

# Establishing Corporate Criminal Liability for Crimes Against Humanity

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## I. INTRODUCTION

A pervasive culture of impunity surrounds corporate involvement in grave international crimes. Presently, there is no international mechanism to punish corporations for serious international crimes, as the jurisdiction of the International Criminal Court (“ICC”) does not permit holding legal persons criminally liable.<sup>1</sup> This has enabled corporations to act without accountability as domestic prosecutions have been largely sparse and unsuccessful. More importantly, cases of corporate complicity in international crimes show an aggregated form of collective criminal culpability, rendering it difficult and even harmful to focus merely on the liability of company executives, disregarding culpable corporate cultures and policies.

This Article discusses the history of corporate criminality together with contemporary legal developments and how both have paved the way for recognizing criminal liability of legal persons in the ICC. This Article highlights the importance and advantages of adopting a form of non-derivative corporate criminal liability, separate from individual culpability, to deter corporate policies and cultures that willfully further human rights violations. This Article further sheds light on the jurisprudential scope and framework of Crimes Against Humanity (“CAH”) and the concept of individual criminal liability within the Rome Statute offer the much-needed legal space for imposing international criminal liability for grave human rights violations. Recognizing that the formal adoption of jurisdiction over corporations will require difficult amendments to the Rome Statute, this Article also explores the means of holding corporations accountable through practices such as naming them as unindicted co-perpetrators, which may help fulfill the goal of deterrence and accountability.

## II. CORPORATE COMPLICITY IN CRIMES AGAINST HUMANITY

A United Nations (“UN”) Fact-Finding Committee Report concluded in August 2019 that two companies, Myanmar Economic Holdings Limited

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1. G.A. Rome Statute of the International Criminal Court, July 17, 1998, art. 25 § 1 (2010), available at ISBN No. 92-9227-227-6, [https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome\\_statute\\_english.pdf](https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf) [hereinafter “Rome Statute”].

(“MEHL”) and Myanmar Economic Corporation (“MEC”), through their wide range of business ventures financed Myanmar’s army, Tatmadaw, in perpetrating a wide array of International Human Rights and Humanitarian Law violations.<sup>2</sup> The UN Human Rights Council identified several private companies and foreign companies in business with Tatmadaw who potentially made substantial and/or direct contributions to the commission of crimes under international law, including grave CAH.<sup>3</sup> In September 2018, the same fact-finding mission had concluded that Tatmadaw was responsible for perpetrating serious human rights violations in the Kachin, Rakhine and Shan states of Myanmar.<sup>4</sup>

This report is one of several other pieces of evidence across the world that demonstrates how companies have fueled and financed groups and/or individuals perpetrating mass atrocities, in willful disregard of their activities. In April 2018, a French cement company, La Farge, was indicted for committing CAH for paying millions of euros to ISIS and other terrorist organizations in order to continue corporate operations in war-torn Syria.<sup>5</sup> LaFarge reportedly made large payments for safe passage of its trucks at checkpoints, purchased minerals like pozzolan and oil, and possibly sold cement to ISIS.<sup>6</sup> It is globally known, that ISIS-occupied parts of Iraq and Syria is responsible for mass execution, sexual slavery, rape, torture and persecution of over thousands of people.<sup>7</sup>

A large number of Fortune 500 companies continue to source gold from its refineries that purchase illegally mined gold from Latin America marked by widespread human trafficking, slavery, and forced labor,<sup>8</sup> all of which constitute CAH under the Rome Statute. Several other companies such as

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2. U.N. Human Rights Council, *Independent International Fact-Finding Mission on Myanmar*, U.N. Doc. A/HRC/42/CRP.3, 62–63 (2019).

3. *Id.*

4. U.N. Human Rights Council, *Rep. of the Independent International Fact-Finding Mission on Myanmar*, U.N. Doc. A/HRC/39/64, 17 (2018).

5. *Lafarge lawsuit (re Complicity in Crimes Against Humanity in Syria)*, BUS. & HUM. RTS. CTR. (Jan. 29, 2019), [www.business-humanrights.org/en/lafarge-lawsuit-re-complicity-in-crimes-against-humanity-in-syria](http://www.business-humanrights.org/en/lafarge-lawsuit-re-complicity-in-crimes-against-humanity-in-syria); See Liz Alderman, *French Cement Giant Lafarge Indicted on Terror Financing Charge in Syria*, N.Y. TIMES (June 28, 2018), <https://www.nytimes.com/2018/06/28/business/lafarge-holcim-syria-terrorist-financing.html>.

6. *Lafarge In Syria – Accusations Of Complicity In Grave Human Rights Violations*, EUR. CTR. FOR CONST. & HUM. RTS. (last date visited Feb. 2, 2021), <https://www.ecchr.eu/en/case/lafarge-in-syria-accusations-of-complicity-in-grave-human-rights-violations/>.

7. UNAMI/OHCHR, *Unearthing Atrocities: Mass Graves in Territory Formerly Controlled by ISIL 4* (Nov. 8, 2018), [https://www.ohchr.org/Documents/Countries/IQ/UNAMI\\_Report\\_on\\_Mass\\_Graves4Nov2018\\_EN.pdf](https://www.ohchr.org/Documents/Countries/IQ/UNAMI_Report_on_Mass_Graves4Nov2018_EN.pdf).

8. *The Nexus of Illegal Gold Mining and Human Trafficking in Global Supply Chains* 6–7, VERITE (July 2016), [http://www.verite.org/wp-content/uploads/2016/11/Verite-Report-Illegal\\_Gold\\_Mining-2.pdf](http://www.verite.org/wp-content/uploads/2016/11/Verite-Report-Illegal_Gold_Mining-2.pdf).

Danzer Group<sup>9</sup> and Amesys<sup>10</sup>, as well as 200 local and international companies based in Colombia,<sup>11</sup> have been accused of committing CAH. A communication submitted to the ICC Prosecutor in 2017 highlighted how Chiquita Brands International, a leading banana producer and distributor, made repeated payments to Colombian paramilitary group AUC, which were used to finance grave human rights violations committed by AUC including mass executions, torture, forced displacements, and sexual violence.<sup>12</sup>

CAH are punishable by the ICC under Article 5 of the Rome Statute. However, Article 25(1) restricts the court's jurisdiction to natural persons only. Consequently, it is not possible for the court to impose criminal responsibility on legal persons for perpetrating CAH or any of the other crimes punishable under Article 5. This limitation on the ICC has allowed companies to function with full impunity and no accountability for their involvement in some of history's gravest international crimes. While bringing corporate persons under the ambit of International Criminal Law ("ICL") would involve holding them liable for the gamut of crimes punishable within ICL, the category of CAH potentially provides a broad framework to criminalize a range of acts that corporations are often involved in during their course of business and the nature of this involvement.<sup>13</sup> This includes selling arms and surveillance equipment to armed groups and states committing CAH<sup>14</sup>, employing forced/trafficked labor directly or through supply chains<sup>15</sup> or carrying out forced deportations<sup>16</sup>. This Article thus examines criminal liability for corporations specifically in the context of CAH although advancing that the ICC should expand its jurisdiction over legal persons in the context of all crimes under Article 5 of its Statute.

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9. *Danzer Group & SIFORCO lawsuits (re Dem. Rep. Congo)*, BUS. & HUM. RTS. RES. CTR. (July 8, 2013), <https://www.business-humanrights.org/en/danzer-group-siforco-lawsuits-re-dem-rep-congo>.

10. *Amesys Case: The Investigation Chamber Green Lights the Investigative Proceedings on the Sale of Surveillance Equipment by Amesys to the Khadafi Regime*, INT'L FED'N FOR HUM. RTS. (Jan. 15, 2013), <https://www.fidh.org/en/region/north-africa-middle-east/libya/Amesys-Case-The-Investigation-12752>.

11. *Colombia: Prosecutor Charges 200 Companies with Crimes Against Humanity for Financing Paramilitary Groups*, BUS. & HUM. RTS. RES. CTR. (Feb. 13, 2017), <https://www.business-humanrights.org/en/colombian-companies-charged-for-crimes-against-humanity>; see also *Columbian Companies Charged for Crimes Against Humanity*, TELESUR (Feb. 4, 2017), <https://www.telesurenglish.net/news/Colombian-Companies-Charged-for-Crimes-Against-Humanity-20170204-0010.html>.

12. INT'L FED'N FOR HUM. RTS., *The Contribution of Chiquita Corporate Officials to Crimes Against Humanity in Colombia Article 15 Communication to the International Criminal Court* 31 (May 2017), [https://www.fidh.org/IMG/pdf/rapport\\_chiquita.pdf](https://www.fidh.org/IMG/pdf/rapport_chiquita.pdf).

13. This issue has been dealt with in greater detail in Paragraph XII.

14. INT'L FED'N FOR HUM. RTS., *supra* note 10.

15. BUS. & HUM. RTS. RES. CTR., *supra* note 9.

16. Lisa Martin, *Qantas shareholders renew push for airline to refuse involvement in deportations*, THE GUARDIAN (Aug. 26, 2019), [https://www.theguardian.com/business/2019/aug/26/qantas-shareholders-renew-push-for-airline-to-refuse-involvement-in-deportations?CMP=Share\\_iOSApp\\_Other](https://www.theguardian.com/business/2019/aug/26/qantas-shareholders-renew-push-for-airline-to-refuse-involvement-in-deportations?CMP=Share_iOSApp_Other).

### III. CORPORATE CRIMINAL LIABILITY IN THE ROME STATUTE

Criminal liability for corporations was proposed by France during the drafting of the Rome Statute, but this proposal was ultimately rejected by the drafting assembly of the states. It was stated that the structural differences amongst the different legal systems of the signatory states, including the lack of a codified corporate criminal liability mechanism in certain states, would have put the functioning of the system of complementarity under the Rome Statute at risk.<sup>17</sup> However, a reading of the Travaux Préparatoires of the Rome Statute reveals that States were not normatively opposed to the inclusion of legal persons under the court's jurisdiction.

In the 1998 Diplomatic Conference of Plenipotentiaries, France clarified that its proposal would not permit the concealment of individual responsibility behind that of an organization, but instead provided that the responsibility of a group or organization would be consequent on the previous commission of a crime by a natural person.<sup>18</sup> The proposal provided that organizations declared criminal by the court would be imposed with penalties, such as fines and confiscation of the proceeds of the crime. Several countries such as Jordan, Australia, Cuba, Argentina, Japan, Tunisia, and Kenya supported this inclusion.<sup>19</sup> The Chairman of the assembly noted that there was a "general agreement on the importance of the problem caused by criminal organizations and most delegations recognized that the French proposal was an improvement over the existing text," which only provided for individual criminal liability.<sup>20</sup>

Even those countries not in favor of the proposal cited lack of a proper definition and lack of adequate time for deliberation as reasons.<sup>21</sup> The Travaux revealed that the concerns of most parties were procedural or practical rather than normative. Apart from complementarity, issues raised by delegations centered around the difficulty of finding acceptable definitions and creation of new obligations for states. State Parties recognized the normative importance of imposing criminal liability on corporations but were concerned about the practical aspects of its implementation.<sup>22</sup>

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17. KAI AMBOS, COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 475–78 (2d. ed. 2008).

18. United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Official Summary records of the plenary meetings and of the meetings of the Committee of the Whole*, U.N. Doc. A/CONF.183/13 (Vol.11), 133 (2002), [http://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings\\_v2\\_e.pdf](http://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf).

19. *Id.* at 133–34.

20. *Id.* at 135.

21. *Id.* at 134–36.

22. United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *supra* note 18, at 133.

#### IV. COLLECTIVE CRIMINAL LIABILITY WITHIN ICL

As seen in the section above, the drafting history of the Rome Statute reveals that several countries favored corporate criminal liability. Additionally, even the history of ICL shows that it has recognized the criminality of groups and organizations in the past. The International Military Tribunal (“IMT”) punished persons as individuals or as members of organizations, and these organizations were held as “criminal.”<sup>23</sup> For instance, the Nazi leadership corps, the SS and the Gestapo were declared to be “criminal”<sup>24</sup> by the IMT. The IMT declared those members to be part of the “criminal” organization who became or remained to be members of the organization with the knowledge that it was being used for the commission of crimes.<sup>25</sup> It was found that the knowledge of these criminal activities was sufficiently general to justify declaring that the SS was a criminal organization.<sup>26</sup> While corporations were not directly prosecuted, they were recognized as an instrument, individually and collectively through which the individuals committed the crimes enumerated in the indictment.<sup>27</sup>

#### V. STATE PRACTICE IN ADOPTING CORPORATE CRIMINAL LIABILITY

As seen in the section above, historically, the criminality of organizations was recognized but it ultimately did not find a place in the ICC. However, legal developments across jurisdictions and within International Law show that the reasons for which corporate criminal liability was rejected during the drafting of the Rome Statute have ceased to be relevant. The Special Tribunal for Lebanon (“STL”) in the case of Prosecutor v. New TV S.A.L. and Karma Mohamed Tahsin al Khayat (hereinafter referred as AL Khayat) has recognized that there has been a concrete international movement backed by the UN for corporate accountability for human rights which manifests in state practice providing for corporate criminal liability.<sup>28</sup> The European Union has encouraged member States to adopt corporate criminal responsibility, especially where the nature of the offense and the

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23. The Charter of the International Military Tribunal – Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis art. 6,9 (Aug. 8, 1945).

24. International Military Tribunal (Nuremberg), Judgement and Sentences (Oct. 1, 1946), reprinted in *AMERICAN J. OF INT’L LAW* 172–73 (1947).

25. *Id.* at 273.

26. *Id.* at 272.

27. *THE UNITED NATIONS WAR CRIMES COMM’N, LAW REPORTS OF TRIALS OF WAR CRIMINALS, VOLUME X THE I.G. FARBEN AND KRUPP TRIALS* 35, 69 (1949); *United States v. Alfried Krupp, et al (Krupp trial)*, (United States Mil. Trib. Nov. 17, 1947–June 30, 1948).

28. *Prosecutor v. New TV S.A.L. and Karma Mohamed Tahsin al Khayat*, Case No. STL14-05/PT/AP/ARI26.1, Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings, ¶ 49 (Special Trib. for Lebanon Oct. 2, 2014) [Hereinafter “AL Khayat Decision”].

degree of fault by the enterprise has consequences for society.<sup>29</sup> Several countries have rejected the outdated maxim of *societas delinquere non potest*<sup>30</sup> and adopted forms of corporate criminal liability.<sup>31</sup> Furthermore, treaties have increasingly featured corporate criminal liability provisions showing the willingness of states to impose criminal liability on corporations for grave crimes.<sup>32</sup>

In Al Khayat, the issue was whether the Tribunal, in exercising its inherent jurisdiction to hold contempt proceedings, had the power to charge legal persons with contempt. Two news corporations in Lebanon were accused of publishing the names of persons alleged to be witnesses before the Tribunal. The Amicus Curiae prosecutor argued that there was an “overwhelming trend” of national legal systems adopting criminal liability for legal persons, and recognizing the need to close the gap of corporate impunity natural persons, criminally responsible.<sup>33</sup> It was argued that while corporate criminal liability was a long-term feature of common law jurisdictions, many civil law countries have adopted different forms of corporate criminal liability.<sup>34</sup> It is pertinent to note that several countries that are State Parties to the Rome Statute,<sup>35</sup> such as Argentina, Austria, Belgium, France, Kenya, Cyprus, Denmark, and Serbia, have now adopted some form of corporate criminal liability.<sup>36</sup>

## VI. CORPORATIONS AS RESPONSIBLE ACTORS UNDER INTERNATIONAL

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29. COUNCIL OF EUR., *Committee of Ministers to Member States Concerning Liability of Enterprises Having Legal Personality for Offences Committed in the Exercise of Their Activities Recommendation No. R (88)* 18 (Oct. 20, 1988), [https://www.ius.uzh.ch/dam/jcr:566125ad-550e-47c2-8e8e-0f9fb42fe52c/01D\\_Council\\_of\\_Europe\\_R\\_88\\_18\\_EN.pdf](https://www.ius.uzh.ch/dam/jcr:566125ad-550e-47c2-8e8e-0f9fb42fe52c/01D_Council_of_Europe_R_88_18_EN.pdf).

30. Corporations cannot commit a crime.

31. Al Khayat Decision, *supra* note 28, at ¶ 32.

32. Bert Swart, *International Trends Towards Establishing Some Form of Punishment for Corporations*, 6 J. INT'L CRIM. JUST. 947, 948 (2008); OECD, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* art. 2, 3(2), 4 (Dec. 17, 1997), [http://www.oecd.org/daf/anti-bribery/ConvCombatBribery\\_ENG.pdf](http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf); UN Convention Against Corruption, UN Doc A/58/422, art. 26, 41 (Dec. 9, 2003); Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, 1673 U.N.T.S. 126, art. 2(14) (Mar. 22, 1989); Int'l Convention on Civil Liability for Oil Pollution Damage, 973 U.N.T.S. 3, art. 1(3) (Nov. 29, 1969); United Nations Convention of the Law and Seat, 1833 U.N.T.S. 3, art. 137(1), (Dec. 10, 1982).

33. Prosecutor v. New TV S.A.L. and Karma Mohamed Tahsin al Khaysat, Case No. STL 14-05/PT/AP, Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceeding, ¶ 7 (Special Trib. for Lebanon July 31, 2014).

34. *Id.* at ¶ 29.

35. *The States Parties to the Rome Statute*, INT'L CRIM. COURT (Aug. 24, 2019), [https://asp.icc-cpi.int/en\\_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx](https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx).

36. See Prosecutor v. New TV S.A.L. and Karma Mohamed Tahsin al Khaysat, Case No. STL 14-05/PT/AP, Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceeding, ¶ 7 (Special Trib. for Lebanon July 31, 2014).

## LAW

Another set of developments that strengthens the case for corporate criminal liability are those that have paved the way for recognition of corporations as subjects of international law. Traditionally, only nation-states have been considered responsible actors under international law and possess an international legal personality. As opposed to domestic law, there is no general rule in international law that declares companies responsible for their internationally wrongful acts.<sup>37</sup> However, the growing impact of non-state actors, particularly corporations, has changed this position. In August 2003, the UN Sub-Commission on the Promotion and Protection of Human Rights adopted the text “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights,” recognizing that transnational corporations and other business enterprises are obligated to respect generally recognized responsibilities and norms contained in UN treaties and other international human rights, environmental law, and labor law instruments.<sup>38</sup> Highlighting the growing influence of corporations, the norms underscore corporate capacity to cause harmful impacts on the human rights and the lives of individuals through their core business practices and operations, including employment practices, environmental policies, relationships with suppliers and consumers, interactions with governments and other activities.<sup>39</sup> The adoption of these norms was a monumental step towards establishing the accountability of businesses within the international legal and human rights framework. Additionally, several multilateral treaties such as the 1969 Convention on Civil Liability for Oil Pollution Damage, 1982 UN Convention on the Law of the Sea, and 2003 UN Convention Against Corruption have been entered into that impose obligations on corporations.<sup>40</sup>

As corporations become more powerful and take on nation state-like functions, their potential to undermine respect for human rights is also enhanced. This ranges from conditions of child labor, forced labor, slavery, and health hazards in supply chains, to the destruction of the environment and local communities by extractive industries.<sup>41</sup> Lack of appropriate legal

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37. Cedric Ryngaert, *Imposing International Duties on Non-State Actors and the Legitimacy of International Law* (Mar. 2009), [https://ghum.kuleuven.be/ggs/research/non\\_state\\_actors/publications/ryngaert.pdf](https://ghum.kuleuven.be/ggs/research/non_state_actors/publications/ryngaert.pdf).

38. *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2, U. OF MINN. HUM. RTS. LIBR. (last visited Jan. 22, 2020), <http://hrlibrary.umn.edu/links/norms-Aug2003.html#approval>.

39. *Id.*

40. Interntional Convention on Civil Liability for Oil Pollution Damage, 973 U.N.T.S. 3, art. 1(3) (Nov. 29, 1969); United Nations Convention of the Law and Seat, 1833 U.N.T.S. 3, art. 137(1) (Dec. 10, 1982); UN Convention Against Corruption, UN Doc A/58/422, art. 26, 41 (Dec. 9, 2003).

41. STEINER, ALSTON & GOODMAN, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT* 1388 (3rd ed. 2008).

sanctions can provide unbridled space to companies for not only directly or indirectly perpetrating such crimes, but giving economic support and moral sanction to those governments or groups engaged in committing them.

The preparatory works of the Rome Statute, including the history of ICL, demonstrate that the role of organizations in perpetrating crimes has been firmly established. The developments in adopting criminal liability for corporations at the domestic and regional level, including the recognition of corporations as responsible actors in international law, demonstrates that attempts have been made to grapple with increasing corporate involvement in mass atrocities. While these are significant developments, they do not create a steady and formidable mechanism to formally impose criminal sanctions on corporations.

## VII. ESTABLISHING NON-DERIVATIVE LIABILITY FOR CORPORATIONS

Corporate complicity in international crimes has posed a challenge to the traditional regime of allocating individual criminal responsibility within ICL. While restricting criminal liability to individuals fails to effectively deter corporate complicity in grave crimes, the organizational complexity of corporate structures further complicates imputing liability. Criminal liability for corporations must not be consequential to establishing the guilt of an individual functionary/executive of the corporation. This is known as “non-derivative liability,” which calls for punishing a corporate culture or organizational practice of “disregard” towards complicity in grave crimes.<sup>42</sup> This model of corporate liability is different from the one France had proposed during the drafting of the Rome Statute, as it would not be conditional on primary identification of individual guilt.

### A. *Prosecutorial Function*

In cases of corporate involvement in perpetrating CAH, it can be difficult to make findings of criminal responsibility against specific individuals. The complexity of corporate structures and organizations pose formidable challenges in identifying specific individuals responsible for crimes. In large corporations, responsibilities are diffused and decisions are made at various levels, making it difficult to determine whether an individual possessed the knowledge and criminal intent necessary to establish their guilt beyond a reasonable doubt. In particular, prosecutors have noted the substantial difficulties faced in identifying the executives responsible for

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42. Section 12 of the Australian Federal Criminal Code Act. Section 12.3 provides that, “If intention, knowledge or recklessness is a fault element in relation to a physical element of an offence, that fault element must be attributed to the body corporate” if that body corporate “expressly, tacitly or impliedly authorised or permitted the commission of the offence.” Section 12.3(2)(c) provides “that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision” and Section 12.3(2)(d) “proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.”



corporate misconduct. This is said to be particularly true in cases that involve determining the culpability of high-level executives, who may be insulated from the day-to-day activity in which the misconduct occurs.<sup>43</sup> Sally Yates, who previously served as U.S. Deputy Attorney General, admitted that it is not easy to disentangle who did what within a huge corporate structure in order to discern whether anyone had the requisite knowledge and intent.<sup>44</sup> Particularly, “[b]lurred lines of authority make it hard to identify who is responsible for individual business decisions.”<sup>45</sup> The former U.S. Attorney General, Eric Holder, opined that corporate misconduct could be considered a symptom of the institution’s culture rather than a result of the wilful actions of any single individual.<sup>46</sup> Organizational complexity thus constitutes not only a challenge to corporate prosecutions, but also a reason to focus on the corporation rather than individuals.<sup>47</sup> Moreover, organizational decisions do not necessarily reflect the preference of any individual within the organization.<sup>48</sup> The literature on voting and organizational theory indicates the presence of a collective or institutional responsibility which is more than the aggregated responsibility of each individual who makes up an organization.<sup>49</sup>

In this context, analyzing the case of Chiquita Brands International in Colombia reveals that its complicity in CAH cannot be narrowed down only to a few company executives involved in making payments to the Colombian guerrilla and para-military group. Chiquita schemed to cover up “sensitive payments” to guerrilla insurgents, paramilitary groups, and the Colombian security forces.<sup>50</sup> Chiquita Papers released by the US Justice Department show the presence of “mutually-beneficial” transactions between Chiquita’s Colombian subsidiaries and several illegal armed groups in Colombia, and shed light on more than a decade of security-related payments to guerrillas,

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43. Sally Quillian Yates, Deputy Attorney General, *Individual Accountability for Corporate Wrongdoing*, U.S. DEP’T OF JUST., (Sept. 9, 2015), <https://www.justice.gov/archives/dag/file/769036/download>.

44. *Deputy Attorney General Sally Q. Yates Delivers Remarks at the New York City Bar Association White Collar Crime Conference*, U.S. DEP’T OF JUST. (May 10, 2016), <https://www.justice.gov/opa/speech/deputy-attorney-general-sally-q-yates-delivers-remarks-new-york-city-bar-association>.

45. *Id.*

46. *Attorney General Holder Remarks on Financial Fraud Prosecutions at NYU School of Law*, U.S. DEP’T OF JUST. (Sept. 17, 2014), <https://www.justice.gov/opa/speech/attorney-general-holder-remarks-financial-fraud-prosecutions-nyu-school-law>

47. Brandon L. Garrett, *The Corporate Criminal As Scapegoat*, 101 VA. L. REV. 1789, 1825 (2015).

48. Ronald Slye, *Corporations, Veils, and International Criminal Liability*, BROOK. J. INT’L L. 955, 963 (2008).

49. *Id.*

50. *The Chiquita 13: Profiles of Banana Officials Accused of Crimes Against Humanity*, NAT’L SECURITY ARCHIVE (Dec. 2018), <https://nsarchive.gwu.edu/briefing-book/colombia-chiquita-papers/2018-12-21/chiquita-13-profiles-banana-officials-accused-crimes-against-humanity>.

paramilitaries, Colombian security forces, and government sponsored Convivir militia groups.<sup>51</sup> The collection also shows how the company concealed the so-called “sensitive payments” in the expense accounts of company managers and through other accounting tricks.<sup>52</sup>

### B. Deterrence

More importantly, merely prosecuting corporate executives does not deter a “corporate culture” of unaccountability and indifference to human rights violations. For example, Australia, a state party to the Rome Statute, has adopted a form of “organizational liability” that is used to hold corporate liable for criminal offense in circumstances where the “corporate culture” or “features” of the organization, direct, encourage, tolerate or lead to commission of the offense.<sup>53</sup> This approach goes to the root of punishing the kind of conduct by companies as demonstrated in Part II, that leads to perpetration of grave human rights violations. The deterrent effect of criminal liability is perhaps most widely accepted by scholars as a legitimate aim for imposing criminal sanctions.<sup>54</sup> Although in the case of corporations, the absence of imprisonment—the most common form of criminal punishment, calls for imposition of penalties where the “expected punishment cost” of a proscribed action exceeds the expected gain.<sup>55</sup>

## VIII. MODES OF CRIMINAL LIABILITY FOR CORPORATIONS

Corporations are often removed from the actual scene of the crime due to which the extent of their sustained presence and involvement is obscured. Nevertheless, examples given in Part II show that their contribution plays an indispensable role in the ways and means through which the crime is committed. Different modes of liabilities provided under Article 25 of the Rome Statute can be utilized to understand the criminality of the nature of their involvement.

Crimes may be perpetrated through and along with other individuals (joint commission and commission through another), such as Military

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51. Michael Evans, *The Chiquita Papers*, NAT'L SECURITY ARCHIVE (Apr. 7, 2011), <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB340/>.

52. *Id.*

53. Section 12 of the Australian Federal Criminal Code Act. Section 12.3 provides that, “If intention, knowledge or recklessness is a fault element in relation to a physical element of an offence, that fault element must be attributed to the body corporate” if that body corporate “expressly, tacitly or impliedly authorised or permitted the commission of the offence.” Section 12.3(2)(c) provides “that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision” and Section 12.3(2)(d) “proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.”

54. Sylvia Rich, *Corporate Criminals and Punishment Theory*, CAN. J. L. & JURIS. 97, 100 (2016).

55. John C. Coffee Jr., *No Soul to Damn: No Body to Kick: An Unscandalized Inquiry Into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 389 (1981).

leaders or armed groups. For instance, in Myanmar, MEHL and MEC can be held responsible for perpetrating CAH in complicity with and through the Tatmadaw. Similarly, La Farge's criminal responsibility stems from paying millions of Euros to ISIS and other terrorist organizations which in turn committed mass atrocities. Such mode of commission of crime has been recognized as indirect co-perpetration by the ICC and is found in Article 25(3)(a). In Katanga, the ICC observed, if a person "acts jointly with another individual—one who controls the person used as an instrument—these crimes can be attributed to him on the basis of mutual attribution."<sup>56</sup> In the 2008 ICC decision, *Prosecutor v. Dominic Ongwen*, the Pre-Trial Chamber confirmed this mode of liability and stated that the Statute also criminalizes situations where the objective elements of the crime are executed "through another person" by jointly controlling the action of another person.<sup>57</sup>

Another form of liability found under Article 25(3)(d)(ii) involves contribution to the commission of a crime by a group of persons acting with a common purpose, with the knowledge of, and intention of the group to commit the crime. This mode of liability is useful to prosecute commissions such as those in the case of Chiquita Brands in Colombia, where Chiquita became a substantial funding stream and provided weapons and ammunition that the AUC used to kill innocent civilians, wilfully disregarding the widely reported and documented violations committed by AUC.<sup>58</sup> The extent of such involvement is likely to satisfy the "significant contribution" requirement established by the ICC in the case of *Prosecutor v. Mbarushimana*.<sup>59</sup> The Special Court for Sierra Leone in the Charles Taylor case stated that the acts and conduct of those convicted can have a substantial effect on the commission of crimes in an infinite variety of ways. This includes, *inter alia*,<sup>60</sup> "providing financial support to an organization committing crimes"<sup>61</sup> or providing a "substantial amount of money" enabling the commission of the crime.<sup>62</sup>

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56. *Prosecutor v. Katanga*, Case No. ICC-01/04-01/07-717, Decision on the Confirmation of Charges, ¶ 493 (Int'l. Crim. Ct. Sept. 30, 2008).

57. *Prosecutor v. Dominic Ongwen*, Case No. ICC-02/04-01/15, Pre-Trial Chamber II, ¶ 39 (Int'l. Crim. Ct. Mar. 23, 2016), [https://www.icc-cpi.int/CourtRecords/CR2016\\_02331.PDF](https://www.icc-cpi.int/CourtRecords/CR2016_02331.PDF).

58. INT'L FED. FOR HUM. RTS., *The Contribution of Chiquita Corporate Officials to Crimes Against Humanity in Colombia Article 15 Communication to the International Criminal Court* (May 2017), [https://www.fidh.org/IMG/pdf/rapport\\_chiquita.pdf](https://www.fidh.org/IMG/pdf/rapport_chiquita.pdf).

59. *Prosecutor v. Mbarushimana*, Case No. ICC-01/04-01/10-465-Red., Pre-Trial Chamber I, ¶ 283 (Int'l. Crim. Ct. Dec. 16, 2011), [https://www.icc-cpi.int/CourtRecords/CR2011\\_22538.PDF](https://www.icc-cpi.int/CourtRecords/CR2011_22538.PDF).

60. Also includes providing weapons and ammunition, vehicles and fuel or personnel.

61. *Prosecutor v. Charles Taylor*, Case No. SCSL-03-01-A, Judgement, ¶ 369, (Special Court for Sierra Leone Sept. 26, 2013), <http://www.rscsl.org/Documents/Decisions/Taylor/Appeal/1389/SCSL-03-01-A-1389.pdf>.

62. *The Prosecutor v. Michel Bagaragaza*, Case No. ICTR-2005-86-S, Judgement, ¶ 25 (Int'l Crim. Trib. for Rwanda Nov. 17, 2009), [http://www.worldcourts.com/icttr/eng/decisions/2009.11.17\\_Prosecutor\\_v\\_Bagaragaza.pdf](http://www.worldcourts.com/icttr/eng/decisions/2009.11.17_Prosecutor_v_Bagaragaza.pdf).

## IX. AMENDMENTS TO THE ROME STATUTE

Introducing corporate criminal liability will require making changes to the Rome Statute which incorporates a difficult amendment process. A two-thirds majority at the Assembly of the States Parties is needed to adopt an amendment for which a consensus cannot be reached.<sup>63</sup> It is further provided that an amendment will enter into force for all, only after instruments of acceptance are deposited by seven-eighths of the State Parties.<sup>64</sup> The long and difficult road to the amendment of the Rome Statute necessitates the need for adopting alternative accountability mechanisms that can put an end to the existing impunity gap left behind.

## X. TREATING CORPORATIONS AS UNINDICTED CO-PERPETRATORS

While treatment of companies as an indirect co-perpetrator will require the Prosecution to prove that the conduct of the company satisfies the objective and subjective elements of co-perpetration,<sup>65</sup> a much bigger challenge is to overcome the jurisdictional barrier imposed under Article 25(1) which restricts the court's ambit to natural persons.

The practice of naming unindicted co-conspirators in U.S. criminal procedure can be used to achieve the goal of globally highlighting the role of corporations in perpetrating CAH and also ensure that they act with caution and accountability. U.S. criminal procedure requires serious offenses to be punished by an indictment which contains a written statement of the essential facts constituting the offense charged.<sup>66</sup> However, the Prosecutor can choose to name certain individuals as un-indicted co-conspirator in cases of criminal conspiracy. The term "unindicted co-conspirator" refers to any person who allegedly agreed with others to violate the law but who is not being charged with an offense and who, consequently, will not be tried or sentenced for his criminal conduct.<sup>67</sup> Under the law, the acts and statements of an unindicted person are admissible against the other conspirators in evidence.<sup>68</sup>

Adopting such a process for corporations complicit in CAH would facilitate the prosecution of company executives while ensuring that corporations act with accountability in order to avoid loss of business and reputation. Furthermore, findings of criminal responsibility are binding only

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63. Rome Statute, *supra* note 1, at art. 121 § 3.

64. *Id.* at art. 121 § 4.

65. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-803-tEN, Pre-Trial Chamber I, ¶ 343 (Int'l. Crim. Ct. Jan. 29, 2007), [https://www.iccpi.int/CourtRecords/CR2007\\_02360.PDF](https://www.iccpi.int/CourtRecords/CR2007_02360.PDF).

66. FED. R. CRIM. P. 7(a)–(c).

67. *Impeachment or Indictment: Is a Sitting President Subject to the Compulsory Criminal Process?: Hearing Before the Subcommittee on the Constitution, Federalism, and Property Rights of the Committee on the Judiciary United States Senate*, 105th Cong. 225–26, (1998) (Statement of Peter F. Rient) (available at HATHI TRUST DIGITAL LIBRARY, <https://babel.hathitrust.org/cgi/pt?id=pst.000043031764&view=1up&seq=227>).

68. *Id.* See also FED. R. EVID. 801(d)(2)(E).

upon the indicted persons in a case<sup>69</sup> and treatment as an unindicted co-perpetrator does not lead to any prejudice to the person such treated.<sup>70</sup> In practice, the acts and omissions of an unindicted co-conspirator are relevant to the responsibility of the indicted accused<sup>71</sup> and evidence against them is also evidence against the other alleged indicted co-conspirators.<sup>72</sup>

However, the process of naming unindicted co-conspirators has received strong criticism for its implications on due process rights. Since trials focus on the guilt or innocence of indicted defendants, the practice of naming an individual as an unindicted co-conspirator in effect accuses the person of a crime without providing them a forum for seeking vindication.<sup>73</sup> This is certainly a matter of legitimate concern for the ICC especially when the statute mandates for conducting a fair trial and protecting the rights of the accused.<sup>74</sup> Nevertheless, there is a compelling interest to end impunity for perpetrators of serious crimes to the international community,<sup>75</sup> which after all is the *raison d'être*<sup>76</sup> of the Court itself. The Office of the Prosecutor and the Pre-Trial Chamber of the ICC would thus have a key role in maintaining this balance. U.S. Prosecutorial guidelines, for instance, require that naming an unindicted co-conspirator must be done in the presence of “significant justification.”<sup>77</sup>

A significant justification for such a treatment could be the essential role played by corporations in the commission of the crimes and the massive impact of such complicity. Reports indicate that companies like MEHL, MEC and Chiquita Brands International were a ‘key component,’ ‘a substantial funding stream,’ or a ‘significant source of income’ in the commission of CAH.<sup>78</sup> The UN Fact-finding committee noted that Tatamadaw was only able to perpetrate crimes in Myanmar due to the

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69. Prosecutor v. Prlic, Case No. IT-04-74-T, Second Amended Indictment, ¶¶ 16–16.1 (Int’l. Crim. Trib. for the Former Yugoslavia June 11, 2008), <https://www.icty.org/x/cases/prlic/ind/en/080611.pdf>.

70. Prosecutor v. Salim Jamil Ayyash, Case No. STL-11-01/T/TC, Decision Amending the Consolidated Indictment, ¶ 17 (Special Trib. for Lebanon Sept. 7, 2016).

71. Prosecutor v. Karemera and Ngirumpatse, Case No. ICTR-98-44-T, Judgement, ¶ 63 (Int’l Crimm. Trib. for Rwanda Feb. 2, 2012).

72. *Id.*

73. Ira P. Robbins, *Guilty Without Charge: Assessing the Due Process Rights of Unindicted Co-Conspirators*, FED. CTS. L. REV. 1, 22 (2004).

74. Rome Statute, *supra* note 1, art. 64 § 2.

75. *Id.* at Preamble.

76. A reason for existence.

77. U.S. DEP’T OF JUST., *Limitation On Naming Persons As Unindicted Co-Conspirators*, JUSTICE MANUAL 9-11.000, <https://www.justice.gov/jm/jm-9-11000-grand-jury> (date last visited Feb 2, 2021).

78. U.N. Human Rights Council, *Independent International Fact-Finding Mission on Myanmar*, U.N. Doc. A/HRC/42/CRP.3, 22 (2019). See also INT’L FED’N FOR HUM. RTS., *The Contribution of Chiquita Corporate Officials to Crimes Against Humanity in Colombia Article 15 Communication to the International Criminal Court* 31, 37–38 (May 2017), [https://www.fidh.org/IMG/pdf/rapport\\_chiquita.pdf](https://www.fidh.org/IMG/pdf/rapport_chiquita.pdf).

strength and support provided by a network of companies and businesses which enabled it to operate with autonomy and civilian oversight.<sup>79</sup>

#### XI. ADMISSIBILITY OF CASES

The jurisdiction of ICC is complementary to national courts, as reflected in the Preamble and Article 1 of the Rome Statute. Thus, the primary responsibility to prosecute corporations for international crimes such as CAH lies with the individual nations in whose territories these crimes have occurred or whose nationality the company bears.

The ICC would not accept a case if there is a national investigation or prosecution with regard to the same case as the one before it unless it is vitiated by unwillingness or inability of the State to genuinely carry out the investigation or prosecution.<sup>80</sup> Unwillingness or inability to prosecute is also said to contemplate legislative impediments such as amnesty laws or statutory limitations.<sup>81</sup> Lack of a statutory framework for imposing corporate criminal liability can very well constitute a legislative impediment which would result in the State's inability to prosecute. This would constitute a situation of the unavailability of the national judicial system as provided under Article 17(3) of the Rome Statute enabling the court to try the corporate within its jurisdiction.

The case would also be inadmissible if the same person has been tried for the same conduct before the national court regardless of their conviction or acquittal. The "same person" requirement could allow the court to prosecute the company in a situation where only its executives have been charged or prosecuted in the national courts.

#### XII. CORPORATE ACTION AND CAH UNDER THE ROME STATUTE

While corporations should be held accountable for all crimes punishable under the Rome Statute, the category of CAH under Article 7 provides the widest scope to encircle several forms and types of violations.

Firstly, the Rome Statute provides a scope for punishing a wide range of gross human rights violations by companies under Article 7(1)(k) which prohibits "inhumane acts . . . intentionally causing great suffering, or serious injury to body or to mental or physical health." The prohibition of "inhumane acts" as a CAH was deliberately designed as a residual category, as it was considered unsuitable for exhaustive enumeration. The International Criminal Tribunal for Yugoslavia (ICTY) has underlined the said characterization of Article 7(1)(k). It has ruled that "inhumane acts" function as a residual category for serious charges which are not otherwise

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79. U.N. Human Rights Council, *Independent International Fact-Finding Mission on Myanmar*, U.N. Doc. A/HRC/42/CRP.3, 23 (2019).

80. Rome Statute, *supra* note 1, at art. 17 § 1(a)-(c).

81. Caleb H. Wheeler, *Re-Examining Corporate Liability at The International Criminal Court Through the Lens of The Article 15 Communication Against Chiquita Brands International*, Vol. 19(1), MELB. J. INT'L L. 369, 377 (2018).

enumerated<sup>82</sup> and that an exhaustive categorization would, in fact, lead to an evasion of the letter of the prohibition.<sup>83</sup> Such a provision is important as it is stated that a more specific and complete list would also be more restrictive.<sup>84</sup> Courts have considered inhumane acts as serious violations of international customary law and the basic rights pertaining to human beings, drawn from the norms of international human rights law.<sup>85</sup> This interpretation provides the scope to punish serious international human rights violations, albeit they should be of similar nature and gravity of the acts mentioned in Article 7(1). The harm inflicted does not need to be permanent and irremediable; it must, however, have more than a short-term or temporary effect on the victim.<sup>86</sup>

Secondly, as opposed to Genocide, CAH provides a much wider range for acts that are punishable besides providing a residual category under Article 7(1)(k). Genocide under Article 6 of the Rome Statute specifically requires that the act be committed against a racial, religious, national or ethnic group and be done with the specific intent of destroying the group in whole or in part “as such.”<sup>87</sup> Genocidal intent further establishes a higher *mens rea* standard. It requires a specific intent with respect to the overall consequences of the prohibited act which is much more than merely possessing general intent to commit one of the enumerated acts.<sup>88</sup>

Thirdly, the key requirement for CAH is that the act should be widespread or systematic against a civilian population with knowledge of the attack.<sup>89</sup> This requirement has been further given a liberal interpretation to include a wide variety of violent acts of different scopes that do not necessarily rise to the level of armed conflict.<sup>90</sup> For instance, the act in

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82. Prosecutor v. Vasiljević, Case No. ICTY TCh II, IT-98-32-T, Trial Judgment, ¶ 234 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 29, 2002); Prosecutor v. Kupreskic, Case No. ICTY TCh, IT-95-16-T, Trial Judgment, ¶ 563 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000).

83. Prosecutor v. Kordić and Čerkez, Case No. IT-95-14/2-A, Appeals Chamber, ¶ 117 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 17, 2004).

84. Prosecutor v. Kupreskic, Case No. ICTY TCh, IT-95-16-T, Trial Judgment, ¶ 563 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000).

85. Prosecutor v. Katanga and Chui, Case No. ICC-01/04-01/07, Decision on the Confirmation of Charges, ¶ 448 (Int’l Crim. Ct. Sept. 30, 2008); See Prosecutor v. Kupre[ki], Case No. IT-95-16-T, Trial Judgment, ¶ 566 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000).

86. Blagojević & Jokić, Case No. IT-02-60, Trial Chamber, ¶ 586 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 17, 2005).

87. Rome Statute, *supra* note 1, at art. 6.

88. *Draft Code of Offences against the Peace and Security of Mankind with commentaries*, INT’L LAW COMM. (1996), <http://www.legal-tools.org/doc/5e4532/>.

89. *Id.* at art. 7.

90. Patricia M. Wald, *Genocide and Crimes Against Humanity*, 6 WASH. U. GLOB. STUD. L. REV. 621, 629 (2007), [https://openscholarship.wustl.edu/law\\_globalstudies/vol6/iss3/13](https://openscholarship.wustl.edu/law_globalstudies/vol6/iss3/13).

question need not necessarily be violent in nature<sup>91</sup> or restricted to the use of armed force but may encompass circumstances where there is mistreatment of the civilian population.<sup>92</sup> An attack may also be non-violent in nature like exerting pressure on the population to act in a particular manner.<sup>93</sup> The category of CAH and its judicial interpretation over time provides scope for encompassing a wider range of actions that corporations may indulge in including conditions of bonded labor and trafficking in their supply chains.

Fourthly, War Crimes are crimes committed during an armed conflict, as opposed to CAH that does not require a connection to international armed conflict.<sup>94</sup> Punishing crimes as CAH allows covering a broader range of victims as opposed to war crimes where victims are required be “protected persons” under the Geneva Conventions or the Additional Protocols which are applicable during armed conflicts.<sup>95</sup>

### XIII. STRENGTHENING REPARATIONS BY PROSECUTING COMPANIES

One distinctive feature of the ICC is the presence of a Victims Compensation mechanism to ensure adequate rehabilitation and restitution of victims of grave crimes. Article 73 of the Rome Statute empowers the Court to specify appropriate reparations for victims, including restitution, compensation, and rehabilitation.<sup>96</sup> The statute also establishes a Victims Trust Fund under Article 79, to which money and other property collected through fines or forfeiture can be transferred.<sup>97</sup> However, in several instances, convicted persons have been found indigent.<sup>98</sup> In the ICC decision of *Lubanga*, no assets or property could be identified which could be used for the purposes of reparations.<sup>99</sup> In such cases, the Victim’s Trust Fund is ordered to compliment the compensation payable to victims. The Victim’s Trust Fund itself has a modest budget in light of the growing number of

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91. Prosecutor v. Musema, Case No. ICTR-96-13-A, Judgement and Sentence, ¶ 205 (Int’l Crim. Trib. for Rwanda Jan. 27, 2000).

92. Prosecutor v. Prlić, Case No. IT-04-74-T, Trial Judgment-Vol I of VI, ¶ 35 (Int’l Crim. Trib. for the Former Yugoslavia May 29, 2013).

93. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Trial Judgment, ¶ 581 (Int’l Crim. Trib. for Rwanda Sept. 2, 1998).

94. Prosecutor v. Duško Tadić, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 141 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 12, 1995).

95. Guido Acquaviva, *Forced Displacement and International Crimes*, UNITED NATIONS HIGH COMM’N FOR REFUGEES (June 2011), <https://www.unhcr.org/4e0344b344.pdf>.

96. Rome Statute, *supra* note 1, at art. 75 § 2.

97. *Id.* at art. 79 § 2.

98. Lubanga, Katanga and Al Mahdi were found to be indigent.

99. *Lubanga case: Trial Chamber I issues first ICC decision on reparations for victims*, INT’L CRIM. CRT. (Aug. 7, 2012), <https://www.icc-cpi.int/pages/item.aspx?name=PR831>. On July 10, 2012, Thomas Lubanga was sentenced to 14 years of imprisonment, for the war crimes of enlisting and conscripting children under the age of 15 years and using them to participate actively in hostilities.



international criminal cases and large number of victims it involves. The Trust is heavily reliant on State Party contributions and donations to meet its demands. Holding corporations liable for CAH and ordering compensation to be payable from the large-scale profits earned by these companies through perpetrating CAH is one way to ensure the adequacy of compensation and its availability to a larger group of victims.<sup>100</sup> For instance, MEHL and MEC, companies owned and controlled by the Tatmadaw, run a wide range of highly lucrative businesses<sup>101</sup> and, along with private and foreign companies, generate billions in revenue which are used to fund mass atrocities committed by the Tatmadaw.<sup>102</sup>

#### XIV. CONCLUSION

The 1946 judgment of the Nuremberg Tribunal famously declared that “[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”<sup>103</sup> However, merely punishing individuals working behind the entity leaves behind an unacceptable impunity gap in punishing grave violations of human rights and does not deter corporate complicity in such violations. Holding companies liable for fuelling mass atrocities will deter corporations from sustaining a corporate culture of total disregard towards grave rights violations and ensure accountability. The massive expansion of the role and functions of corporations and the gradual march towards recognition of corporate liability under international law affirms this view. The travaux of the Rome Statute reveals that though several states normatively favored it, the drafting conference was a missed opportunity to establish corporate criminal liability. In order to fully address the issue, amendments to the Rome Statute must expand the jurisdiction of the ICC over legal persons. State Parties must take up the issue on global platforms such as the UN Forum on Business and Human Rights which serves as a forum to drive the implementation of the UN guiding principles.<sup>104</sup> As seen above, the expanding jurisprudence of ICL, CAH, and modes of criminal liability within the Rome Statute, driven by the ICC, provides the space to prevent corporate complicity in grave human rights violations.

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100. See generally *DRC: Thorny Issue of Reparations for Lubanga's Victims*, THE GUARDIAN (Apr. 12, 2012), <https://www.theguardian.com/global-development/2012/apr/12/congo-reparations-lubanga-child-soldiers>.

101. From construction and gem extraction to manufacturing, insurance, tourism and banking.

102. U.N. Human Rights Council, *Independent International Fact-Finding Mission on Myanmar*, U.N. Doc. A/HRC/42/CRP.3, 21–22 (2019).

103. *France v. Göring*, Case No. 22 IMT 411, The International Military Tribunal In Session At Nuremberg, Germany, ¶ 447 (Int'l Mil. Trib. 1946).

104. See generally *United Nations Forum on Business and Human Rights Geneva, 25–27 November 2019*, UNITED NATIONS HUM. RIGHTS OFF. OF THE HIGH COMM'R. (Sept. 2019), <https://www.ohchr.org/EN/Issues/Business/Forum/Pages/2019ForumBHR.aspx>.