



EMORY
LAW

Emory Corporate Governance and Accountability
Review

Volume 2 | Issue 1

2015

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Recommended Citation

Kelsey G. Spillers, *Corporate Lawlessness: An Era of Corporate Irresponsibility May Be Coming to a Close*, 2 Emory Corp. Governance & Accountability Rev. 55 (2015).

Available at: <https://scholarlycommons.law.emory.edu/ecgar/vol2/iss1/3>

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CORPORATE LAWLESSNESS: AN ERA OF CORPORATE IRRESPONSIBILITY MAY BE COMING TO A CLOSE

*Kelsey G. Spillers**

Corporations currently benefit from an “impunity gap”¹ in international law, a loophole that both empowers them to commit crimes and shields them from punishment. International tribunals created this loophole by limiting criminal liability to “natural persons,” or human beings. This limitation excludes corporations, which are classified as “legal persons.” Without the possibility of retribution, these entities are free to do as they please.² By offering their considerable resources and leverage to individuals, corporations provide the means for these “natural persons” to commit crimes of a magnitude far greater than would otherwise be possible.³

In a recent ruling, the Appeals Chamber for the Special Tribunal for Lebanon made a groundbreaking step, laying the foundation for corporate responsibility in international law. The Chamber found, in *The Case Against New TV S.A.L.*, that corporations, or “legal persons,” could be prosecuted for contempt.⁴ This decision marks a movement away from restricting jurisdiction in international courts to “natural persons,” a significant advancement towards closing the “impunity gap” for corporations in international law.

This piece will investigate the significance of this decision in the scope of international law and the likely consequences with respect to corporate

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¹ See, e.g., In the case against New TV S.A.L and Al Khayat, Case No. STL-14-05, Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings, para. 14 (Oct. 2, 2014), available at <http://www.stl-tsl.org/en/the-cases/stl-14-05/filings-stl-14-05/orders-and-decisions-stl-14-05/f0012-ar126-1> [hereinafter New TV Decision on Appeal].

² This piece does not seek to imply that all corporations are involved with reprehensible acts and notes that many corporations comply with laws and provide substantial contributions to positive social and global change. Rather, this piece addresses a gap in accountability for the corporations that do violate laws and cause harm and proposes the adoption of a bright-line rule that would apply to all corporations to ensure accountability.

³ See, e.g., STATUTE OF THE INTERNATIONAL CRIMINAL COURT, art. 25(1), U.N. Doc. A/CONF.183/9 (1998), available at http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf [hereinafter ICC Statute]; Ronald C. Slye, *Corporations, Veils, and International Criminal Liability*, 33 BROOK. J. INT'L L. 955, 960 (2008).

⁴ New TV Decision on Appeal, *supra* note 1.

responsibility. The structure of the analysis is as follows: A) a historical perspective—focusing on examples of corporate involvement in international crimes; B) the New TV Case and its significance for the future of corporate responsibility in international law; and C) conclusions.

I. HISTORICAL PERSPECTIVE

Corporations have been involved in countless international crimes, acting with the sort of flippancy that comes with the knowledge that there are no rules to break. Without means by which they may be held accountable in international tribunals, these entities have been free to wreak havoc on the world, as evidenced in the following examples.

In *Doe v. Unocal*,⁵ eleven Burmese villagers brought a suit against Unocal, an oil company, for alleged human rights violations in furtherance of a gas pipeline project.⁶ The villagers, representing a class of tens of thousands of residents of Burma, alleged that Unocal acted through the military and police forces to use violence to commit a number of atrocious crimes, including: “forced relocation, forced labor, torture, violence against women, arbitrary arrest and detention, cruel, inhuman or degrading treatment, crimes against humanity, the death of family members, battery, false imprisonment, assault, negligent hiring, or negligent supervision.”⁷ Several villagers described the harsh conditions they endured under the military’s brutal command—threatened with violence, held against their wills and forced to build the pipeline with no compensation.⁸ Testimonies demonstrate that refusal was not an option—when workers protested or became too feeble to contribute, the soldiers executed them.⁹ One villager identified as John Doe I tried to escape the forced labor program.¹⁰ The soldiers allegedly responded by opening fire at him and, as further retribution, threw his wife and infant child into a fire.¹¹ His

⁵ *Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997).

⁶ Shanaira Udwardia, *Corporate Responsibility for International Human Rights Violations*, 13 S. CAL. INTERDISC. L. J. 359, 359 (2004), available at <http://www-bcf.usc.edu/~idjlaw/PDF/13-2/13-2%20Udwardia.pdf>.

⁷ *Doe v. Unocal Corp.*, 248 F.3d 915, 920-921 (9th Cir. Cal. 2001).

⁸ *Doe I v. Unocal Corp.*, 395 F.3d 932, 939-940 (9th Cir. Cal. 2002); see also Udwardia, *supra* note 7, at 361.

⁹ *Doe I*, 395 F.3d at 939.

¹⁰ *Id.*; see also Udwardia, *supra* note 6, at 361.

¹¹ *Doe I*, 395 F.3d at 939; see also Udwardia, *supra* note 6, at 361.

wife sustained severe burns and injuries.¹² Their child died as a result of the burns.¹³

Doe's story is but one of the many tragedies that Unocal facilitated through its alleged complicity with the Burmese government.¹⁴ Though the district court found that there was evidence Unocal knew of and benefitted from these crimes, the corporations ultimately evaded court sanctions by reaching an out-of-court settlement with the plaintiffs before a jury could be empanelled to hear a *Doe v. Unocal* state case.¹⁵ This settlement left many with questions—as a result of the settlement and a previous court order from the Ninth Circuit, the plaintiffs can never bring a suit on the merits of their claims.¹⁶

In Nigeria, two non-governmental organizations¹⁷ lodged a complaint to the African Commission on Human and Peoples' Rights¹⁸ concerning violations of social and economic rights in Nigeria.¹⁹ The complaint alleged that the Nigerian National Petroleum Company, the Nigerian State oil company, had formed a joint venture with Shell Petroleum Development Corporation. The complaint further alleged that this petroleum company's activities had contaminated the environment and caused health problems among the Ogoni people.²⁰ The Nigerian government allegedly supported these violations by providing military personnel to the oil companies and failing to monitor the companies' operations.²¹ The petroleum company's operations contaminated the water, soil, and air.²² The complaint alleged that this contamination had many very serious short and long-term impacts on the health of the local

¹² *Doe I*, 395 F.3d at 939; *see also* Udwardia, *supra* note 6, at 361.

¹³ *Doe I*, 395 F.3d at 939; *see also* Udwardia, *supra* note 6, at 361.

¹⁴ *Id.*

¹⁵ Armin Rosencranz & David Louk, *Doe v. Unocal: Holding Corporations Liable for Human Rights Abuses on Their Watch*, 8 CHAP. L. REV. 135, 143 (2005) available at <http://www.chapmanlawreview.com/wp-content/uploads/2013/07/8-Chap.-L.-Rev.-135.pdf>.

¹⁶ *Id.*

¹⁷ These organizations were the Social and Economic Rights Action Center from Nigeria and the Center for Economic and Social Rights.

¹⁸ Soc. & Econ. Rights Action Ctr. & Ctr. for Econ. & Soc. Rights v. Nigeria (SERAC Case), Comm. No. 155/96, 45 (Afr. Comm'n Hum & Peoples' Rts 2001), reprinted in AFRICAN COMM'N ON HUMAN & PEOPLE'S RIGHTS, 15TH ANNUAL ACTIVITY REPORT ANNEX V. (2002).

¹⁹ Adefolake Adeyeye, *Corporate Responsibility in International Law: Which Way to Go?*, 11 SING. Y.B. INT'L L. 141, 144 (2007).

²⁰ Fons Coomans, *The Ogoni Case Before the African Commission on Human and Peoples' Rights*, 52 INT'L & COMP. L.Q. 749 (July 2003).

²¹ *Id.*

²² *See* SERAC Case, *supra* note 18.

people, including “skin infections, gastrointestinal and respiratory ailments, [] increased risk of cancers, and neurological and reproductive problems.”²³

After the Nuremberg Tribunal, several corporations were scrutinized for their assistance in the heinous crimes of WWII. These corporations were indicted for a variety of crimes including: providing weapons and resources to further the aggressive war, benefitting significantly from the illegal taking of plants and private property in occupied countries, providing gas to the concentrations camps, and employing victims of the forced labor programs and the concentration camps.²⁴ None of these corporations were held responsible for their actions.²⁵ For example, in *U.S. v. Carl Krauch*,²⁶ although the court acknowledged that the officials of the corporation “act[ed] through the instrumentality of [the corporation]. . .,”²⁷ it stated clearly that the corporate entity as such would not be held criminally liable, supporting instead the principle of individual responsibility established in the Tribunal.²⁸

II. A STEP IN THE RIGHT DIRECTION

Though it is indisputable that corporations have been involved in many horrid crimes, the concept of criminal liability for legal persons has been the object of heated debate in international law. Several reservations have been presented, including: i) whether punishing corporations for criminal acts also effectively punishes innocent members of the entity, such as shareholders and employees;²⁹ ii) conflicts with State sovereignty;³⁰ and iii) the issues that corporate liability poses, in contrast to individual liability, in international law.³¹

²³ See The Soc. & Econ. Rights Action Ctr. and Ctr. for Econ. & Soc. Rights v. Nigeria, Communication 155/96 (African Commission on Human and Peoples’ Rights Oct. 27, 2001).

²⁴ Harmen van der Wilt, *Corporate Criminal Responsibility for International Crimes: Exploring the Possibilities*, 12 CH. J. INT’L L. 43, 52 (2013).

²⁵ See generally UNITED STATES OF AMERICA V. CARL KRAUCH ET AL., (*The Farben Case*), VIII TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, NUERNBERG OCTOBER 1946-APRIL 1949 (Washington, DC: GPO, 1952).

²⁶ *Id.*

²⁷ KRAUCH, *supra* note 25, at 1085.

²⁸ *Id.*

²⁹ *E.g.*, Johan D. van der Vyver, *The Perpetrator* 41 (2012) (unpublished manuscript) (on file with author).

³⁰ *E.g.*, Adeyeye, *supra* note 19, at 152.

³¹ *Id.*

Despite these reservations, the benefits of corporate responsibility are overwhelming. Some justifications for holding these entities accountable include: i) when a corporation is involved in a crime, the likelihood of harm is far greater than when a crime is carried out by individuals alone; ii) the individual actions of each member might be insufficient to hold them responsible, despite the collective commission of a large-scale international crime; iii) an organized form of punishment is necessary to prevent these collective actions; and iv) there has been increased international demand for accountability for those organizations that assist in these serious crimes.³²

The Appeals Chamber for the Special Tribunal of Lebanon (“STL”), in *The Case Against New TV S.A.L.*, recently found[HELD?] that the Tribunal has jurisdiction over corporations in contempt cases. While this decision hinges on liability for offenses against the administration of justice and contempt, rather than criminal accountability, it is a step in the right direction.

In this case, a corporation was used as a conduit to reveal confidential information about witnesses in an ongoing trial. Karma Khayat, the organ of New TV S.A.L and acting on its behalf, ordered a report on “purported confidential witnesses in [an ongoing case before the STL].”³³ This report was used to create five episodes revealing this confidential information, which Khayat aired on the corporation’s station and later transferred to New TV S.A.L.’s website and YouTube.³⁴ The Register of the Tribunal sent Notices of Cease and Desist to both Khayat and the corporate entity, with an order to remove the sources exposing the confidential information.³⁵ Khayat refused³⁶ with full knowledge that broadcasting these episodes and subsequently failing to remove them would “undermine public confidence in the Tribunal’s ability to protect the confidentiality of information about, or provided by, witnesses or potential witnesses” and would additionally serve as a violation of the Order by the Pre-trial Judge.³⁷ A contempt case against Khayat was expected, but when the Pre-trial Judge added “New TV S.A.L” to the case, the world was in shock. This decision marked the first time an international criminal tribunal had granted jurisdiction for a “legal person.”

³² Slye, *supra* note 3, at 960; van der Vyver, *supra* note 29, at 43.

³³ In the case against New TV S.A.L and Al Khayat, Case No. STL-14-05, Order in Lieu of an Indictment (Oct. 2, 2014), available at <http://www.stl-tsl.org/en/the-cases/stl-14-05/filings-stl-14-05/orders-and-decisions-stl-14-05/f0001-14-05>.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *See id.*

³⁷ *Id.*

The case hinged on the interpretation of the term “person” in Rule 60bis of the STL Rules of Procedure and Evidence.³⁸ The Appeals Chamber found that “the Contempt Judge was mistaken in excluding legal persons from the ambit of the term ‘person’ in rule 60 bis.”³⁹ Rule 60bis reads, in relevant part:

The Tribunal, in the exercise of its inherent power, may hold in contempt those who knowingly and [willfully] interfere with its administration of justice, upon assertion of the Tribunal’s jurisdiction according to the Statute. This includes, but is not limited to, the power to hold in contempt any *person* who: [. . .]⁴⁰

The Appeals Chamber found the term “person” to be ambiguous.⁴¹ To resolve this ambiguity, the Chamber looked to Rule 3(A). Rule 3(A) states that the Rules must be interpreted “in a manner consonant with the spirit of the Statute”⁴² and lists the sources to consider when interpreting the Rules, in order of precedence:

(i) the principles of interpretation laid down in customary international law as codified in Articles 31, 32 and 33 of the Vienna Convention on the Law of Treaties (1969), (ii) international standards on human rights (iii) the general principles of international criminal law and procedure, and, as appropriate, (iv) the Lebanese Code of Criminal Procedure.⁴³

Focusing on the language of Rule 3(A) and the means for interpretation in the Vienna Conference, the Chamber distinguished between “the *letter* of the law”⁴⁴ and “the *spirit* of the law.”⁴⁵ While “the *letter* of the law” was described to be a stricter, more literal approach; “the *spirit* of the law” was characterized as more liberal, calling for a determination of “the aim and the scope of the Statute as a whole.”⁴⁶ Thus, the Chamber considered the aim and scope of the Rule in its determination.⁴⁷ Looking first to the ordinary meaning of the term

³⁸ See New TV Decision on Appeal, *supra* note 1.

³⁹ *Id.* at para. 91.

⁴⁰ Special Tribunal for Leb., *Rules of Procedure and Evidence*, r. 60bis(a), STL/BD/2009/01/Rev.3/Corr.1 (2010) (emphasis added), available at www.stl-tsl.org/en/documents/stl-documents/rules-of-procedure-and-evidence/rules-of-procedure-and-evidence [hereinafter STL Rules of Procedure and Evidence].

⁴¹ See, New TV Decision on Appeal, *supra* note 1, at para. 26.

⁴² STL Rules of Procedure and Evidence, *supra* note 40, at r. 3(A).

⁴³ *Id.*

⁴⁴ New TV Decision on Appeal, *supra* note 1, at para. 27.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ See *Id.*

“person,” it noted that the drafters distinguished between “person” and “natural person” by including the latter term in the definition of a “victim.”⁴⁸

The Chamber also looked to international standards on human rights and general principles of international criminal law and procedure.⁴⁹ It found an international trend towards criminal responsibility for legal persons⁵⁰ and opined that “corporate criminal liability is on the verge of attaining, at the very least, the status of a general principle of law applicable under international law.”⁵¹ To reinforce this claim, the Chamber pointed to evidence supporting an emerging international support for corporate responsibility.⁵² The Human Rights Committee noted that corporations should respect international law as well as the Guiding Principles on Business and Human Rights.⁵³ Additionally, the Chamber found that corporate accountability had been supported by the United Nations in various resolutions.⁵⁴ The Chamber noted that though these decisions were not binding, corporations are subjects of international law, and thus criminal regimes would be an applicable remedy.⁵⁵ In support of this notion, the Chamber pointed to laws that provided corporate criminal liability which could be found in a vast number of European States including: Austria, Belgium, Croatia, Cyprus, Czech Republic, Denmark, Finland, France, Hungary, Iceland, Lithuania, the Netherlands, Norway, Portugal, Romania, Spain, Switzerland, the United Kingdom.⁵⁶ The Chamber pointed out that beyond Europe, countries of varied legal cultures recognize criminal liability for corporations, including: Australia, Bahrain, Bangladesh, Brazil, Canada, Chile, China, Egypt, Guatemala, India, Indonesia, Jamaica, Japan, Kenya, Lebanon, Malaysia, Morocco, New Zealand, Senegal, South Africa, South Korea, Syria, United Arab Emirates, and the United States.⁵⁷ Considering this evidence, the Chamber reasoned that “it is apparent that in a majority of the legal systems in the world, corporations are not immune from accountability merely because they are a legal—and not a natural—person.”⁵⁸

⁴⁸ *Id.* at para. 37; STL Rules of Procedure and Evidence, *supra* note 40, at r. 2(A) (defining the term “victim”).

⁴⁹ *See* New TV Decision on Appeal, *supra* note 1, at paras. 45-67.

⁵⁰ *Id.*

⁵¹ *Id.* at para. 67.

⁵² *Id.* at 46.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at para. 52.

⁵⁷ *Id.* at para. 55.

⁵⁸ *Id.* at para. 58.

CONCLUSION

Measures must be taken to eliminate the “impunity gap” for corporations in international law. With the support of corporate entities who have considerable resources and leverage, individuals are able to commit international crimes of far greater gravity than would be feasibly possible as a lone actor. The recent decision by the Special Tribunal for Lebanon is a groundbreaking step towards this goal of establishing corporate responsibility in international law. With the cooperation of other international tribunals, corporations will be held accountable for their criminal actions and an era of corporate lawlessness will come to an end.