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Holding Corporations Liable Under the Rome Statute: Is It Really Necessary?

Summary. In regions flaked with civil wars and armed groups, it is not uncommon to find multi-national corporations directly or indirectly involved in hostilities and crimes against humanity. The existing judicial bodies in these areas are handicapped and unlikely to prosecute these much needed investors. Since domestic courts have not been able to hold either corporations and/or individuals behind them responsible for crimes against humanity, it was recommended that the International Criminal Court fill in the impunity gap. In addressing the debate whether the jurisdiction of the ICC should extend to such entities, this article questions the existing limitations of the ICC in trying corporations and the potential outcome of removing this bar. Further this article delves into the fundamental principles of International Criminal Law and analyses the various provisions of the Rome Statute under which individuals behind/responsible for crimes committed by corporations may be prosecuted and ultimately it demonstrates how the existing provisions of the Rome Statute are sufficient to bring the true culprits to justice.

Key words: ICC, corporate criminal liability, Rome Statute, jurisdiction, directors

Introduction

Globalisation is the process of international integration arising from the interchange of world views, products, ideas, and other aspects of culture[1]. A consequence of globalisation is that inter-connectedness of global economies has creat-

[*] This article reflects the position of the law as on 15 April 2014.

[1] See A. Rodhan, R.F. Nayef, G. Stoudman, *Definitions of Globalization: A Comprehensive Overview and a Proposed Definition*, Geneva Centre for Security Policy 2006.

ed an environment in which businesses are capable of carrying out their activities anywhere in the world while engaging with anyone of their choosing[2]. Powerful multinational corporations with headquarters in Western nations operate in many third world countries assisting in exploitation of natural resources such as oil and minerals. Perpetual succession, separate legal status, transnational operability and flexibility in transfer of ownership are amongst the chief reasons why an "incorporated" entity is the most preferred form of doing business globally.

In almost all developed countries stringent regulations of human rights and public accountability ensure good governance from corporates. Strict penal provisions and long term regulations keep corporates on the right side of the law even at the expense of reduced profits. However, in developing countries where the laws are not watertight, corporations or companies take advantage of the favourable business climate[3]. In fact that's the nature of business[4]. Companies engage in a range of activities to maximize profit and at times they do so with impunity. In regions flaked with civil wars and active armed groups, it is not uncommon to find corporations intentionally engaging in illegal business ventures. In some instances companies are also known to be directly involved in hostilities[5]. In such places the existent weak judiciaries facing numerous administrative and socio-legal challenges are unlikely to prosecute the much-needed investors for corporate malfeasance[6]. The strong influence that these companies exert economically, politically and financially through direct investments in such countries reduces the chances of the local legal systems to investigate into their culpability. Further in countries experiencing ongoing civil conflict, the systematic elimination of independent judges, prosecutors, and witnesses willing to testify eliminates any miniscule chance of prosecution and weakens the rule of the law[7].

Since domestic courts have not been able to hold either corporations and/or individuals behind them responsible for crimes against humanity it was suggested that international courts fill the impunity gap. With International ad hoc tribunals having almost exhausted their mandates The International Criminal Court (ICC) is now the single institution to try all war crimes. Part II of this article shows how corporations have been directly and indirectly engaging in such crimes against humanity that ought to be tried by the ICC. Since the jurisdiction of this court

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[2] J.B. Cullen, K.P. Parboteeah, *Multinational Management: A Strategic Approach*, Cengage Learning 2011, p. 7.

[3] M.J. Kelly, *Ending Corporate Impunity For Genocide: The Case Against China's State-Owned Petroleum Company In Sudan*, "Oregon Law Review" 2011, Vol. 90.

[4] Ibidem.

[5] This would be illustrated in detail in part II of this article

[6] J. Graff, *Corporate War Criminals and the International Criminal Court: Blood and Profits in the Democratic Republic of Congo*, "Human Rights Brief" 2004, Vol. 11, Issue 2.

[7] Ibidem.

extends only to natural persons, corporations are excluded from its ambit[8]. Hence part III of this article addresses the ongoing debate whether the jurisdiction of the ICC should be extended to try corporations or not. While questioning the existing limitations, it also investigates the possible outcome of removing them. Taking the above debate as a focal point, this article touches upon questions that go into the basic tenets of International Criminal Law. Part IV deals with the various provisions of the Rome Statute under which individuals responsible for crimes committed by corporations may be prosecuted by the ICC and then proceeds to show how these provisions are sufficient enough bring the true perpetrators to justice. It obviates the need of extending the jurisdiction of the ICC to corporates. Part V presents the concluding comments.

1. Corporations and Crimes Against Humanity

Generally the aim of corporations is to maximise profits. It´s not uncommon to see environmental and human rights concerns being trampled in the pursuit of this sacred corporate endeavour. Corporations have been known to be involved in grave criminal atrocities in a number of ways. They may either directly aid or abet crimes in conflict zones or provide the financial machinery required to sustain conflicts. Further, companies might also be involved in supporting the persecution of dissidents in these regions.

1.1. Direct Collaboration with Military Regimes in Conflict Zones

In majority of military dictatorships governments use repression in the enforcement of political and economic policies as a result of which, workers and trade unionists as well as protestors and general oppositionists are often harshly persecuted[9]. In such situations, companies may profit from collaborating with an abusive regime[10]. Several cases of such support can be seen in the last few decades. Union Oil Company of California (Unocal), a major petroleum explorer and marketer had aided and abetted the government of Myanmar in committing human rights abuse. For its part, the Myanmar military provided Unocal with security and other

[8] Article 25(1), UN General Assembly, Rome Statute of the International Criminal Court, 17 July 1998.

[9] W. Kaleck, M. Saage-Maab, *Corporate Accountability For Human Rights Violations Amounting to International Crimes – The Status Quo and its Challenges*, "Journal of International Criminal Justice" 2010, Vol. 8.

[10] Ibidem.

services for a pipeline project[11]. During the South African apartheid regime a number of multinational corporates were known to have aided and abetted human rights violations committed by the apartheid regime by supplying weapons, vehicles with specific military equipment and computer systems[12]. In Iraq, the Dutch corporation FCA Contractors aided and abetted war crimes by supplying the Iraqi government with chemicals needed for the production of mustard gas, which was used in massacres against Kurdish minorities in Iraq[13]. In another significant case which had resulted in the famous Kiobel-Alien Tort Claims Act litigation in America, Royal Dutch/Shell worked for decades with the Nigerian military regime to suppress any and all demonstrations that were carried out in opposition to the oil company's activities[14]. The oil company and its Nigerian subsidiary provided logistics to the Nigerian police and bribed witnesses to produce false testimonies[15]. Furthermore, the company and its subsidiary allegedly colluded with the Nigerian government in carrying out summary executions, crimes against humanity, torture, inhumane treatment, arbitrary arrest, wrongful death, assault and battery etc.[16]

1.2. Financial Support to Aid Conflicts

Corporations are also known to provide the financial machinery and financially support many conflicts. A number of banks have been accused of aiding and abetting the Argentinean junta and the South African apartheid regime[17]. It has been argued, that loans provided by banks to these regimes helped encourage a policy of growing military expenditure and that the regime could not have supported their systematic human rights abuse and torture apparatus without the loans from these banks[18]. Even the Royal Dutch/Shell was known to have provided a considerable amount of monetary support to the Nigerian Military Regime. According to court documents, between 1997 and 2004, officers of a Chiquita subsidiary paid approximately $1.7 million to the right-wing United Self-Defense Forces of Colombia

[11] Doe v. Unocal, 395 F.3d 932, 947, 9th Circuit 2002, 939.

[12] T. Nemeroff, *Untying the Khulumani Knot: Aiding and Abetting Liability under the Alien Torts Claims Act after Sosa*, "Columbia Human Rights Law Review" 2008, Vol. 40.

[13] Public Prosecutor v. Van Anraat, LJN AU8685, The Hague District Court, 23 December 2005, 13.

[14] Wiwa v. Royal Dutch Petroleum, Wiwa v. Anderson and Wiwa v. Shell Petroleum Development Company were three lawsuits filed on behalf of relatives of murdered activists who were fighting for human rights and environmental justice in Nigeria.

[15] Wiwa v. Royal Dutch Petroleum Note, "Centre for Constitutional Rights", www.ccrjustice.org/ourcases/current-cases/wiwa-v.-royal-dutch-petroleum%20 [31.01.2014].

[16] Ibidem.

[17] In re South African Apartheid Litigation, 02 MDL 1499, 57.

[18] Ibidem.

(AUC). Similar payments were also made to the Revolutionary Armed Forces of Colombia (FARC), as well as the National Liberation Army (ELN) from 1989 to 1997, both left-wing organisations[19]. All three of these groups are on the U.S. State Department's list of Foreign Terrorist Organisations. The United Self-Defense Forces of Colombia was responsible for killing several thousand civilians, particularly trade union activists and leaders employed on the Chiquita Brands plantations[20]. Interestingly, Fenando de Aguirre, the President and CEO of the company said the the sole reason for submitting to these payment demands was to protect its employees from "risks to their safety if the payments were not made"[21]. Furthermore, corporations are also known to fuel ongoing conflicts by trading in weapons, diamonds and timber[22]. It is believed that the participation of these foreign entities effectively sustained the conflict in Liberia and Sierra Leone[23].

1.3. Supporting Persecution of Political Dissidents

Companies also directly support the persecution of political dissidents. A typical example of this category would include high-ranking company managers passing on personal information of regime critics working in their factories to state security forces[24]. In a particular case, sixteen union activists working for Mercedes Benz in Argentina were arrested by the junta's military police and later disappeared[25]. In one case, the manager of the plant allegedly facilitated the arrest, torture and disappearance of a union worker by giving military personnel access to him in the workplace and by passing on the private addresses of the other workers, where-they were later arrested[26]. In a similar instance at the Ford plant in a Buenos Aires Province, trade unionists were arrested by the military and held in prisons on the plant property where they were tortured[27]. The practice of passing on private in-

[19] See G. Taylor, P. Scharlin, *Smart Alliance: How Global Capitalism and Environmental Activists Transformed a Tarnished Brand*, Yale University Press, New Haven, CT 2004.

[20] Doe v. Chiquita Brands International, United District Court District of New Jersey, Class Action Complaint for Damages, www.earthrights.org/sitesjdefault/files/ [31.01.2014].

[21] J. Hallinan, *Chiquita Says It Paid Terrorists to Protect Workers in Columbia*, "Wall Street Journal", 24 November 2013.

[22] W. Kaleck, M. Saage-Maab, op. cit.

[23] *Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of Congo,* UN Doc. S/2002/1146, 16 October 2002.

[24] W. Kaleck, M. Saage-Maab, op. cit.

[25] Ibidem.

[26] R. Azul, *Argentine Victims of Dirty War to Sue Daimler Benz in US Court*, "World Socialist Web Site", May 2011, www.wsws.org/en/articles/2011/05/arge-m23.html?utm_source=twitterfeed&utm_medium=twitter [31.01.2014].

[27] P.H. Lewis, *Guerrillas and Generals: The "Dirty War" in Argentina*, Praeger, Westport, CT 2002, p. 148.

formation of anti-apartheid activists and facilitating their arrest, torture and killing was also a claim made against Mercedes Benz in the South African Apartheid Regime[28]. In another famous ATCA litigation of *Saleh v. Titan* two US government contractors – the Titan Corporation and CACI International Inc. were involved in interrogation and translation services at the infamous Abu Ghraib prison and other detention facilities in Iraq, where through their employees they directed and participated in, inter alia, violations of international law, including torture, cruel, inhuman, or degrading treatment, war crimes and crimes against humanity[29].

2. Holding Corporations Responsible – A Viable Solution?

2.1. Should Corporations Be Held Liable?

As seen in the preceding part, corporations are extensively involved in human rights violations globally. Prima facie, there is merit in the argument that they should be tried under the Statute. The drafting stage of the Rome Statute had seen discussions regarding the inclusion of corporations within the ambit of the ICCs jurisdiction[30]. France put forth the proposal that ICC should have jurisdiction over crimes committed on behalf of legal persons or by their agents or representatives[31]. Over the years this view has found much popularity in academic writings[32] with the ICCs very own prosecutor voicing his support for such a move[33]. The UN Secretary-general´s special representative for business and human rights John Ruggie in his report states:

> By far the most consequential legal development identified in my 2007 report is the growing potential for companies to be held liable for international crimes-with re-

[28] G. Weber, *Mercedes Benz: Industry and Human Rights*, "Le Monde Diplomatique – Southern Cone edition, Buenos Aires", December 2000.

[29] Saleh et al. v. Titan et al., ccrjustice.org/ourcases/current-casesjsaleh-v.-titan [31.01.2014].

[30] *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, Annex II, 58-60, U.N. Doc. A/50/22, 1995.

[31] *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, Vol. II at 49, U.N Doc. A/CONF.183/2/ADD.1, 1996.

[32] See generally L. van den Herik, J. Letnar Černič, *Regulating Corporations under International Law*, "Journal of International Criminal Justice" 2010, Vol. 8; J. Kyriakakis, *Corporate Criminal Liability and the ICC Statute: The Comparative Law Challenge*, "Netherlands International Law Review" 2006, Vol. 56(3); J. Graff, op. cit.; A. Martin, *Corporate Liability For Violations of International Human Rights: Law*, "Minnesota Journal of International Law Online" 2012, Vol. 21; D. Stoitchkova, *Towards Corporate Liability in International Criminal Law*, Intersentia, Mortsel 2010.

[33] Press release: ICC Prosecutor, Communications Received by the Office of the Prosecutor of the ICC, 16 May 2003.

sponsibility imposed under domestic law but reflecting international standards of individual responsibility, as codified by the international ad hoc criminal tribunals and especially by the ICC statute[34].

Holding a corporation liable, permits imposing criminal sanctions which are necessary to indicate the society's condemnation of the corporate wrongdoing[35]. Such corporate criminal liability is necessary to deter corporations from engaging in criminal activities[36]. Imposing corporate criminal liability would allow for sanctions against and seizing of corporate assets – which, in turn, could generate funds for victims or their beneficiaries[37]. It is often considered expedient to prosecute only the corporation because it saves investigating and prosecuting officials from the trouble of searching behind the corporate veil to identify the actual director, manager or employee responsible for the crime[38]. At times culpable individuals are not always easily identifiable[39]. This is particularly true in large and complex corporations[40].

2.2. The Problem with Holding Corporations Responsible

From the above arguments it would seem imperative to bring corporations under the ambit of the ICC. However, inter alia two main issues arise: the first being the adverse consequences on the shareholders and the second being the procedural issues in dealing with complex transnational corporate structures.

A. Adverse Consequences on Innocent Shareholders

Unlike natural persons corporations cannot be imprisoned, the punishment typically applicable to corporations is economic sanctions or other forms of economic disabilities, which may even extend to winding up of the company. In turn, when a corporation is held responsible, the net result is that the shareholders must pay.

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[34] J. G. Ruggie, *Business and Human Rights: The Evolving International Agenda*, Corporate Social Responsibility Initiative*,* Working Paper No. 31, Cambridge, MA 2007, p. 17.

[35] S.S. Beale, A.G. Safwat, *What Developments in Western Europe Tell Us About American Critiques of Corporate Criminal Liability*, "Buffalo Criminal Law Review" 2004, Vol. 8.

[36] J. Chella, *The Complicity of Multinational Corporations in International Crimes: An Examination of Principles*, doctoral dissertation, Bond University-Faculty of Law, 2012, p. 68.

[37] M. Kremnitzer, *A Possible Case for Imposing Criminal Liability on Corporations in International Criminal Law*, "Journal of International Criminal Justice" 2010, Vol. 8(3), p. 909.

[38] A. Vercher, *Some Reflections On the Use of Criminal Law For the Protection of the Environment*, www.defensesociale.org/02/13.pdf [31.01.2014].

[39] J. Clough, C. Mulhern, *The Prosecution of Corporations,* Oxford University Press, Oxford 2002.

[40] A. Vercher, op. cit.

In 2007 Chiquita Brands International Inc. ("Chiquita"), a multinational corporation incorporated in New Jersey with headquartes in Cincinnati, Ohio, pleaded guilty of funding terrorist groups in Colombia and agreed to pay USD 25 million in fines[41]. This was however, not the end of the shareholder's woes. In the same year victims of Colombia's civil conflict sued the company, accusing it of making payments to a paramilitary group responsible for thousands of killings. The plaintiffs included relatives of 387 people thought to have been killed by the group. The families are seeking $7.86 billion in damages from Chiquita, which they accuse of abetting atrocities including terrorism, war crimes and crimes against humanity[42]. Naturally such pay-outs would adversely impact the fortunes of the shareholders.

In many Companies shareholders would be third party individuals in foreign lands totally detached both in intention and behaviour from the primary criminal offense. In most cases, these shareholders would be mere investors or speculators who are looking at corporate gains[43] and have no intention whatsoever to support war crimes. Perhaps it would be safe to assume, that infact most shareholders would themselves condemn the acts that these corporations would be accused of. In such conditions it is not fair in light of justice and equity, that innocent shareholders take the blade for acts of the directors or other management involved, when in fact such directors or other management may get away with minimal or no punishment at all.

B. Difficulty in Holding Corporations Liable

The structure of multinational corporations often makes it difficult to pin liability. By definition, multinational corporations or MNCs are commercial entities that are engaged in business activities in more than one state[44]. Multinational corporations participate in large-scale, cross-border activities. The headquarters of an MNC could be located in one state while operating business activities in other states, through subsidiaries or other contractual relationships[45]. In such situations,

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[41] *Chiquita Brands International Pleads Guilty to Making Payments to a Designated Terrorist Organization and Agrees to Pay $25 Million Fine*, Department of Justice 2007, www.justice.gov/opa/pr/2007/March/07_nsd_161.html [31.01.2014].

[42] *Victims of Colombian Conflict Sue Chiquita Brands*, "New York Times", 15 November 2007, www.nytimes.com/2007/11/15/business/worldbusiness/15chiquita.html?_r=0 [31.01.2014].

[43] Commercial activities carried out by MNC's in conflict zones including exploration, mining, agriculture are often commercially very viable.

[44] P. Fischer, *Transnational Enterprises*, in: *Encyclopaedia of Public International Law*, ed. R. Bernhardt, North Holland Publishing Company 1985, p. 515.

[45] M. Likosky, *Contracting and Regulating Issues in the Oil and Gas and Metallic Minerals Industries*, "Transnational Corporations" 2009, Vol. 18(1); See also BP, *Where we Operate*, www.bp.com. British Petroleum one of the largest energy companies in the world has its head office in the UK, exploration and production facilities in over 30 countries and supplies products and services in over a 100 countries.

identifying the true corporation responsible would be troublesome. Furthermore, multinational businesses tend to adopt wide-ranging internal control systems with respect to the pattern of their decision-making. These systems make it difficult to attribute liability and at times, shield enterprises within the same corporate group[46]. Also an attempt to hold the principal corporation liable in all cases would fail because in a lot of instances the large network of operation systems that these companies have, would see the principal corporations completely detached from the corporation involved in carrying out the crime.

C. Is Piercing the Veil a Solution?

In law, according to the corporate entity doctrine a company exists as an entity having a separate identity, distinct from those of its shareholders and directors who exist behind the "veil"[47]. A basic principle of corporate law is thus, that the shareholders or directors of a corporation are not liable for the obligations of the corporation[48]. Jurisdictions all over have traditionally recognised this rule. However, modern laws have seen that when the corporation has been used to injure, maim and wrongly protect those who are guilty, courts ignore the corporate entity doctrine and hold shareholders and/or directors personally liable for corporate obligations[49]. This holding of shareholders or directors personally liable for wrong doings of the company is known as "piercing the corporate veil".

The guiding principle behind this piercing the corporate veil is that: "A corporation will be looked upon as a legal entity as a general rule […] but, when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons"[50].

While piercing the corporate veil has been successfully used in tax regimes it is highly debatable how this principal would work in holding shareholders in distant countries liable for war crimes. As stated earlier, most corporations have large and complex structures with institutional, individual and corporate shareholders located all over the world. In some cases corporations are partly state owned. A provision that would allow the corporate veil to be pierced and hold such persons of the company liable would result in utter chaos, mischief and confusion with individuals having no connection with the crimes being held liable for the offences.

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[46] J. Chella, op. cit., p. 76.

[47] W.L. Cary, M.A. Eisenberg, *Corporations: Cases And Materials*, Foundation Press, New York 1988, p. 91.

[48] Ibidem.

[49] *Piercing the Corporate Veil*, National Paralegal Education, nationalparalegal.edu/public_documents/courseware_asp_files/businessLaw/Directors&Officers/PiercingCorporateVeil.asp [31.01.2014].

[50] Milwaukee Refrigerator Transit Co 142 F.

3. Individual Liability for Offences by Corporations a the ICC

While Corporations are responsible for crimes, the previous section showed how it is not desirable to bring corporations within the jurisdiction of the ICC. A company is an artificial person and though it has a legal status, it does not have a mind of its own. The actions of a company are in effect the actions desired by the persons controlling the company, be it the board of directors or the management. This section will try to examine provisions of the Rome Statute and see the various modes in which the ICC can hold directors, officers and managers of a company liable for the crime committed by a "company" and analyse whether or not the existing framework is suitable for addressing crimes committed by corporations.

3.1. Superior Command Responsibility

At times, military commanders though not involved in actual hostilities become liable for crimes by the doctrine of superior command responsibility. Since directors of the company sit in positions similar to military generals they might also become criminally liable under the doctrine of superior responsibility[51]. A superior is responsible if he fails to take the necessary and reasonable measures either to prevent or to suppress an international crime committed by a subordinate[52]. Article 28(b) of the ICC Statute explicitly deals with this. His responsibility may be derived from *de jure* or *de facto* authority[53]. The superior must be in a position of **"effective control"** in the sense of having the "material ability to prevent or punish" and mere substantial influence is not enough[54]. The degree of control of a civilian leader over a subordinate must be similar to that of his military counterpart – but its manner and nature may be different[55]. With regard to the superior-subordinate relationship, it is well established that with respect to the *mens rea* required of a superior, the standard for a civilian superior is either knowledge of the crimes that will be or were already committed or conscious disregard of information clearly indicative of such crimes[56]. An illustration of such a form of liabil-

[51] B.B. Jia, *The Doctrine of Command Responsibility: Current Problems*, "Yearbook of International Humanitarian Law*"* 2000*,* Vol. 3.

[52] M. Damaska, *The Shadow Side of Command Responsibility*, "The American Journal of Comparative Law" 2001, Vol. 49.

[53] H. Vest, *Business Leaders and Modes of Individual Criminal Responsibility*, "Journal of International Criminal Justice" 2010, Vol. 8.

[54] G. Mettraux, *The Law of Command Responsibility,* Oxford University Press, Oxford 2009, p. 188.

[55] Judgment, *Aleksovski* (IT-95-14/1-T), Trial Chamber, 25 June 1999, § 78.

[56] H. Vest, op. cit.

ity in businesses would be where the directors of an arms production company are not able to stop their managers from selling arms to rebels involved in hostilities even when they are aware that the rebels are involved in war crimes. Based on doctrine and law of superior responsibility, directors and officers of a corporation can be held liable for a crime ostensibly done by the incorporated entity.

3.2. Aiding and Abetting Crimes

Aiding and abetting is a form of derivative liability and covers those who assist another in the commission of a crime[57]. The Rome Statute provides that a person will be criminally responsible for a Rome Statute crime in cases where that person for the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission[58].

For aiding and abetting, an offender's acts must provide substantial assistance to the commission of a crime, with knowledge that such acts would assist the commission of those crimes or with the awareness as to the substantial likelihood that such acts would render assistance[59]. Generally aiding and abetting requires a three part test: (i) the (attempted) commission of a crime by the primary party; (ii) the material (physical or psychological) act of contribution which; (iii) has to be committed knowingly[60].

Aiding and abetting does not require physical presence at the scene of the crime[61]. The act of aiding or abetting may be provided at any stage – planning, preparation, or execution of the criminal process[62]. The contribution "may take the form of a positive act or an omission, and it may occur before, during, or after the fact of the principal offender"[63]. Furthermore, a causal link is required between the assistance rendered and the principal crime for imposing this form of individual liability[64].

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[57] J. Kyriakakis, *Developments in International Criminal Law and the Case of Business Involvement in International Crimes*, "International Review of the Red Cross" 2012, Vol. 94, No. 887.

[58] Article 25(3)(c)UN General Assembly, Rome Statute of the International Criminal Court, 17 July 1998.

[59] SCSL, Prosecutor v. Charles Ghankay Taylor, Case No. SCSL-03-01-T, Judgement Trial Chamber II, 18 May 2012, p. 6904.

[60] W.A. Schabas, *Enforcing International Humanitarian Law: Catching the Accomplices*, "International Review of the Red Cross" 2001, Vol. 83.

[61] H. Vest, op. cit.

[62] G. Mettraux, *International Crimes and the* Ad Hoc *Tribunals*, Oxford University Press, New York 2005, p. 285.

[63] Ibidem.

[64] M.D. Dubber, *Criminal Law: Model Penal Code*, Foundation Press, New York 2002, p. 113.

Aiding means giving physical or material assistance to a crime such as providing the means for its commission. Abetting is facilitating the crime by means of supporting the perpetrator psychologically or morally, i.e. encouraging him[65]. Corporate actions normally emanate from the board of directors and as described above may take the form of aiding and abetting. The existing law very clearly provides a mechanism for holding a director or an officer of the company accountable for an act done by subordinate staff on behalf of the company.

In one case Gerard Ntakirutimana a medical director at Mugonero hospital played a substantial role in a massacre at the hospital, by providing a weapon to the principal with the knowledge that the principal will use that weapon to take part with others in mass killings[66]. In this case the Appeals Chamber held that such an act would amount to aiding and abetting the crime of extermination[67]. In the Charles Taylor case, Taylor was convicted of aiding and abetting rebel crimes by facilitating a steady provision of arms and ammunition[68]. In line of these reasoning's in *Blagojevic & Jakie* the Appeals Chamber had explicitly stated that, where the accused knowingly participated in the commission of an offence and his or her participation substantially affected the commission of that offence, the fact that his or her participation amounted to no more than his or her "routine duties" will not exculpate the accused[69].

Therefore, it seems obvious that the result would be the same in the case of a business man delivering weapons to a group, e.g. fighting in a civil war, even if arms production and/or arms trade is his ordinary business[70].

3.3. Participation in a Group Crime

A lower form of individual responsibility is via active participation in a group crime. A person who contributes "in any other way" to the commission or attempted commission of a crime "by a group of persons acting with a common purpose" incurs individual criminal responsibility[71]. This mode of contribution requires the commission or attempted commission of a crime by a group acting with a com-

[65] J. Dressler, *Understanding Criminal Law*, Lexis, New York 2006, pp. 506-507.

[66] Judgment *Ntakirutinuma & Ntakimtimana*, ICTR-96-10-A & IT-96-17-A), Appeals Chamber, 13 December 2004, § 530.

[67] Ibidem.

[68] SCSL, Prosecutor v. Charles Ghankay Taylor, Case No. SCSL-03-01-T, Judgement (Trial Chamber II), 18 May 2012, pp. 6972–9686.

[69] Judgment, *Blagojevic & Jokic*, IT-02-60-A, Appeals Chamber, 9 May 2007, § 189.

[70] H. Vest, op. cit.

[71] Article 25 (3) (d), UN General Assembly, Rome Statute of the International Criminal Court, 17 July 1998.

mon purpose. It has been forwarded that a "group" "must consist of at least three persons who are connected by the same purpose"[72]. This mode of responsibility establishes the lowest threshold for individual responsibility[73].

The *mens rea* of this kind of assistance must be intentional requiring either (i) "the aim of furthering the criminal activity of criminal purpose of the group"; or (ii) "the knowledge of the intention of the group to commit a crime"[74]. In the first instance, the participant must share the intent to further the criminal activity or purpose of the group "where such activity or purpose involves the commission of a crime within the jurisdiction of the Court"[75]. The second alternative calls for the knowledge that the group's intention is directed towards a certain crime[76]. Since the assistance is referring to a future conduct of a group of persons, the substantial likelihood that a certain crime will be committed may be enough[77].

In the Zyklon B case a Hamburg based company Tesch & Stabenow distributed huge amounts of prussic acid to the Nazi Government[78]. The company's owner and his deputies knew of the purpose to which their gas was being put[79]. As Fletcher and Ohlin state, a typical scenario of this case would be a similar kind of contribution where the directors/owners knew of the purpose for which their products were being used however, at the same time their knowledge lacked the required intent to hold them liable as aiders or abettors to the crime,[80] but they would be liable for having participated in a group crime.

In another example, such as the case of an activity like an arms deal, where the prosecution can only establish that the respective business leaders have acted with knowledge but lack purpose and *mens rea* for the advancement of their crime, this provision of the ICC Statute may serve to hold them liable on the failure of the predominant contention that the corporate officers are aiders and abettors to the crime.

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[72] A. Eser*, Individual Criminal Responsibility*, in: *The Rome Statute of the International Criminal Court: A Commentary*, vol. I, eds. A. Cassese, P. Gaeta, J.R.W.D. Jones, Oxford University Press, New York 2002, p. 802.

[73] Ibidem.

[74] K. Ambos, *Art. 25*, in: *Commentary Of the Rome Statute of the International Criminal Court*, ed. O. Triffterer, Beck/Hart Nomos, Munich 2008, pp. 762-763.

[75] Ibidem.

[76] Ibidem.

[77] Ch. Burchard, *Ancillary and Neutral Business Contributions to ‚Corporate-Political Core Crime' Initial Enquiries Concerning the Rome Statute*, "Journal of International Criminal Justice" 2010, Vol 8.

[78] *Trial of Bruno Tesch and two others (Zyklon B case)*, Law Reports of Trials of War Criminals (LRTWC), Vol. I, H.M.S.O, London 1947-1949, p. 101.

[79] Ibidem.

[80] G.P. Fletcher, J.D. Ohlin, *Reclaiming Fundamental Principles of Criminal Law and the Darfur Case*, "Journal of International Criminal Justice" 2005, Vol. 3, p. 549.

3.4. Indirect Perpetration Through an Organisation

A new development in international criminal jurisprudence, seen with respect to forms of responsibility has been the adoption by the ICC of the notion of indirect perpetration through an organisation[81]. The concept of indirect perpetration through an organisation, though well known in some domestic legal systems is a rather novel concept in international jurisprudence[82]. Previously, the notion of joint criminal enterprise had been the primary means for allocating responsibility to individuals who make decisions at the highest level, leading to the commission of international crimes[83]. While joint criminal enterprise was utilised significantly in the ad hoc tribunals, the ICC has rejected this doctrine in its early jurisprudence, adopting instead complex notions of co-perpetration and indirect perpetration based on the concept of control of the crime[84].

Indirect perpetration through an organisation is generally concerned with organisations that, to some extent develop a life independent of the changing existence of their members[85]. A similar idea has been described by Fisse and Braithwaite in their critiques of attempts to individualise accountability in the context of corporate crimes[86]. Fisse and Braithwaite have shown how in various ways business corporations transcend the individuals who may pass through the company without affecting change[87]. According to the notion of indirect perpetration through an organisation, a person can be liable as a direct perpetrator of a crime in cases where despite not being physically present in the actual commission of the crime, the person uses their control over the organisation so as to ensure that the crime will occur[88]. This principle of indirect perpetration finds its roots in Article 25(3)(a) of the Rome Statute[89]. Despite the name, it is a means by which the court attributes direct liability on the perpetrator as a principal of

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[81] G. Werle, B. Burghardt, *Indirect Perpetration: A Perfect Fit for International Prosecution of Armchair Killers?*, "Journal of International Criminal Justice" 2011, Vol. 9, No. 1, p. 85.

[82] J. Kyriakakis, *Developments in International Criminal Law…*, op. cit.

[83] S. Manacorda, Ch. Meloni, *Indirect Perpetration Versus Joint Criminal Enterprise: Concurring Approaches in the Practice of International Criminal Law*, "Journal of International Criminal Justice" 2011, Vol. 9.

[84] Ibidem at 163.

[85] N. Jain, *The Control Theory of Perpetration in International Criminal Law*, "Chicago Journal of International Law" 2011, Vol. 12, No. 1.

[86] B. Fisse, J. Braithwaite, *Corporations, Crime and Accountability*, Cambridge University Press, Cambridge 1993.

[87] Ibidem.

[88] N. Jain, op. cit.

[89] Article 25(3)(a) states that a person will be criminally responsible for a Rome Statute crime where such a person "commits the crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible".

the crime regardless of whether they are physically removed from the direct commission of the offence[90].

The ICC had declared that:

> principals to a crime are not limited to those who physically carry out the objective elements of the offence but also include those who, in spite of being removed from the scene of the crime, control or mastermind its commission because they decide whether and how the offence will be committed[91].

The Pre Trial Chamber (Chamber) interprets the "control or mastermind" formula to include the situation where a person "has control over the will of those who carry out the objective elements of the offence"[92]. Since Article 25(3)(a) ICC Statute explicitly declares it to be irrelevant whether the person through whom the crime is committed himself acts culpably or not, the Chamber concludes that "control over the immediate actor can also be exerted by means of an organisation"[93].

As the crimes covered by the ICC Statute "will almost inevitably concern collective or mass criminality", the Chamber had stated that the Statute must be understood in order to encompass organisational control as a form of perpetratorship by specifically regulating the commission of a crime through another responsible person. The Statute targets those categories of cases which involve a perpetrator's control over the organisation[94]. The Chamber defines the necessary elements of an "organisation" by which the perpetrator can control the will of his subordinates[95]. The Chamber finds that the organisation must be based on hierarchical relations between superiors and subordinates[96]. The organisation must also be composed of sufficient subordinates to guarantee that superiors' orders will be carried out, if not by one subordinate, then by another[97]. These criteria ensure that orders given by the recognised leadership will generally be complied with by their subordinates[98]. Indirect perpetration is based upon the idea that principals and accessories are normatively different in terms of moral blameworthiness[99]. Through the adoption of this doctrine by the ICC, the court has ostensibly taken the interpretation that the various Article 25(3) forms of responsibility reflect a hierarchy of moral

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[90] J. Kyriakakis, *Developments in International Criminal Law*…, op. cit.

[91] Decision on the Confirmation of Charges, Prosecutor v. Thomas Lubanga Dyilo (ICC-01/04-01/ 06), Pre-Trial Chamber I, 29 January 2007, pp. 332-333.

[92] Decision on the Confirmation of Charges, Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui (ICC-01/04-01/07), Pre-Trial Chamber I, 30 September 2008, p. 501.

[93] Ibidem at 498.

[94] Ibidem at 512.

[95] Ibidem at 512-517.

[96] Ibidem.

[97] Ibidem.

[98] Judgement Pursuant to Article 74 of the Statute, Concurring Opinion of Judge Christine Van den Wyngaert (Trial Chamber II), 18 December 2012, pp. 24-26.

[99] Ibidem.

blameworthiness with the individual commissioning the crime being more guilty than the ones merely carrying out the orders[100].

Indirect perpetration through an organisation is thus a form of liability intended to describe those armchair masterminds not as the ones who "simply" ordered, or planned, or aided the crime but as its direct perpetrators[101]. This doctrine has been developed in order to capture the "armchair" perpetrator as a principal rather than an accessory to a crime[102]. The inclusion of the notion of committing a crime "through another person" in Article 25(3)(a) led some commentators to state that this form of liability may have a particular value to the prosecution of business officials who commit crimes through the instrumentality of a business organisation[103].

Conclusion – Is the Rome Statute Suitable Enough?

The ICC has no jurisdiction over corporations and even its Statute lacks specific provisions to hold directors personally liable for crimes. Is the solution to this an amendment to the Rome Statue allowing for the inclusion of corporations within the ICC's jurisdiction? Does this mean that until such time acts done by corporations and persons controlling them are not within the jurisdiction of the ICC? The answer to these is in the negative. The ICC through its provisions on individual liability does allow one to ignore the existence of a company and yet look into its internal workings, so as to see the individuals behind the crime and examine their involvement in the crime, thus holding directors and officers liable wherever necessary. Hence, suggestions to include "corporations" within the jurisdiction of the Rome Statute are not only fraught with complications, but in fact they are not necessary at all.

For example – a company A is involved in producing chemicals X used to carry out racial killings in a region of conflict. The directors are aware of the nature of those chemicals and also have knowledge of the purposes for which such chemicals are used and supplied. All the transactions of such chemicals are carried out by junior managers a fact which is also known by senior executives. In this example the chemicals are produced by a company and not by any individual, yet

[100] T. Weigend, *Perpetration Through an Organisation: The Unexpected Career of a German Legal Concept*, "Journal of International Criminal Justice" 2011, Vol. 9, No. 1, pp. 94–97.

[101] J. Kyriakakis, op. cit.

[102] G. Werle, B. Burghardt, op. cit.

[103] A. Clapham, *'The Complexity of International Criminal Law: Looking Beyond Individual Responsibility to the Responsibility of Organizations, Corporations and States'*, in: *Sovereign Impunity to International Accountability: the Search for Justice in a World of States*, eds. R.Ch. Thakur, P. Malcontent, United Nations Press, Tokyo 2004, p. 239.

the provisions of the Rome Statute do not absolve the directors/managers of the company of any guilt. Infact, liabilities can be imposed on the directors through several mechanisms ranging all the way from aiding and abetting racial killings[104], to being involved in a group enterprise[105] and finally, under the doctrine of superior responsibility[106] for not stopping their junior managers from permitting the chemicals to be used for killings. Thus, essentially what the Rome Statute allows is to look into the internal workings of the companies, so as to see the act carried out and accord to individuals varying liabilities commensurate with their culpability. The mere fact that the crime is carried out by a company does not protect any individual and it is no defense that this is an act of the company and not that of an individual.

In another illustration let's assume company A is producing chemical X and is personally carrying out the targeted killings in its corporate personality. All the chambers used to gas individuals are operated by local villagers who are severely famished and would do pretty much anything for food and money. The main brain involved in this case is those of the directors of the company who sit in positions totally detached from the crime scene yet essentially control the company. In such a case the Rome Statute would in fact hold the directors personally liable as principals of the crimes rather than as accessories to the crime via its provisions on indirect perpetration. The centrality of "control" to the notion of indirect perpetration through an organisation might be said to constitute the means by which the organisational veil is pierced in order to find the individual perpetrator behind the organisational structure. This is a notionally similar to the centrality of control as in the mechanism of piercing the corporate veil, in order to identify the true person liable for the commission of the crime[107].

Thus, even though the Rome Statute does not allow for holding a corporation liable or for a consequential piercing of the corporate veil and a subsequent imposition of liability on the directors, yet it deftly allows for investigating into the internal working of the company to see the individual perpetrators behind the corporate veil. This looking into the companies' workings to find the individual perpetrators is an excellent mode of addressing crimes by corporations, which is flexible enough to make culpable those involved in crimes and yet at the same time not impose unnecessary difficulties on individuals, such as investors and shareholders who are literally detached and isolated from the crime both in mind and body.

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[104] Article 25 (3) (c), UN General Assembly, Rome Statute of the International Criminal Court, 17 July 1998.

[105] Article 28 (b), UN General Assembly, Rome Statute of the International Criminal Court, 17 July 1998.

[106] Article 25 (3) (d), UN General Assembly, Rome Statute of the International Criminal Court, 17 July 1998.

[107] For a critical analysis of the bases upon which the corporate veil can be pierced, see P. Muchlinski, *Limited Liability and Multinational Enterprises: A Case for Reform*, "Cambridge Journal of Economics" 2010, Vol. 34.

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Pociągnięcie przedsiębiorstw do odpowiedzialności w ramach postanowień Statutu Rzymskiego – czy naprawdę jest to konieczne?

Streszczenie. W rejonach nawiedzanych przez wojny domowe i grupy zbrojne nie jest rzadkim zjawiskiem zaangażowanie (bezpośrednie lub pośrednie) w działania wojenne lub zbrodnie przeciwko ludzkości ze strony przedsiębiorstw międzynarodowych. Istniejące instytucje wymiaru sprawiedliwości są w takich sprawach bezradne i nie są skore do stawiania tym przedsiębiorstwom jakichkolwiek zarzutów. Skoro sądy krajowe nie są w stanie udowodnić firmom lub osobom prywatnym winy zbrodni przeciw ludzkości, to zaproponowano, by tymi sprawami zajął się Międzynarodowy Trybunał Karny. Autorzy tego artykułu, odnosząc się do debaty, czy powinno się rozszerzyć jurysdykcję Międzynarodowego Trybunału Karnego na tego typu podmioty, podają w wątpliwość istniejące ograniczenia Trybunału i zastanawiają się nad potencjalnymi skutkami zniesienia tych ograniczeń. W dalszej części autorzy omawiają podstawowe zasady międzynarodowego prawa karnego i poddają analizie różne postanowienia Statutu Rzymskiego, które mogłyby posłużyć do postawienia zarzutów przedsiębiorstwom dopuszczających się zbrodni przeciwko ludzkości.

Słowa kluczowe: Międzynarodowy Trybunał Karny, odpowiedzialność karna przedsiębiorstw, Statut Rzymski, jurysdykcja, dyrektorzy