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Human rights and business: In search of effective remedial measure

Jernej Letnar Čerňič

1. Corporate criminal liability for human rights

Growing evidence suggests that corporations have been involved in international crimes.¹ Such violations are particularly common in weak governance zones and in conflict areas. Evidence is particularly abundant where private military and security corporations exercise a number of traditional governmental functions. For example, Human Rights Watch reports that corporations have provided arms to tyrannical regimes² and provided logistical support to a corrupt regime to facilitate even more human rights violations.³ Similarly, the involvement of oil, gas and mining corporations operating in the extractive industry in human rights violations and international crimes is well documented.

This article argues that there are no conceptual difficulties in establishing corporate criminal liability for human rights violations in national legal orders and at the international level.⁴ Through

¹ For reports and cases, see the Business and Human Rights Resource Centre website, <<http://www.business-humanrights.org/Home>>, and the Red Flags website, which focuses on the liability risks for companies operating in high-risk zones, <<http://www.redflags.info>>.

² See Human Rights Watch, *Ripe for Reform: Stemming Slovakia's Arms Trade with Human Rights Abusers*, Vol. 16, No. 2(D), February 2004, <<http://hrw.org/reports/2004/slovakia0204/>>, Chapter VI; Human Rights Watch, *Arms Exports to Human Rights Abusers*, 43-52; *Angola Unravels: The Rise and Fall of the Lusaka Peace Process* (New York: Human Rights Watch, 1999), <<http://www.hrw.org/reports/1999/angola/>>, Chapter IX; Human Rights Watch, "Arms Trade and Embargo Violations," 89-141; *Afghanistan: Crisis of Impunity - The Role of Pakistan, Russia, and Iran in Fueling the Civil War*, Vol. 13, No. 3(C), July 2001, <<http://www.hrw.org/reports/2001/afghan2/>>, 4, 30-31; Human Rights Watch, *Worldwide Production and Export of Cluster Munitions*, April 2005, <<http://hrw.org/background/arms/cluster0405/>>, 3, 12-14.

³ Human Rights Watch, *Sudan, Oil, and Human Rights* (New York: Human Rights Watch, 2003), <<http://www.hrw.org/reports/2003/sudan1103/>>, 41-42, 65-69, 189, 251-273, 428-429, 434-435, 438-449, 524. Also see Dan Watch, *Bad connections, how your mobile phone is linked to abuse, fraud and unfair mining practices in DR Congo*, May 2008, <http://www.danwatch.dk/images/rapport_version_1.1.pdf>.

⁴ See *Corporate Complicity and Legal Accountability, Volume 2: Criminal Law and International Crimes*, Accountability Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes, Geneva, September 2008, <http://icj.org/IMG/Volume_2.pdf>, 58.

an analysis of national legal orders, the paper aims to establish whether recent developments have led to the expansion of corporate criminal liability which, in turn, may potentially contribute to the regulation of corporations. This argument follows a holistic approach to responsibility, focussing on the responsibility of the individuals within corporations who commit crimes.⁵It is submitted that concurrence between different types and levels of responsibility for human rights is a viable alternative. Such an approach appears ever more sustained from the victims' perspective. Individual criminal liability is only a necessary addition to corporate criminal liability for human rights as it works to prevent perpetrators from hiding behind the legal abstraction of the corporation. To this end, corporate criminal liability can be most efficiently achieved if the discussion is not reduced to the question of individual or corporate criminal liability, or civil and criminal sanctions. It is more effective to take a holistic approach and make a range of approaches and sanctions, civil and criminal, individual and corporate, available to regulators to allow for a dynamic and integrated approach to enforcement. In this way, individual criminal responsibility would work at international and national levels and, hypothetically, also concurrently with corporate criminal responsibility for human rights in a number of national legal orders.

Section 2 looks at corporate criminal liability more generally; it argues that corporate criminal liability derives from a growing number of national legal orders. Section 3 examines the individual criminal responsibility of corporate officers under both national legal orders and the international legal order. Section 4 argues for a holistic approach to responsibility for corporate human rights violations and for the concurrence of corporate and individual responsibility for corporate human rights violations.

⁵see Allens Arthur Robinson, Corporate Culture as a Basis for the Criminal Liability of Corporations, prepared for the Special Representative by the law firm, <<http://www.reports-and-materials.org/Allens-Arthur-Robinson-Corporate-Culture-paper-for-Ruggie-Feb-2008.pdf>>, 3.

2. Corporations and criminal liability in general

2.1 Corporate criminal liability in national legal orders

This section argues that corporate criminal liability derives from a number of national legal orders. While ever more jurisdictions recognise individual criminal liability for criminal offences, the recognition of corporate criminal liability is still underdeveloped. Nonetheless, a growing number of national legal orders allows for corporate criminal liability. Over the last two decades, a variety of national criminal jurisdictions have extended criminal liability to corporations due to the adoption and incorporation of the Rome Statute of the International Criminal Court (ICC). It is noted that many jurisdictions do not recognise the criminal liability of legal entities. Almost all countries of South America, the Middle East and North Africa do not offer possibilities for corporate criminal liability in their criminal codes. It appears that national legal orders in civil law countries are more reluctant to recognise corporate civil responsibility. However, Stephens notes that “all domestic legal systems recognize that corporations can be held accountable for the harm they do to others”.⁶ Jurisdictions that do not provide for corporate criminal liability frequently offer non-criminal forms of corporate liability in the form of administrative penalties that may be imposed on corporations for the criminal acts of certain employees. Those countries have adopted a pragmatic approach and allow for corporate criminal liability for international crimes and other human rights violations. Read together, ever more evidence exists of states including corporate criminal liability within their national criminal legislation.

A number of jurisdictions have introduced corporate criminal liability for all or some international crimes. Australia,⁷ Belgium,⁸

⁶ B. Stephens, “The Amoralism of Profit: Transnational Corporations and Human Rights”, 20 *Berkeley Journal of International Law* (2002) 45, at 64.

⁷ Kyriakakis, “Freeport in West Papua: Bringing Corporations to Account for International Human Rights Abuses Under Australian Criminal and Tort Law”, 31 *Monash University Law Review* (2005) 95, at 104-114, and J. Kyriakakis, “Australian prosecution of corporations for international crimes: The potential of the Commonwealth Criminal Code”, *Journal of International Criminal Justice*, Vol. 5 Issue 4 (2007) 809-826.

⁸ B. Demeyere, Survey Response, *Laws of Belgium*, “Commerce, Crime and Conflict: A Survey of Sixteen Jurisdictions”, Fafo AIS, 2006, <<http://www.fafo.no/liabilities/CCCSurveyBelgium06Sep2006.pdf>>.

Canada,⁹ France,¹⁰ India,¹¹ Japan,¹² the Netherlands,¹³ Slovenia,¹⁴ South Korea, South Africa,¹⁵ the United Kingdom¹⁶ and the United States¹⁷ have introduced legislation that extends domestic legislation on international crimes to legal persons. The extraterritorial application of these pieces of domestic criminal legislation varies from country to country. A number of national criminal jurisdictions allow, however, for active and passive extraterritorial jurisdiction over their nationals.¹⁸In France, for example, “legal persons may incur criminal liability for crimes against humanity pursuant to the conditions set out under Article 121-2”.¹⁹ Under Dutch law, the conditions of corporate criminal liability for international crimes are identical to those of natural persons²⁰.The Dutch Criminal Code does not distinguish between the “criminal liability of natural and legal persons”.²¹ Likewise, corporations can be prosecuted under Australian law for international crimes.²²

Nevertheless, recognition of the growing support for corporate criminal liability in ever more national legal orders may yield relevant insights for those national legal orders contemplating in-

⁹Survey Response, Laws of Canada, “Business and International Crimes”, Fafo AIS, 2004, <<http://www.fafo.no/liabilities/Canada%20survey%20standardized%20Nov%202004.pdf>>.

¹⁰ French Criminal Code, Article 213(3).

¹¹S. Muralidhar, Survey Response, Laws of India, “Commerce, Crime and Conflict: A Survey of Sixteen Jurisdictions”, Fafo AIS, September 2006, <<http://www.fafo.no/liabilities/CCCSurveyIndia06Sep2006.pdf>>.

¹²Human Rights Now, Survey Response, Laws of Japan (Human Rights Now), “Commerce, Crime and Conflict: A Survey of Sixteen Jurisdictions”, Fafo AIS, 2006, <<http://www.fafo.no/liabilities/CCCSurveyJapan06Sep2006.pdf>>.

¹³N. Jägers, Survey Response, Laws of the Netherlands, “Commerce, Crime and Conflict: A Survey of Sixteen Jurisdictions”, Fafo AIS, 2006, <<http://www.fafo.no/liabilities/CCCSurveyNetherlands06-Sep2006.pdf>>.

¹⁴Criminal Liability of Legal Entities Act (Slovenia), Official Gazette, no. 59/1999.

¹⁵A. Katz, “An Act of Transformation, The incorporation of the Rome Statute of the ICC into national law in South Africa”, *African Security Review* 12(4)(2003) 25-30.

¹⁶S. Powles et al., Survey Response, Laws of the United Kingdom (Powles et al.), “Business and International Crimes”, Fafo study, Commerce, Crime, and Conflict: A Comparative Survey of Legal Remedies for Private Sector Liability for Grave Breaches of International Law And Related Illicit Economic Activities, United Kingdom, Fafo AIS, 2004. <<http://www.fafo.no/liabilities/UK%20Survey%20standardized%20Nov%202004.pdf>>.

¹⁷R. C. Thompson, Survey Response, Laws of the United States of America, Fafo AIS, September 2006, <<http://www.fafo.no/liabilities/CCCSurveyUS06Sep2006.pdf>>.

¹⁸A. Ramasastry and R. C. Thompson, 2006, 16.

¹⁹ French Criminal Code, Article 213(3).

²⁰N. Jägers, Fafo study, The Netherlands, <<http://www.fafo.no/liabilities/CCCSurveyNetherlands06-Sep2006.pdf>> at 16.

²¹*ibid.* at 9.

²²The Australian Commonwealth Criminal Code Act of 1995, Sections 12(1) and 268. Fafo study, R. Meeran, “Survey on Australia’ conducted as part of Commerce, Crime, and Conflict: A Comparative Survey of Legal Remedies for Private Sector Liability for Grave Breaches of International Law and Related Illicit Economic Activities”, September 2006, <http://www.fafo.no/liabilities/CCCSurveyAustralia06Sep2006.pdf>, at p. 3, 10.

troducing such a possibility in their criminal legislation. The abolition of the slave trade started with the prohibition on slavery in just a handful of national legal orders. It therefore appears likely that corporate criminal liability for international crimes will be gradually introduced into a larger number of national legal orders over the next few decades. What is clear is that corporations can be prosecuted for international crimes in those national jurisdictions in which the largest and arguably most important corporations are domiciled (France, the UK, the USA, Japan, the Netherlands). It may appear that, for such corporations, at least arguably there exists no jurisdiction where they will be able to hide from liability. All in all, it appears that there is growing recognition of corporate criminal liability for international crimes.

2.2. Corporations and the Rome Statute of the International Criminal Court

International criminal law criminalises “the most serious crimes of concern to the international community” because “they threaten the peace, security and well-being of the world”.²³ Corporate responsibility for human rights can hypothetically be effectively protected by the ICC. Historical precedents illustrate the involvement of corporations and their agents in international crimes and forced labour. After the Second World War, the United States Military Tribunal at Nuremberg demonstrated that corporations and their officers can be held responsible for international crimes.²⁴ International human rights law and subsequently international criminal law have emerged as an immediate backdrop for the contemporary treaty regime on the subject. Paragraph 1 of Article 25 of the Statute of the ICC provides under the title “individual criminal responsibility” that “the Court shall have jurisdiction over natural persons pursuant to this Statute”²⁵. It excludes jurisdiction over legal persons and, in so doing, also excludes jurisdiction over

²³Rome Statute of the International Criminal Court, (2002) 2187 UNTS 90, Preamble, paras. 3 and 4.

²⁴*S. v Krauch, et al., The I.G Farben case*, 14 August–29 July 1948, Law Reports of Trials of War Criminals, Selected and Prepared by the United Nations War Crimes Commission, Volume X, The I.G. Farben and Krupp Trials, London, 1949. 3-67. *Trial of Alfried Felix Alwyn Krupp von Bohlen und Halbach and eleven others*, United States Military Tribunal, Nuremberg, 17 November 1947 – 30 June 1948, Law Reports of Trials of War Criminals, Selected and Prepared by the United Nations War Crimes Commission, Volume X, The I.G. Farben and Krupp Trials, London, 1949. *The Flick case*, Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, 1951, Vol. VI.

²⁵Rome Statute of the International Criminal Court, (2002) 2187 UNTS 90, Article 25(1).

corporations. The Statute of the ICC follows the approach of the *ad hoc* International Criminal Tribunals. Both the ICTY and the ICTR only provide that the International Criminal Tribunal has jurisdiction over natural persons pursuant to the provisions of the relevant Statute.²⁶ Namely, their jurisdiction does not extend to legal persons. A prosecutor can, however, bring charges against individual agents of corporations on the basis of the present ICC Statute's provisions on individual criminal responsibility.²⁷

The Diplomatic Conference on the Establishment of an ICC was held in Rome from 15 June to 17 July 1998. Article 23 of the Preparatory Committee's draft specifically recognised the Court's jurisdiction over legal persons in respect of all crimes within its competence.²⁸ Paragraphs 5 and 6 of Article 23 necessarily translate into autonomous corporate criminal liability. They met with resistance on the part of many delegations at the Rome Conference on the grounds that either their legal systems did not include corporate criminal responsibility or that the concept was difficult to apply in the context of an international criminal court. The Norwegian Minister for Foreign Affairs, for example, noted that the proposal would "undermine the basic principle stating that the Court must not take over the main responsibility for criminal prosecution from the national institution concerned, expressed as the principle of complementarity between the Court and national criminal jurisdiction".²⁹ This may appear problematic as the principle of complementarity means that a case will be declared

²⁶statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council on 25 May 1993, U.N. Doc. S/RES/827 (1993), Article 6; and Statute of the International Criminal Tribunal for Rwanda, Article 5. For a discussion on the potential jurisdiction of the Special Court of Sierra Leone over legal persons, see: W. A. Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (2006) (Oxford: Oxford University Press, 2006), 139.

²⁷See ICTY, *Prosecutor v. Félicien Kabuga*, ICTR-98-44B-I, Amended indictment, 1 October 2004.

²⁸*ibid.* Article 23 provided in the relevant part as follows:

⁵ The Court shall also have jurisdiction over legal persons, with the exception of States, when the crimes committed were committed on behalf of such legal persons or by their agencies or representatives.

⁶ The criminal responsibility of legal persons shall not exclude the criminal responsibility of natural persons who were perpetrators or accomplices in the same crimes.

²⁹J. Kyriakakis, "Corporations and the International Criminal Court: The Complementarity objection stripped bare", 19 *Criminal Law Forum* 115 (2008), at 120, quoting Council of Europe: "The Implications for Council of Europe Member States of the Ratification of the Rome Statute of the International Criminal Court- Norway: Recommendation S. No. 94 (1999-2000) to the Sorting (Norwegian Parliament), Recommendation from the Standing Committee on the Foreign Affairs Concerning Consent to the Ratification of the Statute of 17 July 1998 of the International Criminal Court, Proposition to the Sorting No. 24 (1999-2000)" 7 (Strasbourg, 18 October 2001), Consult/ICC (2001) 40.

inadmissible if it has been or is being investigated or prosecuted by a state with jurisdiction. In contrast, the ICC may consider a case if the investigating or prosecuting state is unwilling or unable to genuinely carry out the investigation or prosecution.

There were some additional problems, but ultimately the insurmountable practical problems of complementarities prevented the provision from being adopted.³⁰ At the 26th meeting of the Committee of the Whole, the Coordinator, Mr Aland, introduced the report of the Working Group³¹ concerning the proposed paragraphs 5 and 6 of Article 23 on the corporate criminal responsibility of juridical persons. It was noted that “all delegations had recognized the great merits of the relevant proposal, but some had felt that it would perhaps be premature to introduce that notion”.³² Therefore, those paragraphs were eventually deleted. It appears that the delegations agreed that criminal responsibility for legal persons was in principle desirable, but that the practical issues were simply too complex to be agreed upon in the short time available.³³ The reasons given were the problem of implementation in domestic law, the difficulty of finding acceptable definitions, the potential implications for the complementarity principle, the possible creation of new obligations for states, and the challenge to what was considered the exclusive focus of the Statute, namely individual criminal responsibility.³⁴ However, none of the delegations argued that legal persons are incapable of breaching international criminal law and human rights – such views were absent from the discussion. That corporations can commit international crimes cannot be overshadowed by a discussion on the possible extension of international criminal jurisdiction to corporations.

A considerable movement is underway to develop corporate criminal liability in the majority of national jurisdictions. Notwith-

³⁰ W. A. Schabas, “War economies, economic actors and international criminal law”, in W. A. Schabas (ed.), *War Crimes and Human Rights: Essays on the Death Penalty, Justice and Accountability*, (London: Cameron May Publishers, 2008). 511-530.

³¹ A/CONF.183/C.1/L.4/Add. 3.

³² Summary records of the meetings of the Committee of the Whole: Twenty-Sixth Meeting, 8 July 1998, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, Italy, 15 June-17 July 1998, A/CONF.183/C.1/SR.26 at para. 10, page 3, 20 November 1998.

³³ *ibid.* at paragraphs 32-66, especially the Chairman’s comments at paras. 50 and 66.A. Clapham observes that: “as the US Military Tribunal Judgments in Nuremberg show, corporations are bound by international criminal law concerning war crimes and crimes against humanity. Fifty years later at the Rome Conference on the International Criminal Court, no delegation challenged the conceptual assumption that legal persons are bound by international criminal law.” A. Clapham, 2000, at 191.

³⁴ *ibid.*, at para 50.

standing these developments, the prospects of bringing criminal claims against a corporation for the violation of human rights remain relatively low. Here, one may ask why is the issue so difficult? There are several reasons; firstly, criminal prosecution faces a higher burden of proof than civil claims. Secondly, there is disagreement as to how “indictments are to be served, who is to represent the interests of the legal person, how intention is to be proved, [and] how to ensure that natural persons do not hide behind group responsibility”.³⁵ The international criminal prosecution of a corporation or its agents could potentially bring a sense of criminal justice to the victims. The positive effects at the international level would, however, depend on the context in which such a mechanism is established.

3. Individual criminal responsibility – Possibilities of prosecuting the agents of corporations

Individual criminal responsibility is a general principle of criminal law under both national and international criminal law. The Appeals Chamber of the International Criminal Tribunal for Former Yugoslavia held in *Prosecutor v Tadić* that “the basic assumption must be that in international law as much as in national systems, the foundation of criminal responsibility is the principle of personal culpability: nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated (*nulla poena sine culpa*)”.³⁶ This section argues that individual criminal responsibility forms part of a holistic approach to corporate responsibility. It is a necessary addition to corporate criminal liability for human rights as it works to prevent perpetrators hiding behind the legal abstraction of the corporation. Individual criminal responsibility can be invoked for a violation of human rights which international law and the international community identifies as crimes against international law. Hypothetically, individual criminal responsibility can be pursued concurrently with corporate responsibility. Individual criminal responsibility can be invoked in most national legal or-

³⁵J. B. Tsafack. In search for direct corporate responsibility for human rights violations in Africa: Which way forward, unpublished dissertation, University of Pretoria, 30 October 2004, 37.

³⁶ICTY, *Prosecutor v Duško Tadić* (Appeals Chamber) Case No IT-94-1-A, 15 July 1999, para. 186. See; E. Greppi, “The evolution of individual criminal responsibility under international law”, *International Review of the Red Cross*, No. 835 (1999) pp. 531–553.

ders both domestically and extraterritorially. A case decided in a national jurisdiction illustrates the role of individual criminal responsibility in the implementation of corporate criminal responsibility and in underscoring the nature of a holistic approach to corporate responsibility for human rights. The next section examines the criminal case against a Dutch businessman in the Dutch national legal order.

3.1. National legal orders – Public Prosecutor v. Van Anraat

In *Public Prosecutor v. Van Anraat*,³⁷ the Dutch courts had the opportunity to revisit one of the most enduring problems of corporate responsibility for human rights. On 23 December 2005, the District Court of The Hague held Dutch businessman Frans van Anraat guilty of complicity in war crimes, but acquitted him of complicity in genocide. Van Anraat had supplied thousands of tons of chemicals to Iraq through his corporation called FCA Contractor. Thereafter, the Appeals Court confirmed on 9 May 2007 that van Anraat was responsible for complicity to violate the laws and customs of war.³⁸ He was convicted on the basis of individual criminal responsibility for complicity in war crimes and crimes against humanity for supplying the chemical raw material TDG (thiodiglycol) to Iraq, or to an Iraqi corporation.³⁹

The cardinal issue in the *Van Anraat* case was whether he knew he was assisting the Iraqi authorities in the commission of war crimes. The Court held that van Anraat “knew that his deliveries of TDG were meant for the Iraqi regime and was aware that TDG could serve as a precursor for the manufacture of chemical weapons”.⁴⁰ As for the *actus reus* of aiding and abetting, the Court found that the products supplied by van Anraat had been transformed “into the chemical weapons which had been employed” in the military campaigns.⁴¹ The Court considered whether the assistance offered by the accessory had indeed promoted the offence

³⁷Public Prosecutor v VanAnraat, LJN: BA4676, Court of Appeal The Hague, 2200050906 – 2, 9 May 2007. For a detailed discussion, see H. van der Wilt, *Public Prosecutor v VanAnraat*, Judgment of The Hague Court of Appeal, LJN BA4676, 2200050906-2, Oxford Reports on International Law in Domestic Courts; ILDC 753 (NL 2007), 9 May 2007, <http://www.oxfordlawreports.com/>.

³⁸Public Prosecutor v VanAnraat, 16.

³⁹ibid. 11.5.

⁴⁰H. van der Wilt, <http://www.oxfordlawreports.com/>, at A6.

⁴¹ibid. A7. See *Public Prosecutor v VanAnraat*, 12.1.7.

or made it easier to commit the offence.⁴² It appears that this standard for aiding and abetting varies from the generally accepted standard in international criminal law, which requires a substantial effect on the perpetration of the crime.

Even though charges had been brought against an individual, they *de facto* addressed the corporate liability of van Anraat's one-man company.⁴³ National criminal orders therefore have a role to play in creating a favourable climate for implementing and instigating corporate responsibility for human rights. Yet it appears difficult, if not impossible, to bring successful prosecutions against large and complex corporations for human rights violations. Prosecution may be possible where corporations are small and a single individual can more readily be identified as the "directing mind and will" of a corporation, as in the *Van Anraat* case. However, it appears doubtful that much is gained by proceeding against a corporation rather than an individual directly. An individual should not be able to exclude his/her responsibility by hiding behind the corporate entity. In contrast, the corporation should also not be able to hide behind individual responsibility. Recent developments in national legal orders may suggest that many corporate acts are hierarchically and bureaucratically constructed, and cannot be ascribed to a single individual. In sum, it may be concluded that corporate criminal responsibility for human rights rests not only alongside state responsibility in international law, but also together with individual responsibility. Criminal investigations and prosecutions should not only focus on one side of the coin (individual, corporation or state), but should address all aspects of violations and should not fail to address corporate operations and policies.

⁴²Public Prosecutor v VanAnraat, 12.4.

⁴³Also see Public Prosecutor v. Guus Kouwenhoven, District Court in the Hague holding, Public Prosecutor's Office no. 09/750001-05 - holding that a Dutch businessman, the director of the Oriental Timber Company and/or owner and/or director of the Royal Timber Company, was not responsible for war crimes in Liberia and supplying weapons to the Armed Forces of Charles Taylor and breaching the embargo decreed by the United Nations (UN) with respect to Liberia. <<http://www.hague-justiceportal.net/eCache/DEF/6/891.html>>; "Arms ruling overturned by Dutch", NY Times, 11 March 2008. See the Kilwa case, Case no. 010/06, Military Court Lubumbashi, DR of Congo - acquitting three employees of the Australian corporation Anvil Mining for complicity in war crimes committed in Kilwa by government soldiers in 2004 Victims of Kilwa massacre denied justice by Congolese military court, African Association for the defence of Human Rights (ASADHO/KATANGA), 17 Jul 2007. Also see J Kyriakakis, "Australian prosecution of corporations for international crimes: The potential of the Commonwealth Criminal Code", Vol. 5, Journal of International Criminal Justice, Issue 4 (2007) 811-814.

4. Concurrence of corporate and individual criminal responsibility

A holistic approach to responsibility for corporate human rights violations suggests that responsibility can be established in criminal cases against a corporation and an individual at the same time. The concurrence between individual and corporate criminal responsibility in national legal orders is theoretically feasible. One example is the parallel attribution of complicity in crimes against humanity in Iraq to Mr Van Anraat and his corporation. During the Rome Conference debates, the Greek delegate Daskalopoulou-Livada argued there is no “need for establishing the principle of criminal responsibility of legal persons under the Statute of the Court, not because Greek law did not provide for the criminal responsibility of such persons, but because there was no criminal responsibility which could not be traced back to individuals”.⁴⁴ However, it appears that sole reliance on either corporate or individual criminal liability cannot adequately address corporate human rights violations. In other words, individual and corporate criminal responsibility can coexist side by side. Similarly, Kamminga notes that “individual responsibility under international law has not replaced ... state responsibility for the same offences”.⁴⁵ A holistic approach to responsibility offers three avenues for enforcing criminal responsibility for alleged corporate human rights violations. The serious weaknesses in the current normative orders largely derive from the piecemeal approach to regulating the corporation in relation to human rights. Important safeguards are often missing regarding prosecutions for crimes allegedly committed by corporations. In contrast, there are also numerous obstacles to the effectiveness of the prosecution of corporations, including statutes of limitation, and prohibitions of retroactivity.

Generally, since corporations are legal abstractions, their acts and omissions are mostly those of their agents and employees.

⁴⁴ 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, 1st meeting, UN Doc. A/CONF.183/C.1/L.3, 16 June 1998, <http://untreaty.un.org/cod/icc/rome/proceedings/contents.htm>, Vol. 2, para. 57, p. 136.

⁴⁵ M. T. Kamminga, “Corporate Obligations under International Law”; paper presented at the 71st Conference of the International Law Association, plenary session on Corporate Social Responsibility and International Law, Berlin, 17 August 2004, <http://www2.ohchr.org/english/issues/globalization/business/docs/kamminga.doc>, 2004, 6. See P. A. Nollkaemper, “Concurrence between Individual Responsibility and State Responsibility in International Law”, 52 *International and Comparative Law Quarterly* (2003) 615–640.

Corporations can incur responsibility especially in those cases where under the auspices of his/her employment an individual committed a wrongful act or omission? Yet it appears that corporate criminal liability shall not prejudice the criminal responsibility of individuals who have committed offences. A number of national legal orders offer the possibility of the concurrence of corporate and individual criminal law responsibility. Article 51(2) of the Criminal Code of the Netherlands provides, for example, that corporate and individual criminal responsibility can arise concurrently.⁴⁶ Likewise, the French Criminal Code states that “the criminal liability of legal persons does not exclude that of natural persons”.⁴⁷ Similarly, Australian law also allows for the concurrence of corporate and individual responsibility.⁴⁸ In this light, the concurrence of responsibilities is also recognised at the international level. Paragraph 3 of Article 10 of the UN Convention against Transnational Organised Crime states, for instance, that the liability of legal entities “shall be without prejudice to the criminal liability of the natural persons who have committed the offences”.⁴⁹

The concurrence of individual and corporate criminal responsibility will, however, not be possible in some instances. The UK Corporate Manslaughter and Corporate Homicide Act 2007, for example, does not allow for individual criminal responsibility for aiding, abetting, counselling or procuring the commission of an offence of corporate manslaughter or corporate homicide.⁵⁰ Fisse and Braithwaite observe that “individual actors contribute to collective decision-making processes, without being conscious of the totality of that process— each individual actor is a part of a whole which no one of them fully comprehends”.⁵¹ They argue for a cultural or organisational approach to corporate criminal liability.⁵² A corporate culture may exist in particular within large corporations that direct, en-

⁴⁶ Criminal Code of the Netherlands, Article 51(2).

⁴⁷ Criminal Code of the French Republic, 121-2, Act no. 2000-647, 10 July, Art. 8, Official Journal of 11 July 2000.

⁴⁸ The Australian Commonwealth Criminal Code Act, No. 12, 1995, Section 12.1.

⁴⁹ The United Nations Convention against Transnational Organized Crime, adopted by General Assembly resolution 55/25, 15 November 2000, Art. 10.

⁵⁰ UK Corporate Manslaughter and Corporate Homicide Act 2007, 26 July 2007, Article 18(1 & 2).

⁵¹ B. Fisse and J. Braithwaite, *Corporations, Crime and Accountability*, (Cambridge: Cambridge University Press, 1993), 31.

⁵² See B. Fisse, J. Braithwaite, “The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability” 11 *Sydney Law Review* (1988) 469.

courage, tolerate or result in criminal offences. Fisse and Braithwaite argue that their model was designed to be “responsive of non-prosecution of corporate managers which is now pandemic in modern societies”.⁵³ They also note there can be “situations where, while a corporation may be to blame for a corporate crime, no individual deserves such blame”.⁵⁴ In other words, in some cases responsibility cannot be attributed to an individual.⁵⁵ In these cases, responsibility can only be invoked with regard to the corporation as a whole.

All in all, the moral rationale behind corporate responsibility is that arguments for concurrent responsibility leave the door open for victims to pursue different avenues for establishing responsibility for corporate human rights violations. Corporate and individual responsibility, taken together, are more likely to satisfy those concerned with enforcing responsibility for corporate violations. In the end, the best way forward may be to convince national prosecutors to pursue both levels of responsibility simultaneously.

5. Conclusion

The above analysis of corporate criminal liability in national legal orders and at the international level shows that several different avenues can be pursued in an attempt to enforce corporate responsibility for human rights violations. They can be pursued concurrently. A growing number of national legal orders allow for corporate criminal liability for criminal offences, including international crimes. Whereas this article has shown that there are no conceptual difficulties in establishing corporate liability for human rights violations, the prosecution of a corporation for international crimes or other human rights currently only remains a theoretical possibility. Establishing corporate criminal responsibility on the international level is theoretically possible and preferable. The potential extension of the ICC jurisdiction to corporations would serve as a deterrent against the potential criminal conduct of corporations. Even if one skilfully canvasses the theo-

⁵³ B. Fisse, J. Braithwaite, 1993, 158.

⁵⁴ J. Kyriakakis, “Australian prosecution of corporations for international crimes: The potential of the Commonwealth Criminal Code”, 2007, Vol. 5, Journal of International Criminal Justice, Issue 4, 825.

⁵⁵ B. Fisse, J. Braithwaite, 1993, 160–161.

retical framework, an attempt to construct corporate criminal responsibility in international law may end up in shreds. Presently, prosecution on the basis of the individual liability of corporate managers appears a more viable option with less danger of becoming a futile exercise.