Brooklyn Journal of International Law

Volume 33
Issue 3
SYMPOSIUM: Corporate Liability for Grave Breaches of International Law

Article 6

2008

Corporations, Veils, and International Criminal Liability

Ronald C. Slye

CORPORATIONS, VEILS, AND INTERNATIONAL CRIMINAL LIABILITY

Ronald C. Slye[*]

INTRODUCTION

When should a corporate entity *itself* be held criminally liable for violations of international law? It is well settled that corporate actions are, and should be, subject to international regulation and that international criminal law applies to individual corporate employees just as it applies to other private, non-state individuals. Still, the issue of corporate criminal liability for international law violations remains unresolved. Corporations are not presently subject to criminal liability under international law. Interestingly, business entities have been subject to *domestic* criminal prosecution for centuries in some states[1] and such liability is relatively uncontroversial. There is no reason that the same form of accountability at the international level should be viewed differently.[2] This Arti-

---

* Associate Professor, Seattle University School of Law; Honorary Professor, University of the Witwatersrand School of Law. I would like to thank Dean Kellye Testy and the Seattle University School of Law for their support of this and other scholarly projects; Garrett Oppenheim for quick and useful research assistance; and the editors of the *Brooklyn Journal of International Law* for their helpful editorial suggestions.

1. In fact, corporate criminal liability is found as early as 1670 in France, though it was removed after the French revolution, only to be reimposed in the late nineteenth century with industrialization. For a brief summary of some of the history of corporate criminal liability in domestic legal systems, see Andrew Weissman & David Newman, *Rethinking Criminal Corporate Liability*, 82 IND. L.J. 411, 417–23 (2007) (focusing on history in common law countries).

2. Some argue against holding the corporate entity criminally liable under international law, using the same arguments that were offered at Nuremberg and Tokyo in favor of holding state officials, rather than the state itself, liable for aggression, crimes against humanity, and war crimes. *See, e.g.*, Joseph F.C. DiMento & Gilbert Geis, *Corporate Criminal Liability in the United States*, *in* RESEARCH HANDBOOK ON CORPORATE LEGAL RESPONSIBILITY 159, 160–61 (Stephen Tully ed., 2007) (noting that individuals, not states, are held criminally liable for violations of international criminal law; also noting that heads of family are not held responsible for criminal acts of family members). Such arguments assume that if one holds the corporation criminally liable one cannot also hold individual corporate employees liable. As I note below, I argue that the one (holding the entity liable) does not preclude the other (holding individuals liable). Arguments for holding states liable for violations of international criminal law do not assume that individuals cannot still also be held criminally liable. Oppenheim, for example, notes that the responsibility of the state is different than the responsibility of the individual. The state's responsibility for the acts of one of its nationals is not "vicarious responsibility stricto sensu. The state is in international law not legally responsible for the act itself, but for its own failure to comply with obligations incumbent upon it in relation to the acts of the private person: those acts are the occasion for the state's responsibility for its own wrong-

cle draws upon two different strands of scholarship to illustrate this thesis: corporate accountability under international law[3] and corporate criminal liability in domestic legal systems.[4]

This Article briefly outlines below some general arguments concerning corporations as proper objects of international criminal law. Though this issue appears to have received little attention in international criminal law circles, it has been the subject of a rich and varied conversation in academia, the courts, and legislatures throughout the world. The central inquiry is: under what circumstances should criminal liability be imposed on a collective corporate entity, and what does it mean to hold an entity itself criminally liable? This Article does not tackle all aspects of these questions. Rather, it highlights what are arguably the most important issues raised by any proposal to hold a corporation criminally liable and draws analogies between efforts to hold corporate entities criminally liable for international law violations and recent international human rights and criminal law jurisprudence. International human rights and international criminal law have yet to address directly the question of corporate criminal liability. They have, however, developed some jurisprudence concerning the actions of collectives and groups that provides useful insights into how, and under what circumstances, it might be appropriate to hold a corporate entity criminally liable under international law.

This Article argues for a move to reassert the veil of organizational responsibility for international crimes—an effort that parallels arguments in favor of holding sovereign states criminally liable.[5] Historically, responsibility at the international level focused on the state rather than on individual state officials. Though not the first to break this mold, the

---

ful acts, not the basis of its responsibility." OPPENHEIM'S INTERNATIONAL LAW 501 n.13 (Sir Robert Jennings & Sir Arthur Watts, eds., 9th ed. 1997).

3. *See, e.g.*, Beth Stephens, *The Amorality of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT'L L. 45 (2002) (discussing corporate accountability generally under international law, including civil and criminal liability).

4. *See, e.g.*, CELIA WELLS, CORPORATIONS AND CRIMINAL RESPONSIBILITY (2d ed. 2001); *Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227 (1979) [hereinafter *Corporate Crime*].

5. This Article does not address the question of whether states should be held criminally liable for international law violations or the implications of such liability. Most academic discussion concerning whether to hold states liable for their actions focuses on civil liability. This is not surprising insofar as a number of courts have indeed held states civilly liable for their wrongful acts. Parallels between sovereign state accountability and corporate accountability are worthy of exploration, though this Article does not undertake that inquiry.

Nuremberg and Tokyo Tribunals irrevocably established the proposition that individuals can be held responsible for violating international law, even if their acts are committed on behalf of a state. In other words, German and Japanese officials who ordered and implemented an aggressive war and crimes against humanity could not hide behind the structure of the state, but could be held individually, and criminally, responsible for their official acts. The veil of sovereignty was thus pierced. In one of the most quoted phrases from its judgments, the Nuremberg Tribunal asserted the importance of prosecuting individuals: "Crimes against international law are committed by men, not abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[6]

In domestic corporate law, it is generally accepted that individual corporate officials and employees may be held liable for wrongful acts committed in a corporate capacity. Like their counterparts in the public sector, individual corporate officials are not immunized behind the veil of their organization. Yet, there is support for the idea that the corporation itself should be held liable for certain actions—many domestic jurisdictions have imposed criminal liability on corporations for decades, and in some cases centuries. These prosecutions have all occurred under domestic law, and have involved violations of, inter alia, environmental, labor, tort, and anti-trust law.[7] However, international law has not been applied in similar circumstances to impose criminal liability. This Article will explore whether we should hold a corporate entity *criminally* liable for violations of *international* law, with particular attention to three questions. First, why should the corporate entity, as distinct from corporate officials and employees, be held criminally liable? Second, under what circumstances should criminal liability be imposed upon a corporate entity? Finally, what penalties are appropriate for a corporation criminally

---

6. International Military Tribunal (Nuremberg), Judgment and Sentences (Oct. 1, 1946), *reprinted in* 41 AM. J. INT'L L. 172, 221 (1947).

7. *See, e.g.*, United States v. Overholt, 307 F.3d 1231 (10th Cir. 2002) (conviction of corporation under the Safe Drinking Water Act and the Clean Water Act); People v. O'Neil, 550 N.E.2d 1090 (Ill. App. Ct. 1990) (corporation criminally convicted for death of its employee); United States v. Basic Constr. Co., 711 F.2d 570 (4th Cir. 1983) (holding that a corporation can be held criminally liable for employees' violations of antitrust laws). *See also* David N. Cassuto, *Crime, War and Romanticism: Arthur Anderson and the Nature of Entity Guilt*, 13 VA. J. SOC. POL'Y & L. 179, 228–29 (2006) (discussing unsuccessful prosecution of Ford Motor Company for reckless homicide on theory that Ford failed to warn consumers regarding fire risks related to the design of the vehicle). For additional discussion, see Judy K. Broussard, Note, *The Criminal Corporation: Is Ohio Prepared for Corporate Criminal Prosecutions for Workplace Fatalities?*, 45 CLEV. ST. L. REV. 135 (1997).

convicted of an international crime? Before turning to these questions, Part I briefly addresses whether corporations are subject to international criminal law at all.

I. BACKGROUND: RIGHTS AND DUTIES OF CORPORATIONS UNDER INTERNATIONAL LAW

While there is some debate concerning whether corporations are or should be subject to regulation under international law,[8] this Article proceeds as though they are and should be. There is no question that corporations enjoy rights under international law, including rights under international human rights treaties.[9] Two examples illustrate this point. Corporations have rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms[10] and have brought claims before the European Court of Human Rights ("ECHR") alleging that these rights have been violated.[11] Corporations may also bring international claims against the United States, Mexico, and Canada under the North American Free Trade Agreement.[12]

Corporations are also subject to obligations under international law, both directly and indirectly. For example, liability was imposed directly on ship "owners"—usually corporations—as early as 1969 under the International Convention on Civil Liability for Oil Pollution Damage.[13] Indirect obligations are suggested by the broad language found in the

---

8. For a brief introduction to some of the debate, and a criticism of the direct versus indirect distinction I adopt here, see Carlos M. Vazquez, *Direct vs. Indirect Obligations of Corporations Under International Law*, 43 COLUM. J. TRANSNAT'L L. 927 (2005).

9. Initially corporations were more likely to assert their rights—usually concerning property rights against foreign governments—before ad hoc claims commissions. Prior to the development of commissions before which corporations could appear, corporations, like other private individuals, relied upon states to espouse their claims. Charles M. Spofford, *Third Party Judgment and International Economic Transactions*, 3 RECUEIL DES COURS 116, 177–81 (1964) (giving examples of corporations using international arbitration mechanisms against other entities, including states).

10. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222.

11. *See, e.g.*, Agrotexim and Others v. Greece, 330 Eur. Ct. H.R. 3 (ser. A) (1996) (holding that in fact the company, and not its shareholders, is the proper rights holder); The Sunday Times Case, 30 Eur. Ct. H.R. (ser. A) (1979).

12. North American Free Trade Agreement arts. 1115–1138, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993).

13. The Treaty has been amended numerous times, most thoroughly with a Protocol in 1992. *See* Protocol of 1992 to Amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, Nov. 27, 1992, 1953 U.N.T.S. 330. None of these amendments have changed the fact that owners of ships, who usually are corporations, are liable for damages arising from oil pollution.

preamble to the United Nations Universal Declaration of Human Rights, which states that "every *individual* and every *organ of society*" has an obligation to promote respect for the rights in the declaration.[14] International law also requires states to regulate their nationals, including corporations, thus imposing indirectly on corporations obligations rooted in international law.[15] Sometimes in fulfillment of these obligations, and sometimes on their own initiative, states impose liability on their corporate nationals for acts committed outside of their territory.[16]

Given that corporations clearly enjoy rights under international law, and insofar as corporations are already subject to liability under international law, either directly or indirectly, it follows that corporations should be subject to certain duties and obligations under international *criminal* law. It would be illogical to grant corporations rights under international law, including international human rights law, while simultaneously allowing them to avoid responsibility for the most egregious violations of that same body of law.[17]

II. WHY HOLD THE CORPORATION LIABLE?

Individual corporate officials and other employees may be held civilly and criminally liable for violations of international law. As early as Nuremberg, corporate officials were prosecuted for their involvement in

14. Universal Declaration of Human Rights, G.A. Res. 217A, pmbl., U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948). The Universal Declaration of Human Rights of course is not itself a source of binding international law. While it is clear that a good deal of the Declaration now reflects customary international law, this is less clear with respect to organizational liability. For the purposes of this Article, I do not take a position on this question.

15. *See, e.g.*, Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal art. 4, Mar. 22, 1989, 1673 U.N.T.S. 125; Convention on Combating Bribery of Foreign Officials in International Business Transactions, Dec. 17, 1997, S. TREATY DOC. NO. 105-43, 37 I.L.M. 1 (obligating state parties to exercise jurisdiction over extraterritorial conduct of their nationals).

16. Thus the United States imposes criminal liability for bribery committed by U.S. nationals (both natural and legal) anywhere in the world. Foreign Corrupt Practices Act of 1977 § 104, 15 U.S.C. § 78dd-1 (2008). The Australian Criminal Code Act of 1995 criminalizes slavery, including "any transaction involving a slave." Criminal Code Act, 1995, § 270 (1995) (Austl.), *available at* http://www.austlii.edu.au/au/legis/cth/consol_act/cca1995115/sch1.html.

17. For a good summary of some of the arguments concerning the wisdom of imposing liability on corporations under international law in both the civil and criminal context, see Stephens, *supra* note 3.

crimes against peace, war crimes, and crimes against humanity.[18] The issue there was not the application of international law to corporations; rather, it was the application of international law to private non-state actors. There is no question that private non-state actors can be held liable for violations of international criminal law.[19]

Given that individual employees of a corporation can be prosecuted for international criminal law violations (and, to paraphrase the Nuremberg judgment, it is people, not corporations, who commit crimes), what would be the benefit of prosecuting the corporate entity itself? Corporations, in addition to officials or other employees, should be held criminally liable for three reasons: (1) collective action is likely to result in greater harm than individual action; (2) the individual actions of each corporate employee may be insufficient to hold any one of them liable under international law, even though a wrong has clearly been committed; and (3) effective deterrence of collective actions requires systemic punishment.[20] As will be discussed in detail in the following discussion, these three arguments are not alternatives, but instead build upon each other sequentially. The first recognizes that individuals acting collectively can cause far more damage than any one individual acting alone. This observation is central to the definition of most international crimes, and is usually reflected in the chapeau element of each. The second focuses on a class of crimes that falls outside of the traditional international criminal law approach aimed at individual culpability. These are a subset of those crimes committed by collectives of individuals. The third posits that the primary way to address this subset of collective crimes is to hold the entity itself accountable, which will more effectively deter similar wrongdoing. Such organizational liability may decrease those collective crimes already captured by international criminal law.

---

18. *See, e.g.*, The Zyklon B Case (Trial of Bruno Tesch and Two Others), 1 Law Rep. of Trials of War Criminals 93 (Brit. Mil. Ct. 1946) (holding German industrialists liable for the provision of Zyklon B to Nazi concentration camps).

19. *See, e.g.*, United Nations Convention on the Prevention and Punishment of the Crime of Genocide art. IV, Jan. 12, 1951, 78 U.N.T.S. 277 (private individuals may be liable for genocide).

20. Some might argue that if we hold the entity itself liable we should not also hold individual corporate employees liable. I do not adopt this position. There are important reasons for allowing prosecution of both the entity and individual employees, though in any one case a prosecutor may reasonably decide to only pursue one type of defendant. For my purposes here, however, I focus on the possibility of holding the entity liable independent of whether we also hold employees liable.

A. Collective Action Compared to Individual Action

Corporations wield enormous power; they can, and have, caused significant harms. In addition to wielding enormous economic power,[21] corporations increasingly engage in state-like activity as a result of the privatization of traditional state functions (e.g., the management of prisons, public welfare programs, public utilities, and wars) and the tendency of corporations to elect to operate in environments where state power is weak or non-existent.

The rise of the corporation is analogous to the rise of the modern nation-state—both unite individuals for a common purpose, and both result in entities with an enormous potential for good or ill. The modern human rights movement arose out of a desire to protect the individual from the misuse of power by the modern state, an entity that also provided, and continues to provide, enormous benefits to modern society. While there are significant differences between states and private business corporations, the concern for the protection of individual rights and well-being that arose in response to the concentration of power in the state similarly applies to the concentration of power in the corporation.

International criminal law recognizes the special nature of violations committed by organized groups. The four major international crimes—war crimes, crimes against humanity, genocide, and aggression—all require collective action.[22] The chapeau element of two of these four crimes incorporates a collective action requirement.[23] The third, genocide, does not expressly require collective action, though in practice genocide usually involves collective action.[24] The fourth, aggression,

---

21. The annual revenues of the wealthiest corporations exceed the gross domestic product of all but the wealthiest countries. *See* Jonathan Clough, *Not-So-Innocents Abroad: Corporate Criminal Liability for Human Rights Abuses*, 2005 AUSTL. J. HUM. RTS. 1 (citing to studies showing that close to half of the largest economies in the world are those of multinational corporations).

22. The one major exception to this is torture, which can be committed by a lone state official. There is also some question whether genocide could be committed by one person. *See, e.g.*, Prosecutor v. Akayesu, Case No. ICT-96-4-T, Judgment n.61 (Sept. 2, 1998) ("a person could be found guilty of genocide without necessarily having to establish that genocide had taken place throughout the country concerned").

23. For example, International Criminal Court ("ICC") Statute article 7 requires a "widespread or systematic attack directed against any civilian population" for crimes against humanity and article 8's definition of war crimes requires a plan, policy, or large-scale commission of such crimes. *See* Rome Statute of the International Criminal Court arts. 7, 8, July 17, 1998, 2187 U.N.T.S. 90, *available at* http://untreaty.un.org/cod/icc/statute/romefra.htm [hereinafter Rome Statute].

24. *But see supra* note 23, raising the question of whether a person acting alone could commit genocide.

requires state involvement.[25] This recognition of the power of collectives has not, however, lead to the assertion of international criminal jurisdiction over entities, including corporations. Instead, the response has been to increase individual criminal liability for individuals who participate in such widespread or systemic crimes. We thus attribute to the individual the actions of other individuals that are part of the collective organization.[26] This Article does not argue against such a flow of responsibility, but instead maintains that responsibility should likewise flow in the other direction, from the individual to the organization.

B. Individual Actions May Be Insufficient to Impose Liability

While international criminal law has addressed the collective nature of these crimes by enhancing individual criminal liability, it fails to adequately capture all crimes committed by a group, especially formal organizations. For example, individuals may suffer a harm committed by a corporation, but no single person has acted with the requisite mens rea and actus reus to be held criminally liable. Even if there is no question that a harm has been committed by a collective, we can not hold any one individual criminally liable for that harm if the elements of the crime are not satisfied. In other words, individual actions may not trigger individual liability, but in the aggregate they may add up to a criminal act.

The notion that the whole may be greater than the sum of its parts with respect to liability is not new. Charles Abbott observed as long ago as 1936 that "a corporation has a personality of its own distinct from the personalities which compose it, a 'group personality' different from and greater than . . . the sum of its parts;"[27] and "[i]n the same way that a house is something more than a heap of lumber and an army something more than a mob . . . a corporate organization is something more than a number of persons."[28]

---

25. *See generally* U.N. G.A. Res. 3314 (XXIX), U.N. Doc. A/RES/3314 (Dec. 17, 1974). Article 5.1(d) of the Rome Statute places the crime of aggression within the jurisdiction of the ICC, however, parties have not yet agreed on an operative definition. Rome Statute, *supra* note 23, arts. 5.1–5.2.

26. This was in fact the general approach adopted in the negotiations for the Rome Treaty creating the ICC, which rejected a proposal to include juridical persons within the court's jurisdiction. *See* Andrew Clapham, *The Question of Jurisdiction Under International Criminal Law over Legal Persons: Lessons from the Rome Conference on an International Criminal Court*, *in* LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW 139, 145 (M. Kamminga & S. Zia-Zarifi eds., 2000) (noting that the Rome Statute incorporates the idea of "criminalizing the individual participation in a crime committed by a collective entity").

27. CHARLES ABBOTT, THE RISE OF THE BUSINESS CORPORATION 2 (1936).

28. *Id.* at 15.

Collective action and organization theory makes clear that organizational decisions do not necessarily reflect the preference of any individual within the organization. Instead, organizations often reach a decision through a process of bargaining and concessions among different interest groups.[29] Group decisions may be determined as much by the structure of the decision-making process as by the individual or collective preferences of individuals. Voting theorists have known this for a while—the structure of a voting process has a strong influence on the outcome of a particular vote, thus alterations in the voting process may lead to opposing decisions even though the preferences of individual voters remains the same.[30] This suggests something akin to a collective or institutional responsibility that is more than the aggregated responsibility of each individual who makes up the organization.

C. Effective Deterrence Requires Systemic Punishment

Holding individual corporate officials and employees criminally liable may not adequately deter certain corporate wrongdoing and harms and there may not be sufficient individual culpability to successfully prosecute any one individual. If harms result from the collective action of individuals whose individual acts are not themselves blameworthy, how does one establish accountability for those harms? How does one express societal disapproval, deter future such harms, and rehabilitate the wrongdoer? When it comes to organizational actions that result in harm, sanctioning the entity itself will be more effective in influencing behavior than prosecuting isolated individuals. If the harm one seeks to deter is created by the aggregation of individual acts that are otherwise innocent (or at least not clearly culpable), or if the harm is created by a policy, system, or decision-making process, placing accountability on the aggregate actor rather than individual actors will create more effective deterrence. A focus on holding the corporation responsible is more likely to result in systemic reforms that may be necessary to prevent future harms than is a focus on individual criminal behavior.

---

29. *See, e.g.*, MEIR DAN-COHEN, RIGHTS, PERSONS, AND ORGANIZATIONS: A LEGAL THEORY FOR BUREAUCRATIC SOCIETY 33 (1986) (discussing and citing to some of the literature on organizational theory).

30. *See, e.g.*, KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (Yale Univ. Press 1963) (1951) (one of the major contributors to a complex understanding of voting theory and how, among other things, voting systems influence outcomes). Compare to the school of interest group theory, which also attempts to explain collective preferences and outcomes, and is most often associated with George Stigler. *See* George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971).

III. UNDER WHAT CIRCUMSTANCES SHOULD AN ENTITY BE HELD LIABLE?

When an act or result should be imputed to a corporation and trigger criminal liability is a question that many domestic jurisdictions have addressed. There are four general approaches to determine when an act should be attributed to a corporation for purposes of criminal liability. In the first approach, which derives from the doctrine of respondeat superior, the act of any employee is attributed to the corporation. This theory has been adopted in U.S. law, in which the Supreme Court has held that a corporation can be criminally liable when an employee commits a crime within the scope of her employment and, in some variations, with the intent to benefit the corporation.[31]

Typically, liability is imposed if the individual was acting within the scope of the authority of the corporation and consistent with the powers delegated to that specific individual. But, suppose an employee acts outside her authority or contrary to an internal policy. Under Canadian law, a corporation cannot cite to an internal rule that prohibits the act as a defense.[32] U.S. law is similar, finding corporate liability for the act of a corporate employee even if there is a specific internal rule prohibiting the act.[33] Not allowing the corporation to cite its internal rules as a defense creates a heightened incentive for the organization to ensure that its rules are enforced; it also precludes a company from avoiding liability when it prohibits certain activity on paper but allows it in practice.

Most jurisdictions preclude corporate liability for the acts of employees that were not intended to, or do not, benefit the organization, such as embezzlement.[34] In the human rights context, one might ask if a corporation should be held liable if an employee assists in, for example, a war crime and the corporation is harmed by that involvement through adverse publicity. On the one hand, it seems unfair to hold the corporation liable for an unsanctioned act that harms its public image. On the other hand, if the corporation does not have clear processes in place to prevent, or detect and punish, such activities, holding the corporation liable may create an incentive to implement such controls, thus furthering deterrence.

---

31. In the United States, imputing the mental state of a corporate officer to the corporation was first established by statute (the Elkins Act), which was upheld by the Supreme Court. N.Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481 (1909). *See also* United States v. Ill. Cent. R.R., 303 U.S. 239 (1938); Standard Oil Co. v. United States, 307 F.2d 120, 125 (5th Cir. 1962).

32. *See, e.g.*, Dredge v. R., [1985] 1 S.C.R. 662 (Can.).

33. *See* United States v. Beusch, 596 F.2d 871, 878 (9th Cir 1979).

34. *See, e.g.*, *Corporate Crime supra* note 4, 1250 n.34 (citing to U.S. cases requiring benefit to corporation).

In the second approach to corporate criminal liability, only acts of certain high level officers or managers are attributed to the corporation. The focus of this approach is on the acts of the "brains" of the organization—in other words, only those acts committed by employees with decision-making authority are attributed to the organization and may trigger organizational liability. The acts of low-level employees—the "hands" or "labor" of the organization—will not be attributed to the corporation.[35]

One of the foremost authorities on corporate criminal liability, Celia Wells, criticizes this approach. She warns that the distinction between brains and labor is a rhetorical device that "has been used to justify the class structure, educational inequalities, and the division of labour between manual and intellectual worker."[36] However, the fact that some have used the distinction between intellectual and physical abilities to justify discriminatory treatment does not mean that such distinctions are either inaccurate as a descriptive matter or that they are not useful in some contexts. Within the context of corporate criminal liability, and certainly within the context of international criminal law, there is value in distinguishing between the brains of an operation and those who merely execute. In fact, international criminal law generally emphasizes a preference for prosecuting those at the highest level of responsibility rather than "foot soldiers."[37]

Crucial to this second approach is the determination of what acts will in fact be attributed to the brains of a corporation. This question is not

---

35. *See, e.g.*, *id.* at 1242 (setting forth this theory in the context of U.S. jurisprudence). *See also* Tesco Supermarkets Ltd. v. Nattrass, [1972] A.C. 153 (H.L.) (United Kingdom adopting this approach).

36. WELLS, *supra* note 4, at 154.

37. *See* Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea art. 1, amended Oct. 27, 2004, Royal Decree No. NS/RKM/1004/006 (Cambodia), *available at* http://www.eccc.gov.kh/english/cabinet/law/4/KR_Law_as_amended_27_Oct_2004_Eng.pdf ("The purpose of this law is to bring to trial senior leaders . . . and those who were most responsible . . . ."). *See* International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 [ICTY], Rules of Procedure and Evidence, Rule 11*bis*, May 30, 2006, IT/32/Rev. 38 (encouraging referral to state courts of prosecutions of low-level defendants). The moral philosopher Agnes Heller adopted the distinction between "evil" and "bad" people. Evil people are those who have decision-making power—they have a choice and choose evil. Bad people are those who are subordinate to evil people—they commit wrongful acts, but have less choice. Agnes Heller, *The Natural Limits to Natural Law and the Paradox of Evil*, *in* ON HUMAN RIGHTS 149, 155–57 (S. Shute & S. Hurley eds., 1993). International criminal law has in fact adopted a similar distinction, emphasizing the importance of prosecuting leaders and architects over subordinates and "foot soldiers."

unlike the question in international criminal law concerning the responsibility of superiors for the acts of their subordinates, and in fact domestic corporate criminal law adopts an approach similar to that adopted in international criminal law. The United States Supreme Court has stated that an individual corporate officer may be held liable if he occupied a position of "responsibility and authority" and had the power to prevent the wrong through the exercise of the "highest standard of foresight and vigilance."[38] The Council of Europe adopted a similar position in a convention concerning corruption, which imposes criminal liability on the corporate entity itself when an employee was convicted of a crime if the natural person had a "*leading position* and had a power of *representation*, or *authority to take decisions*, or authority to exercise *control* or where there has been *lack of supervision* by this natural person."[39] Under international criminal law, a similar standard exists with respect to military superiors. The Statute of the International Criminal Tribunal for Rwanda ("ICTR") states that a superior is liable for the acts of his subordinate "if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof."[40] Military commanders thus can be held liable for the acts of their subordinates if they had actual knowledge or if they were negligent in not discovering such knowledge.[41]

The Statute of the International Criminal Court ("ICC") adopts two different standards for military and civilian superiors with respect to responsibility for the acts of their subordinates. For military superiors the standard is the "knew or should have known" standard like that articulated in the ICTR Statute.[42] For civilians, the standard is that the superior either knew or "consciously disregarded information" that indicated the

38. United States v. Park, 421 U.S. 658, 672–74 (1975).

39. *See* Clapham, *supra* note 26, at 153 n.26 (discussing the Council of Europe's Criminal Convention on Corruption).

40. Statute of the International Criminal Tribunal for Rwanda [ICTR] art. 6(3), S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994).

41. Not all articulations of superior responsibility in the military context adopt this negligence standard. Protocol I to the 1949 Geneva Conventions, for example, states that a military superior is liable "if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach." Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 86(2), June 8, 1977, 1125 U.N.T.S. 3. The ICTR standard more accurately reflects current international law on the issue.

42. Rome Statute, *supra* note 23, art. 28(a).

subordinate was acting criminally.[43] This is a weaker standard than that adopted by the United States Supreme Court in the corporate criminal context, which is more like the test for military officers—it creates an incentive for the superior to search out information (compare "highest standards of foresight and vigilance" with "had reason to know"). In contrast, the ICC civilian standard does not create any such incentive because liability attaches if the superior *consciously* disregards available information.

The final two approaches to determining when an act should be attributed to a corporation for purposes of criminal liability take a more holistic approach to the corporate entity. A study of corporate criminal liability in the late 1970s noted the prevalence of jury cases in which a corporation was found criminally liable even though all of the individual corporate officers were acquitted.[44] Such verdicts suggest a theory of liability in which the whole is greater than the sum of its parts[45]—that in some cases, even though no one individual is clearly culpable for a criminal act (or juries feel uncomfortable holding them criminally responsible), someone, in this case the entity, should bear responsibility.

The third approach focuses on the procedures, policies, and culture of the corporation. This approach is the most collective, focusing on the corporation as an entity. It analogizes the internal mental processes of an individual with the internal organizational policies of a corporation. There are two variations of this approach. The first would require that one show that the procedures and practices of the corporation *created* the wrongful conduct—i.e., that there is a causal connection between corporate policies and the wrongful activity.[46] The second would require that one show how the procedures or policies did not and could not prevent such activity.[47] This second variation places a higher burden on the cor-

---

43. *Id.* art. 28(b).

44. *Corporate Crime*, *supra* note 4, at 1248.

45. Of course an equally plausible, and in fact more likely, explanation is the desire of a jury to hold someone accountable for a wrong, but the reluctance to criminally punish any one individual. It could be that there is not enough evidence to attribute morally wrongful behavior to any one individual, but recognition that individual acts resulted in a harm that should be remedied.

46. This is the approach adopted by the United Kingdom in the recently enacted Corporate Manslaughter and Corporate Homicide Act, which provides that a corporate entity may be liable for manslaughter if "the way in which its activities are managed or organized by its senior management is a substantial element in the breach [of a relevant duty owed by the corporation]." Corporate Manslaughter and Corporate Homicide Act, 2007, c. 19, § 1(3) (U.K.).

47. For further articulation and examples of the two variations of this approach, see *Corporate Crime*, *supra* note 4, at 1243. The author articulates three different theories of

porate entity, increasing the collective responsibility of the corporation for the individual acts of its employees. This variation is similar to other areas of the law under which individuals may lose important interests if they do not take reasonable precautions, such as one finds in the doctrines of adverse possession with respect to real property and due diligence in the case of lost personal property.[48] Under U.S. securities laws, corporate officers can be held liable for "knowingly fail[ing] to implement a system of internal accounting controls" that meet a minimum set of standards for corporate accounting transparency and control.[49] Such a theory is not completely foreign to international human rights law. In *McCann v. United Kingdom*, a case brought against the United Kingdom for the killing of suspected IRA terrorists in Gibraltar, the ECHR concluded that the individuals who killed the suspects were not responsible for the deaths because they acted reasonably given what they were told by their superiors.[50] The court did, however, find that those who organized the operation were responsible for the deaths, and that the killings thus violated the right to life of the suspects because the design of the operation made it highly likely that the operatives in the field would shoot to kill in almost all circumstances.[51] In other words, it was the overall design of the operation that was found to have caused the deaths, rather than the individual actions of the persons pulling the trigger.

The fourth and last approach is similar to the third approach, but rather than looking at corporate systems, it aggregates the individual acts of various employees. Under this approach a corporation may be held liable for a crime even though the conduct of no one person satisfies all the elements of the crime. In other words, the actus reus and mens rea do not have to reside within the same person. Celia Wells offers an illustration of this approach: "[T]he question would not be whether employee *X*'s knowledge plus employee *Y*'s knowledge *added up to* recklessness . . . but whether, given the information held amongst a number of 'responsible officers,' it can be said that the corporation itself was reckless."[52] Suppose, therefore, that employee *X* knows that a community of people

---

corporate criminal liability. The third "proposes that a corporation is blameworthy only when its procedures and practices unreasonably fail to prevent corporate criminal violations," and "a corporation is blameworthy when its practices and procedures are inadequate to protect the public from corporate crimes." *Id.*

48. *See* 3 AM. JUR. 2d *Adverse Possession* § 43 (2008); 1 AM. JUR. 2d *Abandoned, Lost, and Unclaimed Property* § 32 (2008).

49. Securities Exchange Act of 1934 § 13, 15 U.S.C. § 78m(b)(5) (2008).

50. McCann v. United Kingdom, 324 Eur. Ct. H.R. (ser. A) ¶¶ 210–13 (1996).

51. *Id.* ¶ 211.

52. WELLS, *supra* note 4, at 156.

live near a dam. Employee *Y* enters into a contract with another company to destroy the dam, is under the impression that no individuals live near the dam, and informs the company of this fact. Under this approach the corporation of which *X* and *Y* are a part would be liable for the deaths caused by the destruction of the dam. (The company that actually destroyed the dam may of course also be liable.) Note also that a focus on the communication system of the corporation might lead to a similar finding of liability under the third approach. For example, a trucking company was found liable for violating a federal regulation that prohibited truckers from driving while ill. The driver had told the company's dispatcher that he could not drive, but then changed his mind when informed of the company's policy concerning absences. The court concluded that the corporate officers knew that the new policy they had implemented would encourage drivers to drive while ill and thus they were responsible for their employee's violation of that federal regulation.[53]

This fourth approach raises some other interesting questions. For example, could one aggregate across corporate entities? In other words, could one hold a collection of corporate entities (a joint venture for example) criminally liable for certain activities even if it was not possible to hold any one individual corporate entity responsible? With respect to individual criminal liability, the third approach may suggest imposing liability on the individual or individuals who designed the decision-making process or procedures of the organization, even if they were not directly involved in the actual decisions that resulted in the wrongful activity. Just as we hold individuals or companies liable for defective design in the U.S. tort system, so too should those who create defective decision-making systems be held liable.[54] As in the product liability context, one would want to show at least negligence, if not actual knowledge and foreseeability, of the consequences of a systemic design flaw in a corporate decision-making system.

IV. PENALTIES AND SANCTIONS

Thus far this Article has suggested reasons for holding a corporate entity criminally accountable for violations of international law and the circumstances under which we might want to do so. The next logical question is what does it mean to hold a corporation criminally liable? In other words, what penalty can be imposed on a corporate entity? Is the

53. *See Corporate Crime*, *supra* note 4, at 1249 (citing United States v. T.I.M.E.-D.C., Inc., 381 F. Supp. 730 (W.D. Va. 1974)).

54. For an explanation of design defect liability, see TERRENCE F. KIELY & BRUCE L. OTTLEY, UNDERSTANDING PRODUCTS LIABILITY LAW 126 (2006).

penalty sufficiently different from non-criminal penalties (such as fines) to justify the higher burden of proof and additional procedural protections afforded to criminal defendants under both domestic and international law?

Penalties to consider are fines, restraints, structural injunctions, publicity, equity awards, and dissolution. Fines are the most common, but are also easily imposed through civil liability. One difference between criminal and civil fines is the criminal label attached to the former. This may result in increased deterrence, public shaming, and some satisfaction of a desire for retribution. There is some evidence that attaching the criminal label to a fine is viewed more seriously by the person being fined, and thus may have a greater deterrence value than civil fines.[55] Labeling a fine criminal and identifying an individual or entity as such publicly shames the individual or organization. This can be viewed as a weak form of punishment, a strong expression of public condemndation, or a weak form of retribution.

A fine's effectiveness is obviously dependent on its size. A small insignificant fine risks having little, if any, impact on a corporation—it runs the danger of being just one additional cost of doing business. A fine that is too large, however, risks weakening the corporation in a way that may be detrimental to its legitimate business activities, and thus socially wasteful. Of course, if the corporation's main business is illegal, then such concerns are lessened or non-existent. There are various solutions to the size problem. First, instead of setting a predetermined absolute amount for a fine, the amount could be calculated as a percentage of corporate income, assets, or some other measure of economic size. The disadvantage of this approach is that the amount of the fine for the same wrongful activity will vary depending on the corporation's size, which raises the problem of horizontal inequity. Second, the fine could be tied to the economic benefit the company derived from its illegal activity, such as the revenue or profits generated by the illegal activity. To emphasize its punitive nature, and to forestall the corporation from viewing the fine as an additional cost of doing business, the fine would have to be more than one hundred percent of the revenues or profits.[56]

---

55. *See* V.S. Khanna, *Corporate Criminal Liability: What Purpose Does it Serve?* 109 HARV. L. REV. 1477, 1497–1512 (1996) (discussing the reputational effect of criminal and civil sanctions on individuals and corporations, though concluding that in most cases involving corporations the stigma associated with criminal sanctions is similar to that of civil sanctions). For a discussion more sympathetic to the power of the stigma of corporate criminal sanctions, see *Corporate Crime*, *supra* note 4, at 1365.

56. While conceptually these two approaches are appealing, one should not underestimate the practical issues concerning the measurement of revenues and profits—

Restraints, also sometimes referred to as incapacitation or probation, usually involve injunctions that prevent a corporation from engaging in a particular type of activity, either temporarily or permanently. A company could be prohibited from operating in a particular country or from engaging in a particular activity in a country or region. For example, if a corporation involved in the resource extraction industry (i.e., oil, mining) is found complicit in a crime against humanity, the company could be prohibited from operating in the country where the violations occurred. Alternatively, the corporation could be placed on "probation" during which its activities would be monitored by a court or other independent agency.[57] These probationary monitoring controls could be implemented and overseen by a domestic agency of the company's place of incorporation (such as the U.S. Treasury Department or the Securities and Exchange Commission), an international organization (such as the United Nations High Commissioner for Human Rights or the International Labour Organization), non-governmental organizations (such as a consortium of human rights organizations), or some combination thereof.

A structural injunction may be used to restructure internal corporate systems and decision-making processes.[58] This penalty is most effective when the basis of liability is systemic—and thus would be most appropriately paired with the third approach to corporate criminal liability described above in Part III.[59]

Adverse publicity orders require that a corporation publicly acknowledge its wrongdoing.[60] This can take the form of a simple acknowledg-

---

corporations have some discretion to inflate or deflate the reported measure of their economic activity. Thus, to be effective, fines should be determined using an independent accounting mechanism.

57. *See, e.g.*, 3 AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE, standard 18-3.14 (3d ed. 1994), *available at* http://www.abanet.org/crimjust/standards/sentencing_blk.html#2.6 (contemplating probationary oversight as a response to corporate criminal conduct, though suggesting that such monitoring should not extend to "the legitimate 'business judgment' decisions of the organization's management or its stockholders or delay such decisions").

58. For a brief discussion of such a punitive injunction, see Brent Fisse & John Braithwaite, *The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability*, 11 SYDNEY L. REV. 468, 501 (1988).

59. *See supra* notes 49–50 and accompanying text. Such restructuring is contemplated in the United Kingdom's newly enacted Corporate Manslaughter and Corporate Homicide Act. Corporate Manslaughter and Corporate Homicide Act, 2007, c. 19, § 9 (U.K.).

60. *See* Patrick Hamilton, *Corporate Criminal Liability for Injuries and Death*, 40 U. KAN. L. REV. 1091, 1101 (1992) (discussing adverse publicity orders). *See generally* Brent Fisse, *The Use of Publicity as a Criminal Sanction Against Business Corporations*, 8 MELB. U. L. REV. 107 (1971) (discussing and supporting adverse publicity orders). The United Kingdom's recently enacted Corporate Manslaughter and Corporate Homicide

ment of wrongdoing ("Corporation *X* admits to having aided crimes against humanity in country *Y*"), but could also include more detail about the nature of the offense, details about other sanctions that may have been imposed, and the steps the corporation has taken to prevent future similar occurrences. The more detail and information required by such orders, the more likely it is that such orders will be viewed as punitive (and thus satisfy retributivists) and the more likely it is that they may lead to corporate reforms and contribute to deterrence.

Equity awards consist of the issuance of new shares in the corporation to victims.[61] In other words, victims of a corporate crime are given an ownership interest in the company. Such a penalty has two clear effects. First, by diluting the investment of existing shareholders it imposes a cost on the corporation's owners. Second, it ties the economic well being of victims to the economic well being of the corporation. The first point I take to be uncontroversial. Imposing a cost on shareholders for corporate wrongdoing makes as much economic sense as allowing shareholders to benefit from a corporation's legal activities.[62] The second point highlights a potential drawback of this type of sanction. Some victims, and possibly many of them, would be offended by the idea of reaping an economic benefit from a corporation that engaged, for example, in a crime against humanity of which they were the victims.[63]

Dissolution is the corporate equivalent of capital punishment. It is a punishment usually reserved for those corporations whose primary purpose is illegal. The U.S. Sentencing Commission contemplates such a punishment in cases where the corporation is not engaged in any legiti-

---

Act allows imposition of such adverse publicity orders. Corporate Manslaughter and Corporate Homicide Act, 2007, c. 19, § 10 (U.K.) (granting the court power to make a "publicity order").

61. *See, e.g.*, New South Wales Law Reform Commission, Report 102 (2003), *Sentencing: Corporate Offenders* § 7 (discussing equity fines), *available at* http://www.lawlink.nsw.gov.au/lrc.nsf/pages/r102chp07. *See also* 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, 413 (1980) (proposing and discussing equity fines).

62. Holding shareholders accountable in this way assumes either that shareholders may be able to influence management (to make sure that they do not engage in illegal activity) or that they may easily learn of such activity allowing them to exit by selling their interest. With the exception of closely held corporations or large institutional investors, neither of these assumptions is clearly warranted.

63. One victim in South Africa, for example, told an interviewer that she would not want money from the person who killed her husband. She explained that if she used that money to buy a house, for example, the house would always remind her of her loss and of the perpetrator. Interview with Anonymous Victim, in Cape Town, S. Afr. (Nov. 28, 2003).

mate business.[64] While dissolution may provide some satisfaction, without the imposition of criminal sanctions on individual officers or the inclusion of restraints on the future activity of the former officers, those same individuals could create a new corporation to engage in similar activity.

CONCLUSION

While corporate criminal liability is controversial in the context of international criminal law, it is widely accepted in many domestic legal systems. The purpose of this Article is to challenge this disconnect between domestic and international legal systems. In the course of this discussion, a number of issues have emerged that warrant further exploration. First, those interested in imposing criminal liability on corporations for international crimes would benefit from the findings of those who study organizational systems and behavior. Such literature could assist in determining what actions are rightly attributed to the organization as well as how best to create incentives to alter organizational structures in a way that minimizes involvement with violations of international criminal law. Second, proponents of corporate criminal liability may draw insight from those who argue for the imposition of criminal liability on states, as well as other entities such as political parties or guerilla movements. Third, as suggested above, there is a good deal to learn from those who have studied corporate criminal liability within domestic legal systems—this is a field with a long and rich history. Fourth, and finally, there are some interesting analogies, and even disconnects, between doctrines that have developed in international criminal law and those that have developed in domestic corporate criminal law.[65] An increased attention to them may benefit both domestic and international legal systems.

64. U.S. Sentencing Guidelines Manual § 8C1.1 (2003).

65. For example, the fact noted above that in the United States corporate officials are subject to a higher duty of responsibility (a knew or should have known standard) than civilian superiors under the ICC (knew or conscious disregard standard). These may be appropriate differences, but it is possible that such differences are not well known, and the anomalies they create are probably unintended.