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Addressing the Human Rights Violation into the Corporate Criminal Accountability under International Law

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In the current era of capitalist globalization, there has been exponential growth in the operations of corporations, translating their geographical boundaries. Such a large-scale reach, however, has also brought about numerous human atrocities, either directly through corporations or by the neglect of them. Nevertheless, despite the magnitude of these violations, international law currently remains too weak in terms of holding corporations accountable for their actions on the program management of human rights abuses. Such an advocate underlines the necessity to directly hold corporations having the specific deliberative capacity for collective action responsible for human rights violations, where global governance complexity alongside transnational corporations' operational complexity comes in. The article considers some of the imperative issues of the international accountability concern that require exploration: Is there a distinction to be made between how international law defines the criminal responsibility of legal entities versus how legal entities are held accountable? Where is the threat coming from that makes it indispensable to include criminal liability within the confines of this line of thought? What is the basis for the imposition of corporate criminal liability under the International Criminal Court (ICC) rather than allowing member states to exercise that discretion? It also analyses the rationale for bringing more corporations under the scope of the ICC despite individual corporate officers being subject to international law and legal accountability. To tackle these problems, the paper suggests particular modifications to the Rome Statute[1] *about corporate entities. This research hopes to aid in the formulation of an international legal order that respects and*

[1] Rome Statute of the International Criminal Court 2002

protects human rights and on the other hand, contains and punishes the legal entities for violations of human rights and other international legal norms.

Keywords: *corporate criminal liability, human rights violations, corporate complicity, statute.*

INTRODUCTION

Given the tremendous surge in corporate power over the past few years, the issue of how international law deals with human rights violations that corporate entities commit has become acute. Traditional criminal accountability has mainly been directed at individual transgressors; however, these days, we see a growing acceptance that the most culpable parties are not the persons but the corporate groups which, when considered as a whole, commit the crime and in this sense, are key to the occurrence of serious international crimes of the like; war crimes, genocide, and crimes against humanity are the most conspicuous ones. The debate on corporate criminal liability is not just a mere academic discussion. It deals with the major issues of fairness and justice and whether the judicial system can provide an adequate means of dealing with the negative sides of modern global markets and corporate structures.

One of the reasons why corporate criminal liability is often sanctioned is the fact that they are considered as having a personality by law and hence, should be answerable for illegal acts the way that natural persons are. The point of view in this perspective is that, as being the ones who can cause a great amount of damage, the companies cannot get away with their actions and should not be excluded from being pursued through criminal law, which is one of the most vivid expressions of our society's morality. The phrase "if we tolerate the half-measure, corporations are assigned all the normal human propensity for causing harm, but no possibility of being called to account[2]", as some writers have pointed out. However, opponents of corporate criminal liability say that such laws might be the reason for the diminishing of the authority of criminal law and its central focus on individual culpability, as well as the proliferation of the abuse of

[2] James G. Stewart, 'A Pragmatic Critique of Corporate Criminal Theory: Lessons from the Extremity' (2013) 16(2) New Criminal Law Review: An International and Interdisciplinary Journal <https://www.jstor.org/stable/10.1525/nclr.2013.16.2.261> accessed 16 August 2024

punitive measures by entities without a permissible philosophical or legal rationale among other reasons too[3].

The stakes of this debate are very high when viewed about international crimes, which is a situation where corporate entities have been involved in acts that perpetuate or directly encourage serious human rights violations. During the Rwandan genocide, Radio Télévision Libre des Mille Collines (RTLM) played a key role in inciting mass violence, demonstrating that corporations can be implicated in the commission of crimes beyond economic contexts, becoming integral to criminal activities. In such situations, the business argument for criminal responsibility of the company might be strengthened by the possibility of it being a greater deterrent action than the ones taken on by individuals because it could be more reasonable to give the status of social misfitting to corporations, or that these actors would be more likely to behave in a kind that avoids the reputation and financial loss of their own.

Nevertheless, this thinking is not so clear-cut. According to the research, the policy of punishment of a company for crime may be unfair because some companies differ in nature and ability to commit crimes. Some companies, for example, smaller entities or those that work in conflict zones, might not have the standard decision-making processes or institutional structures as the bigger, multinational companies have. Therefore, a one-size-fits-all approach would yield unjust consequences, making it necessary for a more nuanced, pragmatic model that considers all aspects specific to each case.

ADDRESSING THE ACCOUNTABILITY GAP FOR CORPORATIONS IN INTERNATIONAL LAW

There are several instances of corporate actions perpetuating human rights violations and war crimes. The author will trace several historical instances of corporations being complicit in international crimes up to recent instances. Then, the expectations placed on corporations by different international human rights instruments will be explained to show the presence of an accountability gap when it comes to holding corporations criminally liable.

[3] *Ibid*

One of the most prominent instances of corporations being complicit in crimes against humanity was when German corporations aided the Nazi regime during World War 2. Three prominent cases that were adjudicated by the U.S. Military Tribunal were I.G. Farben, Krupp and Flick. In the I.G. Farben case[4], 24 executives of the company were indicted for war crimes and crimes against humanity due to plundering and spoliation of occupied territories, use of slave labour, and their collaboration with the Nazi government, with 4 of the executives being part of the Schutzstaffel (SS), which was identified as a criminal organisation. In the Krupp case, the 12 defendants, 11 of whom were directors of the Krupp group, were indicted for crimes against peace by participating in the planning of wars of aggression and crimes against humanity by participating in the murder, imprisonment and use for slave labour of civilians who were under German control. Lastly, in the Flick case, 5 directors of the company that dealt with the production of coal and steel were indicted on charges of using slave labour, aiding the activities of the SS, a criminal organisation, and spoliation.[5]

The above cases show that the need for bringing liability against corporations where they have been deemed to be complicit in crimes had been recognised several decades ago.

Coming to more modern instances of corporate complicity in criminal activities, the *Lafarge v Syria*[6] case stands out. Lafarge was alleged to have made payments in the millions of dollars through intermediaries to terrorist organisations like ISIS to ensure the safe and continued operation of their cement factory in Jalabiya.[7] Eight former executives of the company were indicted in France in 2018 on charges of financing terrorism. They could face up to 10 years in prison. The company even had to pay $778 million as part of a criminal plea agreement with the U.S. Justice Department.[8]

These examples demonstrate that the necessity for addressing the complicity of corporate actions in crimes against humanity has been recognised decades ago and continues to be. While

[4] The United Nations War Crimes Commission, *Law Reports of Trials of War Criminals vol.* X (1949)
[5] *Ibid*
[6] *Lafarge v Syria* [2023] EWHC 2250 (QB)
[7] 'Lafarge in Syria' (*ECCHR*, 16 January 2024) <https://www.ecchr.eu/en/press-release/lafarge-in-syria/> accessed 16 August 2024
[8] *Ibid*

the aforementioned trials adopted the method of attaching criminal liability upon individual directors of the corporations and not the organisations as a whole, which has come to be the norm for attaching criminal liability to corporations under international law, the core principle established here is basically that of *ubi jus ibi remedium*, where corporate actions have perpetuated crimes against humanity or crimes against peace, there must be a remedy to right the wrong, and an accountability gap being left as it is would greatly damage confidence in the effectiveness of international law.

Now, this brings us to the question of what role corporations play in international law and what legal personality they have under international law because where an accountability gap needs to be addressed, the feasibility of attaching liability against the perpetrators needs to be thoroughly considered.

There are broadly three different conceptions of international personality.[9] The first conception takes up a restrictive definition of international personality, which refers to strictly defined traits that are analogous with the state. Three conditions are required to be fulfilled under this definition for an entity to be a subject of international law. Those are:

1. The capacity to conclude international agreements.
2. The capacity to establish diplomatic relations.
3. The capacity to bring international claims.

In response to this restrictive conception, a more extensive conception of international personality was proposed, where a single condition was required to be fulfilled: the capacity to be invested in rights and obligations by international law.[10]

The International Court of Justice reconciled both of these conceptions that were on opposite ends of the spectrum and formulated an intermediate position in the *Reparation Case.*[11] The Court

[9] Vincent Chetail, 'The legal personality of multinational corporations, state responsibility and due diligence: The way forward' (2013) SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2364450> accessed 16 August 2024

[10] The United Nations War Crimes Commission (n 4)

[11] International Court of Justice, *Reparation for Injuries Suffered in the Service of the United Nations* (1949)

put forth two conditions to be fulfilled for an entity to be considered a subject of international law:

- It must be capable of possessing international rights and duties.
- It must have the capacity to maintain its rights by bringing international claims.

Between the two different conceptions, an intermediate position was promoted by the International Court of Justice (ICJ) in the Reparation Case. According to the Court, an entity is a subject of international law only if two cumulative conditions are fulfilled: it 'is capable of possessing international rights and duties, and that it can maintain its rights by bringing international claims'.

The Court further clarified a crucial aspect of international personality by explaining that the subjects of international law and the nature of their personality vary from one to another: "*The subjects of law in any legal system are not necessarily identical in their nature, or the extent of their rights, and their nature depends upon the needs of the community. Throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities that are not States.*"[12]

A significant portion of legal thought holds that multinational corporations do not possess a status within the realm of international law. This viewpoint typically relies on two distinct sets of arguments. Firstly, it is contended that recognising transnational corporations as subjects of international law would diminish the authority of states, thereby challenging their historically predominant role in international legal matters.[13] Secondly, from a more technical standpoint, the refusal to confer legal personality upon these corporations often stems from the analogy to statehood, emphasising that corporations cannot directly engage in the formulation of international laws.[14]

[12] *Ibid*
[13] *Ibid*
[14] Chetail (n 9)

However, the primary arguments used to reject the idea of multinational corporations having international legal status are not compelling. These arguments conflict with the flexible concept of international personality acknowledged by the International Court of Justice (ICJ) in the Reparation for Injuries case. In that specific case, the ICJ explicitly dismissed any attempt to draw an analogy with states when determining the attributes of international personality. The court clarified that being an international person does not equate to being a state, as the United Nations Organization, for example, possesses an international legal personality distinct from that of a state. Additionally, although the ability to engage in international law-making processes might be seen as a potential indicator, it is not a part of the Court's definition. The Court's definition is rooted in the capacity to hold rights and obligations under international law and the ability to make international claims.[15]

Having established the position on the legal personality that corporations are considered to possess under international law, the next phenomenon that must be examined is related to that of corporations claiming that they are subjects of human rights under the European Convention on Human Rights and even approaching the European Court of Human Rights claiming that their 'human rights' have been violated.

This can be observed in how Article 34 of the Convention,[16] when explaining the categories of persons that are allowed to apply with the Court, says "*any person, non-governmental organization or group of individuals...*' with corporations being included within the ambit of the term 'non-governmental organisations". Even the initial version of the Convention mentioned 'any natural or corporate person' as possible applicants, with the terminology being changed to "corporate body" and then 'non-governmental organisation' later on. However, this evolution of the terminology does not indicate an intention to exclude corporations from the scope of the Convention's application.[17]

In addition to the Convention by its provisions including corporations within its ambit to a limited extent (corporations are excluded from claiming certain rights like the right to protection

[15] *Ibid*
[16] European Convention on Human Rights 1950, art 34
[17] Marius Emberland, *The human rights of companies* (Oxford University Press 2006)

against torture for reasons of these rights only being capable of being granted to natural persons), there is also precedent of corporations making claims that their human rights under the Convention have been violated and the ECHR accordingly affirming such rights.[18] Examples of this kind of precedent include *Niemietz v Germany*[19] and *Societe Colas Est v France*[20], where the Court had included corporate offices within the definition of 'home' under Article 8[21] of the Convention, which provides for the right to respect for their 'home'. There is also the case of *Autronic AG v Switzerland*[22], where a telecommunications company applied with the Court claiming that its right to freedom of expression under Article 10 of the Convention had been violated when the Swiss government did not permit to receive television signals from a Russian satellite to demonstrate the capabilities of its dish. The Court, in its judgment, stated that the corporate applicant would be entitled to the protection being sought by it under Article 10 of the Convention[23].

Another prominent case is that of *Khodorkovsky and Lebedev v Russia*, where the applicant company was charged with financial crimes like embezzlement and tax evasion and was subjected to instances of impartiality in the manner the trial was conducted in Russia.[24] The applicant approached the Court claiming that its rights under several provisions of the Convention had been violated, and the Court also found that there were violations under Article 6 (right to a fair trial), Article 7 (no punishment without proper law), Article 10 (right to freedom of expression) and Article 18 (limitations on rights for an improper purpose)[25].

Thus, where corporations can rely on international legal instruments to assert that they are subjects of human rights, the question arises as to why there is no similar provision in the realm

[18] Sam Rezai, 'Corporations and the European Convention on Human Rights' (2021) 25(1) Pacific McGeorge Global Business & Development Law Journal <https://scholarlycommons.pacific.edu/cgi/viewcontent.cgi?article=1011&context=globe> accessed 16 August 2024
[19] *Niemietz v Germany* [1992] App No 13710/88, Eur. Ct. H.R.
[20] *Societe Colas Est v France* [2002] IH Eur. Ct. H.R.
[21] *Ibid*
[22] *Autronic AG v Switzerland* [1990] 178 Eur. Ct. H.R. (ser. A)
[23] *Ibid*
[24] *Khodorkovskiy v Russia* [2011] App No 5829/04, Eur. Ct. H.R
[25] European Convention on Human Rights 1950

of international law to hold them criminally liable when they are complicit in such violations of human rights. This demonstrates the presence of an accountability gap.

WHY CORPORATE CRIMINAL LIABILITY NEEDS ICC OVERSIGHT?

The next issue that comes up is why criminal liability for corporations under international law must be specifically introduced to address this accountability gap, where international law already allows for the prosecution of corporate officials for their involvement in crimes against humanity and war crimes.

There are three compelling reasons to impose criminal liability on corporations, not just on their officials or employees:

1. Collective actions by corporations often lead to more significant harm than individual actions.
2. Individual actions of corporate employees may not individually meet the threshold for liability under international law, even if wrongdoing is evident.
3. To effectively deter collective actions, a systemic approach to punishment is necessary.

Each of these reasons will have to be explored in further detail to understand the necessity of holding corporations criminally liable under international law.

Collective Action v Individual Action: The ascent of corporations parallels the ascent of modern nation-states in that both bring people together for a common purpose, resulting in entities with substantial potential for both positive and negative impacts. The modern human rights movement emerged as a response to safeguarding individuals from the potential misuse of power by nation-states, which, despite their benefits to society, can pose risks. Although there are distinctions between states and private corporations, the fundamental concern for safeguarding individual rights and welfare in response to power concentration applies similarly to both states and corporations.

International criminal law acknowledges that violations committed by organized groups hold a distinct character. The four primary international crimes, war crimes, crimes against humanity,

genocide, and aggression, all necessitate collective involvement. Two of these crimes' overarching elements include a collective action requirement.[26] Genocide, while not explicitly mandating collective action, typically involves it in practice.[27] Aggression, the fourth crime, necessitates state engagement.[28] Despite acknowledging the influence of collective actions, international law has not extended criminal jurisdiction to entities like corporations. Instead, the response has been to heighten individual criminal accountability for those who partake in such extensive or systemic crimes.

Insufficiency of Individual Actions in Imposing Liability: While international criminal law has recognized the collective nature of these crimes by strengthening the accountability of individuals, it falls short of adequately addressing all group-committed crimes, particularly those involving formal organisations. Take, for instance, cases where a corporation causes harm to individuals, but no single person within the organisation exhibits the necessary criminal intent (*mens rea*) and wrongful actions (*actus reus*) to be held criminally responsible. Even when it's evident that a collective has caused harm, if the elements required for an individual's liability aren't met, we cannot hold any one person criminally accountable for that harm. In essence, while individual actions might not trigger individual liability when considered collectively, they may constitute a criminal offence.

Collective action and organisation theory emphasise that the decisions made by organisations don't always mirror the preferences of any single individual within that organisation. Instead, organisational choices frequently result from a negotiation and compromise process among various interest groups.[29] Group decisions are often influenced as much by the decision-making structure as by the individual or collective preferences of the people involved. Scholars in voting theory have long recognised this phenomenon, the way a voting process is structured significantly impacts the outcome of a specific vote. Therefore, modifications in the voting process can lead to different decisions, even if the underlying preferences of individual voters

[26] Rome Statute of the International Criminal Court 1998
[27] *Ibid*
[28] U.N.G.A. Resolution 3314, 1974
[29] Meir Dan-Cohe, *Rights, Persons, and Organizations A Legal Theory for Bureaucratic Society* (2nd edn, Quid Pro LLC 2016)

remain unchanged.[30] This implies a form of collective or institutional responsibility that goes beyond the accumulated responsibility of each individual within the organization.

Effective Deterrence is needed to ensure Systemic Punishment: Punishing individual corporate officials and employees might not be sufficient to deter specific corporate wrongdoings and harms, as there may not be enough individual culpability to successfully prosecute any single person. When harm arises from collective actions where each individual's acts are not inherently blameworthy, the question arises: how can accountability for these harms be established? How can society express disapproval, deter future wrongs, and facilitate the rehabilitation of wrongdoers?

Regarding actions by organizations that lead to harm, penalizing the entity itself tends to be more effective in influencing behaviour than prosecuting isolated individuals. If the harm one wants to discourage results from the accumulation of individual acts that are otherwise innocent or not blameworthy, or if the harm stems from a policy, system, or decision-making process, placing accountability on the collective actor rather than individual actors will create more effective deterrence.

Emphasizing the corporation's responsibility is more likely to lead to the necessary systemic reforms aimed at preventing future harm, as opposed to focusing on individual criminal behaviour.

Various domestic legal systems have grappled with the question of when an act or result should be attributed to a corporation, thereby triggering criminal liability. There are generally four approaches to determining this attribution for criminal liability.

The first approach, rooted in the doctrine of respondent superior, assigns any employee's actions to the corporation. This is seen in U.S. law, where the Supreme Court has held that a corporation can be criminally liable when an employee commits a crime within the scope of their employment and in some cases, with the intent to benefit the corporation. Liability is typically established if the individual is acting within their authority and in line with the powers

[30] *Ibid*

delegated to them by the corporation. However, in cases where an employee acts outside their authority or contrary to internal policies, some jurisdictions like Canada and the U.S. do not allow corporations to use internal rules as a defence. This approach promotes corporate responsibility and prevents corporations from evading liability when they prohibit certain activities on paper but allow them in practice.[31]

In most legal systems, corporate liability is excluded for actions of employees that were not intended to benefit the organization, such as embezzlement. In the context of human rights, a question arises about whether a corporation should be held accountable if an employee, for instance, assists in a war crime, which in turn harms the corporation's reputation. On one side, it may seem unjust to hold the corporation liable for an unsanctioned act that damages its public image. On the other side, if the corporation lacks clear procedures to prevent, detect, and penalize such activities, making the corporation liable could incentivize the implementation of controls, thus enhancing deterrence.[32]

The second approach to corporate criminal liability involves attributing acts to the corporation, particularly those of high-level officers or managers with decision-making authority, known as the 'brains' of the organization. Despite criticism, this distinction between 'brains' and 'labour' holds value in both corporate and international criminal law.

Key to this approach is determining which acts are ascribed to the "brains" of a corporation. Domestic corporate law, much like international criminal law, holds corporate officers liable if they possess the authority to prevent wrongdoing through their foresight and vigilance. For instance, the United States Supreme Court maintains that an individual corporate officer may be held liable if they occupied a position of 'responsibility and authority' and had the power to prevent the wrong through the exercise of the 'highest standard of foresight and vigilance'. Similarly, the Council of Europe's convention on corruption imposes criminal liability on the

[31] *N.Y. Cent. & Hudson River R.R. Co. v United States* [1909] 212 US 481
[32] The United Nations War Crimes Commission (n 4)

corporate entity when an employee with a 'leading position and power of representation' is convicted of a crime due to negligence or lack of supervision by this individual.[33]

In international criminal law, a comparable standard exists for military superiors. The Statute of the International Criminal Tribunal for Rwanda (ICTR) stipulates that a superior is liable for the acts of their subordinate if they knew or had reason to know about the subordinate's criminal acts and failed to take necessary measures. For military commanders, liability hinges on actual knowledge or negligence in failing to discover such knowledge.[34]

The Statute of the International Criminal Court ('ICC') employs different standards for military and civilian superiors concerning responsibility for their subordinates' actions. Military superiors are held to the 'knew or should have known' standard, similar to that in the ICTR Statute. On the other hand, civilian superiors are liable if they either knew or 'consciously disregarded information' indicating their subordinates' criminal actions. This is a weaker standard than the one applied by the United States Supreme Court in the corporate criminal context, resembling the test for military officers. The ICC civilian standard lacks the same incentive for actively seeking out information as the military standard.[35]

Two approaches to corporate criminal liability focus on a holistic view of the corporation. One approach considers the corporation as a whole, arguing that sometimes the entity, rather than specific individuals, should bear responsibility for a criminal act. This perspective emphasizes corporate procedures, policies, and culture, drawing parallels between an individual's mental processes and a corporation's internal policies.[36]

The first variation of this approach seeks to establish a causal link between corporate policies and wrongful conduct, making the corporation accountable. The second variation places a higher burden on the corporation by requiring a demonstration of how procedures or policies failed to prevent misconduct. This approach resembles instances in other areas of law where individuals may lose important interests without taking reasonable precautions, such as adverse

[33] *Tesco Supermarkets Ltd. v Nattrass* [1972] A.C. 153 (H.L.)
[34] Statute of the International Criminal Tribunal for Rwanda 1994, art 6(3)
[35] Rome Statute 1998, art 28(a)
[36] The United Nations War Crimes Commission (n 4)

possession of real property or due diligence in cases of lost personal property. In U.S. securities laws, corporate officers can be held liable for failing to implement transparent accounting controls.[37]

In the case of McCann v United Kingdom, the European Court of Human Rights ruled that those who organized an operation were responsible for deaths, as the operation's design made it highly likely that field operatives would use lethal force in most situations. Thus, it was the overall operation design that caused the deaths, not the individual actions of those executing it.[38]

The fourth approach, similar to the third, aggregates the acts of multiple employees to hold the corporation liable for a crime, even if no single person fulfils all the crime's elements. For example, if employee X is aware that people live near a dam and employee Y, unaware of this, contracts to destroy the dam, the corporation they both belong to could be held liable for the resulting deaths.

This approach raises questions about aggregating across corporate entities, making a collection of corporate entities, like a joint venture, liable for activities even if it's impossible to hold any single entity responsible. In terms of individual criminal liability, the third approach suggests holding those who design decision-making processes or procedures of the organization responsible, even if they weren't directly involved in specific decisions leading to wrongful activities. Just as individuals or companies can be held responsible for flawed designs in the U.S. tort system, those creating defective corporate decision-making systems should also face liability. Demonstrating negligence or knowledge of the consequences of a systemic design flaw is crucial.[39]

The concept of criminal legal entities has a contentious history from Nuremberg to the 1998 Conference. The maxim societas delinquere non potest, once a firmly established principle, no

[37] Corporate Manslaughter and Corporate Homicide Act 2007
[38] *McCann v United Kingdom* [1996] 324 Eur. Ct. H.R. (ser. A)
[39] Terrence F. Kiely DePaul and Bruce L. Ottley, 'Understanding Products Liability Law' (2006) SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1327927> accessed 16 August 2024

longer holds. Both in the international legal order and domestic jurisdictions, there's growing openness to corporate criminal responsibility.

In the Special Tribunal of Lebanon (STL), decisions in cases involving *New TV S.A.L.*[40] and *Akhbar Beirut S.A.L.*[41] have marked a significant shift. The tribunal asserted jurisdiction over corporations for contempt of court, representing the first time an international tribunal extended its reach to legal entities. While these cases may not create a strong precedent, they hold symbolic importance, especially given the increasing emphasis on corporate accountability in international business and human rights developments.

The African Court of Justice and Human Rights (ACJHR) took a pioneering step in 2014 by adopting the Malabo protocol. This protocol grants the ACJHR jurisdiction over legal persons (excluding States) for criminal offences. The liability of these legal entities is rooted in the concept of a criminal corporate culture and policy inferred from their conduct. This approach reflects a collective knowledge perspective. The inclusion of corporations is of significant importance, as many corporate entities have played a role in fueling conflicts within African States. However, it's important to note that Article 46C[42] of the protocol was adopted quickly and lacks a precise definition of the term 'legal person.' Furthermore, the protocol must be ratified by at least 15 States to be implemented, which is not yet the case.[43]

In addition to developments at the international level, more and more domestic jurisdictions have started to reject the traditional principle of *societas delinquere non potest*. This shift is partly motivated by the desire to align with international laws and standards that urge states to adopt laws targeting corporate criminal conduct. The acceptance of corporate liability in international criminal law remains a topic of controversy, yet it has gained widespread acceptance within domestic legal systems around the world.[44] This recognition aligns with the process of industrialization in many countries and the necessity to address economic crimes like tax

[40] *Prosecutor v NEW TV SAL and Al Khayat* (Karma Mohamed Tahsin) [2014] No. STL-14-05/PT/AP/AR126.1
[41] *Ibid*
[42] Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights 2014, art 46C
[43] *Ibid*
[44] *Ibid*

evasion and corruption. There are notable differences between civil law and common law countries in their approach to corporate criminal responsibility, with common law countries having adopted it for a longer duration than their civil law counterparts. While before the 1990s, many civil law states opposed the concept of corporate criminal liability, as of 2013, only Greece, Germany, and Latvia remained without some form of corporate criminal responsibility in Europe.[45] However, this doesn't imply that all accepting states have the same framework for corporate criminal liability. The global landscape has undergone significant change since the 1998 proposal, with more and more states introducing some form of corporate criminal responsibility. While challenges related to the complementarity principle persist in some jurisdictions, the growing trend indicates that one of the major impediments to including corporate criminal responsibility in the Rome Statute is gradually diminishing.

ESSENTIAL AMENDMENTS TO THE ROME STATUTE FOR CORPORATE LIABILITY

Incorporating corporate criminal responsibility in the Rome Statute offers many advantages, but it also raises significant concerns. Critics argue that addressing corporate criminal responsibility introduces complex issues. These issues are not insurmountable, but they require further investigation.

Historically, there has been resistance to including economic actors in the Rome Statute due to the complementarity principle. States have been reluctant to prosecute corporations because they wield significant power and influence, especially in economic matters. Their role in conflicts and international crimes, as seen in various examples, cannot be disregarded. While some countries have adopted forms of corporate criminal responsibility in their legal systems, they don't all follow the same liability model. Two key models include the organizational model, focusing on corporate conduct, and the attributional model, which attributes the actions of company employees to the corporation.[46]

[45] Kamari Maxine Clarke, 'Rethinking liberal legality through the African Court of Justice and Human Rights' in Philipp Kastner (ed), *International Criminal Law in Context* (Routledge 2017)
[46] Stewart (n 2)

The divergence among countries regarding corporate criminal responsibility models could complicate voting for an amendment to the Rome Statute. Amending the Statute requires a two-thirds majority vote from participating countries. Political and economic implications might hinder securing the necessary majority vote. However, history has shown that international criminal law can adapt to societal changes, as evidenced by the 2010 amendment to include the crime of aggression. With increasing openness from states to consider corporate criminal liability, a shift within international criminal law may be possible.[47]

Another potential obstacle lies in criminal law, which traditionally focuses on individuals. Criminal law emphasizes individual guilt, moral responsibility, and sanctions. Critics argue that corporations lack the capacity for intention, moral deliberation, and ethical considerations, reducing them to collections of individual members. However, this viewpoint overlooks the interconnectedness among individual members within a collective.[48]

Incorporating corporate criminal responsibility into the Rome Statute necessitates distinguishing between natural and legal persons for evidence production, due process rights, the physical presence of defendants representing the corporation, and available sanctions. The sanctions against legal persons can vary, including fines, penalties, exclusion from public benefits or aid, and temporary or permanent disqualification from specific practices. Presently, the Rome Statute only offers monetary fines as a sanction for corporations, which might have limited deterrence due to consideration in the corporation's cost-benefit analysis. Therefore, researching suitable sanctions accompanying the inclusion of corporations in the Rome Statute is crucial.[49]

To address corporate criminal liability, amending the Rome Statute is not the sole option. We have other avenues to explore. One possibility is signing a separate protocol to the Rome Statute, which could be of interest to the United States, a major jurisdiction that often applies corporate criminal liability. Regional enforcement through geopolitical zones, as seen with the Malabo

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[47] *Ibid*

[48] *Tesco Supermarkets Ltd. v Nattrass* [1972] A.C. 153 (H.L.)

[49] David Scheffer, 'Corporate Liability under the Rome Statute' (2016) 57(35) Harvard International Law Journal <https://journals.law.harvard.edu/ilj/2016/07/corporate-liability-under-the-rome-statute/> accessed 16 August 2024

protocol, is another option, allowing different nations to collaborate regionally and mitigate the influence of states with specific interests.

If, however, we opt for amending the Rome Statute, there are multiple questions and challenges to overcome before implementing corporate criminal liability. It's essential to determine the legal entities falling under the ICC's jurisdiction. Should it encompass all types of businesses, both profit and non-profit organizations? These questions are vital for defining the scope of corporate criminal liability.

Addressing the actus reus is also crucial. What actions qualify as criminal conduct, and what level of causal connection is necessary between the corporation and the criminal acts? These considerations are influenced by states' willingness to recognize collectiveness and attribute actions to the collective entity. This leads to questions about possible defences – can the corporation rely on compliance with due diligence norms, or is a defence for 'rogue employees' plausible?

Moreover, the mens rea, or mental state, is a challenging aspect to tackle. Determining liability based on the attributional model involves deciding what level of authority binds the corporation. On the other hand, following the organisational model requires establishing a corporate culture through which crimes occur. To adapt procedural safeguards to corporations, which are currently designed for individuals, is another issue to consider. Finding agreement on these complex matters is essential, and amending the Rome Statute will not be a swift process but might become feasible in a few years.

CONCLUSION AND MOVING FORWARD

The development of corporate criminal liability is a huge change in the corpus of international jurisprudence, which existed from its origin at the front of the 20th century to being now one of the most important aspects of modern international law. The U.S. Supreme Court's support for corporate criminal liability prosecution in 1909 launched a trend of what later would be called

attempts to resolve corporate immunity. As the Alien Tort Statute[50] rose and fell, this movement stemmed from a shared worry about corporate power being allowed to take such large steps.

The termination of the ATS has given rise to an event that has involuntarily given the evidence that corporate criminal liability is getting more and more important as an authentic option for invoking corporations and making them responsible. Corporate criminal liability is not reliable in resolving corporate malfeasance; however, it is the first major step in plugging in the voids caused by civil remedies. This is achieved further by the incorporation of corporate criminal liability in international law, especially within the ICC.

All in all, company liability for an offence may not yet remove all the concerns of corporate fraud. However, it is a basis for the setting of future law and regulation provisions. The continuous struggle to hold individuals and companies accountable in this dynamically changing sphere of law is proof that the international community is devoted to making the courts deliver the truth, no matter the challenges they face in their society or economy.

[50] Alien Tort Statute 1948