ENDING IMPUNITY FOR INTERNATIONAL CORPORATE CRIMES: A REVIEW OF DOMESTIC PRINCIPLES OF CORPORATE ATTRIBUTION AND AN EXAMINATION OF THEIR APPLICATION UNDER INTERNATIONAL LAW

By

Vickie Lynn Iacobellis, B.A. (Hons), J.D.

A thesis submitted in conformity with the requirements for the degree of Master of Laws
Graduate Department of Law
University of Toronto

© Copyright by Vickie Lynn Iacobellis (2009)
Corporate Liability under International Criminal Law:  
*How Domestic Principles of Attribution Can and Should be Applied*  
Vickie Lynn Iacobellis, Master of Laws (2009)  
Graduate Department of Law  
University of Toronto

**Abstract**

Currently there are no mechanisms under international criminal law to hold corporations accountable for their role in the commission of human rights abuses. A primary problem with establishing corporate liability under international law, is that it is unclear how to attribute liability to corporations for international crimes. This paper examines the strengths and weaknesses of domestic principles of corporate attribution utilized in Canada, the United States, Britain and Australia. The domestic principles are then reconciled with current international law principles and enumerated crimes of international criminal law. It is argued that a flexible approach is optimal for the imposition of corporate liability under international law. While some of the domestic principles work better than others at first glance, ultimately all can and should be used at international law to end impunity for corporate crimes.
# TABLE OF CONTENTS

**ABSTRACT** ......................................................................................................................... ii

**INTRODUCTION** .................................................................................................................. 1

A. WHY SHOULD INTERNATIONAL LAW TARGET CORPORATIONS? ................. 5

B. DOMESTIC PRINCIPLES OF ATTRIBUTION ................................................................. 7

   Vicarious Liability .................................................................................................................. 7

   Identification Doctrine .......................................................................................................... 11

   Attribution ............................................................................................................................. 16

   Corporate Fault .................................................................................................................... 20

C. INTERNATIONAL PRINCIPLES: HOW WELL DO THEY WORK WITH DOMESTIC CORPORATE LIABILITY PRINCIPLES? ............................................ 24

   Principles of International Criminal Law ........................................................................ 26

   Forms of Participation: Committing, Instigating, Aiding and Abetting, Command Responsibility and Joint Criminal Enterprise ......................................................... 32

      Committing a Crime under International Law ............................................................... 32

      Instigating the Commission of Human Rights Abuses .............................................. 33

      Complicity and/or Aiding and Abetting ................................................................... 34

      Where Does the Corporate Fault Model Fit In? ....................................................... 38

      Command Responsibility and Corporate Fault ....................................................... 39

      Joint Criminal Enterprise ............................................................................................. 43

   Attribution of Liability for Specific International Crimes .............................................. 45

      Crimes Against Humanity ......................................................................................... 45

      Genocide ......................................................................................................................... 48

   Overarching Principles of International Criminal Law .................................................. 50
Specificity.................................................................................................50

Equal Culpability of Participants...............................................................51

CONCLUSION..............................................................................................52
Introduction

In 2001, allegations were made against a Canadian company, Talisman Energy, for its role in egregious human rights abuses committed by the Sudanese government against Sudanese citizens living in the area of Talisman's oil concession. It was alleged that Talisman worked with the Sudanese government to determine how to dispose of people living in the areas mapped out for exploration, resulting in massive civilian displacement, the burning of villages, churches and crops, and the murder and enslavement of innocent civilians.\textsuperscript{1} Indeed, multinational corporations such as Talisman have been described as achieving, “unprecedented international power without corresponding global accountability.”\textsuperscript{2} Much has been written on how corporations may be held liable under international law for such criminal conduct.\textsuperscript{3} Yet currently there are no mechanisms under international criminal law that hold corporations accountable for their participation in international crimes. This is so, despite clear evidence of the role corporations have played, and continue to play, in this regard.

Part of the problem inherent to establishing liability under international law, or through an international forum such as the International Criminal Court, is that it is unclear how, if at all, to properly attribute liability to corporations. Some guidance

\begin{flushleft}
\end{flushleft}
can be found in the fact that there are many domestic jurisdictions that hold corporations liable under criminal law. This paper seeks to examine the underlying principles of attributing criminal liability that are found in domestic jurisdictions, in order to see where there is international consensus on attributing liability to corporate entities, while examining each approach to see what works and what does not. Additionally, to see which of these principles would best transpose to the international level given the current international criminal law principles that have already developed.

This paper starts from the premise that corporations should be held criminally liable for their roles in egregious human rights violations including genocide, war crimes, crimes against humanity and forced labour.\textsuperscript{4} Further, criminal liability must extend to both individual corporate actors as well as the corporate entity. However, the focus of this paper will be on the liability of the corporation itself, rather than its individual actors. This is not to say however that one should be targeted over the other. In fact, just the opposite; both must ultimately face liability under international criminal law in order to effectively deter corporate crime. Part A of this paper thus begins with a brief discussion on the importance of corporate liability under international criminal law.

Part B examines the principles used in domestic jurisdictions to attribute criminal liability to corporations, including the benefits and downfalls of each approach in an attempt to discern which principles are best suited to holding corporate entities accountable. With regards to attributing criminal liability to

\textsuperscript{4} This list is by no means exhaustive.
corporate entities, Canada and Australia are leaders in this field; both have incorporated specific principles of liability for corporations into their respective criminal codes. The United Kingdom and the United States of America are also examined, albeit more briefly. They are included in order to illustrate the variance among the principles that domestic jurisdictions have chosen in order to attribute criminal liability to corporations. There is variety and flexibility in the approach of each jurisdiction. This paper will argue that a flexible approach will be most effective for international criminal law as well.

There are four predominant principles for attributing liability in the jurisdictions examined. First, the doctrine of vicarious liability attributes liability to the corporation for the acts of its employees and agents. Second, the identification doctrine finds that high-level managers or “directing minds” are the only individuals whose actions are ultimately viewed as actions of the corporation itself, and thus will attract liability for the corporation (since they are the corporation). Third, the principle of aggregation combines the acts and mental states of individuals within the corporation in order to satisfy the requisite elements of the offence. Finally, the corporate fault model finds the corporate culture or systems of communications at fault for failing to create an environment in which respect for the law is paramount. Each of these principles are important modes of attributing liability, and should not be exclusive of one another. Rather, they would work best where all of them were accepted and could apply according to the circumstances at hand, and the realities of how the accused corporation functions and operates.
In Part C, these principles are analysed in the context of current principles of international criminal law, in order to see how well these two dimensions can be reconciled. They are examined in relation to the principle of individual criminal responsibility, as well as the forms of participation in international criminal law, including instigation, aiding and abetting, joint criminal enterprise, and command responsibility. Next, they are examined in relation to liability for the specific crimes of genocide and crimes against humanity, as well as the overarching principles of international criminal law. As will be shown, these principles, for the most part, are easily reconcilable with international criminal law. While the identification and vicarious liability doctrines may appear easier to reconcile with the current international criminal law principles, the concepts of aggregation and corporate fault could also apply.

Finally, the paper concludes that, for the purposes of international criminal law, some of these principles work better than others at first glance. Ultimately however, all of these principles could theoretically be utilized. If and when corporate entities are held liable under international criminal law, the principles should apply in a flexible manner that is cognizant of the variety of corporate realities and situations that lead to violations of international criminal law. The benefit of international criminal law is that it adapts and evolves to incorporate new situations and contexts in which liability should be imposed. The recognition of the role played by corporations in human rights abuses provides such a situation, and it is not beyond international criminal law to adopt these principles.
A: Why Should International Law Target Corporations?

The arguments in this paper are based on the premise that both corporate entities and individual actors must be targeted by international criminal law. Liability must fall on the corporate entity in order to fully address the atmosphere through which corporations commit international crimes. There are important incentives and disincentives that will not necessarily be addressed where only the individual is targeted. Where only the individual is targeted, corporate entities may be used to shield individual conduct. Additionally, the corporate entity may then be used to increase incentives for non-compliance by compensating actors for the risks they assume in their decision-making capacities.

Corporate reputation and financial incentives are the most important aspects that can be addressed by international criminal law. A corporation cannot be put in jail, and thereby cannot be sanctioned in the traditional criminal law manner. With regards to reputation, by not targeting the corporation, the individual reputation is separated from the corporate reputation. The corporation can easily distinguish itself from the ‘rogue’ actor.

The stigma carried by conviction under international criminal law will tarnish a corporate reputation. This will result in market reprisals\(^5\) and potential fines\(^6\), thereby acting as a financial disincentive to non-compliance with the law. Reputational sanctions will also affect corporate relationships in the future.

\(^5\) Customers seeking to avoid goods tarnished by human rights violations, etc.
\(^6\) Although not traditionally part of international criminal law sanctions, it is important to note however that the ICC allows victims to seek reparations and the court can also order fines to be paid into a Trust fund for victims and their families. See Chapters 4 (Section 3) and 5 of the Regulations of the Court, and Article 79 ICC Statute.
Partnerships may be lost due to citizens, states and other business entities concerned over their reputational costs of dealing with the violator. The immediate payoff of non-compliance is thus decreased by decreasing future payoffs. All of which could not occur if only individual actors were targeted.

To maximize corporate compliance with international criminal law, both the individual decision-makers and the corporate structure must be liable. Where only the individual is punished, the institutional structure that emphasizes the maximization of corporate profit, and which fostered and lead to the actor’s decisions, is ignored. The corporate entity must face financial and reputational sanctions to alter the incentive structure in which the individuals operate.

There will be positive effects associated with a regime that effectively increases corporate compliance. As Andrew Clapham writes, “If international law is to be effective in protecting human rights, everyone should be prohibited from assisting governments in violating those principles, or indeed prohibited from violating such principles themselves.” When corporations, and the individual decision-makers within those corporations, have incentives to comply (by not placing their corporation is situations where violations may occur), and thereby have increased incentives to monitor their activities in certain countries or situations, this results in increased incentives for host states to comply with their international human rights obligations. This adds an additional layer of incentives on host states, and eliminates the potential for side deals between states and corporations. In other words, host states will be facing an additional layer of

---

7 Clapham, supra note 3, p. 80
monitoring (from corporations) and the financial incentive of attracting investment. This will increase the compliance-pull of international law because all are bound.

Of course, these are the not the only reasons why corporations should be held liable. While a detailed discussion on why corporations must be held liable under international criminal law is beyond the scope of this paper, it suffices to say that there are important reasons why they should be held liable.\(^8\)

**B. Domestic Principles of Attribution**

*Vicarious Liability*

In order to develop liability for corporations under international criminal law, it is important to first understand the various principles of liability attribution that are being used domestically. From there, we can see how international principles can be developed or modified with respect to attributing liability to corporations. The following discussion examines a variety of concepts used to attribute liability to corporations domestically, in the hope of illuminating what is, and is not, working domestically. The next section will deal with how these principles can be reconciled with already-established principles of international criminal law.

There are basically four approaches taken by domestic jurisdictions in attributing liability to corporations. The first approach utilizes the principle of vicarious liability, also known as the doctrine of ‘respondeat superior’. Under this approach, liability is attributed to a corporation for the acts of its agents or

---

employees. The Australian and American legislation illustrate the use of this principle.

With regards to the actus reus of an offence, the Australian Criminal Code attributes liability to the corporate entity where two things can be shown. First, where the physical element of the offence is committed by an employee, agent or officer of the corporation. Second, the employee, agent, or officer must have been acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority.

The Australian Criminal Code does not provide any guidance as to who will be considered an employee, agent, or officer. Joanna Kyriakakis suggests that reference to the common law may provide guidance on this. She points to Australian labour law principles, such as the degree of control, including financial control, exercised by one party over another as one of the indices of an employment relationship.9

Under American federal law, a corporation can be held liable for the acts of its agents regardless of their place in the hierarchy. 10 Further, liability may arise

---

9 Joanna Kyriakakis, “Freeport in West Papua: Bringing Corporations to Account for International Human Rights Abuses under Australian Criminal and Tort Law”, (2005) 31 Monash University Law Review 95 at 109. (Kyriakakis “Freeport”). Uncertainty will arise however where the crimes are committed by private security forces or State military forces, as Kyriakakis points out. She argues that, prima facie, they will be considered employees and agents of the State, unless it can be shown that there are sufficient indicators of an employment relationship present. Thus, the question of whether private security forces retained by a corporation could be viewed as employees of the corporation remains open to debate. However, should they be deemed to be employees, the principle of vicarious liability would then attribute their liability to the corporation.

10 Andrew Weisman, “A New Approach to Corporate Criminal Liability,” (2007) 44 Am. Crim. L. Rev. 1319 at 1320 citing cases in which the actions of low-level employees has resulted in liability for the corporate entity. Cites the following cases: United States v. Dye Construction Co., 510 F.2d 78, 82 (10th Cir. 1975) (superintendent, foreman and backhoe driver); Riss & Co. v. United States, 262 F.2d 245, 250 (8th Cir. 1958) (clerical worker); United States v. George F. Fish, Inc., 154 F2d 798, 801 (2d Cir. 1946) (salesman)
Despite efforts on the part of managers to deter criminal conduct.\textsuperscript{11} Overall however, for liability to accrue to the corporation, the individual must be acting within the scope and nature of his or her employment and must be acting, at least in part, to benefit the corporation.\textsuperscript{12} At times, American courts have added a third condition: that the criminal acts were authorized, tolerated, or ratified by the corporate management.\textsuperscript{13} This addition turns the principle of vicarious liability into something more akin to the identification doctrine, under which fault is found in the higher levels of the corporation and then attributed to the corporation itself.

The principle of vicarious liability has numerous benefits. One of which is to increase the incentives for internal monitoring of the acts of employees, and for a more careful initial selection of all corporate employees – from directors to employees. This method of attributing liability is also useful in that it extends liability to lower-level actors, and thus recognizes the complexities inherent in decision-making processes in large, modern corporations. For instance, decisions made at a field office may not necessarily need to be approved by head office, or a parent company for that matter. However, in the same vein, it can also be argued that it is unfair to attribute liability to the corporation where it may be practically impossible to monitor the activities of what may be thousands of employees.\textsuperscript{14} Yet these decisions, regardless of whether they were made by management, may entail

\textsuperscript{11} Ibid at 1320 citing United States v. Twentieth Century Fox Film Corp., 882 F.2d 656, 660 (2d Cir. 1989) (\textit{\textquotedblleft}We agree with the District Court that Fox\textquoteright s compliance program, however extensive, does not immunize the corporation from liability when its employees, acting within the scope of their authority, fail to comply with the law and the consent decree.\textquoteright\textquotedblright)}

\textsuperscript{12} Ibid at 1319


\textsuperscript{14} James Gobert, \textit{\textquoteright\textquoteright Corporate criminality: four models of fault, \textquoteright\textquoteright} [1994] 14 Legal Studies 393 at 398-399
placing the corporation in the position of violating international criminal law.

Where such risk is present, there must be some method of attributing liability that increases the incentive to have internal monitoring in place to ensure such things are prevented or stopped. Vicarious liability fulfills this role by linking liability to the actions of corporate employees.

The requirements imposed by both the American and Australian legislation are important. The requirement that employees be acting within the scope of their employment ensures that the corporation itself is not a victim of the behaviour of a rogue employee. The further addition in the American legislation, that the employee be acting, at least in part, to benefit the corporation is an extension of this. However, this addition may not be necessary at international law, and could complicate things unnecessarily. It should be sufficient to show that where an employee is acting within the scope of their employment, they are acting for the intended benefit of the corporation. This avoids any discussion of ‘benefits’ to the corporation. For international crimes, liability should attach whether a benefit was intended or not.\(^\text{15}\)

As mentioned, the addition of the third element by some American courts, that management essentially tolerated or allowed the behaviour to occur, may seem more like the identification doctrine. Depending on its interpretation however, it could be a positive addition to the method of attributing liability to corporations. In a positive interpretation, this could be seen as punishing the corporation itself for failing to rectify the decision of its employee. This would require an interpretation

\(^{15}\) There should not be room to argue, for example, that the employee could not have possibly intended to benefit the corporation. Whether a benefit was intended or not is irrelevant. If something is done within the scope of employment, it is done for, and on behalf of, the corporation.
of ‘tolerating’ or ‘allowing’ that stems from the failure of corporate systems to convey and monitor the relevant information. For instance, where the choice to use slave labour is made, the corporation could thus be liable for failing to put an end to that practise. In other words, by failing to rectify the decision, corporate management will be viewed as tolerating it. In a negative light however, this additional element could be interpreted as requiring the decision to be officially authorised, tolerated or ratified by management. One would be hard pressed to find evidence of official authorization of criminal conduct, and international law should be careful not to adopt such a restrictive approach to attributing liability.

Vicarious liability, on its own, arguably falls short where the organizational ethos is at fault for committing or complying in human rights abuses. The principle still requires establishing guilt within an individual actor. This ignores the reality that violations of international criminal law may occur as a result of the decisions of numerous actors acting within a corporate environment. Where offences occur as a result of the decisions of numerous actors, each acting within a corporate environment in which those decisions are encouraged, tolerated or unpunished – vicarious liability will fail to attribute fault to the corporation. As argued in the preceding section, the corporate entity must not be able to evade liability.

**Identification Doctrine**

In this approach, the acts of senior management, or any individual(s) who could be viewed as the ‘directing mind’ of the corporation, are attributed to the corporation. Thus, their actions are ‘identified’ with the corporation; they are the corporation. This is the approach taken by the United Kingdom, and to a lesser
extent in Canada. Canada has chosen to adopt a broader approach to who may be considered to be a ‘directing mind’.

The Canadian *Criminal Code* has expanded the common law concept of "directing mind" developed in the leading case of *Canadian Dredge & Dock Co. v. The Queen.* In that case, the “directing mind” concept encompassed anyone who was delegated the governing executive authority of the corporation. Now however, the Criminal Code defines “representative” to mean a director, partner, employee, agent or contractor of the organization. This broadens the range of individuals whose actions are identified with the corporation, and is an important step towards ensuring corporations are held liable for wrongful conduct. The Criminal Code has also defined “senior officer” to mean a representative who plays an important role in the establishment of an organization’s policies, or who is responsible for managing an important aspect of the organization’s activities. For corporations, this includes a director, its chief executive officer and its chief financial officer. While expanding the scope of who may be considered a “representative” arguably moves the Canadian approach more towards vicarious liability, there is still an emphasis on the role of senior officers.

In Canada, for offences that require proof of negligence in order to prove intent, namely criminal negligence causing bodily harm or death, liability will be attributed to the corporation where two things can be proven. First, where it can be proven that one of the corporation’s representatives, acting within the scope of their

---

17 *Criminal Code* [Canada], s. 2
authority, was a party to the offence.\textsuperscript{19} Or where two or more representatives, acting within the scope of their authority, engage in conduct either by act or omission, such that if it had been the conduct of only one representative, that representative would have been a party to the offence.\textsuperscript{20} Secondly, it must be proven that the senior officer (or senior officers, collectively), responsible for the aspect of the organization’s activities that are relevant to the offence, must have departed markedly from the standard of care that, in the circumstances, could reasonably be expected to prevent a representative from being a party to the offence.\textsuperscript{21} This appears to have imported a duty on a corporation’s senior officers to uphold a standard of care with respect to establishing certain internal policies, as well as a system of internal monitoring in order to prevent such offences from occurring.

For offences where the prosecution must prove fault (other than negligence) liability will be imposed on the corporation where one of three instances can be proven. First, where one of its senior officers, acting within the scope of their authority, is a party to the offence.\textsuperscript{22} Second, where one its senior officers, having the mental state required and acting within the scope of their authority, directs the work of other representatives to commit the offence (or omission, as specified in the offence at issue).\textsuperscript{23} Thirdly, where one of its senior officers knows that a representative of the organization is or is about to be a party to the offence, and does not take all reasonable measures to stop them.\textsuperscript{24} In addition to proving one of

\begin{itemize}
  \item \textsuperscript{19} \textit{Criminal Code} [Canada], s. 22.1 (a)(i)
  \item \textsuperscript{20} \textit{Criminal Code} [Canada], s. 22.1(a)(ii)
  \item \textsuperscript{21} \textit{Criminal Code} [Canada], s. 22.1(b)
  \item \textsuperscript{22} \textit{Criminal Code} [Canada], s. 22.2(a)
  \item \textsuperscript{23} \textit{Criminal Code} [Canada], s. 22.2(b)
  \item \textsuperscript{24} \textit{Criminal Code} [Canada], s. 22.2(c)
\end{itemize}
these three instances, the prosecution must also prove that the senior officer was acting with the intent, at least in part, to benefit the organization.\textsuperscript{25}

It is important to note that in the third instance, the senior officer need not be acting within the scope of his or her authority. Thus, the senior officer need not have authority over the particular representative who committed, or is about to commit, the offence. A manager in one department, who knows of the criminal activity occurring within another department, may satisfy this requirement.

Unlike in Canada or Australia, the United Kingdom does not have a comprehensive criminal code. Instead, criminal offences are codified in numerous different statutes. For the most part however, the identification doctrine is utilized.\textsuperscript{26} For instance, Section 14 of the \textit{Company Directors Disqualification Act 1986}\textsuperscript{27} sets out the following with regards to corporate liability:

\begin{quote}
(1) Where a body corporate is guilty of an offence of acting in contravention of a disqualification order, and it is proved that the offence occurred with the consent or connivance of, or was attributable to any neglect on the part of any director, manager, secretary or other similar officer of the body corporate, or any person who was purporting to act in any such capacity he, as well as the body corporate, is guilty of the offence and liable to be proceeded against and punished accordingly.

(2) Where the affairs of a body corporate are managed by its members, subsection (1) applies in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate.
\end{quote}

Thus, once the \textit{actus reus} has been shown, it must then be proven that the offence occurred with the consent or connivance of, or as a result of any neglect by someone who holds a relatively high position within the corporate entity. Subsection (2)

\begin{footnotes}
\item[25] \textit{Criminal Code} [Canada], s. 22.2
\item[26] The United Kingdom also employs a modified form of the corporate fault model. This will be explored further below.
\item[27] \textit{Company Directors Disqualification Act 1986}, c.46
\end{footnotes}
affirms this by reiterating that corporate members, if acting in a management capacity, will be held to satisfy the ‘management’ criteria. In other words, the emphasis is on substance and not form.

The identification doctrine has been criticized for restricting corporate liability to the conduct or fault of high-level managers or directors. This ignores the realities of modern-day corporate decision-making structures in which decisions that result in a violation of international criminal law may be made by middle or lower-level employees or management. Often such decisions may be made within field offices or branches of the company; it is not uncommon for directors’ of large corporations to have little to no direct involvement in the day-to-day affairs of the company. Thus the principle oversimplifies the structures of large corporations and fails to take account of the fact that decisions and actions are often the result of the conduct of numerous individuals, who may be acting at numerous levels of management.\(^{28}\)

The identification doctrine also fails to find fault in a corporate environment that has tolerated or resulted in violations of international criminal law. It does not recognize that fault may not reside neatly in one individual, but rather in the corporation itself as an entity that promotes or encourages certain behaviour and fails to punish wrongful conduct. It relies on the actions of senior officers only, without any other means for attributing liability. This increases the incentive to insulate senior officers from the ‘unsavoury’ decisions of the corporation. To avoid this, there should be liability where senior officers failed to make themselves aware,

\(^{28}\) Gobert, supra note 14, at 401.
or where systems failed to adequately convey information on improper decisions to those people in the corporation with the power to rectify them. Thus, in the absence of clear criminal action on the part of corporate management, the identification doctrine should be discarded in favour of another method of attributing liability. However, as a method of attribution, it may still retain limited use in such situations. International law must be careful however to recognize the limitations of the identification doctrine.

**Aggregation**

The third principle that can be drawn out of domestic approaches to corporate criminal liability is the principle of aggregation. This can be seen in the Australian legislation. It can also be found in the United States, where it is referred to as the principle of “collective knowledge”. In addition, the Canadian legislation also employs a modified version of the approach.

The principle of aggregation is used to combine the actus reus and mens rea of various employees, where the conduct of no one person satisfies all the elements of the crime. The individual acts and mental states of those within the company are viewed as a whole, which is then attributed to the corporation.

The threat of aggregation thus provides corporations with an incentive to closely monitor their activities. Further, that there is a system in place for communication between corporate actors so that crimes do not inadvertently occur.

Aggregation is an important principle that responds to the problem of locating one individual with whom the corporation can be identified. As mentioned, corporate decision-making structures are often complex and multi-layered, and
decisions leading to criminal activity often arise out of numerous decisions and actions. The principle of aggregation is thus an important principle to include in any corporate criminal liability scheme. Further, it is not necessarily incompatible with already established international criminal law principles. As will be explored below, international criminal law already recognizes the nature of violations committed by organized groups.

In the domestic jurisdictions, aggregation is most often used in relation to crimes where negligence is a fault element. In Australia, Part 2.5 of the *Commonwealth Criminal Code Act of 1995* (Cth) (“Australian Criminal Code”) sets out certain modifications that apply when criminal liability is being imposed on corporate entities.\(^{29}\) With regards to offences requiring proof of negligence, where no individual employee, agent, or officer of the corporate entity satisfies the above requirement for negligence, the fault element may be attributed to the corporation where the corporation’s conduct is negligent when viewed as a whole.\(^{30}\) In other words, the conduct of numerous employees may be aggregated to determine whether, on the whole, the corporate entity was negligent.

Likewise, as was shown above in the section on the identification doctrine, Canada also uses a modified version of the principle of aggregation. For offences requiring proof of negligence, where it can be shown that the combined acts of two or more representatives would be enough to find one representative to be a party to the offence, this will be sufficient to satisfy s. 22.1 of the Canadian Criminal Code.\(^{31}\)

\(^{30}\) *Ibid*, s.12.4(2)
\(^{31}\) *Criminal Code* [Canada], s. 22.1(a)(i)
However, it is a modified version of the principle because it requires the acts of employees to be accompanied by the failure of a senior officer to prevent the acts from occurring.\textsuperscript{32} For offences requiring proof of intent (other than negligence), Canada also allows for the mens rea to be located in one senior officer where that senior officer has directed another representative to commit the actus reus of the crime.\textsuperscript{33}

American courts have also employed the principle of aggregation, known as the doctrine of ‘collective knowledge’ in the U.S. The leading illustration of this principle is found in the case of \textit{United States v. Bank of New England}.\textsuperscript{34} The trial court instructed the jury as such: “The bank’s knowledge is the totality of what all of the employees know within the scope of their authority. So if employee A knows one facet of the currency reporting requirement, and B knows another facet of it, and C a third facet of it, the bank knows them all...”\textsuperscript{35} The Court of Appeals upheld this and further stated: “A collective knowledge is entirely appropriate in the context of corporate criminal liability... Corporations compartmentalize knowledge, subdividing the elements of specific duties and operations into smaller components.

\begin{itemize}
\item \textsuperscript{32} \textit{Criminal Code} [Canada], s. 22.1(a)(ii)
\item \textsuperscript{33} \textit{Criminal Code} [Canada], s. 22.2 (b)
\item \textsuperscript{34} (1987) 821 F.2d 844. In this case, the Bank of New England was convicted for failing to file U.S. Treasury reports of cash transactions over $10,000, arising out of a situation in which one bank customer withdrew over $10,000 from one account in a transaction with a single teller. The bank argues that the teller who conducted the transactions did not know that the law required the filing of reports in such circumstances. Further, that the bank employee who did know of the reporting requirements did not know about the customer’s transactions. Thus, there was no single employee with the requisite mens rea to impute liability to the bank. The trial court rejected this argument, relying on the doctrine of collective knowledge illustrated above.
\item \textsuperscript{35} \textit{Ibid} at 855
\end{itemize}
The aggregate of those components constitutes the corporation’s knowledge of a particular operation...”

While aggregation is easily used in cases involving negligence, there is debate over the appropriateness of aggregation for crimes requiring proof of intent. The problem appears to lie in the two elements that make up the “mens rea” of an offence: awareness or knowledge of the offence combined with the emotional element that encompasses one’s attitude towards this knowledge. Aggregation can be used to compile information in order to determine whether “knowledge” existed, but it is conceptually harder to combine emotional elements from different individuals. Thus, the aggregation model has effectively been restricted to two types of cases in the United States. First, where the offence requires proof of awareness only in order to satisfy the mens rea requirement. Secondly, where intent or recklessness must be shown, one agent of the corporation must have both the knowledge and emotional element of desire or indifference required to fulfill the mens rea.

While the principle of aggregation may be conceptually difficult to reconcile with established international criminal law principles, it remains an important tool for addressing the realities of large, complex corporations that are most often implicated in human rights abuses. It is particularly useful for establishing complicity in egregious human rights abuses. In such cases, the ad hoc tribunals have established that it does not matter whether or not the accused desired the

---

36 Ibid at 856
37 Lederman, supra note 13, at 668
38 Ibid
39 Ibid at 669
crime to be committed by the primary perpetrator;\textsuperscript{40} thereby avoiding the emotional element and allowing aggregation to be used.

\textbf{Corporate Fault}

The fourth, emerging, mode of attribution in the domestic context is the ‘corporate fault’ principle. The principle brings in the concept of ‘corporate culture’ found in Australia, and organizational forms of fault found in the United Kingdom. It attempts to locate corporate liability in the behaviour of the corporation itself. The ‘corporate culture’ model recognizes that corporations possess collective knowledge, and are capable of committing crimes as a collective. Eli Lederman refers to this as the ‘self-identity’ model of corporate liability. The main assumption underlying this model is that large organizations are not only a collection of people who shape and direct them. The corporation is also a set of attitudes, positions and expectations which influence, and even determine, the thought-processes and decisions of the people within the corporation.\textsuperscript{41} It is important to recognize that corporations “consist of a set of expectations about how different kinds of problems should be resolved.”\textsuperscript{42} Further, that corporate crime is often a result of a failure to put in place systems for managing and minimizing risks.\textsuperscript{43}

Australia in particular has pioneered the concept of attributing liability to the existence of a corporate culture that resulted in, or failed to punish, criminal acts committed by agents. Where intention, knowledge or recklessness is a fault element,

\textsuperscript{40} \textit{Prosecutor v. Jean-Paul Akayesu}, Case No. ICTR 96-4-T, Judgment, para 539 (Sept. 2, 1998)
it will be attributed to the corporate entity that expressly, tacitly, or impliedly authorized or permitted the commission of the offence.\textsuperscript{44} The means by which authorization or permission can be established is where the Australian legislation is most creative, perhaps in response to the criticisms associated with the other models of attributing liability. The Australian Criminal Code provides a range of ways in which ‘authorization’ or ‘permission’ to commit the offence may be established. Included among these are traditional identification doctrine methods of attributing liability.\textsuperscript{45} However arguably the most innovative way authorization or permission can be established, is by proving that a corporate culture existed within the corporate entity that directed, encouraged, tolerated or led to non-compliance with the relevant criminal provision.\textsuperscript{46} Or alternatively, by proving that the corporate entity failed to create and maintain a corporate culture that required compliance with the relevant provision.\textsuperscript{47}

How is a ‘corporate culture’ to be analyzed? The Australian Code provides some guidance. It defines “corporate culture” to mean,

\begin{quote}
“an attitude, policy, rule, course of conduct or practise existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place.”\textsuperscript{48}
\end{quote}

A factor that can be considered in determining whether such a corporate culture existed is whether authority to commit an offence of the same or similar character had been given by a high managerial agent of the body corporate.\textsuperscript{49} Thus, it allows

\textsuperscript{44} \textit{Australian Criminal Code}, s. 12.3(1)
\textsuperscript{45} \textit{Ibid}, s. 12.3(2)(a) and (b)
\textsuperscript{46} \textit{Ibid}, s. 12.3(2)(c)
\textsuperscript{47} \textit{Ibid}, s. 12.3(2)(d)
\textsuperscript{48} \textit{Ibid}, s. 12.3(6)
\textsuperscript{49} \textit{Ibid}, s. 12.3(4)(a)
for an examination into past practises and previous authorizations. Another factor that can be examined is whether the employee, agent or officer who committed the offence believed, on reasonable grounds, or entertained a reasonable expectation, that a high managerial agent would have authorized or permitted the commission of the offence.\textsuperscript{50} In other words, is the action something the employee considered to be within acceptable corporate conduct? Is it something they felt would have been accepted, if not encouraged? To date, no cases have tested these provisions, so it remains to be seen exactly how they will be interpreted by the courts.

The British government has also employed a more holistic approach to corporate liability in the relatively new \textit{Corporate Manslaughter and Corporate Homicide Act 2007}.\textsuperscript{51} The approach focuses on the policies and procedures of the corporation and how they result in the wrongful conduct. The act states:

\begin{enumerate}
\item An organisation to which this section applies is guilty of an offence if the way in which its activities are managed or organised—
\begin{enumerate}
\item causes a person’s death, and
\item amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased.
\end{enumerate}
\item The organisations to which this section applies are—
\begin{enumerate}
\item a corporation;
\item a department or other body listed in Schedule 1;
\item a police force;
\item a partnership, or a trade union or employers’ association, that is an employer.
\end{enumerate}
\end{enumerate}

\textsuperscript{50} \textit{Ibid.} s. 12.3(4)(b)
\textsuperscript{51} \textit{Corporate Manslaughter and Corporate Homicide Act 2007}, c.19
(3) An organisation is guilty of an offence under this section only if the way in which its activities are managed or organised by its senior management is a substantial element in the breach referred to in subsection (1).52

Similar to the Australian concept of “corporate culture”, the British have chosen to find liability in the way a corporation’s activities are organized or managed. Subsection (3) however, reaffirms the British approach in finding liability through its senior management or ‘directing minds’ only. “Senior management” is defined as the persons who play significant roles in the making of decisions about how the whole or a substantial part of its activities are to be managed or organized53, or in the actual managing or organizing of the corporation.54 Further, the subsection also adds that the way the corporation is organized or managed must have been a substantial element of the breach. This raises the standard required before liability can be proven.

Unlike the Australian approach, the British approach does not find liability where the corporation’s policies and procedures failed to prevent such activity. Rather, it specifically looks at where they resulted in the wrongful conduct, or fell short of what could have reasonably been expected of the organisation in the circumstances.55 The Australian approach is preferable, as it takes a more holistic approach to corporate fault more adequately captures the recognition that individuals within a company contribute to the ultimate functioning of the

52 Ibid, s. 1 [emphasis mine]
53 Ibid, s. 1(4)(c)(i)
54 Ibid, s. 1(4)(c)(ii)
55 A breach of duty of care by an organization is a “gross” breach if the conduct alleged to amount to a breach of that duty falls far below what can reasonably be expected of the organization in the circumstances. Corporate Manslaughter and Corporate Homicide Act 2007, s. 1(4)(b)
corporation; that the entity is what matters and not merely its individual parts. Further, it recognizes that the corporation itself influences the decision-making processes of individuals within it. The focus on senior management in the British approach fails to capture these realities.

The corporate fault model of attribution could be misunderstood as an easier method of finding corporations liable. However this is not necessarily so. It must still be proven beyond a reasonable doubt that such corporate culture or system existed, and that it was not simply the acts of a one or more rogue employees. The principle has also been criticized for straying away from the established principle of individual criminal responsibility and individual, rather than collective, mens rea.\(^{56}\) Yet its utility lies in exactly that: the recognition that there can and should be collective mens rea.

**C. INTERNATIONAL PRINCIPLES: How well do they work with domestic corporate liability principles?**

So how do these principles meld with international criminal law principles with regards to attributing liability? Are they totally irreconcilable? It will be argued that, for the most part, these principles are easily reconciled with international criminal law principles. There are some areas, however, where they do not work quite as well. This section begins by analyzing the domestic principles against the various forms of liability used by the international criminal tribunals for attributing liability. Beginning with the principle of individual criminal responsibility, it is

argued that this principle is not set in stone and should be re-conceptualized to encompass organizational forms of fault. Further, that a flexible approach must be used to respond to situations where the requisite elements cannot be located in one individual.

Next, the domestic principles are examined in light of the various forms of participation in international crimes. While ‘committing’ is mentioned, it is examined later when dealing with the commission of crimes against humanity and genocide. ‘Instigation’ is examined, showing that the vicarious liability and identification doctrines work well and that aggregation may also be used. The same can be said for ‘aiding and abetting’, however the domestic principles are more easily reconciled where circumstantial evidence is allowed. Throughout this discussion, the corporate fault model appears the hardest to reconcile with international criminal law. Yet it finds many conceptual similarities with the ‘command responsibility’ form of liability. Further, liability for membership in a ‘joint criminal enterprise’ also recognizes organizational forms of liability, thereby lending some conceptual support to modes of attributing liability that also look at organizational fault. Overall, the vicarious liability and identification doctrines are easily reconcilable with all forms of participation. While not as easily reconcilable, aggregation and corporate fault principles find some conceptual support as well.

The domestic principles are then examined in the context of liability for crimes against humanity and genocide. As seen already, the principles of vicarious liability, identification, and aggregation are more easily used. For crimes against humanity, this is even more so, as circumstantial evidence may be used to infer
knowledge. However, it becomes harder where knowledge of the specific intent of genocide is required. Where the corporate fault model is not easily used, it still maintains utility as a way to examine how such acts could be committed and why liability should be attributed.

Finally, the overarching international criminal law principles of specificity and ‘equal culpability of participants’ are examined. Neither of which hinder the use of the domestic principles. More importantly, using the domestic principles to allow for corporate liability under international law would reinforce both of these overarching principles.

**Principle of Individual Criminal Responsibility**

The principle of individual criminal responsibility is arguably the cornerstone of international criminal law. The Nuremberg Judgment famously remarked that crimes are committed by individuals, not ‘abstract entities’ and that no one should be allowed to hide behind such an illusion. As this paper has shown, times have changed since the Nuremberg judgments, and ‘abstract entities’ are indeed being held liable for crimes committed by their agents. In fact, the Nuremberg precedents themselves have been used as evidence of corporate liability, despite the fact that no corporations were prosecuted during the war crimes trials.

---


The Nuremberg judgments were the first to grasp the idea that non-state actors are capable of violating international law. Indeed, the judgments expressed at Nuremberg by the International Military Tribunal (IMT) and the United States Military Tribunal (USMT) appear to expressly acknowledge that corporations can violate international law. In the case of I.G. Farben, a large German chemical and pharmaceutical manufacturer, the defendants were prosecuted for “acting through the instrumentality of Farben”. As Anita Ramasastry notes, the decisions focus quite clearly on the nature of the corporation and its role in perpetrating certain crimes. The Tribunal noted that:

“Where private individuals, including juristic persons, proceed to exploit the military occupancy by acquiring private property against the will and consent of the former owner, such action not being expressly justified by any applicable provisions of the Hague Regulations, is in violation of international law...”

In addition, the case against the Krupp firm also refers to the actions of Krupp as the prime perpetrator of the charged crimes. Like the Farben decision, the USMT expressly acknowledges that the firm itself violated the Hague Regulations.

The effect of these Nuremberg precedents has been to provide a basis from which to argue that corporations can violate international law. Thus, despite not

---

61 The I.G. Farben Case, supra note 60 , at 1132-33 [emphasis mine]
62 See Ramasastry, supra note 60 , at 108-110 citing United States v. Krupp, IX Trials of War Criminals, at 1351-52
63 Ibid
holding corporations liable, part of the Nuremberg legacy has been to assert that individual criminal responsibility is not the steadfast principle it is argued to be. For instance in the 2003 *Presbyterian Church of Sudan v. Talisman Energy, Inc.* case, the court, by directly relying on the Nuremberg precedents, rejected the argument by Talisman that corporations are legally incapable of violating international law. The court stated that, “the concept of corporate liability for jus cogens violations has its roots in the trials of German war criminals after World War II.” Referring to the Farben case, the court noted that, “the language of the decision makes it clear that the court considered that the corporation qua corporation had violated international law.” It found similar findings with respect to the Krupp case.

Similarly, the court in *In re Agent Orange* also relied on the Nuremberg precedents to find that corporations could be civilly liable for violating international law. Note however, that the court was careful to acknowledge that international criminal tribunals, from Nuremberg onwards, have not provided for corporate criminal liability. However, it noted that it was the corporation through which the individuals acted, and which was essential to the commission of the crime. Likewise, in the *Bowoto* case, the court also found that corporations could be held liable for human rights violations under international law.

---

64 It is important to note that the court issued another decision in 2005 which affirmed this position with respect to corporate liability: *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 374 F. Supp. 2d 331-34 (S.D.N.Y. 2005)

65 *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d (S.D.N.Y. 1995) at 315

66 *Ibid*

67 *Ibid* at 316

68 *In re Agent Orange Product Liability Litigation (Agent Orange)*, 373 F. Supp. 2d 7 (F.D.N.Y. 2005), 56-58

69 *Ibid* at 55

70 *Ibid* at 57-58

decisions in the *Presbyterian Church* and *In re Agent Orange* cases, stating that it “…therefore holds that defendants may be held liable for the violation of any international law norm that is binding on private entities.”\(^72\)

The Nuremberg precedents are indeed important for recognizing that corporations are capable of violating international law, and are at least capable of being held civilly liable for doing so. The precedents thus importantly underscore the principle of collective, rather than individual, responsibility. However the Nuremberg cases have also focused on the use of the corporations by individuals, as a kind of vehicle through which they could commit crimes. This is similar to the identification doctrine of corporate liability, where the law views high-level managers as the corporation itself. Thus, like the identification doctrine, the Nuremberg cases ignore the possibility of an overarching corporate culture or systems that influence individual decision-makers. Ultimately, by viewing the corporation as a puppet for its high-level employees, the realities of complex, modern-day corporations are ignored.

Despite the Nuremberg precedents, and growing consensus on the need to attribute liability to corporations, the ad hoc tribunals still uphold the principle of individual criminal responsibility. The parameters of this were set out in *Prosecutor v. Tadic*, the first case tried before the International Criminal Tribunal for the Former Yugoslavia (ICTY). The Trial Chamber held that intent and participation must be shown. Intent involves awareness of the act of participation, coupled with a conscious decision to participate by planning, instigating, ordering, committing, or

\(^72\) *Ibid.*
otherwise aiding and abetting in the commission of the crime. Second, it must be shown that the conduct of the accused (in our case, a corporation) contributed to the commission of the illegal act.⁷³

Corporate criminal liability appears immediately irreconcilable with this principle. Individuals, not entities, are targeted by international criminal law. However, the apparent rationalization for the emphasis on individual responsibility in order to ensure such individuals cannot hide behind the illusion of an ‘entity’ does not quite ring true for the realities of modern, corporate decision-making. Where individuals use the guise of a corporation to commit international crimes, then individual criminal responsibility is indeed appropriate. As mentioned above however, it is often difficult to pin liability on one individual in the corporation. Due to the complexities of modern corporations, decisions may be made by multiple people in multiple departments and/or locations. The mens rea or actus reus may not reside in one person. Corporations may thus find themselves committing or being complicit in international crimes without the ability to clearly identify one such person who is responsible for the decision(s) that lead to such a situation. Nonetheless, the corporation, as a whole, is still responsible and should not walk away with impunity.

How could the principle of individual criminal responsibility be adapted to suit the realities of increasing corporate participation in international crimes? The domestic forums above provide guidance. The term ‘individual’ could be defined to

---

include a corporate entity. This was rejected by the ICC, but it could still nonetheless be accomplished in a review of the ICC statute. Second, the required intent and participation could be satisfied by the domestic principles used for attribution. This could take the form of a sliding scale. Where a high managerial agent could be identified as having the intent required, the identification doctrine could be utilized. Likewise, where lower-level agents can be identified, the doctrine of vicarious liability may be used. Where the actions and mental states of numerous individuals, when taken on the whole, provide the intent and participation required, the aggregation model can be imposed. Or, where it is clear that corporate culture or systems failed to alert those who have the power to direct the corporation to stop the violation, the corporation will be viewed as condoning or causing the behaviour and is therefore liable. Ultimately, a flexible approach that responds to the realities of the accused corporation is best.

The ‘sliding scale’ method would seem to present a diminishing scale of liability; the strongest being where liability can be located in one senior individual, and the weakest being where liability is gleamed from the actions of numerous, perhaps even unrelated, individuals. However, another principle employed by international criminal law is instructive here. The principle of equal culpability of participants holds that all are liable if they contributed to or assisted in the commission of the crime. Once liability is established, the judge evaluates the degree

---

to which one is culpable. Thus, the court could determine, based on the evidence presented, the degree to which a corporation will be culpable. The method of attributing liability may be a factor in this decision.

The domestic principles outlined above can and should be used flexibly in international criminal law. As mentioned, individual criminal responsibility may take many forms, including committing, instigating, planning, or aiding and abetting. While corporations today are much more likely to be charged with aiding and abetting egregious human rights abuses, the following section will also examine how the domestic principles may play out with regards to instigating or actually committing the violation of international criminal law. When attempting to transpose the domestic principles onto international criminal law, it is clear that they can easily apply and should apply in a flexible manner.

**Forms of Participation: Committing, Instigating, Aiding and Abetting, Command Responsibility and Joint Criminal Enterprise**

**Committing a crime under international law**

‘Committing’ a crime will be established where the accused ‘physically perpetrates the relevant criminal act or engenders a culpable omission in violation of a rule of criminal law.’ The accused must also have the requisite mens rea for the particular crime. This will be examined further below, when looking at the

---

mens rea required for genocide and crimes against humanity and how the domestic principles of attribution might play out with regards to these specific offences.

**Instigating the commission of human rights abuses**

‘Instigating’ has been understood to mean ‘urging, encouraging or prompting’.77 Proof is required of a causal connection between the instigation and the actus reus of the crime.78 The required mens rea will be established where it can be shown that the accused intended that the crime in question be committed.79 Further, the accused must have intended to induce the commission of the crime, or at least been aware of the substantial likelihood that the commission of a crime would be a probable consequence of his acts.80

To bring this into context, a corporation could be seen as ‘instigating’ the commission of a crime where it encourages a host government to do whatever it takes to protect company interests (such as pipeline, for example). This could be seen as ‘instigation’ where it is widely known that the host state uses repressive methods against its citizens, or has done so in the past. Anywhere a corporation urges or requests the host state to take action towards protecting company interests, with knowledge, evidence or a suspicion that the host state will commit human rights abuses, instigation could potentially be proven.

---


79 See for example *Blaskic* Trial Judgment, para 280; *Bagilishema* Trial Judgment, para 30.

How would liability for ‘instigating’ a crime be attributed to a corporation?

With regards to the actus reus, the doctrines of vicarious liability and identification will easily satisfy the requirement for all forms of criminal participation, including instigation, as they locate the actus reus in individual actors. The principle of aggregation may also be utilized. The very nature of the crime of ‘instigating’ is not restricted to an individual act; it may be drawn from the evidence of numerous acts or decisions from which it could be shown the accused provoked the commission of the crime. Thus, the concept of aggregation fits quite well.

Any intent requirement is going to be an obstacle for reconciling corporate liability principles with individual criminal liability principles since the latter attempt to locate intent within an individual actor. The doctrines of vicarious liability or identification will satisfy this requirement where individual corporate actors can be identified. Aggregation proves to be more difficult to reconcile. However, the addition of the element, ‘*substantial likelihood that the commission would be a probable consequence*’ appears to lessen the standard of knowledge required, since it inserts an objective test into the equation. Thus it will be easier to argue that the mental states of certain individuals could be aggregated where, on the whole, it is clear that it was substantially likely that the crime would be committed as a result of corporate decisions amounting to instigation.

**Complicity and/or Aiding and Abetting**

Complicity falls under the umbrella of individual criminal responsibility, thus requiring intent and participation to be shown. However, it has also been
interpreted by the ICTY to require that the complicity be ‘direct and substantial.’

The ICC seems to exclude this additional element. Regardless, this requirement could be satisfied by the domestic principles outlined in this paper. It would merely require showing that, on the whole, the assistance, encouragement or moral support was direct and substantial.

To establish individual criminal responsibility for aiding and abetting, two things must be shown. First, it must be shown that the accused carried out an act which consisted of practical assistance, encouragement or moral support to the principal offender which had a substantial effect on the commission of the crime. Secondly, the mens rea for aiding and abetting must be established. For this to be proven, it must be shown that the abettor knew (in the sense that he was aware) that his own acts assisted in the commission of the specific crime. The aider and abettor must have been aware of the essential elements of the crime in question, including the principal offender’s state of mind. Knowing these things, the accused

---

81 Tadic Trial Judgment, para 689 onwards. This was confirmed in Prosecutor v. Aleksovski, IT-95-14/1-T, Judgment, 25 June 1999, para 61 (“Aleksovski Trial Judgment”).
must have then taken the conscious decision to act in the knowledge that he would thereby support the commission of the crime.85

At first glance, the requirement that the accused be aware of the primary perpetrator’s state of mind appears harder to establish for a corporation using the domestic principles outlined. Such individualized knowledge is hard to reconcile with the more abstract form of corporate ‘knowledge’. However, ‘knowledge’ here will depend on the crime at issue. As we will see below, it is harder to reconcile corporate forms of ‘knowledge’ with the specific intent required for genocide. Yet, for other crimes, ‘knowledge’ may be proven by way of direct evidence or inferred from circumstantial evidence. In addition to the jurisprudence of the ad hoc tribunals, the Rome Statute also imports an objective test. Article 30(3) defines ‘knowledge’ to mean ‘awareness that a circumstance exists or a consequence will occur in the ordinary course of events.’ The latter element imports a subjective-objective analysis.86

Where circumstantial evidence is allowed, domestic principles of attribution are more easily applied. In other words, where direct evidence exists that individuals within the corporation were aware of the principal perpetrator’s intent, then the identification or vicarious liability principles may be applied to link certain individuals with the mens rea required. However, in order to utilize the aggregate or corporate fault principles it will be easier to infer knowledge from circumstantial evidence. Thus, if circumstances suggest that, on the whole, it appears the principal

85 Vasiljevic Trial Judgment, para 71; Furundzija Trial Judgment, para 245; Alekovski Appeal Judgment, pars 162-165.
perpetrator is intending to commit murder or acts of enslavement for example, it will be easier to argue that some individuals within the corporation must have known. Accepted indicia for inferring knowledge have included: the extent to which crimes have been reported in the media, the scale of violence, and general historical or political background, among others.87

It is easy to see that if, on the whole, circumstances strongly suggest that corporate agents must have been aware of the primary perpetrator’s intent an argument could be made for aggregating the knowledge of these agents. This is similar to the Unocal case under the Alien Tort Claims Act (“ATCA”). In a motion for summary judgment, although the court ultimately found that Unocal was not liable for knowing the Burmese government used forced labour, it did find that Unocal had knowledge of the actions of the Burmese government with regards to forced labour.88 Knowledge was gleamed in part from the fact that Unocal had obtained a consulting company to assess the risks associated with foreign investment in Burma. The subsequent report by the consulting company highlighted that the Burmese government habitually made use of forced labour to construct roads.89 The court also noted that the violence committed against the plaintiffs was well-documented.90 In addition, human rights groups began corresponding and meeting with Unocal executives in 1995 to inform them of the increased use of forced labour and villager relocation by the Myanmar government.91 Communications stemming

87 These will depend on the crime for which the accused is being charged, or linked with.
88 For more on this topic see Ramasastry, supra note 60, at 134.
90 Ibid at 1298
91 Ibid at 1299
from Unocal also suggested knowledge.92 This seems to suggest that the court viewed the circumstances as a whole to determine that Unocal did have knowledge of the use of forced labour by the Burmese government.93 In a similar manner, such knowledge could be aggregated under international criminal law in order to determine a corporation had the requisite knowledge in order to be liable under international criminal law.

**Wait - Where does the Corporate Fault model fit in?**

As seen, the domestic principles of vicarious liability, identification and aggregation are not irreconcilable with international criminal law. The corporate fault model, however, does not fit as easily under the international criminal law that is currently established. Unlike the other models, it does not provide a mechanism for proving knowledge or mens rea. Rather, liability is imposed where the corporate culture, or systems within the corporation, cause or fail to prevent improper conduct of its employees. The model is thus suggestive of a lower-standard of knowledge which may not be conducive to the seriousness that accompanies the charge of committing or aiding in the commission of an international crime.

Yet, the Australia experience illustrates that this model has some acceptance as an appropriate method of attributing criminal liability to a corporation. It also has support in the literature on corporate liability.94 Ultimately, the model requires a conceptual leap past the individualized concept of ‘knowledge’ and requires the court to adopt an entirely new method of determining when a corporation will be

---

92 *Ibid* at 1301-02
93 This case was settled on December 13, 2004 just one day before the Ninth Circuit was due to hear an appeal en banc of the 2002 Unocal decision.
94 See for example Lederman, *supra* notes 13 and 39; Gobert, *supra* notes 14 and 43.
deemed criminally liable. Essentially, the idea of collective responsibility must first be accepted in order to utilize this model. Once this is so, it will be easier to accept a model that does not focus on individual knowledge, but rather on an overarching collective system and how knowledge is processed and handled in such a system. From there, liability will attach based on how the collective entity used and responded to that knowledge. Indeed, in Australia, for offences requiring proof of intent, liability will attach to a corporation where it can be shown that a corporate culture existed that directed, encouraged, tolerated or led to non-compliance with international criminal law.

The corporate fault model is an important addition to the models used to attribute liability to a corporation since it responds to the reality that modern corporations may not easily trace liability to individuals within the corporation, but rather that the corporation itself can create an environment that results in the commission of crimes. This may not be so all the time. But where it does exist, and it is clear that the corporate culture resulted in the commission of, or complicity in, egregious human rights abuses – liability must attach to the corporation. The corporate fault model provides the answer. Additionally, as it stands currently under international criminal law, the concept of command responsibility arguably already encompasses many of the concepts inherent to the corporate fault model.

Command Responsibility and Corporate Fault

The principle of command responsibility has been described as, ‘the most effective method by which international criminal law can enforce responsible
command.'" It entails responsibility for the commander’s acts or omissions in failing to prevent or punish the crimes of his subordinates whom he knew or had reason to know were about to commit serious crimes or had already done so.\footnote{Prosecutor v. Hadzihasanovic, IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003, para 16.} Three things must be shown in order to establish this form of liability. First, a superior-subordinate relationship existed in which the superior must have had effective control over the subordinates. Second, that the superior knew or had reason to know that subordinates were about to commit crimes or had already done so. Finally, that the superior failed to take reasonable and necessary measures to prevent such acts, or to punish them afterwards.

This form of liability shares many of the same concepts inherent in the corporate fault model. The corporate entity takes the form of the ‘commander’, in that it provides an overarching system under which the actors/subordinates operate. The corporate commander is responsible for controlling the acts of subordinates by way of establishing, implicitly or explicitly, what is acceptable conduct. Proponents of this model would indeed argue that the corporate entity exercises effective control over its agents, as they operate within, and more importantly make decisions within, the corporate ethos. ‘Effective control’ has been held to mean ‘the material ability to prevent offences or punish the principal

offender’. A corporate entity arguably has this ability over its agents. Unless they are rogue agents, corporate employees and agents are acting in accordance with corporate expectations.

‘Knowledge’ here has been defined as the awareness that the relevant crimes were committed or were about to be committed. Actual knowledge can be established by direct or circumstantial evidence. What seems to matter is that the level of information was sufficient to make the accused aware of the acts. The alternative form of knowledge, that the commander ‘had reason to know’, requires that the commander possessed some general information which put him on notice of the likelihood of unlawful acts by his subordinates. In contrast to the ad hoc tribunals, the ICC has chosen to use the phrase, ‘should have known’ in its interpretation of this form of liability. This seems to import an active duty on the superior to inform himself of the activities of his subordinates. In addition, it also appears to establish liability for negligence in this area. The ad hoc tribunals, on the other hand, have found that there is no general duty to actively seek out information of possible criminal conduct. This is currently being debated at the ICC, as the law continues to develop in this area.

98 Kordic and Cerkez Trial Judgment, para 427.
99 See Blaskic Trial Judgment, para 308; Aleksovski Trial Judgment, para 80; Krnojelac Trial Judgment, para 94.
100 See Celebici Appeal Judgment, para 238.
Either of these forms of knowledge suggest that a corporate entity could be held liable using these principles, where the circumstances show that enough information existed within various organs of the corporation to put the entity on notice, or where actual knowledge could be inferred. In other words, where it could be said that it is impossible for the corporate entity not to have known of the acts of individual agents. It therefore removes the ability of individuals to hide behind the guise of the corporate entity while the entity itself remains willfully blind.

Should the higher standard of ‘should have known’ be interpreted to include an active duty of the superior to inform himself and liability for negligence be imposed, this would accord well with the corporate fault principles. This would seem to suggest that there can be liability where systems of communication and monitoring are insufficient, thereby causing or failing to prevent criminal conduct.

One element that is not reconcilable between the corporate fault and command responsibility models is that the principle of corporate fault holds the corporate culture itself liable for causing or failing to prevent. In other words, the corporate ethos is the underlying problem. Under the principle of command responsibility, the commander himself is not liable as a party. The commander himself is not liable for causing the commission of the crimes, but rather for failing to take corrective action before or after the commission of the crime. It is a subtle difference, but a difference nonetheless. Regardless of this nuance, the Australian legislation incorporating the corporate fault model punishes the corporation for its failure to create and maintain a corporate culture (‘effective control’) that requires compliance with the law. This could be seen as liability for failing to prevent the
criminal conduct. When viewed in this light, it is more akin to the liability imposed under the doctrine of command responsibility.

The third requirement of command responsibility is proof that the commander failed to take necessary and reasonable measures to prevent the subordinates from committing the crimes. Similarly, the corporate fault model looks to proof that non-compliance with the law went unpunished. When the command responsibility provision is examined, one can see that there are conceptual similarities with the corporate fault model and that international criminal law does in fact seem to embrace some of the underlying ideas of the corporate fault model. Thus, the model may not require such a huge conceptual leap as was originally thought.

Joint Criminal Enterprise

This form of liability is one of the most contentious issues arising from the ad hoc tribunals’ jurisprudence. The liability for co-perpetration under international law is not at issue; rather what form it should take and under what conditions liability should be imposed. The fact that this form of liability is not cast in stone however, is an advantage for the arguments this paper is putting forth; where there is room for flexibility, there is greater room for adopting domestic corporate principles of liability.

Joint criminal enterprise is seen as a form of ‘commission’. Generally it is understood to mean an understanding or arrangement, between two or more

---

people, that they will commit a crime.\textsuperscript{103} There are three ways in which one can participate in a joint criminal enterprise. First, through direct participation (as a principal offender). Second, by being present at the time the crime is committed and intentionally assisting or encouraging the commission of it by the principal offender (one must also know that the crime is being committed). Third, with knowledge of a system in which the crime is being committed and by acting within that system with the intent to further it.\textsuperscript{104}

What distinguishes joint criminal enterprise from aiding and abetting is that it requires the accused to share the intent with the principal perpetrator. Three particular situations, in which the above forms of participation may occur, have been identified as being part of customary international law.\textsuperscript{105} The first situation requires all participants, acting pursuant to a common purpose, to share the same criminal intent and act to give effect to that intent.\textsuperscript{106} The second situation is similar to the first, but where it occurs within a context of systemic criminal activity, such as where concentration or extermination camps were set up.\textsuperscript{107} The third situation is similar to the first as well, but where the principal offender commits an act which falls outside of the intended joint criminal enterprise but was nonetheless a ‘natural and foreseeable consequence’ of acting out the agreed joint criminal enterprise.\textsuperscript{108}

\textsuperscript{103} See for example \textit{Krnojelac} Trial Judgment, para 80.

\textsuperscript{104} See \textit{Ibid}, para 81.


\textsuperscript{106} See \textit{Vasiljevic Appeal Judgment}, para 97.

\textsuperscript{107} See \textit{Vasiljevic Appeal Judgment}, para 98.

Proving the corporation has the intent to pursue a common purpose with others provides the same difficulties in establishing mens rea that have already been mentioned in respect of other forms of participation. However, the importance of this form of liability lies more in its recognition, by international law, that ‘international criminal responsibility embraces actions perpetrated by a collectivity of persons in furtherance of a common criminal design.”109 The only major obstacle for the purpose of reconciling it with corporate liability is that each member of the joint criminal enterprise must have the same intent, whereas corporate principles of aggregation and corporate fault are looking to numerous individuals or an overarching system in order to attribute liability. In other words, this provision is rooted in, and informed by, the principle of individual criminal responsibility. What is still not recognized at international law is the concept of organizational forms of fault, whereby the overarching system may be liable for inducing criminal activity. Where this is so, concepts like aggregation that point to bits and pieces of ‘fault’ within the ‘system’ are more acceptable.

**Attribution of Liability for Specific International Crimes**

**Crimes Against Humanity**

Five elements must be proven for crimes against humanity to be established. First, an attack must have occurred. Second, there must be a link between the acts of the accused and the attack. Third, the attack must be directed against any civilian population. Fourth, the attack must be widespread and systematic. Finally, the accused must have the appropriate mens rea. In addition to proving the requisite

---

109 See *Tadic* Appeal Judgment, para 193.
mens rea for the underlying offence (i.e. mens rea for murder, extermination, 
torture, rape, etc.), it must also be shown that the accused had knowledge of the 
following: that there is a widespread or systemic attack on a civilian population and 
that the accused's acts formed part of this attack.\textsuperscript{110} Or, the accused took the risk 
that his or her acts will form part of such attack.\textsuperscript{111}

As alluded to earlier, knowledge of the attack and the accused’s awareness of 
his participation in such an attack may be inferred from circumstantial evidence.\textsuperscript{112} 
It is sufficient to show that by the function the accused willingly accepted, he 
knowingly took the risk of participating in the implementation of that attack.\textsuperscript{113} This 
acceptance by international criminal law, of assessing knowledge on an objective 
level, is more conducive to applying domestic corporate liability principles. 
Principles of aggregation may be used to discover whether, on the whole, 
knowledge existed among employees and agents of the corporate entity. 
Alternatively, it could be assessed based on proof of decisions made by the 
corporation which show that the entity willingly placed itself in such a situation, and 
thus took the risk of participating in the implementation of the attack.

Where corporations provide personnel, equipment or facilities that assist 
governments or other groups in committing attacks they could objectively be 
assessed to have had knowledge of the attack and awareness of their participation

\textsuperscript{110} See Kunarac Trial Judgment, para 434; Prosecutor v. Kunarac et al., IT-96-23- and IT-96-23/1-A, 
\textsuperscript{111} See Ibid, but also \textit{R v. Finta} [1994] S.C.R. 701, para 706: ‘…the mens rea requirement of both crimes 
against humanity and war crimes would be met if it were established that the accused was willfully blind to 
the facts of circumstances that would bring his or her actions within the provisions of these offences.’ 
\textsuperscript{112} See Kunarac Trial Judgment, para 434; Kunarac Appeal Judgment, para 102. See also Tadic Trial 
Judgment, para 657: “While knowledge is thus required, it is examined on an objective level and 
factually can be implied from the circumstances.” 
\textsuperscript{113} Blaskic Trial Judgment, para 251; Vasiljevic Appeal Judgment, para 30.
in such attack. The alleged actions of Talisman, a Canadian-based oil company, are illustrative here. There were allegations that Talisman knew its facilities were being used by the Sudanese government to refuel planes and helicopters and load them with 500-pound bombs and other armament, despite large amounts of circumstantial evidence of a widespread or systemic attack against a civilian population (including international accusations of genocide being committed by the Sudanese government). In addition, the complaint against Talisman alleged that Talisman and the Government worked together to devise a plan for the security of the oil fields, that Talisman hired its own military advisors to coordinate military strategy with the Government, and that there were regular meetings between Talisman, Army Intelligence and the Ministry of Energy and Mining where Talisman would map out areas intended for exploration and they would discuss how to dispose of civilians in those areas. The action under the ATCA against Talisman has been dismissed, but the allegations against them are illustrative of how corporations must be careful in their dealings with host states that are (or may be) committing egregious human rights violations. Where, on the whole, it appears that they knew of the attack and were aware of their participation in the attack, the various pieces of evidence could theoretically be aggregated in order to attribute liability to the corporation.

116 On September 12, 2006 the U.S. District Court for the Southern District of New York granted Talisman’s Motion for Summary Judgment, dismissing the lawsuit brought against Talisman on the basis that the plaintiffs had no admissible evidence to support their claims. The plaintiffs appealed in February 2007, but a decision has not yet been granted in the appeal.
The same issues mentioned earlier, with respect to the corporate fault model, apply here as well. It does not locate liability within individuals and therefore requires an entirely new method of determining liability that is specific to organizations and collective liability. The corporate fault model of liability, however, could be used to reinforce corporate liability. Where the internal, overarching structure implicitly or explicitly authorized the actions, decisions and knowledge (which have been aggregated) – liability will fall on the corporation for having such an overall structure and for failing to create and maintain one that promoted compliance of the law as a primary consideration.

Genocide

Under international criminal law, genocide has been defined to mean any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group: killing members of the group, causing serious bodily or mental harm to the group, deliberately inflicting on the group condition of life calculated to bring about its physical destruction in whole or in part, imposing measures intended to prevent births within the group, or forcibly transferring children of the group to another group. In order to prove the crime of genocide, the accused must have the required genocidal mens rea, or must have known of the principal offender’s genocidal intent. In addition, mens rea for the underlying offence (i.e. intention to commit murder, inflict serious bodily or mental harm, etc.) must also be established.

117 See ICTY Statute, Art. 4; ICTR Statute, Art. 2; Rome Statute, Art. 6.
Genocide is thus a crime requiring proof of specific intent. That is, genocidal mens rea. The accused must have intended to destroy, in whole or in part, one of the prescribed groups of people. The existence of such a specific intent requirement makes it difficult to reconcile with domestic corporate law principles that focus more on objective, or more diluted forms of establishing mens rea. Attributing liability to a corporation as a principal offender for genocide is unlikely to happen. To do so would require an individual, or group of individuals, to establish a corporation with the intent to use the corporation as such. Where this is so, those individuals would rightly face individual criminal responsibility. The corporation would have been merely a guise. Such a case would be akin to the finding in the Farben case that the German industrialists used the corporation to commit the crimes.

What are more important for our purposes are the methods of attributing liability to a corporation who is complicit in the genocidal acts of others. In order to be found guilty for complicity in genocide, it must be shown that the accused provided practical assistance, encouragement, or moral support which had a substantial effect on the perpetration of the crime.118 There have been disagreements regarding the mens rea required as an accomplice in genocide, however. Some have argued that the accomplice must also possess the specific intent for genocide.119 This would make it very hard to attribute to a corporation, since specific intent could not be proven by way of aggregation and if any of the high

118 See ICTY Statute Art. 4(3)(e); ICTR Statute, Art. 2(3)(e).
119 See Proscutor v. Jelisic, IT-95-10-T, Judgment, 14 December 1999, para 86 ("Jelisic Trial Judgment"). See also the opinion of Guenael Mettraux, supra note 102, at 263.
managerial agents did possess the specific intent he would be liable as an individual. However other trial chambers of the ad hoc tribunals have not found such a requirement.\textsuperscript{120} Further, the Rome Statute did not import such a requirement.\textsuperscript{121} Thus it appears that knowledge of the principal offender’s intent will suffice. Therefore the same considerations with respect to reconciling ‘knowledge’ under international criminal law with ‘knowledge’ of a corporation under domestic principles applies here in the case of genocide.

While it may be harder to show ‘knowledge’ because of the specific intent required, it is still nonetheless not entirely incompatible with domestic law principles. Where evidence, on the whole, indicates that the corporate entity must have been aware (either through the principles of vicarious liability, identification theory or aggregation), the corporate entity may be found liable. The corporate fault model is not useful in determining whether knowledge existed in the corporation of the principal offender’s genocidal intent. It is more useful in explaining, after other principles have been utilized to attribute mens rea to the corporation, how such acts could be committed and why liability should be attributed.

\textit{Overarching Principles of International Criminal Law}

\textbf{Specificity}

The principle of specificity requires that laws imposing criminal responsibility should be as specific as possible, so that a potential perpetrator is

\textsuperscript{120} See \textit{Bagilishema} Trial Judgment, para 71; \textit{Musema} Trial Judgment, para 181.

\textsuperscript{121} Complicity/aiding and abetting for all crimes, including genocide, is covered under Article 25(3)(c) and (d) of the Rome Statute (provision dealing with Individual Criminal Responsibility, and the forms of participation thereunder).
aware of the mens rea and actus reus elements of the crime in question.¹²² Using the domestic principles enunciated, attributing liability to corporations for international crimes does not appear to violate the principle of specificity. Corporate entities, once aware that they can be found liable for such crimes, may choose to put in place certain measures to ensure their agents and employees do not make decisions that would potentially violate these provisions.

Further, the principle of specificity is not strictly adhered to in international criminal law. Due to the nature of its evolution, international criminal law rules themselves rely on vague and imprecise concepts and can be unclear as to the exact contours of their subjective and objective elements.¹²³ Thus the concepts of aggregation and corporate fault, wherein liability will not be tied to one individual, arguably work just as well at the level of international criminal law.

**Equal Culpability of Participants**

As mentioned earlier, the principle of equal culpability of participants holds that all are liable if they contributed to or assisted in the commission of the crime. Once liability is established, the judge then evaluates the degree to which one is culpable.¹²⁴ Holding corporations liable for their participation in international crimes accords with this principle. The methods of attributing liability must be modified to adapt to the realities of the corporate entity, and it could then be up to

---


¹²⁴ See Mantovani, *supra* note 75, at 107.
the court to determine the degree of culpability. What is important is that corporations are brought to the table.

Some might argue that overall corporate liability may be diminished due to an inability to locate the requisite act and mental state in one culpable individual, however that is insufficient to deny liability for corporations altogether. Liability should exist nonetheless. Further, where domestic principles are utilized that are flexible and responsive to the reality of each particular corporate situation, liability under international criminal law will reflect the reality of the corporate role in the commission of the crime. In other words, providing for corporate liability under international criminal law would allow for true recognition of the principle of ‘equal culpability of participants’.

**Conclusion**

Much has been written about the need to hold corporations accountable for the role in the commission of human rights abuses around the world. Indeed, the general consensus appears to be that corporations can violate international law, and should be held liable for it.\(^\text{125}\) The recent Alien Tort Claims Act cases, relying on the Nuremberg judgments, support this finding. Yet the international forums have thus far refused to recognize the liability of corporations. This may be so, in part, because of the uncertainty surrounding how liability should be attributed to corporations and whether this is compatible with established international criminal law principles. This paper has attempted to illustrate the principles used by domestic

---

jurisdictions in order to uncover which principles work best, and which may be better suited to international criminal law.

Canada and Australia are leaders in the field of attributing liability to corporate entities. Both jurisdictions have incorporated specific principles of liability for corporations into their respective criminal codes. Yet the United States and the U.K. also allow for corporate criminal liability. These four jurisdictions illustrate the four dominant models of attributing of liability to corporations: the doctrine of vicarious liability, the identification doctrine, aggregation, and the corporate fault model. There are benefits and downfalls to each. Yet it is important to note that each jurisdiction uses a combination of approaches. A flexible approach, that responds to the variety of corporate realities and situations that lead to violations of international criminal law will be most effective at attributing liability where it is due. Learning from the domestic experiences, it would be most effective for international criminal law to develop in a manner that does not take a strict approach to attributing liability to corporate entities.

While some of the domestic principles of attribution may work better than others when viewed from an international criminal law perspective, it was shown that even models such as aggregation and corporate fault are not entirely irreconcilable with international criminal law. The principle of individual criminal responsibility may appear immediately irreconcilable with corporate liability, yet it is not beyond international criminal law to adapt and evolve to new situations such as this. The body of law in this area continues to evolve and change. In addition, the
principle of equal culpability of participants underscores the concern of international criminal law with finding liability where it is due.

It is also important to highlight that international criminal law recognizes collective forms of responsibility. This is seen in the provision for joint criminal responsibility. The Nuremberg precedents suggest this as well. In addition, liability for command responsibility recognizes many of the same underlying ideas that are captured by the corporate fault model. Thus, it is not that far beyond international criminal law to accept these ideas with respect to corporate liability.

Ultimately, one of the overarching goals of international criminal law is to end impunity and ensure that those who participate in egregious crimes do not go unpunished. This is reinforced by the fact that all must be bound by international law in order for it to be effective. Understanding the principles used to attribute liability to corporations, and how these may work on an international level, is an important step in the direction of holding corporations accountable.