they are deemed to be separate legal entities. The court shall only consider the nationality of the subsidiary.

3.1.3 Admissibility: Gravity and Complementarity.

During the Rome Conference debates concerning the possibility of extending the jurisdiction of the Court to include legal persons arose.[106] By the final draft, the proposal was directed exclusively towards private corporations,[107] however despite reasonable progress towards this inclusion the draft provisions were eventually excluded. The Statute expressly provided for jurisdiction over natural persons and as a result, only individual employees of a corporation or corporate directors could be prosecuted in the ICC.[108] The Court was reluctant to prosecute or rather 'criminalize' the entity as was stated during Nuremberg and the negotiations. This was due to several objections such as lack of uniformity in domestic jurisdictions on the subject, and other notable objections such as the effect this inclusion would have on the principle of complementarity, a cornerstone of the Rome Statute. Complementarity is provided for under Article 17 of The Statute, encapsulating that the ICC 'shall be complementary to national criminal jurisdictions.' The ICC is therefore a court of last resort and shall intervene if its shown that the state is unwilling or unable to prosecute.[109] National forums are therefore preferred unless certain conditions are met. The concern regarding the proposal to extend ICC jurisdiction to include corporations was that this would affect the complementary relationship between the ICC and States as those states that do not domestically recognise the criminal liability of corporations would be automatically unable to assert their right to 'first go' at the investigation and prosecution over these defendants.[110]

It would be of significance to consider different descriptions of the complementarity objection expressing different positions as to how relevant the objection is to the proposal on the

[106] *Working Paper on Article 23*, 3 July 1998, para 5 and 6.
[107] *Summary Records of the Meetings of the Committee as a Whole, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 26th meeting*, 8 July 1998, 10.
[108] Article 25(1), Rome Statute of the International Criminal Court.
[109] Article 17(1), Rome Statute of the International Criminal Court.
[110] Kyriakis J, Corporations and The International Criminal Court: The Complementarity Objection Stripped Bare, Criminal Law Forum 19, 116.

inclusion of legal persons. Some argue that the extension of jurisdiction would have a partial impact on the functioning of the complementarity regime of the Court.[111] For instance, Frulli stated that the lack of uniformity among different national systems on criminal liability of juridical persons could affect the full functioning of complementarity.[112] Wexler, considers the proposal to be 'practically difficult' due to the absence in several national systems.[113] This is all due to an understanding that the proposal would contravene the principle stating that the court must not take over the main responsibility for criminal prosecution from the national forum concerned.[114]Scholars such as Albin Eser[115] and Kai Ambos have suggested more substantive implications for the complementarity regime, they argue that the absence of corporate criminal liability in many States renders the complementarity concept unworkable.[116] Schabas describes the challenge as "the awesome and ultimately insurmountable problems of complementarity"[117]

The author however asserts that the complementarity objection is invalid. The fact that some states do not recognise the principle of corporate criminal liability hence lacking a forum for domestic prosecution does not result in a fundamental nor partial breach of the complementarity principle such as to justify the staying of progress in this regard. Article 17, paragraph 3 provides that in determining inability to genuinely proceed, the court considers whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.[118]

Cassese argues that an inability to act includes cases where the national court is "unable to try a person not because of a collapse or malfunctioning of the judicial system, but on account of legislative impediments, making it impossible for the national judge to commence proceeding

[111] Kyriakis J, Corporations and The International Criminal Court: The Complementarity Objection Stripped Bare, 116.
[112] Frulli M, 'Jurisdiction Ratione Personae', in Antonio Cassesse, Gaeta P, Jones J, (eds) *The Rome Statute of the International Criminal Court: A Commentary*, 527.
[113] Wexler L, 'Model Draft Statute for the International Criminal Court Based on the Preparatory Committee's Text to the Diplomatic Conference Rome June 15-July 17 1998', 13 Nouvelle Etude Penales 42.
[114] Kyriakis J, Corporations and The International Criminal Court: The Complementarity Objection Stripped Bare, 117.
[115]Eser A, 'Individual Criminal Responsibility', in Antonio Cassesse, Gaeta P, Jones J, (eds) The Rome Statute of the International Criminal Court: A Commentary, 767,779.
[116] Ambos K, 'Article 25: Individual Criminal Responsibility', in Otto Triffterer (ed) *Commentary On the Rome Statute of the International Criminal Court: Observers' Notes: Article by Article*, 1999, 475.
[117] Schabas W, General Principles of Criminal Law in the International Criminal Court Statute, 6 *Europe Journal on Crime* 4, Criminal Law and Criminal Justice, 1998,94.
[118] Article 17(3), Rome Statute of the International Criminal Court.

against the suspect or the accused."[119] This would ideally include a lack of legislative competence over the defendant in question.[120] McCormack, Robinson and Doherty argue that a state's failure to have sufficient penal legislation covering the crimes in question would justify the argument that the state is unable to proceed.[121] As stated by El Zeidy, "the fact that the State cannot obtain custody of the accused … is at the heart of inability.[122] Therefore if a state lacks legislation on corporate criminal liability the ICC should be allowed to intervene as per the inability exception on complementarity. Additionally, even if some states have the relevant legislation, in most instances, the countries in question are either complicit in the crimes or they lack the local institutional capacity to prosecute the entities due to the immense powers exuded especially if they are Multinational corporations.[123]

The ICC was established to adjudicate on "the most serious crimes of concern to the international community as a whole."[124] Therefore the gravity threshold must be met for the case to be admissible. The gravity threshold is uncontroversial in the context of natural persons due to the fact that the court is only concerned with impact caused and the extend of damaged caused by the crime in question. It concerns the extent of damage[125] caused and the number of victims.[126]The gravity threshold would ideally be unproblematic with regard to prosecution of Multi-National Corporations.

3.2 Substantive Considerations

3.2.1 Actus reus and mens rea for corporate criminal liability under Aiding and Abetting responsibility.

The Rome Statute limits the jurisdiction of the International Criminal Court to natural persons.[127]Attempts to have an express provision providing for the criminal liability of legal persons were rejected when Article 23(6) and (7) on criminal responsibility of legal persons, Article 76 on penalties applicable to legal persons, and Article 99 on enforcement of fines and

[119] Cassese A, *International Criminal Law*, 3rd ed, OUP, London, 2003, 352.
[120] Kyriakis J, Corporations and The International Criminal Court: The Complementarity Objection Stripped Bare, 124.
[121] L.H. Timothy, McCormack and Doherty K, 'Complementarity" as a Catalyst for Comprehensive Domestic Penal Legislation', 5 *University of California Davis Journal International* Law, 1999, 147.
[122] Kyriakis J, Corporations and The International Criminal Court: The Complementarity Objection Stripped Bare, 129.
[123] Asaala E, 'Corporate Criminal Liability Under the Malabo Protocol: Breaking New Ground?' in Merwe H and Kemp G (eds) International Criminal Justice in Africa, 1st ed, Strathmore University Press, Nairobi, 2017, 124.
[124] Preamble, Rome Statute of the International Criminal Court.
[125] Rule 145(1)(c), *Rules of Procedure and Evidence of the International Criminal Court.*
[126] The ICC Office of the Prosecutor, Policy Paper on Case Selection and Prioritisation, 15 September 2016, 13.
[127] Article 25(1), Rome Statute of the International Criminal Court.

forfeitures were all expunged from the draft statute.[128] It is evident that the lack of an express provision on legal persons may restrict the court due to the principles of strict construction. Nevertheless, it can be argued that the doctrine of corporate liability may apply under the principle of 'organisational complicity'[129]embodied in the notions of aiding and abetting adopted in the statutes of most international criminal tribunals [130] including the Rome Statute.[131]The actus reus of a corporation, comprises the specific elements of the crime in question. The acts or omissions of the corporation must constitute the elements of the relevant crime. The mens rea element comprises of the corporate intention to commit the crime and the corporate knowledge of the offence in question. In the context of corporations, the 'intention' can be proven once by establishing that the policy of the corporation required the commission of the act that constitutes the offence,[132] or as expressed in the second chapter looking at the intention of the policy makers and accomplices and attributing it to the corporation. The ICC has interpreted that a policy need not be express but can also be inferred from a series of events.[133] Intention can be attached vicariously, through the theory of collective knowledge or through the alter ego doctrine based on the circumstances of the case.

Accomplice liability arises when it is proven that persons have been complicit in the commission of international crimes.[134] Accomplices can either 'prompt' the perpetration of a crime by inciting, or instigating or soliciting or inducing its commission; or by 'assisting' in the perpetration of a crime by aiding or abetting.[135] Accomplice liability of the corporation itself can be established for aiding and abetting international crimes through the failure to fulfil a duty of care rationale (through an omission).[136] Aiding and abetting refers to any act including

[128] United Nations, *Report of the preparatory committee on the establishment of an International Criminal Court,* United Nations diplomatic conference of plenipotentiaries on the establishment of an International Criminal Court, Rome, Italy 5 June – 17 July 1998, A/CONF.183/2/Add.1, https://documents-dds-ny.un.org/doc/UNDOC/GEN/N98/101/05/PDF/N9810105.pdf? on 13 September 2017

[129] Chella J, 'The complicity of multinational corporations in international crimes: An examination of principles,' PhD thesis, Bond University (2012), 200-201,

[130] Article 7(1), ICTY Statute; Article 6(1) of the ICTR Statute; Article 6(1) of the SCSL Statute.

[131] Article 25(3) (c), Rome Statute.

[132] Asaala E, 'Corporate Criminal Liability Under the Malabo Protocol: Breaking New Ground?' in Merwe H and Kemp G (eds) *International Criminal Justice in Africa,* 1st ed, Strathmore University Press, Nairobi, 2017, 110.

[133]*Prosecutor v Germaine Katanga*, (Judgment pursuant to Article 24 of the Statute) ICC 01/04-01/07, 7 March 2014, p 1109.

[134] Ongeso J, 'An Exploration of Corporate Criminal Liability in International Law for Aiding and Abetting International Crimes in Africa' University of Witwaterstrand, Johannesburg, 2015, 150.

[135] Ongeso J, 'An Exploration of Corporate Criminal Liability in International Law for Aiding and Abetting International Crimes in Africa' University of Witwaterstrand, Johannesburg, 2015, 150.

[136] Ongeso J, 'An Exploration of Corporate Criminal Liability in International Law for Aiding and Abetting International Crimes in Africa' University of Witwaterstrand, Johannesburg, 2015, 150.

moral contribution[137]which contributes to the commission or attempted commission of a crime. Article 25(3)(c) of the Rome Statute provides for aiding and abetting however the jurisprudence of the *ad hoc* Tribunals gives guidance on applying this mode of liability.

The Statute states that a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: 'For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission.' The words 'or otherwise assists', broadly interpreted, mean that the commission of a crime under the Rome Statute may possibly be facilitated by both commissions and omissions, that is to say that if one's inaction contributes to the commission of the crime they are liable as well. This is relevant in rationalising corporate liability under as aiders and abettors. Aiding and abetting through omissions can be attached especially in scenarios where there is a particular and lawful duty to act and failure to do so amounts to conduct that has a substantial effect[138] on the commission of the crime.[139] Conduct by omission for corporations can arise in two ways. First, passivity combined with physical presence and authority;[140] or failure to fulfil a duty imposed by law.[141] For example, paying public officials for the unlawful dumping of toxic waste in terms of a legally binding contract encourages these officials to harm both human health and the environment in exchange for money.[142] The determination on whether certain conduct has a substantial effect on the perpetration of crime differs based on the circumstances of the case.

The author asserts that aiding and abetting liability in comparison to attaching liability under article 25(3)(d)(ii) on group crimes is the most appropriate means of charging corporations and establishing organisational complicity. Article 25(3)(d)(ii) requires the intention of each member of the group to be established in order to enable prosecution. This would be suitable for the prosecution of corporate agents such as the board of directors and not the entity itself. Complex organisational structures would make it difficult to assess each employee's individual intent and would also make it unrealistic and inhibit effective investigation during preliminary examination of the case. Aiding and abetting liability can arise in several instance and seems

[137] *Prosecutor v Mrkšić* (2009), International Criminal Tribunal for the Former Yugoslavia, *Nahimana v Prosecutor* (2007) International Criminal Tribunal for Rwanda.
[138]*Prosecutor v Callixte Mbarushimana* (Decision on the Confirmation of Charges) ICC, 2011, 279.
[139] Ongeso J, 'An Exploration of Corporate Criminal Liability in International Law for Aiding and Abetting International Crimes in Africa' University of Witwaterstrand, Johannesburg, 2015, 150
[140] *Proseutor v Furundizja*, (Trial Judgement) (1998), International Criminal Tribunal for Rwanda.
[141] *Prosecutor v Oric* (Trial Judgment) (2006), International Criminal Tribunal for the former Yugoslavia.
[142] Ongeso J, 'An Exploration of Corporate Criminal Liability in International Law for Aiding and Abetting International Crimes in Africa' University of Witwaterstrand, Johannesburg, 2015, 131.

to be more practical. For instance, aiding and abetting by omission can arise when a corporation fails to act collectively by punishing perpetrators or by not halting illegal activity. Liability by omission would arise due to the existence of the duty of care obligation that the company would have failed to fulfil. Additionally, it is assumed that by failing to act the corporation is consenting to the illegal activity. Failure to act is therefore seen as an omission with a 'purpose to facilitate' the commission of the crime as is the required standard under the Rome Statute. Moreover, the Prosecution would still be able to charge the corporation for aiding and abetting by commission in the same vein. This is because that consistent failure to act with regard to certain conduct creates an assumption that the corporation condones such activity hence a policy of such nature being present. The organisational policy can be inferred from a consecutive series of events.

Conclusion

The ICC pursues those most responsible for international crimes, and aims to end impunity, and prevent future crimes. Past events ever since the epoch of international criminal law during the Nuremberg trials have shown that corporate agents can be facilitators and enablers of atrocities, often with little accountability. Despite the obvious need for such investigations and prosecutions, criminal corporate accountability is still limited to theory. The above analysis however shows that the prosecution of corporations is a possibility within the current regime. Having established thus, the following chapter shall look at prospective situations that may investigated and prosecuted by the court.

CHAPTER 4: EXPLORING SITUATIONS INVOLVING CORPORATE PARTICIPATION IN INTERNATIONAL CRIME.

Introduction

According to the UN Guiding Principles, the risks of involvement in gross human rights abuse tends to be most prevalent in contexts where there are no effective government institutions. Perhaps the greatest risks arise in conflict-affected areas.[143] The involvement of multinational companies in gross human rights violations thrive in conflict afflicted areas due to chances of minimal accountability. Such would be a justification for intervention on an international level. Most importantly, commercial interest such as profit maximization and loss minimization seem to be the main motive for corporate involvement in such atrocities. For instance, the profit intensive extraction of natural resources in regions such as Sudan, DRC, Sierra Leone, and Columbia. Other regions involving corporate complicity not necessarily linked to natural resource interest include regions such as Iraq and Palestine. The previous chapter entailed an assessment of the Rome Statute to demonstrate the practicality of the introduction of corporate criminal liability in the ICC. This chapter buttresses this point by looking into conflict situations that warrant prosecution. The research shall restrict itself to three situations namely. Sudan, Palestine and Colombia which are conflict situations involving corporate complicity already undergoing investigation or preliminary examination. The cases shall look into complicity for genocide, war crimes and cries against humanity.

4.1 Sudan: China State Oil Company and the Genocide in Darfur.

4.1.1. Background of the Conflict

On 04 March 2009 and subsequently 12 July 2010 the International Criminal Court issued warrants of arrest for Omar Al Bashir, the de jure and de facto President of Sudan based on reasonable grounds of belief in his participation in war crimes, crimes against humanity and three counts of genocide during the March 2003 to July 2008 armed conflict that existed in Darfur. The armed conflict not of an international character involved the Government of Sudan and several organized armed groups, in particular the Sudanese Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM). As the Commander in Chief of the Sudanese Armed Forces, Al Bashir possessed full control of the military apparatus, coordinating the campaigns against the Fur, Masalit and Zaghawa ethnic groups, and acted

[143] Stichting Onderzoek Multinationale Ondernemingen, *Multinationals and Conflict International principles and guidelines for corporate responsibility in conflict-affected areas, 2014, 21.*

with specific intent to destroy the said groups. Soon after the April, 2003 attack on the El Fasher airport, Omar Al Bashir and other high-ranking Sudanese political and military leaders of the Government of Sudan organized a counter insurgency campaign against the rebel groups opposing the regime. The campaign involved targeted attacks against the civilian population of Darfur mainly comprising of the Fur, Masalit and Zaghawa groups who were perceived to be in support of the rebel groups opposing the Government.[144] The campaign through the *Janjaweed militia,* The Sudanese Armed Forces and Police Forces, the National Intelligence and Security Service (NISS) and the Humanitarian Aid Commission carried out unlawful and systematic acts of pillage against the aforementioned groups, acts of murder, torture, rape, extermination and forcible transfer to camps in Chad and contaminated the wells and water pumps of the towns and villages primarily inhabited by members of the Fur, Masalit and Zaghawa and encouraged members of other tribes, which were allied with the Government of Sudan, to resettle in the villages and lands previously mainly inhabited by members of the targeted groups.[145] Of relevance is the question of corporate involvement and most importantly how a legal person could be complicit in the crime of genocide despite its threshold on the specific intent to destroy. This shall be the subject of discussion for this section.

4.1.2 Corporate Complicity in the Conflict

As highlighted above corporate involvement in atrocities thrive in conflict situations with little to no accountability however the main motive would be to secure commercial interests by minimizing losses in regions they are already invested in such as natural resource and mineral-rich regions. This was the situation in Sudan. The award of petroleum exploration and development blocks by the Sudanese government to Chinese companies in demonstrates such a connection.[146] Amongst the seventeen blocks of Sudan's oil concessions to China, are in the Darfur Region.[147] The only block in production, is located in Darfur and ninety-five percent of

[144] The International Criminal Court, *Situation in Darfur, Sudan -The Prosecutor v. Omar Hassan Ahmad Al Bashir Case Sheet*, ICC-02/05-01/09, 2018, 3.
[145] The International Criminal Court, *Situation in Darfur, Sudan -The Prosecutor v. Omar Hassan Ahmad Al Bashir Case Sheet*, ICC-02/05-01/09, 2018, 3.
[146] Kelly M, 'Ending Corporate Impunity for Genocide: The Case Against China's State-Owned Petroleum Company in Sudan' 90 *Oregon Law Review* ,2011, 413.
[147] Mazen M, 'Sudan Plans to Start Pumping Oil in Darfur, Petroleum Minister Deng Says', Bloomberg, 1 Dec 2010, -< https://www.bloomberg.com/news/articles/2010-12-01/sudan-plans-to-start-pumping-oil-in-darfur-petroleum-minister-deng-says>- on 28 Dec 2019.

that concession is controlled by CNPC. Additionally, yet to be awarded blocks encompass the entirety of the rest of the Darfur region.[148]

In August 2008 Darfuri rebel groups accused the government of mounting the military offensive at the northern Darfur oil blocks.[149] At the time, there were allegations that after the arrival of the Chinese Oil Workers the government attempted to clear the rebels out of the area to make way for oil exploration. The Sudanese military attacks coincided with clearing Sudanese oil fields. Additionally, CNPC and the Greater Nile Petroleum Operating Company (GNPOC), 'a consortium that presently dominates oil production in Sudan' whose forty percent Share is owned by CNPC...contract with Khartoum to secure their oil operations and not only allow Sudanese military forces to use the companies' air strips, mechanical support, but also provide weaponry and training to the military forces such as the pilots who strafe to clear the land.[150] As a result of CPNC's economic power and influence over Sudan, The corporation is most likely to influence the government's position in several matters. Consequently, the economic power of the CPNC and the military power of the Sudan Military and the *Janjaweed militia* resulted in the atrocities in Darfur.

4.1.3. Corporate Mens Rea for Genocide: Is Intent to destroy a requirement?

The 1948 Genocide Convention and the Rome Statute both provide for the requirement 'that acts are committed with the *intent to destroy* in whole or in part ethnic, racial, national or religious groups as such; by either killing members of the group, causing serious bodily or mental harm to members of the group; Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, Imposing measures intended to prevent births within the group; or Forcibly transferring children of the group to another group.[151] The actus reus elements can be easily discerned for each accused based on their participation. Individuals can be liable for aiding and abetting genocide if they, render practical assistance, encouragement, or moral support to the principal which had substantial effect on the commission of the crime knowing that the acts assisted in the commission of the

[148] Mazen M, 'Sudan Plans to Start Pumping Oil in Darfur, Petroleum Minister Deng Says', Bloomberg, 1 Dec 2010, -< https://www.bloomberg.com/news/articles/2010-12-01/sudan-plans-to-start-pumping-oil-in-darfur-petroleum-minister-deng-says>- on 28 Dec 2019.

[149]Kelly M, 'Ending Corporate Impunity for Genocide: The Case Against China's State-Owned Petroleum Company in Sudan' 90 *Oregon Law Review* ,2011, 420.

[150] Kristof N, 'Prosecuting Genocide', New York Times, 17 July 2008, -https://www.nytimes.com/2008/07/17/opinion/17kristof.html- on 28 December 2019.

[151] Reeves E, 'Arming Khartoum: China's Complicity in the Darfur Genocide', South Sudan News Agency18 October 2010, -https://southsudannewsagency.org/index.php/2010/10/19/arming-khartoum-chinas-complicity-in-the-darfur-genocide/- on 28 December 2019.

genocide and (knowing that the crime was committed with specific intent.[152]. For instance, the *Janjaweed militia* committed the genocide, the government orchestrated it by common planning, and the CPNC was complicit by providing practical assistance and moral support. Each of these groups however have a different burden of proof with regards to mens rea. Two schools of thought dominate, purpose based intent,[153] versus knowledge based intent for low level perpetrators.[154] Knowledge based intent reduces the high threshold of intent to destroy or purposed based intent to only requiring that the perpetrator is cognizant of what would occur in the ordinary course of events. This threshold would ideally apply to low level perpetration such as is the case in complicity or aiding and abetting. The ad hoc tribunals recognize three forms of complicity: procuring means used to commit genocide, aiding or abetting a perpetrator of genocide, and instigation. Both tribunals agree, however, that the abettor need not possess genocidal intent, but rather must only know that he is aiding genocide. Therefore, once Al Bashir's intent is established it must be shown that CPNC was cognizant of what would occur, therefore specific intent with regard to CPNC need not be proven. The ICTY inferred Blagojević's knowledge of the perpetrators' intent from the circumstances, for instance the evacuation of the entire Bosnian Muslim population from Srebrenica; the separation of Bosnian Muslim men from the rest of the population; and the detention of Bosnian Muslim men in inhumane conditions.[155] The same can be said for CPNC with regard to the already present atrocities directed at the Fur, Zaghawa and Masalit. ICC in the *Al-Bashir Arrest Warrant decision* seemingly arrived at this conclusion as well. The Chamber seemed to acknowledge the possibility of knowledge-based intent but only for low- and mid-level perpetrators.

4.2 The Israeli- Palestine Conflict and Corporate Complicity

4.2.1 Background of the Conflict

Though both Jews and Arab Muslims date their claims to the land back a couple thousand years, the current political conflict began in the early 20th century. Jews fleeing persecution in Europe wanted to establish a national homeland in what was then an Arab- and Muslim-majority territory in the Ottoman and later British Empire. The Arabs resisted, seeing the land

[152] Kelly M, 'Ending Corporate Impunity for Genocide: The Case Against China's State-Owned Petroleum Company in Sudan', 433.
[153] Greenawalt A, 'Rethinking genocidal intent: The case for a knowledge-based interpretation,' Vol 99 *Columbia Law Review* (1999) 2293-2294, at Footnote 91.
[154] *Prosecutor v. Omar Hassan Ahmad* Al Bashir, International Criminal Court, para. 139–40.
[155] *Prosecutor v. Blagojević,* (2005) Judgment, International Criminal Tribunal for the Former Yugoslavia,779-782.

as rightfully theirs leading to several wars.[156] Following the ongoing conflict the United Nations in accordance with the 1947 UN General Assembly proposal to divide British Mandatory Palestine into a Jewish state and Arab state made an attempt to partition the land between the two states. The result was dissatisfaction due to the severing of Jerusalem from the Jewish State. This consequently led to the 1948 and 1967 wars. The 1967 war is particularly important for today's conflict as it gave Israel control of the West Bank and the Gaza Strip which is largely populated by Palestinians. Currently, the West Bank, is partially controlled by the Palestinian Authority under Israeli Occupation. The result is Palestinian suppression and human rights abuses by Israeli troops, and discrimination in favor of Jewish Settlers.[157] Additionally hostilities occasionally occur between the troops and *Hamas* a Palestinian Islamist political organization and militant group that waged war on Israel since 1987 most notably through suicide bombings and rocket attacks.[158] Efforts made towards negotiations most notably the Oslo Accords between the two states have failed due to the *Intifada* Palestine uprisings in the 1990s. The Oslo Accords which the two states signed in 1993 which endorsed a five-year term of Palestinian Autonomy. The self-rule term would occur first over Gaza and the city of Jericho and then, after an election, throughout the remaining areas under Israeli military rule after-which discussions on the final status were to begin after three years, with a two-year deadline for an agreement to be reached.[159] Issues such as borders, the return of refugees, the status of Jerusalem, and Jewish settlements in the occupied territories were reserved for such discussions. The accords embodied two compromises Israel would rid itself of tumultuous regions such as the Gaza Strip while still retaining strategic control, while Palestine would rid itself off Israeli military occupation, gain self-governance and potentially acquire statehood status. They would also benefit economically from foreign aid and economic agreement between the two states o foster employment and trade.[160] The Oslo Accords that would supposedly guide the concept of two-state solution that would finally resolve the conflict failed due repeated uprisings and conflicts that upto two decades later, leave Israel and Palestine in a vicious violent cycle.

[156]Beauchamp Z, 'What were the intifadas?' Vox, 14 May 2018, -https://www.vox.com/2018/11/20/18080066/israel-palestine-intifadas-first-second- on 30 December 2019.
[157] Bradil, 'Corporate Complicity in Violations of International Law in Palestine' December 2014, 7.
[158] [158] Beauchamp Z, 'What is Hamas?' Vox, 14 May 2018, -https://www.vox.com/2018/11/20/18080066/israel-palestine-intifadas-first-second- on 30 December 2019.
[159] Konrad-Adenauer-Stiftung, 'The Oslo Accords: The Text, The Intentions, and the Question of Peace' 10.
[160] Bradil, 'Corporate Complicity in Violations of International Law in Palestine' December 2014, 7.

4.2.2 Corporate Complicity in Palestine

Israeli companies and multinational corporations participate in atrocities that constitute war crimes and crimes against humanity in Palestine. The London Session of the Russell Tribunal on Palestine[161] categorised the acts attributable to corporations that are in support of, or contribute towards violations of international law, into three main activities.[162] These are the Supply of military equipment, material and vehicles to Israel that were used during the 2008-2009 Gaza Strip incursion, the supply of security equipment to Israeli colonies in the occupied territory and to Israeli troops for use at checkpoints, companies that supply material for the construction of the Annexation Wall and finally Corporate Complicity in Acts of Population Transfer in Palestine. Business enterprises have "directly and indirectly, facilitated and profited from the construction and growth of the settlements."[163]Such activities that raised the most concern with regard to their connection to population transfer included, The supply of equipment and materials facilitating the construction and the expansion of settlements and the Wall, and associated infrastructures; The supply of equipment specifically for the demolition of housing and property, the destruction of agricultural farms, greenhouses, olives groves and crops; Banking and financial operations helping to fund the expanding settlements and even the Pollution, and the dumping of waste in Palestinian villages.[164] Companies become complicit due to their participation in these activities with knowledge of the international crimes that are occurring. This can be inferred from the surrounding circumstances, the publicity surrounding the conflict and additionally the specific use of some of the equipment provided. For instance, it cannot be argued that the provision of equipment for the demolition of structures or provision of weaponry is not for the purpose of facilitating the hostilities.

4.2.3 Case Study: Kardan NV and Kardan Yazamut.

Kardan NV, incorporated in the Netherlands is an investment company that deals in the development of real estate and infrastructure projects through its subsidiaries.[165] Kardan NV operates in the Occupied Palestinian Territory through its subsidiaries in Israel such as El- Har and Tahat. In 2011, Kardan NV transferred its shares to Kardan Yazamut incorporated in Israel. Kardan Yazamut also dealt in real estate but provided other services such as Communication

[161] Russell Tribunal on Palestine: Findings of the London Session. Corporate Complicity in Israel's Violations of International Humanitarian & International Human Rights Law." Russell Tribunal on Palestine: 2nd International Session, 20 November 2010.
[162] Bradil, 'Corporate Complicity in Violations of International Law in Palestine' December 2014, 30.
[163] Bradil, 'Corporate Complicity in Violations of International Law in Palestine' 30.
[164] Bradil, 'Corporate Complicity in Violations of International Law in Palestine' 31.
[165] Bradil, 'Corporate Complicity in Violations of International Law in Palestine' 31.

and Technology.[166] Many of the activities run by the direct and indirect subsidiaries of the two parent companies could be attributed to acts of complicity in the Israeli colonization project. El-Har, a construction company, while being a subsidiary of Kardan NV constructed a bridge over the Atarot Stream connecting Jerusalem to Northern West Bank Colonies. It included a policy that it was only for Israeli use and additionally building permanent infrastructure in Occupied Palestinian land with the aim of exclusive Israeli use. This corporation directly contributing to the construction of Israeli colonies on Palestinian land. This can be deemed as aiding and abetting in the forcible population transfer and persecution of Palestinians. This expressed as a Crime against humanity under the Rome Statute. El- hamer can be deemed not only due to their practical assistance but also their failure to condemn these acts. This implies the existence of an organizational policy hence actual knowledge. Moreover, their activities within the various areas of the colonization project can be seen as practical assistance that has a substantial effect on the commission of crimes and human rights violations. For example, the acts of planning and implementations of water master plans and projects for water infrastructure by Tahal in the Occupied Palestinian Territories or the very constructions work made by El-Har on Palestinian territory. Furthermore, all of the companies examined are aware of their illegal activities. On reply to a request sent to Kardan NV by human rights organizations in the Netherlands, asking for the company's policy regarding the occupation, Kardan NV responded that it was active in Israel and adhered to international laws.[167] The activities of the companies not only contradict international criminal law but also the international obligations codified in the United Nation's Guiding Principles on Business and Human Rights.[168]

As elaborated in the third chapter activities of the subsidiaries can be attributed to the parent companies depending on the level of influence and knowledge possessed by the parent company. Moreover, the state of incorporation assists in questions of nationality. Therefore, Kardan NV, being of Dutch nationality can be held responsible nationally crimes against humanity are criminalized by article 4 and 5 of the Dutch International Crimes Act or 'prospectively' the International Criminal Court. In a similar case, the Dutch Prosecutor's Office opened a criminal investigation into the activities of the Dutch company Riwal, which was suspected to be involved in human rights violations through committing construction

[166] Bradil, 'Corporate Complicity in Violations of International Law in Palestine' 31.
[167] Badil Resource Centre on Residency and Refugees Rights, 'Pursuing Accountability for Corporate Complicity in Population Transfer in Palestine' December 2015, 41.
[168] Badil Resource Centre on Residency and Refugees Rights, 'Pursuing Accountability for Corporate Complicity in Population Transfer in Palestine' 41.

works for the Annexation Wall in Palestine.[169] Although the case was dismissed by the Dutch Public Prosecutor after three years of investigations, the International Court of Justice declared the construction of the wall a war crime,[170] which would prospectively give room for ICC investigations should the court consider corporate complicity in future.

4.3 Colombia: The Article 15 Communication Against Chiquita Brands International

4.3.1 Background

The ICC began its preliminary examination of Colombia in June 2004.[171] The preliminary examination was to ascertain whether war crimes and crimes against humanity had been committed in Colombia during the armed conflict between the government's military forces and rebel groups including *Fuerzas Armadas Revolucionarias de Colombia — Ejército del Pueblo ('FARC-EP'); the Ejército de Liberación Nacional ('ELN');* and paramilitary groups referred to collectively as the AUC.[172] The examination was however was limited in temporal scope by an Article 124 declaration made by the Colombian government when the Rome Statute was ratified in 2002.[173] Article 124 permits states ratifying the Rome Statute to declare that, for a period of seven years after the ratification, the ratifying state does not accept the ICC's jurisdiction for war crimes as defined in Article 8. The examination was therefore limited to the crimes against humanity and genocide and only to war crimes after 1 November 2009.[174] In 2012 the OTP concluded that crimes against humanity and war crimes had been committed.[175] The report identified members of the AUC that were convicted of crimes in relation to murder, abduction, forced displacement and child recruitment.[176]

4.3.2 Chiquita brands international

Chiquita, a multinational corporation headquartered in the United States, is one of the largest worldwide distributors of bananas and, until 2004, operated a wholly owned subsidiary in

[169] Badil Resource Centre on Residency and Refugees Rights, 'Pursuing Accountability for Corporate Complicity in Population Transfer in Palestine' 41.
[170] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (2004), Advisory Opinion, ICJ reports.
[171] Wheeler C, 'Re-Examining Corporate Liability at The International Criminal Court Through the Lens of the Article 15 Communication Against Chiquita Brands International' 19 *Melbourne Journal of International Law 1,* 2018, 370.
[172] Wheeler C, 'Re-Examining Corporate Liability at The International Criminal Court Through the Lens of the Article 15 Communication Against Chiquita Brands International', 370.
[173] Article 124, The Rome Statute of the International Criminal Court.
[174] Wheeler C, 'Re-Examining Corporate Liability at The International Criminal Court Through the Lens of the Article 15 Communication Against Chiquita Brands International', 371.
[175] Office of the Prosecutor, International Criminal Court, *Report on Preliminary Examination Activities,* 14 November 2016 ,231.
[176] Office of the Prosecutor, International Criminal Court, *Report on Preliminary Examination Activities,* 14 November 2016 ,231

Colombia called CI Bananos de Exportación SA ('Banadex').[177] Chiquita admitted, in the District Court for the District of Columbia during the pendency of a criminal action brought against Chiquita by the US government, that it made payments to the AUC between 1997 and 2004 and continued to do so despite being aware that the AUC was committing international crimes. Between 1997 and 2004, Chiquita, through Banadex, made monthly 'security' payments to the AUC totaling over USD1.7 million.[178] The payments were to protect Chiquita's employees and its property from harm threatened by the AUC in the conflict region if the payments were not made.[179]Chiquita was aware of the AUCs illegal status since the US government designated the AUC as a 'Foreign Terrorist Organization' for allegedly having committed 'numerous acts of terrorism', including massacres resulting in the deaths of hundreds of civilians.[180] The AUC disbanded in 2006, pursuant to a demobilization agreement with the Colombian government, although some factions reorganized under different names later on.[181] The OTP Communication indicated that the payments made to the AUC whilst the group was committed 'widespread and systematic crimes' in Colombia, contributed to the realization of those crimes in a manner sufficient to incur criminal liability under the Rome Statute.[182]

The jurisprudence of the *ad hoc* tribunal in respect to the elements of the crime of aiding and abetting provides two approaches to the determination of *actus reus.* The first approach is establishing *specific direction*, what is considered is whether there exists a direct link between the aid provided by the accused and the *relevant specific* crimes committed by the principal perpetrator in order to secure a conviction.[183] The second approach is *substantial contribution* which denotes that without the aid provided by the accused the commission of the crime in question would be unlikely.[184] The specific direction approach was rejected in *Sainovic*[185] and *Prosecutor v Stanisic and Simatovic,* stating that specific direction was "in direct and material

[177] Wheeler C, 'Re-Examining Corporate Liability at The International Criminal Court Through the Lens of the Article 15 Communication Against Chiquita Brands International', 371.
[178] Wheeler C, 'Re-Examining Corporate Liability at The International Criminal Court Through the Lens of the Article 15 Communication Against Chiquita Brands International', 382.
[179] Wheeler C, 'Re-Examining Corporate Liability at The International Criminal Court Through the Lens of the Article 15 Communication Against Chiquita Brands International', 382.
[180] Wheeler C, 'Re-Examining Corporate Liability at The International Criminal Court Through the Lens of the Article 15 Communication Against Chiquita Brands International', 382.
[181] Wheeler C, 'Re-Examining Corporate Liability at The International Criminal Court Through the Lens of the Article 15 Communication Against Chiquita Brands International', 382.
[182] Office of the Prosecutor, International Criminal Court, Report on Preliminary Examination Activities, 14 November 2016 ,231.
[183]*Prosecutor v Momcilo Perisic*, [2013] International Criminal Tribunal for the Former Yugoslavia 44.
[184] *Prosecutor v Popovic*, (2015) International Criminal Tribunal for the Former Yugoslavia, 1741.
[185] *Prosecutor v Sainovic* et al, (2014) International Criminal Tribunal for the Former Yugoslavia,1650.

conflict with the prevailing jurisprudence of the ICTY and the ICTR on the *actus reus* of aiding and abetting liability, and with customary international law"[186] The test used is therefore that of substantial contribution. What amounts to substantial contribution is a matter of fact inquiry.[187]In *Porovic* it was established that substantial contribution occurs if in the absence of such assistance the commission of the crime would less likely have occurred. Looking at this case it is evident that the atrocities of the AUC were occurring even before the monetary assistance of Chiquita and still occurred even after the payments stopped in 2006. This situation would therefore have little prospects of success in the ICC.

It is worthy to note that the intention of this court should be that it deals with those most responsible for international crimes.[188] Therefore even with regards to accessorial liability high threshold must be maintained to best characterises the involvement of leading architects of international crimes.[189] On this *Albin Eser* suggests that one way of keeping complicity within permissible boundaries of the practice of the ICC is considering direct or substantial contribution to the crime[190] so as to encompass the most serious contributions.

Conclusion

The ICC was established to pursue those most responsible for international crimes, with an aim to end impunity, promote justice for victims and prevent future crimes. It is evident from the above situations that the court can only achieve this by investigating and potentially prosecuting corporations for their complicity in international crime. Corporations can be considered to be one of the most responsible persons in international crimes due to the power and influence they exert as seen in the above situations. Considering the facilitative and perpetuating effect of such corporate involvement in conflict zones, the prevailing impunity for corporate complicity in international crimes, and the complementarity principle under which the ICC operates, prosecution of corporate agents before the ICC appears to be a logical and much-needed step forward.

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[187] *Kalimanzira v Prosecutor,* (2000) international Criminal Tribunal for Rwanda, 86.
[188] Joanna Kyriakakis, 'Development in international criminal law and the case of business involvement in international crimes' [2012] IRRC 998.
[189] Joanna Kyriakakis, 'Development in international criminal law and the case of business involvement in international crimes' 998.
[190] Antonio Cassese (ed), The Rome Statute of the international criminal court: A commentary (Oxford 2009).

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

5. 1 Conclusion

The aim of this research was to elaborate on the concept of corporate criminal liability, and suggest its transplantation into international law. In the introduction the writer discussed the justifications for this suggestion, placing emphasis on the goal of international criminal law which is to end impunity. Moreover, international criminal law could not have foreseen a time, when organisations would wield such economic power such as to be able to commit such large scale atrocities. As established throughout the thesis collective action is likely to result in greater harm than individual action and the effective deterrence of collective actions requires systemic punishment. Finally, the individual action of each employee may be difficult to effectively prosecute despite the fact that harm has been done, therefore if at all the ICC is to be useful the current system must be reviewed. The author first assessed the aggregate theory or the real theory of the corporation to explain the rationale of corporate criminal liability. The theory stipulates that corporations are formed when groups of people with a common interest come together for a common purpose, and these private individuals are the basis for all of the acts committed by the corporation, it has no independent separate existence from its owners. Therefore, emphasising that the very reason corporate criminal liability should exist is due to the fact that a corporation ceases to become abstract in crime. This theory and real entity theory essentially presume corporations stand in the shoes of natural persons and thus have available to them all the rights of natural persons and consequently obligations.

In the second chapter the author discussed the historical development of corporate criminal liability in national jurisdictions and examined the concept of corporate mens rea so as to enable prosecution as defined in international criminal law and general criminal law. It was established that mens rea in corporate structures could be established in three ways. Through vicarious liability, through the alter ego doctrine: which uses the decision makers i.e. the board of directors and finally the collective knowledge doctrine which derive mens rea from organisational policy. This approaches would apply differently based on the structure of the corporate and the prosecutor discretion.

Chapter 3 analysed the provisions of the Rome Statute substantively and procedurally so as to determine the practicality of corporate criminal liability. This included procedural considerations such as jurisdiction, trigger mechanisms and the question of complementarity and substantive considerations such as the crimes in question and the modes of liability determining to what extent corporates could be held liable. The overall conclusion was that 'practically' *Proprio Motu* investigations seemed to be the most applicable means of triggering the court's jurisdiction due to the unreliability and general bias of the Security Council. The question of jurisdiction with regard to corporations was hinged on the more problematic issue of nationality unlike territoriality. On this the author relied on the *Case concerning Barcelona Traction, Light and Power Company Limited* stating that the nationality of company is its country of incorporation. Therefore, the court's jurisdiction would be based on this. Finally, it was determined that organisational liability can be brought before the court under article 25(3)(c) on aiding and abetting. The fourth chapter looked into three ongoing conflict situations already under investigations by The court however not on the basis of corporate complicity. The situations involved conflict zones that would ideally be prospective corporate complicity cases had the court recognised the principle. They involve genocide, war crimes and crimes against humanity, in Darfur, Colombia and Palestine.

The main implication of this research is that despite the evident need for corporate complicity, The Statute, through article 25(1) restricts the extension of the court's jurisdiction due to the principle of strict construction of criminal statutes. That the law is to be read as is, without extension by analogy. Some scholars argue that a case for corporate complicity may be made by looking into the substantive conventions that make up the statute. For example, the Geneva Conventions, The Genocide Convention and most recently the Draft Convention on Crimes against Humanity for interpretation, as these treaties do not dissociate between natural persons or legal persons for criminal accountability to arise. However, the strict hierarchy of the sources of law in the ICC under article 21 would still restrict this as The Rome Statute takes precedence. In Conclusion there exists a lacuna in this regard. The court's incapacity to guarantee an end to impunity still remains if this global issue is left disregarded.

5.2 Recommendations

5.2.1 On the amendments to the Rome Statute.

This research recommends that the ICC is the preferred forum to deal with cases of corporate criminal liability in international crime in case where domestic courts are unwilling and unable to prosecute. Moreover, majority of the persons involved in international crime, consist of transnational corporations, complicity in large scale and systematic crimes as is the purview of the ICC. Hence the author recommends that the State Parties should amend the provisions of the Rome Statute, in order to include jurisdiction over legal persons.

5.2.1.1 Article 46 C of the Malabo Protocol

Article 46C of the Malabo Protocol on extending the jurisdiction of the yet to be established African Court of Justice and Human Rights to crimes under international law may provide guidance as on useful provisions as regards corporate criminal liability as the protocol itself goes further and explicitly adopts the doctrine of corporate criminal liability. It provides;

1. For the purpose of this Statute, the Court shall have jurisdiction over legal persons, with the exception of States.
2. Corporate intention to commit an offence may be established by proof that it was the policy of the corporation to do the act, which constituted the offence.
3. A policy may be attributed to a corporation where it provides the most reasonable explanation of the conduct of that corporation.
4. Corporate knowledge of the commission of an offence may be established by proof that the actual or constructive knowledge of the relevant information was possessed within the corporation.
5. Knowledge may be possessed within a corporation even though the relevant information is divided between corporate personnel.
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.[191]

The above provisions would clarify the jurisdiction of the court and the constituent mens rea and actus reus elements required. Most importantly article 46 C (6) emphasises that liability of individual actors who are perpetrators or accessories shall not be excluded. Similar wording

[191] Articles 46C, *Malabo Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights* STC/Legal/Min/7(I) Rev.1 (the Malabo Protocol)

dealing with the liability of natural persons is expressed in Article 23(5) of the Preparatory Commission 1998 Draft Statute,[192]and Article 23(5) of the French Delegation draft corporate liability provisions.[193]

5.2.1.2 Prohibition, punishment, and penalties

The question of corporate punishments was dealt with by The Preparatory Commission, which was tasked with drafting a statute for the establishment of an international criminal court. The most notable contribution with regard to introducing corporate criminal liability was the proposed article 23(6) by the French Delegation. The 1998 Draft Statute included proposals for penalties that were applicable to legal persons, and reflected the corporate punishments already present in most domestic jurisdictions. Article 76 of the 1998 Draft Statute state that a legal person may incur one or more of the listed penalties which included

1. Fines, dissolution,
2. Prohibition, for such period as determined by the Court, of the exercise of activities of any kind
3. Closure, for such a period as determined by the Court, of the premises used in the commission of the crime;
4. Forfeiture of instrumentalities of crime and proceeds, property and assets obtained by criminal conduct; and;
5. appropriate forms of reparation.

5.2.2 On the Interpretation of the Genocide and Geneva Conventions.

Both the Genocide Convention text and the *travaux preparatoires* are ambiguous about whether corporations may be prosecuted for committing genocide The Convention under article 4 provides that persons committing genocide or any of the other acts enumerated in Article 3 shall be punished, whether they are 'responsible rulers, public officials or private individuals'. Despite this international criminal law treaties and tribunal statutes, exclude corporates from criminal jurisdiction. Nevertheless, it cannot be stated that The Genocide Convention holds the same position thus a possibility. Indeed, more recent efforts at codifying crimes against humanity in a single treaty have specifically recognized corporate criminal

[192] United Nations Plenipotentiaries on the Establishment of the International Criminal Court, Report of the Preparatory Committee on the Establishment of an International Criminal Court, '*Draft Statute for the International Criminal Court*' Rome, Italy (15 June–17 July 1998) UN Doc. A/Conf.183/2/Add.1, 14 April 1998.
[193] United Nations Plenipotentiaries on the Establishment of the International Criminal Court, Report of the Preparatory Committee on the Establishment of an International Criminal Court, „Draft Statute for the International Criminal Court", Rome, Italy (15 June–17 July 1998) UN Doc. A/Conf.183/2/Add.1, 14 April 1998.

liability.[194] This interpretation problem may be remedied by the ICJ as provided under Article XI of the Genocide Convention. Consequently, the question on whether the corporations can be tried for genocide is subject to the ICJ. The same would apply to the Geneva Conventions. It is worthy to note that the ICJ has previously held that abstract entities such as states can be held accountable for committing genocide as was the case in Bosnia.[195]It could be argued that this was due to states being' responsible rulers'. The same can be argued for corporations as obligations and responsibility is placed on them as well. The ICJ's jurisdiction must however be triggered. This can be accomplished if one of the ICJ State Parties requests clarification, by bringing a contentious case before the Court in litigation,[196] or by an approved U.N. body seeking an advisory opinion on the matter Michael J Kelly suggests that off these options, a question referred to the ICJ by the U.N. General Assembly would carry the most political and moral weight.[197] This recommendation is simply political in nature, as a consensus in the General Assembly would hold enough political weight to enable the amendment of the Rome Statute.

[194] Global Justice Centre Blog, 'Reproducing Impunity: Gendering the Draft Convention on Crimes against Humanity' http://www.globaljusticecenter.net/blog/19-publications/1175-reproducing-impunity-gendering-the-draft-convention-on-crimes-against-humanity on 30 December 2019.
[195] Article 65(1) of the Statute of the International Court of Justice.
[196] *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro)*, Judgment, 2007 I.C.J. Reports, 43.
[197] Kelly M, 'Ending Corporate Impunity for Genocide: The Case Against China's State-Owned Petroleum Company in Sudan' 2011, 434.

BIBLIOGRAPHY
TREATIES AND INTERNATIONAL INSTRUMENTS

a. Treaties and Conventions

1. The International Criminal Court Statute 17 July 1998.
2. The Malabo Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, 27 June 2014.
3. The Nuremberg Charter (Charter of the International Military Tribunal), 8 August 1945.
4. The Rules of Procedure and Evidence of the International Criminal Court.
5. The Statute for the International Criminal Tribunal for Rwanda.
6. The Statute of the International Court of Justice.
7. The Statute of the International Criminal Tribunal for the Former Yugoslavia.
8. The Statute of the Special Court for Sierra Leone.

b. International Instruments.

1. Summary Records of the Meetings of the Committee as a Whole, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 26th meeting, 8 July 1998, 10.
2. The ICC Office of the Prosecutor, Policy Paper on Case Selection and Prioritisation, 15 September 2016.
3. United Nations, Paragraph 5'United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court: Reports and other documents' at Rome, 15 June -17 July 1998.
4. United Nations, *Report of the preparatory committee on the establishment of an International Criminal Court,* United Nations diplomatic conference of plenipotentiaries on the establishment of an International Criminal Court, Rome, Italy 5 June – 17 July 1998.
5. UNSC S/RES 1953(2005) Situation in Darfur.
6. UNSC S/RES 1970(2011) Peace and Security in Africa.
7. *Working Paper on Article 23*, 3 July 1998, para 5 and 6.

CASE LAW

a. National Courts

1. *Commonwealth v Hancock* (1974), Supreme Court of Pennsylvania.
2. *DPP v. Kent and Sussex Contractors Ltd and Another* (1944), King's Bench.
3. *Herald of Free Enterprise (1987), House of Lords.*

2. *HL Boulton (Engineering) Co Ltd v TJ Graham and Sons Ltd* (1957) Queen's Bench.
3. *Mousell Bros Ltd v London and North-Western Railway Co* (1917), King's Bench.
4. *New York Central and Hudson River Railway Co v United States,* (1909), United States Supreme Court.
5. *Prosecutor v Frans Cornelis Adrianus Van Anraat* (2007), Court of Appeal of The Hague, The Netherlands.
6. *Queen v. The Birmingham and Gloucester Railway Company* (1842), Queen's Bench.
7. *Queen v. The Great North of England Railway Company* (1848), Queen's Bench.
8. *Tesco Supermarkets Ltd. v. Nattrass,* (1971), House of Lords.
9. *United States v Hilton Hotels Corp* (1972), Ninth Circuit.

b. International Courts and Tribunals

1. *France et al v Goring et al* (1946) 22 International Military Tribunal.
2. *Kalimanzira v Prosecutor,* (2000) international Criminal Tribunal for Rwanda.
3. *Legal consequences of the Construction of a wall in the Occupied Palestinian Territory,* Advisory Opinion, ICJ Reports 2004.
4. *Nahimana v Prosecutor* (2007) International Criminal Tribunal for Rwanda
5. *Prosecutor v Callixte Mbarushimana* (Decision on the Confirmation of Charges) ICC, 2011, 279.
6. *Prosecutor v Charles Ghankay Taylor* (2012), The Special Court for Sierra Leone.
7. *Prosecutor v Furundizja*, (Trial Judgement) (1998), International Criminal Tribunal for Rwanda.
8. *Prosecutor v Germaine Katanga,* (Judgment pursuant to Article 24 of the Statute) ICC 01/04-01/07, 7 March 2014.
9. *Prosecutor v Karma Al Khayat and Al Jadeed* (2015), The Special Tribunal for Lebanon.
10. *Prosecutor v Momcilo Perisic,* [2013] International Criminal Tribunal for the Former Yugoslavia.
11. *Prosecutor v Mrkšić* (2009), International Criminal Tribunal for the Former Yugoslavia.
12. *Prosecutor v Oric* (Trial Judgment) (2006), International Criminal Tribunal for the former Yugoslavia.
13. *Prosecutor v Popovic,* (2015) International Criminal Tribunal for the Former Yugoslavia.

14. *Prosecutor v Sainovic* et al, (2014) International Criminal Tribunal for the Former Yugoslavia.
15. *Prosecutor v. Blagojević*, (2005) Judgment, International Criminal Tribunal for the Former Yugoslavia.
16. *Prosecutor v. Omar Hassan Ahmad Al Bashir Case Sheet,* ICC-02/05-01/09, 2018
17. *The Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovinia. v. Serbia and Montenegro)*, Judgment, 2007 I.C.J. Reports
18. *The Case Concerning Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)* Belgium v Spain, Judgment, ICJ Reports 1970, p 74.

BOOKS

1. Cassese A, *International Criminal Law,* 3rd ed, OUP, London, 2003.
2. Frulli M, 'Jurisdiction Ratione Personae', in Antonio Cassesse, Gaeta P, Jones J, (eds) *The Rome Statute of the International Criminal Court: A Commentary*.
3. Smith and Hogan, *Criminal Law*, Butterworths, London (1992).

CHAPTERS IN BOOKS

1. Ambos K, 'Article 25: Individual Criminal Responsibility', in Otto Triffterer (ed) *Commentary On the Rome Statute of the International Criminal Court: Observers' Notes: Article by Article*, 1999, 475.
2. Asaala E, 'Corporate Criminal Liability Under the Malabo Protocol: Breaking New Ground?' in Merwe H and Kemp G (eds) International Criminal Justice in Africa, 1st ed, Strathmore University Press, Nairobi, 2017.
3. Eser A, 'Individual Criminal Responsibility', in Antonio Cassesse, Gaeta P, Jones J, (eds) The Rome Statute of the International Criminal Court: A Commentary, 767-779.
4. Pieth M and Radha I '*Emergence and Convergence: Corporate Criminal Liability Principles in Overview'* in Pieth M, Radha I (eds) *Corporate Criminal Liability. Ius Gentium: Comparative Perspectives on Law and Justice*, Springer Dordrecht, London, 2011.

REPORTS

1. Bradil Resource Centre on Residency and Refugees Rights, 'Corporate Complicity in Violations of International Law in Palestine' December 2014.
2. Badil Resource Centre on Residency and Refugees Rights, 'Pursuing Accountability for Corporate Complicity in Population Transfer in Palestine' December 2015, 41.
3. Konrad-Adenauer-Stiftung, 'The Oslo Accords: The Text, The Intentions, and the Question of Peace' 10. Office of the Prosecutor, International Criminal Court, *Report on Preliminary Examination Activities*, 14 November 2016.
4. Russell Tribunal on Palestine: Findings of the London Session. Corporate Complicity in Israel's Violations of International Humanitarian & International Human Rights Law." Russell Tribunal on Palestine: 2nd International Session, 20 November 2010.
5. United Nations War Crime Commission, *Law Reports of War Criminals Volume IX,*1949.

JOURNALS ARTICLES

1. Balakrishnan K, 'Corporate Criminal Liability- Evolution of the Concept' *Cochin University Law Review,* 2, 1998.
2. Beale Sun S, 'A Response to the Critics of Corporate Criminal Liability' *American Criminal Law Review* 46, 2009.
3. Brickey K 'Corporate Criminal Accountability: A Brief History and an Observation' 60 *Washing University Law Review,* 2, 1982.
4. Clapham A, The Question of Jurisdiction Under International Criminal Law over Legal Persons: Lessons from the Rome Conference on an International Criminal Court, in M. Kamminga and S. Zia-Zarifi (ed*), Liability of Multinational Corporations Under International Law,* Kluwer Law International, Netherlands 2000,139-145.
5. David Scheffer & Caroline Kaeb, The Five Levels of CSR Compliance: The Resiliency of Corporate Liability under the Alien Tort Statute and the Case for a Counterattack Strategy in Compliance Theory, 29 *Berkley Journal. Of International Law,* 2011.
6. Diskant E 'Comparative Corporate Criminal Liability: Exploring the Uniquely American Doctrine Through Comparative Criminal Procedure" *Yale Law Journal*, 129.
7. Greenawalt A, 'Rethinking genocidal intent: The case for a knowledge-based interpretation,' Vol 99 Columbia Law Review (1999).
8. Harper Ho, Theories of Corporate Groups: Corporate Identity Reconceived, 42 *Seton Hall Law Review,* 2014.

9. James Gobert,"Corporate Criminality New Crimes for the Times", *American Criminal Law Review* 1994.
10. Kelly M, 'Ending Corporate Impunity for Genocide: The Case Against China's State-Owned Petroleum Company in Sudan' 90 *Oregon Law Review* ,2011
11. Khanna S, 'Corporate Criminal Liability: What purpose does it serve?' 7 *Harvard Law Review* 109, 1996.
12. L.H. Timothy, McCormack and Doherty K, 'Complementarity" as a Catalyst for Comprehensive Domestic Penal Legislation', 5 *University of California Davis Journal International* Law, 1999.
13. Maglie C, 'Models of Corporate Criminal Liability in Comparative Law', 3 *Washington University Global Studies Law Review* 4, 2005.
14. Padfield S, Corporate Social Responsibility & Concession Theory, 6 *William and Mary Business Law Review* 1, 2015.
15. Podgers J., 'Corporations in the Line of Fire', 90 *American Bar Association Journal,* 2004.
16. Schabas W, General Principles of Criminal Law in the International Criminal Court Statute, 6 *Europe Journal on Crime* 4, Criminal Law and Criminal Justice, 1998.
17. Scheffer D, 'Corporate Liability Under the Rome Statute,' 57 *Harvard International Law Journal*, 2016.
18. Slye R, 'Corporates, Veils, and International Criminal Liability,' 33 *Brooklyn Journal of International Law* 3, 2008.
19. Wexler L, 'Model Draft Statute for the International Criminal Court Based on the Preparatory Committee's Text to the Diplomatic Conference Rome June 15-July 17 1998', 13 *Nouvelle Etude Penales*.
20. Wheeler C, Re-Examining Corporate Liability at the International Criminal Court Through the Lens of the Article 15 Communication Against Chiquita Brands International' 19 *Melbourne Journal of International Law* 2018.

ARTICLES

1. Diakonia International Humanitarian Law Resource Centre, *The Unsettling Business of Settlement Business,* 2013.
2. Joanna Kyriakakis, 'Development in international criminal law and the case of business involvement in international crimes' IRRC, 2012.

3. Kyriakis J, Corporations and The International Criminal Court: The Complementarity Objection Stripped Bare, Criminal Law Forum 19.
4. Martini D, 'Corporate Criminal Responsibility at the ICC', 2017.
5. Stichting Onderzoek Multinationale Ondernemingen, *Multinationals and Conflict International principles and guidelines for corporate responsibility in conflict-affected areas,* 2014.

THESES AND DISSERTATIONS

1. Chella J, 'The complicity of multinational corporations in international crimes: An examination of principles,' PhD thesis, Bond University (2012), 200-201,
2. Ongeso J, 'An Exploration of Corporate Criminal Liability in International Law for Aiding and Abetting International Crimes in Africa' University of Witwaterstrand, Johannesburg, 2015.
3. Savanovic A 'Corporate Criminal Liability in International Criminal Law' Lund University, Sweden, 2017.
4. Wong K, 'Breaking The Cycle: The Development of Corporate Criminal Liability' University of Otago, Dunedin, 2012.

DISCUSSION PAPERS

1. Khanna S, 'Corporate Mens Rea: A legal Construct in Search of Rationale' The Centre for Law and Economics and Business, Discussion paper no 200, September 1996.

ONLINE SOURCES

1. Jonge FDE, 'International Corporate Criminal Liability at the Special Tribunal for Lebanon: Prosecutor v. Karma Al Khayat and Al Jadeed' Peace Palace Library, May 8 2015, -< https://www.peacepalacelibrary.nl/2015/05/international-corporate-criminal-liability-at-the-special-tribunal-for-lebanon-prosecutor-v-karma-al-khayat-and-al-jadeed/>-.
2. Moerloose de B, 'Challenging the Pillage Process: Argor-Heraeus and Gold from Ituri, Open society Foundations, Working Paper 10, 2016, - https://www.opensocietyfoundations.org/sites/default/files/legal-remedies-10-demoerloose%20-20161107.pdf.
3. Dienke De Vos, 'The Emerging Norm of Corporate Criminal Accountability for international Crimes,' European University Institute, 9 December 2017 -

https://me.eui.eu/dieneke-de-vos/blog/the-emerging-norm-of-corporate-criminal-accountability-for-international-crimes/.

4. Tommaso A, 'Corporate criminal liability under international law, 'The Law of Nations, 13 March 2018 -https://lawofnationsblog.com/2018/03/13/corporate-criminal-liability-international-law/- on 27 February 2019.
5. Onwudiwe I and Onyeozili C. E, 'Deterrence Theory', -https://marisluste.files.wordpress.com/2010/11/deterrence-theory.pdf- ,2010.
6. https://avalon.law.yale.edu/imt/judorg.asp on 19 November 2019.
7. Bernaz N, 'Including Corporate Criminal Liability for International Crimes in the Business and Human Rights Treaty: Necessary but Insufficient' Business and Human Rights Centre,-<https://www.business-humanrights.org/en/including-corporate-criminal-liability-for-international-crimes-in-the-business-and-human-riights-treaty-necessary-but-insufficient>.
8. https://corporatefinanceinstitute.com/resources/knowledge/strategy/multinational-corporation/-on 12 December 2019.
9. Mazen M, 'Sudan Plans to Start Pumping Oil in Darfur, Petroleum Minister Deng Says', Bloomberg, 1 Dec 2010, -< https://www.bloomberg.com/news/articles/2010-12-01/sudan-plans-to-start-pumping-oil-in-darfur-petroleum-minister-deng-says>-.
10. Kristof N, 'Prosecuting Genocide', New York Times, 17 July 2008, -https://www.nytimes.com/2008/07/17/opinion/17kristof.html-.
11. Reeves E, 'Arming Khartoum: China's Complicity in the Darfur Genocide', South Sudan News Agency18 October 2010, -https://southsudannewsagency.org/index.php/2010/10/19/arming-khartoum-chinas-complicity-in-the-darfur-genocide/-.
12. Beauchamp Z, 'What were the intifadas?' Vox, 14 May 2018, -https://www.vox.com/2018/11/20/18080066/israel-palestine-intifadas-first-second- on 30 December 2019.
13. Beauchamp Z, 'What is Hamas?' Vox, 14 May 2018, -https://www.vox.com/2018/11/20/18080066/israel-palestine-intifadas-first-second- on 30 December 2019.
14. Global Justice Centre Blog, 'Reproducing Impunity: Gendering the Draft Convention on Crimes against Humanity' http://www.globaljusticecenter.net/blog/19-publications/1175-reproducing-impunity-gendering-the-draft-convention-on-crimes-against-humanity on 30 December 2019.

OTHER SOURCES

1. Supplemental Brief of Ambassador David J. Scheffer, North Western University School of Law, as Amicus Curiae in Support of the Petitioners, *Kiobel v. Royal Dutch Petroleum Co*,2013.