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# LEADERSHIP AND LIABILITY: STRENGTHENING CORPORATE RESPONSIBILITY THROUGH LEGAL DOCTRINE

**Philippa Osim Inyang**

University of Calabar, Calabar, Cross River State, Nigeria.

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**Abstract:** This paper is conceived based on the current focus of the corporate international community on finding ways to ensure the accountability, accountability of corporate entities for their activities that result in human rights human rights violations. It focuses on the 2016 Policy Paper of the violation, Office of the Prosecutor (OTP) of the International Criminal Court international (ICC), which expressed the Prosecutor's intention to prioritize the crimes, senior investigation and prosecution of certain environmental crimes that corporate have extensive human rights impacts primarily resulting from the officers, activities of corporate entities. The paper argues that the complex superior structure of transnational corporations presents considerable responsibility. practical obstacles to the investigation and prosecution of such crimes. However, through the application of the scarcely used 'superior responsibility' doctrine, this paper suggests that there could be a chance of overcoming the corporate complexity and improving corporate accountability for human rights violations that result in international crimes.

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**Keywords:** Corporate Accountability, Human Rights Violations, International Criminal Court, Superior Responsibility, Transnational Corporation

## I. Introduction

The problem of holding transnational corporations (TNCs) to account for their operations that result in human rights problems has arrived at a critical juncture. This is particularly so for TNCs whose operations are focused on natural resources exploration and exploitation in local communities of the global south.<sup>1</sup> Their operations are a huge source of foreign direct investment needed by several States to boost their economies. However, these same operations also result in gross human rights abuse.<sup>2</sup> In Ecuador, for example, it has been reported that Texaco's oil operations have resulted in the spilling of millions of gallons of oil and billions of gallons of untreated toxic waste into the water and arable land.<sup>3</sup> The conflict in the Democratic Republic of Congo is

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<sup>1</sup>Company, 2013) D. Kinley and S. Joseph, Transnational corporations and Human Rights: Questions about their relationship, 21(1) Alternative Law Journal 7 (2002).

<sup>3</sup> B. Stephens, The Amoral of Profit: Transnational Corporations and Human Rights, 20(45) Berkeley Journal of International Law 53 (2002)

<sup>1</sup> P. O. Inyang, The Necessity of Revisiting Direct Corporate Human Rights Obligations in the Current Business and Human Rights Treaty Process 4African Journal of Law, Political Research and Administrative 2 (2021).

J. G. Ruggie, Just Business: Transnational corporations and Human Rights xv-xxv (New York/London: Norton and

recorded to have been fuelled and even enabled by several natural resource exploitation and exploration multinational economic entities.<sup>1</sup> Several communications have been submitted before the International Criminal Court ('ICC') on behalf of local communities alleging the complicity of business leaders in mass human rights violations including large scale land grabbing, murder, illegal imprisonment and other inhumane acts amounting to crimes against humanity.<sup>23</sup> The ICC has been reviewing these cases but has not yet made a decision as to whether to move forward with investigations.<sup>4</sup>

The effects of these TNCs' activities are particularly devastating because the individuals living within the communities where they operate depend on the land and waterways for their survival.<sup>5</sup> With the dependence of States on the economic benefits derived from their activities, TNCs are left without effective regulation and are allowed to perpetrate human rights violations with impunity.<sup>8</sup>

However, on 15 September 2016, the Office of the Prosecutor ('OTP') of the ICC issued a policy paper expressing its intention to prioritise the investigation and prosecution of persons who commit or facilitate the commission of serious international crimes which result in or happen by way of the illegal exploitation of natural resources, land grabbing, or the destruction of the environment, among others-<sup>6</sup> environmental crimes which have strong bearings on the human rights violations that typically result from the operations of TNCs.<sup>7</sup> Thus, the OTP's move has been heralded as a positive step towards ensuring that TNCs are more. Although the policy paper is a significant development that shows the OTPs inclination to prosecute international crimes resulting in environmental damage, the policy paper cannot expand the court's jurisdiction which is dependent on an amendment of the ICC

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<sup>1</sup> Global Witness Briefing Paper, 'Natural Resource Exploitation and Human Rights in the Democratic Republic of Congo 1993-2003', 7 and 21, <[https://www.globalwitness.org/sites/default/files/pdfs/drc\\_e\\_xploitation\\_and\\_human\\_rights\\_abuses\\_93\\_03\\_en.pdf](https://www.globalwitness.org/sites/default/files/pdfs/drc_e_xploitation_and_human_rights_abuses_93_03_en.pdf)> (visited on 5 May 2022).

<sup>2</sup> Global Diligence, 'Communication under Article 15 of the Rome Statute of the International Criminal Court; The Commission of Crimes against Humanity in Cambodia July

to Present', paragraphs 1-3 <[https://www.fidh.org/IMG/pdf/executive\\_summary-2.pdf](https://www.fidh.org/IMG/pdf/executive_summary-2.pdf)> (visited on 5 May 2022).

<sup>4</sup> Change.org, 'Updates: ICC Supplementary Communication' <<https://www.change.org/p/the-international-criminal-court-investigate-crimes-in-cambodia/u/11467876>> (visited on 5 May 2022).

<sup>5</sup> C. Kaeb, Emerging Issues of Human Rights Responsibilities in the Extractive and Manufacturing Industries: Patterns and Liability Risks, 6(2) North-western Journal of International

Human Rights 331 (2008); Amnesty International, 'corporate Accountability' <<https://www.amnesty.org/en/what-wedo/corporate-accountability/>> visited on 5 July 2017; Business and Human Rights Resource Centre, 'Indonesia: What oil and Mining companies could do to achieve a "social licence" from

<sup>6</sup> International Criminal Court Office of the Prosecutor, 'Policy

Paper on Case Selection and Prioritization', 15 September

2016, <[https://www.icccpi.int/itemsdocuments/20160915\\_otp-policy\\_caseselection\\_eng.pdf](https://www.icccpi.int/itemsdocuments/20160915_otp-policy_caseselection_eng.pdf)> (visited on 5 May 2022), paragraph 7.

<sup>7</sup> J. Zerk, 'Corporate Liability for Gross Human Rights Abuses: Towards a fairer and more effective system of domestic law remedies' A Report Prepared for the UN High

Commissioner for Human Rights, pp.16- 29 <[http://www.ohchr.org/Documents/Issues/Business/Domestic\\_LawRemedies/StudyDomesticLawRemedies.pdf](http://www.ohchr.org/Documents/Issues/Business/Domestic_LawRemedies/StudyDomesticLawRemedies.pdf)> (visited on 5 May 2022).

communities whose land they use (refers to protests against Freeport, ExxonMobil, Newmont) <<https://businesshumanrights.org/en/indonesia-what-oil-mining-companiescould-do-to-achieve-a-social-license-from-communitieswhose-land-they-use-refers-to-protests-against-freeportexxonmobil-newmont>> (visited on 5 May 2022).

<sup>8</sup> A. McBeth, *Crushed by an Anvil: A Case Study on Responsibility for Human Rights in the Extractive Sector*, 11(1) Yale Human Rights and Development Journal 3 (2008); S. Joseph, *Taming the Leviathans: Multinational Enterprises and Human Rights*, 46(2) Netherlands International Law Review 176 (2009). Statute. Furthermore, the ICC statute does not recognise the criminal responsibility of corporate entities.<sup>8</sup> Responsibility for the international crimes contemplated under the ICC Statute can only be borne by individuals.<sup>9</sup> Individual criminal responsibility is founded upon the principle of personal culpability.<sup>10</sup> This means that no one may be held criminally responsible for acts or transactions in which he or she has not personally participated in some meaningful way, such as by planning, directing, ordering, or encouraging them.<sup>11</sup> The difficulty here is that international crimes can hardly be committed by individuals acting alone.<sup>12</sup> They are carried out by a large number of individuals acting together in different capacities, and many of such individuals remain unidentified.<sup>17</sup> In most cases, it is practically impossible to prosecute every individual perpetrator who physically carried out the act. The practice has been to focus on the leaders and orchestrators of the crimes.<sup>18</sup> In fact, most of the ICC indictments have been proffered against political leaders and high-ranking military commanders rather than the numerous individuals who merely implemented their policies and directives.<sup>13</sup> The OTP has acknowledged this practice is a deliberate policy decision when it affirmed that the global character of the conscious of the human rights impact of their activities in the areas where they operate.<sup>14</sup>

ICC, its statutory provisions and logistical constraints support a preliminary recommendation that, as a general rule, the Office of the Prosecutor should focus its investigative and prosecutorial investigative efforts and

<sup>17</sup> I. Marchuk, *The Fundamental Concept of Crime in International Criminal Law: A Comparative Law Analysis* 160-161 (London: Springer Heidelberg, 2014).

<sup>18</sup> Ibid, 161.

<sup>8</sup> Article 25 (1) of the Rome statute (UN General Assembly, Rome Statute of the International Criminal Court, 17 July 1998, ISBN No. 92-9227-227-6) See also Report of the preparatory Committee on the Establishment of an International Criminal Court, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment on an International Criminal Court Rome, Italy, 15 June -17 July 1998, A/CONF.183/2.

<sup>9</sup> Article 25 Rome Statute of the ICC, *ibid*.

<sup>10</sup> K. Kittichaisaree, *International Criminal Law* 233 (Oxford; Oxford University Press, 2001).

<sup>11</sup> ICTY 5 July 1999, *Prosecutor v Dusko Tadic*,

<http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf> (visited on 13 MAY 2022), paragraph 264.

<sup>12</sup> G. Werle *et al*, *Principles of International Criminal Law* 116 (The Netherlands: Asser Press, 2005).

<sup>13</sup> For example, Jean-Pierre Bemba Gombo was convicted for crimes against humanity and war crimes in the Democratic Republic of Congo, which were committed by a contingent of the Movement de Liberation du Congo. Gombo was convicted as a person effectively acting as military commander with authority and control over the Movement who committed the crimes.-See *the Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08. Dominic Ongwen is currently facing trial for the War crimes and crimes against humanity committed by the Brigade of the LRA in Sudan. Ongwen is being prosecuted in his capacity as Brigade commander, who, by virtue of his position, 'would have ordered the commission of the crimes'. - see *the Prosecutor v Dominic Ongwen* ICC-02/04-01/15. For a list of ICC case information sheets, see International Criminal Court, 'Cases' <<https://www.icc-cpi.int/cases>> accessed 10 may 2022.

<sup>14</sup> The Guardian, 'ICC widens remit to include environmental destruction cases'

<<https://www.theguardian.com/global/2016/sep/15/haguecourt-widens-remit-to-include-environmental-destructioncases>> (visited on 5 May 2022).

resources on those who bear the greatest responsibility, such as the leaders of the State or organisation allegedly responsible for those crimes.<sup>15</sup>

Within the corporate setting, land grabbing, environmental destruction and the illegal exploitation of natural resources are large scale environmental crimes that usually result from the immediate conduct of several company employees or workers. Fixing criminal liability on such persons generally pose no special problem, but in most cases, these immediate actors are merely used to execute the ideas of the responsible originators of the violative conduct.<sup>16</sup> Such employees or workers carry out their activities in furtherance of the organisational policies and directives issued by senior corporate officers (such as corporate executives, directors and senior level managers).<sup>22</sup> One could suggest that the prosecutorial strategy of the ICC could be followed in this instance, and the senior corporate officers could be prosecuted for their policies and directives that result in the harm. However, the operational structure of TNCs raises certain difficulties. The directives to embark on the harmful activities pass through a range of departments and divisions within the corporate setting before reaching the persons who physically execute them.<sup>17</sup> Most times such officials deliberately disguise their transactions among routine corporate events which are rarely documented.<sup>18</sup> Moreover, modern TNCs consist of distinct and limited liability subsidiaries operating in different States and regions.<sup>19</sup> In sectors such as mining, oil and gas and other natural resource exploration and exploitation industries, these subsidiaries often engage with several contractors and subcontractors, in order to share investment risks and pool their technologies, knowledge, man power and expertise in executing their objectives.<sup>20</sup> In such settings, business policies and directives flow through multiple layers of control and ownership, which further insulates the corporate policy makers from a sense of responsibility for resulting violations.<sup>21</sup> Thus, the conventional requirement of personal culpability based on the linking of certain overt acts (i.e., the orders and directives) of the main criminal masterminds, to the violative conduct of 'the men on the ground' may be an inadequate indicia for ensuring that senior corporate officers in multinational enterprises do not escape liability for their corporate policies and directives that lead to the crimes contemplated by the ICC.

Despite the obvious limitations, the policy paper is highly significant as it outlines a policy of case selection and prioritisation which emphasises the seriousness of environmental damage within the context of the existing crimes under the Rome Statute. Thus, due to the inherent limitations of the legal nature of the policy paper, the jurisdiction of the ICC and the complex corporate form of TNCs, this

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<sup>15</sup> Office of the Prosecutor, 'Paper on some policy issues before the Office of the Prosecutor' September 2003, p. 7 available at <[https://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b78b25-60aa962ed8b6/143594/030905\\_policy\\_paper.pdf](https://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b78b25-60aa962ed8b6/143594/030905_policy_paper.pdf)> (visited on 10 May 2022).

<sup>16</sup> A. Weissman et al, Reforming Corporate Criminal Liability to Promote Responsible Corporate Behavior Institute of Legal Reform Paper October 2008, available at <[http://www.instituteforlegalreform.com/uploads/sites/1/Wei\\_ssmannPaper.pdf](http://www.instituteforlegalreform.com/uploads/sites/1/Wei_ssmannPaper.pdf)> (visited on 10 May 2022). <sup>22</sup> M. Clinard and P. Yeager, Corporate Crime 279 (New Jersey: Free Press, 2006).

<sup>17</sup> A. Kushner, Applying the Responsible Corporate Officer Doctrine outside the public welfare context, 93(2) Journal of Criminal Law and Criminology 682 (2003).

<sup>18</sup> Ibid, 686.

<sup>19</sup> D. Aguirre, The Human Rights to Development in A Globalized World 216 (Ashagate Publishing, 2008).

<sup>20</sup> Ibid.

<sup>21</sup> O. Mestad, Attribution of Responsibility to Listed Companies, in G. Nystuen et al (eds.), Human Rights, Corporate Complicity and Divestment 74 (Cambridge: Cambridge University Press, 2011).

article argues that instead of focussing on establishing a connection between a senior corporate officer's overt acts and the harmful activities of his or her employees or workers, criminal liability should be based on such an officer's failure to prevent or punish such activities when he or she is in a position to do so. There is a long neglected legal framework for this sort of criminal responsibility under the ICC Statute known as the 'superior responsibility doctrine'. The superior responsibility doctrine which has previously been applied by post Second World War international criminal tribunals to military commanders, places responsibility on a superior for his or her failure to act when under a duty to do so.<sup>22</sup> Under the doctrine, a superior will incur responsibility if he or she knows or consciously disregards that his or her subordinates are about to commit a crime or have committed a crime, unless the superior prevents the subordinates from committing the crime or punishes the perpetrators after the crimes are committed.<sup>23</sup> Article 28 of the ICC statute has adopted (although with slight variations) the doctrine of superior responsibility, and expressly extended it to other superiors not within a military setting.<sup>24</sup>

This article explains how the elements of the doctrine of superior responsibility may be applied to cases of TNC involvement in violations of human rights that amount to the international crimes contemplated by the ICC. Although the ICC has not applied the doctrine to cases involving corporate officers, its expression of intent to focus on TNC based crimes may be an indication that the need for the doctrine may arise in the nearest future. This is especially so with the increasing focus on means of ensuring greater corporate accountability for human rights violations. In arguing that the superior responsibility doctrine could serve as a useful tool in ensuring that the relevant superior corporate officials do not escape responsibility for the criminal acts of their employees and workers, section II of this article provides a brief overview of the OTP Policy Paper and addresses how it relates to the human rights effect of the activities of TNCs amounting to international crimes. Section III addresses the issue of individual criminal responsibility in relation to the crimes within the ICC's new remit. Section IV focuses on the doctrine of superior responsibility. It analyses the doctrine according to the decision of the ICTY in the landmark *Celebici* case. An analogy is drawn between the doctrine as interpreted by the ICTY, and the ICC Statute, whilst determining how it may be applicable in multinational corporate settings. Section V concludes the article.

## **II. The ICC and its new focus: Policy Paper on Case selection and prioritisation**

The ICC's decision to focus its attention on certain environmental crimes with gross human rights implications that occur during peace time has been welcomed by many international advocacy groups, which perceive it as a warning to TNCs who are often involved in activities that result in crimes of such nature.<sup>25</sup> However, the OTP's policy paper does not extend the Court's jurisdiction to include new crimes. The ICC's jurisdiction remains limited to the core crimes listed in Article 5 of the Court's

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<sup>22</sup> J. B. J. Moloko, Command Responsibility in International Criminal Tribunals, 3 Berkeley Journal of International Law Publicist 12-13 (2009).

<sup>23</sup> Ibid

<sup>24</sup> Article 28 of the ICC Statute, *supra* n 13.

<sup>25</sup> B. Tesconi, News about the Courts: ICC OTP policy paper on case selection/prioritization expands to environmental destruction probes; Witnesses prep decision in Ongwen case and decision on Kenya's failure to cooperate in *ICL Media*

*Law Review* 20 September 2016 available at,

<<http://www.iclmediareview.com/19-september-2016-news-courts-icc-otp-policy-paper-case-selection-expands-environmental-destruction-probes-witness-prep-decision-ongwen-case-decision-kenyas-failure>> (visited on 10 May 2022).



statute: genocide, crimes against humanity, war crimes and crimes of aggression.<sup>26</sup> The OTP merely expressed the Court's intention to give particular consideration to prosecuting Statute crimes 'that are committed by means of, or that result in, *inter alia*, the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land.'<sup>27</sup> Thus, the consequences that such intention could have in practice should not be overstated. It is important to emphasise that the policy paper is just an internal document that guides the OTPs discretion in the selection and prosecution of cases. Nevertheless, the OTP's policy paper sends a powerful message that the terrible impacts of land grabbing, the illegal exploitation of natural resources, and environmental destruction have been acknowledged at the highest level of criminal justice.<sup>28</sup> The OTP expressed its intention to specifically consider 'the impact of the crimes in the light of, *inter alia*, the increased vulnerability of the victims, the terror subsequently instilled, or the social, economic and environmental damage inflicted on the affected communities.'<sup>29</sup> This necessarily means that by prosecuting perpetrators of the crimes, the ICC will address the human rights impact that follows such conduct when they amount to crimes contemplated within the jurisdiction of the court.

The ICC's move precedes a decision by the Prosecutor on whether to investigate a case filed in 2014 that catalogues mass human rights violations amounting to crimes against humanity linked to systematic land seizures in Cambodia, where corporate entities have been working 'hand-in-glove' with the country's government.<sup>30</sup> On October 7 2014, an official Communication on behalf of some indigenous peoples in Cambodia was submitted to the Office of the Prosecutor of the ICC.<sup>31</sup> The Communication outlined the instances of government and government-connected businesses' forced evictions and displacement of large portions of the population, murder, persecution and other inhumane acts to such a substantial degree that would amount to crimes against humanity.<sup>32</sup> According to the Communication, after seizing power in the 1980s, the ruling elite sought to 'construct a kleptocratic system subjugating the apparatus of a nominally democratic state through patronage and violence for the twin objectives of self-enrichment and maintaining power at all costs'.<sup>39</sup> To ensure that these objectives were implemented, the ruling elite illegally seized and reallocated millions of acres of valuable land from poor Cambodians for exploitation or speculation by foreign corporate multinationals.<sup>40</sup> Those who resisted the evictions faced brutal violence, prosecution for specious crimes and other forms of persecution usually through the State's legal and security systems.<sup>41</sup> A major

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<sup>26</sup> Article 5(1), Rome statute of the ICC: 'The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The crime of Genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression.'

<sup>27</sup> *Supra* note 9, paragraph 41 (emphasis added).

<sup>28</sup> Global Witness press briefing 15 September 2016, Company Executives Could Now be Tried for Land Grabs and Environmental Destruction' available at <https://www.globalwitness.org/en/press-releases/companyexecutives-could-now-be-tried-land-grabbing-andenvironmental-destruction-historic-move-internationalcriminal-court-prosecutor/> (visited on 5 May 2022).

<sup>29</sup> *Supra* note 9, paragraph 41.

<sup>30</sup> *Ibid*.

<sup>31</sup> *Supra* note 5.

<sup>32</sup> Press Release, FIDH, 'Cambodia: 60,000 New victims of government land grabbing policies since January 2014' <<https://www.fidh.org/en/region/asia/cambodia/cambodia-60-000-new-victims-of-government-land-grabbing-policiesince>> (visited on 29 March 2017). Article 7 of the ICC Statute defines a crime against humanity as 'any of the following acts

example of TNC involvement in Cambodia is captured by a Global witness report on Vietnamese rubber companies' operations in Cambodia.

The increasing international demand for land to plant rubber, driven by its high prices led one of the biggest Vietnamese rubber companies, Hoang Anh Gia Lai ('HAGL') to extend its operations through its web of subsidiaries to Cambodia.<sup>33</sup> Vietnam as the third largest global producer of rubber is a key global player, and HAGL, is a prime driver of its domestic production.<sup>34</sup> Through its subsidiaries, HAGL obtained concessions for its rubber plantations in Ratanakiri Province, which has one of the largest populations of indigenous peoples in Cambodia.<sup>44</sup> The concessions were obtained without seeking the free prior and informed consent for any of its projects concerning the land or any other resource.<sup>35</sup> The inhabitants were also not compensated.<sup>36</sup> Most times, they knew about the concessions only when the bulldozers arrived and the digging up began.<sup>37</sup> Company workers fell forests, destroyed farmlands and spiritual sites.<sup>38</sup> Thus, the indigenous peoples who were traditionally farmers, were severely deprived of their livelihood, culture and identities that were intimately tied to the land and forests.<sup>49</sup>

With the promise of financial benefits to be derived from the company's operations, the Cambodian 'ruling elite' failed to prevent the violations and deprivations, rather, through the deployment of HAGL sponsored army and police force, they proactively facilitated the expropriation of the land of the vulnerable Cambodians, through

when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a)murder; (b)Extermination; (c)Enslavement; (d)Deportation or forcible transfer of population; (e)Imprisonment or other severe deprivation of physical liberty; in violation of the fundamental rules of international law; (f)Torture; (g)Rape, sexual slavery... (h)Persecution against any identifiable group;... (i) enforced disappearance of persons; (j) the crime of apartheid; (k) other inhumane acts of a similar character...' <sup>39</sup> *Supra* note 5, paragraph 5.

<sup>40</sup> *Ibid*, paragraph 6

<sup>41</sup> *Ibid*. Although official statistics quoting precise figures were difficult to obtain, credible NGOs estimated that about 830,000 people have been adversely affected by the environmental destruction, with some hundreds of thousands forced away from their land since 2000. This amounts to over six percent of the total population of Cambodia. See Global Diligence, 'Land grabbers may end up in The Hague: Global Diligence welcomes the ICC Prosecutor's New Case Selection Policy

(September 15, 2016),

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<sup>33</sup> Global Witnesses, 'Rubber Barons: How Vietnamese Companies and International Financers are Driving a Land grabbing Crisis in Cambodia and Laos' May 2013, p. 2, <[file:///lancs/homes/20/osim/Downloads/rubber\\_barons\\_lores\\_0\\_1%20\(1\).pdf](file:///lancs/homes/20/osim/Downloads/rubber_barons_lores_0_1%20(1).pdf)> (visited on 2 May 2022).

<sup>34</sup> *Ibid* <sup>44</sup> *Ibid*.

<sup>35</sup> This was in contravention of the requirements of

Cambodia's Sub-decree No. 146 and the concession agreements. See *ibid*, 12; Global Witness n 43, 16. See also Articles 18, 19 and 32 of the United Nations Declaration on the Rights of Indigenous People, 2 October 2007, A/RES/61/295.

<sup>36</sup> *Supra* note 45, 11.

<sup>37</sup> *Supra*, note 43, 12.

<sup>38</sup> *Supra* note 45. <sup>49</sup> *Ibid*

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<<http://www.globaldiligence.com/2016/09/15/land-grabbersmay-end-up-in-the-hague-global-diligence-welcomes-the-iccprosecutors-new-case-selection-policy/>> (visited on 29 March 2017).

forceful evictions and sometimes shooting at protesting villagers.<sup>39</sup> This contributed to the decision to submit a Communication to the ICC to investigate such forcible removal of civilian population from their land (land grabbing) and the attendant human rights violations as crimes against humanity.<sup>40</sup> The situation involving HAGL in Cambodia is only one example of the several instances of TNC involvement in land grabbing, which also generally reflect some of the experiences of local communities in other States where TNCTNCs operate. The dependence of States on the economic benefits of TNC operations foster a sort of cooperation between the governments and these multinational corporate entities, where the states deliberately turn a blind eye to their harmful activities, mortgaging the lives of individuals who live in the affected communities.<sup>41</sup> The ICC being a court of complementary jurisdiction exercises its jurisdiction when States that are unwilling or unable to prevent or remedy a particular situation that results in an international crime contemplated by the ICC Statute.<sup>42</sup> Focussing on crimes typically resulting from the activities of TNCs, as expressed by the Policy Paper, may be one way of addressing the issue of corporate impunity.

### **III. Individual criminal responsibility and the doctrine of superior responsibility**

Although the ICC may prioritize cases that involve violations resulting from corporate activity, the Court is only empowered to investigate or prosecute individuals for international crimes.<sup>43</sup> The Court is yet to recognise corporate criminal liability for international crimes.<sup>55</sup> However, it may investigate individual corporate executives for their part in international crimes.<sup>56</sup> Article 25 of the ICC Statute provides for the various

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<sup>56</sup> As a matter of fact, corporate officials have long been criminally liable for committing violations of human rights amounting to international crimes. The *Farben, Flick, Krupp* and *Zyklon B* Cases all involved corporate officials that were charged before the post Second World War International Criminal Tribunals for supporting and facilitating the Nazi regime in committing international crimes. See *United States v Krausch* (The IG Farben Case), in 7 Trials of War Criminals before the Nuremberg Military Tribunal under Control Council Law No. 19 at 1-2 (1949); *United States v Friedrich Flick et al (Flick Case)*, Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No.

<sup>39</sup> *Supra*, note 43, p. 18.

<sup>40</sup> Technically, the Communication was submitted against

Cambodia's ruling government. The concept of 'the ruling elite' as it is defined in the ICC complaint may have contributed to its government centric focus as it conflates government, military and business leaders into one conglomerate, while highlighting the part of the country's political class but obscuring and obscures the pivotal role of the economic entities in the ensuing violations. However, proper investigations could lead to the ICC further investigating businesses that were complicit in the land grabbing.

<sup>41</sup> E. Oshionebo, *Regulating Transnational Corporations in domestic and International Regimes: An African Case Study* 8 (Toronto/Buffalo/London: University of Toronto Press, 2009).

<sup>42</sup> J. K. Kleffner, *The Impact of Complementarity on National Implementation of Substantive International Criminal Law*, 1(1) *Journal of International Criminal Justice* 86-87 (2003).

<sup>43</sup> *Supra* note 12. <sup>55</sup> *Ibid*.



10 (TWC), Vol. VI (Washington, DC: US Government Printing Office, 1949-1953), at 103; United States v Krupp (The Krupp Case), in 9 Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10 at 1 (1949); and, *Trial of Bruno Tesch and Two others (The Zyklon B Case)*, Law Reports of Trials of War Criminals (LRTWC), Vol. I (London: H.M.S.O., 1947-1949), at 101.

modes of individual liability within the jurisdiction of the ICC.<sup>44</sup> This is the core of the case, providing the legal theory which connects the accused to the crimes charged.<sup>45</sup> According to the Statute, persons can be held individually responsible for direct perpetration in the criminal act,<sup>46</sup> co-perpetration and perpetration by means,<sup>47</sup> by ordering, soliciting a commission or attempted commission of a crime,<sup>48</sup> by aiding, abetting and assisting in the commission of the crimes,<sup>62</sup> or by being part of joint a criminal enterprise.<sup>49</sup> All these require some level of positive action from the perpetrator.

### ***TNC involvement in international crimes under the ICCs new remit***

Transnational corporations as abstract entities act through individuals; usually company employees or workers who take positive action on behalf of the entity. Such action is normally undertaken in furtherance of company policy, goals and directives. Generally, TNCs tailor their policies towards the goal of making financial profit and maintaining a competitive edge in their fields of operation.<sup>50</sup> Consequently, most TNCs maintain a profit at all cost attitude and sometimes neglect to take cognisance of the environmental and human rights' effects of their policies and directives.<sup>51</sup> Illegal dispossession of land, environmental destruction and the illegal exploitation of natural resources are some of the common effects of the execution of company policies, especially for those in the extractive sector. The issues surrounding TNC involvement in the illegal dispossession of land are typically characterised by situations similar to that leading up to the Communication submitted on behalf of Cambodia.<sup>52</sup> To build rubber plantations and meet the international demand for rubber, the rubber corporations operating in Cambodia destroyed arable land, and sponsored State agents who forcefully displaced the indigenous peoples of the community.<sup>53</sup>

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<sup>44</sup> *Supra* note 12, Article 25(3).

<sup>45</sup> K. Bowman, Individual Criminal Responsibility' Case Matrix Network, Commentary to the Rome Statute of the International Criminal Court, <<https://www.casematrixnetwork.org/cmn-knowledgehub/icc-commentary-clicc/commentary-romestatute/commentary-rome-statute-part-3/>> (visited on 2 May 2022).

<sup>46</sup> *Supra* note 12, article 25 (2).

<sup>47</sup> *Ibid*, article 25(3)(a).

<sup>48</sup> *Ibid*, article 25(3)(b). It is important to note the close relationship that Article 25(3)(b) has with Article 28 which governs superior responsibility. The first alternative in sub paragraph (b), 'orders', complements the superior responsibility provision in Article 28. In the Article 28 provision the superior is liable for an omission while in the case of an order to commit a crime in Article 25 (3)(b), the superior is liable for commission of having 'ordered'.

<sup>49</sup> *Ibid*, article, 25(3)(d).

<sup>50</sup> M. Clinard and P. Yeager, *Corporate Crime* 271-287 (New York; Free Press, 2005).

<sup>51</sup> B. S. Parker, 'Applying the Doctrine of Superior Responsibility to Corporate Officers: A Theory of Individual Liability for International Human Rights Violations', 35(1) (2012) 35 *Hastings International and Corporate Law Review* 27 (2012).

<sup>52</sup> Section 2 above.

<sup>53</sup> *Ibid*.

Environmental destruction, occurs when TNCs emit toxic substances into the environment destroying land, air and water, and other natural resources.<sup>54</sup> This is usually due to the use of substandard technology and equipment and faulty waste disposal measures in order to save costs.<sup>55</sup>

The activities of Texpet, the Cambodian subsidiary of Texaco (which was succeeded by Chevron in 2001) in Ecuador clearly demonstrate the problems associated with TNC involvement in environmental destruction. Texpet was granted a concession in Ecuador to explore and produce oil from the 1960s to the 1990s.<sup>56</sup> It employed up to 840 employees and 2,000 contract workers to carry out its exploration activities.<sup>71</sup> Unfortunately, Chevron's activities were not completely beneficial to Ecuador. The company reportedly took advantage of the limited oversight of the Ecuadorian government and abused the trust of the government officials, who assumed that they would employ the same state-of-the-art technology in Ecuador that it had used at home in the United States.<sup>57</sup> However, the company officials allegedly made a calculated decision, based on profit motives, and deliberately chose less expensive obsolete technology and substandard environmental controls in their operations.<sup>58</sup> Texaco's policy in other countries it operated in was to reinject the waste water from its operations underground where it could not harm the environment, however instead of undertaking the cost intensive underground disposal methods, the workers disposed of the toxic waste in shallow waste pits and spilled some in streams and rivers.<sup>59</sup> This seeped into arable land and drinking water, causing various environmental and human rights problems including, loss of aquatic life and livestock, depriving people of their basic avenues for food. It also caused health problems such as, cancer and birth defects, which resulted in the near extinction of the some of the indigenous people in the region.<sup>60</sup> At the expense of the lives of the people, Texaco reportedly gained 5 billion dollars in profit during its operations.<sup>61</sup> Since 1993, the people have sought redress and accountability from the company for the destruction caused, but to no avail.<sup>62</sup>

With regards to the illegal exploitation of natural resources, the activities of TNCs in the Democratic Republic of Congo are repeatedly cited as major examples.<sup>78</sup> The country is known to possess a vast

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<sup>54</sup> P. Sands, J. Peel, A. Fabra and R. MacKenzie, *Principles of International Environmental Law* 706 (3<sup>rd</sup> edn., Cambridge; Cambridge University Press, 2012).

<sup>55</sup> Business and Human Rights Resource Centre, 'Human Rights Impacts of Oil Pollution: Ecuador' <<https://businesshumanrights.org/en/human-rights-impacts-of-oil-pollutionecuador-22>> (visited on 7 May 2022).

<sup>56</sup> T. Haller et al, *Fossil Fuels, Oil Companies and Indigenous Peoples: Strategies of Multinational Corporations, States and Ethnic Minorities. Impact on environment livelihoods and cultural change* 313 (London; Transaction Publishers, 2007). <sup>71</sup> K. Jacques, *Environmental Justice Case Study: Texaco's Oil*

Production in the Ecuadorian Rainforest 21 January 2005, <<http://umich.edu/~snre492/Jones/texaco.htm>> (visited on 7 May 2022).

<sup>57</sup> Ibid.

<sup>58</sup> T Christian Miller, 'The Hunt for Black gold leaves a stain in Ecuador' *Los Angeles Times* 30 November 2003 <<http://articles.latimes.com/2003/nov/30/world/fgecuadoroil30>> (visited on 7 May 2022).

<sup>59</sup> *Supra* note 72.

<sup>60</sup> Ibid.

<sup>61</sup> Ibid.

<sup>62</sup> See *Aguinda v Texaco Inc.*, 303d 470 (2d Cir. 2002); *Jota v Texaco Inc.*, 157 F.3d 153 (2d Cir. 1998). For a general overview of the US litigation see Christopher Krauss, 'Big Victory for Chevron over Claims in Ecuador' *The New York Times* 62 Note 12, article 25(3)(c).

natural wealth; including, diamonds, gold, copper, cobalt, cassiterite (tin ore), timber and oil.<sup>63</sup> From 1993 to 2004, the exploitation of natural resources in the region was characterised by extensive human rights violations.<sup>64</sup> Rebel forces channelled the country's natural wealth into the two wars in 1996 and 1998, which saw the flagrant disregard of human rights.<sup>65</sup> Many TNCs who, in the pursuit of their profit at all cost, were prepared to trade in the natural resources produced in these conditions, and with the groups who had notoriously bad human rights records. They were said to have encouraged and even enabled the human rights abuses.<sup>82</sup> A case in point is the support given by Anvil Mining to Congolese military in the Kilwa massacre. It has been reported that employees from Anvil Mining Congo SARL which was the largest copper producer in Congo gave the Congolese military logistical support by providing the military with company vehicles and drivers, air crafts, food and money. This facilitated the soldiers' ability to reach remote towns of Kilwa where widespread, systematic attacks (including rape, murder, torture and pillage) were committed against the civilian population in the region.<sup>83</sup> In response to questions on Anvil's contribution to the massacre, the company's CEO was quoted stating 'we helped the military to get to Kilwa and then we were gone. Whatever they did there that's an internal issue.'<sup>667</sup> Thus, the company was prepared to overlook human rights considerations for the sake of business interests.<sup>68</sup> For various reasons ranging from the non-recognition of corporate liability, the unwillingness or inability of States to ensure the accountability of the perpetrators, and the constraints involved in identifying the numerous workers involved in the crimes, accountability measures have not adequately ensured the accountability of TNCs for their major roles in the violations considered in this article.<sup>69</sup> As the prosecutorial strategy of the ICC is to focus on the main orchestrators of criminal activity, it would seem that those who set up the policies and directives that result in the violative conduct, may be fair target for prosecution. Considering the mass atrocities committed by TNCs in the DRC, the ICC Chief prosecutor emphasized the possibility that those who direct operations in the extractive industries 'may also be the authors of crimes, even if they are based in other countries'.<sup>70</sup> However, to the extent that corporate executives play a role in the atrocities, they are more likely to remain behind the scenes, issuing orders and providing directives, whilst turning a blind eye to the effects of their employees, workers, suppliers or subcontractors' business practices,<sup>71</sup> making it difficult to link them directly to the crimes. This might be a reason why the ICC has rarely ever indicted a corporate officer for their part in international crimes.<sup>72</sup>

<<https://www.nytimes.com/2014/03/05/business/federal-judge-rules-for-chevron-in-ecuadorean-pollution-case.html>> (visited on 7 May 2022). On 16 March 2016, the ICC Prosecutor rejected on jurisdictional grounds a victims' request to investigate a case of environmental destruction by Chevron in Ecuador as a crime against humanity. It did not completely discount prosecuting environmental destruction

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<sup>63</sup> *Supra* note 4.

<sup>64</sup> *Ibid*, 6.

<sup>65</sup> *Ibid*, pp. 5 and 6. <sup>82</sup> *Ibid*, p. 7 <sup>83</sup> *Ibid*, pp. 4-10.

<sup>66</sup> Action against Impunity for Human Rights, Anvil Mining Limited and the Kilwa Incident: Unanswered Questions at 9,

<sup>67</sup> October 2005, <<http://www.raiduk.org/sites/default/files/qq-anvil.pdf>> (visited on 8 May 2022).

<sup>68</sup> *Supra* note 4, p. 22.

<sup>69</sup> See note 8.

<sup>70</sup> J. Graff, Corporate War Criminals and the International Criminal Court: Blood and Profit in the Democratic Republic of Congo, 11(2) Human Rights Brief 1 (2004).

<sup>71</sup> *Ibid*, p. 3.

<sup>72</sup> The only Corporate executive to face ICC prosecution in that capacity is Joshua Arap Sang, former head of operations and well-known radio personality of Kass FM in Nairobi, Kenya. He recently faced charges for holding a key position in

as a crime against humanity but stated that the crimes in the complaint occurred before 2002 when the Statute of the ICC Came into force.- see Request to the Office of the Prosecutor of the ICC from the legal Representatives of the Victims, 'Communication: Situation in Ecuador', 23 October 2014, <<http://chevrontoxico.com/assets/docs/2014-icccomplaint.pdf>> (visited on 8 may 2022); On 8 August 2016, the US Court of Appeals for the Second Circuit unanimously affirmed a lower court decision holding the US\$ billion judgement against Chevron was the product of fraud and racketeering activity, and unenforceable in the US. See *Chevron v Dozinger*, 14-0826(L) (2d Cir. 2016). <sup>78</sup> *Supra* note 8.

#### **IV. Superior responsibility**

Superior responsibility is a form of indirect liability, as the superior is not held criminally liable for the criminal acts in which he or she committed, planned, ordered, assisted or otherwise facilitated.<sup>90</sup> Rather, he or she is held criminally liable in connection with the criminal acts committed by subordinates.<sup>91</sup> The liability is derived from his/her failure to prevent and punish such acts, and to exercise proper supervision and control over his/her subordinates.<sup>73</sup>

Superior responsibility has its roots in military law and is based on the principle that armed forces should always be 'commanded by a person responsible for his subordinates' as expressed in Article 1(1) of the Hague Regulations from 1899,<sup>74</sup> and the corresponding legal duty of the superior to 'ensure that members of the armed forces under their control are aware of their obligations' and 'to prevent and repress breaches undertaken by 'subordinates'.'<sup>75</sup> The notion of superior responsibility as a form of individual criminal responsibility that emerged in trials that followed the Second World War. It was later codified in Articles 86 and 87 of additional protocol I to the Geneva Conventions.<sup>76</sup> The doctrine also played a major role in the prosecution of war criminals in the ICTY and ICTR. Article 7 (3) of the Statute of the ICTY, which is very similar to the wording of Article 6 (2) of the Statute of the ICTR, provides that The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or punish the perpetrators thereof.<sup>77</sup>

planning and organizing crimes against humanity by using coded messages in his radio broadcasts to commit murder, forcible transfer, and persecution. His prosecution was in connection with the larger situation being investigated in Kenya for the period between June 1 2005 and November 26

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<sup>73</sup> Ibid.

<sup>74</sup> International Conferences (The Hague) Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, 18 October 1907.

<sup>75</sup> Ibid.

<sup>76</sup> International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3.

<sup>77</sup> UN Security Council Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17 May 2002)), 25 May 1993 (hereinafter ICTY); and UN Security Council, Statute of the International Criminal Tribunal for the Former Yugoslavia (as ammended on 13 October 2006), 8 November 1994.

2009 and in particular, the post-election violence of 2007/2008. However, the trial Chamber vacated the charges against Sang on April 5 2016. The Court found that the Prosecutor had presented insufficient evidence linking Joshua with the alleged crimes. See ICC 23 January 2012 The Prosecutor v Sameru Ruto and Joshua Arap Sang, <<https://www.icccpi.int/pages/record.aspx?uri=1314535>> (visited on 20 July 2017); and ICC 5 April 2016, The Prosecutor v William Samero Ruto and Joshua Arap Sang <<https://www.icccpi.int/Pages/record.aspx?docNo=ICC-01/09-01/11-2027Red>> (visited on 20 April 2022).

<sup>90</sup> R. Vark, Superior Responsibility 15 Estonian National Defense College Proceedings 143 (2012).

<sup>91</sup> Ibid.

The ICTY first grappled with the application of this section in the landmark *Celebici* decision of 1998.<sup>78</sup> The trial concerned certain activities that occurred in 1992 at the Celebici camp in the Konjic municipality.<sup>79</sup> Bosnian Croats and Muslim forces invaded Konjic and turned the barracks and warehouses at Celebici into prison houses where Serbian prisoners were kept.<sup>80</sup> The prisoners were killed, tortured, beaten and otherwise subjected to cruel and inhuman treatment.<sup>81</sup> Four accused persons were charged before the ICTY for the atrocities committed at the prison camp; all of whom were charged under the superior responsibility doctrine.<sup>82</sup>

Delalic was alleged to have acted as Commander of the First Tactical Group of the Bosnian Army,<sup>102</sup> and to have had authority over the Celebici prison-camp and its personnel.<sup>83</sup> Mucic was alleged to have been the commander of the Celebici prison camp from approximately May to November 1992. While Delalic was alleged to have been the deputy commander of the Celebici prison-camp from approximately May 1992 to November 1992.<sup>84</sup> After Mucic's departure in November 1992, Delic allegedly took up his position as commander until the closing of the camp in December 1992.<sup>85</sup> Thus, the ICTY's decision deals specifically with their charges as superior officers.

In its judgement, the ICTY listed the elements of superior responsibility as follows:

- (a) The existence of a superior-subordinate relationship;
- (b) The superior knew or had reason to know that the criminal act was about to be or had been committed; and
- (c) The superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrators.<sup>86</sup>

According to the tribunal, it is only those superiors, whether *de jure* or *de facto* who are clearly part of a chain of command, either directly or indirectly, with the actual power to control or punish the acts of

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<sup>78</sup> ICTY 16 November 1998, Prosecutor v Zejnil Delalic

Zdravko Mucic also known as 'Paro', Hazim Delic and Esad

Landzo aka 'Zenga', IT-96-21-T judgement, [http://www.icty.org/x/cases/mucic/tjug/en/981116\\_judg\\_en.p df](http://www.icty.org/x/cases/mucic/tjug/en/981116_judg_en.p df) (visited on 20 April 2022), para 346.

<sup>79</sup> Ibid, paragraph 88.

<sup>80</sup> Ibid, paragraph 141.

<sup>81</sup> Ibid, paragraphs 2 – 12.

<sup>82</sup> Ibid, paragraph 21. Landzo was a prison guard at the Celebici prison camp from approximately May 1992 to December 1992. In his capacity, he was charged as a direct

<sup>83</sup> Ibid

<sup>84</sup> Ibid, paragraph 11

<sup>85</sup> Ibid

<sup>86</sup> *Supra* note 98, paragraph 346. The three elements are a summary of the language of Article 7(3) and 6(2) of the ICTY and ICTR Statutes (note 97).



the subordinates that may incur criminal liability.<sup>87</sup> The ICTY adopted a concept of ‘effective control over a subordinate’ making reference to the material ability to prevent or punish criminal conduct’ irrespective of the manner in which the control is exercised.<sup>88</sup> It conceded that general influence is not sufficient to establish a superior-subordinate relationship, and does not necessarily show direct or formal subordination, but, the accused will be, by virtue of his position, senior in some sort of formal or informal hierarchy to the perpetrator.<sup>89</sup> Therefore, the ICTY underlined that an official position is not determinative of superior responsibility, rather, it is the actual possession or non-possession of power to control subsidiaries that may lead to a conviction or an acquittal.<sup>90</sup> Secondly, the Tribunal considered the *mens rea* requirement of the superior responsibility doctrine. The ICTY explained that superior responsibility is not a strict responsibility doctrine, (i.e., criminal liability does not attach merely by virtue of an individual’s position as a superior).<sup>91</sup> The ICTY found that a superior may possess the *mens rea* for command responsibility where: (1) he had actual knowledge that his subordinates were committing or about to commit crimes...or (2) where he had in his possession information of a nature, which at the least, would put him on notice of the risk of such offences by indicating the need for additional investigation in order to ascertain whether such crimes were committed or were about to be committed by his subordinates.<sup>92</sup> The tribunal found that actual knowledge could be established through direct or circumstantial evidence.<sup>93</sup> Thus, under the ‘knew or should have known’ standard of knowledge a demonstration that prior knowledge fell within the superior’s accepted area of responsibility may be achieved by weighing factors such as the superior’s position and the nature of that position, if the superior regularly received reports or communications from other superiors or subordinates with knowledge of the crimes, or if the crimes were of general knowledge due to media reports.<sup>94</sup> Accordingly, the mental element is ‘determined only by reference to the information, in fact, available to the superior.’<sup>115</sup> However, according to the ICTY, it is not necessary to establish that the superior had some specific information about the crimes as even the general information in his possession, which would put him on notice of possible unlawful acts by his subordinates, is sufficient to prove that ‘he had reason to know’.<sup>95</sup> The tribunal stressed that wilful blindness was no excuse; once a superior had information that provided notice of the crimes committed, he could not choose to simply disregard such information.<sup>96</sup> Third, the Tribunal briefly discussed the definition of ‘necessary and reasonable manner’ as it pertains to superior responsibility. It stated that any evaluation of whether a s

participant in the alleged international crimes; *ibid*, at paragraph 6. <sup>102</sup> *Ibid*, paragraph 19

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<sup>87</sup> *Ibid*, paragraph 354.

<sup>88</sup> *Ibid*, paragraph 370.

<sup>89</sup> *Ibid*, paragraph 378.

<sup>90</sup> *Ibid*, paragraph 354.

<sup>91</sup> *Ibid*, paragraph 383.

<sup>92</sup> *Ibid*.

<sup>93</sup> *Ibid*.

<sup>94</sup> *Supra* note 66, at p. 26. See ICTR 15 May 2003, *The*

*Prosecutor v Laurent Semanzo*, <http://www.ictcaselaw.org/docs/doc37512.pdf> (visited on 20 April 2022) where the ICTR held that an ‘individual’s position in the command hierarchy is considered a significant indicator

<sup>95</sup> *Ibid*, paragraph 387.

<sup>96</sup> *Ibid*.

superior has taken necessary and reasonable measures depends on the circumstances of each case.<sup>97</sup> The superior is not obliged to perform the impossible, he will only be held criminally responsible for failing to take such measures that are within his powers.<sup>119</sup> After discussing the three elements, the Tribunal stated that there need not be a causal link between the superior's failure to act and the resulting violations by the subordinate,<sup>98</sup> but that a recognition of a necessary causal nexus may be considered to be inherent in the requirement of crimes committed by subordinates and the superior's failure to take the measures within his powers to prevent them.<sup>99</sup> In this situation, according to the ICTY, the superior may be considered to be causally linked to the offences, in that, but for his failure to fulfil his duty to act, the acts of his subordinates would not have been committed.<sup>100</sup>

Therefore, according to the ICTY, in order to establish liability under the superior responsibility doctrine, the prosecution only needs to prove that a superior-subordinate relationship exists, that the superior had the requisite knowledge (actual or constructive) and that the superior failed to act.

Although the principle of superior responsibility was discussed in relation to military commanders, as was often the case at the time, the ICTY stated that the term 'superior' could also be extended to include civilian superiors in positions of authority.<sup>101</sup> If the applicability of the doctrine depends on the ability of the superior to exercise effective control over subordinates in the sense that he or she is in a position to prevent or punish erring subordinates then it follows that civilian superiors who can exercise this measure of control are well within the cover of the doctrine.<sup>102</sup> The United Nations Security Council has observed that while 'most legal cases in which the doctrine of command responsibility has been considered have involved military or paramilitary accused, political leaders and other public officials have also been held liable under this doctrine in certain circumstances'.<sup>103</sup> The application of superior responsibility to civilians by the military tribunals can be found in the Tokyo Tribunal proceedings in cases against a number of German civilian political leaders.<sup>104</sup> The doctrines' application to political leaders does not mean that it is limited to civilian leader who hold public offices, or those acting on behalf of the state. As long as a superior is in a hierarchical chain of authority with the perpetrators of an international crime, and that superior was, at the time of the crime, in a position to exercise effective control over them, then the doctrine of superior responsibility may apply. For instance, the doctrine has been applied to directors and managers of privately owned corporations. Pertinent examples are the *Flick* case and the *Musema* case.<sup>105</sup>

that the superior knew or had reason to know about the actions of his subordinates.' Paragraph 404. <sup>115</sup> Ibid, paragraph 386.

<sup>97</sup> n 86, paragraph, 394. <sup>119</sup> Ibid, paragraph, 395.

<sup>98</sup> n 86, paragraph, 398.

<sup>99</sup> Ibid, paragraph 398.

<sup>100</sup> Ibid, paragraph 399.

<sup>101</sup> Ibid, paragraph 357.

<sup>102</sup> Ibid, paragraph 378.

<sup>103</sup> UN Security Council, 'Report of the Commission of

Experts Established Pursuant to United Nations Security Council Resolution 789 (1992), 27 May 1994, S/1994/674, at paragraph 57.

<sup>104</sup> See The Complete Transcripts of the Proceedings of the International Military Tribunal for the Far East, reprinted in

John R. Pritchard and Sonia Magbanua Zaide (eds), *The Tokyo*

<sup>105</sup> *Flick* case *supra* note 57; ICTR 27 January 2000, The

In the *Flick* case, six civilian industrialists were alleged to have committed war crimes and crimes against humanity comprising of the enslavement of civilians from occupied territory.

The prosecution alleged that the accused used thousands of slave labourers in the business that they owned or controlled. Weis and Flick were two of the three accused persons who were eventually convicted. Weis, who was one of Flick's assistants in the industrial enterprise was convicted for his direct participation in the scheme, while Flick .

was said to have been convicted based on the fact that he knew and approved of Weis' actions.<sup>106</sup> The United National War Crimes Commission commented that 'it seems clear that the tribunals finding of guilt with respect to Flick was based on the application of the superior responsibility of Flick for the acts of his subordinates which he has a duty to prevent.'<sup>107</sup>

In the *Musema* case, Alfred Musema was the director of the Gisovu Tea Factory and was convicted when the court found that he acted criminally as a commander-in-fact of the tea factory employees, by virtue of his *de jure* position as the factory boss and his economic domination of those in his employ.<sup>108</sup> Genocidal acts took place within and outside the premises of the tea factory and Musema's employees together with other perpetrators participated in the Genocide.<sup>109</sup> The trial chamber found that Musema was responsible for the atrocities committed by his employees because he exercised *de jure* authority over them while they were on the tea factory premises and while they were engaged in their professional duties as employees of the factory even if those duties were performed outside the factory premises.<sup>132</sup> The Tribunal noted that Musema exercised legal and financial control over the employees, particularly through his power to appoint and remove them from their positions at the Tea Factory.<sup>133</sup> He was therefore in a position, by virtue of these powers, to take reasonable measures, such as removing or threatening to remove, individuals from their positions at the tea factory if they were identified as perpetrators of the said crimes. The Tribunal concluded that Musema was in a position to take reasonable measures to prevent or to punish his employees and therefore had effective control over them as a responsible superior.<sup>110</sup>

While the cases discussed involve the superior responsibility of military and civilian superiors in war or war-like situations, it has to be noted that there is no definition or doctrine that limits its application of the sphere of its application, instead, the ICTY has acknowledged that the basis of the superiors' responsibility lies in his or her obligation as superior to subordinates and not in the 'particular theatre in which the criminal acts were committed.'<sup>111</sup> Furthermore, the fact that the doctrine has been applied to cases alleging genocide and crimes against humanity- crimes that can be committed in the absence of an armed conflict, it can be argued that the doctrine is also applicable in peacetime.<sup>112</sup> This extension

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<sup>106</sup> Ibid, paragraph. 20 *War Crimes Trial Vol 20*. (Garland Publishing: New York and London, 1981). The doctrine of superior responsibility of both military and civilian superiors has also been recognized as part of customary international law. See Antonio Cassese, (Oxford; Oxford University Press, 2008), 24122.

<sup>107</sup> Ibid.

<sup>108</sup> *Supra* note 128 (*Musema* case), paragraph 873 and 880.

<sup>109</sup> Ibid, paragraph 880. <sup>132</sup> Ibid. <sup>133</sup> Ibid

<sup>110</sup> Ibid

<sup>111</sup> ICTY 16 July 2003, Prosecutor v Hadzihasanovic, [http://www.icty.org/x/cases/hadzihasanovic\\_kubura/acdec/en/030716.htm](http://www.icty.org/x/cases/hadzihasanovic_kubura/acdec/en/030716.htm) (visited on 20 April 2022).

<sup>112</sup> These were the crimes in issue in the *Celibici*, *Musema* and *Flick* cases discussed above. See also Articles 6 and 7 of the ICC Statute. <sup>137</sup> *Supra* note 66, 12.

broadens the range of the application of the doctrine and supports its use against superior corporate officers, who sometimes operate in areas void of recognised conflict.<sup>137</sup>

The major international criminal tribunals have adopted the doctrine of superior responsibility for both military and civilian superiors, and the doctrine has even been recognised as part of customary international law.<sup>113</sup> However, the International Criminal

Court has varied some of the mainstream conceptions of the doctrine. Of particular note is its clear distinction between the standard of liability of military commanders from that of other superiors.<sup>139</sup> Since the doctrine is applicable to non-military superiors, it follows that it may be possible to apply it in corporate settings.

However, it must be noted that the earlier applications of the doctrine by the military tribunals in *Flick* and *Musema* involved simple closely held corporate entities, where there were clear connections between the corporate employees who were directly engaged in the violative conduct, and the company executives. Most modern corporations, like the ones involved in the crimes under the ICC's new remit, are composed of a complex web involving layers of control and authority that blurs the connection between the superior officers responsible for issuing orders and directives leading to the crimes and those executing them. In the light of this fact, the following sub-sections will be based on an analysis of the superior responsibility doctrine under the ICC Statute as it relates to non-military superiors, with reference to senior corporate officers in modern multinational settings.

[http://www.worldcourts.com/un\\_etta/eng/decisions/2003.04.05\\_Prosecutor\\_v\\_Cardoso1.pdf](http://www.worldcourts.com/un_etta/eng/decisions/2003.04.05_Prosecutor_v_Cardoso1.pdf) (visited on 20 April 2022) paragraph 507- 'The concept of command responsibility...is not new and follows the examples set in the ICTY and ICTR Statutes, that develop a concept already well-established in customary international law and also in conventional

international law.' <sup>139</sup>*Supra* n 13, Article 28.

<sup>140</sup> The doctrine of superior responsibility as expounded by the ICTR and the ICTR are applied the same way to both military

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<sup>113</sup> Special Panels for Serious Crimes (District Court Dili) East Timor, 5 April 2003, *The Prosecutor v Jose Cardoso Ferreira*,

### ***Superior responsibility under the ICC and its application to senior corporate officers***

Article 28 of the ICC Statute provides a detailed provision on superior responsibility in both military and civilian contexts. Article 28(a) which deals with military commanders, is to a large extent similar to the doctrine as expounded by the ICTY and ICTR. Article 28(b) which provides for other superiors, has different standards for the application of superior responsibility.<sup>140</sup> Article 28 (b) provides:

With respect to a superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

- (i) The superior either knew, or consciously disregarded information which clearly indicated that the subordinates were committing or about to commit such crimes:
- (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
- (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.<sup>114</sup>

The phrase ‘with reference to superior and subordinate relationships not described in paragraph (a)’ refers to the applicability of the doctrine of superior responsibility to all other superior –subordinate relationships that are not covered by Article 28(a) which deals with military settings, provided they meet with the stated criteria. Hence, Article 28(b) may include superior corporate officers.

However, establishing the superior-subordinate relationship within the corporate setting may not be as straight forward as in military settings where there is a clear and formal chain of command like in the typical regular armed forces. In small closely held corporations where the senior corporate officers are directly involved with the day-to-day operations, the task of establishing a clear chain of authority depicting a superior/subordinate relationship is not onerous. But in large multinational enterprises, establishing a link between senior corporate officers and the TNCs ground operations is much more difficult. TNCs usually operate in foreign countries through subsidiaries which are considered as separate legal entities from the parent companies.<sup>115</sup> Such subsidiaries may also enlist the input of contractors, subcontractors and suppliers whose activities may be the direct cause of violations. This inhibits the possibility of connecting resulting violations to the general policy and directives issued by the relevant senior officers of the TNCs.

However, Article 28(b) echoes the military tribunals’ interpretations of Article 7(3) and 6(2) of the ICTY and ICTR, when it states that a superior-subordinate relationship does not depend only on direct or formal subordination. It also depends on a superiors ability to exercise *de facto* ‘effective authority and control’ over the subordinate.<sup>116</sup> It was accepted that such *de facto* control could be established

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<sup>114</sup> *Ibid.* commanders and civilian superiors, i.e. provided it is established that the *de facto* or *de jure* military or civilian superior exercise effective control over the subordinates, in the sense that they can prevent such subordinates from, or punish them for their criminal acts, the superiors will be deemed to be liable under the superior responsibility doctrine. However, the ICC takes a nuanced view with regards to civilian superiors. See Article 28(b) ICC Statute, note 12 above.

<sup>115</sup> See ICJ 5 February 1970, Case concerning Barcelona

Traction, (Belgium v Spain) [http://www.worldcourts.com/icj/eng/decisions/1970.02.05\\_barcelona\\_traction.htm](http://www.worldcourts.com/icj/eng/decisions/1970.02.05_barcelona_traction.htm) (visited 20 April 2022, paragraph 56.

<sup>116</sup> *Supra* note 12, Article 28(b).



operationally, tactically, administratively and executively.<sup>117</sup> Hence, even in ill-defined, ambiguous structures, persons with the ability to prevent and punish the crimes of persons who are in fact under their operational, administrative or executive control and even financial may be held responsible for their failure to do so.<sup>145</sup> Thus, despite the fact that a clear chain of command may be lost in the complex corporate web, the doctrine of superior responsibility is not obviated as long as it can be established that a senior corporate officer exercises effective authority or control, a superior subordinate relationship can be established.

It should be noted that the separate legal personality between an TNC and its subsidiary is not absolute.<sup>118</sup> Under general international law, it is recognised that where the corporate form is being used to perpetrate illegality, such separate legal personality may be

disregarded.<sup>119</sup> According to De Schutter, Multinational corporations are groups of formally separate entities, but whose interconnectedness is such that it may be justified to establish a presumption according to which any act committed by one subsidiary of the group should be treated as if it were adopted by the parent. Here a TNC is seen as ‘a conglomeration of units of a single entity, each unit performing a specific function, the function of the parent company being to provide expertise, technology, supervision and finance. In so far as injuries result from negligence in respect of any of the parent company functions, then the parent company should be held liable.<sup>120</sup> This approach conforms to the structure and operational framework of modern TNCs. The ability of large TNCs to transmit information, technology, and goods swiftly and cost effectively has transformed the traditional understanding of the parent- subsidiary relationship.<sup>121</sup>

TNCs in search for larger markets, lower labour costs, and additional sources of capital establish subsidiaries in foreign states and coordinate the activities of these subsidiaries, functioning as a network of organisations operating along functional lines rather than according to geographical specialisation.<sup>122</sup> This integration process often involves structural arrangements that give global corporate executives authority over the State and regional officers; incentive systems devised to encourage cooperation among employees working for different affiliates; and programs and practices designed to instil in diverse groups of employees scattered around the globe a common sense of purpose.<sup>123</sup> In the Cambodia example previously discussed, the common purpose shared by HAGL and its subsidiaries was to take advantage of the increased international demand for rubber by venturing into Cambodian territory to establish rubber plantations. Investigations by Global Witness uncovered the fact that three of HAGLs subsidiaries operating in Cambodia shared the same director, who was responsible for coordinating the activities of the subsidiaries in the region, and was also the deputy director of the entire HAGL enterprise.<sup>124</sup> As for the case of Texaco (now Chevron), it was reported that

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<sup>117</sup> *Supra* note 98, paragraph 348 and 354. <sup>145</sup> *Ibid*

<sup>118</sup> *Supra* note 143, paragraph, 58.

<sup>119</sup> *Ibid*.

<sup>120</sup> O. De Schutter, Towards a new treaty on business and human rights 1(1) *Business and Human Rights Law Journal* 49 (2015).

<sup>121</sup> *Ibid*.

<sup>122</sup> *Ibid*.

<sup>123</sup> L. A. Marby, Multinational Corporations and U.S. Technology Policy: Rethinking the Concept of Corporate Nationality, 87 *Georgetown Law Journal* 573 (1998-1999).

<sup>124</sup> *Supra* note 43, p. 20.

the \$ 1.5 million that was made from Texpet's operations in Ecuador was reported as earnings in a consolidated form.<sup>125</sup> It was also alleged that Texaco made all the decisions about the substandard technology and methods that led to the violations in the Amazon.<sup>126</sup> Anvil Mining had its parent company stationed in Canada.<sup>155</sup> Through its wholly owned subsidiaries, Anvil Management NL (Australia) and Anvil Mining Holdings Limited (United Kingdom), it had ninety percent holding in Anvil Mining Congo SARL, which owns the Dikulushi Mine in Kilwa.<sup>127</sup> Anvil Mining Canada managed the operations of Anvil Congo in Dikulushi mines, and its proceeds catered for over ninety percent of the earnings of the entire enterprise.<sup>128</sup>

Thus, despite the geographical distance between the TNC and its subsidiaries, they often act as an integrated enterprise, each working towards achieving the objectives of the corporate group. Even in situations where the subsidiaries enlist the help of contractors and sub-contractors, the fact that such third parties are working towards a single corporate goal puts them under the management influence of the TNC.<sup>129</sup> As the principal task of the parent company in an integrated enterprise is to manage the trade network and to ensure all of the pieces of the business come together as an integral whole, the violative conduct of such third parties may be linked to its oversight functions.<sup>130</sup> Thus, in the situations where the corporate sponsored military and police personnel who were enlisted by HAGL and Anvil Mining to protect their business interests directly engaged in harmful activities whilst protecting such interests, it could be argued that they were working towards the corporate goal for which the TNCs could have influenced, managed or controlled.

Although parent companies in integrated corporate enterprises do co-ordinate and manage the operations of the subordinate units, corporate executives in parent companies are typically far removed from the operational activities of their subsidiaries and usually rely on the information provided by the State or regional corporate heads.<sup>131</sup> However, many corporate executives deliberately avoid confronting the details of illegal activity making it difficult to link them with the resultant harm.<sup>132</sup> To an extent, the law encourages this concealment because the conventional provisions on liability focus on the proof of affirmative conduct before the imposition of liability upon an individual. A charge against a Corporate executive of a large multinational corporation for the criminal acts of security personnel hired and directly supervised by a low-ranking employee in a foreign subsidiary presents a far more attenuated link of control than one against the employee who hired and directly interacted with the security personnel.<sup>133</sup> In such situations, the Prosecutor will have to analyse the risk in consideration of the fact that charges against such low level

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<sup>125</sup> K. Koenig, ChevronTexaco on Trial, 17 *World Watch Magazine* 1 (2004).

<sup>126</sup> S. Donziger, 'The Chevron Way' 16 October 2009 Forbes, < <https://www.forbes.com/2009/09/16/chevron-texaco-crudeamazon-ecuador-opinions-contributors-stevendonziger.html>> visited on 8 April 2022. <sup>155</sup> *Supra* note 5, p. 4.

<sup>127</sup> *Supra* note 86, p. 3.

<sup>128</sup> *Ibid*

<sup>129</sup> *Supra* note 153, pp. 573-574.

<sup>130</sup> *Ibid*, 574.

<sup>131</sup> *Supra* note 66, p. 279.

<sup>132</sup> *Ibid*.

<sup>133</sup> *Supra* note 66, p.23.

officers would not provide as much deterrence effect as those against more senior level officers will.<sup>134</sup> TNC directors and executive officers embody the company.<sup>135</sup> They are the mind, and will of the company and any indictment against them affect the entire corporate enterprise.<sup>165</sup> The likelihood of the prosecution of a CEO or a global director is more likely to bring about incentives to properly and more stringently regulate the activities of all the subordinate units in the corporate enterprise. This will increase the likelihood of the corporate entity imputing more diligence into its activities in order to ensure that the risks of causing harm to the environment and ultimately to the human beings who depend on the environment are remote.<sup>166</sup> The negative publicity that will attach to prosecutions against such top level corporate officials who fail to ensure that international crimes do not result from the activities of their subordinates, or who fail to punish perpetrators, would serve as a warning to other company executives to be more vigilant and ensure that the activities of their own employees do not attract criminal investigation and prosecution.<sup>136</sup>

However, this should not mean that if there is nothing linking the senior executives to the crimes, prosecutions should go on strictly based on their positions even when there is nothing they could have done to prevent or punish the crimes.<sup>137</sup> Nevertheless, the director or CEO of a TNC is not entirely powerless to prevent or punish the violations of his or her subordinates. In corporate settings, it is usually the duty of such senior level officers to keep abreast of all material undertakings and activities of the company including all external factors to ensure that the company's operations are conducted with applicable laws. This is why they usually retain the power to re-subordinate units or make changes to the corporate structure and have the ultimate power to promote, replace, remove or discipline any member of the corporation, and the ability to replace or remove any officer within that hierarchy.<sup>138</sup> Thus, in order to avoid overstressing the capacity of the parent company executives to control the activities of its subsidiary's employees and workers, regard must be made as to the level of knowledge such corporate executives had of the crimes of their subordinates or of their potential to commit the crimes.

### ***The standard of knowledge***

According to Article 28 (b)(i) of the ICC Statute, the Prosecutor must establish that the superior either 'knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes.'<sup>170</sup> Thus, the superior must have had either actual knowledge of the violation or planned violation by his or her subordinates. Unlike Article 28 (a) dealing with

September 2016,

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<sup>134</sup> Ibid.

<sup>135</sup> M. T. Molan, *Cases and Materials on Criminal Law* 114 (Cavendish –Routledge Publishing, 2005). <sup>165</sup> HL Bolton (Engineering) Company Limited v T J Graham and sons Limited [1957] 1QB 159 at 172, per Denning LJ. <sup>166</sup> T. Wu and Y. J. Kang, Criminal Liability for the actions of subordinates: The doctrine of Command responsibility and its analogues in United States Law 38(2) Harvard International Law Journal 290-291 (1997).

<sup>136</sup> J. Vidal and O. Bowcott, ICC Widens Remit to Include Environmental Destruction cases, The Guardian, 15

<sup>137</sup> It would be unfair, onerous and of little deterrence value to impose liability on superior officers when there is clearly nothing there could have done in the circumstance- see, note 66, p. 23.

<sup>138</sup> See, the *Prosecutor v Jean-Pierre Bemba Gombo*, discussing elements of effective control for superiors. <sup>170</sup> *Supra* note 12, Article 28(b)(i).

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<<https://www.theguardian.com/global/2016/sep/15/haguecourt-widens-remit-to-include-environmental-destructioncases>> accessed 22 April 2022.

military superiors, and Articles 6 and 7 of the ICTY and ICTR, such knowledge cannot be imputed on objective facts.<sup>139</sup> Essentially, the non-military superior must possess information, that 'clearly' indicates that the subordinates are committing or about to commit the crime.<sup>140</sup> This latter standard has been equated with 'conscious negligence or recklessness' or 'wilful blindness.'<sup>141</sup>

The rationale for setting a higher standard for civilian superiors than their military counterparts is likely because military commanders are in charge of their soldiers 24 hours, 7 days a week and have a duty to stay informed concerning their activities.<sup>142</sup> The degree of difference between the two standards of knowledge depends on the level of the duty to stay informed. If the ICC Prosecutor construes the 'consciously disregarded standard' as a lesser duty on the civilian superiors to stay informed, this would change the weight of the evidence available at trial because the civilian superior might systematically 'fail to acquire such knowledge.'<sup>143</sup> But if civilian superiors have a similar stringent duty to stay informed like the military superiors, the 'should have known or had reason to know' requirement would not be so different from the 'consciously disregarded' requirement.<sup>144</sup> Companies with a high risk of complicity in human rights violations, such as natural resource extraction have to act with a degree of professional diligence in accessing risk for a wide array of factors in any business dealings.<sup>145</sup> As a matter of policy, 'companies evaluate and analyse investment and operations comprehensively,' to such an extent 'that claiming ignorance serves as no excuse when evidence of human rights violations, or the risk of human rights violations, stemming from the company's involvement is available.'<sup>146</sup> With the consistent, wide spread and systematic reporting by the media, industry activists and NGO's, especially in this era where the impact of TNC activities are receiving increasing international attention, it will be unjust and absurd to state that the senior corporate officer did not have some specific information to put him or her on notice of possible unlawful conduct undertaken by the employees or workers to the point that he or she should have either immediately taken action to prevent, halt or punish the unlawful acts, or, at the very least, initiate further investigation.<sup>147</sup> After several calls by civil society groups including a detailed report by Global Witness on the effects of the activities of HAGL and other rubber companies in Cambodia, the TNCs still carried on with their activities and left the indigenous people

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<sup>139</sup> Note 12, Article 29 (a)(i) imposes a more active duty on the superior to inform himself of the activities of his subordinates when he 'knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes.'

<sup>140</sup> K. Ambos, Command Responsibility and

Organisationsherrschaft: ways of attributing international crimes to the 'most responsible', in A. Nollkaemper and H. van der Wilt (eds.) *System Criminality in International Law* 137 (Cambridge: Cambridge University Press, 2009).

<sup>141</sup> Ibid, p. 138. See also n 98, paragraph 387.

<sup>142</sup> R. Arnold, Responsibility of Commanders and Other Superiors, in Otto Triffterer (Ed.) *Commentary on the Rome*

<sup>143</sup> G. Vetter, Command Responsibility of Non-military Superiors in the International Criminal Court (ICC), 25(1) *Yale International Law Journal* 124 (2000).

<sup>144</sup> If the civilian superior has the same duty to stay informed about his/her subordinate's activities then it would be easier to establish wilful blindness as he/she cannot easily deny that he had knowledge of the facts leading to his/her subordinate's criminal activities.

<sup>145</sup> *Supra* note 66, p. 26.

<sup>146</sup> Ibid.

<sup>147</sup> Ibid. Statute of the International Criminal Court 841 (Hart Publishing, 2008)

without any form of compensation for their snatched lands.<sup>148</sup> In the Texaco's case, the use of more expensive and better functioning equipment and practices in other areas where they operated is an indication that they were aware of the potential impacts of the employment of the substandard ones that they used in Ecuador, which resulted in the destruction of the environment and the lives of the people in the region.

Knowledge may also be implied where TNCs invest in conflict zones, failed States or repressive regimes, and engage in business relationships with such States or with parties to the conflict.<sup>149</sup> TNCs in such situations will be fully aware of the risks involved in operating in such regions as the blatant disregard for human life is generally known to be the order of the day.<sup>150</sup> The recent history of the DRC has been one of civil war and corruption which has earned it the name 'Africa's world war'.<sup>151</sup> The country has been characterised by extensive, fraud and gross disregard for human rights.<sup>152</sup> The situation in the DRC was enough to put Anvil Mining on notice as to the potential impacts of its logistical support to any of the parties involved. Rather, the response from the company's CEO showed that the company was unbothered by the potential and subsequent effects of their actions on the innocent people in Kilwa. They were solely concerned about protecting their business interests.<sup>153</sup>

Indeed, corporate executives cannot be expected to control every single individual working for the company, but such corporate officers should be prevented from promoting a profit at all cost business model at the expense of the lives and wellbeing of numerous persons. The ICC has to construe Article 28(b) (i) to imply a strict duty, especially in relation to corporate officers in high-risk industries, to stay informed about company practices in order to avoid complicity in harmful activities that could result in prosecution.

***The crimes must concern the effective authority and control of the superior*** Even where the prosecution can establish that the superior had the requisite knowledge of the criminal activities of his or her subordinates, the superior's liability is limited to the actions which are within the scope of the superiors' effective responsibility and control.<sup>154</sup> There is no equivalent requirement with regards to military superiors under Article 28(a) of the ICC Statute, which has led some commentators to suggest that Article 28(b) (iii) specifically applies to civilian superiors.<sup>155</sup> The rationale for such absence has been said to lie in the nature of military structures.<sup>156</sup> Hence, while the court may make inferences as to the scope of a military commanders authority over his subordinates from the existence and proper functioning of a military chain of command between them, such inference is not readily drawn in

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<sup>148</sup> *Supra* note 42.

<sup>149</sup> Robert McCorquodale and Penelope Simmons, 'Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law' (2007) 70 *Modern Law Review* 598-625, 620.

<sup>150</sup> *Ibid*, 621.

<sup>151</sup> BBC News, 'DR Congo Country Profile' 13 July 2017 < <http://www.bbc.co.uk/news/world-africa-13283212> > accessed 8 April 2022.

<sup>152</sup> *Supra* note 4, p. 6.

<sup>153</sup> *Supra* note 86.

<sup>154</sup> Article 28(b)(iii).

<sup>155</sup> *Supra* n 180, 115 and 119.

<sup>156</sup> G. Mettraux, *The Law of Command Responsibility* 189 (Oxford; Oxford University Press, 2009).



relation to civilian superiors and their subordinates.<sup>157</sup> What is required is that the superior possess the material ability to prevent or punish the crimes of persons that are in fact, his or her subordinates.<sup>158</sup> It has been noted that subordinates within the meaning of Article 28(b) are likely to be within the effective responsibility and control of their civilian superiors whilst they are at work or while engaged in work related activities.<sup>159</sup> Following this argument, superior corporate officials could be held responsible for the criminal activities committed by their employees or workers whilst executing their professional duties during the course of their employment.<sup>160</sup> Since the primary objective of corporate entities is to make profit, corporate executives would hardly permit activities that would not be of some sort of economic benefit to the corporate entity.<sup>161</sup> However, Mettraux and Bantekas agree that, the criminal activities of subordinates would not be excluded from the realm of the superior responsibility doctrine merely because they did not form part of the professional mandate of such subordinates. 'It would have to be established that in all cases, that the duty of the superior to control his subordinates and his ability to do so extends to the context in which the crimes were committed.'<sup>162</sup> Thus, according to Mattraux if there is 'sufficient functional relationship between the conduct that forms the basis of the underlying offence and the position which the subordinate holds in the hierarchy,' effective authority and control can be established.<sup>163</sup> In the absence of any such connection, 'the superior cannot be held liable as a superior in relation to that conduct.'<sup>164</sup> Hence, functional relationship can be interpreted quite broadly to include 'not just crimes committed as part or in the course of that subordinate carrying out his duties, but also any crimes in which his membership to the relevant chain of command played a sufficient part in his ability or his or her decision to commit the crime.'<sup>165</sup> In the *Musema* case, acts of genocide carried out by *Musema*'s employees could not be reasonably within their professional duties as employees of the tea factory, he still was held liable under the doctrine of superior responsibility because he was in a position to take reasonable steps to prevent or to punish the use of the Tea factory vehicles, uniforms and other Tea Factory property in the commission of the crimes.<sup>166</sup> The functional link was Tea factory equipment used to facilitate the commission of the crime of genocide which *Musema*, in his position as Director of the company, could have reasonably prevented or meted out punishment to the perpetrators.

The *Musema* case bears some semblance with the Anvil Mining situation. Anvil Mining's employees gave the Congolese military the company's vehicles, drivers, and aircrafts, food and even contributed to their payment. The CEO of Anvil Mining Canada, which managed all the company's operations at

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<sup>157</sup> Ibid.

<sup>158</sup> Ibid.

<sup>159</sup> R. Arnold, Responsibility of Commanders and other Superiors in O. Triffterer (ed.), Commentary on the Rome Statute of the International Criminal Court 841 (Hart

Publishing; Oxford, 2008); W. Fenrick, 'Article 28, in O. Triffterer (ed), Commentary on the Rome Statute of the International Criminal Court 522 (Nomos Verlagsgesellschaft; Baden-Baden, 1999).

<sup>160</sup> *Supra* note 128 (*Musema* case), paragraph 880.

<sup>161</sup> M. Friedman, The Social Responsibility of Businesses is to Increase Profits in W. Ch Zimerli, M. Holzinger and K. Richter (Eds.) Corporate Ethics and Corporate Governance 173-178 (Springer Verlag Berlin Heidelberg, 2007).

<sup>162</sup> *Supra* note 173, p. 133.

<sup>163</sup> Ibid.

<sup>164</sup> Ibid.

<sup>165</sup> Ibid.

<sup>166</sup> *Supra* note 128 (*Musema* Case).

the Dikulushi mine in Kilwa, confirmed the company's support to the military. Although Anvil's employees may not have performed the resulting illegal acts themselves, the atrocities committed by the Congolese military in Kilwa could not have been carried out in the way they were without their assistance.<sup>167</sup> Hence, there is a clear functional relationship between the use of Anvil's resources by the Congolese military to facilitate the Kilwa massacre and the CEO of Anvil Mining who due to Anvil Mining's oversight functions of the Dikulushi mine was in a position to prevent or punish the employees who rendered the support.<sup>168</sup>

### ***Duty to prevent or repress***

The third requirement under the ICC Statute is that the superior must 'take all necessary and reasonable measures within his or her power to prevent or repress' the commission of the crimes or 'submit the matter to the competent authorities for investigation and prosecution'.<sup>169</sup> The ICC Statute separates the superiors' obligation into three sub-divisions; - the obligation 'to prevent', 'to repress', or to 'submit the matter to the competent authorities for investigation and prosecution'.<sup>170</sup> Whereas, the ICTY provided for two separate duties, - the duty to prevent and to punish. However, there is no reason to construe that the ICC provision provides for a different set of obligations for superiors. Instead it acknowledges what has already been established by previous jurisprudence confirming that both the duty to repress and the duty to submit the matter to the competent authority for investigation and prosecution, form part of the duty to punish borne by a superior once he or she has sufficient notice of the commission of a crime by his or her subordinates, or the risk of the commission of such crimes.

The measures to prevent or punish the commission of the crimes by the subordinates, has to be 'necessary, reasonable and within the superiors power'. Thus, the duty of the superior is not unlimited; it is confined to what may be reasonably expected from him or her.<sup>171</sup> For obvious reasons, a senior corporate officer is unlikely to have disciplinary powers akin to that of military commanders. Actions that can be expected would normally be in line with his or her duty to prevent and repress. They may include preventive mechanisms such as the adoption of safe operational equipment and operation methods; and, in cases where the violations have occurred, issuing directives to ensure that the subordinates cease the harmful operations, immediate dismissal of erring subordinates and/or compensation to victims when it is feasible to do so. If all these possibilities prove inefficient, it is particularly important, (as explicitly stated in article 28 (b) (iii)) to submit the matter to the competent authorities for investigation and prosecution.<sup>172</sup>

### ***V. Concluding remarks***

The doctrine of superior responsibility is not just an academic design, it is a very important means by which both military and civilian superiors can be held responsible for their failure to prevent or punish the misdeeds of their subordinates. The ICTY and ICTR have advanced the application of the doctrine to actual cases so that military and civilian superiors cannot 'hide in the dark' whilst delegating the

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<sup>167</sup> *Supra* note 8, p. 9.

<sup>168</sup> Although Anvil Mining had denied giving its support to the Congolese military willingly, the statement by the company's CEO suggest otherwise. See McBeth *supra* note 8, p. 9 and note 85 *supra*.

<sup>169</sup> *Supra* note 12, Article 28(b)(iii).

<sup>170</sup> *Ibid*.

<sup>171</sup> Article 28(b)(ii)

<sup>172</sup> ICC Statute, *supra*.

execution of criminal activities to the men on the ground. The adoption of the doctrine by the ICC, though nuanced, together with the 2016 announcement of its intended focus on crimes that are principally driven by the activities of TNCs, presents a crucial opportunity to improve the accountability of the TNCs for certain human rights violations. Instead of going through the extremely difficult task of linking the positive act of a senior corporate officer with the actual violations that are usually carried out by their subordinates, the doctrine imposes criminal responsibility for a superior's failure to act when he/she has the capacity to do so. The ICC provides three fairly achievable requirements from the establishment of the superior's capacity under the doctrine.

First, the ICC adopts a 'knew or consciously disregarded standard' which is said to be a lot less stringent than the 'knew or had reason to know' standard prescribed by the ICTY and ICTR. However, as has been submitted, the application of the knowledge requirement depends on the ICC's construction of the level of the superior's duty to be informed. Senior corporate officers are generally required as a matter of corporate policy to stay abreast with the daily activities of their subordinates. This duty will naturally be more stringent with regard to superiors that operate in sensitive fields like the natural resource exploitation and exploration sector. Based on this the 'consciously disregarded standard' will be no more stringent than the standard required under the ICTY and ICTR which considerably reduces the evidential burden of the prosecution.

Secondly, the doctrine presents a wide coverage of corporate violations. Its ability to cover violations that are committed by subordinates in their private capacity presents the possibility for the ICC to prosecute senior corporate officials for the many instances where the prosecutor can establish a link between the crimes and the subordinate's position in the TNC. As most criminal activities carried out by subordinates are usually executed with some sort of corporate apparatus under the control of a superior, the likelihood of the satisfaction of this requirement is plausible.

However, the doctrine does not indiscriminately place responsibility on superiors based on mere position. It is limited to the extent of control that the superior exercises over the relevant subordinates. Superior corporate officers will only be held liable for their failure to prevent violations or punish the perpetrators of the violations when they exercise effective control over such subordinates. Thus, the doctrine of superior responsibility encourages the vigilance of superior corporate officers and promotes broad compliance with the law.

Despite the possibilities for the prosecution of superior corporate officers under the doctrine of superior responsibility for environmental crimes, it should be noted that the mandate of Ms Fatou Bensouda, who was ICC prosecutor at the time the 2016 Policy Paper was issued, expired in early 2021. It is hoped that the current ICC prosecutor of the ICC will pursue similar policy guidance on case selection and prioritization.

Moreover, one must not forget the limited jurisdiction of the ICC to crimes that amount to genocide, crimes against humanity or war crimes. The relevance attributed by the ICC statute to instances of destruction of the environment, illegal exploitation of natural resources or illegal dispossession of land, therefore remains limited to these core crimes. The Policy paper is merely an internal document to guide the OPT in exercising discretion when selecting and prosecuting cases. It does not alter the ICC's current jurisdiction.

Although the ICC's jurisdiction presents institutional hurdles, there is space within the definition of crimes against humanity to incorporate environmental harm that amounts to human rights violations. This opening, together with the shift in international attention to the threat that corporate entities pose

to the environment, and by extension, human rights, could spur the adoption of evolving approaches to interpreting human rights violations and ensure the accountability of corporate officers as well as the entire corporate entity when they engage in activities that encourage the generation of profit at the expense of lives and wellbeing of individuals.