

Corporations, international crimes and national courts: a Norwegian view

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Abstract

For a number of reasons, questions regarding the accountability of corporations for actions that might be complicit in the commission of international crimes have gained prominence in recent times. Though initiatives regarding what is more broadly described as business and human rights are to be welcomed, this sometimes distracts from existing systems of accountability, especially when those acts, which may be discussed as human rights violations, equally constitute crimes. Whilst not all criminal jurisdictions extend to legal persons, the Norwegian Penal Code does. This article analyses the Norwegian Penal Code's provisions, in light of amendments made to it in 2008 to include international crimes in it, with the effect of extending those crimes to corporations. The article first addresses the personal, material, temporal, and geographical scope of the penal code. It then addresses the potential consequence of the exercise of jurisdiction in light of the only case in recent times in Norway that deals explicitly with a corporation's potential criminal liability for war crimes. The article then addresses three additional issues with respect to provisions on complicity, intent, and defences under the Norwegian Penal Code, before concluding with some

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reflections on the possible future effects of this legislation and the possibility that it will inspire developments elsewhere.

Keywords: corporate liability, war crimes, domestic legislation, jurisdiction, Norwegian Penal Code.

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Introduction

It is axiomatic to state that in order to bring all of those responsible for international crimes to trial, one must ultimately rely on domestic courts. There are a number of reasons for this: jurisdictional, reasons of scope (in terms of the accused), financial, and practical ones, to note but a few. These issues are potentially even more acute when it comes to holding corporations accountable for international crimes.

Interest has piqued recently, through a variety of initiatives, in business activities in times of conflict. Much of the debate has revolved around the notion of corporate responsibility in respecting human rights.¹ As significant as those initiatives are, one should not lose sight of those systems where criminal rather than administrative or self-regulatory mechanisms are available, and that would more properly address the activities for which companies should be held accountable.² It should be recalled that prosecuting and punishing criminality may, and likely does, differ from seeking redress for violations of, or requiring respect for, human rights. Whilst certain human rights violations equally constitute crimes, not all do. Being clear about the proper system of accountability would seem beneficial to all. This is also an observation made by John Ruggie, the Special Representative of the United Nations (UN) Secretary-General for Business and Human Rights and the architect of the UN Guiding Principles on Business and Human Rights. He has noted that 'national jurisdictions have divergent interpretations of the applicability to business enterprises of international standards prohibiting gross human rights abuses, potentially amounting to the level of international crimes'.³ He has pointed

- 1 See, for example, the significant volume of material available from the Business and Human Rights Resource Centre (www.business-humanrights.org), though the section on conflict (www.business-humanrights.org/ConflictPeacePortal/Home) arguably addresses issues of tort liability more than criminal liability. Similarly, see the initiatives of Amnesty International (www.amnesty.org/en/business-and-human-rights), the Institute for Human Rights and Business (www.ihrb.org), and the Office of the High Commissioner of Human Rights (www.ohchr.org/EN/Issues/Business/Pages/BusinessIndex.aspx). All internet references were accessed in May 2013.
- 2 Significant work has been done, of course, such as the three-volume International Commission of Jurists' (ICJ) *Report of the ICJ Expert Panel on Corporate Complicity in International Crimes*, 2008, available at: www.icj.org/report-of-the-international-commission-of-jurists-expert-legal-panel-on-corporate-complicity-in-international-crimes/. To the author's knowledge, however, neither this nor any other work has addressed the Norwegian jurisdiction in its current form. A special edition of the *Journal of International Criminal Justice* similarly dealt with these issues in broad terms, though with perhaps less focus on domestic criminal systems. See Special Issue: Transnational Business and International Criminal Law, *Journal of International Criminal Justice*, Vol. 8, No. 3, July 2010.
- 3 See 'Recommendations on Follow-Up to the Mandate', February 2011, p. 4, available at: www.globalgovernancewatch.org/docLib/20110218_GGW_-_Ruggie.pdf.

out that this is a typical challenge in areas of armed conflict and reported on a desire for greater consistency in legal protection, as such divergence raises uncertainty for corporations and victims alike.⁴

The aim of this article is to illustrate the certainty that one particular domestic legislation might introduce for both victims and corporations, and to indicate areas where a greater degree of consistency may well be feasible across jurisdictions.⁵

Preliminary remarks on terminology

Whilst often thought synonymous, liability and responsibility are not identical, particularly in this context.⁶ Issues of corporate criminal liability should not be thought of as a facet of, or confused with, corporate social responsibility (CSR).⁷ The need for making this distinction is all the more urgent given the common assumption that CSR activities are acts done out of goodwill rather than out of obligation.

There is also a distinction to be made between the liability of a company and the responsibility of an individual. It is correct to say, for instance, that a company can be liable in the sense that it can be held accountable for the criminal actions of its employees. The tenet upon which vicarious liability rests is that it is because an action attracts individual criminal responsibility that a corporation may incur criminal liability. However, to say that the company is criminally *liable* for the offence is not the same as saying that it is criminally *responsible* for the offence. Though there may be a number of approaches or views that one could take, it is not the case that a company is imbued with a sense of guilt in the way that an individual is (although reference would be made to a company being ‘found guilty’). It is the sense that a company can attract liability for the actions of its employees that is of principal concern here. I will endeavour therefore to refer to *corporate criminal liability* throughout this paper.

4 *Ibid.*

5 This is not to suggest that the Norwegian Penal Code offers the ideal model for all domestic legal systems. Rather, it is to illustrate those aspects of it that will not be inconsistent with others, considering their own jurisdictions or judicial principles or practice. This is not, however, a comparative paper and will not therefore identify similarities across jurisdictions.

6 Both Hart and Dworkin have employed the phrase ‘liability-responsibility’: see H. L. A. Hart, *Punishment and Responsibility*, Clarendon Press, Oxford, 1968, pp. 216 ff; Ronald Dworkin, *Justice For Hedgehogs*, Harvard University Press, Cambridge, 2011, p. 103 (though Hart goes on to qualify his notion in terms broadly in line with how I wish to approach it, namely to talk of – or emphasise on – liability, not responsibility). Descriptions may however differ dependent on the premise or discipline from which the issue is viewed. See, for a legal perspective, Celia Wells, *Corporations and Criminal Responsibility*, 2nd ed., Oxford University Press, Oxford, 2001, p. 1: ‘This is a book about the criminal liability of corporations’, and, for a philosophical perspective, Thomas Donaldson, *Corporations and Morality*, Englewood Cliffs, NJ, Prentice-Hall, 1982, a work in which the word ‘liability’ does not appear once, compared to the pervasive use of the term ‘responsibility’.

7 I do not suggest that this is an endemic fact, but I think clarity of expression is merited here.

This article is intended therefore to offer a review of those provisions of the Norwegian Penal Code relevant to the potential punishment of a company for the actions of its employees amounting to an international crime and to illustrate pertinent issues that would need to be determined in the event that such proceedings were to be pursued.⁸ The article thus briefly addresses the notion of corporate criminal liability and the absence to date of prosecutions based on that mode of liability for international crimes in Norway. The subsequent sections then consider the relevant substantive aspects of personal, material, temporal, and geographical jurisdiction of the Norwegian Penal Code. The remainder of the article addresses issues of accomplice liability, intent, and defences, as well as aggravating and mitigating factors on sentencing, before offering some concluding observations.

Corporate criminal liability for international crimes and the Norwegian Penal Code

National jurisdictions differ in the way they address the question of corporate criminal liability for international crimes,⁹ if indeed they address it at all. The aim of this article is to analyse how one particular piece of domestic legislation – the Norwegian Penal Code¹⁰ – provides for corporate punishment for those crimes and to explore whether this legislation could provide an example of addressing corporations directly in a domestic criminal code.

Whilst, as I will outline in brief below, no international criminal tribunal or court has yet included legal persons within its jurisdiction, that is not to say that international criminal law is unlikely to affect the determination of corporate liability for international crimes. This article proposes to demonstrate why quite the contrary could very well be the case. Certain provisions of the Norwegian Penal

8 A previous review of the scope of Norwegian criminal law in this regard took place in the context of the 'Business and International Crimes Project' at the Fafo Institute for Applied International Studies, Oslo: see www.faf.no/liabilities/Norway.pdf. However, this review, undertaken in 2004, concerned the previous 1902 Penal Code (as amended). It did not therefore consider the newer specific war crimes provisions in the context of corporate punishment. The Fafo review assessed the likelihood of corporate complicity for war crimes but considered their application via a generic provision of the Military Penal Code. How private corporations would fall under the Military Penal Code was not discussed, but in light of the new Penal Code provisions, this issue is now likely moot. This review was similarly relied upon, though cursorily, in the February 2008 report prepared for the Special Representative of the UN Secretary-General on Human Rights and Business. See Allens Arthur Robinson, *Corporate Culture as a Basis for the Criminal Liability of Corporations*, p. 59, available at: <http://198.170.85.29/Allens-Arthur-Robinson-Corporate-Culture-paper-for-Ruggie-Feb-2008.pdf>. Additional remarks to the Fafo study have been provided by Professor Jo Stigen (p. 9) and can be found at: www.faf.no/liabilities/Additional%20commentary%20Sept%202009.pdf. The Fafo/International Alert Red Flags initiative can be found at: www.redflags.info/index.php?page_id=11&style_id=0.

9 General corporate criminal liability might be thought to exist in different jurisdictions under three forms: vicarious liability, the identification liability, or organisational liability. This paper will not examine the respective merits or details of these variant forms of liability.

10 General Civil Penal Code, LOV 2005-05-20-28, hereinafter also 'Penal Code'. Whilst a formal translation is pending, a working translation was made available by the Norwegian Ministry of Justice and is in the public domain. It is also due to be used in forthcoming updates for Norway in the ICRC Customary Law Study database.

Code will be invoked to explain why this is so and to illustrate that, even before corporations can be directly tried under international criminal law for criminal activity, the jurisprudence of international criminal tribunals can have a significant and determinative effect through domestic courts.

An oft-cited remark from other domestic proceedings has been employed by those seeking to rebut the view that corporations cannot be held responsible for crimes¹¹ and has arguably resonated in the views of international tribunals on the topic of jurisdiction *ratione personae*. In the second winter of the beginning of the eighteenth century, when sitting as Chief Justice of the King's Bench, Sir John Holt is reported to have noted that '[a] corporation is not indictable, but the particular members of it are'.¹² The International Military Tribunal at Nuremberg, nearly 250 years later, famously remarked that '[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced'.¹³

Whilst this sentiment was employed to deny abrogation of individual criminal responsibility for actions committed as part of a collective entity, in this case the state of Germany,¹⁴ some might contend that the sentiment has also informed the absence of corporate (though evidently not collective) liability in all international criminal tribunals to date.

Insofar as real persons are concerned, it is settled law in both domestic and international jurisdictions that natural persons engaged in a collective or corporate activity can be held individually responsible for those actions.¹⁵ It is the attribution of that individual act to the corporation that represents a unique feature of the updated Norwegian Penal Code.

Since 1991, the Norwegian Penal Code has contained provisions that provide for a company to be criminally punishable for the actions of its employees. Since 2008, the Penal Code has included specific provisions on war crimes, genocide, and crimes against humanity.¹⁶ The consequence of those later

11 The following comment, though rendered slightly differently as 'the corporation is not indictable, but its members are', was recently quoted in James A. Stewart, *Corporate War Crimes: Prosecuting the Pillage of Natural Resources*, Open Society Justice Initiative, Open Society Foundations, New York, 2010, p. 75, available at: www.opensocietyfoundations.org/sites/default/files/pillage-manual-2nd-edition-2011.pdf.

12 This statement appears as a single-sentence citation from an anonymous case recorded in 1701. See Anonymous Case No. 935, 88 Eng. Rep. 1518, 1518 (K.B. 1701).

13 See *Trial of the Major War Criminals before the International Military Tribunal*, Nuremberg, Vol. I, 1947, p. 223, available at: www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-I.pdf.

14 In proceedings, a motion adopted by all defence counsel of 19 November 1945 was submitted, which *inter alia* challenged the jurisdiction of the court to try individual persons on the basis that there was no such premise in international law. The focus on attribution of responsibility for unlawful acts of force was on states and not the 'thought of bringing up for trial the statesmen, generals and industrialists of the state which recurred to force'. *Ibid.*, p. 168.

15 The recent title of an essay by Florian Jessberger on the *JG Farben* trial is illustrative of where the emphasis lay (and continues to lie in some fora). See Florian Jessberger, 'On the origins of individual criminal responsibility under international law for business activity', in *Journal of International Criminal Justice*, Vol. 8, 2010, p. 783.

16 Sections 101 ('Genocide'), 102 ('Crimes against humanity') and 103–107 ('War crimes') of the Norwegian Penal Code can be found on the ICC Legal Tools database, available at: www.legal-tools.org/en/doc/a9b7c1/. A summary of the provisions can also be found on the ICRC's National Implementation

amendments is the possibility for a company to be sanctioned where individuals acting on its behalf commit or are complicit in the commission of war crimes, genocide, or crimes against humanity as defined in the Penal Code. Such sanctions, however, have yet to be imposed by a court in Norway. Domestically, the confluence of the recognition of corporate liability under Norwegian law and extant provisions on international crimes as crimes under domestic law is yet to be fully explored.

There has been only one case in which the Norwegian Public Prosecutor's Office has considered prosecuting a corporation for its alleged complicity in an international crime. In this case, an apparent subsidiary of a Norwegian-based company was providing electricity and infrastructure facilities at Guantanamo Bay. Whilst both for international and domestic lawyers this brief set of facts would raise a range of questions, the principal issue of concern was whether the Norwegian parent company could be criminally liable for its apparent subsidiary providing electricity to the detention facilities at Guantanamo Bay and whether such acts might constitute complicity in alleged acts of torture. Ultimately, the Public Prosecutor's Office reached the conclusion that, on the facts of the case, it was unable to demonstrate a sufficient connection or relationship between the respective entities so that there would be a reasonable prospect of conviction.¹⁷

Jurisdictional scope of the Norwegian Penal Code to corporate punishment for international crimes

In the absence of detailed domestic jurisprudence on corporate criminal liability for international crimes in Norway, it seems prudent to approach the issue through a brief analysis of the relevant jurisdictional aspects of the Norwegian Penal Code. Those aspects include issues of personal, material, temporal, and geographical jurisdiction, each of which are dealt with in turn below.

*Jurisdiction *ratione personae**

Chapter 4 of the Penal Code addresses corporate penalties. Only two sections make up this chapter, the first of which, regarding penalties for enterprises, sets out that:

When a penal provision is contravened by a person who has acted on behalf¹⁸ of an enterprise, the enterprise may be liable to a penalty. This applies even if

Database, available at: www.icrc.org/ihl-Nat.nsf/6fa4d35e5e3025394125673e00508143/5f7063073a44a891c12576ce00589022!OpenDocument.

17 The full rationale for the decision not to proceed is not a public document. However, a press statement (in Norwegian) is available at: www.riksadvokaten.no/no/dokumenter/pressemeldinger/Pressemelding+-Anmeldelse+av+Aker+Kv%C3%A6rner+ASA.9UFRrSZr.ips.

18 Whether an individual has, at the material time (either of commission or assistance to the commission of a crime), acted on behalf of the company will generally be a question of fact. Was the employee acting in the ordinary course of the company's business activities? Were the actions of the employees within their remit? Such questions of fact would also have relevance to the defence companies might wish to advance against being penalised.

no individual person has manifested guilt or fulfilled the condition of accountability¹⁹ for his acts, *cf.* section 20.

Enterprise here means a company, cooperative enterprise, society or other association, one-man enterprise, foundation, estate or public activity.

The penalty is a fine. The enterprise may also by a court judgement be deprived of the right to carry on business or may be prohibited from carrying it on in certain forms, *cf.* section 56, and a sentence of confiscation may be imposed, *cf.* chapter 13.

Whilst evidently it is the natural person acting on behalf of the company who commits the criminal offence by contravening any of the penal provisions, the company through that action may be liable for punitive sanction (criminal punishment) as a result of that action. The qualifying 'may' will be addressed in the section below on defences and aggravating and mitigating factors.

The first sentence of this section provides that, insofar as persons contravening a penal provision act on behalf of the company (regardless of their capacity), there is the potential for the company to be held criminally liable for their actions. The second sentence of the section offers a significant argument for broadening the scope further still, particularly with respect to core international crimes. A company may be punished, absent an individual having manifested guilt or fulfilled conditions of accountability, for that individual's contravention of the penal provisions (including aiding and abetting). The reference to section 20 presents a court with an opportunity to punish a company, notwithstanding the fact that the individual – for want of age or mental capacity – cannot be convicted of the crime.²⁰

In short, the section above provides for the *punishment* of the company for the acts of its employees or agents. Such punishment can follow without a finding of guilt against a specific individual. Rather, a court would need to be satisfied that a crime had occurred, and that either those who committed it or those who aided and abetted its commission did so when acting on behalf of the company.

The notion of punishment following from the acts of an anonymous offender would seem contradictory to the requirement that the offender (as principal or accomplice) contravenes a penal provision when acting on behalf of the company. One would seemingly need to know a person's identity to ascertain whether they were acting on behalf of the company at the relevant time. It may of course be open to a court to infer that, given a particular set of circumstances, the contravention could only have been committed by an individual or individuals acting on behalf of the company. That said, a perhaps more likely scenario would be

19 The word used in Norwegian (*tilregnelighet*) can translate as both 'accountability' and 'responsibility'. The term *foretakstraff* – the heading of Chapter 4 of the Penal Code – is translated as 'corporate penalty'; where it is used in the body of the text, such as '*foretaket straffes*', it denotes liability.

20 The likelihood of those of diminished mental capacity acting on behalf of a company in the probable scenarios that this paper postulates is perhaps so remote as not to warrant further exploration here, notwithstanding the interesting conceptual discussion of a company being criminally punishable/responsible for the acts of those not capable of being responsible for themselves.

one in which the individual offender(s) are outside the personal jurisdiction of the court for reasons of nationality or residence, but, at the material time, indeed acted on behalf of a company that did fall within the court's purview. In that sense, it is proper perhaps to speak either of an anonymous or absent offender – neither constituting a bar to proceeding against the company.

There is nonetheless perhaps a helpful corollary or analogy that might be drawn here. I will return to what constitutes aiding and abetting or what acts attract accomplice liability later in this paper, but the notion that accomplices may be tried and convicted in the absence of a principal is well founded in domestic criminal systems and has been systematically applied in international criminal tribunals. In its first trial, the International Criminal Tribunal for Rwanda (ICTR) made the following observation:

The issue thence is whether a person can be tried for complicity even where the perpetrator of the principal offence himself has not been tried. Under Article 89 of the Rwandan Penal Code, accomplices 'may be prosecuted even where the perpetrator may not face prosecution for personal reasons, such as double jeopardy, death, insanity or non-identification' [unofficial translation]. As far as the Chamber is aware, all criminal systems provide that an accomplice may also be tried, even where the principal perpetrator of the crime has not been identified, or where, for any other reasons, guilt could not be proven.²¹

Similarly, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) has concluded that:

A defendant may be convicted for having aided and abetted a crime which requires specific intent even where the principal perpetrators have not been tried or identified. In *Vasiljevic*, the Appeals Chamber found the accused guilty as an aider and abettor to persecution without having had the alleged principal perpetrator on trial and without having identified two other alleged co-perpetrators.²²

Of course, in the context of the present discussions there may be a situation whereby neither the principal nor the accomplice can be tried. Nonetheless, it would appear that, given that aiding and abetting similarly amounts to the contravention of that penal provision which governs the principal's commission, a company could be subject to punishment notwithstanding the inability of the court to try either the principal or the accomplice.

I have just indicated that, in terms of liability, punishment may arise for companies notwithstanding the inability of a court to determine the guilt of principal or accessory offenders. One reason for such inability might be that the

21 International Criminal Tribunal for Rwanda (ICTR), *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgement (Trial Chamber), 2 September 1998, para. 531.

22 International Criminal Tribunal for the Former Yugoslavia (ICTY), *The Prosecutor v. Krstić*, Case No. 98-33-A, Judgement (Appeals Chamber), 19 April 2004, para. 143.

court lacks jurisdiction over them. I will now turn to examine in more detail the extent of jurisdiction *ratione materiae*, *personae*, and *temporae* of the Norwegian Penal Code.

Jurisdiction *ratione materiae*

As noted earlier, the entry into force in 2008 of new specific provisions of the Norwegian Penal Code concerning international crimes, combined with the extant recognition of corporate punishment for criminal acts, has the effect that corporations can be held accountable for war crimes, crimes against humanity, or genocide under this legislation.

In terms of subject matter jurisdiction, the provisions of the Norwegian Penal Code relating to crimes against humanity and genocide mirror almost directly the provisions in the Rome Statute, in particular with regard to the descriptions of the chapeau and the acts which could constitute the crime.²³

With respect to war crimes, however, the domestic offences differ in part from the offences found in the Rome Statute of the International Criminal Court. There are 32 separate war crimes listed in the Norwegian Penal Code.²⁴ Of those 32, modelled in part on the Rome Statute, only three offences specifically relate to international armed conflict. The remaining 29 offences need only to have occurred 'in connection with an armed conflict'.²⁵ The offences are divided into five sections,²⁶ covering war crimes against persons; war crimes against property and civil rights; war crimes against humanitarian missions or distinctive emblems; war crimes consisting in the use of prohibited methods of warfare; and war crimes consisting in the use of prohibited means of warfare. There are two additional provisions on conspiracy and incitement to commit those international crimes,²⁷ as well as a definition of command responsibility.²⁸

Although there are differences in how particular international crimes are defined in the Norwegian Penal Code and the Rome Statute, it is evident that the jurisprudence of international criminal tribunals can (and arguably should) have an influence on the Norwegian Penal Code. One such example is the definition of 'armed conflict'. The term is not defined in the Penal Code, though there is little doubt, in the author's view, that any Norwegian court would not evidently rely on the jurisprudence, in particular of the ICTY, as to how the term 'armed conflict' is to be interpreted.²⁹ If that is the case, then at the very least when a Norwegian

23 See above note 16 for the provision in the Norwegian Penal Code. Arts. 6 and 7 of the Rome Statute are available at: www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEngl.pdf.

24 See above note 16.

25 The chapeau to sections 103–107 reads 'Any person shall be liable to punishment for war crime who in connection with an armed conflict' before listing the particular war crimes each section addresses.

26 See Penal Code, sections 103–107 respectively, above note 16.

27 *Ibid.*, section 108.

28 *Ibid.*, section 109.

29 For a discussion on the way in which Norwegian courts have dealt with this issue see Simon O'Connor, *War Crimes before the Norwegian Supreme Court: The Obligation to Prosecute and the Principle of*

court is addressing an international crime, and the Norwegian Penal Code or domestic jurisprudence do not provide proper interpretive guidance, the court should be cognizant of the manner in which international criminal law has addressed a given issue. This is perhaps particularly so where the Penal Code makes specific reference to international law, or to circumstances where it addresses international crimes committed extraterritorially.³⁰

Jurisdiction *ratione temporis*

In 1991, the Norwegian Penal Code extended its jurisdiction to include corporate criminal liability. In the 2005 amended Penal Code, the temporal jurisdiction is described in terms consistent with the principle of legality in section 3 providing that '[t]he criminal legislation in form at the time the offence is committed applies'. However, the section later clarifies that:

The provisions of Chapter 16 apply to acts committed prior to their entry into force if the act was punishable at the time it was committed under the criminal legislation in force at the time and was regarded as genocide, a crime against humanity or a war crime under international law . . .

In a separate article, I consider the recent proceedings before domestic courts on the subject matter and temporal jurisdiction of the provisions of the Norwegian Penal Code in relation to war crimes.³¹ Those proceedings concerned allegations of unlawful detention of persons protected under international humanitarian law during the armed conflict in Bosnia-Herzegovina in 1992. The accused, a then naturalized Norwegian citizen, was prosecuted under the new war crimes provisions for the offence of unlawful confinement of protected persons.³² Whilst at first instance in 2008,³³ the accused was convicted of war crimes and that conviction was upheld on appeal,³⁴ in 2010 the Norwegian Supreme Court dismissed the conviction,³⁵ substituting it with offences under ordinary penal provisions. It did

Legality – an Incumbrance or opportunity?, Oxford Institute for Ethics, Law and Armed Conflict Working Paper Series, February 2013, p. 17, available at: www.elac.ox.ac.uk/downloads/war%20crimes%20before%20the%20norwegian%20supreme%20court%20-%20working%20paper.pdf.

30 See discussions on section 5(c)(2) of the Norwegian Penal Code in this article.

31 See S. O'Connor, above note 29.

32 Penal Code, section 103(1)(h). The definition of a protected person under the Penal Code is found at section 103(3); see above note 16.

33 Oslo City Court, *The Public Prosecutor v. Misrad Repak*, Case No. 08-018985MED-OTIR/08, Trial Judgement, 2 December 2008. A translation of the trial judgement can be found at: [www.icrc.org/ihl-nat.nsf/46707c419d6bdfa24125673e00508145/45061a413067e31cc125755c004a5773/\\$FILE/Public%20Prosecutor%20v.%20Misrad%20Repak.PDF](http://www.icrc.org/ihl-nat.nsf/46707c419d6bdfa24125673e00508145/45061a413067e31cc125755c004a5773/$FILE/Public%20Prosecutor%20v.%20Misrad%20Repak.PDF).

34 Norwegian Supreme Court, *Public Prosecuting Authority v. Misrad Repak*, Court of Appeal Case No. 09-024039AST-BORG/01, Appeal Judgement, 12 April 2010.

35 The Supreme Court held two hearings in this case. The first concerned the conviction in Norwegian Supreme Court. *A v. The Public Prosecutor*, HR-2010-02057-P (sak nr. 2010/934), 3 December 2010, available at: [www.domstol.no/upload/HRET/Avgj%C3%B8relser/2010/saknr2010-934-plenum\(anonymisert\).pdf](http://www.domstol.no/upload/HRET/Avgj%C3%B8relser/2010/saknr2010-934-plenum(anonymisert).pdf), see especially paras. 106–111. The second sentencing, Norwegian Supreme Court, *A v. The Public Prosecutor*, HR-2011-00808-A (sak nr. 2010/934), 13 April 2011, is available at: [www.domstol.no/upload/HRET/Avgj%C3%B8relser/2011/saknr2010-934\(anonymisert\).pdf](http://www.domstol.no/upload/HRET/Avgj%C3%B8relser/2011/saknr2010-934(anonymisert).pdf). An English translation of this

so on the grounds that it was unconstitutional to invoke war crimes provisions of the Penal Code that entered into force in 2008 for offences committed in 1992 in Bosnia-Herzegovina. As I have argued elsewhere, the Supreme Court did not, in my view, properly take account of the fact that the acts also constituted grave breaches of the Geneva Conventions of 1949.

This discussion is significant for the temporal scope of the Norwegian Penal Code with respect to corporations' involvement in war crimes prior to 7 March 2008. As noted above, the Penal Code provides for corporate punishment since 1991. It would seem to follow that even if pre-2008 acts constituting international crimes would be prosecutable as such (which, as the discussion above illustrates, is not the case in Norway today), pre-1991 acts would not be prosecutable for want of *ratione personae* with respect to corporations.

Jurisdiction *ratione loci*

The geographical jurisdictional scope (*ratione loci*) of the Norwegian Penal Code is addressed in sections 4 and 5 of the legislation. Section 4 addresses the territorial jurisdiction confirming the Penal Code's application to acts committed on Norwegian territory, on an installation on the Norwegian continental shelf, within the statutory jurisdiction of the Norwegian Economic Zone, or on a Norwegian vessel, including an aircraft or drilling platform or similar moveable installation.

Section 5 addresses the extraterritorial application of the Penal Code and its application in respect of persons (legal and natural). Given the greater likelihood of most international crimes occurring extraterritorially, it seems prudent to cite this section in detail:

Outside the scope and extent pursuant to section 4 the criminal legislation applies to acts committed

- (a) by a Norwegian national,
- (b) by a person resident in Norway, or
- (c) on behalf of an enterprise registered in Norway,

when the acts:

1. are also punishable under the law of the country in which they are committed,
2. are regarded as a war crime, genocide or a crime against humanity,
3. are regarded as a breach of the international law of war,

...

The first paragraph applies correspondingly to acts committed

- (a) by a person who since committing the act has become a Norwegian national or has been granted residence in Norway,
- (b) by a person who is or who since the act has become a national of or is resident in another Nordic country, and who is staying in Norway, or
- (c) on behalf of a foreign enterprise which, since the act was committed, has transferred all its operations to an enterprise registered in Norway.

The first paragraph, items 1, 2, 3, 6 and 7 apply correspondingly to acts committed by persons other than those who fall within the scope of the first and second paragraphs, when the person is staying in Norway, and the maximum penalty for the act is imprisonment for a term exceeding one year.

In the case of acts mentioned in the first paragraph, item 2, the second and third paragraphs apply only if the act is regarded as genocide, a crime against humanity or a war crime under international law.

In a prosecution under this section, the penalty may not exceed the highest statutory penalty for a corresponding act in the country in which it was committed.

A prosecution under this section is only instituted when required in the public interest.³⁶

In reviewing the extent of extraterritoriality from the perspective of corporate complicity for core international crimes, the Norwegian Penal Code offers significant food for thought, in terms of material offences, their location, and the persons who commit them. Section 5(c) extends the jurisdiction of the Penal Code to acts committed *outside* of Norway or its territories, vessels, installations, or platforms, but restricts that extension to specific acts. It should be noted that the list is given in the alternative, so that the jurisdictional criterion is met wherever one of the scenarios occurs. It is clear from this provision, for instance, that war crimes, crimes against humanity, and genocide, when committed on behalf of a Norwegian registered company outside of Norway, fall within the jurisdictional scope of the Norwegian Penal Code. There are of course two additional issues raised in section 5 that this author is unable, for want of space, to address in detail here.³⁷

It is necessary, however, to make a brief remark about the war crimes prosecution and Supreme Court dismissal before Norwegian courts discussed above,³⁸ insofar as they dealt with the issue of extraterritoriality. In neither first instance, appellate nor Supreme Court proceedings, did any of the courts

36 Equally, where those crimes are committed by a Norwegian national or resident outside of Norway, they similarly fall within this jurisdiction.

37 Those are issues of prosecutions for extraterritorial international crimes only being instituted when in the public interest and the apparent scope of successor or acquisition liabilities (though likely addressed through due diligence defences). Both, of course, merit sustained attention.

38 See above notes 33 to 35.

consider that the fact that the offences were committed in Bosnia-Herzegovina constitutes a jurisdictional bar to prosecution in Norway. That Norwegian courts had no *ratione loci* over the offences committed was not a substantive ground of appeal.

The defendant had however, on appeal before the Supreme Court, raised an additional challenge: in effect a *nullum crimen* argument that he could not be tried for the offences in question as they fell within the provisions of a 1999 amnesty law passed by the Parliamentary Assembly of Bosnia and Herzegovina. The Supreme Court rejected this argument.³⁹ Its rationale was that under the 1902 Penal Code, the particular offence for which the accused was sentenced was one of those offences specifically listed as falling within the Court's jurisdiction when committed by foreign persons abroad.⁴⁰ The Supreme Court reasoned that given those domestic provisions, '[t]he acts in question could thus have been prosecuted in Norway even if they had not been criminalized in Bosnia and Herzegovina', from which it followed that '[t]he same must apply if criminal liability for an act is repealed in the country where the acts were committed'.⁴¹ Even though these remarks relate to the previous penal code, the argument as to the significance of amnesties in respect of the new Penal Code provisions on core international crimes could be sustained in light of the relative constructions of the respective Norwegian Penal Codes, and significantly strengthened in light of international jurisprudence as to the weight attributable to amnesties with regard to those crimes. As can be noted above, the typologies of acts that may fall within the jurisdiction of the Norwegian Penal Code are listed in the alternative. The consequence would be that, even where an act was not punishable under the law of the country in which it was committed (section 5(b)1), it would still fall within the jurisdiction if it was regarded as a war crime, genocide, a crime against humanity, or a serious violation of international humanitarian law (section 5(b)3, 4, and 5). Were an amnesty offered in a particular country such that one would argue section 5(b)1 applied, this could equally be negated (though evidently not necessarily required) by the fact that the jurisprudence of the international tribunals has made it clear that amnesties offered at the cessation (or to facilitate the cessation) of hostilities cannot cover the most egregious crimes.⁴² The Supreme Court could have been much more robust in negating the amnesty under Bosnian law had the offences been successfully

39 See above note 35. Norwegian Supreme Court, *A v. The Public Prosecutor*, 13 April 2011, para. 98.

40 *Ibid.*

41 *Ibid.*

42 See ICTY, *The Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T, Judgement (Trial Chamber), 10 December 1998, para.155; Special Court for Sierra Leone (SCSL), *The Prosecutor v. Morris Kallon and Brima Bazzy Kamara*, Case Nos. SCSL-2004-15-AR72(E) and SCSL-2004-16-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty (Appeals Chamber), 13 June 2004, paras. 82–84 as to the customary status of such a notion. Additionally, see the detailed reference *inter alia* to national practices of amnesties not covering core international crimes in Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law, Vol. II*, Part 2, Cambridge University Press, Cambridge, 2005, pp. 4017–4044, available with updated material at: www.icrc.org/customary-ihl/eng/docs/v2_rul_rule159.

prosecuted as war crimes and not as the 'ordinary crimes' the accused was ultimately sentenced for.

Complicity: the likely mode of an employee's individual criminal responsibility

In the first section of this paper, I emphasised that corporate criminal liability should be properly distinguished from issues of responsibility. With the exception of those companies whose very business involves the direct use of force, the most likely manner in which corporate employees or agents would be involved in international crimes would be by assisting in their commission. A court is most likely, then, to be faced with a situation where it first needs to determine an individual's responsibility by virtue of their being complicit in the commission of a crime or acting on behalf of the company at the relevant time, before attributing liability to the company in question.

Section 15 of the Norwegian Penal Code, similar to other jurisdictions, equates aiding and abetting with the principal offence. In other words, to aid and abet in the contravention of provision of the Norwegian Penal Code is to similarly contravene that provision. Thus, in the context of this discussion, the reference to an individual whilst acting on behalf of a company contravening a penal provision includes those who aid and abet.

With respect to extraterritoriality, section 5 requires that for the Penal Code to apply to acts committed outside of Norway in the context of our present discussion, the act must be regarded as genocide, a crime against humanity, or a war crime under international law. Where the act is one of assistance, it would seem nonetheless to follow that, for the purpose of the exercise of jurisdiction by Norwegian courts, assistance must equally constitute an international crime. This author does not consider that this presents difficulties in terms of individual criminal responsibility, as under international law, aiding and abetting genocide, crimes against humanity, and war crimes constitute those crimes.

Therefore, when deliberating on whether a company's employee has aided and abetted the commission of an international crime, a Norwegian court (which is required to be satisfied that the act of the accomplice is a crime under international law) ought to draw guidance from the extensive jurisprudence on accomplice liability of international criminal tribunals.

A recent significant judgement in this regard is the conviction of the former Liberian president Charles Taylor by the Special Court for Sierra Leone (SCSL). In a lengthy judgement, the SCSL convicted Taylor on the basis of his having aided and abetted in the commission of crimes against humanity, war crimes, and other serious violations of international humanitarian law.⁴³ The judgement deals with

43 SCSL, *The Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-03-01-T, Judgement (Trial Chamber), 18 May 2012.

the applicable law under the SCSL's Statute. In its remarks on legal findings on responsibility, the Trial Chamber summarised the elements of aiding and abetting those international crimes in the following way:

In order to find the Accused criminally responsible pursuant to Article 6.1 of the Statute for aiding and abetting the planning, preparation or execution of the crimes charged in Counts 1 to 11 of the Indictment, the Trial Chamber must be satisfied beyond reasonable doubt that the Accused provided practical assistance, encouragement, or moral support which had a substantial effect upon the commission of the crimes (*actus reus*). Furthermore, the Trial Chamber must be satisfied beyond reasonable doubt that the Accused knew that his acts or omissions would assist the commission of the crime, or that he was aware of the substantial likelihood that his acts would assist the commission of the crime, and that the Accused was aware of the "essential elements" of the crime committed by the principal offender, including the state of mind of the principal offender (*mens rea*).⁴⁴

Whilst still subject to appeal (with the decision pending at the time of writing), the SCSL's trial judgement relied on what might be thought of as settled law regarding the definition of aiding and abetting international crimes.⁴⁵ The SCSL thus demonstrated that it applies a knowledge rather than purpose *mens rea* standard for accomplice liability – it is required that the accomplice *knew* of the likelihood of their assistance benefiting the commission of the crime, rather than provided assistance with that *specific purpose* in mind. Given that as a matter of general Norwegian criminal law, an accomplice need only know of the likelihood of their assistance affecting the commission of the crime, it seems not unrealistic that any domestic Norwegian court would follow the SCSL's reasoning.

Individual intention

Returning to domestic provisions, section 22 of the Norwegian Penal Code, dealing with the intention of individual perpetrators, lists three standards of intention or volition: purpose, knowledge, and recklessness. These standards extend to the majority of crimes under the Norwegian Penal Code, including war crimes, crimes against humanity, and genocide. Section 23 additionally provides for criminal liability on the basis of negligence. We will not address the issue of negligence here,

⁴⁴ *Ibid.*, para. 6904.

⁴⁵ Whilst there are certain aspects of accomplice liability across tribunals that may differ, the broad sense articulated in the *Taylor* trial judgement is one on which a domestic court considering international crimes could properly rely. This is particularly so where that test is markedly similar to the test for accomplice liability for domestic crimes, as is the case in Norway. At the time of writing there had been a further two trial judgements, three appeal judgements and one retrial judgement from the ICTY. The most recent articulation of the test before the ICTY can be found in ICTY, *The Prosecutor v. Mićo Stanišić and Stojan Župljanin*, Case No. IT-08-91-T, Judgement (Trial Chamber), 27 March 2013, paras.107–108.

but will instead focus our attention on the lower threshold for intent: that of recklessness or, as it is often described, *dolus eventualis*.⁴⁶

Before the international ad hoc tribunals and the International Criminal Court (ICC), somewhat different views have been expressed as to what reliance can be placed on a *dolus eventualis* standard as the basis of establishing the subjective (*mens rea*) element of a crime.

In proceedings before the ICTY, the tribunal was satisfied that both *dolus directus* and *eventualis* were sufficient to establish the *mens rea* standard under Article 3 of the Tribunal's Statute.⁴⁷ It offered a technical definition in that where one engages in life-endangering behaviour, killing in those circumstances would be intentional where the assailant "reconciles himself" or "makes peace" with the likelihood of death.⁴⁸ The ICTY Trial Chamber expressly excluded, however, a standard of negligence as being incorporated into *dolus eventualis*.⁴⁹

By contrast, in a number of decisions the ICC has sought to exclude recklessness as a basis for *mens rea* in its interpretation of the relevant provision of Article 30 of the Rome Statute. In its first confirmation of charges hearing, Pre-Trial Chamber I of the ICC, when considering the meaning of the phrase 'in the ordinary course of events' (concerning an accused's awareness of the likelihood of the occurrence of a crime), refined what constituted *dolus eventualis* into two further conceivable situations: first, where the risk of bringing about the objective elements of the crime is substantial and the suspect is aware of that substantial likelihood and continues nonetheless; and second, where that risk (or likelihood) is low, there must be a clear or express acceptance that the objective elements of the crime will result from the suspect's actions or omissions.⁵⁰

In two further decisions confirming charges, the Pre-Trial Chambers of the ICC have made it clear that reliance on *dolus eventualis* is unfounded based on Article 30 of the Rome Statute.⁵¹ In part, the rationale for the exclusion of *dolus eventualis* as a form of liability under the Rome Statute is a result of the drafting of the Statute itself. As some suggest, the reason may well be the absence of a uniform interpretation in all domestic systems to which it applies.⁵² Alternatively, there are those who argue that notwithstanding the exclusion of a

46 There may be some discussion as to whether recklessness and *dolus eventualis* are directly related. Whilst for some they may seem synonymous, see Antonio Cassese, *International Criminal Law*, Oxford University Press, Oxford, 2003, p. 168.

47 ICTY, *The Prosecutor v. Milomir Stakić*, Case No. IT-97-24-T, Judgement (Trial Chamber), 31 July 2003, para. 587.

48 *Ibid.*

49 *Ibid.*

50 ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. 01/04-01/06, Decision on the Confirmation of Charges (Pre-Trial Chamber I), 29 January 2007, paras. 353–355.

51 ICC, *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Case No. 01/09-01/11, Decision on the Confirmation of Charges (Pre-Trial Chamber II), 23 January 2012, para. 336; ICC, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. 01/05-01/08, Decision on the Confirmation of Charges (Pre-Trial Chamber III), 15 June 2009, paras 358–360.

52 See Donald K. Pigaroff and Darryl Robinson, 'Article 30: mental element', in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 2nd edition, C.H. Beck, München, 2008, p. 860, footnote 67.

draft article⁵³ on recklessness during the negotiations of the Rome Statute, such a standard should apply in the context and meaning of the perhaps qualifying remarks that begin Article 30, 'unless otherwise provided.'⁵⁴

In the context of the Norwegian Penal Code, it is clear however that, insofar as *mens rea* is concerned, an acceptable standard from which to infer intent is *dolus eventualis*, and this can clearly be distinguished by a comparison between the respective subjective elements in Article 30 of the Rome Statute and section 22 of the Norwegian Penal Code. Article 30 of the Rome Statute reads in part:

For the purpose of this article, a person has intent where

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

Section 22 of the Norwegian Penal Code provides:

There is intent where a person

- (a) acts with the intention of committing an act that meets the description of an act in a penal provision,
- (b) acts with the awareness that the act certainly or most probably meets the description of an act in a penal provision, or
- (c) considers it possible that the act meets the description of an act in a penal provision, and decides to commit the act even though the description of the act would certainly or most probably be met.

There is a clear correlation between subsections (a) and (b) in each of the respective provisions. Explicitly including a third tier of intention has the consequence that, insofar as war crimes are concerned, whilst *dolus eventualis* cannot at present form a basis for *mens rea* before the ICC, it can for prosecutions under the Norwegian Penal Code.

53 An additional paragraph to the three that now make up Article 30 was included in draft Article 29. It read: 4. For the purposes of this Statute and unless otherwise provided, where this Statute provides that a crime may be committed recklessly, a person is reckless with respect to a circumstance or a consequence if: (a) The person is aware of a risk that the circumstance exists or that the consequence will occur; (b) The person is aware that the risk is highly unreasonable to take; and (c) The person is indifferent to the possibility that the circumstance exists or that the consequence will occur. See *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Rome, 15 June–17 July 1998, Official Records, A/CONF.183/13 (Vol. III)*, pp. 33–34.

54 Gerhard Werle and Florian Jessberger, 'Unless otherwise provided: Article 30 of the ICC Statute and the mental elements of crimes under international criminal law', in *Journal of International Criminal Justice*, Vol. 3, 2005, pp. 51–55.

Defences, aggravating and mitigating factors on corporate punishment

Beyond generic provisions that would apply to the conviction and sentencing of principals or accomplices, section 28 the Norwegian Penal Code provides the following with respect to corporate punishment:

In deciding whether to impose a penalty on an enterprise pursuant to section 27 and in assessing the penalty account shall be taken, *inter alia* of

- (a) the preventative effect of the penalty
- (b) the seriousness of the offence
- (c) whether an enterprise could by guidelines, instruction, training, control or other measures have prevented the offence
- (d) whether the offence has been committed in order to promote the interests of the enterprise
- (e) where the enterprise had or could have obtained any advantage by the offence
- (f) the enterprise's financial capacity
- (g) whether other sanctions have as a consequences of that offence been imposed on the enterprise or on any person who acted on its behalf, including whether a penalty has been imposed on any individual person, and
- (h) whether an agreement with a foreign State stipulates the imposition of corporate penalties.

This section intentionally includes a reference to 'defence', as section 28 might seem on the face of it to address both the amount of any fine and the question of whether a court would 'impose a penalty' in any event. The Penal Code provides for the concept of 'discharge', familiar in many other criminal systems, where an accused is found guilty yet not subject to any sentence, financial, custodial, or otherwise. But, as we saw above, the liability that corporations face under section 27 is to penalties and not to findings of guilt. However, it is worth recalling that this provision leaves the possibility open that a company *may* be liable to a penalty. The question which follows is whether any of the illustrative factors listed would provide the company with a 'defence' to the imposition of a penalty. Whilst many of the provisions (section 28(b), (d), and (e)) read as potentially aggravating factors regarding the level of fine imposed, there is a question as to whether section 28(c) is merely a point for mitigation or perhaps a form of due diligence defence. Whilst in this author's view, this is perhaps not the intention and that it remains a factor to be considered in mitigation, it remains an issue that a court must address.

In terms of sentencing, it will be recalled that section 27 in its second paragraph provides that in principle the penalty awarded would be a fine, but that on the basis of additional provisions in the Penal Code, it can include a discontinuation of a company's activities or the confiscation of proceeds from crime. Evidently these may be cumulative penalties.

Concluding observations

This article has sought to outline in brief some of the salient provisions of the Norwegian Penal Code relating to corporate punishment in the event that those acting on behalf of companies have committed or been complicit in international crimes. It has illustrated a number of aspects of the Penal Code which, whilst not unique, offer a considerable breadth in their cumulative effect that others might find encouraging or surprising. It has addressed the Norwegian Penal Code's personal, temporal, and material jurisdiction, its vicarious liability standard for corporations for the criminal acts of their agents, its knowledge test with respect to accomplice liability, recklessness as a standard of intent, and the question of what acts constitute international crimes domestically in Norway.

The number of corporations, as opposed to persons, convicted under individual criminal responsibility jurisdictions for crimes committed remains, for all intents and purposes, low, if not indeed nonexistent. The purpose of this article is therefore illustrative and – in parts – necessarily speculative, as Norway has yet to consider a case concerning corporate involvement in international crimes. The intention has been to offer a view on the range of issues likely to be raised and to contribute to the debate informing corporations of extant systems of law to which they might be subject, and lawmakers of the opportunities or challenges for ensuring that accountability mechanisms properly address questions of liability beyond traditional individual criminal responsibility.

However, the confluence in the Norwegian Penal Code of international crimes and corporate punishment has enabled the Norwegian Red Cross as a National Society to invoke international humanitarian law (in the context of discussions on international criminal law, at the very least) with corporations in Norway.⁵⁵ Conscious as they are of initiatives concerning corporate responsibilities in areas of armed conflict, many companies have been receptive to learning and appreciating more the significance of international humanitarian and criminal law and their effects on companies' potential criminal liability under domestic law. For those for whom the topic is relevant, either as a result of similar domestic provisions to Norway's or because they aspire towards such characteristics of accountability, the opportunity to educate and disseminate (with the usual outcome one expects – of refraining from unlawful acts) is not to be missed.

55 Readers might ask whether this activity (i.e. dialogue on international humanitarian law) could enable a corporation to claim that it fulfilled its duties under section 28(c) above. This is arguably not the case, since the factor in mitigation would seem to go beyond mere education but rather to the inculcation of the understanding of the possible implications of international humanitarian law for the company's operations into its corporate practice.