

## A New Penalty Structure for Corporate Involvement in Atrocity Crimes: About Prosecutors and Monitors

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The tide is turning towards holding corporations accountable for atrocities. This is true with regard to domestic criminal codes, international treaties, and the jurisprudence of international criminal tribunals.<sup>1</sup>

This might not have been expected back in 2010, when the Second Circuit rejected corporate liability under the U.S. Alien Tort Statute on the ground that “customary international law has steadfastly rejected the notion of corporate liability for international crimes, and no international [criminal] tribunal has ever held a corporation liable for a violation of the law of nations.”<sup>2</sup> However, this view has not been subsequently endorsed by other circuits and the Supreme Court declined to review corporate liability as such in its *Kiobel* judgment.<sup>3</sup> In 2014, the Special Tribunal for Lebanon (STL)—for the first time in the history of international and hybrid criminal tribunals—dealt with a case involving a corporate accused.<sup>4</sup> The legal landscape of corporate accountability standards for atrocity crimes is increasing dynamically both at the domestic and international level. What, however, should be the plausible, appropriate, and effective criminal penalties to be imposed on corporations as legal persons?

The issue is not merely academic, but also of timely practical interest considering the recent STL holding in favor of corporate liability; the case involved charges of contempt and interference with the administration of justice against a broadcasting company that aired the identities of confidential witnesses and failed to remove this information from its

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<sup>1</sup> See Thompson, Ramasastry, and Taylor, *Translating Unocal: The Expanding Web of Liability for Business Entities Implicated in International Crimes*, 40 GEO. WASH. INT’L L. REV. 841, 856 (2009); see also Bert Swart, *International Trends Towards Establishing Some Form of Punishment for Corporations*, 6 J OF INT’L CRIM. JUST. 949 (2008).

<sup>2</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 120 (2d Cir. 2010).

<sup>3</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659, 1663 (2013).

<sup>4</sup> *In the Case Against New TV S.A.L. and Karma Mohamed Tahsin al Khayat*, STL-14-05/PT/AP/ARI26.1, Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings, F0012, 2 October 2014; *In the Case Against Al-Jadeed [Co.] S.A.L./New T.V. S.A.L. (NT. V.) and Karma Mohamed Tahsin Al Khayat* (“Al-Jadeed Case”), STL-14-05/T/CJ, Judgment, F0176, 18 September 2015.

website and another third-party web platform, thus violating a STL pre-trial order.<sup>5</sup> On March 8, 2016, the STL Appeals Panel issued its decision on the Contempt Judge's effort to extract any guidance from international law for corporate criminal liability. While the Appeals Judges reaffirmed the existence of corporate criminal liability under international law, they held that the corporate officer in charge could not be found guilty on the evidence, which avoided the result of finding any corporate liability. Despite this internal power struggle at the STL, the general trend towards corporate liability for international crimes has been clearly signaled by the Appeals Panel and is expected to continue informing that tribunal's jurisprudence.

In cases of corporate wrongdoing, there is always the option to hold the individual officer responsible within the existing jurisdictional reach of criminal tribunals, including most prominently, the ICC. We have seen this in the *Media* Case where the International Criminal Tribunal for Rwanda found media executives guilty of direct and public incitement to commit genocide.<sup>6</sup> David Scheffer's essay in this symposium describes the prospects of holding individual corporate officers liable for corporate misconduct among other options.<sup>7</sup> While this is an important starting point, attributing liability merely to the individual managers would not be an accurate reflection of blameworthiness when dealing with crimes committed through collective corporate action.<sup>8</sup> Moreover, mere individual criminal prosecution would not lead to the organizational change necessary at the firm level to reform corporate policies and structures that have facilitated the commitment of the crimes in the first place.<sup>9</sup> The literature on organizational behavior has established that optimal deterrence and retribution can be achieved by targeting *both* the responsible individual and the firm for criminal liability.<sup>10</sup> Imposing criminal penalties on the corporate entity itself achieves retribution for the collective action and provides incentives for structural change at the firm level.

Lord Chancellor of England Lord Edward First Baron Thurlow (1731-1806) famously stated that corporations as legal fictions under the law have "no body to be kicked."<sup>11</sup> This limits the spectrum of available forms of criminal penalties as not all will be equally applicable to legal persons, such as imprisonment, or some might require adjustments because they were originally designed to punish natural persons.

In that vein, a significant number of legal systems in Europe have taken a hybrid civil/criminal approach to remedies that allows victims to attach civil tort claims for monetary damages to the underlying criminal proceedings.<sup>12</sup> This so-called 'partie civile'

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<sup>5</sup> *Id.*

<sup>6</sup> Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze v. The Prosecutor, Case No. ICTR-99-52-A, Judgment (Int'l Crim. Trib. For Rwanda, 2007).

<sup>7</sup> David Scheffer, *Corporate Liability under the Rome Statute*, 57 HARV. INT'L L. J. (Online Symposium) 35 (2016).

<sup>8</sup> Sara Sun Beale, *A Response to the Critics of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1484 (2009).

<sup>9</sup> Ronald Slye, *Corporations, Veils, and International Criminal Liability*, 33 BROOK. J. OF INT'L L. 963 (2008).

<sup>10</sup> John Coffee, Jr., "No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment, 79 MICH. L. REV. 387 (1981).

<sup>11</sup> JOHN POYNTER, LITERARY EXTRACTS, Vol. 1, at 268 (1844).

<sup>12</sup> See Supplemental Brief of the European Commission on Behalf of the European Union as Amicus Curiae in Support of Neither Party at 18, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491).

procedure could offer a valid remedy option when dealing with corporate perpetrators.<sup>13</sup> However, the underlying core issue of penalties to be imposed on a legal person would remain unresolved since, despite being consolidated with a civil action, the criminal proceedings remain the principal vehicle upon which the civil action merely piggy-backs.<sup>14</sup> Moreover, as stipulated by their founding documents, international tribunals and the ICC are *criminal* courts for atrocity crimes. Letting these bodies decide on the merits of a civil action for damages, which remains an independent action adhering to substantive tort law, would thus overextend these bodies' mandate. This approach would require an amendment or protocol to the Rome Statute or even the establishment of a new tribunal, any of which would be politically difficult. We have to fundamentally rethink and restructure the penalties catalogue at the domestic as well as international level to accommodate corporations as legal persons in the realm of international and hybrid criminal tribunals.

At first glance, criminal fines seem to be the most feasible penalty to impose on convicted legal persons since corporations, as creatures of business, are profit-driven and thus would be expected to respond to monetary incentives through fines. However, fines are not substantially different from compensatory/monetary damages, which can be considered a 'mis-fit' to right international crimes of vast carnage and magnitude.<sup>15</sup> From a behavioral perspective, monetary incentives (such as fines) run the risk of commoditizing moral values and social norms and thus transforming the underlying relationship of law and morality into a mere market exchange.<sup>16</sup> Justice for victims as well as deterrence of future corporate misconduct seems to be best achieved if criminal fines are paired with other non-monetary remedies as primary penalties, recognizing that imprisonment is not applicable to legal persons. But it would be short-sighted to conceive criminal fines as a legitimate stand-alone penalty in cases involving atrocity crimes.

It will require creative thinking that should be informed by lessons from organizational behavior to ensure that justice is rendered for the victims while corporate behavior is stirred towards compliance with human rights principles. France's experience and experimentation with criminal sanctions for corporations as legal entities provides important insights in that regard. France was the first civil law jurisdiction in Europe to adopt corporate criminal liability, in 1994,<sup>17</sup> and to elaborate a comprehensive catalogue of sanctions tailored specifically to when a legal person is the criminal perpetrator.<sup>18</sup> French law considers nine different deprivations of corporate rights as suitable penalties: dissolution of the corporation, 'judicial surveillance,' public display and distribution of the sentence, general or special confiscation of assets, exclusion from public procurement, and (permanent or temporary) closure of one or more of the firm's establishments that were used to commit the crimes.<sup>19</sup> Considering the magnitude and severity of atrocity crimes, the closure of

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<sup>13</sup> Glossary, Cornell University, Comparing French and US Legal Systems, [http://legal1.cit.cornell.edu/court\\_trials/glossary.htm](http://legal1.cit.cornell.edu/court_trials/glossary.htm).

<sup>14</sup> See Jean Larguier, *Civil Action for Damages in French Criminal Procedure*, 39 TUL. L. REV. 698 (1965).

<sup>15</sup> See Stephens, Beth, *Conceptualizing Violence under International Law: Do Tort Remedies Fit the Crime*, 60 ALB. L. REV. 579 (1997).

<sup>16</sup> See LYNN STOUT, *CULTIVATING CONSCIENCE: HOW GOOD LAWS MAKE GOOD PEOPLE* (2010); see also Gneezy, Uri & Rustichini, Aldo, *A Fine is a Price*, 29 THE J. OF LEGAL STUD. 1 (2000).

<sup>17</sup> CODE PÉNAL [C. PÉN.] [PENAL CODE] art. 121-2 (Fr.), <http://www.legislationline.org/documents/section/criminal-codes/country/30>.

<sup>18</sup> *Id.* at arts. 131-37 to 131-49.

<sup>19</sup> Andrew Kirsch, *Criminal Liability for Corporate Bodies in French Law*, EUR. BUS. L. REV. 41 (1998).

involved company establishments, general confiscation of all assets of the company (as opposed to a mere special confiscation of assets that were the object or result of the criminal offense)<sup>20</sup> and, in the most severe cases, the dissolution of the company seem to be most appropriate as primary penalties in these cases.

Lawmakers must specify the precise requirements for some of these penalties, especially with regard to the dissolution of the corporation, also commonly referred to as the “corporate death penalty,”<sup>21</sup> as it is the most severe criminal punishment imposed on a legal entity. France<sup>22</sup> and Belgium<sup>23</sup> allow for a winding-up of the legal person if it was established in order to commit the crimes or if the corporation was deliberately diverted from its original purpose to pursue the criminal conduct.

When prosecuting legal persons, it is important to design penalty structures that induce compliant behavior in a broader range of corporate operations. A non-monetary sanction that has proven particularly promising in the enforcement of the Foreign Corrupt Practices Act (FCPA) is the imposition of an independent compliance monitor on the company.<sup>24</sup> A monitorship is a powerful remedy that has yet not been utilized in international criminal law, but can be very effective as it is extremely punitive from a corporate perspective and can set the stage for organic change within the company. Unlike the criminal penalty of “judicial surveillance,” which is available against legal persons under French law, monitorships offer distinct advantages since they can also be imposed on public corporations (unlike judicial surveillance). Also, while independent monitors take on the role of auditors and advisors (possibly also investigators) to serve as stewards for a culture and system of compliance, they would not take control of all corporate activities related to the criminal offense as is the case with judicial surveillance. Under this design, monitorships would be particularly suited to facilitate change from within the corporation whereas judicial surveillance seems to serve a primarily punitive function.

While individual prosecutions are vital to achieve deterrence—there has been a significant increase in the number of individual corporate officers prosecuted for violating the FCPA’s anti-bribery and accounting provisions in recent years<sup>25</sup>—it is equally important to address systemic problems in the company that have led to a culture of non-compliance. To this end, federal prosecutors have increasingly imposed independent monitors on corporations as a condition for ending investigations under the FCPA. In fact, more than forty percent of all companies that entered into a settlement or plea bargain on FCPA charges from 2004 to 2010 had a monitor appointed.<sup>26</sup>

Monitorships serve a dual purpose: first, they aim to put in place effective compliance structures and second, they aim to promote a corporate culture of integrity. In FCPA

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<sup>20</sup> The general confiscation of all assets of the company is usually only prescribed in severe cases, such as for crimes against humanity that were committed by a legal person. See Article 213-3 of the French Criminal Code.

<sup>21</sup> See Diane Amann, *Capital Punishment: Corporate Criminal Liability for Gross Violations of Human Rights*, 24 HASTINGS INT’L L. REV. 327 (2000).

<sup>22</sup> CODE PÉNAL [C. PÉN.] [PENAL CODE] art. 131 to 139 (Fr.).

<sup>23</sup> CODE PÉNAL [C. PÉN.] art. 35 (Belg.).

<sup>24</sup> 15 U.S.C. §§ 78dd-1 (1977).

<sup>25</sup> See Jon Jordan, *Recent Developments in the Foreign Corrupt Practices Act and the New UK Bribery Act: A Global Trend Towards Greater Accountability in the Prevention of Foreign Bribery*, 7 NYU J. OF L. AND BUS. 845, 853-54 (2011).

<sup>26</sup> Joseph Warin et al., *Somebody’s Watching Me: FCPA Monitorships and How They can Work Better*, 13 U. OF PA. J. OF BUS. L., 321, 322, 326 (2011).

enforcement, the appointment of monitors by the prosecution has proven to be a viable vehicle to change corporate cultures of non-compliance and address shortcomings in compliance procedures and systems at the firm level. Leading legal practitioners on compliance monitorships have found that “[fe]w penalties imposed on a corporate criminal offender cause as much consternation as do compliance monitors.”<sup>27</sup> Examples of companies that retained an independent monitor as a condition for settling the charges under the FCPA, include major brand names such as Siemens,<sup>28</sup> Daimler,<sup>29</sup> and Eni.<sup>30</sup> The U.S. Department of Justice (DOJ) has utilized monitorships not merely for FCPA enforcement. In its case against BP,<sup>31</sup> the DOJ imposed two independent monitors—a process safety monitor and an ethics monitor—on the company as part of the settlement on the criminal charges resulting from the Deepwater Horizon oil spill.

While the experiences with FCPA monitorship provide important lessons for the punishment of atrocity crimes against corporate perpetrators, it would be necessary to adjust some of the terms, scope, and structuring of monitorships to apply them to the international criminal justice system. Thus, while FCPA monitorships are strictly a creation of the settlement agreement between the company and the prosecution,<sup>32</sup> it would be hard to imagine such a contracts-based approach for human rights compliance monitorships as part of prosecution proceedings for atrocity crimes. Rather, a statutory approach would be preferable in the realm of atrocities prosecution in order to standardize the requirements and codify the latter in the relevant sentencing guidelines of the court. Allowing corporations charged with committing the most egregious violations of international law subject to a plea bargain would fly in the face of the universal condemnation of these crimes by the international community.

The appointment of monitors can offer an innovative option for non-monetary sanctions in the broader context of corporate crime, including corporate involvement in atrocity crimes, that can be combined with other forms of sanctions as deemed appropriate. Monitors are selected in different ways. Sometimes, the specific monitor is designated by the prosecution. In other cases, the selection of the monitor is made in cooperation with the respective government, usually giving the relevant agencies veto power on the selection of the monitor, and at times even requiring court approval.<sup>33</sup> Their primary role is to build a robust compliance system and issue recommendations to ensure compliance in the future.

However, monitors can also take on an investigative function into specific allegations on behalf of the agencies.<sup>34</sup> The monitor exercises significant control over the company as he/she reports to the government, usually on an annual basis for the appointed terms, which

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<sup>27</sup> *Id.* at 321.

<sup>28</sup> SEC v. Siemens Aktiengesellschaft, No. 08-CV-02167, at 5 (D.D.C. Dec. 12, 2008).

<sup>29</sup> United States v. Daimler AG, No. 10-CR-00063, at 12 (D.D.C. Mar. 24, 2010) (sentencing memorandum).

<sup>30</sup> United States v. Snamprogetti Netherlands B.V., No. 10-CR-00460, at 12 (D.D.C. Jul. 7, 2010) (deferred prosecution agreement).

<sup>31</sup> *BP Statement on Deepwater Horizon Settlement With U.S.*, THE WALL ST J.: L. BLOG (Nov. 15, 2012), <http://blogs.wsj.com/law/2012/11/15/bp-statement-on-deepwater-horizon-settlement-with-u-s/>.

<sup>32</sup> Joseph Warin et al., *supra* note 26, at 345-46.

<sup>33</sup> Cristie Ford & David Hess, *Can Corporate Monitorships Improve Corporate Compliance?*, 34 J. CORP. L. 679, 711 (2009).

<sup>34</sup> See Rachel Louise Ensign, *How Daimler Got a Very Good Report Card*, THE WALL ST. J. (May 29, 2013), <http://blogs.wsj.com/riskandcompliance/2013/05/29/how-daimler-got-a-very-good-report-card/>.

can vary, but has often been three years in the context of FCPA enforcement.<sup>35</sup> The investigative powers of the monitor can be rather extensive and are not confined by its mandate as defined by the prosecution. The company is not shielded by an attorney-client privilege with the monitor in these cases.<sup>36</sup> Monitorships can provide an effective and incentive-compatible remedy that extends the reach of international justice far into the corporate organization and ascertain what facilitated the involvement in egregious violations of international law and human rights in the first place.

Monitorships can be extremely costly for the company in terms of time and resources for fees, staffing, compliance measures, etc.<sup>37</sup> The economic costs and the expansive scope of the monitor's powers makes this remedy highly punitive and thus effective to stir corporate behavior towards better compliance. The value of an independent human rights compliance monitor as a criminal remedy would include follow-through on the admonition, "Never again." Modern-day companies are complex creatures, so one must appreciate that it takes the right systems and corporate culture in place to prevent similar violations from happening again in the future. Court-installed monitors could help achieve that goal. A possible drawback to the use of monitorships as a criminal penalty is that it lacks some of the punitive stigma that is associated with other more visible punitive measures, such as massive fines, the ban from public procurement, or the closure of company units. Monitorships are therefore best understood not as a stand-alone penalty, but as an additional measure to facilitate organic change from within the company.

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<sup>35</sup> Joseph Warin et al., *supra* note 26, at 347.

<sup>36</sup> *See id.*

<sup>37</sup> *See id.* at 321, 369.