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Criminal Liability of Canadian Corporations for International Crimes

(La responsabilité pénale des entreprises canadiennes en matière de crimes internationaux)

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Criminal Liability of Canadian Corporations for International Crimes
La responsabilité pénale des entreprises canadiennes en matière de crimes internationaux

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Professeure Anne-Marie Boisvert, présidente-rapporteur
Professeure Hélène Dumont, directrice de recherche
Professeure Geneviève Dufourt, membre du jury

Résumé

Ce mémoire porte sur la responsabilité pénale des entreprises canadiennes pour des crimes internationaux commis en partie ou entièrement à l'étranger.

Dans la première partie, nous montrons que les premiers développements sur la reconnaissance de la responsabilité criminelle d'entités collectives devant les tribunaux militaires établis après la deuxième guerre mondiale n'ont pas été retenus par les tribunaux *ad hoc* des Nations Unies et par la Cour pénale internationale. En effet, la compétence personnelle de ces tribunaux permet uniquement de contraindre des personnes physiques pour des crimes internationaux.

Dans la deuxième partie, nous offrons des exemples concrets illustrant que des entreprises canadiennes ont joué dans le passé et peuvent jouer un rôle criminel de soutien lors de guerres civiles et de conflits armés au cours desquels se commettent des crimes internationaux. Nous montrons que le droit pénal canadien permet d'attribuer une responsabilité criminelle à une organisation (compagnie ou groupe non incorporé) pour des crimes de droit commun commis au Canada, comme auteur réel ou comme complice. Nous soutenons qu'il est également possible de poursuivre des entreprises canadiennes devant les tribunaux canadiens pour des crimes internationaux commis à l'extérieur du Canada, en vertu de la *Loi canadienne sur les crimes contre l'humanité et les crimes de guerre,* du principe de la compétence universelle et des règles de droit commun.

Bref, le Canada est doté d'instruments juridiques et judiciaires pour poursuivre des entreprises soupçonnées de crimes internationaux commis à l'étranger et peut ainsi mettre un terme à leur état indésirable d'impunité.

Mots-clés : entreprises, droit pénal international, crimes internationaux, Canada, compétence universelle, responsabilité collective

Abstract

This master's thesis examines the criminal liability of Canadian corporations for their involvement in international crimes committed in part or entirely overseas.

First, we observe that initial developments by the military tribunals established after the Second World War in recognizing criminal liability of collective entities were not pursued by the United Nations *ad hoc* tribunals and the International Criminal Court. In fact, the personal jurisdiction of the latter tribunals does not extend to organizations and is limited to the prosecution of natural persons accused of committing international crimes.

In the second part of this thesis, we offer concrete examples to illustrate that Canadian corporations have assumed and continue to assume criminal roles in supporting civil wars and armed conflicts where international crimes are committed. We will demonstrate that Canadian criminal law attributes criminal liability to an organization (corporations or unincorporated groups) for common law offences committed in Canada, under direct or accomplice liability. We further maintain that Canadian corporations may be prosecuted before Canadian courts for their involvement in international crimes committed overseas, in accordance with the *Crimes against Humanity and War Crimes Act*, the principle of universal jurisdiction and common law rules.

In conclusion, Canada has the necessary legal and judicial instruments to prosecute corporations suspected of committing international crimes overseas and is therefore capable of ending their undesirable status of impunity.

Keywords : corporations, international criminal law, Canada, universal jurisdiction, collective liability

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Abbreviations

-A	Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia
A.C.	House of Lords, Appeals Cases
A/CONF:	United Nations General Assembly Conference
A/HRC/	United Nations General Assembly Human Rights Council
Adelaide Law Rev.	Adelaide Law Review
Australian LJ	Australian Law Journal
aff'd.	affirmed
AFRC	Armed Forces Revolutionary
Alta. C.A.	Alberta Court of Appeals
AMICC	The American Non-Governmental Organizations Coalition for the International Criminal Court
B.C.L.R.	British Columbia Law Reports (Canada)
BBC	British Broadcasting Corporation
Brit. Mil. Ct.	British Military Court
c.	contre ("versus")
CAHWCA	Crimes Against Humanity and War Crimes Act
C.C.C.	Canadian Citation Committee
C.R.	Criminal Reports
Can. T.S.	Canada Treaty Series
CETS	Council of Europe Treaty Series
ch.	chapter
Chp.	Chapter
CIA	Central Intelligence Agency
Cir.	Circuit
CJP	Criminal Justice Policy
CN	Committee
Crim. L. Q.	Criminal Law Quarterly

CSR	Corporate Social Responsibility
Cth.	Commonwealth
D.L.R.	Dominion Law Reports
DAFFE	Directorate for Financial Fiscal and Enterprise
DFAIT	Foreign Affairs and International Trade Canada
Doc.	Document
DRC	Democratic Republic of the Congo
E	Economic and Social Council of the United Nations
ed.	edition
eds.	editions
EO	Executive Outcomes
ETS	European Treaty Series
FARC	Revolutionary Armed Forces of Colombia
FARDC	*Forces armées de la République Démocratique du Congo*
F.	Federal Reporter (United States)
F. Supp.	Federal Supplement (United States)
F.R.D.	Federal Research Division (United States, Library of Congress)
GAOR	Official Records of the General Assembly
Geo. V.	George the Vth
GNPOC	Greater Nile Petroleum Operating Company Limited
H.C.	High Court of Justice (Canada)
HRW	Human Rights Watch
Hum. Rts. Q.	Human Rights Quarterly
ICJ	International Court of Justice
ICJ Rep.	International Court of Justice Reports
ICC	International Criminal Court
ICC-ASP	International Criminal Court – Assembly of States Parties

ICCLR	International Centre for Criminal Law Reform and Criminal Justice Policy
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
I.G. Farben	Interessen-Germeinschaft Farbenindustrie Aktiengesellschaft
ILR	Israel Law Reports
IME	International Investment and Multinational Enterprises
IMT	International Military Tribunal for the Trial of German Major War Criminals in Nuremberg
IMTFE	International Military Tribunal for the Far East
IRRC	International Review of the Red Cross
ISAF	International Security Assistance Force
IT-	International Criminal Tribunal for the Former Yugoslavia
JCE	Joint Criminal Enterprise
J.Q.	Jugements du Québec
L.R.T.W.C.	Law Reports of Trials of War Criminals
LL.D.	Doctor of Law
Loy. L. A. L. Rev.	Loyola of Los Angeles Law Review
Mass.	Massachusetts
Michigan L. Rev.	Michigan Law Review
MNC	Multinational Corporation
MNE	Multinational Enterprise
MONUC	United Nations Mission in the Democratic Republic of Congo
Mtg.	Meeting
N.J.L.	New Jersey Court of Errors and Appeals
N.Y.U. Journal Int'l. L. & Pol.	New York University Journal of International Law and Politics

NBER	National Bureau of Economic Research
NCP	National Contact Point for the OECD Guidelines for Multinational Enterprises
No.	Number
O.J.	Case from Ontario
OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the High Commissioner for Human Rights
Ont. C.A.	Ontario Court of Appeals
O.R.	Ontario Reports
Ottawa L. Rev.	Ottawa Law Review
P.C.I.J.	Permanent Court of International Justice
Parl.	Parliament (Canada)
PTC	Pre-Trial Chamber (ICC)
Q.B.	Queen's Bench
Q.L.	Lexis Nexis Quick Law
R.	Reine (Queen)
R.G.D.	Revue générale de droit
R.S.	Revised Statutes
R.S.C.	Revised Statutes of Canada
R.S.N.S	Revised Statutes of Nova Scotia
R.S.Q.	Revised Statutes of Quebec
REJB	Répertoire électronique de jurisprudence du Québec
Res.	Resolution
Rev.	Revised
RUF	Revolutionary United Front
-S	Sentence (of the ICTY)
S.C.	Statutes of Canada
S.C. Res.	Security Council Resolution
S.Q.	Superior Court of Quebec

S/RES	Security Council Resolution
SCC	Supreme Court of Canada
SCFAIT	Standing Committee of Foreign Affairs and International Trade
SCOR	Official Records of the Security Council
SCSL	Special Court for Sierra Leone
SDNY	Southern District of New York
Ser.	Series
Sess.	Session
SLWG	Sierra Leone Working Group
SPC	State Petroleum Company
SRSG	Special Representative of the Secretary General
Stat	United States Statutes at Large
Sub.	Sub-Commission
Supp.	Supplement
Sydney L.R.	Sydney Law Review
-T	Trial Chamber (ICTY or ICTR)
T.S.	Treaty Series
Temp. Int'l and Comp. Law Journal	Temple International and Comparative *Law Journal*
TIAS	United States Treaties and Other International Acts Series
T.M.W.C.	Trials of Major War Criminals
TNC	Transnational Corporations
U. Cin. L. Rev.	University of Cincinnati Law Review
U.K.	United Kingdom
U.N.	United Nations
U.N.T.S.	United Nations Treaty Series
U.S.	United States
U.S.A.	United States of America
U.S.C.	United States Code

UNHCR	United Nations High Commissioner for Refugees
UNWCC	United Nations War Crimes Commission
v.	volume
Vols.	Volumes
W.W.R.	Western Weekly Reports (Canada)
WL	Westlaw
WPG	Working Party on the OECD Guidelines for Multinational Enterprises
ZIS	Zeitschrift für Internationale Strafrechtsdogmatik

À mes parents, ma famille et mon conjoint

To my parents, my family and my partner

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It is a sad truism that there is nothing that people will not do to other people. This may be at the individual level, as with the psychopathic serial murderer, but it is particularly the case with regard to collective behaviour. This can occur in groups, institutions and organizations driven by ideology, patriotism, extreme belief in a leader, kinship or clanship, by racial hatred or by religious fanaticism. People become absorbed in the group and, within its solidarity, restraints are removed and they commit acts they would almost certainly never contemplate doing as individuals. To a degree then, the organization or collective is complicit (- Maurice Punch).[1]

Introduction

On 23 March 2005, representatives of an indigenous community organization from the municipality of Mindanao of the Philippines travelled to Canada. The purpose of their travel was to testify against the operations of a Canadian mining company, TVI, on their territory before the Subcommittee on the Human Rights Concerns of the Indigenous and Community of Men and Women of the Standing Committee on Foreign Affairs and International Trade (hereinafter, "SCFAIT").[2] The Subanon people alleged that on 17 March 2004, TVI's heavy equipment vehicles advanced on protesters and that TVI paramilitary guards shot into the ground and wounded four picketers.[3]

Following this hearing and a recommendation of the Subcommittee, SCFAIT prepared a report in 2005 which called on the Canadian government to "establish clear legal norms in Canada to ensure that Canadian companies and residents are held accountable when there is evidence of environmental and/or human rights violations associated with the activities of Canadian mining companies".[4]

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1 Maurice Punch, "Why corporations kill and get away with it: the failure of law to cope with crime in organizations" in André Nollkaemper & Harmen Van Der Wilt, eds., *System Criminality in International Law* (New York: Cambridge University Press, 2009) 42 at 42.

2 Mining Watch Canada, Newsletter, 19, "House of Commons tells Government – 'Regulate Canadian Mining Companies Abroad – Investigate TVI Pacific in the Philippines'" (2005), at 5, online: Mining Watch Canada <http://www.miningwatch.ca/sites/miningwatch.ca/files/MWC_newsletter_19.pdf> (accessed 27 January 2010).

3 *Ibid.*

4 Canada, Standing Committee on Foreign Affairs and International Trade [SCFAIT], *Fourteenth Report: Mining in Developing Countries-Corporate Social Responsibility*, 38th Parliament, 1st sess., (Ottawa: Foreign Affairs and International Trade Canada, 2005) at 3. See also National Roundtables on Corporate Social Responsibility Advisory Group, *National Roundtables on Corporate Social*

As a response to these recommendations, the Government of Canada's Department of Foreign Affairs and International Trade (hereinafter, "DFAIT") hosted a series of national roundtables through the office of its National Contact Point (hereinafter, "NCP")[5] from June to November 2006 in the cities of Vancouver, Toronto, Calgary and Montreal. The objective of the roundtables was to examine the position of Canadian extractive sector companies operating in developing countries and their capacity to meet or exceed leading international corporate social responsibility (hereinafter, "CSR") standards and best practices.[6]

A report was subsequently released on 29 March 2007 by the Advisory Group of the National Roundtables with recommendations that are not binding but are recognized by the Government of Canada as "a valuable input to a government response".[7] The Advisory Group outlined the challenges faced by Canadian extractive companies operating in developing countries' conflict zones or in areas where they perceive the need to protect their operations through the employment of armed security forces.[8] Concomitantly, the

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Responsibility and the Canadian Extractive Industry in Developing Countries (29 March 2007), online: The Mining Association of Canada <http://www.mining.ca/www/media_lib/MAC_Documents/Publications/CSRENG.pdf> (accessed 14 April 2010), at vi, xiv [hereinafter, *Advisory Group Report*].

5 *OECD Guidelines for Multinational Enterprises: Text, Commentary and Clarifications*, OECD Doc. DAFFE/IME/WPG (2000) 15/FINAL, revised 31 October 2001 [hereinafter *OECD Guidelines*]. (The National Contact Point (NCP) acts as a forum to deal with any questions having to do with the operations of multinational corporations); DFAIT, *Canada's National Contact Point (NCP) for the OECD Guidelines for Multinational Enterprises (MNEs)*, online: DFAIT <http://www.ncp-pcn.gc.ca/national_contact-en.asp> (accessed 27 January 2010) (Canada's NCP is located at the Investment Trade Policy Division (TBI), 125 Sussex Drive, Ottawa, Ontario, Canada K1A 0G2. E-mail: ncp.pcn@international.ca; tel.: (613) 996-3324; fax (613) 944-0679. In April 2008, a process was initiated to transfer the role of NCP chair and coordinator from the Investment Trade Policy Division to the Trade Commissioner Service Overseas Operations Division).

6 DFAIT, *The National Roundtables on Corporate Social Responsibility*, online: DFAIT <http://geo.international.gc.ca/cip-pic/current_discussions/csr-roundtables-en.aspx> (accessed 8 December 2006 and 14 April 2010)

7 *Ibid.*, See also *Advisory Group Report*, *supra* note 4, at vi, xiv (So far, two of the Report's recommendations have been implemented. First, Canada announced its support for the Extractive Industries Transparency Initiative, pursuant to recommendation 4.1.2.4, including a contribution of $1,150,000 to the EITI Trust Fund over the next four years. Second, Canada enhanced the public reporting of the Canada Investment Fund for Africa, pursuant to recommendation 2.3.2.2).

8 *Advisory Group Report*, *ibid.* at 6.

Report sustained that some of the countries in which these companies operate are unable or unwilling to enact and enforce laws that ensure compliance with fundamental human rights and basic environmental protection.[9]

The question of accountability of Canadian corporate operations on overseas territories has thus become a concern deliberated on a national level. This thesis will attempt to respond in part to the question by demonstrating that legal mechanisms do exist in Canada for the prosecution of Canadian corporations before Canadian courts for international crimes committed on overseas territories.

Historical Background

The first part of this thesis will provide a historical background and describe the development of international criminal justice related to punishment of collective action to establish the absence of jurisdiction of international courts for the prosecution of corporations. On an introductory level, it is important to mention that since the adoption of the *Peace Treaty of Versailles*[10] that concluded the First World War, there were a number of proposals and failed attempts by the UN General Assembly to create a permanent and effective international justice forum for the prosecution of alleged offenders for international crimes.[11]

It therefore became necessary to set up two international military tribunals following the Second World War for the purpose of judging the atrocities committed by the

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9 *Ibid. at* 41.

10 *The Treaty of Peace between the Allied and Associated Powers and Germany*, (1919) L.N.T.S 34 (entered into force 28 June 1919) [hereinafter, the *Peace Treaty of Versailles*]

11 Hervé Ascensio, Emmanuel Decaux & Alain Pellet, *Droit international pénal* (Paris : Éditions A. Pedone, 2000); See also Chérif Bassiouni, *Introduction au droit pénal* (Brussels : Émile Bruylant, 2002) and Antonio Cassese & Mireille Delmas-Marty, eds., *Juridictions nationales et crimes internationaux* (Paris : Presses Universitaires de France, 2002) (For a history of the discussions and proposals to create an international criminal court).

Nazi and Japanese regimes from 1939 to 1945. These tribunals were named the International Military Tribunal for the Trial of German Major War Criminals in Nuremberg (hereinafter, the "Nuremberg Tribunal" or the "IMT") and the International Military Tribunal for the Far East (hereinafter, the "Tokyo Tribunal" or the "IMTFE"). Their charters allowed for a declaration of criminality of a group or organization of which an accused individual was a member[12] and convictions of individuals for conspiracy to wage aggressive war.[13] A series of trials were thereafter conducted in the Allied Countries of the Second World War which held individual senior company officials, criminal organizations and conspirators criminally responsible for actively assisting the Nazi regime and contributing to the war.

Despite these advancements, the absence of a permanent and neutral adjudicating body with worldwide jurisdiction to punish the criminals of international crimes prevented the United Nations from carrying out effective sanctions to curtail the spread of violence and killing which continued to plague various regions of the world.

In the interval of international negotiations for the creation of an international criminal court, and in response to devastating conflicts and increased threats to worldwide peace and security, the international community reacted in 1993, with the United Nations Security Council's creation of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the

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12 *Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis*, 8 August 1945, 82 U.N.T.S. 280, art. 9(1), online: UNHCR <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b39614> (accessed 17 April 2010) [hereinafter, *London Charter*] and *Charter of the International Military Tribunal for the Far East*, *Special Proclamation by the Supreme Commander for the Allied Powers at Tokyo*, 19 January 1946, *amended* 26 April 1946, TIAS No. 1589, reprinted in 4 Treaties and Other International Agreements of the United States of America 27 (1946), art. 5 [hereinafter, *Charter of the IMTFE*].

13 *London Charter*, *ibid.*, art. 6 (a) and *Charter of the IMTFE*, *ibid.* art. 5 (a).

Territory of the Former Yugoslavia since 1991 (hereinafter, the "ICTY").[14] The following year, the Security Council established the International Criminal Tribunal of Rwanda (hereinafter, the "ICTR") to judge the genocide and other serious crimes committed in the country from 1 January to 31 December 1994.[15]

The personal jurisdiction of each tribunal extends only to natural persons[16] for three distinct violations of international humanitarian law: crimes against humanity, crimes against the laws and customs of war (or "grave breaches of the Geneva Conventions of 1949") and genocide.[17] Previous developments on corporate accountability were not pursued to include corporations as punishable persons under the Statutes of the *ad hoc* tribunals. Nevertheless, the concept of individual responsibility for participation in collective crimes was re-defined and expanded, particularly under notions of complicity, common purpose liability and other modes of participation in international crimes.[18]

Discussions continued on the topic of including jurisdiction for legal persons in the framework of proposals to create a permanent international criminal court. The project lay

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[14] Ana Bijelic, Hélène Dumont & Anne-Marie Boisvert, "Le système de justice des pays de l'ex-Yougoslavie et les défis de l'administration de la justice pénale internationale" in Hélène Dumont & Anne-Marie Boisvert, eds., *La voie vers la Cour pénale internationale : tous les chemins mènent à Rome* (Montréal : Les Éditions Thémis, Inc., 2004), 225 at 260. The ICTY was established under the *Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, U.N. Doc. S/RES 808 (1993), S/RES/827 (1993), S/RES/1166 (1998), annex, S/RES/1329 (2000), S/RES/1411 (2002), S/RES/1431 (2002) annexes I & II, S/RES/1481 (2003), annex, S/RES/1597 (2005), annex, S/RES/1660 (2006), annex, S/RES/1837 (2008), annex, S/RES/1877 (2009), annex, online: ICTY <http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf> [hereinafter, *ICTY Statute*]

[15] The ICTR was established under the *Statute of the International Tribunal for Rwanda*, S.C. Res. 955, U.N. SCOR, 49th Sess. 3453rd mtg., U.N. doc. S/RES/955 (1994), S/RES/1165 (1998), S/RES/1329 (2000), S/RES/(2002), S/RES/1431 (2002), S/RES/1503 (2003), S/RES/1512 (2003), S/RES/1534 (2004), S/RES/1684 (2006), S/RES/1717 (2006), online: ICTR <http://www.ictr.org/ENGLISH/basicdocs/statute/2007.pdf> (accessed 14 April 2010) [hereinafter, *ICTR Statute*].

[16] *ICTR Statute, ibid,* art. 5; *ICTY Statute*, *supra* note 14, art. 6.

[17] *ICTR Statute*, *ibid.*, art. 2 (genocide), 3 (crimes against humanity), 4 (violations of article 3 common to the Geneva Conventions and of Additional Protocol II); *ICTY Statute*, *ibid.*, art. 2 (grave breaches of the Geneva Conventions of 1949), 3 (law and customs of war), 4 (genocide), 5 (crimes against humanity).

dormant until 1992, when an original draft statute for the establishment of an international criminal court was submitted by the preparatory committee to the United Nations Diplomatic Conference in Rome on Plenipotentiaries on the Establishment of an International Criminal Court in 1998 (hereinafter, the "*Rome Conference*")[19].

The Court was finally established by the *Rome Statute of the International Criminal Court* (hereinafter, the "*Rome Statute*") on 17 July 1998[20] and entered into force on 1 July 2002 with sixty (60) State Parties. Today, one hundred and eleven (111) States have become Parties to the Statute[21]. With regards to previous discussions on corporate accountability, the *Rome Conference* decided that "the Court shall have jurisdiction over natural persons"[22] only pursuant to article 25 of the *Rome Statute*. At the same time, this article details at length various modes of participation to reinforce individual responsibility for collective and mass scale international crimes.

Notions: Group Entities, Corporations and Universal Jurisdiction

The need to delineate rules of liability for group action in international law stems from the very nature of the core crimes defined by the international courts. These offences are listed in article 5 (1) of the *Rome Statute*, which provides the Court jurisdiction over

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18 *ICTR Statute*, *ibid.*, art. 6; *ICTY Statute*, *ibid.*, art. 7.

19 *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, Official Records, A/CONF.183/13, Rome, 15 June - 17 July 1998, Volumes I, II, & III, available at online: United Nations <http://untreaty.un.org/cod/diplomaticconferences/icc-1998/icc-1998.html> (accessed 14 April 2010) [hereinafter, *Rome Conference*].

20 *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 U.N.T.S. 90, U.N. Doc. A/CONF.183/9 (adopted on 17 July 1998 and corrected by *procès-verbaux* of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. Entered into force on 1 July 2002), online: United Nations <http://untreaty.un.org/cod/icc/statute/english/rome_statute(e).pdf> (accessed 14 April 2010) [hereinafter, *Rome Statute*].

21 International Criminal Court, *ICC at a Glance*, online: ICC <http://www.icc-cpi.int/menus/icc/about%20the%20court/icc%20at%20a%20glance/icc%20at%20a%20glance?lan=en-GB> (accessed 14 April 2010).

22 *Rome Statute*, *supra* note 20, art. 25(1).

"the most serious crimes of concern to the international community as a whole"[23] and are identified as: genocide, crimes against humanity, war crimes and the crime of aggression.[24] Importantly, each of these crimes requires a systemic form of participation in their commission, either through the perpetration of criminal acts committed as part of a policy or on a large-scale for war crimes[25]; or when committed as part of a widespread or systematic attack for crimes against humanity. "Widespread" refers to a large number of victims and "systematic" implies a high degree of organization, pursuant to a plan or policy instigated or directed by a Government or by any organization or group.[26] Finally,

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[23] *Ibid.,* art. 5(1).

[24] *Ibid.*, art. 5(1)(a)(b)(c)(d). See also art. 5(2) with regards to the crime of aggression, which states: "The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations." An amendment was recently adopted by the Assembly of States Parties to define and provide jurisdiction for the crime of aggression at the Review Conference of the International Criminal Court which took place from 31 May to 11 June 2010. According to this amendment, the Conference included the following definition of aggression: "the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations". See Review Conference of the Rome Statute of the International Criminal Court, *The Crime of Aggression, RC/Res.*6, 13th plenary mtg., Annex I (2010), at art. 2 (1), online: ICC <http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf> (accessed 29 June 2010) [hereinafter, *RC/Res.6*]]. This definition is based on the resolution, United Nations, *Definition of Aggression*, G.A. Res. 3314 (XXIX), 29th Sess., 2319th mtg. (1974) 142 (see Assembly of States Parties, *Review Conference of the Rome Statute Concludes in Kampala,* Press Release ICC-ASP-20100612-PR546 (12 June 2010), online: ICC <http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/review%20conference%20of%20the%20rome%20statute%20concludes%20in%20kampala> (accessed 29 June 2010). The amendment will only be implemented after 17 July 2017 (See *RC/Res.6, ibid.* at art. 3(3)). It remains to be seen how Canada and other national jurisdictions will integrate the new amendment in their domestic legislations and whether the distinction between natural and legal persons will be made therewith. For the moment, Canada only provides jurisdiction for crimes against humanity, war crimes and genocide in its *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24 [hereinafter, CAHWCA] which will be one of the main focuses of this thesis.

[25] *Ibid.*, art. 8.

[26] *Ibid.,* art. 7. See also The International Centre for Criminal Law Reform and Criminal Justice Policy & Rights and Democracy, *International Criminal Court. Manual for the Ratification and Implementation of the Rome Statute*, 3d ed., (Vancouver: University of British Columbia ICCLR, March 2008), at 75. Online: Coalition for the International Criminal Court <http://www.iccnow.org/documents/ICC_Manual_-_March_2008_-_ICLR.pdf> (accessed 14 April 2010) [hereinafter, *Manual for the Ratification and Implementation of the Rome Statute*].

genocide, the "crime of crimes"[27] is considered unique and the most reprehensible crime because of "its element of *dolus specialis* (special intent) to destroy in whole or in part a national, ethnic, racial or religious group"[28], thus requiring an amount of premeditation and thought invested in committing the crime shared by a group of persons.[29]

Collective entities likely to partake in core international crimes of the international tribunals, whilst having a legitimate purpose of existence, include armies, militias, ethnic groups, religious associations, government institutions, police forces and others.[30] The *Criminal Code of Canada*[31] (hereinafter, the "*Criminal Code*") also defines "entity" under the provisions related to terrorism charges as "a person, group, trust, partnership or fund or an unincorporated association or organization".[32]

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27 *Prosecutor* v. *Kambanda*, ICTR-97-23-S, Judgment and Sentence, Case (4 September 1998) at para. 39(x) [hereinafter, *Kambanda*] in Wibke K. Timmerman, "The Relationship between Hate Propaganda and Incitement to Genocide: A New Trend in International Law Towards Criminalization of Hate Propaganda?" (2005) 18 Leiden Journal of International Law 257, at 272. (Genocide was named the "crime of crimes" by Judge Laïty Kama of the ICTR in *Kambanda* because of its special intent requirement that is not included in the other international crimes).

28 *Prosecutor* v. *Jean-Paul Akayesu*, ICTR-96-4-T, Sentence (2 October 1998) (International Criminal Tribunal for Rwanda, Trial Chamber), online: ICTR <http://www.ictr.org/ENGLISH/cases/Akayesu/judgement/ak81002e.html> (accessed 16 April 2010) [hereinafter, *Akayesu*]. *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, [1951] ICJ Rep. 1951, 15 at 23 cited in International Committee of the Red Cross, *Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948. Introduction*, online: ICRC, International Humanitarian Law – Treaties and Documents <http://www.icrc.org/ihl.nsf/INTRO/357?OpenDocument> (accessed 16 April 2010).

29 André Nollkaemper, "Introduction" in Nollkaemper & Van Der Wilt, *supra* note 1, 1 at 12-13 (for the study of the systemic and collective nature of international crimes).

30 See generally, Nollkaemper & Van Der Wilt, *supra* note 1 at 1-353. See also Joseph Rikhof, "Complicity in International Criminal Law and Canadian Refugee Law. A Comparison" (2006) 4 Journal of International Criminal Justice 702 at 712-713 (defining non-brutal organizations as "entities that have a legitimate purpose, but have committed war crimes or crimes against humanity outside its main function and incidental to its mandate").

31 R.S. C. 1985, c. C-46.

32 *Ibid.*, s. 83.01 (1).

Namely, States' responsibility has been engaged for acts of its organs, including certain types of corporations, in violation of international law before the International Court of Justice (hereinafter, the "ICJ").[33]

The corporation is, in fact, by its very essence and definition, the perfect model of a collective entity. Generally, it is referred to as "a body formed and authorized by law to act as a single person although constituted by one or more persons and legally endowed with various rights and duties including the capacity of succession".[34] The etymology of the term "derives from the Latin word *corpus* meaning body, and comes from the Latin verb *corporare* to form into one body, hence a *corporation* represents a body of people, that is a group of people authorized to act as an individual".[35]

The capital of a corporation is composed of shares, owned by shareholders, who possess a separate legal personality from the corporate entity itself. This distinction between the company and its shareholders is important because, although the shareholders invest in the entity, they have very limited rights to the corporate assets.[36] It is, in effect,

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[33] See e.g. *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Judgment, [2007] ICJ Rep. 140, online ICJ: <http://www.icj-cij.org/icjwww/idocket/ibhy/ibhyjudgment/ibhy_ijudgment_20070226_frame.htm> (accessed 4 November 2007), General List no. 91, online: ICJ <http://www.icj-cij.org/docket/files/91/13685.pdf> (accessed 16 April 2010) [hereinafter, *Bosnia and Herzegovina v. Serbia and Montenegro*] and *Case Concerning Military and Paramilitary Activities in and Against Nicaragua,* Merits, [1986] ICJ Rep. 14, online ICJ: <http://www.icj-cij.org/docket/files/70/6503.pdf > (accessed 16 April 2010) [hereinafter, *Nicaragua Case*].

[34] *The Merriam Webster Online Dictionary*, 2009, s.v. "corporation", online: Merriam Webster Online Dictionary <http://www.merriam-webster.com/dictionary/corporation> (accessed 27 January 2010).

[35] Thomas Clarke, *International Corporate Governance, A Comparative Approach* (New York: Routledge, 2007) at 1.

[36] *Barcelona Traction, Light and Power Company Ltd.* (*Belgium* v. *Spain*), [1970] ICJ Rep. 3 at 40-42, online ICJ: <http://www.icj-cij.org/docket/files/50/5387.pdf> [hereinafter, *Barcelona Traction Case*]. In fact, shareholders are only entitled to the portion of the corporation's profits allocated to them through their shares in the form of dividends and only if the directors use their discretionary right to declare such dividends. They may also be entitled to a portion of residual corporate assets after payment of outstanding debts to other creditors upon dissolution and liquidation of the corporation [see Maurice Martel & Paul Martel, *La compagnie au Québec. Les aspects juridiques* (Montreal : Éditions Wilson & Lafleur, 2010) at 19-24 – 19-26 and Raymonde Crête & Stéphane Rousseau, *Droit des sociétés par actions*, 2d ed. (Montreal : Les Éditions Thémis, 2008) at 242-252].

the ability of the corporation to act on its own, as a separate personality from its shareholders, which caused several authors and national jurisdictions to recognize the accountability of the entity itself before the law.

Common law courts were the first to apply criminal sanctions to corporations in the late 19th century as large firms, particularly railroads, played an increasingly important role in the economy.[37] Following the Second World War, corporate entities known as "multinational corporations" (hereinafter, "MNC")'s emerged on a large scale as a product of "the combination of large scale overseas investments under an integrated management organization".[38] More specifically, the *Draft U.N. Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* (hereinafter, the "*Draft Norms on Responsibilities of TNC's and Other*"),[39] define the MNC as "an economic entity operating in more than one country or a cluster of economic entities operating in two or more countries – whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively".[40] Hansen

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[37] See e.g. *R* v *Birmingham and Gloucester Railway Co.* (1842) 3 QB 223 (**t**he first case rendered by an English court in 1842 against the railway company Birmingham and Gloucester Railway Co. for its failure to obey an order to remove a bridge over a public road). See also *State* v. *Morris & Essex Railroad Company,* 23 N.J.L. at. 360 (1852) and *Commonwealth* v. *Proprietors of New Bedford Bridge,* 68 Mass. (2 Gray) at 339 (1854), all cited in Peter A. French, *Collective and Corporate Responsibility* (New York: Columbia University Press, 1984), at 175.

[38] Detlev F. Vagts, "The Multinational Enterprise: A New Challenge for Transnational Law" (1969-1970) 83 Harvard Law Review 739 at 746; Beth Stephens, "The Amorality of Profit: Transnational Corporations and Human Rights" (2002) 20 Berkeley Journal of International Law, 45 at 56.

[39] *Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003), online: UNHCHR <http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2003.12.Rev.2.En> (accessed 27 April 2010) (a non-binding instrument developed by the Sub-Commission on the Promotion and Protection of Human Rights ("Sub-Commission"), a subsidiary of the former Commission on Human Rights) [hereinafter, *Draft Norms on Responsibilities of TNC's and Other*].

[40] *Ibid.,* art. 20 and *Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, U.N. Doc. E/CN.4/Sub.2/2003/38/Rev.2 (2003) online: University of Minnesota Human Rights Library <http://www1.umn.edu/humanrts/links/commentary-Aug2003.html> (accessed 27 April 2010). See David Weissbrodt, "Business and Human Rights" (2005-2006) 74 U. Cin. L. Rev. 65 at 66 (HeinOnline). See also, Vagts, *supra* note 38 at 740 (defines the MNE as "a cluster of corporations of diverse nationality joined together by ties of common ownership and responsive to a common management strategy").

explains that MNCs "typically invest in a foreign country by establishing a directly controlled subsidiary endowed with some of its resources".[41]

This type of corporation is also commonly referred to with the terms "multinational, transnational, corporation, business and enterprise".[42] The terminology "transnational corporations" (hereinafter, "TNC")'s was used during the New International Economic Order movement of the 1970s, and is still mostly used by the United Nations and its related organs, while the term "multinational" appears more frequently in institutions more closely associated with the business community itself, for instance the Organization for Economic Cooperation and Development (hereinafter, "OECD") and the International Chamber of Commerce[43]. The acronym MNC rather than MNE for a "multinational enterprise" will be used in this thesis since "corporation" reflects the terminology employed in the commercial world for profit-seeking operators,[44] as opposed to "enterprise" for unincorporated or incorporated not-for-profit entities, such as nongovernmental organizations (hereinafter, "NGO")'s, churches, hospitals, schools, UN organizations and others. This is important since "[p]rofit-maximization, if not the only goal of all business activity, is certainly central to the endeavor"[45] of a corporation.[46] The term "corporation" will also be used interchangeably with "company" and encompasses MNCs, as well as smaller, single-entity corporations in its significance. Distinctions will nevertheless be made between the terms "corporation" and "MNC" in this thesis for legal purposes relating mostly to relevant jurisdictions for prosecution.

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41 Robin F. Hansen, "Multinational Enterprise Pursuit of Minimized Liability: Law, International Business Theory and the Prestige Oil Spill" (2008) 2 Berkeley Journal of International Law, Vol. 26, 410 at 413.

42 L. Wildhaber, "Some Aspects of the Transnational Corporation in International Law" (1980) 27 Neth. Int'l L. Rev. 79 at 80 cited in Menno T. Kamminga & Saman Zia-Zarifi, "Introduction" in Menno T. Kamminga & Saman Zia-Zarifi, eds., *Liability of Multinational Corporations Under International Law* (The Hague: Kluwer, 2000) 1 at 2.

43 Kamminga & Zia-Zarifi, *ibid.* at 2-3.

44 *Ibid.* at 3, n. 4.

45 Stephens, *supra* note 38 at 46

46 Kamminga & Zia-Zarifi, *supra* note 42 at 3.

The important aspect to retain in this regard is "the ability of MNCs to operate across national borders and outside the effective supervision of domestic and international law".[47] This creates a number of jurisdictional challenges, for example, when determining which country has jurisdiction for the acts of a subsidiary operating on a different territory than its parent corporation.

These legal barriers are further exacerbated when considering that it is currently impossible to prosecute corporations before any of the international criminal tribunals, including the ICC.[48] At first impression, this would seem to create immunity for corporations with regards to violations of international criminal law, representing an increasing paradox in the present context of international commerce and globalization.[49]

The situation is explained by the International Commission of Jurists as follows:

> "The international community has been shocked at reports from all continents that companies have knowingly assisted governments, armed rebel groups or others to commit gross human rights abuses. Oil and mining companies that seek concessions and security have been accused of giving money, weapons, vehicles and air support that government military forces or rebel groups use to attack, kill and "disappear" civilians. Private air service operators have reportedly been an essential part of government programmes of extraordinary and illegal renditions of terrorist suspects across frontiers. Private security companies have been accused of colluding with government security agencies to inflict torture in detention centres they jointly operate. Companies have reportedly given information that has enabled a government to detain and torture trade unionists or other perceived political opponents. Companies have allegedly sold both tailor-made computer equipment that enables a government to track and discriminate against minorities, and earth-moving equipment used to demolish houses in violation of international law. Others are accused of propping up rebel groups that commit gross human rights abuses, by buying conflict diamonds". [50]

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47 *Ibid.*

48 *Ibid.* at 3-4.

49 Robert Dufresne, "The Opacity of Oil : Oil Corporations, Internal Violence, and International Law" (2004) 36 International Law and Politics 331 at 389.

50 *Ibid.* at 345-346 See also International Commission of Jurists, *Report of the ICJ Expert Legal Panel on Corporate Complicity in International Crimes: Corporate Complicity & Legal Accountability. Volume 1: Facing the Facts and Charting a Legal Path*, Vol. 1 (Geneva, 2008), online: UNHCR <http://www.unhcr.org/refworld/docid/4a78418c2.html> (accessed 17 April 2010) [hereinafter, *ICJ Expert Panel Report,* Vol. I]

In many cases, corporate actors deny their involvement in conflicts that affect peace in a country by alleging their political neutrality or the positive impact that they have in contributing to developing countries' economy and human rights.[51] The need to regulate activities and effective neutrality of corporations operating on territories prone to violence and conflict is nevertheless increasingly recognized by the international community.[52]

A question that arises with regards to corporate liability is the practicality and usefulness of invoking corporate rather than individual liability. This thesis does not deny the importance of prosecuting both the corporation and its directors, representatives and/or officers responsible for international crimes. It nevertheless sustains that corporate accountability is essential with or without individual accountability in certain situations. For instance and perhaps the most beneficial reason for prosecuting the corporation is the access that a conviction would provide to corporate assets for reparations to victims. In addition, corporate accountability has the advantage of avoiding the harsh impact of criminal law on individuals, particularly considering the risk of high-level officers denouncing lower-ranked officers as scapegoats to avoid personal liability. Such an undesirable phenomenon resembles the difficulties encountered by the military tribunals following the Second World War with the concept of criminal liability based on membership in criminal organizations that will be described in the first part of this thesis. Namely, convictions based on membership in a criminal organization against individuals risked undermining important legal safeguards for the accused, including the presumption of innocence.[53]

Fisse and Braithwaite list the challenges encountered in identifying individual criminal liability incurred through corporate activities and collective action, which include: "enforcement overload; opacity of internal lines of corporate accountability; expendability

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51 Dufresne, *ibid.* at 363.

52 Brent Fisse & John Braithwaite, *Corporations, Crime and Accountability* (Cambridge: Cambridge University Press, 1993) at 28-29.

of individuals within organizations; corporate separation of those responsible for the commission of past offences from those responsible for the prevention of future offences; and corporate safe-harbouring of individual suspects".[54]

In light of these difficulties and the recognized need for corporate liability, this thesis attempts to demonstrate that corporations engaged in the commission of international crimes may no longer benefit from impunity at all times, since other jurisdictions and venues exist for their prosecution other than the existing international tribunals.

More specifically, criminal jurisdiction originally belonged to the State of nationality of the accused, under the doctrine of personal jurisdiction.[55] Following the French Revolution of 1789, the principles of sovereignty and independence of a State gained international recognition and the new basis of jurisdiction in all States became territorial. The advantages of prosecution of a crime before the judicial authorities of the territory where the crime was committed include proximity and availability of evidence at the location of the crime; and a better prevention of crimes on a State's own territory.[56] In contrast, territoriality fails to address situations such as escape of the offender abroad or a passive approach adopted by local authorities in punishing a particular crime.[57]

Since the Second World War, a new conception of international law based on the obligation to respect fundamental rights at all costs emerged and began to coexist with the principle of sovereignty of States.[58] In this regard, a new head of jurisdiction has been adopted in various national legislations and identified by legal doctrine as the principle of

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53 *Ibid.* at 28-29, 33, 93-94.
54 *Ibid.* at 133.
55 Valentine Buck, "Première Partie: Droits nationaux. Chapitre 4 - Droit espagnol" in Cassese & Delmas-Marty, *supra* note 11, 121 at 126-127.
56 Damien Vandermeersch, "Troisième Partie : Synthèse générale. Chapitre 3 - La compétence universelle" in Cassese & Delmas-Marty, *ibid.*, 589 at 589 and Buck, *ibid.* at 127.
57 *Ibid.* at 128.
58 *Ibid.* at 125-126.

universality for prosecution of international crimes.[59] Its origins date back to the jus-naturalist periods of the 16[h] and 17[th] centuries and the preoccupation of effectively punishing high seas piracy.[60] It was confirmed as a basis of jurisdiction in 1928 by the Permanent International Court of Justice, predecessor of the ICJ in the *S.S. Lotus Case*.[61] The opinion of the court was that some crimes are so reprehensible and appalling to the social conscience that all the tribunals of the world have an interest in prosecuting them.[62]

The ICJ further maintains that "universal jurisdiction is nearing the status of customary law in light of the international consensus that perpetrators of international crimes should not have impunity".[63] Each state however has remained sovereign to determine the limits of its punitive jurisdiction. This includes extraterritorial jurisdiction for crimes committed in a foreign territory and/or by a non-national.[64]

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59 Antonio Cassese, "Troisième Partie: Synthèse générale. L'incidence du droit international sur le droit interne » in Cassese & Delmas-Marty, *supra* note 11, 555 at 571-576. See also George P. Fletcher, «Deuxième Partie : Synthèses régionales. Les pays d'Amérique du Nord. I - Trois modèles de compétence universelle » in Cassese & Delmas-Marty, *supra* note 11, 451 at 467.

60 Fletcher, *ibid.* at 451; Buck, *supra* note 55 at 136.

61 *Case of the S.S. "Lotus" (France v. Turkey)*, (1927), Judgment, P.C.I.J. (Ser. A) No. 10, 4 at 19 [hereinafter, the *Lotus* Case] cited in Roger O'Keefe, "Universal Jurisdiction, Clarifying the Basic Concept", (2004) 2 Journal of International Criminal Justice, 735 at 738, n. 12 (The Court judged that Turkey had jurisdiction to punish the captain of a French ship, which had collided with a Turkish steamboat, drowning eight nationals on board).

62 Fletcher, *supra* note 59 at 467. See also, Richard J. Wilson, "Prosecuting Pinochet: International Crimes in Spanish Domestic Law" (1999) 21 Hum. Rts. Q. 946; Damien Vandermeersch, "Compétence universelle et immunités en droit international humanitaire – la situation belge" in Marc Henzelin & Robert Roth, eds., *Le droit à l'épreuve de l'internationalisation* (Paris : L.G.D.J., 2002) at 71 and *Ministère public* c. *Ntezimana*, Cour d'Assises, Bruxelles, (June 2001), all cited in Hélène Dumont & Martin Gallié, "L'édification sur une fondation fragile d'un droit universel et d'un forum commun supranational en matière de crimes de guerre et contre l'humanité" in Institut canadien d'administration de la Justice, ed., in *Justice et participation dans un monde global : la nouvelle règle de droit* (Montreal : Les Éditions Thémis, 2004) 87 at 108.

63 Kevin R. Gray, "Case Concerning the Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo* v. *Belgium*)" 13:3 *European Journal of International Law* 723 at 723, online: European Journal of International Law <http://207.57.19.226/journal/Vol13/No3/sr1.pdf> (accessed 21 October 2009); See also Cherif Bassiouni, *Internutional Criminul Lalis*, vol. III, 2d ed. (*Enjorcenzent,* 1999) at 228 and Theodor Meron, "International Criminalization of Interna1 Atrocities" (1995) 89 AJIL at 576, both cited in *Case Concerning the Arrest Warrant of 11 April 2000* (*Democratic Republic of the Congo* v. *Belgium*), Separate Opinion of Judges Higgins, Koojimans and Buergenthal, [2002] ICJ Rep. 64 at 76 [hereinafter, the *Arrest Warrant*].

64 Buck, *supra* note 55 at 125-126.

Positions across the world concerning the principle of universality vary, ranging from attempts at full application[65] to a very limited approach.[66] The legitimacy of an unlimited scope of application remains an unresolved question in international law.[67]

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[65] See e.g. the Belgium courts in the *Arrest Warrant* Case, *supra* note 63, referenced as "Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo* v. *Belgium*), International Court of Justice, General List, No. 121, 14 February 2002 (Yerodia case)" in the former edition of The International Centre for Criminal Law Reform and Criminal Justice Policy & Rights and Democracy, *International Criminal Court. Manual for the Ratification and Implementation of the Rome Statute*, 2d ed., (Vancouver: University of British Columbia ICCLR, March 2003) at 116, online: ICCLR's International Criminal Court Programme <http://www.icclr.law.ubc.ca/Publications/Reports/ICC%20Reports/Manual_2nd_ed_mar21_03.pdf> (first accessed 8 Dec. 2006; last accessed 17 April 2010).

[66] See The International Centre for Criminal Law Reform and Criminal Justice Policy & Rights and Democracy, *supra* note 26 at 71 stating: "A modest model, invoked by States such as Argentina and Belgium, asserts jurisdiction over conduct, wherever and by whomever it may have been committed, on the basis of binding international agreements providing for such jurisdiction (for example, the provisions of the 1949 Geneva Conventions and their 1977 Additional Protocols relating to 'grave breaches'). Another interpretation of the concept, espoused by such States as Canada, France, Samoa and Senegal, would permit the exercise of jurisdiction by a State over any perpetrator of a serious international crime, regardless of whether a treaty explicitly provides for such jurisdiction, if the perpetrator is found in that State's territory. Still another approach, invoked for example by New Zealand, Costa Rica, Cyprus and Spain, eschews the latter requirement of territorial presence. In this interpretation, jurisdiction is asserted by a State over serious international crimes committed anywhere by anyone, regardless of the perpetrator's presence in the territory of that State".

[67] Vandermeersch, *supra* note 56 at 589 and Princeton Project on Universal Jurisdiction Steering Committee*, The Princeton Principles on Universal Jurisdiction* (Princeton: Program in Law and Public Affairs and Woodrow Wilson School of Public and international Affairs, Princeton University, 2001), at 40, online: Princeton University Program in Law and International Affairs <http://lapa.princeton.edu/hosteddocs/unive_jur.pdf> (accessed 17 April 2010); See also, O'Keefe, *supra* note 61 at 744-745; *Arrest Warrant*, Judgment, *supra* note 63 at 3. The controversy surrounding the wide scope of jurisdiction of the Belgian law in *Arrest Warrant* caused it to modify its law in February 2002, with final approval by the Senate in August 2003. The new law adds the condition for the victim(s) or suspect(s) to be a Belgian citizen or long-term resident at the time of the alleged crime. It also guarantees diplomatic immunity for world leaders and other government officials visiting Belgium. See, in this regard, "Belgium Senate Approved Revised War Crimes Law", *Associated Press in CTV.ca* (Saturday, 2 August 2003), online: CTV <http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/1059750411634_16/> (accessed 17 April 2010); Diane F. Orentlicher, "Universal Jurisdiction After Pinochet: Prospects and Perils" (Paper presented at UC Irvine as part of the Symposium Series *Prosecuting Perpetrators: International Accountability for War Crimes and Human Rights Abuses*, 21 February 2003) at 10 and "Belgium Amends War Crimes Law", *BBC News* (Friday, 1 August 2003), online: BBC News <http://news.bbc.co.uk/2/hi/europe/3116975.stm> (accessed 17 April 2010).

According to the 2001 *Princeton Principles on Universal Jurisdiction* (hereinafter, the "*Princeton Principles*"), drafted by a group of eminent scholars and jurists across the world, universal jurisdiction is defined as:

> "criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction".[68]

While the *Princeton Principles* set the condition that the accused must be present before the adjudicating body, this does not prevent "a state from initiating the criminal process, conducting an investigation, issuing an indictment, or requesting extradition, when the accused is not present".[69] On the other hand, universal jurisdiction does not eliminate immunity from criminal jurisdiction and inviolability enjoyed by Ministers for Foreign Affairs and Heads of States when they are abroad and for the duration of their offices.[70]

Setting aside any discussions on the admissibility of broad scopes of jurisdiction and on a practical level, the principle of universality aims to prevent all risks of impunity.[71] Its advantages are particularly relevant for the repression of organized criminality or crimes committed by large multinational corporations.[72] These crimes may be initiated on one

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68 Princeton Project on Universal Jurisdiction Steering Committee, *ibid.* at 25-26, 41.

69 *Ibid.* at 44.

70 *Arrest Warrant*, *supra* note 63 at 53-54. See also at 61: the ICJ did however add that immunities enjoyed by an incumbent or former Minister for Foreign Affairs do not represent a bar to criminal prosecution in certain circumstances, which include the absence of criminal immunity in their own countries, situations in which the State which they represent or have represented decides to waive their immunity, situation in which he or she ceases to hold office and therefore no longer enjoy all the immunities accorded by international law, and in particular for acts committed prior or subsequent to his or her period of office and acts committed during that period of office in a private capacity; and before international criminal courts which have jurisdiction (examples include the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, established pursuant to Security Council resolutions under Chapter VII of the United Nations Charter, and the future International Criminal Court created by the 1998 Rome Convention).

71 Buck, *supra* note 55 at 136-137.

72 *Ibid.* Fisse and Braithwaite also argue that an advantage of corporate accountability is that it allows for the corporation to be used as a medium for the international administration of the criminal law, particularly in cases where a local officer's conduct may be immune because no act has been committed

territory at the planning stage, while their development and effects may occur on another or several territories through a process of concerted decision-making and actions.

Today, most States have recognized that offences whose "harmful and murderous effects were so embracing and widespread as to shake the international community to its very foundations"[73] include at least: (1) piracy; (2) slavery; (3) war crimes; (4) crimes against peace; (5) crimes against humanity; (6) genocide; and (7) torture.[74]

In some situations, extraterritorial jurisdiction may also become mandatory by agreements formed in multilateral treaties dealing with specific crimes.[75] For countries that

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against local law, or it may not be covered by extradition arrangements or the costs involved in pursuing extradition proceedings may be too costly (see Fisse and Brathwaite, *supra* note 52, at 42).

73 *Attorney General of the Government of Israel* v. *Eichmann*, 36 ILR 1962 (Supreme Court of Israel) at 300 in Dumont & Gallié, *supra* note 62 at 110. Other jurisdictions having recognized the principle of universal jurisdiction include: the United States (*Demjanjuk* v. *Petrovsky*, 776, F.2d 571 (US Court of Appeal, 6th cir. 1985), Australia (*Polyukhovich* v. *The Commonwealth of Australia and another*, (1991) 172 C.L.R. 501 (FCA 91/26) at 659), Canada (*R.* v. *Finta*, [1994] R.C.S. 701) and Great Britain (*R*. v. *Evans and Another and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet*, 24 March 1999, 38 ILM 581 (1999)) all cited in Dumont & Gallié, *supra* note 62 at 110.

74 *Arrest Warrant*, Separate Opinion of Judge (Pres.) Guillaume, *supra* note 63, 35 at 38, 42, 44 (piracy); Separate Opinion of Judge Koroma, *supra* note 63, 59 at 61 (at least piracy, war crimes and crimes against humanity, including slave trade and genocide); Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, *supra* note 63, at 81-83 (at least piracy, war crimes, crimes against humanity), and Dissident Opinion. Van der Wyngaert, *supra* note 63, 137 at 173 (at least war crimes and crimes against humanity, including genocide). See also O'Keefe, *supra* note 61 at 740, n. 17 and Princeton Project on Universal Jurisdiction Steering Committee*, supra* note 67 at 29.

75 See e.g. *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 U.N.T.S. at 277 (entry into force 12 January 1951 in accordance with article XIII); *1949 Geneva Conventions*:*Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, (1949) 75 U.N.T.S. 31 (entered into force 21 October 1950), *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, (1949) 75 U.N.T.S. 85 (entered into force 21 October 1950), *Geneva Convention relative to the Treatment of Prisoners of War*, (1949) 75 U.N.T.S. 135 (entered into force 21 October 1950), *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, (1949) 75 U.N.T.S. 287 (entered into force 21 October 1950), *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 1125 U.N.T.S. 3 (entered into force 7 December 1978); Conventions on terrorism (http://untreaty.un.org/English/Terrorism.asp), including the *European Convention on the Suppression of Terrorism*, (1977) (ETS No. 090) (entered into force 4 August 1978), and the 1984 *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 U.N.T.S. (entry into force 26 June 1987) [hereinafter, *UN Convention against Torture*]. See Vandermeersch, *supra* note 56 at 590-591 (referring to and citing the above instruments).

do not recognize the self-executing character of international provisions, i.e. dualist countries, a domestic law of execution of new heads of jurisdiction is considered a *sine qua non* condition for their application.[76]

In this regard, pursuant to the complementarity principle enshrined in the *Rome Statute*,[77] a number of national jurisdictions are required to incorporate international criminal law in their domestic legislation following their States' adherence to the ICC. As a repercussion, "regardless of, and to some extent despite, the omission of legal persons from the ICC's jurisdiction, Belgium, Canada, the Netherlands, the United Kingdom, France, Norway, India, Japan and the United States have also introduced some or all of the international crimes contained within the *Rome Statute* into their domestic laws as applicable to legal persons and with varying degrees of extraterritorial reach".[78]

This thesis will similarly describe, in its second part, corporate accountability for international crimes under national jurisdictions derived from the integration of both corporate criminal liability and international criminal law in domestic legislations and jurisprudence.

Canada will serve as an excellent case study of this scenario, since it was the first country to introduce comprehensive domestic implementation legislation of the *Rome Statute* by adopting the *Act Respecting Genocide, Crimes Against Humanity and War*

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76 Vandermeersch, *ibid.* at 593.

77 *Rome Statute*, *supra* note 20 at preamble & art. 1,17.

78 Joanna Kyriakakis, "Corporations and the International Criminal Court: The Complementarity Objection Stripped Bare", (2008) 1 Criminal Law Forum 115, at 147, referring to International Peace Academy and FAFO AIS, *Business and International Crimes: Assessing the Liability of Business Entities for Grave Violations of International Law*, FAFO Report 467 (Oslo: Allkopi Sarpsborg, 2004), online: FAFO <http://www.fafo.no/liabilities/index.htm> (accessed 20 April 2007), <http://www.amnestyusa.org/events/western/pdf/AmnestyConference_RamasastryAnita.doc.pdf> accessed 17 April 2010) [hereinafter, *2004 FAFO Report*]. See also Anita Ramasastry and Robert C. Thompson, *Commerce, Crime and Conflict. Legal Remedies for Private Sector Liability for Grave Breaches of International Law. A Survey of Sixteen Countries*, *Executive Summary*, FAFO Report 536

Crimes and to Implement the Rome Statute of the International Criminal Court, alias *Crimes Against Humanity and War Crimes Act*[79] (hereinafter, "CAHWCA") on 24 June 2000.[80] This Act, entered into force on 23 October 2000, was followed by consequential amendments to other existing Canadian laws such as the *Criminal Code*,[81] the *Extradition Act*,[82] the *Mutual Assistance in Criminal Matters Act*[83] and the *Crimes against Humanity Fund*.[84]

First, as mentioned above, this thesis will begin with a description of the evolution of international criminal justice and collective liability for international crimes.

(Oslo: Allkopi AS, 2006), online: FAFO http://www.fafo.no/pub/rapp/536/536.pdf> (accessed 17 April 2010) [hereinafter, 2006 *FAFO Report*].

79 *Supra* note 24.

80 Morris Rosenberg, "Canadian Legislation against Crimes Against Humanity and War Crimes. Changing Face of International Criminal Law: Selected Papers", (Paper presented at the 10th Annual Conference of the International Centre for Criminal Law Reform and Criminal Justice Policy, 8-9 June 2001) (Vancouver: ICCLR&CJP, 2002) 229 at 232, online: ICCLR&CJP <http://www.icclr.law.ubc.ca/Publications/Reports/ChangingFace.pdf> (accessed 17 April 2010); Bruce Broomhall, "Towards the Development of an Effective System of Universal Jurisdiction for Crimes Under International Law", (2000-2001) 35 New England Law Review 399 at 409 (HeinOnline). Canada signed the *Rome Statute* on December 18th, 1998, and deposited its instrument of ratification on July 7th, 2000 (see online: ICC <http://www.icc-cpi.int/Menus/ASP/states+parties/Western+European+and+Other+States/Canada.htm> (accessed 17 April 2010).

81 *Criminal Code, supra* note 31.

82 S.C. 1999, c.18.

83 R.S., 1985, c. 30 (4th Supp.)

84 CAHWCA, *supra* note 24, ss. 30, 31. See also Rosenberg, *supra* note 80 at 235 (This fund is designed to channel funds obtained through the enforcement of the Act as well as orders of the International Criminal Court enforced in Canada, to the International Criminal Court Trust Fund, victims of offences under CAHWCA or the *Rome Statute,* and their families).

Part I: The Absence of Jurisdiction of Existing International Tribunals for the Prosecution of Accused Corporations

The first major tribunals set up to judge international crimes were created in the aftermath of the Second World War. These judicial institutions laid the foundations of international criminal law which continues to expand its application today through the ICC and other existing *ad hoc* and international tribunals.

Despite the advances in this field of justice over the past decades, it is nonetheless notable that initial developments in judging collective responsibility for the commission of international crimes have never been endorsed as a precedent by the international community. This led to the complete eradication of any form of corporate liability for international crimes before the existing international criminal tribunals. Thus, today it is impossible to assign a Canadian or any other corporation before an international court.

Chapter 1: Initial Developments of Collective Criminal Liability at the Origins of International Criminal Law and Jurisprudence

International criminal law is a branch of justice that developed after centuries of war and horrendous crimes, from the very first accounts of world history. As populations grew and humans began to form groups, the need to regulate collective action became an inevitable legal consideration. The first judicial forums to formally address this question were the Nuremberg and Tokyo Tribunals.

Section 1. The Military War Crimes Tribunals and Trials Involving Collective Entities after the Second World War

The historical events that led to the Second World War are intrinsically linked with the industrial progress preceding and carried out throughout the war. Namely, the severe economic depression in the early 1930's, combined with the development of aviation and major discoveries in the gasoline, rubber and medical fields caused many governments to become more actively involved in the commercial sectors of their countries. Likewise, the attractiveness of war as a profitable machine to build military equipment, develop processes and resort to forced labor to increase production drew a number of businesses into the political and violent atrocities that occurred from 1939 to 1945.[85]

The participation of corporate actors in fuelling the global conflict that shocked the conscience of the world brought many directors, owners, managers and other high-level business officers before the military tribunals created to judge the criminals of the Second World War.

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[85] See, for example, the participation of the Krupp industry in the rearmament period of Germany following the First World War in the 1930's in *United States* v. *Goering et al.,* 6 F.R.D. 69, also cited as 1 *Trial of the Major War Criminals Before the International Military Tribunal*, Judgment from 14 November 1945 to 1 October 1946**,** Nuremberg (1947)*,* 171 at 182-183 (online: Federal Research Division (F.R.D.) Library of Congress. Military Legal Resources <http://www.loc.gov/rr/frd/Military_Law/NT_major-war-criminals.html>, 42-volume series entitled the *Blue Series*, the official record of the trial of the major civilian and military leaders of Nazi Germany who were accused of war crimes [hereinafter, T.M.W.C.], 1st volume downloaded at <http://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-I.pdf> **(**accessed 18 April 2010). A more modern example of corporations profiting from war is described by Gerald Schumacher who refers to examples of private military contractors providing services to the United States in the Iraq war as follows: "*Construction contractors* provide infrastructure services like basic subsistence, housing, utilities, and industrial rehabilitation. *Trucking contractors* keep supplies moving to the soldiers and the construction sites. *Training contractors* provide small-unit combat training, law enforcement training, and battle-staff training for mid-level military officers. *Technical assistance contractors* keep communications networks, radar sites, tanks and aircraft functioning. *Security contractors* provide the first level of security to all the rest of the contractors …" See Gerald Schumacher, *A Bloody Business: America's war zone contractors and the occupation of Iraq* (Minnesota: Zenith Press, 2006), at 15. See also Peter Warren Singer, "Outsourcing War" (2005) 84 Foreign Affairs 119.

Sub-section 1. The Signing of the *London Charter* by the Allied Countries

On 8 August 1945, the Governments of the United Kingdom of Great Britain and Northern Ireland, the United States of America, the Provisional Government of the French Republic and the Union of Soviet Socialist Republics, surnamed the "Allied Countries" entered into the *London Agreement Establishing the International Military Tribunal for the Trial of German Major War Criminals*. [86] The constitution, jurisdiction and functions of the Nuremberg Tribunal were defined in the Charter annexed to the Agreement, whose binding provisions were recognized as the expression of international law existing at the time of its creation.[87]

Paragraph 1. The Criminal Organizations

With regards to criminal responsibility, article 6 (a) of the *London Charter* provided in that "leaders, organisers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes" would be held criminally responsible.[88] The same text provided for the trial and punishment of the major war criminals who, "acting in the interests of the European Axis countries, whether as individuals or as members of organizations" committed crimes against peace, war crimes or crimes against humanity.[89]

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86 *Agreement for the prosecution and punishment of the major war criminals of the European Axis*, 8 August 1945, 82 U.N.T.C. 279, online: UNHCR <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=47fdfb34d> (accessed 17 April 2010) [hereinafter, *London Agreement*]. In accordance with art. 5 of the *London Charter*, *supra* note 12, the Governments of Greece, Denmark, Yugoslavia, the Netherlands, Czechoslovakia, Poland, Belgium, Ethiopia, Australia, Honduras, Norway, Panama, Luxembourg, Haiti, New Zealand, India, Venezuela, Uruguay, and Paraguay, expressed their adherence to the agreement, as Governments of the United Nations. See also

87 T.M.W.C., *supra* note 85 at 171 and 281. See also, *London Agreement*, *ibid.,* art. 2.

88 *London Charter*, *supra* note 12, art. 6 (a).

89 *Ibid.* art. 6.

By providing for jurisdiction over "members of organizations", the Nuremberg Tribunal became the first international forum to formally recognize that criminal responsibility was attributable to collective action, pursuant to article 9 (1) of the *London Charter*, which states:

> "At the trial of any individual member of any group or organization, the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization".[90]

The idea of penalizing membership can be traced back to a French proposal during the drafting of the *London Charter* in response to difficulties in identifying the individual roles played in the atrocities of mass crime. These challenges were discovered during investigations of the destruction of the village of Lidice by units of a German military division during the war. The French delegation proposed to include the concept of "*association de malfaiteurs*", pursuant to its own national criminal legislation which allowed the prosecution of individuals for membership in a criminal organization.[91]

The practical interest of such a charge was to address the situation of hundreds of thousands of prisoners of all categories, ranging from prisoners of war to civilians or demobilized soldiers, being held by the Allied countries at the time.[92] In fact, the government of the United States alone held 74,000 prisoners in Germany and 31,000 prisoners of war in the United States.[93]

Under such considerations, Colonel Murray C. Bernays, the United States Attorney General of the United States War Department, further developed the French proposal by

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90 *London Charter*, *supra* note 12, art. 9(1).

91 Elies van Sliedregt, *The Responsibility of Individuals for Violations of International Humanitarian Law*, (The Netherlands: T.M.C. Asser Press, 2003) at 21.

92 Jonathan A. Bush, "The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said" (2009) 5 Columbia Law Review, Vol. 109, 1094 at 1144, online: Columbia Law Review <www.columbia**law**review.org/assets/pdfs/109/5/Bush.pdf> (accessed 1 August 2009).

suggesting the inclusion of "criminal organizations" and "conspiracy" in a binding text establishing the military tribunal. Bernays' proposals were adopted by the Commission of Allied countries on 16 May 1945 in the *London Charter*.[94]

First, with regards to criminal organizations, the *London Charter* provided that the declaration of criminality of an organization would not lead to a conviction of the organization but rather, the determination of guilt of its individual members in subsequent trials before the national judicial authorities of any Signatory Party, in accordance with article 10. The latter states:

> "In cases where a group or organization is declared criminal by the Tribunal, the competent national authority of any Signatory Party shall have the right to bring individuals to trial for membership therein before national military or occupation courts. In any such case the criminal nature of the group or organization is considered proved and shall not be questioned".[95]

Under these provisions, an indictment was lodged in Berlin before the Nuremberg Tribunal on 18 October 1945 charging the members of seven organizations with crimes against peace by the planning, preparation, initiation and waging of wars of aggression; as well as with war crimes and crimes against humanity[96].

The IMT held that three organizations, i.e. the Leadership Corps of the Nazi Party, the Gestapo (Die Geheime Staatspolizei) and Die Sicherheitsdienst des Reichfuehrer SS (SD), and the SS (Die Schutztaffeln Der Nationalsocialistischen Deutchen Arbeiterpartei)

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93 *Ibid.*

94 Sliedregt, *supra* note 91 at 21-22.

95 *London Charter*, *supra* note 12, art. 10.

96 T.M.W.C., Judgment, *supra* note 85 at 257; T.M.W.C., Indictment, *supra* note 85, 27 at 28 (para. 28). (The seven organizations indicted were: Die Reichregierung, alias the Reich Cabinet, Das Korps der Politischen Leiter Der Nationalsozialistischen Deutschen Arbeiterpartei, alias the Leadership Corps of the Nazi Party, Dieschutz-Staffeln der Nationalsozialistischen Eutschen Arbeiterpartei, commonly known as the "SS" and including Der Sicherheitsdienst, commonly known as the "SD", Die Geheime Staatspolizei, alias the Secret State Police, commonly known as the "Gestapo", Diesturmabteilungen Der NSDAP, commonly known as the "SA", and the General Staff and High Command of the German Armed Forces).

were used for purposes which were criminal under the *London Charter*. The violations included Germanization of incorporated territory, the persecution and/or extermination of Jews, brutalities and killings in concentration camps, excesses in the administration of occupied territories, administration of the slave labor programme and mistreatment of prisoners of war. [97]

Three other organizations, the SA (Die Sturmabteilungen der Nationalsozialistischen Deutchen Arbeiterpartei), the Reich Cabinet (Die Reichsregierung)[98] and the General Staff and High Command of the German Armed Forces, were declared non-criminal by the Tribunal.[99]

The judges first conducted a preliminary analysis of whether there existed a group or organization among the indicted entities.[100] Once this fact was recognized, the Tribunal had discretion to determine whether the group or organization's activities were criminal under the *London Charter*[101] "in accordance with well-settled legal principles, one of the most important of which is that criminal guilt is personal, and that mass punishments should be avoided."[102] At the same time, the Tribunal expressed that it "should not hesitate to declare

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97 T.M.W.C., Judgment, *ibid.*at 261 (Leadership Corps), at 267 (The Gestapo and the SD), at 273 (the SS).

98 *Ibid.*.at 275 (the Reich Cabinet consisted of members of the ordinary cabinet after 30th January 1933, members of the Council of Ministers for defence of the Reich and members of the Secret Cabinet Council).

99 *Ibid.*at 273-279.

100 *Ibid.* at 256 stating: "There must be a group bound together and organised for a common purpose". See also (1947) 41 AJIL 172 cited in Andrew Clapham, "The Question of Jurisdiction under International Criminal Law over Legal Persons: Lessons from the Rome Conference on an International Criminal Court" in Kamminga & Zia-Zarifi, *supra* note 42, 139 at 160.

101 See e.g. T.M.W.C., *supra* note 85 at 275-276, where the IMT was of the opinion that after 1933, the Reich Cabinet did not act as a group or organization. Moreover, the group of persons charged was so small that members could be conveniently tried in proper individual cases without resort to a declaration that the Cabinet was criminal. See also *ibid.* at 276-279, where the IMT decided that the General Staff and High Command of the German Armed Forces were much the same as the armies, navies and air forces of all other countries, and therefore, could not logically be defined as a group or organization within the meaning of article 9 of the Charter. See also, *ibid.* at 256 where the IMT explained that the terms : «The Tribunal may declare…» of article 9 of the *London Charter* were the basis for discretion afforded to the Tribunal.

102 41 AJIL 46, cited in Clapham, *supra* note 100, at 162.

it (the organization) to be criminal because the theory of 'group criminality' is new, or because it might be unjustly applied by some subsequent tribunals".[103]

In making this statement, the IMT did not consider the Prosecutor's reference to certain countries that already included concepts of collective liability in their national legislations, such as the United States, France, Germany and India.[104] The fact is that "the judges at the IMT betrayed considerable discomfort with the case against the criminal organizations".[105] The Tribunal raised such legal questions as:

> "(1) whether the ongoing decisions about the organizations would give rise to presumptions or findings against individual members simultaneously on trial; (2) what sort of evidence gathering procedures and due process rights would be created for the organizations; (3) what sort of immunity, if any, would be given to members held all over Europe whose testimony was not sought by lawyers for their former organizations; (4) how would a decision from the IMT about organizational guilt affect members who were already being detained as POWs or for other reasons; (5) what procedures would embed its procedural recommendations in its findings about organizational guilt so that later tribunals would be bound; (6) would some of those membership trials be heard by a second sitting of the IMT itself under the London Charter (this being winter 1946, it was still conceivable that there would be a second international trial); (7) what inferences might be drawn in any later trial from an organization's conviction in the IMT; and (8) were there any limits to membership guilt (the problem of brief or early-stage members)?"[106]

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103 *Ibid.*

104 See e.g. in the United States, "it was unlawful for any person to organise or help organise any society, group, or assembly of persons to teach, advocate, or encourage the overthrow or destruction of any Government in the United States by force or violence, or to become a member of any such society or group knowing its purposes" according to the *Smith Act* of 28 June 1940, cited in Sliedregt, *supra* note 91 at 23. Justice Jackson also referred to the *British India Act no. 30 of 1936*, penalising the participation in a 'gang of thugs', French laws providing for the concept of "*association de malfaiteurs*" and Soviet and German criminal laws containing provisions on "banditry" and "secret organizations" (UNWCC (1948) at 303-304, cited in Sliedregt, *supra* note 90 at 23).

105 Allison M. Danner & Jenny S. Martinez, "Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law" (2005) 75 California Law Review 77 at 113-114, online: Vanderbilt University Law School <http://law.vanderbilt.edu/faculty/affiliated-faculty/allison-marston-danner/download.aspx?id=645> (accessed 8 September 2009).

106 Bush, *supra* note 92 at 1145.

As a result of the Tribunal's "discomfiture"[107] with the theoretical basis of organizational charges, the prosecutor's burden of proof was significantly raised to prove each individual's voluntary and knowing participation in a group with criminal aims.[108]

While there were no individual convictions before the Nuremberg Tribunal on the basis of membership of these aforementioned 'criminal organizations', national legislation in countries such as Australia, Canada, Czechoslovakia, France, Great Britain, Norway, Poland and the United States subsequently created the offence of being a member of a criminal organization.[109] Moreover, a number of later trials referred to the Nuremberg Tribunal's declarations of organizational guilt to charge individuals of membership therein.

Paragraph 2. The Conspiracy Issue

In addition to organizational liability, "conspiracy" became another subject of contention during the drafting of the *London Charter*.[110] This other form of collective responsibility was defined as "the agreement of two or more persons to effect any unlawful purpose, whether as their ultimate aim or only as a means to it".[111]

The notion of "conspiracy", of common law origin, was considered too broad, vague and unfamiliar amongst the civil law allies. The main continental law objections, namely in Germany and France, were the unreasonable evidentiary and procedural advantages for prosecutors and the creation of penalty enhancements such that in some instances

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107 Term used in *ibid.* at 1144.

108 T.M.W.C., *supra* note 85 at 256. Under this rule, some of the lowest members from the Reichleitung, Gauleitung and Kreisleitung of the Leadership Corps of the Nazi Party were excluded from the declaration of criminality (T.M.W.C., *supra* note 85 at 261-262). *Contra*, in the original proposal for the prosecution of criminal organizations and conspiracy recommended by Murray C. Bernays, a lawyer in the U.S. War Department, "the burden would be on defendants to prove that they did not join the organizations voluntarily, and a defendant's lack of knowledge of the organization's criminal purpose would not constitute a defense" (Danner & Martinez, *supra* note 105 at 113).

109 Clapham, *supra* note 100 at 166.

110 *Supra* note 12.

conspiracy is punished more seriously than the successfully completed act.[112] In contrast, countries of common law tradition, such as Great Britain and the United States, as well as the Soviet Union endorsed the inclusion of conspiracy.[113]

The signatory parties finally settled on the inclusion of "conspiracy" with the additional wording of "common plan" in article 6 (a) of the *London Charter* as a "compromise to the continental unfamiliarity with conspiracy".[114] In this manner, conspiracy was likened to a form of criminal participation rather than a substantive offence as in common law systems.[115]

The conspiracy provisions led to charges against twenty-two defendants before the Nuremberg Tribunal under Count One of the Indictment for a common plan or conspiracy to wage aggressive war. Fourteen of the defendants were convicted and it was generally agreed that the "key concept in the collective criminality theory before the IMT was the concept of conspiracy".[116] Nevertheless, the judges of the Nuremberg Tribunal noted that "conspiracy" had been "hurriedly drafted" in the *London Charter* which listed it twice, "both within Article 6 (a) as a part of crimes against peace and also as a separate free-standing addition to Article 6".[117] They limited the application of this mode of liability to crimes against peace.[118]

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111 C.S. Kenny, *Outlines of Criminal Law*, Cambridge (1966), p. 335 cited in Sliedregt, *supra* note 91 at 17.
112 Sliedregt, *supra* note 91 at 17, 20 and Bush, *supra* note 92 at 1137.
113 Sliedregt, *supra* note 92 at 19.
114 *Ibid.* at 18.
115 *Ibid.*
116 Bush, *supra* note 92 at 1163 and *ibid.* at 17.
117 Bush, *ibid.* at 1139.
118 *Ibid.* at 1139.

The scope of conspiracy was also narrowed under the following terms:

> "the conspiracy must be clearly outlined in its criminal purpose. It must not be too far removed from the time of decision and of action. The planning, to be criminal, must not rest merely on the declarations of a party program, such as are found in the 25 points of the Nazi party, announced in 1920, or the political affirmations expressed in Mein Kampf in later years. The Tribunal must examine whether a concrete plan to wage war existed, and determine the participants in that concrete plan".[119]

The Judgment of the IMT clearly emphasized however that when the parties to a conspiracy cooperated in a plan with knowledge of its criminal aims, it became irrelevant "that they were assigned to their tasks by a dictator".[120] In this regard, the judges of the tribunal agreed that: "Hitler could not make aggressive war by himself. He had to have cooperation of statesmen, military leaders, diplomats and, notably, business men".[121]

Sub-section 2. The Tokyo Tribunal, Groups and Conspiracy Charges

The *Charter of the International Military Tribunal for the Far East* (hereinafter, the *"IMTFE Charter"*)[122] was established in January 1946 by an executive order of the Supreme Commander of the Allied Powers in Japan, General McArthur.[123]

The Trial opened on 3 May 1946 and lasted two years and ninety-eight days.[124] Seven defendants were condemned to death and hanged. The rest were imprisoned. By 1958 however, Danner describes that the politics of Cold War overtook the politics that had

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119 T.M.W.C., *supra* note 85 at 225. See also L. Friedman, *The Law of War, A Documentary History*, Vol. II, (New York, 1972), p. 941, cited in Sliedregt, *supra* note 91 at 19.

120 Sliedregt, *ibid.* at 20.

121 *Ibid.*

122 *Charter of the IMTFE*, *supra* note 12.

123 Andrea Gattini, "A Historical Perspective: from Collective to Individual Responsibility and Back" in Nollkaemper & Van Der Wilt, *supra* note 1, 101 at 117.

124 Allison M. Danner, "Beyond the Geneva Conventions: Lessons from the Tokyo Tribunal in Prosecuting War and Terrorism" in (2005-2006) 46 Virginia Journal of International Law, Vol. 1, 83 at 90.

led to the Tokyo defendants' prosecution[125] and all defendants still alive had been set free.[126]

As opposed to the IMT, the IMTFE did not encounter the same civil law scepticism with regards to the concept of conspiracy. In fact, twenty-five defendants were convicted of this crime.[127] Indeed, although article 5 of the *IMTFE Charter* provided that the Tribunal shall have the power to try and punish war criminals "as individuals or as members of organizations", the "prosecutors in the Far East did not indicate any of the groups or organizations to which the Japanese defendants belonged".[128] The defendants included former Prime Ministers, War and Navy Ministers, and Ambassadors.[129] Furthermore, the *IMFTE Charter* did not foresee the possibility of declaring organizations criminal.[130] The Tribunal therefore limited itself to condemning leading officials but without consideration of their role within a particular organization.[131]

The centerpiece of the Tokyo indictment was Count One, which charged all the accused with conspiring "as leaders, organisers, instigators or accomplices between 1st January 1928 and 2nd September 1945 to have Japan, either alone or with other countries, wage wars of aggression against any country or countries which might oppose her purpose

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125 *Ibid.*
126 *Ibid.* at 92.
127 Sliedregt, *supra* note 91 at 20. See also Gattini, *supra* note 123.
128 Sliedregt, *ibid.* at 21.
129 Danner, *supra* note 124.
130 Gattini, *supra* note 123.
131 See e.g. *ibid.* (Gattini refers for example to "patriotic societies" and the *Zaibatsu*, the "industrial complexes closely connected with the military and which had first made the war possible". See also Yishay Yafeh, "An International Perspective of Japan's Corporate Groups and their Prospects", *National Bureau of Economic Research (NBER) Working Paper Series*, Working Paper 9836 issued in December 2002 at para. 1.1, online: NBER: <http://www.nber.org/papers/w9386.pdf?new_window=1> (accessed 14 March 2010) published in NBER Chapters, ed., *Structural Impediments to Growth in Japan* (Cambridge: National Bureau of Economic Research, Inc., 2003) explaining that the *Zaibatsu* were "family owned conglomerates, controlled through holding companies which in turn held a large number of shares in a first tier of subsidiaries).

of securing the military, naval, political and economic domination of East Asia and of the Pacific and Indian oceans and their adjoining countries and neighbouring islands".[132]

Following the lead of the Nuremberg Tribunal, the IMTFE judges dismissed all charges that involved conspiracy to commit crimes against humanity and war crimes,[133] but held the charges related to conspiracy to commit crimes against peace, in the following terms:

> "A conspiracy to wage aggressive or unlawful war arises when two or more persons enter to commit that crime. Thereafter, in furtherance of the conspiracy, follow planning and preparing for such war. Those who participate at this stage may be either original conspirators or later adherents. If the latter adopt the purpose of the conspiracy and plan and prepare for its fulfillment they become conspirators."[134]

Furthermore, since the Tribunal accepted the overarching conspiracy count, "it did not consider the more limited conspiracies alleged in the other counts of the indictment".[135]

Danner observes that "the Tokyo Tribunal's grand vision of a pre-war Japanese conspiracy has been persistently criticized and represents one of the central weaknesses of the Tokyo judgment".[136]

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132 R. John Pritchard, "The Indictment" in R. John Pritchard, ed., *The Tokyo Major War Crimes Trial: The Records of the International Military Tribunal for the Far East: With an Authoritative Commentary and Comprehensive Guide* (Michigan: Edwin Mellen Press, 1998), Vol. 2, 2 at 2-3, cited in Danner, *supra* note 124, at 90 [hereinafter, *The Tokyo Indictment*]. See also *Tokyo Indictmen*t at 1 in Danner, *supra* note 124 at 114-115, explaining that the total indictment included fifty-five counts. Counts Two through Five broke out the massive conspiracy into smaller conspiracies. Later counts accused the defendants of the waging of aggressive war and more conventional war crimes, including the Rape of Nanking and Bataan Death March.

133 Danner, *supra* note 124 at 116.

134 R. John Pritchard, "The Judgment" in R. John Pritchard, ed., *The Tokyo Major War Crimes Trial: The Records of the International Military Tribunal for the Far East: With an Authoritative Commentary and Comprehensive Guide* (Michigan: Edwin Mellen Press, 1998), Vol. 102, 49 at 375-395, cited in Danner, *supra* note 124, at 116 [hereinafter, *Tokyo Judgment*].

135 *Tokyo Judgment*, *ibid.* at 770 cited in Danner, *ibid.* at 117.

136 Danner,*ibid.* at 118.

Among its very first critics, two judges of the IMTFE, Rabhabinod Pal, from India, who dissented from all of the Tribunal's findings, and Bernard Roehling, from the Netherlands, were strong opponents of the use of conspiracy as a charge, described by the latter as "one of the ugly aspects of the Anglo-Saxon criminal justice".[137] The judgment has also gained considerable disrepute among many contemporary historians[138] and in Japan. In fact, several of its defendants have since been enshrined as martyrs in Japan[139] and "[s]ome Japanese disparagingly refer to the 'Tokyo Trial View of History' as capturing the principal weakness of the institution".[140]

Charging the defendants for "conspiracy to wage aggressive war" rather than "waging an aggressive war" was particularly useful to obtain convictions for all defendants despite the deep divisions that existed between the defendants during their tenure in the Japanese government and military. In this regard, the Chief Prosecutor, Joseph Keenan, subsequently wrote that "the efficacy of the Anglo-American doctrine of conspiracy, as a technical device for the prevention and suppression of potential crime, stems largely from

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137 Danner, *ibid* at 118. See R. John Pritchard, "The Dissenting Opinion of Rabhabinod Pal" in R. John Pritchard, ed., *The Tokyo Major War Crimes Trial: The Records of the International Military Tribunal for the Far East: With an Authoritative Commentary and Comprehensive Guide* (Michigan: Edwin Mellen Press, 1998), Vol. 109, 980 at 982 and B.V.A. Röling, with an introduction by Antonio Cassese, *The Tokyo Trial and Beyond: Reflections of a Peacemonger*, (Cambridge, Polity Press, 1993

138 Hosoya, Chihiro, "Question-And-Answer Period" in C. Hoyosa et al., eds., *The Tokyo War Crimes Trial: An International Symposium* (New York, 1986), 105 at 109; Martin Bagish & Hilary Conroy, *Japanese Aggression Against China: The Question of Responsibility in China and Japan: Search for Balance Since World War I* (1978), 325 at 331; Kokima Noburu, "Contributions to Peace" in C. Hoyosa et al., eds., *The Tokyo War Crimes Trial: An International Symposium* (1986), 69 at 76; Richard H. Minear, *Victors' Justice: The Tokyo War Crimes Trial* 1929 (1971); R. John Pritchard, "The International Military Tribunal for the Far East and the Allied National War Crimes Trials in Asia", 2d. ed. by M. Chérif Bassiouni, *III International Criminal Law* (1999), 109 at 123; Stephen Large, "Far East War Crimes Trials" in I.C.B. Dear, ed., *The Oxford Companion to The Second World War* (Oxford, 1995), 347 at 349; John W. DOWER, *Embracing Defeat: Japan in the Wake of The Second World War* (1999), 470, all cited in Danner, *ibid.*

139 See e.g. "Where War Criminals are Venerated", *CNN News* (14 January 2003), online CNN.com <http://edition.cnn.com/2001/WORLD/asiapcf/east/08/13/japan.shrine> (noting that several Japanese premiers have visited the shrine over the past twenty-five years) and Stephanie Strom, "Japan's Premier Visits War Shrine, Pleasing Few", *N.Y. Times*, (14 August 2001) A1, cited in Danner, *ibid.* at 122.

140 Danner, *ibid.* at 119.

its elasticity".[141] In other terms, instead of focussing on the conduct of individual defendants, the prosecution had to prove only that "a general and continuing conspiracy as alleged in Count One had existed, that each of the defendants had been a member of the conspiracy at some time during the course of its existence, and that the defendant had not expressly withdrawn from it".[142] Pritchard reveals that, in reality, the charges in the indictment had been framed even before the prosecution determined which individuals would be tried.[143] This arbitrary selection seems to have been largely due to the "prosecution's unfamiliarity with the intricacies of Japanese decision-making".[144]

The evidence relied upon by the Tribunal was in fact very general and would probably not have been conclusive to obtain convictions without a charge of conspiracy. As noted by Danner, "[w]hen discussing whether the grand conspiracy charge in Count One had been proved, the Tribunal prefaced its findings with a lengthy discussion of Japanese history that begun with the foundation of the Empire of Japan in 660 B.C"[145] and on "propaganda written by individuals who did not serve in the Japanese government".[146]

The prosecution and tribunal clearly had humanitarian grounds to form their opinions. Danner describes, in this regard, that the United States led prosecution "placed particular emphasis during the trial on the murders of service members that occurred

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141 Joseph B. Keenan & Brendan Francis Brown, *Crimes Against International Law* (Washington, D.C.: Public Affairs, 1950), cited in Danner, *ibid.* at 115.

142 Danner, *ibid.* at 115.

143 Danner, *ibid.* at 115. See R. John Pritchard, "The International Military Tribunal for the Far East and Its Contemporary Resonances: A General Preface to the Collection" in R. John Pritchard, ed., *The Tokyo Major War Crimes Trial: The Records of the International Military Tribunal for the Far East: With an Authoritative Commentary and Comprehensive Guide* (Michigan: Edwin Mellen Press, 1998), Vol. 1 at xxxv.

144 Stephen Large, "Far East War Crimes Trials" in I.C.B. Dear, ed., *The Oxford Companion to The Second World War* (Oxford, 1995), 347 at 349 in Danner, *ibid.* at 90.

145 Danner *ibid.* at 116-117. See *Tokyo Judgment*, *supra* note 134 at 763 stating ""the probable result of such a conspiracy and the inevitable result of its execution is that death and suffering will be inflicted on countless human beings".

146 See e.g. Danner, *ibid.* at 116-117 (The author refers to the writings of the pan-Asian philosopher, professor and writer, Ōkawa Shūmei).

because of the aggressive war against the United States initiated at Pearl Harbor".[147] The United States domination of the trial proceedings is even more apparent when considering that the *Charter of the IMTFE*, promulgated by General Douglas MacArthur, the Supreme Commander of the Allied Powers in the Pacific, was largely written by U.S. officials.[148] Furthermore, "[u]nlike the IMT, which featured one chief prosecutor each from the United States, Great Britain, France, and the Soviet Union, the IMTFE had only one chief prosecutor each from the United States, Great Britain, France and the Soviet Union, the IMTFE had only one chief prosecutor, Joseph Keenan of the United States".[149] It also seems that "[t]hrough the trial, the presence of the major colonial powers in Asia – including Britain, France, and the Netherlands – sitting in judgment over Japan's own colonial ambitions, struck a discordant note".[150]

Although the IMTFE was less restrictive in pronouncing guilty verdicts of conspiracy, the Tokyo Tribunal judges nevertheless limited their convictions against those who were formulators of government policy.[151] For instance, one of the defendants, Matsui Iawme, a former senior officer in the Japanese Army, was acquitted of Count One on this basis.[152]

Sub-section 3. Trials of the Major Industrialists of the Second World War

While the rulings of the international military tribunals were still underway, the Allied Countries promulgated the *Allied Control Council Law No. 10* in Nuremberg on

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147 Danner, *ibid.* at 97. Danner adds that General Douglas MacArthur, the Supreme Commander of the Allied Powers in the Pacific unilaterally established the IMTFE on January 19, 1946. At the same time, he promulgated its Charter, which had been written largely by U.S. officials and which set out the law that would be applied during its proceedings (Danner, *ibid.* at 88-89)

148 *Ibid.* at 88-89. .

149 *Ibid.* at 89

150 *Ibid.* at 89

151 *Ibid.* at 123

152 Danner, *ibid.* at 123. See *Tokyo Judgment*, *supra* note 134 at 814, cited in

20 December 1945.[153] This binding text provided for future prosecution of war criminals and other similar offenders, other than those dealt with by the Nuremberg Trial, under a uniform legal basis in each of the Control Council Areas occupied by the Allied Countries.[154] The Control Council was composed of four representatives of the victorious powers: the United States, Great Britain, France and the U.S.S.R.[155]

Paragraph 1. Discussions of the Allied Countries on Corporate Criminal Liability

A major difference between the Nuremberg Tribunal and the *Allied Control Council Law No. 10* trials was that the former's declarations of criminality were directed at political rather than industrial organizations, while the latter were committed to bringing some of the leading executives of German corporations to justice.

In fact, during the IMT proceedings, the Allied Countries attempted to prosecute one leading industrialist: arms maker, Gustav Krupp. The prosecutors however failed to conduct a medical examination prior to the indictment, which led to the unexpected result of charges

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153 *Allied Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity,* 20 December 1945, Official Gazette Control Council for Germany, no. 3, (Berlin, published on 31 January 1946), available online: Yale Law School Lillian Goldman Law Library. The Avalon Project <http://avalon.law.yale.edu/imt/imt10.asp> (accessed 18 April 2010) [hereinafter, *Allied Control Council Law No. 10*]. This law was promulgated in order to give effect to the aforementioned Moscow Declaration of 30 October 1943 "Concerning Responsibility of Hitlerites for Committed Atrocities" and the *London Agreement* of 1945, pursuant to its Preamble.

154 *United States* v. *Alfred Krupp et al.*, 9 Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10 (Washington D.C.: Government Printing Office, 1949-53. 15 vols.) (Case No. 10, 1948) at 1330 (online Federal Research Division (F.R.D.) Library of Congress. Military Legal Resources <http://www.loc.gov/rr/frd/Military_Law/NT_major-war-criminals.html>, 15-volume series entitled the *Green Series* of the subsequent trials to the I.M.T. trial that took place under *the Allied Control Council Law No. 10* [hereinafter, Trials of War Criminals]. 9th volume downloaded at <http://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-IX.pdf> (accessed 18 April 2010) [hereinafter, *Krupp Case*].

155 Anita Ramasastry, "Corporate Complicity: From Nuremberg to Rangoon. An Examination of Forced Labor Cases and Their Impact on the Liability on Multinational Corporations" (2002) 20 Berkeley Journal of International Law 91 at 105.

deferred because of Krupp's medical condition.[156] On 15 and 17 November 1945, the court rejected the prosecution's suggestion to delay the trial to permit the replacement of Gustav Krupp as a defendant by his son, Alfried Krupp, who took control of the firm in 1943.[157]

The failure to include private businesses in the case before the Nuremberg Tribunal became a "dramatic high point", where the Allied prosecutors "made commitments of varying intensity to bring later proceedings against at least the worst of the German industrialists".[158]

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156 It was proven that since 1939, Krupp suffered from progressive arteriosclerosis and senility, and experienced an attack of cerebral thrombosis which resulted in a temporary facial paralysis, followed by a loss of bladder and sphincter control (Matthew Lippman, "War Crimes Trials of German Industrialists: The 'Other Schindlers'" (1995) 9 Temp. Int'l and Comp. Law Journal,173 at 177).

157 Bush, *supra* note 92 at 1102, 1112.

158 The most adamant amongst the parties was the French Government who undertook to secure commitments from the other Allies. The British government was the first to commit to such a promise, whereas the United States was reluctant, given the negative outcome of charging Krupp as a defendant at the IMT trial with Krupp. Finally, Russia is presumed to have been favourable to the trial of industrialists. (*Ibid.* at 1113).

A. Collective Modes of Liability under the *Allied Control Council Law No. 10*

The *Allied Control Council Law No. 10* included the same international crimes as the *London Charter* for which an individual may be prosecuted.[159] At the same time, it provided a wider scope of collective modes of liability than the *London Charter*. This non exhaustive list would hold a person liable who was:

> "(a) a principal or (b) was an accessory to the commission of any such crime [as defined elsewhere in Article II] or ordered or abetted the same or (c) took a consenting part therein or (d) was connected with plans or enterprises involving its commission or (e) was a member of any organization or group connected with the commission of any civil or military (including General Staff) position in Germany or in one of its Allies, co-belligerants or satellites or held high position in the financial, industrial, or economic life of any such country."[160]

Based on these provisions, a number of proposals were studied for the prosecution of German industrialists in relation to the events before and during the Second World War.

B. Theories of the Prosecution

Several theories of prosecution were set forth in preparation of the *Allied Control Council Law No. 10* trials, based on existing modes of collective liability that would adequately address the involvement and contribution of industry during the Second World War. These proposals had the challenge of addressing a particularly new form of collective liability, namely business crimes.

At the time of the discussions, corporate criminal liability was only applied in certain common law jurisdictions in the world, such as the United States and Great

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159 *Allied Control Council Law No. 10*, *supra* note 153, art. II (2).
160 *Ibid.*, cited in Bush, *supra* note 92 at 1165.

Britain.[161] However, this possibility had not yet been explored in most civil law jurisdictions. For example, in France, "corporations were only made amenable to ordinary criminal jurisdiction in 1992".[162] Furthermore, in Germany, initial developments of collective responsibility in the eighteenth century lost credit "in the wake of Immanuel Kant's individualistic understanding of responsibility".[163] Regardless of some strong arguments in favour of a "real corporate personality",[164] the Penal Code for the new German empire, written in 1870, adhered to another school of thought limiting criminal liability to natural persons.[165]

Despite only primitive developments in the field of corporate responsibility, it seems, according to the collection of data by Jonathan Bush, that there was a proposal made for the prosecution of corporate entities by the United States' senior deputy for the economic cases at Nuremberg in a memorandum dated 27 August 1945 to Telford Taylor.[166] There exist no records however on the government's response to this proposal. Bush suggests that the piece missing to the prospect of conducting such prosecutions was "not whether international law recognized territorial and other national claims to criminal

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161 Bush, *ibid.* at 1152-1153 (providing the history of corporate liability under common law jurisdictions). See also Thomas Weigend, "Societas Delinquere non Potest? A German Perspective", (2008) 6 Journal of International Criminal Justice 927 at 928.

162 Bush, *supra* note 92 at 1221.

163 Weigend, *supra* note 161 at 930.

164 Through the advocacy of Otto von Gierke, the Germanic Reality Theory surfaced on the basis that the law cannot create its subjects and that therefore, groups such as the corporation were declared to be a juridical fact (French, *supra* note 37 at 36-37).

165 According to the "fiction theory" developed by C. Von Savigny, the individual will of each of the company's representatives was regarded as the will of the legal person (Weigend, *supra* note 161 at 930). Legislative discussions in the following decades allowed for the adoption of the Code on Administrative Infractions (*Gesetz u ber Ordnungswidrigkeiten*) in 1968, which permits the imposition of an administrative fine against a legal person if an organ, a representative or a person with control functions of the legal person committed a criminal offence or an administrative infraction by which an obligation of the legal person was violated or the legal person was enriched (Weigend, *supra* note 161 at 931). The Penal Code also provides for the possibility of confiscating the proceeds of a crime from a legal person when a natural person has committed a criminal offence on its behalf. (73 sec. 3 Strafgesetzbuch, cited in Weigend, *supra* note 161 at 931).

166 Abraham L. Pomerantz, "Feasibility and Propriety of Indicting I.G. Farben and Krupp as Corporate entities" (1946) Columbia Law Review, Gantt papers, at box EE, cited in Bush, *supra* note 92 at 1150.

jurisdiction over corporations – that much was straightforward, as examples from a few dozen nations had been prominently published in 1935 – but whether the law defined or recognized international crimes for which corporations as entities might be liable".[167] In fact, at the time of the Nuremberg trials, it was only "acknowledged that a private party can make war, but … that if it does so, the act is either ratified by that party's nation, in which case the act is deemed a legitimate act of war, or it is not ratified, in which case the party may be like the pirate, an international criminal".[168]

Several other theories of collective liability were also proposed for potential business cases against the most illustrious industrialists of German economy. Abraham L. Pomerantz, senior deputy for the economic cases at Nuremberg, was an active protagonist of corporate prosecutions in this regard. The American lawyer recommended a creative use of the conspiracy doctrine connecting industrialists to each other and the Nazi Party. His reasoning was that "if it could be shown that they [industrialists] met in pre-existing groups that shared the militaristic, nationalistic, illiberal, and anti-Semitic views of the Nazi Party, and that those groups actively supported the Party, the groups might serve as the legal expression of the industrialists' shared involvement with the Nazi regime".[169]

Another American, Leo Drachsler, working as a prosecutor, proposed, as an alternative liability theory, the "institutional approach", in order to "address the fact that German industrialists had constituted a 'third pillar' of the regime along with the Nazi Party-controlled government and the military, and that, in important ways, this third pillar

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[167] Harvard Research in International Law, "Draft Convention on Jurisdiction with Respect to Crime", 29 American Law Journal, 439, 535-539 (Supp. 1935), cited in Bush, *ibid.* at 1154. Countries and legislations included in the study referred to were: the British Empire and United States, based on common law, India, Penal Code (1860), sec. 11; Liberia, Criminal Code (1914), sec. 28; Palestine, Companies Ordinance (1921), art. 84; Sudan, Penal Code (1899), art. 9; Mexico, Federal Penal Code (1931), art. 11; Cuba, Project of Penal Code (Ortiz, 1926), art. 15; and France, project of Penal Code (1932), art. 115, para. 2; New South Wales, Act 40 of 1900, sec. 4; New Zealand, Cons. Stat (1908) 1, No. 32, "Crimes", sec 2 and South Africa.

[168] Bush, *ibid.* at 1154-1155.

[169] Bush, *ibid.* at 1155.

was 'a single organization,' 'a single entity'".[170] The German term of this institution, the "Reichsvereinigungen" is described by Bush as "a network of cartels, semi-public and public economic institutions, and instrumentalities… associations through which nazified industries like iron and coal – their owners and senior managers in personal attendance – advised the military, the Party, and each other about shared goals".[171]

The decisive factor in choosing between each theory was the rendering of the Nuremberg Tribunal judgment on 30 September and 1 October 1946. The curtailment of conspiracy and organizational theory doctrines clearly showed the challenges of invoking collective liability theories before the military courts of this period. Moreover, the IMT sharply dismissed the notion of imposing liability on "abstract entities" rather than individual perpetrators.[172] It must be noted however that the court did not rule out the possibility of trying corporations, but rather aimed to ensure "that natural persons could not hide behind the artificial entities like the state".[173]

It was also questionable whether future trials were bound by precedents of the IMT, particularly since the *Allied Control Council Law No. 10* did not contain the same legal wording and accountability provisions as the *London Charter*.

C. The Caseload

The *Allied Control Council Law No. 10* liability provisions were used in a number of Allied countries' jurisdictions to prosecute German industrialists of the Second World War. Japanese industrialists were also targeted by prosecutions in the Allied countries. Finally, new collective liability doctrines were formulated in subsequent military court proceedings.

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170 *Ibid.* at 1158.
171 *Ibid.*
172 *Ibid.* at 1158, 1162.

(i) *The Cases of Bruno Tesch (Zyklon B) and the Roechling Company*

The British were the first Allies to undertake proceedings against industrialists under the *Allied Control Council Law No. 10* three months after its adoption. The charges were laid against the owner and two employees of the firm, Tesch and Stabenow, for selling the highly toxic poison *Zyklon B* to German concentration camps.[174] The chemical was used to exterminate four and a half million prisoners in Auschwitz/Birkenau.[175] Two defendants, Dr. Bruno Tesch and one of his employees, Karl Weinbacher, were declared guilty for their role as accessories to violations of the laws and customs of war and they were sentenced to death.[176]

A second prosecution was brought in France against the directors of the well-known Roechling Company for crimes against peace and war crimes. The lead defendant was Hermann Roechling, the head of Voelklingen Iron Works in the Saar and the "animated figure behind the Roechling Company", named President of the Reich Associated Iron (RVE) and Reich Plenipotentiary (Reichbeauftragter) by Hitler.[177]

Both Hermann Roechling and his nephew, Ernst Roechling, were convicted of the plunder and spoliation of factories and machineries in Alsace Lorraine, as principals and accessories to the crime.[178] Hermann Roechling was further convicted for encouraging,

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173 *Ibid.* at 1162.

174 *Trial of Bruno Tesch and Two Others (The Zyklon B Case)*, Brit. Mil. Ct. Hamburg 1946 in United Nations War Crimes Commission, 1 Law Reports of Trials of War Criminals 93 (1947) [hereinafter, *The Zyklon B Case*].

175 Although *Zyklon B* was manufactured and shipped by another company, Tesch's firm was the exclusive agent for the supply of the gas east of the Elbe River and thus arranged for the shipments, which included "vast quantities to the largest concentration camps in Germany east of the Elbe (*Ibid.* at 94, cited in Kyle Rex Jacobson, "Doing business with the devil: the challenges of prosecuting corporate officials whose business transactions facilitate war crimes and crimes against humanity" (2005) Air Force Law Review 167 at 194 (HeinOnline)).

176 Lippman, *supra* note 156 at 182.

177 Lippman, *supra* note 156 at 182.

178 *The Roechling Case (Superior Military Government Court of the French Occupation Zone in Germany*, 14 Trials of War Criminals (1949) at 1114-1116 (online: Federal Research Division (F.R.D.) Library of

planning and participating in the deportation, allocation and abuse of over two hundred thousand involuntary workers from the occupied territories and assigning them to work in German iron and steel firms to produce munitions under abominable conditions.[179] Roechling executives were also held liable for encouraging and tolerating the cruel conduct of the plant police as well as the use of a Gestapo disciplinary court and punishment camp.[180]

The first two industrialist cases in the British and French Zones served as precedents for the trials that followed under Ordinance Council No. 7 in the American zone. Similarly to the *Allied Control Council Law No. 10*, this legislation dropped modes of liability language of the *London Charter* for the IMT trials.[181]

(ii) *The First United States' Military Court Collective Liability Proceedings: the Justice, Medical and Pohl Cases*

Despite the flexibility offered by the new legal texts, the United States' military courts experienced the same unease as the IMT judges with regards to collective liability.

The first three indictments were brought against sixteen judges and legal officials (*Justice* Case),[182] twenty-three Nazi doctors and medical officials (the *Medical* Case)[183] and

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Congress. Military Legal Resources, 15th volume downloaded at <http://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-XIV.pdf> (accessed 18 April 2010) [hereinafter, *Roechling Case*], cited in Lippman, *supra* note 156 at 183. Hermann and Ernst Roechling were pardoned in 1951 (online: Weltkulturerbe Völklinger Hütte <http://www.voelklinger-huette.org/en/fascination-world-cultural-heritage/the-roechlings-a-family-of-entrepreneurs/>).

179 Lippman, *ibid.* at 183. See *Roechling Case*, *ibid.* at 1127, 1134, 1137-1139.

180 Lippman, *ibid.* at 184. See *Roechling Case*, *ibid.* at 1135-1136.

181 Bush, *supra* note 92 at 1166-1167.

182 Bush, *supra* note 92 at 1167. See *United States* v. *Alstoetter (Justice Case)*, Indictment, 3 Trials of War Criminals, at 15, 17 (1947) (online: Federal Research Division (F.R.D.) Library of Congress. Military Legal Resources, 3rd volume downloaded at: <http://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-III.pdf> (accessed 18 April 2010) [hereinafter, *Justice Case*].

183 Bush, *ibid.* at 1167. See *United States* v. *Brandt (Medical Case)*, Indictment, 1 Trials of War Criminals at 8, 10 (1946) (online: Federal Research Division (F.R.D.) Library of Congress. Military Legal

eighteen chieftains of the SS (*Pohl* Case),[184] each containing a charge of conspiracy or common design to commit war crimes and crimes against humanity.[185] On 11, 14 and 18 July 1947 respectively,[186] the three panels of judges rejected the conspiracy claims, accepting the defendants' arguments which included the binding effect of the IMT's rulings rejecting conspiracy for war crimes and crimes against humanity.[187] Telford Taylor, the United States' principal prosecutor, had nevertheless argued that the civil liberties concerns at the IMT were exaggerated and the ruling was mistaken, since "[n]obody at the IMT ... had been charged with conspiracy as mere thought crime (...) [n]one of the defendants were charged with having agreed early but then withdrawing or renouncing before persecutions had occurred".[188] In fact, in each of the three cases, the "acts that the defendants had contemplated, intended, and agreed upon had actually been undertaken and completed".[189]

As a consequence of these rulings, it became more difficult to convict major participants' roles in mass scale crimes, particularly those running the most important economies of the time.

Resources, 1st volume downloaded at: <http://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-I.pdf> (accessed 18 April 2010) [hereinafter, *Medical Case*].

184 Bush, *ibid.* at 1167. See *United States* v. *Pohl*, Indictment, 5 Trials of War Criminals at 200, 201 (1947) (online: Federal Research Division (F.R.D.) Library of Congress. Military Legal Resources, 5th volume downloaded at <http://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-V.pdf> (accessed 18 April 2010) [hereinafter, *Pohl Case*].

185 Bush, *ibid.* at 1167.

186 Bush, *supra* note 92 at 1208. See *Dismissal Before Judgment of All or Parts of Counts of the Indictments as to All Defendants*, 15 Trials of War Criminals at 234, 235–237 (online: Federal Research Division (F.R.D.) Library of Congress. Military Legal Resources, 15th volume downloaded at: <http://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-XV.pdf> (accessed 18 April 2010).

187 Bush, *ibid.* at 1205.

188 *Ibid.* at 1207.

189 *Ibid.*

(iii) *The First United States' Military Courts' Industrialist Trial: the Flick Case*

Simultaneous to the first three military court cases dealing with collective liability, the United States also conducted its first major industrialist war crimes trial, the *United States of America* v. *Friedrich Flick and al.* (the "*Flick* Case").[190] The Flick concern, Friedrich Flick Kommanditgesellschaft, was a top holding company in the German steel and coal industries.[191] The indictment was filed against Friedrich Flick, the leading director and five of his associates. Among the five counts of which they were charged,[192] two were convicted of the charges related to slave labor,[193] one of economic plunder[194] and two of participating in the atrocities of the SS[195] with sentences ranging from two and a half to seven years of imprisonment.[196]

Count Four of the indictment alleged "that defendants 'were accessories to, abetted, took a consenting part in, were connected with plans and enterprises involving, and were members of organizations or groups connected with' atrocities through their early, continuing, and crucial financial and political support for the SS".[197] This charge, according to Bush, incorporated some of the ideas proposed by Pomerantz "to look for

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190 *United States* v. *Friedrich Flick et al.*, 6 Trials of War Criminals (Case No. 5, 1947), (online: Federal Research Division (F.R.D.) Library of Congress. Military Legal Resources, 6th volume downloaded at: <http://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-VI.pdf> (accessed 18 April 2010) [hereinafter, *Flick Case*].

191 *Ibid.* at 1192.

192 The five counts consisted of the following: (1) forcible deportation of foreign nationals, concentration camp inmates and prisoners of war to forced labor in Germany, and specifically in Flick mines and factories; (2) the seizure of plants and property in France and the USSR; (3) crimes against humanity by the persecution of Jews during the prewar years 1936-39; (4) knowing participation in persecutions and other atrocities perpetrated by the SS; (5) membership of one defendant, Steinbrinck, in the SS subsequent to 1 September 1939 (*Flick Case*, Indictment, *ibid.* at 11-27).

193 *Ibid.* at 1202 (convicting Friedrich Flick and Berhard Weiss).

194 *Ibid.* at 1212 (convicting Friedrich Flick).

195 *Ibid.* at 1222 (convicting Friedrich Flick and Otto Steinbrinck).

196 *Ibid.* at 1228 (convicting the defendents of the following sentences: 7 years of prison for Friechrich Flick, 5 years of prison for Otto Steinbrinck and 2 ½ years of prison for Berhard Weiss).

197 Bush, *supra* note 92 at 1175.

groups and associations that connected big business or at least individual businessmen with Nazi atrocities".[198] More specifically, the charge alleged that defendants "were members of a group variously known as 'Friends of Himmler', 'Freundeskreis' (Circle of Friends), and the 'Keppler Circle', which throughout the period of the third Reich, worked closely with the SS, met frequently and regularly with its leaders, and furnished aid, advice, and support to the SS, financial and otherwise".[199]

There were, however, no aggression or conspiracy charges and in this sense, the indictment was conservative and cautious not to distance itself excessively from the Nuremberg Tribunal rulings.[200]

Furthermore, the prosecutors chose not to indict the corporate entities, but rather the individuals controlling the firm. The decision seems to have been based on practical purposes for accumulating evidence against the magnitude of the Flick empire and the complexity of its business structure, which consisted of "corporations, subsidiaries, hidden interests, shares owned by dummies, and firms and factories".[201]

(iv) *The United States' Military Court's Prosecution of I.G. Farben Representatives and Corporate Liability*

Prosecution of major industrialists pursued in another important industrial war crimes trial, the *United States of America* v. *Carl Krauch et al*[202] on 3 May 1947

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198 *Ibid.* at. 1175.

199 Bush, *supra* note 92 at 1175. See *Flick Case*, Indictment, *supra* note 190 at 23.

200 Bush, *ibid.*

201 Bush, *ibid.* at 1176.

202 *United States of America* v. *Carl Krauch et al* , 7-8 Trials of War Criminals (Case No. 6, 1948) (online: Federal Research Division (F.R.D.) Library of Congress. Military Legal Resources, 7th volume downloaded at: <http://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-VII.pdf> (accessed 18 April 2010) [hereinafter, *IG Farben Case*, Vol. 7] & 8th volume downloaded at <http://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-VIII.pdf> (accessed 18 April 2010) [hereinafter, *I.G. Farben Case*, Vol. 8].

(hereinafter, the "*I.G. Farben Case*"). The indictment charged twenty-four officials[203] of the German concern, *Interessen-Germeinschaft Farbenindustrie Aktiengesellschaft* (hereinafter "I.G. Farben")[204] for five counts: (1) crimes against peace through the planning, preparation, initiation, and waging of wars of aggression and invasions of other countries; (2) plunder and spoliation of public and private property; (3) slavery and mass murder; (4) membership in a criminal organization; and (5) a common plan or conspiracy to commit crimes against peace.[205] The possible verdicts of the Indictment ranged from acquittal to death.[206]

On July 29, 1948, the Tribunal read its judgment and rendered its verdict, acquitting the defendants on counts one, four and five.[207]

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[203] *I.G. Farben Case*, Vol. 7, Indictment, *ibid.* at 11-14 (the accused individuals wered: Carl Krauch, Chairman of I.G.'s supervisory board, Herman Schmitz, Chairman of the managing board, and Goerg von Schnitzler, Fritz Gajewski, Heinrich Hoerlein, August Von Knieriem, Fritz ter Meer, Christian Schneider, Otto Ambros, Max Brueggemann, Ernst Buergin, Heinrich Buetefisch, Paul Haefliger, Max Ilgner, Friedrich Jaehne, Hans Kuehne, Carl Lautenschlaeger, Wilhelm Mann, Heinrich Oster, Carl Wurster, Walter Duerrfel, Heinrich Gattineau, Erich von der Heyde and Hans Kugler, all high-level officials of the concern. Among the indicted defendants, Carl Wurster, Carl Lautenschlaeger and Max Brueggemann were absent on account of illness).

[204] I.G. Farben, freely translated as meaning "Community of Interests of the Dyestuffs Industries, a Stock Corporation", was one of the largest German companies ever to exist, renowned for such achievements as the development and sponsoring of pharmaceutical products including aspirin, atabrin and the salvarsans. In the industrial sphere, this firm was a pioneer in the development of intricate processes and large-scale commercialization of dyestuffs, methanol, plastics, artificial fibres, light metals, buna rubber, nitrogen, gasoline and lubricants. The production capacity and knowledge of this corporation greatly contributed to armament, use of poison gases, military equipment, transportation and other war necessities during the First and Second World Wars (*I.G. Farben Case*, Vol. 8, *supra* note 202, at 1085-1088).

[205] *Ibid.* at 1082. With regards to count five, the Tribunal ruled that a common plan or conspiracy did not exist as to war crimes and crimes against humanity, as they were defined in the *Allied Control Council Law No. 10* (*Ibid.* at 1084).

[206] *London Charter*, *supra* note 12, art. II(3).

[207] *I.G. Farben Case*, Vol. 8, Judgment, *ibid.* at 1113-1127 (count one), 1196-1204 (count four), 1127-1128 NMT (count five).

With relation to counts one and five, the Tribunal indicated:

> "None of the defendants, however, were military experts. They were not military men at all. The field of their life work had been entirely within industry, and mostly within the narrower field of the chemical industry with its attendant sales branches. The evidence does not show that any of them knew the extent to which general rearmament had been planned, or how far it had progressed at any given time". [208]

On the subject of Farben's continuing support during the war, the Tribunal maintained:

> "In this case we are faced with the problem of determining the guilt or innocence with respect to the waging of aggressive war on the part of men of industry who were not makers of policy but who supported their government in the waging of war… We cannot say that a private citizen shall be placed in the position of being compelled to determine in the heat of war whether his government is right or wrong, or, if it starts right, when it turns wrong". [209]

Thus, the Tribunal re-established the high standards required to prove a conspiracy, more appropriately met by those who led their country to war with a "knowing agreement on a concrete plan to wage an aggressive war", rather than civilians working in the industrial sector of society.[210]

The Military tribunal was less lenient however with regards to counts two and three. In fact, nine of the defendants were declared guilty of plunder of public and private property based on article II (1) of the *Allied Control Council Law No. 10*.[211] The remaining fourteen were acquitted. The second conviction was pronounced against five members of the managing board for slave labor and mass murder at I.G. Farben's Auschwitz buna plant

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208 *Ibid.* at 1113.
209 *Ibid.* at 1125-1126.
210 *Ibid.* at 1125.
211 Joseph Borkin, *The Crime and Punishment of I.G. Farben* (New York, The Free Press, a division of Macmillan Publishing Co., Inc., 1978) at 189-194.

and Fuerstengrube, a nearby I.G. coal mine.[212] All other members, including those of the Vorstand, the supervisory board, were acquitted.[213] With respect to Count Four, the tribunal followed the narrow test of the IMT on membership in a criminal organization, concluding that knowledge of the criminal activities of the organization had not been demonstrated and acquitted each accused individual.[214] The tribunal stated that factors indicating membership in a criminal organization excluded the accused individuals' failure to attend the organizations' functions, wear its insignia,[215] passive membership through mere sponsorship[216] or membership in non-culpable factions of the criminal organization.[217]

In conclusion, the Tribunal convicted thirteen defendants with relatively light sentences ranging from one and a half to eight years of prison.[218]

As Joseph Borkin describes, the prosecution staff was obviously "outraged by the court's verdict and the sentences of the guilty" in this high-profile industrial case.[219] Almost five months after the verdict, Judge Hebert filed a forceful dissent on the charge of slavery and mass murder, stating:

> "Willing cooperation with the slave labor utilization of the Third Reich was a matter of corporate policy that permeated the whole Farben organization... criminal responsibility goes beyond the actual immediate participants at Auschwitz. It includes other Farben Vorstand plant-managers and embraces all who knowingly participated in the sharing of the corporate policy".[220]

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212 *I.G. Farben Case*, Vol. 8, *supra* note 202 at 1180-1192. See also Borkin, *ibid.* at 192 (the individuals declared guilty were: Duerrfeld, Ambros, Buetefisch, Krauch and Ter Meer).

213 *I.G. Farben Case*, *ibid.* at 1192-1196.

214 *Ibid.* at 1196-1204.

215 *Ibid.* at 1201 (e.g. the refusal of Buetefisch to wear the organization's insignia).

216 *Ibid.* at 1198 (e.g. Schneider was considered to be merely sponsoring member of the SS, which did not amount to membership in a criminal organization).

217 *Ibid.* at 1201-1203 (e.g. Von Der Heyde belonged to the non-culpable Riding Unit of the SS).

218 Borkin, *supra* note 211 at 194-195 (The sentences were: 8 years of prison for Otto Ambros, 8 years of prison for Walter Duerrfeld, 7 years of prison for Fritz ter Meer, 6 years of prison for Carl Krauch, and 5 years of prison for Heinrich Buetefisch.

219 *Ibid.* at 195.

220 *Ibid.* at 187-188. Judge Hebert's concurring opinion was somewhat more ambiguous than his dissent. On the one hand, he condoned the lenient judgment of the Tribunal, while he nevertheless felt he had to acquit the defendants on counts one and five. For more information, see Alberto L. Zuppi, "Slave Labor

There were a series of factors alleged to have influenced the majority of the Tribunal at the time, namely, the global political climate at the time highly affected by the growing Cold War tensions.[221] Among the critics, Josiah E. DuBois, Prosecutor of the Court, alleged that the United States' War Department did not support charging the industrialists because it in no way wanted to discourage the American industrialists from supplying American troops with war material for fear of future prosecutions of conspiracy.[222] Furthermore, the rise of communism in the Soviet Union had provoked divisions between right-wing "conservative, pro-business, or pro-German interests" in the United States opposing left-wing interest groups that seemed more proactive in bringing German industrialists to justice.[223]

Another major concern for the Allied Countries was centered on the deplorable conditions of the German people and collapse of economy following the devastating effects of the Second World War. Bush describes that:

> "Food rations were reduced in the American zone from an official 1,550 calories per day... to a new low of 1,180 calories in May and June 1946. With production essentially at a halt, living standards were likely to get worse rather than better, and in fact the winter of 1946-47 brought prolonged cold and terrible hardship. A staggering number of refugees – seven million, according to Clay's estimate, mostly East – flooded into the British and U.S. zones with a combined prewar population of 34 million, further draining resources."[224]

Such conditions were likely to cause political disorder and possible German military revival, as was the effect of the Versailles Treaty reparations imposed to Germany after the

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in Nuremberg's I.G. Farben Case: The Lonely Voice of Paul M. Hebert" (2005-2006) 66 Louisiana Law Review 495.

221 Zuppi, *ibid.* at 522.

222 Josiah E. DuBois, *The Devil's Chemists: 24 Conspirators of the International Farben Cartel Who Manufacture Wars* (The Beacon Press, 1952), at 21-22, cited in Zuppi, *ibid.* at 520.

223 See Bush, *supra* note 92 at 1150-1152, 1197, 1215 on the difficulties encountered by Du Bois and Pomerantz during the Nuremberg Trials leading to Pomerantz's eventual resignation due to accusations of his support to the Communist regime of the Soviet Union.

224 *Ibid.* at 1121-1123.

First World War. The goal seemed therefore to avoid destabilization and an increased slowdown in commercial development and ties, which the Western Powers feared would be exploited by the Soviet Union.[225]

(v) *The Anticipated Trial of the Krupp Concern*

The third, long-awaited industrial trial was the *United States of America* v. *Alfried Krupp von Bohlen und Halbach et al.* (hereinafter, the "*Krupp* Case").[226] This case listed Alfried Krupp as the principal defendant, a logical decision following the previous failed attempts at bringing his father before the IMT proceedings. The Krupp firm dominated the mine, steel and armament industries in Germany during the First and Second World Wars.

The military tribunal decided that six defendants[227] were guilty for plunder and spoliation of property in France, Holland and other occupied territories.[228] It also judged that eleven defendants[229] were guilty of slave labor[230] and illegal deportation of civilians from occupied territories by participating extensively in the government labor program.[231] The sentences passed against the guilty individuals of the Krupp Concern were more severe than in all the industry cases, ranging between two years, ten months and nineteen days to twelve years of imprisonment for the head of the enterprise, Alfried Krupp.[232]

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225 *Ibid.* at 1122.
226 *Krupp Case*, *supra* note 154.
227 *Ibid.* at 1373 (the said defendants were Krupp, Loeser, Houdremont, Mueller, Janssen, and Eberhardt).
228 *Ibid.* at 1348. (the counts of property and spoliation were dealt with by the Tribunal from pages 1358 to 1373 of the Judgment).
229 *Ibid.* at 1449 (the said defendants were Krupp, Loeser, Houdremont, Mueller, Janssen, Ihn, Eberhardt, Korschan, von Buelow, Lehmann, and Kupke).
230 *Ibid.* at 1373-1374.
231 *Ibid.* at 1432-1433.
232 *Ibid.* at 1449-1550. The Tribunal emphasized the close relationship between Gustav Krupp, the father of Alfried and Hitler. Krupp had in fact contributed large sums of money to the Nazi Party and played a leading part in bringing other influential industrialists to Hitler's support (See *ibid.* at 1445).

In all four cases of industrialists of major corporations, respectively, the *Roechling*, *Flick, I.G. Farben* and *Krupp Cases*, the defendants argued the defence of necessity, stating that they were submitted to oppressive coercion and compulsion due to government production quotas and compulsory deportation and utilization of slave labor.[233] While the I.M.T. acknowledged the pressure exerted by the dictatorial regime of the former German Chancellor, Adolf Hitler,[234] it did not consider such a defence to be available to individuals who chose to exceed the expectations of their government through their own initiatives and actions.[235] The Tribunal did however consider the defence of necessity for mitigation of punishment in the *I.G. Farben* and *Flick* trials.

Overall, the sentences applied for the industry war crimes trials were very light, considering "thousands of helpless victims whom they daily exposed to danger of death, great bodily harm from starvation, and the relentless air raids upon the armament plants; to say nothing of involuntary servitude and the other dignities which they suffered".[236] Borkin and Clapham shed some light on the lenient sentences by explaining that the imminence of the Cold War during the trials, had made Germany a sought-after ally, whereas the U.S.S.R., the former ally, was now regarded as the enemy.[237]

Importantly, the trials of major industrialists did not include the corporations as parties to the judgment, but rather, the prosecution of its individual representatives, the majority of which were directors, officers or agents of a corporation.

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233 See *I.G. Farben Case,* Vol. 8 *supra* note 202, at 1174-1179 (describing also the defense of necessity in the *Roechling Case, supra note* 178 and the *Flick Case, supra note* 190), as well as *Krupp Case*, *ibid.* at 1435-1448. According to the *I.G. Farben Case* military tribunal, at least 5,000,000 persons were forcibly deported from the occupied territories to Germany to support its war efforts (*I.G. Farben Case*, Vol. 8, *supra* note 202 at 1173).

234 T.M.W.C., *supra* note 85 at 176, stating: " the history of the Nazi regime shows that Hitler and his followers were only prepared to negotiate on the terms that their demands were conceded, and that force would be used if they were not". See also the military tribunal judgments in the *I.G. Farben Case*, *ibid.* at 1175 and the *Flick Case*, *supra* note 190 at 1201.

235 *Flick Case*, *ibid.* at 1202.

236 *Krupp Case*, *supra* note 154 at 1445-1446.

237 Borkin, *supra* note 211 at 176. See also, Clapham, *supra* note 100 at 165.

Whether it would have been possible to convict a corporation for the same crimes remains ambiguous. Clapham observes that despite the Tribunal's assertion that "'the corporate defendant, Farben, is not before the bar of this Tribunal and cannot be subjected to criminal penalties in these proceedings', the Tribunal did in fact treat Farben as a legal entity (juristic person) capable of violating the laws of war".[238] Furthermore, Bush describes how, during the IMT trial, "Dr. Friedrich Silcher, formerly a Farben in-house lawyer now assisting in the defense of August von Knieriem, rose to speak for what 'from a moral point of view is the invisible defendant', arguing that to the 'portion of human society which was qualified and prepared for it... Farben had become the enterprise per se".[239]

It is also relevant that just like in the Flick case, "corporate charges would be difficult to aim correctly against an entity as structurally complex as Farben".[240] Moreover, as previously described, charging corporations for international crimes was a novel idea which "might awaken legal concerns with the judges or political concerns with the military government or Allied Control Council, a deadlocked group that was formally still the highest authority in Germany and might have other plans for German corporate assets".[241] Finally, since many of the private industrialists of the Reich had been offered and accepted public offices in the government ministries and regulatory boards, it was easier for prosecutors to target defendants through these "lords of industry" on a personal level,

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238 Clapham, *ibid.* at 167, 169. Clapham quotes, among others, the following part of the judgment: "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 provision of the Hague regulations, is in violation of international law...." in *I.G. Farben Case*, Vol 8, *supra* note 202 at 1132-1133.

239 Bush, *supra* note 92 at 1224, quoting an official unpublished transcript of the I.G. Farben Case cited as *Closing Statement for Farben as an Entity,* Official Transcript at 15400 (9 June 1948), *Krauch*, 7 Trials of Major War Criminals at III.

240 Bush, *ibid.* at 1198.

241 *Ibid.* 1199.

"regardless of which of their many hats one could prove they were wearing during particular decisions".[242]

(vi) *The Trial of Japanese Industrialist Washio Awochi*

In addition to the German industrialists' trials, subsequent proceedings followed the judgment of the IMTFE against Japanese industrialists for their active role during the Second World War. For instance, in 1946, the Netherlands Temporary Court-Martial at Batavia tried Washio Awochi for forcing Dutch women into prostitution during the Japanese occupation of Batavia in his restaurant, bar and brothel, the Sakura Club.[243] Despite one of Awochi's arguments that he was compelled to conduct this business at the order of the Japanese government, the court-martial found Awochi guilty of the war crime of "enforced prostitution" and sentenced him to ten years' imprisonment.[244]

(vii) *New Doctrines of Collective Liability: Common Design and Common Enterprise*

The challenges propounded by the role of industrialist actors in the war, as well as widely disputed collective liability theories of conspiracy and organizational membership caused other judicial forums to formulate new tenets of mass crime responsibility. In particular, British and American JAG trials taking place simultaneously to the IMT trials opted for the use of "common design" and "common enterprise" language similar to the accomplice liability wording adopted in the *Allied Control Council Law No. 10*. Based on these new forms of liability, SS men and women were charged for planning and for participatory activity instead of a conspiracy.[245]

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242 *Ibid.* 1199.

243 *In re Awochi*, Neth. Temp. Ct. Martial Batavia 1946, in United Nations War Crimes Commission, 13 Law Reports of Trials of War Criminals 122 (1949) at 122-23, cited in Jacobson, *supra* note 175 at 196.

244 Jacobson, *ibid.* at 123.

245 Bush, *supra* note 92 at 1165.

The first case was instituted by British Judge Advocate-General prosecutors in the fall of 1945 against officials and guards from the Bergen Belsen concentration camp, using a theory of "concerted action" or "joint action" or agreement.[246] This was followed by a series of American cases against personnel from concentration camps owned and run by German cartels or production firms in Dachau, Buchenwald, Mauthausen, and other camps and sub-camps.[247] Other prosecutions were also brought in Poland against Rudolf Hoess, commandant of Auschwitz, and later, against Joseph Buhler, the deputy of the IMT's defendant Hans Frank. The latter was known as the Germany's economic tzar at the time of the war.[248] All the charges in these cases used "common design" liability language.[249]

These cases were innovative in providing a new theory for trying executives and directors from German big business in 1948, imputing a kind of corporate status to the concentration camps that permitted to hold its members responsible for atrocities committed under a systemized "common design".[250] Indeed, as explained by Bush, "[v]iewing camps as ongoing enterprises and the officials and guards as members or coparticipants allowed courts to try Nazis for participating in atrocities even where the proof needed for an ordinary murder conviction was unavailable".[251]

With new concepts developed in the concentration camp cases, the creators of the future international criminal law tribunals were able to abandon the controversial and

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246 *Trial of Josef Kramer (The Belsen Trial),* Trial of Josef Kramer (The Belsen Trial), 2 U.N. War Crimes Comm'n, Law Reports of Trials of War Criminals, at 1, 108–09, 118, 120 (Brit. Mil. Ct. Luneberg, 1945), cited in Bush*, ibid.* at 1225.

247 See Michael S. Bryant, "Punishing the Excess: Sadism, Bureaucratized Atrocity, and the U.S. Army Concentration Camp Trials, 1945–1947", in Nathan Stoltzfus & Henry Friedlander, eds., *Nazi Crimes and the Law*, (2008) at 63, 69, cited in Bush, *ibid.* at 1225.

248 See *Trial of Joseph Buhler*, 14 U.N. War Crimes Commission, Law Reports of Trials of War Criminals (1947) 93 at 23 (Sup. Nat'l Trib. of Poland, 1948) and *Trial of Rudolf Hoess*, 7 U.N. War Crimes Commission, Law Reports of Trials of War Criminals (1947) 93 at 11, 20 (Sup. Nat'l Trib. of Poland, 1947), both cited in Bush, *ibid.* at 1225.

249 Bush,at *ibid.*

250 *Ibid.* at 1226.

251 *Ibid.*

seemingly ineffective notions of conspiracy and criminal organizations and ultimately endorse other doctrines of collective criminal responsibility.

Chapter 2: The *Ad Hoc* Tribunals Created by the Security Council of the United Nations in Response to the Conflicts of Rwanda and the Former Yugoslavia

Contrary to the international military tribunals, the Statutes of the *ad hoc* tribunals did not contain any provisions related to organizational criminality nor any advancements in corporate criminal liability since the trials of major industrialists of the Second World War. Indeed, articles 5/6 *ICTR/ICTY Statutes* only provide for jurisdiction over natural persons.

Reasons for prosecuting corporations did however exist for the conflicts that took place in the former Yugoslavia and Rwanda during the 1990s. These included arms dealings, possible involvement of construction companies in covering up mass graves and the role of the radio station, *Radio des Milles Collines* that had urged the killing of Tutsis during the Rwandan genocide. Reference has also been made to coffee companies in Rwanda that assisted in the genocide by storing arms and equipment.[252]

The practice until now has been to hold States responsible for the acts of organs, groups or entities acting under their control.

Section 1. State Liability Engaged Through Actions of Collective Entities

When the *ad hoc* tribunals were created, criminal acts committed by organizations were only addressed before the sole permanent international judicial forum existing at the

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[252] Clapham, *supra* note 100 at 148.

time, the ICJ. Under the jurisdiction of the international court, responsibility may only be incurred by the State for acts of its organs or *de facto* organs acting under its control.[253] By analogy, States may be held liable for the acts of corporations or entities acting under their authority for violations of international law.

Sub-section 1. The Attribution of State Responsibility for the Acts of its Organs

In a recent judgment, *Bosnia and Herzegovina v. Serbia and Montenegro*,[254] the ICJ attributed responsibility to a State for the acts of its organs. This case was brought by Bosnia-Herzegovina against the former Federal Republic of Yugoslavia (at the time of judgment, this State was called *Serbia & Montenegro*) for participation in genocide during the armed conflict that took place from 1991 to 1993.[255] The Court rendered its first judgment interpreting the 1948 *Convention on the Prevention and Punishment of the Crime of Genocide* (hereinafter, the "*Genocide Convention*")[256] and held that the massacre of Bosnian Muslims at Srebrenica during the month of July 1995 amounted to genocide. In its landmark ruling, the Court also found that Serbia and Montenegro had violated the *Genocide Convention* by failing to prevent and punish those responsible for the massacre of Bosnian Muslims.[257]

The most novel and controversial statement of the Court was the recognition that a State may be held responsible for genocide and for violating the Convention, independent

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253 *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No. 7, art. 93.

254 *Bosnia and Herzegovina* v. *Serbia and Montenegro*, *supra* note 33.

255 *Ibid.*

256 *Convention on the Prevention and Punishment of Genocide*, 9 December 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951) [hereinafter *Genocide Convention*].

257 Susana Sa Couto, "Reflections on the Judgment of the International Court of Justice in Bosnia's Genocide Case against Serbia and Montenegro", (2007) 15 Human Rights Brief 2 at 2,3 (See *Bosnia and Herzegovina v. Serbia and Montenegro*, *supra* note 33 at 386, 434).

from any individual prosecution.[258] More specifically, Serbia and Montenegro was held liable for acts of Bosnian-Serb armed forces acting as *de facto* organs of the Federal Republic of Yugoslavia, in accordance with article 8 of the International Legal Commission *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*[259] (hereinafter, "*Draft Articles on State Responsibility*"), a reflection of international customary law.[260] The article attributes to a state conduct by persons or groups of persons acting 'on the instructions', or 'under the direction' or 'under the control' of the state.[261]

In this sense, the ICJ relied on the "effective control" test that it developed in a prior judgment, the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (hereinafter, the "*Nicaragua Case*").[262] The ICJ also rejected the "overall control" standard developed by the ICTY in its *Prosecutor* v. *Tadić* judgment of the Appeals Chamber in 1999 [hereinafter, "*Tadić*"] stating among others that the ICTY did not have jurisdiction to address State responsibility.[263]

The more lenient standard developed by the ICTY Chamber in the *Tadić* judgment was derived from article 10 of the former *Draft Articles on State Responsibility* provisionally adopted by the International Law Commission in 1998, which provided that a State may be even be held responsible for the *ultra vires* acts of its organs or a military

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258 Notwithstanding the acknowledgement of State responsibility, the Court concluded that there was not enough evidence to find Serbia directly responsible or complicit in that genocide (Sa Couto, *ibid.* at 3. See *Bosnia and Herzegovina v. Serbia and Montenegro*, *ibid.* at 166-169, 182).

259 International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, UN GAOR, 56th Sess., Supp. No. 10, UN Doc. A/56/10, chp.IV.E.1 (2001), art. 8, online: UNHCR: <http://www.unhcr.org/refworld/docid/3ddb8f804.html> (accessed 22 April 2010) [hereinafter, *Draft Articles on State Responsibility*]. The article provides that "[t]he conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct".

260 *Bosnia and Herzegovina* v. *Serbia and Montenegro*, *supra* note 33 at 398.

261 Antonio Cassese, "The *Nicaragua* and the *Tadić* Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia" (2007) 4 The European Journal on International Law, Vol. 18, 649 at 650.

262 *Nicaragua Case*, *supra* note 33, at 105–115.

263 Cassese, *supra* note 261. See *Bosnia and Herzegovina* v. *Serbia and Montenegro*, *supra* note 33 at 406, referring to the *ICTY Statute*, *supra* note 14, art. 6.

group.[264] The standard of control was consequently lowered from a requirement of issuing specific instructions or directions to a group to one where "a State wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity".[265]

A question which arises from these judgments is whether corporate leaders or corporations acting in connection with armed forces or in collusion with state authorities would, under one or the other control test, engage State responsibility for international crimes.

Sub-section 2. Corporations Engaging States' Liability

Andrew Clapham provides two circumstances under which, similarly to acts of armed groups, State responsibility may be engendered for acts committed by corporations. First, under article 5 of the *Draft Articles on State Responsibility*:

> "The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of the state to exercise elements of governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance".[266]

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[264] *Prosecutor* v. *Tadíc*, IT-94-1-A, Judgment on Appeal (15 July 1999) at para. 121 (ICTY, Appeals Chamber) online: ICTY <http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf> (accessed 27 October 2009) [hereinafter, *Tadíc*, ICTY Appeals Chamber] referring to article 10 of the *Draft Articles on State Responsibility* in *Report of the International Law Commission on the work of its thirty-second session* (5 May–25 July 1980), U.N. Doc. A/35/10, p.31. See also *First Report on State Responsibility by the Special Rapporteur J. Crawford*, U.N. Doc. A/CN./490/Add.5, pp. 29-31. The ICTY also referred to article 10 of the *Draft Articles on State Responsibility* as provisionally adopted in 1998 by the ILC Drafting Committee, U.N. Doc. A/CN.4/ L.569 at 3. See also *First Report on State Responsibility by the Special Rapporteur J. Crawford*, U.N. Doc. A/CN./490/Add.5, pp. 29-31 (U.N. Doc. A/CN.4/ L.569) at 3.

[265] *Tadíc*, ICTY Appeals Chamber, *ibid.* at para. 131.

[266] Andrew Clapham, *Human Rights Obligations of Non State Actors* (New York: Oxford Press University, 2006) at 142. See *Draft Articles on State Responsibility*, *supra* note 259, art. 5.

According to the ILC Commentary, the entities in question may include

> "public corporations, semi-public entities, public agencies of various kinds and even, in special cases, private companies, provided that in each case the entity is empowered by the law of the State to exercise functions of a public character normally exercised by State organs."[267]

In fact, during the 1930s process of drafting the articles on State responsibility, the German Government had already proposed responsibility of States for situations where the government authorized private organizations, such as private railway companies, to fulfill certain sovereign functions.[268] A few more modern examples would include activities carried out by privatized detention centres, prison transfers, airports, housing associations, and even water services.[269]

In order for attribution of State responsibility to apply however, it must be proven that the entity was empowered under internal law and second, that the conduct concerned "governmental activity and not other private or commercial activity in which the entity may engage".[270]

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267 Clapham, *ibid.* at 242. See UN General Assembly, *Report of the International Law Commission on the Work of Its Fifty-third Session*, Commentary to the Draft Articles on State Respnosibility, UN GAOR, 56th Sess, Supp. 10, UN Doc. A/56/10 (2001) at 92, online: United Nations Treaty Collection <http://untreaty.un.org/ilc/reports/english/a_56_10.pdf> (accessed 22 April 2010) [hereinafter, *Commentary to the Draft Articles on State Responsibility*].

268 Clapham, *ibid.* See League of Nations, Conference for the Codification of International Law, *Bases of Discussion for the Conference drawn up by the Preparatory Committee*, Vol. III: *Responsibility of States for Damage caused in their Territory to the Person or Property of Foreigners* (Doc. C.75.M.69.1929.V.) at 90, cited in *Commentary to the Draft Articles on State Responsibility*, *ibid.* at 93.

269 Clapham, *ibid.*

270 *Ibid.* See *Commentary to the Draft Articles on State Responsibility*, *supra* note 267 at 94.

Under the aforementioned article 8 of the *Draft Articles on State Responsibility*, a State may also become liable specifically for the conduct of a corporation when the "state actually controls or directs a company to act in a certain way".[271] The ILC Commentary notes in this regard that:

> "(...) In discussing this issue it is necessary to recall that international law acknowledges the general separateness of corporate entities at the national level, except in those cases where the 'corporate veil' is a mere device or vehicle for fraud or evasion.
>
> (...) Since corporate entities, although owned by and in that sense subject to the control of the State, are considered to be separate, *prima facie* their conduct in carrying out their activities is not attributable to the State unless they are exercising elements of governmental authority within the meaning of article 5. This was the position taken, for example, in relation to the *de facto* seizure of property by a State-owned oil company, in a case where there was no proof that the State used its ownership interest as a vehicle for directing the company to seize the property. On the other hand, where there was evidence that the corporation was exercising public powers, or that the State was using its ownership interest in or control of a corporation specifically in order to achieve a particular result, the conduct in question has been attributed to the State."[272]

The responsibility of States for conduct of corporations has a much narrower scope than that for conduct of soldiers under article 4 of the *Draft Articles on State Responsibility*.[273] In the latter situation, it suffices to show that the person engaging the state's responsibility was indeed a soldier. On the other hand, as Hoppe explains, unless incorporation of the personnel into the national army can be proven, attribution of contractor conduct to a state under the conventional reading of the *Draft Articles on State Responsibility* requires a much more complex factual inquiry.[274] This makes it very difficult to attribute state responsibility for private military or security companies (alias

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271 Clapham, *ibid.* at 243. See article 8 of the *Draft Articles on States Responsibility*, *supra* note 259.

272 Clapham, *ibid.* at 244. *Commentary to the Draft Articles on State Responsibility*, *supra* note 267 at 107-108.

273 *Draft Articles on State Responsibility*, *supra* note 267, art. 4.

274 Carsten Hoppe, "Passing the Buck: State Responsibility for Private Military Companies" (2008) 5 European Journal of International Law, Vol. 19, 989, at 990-991.

PMSCs/*contractors*) often hired in armed conflict and occupation to fulfil many tasks formerly exclusively handled by government armed forces.[275]

Indeed, the ICJ explains that the independence contractors tend to have in planning their operations creates a challenging task to prove that they were acting as *de facto* organs of State.[276] This, as mentioned by Hoppe, was the problem with attributing State liability for acts of torture or other similar conduct of combat, guarding and protection personnel, as well as interrogation services in countries ravaged by armed conflict, such as Iraq and Afghanistan.[277]

Clapham points out that the law of state responsibility developed by international tribunals and the International Law Commission does not exhaust the relevance of international law for corporate behaviour.[278] First, it must be noted that the ICJ's jurisdiction excludes other legal entities other than the State.[279] Furthermore, the *ad hoc* tribunals' jurisdiction is only applicable to natural persons. Nevertheless, certain collective forms of criminality, originally developed during the Nuremberg era, were re-explored by the tribunals instated by the Security Council.

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275 *Ibid.*at 989.

276 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 Feb. 2007, not yet reported, at para. 392.cited in Hoppe, *ibid.* 990-991.

277 Hoppe, *ibid.* at 990-991.

278 Clapham, *supra* note 266, at 244.

279 *Statute of the International Court of Justice.* 26 June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993, art. 34, online: ICJ <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0> [hereinafter *ICJ Statute*]. Article 34 of the ICJ Statute states that "[o]nly States may be parties in cases before the Court".

Section 2. Individuals as Principals of Collective Crime: Creation of New Doctrines to Attribute Individual Responsibility under the United Nations *Ad Hoc* Tribunals

As described previously, the *ad hoc* tribunals' *ratione personae* jurisdiction is limited to natural persons and it excludes juridical persons, such as political parties, paramilitary formations or states.[280]

In particular, unlike the situation before the international military courts, there are no provisions in the *ICTR/ICTY Statutes* according to which criminal organizations can be declared criminal or under which corporations or other collective entities may be prosecuted.[281] Nevertheless, both Statutes of the *ad hoc* tribunals provide for the criminal responsibility of an individual based on his interaction with others.[282] In this regard, an individual becomes accessorial to a crime and incurs criminal liability when he instigates, orders, aids or abets the commission of a crime by a principal offender.[283] Furthermore, an individual with command authority, whether as a civilian or military leader, may be held responsible for crimes committed by his subordinate(s) if he took active steps to bring about the crime or failed to prevent or punish the crimes of his subordinates.[284]

It is important from the outset to draw a distinction between various degrees of involvement in committing international crimes.

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280 Guénaël Mettraux, *International Crimes and the* ad hoc *Tribunals* (New York: Oxford University Press, 2005) at 273.
281 *Ibid.*
282 Danner & Martinez, *supra* note 105 at 102.
283 *ICTR Statute*, *supra* note 15, art. 6(1) and *ICTY Statute*, *supra* note 14, art. 7(1).
284 *ICTR Statute*, *ibid.* art. 6(3) and *ICTY Statute*, *ibid.* art. 7(3).

Sub-section 1. The Imprecise Notion of Complicity and Joint Criminal Enterprise Included in the *Ad Hoc* Tribunals' Statutes

John Ruggie, the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises (hereinafter, "SRSG on Business and Human Rights"), states that "few companies may ever directly commit acts that amount to international crimes. But there is greater risk of their facing allegations of 'complicity' in such crimes."[285] Particularly, when placed in a high legal risk zone, a company may become involved with actors of an armed conflict or in committing violations of international criminal law by trying to protect its operations or increase financially profitable relationships.

The concept of "complicity" has a historical meaning closely linked to the concept of "aiding and abetting" in criminal law. The International Law Commission is nonetheless of the view that, in a general way, other forms of participation contained in the ICTY/*ICTR Statute*s constitute forms of complicity.[286]

This would naturally exclude the actual "commission" of a crime, which, according to the ICTY/ICTR Trial Chambers, refers to the physical participation of an accused in the

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[285] John Ruggie, *Report of the Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises*, A/HRC/4/035 (2007) at 10, online: OHCHR, Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises <http://daccess-ods-un.org/access.nsf/Get?Open&DS=A/HRC/4/35&Lang=E> (accessed 22 April 2010) [hereinafter, *2007 SRSG on Business and Human Rights Report*].

[286] International Law Commission, Yearbook of the International Law Commission, 1996, Vol. II (Part Two), UN Doc. A/CN.4/SER.A/1996/Add.l (Part 2), (ILC Yearbook 1996) pp. 18-20, cited in International Commission of Jurists, *Report of the ICJ Expert Legal Panel on Corporate Complicity in International Crimes: Corporate Complicity & Legal Accountability. Volume II: Criminal Law and International Crimes*, Vol. II (Geneva, 2008), online: UNHCR <http://www.unhcr.org/refworld/docid/4a78423f2.html> (accessed 22 April 2010) [hereinafter, *ICJ Expert Panel Report,* Vol. II] at 2.

actual acts consisting in the material elements of a crime.[287] A person may also be found criminally liable by engendering an omission in violation of a rule of criminal law.[288]

First, based on articles 6(1)/7(1) of the *ICTR/ICTY Statutes*, individuals may be convicted of planning to commit international crimes. Planning occurs when one or several persons contemplate designing the commission of a crime at both the preparatory and execution phases, usually at the level of high-ranking officers or influential individuals[289]. For instance, the IMT held that industrialists who contributed to fuelling the Second World War through their participation in the government re-armament program and the reorganization of the economic life of Germany for military purposes were responsible for planning to wage a war of aggression.[290]

Another form of participation was described in an ICTR ruling, convicting Ferdinand Nahimana and Jean-Bosco Barayagwiza, leaders of the Rwandan *Radio Television Libre Mille Collines* and Hassan Ngeze, editor-in-chief, founder and director of Kangura newspaper for incitement and instigation to commit genocide [hereinafter, the "*Media Case*"].[291] This trial was "the first time since Nuremberg that the role of the media

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287 *Prosecutor* v. *Georges Anderson Nderubumwe Rutaganda,* ICTR-96-3, Judgment at para. 40 (ICTR, Trial Chamber), online: ICTR <http://www.ictr.org/ENGLISH/cases/Rutaganda/judgement/index.htm> (accessed 22 April 2010) [hereinafter, *Rutaganda,* Trial Chamber*]*, *Prosecutor* v. *Stanislav Galić*, IT-98-29-T, Judgment (5 December 2003) at para. 168 (ICTY, Trial Chamber), online: ICTY <http://www.icty.org/x/cases/galic/tjug/en/gal-tj031205e.pdf> (accessed 22 April 2010) [hereinafter, *Galić*], *Rome Statute*, *supra* note 20, art. 25(3), cited in *ICJ Expert Panel Report,* Vol. II, *supra* note 286, at 11.

288 Mettraux, *supra* note 280 at 283.

289 *Akayesu*, *supra* note 28 at para. 480, *Rutaganda*, Trial Chamber *supra* note 287 at para. 37, *Galić*, *supra* note 287 at para. 168, cited in *ICJ Expert Panel Report,* Vol. II, *supra* note 286, at 11.

290 *Trial of the Major War Criminals Before the International Military Tribunal*, Nuremberg, 14 November 1945 – 1 October 1946, Vol. 1 at 35, cited in *ICJ Expert Panel Report,* Vol. II, *supra* note 286, at 13.

291 See Trial and Appeal Chambers decisions *Rutaganda,* Trial Chamber, *supra* note 287 and *Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze* v. *Prosecutor*, ICTR-96-30A, Judgment (26 May 2003) at para. 678 (ICTR, Appeals Chamber), online: ICTR <http://www.icty.org/x/cases/galic/tjug/en/gal-tj031205e.pdf> (accessed 23 April 2010) [hereinafter, *The Media Case*, ICTR Appeals Chamber] The convictions were made for counts of genocide under article 6 (1), conspiracy to commit genocide under sub-paragraph 2(3)(b), direct and public incitement to

was examined as a component of international criminal law".[292] It focused on the role of businessmen related to the media companies.

Instigating under articles 6(1)/7(1) of the *ICTR/ICTY Statutes* means prompting another to commit an offence which is actually committed.[293] This form of liability requires only that the acts contributed substantially to the commission of the crime, but they need not be a *sine qua non* condition for its commission as in "incitement to genocide" under articles 2(3)/2 *ICTR/ICTY Statutes*.[294]

Ordering, a third form of liability, occurs when a person in a position of authority uses that authority to instruct another, explicitly or implicitly, to commit an offence.[295] This position of authority may be held only temporarily[296] and may be conferred on a factual basis rather than by title.[297] It occurs, for example, when a company hires the services of a private security firm to protect its assets in a high legal risk zone and the company or one of its officials issues binding orders to the security forces to commit crimes against humanity, such as transfers of populations or attacks targeted against rebel forces.[298]

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commit genocide under sub-paragraph 2(3)(c), as well as crimes against humanity under article 3 of the *ICTR Statute*.

292 Michael Scharf, "Statute of the International Criminal Tribunal of Rwanda" (2008) United Nations Audiovisual Library of International Law at 3, online: United Nations <http://untreaty.un.org/cod/avl/pdf/ha/ictr/ictr_e.pdf> (accessed 21 October 2009).

293 *Sylvestre Gacumbitsi* v. *Prosecutor,* ICTR-2001-64-A, Judgment (7 July 2006) at para. 129 (ICTR, Appeals Chamber), online: ICTR <http://www.ictr.org/default.htm> (accessed 22 April 2010) [hereinafter, *Gacumbitsi*]. *Rome Statute*, *supra* note 20, art. 25(3)(b), which prohibits soliciting or inducing the commission of a crime, cited in the ICJ, Expert Panel Report, Vol. II, *supra* note 286 at 11.

294 Sliedregt, *supra* note 91 at 87.

295 *Akayesu*, *supra* note 28, at para. 483; *Rutaganda*, Trial Chamber, *supra* note 287, at para. 39; *Gacumbitsi*, *ibid.* at paras. 181-183. See also *Rome Statute*, *ibid.* and *Prosecutor* v. *Tihomir Blaškić*, IT-95-14-A, Judgment (29 July 2004) at para. 282 (ICTY, Appeals Chamber), online: ICTY <http://www.icty.org/x/cases/blaskic/acjug/en/bla-aj040729e.pdf> (accessed 22 April 2010) [hereinafter, *Blaškić*], cited in Sliedregt, *ibid.* at 84.

296 Mettraux, *supra* note 280 at 282.

297 *Akayesu*, *supra* note 28 at para. 483 and *Blaškić, supra* note 295 at para. 281 in Sliedregt, *ibid.* at 84.

298 *ICJ Expert Panel Report,* Vol. II, *supra* note 286 at 43.

Finally, the ICTR *Prosecutor* v. *Ignace Bagilishema* judgment in 2001 described the general concepts related to the *actus reus* of aiding and abetting, one of the most known forms of complicity, as follows:

> "For an accomplice to be found responsible for a crime under the Statute, he or she must assist the commission of the crime; the assistance must have a substantial effect on the commission of the crime. Further, the participation in the commission of a crime does not require actual physical presence or physical assistance (...) The Chamber agrees that presence, when combined with authority, may constitute assistance (the *actus reus* of the offence) in the form of moral support. Insignificant status may, however, put the 'silent approval' below as the threshold necessary for the *actus reus*."[299]

The *ad hoc* tribunals have recognized, with regards to the *mens rea* for aiding and abetting, that mere knowledge of the commission of the crime is necessary, while the subjective intention to aid or encourage is essential.[300] Moreover, the International Commission of Jurists' Expert Panel on Corporate Complicity in International Crimes (hereinafter, the "*ICJ Expert Panel"*) "considers that there could be situations in which a company official exercises such influence, weight and authority over the principal perpetrators of a crime that his or her silent presence could be taken by the principals to communicate approval and moral encouragement to commit the crime. Further, if these company officials actually have the authority to prevent, stop or mitigate a crime and do not do so, they may be considered as aiding and abetting it".[301]

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299 *Prosecutor* v. *Ignace Bagilishema*, ICTR-95-1-A-T, Judgment (7 June 2001) at paras. 32-34 (ICTR, Appeals Chamber) online: <http://www.ictr.org/default.htm> (accessed 22 April 2010) [hereinafter, *Bagilishema*], cited in Rikhof, *supra* note 30 at 706.

300 *Akayesu*, *supra* note 28 at paras. 538-545. See also *Prosecutor* v. *Furundžija*, IT-95-17/1, Judgment,(10 December 1998) at para. 243 (ICTY, Trial Chamber II), *Prosecutor* v. *Dusko Tadić*, IT-94-1-T (7 May 1997) at para. 689 (ICTY, Trial Chamber II) [hereinafter, *Tadić*, ICTY Trial Chamber], all cited in Rachel Grondin, « L'élément psychologique des crimes internationaux les plus graves » (2003) 33 *R.G.D.* 439 at 452. The ICTY has suggested that the *mens rea* required for the crime of complicity in genocide, provided in articles 4(3)(e)/2(3)(e) of the ICTY/*ICTR Statute*s could be narrower than aiding and abetting, and thus require a specific intent to commit genocide , i.e. the aider and abettors must know that the people whom they are helping intend to destroy a particular national, ethnic, religious or racial group (*Prosecutor* v. *Krstić*, IT-98-33-A, Judgment (19 April 2004) at paras. 140-142 (ICTY, Appeals Chamber) online: ICTY <http://www.icty.org/x/cases/krstic/acjug/en/krs-aj040419e.pdf> (accessed 22 April 2010).

301 *ICJ Expert Panel Report,* Vol. II, *supra* note 286 at 20.

The *ICJ Expert Panel* also provides specific examples of aiding and abetting to commit crimes, which can include the provision of goods or services,[302] information,[303] personnel, such as private security companies or detention employees, guards or translators for interrogations,[304] logistical assistance[305] and banking facilities for the deposit of proceeds of a crime.[306]

Liability for direct commission of a crime does not necessarily entail a higher degree of responsibility than accessorial liability under the *ad hoc* tribunal Statutes. This is consistent with the Anglo-American model of liability where participation as an accomplice is considered as a "contribution" to a crime, to a lesser or higher degree, but punishment is often "equal to that of the one who pulled the trigger".[307]

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302 See *Zyklon B Case*, *supra* note 174 at 93-102 and *Public Prosecutor* v. *Van Anraat*, LJN AX6406 (23 December 2005) The Hague District Court, both cited in *ICJ Expert Panel Report,* Vol. II, *ibid* at 20.

303 *Gustav Becker, Wilhelm Weber and 18 Others,* Vol. VII, Law Reports 67 at 70 cited in *Tadić*, Trial Chamber *supra* note 300 *at* 687, cited in *ICJ Expert Panel Report,* Vol. II, *ibid.* at 39.

304 *Prosecutor* v. *Vidoje Blagojević* & *Dragan Jokić*, IT-02-60-A, Judgment (9 May 2007) at paras 130-135 (ICTY, Appeals Chamber) at 130-135, cited in *ICJ Expert Panel Report,* Vol. II, *ibid.* at 19, 39.

305 *Prosecutor* v. *Radoslav Brđanin*, IT-99-36-T, Judgment (1 September 2004) at paras. 571-583 (ICTY, Trial Chamber, II) [hereinafter, *Brđanin,* ICTY Trial Chamber] and *Prosecutor* v. *Radoslav Brđanin*, IT-99-36-A, Judgment (3 April 2007) paras. 305-306 (ICTY, Appeals Chamber) [hereinafter, *Brđanin*, ICTY Appeals Chamber], both cited in *ICJ Expert Panel Report,* Vol. II, *ibid.* at 19. *In re South African Apartheid Litigation*, WL 960078 (SDNY 2009) at 16-17, 20 (for example, the provision by the International Business Machines Corporation (IBM) to the South African Government under the apartheid era of computers, software, training and technical support to register individuals, strip them of their South African Citizenship, and segregate them in particular areas of South Africa, as well as to produce identity documents and effectuate denationalization).

306 T.M.W.C., *supra* note 85 at 305-306; Telford Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir* (New York: Knopf, 1992) at 381-398. For example, Walter Funk, President of the Reichbank since January 1939 was convicted for participation in crimes against peace, crimes against humanity and war crimes for setting up a revolving fund of 12,000,000 Reichsmarks to the credit of the SS for the construction of factories to use concentration camp laborers during the Second World War. Walther Funk also took office in early 1938 as Minister of Economics and Plenipotentiary General for War Economy; was member of the Ministerial Council for the Defence of the Reich on August 1939; and a member of the Central Planning Board in September 1943 (See *ICJ Expert Panel Report,* Vol. II, *ibid.* at 14).

307 Sliedregt, *supra* note 91 at 63.

Sub-section 2. Common Purpose Liability

An additional form of liability has been developed by the *ad hoc* tribunals and recognized as implicit in articles 6(1)/7(1) of the *ICTR/ICTY Statutes* under the doctrine of "common purpose liability" or "joint criminal enterprise" (hereinafter, "JCE").[308] This doctrine was specifically referred to for the first time by the ICTY in the case of Dusko Tadić (hereinafter, "*Tadić*").[309] The *Tadić* Appeals Chamber reversed the accused's acquittal for murdering five Muslim men in the Bosnian village of Jaskići,[310] by introducing the concept of a JCE.[311] The Appeals Chamber's conclusions were drawn despite the recognized fact that Tadić had not personally shot the men.[312] In its judgment, the Appeals Chamber reviewed the case law of the Second World War military courts on common design and common enterprise.[313]

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308 *Tadić*, ICTY Appeals Chamber, *supra* note 264 at para. 190, *Prosecutor* v. *Mitar* ***Vasiljević***, IT-98-32-A, Judgment (25 February, 2004) at para. 95 (ICTY Appeals Chamber), *Prosecutor* v. *Milorad Krnojelac*, IT-97-25-A, Judgment (17 September 2003) at paras. 28-32 (ICTY, Appeals Chamber) [hereinafter, *Krnojelac*, ICTY Appeals Chamber], cited in *ICJ Expert Panel Report,* Vol. II, *supra* note 286 at 27.

309 *Tadić*, ICTY Appeals Chamber, *ibid.* at para. 188, 190. See also Natalie Wagner, "The Development of the Grave Breaches Regime and of Individual Criminal Responsibility by the International Criminal Tribunal for the former Yugoslavia" (2003) 850 IRRC, Vol. 85, 351 at 362.

310 *Tadić*, ICTY Trial Chamber, *supra* note 300. See also Danner & Martinez, *supra* note 105.

311 *Tadić*, ICTY Appeals Chamber, *supra* note 264 at para. 183.

312 Danner & Martinez, *supra* note 105 at 104.

313 There were two types of cases referred to by the ICTY. The first type involved the unlawful killings of small groups of Allied prisoners of war (POWs), either by German soldiers with or without German townspeople, such as (1) the *Essen Lynching Case*, cited as *The Essen Lynching Case, Trial of Erich Heyer and Six Others,British Military Court for the Trial of War Criminals*, in 1 Law Reports of Trials of War Criminals,(London: UNWCC, 1947) at 88 and (2) the *Georg Otto Sandrock et al. case,* cited as *The Almelo Trial, Trial of Otto Sandrock and Three Others, British M ilitary Court for the Trial of War Criminals*, in 1 Law Reports of Trials of War Criminals (London: UNWCC, 1947), at 35,40. The second group of cases concerned crimes committed in concentration camps, namely, (1) the *Dachau Concentration Camp Trial*, cited as *Trial of Martin Gottfried Weiss and Thirty-Nine Others,* General Military Government Court of the United States Zone, in XI Law Reports of Trials of War Criminals (London: UNWCC, 1949) at 5, 12 and (2) the *Trial of Josef Kramer (The Belsen Trial),* 2 L.R.T.W.C., at 1, 108-09, 118, 120 (Brit. Mil. Ct. Luneberg, 1945). The ICTY has also referred to decisions by Italian courts from 1960s to 1990s, decisions from the French Court of Cassation from 1947 and 1984, as well as jurisprudence in England, Wales, Canada, the United States, Australia and Zambia. See Danner & Martinez, *supra* note 105 at 110-112 for summaries and citations on the cases. See also Jasmina Pjanić, "Joint Criminal Enterprise. New form of individual responsibility", (2007) 4 OKO RRZ, 6 at 6-7, online: OKO Reporter <www.okobih.ba/files/docs/oko_Reporter_4_ENG.pdf> (accessed 23 April 2010).

As defined by the ICTY, JCE occurs "where several persons having a common purpose embark on criminal activity that is then carried out either jointly or by some members of this plurality of persons. Whoever contributes to the commission of crimes by the group of persons or some members of the group, in execution of a common criminal purpose, may be held to be criminally liable".[314]

The *actus reus* of a JCE requires: (1) a plurality of persons; (2) the existence of an explicit or implicit common plan, design or purpose, to commit a crime provided for in the Statute of the ICTY or of the ICTR; and (3) the participation of the accused in the common design, translated by the commission of the crime, assistance in, contribution to or execution of the common plan or purpose.[315]

Three categories of collective criminality were distinguished by the Appeals Chamber in *Tadić*. In the first category (hereinafter, "JCE I"), the perpetrators act pursuant to a common design and share the same criminal intention.[316] The defendants must voluntarily enter into an agreement with other members of the JCE with the intention to commit crimes, even if they do not physically perpetrate the crime.[317]

The second category of JCE (hereinafter, "JCE II") is applicable to "systems of ill-treatment", primarily concentration camps.[318] Danner and Martinez explain that "to convict an individual under this rubric, the prosecution must prove the existence of an organized system of repression; active participation in the enforcement of this system of repression by

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314 *Tadić*, ICTY Appeals Chamber, *supra* note 264 at para. 190.

315 *Ibid.* at para. 227. See also Kai Ambos, "Individual Criminal Responsibility, Article 25 Rome Statute" in 2d ed.by Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court. – Observers' Notes, Article by Article* (München: C.H. Beck – Hart – Nomos, 2008), 743 at 750.

316 *Tadic*, *ibid.* at para. 196.

317 *Prosecutor* v. *Multinovic*, IT-99-37-AR72, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction – Joint Criminal Enterprise (21 May 2003) at para 23 (ICTY, Appeals Chamber), online: ICTY <http://www.icty.org/x/cases/milutinovic/tdec/en/060322.htm> (accessed 23 April 2010), *Tadić*, ICTY Appeals Chamber, *ibid.* at para. 196. See Danner & Martinez, *supra* note 105 at 105-106

318 *Tadić*, ICTY Appeals Chamber, *ibid.* at para 202. See Danner & Martinez, *ibid.* at 105-106

the accused; knowledge of the nature of the system by the accused; and the accused's intent to further the system of repression".[319]

Importantly, in the two first categories, all members of the JCE may be found criminally responsible for all crimes committed that fall within the common design.[320]

Alternatively, the third and most far-reaching category of JCE (hereinafter, "JCE III") "involves criminal acts that fall outside the common design".[321] The *Tadić* Appeals Chamber concluded that a member of a JCE may be found guilty of acts outside that design if such acts are a "natural and foreseeable consequence of the effecting" of the common design or purpose.[322] According to the *Brdjanin* judgment of the ICTY Appeals Chamber, JCE III may even give rise to the criminal responsibility of a JCE participant for genocide without having the specific intent to destroy a protected group.[323]

Sliedregt describes that "the bulk of case law which the *Tadić* Appeals Chamber relied upon in drawing up the common purpose concept was the output of Bernay's collective criminality theory",[324] described in the previous chapter of this thesis. In this respect, Danner and Martinez also observe that it seems rather unusual that neither the ICTY nor the ICTR have recognized the close doctrinal link between the criminal organization charges at Nuremberg and the concept of JCE.[325] In fact, both liability

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319 *Tadić*, ICTY Appeals Chamber, *ibid.* at para. 203 in Danner & Martinez, *ibid.* at 106.

320 Danner & Martinez, *ibid.* at 106.

321 *Ibid.* at 106.

322 In this regard, although it was not part of the common purpose of the armed group to which he belonged, the Appeals Chamber held that Tadić was guilty for the killing of non-Serbs in Jaskici. It was determined that Tadić was aware of a foreseeable risk of killing but nevertheless willingly participated in the common plan. *Tadić*, ICTY Appeals Chamber, *ibid.* at paras. 204, 232. See also in Danner & Martinez, *ibid.* at 106-107.

323 *Prosecutor* v. *Brđanin*, IT-99-36-A, Decision on Interlocutory (19 March 2004), online: ICTY <http://www.icty.org/x/cases/brdanin/tdec/en/040319-2.htm> (accessed 23 April 2010) cited in Ambos *supra* note 315 at 751.

324 Sliedregt, *supra* note 91 at 106. Please refer to pages 24-28 above concerning Bernay's collective liability theory and proposals for the *London Charter*.

325 Danner & Martinez, *supra* note 105 at 117-118.

mechanisms include membership in a group which ultimately committed crimes.[326] Nevertheless, the ICTY Appeals Chamber denies the analogy between the various doctrines.[327]

Efforts to distance *ad hoc* tribunals' jurisdiction from the precedents of Nuremberg seem to be influenced by the significant criticism surrounding the concepts of both organizational criminality and conspiracy following the Second World War,[328] as described in the previous chapter.

Sliedregt adds that "the mix of conspiracy and complicity – that is typical for the common purpose concept – was one of the features of the conspiracy concept at Nuremberg".[329] The author points out the danger in shading the lines between both concepts which allows complicity's reach of criminality to extend "to remotely associated parties of whose existence co-conspirators may not even know".[330]

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326 Danner & Martinez, *supra* note 105 at 118. It must be noted, however, that continental law, as well as many U.S. statutes and other jurisdictions do include such a requirement.

327 *Prosecutor* v. *Multinovic*, *supra* note 317 at para. 26.

328 Danner & Martinez, *supra* note 105 at 119-120.

329 Sliedregt, *supra* note 91 at 106.

The intertwining of various modes of liability with JCE is in fact a problem identified by the *ad hoc* tribunals. For instance, the ICTY Trial Chamber made a fundamental distinction between aiding and abetting, as a form of accessorial liability, and co-perpetratorship as a form of principal liability, whereby:

> "a co-perpetrator of a joint criminal enterprise shares the intent to carry out the joint criminal enterprise and performs an act or omission in furtherance of the enterprise; an aider or abettor of the joint criminal enterprise need only be aware that his or her contribution is assisting or facilitating a crime committed by the joint criminal enterprise. An aider or abettor need not necessarily share the intent of the co-perpetrators.... Eventually, an aider or abettor, one who assists or facilitates the criminal enterprise as an accomplice, may become a co-perpetrator, even without physically committing crimes, if their participation lasts for an extensive period or becomes more directly involved in maintaining the functioning of the enterprise. By sharing the intent of the joint criminal enterprise, the aider or abettor becomes a co-perpetrator."[331]

The ICTY Appeals Chamber took a partly different stance than the Trial Chamber and considered co-perpetratorship as a *form* of accomplice liability.[332] Nevertheless, the Chamber felt that the distinction was superfluous in terms of sentencing[333] since, regardless of the mode of participation prosecuted, "international judges may impose any sentence from one day imprisonment to life imprisonment".[334] The ICTR/ICTY tribunals have in fact allowed considerable prosecutorial discretion for the description of JCE's in expansive terms.[335] According to Danner and Martinez, this permissiveness is justified as a means to

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330 Sliedregt, *supra* note 91 at 106.

331 *Prosecutor* v. *Kvocka*, IT-98-30/1-T, Judgment, (2 November 2001) at para. 284 (*Kvocka* , ICTY Trial Chamber), online: ICTY <http://www.icty.org/x/cases/kvocka/tjug/en/kvo-tj011002e.pdf> (accessed 23 April 2010) [hereinafter, *Kvocka,* ICTY Trial Chamber], cited in Sliedregt, *ibid* at 72.

332 *Tadić,* ICTY Appeals Chamber, *supra* note 264 at para. 221 in Sliedregt, *ibid.* at 73. This view was also endorsed by the Trial Chamber in *Prosecutor* v. *Krnojelac*, IT-97-25-T, Judgment (15 March 2002) at para. 77 (ICTY, Trial Chamber II), online: ICTY <http://www.icty.org/x/cases/krnojelac/tjug/en/krn-tj020315e.pdf> (accessed 23 April 2010) [hereinafter, *Krnojelac*] which rejected the findings on this point in the *Kvocka*, ICTY Trial Chamber case, *ibid.*. In this regard, see, Sliedregt, *ibid.* at 73.

333 *Krnojelac*, *ibid.*

334 Danner & Martinez, *supra* note 105 at 99, 141 (according to Danner and Martinez, objections to JCE and its far-reaching effects may be resolved through formal limitations and safeguards, such as sentencing determinations).

335 *Ibid.* at 135-136.

secure convictions when proof is lacking due to chaotic conditions caused by war, mass atrocity and large-scale breakdown in public order.[336]

This wide latitude of liability may affect corporations conducting operations on high legal risk territories, since they may incidentally become involved in armed conflict. This may occur, for instance, for corporations wishing to protect their operations, obtain territorial concessions or negotiate the safety of their personnel by succumbing to dubious demands of the actors of a conflict.

For example, the *ICJ Panel of Experts* describes the varying levels of participation under which corporations contributed to international crimes related to the perpetuation of apartheid in South Africa during the 1980s, as follows:

> "Companies that actively helped to design and implement apartheid policies were found to have had 'first-order involvement'. This included, for example, the mining industry which worked with the government to shape discriminatory policies such as the migrant labor system for their own advantage. Companies which knew the state would use their products or services for repression were considered as having 'second-order involvement'. this included more indirect assistance, such as banks' provision of covert credit cards for repressive security operations or the armaments industry's provision of equipment used to abuse human rights. This contrasted with more indirect transactions that could not have been reasonably expected to contribute directly or subsequently to repression, such as building houses for state employees. Finally, the Commission identified "third-order involvement:" ordinary business activities that benefited indirectly by virtue of operating within the racially structured context of an apartheid society."[337]

Common purpose liability has nevertheless been applied in other international criminal tribunals.[338] In particular, the Special Court for Sierra Leone[339] (SCSL) has

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336 *Ibid.* at 138.

337 *ICJ Expert Panel Report,* Vol. I, *supra* note 50 at 14.

338 Danner & Martinez, *supra* note 105 at 75.

339 The Special Court for Sierra Leone was created in a process that differed from that of ICTY and ICTR. The U.N. Security Council requested that the U.N. Secretary-General negotiate with the government of Sierra Leone to create a court to prosecute crimes against humanity, war crimes, "other serious violations of international law," and violations of "relevant Sierra Leonean law." (See United Nations, *Security Council Resolution 1315 on the situation of Sierra Leone*, S.C. Res. 1315, U.N. SCOR, 55th

employed this doctrine of liability under the same terms as the ICTR and ICTY.[340] While the Statute of the SCSL does not contain any express reference to a JCE, the Court has recognized it as implicit in the action of "committing" a crime, under its article 6 (1), which closely mirrors the individual criminal responsibility provisions of the *ICTR/ICTY Statutes*[341]. As a result, at least eleven indictments from the Special Court have accused the indicted of participating in a JCE.[342]

Most of these charges included a JCE III theory.[343] It seems however, according to some commentators, that the indictments emerging from the SCSL were overly expansive and flawed since the common plan or purpose ascribed to the enterprise did not appear to be the sort of activity that would attract criminal liability.[344] Boas, Bischoff and Reid refer to *Prosecutor* v. *Taylor* where the Revolutionary United Front (RUF) and the Armed Forces Revolutionary (AFRC) were accused of "sharing a 'common plan, purpose or design (joint criminal enterprise) which was to take any actions necessary to gain and

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Sess., 4186th mtg. at 2 (2000), online: UN Security Council Resolutions – 2000 <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N00/605/32/PDF/N0060532.pdf?OpenElement> (accessed 23 April 2010), cited in Jacobson, *supra* note 175 at 221).

340 Danner & Martinez, *supra* note 105 at 75. See also, *Statute of the Special Court for Sierra Leone,* 16 January 2002, 2178 U.N.T.S. 138, annex, art. 6, online: SCSL <http://www.sc-sl.org/LinkClick.aspx?fileticket=uClnd1MJeEw%3D&> (accessed 23 April 2010) [hereinafter, *SCSL Statute*].

341 *SCSL Statute*, *ibid.* art. 6(1) provides: "A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 of the present Statute shall be individually responsible for the crime"

342 These include the following: *Prosecutor* v. *Charles Ghankay Taylor*, SCSL-2003-01, Indictment, (7 March 2003) at paras. 23-25 (SCSL); *Prosecutor* v. *Fodah Saybana Sankoh*,. SCSL-2003-02, Indictment, (7 March 2003) (SCSL), *Prosecutor* v. *Johnny Paul Koroma*, SCSL-2003-03, Indictment, (7 March 2003) at para. 24 (SCSL); *Prosecutor* v. *Sam Bockarie*, SCSL-2003-04 Indictment (7 March 2003) at 25 (SCSL), *Prosecutor* v. *Issa Hassan Sesay*, SCSL-2003-05, Indictment, (7 March 2003) at 23 (SCSL), *Prosecutor* v. *Alex Tamba Brima*, SCSL-2003-06, Indictment (7 March 2003) at 23 (SCSL), *Prosecutor* v. *Augustine Gbao*, SCSL-2003-09, Indictment (16 April 2003) at 25 (SCSL), *Prosecutor* v. *Brima Bazzy Kamara*, SCSL-2003-10, Indictment, (26 May 2003) at 23 (SCSL), *Prosecutor* v. *Moinina Fofana*, SCSL-2003-11, Indictment, (24 June 2003) at 14 (SCSL), *Prosecutor* v. *Allieu Kondewa*, SCSL-2003-12, Indictment, (24 June 2003) at 14 (SCSL); *Prosecutor* v. *Santigie Borbor Kanu*, SCSL-2003-13, Indictment (16 April 2003) at 23 (SCSL), all cited in Danner & Martinez, *supra* note 105 at 155.

343 Danner & Martinez, *ibid.* at 77.

344 Gideon Boas, James L. Bischoff, Natalie L. Reid, *Forms of Responsibility in International Criminal Law*, Vol. I (New York: International Criminal Law Practitioner Library, 2007) at 132.

exercise political power and control over the territory of Sierra Leone, in particular the diamond mining areas'".[345] The same authors point out that this differs from the *ad hoc* model, where the common plan must itself be criminal, and the common mental state of JCE participants must be an express or implied agreement that a crime would be committed.[346]

In addition to this form of liability, the *ad hoc* tribunals have also recognized responsibility of military commanders and other superiors based on hierarchical roles played in the commission of international crimes.

Sub-section 3. Criminal Responsibility of Military Commanders and Other Superiors

The concept of "command responsibility" originates from the post-Second World War case law. The most famous case is that of General Tomoyuki Yamashita, the commanding general of the Imperial Japanese Army in the Philippines, who was sentenced to death by a US military commission for atrocities committed by troops under his command. The military commission and the US Supreme Court accepted the basic premise that a military commander could be held criminally liable in some circumstances for breaching his duty to prevent his troops from committing crimes[347] even without any actual knowledge of the commission of crimes by his troops. In this regard, the tribunal was of the view that Yamashita's failure to provide the effective control of his troops as required

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345 *Prosecutor* v. *Charles Ghankay Taylor*, *supra* note 342 at para. 23 in *ibid.* at 129.

346 *Prosecutor* v. *Milošević, Milutinović, Šainović, Ojdanić and Stojiljković,* IT-99-37-PT, Motion for Leave to File a Second Amended Indictment, Attachment A (16 October 2001) (ICTY, PT) at para. 17, cited in *ibid.* at 132.

347 *Trial of General Tomuyuki Yamashita*, IV Law Reports of Trials of War Criminals (London: UNWCC, 1947) at 35, cited in Jenny S. Martinez, "Understanding *Mens rea* in Command Responsibility. From Yamashita to Blaskic and Beyond" (2007) 5 Journal of International Criminal Justice 638 at 647. Martinez also describes the other case law, namely that of: *United States* v. *Wilhelm List and others*, VIII Law Reports of Trials of War Criminals (London: UNWCC, 1949) at 34 and *The Hostage Trials*,

by circumstances was sufficient to presume the existence of requisite knowledge of the accused, although he had not personally committed or ordered the crimes in question, nor had it been alleged that he had any knowledge of their commission.[348]

The doctrine of superior responsibility was also used to convict industrialists during the Second World War. For instance, in the *Flick* Case, studied as one of the industrialist cases under the *Allied Control Council Law No. 10* in the previous chapter of this thesis, the accused was convicted for knowing and approving the increase of quotas by Weiss, an official of his firm, to produce freight cars with additional forced labor.[349]

Liability of non-military superiors of international crimes has been incorporated under articles 6(3)/7(3) *ICTR/ICTY Statutes*. In *Čelibići*, the ICTY Appeals Chamber confirmed the Trial Chamber's position that "command' normally means powers that attach to a military superior, whilst the term 'control', which has a wider meaning, may

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XI Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10 (1950).

348 Beatrice Bonafé, "Finding a Proper Role for Command Responsibility" (2007) 5 Journal of International Criminal Justice 599 at 605. Bonafé describes the dissenting opinion of Justice Murphy on the requisite knowledge for criminal liability. In this regard, Justice Murphy expressed: "No one denies that inaction or negligence may give rise to liability, civil or criminal. But it is quite another thing to say that the inability to control troops under highly competitive and disastrous battle conditions renders one guilty of a war crime in the absence of personal culpability. Had there been some element of knowledge of direct connection with the atrocities the problem would be complete different" (See *In re Yamashita*, judgment of 7 December 1945, International Law Review, Vol. 13 and US Supreme Court, judgment of 4 February 1946, in International Law Review, Vol. 13, at 278, cited in ibid. at 605-605, n. 14). See also, Danner & Martinez, *supra* note 105 at 123. Other cases before the Tokyo Tribunal included the conviction of Japanese Foreign Minister, Koki Hirota, for having disregarded his duty to take adequate steps to secure the observance and prevent breaches of the laws of war in relation to the rape of Nanking. Similarly, the tribunal found Prime Minister Hideki Tojo and Foreign Minister Mamoru Shigemitsu criminally liable for their omissions to prevent or punish the criminal acts of the Japanese troops. See *The Complete Transcripts of the Proceedings of the International Military Tribunal for the Far East*, reprinted in R. John Pritchard and Sonia Magbanua Zaide, eds., The Tokyo War Crimes Trial, Vol. 20 (New York & London: Garland Publishing, 1981), at 49, 816, 49, 791, 49, 831 cited in *Prosecutor* v. *Zejnil Delalić et al.*, IT-96-21-T (16 November 1998) at paras. 357-358 (ICTY, Trial Chamber) cited in *ICJ Expert Panel Report,* Vol. II, *supra* note 286 at 35.

349 *Flick Case*, *supra* note 190 at 1202 in *ICJ Expert Panel Report,* Vol. II, *ibid.* Please refer to pages 45-46 above for the description of this case.

encompass powers wielded by civilian leaders".[350] In *Kordic*, the ICTY acknowledged that a civilian authority did not have the same degree of influence and power as a military commander[351] and that his effective control over subordinates "must be based on an assessment of the reality of the accused's authority."[352]

Articles 6(3)/7(3) *ICTR/ICTY Statutes* specifically provide that a superior may not be relieved of responsibility "if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof"[353]. Necessary measures are limited to those which are feasible in all circumstances and are within the power of the superior.[354] The ICTY Appeals Chamber has nonetheless adopted a more careful approach for the knowledge requisite of this form of responsibility compared to the more strict liability approach of the post-World War II cases. Notably, the ICTY Appeals Chamber specifies that a showing that the military commander/superior "had alarming information in his possession" would be needed to prove that he "had reason to know" of the wrongful acts.[355]

Under this doctrine, the *ad hoc* tribunals have proceeded to convict political and business figures with significant influence and effective control over the commission of international crimes. For instance, the ICTR held a civilian tea factory manager, Alfred

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350 *Prosecutor* v. *Zejnil Delalić et al.*, IT-96-21-A (20 February 2001) at para. 196 (ICTY, Appeals Chamber).

351 *Prosecutor* v. *Kordic,* IT-95-14/2-T, Judgment, 26 February 2001 at paras. 415-416 (ICTY, Appeals Chamber), online: ICTY <http://www.icty.org/x/cases/kordic_cerkez/tjug/en/kor-tj010226e.pdf> (accessed 24 April 2010).

352 Maria Nybondas, "Civilian superior responsibility in the Kordic case." 50 Netherlands International Law Review 59 at 69.

353 *ICTR Statute*, *supra* note 15, art. 6(3) and *ICTY Statute*, *supra* note 14, art. 7(3).

354 *Prosecutor* v. *Krnojelac*, *supra* note 332 at para. 95.

355 Similarly, in *Delalić et al., supra* note 348 at para. 232, the ICTY Trial Chamber stated that "a superior is not permitted to remain wilfully blind to the acts of his subordinates," however, he would only be held criminally responsible "only if some specific information was in fact available to him which would provide notice of offences committed by his subordinates" (at. 393), confirmed by the Appeals Chamber in *Prosecutor* v. *Delalić et al.*, *supra* note 350 at paras. 400-413. See also Bonafé, *supra* note 348.

Musema, responsible as a superior for the actions of his employees who participated in the genocide and crimes against humanity through the provision of factory vehicles, uniforms or other property of the factory.[356] It was established that Musema exercised *de jure* authority over his employees performing duties outside factory premises because he had legal and financial control over these employees, particularly through his power to appoint and remove them from their positions at the factory.[357]

The *ICJ Panel of Experts* sustains that superior responsibility is not limited to crimes physically committed by subordinates in person but encompasses any modes of individual criminal responsibility including aiding and abetting.[358] For example, "if a local manager of private security forces is engaged in assisting in interrogations in a war zone which involve torture, by organising the guarding of interrogation rooms, he or she may be guilty of aiding and abetting torture and his or her superiors could be held responsible as superiors if the other elements of this offence are made out".[359]

It is important to mention, when referring to positions of authority and influence, that although in most scenarios, and as mentioned by the United States military tribunal in *Farben*, men of industry are not makers of policy but support their government in the waging of war,[360] "[s]ome businesses now wield considerable political influence and possess more economic power than some governments".[361]

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356 *Alfred Musema* v. *Prosecutor*, ICTR-96-13-A, Judgment (16 November 2001) (ICTR, Appeals Chamber), online: ICTR <http://www.ictr.org/default.htm> (accessed 24 April 2010) [hereinafter, *Musema*]. See Anne-Marie Boisvert, Hélène Dumont & Martin Petrov, « Quand les crimes des sous-fifres engagent la responsabilité de leur chef : la doctrine de la responsabilité du supérieur hiérarchique en droit pénal international » (2004) 9 Revue canadienne de droit pénal 93 at 113.

357 *Musema*, *supra* note 356 at para. 378.

358 *Prosecutor* v. *Naser Orić*, IT-03-68-T, Judgment (30 June 2006) at paras. 301-305 (ICTY, Trial Chamber), online: ICTY <http://www.icty.org/x/cases/oric/tjug/en/ori-jud060630e.pdf> (24 April 2010).

359 *ICJ Expert Panel Report,* Vol. II, *supra* note 286 at 132.

360 *I.G. Farben Case*, Vol. 8, *supra* note 202, at 1125.

In this regard, the ICJ Experts Panel describes how:

> "many [businesses] have developed close business and political relationships with those in power, including governments or armed groups that perpetrate gross human rights abuses. Through privatisation and sub-contracting, companies now often exercise sensitive functions that were once reserved for the state. Businesses in the 21st century operate across borders, through supply chains, product distribution, direct operations or relationships within corporate groups».[362]

Considering the growing importance of businesses across the world that carry some influence on political and social spheres of society, the scope of responsibility of corporate actors may potentially extend to that of a non-military superior. Furthermore, while the new knowledge requisites formulated by the *ad hoc* tribunals create a higher standard in determining guilt than the post-World War II trials, it is still relatively broad and may potentially enable the prosecution of corporations and their corporate directors far removed from the scene of a crime and its direct operations before national and international tribunals.

The ICTR recognized the involvement of a business actor in the Rwandan genocide of 1994 in the *Kayichema & Ruzindana* case, providing a relevant example of various forms of participation in international crimes, including that of superior responsibility. The tribunal decided that Ruzindana, a prominent business man engaged in transporting merchandise out of Rwanda and importing goods into the country, had taken an active part in the killings of thousands of Tutsi men, women and children in the area of Bisesero. Thus, the Trial Chamber found that the proof established beyond a reasonable doubt that Ruzindana had headed a convoy of assailants, transported attackers in his vehicle, distributed weapons, orchestrated the assaults, led the groups of attackers, shot at the Tutsi refugees; and offered to reward the attackers with cash or beer; as well as personally mutilated and murdered individuals during the attack at the Mine at Nyiramuregra Hill.

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361 *ICJ Expert Panel Report,* Vol. I, *supra* note 50 at 2.

The Chamber decided that by committing these acts, Ruzindana was responsible for instigating, ordering, committing and otherwise aiding and abetting in the preparation and execution of the massacres that resulted in thousands of murders with the intent to destroy the Tutsi ethnic group.[363]

It must be noted however that business actors involved in international crimes are not always incorporated in the same territory on which they operate. In fact, particularly in the case of large MNC's, their head offices or parent companies are incorporated in one country while their subsidiaries are stationed on another territory where the offence took place.

Section 3. Foreign Participation in Collective Crimes in Rwanda or in the Former Yugoslavia

The jurisdictions of the *ad hoc* tribunals are limited to time and territorial restrictions. In this regard, the ICTR is only competent to prosecute persons for crimes that took place in Rwanda and Rwandan citizens responsible for crimes committed in neighboring States between 1 January 1994 and 31 December 1994.[364] The *ICTY Statute* also provides that the Tribunal will have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.[365]

The causes and relationships that may be investigated for the commission of crimes under both statutes are not solely restricted to what constituted the borders of Rwanda and

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362 *ICJ Expert Panel Report,* Vol. II, *supra* note 286 at 2.

363 *Prosecutor* v. *Clément Kayishema and Obed Ruzindana*, ICTR-95-1-T, Judgment (21 May 1999) (ICTR, Trial Chamber) online <http://www.ictr.org/default.htm> (accessed 24 April 2010), confirmed by *Prosecutor* v. *Clément Kayishema and Obed Ruzindana*, ICTR-95-1-A, Judgment (1 June 2001) (ICTR, Appeals Chamber), online <http://www.ictr.org/default.htm> (accessed 24 April 2010).

364 *ICTR Statute*, *supra* note 15, art. 1.

365 *Ibid.*

the former Yugoslavia at the time of the armed conflicts. For instance, allegations were made from an independent commission of the Rwandan government of France's involvement in backing Rwanda's Hutu government with political, military, diplomatic and logistical support during the genocide and training Hutu militias responsible for the slaughter of thousands of Tutsis.[366]

Other countries have also been linked to the Rwandan and Former Yugoslavian conflicts through the intermediary of private contractors.

Sub-section 1. Involvement of Foreign Private Contractors

In 1993, the United States was able to circumvent a United Nations arms embargo during the conflict of the Former Yugoslavia[367] by referring the Defence Minister of Croatia to the services of Military Professional Resources, Incorporated (MPRI). This American company is specialized in providing military training and expertise to governments and organizations worldwide. It is alleged that the instructions of MPRI on a variety of non-strategic subjects, such as leadership skills and the role of the military, while not directly in violation of the arms embargo, was instrumental in the success of the Croatian army's Operation Uruja (or "Storm") against the Serb-held Krajina region of Croatia.[368] Most

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366 "France Accused in Rwanda Genocide" *BBC News* (5 August 2008), online: BBC News <http://news.bbc.co.uk/go/pr/fr/-2/hi/africa/754418.stm> (accessed 27 October 2009). Relationships between both countries, France and Rwanda, were in fact stalled since 2006, after a French judge said President Paul Kagame helped spark the genocide, and Rwanda accused France of arming the Hutu militias. Both countries apparently restored ties in November 2009 with both countries agreeing to appoint ambassadors at the end of long negotiations. See also, "France to set up Genocide Court", *BBC News*, (7 January 2010), online: BBC News <http://news.bbc.co.uk/go/pr/fr/-/2/hi/europe/8445629.stm> (accessed 27 October 2009): in January 2010, the French government announced that it will set up a new panel to try cases of genocide and war crimes committed in France or abroad. The country is currently hearing several cases about Rwandan genocide suspects living in France.

367 United Nations Security Council Resolution 713, U.N. SCOR (1991), cited in Matthew J. Gaul, "Regulating the New Privateers: Private Military Service Contracting and the Modern Marque" (1997-1998) 31 Loy. L. A. L. Rev. 1489 at 1489.

368 Gaul, *ibid.* at 1489-1490.

military analysts agreed that the evidence of American instruction in strategy and tactics were unmistakable.[369]

Similarly, it has been observed that governments increasingly rely on private military service contractors like MRPI to disguise their own military objectives, to perform military and quasi-military functions abroad. These corporate enterprises make their own profit for the services they offer in return.[370]

Another form of corporate actors' involvement in genocide in recent worldwide conflict is through the distribution and trade of light arms across borders. It is alleged, for example, that more than a dozen nations have helped fuel the Rwandan war, namely through the sales of arms to all sides of the conflict and "[b]y its own admission, the Rwanda government bankrupted its economy to pay for those weapons"[371] before and during the genocide. It seems that Rwandan government forces turned, among others, to Russians for the famous Kalashnikov AKM automatic rifles, and other nations, like France, Egypt and South Africa.[372]

While a majority of the suppliers of weapons to the covert arms trade are not freelancing private arms dealers, but governments themselves, it is inevitable that companies indirectly become involved in such dealings. For example, a $6 million contract between Egypt and Rwanda in March 1992, including the purchase by Rwanda of 60-mm and 82-mm mortars, 16,000 mortar shells, 122-mm D-30 howitzers, 3,000 artillery shells, rocket-propelled grenades, plastic explosives, antipersonnel land mines, and more than three million rounds of small arms ammunition was guaranteed by the nationalized French

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369 Roger Cohen, "U.S. Cooling Ties to Croatia after Winking at its Buildup" *N.Y. Times* (28 October 1995), cited in Gaul, *ibid.* at 1490.

370 Gaul, *ibid.* at 1491.

371 Stephen D. Goose & Frank Smyth, "Arming Genocide in Rwanda", (1994) 5 Foreign Affairs, Vol. 73, 86, online: Council on Foreign Relations <http://www.istor.org/stable/20046833?seq=2> (accessed 27 October 2007).

372 *Ibid.* at 89-90.

bank, Crédit Lyonnais.[373] Moreover, according to Human Rights Watch, an independent nongovernmental organization, purchases from independent arms dealers probably include Kalashnikov automatic rifles, which are widely available throughout Africa, and Chinese stick grenades, also easily obtainable on the open market.[374]

The realities of corporations' involvement in international crimes have not been translated in the jurisdiction of the *ad hoc* tribunals, which only provides individual accountability for international crimes committed by natural persons.[375]

Sub-section 2. The Target: High-Ranking Corporate Officers

As described in the previous chapter, the IMT and IMTFE judgments and subsequent military court trials conducted by the Allied countries have set the path for trials of high-ranking corporate officers before the international tribunals *in lieu* of corporations. In this regard, the responsibility of the individual corporate leaders mirrors the corporations' responsibility before the eyes of justice. This in fact occurred in the *Zyklon B* case where it was inferred "that a competent business person in a leadership position will know the context behind the major efforts of his business. (...) Thus, tribunals will impute knowledge to certain corporate officials if the officials ordinarily must have knowledge of that type to effectively carry out his or her duties".[376]

Similarly, in *Musema* and the *Media Case* before the ICTR, prosecutors of international criminal law "of course attempt to pierce the corporate shell and get at the

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373 *Ibid.* at 89.

374 Human Rights Watch, *Arming Rwanda - The Arms Trade and Human Rights Abuses in the Rwandan War*, Vol. 6, Issue 1 (New York: Human Rights Watch, 1 January 1994), online: UNHCR <http://www.unhcr.org/refworld/docid/3ae6a7fc8.html> (accessed 11 October 2009).

375 *ICTR Statute*, *supra* note 15, art. 5 and *ICTY Statute*, *supra* note 14, art. 6.

376 Jacobson, *supra* note 175 at 195.

individuals behind it".[377] Most often, such individuals will be at a high-level managerial position or directors of the corporation who are interchangeably referred to as the "directing mind", the "*alter ego*", the "centre" of the corporate personality or the "vital organ" of the body corporate.[378]

Capuano explains that to pierce the corporate veil there must be a sufficient level of control by the accused individuals over the corporation, which entails that they:

> "(1) are in control of a company or group of companies, and; (2) are (i) guilty of a crime, domestic or international as defined in the relevant law, (ii) a corporate or personal tort, or (iii) use the company as a sham, facade or to perpetrate fraud, or (iv) use the corporate structure to avoid existing legal liabilities and obligations that will foreseeably become legally enforceable (like prospective contract, enforceable labor rights, payments, foreseeable litigation etc), or (v), for any other reason which the courts have deemed appropriate to lift the corporate veil, and (3) have done so with male fides or in bad faith, capriciously and without legitimate commercial interests".[379]

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377 William A. Schabas, "Enforcing International Humanitarian Law: Catching the Accomplices", (2001) 83 International Review of the Red Cross 439 at 453, Jacobson, *ibid.* at 231, Andrew Clapham, "The Complexity of International Criminal Law: Looking Beyond Individual Responsibility to the Responsibility of Organizations, Corporations and States", in R. Thakur and P. Malcontent (eds), *From Sovereign Impunity to International Accountability: The Search for Justice in a World of States* (Tokyo: United Nations Press, 2004), 233 at 239, all cited in Joanna Kyriakakis, "Australian Prosecution of Corporations for International Crimes" (2007) 5 Journal of International Criminal Justice 809 at 824, online: Journal of International Criminal Justice <http://jicj.oxfordjournals.org/cgi/content/short/5/4/809> (accessed 6 January 2010).

378 *R. v. Canadian Dredge & Dock Co.*, 1985 SCC 1, [1985] 1 S.C.R. 662 at para. 20, online: S.C.R. <http://scc.lexum.umontreal.ca/en/1985/1985scr1-662/1985scr1-662.pdf> (accessed 24 April 2010) [hereinafter, *Dredge*].

379 Angelo Capuano, "The Realist's Guide to Piercing the Corporate Veil: Lessons from Hong Kong and Singapore" (2009) 1 Australian Journal of Corporate Law, Vol. 23, 1 at 3, online: Social Science Research Network <http://ssrn.com/abstract=1369110> (accessed 24 April 2010). The civil law counterpart of this doctrine appears in the *Civil Code of Quebec*, S.Q. c. 64, s. 317 [hereinafter, C.c.Q.] thus providing an exception to the principle of the distinct personality of a corporation from their members contained in s. 309 C.c.Q. (its predecessor, the former s. 345 of the *Civil Code of Quebec*, S.Q. 1987, c. 18, was the first article adopted to codify the doctrine of lifting the corporate veil in the world, but it was never entered into force). More specifically, s. 317 states that "[i]n no case may a legal person set up a juridical personality against a person in good faith if it is set up to dissemble fraud, abuse of right or contravention of a rule of public order". These provisions address situations in which a shareholder of a corporation manipulates and shields himself/herself behind the corporate shell, while acting in bad faith to commit a breach of public order. It is usually applicable in situations where corporations are entirely controlled by one shareholder or a limited group of shareholders that use the corporation as an instrument to commit their wrongful acts, and otherwise referred to as the "alter ego" of the corporation. It is in fact only under exceptional circumstances that the doctrine of lifting the

The preferred option between individual or corporate prosecution has traditionally been divided by two schools of thought. Advocates of prosecuting individuals support the philosophy of "methodological individualism"[380] which holds "that only individuals are responsible, and that corporate action or corporate responsibility is no more than the sum of its individual parts".[381]

In contrast, proponents of "enterprise liability" or "collective responsibility"[382] theories argue in response that "the notion that individuals are real, observable, flesh and blood, while corporations are legal fictions is false. Plainly, many features of corporations are observable (their assets, factories, decision-making procedures), while many features of individuals are not (for example, personality, intention, unconscious mind).[383]

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corporate veil may be used against the directors of the corporation and particularly when a shareholder acts simultaneously in this capacity and in the capacity of a director. Liability of directors is otherwise addressed in sections 1457 for contractual matters and 1526 in extra-contractual matters. (See Martel & Martel, *supra* note 36, at I-67- I-87, and specifically, at paras. 1-256-1-263; see also Crête & Rousseau, *supra* note 36, at 105-142)

380 See e.g. Friedrich August Hayek, *Individualism and Economic Order* (Chicago: The University Chicago Press, 1980), Leonard H. Leigh, *The Criminal Liability of Corporations in English Law* (London : Weidenfeld & Nicolson, 1969); Eliezer Lederman, "Criminal Law, Perpetrator and Corporation: Rethinking a Complex Triangle" (1985) 76 Journal of Criminal Law and Criminology 285, Donald Cressey. "The Poverty of Theory in Corporate Crime Research'" in William S. Laufar & Freda Adler, eds., *Advances in Criminological Theory* Vol. 1, 31(New Brunswick, NJ: Transaction, 1989) and George P. Fletcher, *Rethinking Criminal Law* (New York, Oxford University Press, 1979) and others, cited in Fisse and Braithwaite, *supra* note 52.

381 Fisse and Braithwaite, *ibid.* at 18.

382 See e.g. Kenneth Elzinga & William Breit, *The Antitrust Penalties* (New Haven, [Conn.]: Yale University Press, 1976), Reinier Kraakman, "Corporate Liability Strategies and the Costs of Legal Controls" (1984) 93 Yale Law Journal 857, Christopher Stone, "The Place of Enterprise Liability in the Control of Corporate Conduct" (1980) 90 Yale Law Journal 1, David Pearce, Anil Markandya & Edward B. Barbier, *Blueprint for a Green Economy* (London: Earthscan, 1989), Mitchel Polinsky & Steven Shavell, "Should Employees be Subject to Fines and Imprisonment Given the Existence of Corporate Liability"? (1993) 3 International Review of Law and Economics, Vol. 13, 239, French, *supra* note 37, Fisse & Braithwaite, *ibid.*, Brent Fisse & John Braithwaite, "The Allocation of Responsibility of for Corporate Crime: Individualism, Collectivism and Accountability" (1986-1988) 11 Sydney Law Review 468, Pamela H. Bucy, "Corporate Ethos: A Standard for Imposing Corporate Criminal Liability" (1990-1991) 75 Minnesota Law Review 1095.

383 Fisse & Braithwaite, *ibid.* (*supra* note 52) at 19. The statement to the effect that many features of corporations are observable is based on the legal mistake of confusing the corporation and the business or enterprise that it contains, which are in fact two very different concepts. A corporation, for example, can exist with no activities, or be used only for the purpose of holding shares in another corporation, i.e. a "holding corporation". It is a legal structure or a vehicle used to carry out a business. For instance,

More specifically with regards to the commission of international crimes, "there is a moral concern that corporations that receive the profits from serious international crimes may continue to operate in the economic sphere with effective impunity (...). Finally, and perhaps the most commonly cited basis for corporate responsibility, is that this would allow access to corporate assets for the benefit of reparations to victims".[384]

These various controversies, political implications and startling conclusions of criminality based on individual responsibility for collective crimes re-emerged during the negotiations to establish a permanent international criminal court.

Professor Dufour refers to other legal structures that may also be used to carry out a business other than a corporation, such as an individual business, general partnerships, limited partnerships, undeclared partnerships in Quebec or limited liability partnerships in the common law provinces, a trust constituted by onerous title in Quebec or business trusts in the common law provinces and cooperatives [See Geneviève Dufour, *Droit moderne des entreprises*, (Montreal: Les Éditions Yvon Blais, 2008) at 16-18, n. 45-49]. On the other hand, Professor Dufour defines a business as "an organised economic activity, i.e. a set of assets and liabilities, material and human factors that are gathered for an economic purpose (and therefore to contribute to the economic cycle of production, circulation and consumption of goods and services), for profit or not, thus forming a complete entity, whose owner is a legal entity" [the original French version states: *l'entreprise est une activité économique organisée, c'est-à-dire un ensemble d'actifs et de passifs, de facteurs humains et matériels qui sont réunis en vue d'une finalité (donc pour contribuer au cycle économique de production, circulation et consummation de biens et services), dans un but lucratif ou non, et forment donc un tout organique, dont une entité jurique va être le propriétaire*], in *ibid.* at 15. There is a debate in Quebec on the difference between a business and the carrying on of a business, caused mainly because of the definition of the latter expression in s. 1525 of the C.c.Q., *supra* note 279, without a distinct definition of a "business" in the Code. After examining the positions of various legal authors in Quebec and in Canada on this matter, Professor Dufour determines that all positions refer to common elements that emerge from proposed definitions of both expressions: "business" and "carrying on of a business", which are contained in her aforementioned definition of a "business". See *ibid.* at 15-33, citing, e.g. Nabil Antaki & Charlaine Bouchard, *Droit et pratique de l'entreprise*, 2d. ed., Vol. 1 (Cowansville: Éditions Yvon Blais, 2007) at 195; Nicole Lacasse, *Droit de l'entreprise*, 6d. ed. (Quebec: Les ÉditionsNarval, 2002) at 23-27; Bernard Larochelle, *Contrat de société et d'association*, 2d. ed., (Montreal : Wilson & Lafleur, 2007) at 23; Patrice Vachon, « L'entreprise du Code civil du Québec » (1995) Repères 138 at 140 and others. Nevertheless, the simple decision-making process of a corporation, even one that does not carry out any business activities would be sufficient to submit it to the application of the law under the explanation provided by Fisse & Braithwaite.

384 Kyriakakis, *supra* note 377 at 825-826. See also Ramasastry, *supra* note 155 at 96-97.

Chapter 3: The International Criminal Court

The drafters of the *Rome Statute* undertook to clarify and refine the existing international criminal law at the time of its adoption. Despite interesting proposals and discussions to include corporate liability, the final text agreed upon did not contain any innovations on the topic and limited the jurisdiction of the ICC to individual criminal responsibility.[385]

Section 1. The Political Debate over the Jurisdiction *Ratione Personae* of the ICC

The *Rome Conference* established that the jurisdiction of the ICC would extend only to natural persons. This decision was the result of numerous debates on a contentious draft provision, proposed by the French Delegation to extend the jurisdiction of the Court to legal persons in addition to natural persons.[386]

The immediate reaction in the Commission of the Whole towards this proposal was far from uniform.[387] First, there were many arguments in favor of including corporations as potential defendants in a case before the court. It was argued that assigning responsibility on a legal person would increase the assurances of compensating victims, whereas the individual criminals may not always have the assets to pay the reparation ordered by the Court. Second, the opprobrium attached to a conviction for an international crime would create a stigma on the legal person and thereby, penalize its operations. Third, the value of a

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385 Clapham, *supra* note 100 at 160.

386 *Ibid.* at 146. The proposal was contained in paragraphs 23 (5) and (6) of the draft *Rome Statute* (See UN Doc. A/CONF.183/2/Add.1 at 49, cited in *ibid.* 143-144).

387 Jordan, Tunisia, Tanzania, Algeria and South Korea all expressed interest in the French proposal. On the other hand, notwithstanding the Nuremberg precedent, scepticism about the utility and practicality of introducing such a clause was expressed by Australia, China, Syria, Greece, Portugal, Egypt, Poland, Slovenia, El Salvador and Yemen. A third group were doubtful that the French proposal could work as it stood but were prepared to work on it to try to develop a viable text. In this group we could include Ukraine, Cuba, Japan, Kenya and Singapore (*ibid.* at 147).

potential conviction was considered by its capacity to deter the commission of war crimes or crimes against humanity.[388]

As the discussions progressed, the difficulties in obtaining a consensus on the various implications among delegations became more apparent. A new text was proposed with a number of additions and modifications to respond to the various claims.[389] The terminology of "legal persons" of the previous version was replaced by "juridical persons" to dispel the potential misunderstanding that illegal organizations would escape the Court's jurisdiction.[390] Furthermore, as opposed to the precedent of the Nuremberg trials, criminal prosecution of an individual would not necessarily flow from his particular position or membership in a juridical person declared criminal.[391] Inversely, juridical persons would only be charged where a natural person in a position of control within it had also been charged and convicted on behalf and with the explicit consent of the legal person.[392]

This concept of a controlling or a directing mind is consistent with French law, according to which a legal entity may be held liable for the acts of individuals with high-level decision-making authority. The latter could be part of the corporation's board of directors, the managing director, the superintendent, the manager or anyone else delegated by the board of directors.[393] This liability doctrine, originating from British case law,[394] is reflected in several jurisdictions around the world and was influential during the discussions of the *Rome Conference*.[395]

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388 *Ibid.* at 147.
389 *Ibid.* at 150.
390 *Ibid.* at 151-152.
391 *Ibid.* at 152.
392 *Ibid.* at 153-154.
393 *Dredge, supra* note 378 at 50.
394 *Lennard's Carrying Co.* v. *Asiatic Petroleum Co.* [1915] A.C. 705, cited in *ibid.* at 16.
395 Andrew Clapham, "Extending International Criminal Law beyond the Individual to Corporations and Armed Opposition Groups" (2008) 6 Journal of International Criminal Justice 899 at 914-915. Clapham refers to international treaties where this mode of corporate liability is incorporated, such as the *Criminal Convention on Corruption* adopted in the context of the Council of Europe Joint Action of 22 December 1998 adopted by the Council on the basis of art. K.3 of the *Treaty on European Union*, OJ L 358, 31, 12,

Notwithstanding these changes, corporate liability became a debatable topic at the Rome Conference, particularly since other national jurisdictions follow different rules for determining corporate accountability.[396] For instance, Australian law incorporates the concept of "corporate culture" as an alternate premise for corporate criminal liability in the *Australian Criminal Code Act*, adopted in 1995.[397] Protagonists of this theory observe "the policies, standing orders, regulations and institutionalized practices of corporations are evidence of corporate aims, intentions and knowledge that are not reducible to the aims, intentions and knowledge of individuals within the corporation".[398] A third form of

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1998, at 2, 4; the *Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union*, OJ C 195, 25 June 1997, at 2, 11; the *Convention on the protection of the European Communities financial interests*, OJ C 316, 27 November 1995, at 49, 57.

396 Clapham, *ibid.* at 916.

397 Justice Canada, *Corporate Criminal Liability: Discussion Paper – Issues* (Ottawa: Justice Canada, March 2002), online: Justice Canada <http://www.justice.gc.ca/eng/dept-min/pub/jhr-jdp/dp-dt/> [hereinafter, *Justice Canada*, *Discussion Paper*] (accessed 24 April 2010); Justice Canada, *Government Response to the Fifteenth Report of the Standing Committee on Justice and Human Rights - Corporate Liability* (Ottawa: Justice Canada, November 2002), online: Justice Canada <http://www.justice.gc.ca/eng/dept-min/pub/jhr-jdp/index.html> (accessed 24 April 2010) [hereinafter, *Justice Canada Response to the JUST Fifteenth Report*]; Justice Canada, *A Plain Language Guide: Bill C-45 - Amendments To The Criminal Code Affecting The Criminal Liability Of Organizations* (Ottawa: Justice Canada, 2004), at 3, online: Justice Canada <http://www.justice.gc.ca/eng/dept-min/pub/c45/c45.pdf> (accessed 24 April 2010) [hereinafter, *Justice Canada*, *A Plain Language Guide*].

398 S. Field and N. Jorg, "Corporate Liability and Manslaughter: Should we be Going Dutch?" (1991) *Crim. L.R.* 156 at 159, cited in Anne-Marie Boisvert, "Corporate Criminal Liability. A Discussion Paper" (Paper presented to the Uniform Law Conference of Canada, August 1999) at para. 35, online: ULCC <http://www.ulcc.ca/en/criminal/index.cfm?sec=3&sub=3e> (accessed 24 April 2010). An interesting Canadian example of how the corporate culture approach may determine criminal liability is the case *R.* v. *Transpavé inc*., EYB 2008-130943 (17 March 2008), [2008] J.Q. No 1857 (C.Q.) which led to the first corporate criminal conviction after the 2003 amendments that were brought to the corporate criminal liability regime under the Canadian *Criminal Code*, *supra* note 31. The charges were laid against Transpavé, Inc., a company based in St-Eustache, Quebec, for criminal negligence causing death. The victim, Steve l'Écuyer, an employee of Transpavé, was crushed by the company's machine while he was attempting to clear a pileup of paving blocks. It seems that the grab of the machine was activated by a control lever that became unstuck. An inspection later carried out by la *Commission de la Santé et de la Sécurité au Travail* explained that the light curtain system had been disabled by a pen cap, and had been disabled for the majority of time in 2004 and 2005. The inspectors also discovered that the company did not have any type of inspection program to confirm whether guarding systems were operational. Training systems for new operators were not reviewed by management. A member of management had also noted in the past that the light curtain guarding system was disabled but had not taken any action to address the situation. This clearly demonstrated a negligent corporate culture leading to the death of an employee in the workplace. A penalty of $100,000.00 was imposed on Transpavé by the Court of Quebec as well as an additional $10,000.00 victim assistance surcharge (See Cheryl A.

criminal accountability, the "vicarious liability model" or the doctrine of *respondeat superior* is applied in the United States,[399] which engages corporate responsibility for the acts of its officer and agents acting within the scope of their employment for the benefit of the corporation.[400]

The various legal traditions present at the *Rome Conference* created an atmosphere of criticism and indecision during the discussions on corporate accountability. In the remaining two weeks, the French delegation finally withdrew its proposal, when it became clear that a text would not be adopted by consensus.[401]

Edwards, "Corporate Criminal Liability Comes to Canada, Transpavé Convicted and Fined for Criminal Negligence Causing Death", Part I, COS Magazine (May-June 2008), online: Heenan Blaikie <http://www.heenan.ca/en/media/pdfs/pdf/COS_Mag_Transpave_May_June_PartI2008.pdf;jsessionid=28D26457376C7406B05491BBC6209AAB> (accessed 26 June 2010). It must be noted that the concept of corporate culture is mainly relevant in "[m]any civil regulatory regimes" which "contain provisions stipulating that factors such as the deliberateness of the breach, the seniority of those involved, and the corporation's approach to compliance are relevant to the determination of an appropriate penalty; even where such provisions are not expressly applied, courts tend to take these factors into account. See, e.g., *Trade Practices Commission v Dunlop Australia* (1980) 30 ALR 469 at 484-5; *Trade Practices Commission* v. *TNT Australia Pty Ltd* (1995) ATPR 41-375; *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd* (1997) 145 ALR 36 at 41-43; *Environment Protection Authority* v. *Energy Services International Pty Ltd* [2001] NSWLEC 59 at [22]-[35]; *Environment Protection Authority* v. *Middle Harbour Constructions Pty Ltd* (2002) 119 LGERA 440 at [57]-[58]", cited in Allens Arthur Robinson, *'Corporate Culture' as a Basis for the Criminal Liability of Corporations*, (report prepared for the United Nations Special Representative of the Secretary General on Human Rights and Business, February 2008), at 11, n. 17, online: Allens Arthur Robinson <http://198.170.85.29/Allens-Arthur-Robinson-Corporate-Culture-paper-for-Ruggie-Feb-2008.pdf> (accessed 26 June 2010). One can also imagine for example, a corporate culture of a trucking company which encourages its drivers to disobey regulatory speed limits in order to increase its service performance. In fact, to this date, there have been no convictions, even under Australian law, using the notion of corporate culture for fault-based crimes, which include international crimes (see *infra* note 630, explaining the standard of liability for international crimes). It would nonetheless be interesting to observe "how the development of jurisprudence in Australia on the concept of corporate culture for serious corporate misbehaviour could be instructive in the international debate toward models of corporate criminal liability" (Kyriakakis, *supra* note 377 at 826).

399 The first case defining vicarious liability was developed in the 1909 judgment in *New York Central & Hudson River Rail Road* v. *United States* 212 U.S 481 (1909), cited in *Dredge*, *supra* note 378 at para. 23.

400 *Egan v. United States* 137 F.2d 369 (1943), *per* Thomas J., at 379 and *United States* v. *Basic Construction Co.*, 771 F.2d 570 (1983) (5th CCA), cited in *Dredge*, *ibid.*

401 Clapham, *supra* note 100 at 157.

According to Clapham, "as long as there is no international criminal court with jurisdiction over legal persons, we are unlikely to see an unambiguous international standard develop which details the requisite mental engagement of a company before it can be said to have committed an international crime. For the moment the field is likely to develop according to those national jurisdictions which are among the first to try corporations for international crimes."[402]

The personal jurisdiction of the Court was thus limited to natural persons only pursuant to article 25 (1) of the adopted Statute of the ICC.

Section 2. Modes of Attribution of Criminal Liability on Corporations for International Crimes under the *Rome Statute*

The Pre-Trial Chamber of the ICC has recognized that the "crimes falling within the jurisdiction of this Court – those of 'the most serious [...] concern to the international community as a whole', and which 'threaten the peace, security, and well-being of the world' – will almost inevitably concern collective or mass criminality."[403]

This excerpt refers to the phenomenon of mass criminality and collective action in international crimes, previously explored by the various international tribunals set up since the Nuremberg era. The tendency of the Pre-Trial Chamber has clearly been to cast a wide net of liability to include various categories of perpetrators in attributing individual criminal liability.

A closer examination of each mode of individual criminal participation listed in articles 25 (3) and 28 of the *Rome Statute* shows that the scope of liability is large enough

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402 Clapham, s*upra* note 395 at 917-918.

to include business actors and activities directly or indirectly involved in the commission of international crimes.

Sub-section 1. A New Doctrine of Co-perpetration for Individual Responsibility under Article 25 (3) (a) of the *Rome Statute*

Professor Kai Ambos, a leading scholar who was a member of the German delegation at the *Rome Conference*, explains that the first part of article 25 (3) (a) of the *Rome Statute* distinguishes between three forms of perpetration: direct or immediate perpetration ("as an individual"), co-perpetration ("jointly with another") and perpetration by means ("through another person").[404]

Paragraph 1. Direct Perpetration

There is little interpretation that can be given to direct perpetration of a crime. Importantly, it must be retained that only individuals and no collective entities (including corporations) may be held responsible for directly committing a crime under the *Rome Statute*.

With regards to other perpetration forms in this paragraph, various authors and the Pre-Trial Chamber of the ICC in the *Lubanga*[405] and *Katanga*[406] confirmations of charges

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403 *The Prosecutor* v. *Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-717, Decision on Confirmation of Charges (26 September 2008) at para. 501 (ICC, Pre-Trial Chamber), online: ICC <http://www.icc-cpi.int/iccdocs/doc/doc571253.pdf> (accessed 24 April 2010) [hereinafter, *Katanga*].

404 Kai Ambos, "Individual Criminal Responsibility, Article 25 Rome Statute" in 1st ed.by Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court. – Observers' Notes, Article by Article* (München: C.H. Beck – Hart – Nomos, 1999), 475 at 478. See also Ambos, *supra* note 315 at 748.

405 *The Prosecutor* v. *Thomas Lubanga Dyilo*, ICC-01/04-01/06, Decision on Confirmation of Charges (29 January 2007) (ICC, Pre-Trial Chamber), online: ICC <http://www.icc-cpi.int/iccdocs/doc/doc266175.PDF> (accessed 24 April 2010) [hereinafter, *Lubanga*]

406 *Katanga*, *supra* note 403.

decisions have referred to German law to explain the legal concepts of "perpetration by means" and "joint or co-perpetration".

Paragraph 2. Perpetration by Means

First, perpetration by means presupposes that the person who commits the crime (*intermediary*, *intermédiaire*, *Tatmittler*) can be used as an instrument or a tool (*Werkzeug*) by the indirect perpetrator (*auteur médiat*). The indirect perpetrator is, in fact, the master-mind or "individual in the background" (*Hintermann*),[407] while the intermediary is normally an innocent agent, not responsible for the criminal act.[408]

However, as described by the Pre-Trial Chamber in the *Katanga* confirmation of charges decision, there are situations where perpetration by means occurs with a completely culpable direct perpetrator.[409] In such cases, the "*Hintermann*" dominates the direct perpetrators by way of a hierarchical organizational structure, i.e., "*Organizationsherrschaft*".[410]

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407 Ambos, *supra* note 404 at 479. See also Ambos, *supra* note 315, at 752-753.

408 *Ibid.*

409 *Katanga*, s*upra* note 403. See also Ambos, *ibid.* (supra note 404) and Ambos, *supra* note 315 at 753-754.

410 Ambos, *ibid.* (*supra* note 404). The German legal concept of "organizationsherrschaft", currently integrated in s. 25 (1) of the German Penal Code (*Strafgesetzbuch*, as promulgated on 13 November 1998 in the Federal Law Gazette I, p. 945, p. 3322) was first created by German author Roxin Claus in his analysis of *Attorney General of the Government of Israel* v. *Eichmann*, *supra* note 73 [see Claus Roxin, Straftaten im Rahmen Organisatorischer Machtapparate (Criminal Acts within the Framework of Organizational Apparatus of Hierarchical Power), *in* Goltdammer's Archiv ffir Strafrecht (Goltdammer's Archive of Criminal Law) 193-207 (1963), cited in Mark Osiel, "The Banality of Good: Aligning Incentives Against Mass Atrocity" (2005) 105 Columbia Law Journal, 1751 at 1831]. It was created to punish what is called a *Schreibtischtäter*, the principal of a crime who controls accomplices belonging to an organizational entity in such a way that the desired aim is reached with certainty [See C. Roxin, *Taterschaft und Tatherrschaft* (8th edn, De Gruyter, Berlin 2006), pp. 242–52, 704–17, cited in Kai Ambos, "Command responsibility and *Organisationsherrschaft*: ways of attributing international crimes to the 'most responsible'" in André Nollkaemper & Harmen Van Der Wilt, eds., *System Criminality in International Law* (New York: Cambridge University Press, 2009), 127 at 142]. Argentine judges first used this mode of liability when convicting the country's military *juntas* for large-scale human rights abuses. German courts later used it to convict high-ranking superiors of the German Democratic Republic's National Defense Counsel for issuing orders to the border guards to shoot East Germans

The Pre-Trial Chamber described that the most important characteristics of this apparatus are: (i) the authority and control of its leader; (ii) the automatic compliance of his/her subordinates; and (iii) a sufficient number of subordinates in order to ensure that their replacement will not affect the successful execution of the plan.[411] Importantly, criminal responsibility of a person – whether as an individual, jointly with another or through another person – must be determined under the "control over the crime" approach used for distinguishing between principals and accessories.[412]

This mode of liability has not yet been made applicable to corporations under the *Rome Statute* and in national jurisdictions. In fact, it is mostly used to break the barriers leading to the responsibility of leaders and politicians in a state bureaucracy. It is however plausible to consider the evolution of international criminal law in this regard, particularly with the development of agency theories in common law jurisdictions to hold parent corporations liable for acts of their subsidiaries that they control.[413]

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scaling the Berlin Wall [See both cases cited as Camara Nacional de Apelaciones en lo Criminal y Correccional de la Capital (9 December 1985) 309-I/II Coleccion Oficial de Fallos de la Corte Suprema de Justicia de la Nacion ('Fallos') 1601–2 and BGHSt 40, 218 (Official collection of the Supreme Court judgments in criminal matters) 236 *et seq*. BGH (1994) NJW 2703, cited and described in Ambos, *ibid.* at 143 and Osiel, *ibid.*]. The theory of a principal behind the direct perpetrator has also been used in Peruvian jurisprudence and most notably against the former President, Alberto Fujimori, for the assassination of 25 Peruvians and serious injuries caused to others by Grupo Colina, the paramilitary group which he controlled in the 1990's [see Sentencia de 7.4.2009, Sala Penal Especial de la Corte Suprema contra Alberto Fujimori Fujimori, cited in Iván Meini, "La autoría mediata por dominio de la organización en el caso Fujimori". Comentario a la sentencia de fecha 7.4.2009 (Exp. a.v. 19 - 2001) emitida por la Sala Penal especial de la Corte Suprema (2009) 11 Zeitschrift für Internationale Strafrechtsdogmatik, 549 at 602, online : ZIS <http://www.zis-online.com/dat/ausgabe/2009_11_ger.pdf> (accessed 27 June 2010)].

411 *Katanga*, *supra* note 403 at paras. 512-517.

412 *Ibid.* at para. 510.

413 On the one hand, Ambos states that, "for the purpose of imputation in criminal law the 'man' or people in the background are always natural, not juridical persons. This does not deny that system criminality (…) refers to situations where collective entities order or encourage, or permit or tolerate the commission of international crimes. This collective element precisely concerns the system level of macro criminality and explains the existence of a collective or context element in international crimes" (see Ambos, *supra* note 410). The concept has nevertheless been considered to potentially hold directors of corporations liable for crimes committed workers and employees [see Thomas Rotsch, "Considering the hypertrophy of law" (2009) 3 Zeitschrift für Internationale Strafrechtsdogmatik, 89 at 91 (online: ZIS <http://www.zis-online.com/dat/ausgabe/2009_3_ger.pdf> (accessed 27 June 2010)]. Under a similar doctrine, the "agency theory", United States courts have held that parent corporations are liable

The control criterion, first established by the Pre-Trial Chamber in *Katanga,* also became an essential element of the concept of co-perpetration developed by the same Chamber in the *Lubanga* confirmation of charges decision.[414]

Paragraph 3. Co-perpetration

Co-perpetration, which falls under the expression "jointly with another" in article 25 (3) (a) of the *Rome Statute*, "is characterised by a functional division of tasks between the different (at least two) co-perpetrators, who are normally interrelated by a common plan or agreement. Every co-perpetrator fulfils a certain task which contributes to the commission of the crime and without which the commission would not be possible".[415]

The agreement or common plan between two or more persons in a co-perpetration must include an element of criminality, although it does not need to be specifically directed

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for the acts of their subsidiaries acting as their agents on foreign territory in violation of human rights and international criminal law [see e.g. *Bowoto* v *Chevron Texaco Corp*, 312 F.Supp. 2d 1229 (N.D. Cal. 2004), *Doe* v *ExxonMobil Corp*, 573 F.Supp. 2d 16 (D.D.C. 2008), *Wiwa* v *Royal Dutch Petroleum Co*, 226 F.3d 88 (2d Cir 2000), and *Presbyterian Church of Sudan* v *Talisman Energy, Inc*, 244 F.Supp. 2d 289 (S.D.N.Y. 2003), all cited in Jonathan C. Drimmer, "Human Rights and Extractive Industries: Litigation and Compliance Trends" (2010) 2 Journal of World Energy Law and Business, Vol. 3, 121 at 125-127, online: Oxford Law Journals <http://jwelb.oxfordjournals.org/cgi/reprint/3/2/121> (accessed 27 June 2010)]. While there are no authors or jurisprudence that support such a view, this thesis proposes that in certain cases, the agent subsidiaries could be considered to be the *Tatmittler* acting on behalf of the parent corporation (*Hintermann*) (more information will be provided on this subject in the last chapter of this thesis). Also closer to the concept of "organisationsherrschaft", one can imagine a hypothetical situation of mining corporations (the *Hintermann*) operating in a conflict zone and using child labourers (an innocent agent in international criminal law, or the *Tatmittler*) to carry out violations of international criminal law, such as killing other children and families or setting fire to residential structures, in order to have access to rebel territory's resources. In fact, employment of children under eighteen years of age in the mining industry, and particularly small-scale artisanal mining corporations is well-documented by international organizations [see, e.g. International Labour Office, Eliminating Child Labour in Mining and Quarrying (Geneva: United Nations, 2005), online: <http://www.ilo.org/public/portugue/region/eurpro/lisbon/pdf/minas.pdf> (accessed, 27 June 2010) and Rukmini Callimachi & Bradley Klapper, *Exploited Children Stories* (Tenkoto: Associated Press, 2008), at 8-15, online: Associated Press < http://www.ap.org/media/pdf/calimachi.pdf> (accessed 27 June 2010)].

414 *Lubanga*, *supra* note 405 at paras. 340, 342.

415 Ambos, *supra* note 315 at 748-749.

at the commission of a crime.[416] In this sense, co-perpetration liability under article 25 (1) (a) of the *Rome Statute* resembles the *ad hoc* tribunals' JCE III, where the crime committed need not necessarily have been part of the common plan or design of the participants. It suffices that the latter were at least aware of the risk of such an outcome.

The *mens rea* of this mode of liability requires that the suspect fulfil all the subjective elements of the crime with which he or she is charged, including any requisite *dolus specialis* or ulterior intent.[417] Basing itself on article 30 of the *Rome Statute*,[418] the Chamber endorsed the application of *dolus eventualis* as a minimal level of subjective "intent and knowledge" requirement necessary for the crime of co-perpetration, i.e. the suspect reconciles himself/herself and accepts the risk that the objective elements of the crime may result from his or her actions or omissions.[419]

In terms of criminal responsibility, *dolus eventualis* for co-perpetration is very closely related to the intention requirements of JCE III as developed in *Tadić*, *Brdanin* and other cases of the *ad hoc* tribunals. The Pre-Trial Chamber specifies in this regard that "if the risk of bringing about the objective elements of the crime is low, the suspect must have clearly or expressly accepted the idea that such objective elements may result from his or her actions or omissions".[420]

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416 *Lubanga*, *supra* note 405 at para. 345.

417 *Lubanga*, *supra* note 405 at para. 349.

418 *Ibid.* at 350; *Katanga*, *supra* note 403 at para. 528 . Article 30 of the *Rome Statute* specifies :

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.

2. For the purposes of this article, a person has intent where:

(a) In relation to conduct, that person means to engage in the conduct;

(b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly (*Rome Statute*, *supra* note 20, art. 30).

419 *Lubanga, ibid.* at paras. 351-352; *Katanga*, *ibid.* at paras. 529-530.

According to Professor Weigend, "[t]he problem with the PTC's formula is that it seems to make punishment depend on a (non-provable) subjective attitude rather than on the amount of risk the actor took".[421] It is, in this regard, questionable whether foreseeability of risks will be upheld as an acceptable level of intention under the Trial and Appeal Chambers future interpretations of article 30 of the *Rome Statute* in this case.

With respect to corporate actors, these low requisites of knowledge and intent for co-perpetration, if endorsed by future Trial Chamber judgments, could potentially cast large webs of doubt on the legality of their operations in perilous zones of conflict and war in the event of future prosecutions based on international criminal law in domestic jurisdictions. Indeed, fluctuations of the stock market in such a globalized and modern business world are closely linked to the accessibility of information through increased use of internet and progress in communication technology. It would therefore be difficult to justify that the corporation as a whole or its representing officers did not possess the proper information tools to make prior assessments of legal risks associated with conducting business on territories prone to insecurity and violence.

On the other hand, the Pre-Trial Chamber has raised the intent threshold of co-perpetration in comparison to that of JCE III by requiring that the suspect and the other co-perpetrators must all be mutually aware and mutually accept that implementing their common plan may result in the realisation of the objective elements of the crime.[422] Furthermore, the *Lubanga* and *Katanga* Pre-Trial Chamber decisions applied the German doctrine of "functional control over the act" ("*funktionelle Tatherrschaft*"), where "although none of the participants has overall control over the offence because they all

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420 *Lubanga, ibid.* at para. 355.

421 Weigend, *supra* note 161 at 483-484. See also Sliedregt, *supra* note 91 at 113 (of the view this level of intent is excluded from the strict *mens rea* requirements of Article 30 of the *Rome Statute*).

422 *Lubanga*, *supra* note 405 at para. 361, 363 and *Katanga*, *supra* note 403 at para. 533.

depend on one another for its commission, they all share control because each of them could frustrate the commission of the crime by not carrying out his or her task".[423]

Co-perpetration therefore differs from the *ad hoc* tribunals' common purpose doctrine which only requires a significant and substantial contribution in a JCE.[424] The advantage of the model of co-perpetration is that it "ends the dissatisfaction with the failing terminology of complicity liability" in the Statutes of the *ad hoc* tribunals and makes each co-perpetrator an essential principal to the crime.[425]

As a means of proving control, the Pre-Trial Chamber refers to the leader's capacity to hire, train, impose discipline, and provide resources to his subordinates.[426] Moreover, essential contributions before or during the execution stage of the crime may include acts such as "designing the attack, supplying weapons and ammunitions, exercising the power to move the previously recruited and trained troops to the fields; and/or coordinating and monitoring the activities of those troops".[427]

Such levels of involvement may be difficult to prove with regards to corporations. However, certain types of corporations, particularly MNC's, have gained substantial influence in the world and often carry important roles on the territories in which they operate.

Furthermore, the "[p]rincipals to a crime are not limited to those who physically carry out the objective elements of the offence, but also include those who, in spite of being

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423 *Lubanga*, *ibid.* at para. 342 and *Katanga*, *ibid.* at 539. See also Weigend, *supra* note 161 at 479-480 (on the description of the "essential tasks" theory).

424 Ambos, *supra* note 315 at 752. See also Héctor Olásolo, "Reflections on the Treatment of the Notions of Control of the Crime and Joint Criminal Enterprise in the Stakic Appeal Judgement" (2007) 7 International Criminal Law Review 143 at 153.

425 Sliedregt, *supra* note 91 at 113.

426 *Katanga*, *supra* note 403 at para. 513.

427 *Ibid.* at para. 526.

removed from the scene of the crime, control or mastermind its commission".[428] In counterpart, it would need to be proven that the directors or high-level managers of an MNC maintained a significant degree of control over the criminal acts committed at the scene of the crime.

Sub-section 2. Common Purpose Liability under Article 25 (3) (d) of the *Rome Statute*

The common purpose doctrine in article 25 (3) (d) of the *Rome Statute* states that an individual may be held criminally liable if he/she contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either "(i) [b]e made with the aim of furthering the criminal activity or criminal purpose of the group where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or (ii) [b]e made in the knowledge of the intention of the group to commit the crime".[429]

Although various analogies have been made between the co-perpetration and *ad hoc* tribunal JCE liability doctrines,[430] Professors Ambos and Weigend distinguish the various forms of liability.[431] In this regard, "since the JCE doctrine resembles the law of conspiracy, its inclusion in the ICC Statute would conflict with the intent of the *Rome Statute*'s drafters, who explicitly rejected conspiracy and drafted Article 25 (3)(d) as a

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428 *Ibid.* at para. 485. See also Weigend, *supra* note 162 at 476.

429 *Rome Statute*, *supra* note 20, art. 25(3)(d).

430 Sliedregt would tend to associate JCE I to sub-paragraph 25(3)(d)(i) *Rome Statute* which requires a shared intent by the perpetrators and JCE III to sub-paragraph 25(3)(d)(ii) which provides a lower threshold of intent and knowledge, thereby suggesting that the co-perpetrator does not have to share the *mens rea* of the actual perpetrator. The author adds that JCE II could fall under both sub-paragraphs, depending on whether the suspects intended to further the ongoing criminal activity, i.e. the functioning of a concentration camp for sub-paragraph (i) or for suspects "who cannot be identified as the ideologists behind it but had knowledge of the system and intended to further it" for sub-paragraph (ii) (Sliedregt, *supra* note 91 at 108).

431 Kai Ambos, "Joint Criminal Enterprise and Command Responsibility" 1 Journal of International Criminal Justice, Vol. 5 159 at 172-173 and Weigend, *supra* note 161 at 176

compromise formula".[432] This reasoning is persuasive considering the term "conspiracy" included in previous drafts of the *Rome Statute* was eventually dropped in later documents.[433] Nevertheless, it must be noted that the mixed conspiracy-complicity concept which developed from the IMT and subsequent Nuremberg trials is reflected in article 25 of the *Rome Statute* through the English "common purpose" concept contained in paragraph 3(d).[434]

Future interpretations of the ICC Trial Chamber may clarify this paragraph of the *Rome Statute* and the notion of common purpose liability. At this stage, it is important to retain that the ICC legislation and initial case law seems to provide for individual liability of various actors that may be incurred through common purpose liability doctrines with forseeability as a likely level of intention requirement.

In terms of corporate liability, the ICJ Experts Panel provides some examples of common purpose liability's application to corporations. One such situation would be where the personnel of a contracted security services committed international crimes on civilians. In addition to proving that the company and the security provider were acting with the common purpose of securing the company's personnel and assets, and that crimes were committed in furtherance of that purpose, "[t]he critical issue will again be one of intention and knowledge: to what extent did the company official knowingly contribute to the commission of the crimes or the furtherance of the purpose?".[435] Among various factors that the courts may consider, foreseeability would be more likely, "where the security forces in question have a record of gross human rights abuses".[436] Furthermore, the Panel points out that "the level of proximity between the company and the security forces will

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[432] Ambos, *ibid.* at 172-173.

[433] Sliedregt, *supra* note 91 at 94-95. Slieregt describes that article 2(3) of the 1996 Draft Code of Crimes introduced a conspiracy-complicity concept generating liability only when a person "directly participates in planning or conspiring to commit such a crime *which in fact occurs*".

[434] Sliedregt, *supra* note 91 at 95.

[435] *ICJ Expert Panel Report,* Vol. II, *supra* note 286 at 43.

[436] *ICJ Expert Panel Report,* Vol. I, *supra* note 50 at 29.

usually be high".[437] Notably, "the company and the security forces will need to share a certain level of information. The security forces may be present on the company's premises, and/or have access to its equipment. At times the company may pay a fee to the security providers".[438]

Sub-section 3. Other Modes of Participation under the *Rome Statute*

Until the ICC future case law addresses the various modes of participation in international crimes provided under the *Rome Statute*, the *ad hoc* tribunals' jurisprudence describing such modes may be referred to for their definition under existing international criminal law.

Paragraph 1. Orders, Solicits or Induces under Article 25 (3) (b) of the Rome Statute

The ICTR/ICTY equivalent of "orders, solicits or induces" under article 25 (3) (b) of the *Rome Statute* is "planned, ordered, instigated" as incorporated in articles 6(1)/7(1) *ICTR/ICTY Statutes*.[439]

The term "inducing" is defined in Black's Law Dictionary as: "to bring on or about, to affect, cause, to influence an act or course of conduct, lead by persuasion or reasoning, incite by motives, prevail on".[440] According to Sliedregt, "inducing" in the *Rome Statute* "seems to constitute the lowest grade of instigation and is broad enough to cover any type of influence causing another person to commit a crime".[441]

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437 *Ibid.* at 29.
438 *Ibid.*
439 Sliedregt, *supra* note 91 at 78.
440 *Ibid.* at 77.
441 *Ibid.*

"Soliciting" in Black's Law Dictionary is defined as "asking, enticing, urgent request".[442]

With regards to "ordering", Slieregt refers to the existence of a superior-subordinate relationship, *de jure* or *de facto*, and an underlying (subordinate) crime. Furthermore, "ordering should be interpreted as implying issuance by a person 'who is in a position of an authority and uses his authority to compel another individual to commit a crime".[443]

Paragraph 2. Aiding and Abetting under Article 25 (3) (c) of the Rome Statute

Also similar to the statutes of the *ad hoc* tribunals, article 25 (3) (c) of the *Rome Statute* provides that individual criminal responsibility may be held against a person who aids, abets or otherwise assists in the commission or attempted commission of a crime for the purpose of facilitating its commission.[444] While there have been no cases heard by the ICC on this form of liability, the District Court of New York has cited a number of services and goods that a corporation can provide that would engage its responsibility under aiding and abetting liability of the *Rome Statute*. This includes the provision of information for use by interrogators, selling transportation vehicles, sale of computer and technology to support denationalization processes and other ethnic or racial discriminatory measures; and selling armaments and related equipment and expertise to assist governments or rebel groups in carrying out extrajudicial killings.[445]

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442 *Ibid.*

443 *Ibid.* at 78.

444 *Ibid.* 88.

445 *In re South African Apartheid Litigation*, 617 F. Supp. 2d 228 (SDNY 2009) at paras. 264-296 cited in Duane W. Krohnke, "US Federal Courts Rely on the *Rome Statute* of the International Criminal Court in Civil Cases", American Non-governmental Organization Coalition for the International Criminal Court (AMICC) (9 November 2009), online: AMICC <http://www.amicc.org/docs/Krohnke%20on%20Khulumani.pdf> (accessed 24 April 2010). The corporations referred to included GM, Ford, Daimler, IBM, Fujitsu Ltd, and Rheinmetall Group A.G.

Paragraph 3. Direct and Public Incitement to Genocide under Article 25 (3) (e) of the Rome Statute

The ICTR Trial Chamber described the *actus reus* of the offence of incitement to commit genocide as:

> "[d]irectly provoking the perpetrator(s) to commit genocide, whether through speeches, shouting or threats uttered in public places or at public gatherings, or through the sale or dissemination, offer for sale or display of written material or printed matter in public places or at public gatherings, or through the public display of placards or posters, or through any other means of audiovisual communication".[446]

The *mens rea* of this mode of liability would require an

> "intent to directly prompt or provoke another to commit genocide. It implies a desire on the part of the perpetrator to create by his actions a particular state of mind necessary to commit such a crime in the minds of the person(s) he is engaging".[447]

Consistent with the ICTR *Media Case* described in the previous chapter,[448] direct and public incitement to genocide is also prohibited under article 25 (3) (e) of the *Rome Statute*.

Paragraph 4. Attempt under Article 25 (3) (f) of the Rome Statute

Finally, article (3) (f) of the *Rome Statute* provides criminal responsibility for the attempt to commit an international crime. It is generally agreed that punishment for attempt is part of international customary law.[449]

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446 *Akayesu*, *supra* note 28 at para. 559. See Sliedregt, *supra* note 91 at 110.
447 *Akayesu, ibid.* at para. 559. See Sliedregt, *ibid.*

The codification of attempt under the *Rome Statute* is in fact novel compared to previous international criminal tribunals' Statutes. Indeed, conspiracy, incitement and attempt were included in relation only to the crime of genocide under articles 2(3)(b),(c) and (d)/4(3)(b),(c),(d) *ICTR/ICTY Statute*s. Article 25 of the *Rome Statute* no longer mentions conspiracy, retains incitement to genocide and extends the notion of attempt to all three crimes.[450] Rikhof differentiates the three by explaining that incitement consists in a suggestion, conspiracy in an agreement and attempt in an offence that had begun but was not yet been completed.[451]

This mode of participation under the *Rome Statute* is committed when a crime is commenced "by means of a substantial step".[452] Werle underlines that considerable doctrinal and jurisprudential efforts by the ICC lie ahead with regards to clarifying the legal requirements of attempt under this paragraph.[453]

Sub-section 4. Criminal Responsibility of Military Commanders and Other Superiors under Article 28 of the *Rome Statute*

The *Rome Statute* provides a more detailed description of superior responsibility compared to the statutes of the *ad hoc* tribunals. First, article 28 *Rome Statute* draws a clear distinction between military commanders in its paragraph (a) and non-military superiors in paragraph (b).[454]

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448 *Prosecutor* v. *Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze,* ICTR-99-52-T, Judgment (3 December 2003) (ICTR, Trial Chamber) [hereinafter, *The Media Case*, ICTR Trial Chamber] and *The Media Case*, *supra* note 291. Please refer to pages 65-66 above.

449 Gerhard Werle, *Principles of International Criminal Law* (The Netherlands, T·M·C Asser Press, 2005) at 168.

450 Rikhof, *supra* note 30 at 705.

451 *Ibid.*

452 *Rome Statute*, *supra* note 20, art. 25 (1)(f).

453 Gerhard Werle, *supra* note 449 at 169.

454 *Rome Statute*, *supra* note 20, art. 28.

Moreover, contrary to the possibility of invoking the "should have known" intent requirement under the *ad hoc* tribunals' Statutes, the bar is raised under the *Rome Statute* for non-military commanders who either knew or "consciously disregarded information which clearly indicated that the subordinates were committed or about to commit such crimes".[455] Thus, contrary to a military superior who must take the initiative of informing himself of his/her subordinates' activities, non-military superiors do not have a duty to inform themselves of every single one of the activities of persons under his control[456] nor are they required to control their subordinates "twenty-four hours in a day".[457]

Other relevant criteria to judge non-military superior responsibility are consistent with jurisprudence of the *ad hoc* tribunals. This includes the duty to take all reasonable measures to prevent or repress the crime[458] and that the subordinates who committed the crime were under the effective responsibility and control of the superior.[459]

Various authors agree that corporate actors could be held liable under the provisions of command responsibility within national jurisdictions as in the ICTR *Musema* and *Media* cases, described above.[460] The ICJ Experts Panel also expresses that "any company operating in countries in conflict, or where gross human rights violations or abuses are widespread or systematic, should be especially vigilant to exercise due diligence and put into place policies and procedures of management oversight to ensure that superiors take necessary and reasonable measures to prevent or punish acts committed by subordinates that could amount to crimes".[461] Particularly, the Panel indicates that corporate officials

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455 *Ibid.,* art. 28(b)(i).

456 Boisvert, Dumont & Petrov, *supra* note 356 at 132. See *Ruzindana*, ICTR Trial Chamber, *supra* note 363 at para. 228.

457 Boisvert, Dumont & Petrov, *ibid.* at 135.

458 *Ibid.* at 133.

459 *Procureur* c. *Aleksovski*, IT-95-14/1, arrêt d'appel (30 mai 2001), at para. 76 cited in *ibid.* at 118. The control may be granted by law or exist in facts (*Prosecutor* v. *Musema*, *supra* note 356, at para. 143).

460 Boisvert, Dumont & Petrov, *supra* note 356 at 109-111. See also *Manual for the Ratification and Implementation of the Rome Statute*, *supra* note 26 at 87.

461 *ICJ Expert Panel Report,* Vol. II, *supra* note 286 at 35.

operating in conflict zones conducting private security functions, or mining or resource companies which employ their own security personnel must exercise strict control over their employees for safety purposes.[462]

For instance, collaboration with the South African mercenary, Executive Outcomes, allowed the Sierra Leonean government to gain control of the diamond region Kono and fight the rebels out of this territory. This caught the attention of the international legal community on the agreements entered into between Executive Outcomes and Diamond Works, a Canadian company registered at the Toronto Stock Exchange.[463]

The superior responsibility of Executive Outcomes and Diamond Works over violations of international criminal law could not be addressed before the ICC under its jurisdiction which only extends to natural persons. It would therefore be necessary to identify the individual actors within the corporation who were the most highly involved and against whom the evidence most saliently points to their participation in crimes through their business dealings and operations.

The following section provides additional background on the limits of personal jurisdiction of the ICC, as well as the alternative possibility of resorting to national jurisdictions for prosecution of corporations for international crimes.

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462 *Ibid.*

463 Boisvert, Dumont & Petrov, *supra* note 356 at 109-111; Ian Smillie, Lansana Gberie & Ralph Hazleton, *The Heart of the Matter. Sierra Leone, Diamonds and Human Security* (Ottawa: Partnership Africa Canada, January 2000) at 9, online: Partnership Africa Canada <http://www.pacweb.org/Documents/diamonds_KP/heart_of_the_matter_summary-Eng-Jan2000.pdf> (accessed 21 October 2009); Alain Deneault, Delphine Abadie & William Sacher, *Noir Canada. Pillage, corruption et criminalité en Afrique* (Montréal, Écosociété, 2008) at 184-186; KAIROS, *Africa's Blessing, Africa's Curse. The Legacy of Resource Extraction in Africa* (Toronto: Thistle Printing Ltd., 2004) at 13.

Section 3. Personal Liability of the *Alter Ego* of a Corporation: Issues of Jurisdiction and the Complementarity Principle

As described above, the ICC solely has jurisdiction over natural persons and not over organizations or States.

Similarly to the jurisdiction of the *ad hoc* tribunals, corporate liability may be indirectly addressed before the ICC by prosecuting the individual *alter ego* of a corporation. Nevertheless, jurisdiction for international crimes extends beyond the boundaries of the ICC. Indeed, national jurisdictions still remain fully competent to resort to their own judicial authorities and legislation for the application of international criminal law. In this regard, Williams and Castel suggest that "the essence of a crime of international law would require that it belong to the jurisdiction of all States".[464] In fact, international criminal law privileges sovereignty and equality of States. These principles continue to dominate international relations.[465] Sovereignty is in fact so sacred that the State Parties to the Rome Conference chose to confer prerogative to national jurisdictions to judge international crimes before the ICC. As a result, the principle of complementarity was ultimately enshrined in the *Rome Statute*, under the provisions of its Preamble and article 1.[466]

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464 Dumont & Gallié, *supra* note 62 at 110.

465 Buck, *supra* note 55 at 125-126.

466 The *Rome Statute*, *supra* note 20 states in its preamble, paragraph 10: "Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions". Furthermore, according to article 1: "[a]n International Criminal Court ("the Court") is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, *and shall be complementary to national criminal jurisdictions*. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute." [emphasis added].

According to this principle, the inadmissibility of a case before the ICC is determined under the following circumstances:

> "(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
>
> (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute".[467]

Based on these provisions, authors Dumont and Gallié logically interpret that if a State party wishes to prosecute ICC crimes it should, at a minimum, enact legislation allowing it to apply territorial jurisdiction over such crimes and extra-territorial jurisdiction over its nationals who commit crimes abroad. States should also ensure the existence of laws and procedures to carry out such investigations and prosecutions in accordance with the relevant provisions of the ICC Statute; grant "universal" or other appropriate heads of jurisdiction to all relevant national authorities, in order to facilitate prosecution of ICC crimes at a national level, wherever and whenever they may have been committed; and implement procedures to enable relevant authorities to take full advantage of the Court's "complementary" jurisdiction.[468]

The complementarity principle led many States to enact international criminal law provisions in their national legislations. This has permitted the prosecution of corporations for international crimes in their jurisdictions. Thus, regardless of the omission of legal persons from the ICC's jurisdiction, Belgium, Canada, the Netherlands, the United Kingdom, France, Norway, India, Japan and the United States have also introduced some or

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467 *Rome Statute*, *ibid.* art. 17(1).

468 Dumont & Gallié, *supra* note 62, 106-107.

all of the international crimes contained within the *Rome Statute* into their domestic laws as applicable to legal persons and with varying degrees of extraterritorial reach".[469]

The next part of this thesis will focus on Canada's application of international criminal law as a case study on the accountability of corporations for international crimes within a national jurisdiction.

Part II : Canadian Corporations as Subjects of Liability for International Crimes under Canadian Criminal Law

The possibility of prosecuting corporations for criminal offences in Canada is a combined product of common law, jurisprudence and legislative developments. The Supreme Court of Canada first addressed the accountability of corporations for *mens rea* crimes in 1985 in the case of *R. v. Canadian Dredge & Dock Co* [hereinafter, "*Dredge*"].[470] According to the court's judgment, corporations have been subjects liable for indictable and regulatory offences for several decades in most common law jurisdictions, including the United Kingdom, Australia, New Zealand, the United States and Canada.

With respect to accountability of corporations for international crimes, Canada deposited its instrument of ratification to the *Rome Statute* on 7 July 2000. According to sub-section 11 (g) of the *Canadian Charter of Human Rights and Freedoms*, a person may be found guilty of an act or an omission if it constituted an offence under Canadian or international law and was criminal according to the general principles of law recognized by the community of nations.[471] Nevertheless, since Canada practices a dualist approach with respect to the domestic effect of international treaties, the implementation of international

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469 *2004 FAFO Report*, *supra* note 78 and Kyriakakis, *supra* note 78.

470 *Dredge*, *supra* note 378. This case also refers to two previous decisions by lower instance courts, *R. v. Fane Robinson Ltd.*, [1941] 3 D.L.R. 409 and *R. v. St. Lawrence Corp.*, [1969] 2 O.R. 305 (C.A.), having previously addressed the issue of corporate liability for *mens rea* crimes based on common law jurisprudence imported from England.

criminal law of the *Rome Statute* on its territory requires the adoption of national legislation.[472] Consistently, Canada adopted CAHWCA[473] in 2000.

The second part of this thesis will describe the legal construction under which responsibility for international crimes may be attributed to corporations through the combined application of Canadian criminal law, CAHWCA and international criminal law.

Chapter 1: Notorious Examples of Alleged Criminal Activities and Potential Violations of International Criminal Law by Canadian Corporations

Multinational corporations often carry out operations that generate profits on various territories. They may have a principal residence in one country, with their headquarters located in another and several subsidiaries in other countries rich in specific resources, or with considerable space or a targeted market of customers. Examples of this corporate activity may be drawn from various sectors of industry.

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471 *Charter of human rights and freedoms*, R.S. Q. c. C.-12, art. 11(g).

472 This rule of British origin was set out by the Judicial Committee of the Privy Council in the 1937 *Labor Conventions* case, where Lord Atkin famously wrote: "Within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action." (*Attorney General for Canada* v. *Attorney General for Ontario* [1937] AC 326 (PC)). Within the federal constitutional system of Canada, such legislative transformation of treaty obligations must be done by the legislative authority competent on the matter, under sections 91 and 92 of the Constitution Act 1867. In this regard, see J. W. Perry, "At the Intersection— Australian and International Law", (1997) 71 Australian LJ 841; and S. Donaghue, "Balancing Sovereignty and International Law: The Domestic Impact of International Law in Australia", (1995) 17 Adelaide L Rev 213; and *Labor Conventions* case, at 351, all cited in Elisabeth Eid, "Interaction Between International and Domestic Human Rights Law: A Canadian Perspective" (Paper presented to the Sino Canadian International Conference on the Ratification and Implementation of Human Rights Covenants, Beijing, China, October 2001) at 2, online: ICCLR <http://www.icclr.law.ubc.ca/Publications/Reports/E-Eid.PDF> (accessed 25 April 2010). See also *Charter of human rights and freedoms*, *supra* note 471 and Hélène Dumont, La réception du droit international pénal en droit interne à la lumière de l'affaire Mugesera : le Canada aurait-il deux faces de Janus? (2007) 1 Revue de science criminelle et de droit pénal comparé 187 at 189.

473 CAHWCA, *supra* note 24.

Section 1. Illustrative Case Studies of Impunity of Corporations despite Publicized Allegations of Violations of International Criminal Law

In the past three decades, there has been a considerable increase of multinational corporate activities across the world. In 2003, UNCTAD reported that "the share of global GDP generated by MNEs has doubled over the past 25 years. In 2002, value-added by MNEs (3.4 trillion USD) accounted for approximately 10 percent of global GDP, or twice the 1982 percentage".[474]

This remarkable expansion has outpaced the development of corporate liability under international criminal law, thereby creating a shortage of laws governing the conduct of multinationals in territories where violations of human rights and international criminal law are rampant. The SRSG on Business and Human Rights refers to this situation as a "governance gap" created by globalization, which "provides the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation".[475]

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474 UNCTAD, *World Investment Report 2003: FDI Policies for Development: National and International Perspectives*, at 23, U.N. Doc. UNCTAD/WIR/2003, Sales No. E.03.II.D.8, (2003), cited in Hansen, *supra* note 41 at 412.

475 John Ruggie, *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development. Protect, Respect and Remedy: a Framework for Business and Human Rights. Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, 8th Sess., 2008, A/HRC/8/5, at 3, online: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/128/61/PDF/G0812861.pdf?OpenElement> (accessed 25 April 2010) [hereinafter, *2008 SRSG on Business and Human Rights Report*].

In Canada, it has been recognized that extractive industries, i.e. mining, oil and gas, operating in foreign territories where international crimes occur, make a major contribution to the nation's prosperity. The Government of Canada has in fact reported that:

> "[a]t about $79.3 billion in 2007, mining and energy investment is the third-largest component of Canadian direct investment abroad (stocks), generating significant additional exports from Canada. (...) In 2008, over 75 percent of the world's exploration and mining companies were headquartered in Canada. These 1293 companies had an interest in some 7809 properties in Canada and in over 100 countries around the world."[476]

Canadian MNC's are active in many regions of the world. The Canadian Government indicates that simply between 1992 and 1995, foreign properties owned by national mining firms had grown by twenty percent (20) and that the majority of these projects, close to six hundred (600) existed in Africa alone.[477] In Columbia, one of the most prosperous countries of the South American continent in terms of natural resources, Canadian direct investment stock is reported to amount to $453 million in 2006.[478] According to the Ministry of Mines and Energy of Columbia, fifty-two (52%) of foreign companies investing in mining in Colombia are Canadian.[479]

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476 DFAIT Canada, *Building the Canadian Advantage: A Corporate Social Responsibility (CSR) Stategy for the Canadian International Extractive Sector* (Ottawa: DFAIT, March 2009) at 3, online: DFAIT <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/CSR-March2009.pdf> (accessed 25 April 2010).

477 DFAIT Canada, *Mining in Developing countries – Corporate Social Responsibility. The Government's Response to the Report of the Standing committee on Foreign Affairs and International Trade* (Ottawa: DFAIT, October 2005) at 2, online: DFAIT <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/scfait-response-en.pdf> (accessed 25 April 2010).

478 Agriculture and Agri-Food Canada, *Agri-Food Past, Present & Future Report – Colombia* (Ottawa: Agriculture and Agri-Food Canada, November 2007), online: Agriculture and Agri-Food Canada . <http://www.ats-sea.agr.gc.ca/lat/3854_e.htm> (accessed 26 August 2009) in *Ibid.* at 11.

479 República de Colombia, Ministerio de Mina y Energía, Colombia Minera: Desarrollo Responsable, n.d. Retrieved June 11, 2009 from http://www.cafedecolombia.com/eventos/grupodenotables/docs/Octubre6de2008SeminarioDeInversion/MiningSector.pdf, cited in Mining Watch Canada and CENSAT-Agua Viva, *Land and Conflict: Resource Extraction, Human Rights and Corporate Social Responsibility: Canadian Companies in Colombia*, Report prepared for InterPares (Ottawa: InterPares, September 2009), at 11-12, online: InterPares <http://www.interpares.ca/en/publications/pdf/Land_and_Conflict.pdf> (accessed 25 April 2010) [hereinafter, *InterPares Report*].

This thesis will focus on four concrete examples of Canadian multinationals, subjected to public and legal scrutiny concerning their past and ongoing activities and alleged involvement in armed conflicts on the African and South American continents: the Democratic Republic of the Congo, Sierra Leone, Colombia and Sudan.

Sub-section 1. The Democratic Republic of the Congo

The Democratic Republic of the Congo (hereinafter, the "DRC") is located in the heart of equatorial central Africa with an area of 2,267,600 square kilometres and a population of 62.6 million people.[480] The key mineral resources in the country, gold, coltan, diamonds, copper and cobalt[481] as well as favourable conditions, have created the setting for the current ongoing occupation and struggle to exploit these natural resources.[482]

In this regard, the ICC Chief Prosecutor, Luis Moreno Ocampo "stated in September 2003 that crimes committed in Ituri (Congo) appear to be directly linked to control of resource extraction sites and that 'those who direct mining operations, sell diamonds or

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480 "Country Profile: Democratic Republic of Congo" *BBC News* (last updated 10 February 2010), online: BBC News <http://news.bbc.co.uk/2/hi/africa/country_profiles/1076399.stm> (accessed 25 April 2010).

481 *Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo*, Annex to United Nations Security Council, Letter dated 12 April 2001 from the Secretary-General to the President of the Security Council, S 2001/357 (12 April 2001) at 10-11 (diamonds) [hereinafter, *UN Panel of Experts Report 2001*]; *Addendum to the report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo,* Annex to United Nations Security Council, Letter dated 10 November 2001 from the Secretary-General to the President of the Security Council, S 2001/1072 (13 November 2001) at 8 (gold, copper, cobalt) [hereinafter, *Addendum to the UN Panel of Experts Report 2001*]; *Final report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo*, Annex to United Nations Security Council, Letter dated 15 October 2002 from the Secretary General addressed to the President of the Security Council, S/2002/1146 (16 October 2002) at 16 (coltan) [hereinafter, *Final Report of the UN Panel of Experts 2002*]; online: United Nations <http://www.un.org/Docs/sc/letters/2001/sglet01.htm> for exchange of letters in 2001 & <http://www.un.org/Docs/sc/letters/2002/sglet02.htm> for exchange of letters in 2002 (accessed 25 April 2010).

482 *UN Panel of Experts Report 2001*, *ibid.*

gold extracted in these conditions, launder the dirty money or provide weapons could also be authors of the crimes, even if they are based in other countries'".[483]

Corruption in the DRC dates back from its colonization by Belgium and following its independence in 1965, under the dictatorship of Joseph Mobutu Sese Seko.[484] In 1996, the Alliance of Democratic Forces for the Liberation of Congo-Zaire (hereinafter, the "AFDL"), a rebel movement led by the late Laurent-Désiré Kabila, conquered eastern Zaire and ousted Mobutu Sese Seko as President with the support of Angolan, Rwandan and Ugandan forces.[485] A rift between Mr. Kabila and his former allies sparked a new rebellion in the country with groups backed by Uganda and Rwanda as of 2 August 1998. This second war became known as "Africa's first world war", resulting in the deaths of 3.5 million people.[486]

Further instability occurred after the assassination of Laurent Kabila in 2001.[487] The following year, the *Sun City Global and All Inclusive Peace Agreement* was signed. A transitional government was set up in June 2003 with Joseph Kabila, son of Laurent Kabila, as leader of the nation.[488] Nevertheless, despite the withdrawal of foreign troops, economic interests and criminal groups, linked to the armies of Rwanda, Uganda, Zimbabwe and the DRC continued to benefit from micro-conflicts existing in the country.[489]

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483 Luis Moreno-Ocampo, *Report of the Prosecutor of the International Criminal Court to Second Assembly of States Parties to the Rome Statute*, 8 September 2003 in Human Rights Watch, *The Curse of Gold* (New York: HRW, June 2005), online: Anglo Gold Corp. <http://www.anglogold.com/NR/rdonlyres/CBB6C75C-EE9C-439E-962F-DDB5C52FB968/0/HRWDRCreport.pdf> (accessed 25 April 2010).

484 "Country Profile: Democratic Republic of Congo", *supra* note 480.

485 *UN Panel of Experts Report 2001*, *supra* note 481.

486 *Ibid.* at 7, "Country Profile: Democratic Republic of Congo", *supra* note 480, Human Rights Watch, *supra* note 483 at 12.

487 "Country Profile: Democratic Republic of Congo", *ibid.*

488 Human Rights Watch, *supra* note 483 at 12.

489 *Final Report of the UN Panel of Experts 2002*, *supra* note 481 at 5.

In 2005, various business transactions and agreements existing on the Congolese territory were studied by the *Congolese Special Parliamentary Commission Charged with Examining the Validity of Economic and Financial Agreements Signed during the 1996-1997 and 1998 Wars*.[490] The primary mission of this commission, set up in 2003 was to assess the legality of contracts signed in the DRC during the two armed conflicts.

The report of the Commission, surnamed the *Lutundula Report* after its Chairman, Christophe Lutundula Atola, provides a detailed examination of various contracts with foreign companies in the DRC. Among others, the Canadian companies, Lundin Group, Banro, Mindev, Barrick Gold, South Atlantic Resources, Anvil Mining, American Mineral Fields and Tenke Mining, were identified as having established contracts under the Mobutu era or directly with the AFDL forces prior to their taking of power. Meanwhile, the DRC's two largest mining companies, previously State-owned under the Mobutu regime, Bakwanga Mining and Gégamines, have been severely deprived in their share of the profits under the weak government administration.[491]

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490 This commission was set-up in the DRC pursuant to Resolutions DIC/CEF/04 and DIC/CEF/01 of the Inter-Congolese Dialogue in Sun City, South Africa in 2003, attended by delegates of the Government of the Democratic Republic of Congo, the Congolese Rally for Democracy, the Movement for the Liberation of Congo, the main organizations and parties of the political opposition as well as representatives of the *forces vives* of the Country, the Congolese Rally for Democracy-Liberation Movement, the Congolese Rally for Democracy-National and the Mai-Mai, at Sun City, Republic of South Africa, on 2 April 2003. *Inter-Congolese Political Negotiations. Final Act*, Inter-Congolese Dialogue, Sun City, South Africa, April 2003, online: Congonline <http://www.reliefweb.int/library/documents/2003/ic-drc-2apr.pdf> (accessed 21 October 2009).

491 Assemblée nationale, Commission spéciale chargée de l'examen de la validité des conventions à caractère économique et financier conclues pendant les guerres de 1996-1997 (« Commission Lutundula »), *Rapport des travaux – 1ère partie* (Kinshasa, Commission Lutundula, 2005), at 8, online : Congonline <http://www.congonline.com/documents/Rapport_Lutundula_pillage_2006.pdf> (accessed 25 April 2010) [hereinafter, *Lutundula Report*].

The report describes the situation as follows:

> *« L'absence d'un Etat exerçant une autorité réelle partout sur un territoire vaste de 2.345.000 Km2, la situation de guerre et l'instabilité politique créent une opportunité de prédation à grande échelle qui transforme la République Démocratique du Congo en un espace économique de libre-service où se croisent les réseaux les plus divers et se côtoient les hommes d'affaires de tous calibres et horizons pour exploiter le cuivre, le cobalt et les métaux associés, le diamant, l'or, la cassitérite, le coltan, le bois, le café…De deux côtés de la ligne de front se développe une économie de guerre (…)».*[492]

The *Lutundula Report* caused significant controversy and was only released on February 20, 2006.[493] Prior to the report, however, in 2000, the United Nations Security Council had already expressed concern that the quest for Congo's natural resources was the principal cause of the deadly war. As a result, a panel of experts was appointed, the *U.N. Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of Congo* (hereinafter, the "U.N. Panel of Experts"), to look into the matter.

In its separate report, the U.N. Panel of Experts underlined the role that domestic and foreign companies played in financing the armed conflicts of the DRC as follows:

> "The role of the private sector in the exploitation of natural resources and the continuation of the war has been vital. A number of companies have been involved and have fuelled the war directly, trading arms for natural resources. Others have facilitated access to financial resources, which are used to purchase weapons. Companies trading minerals, which the Panel considered to be 'the engine of the conflict in the Democratic Republic of the Congo' have prepared the field for illegal mining activities in the country'".[494]

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492 *Ibid.* at 9.

493 "Kinross Gold and Katanga Mining: Part of the Pillage of the Democratic Republic of Congo?", *Mining Watch Canada* (Saturday, 8 April 2006), online: Mining Watch Canada <http://www.miningwatch.ca/en/kinross-gold-and-katanga-mining-part-pillage-democratic-republic-congo> (accessed 25 April 2010).

494 *UN Panel of Experts Report 2001*, *supra* note 481 at 41-42.

The U.N. Panel of Experts' report, released in 2002, provided a list of companies which directly or indirectly "contribute to the ongoing conflict and to human rights abuses", in violation of the *OECD Guidelines for Multinational Enterprises*.[495] Among these companies, the Panel identified five Canadian companies: First Quantum Minerals, Harambee Mining Corporation, International Panorama Resources Corp., Melkior Resources Inc. and Tenke Mining Corporation.[496]

No further investigations were conducted on the activities of the companies listed in 2002 by the Panel of Experts. Moreover, the final report of the U.N. Panel of Experts in 2003 determined that all issues with the forty-two companies on the list had been resolved.[497] It did however add an "important caveat in their final report stressing that 'resolution should not be seen as invalidating the panel's earlier findings with regard to the activities of these [companies]".[498]

In addition to the companies mentioned above, on 17 October 2006, a military judge in the DRC stated that three former employees of a Canadian mining company Anvil Mining Ltd. (hereinafter, "Anvil Mining") should face prosecution for complicity in war crimes committed in the village of Kilwa at the Dikulushi mine in October 2004.[499] One of the accused individuals was Pierre Mercier, a Canadian manager of Anvil.[500] Such

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495 *OECD Guidelines*, *supra* note 5.

496 *Report of the UN Panel of Experts 2002*, *supra* note 481 at Annex III, 8-9.

497 *Final report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo*, Annex to United Nations Security Council, Letter dated 23 October 2003 from the Secretary-General addressed to the President of the Security Council, S/2003/1027 at 9 (para. 23), online: United Nations <http://www.un.org/Docs/sc/unsc_presandsg_letters03.html> (accessed 26 April 2010) [hereinafter, *Final Report of the UN Panel of Experts 2003*].

498 *Ibid.* See Human Rights Watch, *supra* note 483 at 64.

499 Kelly Patterson, "African Tribunal cites Canadian company for role in massacre"; *Ottawa Citizen*, (17 October 2006) online: National Post <http://www.nationalpost.com/news/story.html?id=d7c6d1ea-3fb7-4a10-84df-9595122e8908&k=15342> (accessed 2 February 2009).

500 *Ibid.* See also, Andrew Geoghagan, "Australian Mining Company Cleared of Congo War Crimes", *Australian Broadcasting Commission* (29 June 2007), online: ABC <http://www.abc.net.au/news/stories/2007/06/29/1965195.htm?section=justin> (accessed 2 February 2009) *(*South Africans Peter Van Niekerk and Cedric Kirsten faced the same charge); Joe Bavier,

accusations followed a report by the United Nations Organization Mission in the Democratic Republic of Congo (hereinafter, "MONUC"), published in 2005, which found that the copper-mining company's subsidiary loaned a plane and vehicles to the Congolese government troops, the *Forces armées de la République Démocratique du Congo* (hereinafter, the "FARDC"). It also stated that Anvil drivers helped transport corpses after the massacre. The soldiers killed between seventy to a hundred civilians, including women and children, to suppress a rebellion led by a poorly organised and underfunded group, the Movement for the Liberation of Katanga Province.[501] Nevertheless, in June 2007, the president of the military tribunal, Colonel Joseph Moskako, acquitted the three accused employees qualifying the claims as groundless.[502]

Aside from the Australian Federal Police investigation, Anvil Mining was also "being investigated by Canadian authorities over their possible role in assisting in the conduct of hostilities".[503] Such investigations could eventually lead to a prosecution of the corporation before Canadian courts.[504] It must be acknowledged however that a prosecution against Anvil Mining may prompt a number of credible defences, such as the absence of criminal intent and the right to defend its employees.

"Congo Court Acquits Anvil Employees", *News.com.au* (29 June 2007), online: News.com.au <http://www.news.com.au/story/0,23599,21987977-29277,00.html> (accessed 2 February 2009).

501 Patterson, *supra* note 499. See also United Nations Mission in the Democratic Republic of Congo (MONUC), *Report on the Conclusions of the Special Investigation into Allegations of Summary Executions and Other Violations of Human Rights Committed by the FARDC in Kilwa (Province of Katanga) on 15 October 2004* (MONUC Report, 2005) at para. 22, online: ABC <http://abc.net.au/4corners/content/2005/MONUC_report_oct05.pdf> (accessed 2 February 2009) [hereinafter, *MONUC 2005 Report - Anvil*].

502 Geoghagan, *supra* note 500 and Bavier, *supra* note 500.

503 Kyriakakis, *supra* note 377, at 813.

504 *Criminal Code*, *supra* note 31, art. 6(6) states that "[w]here a person is alleged to have committed an act or omission that is an offence by virtue of this section and that person has been tried and dealt with outside Canada in respect of the offence in such a manner that, if that person had been tried and dealt with in Canada, he would be able to plead *autrefois acquit*, *autrefois convict* or pardon, that person shall be deemed to have been so tried and dealt with in Canada." In the case of prosecution of Anvil before Canadian courts, the person accused would be the corporation, contrary to its representatives that were prosecuted before the Congolese military tribunal. Therefore, the principle of *res judicata* would not apply.

In fact, when asked about its involvement in the Kilwa massacre:

> "Anvil confirmed it loaned a plane and vehicles to the army, but said it 'had absolutely no choice' but to accede to a government request for logistical support. 'When the army arrives with AK-47s ... you give them what they want,' said Anvil spokesman Robert LaValliere, recalling that troops had commandeered vehicles at gunpoint in a previous clash with rebels earlier that year. He added that companies are obliged by law to comply with Congolese government requests."[505]

MONUC's report of the massacre also confirmed that the insurgents had become "more aggressive" towards the employees of Anvil mining at the company's petrol depot, when they refused to help them communicate with the "white people" of the company.[506]

If a Canadian national jurisdiction were seized of this case in the future, the court would have the difficult task of weighing various ethical considerations and ambiguous decisions that were made under the violent circumstances of war. Furthermore, jurisdictional issues may arise with regards to the control of Anvil Mining over its subsidiary in the RDC.

Before studying such legal questions on jurisdiction that will be analyzed in the last chapter of this thesis, the following paragraphs describe the 1991-1999 armed conflict in Sierra Leone, another example of an African country where Canadian mining companies operations are interwoven in the web of politics and violence, raising questions of corporate participation in international crimes.

Sub-section 2. Sierra Leone

After a period of colonization by the British Empire that began in 1808, Sierra Leone gained its independence in 1961.[507] For the two following decades, the despotic

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505 Patterson, *supra* note 499.
506 MONUC 2005 Report, *supra* note 501.

Government of the All People's Congress, led by Siaka Stevens, ruled the country until Stevens' retirement and replacement by Major-General Joseph Saidu Momoh.[508]

In 1991, a civil war broke out with a rebellion led by former army corporal Foday Sankoh and his party, the Revolutionary United Front (hereinafter, "RUF"). A succession of military coups followed thereafter. The election of President Ahmad Tejan Kabbah in 1996 created a brief period of stability, until he was ousted by Major Johnny Paul Koroma of the Armed Forces Revolutionary Council (hereinafter, "AFRC") in 1997. Kabbah fled to Guinea to mobilize international support.[509]

In October 1997, the UN Security Council imposed sanctions against Sierra Leone, barring the supply of arms and petroleum products. In March 1998, Kabbah returned to power.

The consequences of this war were abominable in terms of human lives and destruction. In fact, "between 1991 and 1999, the war took over 75,000 lives, caused half a million Sierra Leoneans to become refugees, and has displaced half of the country's 4.5 million people".[510]

A peace accord between the government and the RUF was signed in July 1999 and the war officially ended in January 2002, as declared by the United Nations. One year later, Kabbah won a landslide victory in national elections. In 2004, a UN-backed war crimes tribunal opened courthouse to try senior militia leaders from both sides of the civil war. Finally, in August 2007, Ernest Bai Koroma won the presidency after national

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507 "Timeline: Sierra Leone", *BBC News* (published 18 June 2008), online: BBC NEWS <http://news.bbc.co.uk/go/pr/fr/-/2/hi/africa/country_profiles/1065898.stm> (accessed 6 February 2009).

508 Smillie, Gberie & Hazleton, *supra* note 463 at 9.

509 "Timeline: Sierra Leone", *supra* note 507.

510 Smillie, Gberie & Hazleton, *supra* note 463 at 9.

elections and his party, the All People's Congress, formerly in opposition, obtained a majority in parliament.[511]

In the aftermath of the peace accord and presidential election, the Sierra Leone Working Group (hereinafter, "SLWG"), created under the auspices of the Canadian and African NGO coalition, Partnership Africa Canada, published a study entitled *Heart of the Matter* on the problems related to mining and selling diamonds inside Sierra Leone and internationally. According to the SLWG, diamonds were central to the conflict in Sierra Leone and as a result, a highly criminalized war economy had developed a momentum of its own.[512]

The authors allege that the Canadian firm, DiamondWorks, registered on the Toronto stock exchange, and its acquisition, Branch Energy Ltd., a private company registered on the Isle of Man, had "apparent but much-denied connections" with the two major international security firms, Executive Outcomes (hereinafter, "EO") and Sandline, operating in Sierra Leone.[513] In particular, in 1995, EO provided 200 soldiers, air support and sophisticated equipment in order to push the RUF back from Freetown within a week and clear the major diamond areas of Kono.[514] Sandline, a British security company, is the only company, according to BBC News, that continued to supply "logistical support" including rifles to Kabbah allies despite the 1997 UN Security Council embargo imposed on the supply of arms.[515]

The SLWG claims that shortly after EO took control of the diamond areas, Branch Energy secured a 25-year lease on Sierra Leonean diamond concessions.[516] Furthermore, in 1995, DiamondWorks' Sierra Leone country manager was seconded – as a "private citizen"

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511 "Timeline: Sierra Leone", *supra* note 507.
512 Smillie, Gberie & Hazleton, *supra* note 463 at vii (Preface).
513 *Ibid.* at 7.
514 *Ibid.*
515 *Ibid.* at 7.

– to Sandline, in connection with a controversial arms' shipment intended for the briefly exiled government of Tejan Kabbah.[517]

These same events are reported by several other authors, including Deneault, Delphine and Sacher in *Noir Canada*[518] and the 2004 Report of KAIROS organization, entitled *Africa's Blessing. Africa's Curse. The Legacy of Resource Extraction in Africa*.[519]

Dealings with security personnel on the field have caused other organizations in the world to question activities of multinationals in high legal-risk zones marred by decades-long violent conflict and armed rebellion. For instance, corporations operating in Colombia, including Canadian corporations, have recently been exposed to a level of scrutiny and questioning over the legality of their agreements with government troops or paramilitary elements.[520]

Sub-section 3. Colombia

One of the most renowned and dangerous conflicts currently taking place in Colombia, the fourth largest country of South America, has been greatly motivated by the abundance of natural resources of this country. Initially, this rich territory drew Spanish conquerors in 1525, who were later defeated by Simon Bolívar, a Venezuelan political leader and his troops in 1819 in their struggle for the independence of Latin America. Thereafter, the Republic of Grán Colombia was formed with Panama, Ecuador and Venezuela. The separation of the two latter countries in 1830 dissolved the Grán Colombia. A forty-five year dictatorship followed by the Conservative Party. Decades of violent and political conflict between Conservatives and Liberals ensued and eventually, a truce was

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516 *Ibid.*
517 *Ibid.*
518 Deneault, Abadie & Sacher, *supra* note 463 at 184-186.
519 KAIROS, *supra* note 463 at 13.
520 *InterPares Report*, *supra* note 479 at 6.

agreed upon in 1958, creating a coalition party, the National Front, and banning all other parties from political power.

Colombia's prosperity in oil reserves, gold, silver, emeralds, platinum and coal have encouraged other parties to fight for power and control over its territory against the National Front.[521] This resulted in the creation of various rebel groups and opposition parties in the 1960s and 1970s, including the Leftist National Liberation Army and Maoist People's Liberation Army, the Revolutionary Armed Forces of Colombia (hereinafter, "FARC"), the National People's Alliance, and the Left-wing M-19 guerrilla group.[522] The largest of the guerrilla groups is currently the FARC. It is heavily funded by the drug trade and has been fighting with the national government for over four decades with an escalation of conflict in the 1990s.[523]

Since the election of President Alvaro Uribe Velez on 7 August 2002, violence has decreased, but the United States' Central Intelligence Agency reports:

> "insurgents continue attacks against civilians and large areas of the countryside are under guerrilla influence or are contested by security forces. More than 31,000 former paramilitaries had demobilized by the end of 2006 and the United Self Defense Forces of Colombia (AUC) as a formal organization had ceased to function. In the wake of the paramilitary demobilization, emerging criminal groups arose, whose members include some former paramilitaries."[524]

A report prepared by Mining Watch Canada and the Colombian nongovernmental organization, CENSAT-Agua Viva, for another Canadian NGO, InterPares (hereinafter,

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521 "Country Profile: Colombia", *BBC News* (last updated 27 February 2010), online: BBC News <http://news.bbc.co.uk/2/hi/americas/country_profiles/1212798.stm> (accessed 26 April 2010).

522 "Timeline: Colombia", *BBC News* (last updated 27 February 2010), online: BBC News <http://news.bbc.co.uk/2/hi/americas/country_profiles/1212827.stm> (accessed 26 April 2010).

523 "Colombia", *CIA World Factbook* (last updated 21 April 2010), online: CIA World Factbook <https://www.cia.gov/library/publications/the-world-factbook/geos/co.html> (accessed 26 April 2010).

524 *Ibid.*

the "*InterPares Report*") has studied various allegations of implication of Canadian companies in Colombia's armed conflict.[525]

According to the *InterPares Report*, paramilitaries and their successors control between two and seven million hectares of stolen land.[526] Furthermore, there seems to be a relationship between the displacements and conflict in Colombia and the resources of the country. Indeed, "resource-rich regions are the source of 87 per cent of forced displacements, 82 per cent of the violations of human rights and international humanitarian law, and 83 per cent of murders of union leaders".[527] A UN Report in 2006 similarly noted that "the conflict has been complicated by interests in the cocoa industry and the development of new plantation farms for bananas and palm oil-producing trees, the illegal drug trade and exploitation of huge deposits of oil and other mineral resources found across the country's major regions."[528]

The *InterPares Report* refers to questionable activities of certain multinationals to secure their investments, which have directly and/or indirectly supported paramilitary groups. The latter function as irregular forces for territorial consolidation in extractive projects, whether operating on their own or under a more explicit understanding with transnational corporations.[529] In particular, "[b]oth the high levels of violence and the

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525 *InterPares Report*, *supra* note 479 at 6.

526 *Ibid.* at 4.

527 Interview with Francisco Ramírez, President of SINTRAMINERCOL (Colombian Union of Mine Workers), Bogotá, July 28, 2008 (cited in *ibid.* at 2). The categories of population the most severely displaced are 74% women and children and 8% indigenous people. Indigenous and Afro-Columbians remain disproportionately affected by displacement: UNHCR, *The State of the World's Refugees 2006*, April 2006. Box 7.4 (cited in *ibid.* at 5). On a global perspective, Colombia is second only to Sudan as the country with the most internally displaced people in the world. Human Rights Watch, *Breaking the Grip? Obstacles to Justice for Paramilitary Mafias in Colombia*, October 2008 (cited in *ibid.* at 5).

528 UN, E/CN.4/2006/56/Add.1, (Geneva: United Nations, 17 January 2006) at para. 13 and 56, cited in *ibid.* at 6.

529 *Ibid.* at 5

presence of illegal armed groups raise serious concerns about the potential for Canadian investment to benefit from or be complicit in the conflict"[530].

Namely, the *InterPares Report* identified certain legal risks for the companies who contracted with the Colombian Army for private security services, "[g]iven the documented relationship between the Army and Carlos Castaño's AUC (Autodefensas Unidas de Colombia or United Self-Defence Forces of Colombia) paramilitaries".[531] In fact, the Army itself is alleged to be responsible for massive and serious human rights abuses and its operations are designed to protect the interests of international mining companies in the area."[532]

For example, in February 2007, B2Gold, a Canadian company, acquired the rights of Avasca Andean Resources in a joint-venture exploration project in Sur de Bolívar with AngloGold Ashanti, a South African company operating in the region since 2003, and its subsidiary, Kedaha SA.[533] According to an interview with B2Gold conducted by InterPares, its security department works exclusively with the Colombian Army.

Similarly, B2Gold, as well as another Canadian company, Colombia Goldfields Ltd., are carrying out mining operations in the department of Antioquia, with one of the highest rates of violence and forced displacement in Colombia.[534] It is alleged that through security arrangements with the Colombian government "[p]eople have been dispossessed and removed from the community to make way for mega-mining projects"[535] of these companies.

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530 *Ibid.* at 2.
531 *InterPares Report*, *ibid.* at 21.
532 Amnesty International, AMR 23/001/2007 (July 2007), cited in *ibid.* at 22.
533 *InterPares Report*, *ibid.* at 26. (B2Gold's website may be found at: <http://www.b2gold.com/corporate/directors-and-management.aspx> (accessed 26 April 2010).
534 *InterPares Report*, *ibid.* at 44.
535 *Ibid.*

Another security alliance with the Colombian Army was established with Greystar Resources Ltd., a Canadian mining corporation, which first came to the region in 1995. The *InterPares Report* alleges that, previous to the year 2000, Greystar "had a relationship of 'coexistence' with insurgents, a reflection of its keen awareness of the absence of the State and the control exercised by the guerrillas", such as FARC.[536] It left the country after one of its executives was kidnapped by guerrillas but returned in 2003, after President Uribe came into power.[537]

It seems that, in the interest of securing its commercial operations, Greystar has indirectly become involved in the political violent climate of the country once again. More specifically, Greystar "provided logistical support to establish a base for security operations in the area, and part of the troops' mandate is to ensure the viability of mining operations".[538] Perhaps coincidentally, InterPares reports that Greystar's return to the area was preceded by a series of military operations, including one particularly extensive campaign.[539] According to the *InterPares Report*, "[s]oon thereafter, the Army was able to re-establish control over the area and put in place sufficient controls that Greystar could return.[540]

Finally, InterPares refers to the case of Nexen Inc., the third largest oil exploration company in Canada, operating in partnership with Repsol, a Spanish-Argentine energy company in an exploration oil drilling project located in the department of Tolina. This property is owned by the aforementioned companies in association with the Colombian and Brazilian oil production companies, Ecopetrol and Petrobras.[541] Most oil companies operating in this area employ ex-members of the Colombian security forces.[542] Although

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536 *Ibid.* at 36.
537 *Ibid.*
538 *Ibid.* at 37.
539 *Ibid.*
540 *Ibid.*
541 *Ibid.* at 52.
542 *Ibid.* at 53.

Nexen's policies seem to be very thorough and respectful of recognized CSR standards, according to the *InterPares Report*, its partnerships, security arrangements and operations in a high-conflict zone have generated risks of benefitting from earlier appropriation of lands and titles, contributing to consolidation of paramilitaries in new groupings and to marginalization of Indigenous peoples and Afro-Colombians.[543]

These examples have not been investigated by Canadian authorities, but the *InterPares Report* nevertheless represents one witness account of potential violations of international criminal law by Canadian corporations.

Another alleged demonstration of the interrelatedness of commercial oil operations and violence is linked to the ongoing armed conflict in the Republic of Sudan and the operations of Talisman Energy, addressed by the U.S. District Court for the Southern District of New York.[544]

Sub-section 4. Sudan

Sudan is the largest country in Africa with a population of approximately 39.4 million people.[545] The Sudanese conflict dates back to the period when it was a British-Egyptian condominium from 1898 to 1956. After the First World War, the British Colonial Rule established the "Southern Policy" which "proscribed the teaching of Arabic

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543 *Ibid.* at 56.

544 *Presbyterian Church of Sudan* v. *Talisman Energy, Inc*., 453 F. Supp. 2d 633 (S.D.N.Y. 2006) 01 Civ. 9882 (DLC) (Opinion & Order), online: Business & Human Rights Resource Centre <http://www.nysd.uscourts.gove/courtweb/pdf/D02NYSC/06-03562.pdf> (accessed 26 April 2010) [hereinafter, *Talisman Energy,* SDNY 2006], aff'd by US Court of Appeals for the Second Circuit, in F.3d 244 (2d Cir 2009), Docket No. 07-0016-cv, online: Business & Human Rights Resource Centre <http://www.ca2.uscourts.gov/decisions/isysquery/fa0db23d-6de5-4fed-acdc-24b6911c7089/1/doc/07-0016-cv_opn.pdf> (accessed 26 April 2010) [hereinafter, *Talisman Energy*, 2d Cir 2009].

545 "Country Profile: Sudan", *BBC News*, (updated 29 January 2009), online: BBC News <http://news.bbc.co.uk/2/hi/middle_east/country_profiles/820864.stm> (accessed 6 February 2009).

and Islam in the three southern provinces and encouraged the use of English and conversion to Christianity".[546]

After Sudan's independence in 1956, a rebellion led by General Abboud gradually intensified and a campaign was initiated to extend Islam to the south. By 1963, it had taken the form of a "full-fledged civil war".[547] In 1972, an agreement was signed in Addis Ababa to end Sudan's first civil war. A period of peace followed for about eleven years.

The situation in Sudan newly deteriorated after the discovery of oil in the southern provinces by the oil company Chevron in 1979. The Government proceeded to divide the country into numbered "blocks" in order to expand its reach on oil resources and grant concessions. In 1983, Sudan was transformed into an Islamic State and the second civil war began between the Sudan People's Liberation Army against the Government forces.[548]

Regardless of the ongoing conflict, oil revenues in Sudan increased by almost 900% in three years, from $61 million in 1999 to almost $600 million in 2001.[549] According to Kobrick, "the dramatic increase in resources available to the government in Khartoum resulted in a very significant increase in military expenditure and the purchase of modern weapons, including helicopter gunships" and the manufacturing of tanks and artillery.[550]

The dangerous conditions in the region, amplified by the kidnapping of three expatriate Chevron employees in 1984, caused the company to suspend its operations and

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546 Steven J. Kobrick, "Oil and Politics: Talisman Energy and Sudan" (2003-2004) 36 N.Y.U. Journal Int'l. L. & Pol. 426 at 431.

547 *Ibid.*

548 *Ibid.* at 432-433. See also, *Talisman Energy*, SDNY 2006, *supra* note 544 at 10-11.

549 Georgette Gagnon & John Ryle, "Report of an Investigation into Oil Development, Conflict and Displacement in Western Upper Nile, Sudan 18" (Canadian Auto Workers Union et al., 2001), at 35, online: <http://www.iabolish.com/act/camp/divestment/Rylefinal.pdf> and International Crisis Group, *God, Oil and Country: Changing the Logic of War in Sudan* (New York, International Crisis Group, 2002) at 102, both cited in Kobrick, *ibid.* at 442.

withdraw from Sudan. On 28 August 1993, the Canadian company, State Petroleum Company (hereinafter, the "SPC"), entered into a production-sharing agreement with the government of Sudan, acquiring a large part of what had been Chevron's concession. In May 1994, Arakis Energy Corporation, another Canadian company, acquired SPC, which became a wholly-owned subsidiary of Arakis.[551]

To better meet Arakis' production quotas, SPC entered into a Consortium Agreement on 28 February 1997 with the China National Petroleum Corporation, Petronas Carigali Overseas SDN BHD and Sudapet Ltd. The Consortium Members established the Greater Nile Petroleum Operating Company Limited (hereinafter, "GNPOC"), which thereafter concluded agreements with the Sudanese government to conduct operations.[552]

This Agreement was signed at a time when the political turmoil occurring in Sudan was exposed to the international community. Notably, the United Nations condemned the country for gross violations of human rights in 1992 and the Security Council imposed diplomatic sanctions on the government of Sudan in 1996. Moreover, pursuant to the United States *Anti-Terrorism Act* signed in April 1996 and an executive order enacted under the *International Emergency Powers Acts* in November 1997, all Sudanese assets in the United States were frozen and a ban was imposed on all bank loans, investments, and trade with that country.[553]

As a consequence of these political stances, as well as some pressure applied from the Canadian government to withdraw its operations, Arakis was unable to raise the

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550 Randolph Martin, "Sudan's Perfect War", (2002) 81 Foreign Aff. 111 at 118-19, cited in Kobrick, *ibid.* at 442.

551 Kobrick, *ibid.* at 434 and See also, Talisman Energy, SDNY 2006 at 15. (The shares of GNPOC were 40% owned by CNPC, 30% owned by Petronas, 25% owned by SPC and 5% owned by Sudapet. All of the Consortium Members were wholly owned respectively by the governments of China, Malaysia and Sudan, except of SPC).

552 *Talisman Energy*, SDNY 2006, *ibid.* at 15-17.

553 Kobrick, *supra* note 546, at 445.

necessary funds to complete its project.[554] On October 1998, Talisman Energy, a Canadian subsidiary of British Petroleum and the second largest independent oil company in Canada, headquartered in Calgary, Alberta, acquired the outstanding shares of Arakis.[555]

Once the acquisition was completed, high-level security arrangements were concluded between the GNPOC concession and the Government of Sudan for "about 1,000 military and police officers assigned to protect the oilfield operations themselves; about 1,300 intelligence officers who worked to gather intelligence in the communities within the concession; and about 5,000 military personnel who were stationed in the concession".[556] GNPOC also had its own security force, which was unarmed and served as a liaison with the Government forces.[557]

In November 2001, a $1 billion class-action lawsuit was filed against Talisman, on behalf of the Presbyterian Church of Sudan and a number of individual plaintiffs, former and current residents of Sudan, in the U.S. District Court for the Southern District of New York. The suit, filed under the *Aliens Tort Claims Act*[558] of the United States,[559] charged Talisman with conspiracy, aiding and abetting with the Government of Sudan to commit genocide, torture, war crimes and crimes against humanity. The alleged criminal acts

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554 *Ibid.* at 436.

555 *Ibid.* at 437. See also *Talisman Energy*, SDNY 2006, *supra* note 544, at 15-17.

556 *Talisman Energy*, SDNY 2006, *ibid.* at 23 (according to the studies conducted by the Sudan Steering Committee, formed by Talisman).

557 *Ibid.* at 24.

558 28 U.S.C. §1350. The *Alien Torts Claims Act* [hereinafter, ATCA] an old law passed in 1879, is largely criticized in the United States, including the former Bush Administration, who took a strong stand against it (see Charles Lane, "High Court to Consider Arrests Abroad", *Washington Post* (2 December 2003), online: Global Policy <http://www.globalpolicy.org/intljustice/atca/2003/1202arrest.htm> (accessed 26 April 2010). ATCA, as interpreted in several recent cases, permits aliens to bring private tort suits against corporations for certain human rights violations committed in the United States or abroad. Most actions require state action, but in a few cases, including slave trading, it is not necessary: (see *Doe* v *Unocal Corp*, 395 F .3d 932 (9th Cir 2002) at paras 2-3 and Daphne Eviatar, "A Big Win for Human Rights", *The Nation* (21 April 2005), online: The Nation <http://www.thenation.com/doc/20050509/eviatar> (accessed 26 April 2010).

559 *Talisman Energy*, SDNY 2006, *supra* note 544 at 48 (the Presbyterian Church of Sudan also claimed the loss of sixty-four churches due to Government attacks).

included rape, enslavement, targeted attacks by the military on civilians, as well as widespread and systematic forcible transfer of civilian population.[560]

In March 2003, a federal district court judge ruled that the case was properly brought in the Manhattan Federal Court[561]. On 12 September 2006, however, Judge Denise Côté from the United States District Court, Southern District of New York, dismissed the case and allowed only summary judgment on the basis that the plaintiffs failed to submit sufficient admissible evidence to proceed to trial on their claims.[562]

On 26 February 2007, the plaintiffs filed an appeal before the United States Court of Appeals for the Second Circuit.[563]

In reaction to this appeal, the Canadian government filed an *amicus curiae* brief to the Second Circuit Court of Appeals in May 2007, arguing that "the U.S. cannot claim jurisdiction in the case, and warns such a move would 'create friction in Canada-U.S. relations'".[564] The Canadian government also stated that the suit would have "'a chilling effect on Canadian firms engaging in Sudan', noting the government is using the promise of more Canadian investment to pressure Sudan into ending the savage civil war in Darfur".[565]

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560 Kobrick, *supra* note 546 at 449-450 and *Talisman Energy*, SDNY 2006, *supra* note 544 at 2, 51.

561 *Presbyterian Church of Sudan* v. *Talisman Energy, Inc*., 244 F. Supp. 2d at 335-41, cited in Kobrick, *ibid* at 451.

562 *Talisman Energy*, SDNY 2006, *supra* note 544 at 4 and 87.

563 *Talisman Energy*, 2d Cir 2009, *supra* note 544.

564 *Presbyterian Church of Sudan et al.* v. *Talisman Energy Inc. and the Republic of Sudan*, 07-0016-cv (Brief of *Amicus Curia*e, the Government of Canada, in Support of Dismissal of the Underlying Action, filed before United States Court of Appeal (2d Cir.), online: Kairos <http://www.kairoscanada.org/fileadmin/fe/files/PDF/HRTrade/Sudan/Brief_Amicus-Talisman_April07.pdf> (accessed 28 June 2010). See also Kelly Patterson, "Canada says U.S. can't hear lawsuit" *The Leader-Post Regina* (Saturday, May 26, 2007), online: The Leader-Post Regina, <http://www.canada.com/reginaleaderpost/news/story.html?id=0b22a8b6-36a3-48c0-a8ed-86ecb9a86e98> (accessed 26 April 2010).

565 *Ibid.*

Similarly, the U.S. District Court's judgment summarized the Canadian government's positive role in supporting Sudan through its companies' investments, as follows:

> "Canada, as a matter of national policy holds out the promise of the reinstatement of support services for Canadian companies engaged in trade with the Sudan as an incentive for the Sudan to resolve its internal disputes peacefully, believing that engagement and economic development of the country is the best route to bringing peace and the rule of law".[566]

The appellate court affirmed the Southern District Court of New York's dismissal of the law suit on 2 October 2009.[567] This included the finding of the district court of an "insufficient nexus between Canada's foreign policy and the specific allegations in the complaint because the litigation did not require judging Canada's policy of 5 constructive engagement with the Sudan, but 'merely' judging 'whether Talisman acted outside the bounds of customary international law while doing business in Sudan'".[568]

Since the filing of the original suit, on 12 March 2003, Talisman and Goal Olie sold TGNBV to ONGC Videsh Ltd., an Indian oil and gas company.[569]

The case, however, remains significantly important in terms of corporate responsibility for international crimes, both in the United States and Canada and may even

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566 See *Presbyterian Church of Sudan* v. *Talisman Energy, Inc*., No. 01 Civ. 10 9882 (DLC), 2005 WL 2082846, at 1 (S.D.N.Y. Aug. 30, 2005) at 1, 6 (describing diplomatic note from the Embassy of Canada to the United States Department of State and distinguishing oil exploration from trade), cited in *Talisman Energy*, SDNY 2006, *supra* note 544 at 72. Canada also argued that the court's exercise of jurisdiction [i] infringed on its sovereignty, [ii] chilled its ability to use "trade support services as 'both a stick and carrot in support of peace,'" and [iii] violated traditional restraints on the exercise of extraterritorial jurisdiction (see *Presbyterian Church of Sudan* v. *Talisman Energy, Inc*., No. 01 Civ. 10 9882 (DLC), 2005 WL 2082846 (S.D.N.Y. Aug. 30, 2005) at 1, cited in *Talisman Energy*, 2d Cir 2009, *supra* note 544 at 19.

567 *Talisman Energy*, 2d Cir 2009, *supra* note 544.

568 *Presbyterian Church of Sudan* v. *Talisman Energy, Inc*., No. 01 Civ. 10 9882 (DLC), 2005 WL 2082846 (S.D.N.Y. Aug. 30, 2005) at 5-8, cited in *Talisman Energy*, 2d Cir 2009, *supra* note 544 at 20.

569 *Talisman Energy*, SDNY 2006, *supra* note 544 at 22.

carry some far-reaching effects on other territories. Namely, important questions were addressed and could even be dealt with in the future before a Canadian court in separate criminal law proceedings. For instance, it would be necessary to determine the proper forum for such judicial proceedings, i.e. the United States', Canadian or Sudanese courts?

With such notorious examples and allegations against Canadian corporations' responsibility for international crimes, it could be considered unethical for the Canadian government to adopt a passive attitude. Indeed, the U.N. Panel of Experts has affirmed that "Governments of the countries where the individuals, companies and financial institutions that are systematically and actively involved in these activities are based should assume their share of the responsibility (...)"[570] and that "Governments with jurisdiction over these enterprises are complicit themselves when they do not take remedial measures".[571]

The following chapters will summarize how it is possible to prosecute a Canadian corporation under Canadian law for international crimes committed overseas.

Chapter 2. International Crimes in Canadian Criminal Law

In Part I of this thesis, it was established that existing international criminal tribunals do not have jurisdiction to judge the accountability of corporations for alleged direct commissions or accomplice participation in international crimes.

Corporations do not however enjoy complete immunity from responsibility for international crimes. As described in the previous chapter, public accounts and procedures have already been initiated on other territories for potential liability of Canadian corporations for international crimes. The last chapter of this thesis will use Canada as an example of jurisdiction of national courts to judge allegations against corporations of

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[570] *Report of the UN Panel of Experts 2002*, *supra* note 481 at 31.

violations of international criminal law, either through national legislation incorporating international criminal law or through the domestic application of international customary law.

More specifically, Canadian legislation provides jurisdiction over the three core international crimes contained in the *Rome Statute* and the inchoate offences related to these crimes, as well as the crime of torture.

Section 1. The Core Crimes of CAHWCA

The three core international crimes described in CAHWCA are crimes against humanity, genocide and war crimes and are identical to those provided for in the *Rome Statute*.[572] In this regard, sub-sections 4(4) and 6(4) of CAHWCA[573] specify that the crimes identified in articles 6, 7 and 8 (2) of the *Rome Statute* are, as of 17 July 1998, crimes according to customary international law.[574]

It is important to note that, under CAHWCA, existing or developing rules of international law should not be prejudiced in any way,[575] thereby enlarging the scope of definitions to the law before 17 July 1998 and possible developments that may take place after this date. At present, customary international law has not progressed significantly

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571 *Ibid.*

572 CAHWCA, *supra* note 24, s. 4(3) (for offences committed within Canada) and 6 (3) (for offences committed outside Canada).

573 CAHWCA, *ibid.* s. 4(4) (for offences committed within Canada) and 6(4) for offences committed outside Canada).

574 CAHWCA, *ibid.* s. 6 (5). This paragraph also interprets that the offence of crimes against humanity was part of customary international law or was criminal according to the general principles of law recognized by the community of nations before the coming into force of either of the following: a) the Agreement for the prosecution and punishment of the major war criminals of the European Axis, signed at London on August 8, 1945; and (b) the Proclamation by the Supreme Commander for the Allied Powers, dated January 19, 1946.

575 CAHWCA, *ibid.*ss. 4(4) and 6(4). See also Rosenberg, *supra* note 80, at 233.

since the implementation of the *Rome Statute*.[576] It is therefore highly relevant to refer to the definitions of international crimes in the *Rome Statute*, international jurisprudence and the *Elements of Crimes*, a legal commentary adopted by the Assembly of States Parties of the ICC for the interpretation of articles 6, 7 and 8 of the *Rome Statute*.[577]

Canadian legislation also provides for the preventative punishment of behaviour before it aggravates, otherwise referred to as "inchoate offences".[578]

Section 2. Inchoate Crimes of the *Criminal Code* and CAHWCA

Canadian criminal law prohibits a greater number of incomplete crimes or "inchoate" offences[579] than the *Rome Statute* and other treaties of international tribunals.

Four types of general inchoate offences are included in Canadian criminal law: conspiracy, attempt, accessory after the fact and counselling in sub-section 464(a) of the *Criminal Code*.[580] They are regulated in sections 463 to 465, which include specific

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576 Grondin, *supra* note 300 at 445.

577 Pursuant to article 9 of the *Rome Statute*, the Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7 and 8, consistent with the Statute. The provisions of the Statute, including article 21 and the general principles set out in Part 3, are applicable to the Elements of Crimes. They are published in a document entitled: *Elements of Crimes*, ICC-ASP/1/3(part II-B), (adopted and entered into force on 9 September 2002), online: ICC <http://www.icc-cpi.int/Menus/ICC/Legal+Texts+and+Tools/Official+Journal/Elements+of+Crimes.htm> (accessed 26 April 2010).

578 Rikhof, *supra* note 30 at 1125, n.16.

579 The reason that inchoate behaviour is made criminal has been explained by the Supreme Court as follows: "If the primary act (for example, killing), is harmful, society will want people not to do it. Equally, it will not want them event to try to do it, or to counsel or incite others to do it. For while the act itself causes actual harm, attempting to do it, or counselling, inciting or procuring someone else to do it, are sources of potential harm – they increase the likelihood of that particular harm's occurrence. Accordingly, society is justified in taking certain measures in respect of them: outlawing them with sanctions, and authorizing interventions to prevent the harm from materializing" (See *Hamilton* v. *The Queen*, 2005 SCC 47, 29 July 2005 § 25, cited in Rikhof, *ibid.* at 1132)

580 *Criminal Code*, *supra* note 31, s. 464(a).

punishments for each offence,[581] in conjunction with sections 22 to 24 of the *Criminal Code*.[582] Moreover, CAHWCA provides that these same inchoate offences can also be committed in respect to genocide, war crimes and crimes against humanity in sub-sections 4(1.1) and 6(1.1) of CAHWCA.[583]

The *Criminal Code* also prohibits the more specific inchoate offences of advocating or promoting genocide in section 318 and inciting or promoting hatred in section 319.[584]

Each of these inchoate offences will be examined in the following paragraphs.

Sub-section 1. Conspiracy

The crime of conspiracy is derived from common law and has been integrated as an inchoate offence under paragraph 465 (1) (c) of the *Criminal Code*.[585] Its commission with relation to war crimes, crimes against humanity and genocide is also regulated under paragraphs 4 (1.1) and 6 (1.1) of CAWHCA.

Generally, conspiracy in Canadian law may be defined as « an agreement between two or more people to commit an indictable offence. The principal factor of this offence is thus the intention to commit the indictable offence".[586] There exist two material elements

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581 *Criminal Code*, *ibid.,* s. 463 (regulates punishments for attempts and accessories after the fact), art. 464 (regulates the offence of counselling and its punishments), art. 465 (defines a conspiracy and regulates its punishment).

582 *Criminal Code*, *ibid.,* s. 22 (defines the act of counselling), s. 23 (defines the act of an accessory after the fact), s. 24 (defines attempt).

583 CAHWCA, *supra* note 24, ss. 4(1.1), 6(1.1). See also Rikhof, *supra* note 30 at 1125.

584 *Criminal Code*, *ibid.* s. 318, 319.

585 *Criminal Code*, *ibid.* s. 461(1)(c) provides that : «every one who conspires with any one to commit an indictable offence not provided for in paragraph (*a*) or (*b*) is guilty of an indictable offence and liable to the same punishment as that to which an accused who is guilty of that offence would, on conviction, be liable».

586 *R.* c. *Valcourt*, 2007 QCCA 59, EYB 2007-112310 at para. 43 and *R.* c. *Couture*, 2007 QCCA 1609, EYB 2007-126227 at para. 150, cited in Sophie Bourque *et al.*, *Droit pénal. Infractions, moyens de*

to this offence: the agreement and the illegal purpose. It is not necessary for each conspirator to enter the agreement with the purpose of accomplishing the indictable offence(s), but rather, it must be proven that the conspirators agreed to participate in the agreement at any given time.[587]

It is therefore possible in Canada to prosecute two or more corporations[588] or one or more corporation(s) and a physical person[589] for conspiracy to commit international crimes.[590]

The other inchoate crimes in Canadian law are not necessarily committed by concluding a prior agreement, such as the offence of counselling.

Sub-section 2. Counselling

In 2005, the Supreme Court of Canada rendered a decision to deport Léon Mugesera, a Rwandan politician with permanent residency in Canada for incitement to commit murder, genocide and hatred, as well as for committing crimes against humanity.[591]

With regards to incitement to commit murder, it was determined that Mr. Mugesera had pronounced a hateful speech against the Rwandan Tutsi population on 22 November

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défense et peine – Collection de droit 2005-2006, Vol. 12, École du Barreau du Québec (collaborator), ed. by Christian Boulet, (Cowansville, Éditions Yvon Blais, 2005) at 59.

587 *R*. c. *Couture*, *ibid.* at para. 152, cited in Sophie Bourque *et al*., *ibid.*

588 *Regina* v. *Dominion Steel & Coal Corp*., 1956 O.W.N. 753, 116 C.C.C. 117 (H.C.), cited in Leonard H. Leigh, *The Criminal Liability of Corporations and Other Groups*, (1977) 9 Ottawa L. Rev. 247 at 257.

589 *Regina* v. *Can. Liquid Air Ltd.*, 20 C.R.N.S. 208 (B.C.S.C. 1972), Rex v. Martin, 40 Man. R. 524, [1933] 1 D.L.R. 434 (C.A. 1932), Goldlawr, Inc. v. Shubert, 276 F.2d 614 (3rd Cir. 1960), *Nelson Radio & Supply Co.* v. *Motorola, Inc.,* 200 F.2d 911 (5th Cir. 1952), all cited Leigh, *ibid.* at 256.

590 Sophie Bourque *et al*,, *supra* note 586 at 60.

591 Mugesera was deported only on the basis of grave crimes contained in sub-section 7 (3.76) of the *Criminal Code* and not of international crimes in CAHWCA. Sub-section 7 (3.76) of the *Criminal Code* was applicable for deportation before October 2000 and CAHWCA was applicable only after this date, by virtue of the former *Immigration Act of Canada* L.R.C. 1985, ch. I-2 (replaced by the *Immigration*

1992 infront of about one thousand attendants of a radical Hutu political party's assembly. This speech took place before the 1994 genocide in Rwanda. Mugesera was accused, among others, of actively promoting, advocating, or encouraging the commission of murder. More generally, he was accused of "counselling" to commit murder under sub-section 464 (a) of the *Criminal Code*.[592]

The Supreme Court of Canada indicated that counselling includes procuring, soliciting or inciting pursuant to the definition provided in sub-section 22 (3) of the *Criminal Code*. If the statements pronounced are likely to incite and are made with a view to inciting the commission of the offence, the requisite elements of the crime of counselling will be met.[593] The definition will be analyzed in more details below in the section of this thesis related to counselling as a form of complicity in criminal law.[594]

The offence of counselling is similar to the two other inchoate offences for which Mugesera was convicted: advocating or promoting genocide and incitement to hatred. Counselling is more generally directed to the criminal purpose of any offence counselled,[595] while the two other offences encompass preparatory activities that lead more specifically to genocide or hate propaganda.[596] The following paragraphs will describe these specific inchoate offences in greater detail.

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and Refugee Protection Act, S.C. 2001, ch. 27) (See Hélène Dumont, *supra* note 472 at 195. See also Rikhof, *supra* note 30 at 1123.

592 *Mugesera* c. *Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2005 SCC 40, [2005] 2 R.C.S. 100, online : SCC <http://csc.lexum.umontreal.ca/en/2005/2005scc40/2005scc40.html> (accessed 26 April 2010) [hereinafter, *Mugesera*].

593 *Ibid.* at paras. 63-64. See Rikhof, *supra* note 30 at 1125. See also *Hamilton* v. *R.*, 2005 SCC 47, 29 July 2005, para. 29, cited in Rikhof, *supra* note 30 at 1125.

594 Mugesera, *ibid.* at para. 63.

595 *Ibid.* at para. 64.

596 Rikhof, *supra* note 30 at 1132.

Sub-section 3. Advocating or Promoting Genocide

The offence of advocating or promoting genocide is materialized through words rather than physical actions. Professor Dumont points out that the intellectual essence of such a crime requires a complex qualification process that must be positioned in time and in its legal context.[597] In *Mugesera*, the Supreme Court of Canada explained that the offence defined in section 318 of the *Criminal Code* was equivalent to public and direct incitement. In this regard, a vague or indirect suggestion is not sufficient for this kind of offence. Furthermore, the direct element of incitement "should be viewed in light of its cultural and linguistic content".[598] A person convicted of this offence is liable to imprisonment for a term not exceeding five years.[599]

The person advocating or promoting genocide must have the intention to prompt or provoke another to commit genocide, as well as the specific intent to commit genocide, i.e. an intent to destroy in whole or in part any identifiable group, namely any section of the public distinguished by colour, race, religion or ethnic origin.[600]

Since there were no Canadian judicial precedents on the interpretation of section 318 *Criminal Code* at the time of the *Mugesera* judgment, the court examined principles of international law existing on the date that he had pronounced his controversial speech in 1992[601]. Namely, the court relied on the definition of genocide in the *Genocide Convention*, which was almost textually replicated in section 318 of the *Criminal Code*.[602] The Court further stated the rule that domestic law must be interpreted in conformity with

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597 Dumont, *supra* note 472 at 192.

598 *Mugesera*, *supra* note 592 at para. 87, referring to the *Akayesu* case (*supra* note 28), cited in Rikhof, *supra* note 30 at 1126. See also Dumont, *ibid.* at 193.

599 *Criminal Code*, *supra* note 31, s. 318(1).

600 *Mugesera*, *supra* note 592 at paras. 88-89, quoting the *Akayesu* (*supra* note 28) and *Media* cases (*supra* note 291), cited in Rikhof, *supra* note 30 at 1126.

601 At the time of the *Mugesera* Supreme Court of Canada judgment, there were no Canadian precedents on the application of this specific article. (See Dumont, *supra* note 472 at 194).

602 Dumont, *ibid.* at 194.

international customary law, in the absence of any contradictory domestic laws.[603] This paved the way for international jurisprudence and law to be used as important sources of reference for the analysis of *Criminal Code* provisions.[604]

The Court also referred to international law when interpreting the subsequent section 319 of the *Criminal Code* for the offence of inciting or promoting hatred.

Sub-section 4. Inciting or Promoting Hatred

There are two different offences in section 319 of the *Criminal Code*: (i) communicating statements in any public place where such incitement is likely to lead to a breach of the peace; and (ii) communicating statements, other than in a private communication, wilfully promoting hatred.[605] A person convicted of this offence can be held liable of an indictable offence and imprisonment not exceeding two years.[606]

Promoting hatred was interpreted by the court as actively supporting or instigating, and more than mere encouragement. Moreover, hatred was defined as an "emotion of an intense and extreme nature that is clearly associated with vilification and detestation".[607] The accused must have had a conscious purpose to promote hatred against an identifiable group or foreseen that the promotion of hatred against the group was certain to result.[608]

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603 *Baker* c. *Canada (Ministre de la Citoyenneté et de l'Immigration)* [1999] 2 R.C.S. 817, cited in *Mugesera*, *supra* note 592 at para. 82. (See Dumont, *ibid.* at 195).

604 Dumont, *ibid.* (Dumont enumerates the following judgments that the Supreme Court relied on, cited at 195 : *Le procureur c/ Akayesu*, aff. n° ICTR -96-4, 2 sept. 1998, confirmé par n° ICTR-964-A, 1er juin 2001, *Le procureur c/ Nahimana, Barayagwisa et Ngeze*, aff. n° ICTR-99-52-T-I (affaire des Médias) [en appel]).

605 *Criminal Code*, *supra* note 31, s. 319.

606 *Ibid.,* s. 319(1)(a).

607 *Mugesera*, *supra* note 592 at para. 101, cited in Rikhof, *supra* note 30 at 1126.

608 *Mugesera*, *ibid.* at para. 104-105. See Rikhof, *ibid.*

Similarly to advocating or promoting genocide, promotion of hatred must be interpreted within its cultural and historical context.[609] The type of speech provided for in section 319 of the *Criminal Code* is nevertheless broader than incitement, as stated by the ICTR in the *Media Case* as follows: "... hate speech lies not only in the injury to the self-dignity of target group members but also in the credence that may be given to the speech, which may promote discrimination and even violence".[610]

Thus, the Supreme Court followed international jurisprudence in elevating hate crime to a specific inchoate offence by including it within the crime against humanity.[611]

Aside from the inchoate offences of promoting or advocating genocide and inciting or promoting hatred, directly related to the international crimes of genocide and crimes against humanity, respectively, CAHWCA and the *Criminal Code* provide for two more general inchoate offences with a temporal component: complicity after the fact and attempt. The first, complicity after the fact, is committed after the commission of an offence, while the second, attempt, is committed prior to the offence.

Sub-section 5. Complicity after the Fact

The *Rome Statute* does not contain any provisions relating to accomplices after the fact of a crime that has already been committed. On the other hand, section 23 of the *Criminal Code* provides that a person who receives, comforts or assists another person who was a party to an offence, could be convicted of the same offence.

Two conditions are required to establish the criminal intention of an accomplice after the fact: (i) knowledge that a person participated in a criminal offence; and (ii) the

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609 *Ibid.*

610 *Media Case*, *supra* note 291 para. 1078, cited in *Mugesera*, *ibid.* para. 147. See Rikhof, *supra* note 30 at 1131.

intention to assist that person to escape. The term "escape" must be interpreted largely as "escaping justice". This includes hiding evidence and making false statements.[612]

The ICJ Panel of Experts refers to a leading example of the case of Walther Funk, a Nazi businessman, to describe the offence of accessory after the fact.[613] The IMT judgment determined that Funk, President of the Reichbank since January 1939, had agreed that "the Reichbank was to receive certain gold and jewels and currency from the SS and instructed his subordinates, who were to work out the details, not to ask too many questions. As a result of this agreement the SS sent to the Reichbank the personal belongings taken from the victims who had been exterminated in the concentration camps".[614] Funk was therefore declared guilty as an accessory after the fact in the crimes committed against the concentration camp victims.[615]

The fourth inchoate offence listed in sub-sections 4 (1.1)/6 (1.1) of CAHWCA is attempt.

Sub-section 6. Attempt

With respect to the crime attempt, the Supreme Court of Canada has established the following test, based on sub-section 24 (1) of the *Criminal Code*: the «act must be beyond

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611 Rikhof, *ibid.* at 1132-1133.

612 *R.* c. *Knuff*, (1980) 52 C.C.C. (2d) 523 (Alta. C.A.); *R.* c. *French*, (1978) 37 C.C.C. (2d) 201, aff'd in [1980] 1 R.C.S. 158, cited in Bourque *et al. supra* note 586 at 70.

613 Funk held several titles, including Minister of Economics and Plenipotentiary General for War Economy since early 1938, President of the Reichbank since 1939, member of the Ministerial Council for the Defence of the Reich since August 1939 and of the Central Planning Planning Board in September 1943 (Telford *Taylor, The Anatomy of the Nuremberg Trials: A Personal Memoir* (New York: Knopf, 1992) at 398, cited in *ICJ Expert Panel Report,* Vol. II at 14.

614 *Ibid.*

615 *Ibid.*

preparation and go so far toward the commission of the completed offence that but for some intervention he is prevented or desists from the completion thereof».[616]

The definition of attempt under the *Criminal Code* is different from that under article 25 (3) (f) of the *Rome Statute* which states that the attempted crime "does not occur because of circumstances independent" of the accused's intentions, whereas, under Canadian law, a person may be accused of attempt for a completed crime.

Violations of international criminal law do not only extend to the core crimes contained in the *Rome Statute* and related inchoate offences. The international community has thus recognized the importance of prosecuting all crimes of a reprehensible nature, regardless of jurisdictional barriers that apply to other crimes.

Section 3. Torture

Torture is widely recognized as a crime that shocks the conscience of the international community and compels its prosecution under all national jurisdictions of the world. Universal jurisdiction over the crime was recognized in 1998, when General Augusto Pinochet, the former President of Chile, was indicted by the Spanish magistrate Baltasar Garzón of the *Audiencia Nacional*.

Moreover, the Supreme Court of Canada recognizes that there are three compelling indicia supporting that the prohibition of torture has become customary law.[617] First, there is the great number of multilateral instruments that explicitly prohibit torture.[618] Second, no

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616 *The King v. Quinton,* [1947] R.C.S. 234 at 236, online: SCC <http://scc.lexum.umontreal.ca/en/1947/1947scr0-234/1947scr0-234.html> (accessed 27 April 2010).

617 *Suresh* v. *Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, at 62-65 [hereinafter, *Suresh*].

618 See e.g. 1949 *Geneva Convention*, *supra* note 75, art. 3 (common to each convention); *Universal Declaration of Human Rights*, GA Res. 217 A (III), UN Doc. A/810, at 71 (1948), art. 5; *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading*

State has ever legalized torture or admitted to its deliberate practice.[619] Furthermore, it is considered by many academics to be an emerging, if not established peremptory norm.[620] Thus, Canada and any other civilized nation of the world, cannot derogate from internationally recognized rules prohibiting torture.[621]

Namely, the act of torture is prohibited under the UN *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (hereinafter, the *"UN Convention against Torture*"),[622] ratified by 146 countries of the world, including Canada on 28 September 1989. Article 4 of the Convention requires all its parties to ensure that torture is recognized as a criminal offence in their respective jurisdictions. Furthermore, according to article 5, "[e]ach party is required to establish jurisdiction over the crime when committed on its territory, by one of its nationals, against one of its nationals (if the State

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Treatment or Punishment, GA Res. 3452 (XXX), UN Doc. A/10034 (1975); *International Covenant on Civil and Political Rights* (1966), Can. T.S. 1976 No. 47, art. 7, *European Convention for the Protection of Human Rights and Fundamental Freedoms* (1950), 213 U.N.T.S. 221, art. 3; *American Convention on Human Rights* (1969), 1144 U.N.T.S. 123, art. 5; *African Charter on Human and Peoples' Rights* (1981), 21 I.L.M. 58, art. 5; *Universal Islamic Declaration of Human Rights* (1981), 9:2 *The Muslim World League Journal* 25, art. VII, all cited in *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 [2002] 1 S.C.R. 3 at 62.

619 *Ibid.* at 63.

620 Lauri, Hannikainen, *Peremptory Norms (Jus Cogens) in International Law: Historical Development, Criteria, Present Status*. Helsinki: Finnish Lawyers' Publishing Co., 1988 at 509; Malcolm N. Shaw, *International Law* (4th ed. 1997) at 203-204; *Prosecutor v. Furundzija*, 38 I.L.M. 317 (1999) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, No. IT-95-17/1-T, December 10, 1998); *R. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 3)*, [1999] 2 W.L.R. 827 (H.L.). Others do not explicitly set it out as a peremptory norm; however, they do generally accept that the protection of human rights or humanitarian rights is a peremptory norm: see Ian Brownlie, *Principles of Public International Law* (5th ed. 1998) at 515, and C. Emanuelli, *Droit international public: Contribution à l'étude du droit international selon une perspective canadienne* (1998), at sections 251, 1394 and 1396. All references contained in this footnote are cited in *ibid.* at 64.

621 *Suresh*, *supra* note 617. See Dumont, *supra* note 472 at 197.

622 *UN Convention against Torture*, *supra* note 75, art.1 defines torture as: "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions".

feels it appropriate) or in any case in which the accused is present on its territory and it does not extradite him or her".[623]

Accordingly, section 269.1 of the *Criminal Code* prohibits the crime of torture.[624] This crime is considered to be of a serious nature and a grave concern in Canada and across the world. It nonetheless remains a very controversial topic and the details on how the crime is carried out have received various interpretations, particularly with regards to treatment of Guantanamo Bay prison detainees and terror suspects.[625] Reports of torture in the past years have in fact referred to investigations by the International Committee of the Red Cross on "a system devised to break the will of the prisoners at Guantánamo (...) and make them wholly dependent on their interrogators through 'humiliating acts, solitary confinement, temperature extremes, use of forced positions'".[626]

Since November 2009, there has also been growing publicity and parliamentary discussions in Canada over the alleged torture faced by captives transferred by the Canadian military to local Afghan authorities and alleged knowledge of the situation by the

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623 *Ibid.* arts. 4, 5. Bruce Broomhall, *supra* note 80 at 404.

624 *Criminal Code*, *supra* note 31, s. 269.1.

625 The United States occupies the Naval Base at Guantánamo Base, which comprises 45 square miles of land and water along the southeast coast of Cuba, pursuant to a 1903 Lease Agreement executed with the newly independent Republic of Cuba in the aftermath of the Spanish-American War: On September 11, 2001, agents of the al Qaeda terrorist organization hijacked commercial airplanes and attacked the World Trade Center in New York City and the national headquarters of the Department of Defense in Arlington, Virginia. Since early 2002, the U. S. military has held more than 640 non-Americans captured abroad.at the Naval Base at Guantánamo Bay in response to the 11 September 2001 attacks. See *Rasul* v. *Bush*, (03-334) 542 U.S. 466 (2004), Opinion of the Court, online: University of Cornell Law School <http://www.law.cornell.edu/supct/pdf/03-334P.ZO> (accessed 27 April 2010) at 2.

626 Neil A. Lewis, "Red Cross Finds Detainee Abuse in Guantánamo", *The New York Times* (30 November 2004), online: New York Times <http://www.nytimes.com/2004/11/30/politics/30gitmo.html?8bl=&pagewanted=print&po> (accessed 27 April 2010). See also Amnesty International, *Afghanistan. Detainees Transferred to Torture: ISAF Complicity?* Index: ASA 11/011/2007, (London, Amnesty International Publications, 2007), online: Amnesty Canada <http://www.amnesty.ca/amnestynews/upload/ASA110112007.pdf> (accessed 27 April 2010).

Canadian government.[627] As mentioned in Part I, Chapter 2 of this thesis, in the event that the allegations of torture were proven, any private contractors, if any, that were hired for guarding and protecting detention premises, as well as conducting interrogation services may also be accused of participating in the offence of torture against the transferred detainees.[628]

The serious nature of torture and the three core international crimes described previously has conferred upon them the status of being the most reprehensible indictable crimes under Canadian law.

Section 4. International Crimes are *Mens Rea* Crimes under Canadian Legislation

According to CAHWCA, persons who commit any of the crimes contained in the Act are liable for "indictable offences".[629] Furthermore, the Supreme Court of Canada has already stated that a subjective *mens rea* is required to convict a person of an international crime.[630]

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627 Richard Colvin, a former Canadian diplomat who served in Afghanistan for seventeen months, testified that from the very beginning in May 2006 his warnings were sent to the senior ranks of the military on torture that the transfer detainees had suffered. According to Colvin, his warnings were ignored by the Canadian government. See Steve Chase, "Canada Complicit in Torture of innocent Afghans, diplomat says" *The Globe and Mail* (18 November 2009), online: The Globe and Mail <http://www.theglobeandmail.com/news/politics/canada-complicit-in-torture-of-innocent-afghans-diplomat-says/article1369069/> (accessed 27 April 2010). The former judge, Honorable Frank Iacobucci, was appointed by the government to review the disclosure bans by government lawyers on hundreds of documents related to detainee transfers. See also Janice Tibbetts, "Tories Accused of contempt for detainees stance", *The Montreal Gazette* (5 March 2010), online: The Montreal Gazette <http://www.montrealgazette.com/news/Retired+judge+resolve+Afghan+detainees+documents+dispute/2645675/story.html> (accessed 27 April 2010) and Juliet O'Neil, "Stop Transferring Afghan Detainees, Amnesty Lawyer tells Canada" *The Montreal Gazette* (17 March 2010), online: The Montreal Gazette <http://www.montrealgazette.com/news/Stop+transferring+Afghan+detainees+Amnesty+lawyer+tells+Canada/2694699/story.html> (accessed 27 April 2010).

628 Please refer to pages 59-62 above..

629 CAHWCA, *supra* note 24, ss. 4(1), 6(1).

630 *R* v. *Finta* [1994] 1 S.C.R. 701, 816, online: SCC <http://scc.lexum.umontreal.ca/en/1994/1994scr1-701/1994scr1-701.html> (accessed 27 April 2010) [hereinafter, *Finta*]. The decision stated that the stigma attached to a crime against humanity or a war crime was so serious that only a subjective *mens*

The liability of corporations for the commission of international crimes in Canada will therefore be studied under rules applicable for subjective intention crimes in the next chapter of this thesis.

Chapter 3: Canadian Corporations as Subjects of Criminal Liability in Canada

The mental element for fault-based crimes in Canada requires the Crown, i.e. the Prosecutor, to establish a subjective *mens rea*. Where the stigma attached to the offence is so damageable to a person, such as murder or theft, a specific intention to accomplish the consequence of the crime is necessary.[631] In such situations, "the accused must (i) know a fact (e.g. that goods are stolen), or (ii) have a specified intent, either to achieve a certain outcome (e.g. to mislead) or to do a certain act (e.g. to intentionally apply force to another person).[632] In the other cases, this subjective state of mind is replaced by that of wilful blindness or recklessness, which, under Canadian criminal law, are interpreted as lower-level subjective intentions.[633]

All fault-based crimes in the *Criminal Code* are committed by direct perpetrators, with or without accomplices.[634] In addition to this, CAHWCA provides for an additional mode of

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rea could be used to determine guilt of an accused person. The analysis would be analogous for genocide and torture.

631 *R* v. *Vaillancourt*; 1987 SCC 78, [1987] 2 S.C.R. 636, online: SCC <http://scc.lexum.umontreal.ca/en/1987/1987scr2-636/1987scr2-636.html> (accessed 27 April 2010); *R* v. *Logan* [1990] 2 S.C.R. 731, online : SCC <http://scc.lexum.umontreal.ca/en/1990/1990scr2-731/1990scr2-731.html> (accessed 27 April 2010).

632 *Justice Canada*, *A Plain Language Guide*, *supra* note 397 at 2.

633 *R.* v. *Sansregret* [1985] 1 S.C.R. 570, online : SCC <http://scc.lexum.umontreal.ca/en/1985/1985scr1-570/1985scr1-570.html> (accessed 27 April 2010). Wilful blindness is defined as the attitude of one "who has become aware of the need for some inquiry declines to make the inquiry because he does not wish to know the truth. He would prefer to remain ignorant (…) in deliberately failing to inquire when he knows there is reason for inquiry". Recklessness takes place when a person "who, aware that there is danger that his conduct could bring about the result prohibited by the criminal law, nevertheless persists, despite the risk. It is, in other words, the conduct of one who sees the risk and who takes the chance".

634 *Criminal Code*, *supra* note 31, ss. 21, 22.

liability inherited from international criminal law, i.e. liability of military commanders and other superiors.[635]

Section 1. Canadian Corporations as Perpetrators of International Crimes

According to sub-section 21 (a) of the *Criminal Code*, "every one" is a party to an offence who "actually commits it".

It seems furthermore, that the terms "every one", "person" and "owner" may be used interchangeably throughout the *Criminal Code*. More specifically, section 2 of the *Criminal Code* provides that the terms "every one", "person" and "owner" and "other similar expressions" include Her Majesty and an organization. The same article defines "organization" as "a public body, body corporate, society, company, firm, partnership, trade union or municipality, or an association of persons".[636]

Consistently, under CAHWCA, it is possible to convict any "person" who commits, inside[637] or outside Canada,[638] genocide, war crimes or crimes against humanity. The term "person" in CAHWCA is analogous to the definition of "person" in the *Criminal Code*, according to sub-section 2 (2) of CAHWCA, which states that "words and expressions used in this Act have the same meaning as in the Criminal Code".[639] Moreover, sub-section 34 (2) of the *Interpretation Act of Canada* states that "all the provisions of the Criminal Code relating to indictable offences apply to indictable offences created by enactment",[640] hence the three core international crimes defined in CAWHCA.

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635 CAHWCA, *supra* note 24, ss. 5, 7.
636 *Criminal Code*, *supra* note 31, s. 2.
637 CAHWCA, *supra* note 31, s. 4(1).
638 *Ibid.*, s. 6(1)
639 CAHWCA, *supra* note 31, s. 2(2).

Sub-Section 1. A Canadian Organization

The definition of a "person" in section 2 of the Criminal Code broadly encompasses a number of possibilities for prosecution of corporations. Indeed, the *Canada Business Corporations Act* provides that a "body corporate" includes a company or other body corporate wherever or however incorporated and that a "corporation" means a body corporate incorporated under the Act. The definition of "entity" is even larger and includes "a body corporate, a partnership, a trust, a joint venture or an unincorporated association or organization".[641] This therefore includes non-profit and charitable organizations, although this thesis limits itself to responsibility of profit-making corporations for international crimes.[642]

Based on these definitions, it would be possible to convict a foreign or Canadian corporation under the *Criminal Code* and CAHWCA, wherever and however incorporated.

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640 *Interpretation Act of Canada*, R.S.C. 1985, c. I-21, s. 34(2). See also the same argumentation given by Cory Wanless, "Corporate Liability for International Crimes under Canada's Crimes Against Humanity and War Crimes Act" (2009) 7 Journal of International Criminal Justice 201 at 207.

641 *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 2 (1). Corporations are incorporated in Canada under the *Canada Business Corporations Act* or under provincial statutes (see Dufour, *supra* note 383, at 16, n. 45).

642 The *Criminal Code* definition of "person" includes bodies in addition to corporations and it is important to ensure that the same rules for attributing corporate liability apply to all forms of joint enterprises carried out by individuals, regardless of their structure. Indeed, in the recent years preceding the adoption of Bill C-45, it had been determined that neither the terms "person" nor "corporation" would cover all "bodies" that may be involved in a crime. This would include a biker gang, for example. Similarly, in 2001, the terrorism offences defined an "entity" as a person, group, trust, partnership or fund or an unincorporated association or organization (See *Justice Canada*, *A Plain Language Guide*, *supra* note 397 at 4). In 1992, the Supreme Court had also decided that unions can be guilty of crimes in *United Nurses of Alberta* v. *Alberta (Attorney General)* [1992] 1 S.C.R. 901, 71 C.C.C. (3d) 225, 89 D.L.R. (4th) 609 (See *Justice Canada*, *A Plain Language Guide*, *supra* note 397 at 6-7).

Sub-section 2. A Canadian Multinational Corporation

As explained in the introduction, the term "corporation" used in this thesis, is meant to include MNC's, defined by the *Draft Norms on Responsibilities of TNC's and Other*[643] as "an economic entity operating in more than one country or a cluster of economic entities operating in two or more countries – whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively".[644]

The *Canada Business Corporations Act* is also applicable to Canadian MNC's and defines each of its entities as affiliated bodies corporate, either "(a) if one of them is the subsidiary of the other or both are subsidiaries of the same body corporate or each of them is controlled by the same person; and (b) if two bodies corporate are affiliated with the same body corporate at the same time, they are deemed to be affiliated with each other".[645]

These terms and definitions which are all comprised in the meaning of an "organization", a subject of liability under Canadian criminal law, are particularly innovative. Significantly, through CAHWCA, the door is opened for prosecution of corporations for international crimes before Canadian courts.

In this regard, the *Criminal Code* regulates the various modes of participation in crimes, which are applicable to CAHWCA, by interpretation, under sub-sections 34 (2) of the *Interpretation Act of Canada* and 2 (2) of CAHWCA, described above.

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643 *Draft Norms on Responsibilities of TNC's and Other*, *supra* note 39.

644 *Ibid.* See also *Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, *supra* note 40; Similarly, Detlev F. Vagts defines the MNE as "a cluster of corporations of diverse nationality joined together by ties of common ownership and responsive to a common management strategy" (See Vagts, *supra* note 38 at 740).

Sub-section 3. Perpetrators under paragraph 21 (1) (a) of the *Criminal Code*

Under paragraph 21 (1) (a) of the *Criminal Code*, every one who "actually commits" an offence, becomes a party to the latter.[646] This is consistent with article 25 (3) (a) of the *Rome Statute*.[647]

Since the provisions of the *Criminal Code* are applicable to the application of CAHWCA, pursuant to sub-section 34 (2) of the *Interpretation Act of Canada*,[648] the interpretation of "commits" in sub-sections 4(1)/6(1) of CAHWCA will be consistent with the explanations provided below for paragraph 21 (1) (a) of the *Criminal Code*.

Paragraph 1. The Direct Author

Very little interpretation can be given to paragraph 21 (1) (a) of the *Criminal Code* when the principal perpetrator of an offence has physically committed the acts which led to the realization of the offence. In such a case, an actor is referred to as the principal author of an offence if that person actually does or contributes to the doing of the *actus reus* with the requisite *mens rea* of an offence. As seen above, the person may include a human being, a corporation or another form of organization.[649]

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645 *Canada Business Corporations Act*, *supra* note 641, s. 2(2).

646 *Criminal Code*, *supra* note 31, s. 21(1)(a).

647 *Rome Statute*, *supra* note 20, s. 25(3)(a).

648 *Interpretation Act of Canada*, *supra* note 640, s. 34(2).

649 *R.* v. *Mammolita*, [1983] O.J. No. 151 (Q.L.) (Ont. C.A.), cited in Amissi Manirabona, *La responsabilité pénale des sociétés canadiennes pour les crimes contre l'environnement survenus à l'étranger*, (LL.D. Thesis, Université de Montréal, 2010) [unpublished] at 145-146.

Specifically in terms of corporate liability, the corporation must have personally and directly taken part in the original activities which led to the offence rather than simply have assets in other corporations which took part in the said offence.[650]

Paragraph 2. Co-perpetrators

Each person of a group may also be held individually liable as a principal to an offence under paragraph 21 (1) (a) of the *Criminal Code* if each of those persons had acted wilfully in committing the offence.[651] Manirabona, adds that co-perpetration requires that an agreement is made prior or spontaneously with the commission of the offence.[652] This theory of co-perpetration, developed in Canadian jurisprudence, is similar to the one adopted by the Pre-Trial Chamber of the ICC in the *Lubanga* case, discussed previously in Part II, Chapter 3 of this thesis.[653]

The various partners of joint venture corporations developing projects in conflict zones or high legal-risk territories are particularly susceptible to become involved in co-perpetration of international crimes, due to the high level of cooperation between entities in achieving common financial, commercial or technical goals.[654]

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650 Cynthia D. Wallace, The Multinational Enterprise and Legal Control, Host State Sovereignty in an Era of Economic Globalization (The Hague/London, New York: Martins Nijhoff Publishers, 2002) at 140, cited in Manirabona, *ibid.* at 145.

651 *R.* v. *Mammolita*, [1983] O.J. No. 151 (Q.L.) (Ont. C.A.) at paras. 12-13, cited in Manirabona, *ibid.* at 145-146.

652 Manirabona*, ibid.* at 147.

653 Please refer to pages 96-100 above.

654 By definition, a joint venture is considered as a form of collaboration, generally on a contractual level, reuniting two or more corporations with the purpose of accomplishing a common commercial, financial or technical goal. See Peter T. Muchlinski, *Multinational Enterprises and the Law*, 2d ed., (Oxford/Toronto: Oxford University Press, 2007) at 66 and Larry A. DiMattea, *Law of International*

Paragraph 3. The Innocent Agent

The theory of perpetration by means provided for in international criminal law in the *Katanga* case, discussed in the previous Chapter 3 of this thesis[655] is also reflected in common law through the concept of "innocent agency".[656] The British Columbia Court of Appeals has also recognized that "a person who commits an offence by means of an instrument 'whose movements are regulated' by him, actually commits the offence himself".[657]

In some common law jurisdictions, it is accepted that "[a] subsidiary may operate as the agent of the parent company such that the parent company is liable for the actions of the subsidiary".[658] Nevertheless, the "agency theory is inappropriate in most cases because both parties (the parent and subsidiary) must agree that the subsidiary is acting on behalf of the parent (...). Subsidiaries are frequently used to 'shield the parent corporation from liability' and therefore parent companies are careful not to act as though they have consented to having their subsidiaries act as agents".[659]

Contracting, 2d ed., (Alphen aan den Rijn: Wolters Kluwer Law & Business/Kluwer Law International, 2009) at 380-381, cited in Manirabona, *ibid.* at 148.

655 Please refer to pages 94-96above.

656 *R.* v. *Palmer & Hudson* (1804), 2 Leach 978, 168 E.R. 586; *R* v. *Mazeau* (1840), 9 Car. & P. 676, 173 E.R. 1006; *R*. v. *Bleasdale* (1948) 2 Car. & K. 765, 175 E.R. 321; *R.* v. *Dowey* (1868), 11 Cox C.C. 115 ; R. v. Butt (1884), 15 Cox C.C. 564), all cited in *Berryman* v. *R*, paras. 11-15

657 *R.* v. *MacFadden* (1971), 16 C.R.N.S. 251, 5 C.C.C. (2d) 204, 4 N.B.R. (2d) 59, cited in *R.* v. *Berryman*, 1990 CarswellBC 174, 48 B.C.L.R. (2d) 105, 57 C.C.C. (3d) 375, 78 C.R. (3d) 376 at para. 27.

658 Hansen, *supra* note 40 at 434.

659 *Ibid.* Among various facts considered under common law to decide that a subsidiary acted as an agent of the parent corporation, the courts took into account that the subsidiary's shares were wholly owned by the parent corporation, that it had the same address as the parent, that the parent corporation's directors and officers controlled the subsidiary through board membership or through an investor's office, etc. (see United States tort law cases and other examples referred to in *supra* note 413). Additional information will also be provided in the last chapter of this thesis linking these agency theories to superior-subordinate relationships and perpetration by means modes of liability for international crimes.

In addition to the actual commission of an offence through the actions of a principal author, sub-section 21 (1) of the *Criminal Code* provides for criminal liability of every one who aids or abets another person in committing an offence.

Sub-section 4. Canadian Corporations as Accomplices in the Commission of International Crimes

The SRSG on Business and Human Rights states that "few companies may ever directly commit acts that amount to international crimes. But there is greater risk of their facing allegations of 'complicity' in such crimes. With nuanced differences, most national legal systems recognize complicity as a concept".[660]

When determining a corporation's involvement in international crimes, mere presence in a country and paying taxes are unlikely to create liability. On the other hand, derived indirect economic benefit from the wrongful conduct of others may do so, depending on such facts as the closeness of the company's association with those actors. However, even where a corporation did not intend for a crime to occur, its liability may be incurred if it knew, or should have known, that it was providing assistance that had a substantial effect on the commission of the crime.[661]

In this regard, in Canada, as in international criminal law, there exist various modes of criminal complicity recognized by law.

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660 *2007 SRSG on Business and Human Rights Report*, *supra* note 285 at 18.
661 *Ibid.*

Paragraph 1. Complicity by Aiding and Abetting under sub-sections 21 (b) and (c) of the Criminal Code

Pursuant to sub-sections 21 (1) (b) and (c) of the *Criminal Code*, every one who aids or abets an offence will be considered a party to that offence as if the person actually committed it. Through a joint reading of this section and the aforementioned sub-section 34 (2) of the *Interpretation Act of Canada*, it is probable that these modes of criminal participation are implicitly comprised under the expression «commits» of sub-sections 4(1)/6(1) of CAHWCA.

A. The Meaning

Criminal liability is triggered if a person knowingly contributed to the commission of the offence with the purpose of facilitating its commission through action or omission with a view to aiding someone.[662]

Abetting, on the other hand, constitutes a different form of complicity than aiding, because it seeks to instigate the principal or principals to accomplish the crime by taking active steps in this perspective.[663]

B. Examples

Although there have been no judgments rendered to date by Canadian courts for corporate criminal liability for international crimes, it is possible to refer to rulings of other common law jurisdictions as a source of reference. In this regard, the District Court of New

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[662] *R.* v. *Dunlop and Sylvester*, [1979] 2 R.C.S. 881, online: SCC <http://scc.lexum.umontreal.ca/en/1979/1979scr2-881/1979scr2-881.html> (accessed 27 April 2010) and *R.* v. *Greyeyes* [1997] 2 R.C.S. 825, REJB 1997-01540, online: SCC <http://scc.lexum.umontreal.ca/en/1997/1997scr2-825/1997scr2-825.html> (accessed 27 April 2010).

York determined that a number of situations may be used as sufficient claims to proceed to litigation against a corporation under aiding and abetting liability.

Among others, the District Court referred to (i) the provision of information to facilitate arrests and for use by interrogators; (ii) participation in interrogations; (iii) sales of transportation vehicles to government defence forces and police units; (iv) sales of computer hardware, software and the provision of other technological support to governments in carrying out unlawful breaches against human rights; and (v) sales of armaments and related equipment and expertise to the government with knowledge that they would be used for extrajudicial killings or other underlying acts of international crimes.[664]

Such forms of liability were also recognized by the ICJ Panel of Experts as described previously in Part II, Chapter 3 of this thesis.[665]

These examples attest to the fact that corporations may act as accomplices in international crimes through aiding or abetting. Two other forms of complicity in criminal law, conspiring and counselling, also exist that would engage a corporation's liability.

Paragraph 2. Complicity by Conspiring under sub-section 21 (2) of the **Criminal Code**

One of the other forms of complicity in Canadian criminal law is contained in sub-section 21 (2) of the *Criminal Code*, which states that "where two or more persons form an intention to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or

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663 *R.* c. *Curran*, (1978) 38 C.C.C. (2d) 151, leave to appeal to SCC refused in [1978] 1 S.C.R. xi; *R.* c. *Dunlop and Sylvester*, *ibid.* (See Bourque *et al.*, *supra* note 586 at 67.

664 Khulumani District Court (remanded), paras. 15-20, cited in Krohnke, *supra* note 445.

ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence."[666]

As opposed to the inchoate offence of conspiracy described under section 465 of the *Criminal Code*, conspiring as a form of complicity requires that the offence be completed in order to charge the parties of the common plan to participation in a criminal offence. In this sense, the wording of sub-section 21 (2) *Criminal Code* is also almost identical to that of article 25 (3) (d) of the *Rome Statute* and resembles common purpose liability formulated under international criminal law jurisprudence, described above in Part I, Chapter 2 of this thesis.

Similarly, counselling can also be an inchoate offence or a form of accomplice liability, depending on whether the offence counselled is committed or not.

Paragraph 3. Complicity by Counselling under Sub-section 22 (3) of the Criminal Code

Although in the *Mugesera* case, the accused was found guilty of counselling to commit an offence which was not committed, the Supreme Court of Canada relied on the definition provided in sub-section 22 (3) of the *Criminal Code* to define the inchoate crime as the act of procuring, soliciting or inciting.[667]

The same definition is therefore used for the inchoate crime of counselling incomplete crimes as the one for counselling as a mode of complicit participation in a crime, pursuant to sub-sections 22 (1) and (2) of the *Criminal Code*. Thus, "[w]here a person counsels another person to be a party to an offence and that other person is

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665 Please refer to page 102 above.
666 Bourque *et al.*, *supra* note 586, p. 68.
667 *Mugesera*, *supra* note 592 at para. 63.

afterwards a party to that offence, the person who counselled is a party to that offence, notwithstanding that the offence was committed in a way different from that which was counselled".[668]

According to paragraph 4 (2) (a) CAHWCA, every person who commits an international crime shall be sentenced to imprisonment for life, if an intentional killing forms the basis of the offence. In all other cases, paragraph 4 (2) (b) CAHWCA provides that a person who commits an international crime is liable to imprisonment for life.

On a theoretical level, Canadian law, like the *Rome Statute*, considers that the principal perpetrator and the accomplice are equal on the level of determination of sentencing, as discussed previously in Part I, Chapter 2 of this thesis.[669] Notwithstanding, the practice of Canadian tribunals is to reduce the sentence for accomplices compared to that which would be imposed on the principal perpetrator of the crime.[670] Accused corporations may therefore attempt to plead reduced sentences before Canadian Courts if they are prosecuted for participation in violations to international criminal law, provided an intentional killing was not the basis of the offence.

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668 *Criminal Code*, *supra* note 31, s. 22 (1). See also para. 22 (2) of the *Criminal Code* which provides that "[e]very one who counsels another person to be a party to an offence is a party to every offence that the other commits in consequence of the counselling that the person who counselled knew or ought to have known was likely to be committed in consequence of the counselling".

669 For international law, refer to *Elements of Crimes*, *supra* note 577. (See Grondin, *supra* note 300 at 453. See also p. 66, n. 307 of this thesis referring to Sliedregt, *supra* note 91 at 63. For Canadian law, see Chile Eboe-Osuji, "'Complicity in Genocide' versus 'Aiding and Abetting Genocide'" (2005) 3 Journal of International Criminal Justice 56 at 73.

670 See *Criminal Code*, *supra* note 31, s. 718.1, which provides: "A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender". See also *R* v. *M (C A)*, [1996] 1 S.C.R. 500; *DPP for Northern Ireland* v. *Maxwell* [1978] 1 WLR 1350 per Lord Edmund-Davies at 150 (House of Lords); *Gould & Co Ltd* v. *Houghton* [1921] 1KB 509, per Lord Reading C.J. at 518 (King's Bench Division); and C.C. Ruby, *Sentencing*, 5th ed., (Toronto: Butterworths,1999),167, especially at 229, all cited in Chile Eboe-Osuji, *ibid.* at 71. Furthermore, where the law provides flexibility in the degree of sentencing, judges have discretion to impose sentences according to the roles of each defendant concerned in the same criminal transaction, pursuant to *Criminal Code*, *supra* note 31, s. 718.3(1),(2) Chile Eboe-Osuji, *ibid.* at 70.

A final form of participation in international crimes is liability of military and civil superiors and is indicated as a separate and punishable offence under CAHWCA.[671]

Sub-section 4. Canadian Corporations as Superiors Accountable for International Crimes

Sections 5 to 7 of CAWHCA innovate in Canadian law and introduce the notion of criminal liability of military and civil superiors, under almost identical terms to those of the *Rome Statute*. This is a significant precedent: even if at present, the doctrine of superior responsibility has not been applied against corporations, the possibility may be introduced in Canadian law.[672] In this regard, CAHWCA allows the prosecution of corporations that were not present during the perpetration of an international crime, with the condition however that they knowingly or consciously refused to take into account existing information on their commission.[673]

Indeed, pursuant to sub-sections 5(2)/7(2) of CAHWCA, a superior, other than military, may be declared guilty if the accused: (i) consciously disregarded information that clearly indicated that an offence was about to be committed or was being committed; (ii) when the person about to commit or committing the crime was under the superior's effective authority and control; and (iii) knowing that that person was about to commit or is committing such an offence, failed to take, as soon as practicable, all necessary and reasonable measures within the superior's power to prevent or repress the commission of the offence or further commission of offences or failed to submit the matter to the competent authorities for investigation and prosecution as soon as practicable.[674]

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671 CAHWCA, *supra* note 24, s. 5/7.
672 *Ibid.,* s. 5(2).
673 *Ibid.,* s. 5 (2).
674 It is not certain whether, under constitutional requirements in Canada, recklessness, as provided in sub-section 22.2 (c) of the *Criminal Code*, will be sufficient as a psychological element for a specific intention crime, such as genocide. Nonetheless, and paradoxically, this does not seem to cause any issue to establish a criminal responsibility by virtue of the command or superior responsibility doctrine under

In addition to the examples cited previously in Part I, Chapter 2, where business leaders were held criminally responsible for the act of their subordinates[675] it is also possible that in cases where a subsidiary is considered to have acted on behalf of a parent corporation, non-military superior liability may be invoked against the latter.[676]

As with accomplice liability, a person who commits an international crime under superior responsibility in CAHWCA is liable for an indictable offence and life imprisonment.[677]

In the case of corporations, sub-section 735 (1) of the *Criminal Code* provides that an organization convicted of an offence is liable, in lieu of any imprisonment that is prescribed, to be fined in an amount that is in the discretion of the court for indictable offences. Furthermore, a sentence imposed is proportionate to the gravity of the offence and the degree of responsibility of the offender, pursuant to section 718.1 of the *Criminal Code*. It may therefore be assumed that for sentences imposing life imprisonment in CAHWCA, a corporation will be held liable to pay a considerable fine.

Additional details on sentencing corporations for international crimes will be provided in the Chapter 4 below. It is important however to first study the evolution of corporate criminal liability in Canada for the commission of indictable offences.

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the jurisprudence of *ad hoc* tribunals. (See *Prosecutor* v. *Zejnil Delalić et al., supra* note 348, paras. 333-343).

675 Please refer to pages 76-81 above.

676 See also page154above, where it is explained that in some common law jurisdictions, a subsidiary may be considered to be the "agent of a parent corporation". The agency theory may also be linked to the "perpetration by means" mode of liability if it is deemed applicable to corporations in the future, as described previously in Part I, Chapter 3 of this thesis and will be further described in the last chapter of this thesis.

677 CAHWCA, *supra* note 24, ss. 5(3)/7(3).

Chapter 4: The Doctrine of Corporate Criminal Liability in Canada

The increasingly dominant position carried out by corporations since the Second World War and the need to address broad policy questions on the use of criminal law to deal with corporate behaviour was explicitly underlined by the Canadian Law Reform Commission in 1976 in a working paper entitled *Criminal Responsibility for Group Action.*[678]

Before this date, corporations had been subjects liable for indictable and regulatory offences for several decades in most common law jurisdictions, including the United Kingdom, Australia, New Zealand, the United States and Canada.

Initially, they were held guilty of property offences in common law jurisdictions, such as nuisance and nonfeasance in seventeenth-century England. Their legal accountability thereafter gradually expanded to a greater range of offences. The courts began applying criminal sanctions to corporations only in the late 19th century as large firms, particularly railroads, played an increasingly important role in the economy. Rules were adopted on a case-by-case basis where the courts made the corporation responsible for the actions of the individuals who committed the physical act of the crime.[679]

Section 1. Historical Evolution of Corporate Criminal Liability in Canada

Corporate accountability was initially included in the *Canadian Criminal Code* of 1892, which made it punishable for a corporation to break a contract with a municipal

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678 Law Reform Commission of Canada, *Criminal Responsibility for Group Action*, Working Paper no. 16, (Ottawa: Information Canada, 1976) at 1, 4, 5.

679 French, *supra* note 37 at 174. See also *Justice Canada Response to the JUST Fifteenth Report*, *supra* note 397 at 4.

corporation for supply of electric light, power, gas or water.[680] In 1906, the *Criminal Code* was amended and included the term "corporation" in the definition of the term "person".[681]

For the first time, in 1941, a Canadian court decided that a corporation could be held criminally responsible as a "person" for crimes involving active wrongdoing in *Rex* v. *Fane Robinson Ltd*.[682]

Four decades later, a case was brought before the Ontario Court of Appeals against a group of corporations that conspired to submit collusive bids to a call for sealed tenders by Canadian public agencies for dredging and marine construction projects from February 1967 to April 1973.[683] The court convicted five individuals who maintained high-level, decision-making positions of the corporations, including presidents and directors, for defrauding and conspiring to defraud the public under the 1970 *Criminal Code of Canada*.[684] Furthermore, and significantly, eight companies were held criminally liable for the same offences.[685]

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680 S.C. 1892, c. 29, s. 521 (2), cited in Leigh, *supra* note 589 at 250. This study was prepared as a background paper for the use of the Law Reform Commission of Canada in preparing its working paper no. 16 (*supra* note 678). It was published with the consent of the Law Reform Commission of Canada. See also, Law Reform Commission, *supra* note 678 at 7.

681 R.S.C. 1906, c. 146, s. 2 (13), cited in Leigh, *ibid.* at 250. See also, Law Reform Commission of Canada, *ibid.* at 7.

682 *Rex.* v. *Fane Robinson Ltd*., [1941] 2 W.W.R. 235, 76 C.C.C. 1961, [1941] 3 D.L.R. 409 (Alta. C.A.), cited in Law Reform Commission of Canada, *ibid.* at 7. See also, Leigh, *ibid.* at 250.

683 *R. v. McNamara,* (1981), 56 C.C.C. (2d) 193 (CarswellOnt 1243). The following were corporations convicted and their corresponding fines : (i) Canadian Dredge and Dock Company Ltd.: $1,000,000.00; (ii) Pitts Engineering Construction Ltd. :$1,000,000.00, (iii) C.A. Pitts General Contractors Ltd.: $ 50,000.00, (iv) Sceptre Dredging Ltd.: $450,000.00, (v) Marine Industries Ltd: $ 650,000.00, (vi) McNamara Corp.: $2,000,000.00, (vii) J.P. Porter Company Ltd.: $1,000,000.00, (viii) Richelieu Dredging Corp. Inc.: $500,000.00. Also, the following individuals were the individuals convicted with their corresponding prison sentences: (i) Sydney Cooper of Pitts Engineering : three years; (ii) Albert Gill of Sceptre Dredging Ltd.: two years; (iii) Frank Hamata of Sceptre Dredging Ltd.: two years less a day; (iv) Jean Simard of Marine Industries Ltd.: three years; (v) Harold McNamara of McNamara Corp.: five years.

684 *Criminal Code*, R.S.C. 1970, c. C-34, ss. 338(1), 423(1)(*d*).

685 *R.* v. *McNamara, supra* note 683.

An appeal was allowed before the Supreme Court of Canada, instituted by four of the convicted companies: Canadian Dredge and Dock Company, Marine Industries, J.P. Porter Company and Richelieu Dredging Company. The appeal was rejected and criminal liability of the appellants was upheld by the Supreme Court of Canada in *Dredge*[686] in 1985.

Sub-section 1. Importation of the Identification Theory for Liability of Corporations for *Mens Rea* Crimes

In *Dredge*, the Supreme Court of Canada imported the identification theory of British case law as it was defined in the House of Lords *Lennard's Carrying Co.* v. *Asiatic Petroleum Co.*[687] This same theory had been applied in previous Canadian jurisprudence, including the English decision of *Tesco Supermarkets Ltd* v. *Nattrass*,[688] and Canadian lower-courts decisions, *Rex* v. *Fane Robinson Ltd*,[689] *R. v. J.J. Beamish Construction Co.*[690] and *R. v. St. Lawrence Corp.*[691]

Henceforth, corporations would be held liable for the acts of individuals who represented the "directing mind of the company". This theory seeks to identify such individuals who could be part of the corporation's board of directors, the managing director, the superintendent, the manager or anyone else delegated by the board of directors, while having governing executive authority of the corporation.[692] Because of their high-level decision-making authority, these individuals were said to represent the very existence of the company and could not be dissociated from it. In other terms, they were considered

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686 *Dredge*, *supra* note 378.
687 [1915] A.C. 705, (see *ibid.* at para. 16).
688 [1972] AC 153, (see *Dredge*, *ibid.* at para. 20).
689 *Rex.* v. *Fane Robinson Ltd*., [1941] 2 W.W.R. 235, 76 C.C.C. 1961, [1941] 3 D.L.R. 409 (Alta. C.A.) (see Law Reform Commission of Canada, *supra* note 678 at 7 and Leigh, *supra* note 589 at 250.
690 [1966] 2 O.R. 867 (H.C.), at p. 891, *per* Jessup J. (see *Dredge*, *supra* note 378 at para. 19).
691 [1969] 2 O.R. 305 (C.A.) at 320 *per* Schroeder J.A. (see *Dredge*, *ibid*).
692 *Dredge, supra* note 398 at para. 50.

the "alter ego" of the company.[693] The Court explained that this idea is employed as a "direct descendant of Blackstone's famous theorem: The husband and the wife in law are one and that one is the husband".[694]

In addition, the Supreme Court of Canada set out three conditions for the identification theory to operate: that the action of the directing mind "(a) was within the field of operation assigned to him; (b) was not totally in fraud of the corporation; and (c) was by design or result partly for the benefit of the company."[695]

Despite this flexible approach, the 1985 Supreme Court's decision posed a series of problems in its subsequent practical application. This led the Canadian government to revise the doctrine and liability regimes of other common law jurisdictions.

Sub-section 2. The Westray Mining Disaster of 1992

Government deliberations to adopt legislation on corporate criminal liability were already underway since 1987. Simultaneous to these discussions, the topic of corporate liability was gaining ground on popular Canadian territory after a methane gas mining explosion took place in Plymouth, Nova Scotia in 1992. Twenty-six (26) miners of the mining company Curragh Inc. were killed as a result of the explosion.[696]

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693 *Ibid.* at para. 38. The Supreme Court of Canada phrases this requirement in the following manner : "In order to trigger its operation and through it corporate criminal liability for the actions of the employee (who must generally be liable himself), the actor-employee who physically committed the offence must be the *ego*", the centre" of the corporate personality, the vital organ" of the body corporate, the *alter ego*" of the employer corporation or its directing mind" (*ibid.* at para. 20).

694 *Ibid.* para. 20

695 *Dredge, ibid.* at para. 65. See also *Justice Canada Discussion Paper*, *supra* note 397 and *Justice Canada Response to the JUST Fifteenth Report*, *supra* note 397 at 6.

696 *Westray Campaign: Corporate Criminal Responsibility and the Westray Mine Disaster* ‹www.uswa.ca/eng/hse/bkg468_2.htm›, cited in Christopher M. Little & Natasha Savoline, *Corporate Criminal Liability in Canada : The Criminalization of Occupational Health and Safety Offences*, paper presented at Filion Wakely Thorup Angeletti, LLP Annual Seminar (Toronto: Filion Wakely Thorup Angeletti, LLP, 2003) at 3. See also Mr. Justice Richard, *The Westray Story: A Predictable Path to Disaster*, Report of Mr. Justice Richard (November 1997), cited in Steven Bittle, "Constituting the

This unfortunate event, surnamed the "Westray Mining Disaster" triggered an immediate reactive response from the United Steelworkers of America, representing the Westray Coal underground and surface employees. The written submissions of the United Steelworkers of America to the Westray Mine Public Inquiry Commission were in fact categorical in blaming public officials responsible for regulating the mine as well as the operator of the mine for not acting prudently and following widely accepted safe mining practices.[697]

On October 5, 1992, following investigations led by the Royal Canadian Mounted Police and three separate inquiries on the matter, the Attorney General and Public Prosecution Service charged the company and Messrs. Gerald James Phillips and Roger James Parry, two of the mine's managerial staff with fifty-two offences under the *Occupational Health and Safety Act*,[698] in an attempt to affix the blame on them for the explosion and deaths.[699] The trial, however, was halted in mid-course by a decision of the judge to stay the proceedings on the basis that: "[t]he entire proceedings were tainted by prosecutors who were playing to an enraged public, and playing to win".[700]

The controversy created by this mining project fell from government and judicial echelons onto public outrage.[701] The publicity surrounding the event took an even greater toll following the November 1997 report entitled *The Westray Story: A Predictable Path to*

Corporate Criminal: Corporate Criminal Liability in Post-Westray Canada", in 5 *Governing the Corporation: Mapping the Loci of Power in Corporate Governance Design* (Belfast: Queen's University Belfast, 20-21 September 2004) at 3.

697 United Steelworkers of America, "Written Submissions of the United Steelworkers of America" (submitted to Westray Mine Public Inquiry Commission, Stellarton, Nova Scotia, August 1996), online: Westray Mine Public Inquiry, United Steelworkers Union <http://www.alts.net/ns1625/wrpi99a.html> (accessed 27 April 2010).

698 R.S.N.S. 1989, c. 320 (the "OHSA"), a provincial statute of Nova Scotia.

699 *R.* v. *Curragh Inc.*, [1997] 1 S.C.R. 537 at para. 30.

700 *Ibid.* at para. 121.

701 United Steelworkers of America, *supra* note 697.

Disaster[702] of the appointed Commissioner under the *Public Inquiries Act*[703] and Special Examiner under the *Coal Mines Regulation Act*,[704] Mr. Justice K. Peter Richard. The report found that senior executives, including the President of the company had been grossly negligent in complying with occupational health and safety standards,[705] which contributed to the explosion.

Among the various recommendations of Justice Richard, Recommendation 73 provided:

> "The Government of Canada, through the Department of Justice, should institute a study of the accountability of corporate executives and directors for the wrongful or negligent acts of the corporation and should introduce in the Parliament of Canada such amendments to legislation as are necessary to ensure that corporate executives and directors are held properly accountable for workplace safety".[706]

Further to these findings, victims' families, associations and advocates of criminalization of occupational health and safety violations launched an intense lobbying campaign against what they considered to be a failure of justice.[707] Moreover, "at the same time that the aftermath of Westray was unfolding, a series of high profile corporate fraud cases in the United States, including the Enron and WorldCom cases, and the poison water scandal in Walkerton, Ontario were contributing to an overall climate of concern with respect to unregulated neo-liberal (corporate) activities".[708]

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[702] Richard, Justice K. P., *The Westray story: A predictable path to disaster. Report of the Westray Mine Public Inquiry,* Vol. 1: Executive Summary (Halifax, NS: Government Printer, 1997).

[703] R.S.N.S. 1989, c. 372

[704] R.S.N.S. 1989, c. 73. (See *R.* v. *Curragh Inc.*, *supra* note 699 at paras. 24-25).

[705] See Bittle, *supra* note 696, 4. See also *Justice Canada Discussion Paper*, *supra* note 397.

[706] Bittle, *ibid.*.

[707] *Ibid.*,

[708] S. BITTLE, *supra* note 59, p. 5. See also "The Enron Affair", *BBC News* (17 February 2003), online: BBC News <http://news.bbc.co.uk/2/hi/in_depth/business/2002/enron/default.stm> (accessed 27 April 2010); "WorldCom Wall Street scandal", *BBC News* (1 July 2002), online: BBC News <http://news.bbc.co.uk/2/hi/business/2077838.stm> (accessed 27 April 2010); and "INDEPTH: Inside Walkerton. Walkerton Report Highlight", *CBC News* (January 2002), online: CBC News <http://www.cbc.ca/news/background/walkerton/walkerton_report.html> (accessed 27 April 2010) (The

As a result of all this controversy, and pursuant to the recommendations of Mr. Justice K. Peter Richard, the Government of Canada agreed to revisit the judicial construction of corporate criminal liability.[709]

Sub-section 3. Legislative Discussions on Corporate Criminal Liability in Canada

In response to the Westray Inquiry's recommendations, the Canadian House of Commons studied various legislative proposals between 1999 and 2002 for enhanced criminal accountability of corporations and senior corporate officials.[710]

The Standing Committee on Justice and Human Rights held hearings in May 2002 to study one of the final proposals for legislation on corporate criminal liability, Bill C-284, sponsored by M.P. Beverley Desjarlais of the New Democratic Party, and thoroughly debated in the Parliament.[711]

During its deliberations, the Committee considered various models of liability for corporations applied in different common law systems of the world. First, it was agreed that the identification theory, as defined in *Dredge*,[712] was too restrictive since it applied only to acts of individuals with decision-making authority, without taking into account other individuals and the corporation's responsibility as a whole.[713]

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poisonous water caused (7) people to die and more than two-thousand three hundred (2,300) people to suffer various illnesses after drinking tap water contaminated with deadly E.coli).

709 *Justice Canada Discussion Paper*, *supra* note 397.

710 *Justice Canada*, *A Plain Language Guide, supra* note 397 at 5. See also Bittle, *supra* note 696 at 6 (the first initiatives were presented by the minority New Democratic Party (N.D.P.) of Canada at the 36th Parliament in 1999 through Bill C-468 introduced by Ms. Alexa McDonough from the region where the Westray tragedy occurred. The second proposal was introduced during the following Parliament in September 2001 through Bill-C-259, sponsored by N.D.P. Member of Parliament, Ms. Beverly Dejarlais).

711 *Justice Canada Response to the JUST Fifteenth Report*, *supra* note 397 at 1, 2.

712 *Dredge supra* note 378.

713 Little & Savoline,, *supra* note 696 at 6.

Paragraph 1. Criticism of the Identification Doctrine

Critics of the identification doctrine mainly contend that the notion of a "directing mind" is too limited and thereby conduces to an excess of exonerations for corporate wrongdoing. This was the view adopted by the government in 1999, as described by Professor Boisvert in a discussion paper presented at the Uniform Law Conference of Canada held during the same year. According to this view, restricting corporate responsibility to the actions of individuals with "governing executive authority, i.e. those with decision-making power and discretion to design a policy, rather than the individuals who implement it,[714] fails to consider that "in multifaceted companies, lower-level management may be the ones interpreting, applying and even creating corporate policy"[715]. In addition, "linking the corporation's liability to the wrongful acts of its senior officials clearly constitutes an encouragement to isolate the latter to ensure they are unaware of any doubtful practices by the corporation".[716]

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714 *Rhône (The)* v. *Peter A.B. Widener (The)* [1993] 1 S.C.R. 497 at 523. See Boisvert, *supra* note 398 at para. 23.

715 *Justice Canada Discussion Paper*, *supra* note 397.

716 See, for example, Bucy, *supra* note 382 at 1105; Celia Wells, "Corporate Liability and Consumer Protection: *Tesco* v. *Natrass* Revisited", (1994) 57 Modern L. Rev. 817; S. Field and N. Jorg, "Corporate Liability and Manslaughter: Should we be Going Dutch?", [1991] Crim. L.R. 156 at 158, cited in Boisvert, *supra* note 398, para. 33. See also *Justice Canada Discussion Paper*, *ibid.*

Professor Boisvert added in her paper that "[f]ocusing on the state of mind of the senior management works to the benefit of the larger entities and to the detriment of the smaller ones and this is unfair".[717] This view is consistent with Fisse's statement that:

> "[o]ffences committed on behalf of large organizations often occur at the level of middle or lower-tier management, yet the *Tesco* principle requires proof of fault of a top-tier manager or a delegate in the very restricted sense of a person given full discretion to act independently of instructions in relation to part of the functions of the board. Perversely, the *Tesco* principle works best in the context of small companies, where fault on the part of a top manager is usually much easier to prove and where there is relatively little need to impose corporate criminal liability".[718]

From another viewpoint, the identification theory may also be too broad since it automatically attributes "to the corporation the moral turpitude of an individual even though the organization itself, as an entity, has committed no wrong in the strict sense of the word".[719]

The government discussions that followed were therefore aimed at finding a common ground on the subject of corporate criminal liability that would effectively assist in implementing a new legislation.

Paragraph 2. Consideration of the Corporate Culture Approach

Particularly relevant to the government discussions, it was observed that Bill C-284 proposed a similar approach to that of the *Australian Criminal Code Act*, adopted in 1995, which incorporates the concept of "corporate culture" as a premise for corporate criminal liability.[720]

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717 Brent Fisse, "Criminal Law: The Attribution of Liability to Corporations: A Statutory Model" (1991) 13 Sydney L.R. 277 at 278. See also Bucy, *ibid.* note 382 at 1104; Boisvert, *supra* note 398 at para. 33.

718 Fisse, *ibid.* at 277. See also Bittle, *supra* note 696 at 6.

719 Fisse, *supra* note 717 at 277. See Boisvert, *supra* note 398 at para. 34.

720 *Justice Canada Discussion Paper*, *supra* note 397; *Justice Canada Response to the JUST Fifteenth Report*, *supra* note 397 at 10, *Justice Canada*, *A Plain Language Guide*, *supra* note 397 at 3.

Corporate culture or "organizational blameworthiness" has been developed from extensive sociological and philosophical literature, by eminent authors such as Peter French, Pamela Bucy, Brent Fisse and John Braithwaite. The concept serves as a tool under Australian law to elaborate criminal accountability mechanisms for corporations. As stated by Fisse and Braithwaite, "[i]f we understood how organizations decide to break the law or how they drift into breaking the law, we might be able to prescribe legal accountability principles which are consonant with organizational realities".[721]

In this regard, French explains that corporate internal decision (CID) structures comprised of the organizational flowchart, procedural rules and policies mirror "collective choice, influenced by organizational factors, including bargaining and teamwork" and constitute the intention of a corporation.[722]

Pamela Bucy sustains in this regard that the criminal intention of a corporation will be determined where: "there exists a corporate ethos that encouraged the particular criminal conduct at issue".[723] The term "ethos" (ἦθος) was first referred to by the ancient Greek philosopher Aristotle in his dissertation, *Rhetoric*, to describe the personal character of a public speaker, based on the audience's perception on his ability to form a judgment, his integrity and truthfulness.[724]

Australian law has incorporated the concept of corporate culture by attributing criminal liability to a corporation through a "compliance culture" test under paragraphs 12.3 (2) (d) and (e) of the *Australian Criminal Code Act*. These paragraphs provide that liability may arise from the existence of a corporate culture that "directed, encouraged,

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721 Fisse & Braithwaite, *supra* note 52 at 101.

722 French, *supra* note 37 at 41. French expresses that "corporate internal decision structures license the descriptive transformation of events as intentional actions and expose the corporate character of those events"

723 Bucy, *supra* note 382 at 1127-1128.

724 Bucy, *supra* note 382 at 1122-1123.

tolerated or led to non-compliance" with the relevant law, or the failure of the body corporate "to create and maintain a corporate culture that required compliance with the relevant provision".[725] "Corporate culture" is defined in the Australian code as "an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities take place".[726] Furthermore, paragraph 12.3 (2) (e) provides that organizational blameworthiness amounts in a failure of the body corporate to create and maintain a corporate culture that required compliance.

Based on corporate culture literature and the Australian legislation model, Professor Boisvert argued before the Committee hearings that "some offences may be committed as a result of systemic or organizational pressure originating directly from the corporate context".[727]

In reviewing Bill-C-284, the Government of Canada pointed out at the Committee hearings that Australian law provides a more comprehensive definition of "corporate culture" which was lacking from Bill C-284.[728] Furthermore, the Government noted that, despite extensive literature on the topic, on a practical level, corporate culture remained an untested basis for criminal liability at the time. In particular, at the time of the discussions, the federal government of Australia had not allowed for its new law to be tested in a criminal prosecution for death or injury, restricting its application only for sentencing regulatory offences. It was also noted that "criminal law is primarily the responsibility of Australia's states, which have thus far generally retained the identification theory model"[729]

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725 *Criminal Code Act 1905* (Cth.), s. 12.3(2)(e)(d.

726 *Ibid.*, s. 12.3(6).

727 Wells, *supra* note 716 at 820-821; John Coffee, "'No Soul to Damn: No Body to Kick': An Unscandalized Inquiry Into The Problem of Corporate Punishment" (1981) Michigan L. Rev. 386; Don Hanna, "Corporate Criminal Liability", (1988-89) 31 Crim. L. Q. 452, 474-479. Bucy, *supra* note 382 at 1104-1105. See all, cited in Boisvert, *supra* note 398 at para. 34.

728 *Justice Canada Discussion Paper*, *supra* note 397 and *Justice Canada Response to the JUST Fifteenth Report*, *supra* note 397.

729 *Justice Canada Response to the JUST Fifteenth Report, ibid.* and *Justice Canada*, *A Plain Language Guide, supra* note 397 at 11, n. 18.. See also page 90 above and *supra* note 398, with examples on how

Considering the need for clarity in the law, "corporate culture" was therefore regarded as too vague to constitute the necessary corporate *mens rea*.[730]

Aside from the topic of corporate culture, the Committee hearings also studied corporate liability mechanisms applied in the United Kingdom and the United States.

Paragraph 3. The Rejection of the Vicarious Liability Doctrine

The 2002 Government's *Response to the Fifteenth Report of the Standing Committee on Justice and Human Rights. Corporate Liability* also noted that the United States' vicarious liability model of corporate liability was not the preferred option of any witness before the Standing Committee.[731] The leading case on this liability theory, otherwise known as the doctrine of *respondeat superior*, was the 1909 judgment in *New York Central & Hudson River Railroad* v. *United States*[732] based on the *Elkins Act*, a statute that specifically imposed liability on the corporation for the acts of its agents, employees, managers, etc. (without limitation).[733]

The rules of vicarious liability were restated in 1943 by the Court of Appeal of the 8th Circuit in *Egan* v. *United States* in the following manner:

> "The test of corporate responsibility for the acts of its officers and agents, whether such acts be criminal or tortuous, is whether the agent or officer in doing the thing complained of was engaged in employing the corporate powers actually authorized 'for the benefit of the corporation while acting within the scope of his employment in the business of the principal.'"[734]

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corporate culture may serve as a basis to hold corporations liable for negligence-based offences and manslaughter and how its practical application is limited mostly to regulatory offences at this moment.

730 *Justice Canada Response to the JUST Fifteenth Report, ibid.*

731 *Ibid.*

732 212 U.S. 509 (1909).

733 French, *supra* note 37 at 178.

734 137 F.2d 369 (1943), *per* Thomas J., at 379; see also *United States* v. *Basic Construction Co.*, 771 F.2d 570 (1983) (5th CCA), both cited in *Dredge*, *supra* note 378 at para. 23.

In a 2002 discussions paper, the Government of Canada enunciated the following objections to adopting the vicarious liability approach: 1) it distorts the notion of fault, which is readily transferred to the company without proof of its efforts to prevent illegal activity by employees; and 2) the vicarious liability approach has already been rejected by Canadian courts who recognize that criminal law makes an individual responsible only for crimes in which he or she is the primary actor.[735]

The Supreme Court contends in this regard that "[t]he criminal law has never applied the maxim 'respondeat superior', and to seek to ingraft from without what has not taken spontaneous growth might prove an experiment foredoomed to failure".[736]

In its *Response to the Fifteenth Report of the Standing Committee on Justice and Human Rights,* the Government promised to table legislative reforms that would best reflect the views and concerns discussed at the hearings.[737] Bill C-284 was finally withdrawn at its second reading stage in February 2002.[738] Nine months later, a new legislative proposal was presented and eventually adopted as the current criminal liability basis for corporations in Canada.

Section 2. Adoption and Implementation of Bill C-45 (the Westray Bill)

In November 2003, the Canadian Parliament formally addressed the aforementioned recommendations by adopting Bill C-45[739] to amend the *Criminal Code* for all federal criminal offences.[740]

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735 *Justice Canada Discussion Paper*, *supra* note 397.

736 C.R.N. Winn., The Criminal Responsibility of Corporations" (1929), 3 *Camb. L.J.* 398, at 407 in *Dredge*, *supra* note 378 at para. 20.

737 *Justice Canada Response to the JUST Fifteenth Report*, *supra* note 397.

738 *Justice Canada*, *A Plain Language Guide*, *supra* note 397 at 5 (its subject-matter was referred for study by the House of Commons Standing Committee on Justice and Human Rights in February 2002).

739 Bill C-45, *An Act to amend the Criminal Code that imposes criminal liability on corporations and organizations*, 2d. Sess., 37th Parl., 2003.

Henceforth, the law "eradicates the distinction between those who create or set policy and those charged with managing its implementation".[741] Indeed, as Macpherson indicates, the prosecution no longer has to prove that a person is a "directing mind" of a corporation but rather that a 'senior officer' was implicated in the criminal activity".[742]

The new law defines a *senior officer*, in the new section 2 of the *Criminal Code* as a "representative who plays an important role in the establishment of an organization's policies or is responsible for managing an important aspect of the organization's activities and, in the case of a body corporate, includes a director, its chief officer and its chief financial officer"[743]. Thus, the class of persons engaging the liability of the corporation is expanded to include individuals who exercise delegated, operational activity.[744] In this respect, the function of the individual, rather than any particular title is the new focus.[745]

Other significant modifications to the identification doctrine of Canadian common law appear in the *Criminal Code* provisions pertaining specifically to criminal liability of organizations: sections 22.1 and 22.2.

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740 These amendments do not apply to offences of either absolute or strict liability (see Darcy L. Macpherson, *supra* note 398, at 253.

741 Macpherson *ibid.* at 259.

742 *Ibid.* at 258.

743 *Criminal Code*, *supra* note 31, s. 2.

744 *Justice Canada Response to the JUST Fifteenth Report*, *supra* note 397 at 5.

745 *Justice Canada*, *A Plain Language Guide*, *supra* note 397 at 5-10.

Specifically with respect to international crimes, section 22.2 of the *Criminal Code* is applicable to indictable, fault-based offences and provides:

> "In respect of an offence that requires the prosecution to prove fault – other than negligence – an organization is a party to the offence if, with the intent at least in part to benefit the organization, one of its senior officers:
> a) acting within the scope of their authority, is a party to the offence;
> b) having the mental state required to be a party to the offence and acting within the scope of their authority, directs the work of other representatives of the organization so that they do the act or make the omission specified in the offence; or
> c) knowing that a representative of the organization is or is about to be a party to the offence, does not take all reasonable measures to stop them from being a party to the offence".[746]

According to Macpherson, the first two sub-sections of this section simply put Justice Estey's comments from *Dredge* into statutory form.[747] The author points out that most substantial change to the law is in sub-section 22.2 (c), extending corporate liability in four ways.

First, the section no longer requires active participation in the offence by someone acting in a managerial capacity or control position.[748] The application of agency is therefore enlarged and closer to vicarious liability.

Furthermore, "the section does not require the senior officer who becomes aware of the misconduct to have any power in the area of the corporation's business and affairs

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[746] *Criminal Code*, *supra* note 31, s. 22.2 Bill C-45 has also partly integrated the concept of corporate culture in s. 22.1 of the *Criminal Code* for negligence-based offences. The section states in its last paragraph that "criminal liability may be determined in circumstances where conduct of senior officers collectively, departed – markedly from the standard of care that, in the circumstances, could reasonably be expected to prevent a representative of the organization from being a party to an offence". The joint-liability language actually treats the corporation's decision-making as a cohesive whole, rather than viewing corporate decisions in an individualized way, thus taking into account collective-decision making processes [see, Darcy Macpherson, "Extending Corporate Criminal Liability?: Some Thoughts on Bill C-45" (2003-2004) 30 Manitoba Law Journal 253 at 272-273, online: Robson Hall Faculty of Law <http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=darcy_macpherson> (accessed 28 April 2010)].

[747] Macpherson, *supra* note 398 at 259-260.

where the crime is being or will be committed".[749] In this context, it "alleviates the activity-specific nature of the designation"[750] that was necessary in the common-law construed identification doctrine.

Third, the law provides that knowledge of a senior officer that a company representative is being a party to an offence is sufficient to convict the corporation of an indictable offence. On the other hand, the senior officer may simultaneously be acquitted because such knowledge is insufficient in the case of individual liability.[751]

Finally, Bill C-45 creates a responsibility on the senior officer to take all reasonable measures to stop a representative that he is aware is or about to be a party to an offence. Macpherson mentions that, at a minimum, this sub-section obliges senior officers to communicate with one another in order to protect the interests of the corporation. Under this perspective, a senior officer would not be able to justify that he allowed the commission of an offence by a representative that was not in his department.[752]

Bill C-45 further provides that the offence must be accomplished with the intent, at least in part, to benefit the organization.[753] This reverses previous common law requirements which required proof of an intention to destruct the undertaking of the corporation rather than a reasonable doubt as to whether there was intention for the corporation to benefit in part.[754] This requirement narrows the liability scope to convict a corporation under the new legislation compared to the former requirements set out in *Dredge* in 1985.[755]

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748 *Ibid.* at 262.
749 *Ibid.*
750 *Ibid.*
751 *R.* v *Dunlop and Sylvester*, *supra* note 662 at 898. See also Macpherson *supra* note 398 at 263.
752 Macpherson, *ibid.* at 263.
753 *Ibid.* at 263-264. See *Criminal Code*, *supra* note 31, s. 22.2(c).
754 Macpherson, *ibid.* at 268.
755 *Ibid.* at 266 and following.

Thus, a conviction under a combined reading of sections 2 and 22.2 of the *Criminal Code* and CAHWCA makes it possible to punish liable corporations for their commission of international crimes and sentence them pursuant to the relevant provisions under Canadian legislation, which will be studied in the following chapter.

Chapter 5: Sentencing a Canadian Corporation and an *Alter Ego* under Canadian Criminal Law

Much to the detriment of corporate liberty of operations, Bill C-45 has increased the severity of the sentencing regime for corporate offenders. Most of the literature on collective responsibility was taken into account in the adoption of these legal sentencing rules.

This section will study the changes brought to the law in this area in 2003 as well as the influence that corporate culture now has on the determination of sentences for a corporation, and, as a corollary, the role and impact of corporate image and reputation.

Section 1. Fundamental Purposes and Principal Guidelines for Sentencing a Criminal Organization

According to sub-section 718 (1) of the *Criminal Code*, the fundamental purpose of sentencing is "to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions" with the objectives of denunciation, deterrence, separating offenders from society (when necessary), rehabilitation, reparation and promoting a sense of responsibility and acknowledgement of harm done by offenders.[756] These purposes are based on underlying

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[756] *Criminal Code*, *supra* note 31, s. 718.

philosophical and historical trends of retribution and deterrence that society has relied on to serve justice.[757]

At the same time, French opines that "retributivism does not, as most theorists will tell us, have to be understood in such biblical blood-lust terms".[758] The idea advanced by French is that punishment need not always be made in kind. Under this perspective, a corporation must be treated in its own uniqueness as a personality that differs from that of a human being, while taking into account that clearly, a corporation has another form of personality than a human being and cannot be imprisoned.

In order to ensure the consideration of the above purposes as much as possible by the courts, the 2003 amendments to the *Criminal Code* also set out guidelines for judicial sentencing in section 718.21 applicable to organizations.[759]

The first three sub-sections a), b), and c) take into account a list of factors proposed by Pamela Bucy that can be referred to as circumstantial evidence of a guilty corporate ethos, i.e. advantages drawn by the organization as a result of the offence committed, the degree of planning involved in carrying out the offence and attempts of the corporation to conceal information and evidence.[760] In this regard, Bucy underlines the importance of investigating offences in depth and examining "who did it, who contributed to its success and which (if any) higher echelon officials 'recklessly tolerated it'".[761]

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757 Fisse & Braithwaite, *supra* note 52 at 45.

758 French explains, in this respect that: "If a corporation has no body to kick (leaving to God the business of souls and eternal damnation), how can it repay in kind for its felonious behaviour? It has no eye to be exchanged for an eye that was blinded by unsafe working conditions. Or so the story is meant to go." (See French, *supra* note 37 at 187-188).

759 For an analysis of these sentencing guidelines, see Macpherson, *supra* note 398 at 274-283. See also *Criminal Code*, *supra* note 31, s. 718.21.

760 Bucy, *supra* note 382 at 1121-1146.

761 *Ibid.* at 1138.

The following sub-sections d) and e) calculate the "impact that the sentence would have on the economic viability of the organization and the continued employment of its employees" as well as the costs to public authorities of investigation and prosecution of the offence. These provisions follow the rationale of Fisse and Braithwaite's literature on the importance of effectiveness and a deterrent impact on organizational crime, without completely depleting resources available.[762]

Finally, the last sub-sections f) to j) emphasize the need to investigate the corporation's reactive measures to an offence before imposing court-ordered sentences, consistent with the accountability models proposed by French, Bucy, Fisse and Braithwaite[763]. This includes regulatory penalties already imposed, as well as prior and similar convictions on the corporation; penalties imposed by the corporation on a representative for their role in the commission of the offence; and restitutions that the corporation is ordered to make to the victims of the offence.

It is evident that the sentencing guidelines were inspired by much of the philosophical and legal literature that emerged in the 1970s and 1980's on the concept of corporate culture, once again following the route proposed by Professor Boisvert to effectively fulfill objectives of punishment and deterrence, while favouring a positive reforming impact on a corporation's culture.[764]

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762 Fisse & Braithwaite, *supra* note 52 at 64, 189-190.

763 Reactive corporate policy is based on the Principle of Responsive Adjustment (PRA) elaborated by the ancient Greek philosopher, Aristotle. It "captures the notion that the causally responsible party for an untoward event should adopt specific courses of future action calculated to prevent repetition" (See French, *supra* note 37 at 61-62, 156, 165-166). See also Fisse & Braithwaite, *supra* note 382 at 47-48 (the authors state: "corporate blameworthiness can be judged within a reactive timeframe, a timeframe which generates the concept of reactive corporate fault"); Bucy, *supra* note 382 at 1138-1139.

764 Boisvert, *supra* note 398 at para. 4.

Section 2. A First Option: Fines

Even before the adoption of Bill C-45, the former *Criminal Code of Canada* was amended in 1995 and provided that fines would be imposed on corporations in place of prison sentences[765]. This sanction was reintegrated in sub-section 735 (1) of the current *Criminal Code.*[766]

In the case of indictable offences, there is no maximum allowable fine, and the exact amount of the latter is left to the discretion of the courts.[767] Perhaps just as important, a result from the modification of the 2004 tax law is the inability for a corporation to use the fine as a tax deduction.[768]

It is quite likely that the fine applied to sentence a corporation will be proportionate to the prison sentence provided for the applicable crime.[769] For instance, life imprisonment may equate to considerable fines that may cause the very destruction of the company. This is relevant to international crimes in Canada, for which a person convicted is liable to life imprisonment under CAHWCA.[770]

While this modification is indeed a more effective one, since it focuses on corporate profits, an important motivational factor in corporate operations, it should not be mistaken as the only effective measure to enforce deterrence or retribution under the fundamental principles of criminal law. In this regard, Fisse and Braithwaite have stressed the

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765 Macpherson, *supra* note 398 at 274.

766 *Ibid.* See also, *Criminal Code*, *supra* note 31, s. 735 (1).

767 *Criminal Code* , *ibid.* s. 735(1)(a). See also, *Justice Canada Discussion Paper*, *supra* note 397.

768 *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), as amended s. 67.5 See Macpherson, *supra* note 398 at 274.

769 As mentioned on page. 161 above, section 718.1 of the *Criminal Code* provides that a sentence imposed is proportionate to the gravity of the offence and the degree of responsibility of the offender. Furthermore, pursuant to paragraphs 718.3 (1) and (2) of the *Criminal Code*, judges have discretion to impose sentences according to the roles of each defendant concerned in the same criminal transaction. See *Criminal Code*, *supra* note 31, ss. 718.1, 718.3(1)(2).

importance of avoiding the "deterrence trap", commonly referred to as "the impact that the sentence would have on the economic viability of the organization and the continued employment of its employees" pursuant to sub-section 718.21 (d) of the *Criminal Code*.[771]

Another common concern with regards to criminal liability of corporations is the spillover effects it may have on innocent parties, such as shareholders, creditors, employees or consumers.[772]

In response to this concern, the majority of the Supreme Court in *Dredge* judged that: "[w]hile it is true that this penalty will feed through to the stockholders, who may well be totally innocent as in the case of a large public company, it may be seen as a risk or cost associated with the privilege of operating through the corporate vehicle (…)."[773]

On the other hand, as mentioned previously, the effects of having introduced different measures of punishment in the new law have considerably diminished this problem.

Section 3. An Alternative Sentence: The Corporate Probation

Importantly, the adoption of Bill C-45 introduces probation orders unique to corporations, including restitution orders, public notification of the offence, and requirements to adopt new standards, policies and procedures.[774] Companies will therefore no longer be able to carry out their operations freely, in circumstances where they have violated the law. The relevant sub-section 732.1 (3.1) of the *Criminal Code* is non-binding on the courts and leaves sufficient discretion to the judge to set and create the conditions

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770 CAHWCA, *supra* note 24, ss. 4 (2)(b), 6(2)(b) and 7(4).
771 Fisse & Braithwaite, *supra* note 52 at 189.
772 *Ibid.* at 188.
773 *Dredge*, *supra* note 378 at para. 33. See also French, *supra* note 37 at 188-189.
774 *Criminal Code*, *supra* note, s. 732.1 (3.1)

"that the court considers desirable to prevent the organization from committing subsequent offences or to remedy the harm caused by the offence".[775]

Sub-section 1. The Doctrinal Point of View

Literary reflections on the need to escape the "deterrence trap" and alternative "ways of remedying the delinquent conduct of corporations"[776] were taken into account in elaborating the new rules in the *Criminal Code* for sentencing organizations and probationary orders.

Fisse and Braithwaite do however express the concern that probationary directives could potentially become an excessively intrusive governmental intervention. They state that in order to prevent such overbearing state control, the sentencing criteria could and should be devised so as to maximize freedom of enterprise in compliance systems[777]. Sub-section 732.1 (3.2) of the *Criminal Code* on sentencing guidelines appeases such apprehensions by stating that:

> "Before making an order under paragraph (3.1)(*b*), a court shall consider whether it would be more appropriate for another regulatory body to supervise the development or implementation of the policies, standards and procedures referred to in that paragraph."[778]

In this manner, the Court will be the ultimate decision-maker on the need to apply more intrusive governmental measures on the corporation.

Furthermore, through probationary orders, corporations are encouraged to change their conduct of operations from a more ethical standpoint. If they do not succeed, further

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775 *Ibid.* s. 732.1(3.1)(g).
776 *Justice Canada Discussion Paper*, *supra* note 397.
777 Fisse and Braithwaite, *supra* note 52 at 44-45.
778 *Criminal Code*, *supra* note 31, s. 732.1(3.2).

conditions could be applied or an increase of severity of sanctions ranging from flexible conditions of a probationary order, to more restrictive measures, and finally to the imposition of a fine.[779]

Regardless of the ultimate option applied, safeguards must be taken to ensure that senior and middle managers responsible for assuring a remedial and disciplinary program do not fail in accomplishing their task. In this sense, Fisse and Braithwaite propose a reporting system to be put in place whereby courts are equipped "with the power to insist upon monitoring and supervisory controls where necessary to deal with untrustworthy defendants".[780] This has in fact been included in paragraph 732.1 (3.1) (d) of the *Criminal Code*.

Sub-section 2. The Effect of Adverse Publicity as a Probationary Order

Another condition proposed for a corporate probationary order under paragraph 732.1 (3.1) (f) of the *Criminal Code* would require a corporation to provide information to the public on the offence of which it was convicted, the sentence imposed by the court and any measures that the organization is taking to reduce the likelihood of committing a subsequent offence.[781]

The author most referred to by doctrine with regards to the effects of publicity of probationary orders on corporations is John Coffee.[782] The author conveys that "little doubt exists that corporations dislike adverse publicity and that unfavourable publicity emanating

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779 *Justice Canada*, *A Plain Language Guide*, *supra* note 397 at 9 and Fisse & Braithwaite, *ibid.* at 86-87.

780 Fisse & Braithwaite, *supra* note 52 at 160-161.

781 *Criminal Code*, *supra* note 31, s. 732.1 (3.1) (f).

782 Coffee takes his example from a report, *The Great Oil Spill* prepared by John J. McCloy, on the bribery committed in the US and abroad by the personnel of the Gulf Oil Corporation during the 1970s. The revelations in the report were eventually "picked up by the press and republished as a paperback best-seller." (See Coffee, *supra* note 727, cited in Fisse & Braithwaite *supra* note 52 at 139). The citation of the report is John J. McCloy, Nathan W. Pearson & Beverley Matthews, *The Great Oil Spill: The Inside Report, Gulf Oil's Bribery and Political Chicanery*, (New York: Chelsea House Publishers, 1976).

from an administrative or judicial source has considerable credibility".[783] The results of a corporation reporting its offence would indeed cause negative publicity on its reputation and image.[784] The risk of such a sentence thereby plays an important role "in the strategy to prevent and remedy criminal intent within a corporate culture by recognizing that corporate actors are 'motivationally complex'".[785] In fact, while profit and loss are "the engine of corporate deterrence… in bureaucratic practice, if not standard economic theory, corporations serve many non-monetary goals".[786] Another author, Robert Gordon, enumerates seven non-financial considerations in this respect: "the urge for power, the desire for prestige, the creative urge, the need to identify with a group, the desire for security, the urge for adventure, and the desire to serve others".[787]

The idea of adopting paragraph 732.1 (3.1) (f) of the *Criminal Code* is therefore, as stated by the Government of Canada, for the corporation to avoid such negative publicity that could potentially affect consumer, as well as investors' and qualified human resources' confidence.[788]

There may also be circumstances in which it is more practicable or effective to prosecute responsible individuals within the corporation rather than the entity itself.

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783 French, *supra* note 37 at 195.

784 Bucy, *supra* note 382 at 1160. See also Brent Fisse & John Braithwaite, *The Impact of Publicity on Corporate Offenders* (Albany : State University of New York Press, 1983).

785 Fisse and Braithwaite, *supra* note 52 at 190.

786 *Ibid.* at 81.

787 Robert A. Gordon, *Business Leadership in the Large Corporation* (Berkeley: University of California, 1961) at 305 cited in Fisse and Braithwaite, *supra* note 52 at 81. See also Hans van der Haas, *The Enterprise in Transition* (London, New York: Tavistock Publications, 1967), cited in French *supra* note 37 at 190-191 (on the effects of shame in the notion of guilt).

788 *Justice Canada*, *A Plain Language Guide*, *supra* note 397 at 9.

Section 4. Sanctioning the *Alter Ego*

The Government of Canada has not yet expressed its concrete will to prosecute corporations for international crimes under the provisions of CAHWCA. In 2005, it confirmed the potential of such prosecutions, while simultaneously expressing the problems that may arise from extraterritorial application of Canadian law[789] and concerns of international comity.[790]

Furthermore, it must be noted that once a corporation is dissolved in Canada, criminal proceedings may only be brought against it within two years after its dissolution.[791]

It is therefore possible to assume that the Government may resort to prosecution of individual corporate actors under CAHWCA for political or practical purposes, if they are or were the "directing minds" behind corporate decisions that amounted to an offence under the Act[792].

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789 Challenges include conflict with the sovereignty of foreign states; conflicts where states have legislation that differs from that of Canada; and difficulties with Canadian officials taking enforcement action in foreign states. Canada has objected to the extraterritorial application of other states' laws and jurisdiction to Canadians and Canadian businesses where there is no sufficient nexus to those states or where the action undermines Canadian legislative authority or Canadian policy in the area. As an exception, the Government nevertheless confirmed that extraterritoriality of the law may apply in cases where there is a sufficient nexus to Canada or where the international community has agreed on the need for such jurisdiction, as well as for certain offences determined so important to prosecute by the international community, such as torture, terrorism and crimes identified in CAHWCA (See DFAIT Canada, *supra* note 477 at 9).

790 *Ibid*.

791 *Canada Business Corporations Act*, *supra* note 641, s. 226(2)(b). If the proceedings have already commenced before the corporation's dissolution, they may be continued, pursuant to s. 226(2)(a).

792 DFAIT Canada, *supra* note 477 at 9.

There is also nothing that precludes simultaneous proceedings against both the corporation and the directing mind or *alter ego* of the corporation. The conviction of one does not however necessarily entail that of the other.[793]

This legal framework under which corporations may be tried and sentenced under Canadian criminal law for international crimes is conditional to jurisdiction of Canadian courts, which will be studied in the last chapter of this thesis.

Chapter 6: Jurisdiction of Canadian Criminal Courts for the Prosecution of Canadian Corporations' Alleged Overseas Commissions of International Crimes

The *Statute of Westminster, 1931*[794] conferred on Canada the authority to make laws having extraterritorial operation. This power allowed Canada to enact legislation such as CAHWCA.[795] In contrast to all Canadian laws that punish offences committed on Canadian territory, CAHWCA provides that a person who has committed a crime of genocide, a crime against humanity or a war crime abroad can be prosecuted in Canada under certain conditions that will be described below.[796]

Previous to the adoption of CAHWCA and developments from Canadian jurisprudence, there was considerable ambiguity concerning extraterritorial jurisdiction in relation to crimes of international law.

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793 Macpherson, *supra* note 398 at 280.

794 (U.K), 22 & 23 Geo. V, c. 4, s. 3.

795 *R.* v. *Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292 at para. 66, online: SCC <http://scc.lexum.umontreal.ca/en/2007/2007scc26/2007scc26.html> (accessed 28 April 2010).

796 *R.* c. *Munyaneza*, [2009] J.Q. no 12271 (2009 SQ 2201), Montreal 500-73-002500-052 (S.Q.) at para. 65.

In part, this is due to the provisions of section 6 of the *Criminal Code* to the effect that, subject to any contrary legal provisions, no person shall be convicted or discharged of an offence committed outside Canada.[797] This is consistent with the principle of territoriality or sovereign integrity, "which dictates that a state has exclusive sovereignty over all persons, citizens or aliens, and all property, real or personal within its own territory".[798]

There exist nevertheless a set of exceptions to the principle of territoriality and the application of criminal law.

Section 1. Crimes with an Extraterritorial Dimension

Certain crimes require that Canadian law extends its application across borders in order to properly address all the unlawful acts committed in accomplishment of the totality of the crime.

Sub-section 1. Crimes Committed in Canada and Overseas by a Corporation (the Nexus Theory)

In Canada, extraterritorial jurisdiction of criminal law is applicable where the acts that constitute the offence have a "real and substantial link" or a "sufficient nexus" to Canada. In other terms, while much of the activity may have occurred outside Canada, a significant portion of the acts took place in Canada.[799] Thus, when the impact of a crime is felt in Canada, it becomes punishable.[800]

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797 CAHWCA, *supra* note 24, s. 6 (2)

798 *Finta*, *supra* note 630 at 806. See also *Lotus* Case, *supra* note 61 at 18 (cited in *Finta*).

799 DFAIT, *supra* note 477 at 19. The test of a 'real and substantial link" was applied by the Supreme Court of Canada in *Libman* v. *The Queen*, [1985] 2 S.C.R. 178, online: SCC <http://scc.lexum.umontreal.ca/en/1985/1985scr2-178/1985scr2-178.html> (accessed 28 April 2010).

Sub-section 2. The Issue of Conspiracy: Sub-sections 465 (3) and (4) of the *Criminal Code*

A specific example of extraterritorial Canadian subject-matter jurisdiction under the nexus theory is the crime of conspiracy as identified in the case *R.* v. *Libman*, rendered by the Supreme Court of Canada in 1985.[801] In this regard, sub-section 465 (3) of the *Criminal Code* provides that everyone who, while in Canada, conspires with anyone to commit a crime in a place outside Canada that is an offence under the laws of that place shall be deemed to have conspired to do that thing in Canada. Furthermore, according to sub-section 465 (4) of the *Criminal Code*, everyone who conspires with another person outside of Canada to commit an offence in Canada shall be deemed to have conspired in Canada.

Canadian criminal law also provides for other bases of extraterritorial jurisdiction to judge crimes with a foreign component to their alleged commission.

Section 2. The Personality Principle under Section 8 of CAHWCA

As a result of political difficulties associated with expansive universal jurisdiction legislations,[802] Canada chose to legislate limited extraterritorial jurisdiction that would

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800 *Ibid.* at para. 59.

801 *Ibid. at* para. 9 (under the former *Criminal Code*, *supra* note 684 provisions, the relevant paragraphs that applied were paragraph 423 (3) for conspiracies to commit crimes outside Canada and 423 (4) for conspiracies outside Canada to commit crimes in Canada).

802 See, for example, the difficulties encountered by Belgium, with its controversial universal jurisdiction Law of 16 June 1993 para. "concerning the Punishment of Grave Breaches of the International Geneva Conventions of 12 August 1949 and of Protocols I and II of 8 June 1977 additional thereto", as amended by the Law of 10 February 1999 "concerning the Punishment of Serious Violations of International Humanitarian Law", article 7, cited in *Arrest Warrant*, *supra* note 63 at para. 15. See also Vandermeersch, *supra* note 56 at 601. Under this law, Belgium attempt to convict a number of famous political figures such as law after indictments were issued against Ariel Sharon, Yassir Arafat, Fidel Castro, George Bush, Dick Cheney and Colin Powell among others (See Wanless, *supra* note 640 at 215).

ensure a personal or territorial connection with its adjudicating bodies[803] under section 8 of CAHWCA.

First, sub-section 8 (a) of CAHWCA provides for an enlarged personal jurisdiction of Canadian courts. Its provisions almost textually replicate the predecessor paragraph 7 (3.71) (a) of the former *Criminal Code*. The latter was enacted in the mid-1980's in response to the Deschênes Commission Report, named after the judge responsible for investigating the presence of Nazi criminals in Canada for the purpose of formulating recommendations for future criminal prosecutions against them.[804]

Sub-section 1. Active Personality Jurisdiction

Similarly to its predecessor, paragraphs 8 a) (i) and (ii) of CAHWCA provide for an active personality jurisdiction of Canadian courts over persons who were Canadian citizens, were employed by Canada in a civilian or military capacity, were citizens of a state that was engaged in an armed conflict against Canada, or were employed in a civilian or military capacity by such a state.

In the case of corporations, problems may arise with respect to the application of these provisions of CAHWCA, and particularly in determining the citizenship of a corporation. As stated by Cory Wanless, "throughout the Criminal Code, the word citizen is used in accordance with its meaning in the Citizenship Act. Because corporations simply are not considered Canadian citizens within the meaning of the Citizenship Act, CAHWCA likely does not extend jurisdiction to corporations based on the principle of active personality".[805]

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803 Wanless, *ibid.* at 215.

804 Commission Deschênes, created by Order in Council no. 1985-348 referred to in Dumont, *supra* note 472 at 189.

This thesis nevertheless supports the view that under CAHWCA, Canadian courts would have jurisdiction to judge corporations incorporated in Canada as though they were Canadian citizens, which is consistent with the 1970 ICJ opinion in the *Barcelona Traction Case* that corporations are nationals of their country of incorporation.[806] This is also the most traditional and predominant factor identified by doctrine to determine the nationality of a corporation in common law States.[807]

For instance, despite the complex business structure existing between Talisman and GNPOC,[808] Canadian courts would have jurisdiction to judge a prosecution against Talisman, a Canadian subsidiary corporation. It must be noted, however, that once the case is before the courts, the latter may encounter the same difficulties as the American courts in attributing responsibility for alleged acts, such as operating airstrips or upgrading runways, directly to Talisman.[809]

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805 Wanless, *supra* note 640 at 216, citing *Citizenship Act*, R.S.C 1985, c. C-29.

806 *Barcelona Traction Case,supra* note 36 at 9. See Hansen, *supra* note 41 at 432.

807 Linda A. Mabry, « Multinational Corporations and U.S. Technology Policy : Rethinking the Concept of Corporate Nationality », (1999) 87 Geo. L.J. 563 at 583; Sara L. Seck, « Home State Responsibility and Local Communities : The Case of Global Mining » (2008) 11 Yale Hum. Res. & Dev. L.J., 177 at 187 cited in Amissi M. Manirabona, « Le droit pénal des organizations face à l'internationalisation de la conduite criminelle : Le cas de la société Anvil Mining Ltd. au Congo » (2009) 3 Canadian Criminal Law Review, Vol. 13, 217 at 231-232. It must however be noted that some continental systems have begun to look to the place of the corporations 'seat', its principal office. Furthermore, numerous statutes now define corporate nationality in terms of stock ownership, management or "control" generally (See Vagts, *supra* note 38 at 740-741).

808 *Talisman Energy,* SDNY 2006, *supra* note 544 at 82. This complex business structure was described by the Court as follows: "After it acquired Arakis, Talisman transferred the interests that Arakis had held in GNPOC Project Agreements to State Petroleum Corporation B.V., an indirect subsidiary of Talisman, which was renamed Talisman (Greater Nile) B.V. or TGNBV on December 10, 1998. TGNBV was a wholly-owned subsidiary of Goal Olie-en-Gasexploratie B.V. (Goal Olie). In the period that it owned TGNBV, Goal Olie was wholly owned by two English companies, first Supertest Petroleum (U.K.) Limited ("Supertest") and then Igniteserve Limited ("Igniteserve"). Both Supertest and Igniteserve were wholly owned by Talisman Energy (UK) Limited ("Talisman UK"). Talisman UK was a direct and wholly-owned subsidiary of Talisman." (see *Talisman Energy,* SDNY 2006, *supra* note 544 at 22).

809 *Ibid.*

Sub-section 2. Passive Personal Jurisdiction

In addition to jurisdiction based on the accused's nationality or employment by a State, paragraphs 8 a) (iii) and (iv) of CAHWCA also provide that Canadian courts have passive personal jurisdiction if, at the time that the war crime, crimes against humanity or genocide was alleged to be committed, the victim of the alleged offence was a Canadian citizen or the victim of the alleged offence was a citizen of a state that was allied with Canada in an armed conflict.

This would be the case, for example if former residents of Sudan who obtained citizenship in Canada would refer the case of Talisman Energy to Canadian courts, just as it was done in the United States.

On the other hand, the plaintiffs of the New York District Court's case of *The Presbyterian Church of Sudan* v. *Talisman Energy*[810] would not be able to invoke this head of jurisdiction since they are former residents of Sudan or current residents of the United States and not Canadian citizens. They may however be able to institute criminal proceedings before Canadian Courts under other heads of jurisdiction provided under section 8 of CAHWCA.

Section 3. The Principle of Universality under Section 8 of CAHWCA

Even where the accused person or the victims are not Canadian citizens, or do not fall under any of the requirements of sub-section 8 a), CAHWCA also provides for a limited universal jurisdiction, provided that the person accused is present in Canada.[811]

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[810] *Ibid.*
[811] CAHWCA, *supra* note 24, s. 8 (b).

Indeed, as another exception to the territoriality rule for jurisdiction in section 6 of the *Criminal Code*, the principle of universality "permits the exercise of jurisdiction by a state in respect of criminal acts committed by non-nationals against non-nationals wherever they take place. Jurisdiction is based upon the accused's attack upon the international order as a whole and is of common concern to all mankind as a sort of international public policy."[812] More specifically, while accepting that concerns of international comity normally called for restraint in the extraterritorial application of Canadian criminal law,[813] the Supreme Court of Canada has also held that it is no longer possible to remain indifferent to the protection of the people living in other countries.[814]

Sub-section 1. The Presence of the Corporation in Canada

Pursuant to the principle of universality, sub-section 8 b) of CAHWCA provides that if an accused person is present in Canada, it would be possible to prosecute the individual or organization before Canadian courts for alleged international crimes.

Some complexities may arise however in determining the presence of a corporation on Canadian territory. This is due to the limited shareholder liability scheme of an MNC, which creates a corporate veil that shields parent companies, often incorporated in one territory, for the actions of their subsidiaries, incorporated in another territory.[815] This limited liability approach, also known as the "entity law approach" poses a real problem on a jurisdictional level, as in the *Barcelona Traction Case* where the ICJ refused to lift the corporate veil to determine the real control relationship of Belgian shareholders of the

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812 Gillian Triggs, "Australia's War Crimes Trials: A Moral Necessity or Legal Minefield?"(1987) 16 *M.U.L.R.* 382 at 389, cited in Finta, *supra* note 630 at 806.

813 *R.* v. *Libman*, *supra* note 799 at 183-184 (See Manirabona, *supra* note 807 at 221).

814 *R.* c. *Libman*, *ibid.* at 213-214 (See Manirabona, *ibid.* at 221).

815 Hansen adds that an even more insurmountable barrier is that posed by the logistical challenges of transnational litigation involving multiple corporate entities (i.e. arranging cooperation among states in enforcement matters, tracking corporate finances and dissolution, witness subpoenas, evidence gathering, etc.). (See Hansen, *supra* note 41 at 431).

Barcelona Traction Company. The Court decided that since the corporation was incorporated in Canada, only the latter country could sue the corporation.[816]

Some common law jurisdictions use the "agency theory" to overcome the entity law approach, where it can be determined that a subsidiary operated as the agent of the parent company and that therefore the parent company is liable for the actions of the subsidiary. In order for this theory to become applicable, it must be determined that both parties, the parent and the subsidiary, agreed that the subsidiary was acting on behalf of the parent.[817]

In common law, certain factors have been used to determine whether a subsidiary is an agent of the parent. They include (i) whether the profits were treated as the profits of the parent; (ii) if the persons conducting the business were appointed by the parent; (iii) if the parent was the head and the brain of the trading venture; (iv) if the parent governed the adventure, decided what should be done and what capital should be embarked on the venture; (v) if the parent made profits by its skill and direction; and (vi) if the parent was in effectual and constant control.[818]

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816 *Ibid.* at 432.

817 *Ibid.* at 434.

818 *Smith, Stone and Knight Ltd.* v. *Birmingham Corporation*, [1939] 4 All ER 116, Atkinson J., cited in Anil Hargovan & Jason Harris, "Piercing the Corporate Veil in Canada: A comparative analysis", (2007) 2 Company Lawyer, Vol. 28, 58, online: Social Science Research Network, <http://ssrn.com/abstract=980366> (accessed 29 April 2010). See also *supra* note 659 on various facts considered by common law courts and, in particular, the United States courts to decide that a subsidiary was acting as an agent of a parent corporation. Interestingly, Quebec civil law courts have referred to common law decisions, namely *Smith, Stone and Knight Ltd.* v. *Birmingham Corporation,* to apply the same factors in determining whether a subsidiary is an agent of a parent. See e.g. *Buanderie centrale de Montréal Inc.* v. *Montreal (City)*; *Conseil de la santé et des services sociaux de la région de Montréal métropolitain* v. *Montreal (City),* [1994] 3 S.C.R. 29, at 22-24, online: SCC <http://scc.lexum.umontreal.ca/en/1994/1994scr3-29/1994scr3-29.pdf> (accessed 29 June 2010). The Supreme Court emphasized, that "[i]n light of the foregoing cases, a corporation may be regarded as the *alter ego* of another corporation when there is such a close relationship between them that what apparently concerns one actually pertains to the activities of the other. Undoubtedly a large number of factors can be identified to determine the existence of such a relationship: in my opinion, however, the one that is most explicit and most likely to cover all aspects of the concept is control.", at 24. See also, Crête & Rousseau, *supra* note 36 at 113-115.

Furthermore, under the *Canada Business Corporations Act*, "a body corporate is controlled by a person or by two more bodies corporate if (a) securities of the body corporate to which are attached more than fifty per cent of the votes that may be cast to elect directors of the body corporate are held, other than by way of security only, by or for the benefit of that person or by or for the benefit of those bodies corporate; and (b) the votes attached to those securities are sufficient, if exercised, to elect a majority of the directors of the body corporate".[819] This notion of control is important to determine whether a body corporate is a subsidiary of another body corporate.[820]

Based on this criteria and description of a subsidiary under Canadian law, it seems that certain liability mechanisms described previously in this thesis may be applied to hold Canadian parent corporations responsible for the acts of their subsidiaries. A parent corporation may for instance be held liable under the superior responsibility doctrine for the acts of its subsidiaries which could be considered to be "subordinates" of the said parent corporation. In this regard, it would be necessary to prove (i) that the parent corporation consciously disregarded information that clearly indicated that an offence was about to be committed or was being committed by its subsidiary; (ii) that the subsidiary about to commit or committing the crime was under the parent corporation's effective authority and control; and (iii) knowing that that subsidiary was about to commit or is committing such an offence, failed to take, as soon as practicable, all necessary and reasonable measures within the its power to prevent or repress the commission of the offence or further commission of offences or failed to submit the matter to the competent authorities for investigation and prosecution as soon as practicable.[821] The second element, i.e. the control criterion, could be proven using the aforementioned factors to determine that the subsidiary was acting as the agent of the parent corporation.

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819 *Canada Business Corporations Act*, *supra* note 641, s. 226(2)(3). As seen previously Chapter 3 of this thesis, at p. 144, a "corporation" means a body corporate incorporated under the Act.

820 *Ibid.,* s. 226 (2)(5).

821 Please refer to pages 154, 160-161 above.

Furthermore, this thesis proposes that the "perpetration by means" doctrine developed by the International Criminal Court using the concept of "organisationsherrschaft" could evolve to include corporate liability in the future. More specifically, it could be used in the context of large MNC's composed of multiple subsidiaries operating on many territories. In such an eventuality, the factors used to determine an agency theory would assist in establishing the authority and control of the parent corporation over its subsidiaries and automatic compliance of the latter in execution of a plan. It may be a very challenging task however to prove that the replacement of subsidiaries would not affect the successful execution of the plan.[822] Consistent with the agency theory, one could imagine situations where the parent's control over the subsidiary included appointment of persons conducting the business, taking important decisions over which capital should be spent on the overseas operations, and treating the profits of its subsidiary as its own. This of course is hypothetical since, at the moment, the concept of "organisationsherrschaft" has only been used for determining natural persons' liability in international and national jurisdictions, as described previously in Part I, Chapter 3 of this thesis.

The agency theory could for example be invoked to prosecute Anvil Mining for its alleged responsibility for the Kilwa massacre in October 2004. The Canadian parent corporation was established that same year specifically for the purpose of acquiring the former Australian company, Anvil Mining NL, and thereafter obtained 90% control over the Dikulushi mine.[823] Manirabona asserts that Anvil Mining maintained a high-level of control over Anvil Congo through the intermediary of Anvil Management NL and Mining

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822 Please refer to pages 95-96 above and *supra* notes 410-413. Namely, the relevant factors to consider to establish perpetration by means are: (i) the authority and control of its leader; (ii) the automatic compliance of his/her subordinates; and (iii) a sufficient number of subordinates in order to ensure that their replacement will not affect the successful execution of the plan (*Katanga*, supra note 403, at paras. 512-517).

823 See Anvil Mining Limited, Can. Stock Rev., March 3, 2006, available at http://www.canstock.com/shownews.php?article_id=29, cited in Jonathan Clough, "Punishing the Parent: Corporate criminal complicity in human rights abuses" (2007-2008) 33 Brooklyn Journal of International Law 899, at 925.

Holdings Ltd., receiving almost all the profits generated by its subsidiary in the Dikulushi mine in the DRC. It seems moreover that the events that took place in Kilwa were regularly followed by the board of Anvil Mining and described on its Internet website.[824] On the other hand, Anvil Mining continues to have its principal place of business in Australia and it conducts all of its overseas operations in the DRC.[825] It is also notable that since operations in the DRC were already being carried out by its subsidiaries since 2002,[826] Anvil Mining may not have had sufficient time to gain complete control over them.

It must therefore be acknowledged that the evidence seems only to indicate the *possibility* of a sufficient level of control that could lead to Anvil Mining's prosecution in Canada and subsequent conviction over the alleged acts of its subsidiary, Anvil Congo. Further investigation would nevertheless need to be carried out to determine which corporation, Anvil Mining, Anvil Management NL, Anvil Congo or all were in fact taking the necessary decisions and controlling the operations at the Dikulushi mine in 2004. Moreover, there is no presumption that a subsidiary acts as the agent of its parent and in criminal law, this would need to be proven beyond a reasonable doubt.[827]

Of course, corporate accountability is not limited to the corporation *per se*. Indeed, directors, officers and employees of a corporation are still liable in a personal capacity for

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824 Manirabona, *supra* note 807, at 224-225 (see also Anvil Mining's Internet website at: http://www.anvilmining.com).

825 Clough, *supra* note 823.

826 Anvil Mining, *2006 Annual Report* (26 March 2006), at 26, online: Anvil Mining <http://www.anvilmining.com/files/Anvil_AR06_lo-res_March26.pdf> (accessed 29 June 2010).

827 Schabas argues that "[a] subsidiary – even a wholly owned subsidiary – will not generally be found to be the 'alter ego' of its parent unless the subsidiary is under the complete control of the parent and is nothing more than a conduit used by the parent to avoid liability" [See Paul B. Schabas & Tony S.K. Wong, "Canadian Criminal Law for Businesses: New Developments and What you Need to Know", (Paper presented at the Seminar Keeping the Collar White: What You Need to Know to Protect Your Organization From Criminal Liability, Calgary, Blake, Cassels & Graydon LLP, 25 April 2008), at 6 online: Blake, Cassels & Graydon LLP <http://blakes.com/english/view.asp?ID=2275> (accessed 29 April 2010)]. Furthermore, parent corporations are careful not to act as though they have consented to having their subsidiaries act as agents, according to Hansen, *supra* note 41 at 434.

criminal offences of a corporation, "depending on their role in the commission of the alleged offence and their knowledge of the same".[828]

In this regard, individual accountability for international crimes on the basis of sub-section 8 (b) of CAHWCA does not seem to pose any problems as of yet. In fact, on 27 March 2007, the first trial under this Act was instituted before the Criminal Division of the Superior Court of Quebec, charging Désiré Munyaneza, a Rwandan living in Canada, for genocide, war crimes and crimes against humanity committed between 1 April and 31 July 1994 in the Prefecture of Butare in Rwanda.[829] The decision was rendered on 22 May 2009 by the Honourable André Denis J.S.C. and convicted Munyaneza of all three international crimes.

It is important to point out, however, that the universal jurisdiction principle had already been recognized in Canadian courts for the adjudication of international crimes.

Sub-section 2. The Jurisprudential Recognition of the Principle of Universality before the Enactment of Section 8 of CAHWCA in the *Finta* and *Mugesera* Cases

Even before the adoption of CAHWCA, Canadian jurisprudence had accepted the principle of universality for jurisdiction over international crimes through the prosecution of Mr. Imre Finta, a legally trained captain in the Royal Hungarian Gendarmerie during the Second World War.[830] He was acquitted by the Supreme Court of Canada on the basis of the defence of obedience of superior orders[831] and an absence of a discriminatory intent,

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828 Schabas & Wong, *ibid.* at 6.

829 *R.* c. *Munyaneza*, *supra* note 796.

830 For the analysis of universal jurisdiction in this case, see: *Finta, supra* note 630 at 806-811.

831 *Ibid*, at 839-849. According to the Court considering the context of a global war that was taking place at the time of the crimes, the the "Baky Order" from the Hungarian Ministry of the Interior under which Mr. Finta committed war crimes and crimes against humanity did not appear to be evidently and "manifestly illegal" to Finta.

determined by the Court to be a necessary element for conviction of crimes against humanity.[832] The Court nonetheless recognized that the principle of territoriality contained in the former section 6 of the *Criminal Code* was subject to an exception pursuant to section 7 (3.71).[833] According to the Court, the legal exception applied on condition that the alleged crime constituted a war crime or a crime against humanity. It was therefore the nature of the act committed that was of crucial importance in the determination of jurisdiction.[834]

Finta's acquittal has since been perceived as a failure of Canadian politics to apply international criminal law and prosecute war criminals on its territory.[835] First, the fact that the proceedings were instituted about fifty years after the alleged crimes were committed created difficulties in analyzing the accused's defences of obeying superior orders and of acting under duress.[836] Furthermore, it has since been determined that the need for a discriminatory intent is required as a *mens rea* only for a crime against humanity committed by persecution and not for the other underlying offences of this international crime.[837]

In an article published in 2007, Professor Dumont in fact remarked Canada's reluctance to apply international criminal law before its national courts on the basis of universal jurisdiction. Instead, it seems that the more frequent strategy to address the issue has been to refer the cases of international crimes to immigration officials and decision-makers for deportation of accused individuals on Canadian territory.[838]

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832 *Ibid*, at p. 813.
833 *Criminal Code,* R.S.C., 1985, c. C-46, s. 7 (3.71)
834 Finta, *supra* note 630 at 806-811.
835 Dumont, *supra* note 472 at 191.
836 *Ibid.*
837 *Ibid.* at 196. See also *Tadíc*, ICTY Appeals Chamber, *supra* note 264 at para. 283.
838 Professor Dumont adds that by providing for proceedings for offences described in CAHWCA to be commenced with the personal consent in writing of and conducted by the Attorney General or Deputy Attorney General of Canada, Canada has ensured its control over the institution of such proceedings. (See Dumont, *ibid.* at 197-198. See also Eboe-Osuji, *supra* note 669.

The *Mugesera* case, studied above, serves as an example of this practice. As mentioned, the Court did not shy away from resorting to international customary law and international tribunal's decisions to interpret domestic law related to international crimes. Namely relying on the jurisprudence of the ICTY, the Court reversed its opinion in *Finta* by stating that "the requirement of discriminatory intent is unique to persecution".[839]

Since corporations are not subject to the laws of immigration for deportation, the reluctance of Canada to favour immigration orders over the prosecution of persons for the commission of international crimes may create a risk of impunity if this practice were to continue.

Nevertheless, since the *Finta* case, it seems that CAHWCA, as a separate Act of Parliament from the *Criminal Code*, has settled any questions or previous ambiguities that existed concerning universal jurisdiction and the adjudication of international crimes.[840] Furthermore, the *Munyaneza* case has created an interesting precedent with regards to criminal prosecutions for such crimes that could eventually be transferred to the level of organizations, including corporations.

Finally, just like the three international crimes defined in CAHWCA and the *Rome Statute*, there also exist other crimes "that the international community has determined are so important to prosecute that a country will have jurisdiction to prosecute, regardless of where the acts took place, on the basis of criteria established by treaty."[841]

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839 *Mugesera*, *supra* note 592 at paras. 142-143, referring to : "*Le procureur* c/ *Tadić*, 112 ILR 1 (Chambre de première instance, 1997) and *Le procureur* c/*Kupreskic*, aff. no. IT-95-16T-II, 14 janv. 2000". See also Dumont, *supra* note 472 at 196.

840 CAHWCA, *supra* note 24, s. 8.

841 DFAIT, *supra* note 477 at 8. See also Advisory Group Report, *supra* note 4 at 8, 44; *2007 SRSG on Business and Human Rights Report*, *supra* note 285 at 17; DFAIT Canada, *supra* note 476; 2006 FAFO Report, *supra* note 78 at 10.

Section 4. Torture

In a third scenario that provides an exception to the territorial jurisdiction principle of section 6 of the *Criminal Code*, the Supreme Court of Canada has recognized that, pursuant to section 7 of the *Criminal Code,* torture and other determined crimes are deemed to have been committed in Canada, if, "inter alia, the person who committed it is a Canadian citizen or normally resides in Canada, it was committed on an aircraft registered in Canada or it was committed against a Canadian citizen".[842]

Importantly, through the application of national and international law for liability for international crimes, as well as historical and public accounts, it is no longer possible for a corporation to shield itself against legal exposure on the activities it carries out in high legal and security-risk territories.

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842 *R.* v. *Hape*, *supra* note 795 at para. 66.

Conclusion

Canadian corporations' increasing presence and operations on foreign territories is part of the inescapable phenomenon of international globalization. As a corollary of overseas investments and growth of enterprises across the world, the international community has reacted to the absence of rules governing actions of a new legal personality, the MNC. Canada has been a part of this global movement to elaborate the concept of CSR. Its participation in the conceptualization and development of CSR shows that the Government supports sound corporate governance and corporations' respect of the rule of law.

In addition to measures taken on a national level, Canada has joined various multilateral initiatives to promote responsibility of Canadian corporations for human rights and international crimes. This includes, for example, discussions to provide a regulatory basis for extraterritorial accountability of legal persons under the *Draft Code of Conduct for Transnational Corporations*, prepared by the UN Centre on Transnational Corporations (UNCTC), set up in 1974.[843] Canada has also ratified the *Criminal Law Convention on Corruption*, which holds legal persons liable for criminal offences that constitute or are related to the act of corruption;[844] it participates in the Kimberley Process Certification Scheme, a joint governments, industry and civil society initiative to stem the flow of

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[843] Peter Muchlinski, "Attempts to Extend the Accountability of Transnational Corporations: The Role of UNCTAD" in Kamminga & Zia-Zarifi, *supra* note 42, 97 at 99 (the Commission was originally named the UN Commission on Multinational Corporations and a UN Centre on Multinational corporations). See *United Nations Draft International Code of Conduct on Transnational Corporations*, U.N. Doc. E/C. 10/1984/S/5 (1984), 23 I.L.M. 626 (1984) and Proposed text of the draft code of conduct on transnational corporations, last version: UN Doc. E/1990/94 of 12 June 1990; See also Carolin F. Hillemanns, "UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights", (2003) 10 German Law Journal, Vol. 4, 1065 at 1066, n. 4.

[844] 27 January 1999, CETS No. 173 (Strasbourg, Council of Europe, entered into force 1 July 2002), art. 18, online: Council of Europe <http://conventions.coe.int/treaty/Commun/QueVoulezVous.asp?NT=173&CL=ENG> (accessed 29 April 2010). See also Clapham, *supra* 100 at 175-176.

diamonds extracted under circumstances of armed conflict;[845] and officially supports and contributes to the Extractive Industries Transparency Initiative (EITI), created to establish a degree of revenue transparency in sums companies pay to host governments.[846]

Moreover, as a member of the OECD, Canada complies with a number of recommendations under the *OECD Guidelines on Multinational Enterprises*,[847] a set of voluntary principles and standards for responsible conduct of MNC's, last revised in 2000.

Finally, the membership of the United Nations Global Compact (GC), which became operational in 2000, includes some 7,700 corporate participants and stakeholders from over 130 countries, including Canada.[848] The GC promotes UN principles in the areas of human rights, labour standards, environmental protection and, since 2004, anti-corruption.[849] This is nevertheless a voluntary initiative with no binding effects.

The GC is complementary to the *Draft Norms on Responsibilities of TNC's and Other*.[850] The latter provide, in the fourth paragraph of their preamble, that "transnational corporations and other business enterprises, their officers, and their workers are further obligated to respect generally recognized responsibilities and norms in United Nations treaties and other international instruments".[851] They thereafter enumerates a long list of

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845 Information on the Kimberley Process Certification Scheme is available at online: Kimberley Process <http://www.kimberleyprocess.com/> (accessed 29 April 2010). See *2007 SRSG on Business and Human Rights Report*, *supra* note 285 at 22-23.

846 Information on the Extractive Industries Transparency Initiative is available at online: EITI <http://www.eitransparency.org> (accessed 29 April 2010). See *2007 SRSG on Business and Human Rights Report*, *ibid.* In 2007, Canada announced its support for this initiative, including a contribution of $1,150,000 to the EITI Trust Fund over the next four years. Advisory Group Report, *supra* note 4 at vi, xiv.

847 *OECD Guidelines*, *supra* note 5.

848 Information on the United Nations Global Compact is available at online: Global Compact <http://www.unglobalcompact.org/AboutTheGC/index.html> (accessed 16 April 2010).

849 John Gerard Ruggie, "Business and Human Rights: The Evolving International Agenda", Working Paper No. 31, Corporate Responsibility Initiative (Cambridge, MA: John F. Kennedy School of government, Harvard University, 2007) at 2.

850 *Draft Norms on Responsibilities of TNC's and Other*, *ibid.* See also *Ruggie*, *ibid.*

851 *Ruggie*, *ibid.*

such instruments, among which there is a reference to the *Rome Statute*. This would be a formal recognition that MNCs are prohibited from committing international crimes.

The SRSG on Business and Human Rights's nevertheless observes that there exist potential difficulties in adopting the draft norms. In particular, he expresses that "[t]he business and human rights agenda remains hampered because it has not yet been framed in a way that fully reflects the complexities and dynamics of globalization and provides governments and other social actors with effective guidance."[852] In particular, the draft Norms have not yet gained international recognition. Indeed, on the one hand, the text of 2003 was praised by the main international human rights NGOs and the Sub-Commission as the "first non-voluntary initiative [in the area of business and human rights] accepted at the international level".[853] This optimism was not shared by the business community, including the International Chamber of Commerce and the International Organization of Employers, which were firmly opposed to it.[854]

International efforts to promote CSR on the level of soft law and conventions with restricted membership must therefore be accompanied by enforcement of corporate accountability within national legal systems to have a true impact on corporate operations and concrete progression in this field. In this regard, the recognition of domestic courts' jurisdiction over international crimes is important to address the current impunity of corporations' activities with regards to their involvement in international crimes across the world. As it has been demonstrated in this thesis, international tribunals currently do not have jurisdiction to judge the accountability of corporations for the commission of international crimes.

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852 *Ibid* at 5.

853 David Weissbrodt & Muria Kruger, "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights", (2003) 97 AJIL 901 at 903, cited in *ibid* at 31 (Weissbrodt and Kruger are described by Ruggie as "the principal authors" of the *Draft Norms on Responsibilities of TNC's and Other*).

854 Ruggie, *ibid.* at 3.

This thesis has shown however that precedents of the military tribunals after the Second World War on concerted action, including common plans, joint criminal enterprises and complicity in committing international crimes have been re-integrated and further developed in the jurisprudence and statutes of the *ad hoc* tribunals and the ICC.

Furthermore, the principle of complementarity of the *Rome Statute* confers a binding nature and implementation of international criminal law within the national jurisdictions of States Parties to the ICC. States that recognize liability of corporations for indictable offences are henceforth compelled to take all necessary measures to ensure corporate accountability for international crimes.

Responsibility of corporations for international crimes in Canada is recognized through a combined reading of sections 2 and 22.2 of the *Criminal Code* and CAHWCA, as well as customary international law. In addition to this, Canada benefits from an excellent reputation among nations for having contributed to the development of international criminal law, having participated as a leading party in the negotiations for the establishment of an International Criminal Court and with many of its legal experts serving abroad within the international tribunals.[855]

On the other hand, despite its important role and leadership on the international scene, Canada has shown some reluctance in the application of international criminal law within its own territory. In the past two decades, it has favoured a political strategy of refusing immigration or refugee requests or resorting to deportation, denaturalization or extradition orders for presumed authors of international crimes, as was shown in this thesis through the examples of the *Finta* and *Mugesera* cases.[856] The recent *Munyaneza* case however has shown some progress under the new provisions of CAHWCA to apply a

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[855] Dumont, *supra* note 472 at 189. In fact, the Honourable Philip Kirsch, a Canadian jurist was judge of the ICC from 2003 to 2009 and was the ICC's first president.

[856] Dumont, *ibid.* at 198.

limited universal jurisdiction to judge accused perpetrators of international crimes before Canadian courts.

With the growing publicity surrounding notorious allegations of Canadian corporations' participation in international crimes, SCFAIT responded to recommendations of its Sub-Committee on the issue of accountability of Canadian corporations in 2005.[857] In its response, it recognized corporate responsibility for international crimes, and indicated the possibility of extraterritorial grounds of jurisdiction in Canada, which include a substantial link between the crime and the adjudicating forum, as well as for the three "core crimes" in CAHWCA or other crimes of universal jurisdiction. This view was supported by the Advisory Group of the national roundtables report,[858] the March 2009 response of the Canadian Government to the Advisory Group report entitled *Building the Canadian Advantage: A Corporate Social Responsibility (CSR) Strategy for the Canadian International Extractive Sector,*[859] the 2007 Human Rights Council report drafted by the SRSG on Business and Human Rights[860] as well as a 2005 study conducted by the Norwegian organization FAFO, sponsored by the Government of Canada.[861]

This legal analysis remains theoretical at the time of writing, since, until this date, no corporation has ever been prosecuted for an international crime before a Canadian court. Notwithstanding, potential violations of international criminal law by Canadian corporations continue to face legal and public scrutiny in recent years. Causes for prosecution may therefore eventually break the barriers and attain the realms of criminal justice. In such cases, amendments to the *Criminal Code* in 2003 include an elaborate list of sentences specifically applicable to corporations, including fines under sub-section 735 (1)

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857 Advisory Group Report, *supra* note 4 at 8.
858 *Ibid.* at 44.
859 DFAIT, *supra* note 476.
860 *2007 SRSG on Business and Human Rights Report*, *supra* note 285 at 17.
861 FAFO, *supra* note 78 at 10.

and probationary orders under sub-section 732.1 (3.1) of the *Criminal Code* as studied in Part II, Chapter 4.

In conclusion, through international solidarity efforts, soft law and binding instruments are currently being developed to increase the range of situations through which corporations may improve their conduct and/or be held accountable for violations of international criminal law. Furthermore, it is now recognized by various sources that although corporations cannot be prosecuted for the commission of international crimes before the ICC or the other international tribunals, in many countries, including Canada, their actions may be denounced and judged before a national domestic court on the basis of both national criminal law and universal jurisdiction.

Moreover, international law recognizes that the ICJ's jurisdiction over States extends to violations of international criminal law for the acts of its organs, including corporations. Public allegations and foreign proceedings taken against Canadian corporations for their participation in international crimes may therefore encourage Canada to consider prosecution of its corporations under its national legislation and jurisdiction. Indeed, the Security Council Panel of Experts affirms that "Governments of the countries where the individuals, companies and financial institutions that are systematically and actively involved in these activities are based should assume their share of the responsibility. (...) Governments with jurisdiction over these enterprises are complicit themselves when they do not take remedial measures".[862]

The qualification of the State as a concerned actor of corporate violations of international crimes, even beyond the *Draft Articles on State Responsibility*, may, in fact become a key motivational factor that will lead the Canadian government to consider future prosecutions under CAHWCA and corporate criminal responsibility legislation in Canada.

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862 *Final Report of the UN Panel of Experts 2002*, *supra* note 481 at 31.

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