Prosecuting Corporations for Genocide Under International Law

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> Corporations have neither bodies to be punished, nor souls to be condemned, they therefore do as they like.
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> — Edward, Lord Thurlow, 1731–1806[1]

I. Introduction

Anyone who commits genocide should be accountable for it. This includes individuals, states, and organizations. Both individuals and states are considered capable of committing, attempting, aiding and abetting, or being complicit in genocide. Why not corporations? As legal (or juridical) persons, corporations should be accountable for their criminal conduct just as natural persons are. Genocide is, after all, the crime of crimes. In the wake of the Holocaust, the world outlawed this atrocity via treaty in 1948.[2] That treaty holds "persons" accountable for committing genocide—it does not distinguish between natural and legal persons.[3] Indeed, nothing in the preparatory work (*travaux preparatoires*) to the Genocide Convention accords corporations impunity in this regard.[4]

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[1] Oxford Dictionary of Quotations 810 (Elizabeth Knowles ed., 7th ed. 2009). A version of this observation marks the opening quote of the first article to seriously address corporate crime in an "attempt to establish connections between the distant fields of corporate and criminal law." John C. Coffee, Jr., "*No Soul to Damn: No Body to Kick": An Unscandalized Inquiry Into the Problem of Corporate Punishment*, 79 Mich. L. Rev. 386, 386–88 (1981) (arguing for dual prosecution of corporate officers and the organization).

[2] Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

[3] *Id.*

[4] *See* Michael J. Kelly, *The Status of Corporations in the* Travaux Préparatoires *of the Genocide Convention: The Search for Personhood*, 43 Case W. Res. J. Int'l L. 483, 484 (2010) [hereinafter Kelly, *Status of Corporations*].

But accountability has not been forthcoming.[5] While great strides have been taken to imbue legal persons with the same rights as natural persons,[6] much less has been done to impose upon them similar obligations. And while multinational corporations have been complicit in genocides over many years, none have been prosecuted. "[T]he issue of corporate criminal liability for international law violations remains unresolved."[7]

The modus operandi for dealing with corporate involvement in genocide since the days of the Nuremberg Trials has been individual criminal liability for corporate officers and civil liability for the corporate entity. The civil liability prong has been pursued exclusively in domestic courts—best exemplified by tort litigation in the United States under the Alien Tort Statute (ATS), although "[i]n some 60 cases so far, the plaintiffs have . . . won no outright victories."[8] Even so, courts have begun closing off those civil liability options.[9] And the avenue of criminal liability for the corporate entity, though theoretically possible, has remained inchoate.

Typical corporate complicity in genocide involves supplying the individual perpetrator, or *genocidaire*, with the necessary equipment or support to carry out the atrocity.[10] Think of the foreign companies that supplied Rwanda with machetes to kill Tutsis[11] or Saddam's regime in Iraq with the components for mustard gas to slaughter Kurds.[12] To the extent that corporations participate in genocide, they often assume the role of enablers, not active participants.[13]

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[5] *See*, *e.g.*, W. Cory Wanless, Note, *Corporate Liability for International Crimes Under Canada's Crimes Against Humanity and War Crimes Act*, 7 J. Int'l Crim. Just. 201, 202 (2009).

[6] *See, e.g.*, Citizens United v. FEC, 558 U.S. 50 (2010) (recognizing the free political speech rights of corporations).

[7] Ronald C. Slye, *Corporations, Veils, and International Criminal Liability*, 33 Brook. J. Int'l L. 955, 955 (2008).

[8] *Alien Torts: Trial Trails*, Economist, Oct. 9, 2010, at 51, *available at* http://www.economist.com/node/17199924.

[9] *See* Kiobel v. Royal Dutch Petroleum, 621 F.3d 111 (2d Cir. 2010). As of this writing, the U.S. Supreme Court is deciding the appeal in *Kiobel* from the Second Circuit. Regardless of whether it finds corporations civilly liable for atrocities committed abroad under the ATS, the question of criminal liability remains salient. The stigma of criminal indictment and prosecution is much more harmful to a corporation's public image than tort liability and, arguably, can better induce corporate compliance with societal norms.

[10] Jonathan Clough, *Punishing the Parent: Corporate Criminal Complicity in Human Rights Abuses*, 33 Brook. J. Int'l L. 899, 905 (2008).

[11] Linda Melvern, Conspiracy to Murder: The Rwandan Genocide 56 (2004).

[12] In neither case were corporate defendants ever indicted, although, in the Iraq case, Frans van Anraat, a Dutch supplier of chemical weapons, was prosecuted for aiding and abetting genocide under applicable Dutch law. *See* Marten Zwanenburg & Guido den Dekker, *Prosecutor v. Frans van Anraat*, 104 Am. J. Int'l L. 86, 86–94 (2010) (finding van Anraat guilty of complicity in multiple war crimes but not guilty of complicity in genocide).

[13] *See* Florian Jessberger & Julia Geneuss, *Introduction*, 8 J. Int'l Crim. Just. 695, 695 (2010).

Conversely, for war crimes and crimes against humanity, corporations take on a more active role.[14] Indeed, "[p]rivate military companies engaging in direct combat are perhaps the most notorious for committing atrocities."[15] But despite the more passive role corporations tend to assume with respect to genocide, to never prosecute them for genocide erases any incentive they have to act otherwise.

Likewise, although victim compensation would be a positive development, to allow companies to escape criminal prosecution by simply paying reparations would equally undermine the impetus against committing the crime in the first place. As the British delegate to the Genocide Convention negotiations observed in 1948: "If genocide were committed, no restitution or compensation would redress the wrong. The convention would be rendered valueless if it were couched in terms which might allow criminals who committed acts of genocide to escape punishment by paying compensation."[16]

As the relative economic and political power of corporations expands, there is increasing recognition that corporations should bear greater responsibility for their actions; however, the law has yet to evolve in this direction. Riding the tide of globalization, corporations have gained dramatically in transnational power, while largely escaping responsibility.[17] In fact, according to a 1999 study, "fifty-one of the one hundred largest economies in the world are corporations, while only forty-nine are countries . . . ."[18] Nor has the legal academy taken up the issue in a serious way.[19] The legal aspect of the increasing moral responsibility of companies that is being recognized "remains in the realm of controversy and speculation."[20]

While international law says little about corporate criminal liability for atrocities like genocide, treatises and casebooks on corporate law say even

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[14] Wim Huisman & Elise van Sliedregt, *Rouge Traders: Dutch Businessmen, International Crimes and Corporate Complicity*, 8 J. Int'l Crim. Just. 803, 816 (2008).

[15] Laura A. Dickinson, *Government For Hire: Privatizing Foreign Affairs and the Problem of Accountability Under International Law*, 47 Wm. & Mary L. Rev. 135, 153 (2005) ("[D]uring the conflict in Sierra Leone, officers of Executive Outcomes, working under contract with the government, reportedly ordered employees carrying out air strikes against rebels to '[k]ill everybody,' even though the employees had told their superiors they could not distinguish between civilians and rebels. Neither the . . . employees, nor the company itself, has been held legally accountable." (second alteration in original) (footnote omitted)).

[16] Hirad Abtahi & Philippa Webb, 2 The Genocide Convention: The Travaux Preparatoires 1778 (2008). The ambassador's comment occurred in connection with a discussion of state responsibility, but the negative reaction to the notion of replacing culpability with compensation was a universal observation. Other delegates agreed; for example, the representative from the Philippines said, "An award of damages would not be an adequate substitute for the punishment of the individual criminal." *Id.*

[17] David Weissbrodt & Muria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises With Regard to Human Rights*, 97 Am. J. Int'l L. 901, 901–02 (2003).

[18] *Id.* at 902 n.9.

[19] Jessberger & Genuess, *supra* note 13, at 695.

[20] Desislava Stoitchkova, Towards Corporate Liability in International Criminal Law 95 (2010).

less—often nothing at all.[21] Given the urgency of what's going on in the world with respect to genocide (and the complicit role of companies), more research is needed. Certainly more attention is deserved than the collective shrug the idea has largely received from the academy: "No one seems to know what to do about it. It almost seems as though a certain level of corporate crime is just assumed as a real-life 'cost of doing business.'"[22]

Moreover, the dearth of prosecutions under international law is unconvincing as a reason for not exploring the possibilities. Some may seek solace in the ultimate decision at Nuremberg not to prosecute corporations. But such solace would be historically misplaced:

> [C]orporate and associational criminal liability was seriously explored [by prosecutors at Nuremberg], and was never rejected as legally unsound.
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> These theories of liability were not adopted, but not because of any legal determination that it was impermissible under international law. Instead, their rejection was the result of the wishes of the occupation governments for handling the corporations and the coincidence that the first defendants tried were companies with the structures of Flick, Krupp, and Farben. Corporate or entity liability would have been novel, but no more so than other features of postwar accountability, starting with the idea of an international criminal trial, liability for a head of state, or for crimes against peace, crimes against humanity, or genocide.[23]

Defenders of corporate impunity will always argue that prosecuting corporations for genocide is bad policy, often resting such arguments on economic grounds. But they will also make an array of procedural and jurisdictional arguments against corporate criminal liability for genocide under international law.[24] This paper examines and rebuts these arguments *seria-*

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[21] *See, e.g.*, ROBERT C. CLARK, CORPORATE LAW (1986); MELVIN ARON EISENBERG, CORPORATIONS AND OTHER BUSINESS ORGANIZATIONS (9th ed. 2005); FRANKLIN A. GEVURTZ, CORPORATION LAW (2d ed. 2010); JAMES D. COX & THOMAS LEE HAZEN, CORPORATIONS § 8.13, at 130–31 (2d ed. 2003) (offering a single page on corporate criminal liability); ROBERT A.G. MONKS & NELL MINOW, CORPORATE GOVERNANCE 21–29 (4th ed. 2008) (containing a small section on this topic devoted almost entirely to the financial scandals of the Enron and WorldCom variety). The question of corporate criminal liability is distinct from the question of individual director and officer criminal liability, which is treated extensively elsewhere. *See, e.g.*, WILLIAM E. KNEPPER & DAN A. BAILEY, LIABILITY OF CORPORATE OFFICERS AND DIRECTORS (6th ed. 1998).

[22] MONKS & MINOW, *supra* note 21, at 29. John Coffee, Jr. notes the conundrum often used as an excuse for inaction: "At first glance, the problem of corporate punishment seems perversely insoluble: moderate fines do not deter, while severe penalties flow through the corporate shell and fall on the relatively blameless." *Id.* (quoting Coffee, *supra* note 1, at 386–87).

[23] Jonathan A. Bush, *The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said*, 109 COLUM. L. REV. 1094, 1239 (2009).

[24] Michael J. Kelly, *Ending Corporate Impunity for Genocide: The Case Against China's State-Owned Petroleum Company in Sudan*, 90 OR. L. REV. 413, 417 (2011) [hereinafter Kelly, *Ending Corporate Impunity*].

tim in Part II. Part III concludes with an admonition to move forward and secure an advisory judicial opinion on the question of corporate criminal liability for complicity in genocide under international law.

II. Refuting Arguments Against Criminal Liability

A. Corporations Are Subjects of International Law

Classically, only states were subjects of public international law. They could make conventional and customary international law, and they remained bound by it. They were also the only parties that had standing under international law and, therefore, the only legal actors in the field.[25] Hans Kelsen explains this special status of states, as compared to other actors, in international law: "[W]e may differentiate the state as a juristic person or corporation, and the corporations within the state: the latter are subject to the national legal order, to the law of the state within which they are established. The state as a juristic person is . . . inferior only to international law."[26]

Positivists still cling desperately to this notion[27] and warn about the possible effects of subjecting corporations to international law. For example, they acknowledge judicial decisions finding "that corporations, like any other private actor, are subject to *jus cogens* [peremptory norms] for acts such as genocide" and "could be found liable, no less than individuals, at least in some cases as aiders and abettors, co-conspirators, or entities otherwise 'complicit' in such acts."[28] But they admonish those pushing for this to be careful what they wish for. If corporations are subjects of international law, then they get all the rights that go with that status, not just the obligations. In other words, "human rights" as we know them could become distorted if companies avail themselves of those rights.[29]

By the twentieth century, however, individuals and organizations had joined the mix as subjects of, and, in some cases contributors to, international law—if not formal makers of it. At the Nuremberg trials, natural persons were held criminally accountable for violations of international law.[30]

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[25] *But see* Ian Brownlie, Principles of Public International Law (7th ed. 2008) (acknowledging the primacy of states as subjects of international law but allowing for the possibility of expanding this cohort). *See generally* James R. Crawford, The Creation of States in International Law (2d ed. 2006).

[26] Hans Kelsen, Principles of International Law 114 (2003).

[27] *See* Andrew Clapham, Human Rights Obligations of Non-State Actors 35 (2006).

[28] José E. Alvarez, *Are Corporations "Subjects" of International Law?*, 9 Santa Clara J. Int'l L. 1, 3 (2011).

[29] *See id.* at 28 ("Human rights advocates may not like what happens to their human rights as these get translated to the commercial setting of investor-state disputes."). *But see* Janne Elisabeth Nijman, The Concept of International Legal Personality: An Inquiry Into the History and Theory of International Law 406 (2004) ("From a pragmatic perspective on contemporary global problems, the question of legal status is *less relevant* than how and with which rights and duties these new participants can be effectively endowed.").

[30] Slye, *supra* note 7, at 957.

This marked a significant change from the time when states were considered the only subjects of international law, and natural persons were excluded, except for acts of piracy.

Aside from natural persons, non-state actors have also been recognized as possessing international legal capacity as subjects of international law for many years.[31] The United Nations was considered a subject of international law as far back as the *Reparations* case in 1949,[32] and the Restatement of Foreign Relations Law implicitly recognized corporations as subjects of international law in 1987.[33] Since then, scholars and institutions have increasingly acknowledged individuals and corporations as falling under international law.[34]

Corporations, as is the case with all legal persons, are staffed by natural persons who ultimately make decisions for the corporation. Why should groups of people not be held criminally liable for conduct that individuals, like those at Nuremberg, are held liable by virtue of the fact that they operate as a group?[35] Although some scholars continue to insist that corporations are not subjects of international law,[36] this circle is distinctly shrinking.[37] In fact, "[s]cholars are increasingly rejecting the whole notion of subjects, and

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[31] Notions of international legal personality and status as a subject of international law have been alternately distinguished and conflated by scholars. *See* DAVID RAIÈ, STATEHOOD AND THE LAW OF SELF DETERMINATION 10–16 (2002).

[32] Reparation for Injuries Suffered in Service of United Nations, Advisory Opinion, 1949 I.C.J. 174 (April 11). The General Assembly asked the ICJ for an advisory opinion on whether the U.N. could make a claim for damages after the assassination of the Secretary General's mediator in Jerusalem. The Court said yes, the United Nations had international legal personality sufficient to effectuate its core functions. *Id.*

[33] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW pt. 2, intro. note (1987) ("In the past it was sometimes assumed that individuals and corporations, companies or other juridical persons created by the laws of a state, were not persons under (or subjects of) international law.").

[34] ANTHONY AUST, HANDBOOK OF INTERNATIONAL LAW 180 (2d ed. 2010); MARTIN DIXON, TEXTBOOK ON INTERNATIONAL LAW 122–25 (6th ed. 2007); IGNAZ SEIDL-HOHENVELDERN, CORPORATIONS IN AND UNDER INTERNATIONAL LAW 67–74 (1987). Scholars sometimes also make a distinction in the literature between subjects and objects of international law. *See* L. OPPENHEIM, 1 INTERNATIONAL LAW: A TREATISE § 290 (Ronald F. Roxburgh ed., 3d ed. 1920); WILLIAM R. SLOMANSON, FUNDAMENTAL PERSPECTIVES ON INTERNATIONAL LAW 179 (4th ed. 2003). But this, too, is a false construct. As Rosalyn Higgins, the British Judge for the International Court of Justice, said "[T]he whole notion of 'subjects' and 'objects' has no credible reality, and, in my view, no functional purpose. We have erected an intellectual prison of our own choosing and then declared it to be an unalterable constraint." CLAPHAM, *supra* note 27, at 62–63 (quoting ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 49 (1994)). Academicians mostly agree with Judge Higgins, contending that "international law must abandon the conceptual category of *subjects of international law* . . . . [I]nternational law does not have *a priori* subjects of international law." NIJMAN, *supra* note 29, at 396 (quoting PHILIP ALLOTT, EUNOMIA: NEW ORDER FOR A NEW WORLD 372–73 (1990)).

[35] CLAPHAM, *supra* note 27, at 61.

[36] Slye, *supra* note 7, at 958–59; Wanless, *supra* note 5, at 202 (citing M. CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 57, 82–84 (2003)).

[37] CLAPHAM, *supra* note 27, at 77. Even those scholars who have not settled on an adequate mechanism for treating corporations as subjects of international law recognize the problem. *See, e.g.*, Simon Chesterman, *Lawyers, Guns, and Money: The Governance of Business Activities in Conflict Zones*, 11 CHI. J. INT'L L. 321 (2011).

exposing the fact that there seem to be no agreed rules for determining who can be classed a subject [of international law]."[38]

This development accords with the reality that multinational corporations are in fact regulated by international law on a daily basis. Indeed, the entire web of international economic law, from trade to financial regulation, governs the conduct of corporations in very precise ways—making them the main instruments through which international economic law is animated.[39]

Furthermore, the provisions of the Universal Declaration of Human Rights have been interpreted by successive European Union governments and the United Nations as applying to corporations.[40] And states have always been able to expressly include corporate actors as subjects of regulation in individual treaty regimes.[41] Louis Henkin's observation in his commentary accompanying the revision of the Restatement (Third) of Foreign Relations Law of the United States is, therefore, perhaps definitive of modern thinking: "[T]he reporters reject the suggestion that individuals or companies cannot be 'persons' in international law . . . ."[42]

Thus, companies may not escape through the ever-shrinking historical loophole that they are not "states" and, therefore, not subjects of international law. Corporations are already widely regulated by international law, whether through economic frameworks and trade agreements or through penal provisions governing fraud and money laundering. Indeed, the next step to bring them specifically under the rubric of international criminal legal norms is not a far stretch.

B. Corporations Are Subject to the Genocide Convention

Even if they concede that corporations are subjects of international law generally, those arguing against criminal liability would contend that corporations are not subject to the Genocide Convention in particular. Article 4 of the Genocide Convention covers individual responsibility: "Persons committing genocide or any of the other acts enumerated in article III shall be

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[38] CLAPHAM, *supra* note 27, at 62–63. While scholars concede that states remain "first among equals," as subjects of international law, the idea of international legal personality, post-*Reparations*, "may be capable of development." Ryszard Piotrowicz, *The Structure of the International Legal System*, *in* PUBLIC INTERNATIONAL LAW: AN AUSTRALIAN PERSPECTIVE 56 (Sam Blay et al. eds., 2d ed. 2005); *see also* MALCOLM N. SHAW, INTERNATIONAL LAW 224–25 (5th ed. 2003); Larry Catá Backer, *On the Evolution of the United Nations' "Protect-Respect-Remedy" Project: The State, the Corporation and Human Rights in a Global Governance Context*, 9 SANTA CLARA J. INT'L L. 37 (2011); Larry Catá Backer, *Multinational Corporations As Objects and Sources of Transnational Regulation*, 14 ILSA J. INT'L & COMP. L. 499 (2008); Larry Catá Backer, *From Moral Obligation to International Law: Disclosure Systems, Markets and the Regulation of Multinational Corporations*, 39 GEO. J. INT'L L. 591 (2008).

[39] CHRISTOPHER C. JOYNER, INTERNATIONAL LAW IN THE 21ST CENTURY: RULES FOR GLOBAL GOVERNANCE 27, 253–83 (2005).

[40] CLAPHAM, *supra* note 27, at 228; NIJMAN, *supra* note 29, at 355 n.16.

[41] Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 479–80 (2001).

[42] Louis Henkin, *Restatement of the Foreign Relations Law of the United States (Revised): Tentative Draft No. 2*, 75 AM. J. INT'L L. 987, 987 (1981).

punished, whether they are constitutionally responsible rulers, public officials or private individuals."[43]

While defenders of corporate impunity would read the list of potential defendants as exhaustive and not specifically inclusive of legal persons, there is in fact no textual distinction between natural or legal (juridical) in the reference to "persons." By contrast, such a distinction is specifically made in later international criminal treaties.[44] For example, the term "person" was expressly defined by the drafters of the Rome Statute creating the International Criminal Court (ICC) as meaning natural person.[45] Importantly, the criminal liability of companies was considered for inclusion in the court's jurisdiction; thus, the effort to clarify natural person reveals a tacit acknowledgement that specificity was required to avoid inclusion of companies.

The Vienna Convention on the Law of Treaties establishes a two-pronged inquiry for interpreting the meaning of a treaty like the Genocide Convention. First, the plain meaning of the words should be divined. Second, if ambiguity remains, the preparatory work of the drafters may be utilized.[46] The question here is whether the term "person" in the Genocide Convention excludes corporations. The answer is no.

With respect to the first inquiry, applying the plain meaning of the words, the legal definition of "person" during the 1946–1948 period when the treaty was being drafted included both "natural and artificial" persons, and "as a general rule include[d] corporations."[47]

As to the secondary inquiry, references to legal or juridical persons in the *travaux preparatoires* are scant.[48] Some of the drafters obliquely referred to the criminal liability of organizations, which might include corporations, like the U.S. delegate who referred to corporate bodies such as state governments.[49] But there is no evidence one way or the other that corpora-

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[43] Genocide Convention, *supra* note 2, art. IV.

[44] Kelly, *Status of Corporations*, *supra* note 4, at 484.

[45] Rome Statute of the International Criminal Court, art. 25, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

[46] Vienna Convention on the Law of Treaties, arts. 31–32, Jan. 27, 1980, 1155 U.N.T.S. 331.

[47] BALLENTINE'S LAW DICTIONARY 622 (2d ed. 1948). This understanding reflects a long history recognizing that both rights and duties devolve onto corporations as legal persons. *See* HORACE L. WILGUS, CASES ON THE GENERAL PRINCIPLES OF THE LAW OF PRIVATE CORPORATIONS §§ 1–10 (1902); CORPORATIONS REPRINTED FROM RULING CASE LAW VOLUME SEVEN §§ 3, 8 (1915); *see also* BLACK'S LAW DICTIONARY 1355 (3d ed. 1933) (according the term its usage for a man first, then noting, "the term is, however, more extensive than *man*. It may include artificial beings, as corporations . . . . A corporation is also a person under a penal statute . . . ."); BOUVIER'S LAW DICTIONARY 934 (Baldwin's Century ed. 1934) (tracking the definition in BLACK'S); BOUVIER'S LAW DICTIONARY 64 (Baldwin's Century ed. Supp. 1934) (adding to the BLACK'S definition that, within the meaning of two criminal statutes, "person" means something more—under the 1914 Anti-Narcotic Act, "the word 'person' should be construed to mean and include a partnership, association or corporation as well as a natural person," and a similar construction applies to the 1917 Trading With the Enemy Act).

[48] Kelly, *Status of Corporations*, *supra* note 4, at 484.

[49] ABTAHI & WEBB, *supra* note 16, at 1694.

tions as such were to be included or excluded from the Genocide Convention's reach.[50]

As with any treaty-making conference, some delegates emphasized universal application—like the Soviet representative who proclaimed, "all those committing genocide, no matter who they were, should be punished."[51] The caution expressed by other delegates was based on their domestic civil-law tradition of not holding corporations criminally liable, like the Swedish representative who observed that "the Swedish criminal code did not recognize the idea of penal responsibility of legal persons."[52] Consequently, an examination of the *travaux* sheds no more light on the question. That said, the plain meaning of the term "persons" at the time, together with the declination of the drafters to clarify the term as applicable only to natural beings, renders the secondary inquiry unnecessary. Corporations as legal persons should be included under the term "persons" in the Genocide Convention.

The current Legal Adviser of the U.S. Department of State is in accord on this point.[53] But some legal scholars have adopted a more restrictive interpretation.[54] Nevertheless, the historical trajectory of greater corporate activity and responsibility clearly militates in favor of an inclusive interpretation.

C. Vicarious Criminal Liability Theory

Vicarious liability can induce state liability for the actions taken by its nationals. Vicarious liability is a straightforward legal concept. Liability is imputed from one party to another based upon a set of factors like an agency relationship. Traditionally, states were ultimately responsible, in a pecuniary sense, for the crimes of their nationals. This theory of vicarious liability rests on the notion that, historically at least, states were the only actors in international law. And this was true even where the harm caused by the nationals crossed international borders.[55] In 2007, the International Court of Justice (ICJ) decided that states could be held liable for committing genocide, although it declined to find Serbia so with respect to the Srebrenica massacre.[56]

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[50] *See* Kelly, *Status of Corporations*, *supra* note 4.

[51] ABTAHI & WEBB, *supra* note 16, at 1591–92.

[52] *Id.* at 1595.

[53] Harold Hongju Koh, *Separating Myth From Reality About Corporate Responsibility Litigation*, 7 J. INT'L ECON. L. 263, 266 (2004).

[54] *See, e.g.*, Ben Saul, *In the Shadow of Human Rights: Human Duties, Obligations, and Responsibilities*, 32 COLUM. HUM. RTS. L. REV. 565, 596 (2001); Johan D. van der Vyver, *Prosecution and Punishment of the Crime of Genocide*, 23 FORDHAM INT'L L.J. 286, 290 (1999).

[55] *See, e.g.*, Trail Smelter (U.S. v. Can.), 3 R.I.A.A. 1905 (1938 & 1941), *available at* untreaty.un.org/cod/riaa/cases/vol_III/1905-1982.pdf.

[56] *See* Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), 2007 I.C.J. 43, 237–39 (Feb. 26), *available at* http://www.icj-cij.org/docket/files/91/13685.pdf (deciding that under Article I of the Genocide Con-

More and more, states are held to have breached their human rights obligations when private actors over whom they ostensibly have control commit abuses.[57] The ICJ decision in *Bosnia v. Serbia* bears this out. But, in fact, states are rarely held liable for genocide. Thus, prosecutors should go after the equally culpable enterprises that sometimes fund or back atrocities—multinational corporations.

Modern companies cannot feign innocence by claiming that they were unaware that they enabled genocide. In complying with modern regulations and monitoring profitability, corporations must be aware of what they are doing.[58] Myriad internal and external economic and financial pressures practically mandate that all sectors of a corporation justify themselves along cost-benefit lines. And that path reveals to the company exactly what is happening as it conducts business.

The main theories of vicarious liability for perpetrators in a criminal context are the command responsibility doctrine (used to deal with military hierarchies) and respondeat superior. Such theories rest heavily on notions of agency. The related and newer joint criminal enterprise theory is discussed in Section D.

1. *Command Responsibility*

Of the three main theories of vicarious liability, the command responsibility doctrine[59] is the most well-established theory in international criminal law. As such, it holds the most promise for application to corporations under international law.[60] Under this theory, commanders of armed forces were held accountable for the conduct of their troops—and any atrocities carried out by those troops.

By extrapolation, and by analogy to the notions of imputed state liability discussed above, the next step should be taken to hold the organization accountable for the actions of its leaders. In the military context, armies and navies are components of the state and therefore are accorded sovereign immunity. Thus, that next step cannot be effectively taken. But when grafted from the military context onto the corporate context, the command responsibility doctrine is not so constrained.

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vention, states are obligated not to commit genocide and that under Article IX of the Convention, the ICJ has jurisdiction to decide a state's responsibility for committing genocide in violation of the Convention).

[57] Int'l Council on Human Rights Policy, Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies 1 (2002), *available at* http://www.ichrp.org/files/reports/7/107_report_en.pdf.

[58] Thomas L. Friedman, The World Is Flat 461–62 (2005).

[59] Although fully articulated in the late 1940s, the idea of command responsibility is an old one, dating back at least to the time of Sun Tzu (circa 500 BCE). Eugenia Levine, Global Policy Forum, Command Responsibility: The Mens Rea Requirement (2005), *available at* http://www.globalpolicy.org/component/content /article/163/28306.html.

[60] Michael J. Kelly, *Grafting the Command Responsibility Doctrine Onto Corporate Criminal Liability for Atrocities*, 24 Emory Int'l L. Rev. 671, 689 (2010) [hereinafter Kelly, *Grafting*].

There are three basic elements to prove the superior-subordinate relationship necessary for a superior to be held liable for a subordinate's actions under this theory: authority, knowledge—either actual or constructive—and inaction.[61] The knowledge element has evolved over time from post–World War II cases to more recent decisions in the International Criminal Tribunal for the Former Yugoslavia (ICTY) stemming from the Balkan civil wars.[62] Basically, the commander needed to know or should have known (with some notice) that misconduct was occurring and did nothing to stop it.

> Command responsibility doctrine [has become] a central pillar of international criminal law because it addresses a fundamental dilemma of legal responses to mass atrocity, which is that the atrocities are usually carried out by foot soldiers but it is often the generals and presidents who bear a greater share of moral responsibility.[63]

Likewise, multinational corporations should bear a greater share of moral responsibility for atrocities that occur as a result of their economic enterprises, and it should be of no moment that the companies themselves do not carry out the actual atrocities.

This leaves the technical question of application. How can the theory be successfully transferred between the military and corporate fields? After all, the reporting hierarchies are less stringent on the corporate side, and the end of the equation on the military side is the commanding officer, not the military organization. And here, the analogous object of prosecution is the organization, not the commanding corporate officer.[64]

The first leap to make is from the military side to the civilian side of the equation. ICTY jurisprudence is suggestive on this point and supports the application of the command responsibility doctrine in a civilian rather than

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[61] FORD *ex rel.* Estate of Ford v. Garcia, 289 F.3d 1283, 1288 (11th Cir. 2002); Jared Olanoff, Note, *Holding a Head of State Liable for War Crimes: Command Responsibility and the Milosevic Trial*, 27 SUFFOLK TRANSNAT'L L. REV. 327, 338 (2004). For defenses to a command responsibility theory based charge, see Arce v. Garcia, 434 F.3d 1254, 1259 (11th Cir. 2006); *Ford*, 289 F.3d at 1288; Olanoff, *supra*, at 338–41.

[62] *See In re* Yamashita, 327 U.S. 1 (1946) (requiring little or no knowledge); Trial of Wilhelm List and Others (The Hostages Trial), 8 Law Reports of Trials of War Criminals 34, 42 (U.S. Military Trib. 1949) (requiring some knowledge); Trial of Wilhelm von Leeb and Thirteen Others (The German High Command Trial), 12 Law Reports of Trials of War Criminals 1 (U.S. Military Trib. 1949) (requiring some knowledge together with personal dereliction); Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 7(3), May 25, 1993, 32 I.L.M. 1159 (emphasizing that the commander knew or had reason to know about the misconduct and did nothing); Prosecutor v. Delalic, Case No. IT-96-21-T, Judgment, ¶¶ 387–90, (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998) (noting that "knew" means actual knowledge, and "should have known" at least requires notice and requires the commander to seek out information); Prosecutor v. Delalic, Case No. IT-96-21-A, Judgment, ¶¶ 215–39, (Int'l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001); Prosecutor v. Blaskic, Case No. IT-95-14-A, Judgment, ¶¶ 54–64 (Int'l Crim. Trib. for the Former Yugoslavia July 29, 2004) (affirming the *Delalic* standard that either knowledge or notice and inaction suffices).

[63] Jenny S. Martinez, *Understanding Mens Rea in Command Responsibility: From* Yamashita *to* Blaškiæ *and Beyond*, 5 J. INT'L CRIM. JUST. 638, 639 (2007).

[64] Kelly, *Grafting*, *supra* note 60, at 678–79.

military context.[65] In *Prosecutor v. Delalic*,[66] the trial chamber embraced the prosecution's theory "that individuals in positions of authority, whether civilian or within military structures, may incur criminal responsibility under the doctrine of command responsibility on the basis of their *de facto* as well as *de jure* positions as superiors."[67] Indeed, civilian responsibility was specifically provided for under this theory in the Rome Statute for the International Criminal Court.[68]

The ICTY was not disturbed by the lack of legal authority as a basis for the superior's control. "The mere absence of formal legal authority to control the actions of subordinates should . . . not be understood to preclude the imposition of such responsibility."[69] That observation precisely describes one of the key differences between the military and corporate contexts of hierarchical reporting lines. For the military, the reporting chain is statutory, unlike the case of the company. Nevertheless, the degree of control exercised must be similar: "[T]he doctrine of superior responsibility extends to civilian superiors only to the extent that they exercise a degree of control over their subordinates which is similar to that of military commanders."[70]

Although the appellate chamber in *Delalic* declined to find the locus of the commander's duty to exist in customary law, it left undisturbed the trial chamber's assertion that the theory could be applied to civilians.[71] Thus, the first hurdle is cleared—applying the doctrine to civilians. What about the next hurdle—applying the doctrine to civilian corporations?

Professor Steven Ratner proposed a four-part legal theory to effectuate such corporate responsibility in human rights abuse cases: "[C]orporate duties are a function of four clusters of issues: the corporation's relationship with the government, its nexus to affected populations, the particular human right at issue, and the place of individuals violating human rights within the corporate structure."[72]

In his theory, Ratner accounts for variables such as differential corporate structures, connections with state agencies, and victim classes.[73] Ratner then acknowledges the utility of the command responsibility doctrine:

> The need for care in transposing notions of individual responsibility [from the military area] into the corporate area is demonstrated by a special, significant form of culpability that international law recognizes for acts of omission—the doctrine of superior or com-

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[65] Michael A. Newton & Casey Kuhlman, *Why Criminal Culpability Should Follow the Critical Path: Reframing the Theory of 'Effective Control,'* 40 NETH. Y.B. INT'L L. 3, 29 (2009).

[66] Case No. IT-96-21-A, Judgment, ¶ 240 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001).

[67] *Id.* ¶ 354.

[68] Rome Statute, *supra* note 45, art. 28(b).

[69] *Delalic*, Case No. IT-96-21-T, ¶ 354.

[70] *Id.* ¶ 378.

[71] *Id.* ¶ 240.

[72] Ratner, *supra* note 41, at 496–97.

[73] Kelly, *Grafting*, *supra* note 60, at 679.

> mand responsibility. It extends the liability of a military commander or civilian superior for acts of subordinates beyond those covered through the notion of accomplice liability to those where the superior plays a more passive role by failing to prevent certain actions of subordinates.[74]

The stratified lines of command that exist in corporations are certainly not as rigid as those of military organizations. Nevertheless, if the degree of control to induce vicarious liability is there, then the analogy rests on a firmer foundation: "The rationale for such responsibility is that, by virtue of a hierarchical relationship between superior and subordinate, the former should be held criminally liable for failure to exercise his duties when the result is the commission of offenses by subordinates."[75] Of course, this adaptation would turn as much on fact-sensitivity in the corporate context as it does in the military context.

The adaptation Ratner adopts posits corporate liability stemming from state responsibility when companies and states work together to perpetrate human rights abuses.[76] Otherwise, the genocide in Darfur, where the Chinese National Petroleum Company is calling the shots and the Sudanese government is arranging the genocide,[77] would be excused. There is no need to limit this application to scenarios where the company is the principal and the government is the agent.

Acknowledging corporate liability as superior to state action implicitly recognizes that the companies themselves are subjects of international law with similar, though perhaps not coextensive, duties of care. Ratner's theory on this point is limited to a conception akin to that of the state-actor requirement for proving a case of torture. State action is not required to find that human rights abuses, much less atrocities, have occurred.[78]

a. The Knowledge Standard

The liability trip wire for command responsibility is imputed knowledge.[79] In the military context, knowledge imputed to the commander is based on a rigid command structure that may not exist in the corporate context.[80] But it might be easier to swallow an imputed knowledge theory in a

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[74] Ratner, *supra* note 41, at 504.
[75] *Id.* at 505.
[76] *Id.* at 506.
[77] Kelly, *Ending Corporate Impunity*, *supra* note 24, at 423.
[78] CLAPHAM, *supra* note 27, at 29 ("Although a policy must exist to commit these crimes, it need not be the policy of a state." (quoting Prosecutor v. Tadiè, Case No. IT-94-1-T, Opinion and Judgment, ¶ 655 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997))).
[79] The knowledge imputed can take several forms and exists in at least four different types of factual scenarios focusing on the commander's temporal and physical proximity to the atrocity (which weighs in the severity of a commander's sentencing). Volker Nerlich, *Superior Responsibility Under Article 28 ICC Statute: For What Exactly Is the Superior Held Responsible?*, 5 J. INT'L CRIM. JUST. 665, 667–68 & n.12 (2007).
[80] *See generally* Newton & Kuhlman, *supra* note 65.

less rigidly structured corporate context where only corporate financial assets, and not the liberty of the accused, would be at risk.

Even so, there are breaking mechanisms built into knowledge imputation. The knowledge prong and the action prong of command responsibility each have at least two manifestations. The first is the "knew or should have known" standard. The International Military Tribunal for the Far East (IMTFE) in *United States v. Soemu Toyoda* said that the Admiral's liability for the conduct of his troops flowed from the fact that he knew "or should by the exercise of ordinary diligence have learned" what they were doing.[81]

Modern international criminal tribunal case law has not disturbed this basic premise. "The *mens rea* requirement is firmly established as constructive or actual notice."[82] And while neither the actual nor the constructive notice can be presumed simply because one is in a command position, "notice may be inferred from the entirety of the circumstances."[83]

Observing the stretch of the knowledge element in the aiding and abetting context is instructive. The British Military Court in the *Zyklon B Case* found that knowledge was the appropriate triggering mechanism for aiding and abetting liability.[84] Even though defense counsel argued that the prosecution had to prove that the defendant intended that the gas he supplied be used for extermination, the court determined that it was sufficient for the prosecution to show that (1) Allied nationals were gassed with Zyklon B, (2) the defendant supplied it, and (3) the defendant knew that the gas would be used to kill humans.[85]

Similarly, American military tribunals employed the knowledge standard in a trio of cases against corporate executives. Although the tribunals did not convict entire corporations, they utilized knowledge as the benchmark for the conviction of individual corporate officers. Indeed, in *United States v. Krupp*, the tribunal went out of its way to describe knowledge as a sorting mechanism for determining the guilt of various board members of Krupp enterprises—which utilized slave labor in furtherance of the Nazi industrial war machine. "[G]uilt must be personal. The mere fact without more that a defendant was a member of the Krupp Directorate . . . is not sufficient."[86]

In *United States v. Flick*, the tribunal convicted two civilian industrialists for knowingly using their "influence and money" to further the activities

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[81] Valerie Oosterveld & Alejandra Flah, *Holding Leaders Liable for Torture by Others: Command Responsibility and* Respondeat Superior *as Frameworks for Derivative Civil Liability*, *in* TORTURE AS TORT: COMPARATIVE PERSPECTIVES ON THE DEVELOPMENT OF TRANSNATIONAL HUMAN RIGHTS LITIGATION 440, 444 (Craig Scott ed., 2001) (quoting Official Transcript of Record of Trial at 5006, United States v. Soemu Toyoda (Int'l Military Trib. for the Far East Sept. 1949)).

[82] Newton & Kuhlman, *supra* note 65, at 31.

[83] *Id.* at 32 (citing Prosecutor v. Oriæ, Case No. IT-03-68-T, Judgment, ¶¶ 319, 321 & n.82 (Int'l Crim. Trib. for the Former Yugoslavia June 20, 2006)).

[84] *In re* Tesch (The Zyklon B Case), 13 Ann. Dig. 250 (British Military Ct. 1946).

[85] *Id.* at 252.

[86] United States v. Krupp (The Krupp Case), 9 Trials of War Criminals Before the Nuremberg Military Tribunals 1326, 1448 (1950).

of the SS, and increasing their production quotas knowing that slave labor would be needed to meet the new requirements.[87] But *United States v. Krauch* (the *I.G. Farben Case*) offers a reverse conclusion. There, pharmaceutical corporate executives were actually acquitted because the prosecution could not show that defendants knowingly "participate[d] in the planning, preparation or initiation of an ag[g]ressive war."[88] Awareness is an important aspect of knowledge and, perhaps, a required component. In the *I.G. Farben Case*, the executives believed the gas they manufactured was put to the purpose of delousing prisoners. They were, in fact, unaware of the criminal purposes for which it was being used.[89]

These cases convicted individual corporate officers, not corporations. Nevertheless, the knowledge standard appears to contain sufficient elasticity for courts and tribunals to employ it to meet a wide array of fact patterns in often complex corporate liability scenarios. But a string of corporate cases brought under the knowledge standard in the United States during the past decade recently culminated in a Second Circuit decision throwing out a case based on this standard not being met.

b. Lessons From U.S. Civil Litigation

Although cases brought under the U.S. Alien Tort Statute (ATS)[90] are civil rather than criminal in nature, they are instructive for this brief inquiry as to how courts wrestle with the knowledge question that is the linchpin of command responsibility liability. ATS litigation typically involves a foreign national suing a foreign entity in U.S. federal court for a tort committed in violation of international law. Although the first Congress passed the statute in 1789 under pressure to provide an avenue of redress for foreign nationals, it was rarely used until the 1990s. At that point, NGOs began encouraging plaintiffs to utilize the ATS machinery to hold perpetrators of human rights abuses accountable. Eventually, multinational corporations became ensnared in ATS litigation as defendants.

In *Presbyterian Church of Sudan v. Talisman Energy, Inc.*,[91] a Canadian energy concern became embroiled in the Sudan genocide when it acquired a Sudanese oil company, Arakis Energy, in 1998.[92] As the Arab-dominated Sudanese government began forcibly displacing large swaths of the black population to clear ground for oil exploration and drilling, Talisman Energy found itself a target of persistent calls for divestiture. Eventually, Talisman did divest itself of Arakis—selling off its holdings to an Indian company, ONGC Videsh, in 2003.

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[87] United States v. Flick, 6 Trials of War Criminals Before the Nuremberg Military Tribunals 3, 1198, 1217 (1952).

[88] United States v. Krauch (The I.G. Farben Case), 8 Trials of War Criminals Before the Nuremberg Military Tribunals 1117 (1952).

[89] *Id.* at 1169.

[90] 28 U.S.C. § 1350 (2006).

[91] 582 F.3d 244 (2d Cir. 2009).

[92] *Id.* at 259.

During this turmoil, Talisman Energy was brought into U.S. federal court under the ATS by the Presbyterian Church of Sudan, which accused it of backing the efforts of Sudan's government to clear the land for oil exploration by attacking villages, bombing churches, and killing church leaders. The Southern District of New York upheld the Church's cause of action,[93] but the Second Circuit on appeal knocked it down in October 2009, saying:

> [A]pplying international law, we hold that the *mens rea* standard for aiding and abetting liability in ATS actions is purpose rather than knowledge alone. Even if there is a sufficient international consensus for imposing liability on individuals who *purposefully* aid and abet a violation of international law, no such consensus exists for imposing liability on individuals who *knowingly* (but not purposefully) aid and abet a violation of international law. . . .
>
> Only a purpose standard . . . has the requisite "acceptance among civilized nations" for application in an action under the ATS . . . .
>
> Therefore, in reviewing the district court's grant of summary judgment to Talisman, we must test plaintiffs' evidence to see if it supports an inference that Talisman acted with the "purpose" to advance the Government's human rights abuses.[94]

Thus, a new prong of purpose was added onto the traditional knowledge standard. Legal scholars were quick to note the sweeping implications of this holding. Roger Alford observed:

> [T]he opinion . . . creates an intent hurdle that will be extraordinarily difficult for plaintiffs to overcome. Plaintiffs must show that a corporation had the intent to assist in the violation of human rights . . . . If this case stands, it will be the death knell for most corporate liability claims under the Alien Tort Statute.[95]

And at least two amicus curiae briefs were filed with the Supreme Court correcting the Second Circuit on its misreading of the knowledge standard—one focusing on customary law aider and abettor mens rea and its interplay with the Rome Statute,[96] and the other focusing on the court's misconstruction of the *Ministries Case* in the Nuremberg canon.[97] The *Ministries Case* yielded a conviction and acquittal, but the prosecution met the

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[93] Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289 (S.D.N.Y. 2003).

[94] *Talisman Energy*, 582 F.3d at 259–60 (citations omitted).

[95] Roger Alford, *Second Circuit Adopts Purpose Test for ATS Corporate Liability*, OPINIO JURIS (Oct. 2, 2009, 6:32 PM), http://opiniojuris.org/2009/10/02/second-circuit-adopts-purpose-test-for-ats-corporate-liability/.

[96] Brief for International Law Scholars William Aceves, Philip Alston et al. as Amici Curiae Supporting Petitioners, *Talisman Energy*, 582 F.3d 244 (No. 09-1262), 2010 WL 1787371.

[97] Brief for Nuremberg Scholars Omer Bartov, Michael J. Bazyler et al. as Amici Curiae Supporting Petitioners, *Talisman Energy*, 582 F.3d 244 (No. 09-1262), 2010 WL 2032488.

knowledge showing in both instances. The divergent outcomes were rather the result of different actus reus showings.[98]

Legal scholars have long turned to the Nuremberg trials for guidance on the knowledge standard in ATS litigation,[99] although private interests have sought to wriggle out from those constraints—repeatedly citing the Supreme Court's admonition in its single ATS decision, *Sosa v. Alvarez-Machain*,[100] that judges should exercise "vigilant doorkeeping" prior to opening U.S. courts to ATS litigation and set "a high bar to new private causes of action for violating international law."[101]

If the Supreme Court adopts the Second Circuit's holding of knowledge plus purpose as the correct threshold for litigation in the civil context of ATS litigation, then it stands to reason that the same threshold would obtain in criminal litigation against a corporation. This would severely truncate the possibility of grafting the command responsibility doctrine from the military context into the corporate context.

The next obvious question is why no military has been held liable as an organization for atrocities, and whether that has to happen before a successful case can be brought against a corporation under command responsibility theory. Prosecuting an organization is traditionally problematic unless that organization is legally characterized as "criminal," like the mafia or, as in the case of Nazi Germany, the Gestapo or the SS. In the aftermath of World War II, the Allies were able to prosecute individuals for mere membership in those organizations. Today, the United States detains anyone belonging to the Taliban or al-Qaeda based on membership alone—some of the detainees have been prosecuted in U.S. courts or by military commission.[102] So association with a criminal organization is ipso facto prosecutable once that organization is designated criminal. But what about prosecuting the organization itself?

The prospect of prosecuting an entire organization was on chief U.S. prosecutor Robert Jackson's mind as he prepared for the Nuremberg trials,[103] and some of the Reich's political/military organizations were indeed convicted as criminal organizations—thereby opening a path to convict individ-

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[98] *Id.*

[99] *See* Gwynne Skinner, *Nuremberg's Legacy Continues: The Nuremberg Trials' Influence on Human Rights Litigation in U.S. Courts Under the Alien Tort Statute*, 71 ALB. L. REV. 321 (2008)

[100] 542 U.S. 692 (2004).

[101] *Id.* at 727, 729.

[102] *See* Jack Goldsmith, *Long-Term Terrorist Detention and Our National Security Court* 4–5, 9 (Series on Counterterrorism & Am. Statutory Law, a joint project of the Brookings Inst., the Georgetown Univ. Law Ctr. & the Hoover Inst., Working Paper No. 5, 2009), *available at* http://www.brookings.edu/~/media/Files/rc/papers/2009/0209_detention_goldsmith/0209_detention_goldsmith.pdf.

[103] *See* ROBERT H. JACKSON, REPORT TO THE PRESIDENT ON ATROCITIES AND WAR CRIMES (1945), *available at* http://avalon.law.yale.edu/imt/imt_jack01.asp. In part III, section 5, Jackson asks rhetorically, "What specifically are the crimes with which these individuals *and organizations* should be charged, and what marks their conduct as criminal?" *Id.* (emphasis added).

uals based merely upon membership. But private companies were not among them. Which is not to say that Jackson precluded the possibility of going after corporations.[104] But the tribunal's acquittal of Hitler's economics minister, Hjalmar Schacht, together with the light twenty-year sentence meted out to Albert Speer, the titular head of industrial production in Nazi Germany, took the wind out of prosecutorial sails for a frontal attack on individual corporations in later trials.[105]

Krupp, I.G. Farben, and other industrial concerns whose corporate officers underwent separate trials after the Nuremberg judgment were not branded criminal organizations. Only their officers were tried. Neither was Talisman Energy; and it is unlikely to be designated as such no matter what atrocities or criminal negligence it has wrought or was complicit in undertaking.

2. *Respondeat Superior*

Respondeat Superior is less prevalent in international criminal law. Prosecuting organizations in the United States under common law relied heavily on the transference of respondeat superior from the civil to the criminal context. Respondeat superior is the conceptual cousin of command responsibility theory and was the issue in *Talisman Energy*. It predates command responsibility by centuries and was traditionally a method of holding an employer civilly liable for the acts of the employee.

The U.S. Supreme Court first grafted respondeat superior from the civil to the criminal context in the *New York Central & Hudson River Railroad v. United States*[106] case at the turn of the twentieth century. Using the agency theory endemic to respondeat superior, the Court found that the criminal activity (bribery) of a railroad employee was imputable to the corporation as a whole and found the company criminally liable. The Court noted that since the concept was well-founded in civil tort law, it had every reason in public policy to "go only a step farther" and apply it in criminal law.[107]

Cases following *New York Central* have blended civil and criminal liability of corporations as organizations. The Eighth Circuit noted that "[t]here is no longer any distinction in essence between the civil and criminal liability of corporations, based upon the element of intent or wrongful purpose."[108] But one of the problems with respondeat superior is that corpo-

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[104] Jackson made the rhetorical point in his opening statement that men cannot escape criminal liability by hiding behind organizations, not the substantive point that organizations cannot be charged: "[T]he idea that a state, any more than a corporation, commits crimes is a fiction. Crimes always are committed only by persons . . . . While it is quite proper to employ the fiction of responsibility of a state or corporation for the purpose of imposing a collective liability, it is quite intolerable to let such a legalism become the basis of personal immunity." Bush, *supra* note 23, at 1162 n.234 (citation omitted).

[105] *See id.* at 1161.

[106] 212 U.S. 481 (1909).

[107] *Id.* at 494.

[108] Egan v. United States, 137 F.2d 369, 379 (8th Cir. 1943).

rations may raise a due diligence defense based on the existence of corporate compliance manuals and policies.

That defense is not allowed, however, in command responsibility–based prosecutions. Indeed, the commander cannot even delegate his command responsibility.[109] Command responsibility holds the superior's feet to the fire of criminal liability more firmly than respondeat superior and, therefore, is the preferable avenue for prosecution. If the theoretical leap from the military to the corporate context can be made,[110] then a new and vital tool in the fight against impunity for the commission of international crimes can be brought to the fore. Moreover, as both the "nature as well as the elements of command responsibility can be regarded as well established under customary international law,"[111] any court may use them.

D. Corporations Are Capable of Forming the Requisite Intent to Support a Genocide Charge

To prove most crimes, a prosecutor must show general intent on the part of the perpetrator to commit the crime. Such intent often rests upon, or is derived from, motive. But for genocide, a heightened showing is required. The prosecutor must demonstrate that the perpetrator had the specific intent to destroy the population in whole or in part.[112]

Defenders of corporate impunity would argue that, even if corporations are subjects of international law in general, and the Genocide Convention in particular, and even if they are capable of forming general intent, corporations are not capable of forming the *specific* intent required to prosecute for genocide. The toughest hurdle faced by prosecutors in any criminal trial is proving the intent of the perpetrator to commit the crime. In the case of genocide, this is an especially difficult hurdle because the bar is raised from intent to specific intent.[113] A mere showing of motive to commit genocide will not do.[114] For this reason alone, prosecutors will sometimes choose to move forward on other grounds such as war crimes or crimes against humanity.[115]

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[109] *See generally* Ilias Bantekas, *The Contemporary Law of Superior Responsibility*, 93 AM. J. INT'L L. 573 (1999).

[110] The superior, of course, would be the offending corporation instead of the commanding officer.

[111] Beatrice I. Bonafé, *Finding a Proper Role for Command Responsibility*, 5 J. INT'L CRIM. JUST. 599, 601 (2007).

[112] *See* Genocide Convention, *supra* note 2, art. II.

[113] *See* M. Cherif Bassiouni, *Observations Concerning the 1997–98 Preparatory Committee's Work*, 25 DENV. J. INT'L L. & POL'Y 397, 413 (1997); *see also* Matthew Lippman, *Genocide: The Crime of the Century. The Jurisprudence of Death at the Dawn of the New Millennium*, 23 HOUS. J. INT'L L. 467, 506–07 (2001).

[114] Lippman, *supra* note 113, at 474, 485, 506–07.

[115] *See* Fran Pilch, *The Prosecution of the Crime of Genocide in the ICTY: The Case of Radislav Krstic*, 12 USAFA J. LEG. STUD. 39, 42 (2002/2003); *see also* Lippman, *supra* note 113, at 485.

To meet the standard of specifically showing that the *genocidaire* possessed "intent to destroy, in whole or in part"[116] members of a protected group, the prosecutor needs proof—proof that is invariably difficult to come by in the form of intercepted conversations, correspondence, or documents that demonstrate the perpetrator's state of mind. Not all *genocidaires* meticulously catalogue, index, and document their activities as the Nazis did when carrying out Hitler's Final Solution.

Even without clear evidence, it may be possible to build a successful case because modern international case law allows a prosecutor to infer the requisite intent from the acts.[117] The International Criminal Tribunal for Rwanda (ICTR) determined in *Prosecutor v. Akayesu* that specific intent to commit genocide can be successfully inferred through context, thereby somewhat easing the way for this showing.[118] Examples of situations from which intent can be inferred include

> "the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts." . . . Conversely, if the perpetrator's acts are not completely consistent with the aim to destroy the group, it does not necessarily disprove specific intent.[119]

Yet even if the requisite intent may be inferred from the facts in evidence establishing the genocidal acts, the evidence may still fall short for individual perpetrators. Charges of genocide against General Radislav Krstic at the ICTY failed precisely because of the specific intent requirement. Using the *Akayesu* standard, the trial chamber convicted Krstic for the 1995 genocide that targeted and killed between 7000 and 8000 Bosnian Muslim men of military age in Srebrenica as a principal on a theory of joint criminal enterprise (JCE).[120] However, his conviction was overturned by the appellate chamber, which concluded that although the Srebrenica massacre was genocide, and others in the JCE shared a specific intent to carry it through,

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[116] Genocide Convention, *supra* note 2, art. II.

[117] *See* KARIM A.A. KHAN ET AL., ARCHBOLD, INTERNATIONAL CRIMINAL COURTS: PRACTICE, PROCEDURE AND EVIDENCE 1094, 1104 (2009).

[118] Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 523 (Int'l Crim. Trib. for Rwanda Sept. 2, 1998) ("[I]t is possible to deduce the genocidal intent inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others.").

[119] Grant Dawson & Rachel Boynton, *Reconciling Complicity in Genocide and Aiding and Abetting Genocide in the Jurisprudence of the United Nations Ad Hoc Tribunals*, 21 HARV. HUM. RTS. J. 241, 251 (2008).

[120] Prosecutor v. Krstiæ, Case No. IT-98-33-A, Judgment, ¶ 3 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 22, 2004); *see also* Pilch, *supra* note 115, at 55–56.

the evidence did not support the inference that Krstic possessed the required specific intent to destroy, rather than mere knowledge.[121]

In contrast, ICTY prosecutors charged Serbian leader Slobodan Miloševic with both JCE and complicity to genocide for his conduct in the Balkan wars.[122] Unlike JCE, where each actor must possess his own specific intent, complicity to genocide requires not that the complicit actor himself possess specific intent, but rather that he possess knowledge of the *genocidaires*' specific intent and then assists anyway.[123]

> To prove complicity to commit genocide . . . it is not necessary to prove intent. For complicity in genocide, prosecutors would only need to prove that Milosevic knew that the Bosnian Serbs had genocidal intent—in other words that they planned to kill the Muslims in Srebrenica—and continued to aid and abet them in spite of that knowledge.[124]

According to ad hoc tribunal jurisprudence, complicity would encompass "all acts of assistance or encouragement that have substantially contributed to, or have had a substantial effect on, the completion of the crime of genocide."[125] The ICTR specifically outlined the interoperability of complicity and JCE:

> Whereas the genocide is the crime, joint criminal enterprise and complicity in genocide are two modes of liability, two methods by which the crime of genocide can be committed and individuals held responsible for this crime. It is therefore *impossible to plead that complicity in genocide has been committed by means of a*

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[121] *Krstiæ*, Case No. IT-98-33-A, ¶ 134; *see also* L.J. van den Herik, The Contribution of the Rwanda Tribunal to the Development of International Law 120–21 (2005).

[122] *Milosevic Charged With Bosnia Genocide*, BBC NEWS (Nov. 23, 2001), http://news.bbc.co.uk/2/hi/europe/1672414.stm.

[123] *See* Mugambi Jouet, *Reconciling the Conflicting Rights of Victims and Defendants at the International Criminal Court*, 26 ST. LOUIS U. PUB. L. REV. 249, 289 (2007). *See generally* MICHAEL J. KELLY, NOWHERE TO HIDE: DEFEAT OF THE SOVEREIGN IMMUNITY DEFENSE FOR CRIMES OF GENOCIDE AND THE TRIALS OF SLOBODAN MILOSEVIC AND SADDAM HUSSEIN 118 (2005); Dawson & Boynton, *supra* note 119, at 264; Flavia Zorzi Giustiniani, *Stretching the Boundaries of Commission Liability*, 6 J. INT'L CRIM. JUST. 783 (2008); Daryl A. Mundis, *Current Developments at the Ad Hoc International Tribunals*, 1 J. INT'L CRIM. JUST. 520, 521 (2003) ("[T]he *mens rea* for aiding and abetting as a form of complicity in genocide would only be knowledge of the elements of the crime of genocide, including the genocidal intent of superiors or other persons, and acceptance of the course of events, taking into account the foreseeable consequences of providing substantial support." (*quoting* Prosecutor v. Stakic, Case No. IT-97-24-T, Decision on Rule 98 *bis* Motion for Judgment of Acquittal (Int'l Crim. Trib. for the Former Yugoslavia Oct. 31, 2002)); Stacy Sullivan, *Has the Prosecution Made the Case?*, FOREIGN POL'Y FOCUS (Oct. 2, 2005), http://www.fpif.org/articles/has_the_prosecution_made_the_case. Miloševiæ, of course, died before judgment could be rendered in his case.

[124] Sullivan, *supra* note 123.

[125] Prosecutor v. Karemera, Case No. ICTR-98-44-T, Decision on Defence Motions Challenging the Pleading of a Joint Criminal Enterprise in a Count of Complicity in Genocide in the Amended Indictment, ¶ 6 (Int'l Crim. Trib. for Rwanda May 18, 2006).

> *joint criminal enterprise.* Complicity can only be pleaded as a form of liability for the crime of genocide.[126]

A corporation may assist with genocide by providing any number of methods and means of support. "Various forms of participation can constitute complicity including complicity by procuring means (such as weapons), complicity by knowingly aiding and abetting; and complicity by instigation."[127] Whether the complicit actions are knowingly done or intentionally done could be dispositive on the question of successfully prosecuting the corporate entity for genocide using one of the theories of vicarious liability outlined in the prior section. But at least knowledge and approval must be shown to bring a case for complicity. In other words, "did the business entity know or have the possibility to know (should have known) that the business activities contributed to international crimes . . . ?"[128]

The knowledge standard for aiding and abetting is the same as the standard for complicity—knowledge of the *genocidaires*' intent.[129] "[O]ne can be held liable for aiding and abetting genocide, even if one does not share the specific genocidal intent of the principal perpetrator."[130] But, the ad hoc tribunals do not convict defendants on both a charge of genocide and a charge of complicity;[131] thus, most case law focuses on aiding and abetting.[132] Unhelpfully, the statutes of current international criminal tribunals diverge on the mens rea issue. Because there is no common statute for all international criminal tribunals and stare decisis does not exist in international law, each tribunal can go its own way on legal theories and evidentiary standards. For example:

> The Rome Statute contains a provision about criminal responsibility that is not found in either of the U.N. *ad hoc* tribunal statutes or the Genocide Convention but which further illuminates the mens rea of genocide. Under Article 30 of the Rome Statute, "knowledge" and "intent" are the two components of mens rea. A person has "intent" when the person "means to engage in the conduct" and "means to cause that consequence or is aware that it will occur in the ordinary course of events." "Knowledge" requires that the person had "awareness that a circumstance exists or a consequence will occur in the ordinary course of events." As defined in

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[126] *Id.* ¶ 8 (emphasis added).
[127] KHAN ET AL., *supra* note 117, at 1102.
[128] Huisman & van Sliedregt, *supra* note 14, at 820.
[129] Dawson & Boynton, *supra* note 119, at 264.
[130] *Id.* at 250.
[131] *Id.* at 263–64.
[132] *Id.* at 264 ("Chambers have generally only made concrete observations about complicity in genocide in relation to aiding and abetting. One could thus argue that there are clear elements for complicity in genocide *through aiding and abetting*, which are identical to those for aiding and abetting genocide itself." (emphasis added)).

> Article 30, recklessness . . . and negligence are insufficient to establish criminal responsibility.[133]

Not surprisingly, domestic jurisdictions are also often not in accord. In the United States, with respect to corporate criminal liability, "[t]he different levels of intent are commonly identified in descending order of culpability as purpose, knowledge, recklessness, and negligence."[134] This is a rather fluid sliding scale depending on the conduct in question. But distinctions are discernable; as Justice Oliver Wendell Holmes noted, "Even a dog distinguishes between being stumbled over and being kicked."[135]

As to the higher level mens rea, "[p]urpose, or willfulness, is frequently associated with the common-law concept of specific intent, that is, a person acts purposefully if he consciously desires the result of his actions."[136] Although the United States tends to follow the higher-threshold purpose test instead of the knowledge test (and courts are beginning to utilize that for ATS litigation as discussed above), if the ICC were to do likewise, it would place the court at odds with ad hoc tribunal jurisprudence.[137]

Moreover, "[i]f the ICC standard in Article 25(3)(c) is to be understood as a purpose-test for aiding and abetting international crimes, it does not comply with customary international law . . . ."[138] Even if the ICC's chief prosecutor could bring a case for complicity or aiding and abetting genocide against a corporation, which he currently cannot, he would be seriously hamstrung by his own statute.[139]

E. Lack of International Criminal Jurisdiction Should Not Be an Impediment to Prosecution

The absence of international criminal jurisdiction over companies cannot be taken to mean that legal persons are not bound by international law and are not required to refrain from acts of genocide. The lack of jurisdiction by an international criminal tribunal over corporate crime in no way relieves the corporation of international legal obligations.[140] Moreover, it does not mean that the jurisdiction of an authoritative interpretive body such as the ICJ should not be invoked. Nor does it mean that the statute of an existing international criminal tribunal should not be broadened to include

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[133] *Id.* at 250 (quoting Rome Statute, *supra* note 45, art. 30).

[134] James Patrick Hanlon, *Criminal Statutory Liability and Interpretation*, *in* PUNISHING CORPORATE CRIME: LEGAL PENALTIES FOR CRIMINAL AND REGULATORY VIOLATIONS 47, 60 (James T. O'Reilly et al. eds., 2009) (citing United States v. Bailey, 444 U.S. 394, 403 (1980)).

[135] *Id.* at 61.

[136] *Id.* at 60 (citing *Bailey*, 444 U.S. at 404–05).

[137] Huisman & van Sleidregt, *supra* note 14, at 822.

[138] *Id.*

[139] *See id.* at 827–28 ("The strict 'purpose-test' of Article 25(3)(c) seems to constitute too high a threshold for successfully prosecuting corporate complicity.").

[140] CLAPHAM, *supra* note 27, at 31.

corporations or that domestic prosecutions cannot be commenced in jurisdictions where the legal framework has been constructed—like in Canada.[141]

1. *International Prosecution*

Genocide is an international crime. As such, our inquiry begins on the international plane. The treaty outlawing genocide, by its own terms, contemplates domestic prosecution[142] or international prosecution if a penal tribunal is constituted to undertake it[143]—leaving to the ICJ questions of interpretation and application.[144]

Genocide is one of the key crimes prosecutable before the ICC,[145] the ICTY,[146] the ICTR,[147] and the Special Court for Cambodia (ECCC).[148] The statutes creating these organs, however, do not currently imbue them with jurisdiction over legal persons.

But this situation can certainly be remedied. The lack of jurisdiction over companies should not be construed as dismissal of the notion altogether. Luis Moreno Ocampo, the first Chief Prosecutor for the ICC, supported holding corporations accountable for criminal violations of international law.[149] Although the Rome Statute prescribes no jurisdiction over legal persons, only natural persons,[150] the preparatory conference considered such jurisdiction.[151] A paragraph in the draft text provided for trying "legal persons, with the exception of States, when the crimes were committed on behalf of such legal persons or by their agents or representatives."[152]

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[141] Domestic prosecutions can entail either an assertion of universal jurisdiction over a foreign corporation or a simple domestic assertion over a parent corporation. "[T]he nature of corporate involvement in human rights abuses, coupled with the difficulty of securing prosecutions in the host jurisdiction, has focused attention on the potential liability of the parent corporation under the domestic laws of the home jurisdiction." Clough, *supra* note 10, at 903.

[142] Genocide Convention, *supra* note 2, art. VI. The internal illogic of the phrase "shall be tried by a competent tribunal of the State in the territory of which the act was committed" was not lost on the drafters. *Id.* The Dutch delegate observed, "The difficulty was that, when genocide was committed, encouraged or tolerated by the State, the national tribunals would obviously not be in a position to punish the guilty." Abtahi & Webb, *supra* note 16, at 1674.

[143] Genocide Convention, *supra* note 2, art. VI.

[144] Genocide Convention, *supra* note 2, art. IX.

[145] *See* Rome Statute, *supra* note 45, art. 6.

[146] *See* 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 art. 6, May 25, 1993, 32 I.L.M. 1192.

[147] *See* Statute of the International Tribunal for Rwanda art. 5, Nov. 8, 1994, 33 I.L.M. 1602.

[148] Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea art. 4, *amended* Oct. 27, 2004, NS/RKM/1004/006.

[149] James Podgers, *Corporations in the Line of Fire*, A.B.A. J., Jan. 2004, *available at* http://www.abajournal.com/magazine/article/corporations_in_line_of_fire.

[150] Huisman & van Sliedregt, *supra* note 14, at 804.

[151] Kelly, *Grafting*, *supra* note 60, at 689.

[152] Clapham, *supra* note 27, at 30 (quoting Report of the Preparatory Committee on the Establishment of an International Criminal Court art. 23(5), U.N. Doc. A/CONF.183/2/Add.1 (Apr. 14, 1998)).

That the provision did not make it into the final statute was a matter of time constraints and not a coordinated effort motivated by overt hostility to the notion of holding companies accountable.[153] Indeed, "[a]t no point during the drafting of the Rome Statute was it claimed by any delegation that the 'legal persons' referred to in the draft could not demonstrate the requisite legal capacity to be the bearers of international obligations."[154] But States Parties to the Rome Statute (which does not include China, Russia, or the United States) would need legal impetus and political cover to amend the treaty and allow for such prosecution. The ICJ can provide both.

The ICJ does not hear criminal cases. It has jurisdiction in contentious cases between states, not individuals.[155] However, the ICJ may issue advisory opinions when requested to do so by organs or approved agencies of the United Nations.[156] This is a seldom-used legal procedure, but when it is used, the international community takes notice because it is the opinion of the world's highest authority on international law. Although the ICJ has rendered opinions on questions implicating the 1948 Genocide Convention, none involved corporations.[157] The U.N. General Assembly has requested advisory opinions[158] from the ICJ fifteen times since the founding of the court.[159] If the General Assembly were to ask whether corporations can be prosecuted for genocide, and if the ICJ were to answer in the affirmative, then the States Parties to the Rome Statute would have the necessary green light to amend the treaty and empower the ICC's prosecutor to charge companies along with individuals for genocide.

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[153] "[A]ccording to the Co-ordinator of the working group on general principles, 'Time was running out.'" *Id.* at 31 (quoting Per Saland, *International Criminal Law Principles*, *in* THE INTERNATIONAL CRIMINAL COURT: MAKING THE ROME STATUTE—ISSUES, NEGOTIATIONS, RESULTS 189, 199 (Roy S. Lee ed., 1999)). In addition to the question of charging corporations, there was insufficient time to consider the other end of the equation—specifically, what punishments equivalent to imprisonment could be imposed on corporations if they were found guilty. *See* Brief for David Scheffer as Amicus Curiae in Support of the Petitioners, Kiobel v. Royal Dutch Petroleum, No. 10-1491 (July 12, 2011), 2011 WL 6813576, *available at* http://sblog.s3.amazonaws.com/wp-content/uploads/2012/01/Scheffer-Kiobel-Amicus-Brief-Final.pdf.

[154] CLAPHAM, *supra* note 27, at 31.

[155] Statute of the International Court of Justice art. 34, June 26, 1945, 59 Stat. 1031, 33 U.N.T.S. 993.

[156] *Id.* art. 65.

[157] JOHN B. QUIGLEY, THE GENOCIDE CONVENTION: AN INTERNATIONAL LAW ANALYSIS 217–21 (2006).

[158] The U.N. Charter specifically authorizes both the General Assembly and the Security Council to pose legal questions to the ICJ. U.N. Charter art. 96, para. 1. The question of corporate criminal liability for genocide would not likely come from the Security Council since the five permanent members, which are home to some of the largest multinational corporations, would veto such a referral.

[159] *Organs and Agencies of the United Nations Authorized to Request Advisory Opinions*, INT'L CT. JUST., http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=2&p3=1&organ=3 (last visited Apr. 13, 2012) (listing the ICJ advisory opinions requested by the General Assembly).

2. *Domestic Prosecution*

While it is true for the moment that companies cannot be investigated for genocide by an international tribunal, domestic prosecution is not so similarly constrained. Although the crime of genocide carries an international legal definition and is prosecutable before several international criminal tribunals, it is also criminalized in many domestic jurisdictions and, therefore, is prosecutable in domestic courts.[160] But there must be a confluence of a domestic court empowered to hear a genocide case and a domestic prosecutor empowered to bring a corporation before the bar. That confluence is rare.

Prior to the twentieth century, the United States adhered to the British view that corporations could not be held criminally liable as legal persons. But the U.S. Supreme Court reversed this traditional view in 1908. U.S. law does not place procedural restrictions on prosecuting corporations. "[C]orporations may be prosecuted for any crime which [they are] capable of committing, even aiding and abetting rape or murder. There are no insurmountable hurdles or extra burdens . . . which make prosecution of a corporation inherently more difficult than prosecution of an individual."[161]

So companies can be prosecuted for genocide in some domestic jurisdictions for violations of domestic law. But they can also be prosecuted domestically for a violation of international law because genocide is a *jus cogens* crime. As such, universal jurisdiction attaches. Any court, anywhere in the world, has jurisdiction over genocide and may hear a case against a company as long as the court has criminal jurisdiction over corporations.

For example, although they may not have jurisdiction over companies Spanish courts have used universal jurisdiction to open investigations into allegations of genocide in Tibet[162] and Belgian courts have employed universal jurisdiction to successfully try *genocidaires* for participation in the Rwandan genocide.[163] German and Swiss courts have also tried foreign individuals for genocide,[164] as have the Dutch, who are preparing legislation "to expand the possibilities in the Netherlands to investigate and prosecute inter-

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[160] QUIGLEY, *supra* note 157, at 23 ("States have conducted prosecutions for genocide. The prosecutions have fallen into three categories, in terms of their legal basis. Some have been under a statute protecting a particular group. Some have been on the basis of the Genocide Convention, without any local statute. Some have been on the basis of domestically enacted genocide statutes.").

[161] ROBERT C. THOMPSON, FAFO INST. FOR APPLIED INT'L STUDIES, SURVEY QUESTIONS AND RESPONSES: COMMERCE, CRIME, AND CONFLICT: A COMPARATIVE SURVEY OF LEGAL REMEDIES FOR PRIVATE SECTOR LIABILITY FOR GRAVE BREACHES OF INTERNATIONAL LAW AND RELATED ILLICIT ECONOMIC ACTIVITIES 11 (2006), *available at* http://www.fafo.no/liabilities/CCCSurveyUS06Sep2006.pdf.

[162] *See* Christine A.E. Bakker, *Universal Jurisdiction of Spanish Courts Over Genocide in Tibet: Can It Work?*, 4 J. INT'L CRIM. JUST. 595 (2006).

[163] M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT'L L. 81, 146 (2001).

[164] *Id.* at 147 n.230.

national crimes, with emphasis on genocide."[165] But structurally and statutorily, it is Canada that really points the way forward with respect to prosecuting corporations because a Canadian court may use universal jurisdiction in conjunction with criminal jurisdiction over companies.

Canada adopted a statute in 2000 implementing key provisions of the ICC's Rome Statute. The Canadian Crimes Against Humanity and War Crimes Act (CAHWCA)[166] vests jurisdiction in Canadian federal courts to try individuals for the crimes comprehended in the Rome Statute. Together with Canadian law allowing corporations to be prosecuted, the potential impact of this statute is profound. "Specifically, CAHWCA employs the Canadian definitions for both the 'persons' that can be tried, and for the relevant modes of commission to which liability will attach. In so doing, the Act has created space for corporate liability for violations of international law that previously did not exist."[167]

Thus, for example, a domestic prosecution for genocide in Canada against a corporation could potentially move forward under Canadian and international law if there is a demonstrable connection between that situation and Canada.[168] Mechanically, this means the jurisdictional provisions of CAHWCA could be employed using universal jurisdiction for *jus cogens* crimes like genocide together with Canadian law on aiding and abetting that allows for criminal prosecution of companies.[169]

Canada has, therefore, effectively amended the Rome Statute via domestic legislation to allow for the prosecution of corporate *genocidaires* in Canadian courts. This, it seems, is the proper paradigm to emulate for developed states interested in holding companies accountable for genocidal conduct. At least, this is the path currently open until jurisdiction is expanded at international tribunals.

III. Conclusion

International law does not prevent the prosecution of corporations for complicity in genocide. This Paper has responded to an array of legal arguments against prosecution to demonstrate that it is possible. Moreover, the theories currently available to international criminal prosecutors can be applied in the corporate context without much difficulty. Even the problem of

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[165] Zwanenburg & Dekker, *supra* note 12, at 94 n.38.

[166] Crimes Against Humanity and War Crimes Act, R.S.C. 2000, c. L-24 (Can.).

[167] Wanless, *supra* note 5, at 206.

[168] For a list of the jurisdictional bases available to prosecutors under CAHWCA, see *Canada's Crimes Against Humanity and War Crimes Act*, Foreign Aff. & Int'l Trade Can. (Jan. 26, 2012), http://www.international.gc.ca/court-cour/war-crimes-guerres.aspx?view=d.

[169] *See* Mugesera v. Canada (Minister of Citizenship and Immigration), [2005] 2 S.C.R. 100, ¶¶ 153–76 (Can.); R. v. Jorgensen, [1995] 4 S.C.R. 55, ¶ 102 (Can.); R. v. Duong (1998), 124 C.C.C. (3d) 392, ¶ 21 (Can. Ont. C.A.); R v. Yanover (1985), 9 O.C.A 93, ¶ 329 (Can. Ont. C.A); Eric Colvin & Sanjeev Anand, Principles of Criminal Law 179–80 (3d ed. 2007); Wanless, *supra* note 5, at 207.

judicial jurisdiction can be overcome with a strong effort to clarify the Genocide Convention of 1948 and amend the Rome Statute of 2002.

Indeed, it is time for international criminal law to catch up with other international legal fields in holding corporations accountable for their actions. "Despite some reluctance to apply international criminal law to corporations in the mid-twentieth century, the concept of international corporate crimes is now common. . . . [S]everal international treaties have expressly included corporate crimes, including the Apartheid Convention, and treaties governing corruption and bribery, hazardous wastes, and other environmental violations."[170]

If companies can be held criminally liable for environmental pollution or bribery, then why not for genocide—where millions may perish?[171] In the absence of an international tribunal currently imbued with the capacity to prosecute a corporation for genocide, the General Assembly of the United Nations, or one of its constituent bodies, should request an advisory opinion from the International Court of Justice on this question of whether companies can be prosecuted.[172] The ICJ has already ruled that states can be held responsible for genocide. Holding corporations responsible would be a logical next step.

If the ICJ answers the question in the negative with respect to corporations, then the world is no worse off and the possibility of domestic prosecutions (currently the only option) would not be disturbed. However, if the Court confirms criminal liability for corporate complicity in genocide under international law, a new impetus to amend the statute of the International Criminal Court would commence.

Certainly, an intended by-product of such a finding would be to encourage a greater sense of corporate responsibility on a global scale.[173] Companies are driven by profits and are answerable to their shareholders. As such, there is a public image factor. Criminal indictments of companies by international bodies can damage the corporate image in numerous ways. "Criminal liability assumes an advantage over civil law and other less stringent mechanisms in that penal sanctions have stigmatizing side effects. The publicity alone of standing trial in the spotlight for international crimes carries unique censure."[174]

It is time to take the promise of Nuremberg to the next level. In moving for the first time in history to hold successfully natural persons (military, government, and corporate leaders in Nazi Germany) accountable under in-

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[170] Beth Stephens, *The Amorality of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT'L L. 45, 76–77 (2002).

[171] Kelly, *Grafting*, *supra* note 60, at 689.

[172] Alternatively, a state party to the Genocide Convention may bring a contentious case before the ICJ under Article IX.

[173] *See generally* JOHN M. KLINE, ETHICS FOR INTERNATIONAL BUSINESS: DECISION MAKING IN A GLOBAL POLITICAL ECONOMY (2005).

[174] STOITCHKOVA, *supra* note 20, at 190 (citation omitted).

ternational law, Justice Robert Jackson was cognizant of the opportunity that lay before him:

> Any legal position asserted on behalf of the United States will have considerable significance in the future evolution of International Law. In untroubled times, progress toward an effective rule of law in the international community is slow indeed. Inertia rests more heavily upon the society of nations than upon any other society. Now we stand at one of those rare moments when the thought and institutions and habits of the world have been shaken by the impact of world war on the lives of countless millions. Such occasions rarely come and quickly pass. We are put under a heavy responsibility to see that our behavior during this unsettled period will direct the world's thought toward a firmer enforcement of the laws of international conduct, so as to make war less attractive to those who have governments and the destinies of peoples in their power.[175]

The opportunity to do justice identified by Jackson after the Second World War is similar to the opportunity to do justice now. A good case can be marshaled before the ICJ, based upon sound legal and policy arguments that multinational corporations should not remain above the law when they are complicit in the commission of the most heinous crimes.

In the intervening years since 1946, multinational corporations have grown in scope and power to frame the architecture upon which the modern global economy is based. There is no question that the largest companies are coming to have, as Justice Jackson put it, "governments and the destinies of peoples in their power."[176] The latitude corporations have been afforded to pursue profit and increase trade is vast. But along with rights come responsibilities. People all over the world have benefited from increased business activity. But darker chapters have also emerged in this larger success story.

Justice demands holding companies accountable when they are complicit parties to genocide. International legal theory provides the tools for doing so even if international jurisdiction is not yet available. The ICJ should issue an advisory opinion that unequivocally holds corporations accountable just as it has done for states. Until international criminal tribunal jurisdiction is forthcoming, the Canadian model for statutory incorporation of international criminal law with the prospect for prosecuting corporate actors domestically is the most promising one to follow.

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[175] JACKSON, *supra* note 103, pt. IV; Michael J. Kelly, *The Evolution of International Law: Arcs and Cycles*, 44 CASE WESTERN RES. J. INT'L L. 1, 5–6 (2011).

[176] *Id.*