Corporate Criminal Responsibility for Gross Human Rights Violations

Advocating for its implementation at the ICC

I. Introduction

Now that the concept of business responsibility for human rights has been taken seriously, it is time to come up with punishment as a sort of remedy in case the business fails to do so. The idea that “companies cannot commit offences” (*societas delinquere non potest*) is a relic of the past.¹

Indeed, the crucial role that corporate agents can play in conflict and the commission of international crimes has been well documented throughout the past decades, ranging from IG Farben’s support of Nazi crimes during the Second World War to “blood diamonds” funding warring factions in western Africa.² This shows that there is a link between corporate responsibility for human rights and the concept of legal and criminal responsibility.³

While corporate responsibility for human rights violations has appeared on the agenda of many international bodies such as the European Union, the Council of Europe, the Organization


for Economic Cooperation and Development and the United Nations, the results from these attempts constitute soft law.\textsuperscript{4} What is missing is a legally binding convention that should be internationally enforceable and applicable not only to states but also to corporations, while also covering corporate supply chains and subsidiaries.\textsuperscript{5} However, due to the complexity of applying such a convention internationally, pursuing a legally enhanced corporate responsibility is expected to take place largely and primarily at the domestic level.\textsuperscript{6}

Yet, while most states accept prosecuting executives of a company as complicit in international crimes, a few only permit the prosecution of the company itself. This idea appears incompatible with a criminal law system based on the proof of intent and the concept of individual guilt.

However, the argument that legal persons cannot have an “intent” falls short. The whole notion of “intent”, even applied to individuals, is a legal fiction to start with. It stems from the philosophical fiction that we are autonomous moral beings who consciously and freely make decisions and therefore should bear responsibility for their consequences.\textsuperscript{7} This problem still

\textsuperscript{4} Id. at 423.


\textsuperscript{7} D. Jacobs, “The Dream Factory Strikes Again: the Special Tribunal for Lebanon recognizes International Criminal Corporate Liability”, April 28, 2014,
divides and explains why there are two ways of holding a corporation liable for international crime.

The traditional way is to attribute agents’ conduct to the company as legal person. It is the individualist approach or attribution model to the concept of CCR, the liberal conception.\(^8\) Wanting to hold artificial legal persons accountable as collective entities is on the other hand, the organizational approach to the concept of CCR, the romantic conception. It is more closely connected to the human rights tradition.\(^9\)

However, for those states that are reluctant to accept the CCR, criminal responsibility is not the only liability regime that can be used to hold a company liable; there is also civil liability, human rights accountability that permits the company to be subject to wide a range of sanctions, including the revocation of licenses (i.e., the ‘corporate death penalty’ for legal persons), temporary license suspension, the initiation of investigations and prosecutions, civil or administrative penalties, and warning or persuasion techniques.\(^10\)

Therefore, Corporate Criminal Responsibility (CCR) is not a far-fetched idea anymore and this paper will try to advocate for its implementation at the International Criminal Court


\(^9\) Voiculescu, supra note 3 at 427; Stahn, supra note 8 at 102.

(hereafter ICC). Indeed, the author thinks that the Court’s ambition to end impunity and contribute to the prevention of war crimes, crimes against humanity and genocide cannot be done if corporate agents remain outside of the scope of investigations and prosecutions.¹¹

Because of space limitation, this paper will exclusively focus on corporate criminal responsibility for gross violations of human rights which can amount to international crimes such as crimes against humanity, crime of aggression, war crimes and genocide.

Part I will be about the argument that stands for a CCR in International Criminal Law (hereafter ICL). Part II will provide information on what has been done so far internationally regarding CCR while Part III will try to imagine how to articulate such a thing at the ICC. Finally, Part IV will provide some final reflections on the topic.

II. Why corporations should be prosecuted in International Criminal Law?

It is a principle of International Criminal Law that legal entities, including companies, cannot be prosecuted. The personal jurisdiction of the courts’ concerns only natural persons. The ICC is no exception. However, several reasons advocate for a change.

In our time and world where globalization renders every market and resources accessible to corporations, it would make sense for the law to regulate more what is wrong and right to do and what can be done, prosecutorially speaking, in case of gross human rights violations.

The first reason why corporations’ criminal responsibility in ICL should exist is simply because it makes sense. As David Crane, the former Chief Prosecutor of the Special Court for Sierra Leone (SCSL) said: “[o]ne must appreciate that rarely do these conflicts involve combatants alone. External players consist of States, international criminal cartels, possibly

corporations, terrorists, and heads of government acting in their personal capacity in a type of joint criminal enterprise”. Indeed, a lot of sectors are most likely to become linked to international crimes such as extractive industries (incl. minerals, agriculture, forestry), private military industry, arms trade, chemical industry, and the financial sector. These sectors are very lucrative, and therefore competitive, and therefore subject to human rights violations for profit. And it is not new news. Starting from colonial times, where state owned companies had extracted and sold natural resources from conflict zones, to World War II and contemporary conflicts, where companies support and facilitate warfare. In modern times, corporate actors have been involved in violations in several ways: as direct perpetrator of violations, through supply of goods that fuel international crimes, as providers of information or services that facilitate crimes, or through investments in conflict environments.

The second reason why corporations’ criminal responsibility in ICL should exist is because there is a willingness to do so. Proposals to extend the jurisdiction of the International Criminal Court to cover corporate entities were on the agenda of the Kampala Review Conference in 2010, but they were overshadowed by the preoccupation with the crime of aggression and hence

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13 W. Huisman, Business as Usual? The Involvement of Corporations in International Crimes (Boom Legal Publishers, 2010), at 13-21.

14 Stahn, supra note 8 at 93.

not properly discussed.¹⁶ More importantly, there is a willingness to do so on the part of the ICC Prosecutor. In 2016, the Office of the Prosecutor has devoted some attention to the problem in its Policy Paper on Case Selection and Prioritization by stating that her Office “will give particular consideration to prosecuting Rome Statute crimes that are committed by means of, or that result in, inter alia, the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossesssion of land”.¹⁷

It triggered several communications related to companies’ involvement in international crimes. For example, in May 2017, three non-governmental organizations submitted an art 15 communication to the ICC, seeking the expansion of the Office of the Prosecutor’s ongoing preliminary investigation in Colombia to include executives of Chiquita Brands International Inc (hereafter Chiquita). Indeed, the communication talks about a financial involvement of Chiquita with paramilitary forces in Colombia between 2002 and 2004 that can amount to complicity of crimes against humanity committed by Colombian paramilitaries.¹⁸

Moreover, the idea of holding companies’ accountable helps deter offences.¹⁹ Indeed, prosecuting a business is like the human rights strategy of naming and shaming. It can impact the business reputation that the companies want to protect. The consequences of sanctioning a

corporation for its actions are felt by the individuals controlling the corporation who then take steps to change how the corporation operates so as to avoid future sanctions.20

It is also interesting from a retributive perspective. Corporate responsibility may offer a new pathway to give individual or collective reparation to victims that is more commensurate to the harm caused.21

Finally, corporations are more and more prosecuted in numerous countries and ICL is derived from legal traditions. For example, in the Netherlands, the businessman Frans van Anraat stood trial on charges of complicity in war crimes because he delivered Thiodiglycol to the Iraqi regime of Saddam Hussein in the period from 1985 until early 1988 that served as the main ingredient for the production of chemical weapons. He was convicted of 17 years in prison.22 Another Dutch businessman, Gus Van Kouwenhoven, who was president-director of Oriental Timber, Company and close friend of former Liberian president Charles Taylor, was prosecuted on charges of having financed the civil war in Sierra Leone with the profits from the trade in tropical timber.23 Moreover, Van Kouwenhoven was accused of being involved in violence against the civilian population by means of his security staff who had been recruited from militias.24

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21 Stahn, supra note 8 at 121.
23 District Court of The Hague, 7 June 2006, LJN: AY5160.
24 District Court of The Hague, 7 June 2006, LJN: AY5160.
Juan Tasselkraut, a Mercedes Benz Manager during the military dictatorship in Argentina, was charged for sharing private information about company officials with the military regime that led enforced disappearances.25

Another recent successful prosecution is the French one in the Lafarge case. Indeed, the French multinational cement company Lafarge Holcim SA (Lafarge) was indicted for complicity of its subsidiary Lafarge Cement Syria (LCS) in crimes against humanity and financing of terrorism committed by the Islamic State of Iraq and Syria and other armed groups in Syria.26

Finally, the Alien tort act in the United States, while a tort law instrument permits in theory to held companies responsible. The most recent case concerning the ATS was John Doe I, et al. v. Nestle, which was heard by the Supreme Court on December 1, 2020, and decided June 17, 2021. The case alleges that Nestle and Cargill aided and abetted forced child labor in the Ivory Coast in connection with the harvesting of cocoa.27

III. What has been done so far in ICL?

When we look at the Nuremberg Tribunal Charter, it appeared to accept the criminal responsibility of organizations or legal entities as such.28 Indeed, Article 9 allowed for the court to declare an organization criminal. However, Article 10 makes it clear that the intent is to employ the provision as a vehicle to hold individuals criminally responsible for membership of

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26 Cour de Cassation, 7 septembre 2021, n° 19-87.036.
28 Van der Wilt, supra note 16 at 50.
certain organizations.\textsuperscript{29} The Nuremberg Tribunal did not, therefore, allow for the prosecution of a legal person as it made it clear: “[c]rimes against International Law are committed by men not abstract entities.”\textsuperscript{30}

However, this decision permitted military courts of the Allied forces in Germany to prosecute corporate business leaders on charges of complicity in crimes against peace, war crimes and crimes against humanity on the basis of the Allied Control Council Law No. 10 of 20 December 1945.\textsuperscript{31}

These corporate agents were charged for providing weapons, raw materials and instrumentalities which sustained the aggressive war (Farben, Krupp) benefiting on a large scale from the illegal confiscations of plants and other private and public property in the occupied countries (Farben, Flick), delivering gas to the concentration camps (Zyklon B) and employing concentration camp inmates and other forced laborers as slaves in their factories (Krupp, Farben, Roechling).\textsuperscript{32} For example, in the Zyklon B case, the owner and the deputy of the company Testa were convicted as accomplices to murder for supplying the prussic acid that

\textsuperscript{29} Id. at 51.

\textsuperscript{30} International Military Tribunal, \textit{Trial of the Major War Criminals before the International Military Tribunal: Nuremberg, 14 November 1945 – 1 October 1946 vol. 2, United States v. Goring}, (1948), at 466.


\textsuperscript{32} Van der Wilt, \textit{supra} note 16 at 52.
was used in extermination and concentration camps and thirteen members of IG Farben, were
found guilty of enslavement or plunder.\textsuperscript{33}

At the International Criminal Tribunal for Rwanda, Alfred Museum, director of a public tea
factory and member of the regional authorities, was held liable as de jure and de facto superior
of tea factory employees who committed acts of genocide.\textsuperscript{34} Indeed, despite his authority, legal
and financial control over the employees, and his knowledge of the crimes, Musema did not
take action to prevent the crimes or punish those involved.\textsuperscript{35} The ICTR also convicted Michel
Bagaragaza, Director General of the government office controlling the tea industry in Rwanda,
for aiding and abetting the principal perpetrators of genocide in Rwanda.\textsuperscript{36} The Chamber
considered that he had provided “substantial assistance” to the principal perpetrators while
having “the knowledge of the planners’ and principal perpetrators’ genocidal intent”.\textsuperscript{37}

A few early developments then, but neither the Nuremberg and Tokyo tribunals, nor the ad
hoc tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) or the International
Criminal Court (ICTR) were formally vested with the authority to try legal persons.\textsuperscript{38}

In recent years, ICL has witnessed the renaissance of this possibility with the jurisprudence
of the Special Tribunal for Lebanon, the Malabo Protocol of the African Union and the Draft
Articles of the International law Commission on Crimes Against Humanity.\textsuperscript{39}

\textsuperscript{33} Bruno Tesch and Two Others, Judgment, Law Reports of Trials of War Criminals Vol. 1
(British Military Court, 1946); Krauch et al., Judgement, Trials of War Criminals before the

\textsuperscript{34} Prosecutor v. Alfred Musema, Judgment and Sentence, ICTR-96-13-T, 27 January 2000.

\textsuperscript{35} Id. paras. 894–895, 900, 906, 915, 920, 925.

\textsuperscript{36} Bagaragaza, Judgment, Trial Chamber, ICTR-05-86-S, 17 November 2009.

\textsuperscript{37} Id. paras 24-26.

\textsuperscript{38} Stahn, supra note 8 at 97.

\textsuperscript{39} Stahn, supra note 8 at 91.
The sole tribunal that has accepted the idea of criminal responsibility for legal persons is the Special Tribunal for Lebanon (hereafter STL). In January 2014, the STL decided to initiate a contempt proceeding against a legal person, a Lebanese media company in the Al-Jadeed case, for the publication, among other things, of alleged witnesses.\textsuperscript{40}

In other words, the STL has now recognized corporate liability in international criminal law.\textsuperscript{41}

The starting point of the reasoning was that the STL Statute and the Rules of Procedure and Evidence (hereafter RPE) do not define what a “person” is. In fact, the Statute of the STL, contrary to the Rome Statute, does not explicitly limit the personal jurisdiction of the tribunal to natural persons.\textsuperscript{42}

Moreover, the Chamber declared:

\begin{quote}
Corporate liability for serious harms is a feature of most of the world’s legal systems and therefore qualifies as a general principle of law... Corporate criminal liability is on the verge of attaining, at the very least, the status of a general principle of law applicable under international law.\textsuperscript{43}
\end{quote}

The court development has been welcomed as a step in the right direction, namely as “a foundation for further development of liability of corporate entities in international criminal law”.\textsuperscript{44}

\begin{footnotes}
\item[41] Jacobs, \textit{supra} note 7.
\item[42] \textit{Id.}
\item[43] \textit{Al Khayat, supra} note 40 para. 67.
\item[44] Karlijn Van der Voort, Contempt case Against Lebanese Journalists at the STL, Special Tribunal For Lebanon Blog (Apr. 30, 2014, 11:37 AM), https://perma.cc/Z7M4-3H9S.
\end{footnotes}
Another development to note is the adoption of the Malabo protocol55 that extends the jurisdiction of the proposed African Court of Justice and Human and Peoples Rights to “legal persons, with the exception of States”.45

It is the first statutory instrument of a regional court that contains a specific article on corporate criminal responsibility.46 As Joanna Kyriakakis has noted, it follows the ‘organizational model’: “This means that, rather than focusing upon the conduct and state of mind of specific individuals within the corporation and deriving the corporation’s fault from there, corporate culpability is instead deemed to be situated within the corporation itself.”47

However, the Protocol does not define “legal person” as well as the potential sentence.

At the international level, there are seventeen multilateral international instruments with provisions on corporate criminal liability, including the UN Convention against Transnational Organized Crime.48

But they leave it to the discretion of states to determine the appropriate sanctions. This approach was recently followed by the International Law Commission (ILC) in its work on crimes against humanity which decided to include a provision on legal persons in its draft in light of the ‘the


potential involvement of legal persons in acts committed as part of a widespread or systematic attack directed against a civilian population’. 49

IV. How could it be implemented at the ICC?

Although the concept was suggested during the drafting of the Rome Statute, criminal liability for corporate entities does not exist before the ICC. 50 However, the French proposal during the Diplomatic Conference at Rome, preceding the adoption of the ICC Statute, was truly elaborate and comprehensive. Even realistic. It was a compromise between those who did not want CCR and those who wanted it. In addition, the rationale behind it was honorable: increase the chances of victims obtaining compensation through the ICC reparation regime. 51

Under the French proposal, corporate criminal responsibility was made dependent on individual criminal responsibility:

Without prejudice to any individual criminal responsibility of natural persons under this Statute, the Court may also have jurisdiction over a juridical person under this Statute. Charges may be filed by the Prosecutor against a juridical person, and the Court may render a judgement over a judicial person for the crime charged, if:

(a) The charges filed by the Prosecutor against the natural person and the juridical person allege the matters referred to in subparagraphs (b) and (c); and

50 De Leeuw, supra note 11 at 243.
51 Stahn, supra note 8 at 101.
(b) The natural person charged was in a position of control within the juridical person under the national law of the State where the juridical person was registered at the time the crime was committed; and

(c) The crime was committed by the natural person acting on behalf of and with the explicit consent of that juridical person and in the course of its activities; and

(d) The natural person has been convicted of the crime charged.

For the purpose of this Statute, “juridical person” means a corporation whose concrete, real or dominant objective is seeking private profit or benefit.”

Regarding the restrictiveness of this provision, we can wonder why it was turned down. First of all, the scope of responsibility was limited and conditional because it required a conviction of a company agent for acts carried out ‘on behalf of and with the explicit consent’ of the company concerned. This approach strongly reflects the agency theory which stipulates that a legal person can only “act” through its organs/natural persons and that their conduct and mens rea must be attributed to the legal entity. This approach is the least controversial of all and could potentially please even the countries that are the most reluctant to CCR.

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53 Stahn, supra note 8 at 100.

54 Van der Wilt, supra note 16 at 47.
The chosen term of “acting on behalf” permits to encompass any employee that is employed by the company, including sub-contractors.55

The last condition of explicit consent suggests that the legal person is not only aware but also positively intends the activities of the natural person.56

In addition, there is no room for abuse with this provision because it is clear that solely the employees with control within the corporation could trigger this liability.

Finally, all these conditions are cumulative with the requirement that the crime was committed “in the course of the corporation’s activities”.

This last condition serves as a correcting factor, in order to prevent criminal responsibility from extending too far. Indeed, it is not unreasonable to think of an employee that uses the business for his own sake only.57

In other words, as Celia Wells summarizes it, the corporation can be held “criminally liable for the acts of any of its agents if an agent commits a crime within the scope of his employment and with intent to benefit the corporation”.58

This would permit to draw from the individualist approach an organizational guilt which is, according to the author of this paper, what ICL should plead for. As Thomas Weigend said: “It is not a single individual who sells poison gas to a dictator to be used in war crimes, but it is a firm, organized as a legal person that is the provider of the gas. It is not a single individual who buys, and re-sells stolen diamonds and thus lends critical financial support to a dictatorial regime, but an enterprise specialized in such lucrative deals.”59

55 Id. at 48.
56 Id. at 47.
57 Id. at 48.
58 C. Wells, Corporations and Criminal Responsibility (1993), at 118.
59 Weigend, supra note 20 at 927-928.
Even though the proposal was not accepted though, nothing bars the ICC from holding corporate actors liable for international crimes. However, to date, the International Criminal Court has focused its attention on prosecuting governmental and military leaders.\textsuperscript{60}

Opening an investigation on the basis of the communications we talked in the introduction would be the first time that the ICC made any effort to hold corporate actors accountable for atrocity crimes. The ICC would signal a willingness to broaden its fight against impunity by expanding its reach while respecting the law.\textsuperscript{61}

There are several ways to use the Rome Statute to do so but it is difficult to prove that the corporate agents involved had the requisite intent under art. 25 (a)-(c) to commit, order, solicit, induce or aid and abet in the crime, or that they conducted their business with the aim to assist the principal perpetrators in the crime, as required under art. 25 (3)(d)(i).\textsuperscript{62}

For instance, scholars mostly discuss the application of aiding and abetting liability (art. 25 (3) (c) Rome Statute) but the required mens rea is too high to prove (“for the purpose of facilitating the commission”).\textsuperscript{63}

On the other hand, Article 25(3)(d)(ii) entails a lesser evidentiary showing because an individual is criminally responsible when (s)he: In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose.


\textsuperscript{61} Id. at 372.

\textsuperscript{62} De Leeuw, supra note 11 at 246.

Such contribution shall be intentional and shall either: i. [...] ii. Be made in the knowledge of the intention of the group to commit the crime.\textsuperscript{64}

This provision on contribution liability is an appropriate way to capture the typical role and criminal liability of corporate agents. The Court must mostly determine whether the corporate agent made this contribution willingly, either knowing it would contribute to the commission of international crimes by a group, or aware that it will contribute to the commission in the ordinary course of events.

The knowledge of the contributor must relate to the “specific crime” the group intends to commit, rather than the overall criminal activities or purpose of the group.\textsuperscript{65} The high standard of knowledge complements the relatively low actus reus threshold of “any contribution”.\textsuperscript{66} Whether the requisite knowledge of a corporate agent in relation to his/her contribution meets the \textit{mens rea} threshold applicable to art. 25 (3) (d) (ii) can depend on a number of factors: the nature of the sold products, the context in which the goods or services are sold, the information the defendant has on its business involvement in international crimes, …\textsuperscript{67}

Another possibility is to say that corporate agents can also bear superior responsibility for international crimes committed by their subordinates. We already discussed domestic and international precedents that used this mode of liability.

Under art. 28 (b) of the Rome Statute, a civilian superior:

\textsuperscript{64} Wheeler, \textit{supra} note 60 at 384.


\textsuperscript{67} \textit{Id.} at 37–38.
shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where: i. The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes; ii. The crimes concerned activities that were within the effective responsibility and control of the superior; and iii. The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

This provision is restrictive enough to avoid abuse. Firstly, only a superior with effective authority and control over his subordinates can be held liable when crimes are committed by his/her subordinates. It means someone with de facto and/or de jure position of authority. Moreover, a corporate agent can only be held liable when his/her subordinates committed the crimes as a result of his/her failure to properly exercise control over these subordinates. However, the Court held that physical remoteness, as it is often the case for business executives, does not necessarily imply a “lack of legal proximity” to the crime, as has been proven by ICTY and ICTR jurisprudence dealing with persons in leadership positions who were removed from the physical commission of the crime.

V. Some final reflections

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As we saw in this paper, there is an urge to hold companies accountable for their gross human rights violations. The international human rights field has made so much progress in regulating and promote it while ICL is lagging behind. The paper discussed several reasons why ICL should allow CCR, especially the International Criminal Court.

Drawing on what already exists, the French proposal at the Rome conference, the ICC could pretend to serve its overarching goal of ending impunity.

However, the authors is aware of the difficulties to change the statute and modestly, advocate for simply trying to prosecute corporate actors who would have, through their companies, committed or helped commit international crimes. Yet, theory needs to be confronted with reality. A few reasons also exist to advocate for the contrary. First of all, there are concerns that providing for corporate criminal liability would remove focus from individual responsibility.\(^{70}\) As Harmen van der Wilt said: “putting the blame exclusively on the corporation entails the risk that at the end of the day no one is guilty but the abstract entity.”\(^{71}\) Prosecution of corporations or their executives could also raise practical issues. It may first be difficult to obtain evidence and it can make criminal trials longer and more expensive.\(^{72}\) Also, the fact that a great number of countries does not recognize CCR would make the principle of complementarity useless and overburden the ICC.

However, what message is this for the victims? It conveys the idea that corporations, as entities, are free to commit atrocity crimes without fear of punishment.

Although national laws exist that impose liability on corporations and/or their individual employees, they have obviously not proven to be sufficient to deter corporate participation in

\(^{70}\) Wheeler, \textit{supra} note 60 at 373.

\(^{71}\) Van der Wilt \textit{supra} note 16 at 73.

\(^{72}\) D. Scheffer, “Corporate Liability under the Rome Statute”, \textit{57 Harvard International Law Journal} (Spring 2016), at 35.
human rights abuses. Moreover, many individual states are often unwilling or unable to adequately regulate human rights abuses committed by corporations within their jurisdiction.

At the very least, the ICC should accept to use its current statute to prosecute business leaders.

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73 Wheeler, supra note 60 at 373.